WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES

Volume II

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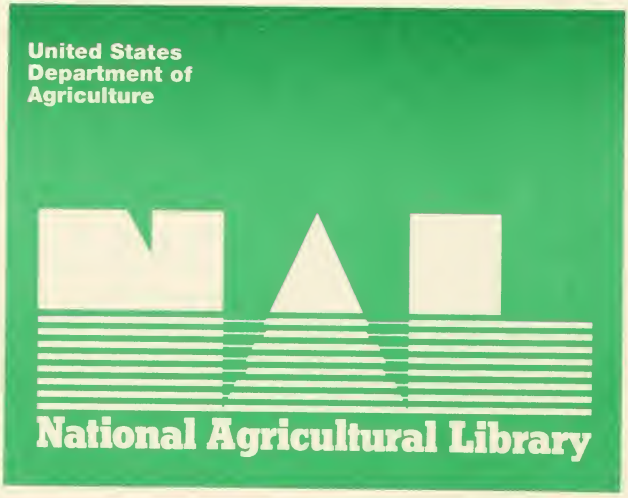
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By

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VOLUME II

Chapter 10

THE RIPARIAN DOCTRINE

THE RIPARIAN DOCTRINE IN THE WEST

Chapter 6 contains a discussion of the origins and asserted origins of the riparian doctrine and the development and status of the doctrine. To better orient the discussion in this chapter, brief statements regarding the development and status of the doctrine are included at the outset.

Importance of the Riparian Doctrine

States in Which the Doctrine Has Been Generally Repudiated

The riparian water-rights doctrine has been generally repudiated in the block of generally arid States—Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming—lying between those on the 100th meridian and those bordering the Pacific Ocean. In these eight jurisdictions, rights to the use of watercourses usually do not vest, by operation of general law, in the proprietors of lands bordering on or crossed by such watercourses, solely as a result of the natural contact of land and flowing water.

However, there are cases in some of these jurisdictions (as well as in other Western States) which have declared or implied that a riparian owner may apply the water to beneficial use by virtue of his riparian status, so long as he does not interfere with the recognized operation of the appropriation doctrine.[1]

In addition, it should be noted that the riparian doctrine and rights under discussion in this chapter refer to rights to use the water of watercourses. Riparian rights also may encompass some other features that have been recognized by various courts in certain of these jurisdictions, such as riparian rights regarding bed ownership, avulsions or accretions, and fishing.[2] Such riparian rights are only occasionally referred to in this chapter.

States in Which the Doctrine Has Been Recognized in Varying Degree

The riparian doctrine has been recognized in each of the tier of six States extending from North Dakota to Texas on the 100th meridian, in the four

[1] See chapter 6 at notes 152 and 153.
[2] See chapter 6 at notes 154-156.

States bordering on the Pacific Ocean, and in Hawaii. However, the degrees of its legal and economic importance have varied markedly from one jurisdiction to another. The doctrine attained its most significant status in California and Texas.

Generally based on common law.—The general rule governing adoption of the riparian doctrine in these several Western States was that the State—or its preceding Territory—had adopted the common law of England, as modified by applicable American decisions, as the rule of decision in all cases insofar as it was applicable to local conditions and not inconsistent with the Constitution and laws of the United States, and that the riparian doctrine was part of this adopted common law.

California based its adoption of riparianism squarely on adoption of the common law, with no consideration of whether the preceding Spanish or Mexican governments did or did not intend to grant riparian rights as a part of their grants of land.[3]

Texas based its adoption of the riparian doctrine on the Texas Republic's adoption of the common law, which the succeeding State accepted. A judicial pronouncement in 1926 added Mexican ancestry to the common law,[4] but in 1962 this was rejected as *dictum* and lands riparian to the lower Rio Grande, held under Spanish and Mexican grants, were held to have no appurtenant riparian rights to irrigate with the river waters.[5]

Alaska decisions that recognized the riparian right based it on applicability of the common law, but in 1910 these decisions were repudiated by a higher court.[6] This court held that the common law doctrine of riparian rights did not apply in the jurisdiction. But in 1917 the legislature made delcarations concerning rights to water in mining claims that included both banks of a stream.[7] As stated by a Federal court, this legislation enacted the law of riparian rights to a limited extent.[8]

California.—Development of the riparian doctrine produced far more litigation and high court decisions in California than in any other Western State. It began with the Gold Rush, when the California Supreme Court resorted to analogies of the common law for solution of controversies over mining claims and uses of water for operating them.[9] The disputants were

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[3] *Lux* v. *Haggin,* 69 Cal. 255, 384, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[4] *Motl* v. *Boyd,* 116 Tex. 82, 107-108, 286 S.W. 458 (1926).

[5] *Valmont Plantations* v. *State of Texas,* 163 Tex. 381, 355 S.W. (2d) 502 (1962).

[6] *Van Dyke* v. *Midnight Sun Min. & Ditch Co.,* 177 Fed. 85, 88, 91 (9th Cir. 1910).

[7] Alaska Laws 1917, ch. 57, Comp. Laws Ann. § 47-3-35 (1949), Stat. §§ 27.10.080 (Supp. 1962) and 38.05.260 (Supp. 1965).

[8] *Balbanoff* v. *Kellog,* 10 Alaska 11, 16-17, 118 Fed. (2d) 597, 599 (9th Cir. 1940), certiorari denied, 314 U.S. 635 (1941).

[9] *Irwin* v. *Phillips,* 5 Cal. 140, 145-146 (1855); *Hill* v. *Newman,* 5 Cal. 445, 446 (1855); *Kelly* v. *Natoma Water Co.,* 6 Cal. 105, 108 (1856); *Hill* v. *King,* 8 Cal. 336, 338 (1857); *Kidd* v. *Laird,* 15 Cal. 161, 180 (1860).

trespassers on the public domain and the landowner (the United States) was not in court. The pattern of a riparian system was thus set by the State supreme court, already quite conscious of the common law, which was adopted by the legislature in the year of admission to statehood.[10] The riparian doctrine still has considerable significance in California, although a constitutional amendment has restricted the exercise of riparian rights to reasonable beneficial use under reasonable methods of diversion and use.[11]

Texas.—In Texas, as well, riparian court decisions began in the 1850's and were based predominantly on the common law. Here, also, the riparian doctrine has had considerable significance, although its relative importance has been curtailed by a 1962 supreme court decision rejecting application of riparian irrigation rights to lands in Spanish and Mexican grants along the lower Rio Grande.[12] Common law riparian rights were unaffected by this decision. But a 1967 statute has restricted the exercise of riparian rights, except for domestic or livestock purposes, to the extent of the maximum beneficial use made during certain recent years.[13]

Other Pacific States.—In Oregon, as a result of legislation and of court decisions favorably construing it, the riparian doctrine has been progressively so modified and restricted as to leave very little vestige insofar as it may be asserted against those who claim statutory appropriative rights.[14] In the irrigation economy of Oregon, the sum total of these remnants of riparianism is small.

In Washington, the riparian doctrine has been restricted and narrowed by court decisions to the extent that, to be protected against an appropriative right, a riparian rights holder must show that he will beneficially use the water either presently or within a reasonable time.[15] A 1967 statute provided that riparian rights shall be relinquished for abandonment or voluntary failure, without sufficient cause, to beneficially use such a right for any period of 5 successive years thereafter.[16]

In Alaska, the riparian doctrine has been of limited importance. A 1966 statute apparently purports to convert any riparian rights to appropriative

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[10] Cal. Stats. 1850, p. 219.

[11] Cal. Const. art. XIV, § 3.

[12] *Valmont Plantations* v. *State of Texas,* 163 Tex. 381, 355 S.W. (2d) 502 (1962).

[13] Tex. Rev. Civ. Stat. Ann. art. 7542a, § 4 (Supp. 1970).

[14] Oreg. Laws 1909, ch. 216, Rev. Stat. ch. 539 (Supp. 1955); *In re Willow Creek,* 74 Oreg. 592, 610-620, 625-628, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *In re Hood River,* 114 Oreg. 112, 173-182, 227 Pac. 1065 (1924); *California-Oregon Power Co.* v. *Beaver Portland Cement Co.,* 73 Fed. (2d) 555, 562-569 (9th Cir. 1934), affirmed, 295 U.S. 142, 155-165 (1935).

[15] *Brown* v. *Chase,* 125 Wash. 542, 549, 553, 217 Pac. 23 (1923); *In re Alpowa Creek,* 129 Wash. 9, 13, 224 Pac. 29 (1924); *Proctor* v. *Sim,* 134 Wash. 606, 616-619, 236 Pac. 114 (1925); *State* v. *American Fruit Growers, Inc.,* 135 Wash. 156, 161, 237 Pac. 498 (1925); *In re Sinlahekin Creek,* 162 Wash. 635, 640-641, 229 Pac. 649 (1931).

[16] Wash. Laws 1967, ch. 233, Rev. Code § 90.14.150 (Supp. 1970).

rights and it apparently contemplates that any such rights may be forfeited for failure to beneficially use them within 5 years thereafter.[17]

In Hawaii, the riparian doctrine applies, as between "konohiki" (major land) units, to the surplus freshet waters of a stream, but not to the normal flow. Unlike other Western States, there is no appropriation system of surface water rights recognized in Hawaii.[18]

Other 100th meridian States.—An early statute of the Territory of Dakota declared the rights of the landowner in definite streams contiguous to his land.[19] This, according to the South Dakota Supreme Court, was a concise statement of the common law doctrine applicable to the rights of riparian owners.[20] It has been repealed in both North Dakota and South Dakota.[21] Courts of both Dakotas have recognized the common law riparian right.[22] South Dakota enacted a statute designed to restrict the operation of the riparian doctrine. Riparian rights for other than domestic purposes were not recognized except for vested rights under which water had been put to beneficial use before or, if works were then under construction, within a reasonable time after its enactment.[23] Validity of the statute was upheld by the State supreme court.[24]

A 1955 North Dakota act declared that the rights of riparian owners, other than municipalities, comprise domestic and stockwatering purposes.[25] It and the earlier territorial statute[26] were eliminated in 1963.[27] The 1955 act also amended the statute regarding waters subject to appropriation.[28] The 1963 legislation added various provisions regarding priority of water rights and water-use preferences, no permit being required for domestic and livestock purposes.[29] In 1968, the State supreme court appears to have concluded that

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[17] Alaska Laws 1966, ch. 50, Stat. § 46.15.010 *et seq.* (Supp. 1966).

[18] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 70-71 (1917); *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 394-417 (1930), affirmed, 52 Fed. (2d) 356 (9th Cir. 1931), certiorari denied, 284 U.S. 677 (1931).

[19] Terr. Dak. Laws 1865-1866, ch. 1, § 256, Civ. Code § 255 (1877).

[20] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.,* 15 S. Dak. 519, 525-527, 91 N.W. 352 (1902); *Redwater Land & Canal Co.* v. *Reed,* 26 S. Dak. 466, 474, 128 N.W. 702 (1910).

[21] N. Dak. Cent. Code Ann. § 47-01-13 (1960), repealed, Laws 1963, ch. 419, § 7; S. Dak. Code § 61.0101 (1939), repealed, Laws 1955, ch. 430, § 1.

[22] *McDonough* v. *Russell-Miller Mill. Co.,* 38 N. Dak. 465, 165 N.W. 504 (1917); *Johnson* v. *Armour & Co.,* 69 N. Dak. 769, 291 N.W. 113 (1940); *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.,* 15 S. Dak. 519, 91 N.W. 352 (1902); *Redwater Land & Canal Co.* v. *Reed,* 26 S. Dak. 466, 128 N.W. 702 (1910).

[23] S. Dak. Laws 1955, ch. 430, Comp. Laws Ann. § 46-1-9 (1967).

[24] *Belle Fourche Irr. Dist.* v. *Smiley,* 176 N.W. (2d) 239 (S. Dak. 1970); *Knight* v. *Grimes,* 80 S. Dak. 517, 127 N.W. (2d) 708 (1964).

[25] N. Dak. Laws 1955, ch. 345, § 2, Cent. Code Ann. § 61-01-01.1 (1960).

[26] Terr. Dak. Laws 1865-1866, ch. 1, § 256, N. Dak. Cent. Code Ann. § 47-01-13 (1960).

[27] N. Dak. Laws 1963, ch. 419, § 7.

[28] N. Dak. Laws 1955, ch. 345, § 1, Cent. Code Ann. § 61-01-01 (1960).

[29] N. Dak. Laws 1963, ch. 419, § 1, Cent. Code Ann. § 61-01-01.1 (Supp. 1969).

unused riparian rights to irrigate from an underground stream could be validly abrogated by the 1955 and related legislation, at least as against appropriative rights, although the court qualified this and it did not deal with the 1963 legislation.[30]

The early Dakota statute was copied in Oklahoma.[31] In 1963, the Oklahoma Legislature undertook to amend it so as to restrain the exercise of unused riparian rights to domestic purposes, to protect previous beneficial uses made under various circumstances, and to make all streamflow in excess of the foregoing public water subject to appropriation.[32] Oklahoma Supreme Court decisions have recognized the common law riparian right.[33] In a 1968 case, the court held that the 1963 legislation did not apply to previously vested rights.[34]

By statute, Kansas followed the lead of Oregon (also followed later in South Dakota) in restricting vested water rights to actual beneficial use at the time of enactment of the statute (or, if works were then under construction, within a reasonable time thereafter).[35] Common law claimants without vested rights could be enjoined by appropriators from making subsequent diversions, although compensation could be had in an action at law for damages proved for any property taken from a common law claimant by an appropriator. Constitutionality of the statute was sustained in decisions of both State and Federal courts.[36]

Early decisions of the Nebraska Supreme Court had the effect of eliminating much of the common law advantage of lands claiming unused riparian rights;[37] but a 1966 decision tempered their effect.[38] The time that riparian lands passed into private ownership is of importance, as against appropriative rights, in this and some other States.

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[30] *Baeth* v. *Hoisveen,* 157 N.W. (2d) 728, 733-734 (N. Dak. 1968).

[31] Terr. Okla. Stat. § 4162 (1890), Stat. Ann. tit. 60, § 60 (Supp. 1961).

[32] Okla. Laws 1963, ch. 205, Stat. Ann. tit. 60, § 60 (Supp. 1970), and tit. 82, § 1-A (1970).

[33] Hutchins, W. A., "The Oklahoma Law of Water Rights" 13-22 (1955).

[34] *Oklahoma Water Resource Bd.* v. *Central Okla. Master Conservancy Dist.,* 464 Pac. (2d) 748 (Okla. 1968).

[35] Kans. Laws 1945, ch. 390, Laws 1957, ch. 539, Stat. Ann. § 82a-701 *et seq.* (1969). Domestic uses are exempt from appropriation permit requirements, although such uses initiated subsequently shall constitute appropriative rights.

[36] *State ex rel. Emery* v. *Knapp,* 167 Kans. 546, 555-556, 207 Pac. (2d) 440 (1949); *Baumann* v. *Smrha,* 145 Fed. Supp. 617 (D. Kans. 1956), affirmed per curiam, 352 U.S. 863 (1956); *Williams* v. *Wichita,* 190 Kans. 317, 374 Pac. (2d) 578 (1962), appeal dismissed "for want of a substantial Federal question," 375 U.S. 7 (1963), rehearing denied, 375 U.S. 936 (1963); *Hesston & Sedgewick* v. *Smrha,* 192 Kans. 647, 391 Pac. (2d) 93 (1964).

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

[38] *Wasserburger* v. *Coffee,* 180 Nebr. 147, 141 N.W. (2d) 738, modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966).

Summary of Recognition, Repudiation, and Status of Riparian Doctrine in Individual Western States

Matters affecting the varied course of the riparian water-use doctrine in each of the 19 Western States are presented in one form or another immediately above, as well as in chapter 6 and in the appendix, which contains summaries of the water rights systems of all these States. Several points are brought together below in this concise form for ready reference purposes in the course of reading subsequent subdivisions of this chapter. Bear in mind, as noted at the outset of this chapter, that in those States in which the riparian water use doctrine has been generally repudiated or never recognized (Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming), there are cases in some of these jurisdictions (as well as other Western States) which have declared or implied that a riparian landowner may beneficially use the water so long as he does not interfere with the recognized operation of the appropriation doctrine. Moreover, certain other features of riparian rights have been recognized in some of these States. Considerations regarding navigable watercourses are discussed later under "The Riparian Right—Attachment of Riparian Rights to Various Water Sources—Navigable Watercourses."

Alaska

(a) Riparian water-rights doctrine recognized by court in 1903, but (b) repudiated by higher court in 1910. (c) Territorial legislature enacted statute in 1917 enacting law of riparian rights to limited extent regarding mining claims and (d) recognized by court in 1940. (e) A 1966 statute, which repealed the earlier mining legislation, apparently purports to convert any riparian rights to divert, impound, and withdraw water to appropriative rights and it apparently contemplates that any such rights may be forfeited, in whole or in part, for failure to beneficially use them, without sufficient cause, for any period of 5 successive years thereafter.[39] Status: Riparian doctrine has been recognized only to a limited extent. The 1966 statute apparently purports to convert any riparian rights to divert, impound, or withdraw water to appropriative rights and contemplates that they may be forfeited for failure to beneficially use them, without sufficient cause, for any period of 5 successive years thereafter.

Arizona

Riparian water-use doctrine repudiated by (a) Territorial legisla-

[39] (a) *Ketchikan Co.* v. *Citizens' Co.*, 2 Alaska 120, 123-124 (1903). (b) *Van Dyke* v. *Midnight Sun Min. & Ditch Co.*, 177 Fed. 85, 88, 91 (9th Cir. 1910). (c) Alaska Laws 1917, ch. 57, Comp. Laws Ann. § 47-3-35 (1949), Stat. § § 27.10.080 (Supp. 1962) and 38.05.260 (Supp. 1965). (d) *Balabanoff* v. *Kellogg*, 10 Alaska 11, 16-17, 118 Fed. (2d) 597, 599 (9th Cir. 1940), certiorari denied, 314 U.S. 635 (1941). (e) Alaska Laws 1966, ch. 50, Stat. § 46.15.010 *et seq.* (Supp. 1966).

ture in 1887, (b) Territorial supreme court in 1888, (c) State constitution in 1912.[40] Status: Doctrine never recognized in the jurisdiction.

California

(a) Common law riparian rights adjudicated between riparian proprietors in 1865. (b) Doctrine elaborated in 1886 court opinion, which stated that State adopted the doctrine in 1850 as part of the common law. (c) Superiority over appropriative rights intensified by decisions, especially in 1907 and 1926, (d) leading to State constitutional amendment in 1928. (e) Amendment accepted by supreme court in 1935 as commanding a new State water policy restricting riparian and all other water rights to reasonable beneficial use of water under reasonable methods of diversion and use.[41] Status: Riparian rights recognized but restricted to reasonable beneficial use under reasonable methods of diversion and use.

Colorado

(a) Riparian water-use doctrine repudiated in State court in 1882. (b) Confusing language in 1896-98 State cases suggest that perhaps domestic use was treated as recognized riparian right protected as against appropriative right. (c) Doctrine approved by Federal district court in 1898 for artificial uses of manufacturing, mining, and mechanical purposes, while recognizing repudiation of doctrine with respect to irrigation. (d) This 1898 Federal district court case expressly disapproved in 1910 by Federal circuit court of appeals. (e) Doctrine discussed in 1898 Federal circuit court of appeals case which implied that a riparian may apply water to beneficial use by virtue of his riparian status so long as he does not interfere with recognized operation of appropriation doctrine. (f) Latter case acknowledged in 1909 State case which, however, indicated that abolition of riparian doctrine was long established in Colorado.[42] Status: Doctrine not recognized in Colorado as means

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[40] (a) Ariz. Rev. Stat. § 3198 (1887). (b) *Clough* v. *Wing*, 2 Ariz. 371, 381, 17 Pac. 453 (1888). (c) Ariz. Const. art. XVII, § 1. See *Brasher* v. *Gibson*, 101 Ariz. 326, 419 Pac. (2d) 505, 509 (1966).

[41] (a) *Ferrea* v. *Knipe*, 28 Cal. 340, 343-345 (1865). (b) *Lux* v. *Haggin*, 69 Cal. 255, 384, 387, 4 Pac. 919 (1884), 10 Pac. 674 (1886). (c) *Miller & Lux* v. *Madera Canal & Irr. Co.*, 155 Cal. 59, 64, 99 Pac. 502 (1907); *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 107-108, 252 Pac. 607 (1926). (d) Cal. Const. art. XIV, § 3. (e) *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 365, 40 Pac. (2d) 486 (1935).

Most California law with respect to conflicting riparian-appropriation interrelationships was made in controversies in which the riparian right was adjudged superior. Regarding differences, as against appropriative rights, that may arise due to the time that lands passed into private ownership, and related factors, see, in chapter 6, "Interrelationships of the Dual Water Rights Systems–The Status in Summary: By States–California."

[42] (a) *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443, 446-447 (1882). (b) *Montrose Canal Co.* v. *Loutsenhizer Ditch Co.*, 23 Colo. 233, 237, 48 Pac. 532 (1896); *Broadmoor Dairy & Live Stock Co.* v. *Brookside Water & Improvement Co.*, 24 Colo. 541, 545-546, 550, 52

of acquiring water-use rights as against a valid appropriation, except perhaps in the case of domestic use.

Hawaii

(a) Riparian doctrine mentioned in early cases, beginning in 1867, but (b) riparian rights not actually adjudicated until 50 years later. (c) As a result of two Territorial supreme court decisions rendered in 1917 and 1930, the riparian doctrine applies, as between "konohiki" (major land) units, to the surplus freshet waters of a stream but not to the normal flow.[43] Status: Riparian doctrine recognized in Hawaii, but of limited application.

Idaho

(a) Riparian water-use doctrine rejected as against lawful appropriator in 1890, (b) also in 1909, but held superior to any right of "a stranger, intermeddler, or interloper." (c) Repudiated so far as conflicts with appropriators in 1912. (d) Declared to have been abrogated in 1939. (e) In a 1963 decision, use of water by person having apparently only "rights or privileges of a riparian owner" permitted so long as it does not interfere with decreed rights of appropriator.[44] Status: Doctrine repudiated to extent it conflicts with doctrine of prior appropriation.

Pac. 792 (1898). The court's language appears to have been *dicta* in both cases. (c) *Schwab* v. *Beam,* 86 Fed. 41, 44 (C.C.D. Colo. 1898). (d) As being not in accord with State court decisions, *Snyder* v. *Colorado Gold Dredging Co.,* 181 Fed. 62, 68 (8th Cir. 1910). (e) *United States Freehold Land & Emmigration Co.* v. *Gallegos,* 89 Fed. 769, 772-773 (8th Cir. 1898). The court said, *inter alia,* that "By the rules of the common law, the appellant has the right to restrain the diversion of the flow of the water of this river from its natural channel, as against all the world. By the constitution and statutes of Colorado, it has the same right, although it never has appropriated any of the water to a beneficial use, as against every one but lawful prior appropriators; and, as the appellees are not such, it must have this right as against them." The court also said that since the appellant owned the land on both banks of the river, "the appellees can divert no water without entering upon and leading it across this land, and committing a continuing trespass upon it." (f) *Sternberger* v. *Seaton Min. Co.,* 45 Colo. 401, 402-404, 102 Pac. 168 (1909). The court said that since the defendant apparently had made a valid appropriation, "the doctrine of the case cited [*United States Freehold Land & Emmigration Co.* v. *Gallegos*, *supra*], that plaintiff, as a riparian owner merely, is entitled to restrain the acts of a mere trespasser, does not apply." In *Colorado River Water Conservation Dist.* v. *Rocky Mt. Power Co.,* 158 Colo. 331, 406 Pac. (2d) 798, 801 (1965), the court quoted approvingly an Idaho court opinion that "there is no such thing as a riparian right to the use of water as against an appropriator. . . ." Regarding domestic use, see chapter 6, note 153.

[43] (a) *Peck* v. *Bailey,* 8 Haw. 658, 661-662, 670-672 (1867). (b) *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 70-71 (1917). (c) *Carter* v. *Territory of Hawaii, supra*; *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 394-417 (1930), affirmed, 52 Fed. (2d) 356 (9th Cir. 1931), certiorari denied, 284 U.S. 677 (1931).

[44] (a) *Drake* v. *Earhart,* 2 Idaho 750, 757, 23 Pac. 541 (1890). (b) *Hutchinson* v. *Waterson Slough Ditch Co.,* 16 Idaho 484, 490-495, 101 Pac. 1059 (1909). (c) *Schodde* v. *Twin*

Kansas

(a) Riparian doctrine recognized in 1877. (b) Doctrine elaborated in 1905 court opinion, which declared that the Territory adopted the riparian doctrine as part of the common law. (c) Legislation in 1945, amended in 1957, limited vested riparian rights to beneficial use prior to enactment or, if works were then under construction, within a reasonable time thereafter. Claimants holding unused rights could be enjoined by appropriators from making subsequent diversions, although compensation could be had in an action for damages for any property taken from the claimant by an appropriator. Domestic uses exempt from appropriation permit requirements, although such uses initiated after 1945 legislation constitute appropriative rights. (d) Constitutionality upheld by State and Federal courts.[45] Status: Vested riparian rights limited to beneficial use prior to enactment of 1945 legislation. Claimants holding unused nondomestic rights could be enjoined by appropriators from making subsequent diversions, although compensation could be had in an action for damages for any property taken from claimant by an appropriator.

Montana

Long considered a doubtful State because of (a) references to riparian doctrine in early decisions and (b) *dicta* in 1900 decision. (c) Riparian water use doctrine completely repudiated by supreme court in 1921 and 1925.[46] Status: Doctrine declared never to have prevailed in Montana.

Nebraska

(a) Riparian doctrine, as modified by the irrigation statutes, recognized late in the 19th century and (b) thoroughly considered

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Falls Land & Water Co., 224 U.S. 107, 121-125 (1912). (d) *Jones* v. *McIntire*, 60 Idaho 338, 352, 91 Pac. (2d) 373 (1939). (e) *Weeks* v. *McKay*, 85 Idaho 617, 382 Pac. (2d) 788 (1963).

[45] (a) *Shamleffer* v. *Council Grove Peerless Mill Co.*, 18 Kans. 24, 31-33, 26 Am. Dec. 765 (1877). (b) *Clark* v. *Allaman*, 71 Kans. 206, 224-229, 237-241, 80 Pac. 571 (1905). (c) Kans. Laws 1945, ch. 390, amended, Laws 1957, ch. 539, Stat. Ann. § 82a-701 *et seq.* (1969). (d) *State ex rel. Emery* v. *Knapp*, 167 Kans. 546, 555-556, 207 Pac. (2d) 440 (1949); *Baumann* v. *Smrha*, 145 Fed. Supp. 617 (D. Kans. 1956), affirmed per curiam, 352 U.S. 863 (1956); *Williams* v. *Wichita*, 190 Kans. 317, 374 Pac. (2d) 578 (1962), appeal dismissed "for want of a substantial Federal question," 375 U.S. 7 (1963), rehearing denied, 375 U.S. 936 (1963); *Hesston & Sedgwick* v. *Smrha*, 192 Kans. 647, 391 Pac. (2d) 93 (1964). The first cited case involved a surface watercourse. The others appear to have involved percolating ground water. In this regard, see chapter 6, note 245.

[46] (a) *Thorp* v. *Woolman*, 1 Mont. 168, 171-172 (1870); *Fitzpatrick* v. *Montgomery*, 20 Mont. 181, 185, 50 Pac. 416 (1897); *Haggin* v. *Salle*, 23 Mont. 375, 381, 59 Pac. 154 (1899). (b) *Smith* v. *Denniff*, 24 Mont. 20, 21-23, 60 Pac. 398 (1900). (c) *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 157-158, 165, 166, 201 Pac. 702 (1921); *Wallace* v. *Goldberg*, 72 Mont. 234, 244, 231 Pac. 56 (1925).

and redeclared in 1903 as applicable to lands passing into private ownership before enactment of 1889 appropriation statute. (c) Decisions in 1903-04 tended to eliminate much of advantage of location of lands claiming unused riparian rights. (d) Decision in 1966 held that the 1889 appropriation statute did not substitute prior appropriation doctrine in place of the riparian doctrine; therefore lands passing into private ownership between the 1889 statute and the 1895 statute are still subject to the riparian doctrine, and earlier decisions tempered as to lands claiming unused riparian rights. The court indicated that a riparian right "may be superior" to an appropriative right if the riparian land passed into private ownership before the 1895 statute, but an appropriator may be liable for injury to a riparian right "if, but only if, the harmful appropriation is unreasonable in respect to the [riparian] proprietor." The court added that "if riparian lands passed into private ownership after April 4, 1895, a competing appropriative right "outranks the riparian right under the facts of the present case."[47] Status: Doctrine recognized, but the time that riparian lands passed into private ownership is important, as against appropriative rights, and the advantage of unused riparian rights as against appropriative rights has been reduced.

Nevada

(a) Riparian water-use doctrine discussed in early cases; (b) definitely recognized in 1872; (c) repudiated in 1885. (d) Some riparian rights were adjudicated during the 1872-85 period before the repudiation of such rights in 1885.[48] Status: After being recognized for 13 years in Nevada, the doctrine was specifically repudiated in 1885 and has remained so.

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[47] (a) *Clark* v. *Cambridge & Arapahoe Irr. & Improvement Co.,* 45 Nebr. 798, 806, 64 N.W. 239 (1895). (b) *Crawford Co.* v. *Hathaway,* 67 Nebr. 325, 339, 342, 93 N.W. 78 (1903); *Meng* v. *Coffee,* 67 Nebr. 500, 511-512, 93 N.W. 713 (1903). (c) *McCook Irr. & Water Power Co.* v. *Crews,* 70 Nebr. 109, 96 N.W. 996 (1903), 102 N.W. 249 (1905) *Cline* v. *Stock,* 71 Nebr. 70, 98 N.W. 454 (1904), 102 N.W. 265 (1905). (d) *Wasserburger* v. *Coffee,* 180 Nebr. 147, 141 N.W. (2d) 738, 742, 743, 745 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966); *Brummund* v. *Vogel,* 184 Nebr. 415, 168 N.W. (2d) 24 (1969), appears to have added some uncertainty regarding the status of domestic use.

[48] (a) *Lobdell* v. *Simpson,* 2 Nev. 274, 277, 278, 90 Am. Dec. 537 (1866). (b) *Vansickle* v. *Haines,* 7 Nev. 249, 256, 257, 260-261, 265, 285 (1872). (c) *Jones* v. *Adams,* 19 Nev. 78, 84-88, 6 Pac. 442 (1885); *Reno Smelting, Mill. & Reduction Works* v. *Stevenson,* 20 Nev. 269, 275-276, 280, 282, 21 Pac. 317 (1889). (d) A Federal circuit court said that final and unreversed decrees of riparian rights became *res adjudicata* of the subject matter in dispute as between the parties and their successors in interest. The court refused to allow any one of the riparian parties to the suit to claim any priority over the others based upon the Nevada court's recognition of appropriative rights and repudiation of the riparian rights doctrine in 1885. *Union Mill & Min. Co.* v. *Dangberg,* 81 Fed. 73, 85, 92, 115-116 (C.C.D. Nev. 1897).

New Mexico

Riparian water-use doctrine repudiated (a) expressly by the Territorial and State supreme court (1891 and 1945), (b) impliedly by the constitutional declaration that all unappropriated stream water is subject to appropriation.[49] Status: Doctrine never recognized in the jurisdiction.

North Dakota

Riparian doctrine recognized (a) by Dakota Territorial statute in 1866 but repealed in 1963, (b) by Territorial supreme court in 1888, affirmed by United States Supreme Court in 1890, (c) again by State supreme court in 1917 and 1940. (d) 1955 act declared rights of riparian owners, other than municipalities, comprise domestic and stockwatering purposes, but this was eliminated in 1963. (e) 1955 act also amended statute regarding waters subject to appropriation. (f) 1963 legislation added various provisions as to priority of water rights and water-use preferences, no permit required for domestic and livestock purposes. (g) In 1968, State supreme court apparently concluded unused riparian rights to irrigate from underground stream could be validly abrogated by the 1955 and related legislation, at least as against appropriative rights, although the court qualified this and it did not deal with the 1963 legislation.[50] Status: Riparian doctrine recognized in North Dakota by legislation as early as 1866 but provisions deleted in 1963. Also recognized by courts in several decisions. In 1968, State supreme court apparently concluded unused riparian rights for nondomestic purposes could be validly abrogated by the 1955 and related legislation, at least as against appropriative rights acquired thereafter, although the court qualified this. And, the court did not deal with 1963 legislation regarding priority of water rights, eliminating the 1955 definition of riparian rights, and requiring no permit for domestic and livestock purposes.

Oklahoma

Riparian doctrine recognized (a) by Territorial statute in 1890,

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[49] (a) *Trambley* v. *Luterman,* 6 N. Mex. 15, 25, 27 Pac. 312 (1891); *State ex rel. State Game Comm'n* v. *Red River Valley Co.,* 51 N. Mex. 207, 218, 225, 182 Pac. (2d) 421 (1945). (b) N. Mex. Const. art. XVI, § § 2 and 3 (1911).

[50] (a) Terr. Dak. Laws 1865-1866, ch. 1, § 256, Civ. Code § 255 (1877), N. Dak. Cent. Code Ann. § 47-01-13 (1960), repealed, Laws 1963, ch. 419, § 7. (b) *Sturr* v. *Beck,* 6 Dak. 71, 50 N.W. 486 (1888), affirmed, 133 U.S. 541, 547, 551 (1890). (c) *McDonough* v. *Russell-Miller Mill. Co.*, 38 N. Dak. 465, 471-472, 165 N.W. 504 (1917); *Johnson* v. *Armour & Co.*, 69 N. Dak. 769, 776-777, 291 N.W. 113 (1940). (d) N. Dak. Laws 1955, ch. 345, § 2, Cent. Code Ann. § 61-01-01.1 (1960), entire subject matter deleted from section and other provisions substituted, Laws 1963, ch. 419, § 1. (e) N. Dak. Laws 1955, ch. 345, § 1, Cent. Code Ann. § 61-01-01 (1960). (f) N. Dak. Laws 1963, ch. 419, Cent. Code Ann. § 61-01-01.1 (Supp. 1969). (g) *Baeth* v. *Hoisveen*, 157 N.W. (2d) 728 (N. Dak. 1968).

copied from Dakota Territorial statute of 1866, (b) by State supreme court in 1908 and 1933. (c) By statute in 1963, the legislature undertook to restrict the exercise of unused riparian rights to domestic purposes, with protection accorded previous beneficial uses made under various circumstances, and all streamflow in excess of the foregoing becoming water subject to appropriation. (d) In a 1968 case, the court held the 1963 legislation did not apply to previously vested rights, although it retroactively eliminated certain procedural requirements in previous appropriation statutes.[51] Status: Riparian doctrine recognized by both legislature and supreme court, but in 1963 the legislature undertook to restrict exercise of unused riparian rights to domestic purposes, with protection accorded to previous beneficial uses made under various circumstances, and all excess streamflow being subject to appropriation. This legislation held not to apply to vested rights.

Oregon

(a) Riparian doctrine recognized by supreme court in 1876, (b) expounded more fully in 1886, and (c) generally recognized in many court decisions in which it was progressively modified. (d) Legislature in 1909 generally limited vested riparian rights to beneficial use prior to enactment or, if works were then under construction, within a reasonable time thereafter. (e) Constitutionality of legislative restrictions upheld by State and Federal courts.[52] Status: The common law riparian doctrine received early recognition in Oregon, but over the years it suffered legislative and progressive judicial modification. The sweeping results have not brought abrogation of the doctrine, but they leave little vestige

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[51] (a) Terr. Okla. Stat. 1890, § 4162; Terr. Dak. Laws 1865-1866, ch. 1, § 256. (b) *Chicago, R. I. & P. Ry.* v. *Groves,* 20 Okla. 101, 111, 93 Pac. 755 (1908); *Broady* v. *Furray,* 163 Okla. 204, 205, 21 Pac. (2d) 770 (1933). (c) Okla. Laws 1963, ch. 205, Stat. Ann. tit. 60, § 60 (Supp. 1970) and tit. 82, § 1-A (1970). (d) *Oklahoma Water Resources Bd.* v. *Central Okla. Master Conservancy Dist.,* 464 Pac. (2d) 748 (Okla. 1968).

[52] (a) *Taylor* v. *Welch,* 6 Oreg. 198, 200 (1876). (b) *Weiss* v. *Oregon Iron & Steel Co.,* 13 Oreg. 496, 498-502, 11 Pac. 255 (1886). (c) Hutchins, W. A., "The Common-Law Riparian Doctrine in Oregon: Legislative and Judicial Modification," 36 Oreg. Law Rev. 193 (1957). (d) Oreg. Laws 1909, ch. 216, Rev. Stat. § 539.010 (Supp. 1955). Regarding domestic and stockwatering uses, see Hutchins, *supra* at 218-219. (e) *In re Willow Creek,* 74 Oreg. 592, 610-620, 625-628, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *In re Hood River,* 114 Oreg. 112, 173-182, 227 Pac. 1065 (1924); *California-Oregon Power Co.* v. *Beaver Portland Cement Co.,* 73 Fed. (2d) 555, 562-569 (9th Cir. 1934). The United States Supreme Court affirmed the decree of the Court of Appeals in this Federal case, but expressed no opinion as to whether the common law right had been validly modified by State legislation as construed by the State supreme court. *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142, 155-165 (1935). Present status as modified by the water code, *Fitzstephens* v. *Watson,* 218 Oreg. 185, 344 Pac. (2d) 221 (1959).

insofar as a riparian right may be asserted against claimants of appropriations under the water rights statute.

South Dakota

Riparian doctrine recognized (a) by Dakota Territorial statute in 1866, (b) by Territorial supreme court in 1888, affirmed by United States Supreme Court in 1890, and (c) reaffirmed by State supreme court in 1902 and 1910. (d) The legislature in 1955 generally limited vested riparian rights, for other than domestic purposes, to beneficial use prior to enactment or, if works were then under construction, within a reasonable time thereafter. (e) The State supreme court has sustained the constitutionality of the 1955 enactment.[53] Status: The riparian doctrine was consistently recognized in a number of decisions of the supreme court beginning in the Territorial period; but in 1955 the legislature enacted a statute restricting vested riparian rights for nondomestic purposes to actual beneficial use of water at the time of enactment or shortly thereafter.

Texas

(a) During a 70-year period from the first recognition of the riparian doctrine in 1856 the Texas courts were concerned chiefly with the common law. (b) In 1926, by *dictum*, the supreme court placed riparianism on a Mexican law basis. (c) The legislature in 1889 acknowledged riparian rights for domestic purposes; in 1895 accorded riparian rights in arid areas protection; in 1913 declared nonrecognition of riparian rights in land that passed from State ownership after July 1, 1895, but protected earlier rights. (d) In 1962, the Texas Supreme Court held that lands in Spanish and Mexican grants on the lower Rio Grande do not have an appurtenant right to irrigate with the river waters.[54] There was no issue of common law riparian rights in the case. (e) A 1967 statute restricted the exercise of riparian rights, except for domestic and livestock purposes, to the extent of the maximum beneficial use made during any one of certain recent years.[55] Status: Throughout

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[53] (a) Terr. Dak. Laws 1865-1866, ch. 1, § 256, Civ. Code § 255 (1877). (b) *Sturr* v. *Beck*, 6 Dak. 71, 50 N.W. 486 (1888), affirmed, 133 U.S. 541, 547, 551 (1890). (c) *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 522-527, 91 N.W. 352 (1902); *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 474, 128 N.W. 702 (1910). (d) S. Dak. Laws 1955, ch. 430, Comp. Laws Ann. § 46-1-9 (1967). (e) *Belle Fourche Irr. Dist.* v. *Smiley*, 176 N.W. (2d) 239 (S. Dak. 1970); *Knight* v. *Grimes*, 80 S. Dak. 517, 127 N.W. (2d) 708 (1964).

[54] Nevertheless, see chapter 7 at notes 656-659 regarding "equitable" rights recognized in a 1969 Texas Court of Civil Appeals case.

[55] (a) *Haas* v. *Choussard*, 17 Tex. 588 (1856). (b) *Motl* v. *Boyd*, 116 Tex. 82, 108, 286 S.W. 458 (1926). (c) Tex. Gen. Laws 1889, ch. 88, § 1, Laws 1895, ch. 21, § § 3 and 10, Laws 1913, ch. 171, § § 3, 19, 97, 98, and 98a, Laws 1917, ch. 88, § § 3, 24, 136, and 137. (d) *Valmont Plantations* v. *State of Texas*, 163 Tex. 381, 355 S.W. (2d) 502 (1962), affirming 346 S.W. (2d) 853 (Tex. Civ. App. 1961). (e) From 1963 to 1967,

most of Texas judicial history the riparian doctrine has been recognized, and the legislature has both recognized its existence and limited its application. The *Valmont Plantations* decision in 1962 concluded that no implied riparian irrigation rights were included with Spanish and Mexican grants, but common law riparian rights were not affected. The 1967 legislation has restricted the exercise of riparian rights, except for domestic and livestock purposes, to the extent of maximum beneficial use during certain recent years. Riparian influence in Texas has been curtailed by these developments.

Utah

Riparian water-use doctrine repudiated in 1891.[56] Status: Doctrine never recognized in the jurisdiction.

Washington

(a) Riparian doctrine recognized by legislature in 1891 and (b) by supreme court in 1892. (c) Modified in 1920's by requiring riparian owner to show that either at present or within a reasonable time, he will make use of the water for beneficial purposes to be protected against an appropriative right. (d) A 1967 statute provided that riparian rights shall be relinquished in whole or in part for abandonment or voluntary failure, without sufficient cause, to beneficially use all or part of such a right for any period of 5 successive years thereafter.[57] Status: Riparian rights are recognized in Washington; but they have been restricted to present or reasonably prospective beneficial use to be protected against an appropriative right, and they shall be relinquished for abandonment or voluntary failure, without sufficient cause, to beneficially use such a right within a certain period.

Wyoming

Riparian water-use doctrine repudiated in 1896.[58] Status: Doctrine never recognized in the jurisdiction.

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inclusive, or until the end of 1970, if works were under construction before the act's effective date. If valid under existing law, claims for such rights shall be filed as required with the administering agency to prevent their being extinguished. Tex. Rev. Civ. Stat. Ann. art. 7542a, § 4 (Supp. 1970).

[56] *Stowell* v. *Johnson,* 7 Utah 215, 225-226, 26 Pac. 290 (1891).

[57] (a) Wash. Laws 1891, ch. 142. § § 2-4. (b) *Crook* v. *Hewitt,* 4 Wash. 749, 750, 31 Pac. 28 (1892). (c) *Brown* v. *Chase,* 125 Wash. 542, 549, 553, 217 Pac. 23 (1923); *State* v. *American Fruit Growers, Inc.,* 135 Wash. 156, 161, 237 Pac. 498 (1925). (d) Wash. Laws 1967, ch. 233, Rev. Code § 90.14.170 (Supp. 1970).

Regarding restrictions in the use of navigable waters, see the discussion at note 411 *infra.*

[58] *Moyer* v. *Preston,* 6 Wyo. 308, 318-320, 44 Pac. 845 (1896).

THE RIPARIAN RIGHT

In the following discussions of the riparian right and its exercise, references are made to pronouncements and comments by courts of various Western States, even though in some of them such restrictions on riparianism have been imposed as to render the statements of minor or even perhaps academic importance in the respective jurisdictions. That is, an attempt is made to present the substance of various aspects of what has been—and in some States may still be—an important part of western water rights law as jurists viewed the material when writing their opinions. The reader who wishes to evaluate the pragmatic significance of a particular statement of a court at the time of utterance may find the abstract in the preceding division useful.

Accrual of the Right

Source of Title to Land

Riparian rights relate chiefly to private land.—The law of riparian rights relates chiefly to the rights of proprietors of private lands. It is settled, according to the California courts, that private riparian rights generally do not attach to lands held by the Government until such land has been transmitted to private ownership,[59] although as to subsequent parties other than the United States, riparian rights may date from the first steps taken to secure title from the Government.[60] This is an equally sound principle in any of the other public-domain States in which the riparian doctrine is recognized.[61]

Ownership of most of the western lands, with their waters and all other natural resources, was originally in the United States which succeeded in title to such lands of the previous sovereigns, with the exception of Texas, as had not been effectively granted to private grantors by these governments. With respect to Texas, however, on annexation to the United States the Republic of Texas retained for the State all vacant and unappropriated lands within its limits.

It is sometimes said that the United States owns riparian rights in lands on the public domain; or that a particular State owns riparian rights in the school lands or other lands granted to it or reserved by it and held in a proprietary capacity. However, governmental ownership, whether Federal or State, goes beyond that of riparian rights in such of its lands as meet the recognized

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[59] *McKinley Bros.* v. *McCauley*, 215 Cal. 229, 231, 9 Pac. (2d) 298 (1932); *Rindge* v. *Crags Land Co.*, 56 Cal. App. 247, 252, 205 Pac. 36 (1922).

[60] See "Time of Accrual of Riparian Right," *infra.*

[61] The Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1964), applied specifically to all of the original 17 contiguous Western States except Nebraska, Kansas, Oklahoma, Texas, and Colorado. An amendment of March 3, 1891, extended the provisions to Colorado. 26 Stat. 1096, 1097, 43 U.S.C. § 321 *et seq.* (1964).

requirements of riparian land ownership. It extends to *all rights* in *all waters* on *all lands* within its domain, subject to whatever lawful method of disposal may be authorized by its constitutional and legislative law, and except for such rights as it has granted to the public at large or to specific individuals. Congress has made such grants, as noted below. But *in the absence of expressed consent,* the Government is not bound to observe riparian doctrine principles of State water law in handling waters on its own public lands through which or contiguous to which streams of water flow.

Of course, if the sovereign purchases or condemns private riparian land, it could also acquire whatever water rights are incident thereto and thereby become a riparian proprietor on the same basis as private proprietors.

Lands in Spanish and Mexican grants.—The only parts of the former Mexican territory in which the riparian water-use doctrine has had extensive recognition in American courts are California and Texas.

(1) California. Lands held in Spanish and Mexican grants contiguous to streams in California are recognized as having riparian rights, but neither greater nor less than those of lands acquired from the United States Government. The California courts did not trace the water rights of pre-American land grants solely to Mexican law, although they did note it without particular emphasis in the landmark riparian case of *Lux* v. *Haggin*[62] and in a few other cases.

The prompt acceptance of the riparian doctrine as a part of the common law in the early judicial history of California served to clothe the proprietors of riparian lands granted prior to statehood with the identical water privileges that it accorded to early possessors on the public domain of the United States and to subsequent grantees thereof.[63] It is true that some important features of the present California riparian doctrine were decided in controversies arising on lands originally granted by Spain or Mexico. But this was not because the land titles were so derived, nor by reference to Spanish-Mexican law, but solely because these privately owned lands, regardless of the source of private title, were contiguous to flowing streams or were traversed by them.[64]

(2) Texas. After several decades of controversy—resulting from *dicta* in a 1926 Texas Supreme Court opinion—over the relationship of riparian rights to Spanish and Mexican land grants, the issue was squarely presented to the Texas Supreme Court in a true adversary proceeding to determine it, and it was

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[62] *Lux* v. *Haggin,* 69 Cal. 255, 317-334, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[63] All land that passed to private ownership in fee simple is protected in its riparian rights against subsequent appropriators, whether the fee was obtained by virtue of a Mexican grant or under a land law of the United States. Wiel, S. C., "Water Rights in the Western States," 3d ed., vol. 1, § 260 n. 76 (1911).

[64] See *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327, 331-332, 88 Pac. 978 (1907); *Frazee* v. *Railroad Comm'n,* 185 Cal. 690, 693-694, 201 Pac. 921 (1921); *Holmes* v. *Nay,* 186 Cal. 231, 235, 199 Pac. 325 (1921); *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 526, 81 Pac. (2d) 533 (1938).

squarely decided by that court. The definitive decision in the *Valmont* case, is that the original Spanish and Mexican grants riparian to the lower Rio Grande did not carry with them implied rights of irrigation.[65]

The judicial opinion which led to such protracted riparian rights controversy in Texas was written by Justice Cureton in *Motl* v. *Boyd*.[66] Despite the fact that no Spanish or Mexican grants were involved in that case, and that what the court actually held was that certain parties would have riparian rights if they had not become estopped to assert them, the court offered its opinion that under Mexican law riparian lands granted by the Government of Mexico had appurtenant rights of irrigation; and it totally ignored Spanish law. In the *Valmont* case the trial court concluded that when the grants were made, the laws of Spain did not recognize a riparian right of irrigation, but required an irrigator to exhibit his title to irrigation waters; but despite this, the court concluded that under the doctrine of *stare decisis* it was bound to the contrary by the erroneous *dicta* in *Motl* v. *Boyd*. The San Antonio Court of Civil Appeals, in an exhaustive, well-documented opinion, agreed with the trial court on the matter of Spanish law, but disagreed on the issue of *stare decisis* and reversed the judgment. In a brief opinion, the Texas Supreme Court affirmed the judgment of the court of civil appeals and adopted the opinion of that court as that of the supreme court.

There was no issue of common law riparianism in the *Valmont* case. Nothing that the Texas Supreme Court previously decided respecting common law riparian rights, or riparian rights of grantees of Republic or State land, was affected in any way by this decision.

Federal land grants.—By the Congressional legislation of 1877, if not by the preceding Acts of 1866 and 1870,[67] the United States formally consented to the acquisition of appropriative rights on the public domain and thereby waived its right to object to the impairment of the rights of its public lands in the use of the nonnavigable streams flowing through them.[68] So long as the

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[65] *Valmont Plantations* v. *State of Texas,* 163 Tex. 381, 355 S.W. (2d) 502 (1962), affirming 346 S.W. (2d) 853 (Tex. Civ. App. 1961). The court of civil appeals affirmed the trial court's conclusion that a "specific Spanish or Mexican grant of Rio Grande waters was necessary for irrigation purposes" and concluded that the "acts done in making the Lower Rio Grande grants refute any intent to grant waters with the land." 346 S.W. (2d) at 878. See also *Duke* v. *Reily,* 431 S.W. (2d) 769, 771 (Tex. Civ. App. 1968). Nevertheless, see chapter 7 at notes 656-659 regarding "equitable" rights recognized in a 1969 Texas Court of Civil Appeals case. *State* v. *Hidalgo County Water Control & Improvement Dist. No. 18,* 443 S.W. (2d) 728, 748-749 (Tex. Civ. App. 1969).

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

[67] 14 Stat. 253, § 9 (1866); 16 Stat. 218 (1870); 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964).

[68] If the Acts of 1866 and 1870 did not constitute an entire abandonment of the common law rule of running waters insofar as the public lands and running waters were concerned, they foreshadowed the more positive declarations of the Desert Land Act of

lands remain in Government ownership, therefore, riparian rights are not asserted as against intending appropriators.[69]

In the landmark *California Oregon Power Company* case arising in Oregon, the United States Supreme Court held that following the Congressional desert land legislation of 1877, a patent issued 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," (emphasis added) but that all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated States, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of private rights should obtain.[70] The Court noted the lack of harmony among the State courts that had spoken on the matter. Approval was expressed of Oregon and South Dakota decisions that the effect of the Desert Land Act was to abrogate the common law rule with respect to *all* lands thereafter passing to private ownership; and the Washington and California courts were held to be in error in applying it only to desert land entries.[71]

After the *California Oregon Power Company* case had been decided, the supreme courts of both California and South Dakota referred to the statements in the opinion therein that it remained for each state to determine for itself to what extent the appropriation or riparian doctrine should obtain respecting these nonnavigable waters by grantees of Federal lands; and both courts held that their local laws had been, and still were, to the effect that riparian rights should accrue to patentees thereof.[72] It was recognized by the California Supreme Court in an early case that the effect of a grant by the United States of public lands is subject to exceptions where the water is reserved from the grant by its own terms or as a result of Congressional legislation granting the land or authorizing the patent or other muniment of title.[73]

1877. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 155-158 (1935). See *Duckworth* v. *Watsonville Water & Light Co.*, 150 Cal. 520, 531, 89 Pac. 338 (1907); *San Joaquin & Kings River Canal & Irr. Co.* v. *Worswick*, 187 Cal. 674, 686, 203 Pac. 999 (1922), certiorari denied, 258 U.S. 625 (1922).

[69] But see "Time of Accrual of Riparian Right—Protection of title by relation back," *infra*, with respect to settlers on the public domain.

[70] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163-164 (1935). Desert Land Act, 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964).

[71] *Hough* v. *Porter*, 51 Oreg. 318, 383-407, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909); *Cook* v. *Evans*, 45 S. Dak. 31, 38-39, 185 N.W. 262 (1921); *Still* v. *Palouse Irr. & Power Co.*, 64 Wash. 606, 612, 117 Pac. 466 (1911); *San Joaquin & Kings River Canal & Irr. Co.* v. *Worswick*, 187 Cal. 674, 690, 203 Pac. 999 (1922).

[72] *Williams* v. *San Francisco*, 24 Cal. App. (2d) 630, 633-638, 76 Pac. (2d) 182 (1938), hearing denied by supreme court (1938); *Williams* v. *San Francisco*, 56 Cal. App. (2d) 374, 378-381 (1942), hearing denied by supreme court (1943), certiorari denied, 319 U.S. 771 (1943); *Platt* v. *Rapid City*, 67 S. Dak. 245, 248-250, 291 N.W. 600 (1940).

[73] *Lux* v. *Haggin*, 69 Cal. 255, 336, 339, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

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

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

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

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

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

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

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

[76] Cal.Civ. Code § 1422 (1872).

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

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

(2) According to the Texas Supreme Court, riparian rights attached to lands granted by the Republic of Texas after 1840—the year in which the common law was adopted—and to lands granted by the State prior to the enactment of the first appropriation statute in 1889.[80] According to the Texas Legislature's own policy declaration in enacting the appropriation law of 1913—from which policy it has not receded—nothing contained in the act was to be construed as a recognition of any riparian right in the owner of any lands the title to which passed out of the State after July 1, 1895.[81]

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

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[78] Wiel, *supra* note 63, § 113.

[79] Cal. Stat. 1887, p. 114.

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

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

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

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

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

Time of Accrual of Riparian Right

When land title passes from public to private ownership.—It is the generally recognized rule that title to the riparian right, in the jurisdictions in which the riparian doctrine of water rights is recognized, accrues when title to the riparian land passes from public—Federal or State—to private ownership.[85]

In the early gold mining days in California, before provision had been made for the acquisition of private title to the public lands in which the gold was found, the courts of that State took the view that an occupant of public land of the United States contiguous to a stream gained, by virtue of location thereon with intent to appropriate the land to his own use, rights equivalent to those of an owner of private riparian land as against persons who subsequently appropriated water from the same stream.[86] This right accrued at the time of occupation, and the water right of the possessor was protected from the time he took possession. After Congress established procedure for the formal acquisition of land titles from the Government, however, the riparian right of the grantee of land from the United States was protected from a time which bore some relation to the formal procedure for acquiring the title. This is the subject of the next ensuing subtopic.

Protection of title by relation back.—After some vacillation,[87] the California Supreme Court reached the conclusion that as to subsequent parties other than the United States, the inception of the land right is the date of settlement, and that riparian rights in lands acquired from the Government are protected, not only from the filing of entry in the land office, but from the time of *bona fide* settlement with the intention of subsequently acquiring a complete title by patent.[88] Other courts rendered decisions to the same effect.[89]

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continue to obtain funds for educational and other trust purposes, adding that "Washington has benefitted greatly . . . by a policy of retention and development of these lands." The court said that "Const. art. 21, § 1 does not, by its terms, waive riparian water rights in state trust lands. Nor is it essential to so read it in order to avoid conflict with provisions of the Enabling Act or of other provisions of the constitution." 466 Pac. (2d) at 511-513. The court indicated that the two riparian parcels of public trust lands in dispute were obtained from the Federal Government in pursuance of the 1889 Enabling Act dedicating such lands to the support of agricultural colleges (25 Stat. 681) and for the support of common schools (25 Stat. 679). 466 Pac. (2d) at 509.

[85] *McKinley Bros.* v. *McCauley,* 215 Cal. 229, 231, 9 Pac. (2d) 298 (1932); *Sturr* v. *Beck,* 133 U.S. 541, 551 (1890); *Motl* v. *Boyd,* 116 Tex. 82, 107-108, 286 S.W. 458 (1926). But see the immediately preceding discussion of a recent Washington court decision dealing with State lands.

[86] *Crandall* v. *Woods,* 8 Cal. 136, 140-144 (1857). See, in chapter 6, "Establishment of the Riparian Doctrine in the West—Early Development of the Riparian Doctrine in Specified Jurisdictions—California."

[87] See Hutchins, W. A., "The California Law of Water Rights" 180-181 (1956).

[88] *Pabst* v. *Finmand,* 190 Cal. 124, 131, 211 Pac. 11 (1922). See chapter 6, at note 233.

[89] *Norwood* v. *Eastern Oreg. Land Co.,* 112 Oreg. 106, 111, 227 Pac. 1111 (1924); *Cook* v. *Evans,* 45 S. Dak. 31, 37, 185 N.W. 262 (1921), 45 S. Dak. 43, 45, 186 N.W. 571

The Supreme Court of Washington agreed that riparian rights date from the first step taken to secure title from the Government,[90] but emphasized that while the rights of the patentee relate back to the very inception of his title, yet they do not and cannot vest until patent issues.[91] In other words, the riparian right attaches to the riparian land by virtue of a patent to the original owner,[92] and not before, whereupon the doctrine of relation is invoked to fix its date of beginning. Early in the 20th century, this court rejected the contention "that a mere squatter on public land who subsequently sells out or abandons his claim acquires, or can acquire, riparian rights in a stream flowing through the land."[93]

Riparian right acquired by owner as part of land acquisition.—Thus, whether at the initial acquisition of riparian land from the Government[94] or on acquisition of the land from a private owner,[95] the riparian water right becomes possessed by the landowner as a part of the transaction by which he acquires title to the land.

This water right is "part and parcel" of the land itself.[96] (See "Property Characteristics—Right of Property," below.) It became so at the time the land was transferred from public to private ownership, and the right remains with the land unless divested by circumstances noted later under "Property Characteristics—Severance of Riparian Right From Land." Whether the

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(1922), concluded to have been in error in another respect, *Platt* v. *Rapid City,* 67 S. Dak. 245, 248-250, 291 N.W. 600 (1949); *Redwater Land & Canal Co.* v. *Jones,* 27 S. Dak. 194, 130 N.W. 85 (1911). See *Sturr* v. *Beck,* 133 U.S. 541, 547-548, 551 (1890), affirming 6 Dak. 71, 50 N.W. 486 (1888). The South Dakota court indicated that the inception of the riparian rights could not precede the time the lands were opened to entry by settlers. *Cook* v. *Evans, supra,* 45 S. Dak. at 37. See also *Redwater Land & Canal Co.* v. *Jones, supra,* 130 N.W. at 89.

The Nebraska Supreme Court, in deciding questions regarding the significance of the 1895 irrigation act (see the discussion at note 263 *infra*) noted that a few of the land patents in dispute "had been initiated by entries filed prior to March 27, 1889. All other patents were initiated after April 4, 1895," the effective date of the 1895 act. *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738, 742 (1966), modified in other respects, 180 Nebr. 569, 144 N.W. (2d) 209 (1966), in which the court again spoke of the dates that entries were filed. The question of the effect, if any, of any settlement prior to the filing of an entry was not expressly considered.

[90] *In re Alpowa Creek*, 129 Wash. 9, 13, 224 Pac. 29 (1924).

[91] *Benton* v. *Johncox*, 17 Wash 277, 288, 49 Pac. 495 (1897).

[92] *Petition of Clinton Water Dist. of Island County*, 36 Wash. (2d) 284, 287, 218 Pac. (2d) 309 (1950).

[93] *Kendall* v. *Joyce*, 48 Wash. 489, 492-493, 93 Pac. 1091 (1908).

[94] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 357, 93 N.W. 781 (1903), overruled on different matters, *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966).

[95] *San Francisco* v. *Alameda County*, 5 Cal. (2d) 243, 246, 54 Pac. (2d) 462 (1936).

[96] *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.*, 202 Cal. 56, 65, 259 Pac. 444 (1927); *Parker* v. *El Paso County W. I. Dist. No. I,* 116 Tex. 631, 642-643, 297 S. W. 737 (1927).

landowner contemplates use of the water is immaterial. The right arises out of ownership of land through or by which a stream flows.[97] "*Use* does not create, and *disuse* cannot destroy or suspend it."[98] And this natural right thus annexed to the soil—unless divested under special circumstances as suggested above—arises immediately with every new subdivision or severance of the ownership.[99]

Parcel of land detached from stream.—Some courts have indicated that if the owner of a riparian tract conveys away a noncontiguous portion of the tract, the conveyed parcel is forever deprived of its riparian status unless a contrary intention has been manifested. Moreover, acquisition of title to nonriparian land contiguous to a riparian tract may not operate to extend the water right of the riparian tract to the new acquisition. But some other courts have expressed contrary views. Such matters will be discussed later.[100]

Property Characteristics

Right of Beneficial Use

Usufruct.—The riparian owner has a right of use—a usufruct—in the stream as it passes by or over his land.[101] This right, as said in an early California case, "consists not so much in the fluid itself as in its uses, including the benefits derived from its momentum or impetus."[102] It follows that the rights of a riparian proprietor do not include a proprietorship in the *corpus* of the water while it is flowing past his land.[103]

The California Supreme Court criticized a trial court for using throughout

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[97] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585, 86 S.W. 733 (1905).

[98] *Lux* v. *Haggin*, 69 Cal. 255, 391, 4 Pac. 919 (1884), 10 Pac. 674 (1886); *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.*, 202 Cal. 56, 65, 259 Pac. 444 (1927).

[99] *Johnson* v. *Armour & Co.* 69 N. Dak. 769, 776, 291 N.W. 113 (1940).

[100] See, under "Riparian Lands," "Relation to Chain of Title—Smallest tract held under one title" and "Contiguity to Water Source—Acquisition by riparian of noncontiguous land."

[101] *San Francisco* v. *Alameda County,* 5 Cal. (2d) 243, 246, 54 Pac. (2d) 462 (1936); *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 351-353, 373, 93 N.W. 781 (1903); *In re Hood River*, 114 Oreg. 112, 181, 213, 227 Pac. 1065 (1924); *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 474-475, 128 N.W. 702 (1910); *Texas Co.* v. *Burkett*, 117 Tex. 16, 25, 296 S.W. 273 (1927); *Crook* v. *Hewitt*, 4 Wash. 749, 31 Pac. 28 (1892); waters of nonnavigable lake, *Proctor* v. *Sim*, 134 Wash. 606, 613-619, 236 Pac. 114 (1925).

[102] *Lux* v. *Haggin*, 69 Cal. 255, 390, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[103] *Gould* v. *Eaton*, 117 Cal. 539, 542, 49 Pac. 577 (1897); *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 351-353, 373, 93 N.W. 781 (1903); *In re Hood River*, 114 Oreg. 112, 181, 213, 227 Pac. 1065 (1924); *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 474-475, 128 N.W. 702 (1910); *Magnolia Petroleum Co.* v. *Dodd*, 125 Tex. 125, 129, 81 S.W. (2d) 653 (1935); *Crook* v. *Hewitt*, 4 Wash. 749, 31 Pac. 28 (1892); waters of nonnavigable lake, *Proctor* v. *Sim*, 134 Wash. 606, 613-619, 236 Pac. 114 (1925).

its findings and judgment the expression that one of the parties "owns" and is entitled to take and use water on its riparian lands. "The riparian does not 'own' the water of a stream," said the supreme court; what he "owns" is a usufructuary right—the right of reasonable use of the water on his riparian land when he needs it.[104]

Right of use for beneficial purposes.—Uses of the water by a riparian proprietor may be made for certain purposes that are beneficial to him, as indicated below under "Purpose of Use of Water." Although at one period the riparian proprietor in California was not constrained to avoid waste of water as against an appropriator, that incongruous anomaly was eventually corrected by constitutional amendment which the courts accepted as declaring an overriding State policy to which they must conform.[105] The Texas Supreme Court commented that unnecessary waste of water was being guarded against in the decisions.[106]

It is a rule of general acceptance, said the Oklahoma Supreme Court, that the riparian owner has the right to make any use of the water, beneficial to himself, which the situation makes possible, so long as the holders of other rights are not substantially impaired.[107] The South Dakota and Washington courts made declarations to the same general effect.[108]

For a broader treatment of such matters, see "Measure of the Riparian Right," discussed later.

Not dependent on use of water.—Preservation of a vested riparian right does not depend upon the owner's participation in use of the water, *as against other riparian proprietors.*[109] Where this rule is in effect—as it is in California—the right is not destroyed or impaired by the fact that the riparian owner has not yet used the water on his riparian lands, or that he has no present intention of doing so; in other words, the riparian right is perpetual, whether exercised or not.[110] In such jurisdictions, regardless of whether the riparian right is being

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[104] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 554-555, 81 Pac. (2d) 533 (1938).

[105] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 100-101, 252 Pac. 607 (1926); Cal. Const. art. XIV, § 3 (1928); *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 374-375, 40 Pac. (2d) 486 (1935); *Meridian* v. *San Francisco*, 13 Cal. (2d) 424, 445-447, 90 Pac. (2d) 537 (1939); *Joslin* v. *Marin Municipal Water Dist.*, 67 Cal. (2d) 132, 429 Pac. (2d) 889, 60 Cal. Rptr. 377 (1967).

[106] *Ward County W. I. Dist. No. 3* v. *Ward County Irr. Dist. No. 1*, 117 Tex. 10, 16, 295 S.W. 917 (1927).

[107] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 501-502, 172 Pac. (2d) 1002 (1946). Regarding the court's later interpretation of 1963 Oklahoma legislation which, among other things, undertook to limit unused riparian rights to domestic use, see, in chapter 6, "Interrelationships of the Dual Water Rights Systems—The Status in Summary: By States—Oklahoma."

[108] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 475-476, 487, 128 N.W. 702 (1910); *Brown* v. *Chase*, 125 Wash. 542, 549, 217 Pac. 23 (1923).

[109] *Parker* v. *Swett*, 188 Cal. 474, 480, 205 Pac. 1065 (1922).

[110] *Heilbron* v. *The 76 Land & Water Co.*, 80 Cal. 189, 193, 22 Pac. 62 (1889); *Mt. Shasta Power Corp.* v. *McArthur*, 109 Cal. App. 171, 192, 292 Pac. 549 (1930).

exercised, it will be protected by judgment against the possibility of the development of a prescriptive easement.[111]

It follows in such jurisdictions that mere "*disuse* cannot destroy or suspend the right."[112] "Mere" is inserted before "disuse" in the foregoing statement advisedly, because perpetuity of the right is subject to a proviso that the riparian proprietor has not suffered his right to be impaired or destroyed by adverse use on the part of others,[113] or to be nullified by creation of an estoppel against him.[114] See the later subtopic, "Severance of Riparian Right from Land."

The instant discussion deals with preservation of the riparian right as against other riparian proprietors. Regarding its preservation, abrogation, or limitation as against appropriators, see the later discussion, "Measure of the Riparian Right—As Against Appropriators."

Right of Property

Private property.—The riparian right is "a right of property"[115]—a right of *private* property,[116] vested exclusively in the owner of the abutting land for use on that land; and it is not of a political nature.[117] Being property, the riparian owner's right to take water from the stream is within the protection of the constitutional ban against the taking of private property without adequate compensation, unless by the owner's consent,[118] to the same extent as property

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[111] *Duckworth* v. *Watsonville Water & Light Co.*, 150 Cal. 520, 531-532, 89 Pac. 338 (1907).

[112] *Lux* v. *Haggin,* 69 Cal. 255, 391, 4 Pac. 919 (1884), 10 Pac. 674 (1886); *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.*, 202 Cal. 56, 65, 259 Pac. 444 (1927); *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 268, 143 N.W. 124 (1913); *Fleming* v. *Davis*, 37 Tex. 173, 201 (Semicolon Ct. 1872); *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 583, 38 Pac. 147 (1894).

[113] *Fresno Canal & Irr. Co.* v. *People's Ditch Co.,* 174 Cal. 441, 450, 163 Pac. 497 (1917).

[114] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 103, 252 Pac. 607 (1926).

[115] *Huffner* v. *Sawday*, 153 Cal. 86, 91, 94 Pac. 424 (1908); a "vested property right," *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.*, 202 Cal. 56, 65, 259 Pac. 444 (1927); *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian*, 74 Tex. 170, 173-174, 11 S.W. 1078 (1889); an "unquestioned" property right, *Emporia* v. *Soden*, 25 Kans. 588, 604 (1881); *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 340-341, 93 N.W. 781 (1903); *Wasserburger* v. *Coffee*, 180 Nebr. 147, 151-155, 141 N.W. (2d) 738 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966); *Atchison T. & S.F. Ry.* v. *Hadley*, 168 Okla. 588, 591, 35 Pac. (2d) 463 (1934); *Parsons* v. *Sioux Falls*, 65 S. Dak. 145, 151, 272 N.W. 288 (1937).

[116] *San Bernardino* v. *Riverside*, 186 Cal. 7, 13, 198 Pac. 784 (1921); *Bigham Bros.* v. *Port Arthur Canal & Dock Co.*, 91 S.W. 848, 853 (Tex. Civ. App. 1905), reversed and remanded on other points, 100 Tex. 192, 97 S.W. 686 (1906).

[117] *Antioch* v. *Williams Irr. Dist.*, 188 Cal. 451, 456, 205 Pac. 688 (1922).

[118] *Hidalgo County W. C. & I. Dist.* v. *Hedrick*, 226 Fed. (2d) 1, 6 (5th Cir. 1955), certiorari denied, 350 U.S. 983 (1956); *Petition of Clinton Water Dist. of Island County*, 36 Wash. (2d) 284, 287, 218 Pac. (2d) 309 (1950).

rights generally.[119] Nevertheless, some rather substantial limitations on riparian rights, as against competing appropriative rights, have been upheld by courts in a number of States on the points presented for determination.[120]

Riparian rights are incident to the ownership of upland and enter materially into the actual value of the estate.[121] Although not unlimited, they are substantial rights.[122]

Real property.—The riparian right is an incident of property in the land, a part of the realty, and therefore real property.[123] In a very early California case, it was said that the right to water must be treated as a right running with the land, "and as such, has none of the characteristics of mere personalty."[124]

Part and parcel of the soil.—The right of the riparian proprietor to the flow of the water, as discussed in the next subtopic, is annexed to the soil, not as a mere easement or appurtenance, but as part and parcel of the land itself. This statement has been repeated in many decisions rendered by the California courts over the years, from at least as early as 1882.[125] It is noted in many cases in the supreme court and district courts of appeal. Probably no other facet of this State's riparian water law has been emphasized so much.[126] Decisions in other western jurisdictions have expressed the same thought.[127]

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[119] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 266-267, 143 N.W. 124 (1913). See also *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 340-341, 346-349, 93 N.W. 781 (1903).

[120] See, in chapter 6, "Interrelationships of the Dual Water Rights Systems—The Status in Summary: By States."

[121] *Parsons* v. *Sioux Falls*, 65 S. Dak. 145, 151, 272 N.W. 288 (1937).

[122] *Greenman* v. *Fort Worth*, 308 S.W. (2d) 553, 555 (Tex. Civ. App. 1957, error refused n.r.e.).

[123] *Palmer* v. *Railroad Comm'n*, 167 Cal. 163, 173, 138 Pac. 997 (1914); *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 340-341, 346-349, 93 N.W. 781 (1903); *Magnolia Petroleum Co.* v. *Dodd*, 125 Tex. 125, 128-129, 81 S.W. (2d) 653 (1935). There is eminent authority for the doctrine that a riparian right is real estate. *Johnson* v. *Armour & Co.*, 69 N. Dak. 769, 776-777, 291 N.W. 113 (1940), quoting from *Bigelow* v. *Draper*, 6 N. Dak. 152, 161-162, 69 N.W. 570 (1896).

[124] *Hill* v. *Newman*, 5 Cal. 445, 446 (1855). In 1936, for purposes of taxation, riparian rights divested by purchase or condemnation from the land of which they formed a part were held to be "land" as that term is used in Cal. Const. art. XIII, § 1. *San Francisco* v. *Alameda County*, 5 Cal. (2d) 243, 245-247, 54 Pac. (2d) 462 (1936).

[125] *St. Helena Water Co.* v. *Forbes*, 62 Cal. 182, 184, 45 Am. Rep. 659 (1882).

[126] See, e.g., *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.*, 202 Cal. 56, 65, 259 Pac. 444 (1927). A Federal court stated, "The established doctrine of the California decisions is that the right to the flow of water is annexed to the soil, not as an easement or appurtenance but as a parcel * * *." *Hilbert* v. *Vallejo*, 19 Fed. (2d) 510, 511 (9th Cir. 1927).

[127] *Smith* v. *Miller*, 147 Kans. 40, 42, 75 Pac. (2d) 273 (1938); *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 340, 93 N.W. 781 (1903); *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 266-267, 143 N.W. 124 (1913); *Parker* v. *El Paso County W. I. Dist. No. 1*, 116 Tex. 631, 642-643, 297 S.W. 737 (1927); *Methow Cattle Co.* v. *Williams*, 64 Wash. 457, 460, 117 Pac. 239 (1911).

In various western decisions it was stated that the riparian right is "inseparably" annexed to the land.[128] Despite the often careless use of this term, it was recognized in early court opinions,[129] and it is still the law, that the riparian right may be separated from the land in various ways. See the later discussion, "Severance of Riparian Right From Land."

The relation of the riparian right as a part of the land to claimed interferences appears in some California cases. As parcel of the land, it enables the owner to join an injurious interference with the stream when the stream is affected where it touches his land.[130] The riparian owner is entitled to judgment against acts of others that will deprive him of a right of property, a valuable part of his estate.[131] As in a legal sense the riparian right is an inherent part of the land, deprivation of the water is a detriment to the real property as distinguished from a mere trespass.[132] However, it is a usufructuary and intangible right, so that neither a partial nor a complete taking produces a disfigurement of the physical property.[133]

As riparian rights can exist only as part and parcel of specific tracts of land, "any contract relating thereto would be void for uncertainty and of no avail unless it describes or refers to the land in a manner sufficient for identification."[134]

Right to the Flow of Water

Quantity of Water.—The water right to which a riparian proprietor is entitled, in the jurisdictions in which this right is recognized, is to have the stream flow

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[128] *St. Helena Water Co.* v. *Forbes*, 62 Cal. 182, 184 (1882); *McDonough* v. *Russell-Miller Mill. Co.*, 38 N. Dak. 465, 471-472, 165 N.W. 504 (1917); *Norwood* v. *Eastern Oreg. Land Co.*, 112 Oreg. 106, 114, 227 Pac. 1111 (1924); *Wright* v. *Best*, 19 Cal. (2d) 368, 382, 121 Pac. (2d) 702 (1942).

[129] In *Lux* v. *Haggin*, 69 Cal. 255, 4 Pac. 919 (1884), 10 Pac. 674 (1886), the California Supreme Court discussed the riparian right at common law and said, 69 Cal. at 391, that it "*is inseparably annexed to the soil*," and yet the court said, "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." 69 Cal. at 392. In *Gould* v. *Stafford*, 91 Cal. 146, 155, 27 Pac. 543 (1891), it is said that the riparian right, while considered part and parcel of the land, may be severed or "segregated" from the land by grant, condemnation, or prescription.

[130] *San Joaquin & Kings River Canal & Irr. Co.* v. *James J. Stevenson*, 164 Cal. 221, 241, 128 Pac. 924 (1912).

[131] *Southern Cal. Inv. Co.* v. *Wilshire*, 144 Cal. 68, 74, 77 Pac. 767 (1904). Such an action may be maintained by a reversioner. *Heilbron* v. *Last Chance Water Ditch Co.* 75 Cal. 117, 123-124, 17 Pac. 65 (1888).

[132] *Martin* v. *Western States Gas & Elec. Co.*, 8 Cal. App. (2d) 226, 230, 47 Pac. (2d) 522 (1935, hearing denied by supreme court).

[133] *Collier* v. *Merced Irr. Dist.*, 213 Cal. 554, 571, 2 Pac. (2d) 790 (1931).

[134] *Title Ins. & Trust Co.* v. *Miller & Lux*, 183 Cal. 71, 81, 190 Pac. 433 (1920).

in its natural channel to his land.[135] This, however, is not an unrestricted right; it is subject in all western riparian jurisdictions to reasonable use of the stream on the part of other riparian owners, and, in particular instances and respects, to rights of appropriators. These matters are dealt with later under "Measure of the Riparian Right."

As adopted by the Kansas Supreme Court, the original theory of the common law was that the riparian owner had the right to such benefits as would result from the uninterrupted flow of a stream of water through its natural channel across or contiguous to his land, "without diminution or alteration."[136] Other cases decided by this court even into the 1930's might leave the impression that the "natural flow" common law right in its original strict form prevailed consistently in Kansas; but this was not the case, because diversions that were not considered unreasonable were not held actionable. Furthermore, throughout practically this entire period modifications were being stated in one form or another.[137] And in sustaining the constitutionality of the 1945 appropriation doctrine statute[138] on the points presented for determination, the broad language of the previous decisions on riparianism were rejected.[139]

A large majority of the western riparian doctrine cases were litigated in California. In the 1850's, references to riparian rights appeared in opinions of the supreme court, but apparently the first case in which rights of only riparian owners were involved, with no question of use on nonriparian land, was decided in 1865.[140] The decision, which rested wholly on the common law rights of riparian proprietors as against each other, was to the effect that the lower riparian owner was entitled to the natural flow, undiminished, except by the use of the upstream proprietor for domestic purposes and reasonable irrigation. This general approach has remained the California rule where rights of only riparian proprietors were involved. Riparian conflicts of most

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[135] *Miller & Lux* v. *Madera Canal & Irr. Co.*, 155 Cal. 59, 65, 99 Pac. 502 (1907); *Durkee* v. *Board of County Comm'rs*, 142 Kans. 690, 693-694, 51 Pac. (2d) 984 (1935); *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 340, 93 N.W. 781 (1903); *McDonough* v. *Russell-Miller Mill. Co.*, 38 N. Dak. 465, 471-473, 165 N.W. 504 (1917); *McGhee Irr. Ditch Co.* v. *Hudson*, 85 Tex. 587, 592-593, 22 S.W. 398, 967 (1893); *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 582-583, 38 Pac. 147 (1894).

[136] *Shamleffer* v. *Council Grove Peerless Mill Co.*, 18 Kans. 24, 31, 33 (1877).

[137] Hutchins, W. A., "The Kansas Law of Water Rights" 40-41 (1957).

[138] Kans. Laws 1945, ch. 390, Laws 1957, ch. 539, Stat. Ann. § 82a-701 *et seq.* (1969). Under the Kansas legislation, vested rights were recognized only to the extent of their being put into beneficial use before or shortly after the 1945 enactment. Common law claimants without vested rights could be enjoined by appropriators from making subsequent diversions, although compensation could be had in an action at law for damages proved for any property taken from a common law claimant by an appropriator.

[139] *State ex rel. Emery* v. *Knapp*, 167 Kans. 546, 555, 207 Pac. (2d) 440 (1949).

[140] *Ferrea* v. *Knipe*, 28 Cal. 340, 343-345, 87 Am. Dec. 128 (1865).

fundamental and far-reaching importance have involved contests with appropriators. (See "Measure of the Riparian Right," discussed later.)

Specific quantity of water, when fixed.—This question is discussed later under "Measure of the Riparian Right."

Briefly, as against other riparian owners, the riparian right usually does not relate to any specific quantity of water, because in its nature this right is a tenancy in common, not a separate or severable estate. If the water were apportioned, each owner's share would fluctuate according to quantities of water available and reasonable needs of all proprietors.

As against appropriators, different considerations are involved and, at least in California, there are circumstances under which the riparian's quantitative right of use may be judicially determined.

Quality of the water.—The common law rule respecting a riparian owner's rights in the streamflow, and its modification dealing with relative rights of reasonable use, applies to both quantity of the flow and to quality of the water.[141] It was sometimes said that the riparian owner has a natural right to the flow of the stream, unimpaired in quality as in quantity[142]—a statement of general rule which was too broad for practical purposes. A more realistic approach was taken in holding that if the riparian owner is held entitled to sufficient water for the purpose of his lands, this necessarily means sufficient *usable* water.[143]

The upper proprietor is entitled to make use of the stream in connection with his riparian land, even though this involves some necessary impairment of its quality.[144] "[C]ertain uses of a stream are universally recognized as lawful which may affect the quality of its water to a certain extent."[145] This pragmatic approach, however, involves certain essential qualifications.

If a riparian owner is to have sufficient *usable* water for the use of his lands,[146] as noted above, the upstream use of the water must be reasonable. This would not be the case, according to Texas cases, if the upstream right is exercised in such manner as to cause essential impairment of the purity and usefulness of the water for any purposes to which running water is usually applied,[147] or if it causes stagnation of the water and sickness in the

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[141] The original Dakota Territory enactment authorized the landowner to use a natural stream while on his land, and forbade him to prevent the natural flow or to pursue or pollute it. Terr. Dak. Laws 1865-1866, ch. 1, § 256, Civ. Code § 255 (1877).

[142] *Benjamin* v. *Gulf, C. & S. F. Ry.*, 49 Tex. Civ. App. 473, 477, 108 S.W. 408 (1908, error refused).

[143] *Biggs* v. *Lee*, 147 S.W. 709, 711 (Tex. Civ. App. 1912, error dismissed).

[144] *Holmes* v. *Nay*, 186 Cal. 231, 241, 199 Pac. 325 (1921).

[145] *Boyd* v. *Schreiner*, 116 S.W. 100, 103 (Tex. Civ. App. 1909, error refused).

[146] *Biggs* v. *Lee*, 147 S.W. 709, 711 (Tex. Civ. App. 1912, error dismissed).

[147] *Benjamin* v. *Gulf, C. & S. F. Ry.*, 49 Tex. Civ. App. 473, 477, 108 S.W. 408 (1908, error refused).

vicinity.[148] A slight impairment of quality would not necessarily be unreasonable and actionable; liability may depend on both the factual situation and the rules of law by which reasonableness of the use of water is determined.[149] According to a California case, the use is unreasonable if it injures downstream riparians maliciously or unnecessarily.[150]

Whether or not the upstream use *substantially* injures the downstream right of use is the essential consideration,[151] qualified by any other limitation as to reasonableness of use. If necessary to safeguard the exercise of his lawful riparian uses, said the California Supreme Court, the downstream proprietor is entitled as against upstream riparians and prior appropriators "to a substantially unpolluted stream."[152] This is particularly the case when the downstream use is for domestic purposes.[153]

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[148] *Boyd* v. *Schreiner*, 116 S.W. 100, 103 (Tex. Civ. App. 1909, error refused). Elements of the nuisance doctrine have been employed in this and some of the other pollution cases. Moreover, some cases have employed elements of the negligence doctrine. An Oklahoma riparian owner brought an action for damages arising from the claimed pollution of a stream, flowing through his premises, as a result of poisonous chemicals discharged into the channel from a carbide plant. However, his failure to prove that there were poisonous or deleterious substances in the water harmful to animal life, or that his animals and fowl died as the result of drinking the water, was held fatal to his right of recovery. The syllabus by the court contains the following paragraph: "1. In order to sustain a recovery in an action based on negligence, there must be a causal connection between the negligence averred and the injury received, and such causal connection cannot be established by basing inference upon inference, or presumption upon presumption." *Prest-O-Lite Co.* v. *Howery*, 169 Okla. 408, 37 Pac. (2d) 303 (1934), approved, but distinguished on the facts, in *Gulf Oil Corp.* v. *Miller,* 198 Okla. 54, 55-56, 175 Pac. (2d) 335 (1946). In a decision rendered in 1951, this case was reviewed and the holding therein approved as to proof of cause of injury from stream pollution. "The holding in this case *** is now the settled law in this state." *Ogden* v. *Baker*, 205 Okla. 506, 508, 239 Pac. (2d) 393 (1951), again approved, *Sunray Oil Corp.* v. *Burge*, 269 Pac. (2d) 782, 786 (Okla. 1954).

[149] *Boyd* v. *Schreiner*, 116 S.W. 100, 103 (Tex. Civ. App. 1909, error refused). The discharge of sewage that so polluted stream water as to lessen the value of riparian lands was held actionable in *New Odorless Sewerage Co.* v. *Wisdom*, 30 Tex. Civ. App. 224, 226-228, 70 S.W. 354 (1902, error refused).

The South Dakota Supreme Court held that inasmuch as riparian rights are property and enter materially into the actual value of the land abutting on a stream, an impairment of such rights by pollution of the stream water by the discharge of sewage into it is a taking, or at least a damaging, of the owner's property. The evidence showed conclusively that plaintiff's use and enjoyment of a stream was substantially curtailed, that he and his family suffered from obnoxious odors, and that he had sustained substantial damages. "From their very nature, such damages are not susceptible of exact measurement, nevertheless it was for the court to determine their extent." *Parsons* v. *Sioux Falls*, 65 S. Dak. 145, 151-153, 272 N.W. 288 (1937).

[150] *Holmes* v. *Nay*, 186 Cal. 231, 241, 199 Pac. 325 (1921).

[151] *Duckworth* v. *Watsonville Water & Light Co.*, 150 Cal. 520, 525, 89 Pac. 338 (1907); *Mentone Irr. Co.* v. *Redlands Elec. Light & Power Co.*, 155 Cal. 323, 327, 100 Pac. 1082 (1909); *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 195, 102 Pac. (2d) 124 (1940).

[152] *Crum* v. *Mt. Shasta Power Corp.*, 220 Cal. 295, 312, 30 Pac. (2d) 30 (1934).

[153] *Joerger* v. *Pacific Gas & Elec. Co.*, 207 Cal. 8, 25-26, 276 Pac. 1017 (1929).

Wrongful pollution of a stream by one riparian to the injury of others will give a cause of action to the injured parties, and will entitle them to enjoin the wrongful use and to recover damages for the injury. The maxim "*sic utere tuo ut alienum non laedas*" (so use your own that you do not injure that of another) must be observed by both parties.[154] This relates to appreciable injury, not to slight inconvenience or occasional annoyance.[155]

Some courts have indicated that as between riparians reasonableness of use in regard to water quality is primarily a question of fact, to be determined by consideration of all the circumstances of each particular case. The North Dakota Supreme Court said that due consideration is to be given to the character and size of the watercourse, location, uses to which it may be applied, general usage of the country in similar cases, the character and extent of the upper proprietor's use, and the use to which the lower proprietor is putting the water.[156]

Where invasion of the downstream right is threatened rather than actually begun, resort to the injunctive process will depend on the circumstances. A Texas court of civil appeals observed that such relief will be granted if the "threatened invasion, will be continuing, and the extent of the injurious consequences is contingent and of doubtful extent."[157] On the other hand, where some salt impregnation had occurred but not yet enough to render the

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[154] *Teel* v. *Rio Bravo Oil Co.*, 47 Tex. Civ. App. 153, 160, 104 S.W. 420 (1907).

[155] *Benjamin* v. *Gulf, C. & S. F. Ry.*, 49 Tex. Civ. App. 473, 477, 108 S.W. 408 (1908, error refused).

[156] *McDonough* v. *Russell-Miller Mill. Co.*, 38 N. Dak. 465, 471-473, 165 N.W. 504 (1917). Under the circumstances of this case, it was held that the downstream riparian proprietor had wholly failed to establish his alleged cause of action against the upper owner.

In *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 194-196, 102 Pac. (2d) 124 (1940), the Oklahoma Supreme Court held that the discharge of excess drilling water into a stream was not of itself an unlawful act; that it becomes unlawful only when done in such a way as to constitute an unreasonable use of the stream and the proximate cause of injury to the rights of other riparians; that the question of reasonableness is one of fact, to be determined in the light of all the circumstances. Plaintiff failed to sustain the burden of proof that the drilling water contained large quantities of drilling mud and sediment which when deposited in the channel so altered the course of the stream as to wash away part of his land, as against evidence of defendants that they deposited nothing more than "muddy" water in the stream, with no effect upon the flow, and that the injury to plaintiff's land resulted from the natural flow of the stream in times of flood.

In States that ordinarily may adhere to the criteria of "reasonable under all the circumstances," however, stricter protection often may be accorded to domestic as against nondomestic use of water. See "Purpose of Use of Water—Natural and Artificial Uses of Water—Preferences accorded to natural uses of water," *infra*. Regarding nonriparian use, see "Exercise of the Riparian Right—Place of Use of Water—Nonriparian land," *infra*. The latter subject was considered in the *Martin* case. See note 711 *infra*.

[157] *Houston Transp. Co.* v. *San Jacinto Rice Co.*, 163 S.W. 1023, 1027-1028 (Tex. Civ. App. 1914).

water unfit for irrigation, the California Supreme Court took the view that the alleged "serious and threatening" damage of pollution, in the absence of actual pollution, would not justify a prohibitory injunction, especially when protective measures short of actual prohibition might be applied by the court.[158]

A grant by a North Dakota riparian proprietor to an upstream landowner of an easement over his land, for the purpose of discharging sewage and waste products into the common stream, was held binding on not only the grantor but also his successors.[159] In a California case, in which the validity of an easement to pollute a stream which had been granted by a nonriparian appropriator to a mining company was sustained, the supreme court stated that, "A prescriptive right to pollute a watercourse may be acquired as against lower riparian users and their successors in interest provided the deterioration in quality is not so great as to constitute a public nuisance." The novelty of the incident was held to be no bar to its recognition as an easement if its creation violated no principle of public policy.[160]

Right to use water attaches only on reaching riparian land.—The right of the riparian owner to have the stream flow to his land is obviously necessary to the enjoyment of its benefits. But his right of possession and use of the water does not begin until the water actually reaches the riparian land, and it lasts only so long as the stream is flowing by or across his land. "Until it touches his land he has no title whatsoever and no right other than the protective right to see that the full flow past his land to which he is entitled is not illegally diminished."[161]

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[158] *Meridian* v. *San Francisco*, 13 Cal. (2d) 424, 451-452, 90 Pac. (2d) 537 (1939). The evidence in this case showed that some pollution of the water available to the downstream riparian plaintiff occurred as a result of return flow from upstream irrigation projects, but that the return flow in the river had not yet contained a sufficient concentration of salts to render the water unfit for irrigation on plaintiff's lands. Plaintiff's concern over the "serious and threatening" damage of pollution arose over the possibility that the city's increased storage facilities farther upstream would withhold water that otherwise would flow down the river to freshen the flow before reaching plaintiff's land. The California Supreme Court held that, in view of the availability of protective measures ordered by the court, an injunction was not justified. That is, "if the city's diversions should result in making the water of the river unfit for use at the plaintiff's location, and the release of fresh water by the city and its return down the river channel would freshen the water to the required extent, the city could by proper order of the court be required to make such releases without rendering useless the city's increased storage facilities."

A finding of heavy mineral impregnation of stream water in times of low flow was the basis of an opinion by a Texas court of civil appeals that as against an upstream irrigation appropriator, a riparian owner was entitled not only to enough water for the irrigation of his land, but sufficient *usable* water for irrigation purposes. *Biggs* v. *Lee*, 147 S.W. 709, 711 (Tex. Civ. App. 1912, error dismissed).

[159] *Johnson* v. *Armour & Co.*, 69 N. Dak. 769, 776-779, 291 N.W. 113 (1940).

[160] *Wright* v. *Best*, 19 Cal. (2d) 368, 382-383, 121 Pac. (2d) 702 (1942).

[161] *Miller & Lux* v. *Enterprise Canal & Land Co.*, 169 Cal. 415, 441, 141 Pac. 567 (1915);

The riparian owner, therefore, can complain of upstream interference with the flow of the water only insofar as such intereference affects the stream where it passes his land.[162] It follows that if in the natural flow of the stream to the riparian land there is insufficient water for the proprietor's uses, or if there is no flow to his land at all, he is not at liberty to go upstream above his riparian land and divert the water there solely on the strength of the right pertaining to his own land, without the consent of those who would be affected or injured thereby.[163]

As a result of natural flow conditions, therefore, one's riparian right may be in suspense during certain periods. This condition may occur with some regularity. It is strikingly exemplified by the situation that was litigated concerning the confluence of Fall River and Pit River in the northeastern part of Shasta County in northern California.[164] (The physical facts are stated briefly later under "Attachment of Riparian Rights to Various Water Sources–Interconnected Water Supplies–Main stream and tributary.")

Generally no right to water that has left the premises.–The riparian owner generally has no concern with any diversion or use of water after it has passed his land, and he has no right and is under no obligation to object thereto.[165] His riparian rights are fully satisfied at the time the water reaches his lower boundary line,[166] after having been available at his land, in quantity, quality, and time, for his proper riparian uses. He generally is not affected by any use of the waters of the stream after the flow has passed the lower boundary line of his riparian property.[167]

As the riparian owner is powerless to prevent any use of the water after it has passed beyond his boundary line, it follows that such downstream use by others generally is not adverse in the sense required to found a prescriptive right against him.[168] Nor is it sufficient to support a

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accord, *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 93, 252 Pac. 607 (1926).

[162] *San Joaquin & Kings River Canal & Irr. Co.* v. *James J. Stevenson*, 164 Cal. 221, 241, 128 Pac. 924 (1912).

[163] *Duckworth* v. *Watsonville Water & Light Co.*, 150 Cal. 520, 526, 89 Pac. 338 (1907); *Drake* v. *Tucker*, 43 Cal. App. 53, 58, 184 Pac. 502 (1919). In this regard, see "Exercise of the Riparian Right–Diversion of Water–Place of diversion of water," *infra*.

[164] *Crum* v. *Mt. Shasta Power Corp.*, 117 Cal. App. 586, 591-597, 4 Pac. (2d) 564 (1931, hearing denied by supreme court); *Crum* v. *Mt. Shasta Power Corp.*, 220 Cal. 295, 299-302, 30 Pac. (2d) 30 (1934); *McArthur* v. *Mt. Shasta Power Corp.*, 3 Cal. (2d) 704, 711-712, 45 Pac. (2d) 807 (1935).

[165] *Holmes* v. *Nay*, 186 Cal. 231, 234, 235-237, 242, 199 Pac. 325 (1921); *Hargrave* v. *Cook*, 108 Cal. 72, 77-79, 41 Pac. 18 (1895).

[166] *United States* v. *Central Stockholders' Corp. of Vallejo*, 52 Fed. (2d) 322, 339 (9th Cir. 1931).

[167] *Akin* v. *Spencer*, 21 Cal. App. (2d) 325, 327-328, 69 Pac. (2d) 430 (1937).

[168] *Cory* v. *Smith*, 206 Cal. 508, 511, 274 Pac. 969 (1929); *Bathgate* v. *Irvine*, 126 Cal.

claim of estoppel.[169] The upstream proprietor loses no part of his riparian right solely because of the long-continued use by downstream proprietors of water to which the upstream owner has been entitled but which he has allowed to pass the lower boundary of his land.[170] This may be subject to the qualification that under certain circumstances the downstream use may amount to an actual interference with the upstream riparian right,[171] such as the backflow of water from a lower dam.

Preservation of Riparian Right on Change of Title to Land

Right passes with conveyance of land.—Title to a riparian right passes with a grant of the land to which the stream is contiguous, not as an easement or appurtenance, but as a parcel of the land[172]—provided, of course, that the deed to the land does not reserve from its operation any riparian rights incident thereto.[173] The title passes without mention in the deed of conveyance.[174] The right also passes even if mentioned in a reservation if it is ineffective and void under the circumstances.[175]

135, 140-141, 58 Pac. 442 (1899). In an early Texas case, the diversion of water by plaintiff, the lower proprietor, was not inimical to the rights of the upstream defendants and hence raised no presumption against them. "The defendants could not have prevented or interrupted the use of the water by plaintiff by any legal proceedings because it in no manner affected their rights." *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian*, 74 Tex. 170, 174, 11 S.W. 1078 (1889). See *Santa Rosa Irr. Co.* v. *Pecos River Irr. Co.*, 92 S.W. 1014, 1017 (Tex. Civ. App. 1906, error refused); *Fort Quitman Land Co.* v. *Mier*, 211 S.W. (2d) 340, 344 (Tex. Civ. App. 1948, error refused n.r.e.).

[169] *San Joaquin & Kings River Canal & Irr. Co.* v. *Worswick*, 187 Cal. 674, 684, 693, 203 Pac. 999 (1922).

[170] *Peake* v. *Harris*, 48 Cal. App. 363, 382, 192 Pac. 310 (1920). See *Hanson* v. *McCue*, 42 Cal. 303, 310 (1871), with respect to the flow from a spring in an artificial channel.

[171] *Smith* v. *Nechanicky*, 123 Wash. 8, 211 Pac. 880 (1923). For a case regarding backflow from a dam see, e.g., *Haas* v. *Choussard*, 17 Tex. 588 (1856). After citing authority to the effect that the riparian owner cannot throw the water back upon the proprietors above, without a grant or a prescriptive right, the Texas Supreme Court observed that "Whether an action for throwing back water will lie for merely nominal damages, where there has been no actual injury, is not free from doubt, though supported by American authorities." *Id.* at 590.

See also, in chapter 14, "Prescription—Establishment of Prescriptive Title—Relative Locations on Stream Channel—Downstream prescriptive claimant: Actual interference with upstream property or water right."

[172] *San Francisco* v. *Alameda County*, 5 Cal. (2d) 243, 246, 54 Pac. (2d) 462 (1936).

[173] *Holmes* v. *Nay*, 186 Cal. 231, 236, 199 Pac. 325 (1921); *Benton* v. *Johncox*, 17 Wash. 277, 281, 49 Pac 495 (1897). "It has been held that he [the riparian proprietor] may sell his riparian rights without selling the land or reserve them though the land be sold." *Bigham Bros.* v. *Port Arthur Canal & Dock Co.*, 91 S.W. 848, 853 (Tex. Civ. App. 1905), reversed and remanded on other points, 100 Tex. 192, 97 S.W. 686 (1906).

[174] *Risien* v. *Brown*, 73 Tex. 135, 141, 10 S.W. 661 (1889).

[175] See the *Richter, Gibson,* and *Texas Co.* cases cited in note 187 *infra.*

Subdivision of land.—In the subdivision of tracts of riparian land, parcels often are so located as to be left without physical contiguity to the stream. The original riparian right, nevertheless, can be preserved in the detached parcels so severed from the stream if the parties to the conveyance so intend.[176] When so conveyed with the land, the riparian right "is still a riparian right with all the attributes of such right, and is in strict technical language 'parcel of the land' conveyed."[177]

This is not the creation of a new right (which obviously would exceed the powers of the parties); it is preservation of the existing right.[178] Hence, such a grant is effective as against lower riparian lands and water users.[179] "They have the same right that they had before the transfer, neither more nor less."

The riparian right thus preserved in a parcel of detached land passes in all subsequent conveyances of such land.[180]

Partition of land by decree.—When several parties have undivided interests in common in a tract of riparian land, each holding an undivided interest in the riparian right in proportion to his interest in the land, a judgment in partition of such land "is a mere severance of the unity of possession and community of interest, and does not in any other respect affect the character of the title or estate, unless it expressly so declares."[181] The partition decree does not create new rights or estates in the waters of the stream to which the original undivided tract is riparian, nor does it change the character of the rights of the respective parties therein. It merely divides and apportions the preexisting rights and estates.[182]

The decree in partition proceedings may make appropriate provision for the preservation or allotment of riparian rights to the portions of the land which, after the subdivision, do not abut upon the stream.[183] However, it is not essential to the preservation of the right that the decree of partition shall specifically allocate the riparian rights of the detached parcels. If the decree is silent as to the division of riparian rights, each parcel retains its water right; prior to the partition, each tenant in common owned a proportionate interest in all the land and the overall riparian right, and after partition he merely owns in severalty what he formerly owned in common.[184]

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[176] *Copeland* v. *Fairview Land & Water Co.*, 165 Cal. 148, 161, 131 Pac. 119 (1913). In this regard, see "Severance of Riparian Right From Land—Loss of contact with stream by conveyance," *infra.*

[177] *Strong* v. *Baldwin*, 154 Cal. 150, 156-157, 97 Pac. 178 (1908). See *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331, 88 Pac. 978 (1907).

[178] *Strong* v. *Baldwin*, 154 Cal. 150, 157, 97 Pac. 178 (1908).

[179] *Miller & Lux* v. *J. G. James Co.*, 179 Cal. 689, 691-692, 178 Pac. 716 (1919).

[180] *Strong* v. *Baldwin,* 154 Cal. 150, 157, 97 Pac. 178 (1908).

[181] *Rose* v. *Mesmer*, 142 Cal. 322, 328-329, 75 Pac. 905 (1904).

[182] *Verdugo Canyon Water Co.* v. *Verdugo*, 152 Cal. 655, 662-663, 93 Pac. 1021 (1908).

[183] *Strong* v. *Baldwin*, 154 Cal. 150, 156-157, 97 Pac. 178 (1908); *Frazee* v. *Railroad Comm'n*, 185 Cal. 690, 693, 201 Pac. 921 (1921).

[184] *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 540, 81 Pac. (2d) 533 (1938). That it

After preservation of the riparian right in detached parcels resulting from a decree in partition, a subsequent conveyance of partitioned land would carry with it the water right belonging to the particular tract conveyed.[185]

Partition of land by deed.—In a Texas case, a land grant owned by tenants in common was partitioned by a deed which contained a provision that all water rights and rights to use ditches on the lands were to remain forever appurtenant to the lands abutting on the creek or on the artificial ditches. It was held that the provisions of the deed of partition contemplated that the backlands should have access to water, and that this could have been with a view to watering stock only. However, the court looked to conditions that existed at the time of the partition and prior thereto, in construing the *intent* of the parties when they stipulated with reference to their future water rights. It was concluded that the rights safeguarded in the deed related to both irrigation and stockwatering.[186]

Severance of Riparian Right From Land

Although the riparian right is sometimes said to be "inseparably" attached to the land itself—"part and parcel of the soil"—there are ways in which it may be severed from the land in connection with which the water right came into being. Following is a discussion of important means of severance. As various ways overlap in the classification, some repetition occurs.

Reservation of right in conveyance of land.—The grantor of land through which a stream of water flows may reserve the riparian rights from the conveyance.[187] It is competent for a riparian owner to convey to one person a part of his land abutting upon a stream, reserving and excepting from the grant the water rights attached to such land, and later to convey to another person not only the remaining portion of his riparian land but also the water rights so reserved and excepted from the first conveyance.[188]

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is not necessary to describe the water rights in the complaint in the partition suit, as the description of the land included the water, see *Rose* v. *Mesmer*, 142 Cal. 322, 329, 75 Pac. 905 (1904).

[185] *Frazee* v. *Railroad Comm'n*, 185 Cal. 690, 694, 201 Pac. 921 (1921).

[186] *Stratton* v. *West & Bennett*, 27 Tex. Civ. App. 525, 529, 66 S.W. 244 (1901, error refused).

[187] *Doyle* v. *San Diego Land & Town Co.*, 46 Fed. 709, 711 (C.C.S.D. Cal. 1891); *Walker* v. *Lillingston*, 137 Cal. 401, 402-404, 70 Pac. 282 (1902); *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 584-585, 86 S.W. 733 (1905); *Benton* v. *Johncox*, 17 Wash. 277, 281, 49 Pac. 495 (1897).

For uncertainties in other Texas cases, see *Risien* v. *Brown*, 73 Tex. 135, 140-142, 10 S.W. 661 (1889); *Richter* v. *Granite Mfg. Co.*, 107 Tex. 58, 62-64, 174 S.W. 284 (1915); *Gibson* v. *Carroll*, 180 S.W. 630, 633-634 (Tex. Civ. App. 1915). Uncertainties were apparently disposed of in *Texas Co.* v. *Burkett*, 117 Tex. 16, 26, 296 S.W. 273 (1927).

[188] *Forest Lakes Mutual Water Co.* v. *Santa Cruz Land Title Co.*, 98 Cal. App. 489, 495-496, 277 Pac. 172 (1929).

If the deed of conveyance does not reserve from its operation any riparian rights incident to the land conveyed, then "on the face of the deed" such rights are conveyed as a part of the land.[189]

Grant.—It is competent for an owner of riparian land to grant the use of the water in whole or in part, leaving the fee of the land vested in the grantor.[190] "It is well established by authority that riparian or littoral rights are subject to conveyance."[191]

(1) Effect as against grantees. As between the riparian owner and his grantee, such a deed is binding,[192] providing conveyancing requirements have been met. The riparian owner thereby parts with an interest in the land.[193] To that extent he parts with his riparian right to divert or use that water to the detriment of his grantee,[194] and so disables himself from granting the riparian right to one to whom he may later convey his riparian land.[195] By reason of his voluntary act he waives for himself and his own successors all claims based upon the doctrine of riparian rights, and he cannot complain thereafter of any invasion of such rights by the grantee or by the successors of the latter.[196] The grantor of a riparian right is estopped, by virtue of his deed, from asserting the right in antagonism to the grantee.[197] This "self-created estoppel runs not merely against the consenting riparian owner but likewise against the riparian lands."[198]

The California Supreme Court considered it logical to hold that a grant of his riparian right by a riparian owner creates an easement in the land, based

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[189] *Holmes* v. *Nay*, 186 Cal. 231, 236, 199 Pac. 325 (1921).

[190] *Doyle* v. *San Diego Land & Town Co.*, 46 Fed. 709, 711 (C.C.S.D. Cal. 1891); *Alta Land & Water Co.* v. *Hancock*, 85 Cal. 219, 223, 24 Pac. 645 (1890); *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 346-347, 349, 93 N.W. 781 (1903), overruled on different matters, *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966); *Johnson* v. *Armour & Co.*, 69 N. Dak. 769, 776-779, 291 N.W. 113 (1940); *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 487, 128 N.W. 702 (1910).

[191] *Corpus Christi* v. *McLaughlin*, 147 S.W. (2d) 576, 578 (Tex. Civ. App. 1940, error dismissed).

[192] *Spring Valley Water Co.* v. *Alameda County*, 88 Cal. App. 157, 164, 263 Pac. 318 (1927, hearing denied by supreme court). See *Gould* v. *Eaton*, 117 Cal. 539, 543, 49 Pac. 577 (1897); *Fitzstephens* v. *Watson*, 218 Oreg. 185, 344 Pac. (2d) 221, 228 (1959).

[193] *San Francisco* v. *Alameda County*, 5 Cal. (2d) 243, 246, 54 Pac. (2d) 462 (1936). Under the circumstances of this case, the court said, "It must be assumed that by the grant he has stripped the land of much of its value."

[194] *Yocco* v. *Conroy*, 104 Cal. 468, 471, 38 Pac. 107 (1894).

[195] *Gould* v. *Stafford*, 91 Cal. 146, 155, 27 Pac. 543 (1891).

[196] *California Pastoral & Agric. Co.* v. *Madera Canal & Irr. Co.*, 167 Cal. 78, 86, 138 Pac. 718 (1914).

[197] *Duckworth* v. *Watsonville Water & Light Co.*, 158 Cal. 206, 213, 110 Pac. 927 (1910), 170 Cal. 425, 429-430, 150 Pac. 58 (1915).

[198] *Spring Valley Water Co.* v. *Alameda County*, 88 Cal. App. 157, 168, 263 Pac. 318 (1927, hearing denied by supreme court).

upon the reasoning that as a riparian right is annexed to the land as part and parcel of it, any claim by the riparian owner which affects his water right necessarily burdens his land.[199]

Even if a grant to a nonriparian is verbal or oral and usual conveyancing requirements have not been met, under some circumstances a riparian owner's conduct may be such as to estop him from asserting his riparian water rights in derogation of the claims of others. Whether this completely bars the exercise of his water right, or only partially restricts the diversion and use of the water, depends on the facts. And whether an estoppel brings about an actual severance of the riparian right from the land likewise depends upon the circumstances.

Although in the landmark riparian case of *Motl* v. *Boyd*[200] the opinion by Chief Justice Cureton made sweeping declarations concerning the origin and extent of the riparian right in Texas (for which *dicta* the case is best known), the actual holding of the court was that the superior riparian right of defendants as against the plaintiff appropriators was denied them, not because it did not exist, but because defendants were estopped to assert it in this case. The basis of estoppel was a "grant, license, or easement"—given verbally by Lee, predecessor in title of defendants, to plaintiffs' predecessors—to construct a dam and ditch on Lee's riparian land, from and by means of which water would be taken to plaintiffs' lands downstream. No compensation was paid or asked for, but in reliance on this verbal consent, works were constructed and put to use at considerable expense and water was taken by means thereof for 35 years without protest by the riparian owners.

The same principle was involved in another decision of the Texas Supreme Court in the year following *Motl* v. *Boyd*. A written agreement between plaintiff and defendant with respect to the use of riparian land and water rights was extended orally. This contract was held to be one affecting real estate to such an extent as to be within the statute of frauds,[201] but it was taken out of the statute by reason of the conduct of the parties. The rule was followed that where one party to an oral contract has, in reliance thereon, so far performed his part of the agreement that it would be perpetrating a fraud on him to allow the other party to repudiate the contract and set up the statute of frauds in justification thereof, equity will regard the case as being removed from the operation of the statute and will enforce the contract.[202]

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[199] *Wright* v. *Best*, 19 Cal. (2d) 368, 382, 121 Pac. (2d) 702 (1942). See also *Fitzstephens* v. *Watson*, 218 Oreg. 185, 344 Pac. 221, 229 (1959).

[200] *Motl* v. *Boyd*, 116 Tex. 82, 128-130, 286 S.W. 458 (1926).

[201] Statutes of frauds in the several States provide, with various exceptions, limitations, and qualifications, that no estates in land may be created or conveyed except by instruments in writing signed by the grantor.

[202] *Texas Co.* v. *Burkett*, 117 Tex. 16, 30-33, 296 S.W. 273 (1927). Temporary estoppel to revoke a revocable permission or license, under the facts, *Risien* v. *Brown*, 73 Tex. 135, 142-143, 10 S.W. 661 (1889). See *Fort Quitman Land Co.* v. *Mier*, 211 S.W. (2d) 340, 343 (Tex. Civ. App. 1948, error refused n.r.e.).

(2) Effect on other riparians. While it is settled that the grant of a riparian right is binding as between the grantor and grantee, it is equally well settled that such a grant is not operable if its effect is adverse to other riparian proprietors. But the applicable rules in the latter regard may vary from State to State and in some States are rather unsettled. This is discussed further under "Exercise of the Riparian Right—Place of Use of Water—Nonriparian land."

The California Supreme Court has indicated that a riparian could not, by transfer of his riparian rights, sell to another, as against other riparians, the right to use the water on nonriparian land. His grant would estop him from complaining of such use but it would not affect other riparians.[203] The 1928 California constitutional amendment, article 14, section 3, deprived the riparian owner of the right to enjoin an act that caused him no substantial injury, while assuring him protection in his rights of both present and prospective reasonable beneficial use. This is discussed in chapter 13 under "Remedies for Infringement—Injunction—Riparian Owners—California," paragraphs 4 and 5.

The Supreme Court of Texas has taken the position that the riparian owner has the right to divert riparian water to nonriparian lands if the supply is abundant and if no possible injury can result to lower riparian owners. Also, it is quite true in this State that a riparian owner cannot unconditionally grant the use of his riparian water to nonriparian lands, but again this is so only to the extent that he cannot grant such use to the detriment of other riparian proprietors. Apparently, it is only a prejudicial diversion that is prohibited.[204]

The expressed view of the Oklahoma Supreme Court is that a riparian owner has the right to make any use of the water, beneficial to himself, which his situation makes possible, so long as he does not inflict substantial or material injury on other riparians who are to be deemed as having corresponding rights; that the taking of water to nonriparian lands is not of itself an unreasonable use of the water, but when considered in connection with all other circumstances it might be made unreasonable; and to entitle lower riparian owners to relief in such a case, they must show that they suffered an injury to the use of water which the law recognized as belonging to them.[205] The syllabus by the court in this case includes the statement that: "The right of a

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[203] *Duckworth* v. *Watsonville Water & Light Co.*, 150 Cal. 520, 526, 89 Pac. 338 (1907). See also *Anaheim Water Co.* v. *Semi-Tropic Water Co.*, 64 Cal. 185, 189, 30 Pac. 623 (1883); *Mt. Shasta Power Corp.* v. *McArthur*, 109 Cal. App. 171, 192-193, 292 Pac. 549 (1930, hearing denied by supreme court).

[204] *Texas Co.* v. *Burkett*, 117 Tex. 16, 25-28, 296 S.W. 273 (1927). "The defendant in error is a riparian proprietor, and as such had the legal right to take riparian water from the stream, and use it or sell it for use on either riparian or non-riparian land, unless it thereby interfered with some other riparian owner." *Humphreys-Mexia Co.* v. *Arseneaux*, 116 Tex. 603, 610, 297 S.W. 225 (1927). See also the discussion in chapter 13 under "Remedies for Infringement—Injunction—Riparian Owners—Texas."

[205] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 501-502, 172 Pac. (2d) 1002 (1946).

riparian proprietor to the use of the water of the stream may be conveyed, but he cannot convey more than the reasonable use, nor can the grantee acquire more." Regarding the court's later interpretation of 1963 Oklahoma legislation which, among other things, undertook to limit unused riparian rights to domestic use, see, in chapter 6, "Interrelationships of the Dual Water Rights Systems—The Status in Summary: By States—Oklahoma."

Loss of contact with stream by conveyance.—In an important riparian rights case decided in 1938, *Rancho Santa Margarita* v. *Vail*, the California Supreme Court stated unqualifiedly that the rule is well settled that where the owner of a riparian tract conveys away a noncontiguous portion of the tract by a deed that is silent as to riparian rights, the conveyed parcel is forever deprived of its riparian status.[206] For its authority, the court cited the much earlier case of *Anaheim Union Water Company* v. *Fuller,*[207] but it did not mention a later decision, *Hudson* v. *Dailey,*[208] which stated a more liberal rule (regarding permanent severance of the riparian right from land thus cut off from contact with the stream) that enlarged the exceptions from the rule to include some circumstances other than express mention in the deed of conveyance. For example, the circumstances might be such as to show that the parties so intended the right to go with the detached land, or they might have been such as to raise an estoppel. Ditches leading to the land at the time of conveyance, and previous delivery of water thereto, would tend to support a presumption of intent on the part of the parties.[209]

As a matter of fact, in the *Rancho Santa Margarita* case there was no issue as to whether any particular tract had been originally riparian and thereafter cut off from contiguity to the stream by a deed silent as to riparian rights. The issue was whether the rule applicable to grant deeds, which the court approved, had application to a partition decree. (See "Preservation of Riparian Right on Change of Title to Land—Partition of land by decree," above.) The supreme court agreed that it did not apply to a partition decree, which is fundamentally distinct from a grant, and consequently held that certain tracts involved in a partition did not thereby lose their riparian status. In view of this, there is nothing in the *Rancho Santa Margarita* case that weakens the more liberal rule respecting grants expounded in *Hudson* v. *Dailey.*

The Washington Supreme Court followed the California case of *Anaheim Union Water Company* v. *Fuller*, to the effect that an owner of riparian land

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[206] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 538, 81 Pac. (2d) 533 (1938).

[207] *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331, 88 Pac. 978 (1907).

[208] *Hudson* v. *Dailey,* 156 Cal. 617, 624-625, 105 Pac. 748 (1909).

[209] In *Strong* v. *Baldwin*, 154 Cal. 150, 156-157, 97 Pac. 178 (1908), the intent to preserve the water right in the detached parcels was deduced from the facts that at least a part of each parcel had been irrigated from the stream and that all original deeds for the noncontiguous tracts contained provisions regarding water. In *Miller & Lux* v. *J. G. James Co.*, 179 Cal. 689, 690-692, 178 Pac. 716 (1919), the intent was clearly expressed in stipulations in the deeds of conveyance.

who conveys to another a part of the land not contiguous to the stream thereby cuts off the riparian rights of such conveyed tract unless the conveyance declares the contrary, and that land thus severed from the stream can never regain the riparian right even though thereafter reconveyed to the person who owns the part touching the stream.[210]

In Texas, apparently, there has never been a clear-cut pronouncement as to whether tracts cut off and sold from a riparian tract can keep their riparian rights. In several cases, the decisions clearly reflect what the courts deemed to be the intent of the granting parties.[211]

At the trial in the *Valmont* case, which went to the Texas Supreme Court,[212] Judge Blalock noted the absence of any such clear pronouncement as to the effect upon the riparian right, if any, of the existence of railroads, streets, highways, canals, flood control levees, and drainage canals separating a part of an original grant and a navigable stream, or as to the effect of conveyances that separated lands from the river.[213] On appeal, the San Antonio Court of Civil Appeals did not deal with the trial court's holding that riparian status was retained notwithstanding loss of access.

Courts in some other States have indicated, contrary to the California approach discussed above, that severed land may regain riparian status upon being reunited and held in common ownership with contiguous riparian land. This is discussed later.[214]

Loss of contact with stream by avulsion.—The riparian right may be lost by avulsion—a *sudden* natural change in the course of the stream that results in separating the new channel from contact with the former riparian land. A California court stated that without doubt a riparian owner, having lost his rights as such by avulsion, may ditch the water back to its original channel, but under two conditions: (a) He must not delay doing so beyond a reasonable time, and (b) in making the restoration, he must not disturb the rights of appropriators, nor go upon the lands of others without their consent or acquiescence to build dams and ditches thereon.[215]

The riparian right is *not* lost by accretion, which is a *gradual* natural change in the course of the stream resulting in the withdrawal of the water from the land along one side of the stream. The riparian ordinarily acquires title to the

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[210] *Yearsley* v. *Cater*, 149 Wash. 285, 287-289, 270 Pac. 804 (1928).

[211] *Stratton* v. *West & Bennett*, 27 Tex. Civ. App. 525, 529, 66 S.W. 244 (1901, error refused); *Gibson* v. *Carroll*, 180 S.W. 630, 632-634 (Tex. Civ. App. 1915); *State* v. *Arnim*, 173 S.W. (2d) 503, 508-509 (Tex. Civ. App. 1943, error refused want merit).

[212] *Valmont Plantations* v. *State of Texas*, 163 Tex. 381, 355 S.W. (2d) 502 (1962), affirming 346 S.W. (2d) 853 (Tex. Civ. App. 1961).

[213] Blalock, W. R., Judge, "Excerpts From the Opinion of the Trial Court," Proc., Water Law Conference, Univ. Tex. 16, 30-32 (1959).

[214] See "Riparian Lands–Contiguity to Water Source–Acquisition by riparian of non-contiguous land."

[215] *McKissick Cattle Co.* v. *Alsaga*, 41 Cal. App. 380, 388-389, 182 Pac. 793 (1919).

land that is no longer submerged. See, in chapter 3, "Collateral Questions Respecting Watercourses–Change of Channel."

Prescription.–Adverse possession and use of water that has ripened into prescription is a generally recognized method of losing title to a riparian right, and it has been so for a long time. It was recognized in the leading California riparian case of *Lux* v. *Haggin*, and has been restated or actually decided in many cases in that State.[216]

In an address before the American Bar Association at San Francisco, August 9, 1922, Chief Justice Shaw of the California Supreme Court stressed the fact that a very general use of streamflow had been made on nonriparian land, despite the existence of vested riparian rights up and down the streams of early California.[217] Of several causes that made this possible, he said, the most important and effective cause of a legal nature was the rule enabling the acquisition of a prescriptive right by adverse use.

The same general rule has been stated in a number of other States in which there is or has been substantial recognition of riparian rights.[218] The South Dakota Supreme Court has said, "The riparian proprietor's right . . . can be lost . . . by adverse prescriptive right."[219]

In some States the possibility of establishing a prescriptive water right as against riparian as well as other water rights appears to have been negated or questioned by legislation or one or more reported court decisions. See the later discussion in chapter 14 under "Prescription–Establishment of Prescriptive Title–Possibility of Establishing Prescriptive Water Right Negated or Questioned." Various aspects of the effect of prescription on rights of riparian proprietors are also discussed in chapter 14.

Condemnation.–In various States, it is well settled that the riparian right may be acquired and severed from the land of which it is a part by condemnation for public use pursuant to the statutes relating to exercise of the power of eminent domain.

In an early North Dakota case, a railroad company, through its receivers, was allowed to condemn riparian rights in a stream for the purpose of improving its railway lines, without taking also the fee of the lands through which the river flowed.[220]

In some Texas court decisions, the possibility of severing the riparian right by condemnation from the land to which it inheres has been acknowledged,

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[216] *Lux* v. *Haggin*, 69 Cal. 255, 392, 4 Pac. 919 (1884), 10 Pac. 674 (1886). See *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 374, 40 Pac. (2d) 486 (1935).

[217] Shaw, L., "The Development of the Law of Waters in the West," 10 Cal. Law Rev. 443, 455-456 (1922).

[218] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 374-375, 93 N.W. 781 (1903); *Meng* v. *Coffee*, 67 Nebr. 500, 520-521, 93 N.W. 713 (1903); *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 487, 128 N.W. 702 (1910).

[219] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 487, 128 N.W. 702 (1910).

[220] *Bigelow* v. *Draper*, 6 N. Dak. 152, 161-162, 69 N.W. 570 (1896).

but with caution.[221] In other cases, on the contrary, the Texas courts acknowledged, without restraint, that the power to condemn riparian rights exists.[222]

In *Lux* v. *Haggin* the California Supreme Court stated that the riparian owner's right may be condemned to supply "farming neighborhoods" with water, referring with approval to a previous decision.[223] The right to condemn the riparian right for public use is stated in various other California decisions. One of these decisions from California involved the question as to whether the city of Los Angeles, in seeking to condemn the fee simple title to the littoral rights of adjacent landowners to maintain the natural level of Mono Lake—both navigable and nontidal—the water of which was so impregnated with mineral salts and alkali as to render it unfit for domestic use, might avoid the payment of substantial damages in compensation therefor. A court of appeals held that the usefulness of a riparian right for the taking of which compensation must be made was not limited to such purposes as irrigation and household needs, but included a situation such as the instant case in which the existence of the lake in its natural condition, "with all of its attractive surroundings," was the vital thing that furnished the marginal land almost its entire value, and hence came within the requirement of being "reasonably beneficial" to the land. These littoral rights could not be appropriated, even for a higher or more beneficial use for public welfare, without just compensation therefor.[224]

Nonuse of the right.—A declaration that has been made many times over the years is that the riparian right is inseparably annexed to the riparian land by operation of law, that use of the water does not create the right, and that disuse cannot destroy or suspend it.[225] That this broad statement is not literally and unqualifiedly true is evidenced by some of the situations discussed above under the instant subtopic, wherein it is shown that the riparian right is

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[221] *Biggs* v. *Miller*, 147 S.W. 632, 637 (Tex. Civ. App. 1912); *Hidalgo County W. C. & I. Dist.* v. *Hedrick*, 226 Fed. (2d) 1, 6 (5th Cir. 1955), certiorari denied, 350 U.S. 983 (1956); *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1181 (Tex. Civ. App. 1913).

[222] *Gibson* v. *Carroll*, 180 S.W. 630, 632 (Tex. Civ. App. 1915); *Freeland* v. *Peltier*, 44 S.W. (2d) 404, 408 (Tex. Civ. App. 1931). In 1957, a court of civil appeals held that in the condemnation by the City of Fort Worth of land riparian to Trinity River, part of which was susceptible of irrigation and part of which was actually being irrigated, the value of the landowner's property right to take water from the river for irrigation of his riparian land was as material as any other element of value. *Greenman* v. *Fort Worth*, 308 S.W. (2d) 553, 555 (Tex. Civ. App. 1957, error refused n.r.e.).

[223] *Lux* v. *Haggin*, 69 Cal. 255, 302, 4 Pac. 919 (1884), 10 Pac. 674 (1886), referring to *St. Helena Water Co.* v. *Forbes*, 62 Cal. 182, 185 (1882).

[224] *Los Angeles* v. *Aitken*, 10 Cal. App. (2d) 460, 473-475, 52 Pac. (2d) 585 (1935, hearing denied by supreme court). The requirement of reasonable beneficial use had been made by Cal. Const. art. XIV, § 3. The court construed the constitutional commands respecting flowing streams to include lakes.

[225] *Lux* v. *Haggin*, 69 Cal. 255, 390-391, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

not inseparably annexed to the land but may be severed from it in ways both voluntary and involuntary on the part of the landowner.

Nonuse of the water by the landowner in a State in which the riparian right is recognized does not automatically, *of itself,* destroy or suspend his riparian right. But if an upstream diverter takes advantage of such nonuse to perfect a prescriptive right by adverse use of such water throughout the statutory period of limitation, this nonuse by the riparian landowner leads directly to the loss of his right. And in Washington, in which the supreme court stated that the riparian right is not created by use nor lost by disuse,[226] the more recent policy—reached by the supreme court during the 1920's—has been that before the riparian owner has any rights to protect *as against an intending appropriator* of the water, he must show with reasonable certainty that either at present or within a reasonable time, he will make use of the water for beneficial purposes.[227] Washington legislation enacted in 1967 regarding the loss of riparian rights because of nonuse is discussed below under "(2) Question of statutory forfeiture."

(1) Question of abandonment. Strictly construed, abandonment of a water or other property right involves intentional relinquishment of possession thereof without any present intention to repossess it.

The South Dakota Supreme Court has said, "The riparian proprietor's right does not depend upon use; it is an incident of ownership which can be lost only by adverse prescriptive right, grant, or *actual abandonment.*" [Emphasis added.][228] However, no reported Western case has come to the author's attention in which an abandonment of a riparian right has been actually decreed. Samual C. Wiel declared flatly that "Riparian rights cannot be lost by abandonment. . . ."[229]

In a 1902 California case, claimants under a grant of part of a riparian tract of land, which grant contained a reservation of enough water to operate a hydraulic ram, contended that all rights under the reservation had been lost by abandonment and adverse use. The fact that the successor in interest of the grantor abandoned the use of the hydraulic ram in favor of other means of use was not deemed material by the supreme court, because his right to the use of the water did not cease when he ceased to operate the ram. "As a riparian owner he is not bound to use the water, or, in case of non-user, lose his right to its use."[230]

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[226] *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 583, 38 Pac. 147 (1894).

[227] *State* v. *American Fruit Growers, Inc.*, 135 Wash. 156, 161, 237 Pac. 498 (1925). (With respect to riparian use of navigable waters, see the discussion at note 411 *infra*.) The Washington court has taken a somewhat different approach to the use of water on nonriparian land by persons *without appropriative rights*. See the discussion at note 709 *infra*.

[228] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 487, 128 N.W. 702 (1910).

[229] Wiel, S. C., "Water Rights in the Western States," 3d ed., vol. 1, § 861 (1911), discussed in chapter 14 at note 10.

[230] *Walker* v. *Lillingston*, 137 Cal. 401, 403-404, 70 Pac. 282 (1902).

Washington legislation enacted in 1967, providing for abandonment and forfeiture of riparian rights, is discussed in the succeeding subtopic.

(2) Question of statutory forfeiture. The statutes of a large majority of the Western States prescribe periods of years during which failure to exercise an appropriative water right subjects the right to loss by forfeiture. These provisions generally pertain solely to appropriative rights. Time is of the essence of a statutory forfeiture; intent to forego the right, or to retain title to it despite nonuse, generally has no bearing on this forfeiture process. See, in chapter 14, "Abandonment and Statutory Forfeiture—Abandonment and Forfeiture Distinguished."

The South Dakota court held in 1913 that the forfeiture provision in an early water administration act[231]—which provided that "when the party entitled to the use of water" failed to beneficially use all or any portion of the waters that he claimed for a period of 3 years, such unused waters reverted to the public—was "void as to a riparian owner but valid as to one who is no more than an appropriator without riparian right. A riparian right to use such waters of a flowing stream cannot be lost by disuse."[232]

In *Belle Fourche Irrigation District* v. *Smiley*, upholding the validity of 1955 South Dakota legislation which, among other things, undertook to eliminate both unused riparian rights existing at the time of enactment and the future acquisition of riparian rights for nondomestic purposes as against appropriative rights, the South Dakota Supreme Court noted generally that in the 1913 case, "The act there considered contained no provisions comparable to existing statutory provisions defining, determining and protecting vested rights. . . ."[233] This 1955 legislation also included a reenacted forfeiture provision, not considered in the *Belle Fourche* case, which expressly applies only to "appropriated water."[234]

The California Legislature's one attempt to subject the riparian right to forfeiture for failure to exercise the right was frowned upon by the courts and finally declared unconstitutional. The original water appropriation act of 1913 contained a provision to the effect that nonapplication of water to riparian land for any continuous period of 10 years after passage of the act should be conclusive presumption that the water was not needed thereon for any useful or beneficial purpose, such water thereupon being subject to appropriation.[235] After three decisions in which the California Supreme Court took an unfavorable view of this provision,[236] the constitutional amendment of 1928

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[231] S. Dak. Laws 1907, ch. 180, § 46.

[232] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 268, 143 N.W. 124 (1913).

[233] *Belle Fourche Irr. Dist.* v. *Smiley*, 176 N.W. (2d) 239, 244, 245 (S. Dak. 1970). The 1955 legislation is discussed at notes 491-492 *infra*.

[234] S. Dak. Comp. Laws Ann. § 46-5-37 (1967).

[235] Cal. Stat. 1913, ch. 586, § 11.

[236] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 115-116, 252 Pac. 607 (1926); *Scott* v. *Fruit Growers' Supply Co.*, 202 Cal. 47, 54, 258 Pac. 1095 (1927);

was adopted.[237] While limiting the riparian right to reasonable beneficial use, this amendment expressly protects the riparian owner not only as to present needs but also as to prospective reasonable beneficial needs. This gave the supreme court its opportunity to hold expressly that the statutory 10-year limitation upon riparians was unconstitutional.[238] This provision was omitted from the California Water Code when it was enacted in 1943.

In Kansas, on the other hand, without calling the vested common law claim to the use of water a riparian right,[239] the Kansas statute provides for the cancellation and termination of such right, as well as other water rights, in the event the holder fails, without good cause, to make a beneficial use of the water over a consecutive 3-year period.[240] And in Washington, legislation enacted in 1967 provides that a riparian landowner (although this precise term is not used) who abandons his right to divert or withdraw water, or who voluntarily fails, without sufficient cause, to beneficially use all or any part of the water that he is entitled to withdraw or divert for any period of 5 successive years shall relinquish such right or portion thereof.[241] These forfeiture provisions have not been specifically construed by the respective supreme courts.

Dedication.—It was held in a case decided by a Texas court of civil appeals that riparian rights in the waters of a bay might be separated from the land on the shore and dedicated to the public to the extent that they were necessary for the purpose of public ways.[242]

Fall River Valley Irr. Dist. v. *Mt. Shasta Power Corp.*, 202 Cal. 56, 67-69, 259 Pac. 444 (1927).

[237] Cal. Const. art. XIV, § 3.

[238] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 530-531, 45 Pac. (2d) 972 (1935). The California Supreme Court recently discussed the history of the cases under the amendment in *Joslin* v. *Marin Mun. Water Dist.*, 67 Cal. (2d) 132, 429 Pac. (2d) 889, 60 Cal. Rptr. 377 (1967).

[239] Kans. Stat. Ann. § 82a-701(d) (1969).

[240] *Id.* § 82a-718. See also § 82a-703.

[241] Wash. Laws 1967, ch. 233, Rev. Code § 90.14.170 (Supp. 1970).

These statutory provisions in Kansas and Washington are discussed in chapter 14 under "Abandonment and Forfeiture—Statutory Forfeiture—Rights Subject to Forfeiture—Generally not riparian rights." See the later discussion under "Measure of the Riparian Right—As Against Appropriators—Cutoff dates" and "Unused riparian right," for a discussion of legislation limiting the unused riparian right to the extent of actual application to beneficial use as of stated times, and related court decisions.

[242] *Gibson* v. *Carroll*, 180 S.W. 630, 632-633 (Tex. Civ. App. 1915). A onetime owner of a lot on the shore of Corpus Christi Bay placed on record a map showing a street along the waterline of the lot, the street area at that time being submerged land. This was held equivalent to a conveyance to the public of the owner's riparian rights in the waters that then covered the dedicated street. Having so dedicated his riparian right to the public for the purpose of the street, a subsequent purchaser of the lot could take no title to such riparian rights.

Riparian Lands

Determination of Rights in Land

Obviously, the rights that are embraced in the word "land" are determined by the applicable law in the jurisdiction in which the land is situated.[243]

In the *Los Angeles* case, the California Supreme Court was concerned with the relative superiority of pueblo rights and riparian rights. However, the court led up to the above statement about "land" and the law of the jurisdiction by pointing out the well-known principle that the right of an owner of riparian land to have the stream flow to his land without material diminution in quantity (which may accrue to the patentee of lands situated in a jurisdiction in which the English common law doctrine of riparian ownership may prevail to the full extent) would not accrue in an arid region of a western State in which irrigation is necessary to successful agriculture, and in which the original rule has been so modified by the State law as to allow a riparian proprietor to divert and use a reasonable amount of the water for irrigating his riparian land.

Extent of Lands Having Riparian Status

In California, where the question has been considerably litigated, it is 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 upon the stream, except in those cases in which the right has been reserved in parcels that have become noncontiguous by reason of subdivision of the land or partition (see "Property Characteristics–Preservation of Riparian Right on Change of Title to Land," above); (2) the riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner; and (3) the land, in order to be riparian, must be within the watershed of the stream.[244]

In the *Rancho Santa Margarita* case, the California Supreme Court said further that "In determining the riparian status of land the same rules apply regardless of the size of the tract, the extent of the watershed or the amount of the run off." Whether there is sufficient water in the stream for the riparian needs of any party has no bearing whatever in determining whether a particular tract is riparian.

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[243] *Los Angeles* v. *Los Angeles Farming & Mill. Co.*, 152 Cal. 645, 649-650, 93 Pac. 869, 1135 (1908). For purposes of taxation, riparian rights acquired from riparian owners in California are land within the meaning of Cal. Const. art. XIII, § 1. *San Francisco* v. *Alameda County*, 5 Cal. (2d) 243, 245-247, 54 Pac. (2d) 462 (1936).

[244] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 528-529, 534, 81 Pac. (2d) 533 (1938).

Contiguity to Water Source

Necessity of contiguity.—It is essential that land, to have riparian status with respect to a stream or other water source, shall be contiguous thereto. The word "riparian" pertains to the bank of a river, or lake, or to tidewater; and so, in common parlance, "riparian rights" are rights in the banks, bed, and/or waters that are held by proprietors of lands along the banks—in other words, proprietors of contiguous lands.

This association of contiguous lands and waters necessary to the founding of a riparian right is stated expressly in many high court decisions, and it is implicit in other decisions in most Western States that have recognized the riparian doctrine. "In law * * * only the tracts which border upon the stream are endued with riparian rights."[245] "Legally defined, a riparian owner is an owner of land bounded by a water course or lake or through which a stream flows."[246] "Riparian rights depend upon ownership of land which is contiguous to the water."[247]

The basis of the riparian doctrine, and an indispensible requisite of it, is *actual contact* of land and water; mere proximity or closeness short of contact is unavailing.[248]

The California Supreme Court has indicated that it is not only the portion of a tract bordering a stream that is "actually washed by the waters of the stream" that is riparian thereto. If a tract originally contiguous to a stream—and entirely within its watershed (discussed later)—has never been subdivided, it all remains riparian to the stream.[249]

Contiguity to underflow of stream.—In a California case in which the watercourse in litigation included both a surface and a subsurface stream, the latter extending a considerable distance from each bank of the former, "the riparian land owners and the overlying land owners may be said to possess a

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[245] *Gallatin* v *Corning Irr. Co.*, 163 Cal. 405, 416, 126 Pac. 864 (1912).

[246] *Sayles* v. *Mitchell*, 60 S. Dak. 592, 594, 245 N.W. 390 (1932).

[247] *Woody* v. *Durham*, 267 S.W. (2d) 219, 221 (Tex. Civ. App. 1954, error refused). Some other relevant decisions include *Balabanoff* v. *Kellogg*, 10 Alaska 11, 16-17, 118 Fed. (2d) 597, 599 (9th Cir. 1940), certiorari denied, 314 U.S. 635 (1941); *Carter* v. *Territory of Hawaii*, 24 Haw. 47 (1917); *Territory of Hawaii* v. *Gay*, 31 Haw. 376 (1930), affirmed, 52 Fed. (2d) 356 (9th Cir. 1931), certiorari denied, 284 U.S. 677 (1931); *Clark* v. *Allaman*, 71 Kans. 206, 244-245, 80 Pac. 571 (1905); *McDonough* v. *Russell-Miller Mill. Co.*, 38 N. Dak. 465, 471-473, 165 N.W. 504 (1917); *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 196, 102 Pac. (2d) 124 (1940); *Weiss* v. *Oregon Iron & Steel Co.*, 13 Oreg. 496, 498-502, 11 Pac. 255 (1886).

[248] *Stratbucker* v. *Junge*, 153 Nebr. 885, 889, 46 N.W. (2d) 486 (1951). Riparian rights do not attach to any lands, however near, that do not extend to the water. *El Paso County W. I. Dist. No. 1* v. *El Paso*, 133 Fed. Supp. 894, 909 (W.D. Tex. 1955).

[249] *Alta Land & Water Co.* v. *Hancock*, 85 Cal. 219, 229, 24 Pac. 645 (1890). In this case, an entire tract of 1,280 acres in single ownership, on which only a small area one-half mile or more from the stream was irrigated, was all held to be riparian.

right to the stream, surface and subsurface, analogous to the riparian right, which should be protected against an unreasonable depletion by an appropriator."[250]

The right of an owner of overlying land in the water of a subsurface stream was thus made equivalent to and correlated with the riparian right of a holder of land contiguous to the surface stream, in a situation in which the waters physically comprise a common supply. In such a case, the right of access of an owner of land overlying the subsurface portion of the stream, but not contiguous to the surface portion, would extend downward to the ground water underlying the surface of his land.[251]

Frontage on stream channel.—In determining the riparian status of land that abuts upon a stream, under the California cases, the length of frontage is an immaterial factor. Rather, "it is access to the stream, and not whether all surface drainage from the area in question drains directly into the stream at the point of access, that determines the riparian status of the land." If a tract of land has any access to the stream at all, and the other requirements are fulfilled, the entire tract is riparian to the stream.[252]

In several cases, the California Supreme Court has recognized that a tract of land may be riparian even though it has only a short frontage on the stream.[253] In one instance, a riparian right was adjudicated with respect to a 40-acre tract that was contiguous to a stream for a distance of only 250 feet, where the sharply curving bank of the stream jutted into the parcel.[254]

Lands in the flood plain of a stream.—In chapter 3, under "Elements of Watercourse—Channel," there is a discussion of the flood plain, which in the case of a live stream is the land adjacent to the ordinary channel that is overflowed in times of high water, from which the floodwaters drain back into the stream channel at lower points. In an ordinary situation, this bottomland is as much a part of the overall watercourse as are its beds, banks, and ordinary channel. This of course does not and cannot apply to great river valleys and great catchment areas.

The court decisions in which lands in the flood plain of a stream are involved usually deal with obstructions to and control of flood flows within the flood plains, rather than with rights to the use of the water. However, in a

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[250] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 375-376, 40 Pac. (2d) 486 (1935). See also *Prather* v. *Hoberg*, 24 Cal. (2d) 549, 559-562, 150 Pac. (2d) 405 (1944).

[251] Compare the earlier case of *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 332, 88 Pac. 978 (1907).

[252] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 528, 533, 81 Pac. (2d) 533 (1938). Compare the earlier case of *Southern Cal. Inv. Co.* v. *Wilshire*, 144 Cal. 68, 71, 77 Pac. 767 (1904).

[253] See, e.g., *Title Ins. & Trust Co.* v. *Miller & Lux*, 183 Cal. 71, 85, 190 Pac. 433 (1920); *Omnes* v. *Crawford*, 202 Cal. 766, 768, 262 Pac. 722 (1927).

[254] *Joerger* v. *Pacific Gas & Elec. Co.*, 207 Cal. 8, 30-33, 276 Pac. 1017 (1929). See also *Joerger* v. *Mt. Shasta Power Corp.*, 214 Cal. 630, 635, 7 Pac. (2d) 706 (1932).

California case in which it was held that the bed of the Ventura River was bounded by its permanent and fast banks, the question was whether certain lands lying between some lower banks and the high banks of the river were riparian to the river; and the supreme court held that they were.[255] Five years later, in explaining certain language used in the opinion in this case, the supreme court cautioned that the character of the bottomland soil had nothing to do with the right of the owner, as a riparian proprietor, to use the stream water for any useful purpose. With respect to the landowner's right to make reasonable use of the water, the court was of the opinion that bottomlands riparian to a stream, even though lying between high bluffs on each side, are not to be distinguished from other land abutting on the stream.[256]

Lands thus meeting the riparian requirement of contiguity by being outside the high banks of a stream, but nonetheless bordering it, may be so high above the stream level as to require pumping the water to the irrigated lands. This necessity does not deprive the land of its riparian character. Whatever quantity of water the riparian proprietor is entitled to divert by virtue of his riparian ownership "cannot be diminished by the fact that in order to utilize it he must raise it from the bed of the stream by pumps, or other similar appliances."[257]

Acquisition by riparian of noncontiguous land.—A number of court decisions have dealt with the question as to whether a riparian owner who acquires a tract adjoining his own, but which is not contiguous to the water source, can thereby clothe this noncontiguous parcel with riparian status.

In an early case, the California Supreme Court held that mere contiguity of tracts to each other, even though granted to the same person on the same day *but by separate patents*, could not extend the riparian right inherent in one contiguous parcel to another not touching the stream.[258] Some other courts have approved or declared elements of this principle.[259]

The Oregon Supreme Court, however, adhered to a different view in a 1909 case. The court's view was that the owner of land contiguous to a stream is entitled to the rights of a riparian proprietor without regard to the actual extent of his land, or from whom or when he acquired title.[260]

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[255] *Ventura Land & Power Co.* v. *Meiners*, 136 Cal. 284, 290-291, 68 Pac. 818 (1902).

[256] *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 328-329, 88 Pac. 978 (1907).

[257] *Charnock* v. *Higuerra*, 111 Cal. 473, 477-481, 44 Pac. 171 (1896).

[258] *Boehmer* v. *Big Rock Irr. Dist.*, 117 Cal. 19, 26-27, 48 Pac. 908 (1897); accord, *Miller & Lux* v. *James*, 180 Cal. 38, 51, 179 Pac. 174 (1919).

[259] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585, 589, 86 S.W. 733 (1905); *Yearsley* v. *Cater*, 149 Wash. 285, 287-289, 270 Pac. 804 (1928).

[260] *Jones* v. *Conn*, 39 Oreg. 30, 39-41, 64 Pac. 855, 65 Pac. 1068 (1901). One riparian proprietor in this controversy made a ditch to tap the river some distance from his property with which to irrigate a tract separated from the river by a bluff. It was the court's view that the fact that the landowner purchased the particular riparian tract at one time, and the adjoining tract subsequently, would not make him any less a riparian proprietor, nor should it alone be a valid objection to his using the water on the land last acquired. The court said the only thing necessary to entitle him to the right of a

In a 1905 case, the Kansas Supreme Court imposed a watershed limitation on the extent of riparian land, unlike the Oregon court, as is discussed later. But within this limitation, the court said the principles of the modified riparian doctrine should control, "irrespective of the accidental matter of governmental subdivisions of the land." The court then quoted approvingly the language in the 1901 Oregon case described above.[261]

In 1966, the Nebraska Supreme Court, without mentioning the 1901 Oregon case, indicated that the area or size of the parcel is immaterial insofar as its character as riparian land is concerned. The court reasoned that restrictions to original entries or to government subdivisions as a basis of determining the extent of the riparian right are arbitrary as such, whether as between riparians or as against competing appropriators.[262] These apparently are the guidelines for determining what lands were riparian immediately prior to the effective date of the irrigation act of 1895 (April 4, 1895).[263] "However, if the tract, or part of it, later lost its riparian status as a result of severance, the nonriparian land cannot regain the riparian status."[264] The latter restriction applies as against competing appropriative rights, which was in issue here, although it apparently would not apply as between persons asserting riparian rights.

Relation to Chain of Title

Origin of title to riparian land.—Except in Texas, private ownership of lands in the West was derived by patents from the United States, or by patents issued by States to which lands had been granted by the Federal Government, or by grants from sovereigns to whose lands the United States subsequently succeeded.

In Texas, Spanish and Mexican grants were made prior to independence from Mexico, and thereafter land grants were made by the Republic of Texas to private parties. On annexation to the United States, the Republic retained for the State all vacant and unappropriated lands lying within its boundaries; since annexation, therefore, the State of Texas has been the source of title to public lands and the grantor thereof to specific organizations and individuals.

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riparian proprietor is to show that the body of land owned by him borders upon a stream.

[261] *Clark* v. *Allaman*, 71 Kans. 206, 244-245, 80 Pac. 571 (1905).

[262] *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified with direction to the trial court to amplify the findings to determine whether one plaintiff was inadvertently excluded from the decree, 180 Nebr. 569, 144 N.W. (2d) 209 (1966). This decision overruled *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 353-354, 93 N.W. 781 (1903), on this specific point.

[263] The other significance of this date is discussed at notes 484-489 *infra*. See also note 89 *supra*.

[264] 141 N.W. (2d) at 745, discussed at note 278 *infra*. See also Comment, "The Dual-System of Water Rights in Nebraska," 48 Nebr. L. Rev. 488, 494-495 (1969).

Originally, all land in Hawaii belonged to the king, the ruling chief, who from time to time made revocable allotments of tracts to the principal chiefs. In 1848, a voluntary division of lands was made between the king, the chiefs, and the government. By the treaty of annexation, title to "all public, government or crown lands" was conveyed by the Republic of Hawaii to the United States. Ancient land units in the islands comprised chiefly the ahupuaa as the primary division of land; the ili kupono, usually geographically a part of an ahupuaa but wholly independent of it; and the kuleana, a small tract of cultivated land awarded to a native tenant in the course of land reform. Konohiki or landlord units were the ahupuaas and ilis kupono.[265] In the two Hawaiian cases in which riparian rights were actually decreed to specific lands, the riparian tracts in one case comprised an ahupuaa owned by the Territory on which the stream rose, and a privately owned ahupuaa into which it flowed; and in the other case, the riparian tracts comprised ilis kupono in private possession on which the stream rose, and the seaward portion of the ahupuaa of which the ilis formed a geographical (but not a legal) part across which the stream flowed to the sea.[266]

It has been stated earlier that the generally recognized rule in the States which recognize the riparian right is that title to the right accrues when title to the riparian land passes from public to private ownership (see "Accrual of the Right," above). The source of the title to the riparian right, therefore, lies in the origin of title to the riparian land in which it inheres. In many cases this is the date of entry or settlement upon vacant public land. Although the right actually accrues when the land is patented, as against parties other than the government the entryman is generally protected in his pending enterprise by the doctrine of relation back to date of entry or settlement with the *bona fide* intention of obtaining a patent.

Original grant from the government.—It was early established in California that the riparian right cannot extend to more land than embraced within the original single grant from the Federal Government or from the State that established the initial riparian title—that the acquisition was limited to one transaction.[267] The Texas Supreme Court adopted the California rule that, in the first place, riparian rights cannot extend beyond the original survey as granted by the government; and second, the boundary of riparian land is restricted to land the title to which was acquired by one transaction.[268]

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[265] Hutchins, W. A., "The Hawaiian System of Water Rights" 21-46 (1946).

[266] *Carter* v. *Territory of Hawaii*, 24 Haw. 47 (1917); *Territory of Hawaii* v. *Gay*, 31 Haw. 376 (1930), affirmed, 52 Fed. (2d) 356 (9th Cir. 1931), certiorari denied, 284 U.S. 677 (1931).

[267] *Lux* v. *Haggin*, 69 Cal. 255, 424-425, 4 Pac. 919 (1884), 10 Pac. 674 (1886); *Boehmer* v. *Big Rock Irr. Dist.*, 117 Cal. 19, 26-27, 48 Pac. 908 (1897), discussed at note 258 *supra; Title Ins. & Trust Co.* v. *Miller & Lux*, 183 Cal. 71, 82, 190 Pac. 433 (1920).

[268] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585, 86 S.W. 733 (1905); *Sun Co.* v. *Gibson*, 295 Fed. 118, 119-120 (5th Cir. 1923).

The Nebraska Supreme Court apparently agreed that the extent of a riparian holding cannot exceed the area acquired by a single entry or purchase from the government, but at first refrained from deciding whether the maximum area should be held to be 40 or 640 acres, preferring to leave the area policy to be determined according to the circumstances of the particular case.[269] In a 1939 case, the area was extended to an entire section because in the locality in litigation it had been possible to acquire a section of land from the government.[270] However, in a 1966 case the court held that such limitations were arbitrary and it disapproved them.[271]

The Kansas Supreme Court decided that certain principles of the modified riparian doctrine should control the question of what is riparian land, "irrespective of the accidental matter of governmental subdivisions of the land."[272]

Smallest tract held under one title.—In California, "The riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner."[273] The first statement of the foregoing principle in these words by the California Supreme Court appears to have been made in 1938 in the *Rancho Santa Margarita* case. However, the statement is a logical summation of the results of various California decisions, including the holdings that lands detached from a riparian tract may, under certain circumstances, lose their riparian status irretrievably, but that nonriparian land cannot become riparian by being joined in ownership with riparian land. The principle is simply one of inexorable attrition.[274]

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[269] *Crawford Co.* v. *Hathaway,* 67 Nebr. 325, 353-354, 93 N.W. 781 (1903).

[270] *McGinley* v. *Platte Valley Pub. Power & Irr. Dist.*, 132 Nebr. 292, 298, 271 N.W. 864 (1937).

[271] *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966), discussed at note 262 *supra.*

[272] *Clark* v. *Allaman*, 71 Kans. 206, 244-245, 80 Pac. 571 (1905). See the discussion at notes 260-261 *supra*, regarding this case and *Jones* v. *Conn*, 39 Oreg. 30, 39-41, 64 Pac. 855, 65 Pac. 1068 (1901).

[273] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 529, 81 Pac. (2d) 533 (1938). The supreme court cited only one authority, *Boehmer* v. *Big Rock Irr. Dist.*, 117 Cal. 19, 48 Pac. 908 (1897), which was based on the holding in *Lux* v. *Haggin*, 69 Cal. 255, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[274] In *Yearsley* v. *Cater*, 149 Wash. 285, 287-289, 270 Pac. 804 (1928), while the Washington court did not expressly consider the foregoing question of whether the riparian right extends only to the smallest tract in the chain of title, the court approvingly quoted a California case in the latter regard and indicated that the later acquisition of adjoining riparian land by the owner of nonriparian land did not convert the nonriparian land into riparian land, the nonriparian land having lost its riparian status by its detachment from the riparian land unless the detaching conveyance had declared the contrary. See the discussion at notes 206-210 *supra*. And in *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 589, 86 S.W. 733 (1905), while the Texas court also did not expressly consider the smallest-tract-in-chain-of-title question, it indicated that riparians did not have the right to use the streamwater on "nonriparian land which they

Wiel, writing in 1911, noted that "The California decisions, while not controlled by governmental subdivisions, lean toward holding the extent of riparian land to the smallest parcel touching the stream in the history of the title while in the hands of the present owner."[275] He strongly disapproved of the principle and of judicial interpretations leading up to it.

The early Oregon and Kansas cases are not in harmony with this limitation on riparianism, as discussed above.[276]

The Nebraska Supreme Court, in *Wasserburger* v. *Coffee,* indicated that the riparian right ordinarily attaches, as between competing appropriative and riparian rights, to "the smallest tract [of land] held in one chain of title leading from the owner on April 4, 1895, to the present owner."[277] This apparently would not apply between persons asserting competing riparian rights. According to the *Wasserburger* court opinion, prior to April 4, 1895, which was the effective date of the irrigation act of 1895, a riparian owner was apparently capable of expanding the limits of his riparian land, comparable to the Oregon approach. This apparently would apply both as between competing riparian rights and competing appropriative and riparian rights. And as between competing riparian rights, apparently a riparian has continued to be capable of expanding his riparian land after April 4, 1895.[278]

State lands.—Construing certain articles of the State constitution and the State water legislation, the Washington Supreme Court held that the rights held by the State in the State school lands had been granted for the purpose of irrigation to the public. Hence, the riparian rights of the State in such lands were waived as long as title remained in the State, but they attach to the lands by transfer from the State to private ownership, thus following the rule that relates to Federal lands.[279] However, in a recent case the court held that "the state may establish riparian rights in its trust lands, to the same extent that such rights could be established by a private owner." It added that to the extent that the 1925 case is inconsistent with this holding, it is overruled.[280]

In the leading riparian case of *Lux* v. *Haggin*, the California Supreme Court held that grantees of State lands contiguous to streams thereby acquired title to riparian rights in such lands whether they were swamp and overflowed lands

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may own, although it may adjoin land owned by one of them which is entitled to the use of water." See also the discussion to the effect that the riparian land cannot extend beyond the original survey as granted from the government and that its boundary "is restricted to land the title to which is acquired by one transaction." 98 Tex. at 585.

[275] Wiel, S. C., *supra* note 229, § 771.

[276] Notably at notes 260-261 *supra.*

[277] *Wasserburger* v. *Coffee*, 180 Nebr. 149, 141 N.W. (2d) 738, 745 (1966).

[278] In these regards, see the discussion at notes 262-264 *supra*. See also the discussion at notes 484-489 *infra.*

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

[280] *In re Stranger Creek & Tributaries in Stevens County,* 77 Wash. (2d) 649, 466 Pac. (2d) 508, 513 (1970), discussed at note 84 *supra.*

acquired from the United States under the Act of 1850[281] or other lands derived by grant from the Government. In the instant case, the swamplands described in the complaint became the property of California only a few weeks after its admission to the Union.[282] That riparian rights attach to these swamp and overflowed lands of the State as well as to other lands has been reaffirmed in other decisions.[283]

The Texas statute providing for the appropriation of water provides that "Nothing in this chapter contained shall be construed as a recognition of any riparian right in the owner of any lands the title to which shall have passed out of the State of Texas subsequent to the first day of July, A.D. 1895."[284] This statutory declaration fixed the termination of any previous policy of granting riparian rights with State lands as of the enactment of the water appropriation act of 1895. In *Motl* v. *Boyd*, the Texas Supreme Court adopted the time of enactment of the 1889 statute as ending that policy.[285]

Not affected by acts of trespasser.—In an early California case, the supreme court held that use of water on riparian land by a trespasser who never acquired title to the land could not affect the right inherent in the land, even though the water was used on only a small area one-half mile or more from the stream. The entire tract being riparian, the owner's right to the use of the water was not affected by its use on only a portion of the tract, whether contiguous to the stream or not contiguous, and whether made by the owner or by a trespasser.[286]

Relation to Watershed

Riparian right generally limited to watershed.—The general rule in the riparian States of the West is that "The land, in order to be riparian, must be within the watershed of the stream."[287] This is the case, even though land

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[281] 9 Stat. 519, c. 84 (1850).

[282] *Lux* v. *Haggin*, 69 Cal. 255, 340-341, 368, 376, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[283] *United States* v. *Central Stockholders' Corp. of Vallejo*, 43 Fed. (2d) 977, 981 (S.D. Cal. 1930); *California Pastoral & Agric. Co.* v. *Enterprise Canal & Land Co.*, 127 Fed. 741, 742 (C.C.S.D. Cal. 1903); *Modoc Land & Live Stock Co.* v. *Booth*, 102 Cal. 151, 152-154, 36 Pac. 431 (1894).

[284] Tex Rev. Civ. Stat. Ann. art. 7619 (1954).

[285] *Motl* v. *Boyd*, 116 Tex. 82, 108, 286 S.W. 458 (1926). The court referred to this statutory declaration, 116 Tex. at 121.

[286] *Alta Land & Water Co.* v. *Hancock*, 85 Cal. 219, 229-230, 24 Pac. 645 (1890).

[287] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 529, 81 Pac. (2d) 533 (1938); accord, *Clark* v. *Allaman*, 71 Kans. 206, 244-245, 80 Pac. 571 (1905); *Sayles* v. *Mitchell*, 60 S. Dak. 592, 594-595, 245 N.W. 390 (1932); apparently approved, but not the sole basis of decision, *Mally* v. *Weidensteiner*, 88 Wash. 398, 402, 153 Pac. 342 (1915); *Osterman* v. *Central Nebr. Pub. Power & Irr. Dist.*, 131 Nebr. 356, 268 N.W. 334, 339-340 (1936). It is problematical whether or not *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified, 144 N.W. (2d) 209 (1966), would

beyond the watershed of a river is part of an original tract that extends to the river.[288] It follows that if a tract of land riparian to a stream in watershed A extends across the divide into watershed B, the portion lying in watershed B may or may not be riparian to the stream that drains it, depending upon the circumstances, but it usually is not riparian to the stream in watershed A. Some watershed tributaries questions are discussed below.

Principal reason for the rule.—The rule limiting riparian rights to lands bordering the stream within the watershed thereof is based chiefly on the considerations "that where the water is used on such land it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such land feeds the stream, the land is, in consequence, entitled, so to speak, to the use of its waters."[289]

Exception in Oregon.—In *Jones* v. *Conn*, decided in 1901, the Oregon Supreme Court took the position that a person who owns land contiguous to a natural stream is a riparian proprietor and entitled to riparian rights without regard to the extent of his land or from whom or when he acquired his title. One party had built a ditch to divert water from the stream some distance above his riparian property for the purpose of irrigating a tract he later acquired that was separated from the river by a bluff. The particular question at issue was whether such land behind the bluff was riparian, as against a claim by opposing parties that the slope of the tract prevented percolation of the water from the irrigated land, or return flow, from flowing back into the stream.[290]

Injury to other riparians.—The general rule in Texas is that "All surveys of land which abut upon a running stream are riparian as to all that portion of the survey which lies within the watershed of the stream, and its surface drainage is into the stream."[291] In *Watkins Land Company* v. *Clements*, the Texas Supreme Court approved the general limitation that the riparian proprietor "can not ordinarily divert water to land lying beyond the watershed of the stream," but suggested that conditions might exist in which diversion beyond

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apply to the *Osterman* case on this point. See the discussion of the *Wasserburger* case under "Contiguity to Water Source—Acquisition by riparian of noncontiguous land," *supra*. In *Wasserburger*, the court decided questions concerning the definition of riparian land but it did not expressly discuss the watershed limitation question nor the *Osterman* case in this regard. 141 N.W. (2d) at 744-745. This perhaps was because all the lands in dispute apparently were considered to be within the watershed. 141 N.W. (2d) at 741-742.

[288] *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 330, 88 Pac. 978 (1907).

[289] *Id.*

[290] *Jones* v. *Conn*, 39 Oreg. 30, 39-41, 64 Pac. 855 (1901). On rehearing, 65 Pac. 1068 (1901), the court denied plaintiff's contention that it had "erred in not holding that the right of a riparian proprietor to use the waters of a stream for irrigating purposes does not extend beyond the watershed. . . ."

[291] *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1180 (Tex. Civ. App. 1913).

the watershed would be authorized, such as existence of an abundant supply of water and no deprivation to other riparian proprietors.[292]

Thus, in the Texas case, the concept that diversion of riparian water to land without the watershed, to be upheld, depends on noninjury to other riparians, is consonant with the application of this rule in Texas to diversion to nonriparian land *within* the watershed. (See the later discussion, "Exercise of the Riparian Right—Place of Use of Water—Nonriparian land.) In the Oregon case, on the other hand, the court saw no objection to extending the riparian right to land without the watershed. On the facts of the case, it reached a result similar to that of the Texas court, by affirming a decree restraining a diversion out of the watershed that would result "in substantial injury of the present or future rights of" the other riparian proprietors. But the court explained it did so because, since the defendant was asserting "the absolute right to sufficient water to irrigate his land, regardless of the effect it may have upon other proprietors, the plaintiffs are entitled to such a decree as will prevent his use from ripening into an adverse title."[293]

Relation to watersheds of tributaries.—The rules developed by the California Supreme Court governing relationships of the watersheds of a main stream and those of its tributaries, so far as they bear upon riparian rights within the respective watersheds, are as follows:

(1) Each tributary is considered a separate stream with regard to lands contiguous thereto above the junction, so that land lying within the watershed of one tributary above that point is not riparian to the other stream.[294]

(2) As against lower riparian owners located below the confluence of a main stream and a tributary, however, the watersheds of the main stream and of the tributary stream constitute parts of a single watershed.[295]

The holdings in both the *Anaheim Union* and *Holmes* cases were more recently approved by the California Supreme Court, which said that: "The two

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[292] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585, 86 S.W. 733 (1905), citing *Jones* v. *Conn*, 35 Oreg. 30, 40-41, 64 Pac. 855, 65 Pac. 1068 (1901). See also *In re Metropolitan Util. Dist. of Omaha*, 179 Nebr. 783, 140 N.W. (2d) 626, 637 (1966), regarding reasonable use.

[293] *Jones* v. *Conn*, 39 Oreg. 30, 39-41, 64 Pac. 855 (1901). On rehearing, 65 Pac. 1068 (1901), the court added, "It was to prevent any future contention that this claim or the use of the water thereunder had ripened into an adverse right as against the plaintiffs that the decree was so framed." In its original opinion, the court said that each riparian is limited to a reasonable use of water, "which is defined as 'any use that does not work actual, material, and substantial damage to the common right which each proprietor has, as limited and qualified by the precisely equal right of every other proprietor.'"

[294] *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 330-331, 88 Pac. 978 (1907). See *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 399-400, 54 Pac. (2d) 1100 (1936).

[295] *Holmes* v. *Nay*, 186 Cal. 231, 240-241, 199 Pac. 325 (1921). See *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 399-400, 54 Pac. (2d) 1100 (1936).

cases when considered together, supply a complete picture of the rights of riparians on converging streams."[296]

Delta land sloping away from stream.—In delta land at the lower end of a stream, the banks and bed of the stream in places are higher than the adjacent land. This results from the long-time action of the stream in bringing soil down from higher lands in times of flood and depositing it upon the more nearly level land near the outlet of the stream. The question then is whether the riparian lands in the area comprise only those lying within the stream banks, or whether they include lands contiguous to, but outside, the stream banks from which water naturally flows away from the channel instead of toward and into it.

The question has been litigated in both California and Texas. It has been long settled by high court decisions in California. In Texas, however, although decided by the judge of a trial court, appellate decisions on the main issues made it unnecessary to decide this one.

(1) California. The supreme court has held that the fact that in such delta area the land slopes away from the banks and that water overflowing the banks will not return to the stream does not take such land out of the watershed of the stream nor deprive the sloping land of its riparian character.[297] This "correct and salutary" rule applies to a present, existing delta, but not to mesa land many feet above the stream which in past geologic ages may have been delta land. Riparian lands are not determined by past geologic formations, but from the present natural topography.[298]

(2) Texas. A positive statement by a Texas court of civil appeals with respect to the measure of the extent of riparian lands—but not in connection with any question respecting delta lands—is:[299] "All surveys of land which abut upon a running stream are riparian as to all that portion of the survey which lies within the watershed of the stream, and *its surface drainage is into the stream.*" [Emphasis added.]

In the final judgment of the trial court in the *Valmont* case there is embodied the principle that no lands that lie outside the watershed of the Rio Grande—lands the surface of which does not cast its waters therein by natural drainage—have a riparian right of irrigation from the river.[300] Although to apply the Texas decisions strictly would exclude from a riparian right much intensively cultivated and highly improved land in the lower Rio Grande Valley, Judge Blalock did not believe that the California cases, invoked by

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[296] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 532, 81 Pac. (2d) 533 (1938).

[297] *Half Moon Bay Land Co.* v. *Cowell*, 173 Cal. 543, 547-548, 160 Pac. 675 (1916).

[298] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 547-549, 81 Pac. (2d) 533 (1938); *Smith* v. *Wheeler*, 107 Cal. App. (2d) 451, 455, 237 Pac. (2d) 325 (1951).

[299] *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1180 (Tex. Civ. App. 1913).

[300] *State of Texas* v. *Valmont Plantations*, No. B-20, 791, 93rd Dist. Court, Hidalgo County, Texas, September 3, 1959. See Blalock, W. R., Judge, "Excerpts From the Opinion of the Trial Court," Proc., Water Law Conference, Univ. of Tex. 26-29 (1959).

some of the parties here, were applicable to the instant controversy. Hence he was constrained to follow the doctrine of *stare decisis.*

However, on appeal to the San Antonio Court of Civil Appeals in the *Valmont* case, the ultimate and controlling question for determination was whether, in the absence of specific grants of irrigation waters, Spanish and Mexican land grants along the Rio Grande have appurtenant irrigation water rights. The court of civil appeals and the supreme court decided this controlling question in the negative.[301] But this did not negate common law rights. It was mentioned early in the San Antonio court's opinion that "The trial court then defined the watershed so narrowly that most of the riparian claims were also denied. There are other subsidiary issues, but the controlling question is whether the Spanish and Mexican laws recognized riparian rights to irrigate."[302] In the appellate courts' opinions, no further attention was paid to the "subsidiary" watershed issue.

Some problems involving relationships between public water districts and owners of riparian land within their boundaries are discussed later under "Exercise of the Riparian Right—Relations Between Organization and Riparian Proprietors."

Riparian Proprietors

Public Domain

The United States as riparian proprietor.—As original owner of all land and all water on the public domain, the United States made grants of land to individuals and to States under the several public land disposal acts. Under general Congressional enactments, the right to appropriate water on the public domain was accorded to individuals pursuant to local laws, customs, and court decisions. These matters have been discussed previously under "Accrual of the Right—Source of Title to Land."

"The United States, with respect to the lands which it owns in this state [California], is a riparian proprietor as to the streams running through such lands."[303] Originally, of course, as stated earlier, the United States was more than a riparian owner on the public domain—it was an absolute owner of all the water thereon. However, by the Act of 1866,[304] the United States consented that an appropriator should obtain rights pertaining to any public land over which the stream from which he proposed to make his diversion might run.

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[301] *Valmont Plantations* v. *State of Texas,* 163 Tex. 381, 355 S.W. (2d) 502 (1962), affirming 346 S.W. (2d) 853 (Tex. Civ. App. 1961).

[302] 346 S.W. (2d) at 855.

[303] *Palmer* v. *Railroad Comm'n*, 167 Cal. 163, 168, 138 Pac. 997 (1914). See *Lux* v. *Haggin*, 69 Cal. 255, 338-339, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[304] 14 Stat. 253, § 9 (1866).

Hence, a diversion from a stream on the public domain that was recognized by local laws became, by reason of the consent of the United States as expressed in the Act of 1866, effectual to confer upon the diverter the riparian rights in the stream pertaining to the lands of the United States abutting thereon, on the theory that as proprietor of the land the United States by that act granted a part of its property in its land to such diverter.[305]

The Supreme Court of the United States in the *California Oregon Power Company* case declared its views on this matter by saying, among other things,[306] that if the Acts of 1866 and 1870[307] did not constitute an entire abandonment of the common law rule of running waters insofar as the public lands and running waters were concerned, they foreshadowed the more positive declarations in the Desert Land Act of 1877.[308] In one of its early water-rights cases, the Court stated that "the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams."[309]

Holders of possessory rights.—In the early mining days in California, the principle was developed that parties holding possessory rights in separate parcels of land, title being in the United States, have the rights equivalent to riparian owners in the waters of any stream flowing naturally over both parcels.[310]

A contention that a possessor's claim of right in Federal land is based upon unlawful occupation cannot be raised by parties who claim no interest in the land. Occupancy of the claimant constitutes sufficient title as against such a contention, the character of possession of the occupant being a matter to be settled between him and the Federal Government.[311]

Grantees.—As shown previously under "Accrual of the Right—Source of Title to Land—Federal land grants," the United States Supreme Court held that following the enactment of the Desert Land Act,[312] if not before, a patent issued 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 the lands conveyed. Whether the grantee took title to a riparian right in the water depended altogether on the laws of the State in which the land was situated.[313]

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[305] *Duckworth* v. *Watsonville Water & Light Co.*, 170 Cal. 425, 432, 150 Pac. 58 (1915).

[306] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 155-158 (1955).

[307] 14 Stat. 253, § 9 (1866); 16 Stat. 217 (1870).

[308] 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964).

[309] *Atchison* v. *Peterson*, 87 U.S. 507, 512 (1874).

[310] See *Dripps* v. *Allison's Mines Co.*, 45 Cal. App. 95, 100, 187 Pac. 448 (1919).

[311] *Duvall* v. *White*, 46 Cal. App. 305, 310, 189 Pac. 324 (1920).

[312] 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964).

[313] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163-164 (1935).

Thus, in California, where the riparian doctrine has been consistently recognized in numerous court decisions, and where the State courts were called upon to reexamine the question in the light of the *California Oregon Power Company* case, the conclusion was that the State law had been, and still was, to the effect that riparian rights should accrue to the patentees of Federal lands.[314] In a State in which the riparian doctrine has been generally repudiated, the patentee would obviously, under the Supreme Court decision, have no claim to the accrual of a riparian right. And in a State such as Oregon, in which the supreme court had held that the effect of the Desert Land Act was to abrogate the common law rule in respect of riparian rights as to all public lands settled upon or entered after its enactment, *except* for domestic and stockwatering purposes, that restriction would follow as the State law on the subject.[315]

State Lands

Earlier, under "Accrual of the Right—Source of Title to Land—State land grants," the situations in several jurisdictions with respect to the State as owner of riparian land are discussed. Of the high court decisions that have come to the attention of the author with respect to jurisdictions in which the riparian doctrine is recognized, the consensus is that the State holds title to riparian rights in lands which it possesses in a proprietary capacity. By its appropriation legislation, the State offered such waters to the public for appropriation under the statutory procedure. Purchasers of lands from the State thereby became vested with title to riparian rights in such lands, which were inferior to appropriative rights previously vested in the stream but were superior to appropriations subsequently made. These principles are comparable to those affecting the acquisition of riparian rights in Federal lands.

Municipality

A municipality occupies a unique position in the field of riparian proprietorship. It may border a stream, or it may extend on both sides of the stream. In either event, the city may and often does own some parcels of land contiguous to the stream, and private parties own contiguous lands. But by far the greatest number of separately owned parcels within the city limits may not border the stream. Questions then arise as to what are the rights of and limitations upon diversion and distribution of water by the municipality based

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[314] *Williams* v. *San Francisco*, 24 Cal. App. (2d) 630, 633-638, 76 Pac. (2d) 182 (1938), hearing denied by supreme court (1938); *Williams* v. *San Francisco*, 56 Cal. App. (2d) 374, 378-381 (1942), hearing denied by supreme court (1943), certiorari denied, 319 U.S. 771 (1943).

[315] *Hough* v. *Porter*, 51 Oreg. 318, 383-407, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).

upon the riparian doctrine. The general question has been involved in some litigation in the West. A good analysis of the situation is contained in a 1922 California decision discussed immediately below.

California.—A municipality in this State may have riparian rights in a stream by reason of its ownership of riparian land, but it has no greater right to the use of the water than a private owner of the same tract would have. The private proprietor in California is not entitled solely because he owns riparian land to divert water for use on nonriparian land, and a city has no greater right to do so. Nor does the fact that a city borders a stream give it riparian rights therein. The California Supreme Court said that:[316]

> The fact that the city of Antioch is situated upon the San Joaquin River is wholly immaterial in the consideration of its rights in this case. The rights in a stream or body of water which attach to land because it abuts thereon are not of a political nature, but are private rights. They are vested exclusively and only in the owner of the abutting land and they extend only to the use of the water upon the abutting land and none other.

The supreme court said there were cases in some Eastern States holding that a municipality whose boundaries extend to a stream has some rights by reason of that situation to apply the water to public uses within the city—rights similar in nature to that of a riparian proprietor to use the water of the stream on his land. Regardless of the reasoning therein, the court declined to so extend the doctrine of riparian rights in California as to make it political, thereby conferring it upon cities bordering a stream but owning no land abutting thereon.

Texas.—The courts of Texas have been called upon to give some consideration to the question of municipal riparianism. *Grogan* v. *Brownwood*, decided in 1919 by the Austin Court of Civil Appeals, has sometimes been cited as authority for the broad proposition that a city in its corporate capacity may be a riparian proprietor and entitled thereby to supply its inhabitants with water for domestic purposes in preference to the use of water by other riparian proprietors, parties to the suit, for irrigation purposes. However, in evaluating this case in this connection, it is of prime significance that the actual controversy was resolved on the basis of preexisting contractual relationships between the parties. There is in the opinion of the court nothing to suggest that in an ordinary situation the decision should be held to be authority for the unqualified proposition above stated.[317]

The United States District Court at El Paso had for consideration water rights of the City of El Paso, which in its proprietary capacity owned a few hundred acres of land riparian to the Rio Grande. It was the court's opinion

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[316] *Antioch* v. *Williams Irr. Dist.*, 188 Cal. 451, 456, 205 Pac. 688 (1922).
[317] *Grogan* v. *Brownwood*, 214 S.W. 532, 536-539 (Tex. Civ. App. 1919).

that *Grogan* v. *Brownwood* did not reflect any broad rule on the subject of riparian rights for municipal purposes which would be controlling in the instant case. "The general rule is that the riparian rights of a city, owning land along a river, are no different from the rights of an individual owner, and cannot be expanded to justify the use of such rights as a nucleus for supplying and selling water in great quantities to the general public in said municipality, including mainly residents of non-riparian lands." Further, "the great weight of authority agrees that the pattern of riparian rights was never cut to fit the public water requirements of a large municipality." The court of appeals did not disturb this part of the district court's judgment.[318] (But compare the district court's remarks tending to confuse the riparian relationship with what was really a right to the use of return flow.[319])

Other States.—The Washington Supreme Court held that use of waters of a stream to supply the inhabitants of a town is in no sense the exercise of a riparian right.[320] It also said that a city located on a stream must purchase or condemn the rights of downstream riparian proprietors before diverting any of the water thereof to provide for the domestic needs of its citizens.[321]

The City of Mitchell, South Dakota, became a riparian owner by reason of purchase of a tract of land adjacent to a creek. Foregoing any decision as to the quantity of water that the city might or might not lawfully take as a riparian owner, the South Dakota Supreme Court held that the city could not divert water from the stream to supply its nonriparian inhabitants without compensating the lower riparian owner.[322]

In a Nebraska case, a city and a mill were both owners of riparian land, the only city use of the water being for cooling its turbine engines used in connection with the municipal light and water plant, after which the water was returned to the stream. The Nebraska Supreme Court observed that while both parties were riparian landowners, both seemed in this litigation to be relying more on appropriation to beneficial use than on their rights as riparian owners. However, considering their rights as riparian owners, it was held that the city's use was reasonable and not an interference with any use which the downstream mill owner desired to make as a riparian proprietor. In other words, the city was treated as an ordinary riparian owner. Nothing in the court's opinion suggests any question as to the riparian status of a municipality. Under the

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[318] *El Paso County W. I. Dist. No. 1* v. *El Paso*, 133 Fed. Supp. 894, 909-910 (W.D. Tex. 1955), affirmed in part and reversed in part, 243 Fed. (2d) 927 (5th Cir. 1957), certiorari denied, 355 U.S. 820 (1957).

[319] 133 Fed. Supp. 894, 926 (W.D. Tex. 1955).

[320] *Van Dissell* v. *Holland-Horr Mill Co.*, 91 Wash. 239. 241, 157 Pac. 687 (1916). See *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 581, 38 Pac. 147 (1894).

[321] *New Whatcom* v. *Fairhaven Land Co.*, 24 Wash. 493, 498, 513, 64 Pac. 735 (1901).

[322] *Sayles* v. *Mitchell*, 60 S. Dak. 592, 594-595, 245 N.W. 390 (1932). From the demurrer it appeared that the city was located outside the watershed of the stream. The court adopted the principle that land is not riparian to a stream if not within its watershed.

circumstances of this case, with the city making a noninterfering use of the water, there was perhaps no occasion for that question to arise.[323]

Public and Private Organizations

In the early riparian cases, rights of individuals were usually involved, but as time went on, both unincorporated companies and corporations appeared as owners of land for which riparian rights were claimed. No case has come to the author's attention in which the right of a corporation to exercise riparian proprietorship was held to differ from that of an individual, provided that the acquisition of title to land was consonant with its corporate powers. Inclusion of both unincorporated and incorporated companies within the concept of riparian proprietorship seems to have been taken for granted. The same observation applies to public water districts authorized by their enabling legislation to acquire and hold title to land. Relations between water organizations and owners of riparian land are discussed later under "Exercise of the Riparian Right—Relations Between Organization and Riparian Proprietors."

Individual

"Legally defined, a riparian owner is an owner of land bounded by a water course or lake or through which a stream flows."[324]

Most of the controversies over claims of riparian rights have involved individuals. The fact that riparian proprietorship, individual or otherwise, contemplates ownership of land contiguous to the stream or other source has been stated by many courts. (See the previous discussion, "Riparian Lands—Contiguity to Water Source.")

Trespasser.—In an early case, the California Supreme Court held that a trespasser on private land, who uses thereon water to which the land is entitled by reason of its riparian right, does not acquire "such a right in the water as that he may thereafter divert it from the land, or upon being evicted therefrom, convey to a stranger a legal title in the water or in the use thereof." Where such trespassers are evicted from the riparian land before they perfect title by adverse possession, nothing is taken from the rights of the rightful owners by reason of the trespassers' unlawful acts.[325]

Although a trespasser on public lands is for some purposes deemed to be the owner, one who asserts riparian rights as against an upper appropriator of water must show some right, inchoate or otherwise, to the land.[326]

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[323] *Fairbury* v. *Fairbury Mill & Elevator Co.*, 123 Nebr. 588, 592-593, 243 N.W. 774 (1932).

[324] *Sayles* v. *Mitchell*, 60 S. Dak. 592, 594, 245 N.W. 390 (1932).

[325] *Alta Land & Water Co.* v. *Hancock*, 85 Cal. 219, 228-229, 24 Pac. 645 (1890).

[326] *Silver Creek & Panoche Land & Water Co.* v. *Hayes*, 113 Cal. 142, 145, 45 Pac. 191 (1896).

In 1908, the Washington Supreme Court rejected a contention "that a mere squatter on public land who subsequently sells out or abandons his claim acquires, or can acquire, riparian rights in a stream flowing through the land."[327]

The issue of trespass was raised in an Oklahoma case in which, however, the evidence tended to show permission by a riparian owner. "This being so, they were not mere trespassers, and their liability would depend upon whether the use made was unreasonable and was the proximate cause of the injury to plaintiff's land."[328] It may perhaps be inferred from the language used by the court that if the defendants had been "mere trespassers," devoid of all permission, they could not assert riparian rights as against other riparian owners. However, the point was not stated specifically, even by *dictum*.

Appropriation of water by riparian proprietor.—In chapter 7, under "Who May Appropriate Water," it is shown that in California, Texas, and Washington a person may be possessed of rights to the use of the waters of a stream both because of the riparian character of the land owned by him and also as an appropriator. There are some circumstances under which it might be advantageous for such a riparian proprietor to exercise his riparian rather than his appropriative right, such as if the appropriative right had been acquired after most of the riparian lands on the stream had passed to private ownership. Or it might be advantageous to appropriate floodflow for storage for late-season use of the water.[329]

It is also shown, on the contrary, that in Oregon it is competent for a riparian owner to make an appropriation of water for use on his own riparian land and in such a case he may elect to claim a right to the use of the water either as a riparian owner or as an appropriator; *but* he cannot be both at once.[330]

Attachment of Riparian Rights to Various Water Sources

In general, in the States in which the riparian doctrine is recognized, riparian rights attach to watercourses, both surface and subterranean, and to other definite natural sources of water supply on the surface of the earth.

Natural Versus Artificial Water Source

The California Supreme Court expressed itself as being in accord with the general rule that riparian rights exist only in natural watercourses and in waters

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[327] *Kendall* v. *Joyce*, 48 Wash. 489, 492-493, 93 Pac. 1091 (1908).

[328] *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 196, 102 Pac. (2d) 124 (1940).

[329] As noted in chapter 7, under "Who May Appropriate Water—Riparian Proprietor—California," a person claiming water as both a riparian and an appropriator may not necessarily claim the sum of the amount of water under each of the rights.

[330] In this regard, see the later discussion under "Measure of the Riparian Right—As Against Appropriators—Apportionment among riparians and appropriators."

naturally flowing therein.[331] It also said that the right of an owner of adjoining land to use water thereon "applies as well to the water of a lake, pond, slough, or any natural body of water, by whatever name it may be called, as to a running stream."[332]

In Texas, the San Antonio Court of Civil Appeals held that riparian rights do not ordinarily attach to artificial streams in artificial channels; hence they did not attach to water flowing in an artificial drainage system, which in no way took the place of or obtained water directly from any natural stream.[333]

The California Supreme Court acknowledged the general rule that riparian rights exist only in natural watercourses and in waters naturally flowing in them, as noted above. However, the court held that a watercourse, although originally constructed artificially, may, from the circumstances under which it originated and by long continued use and acquiescence by persons interested therein, become in legal contemplation a natural watercourse. In that event, riparian owners thereon and persons affected thereby become possessed of all the rights to the waters therein that they would have in a natural watercourse. The question of riparian rights arose in connection with an artificial bypass that permitted water to flow from Kings River into the San Joaquin River in California. The court concluded that under the circumstances the owner of lands riparian to the San Joaquin River had all the rights with respect to the waters thereof, after being augmented with the overflow from Kings River through the bypass, that any riparian owner would have with respect to waters of a stream to which his land is naturally riparian.[334]

Elsewhere, it has been held that in case of a change made by mutual action of riparian owners, their rights and duties respecting the artificial channel may be the same as if it were the natural one.[335] "The diversion of a stream by substituting an artificial channel for part of a natural one, by common consent, running in the same general direction, which has existed for a considerable time, may have the characteristics of a watercourse, to which riparian rights would attach."[336]

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[331] *Chowchilla Farms* v. *Martin*, 219 Cal. 1, 19, 25 Pac. (2d) 435 (1933). See *Green* v. *Carotto*, 72 Cal. 267, 269, 13 Pac. 685 (1887).

[332] *Turner* v. *James Canal Co.*, 155 Cal. 82, 87, 99 Pac. 520 (1909).

[333] *Harrell* v. *Vahlsing, Inc.*, 248 S.W. (2d) 762, 769-770 (Tex. Civ. App. 1952, error refused n.r.e.).

[334] *Chowchilla Farms Co.* v. *Martin*, 219 Cal. 1, 18-26, 25 Pac. (2d) 435 (1933).

[335] *Jack* v. *Teagarden*, 151 Nebr. 309, 315-316, 37 N.W. (2d) 387 (1949); *Harrington* v. *Demaris*, 46 Oreg. 111, 118-119, 77 Pac. 603, 82 Pac. 14 (1904); *Cottel* v. *Berry*, 42 Oreg. 593, 596, 72 Pac. 584 (1903).

[336] *Hornor* v. *Baxter Springs*, 116 Kans. 288, 290, 226 Pac. 779 (1924).

Appellate courts of Texas held that an artificial canal that diverted all the water of a creek to all intents and purposes took the place of the creek, so that land adjacent to the canal was considered as riparian land. *Santa Rosa Irr. Co.* v. *Pecos River Irr. Co.*, 92 S.W. 1014, 1017 (Tex. Civ. App. 1906, error refused); *McKenzie* v. *Beason*, 140 S.W. 246, 247 (Tex. Civ. App. 1911).

For matters concerned with changes of identity from artificial to natural watercourse, see, in chapter 3, "Collateral Questions Respecting Watercourses–Watercourse Originally Made Artificially."

Watercourse

Definite stream.–As defined in chapter 2, a watercourse may be taken for the purpose of this discussion as a definite stream of water in a definite natural channel, originating from a definite source or sources of supply. It includes the underflow. The stream may flow intermittently or at irregular intervals, if that is characteristic of the sources of water supply in the area.

Most problems relating to riparian rights that have reached the high courts of the West have related to rights or claims of right to the use of definite flowing streams of water. Although the riparian right may relate to definite sources other than watercourses, nevertheless the concept of a natural flowing stream and of lands contiguous thereto is expressed or implicit in much that is written and said about the riparian doctrine. Except in contests over the existence or essential qualifications of a watercourse, or in other situations in which accurate terminology is indicated, the terms "watercourse," "stream," and "definite natural stream" are often used synonymously.

In a lengthy review of the riparian doctrine by the California Supreme Court in 1886, it was stated that each riparian proprietor has a right to the "natural flow of the watercourse"; that each person "through whose land a watercourse flows" has such right; and that there may be a "continuous watercourse" through a body of swamp lands.[337] The amendment to the State constitution adopted 42 years later speaks specifically of "Riparian rights in a stream or water course * * *."[338]

Court decisions of various other Western States have noted the relation of riparian rights to watercourses or natural streams. For example, "Riparian rights arise out of the ownership of land through or by which a stream of water flows."[339] "Legally defined, a riparian owner is an owner of land bounded by a water course or lake or through which a stream flows."[340] The riparian doctrine has been held by several State courts to apply to the flow of water in the natural channels of all surface streams.[341]

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[337] *Lux* v. *Haggin*, 69 Cal. 255, 391, 413, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[338] Cal. Const. art. XIV, § 3.

[339] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585, 86 S.W. 733 (1905).

[340] *Sayles* v. *Mitchell*, 60 S. Dak. 592, 594, 245 N.W. 390 (1932).

[341] *Clark* v. *Allaman*, 71 Kans. 206, 224, 229, 80 Pac. 571 (1905); *Taylor* v. *Welch*, 6 Oreg. 198, 200 (1876); *Osterman* v. *Central Nebr. Pub. Power & Irr. Dist.*, 131 Nebr. 356, 362-364, 268 N.W. 334 (1936); *Chicago, R. I. & P. Ry.* v. *Groves*, 20 Okla. 101, 111, 93 Pac. 755 (1908); *Wallace* v. *Weitman*, 52 Wash. (2d) 585, 588, 328 Pac. (2d) 157 (1958).

Portion of streamflow.—(1) In the States in which the part of the natural streamflow to which riparian rights attach has been in issue, some distinction has been made between normal flow and extraordinary floodwaters.

(2) Originally, riparian owners in California had a "technical right" to the full flow of the stream.[342] The annually recurring spring floodflows in the major streams flowing from the Sierra Nevada into the San Joaquin Valley were held to be part of the usual and ordinary flow of the stream, so that the rights of the riparian owners included these annually recurring high waters.[343] On the other hand, floodwaters that were not being used by riparian owners and could not be put to any beneficial use by them were held to be subject to appropriation as against such riparian owners.[344]

Since the adoption of the constitutional amendment of 1928,[345] no distinction is recognized in California between ordinary and extraordinary floodflows in a stream, and the right of the riparian owner now extends to whatever water is naturally available but only to the extent of his own reasonable and beneficial use.[346]

The Nebraska Supreme Court has held that the riparian owner is entitled at most to only the ordinary and natural flow of the stream, or so much as necessary for his riparian uses, and cannot claim, as against an appropriator, the floodwaters passing down the channel in times of freshets.[347]

In a highly controversial decision rendered in 1926, the Texas Supreme Court expressed its opinion in *Motl* v. *Boyd* 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."[348]

For several decades, the criteria stated in *Motl* v. *Boyd* for determining this "line of highest ordinary flow" were criticized as impracticable of application; and the phraseology appeared to be wholly foreign to the understanding of expert hydraulic engineers who testified at the trial in *State* v. *Valmont Plantations.*[349] The well-established formula of the hydrologists for determining "base flow" in the instant case was found by the trial judge as closest to the definition in *Motl* v. *Boyd*, and was used by him in making necessary

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[342] *J. M. Howell Co.* v. *Corning Irr. Co.*, 177 Cal. 513, 519, 171 Pac. 100 (1918).

[343] *Miller & Lux* v. *Madera Canal & Irr. Co.*, 155 Cal. 59, 63, 76-77, 99 Pac. 502 (1907).

[344] *Chowchilla Farms* v. *Martin*, 219 Cal. 1, 38, 25 Pac (2d) 435 (1933).

[345] Cal. Const. art. XIV, § 3.

[346] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 368, 40 Pac. (2d) 486 (1935); *Meridian* v. *San Francisco,* 13 Cal. (2d) 424, 445-447, 90 Pac. (2d) 537 (1939).

[347] *Crawford Co.* v. *Hathaway,* 67 Nebr. 325, 373-374, 93 N.W. 781 (1903), overruled on different matters, *Wasserburger* v. *Coffee,* 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966).

[348] *Motl* v. *Boyd,* 116 Tex. 82, 111, 286 S.W. 458 (1926).

[349] *State* v. *Valmont Plantations,* 346 S.W. (2d) 853 (Tex. Civ. App. 1961), affirmed, 163 Tex. 381, 355 S.W. (2d) 502 (1962).

calculations.[350] However, the appellate courts found no riparian rights in the case and hence had no occasion to pass on this application of the definition in *Motl* v. *Boyd*.

Floodwaters of a stream that occur annually with practical regularity, and therefore cannot be said to be unprecedented or extraordinary, are held by the Washington Supreme Court to be part of the stream to which riparian rights attach. The court conceded the possibility that there would be no riparian rights in unprecedented or extraordinary floodwaters, but emphasized that the facts were otherwise in this case.[351]

(3) In contrast with some of the mainland decisions that have limited riparian rights to the lower streamflows, the Supreme Court of Hawaii rendered two decisions the combined result of which is that the riparian doctrine applies, as between major land units contiguous to a stream, to the surplus freshet waters of the stream but *not* to the surplus normal flow.[352]

Return flow from foreign waters.—The courts of California and Washington held that the return flow from foreign waters—that is, waters brought into an area from a different watershed—are not subject to the rights of owners of riparian lands on a stream into which these waters drain, because they do not become a part of the natural waters of such stream.[353]

Continuity of streamflow.—In chapter 3 it is brought out that to constitute a watercourse, continuity of the flow of water is not generally required, although subject to exceptions exemplified by the cited cases.

With respect to the present context—riparian waters—the Washington Supreme Court held that the rights of a lower riparian owner remain attached to water that temporarily disappears in the channel, or sinks in and rises out of it, provided that the water can be traced back to the general course without

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[350] Blalock, W. R., Judge, "Excerpts From the Opinion of the Trial Court," Proc., Water Law Conference, Univ. of Tex., 16, 32-38 (1959).

[351] *Longmire* v. *Yakima Highlands Irr. & Land Co.*, 95 Wash. 302, 305-307, 163 Pac. 782 (1917).

See also, in chapter 3, "Floodflows–Flood Overflows–Overflows not Separated From the Stream–The situation in Washington."

[352] *Carter* v. *Territory of Hawaii*, 24 Haw. 47 (1917); *Territory of Hawaii* v. *Gay*, 31 Haw. 376 (1930), affirmed, 52 Fed. (2d) 356 (9th Cir. 1931), certiorari denied, 284 U.S. 677 (1931).

This is treated in detail in the discussion of riparian rights in Hawaii in chapter 12.

[353] *E. Clemens Horst Co.* v. *Tarr Min. Co.*, 174 Cal. 430, 440, 163 Pac. 492 (1917); *E. Clemens Horst Co.* v. *New Blue Point Min. Co.*, 177 Cal. 631, 635-641, 171 Pac. 417 (1918); *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 392-395, 399-400, 54 Pac. (2d) 1100 (1936); *Elgin* v. *Weatherstone*, 123 Wash. 429, 432-434, 212 Pac. 562 (1923). See *Bloss* v. *Rahilly*, 16 Cal. (2d) 70, 75-76, 104 Pac. (2d) 1049 (1940).

The Texas Supreme Court, in holding that riparian rights attach to streamwaters that do not rise above the line of highest ordinary and normal flow, added that this includes all such waters *regardless of source*. This apparently might sometimes include return flows from foreign waters, but the court did not expressly consider this question. *Motl* v. *Boyd*, 116 Tex. 82, 122, 286 S.W. 458 (1926).

loss of identity of the flow.[354] In the California landmark riparian case of *Lux* v. *Haggin*, the supreme court held that while a regular channel with banks or sides is necessary to constitute a watercourse, "there may be a continuous water-course through a body of swamp lands."[355]

Water while opposite riparian land.—While the right of the riparian owner includes the right to have the water flow naturally in the stream to his riparian land, his right to divert the water begins only when the water naturally reaches his riparian land and extends only so long as the water is there. This facet of the riparian right has been discussed previously in the subtopics "Right to use water attaches only on reaching riparian land" and "Generally no right to water that has left the premises" under "Property Characteristics—Right to the Flow of Water."

Underground Watercourse

Waters in the ground, other than diffused percolating waters, are classed historically for legal purposes as "underflow of stream" and "definite underground stream." Their physical characteristics are discussed in chapters 19 and 20 dealing with ground waters, and underflow is also discussed in chapter 3.

Underflow of stream.—The underflow of a surface stream is the subsurface portion of a watercourse, the whole of which comprises waters flowing in close association both on and beneath the surface. Also referred to as "subflow," it is an integral part of the watercourse. It is "well established that the underground and surface portions of the stream constitute one common supply."[356] In an interstate case decided in 1907, the United States Supreme Court held that evidence of an alleged underflow of the Arkansas River did not warrant a finding that the subsurface water constituted a second and separate stream. It was the Court's opinion that the surface and subterranean flows constituted one stream.[357]

The supreme courts of both California and Texas approved the principle that underflow is riparian water to the same extent as surface streamflow.

(1) California. "With respect to subsurface flow, all riparian owners share correlatively just as in the surface flow."[358] However, in *Anaheim Union Water*

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[354] *Dement Bros. Co.* v. *Walla Walla,* 58 Wash. 60, 64, 107 Pac. 1038 (1910).

[355] *Lux* v. *Haggin,* 69 Cal. 255, 413, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[356] *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 555, 81 Pac. (2d) 533 (1938).

[357] *Kansas* v. *Colorado,* 206 U.S. 46, 114-115 (1907).

[358] *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.,* 78 Cal. App. (2d) 900, 911, 178 Pac. (2d) 844 (1947). Each parcel of riparian land is entitled to its proper share of the entire underflow, provided that no owner may by abstracting water from the underflow diminish the surface stream to the injury of anyone entitled to it. *Verdugo Canyon Water Co.* v. *Verdugo,* 152 Cal. 655, 665, 93 Pac. 1021 (1908). See *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 556, 81 Pac. (2d) 533 (1938).

Company v. *Fuller*, the California Supreme Court determined that the location of land above the underflow of a stream without being contiguous to the surface flow does not carry the right to divert water from the surface stream and conduct it across intervening land to the tract separated from the surface stream and there put it to use *to the injury of lands which abut upon the proper banks of the surface stream.*[359]

In the *Anaheim* case, the court did not pass upon the right of the owner of the overlying land to abstract water from the underflow by pumping. That right was not in issue. The controlling point was lack of contiguity and of access to the surface stream—absence of one of the essential criteria in determining the riparian status of land, from which the right to divert water from the surface stream is derived providing the other criteria are present.

Under the present water policy of the State of California as commanded by the constitutional amendment of 1928,[360] the overlying landowner's right to pump water from the underflow in his land would stand as high as the right of an owner of land contiguous to the surface stream to pump water over the banks onto his land. With respect to such a situation, the California Supreme Court, in construing the amendment, said that the "riparian land owners and the overlying land owners may be said to possess a right to the stream, surface and subsurface, analogous to the riparian right, which should be protected against an unreasonable depletion by an appropriator." The court further held that the right of an overlying landowner would be the same, whether founded on a strictly percolating water right or a right in an underground stream. Whichever it might be considered to be, the right would be exercised by pumping the water from the overlying landowner's ground.[361]

One of the issues in another California case was the claim of a downstream riparian owner of the right to maintain underground basins in the stream full of water in order to support the surface stream flowing over them, so that cattle could be watered from the surface flow. The supreme court held that neither riparian owner was entitled, as a matter of law, to supply its needs from the surface stream if such riparian owner could economically obtain water from the underground basins. It was concluded that either or both riparian owners could be required to endure a reasonable inconvenience or incur a reasonable expense in order that water might be reasonably used by the other.[362]

(2) Texas. In the famous case of *Motl* v. *Boyd*, the Texas Supreme Court partitioned the waters of flowing streams into riparian and nonriparian waters and, by acknowledged *dictum*, included in riparian waters the underflow of streams.[363]

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[359] *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 332, 88 Pac. 978 (1907).
[360] Cal. Const. art. XIV, § 3.
[361] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 375-376, 40 Pac. (2d) 486 (1935).
[362] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 556-562, 81 Pac. (2d) 533 (1938).
[363] *Motl* v. *Boyd*, 116 Tex. 82, 111, 286 S.W. 458 (1926).

Subsequently, the supreme court discussed the rules governing the right of a riparian owner to contract for the use of his proportionate share of riparian water on nonriparian land and stated that: "What has been said with reference to riparian water flowing on the surface of the bed of the stream applies with equal force to riparian water, if any, which might flow through the sand and gravel beneath the surface of the bed of the stream."[364]

Definite underground stream.—In contrast with underflow or subflow, which is an essential part of a watercourse comprising both surface and subterranean waters, a so-called definite underground stream may exist entirely independently of a surface watercourse.

Rights to the use of waters of such an underground stream were litigated as between two riparian owners in a California case. There were no other parties, inasmuch as the two parties litigant owned all the land riparian to this subterranean stream. Their chief uses of the water were for guests at summer resorts. In apportioning the water, the court held that "The question is whether under all circumstances of the case the use of water by the one is reasonable and consistent with the corresponding enjoyment of the right by the other. * * * What constitutes reasonable use is, in the first instance, a question for the trier of facts."[365]

An enactment of the Territory of Dakota in 1866 declared that water running in a natural stream over or under the surface might be used by the landowner as long as it remained there, but that he might not prevent the natural flow of the stream nor pursue nor pollute it.[366] This was carried over into the State laws of both North Dakota and South Dakota, but it has been repealed in both States.[367]

The Dakota Territorial declaration was also adopted by the Territory of Oklahoma and, as amended in 1963, is still on the statute books.[368] The amendment, among other things, respects existing claims of water rights based upon beneficial use, but undertakes to limit the exercise of unused riparian rights to the use of water for domestic purposes only, as defined in the statute. Excess streamflow over such domestic use becomes public water subject to appropriation.[369]

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[364] *Texas Co.* v. *Burkett,* 117 Tex. 16, 25-28, 296 S.W. 273 (1927). Compare the court's further statement, 117 Tex. at 29, concerning testimony that ground waters obtained by excavating on the banks of the stream are underground streams with defined channels.

[365] *Prather* v. *Hoberg,* 24 Cal. (2d) 549, 559-562, 150 Pac. (2d) 405 (1944).

[366] Terr. Dak. Laws 1865-1866, ch. 1, § 256, Civ. Code § 255.

[367] S. Dak. Code § 61.0101 (1939), repealed, Laws 1955, ch. 430, § 1; N. Dak. Cent. Code Ann., § 47-01-13 (1960), repealed, Laws 1963, ch. 419, § 7.

[368] Terr. Okla. Stat. § 4162 (1890), Stat. Ann. tit. 60, § 60 (1961), amended, Laws 1963, ch. 205, § 1, Stat. Ann. tit. 60, § 60 (Supp. 1970).

[369] Regarding this provision and a recent case holding it did not apply to previously vested rights, see the discussion at notes 494 and 497 *infra.*

Some Other Sources

Lake.—Riparian rights inhere in the ownership of lands contiguous to lakes to the same extent as they do with respect to lands bordering on flowing streams.[370]

Such riparian rights extend not only to the use of water for irrigation and household purposes, but likewise to the maintenance of the lake level for recreational purposes.[371] As stated by the Washington Supreme Court, one of the privileges, owned in common, of landownership contiguous to the shore of a nonnavigable lake is access to the water, which carries with it the rights of boating, bathing, swimming, and fishing.[372] And a Texas court said, "Appellee is entitled to the enjoyment and use of his land with the opportunities, advantages, and benefits thereto accruing by reason of a portion thereof being covered by a natural lake, subject only to riparian rights of others * * *."[373]

Pond.—As stated in chapter 2, the difference between a lake and a pond is in size. A pond is a small lake—a compact body of water with defined boundaries, substantially at rest.

The right to use water upon adjacent land applies to the water of a natural pond as well as to any other natural body of water.[374] This principle was applied to a pond (Pitville Pool) formed periodically in the bed of a stream by reason of the natural impounding of the waters of the stream and of a downstream tributary, as well as to other natural ponds.[375] For more detail on the unique Pitville Pool situation, see the later discussion, "Interconnected Water Supplies—Main stream and tributary."

Where all waters of a stream below the highest line of flow are held to be riparian waters, they necessarily include the waters left in the stream in holes

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[370] *Duckworth* v. *Watsonville Water & Light Co.*, 150 Cal. 520, 527, 89 Pac. 338 (1907); *Turner* v. *James Canal Co.*, 155 Cal. 82, 87, 99 Pac. 520 (1909); *Brignall* v. *Hannah*, 34 N. Dak. 174, 185-186, 157 N.W. 1042 (1916); *Sayles* v. *Mitchell*, 60 S. Dak. 592, 594, 245 N.W. 390 (1932); *Humphreys-Mexia Co.* v. *Arseneaux*, 116 Tex. 603, 611, 297 S.W. 225 (1927); *Lakeside Irr. Co.* v. *Kirby*, 166 S.W. 715, 718 (Tex. Civ. App. 1914, error refused); *Snively* v. *Jaber*, 48 Wash. (2d) 815, 819-822, 296 Pac. (2d) 1015 (1956); *Proctor* v. *Sim*, 134 Wash. 606, 612-619, 236 Pac. 114 (1925).

[371] *Los Angeles* v. *Aitken*, 10 Cal. App. (2d) 460, 473-475, 52 Pac. (2d) 585 (1935, hearing denied by supreme court); *Elsinore* v. *Temescal Water Co.*, 36 Cal. App. (2d) 116, 129-130, 97 Pac. (2d) 274 (1939).

[372] *Petition of Clinton Water Dist. of Island County*, 36 Wash. (2d) 284, 287, 218 Pac. (2d) 309 (1950). See *Snively* v. *Jaber*, 48 Wash. (2d) 815, 821-822, 296 Pac. (2d) 1015 (1956).

[373] *Lakeside Irr. Co.* v. *Kirby*, 166 S.W. 715, 718 (Tex. Civ. App. 1914, error refused).

[374] *Turner* v. *James Canal Co.*, 155 Cal. 82, 87, 99 Pac. 520 (1909); *Humphreys-Mexia Co.* v. *Arseneaux*, 116 Tex. 603, 611, 297 S.W. 225 (1927).

[375] *Crum* v. *Mt. Shasta Power Corp.*, 117 Cal. App. 586, 591-597, 4 Pac. (2d) 564 (1931, hearing denied by supreme court); *Crum* v. *Mt. Shasta Power Corp.*, 220 Cal. 295, 299-302, 30 Pac. (2d) 30 (1934); *McArthur* v. *Mt. Shasta Power Corp.*, 3 Cal. (2d) 704, 711-712, 45 Pac. (2d) 807 (1935).

or pools after it has ceased to flow. The water that comes to rest permanently in a basin made by nature for that purpose, although it may have been floodwater at one time, ceases to be floodwater and becomes a lake or pond.[376]

Spring.—The law regarding spring waters is treated later, in chapter 18. If the spring does not flow from the land on which it rises, this subject may merge into that of percolating ground waters and diffused surface waters. If, however, the spring is the fountainhead of a watercourse that is not confined to the tract on which it originates, the laws regarding watercourses apply. This is indicated later under "Interconnected Water Supplies."

Marsh or swamp.—As shown later under "Interconnected Water Supplies—River and cienaga," it was held in California that riparian rights in a river applied to the water in a cienaga—swamp or marsh—which the evidence clearly showed to be a part of the water of the river.[377] In that case the cienaga was directly connected with the river and its waters were part of the river waters. Under the circumstances of a Washington case, on the other hand, it was held that the evidence failed to show any riparian right in the appellant because of the absence from the case of any stream or waterway. "The evidence shows that a marsh or swamp with no outlet existed upon respondent's land. There is some evidence that a depression or possibly an outlet once existed, but such outlet had long since been obliterated, and the only outlet now existing or which has ever been used by the appellant is an artificial one."[378]

Diffused surface water.—In chapter 2, "watercourse" is defined as a definite stream of water in a definite natural channel, originating from a definite source or sources of supply; "lake or pond" is defined as a compact body of water with defined boundaries, substantially at rest; and "diffused surface water" is defined as water that occurs, in its natural state, in places on the surface of the ground other than in a watercourse or lake or pond.

It is true that in moving over the surface of the ground, rain and melting snow follow depressions, both shallow and deep. It is also true that these flows become concentrated in channels for periods of time that may be either brief or protracted, and for distances of varying length. At the point at which the channel with its streamflow begins to conform to the characteristics of a watercourse, these previously diffused surface waters lose their classification as such and become waters of a watercourse, subject to the laws applicable thereto.[379]

Because of the natural physical features involved in the mutual exclusion of diffused surface water and water of a watercourse or lake or pond in the above

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[376] *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 611, 297 S.W. 225 (1927).

[377] *Hall* v. *Webb,* 66 Cal. App. 416, 420, 226 Pac. 403 (1924, hearing denied by supreme court).

[378] *Hayward* v. *Mason,* 54 Wash. 653, 656-657, 104 Pac. 141 (1909).

[379] For a discussion of whether and under what circumstances flood waters of a stream may become diffused surface waters, see, in chapter 3, "Floodflows—Flood Overflows."

definitions, it is difficult to reconcile the doctrine of riparian rights—which rights come into being by reason of contiguity of land to definite natural bodies of water with reasonably defined boundaries—with these normally "vagrant" diffused surface waters. Many controversies have been decided by the high courts respecting the handling of diffused surface waters by drainage and obstruction of their flow—their riddance and avoidance—but few cases have dealt with their capture for the purpose of putting them to beneficial use. The most positive declaration of the nonapplicability of riparian rights to such waters that has come to the attention of the author is in a South Dakota decision. The court said:[380]

> No riparian rights attach to surface waters, nor does the arid region theory of appropriation apply thereto. 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 California, there seems to be little direct authority for the proposition that riparian rights *cannot* attach to diffused surface waters—perhaps because it appears so obvious. Direct support seems to rest chiefly on the holding in *Lux* v. *Haggin*, that if plaintiffs were owners only of swamplands through which there was no watercourse, they could not have a cause of action for invasion of riparian rights because they would then not be *riparian* proprietors.[381] Indirect support may be derived from decisions defining and acknowledging the existence under specific circumstances of watercourses to which riparian rights attach, as against contentions to the contrary, thus at least by implication excluding from attachment of riparian rights waters existing under circumstances that fail to meet the requirements of a watercourse.[382]

The Texas Supreme Court held, at least by necessary implication, that riparian rights do not attach to diffused surface waters, even while concentrated in channels (as such waters necessarily will be at some times and places) so long as they do not assume the characteristics of watercourses. What the court actually held, as against the major contention of defendants that the waters of Barilla Creek were mere diffused surface waters to which water rights do not attach, was that "Barilla Creek under the undisputed evidence and

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[380] *Terry* v. *Heppner*, 59 S. Dak. 317, 318-319, 239 N.W. 759 (1931).

[381] *Lux* v. *Haggin*, 69 Cal. 255, 413, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[382] For example, runoff from the usual and annually recurring fall of rain and snow, running in a defined stream, constitutes a watercourse to which the riparian proprietors' rights attach. *Lindblom* v. *Round Valley Water Co.*, 178 Cal. 450, 453, 173 Pac. 994 (1918).

admitted facts meets all the requirements of a natural water course to which water rights, whether riparian or by appropriation, attach."[383]

For a general discussion of diffused surface waters, including rights to use such waters, see chapter 17.

Interconnected Water Supplies

Main stream and tributary.—Earlier, under "Riparian Lands—Relation to Watershed," some questions litigated in California with respect to relative riparian rights of lands located upon main and tributary streams have been noted. Briefly, the riparian rights of an owner of land situated upon a stream below the confluence of two streams attach to the waters of both branches; the drainage areas of both branches constitute a single watershed with respect to the owner below the confluence. The return flow from water diverted from one of the streams and finding its way into the other remains a part of the waters to which the owner below the confluence is entitled. On the other hand, as between owners of lands abutting upon different branches of a stream above their confluence, the drainage area of each branch is a separate watershed.[384]

Under "Some Other Sources—Pond" (also under "Property Characteristics—Right to the Flow of Water—Right to use water attaches only on reaching riparian land"), above, brief reference has been made to a situation that was litigated concerning the upper northern part of California in which main streams and tributary riparian rights were involved under most unusual physical circumstances. A natural rock reef extended across Pit River shortly below its confluence with Fall River. Above the confluence was an enlargement of the bed of Pit River known as Pitville Pool. During the low water season of each year, the rock reef, acting as a natural barrier, caused a substantial part of the water of Fall River to flow upstream into Pitville Pool. During floods, the waters of the two rivers flowed over the reef, leaving very little of the water of Fall River impounded in the pool. Under these circumstances, lands contiguous only to Pitville Pool were held to have riparian rights in the water of Fall River during the summer months of low flow, but not during the season of floodflow in the winter.[385]

River and slough.—It has long been recognized in California that a slough connected with a watercourse and supplied with water therefrom is a part of

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[383] *Hoefs* v. *Short,* 114 Tex. 501, 510, 273 S.W. 785 (1925).

[384] *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327, 330-331, 88 Pac. 978 (1907); *Holmes* v. *Nay,* 186 Cal. 231, 240-241, 199 Pac. 325 (1921); *Crane* v. *Stevinson,* 5 Cal. (2d) 387, 399-400, 54 Pac. (2d) 1100 (1936); *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 532, 81 Pac. (2d) 533 (1938).

[385] *Crum* v. *Mt. Shasta Power Corp.,* 117 Cal. App. 586, 591-597, 4 Pac. (2d) 564 (1931, hearing denied by supreme court); *Crum* v. *Mt. Shasta Power Corp.,* 220 Cal. 295, 299-302, 30 Pac. (2d) 30 (1934); *McArthur* v. *Mt. Shasta Power Corp.,* 3 Cal. (2d) 704, 711-712, 45 Pac. (2d) 807 (1935).

the watercourse, and that lands contiguous to the slough have riparian rights in the waters of the river with which it is connected during such times as the water of that stream is present in the slough. It is not necessary that the water in the slough be flowing; riparian rights "exist in any body of water, whether flowing or not." And a slough that connects with two rivers is riparian to each river during such periods of time as the water therefrom is flowing in the slough.[386]

River and cienaga.—Likewise, a California court has indicated that riparian rights in a river apply to the water in a cienaga (swamp or marsh) connected with the river. "Whatever water defendants took from the cienaga was the same, so far as riparian rights were concerned, as though the water had been taken directly from the river."[387]

River and lake.—Riparian rights attach to a lake that is part of a stream system as well as to any of its tributaries or to its outlet.[388]

Spring discharging into watercourse.—(1) California. It is well settled in this State that the owner of land upon which there is located a spring, the water from which flows in a natural channel across his land and thence upon or through lands belonging to others, does not have, solely by virtue of his location with respect to the spring, exclusive rights therein. On the contrary, he has only the rights of a riparian owner.[389] The riparian doctrine applies both to the spring and to the natural watercourse that flows away from it.[390]

The same rule applies with respect to a spring on one's land that supplies water to a watercourse by percolation through the soil, rather than in a defined channel. In either case, the spring supplying the stream is a part of the stream insofar as riparian rights are concerned.[391]

Early in the 20th century, the California Supreme Court held that a riparian

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[386] *Turner* v. *James Canal Co.*, 155 Cal. 82, 87-88, 91-92, 99 Pac. 520 (1909); *Miller & Lux* v. *Enterprise Canal & Land Co.*, 169 Cal. 415, 420-421, 147 Pac. 567 (1915); *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 92, 252 Pac. 607 (1926).

[387] *Hall* v. *Webb*, 66 Cal. App. 416, 420, 226 Pac. 403 (1924, hearing denied by supreme court).

[388] *Duckworth* v. *Watsonville Water & Light Co.*, 150 Cal. 520, 523-529, 89 Pac. 338 (1907); *Dougan* v. *Board of County Comm'rs*, 141 Kans. 554, 562, 43 Pac. (2d) 223 (1935).

[389] *Scott* v. *Fruit Growers' Supply Co.*, 202 Cal. 47, 52, 258 Pac. 1095 (1927); *L. Mini Estate Co.* v. *Walsh*, 4 Cal. (2d) 249, 254, 48 Pac. (2d) 666 (1935); *San Francisco Bank* v. *Langer*, 43 Cal. App. (2d) 263, 268, 110 Pac. (2d) 687 (1941).

[390] *Holmes* v. *Nay*, 186 Cal. 231, 234-235, 199 Pac. 325 (1921).

[391] *Gutierrez* v. *Wege*, 145 Cal. 730, 734, 79 Pac. 449 (1905). The claim of the owner of land on which such a spring rises "to a paramount and exclusive right is untenable." *Bigelow* v. *Merz*, 57 Cal. App. 613, 617-618, 208 Pac. 128 (1922, hearing denied by supreme court). The riparian owner's right to have the water of a stream flow to his land does not depend upon the length of the stream above him, but "is the same, whether the stream commences on his neighbor's land or fifty miles away." *Chauvet* v. *Hill*, 93 Cal. 407, 408, 28 Pac. 1066 (1892). See *Eckel* v. *Springfield Tunnel & Dev. Co.*, 87 Cal. App. 617, 622, 262 Pac. 425 (1927, hearing denied by supreme court).

owner who by artificial means increases the flow of a spring on his land, the water being tributary to a creek, was entitled to the increased quantity of water as against a downstream claimant.[392] However, if this so-called "developed" water would have eventually entered the stream by natural processes, then, according to the current water law philosophy of California, it would not be subject to the rules governing developed water, but would be considered part of a common water supply in which all rights of use are now coordinated.[393]

(2) Texas. The owner of a tract of land on which a spring rises and from which the spring water flows into the channel of a stream is not the absolute owner of all the spring water.[394] In the opinion written in an important case in 1905, it seems implicit that the owner of the headspring site has the rights of a riparian owner, and only such rights.[395] And in a more recent case—a controversy between two owners of land riparian to a creek, one of the principal sources of which was a large spring on the land of the upper owner, the Austin Court of Civil Appeals adjudicated the relative rights of the parties solely as proprietors of land riparian to the same creek.[396]

(3) Washington. An early statute, subsequently repealed, provided that ditches for utilization of spring waters should be governed by the laws pertaining to natural streams, but that the person on whose lands the spring waters rose had the prior right thereto if capable of use on his land.[397] While this statute was in effect, the supreme court held that it had no application to a spring having a sufficient flow of water to form a watercourse,[398] provided that the stream was wont to flow from time immemorial.[399] All proprietors of land contiguous to such a spring have riparian rights in its flow. The person on whose land the spring arises has no greater rights in its waters than have the lower riparian owners.[400]

Navigable Watercourses

Decisions in the Western States which recognize the riparian doctrine with respect to nonnavigable waters are not uniform in extending that doctrine to

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[392] *Churchill* v. *Rose,* 136 Cal. 576, 578-579, 69 Pac. 416 (1902); *Gutierrez* v. *Wege,* 145 Cal. 730, 734, 79 Pac. 449 (1905).

[393] Hutchins, W. A., "The California Law of Water Rights" 386, 407, 517 (1956).

[394] *Cluck* v. *Houston & T.C.R.R.,* 34 Tex. Civ. App. 452, 453, 79 S.W. 80 (1904). See the reconstruction court cases of *Tolle* v. *Correth,* 31 Tex. 362, 364-366, 98 Am. Dec. 540 (Military Ct. 1868); *Fleming* v. *Davis,* 37 Tex. 173, 194-201 (Semicolon Ct. 1872).

[395] *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 585-590, 86 S.W. 733 (1905). See *Sun Co.* v. *Gibson,* 295 Fed. 118, 119-120 (5th Cir. 1923).

[396] *Great Am. Dev. Co.* v. *Smith,* 303 S.W. (2d) 861, 862, 864 (Tex. Civ. App. 1957).

[397] Wash. Laws 1889-90, ch. 21, § 15, repealed, Laws 1917, ch. 117, § 47.

[398] *Hollett* v. *Davis,* 54 Wash. 326, 329, 103 Pac. 423 (1909).

[399] *Mason* v. *Yearwood,* 58 Wash. 276, 280, 108 Pac. 608 (1910).

[400] *Nielson* v. *Sponer,* 46 Wash. 14, 15, 89 Pac. 155 (1907).

the waters of navigable watercourses. But it has been so extended by most state courts that have decided the matter. See relevant court decisions below.

The navigation servitude and public rights to which riparian rights may be subject, and the definitions of navigable waters for various purposes, have been discussed in chapter 4.[401] Such matters are only briefly referred to in this subtopic and elsewhere in this chapter, notably under "Purpose of Use of Water—Attractive Surroundings and Recreation—Uses having tangible value—(3) Fishing and propagation of fish," below.

California.—The riparian right attaches to navigable waters to the extent that their navigability is not interfered with. "The riparian owner on a non-tidal, navigable stream has all the rights of a riparian owner not inconsistent with the public easement."[402] A district court of appeal expressed the belief that a lake is not excluded from the application of the constitutional amendment of 1928[403] merely because it is navigable.[404]

The United States Supreme Court held that in the construction of the Central Valley Project, California, Congress elected to take any State-created rights, including riparian rights, on the San Joaquin River—navigable on the lower portion of its course—under its power of eminent domain for reclamation purposes, rather than under its dominant commerce power.[405] Whether Congress could have taken them under its dominant commerce power was therefore immaterial. Riparian lands that had previously benefited from the annual inundations of the San Joaquin River, which ceased with construction of Friant Dam behind which the high floodflows were impounded, were held to have valid riparian water rights under California law, for the deprivation of which compensation must be paid.

Nebraska.—Although aspects of the question have been discussed, the question of riparian rights in navigable streams apparently has not been squarely decided by the Nebraska Supreme Court.[406]

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[401] See especially "Water Rights in Navigable Waterways—Riparian Rights," "Uses of Navigable Water," "Classification of Navigable Waters," and "Determinations of Navigability for Commerce Power and Bed Title Purposes."

[402] *Heilbron* v. *Fowler Switch Canal Co.,* 75 Cal. 426, 432-433, 17 Pac. 535 (1888). The fact that the San Joaquin River between two indicated points is navigable "does not affect riparian rights." *Miller & Lux* v. *San Joaquin Light & Power Corp.,* 120 Cal. App. 589, 612, 8 Pac. (2d) 560 (1932, hearing denied by supreme court). In *Antioch* v. *Williams Irr. Dist.,* 188 Cal. 451, 456, 205 Pac. 688 (1922), the claims of riparian rights of the City of Antioch in the San Joaquin River, which is actually navigable in this locality, were passed upon by the supreme court without regard to the question of navigability.

[403] Cal. Const. art. XIV, § 3.

[404] *Los Angeles* v. *Aitken,* 10 Cal. App. (2d) 460, 474, 52 Pac. (2d) 585 (1935, hearing denied by supreme court).

[405] *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 739, 754-755 (1950). See *Blake* v. *United States,* 295 Fed. (2d) 91, 96 (4th Cir. 1961).

[406] See *Clark* v. *Cambridge & Arapahoe Irr. & Improvement Co.,* 45 Nebr. 798, 804-805,

South Dakota.—Owners of land on navigable streams have, in addition to rights common to the public, certain riparian rights of use and enjoyment of the stream which are incident to ownership of its banks not necessarily dependent upon title to the soil under the water. An impairment of these rights caused by pollution of the streamflow resulting from discharge of sewage into it is a taking, or at least a damaging, of the owner's property.[407]

Texas.—The question of attachment of riparian water-use rights to streamflow does not depend upon the navigability or nonnavigability of the stream.[408] Riparian owners have valuable rights in navigable streams.[409]

Washington.—Although riparian rights apply, within certain limitations, to waters of nonnavigable streams and nonnavigable lakes,[410] the Washington Supreme Court held that owners of uplands bordering on navigable waters cannot assert riparian rights for irrigation as against claims of appropriators.[411]

Measure of the Riparian Right

As Against Other Riparian Proprietors

Natural flow theory versus reasonable use.—Under the natural flow theory, each riparian proprietor was entitled to have the water of the stream maintained in its natural state, not sensibly diminished in quantity or impaired in quality. Under the reasonable use theory, the riparian proprietor had a right to be free from an unreasonable interference with his use of the water.

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64 N.W. 239 (1895); *Crawford Co.* v. *Hathaway,* 67 Nebr. 325, 350-351, 93 N.W. 781 (1903), overruled on different matters, *Wasserburger* v. *Coffee,* 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966); *Osterman* v. *Central Nebr. Pub. Power & Irr. Dist.,* 131 Nebr. 356, 362-364, 268 N.W. 334 (1936). This is discussed in the State summary for Nebraska in the appendix.

[407] *Parsons* v. *Sioux Falls,* 65 S. Dak. 145, 150-153, 272 N.W. 288 (1937); *Hildebrand* v. *Knapp,* 65 S. Dak. 414, 418-419, 274 N.W. 821 (1937).

[408] *Barrett* v. *Metcalfe,* 12 Tex. Civ. App. 247, 254, 33 S.W. 758 (1896, error refused); *Bigham Bros.* v. *Port Arthur Channel & Dock Co.,* 100 Tex. 192, 97 S.W. 686 (1906); *King* v. *Schaff,* 204 S.W. 1039, 1042 (Tex. Civ. App. 1918); *Motl* v. *Boyd,* 116 Tex. 82, 111, 286 S.W. 458 (1926).

[409] *Heard* v. *State,* 146 Tex. 139, 146, 148, 204 S.W. (2d) 344 (1947).

[410] *Brown* v. *Chase,* 125 Wash. 542, 553, 217 Pac. 23 (1923); *Proctor* v. *Sim,* 134 Wash. 606, 612-619, 236 Pac. 114 (1925).

[411] *State ex rel. Ham, Yearsley & Ryrie* v. *Superior Court,* 70 Wash. 442, 453, 126 Pac. 945 (1912). In the language of the court: "We are of the opinion that common law riparian rights in navigable waters, if it can be said that the common law recognized such rights, have not existed or been recognized in this state since the adoption of our constitution; at least so far as the upland owner having any right to occupy in any way the beds or shore lands of such waters or to take from such waters water for irrigation as against the state, its grantees, or those who have appropriated such water for purposes of irrigation in compliance with the laws of the state." See also Johnson, R. W., "Riparian and Public Rights to Lakes and Streams," 35 Wash. L. Rev. 580, 601-605 (1960).

The evolution of the riparian owner's right from natural flow to reasonable use is exemplified by the experience in Kansas. The original theory adopted by the Kansas Supreme Court was that the riparian owner had the right to such benefits as would result from the uninterrupted flow of a stream of water through its natural channel across or along his land "without diminution or alteration."[412] Statements in some other decisions rendered as late as the 1930's might, if taken alone, leave the impression that the natural flow theory in its original strict form prevailed consistently in Kansas.[413] This was not the case. Diversions that were not considered unreasonable were not held actionable. And throughout practically the entire period during which statements were being made by the court concerning the riparian owner's right to the natural flow of the stream, modifications were stated in various cases in one form or another.[414] In 1949, the Kansas Supreme Court discussed the two theories and came out strongly in favor of the reasonable use theory.[415]

Prevalence of reasonable use theory.—Recognition of the natural flow theory was limited to a few early cases in western jurisdictions. It was discarded as impracticable in developing communities wherein need for water for consumptive uses caused the courts to turn to a more rational concept.

In 1909, it was said by the California Supreme Court that the "alleged common-law rule" that a riparian proprietor is entitled as a right to the full flow of the stream in its natural course through his land is not subject to the conditions of a climate as dry as that of California, hence such rule is subject to the common right of all to a reasonable share of the water.[416] Actually, as noted immediately below, this reasonable share rule had been adopted earlier by the California courts in an 1857 case.[417] And as stated by the Oregon Supreme Court in an early case, to hold that there could be no diminution whatever in the streamflow as a result of the proprietor's use of the water

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[412] *Shamleffer* v. *Council Grove Peerless Mill Co.*, 18 Kans. 24, 31, 33 (1877).

[413] *Dougan* v. *Board of County Comm'rs*, 141 Kans. 554, 562, 43 Pac. (2d) 223 (1935); *Durkee* v. *Board of County Comm'rs*, 142 Kans. 690, 51 Pac. (2d) 984 (1935); *Frizell* v. *Bindley*, 144 Kans. 84, 91-92, 58 Pac. (2d) 95 (1936); *Smith* v. *Miller*, 147 Kans. 40, 42, 75 Pac. (2d) 273 (1938).

[414] *Emporia* v. *Soden*, 25 Kans. 588, 606 (1881); *Campbell* v. *Grimes*, 62 Kans. 503, 505, 64 Pac. 62 (1901); *Clark* v. *Allaman*, 71 Kans. 206, 241, 245, 80 Pac. 571 (1905); *Wallace* v. *Winfield*, 96 Kans. 35, 40, 149 Pac. 693 (1915), 98 Kans. 651, 653-654, 159 Pac. 11 (1916); *Atchison, T. & S.F. Ry.* v. *Shriver*, 101 Kans. 257, 258, 166 Pac. 519 (1917). In *Frizell* v. *Bindley*, 144 Kans. 84, 91-92, 58 Pac. (2d) 95 (1936), the court stated that there had been no departure from the natural flow rule; yet the syllabus by the court contradicts this by including a paragraph stating that the rights of riparian owners holding under valid titles antedating the appropriation statute of 1886 were prescribed and governed by the doctrine of reasonable use.

[415] *Heise* v. *Schulz*, 167 Kans. 34, 41-43, 204 Pac. (2d) 706 (1949). The reasonable use doctrine was applied in *Weaver* v. *Beech Aircraft Corp.*, 180 Kans. 224, 303 Pac. (2d) 159 (1956).

[416] *Turner* v. *James Canal Co.*, 155 Cal. 82, 94-95, 99 Pac. 520 (1909).

[417] *Hill* v. *King*, 8 Cal. 336, 338 (1857).

would be to deny any valuable use of it; hence, each landowner is allowed to make a reasonable consumptive use of the common supply.[418]

Generally, in the western jurisdictions that recognized the doctrine of riparian rights in streamflow, the theory of equal rights to reasonable use of the water was specifically adopted.[419] This was subject, however, to certain preferences and exceptions regarding natural or domestic uses which are discussed later under "Purpose of Use of Water."

Some implications of reasonableness.—(1) Application to the individual. Each riparian owner is entitled, as against all other riparian owners, to a reasonable use of the stream for useful and beneficial riparian purposes, necessarily subject to such diminution of the streamflow as may be caused by the reasonable use of the water by other riparian owners for their own proper purposes.[420] Each riparian owner is entitled to his just share of the available water.[421]

(2) But the rights of riparian owners are reciprocal. They severally have the right to make any use of the water that is beneficial and practical, but by reason of concurrence of rights there arises the reciprocal duty of each to limit his taking to a reasonable quantity.[422] The use of water by any one riparian owner must be consistent with the rights of other owners of land riparian to the same source of supply;[423] and the reasonableness of the quantity of water to which any one owner is entitled is measured by comparison with the needs of other riparian owners.[424] Reasonable use of the water necessarily precludes unreasonable waste.[425]

(3) Limitation to actual needs of proprietor. The riparian right to the use of water is limited to the actual needs of the proprietors, with the least possible

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[418] *Weiss* v. *Oregon Iron & Steel Co.*, 13 Oreg. 496, 498-502, 11 Pac. 255 (1886).

[419] *Hill* v. *King*, 8 Cal. 336, 338 (1857); *Carter* v. *Territory of Hawaii*, 24 Haw. 47, 70 (1917); *Heise* v. *Schulz*, 167 Kans. 34, 41-43, 204 Pac. (2d) 706 (1949); *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 351-353, 373, 93 N.W. 781 (1903); *Bigelow* v. *Draper*, 6 N. Dak. 152, 162-163, 69 N.W. 570 (1896); *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 195, 102 Pac. (2d) 124 (1940); *Coffman* v. *Robbins*, 8 Oreg. 278, 282 (1880); *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 267, 143 N.W. 124 (1913); *Baker* v. *Brown*, 55 Tex. 377, 379-380 (1881); *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 582-583, 38 Pac. 147 (1894).

[420] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501,534, 81 Pac. (2d) 533 (1938); *Crum* v. *Mt. Shasta Power Corp.*, 220 Cal. 295, 312, 30 Pac. (2d) 30 (1934). "Each riparian owner is entitled to the reasonable use of the waters as an incident to his ownership, and as all owners upon the same stream have the same right of reasonable use, the use of each must be consistent with the rights of others, and the right of each is qualified by the rights of others." *McEvoy* v. *Taylor*, 56 Wash. 357, 358, 105 Pac. 851 (1909).

[421] *Parker* v. *El Paso County W. I. Dist. No. 1*, 116 Tex. 631, 642-643, 297 S.W. 737 (1927).

[422] *Parker* v. *Swett*, 188 Cal. 474, 485, 205 Pac. 1065 (1922).

[423] *Crowell* v. *Armstrong*, 210 Cal. 218, 226, 290 Pac. 1036 (1930).

[424] *Pabst* v. *Finmand*, 190 Cal. 124, 129, 211 Pac. 11 (1922).

[425] *Turner* v. *James Canal Co.*, 155 Cal. 82, 92, 99 Pac. 520 (1909).

injury to other interested parties on the stream. No riparian can successfully claim more water than he actually uses; and what he does use must be for a beneficial purpose, without unnecessarily interfering with the rights of others.[426]

Any use that works substantial injury to the common right is unreasonable.[427] "Where the result of the diversion is an unreasonable diminution of the water supply, equity will intervene to restrain an upper riparian owner * * *."[428]

(4) Reasonableness of riparian practices. In one of its early cases, the Washington Supreme Court characterized defendant's irrigation practices as nothing more than allowing water to percolate through the ditch banks along which orchard trees and vegetables were growing, and observed that: "This is not irrigation at all; much less, reasonable irrigation."[429]

In more recent cases, the Washington court held that one of the privileges of landownership on the shore of a nonnavigable lake is access to the water, which carries with it the rights of boating, bathing, swimming, and fishing—all of which rights and privileges are owned in common. In the exercise thereof, any proprietor or his lessee may use the entire surface of the lake so long as he does not unreasonably interfere with the exercise of similar rights by other owners.[430]

The mere method of diverting water from a stream—such as by pumping—is not a factor to be considered in determining the reasonableness of use of the water, so long as the use of the particular method does not deprive others of their equal rights.[431]

Later, under "As Against Appropriators," attention will be called to the California constitutional limitation of riparian rights to reasonable beneficial use under reasonable methods of diversion and use, which resulted from a long series of controversies with appropriators. However, the mandate is also applied as between riparian owners only.[432]

(5) Question of fact. Reasonable use of water as among riparian claimants is a question of fact, for it is impossible to formulate any mathematical rule to determine such rights.[433]

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[426] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 475-476, 487, 128 N.W. 702 (1910).

[427] *Motl* v. *Boyd*, 116 Tex. 82, 115, 286 S.W. 458 (1926).

[428] *Woody* v. *Durham*, 267 S.W. (2d) 219, 221 (Tex. Civ. App. 1954, error refused).

[429] *Shotwell* v. *Dodge*, 8 Wash. 337, 341, 36 Pac. 254 (1894).

[430] *Petition of Clinton Water Dist. of Island County*, 36 Wash. (2d) 284, 287, 218 Pac. (2d) 309 (1950); *Snively* v. *Jaber*, 48 Wash. (2d) 815, 821-822, 296 Pac. (2d) 1015 (1956). See also *Bach* v. *Sarich*, 74 Wash. (2d) 575, 445 Pac. (2d) 648, 651 (1968).

[431] *Charnock* v. *Higuerra*, 111 Cal. 473, 481, 44 Pac. 171 (1896).

[432] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 556-562, 81 Pac. (2d) 533 (1938).

[433] *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.*, 78 Cal. App. (2d) 900, 911, 178 Pac. (2d) 844 (1947).

Application of the rule of reasonableness necessarily involves determinations of questions of fact,[434] of which the following are significant. In determining whether a use would be unreasonable, consideration would be taken of the size and character of the stream, the quantity of water taken, and all other circumstances surrounding the case.[435] Due consideration would be given, in addition to character and size of the watercourse, to location, uses to which it may be applied, and general usage of the country in similar cases; and on the question of reasonableness of use by the upper proprietor, there may be taken into consideration also the character and extent of his business, as well as the use to which the lower proprietor is putting the water.[436] In 1905, the Texas Supreme Court, in summing up the riparian owner's right of reasonable use of water, included the observation that:[437]

> It is true that oftentimes it will be found difficult to determine what is a reasonable use of water under existing conditions; however, the same difficulty is encountered by courts in the determination of questions of reasonable conduct on the part of individuals in every phase of life and in all classes of business, but that constitutes no reason for rejecting the rule which makes reasonable use the standard by which to determine conflicting claims. Courts have ample authority to ascertain the relative rights of riparian owners and to regulate the manner of using the water.

(6) Reasonableness of quantity of water. What is a reasonable amount of water may vary not only with the circumstances of each particular case, but also from one year to another, "for the amount which might be reasonable in a season of plenty might be manifestly unreasonable in a season of drought."[438] The reasonableness of use of water by a riparian proprietor in any particular case has thus been said by the California Supreme Court to be a subject for judicial inquiry, and not for a statewide legislative mandate.[439]

The United States District Court at El Paso summed up the situation by saying that "the riparian's use measure of water is elusive and shrouded in the word 'reasonable,' more unknown than foreknown."[440]

(7) Materiality of source of water in a slough. The source from which the water in a slough is derived is immaterial in determining that contiguous land is

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[434] *Stacy* v. *Delery,* 57 Tex. Civ. App. 242, 247, 122 S.W. 300 (1909); *Weiss* v. *Oregon Iron & Steel Co.,* 13 Oreg. 496, 498-502, 11 Pac. 255 (1886); *Martin* v. *British Am. Oil Producing Co.,* 187 Okla. 193, 194, 102 Pac. (2d) 124 (1940).

[435] *Smith* v. *Stanolind Oil & Gas Co.,* 197 Okla. 499, 502, 172 Pac. (2d) 1002 (1946).

[436] *McDonough* v. *Russell-Miller Mill. Co.,* 38 N. Dak. 465, 471-473, 165 N.W. 504 (1917).

[437] *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 585-586, 86 S.W. 733 (1905).

[438] *Pabst* v. *Finmand,* 190 Cal. 124, 129, 211 Pac. 11 (1922). To the same effect, *Prather* v. *Hoberg,* 24 Cal. (2d) 549, 560, 150 Pac. (2d) 405 (1944).

[439] *Herminghaus* v. *Southern Cal. Edison Co.,* 200 Cal. 81, 117-118, 252 Pac. 607 (1926).

[440] *El Paso County W. I. Dist. No. 1* v. *El Paso,* 133 Fed. Supp. 894, 910 (W.D. Tex. 1955).

entitled to a reasonable share of the water, provided that it comes as a result of natural forces. But if the water comes from different sources at different times of the year, the source does become a material factor in the determination.[441]

Common rights in the flow of water.—All owners of land riparian to a watercourse have a common right therein, each being entitled to sever his share for use on his riparian land.[442] The concept of common rights among riparians in the flow of water was expressed in one of the earliest Texas water cases (in which, however, riparian rights of use of water were not actually involved), as well as in various subsequent decisions.[443]

Use of entire stream by riparian: When permissible.—Some State court decisions have indicated that, for preferred domestic purposes, a riparian proprietor may be allowed to use the entire streamflow, as against lower riparians. This is discussed later under "Purpose of Use of Water."

With respect to other purposes of water use, if all riparian proprietors are not using the water on their particular lands, those who wish to do so may make use of the entire stream,[444] unless and until the others have use for their proportionate shares.[445] Any such riparian owner, until he has use for the water, has no right to object to its use by other owners on their own riparian lands.[446] The use of the entire flow by the latter under such circumstances is not adverse to the rights of the former.[447]

In a case arising at El Paso, the Texas Supreme Court said, by way of *dictum*, that if one of the parties does not take his proportionate share of the riparian water and use it, then that proportion, so long as he does not take it, increases the residue of riparian water in the river available for the use of others.[448]

There is another circumstance under which the entire flow may be taken by a riparian owner—if and when none of such flow would naturally reach the downstream owner during summer periods of low streamflow, or if the quantity that does reach his land is too small to be put to beneficial use. Under such circumstances, diversion and use of the available flow by the upstream

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[441] *Turner* v. *James Canal Co.*, 155 Cal. 82, 91, 99 Pac. 520 (1909).

[442] *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.*, 78 Cal. App. (2d) 900, 911, 178 Pac. (2d) 844 (1947); *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 335, 88 Pac. 978 (1907).

[443] *Rhodes* v. *Whitehead*, 27 Tex. 304, 309, 84 Am. Dec. 631 (1863); *Motl* v. *Boyd*, 116 Tex. 82, 115, 286 S.W. 458 (1926).

[444] *Gould* v. *Eaton*, 117 Cal. 539, 543, 49 Pac. 577 (1897).

[445] *Joerger* v. *Mt. Shasta Power Corp.*, 214 Cal. 630, 636, 7 Pac. (2d) 706 (1932).

[446] *Half Moon Bay Land Co.* v. *Cowell,* 173 Cal. 543, 549, 160 Pac. 675 (1916). An injunction cannot be obtained under such circumstances. *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 550, 555, 81 Pac. (2d) 533 (1938).

[447] *Joerger* v. *Mt. Shasta Power Corp.* 214 Cal. 630, 636, 7 Pac. (2d) 706 (1932).

[448] *Parker* v. *El Paso County W. I. Dist. No. 1*, 116 Tex. 631, 643, 297 S.W. 737 (1927).

riparian cannot be considered unreasonable.[449] As shown earlier ("Property Characteristics—Right to the Flow of Water"), a riparian can complain of the upstream interference with the flow only if it affects the stream where it passes his land. He has no right to go upstream to divert water that under natural conditions would not reach his land.

Use of entire stream by riparian: When not permissible.—The foregoing paragraph relates to the use of the entire streamflow by one riparian for nondomestic purposes *when others are not using or needing or demanding their own shares, or when the flow available upstream would not naturally reach them.* Applying as it does only in the absence of exercise of other legitimate rights, it does not conflict with the California Supreme Court's statement late in the 19th century that "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."[450]

The riparian owner does not have an absolute and exclusive right to all the streamflow in its natural state, but only the right to the benefit, advantage, and use of the water flowing past his land so far as it is consistent with a like right in all other riparian owners.[451] Therefore, as the rights of riparian proprietors on the same stream with respect to each other are mutual and reciprocal, this necessarily follows when they wish to exercise their rights, regardless of whether one of them at such time needs the whole stream for proper irrigation of his land.[452]

In one of its leading riparian cases, the California Supreme Court reiterated the principle that under the riparian doctrine as applied in that State no riparian owner is entitled to the full flow of the stream as it existed in a state of nature, and held that either or both of two owners can be required to endure a reasonable inconvenience or incur a reasonable expense in order that water may be reasonably used by the other. Hence, if a diversion by an upstream proprietor depletes the surface flow at the diversion of a lower riparian owner, the upper owner—if he is to continue his existing diversion—may be required to share the expense of the downstream owner in obtaining his own share of the water from the subsurface supply.[453]

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[449] In *Cowell* v. *Armstrong*, 210 Cal. 218, 226, 290 Pac. 1036 (1930), the court said that "the plaintiffs' case falls in the absence of any proof in the record, first, that any water normally reaches the plaintiffs' lands in the summer season, and, second, that the defendants were making any unreasonable use of the waters of the stream, having due regard for the plaintiffs' rights."

[450] *Harris* v. *Harrison*, 93 Cal. 676, 681, 29 Pac. 325 (1892).

[451] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 373, 93 N.W. 781 (1903), overruled on different matters, *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966).

[452] *Parker* v. *Swett*, 188 Cal. 474, 485, 205 Pac. 1065 (1922); *Learned* v. *Tangeman*, 65 Cal. 334, 336, 4 Pac. 191 (1884); *Barneich* v. *Mercy*, 136 Cal. 205, 206, 68 Pac. 589 (1902).

[453] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 561-562, 81 Pac. (2d) 533 (1938).

Determining the quantity of water.—The California Supreme Court has said that the riparian right generally does not entitle the proprietor to the use of "any specific concrete amount of water"[454]—such as 475 cubic feet per second—because,[455] "No stream in a state of nature would yield any such uniformity. Indeed, the riparian right is in its nature a tenancy in common and not a separate or severable estate."

In the course of its protracted modification of the common law riparian doctrine, the Oregon Supreme Court also emphasized that the right of use by a riparian proprietor is analogous to a tenancy in common with other riparian proprietors on the same stream; that it is correlated with the similar right of every other such landowner; and that in the nature of things it contemplates the right to use a variable quantity of water.[456]

Problems in apportioning water among riparian claimants have presented difficulties.

(1) Adjudication of existence of rights only. Existence of riparian rights has been adjudicated in various cases in which the actual extent of the several rights was not ascertained, leaving to future determinations the settlement of controversies as to specific quantities of water to which the riparians are entitled if such disputes should arise.[457]

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[454] While this is true in most instances, in some of the States where, by statute, the riparian right is limited to actual application of water to beneficial use, thus limiting the unused riparian right (discussed later under "As Against Appropriators—Unused riparian right"), the riparian is required to file a claim stating a specific quantity of water. And this apparently purports to apply regardless of whether the claim is considered as being against an appropriator or as against a riparian. See, e.g., Tex. Rev. Civ. Stat. Ann. art. 7542a, § 4 (Supp. 1970); Wash. Rev. Stat. §§ 90.14.041 and .051 (Supp. 1970), discussed at notes 525 and 527 *infra.* See also the discussion under that subtopic of the contrasting views of the Oregon and South Dakota courts.

[455] *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.*, 209 Cal. 206, 219-221, 287 Pac. 93 (1930). The common law doctrine of riparian rights to the use of water by riparian owners is not a doctrine of fixed rights; that is, the riparian right does not relate to a definite and certain quantity of water. *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 502, 172 Pac. (2d) 1002 (1946).

[456] *Caviness* v. *La Grande Irr. Co.*, 60 Oreg. 410, 420-422, 119 Pac. 731 (1911); *In re Deschutes River & Tributaries*, 134 Oreg. 623, 704-705, 286 Pac. 563, 294 Pac. 1049 (1930). For discussion of this phase, see Hutchins, W. A., "The Common-Law Riparian Doctrine in Oregon: Legislative and Judicial Modification," 36 Oreg. Law Rev. 193, 198-200 (1957).

[457] The California Supreme Court has held that a judgment that finds only that certain parties are entitled to the flow of sufficient water down the stream for certain purposes and that does not find nor determine the specific amount to which the parties are entitled is not fatally defective on that account. *Omnes* v. *Crawford*, 202 Cal. 766, 768-769, 262 Pac. 722 (1927). The court said that in *Strong* v. *Baldwin*, 154 Cal. 150, 163, 97 Pac. 178 (1908), and *Bigelow* v. *Merz*, 57 Cal. App. 613, 208 Pac. 128 (1922), it was held that if a controversy should arise as to the specific amount of water to which the parties are entitled, this might well abide the result of a future determination.

(2) Adjudication and apportionment of water. On the other hand, in various cases, courts have been called upon to define the extent of riparian rights pertaining to a particular stream and to apportion the stream water accordingly. Where landowners who have riparian rights have use for the water and a controversy arises as to an excessive use by one as against the others, the remedy is a division or apportionment of the water in accordance with principles of equity, taking into consideration the reasonable needs of each.[458]

In the absence of State administrative procedure for adjudicating riparian rights quantitatively or of a binding agreement among riparians, or among riparians and appropriators,[459] a suit in equity may be brought to adjudicate the relative rights and to provide through the medium of judicial orders for the enforcement of decrees.[460] In 1905, the Texas Supreme Court stated a proposition, well recognized in other riparian jurisdictions, to the effect that, "Courts have ample authority to ascertain the relative rights of riparian owners and to regulate the manner of using the water."[461]

(3) Problems of criteria to determine apportionment. Necessarily, when riparian rights attaching to a stream have been adjudicated with respect to specific tracts of riparian land, a determination of the quantities of water applicable to these respective tracts requires, in the first instance, adoption of sensible, practicable criteria to govern the determination.

Generally, in handling this question, appellate courts have suggested criteria in greater or less degree, leaving to the judgments and decrees of the trial courts the actual application of pertinent criteria to the facts and circumstances of each individual controversy, taking into consideration the aggregate requirements of the riparians, subject of course to appeal by any dissatisfied party. In deciding one such case, regarding an underground stream, the California Supreme Court pointed out that inasmuch as a riparian owner has no right to any mathematical or specific quantity of water as against others, but only a right in common to take a proportional share of the water,

> [I]t is preferable, whenever possible, to have an apportionment decreed in terms of a percentage or proportional allotment. . . . Although problems of measurement and pumping engendered by

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[458] *Joerger* v. *Mt. Shasta Power Corp.*, 214 Cal. 630, 636, 7 Pac. (2d) 706 (1932); *Mally* v. *Weidensteiner*, 88 Wash. 398, 402, 153 Pac. 342 (1915).

[459] Compare Cal. Water Code § § 4000-4407 (West 1956). For a history of the successful administration of such an agreement respecting a California stream, written by the man who administered the agreement, see Kaupke, C. L., "Forty Years on Kings River" (1957).

[460] *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.*, 78 Cal. App. (2d) 900, 911, 178 Pac. (2d) 844 (1947).

[461] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 586, 86 S.W. 733 (1905). See *Hidalgo County W. I. Dist. No. 2* v. *Cameron County W. C. & I. Dist. No. 5*, 250 S.W. (2d) 941, 944-945 (Tex. Civ. App. 1952).

> reason of the underground character of the flow may have impelled the specific allotment in this case, it may be possible upon the retrial to decree an apportionment in a proportional or some other more equitable form. The apportionment should be measured in the "manner best calculated to a reasonable result," and the court may adopt any standard of measurement "that is reasonable on the facts to secure equality."[462]

The question of apportionment criteria has had the attention of California courts in a number of cases. Leading statements in court opinions over the years have been to the effect that: Where many riparian proprietors are involved, consideration must be given to the length of the stream, volume of water, extent of each landownership, character of soil on each tract, and area sought to be irrigated.[463] The area of irrigable land, rather than the area under cultivation, would be properly a controlling element.[464] The relative value of possible uses of riparian tracts may be taken into consideration.[465] The standard of profitable irrigation was applied in one apportionment.[466] And in the well known *Herminghaus* case, it was said that the relative extent of reasonable requirements of the riparian lands may depend upon "location, aridity, rainfall, soil porosity, responsiveness, adaptability to particular forms of production, and many other elements."[467]

In Texas, a court of civil appeals observed that in any controversy between upper and lower riparian owners having equal rights, "the use of the water for irrigation would be proportioned in accordance with the number of acres of

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[462] *Prather* v. *Hoberg,* 24 Cal. (2d) 549, 559-560, 150 Pac. (2d) 405 (1944), citing Wiel, S. C., "Water Rights in the Western States," 3rd ed., vol. 1, § 741, pp. 820-821 (1911). In an earlier case, the court had indicated that as to a surface stream, the apportionment could take the form of fixing fractions of the whole stream but that as to wells pumping from an underground stream, in view of difficulties in ascertaining the total amount of available water, the apportionment should be in terms of a positive quantity of water as one's proper share of the whole. *Verdugo Canyon Water Co.* v. *Verdugo*, 152 Cal. 655, 93 Pac. 1021, 1034-1035 (1908). (The case dealt with complexities of apportioning the water of surface streams and underground flows in their vicinity. In this regard, see also *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 375-376, 40 Pac. (2d) 486 (1935), discussed at note 250 *supra.*) Moreover, in 1947 a district court declared, "As to subflow or underground waters, a definite capacity should be fixed, for it is said to be impracticable to give a proportion of the stream." *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.*, 78 Cal. App. (2d) 900, 911, 178 Pac. (2d) 844 (1947). Nevertheless, the supreme court in *Prather* v. *Hoberg, supra*, did not concede such impracticability. While acknowledging the practical difficulties of measurement, the court suggested the possibility on the retrial of basing the decree on a proportional or "some other more equitable" basis.

[463] *Harris* v. *Harrison*, 93 Cal. 676, 681, 29 Pac. 325 (1892).

[464] *Wiggins* v. *Muscupiabe Land & Water Co.*, 113 Cal. 182, 195, 45 Pac. 160 (1896).

[465] *Southern Cal. Inv. Co.* v. *Wilshire*, 144 Cal. 68, 71, 77 Pac. 767 (1904).

[466] *Half Moon Bay Land Co.* v. *Cowell*, 173 Cal. 543, 549-550, 160 Pac. 675 (1916).

[467] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 117-118, 252 Pac. 607 (1926).

riparian land owned by each of the parties."[468] The South Dakota Supreme Court, on the other hand, held in one case that the actual quantity of water to which a particular riparian owner may be entitled for irrigating his land may and usually does differ for different crops.[469] In another case, that court held that the quantity of water required for irrigation is not necessarily determined by the size of the tract, for the fact of equal acreage does not raise a presumption that the riparian rights of several parties are equal.[470] The South Dakota court in another case said:

> [T]he amount of water, in inches, to which a riparian owner may be entitled for irrigation as against other riparian owners, is absolutely impossible of estimation, as it must continually vary, not only from the varying volume of water flowing down the stream at different times of the year or during different years, but also from the amount of land that may have been settled upon; and the extent of the use of water for the so-called ordinary or natural purposes which in itself varies with the population of the riparian district and the number of domestic animals kept thereon.
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> The trial court was therefore in error in adjudging that defendant Jolly had any rights superior, to use of water for irrigation, over those plaintiffs who possessed riparian lands, either to the extent of 100 miner's inches or to any extent whatsoever.[471]

The court also said, however, that:

> It is the established law of riparian rights that the riparian owner whose land lies the nearer the source of the stream has as against those riparian claimants whose land lies lower down, the right to use, for domestic purposes and watering of his stock, if he needs it, all of the water of the stream to the exclusion of the others. . . .[472]

(4) Apportionment of water by rotation. It is held in both California and Texas that a court may solve the problem of apportionment of riparian water,

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[468] *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1180 (Tex. Civ. App. 1913).

[469] *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 205-206, 130 N.W. 85 (1911).

[470] *Henderson* v. *Goforth*, 34 S. Dak. 441, 452-453, 148 N.W. 1045 (1914). The court thus determined that it was error for the trial court to conclude, as a matter of law, that because the acreages of five claimants were substantially equal, their riparian rights were equal and that each was entitled to one-fifth of the total water supply for irrigating his land.

[471] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 26 S. Dak. 307, 313, 128 N.W. 596, 598 (1910).

Oregon courts have emphasized difficulties in making an equitable apportionment inherent in the nature of riparian rights—analogous to a tenancy in common—in contrast to appropriative rights, which contemplate a tenancy in severalty. This subject is discussed later under "As Against Appropriators—Apportionment among riparians and appropriators."

[472] *Id.* at 312, 128 N.W. at 598. See "Purpose of Use of Water," *infra*, regarding domestic use.

if practicable, by decreeing to the parties the full use of the whole stream or a designated part thereof at intervals—in rotation—rather than on a basis of continuous flow of a segregated part of the stream.[473] (See the later discussion, "Exercise of the Riparian Right.")

(5) Apportionment decree as *res judicata.* In *Los Angeles* v. *Baldwin*, the California Supreme Court determined that so long as the conditions upon which a decree of apportionment is based continue unchanged, the judgment rendered in such an action operates as a bar between the same parties in a subsequent proceeding.[474] But in a specially concurring opinion, it was pointed out that a judgment determining that at a certain time the parties are entitled to the waters in certain proportions is not necessarily conclusive in a subsequent action because the facts upon which rests the determination may then be materially different.

Decrees that actually do purport to apportion the flow of a stream among riparian owners, according to the Oregon Supreme Court, can usually be regarded as *res judicata* only so long as the conditions upon which they were rendered remain the same.[475] Citing the Oregon case, the Oklahoma Supreme Court observed that if a specific apportionment of water is made as between riparians, "it should not follow that rights thereafter are fixed by the decree further than where facts incident thereto coincide with the facts at the time of such decree."[476]

Return of surplus water to the stream.—It is a long-established rule that after making use of the water, any surplus over the quantity which the riparian owner is entitled to consume must be returned to the natural channel of the stream.[477] Some decisions concerning the place of return of riparian water are noted below under "Exercise of the Riparian Right."

As Against Appropriators

The question of measure of the water right of a riparian proprietor as against appropriators on the same stream is the very heart of the riparian-appropriation relationship. This subject is considered at the end of chapter 6 under "Interrelationships of the Dual Water Rights Systems." It is also treated in more detail in the State summaries for individual States in the appendix.

In view of what is said in this chapter concerning the riparian rights measure as among riparians themselves, it is appropriate for purposes of comparison to

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[473] *Harris* v. *Harrison*, 93 Cal. 676, 680-682, 29 Pac. 325 (1892); *Ward County W. I. Dist. No. 3* v. *Ward County Irr. Dist. No. 1*, 117 Tex. 10, 14-16, 295 S.W. 917 (1927).

[474] *Los Angeles* v. *Baldwin*, 53 Cal. 469, 470 (1879).

[475] *In re Silvies River*, 115 Oreg. 27, 31-32, 237 Pac. 322 (1925).

[476] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 502, 172 Pac. (2d) 1002 (1946).

[477] *Haas* v. *Choussard*, 17 Tex. 588, 589-590 (1856); *Stanford* v. *Felt*, 71 Cal. 249, 250, 16 Pac. 900 (1886); *Gould* v. *Stafford*, 77 Cal. 66, 68, 18 Pac. 879 (1888); *Vernon Irr. Co.* v. *Los Angeles*, 106 Cal. 237, 256, 39 Pac. 762 (1895); *Bathgate* v. *Irvine*, 126 Cal. 135, 144, 58 Pac. 442 (1899); *Anderson* v. *Bassman*, 140 Fed. 14, 29 (C.C. N. D. Cal. 1905).

bring together at this point some of the facets of this measure vis-à-vis conflicting appropriative rights.

States involved.—The States in which these interdoctrinal relationships have been substantially involved are Alaska, California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. Riparian rights are recognized in Hawaii, but there is no appropriative system of surface water rights. In the remaining eight States, the riparian water-use doctrine has been generally repudiated, as noted at the outset of this chapter.

Cutoff dates.—Some courts have held that riparian rights in lands that passed into private ownership after enactment of the State water appropriation legislation are inferior to appropriators under the statute. In 1926, the Texas Supreme Court indicated that the enactment of the first appropriation statute in 1889 had this effect with respect to State lands.[478] Previously, the Texas Legislature had set the cutoff date at July 1, 1895, and has not changed it.[479]

Construing together the Congressional Acts of 1866, 1870, and 1877,[480] the Oregon Supreme Court believed that their effect was to dedicate to the public all rights of the Government with respect to the waters and purposes named—which excluded domestic and associated stockwater use—and to abrogate the modified common law rules with respect thereto so far as applicable to all lands entered after March 3, 1877.[481] The United States Supreme Court approved of the reasoning and conclusion of the Oregon court and agreed that the Desert Land Act (1877) applied to public lands entered under other Federal laws, as well as to desert lands.[482] But the court left it to each State to determine for itself whether or not riparian rights would attach to such tracts upon passing into private ownership.[483]

The Nebraska Supreme Court has indicated that a riparian right to the use of a watercourse "may be superior" to a competing appropriative right if the riparian land passed into private ownership from the public domain prior to April 4, 1895, the effective date of the Nebraska irrigation act of 1895, and

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[478] *Motl* v. *Boyd*, 116 Tex. 82, 108, 286 S.W. 458 (1926).

[479] Tex. Laws 1913, ch. 171, § 97, Rev. Civ. Stat. Ann. art. 7619 (1954).

In California, it is the relative time of the inception of private ownership of riparian land as compared to the inception of an appropriative right that is important in this respect. See, in chapter 6, "Interrelationships of the Dual Water Rights Systems—The Statutes in Summary: By States—California." See also "Accrual of the Right—Time of Accrual of Riparian Right," *supra*, with respect to that subject.

[480] 14 Stat. 353, § 9 (1866); 16 Stat. 217 (1870); 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964).

[481] *Hough* v. *Porter*, 51 Oreg. 318, 383-407, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).

[482] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 160-163 (1935).

[483] Following this decision, the California and South Dakota courts asserted that riparian rights in those States attached to lands patented after 1877 as well as before, as discussed at note 72 *supra*.

provided the riparian land has not subsequently lost its riparian status by severance.[484] But the court concluded that an appropriator may be liable for injury to a recognized riparian right "if, but only if, the harmful appropriation is unreasonable in respect to the [riparian] proprietor."[485] The court set forth criteria for determining such reasonableness as well as criteria for determining the appropriateness of an injunction, discussed below under "Unused riparian right." The court concluded that "On the facts of this case the riparian right is superior. Plaintiffs' need for livestock water is greater than defendants' need for irrigation, and the difference is not neutralized by time priorities."[486] The court indicated that if riparian lands passed into private ownership after the effective date of the 1895 act, a competing appropriative right "outranks the riparian right under the facts of the present case."[487] A "Syllabus by the Court" stated in part:

> A right to the use of waters under the doctrine of prior appropriation is superior to a competitive riparian right in land which was part of the public domain prior to April 4, 1895, the effective date of the irrigation act of 1895.
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> . . . .
>
> In respect to competing water claims by an appropriator and by a riparian proprietor, land is considered riparian if by common law standards it was such immediately prior to April 4, 1895, and if it has not since lost its riparian status by severance.[488]

In a 1969 case, the court cited this 1966 case in support of the statement that "Plaintiff does not plead nor prove facts entitling him to vested riparian rights under the common law which might precede April 4, 1895, the effective date of the irrigation act of 1895, which is the cut-off date for the acquisition of riparian rights and the invoking of the law of priority. . . ."[489]

Following the example set by Oregon in its water code of 1909,[490] the legislatures of Kansas in 1945 and South Dakota in 1955—through their rewritten and reenacted water appropriation statutes—undertook to define and to protect as vested rights, the common law riparian rights to the continued use of water to the extent of actual application thereof to beneficial use at the time of enactment, or within a reasonable time thereafter with works then

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[484] *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738, 742, 743, 745 (1966), modified in other respects, 180 Nebr. 569, 144 N.W. (2d) 209 (1966).

[485] 141 N.W. (2d) at 745.

[486] 141 N.W. (2d) at 747. Regarding riparian and appropriative rights both of which dated from before the 1895 act, see chapter 6, note 249.

[487] 141 N.W. (2d) at 742.

[488] 141 N.W. (2d) at 740. In the latter regard, see the discussion at notes 262-264 *supra*.

[489] *Brummund* v. *Vogel*, 184 Nebr. 415, 168 N.W. (2d) 24, 27 (1969). This case appears to have added some uncertainty regarding the status of domestic use of water. This is discussed in the State summary for Nebraska in the appendix.

[490] Oreg. Laws 1909, ch. 216, Rev. Stat. § 539.010 (Supp. 1955).

under construction, all surplus unappropriated flowing water being thereafter subject to appropriation under the statute.[491] In Kansas, while common law claimants without vested rights could be enjoined by appropriators from making subsequent diversions, compensation could be had in an action at law for damages proved for any property taken from a common law claimant by an appropriator. In the Kansas and South Dakota laws, domestic uses could be subsequently initiated and are exempt from appropriation permit requirements, although in Kansas domestic use initiated after the 1945 enactment shall constitute an appropriative right.[492]

A 1967 Texas statute has restricted the exercise of riparian rights, except for domestic or livestock purposes, to the extent of maximum actual application of water to beneficial use made during any calendar year from 1963 to 1967, or until the end of 1970 if works were under construction before the effective date of the act.[493]

An Oklahoma statute, copied from an act of the Dakota Territorial Act of 1886, accorded to the riparian landowner the right to use a definite natural stream only while it remained on his land.[494] The 1963 legislature so amended this section as to provide, among other things, that the riparian proprietor might use water of a definite natural stream *for domestic purposes* only while it remains there; all water in excess thereof to be public water subject to appropriation under the statute.[495] The statute made provision for protection of priorities based on beneficial use of water theretofore made, dating from initiation of the beneficial use. But no such priority right for a beneficial use initiated after statehood shall take precedence over those for a beneficial use

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[491] Kans. Laws 1945, ch. 390, which was extensively amended by Laws 1957, ch. 539, Stat. Ann. § 82a-701(d) (1969); S. Dak. Laws 1955, ch. 430, Comp. Laws Ann. § 46-1-9 (1967).

Under the Oregon legislation, vested rights include prior beneficial use only to the extent that it had not been abandoned for a continuous period of 2 years. Oreg. Rev. Stat. § 539.010 (Supp. 1955).

Under the South Dakota legislation, vested rights, except for domestic use, include beneficial use to the extent of the beneficial use made at the time of the 1955 enactment or within 3 years immediately prior thereto. This legislation includes the additional qualifications that vested rights include rights granted before July 1, 1955, by court decree, as well as uses of water under diversions and applications of water prior to the 1907 water law and not subsequently abandoned or forfeited.

[492] With respect to common law claimants in Kansas, see Kans. Stat. Ann. § § 82a-716 and -717a (1969). See also § 82a-721a.

With respect to domestic use in Kansas and South Dakota, see Kans. Stat. Ann. § § 82a-705, -705(a), and -707(b) (1969); S. Dak. Comp. Laws Ann. § 46-1-5 (1967). See the discussion at note 481 *supra*, regarding domestic use in Oregon. Regarding domestic and stockwatering uses in Oregon, see also Hutchins, *supra* note 456, at 218-219.

[493] Tex. Rev. Civ. Stat. Ann. art. 7542a, § 4 (Supp. 1970).

[494] Terr. Dak. Laws 1865-1866, ch. 1, § 256, Civ. Code § 255 (1877); Terr. Okla. Stat. 1890, § 4162, Stat. Ann. tit. 60, § 60 (Supp. 1961).

[495] Okla. Laws 1963, ch. 205, Stat. Ann. tit. 60, § 60 (Supp. 1970).

with a priority date earlier than the effective date of the 1963 amendment arising by compliance with the appropriation statutes. Provision is made for protection of priorities based on beneficial use theretofore made under various combinations of circumstances.[496] In a recent case, the Oklahoma Supreme Court held that this 1963 legislation did not apply to situations in which it concluded that the rights of the litigants had vested under the laws in existence prior to this amendment, although it was held to have retroactively eliminated certain procedural requirements in previous appropriation statutes.[497]

Segment of streamflow.—This matter is discussed earlier under "Attachment of Riparian Rights to Various Water Sources—Watercourse—Portion of streamflow." Briefly, as against appropriators, the riparian right in California extends to a reasonable and beneficial use of whatever water is naturally available in the stream.[498] In Washington, riparian rights attach not only to the ordinary flow, but to floodwaters that occur annually with practical regularity and hence cannot be said to be unprecedented or extraordinary.[499] In Texas and Nebraska, on the contrary, the riparian right extends to only the ordinary flow, floodwaters being subject to appropriative rights only.[500]

Reasonable and beneficial use.—It is held uniformly by the State supreme courts that have passed on the question that as against an appropriator, the use of water by a riparian owner must be a reasonable benefical use.

This was not always the case in California. In 1926, it was held that as against an appropriator, the riparian owner "is not limited by any measure of reasonableness."[501] The unreasonableness of use by a riparian owner as against an appropriator in this case led to the adoption of a State constitutional amendment in 1928 limiting the right of the riparian owner as against an appropriator (as well as against another riparian owner) to reasonable beneficial

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[496] Okla. Stat. Ann. tit. 82, § 1-A(b)6 (1970), referring to § 32. Regarding some other provisions that conceivably might affect existing riparian rights in Oklahoma, see chapter 6, note 271.

[497] *Oklahoma Water Resources Bd.* v. *Central Okla. Master Conservancy Dist.*, 464 Pac. (2d) 748 (Okla. 1968). For additional details regarding this case, see chapter 6 at notes 272-273.

For further consideration of matters discussed in this subtopic, see the discussion under "Unused riparian right," *infra.*

[498] *Meridian* v. *San Francisco*, 13 Cal. (2d) 424, 445-447, 90 Pac. (2d) 537 (1939).

[499] *Longmire* v. *Yakima Highlands Irr. & Land Co.* 95 Wash. 302, 305-307, 163 Pac. 782 (1917). The court raised the question as to whether this would be the case with unprecedented or extraordinary floodwaters, but there was no such issue in this case.

[500] *Motl* v. *Boyd*, 116 Tex. 82, 111, 286 S.W. 458 (1926); *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 373-374, 93 N.W. 781 (1903), overruled on different matters, *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966).

[501] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 100-101, 252 Pac. 607 (1926); first announced in *Miller & Lux* v. *Madera Canal & Irr. Co.*, 155 Cal. 59, 64, 99 Pac. 502 (1907), and repeated in *Pabst* v. *Finmand*, 190 Cal. 124, 132, 211 Pac. 11 (1922).

use, present and prospective.[502] This was accepted by the California Supreme Court as controlling the State water policy thenceforth.[503] Consequently, in a contest between a riparian and an appropriator, it is necessary that the trial court find especially the quantity of water required for the reasonable beneficial uses of the riparian owner and so used by him, after which a determination may be made as to whether there is surplus water subject to appropriation.[504]

In sustaining the validity of the 1945 statute limiting vested riparian rights for nondomestic purposes, discussed earlier under "Cutoff dates," the Kansas Supreme Court declared that the beneficial use of the water which the individual is making or has the right to make has become the important phase of his water rights.[505]

In the early 1900's the South Dakota Supreme Court approved a limitation to reasonable beneficial use of water not only as among riparians themselves, but also as against appropriators.[506] At about this same period, a Texas court of civil appeals imposed a limitation of reasonable and necessary use upon riparians. The court took the position that to accord to riparian owners the right to have all the water flow past their land as against a statutory appropriator would be to destroy the statute in its entirety; that the riparian owners were entitled to quantities of water reasonably sufficient for irrigation, stockraising, and domestic purposes; but that waters in excess thereof were subject to statutory appropriation.[507] In both South Dakota and Texas, as discussed above under "Cutoff dates," riparian rights for other than domestic or livestock purposes have subsequently been further restricted, as in Kansas, to beneficial use made before or around certain dates.

In Nebraska, as noted above, although riparian rights in lands that passed into private ownership prior to the 1895 Nebraska irrigation act "may be superior" to a competing appropriative right, an appropriator may be liable for injury to a recognized riparian right "if, but only if, the harmful appropriation is unreasonable in respect to the [riparian] proprietor."[508] The court set forth

[502] Cal. Const. art. XIV, § 3.

[503] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 365, 40 Pac. (2d) 486 (1935).

[504] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 524-525, 529-530, 45 Pac. (2d) 972 (1935). Regarding the relative superiority of riparian and appropriative rights and for further discussion of the reasonable beneficial use requirement in California, see, in chapter 6, "Interrelationships of the Dual Water Rights Systems–The Status in Summary: By States–California" and in chapter 13, "Remedies for Infringement–Injunction or Damages or Both–Some State Riparian-Appropriation Situations–California."

[505] *State ex rel. Emery* v. *Knapp*, 167 Kans. 546, 555-556, 207 Pac. (2d) 440 (1949).

[506] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 526-528, 91 N.W. 352 (1902); *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 204, 207, 130 N.W. 85 (1911).

[507] *Biggs* v. *Lee*, 147 S.W. 709, 710-711 (Tex. Civ. App. 1912, error dismissed).

[508] *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738, 742, 743, 745 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 509 (1966).

criteria for determining such reasonableness, discussed later under "Unused riparian right."

Apportionment among riparians and appropriators.—The problem of apportioning water among riparian claimants, in view of the imprecise nature of their reasonable use rights and related factors, is discussed earlier under "As Against Other Riparian Proprietors—Determining the quantity of water."

In a series of cases, the Oregon Supreme Court emphasized the difficulties of making an equitable apportionment inherent in character differences between appropriative and riparian rights—the former contemplating a tenancy in severalty, the latter analogous to a tenancy in common.[509] And the principle was established—and it was reiterated in many court opinions—that a riparian proprietor who claims a right to use of water both as a riparian proprietor and as an appropriator must choose between them.[510]

The Oregon court said that by reason of the fact that the riparian rights doctrine does not provide for a fixed quantity of water to be apportioned to different persons or different tracts of land, that rule "cannot be worked out or applied" under the statutory procedure provided for in the 1909 Oregon water code in adjudicating the relative rights of claimants to use water of a stream system.[511] Therefore, in the adjudication of rights to the Deschutes River system, the supreme court held that a claim denominated as "a riparian right," but which asked for a decree of a specific quantity of water for use in the future, "was, in substance, that of an appropriator." The so-called claim of "riparian right" was actually adjudicated with a date of priority and for a definite quantity of water—in other words, on a basis of prior appropriation.[512]

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[509] *Hough* v. *Porter,* 51 Oreg. 318, 380, 95 Pac. 732 (1908), 98 Pac. 1083, 102 Pac. 728 (1909); *Caviness* v. *La Grande Irr. Co.,* 60 Oreg. 410, 421-422, 119 Pac. 731 (1911). See also *Jones* v. *Conn,* 39 Oreg. 30, 37, 46, 64 Pac. 855, 65 Pac. 1068 (1901).

[510] *Williams* v. *Altnow,* 51 Oreg. 275, 300, 95 Pac. 200, 97 Pac. 539 (1908). "He may be one or the other, but he cannot be both at once." *State ex rel. Pac. Livestock Co.* v. *Davis,* 116 Oreg. 232, 236, 240 Pac. 882 (1925). But in a 1959 case the court appears to have held that grantees of riparian land burdened with a contractual agreement could assert no conflicting rights, as against this agreement, on the strength of an appropriative-rights permit they had subsequently obtained. *Fitzstephens* v. *Watson,* 218 Oreg. 185, 226-229, 344 Pac. (2d) 221 (1959). Hence, they apparently had no option to assert conflicting appropriative rights as against such contractual rights.

In a 1930 case, the California Supreme Court said that "the riparian right is in its nature a tenancy in common and not a separate or severable estate. The moment a right in a natural stream is specifically defined in a concrete inflexible amount, at that moment the right becomes one of priority and not riparian." *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.,* 209 Cal. 206, 220, 287 Pac. 93 (1930). In this respect, the court did not discuss a 1927 case and some earlier California cases, discussed at note 457 *supra,* which did not go this far.

[511] *In re Hood River,* 114 Oreg. 112, 162, 227 Pac. 1065 (1924).

[512] *In re Deschutes River & Tributaries,* 134 Oreg. 623, 692-693, 703-706, 286 Pac. 563, 294 Pac. 1049 (1930).

In the *Deschutes* case, the court noted that the applicable statute, among other things, required a fee to be based, for water power purposes (involved here), on the

Others involved in the cited Oregon cases, besides the riparian claimants, were claiming appropriative rights.

Both of the cited Oregon cases dealt with claimed riparian rights for water power uses initiated prior to the 1909 Oregon water code.[513] That code recognizes and protects, as "vested rights" of a riparian proprietor, his water use "to the extent of the actual application to beneficial use" shortly before or, in some cases, after its enactment, as discussed above under "Cutoff dates."[514] Although the court did not expressly so state, the implication of these opinions apparently is that no *specific* amount may be claimed as a *riparian* right, even to the extent of such *prior beneficial use,* under the Oregon statutory adjudication procedure. Any *specific* quantity apparently must be claimed thereunder as an "appropriative right."[515]

In a South Dakota case, however, the supreme court allowed an award of a specific amount of irrigation water (100 miner's inches) to a riparian who was deemed to have a right superior to a competing appropriative right, where the riparian land had been settled before the 1881 appropriation act.[516] For this

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amount of horsepower, and it also provided for the issuance of a certificate setting forth the "priority of the date, extent, and purpose of the right." The court referred to a question of counsel as to how the extent of the right could be specified if no quantity of water could be mentioned in the proceedings without forfeiting the right. In this regard the court said, "The only answer that we think of to this question is that the quantity of water to which the claimant is entitled under the date of relative priority and the purposes for which it is intended to be used, should be specified as it has been specified in our former memorandum, and no doubt will be, when the time arrives, specified in the certificate of the state engineer, pursuant to the decree of this court. Therefore, as heretofore mentioned, we concluded that the claim of this power company was, in substance, that of an appropriator. We still adhere to that opinion." 134 Oreg. at 705-706.

But see note 510 *supra,* regarding the effect of contractual agreements as construed in *Fitzstephens* v. *Watson,* 218 Oreg. 185, 344 Pac. (2d) 221 (1959). See also *California-Oregon Power Co.* v. *Beaver Portland Cement Co.,* 73 Fed. (2d) 555, 558, 569 (9th Cir. 1934), affirmed in other respects, 295 U.S. 142, 165 (1935).

[513] *In re Hood River,* 114 Oreg. 112, 227 Pac. 1065, 1081 (1924); *In re Deschutes River & Tributaries,* 134 Oreg. 623, 286 Pac. 563, 584-585 (1930).

[514] Oreg. Rev. Stat. § 539.010 (Supp. 1955). See also note 454 *supra,* regarding Texas and Washington legislation.

[515] The provision of the 1909 water code regarding vested rights of riparian proprietors was not mentioned by the supreme court in the *Deschutes* case, but it was discussed in the *Hood* case. Although the court did not expressly so state, its language apparently implies the above proposition. *In re Hood River,* 114 Oreg. 112, 227 Pac. 1065, 1081, 1084 (1924). See Hutchins, W. A., "The Common-Law Riparian Doctrine in Oregon: Legislative and Judicial Modification," 36 Oreg. Law Rev. 193, 207, 212, 219 (1957).

[516] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.,* 26 S. Dak. 307, 128 N.W. 596 (1910).

The court said with respect to the riparian's award of 100 inches as against the competing appropriative right: ". . . there were no findings whatever giving the amount of water flowing down the stream, or the number of persons holding riparian rights along said stream, and nothing whatever upon which it would be possible for the court to base a finding as to what would be a reasonable use of water by Jolly, taking into

purpose, the question of when the riparian irrigation use had begun and the extent of his actual use was not considered by the supreme court and was apparently deemed to be immaterial. Hence it took a position contrary to the Oregon court even without any consideration of the question of vested riparian rights based on prior beneficial use. In a recent case, the court held that unused riparian irrigation rights could be validly abrogated by the 1955 South Dakota appropriation legislation which protected, as vested rights, the rights of riparian owners "to the extent of the existing beneficial use" made shortly before or, in some cases, after its enactment.[517] The court did not consider the question of whether a *specific* amount could be claimed as a vested riparian right as against appropriative rights. A specific amount had been awarded to a riparian landowner for irrigation purposes. The court held that the limitations on the amount awarded were not sustained by the record in the case and it should be redetermined, but the court did not question the matter of its specificity.[518]

Unused riparian right.—This has often been a thorny problem.

In California, the right of future use of water by the riparian proprietor stands as high as the right of present use. Although the riparian owner is now held, as against other riparians and appropriators alike, to reasonable beneficial use, he is not required to exercise his right to keep it in good standing, and his rights are not measured by the quantity of water he is using at the time of his action to enjoin an injurious upstream diversion.[519] Regardless of whether the right is being exercised, it will be protected by declaratory judgment against the possibility of establishment of a prescriptive right.[520]

In the landmark decision in which the California Supreme Court accepted

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consideration the rights of other riparian owners. Was any such finding of the amount reasonable to use necessary as between appellant corporation and Jolly in order for the court to have been justified in its judgment as between these parties? We think not. The court found that 100 inches of water was necessary for the proper irrigation of Jolly's riparian lands. Therefore the right of Jolly to use 100 inches was lawful as against such corporation, which corporation had no rights to the water as against Jolly, save and except its right to restrain Jolly from any waste of such water." *Id.* at 310-311, 128 N.W. at 597.

[517] S. Dak. Comp. Laws Ann. § 46-1-9 (1967).

[518] *Belle Fourche Irr. Dist.* v. *Smiley*, 176 N.W. (2d) 239, 245-246 (S. Dak. 1970).

In South Dakota, riparian rights for domestic purposes are unqualifiedly declared a vested right and are not limited to the amounts beneficially used before any certain water appropriation legislation. See S. Dak. Comp. Laws Ann. § 46-1-9 (1967) and the earlier quotation from the opinion of the South Dakota court in the *Lone Tree Ditch* case, at note 471 *supra.*

Regarding the question of determining a *specific* amount of water for a riparian right to an *underground* stream, see the discussion of California cases at note 462, *supra.*

[519] *San Joaquin & Kings River Canal & Irr. Co.* v. *Fresno Flume & Irr. Co.*, 158 Cal. 626, 631, 112 Pac. 182 (1910).

[520] *Duckworth* v. *Watsonville Water & Light Co.*, 150 Cal. 520, 531-532, 89 Pac. 338 (1907).

the constitutional amendment of 1928 as controlling the new State policy, several important principles were declared. One was that although now the technical infringement of the riparian's paramount right by the exercise of an appropriative right is not actionable, except to establish the prior and preferential right, nevertheless even if there is no substantial infringement of the riparian right, that is, "when there is no material diminution of the supply by reason of the exercise of the 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."[521] Shortly thereafter, it was held that the *prospective* reasonable beneficial uses of the riparian should be protected in the same way pending the time he is ready to make use of the water, the appropriator being allowed to make use of it in the meantime.[522]

As stated earlier under "Cutoff dates," the legislatures of Oregon, Kansas, and South Dakota undertook to eliminate unused riparian rights (except for riparian domestic use rights in one or more States) in more or less similar ways. In Oregon and South Dakota, this was done by essentially denying their future existence as against appropriative rights. In Kansas, while common law claimants without vested rights could be enjoined by appropriators from making subsequent diversions, compensation could be had in an action at law for damages proved for any property taken from a common law claimant by an appropriator.[522a] Validity of the Oregon and Kansas statutes restricting the exercise of riparian rights was sustained by State and Federal courts on the several points presented for determination.[523]

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[521] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 374, 40 Pac. (2d) 486 (1935), construing Cal. Const. art. XIV, § 3.

[522] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.,* 3 Cal. (2d) 489, 524-525, 529-530, 45 Pac. (2d) 972 (1935).

Most California law with respect to conflicting riparian-appropriation interrelationships was made in controversies in which the riparian right was adjudged superior. Regarding differences, as against appropriative rights, that may arise due to the time that lands passed into private ownership, see, in chapter 6, "Interrelationships of the Dual Water Rights Systems—The Status in Summary: By States—California."

[522a] Kans. Stat. Ann. § § 82a-716 and -717a (1969). See also, § 82a-721a which states "Nothing in this act shall be construed as limiting any right of an owner of an estate or interest in or concerning land to recover damage for any injury done to his land or to any water rights appurtenant thereto."

Regarding the subsequent termination of every water right "of every kind" for 3 years' nonuse without sufficient cause, see Kans. Stat. Ann. § 82a-718 (1969) discussed in chapter 14 under "Abandonment and Statutory Forfeiture—Statutory Forfeiture—Rights Subject to Forefeiture—Generally not riparian rights."

[523] Oregon: *In re Willow Creek,* 74 Oreg. 592, 610-620, 625-628, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *In re Hood River,* 114 Oreg. 112, 173-182, 227 Pac. 1065 (1924), by a vote of 4 to 3; *California-Oregon Power Co.* v. *Beaver Portland Cement Co.,* 73 Fed. (2d) 555, 562-569 (9th Cir. 1934), by a vote of 2 to 1. The United States Supreme Court affirmed the court of appeals' decree in this Federal case, but expressed

Constitutionality of the South Dakota statute was upheld by the State supreme court.[524]

A 1967 Texas statute has restricted the exercise of riparian rights, except for domestic or livestock purposes, to the extent of maximum actual application of water to beneficial use made during any calendar year from 1963 to 1967, or until the end of 1970 if works were under construction before the effective date of the act.[525]

The approach of the Washington Supreme Court to the unused riparian rights question was taken in a series of decisions rendered chiefly in the 1920's. Briefly, the right of a riparian owner to use water on or in connection with his riparian land under standards of reasonable and beneficial use may be protected as against an appropriator so long as the riparian right is so exercised. But if the riparian's right is assailed by an intending appropriator, the riparian must show with reasonable certainty that either at present, or within a reasonable time, he will make proper use of the water on his land.[526]

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no opinion as to whether the common law right had been validly modified by State legislation as construed by the State supreme court. 295 U.S. 142, 155-165 (1935).

Kansas: *State ex rel. Emery* v. *Knapp,* 167 Kans. 546, 555-556, 207 Pac. (2d) 440 (1949); *Baumann* v. *Smrha,* 145 Fed. Supp. 617 (D. Kans. 1956), affirmed per curiam, 352 U.S. 863 (1956); *Williams* v. *Wichita,* 190 Kans. 317, 374 Pac. (2d) 578 (1962), appeal dismissed "for want of a substantial Federal question," 375 U.S. 7 (1963), rehearing denied, 375 U.S. 936 (1963); *Hesston & Sedgwick* v. *Smrha,* 192 Kans. 647, 391 Pac. (2d) 93 (1964). The first cited case involved a surface watercourse. The others appear to have involved percolating groundwaters. See chapter 6, note 245.

[524] *Belle Fourche Irr. Dist.* v. *Smiley,* 176 N.W. (2d) 239 (S. Dak. 1970); *Knight* v. *Grimes,* 80 S. Dak. 517, 127 N.W. (2d) 708 (1964).

In *Baeth* v. *Hoisveen,* 157 N.W. (2d) 728 (N. Dak. 1968), the North Dakota Supreme Court apparently concluded that unused riparian rights for nondomestic purposes could be validly abrogated by 1955 and related North Dakota legislation, at least as against appropriative rights acquired thereafter, although the court qualified this. And the court did not deal with 1963 North Dakota legislation regarding priority of water rights, eliminating the 1955 definition of riparian rights and requiring no permit for domestic and livestock purposes. See in chapter 6 "Interrelationships of the Dual Water Rights Systems–The Status in Summary: By States–North Dakota."

[525] If valid under existing law, claims for such rights as required, showing the dates and volumes of water used, shall be filed with the Texas Water Rights Commission to prevent their being extinguished. Tex. Rev. Civ. Stat. Ann. art. 7542a, § 4 (Supp. 1970).

Previously existing legislation has disclaimed any intent to impair vested rights or rights of property. Tex. Rev. Civ. Stat. Ann. arts. 7469, 7507 and 7620 (1954). Relevant provisions in the 1967 statute include Tex. Rev. Civ. Stat. Ann. art 7542a, § § 12 and 14 (Supp. 1970). This 1967 legislation has not been construed by the Texas Supreme Court or courts of civil appeals.

[526] *State* v. *American Fruit Growers, Inc.,* 135 Wash. 156, 161, 237 Pac. 498 (1925). See also *Brown* v. *Chase,* 125 Wash. 542, 549, 553, 217 Pac. 23 (1923); *In re Alpowa Creek,* 129 Wash. 9, 13, 224 Pac. 29 (1924); *Proctor* v. *Sim,* 134 Wash. 606, 616-619, 236 Pac. 114 (1925); *In re Sinlahekin Creek,* 162 Wash. 635, 640-641, 299 Pac. 649 (1931); foreshadowed in *State ex rel. Liberty Lake Irr. Co.* v. *Superior Court,* 47 Wash.

In addition to the fact that unused riparian rights may be limited (as in Washington) or cut off or restricted as of a certain date or time (as in Oregon, Kansas, South Dakota, and Texas, discussed above), the riparian right, as limited, may be subsequently lost in Washington and Kansas if it is unexercised for a certain period of time. Under Washington legislation enacted in 1967, anyone entitled to divert or withdraw water by virtue of his ownership of land abutting a stream, lake or watercourse "who abandons the same, or who voluntarily fails, without sufficient cause," to beneficially use all or any part of such right for any period of 5 successive years after the act's effective date (July 1, 1967) shall relinquish such right or portion thereof (which shall revert to the State and the affected waters become available for appropriation).[527] This legislation has not been construed by the Washington Supreme Court.

310, 313-314, 91 Pac. 968 (1907). See also *United States* v. *Ahtanum Irr. Dist.*, 330 Fed. (2d) 897, 904-905 (9th Cir. 1964), rehearing denied, 338 Fed. (2d) 307, certiorari denied, 381 U.S. 924 (1965).

A number of conjectured alternative meanings of this limitation on riparian rights (which limitation is discussed in chapter 6 at notes 311-313 and in the State summary for Washington in the appendix) are discussed in Corker, C. E., & Roe, C. B., Jr., "Washington's New Water Rights Law–Improvements Needed," 44 Wash. L. Rev. 85, 113-128 (1968).

With respect to riparian use of navigable waters, see the discussion at note 411 *supra*.

[527] Wash. Laws 1967, ch. 233, Rev. Code § 90.14.170 (Supp. 1970). Kans. Stat. Ann. § 82a-701(d) (1969), regarding the restriction date, is discussed earlier under "Cutoff dates" and §§ 82a-703 and -718, regarding forfeiture, are discussed earlier under "Property Characteristics–Severance of Riparian Right From Land–Nonuse of the right–(2) Question of statutory forfeiture," and also in chapter 14.

The 1967 Washington legislation, revised in 1969, also requires that anyone using or claiming water rights other than under a permit or certificate from the Department of Ecology shall file a claim, stating the amount used and time, place, and purpose of use, with the department by June 30, 1974. Failure to do so shall be conclusively deemed a waiver and relinquishment of the right. Wash. Rev. Code §§ 90.14.010-90.14.121. This may present a question for registering unused riparian rights somewhat similar to the question regarding unused riparian rights in Alaska mentioned in chapter 6 at note 228. But in any event, a number of these unused rights might be extinguished for 5 years' nonuse after July 1, 1967, under the statutory provision discussed above, prior to the final June 30, 1974, date for filing water rights claims.

The 1967 Washington legislation also stated that "The legislature hereby affirms the rule that no right to withdraw or divert any water shall accrue to any riparian unless said riparian shall have complied with the provisions of law applicable to the appropriation of water." But this provision (critically discussed in Corker & Roe, *supra* note 526, at 106 *et seq.*) was repealed in 1969. Laws 1967, ch. 233, § 12, creating Rev. Code § 90.14.120 (Supp. 1970), repealed, Laws 1969, ch. 284, § 23.

Alaska's 1966 Water Use Act [Alaska Laws 1966, ch. 50, Stat. § 46.15.010 *et seq.* (Supp. 1966)] apparently purports to convert any riparian rights to appropriative rights, although the act does not appear to include any procedure for establishing evidence of and preserving *unused* rights (except where works were under construction on the act's effective date). At any rate, the act apparently contemplates that its statutory forfeiture provision applicable to appropriative rights may apply to any

In South Dakota, the State supreme court held that the forfeiture provision of an early State water appropriation statute[528] was void as against a riparian owner, but valid as against an appropriator without a riparian right.[529] In 1955, the South Dakota Legislature repealed this earlier provision and substituted another forfeiture provision which expressly only applies to "appropriated water."[530] Thus, in South Dakota the riparian landowner is apparently under no requirement to continue using the water to the extent of his vested right (acquired by beneficial use under the 1955 cutoff provision[531]) after the time the right accrued, or run the risk of losing the right for nonuse.[532]

The Nebraska Supreme Court, in an early case, held that an appropriator might restrain upstream riparians—who had not diverted water until after the appropriative right had vested—from now diverting an injurious quantity from the stream, leaving the riparians to an action to recover damages if any had been sustained.[533] In another case, on general demurrer, it was held that a lower riparian owner could not enjoin continued use of water by an upstream appropriator who had lawfully acquired an appropriative right, constructed works, and put the water to beneficial use, but must rely upon his action to recover such damages, if any, as he might sustain thereby.[534] But in a 1966 case, the Nebraska Supreme Court changed its former rule that riparians could only maintain an action to recover damages against an appropriator. The court held that a lower riparian could enjoin an upstream appropriator depending upon a balancing of the interests involved and the appropriateness of injunctive relief as determined from certain factors. The court considered the following factors as entering the balancing process on the side of the appropriator: (a) the social value which the law attaches to the use of which the appropriation is made; (b) the priority date of the appropriation; and (c) the impracticability of

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appropriative rights that *were formerly riparian rights.* See the discussion in chapter 6 under "Interrelationships of the Dual Water Rights Systems—The Status in Summary: By States—Alaska." This legislation has not been construed by the Alaska Supreme Court.

[528] S. Dak. Laws 1907, ch. 180, § 46. This provided that "When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water."

[529] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.,* 32 S. Dak. 260, 268, 148 N.W. 124 (1913).

[530] S. Dak. Laws 1955, ch. 430, § 1, Comp. Laws Ann. § 46-5-37 (1967).

[531] S. Dak. Comp. Laws Ann. § 46-1-9 (1967).

[532] See also the discussion at notes 231-234 *supra.*

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

[534] *Cline* v. *Stock,* 71 Nebr. 70, 79, 98 N.W. 454 (1904), 102 N.W. 265 (1905). This and the *McCook* case, cited in the preceding note, are discussed in more detail in chapter 13 under "Remedies for Infringement—Injunction or Damages or Both—Some State Riparian-Appropriation Situations—Nebraska."

preventing or avoiding the harm. The following factors were considered as entering the balancing process on the side of the riparian owner: (a) the extent of the harm involved; (b) the social value which the law attaches to the riparian use; (c) the time of initiation of the riparian use; (d) the suitability of the riparian use to the watercourse; and (e) the burden on the riparian proprietor of avoiding the harm. In view of the balancing of the interests in reaching the decision, it is likely that the decision will be more favorable to an appropriator when the riparian right is unused. Even if the balancing process resulted in a preliminary finding favorable to the riparian, the factors to be considered in determining the appropriateness of an injunction may prompt a court to leave the riparian to only an action for damages if the riparian right is unused. The factors to be considered in determining the appropriateness of an injunction constitute a comparative appraisal of all elements of the case, including the following: (a) the character of the interest to be protected; (b) the public interest; (c) the relative adequacy to the plaintiff of injunctive relief and other remedies; and (d) the relative hardship likely to result to the defendant if the injunction is granted and to the plaintiff if the injunction is denied.[535]

Purpose of Use of Water

All Useful Beneficial Purposes

In the historically important case of *Lux* v. *Haggin*, the California Supreme Court expounded the nature of the riparian owner's right in water, stating that each such owner has, in common with those in like situation, an equal right to the "benefit" of the water as it passes through his land "for all useful purposes to which it may be applied."[536] The same court subsequently said he has the right to make "any use beneficial to himself on the riparian land," subject to the rights of other riparian proprietors.[537]

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[535] *Wasserburger* v. *Coffee,* 180 Nebr. 147, 161-164, 141 N.W. (2d) 738 (1966), modified in other respects, 180 Nebr. 569, 144 N.W. (2d) 209 (1966). While the riparian was granted an injunction in this case, the riparian right was not an unused right. In regard to the significance of the 1895 irrigation act, see the discussion at notes 484-489 *supra.* For a critical discussion of this case, see Comment, "The Dual-System of Water Rights in Nebraska," 48 Nebr. L. Rev. 488, 497-498 (1969).

Brummund v. *Vogel,* 184 Nebr. 415, 168 N.W. (2d) 24, 27 (1969), appears to have added some uncertainty regarding the status of domestic use of water. This is discussed in the State summary for Nebraska in the appendix.

[536] *Lux* v. *Haggin,* 69 Cal. 255, 391, 4 Pac. 919 (1884), 10 Pac. 674 (1886). The right extends to irrigation "or other necessary purpose." *Van Bibler* v. *Hilton,* 84 Cal. 585, 588, 24 Pac. 308 (1890).

[537] *Mentone Irr. Co.* v. *Redlands Elec. Light & Power Co.,* 155 Cal. 323, 327, 100 Pac. 1082 (1909); to the same effect, *Smith* v. *Stanolind Oil & Gas Co.,* 197 Okla. 499, 501-502, 172 Pac. (2d) 1002 (1946). In an early Nebraska case the court said that "the riparian owner has the right to use all the water which it is necessary for him to employ for any purpose." *Eidemiller Ice Co.* v. *Guthrie,* 42 Nebr. 238, 253, 60 N.W. 717 (1894).

Natural and Artificial Uses of Water

Distinguished in many riparian jurisdictions.—A distinction between so-called "natural" or "ordinary" uses of water and "artificial" or "extraordinary" uses was made in many American and English cases. It was generally recognized in the Western States that accepted the riparian doctrine.[538] Natural uses of water, as the term is used in the riparian cases, are uses to support life, and artificial uses are business or commercial uses.

Natural uses of water generally include only the use of water for domestic purposes and for the watering of a garden and relatively small numbers of domestic animals. Artificial uses of water generally include the watering of larger herds of stock, irrigation, development of hydroelectric power, mining, manufacturing, industrial, and various other comparable business uses dissociated from domestic connotations.[539] These distinctions are discussed below.

Preferences accorded to natural uses of water.—(1) Wiel's summary. An excellent summary by Wiel as to the distinction between natural and artificial uses of riparian water, and of the preferences accorded to the natural uses, may be paraphrased as follows.[540] Natural uses of water are those arising out of the necessities of life on the riparian land, such as household use, drinking, and watering domestic animals. As discussed below, for these purposes the riparian owner often may be allowed to take the whole flow of the stream if necessary, leaving none to go down to lower riparian proprietors. Artificial uses, on the other hand, are all those that do not minister directly to the necessities of life upon the land. Such uses are primarily for the purpose of improvement, trade,

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[538] *Lux* v. *Haggin,* 69 Cal. 255, 395, 407, 4 Pac. 919 (1884), 10 Pac. 674 (1886); *Wong Leong* v. *Irwin,* 10 Haw. 265, 270-272 (1896); *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 70 (1917); *Clark* v. *Allaman,* 71 Kans. 206, 241-242, 80 Pac. 571 (1905); *Crawford Co.* v. *Hathaway,* 67 Nebr. 325, 353, 93 N.W. 781 (1903); *Shook* v. *Colohan,* 12 Oreg. 239, 244, 6 Pac. 503 (1885); *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.,* 26 S. Dak. 307, 311-313, 128 N.W. 596 (1910); *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 585-590, 86 S.W. 733 (1905); *Hunter Land Co.* v. *Laugenour,* 140 Wash. 558, 571-575, 250 Pac. 41 (1926). In 1955, the North Dakota Legislature declared that the several and reciprocal rights of a riparian owner, other than a municipality, comprise "the ordinary or natural use of water for domestic and stockwatering purposes," but repealed the declaration in 1963. N. Dak. Laws 1955, ch. 345, § 2, Cent. Code Ann. § 61-01-01.1 (1960), amended by Laws 1963, ch. 419, § 1, to delete the language of the declaration completely.

[539] Throughout a 42-year period extending into the 20th century, various decisions of the high courts of Texas announced conflicting points of view as to whether irrigation was a natural or an artificial use of riparian water. In this confused state of the law, the Texas Supreme Court in 1905 examined prior opinions, sorted out the *dicta* and actual authoritative holdings, and rendered a definitive decision to the effect that *irrigation* is an *artificial* use of water, subject to the right of natural use for domestic purposes by other riparian proprietors. *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 585-590, 86 S.W. 733 (1905).

[540] Wiel, S. C., "Water Rights in the Western States," 3d ed., vol. 1, § § 740-744 (1911).

or profit. For these business uses, the riparian owner cannot take all the water to the exclusion of other riparian owners; he can take only what is reasonable with due regard to the uses of others on the same stream.

In considering the matter in *Lux* v. *Haggin*, the California Supreme Court thus summarized the effect of this distinction:[541]

> The real difference here pointed out between the classes of uses is, that (as is assumed) water may be used for *ordinary* purposes without regard to the effects of such use in case of deficiency below; while with reference to extraordinary uses, the effects on those below must always be considered in determining its reasonableness.

(2) Upper and lower natural uses of water. The California Supreme Court observed further, in *Lux* v. *Haggin*,[542] the limitation that the upper riparian owner "may, if *necessary*, consume *all* the water of the stream for those purposes. * * * Indeed, in case of a small rivulet, the necessary consequence of using it at all, by one or more upper owners, for these 'natural' or 'primary' purposes, must often be to exhaust the water." The lower riparian owner is without remedy in such case.[543] But the upper owner has no right to dam and obstruct the flow unreasonably nor to waste surplus water above his needs.[544] And reasonableness has sometimes been said to be a question of fact depending upon all the circumstances. (See the later discussion under "Domestic Use of Water—Reasonableness of the domestic use.")

(3) Natural and artificial uses on the same stream. When natural and artificial uses conflict, the natural uses generally have preference. The California Supreme Court said that irrigation "must always be held in subordination to the rights of all other riparian proprietors to the use of the water for the supply of the natural wants of man and beast."[545]

Domestic Use of Water

A long established part of the riparian right.—The use of water by the riparian owner for domestic purposes was one of the original rights recognized by the common law.[546] This purpose has been specifically held to be a part of

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[541] *Lux* v. *Haggin*, 69 Cal. 255, 407, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[542] 69 Cal. at 395.

[543] *Ferrea* v. *Knipe*, 28 Cal. 340, 343-344 (1865).

[544] *Id.* at 343-345; *Hale* v. *McLea*, 53 Cal. 578, 584 (1879). See *Bernick* v. *Mercy*, 136 Cal. 205, 206, 68 Pac. 589 (1902).

[545] *Alta Land & Water Co.* v. *Hancock*, 85 Cal. 219, 230, 24 Pac. 645 (1890); accord, *Smith* v. *Corbit*, 116 Cal. 587, 592, 48 Pac. 725 (1897), restated in *Drake* v. *Tucker*, 43 Cal. App. 53, 58, 184 Pac. 502 (1919).

[546] Wiel, S. C., *supra* note 540, § 740; *Bathgate* v. *Irvine*, 126 Cal. 135, 142, 58 Pac. 442 (1899); *Honaker* v. *Reeves County W. I. Dist. No. 1*, 152 S.W. (2d) 454, 455 (Tex. Civ. App. 1941, error refused).

the riparian right by the highest courts in most Western jurisdictions in which the riparian doctrine has been recognized.[547]

What domestic use includes.—Domestic uses include drinking, cooking, washing, and laundering—the uses of water necessary for the sustenance of human beings and for their household conveniences. The term is sometimes used to include the watering of farm animals.[548] In 1944, the California Supreme Court defined the term domestic purpose as including "consumption for the sustenance of human beings, for household conveniences, and for the care of livestock."[549] However, as noted later under "Stockwatering," the *number* of farm animals watered usually enters into the determination of natural use of water, in common with drinking and household use for human beings, only to the extent of the number of animals ordinarily kept to sustain the domestic needs of man—beyond this limit, stockwatering usually is not a natural use.

In addition to the foregoing, the term has come to be used to include the watering of garden and other produce reasonably necessary for the riparian owner's domestic consumption.[550] The inclusion of this minor irrigation of homestead and farmstead lands as a part of family domestic use appears in some current statutes and administrative rules and regulations.

Following are legislative definitions in Oklahoma and South Dakota, respectively:

> "Domestic Use" means the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land, and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards and lawns, and water for such purposes may be stored in an amount not to exceed two years supply.[551]

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[547] See the citations under "Natural and Artificial Uses of Water," *supra.* In addition, see *Oklahoma City* v. *Tytenicz,* 171 Okla. 519, 521, 43 Pac. (2d) 747 (1935); *Smith* v. *Stanolind Oil & Gas Co.,* 197 Okla. 499, 500, 172 Pac. (2d) 1002 (1946).

[548] *Shook* v. *Colohan,* 12 Oreg. 239, 244, 6 Pac. 503 (1885), drinking, use for culinary purposes, and watering animals.

[549] *Prather* v. *Hoberg,* 24 Cal. (2d) 549, 562, 150 Pac. (2d) 405 (1944).

[550] *Hough* v. *Porter,* 51 Oreg. 318, 403-404, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909). The court stated that the necessary use of an adequate supply of water for domestic purposes and for the watering of animals needed for the proper subsistence and maintenance of the riparian proprietor and his family no doubt gave rise to the doctrine of riparian rights in the earliest development of the law thereon. This was followed by requirements for navigation, next extended to the use of the water for power purposes, "and later to the production of such garden and grains as was essential to the subsistence of the family of such riparian owner." As civilization spread over the semiarid and arid regions, the riparian right was extended to include irrigation on a large scale as well as other industrial uses. See also *Caviness* v. *La Grande Irr. Co.,* 60 Oreg. 410, 420, 119 Pac. 731 (1911).

[551] Okla. Stat. Ann. tit. 82, § 1-A(a) (1970).

> "Domestic Use," the use of water by an individual, or by a family unit or household, for drinking, washing, sanitary, culinary purposes, and other ordinary household purposes; and irrigation of a family garden, trees, shrubbery or orchard not greater in area than one half acre. Stock watering shall be considered a domestic use.[552]

As employed by the Texas Water Rights Commission,

> *Domestic Use* is the use of water by an individual, or by a family household, for drinking, washing, culinary purposes, irrigation of a family garden and/or orchard when the produce is to be consumed by the family household, and the watering of domestic animals.[553]

These legislative and administrative definitions are similar in including as domestic use the use of water for normal household purposes, and also minor irrigation around the homestead or farmstead primarily for the benefit of the family. Stockwatering as a riparian use is considered later.

Reasonableness of the domestic use.—The element of reasonableness has been imposed upon uses of water for domestic purposes as well as for irrigation. That is, the preference accorded to riparian owners in making use of water for domestic purposes does not entitle the riparian to the *continual* flow of the stream therefor as a matter of law.[554] He may be entitled to only a reasonable use.[555] Nevertheless, some court opinions have indicated that the riparian may take all that he reasonably needs for domestic use even though this may exhaust the entire flow.[556] In an 1896 case, the California Supreme Court indicated, however, that reasonableness is a question of fact depending upon all the circumstances of the case.[557] The supreme court held that the same principles that govern an apportionment of the flow by periods of time—that is, in rotation—among riparian owners for purposes of irrigation, justify such an apportionment for domestic uses.[558] But in a case decided the next year, the court appears to have applied these principles only as among

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[552] S. Dak. Comp. Laws Ann. § 46-1-6(4) (1967).

[553] Tex. Water Rights Comm'n, "Rules, Regulations and Modes of Procedure," rule 115.1(s) (1970 Rev., Jan. 1970).

[554] *Wiggins* v. *Muscupiabe Land & Water Co.*, 113 Cal. 182, 190-193, 45 Pac. 160 (1896).

[555] In *Martin* v. *Burr*, 111 Tex. 57, 62, 228 S.W. 543 (1921), the court said that "upper riparian owners cannot lawfully use the water of a flowing stream for irrigation, when such use materially interferes with the supply required to meet the *reasonable* domestic needs of lower riparian owners, including water for stock." (Emphasis added.)

[556] Apparently as against domestic or other uses of other riparians. *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 26 S. Dak. 307, 128 N.W. 596, 598 (1910); *Caviness* v. *La Grande Irr. Co.*, 60 Oreg. 410, 119 Pac. 731, 735 (1911). See also *Lux* v. *Haggin*, 69 Cal. 255, 395, 4 Pac. 919 (1884), 10 Pac. 674 (1886), discussed at note 543 *supra*.

[557] *Wiggins* v. *Muscupiabe Land & Water Co.*, 113 Cal. 182, 190-193, 45 Pac. 160 (1896).

[558] *Id.* Regarding limitations on damming the streamflow and on wastage of surplus water, see the discussion at note 544 *supra*.

competing irrigation uses, after first stating that each riparian could take as much water as necessary for domestic purposes before any could be used for irrigation.[559]

Commercialized domestic use.—In California, the commercialization of domestic use of water by serving the needs of paying guests on riparian land does not necessarily make it an artificial use. But extensive commercialization to the prejudice of a lower riparian owner cannot be considered a natural use entitling it to preference. This matter was litigated between the owners of two California resorts that drew water from the same underground stream to which the resort lands were riparian. These two resort proprietors owned all the land riparian to the stream.[560] The court was aware of no authority directly in point in answering the question as to what extent the use of water by paying guests

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[559] *Smith* v. *Corbit,* 116 Cal. 587, 592, 48 Pac. 725 (1897). See also *Deetz* v. *Carter,* 232 Cal. App. (2d) 851, 43 Cal. Rptr. 321, 323 (1965); *Drake* v. *Tucker,* 43 Cal. App. 53, 184 Pac. 502, 505 (1919).

In an early Kansas case the court said that "each riparian owner may, without subjecting himself to liability to any lower riparian owner, use of the water whatever is needed for his own domestic purposes and the watering of his stock." *Emporia* v. *Soden,* 25 Kans. 588, 606, 37 Am. Rep. 265 (1881). And the court stated in the syllabus to a 1936 case that each riparian has a primary right to all water needed for domestic use and watering stock, after which all proprietors are equally entitled to share for irrigation purposes what remains in the stream. *Frizell* v. *Bindley,* 144 Kans. 84, 58 Pac. (2d) 95 (1936). See also *Campbell* v. *Grimes,* 62 Kans. 503, 505, 64 Pac. 62 (1901); *Clark* v. *Allaman,* 71 Kans. 206, 241, 80 Pac. 571 (1905); *Atchison, Topeka & S.F. Ry.* v. *Shriver,* 101 Kans. 257, 258, 166 Pac. 519 (1917); *Wallace* v. *Winfield,* 96 Kans. 35, 40, 149 Pac. 693 (1915); *Wallace* v. *Winfield,* 98 Kans. 651, 653-654, 159 Pac. 11 (1916). In a 1949 case, the court said and repeated in its syllabus that "an upper riparian proprietor may impound water for beneficial use for domestic purposes as long as he does not commit waste, and does not *unreasonably* use or divert the water away from the lower riparian owners." (Emphasis added.) *Heise* v. *Schulz,* 167 Kans. 34, 41, 204 Pac. (2d) 706, 710 (1949). This language appears to be somewhat more restrictive than the court's earlier language regarding domestic use, but the court did not expressly negate its earlier language and quoted its previous statement in *Clark* v. *Allaman, supra,* 71 Kans. at 241, that "The restrictions upon the use of water for irrigation, after the primary uses for quenching thirst and for domestic requirements are subserved, are those which justice and equity suggest." Also, in noting that the reasonable use theory had been extended to irrigation in *Frizell* v. *Bindley, supra,* the court quoted its statement in that case, 144 Kans. at 93, to the effect *inter alia* that the use of water for irrigation is "subject to its primary uses of lavandum and potandum." See also *Weaver* v. *Beach Aircraft Corp.,* 180 Kans. 224, 303 Pac. (2d) 159 (1956), which may shed some further illumination on the matter.

By virtue of Kansas legislation in 1945, amended in 1957, although domestic use is exempt from appropriation permit requirements, domestic use initiated after the cutoff date shall constitute an appropriative right. Kans. Laws 1945, ch. 390, amended by Laws 1957, ch. 539, Stat. Ann. § § 82a-705, -705(a), and -707(b) (1969). Regarding this and other aspects of this legislation, see the subtopics "Cutoff dates" and "Unused riparian right" under "Measure of the Riparian Right—As Against Appropriators," *supra.*

[560] *Prather* v. *Hoberg,* 24 Cal. (2d) 549, 560-562, 150 Pac. (2d) 405 (1944).

residing on riparian land is a domestic use (sometimes called a natural use) as distinguished from a commercial use (often referred to as an artificial use). The court held that the fact that human beings are occupants of hotels, apartment houses, boarding houses, auto camps, or resorts of the character in litigation does not necessarily exclude them from the preferential class. But if swimming pools, ornamental pools, boating, and the like—which are not, in themselves, held to be domestic—are furnished as a part of the service to the guests, it may well be that the commercial character of the proprietor's business in serving his guests may be so *extensive* that a lower riparian whose domestic use, whether or not commercialized, would be prejudiced by the business activities of the upper riparian. In that case, the domestic preference would not be accorded to this upstream prejudicial commercial use. On the contrary, the latter commercialized domestic use then becomes an artificial use, subject to the same rule of reasonableness that applies generally to artificial uses of water.

The question as to commercialized domestic use—as with irrigation and other artificial uses—is whether under all the circumstances of the case the use of water by the one is reasonable and consistent with the corresponding enjoyment of the right by the other. This is, in the first instance, a question for the trier of facts.

The question of commercialized stockwatering use is discussed below.

Stockwatering

"Obviously the watering of cattle is a reasonable beneficial use" of water by a riparian owner.[561] From the standpoint of riparian rights to the use of water for stockwatering, the weight of authority is to the effect that two classifications are involved—domestic (natural) and commercial (artificial).

Associated with domestic use.—The riparian right at common law entitled the landowner to water his stock from the stream,[562] a right which is generally recognized in Western States that adopted the riparian doctrine.[563] As in the case of use for household purposes, the landowner generally may take as much of the water as he needs for watering his farmstead domestic animals,[564] even to the extent of consuming, *if necessary*, all the water of the stream for that purpose.[565]

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[561] *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 561, 81 Pac. (2d) 533 (1938).

[562] *Bathgate* v. *Irvine,* 126 Cal. 135, 142, 58 Pac. 442 (1899).

[563] *Emporia* v. *Soden,* 25 Kans. 588, 606 (1881); *Clark* v. *Allaman,* 71 Kans. 206, 241-242, 80 Pac. 571 (1905); *Smith* v. *Stanolind Oil & Gas Co.,* 197 Okla. 499, 500, 172 Pac. (2d) 1002 (1946); *Shook* v. *Colohan,* 12 Oreg. 239, 244, 6 Pac. 503 (1885); *Martin* v. *Burr,* 111 Tex. 57, 62, 228 S.W. 543 (1921); *Petition of Clinton Water Dist. of Island County,* 36 Wash. (2d) 284, 287, 218 Pac. (2d) 309 (1950).

[564] *Smith* v. *Corbit,* 116 Cal. 587, 592, 48 Pac. 725 (1897).

[565] *Drake* v. *Tucker,* 43 Cal. App. 53, 58, 184 Pac. 502 (1919).

See, however, the discussion at notes 557-559 *supra,* regarding an earlier California case and, in note 559, regarding a Kansas case that suggested such rights may be somewhat more restrictive.

The preference accorded to the use of water for watering domestic animals as one of the primary uses of water usually applies only to the number of domestic animals required for ordinary farm domestic uses.[566] In South Dakota, however, the statutory definition of domestic use, quoted earlier, declares flatly that stockwatering shall be considered a domestic use and places no limitation upon the number of stock to which this pertains. And the Oklahoma definition of domestic use appears to recognize the possibility of some commercial stockwatering, "up to the normal grazing capacity of the land."[567]

Not associated with domestic use.—While the watering of large or small herds of stock on a commercial scale is a proper riparian use, subject to the rule of reasonableness, it usually is not a preferred use of the water, although it is a preferred use in South Dakota and perhaps Oklahoma, as noted above. Therefore, the riparian who raises stock on a commercial scale is ordinarily not entitled to exhaust the streamflow for watering his stock, nor to claim preference as against another riparian owner who uses the water for irrigation.

In *Lux* v. *Haggin*, the California Supreme Court recognized that the riparian owner may consume all the water of the stream for domestic purposes and for watering cattle if he requires it therefor, but stated that "it may happen, all the conditions being considered, that the exhaustion of an entire stream by large bands of cattle ought not to be permitted."[568]

The question as to whether, in California, the watering of commercial herds of stock is a preferred use was directly in issue and was decided in the negative in 1930. Plaintiffs, downstream riparian owners, contended that their right as riparian owners to water their commercial herds of about 2,000 head of beef cattle from the stream was superior to the right of defendant, an upstream riparian owner, to use the water for irrigation. The court referred to several California cases cited by plaintiffs, and pointed out that in none of them was more than the ordinary number of domestic animals involved and that there was no indication in the opinions that the common law rule of preference would apply to herds larger than necessary for ordinary domestic use. It was doubted, furthermore, that any authority could be found which would favor, as between commercial livestock use and use for irrigation, one use over the other. "Under the circumstances of this case it must therefore necessarily be concluded that the plaintiffs and the defendants all are entitled to a reasonable use of the waters of the stream for irrigation and for the raising of stock for commercial purposes."[569]

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[566] *Cowell* v. *Armstrong*, 210 Cal. 218, 224-225, 290 Pac. 1036 (1930).

[567] For an interpretation of the intent of the subcommittee that drafted the legislation, in using this phrase, see Rarick, J. F., "Oklahoma Water Law, Stream and Surface Under the 1963 Amendment," 23 Okla. L. Rev. 19, 37 (1970). Minutes of the subcommittee in that author's files are cited.

[568] *Lux* v. *Haggin*, 69 Cal. 255, 407, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[569] *Cowell* v. *Armstrong*, 210 Cal. 218, 224-226, 290 Pac. 1036 (1930). See also *Deetz* v. *Carter*, 232 Cal. App. (2d) 851, 43 Cal. Rptr. 321, 324 (1965).

In Texas, the administrative rules and regulations provide that "Stockraising use is the use of water for watering livestock connected with the operation of a commercial feedlot." The Texas regulations also contain a provision defining livestock use as "the use of water for watering livestock connected with farming, ranching or dairy enterprises."[570]

Irrigation

A long recognized riparian use of water.—In what apparently was the first California decision as to relative rights of riparian proprietors, it was held that the downstream riparian was entitled to the natural flow, undiminished, except by the use of the upstream proprietor for domestic purposes and reasonable irrigation.[571] At about this time, irrigation as a riparian use was being discussed in several Texas cases.[572] Decisions from other States recognizing reasonable irrigation as a proper riparian use are cited earlier under "Natural and Artificial Uses of Water."[573]

Artificial use of water.—Except in Texas, irrigation was not held in any western jurisdiction, so far as the author has been able to ascertain, to be a natural use of riparian water as distinguished from an artificial use. On the contrary, reasonableness of use for irrigation has consistently measured the riparian right as among riparian owners. As against uses of water for domestic purposes and the watering of farm livestock, the irrigation right is subordinate and applies only to the surplus of water above the quantities required for these primary or natural uses. "These natural wants supplied and protected, the right to a reasonable use of the surplus water by the riparian proprietor, in common with others in like situation, for purposes of irrigation, has been acknowledged and recognized, but it cannot be extended even by implication."[574]

As noted previously under "Natural and Artificial Uses of Water," conflicting points of view as to which category irrigation belonged in were expressed by the Texas courts over a period of more than four decades. This confusion was brought to a close by the Texas Supreme Court in a decision holding unqualifiedly that irrigation was an artificial use.[575]

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[570] Tex. Water Rights Comm'n, "Rules, Regulations and Modes of Procedure," rules 115.1(t) and (ff) (1970 Rev., Jan. 1970).

[571] *Ferrea* v. *Knipe,* 28 Cal. 340, 343-345, 87 Am. Dec. 128 (1865). See *Lux* v. *Haggin,* 69 Cal. 255, 359-360, 4 Pac. 919 (1884), 10 Pac. 674, 734 (1886).

[572] *Rhodes* v. *Whitehead*, 27 Tex. 304, 310, 84 Am. Dec. 631 (1863); *Tolle* v. *Correth*, 31 Tex. 362, 365, 98 Am. Dec. 540 (Military Ct. 1868); *Fleming* v. *Davis*, 37 Tex. 173, 196-200 (Semicolon Ct. 1872); *Baker* v. *Brown*, 55 Tex. 377, 379-380 (1881).

[573] See also *Markwardt* v. *Guthrie*, 18 Okla. 32, 33-34, 90 Pac. 26 (1907).

[574] *Alta Land & Water Co.* v. *Hancock*, 85 Cal. 219, 230, 24 Pac. 645 (1890). It is after the natural wants of the riparian owners for strictly domestic purposes and the watering of domestic animals are supplied that the several riparian proprietors are entitled to a reasonable use of the remaining water for irrigation. *Smith* v. *Corbit*, 116 Cal. 587, 592, 48 Pac. 725 (1897).

[575] *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 585-590, 86 S.W. 733 (1905).

Cultivated and uncultivated land.—The riparian right for irrigation applies to cultivated land in probably most instances.[576] It is not uncommon to find references to regions in which irrigation is necessary to successful cultivation of the soil.[577]

However, the riparian right is not limited, so far as the use of water for agricultural purposes is concerned, to the irrigation of cultivated land that is producing tilled crops. It has been held in California to be equally effective with respect to uncultivated areas of riparian land, including lands that benefit from natural overflow from the stream.[578] With respect to natural overflow, the constitutional amendment of 1928 did not negate the right; it limited exercise of the right to reasonable beneficial use under reasonable methods of diversion and use.[579]

The California Supreme Court held that the statutory limitation of the term "useful or beneficial purposes," as used in the statute[580] (defined as not more than 2½ acre-feet per acre in the irrigation of uncultivated land not devoted to cultivated crops), was not applicable in the exercise of a riparian right.[581]

Some restrictions upon riparian irrigation.—The following matters have been referred to in various connections at various other places in this chapter. For the purpose of completion, they are briefly summarized here.

(1) The Oregon Supreme Court construed the Congressional legislation of 1866, 1870, and 1877[582] as depriving all public lands entered after March 3, 1877, of riparian rights for all purposes other than domestic use.[583] The United States Supreme Court approved, holding that public lands entered after such date carried, of their own force, no common law riparian rights, and left to each State to determine for itself whether or not riparian rights should attach to such tracts upon passing to private ownership.[584]

The Oregon water code of 1909 undertook to recognize and limit the vested right of a riparian owner who had actually applied water to beneficial use prior to the enactment, to the extent thereof, and to recognize a similar right

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[576] *Ferrea* v. *Knipe*, 28 Cal. 340, 341-345 (1865), which appears to have been the first case in the California Supreme Court that involved riparians only, upheld the right of a riparian owner to use water for irrigation of a commercial vegetable garden.

[577] *Harris* v. *Harrison*, 93 Cal. 676, 681, 29 Pac. 325 (1892).

[578] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 116-118, 252 Pac. 607 (1926); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 729-730, 752, 755 (1950), discussed in chapter 6 at note 215 and at the end of note 239.

[579] Cal. Const. art. XIV, § 3. See the discussion at notes 660-662 *infra*.

[580] Cal. Water Code § 1004 (West 1956).

[581] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 116-118, 252 Pac. 607 (1926).

[582] 14 Stat. 353, § 9 (1866); 16 Stat. 217 (1870); 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964).

[583] *Hough* v. *Porter*, 51 Oreg. 318, 383-407, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).

[584] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 158, 160-164 (1935).

respecting uncompleted works if completed within a reasonable time thereafter.[585]

(2) The Kansas Legislature enacted a statute in 1945, and substantially amended it in 1957, which, among other things, follows the lead of Oregon in limiting "vested right" to continuance of the use of water actually applied to beneficial use on or before the effective date of the 1945 act, or within a reasonable time thereafter by means of works then under construction. This includes domestic use. Use of water for domestic purposes after such date to the extent that it is beneficial constitutes an appropriation, although such use is exempt from appropriation permit requirements; for all other purposes, the water must be appropriated.[586] While common law claimants without vested rights could be enjoined by appropriators from making subsequent diversions, compensation could be had in an action at law for damages proved for any property taken from a common law claimant by an appropriator.

(3) Prior to 1921, the South Dakota Supreme Court adhered to the principle that the riparian right of use not only for domestic purposes but for reasonable irrigation was a vested riparian right.[587] In that year it followed the Oregon court decision in *Hough* v. *Porter*,[588] in holding that public land entered after the enactment of the Desert Land Act acquired riparian rights only for domestic purposes.[589] But in 1940, as a result of the United States Supreme Court decision in *California Oregon Power Company* v. *Beaver Portland Cement Company*,[590] noted above, the South Dakota court reestablished the right to irrigate riparian land in South Dakota with respect to lands patented after 1877 as well as before.[591]

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[585] Oreg. Laws 1909, ch. 216, § 70, Rev. Stat. § 539.010 (Supp. 1955). The validity of this restrictive legislation was sustained by State and Federal courts on the several points presented for determination. *In re Hood River*, 114 Oreg. 112, 173-182, 227 Pac. 1065 (1924), vote of 4 to 3; *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 73 Fed. (2d) 555, 562-569 (9th Cir. 1934), vote of 2 to 1.

[586] Kans. Laws 1945, ch. 390, Laws 1957, ch. 539, Stat. Ann. § § 82a-701(d),-705, and -705a (1969). The constitutionality of these provisions was upheld by State and Federal courts on the several points presented for determination. *State ex rel. Emery* v. *Knapp*, 167 Kans. 546, 555-556, 207 Pac. (2d) 440 (1949); *Baumann* v. *Smrha*, 145 Fed. Supp. 617 (D. Kans. 1956), affirmed per curiam, 352 U.S. 863 (1956); *Williams* v. *Wichita*, 190 Kans. 317, 374 Pac. (2d) 578 (1962), appeal dismissed "for want of a substantial Federal question," 375 U.S. 7 (1963), rehearing denied, 375 U.S. 936 (1963); *Hesston & Sedgwick* v. *Smrha*, 192 Kans. 647, 391 Pac. (2d) 93 (1964). The first cited case involved a surface watercourse. The others appear to have involved percolating ground waters. In this regard, see chapter 6, note 245.

[587] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 267, 143 N.W. 124 (1913).

[588] *Hough* v. *Porter*, 51 Oreg. 318, 383-407, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).

[589] *Cook* v. *Evans*, 45 S. Dak. 31, 38-39, 185 N.W. 262 (1921).

[590] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 158, 160-164 (1935).

[591] *Platt* v. *Rapid City*, 67 S. Dak. 245, 248-250, 291 N.W. 600 (1940).

In 1955, the South Dakota Legislature followed the precedents set in Oregon and Kansas by defining vested rights as including the right of a riparian owner to continue beneficial use of water to the extent actually made at the time of enactment of the statute, or within 3 years immediately preceding it, or with the use of works then under construction and completed within a reasonable time thereafter. The use of water for domestic purposes as defined in the act is a vested right; but irrigation is not, unless the above requirements as to beneficial use were met.[592]

(4) In numerous Texas cases, the right of reasonable irrigation was recognized as a proper riparian right under the common law.[593]

The Texas Supreme Court stated by *dictum* in 1926 that from the Mexican decree of 1823 down to the passage of the State appropriation act of 1889, the fixed policy of the successive governments of Texas was to recognize the right of the riparian owner for irrigation as well as domestic purposes.[594] Thirty-six years later, this court concluded that these observations, so far as they pertain to riparian irrigation rights under Mexican law, were erroneous *obiter dicta*. It was held that lands in Spanish and Mexican land grants along the lower Rio Grande do *not* have implied rights to irrigate with the river waters.[595] But there was no issue of common law riparian rights in the later case.

Water Power

Propulsion of mill machinery.—The use of the water power of a stream—the momentum of the streamflow across the riparian land[596]—is a time-honored riparian use. It was recognized as a riparian right at common law.[597] There is no more "ancient or well-established feature of riparian rights" than the right

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[592] S. Dak. Laws 1955, ch. 430, Comp. Laws Ann. § 46-1-9 (1967). Validity of this restriction was sustained by the State supreme court in *Belle Fourche Irr. Dist.* v. *Smiley*, 176 N.W. (2d) 239 (S. Dak. 1970); *Knight* v. *Grimes*, 80 S. Dak. 517, 127 N.W. (2d) 708 (1964).

Relevant Oklahoma legislation and a recent court case are discussed at notes 494-497 *supra.*

[593] See, e.g., *Baker* v. *Brown*, 55 Tex. 377, 378-380 (1881); *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585-590, 86 S.W. 733 (1905); *Martin* v. *Burr*, 111 Tex. 57, 62, 228 S.W. 543 (1921); *Board of Water Engineers* v. *McKnight*, 111 Tex. 82, 92, 229 S.W. 301 (1921); *Motl* v. *Boyd*, 116 Tex. 82, 107-108, 286 S.W. 458 (1926).

[594] *Motl* v. *Boyd*, 116 Tex. 82, 99-108, 286 S.W. 458 (1926).

[595] *Valmont Plantations* v. *State of Texas*, 163 Tex. 381, 355 S.W. (2d) 502 (1962), affirming 346 S.W. (2d) 853 (Tex. Civ. App. 1961). Nevertheless, see chapter 7, at notes 656-659, regarding "equitable" rights recognized in a 1969 Texas Court of Civil Appeals case.

[596] *Weiss* v. *Oregon Iron & Steel Co.*, 13 Oreg. 496, 498-502, 11 Pac. 255 (1886). The fall of the stream as it passes or crosses the riparian land in its natural state—that is, the difference in level between the surface point at which the stream first touches and that at which it leaves the land. *Rhodes* v. *Whitehead*, 27 Tex. 304, 309-310, 84 Am. Dec. 631 (1863).

[597] *Bathgate* v. *Irvine*, 126 Cal. 135, 142, 58 Pac. 442 (1899).

of the riparian owner to operate a mill on his riparian land with which to grind grain or to operate any other machinery with the use of the streamflow as it passes through his land.[598] As stated by the Nebraska Supreme Court: "The right and reasonableness of use of water power to propel a flouring mill by a riparian owner needs no justification. It has been practiced and protected ever since English law began."[599] The use of water power as a proper riparian use has continued to be recognized.[600]

Generation of hydroelectric power.—(1) With the development of the industrial age, a logical extension of the original riparian right to the use of waterpower on riparian land for propelling mill machinery, was its adaptation to the generation of hydroelectric energy. This use by a riparian to operate a power plant on his land "is as clearly within his rights as is his right to operate a mill thereon with which to grind grain or to operate any other machinery"[601]—a new application of an old rule.[602]

(2) Recognition of this extended riparian right appears in a number of California cases decided in the first half of the 20th century.[603] The California Supreme Court elaborated on the principle as follows:[604]

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[598] *Mentone Irr. Co.* v. *Redlands Elec. Light & Power Co.*, 155 Cal. 323, 327, 100 Pac. 1082 (1909).

[599] *Cline* v. *Stock*, 71 Nebr. 70, 76, 98 N.W. 454 (1904), 102 N.W. 265 (1905). The fact that this case was decided, on rehearing (71 Nebr. 79), against the mill owner does not affect the historical accuracy of this statement. In a subsequent case, the same court stated, with reference to the predecessor of one of the parties: "By virtue of the fact of his ownership of the right of way connecting with the river, he was a riparian owner, and, as such, had the right to divert the water for power purposes. This right was not bestowed upon him as a special privilege by the state or any of its municipal subdivisions, but was a common-law right applicable to every riparian owner alike." *Southern Nebr. Power Co.* v. *Taylor*, 109 Nebr. 683, 686-687, 192 N.W. 317 (1923).

[600] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 338, 93 N.W. 781 (1903), overruled on different matters, *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified, 180 Nebr. 569, 144 N.W. (2d) 209 (1966); *Fairbury* v. *Fairbury Mill & Elevator Co.*, 123 Nebr. 588, 592-593, 243 N.W. 774 (1932); *Kuehler* v. *Texas Power Corp.*, 9 S.W. (2d) 435, 436-437 (Tex. Civ. App. 1928), error refused with written opinion, 118 Tex. 224, 13 S.W. (2d) 667 (1929).

[601] *Mentone Irr. Co.* v. *Redlands Elec. Light & Power Co.*, 155 Cal. 323, 327, 100 Pac. 1082 (1909).

[602] In a Nebraska case, an original riparian use of streamflow to operate a grist mill was eventually converted to use of the waterpower for generating electricity for municipal and public utility consumption. *Southern Nebr. Power Co.* v. *Taylor*, 109 Nebr. 683, 686-687, 192 N.W. 317 (1923).

[603] See *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 109, 252 Pac. 607 (1926); *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.*, 202 Cal. 56, 71-72, 259 Pac. 444 (1927); *Miller & Lux* v. *San Joaquin Light & Power Corp.*, 120 Cal. App. 589, 609, 8 Pac. (2d) 560 (1932); *Crum* v. *Mt. Shasta Power Corp.*, 124 Cal. App. 90, 94, 12 Pac. (2d) 134 (1932); *Moore* v. *California Oregon Power Co.*, 22 Cal. (2d) 725, 730, 140 Pac. (2d) 798 (1943).

[604] *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.*, 209 Cal. 206, 215, 219, 287 Pac. 93 (1930).

> The use of the hydraulic effect of the stream for the generation of electric current is, of course, a legitimate exercise of the riparian right.
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> The essence of the riparian right for power, therefore, is that the land owner is entitled to the benefit of the hydraulic effect of the natural flow of the stream measured by its drop from the highest point to the lowest on his land. He, too, may make such temporary detention in forebays or reservoirs as will insure him this right, but a detention of surplus water above his needs, from a wet season to a dry one, when he may utilize it, is not a use of the stream as it flows and is in plain violation of the correlative rights of proprietors below.

(3) The Washington version recognized and sustained the riparian owner's right to use stream water in producing electric power.[605] With respect to the right of storage by a riparian owner for power purposes, the Washington Supreme Court conceded the general rule that every riparian owner is entitled as against the others to steady natural streamflow, but acknowledged that strict application of this rule would preclude the best utilization of flowing waters. Therefore, "where power is desired the rule must yield to the necessity of gathering the water into reservoirs"—a proper and lawful use when made in good faith and with the least practicable interference with the equal rights of other riparians.[606] Apparently, the reasonableness of an interruption by means of such storage is a question of fact, depending upon the circumstances of the case. (See "Exercise of the Riparian Right—Storage of Water," below.)

(4) The question of transmission of electric energy to nonriparian lands was litigated in California. The supreme court held that the generation of electric energy on riparian land is a proper use of the water under the riparian right even though the electricity is transmitted away from the riparian land for use at distant points not riparian to the stream. The court pointed out that the water itself is not transformed into anything; it remains in the stream channel or returns to the stream channel after passing through the power plant. The only thing that is exported from the area is the electrical energy, the product of use of the waterpower.[607] An obvious parallel not alluded to by the court would be the shipment away from riparian land of food products grown with the use of irrigation water on the land.[608]

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[605] *Kalama Elec. Light & Power Co.* v. *Kalama Driving Co.*, 48 Wash. 612, 616-617, 94 Pac. 469 (1908).

[606] *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 72 Wash. 631, 640-641, 131 Pac. 220 (1913).

[607] *Mentone Irr. Co.* v. *Redlands Elec. Light & Power Co.*, 155 Cal. 323, 327, 100 Pac. 1082 (1909). See *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 109, 252 Pac. 607 (1926); *Moore* v. *California Oregon Power Co.*, 22 Cal. (2d) 725, 731, 140 Pac. (2d) 728 (1943).

[608] The use of water on nonriparian land is discussed later under "Exercise of the Riparian Right—Place of Use of Water—Nonriparian land."

(5) Generation of hydroelectric energy is an "artificial" use of the water. Hence, for such purpose, the right of the landowner is limited to the use of his reasonable proportion of the water of the stream.[609] The determination as to what is the reasonable share of the riparian owner for such purpose is a question of fact to be decided according to the circumstances of each case, as in the case of other artificial uses of water.

Municipal

This feature of the riparian right has been discussed earlier under "Riparian Proprietors—Municipality." Briefly, in California, a municipality may have riparian rights in a stream by reason of its ownership of riparian land, but it has no greater right to the use of the water than a private owner of the same land would have.[610]

A Texas decision is sometimes cited as authority for the broad proposition that a city in its corporate capacity may be a riparian proprietor and entitled thereby to supply its inhabitants with water for domestic purposes in preference to the use of the water by other riparian proprietors. However, the actual controversy in this case was resolved on the basis of preexisting contractual relationships, and a Federal court expressed its opinion that this case did not reflect any broad rule on the subject.[611]

Decisions of the Washington Supreme Court do not favor inclusion of municipal use under the riparian right.[612]

The South Dakota Supreme Court held that a city that owned a tract of land riparian to a creek could not take water therefrom to supply its inhabitants living outside the watershed, without compensating lower riparian owners, but expressed no opinion as to what the city could do within the watershed.[613]

A Nebraska city that was making a noninterfering use of water was treated as an ordinary riparian owner. The question of riparian status of a municipality was not discussed in the court's opinion.[614]

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[609] *Callison* v. *Mt. Shasta Power Corp.*, 123 Cal. App. 247, 252, 11 Pac. (2d) 60 (1932). See *Joerger* v. *Mt. Shasta Power Corp.*, 214 Cal. 630, 636-637, 7 Pac. (2d) 706 (1932); *Crum* v. *Mt. Shasta Power Corp.*, 220 Cal. 295, 306-307, 30 Pac. (2d) 30 (1934).

[610] *Antioch* v. *Williams Irr. Dist.*, 188 Cal. 451, 456, 205 Pac. 688 (1922).

[611] *Grogan* v. *Brownwood*, 214 S.W. 532, 536-539 (Tex. Civ. App. 1919); *El Paso County W. I. Dist. No. 1* v. *El Paso*, 133 Fed. Supp. 894, 909-910 (W.D. Tex. 1955).

[612] *Van Dissel* v. *Holland-Horr Mill Co.*, 91 Wash. 239, 241, 157 Pac. 687 (1916); *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 581, 38 Pac. 147 (1894); *New Whatcom* v. *Fairhaven Land Co.*, 24 Wash. 493, 498, 513, 64 Pac. 735 (1901).

[613] *Sayles* v. *Mitchell*, 60 S. Dak. 592, 594-595, 245 N.W. 390 (1932).

[614] *Fairbury* v. *Fairbury Mill & Elevator Co.*, 123 Nebr. 588, 592-593, 243 N.W. 774 (1932).

Mining

The earliest decisions of the California Supreme Court with regard to riparian water rights were rendered as a result of controversies in the mining areas on the public domain. Occupants of mining claims contiguous to streams on the public lands of the United States were regarded as having rights *equivalent* to those of riparian landowners as against persons who undertook to appropriate water from the streams to which the mining claims were contiguous.[615] These were not complete riparian rights, because the actual owner of the land, the United States, was not in court, and a miner's possessory right ceased when he abandoned the claim. Thus, the inchoate riparian right could be asserted by prior occupants of public lands for mining purposes, as well as for agriculture, as against subsequent appropriators, just as the matured riparian right could be asserted by patentees of such lands.

Mining is classed as an extraordinary or artificial use of water, as is irrigation.[616]

An Alaska statute enacted in 1917 accorded to the locator of any mining claim that includes both banks of a stream, in the absence of a prior appropriation and as against all subsequent locators, the use of all of the stream waters necessary for his use in mining the claim.[617] A United States Court of Appeals repudiated the riparian doctrine in Alaska in 1910, but declared 30 years later that the 1917 statute enacted the law of riparian rights to a limited extent.[618] However, in 1966 the Alaska Legislature repealed this mining legilsation in enacting the Water Use Act,[619] which apparently purports to phase out riparian rights to divert, impound, and withdraw water.[620]

Industrial

Manufacturing is a recognized artificial use of riparian water.[621] Some other

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[615] *Crandall* v. *Woods*, 8 Cal. 136, 140-144 (1857); *Hill* v. *Newman*, 5 Cal. 445, 446 (1855); *Kelly* v. *Natoma Water Co.*, 6 Cal. 105, 108 (1856); *Conger* v. *Weaver*, 6 Cal. 548, 558 (1856); *Leigh Co.* v. *Independent Ditch Co.*, 8 Cal. 323 (1857); *Lux* v. *Haggin*, 69 Cal. 255, 357, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[616] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 26 S. Dak. 307, 311-313, 128 N.W. 596 (1910).

[617] Alaska Laws 1917, ch. 57, Comp. Laws Ann. § 47-3-35 (1949), Stat. § § 27.10.080 (Supp. 1962) and 38.05.260 (Supp. 1965).

[618] *Van Dyke* v. *Midnight Sun Min. Co.*, 177 Fed. 85, 88, 91 (9th Cir. 1910); *Balabanoff* v. *Kellogg*, 10 Alaska 11, 16-17, 118 Fed. (2d) 597, 599 (9th Cir. 1940), certiorari denied, 314 U.S. 635 (1941).

[619] Alaska Laws 1966, ch. 50, § 2.

[620] *Id.* § 1, Stat. § 46.15.060 *et seq.* (Supp. 1966). For a further discussion of this legislation see, in chapter 6, "Interrelationships of the Dual Water Rights Systems—The Status in Summary: By States—Alaska."

[621] *Benton* v. *Johncox*, 17 Wash. 277, 289-290, 49 Pac. 495 (1897), *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 26 S. Dak. 307, 311-313, 128 N.W. 596 (1910).

industrial uses of riparian water that have been involved in litigation in the high courts include use for drilling operations;[622] for cooling turbine engines used in connection with a municipal light and water plant;[623] for supplying railroad engines; and operating a railroad.[624]

Attractive Surroundings and Recreation

Esthetic considerations not recognized in early riparian cases.—The trend of the decisions over a long span of years was to recognize the use of water for material purposes only, as a part of the riparian landowner's right. Esthetic considerations were not approved of, at least where the result of according such a right to one or a few would be to prevent other landowners upstream from putting the water to strictly utilitarian purposes.[625]

Thus, in a series of California cases, riparian use did not include the flow of water for "mere sentiment," or a flow that merely "pleases the eye or gratifies a taste for the beautiful;"[626] nor for "the mere pleasure of looking at it as a feature of the landscape;"[627] or "for no purpose other than to afford him pleasure in its prospect."[628] And a Texas court of civil appeals, in similar vein, discounted "a mere artistic desire" on the part of a riparian owner "to see unappropriated and waste water flow by" his riparian land "on its way to the sea."[629]

Uses having tangible value.—(1) Attractive surroundings. With respect to two California lakes—Mono Lake and Lake Elsinore—maintenance of the lake level in its natural condition, with all of its attractive surroundings, was held to be a reasonable beneficial use of water under the constitutional amendment of 1928 and a part of the littoral rights of the bordering lands. The community interest in each case was considerable. Even though the water of Mono Lake is so high in salt content as to render it unfit for human consumption or domestic

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[622] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 500, 172 Pac. (2d) 1002 (1946).

[623] *Fairbury* v. *Fairbury Mill & Elevator Co.*, 123 Nebr. 588, 589-590, 243 N.W. 774 (1932).

[624] *Martin* v. *Burr*, 111 Tex. 57, 62, 65, 228 S.W. 543 (1921). See *King* v. *Schaff*, 204 S.W. 1039, 1040 (Tex. Civ. App. 1918). See also *Grogan* v. *Brownwood*, 214 S.W. 532, 538 (Tex. Civ. App. 1919), involving rights under contracts with riparians. The right acknowledged in *Atchison, T. & S.F. Ry.* v. *Shriver*, 101 Kans. 257, 258, 166 Pac. 519 (1917), is not a part of the court's holding, but indicates the court's view on a salient matter which, because of a change in physical conditions, was no longer an issue in the case.

[625] *Modoc Land & Stock Co.* v. *Booth*, 102 Cal. 151, 156-157, 36 Pac. 431 (1894); *Crum* v. *Mt. Shasta Power Corp.*, 117 Cal. App. 586, 601, 4 Pac. (2d) 564 (1931), hearing denied by supreme court.

[626] *Lux* v. *Haggin*, 69 Cal. 255, 396, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[627] *Rose* v. *Mesmer*, 142 Cal. 322, 330, 75 Pac. 905 (1904).

[628] *San Joaquin & Kings River Canal & Irr. Co.* v. *Fresno Flume & Irr. Co.*, 158 Cal. 626, 629, 112 Pac. 182 (1910).

[629] *Biggs* v. *Leffingwell*, 62 Tex. Civ. App. 665, 668, 132 S.W. 902 (1910).

use, the existence of the lake was held to be the vital thing that furnishes to the marginal land almost its entire value, the deprivation of which for public use requires payment of substantial damages.[630]

A Texas court of civil appeals held that one who owns part of the bed of a natural lake—which is very valuable for hunting and fishing purposes with the water on it and worthless without it—has the right to have the water maintained at its natural level unless that level is disturbed by another riparian owner for proper riparian uses.[631]

The Washington Supreme Court has held that owners of land riparian to lakes, on which homes and resorts were built because of access to the water for bathing, boating, swimming, fishing, and summer residences, were entitled to protection against lowering of the lake levels by diverting water therefrom for nonriparian purposes.[632]

(2) Recreation. Recreational uses, combined with the feature of attractive surroundings, depended on maintenance of lake levels in the cases cited under the immediately preceding subtopic. This was particularized by a California court of appeals by saying,[633]

> [T]he argument that the use of water for the purpose of maintaining the level in Lake Elsinore constitutes waste and unreasonable use thereof is without merit. Neither the maintenance of health-giving recreational opportunities, nor the existence and continuance of large business interests devoted to and built up for the purpose of making those opportunities available to large numbers of its citizens, can be held to be against the public policy of this state.

Recreational uses were recognized by the California Supreme Court in 1944 as being properly a part of the riparian right. These recreational uses were enjoyed by guests at resorts "where swimming pools, ornamental pools, boating, and the like" were furnished as part of the service to the guests.[634] This case is discussed above under "Domestic Use of Water—Commercialized domestic use," the chief issues being not only whether these uses were riparian, but whether they were preferred domestic uses. Recognition of recreation as a proper riparian use of water appears in other cases as well.[635]

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[630] *Los Angeles* v. *Aitken,* 10 Cal. App. (2d) 460, 473-475, 52 Pac. (2d) 585 (1935), hearing denied by supreme court; *Elsinore* v. *Temescal Water Co.,* 36 Cal. App. (2d) 116, 129-130, 97 Pac. (2d) 274 (1939).

[631] *Lakeside Irr. Co.* v. *Kirby,* 166 S.W. 715, 718 (Tex. Civ. App. 1914, error refused).

[632] *In re Martha Lake Water Co. No. 1,* 152 Wash. 53, 54-57, 277 Pac. 382 (1929); *Petition of Clinton Water Dist. of Island County,* 36 Wash. (2d) 284, 285-291, 218 Pac. (2d) 309 (1950).

[633] *Elsinore* v. *Temescal Water Co.,* 36 Cal. App. (2d) 116, 129, 97 Pac. (2d) 274 (1939).

[634] *Prather* v. *Hoberg,* 24 Cal. (2d) 549, 560-562, 150 Pac. (2d) 405 (1944).

[635] Pleasure resort, *Martin* v. *British Am. Oil Producing Co.,* 187 Okla. 193, 195, 102 Pac. (2d) 124 (1940); public swimming pool, *Sayles* v. *Mitchell,* 60 S. Dak. 592, 593-594,

(3) Fishing and propagation of fish. Fishing as a recognized riparian use appears under several of the foregoing subtitles. Following are some cases dealing with riparian and public rights to fish in public or navigable watercourses.

The public shares with the owner of riparian land the right to fish in the public water of Texas. This right of the public does not include a right to cross or trespass on privately owned land in order to reach the water. However, in *Diversion Lake Club* v. *Heath*, the Texas Supreme Court held that members of the public who had lawful access to the waters of a lake (created by a dam across a navigable river) from a bridge on a public road had the right to fish in the waters not only above what was the State-owned bed of the river, but also above parts of the lakebed that were privately owned.[636] The Court indicated that by voluntarily damming the navigable river and flooding adjoining lands, the public had been afforded a new additional bed for the public waters and that this artificial change in the river and its bed did not take away the right of the public to use the waters for fishing.

Shortly thereafter, a Texas court of civil appeals said:

> It may be conceded as a general proposition, as contended by appellee, that under the common law a riparian landowner whose land abuts on a nonnavigable lake and whose field notes call for the lake as a boundary line impliedly owns the land under the water to the center of the lake and that all riparian owners whose lands abut on such a lake have a right to the joint use of the entire lake for fishing and boating. 26 C.J. 599; Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 808, 838, 35 L.Ed. 428; Weller v. State (Tex. Civ. App.) 196 S.W. 868, and authorities there cited. But regardless of what may be the rights of the abutting owners under such circumstances, we are of the opinion that such rule has no application to the facts here under consideration. Here the appellee, by specific grant from the state, owned the land under a definite and specific portion of the lake, and we think it a sound proposition that an abutting landowner whose field notes cross a nonnavigable lake and who, by virtue thereof, holds title to a specific portion of the bed of the lake, has a right to control that part of the surface of the lake above his land, including the right to fish in or boat upon the water, and that any use or interference therewith by another constitutes an infringement on his rights as such owner. This is particularly true where, as in this case, the land lines are capable of being marked.
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> Our holding in this respect is not at variance with that of the

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245 N.W. 390 (1932); swimming, *Great Am. Dev. Co.* v. *Smith,* 303 S.W. (2d) 861, 864 (Tex. Civ. App. 1957); boating, swimming, fishing, *Snively* v. *Jaber,* 48 Wash. (2d) 815, 821-822, 296 Pac. (2d) 1015 (1956); *Back* v. *Sarich,* 74 Wash. (2d) 575, 445 Pac. (2d) 648, 651 (1968).

[636] *Diversion Lake Club* v. *Heath,* 126 Tex. 129, 132-140, 86 S.W. (2d) 441 (1935).

> Commission of Appeals in Diversion Lake Club v. Heath, 86 S.W. (2d) 441, 443, for in that case the court distinctly recognized that the right to fish in a stream depended on the ownership of the bed thereof. In this connection, the court said: "The general rule is well established by the authorities that the right to fish in a stream, whether belonging to the public in common or exclusively to the owners of the land bordering the stream, is determined by the ownership of the bed."[637]

The Oklahoma Supreme Court in a recent case appears to have considered a certain river to be nonnavigable for bed title purposes. It nevertheless held that it was "navigable in fact and can be fished on from boats if the fisherman gets on the stream without trespass against the will of the abutting owner, but that the fisherman cannot fix or station trot lines on the bottom of that part of the stream owned by the abutting land owner without permission of such owner."[638]

The Washington Supreme Court held that on a nonnavigable lake riparians hold such rights in common. In the exercise thereof, any proprietor or his lessee may use the entire surface of the lake so long as he does not unreasonably interfere with the exercise of similar rights by other riparian owners.[639]

Other Uses of Riparian Water

Some other uses of water that have been held to be within the riparian right include the following.

Floating logs.—The right of a riparian owner to impound the waters of a stream for the purpose of floating logs, so long as the operation did not

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[637] *Taylor Fishing Club* v. *Hammett,* 88 S.W. (2d) 127, 130-131 (Tex. Civ. App. 1935, error dismissed). See also *Reed* v. *State,* 175 S.W. (2d) 473, 475 (Tex. Civ. App. 1943), where the State had acquired land that surrounded a nonnavigable lake. In that situation, the court held the State could prevent others from using it without its consent.

[638] *Curry* v. *Hill,* 460 Pac. (2d) 933, 936 (Okla. 1969), discussed in chapter 4 at notes 99 and 118. See also *Luscher* v. *Reynolds,* 153 Oreg. 625, 56 Pac. (2d) 1158 (1936); *Wilbour* v. *Gallager,* 77 Wash. (2d) 306, 462 Pac. (2d) 232, 233, 239 (1909), discussed at and in notes 98-99, respectively, of chapter 4. See generally Johnson, R. W., and Austin, R. A., Jr., "Recreational Rights and Titles to Beds in Western Lakes and Streams," 7 Nat. Res. J. 1 (1967).

Of two other Oklahoma cases involving uses of water by riparian owners, one related to propagation of fish, stockwatering, and irrigation of vegetable gardens; and the other to a fish hatchery and a fishing resort. Respectively, *Markwardt* v. *Guthrie,* 18 Okla. 32, 33-34, 90 Pac. 26 (1907); *Broady* v. *Furray,* 163 Okla. 204, 205, 21 Pac. (2d) 770 (1933).

[639] *Snively* v. *Jaber,* 48 Wash. (2d) 815, 821-822, 296 Pac. (2d) 1015 (1956). See also *Bach* v. *Sarich,* 74 Wash. (2d) 575, 445 Pac. (2d) 648, 651 (1968).

interfere with the rights of others to the waters of the stream, was sustained in a California case.[640]

Recovery of materials.—The Oklahoma Supreme Court has indicated that the use of a stream by a riparian owner for the purpose of recovering, for sale as building material, rock, sand, and gravel deposited by the stream on his land is a beneficial use within the riparian right.[641]

An early Nebraska decision was to the effect that on a nonnavigable stream the riparian owner might use water needed "for any purpose" and, specifically, to cut and remove the ice on the stream, provided he did not decrease the streamflow below what was required to successfully operate a lower mill.[642]

But, according to the Texas Supreme Court, the riparian right does not extend to the capture of waste oil floating downstream from producing wells. The court considered it obvious that the waste oil had no relation to the beneficial use of the land abutting on the creek, nor to a riparian right that was inherent in the land.[643]

Exercise of the Riparian Right

Diversion of Water

Historically, the right of the riparian owner to use the water of the stream to which his land is contiguous includes both the right to divert the water from the channel and the obligation to return the surplus to the stream after it has served his lawful purposes.[644]

Place of diversion of water.—(1) Apparently, as a general rule, the riparian owner may divert the water to which he is entitled at any point on his riparian land that is suitable for accomplishing the lawful use of the water, provided he returns the excess to the stream above the lower boundary of his riparian tract. (See "Return of Unused Water to Stream," below.)[645] The California Supreme Court has indicated this may be done at the upper end of his riparian possessions if that location will contribute to the maximum utilization of his

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[640] *San Joaquin & Kings River Canal & Irr. Co.* v. *Fresno Flume & Irr. Co.*, 158 Cal. 626, 631-632, 112 Pac. 182 (1910).

[641] *Zalaback* v. *Kingfisher*, 59 Okla. 222, 223, 158 Pac. 926 (1916); *Kingfisher* v. *Zalaback*, 77 Okla. 108, 109-110, 186 Pac. 936 (1920).

But see the discussion in chapter 6, note 239, concerning *Joslin* v. *Marin Mun. Water Dist.*, 67 Cal. (2d) 132, 142-143, 429 Pac. (2d) 889, 60 Cal. Rptr. 377 (1967), involving the effect of the 1928 California constitutional amendment in a dispute between a riparian and an appropriator.

[642] *Eidemiller Ice Co.* v. *Guthrie*, 42 Nebr. 238, 253, 60 N.W. 717 (1894).

[643] *Magnolia Petroleum Co.* v. *Dodd*, 125 Tex. 125, 129-130, 81 S.W. (2d) 653 (1935).

[644] *Mentone Irr. Co.* v. *Redlands Elec. Light & Power Co.*, 155 Cal. 323, 328, 100 Pac. 1082 (1909).

[645] *Burkett* v. *Bayes*, 78 Okla. 8, 10-11, 187 Pac. 214 (1918, 1920).

lawful right of diversion.[646] The water may even be diverted outside the riparian tract, provided that the rights of others to the use of the stream are not impaired, that the necessary easements are obtained, and subject to limitations noted immediately below.

(2) So far as *downstream* riparian owners are concerned, the upper proprietor can divert the water at a point above his own land, provided no unreasonable loss of water is caused thereby.[647] "So long as the riparian takes no more than his reasonable share and uses it upon his riparian land, without unreasonable waste, other riparian owners below have no right to inquire, how, or by what means, or at what place, he manages to divert his share from the stream, whether at a point on his own land, or at some point far above * * *."[648] In 1901, the Oregon Supreme Court affirmed a decree enjoining the upstream defendant riparian proprietor "from diverting the water from the stream to the substantial injury of the present or future rights of the plaintiffs," the lower riparians.[649] This inter-riparian principle applies equally with respect to upstream riparians vis-à-vis downstream appropriators.[650]

(3) The upstream owner, however, must have the consent of the abutting and intervening owners *upstream* from him, that is, owners of lands lying between the proposed point of diversion and the riparian land on which the water is to be used.[651] A riparian owner may not divert his water above the riparian lands of an upstream proprietor without the consent of the latter.

(4) Providing the above conditions are fulfilled, the riparian proprietor may make his upstream diversion upon another tract belonging to himself, as well as upon lands belonging to others, for use upon his downstream riparian lands.[652] This use of upstream water on the lower tract is not a use permitted as an incident of the upper tract. Ownership of this upper tract is merely a convenience in the exercise of the privilege of diverting one's riparian water upstream with consent of the upper owners.

(5) A further limitation upon the right to make an upstream riparian diversion is that it may not be done at a time when the natural flow of the stream is not sufficient to reach the land of the interested riparian owner.

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[646] *Joerger* v. *Mt. Shasta Power Corp.*, 214 Cal. 630, 638, 7 Pac. (2d) 706 (1932); *Mentone Irr. Co.* v. *Redlands Elec. Light & Power Co.*, 155 Cal. 323, 328, 100 Pac. 1082 (1909).
But see *Miller* v. *Baker*, 68 Wash. 19, 122 Pac. 604 (1912), where the defendants, whose land touched the stream only along its southeast corner, were not allowed to divert water across another's land to irrigate their upper lands, the return flow being diverted away from the plaintiffs' intervening land.

[647] *Holmes* v. *Nay*, 186 Cal. 231, 240, 199 Pac. 325 (1921).

[648] *Turner* v. *James Canal Co.*, 155 Cal. 82, 92, 99 Pac. 520 (1909).

[649] *Jones* v. *Conn*, 39 Oreg. 30, 46, 64 Pac. 855, 65 Pac. 1068 (1901).

[650] *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 202, 130 N.W. 85 (1911).

[651] *Turner* v. *Eastside Canal & Irr. Co.*, 168 Cal. 103, 108, 142 Pac. 69 (1914); *Miller & Lux* v. *Enterprise Canal & Land Co.*, 169 Cal. 415, 440, 444-445, 147 Pac. 567 (1915); *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 202, 130 N.W. 85 (1911).

[652] *Holmes* v. *Nay*, 186 Cal. 231, 235, 240, 199 Pac. 325 (1921).

Under such circumstances he has not, as a riparian owner merely, the right to go on the land of an upper proprietor and divert water there.[653] This is because the title of a riparian owner to use the water begins only when the water reaches his land—it does not exist during such time as the water naturally cannot flow that far down the channel. Until the water actually gets there, the riparian has "no right other than the protective right to see that the full flow past his land to which he is entitled is not illegally diminished."[654]

(6) The riparian owner may change the point of his diversion of the water so long as the rights of others are not injuriously affected thereby.[655]

Means of diversion of water.—(1) "And the momentum of the stream may be resorted to as a power for making it available, or it may be turned by a proprietor on his own land by a dam, or by any other means which he may find appropriate for the purpose." So said the Texas Supreme Court in discussing riparian rights at the common law and the civil law in a very early case.[656]

In many decisions, the theme has been that the method of diverting water from the stream for use on riparian land was not a factor for consideration so long as the rights of others were not thereby impaired.[657]

In 1893, the Oregon Legislature enacted a statute—still extant—giving the owner or possessor of land adjacent to a lake or natural stream the right to employ "wheels, pumps, hydraulic engines, or other machinery" for lifting water to the level required to irrigate any land belonging to him, provided that the use should not conflict with the "better or prior right" of anyone else.[658]

(2) Inherent in the right of the riparian owner to divert water from the stream for use on his land is his right to make such changes in the natural channel as are necessary to effectuate his diversion but without impairing other rights in the stream.[659]

(3) The question whether natural overflow of a stream served a useful and beneficial purpose in contributing to the productivity of the riparian lands aroused much contention in California over a considerable period of time.

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[653] *Drake* v. *Tucker,* 43 Cal. App. 53, 58, 184 Pac. 502 (1919).

[654] *Miller & Lux* v. *Enterprise Canal & Land Co.,* 169 Cal. 415, 441, 147 Pac. 567 (1915).

[655] *Osborn* v. *Chase,* 119 Wash. 479, 205 Pac. 844 (1922); *Smith* v. *Corbit,* 116 Cal. 587, 591-592, 48 Pac. 725 (1897). As against appropriators, see *Norwood* v. *Eastern Oreg. Land Co.,* 112 Oreg. 106, 227 Pac. 1111, 1113 (1924), discussed at note 716 *infra.*

[656] *Rhodes* v. *Whitehead,* 27 Tex. 304, 310, 84 Am. Dec. 631 (1863). See the facts in *Kuehler* v. *Texas Power Corp.,* 9 S.W. (2d) 435, 436-437 (Tex. Civ. App. 1928), error refused, 118 Tex. 224, 13 S.W. (2d) 667 (1929).

[657] *Charnock* v. *Higuerra,* 111 Cal. 473, 480-481, 44 Pac. 171 (1896); any suitable means, *Shook* v. *Colohan,* 12 Oreg. 239, 244, 6 Pac. 503 (1885); whether by ditch or hydraulic engine immaterial, *Redwater Land & Canal Co.* v. *Reed,* 26 S. Dak. 466, 476, 128 N.W. 702 (1910); by dam and headgate, or by pumps and buckets, *Turner* v. *James Canal Co.,* 155 Cal. 82, 92, 99 Pac. 520 (1909); pumps or other similar appliances, *Charnock* v. *Higuerra, supra.*

[658] Oreg. Laws 1893, p. 150, Rev. Stat. § 541.410 (Supp. 1955).

[659] Compare *Garrett* v. *Haworth,* 183 Okla. 569, 572-573, 83 Pac. (2d) 822 (1938).

In the *Herminghaus* case, decided in 1926, the California Supreme Court held that as against an appropriator, the use of artificial appliances instead of natural overflow in getting stream water over its banks to irrigate adjacent riparian land was unnecessary.[660] This decision, that the use of the floodflow of a stream for natural irrigation of riparian lands by overflow was reasonable, even though it required the *entire* flow of the stream to lift the water over the banks and thereby deprived upstream appropriators of its use, led to the adoption of a constitutional amendment in 1928 limiting the riparian right, among other things, to a reasonable method of diversion of water.[661] As a result of the constitutional amendment, the riparian owner is now limited in the exercise of his right to reasonableness as against appropriators as well as against other riparian owners.[662]

There appears to be no basis in present California law for asserting that the diversion of water by natural overflow, without the use of artificial appliances, is, of itself, an unreasonable means of diversion. Whether, in a particular case, the diversion of water by natural overflow is reasonable or unreasonable will undoubtedly depend upon all the circumstances of that case.

Conveyance of water from diversion point.—(1) The fact that in diverting water above one's riparian land, with consent of intervening owners, the water must be taken from the river over intervening nonriparian lands belonging to other persons is of no consequence. The latter may of course object; but other riparian owners have no privity with such third parties and cannot avail themselves of their rights should the latter fail to object.[663] Thus the fact that in making a legitimate riparian use of a stream by the construction and operation of a hydroelectric plant, a tunnel, or conduits were constructed through or across nonriparian lands, is immaterial.[664]

(2) The fact that a riparian owner lawfully diverts water from a spring tributary to a creek and conveys it to his land through "a pipe, flume and ditch," instead of letting the water flow naturally down the creek to the riparian land, does not destroy the character of the water as riparian water or the rights of the landowner therein as a riparian owner.[665]

(3) In an early riparian case, the Washington Supreme Court agreed that allowance must be made for some loss in transmission of water to the land, but cautioned that the irrigator must take reasonable means to lessen it.[666]

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[660] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 107-108, 252 Pac. 607 (1926). Compare *Miller & Lux* v. *Madera Canal & Irr. Co.*, 155 Cal. 59, 64, 99 Pac. 502 (1907).

[661] Cal. Const. art. XIV, § 3. See *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 749-756 (1950).

[662] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 367, 368, 40 Pac. (2d) 486 (1935). See also the discussion at notes 578-579 *supra*.

[663] *Turner* v. *James Canal Co.*, 155 Cal. 82, 92, 99 Pac. 520 (1909).

[664] *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.*, 202 Cal. 56, 71-72, 259 Pac. 444 (1927).

[665] *Eckel* v. *Springfiled Tunnel & Dev. Co.*, 87 Cal. App. 617, 622, 262 Pac. 425 (1927).

[666] *Shotwell* v. *Dodge*, 8 Wash. 337, 341, 36 Pac. 254 (1894). The court was sharply

Storage of Water

Following is a discussion of some court decisions and legislative provisions regarding the storage of water by riparian landowners.

California distinctions.—In 1910, the California Supreme Court held that a riparian owner might impound the water of the stream by means of a dam for the purpose of floating logs, provided that the rights of others in the streamflow were not interfered with.[667] Other later cases distinguish between temporary storage of water in forebays, which is within the riparian right, and seasonal storage which the court has said is not a proper riparian use.

(1) Temporary storage. To insure the uninterrupted operation of mills, water wheels, or powerplants in exercising this right, the riparian owner may make temporary detention of the water in forebays or reservoirs. He is entitled "to the benefit of the hydraulic effect of the natural flow of the stream measured by its drop from the highest point to the lowest on his land."[668]

(2) Seasonal storage. Decisions acknowledging that the riparian owner may make a mere temporary detention of the water for operating machinery have no bearing upon such a prolonged and indefinite storage and withdrawal of stream waters as would be effectuated with the use of a large impounding dam and reservoir.[669] A detention of surplus water above the needs of the riparian owner, from a wet season to a dry one when he may utilize it, "Is not a use of the stream as it flows and is in plain violation of the correlative rights of proprietors below."[670]

Subsequent consideration of this topic by the California Supreme Court led it in a 1933 case to redeclare, with approval, the principle established in the *Herminghaus* and *Seneca* cases, substantially as follows: Seasonal storage of water for power purposes is not a proper riparian use. If continued for the time prescribed by the statute of limitations, it may ripen into a prescriptive right; hence, the downstream riparian is entitled to an injunction or damages for substantial interference with his right. The court said these two cases settled these propositions and set at rest the question of seasonal carryover by a riparian owner who dams the entire streamflow, by determining that such

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critical of the irrigation practices followed by one of the parties, and stated the general principles as to conservation and proper use of water which an irrigator should follow.

[667] *San Joaquin & Kings River Canal & Irr. Co.* v. *Fresno Flume & Irr. Co.*, 158 Cal. 626, 631-632, 112 Pac. 182 (1910).

[668] *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.*, 209 Cal. 206, 215-216, 219, 287 Pac. 93 (1930). See *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 111, 252 Pac. 607 (1926); *Colorado Power Co.* v. *Pacific Gas & Elec. Co.*, 218 Cal. 559, 565, 24 Pac. (2d) 495 (1933).

[669] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 111, 252 Pac. 607 (1926).

[670] *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.*, 209 Cal. 206, 216-217, 219, 287 Pac. 93 (1930).

sequestration of streamflow was not authorized in exercising a riparian right.[671]

Texas.—(1) General situation as to riparian storage. In a few cases in the high courts of Texas, the right of a riparian owner to utilize storage of water as a means of making the exercise of his right effective in a semiarid region, consistently with the rights of others on the stream, has been recognized.[672] In 1934, the Texas Supreme Court indicated that having a vested right to the use of water, the riparian necessarily has the authority to adopt any lawful means of effectuating it, which in a semiarid region means storage; and this right the legislature cannot defeat, or unreasonably burden, "by irrevocable or uncontrollable grants to railway companies to cross, build upon or along streams and water courses."[673]

In the later *Valmont Plantations* case, the trial court did not follow this lead, but held that the riparian right of irrigation of waters of the Rio Grande does not include the right to use waters stored in Falcon Reservoir, nor to store waters therein for future use.[674] It was the trial court's view that the riparian right is a right to the normal streamflow past the riparian land, and that it appeared contrary to the whole theory of riparian law to allow riparians to have their flow stored in Falcon Reservoir to be released as they need it. However, on appeal, it was held that lands riparian to the lower Rio Grande held under Spanish and Mexican grants do not have an implied right to irrigate

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[671] *Colorado Power Co.* v. *Pacific Gas & Elec. Co.,* 218 Cal. 559, 564-566, 24 Pac. (2d) 495 (1933). See also *Moore* v. *California Oregon Power Co.,* 22 Cal. (2d) 725, 731, 734-735, 738-739, 140 Pac. (2d) 798 (1943), and note the circumstances at 22 Cal. (2d) 727-729, 733-735. In the *Colorado Power Co.* case, *supra,* after holding that seasonal storage is not a proper riparian use, the court said, "We do not find it necessary to discuss the question of whether an upper riparian owner may appropriate water when such water is in excess of all the reasonable present or prospective needs of lower riparian owners. In the present case the trial court found that the proposed storage would cause substantial damage to plaintiff." 218 Cal. at 565-566. The later *Moore* case, *supra,* dealt with a type of storage that was said to be sometimes referred to as "periodic storage," which the court said was similar in effect to seasonal storage. The court said, *inter alia,* that "The next contention is that the use of the waters of a stream is adverse to the rights of a lower riparian owner's rights whether or not he is damaged. A number of cases are cited in support of this contention. The cases cited are all in actions in which injunctive relief was asked and we are in thorough accord with the rulings contained therein. But our attention has not been called to any authority holding that damages may be awarded a riparian owner of lands for an interference with his riparian rights without proof on his part that he has actually been damaged by reason of such interference." 22 Cal. (2d) at 734, 738-739.

[672] *Stacy* v. *Delery,* 57 Tex. Civ. App. 242, 248, 122 S.W. 300 (1909).

[673] *Chicago, R. I. & G. Ry.* v. *Tarrant County W. C. & I. Dist. No. 1,* 123 Tex. 432, 448, 73 S.W. (2d) 55 (1934).

[674] *State of Texas* v. *Valmont Plantations,* No. B-20, 791, 93rd Dist. Court, Hidalgo County, Tex. (1959). See Blalock, W. R., Judge, "Excerpts From the Opinion of the Trial Court," Proc., Water Law Conference, Univ. Tex. 16, 38-40 (1959).

with the river waters.[675] Hence, the Texas Supreme Court had no occasion in this case to reconsider its views on riparian storage as expressed in its 1934 opinion.

(2) Limitations on the riparian right of storage. In acknowledging the right of the riparian owner to store water when it can be done consistently with the equal rights of others, the Texas Court of Civil Appeals took occasion to declare, and to hold, that the action of an upstream riparian owner in damming the stream and taking the *entire* flow, thereby allowing none of the water to get down to the lower owner who was prepared to capture and store at least a part if not all of the flow, would obviously not be a reasonable use of a stream consistent with the lower owner's equal right to use the water.[676]

Furthermore, while one with proper authority, including a riparian owner, may construct dams in streams for the purpose of creating reservoirs, nevertheless in so doing he is not permitted to flood the lands of others, or to back the water past the line of other owners of the streamway, without permission or condemnation. A violation of this inhibition is a direct trespass.[677]

(3) Permit exemption for small reservoirs. A Texas statute as amended in 1959 provides that anyone may construct on his own property a dam or reservoir to impound or contain not to exceed 200 acre-feet of water for domestic and livestock purposes without the necessity of securing a permit therefor.[678] The Texas Attorney General issued an opinion to the effect that on streams that are "watercourses," an appropriative permit is required if the water stored in the reservoir is to be beneficially used for irrigation, or for purposes other than domestic or livestock, even if the storage capacity is less than 200 acre-feet.[679] The final section of the article in question provides "This Act shall in no way alter, affect or change the status quo of riparian rights or rights in diffused surface waters."[680]

Washington situation as to riparian storage.—Decisions of the Washington Supreme Court are to the effect that the privilege of storing water to the use of which a riparian owner is entitled is not within the riparian right if the detention results in unreasonable injury to other riparian proprietors, but may be lawful if such injury does not follow. Thus, it was held that water may not be gathered into reservoirs for the future use of one riparian owner when it

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[675] *Valmont Plantations* v. *State of Texas,* 163 Tex. 381, 355 S.W. (2d) 502 (1962), affirming 346 S.W. (2d) 853 (Tex. Civ. App. 1961). Nevertheless, see chapter 7, at notes 656-659, regarding "equitable" rights recognized in a 1969 Texas Court of Civil Appeals case.

[676] *Stacy* v. *Delery,* 57 Tex. Civ. App. 242, 248, 122 S.W. 300 (1909).

[677] *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 612-614, 297 S.W. 225 (1927).

[678] Tex. Rev. Civ. Stat. Ann. art. 7500a (Supp. 1970).

[679] Tex. Atty. Gen. Opinion No. WW-97, May 17, 1957.

[680] See also chapter 6, note 269 for a discussion of Oklahoma legislation regarding such matters.

might best suit his convenience, if the result is to deprive other riparian owners of their use of the stream in its natural condition, unless such right be exercised under a valid prior appropriation.[681] Lawful detention of the entire flow of a stream for 14 hours out of every 24 would require consent of lower riparian owners or condemnation of their rights, inasmuch as they might require use of the stream at all times.[682]

On the other hand, an upstream detention of water that does not cause unreasonable interference with downstream riparian uses may not necessarily be unlawful. The Washington Supreme Court believed that to strictly apply the rule of riparian entitlement to steady natural streamflow would preclude the best use of flowing waters, particularly where power development is desired. Such use was considered proper and lawful when made in good faith and for a useful purpose, "with as little interference with the right of other proprietors as is reasonably practicable under the circumstances."[683] (See "Purpose of Use of Water–Water Power–Generation of hydroelectric power," discussed earlier.)

Kansas legislation.–A statute enacted in 1891 and amended in 1957 provides that, subject to prior appropriation and vested rights, any person entitled to use water for beneficial purposes may collect and store the same for use thereafter, so long as such collection, storage, use, and times of use thereafter are consistent with reasonable storage and conservation practices. Failure to apply or use such water during the period of collection and storage does not impair the right.[684] Other legislation provides that it shall be unlawful for anyone to construct any dam or make any change or addition thereto without permission from, and subject to conditions imposed by, the Chief Engineer, Division of Water Resources, State Board of Agriculture. But this shall not prohibit the placing in a "purely private stream" of any dam not more than 10 feet high and not impounding more than 15 acre-feet of water.[685]

Rotation in Use of Water Among Riparians

(1) The question of rotation in use of water among claimants of rights

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[681] *Still* v. *Palouse Irr. & Power Co.*, 64 Wash. 606, 609-610, 117 Pac. 466 (1911). It appeared here that the contemplated detention of spring floodflows would deprive downstream riparians of the accustomed natural spreading of the floodwater over their lands to the enrichment thereof.

[682] *Tacoma Eastern R.R.* v. *Smithgall*, 58 Wash. 445, 452, 108 Pac. 1091 (1910). Intermittent operation of an upstream dam to facilitate the owner's floating of shingle bolts was adjudged a nuisance to a lower riparian owner. *Monroe Mill Co.* v. *Menzel*, 35 Wash. 487, 496-497, 77 Pac. 813 (1904).

[683] *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 72 Wash. 631, 640-641, 131 Pac. 220 (1913). Under such circumstances it was held to be not unreasonable nor unlawful to detain surplus waters not used in the wet season and to discharge them in proper quantities in the dry season. Under the facts of the instant case, the interruption was held to be not unreasonable.

[684] Kans. Stat. Ann. § 42-313 (1964), enacted, Laws 1891, ch. 133.

[685] Kans. Stat. Ann. § § 82a-301 to -305 (1969).

thereto is discussed at some length in chapter 9. Under "Rotation in Use of Water—Imposition of Rotation Plan by Court Decree," there is a quotation from one of the California decisions that while the remedy of rotation and use of water for irrigation purposes in times of short supply "has been more generally applied as between riparian proprietors * * *, in principle there is no reason why it should not be made applicable as between claimants by appropriation."[686] It apparently is more readily imposed as between riparians in view of the more equalitarian nature of their respective rights.

(2) Most of the high court cases in which rotation questions as among riparian proprietors have been considered arose in California. These decisions are to the effect that riparian proprietors may adjust their rights as among themselves by providing for use of the streamflow by each party intermittently and alternately, one taking the exclusive use of the entire flow during the irrigation season for a certain number of days and the other following with a like use.[687] As is the case with rotation among appropriators, the practice necessarily would be limited to situations in which the rights of other claimants to the use of the water are not infringed by the practice.

The policy of imposing rotation upon the parties by court decree is approved by the courts of California in cases in which the claim of right to the entire flow or entire proportion of the flow of the water would be unreasonable under the circumstances, and in which the rights of the parties can be best preserved by allotting the entire flow at alternate periods.[688] For example, an early trial court decree to the effect that each of the parties was entitled to the full flow of the water every 3½ out of 7 days was approved by the supreme court.[689]

The principle of apportionment of water among riparians, when most desirable, was applied in an 1896 California Supreme Court case to use for domestic purposes as well as for irrigation.[690] But in a case decided the next year, the court appears to have applied this principle only as among competing

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[686] *Hufford* v. *Dye,* 162 Cal. 147, 160-161, 121 Pac. 400 (1912).

[687] *Peake* v. *Harris,* 48 Cal. App. 363, 378, 192 Pac. 310 (1920). See *Lux* v. *Haggin,* 69 Cal. 255, 408-409, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[688] *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.,* 78 Cal. App. (2d) 900, 911, 178 Pac. (2d) 844 (1947). "In this class of cases the decree of the court should be made to fit the stream that it applies to, and as a general rule when the stream is small the parties can best be served by giving them the alternate use of the entire stream." *Gutierrez* v. *Wege,* 145 Cal. 730, 735, 79 Pac. 449 (1905). See *Smith* v. *Corbit,* 116 Cal. 587, 592, 48 Pac. 725 (1897); *Craig* v. *Crafton Water Co.,* 141 Cal. 178, 181-182, 74 Pac. 762 (1903).

[689] *Harris* v. *Harrison,* 93 Cal. 676, 680-682, 29 Pac. 325 (1892).

Under circumstances of scarcity, the riparian owner would have no right as against the other riparian owners "to insist on the full flow of the stream over his land for the mere pleasure of looking at it as a feature of the landscape." *Rose* v. *Mesmer,* 142 Cal. 322, 329-330, 75 Pac. 905 (1904).

[690] *Wiggins* v. *Muscupiabe Land & Water Co.,* 113 Cal. 182, 190-193, 45 Pac. 160 (1896).

irrigation uses, after first stating that each riparian could take as much water as necessary for domestic purposes before any could be used for irrigation.[691]

(3) The rotation principle was imposed by a Federal court with respect to the use of water of an interstate stream flowing from California into Nevada. Defendants, who were users of water within California, either riparian owners or appropriators or both, were restrained from diverting the waters to the stream in excess of 5 in every 10 days from June 1 to October 1 of each year. In this way, the water of the stream was allocated for 5-day periods alternately between the States.[692]

(4) In a suit between two Texas districts involving rights to the use of water on both riparian and nonriparian lands, the jury found that it was more practical and economical to rotate the entire normal flow available in the Pecos River between the districts. Imposition of a rotation schedule by the trial court with respect to both riparian and appropriative rights was affirmed on appeal.[693]

A riparian user of water for stock, domestic, and irrigation purposes in Texas entered into contract with an irrigation company under which the landowner was obligated to accept his water through the company system at the times designated by the company. A regulation of the successor district discontinuing continuous delivery of water for stock and domestic purposes and substituting delivery every 12½ days was held to be not unreasonable under these circumstances.[694]

Place of Use of Water

Riparian land.—(1) The riparian right entitles the riparian proprietor to a reasonable use of the water on his riparian land.[695] Definitions of riparian lands were discussed earlier under "Riparian Lands."

The riparian right is founded on the theory that land contiguous to a stream

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[691] *Smith* v. *Corbit,* 116 Cal. 587, 592, 48 Pac. 725 (1897). These cases are discussed at notes 557-559 *supra.*

[692] *Anderson* v. *Bassman,* 140 Fed. 14, 29 (C.C.N.D. Cal. 1905).

[693] *Ward County W. I. Dist. No. 3* v. *Ward County Irr. Dist. No. 1,* 117 Tex. 10, 14-16, 295 S.W. 917 (1927), reforming and affirming 237 S.W. 584, 588 (Tex. Civ. App. 1921). Authorities were cited to support the apportionment of water among both riparian owners and appropriators when it is shown to be the more economical method and when the result is not to impair the rights of the parties or of others. See *Hidalgo County W. I. Dist. No. 2* v. *Cameron County W. C. & I. Dist. No. 5,* 253 S.W. (2d) 294, 296-297 (Tex. Civ. App. 1952, error refused n.r.e.).

[694] *Honaker* v. *Reeves County W. I. Dist. No. 1,* 152 S.W. (2d) 454, 455-456 (Tex. Civ. App. 1941, error refused).

[695] *Senior* v. *Anderson,* 130 Cal. 290, 296, 62 Pac. 563 (1900); *Joerger* v. *Mt. Shasta Power Corp.,* 214 Cal. 630, 637-638, 7 Pac. (2d) 706 (1932). "The use of water upon riparian lands is presumed to be riparian, and the burden of proving prescriptive rights is upon the person asserting them." *Morgan* v. *Walker,* 217 Cal. 607, 615, 20 Pac. (2d) 660 (1933).

receives benefits and increased usufructuary value by reason of its location with respect to the stream, its direct access to the water, and the right to use the water on or in connection with the land.[696] Hence, basically, the place of use of riparian water is on the riparian land;[697] and that is where the use is customarily made.[698]

(2) The water may be used at any place on the riparian parcel.[699] The right is not affected by use of the water on only a small part of the tract some half-mile or more away from the stream.[700]

(3) An owner of two tracts of land riparian to a stream may divert the water on the upper tract and convey it to the lower tract for use thereon, if rights of way across intervening lands are obtained and there is no impairment of rights of others in the stream.[701] And it has been said that the riparian proprietor has the right to contract with other riparians for the use of his proportionate share of the water on their riparian lands.[702]

Nonriparian land.—The decisions have been in some conflict in this regard. Some western decisions, notably in California, have been to the effect that the riparian right is limited to the riparian land and does not entitle the proprietor to take any of the water away to other lands not riparian to the stream.[703] Following this view—that riparian rights are vested exclusively in the owner of the abutting land and "extend only to the use of the water upon the abutting land and none other"—the California Supreme Court in a 1922 case indicated that a city, the boundaries of which extend to a stream of water, is not a riparian owner by virtue of the fact and has no right by reason of that situation to apply the water of the stream to public uses within the city.[704]

The trend of other cases is to relate the privilege of using riparian water on nonriparian land to the effect that it has upon other riparian owners. Thus, the California Supreme Court indicated in a 1907 case that the use of water of a

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[696] *Magnolia Petroleum Co.* v. *Dodd,* 125 Tex. 125, 129, 81 S.W. (2d) 653 (1935).

[697] *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 585, 589, 86 S.W. 733 (1905).

[698] See *Crawford Co.* v. *Hathaway,* 67 Nebr. 325, 353, 93 N.W. 781 (1903); *Norwood* v. *Eastern Oreg. Land Co.,* 112 Oreg. 106, 114, 227 Pac. 1111 (1924); *Fitzstephens* v. *Watson,* 218 Oreg. 185, 344 Pac. (2d) 221 (1959); *Martin* v. *British Am. Oil Producing Co.,* 187 Okla. 193, 195, 102 Pac. (2d) 124 (1940).

[699] *Parker* v. *Swett,* 188 Cal. 474, 485-486, 205 Pac. 1065 (1922); *Holmes* v. *Nay,* 186 Cal. 231, 235, 199 Pac. 325 (1921). Note the facts in *Joerger* v. *Mt. Shasta Power Corp.,* 214 Cal. 630, 632-635, 7 Pac. (2d) 706 (1932).

[700] *Alta Land & Water Co.* v. *Hancock,* 85 Cal. 219, 229-230, 24 Pac. 645 (1890).

[701] *Holmes* v. *Nay,* 186 Cal. 231, 235, 240, 199 Pac. 325 (1921).

[702] *Texas Co.* v. *Burkett,* 117 Tex. 16, 27, 296 S.W. 273 (1927); *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 610, 297 S.W. 225 (1927).

[703] *Gould* v. *Stafford,* 77 Cal. 66, 68, 18 Pac. 879 (1888); *Osterman* v. *Central Nebr. Pub. Power & Irr. Dist.,* 131 Nebr. 356, 365-366, 268 N.W. 334 (1936). But see *In re Metropolitan Util. Dist. of Omaha,* 179 Nebr. 783, 140 N.W. (2d) 626, 637 (1966).

[704] *Antioch* v. *Williams Irr. Dist.,* 188 Cal. 451, 456, 205 Pac. 688 (1922). See the earlier discussion under "Riparian Proprietors—Municipality," regarding this and other cases dealing with related questions of water use by municipalities.

stream by a riparian owner on nonriparian land is a nonriparian use, and that in making such use the riparian owner has trespassed on the rights of the lower riparian proprietors from the inception of such use.[705] In another case, the court indicated that such use is hostile to the lower proprietors and an invasion of their rights, and if continued under the circumstances necessary to constitute prescription it may ripen into a prescriptive right against them.[706] This view therefore is that the riparian proprietor has no right to divert the waters to nonriparian land *as against the rights of lower riparian proprietors.*[707]

In this respect, the California Supreme Court indicated that as the riparian proprietor himself has no right to divert the water to nonriparian land, he cannot as against a lower riparian proprietor confer such right upon another. On the contrary, "If he does not in fact use any of the water himself, the inferior proprietor has a right to the flow of the entire stream."[708] However, so long as the rights of the lower proprietor are not infringed, the California riparian may contract for the diversion of water to nonriparian lands *as against himself and his grantees only.* The effect of this is simply to estop the grantor and his successors in title from objecting to the grantee's diversion. (See the earlier discussion under "Property Characteristics–Severance of Riparian Right from Land–Grant–(1) Effect as against grantees" and "(2) Effect on other riparians.")

The 1928 California constitutional amendment, article 14, section 3, deprived the riparian owner of the right to enjoin an act that caused him no substantial injury, while assuring him protection in his rights of both present and prospective reasonable beneficial use. This is discussed in chapter 13 under "Remedies for Infringement–Injunction–Riparian Owners–California," paragraphs 4 and 5.

The Washington Supreme Court has said "A nonriparian owner has no right to divert water from a stream, even though the riparian owner is not himself using it. . . . Nonriparian owners have no right to divert water from a water course even though they are using it by grant or license from a riparian owner."[709]

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[705] *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327, 334-335, 88 Pac. 978, 981-982 (1907). See *Moore* v. *California Oregon Power Co.,* 22 Cal. (2d) 725, 734, 140 Pac. (2d) 798, 803 (1943).

[706] *Pabst* v. *Finmand,* 190 Cal. 124, 137, 211 Pac. 11 (1922).

[707] *Heilbron* v. *The 76 Land & Water Co.,* 80 Cal. 189, 194, 22 Pac. 62 (1889); *Gutierrez* v. *Wege,* 145 Cal. 730, 733, 79 Pac. 449 (1905); *Miller* v. *Bay Cities Water Co.,* 157 Cal. 256, 278, 107 Pac. 115 (1910).

[708] *Gould* v. *Eaton,* 117 Cal. 539, 543, 49 Pac. 577 (1897).

[709] *Alexander* v. *Muenscher,* 7 Wash. (2d) 557, 110 Pac. (2d) 625, 627 (1941). In this regard, the court quoted Gould on Waters, 3d ed., p. 443, § 224 to the effect that "the rights of a riparian proprietor with respect to the stream appear not to be affected by rights which nonriparian proprietors may have acquired to use the water by grant or license from other riparian owners." The court also quoted Wiel, S. C., "Water Rights in the Western States," 3d ed., vol. 1, § 861, p. 913 (1911), to the effect that "Should a

The Texas Supreme Court has taken the position that although it is the general rule that a riparian owner has no right to divert his riparian water to nonriparian land, circumstances may exist under which it is lawful to do so—such as where water is abundant and no possible injury could result to lower riparian owners. This includes the right to contract for the use of his riparian water on nonriparian land.[710]

The Supreme Court of Oklahoma has expressed the view that the taking of water by a riparian to nonriparian land or his contracting for its use on such land is not of itself an unreasonable use of the water, although when considered in connection with all other circumstances, including the size and character of the stream and the quantity of water diverted, it might be unreasonable.[711]

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nonriparian owner divert the water above the riparian owner, the nonriparian owner will be enjoined so far as the water is or may be beneficial to the riparian land, though the riparian owner is not himself using it; and should the nonriparian owner be diverting the water below the riparian owner who is not using it, the nonriparian owner cannot complain when the riparian above takes it from him thereafter for his own use upon his own land."

The court did not mention an earlier broad statement it had made to the effect that the upper riparian owner as such does not have the right to dispose of the water to nonriparians when there are lower riparian rights—which should probably be limited to the circumstances of that earlier case. It was a condemnation proceeding in which a suggestion was made that all the riparian proprietors might combine their rights and jointly dispose of the water to nonriparians. This was rejected by the trial court as too remote and specultative for use in fixing the value of the riparian right, and the supreme court agreed. *Kirkland* v. *Cochrane,* 87 Wash. 528, 530-531, 151 Pac. 1082 (1915).

The Washington Supreme Court has taken a somewhat different approach to the question of riparian rights *as against appropriative rights.* See the discussion at notes 526-527 *supra.* In *State* v. *American Fruit Growers, Inc.,* 135 Wash. 156, 161, 237 Pac. 498 (1925), the court said that "In *Brown* v. *Chase,* 125 Wash. 542, 217 Pac. 23 (1923), we stated that . . . 'waters of nonnavigable streams in excess of the amount which can be beneficially used, either directly or prospectively, within a reasonable time, on, or in connection with, riparian lands, are subject to appropriation for use on nonriparian lands.' In other words, the riparian owner, before he has any rights to protect, must with reasonable certainty show that either at present or within the near future he will make use of the water for irrigation purposes."

With respect to riparian use of navigable waters, see the discussion at note 411 *supra.*

[710] *Texas Co.* v. *Burkett,* 117 Tex. 16, 25-26, 27-28, 296 S.W. 273 (1927); *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 610, 297 S.W. 225 (1927). Apparently, only a prejudicial diversion would fall within the general prohibition. See *Texas Co.* v. *Burkett, supra* at 25; *Lakeside Irr. Co.* v. *Kirby,* 166 S.W. 715, 718 (Tex. Civ. App. 1914, error refused). See also note 204 *supra* and the discussion in chapter 13 under "Remedies for Infringement—Injunction—Riparian Owners—Texas."

[711] *Smith* v. *Stanolind Oil & Gas Co.,* 197 Okla. 499, 501-502, 172 Pac. (2d) 1002 (1946), citing *Lawrie* v. *Silsby,* 82 Vt. 505, 74 Atl. 94, 96 (1909), and *Martin* v. *British Am. Oil Producing Co.,* 187 Okla. 193, 102 Pac. (2d) 124 (1940) (involving water pollution).

Regarding the court's later interpretation of 1963 Oklahoma legislation which,

There apparently has not been a direct holding in Oregon regarding a grant to use water on nonriparian land and some seemingly inconsistent language has been employed in some cases. The Oregon Supreme Court, in a 1959 case, said, "Although there is a conflict of authority as to whether the grant to a nonriparian owner of the riparian owner's rights is effective as against other riparian owners . . . it is clear that as between the parties to the conveyance the grantor is bound by his grant."[712] It was unnecessary to, and the court apparently did not, decide the question of the effect of such a grant as against other riparians. The court at one point said:[713]

> Our cases recognize that riparian rights may be conveyed to a nonriparian owner. Coquille Mill & Mercantile Co. v. Johnson, 1903, 52 Or. 547, 98 P. 132; Morton v. Oregon Short Line R. Co., 1906, 48 Or. 444, 87 P. 151, 87 P. 1046, 7 L.R.A., N.S., 344, 120 Am. St. Rep. 827; Montgomery v. Shaver, 1901, 40 Or. 244, 66 P. 923; Curtis v. La Grande Hydraulic Water Co., 1890, 20 Or. 34, 23 P. 808, 25 P. 378, 10 L.R.A. 484; cf., Norwood v. Eastern Oregon Land Co., 1924, 112 Or. 106, 227 P. 1111.

This statement is probably *dictum,* however, as the facts described by the court do not indicate there was any grant to a *nonriparian* owner involved in the case.[714] In addition, it should be noted that the first three cases cited by the court related to the conveyance of rights to erect wharves or other structures in a watercourse, not to take water for use on nonriparian land. The fourth case the court cited involved the damming of water for the water supply of a town, but the case was governed by contractual agreements binding upon the parties and did not deal with the question of effects on third persons, nor the question of nonriparian use. Note that after citing these four cases the court added "cf., Norwood v. Eastern Oregon Land Co., 1924, 112 Or. 106, 227 P. 1111." In that case, the court had said that the riparian right is purely local, inseparably

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among other things, undertakes to limit unused riparian rights to domestic use, see, in chapter 6, "Interrelationships of the Dual Water Rights Systems–The Status in Summary: By States–Oklahoma."

[712] *Fitzstephens* v. *Watson,* 218 Oreg. 185, 344 Pac. (2d) 221, 228 (1959).

[713] 344 Pac. (2d) at 229.

[714] The facts showed that the grant from Davies to Mairs of the dominant tract and the water right was *not* to a nonriparian owner, for the dominant tract was not only carved out of the original riparian tract but itself remained riparian. "This [dominant] tract was bounded on the west by the creek described above." 344 Pac. (2d) at 224. It is true that the eastern part of the dominant tract was later sold to plaintiff, so that this part no longer had contact with the creek; but the court apparently felt that severance of contact of plaintiff's land from the stream after the easement was acquired had no effect thereon, for it adjudicated his water right as a riparian right transferred to land that the statement of facts showed to have been then riparian, which right was protected as against the grantor and his successors by a perpetual easement in the servient tract.

annexed to the land where it borders the stream, and not subject to transfer to other land; and that a riparian owner who takes out water for irrigation on nonriparian land becomes an appropriator and to that extent surrenders his status as a riparian owner.[715] Notwithstanding such broad language, the court's holding in this respect apparently did not pertain to use of water on nonriparian land but was limited to its prohibition of a change in the place of diversion of water from a point on defendant's riparian lands lying below the lands of the plaintiff appropriator to other riparian lands of the defendant located above the plaintiff's lands.[716] In an earlier opinion in 1901, rendered prior to the 1909 Oregon water code, the court had said "there is some conflict in the authorities as to whether a riparian proprietor can enjoin the use of water for the irrigation of nonriparian lands without showing damage. . . ."[717] It was unnecessary to decide this question in that case.

Relation to watershed.—This question has been discussed earlier, under "Riparian Lands—Relation to Watershed."

The more general rule is that riparian rights and the exercise thereof are limited to lands within the watershed of the stream to which the holdings are contiguous. Decisions to this effect were rendered by the high courts of California, Kansas, South Dakota, and apparently Washington.[718] The chief reason for the rule is that the unconsumed portion of water applied to lands in the original watershed tends to return to the stream that drains it, whereas the return flow from water taken over the divide into another watershed is lost to the original one.

An exception appears in an Oregon decision which took the position that one who owns land contiguous to a natural stream is a riparian proprietor and entitled to riparian rights without regard to the extent of his land. The Texas Supreme Court, while approving the general limitation that the riparian proprietor ordinarily cannot divert water outside of the watershed, suggested that conditions might exist in which a diversion beyond the watershed might be authorized so long as there would be no substantial injury to other riparian proprietors.

It is also shown in the foregoing discussion that in applying the watershed principle to the use of riparian water in California, each tributary above a common junction is considered a separate stream with regard to lands contiguous thereto; but with respect to lower riparian owners below the confluence of a main stream and a tributary, the watersheds of the main stream and of the tributary stream constitute parts of a single watershed.

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[715] 112 Oreg. 106, 114, 227 Pac. 1111, 1113.

[716] 227 Pac. at 1111, 1113.

[717] *Jones* v. *Conn,* 39 Oreg. 30, 64 Pac. 855, 860, 65 Pac. 1068 (1901).

[718] See note 287 *supra,* regarding the problematical situation in Nebraska.

Return of Unused Water to Stream

A long-established requirement.—Early in the history of riparian water rights law in the West it was established that the riparian proprietor's rights attach to the stream where it crosses or passes his land; that he has a simple usufruct in the water while it is there; and that he must return to the stream, when it leaves his estate, the excess water above his rightful consumption.[719]

Point of return of water to the stream.—This matter has been litigated in several California cases.

(1) In 1895, the California Supreme Court stated that the riparian owner might exercise his usufructury right in the water of the stream "provided he returns it to the stream above his lower boundary,"[720] and the court made comparable statements in subsequent cases.[721] A few years after the 1895 case, however, the court pointed out that in that case the upper and lower riparian tracts joined each other so that necessarily the upper owner was required to return the water at or above his lower boundary line, whereas under the facts of the instant case it was properly found that "defendant must return the waters at the upper boundary line or above the lands of plaintiffs."[722]

(2) The *Joerger* case. This 1932 California case involved the point of return of water diverted by a riparian owner for hydraulic power development.[723] Defendant power company held title to lands on both sides of a stream and also to adjacent downstream lands contiguous to the left bank of the stream, together with the riparian rights pertaining thereto. Plaintiff owned downstream land, consisting of three parcels, contiguous to the right bank opposite defendant's lower land, together with the riparian right pertaining to only the intermediate parcel; the riparian rights of plaintiff's two other parcels were held by defendant company. Defendant diverted substantially all the water of the stream from its left bank at a point just below the upper boundary of its riparian land, conveyed it to a power house located on the left bank of the stream not far from the lower boundary of the riparian land, and there returned the water to the stream. Thus, the water was returned to the stream

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[719] *Haas* v. *Choussard,* 17 Tex. 588, 589-590 (1856); *Rhodes* v. *Whitehead,* 27 Tex. 304, 309-310, 84 Am. Dec. 631 (1863); *Tolle* v. *Correth,* 31 Tex. 362, 363, 98 Am. Dec. 540 (Military Ct. 1868); *Stanford* v. *Felt,* 71 Cal. 249, 250, 16 Pac. 900 (1886); *Gould* v. *Stafford,* 77 Cal. 66, 68, 18 Pac. 879 (1888); *Anderson* v. *Bassman,* 140 Fed. 14, 29 (C.C.N.D. Cal. 1905). "The rule is well established that the riparian owner may cause the channel of a water course to be changed upon his own premises, providing he causes the water to be returned into the original water course before it leaves his premises." *Burkett* v. *Bayes,* 78 Okla. 8, 10-11, 187 Pac. 214 (1918).

[720] *Vernon Irr. Co.* v. *Los Angeles,* 106 Cal. 237, 256, 39 Pac. 762 (1895).

[721] See *Mentone Irr. Co.* v. *Redlands Elec. Light & Power Co.,* 155 Cal. 323, 328, 100 Pac. 1082 (1909); *Parker* v. *Swett,* 188 Cal. 474, 486, 205 Pac. 1065 (1922).

[722] *Bathgate* v. *Irvine,* 126 Cal. 135, 144, 58 Pac. 442 (1899).

[723] *Joerger* v. *Mt. Shasta Power Corp.,* 214 Cal. 630, 636-638, 7 Pac. (2d) 706 (1932).

above the boundary of one of plaintiff's parcels from which the riparian right had been divested, but below the parcel the riparian right of which was still in effect.

The supreme court held that notwithstanding the divestiture of riparian rights from two of plaintiff's parcels, the two parties in a true sense were opposite riparian owners (which they unquestionably were at the location of plaintiff's intermediate parcel). By a strange course of reasoning, the court reached the conclusion that the defendant was not exceeding its riparian rights in carrying the water throughout the length of its riparian holdings, on the left bank of the stream, putting it to use at the lowest point on the left side, and there returning the water to the stream just above its lower boundary and above the lower boundary of the plaintiff's opposite "riparian" tract.

This strained conclusion disregards the fact that the plaintiff's lowest parcel, divested of its riparian rights which now belonged to defendant, had a *nonriparian* status despite its contiguity to the stream. Therefore, the defendant was not returning the water to the stream opposite plaintiff's legally *riparian* land, but far below it where, even though he owned the right bank tract, he had no riparian privileges in connection with it.

The supreme court did point out that plaintiff had not shown any substantial beneficial use to which he could have put the water on his riparian tract if defendant had not used the water on its opposite riparian tract. Under such circumstances, each owner may use all the water beneficially so long as the other has no use for it. This of course accords with recognized riparian law. Presumably, the court could have rested its decision on this point and thus avoided the strained interpretations of opposite riparian ownerships.

Relations Between Organization and Riparian Proprietors

Character of water organizations.—Characteristics of both public and private enterprises having to do with the supply and service of water to consumers are discussed in broad outline in chapter 8 under "Elements of the Appropriative Right—Sale, Rental, or Distribution of Water." That discussion is slanted, of course, toward the relations between group organizations and rights to appropriate water. However, the fundamental legal characteristics of various kinds of enterprises as there outlined apply in discussions of riparian as well as appropriation relationships.

A shorter summary of water organizations appears in chapter 9 under "Diversion, Distribution, and Storage Works—Relation of Physical Works to Water Right—Control of Waterworks."

Private company relations.—(1) California. (a) A California case indicates it is competent for riparian proprietors (in this case a land company) by specific agreement to make a water company their agent for the purpose of distributing the waters to which the proprietors are entitled. The water company under

such circumstances has no interest in or title to the waters other than its right to divert and distribute them in accordance with the agreement.[724]

(b) Riparian rights in a tract of land owned by a land company are preserved by a transaction in which the land company conveys the water rights to a water company in exchange for shares of its capital stock, and thereafter sells to individuals parcels of the land together with proportionate shares of the capital stock. The purchasers of the subdivided parcels of land thereby become the holders of their proportionate shares of the original water right; and the water company is simply the agent or trustee of the riparian proprietors in the exercise of their riparian rights.[725]

(c) A corporation can be created for the convenient and more economical mangement of a common source of water in which the owners of a number of tracts have respective rights of use.[726]

(d) With respect to the incorporators of a mutual water company who had acquired prescriptive rights, or who themselves had riparian rights, the California Supreme Court stated that it was immaterial to an upper riparian owner whether the right was enforced by them separately or through a corporation representing them, "either as their agent and trustee or as possessor of their former titles."[727]

(2) Texas. (a) An irrigation company by its incorporation was held, in an early case, to have become invested with the power to acquire a privilege of using certain stream waters for irrigation, but not a right to the use of the water. That water right remained to be acquired by purchase, or by condemnation if the use was a public one. Any riparian rights held by owners of land along the stream remained unaffected by the company's incorporation.[728]

(b) In 1911, it was held that the canal of an irrigation company that had condemned all the waters of Santa Rosa Creek should be treated, for all intents and purposes, as the creek itself. Hence, a tract of land contiguous to the canal, the owner having purchased a right of use from the company, would be considered riparian to the creek and entitled to have upper riparian owners restrained from diverting more water than reasonably necessary for their lands.[729]

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[724] *Quist* v. *Empire Water Co.*, 204 Cal. 646, 651, 269 Pac. 533 (1928).

[725] *Copeland* v. *Fairview Land & Water Co.*, 165 Cal. 148, 161-162, 131 Pac. 119 (1913).

[726] *Woodstone Marble & Tile Co.* v. *Dunsmore Canyon Water Co.*, 47 Cal. App. 72, 76-77, 190 Pac. 213 (1920). The reported decision does not state whether the water rights were appropriative or riparian, but apparently the principle would be the same in either case.

[727] *Arroyo Ditch & Water Co.* v. *Baldwin*, 155 Cal. 280, 285, 100 Pac. 874 (1909). See *Arroyo Ditch & Water Co.* v. *Dorman*, 137 Cal. 611, 613-614, 70 Pac. 737 (1902).

[728] *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian*, 74 Tex. 170, 173, 11 S.W. 1078 (1889).

[729] *McKenzie* v. *Beason*, 140 S.W. 246, 247 (Tex. Civ. App. 1911), citing *Santa Rosa Irr. Co.* v. *Pecos River Irr. Co.*, 92 S.W. 1014, 1017 (Tex. Civ. App. 1906, error refused).

(c) In a suit between two water companies that held appropriative rights, many water tenants of the junior appropriation company held or claimed riparian rights in the river water superior to any right of the senior company and thus were necessary parties to the suit. "The fact that they could, under present conditions, only utilize their riparian rights through their contract with appellee, did not affect such rights, and appellant would not be permitted to deprive them of such rights in a suit in which they were not parties, by enjoining appellee from performing its contract with them."[730]

(d) A riparian landowner contracted with an irrigation corporation to supply water from the stream to her land through its canal system in consideration of the payment of fixed annual charges, which contract was fully performed for a number of years. Later, she brought suit to have the contract canceled and all payments thereon returned. The court held that even though it might be true that plaintiff was entitled to the free use of the water, she was not entitled to the free use of the company's facilities for distributing the water on her land, since she had agreed to pay for them.[731]

(e) Riparian owners who had been using water from a creek for irrigation, domestic, and stockwatering purposes contracted in 1907 with an irrigation company—succeeded by defendant district—for delivery to their lands of water for these purposes, agreeing to conform to company rules and regulations and to accept their water at times designated by the company. After delivering irrigation water at fixed intervals and stock and domestic water continuously for many years, a new rule was established in 1940 under which stock and domestic water was to be delivered every 12½ days instead of continuously. The court held that under the terms of the contract and the facts of the case, the rule made by the district was a reasonable one for the supply, use, and enjoyment of the water that the contracting parties were entitled to under their original riparian rights.[732]

Public district relations.—(1) California. A county water district that is authorized by its enabling act to participate in actions and proceedings to prevent interference with waters that are of a common benefit to the lands within the district or its inhabitants, may lawfully proceed in a representative capacity to protect the rights of all landowners and other users of water within the district. This is the case, regardless of whether the water rights to be protected are riparian, appropriative, or correlative percolating water rights, and regardless of the fact that the district does not assert title in itself to any of such water rights.[733]

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[730] *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1180 (Tex. Civ. App. 1913).

[731] *Berry* v. *American Rio Grande Land & Irr. Co.*, 236 S.W. 550, 552-553 (Tex. Civ. App. 1921).

[732] *Honaker* v. *Reeves County W. I. Dist. No. 1*, 152 S.W. (2d) 454, 455-456 (Tex. Civ. App. 1941, error refused).

[733] *Coachella Valley County Water Dist.* v. *Stevens*, 206 Cal. 400, 406-410, 274 Pac. 538 (1929).

(2) Texas. (a) Riparian lands may be lawfully included within a public water district. If so, they are (i) entitled to the benefits conferred and (ii) subject to taxation by the district (if authorized by its enabling act) for purposes of organization and operation. The water rights of a riparian landowner who diverts water from the stream for irrigation of his riparian land are not affected by inclusion of his land in the district, for he can still assert his right to divert through his own ditch (unless of course condemned by the district) his just proportion of the riparian water. Notwithstanding this, the lands are lawfully subject to district taxation.[734]

(b) In *Parker* v. *El Paso County Water Improvement District Number 1,* discussed immediately above, the locus of the riparian land was the Federal Rio Grande Project in El Paso County, Texas. The Texas Supreme Court made some observations in this case as to relative water rights of the district and of the owner of riparian land included therein.[735] Among these were:

The riparian owner has the right to take his just correlative proportion of riparian water from the river and to conduct it to and use it on his land. This is incident to his ownership of the land, part and parcel thereof, and property within the constitutional guarantees.

The district cannot take that water and distribute it without his consent, if he wishes to use it himself and does so. But if the riparian does not take the share to which he is entitled, then that proportion, while he refrains from taking it, increases the residue of riparian water in the river available for the use of other riparian proprietors, including those whose lands are within the district boundaries. This water may be taken out of the river by the riparian landowners, or by the district for distribution if they have authorized it to do so.

The floodwaters impounded upstream, turned into the channel of the Rio Grande, and permitted to mingle with the ordinary flow did not become a part of the riparian waters of the stream. In using the channel and banks of the Rio Grande for delivering its appropriated water from the place of storage to the places of use within its boundaries, whether on riparian or nonriparian land, the district was acting pursuant to its statutory authority and within its legal rights, regardless of the question of riparian rights.

(c) In *Ward County Water Improvement District Number 2* v. *Ward County Irrigation District Number 1,* a suit between two public water districts, it was held—by reference to a much earlier case involving an irrigation corporation—that title to the riparian water rights inherent in lands contiguous to the Pecos River and located within the plaintiff district remained vested in the respective landowners and was not affected by the district organization.[736]

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[734] *Parker* v. *El Paso County W. I. Dist. No. 1,* 116 Tex. 631, 638-642, 297 S.W. 737 (1927).

[735] 116 Tex. at 642-644.

[736] *Ward County W. I. Dist. No. 2* v. *Ward County Irr. Dist. No. 1,* 222 S.W. 665, 666-667 (Tex. Civ. App. 1920, error refused), referring to *Mud Creek Irr., Agric. & Mfg. Co.* v.

Until the district connected itself with these private water rights—which it had statutory authority to acquire but had not done so—it had no right to maintain a suit to enjoin other riparian owners or water users from diverting and using the waters. No right of the district was being infringed; the only ones affected were the riparian landowners in the district. They could bring an independent suit to protect their own rights whenever they chose to do so; but they were not necessary parties to this suit and would not have been bound by any judgment in it.

After the ruling in the *Ward County* case, the act under which the district was formed was so amended as to empower such districts to institute and maintain suits to protect their water supplies and prevent interference therewith.[737]

(d) Subsequently, in *Wilson* v. *Reeves County Water Improvement District Number 1,* an owner of land riparian to Toyah Creek brought suit against a district which diverted water from the same creek, at a point above plaintiff's land, for supply to landowners within the district boundaries. The purpose was to establish as against the district the plaintiff's riparian right, to enjoin the diversion of more water than the riparian owners in the district were entitled to, and to enjoin the delivery of any water to nonriparian land. Of several points decided, one was that on the authority of the *Ward County* case the present action could not be maintained without the joinder of the parties to whom the district was furnishing water under a claim of right to the use of such water vested in such parties. The court took note of the amendment to the district statute, but pointed out that while that amendment undertook to alter the rule announced in the *Ward County* case so far as parties plaintiff are concerned, it did not in any way change the rule as to necessary parties defendant in actions such as the instant one.[738]

Vivian, 74 Tex. 170, 173, 11 S.W. 1078 (1889). See "Private company relations.–(2) Texas," above.

[737] Tex. Rev. Civ. Stat. Ann. arts. 7797 and 7798 (1954).

[738] *Wilson* v. *Reeves County W. I. Dist. No. 1,* 256 S.W. 346, 347-348 (Tex. Civ. App. 1923). The amendment "does not attempt to authorize the maintenance of suits against it [the district] for alleged unauthorized diversion of water without the joinder of other necessary parties defendant."

Chapter 11

THE PUEBLO WATER RIGHT

CHARACTER OF THE RIGHT

In Western States water rights law, the pueblo water right is the paramount right of an American city as successor of a Spanish or Mexican pueblo (primitive village or town) to the use of water naturally occurring within the old pueblo limits for the use of the city and its inhabitants. Although the Spaniards made settlements in many parts of the Southwest, the only American jurisdictions in which the doctrine has been recognized are California and New Mexico. The right was first recognized in California in 1881, and in New Mexico in 1958.

By far the greatest amount of litigation over pueblo water rights was in California. Since that is where the doctrine originated and became established, and since the New Mexico Supreme Court based its recognition of the doctrine entirely on the California decisions, experience in the two States is presented separately. Much of the material that follows first appeared in published writings of the author.[1]

PUEBLO WATER RIGHTS IN CALIFORNIA

Origin

Colonization of California by Spain

As elsewhere in the Southwest, colonization of California by Spain included the establishment of civil pueblos or municipalities, as well as religious missions and presidial or military towns.[2] Under the old Spanish law as it

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[1] Hutchins, W. A.: "The California Law of Water Rights" 256-262 (1956); "The New Mexico Law of Water Rights" 7-8 (1955); "Pueblo Water Rights in the West," 38 Tex. Law Rev. 748 (1960). See Clark, R. E., "The Pueblo Rights Doctrine in New Mexico," 35 N. Mex. Historical Rev. 265 (1960).

The original paper on this subject by the author, entitled "Pueblo Rights in the West," was presented at the Fourth Annual N. Mex. Water Conference, N. Mex. State Univ., University Park, N. Mex., Nov. 5, 1959. This was revised for publication in the Texas Law Review and was used therein with permission of H. R. Stucky, Water Conference Chairman. Permission was granted by the Texas Law Review for use in this chapter.

[2] Hutchins, W. A., "The Community Acequia: Its Origin and Development," 31 Southwestern Historical Quarterly 261, 272-273 (1928).

existed in Spain, waters were held by pueblos as a common property for domestic use, irrigation, and other purposes under regulations administered by the town officials.[3] In the Spanish settlement of California, this practice was followed in the early agricultural pueblos of San Jose and Los Angeles, at each of which irrigation was an all-important consideration;[4] and the public acequias (ditches) were managed as such by the pueblo authorities throughout the Spanish and Mexican rule.[5]

American Municipal Succession

In the year of attainment of statehood, the California Legislature passed acts incorporating the cities of San Jose and Los Angeles. By appropriate legislation in this and ensuing years, both of these American municipalities were confirmed in their rights and responsibilities as successors of the pueblos.[6]

Whatever water rights San Jose may have possessed were not adjudicated. On the other hand, the pueblo water rights of the City of Los Angeles, which succeeded the Spanish-Mexican pueblo, and of the City of San Diego as successor to a pueblo established under Mexican rule, have been adjudicated in a series of cases.[7] The United States Supreme Court held that the nature and extent of water rights claimed as incident to grants of land by the Spanish and Mexican Governments within California, including the pueblo grants, are not Federal questions, but are questions of State law and general public law on

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[3] Hall, W. H., "Irrigation Development," p. 370 (1886).

[4] Bancroft, H. H., "History of California," vol. 1, p. 345 (1884).

[5] Hutchins, *supra* note 2, at 282-284.

[6] San Jose: Cal. Stat. 1850, ch. 47 (act to incorporate the city, March 27, 1850); Cal. Stat. 1857, ch. 107 (act to reincorporate the city, March 27, 1857, giving the Board of Trustees authority "to construct wells and cisterns; organize and maintain fire departments, and supply the city with water," but omitting reference to irrigation).

Los Angeles: Cal. Stat. 1850, ch. 60 (act to incorporate the city, April 4, 1850); Cal. Stat. 1851, ch. 78 (supplementary act, April 5, 1851); Cal. Stat. 1854, ch. 65, April 13, 1854 (Kerr ed.), Special Acts ch. 95 (Redding ed.) (construing 1850 statute as vesting in the mayor and common council control over the distribution of water for irrigation within the limits of the ancient pueblo); Cal. Stat. 1874, ch. 447 (amending charter to provide, among other things, that the city is granted "in absolute ownership, the full, free, and exclusive right to all of the water" of the Los Angeles River from its source to the southern boundary of the city, together with the right to develop and use all waters in the bed of the river beneath the surface); Cal. Stat. 1876, ch. 476 (amending the 1874 statute). This exclusive legislative grant of all water was not taken seriously by the California Supreme Court, which could not see that the city had acquired any new rights by reason of the legislative acts and stated that "It will hardly be claimed that the legislature could grant to the city the water of the river so as to deprive riparian owners of it." *Vernon Irr. Co.* v. *Los Angeles,* 106 Cal. 237,253, 39 Pac. 762 (1895).

[7] See "Extent of the Pueblo Water Right—Adjudication of Pueblo Water Rights of Los Angeles and San Diego," *infra.*

which decisions of the State courts are final. This is discussed below under "Question of Local Law."

Early Judicial Inquiries

Lux v. Haggin

Statements by the California Supreme Court in the leading riparian rights case of *Lux* v. *Haggin* played a significant part in laying the foundation of the California pueblo rights doctrine, despite the fact that the statements were *dicta.* The court went into the question of pueblo water rights, although it took notice that no pueblo existed on Kern River, the waters of which were the subject of the controversey.[8] Although not necessary to the decision in this case, the subject matter became judicial law as the result of actual adjudications in later cases.

Under the Mexican law, said the supreme court in *Lux* v. *Haggin,* each pueblo was a *quasi* public corporation having a right, by reason of its title to the four leagues of land set apart for its use, to the use of the waters of the stream on which it was situated, and vested with power to provide for a distribution of the waters to those for whose benefit the right and powers were conferred. The court's thesis was based on a decision that it had rendered in 1860 in a case involving lands of the pueblo at San Francisco, in which water rights were not involved.[9] By analogy to this earlier decision, the court purported to "hold" that the pueblos had "a species of right or title in the waters and their use" within the pueblo limits, "subject to the public trust of continuously distributing the use in just proportion" to the common lands and settlers. Apparently, according to this thesis, the pueblo had a preference or prior right to the use of the water as against other proprietors of land contiguous to the same stream.

Early Los Angeles Cases

The first California decision in point was rendered in 1881, prior to the decision in *Lux* v. *Haggin,* with respect to the pueblo of Los Angeles, but without invoking or examining the ancient pueblo water laws. The basis of the decision was that as the pueblo and City of Los Angeles, for a full century from the founding of the pueblo in 1781, had claimed a right to all the waters of Los Angeles River, and as plaintiffs and their predecessors had recognized

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[8] *Lux* v. *Haggin,* 69 Cal. 255, 328-332, 4 Pac. 919 (1884), 10 Pac. 674 (1886).
[9] *Hart* v. *Burnett,* 15 Cal. 530, 542, 573 (1860).

and acknowledged that claimed right, the latter could not now assert a claim of right adverse to that of the city.[10]

The conclusions of the California Supreme Court as to pueblo water rights expressed in *Lux* v. *Haggin,* whether right or wrong, were accepted by that court in the following decade in again adjudicating the Los Angeles pueblo right, after perusing translations of Spanish and Mexican laws, regulations, ordinances, and rules pertaining to the subject.[11] A few years later these conclusions were not only reiterated, but were so enlarged as to declare that the pueblo right was capable of expanding with the growing needs of the city up to the full capacity of the water supply, thus inexorably supplanting private water rights that may have been exercised beneficially for many years.[12]

Question of Local Law

Assertion of rights or titles to the use of water derived under Spanish and Mexican land grants and United States patents based on the original grants does not raise a Federal question if it does not involve any title or right claimed under the United States Constitution, or any treaty, statute, commission held, or authority exercised under the Constitution.[13] The controversy in the California State court did not involve construction of the treaty of Guadalupe Hidalgo between Mexico and the United States, but involved only the validity of Mexican and Spanish grants prior to the treaty. Hence the question of private title or right in the land and whatever appertained thereto was one of State law and general public law, on which the decision of the State court was final.

A suit does not arise under the Constitution or laws or treaties of the United States, said the United States Supreme Court, "unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends."[14] In a later case the Supreme Court said that "whatever the rule may be as to patents conveying title to the lands of the United States, it has been distinctly held in this court that neither the treaty of Guadalupe Hidalgo nor patents under the act of March 3, 1851, are original sources of private title, but are merely confirmatory of rights

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[10] *Feliz* v. *Los Angeles,* 58 Cal. 73, 78-80 (1881). *Elms* v. *Los Angeles,* 58 Cal. 80 (1881), was presented on the same facts and submitted on the same arguments as the *Feliz* case, and on the authority of that case the same decision was rendered by the supreme court.

[11] *Vernon Irr. Co.* v. *Los Angeles,* 106 Cal. 237, 250, 39 Pac. 762 (1895).

[12] *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 649-650, 57 Pac. 585 (1899).

[13] *Hooker* v. *Los Angeles,* 188 U.S. 314, 317-318 (1903), dismissing writ of error, *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 57 Pac. 585 (1899).

See generally Kinney, C. S., "A Treatise on the Law of Irrigation and Water Rights," 2d ed., vol. I, § 583 (1912).

[14] *Devine* v. *Los Angeles,* 202 U.S. 313, 332-333, 337 (1906).

already accrued under a former sovereignty."[15] And so it follows that "the extent of the riparian rights belonging to pueblos or persons receiving such patents are matters of local or general law." Questions as to the nature and extent of water rights claimed by holders of United States patents based upon Spanish and Mexican grants are necessarily questions of State or general law.

Extent of the Pueblo Water Right

Needs of Inhabitants of City

Full extent of needs of inhabitants.—In its first decision respecting the pueblo water right, the California Supreme Court held that the City of Los Angeles had the paramount right to the use of the waters of Los Angeles River "to the extent of the needs of its inhabitants, * * * and the further right, long exercised and recognized, * * * to manage and control the said waters for those purposes."[16] The right extends only to the amount of water needed to supply the wants of the city's inhabitants,[17] "for the pueblo right has always been measured, and therefore circumscribed, by the needs of the city."[18]

Grows with needs of expanding city.—Not only are the inhabitants of the area constituting the old pueblo entitled to enjoy the full pueblo right, but the right grows both with the number of inhabitants to whatever extent increased, and with the extension of the city limits by the annexation of land not within the limits of the original pueblo.[19] The right extends to so much of the waters of the stream "as the expanding needs of such city" require,[20] and "thus insures a water supply for an expanding city."[21]

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[15] *Los Angeles Farming & Mill. Co.* v. *Los Angeles,* 217 U.S. 217, 233, 234 (1910), dismissing writ of error to California Supreme Court for want of jurisdiction, 152 Cal. 645, 93 Pac. 869, 1135 (1908). The Act of Congress of March 3, 1851, 9 Stat. 631, ch. 41, provided for the ascertainment and settlement of the land claims derived from Spain or Mexico in the State of California; created a board of land commissioners for that purpose; provided that all lands, claim to which was rejected or not presented to the board, should be held a part of the public domain of the United States; provided that claims of towns or cities should be presented under that act; and provided that decrees and patents issued under that act should be conclusive between the United States and the claimant.

[16] *Feliz* v. *Los Angeles,* 58 Cal. 73, 80 (1881). See *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 152, 164-165, 287 Pac. 496 (1930).

[17] *Vernon Irr. Co.* v. *Los Angeles,* 106 Cal. 237, 250-251, 39 Pac. 762 (1895).

[18] *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 74-75, 142 Pac. (2d) 289 (1943).

[19] *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 649-650, 57 Pac. 585 (1899); *Los Angeles* v. *Hunter,* 156 Cal. 603, 608-609, 105 Pac. 755 (1909).

[20] *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 152, 164, 287 Pac. 496 (1930).

[21] *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 75, 142 Pac. (2d) 289 (1943).

Place of Use of Water

The pueblo water right extends to the use of water only within the city limits.[22] The city has no right to take for sale, outside the city limits, any quantity of water in excess of the requirements of its inhabitants therein.

Purpose of Use of Water

The pueblo right relates to the use of water necessary for the inhabitants of the city and for all ordinary municipal purposes.[23] The original pueblo right included the use of water for domestic purposes, watering of stock, and irrigation. The California Supreme Court agreed that the fact that some of the pueblo lands had been converted into ornamental parks would not impair the right to irrigate them and, somewhat reluctantly, approved the use of water for ornamental fountains and artificial lakes in which considerable water is lost through absorption and evaporation.[24] No restrictions upon the purpose of use of water under the pueblo right have been imposed by the California Supreme Court.[25]

Waters to Which Pueblo Rights Attach

The pueblo right extends to the use of all surface and ground waters of the stream that flowed through the original pueblo, including its tributaries, from its source to its mouth.[26] This applies to peak floodflows as well as other flows, and to waters impounded for the purpose of controlling floods and subsequently released to rejoin the body of water of which they are naturally a part.[27]

The pueblo right attaches only to waters naturally in the watershed of the stream flowing through the pueblo. Hence it does not attach to waters brought into the area from other nontributary watersheds.[28]

Superiority of the Pueblo Water Right

Prior and paramount right.—The city as successor of the pueblo has the prior and paramount right to the use of the waters of the stream, on the

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[22] *Feliz* v. *Los Angeles,* 58 Cal. 73, 79-80 (1881); *Vernon Irr. Co.* v. *Los Angeles,* 106 Cal. 237, 250-251, 39 Pac. 762 (1895).

[23] *Los Angeles* v. *Los Angeles Farming & Mill. Co.,* 152 Cal. 645, 652, 93 Pac. 869, 1135 (1908); *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 122, 287 Pac. 475 (1930).

[24] *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 639-640, 650, 57 Pac. 585 (1899).

[25] See *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 151, 287 Pac. 475 (1930).

[26] *Id.; Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 74, 142 Pac. (2d) 289 (1943).

[27] *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 73-74, 142 Pac. (2d) 289 (1943).

[28] 23 Cal. (2d) at 73.

surface, and in the ground, that flowed through the original pueblo.[29]

Generally superior to riparian rights of other landowners.—In *Lux* v. *Haggin* the California Supreme Court expressed its belief that a pueblo had a preference or prior right to consume the water of the stream even as against another riparian proprietor on the same stream, but considered it unnecessary to decide the question in this case inasmuch as no pueblo actually was involved.[30] In subsequent cases this court held the pueblo right to be superior to riparian rights of other proprietors.[31]

Generally superior to appropriative rights.—The California Supreme Court has said that the pueblo water right of the City of Los Angeles is superior to the rights of appropriators on the stream.[32]

Any rights-of-way acquired under the Act of Congress of 1866 and the supplementary act of January 12, 1891,[33] were held to be subordinate to the vested rights of the City of San Diego derived from its succession to the pueblo of San Diego established under Mexican rule in 1834. This resulted from the fact that the Congressional acts were passed after the rights of San Diego had become vested.[34]

Not inconsistent with California Constitution.—The pueblo right, even though it includes a potentital right to waters not presently needed, is not

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[29] *Id.; San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 116, 122, 151, 287 Pac. 475 (1930); *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 152, 164-165, 287 Pac. 496 (1930); *Los Angeles* v. *Los Angeles Farming & Mill. Co.,* 152 Cal. 645, 652-653, 93 Pac. 869, 1135 (1908); *Feliz* v. *Los Angeles,* 58 Cal. 73, 79-80 (1881).

[30] *Lux* v. *Haggin,* 69 Cal. 255, 331-332, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[31] *Vernon Irr. Co.* v. *Los Angeles,* 106 Cal. 237, 250, 39 Pac. 762 (1895); *Los Angeles* v. *Los Angeles Farming & Mill. Co.,* 152 Cal. 645, 651-652, 93 Pac. 869, 1135 (1908); *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 152, 164-165, 287 Pac. 496 (1930); *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 73, 142 Pac. (2d) 289 (1943). See also *San Diego* v. *Sloane,* 272 Cal. App. (2d) 663, 77 Cal. Rptr. 620 (1969).

In *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 641, 57 Pac. 585, 600-601 (1899), writ of error dismissed sub nom. *Hooker* v. *Los Angeles,* 188 U.S. 314 (1903), the California Supreme Court noted that the competing riparians held their lands "as successors to several Spanish and Mexican grantees, under patents from the United States based upon the original grants." The riparians argued that the Spanish and Mexican grants preceded establishment of the pueblo of Los Angeles but the court found the situation to be otherwise. The court thereby appears to have implied, but it was unnecessary to decide, that the pueblo right would *not* have been superior to the riparian right if the pueblo had *not* been established before the early Spanish and Mexican grants of the riparian lands. See also *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 287 Pac. 475, 485-486 (1930).

As discussed under "Question of Local Law," *supra,* interpretations of such Spanish and Mexican grants and associated pueblo or riparian rights are questions of local law. See especially the discussion at note 15 *supra.*

[32] *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 73, 142 Pac. (2d) 289 (1943). See the preceding footnote regarding the city's pueblo right versus riparian rights.

[33] 14 Stat. 253, ch. 262, § 9; 26 Stat. 714, ch. 65, § 8.

[34] *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 131-132, 287 Pac. 475 (1930).

thereby inconsistent with the 1928 amendment of the California Constitution.[35] The supreme court said that:[36]

> The declared policy of the constitutional amendment against waste of water is thus implemented by its rule that no one has the right to more water than is reasonably necessary for the beneficial use to be served. Such a rule in no way diminishes the rights of the successor to the pueblo, for the pueblo right has always been measured, and therefore circumscribed, by the needs of the city.

The court went on to point out that the surplus water over existing needs is left accessible to others for beneficial use until such time as the city needs it, and that neither before nor after adoption of the amendment did the pueblo or its successor city have the right to object to use by others of water not presently needed.

Preservation of the pueblo right.—The pueblo right is available for the use of the city whenever the city is ready to exercise it. No method by which the pueblo right can be lost to the city has yet been declared by the California Supreme Court. On the contrary, the decision in *Los Angeles* v. *Glendale* specifically ruled out some suggested ways in which the right might be lost or impaired. These include nonuse and statutory forfeiture.[37] Specifically, the portion of section 11 of the Water Commission Act[38] providing that, among other things, waters not put to use by riparian owners for any consecutive period of 10 years thereby became subject to appropriation, had no application to pueblo rights.

Nor does section 20a of the Water Commission Act[39]—providing that failure for 3 years to beneficially use water for the purpose for which it was appropriated or adjudicated, causes such water to revert to the public—apply to the pueblo water right, which is not based upon appropriation or adjudication.

The court also held that the pueblo water right is not lost or impaired by prescription because of the taking (during the period prescribed by the statute of limitations) of part of the water by others while the city does not need that portion. Inasmuch as the pueblo right enables a city to take only what it needs at any time, it has no occasion to object to the taking of the remainder by others.[40] An appropriation must invade the rights of another before it can destroy them by the establishment of a prescriptive title.

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[35] Cal. Const. art. XIV, § 3.

[36] *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 74-75, 142 Pac. (2d) 289 (1943).

[37] 23 Cal. (2d) at 74-79.

[38] Cal. Stat. ch. 586, § 11 (1913). This portion of § 11 was omitted from the Water Code, enacted in 1943.

[39] Cal. Water Code § 1241 (West 1956).

[40] See *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 75, 79, 142 Pac. (2d) 289 (1943); *San Diego* v. *Sloane,* 272 Cal. App. (2d) 663, 77 Cal. Rptr. 620, 622, 624-625 (1969).

Although not mentioned by the court, a California statute provides that a prescriptive right to water, among other things, may not be acquired by any person, firm or corporation against any public entity. The extant version of the statute reads in part, "no possession by any person, firm or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility or dedicated to or *owned by the state or any public entity, shall ever ripen into any [prescriptive] title, interest or right against the owner thereof.*"[41] (Emphasis added.)

In an earlier case in which the pueblo rights of the City of San Diego were first litigated and established, the California Supreme Court said[42] that no claim of right based upon estoppel

> could come into being as against a municipal corporation, founded upon its mere acquiescence or that of its officials in the diversion by any number of upper appropriators or even of upper riparian owners of the waters of a stream to the use of the waters of which such public or municipal corporation was entitled as a portion of its public rights and properties held in perpetual trust for public use.

Adjudication of Pueblo Water Rights of Los Angeles and San Diego

The California Supreme Court held in 1881 that from the founding of the pueblo of Los Angeles in 1781, a century earlier, the right to all the waters of Los Angeles River had been rightfully claimed by the pueblo and by the city, which succeeded to all the rights of the former pueblo. With respect to this claim of the city, "we hold that, to the extent of the needs of its inhabitants, it has the paramount right to the use of the waters of the river, and the further right, long exercised and recognized, as appears from the findings, to manage and control the said waters for those purposes."[43] As previously stated under "Early Judicial Inquiries—Early Los Angeles Cases," as the opponents and their predecessors had recognized and acknowledged this long claim of right by the city, they could not now be allowed to assert a claim of adverse right. In subsequent cases the California Supreme Court repeatedly recognized and adjudicated the pueblo water right of Los Angeles.[44]

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[41] Cal. Civ. Code § 1007 (West Supp. 1970).

[42] *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 137, 142-143, 287 Pac. 475 (1930). See also *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 142 Pac. (2d) 289, 296 (1943).

[43] *Feliz* v. *Los Angeles,* 58 Cal. 73, 78-80 (1881). Related case and same decision, *Elms* v. *Los Angeles,* 58 Cal. 80 (1881).

[44] *Vernon Irr. Co.* v. *Los Angeles,* 106 Cal. 237, 250-251, 39 Pac. 762 (1895); *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 639-640, 649-650, 57 Pac. 585 (1899); *Los Angeles* v. *Los Angeles Farming & Mill. Co.,* 152 Cal. 645, 651-653, 93 Pac. 869, 1135 (1908); *Los Angeles* v. *Hunter,* 156 Cal. 603, 608-609, 105 Pac. 755 (1909); *Los Angeles* v.

In three decisions, the United States Supreme Court refused to review questions as to the validity of the pueblo water right of Los Angeles and of claims derived from Spanish or Mexican grants in opposition thereto. Two of these cases went to the Supreme Court from the California Supreme Court.[45] One was appealed from a Federal Court.[46] In all three cases the Supreme Court held that these were questions of State or general law, not Federal questions.

The pueblo water right of the City of San Diego was adjudicated by the California Supreme Court in two cases under the same title, decided on the same day.[47] The court said that the subject of the pueblo right of a city that succeeded a Spanish or Mexican pueblo

> is no longer an open one for further consideration and review before this court, and that . . . the proposition that the prior and paramount right of such pueblos and their successors to the use of the waters of such rivers and streams necessary for their inhabitants and for ordinary municipal purposes, has long since become a rule of property in the state, which at this late date in the history and development of those municipalities which became the successors of such pueblos we are not permitted, under the rule of *stare decisis,* to disturb.[48]

The court also said,[49]

> It follows from the law, as thus declared, that the City of San Diego, as plaintiff herein, as the successor of the pueblo of San Diego, has had at all times and still has a prior and paramount right to the use of the waters of the San Diego river particularly involved in the present discussion whenever, and to the extent that, the needs of the city and its inhabitants require such use.

Glendale, 23 Cal. (2d) 68, 73-80, 142 Pac. (2d) 289 (1943). In opinions in several cases not involving questions of pueblo water rights, the Los Angeles pueblo water right is mentioned. *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327, 334, 88 Pac. 978 (1907); *Fellows* v. *Los Angeles,* 151 Cal. 52, 61, 90 Pac. 137 (1907); *Miller* v. *Bay Cities Water Co.,* 157 Cal. 256, 287-288, 107 Pac. 115 (1910).

[45] *Hooker* v. *Los Angeles,* 188 U.S. 314 (1903), dismissing writ of error, *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 57 Pac. 585 (1899), *Los Angeles Farming & Mill. Co.* v. *Los Angeles,* 217 U.S. 217 (1910), dismissing writ of error, 152 Cal. 645, 93 Pac. 869, 1135 (1908).

[46] *Devine* v. *Los Angeles,* 202 U.S. 313 (1906).

[47] *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 116, 122-132, 151, 287 Pac. 475 (1930); *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 152, 164-165, 287 Pac. 496 (1930). See also *San Diego* v. *Sloane,* 272 Cal. App. (2d) 663, 77 Cal. Rptr. 620, 621-623 (1969).

[48] *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 122, 287 Pac. 475 (1930).

[49] 209 Cal. at 165.

Foundation of the California Doctrine

The Original Pueblo Water Right

The California doctrine of pueblo water rights was created by the California Supreme Court. It is contained in the opinions of this court in the cases cited earlier in this chapter.[50]

In reviewing these decisions, the author's attempt to find any quotations from Spanish or Mexican authorities that would unequivocally portray the policy of the sovereign respecting the pueblo's rights in the water of the stream on which the pueblo was situated met with little success.

Most of the discussion of this matter is in the *dicta* in *Lux* v. *Haggin.*[51] That the statements concerning pueblo rights were merely *dicta* is demonstrated beyond question by the court's statement that "We take notice that no pueblo existed on the water-course (if any there be) which is the subject of the present controversy."[52] Despite that frank admission, the court declared, "By analogy, and in conformity with the principles of that decision [*Hart* v. *Burnett,* 15 Cal. 530 (1860)], we hold the pueblos had a species of property in the flowing waters within their limits," to be held in trust and exercised with respect to the common lands and inhabitants.[53]

The court went on to say that the laws of Mexico relating to pueblos conferred on the municipal authorities the power of distributing the waters to the common land and inhabitants, and that *it would seem* that a species of right to the use of *all its waters* needed by the settlers was vested in the authorities for the common benefit. Two sections of the Plan of Pitic (or Pictic) were quoted.[54] Both dealt with water distribution within the pueblo; neither gave the pueblo the right to all stream waters as against *nonpueblo users.* However, the court quoted a paragraph from Escriche to the effect that owners of lands through which a nonnavigable river passes "may use the waters thereof for the utility of their farms or industry, *without prejudice to the common use or destiny which the pueblos on their course shall have given them."*[55] [Emphasis added.] From the foregoing, said the court, *it appears*

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[50] The discussion of foundation of the California doctrine in this and the next subsection is based largely on the author's article, "Pueblo Water Rights in the West," 38 Tex. Law Rev. 748 (1960).

[51] *Lux* v. *Haggin,* 69 Cal. 255, 326-332, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[52] 69 Cal. at 332.

[53] 69 Cal. at 328-329. *Hart* v. *Burnett* was a land case, a large part of its 100-page opinion being devoted to analysis of Spanish and Mexican laws in support of the court's decision respecting the existence of a pueblo at San Francisco and its rights to lands within its limits. Water rights were not involved.

[54] This was the plan decreed by the King of Spain in 1789 establishing the Pueblo of Pitic (or Pictic).

[55] 69 Cal. at 330.

that a riparian proprietor could not so appropriate water as to interfere with such common use or destiny, and that the pueblos had a preference right to consume the waters even as against another riparian proprietor. But the court considered it unnecessary here to decide that the pueblos had the preference *above suggested,* nor to speak of the relative rights of two or more municipalities on the same stream, inasmuch as there was not even one pueblo in the area. From the use of these qualified expressions, it may be surmised that the court knew that it was treading on uncertain ground, and was not too sure of the soundness of its tentative conclusions.

However, whether right or wrong, these conclusions were accepted by the California Supreme Court a decade later in again adjudicating the Los Angeles pueblo right.[56] It was stated in this case that counsel had furnished the court with translations of numerous ordinances, laws, rules, and regulations of Spain and Mexico relating to the subject and that, after perusing them, the court was satisfied with the conclusion reached in *Lux* v. *Haggin* that pueblos had a right to the water similar to the rights in pueblo lands, and that the inherited water right of Los Angeles was superior to that of a riparian owner on the stream.

It is probable that in these early pueblo rights cases the courts were provided with many documents such as those alluded to above. As to precisely what they were, and how well translated, there is no specific mention in the water rights decisions. Apropos of this, a most illuminating comment by the supreme court appears in the lengthy opinion in *Hart* v. *Burnett,* the San Francisco land case.[57]

> The Bench and Bar of California, generally, have not been familiar with these laws [Spanish and Mexican]; it has been exceedingly difficult to procure copies of the Mexican statutes, and sometimes impossible to procure the works of the most distinguished commentators on the Spanish civil code. And even when procured, it was equally difficult to obtain correct translations of such laws and of the works of such law writers. Add to this the fact that nearly all the Mexican orders, laws, decrees, etc., respecting California, are still in manuscript, scattered through immense masses of unarranged archives, almost inaccessible, and known, even imperfectly, to scarcely half a dozen persons, and will it appear surprising that errors have been committed by the judiciary?

By contrast to the lengthy analysis of Spanish and Mexican land laws in *Hart* v. *Burnett,* the treatment of Spanish and Mexican law in the pueblo water rights cases of California is most sketchy. Whether or not well grounded in Spanish-Mexican law, the principle that a pueblo on its creation was

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[56] *Vernon Irr. Co.* v. *Los Angeles,* 106 Cal. 237, 250, 39 Pac. 762 (1895). The first such adjudication was in *Feliz* v. *Los Angeles,* 58 Cal. 73, 78-80 (1881).

[57] *Hart* v. *Burnett,* 15 Cal. 530, 611 (1860).

automatically endowed with an unlimited preference right to stream water for uses within the original pueblo limits rests, so far as the authorities quoted in the American decisions show, on a very narrow foundation.

The Ever-Expanding Pueblo Water Right

The extension of the original pueblo water rights principle to encompass the future needs of a city after outgrowing the original pueblo limits was first made in *Los Angeles* v. *Pomeroy* in 1899 by a divided court. The prevailing opinion sets forth the purpose of establishing pueblos pursuant to the royal regulations of Spain, the original plan of which was for a primitive village, to aid and encourage the settlement of the country. Then, said the court:[58]

> Unquestionably it was contemplated and hoped that at least some of them would so prosper as to outgrow the simple form of the rural village. It is in the nature of things that this might happen, and when it did, and the communal lands were required for house lots, *we must presume* that under Mexican or Spanish rule they could be so converted, and that when the population increased so as to overflow the limits of the pueblo that such extension could be legally accomplished. Had this happened under Mexican rule, *can it be doubted* that the right vested in the pueblo *would have been construed to be* for the benfit of the population, however great the increase would be? [Emphasis added.]

The significance of this is that the court's attention could not have been called to any Spanish or Mexican law or regulation to that effect—of which it could have taken judicial notice—but "must presume" that one would have been promulgated had the occasion called for it. Thus this vitally important principle that has enabled great cities to monopolize the entire flows of streams, regardless of water developments thereon by others—solely because the cities originated from primitive villages organized as pueblos—was added to the jurisprudence of California as the result of a presumption.

Later decisions of the California Supreme Court reaffirmed and buttressed the principles thus decided, but without adding anything to the authorities on which they rested. After all, there was no need to add to the foundation already established. The successive decisions of this court on the subject of pueblo water rights are definitely held to be *stare decisis*—to have established a rule of property.[59] The preferred water rights of the California cities that succeeded pueblos are matters of law. Prospective developers of waters of the same stream are on notice. Those who fail to take account of the situation have no ground for complaint when the city elects to assert its latent rights.

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[58] *Los Angeles* v. *Pomeroy*, 124 Cal. 597, 649, 57 Pac. 585 (1899).

[59] *San Diego* v. *Cuyamaca Water Co.*, 209 Cal. 105, 122, 287 Pac. 475 (1930).

Thus the soundness of the foundation on which the principle of unrestricted expansion of the pueblo right rests is not material in California law. This has been so for decades.

PUEBLO WATER RIGHTS IN NEW MEXICO

The *Cartwright* case, as it is commonly known, was decided by the New Mexico Supreme Court in 1958.[60] This was preceded by two decisions of this court rendered, respectively, in 1914 and 1937-38, in which claims of pueblo rights were involved but in which the pueblo water rights doctrine was neither approved nor disapproved. The *Cartwright* case, on the other hand, produced a contemporaneous, definitive decision on the subject of the pueblo water rights.

Doctrine Not Applicable in Earlier Cases

Tularosa

The New Mexico Supreme Court early held that no exclusive right on the part of the residents of the town of Tularosa to the use of water could be sustained under what was known under Spanish laws and customs as a "pueblo right."[61] The court said:[62]

> Whether the "Plan of Pictic" applied to that portion of New Mexico, of which this state was a part, is wholly immaterial, for this townsite grant was made by officers of the United States Government, under authority of an act of congress, long after New Mexico became a part of the United States, and of course would be subject to and controlled by the laws of the granting sovereign. Whatever might have been the rights of the people of this settlement, had the land been acquired from the Mexican Government by grant, or otherwise, is of no consequence. The land having been acquired from the United States, after it had passed under its jurisdiction and control, the grant would carry with it only such rights and privileges as were accorded by the laws of the United States.

Santa Fe

In the 1930's, a trial court ruled that "pueblo right" as defined in certain California cases obtained in New Mexico.[63] This trial court "held in effect that

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[60] *Cartwright* v. *Public Serv. Co. of N. Mex.*, 66 N. Mex. 24, 343 Pac. (2d) 654 (1958).

[61] *State ex rel. Community Ditches* v. *Tularosa Community Ditch*, 19 N. Mex. 352, 376, 143 Pac. 207 (1914).

[62] 19 N. Mex. at 378.

[63] See *New Mexico Products Co.* v. *New Mexico Power Co.*, 42 N. Mex. 311, 315, 77 Pac. (2d) 634 (1937), referring particularly to *San Diego* v. *Cuyamaca Water Co.*, 209 Cal.

the city of Santa Fe had the right—regardless of the prior appropriation and beneficial use by others—to take from the Santa Fe creek from time to time all the water that may be needed at such time for the use of the inhabitants of said city and for all municipal and public uses and purposes therein." On appeal the New Mexico Supreme Court[64] considered the origin and nature of the pueblo water right as declared in the California cases, and pointed out that in several such cases reference had been made to grants under Spanish and Mexican law as the source of the pueblo water right. Extensive quotations were taken from an opinion of the United States Supreme Court in a case involving the right of the City of Santa Fe to the lands upon which it is situated.[65] With respect to the asserted "pueblo right" of Santa Fe, the New Mexico Supreme Court concluded:[66]

> It appears to have been definitely settled by this decision [*United States* v. *Santa Fe*] that there was no grant made by the Spanish King to the Villa de Santa Fe. Without a grant, the Villa de Santa Fe had no pueblo right. We have found neither decision nor text suggesting that a mere colony of "squatters" could acquire under the Spanish law this extraordinary power over the waters of an entire nonnavigable stream known as "pueblo right," even though they were organized as a pueblo—which is the equivalent of the English word "town"—with a full quota of officers. The Supreme Court of the United States held, in effect, that the occupancy of the pueblo by the Spanish military and governmental authorities conferred no title on the inhabitants.

Effect of the Earlier Decisions

Neither of the two foregoing decisions relating to claims of pueblo water rights for Tularosa and Santa Fe is authority either for or against the principle that the pueblo rights doctrine obtained in New Mexico during the first half of the present century. The supreme court did not hold or intimate that some other municipality in the State which originated as a pueblo might or might not qualify for an adjudicated pueblo water right. What it held was that neither Tularosa nor Santa Fe possessed the qualifications requisite to such an adjudication. This was emphasized in the opinion in the *Cartwright* case wherein the supreme court said, in part,[67]

105, 287 Pac. 475 (1930), and to *Los Angeles Farming & Mill. Co.* v. *Los Angeles,* 217 U.S. 217 (1910).

[64] 42 N. Mex. at 315-318.

[65] *United States* v. *Santa Fe,* 165 U.S. 675, 676-678, 691-692, 707 (1897).

[66] 42 N. Mex. at 318.

[67] *Cartwright* v. *Public Serv. Co. of N. Mex.,* 66 N. Mex. 64, 80-81, 343 Pac. (2d) 654 (1959).

> It is an admitted fact that the doctrine of Pueblo Rights as we understand and all the parties argue it is well recognized in the State of California. The parties agree that the question has not been determined in the State of New Mexico, although both parties seek to gain some comfort from two New Mexico cases which mention the doctrine [cited and discussed above]. * * * In neither case was any position taken by the Court on the doctrine. * * * We did not in either of the cases mentioned hold that the doctrine of Pueblo Rights was not applicable in New Mexico, but only that, under the facts before us, neither Town had such rights.
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> * * * *
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> As already stated, however, neither this case [Tularosa] nor that of New Mexico Products Co. v. New Mexico Power Co. may be cited with any justification by any party to this suit as sustaining a position taken by this Court on the Pueblo Rights doctrine.

The Cartwright Case

The Original Case

There were two *Cartwright* cases. The second resulted in a decision that the holdings in the original action with respect to ownership of the waters in litigation were *res judicata* and not subject to further inquiry in a second suit claimed by the plaintiffs to be a continuation of the first. This will be mentioned below under "Subsequent Litigation." The discussion under the instant heading relates solely to the original *Cartwright* case.[68]

The original *Cartwright* decision was rendered December 12, 1958. Motion for rehearing was denied May 14, 1959. A second motion for rehearing and motions on a jurisdictional issue were denied September 3, 1959. Each order was made by a divided court on a vote of three to two. To each order the minority filed a long dissenting opinion.[69]

The action in the *Cartwright* case was brought by certain users of water from Gallinas River—on which the Mexican pueblo of Las Vegas was situated—against the Public Service Company of New Mexico, which was engaged in furnishing water from this stream to the Town and City of Las Vegas under a county franchise. The Town of Las Vegas intervened. On April 6, 1835, the Mexican Government established the pueblo and made a community colonization grant to it. The Town and City of Las Vegas are American successors to the Mexican pueblo. The trial court decided that the Town and City of Las Vegas succeeded to ownership of the pueblo water right

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[68] This discussion of the original *Cartwright* case is based chiefly on the author's article, "Pueblo Water Rights in the West," 38 Tex. Law Rev. 748 (1960).

[69] *Cartwright* v. *Public Serv. Co. of N. Mex.*, 66 N. Mex. 64, 343 Pac. (2d) 654 (1958). For a critical analysis of the decisions, see Clark, R. E., "The Pueblo Rights Doctrine in New Mexico," 35 N. Mex. Historical Rev. 265 (1960).

which had vested in the pueblo with a priority date of 1835, prior and paramount to any rights of the plaintiffs, and that the right of the defendant company under its franchise was a complete defense to the action.[70]

On the appeal the supreme court, before considering the applicability of the pueblo rights doctrine, disposed of two other major questions. Briefly:

(1) The "*Hope* decree," entered in a cause in the United States District Court,[71] was adjudged to be not *res judicata* as to the defendant Public Service Company and the intervenor Town of Las Vegas, and thus it did not bar the defense of pueblo rights.[72]

(2) The trial court was not in error in finding that the claimed earlier title of certain plaintiffs was inferior to those of defendant and intervenor.[73]

(3) The third basic question—the one of general interest and concern—was thus phrased by the New Mexico Supreme Court: "Are we entitled to apply the doctrine of Pueblo Rights, as known and recognized in California in the State of New Mexico?"[74]

The supreme court thought it not surprising that such a doctrine arose, when it is considered that these colonization pueblos were generally established before there was any settlement of the surrounding area—hence no prior appropriation of water nor allotment of lands by the Mexican Government prior to establishment of the pueblo.[75] But note that in two dissenting opinions, Judge Federici asserted and explained in considerable detail the "fatal factual error" of the majority in stating that "A new, undeveloped and *unoccupied territory* was being settled. There were no questions of *priority* of use when a colonization pueblo was established *because there were no such users.*" [Emphasis added.] The facts in the case and history itself, he said, show that there were settlers on the Gallinas River long before the grant to the Pueblo de Nuestra Senora de Las Dolores de Las Vegas. Many documents were cited.[76]

The defendant Public Service Company did not own the pueblo rights of the town and city, but acted as their agent in enabling the inhabitants to enjoy to the fullest extent the pueblo rights inaugurated by the King of Spain in the Plan of Pitic. On this major issue, the majority believed that the trial court was correct in sustaining the claim of defendant and intervenor under the pueblo rights doctrine.[77]

After quoting extensively from several texts and citing the chief California decisions, the majority found itself "unable to avoid the conclusion that the

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[70] 66 N. Mex. at 66-71.
[71] *United States* v. *Hope Community Ditch,* Equity No. 712 (D. N. Mex., 1933).
[72] 66 N. Mex. at 71-76.
[73] 66 N. Mex. at 76-79.
[74] 66 N. Mex. at 71-72.
[75] 66 N. Mex. at 79-80.
[76] 66 N. Mex. at 94-96, 110-113.
[77] 66 N. Mex. at 86.

reasons which brought the Supreme Court of California to uphold and enforce the Pueblo Rights doctrine apply with as much force in New Mexico as they do in California."[78]

Authorities on Which the Cartwright Decision Rests

The authorities on which the New Mexico Supreme Court based its original decision in the *Cartwright* case may be briefly and accurately summarized as the California Supreme Court decisions in the pueblo water rights cases.

It is true that the opinion of the court in the *Cartwright* case includes a long quotation from Kinney on *Irrigation and Water Rights* and shorter ones from Wiel on *Water Rights, Corpus Juris,* and *American Jurisprudence.*[79] However, the only authorities cited by the writers of the quoted paragraphs to support their statements are the California decisions. None of the statements so quoted, and none of the statements made by the New Mexico court in the *Cartwright* case, are supported by any specifically cited Spanish or Mexican law, regulation, or text to the effect that a pueblo was endowed on its creation with "this extraordinary power over the waters of an entire nonnavigable stream known as 'pueblo right' . . . ."[80]

The reason given for the New Mexico court's adoption of the pueblo water rights doctrine of the California court was not that the New Mexico court had examined the basic Spanish-American authorities and believed that the doctrine has a solid foundation in Spanish or Mexican law; it was the New Mexico court's conclusion that the reasons for adoption in California apply with equal force in New Mexico.[81] The minority's dissenting opinion severely and plausibly criticized the basis of the California doctrine. The majority decision accepted the California doctrine with full approval, and applied it to the settlement of the instant controversy.

District Judge Federici wrote three dissenting opinions—on the original judgment of the court, the order denying motion for rehearing, and the order denying a second motion for rehearing. Judge Federici's disapproval related to most or all of the points in the original opinion written by Justice Sadler. One of these points is the instant topic—acceptability of the California pueblo rights doctrine—concerning which Judge Federici listed his many objections to following the California cases. Among other things, he quoted from sections 7

[78] 66 N. Mex. at 80-85.

[79] 66 N. Mex. at 81-84, citing Kinney, C. S., "A Treatise on the Law of Irrigation and Water Rights," 2d ed., vol. 3, pp. 2591-93 (1912); Wiel, S. C., "Water Rights in the Western States," 3d ed., vol. 1, p. 68 (1911); 67 C. J. *Waters* § 462 (1934); 56 Am. Jur. *Waterworks* § 45 (1947).

[80] *New Mexico Products Co.* v. *New Mexico Power Co.,* 42 N. Mex. 311, 318, 77 Pac. (2d) 634 (1937).

[81] *Cartwright* v. *Public Serv. Co. of N. Mex.,* 66 N. Mex. 64, 84-85, 343 Pac. (2d) 654 (1958).

and 19 of the Plan of Pitic (or Pictic) and said that from this language it was his view that the California decisions on the pueblo rights doctrine "stretched the meaning and context of the plan out of proportion and beyond its original intended meaning and colonization." He also referred to a published statement that Los Angeles, "being thwarted by the courts in her attempts to expropriate all the waters of the Los Angeles river, then went to the legislature and after legislation was adopted favorable to the municipality the statutes were upheld although the courts prior to such legislation had refused to uphold the claims of Los Angeles to the water." This he mentioned "to point up the proposition that this California Pueblo Water Rights Doctrine is a hybrid mixture of the application of (1) Spanish and Mexican law as far as it could be applied and stretched, plus (2) California cases and decisions originally dealing only with land titles and not water rights plus (3) legislative enactment."[82]

The New Mexico Supreme Court thus applied to the decision in the *Cartwright* case American law—the law of an American sister State—rather than Spanish-American law. The decisions of the California Supreme Court on pueblo water rights, although *stare decisis* in California, were obviously not conclusive on the New Mexico court. The latter was free to accept them as precedents or to reject them; as the United States Supreme Court said in refusing to review the early California decisions on pueblo water rights, these were matters of general law or State law, not Federal law. See the earlier discussions "Pueblo Water Rights in California—Question of Local Law."

With the new, larger, and more readily available sources of information, there was an opportunity in the *Cartwright* case to explore the basic Spanish and Mexican laws, and to reach an independent conclusion as to their applicability to the local situation, before engrafting upon the jurisprudence of New Mexico a concept the authenticity of which has been the subject of so much criticism, both interested and disinterested. There is no hint in the court's opinion that such an objective study was authorized or even considered by the majority. Judge Federici made a determined effort to gather together and to present in a persuasive manner all pertinent materials that were available, but on each presentation he was outvoted.

Municipal Pueblo Right vis-à-vis Appropriative Right

The majority opinion in the *Cartwright* case included the statement that "We see nothing in the theory of Pueblo Rights inconsistent with the doctrine of prior appropriation and beneficial use."[83] In his second dissent, Judge Federici criticized the fallacy of this statement—particularly with respect to the diversion of water from a source of supply in accordance with law, with the *intent* to apply the water to a *specific beneficial use*, and *consummated* with

[82] 66 N. Mex. at 93-99.
[83] 66 N. Mex. at 80.

reasonable diligence within a reasonable time by actual application of all the water to the *use designed* or to *some other useful purpose.* He asked if 100 years is a reasonable time for actual application of all the water of the Gallinas River. And he concluded on this branch of the case that "The theory of pueblo rights, as construed by the majority here and by the California courts, is as antithetical to the doctrine of prior appropriation as day is to night." [84]

It is true that under each of these doctrines there is a date of priority based on the time of vesting of the right and, when the water is actually put to use, there is the necessity for using it beneficially and without unnecessary waste. However, with respect to the methods of acquiring the water rights and of exercising them, there are important differences that were disregarded in the majority opinion. Certain of these differences will be noted with respect to American municipalities.

Statutes of most Western States authorize appropriation of unappropriated water by individuals, unincorporated groups, corporations, municipalities, and governmental entities and agencies pursuant to prescribed procedures under which protection of vested rights is afforded. (See, in chapter 7, "Who May Appropriate Water.") On the other hand, the pueblo right of an American municipality that succeeded a Spanish or Mexican pueblo—pertaining to all the water of a stream that flowed by or through the original pueblo—may be adjudicated to the city by a court decree a century after the pueblo was established, regardless of the use of all the streamflow by upstream appropriators throughout most of the century and none whatsoever within the pueblo or city limits. The only vested water right is the city's pueblo right. The most that the prior appropriators have is priorities, as among themselves, to use of the water until the city demands the uncompensated surrender of part or all of such water, to be allowed to flow downstream to the city limits.

The doctrine of relation is an important facet of the appropriation doctrine. It affords protection to one who appropriates water for a large project which, even with the use of reasonable diligence, requires several years for completion, as against another appropriator who initiates his right after commencement of the earlier one but who completes his project before the senior right is completed. The earlier right is contingent until its completion, but its priority (if reasonable diligence prevails throughout) thereupon relates back to the date of initiation of the right and renders it vested and senior to the later appropriation. (See, in chapter 7, "Methods of Appropriating Water of Watercourses—Completion of Appropriation—Doctrine of Relation.") Radically different from this is the principle of relation back as applied to the pueblo right of an American city. Even though neither the pueblo nor the city ever exercised the right, it relates back by court decree to the time of establishment of the pueblo and thus supersedes all appropriative and all

[84] 66 N. Mex. at 110.

riparian rights (if any) that accrued after such date of establishment.[85]

Preferences in the appropriation of water are granted to municipalities in various western jurisdictions. Wherever preferences in appropriating water are provided for, domestic use stands highest and municipal use is closely associated with it. This results naturally from the indispensability of water to human life, and from the overriding need for water in other activities carried on in communities both large and small. These matters are discussed in the last part of chapter 7. Briefly, as applied to conflicting applications to appropriate water, no problem of compensation is involved. As applied to the taking for a superior use a right to water already appropriated for an inferior use, particularly in time of water shortage, some constitutional and statutory declarations require compensation and some do not; but in no court decisions on this matter that have come to the author's attention has payment of compensation been held unnecessary.[86]

Statutes of several States provide for reservation of water to meet the growing needs of municipalities, and the principle has been sanctioned in several court decisions. (See, in chapter 7, "Who May Appropriate Water.") The details differ; but in most instances the process comprises appropriation of water to meet future reasonable needs of the municipality and its inhabitants, the effect of which is to prevent the accrual of intervening rights pending the time the city will require a larger proportion of the water supply than needed at the time of initiating the appropriation. The appropriation for both present and future uses relates to specific quantities of water; if the city outgrows its estimates, additional appropriations must be made with priorities as of such times, or other water supplies must be purchased or condemned. Use of surplus water until needed by the city may be made by others in the meantime; but overestimates by these surplus water users of the longevity of their water tenure are made at their peril, for from the beginning they are on notice that the law is granting them water rights that are temporary only.

A number of western legislatures and courts have been responsive to the needs of growing cities for larger and larger water supplies. They have devised and sanctioned means of making this possible by appropriating water or by

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[85] See note 31 *supra,* regarding riparian rights in California.

[86] Tex. Rev. Civ. Stat. Ann. art. 7472a (1954), enacted in 1931, provides that appropriations for other than domestic or municipal purposes, made after May 17, 1931, are subject to appropriation, without compensation, by municipalities for domestic and municipal purposes. The statute also provides that this provision does not apply to any stream which forms an international boundary, meaning the Rio Grande River. The only part of the statute the constitutionality of which was disputed and upheld was the Rio Grande exception, which the court determined did not reflect a repugnant classification. *El Paso County W. I. Dist. No. 1* v. *El Paso,* 133 Fed. Supp. 894, 906-907 (W. D. Tex. 1955), reversed in part but not on matters here under consideration, 243 Fed. (2d) 927 (5th Cir. 1957). Validity of the statute with respect to other Texas streams was not involved.

purchase or condemnation, all within the scope of due process. Some municipal attempts to obtain new water supplies, necessarily from great distances, have aroused local hostility and protracted litigation. Probably in most such instances the procedures were based on constitutional grounds; the difficulties may have arisen chiefly over the methods actually used. However, the author is unaware of anything in the appropriation water law of any Western State that would sanction the right of any city to make an appropriation of water from a stream and, by virtue of that appropriation alone—with no compensation to anyone—obtain a right that may supersede and eventually destroy all private water rights that have been exercised by many individuals along that stream.[87] Yet the high courts of California and New Mexico have indicated that an American municipal successor to an ancient pueblo may do that by obtaining a court decree adjudicating its ancient pueblo water right. And this, despite the New Mexico Supreme Court's declaration that it saw nothing in the theory of pueblo rights inconsistent with the doctrine of prior appropriation and beneficial use.

There is another feature of the pueblo-appropriation contrast which may involve practical potentialities. Under the California doctrine, the pueblo water right dates from the time of establishment of the pueblo. An effect of the Treaty of Guadalupe Hidalgo, which was proclaimed July 4, 1848, was necessarily to foreclose the establishment of any more Mexican pueblos in the area ceded to the United States. Therefore, the priorities of all pueblos to which American cities succeeded relate back at least to 1848—more than a century ago. From the pueblo rights doctrine as declared by the California courts, it would follow that in a jurisdiction in which such doctrine is the law, a city that can trace its succession to a Spanish or Mexican pueblo to which a pueblo land grant was made by the sovereign may—if not precluded by other circumstances—find itself in position to assert, without payment of compensation to existing water users, paramount rights to all the waters of a stream that flows through or by the city—waters of which the city and its inhabitants may never have used a drop for more than 100 years, but a large part of which may have been used for upward of a century as the lifeblood of farming communities. Under the appropriation doctrine, on the contrary, the priority of a municipality's water right for future use ordinarily dates from the first assertion of a claim of right therefor.[88] It does not relate back to a date of vesting declared by the courts for the first time a half-century or a century

[87] A 1931 Texas statute, which is an exception to the usual appropriation laws in this regard, subjects appropriations made thereafter of water for other than domestic and municipal purposes from all streams, except the Rio Grande, to further appropriations by municipalities for domestic and municipal purposes, without compensation. See note 86 *supra*.

[88] Although in Texas it may date from 1931 for all streams except the Rio Grande. See note 86 *supra*.

later, during which period the municipality may never have used the water or even asserted the right to a preferential use.

The Matter of Public Welfare

The opinion of the court in the original *Cartwright* case specifically raised a question of public policy, and then proceeded, in the author's opinion, to reach an anomalous conclusion. It was said that when a colonization pueblo was established there were no questions of priority of use of water, because the pueblo was located in unoccupied territory (but see Judge Federici's assertion that this statement was a "fatal factual error," noted earlier under "The Original Case"); that water formed the lifeblood of the community not only at its origin but as it expanded from a handful to thousands of families, and that in the process of growth and expansion, the founders of the pueblo carried with them the torch of priority so long as there was water to supply the lifeblood of the expanded community. The next statement appears to have formed the ultimate conclusion of the New Mexico Supreme Court with respect to the pueblo rights doctrine.[89]

> There is present in the doctrine discussed the recognizable presence of *lex suprema,* the police power, which furnishes answer to claims of confiscation always present when private and public rights or claims collide. * * * So, here, we see in the Pueblo Rights doctrine the elevation of the public good over the claim of a private right.

In the author's opinion, the anomaly of this attempted justification of the adoption of the pueblo rights doctrine on the ground of *lex suprema* and elevation of the public good over the claim of a private right lies in the court's apparent disregard of the existence and growth of communities and individual holdings along New Mexico streams during the long period that ensued before the court finally declared itself. Specifically, granted that settlers concentrated at chosen points when the pueblos were established, this was followed by more widely scattered developments by groups or even individuals. Among these settlements, priorities of appropriation and actual use of water were established under Territorial and State laws which purported to continue appropriation methods followed under Mexican sovereignty, not to initiate a new system. The pueblo rights doctrine became *stare decisis* in California before any such claim of right was even considered in New Mexico. The first case in which the New Mexico Supreme Court considered such a claim was in 1914, the second in 1937-38, and the third case—the first actually to adopt and apply the doctrine—in 1958, which was 110 years following the cession from Mexico. In

[89] *Cartwright* v. *Public Serv. Co. of N. Mex.,* 66 N. Mex. 64, 85, 343 Pac. (2d) 654 (1958).

view of this, it may be questioned whether, or the extent to which, individuals or groups along a New Mexico stream before 1958 were aware that some group among them might, solely by reason of its fortuitous establishment as a pueblo, successfully claim in the distant future all the waters of the stream, without compensation to any of them.

Introduction of the pueblo rights doctrine—dispensing with the requirement of compensation (as discussed in the preceding subtopic)—into New Mexico jurisprudence at this late date involves considerations of public welfare. This is particularly true if the supreme court goes on in future decisions to actually apply the principle of unlimited expansion.[90] Water is no less the lifeblood of a small farming community or single establishment than of a growing city. It may be questioned whether the taking by municipalities of valuable water rights of others—rights that may have been exercised for decades or even for generations under the long-established principle of priority of appropriation—without paying for them, bears out the New Mexico Supreme Court's observation that in the pueblo rights doctrine there is seen the elevation of the public good over the claim of a private right.

Subsequent Litigation

The Second Cartwright Case

Plaintiffs having failed in the former action[91] instituted a separate action against the same defendant alleging that the grant from Mexico or Spain was made to the "Town of Las Vegas Grant" and not to the "Town of Las Vegas" as determined in the former case.[92]

The New Mexico Supreme Court held that the statute[93] providing for continuation of a first action in a second suit under prescribed circumstances had no application to a case in which judgment had been rendered on the merits. Taking judicial notice of the pleadings, findings of fact, conclusions of law, and judgment in the former case, the court held the conclusion to be inescapable that all issues raised in plaintiffs' complaint in the instant action were adjudicated in the first case and that the matter was *res judicata.* The adjudication in the first case that the ownership of the waters of Gallinas River and tributaries to the City and Town of Las Vegas as successors to the original Mexican pueblo "is conclusive of all matters alleged in this action." The order dismissing the complaint was sustained.

Justice Carmody, in a specially concurring opinion, pointed out that his concurrence here neither suggested nor intimated either approval or

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[90] That the original decision "has large and forseeable implications" is stated by Clark, R. E., "New Mexico Water Law Since 1955," 2 Natural Resources Jour. 484, 557 (1962).
[91] *Cartwright* v. *Public Serv. Co. of N. Mex.,* 66 N. Mex. 64, 343 Pac. (2d) 654 (1958).
[92] *Cartwright* v. *Public Serv. Co. of N. Mex.,* 68 N. Mex. 418, 362 Pac. (2d) 796 (1961).
[93] N. Mex. Stat. Ann. § 23-1-14 (1953).

disapproval of the first *Cartwright* case. His concurrence in the disposition of this particular proceeding was based solely on the construction of the statute mentioned in the majority opinion.

The Albuquerque Case

This case involved chiefly questions of jurisdiction and procedure applicable to statutory appropriation of ground water that is interrelated with the already fully appropriated surface streamflow of the Rio Grande;[94] and the City of Albuquerque injected pueblo rights questions into this proceeding in connection with four applications to the State Engineer for permits to appropriate ground water from the Rio Grande Underground Water Basin for its municipal water supply. Each application referred to and incorporated by reference a separate letter of transmittal in which the city stated its claim that, as the successor to the "Pueblo de Alburquerque y San Francisco Xavier," founded not later than 1706, it had the absolute right to the use of all waters, both ground and surface within its limits, for the use and benefit of its inhabitants and that this claim was not to be considered as waived or abandoned by reason of the filing and prosecution of the applications.

At the hearing held by the State Engineer, hydrologic testimony was received, but no evidence was offered at the hearing in support of the city's claim to a pueblo water right. The city's applications for permits were denied, whereupon an appeal was taken to the district court. Over the objection of the State Engineer, the district court received evidence relating to the city's claimed pueblo water right and filed findings of fact and conclusions of law covering this claim as well as other contested questions. Judgment was entered granting the city the absolute right to appropriate and apply to beneficial use such ground waters from the basin as it might need from the four wells in question, without regard to the conditions imposed by the State Engineer. On appeal, the New Mexico Supreme Court stated that the district court made extensive findings of fact and conclusions of law relating to the city's claimed pueblo water right, and in its opinion quoted two of the conclusions of law, as follows.[95]

> "4. That the State Engineer has no jurisdiction to impose upon the City of Albuquerque any requirement of retiring surface water rights as a condition precedent to the diversion and use of underground waters forming the subject of the four applications involved in this case, because the said City, as successor of the pueblo, San Felipe de Alburquerque, has an absolute and unconditional right to divert and use so much of the surface and

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[94] *Albuquerque* v. *Reynolds*, 71 N. Mex. 428, 379 Pac. (2d) 73 (1963).
[95] 379 Pac. (2d) at 75-76.

underground waters of the Rio Grande as is necessary for its use and that of its inhabitants.

"11. That the State Engineer has no power to impair or disturb the ancient water rights of the City of Albuquerque, New Mexico, which were vested and existed prior to 1907."

The State Engineer contended that he had no jurisdiction to adjudicate the city's pueblo right claim, and that the district court on appeal had no greater jurisdiction in the matter. The supreme court agreed with the State Engineer. On this issue the supreme court stated in part that[96]

> It is apparent that the city has attempted by this proceeding to secure an adjudication as to the validity of its claimed pueblo water right without notice of any kind to other appropriators of Rio Grande Stream and Basin Waters and none of these appropriators are parties hereto.
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> * * * *
>
> It is fundamental to say that due process requires notice and hearing so that those who are to be bound or affected by a judgment may have their day in court. * * * The district court, in this proceeding, clearly had no jurisdiction to consider and adjudicate the claimed pueblo water right.
>
> We therefore hold that all of the findings of fact and conclusions of law of the district court, relating to the Pueblo of San Felipe de Alburquerque and the claimed pueblo water right, should be stricken as not being within the issues properly before the court, and the judgment of the district court, insofar as it is based upon such findings and conclusions, should be reversed.

The Situation in Summary

The decision rendered in the original *Cartwright* case in 1958 adopted the doctrine of pueblo water rights as declared in the California decisions, and adjudicated to the Town and City of Las Vegas a pueblo right to the waters of Gallinas River and tributaries.[97]

The second *Cartwright* decision in 1961, in a controversy between the same parties, held that the instant case was not a continuation of the first action, and that all matters respecting pueblo rights decided in the first action were *res judicata.*

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[96] 379 Pac. (2d) at 76-77.

[97] No mention was made in the court's opinion respecting ground water other than inclusion of a brief quotation from *Corpus Juris.* 67 C. J. 1130: "A Spanish or Mexican pueblo organized in California under the laws, institutions, and regulations of Spain or Mexico acquired a prior and paramount right to the use of the waters of rivers or streams passing through and over or *under the surface of their allotted lands* as far as was necessary for the pueblo or its inhabitants * * * ." [Emphasis added.]

The *Albuquerque* case, decided in 1963, concerned chiefly questions pertaining to appropriation of ground water, in connection with which the interrelationships of surface and ground waters as declared in previous decisions were recognized. However, pueblo rights questions were injected into the controversy by the plaintiff City of Albuquerque and the district court, and were rejected by the New Mexico Supreme Court. Specifically, the findings of fact and conclusions of law of the district court regarding the original pueblo at Albuquerque and the city's claimed pueblo right were ordered stricken by the supreme court as not being within the issues properly before the court.

Thus, following the original *Cartwright* case in 1958, the New Mexico Supreme Court rendered decisions respecting pueblo rights in 1961 and 1963. But nothing decided in the *Cartwright* case has been changed—whether by repudiation, restriction, or enlargement.[98]

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[98] In a 1962 article on New Mexico water law it was stated that the early colonization grants did not contemplate ground water uses, and that although the *Cartwright* decision involved surface waters, the court made no distinction between its application to surface or ground waters in adopting the California doctrine which includes both. Further, application of the pueblo rights theory of the *Cartwright* case in the *Albuquerque* case would have allowed the City of Albuquerque to drill for and to pump large quantities of water from storage, regardless of the effect that this would have on the regimen of the Rio Grande, all the surface waters of which are appropriated. It was also stated that the applicable interstate compacts made no mention of ground waters, and that the effects of recognition of a pueblo right along the Rio Grande on interstate relations and project developments, and on plans for the Upper Colorado Basin and the San Juan-Chama development, are obviously far reaching. Clark, *supra* note 90, at 485-486, 528, 557-559. See note 97 *supra*, regarding the only reference to ground water in the *Cartwright* case.

Chapter 12

THE ANCIENT HAWAIIAN WATER RIGHTS

ANCIENT CUSTOMS IN THE NEWEST STATE

Governmental Changes

The Hawaiian Kingdom, which was consolidated and founded by Kamehameha I, persisted for nearly a century until its overthrow in 1893. Following an intervening provisional government, a republic was established in 1894 and ended with the installation of a Territorial government in 1900 after annexation of the Islands to the United States.[1]

Hawaii was annexed to the United States in 1898. The treaty between the Republic of Hawaii and the United States, providing for annexation, was concluded June 16, 1897. The resolution of the Senate of Hawaii ratifying the treaty was adopted September 9, 1897, and the Joint Resolution of Congress to provide for annexation was approved July 7, 1898. Transfer of sovereignty was effective August 12, 1898.[2]

The Hawaiian Organic Act, passed by Congress to provide a government for the Territory of Hawaii, was approved April 30, 1900, and went into effect June 14, 1900.[3]

Hawaii, which became the newest State, was admitted to the Union August 21, 1959.[4]

Basis of the Hawaiian System of Water Rights

"Our system of water rights," said the Hawaii Supreme Court, "is based upon and is the outgrowth of ancient Hawaiian customs and the methods of Hawaiians in dealing with the subject of water."[5]

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[1] Kuykendall, R. S., "The Hawaiian Kingdom, 1778-1854" (1938); Snell, J., "Historic Background," First Progress Report, Territorial Planning Board of Hawaii 4-12 (1939).

[2] Senate Resolution ratifying treaty of annexation, Haw. Rev. Laws, p. 15 (1955). Joint Resolution of Congress to provide for annexation, 30 Stat. 750; Haw. Rev. Laws, pp. 13-14 (1955).

[3] Organic Act, Terr. Haw., 31 Stat. 141, ch. 339; Haw. Rev. Stat., pp. 23-76 (1968).

[4] 73 Stat. c. 74.

The Constitution of the State of Hawaii contains an article entitled "Conservation and Development of Resources" of which two sections read as follows: "Section 1. The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources."

"Section 3. All fisheries in the sea waters of the State not included in any fish pond or artificial inclosure shall be free to the public, subject to vested rights and the right of the State to regulate the same." Haw. Const. art. X, § § 1 and 3.

[5] *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 395 (1930). The system of surface and ground

By contrast with the mainland Western States, the fundamental surface water rights system of Hawaii is most unique. Aside from a very limited engrafting of the riparian doctrine upon the ancient system in modern times, it is not based upon the common law; nor is it based on the civil law or the doctrine of prior appropriation. It is the crystallization into legal form of customs of ancient origin that were developed among the natives.

The early water rights in Hawaii related to waters on the surface of the earth, chiefly streams and springs. Ground water development, which began late in the 19th century, has become of major importance in the economy of the Islands. Rights to the use of ground waters are discussed in chapter 20.

The System of Land Titles

Originally all lands and waters were owned and controlled by the King, who made grants from time to time to the principal chiefs or "konohikis" under whom further divisions and subdivisions were made.[6] All allotments and suballotments were revocable at the will of the grantor, and reverted to the King on the death of the holder. Possession of allotted land, temporary and insecure though it was, carried with it water rights, fishing rights, and the right to use forest products.

Complications over the land question which developed as alien residents became numerous led eventually to the "Great Mahele," or voluntary division of lands between the King and the chiefs or konohikis.[7] This transaction, which took place in 1848, left the King in possession of the larger part of the lands in the kingdom; but he immediately made a second division of this retained area and conveyed the larger part of it to "the chiefs and people."[8] The lands finally reserved by the King were known as "crown lands" and those ceded as "government lands." On the formation of the Republic of Hawaii, all crown lands not disposed of became the property of the government.

A commission to quiet land titles—commonly known as the land commission—which functioned from 1846 to 1855,[9] made awards adjudicating the kind and amount of land title of claimants other than the King and government. The awards were subject to (1) obtaining patent from the government upon payment of commutation, except as noted below, and (2) appeal to the supreme court.

Rights of native tenants or "hoaainas," as against the landlords or konohikis, however, were secured by land commission awards of fee simple

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water rights in Hawaii is treated in detail in Hutchins, W. A., "The Hawaiian System of Water Rights" (1946).

[6] "Principles Adopted by Land Commission," Haw. Laws 1847, p. 81.

[7] See Kuykendall, *supra* note 1; Thurston, L. A., "The Fundamental Law of Hawaii" (1904).

[8] *In re Estate of His Majesty Kamehameha IV,* 2 Haw. 715, 722-723 (1864).

[9] Haw. Laws 1846, p. 107; Laws 1854, p. 21.

titles free of commutation, called "kuleana" awards. These kuleanas are estimated to have aggregated less than 30,000 acres, whereas the konohikis received approximately 1.5 million acres and the crown and government a combined total of about 2.5 million. However, the kuleanas of the common people were the "cream of the land," very valuable for native taro (kalo) culture so long as their appurtenant water rights were assured, whereas the other groups contained extensive areas of mountainous, desert, or forest land.[10]

The land commission was required by law to render its decisions in accordance with civil code principles and native usages, which among other things related to "water privileges."[11] Apparently the commission did not determine or award water rights specifically as such; but it is not likely that it could have escaped careful consideration of water rights. The fact that a kuleana award said nothing about appurtenant water rights was apparently of no importance. In most cases, according to the supreme court, express mention was not made of water rights by the land commission even when such rights were undoubtedly intended to pass.[12]

Land Units Commonly Associated With Water Rights

Ancient Hawaiian land units to which water rights are commonly related are:[13]

(1) The *ahupuaa.* These units varied in size from less than 1,000 to more than 100,000 acres. In the ideal but by no means universal arrangement, the ahupuaa was a wedge-shaped tract radiating from the mountain top and extending with increasing width to the seashore. An ahupuaa might or might not include the entire drainage area of a stream; or the main stem of a stream might cross two or more such land holdings on its way to the sea.[14]

(2) The *ili.* This term designated either a subdivision of an ahupuaa made by the konohiki for his own convenience, or an *ili kupono* carved out of an ahupuaa by the King and held independently of the konohiki.

(3) The *kuleana.* A small tract of land within a larger tract claimed by another. The term was commonly used to designate the tract of cultivated land awarded to a hoaaina or native tenant by the land commission.[15]

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[10] Kuykendall, *supra* note 1, at 294.

[11] Haw. Laws 1846, § 7, pp. 107, 109.

[12] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 58-59, 64 (1917). See also *Peck* v. *Bailey,* 8 Haw. 658, 660-661 (1867); *Jones* v. *Meek,* 2 Haw. 9, 12 (1857); *Bishop* v. *Mahiko,* 35 Haw. 608, 656 (1940).

[13] See "Hawaiian Land Terms," Thrum's Hawaiian Annual, pp. 65-71 (1925); King, R. D., "Hawaiian Land Titles," First Progress Report, Territorial Planning Board of Hawaii 41-45 (1939).

[14] The characteristics of these early primary land divisions were summarized in *In re Boundaries of Pulehunui,* 4 Haw. 239, 240-242 (1879). See also *Palama* v. *Sheehan,* 50 Haw. 298, 300, 440 Pac. (2d) 95 (1968).

[15] For one case referring to such an award, see *Maikai* v. *A. Hastings & Co.,* 5 Haw. 133 (1884).

WATER RIGHTS IN SURFACE WATERCOURSES

General Nature and Classification

"The law of priority of appropriation which prevails in the arid sections of the mainland of the United States has never been recognized in this jurisdiction."[16]

The waters of Hawaii streams are essentially private, not public waters. Originally they all belonged to the King as sole landowner; thereafter rights of use became vested in the public and private owners of the primary land units; and individual rights as against the konohikis were acquired by ancient usage, adverse use, and grant. It is true that the government controls the use of stream waters incident to the lands that it owns; but it is equally true that neither the legislature nor the courts of Hawaii have ever recognized the doctrine of prior appropriation as effective in this jurisdiction with respect to surface watercourses.

Classification of currently established rights in surface watercourses in Hawaii begins with the ancient rights, which consisted of (1) those of ahupuaas and ilis kupono and (2) those accorded to individual native tenants out of the water supplies of such primary units. The great body of surface water rights in the Islands currently comprises: (a) Ancient rights of major land divisions (ahupuaas and ilis kupono). (b) Rights conveyed by the konohiki of an ahupuaa or ili kupono. (c) Ancient appurtenant rights of kuleanas or small tracts of cultivated land awarded to native tenants, and land units or parts of land units irrigated from ancient times. (d) Statutory rights in gross which accrue to lawful occupants within an ahupuaa after it has passed to private ownership. (e) True prescriptive rights. (f) Riparian rights in surplus freshet waters of a stream.

The kuleana or "ancient appurtenant" rights composing the third group were originally termed "prescriptive," but this was a misnomer. Truly prescriptive rights against the konohiki or others form another class of established water rights. (See "Prescriptive Rights," discussed later.) After providing for these ancient and prescriptive rights, the konohikis have original title to all surplus stream waters on the primary land units. In this connection the classification of water rights includes a modern version of the riparian doctrine.

The principles that govern these rights have been developed chiefly in a number of reported court decisions beginning in 1867.[17] There is no great body of statutory law on the subject.

In view of the private status of surface watercourses in Hawaii, there is no administrative procedure under which one may acquire a right to the use

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[16] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 57 (1917).
[17] *Peck* v. *Bailey,* 8 Haw. 658 (1867).

thereof. The only ways in which title to a water right may be acquired are by grant from the public or private owner, prescription, or condemnation. Nor is there statewide administrative control over the distribution of the water of such watercourses to those entitled to receive it. There is in Hawaii, however, a special statutory *judicial* procedure for the settlement of water controversies.

Ancient Water Rights

Ahupuaas and Ilis Kupono

A royal grant of an ahupuaa to a konohiki carried with it all natural resources thereon except what the King reserved for his own use. A common royal reservation was an ili—in such case termed ili kupono—with natural resources including water found upon it, over which the konohiki of the ahupuaa had no control. The use of water of an ili kupono belonged to the King and to his successor as konohiki of the ili, not to the konohiki of the ahupuaa of which it formed only a geographical part.[18]

Under "Ancient Appurtenant Rights," below, there is noted the significant changeover from taro (kalo) to sugarcane irrigation of so many of the ancient appurtenant kuleana water rights since the period of land reform. This substitution of irrigated crop and original place of use did not affect the validity of the old established rights or their preferential standing in the ahupuaa or ili in which they were located. The aggregate of all proven uses of water in the 1850's, even if all such uses were converted from taro to sugar irrigation, would have been adequate for only a very small fraction of the acreage in cane that came to be irrigated from surface streams. More water than that covered by ancient appurtenant rights was required; hence there were developed principles relating to the use of *surplus* waters of an ahupuaa or an ili kupono—meaning the quantity of water flowing in a stream of the ahupuaa of the ili *in excess of* that required to satisfy the ancient appurtenant and prescriptive rights attaching to the waters of such stream. These "surplus" waters are of great importance in the agriculture of the Islands.

The konohiki of either an ahupuaa or an ili kupono—or his successor—had as his ancient heritage the unqualified right of use of all *surplus* waters of streams that lay entirely within such land unit.[19] This was subject to the paramount established rights which may have been ancient appurtenant rights of kuleanas, prescriptive rights, or rights conveyed by deed. Subject thereto, the konohiki or present owner of the ahupuaa or ili may use such surplus waters as he pleases—and either within or outside the ahupuaa or ili, because the surplus waters are not appurtenant to any particular portion of it.[20]

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[18] *Territory of Hawaii* v. *Gay*, 31 Haw. 376, 380-382 (1930), affirmed, 52 Fed. (2d) 356 (9th Cir. 1931), certiorari denied, 284 U.S. 677 (1931).

[19] Hutchins, *supra* note 5, at 69-74.

[20] See *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 680-683

The same principle of an unqualified right of use applies to the *surplus normal flow* of a stream that arises within an ahupuaa or an ili kupono and flows thence into a lower ahupuaa. The konohiki of the unit on which the waters arise has the exclusive right of use. Rights to the use of the *surplus floodwaters* in such case, however, are qualified by the rights of the konohiki of the lower ahupuaa. The respective rights of the konohikis in the surplus floodflows are to be determined by the principles of the riparian doctrine.[21] (See the later discussion under "Riparian Rights: Limited Application.")

So long as the holders of established rights are properly safeguarded, surplus waters of an ahupuaa may be separated therefrom by its owners and conveyed to others for use outside its boundaries.[22] The owner of an ahupuaa who conveys portions of it to others is still konohiki. No one of several grantees of lands of substantial area, but which are still minor fractions of an ahupuaa, can be lord paramount over the river that flows through it.[23]

Whether or not the deed to a portion of an ahupuaa expressly mentions appurtenances, the grant by the konohiki includes as an appurtenance the artificial watercourses thereon and all the water that has been enjoyed therefrom from time immemorial.[24] However, a grant or lease of land without express mention of water rights includes water privileges only if the easement already exists. A conveyance of "kula" or "dry" (that is, unirrigated) land within an ahupuaa to which ditches are not constructed carries no *implied* grant of water privileges.[25]

As an integral part of the sweeping land reform in the mid-19th century, in which the relative rights of the King, konohikis, and hoaainas were defined and established, an act of the legislature granting fee simple titles to native tenants for their cultivated lands and house lots, and protecting them in the enjoyment of certain rights, contained a section which with slight modifications is still on the statute books.[26] This section declares that the people on lands to which landlords have taken fee simple titles have the right to take firewood and certain other products from the tracts where they live for their own private use, together with a right to drinking water, running water, and the right of

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(1904); *In re Taxes, Waiahole Water Co.,* 21 Haw. 679, 682 (1913); *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 70 (1917); *Foster* v. *Waiahole Water Co.,* 25 Haw. 726, 734-735 (1921); *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 384, 388 (1930).

[21] *Carter* v. *Territory of Hawaii,* 24 Haw. 47 (1917); *Territory of Hawaii* v. *Gay,* 31 Haw. 376 (1930).

[22] *Foster* v. *Waiahole Water Co.,* 25 Haw. 726, 734-735 (1921).

[23] *Peck* v. *Bailey,* 8 Haw. 658, 662-663 (1867).

[24] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 57-58 (1917).

[25] *Peck* v. *Bailey,* 8 Haw. 658, 661 (1867). The grantee in such case, having no claim upon the surplus waters of the ahupuaa, cannot restrain diversion thereof by the konohiki to his own kula lands. *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 15 Haw. 675, 682-683, 690 (1904).

[26] Haw. Laws 1850, § 7, pp. 202, 203, Rev. Stat. § 7-1 (1968).

way. On all such lands the springs, running water, and roads are free to all, except as to wells and watercourses provided by individuals for their own use. This enactment, according to a practically contemporaneous decision of the supreme court, was designed to protect the tenants in the enjoyment of the rights so enumerated as against the sweeping operation of the konohikis' allodial titles.[27]

Ancient Appurtenant Rights

Water rights of this class,[28] although relating to a very small percentage of the lands involved in the Mahele, have had judicial attention in many cases. Throughout the royal, republican, and Territorial regimes, it was consistently held—as a fundamental principle of Hawaiian water law—that lands which from time immemorial have enjoyed the use of water are entitled to that use as a matter of right.[29]

The probable area in taro (kalo) necessary to supply the large early native population is considered to have covered many thousands of acres, of which the "dry" or nonirrigated upland plantings were probably as important as those on the "wet" or irrigated lowlands.[30] However, both the native Hawaiian population and the area in taro have greatly decreased, whereas sugarcane has become the most important crop grown under irrigation.

The present importance of ancient taro irrigation water rights is out of proportion to the very small percentage of all irrigated land in Hawaii now represented by this crop. The original kuleana water rights applied chiefly or wholly to taro culture, but many of them have since become used for sugarcane.[31] Regardless of their present place or purpose of use these ancient kalo or taro water rights are vested rights of a high order.

The general custom of early landlords was to authorize the continued delivery of water to wet kalo (taro) lands for the service of which distribution systems had been built, because continued cultivation was in their interest as well as that of their tenants. So long as the water supply continued dependable,

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[27] *Oni* v. *Meek,* 2 Haw. 87, 91-95 (1858). These statutory rights of tenants are distinguished from the ancient appurtenant rights incident to particular lands, considered immediately below. See *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 67 (1917).

[28] See Hutchins, *supra* note 5, at 102-110.

[29] See *Loo Chit Sam* v. *Wong Kim,* 5 Haw. 130, 132, 200, 201 (1884); *Ing Choi* v. *Ung Sing & Co.,* 8 Haw. 498 (1892); *Peck* v. *Bailey,* 8 Haw. 658, 661 (1867); *Wailuku Sugar Co.* v. *Hale,* 11 Haw. 475, 476 (1898); *Kohala Sugar Co.* v. *Wight,* 11 Haw. 644, 651 (1899); *Palolo Land & Improvement Co.* v. *Wong Quai,* 15 Haw. 554, 563 (1904).

[30] Whitney, L. D., Bowers, F. A. I., and Takahashi, M., "Taro Varieties in Hawaii," Haw. Agric. Expt. Sta. Bull. 84, p. 7 (1939).

[31] Rice irrigation was important for a time. *Loo Chit Sam* v. *Wong Kim,* 5 Haw. 200, 201 (1884). But after the first decade of the present century this culture rapidly declined.

lands productive, and tenants available, distribution of water to the general area and thence to the subunits of kalo patches was an established procedure. In some cases kalo patches were laid out in terraces, into the highest of which water was turned from the ditch, the overflow entering lower terraces successively. The practice in other areas was to supply all kalo patches directly from ditches. In either instance, the method of distribution of water was such as to perpetuate its use on a given tract.

As a result of these practices the use of water was originally attached by custom to the irrigated tract, subject of course to severance by the konohiki. This land relationship which originated in custom eventually ripened into a legal appurtenance, or easement, or incident to the land—that is, the ancient use of water, where continued down to the period of land reform and existing at the time of confirmation of land titles in tenants, became the basis of a valid water right. And the use of water on a tract at the time title was acquired, even though not literally ancient, became the basis of an equally valid right. These are all included in the term "ancient appurtenant rights."

These ancient water rights applied in many cases to "kuleanas"—homesteads of the common people—a term that now is used to designate the small tracts of cultivated lands awarded to native tenants.[32] However, the right of any part of an ahupuaa which, by ancient use, was irrigated land would be on an equality with that of irrigated kuleana land.[33]

Rights of kuleana holders to the use of water appurtenant to their awarded lands are paramount to the landlord's (konohiki's) right to make further disposal of water privileges pertaining to the ahupuaa that would infringe these established individual rights. This results from the principle that the konohiki has no further claim upon the kuleana waters; he now has title to only the surplus waters of the ahupuaa—waters in excess of the ancient appurtenant and prescriptive rights of individual hoaainas. Necessarily, his further disposal rights are limited to the surplus. (See "Ahupuaas and Ilis Kupono," above.)

Ancient kula or dry (unirrigated) land, as stated above, had no water right.[34] Water to the use of which one is entitled in connection with certain land cannot be transferred to kula land if others are manifestly injured by the change.[35] But absent such injury, one may transfer to kula land the same quantity of water to which he is entitled by immemorial usage on kalo land.[36]

Water titles were adjudicated by courts to owners of land to which the use of water was appurtenant by ancient custom. In determining these questions, land commission records were important. For example, in an award, the description of a kuleana as kalo land or cultivated land would be evidence that

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[32] See *Territory of Hawaii* v. *Liliuokalani,* 14 Haw. 88, 95 (1902).
[33] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 58 (1917).
[34] See *Loo Chit Sam* v. *Wong Kim,* 5 Haw. 200, 201 (1884).
[35] *Kahookiekie* v. *Keanini,* 8 Haw. 310, 312 (1891).
[36] *Wong Leong* v. *Irwin,* 10 Haw. 265, 269 (1896).

the land was entitled by ancient custom to water for irrigation,[37] "and the lack of such description would probably be evidence to the contrary, though not conclusive."[38] In addition, conveyances of crown land by warranty deed have been held to pass ancient rights shown to be appurtenant.[39] "Kamaaina" or "old-timer" testimony, although sometimes conflicting and uncertain,[40] has usually been accorded great weight.[41] The position of the premises, where water was distributed in successive terraces, has supported adjudications of ancient rights in lower tracts.[42]

The quantity of water to which the ancient right attaches is that quantity customarily used and necessary for the use that was being enjoyed at and immediately prior to the time the legal right accrued.[43] Owing to the then importance of kalo or taro culture, the quantity of water required therefor was probably the basis of most ancient agricultural rights.[44] Likewise, the use has been adjudicated in most cases for irrigation purposes, but it also includes water for household and other domestic purposes.[45]

Aside from the preference accorded to domestic use, noted below,[46] ancient appurtenant rights are apparently on a basis of equality with respect to each other. In the literature, neither the actual time of beginning use of water—provided use was being made when title to the land passed to private parties—nor the date of award or of patent appears to be a factor. Rights accustomed to divert proportional parts of the usual streamflow are on an equality when the supply becomes insufficient for their usual requirements; all must be reduced proportionately.[47]

Some Aspects of the Ancient Rights

Most surface water used in Hawaii is diverted directly from natural watercourses, to which rights of use attach. The characteristic drainage areas of the islands are short, "extending from the crests of the mountains to the sea in

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[37] *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 383 (1930).
[38] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 58-59 (1917).
[39] *Peck* v. *Bailey,* 8 Haw. 658, 661 (1867).
[40] *Kohala Sugar Co.* v. *Wight,* 11 Haw. 644, 646, 651 (1899).
[41] *Palolo Land & Improvement Co.* v. *Wong Quai,* 15 Haw. 554, 564 (1904); *In re Boundaries of Pulehunui,* 4 Haw. 239, 245 (1879).
[42] *Wailuku Sugar Co.* v. *Hale,* 11 Haw. 475, 476 (1898).
[43] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 64, 66, 71 (1917); *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 383 (1930).
[44] See *Lonoaea* v. *Wailuku Sugar Co.,* 9 Haw. 651, 665 (1895); *Wong Leong* v. *Irwin,* 10 Haw. 265, 267-269 (1896); *Palolo Land & Improvement Co.* v. *Wong Quai,* 15 Haw. 554, 560-563 (1904).
[45] *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 395-396 (1930).
[46] See *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 62, 69, 70-71 (1917).
[47] See *Yick Wai Co.* v. *Ah Soong,* 13 Haw. 378, 383 (1901); *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 60-61 (1917).

narrow closely-spaced strips and are very steep"; and remarkably high intensities frequently occur on the small steep streams that are common here.[48]

In a leading water rights case, in which the doctrine of riparian rights was invoked, the Supreme Court of Hawaii divided the waters of the stream in litigation into "ordinary or normal flow" and "surplus flood and freshet waters" and impressed the distinction upon rights of use.[49] The physical distinction was again used in another riparian rights case.[50] This distinction, mentioned earlier under "Ahupuaas and Ilis Kupono," will be discussed further under "Riparian Rights: Limited Application."

Many of the ancient "auwais" (ditches) of Hawaii long antedated the period of land reform. Regulation of uses of water therefrom by custom was also of ancient origin. As established custom was the controlling principle in determining established water rights, there was no need for differentiating ancient artificial watercourses from natural ones, and it was not done. Principles pertaining to natural streams "apply equally to artificial water courses as this auwai is."[51]

From the earliest times at which water rights cases were reported, the right to use water has been held to be an easement in favor of land, to be gained by grant or prescription.[52] Whether ancient or prescriptive, this right is regarded as appurtenant to land by reason of use of the water thereon.[53] Konohiki rights, while presumably appurtenant to the ahupuaa or ili kupono through which the stream flows, are not appurtenant to any particular part thereof. (See "Ahupuaas and Ilis Kupono," above.)

The water right, however, is not an inseparable appurtenance, for it may be severed in ownership from the lands by a separate sale of the water right,[54] or separated by prescription or condemnation.[55]

As an easement in land, the water right is real estate.[56]

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[48] Carson, M. H., "Surface-Water Resources," First Progress Report, Territorial Planning Board of Hawaii, pp. 125-126 (1939).

[49] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 70-71 (1917).

[50] *Territory of Hawaii* v. *Gay,* 31 Haw. 376 (1930).

[51] *Davis* v. *Afong,* 5 Haw. 216, 223-224 (1884). See also *Wilfong* v. *Bailey,* 3 Haw. 479 (1873); *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 57-58, 60-62 (1917). In the *Carter* case, *supra* at 61, the court said, "Large ditches which were constructed and have been used for the purpose of diverting a constant flow of water from a stream and distributing it among several parcels of land are to be regarded virtually as natural water-courses."

[52] *Peck* v. *Bailey,* 8 Haw. 658, 661-662 (1867); *Appeal of A. S. Cleghorn,* 3 Haw. 216, 218 (1870).

[53] *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 16 Haw. 113, 117 (1904).

[54] *In re Taxes, Waiahole Water Co.,* 21 Haw. 679, 682 (1913).

[55] See Hutchins, W. A., "The Hawaiian System of Water Rights" 111-120, 220-222 (1946).

[56] *Kaneohe Ranch Co.* v. *Ah On,* 11 Haw. 275, 276 (1898).

It is well settled that a water right shown to be an easement appurtenant to particular land will pass by a grant of the land, without express mention of the easement or the appurtenances. This includes public grants as well as awards of the land by and through the land commission.[57]

The principal uses of water involved in controversies that reached the supreme court were the ancient uses for drinking and other domestic purposes and for irrigation. Most of them concerned irrigation. In one case, use of water for a fishpond was approved.[58] In another, use of water for generating electricity was involved, but the fact that a water right might be acquired or exercised for such purpose was not questioned.[59] Domestic use of water was held to be a superior use in connection with ancient appurtenant rights.[60]

Each individual water right may be exercised only on certain conditions which are peculiar to it. The use of water under an ancient or prescriptive right is conditioned on the diversion of a certain quantity of water, or a certain proportion of the available supply, at a given point, either continuously or in rotation under a certain schedule. Konohiki rights carry greater privileges, extending as they do to the entire supply of surplus water which the konohiki may do with as he pleases, the chief limitation being in situations concerning the use of surplus floodwaters in which two or more konohiki units are riparian to the same stream.[61]

The water right holder may not alter the conditions of his right to the injury of others, but he may require others to respect such conditions. The several rights of use in a common supply of water are necessarily reciprocal.

In a leading water rights decision, *Carter* v. *Territory of Hawaii,* the supreme court said that "It has been held that water appurtenant to land for household purposes may be put to a different use; that water appurtenant to one piece of land may be used on another piece provided no one's rights are infringed by the change; and that improved methods for diverting water may be made use of upon like conditions."[62] The condition that no injury be inflicted on other rights is essential to the validity of all such changes in exercise of a water right.

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[57] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 58, 63-64 (1917). For a discussion of water rights claims under leases of land, see Hutchins, *supra* note 55, at 122-125.

[58] *Kaalaea Mill Co.* v. *Steward,* 4 Haw. 415, 416-417 (1881).

[59] *Cross* v. *Hawaiian Sugar Co.,* 12 Haw. 415 (1900).

[60] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 62, 66, 69, 70-71 (1917).

"It is well established at common law that the ordinary and natural use of water for household purposes, i.e., for drinking, washing, cooking, and for watering domestic animals, is a superior right to the use of water artificially, i.e., for mining, agricultural and commercial purposes. . . . And we have no doubt that such is the law of this Territory." *Id.* at 66.

[61] See "Riparian Rights: Limited Application," *infra;* Hutchins, *supra* note 55, at 60, 77, 106, 114, 125-127.

[62] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 69 (1917).

In the *Carter* case, changes in both point of diversion and method of diversion were approved.[63] Changes in other cases sanctioned on the invariable condition of noninjury to others include changes in location of canal;[64] place of use,[65] including a change from one ahupuaa to another;[66] diversion of water to another watershed;[67] purpose of use, including changes from one irrigated crop to another;[68] and consolidation or exchange of water supplies under a rotation schedule.[69]

The water right may be lost by prescription (adverse possession and use on the part of another for the statutory period of limitations). The legal effect of suffering another to possess one's land adversely for the statutory period is not only to bar the remedy of the owner of the paper title, but actually to divest his estate and to vest it in the adverse party, who obtains a title in fee simple as perfect as a title by deed.[70] The same principle applies to prescription in relation to water titles. The *loss* of one's water right by prescription necessarily coincides with the *acquisition* by another party of a prescriptive right to use the water. (See "Prescriptive Rights," below.)

The water right may also be lost by abandonment. "The alleged abandonment of an easement presents a question of intention and of fact, the burden of proof being upon the party making the allegation."[71]

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[63] *Id.* at 51, 68.

[64] *Liliuokalani* v. *Pang Sam,* 5 Haw. 13 (1883).

[65] *Peck* v. *Bailey,* 8 Haw. 658, 666, 673 (1867). There is "no objection either in law or reason to allowing" such transfers. *Lonoaea* v. *Wailuku Sugar Co.,* 9 Haw. 651, 665 (1895).

[66] *Wong Leong* v. *Irwin,* 10 Haw. 265, 270-272 (1896). "There is no difference in principle between a transfer from one place to another in the same ahupuaa and a transfer from one ahupuaa to another."

[67] Tacit recognition of the practice as incidental to approved changes in place of use. *Id.; Foster* v. *Waiahole Water Co.,* 25 Haw. 726 (1921); *Territory of Hawaii* v. *Gay,* 31 Haw. 376 (1930).

[68] *Peck* v. *Bailey,* 8 Haw. 658, 666 (1867). Changes in irrigated crops have been consistently upheld.

[69] *Horner* v. *Kumuliilii,* 10 Haw. 174, 180-182 (1895).

[70] *Waianae Co.* v. *Kaiwilei,* 24 Haw. 1, 7 (1917), citing *Leialoha* v. *Wolter,* 21 Haw. 624, 630 (1913).

[71] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 55 (1917). See *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 15 Haw. 675, 691 (1904).

In the *Carter* case, *supra* at 52, 68, the court held that the ancient rights for irrigation purposes by certain individuals who had abandoned them must be regarded as having reverted to the Territory. Presumably the reversion to the Territory resulted from the adjudicated ownership by the Territory of all the waters of the ordinary or normal flow of the stream, subject to vested appurtenant rights. In the *Hawaiian Commercial & Sugar Co.* case, *supra,* a contention was made that the rights of ancient taro lands, claimed to have been abandoned, had reverted by operation of law to the konohiki. The claim of abandonment was not sustained; but had it been upheld, the reversion necessarily would have been to the konohiki, against whom the ancient rights had been established. The waters of privately owned ahupuaas are in private—not public—ownership; hence in such case there would be no question of reversion to the public.

Very few water rights cases involving questions of estoppel have reached the Supreme Court of Hawaii.[72] In the cases that have come to the attention of the author, actual losses of water rights by estoppel have not been adjudged. However, principles and limitations of estoppel should be applicable here as in other jurisdictions.

The surface water law of Hawaii does not include loss of water rights by statutory forfeiture, which applies to appropriative rights in most Western States.

Prescriptive Rights

In the published opinions in some of the earlier court decisions of Hawaii, the term "prescriptive" implies ancient appurtenant rights as well as those acquired by uses strictly adverse.[73] (The latter is a usual requirement for prescriptive rights in other States. See chapter 14.) The clear legal distinction between a right to the use of water acquired adversely and one based upon a use always permissive was disregarded. But the ancient uses of water in Hawaii by taro (kalo) cultivators were not hostile to the konohiki; they were made with his permission, on a mutual business basis, with water supplied through systems which he controlled. The ripening into legal rights of the enjoyment of such privileges as against the konohiki evolved from the land reform policy of vesting in native tenants the "rights" that equitably were theirs by ancient custom, even though related to and based upon uses that had been essentially permissive. Finally, in the Wailuku (lao) cases on the Island of Maui, this use of the term "prescription" in relation to "ancient" rights was in issue.[74] The court pointed out the historical inaccuracy in confusing the terms; and as a result of the clarification, the tendency in the later decisions has been to observe the distinction.[75]

"We deem it to be well settled in this Kingdom that the right to use water for irrigation purposes can be acquired by adverse and continuous use for twenty years."[76] The 20-year limitation period was changed to 10 years in 1898.[77] To establish a prescriptive title to a water right, there must have been

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[72] Compare *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 54-57 (1917); *Richards* v. *Ontai,* 19 Haw. 451, 460-461 (1909), 20 Haw. 335, 342 (1910). For general principles, see also *Nahaolelua* v. *Kaaahu,* 10 Haw. 18, 21 (1895); *Peabody* v. *Damon,* 16 Haw. 447, 456 (1905).

[73] This was done repeatedly in *Peck* v. *Bailey,* 8 Haw. 658, 661, 665, 666, 671, 672 (1867), the earliest reported water rights decision, and in various other cases during the remainder of the century.

[74] *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 15 Haw. 675, 683, 16 Haw. 113, 115-117 (1904).

[75] See *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 383-384 (1930).

[76] *Heeia Agric. Co.* v. *Henry,* 8 Haw. 447, 448 (1892).

[77] Haw. Laws 1870, ch. 22, § 1, Laws 1898, Act 19, § 1, Rev. Stat. § 657-13 (1968).

an "actual, open, notorious, continuous and hostile" use of the water for the statutory period of limitations,[78] under a claim of right.[79]

Additional aspects of prescriptive rights in Hawaii are discussed in chapter 14.

Riparian Rights: Limited Application

The doctrine of riparian rights has been engrafted upon the ancient Hawaiian system of water rights to a limited extent.

Adoption of the Common Law

In 1892 the Hawaiian legislature formally adopted the common law, subject to judicial precedents and Hawaiian national usage.[80] Before that time the courts were generally friendly to common law principles and usually followed them when applicable, but felt free to reject them when the circumstances so indicated.[81]

This 10-year limitation statute is the statute that governs the acquisition of titles to land by adverse possession and use, which has been applied by analogy to water rights to the extent it is applicable. In such cases the actual use of water for the statutory period by the claimant of an adverse title is the foundation of the right. Hutchins, *supra* note 55, at 111-120.

[78] *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 383 (1930).

[79] See *Wong Leong* v. *Irwin,* 10 Haw. 265, 271 (1896); *Kohala Sugar Co.* v. *Wight,* 11 Haw. 644, 648-650 (1899); *Kaneohe Ranch Co.* v. *Kaneohe Rice Mill Co.,* 20 Haw. 658, 666 (1911).

[80] Haw. Laws 1892, ch. 57, § 5.

[81] In a 1901 case, the Hawaii Supreme Court said: "The New Englanders who early settled here did not come as a colony or take possession of these islands or bring their body of laws with them, though they exercised a potent influence upon the growth of law and government. The ancient laws of the Hawaiians were gradually displaced, modified and added to. The common law was not formally adopted until 1893 and then subject to judicial precedents and Hawaiian national usage. Prior to that time the courts were at first without statutory suggestion as to what law they should follow in the absence of statutes, and later were expressly permitted by statute to appeal to 'natural law and reason, or to received usage, and *** the laws and usages of other countries' and 'to adopt the reasonings and principles of the admiralty, maritime, and common law of other countries, and also of the Roman or civil law, so far as *** founded in justice, and not in conflict with the laws and customs' of this country. See Civ. Code, Secs. 14,823. The courts usually followed the common law when applicable. But they felt free to reject it, and did as a rule when, as in the present case, it was based on conditions that no longer exist, and when it had come to be generally recognized as merely technical and subversive of justice or the intentions of the parties to instruments and when it had in consequence been generally altered or abrogated by statute elsewhere. The question here, unlike that in the United States, was not whether the court should decline to follow a rule, but whether it should adopt a rule." *Branca* v. *Makuakane,* 13 Haw. 499, 504-505 (1901).

The extant enactment reads as follows:[82]

> Common law of State; exceptions. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

Early Mention of Riparianism

Discussions of the riparian doctrine appeared at some length in *Peck* v. *Bailey,* the earliest reported opinion regarding Hawaiian water rights, probably because counsel on both sides had made frequent reference to the matter; but this decision made no adjudication of any riparian right.[83] In several succeeding cases, also, there were some discussions of or references to the doctrine.[84] However, it was not until 1917—50 years after *Peck* v. *Bailey*—that the supreme court in the *Carter* case definitely adjudicated a riparian right in accordance with riparian principles then for the first time declared.[85] In the *Gay* case, 13 years later, the actual holdings by a divided court left the principles so declared unaltered.[86]

The Carter and Gay Cases

The *locus* of the *Carter* case,[87] decided in 1917, was on the Island of Hawaii. The stream arose on an ahupuaa owned by the Territory and flowed down to an ahupuaa in private ownership. Most of the court's opinion was devoted to important questions other than the principal issues. The latter issues were the effect of a greatly diminished water supply upon the rights of the parties, and the right of the Territory to make a new use of part of the water.

There was no extended discussion of the riparian doctrine, nor was there any explicit consideration of the previous Hawaiian cases. After disposing of

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[82] Haw. Rev. Stat. § 1-1 (1968).

[83] *Peck* v. *Bailey*, 8 Haw. 658, 661-662, 670-672 (1867).

[84] See *Wailuku Sugar Co.* v. *Widemann,* 6 Haw. 185, 187 (1876); *Haiku Sugar Co.* v. *Birch, Tax Collector,* 4 Haw. 275, 277 (1880); *Wong Leong* v. *Irwin,* 10 Haw. 265, 270-272 (1896); *Cha Fook* v. *Lau Piu,* 10 Haw. 308, 313 (1896); *Brown* v. *Koloa Sugar Co.,* 12 Haw. 409, 411-412 (1900); *Scharsch* v. *Kilauea Sugar Co.,* 13 Haw. 232, 236 (1901); *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 15 Haw. 675, 680 (1904).

[85] *Carter* v. *Territory of Hawaii,* 24 Haw. 47 (1917).

[86] *Territory of Hawaii* v. *Gay,* 31 Haw. 376 (1930), affirmed, 52 Fed. (2d) 356 (9th Cir. 1931), certiorari denied, 284 U.S. 677 (1931).

[87] *Carter* v. *Territory of Hawaii,* 24 Haw. 47 (1917).

questions other than riparian rights, the court mentioned the principle decided in Hawaii that where a stream flows in a single ahupuaa the surplus waters belong to the konohiki thereof, and stated that the question here presented, as to surplus waters of a stream that flows from one ahupuaa to another, "is one of first impression. We think it must be settled according to the principles applicable to riparian rights at common law."[88]

The definite holdings in this case accorded (1) to the owner of the upper ahupuaa (the Territory) the entire ordinary or normal flow of the stream, subject to vested appurtenant rights that attached thereto, and (2) to the owners of the two ahupuaas the reasonable use of the surplus flood and freshet waters according to the principles applicable to riparian rights at common law.[89] The court said with respect to riparian rights that "each ahupuaa is entitled to a reasonable use of such water, first, for domestic use upon the upper ahupuaa, then for the like use upon the lower ahupuaa, and, lastly, for artificial purposes upon each *ahupuaa,* the upper having the right to use the surplus flow without diminishing it to such an extent as to deprive the lower of its just proportion under existing circumstances."[90]

There was no further riparian rights decision until 1930.[91] The stream in the *Gay* case of 1930[92]—on the Island of Kauai—arose on privately owned ilis kupono, which occupied the inland portion of an ahupuaa owned by the Territory, and flowed thence across the seaward portion to the coast. The owner of the ilis diverted water from the stream within one of them and conveyed it to another ahupuaa for irrigation of sugarcane; and the Territory brought suit to restrain the diversion. At issue was title to the "normal daily surplus" of water in the stream—the only waters dealt with at the trial. Interference with ancient appurtenant rights was not involved.

The supreme court held that the ilis kupono were of no less degree and dignity than the ahupuaa, nor inferior to it in the matter of water rights. Hence the ilis kupono had the same rights as against the ahupuaa that it would have if it were itself an ahupuaa.

Each of the three justices filed an opinion, no one of which was designated as the opinion of the court. The differences of opinion were confined to the relation of riparian rights to surplus waters.

(1) The opinion of Chief Justice Perry devoted considerable space to a discussion of the riparian doctrine and to his disapproval of its application in the *Carter* case. He felt that the ruling in the *Carter* case with respect to freshet

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[88] *Id.* at 70.

[89] *Id.* at 70-71.

[90] *Id.* at 70. See note 60 *supra,* regarding the court's distinction between domestic or natural uses and artificial uses of water. 24 Haw. at 66.

[91] A passing reference to the subject was made in a case which did not involve claims of riparian rights in any way. *Foster* v. *Waiahole Water Co.,* 25 Haw. 726, 734 (1921).

[92] *Territory of Hawaii* v. *Gay,* 31 Haw. 376 (1930), affirmed, 52 Fed. (2d) 356 (9th Cir. 1931), certiorari denied, 284 U.S. 677 (1931).

water should be disapproved and that the one partial error in that decision should now be corrected.[93]

(2) Justice Parsons concurred in the opinion of the Chief Justice so far as it concerned rights in the normal surplus waters; but he dissented from that portion which disapproved of the ruling in the *Carter* case with respect to surplus flood and freshet waters, "for the sole reason that such disapproval is not necessary to a determination of the issues before us." Without expressing any view as to how that question should be ultimately determined, he refused to support an overruling of the *Carter* decision in that particular.[94]

(3) Justice Banks believed that the riparian rule announced in the *Carter* case was inherently just and not inconsistent with preceding decisions. He believed, further, that the riparian rule should be applied to normal as well as to storm surplus flow, and finally adopted as the law of the Territory.[95]

In view of the three opinions, the actual holdings in the *Gay* case with respect to surplus waters and riparian rights can best be stated by quoting a portion of the syllabus by the court:

> The normal surplus water (as distinguished from the freshet surplus water) of an independent ili, meaning thereby water that is not required to satisfy ancient appurtenant rights and prescriptive rights, is the property of the konohiki of the ili, to do with as he pleases, even though if left unrestrained by man it would flow through a lower ahupuaa before reaching the sea.
>
> The common-law doctrine of riparian rights is not in force in Hawaii with reference to the surplus waters of the normal flow of a stream,—using the term "surplus waters" in the same sense as in the next preceding paragraph.

The *Carter* decision, then, adjudicated riparian rights with respect to the *surplus flood and freshet waters* of a stream as between two ahupuaas riparian thereto. It did not adjudicate riparian rights with respect to the *surplus normal flow,* nor as between lands within a single ahupuaa.

The *Gay* decision held squarely that the riparian doctrine does not extend, as between konohiki units, to the *surplus normal flow* of a stream—the only surplus flow at issue in the case. As the *Carter* decision previously had refused to apply the riparian doctrine to *surplus normal flow,* the *Gay* decision thus supports it in this respect. But as to the question of riparian rights in *surplus floodwaters,* directly involved and decided in the *Carter* case but not at issue in the *Gay* case, the rationale of the *Gay* decision is legally sound in rejecting a premature judgment.

The result of these two decisions—the only ones in Hawaii that control the question—is that the riparian doctrine applies, as between konohiki units, to

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[93] 31 Haw. at 394-403.
[94] *Id.* at 404-408.
[95] *Id.* at 409-417.

the surplus floodwaters of a stream and not to the surplus normal flow.

DETERMINATION OF CONFLICTING WATER RIGHTS

Water rights have been established in Hawaii in the course of controversies over water, in proceedings originating in tribunals from which appeals could be and in many cases were taken to the supreme court. The decrees in such controversies had the effect of adjudicating the water rights so established.[96]

Throughout the period of land reform in the middle of the 19th century it was implicit that water privileges should go hand in hand with other privileges of land use. The land commission was directed by the statute that created it to make its decisions in accordance with civil code principles regarding the occupancy and use of land, specifically relating, among other things, to "water privileges."[97] The land commission apparently made few, if any, awards of water privileges as such; but in making its awards of land the commission undoubtedly gave full consideration to appurtenant water privileges and intended them to pass with the awarded lands as appurtenances.

Water rights in Hawaii have been established and controversies over their exercise have been settled:

(1) In special statutory proceedings before commissioners of water rights. These officials originally were appointed to hear and determine controversies respecting rights of way, jurisdiction over water controversies being added later.[98] Early in the present century, jurisdiction in the statutory controversies was transferred from persons appointed as commissioners of private ways and water rights to the circuit judges within their respective circuits.[99]

(2) Before the circuit judges at chambers sitting as courts of equity. Jurisdiction in equity, in a proper case for equity, exists concurrently with jurisdiction under the "commissioner" statutes.[100] Hence the circuit judge hears and determines water controversies relating to property within his circuit under the statutory procedure,[101] and still has general equity powers when the parties are without remedy at law.[102]

(3) Before the circuit courts in actions at law for damages.[103]

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[96] This subject is discussed in the State Summary for Hawaii in the appendix and in Hutchins, *supra* note 55, at 48-65.

[97] Haw. Laws 1846, p. 107; Laws 1854, p. 21.

[98] Haw. Laws 1856, p. 16; Laws 1860, p. 12.

[99] Haw. Laws 1907, Act 56, Rev. Stat. § § 664-31 to -37 (1968).

[100] *Wailuku Sugar Co.* v. *Cornell,* 10 Haw. 476, 477-480 (1896).

[101] Haw. Rev. Stat. § § 664-31 to -37 (1968).

[102] *McBryde Sugar Co.* v. *Koloa Sugar Co.,* 19 Haw. 106, 116-119 (1908); *Territory of Hawaii* v. *Gay,* 32 Haw. 404, 410-414, 418 (1932).

[103] *Mele* v. *Ahuna,* 6 Haw. 346, 347-349 (1882).

SUBTERRANEAN WATERCOURSES

The views expressed by the Hawaii Supreme Court in cases that have reached it suggest that the rules of law that govern uses of water of definite underground streams may be substantially the same as those that apply to surface watercourses, although it is believed that the court has not yet actually adjudicated rights in such underground streams. The Ground-Water Use Act, passed in 1959, relates to any water in the ground, specifically including water "in underground channels or streams." It provides for regulation by a State commission of withdrawals of ground water from areas designated by the commission. By far the most important ground waters in Hawaii, both legally and economically, are artesian and nonartesian waters. The laws applicable to the various ground water sources in Hawaii are discussed in chapter 20.

Chapter 13

PROTECTION OF WATER RIGHTS IN WATERCOURSES

NEED FOR PROTECTION

As mentioned in chapter 5 under "Water Rights," a valid water right—whether appropriative or riparian[1]—is a right of property. It is real property, a usufruct, a right to make beneficial use of water.

The lawful acquisition and disposition of water rights are entitled to protection. In the exercise of his right to the use of water of a watercourse, the holder also is entitled to legal protection in his lawful acts of diverting, storing, distributing, and using the water. Necessarily, to make the right effective, the water must reach his headgate or land in the quantity and quality and at the times required for the uses to which the holder may lawfully put it. His right of protection may be invoked against acts of persons holding lesser rights, or without right, that result in materially diminishing the quantity or depreciating the quality of the water for his proper purposes, or that interfere with the streamflow at the times he is entitled to receive it. Under various circumstances and in various ways, his right of protection also may be invoked against acts of those with equal rights, or even against those with greater rights.

To be entitled to this protection of a claim of right to the use of water, one who asserts impairment or injury or improper interference must first establish his right. If he cannot do this, he has no water right that he can invoke the courts to protect.[2]

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[1] These are the two principal water rights doctrines applicable to watercourses in the Western States. Pueblo rights and ancient Hawaiian water rights have been discussed in the immediately preceding chapters and are not further discussed in this chapter, although a number of its topics may be applicable, in various ways, to such rights.

The general principles applicable to water rights doctrines as between certain parties, may be altered by such complicating factors as voluntary contractual agreements, condemnation, prescriptive rights, and estoppel. Such factors were involved in some of the court decisions discussed in this chapter. The latter factors are discussed in chapter 14. See, e.g., "Prescription—Loss of Prescriptive Rights."

[2] A city that had been pumping water from a stream for service to its inhabitants failed to show that it had any water right in the premises, hence was not entitled to a preliminary writ of injuction against upper riparian owners to protect its customary use of the water. *Miller* v. *Ballinger,* 204 S. W. 1173, 1174 (Tex. Civ. App. 1918).

JUDICIAL RECOGNITION OF THE NEED

The owner of a water right acquires "a right gained to use water beneficially which will be regarded and protected as real property."[3]

The California Supreme Court has said that the rights of "the prior appropriator are entitled to the protection of the courts of law or in equity."[4] In 1875 the United States Supreme Court stated that ever since a California decision rendered 20 years earlier,[5] "it has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection."[6] Likewise, "It is obvious that an action will lie to quiet title to riparian rights in a stream."[7] And so "This [riparian] right to use the water of the stream we hold to be entitled to the same respect and protection at the hands of the law as any other vested property right."[8]

In 1954, in an action to change the point of diversion of certain municipal water rights and to change the manner of use from farmland irrigation to municipal purposes, the Colorado Supreme Court declared, "It is the purpose of the law, both statutory and by decision, to protect all appropriators and holders of water rights; to this end all elements of loss to the stream by virtue of the proposed change should be considered and accounted for; and thereupon such appropriate provisions of limitation inserted in the decree as the facts would seem to warrant."[9]

In a 1928 case, the New Mexico Supreme Court said:[10]

> A water right is distinct from the property right in the canals, ditches, pipe lines, and reservoirs by which the water is diverted, stored, and carried to the land for use thereon, and each may exist without the other. * * * Considering this principle, we are satisfied that a right to the continued use of a vested and accrued water right shall be maintained and protected as fully as the right to a continued use of the easements of the canal, pipe lines, etc., by which the use of the water and water rights is effectuated.

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[3] *Application of Filippini,* 66 Nev. 17, 21-22, 202 Pac. (2d) 535 (1949).
[4] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 374, 40 Pac. (2d) 486 (1935).
[5] *Tarter* v. *Spring Creek Water & Min. Co.,* 5 Cal. 395 (1855).
[6] *Basey* v. *Gallagher,* 87 U.S. 670, 683 (1875).
[7] *J. M. Howell Co.* v. *Corning Irr. Co.,* 177 Cal. 513, 518, 171 Pac. 100 (1918).
[8] *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.,* 202 Cal. 56, 65, 259 Pac. 444 (1927).
[9] *Farmers Highline Canal & Res. Co.* v. *Golden,* 129 Colo. 575, 586-587, 272 Pac. (2d) 629 (1954).
[10] *First State Bank of Alamogordo* v. *McNew,* 33 N. Mex. 414, 437, 269 Pac. 56 (1928).

APPROPRIATIVE RIGHT

It has long been consistently held that the appropriative right—a right of property—is entitled to protection in the courts. The nature and extent of such protection in western jurisdictions is discussed in some detail in chapters 7 to 9. Following is a brief general discussion of such considerations. The succeeding topics deal with more specific subjects that may apply to appropriative rights.

An appropriator, or two or more appropriators acting together, may hold this right as other property and may sue to have it protected against invasion or unlawful interference.[11] But an appropriator has no recourse against acts that cause no injury to his water right.[12] To be entitled to relief, there must be "a substantial as distinguished from a mere technical or abstract damage" to the water right.[13] Furthermore, protection is afforded to the right of the first appropriator only while it is being exercised within reasonable limits.[14]

The Oregon Supreme Court pointed out that while the legislative control of waters in the State is plenary, it does not include the right to infringe vested rights to the use thereof,[15] nor to interfere with them arbitrarily or unreasonably.[16] And the Nebraska Supreme Court said that:[17]

> While vested water rights may be interfered with within reasonable limits under the police powers of the state to secure a proper regulation and supervision of them for the public good, any interference that limits the quantity of water or changes the date of its priority to the material injury of its holder is more than regulation and supervision and extends into the field generally referred to as a deprivation of a vested right.

Senior Appropriator

The California Supreme Court has said, "As between appropriators * * * the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs, up to the amount that he has taken in the past, before a

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[11] *Kimball* v. *Gearhart,* 12 Cal. 27, 47 (1859); *Moore* v. *The Clear Lake Water Works,* 68 Cal. 146, 150, 8 Pac. 816 (1885).

[12] *Nevada County & Sacramento Canal Co.* v. *Kidd,* 37 Cal. 282, 313 (1869).

[13] *Waterford Irr. Dist.* v. *Turlock Irr. Dist.,* 50 Cal. App. 213, 221, 194 Pac. 757 (1920).

[14] *Basey* v. *Gallagher,* 87 U.S. 670, 683 (1875); *Bolter* v. *Garrett,* 44 Oreg. 304, 308, 75 Pac. 142 (1904).

[15] *Dill* v. *Killip,* 174 Oreg. 94, 103, 147 Pac. (2d) 896 (1944).

[16] *In re Willow Creek,* 74 Oreg. 592, 616-617, 144 Pac. 505 (1914), 146 Pac. 475 (1915).

[17] *Enterprise Irr. Dist.* v. *Willis,* 135 Nebr. 827, 834, 284 N.W. 326 (1939).

subsequent appropriator may take any."[18] Various other courts have held to the same general effect.[19]

Priorities of appropriation ordinarily govern the respective rights thereto regardless of whether the senior appropriator diverts water at a point above or below the points at which junior appropriators make their diversions from the stream.[20] This, one of the cardinal principles of the doctrine of prior appropriation, was established in an early California case.[21] Exercise of this principle is sometimes complicated by matters of loss of water in long stream channels, return flow accretions, and comparable practical difficulties, as noted in chapter 8 under "Relative Rights of Senior and Junior Appropriators—Reciprocal Rights and Obligations of Appropriators."

As a result of statutory preferences and restrictions that now prevail generally in the West with respect to permits for the appropriation of streamflow, the first applicant is not necessarily the one who acquires the first priority (see the discussions of restrictions and preferences at the end of chapter 7). With respect to such appropriations, it is more nearly correct to say that the one who holds the highest priority—who may or may not have been the earliest applicant—is first in right.

Furthermore, the appropriator ordinarily has no right to or interest in the water after it has left his premises, and so he usually cannot complain of any uses of the water made by others downstream. (See, in chapter 8, "Property Characteristics—Right of Property—Right to the Flow of Water.") Hence the right of protection of an appropriator against unlawful interference by a downstream junior appropriator or riparian owner would ordinarily relate to some act or threat of hostile physical interference with the upper appropriator's works or use of the water.[22] Probably it would not encompass an action

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[18] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 926, 207 Pac. (2d) 17 (1949). This right of protection was acknowledged by the California Supreme Court in one of the earliest cases in 1855. *Stiles* v. *Laird,* 5 Cal. 120, 122 (1855).

[19] *Bailey* v. *Idaho Irr. Co.,* 39 Idaho 354, 358, 227 Pac. 1055 (1924). In an action brought by a prior appropriator with respect to a diversion that interferes with the exercise of his rights, it is not necessary that he aver ownership of the waters, the averment of his own prior appropriation and of defendant's diversion being enough, for an allegation of ownership of the water would be a conclusion of law and would add nothing to the pleadings. *Jerrett* v. *Mahan,* 20 Nev. 89, 98, 17 Pac. 12 (1888). (Of course it is now recognized that the appropriator does not "own" the water until he takes it into private possession. See chapter 5.) *Gates* v. *Settlers' Mill., Canal & Res. Co.,* 19 Okla. 83, 88-89, 91, 91 Pac. 856 (1907). *Low* v. *Schaffer,* 24 Oreg. 239, 244, 33 Pac. 678 (1893). Protection of the right is afforded only to the extent that the appropriator makes a beneficial use of the water. *Sullivan* v. *Jones,* 13 Ariz. 229, 233, 108 Pac. 476 (1910). It extends only to the reasonable use of water by the prior appropriator, after which he has no right to the use of the surplus. *Bolter* v. *Garrett,* 44 Oreg. 304, 308, 75 Pac. 142 (1904).

[20] *Beecher* v. *Cassia Creek Irr. Co.,* 66 Idaho 1, 9-10, 154 Pac. (2d) 507 (1944).

[21] *Hill* v. *King,* 8 Cal. 336, 337-339 (1857).

[22] For example, in *Spargur* v. *Heard,* 90 Cal. 221, 230, 27 Pac. 198 (1891), an appropriator

to quiet title as against the downstream user in the absence of such hostile act or threat.[23]

Junior Appropriator

The right of a junior appropriator is entitled to protection to its full extent, just as is the right of a prior appropriator. Hence, "if the person who first appropriates the waters of a stream only appropriates a part, another person may appropriate a part or the whole of the residue; and when appropriated by him, his right thereto is as perfect, and entitled to the same protection, as that of the first appropriator to the portion appropriated by him."[24] This protection of the junior appropriative right may be had against unlawful acts by senior appropriators as well as by others. "The rights of the former [senior] being thus fixed, he cannot enlarge his rights to the detriment of the latter [junior] by increasing his demands, or by extending his use to other lands, even if used for a beneficial purpose."[25] (See, in chapter 8, "Relative Rights of Senior and Junior Appropriators.")

RIPARIAN RIGHT

To the extent that the riparian doctrine is recognized in a particular jurisdiction, the riparian right is entitled to protection against impairment or destruction. The western jurisdictions in which this recognition is accorded, and the nature and extent thereof, are discussed in some detail in chapter 10. Following are brief general discussions of such considerations. Several of the succeeding topics deal with more specific subjects that apply to riparian rights.

As Against Other Riparians

The riparian owner is entitled to protection against the acts of upstream proprietors that cause a detriment to the downstream riparian lands.[26] Such upstream acts may consist of the use of an excessive portion of the streamflow,

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whose right had vested by prescription against certain downstream riparian owners obtained a decree enjoining them from wrongfully obstructing the flow of water into his ditch.

[23] See *United States* v. *Central Stockholders' Corp. of Vallejo,* 52 Fed. (2d) 322, 339 (9th Cir. 1931). See the discussion of downstream prescriptive claims in chapter 14 under "Prescription–Establishment of Prescriptive Title–Relative Locations on Stream Channel"–"Downstream prescriptive claimant: Actual interference with upstream property or water right."

[24] *Smith* v. *O'Hara,* 43 Cal. 371, 375 (1872).

[25] *Becker* v. *Marble Creek Irr. Co.,* 15 Utah 225, 228-229, 49 Pac. 892 (1897).

[26] *Rindge* v. *Crags Land Co.,* 56 Cal. App. 247, 250, 205 Pac. 36 (1922), hearing denied by supreme court (1922). See *Scott* v. *Fruit Growers' Supply Co.,* 202 Cal. 47, 52, 258 Pac. 1095 (1927).

resulting in actual damage to the lower riparian proprietor;[27] failure of the upstream owner to return to the stream the surplus water remaining after his reasonable use;[28] wastage of water by an upstream riparian owner;[29] or use of water on nonriparian land (discussed below).

In most cases relief is sought by riparian proprietors against those who make upstream diversions of water. A downstream diverson under ordinary circumstances is not injurious to the upstream riparian owner.[30]

"It is unnecessary to cite authorities upon the general proposition that the wrongful pollution of a stream by one riparian owner to the injury of others will give a cause of action to the parties so injured * * * ."[31] The question of pollution will be given attention later under "Quantity and Quality of the Water."

Chapter 10 contains a discussion of the question of use of water on nonriparian land. (See "The Riparian Right—Exercise of the Riparian Right—Place of Use of Water.") It is there brought out that the decisions are in some conflict.

Some western decisions have been to the effect that the riparian right does not entitle the proprietor to use water on lands not riparian to the stream as against the rights of lower riparian proprietors. Some other decisions have indicated that circumstances may exist under which it is nevertheless lawful to take the water elsewhere—such as when water is abundant and no possible injury could result to lower riparian owners. This may include the riparian's right to contract for the use of his riparian water on nonriparian land, apparently only prejudicial diversions being proscribed. Moreover, even though a diversion to nonriparian lands is actionable by lower riparians, the contract may be binding against the grantor.

The Supreme Court of Oklahoma has expressed the view that the taking of water by a riparian to nonriparian land is not of itself an unreasonable use of the water, although when considered in connection with all other circumstances, including the size and character of the stream and the quantity of water diverted, it might be unreasonable.[32]

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[27] *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 555, 558, 561-562, 81 Pac. (2d) 533 (1938).

[28] *Stanford* v. *Felt,* 71 Cal. 249, 250, 16 Pac. 900 (1886).

[29] *Holmes* v. *Nay,* 186 Cal. 231, 242, 199 Pac. 325 (1921).

[30] As stated by a Federal court, "Under the decisions of the state of California a lower riparian owner, or appropriator, gains no title to the water by prescription or use as against an upper riparian owner or appropriator, for the reason that the use of the water after it leaves the lands of the riparian owner is in no sense an interference with the rights of an upper riparian owner which are fully satisfied at the time the water leaves his lower boundary line." *United States* v. *Central Stockholders' Corp. of Vallejo,* 52 Fed. (2d) 322, 339 (9th Cir. 1931). But see chapter 10 at note 172, regarding such actions as flooding of upstream lands.

[31] *Teal* v. *Rio Bravo Oil Co.,* 47 Tex. Civ. App. 153, 160, 104 S. W. 420 (1907).

[32] *Smith* v. *Stanolind Oil & Gas Co.,* 197 Okla. 499, 501-502, 172, Pac. (2d) 1002 (1946),

As Against Appropriators

As a result of the California constitutional amendment of 1928,[33] the riparian owner's relation to conflicting appropriative rights underwent a marked change in that State. No longer was he, as against an inferior appropriator, not limited by any measure of reasonableness. On the contrary, he was commanded by the fundamental law to make reasonable beneficial use of water under reasonable methods of diversion and use. No longer could he enjoin an inferior appropriative right that interfered with his use of the water under any kind of diversion process. The amendment did not destroy the riparian right. It restricted the exercise of the right. The riparian owner remained entitled to compensation for any substantial deprivation of his riparian right, or to a physical solution.

In its first major examination and construction of the amendment, the California Supreme Court held that since its adoption the technical infringment of the paramount right of the riparian owner by the exercise of an appropriative right has not been actionable, except to establish the paramount right. But even if there is not substantial infringement of the riparian right, that is, "where there is no material diminution of the supply by reason of the exercise of the 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."[34]

It has long been the rule in California that protection may be had against those who divert water upstream without right, to the material injury of the downstream riparian owner's right,[35] and that it is equally applicable as against

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citing *Lawrie* v. *Silsby,* 82 Vt. 505, 74 Atl. 94, 96 (1909). Regarding the court's later interpretation of 1963 Oklahoma legislation which, among other things, undertakes to limit unused riparian rights to domestic use, see, in chapter 6, "Interrelationships of the Dual Water Rights Systems–The Status in Summary: By States–Oklahoma."

[33] Cal. Const. art. XIV, § 3.

[34] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 374, 40 Pac. (2d) 486 (1935). (See "Remedies for Infringement–Injunction or Damages or Both–Some State Riparian-Appropriation Situations–California," *infra.*) Prior to the adoption of the amendment, the riparian owner was entitled "to the full flow of the stream without the slightest diminution," and so the initial step in the diversion of water by an inferior appropriator was an invasion of the right of the lower riparian owner and every successive diversion was a further invasion of that right. *Pabst* v. *Finmand,* 190 Cal. 124, 132, 211 Pac. 11 (1922). It followed that the riparian owner was entitled to restrain any diversion of the water to nonriparian lands.

Most California law with respect to conflicting riparian-appropriation interrelationships was made in controversies in which the riparian right was adjudged superior. Regarding differences, as against appropriative rights, that may arise due to the time that lands passed into private ownership, and related factors, see, in chapter 6, "Interrelationships of the Dual Water Rights Systems–The Status in Summary: By States–California."

[35] See *Creighton* v. *Evans,* 53 Cal. 55, 56 (1878); *Pope* v. *Kinman,* 54 Cal. 3, 4-5 (1879).

those who do so under claims of right which by lapse of time may ripen into prescriptive rights.[36] The unlawful taking of water to nonriparian lands is not an ordinary trespass; it is a permanent taking which, if allowed to continue, may produce a material injury to the right of the downstream riparian owner. Regardless of whether the riparian right is being exercised, it will be protected by declaratory judgment against the possibility of development of a prescriptive right.[37]

Two decades after the constitutional amendment had been adopted, a Federal court noted that under the California cases an intending appropriator has no right to disregard the rights of riparian owners and other holders of prior or permanent rights to make use of all waters of a stream which they can put to reasonable beneficial use under reasonable methods of use. If one seeks to appropriate water wasted or not put to any beneficial use, it is obligatory that he find some physical solution at his own expense for preserving existing prior rights, if such solution can be found. If this cannot be done, the riparian owners and other holders of prior and paramount rights must be compensated for the value of the rights taken by the United States as appropriator under the law of eminent domain.[38]

The Texas courts acknowledged the coexistence of the dual riparian and appropriation doctrines, that they are in conflict, and that conflicts that reach the stage of litigation must be reconciled. They took the position that the riparian doctrine is underlying and fundamental, formerly without regard to segments of streamflow,[39] but in *Motl* v. *Boyd* in 1926 as to only the normal flow and underflow of the stream.[40]

An important limitation to reasonable and necessary use was imposed in 1912. It was recognized that to accord to riparian owners the right to have all the water flow past their land as against a statutory appropriator would result in destroying the statute in its entirety; that the riparian owners were entitled to protection in their rights to quantities of water reasonably sufficient for irrigation, stockraising, and domestic purposes; and that waters in excess thereof were subject to statutory appropriation.[41]

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[36] *Gould* v. *Eaton,* 117 Cal. 539, 543, 49 Pac. 577 (1897); *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327, 333-334, 88 Pac. 978 (1907).

[37] *Pabst* v. *Finmand,* 190 Cal. 124, 132, 211 Pac. 11 (1922); *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 374-375, 40 Pac. (2d) 486 (1935). The riparian owner's rights are not measured by the quantity of water he is using at the time of his action. *San Joaquin & Kings River Canal & Irr. Co.* v. *Fresno Flume & Irr. Co.,* 158 Cal. 626, 631, 112 Pac. 182 (1910).

[38] *Gerlach Livestock Co.* v. *United States,* 76 Fed. Supp. 87, 94-95 (Ct. Cl. 1948), affirmed, 339 U.S. 725 (1950). See particularly 339 U.S. 752-755.

[39] *Biggs* v. *Miller,* 147 S.W. 632, 636-637 (Tex. Civ. App. 1912); *Matagorda Canal Co.* v. *Markham Irr. Co.,* 154 S.W. 1176, 1180-1181 (Tex. Civ. App. 1913).

[40] *Motl* v. *Boyd,* 116 Tex. 82, 111, 121-122, 286 S.W. 458 (1926).

[41] *Biggs* v. *Lee,* 147 S.W. 709, 710-711 (Tex. Civ. App. 1912, error dismissed).

In construing the water appropriation statutes, the Texas courts undertook to protect riparian rights from adverse effects, thus: These statutes could not operate on preexisting rights of riparian owners, but only on such rights as were in the State by reason of its ownership of riparian lands.[42] They were valid only when they could be applied without detriment to vested property rights.[43] And in various statutory enactments, the legislature itself specifically undertook to protect the rights of riparian landowners.[44]

The Texas Supreme Court objected to legislation[45] authorizing the Board of Water Engineers (now the Texas Water Rights Commission) to make findings of fact and orders determining rights to the use of water, necessarily including riparian rights.[46] But in a later decision it was concluded that the appropriation statutes of 1889 to 1917,[47] inclusive, were valid and constitutional insofar as they authorized the appropriation of storm and floodwaters, and of other waters without violation of riparian rights.[48]

The latest major decision of the Texas Supreme Court with respect to riparian rights involved not their *protection* but their *existence* in the lower Rio Grande Valley. This decision was to the effect that lands in Spanish and Mexican grants riparian to the lower Rio Grande do *not* have an appurtenant right to irrigate with the river waters.[49] No riparian rights of possible common law grants in the valley were in issue in this case, and the decision therein does not affect previous pronouncements of the supreme court concerning such rights.

The statute of 1875, which purported to grant the free use of stream water to any company that complied with its provisions, was held by the supreme court to apply only to streams on State public lands, as the legislature had no power to impair vested rights of riparians without providing for compensation. *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian,* 74 Tex. 170, 173-174, 11 S.W. 1078 (1889).

[42] *McGhee Irr. Ditch Co.* v. *Hudson,* 85 Tex. 587, 591-592, 22 S.W. 398, 22 S.W. 967 (1893).

[43] *Barrett* v. *Metcalfe,* 12 Tex. Civ. App. 247, 252-254, 33 S.W. 758 (1896, error refused); *Santa Rosa Irr. Co.* v. *Pecos River Irr. Co.,* 92 S.W. 1014, 1016 (Tex. Civ. App. 1906, error refused).

[44] Tex. Rev. Civ. Stat. Ann. arts 7469, 7507, and 7620 (1954); *Matagorda Canal Co.* v. *Markham Irr. Co.,* 154 S.W. 1176, 1180-1181 (Tex. Civ. App. 1913); *Grogan* v. *Brownwood,* 214 S.W. 532, 536 (Tex. Civ. App. 1919). See Hutchins, W. A., "The Texas Law of Water Rights" 412-413 (1961).

[45] Tex. Laws 1917, ch. 88.

[46] *Board of Water Engineers* v. *McKnight,* 111 Tex. 82, 229 S.W. 301 (1921).

[47] Tex. Laws 1889, ch. 88, Laws 1895, ch. 21, Laws 1913, ch. 171, Laws 1917, ch. 88.

[48] *Motl* v. *Boyd,* 116 Tex. 82, 124, 286 S.W. 458 (1926).

[49] *Valmont Plantations* v. *State of Texas,* 163 Tex. 381, 355 S.W. (2d) 502 (1962), affirming 346 S.W. (2d) 853 (Tex. Civ. App. 1961). Nevertheless, see chapter 7 at notes 652-661, regarding the recognition of certain "equitable" rights and the application of a system of weighted priorities in a 1969 Texas Court of Civil Appeals case under what the court called "unprecedented" circumstances. *State* v. *Hidalgo County Water Control & Improvement Dist. No. 18,* 443 S.W. (2d) 728 (Tex. Civ. App. 1969).

In 1967, the Texas Legislature enacted a statute which restricts the exercise of riparian rights, except for domestic or livestock purposes, to the extent of maximum actual application of water to beneficial use made during any calendar year from 1963 to 1967, or until the end of 1970 if works were under construction before the effective date of the act.[50] This legislation has not been construed by the Texas Supreme Court or the courts of civil appeals.

In Washington, waters of nonnavigable streams in excess of the amount that can be beneficially used, either directly or prospectively, within a reasonable time, on or in connection with riparian lands, are subject to appropriation for use on nonriparian lands.[51] Consequently, before the riparian owner now has any rights to protect, he must show with reasonable certainty that either at present or within a reasonable time, he will make use of the water for beneficial purposes.[52] Under Washington legislation enacted in 1967, anyone entitled to divert or withdraw water by virtue of his ownership of land abutting a stream, lake, or watercourse, "who abandons the same, or who voluntarily fails, without sufficient cause," to beneficially use all or any part of such right for any period of 5 successive years after the effective date of the act (July 1, 1967), shall relinquish such right or portion thereof, which shall revert to the State and the affected waters become available for appropriation.[53]

Some of the State appropriation statutes specifically disclaim any intent to impair existing vested rights to the use of water. For example, the Oregon statute of 1909, often referred to as the "water code," provides in its present form that "nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water."[54]

Legislative protection of vested riparian rights was contained in the water codes or appropriation statutes of several States passed for the purpose of deflating the obstructive features of riparian rights—particularly unused rights—and placing rights to the use of streamflow on a basis of reasonable beneficial use. The Oregon water code of 1909 pioneered in this effort by providing that actual application of water to beneficial use prior to the passage

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[50] Tex. Rev. Civ. Stat. Ann. art. 7542a, § 4 (Supp. 1970).

[51] *Brown* v. *Chase,* 125 Wash. 542, 553, 217 Pac. 23 (1923).

With respect to riparian use of water from navigable waters see the quotation from *State ex rel. Ham, Yearsley & Ryrie* v. *Superior Court,* 70 Wash. 442, 453, 126 Pac. 945 (1912), in chapter 10, note 411.

[52] *State* v. *American Fruit Growers, Inc.,* 135 Wash. 156, 161, 237 Pac. 498 (1925).

[53] Wash. Rev. Code § 90.14.170 (Supp. 1970).

This 1967 legislation, revised in 1969, also requires that anyone using or claiming water rights other than under a permit or certificate from the Department of Ecology shall file a claim, stating the amount used and time, place, and purpose of use, with the department by June 30, 1974. Failure to do so shall be conclusively deemed a waiver and relinquishment of the right. *Id.* § § 90.14.010 – 90.14.121. This legislation has not yet been construed by the Washington Supreme Court.

[54] Oreg. Rev. Stat. § 537.120 (Supp. 1969).

of the act, by or under authority of any riparian proprietor or his predecessors in interest, should be deemed to create in him a vested right to the extent of actual application of water to beneficial use, provided the use had not been abandoned for a continuous period of 2 years. It also accorded the same protection to a riparian or his predecessor if, at the time of enactment, he was engaged in good faith in constructing works and if he completed the works and diverted the water to beneficial use within a reasonable time thereafter.[55] Kansas in 1945, with amendments in 1957, adopted the foregoing principle, with some variations,[56] and South Dakota followed the lead of Oregon and Kansas in 1955.[57] These statutes, so carefully framed in their task of (1) limiting riparian rights to actual beneficial use[58] and (2) safeguarding vested rights based upon actual beneficial use, were declared constitutional by their State supreme courts (and, in the case of Oregon and Kansas, by Federal courts as well) on the several points presented for determination.[59] These statutes and more recent legislation in some other States are discussed in chapter 10 under "The Riparian Right—Measure of the Riparian Right—As Against Appropriators."[60]

PROTECTION OF SOURCE OF SUPPLY

Stream Tributaries

(1) In one of its early water rights cases the California Supreme Court held that the prior *appropriator* is entitled to protection against interference with the flow, into the stream on which he made his appropriation, of the water of lakes or other tributary sources of supply that discharge naturally into the

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[55] Oreg. Laws 1909, ch. 216, Rev. Stat. § 539.010 (Supp. 1955).

However, under the Oregon statutory adjudication procedure, although the Oregon Supreme Court has not so stated, the implication of *In re Hood River,* 114 Oreg. 112, 227 Pac. 1065 (1924), and *In re Deschutes River & Tributaries,* 134 Oreg. 623, 286 Pac. 563 (1930), apparently is that in adjudicating water rights for specific amounts of water, no *specific* amount of water may be claimed as a *riparian* right, even to the extent of such *prior beneficial use.* This is discussed in chapter 10, under "The Riparian Right—Measure of the Riparian Right—As Against Appropriators—Apportionment among riparians and appropriators." As discussed there, *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.,* 26 S. Dak. 307, 128 N.W. 596 (1910), took a contrary position.

[56] Common law claimants without vested rights could be enjoined by appropriators from making subsequent diversion, although compensation could be had in an action at law for damages proved for any property taken from a common law claimant by an appropriator.

[57] Kans. Laws 1945, ch. 390, Laws 1957, ch. 539, Stat. Ann. § 82a-701 *et seq.* (1969); S. Dak. Laws 1955, ch. 430, Laws 1961, ch. 456, Laws 1963, ch. 454, Comp. Laws Ann. § 46-1-9 (1967).

[58] Except for riparian domestic-use rights in one or more States.

[59] See cases cited and the discussion in chapter 10, notes 523-524.

[60] Texas and Washington legislation has been previously discussed in this subtopic.

stream, provided such interference materially infringes his prior rights.[61]

Likewise the right of the *riparian owner* includes the right to protection on tributary sources of supply of the stream to which his land is contiguous. This right of protection includes tributary streams that enter the main stream above the riparian land.[62]

(2) The reason for the rule seems fairly obvious, but it had to be litigated in various cases. In its earliest reported decision in controversies over water rights, the Idaho Supreme Court said that:[63]

> If persons can go upon the tributaries of streams whose waters have all been appropriated and applied to a useful and legitimate purpose, and can take and control the waters of such tributaries, then, indeed, the sources of supply of all appropriated natural streams may be entirely cut off, and turned away from the first and rightful appropriators. To allow this to be done would disturb substantial vested rights, and the law will not permit it.

"It seems self-evident," said the same court in another case, "that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream * * *."[64]

(3) This protective right of the appropriator extends to water flowing in tributaries above his point of diversion.[65] And it extends from the head of each such tributary down to his point of diversion.[66] But it extends only to waters of a tributary that reach the appropriator during the time he has need of the water.[67] "An appropriator from a main channel can complain of a diversion from a 'tributary' only if and when such tributary would, if not interfered with, make a valuable contribution to the main stream."[68]

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[61] *Weaver* v. *Eureka Lake Co.,* 15 Cal. 271, 274 (1860). Such acts of interference are a trespass upon the rights of the prior appropriator—"exactly the same kind of trespass as though the creek was tapped and that amount of water directly taken therefrom without any molestation of the lakes." *Baxter* v. *Gilbert,* 125 Cal. 580, 582, 58 Pac. 129 (1899).

[62] See *Holmes* v. *Nay,* 186 Cal. 231, 240-241, 199 Pac. 315 (1921); *Crane* v. *Stevinson,* 5 Cal. 387, 399-400, 54 Pac. (2d) 1100 (1936).

[63] *Malad Valley Irr. Co.* v. *Campbell,* 2 Idaho 411, 415, 18 Pac. 52 (1888).

[64] *Josslyn* v. *Daly,* 15 Idaho 137, 149, 96 Pac. 568 (1908). See *Strickler* v. *Colorado Springs,* 16 Colo. 61, 66-67, 26 Pac. 313 (1891); *Farmers Independent Ditch Co.* v. *Agric. Ditch Co.,* 22 Colo. 513, 521, 45 Pac. 444 (1896); *Dry Gulch Ditch Co.* v. *Hutton,* 170 Oreg. 656, 679, 133 Pac. (2d) 601 (1943); *Low* v. *Schaffer,* 24 Oreg. 239, 244, 33 Pac. 678 (1893).

[65] *Marks* v. *Hilger,* 262 Fed. 302, 304 (9th Cir. 1920).

[66] *Helena* v. *Rogan,* 26 Mont. 452, 469-470, 68 Pac. 798 (1902).

[67] *Anderson* v. *Spear-Morgan Livestock Co.,* 107 Mont. 18, 29-30, 79 Pac. (2d) 667 (1938); *Leonard* v. *Shatzer,* 11 Mont. 422, 426-427, 28 Pac. 457 (1892).

[68] *United States* v. *Haga,* 276 Fed. 41, 43 (D. Idaho 1921). See *Tonkin* v. *Winzell,* 27 Nev. 88, 96-97, 73 Pac. 593 (1903).

Whether one stream or other source of water supply is a tributary of another is a question of fact.[69] In a controversy over the question of whether a certain stream was a tributary of the Platte River on which plaintiff had prior rights, it was incumbent upon the plaintiff, in order to show that it was entitled to relief, to establish the fact that the stream in controversy was a tributary of the Platte River. The burden of proof was on the plaintiff to show that the stream was such a tributary, not on the defendants to show that it was not a tributary.[70]

A Federal court stated the relationship of main stream and tributaries thus:[71]

> Tributary waters, branches, are inseparable parts of the main stream, and with it are subject to common appropriation and control in so far as reasonably necessary in irrigation as in navigation. The first may not be diverted to the impairment of prior rights in the last. The proprietor of the trunk owns the branches, and safety of the first requires protection of the last.

(4) Circumstances under which an appropriator might claim a right of protection with respect to tributaries flowing into the stream *below* his point of diversion were thus stated by the Montana Supreme Court:[72]

> 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 diverson, 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.

Other Tributary Sources

Of other tributary sources of supply of watercourses, springs have been involved in many controversies that have reached the high courts. Other sources of great practical importance are return flow and percolating ground waters. The various facets of these other sources are discussed later in chapters 18 to 20.

In connection with the present subject of protection in tributary sources of supply, mention will be made of only one point relating to springs—the general rules as to tributary springs in States in which the appropriation doctrine is

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[69] *Loyning* v. *Rankin,* 118 Mont. 235, 246, 165 Pac. (2d) 1006 (1946).

[70] *Buckers Irr., Mill. & Improvement Co.* v. *Platte Valley Irr. Co.,* 28 Colo. 187, 189-191, 63 Pac. 305 (1900).

[71] *Dern* v. *Tanner,* 60 Fed. (2d) 626, 628 (D. Mont. 1932).

[72] *Helena* v. *Rogan,* 26 Mont. 452, 470, 68 Pac. 798 (1902).

generally exclusive and in dual system (appropriation and riparian doctrine) States. Other considerations regarding springs are discussed in chapter 18.

In a State in which the doctrine of appropriation is generally recognized to the exclusion of the doctrine of riparian rights, prior appropriation of the waters of a stream gives the better right to the flow of the tributaries, including tributary spring waters; and when this right once vests, it must be protected and upheld.[73]

Inasmuch as a spring supplying a natural stream is itself a part of the stream, such springs in California and some other States are held to be subject to the dual doctrines of appropriation and riparian rights.

(1) Appropriative rights. The owner of land that contains a spring from which a stream flows has only such rights in the spring as he may be entitled to as a riparian owner, as noted immediately below, or as an appropriator in the event that he himself has appropriated water from the spring. Such an appropriation he may make; but his appropriative right in the spring water will be limited, as against the rights of junior appropriators, by the circumstances of his acquisition and perfection of the right, just as in case of appropriations of water generally.[74]

In an early case the Washington Supreme Court stated that the fact that a watercourse may have its head or source in a flowing spring, as found in the instant case, in no way changes its nature. "The water from such spring is the subject of appropriation as certainly as the waters of a river."[75]

(2) Riparian rights. It is well settled in California that the owner of land upon which there is located a spring, the water from which flows in a natural channel across his land and thence upon or through lands belonging to others, does not have, solely by virtue of his location with respect to the spring, exclusive rights therein, but on the contrary has only the rights of a riparian owner.[76] As the spring supplying the stream is a part of the stream,[77] the riparian doctrine applies both to the spring and to the natural watercourse that

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[73] *Malad Valley Irr. Co.* v. *Campbell,* 2 Idaho 411, 415, 18 Pac. 52 (1888). In this case the testimony tended to show that the springs in litigation were in the immediate vicinity of a certain creek and that they constituted the principal and immediate sources of supply for the stream. See also *Bruening* v. *Dorr,* 23 Colo. 195, 198-199, 47 Pac. 290 (1896); *Beaverhead Canal Co.* v. *Dillon Elec. Light & Power Co.,* 34 Mont. 135, 140-141, 85 Pac. 880 (1906); *Campbell* v. *Goldfield Consol. Water Co.,* 36 Nev. 458, 462, 136 Pac. 976 (1913); *Herriman Irr. Co.* v. *Butterfield Min. Co.,* 19 Utah 453, 467-468, 57 Pac. 537 (1899).

[74] *Suisun* v. *DeFreitas,* 142 Cal. 350, 351-353, 75 Pac. 1092 (1904).

[75] *Geddis* v. *Parrish,* 1 Wash. 587, 589, 21 Pac. 314 (1889). In this case the rights of the owner of the land on which the spring rose were held to be junior to those of an earlier appropriator of water of the stream below.

[76] *Scott* v. *Fruit Growers' Supply Co.,* 202 Cal. 47, 52, 258 Pac. 1095 (1927); *L. Mini Estate Co.* v. *Walsh,* 4 Cal. (2d) 249, 254, 48 Pac. (2d) 666 (1935); *San Francisco Bank* v. *Langer,* 43 Cal. App. (2d) 263, 268, 110 Pac (2d) 687 (1941).

[77] *Gutierrez* v. *Wege,* 145 Cal. 730, 734, 79 Pac. 449 (1905).

flows away from it.[78] This means that as against a lower riparian owner, the owner of the land on which the spring is located is "entitled only to a reasonable use of the waters of all parts of the stream including the spring."[79]

The same result was reached in the Texas courts in according to the owner of land containing a head spring only the right of a riparian owner to make reasonable use of the water for irrigation as against similar rights of owners of lands contiguous to the stream flowing from the spring.[80]

The Washington Supreme Court differentiated between old and new springs thus:[81]

> While one may have riparian rights in a stream even though its source be a spring upon the land of another * * * yet it must be a stream that was wont to flow from time immemorial. The owner of land upon which a new spring breaks out may make such use of the waters as he pleases, notwithstanding it would, if unmolested, cause a stream to flow across another's land. Any other rule would make his estate involuntarily servient to a use to which it was not subject when he acquired it.

QUANTITY AND QUALITY OF THE WATER

A century ago the California Supreme Court stated that: "The prior appropriator is clearly entitled to protection against acts which materially diminish the quantity of water to which he is entitled, or deteriorate its quality, for the uses to which he wishes to apply it."[82] Statements to this effect have been made in one form or another by a number of courts.[83]

Likewise, the riparian proprietor in California, whose right of reasonable beneficial use of water was preserved and declared in the constitutional amendment of 1928,[84] "is entitled to all of the water of the stream, both in the quantity and quality of its natural state, which he is able to put to a

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[78] *Holmes* v. *Nay,* 186 Cal. 231, 234-235, 199 Pac. 325 (1921).

[79] *Gutierrez* v. *Wege,* 145 Cal. 730, 734, 79 Pac. 449 (1905).

[80] *Fleming* v. *Davis,* 37 Tex. 173, 194-201 (Semicolon Ct. 1872); implicit in *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 585-590, 86 S.W. 733 (1905).

[81] *Mason* v. *Yearwood,* 58 Wash. 276, 280, 108 Pac. 608 (1910).

[82] *Phoenix Water Co.* v. *Fletcher,* 23 Cal. 481, 487 (1863).

[83] *Arizona Copper Co.* v. *Gillespie,* 12 Ariz. 190, 202-203, 100 Pac. 465 (1909); *Larimer County Res. Co.* v. *People ex rel. Luthe,* 8 Colo. 614, 617, 9 Pac. 794 (1886); *Crane* v. *Winsor,* 2 Utah 248, 253 (1878); *Ravndal* v. *Northfork Placers,* 60 Idaho 305, 311-313, 91 Pac. (2d) 368 (1939); *Helena* v. *Rogan,* 26 Mont. 452, 469-470, 68 Pac. 798 (1902). The prior appropriator is entitled to the use of his appropriated waters, as against subsequent appropriators, "without material interruption in the flow thereof, or in quantity or quality." *Atchison* v. *Peterson,* 1 Mont. 561, 569 (1872), affirmed, 87 U.S. 507 (1874).

[84] Cal. Const. art. XIV, § 3.

reasonable beneficial use, and to be protected in that right by the injunctive processes of the court."[85]

Quantity of the Water

The reasoning of the California Supreme Court in reaching its conclusion as to the appropriator's protection in quantity of water appears in a decision rendered during the rather extensive gold mining litigation. This was to the effect that the appropriator is entitled to have the water flow without material interruption in its natural channel to his point of diversion, such right being essential to his protection; for otherwise, if the rule were followed that the subsequent upstream users might so use the water as to diminish the quantity, it would be difficult to set any practical limits to such diminution, and so the downstream property with the earlier right might be rendered entirely worthless.[86] "An appropriator is entitled to have the full quantity of water called for by his appropriation flow in the natural stream, or in his ditch or canal, in such a way that he can enjoy its use," and he is entitled to protection from the courts against any material interference with this flow of water by which his right to its use is substantially impaired.[87]

The injury or threat of injury arises in various ways. Some that have been litigated are interference with the natural flow of a watercourse;[88] irregularity of flow, from complete detention to over-rapid discharge;[89] obstruction of streamflow;[90] allowing water to run to waste without substantial beneficial use;[91] diverting excessive quantity of water;[92] removal of natural dam in stream;[93] and maintenance of dams for purpose of controlling soil erosion.[94]

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[85] *Meridian* v. *San Francisco,* 13 Cal. (2d) 424, 447, 90 Pac. (2d) 537 (1939).

[86] *Bear River & Auburn Water & Min. Co.* v. *New York Min. Co.,* 8 Cal. 327, 336 (1857).

[87] *Bailey* v. *Idaho Irr. Co.,* 39 Idaho 354, 358, 227 Pac. 1055 (1924).

The interruption in flow of the water and the diminution of quantity must be material in order to constitute an invasion of the rights of the prior appropriator; and these are matters of fact. *Atchison* v. *Peterson,* 87 U.S. 507, 514-515 (1874); *Montana Co.* v. *Gehring,* 75 Fed. 384, 388 (9th Cir. 1896).

[88] *Weidmeier* v. *Edelman,* 75 S. Dak. 29, 58 N.W. (2d) 306 (1953); *Willadsen* v. *Crawford,* 75 S. Dak. 161, 60 N.W. (2d) 692 (1953).

[89] *Lone Tree Ditch Co.* v. *Rapid City Elec. & Gas Light Co.,* 16 S. Dak. 451, 93 N.W. 650 (1903).

[90] *Lasson* v. *Seely,* 120 Utah 679, 238 Pac. (2d) 418 (1951); *Kano* v. *Arcon Corp.,* 7 Utah (2d) 431, 326 Pac. (2d) 719 (1958); *Monroe Mill Co.* v. *Menzel,* 35 Wash. 487, 77 Pac. 813 (1904); *Kalama Elec. Light & Power Co.* v. *Kalama Driving Co.,* 48 Wash. 612, 94 Pac. 469 (1908); *Hutchinson* v. *Mt. Vernon Water & Power Co.,* 49 Wash. 469, 95 Pac. 1023 (1908).

[91] *Campbell* v. *Grimes,* 62 Kans. 503, 64 Pac. 62 (1901).

[92] *Handy Ditch Co.* v. *Louden Irrigating Canal Co.,* 27 Colo. 515, 62 Pac. 847 (1900).

[93] *Broady* v. *Furray,* 163 Okla. 204, 21 Pac. (2d) 770 (1933).

[94] *State ex rel. Johnson* v. *Stewart,* 163 Oreg. 585, 96 Pac. (2d) 220 (1939).

The use of water by the holder of a riparian right ordinarily is subject to the reasonable use of the stream on the part of other riparians, although in some States an upper riparian may be allowed to take all he reasonably needs for domestic purposes as against a lower riparian, even if this exhausts the flow. As against other riparian owners, the riparian right does not relate to any specific quantity of water, because in its nature it is a tenancy in common. As against appropriators, different considerations are involved. These and related matters are dicussed in chapter 10.[95]

Questions regarding the laws applicable to changes or proposed changes in the exercise of water rights, particularly changes in points of diversion and purpose or place of use,[96] and plans of rotation in diversion and use of water among appropriators or riparians, or both, which may affect the quantity of water, have been discussed in earlier chapters.[97]

Quality of the Water

As a general principle, the appropriator is entitled to the flow of water in a stream to his diversion works in such state of natural purity as to substantially fulfill the purposes for which his appropriation was made. Various modifications and qualifications of this principle have been adopted by western courts, as discussed in chapter 8.[98]

During the early mining years it was recognized in California that some deterioration in quality of the water might not impair the usefulness of an appropriation, that question to be determined in view of the purpose to which the water was being applied. There were indeed divergences in the judicial views as expressed in the earliest opinions,[99] but the California Supreme Court

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[95] See, in chapter 10, "The Riparian Right–Property Characteristics–Right to the Flow of Water" and "Measure of the Riparian Right."

[96] Some typical high court decisions include *Handy Ditch Co.* v. *Louden Irrigating Canal Co.*, 27 Colo. 515, 62 Pac. 847 (1900); *Vogel* v. *Minnesota Canal & Res. Co.*, 47 Colo. 534, 107 Pac. 1108 (1910); *Colorado Springs* v. *Yust*, 126 Colo. 289, 249 Pac. (2d) 151 (1952); *Cline* v. *McDowell*, 132 Colo. 37, 284 Pac. (2d) 1056 (1955); *East Bench Irr. Co.* v. *Deseret Irr. Co.*, 2 Utah (2d) 170, 271 Pac. (2d) 449 (1954); *Salt Lake City* v. *Boundary Springs Water Users Ass'n*, 2 Utah (2d) 141, 270 Pac. (2d) 453 (1954); *Haberman* v. *Sander*, 166 Wash. 453, 7 Pac. (2d) 563 (1932).

[97] See, in chapter 9, regarding the appropriative right, "Change in Exercise of Water Right" and "Rotation in Use of Water" and, in chapter 10, "The Riparian Right–Exercise of the Right–Rotation in Use of Water Among Riparians." Changes in means of diversion are discussed under "Means of Diversion,"*infra.*

[98] See "Property Characteristics–Right of Property–Right to the Flow of Water–Quality of the water."

[99] See *Bear River & Auburn Water & Min. Co.* v. *New York Min. Co.*, 8 Cal. 327, 333-336 (1857); *Mokelumne Hill Canal & Min. Co.* v. *Woodbury*, 10 Cal. 185, 186-187 (1858); *Butte Canal & Ditch Co.* v. *Vaughn*, 11 Cal. 143, 153-154 (1858); *Pilot Rock Creek Canal Co.* v. *Chapman*, 11 Cal. 161, 162 (1858). See also *Esmond* v. *Chew*, 15 Cal. 137, 143 (1860).

settled upon the principal that "The prior appropriator is clearly entitled to protection against acts which materially diminish the quantity of water to which he is entitled, or deteriorate its quality, for the uses to which he wishes to apply it."[100]

In 1942 the California Supreme Court again expressed its views on this question.[101] It at first mistakenly said that[102] "it is an established rule in this state that an appropriator of waters of a stream, as against upper owners with inferior rights of user, is entitled to have the water at his point of diversion preserved in its natural state of purity. . . ." But the court went on to qualify this flat statement by adding that "any use which corrupts the water so as to *essentially impair its usefulness for the purposes* to which he originally devoted it, is an invasion of his rights. Any *material* deterioration of the quality of the stream by subsequent appropriators or others without superior rights entitles him to both injunctive and legal relief."[103]

In California and other dual system States, as discussed in chapter 10,[104] the riparian right is also accorded protection against impairment of quality of the water. The riparian proprietor may be protected in his right to all the water of the stream, in both quantity and quality of its natural state, which he is able to put to a reasonable beneficial use.[105] It is said further that if necessary to safeguard the exercise of his lawful riparian uses, the downstream proprietor is entitled as against both upstream riparians and prior appropriators "to a substantially unpolluted stream,"[106] particularly where the downstream use is for domestic purposes.[107] On the other hand, a "'serious and threatening' damage of pollution, in the absence of actual pollution," would not justify a prohibitory injunction, especially when protective measures short of absolute prohibition might, if necessary, be applied by the court.[108]

Some courts have indicated that as between riparians reasonableness of use in regard to water quality is primarily a question of fact, to be determined by consideration of all the circumstances of each particular case.[109]

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[100] *Phoenix Water Co.* v. *Fletcher,* 23 Cal. 481, 487 (1863).

[101] *Wright* v. *Best,* 19 Cal. (2d) 368, 378, 121 Pac. (2d) 702 (1942). See also *Joerger* v. *Pacific Gas & Elec. Co.,* 207 Cal. 8, 25-26, 276 Pac. 1017 (1929); *Dripps* v. *Allison's Mines Co.,* 45 Cal. App. 95, 99, 187 Pac. 448 (1919); *Antioch* v. *Williams Irr. Dist.,* 188 Cal. 451, 457-458, 465, 205 Pac. 688 (1922).

[102] *Wright* v. *Best,* 19 Cal. (2d) 368, 378, 121 Pac. (2d) 702 (1942).

[103] *Id.* Emphasis added. But see *Heil* v. *Sawada,* 187 Cal. App. (2d) 633, 637-638, 10 Cal. Rptr. 61 (1960), in which a California court of appeal restated this rule but indicated that an injunction will only be granted if the plaintiff would receive some advantage and harm would not accrue to the defendant.

[104] See "The Riparian Right—Property Characteristics—Right to the Flow of Water—Quality of the water."

[105] *Meridian* v. *San Francisco,* 13 Cal. (2d) 424, 447, 90 Pac. (2d) 537 (1939).

[106] *Crum* v. *Mt. Shasta Power Corp.,* 220 Cal. 295, 312, 30 Pac. (2d) 30 (1934).

[107] *Joerger* v. *Pacific Gas & Elec. Co.,* 207 Cal. 8, 25-26, 276 Pac. 1017 (1929).

[108] *Meridian* v. *San Francisco,* 13 Cal. (2d) 424, 451-452, 90 Pac. (2d) 537 (1939).

[109] *McDonough* v. *Russell-Miller Mill. Co.,* 38 N. Dak. 465, 471-473, 165 N.W. 504 (1917);

Some specific types of injuries that have been complained of and litigated by appropriators or riparians include pollution by mining and milling debris,[110] contamination by sewage,[111] drainage from oil fields,[112] salt water impregnation,[113] and deleterious industrial wastes.[114]

MEANS OF DIVERSION

An appropriator of water is entitled to protection in a reasonably efficient means of diversion, as against junior appropriators. Some of the situations in which this general principle has been worked out follow.[115] Some considerations regarding means of diversion under the riparian doctrine are discussed in

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Martin v. *British Am. Oil Producing Co.,* 187 Okla. 193, 194-196, 102 Pac. (2d) 124 (1940).

[110] Complaints by appropriators: *Phoenix Water Co.* v. *Fletcher,* 23 Cal. 481, 487 (1863); *Ravndal* v. *Northfork Placers,* 60 Idaho 305, 311-313, 91 Pac. (2d) 368 (1939); *Arizona Copper Co.* v. *Gillespie,* 12 Ariz. 190, 202-203, 100 Pac. 465 (1909), affirmed, 230 U.S. 46 (1913); *Humphreys Tunnel & Min. Co.* v. *Frank,* 46 Colo. 524, 529-530, 105 Pac. 1093 (1909).

The earliest complaints of injury to quality of the water that reached the premises of the prior appropriator or riparian owner were in the mining areas of the Sierra Foothills in California, and arose out of the discharge of water and debris from mining and milling operations. *Bear River & Auburn Water & Min. Co.* v. *New York Min. Co.,* 8 Cal. 327, 333-336 (1857); *Pilot Rock Creek Canal Co.* v. *Chapman,* 11 Cal. 161, 162 (1858).

[111] Complaints by riparians: *Boyd* v. *Schreiner,* 116 S.W. 100, 103 (Tex. Civ. App. 1909, error refused); *New Odorless Sewerage Co.* v. *Wisdom,* 30 Tex. Civ. App. 224, 226-228, 70 S.W. 354 (1902, error refused); *Markwardt* v. *Guthrie,* 18 Okla. 32, 33-35, 54, 90 Pac. 26 (1907); *Enid* v. *Brooks,* 132 Okla. 60, 61-63, 269 Pac. 241 (1928); *Oklahoma City* v. *Tytenicz,* 171 Okla. 519, 521, 43 Pac. (2d) 747 (1935); *Oklahoma City* v. *Tyetenicz,* 175 Okla. 228, 229, 52 Pac. (2d) 849 (1935); *Parsons* v. *Sioux Falls,* 65 S. Dak. 145, 151-153, 272 N.W. 288 (1937).

[112] Complaints by riparians: *Teel* v. *Rio Bravo Oil Co.,* 47 Tex. Civ. App. 153, 160, 104 S.W. 420 (1907); *Benjamin* v. *Gulf, C. & S. F. Ry.,* 49 Tex. Civ. App. 473, 477, 108 S.W. 408 (1908, error refused); *Comar Oil Co.* v. *Blagden,* 169 Okla. 78, 35 Pac. (2d) 954 (1934); *Martin* v. *British Am. Oil Producing Co.,* 187 Okla. 193, 194-195, 102 Pac. (2d) 124 (1940); *Gulf Oil Corp.* v. *Miller,* 198 Okla. 54, 55-56, 175 Pac. (2d) 335 (1946).

[113] Complaints by riparians: *Meridian* v. *San Francisco,* 13 Cal. (2d) 424, 451-452, 90 Pac. (2d) 537 (1939); *Biggs* v. *Lee,* 147 S.W. 709, 711 (Tex. Civ. App. 1912, error dismissed); *Bigham Bros.* v. *Port Arthur Channel & Dock Co.,* 100 Tex. 192, 199-202, 97 S.W. 686 (1906), on further hearing, 59 Tex. Civ. App. 367, 372-373, 126 S.W. 324 (1910).

[114] Complaints by riparians: *Prest-O-Lite Co.* v. *Howery,* 169 Okla. 408, 37 Pac. (2d) 303 (1934), approved, but distinguished on the facts, *Gulf Oil Corp.* v. *Miller,* 198 Okla. 54, 55-56, 175 Pac. (2d) 335 (1946), approved as to proof of cause of injury from stream pollution, *Sunray Oil Corp.* v. *Burge,* 269 Pac. (2d) 782, 786 (Okla. 1954).

Regarding runoff from a cattle feedlot, see *Atkinson* v. *Herington Cattle Co.,* 200 Kans. 298, 436 Pac. (2d) 816, 823-824 (1968).

[115] See also, in chapter 9, "Efficiency of Practices." For some other discussions related to diversions by appropriators, see, in chapter 9, "Diversion, Distribution, and Storage

chapter 10 under "The Riparian Right–Exercise of the Riparian Right–Diversion of Water–Means of diversion of water."

Restrictions on Senior Appropriator

(1) The earliest case that has come to the attention of the author in this field featured the obligation of a senior appropriator to meet the situation caused by a junior diversion upstream. The California Supreme Court refused the request of the earlier appropriator for an injunction against a junior upstream appropriator whose diversion, by reason of its location on the body of slack water above the senior appropriator's dam, required the latter to use flashboards on its dam in periods of high flow as well as low flow in order to obtain the prior appropriated supply. In view of the requirement of public policy for careful economy of the limited water supply, the senior was required to use all reasonable diligence in handling it; and if with such diligence and the use of ordinary means of diversion he could obtain all the water that he was entitled to, he could not complain of the trouble and expense involved. The court stated that[116]

> While the right of the prior appropriator is carefully protected, he is compelled to exercise it with due regard to the rights of others and the paramount interests of the public. The quantity of his lawful appropriation cannot be diminished, but he must return the surplus to the stream without unnecessary waste, and he must use reasonable diligence and reasonably efficient appliances in making his diversion in order that the surplus may not be rendered unavailable to those who are entitled to it. Upon the same principle it must be held that a prior appropriator whose means of diversion become insufficient for his purposes, by reason of their inherent defects, when the surplus is diverted above him, must take the usual and responsible measures to perfect such means.

In other words, the extra inconvenience and minor expense of resorting to the same means that the senior was accustomed to employ in periods of scarcity to fill its canal was not considered by the court as constituting a material infringement of the senior's right.

(2) An appropriator of water from the Snake River in Idaho, whose diversion consisted of an arrangement of waterwheels and who claimed an appropriation of the current for that purpose, was denied recovery of damages for such raising of the water level of the stream by means of a later

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Works–Some Features of Waterworks–Diversion and Distribution Works" and "Change in Exercise of Water Right–Point of Diversion." The general subject of the rights of senior and junior appropriators is discussed in chapter 8 under "Relative Rights of Senior and Junior Appropriators."

[116] *Natoma Water & Mining Co.* v. *Hancock,* 101 Cal. 42, 50-52, 31 Pac. 112 (1892), 35 Pac. 334 (1894).

downstream dam as to render the waterwheels inoperative. The court rejected the claim that the current was appurtenant to the water location and, furthermore, followed "the general principle that the right of appropriation must be exercised with some regard to the rights of the public."[117] In other words, to devote the entire current of a river to lifting a small quantity of water over the banks is not a reasonable method of diversion.

(3) The provision in a 1929 Oregon circuit court decree that the method of diversion by natural overflow that was so common for many years in parts of Oregon was "not a right, but merely a privilege to be enjoyed only until rendered impracticable by a fuller development and use of the unappropriated waters" was quoted with approval by the Oregon Supreme Court in a 1959 case, which then stated:[118] "That time has come. We hold that the method of diversion by way of natural overflow is a privilege only and cannot be insisted upon by the objectors if it interferes with the appropriation by others of the waters for a beneficial use."

Restrictions on Junior Appropriator

(1) Statements about a Montana diversion (achieved by means of a wing dam constructed of brush, rocks, and dirt) as "suitable and efficient for the diversion of water," and "a reasonably adequate means of diversion and reasonably constructed and maintained," notwithstanding fluctuations incidental to reasonable and lawful use by others, were held to be statements of ultimate facts sufficient to support a statement of cause of action. The injury complained of was such a reduction of streamflow by reason of the defendants' upstream storage that the water would not flow into plaintiff's ditches, so that he could not now divert without large expenditures in construction of a new diversion or installation of a pumping plant. The Montana Supreme Court held that absolute efficiency was neither requisite nor practicable; that the necessity for minimizing waste of water resources does not extend to the abandonment of reasonably efficient diversion systems and the necessity of installing other systems "by which the last drop may be taken from the stream"; that the defendants cannot argue that they are limited by the amount but not the means of prior appropriations; and that the right of the plaintiff appropriator is to divert and use water, not merely to have it left in the streambed.[119]

(2) An appropriator of water from a surface stream in Arizona was held entitled to protection against depletion of the undercurrent to the extent of preventing the free flow of his appropriation in quantity and quality to the

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[117] *Schodde* v. *Twin Falls Land & Water Co.*, 161 Fed. 43, 45-48 (9th Cir. 1908), affirmed, 224 U.S. 107 (1912).

[118] *Warner Valley Stock Co.* v. *Lynch*, 215 Oreg. 523, 537, 336 Pac. (2d) 884 (1959). The vested water rights of these appropriators were not affected by the fact that they no longer had the privilege of a natural overflow *method* of diversion.

[119] *State ex rel. Crowley* v. *District Court*, 108 Mont. 89, 97-98, 88 Pac. (2d) 23 (1939).

head of his ditch, which interference if allowed to continue would require him to install a new method of diversion. The solution of this problem (a) allowed the defendant, a public service corporation, to make its diversion from the underflow and (b) required it to deliver to plaintiff the quantity of water he had appropriated.[120]

The following two cases had to do with the water level of standing water:

(3) A California water company which had acquired the right to pump water from a lake for irrigation of nonriparian land had the right to insist upon a reasonably ample quantity of water to last through the entire irrigation season; and the company had the right "also to enjoin a depletion of the lake which will lower the water surface so as to substantially increase the cost of making the diversion it is entitled to make."[121]

(4) In the other case, a prior appropriator diverted water from a Colorado reservoir by means of a gravity outlet pipe and also used the reservoir as a conduit for water entering by a ditch. Junior appropriators diverted water 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 to lower the water level below the outlet pipe by means of their pumping. It was not feasible to lower the prior appropriator's 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 Colorado Supreme Court held that the senior ditch and reservoir rights were being unlawfully interfered with and practically nullified by the juniors, and that the senior could not, against its will, be compelled to bear the expense of pumping water upon its lands which by gravity would reach them were it not for this unwarranted interference with its prior rights. 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.[122]

Alteration of Senior Diversion by Junior Appropriator

If a junior appropriator wishes to make some change in his senior's diversion works, provided they are reasonably efficient—not necessarily absolutely efficient, for 100 percent efficiency is seldom attainable—in order to benefit his own junior diversion, he must bear the cost and must accomplish the change without impairing the exercise of the senior's right.

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[120] *Pima Farms Co.* v. *Proctor,* 30 Ariz. 96, 106-108, 110-113, 245 Pac. 369 (1926).

[121] *Duckworth* v. *Watsonville Water & Light Co.,* 150 Cal. 520, 527, 533, 89 Pac. 338 (1907).

[122] *Joseph W. Bowles Res. Co.* v. *Bennett,* 92 Colo. 16, 22-24, 18 Pac. (2d) 313 (1932).

(1) According to an Arizona decision:[123]

> An appropriator of water from a running stream is entitled to have it flow down the natural channel to his point of diversion undiminished in quantity and quality or, if diverted from the natural channel by other appropriators for their convenience, to have it delivered to him at available points by other means provided by subsequent appropriators and at their expense. This seems to be a rule of general accomodation and utility and has been universally followed by the courts when applied to surface streams.

(2) This rule was adhered to by the Utah Supreme Court in several cases. Salt Lake City as prior appropriator and others as juniors diverted water from Utah Lake and from its outlet, Jordan River. When the lake level fell below the level of the outlet, the city pumped water from the lake into the river. The Utah Supreme Court held that the original appropriator from a stream or body of water also acquires the right to continue the use of the means of diversion which he installs; if the junior appropriators could pump water from the lake without interference with the city's prior rights, they should be permitted to do so; but if their pumping interfered or threatened to interfere with the senior diversion and a new one was required, the juniors must bear the expense of the change or make up the deficiency by providing an additional supply of water at their own expense.[124]

The principle of the foregoing decision was applied by the Utah Supreme Court, by reference to that decision, in a case in which it appeared that more than 90 percent of the water diverted from a stream was lost in a rocky channel through which it was conveyed to the place of use. The court held that if the ditch company, the junior appropriator, could save the quantity being lost, by substituting a better method of diverting and conveying the water to the place of use, it should be permitted to do so.[125] It should be emphasized that if a substitute supply of water is provided by the junior appropriator, it must be returned into the stream or into the ditch of the prior appropriator, if that is done at a point where the prior appropriator can make full use of the water, and without any injury to him.[126]

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[123] *Pima Farms Co.* v. *Proctor,* 30 Ariz. 96, 106-107, 245 Pac. 369 (1926). For administrative complications foreseen by the court, see *Maricopa County M. W. C. Dist.* v. *Southwest Cotton Co.,* 39 Ariz. 367, 370, 7 Pac. (2d) 254 (1932).

[124] *Salt Lake City* v. *Gardner,* 39 Utah 30, 45-48, 114 Pac. 147 (1911).

[125] *Big Cottonwood Tanner Ditch Co.* v. *Shurtliff,* 56 Utah 196, 204-205, 189 Pac. 587 (1919).

[126] *United States* v. *Caldwell,* 64 Utah 490, 497-498, 231 Pac. 434 (1924). See *Salt Lake City* v. *Salt Lake City Water & Elec. Power Co.,* 24 Utah 249, 266, 67 Pac. 672 (1902), 25 Utah 456, 71 Pac. 1069 (1903). See also *Macricopa County M.W.C. Dist.* v. *Southwest Cotton Co.,* 39 Ariz. 367, 370, 7 Pac. (2d) 254 (1932); *Reno* v. *Richards,* 32 Idaho 1, 5, 178 Pac. 81 (1918). (Footnote continued.)

INCHOATE APPROPRIATIVE RIGHT

The nature and extent of the inchoate appropriative right is considered in the last part of chapter 8.[127] Following are some considerations regarding the protection of such inchoate rights.

(1) The view of the California courts in cases involving water rights existing prior to enactment of the Civil Code in 1872 was that before making any actual diversion or use of the water, a claimant might acquire an incipient, incomplete, and conditional right to the future use of the water by beginning the construction of works and diligently prosecuting the same toward completion. In 1912, the California Supreme Court said, "There is no case, arising prior to the enactment of the code, which holds that the party who thus in good faith began and diligently prosecuted the work on a dam and ditch for the diversion and use of water, could not protect his incipient right to the water, against the hostile diversions and claims of others, by an appropriate suit for that purpose."[128]

Considering together this 1912 case and a much earlier one[129] distinguished in the later decision, the rule apparently was that the holder of an inchoate right who had begun the construction of his works and was prosecuting the work diligently could not obtain damages from someone who began use of the water before he himself was ready to take it, but that he nevertheless had a substantial right in real property which he could protect against invasion by an appropriate suit for that purpose.

An intending appropriator on the public domain acquired a possessory right to continue with diligence the prosecution of the work until completion, which possessory right was good as against all the world but the United States.[130]

It was likewise held that an appropriator under the California Civil Code acquired an incomplete right pending the time of completion of his appropriation, which was an interest in the realty, and was entitled to maintain an action to determine the validity of a conflicting claim adverse to his own claim.[131] He was entitled to a judgment protecting his interest, if valid, pending completion of his appropriation, which judgment "should only declare and

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This aspect of the junior appropriator's right merges into the topic "Exchange or Substitution of Water" which is discussed in chapter 9 under "Natural Channels and Reservoirs—Use of Natural Channel."

[127] Under "Inchoate Appropriative Right."

[128] *Inyo Consol. Water Co.* v. *Jess,* 161 Cal. 516, 519, 119 Pac. 934 (1912). See also *Haight* v. *Costanich,* 184 Cal. 426, 431-432, 194 Pac. 26 (1920).

[129] *Nevada County & Sacramento Canal Co.* v. *Kidd,* 37 Cal. 282, 313 (1869).

[130] The California Supreme Court said: "The property rights which do accrue are such as to protect the appropriator from the acts of all persons saving the paramount authority. So far as the United States itself is concerned, it is under no justiciable duty in law or equity to such an appropriator until his work shall have been completed." *Silver Lake Power & Irr. Co.* v. *Los Angeles,* 176 Cal. 96, 101-103, 167 Pac. 697 (1917).

[131] *Inyo Consol. Water Co.* v. *Jess,* 161 Cal. 516, 520-521, 119 Pac. 534 (1912).

describe the plaintiff's contingent right to use the water and enjoin adverse claims or uses injurious thereto."[132]

Intervening appropriations under the Civil Code were superior to uncompleted nonstatutory appropriations.[133] The inchoate Civil Code appropriative right was protected, pending the time it ripened into a completed appropriation by following the statutory procedure, not only as against rights subsequently initiated under the Civil Code, but also as against any portion of a nonstatutory appropriation that had not been consummated at the time of posting the Civil Code notice.[134]

(2) In Idaho, the permittee, even though he has not yet received a license, is entitled upon substantial compliance with the terms of his permit to enjoin others from interfering unlawfully with his use of the water and from thereby preventing him from ripening his incipient interest into a complete appropriation. In this respect, said the Idaho Supreme Court, his right, though only a consent to construct works and acquire real property, partakes of the nature of a vested right.[135]

(3) In Montana, an inchoate right is entitled to protection as long as it is kept in good standing. A Federal court said,[136] "True, this inchoate right may not be defeated by an intervening appropriation so long as the holder thereof, after the construction of his diversion works, exercises due diligence in making such application of the water; but it still remains true that to perfect the right, actual use is indispensable."

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[132] *Merritt* v. *Los Angeles,* 162 Cal. 47, 50-51, 120 Pac. 1064 (1912). But note the contrary view expressed 10 years earlier by a Federal disctrict court in *Rincon Water & Power Co.* v. *Anaheim Union Water Co.,* 115 Fed. 543, 547-548 (S.D. Cal. 1902).

[133] *Haight* v. *Costanich,* 184 Cal. 426, 432-433, 194 Pac. 26 (1920).

[134] After enactment of the California Water Commission Act, now codified in the Water Code, questions arose as to protection of applicants for permits to appropriate water both as against other claimants and as against the State. Dicta in *East Bay Municipal Util. Dist.* v. *State Dept. of Pub. Works,* 1 Cal. (2d) 476, 480-481, 35 Pac. (2d) 1027 (1934), suggest that in certain circumstances an applicant for a permit may acquire an inchoate right sufficient to authorize him to institute a court action to determine conflicting claims between himself and other claimants, but that this may present different considerations from the question of the applicant's rights as against the State. The court cited and discussed *Yuba River Power Co.* v. *Nevada Irr. Dist.,* 207 Cal. 521, 522-528, 279 Pac. 128 (1929). The *Yuba* case also is cited and discussed in *Madera Irr. Dist.* v. *All Persons,* 47 Cal. (2d) 681, 306 Pac. (2d) 886, 891 (1957), reversed on other grounds in *Ivanhoe Irr. Dist.* v. *McCracken,* 357 U.S. 275 (1958), and *Ivanhoe Irr. Dist.* v. *All Parties & Persons,* 53 Cal. (2d) 692, 350 Pac. (2d) 69, 94 (1960). See also *County of Tuolumne* v. *State Bd. of Equalization,* 206 Cal. App. (2d) 352, 24 Cal. Rptr. 113, 119 (1962).

[135] *Lambrix* v. *Frazier,* 31 Idaho 382, 385, 171 Pac. 1134 (1918). Compare *Griffiths* v. *Cole,* 264 Fed. 369, 372-373 (D. Idaho 1919), in which the Federal court expressed its belief that a suit could not be maintained for the purpose of adjudicating the rights of water as between two parties who had inchoate rights only.

[136] *Oscarson* v. *Norton,* 39 Fed. (2d) 610, 613 (9th Cir. 1930).

(4) Prior to 1969, the adjudication statutes of Colorado provided for conditional decrees. On satisfactory proof of partial completion by the claimant, he received a conditional decree under which application of the water to beneficial use had to be made within a reasonable time thereafter. The final decree in a subsequent proceeding fixed a quantity of water not in excess of the maximum fixed in the conditional decree. In this way, rights of partially completed appropriations were safeguarded pending completion and final adjudication, or forfeiture and cancellation, as the case might have been.[137] In 1969, the Colorado Legislature enacted the "Water Right Determination and Administration Act of 1969" which, among other things, provided for determinations of conditional water rights and the amounts and priorities thereof, including a determination that a conditional water right has become a water right by virtue of a completed appropriation.[138]

REMEDIES FOR INFRINGEMENT

A number of western courts have indicated that all or numerous legal remedies may be invoked for the protection of water rights,[139] although certain legal remedies may not be available under the circumstances of particular cases. In the latter regard, see, for example, the subsequent discussion under "Injunction or Damages or Both."

The remedies discussed below primarily involve court litigation to protect private water rights under the prevailing principles applicable to such rights in the different States. The application of such general principles as between certain parties may be altered by such complicating factors as voluntary contractual agreements, condemnation, prescriptive rights, and estoppel, which were involved in some of the court decisions discussed in this chapter. The latter factors are discussed in chapter 14, "Loss of Water Rights in Watercourses."

In addition to relief through court litigation, water rights may be protected by various actions of administrative agencies or governmental officials. Mandamus actions that may be brought to compel agencies or officials to act

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[137] Colo. Rev. Stat. Ann. § § 148-10-6 to 148-10-9 (1963), repealed, Laws 1969, ch. 373, § 20.

[138] Colo. Rev. Stat. Ann. § 148-21-18(1) (Supp. 1969). For further discussions of this and other provisions of this legislation, see, in chapter 8, "Inchoate Appropriative Right–Conditional Decrees and Water Rights in Colorado." See also chapter 15 and the State summary for Colorado in the appendix.

[139] Regarding appropriative rights, see *Hoffman* v. *Stone,* 7 Cal. 46, 49 (1857); *McDonald* v. *Bear River & Auburn Water & Min. Co.,* 13 Cal. 220, 232-233 (1859); *Hill* v. *King,* 8 Cal. 336, 337 (1857). Regarding riparian rights, see *Crawford Co.* v. *Hathaway,* 67 Nebr. 325, 340, 93 N.W. 781 (1903). More recent Nebraska court decisions are discussed later under "Injunction or Damages or Both–Some State Riparian-Appropriation Situations."

are discussed below under "Mandamus" and actions of such agencies or officials are referred to at some other places in this chapter.[140] The role of State agencies in the adjudication of water rights is discussed in chapter 15, and in regard to the administration of water rights and distribution of water, in chapter 16. See also chapters 7 to 9 concerning these and other aspects of the role of State agencies regarding appropriative rights such as their role with respect to the handling of permits and licenses. Moreover, the protection of public rights and governmental interests in navigable watercourses often may involve actions taken by administrative agencies or government officials. Such rights and interests are discussed in chapter 4. The role of administrative agencies or governmental officials in some of the above regards in particular States is further discussed in the appendix, "Summaries of the State Water Rights Systems."

In a 1901 case, the Colorado Supreme Court determined that a water right is an easement and an incorporeal hereditament, descendable by inheritance and a freehold estate.[141] The court subsequently concluded that a water right therefore came within the meaning of the term real property, as used in the Colorado statutes. But in addition to the ordinary allegations in an action to quiet title, there were also allegations that the defendant had interefered with, and obstructed, the plaintiff in its enjoyment of the right to the use of water for purposes of irrigation. It seemed to the supreme court well settled that a court of equity, independently of the statute, had jurisdiction to restrain interference with a water right. Hence, under this doctrine the court, having acquired jurisdiction to restrain interference with plaintiff's use of the water, might properly retain jurisdiction and determine all the rights of the parties, even though plaintiff was not in actual possession. If the easement were considered by itself, wholly apart from the land on which the water was used, ejectment would not lie to recover possession. But whether in or out of possession, "plaintiff certainly can obtain appropriate relief in a court of equity against any unlawful obstruction of his rights to the enjoyment of the easement. The evidence shows legal title in plaintiff. From that flows the right

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[140] See, for example, "Injunction–Appropriators–Some local situations," paras. 2 to 5, *infra*. Paragraph 2 thereof discusses a Colorado case in which the court indicated that the Colorado statutory method for establishing priorities and the distribution of water, which makes violations thereof criminal offenses, may not afford a complete and adequate remedy for injuries to senior appropriators and injurious violations may constitute special injury that may be enjoined by a court of equity. *Rogers* v. *Nevada Canal Co.*, 60 Colo. 59, 64, 151 Pac. 923 (1915). The Montana Supreme Court has indicated that the appointment of a water commissioner for an adjudicated stream under the Montana statute [Mont. Rev. Codes Ann. § 89-1001 *et seq.* (1964)] is a special statutory remedy that is not exclusive, but is merely cumulative. It does not prevent one whose water right has been impaired from maintaining an action for damages. *Tucker* v. *Missoula Light & Ry. Co.*, 77 Mont. 91, 97-99, 250 Pac. 11 (1926).

[141] *Grand Valley Irr. Co.* v. *Lesher*, 28 Colo. 273, 284, 65 Pac. 44 (1901).

to whatever possession the nature of the right is susceptible of, and to its free use and enjoyment."[142]

In a suit to adjudicate the relative appropriative rights of contesting irrigation companies to the use of streamflow, the Texas Supreme Court, in answering a certified question of venue, agreed that an action to quiet title and determine and establish rights to divert and use water is in the nature of an action to quiet the title to real estate. From that it necessarily followed that the injunctive relief sought was auxiliary to the main purpose of the suit, which was properly brought in the county in which the affected land was situated. The district court of such county, having jurisdiction to determine and establish plaintiff's title to the water and to quiet such title, also acquired jurisdiction of the defendants and was entitled to issue any writ necessary to accomplish the purpose of this suit.[143]

Damages

Conventional legal remedies to protect appropriative or riparian rights against infringement by another may include a suit for damages, an action to enjoin further interference, or both. Instances in which an injunction may be obtained in addition to, or instead of, money damages are discussed in later subtopics.

A number of the applicable rules for determining whether one may have a cause of action for damages have been referred to in the preceding topics. The diversion, obstruction, pollution, or other alteration of the quantity or quality of the water by others may give rise to a cause of action, depending upon the applicable rules and the particular circumstances. Ordinarily, in addition to any other requirements, one must show that interference with his water right has resulted in substantial injury in order to have a cause of action for damages.[144]

Following is a discussion of some court decisions regarding appropriative, riparian, or other rights that concern questions pertaining to the determination

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[142] *Gutheil Park Inv. Co.* v. *Montclair,* 32 Colo. 420, 424-425, 427, 76 Pac. 1050 (1904); accord, *Bessemer Irrigating Ditch Co.* v. *Woolley,* 32 Colo. 437, 440-441, 76 Pac. 1053 (1904); *Blanchard* v. *Holland,* 106 Colo. 147, 154, 103 Pac. (2d) 18 (1940).

[143] *Lakeside Irr. Co.* v. *Markham Irr. Co.,* 116 Tex. 65, 77-78, 285 S.W. 593 (1926).

[144] Regarding appropriative rights, see, e.g., *Bailey* v. *Idaho Irr. Co.,* 39 Idaho 354, 358, 227 Pac. 1055 (1924); *Tartar* v. *Spring Creek Water & Min. Co.,* 5 Cal. 395, 397, 399 (1855); *Phoenix Water Co.* v. *Fletcher,* 23 Cal. 481, 487 (1863); *Natoma Water & Min. Co.* v. *McCoy,* 23 Cal. 490, 492 (1863); *Wixon* v. *Bear River & Auburn Water & Min. Co.,* 24 Cal. 367, 368-373 (1864).

Regarding riparian rights, see, e.g., *Colorado Power Co.* v. *Pacific Gas & Elec. Co.,* 218 Cal. 559, 564, 24 Pac. (2d) 495 (1933); *Durkee* v. *Board of County Comm'rs,* 142 Kans. 690, 693-694, 51 Pac. (2d) 984 (1935); *Sayles* v. *Mitchell,* 60 S. Dak. 592, 595, 245 N.W. 390 (1932).

Questions regarding the burden of proof in these and other regards are discussed under "Burden of Proof," *infra.*

and measurement of damages. These decisions exemplify some of the various methods sanctioned by the courts for ascertaining the damages that may be awarded.[145]

(1) As a general proposition, damages which are the natural and proximate consequences of a wrongful act, and result from it, may be recovered by the injured party.[146]

(2) A 1914 Nebraska case concerning appropriative rights involved an action for damages alleged to have accrued to plaintiffs by depriving their cattle of water in a summer month. Defendant so obstructed the flow of a stream as to cut off the water supply which rightfully should have gone to his neighbor. The evidence showed that during this period of interference with the water needed by the plaintiffs' cattle, their weight and corresponding value fell off to the extent of about $800. Defendant made a counterclaim of $250 for damages to his crop of hay, alfalfa, and corn by plaintiffs' cattle. A jury verdict was rendered for plaintiffs for the sum of $397.50. The supreme court held that the evidence sustained the verdict and that the amount of the verdict was not excessive.[147]

(3) In a Colorado case, the plaintiff had alleged in his first cause of action that the defendant irrigation district so constructed its irrigation ditch as to destroy the laterals by which the plaintiff's land was supplied with irrigation water so that plaintiff received insufficient water and his crops were thereby destroyed during 1910 and 1911. The Colorado Supreme Court said in regard to the instruction by the trial court:[148]

> The court instructed the jury that if they found from the evidence that any damage was occasioned to the growing crops for which defendant was liable under the first cause of action, the measure of such damage would be the reasonable value of the crops at the time the damage occurred, and in the condition they then were. Counsel for defendant insist this instruction was erroneous, because the measure of damages was the rental value of the land. It appears that plaintiff was in possession of the land, and planted crops thereon, which did not fully mature for lack of water. Had he been deprived of the entire use of the land, the rental value

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[145] In addition to other damages such as those discussed below, punitive damages may be awarded in a proper case. See, e.g., *Falkenberg* v. *Neff,* 72 Utah 258, 269 Pac. 1008, 1012-1013 (1928); *Lowe* v. *Yolo County Consol. Water Co.,* 157 Cal. 503, 108 Pac. 297, 300-301 (1910), referring to § 3294 of the California Civil Code; *Village of Peck* v. *Denison,* 92 Idaho 747, 450 Pac. (2d) 310, 314-315 (1969); *Augustine* v. *Hinnen,* 201 Kans. 710, 443 Pac. (2d) 354, 356-357 (1968); *Atkinson* v. *Herington Cattle Co.,* 200 Kans. 298, 436 Pac. (2d) 816, 825-826 (1968), which also discusses, at 824-825, the question of mitigation of damages.

[146] *North Point Consol. Irr. Co.* v. *Utah & S. L. Canal Co.,* 23 Utah 199, 63 Pac. 812, 814 (1901).

[147] *Norman* v. *Kusel,* 97 Nebr. 400, 401, 404-405, 150 N.W. 201 (1914).

[148] *North Sterling Irr. Dist.* v. *Dickman,* 59 Colo. 169, 149 Pac. 97, 98 (1915).

> might have been the proper measure of damages, but such is not the fact in this case. Northern Colorado Irrigation Co. v. Richards, 22 Colo. 450, 45 Pac. 423 (1896).

The court also approved the trial court's further instruction to the jury in substance that:[149]

> [A]ll evidence as to the probable maturing of the crops, the cost of harvesting, and the probable yield thereof, the climatic condition of the seasons, and the condition and yield of crops on adjacent lands for the same years, should only be considered in so far as they assisted in determining the value of the crops as above mentioned.

(4) In an action for damages for the obstruction of a watercourse causing flood water to back up onto plaintiff's premises, the Oklahoma Supreme Court indicated that the measure of damages for injury to growing crops is the value of the unmatured crops at the time of the injury. This value is determined by evidence of (a) the probable yield of the crops when finally harvested at maturity, and (b) their market value when matured and ready for market, less costs of finishing the cultivation and of gathering, preparing, and transporting the crops to market. With respect, however, to anticipated loss of crops which the farmer was prevented from planting because of the flooding, the measure of damages is the reasonable rental value of the land for the season.[150]

(5) In a Utah case involving interference with appropriative rights that caused a celery crop failure in 1955, the defendants contended that "plaintiffs, if entitled at all, should be allowed only the reasonable rental value of the property, since the crops had not been planted yet."[151] The Utah Supreme Court said "We recognize the merit of this general statement" but it concluded that "here we have a situation where, although the crop was not planted out in the field, for a period of two months prior to the time defendants cut off plaintiff's water supply, the plaintiffs had about 200,000 celery plants in a greenhouse, and there was little to do except perform a simple transplant operation."[152]

(6) A California case involved an action for damages for a water company's failure to deliver water to the plaintiff for the irrigation of 42 acres of land for the growing season of 1906. The plaintiff obtained one crop of alfalfa but

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[149] *Id.*

[150] *Garrett* v. *Haworth,* 183 Okla. 569, 573-574, 83 Pac. (2d) 822 (1938).

[151] *Kano* v. *Arcon Corp.,* 7 Utah (2d) 431, 326 Pac. (2d) 719, 721 (1958).

In an earlier case, the Utah Supreme Court approved as the measure of damages the reasonable yearly market value of the water from 1892 to 1898 for irrigation purposes. *North Point Consol. Irr. Co.* v. *Utah & S. L. Canal Co.,* 23 Utah 199, 63 Pac. 812, 814 (1901).

[152] 326 Pac. (2d) at 721.

failed to obtain two more crops it would have produced if properly irrigated. Moreover, the land would need to be reseeded to put it in the condition it was in at the time the water was refused. It had just been prepared for alfalfa that spring and its expected capacity to produce alfalfa for several years was destroyed. The California Supreme Court concluded that in such a case the proper measure of damage was the value of the two crops that were lost in 1906 plus the cost of reseeding.[153]

In a case involving damage to alfalfa by flooding in 1929, 1930, and 1931, the California court said:[154]

> The authorities note a distinction between the proper measure of damages for the destruction of a perennial crop, such as alfalfa, and the measure of destruction of such crops as vegetables and grain, which require annual planting . . . . Both in this state and elsewhere there is more or less confusion on the subject of the correct method of estimating such damages. . . .
>
> We gather that where there has been a total destruction of a perennial crop, such as alfalfa, akin to destruction of pasturage, grazing land, or meadow, the better rule for measuring damages may be that relied upon by appellant (the difference in rental value of the property with and without the crop thereon), but where, as here, the court merely finds that the "alfalfa * * * was *injured*" and plaintiff was unable to carry on her usual and customary farming operations, the rule applied by the trial court would seem to be the approved measure of damages (the local market value of the crop less cost of production and marketing). . . . Notwithstanding the conflict of authority and the difficulty of estimating damages in these cases, the decisions are in complete agreement upon one proposition, and that is, that "compensation for the real injury is the purpose of all remedies."

(7) In a 1967 case involving injury from water pollution caused by a State fish hatchery, the Colorado Supreme Court said in regard to the measure of damages that the "loss necessarily includes out-of-pocket expenses incurred by those suffering the damage in an effort to avoid the consequences of the defendants' acts resulting in the loss" and indicated that the trial court had properly considered relevant expenditures of money by various plaintiffs covering costs of hauling water and digging wells in order to secure a new source of supply.[155]

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[153] *Lowe* v. *Yolo County Consol. Water Co.*, 157 Cal. 503, 108 Pac. 297, 299-300 (1910).

[154] *Staub* v. *Muller*, 7 Cal. (2d) 221, 60 Pac. (2d) 283, 286-287 (1936).

[155] *Game & Fish Comm'n* v. *Farmers Irr. Co.*, 162 Colo. 301, 426 Pac. (2d) 562, 565-566 (1967). The court indicated that where the State agency lacks the power to condemn private property for a claimed public use, a property owner whose property has been damaged by it cannot be held to have commenced an action for "inverse condemnation" when he seeks to recover the damages and is not forced to accept the measure of

(8) Several of the cases decided by the Oklahoma Supreme Court in which protection against injury to riparian rights was sought involved claims of damage from pollution of the stream water.[156] The proper measure of damages, where such a nuisance to riparian land as stream pollution is abatable but the injury is continuing, for which successive actions might be brought for temporary damages, was held to be the depreciation in usable or rental value of the realty by reason of maintenance of the nuisance, together with such special damages as for such discomfort, annoyance, and personal inconvenience, and such injury to crops or personal property as may have been sustained as the proximate result thereof.[157]

(9) However, in the case of *permanent* injury to real estate, caused by a city's construction of a dam which raised the streamwater level and injured riparian land, the Oklahoma Supreme Court indicated that the true measure of damages was the difference in the market value of the property before and after the water level was thus injuriously raised.[158] And in a California case apparently concerned with permanent damages, the measure of damages for the unlawful diversion of water from land riparian to a stream was said to be the difference between the market value of the land before and after the diversion.[159] Similarly, in an action to recover for damage allegedly caused by

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damages usually applicable to a condemnation case. 426 Pac. (2d) at 566. The plaintiff requested and obtained damages and injunctive relief.

The measure of damages in such cases and in other cases pertaining to permanent damages is discussed below. Other aspects of inverse condemnation are discussed under "Reverse or Inverse Condemnation," *infra.*

[156] Damages were awarded to riparian owners who suffered losses from polluted water which impaired their riparian uses. *Markwardt* v. *Guthrie,* 18 Okla. 32, 33-35, 54, 90 Pac. 26 (1907); *Enid* v. *Brooks,* 132 Okla. 60, 61-63, 269 Pac. 241 (1928). The loss for domestic purposes of the use of water from a stream was an injury to the usable value of the riparian owner's real estate. *Oklahoma City* v. *Tytenicz,* 171 Okla. 519, 521, 43 Pac. (2d) 747 (1935).

[157] *Enid* v. *Brooks,* 132 Okla. 60, 61-62, 269 Pac. 241 (1928); *Oklahoma City* v. *Tyetenicz,* 175 Okla. 228, 229, 52 Pac. (2d) 849 (1935).

[158] *Zalaback* v. *Kingfisher,* 59 Okla. 222, 223, 158 Pac. 926 (1916); *Kingfisher* v. *Zalabak,* 77 Okla. 108, 109-110, 186 Pac. 936 (1920).

In another case of permanent injury to real estate, caused by a dike that diverted and obstructed the flow of water in a watercourse so as to overflow plaintiff's land, the court said that the measure of damages for permanent injury ordinarily is the difference in fair market value of the property "immediately before and immediately after the injury occurs." *George* v. *Greer,* 207 Okla. 494, 495, 250 Pac. (2d) 858 (1952). In a later case involving permanent injury to real property, alleged to have been caused by escaping salt water from an oil well, the court added: "However, in applying this test, the jury must consider the matter in the light of the condition and value of the property prior to the injury. And, in order to fix the value immediately after injury, the jury may consider evidence as to the entire effect of the injury, although the complete effects thereof were not manifested immediately, but gradually became more apparent." *Peppers Refining Co.* v. *Spivey,* 285 Pac. (2d) 228, 232 (Okla. 1955).

[159] *Collier* v. *Merced Irr. Dist.,* 213 Cal. 554, 571, 2 Pac. (2d) 790 (1931). This case

an irrigation district in the construction, maintenance, and operation of an artificial channel in a river, the Idaho Supreme Court indicated that the measure of damages was the difference between the fair market value of the plaintiff's land before and after the alleged flooding of his land resulting from the defendant's wrongful action.[160]

(10) In a Colorado proceeding to condemn a right of way for an appropriator's canal across defendant's land, in which the canal was completed

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involved an action against an appropriator that held eminent domain powers (*id.* at 794) and was treated in effect as an inverse condemnation proceeding. For this and related aspects of the case, see "Reverse or Inverse Condemnation," *infra.* See also *Crum* v. *Mt. Shasta Power Corp.,* 117 Cal. App. 586, 604, 4 Pac. (2d) 564 (1931). Although it was later held not to involve inverse condemnation in 124 Cal. App. 90, 12 Pac. (2d) 134 (1932), any injunctive relief was voluntarily abandoned in this action for damages due to a permanent diversion of water. 4 Pac. (2d) at 566, 568, 570. Regarding the question of considering offsetting benefits in determining the market value, see the *Collier* case, 2 Pac. (2d) at 796-797, and the *Crum* case, 4 Pac. (2d) at 572-573.

The *Crum* case and other cases were cited in *Rilovich* v. *Raymond,* 20 Cal. App. (2d) 630, 67 Pac. (2d) 1062, 1070-1071 (1937), hearing denied by the California Supreme Court (1937), in support of the district court of appeal's conclusion that the proper measure of damages for the loss of plaintiff's orange trees, exclusive of nursery stock, was the depreciation in the value of the land caused by the failure to supply water under a contract. The court said that damage to the trees was damage to the land and when the loss of the tree is compensated in damages to the full value, the value takes the place of the tree and there will be no future crops to consider. The court thereupon refused to apply the "restoration rule" applied to the destruction of alfalfa in *Lowe* v. *Yolo County Consol. Water Co.,* 157 Cal. 503, 108 Pac. 297 (1910), discussed at note 153 *supra,* in which the damages allowed included the cost of reseeding and the crops lost until reseeded. The court said, "We see a vast difference, however, between the restoration of a part of an established crop of alfalfa, which can be accomplished readily and with a fair measure of certainty, and the restoration of such an orange grove as the one involved in the present case." Different rules were applied to other types of damage in this case.

[160] *Smith* v. *Big Lost River Irr. Dist.,* 83 Idaho 374, 364 Pac. (2d) 146, 152 (1961). The court said that it had consistently followed the rule it had announced in *Young* v. *Extension Ditch Co.,* 13 Idaho 174, 89 Pac. 296, 298 (1907), to the effect that this should be the measure of damages if land is permanently injured, whereas if it is only temporarily injured the owner is entitled to recover the amount necessary to repair the injury and restore the land to its former condition, and, in either event, legal interest should be included to the time of trial.

In rejecting a contention that an award of damages for stream pollution was excessive, that the injury to plaintiff's property was not a permanent one for which damages for the defendant in market value before and after the injury could be obtained, but was a temporary one and the depreciation in market value was not the correct measure of recovery, the South Dakota Supreme Court approved the trial court's finding that the amount of damages recoverable was the decrease in market value and pointed out in regard to the damages sustained that "From their very nature, such damages are not susceptible of exact measurement, nevertheless it was for the court to determine their extent." *Parsons* v. *Sioux Falls,* 65 S. Dak. 145, 153, 272 N.W. 288 (1937).

before the case was tried, it developed that the flow of a natural spring on the land, which flow had been used beneficially by defendant, was interfered with by the canal. "In condemnation proceedings, the owner across whose land a right of way is taken, is entitled to recover damages to the residue caused by such right of way, equal to the diminution in the market value of such residue for any use to which it may reasonably be put." The petitioner was not attempting to condemn the spring water for its own use, but by constructing its ditch in the place and manner it did, it interfered with the use of water by respondents on their land as theretofore enjoyed by them. "This necessarily depreciates its market value, and to this extent the petitioner should respond in damages, not for the value of water taken or appropriated, but because by the construction of its canal, it has depreciated the value of respondents' land by depriving them of the use of water thereon to which they are entitled."[161]

(11) The Colorado Supreme Court has said "While the general rule is that damages to real estate are to be determined by finding the difference between its value before the injury and its value afterwards, it is not of universal application; there being cases in which it would not do justice." The court added that "the rule to be applied should be as near as may be, the actual loss suffered" and that the best evidence obtainable as to damage would be admissable.[162]

(12) In a 1943 case, the Utah Supreme Court said that in an earlier case "this court specifically repudiated the theory that the measure of damages is the difference in the value of the land with and without the water. In that case we held that where the facts were such that no market value was ascertainable then the value of the water can be determined by the uses to which it had been put, and that the owner was entitled to be compensated for the full measure of his loss."[163] In the 1943 case, the court held that the value of the water can be determined by the value of the water for the purposes to which it is adapted as well as the uses to which it has been put.[164]

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[161] *Farmers' Res. & Irr. Co.* v. *Cooper,* 54 Colo. 402, 406-407, 130 Pac. 1004 (1913).

[162] *Big Five Mining Co.* v. *Left Hand Ditch Co.*, 73 Colo. 545, 216 Pac. 719, 720 (1923), involving damage from flooding. The court did not expressly classify the damage as either permanent or temporary. This case was later cited and discussed in *Game & Fish Comm'n* v. *Farmers Irr. Dist.*, 162 Colo. 301, 426 Pac. (2d) 562, 565 (1967), involving water pollution, in which damages and injunctive relief were obtained. See the discussion at note 155 *supra.*

[163] *Sigurd City* v. *State,* 105 Utah 278, 142 Pac. (2d) 154, 159 (1943), referring to *Whitmore* v. *Utah Fuel Co.*, 42 Utah 470, 131 Pac. 907 (1913).

[164] *Sigurd City* v. *State,* 105 Utah 278, 142 Pac. (2d) 154, 159 (1943), referring to *Shurtleff* v. *Salt Lake City,* 96 Utah 21, 82 Pac. (2d) 561, 564 (1938), which it said in effect had agreed with the concurring opinion of Judge Straup in the *Whitmore* case cited in the preceding note. In the latter regard, the court said that under the Utah statutes an appropriator may change the use of his water upon application to the State engineer. All of these Utah cases involved permanent damages and the *Sigurd* case involved condemnation of water rights.

Injunction

In a considerable number of western cases, questions were raised as to the propriety of granting injunction and assessing damages in the same proceeding, or of choosing between the two remedies. This subject is discussed below under "Injunction or Damages or Both." Various cases that could properly be included under "Damages" or "Injunction" are left to the later topic.

Appropriators

"Injunction lies to restrain the wrongful diversion of water away from one lawfully entitled to the use thereof. Such remedy has been applied times without number."[165]

Applicability of injunctive relief.—In one of its early cases, the California Supreme Court said that while no equitable remedy of injunction could be had for a mere *past* diversion of water of a watercourse to the injury of the holder of a water right, nevertheless,[166] "where the injury is *continuing*, relief may be appropriately sought in equity. It is only in equity that *future* injury can be restrained. Continued diversion of water from a party entitled to it, is such an irreparable injury as a Court of Equity will redress."

Other decisions have emphasized the continuing nature of the injury that entitles the injured party to a restraining order.[167] In such cases, the remedy by

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See also *Moyle* v. *Salt Lake City,* 111 Utah 201, 176 Pac. (2d) 882, 888 (1947), which rejected the contention that the reasonable rental value should be limited to the value of the use to which it had been put by the condemnee, in an action by a condemnee for temporary damages resulting from possession by the condemnor until the latter caused its own condemnation proceedings to be dismissed. A criticism of this approach to the measurement of the value of appropriative rights, by a dissenting justice in the case, appears in 176 Pac. (2d) at 893-903.

[165] *Olney Springs Drainage Dist.* v. *Auckland,* 83 Colo. 510, 516, 267 Pac. 605 (1928).

[166] *Tuolumne Water Co.* v. *Chapman,* 8 Cal. 392, 397 (1857). The issuance of injuctions protecting prior appropriators from future injury to their water rights resulting from unlawful interference was approved in a number of cases during the early development of California water law. See *Marius* v. *Bicknell,* 10 Cal. 217, 224 (1858); *Rupley* v. *Welch,* 23 Cal. 452, 455-457 (1863); *Stein Canal Co.* v. *Kern Island Irrigating Canal Co.,* 53 Cal. 563, 565 (1879); *Lytle Creek Water Co.* v. *Perdew,* 65 Cal. 447, 452, 4 Pac. 426 (1884).

[167] *Cartier* v. *Buck,* 9 Idaho 571, 573-577, 75 Pac. 612 (1904); *MacKinnon* v. *Black Pine Min. Co.,* 32 Idaho 228, 230, 179 Pac. 951 (1919). A use of the stream channel, or an interference with the natural flow of water therein which, unless restrained, will continue to interfere with rights of prior appropriators and deprive them of water to which they are rightfully entitled, is wrongful and may be enjoined. *Arkoosh* v. *Big Wood Canal Co.,* 48 Idaho 383, 390-391, 396, 283 Pac. 522 (1929). The syllabus by the court in *Loup River Public Power Dist.* v. *North Loup River Pub. Power & Irr. Dist.,* 142 Nebr. 141, 5 N.W. (2d) 240 (1942), contains the following paragraph. "16. A petition to determine relative rights to waters flowing in a public stream in this state, wherein the facts alleged show that plaintiff appropriated such water and applied the

way of an action for damages is not exclusive. A number of court decisions have indicated that such a continuous injury may be enjoined to prevent the wrongful acts from ripening into an adverse or prescriptive right.[168]

Prerequisites.—(1) With respect to the petition for an injunction, "In order for a party to be entitled to an injunction, his petition must not only state facts showing a prima facie case, but must also negative every reasonable inference, arising from the facts stated, that the plaintiff may not be entitled to the relief sought."[169] Again, "It seems to be well established that to be entitled to injunctive relief the petition must specify the relief sought and a court is without authority to grant relief beyond that so specified."[170]

(2) Before one can invoke the power of a court of equity to restrain a diversion of water above his lands, it is necessary for him to show, first, that there is a wrongful diversion of water above such lands, and second, that the amount wrongfully diverted would be rightfully used by him and that the water is being used or would be used for reasonable and beneficial purposes.[171]

(3) Furthermore, to authorize a party to invoke "the extraordinary remedy of injunction," the rights which it is designed to protect should be established with certainty.[172] If a party who asserts impairment or injury to his customary use of water cannot first establish his *right of use,* injunction will not be granted.[173]

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same to a beneficial use prior in time to the alleged diversion by the defendant, states a cause of action entitling plaintiff to an injunction restraining futher wrongful diversions by the defendant."

[168] See, e.g., *Bidleman* v. *Short,* 38 Nev. 467, 471, 150 Pac. 834 (1915); *Robison* v. *Mathis,* 49 Nev. 35, 43-44, 234 Pac. 690 (1925); *Manney* v. *McClure,* 76 Colo. 539, 541, 233 Pac. 158 (1925).

And in some instances it may not be necessary that the appropriator aver or prove actual damages. See *Barnes* v. *Sabron,* 10 Nev. 217, 247 (1875); *Robinson* v. *Bate,* 78 Nev. 506, 376 Pac. (2d) 763, 766 (1962).

Prescriptive rights are discussed in chapter 14.

[169] *Miller* v. *Ballinger,* 204 S.W. 1173, 1174 (Tex. Civ. App. 1918). See *Pecos County W. C. & I. Dist. No. 1* v. *Williams,* 271 S.W. (2d) 503, 506-507 (Tex. Civ. App. 1954, error refused n.r.e.).

[170] *Scoggins* v. *Cameron County W. I. Dist. No. 15,* 264 S.W. (2d) 169, 173 (Tex. Civ. App. 1954, error refused n.r.e.).

[171] *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.,* 78 Cal. App. (2d) 900, 914, 178 Pac. (2d) 844 (1947).

[172] *Andrews* v. *Donnelly,* 59 Oreg. 138, 148-149, 116 Pac. 569 (1911); *Bowen* v. *Spaulding,* 63 Oreg. 392, 396, 128 Pac. 37 (1912).

[173] *Miller* v. *Ballinger,* 204 S.W. 1173, 1174 (Tex. Civ. App. 1918). In *Blanchard* v. *Holland,* 106 Colo. 147, 154, 103 Pac. (2d) 18 (1940), wherein the evidence clearly showed that plaintiffs had ditch easements for conveying water to their land, the court said that "independent of any statute, equity has jurisdiction to protect easements clearly shown to exist" and that plaintiffs had made out a prima facie case for injunctive relief. "In so holding we do not depart from the rule we have heretofore announced that title to water and rights to its use may not be established between the

Rights of junior appropriator.—The junior appropriator, as well as the senior, is entitled to equitable relief and to the protection of his right against impairment. This protection is afforded the junior appropriator against infringements by holders of other rights, whether senior or junior to his own, or by persons without right.[174]

In 1941 the Colorado Supreme Court held that in order to invoke the well-established doctrine that a junior appropriator has a vested right, as against his senior, in a continuance of the conditions on the stream as they existed at the time the junior made his appropriation, an actual impairment or irreparable injury to the legal rights of the junior appropriator must be demonstrated by evidential facts and not by potentialities. In this class of cases, said the court, injunction will not issue until it is demonstrated clearly and conclusively that a diminution in the water supply to which the complaining party is lawfully entitled is occasioned by reason of the diversion and use to which objection is made.[175]

The interrelationships of senior and junior appropriators are discussed at some length in chapter 8 under "Relative Rights of Senior and Junior Appropriators."

Some local situations.—(1) Utah. Several parties were sued in an equity proceeding, and it appeared that others who had not been made parties had also diverted water from the same stream during the same period. This had been done to such an extent as to preclude a sufficient showing that but for the acts of the parties who were sued, no injury would have resulted to the plaintiff. On these facts, an injunction would not be granted in an action brought solely for that purpose. "In such cases it must appear that the acts of those sued caused the injury, and that if such acts are continued damages will follow." Further:[176]

> A court of equity could not be expected to enjoin an appropriator of water furthest up the stream without satisfactory proof that the water so claimed to be diverted would have, had it been allowed to pass down the stream, reached plaintiff's ditch.

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parties where the action is solely for injunctive relief and the rights are not clear or certain."

[174] In the early California case of *Higgins* v. *Barker*, 42 Cal. 233, 235 (1871), plaintiff first appropriated all the original ditch would carry, which the trial court found was 300 inches. Defendants afterward appropriated the whole or a portion of the surplus water flowing in the creek. Subsequently plaintiff constructed a new ditch of larger capacity. The judgment limiting plaintiff's right to 300 inches and enjoining defendant from interfering therewith, but leaving the surplus for the use of defendant, was affirmed by the supreme court as being consistent with justice.

[175] *Del Norte Irr. Dist.* v. *Santa Maria Res. Co.*, 108 Colo. 1, 7, 9, 113 Pac. (2d) 676 (1941).

[176] *West Point Irr. Co.* v. *Moroni & Mt. Pleasant Irr. Ditch Co.*, 21 Utah 229, 237, 238, 61 Pac. 16 (1900).

> While one or all who take water might be sued, the parties who are sued should not be enjoined until it appears that their acts caused the injury complained of.

(2) Colorado. There is in this State an elaborate statutory method for establishing priorities to the use of water and for the distribution of water pursuant to decreed priorities.[177] Any division engineer or his representative who fails to perform the duties imposed upon him by the statutes, and any person violating the orders relative to opening or closing headgates or using water, are severally guilty of criminal offenses.[178] Said the Colorado Supreme Court:[179]

> However, these statutes do not afford a complete and adequate remedy for the injury and loss occasioned by taking water from the streams by a junior appropriator, when it is needed and demanded by a senior appropriator of the same stream within the same irrigation division. While the acts of a water officer in permitting the water to be so taken by a junior appropriator, and the taking by the latter against the order of the former, are crimes, for the commission of which the people may prosecute the respective violators of the law, the result, nevertheless, constitutes a special injury to the senior appropriator. Acts of such character may be enjoined by a court of equity.

(3) Texas. The statute governing appropriation of water authorizes persons and organizations in control of conserved or stored waters to enter into contracts to deliver the same to others and, in doing so, to utilize flowing streams under the supervision of the Texas Water Rights Commission. It is the duty of the district courts to enforce these provisions by issuing "such writ or writs of injunction, mandamus, or other process, as may be proper or necessary to prevent such wrongful acts."[180]

(4) Oregon. In a situation in which the relative priorities of parties to a controversy had been established, the defendant junior appropriator radically changed his "manner, method, and period of irrigation" without the permission of the State administrator, in violation of the statute. This he obviously had no right to do. Whether or not the plaintiff senior appropriator thereby suffered a detriment to his rights, he was entitled to an injunction against the junior. "He [Lodge, the junior] has sought, in this case, to thrust upon Oliver [the senior] the burden of showing that Lodge's improved system

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[177] Colo. Rev. Stat. Ann. ch. 148 (1963), as amended, Rev. Stat. Ann. ch. 148 (Supp. 1969).

[178] Colo. Rev. Stat. Ann. §§ 148-7-21, 148-16-3 (1963) and 148-7-22 (Supp. 1969).

[179] *Rogers* v. *Nevada Canal Co.*, 60 Colo. 59, 64, 151 Pac. 923 (1915). This statement, however, may be affected by Colo. Rev. Stat. Ann. § 148-21-35(2) (Supp. 1969) which contains a number of considerations by which the division engineer shall be governed in providing water to senior appropriators at the expense of junior appropriators.

[180] Tex. Rev. Civ. Stat. Ann. arts. 7547-7550 (1954) and 7550a (Supp. 1970); Tex. Pen. Code Ann. art. 839 (1961).

of irrigation actually was a detriment to Oliver's rights, but he cannot be permitted to do this."[181]

(5) Oklahoma. In the first two cases that involved interpretation of the Oklahoma water rights statute, injunctions were sought.

The first action was brought (a) to determine the respective rights of the parties to the suit, except the State administrator; and (b) to obtain an injunction restraining the State administrator and defendant Hicks—an applicant for a permit to appropriate water—from conducting proceedings the purpose of which was to issue a permit to Hicks in disregard, it was claimed, of the rights of plaintiffs to the use of the water based upon a claim of prior appropriation and beneficial use thereof. The Oklahoma Supreme Court reversed the action of the trial court in dissolving a temporary injunction, holding that the State administrator had no authority to issue a permit to appropriate water for irrigation purposes until after the making of a hydrographic survey and an adjudication of rights in the stream system.[182]

The second suit was brought by the holder of a permit to appropriate water to restrain certain parties from diverting water upstream. No hydrographic survey and adjudication of rights had been made. On the authority of the earlier cases, the trial court refused plaintiff an injunction and the supreme court affirmed the judgment.[183]

Since 1963, this requirement—that a hydrographic survey and a determination of water rights are prerequisite to the issuance of a permit to appropriate water for irrigation purposes—is no longer required for appropriating water for irrigation or other purposes,[184] and was never extended to the issuance of permits to develop water power.[185]

(6) The evidence in a contest between two Nebraska districts, which received water through a joint canal diverted under separate appropriations, showed that practices by the defendant district resulted in preventing the plaintiff from receiving all the water to which it was entitled under its appropriation. "The right is clear and it requires no stretch of the imagination to arrive at the conclusion that this kind of damage is irreparable and a remedy at law is inadequate."[186]

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[181] *Oliver* v. *Skinner & Lodge,* 190 Oreg. 423, 448-449, 226 Pac. (2d) 507 (1951).

[182] *Gay* v. *Hicks,* 33 Okla. 675, 676, 686-687, 124 Pac. 1077 (1912).

[183] *Owens* v. *Snider,* 52 Okla. 772, 775-778, 781-782, 153 Pac. 833 (1915).

[184] Okla. Stat. Ann. tit. 82, § § 11 and 12 (1970); *Oklahoma Water Resources Bd.* v. *Central Okla. Master Conservancy Dist.,* 464 Pac. (2d) 748 (Okla. 1968).

[185] *Grand-Hydro* v. *Grand River Dam Authority,* 192 Okla. 693, 695-696, 139 Pac. (2d) 798 (1943).

[186] *Gering Irr. Dist.* v. *Mitchell Irr. Dist.,* 141 Nebr. 344, 354-355, 3 N.W. (2d) 566 (1942).

The Nebraska Supreme Court had indicated in 1918 that if tenants in common of a canal and water right cannot agree, and one commits an act which prevents or threatens the others in their use of the water to which they are entitled, the courts will protect the right of all as among themselves, by injunction or otherwise. *Larned* v. *Jenkins,* 102 Nebr. 796, 798, 169 N.W. 723 (1918).

Riparian Owners

Applicability of injunctive relief.—"Injunction is a proper remedy to a riparian owner whose rights as such have been unlawfully invaded or interfered with."[187]

In a case involving riparian rights the Washington Supreme Court said:[188]

> While it is perhaps true that the respondent may recover in an action at law such damages as he may be entitled to on account of past injuries, he can hardly be said to have a present legal remedy for the injuries which may and probably will be inflicted upon his property in the future by a continuance of the wrongs complained of. The mere fact that he may bring a separate action for each recurring injury does not prove the adequacy of the legal remedy. Indeed, there is no adequate and effectual remedy from a constantly operating injury save that of prevention. And no court can exercise direct preventive power but a court of equity. It follows, therefore, that the respondent is entitled to have the appellants restrained from further diverting the waters of the creek from his land, and compelled to restore them to their natural channels, unless he has so far waived his rights that it would now be inequitable to enforce them by means of an injunction.

Much of the litigation over the injunctive process in relation to riparian rights has been in the courts of Texas and California, in both of which States the modified common law doctrine of riparian rights has been recognized.[189] The conflicts and the declarations of principles in these two States will be considered separately, beginning with Texas. A few decisions from a few other States are discussed later under "Injunction or Damages or Both."

Texas.—(1) In 1954 a court of civil appeals stated in regard to riparian rights that:[190]

> It seems * * * clear that an injunction will be granted to restrain the wrongful continuing diversion or threatened diversion to

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Incidentally one of the early holdings in Nevada was to the effect that whereas parties who have separate interests in the waters of a stream cannot unite in an action for damages for its past unlawful diversion, nevertheless they may unite in an action to restrain future diversions. *Ronnow* v. *Delmue,* 23 Nev. 29, 30, 33, 41 Pac. 1074 (1895).

[187] *King* v. *Schaff,* 204 S.W. 1039, 1042 (Tex. Civ. App. 1918).

[188] *Rigney* v. *Tacoma Light & Water Co.,* 9 Wash. 576, 38 Pac. 147, 150 (1894).

[189] A 1967 Texas statute, Tex. Rev. Civ. Stat. Ann. art. 7542a, § 4 (Supp. 1970), has restricted the exercise of riparian rights, as explained in chapter 10 under "The Riparian Right—Measure of the Riparian Right—As Against Appropriators—Unused riparian right." A 1928 California constitutional amendment, Cal. Const. art. XIV, § 3, is discussed later.

[190] *Woody* v. *Durham,* 267 S.W. (2d) 219, 221 (Tex. Civ. App. 1954, error refused).

> prevent irreparable damage, or to avoid vexatious litigation or a multiplicity of suits.
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> Where the result of the diversion is an unreasonable diminution of the water supply, equity will intervene to restrain an upper riparian owner; and there would appear to be a stronger reason for such action when the water is diverted by one who is not a riparian owner, or used on nonriparian lands.[191]

After promising to discontinue his diversions of water to his nonriparian lands, appellee changed his mind; he did not say that he would not divert any more water, but simply that he did not intend to divert again. The court noted that he might conceivably change his mind again. "We do not believe that appellants ought to be put to the trouble and expense of filing a suit each time appellee starts pumping water from that creek, or to risk losing their rights by prescription, and we think the injunction should have been granted."[192] In its opinion in this case, the court noted authorities to the effect that an injunction will lie to restrain an unlawful interference with riparian water rights even if the owner contemplates no immediate exercise of such rights, in order to prevent their loss by adverse use. It was then stated that in the *Humphreys-Mexia* case[193] "it was intimated but not decided that injunction would lie to prevent diversion of water in such manner as would set in motion the statute of limitations, irrespective of actual damage."[194]

What the Texas Supreme Court said in the *Humphreys-Mexia* case, in apparently approving the principle but without having to decide it, was that:[195]

> [I]t is obvious that a court of equity would not, even at the suit of a riparian owner, enjoin the diversion of riparian water, unless the complainant was injured thereby, or under circumstances that would reasonably show a hostile and adverse use of sufficient moment to set in motion the statute of limitation, or prescription.* * * The oil company in this case, however, not being a riparian owner, could not object to the diversion of riparian water, and was not entitled to an injunction to prevent such diversion, if

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[191] In the latter regard, see chapter 10 at note 710.

[192] In a case decided by the old court of civil appeals early in the 20th century, concerning a requested temporary injunction, the only immediate necessity for injunctive relief alleged by a riparian in his petition was that it was required to prevent defendants from obtaining a prescriptive right to the use of water to which the plaintiff was entitled. However, institution of the suit was held by the court to have had this effect, so that no fact stated in the petition required the temporary injunction. *Biggs* v. *Leffingwell,* 62 Tex. Civ. App. 665, 667-668, 132 S.W. 902 (1910).

[193] *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 610-611, 297 S.W. 225 (1927).

[194] *Woody* v. *Durham,* 267 S.W. (2d) 219, 221 (Tex. Civ. App. 1954, error refused n.r.e.).

[195] *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 610-611, 297 S.W. 225 (1927).

any. This is so for the reason that the oil company had no justifiable interest in the riparian water.[196]

(2) A riparian who is interested in the water of a stream apparently would ordinarily have the right to enjoin the diversion of the water thereof to nonriparian land if he is injuriously affected by such diversion.[197] The Texas Supreme Court has taken the position that although it is the general rule that a riparian owner has no right to divert his riparian water to nonriparian land, circumstances may exist under which it is lawful to do so—such as where water is abundant and no possible injury could result to lower riparian owners.[198]

(3) Upper riparian owners have been enjoined from diverting water for irrigation to such an extent as to impair the use of the stream by lower riparians for domestic and stockraising purposes, which were natural uses of water and hence superior to irrigation,[199] and also for diverting more water than reasonably necessary for irrigating their riparian lands, where the upstream use resulted in depriving lower owners of water for their own irrigation as well as domestic uses.[200]

(4) The burden is on those who seek affirmative relief to show, by pleading and proof, that they are entitled to it. If they fail to do this, it is fundamental error to grant a perpetual injunction.[201]

(5) And to obtain relief in equity, one must do equity—he must come into court with clean hands. Injunction will not be granted if the effect will be to aid the complainant in the continuance of a legal wrong and trespass. Equity does not adjust differences between wrongdoers; the complainant is first

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[196] Prescription is discussed in chapter 14. See especially the discussion at notes 668-674 regarding Texas.

[197] *Santa Rosa Irr. Co.* v. *Pecos River Irr. Co.*, 92 S.W. 1014, 1016 (Tex. Civ. App. 1906, error refused); *Lakeside Irr. Co.* v. *Kirby*, 166 S.W. 715, 718 (Tex. Civ. App. 1914, error refused); *King* v. *Schaff*, 204 S.W. 1039, 1042 (Tex. Civ. App. 1918); *Woody* v. *Durham*, 267 S.W. (2d) 219, 221 (Tex. Civ. App. 1954, error refused). See *Humphreys-Mexia Co.* v. *Arseneaux*, 116 Tex. 603, 610-611, 297 S.W. 225 (1927); *Biggs* v. *Leffingwell*, 62 Tex. Civ. App. 665, 667-668, 132 S.W. 902 (1910).

[198] *Texas Co.* v. *Burkett*, 117 Tex. 16, 25-26, 27-28, 296 S.W. 273 (1927); *Humphreys-Mexia Co.* v. *Arseneaux*, 116 Tex. 603, 610, 297 S.W. 225 (1927).

The court decisions in the Western States have been in some conflict in regard to nonriparian use, as discussed in chapter 10, under "The Riparian Right—Exercise of the Riparian Right—Place of Use of Water—Nonriparian land."

[199] See *Baker* v. *Brown*, 55 Tex. 377, 379-380 (1881); *Hall* v. *Carter*, 33 Tex. Civ. App. 230, 233-234, 77 S.W. 19 (1903, error refused); *Grogan* v. *Brownwood*, 214 S.W. 532, 537-538 (Tex. Civ. App. 1919); *Great Am. Dev. Co.* v. *Smith*, 303 S.W. (2d) 861, 864 (Tex. Civ. App. 1957).

[200] *McKenzie* v. *Beason*, 140 S.W. 246, 247 (Tex. Civ. App. 1911); *Stratton* v. *West*, 201 S.W. (2d) 80, 81 (Tex. Civ. App. 1947).

[201] *McGhee Irr. Ditch Co.* v. *Hudson*, 85 Tex. 587, 590, 593, 22 S.W. 398, 967 (1893).

judged, and not until he has been found free from taint does equity proceed to determine whether he has been wronged.[202]

(6) Injunction against a diversion of water that interferes with the petitioner's accustomed use will be refused if the latter fails to show title to a water right entitled to protection of the courts.[203]

California.—(1) In this State, the right of the riparian both extends to and is limited to reasonable beneficial use of the water, both present and prospective, under reasonable methods of diversion and use.[204] Prohibitory injunctions may issue when damage is threatened.[205] According to the California Supreme Court:[206]

> [T]he riparian is entitled to all of the water of the stream, both in the quantity and quality of its natural state, which he is able to put to a reasonable beneficial use, and to be protected in that right by the injunctive processes of the court. But the riparian owner 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.

(2) In the foregoing case, a remedy short of prohibitory injunction was applied as between a riparian owner and the City of San Francisco as an upstream appropriator. Some pollution of the water available to plaintiff riparian occurred by reason of operations of irrigation districts upstream from the riparian but downstream from the city's diversions, but the trial court found on sufficient evidence that the return flow in the river did not yet contain a sufficient concentration of salts to render the water unfit for irrigation on plaintiff's riparian lands. Hence, said the supreme court:[207]

> The alleged "serious and threatening" damage of pollution, in the absence of actual pollution, would not justify the injunction ordered herein, especially when protective measures short of absolute prohibition may, if necessary, be applied by the court. Obviously, if the city's diversions should result in making the water of the river unfit for use at the plaintiff's location, and the release

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[202] *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 612-615, 297 S.W. 225 (1927).

[203] *Miller* v. *Ballinger,* 204 S.W. 1173, 1174 (Tex. Civ. App. 1918).

Regarding the recognition of certain "equitable rights" of riparian landowners under what the court called "unprecedented" circumstances, see *State* v. *Hidalgo County Water Control & Improvement Dist. No. 18,* 443 S.W. (2d) 728 (Tex. Civ. App. 1969), discussed in chapter 7 at notes 652-661.

[204] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 365-368, 40 Pac. (2d) 486 (1935); *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.,* 3 Cal. (2d) 489, 524-530, 45 Pac. (2d) 972 (1935); *Meridian* v. *San Francisco,* 13 Cal. (2d) 424, 444-447, 90 Pac. (2d) 537 (1939).

[205] *Smith* v. *Wheeler,* 107 Cal. App. (2d) 451, 455-456, 237 Pac. (2d) 325 (1951).

[206] *Meridian* v. *San Francisco,* 13 Cal. (2d) 424, 447, 90 Pac. (2d) 537 (1939).

[207] 13 Cal. (2d) at 451-452.

> of fresh water by the city and its return down the river channel would freshen the water to the required extent, the city could by proper order of the court be required to make such releases without rendering useless the city's increased storage facilities.

(3) Before one can invoke the power of a court of equity to restrain a diversion above his lands, it is necessary for him to show first, that there is a wrongful diversion of water above such lands, and second, that the amount wrongfully diverted would be rightfully used by him and that the water is being used or would be used for reasonable and beneficial purposes.[208] The action complained of must be such as to interfere substantially with existing or prospective uses of the water.[209]

(4) It has been the consistent rule of the California courts, even prior to the impact of the constitutional amendment of 1928,[210] that a nonriparian diversion of water that produces a material injury to the riparian owner, or that will do so if allowed to continue, is subject to injunction.[211] As expressed in a number of decisions rendered prior to adoption of the amendment, the rule was that where it appeared that the continuance of the act complained of would ripen into an adverse right and thereby deprive the riparian owner of a right of property, it was not necessary before obtaining an injunction to show any actual present damage.[212]

(5) What the 1938 California constitutional amendment did was to deprive the riparian owner of the right to enjoin an act that caused him no substantial injury, while at the same time assuring him protection in his rights of both present and prospective reasonable beneficial use.[213] But an absolute injunction is not justified "where it appears that in any event other forms of relief are available and would be adequate."[214] The impact of the 1928 constitutional amendment is discussed in more detail later under "Injunction or Damages or Both–Some State Riparian-Appropriation Situations–California."

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[208] *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.*, 78 Cal. App. (2d) 900, 914, 178 Pac. (2d) 844 (1947).

[209] *Colorado Power Co.* v. *Pacific Gas & Elec. Co.*, 218 Cal. 559, 564, 24 Pac. (2d) 495 (1933).

[210] Cal. Const. art. XIV, § 3.

[211] *Peabody* v. *Vallejo*, 2 Cal. 351, 374-375, 40 Pac. (2d) 486 (1935); *Gallatin* v. *Corning Irr. Co.*, 163 Cal. 405, 417, 126 Pac. 864 (1912); *Heilbron* v. *Fowler Switch Canal Co.*, 75 Cal. 426, 431, 17 Pac. 535 (1888).

[212] *Pabst* v. *Finmand*, 190 Cal. 124, 132, 211 Pac. 11 (1922); *Fresno Canal & Irr. Co.* v. *People's Ditch Co.*, 174 Cal. 441, 445-446, 163 Pac. 497 (1917); *Shurtleff* v. *Bracken*, 163 Cal. 24, 26, 124 Pac. 724 (1912); *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 333-334, 88 Pac. 978 (1907); *California Pastoral & Agric. Co.* v. *Enterprise Canal & Land Co.*, 127 Fed. 741, 742-743 (S.D. Cal. 1903).

[213] *Meridian* v. *San Francisco*, 13 Cal. (2d) 424, 445, 447, 90 Pac. (2d) 537 (1939).

[214] See *Peabody* v. *Vallejo*, 2 Cal (2d) 351, 382-383, 40 Pac. (2d) 486 (1935).

Temporary Injunction

In water rights litigation in the lower Rio Grande Valley of Texas before the main regionwide suit was brought by the State of Texas,[215] important questions that were involved related to temporary injunctions, parties, and apportionment of water.[216] Insofar as the present topic is concerned, the court stated:[217]

> The purpose of a temporary injunction is not the final adjudication of rights, but, in the exercise of a sound discretion, is the maintenance of the status quo.
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> * * * *
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> A state of action, as well as a state of rest, may constitute the status quo. Had the court denied the relief appellees sought, they would have sustained irreparable injury, in which circumstances courts of equity may issue even mandatory writs before the case is heard on its merits.
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> * * * *
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> As above pointed out, the purpose of the status quo injunction is not to fix and settle the legal rights of the parties, but to maintain an existing situation, position or condition of affairs until a judicial tribunal may with orderliness proceed to a determination of such rights with some semblance of accuracy.

In a subsequent case arising in the same region, rules of law were stated to the effect that the applicant for a temporary writ need not establish the right and the impairment with absolute certainty, but must make proof of probable right and danger, and that in appeals from interlocutory orders thereon the sole question is whether the trial court abused its discretion.[218]

A much earlier Texas decision stated "a well-settled rule of equity that, if it appears to the judge that more damage is likely to occur by granting a temporary injunction than by refusing it, such injunction should not be granted.[219] On the other hand, if greater injury will occur by refusing than by granting the writ, any doubt as to the right of the applicant should be solved in his favor."[220]

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[215] *State* v. *Hidalgo County W. C. & I. Dist. No. 18,* No. B-20576, 93rd Dist. Court, Hidalgo County, Texas.

[216] *Hidalgo County W. I. Dist. No. 2* v. *Cameron County W. C. & I. Dist. No. 5,* 250 S.W. (2d) 941 (Tex. Civ. App. 1952), 253 S.W. (2d) 294 (Tex. Civ. App. 1952, error refused n.r.e.).

[217] 253 S.W. (2d) at 297, 298, 300.

[218] *Scoggins* v. *Cameron County W. I. Dist. No. 15,* 264 S.W. (2d) 169, 173 (Tex. Civ. App. 1954, error refused n.r.e.).

[219] For such a case, see *Kuehler* v. *Texas Power Corp.,* 9 S.W. (2d) 435-437 (Tex. Civ. App. 1928), discussed under "Some Instances in Which Injunction Not Justified," *infra.*

[220] *Matagorda Canal Co.* v. *Markham Irr. Co.,* 154 S.W. 1176, 1179-1180 (Tex. Civ. App.

Interstate Suit

The State of Washington brought suit in the United States Supreme Court against the State of Oregon, charging wrongful diversion of waters of an interstate stream to the prejudice of Washington inhabitants, and praying an adjudication apportioning the interests of the two States in the river system and restraining unlawful diversions and uses of the water.[221]

The special master appointed by the Supreme Court found that owing to stream channel losses of water, to limit the long-established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users. The Court concluded:[222] "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 Court believed that the burden of proof, which fell more heavily on the complainant here than in a suit for an injunction in which States are not involved, had not been borne and that the injury caused by Oregon users, if there was any, did not appear by clear and convincing evidence to be one of serious magnitude. "Between the high contending parties whose interests are involved, nothing less will set in motion the restraining power of the court." Before ordering a decree dismissing the complaint, the Supreme Court summarized the situation thus:[223]

> 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.

Other aspects of interstate suits are discussed in chapter 22.

1913). If it appears that the preliminary injunction is not necessary to preserve the status quo until final hearing, and that the rights of the complainant will suffer no serious injury until that time, or that the injury threatened is of such nature that it can be remedied on final hearing, then the injunction ought not to be granted. *Biggs* v. *Leffingwell,* 62 Tex. Civ. App. 665, 667-668, 132 S.W. 902 (1910).

[221] *Washington* v. *Oregon*, 297 U.S. 517 (1936).

[222] *Id.* at 523.

[223] *Id.* at 529.

Injunction or Damages or Both

Both Remedies

Both an injunction and damages have been obtained in a number of cases, such as where damages are awarded for *past* injury and *future* injury is enjoined. Some of these cases have been discussed above. In the early gold mining years in California, awards of damages for past injury, as well as perpetual injunctions against future injurious acts, were made in the same judgment in various cases of impairment of water rights by unlawful interference.[224]

It was held in Texas that flooding of lands of others without their consent is a direct trespass for which the injured party may have redress in court, not only for damages, but also for abatement of the nuisance.[225]

In an Oregon case the court stated that it was "clear that the defendants acted without right and that it is a proper subject for injunction at the hands of the court. Having properly taken jurisdiction of the subject-matter, it is right for a court of equity to award damages for the tort of the defendants."[226]

Some Instances in Which Injunction Not Justified

Some cases in which the court concluded that under the circumstances an injunction was not justified have been discussed above. Following are some other instances in which an injunction was said not to be justified.

(1) In an early case arising in Montana, the United State Supreme Court held that whether an injunction against interference with an appropriator's water right is justified will depend upon the circumstances of the particular case. The Court said that:[227]

> [W]hether, 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

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[224] *Tartar* v. *Spring Creek Water & Min. Co.*, 5 Cal. 395, 397, 399 (1855); *Phoenix Water Co.* v. *Fletcher*, 23 Cal. 481, 487 (1863); *Wixon* v. *Bear River & Auburn Water & Min. Co.*, 24 Cal. 367, 372-373 (1864).

[225] *Rhodes* v. *Whitehead*, 27 Tex. 304, 310, 84 Am. Dec. 631 (1863); *Humphreys-Mexia Co.* v. *Arseneaux*, 116 Tex. 603, 612-613, 297 S.W. 225 (1927). See *Houston Transp. Co.* v. *San Jacinto Rice Co.*, 163 S.W. 1023, 1027-1028 (Tex. Civ. App. 1914).

[226] *Dunn* v. *Henderson*, 122 Oreg. 331, 335-336, 258 Pac. 183 (1927).

[227] *Atchison* v. *Peterson*, 87 U.S. 507, 514-516 (1874), affirming 1 Mont. 561 (1872). See *Mann* v. *Parker*, 48 Oreg. 321, 324, 86 Pac. 598 (1906).

> ordinarily govern a court of equity in the exercise of its preventive process of injunction.

The Court reviewed the circumstances relating to the alleged pollution of the water diverted into the lower ditches, indicated that any injury caused by the defendant was slight and speculative, and concluded that:

> The injury thus sustained, and which is only to a limited extent attributable to the mining of the defendants, if at all, is hardly appreciable in comparison with the damage which would result to the defendants from the indefinite suspension of work on their valuable mining claims. The defendants are also responsible parties, capable, according to the evidence, of answering for any damages which their mining produces, if any, to the plaintiffs. Under these circumstances we think that there was no error in the refusal of the court below to interfere by injunction to restrain their operations, and in leaving the plaintiffs to their remedy, if any, by an action at law.

(2) The same principle was applied in a Texas case in which it was held that the trial court properly denied a temporary injunction compelling the defendant to lower the waters raised by a dam which had destroyed the current that was turning plaintiff's waterwheel. The water supply was not abridged, and the plant could be operated by a gasoline engine at relatively small expense. "The injury to appellants in preventing the operation of the water wheel pending the suit is one that can be readily compensated for in damages, and this injury is small in comparison with the injury to appellee which would flow from granting the temporary mandatory injunction."[228]

(3) The South Dakota Supreme Court rejected a contention that the trial court, having denied an injunction, had no power to retain the cause for the purpose of awarding damages.[229] In this case, by reason of the continuing nature of the injury created by pollution of a river by a city, the record would have supported a decree granting equitable relief; but an injunction is not a remedy which issues as a matter of course—its granting or refusal rests in the

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[228] *Kuehler* v. *Texas Power Corp.*, 9 S.W. (2d) 435, 437 (Tex. Civ. App. 1928), error refused, 118 Tex. 224, 13 S.W. (2d) 667 (1929). Other Texas cases regarding criteria for issuing temporary injunctions are discussed under "Temporary Injunction," *supra.*

[229] *Parsons* v. *Sioux Falls*, 65 S. Dak. 145, 152-153, 272 N.W. 288 (1937). The Nebraska Supreme Court indicated that a court of equity having properly taken jurisdiction of a case will retain the case for adjudication of all issues; and an action seeking injunctive and other equitable relief and damages is an action in which a court of equity can take and retain jurisdiction to hear the prayer for damages although failing to grant injunction. *Robinson* v. *Dawson County Irr. Co.*, 142 Nebr. 811, 8 N.W. (2d) 179 (1943). But this Nebraska rule was later tempered by the statement that "Equity jurisdiction will not be retained to grant legal relief where no right to equitable relief is established." *Gillespie* v. *Hynes*, 168 Nebr. 49, 54-55, 95 N.W. (2d) 457 (1959).

sound discretion of the court under the facts of each particular case. Here the public interest was involved. The city had made a large investment in its sewerage plant, and the health of many people would be imperiled by restraining its continued use. Such injury would greatly exceed the private or personal loss and inconvenience resulting therefrom. Judgment denying injunction and awarding damages appropriate to the occasion (for decrease in the market value of the plaintiff's property) was approved by the supreme court. The court noted that the city had statutory authority to condemn private property if necessary.[230]

(4) Late in the 19th century the Nebraska Supreme Court applied the well-established principle that a party who, by his laches, made it impossible to restrain the completion or use of public works without great injury to his adversary or to the public, will be left to pursue his ordinary legal remedies.[231]

(5) In an 1892 case, the Montana Supreme Court observed that it is not the law that when none of the water in controversy could, if left in the stream, reach the prior appropriator's point of diversion at a distant point below, the junior upstream appropriator should be enjoined from using the water on the sole ground that the downstream appropriation is prior in right.[232]

Some State Riparian-Appropriation Situations

Nebraska.—(1) The riparian-appropriation interrelationship in Nebraska was profoundly influenced through 1966 by two decisions rendered by the supreme court, practically simultaneously, in 1905. One was a suit by an appropriator to enjoin upstream riparians; the other, a suit by a riparian to enjoin upstream appropriators. Both dealt with remedial rights of riparian and appropriative claimants as against each other, rather than with substantive rights of property. In each of these cases the trial court's judgment was reversed, and on rehearing the former supreme court judgment was reversed and the lower court's action was affirmed. The two decisions on rehearing were rendered on the same day. It is only these decisions on rehearing that are discussed below.

(2) In the first case, an irrigation company which had appropriated water under the statutory procedure, and held therefor an adjudicated right, brought action to restrain upstream riparians from depriving it of its water supply. Not until long after the appropriative right had vested did the riparians either divert

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[230] 65 S. Dak. at 149-152. Regarding inverse condemnation actions, see "Reverse or Inverse Condemnation," *infra.*

[231] *Clark* v. *Cambridge & Arapahoe Irr. & Improvement Co.*, 45 Nebr. 798, 808, 64 N.W. 239 (1895).

[232] *Raymond* v. *Wimsette,* 12 Mont. 551, 560-561, 31 Pac. 537 (1892).

In regard to such considerations, see, in chapter 8, "Relative Rights of Senior and Junior Appropriators—Reciprocal Rights and Obligation of Appropriators—Effect of Losses of Water in Stream Channel."

or attempt to divert any of the stream water for irrigation. Under these circumstances, according to the supreme court, the question whether defendants suffered any substantial damages to their riparian estates by reason of their being denied the reasonable use of the streamwater was problematical and must 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 riparians who built irrigation works with full knowledge of existing appropriative rights should receive greater compensation because of their expenditures. The order of injunction was affirmed, and the riparians were remanded to their remedy by action at law for whatever damages, if any, they had actually sustained.[233]

(3) The second case, which was decided on demurrer, involved a complaint by a lower riparian owner against upstream diversions with request for an injunction. In sustaining the trial court's refusal to grant the riparian an injunction, the Nebraska Supreme Court propounded and adopted the following principle.[234]

> 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 proposed 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.

(4) In a 1966 case, the Nebraska Supreme Court changed its former rule that riparians could only maintain an action to recover damages against an upstream appropriator. The court held that a lower riparian could enjoin an upstream appropriator who intentionally causes substantial harm to him depending upon a balancing of the interests involved and the appropriateness of injunctive relief. The court considered the following factors as entering the balancing process on the side of the appropriator: (a) the social value which the law attaches to the use for which the appropriation is made; (b) the priority date of the appropriation; and (c) the impracticability of preventing or avoiding the harm. The following factors were considered as entering the balancing process on the side of the riparian owner: (a) the extent of the harm involved; (b) the

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[233] *McCook Irr. & Water Power Co.* v. *Crews,* 70 Nebr. 109, 115, 121-123, 127, 96 N.W. 996 (1903), 102 N.W. 249 (1905).

[234] *Cline* v. *Stock,* 71 Nebr. 70, 71-72, 79, 81-83, 98 N.W. 454 (1904), 102 N.W. 265 (1905).

social value which the law attaches to the riparian use; (c) the time of initiation of the riparian use; (d) the suitability of the riparian use to the watercourse; and (e) the burden on the riparian proprietor of avoiding the harm. In view of the balancing of the interests in reaching the decision, it is likely that the decision will be more favorable to an upstream appropriator when the riparian right is unused. Even if the balancing process resulted in a preliminary finding favorable to the riparian owner, the factors to be considered in determining the appropriateness of an injunction may prompt a court to leave the riparian solely to an action for damages if the riparian right is unused. The factors to be considered in determining the appropriateness of an injunction constitute a comparative appraisal of all elements of the case, including the following: (a) the character of the interest to be protected; (b) the public interest; (c) the relative adequacy to the plaintiff of injunctive relief and other remedies; and (d) the relative hardship likely to result to the defendant if the injunction is granted and to the plaintiff if the injunction is denied.[235]

California.—(1) The most significant development in the riparian-appropriation interrelationship in California was the constitutional amendment of 1928—its adoption by the electorate and its construction by the courts.[236] It contained one section, which in carefully worded sentences declared mandates governing the control and use of water which may be paraphrased as follows. 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; that waste or unreasonable use or unreasonable method of use of water be prevented; and that such waters shall be conserved in the public interest. The water right is limited to such quantity as is reasonably required; it does not extend to the (a) waste, (b) unreasonable use, (c) unreasonable method of use, or (d) unreasonable method of diversion of water. Riparian rights in a stream or watercourse attach to, but to no more than, the quantity of water required consistent with this section. Lawful riparian and appropriative rights that conform to the requirements of the amendment are not impaired by it.

In a number of cases the California Supreme Court has had occasion to interpret the amendment. Its purpose was construed as designed to prevent the waste of waters by allowing them to flow unused to the sea, and as an effort to conserve waters without interference with the beneficial use to which they

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[235] *Wasserburger* v. *Coffee,* 180 Nebr. 147, 161-164, 141 N.W. (2d) 738 (1966), modified in other respects, 180 Nebr. 569, 144 N.W. (2d) 209 (1966). While the riparian was granted an injunction in this case, the riparian right was not an unused right. In regard to the significance of the 1895 irrigation act, see the discussion in chapter 10 at notes 484-489. For a critical discussion of this case, see Comment, "The Dual-System of Water Rights in Nebraska," 48 Nebr. L. Rev. 488, 497-498 (1969).

Brummund v. *Vogel,* 184 Nebr. 415, 168 N.W. (2d) 24, 27 (1969), appears to have added some uncertainty regarding the status of domestic use of water. This is discussed in the State summary for Nebraska in the appendix.

[236] Cal. Const. art. XIV, § 3.

might be put by holders of water rights including riparian owners. "Upon the adoption of the amendment, it superseded all state laws inconsistent therewith."[237]

(2) Two basic rules now are that: (a) An appropriative use of water that causes substantial damage to a paramount riparian right, taking into consideration all 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,[238] the riparian proprietor is entitled to injunctive relief. (b) If such appropriative use causes no substantial infringement by materially diminishing the riparian water supply, the riparian proprietor 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.[239]

In the first major construction of the 1928 constitutional amendment, in *Peabody* v. *Vallejo,* the California Supreme Court held that since its adoption the technical infringement of the paramount right of the riparian owner by the exercise of an appropriative right has not been actionable, except to establish the paramount right.[240]

In the application of these rules, under the new doctrine enunciated and commanded by the constitutional amendment of 1928, the California Supreme Court stated, "it is clear that when a riparian or overlying owner brings an action against an appropriator, it is no longer sufficient to find that the plaintiffs in such action are riparian or overlying owners, and, on the basis of such finding, issue the injunction."[241] On the contrary, declared the court,[242] the trial court must now determine whether the complaining riparian or overlying owner, considering all the needs of those in the particular water field, is putting the water to any reasonable beneficial use, giving consideration to all

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[237] *Gin S. Chow* v. *Santa Barbara,* 217 Cal. 673, 700, 22 Pac. (2d) 5 (1933). In another case the court said, "It was undoubtedly the purpose of the proponents of the amendment of 1928 to make it possible to marshall the water resources of the state and make them available for the constantly increasing needs of all of its people." *Meridian* v. *San Francisco,* 13 Cal. (2d) 424, 449, 90 Pac. (2d) 537 (1939).

[238] In the latter regard, see "Reverse or Inverse Condemnation," *infra.*

[239] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 374-375, 40 Pac. (2d) 486 (1935).

In the latter regard, see "Declaratory Decree and Reservation of Continuing Jurisdiction," *infra.*

Most California law with respect to conflicting riparian-appropriation interrelationships was made in controversies in which the riparian right was adjudged superior. Regarding differences, as against appropriative rights, that may arise due to the time that lands passed into private ownership, and related factors, see in chapter 6, "Interrelationships of the Dual Water Rights Systems—The Status in Summary: By States—California."

[240] 2 Cal. (2d) at 374.

[241] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.,* 3 Cal. (2d) 489, 524, 45 Pac. (2d) 972 (1935).

[242] 3 Cal. (2d) at 524-525.

factors involved, including reasonable methods of use and reasonable methods of diversion. The court must then determine whether there is a surplus in the water field subject to appropriation. The court must find expressly the quantity of water required and used for the riparian's reasonable beneficial uses before enjoining the appropriator from interfering with those uses. As to future or prospective reasonable beneficial uses, the court does not attempt to fix in advance the quantity needed, but declares such prospective uses paramount to any right of the appropriator, by which the rights of the riparian owner will be fully protected against the ripening of the adverse appropriative use into a right by prescription. In the meantime, pending the time the riparian is himself ready to use the water, the appropriator may make an interim use of it.

The effect of the foregoing rules, then, is not to prohibit the appropriator from making *any* use of the water. It is to prohibit his using the water only at such times as the riparian owner under his paramount right wishes to use it, and to prevent the destruction or impairment of the riparian right by adverse use on the part of the appropriator.[243]

(3) The United States Supreme Court, in *United States* v. *Gerlach Live Stock Company,* recognized that the 1928 California constitutional amendment attempted to serve the general welfare of the State by preserving and limiting both riparian and appropriative rights while curbing either from being exercised unreasonably or wastefully.[244] The Court indicated that the riparian right, which was actually damaged by reason of the deprivation of use of water that the proprietor had been putting to beneficial use, remained compensable even though the circumstances might be such that the right no longer was enforceable by injunction.[245]

(4) In *Joslin* v. *Marin Municipal Water District,* decided in 1967, the California Supreme Court said that in view of the State's 1928 constitutional amendment limiting the use of water only to beneficial uses "to the fullest extent of which they are capable," and providing that "waste or unreasonable use" shall be prevented and that conservation shall be exercised "in the interest of the people and for the public welfare," "in the instant case the use of such waters as an agent to expose or to carry and deposit sand, gravel and rocks, is as a matter of law unreasonable within the meaning of the constitutional amendment."[246] The court said that "since there was and is no property right in an unreasonable use, there has been no taking or damage of property by the

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[243] See Federal Judge Peirson M. Hall's analysis of the California riparian owner's right of prospective reasonable beneficial use and of its protection in *Rank* v. *(Krug) United States,* 142 Fed. Supp. 1, 104-115 (S.D. Cal. 1956).

[244] *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 751-755 (1950), affirming 76 Fed. Supp. 87 (Ct. Cl. 1948).

[245] 339 U.S. at 752-755. The case arose upon claims for compensation by riparian owners for deprivation of the natural overflow of the San Joaquin River by reason of operation of Friant Dam.

[246] In this regard, see chapter 6, note 239.

deprivation of such use and, accordingly, the deprivation is not compensable."[247]

(5) The case of *Peabody* v. *Vallejo,*[248] discussed above, was an appeal from a judgment permanently enjoining the defendant, City of Vallejo, as an appropriator, from storing any of the waters of a certain creek. Operation of the injunction was stayed on certain conditions pending a determination of the appeal. After discussing at considerable length the constitutional amendment, the mandates in which "are plain, they are positive, and admit of no exception," in relation to various aspects of the California law of water rights,[249] the supreme court concluded in part that the rule of reasonable use as enjoined in the amendment applies to all water rights in the State—riparian, overlying, percolating, appropriative; that this test was not applied in the present action, so that the judgment must be reversed and the cause remanded for trial as a condemnation action; and that on a retrial the rights of the parties should be determined in harmony with the new constitutional policy and in accordance with the views expressed in the opinion.

(6) One of the issues in *Peabody* v. *Vallejo,* discussed and passed on separately, reached a solution that exemplifies the practical application of the State constitutional water policy. The town of Suisun, one of the plaintiffs, based its asserted rights on ownership of a small tract of land overlying a ground water supply and on an appropriation by use prior to that of defendant. The trial court permanently enjoined the defendant from impounding and diverting certain waters as against Suisun. After discussing the facts and pointing out the minimal damage that would accrue to Suisun, the supreme court stated that:[250]

> No attempt appears to have been made to show any interference with these [Suisun's] wells by the storage by the defendant. Can the town of Suisun, because of its municipal status, compel the use of the entire stream flow to feed such a percolating right, the enjoyment of which is limited to the operation of a well or wells usually inactive and necessary only in years of great shortage? The answer must be in the negative. Any interference by the defendant's storage with the underground supply on this acre of land is

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[247] *Joslin* v. *Marin Mun. Water Dist.,* 67 Cal. (2d) 132, 142-143, 429 Pac. (2d) 889, 60 Cal. Rptr. 377 (1967). The court, at 429 Pac. (2d) 898, distinguished *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725 (1950), discussed at note 245 *supra,* as a case involving the natural overflow for irrigation, a recognized reasonable use. Regarding such use, see the discussion in chapter 10 at notes 578-579 and 660-662.

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

[249] 2 Cal. (2d) at 367. "As the subject is approached, it is readily apparent that it is for this court, which has largely created the water law of this state without constitutional direction, to cause the law to conform to the state policy now commanded by our fundamental law." 2 Cal. (2d) at 365.

[250] 2 Cal. (2d) at 382-383.

> technical and unsubstantial. Conceding, however, that this town's right should be protected by the decree, the prior right could be declared and, if necessary, the duty imposed on the defendant to make up the loss, if any, in kind, thus supplementing the town's supply to the extent of the loss by means other than by the percolating water process. We find no justification in law or the evidence for this absolute injunction in favor of the town of Suisun where it appears that in any event other forms of relief are available and would be adequate.[251]

Kansas.—In 1945, the Legislature of Kansas passed an act, which was extensively amended in 1957, that undertook to define and protect as vested rights the common law riparian rights to the continued use of water to the extent of actual application thereof to beneficial use at the time of enactment, or within a reasonable time thereafter with works then under construction, all surplus unappropriated flowing water being thereafter subject to appropriation under the statute.[252] While common law claimants without vested rights could be enjoined by appropriators from making subsequent diversions, compensation could be had in an action at law for damages for any property taken from a common law claimant by an appropriator.[253] The validity of the Kansas statute has been sustained by both State and Federal courts on the several points presented for determination.[254]

Physical Solution

(1) The California constitutional amendment of 1928 compels trial courts in water cases, before issuing a decree entailing a great waste of water in order to safeguard a prior right to a small quantity of water, to ascertain whether there exists a physical solution of the problem that will avoid the waste and at the same time not unreasonably and adversely affect the property right of the paramount holder.[255] If no physical solution is suggested by the parties, it is the duty of the trial court to work out one independently of them. No

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[251] See also the discussion under "Physical Solution," *infra.*

[252] Kans. Laws 1945, ch. 390, Laws 1957, ch. 539, Stat. Ann. § 82a-701(d) (1969).

[253] Domestic uses are exempt from appropriation permit requirements, although domestic use initiated after the 1945 enactment shall constitute an appropriative right. Kans. Stat. Ann. § § 82a-705,-705a, and -707(b) (1969).

[254] See chapter 6, note 245.

The riparian-appropriation situations in the foregoing States (Nebraska, California, and Kansas) also are discussed in chapter 10 under "The Riparian Right—Measure of the Riparian Right—As Against Appropriators."

[255] *Lodi* v. *East Bay Municipal Util. Dist.*, 7 Cal. (2d) 316, 339-340, 60 Pac. (2d) 439 (1936). "In attempting to work out such a solution the policy which is now part of the fundamental law of the state must be adhered to."

injunction should be granted if its effect would be to waste water that could be beneficially used.[256]

(2) A Federal court cautioned that the constitutional amendment does not permit an appropriator to disregard the rights of riparian owners and others having prior or paramount rights to the use of all waters of a stream which they can put to reasonable beneficial use under reasonable methods of use. If under such circumstances "one seeks to appropriate the water wasted or not put to any beneficial use, it is obligatory that he find some physical solution, at his expense, to preserve existing prior rights, or if this cannot be done, and the water is to be appropriated, nonetheless, under the right of eminent domain, the riparian owners, prior appropriators and overlying landowners must be compensated for the value of the rights taken."[257]

(3) The Arizona Supreme Court has suggested physical solutions, in the interest of economy of water and equity to all parties under the circumstances involved, in the settlement of conflicting claims to water rights. In each case it was recommended that the organization obligated to yield water to other parties do so through its own canal system at no greater expense to the prevailing parties than would be occasioned by their own methods of diversion, rather than to release the water through natural channels with resulting losses.[258]

The matter of physical solutions is discussed in more detail in chapter 15.

Declaratory Decree and Reservation of Continuing Jurisdiction

In a contest between the holder of a paramount riparian right and an appropriator, the riparian owner, even if not materially injured, is entitled to a judgment declaring his paramount right and enjoining the assertion of an adverse right that might otherwise become a prescriptive right.[259] His prospective reasonable beneficial uses likewise may be protected by a declaratory decree pending the time he is ready to use the water.[260] In giving declaratory relief, the court has the powers of a court of equity.[261]

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[256] *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 559, 81 Pac. (2d) 533 (1938).

[257] *Gerlach Livestock Co.* v. *United States,* 76 Fed. Supp. 87, 94-95 (Ct. Cl. 1948), affirmed, 339 U.S. 725 (1950). See particularly 339 U.S. at 752-755.

[258] *Pima Farms Co.* v. *Proctor,* 30 Ariz. 96, 112-113, 245 Pac. 369 (1926); *Maricopa County M. W. C. Dist.* v. *Southwest Cotton Co.,* 39 Ariz. 367, 370, 7 Pac. (2d) 254 (1932).

[259] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 374, 382-383, 40 Pac. (2d) 486 (1935). This has been noted above in the discussion of the impacts of the 1928 California constitutional amendment under the subtopic "Injunction or Damages or Both–Some State Riparian-Appropriation Situations–California."

See note 239 *supra* regarding riparian versus appropriative rights.

[260] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.,* 3 Cal. (2d) 489, 525, 529-530, 45 Pac. (2d) 972 (1935). Compare *Rank* v. *(Krug) United States,* 142 Fed. Supp. 1, 104-115 (S.D. Cal. 1956).

[261] *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 81, 142 Pac. (2d) 289 (1943).

The principle that a trial court, in an action to adjudicate water rights, may retain continuing jurisdiction in order to modify its decrees as occasion may require, is well established in California. "The retention of jurisdiction to meet future problems and changing conditions is recognized as an appropriate method of carrying out the policy of the state to utilize all water available."[262]

The topics of declaratory decree and reservation of continuing jurisdiction are further discussed in chapter 15,[263] which deals with the related subject of adjudication of water rights. A suit to adjudicate water rights contemplates the establishment of and quieting title to the right. Some court actions to quiet title have been discussed earlier in this chapter[264] and in chapter 5.[265]

Reverse or Inverse Condemnation

(1) "Reverse condemnation" and "inverse condemnation," interchangeable terms, appear in a number of California water decisions. They ordinarily signify a proceeding to fix damages for the taking of property after intervention of public use by an entity which has, but has not exercised, the power of eminent domain for such purpose. In such a case, an injunction may have issued to prevent such taking without eminent domain proceedings, but such an injunction was not requested before the taking and the aggrieved party now seeks damages after the taking. The terms mean that the converting of a suit of different nature into one of eminent domain amounts to reverse or inverse condemnation.[266] It was explained in a California case that "This cause is in effect the reverse of a condemnation proceeding—a proceeding to fix damages after the taking and not before the taking of the property as enjoined by the Constitution."[267]

(2) *Collier* v. *Merced Irrigation District,* just cited, was an action brought by a downstream riparian owner against an irrigation district which held an

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[262] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 937-938, 207 Pac. (2d) 17 (1949).

[263] See the subtopics "Jurisdiction—Reservation of Continuing Jurisdiction" and "Judgments and Decrees—Declaratory Decree" under "Some General Procedural Matters in Water Rights Litigation."

[264] See, e.g., the discussion at notes 141-143 *supra.*

[265] See "Water Rights—Appropriative Right—Real Property: The General Rule—Quiet title actions."

[266] *Crum* v. *Mt. Shasta Power Corp.,* 124 Cal. App. 90, 92, 12 Pac. (2d) 134 (1932).

[267] *Collier* v. *Merced Irr. Dist.,* 213 Cal. 554, 563, 2 Pac. (2d) 790 (1931). The court said that "in view of the fact that the property has already in effect been taken, the question of the validity of this section does not arise." There was "no objection to respondent here, who has the right to invoke the power of eminent domain, tendering the issue by answer or cross-complaint of its own claims to the property and after these were settled to allow the action to be tried as if in an eminent domain proceeding." The court held that any right to previously enjoin the public use had been barred by laches. 2 Pac. (2d) at 794. See also the discussion of this case at note 159 *supra,* regarding the determination of damages.

appropriative right and the power of eminent domain. Plaintiff asked for damages and for an injunction against threatened additional encroachment on his riparian rights. The district stipulated that it would never impound or divert water from the river at any time unless there was then a flow of at least 18 cubic feet per second at plaintiff's riparian lands. This, then, was not a complete divestiture of plaintiff's riparian right; it was "a partial taking, with a relinquishment to the stream of a portion of the right seized."[268] Under the court's ruling the action became in effect a cross-action to determine damages as if in eminent domain proceedings. In an eminent domain proceeding a stipulation of this character would be proper. On that theory, the California Supreme Court approved the method of settlement.

(3) In earlier California cases the doctrine of reverse or inverse condemnation was stated to be: Where a person has suffered his property to be taken and devoted to a public use by an administrator thereof, and the matter has proceeded so far that the beneficiaries of the public use rely on its continuance and adjust their affairs accordingly—the owner having knowledge and making no objection—his conduct will be regarded by the courts as a dedication by him of the property to the particular public use. The owner cannot thereafter interrupt or prevent the public use. His only remedy is to seek compensation for the taking,[269] or an injunction against further damage only in the event that the proper compensation is not made.[270]

(4) In its first major interpretation of the constitutional amendment of 1928, the California Supreme Court stated that "it was established by decisions of this court long prior to the trial that when public interests had intervened through the construction and operation of public agencies before the actions were commenced, any right of the parties to disturb them in their possession of the property was thereby lost, and only an action to recover compensation for the land taken could be available."[271]

(5) In a 1938 case involving groundwater supplies of the City of Los Angeles the court stated that assuming the city in the first instance should have brought condemnation proceedings or purchased the water rights of respondents, nevertheless the opportunity was still available to accomplish that result by the process of reverse condemnation. And it was said and held:

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[268] 213 Cal. at 566.

[269] *Miller & Lux* v. *Enterprise Canal & Land Co.*, 169 Cal. 415, 429-430, 147 Pac. 567 (1915).

[270] *Newport* v. *Temescal Water Co.*, 149 Cal. 531, 538-539, 87 Pac. 372 (1906).

[271] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 377-378, 40 Pac. (2d) 486 (1935). See *Martin* v. *Western States Gas & Elec. Co.*, 8 Cal. App. (2d) 226, 229, 47 Pac. (2d) 522 (1935), hearing denied by supreme court (1935); *Provident Irr. Dist.* v. *Cecil*, 126 Cal. App. (2d) 13, 18, 271 Pac. (2d) 157, 160 (1954). See also *J. M. Howell Co.* v. *Corning Irr. Co.*, 177 Cal. 513, 518-519, 171 Pac. 100 (1918).

See also the Washington case of *Longmire* v. *Yakima Highlands Irr. & Land Co.*, 95 Wash. 302, 307, 163 Pac. 782 (1917).

> When a public use has attached a prohibitory injunction should be granted only in the event that no other relief is adequate. * * * In such cases compensation in lieu of injunction is preferred. * * * The doctrine that intervention of a public use will foreclose the right to an injunction rests not only on estoppel. The doctrine may be applicable even though the aggrieved party be in ignorance of the violation of his rights. In other words, implied dedication to public use is not essential to the operation of the doctrine. Public policy in favor of a continuance of the public use may also be invoked to prevent a prohibitive injunction. * * * When public use has attached for any recognized reason reverse condemnation proceedings may be invoked and applied. No good reason has been advanced why such a proceeding should not be employed in this case. It would appear to be the only appropriate course to pursue.[272]

(6) The Colorado Supreme Court, in a 1967 case involving injury caused by a State fish hatchery, said:[273]

> Where there is no power on the part of a State agency to condemn private property for a claimed public use, a property owner whose property has been damaged by such agency cannot be held to have commenced an action for "inverse condemnation" when he seeks to recover the damages actually sustained by him. There can be no "inverse condemnation" in a situation where no right exists in a governmental agency to proceed under eminent domain. The plaintiffs, in demanding relief in the form of damages covering the loss sustained by them, are not forced to accept the measure of damages usually applicable to a condemnation case.[274]

Mandamus

A mandamus action is an action to compel a governmental agency or official to take action in a particular regard.

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[272] *Hillside Water Co.* v. *Los Angeles,* 10 Cal. (2d) 677, 687-688, 76 Pac. (2d) 681 (1938). The principle of reverse or inverse condemnation has been discussed or applied in several other California ground water cases. See *Katz* v. *Walkinshaw,* 141 Cal. 116, 136, 70 Pac. 663 (1902), 74 Pac. 766 (1903); *Newport* v. *Temescal Water Co.,* 149 Cal. 531, 538-539, 87 Pac. 372 (1906); *Barton* v. *Riverside Water Co.,* 155 Cal. 509, 515, 101 Pac. 790 (1909); *Miller* v. *Bay Cities Water Co.,* 157 Cal. 256, 284, 107 Pac. 115 (1910); *Burr* v. *Maclay Rancho Water Co.,* 160 Cal. 268, 280, 116 Pac. 715 (1911); *Eden Township County Water Dist.* v. *Hayward,* 218 Cal. 634, 640-641, 24 Pac. (2d) 492 (1933); *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 377-379, 383, 40 Pac. (2d) 486 (1935); *Hillside Water Co.* v. *Los Angeles,* 10 Cal. (2d) 677, 687, 76 Pac. (2d) 681 (1938); *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 920-921, 207 Pac. (2d) 17 (1949), certiorari denied, 339 U.S. 937 (1950).

[273] *Game & Fish Comm'n* v. *Farmers Irr. Co.,* 162 Colo. 301, 426 Pac. (2d) 562, 566 (1967).

[274] Regarding the damages awarded, see the discussion at notes 155 and 162 *supra.*

In the early 1940's several decisions were rendered by the Supreme Court of Nebraska involving actions for mandamus against State water administrative officers to compel proper enforcement of irrigation laws, and thus to prevent alleged unlawful diversions of water by junior appropriators. It was held that such an action was properly instituted in the county in which the resulting damages occurred.[275]

The correct rule in Nebraska was stated to be that: "To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear." Other facets of the process were: If a default existed at the time the writ of mandamus was applied for, the court would have jurisdiction both to determine relators' right to it even if the default no longer existed when the case came on for trial, and to issue the writ and make it effective as to the future. "But we are obligated to adhere to the rule that a default must exist when the writ is applied for, to properly invoke the extraordinary writ of mandamus." Further, "A writ of mandamus requiring the respondents to enforce all the irrigation laws and appropriation rights of relators is too general in character to invoke coercive processes and subject respondents to summary proceedings for a violation thereof. The issuance of the writ is subject to the sound judicial discretion of the court." The court also noted that the pleadings and evidence in this case failed to disclose a default of any ministerial duty on the part of the defendants and they indicated a willingness to administer the stream waters in accordance with established law.[276]

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[275] *State ex rel. Cary* v. *Cochran,* 138 Nebr. 163, 166-167, 292 N.W. 239 (1940), reaffirmed, *Platte Valley Irr. Dist.* v. *Tilley,* 142 Nebr. 122, 126, 5 N.W. (2d) 252 (1942); *Loup River Pub. Power Dist.* v. *North Loup River Pub. Power & Irr. Dist.,* 142 Nebr. 141, 145, 148, 5 N.W. (2d) 240 (1942).

[276] *State ex rel. Cary* v. *Cochran,* 138 Nebr. 163, 177-178, 292 N.W. 239 (1940). See *Platte Valley Irr. Dist.* v. *Tilley,* 142 Nebr. 122, 127-128, 5 N.W. (2d) 252 (1942); *State* v. *Board of Supervisors of Clay County,* 171 Nebr. 117, 105 N.W. (2d) 721, 726 (1960), which discussed proper procedures in mandamus actions in Nebraska.

In the *Cochran* case, *supra*, a peremptory writ of mandamus was granted without notice, the chief administrative officer complied with it, and the defendant ignored the administrative order. Shortly afterward the district court on its own motion vacated the erroneous peremptory writ, and the order therefor was affirmed by the supreme court without prejudice to the party which had failed to comply with the erroneous writ. See *Platte Valley Irr. Dist.* v. *Tilley,* 142 Nebr. 122, 129-130, 5 N.W. (2d) 252 (1942).

An anomaly is disclosed in an Oregon case in which certain landowners brought suit for an injunction restraining the stream watermaster from interfering with the alleged water rights of the plaintiffs. Their claim was that the watermaster had been enforcing the provisions of a 1916 court decree, whereas they had obtained prescriptive rights superior to those granted in the decree. In other words, the complaint was not that the watermaster had failed to carry into effect a decree of court (as it would in a mandamus action), but on the contrary that he had been enforcing such decree. Injunction could not issue to accomplish that purpose. *Calderwood* v. *Young,* 212 Oreg. 197, 202-206, 315 Pac. (2d) 561 (1957).

American Jurisprudence, Second Edition, Administrative Law, section 626, states:

> Where, as distinguished from the performance of ministerial acts, discharge of the duties of an administrative agency calls for the exercise of discretion or judgment, mandamus is not an instrument for correcting or reviewing the exercise of such discretion unless it is shown that the action was arbitrary or capricious or prompted by wrong motives; or, as sometimes stated, mandamus does not lie to control discretion of an administrative agency in the absence of caprice, passion, partiality, fraud, some ulterior motive, arbitrary conduct, or misapprehension of law. Mandamus is not an appropriate process to obtain a review of an order entered by an agency acting within its jurisdiction, and the remedy by mandamus requires a plain duty and a clear legal right.

Burden of Proof

Following are some western court decisions regarding questions of the burden of proof.

Appropriators

Various considerations regarding the burden of proof as between appropriators have been discussed in chapter 8 under "Relative Rights of Senior and Junior Appropriators–Reciprocal Rights and Obligations of Appropriators–Burden of Proof."[277] Some additonal considerations are brought out in the following discussion.

(1) The California Supreme Court has indicated that one who claims to be a prior appropriator, and who brings suit to quiet title to the water right so claimed and to enjoin interference with its exercise, has the burden of proving every element of such right. The burden is upon him "to establish by sufficient evidence the fact of appropriation by him, and the quantity of water appropriated and applied by him to beneficial use upon his land."[278] After he has proved the extent of his right, the burden of proof then falls on a subsequent appropriator–who seeks to appropriate any surplus in the water supply–to prove the existence of a surplus.[279] "It must constantly be kept in mind that in an action such as this, just as in any other quiet title suit, the

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[277] See also, in chapter 9, under "Natural Channels and Reservoirs–Use of Natural Channel" the subtopics "Commingling–Burden of proof" and "Exchange or Substitution of Water–Burden of proof." Also see the related discussions of burden of proof in chapter 14 under the topics "Abandonment and Statutory Forfeiture" and "Prescription."

[278] *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 398, 54 Pac. (2d) 1100 (1936).

[279] *Lodi* v. *East Bay Municipal Util. Dist.*, 7 Cal. (2d) 316, 339, 60 Pac. (2d) 439 (1936); *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 381, 40 Pac. (2d) 486 (1935); *Miller* v. *Bay Cities*

plaintiffs must recover upon the strength of their own title and not upon the weakness of defendant's title."[280]

(2) The Idaho Supreme Court has indicated that one who diverts water, and who claims that such diversion will not injure a prior appropriator below him on the stream, has the burden of establishing that fact by clear and convincing evidence.[281]

(3) The Colorado Supreme Court held that "The presumption is that the water of a tributary of a stream, less the evaporation, if not interfered with, will naturally reach the main stream either by surface or subterranean flow."[282] Hence, the burden of establishing a contention that water proposed to be diverted from an upstream tributary would not in its natural course reach the headgate of a prior appropriator on the main stream below, rests upon the junior claimant.

(4) The Idaho Supreme Court in a 1966 case said that the defendant, who was a junior appropriator, "contends that not all of the water flowing in his ditch comes from springs and swamps along its course: that part of its [sic] arises by means of percolation from the irrigation of lands lying on the bench above the bluff. The burden was on defendant to show the water he takes through his ditch, was not tributary to Spring Creek."[283]

(5) In a California case, the mere location of a well in close proximity to a stream all the water of which had been appropriated, under circumstances tending strongly to show that the pumping from the well tapped water directly connected with the stream, was held to make out a *prima facie* case in favor of the stream appropriators and to cast upon the well operator the burden of proving that his development of water had not interfered with the waters flowing in the stream.[284]

(6) The Texas Supreme Court has indicated that the burden is on those who seek affirmative relief to show, by pleading and proof, that they are entitled to it. If they fail to do this, it is fundamental error to grant a perpetual injunction.[285] And to obtain relief in equity, one must come into court with clean hands. Injunction will not be granted if the effect will be to aid the complainant in the continuance of a legal wrong and trespass. Equity does not

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Water Co., 157 Cal. 256, 272, 107 Pac. 115 (1910); *Smith* v. *Wheeler,* 107 Cal. App. (2d) 451, 456, 237 Pac. (2d) 325 (1951).

[280] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 547-548, 45 Pac. (2d) 972 (1935).

[281] *Josslyn* v. *Daly,* 15 Idaho 137, 149, 96 Pac. 568 (1908); *Silkey* v. *Tiegs,* 54 Idaho 126, 128-129, 28 Pac. (2d) 1037 (1934). See also *Neil* v. *Hyde,* 32 Idaho 576, 586, 186 Pac. 710 (1919).

[282] *Petterson* v. *Payne,* 43 Colo. 184, 186-187, 95 Pac. 301 (1908); principle reaffirmed in *De Haas* v. *Benesch,* 116 Colo. 344, 350-351, 181 Pac. (2d) 453 (1947).

[283] *Martiny* v. *Wells,* 91 Idaho 215, 419 Pac. (2d) 470, 471, 473-474 (1966).

[284] *Larsen* v. *Apollonio,* 5 Cal. (2d) 440, 444, 55 Pac. (2d) 196 (1936).

[285] *McGhee Irr. Ditch Co.* v. *Hudson,* 85 Tex. 587, 590, 593, 22 S.W. 398, 967 (1893).

adjust differences between wrongdoers; the complainant is first judged, and not until he has been found free from taint does equity proceed to determine whether he has been wronged.[286]

(7) A Colorado statute enacted in 1899—and still in effect—authorized the owners of ditches and water rights, taking water from the same stream, to exchange with and loan to each other, for a limited time, the water to which each might be entitled, for the purpose of saving crops or of using the water in a more economical manner.[287]

Several years later the Colorado Supreme Court had occasion to decide two controversies in which operations under the statute were involved. The first decision was to the effect that any such exchange or loan, if permissible at all, cannot be allowed if it injuriously affects the rights of others; and that it is the duty of a senior appropriator who disregards the strict rule of priority and passes over one or more junior appropriators, in order to loan his water to another appropriator junior to the latter, to show the facts that justify his departure from the priority rule.[288] The second decision referred to the first as authority for a construction of the statute "which permits an exchange or loan of water under circumstances and conditions which do not injuriously affect the vested rights of other appropriators," and held that in the instant case "the burden of establishing such facts resting upon plaintiffs, the complaint should make apt averments in that behalf."[289]

Riparian Owners

(1) The riparian owner is under the same burden as is the appropriator in proving the extent of his right when an attempt is made to establish a right to appropriate part or all of the surplus in a water field. According to the California Supreme Court:[290]

> This rule, placing the burden on the appropriator who seeks to take water from a particular water field to show that there is a surplus, does not relieve the riparians and appropriators, who are already in the field, from the burden of proving the quantity of water that they have been using, and that such amount is necessary for their reasonable beneficial purposes. The rule throws on the new appropriator the burden of proving the existence of a surplus from which it can extract the quantity it desires from either the surface or subterranean flow without injury to the uses and requirements of those who have prior rights. In the present case, while it is true

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[286] *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 612-615, 297 S.W. 225 (1927).

[287] Colo. Laws 1899, p. 236, Rev. Stat. Ann. § 148-6-5 (1963).

[288] *Fort Lyon Canal Co.* v. *Chew,* 33 Colo. 392, 400, 404-405, 81 Pac. 37 (1905).

[289] *Bowman* v. *Virdin,* 40 Colo. 247, 249-251, 90 Pac. 506 (1907).

[290] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.,* 3 Cal. (2d) 489, 535, 45 Pac. (2d) 972 (1935).

> the burden was on appellant to prove the existence of a surplus, that burden did not come into existence until after the respondent riparians first proved the amount required by them for reasonable beneficial purposes. This primary burden the riparians did not sustain.

(2) A riparian owner who claims that he has been damaged by the diversion of water by an appropriator has the burden of sustaining his allegation of damages by competent proof thereof. It becomes necessary for him to show that his property was actually damaged by the diversion complained of.[291]

(3) The riparian owner who is injured by stream pollution has the burden of proving the extent of the damage.[292]

In an Oklahoma action for damages arising from the pollution of a stream flowing through plaintiff's premises, failure to prove that there were poisonous or deleterious substances in the water harmful to animal life, or that the plaintiff's animals and fowls died as the result of drinking the water, was held fatal to his right of recovery. The syllabus by the Oklahoma Supreme Court contains the following paragraph:[293]

> In order to sustain a recovery in an action based on negligence there must be a causal connection between the negligence averred and the injury received, and such causal connection cannot be established by basing inference upon inference, or presumption upon presumption.

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[291] *Crum* v. *Mt. Shasta Power Corp.*, 117 Cal. App. 586, 602, 4 Pac. (2d) 564 (1931), hearing denied by supreme court (1931).

[292] *Oklahoma City* v. *Tytenicz*, 171 Okla. 519, 521, 43 Pac. (2d) 747 (1935). See *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 194-195, 102 Pac. (2d) 124 (1940).

[293] *Prest-O-Lite Co.* v. *Howery*, 169 Okla. 408, 37 Pac. (2d) 303 (1934). See *Gulf Oil Corp.* v. *Miller*, 198 Okla. 54, 55-56, 175 Pac. (2d) 335 (1946); *Ogden* v. *Baker*, 205 Okla. 506, 508, 239 Pac. (2d) 393 (1951); *Sunray Oil Corp.* v. *Burge*, 269 Pac. (2d) 782, 786 (Okla. 1954).

Chapter 14

LOSS OF WATER RIGHTS IN WATERCOURSES

CHARACTER OF RIGHT

Appropriative Right

Ways in which appropriative rights in watercourses may be commonly subject to complete or partial loss include abandonment, statutory forfeiture, and prescription, as well as estoppel and laches. These methods of loss are discussed in this chapter.[1]

Riparian Right

Riparian rights apparently are not generally subject to abandonment or statutory forfeiture.[2] Riparian rights generally are subject to loss by adverse use ripening into prescriptive rights. This is the principal way in which they have been separated from riparian land in California. The existence and exercise of this important principle had much to do in furthering the early growth of the appropriation doctrine in this State despite the judicial recognition of paramount riparian rights from the early mining days on.[3]

Riparian rights have also been severed from the land in other ways, both voluntary and involuntary. These separations are caused chiefly by reservation of the riparian right in conveyance of land; grant; condemnation; loss of contact with the stream by a conveyance in which the riparian right is not

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[1] One's appropriative right also might be lost or terminated in some other ways. For example, appropriative rights may be involuntarily lost by condemnation, certain aspects of which have been discussed earlier. (See, e.g., in chapter 7, "Methods of Appropriating Water of Watercourses–Restrictions and Preferences in Appropriation of Water–Preferences in Water Appropriation–Taking for a superior use a right to water already appropriated for an inferior use.") In addition, one's appropriative right may be voluntarily terminated by such measures as its sale or transfer to another. (See, e.g., in chapter 8, "Property Characteristics–Conveyance of Title to Appropriative Right.") Moreover, in some instances there may be temporary or limited permits or licenses that may terminate at the end of their specified duration. (See, e.g., in chapter 7, "Methods of Appropriating Water of Watercourses–Current Appropriation Procedures–Administrative–Procedural steps in appropriating water–(5) Permit: Types.") See also chapter 7 at notes 117-127 and chapter 8 at note 484.

[2] Under "Abandonment and Statutory Forfeiture," see the subtopics "Abandonment–Rights in Watercourses Subject to Abandonment" and "Statutory Forefeiture–Rights Subject to Forfeiture–Generally not riparian rights," *infra.*

[3] Shaw, L., Chief Justice, California Supreme Court, "The Development of the Law of Waters in the West," 10 Cal. L. Rev. 443, 455-456 (1922).

preserved; and loss of contact with the stream by avulsion. Estoppel often may be involved in the grant of a riparian right to a nonriparian owner. These matters are discussed in chapter 10 under "The Riparian Right–Property Characteristics–Severance of Riparian Right from Land," and estoppel is further discussed later.[4]

Pueblo Right

No method by which the pueblo water right can be lost to the municipality that succeeded a primitive Spanish or Mexican pueblo has yet been declared by the high courts of either California or New Mexico, the two States in which such rights have been adjudicated. On the contrary, the California Supreme Court has specifically ruled out some suggested ways in which the pueblo water right might be lost or impaired. These include nonuse and statutory forfeiture.[5] No reported Western case in which an abandonment of a peublo right or its loss by prescription or estoppel was decreed has come to the attention of the author.

Ancient Hawaiian Rights

The ancient Hawaiian surface water rights may be lost by abandonment or by prescription. It is probable that the principles and limitations of estoppel would be applicable here, although actual losses of water rights by estoppel have not been adjudicated in cases that have come to the attention of the author. There is no provision in Hawaiian water law for loss of surface water rights by statutory forfeiture, which applies to appropriative rights in most Western States.[6]

ABANDONMENT AND STATUTORY FORFEITURE

Abandonment

The laws relating to abandonment have generally been a matter of court-created law. There are, however, some States that have statutory provisions expressly dealing with the subject. These provisions are discussed later under "Some Statutory Provisions," and a Washington statute relating to abandonment of a riparian right is noted immediately below under "Rights in Watercourses Subject to Abandonment."

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[4] See especially "Estoppel–Some Other Facets–Grant of Riparian Right," *infra.*

[5] See, in chapter 11, "Pueblo Water Rights in California–Extent of the Pueblo Water Right–Superiority of the Pueblo Water Right–Preservation of the pueblo right."

[6] See, in chapter 12, "Water Rights in Surface Watercourses–Some Aspects of the Ancient Hawaiian Surface Water Right." For a detailed discussion, see Hutchins, W. A., "The Hawaiian System of Water Rights" 140-143 (1946).

Rights in Watercourses Subject to Abandonment

Appropriative rights and ancient Hawaiian water rights may be lost by abandonment.[7] Regarding riparian rights, in each of three cases decided early in the 20th century, the South Dakota Supreme Court made a statement to the effect that the riparian proprietor's right does not depend upon use, but is an incident of ownership, a part of the land itself, which can be lost only by "adverse prescriptive right, grant, or *actual abandonment.*" [Emphasis added.][8] However, a loss of riparian rights by abandonment has not been actually decreed in any reported Western court decision that has come to the attention of the author. Wiel's positive conclusion is:[9]

> Riparian rights cannot be lost by abandonment, wherein they differ in an essential element from appropriations. The latter depend on continued beneficial use; but in the riparian right, future possible use stands as high as actual present use. Riparian rights remain both against other riparian owners and against nonriparian owners, though the water is put to no use at all.[10]

In a 1902 California case, claimants under a grant of part of a riparian tract of land in California, which grant contained a reservation of enough water to operate a hydraulic ram, contended that all rights under the reservation had been lost by abandonment and adverse use. The fact that the grantor's successor in interest abandoned the use of the hydraulic ram in favor of other means of use was not deemed material by the supreme court, because his right to the use of the water did not cease when he ceased to operate the ram. "As a riparian owner he is not bound to use the water, or, in case of non-user, lose his right to its use."[11] This decision thus supports the principle, discussed below, that abandonment of a water right is to be distinguished from abandonment of material objects.

Washington legislation enacted in 1967 provides that "Any person entitled to divert or withdraw waters of the state by virtue of his ownership of land abutting a stream, lake, or watercourse, who abandons the same . . . shall relinquish such right or portion thereof, and such right or portion thereof shall

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[7] Regarding the loss of prescriptive water rights by abandonment, see "Prescription—Loss of Prescriptive Rights," *infra.*

[8] *Stenger* v. *Tharp,* 17 S. Dak. 13, 23-24, 94 N.W. 402 (1903); *Redwater Land & Canal Co.* v. *Reed,* 26 S. Dak. 466, 487, 128 N.W. 702 (1910); *Redwater Land & Canal Co.* v. *Jones,* 27 S. Dak. 194, 203-204, 130 N.W. 85 (1911).

[9] Wiel, S. C., "Water Rights in the Western States," 3d ed., vol. 1, §861 (1911).

[10] Most of Wiel's discussion in this section has to do with nonuse of the water by the riparian owner, which in itself is no abandonment as will be shown later. He does not go into the element of intent, which in discussing abandonment of appropriative rights he emphasizes so clearly as a necessary element of such abandonment. *Id.* §567. If necessary in the one case, it should be in the other.

[11] *Walker* v. *Lillingston,* 137 Cal. 401, 403-404, 70 Pac. 282 (1902).

revert to the state, and the waters affected by said right shall become available for appropriation. . . ."[12] The legislation has not been construed by the Washington Supreme Court.

Abandonment Defined

Late in the 19th century the California Supreme Court defined the abandonment of an appropriative right and, in doing so, stated principles that have been restated and applied in a number of succeeding cases in various Western States:[13]

> The right which is acquired to the use of water by appropriation may be lost by abandonment. To abandon such right is to relinquish possession thereof without any present intention to repossess. To constitute such abandonment, there must be a concurrence of act and intent, viz., the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. * * * The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone without an intention to abandon be held to amount to an abandonment. Abandonment is a question of fact to be determined by a jury or the court sitting as such. Yielding up possession and nonuser is evidence of abandonment, and under many circumstances sufficient to warrant the deduction of the ultimate fact of abandonment. But it may be rebutted by any evidence which shows that, notwithstanding such nonuser or want of possession, the owner did not intend to abandon.

A 1955 analysis by the Colorado Supreme Court is thus phrased, in part:[14]

> In common usage to abandon means to forsake; give up wholly; quit; when applied to a possessory right, such as is a water right, it

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[12] Wash. Rev. Code §90.14.170 (Supp. 1970). Sections 90.14.160 and 90.14.180 (providing for abandonment of appropriations authorized by the legislature prior to enactment of Laws 1917, ch. 117, or by custom or general adjudication, or appropriations by any "person hereafter [after July 1, 1967] entitled to divert or withdraw waters of the state . . . authorized under" the pertinent statutes) are noted under "Some Statutory Provisions," *infra.* The other portions of these three statutes are noted in the subtopics "Rights Subject to Forfeiture—Generally not riparian rights" and "Statutory Provisions: By States—Washington" under "Statutory Forfeiture," *infra.*

[13] *Utt* v. *Frey,* 106 Cal. 392, 397-398, 39 Pac. 807 (1895). In the following year a Federal court approved an almost identical instruction to the jury. *Integral Quicksilver Min. Co.* v. *Altoona Quicksilver Min. Co.,* 75 Fed. 379, 380-381 (9th Cir. 1896). See also *Anson* v. *Arnett,* 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.); *Hammond* v. *Johnson,* 94 Utah 20, 31, 66 Pac. (2d) 894 (1937).

[14] *Knapp,* v. *Colorado River Water Conservation Dist.,* 131 Colo. 42, 53-54, 279 Pac. (2d) 420 (1955). For some other summaries of principles, see *Mason* v. *Hills Land & Cattle Co.,* 119 Colo. 404, 408-409, 204 Pac. (2d) 153 (1949); *In re Willow Creek,* 74 Oreg. 592, 641-642, 664, 144 Pac. 505 (1914), 146 Pac. 475 (1915).

> means to discontinue, desert, relinquish, surrender, vacate or give up. Its opposite is to occupy, keep, maintain, use, preserve and protect. In water and irrigation matters it has no special, mystical or different meaning than that well and generally recognized in all instances where are involved legal rights, the preservation and continuation of which are dependent upon possession, use or occupancy. That the life of such right terminates and that it goes completely out of existence upon abandonment, is a principle so well recognized that citation of authority to support it is unnecessary. In the absence of expressed declaration, the difficult question for determination is whether, at any time following its acquisition, the owner of the right decided to quit, surrender or give it up. * * *
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> Decisions of courts of last resort are legion in support of the firmly recognized principle that where a water right is not used for an unreasonable period of time, intent to abandon it may be implied.

Distinguished from abandonment of facilities.—Abandonment of a water right is to be distinguished from abandonment of any particular facilities for diverting and conveying the water in the exercise of such right. This applies, for example, to the discarding of an old or dilapidated flume. "The substantive right is the right of diversion and use of the water; the flume is a mere means of conveying the water."[15] In an early case the Colorado Supreme Court stated that: "It may be that plaintiff had abandoned a portion of his original ditches, yet it would seem, from this finding, that he had *not* abandoned his water rights. A distinction must be observed between the abandonment of *an irrigating ditch* and the abandonment of *the right to the use of water for irrigation.*"[16]

The same principles apply to abandonment of an appropriator's point of diversion. Where water is put to continuous beneficial use by the holder of a water right, the appropriation is not abandoned, even though the point and method of diversion are changed.[17]

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[15] *Wood* v. *Etiwanda Water Co.,* 147 Cal. 228, 233, 81 Pac. 512 (1905). As a ditch and the water right associated therewith are separate species of property, the ditch may be abandoned and the water used through another ditch without abandoning the water right. *In re Johnson, Appeal from Department of Reclamation,* 50 Idaho 573, 579, 300 Pac. 492 (1931). *Kleinschmidt* v. *Greiser,* 14 Mont. 484, 495, 37 Pac. 5 (1894). Nor does an abandonment of a water right, *of itself,* operate as abandonment of a claim to a ditch right. *McDonnell* v. *Huffine,* 44 Mont. 411, 423, 120 Pac. 792 (1912).

[16] *Nichols* v. *McIntosh,* 19 Colo. 22, 28, 34 Pac. 278 (1893). See *Greer* v. *Heiser,* 16 Colo. 306, 314, 26 Pac. 770 (1891); *Boulder & Larimer County Co.* v. *Culver,* 63 Colo. 32, 33-35, 164 Pac. 510 (1917); *Stoner* v. *Mau,* 11 Wyo. 366, 395-396, 72 Pac. 193 (1903); *Malnati* v. *Ramstead,* 50 Wash. (2d) 105, 109, 309 Pac. (2d) 754 (1957), but compare the facts in the earlier decision in *Hunter Land Co.* v. *Laugenour,* 140 Wash. 558, 567, 250 Pac. 41 (1926).

[17] *Anderson* v. *Baumgartner,* 4 Cal. (2d) 195, 196, 47 Pac. (2d) 724 (1935). See *McGuire* v. *Brown,* 106 Cal. 660, 672, 39 Pac. 1060 (1895).

In a proceeding to change the point of diversion of water in Idaho, the question of abandonment of priority, as such, is held to be not generally before the court if a proper objection is made. Whether there has been an abandonment of the right or any portion of it is a matter to be settled in some other appropriate proceeding.[18] However, while abandonment as such is not to be settled in an action involving a change in place of diversion, the reasons why the desired change will or will not injure other appropriators may be considered therein.[19]

Much litigation has reached the high courts of Colorado over proposed changes in points of diversion, pursuant to statutory authority and special court procedure, and in some of these cases questions of abandonment have arisen. It has long been settled in this State, according to the supreme court, that the diverting of water through a headgate located at a point other than that designated in the decree of adjudication does not constitute abandonment of the water right.[20] And in an action for a decree authorizing a change in point of diversion of water decreed to a ditch, the Colorado Supreme Court observed:[21]

> It may well be that there has been an abandonment of the original Ireland Ditch and the original point of diversion of the ditch. Certainly a change in the method or means of conveying appropriated water from the source of supply to the point of beneficial use is not evidence of abandonment. Likewise the unauthorized, unprotested, change of the point of diversion is not evidence of abandonment; on the other hand, it is evidence of nonabandonment.

The distinction likewise applies logically to a reservior.[22] And a water right is held not abandoned by simply changing the place of use to other lands.[23]

Distinguished from abandonment of particles of water.—Abandonment of a water right is to be distinguished likewise from abandonment of particles of water that have been released from possession. Inevitably, in the functioning of

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[18] *Twin Falls Canal Co.* v. *Shippen,* 46 Idaho 787, 791, 271 Pac. 578 (1928).

[19] *First Security Bank of Blackfoot* v. *State,* 49 Idaho 740, 745, 291 Pac. 1064 (1930).

[20] *Graeser* v. *Haigler,* 117 Colo. 197, 199, 185 Pac. (2d) 781 (1947).

[21] *Lengel* v. *Davis,* 141 Colo. 94, 347 Pac. (2d) 142 (1959).

[22] *Munson* v. *Schade,* 79 Colo. 597, 598, 247 Pac. 454 (1926). This was an action to cancel a decree for, among other things, storage rights in a reservoir on the ground of abandonment. Said the supreme court, "The reservoir was a part of their general plan; the use of the water was another part, and while it requires strong evidence to show the abandonment of a valuable right, not less if not more does it require to show an abandonment of a valuable part of a system while the remainder is maintained."

[23] *Joyce* v. *Murphy Land & Irr. Co.,* 35 Idaho 549, 554, 208 Pac. 241 (1922); *In re Johnson, Appeal from Department of Reclamation,* 50 Idaho 573, 579, 300 Pac. 492 (1931); *Harris* v. *Chapman,* 51 Idaho 283, 296, 5 Pac. (2d) 733 (1931); *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 15 Haw. 675, 691 (1904); *Hays* v. *Buzard,* 31 Mont. 74, 80-81, 77 Pac. 423 (1904).

an irrigation system, some of the water diverted from the source of supply returns to a stream channel through natural percolation or artificial ditches or wasteways, for in actual practice complete use of all water applied to the land is seldom attainable. 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 original water right or of any part of it. This situation is illustrated by decisions in two cases, with different sets of facts, both of which are discussed in chapter 18.

In one of these, an Oregon case, surplus water had been released by a city from reservoirs with no intention of reclaiming it and allowed to reach the natural level of the country. The Oregon Supreme Court, in holding that the city appropriator had no further interest in such water after its release and could confer no right upon anyone to its use, specifically referred to such overflow water as "released" or "waste" water in order not to confound or connect the word "abandoned" with the actual water right of the city. The court distinguished the abandonment of specific parcels of the water, which had flowed out of the reservoirs, from abandonment of a water right, by saying that "Water which is taken into possession and confinement becomes personal property and only specific quantities may be abandoned. * * * The City of Baker has absolute control of the water in its reservoirs. The city has abandoned no water right."[24]

The other is a California case. With respect to waters brought into an area from another watershed, reduced to possession, and put to use, the surplus thereafter being allowed to drain into a natural watercourse, the California Supreme Court held that such waters were private property during the period of possession, and:[25]

> When possession of the actual water, or *corpus*, has been relinquished, or lost by discharge without intent to recapture, property in it ceases. This is not the abandonment of a water right, but merely an abandonment of specific portions of water, i.e., the very particles which are discharged or have escaped from control.

It was held in this case that there had been no abandonment of a water right by the importer of the water—only an abandonment of those portions of the foreign water which had actually been permitted to drain into the watercourse and thence out of the irrigated area.

Essential Elements of Abandonment

Abandonment is a voluntary matter.[26] After an appropriation of water has

[24] *Vaughn* v. *Kolb,* 130 Oreg. 506, 512-513, 280 Pac. 518 (1929).

[25] *Stevens* v. *Oakdale Irr. Dist.,* 13 Cal. (2d) 343, 350, 90 Pac. (2d) 58 (1939).

[26] "An abandonment must always be voluntary," *Morris* v. *Bean,* 146 Fed. 423, 434 (C.C.D. Mont. 1906); *St. Onge* v. *Blakely,* 76 Mont. 1, 14, 245 Pac. 532 (1926); *Osnes Livestock Co.* v. *Warren,* 103 Mont. 284, 294, 62 Pac. (2d) 206 (1936); *Hawaiian*

been completed, "the courts will not lightly decree an abandonment of a property so valuable in a semi-arid region such as this * * *."[27]

Whether a water right has actually been abandoned "depends upon the facts and circumstances surrounding each particular case, tending to prove the essential elements of abandonment, viz., the intent and the acts of the party charged with abandoning such right."[28]

Both intent and relinquishment of possession are essential to constitute an abandonment of a water right. The intention alone, no matter how definite, is not sufficient. It must be coupled with acts of the appropriator that implement the intent. Nor is mere nonuse of the water more than rebuttable evidence of an intention to abandon the water right.

Intent.—The intention not to repossess the water right is an essential feature of its abandonment.[29] Abandonment "depends upon proof of an intent to permanently relinquish the possession and enjoyment of a property right."[30] This denotes the absolute giving up of the right, "often with the further implication of its surrender to the mercy of something or someone else."[31]

The intent may be evidenced by the declaration of the party, or may be fairly inferred from his acts.[32] "A single act may be of such a character, and done in such manner, and under such circumstances, that an intention to abandon may be inferred from it."[33] Thus, one who sold his land with

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Commercial & Sugar Co. v. *Wailuku Sugar Co.,* 15 Haw. 675, 691 (1904); *In re Manse Spring & Its Tributaries,* 60 Nev. 280, 286, 108 Pac. (2d) 311 (1940); *In re Willow Creek,* 74 Oreg. 592, 664, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *Anson* v. *Arnett,* 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.); *Ramsay* v. *Gottsche,* 51 Wyo. 516, 532, 69 Pac. (2d) 535 (1937); *Horse Creek Conservation Dist.* v. *Lincoln Land Co.,* 54 Wyo. 320, 335, 92 Pac. (2d) 572 (1939).

[27] *Thomas* v. *Ball,* 66 Mont. 161, 167, 213 Pac. 597 (1923); accord, *Sander* v. *Bull,* 76 Wash. 1, 6, 135 Pac. 489 (1913).

[28] *Joyce* v. *Murphy Land & Irr. Co.,* 35 Idaho 549, 555, 208 Pac. 241 (1922).

[29] *McFarland* v. *Alaska Perseverance Min. Co.,* 3 Alaska 308, 337 (1907); *Gila Water Co.* v. *Green,* 29 Ariz. 304, 306, 241 Pac. 307 (1925); *Wood* v. *Etiwanda Water Co.,* 147 Cal. 228, 234, 81 Pac. 512 (1905); *Beaver Brook Res. & Canal Co.* v. *St. Vrain Res. & Fish Co.,* 6 Colo. App. 130, 136, 40 Pac. 1066 (1895); *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 15 Haw. 675, 691 (1904); *Union Grain & Elevator Co.* v. *McCammon Ditch Co.,* 41 Idaho 216, 223, 240 Pac. 443 (1925); *Atchison* v. *Peterson,* 1 Mont. 561, 565 (1872), affirmed, 87 U.S. 507 (1874); *State* v. *Nielsen,* 163 Nebr. 372, 381, 79 N.W. (2d) 721 (1956); *In re Manse Spring & Its Tributaries,* 60 Nev. 280, 286-287, 289, 290, 108 Pac. (2d) 311 (1940); *Borman* v. *Blackmon,* 60 Oreg. 304, 308, 118 Pac. 848 (1911); *Edgemont Improvement Co.* v. *N. S. Tubbs Sheep Co.,* 22 S. Dak. 142, 145, 115 N.W. 1130 (1908); *Anson* v. *Arnett,* 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.); *Deseret Live Stock Co.* v. *Hooppiania,* 66 Utah 25, 32, 239 Pac. 479 (1925); *Sander* v. *Bull,* 76 Wash. 1, 6, 135 Pac. 489 (1913); *Campbell* v. *Wyoming Dev. Co.,* 55 Wyo. 347, 400, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940); *Valcalda* v. *Silver Peak Mines,* 86 Fed. 90, 95 (9th Cir. 1898).

[30] *Lindblom* v. *Round Valley Water Co.,* 178 Cal. 450, 455, 173 Pac. 994 (1918).

[31] *Carrington* v. *Crandall,* 65 Idaho 525, 532, 147 Pac. (2d) 1009 (1944).

[32] *Gould* v. *Maricopa Canal Co.,* 8 Ariz. 429, 448, 76 Pac. 598 (1904).

[33] *Farmers' Irr. Dist.* v. *Frank,* 72 Nebr. 136, 155, 100 N.W. 286 (1904).

accompanying water right, and subsequently repurchased the land without the water right and irrigated it with rented water, was held to have abandoned his original right of appropriation and to have initiated a new right in connection with the renting of water.[34]

Being a question of intent, abandonment is to be determined with reference to the conduct of the parties.[35] As said by the South Dakota Supreme Court:[36]

> Conduct may support an inference of such an intention. While abandonment of a valuable water right should not be lightly implied, public interests require that this natural resource be applied to a beneficial use by the holder of such a right, or that it be rendered available for appropriation and use by others.

Thus the court may conclude that the conduct of the parties "showed that they had no intention to abandon."[37] Or the court may find that during a certain period certain ditches were "neglected, and probably used but little during one or more of the seasons; but we cannot say that the evidence sufficiently establishes an intention to abandon either of them, or the right to water acquired thereby."[38]

The effect of long continued failure of an appropriator to use his water upon the determination of an issue of abandonment of the water right is discussed below under the subtopic "Relation of nonuse to intent."

Act of relinquishment of possession.—The intent to abandon the water right must be accompanied by an actual relinquishment of its possession, that is, a cessation of control and use of the water. The intent to abandon the right and the relinquishment of possession must coincide.[39] In 1904, the Supreme Court of Utah stated, "It is a well-settled principle of law that in order to constitute an abandonment there must be an intent to abandon, coupled with some external act of relinquishment by which the intent is carried out."[40] "In such cases," it was said in a later California case, "the abandonment is accomplished by the affirmative acts of the claimant or user or by his failure to make use of that which he has claimed."[41] The general principle has been declared in various other decisions.[42]

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[34] *Brockman* v. *Grand Canal Co.*, 8 Ariz. 451, 452, 76 Pac. 602 (1904).
[35] *Miller* v. *Wheeler*, 54 Wash. 429, 435, 103 Pac. 641 (1909).
[36] *Cundy* v. *Weber*, 68 S. Dak. 214, 225, 300 N.W. 17 (1941).
[37] *Gill* v. *Malan*, 29 Utah 431, 437, 82 Pac. 471 (1905).
[38] *Sieber* v. *Frink*, 7 Colo. 148, 153-154, 2 Pac. 901 (1884).
[39] *Thomas* v. *Bell*, 66 Mont. 161, 167, 213 Pac. 597 (1923).
[40] *Promontory Ranch Co.* v. *Argile*, 28 Utah 398, 407-408, 79 Pac. 47 (1904).
[41] *Helvey* v. *United States Bldg. & Loan Assn. of Los Angeles*, 81 Cal. App. (2d) 647, 650, 184 Pac. (2d) 919 (1947).
[42] *Joyce* v. *Murphy Land & Irr. Co.*, 35 Idaho 549, 555, 208 Pac. 241 (1922); *State* v. *Nielsen*, 163 Nebr. 372, 381, 79 N.W. (2d) 721 (1956); *In re Willow Creek*, 74 Oreg. 592, 641-642, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *Cundy* v. *Weber*, 68 S. Dak.

Relation of nonuse to intent.—Mere nonuse of the water to which an appropriator is entitled, without some proof of intent, is not conclusive evidence of abandonment of the right.[43] In 1908, the South Dakota Supreme Court stated: "It is well settled that mere nonuser of water does not amount to abandonment, nor is mere lapse of time alone sufficient to establish abandonment. In all cases abandonment is a question of intention."[44]

However, in determining the question of intent to abandon a water right, the courts may take nonuse of the water and other pertinent circumstances into consideration.[45] Nonuse of the water, therefore, affords evidence from which the intent to abandon the right may be inferred; but it still is merely evidence of such intent,[46] and it may be rebutted by evidence showing that, notwithstanding such nonuse or want of possession, the owner did not intend to abandon the water right.[47] "Nonuser for any period whatever may be urged as evidence of an intention to abandon; but under no circumstances does mere nonuser extinguish title."[48] Eventually it creates a presumption of such intention, but it is a rebuttable presumption.

"Decisions of courts of last resort are legion in support of the firmly recognized principle that where a water right is not used for an *unreasonable period of time*, intent to abandon it may be *implied.*" [Emphasis added.][49] Some of the facets of this considerable subject follow.

"A *prima facie* showing of an intention to abandon the right to use a

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214, 225, 300 N.W. 17 (1941); *Anson* v. *Arnett,* 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.); *Sander* v. *Bull,* 76 Wash. 1, 6, 135 Pac. 489 (1913).

[43] *Land* v. *Johnston,* 156 Cal. 253, 256, 104 Pac. 449 (1909); *Balabanoff* v. *Kellogg,* 10 Alaska 11, 17, 118 Fed. (2d) 597, 599 (9th Cir. 1940), certiorari denied, 314 U.S. 635 (1941); *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 15 Haw. 675, 691 (1904); *Featherman* v. *Hennessy,* 42 Mont. 535, 540-541, 113 Pac. 751 (1911); *In re Willow Creek,* 74 Oreg. 592, 664, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *Thorp* v. *McBride,* 75 Wash. 466, 468-469, 135 Pac. 228 (1913); *Valcalda* v. *Silver Peak Mines,* 86 Fed. 90, 95 (9th Cir. 1898).

[44] *Edgemont Impr. Co.* v. *N. S. Tubbs Sheep Co.,* 22 S. Dak. 142, 145, 115 N.W. 1130 (1908).

[45] *In re Manse Spring & Its Tributaries,* 60 Nev. 280, 290, 108 Pac. (2d) 311 (1940); *Valcalda* v. *Silver Peak Mines,* 86 Fed. 90, 95 (9th Cir. 1898).

[46] *Lindblom* v. *Round Valley Water Co.,* 178 Cal. 450, 455, 173 Pac. 994 (1918).

[47] *Utt* v. *Frey,* 106 Cal. 392, 398, 39 Pac. 807 (1895); *Integral Quicksilver Min. Co.* v. *Altoona Quicksilver Min. Co.,* 75 Fed. 379, 381 (9th Cir. 1896). In *Moore* v. *Sherman,* 52 Mont. 542, 546, 159, Pac. 966 (1916), the trial court found that neither the defendant nor her predecessors intended to abandon the right, "but, on the contrary, so far as they had any conscious intent, it was not to abandon either the ditch or water right. In the absence of any intention to abandon there could not have been an adandonment. There was nonuser for ten years, but nonuser does not constitute abandonment. If any principle of the law of water rights can be settled, this one is."

[48] *Moore* v. *United Elkhorn Mines,* 64 Oreg. 342, 352, 127 Pac. 964 (1912), 130 Pac. 640 (1913).

[49] *Knapp* v. *Colorado River Water Conservation Dist.,* 131 Colo. 42, 54, 279 Pac. (2d) 420 (1955).

particular quantity of water may be made by evidence of the failure to apply such water to a beneficial use for an unreasonable period of time." [Emphasis added.][50] A failure to use water for a time is competent evidence on the question of abandonment and if continued for an unreasonable period it may fairly create a presumption of intention to abandon; "but this presumption is not conclusive, and may be overcome by other satisfactory proofs."[51]

"The non-use of a right is not sufficient of itself to show abandonment but if the failure to use is long continued and *unexplained*, it gives rise to an *inference* of intention to abandon." [Emphasis added.][52] The qualification "unexplained" appears in other cases.[53]

Concurrence of act and intent.—It follows that to constitute the abandonment of an appropriative right, there must be a concurrence of act and intent.[54] This is an important feature of the law of abandonment of water rights. It is well to repeat that neither the intent to abandon the right without

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[50] *Cundy* v. *Weber,* 68 S. Dak. 214, 225-226, 300 N.W. 17 (1941).

[51] *Sieber* v. *Frink,* 7 Colo. 148, 154, 2 Pac. 901 (1884).

[52] *Anson* v. *Arnett,* 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.).

[53] *Farmers' Irr. Dist.* v. *Frank,* 72 Nebr. 136, 155, 100 N.W. 286 (1904). A lapse of 25 years, unexplained, would be very strong evidence of an intention to abandon, but other circumstances may show that there was no such intention. *Gila Water Co.* v. *Green,* 27 Ariz. 318, 329, 232 Pac. 1016, 29 Ariz. 304, 306, 241 Pac. 307 (1925). A period of 20 or even 18 years is too long for nonuse to continue without presuming abandonment, "unless some peculiar fact or condition can be shown by which the party or parties might be excused." *Green Valley Ditch Co.* v. *Frantz,* 54 Colo. 226, 233, 129 Pac. 1006 (1913). The continued practical nonuse of a water right of great value for 40 years is evidence of abandonment, and when not reasonably explained is sufficient to authorize an inference that the nonuse was with intent to abandon. *Farmers Res. & Irr. Co.* v. *Fulton Irrigating Ditch Co.,* 108 Colo. 482, 496, 120 Pac. (2d) 196 (1941). To rebut the presumption of abandonment arising from an unreasonably long period of nonuse, "there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse." *Knapp* v. *Colorado River Water Conservation Dist.,* 131 Colo. 42, 55, 279 Pac. (2d) 420 (1955). The court added that neither may such nonuse be justified by a showing that the owner intended to sell the property, or that it was kept listed with real estate brokers as a matter of speculation on the market—that being "wholly foreign to the principle of keeping life in a proprietary right and is no excuse for failure to perform that which the law requires." See *Cross* v. *Jones,* 85 Nebr. 77, 81-82, 122 N.W. 681 (1909), for a detailed statement of the circumstances showing defendant's lack of sustained interest and activity during a considerable period of time which led the Nebraska Supreme Court to conclude "that the trial judge was justified in finding that defendant had abandoned the rights acquired by him from his grantors to overflow plaintiffs' land."

[54] *Utt* v. *Frey,* 106 Cal. 392, 397-398, 39 Pac. 807 (1895); this means leaving the premises or property vacant so that it may be appropriated by the next comer, coupled with the intention of not returning, *Wood* v. *Etiwanda Water Co.,* 147 Cal. 228, 234, 81 Pac. 512 (1905); *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 55 (1917); *Joyce* v. *Murphy Land & Irr. Co.,* 35 Idaho 549, 555, 208 Pac. 241 (1922); *Thomas* v. *Ball,* 66 Mont. 161, 167, 213 Pac. 597 (1923); *Farmers' Irr. Dist.* v. *Frank,* 72 Nebr. 136, 154, 100 N.W. 286 (1904); *In re Willow Creek,* 74 Oreg. 592, 641-642, 664, 144 Pac. 505 (1914), 146 Pac.

actually relinquishing possession, nor the relinquishment of possession without the intent to abandon the right, is sufficient.

Establishment of Abandonment

In 1902, the Idaho Supreme Court said, "[A]bandonment will not be presumed, but must be clearly established by the evidence."[55]

Question of fact.—"The issue of intent in such instance becomes a question of fact for determination by the trial court from all the pertinent facts and surrounding circumstances, and where supported by competent evidence such finding will not be disturbed on review."[56]

Elsewhere it is said that "Abandonment is a mixed question of law and fact."[57] In several cases it is said that abandonment is a question of "fact and intent"[58] or "a mixed question of intention and act."[59]

Evidence.—The fact that nonuse of water and want of possession constitute rebuttable evidence of intent to abandon the water right has been brought out earlier under "Essential Elements of Abandonment—Relation of nonuse to intent." If not rebutted, such evidence may be sufficient under certain circumstances to warrant the conclusion of the ultimate fact of abandonment.

It must be remembered, said the Idaho Supreme Court, "that it requires very convincing and satisfactory proofs to support a forfeiture by abandonment of a real property right."[60]

Said a Texas court of civil appeals: "An essential element of abandonment is the intention to abandon and such intention must be shown by clear and satisfactory evidence. Abandonment may be shown by circumstances but the

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475 (1915); *Cundy* v. *Weber,* 68 S. Dak. 214, 225, 300 N.W. 17 (1941); *Hammond* v. *Johnson,* 94 Utah 20, 31, 66 Pac. (2d) 894 (1937); *Sander* v. *Bull,* 76 Wash. 1, 6, 135 Pac. 489 (1913).

[55] *Hall* v. *Blackman,* 8 Idaho 272, 283, 68 Pac. 19 (1902).

[56] *Knapp* v. *Colorado River Water Conservation Dist.,* 131 Colo. 42, 55, 279 Pac. (2d) 420 (1955); accord, *Utt* v. *Frey,* 106 Cal. 392, 397-398, 39 Pac. 807 (1895); facts and circumstances in the case to be examined, *Haggin* v. *Saile,* 23 Mont. 375, 381, 59 Pac. 154 (1899); "The question of abandonment is one of fact to be determined in each case from all the evidence in the record," *Anson* v. *Arnett,* 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.); "It is well settled that the question of abandonment is to be determined by the conduct of the parties, and is a question of fact for the trial court," *Barton* v. *Pierce,* 131 Cal. App. 33, 37, 20 Pac. (2d) 736 (1933); abandonment of a water right and water works depends upon the facts in each case, *Landers* v. *Joerger,* 15 Ariz. 480, 484, 140 Pac. 209 (1914).

[57] *Farmers' Irr. Dist.* v. *Frank,* 72 Nebr. 136, 154, 100 N.W. 286 (1904).

[58] *Wendler* v. *Woodward,* 93 Wash. 684, 688, 161 Pac. 1043 (1916); *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 55 (1917); *McFarland* v. *Alaska Perseverance Min. Co.,* 3 Alaska 308, 337 (1907).

[59] *Gassert* v. *Noyes,* 18 Mont. 216, 219, 44 Pac. 959 (1896).

[60] *Perry* v. *Reynolds,* 63 Idaho 457, 464, 122 Pac. (2d) 508 (1942). This statement apparently applies both to statutory forfeiture and genuine abandonment of appropriative rights.

circumstances must disclose some definite act showing intention to abandon."[61]

And a Federal court said, "Abandonment is a question of intention, to be evidenced by overt acts; but, when such overt acts appear, the right to appropriate water, like an usufructuary right, ceases and cannot be resumed after the rights of others have intervened."[62]

It was held in a Washington case that the mere failure to mention the water right specifically in deeds or leases was not evidence of abandonment. This was especially so in the instant case, as it appeared that the persons then in possession, even if not asserting title thereto, were using all the water that flowed to the lands.[63]

In an Oregon case, one Mrs. Staub filed with the State Engineer an application for a permit to appropriate a specific quantity of water from a certain creek for irrigation and domestic purposes on a definite tract of land. "Defendants argue that, by making such filing, she expressly abandoned whatever rights she may have had prior thereto. The argument is ineffectual. There is no evidence that Mrs. Staub intended to abandon her former rights, and the law presumes to the contrary."[64]

Previously, under "Abandonment Defined—Distinguished from abandonment of facilities," it is stated that much litigation has reached the high courts of Colorado over proposed changes in points of diversion, pursuant to statutory authority and special court procedure, and that in some of these cases questions of abandonment have arisen. These statutory changes in diversion places are made only with respect to rights decreed under the formal State procedure and by the court that has jurisdiction over the rights. With respect to these decreed rights themselves, questions of abandonment arise. With respect to evidence therein, the Colorado Supreme Court said:[65]

> Evidence of abandonment must, of course, be of facts which occur after the decree which awards the priorities, but previous conditions, declarations of the parties and the proceedings in the suit of which that decree is the result are competent to show conditions and intent subsequent to the decree.

Some circumstances evidencing abandonment.—Following are some court decisions in which the circumstances were held to evidence abandonment of appropriative rights. As noted above, nonuse of water and want of possession may constitute rebuttable evidence of intent to abandon a water right which, if not rebutted, may in some cases be sufficient to warrant a finding of abandonment.

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[61] *Anson* v. *Arnett,* 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.).
[62] *Anderson Land & Stock Co.* v. *McConnell,* 188 Fed. 818, 823 (D. Nev. 1910).
[63] *Pays* v. *Roseburg,* 123 Wash. 82, 85, 211 Pac. 750 (1923).
[64] *Staub* v. *Jensen,* 180 Oreg. 682, 690, 178 Pac. (2d) 931 (1947).
[65] *New Mercer Ditch Co.* v. *New Cache la Poudre Irrigating Ditch Co.,* 70 Colo. 351, 353-354, 201 Pac. 557 (1921).

(1) California. (a) Water had been appropriated for a special purpose, fully accomplished, and the parties had dispersed to other localities. More than 2 years passed without their giving any attention to the ditch and then only to sell it for $25.[66]

(b) For more than 20 years a ditch, except for a small portion, was unused by the association of miners who built it or by anyone else. No person or persons performed any acts of ownership or used it for any purpose.[67]

(2) Colorado. There was a practical nonuse by the town of Alamosa for more than 20 years; there had been no use by the town from the date of the decree of priority. The town installed a new source of water supply which was adequate and satisfactory; and the town had no property on which to apply this water right and no appliances for diverting the water and conveying it to the town.[68]

(3) Idaho. (a) Failure of the party charged to use the right or to keep the necessary facilities in repair.[69]

(b) The water right had not been used for approximately 25 years.[70]

(c) It was clearly inferable that the holders of the water right had formed an intent to abandon their ranch and water right when they failed to pay a mortgage installment; and relinquishment of possession began when they ceased to apply the water to a beneficial use.[71]

(4) Montana. (a) Voluntary nonuse by purchaser of water right, with no intent to resume the use, and without assertion of possession or title for a number of years after purchase, particularly where he had permitted others to use the water adversely for a period of years.[72]

(b) An appropriator allowed his ditches and flumes to deteriorate to such an extent that they would not convey water, and his successor in interest disclaimed on several occasions any right acquired by the appropriator.[73]

(5) Nebraska. Plaintiff's appropriation for power purposes regarded as abandoned, except so far as it had equipped itself to utilize it for that purpose when the water rights act of 1889 took effect or did so within a reasonable time thereafter; likewise with respect to its appropriation for irrigation purposes except so far as it was completed by application of the water to the land in a reasonable time.[74]

(6) Oregon. (a) A water right not exercised nor the stream waters used on

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[66] *Davis* v. *Gale,* 32 Cal. 26, 34-35 (1867).

[67] *Kirman* v. *Hunnewill,* 93 Cal. 519, 528-529, 29 Pac. 124 (1892).

[68] *San Luis Valley Irr. Dist.* v. *Alamosa,* 55 Colo. 386, 390-391, 135 Pac. 769 (1913).

[69] *Joyce* v. *Murphy Land & Irr. Co.,* 35 Idaho 549, 555, 208 Pac. 241 (1922).

[70] *Knutson* v. *Huggins,* 62 Idaho 662, 667, 115 Pac. (2d) 421 (1941).

[71] *Chill* v. *Jarvis,* 50 Idaho 531, 536-537, 298 Pac. 373 (1931).

[72] *Haggin* v. *Saile,* 23 Mont. 375, 381, 59 Pac. 154 (1899).

[73] *Goon* v. *Proctor,* 27 Mont. 526, 528, 71 Pac. 1003 (1903).

[74] *Kearney Water & Elec. Powers Co.* v. *Alfalfa Irr. Dist.,* 97 Nebr. 139, 146-147, 149 N.W. 363 (1914).

the premises for 18 years "clearly establishes an intention to abandon the right;" and a certain claim now asserted "is too stale to be considered by a court of equity."[75]

(b) A mining ditch was originally dug by one Anderson and others. Small quantities of water were diverted from the ditch for irrigation by some of the owners; but some years prior to the decision they all leased their interests to Anderson for a term of 99 years, "which was an abandonment of their irrigation rights." One owner was excepted because he reserved his right to irrigate from the ditch.[76]

(7) Washington. By deed, appellants and their predecessors conveyed all water to which they had title in a certain creek above respondents' lands; this included the "percolated" waters. Consequently they reserved no title in any waters, or the residuum thereof, "except such as the grantees did not divert and use. They diverted and used all." Hence appellants abandoned all rights to any of the seepage water when they conveyed the same by deed.[77]

(8) Wyoming. Abandonment and relinquishment of irrigated lands operated as an abandonment of the right to so much of the water as needed for irrigation thereof and, at the same time, any right of way for conveying the water to such lands.[78]

Burden of proof.—"The authorities are all of one accord in holding that the party claiming abandonment has the burden of proving his contention by a preponderance of the evidence, and that to establish abandonment the evidence to that effect should be clear and definite."[79] This principle appears to be uniformly accepted by the western courts of last resort.[80]

Some Circumstances not Constituting Abandonment

Enforced discontinuance of water use.—"An abandonment of water right * * * must be voluntary."[81] Therefore, abandonment cannot be accomplished through enforced discontinuance of the use of the water—when nonuse results from circumstances not under the appropriator's control.[82]

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[75] *Oviatt* v. *Big Four Min. Co.,* 39 Oreg. 118, 125, 65 Pac. 811 (1901).

[76] *Davis* v. *Chamberlain,* 51 Oreg. 304, 312-313, 98 Pac. 154 (1908).

[77] *McFadden* v. *Ferguson,* 99 Wash. 683, 691-692, 170 Pac. 365 (1918).

[78] *Rutherford* v. *Lucerne Canal & Power Co.,* 12 Wyo. 299, 313-314, 75 Pac. 445 (1904).

[79] *Thomas* v. *Ball,* 66 Mont. 161, 168, 213 Pac. 597 (1923).

[80] See, e.g., *Ward* v. *Monrovia,* 16 Cal. (2d) 815, 820-821, 108 Pac. (2d) 425 (1940); *Lema* v. *Ferrari,* 27 Cal. App. (2d) 65, 73, 80 Pac. (2d) 157 (1938); *Cline* v. *McDowell,* 132 Colo. 37, 42, 284 Pac. (2d) 1056 (1955); *Pouchoulou* v. *Heath,* 137 Colo. 462, 463, 326 Pac. (2d) 657 (1958); *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 55 (1917); *Smithfield West Bench Irr. Co.* v. *Union Cent. Life Ins. Co.,* 113 Utah 356, 363, 195 Pac. (2d) 249 (1948); *Miller* v. *Wheeler,* 54 Wash. 429, 436, 103 Pac. 641 (1909); *Laramie Rivers Co.* v. *LeVasseur,* 65 Wyo. 414, 449, 202 Pac. (2d) 680 (1949); *Lake DeSmet Res.* v. *Kaufmann,* 75 Wyo. 87, 102, 292 Pac. (2d) 482 (1956).

[81] *Scherck* v. *Nichols,* 55 Wyo. 4, 24, 95 Pac. (2d) 74 (1939).

[82] 55 Wyo. at 23-24; *Huffner* v. *Sawday,* 153 Cal. 86, 92, 94 Pac. 424 (1908); *St. Onge* v.

Some statements by Western State supreme courts are as follows:

> The nonuser of the ditch, or any part thereof, during that portion of the time that its use was prevented by circumstances over which the plaintiff had no control, is not evidence of abandonment of, or intention to abandon, such ditch. The prevention of its use by the defendant in any one year did not show any intention on the part of the plaintiff to abandon such ditch. The evidence all tends to rebut the idea of abandonment.[83]

> Courts appreciate the necessity of requiring that water be beneficially used, because of its importance to the agricultural industry of the state. They will, however, take into consideration the circumstances of the particular case, and will not cause to be forfeited or taken away valuable rights when the non-use of water was occasioned by justifiable causes.[84]

> In times of low water in a stream, or its tributaries, which is the common source of supply for many ditches, some will be unable to obtain their full share. If a failure of one diverting water from a stream to protest every time a shortage in his supply is occasioned by another withdrawing water to which he is not entitled, is to be construed as laches or acquiescence, amounting to an abandonment, priorities as determined under the statutes would be of little value.[85]

Use of water by trespasser.—An appropriator, by going on homestead land in an attempt to change the point of diversion and build a new ditch, did not thereby lose all prior right to the use of the water itself. "He certainly did not attempt to abandon his interest in the water."[86]

The Montana Supreme Court, which has held that a water right initiated in trespass is invalid, and that where it can only be exercised by committing a trespass it may not be asserted against the true owner of the land on which the trespass is committed, nevertheless said, "We know of no rule of law which provides for the enforced abandonment of a vested water right as a penalty for exercising it as a trespasser."[87]

Other circumstances regarding use and nonuse of water.—Findings of abandonment were denied in the following instances.

(1) Nonuse without evidence of intent. "It is well settled that mere nonuser

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Blakely, 76 Mont. 1, 14-15, 245 Pac. 532 (1926); *Federal Land Bank* v. *Morris,* 112 Mont. 445, 453, 116 Pac. (2d) 1007 (1941); *Hough* v. *Porter,* 51 Oreg. 318, 435, 95 Pac. 732 (1908), 98 Pac. 1083, 102 Pac. 728 (1909).

[83] *Welch* v. *Garrett,* 5 Idaho 639, 641, 51 Pac. 405 (1897).

[84] *In re Manse Spring & Its Tributaries,* 60 Nev. 280, 290-291, 108 Pac. (2d) 311 (1940).

[85] *Lower Latham Ditch Co.* v. *Louden Irrigating Canal Co.,* 27 Colo. 267, 273-274, 60 Pac. 629 (1900).

[86] *McGuire* v. *Brown,* 106 Cal. 660, 672, 39 Pac. 1060 (1895).

[87] *Osnes Livestock Co.* v. *Warren,* 103 Mont. 284, 295, 62 Pac. (2d) 206 (1936).

of water does not amount to abandonment, nor is mere lapse of time alone sufficient to establish an abandonment. In all cases abandonment is a question of intention."[88]

(2) On the other hand, "an expressed intention to abandon does not cause forfeiture of rights unless possession is relinquished and acts of ownership cease."[89]

(3) Temporary nonuse of water without intent to abandon.[90]

(4) Nonuse of water while laboring under uncertainties or disabilities.[91]

(5) Permissive use of water. "This being a permissive use, and in the nature of a gift, any idea of abandonment is immediately negatived."[92]

(6) Ample supply of available water. "When there is an abundance of [natural flow and storage] water in a stream being used by the different appropriators according to their adjudicated rights, one of such users would not lose or abandon his right by using any particular part of such waters."[93]

(7) Disposal of surplus water. Agreement between neighbors for the use of water flowing from each other's land, out of a supply that they both had been instrumental in bringing into the area, tended to show that it was not the intention of the parties to abandon the water supply that they had developed; and their actual use of the water for a beneficial purpose seemed conclusive of no abandonment. The fact that the surplus was allowed to flow into a previously appropriated natural stream, from which one of the parties planned to divert it, was a circumstance to be considered, but it did not shift the burden of proving an abandonment from the party claiming an abandonment.[94]

(8) Release of water without intent to recapture. No part of one's right to appropriate water and store it in a reservoir for later use is abandoned by reason of releasing excess water from the reservoir and allowing it to flow away without intent to recapture.[95]

(9) Resumption of use of water. The resumption of use of the water in 1900 was held to be some evidence that the owners did not intend to abandon the appropriation by their failure to employ it from 1893.[96] In a subsequent

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[88] *Edgemont Impr. Co.* v. *N. S. Tubbs Sheep Co.*, 22 S. Dak. 142, 145, 115 N.W. 1130 (1908); accord, *Smith* v. *Hope Mine Co.*, 18 Mont. 432, 438-439, 45 Pac. 632 (1896); *State* v. *Oliver Bros.*, 119 Nebr. 302, 305, 228 N.W. 864 (1930); *Promontory Ranch Co.* v. *Argile*, 28 Utah 398, 407-408, 79 Pac. 47 (1904); *Gill* v. *Malan*, 29 Utah 431, 437, 82 Pac. 471 (1905); *Thorp* v. *McBride*, 75 Wash. 466, 468-469, 135 Pac. 228 (1913).

[89] *Rio Grande Res. & Ditch Co.* v. *Wagon Wheel Gap Improvement Co.*, 68 Colo. 437, 441, 191 Pac. 129 (1920).

[90] *Land* v. *Johnston*, 156 Cal. 253, 256, 104 Pac. 449 (1909).

[91] Uncertainties, *Enterprise Irr. Dist.* v. *Tri-State Land Co.*, 92 Nebr. 121, 152-153, 138 N.W. 171 (1912); disabilities, *St. Onge* v. *Blakely*, 76 Mont. 1, 14-15, 245 Pac. 532 (1926).

[92] *Irion* v. *Hyde*, 107 Mont. 84, 91, 81 Pac. (2d) 353 (1938).

[93] *Masterson* v. *Kennard*, 140 Oreg. 288, 294-295, 12 Pac. (2d) 560 (1932).

[94] *Miller* v. *Wheeler*, 54 Wash. 429, 435-436, 103 Pac. 641 (1909).

[95] *Vaughn* v. *Kolb*, 130 Oreg. 506, 511, 513, 280 Pac. 518 (1929).

[96] *Thomas* v. *Ball*, 66 Mont. 161, 168, 213 Pac. 597 (1923).

decision the Montana Supreme Court stated:[97]

> The evidence in this respect merely shows the nonuser of the water for an indefinite period while the owners were laboring under certain disabilities, and the resumption of the use thereof when possession was secured by those in a position to use the water, and the fact that other parties had, in the meantime, acquired junior rights, in no manner affected the owner's right to resume the use of his property.

(10) Use of water continuously on other land. A presumption that one who abandoned his desert entry intended to abandon also his water right was overturned by the fact that he continuously thereafter used the water on other land in his possession.[98]

(11) Nonuse in absence of a substituted use. In answer to a claim of abandonment of a water right, the Hawaii Supreme Court held that mere nonuse of water, of however long duration, does not constitute an abandonment of the right, in the absence of a substituted use, or of intervening equities, or of adverse use. Furthermore, from the facts of the case, the court was not convinced that there had been a real nonuse of the right.[99]

Circumstances regarding planning and operation.—(1) Change in original plan. The mere fact that plaintiff at one time contemplated the construction of two additional reservoirs by no means indicated the abandonment of its general scheme for diversion and storage of water as contemplated in its original appropriation.[100]

(2) Use of a power plant temporarily erected because of construction difficulties respecting transmission. This does not indicate abandonment of the appropriation if reasonable diligence is used in consummating the original plan.[101]

(3) Use of natural channel to convey water. The discharge of water into a natural channel, whether dry or containing water to which other appropriators have rights, for the sole purpose of conveying it to a lower point at which the water will be recaptured, is not an abandonment of the water or the water right.[102] Obviously there is no intention of abandoning the water right. The

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[97] *St. Onge* v. *Blakely,* 76 Mont. 1, 15, 245 Pac. 532 (1926).

[98] *Hays* v. *Buzard,* 31 Mont. 74, 80-81, 77 Pac. 423 (1904).

[99] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 54-57 (1917).

[100] *Pleasant Valley Irr. & Power Co.* v. *Okanogan Power & Irr. Co.,* 98 Wash. 401, 411, 167 Pac. 1122 (1917).

[101] *State ex rel. Van Winkle* v. *People's West Coast Hydro-Elec. Corp.,* 129 Oreg. 475, 483-484, 278 Pac. 583 (1929).

[102] *Butte Canal & Ditch Co.* v. *Vaughn,* 11 Cal. 143, 151-152, 70 Am. Dec. 769 (1858); *Harriman Irr. Co.* v. *Keel,* 25 Utah 96, 115, 69 Pac. 719 (1902). "It would be a harsh rule * * * to require those engaged in these enterprises to construct an actual ditch along the whole route through which the waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch, or cañon." *Hoffman* v. *Stone,* 7 Cal. 46, *49 (1857).

process is simply the use of a particular method of exercising the water right.

(4) Maintenance of reserve supply of water. An irrigation company maintained in reserve a supply of river water in excess of a quantity to which it was entitled by contract. At all times during high water a part of a canal was kept filled with water ready for use in case its contract supply fell below the canal's needs. "This negatives the idea of an intent to abandon."[103]

(5) Diligence in making repairs. A California city had been diligent in making repairs on its pipelines; and only when the state of the system indicated that repairs would no longer be an economic method of maintaining it were replacement and reconstruction of the system undertaken. This was not evidence of abandonment of the city's diversion rights.[104]

An impounding dam in Texas had deteriorated to such an extent that very little water could be held in the reservoir. The owner had not been responsible for the breaking of the dam; and though he had allowed it to remain in a state of disrepair for some 6 years, he discussed the matter of repair on several occasions during that time. "There is no evidence of any statement or overt act by Arnett which would indicate an intention to abandon." Judgment of no willful abandonment was affirmed.[105]

Change in exercise of water right.[106]—(1) Point of diversion. Where water is put to continuous beneficial use by the holder of a water right, the appropriation is not abandoned by reason of changing the point and method of diversion.[107]

(2) Place of use. A change of place of use of a decreed water right to lands other than those upon which such water right was formerly used does not constitute abandonment.[108]

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[103] *East Side Canal & Irr. Co.* v. *United States,* 76 Fed. Supp. 836, 839 (Ct. Cl. 1948), certiorari denied, 339 U.S. 978 (1950).

[104] *Ward* v. *Monrovia,* 16 Cal. (2d) 815, 820-821, 108 Pac. (2d) 425 (1940).

[105] *Anson* v. *Arnett,* 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.). The court was dealing with Tex. Rev. Civ. Stat. Ann. art. 7544 (1954) which provides for the loss of appropriative rights that are willfully abandoned during any 3 successive years. This statute is discussed at notes 336-338 *infra.*

[106] The subject of changes in exercise of water rights constitutes one of the major parts of chapter 9. It is there shown that in various States, by statute or court decision or both, various restrictions and in certain instances prohibitions are imposed upon certain changes.

[107] *Anderson* v. *Baumgartner,* 4 Cal. (2d) 195, 196, 47 Pac. (2d) 724 (1935). One does not lose his possessory rights in water by diverting the water at a point or points other than those decreed to him. *Means* v. *Pratt,* 138 Colo. 214, 331 Pac. (2d) 805 (1958); *Lengel* v. *Davis,* 141 Colo. 94, 347 Pac. (2d) 142 (1959). "This court has held that one who has a legally established water right for irrigation purposes may change the point of diversion of water therefor without losing his priority and without causing an abandonment of the water right." *Ramsay* v. *Gottsche,* 51 Wyo. 516, 530, 69 Pac. (2d) 535 (1937); accord, *Stoner* v. *Mau,* 11 Wyo. 366, 395-396, 72 Pac. 193 (1903).

[108] *Joyce* v. *Murphy Land & Irr. Co.,* 35 Idaho 549, 554, 208 Pac. 241 (1922).

(3) Purpose of use. In an early case, the California Supreme Court stated that the mere fact that an appropriator, who had a right to use water in sawing timber, chose to apply the water to grinding wheat, was no abandonment of his title to the water right, but that the question had not been so made on the record as to require a decision on that point.[109]

(4) Conduit. A change in the method or means of conveying appropriated water from the source of supply to the place of beneficial use is not evidence of abandonment.[110] The same principle applies to a change in location of a waste ditch.[111]

Conveyance of title to water right.—In the early California litigation respecting transfers of possessory rights in lands and mining claims, it was sometimes contended that such a transfer operated as an abandonment of the possessory right. The supreme court rejected such contentions on the ground that "The elements of an abandonment are quite different from those of a sale; and where for any reason a transaction fails, as a sale, it cannot be converted into an abandonment. There is no such thing as an abandonment to particular persons, or for a consideration."[112]

This statement of the California court was repeated by the Montana Supreme Court, which added: "In the case at bar the evidence is that the parties did not intend to abandon the use of the water which they had appropriated. Their acts indicated precisely the contrary intention. They conveyed, by an instrument in writing sufficient for the purpose, the use of the water for a valuable consideration. This is not an abandonment."[113] In fact, in one of the earliest Montana water rights decisions, which was affirmed by the U.S. Supreme Court in a landmark decision, the Territorial supreme court stated that "There was no abandonment of the ditch within the meaning of the law, for when the work was suspended there was no *intention* to abandon, and the subsequent sale for a valuable consideration showed the property to be valuable, and there was, in fact, no abandonment of possession."[114]

The Oregon Supreme Court also followed the California statement, repeated in Montana, and held that, in the case at bar, the acts of the appropriator indicated no intention of abandoning the use of his water. "He sold his title for a consideration, surrendered possession, and agreed to make a proper

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[109] *McDonald* v. *Bear River & Auburn Water & Min. Co.,* 13 Cal. 220, 236-237 (1859).

[110] *Lengel* v. *Davis,* 141 Colo. 94, 347 Pac. (2d) 142 (1959); *Stoner* v. *Mau,* 11 Wyo. 366, 395-396, 72 Pac. 193 (1903).

[111] *Schumacher* v. *Brand,* 72 Wash. 543, 546-547, 130 Pac. 1145 (1913).

[112] *McLeran* v. *Benton,* 43 Cal. 467, 476 (1872); accord, *Stephens* v. *Mansfield,* 11 Cal. 363, 365-366 (1858); *Richardson* v. *McNulty,* 24 Cal. 339, 344-345 (1864).

[113] *Middle Creek Ditch Co.* v. *Henry,* 15 Mont. 558, 576-577, 39 Pac. 1054 (1895); accord, *Norman* v. *Corbley,* 32 Mont. 195, 203, 79 Pac. 1059 (1905). The sale of a water right for a valuable consideration in 1909 was held to be some evidence that the right was not abandoned in 1905. *Thomas* v. *Ball,* 66 Mont. 161, 168, 213 Pac. 597 (1923).

[114] *Atchison* v. *Peterson,* 1 Mont. 561, 565 (1872), affirmed, 87 U.S. 507 (1874).

conveyance."[115] But in the same year, the Oregon court held that a 99-year lease of the interests of co-owners of a ditch originally dug as a mining ditch, but from which some of the owners diverted small quantities of water for irrigation, was an abandonment of their irrigation rights. One owner who reserved his irrigation right was exempted from the determination.[116]

The Washington Supreme Court has said: "The mere failure to mention the water right specifically in deeds or leases is not evidence of abandonment, especially as it appears that the persons then in possession, even if not asserting title thereto, were using all of the water which flowed to the lands."[117]

Questions concerning *oral* conveyances of water rights are considered below.

The Question of Oral Sale of an Appropriative Right

In chapter 8, under "Property Characteristics—Conveyance of Title to Appropriative Right—Some Aspects of Conveyance of Appropriative Titles—Formalities of conveyance," there is mentioned the early fallacious concept that a transfer of appropriative title lacking all formalities operated as an abandonment of the water right. This matter was the subject of some controversy in California and Montana over a period of several decades.

In *Smith* v. *O'Hara*, decided in 1872, the California Supreme Court held that the claimant of a ditch and of the water right exercised by its use could not connect himself with the water rights acquired by the persons who constructed the ditch except by deed. Oral testimony tending to prove the sale of the ditch by the builders was held properly stricken by the trial court.[118] And yet, shortly thereafter in the same year, the supreme court held that an attempted sale of land which failed because of a fatal defect in the deed was not to be regarded as an abandonment by the grantor of possession of the premises. The court stated that the elements of an abandonment are quite different from those of a sale; that the failure of a transaction as a sale cannot convert it into an abandonment; and repeated a statement that had been made in two previous court opinions to the effect that there can be no such thing as abandonment to particular persons or for a consideration.[119]

The next move was in Montana, in which an appropriator of water by means of two ditches attempted to convey the ditches by unsealed and unacknowledged paper writings.[120] This case, *Barkley* v. *Tieleke*, was frequently cited as holding that an attempt to transfer an appropriative right by an imperfect conveyance operates as an abandonment of the right. In fact, the Montana Supreme Court itself said later, with respect to *Barkley* v. *Tieleke*,

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[115] *Watts* v. *Spencer*, 51 Oreg. 262, 271, 94 Pac. 39 (1908).
[116] *Davis* v. *Chamberlain*, 51 Oreg. 304, 312-313, 98 Pac. 154 (1908).
[117] *Pays* v. *Roseburg*, 123 Wash. 82, 85, 211 Pac. 750 (1923).
[118] *Smith* v. *O'Hara*, 43 Cal. 371, 376-377 (1872).
[119] *McLeran* v. *Benton*, 43 Cal. 467, 476 (1872).
[120] *Barkley* v. *Tieleke*, 2 Mont. 59, 62-65 (1874).

"The language of the territorial court in that case was, substantially, that where an appropriator of a water right transfers it by an imperfect or verbal conveyance he thereby abandons it, and his transferee in possession is to be regarded, not as a successor in interest, but only as an appropriator by recapture, and therefore as debarred from availing himself of the date of his predecessor's appropriation."[121] In *McDonald* v. *Lannen*, the doctrine of *Barkley* v. *Tieleke* was disapproved of, if not actually overruled,[122] in the following language:[123]

> We cannot comprehend the logic of the language in *Barkley* v. *Tieleke*, which is claimed generally to hold, if it does, and the decision of the supreme court of California, rendered in 1872 (see *Smith* v. *O'Hara,* 43 Cal. 373), which does hold, that an appropriator of a water right by verbal transfer abandons it, and therefore divests his transferee, to whom he has honestly intended to surrender the property, of all rights of priority he himself acquired therein. The error seems to lie in the failure to properly distinguish in this connection the true sense of the word "abandon."

The concept that an oral transfer of an appropriative right does not necessarily, of itself, operate as an abandonment of the right was further and firmly established in Montana in two subsequent decisions.[124]

In 1904, the California Supreme Court approved a statement to the effect that a verbal sale and transfer of his water right by a prior appropriator operates *ipso facto* as an abandonment of such right. It was proved in this case that an appropriator had made a verbal sale of his interest in a ditch and water, thereafter had made frequent declarations that he had no interest in such property, and much later by deed had transferred his land with appurtenances. The court held that it was competent for other claimants of water from the same source of supply to show that long before the deed of the appropriator and continuously for many years he had treated his right as abandoned, and that his verbal sale was admissible as tending to establish this fact.[125] So far as has been ascertained, the California Court has had no occasion subsequently to specifically reexamine this question.

The concept engendered in *Smith* v. *O'Hara* and *Barkley* v. *Tieleke* has been referred to in the supreme courts of several other States,[126] but so far as the

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[121] *McDonald* v. *Lannen,* 19 Mont. 78, 84, 47 Pac. 648 (1897). In the meantime, in *Middle Creek Ditch Co.* v. *Henry,* 15 Mont. 558, 572-581, 39 Pac. 1054 (1895), the supreme court questioned the doctrine of *Barkley* v. *Tieleke* and held it inapplicable.

[122] Wiel, S. C., "Water Rights in the Western States," 3d ed. vol. 1, § 555, p. 598 (1911).

[123] *McDonald* v. *Lannen,* 19 Mont. 78, 85-86, 47 Pac. 468 (1897).

[124] *Wood* v. *Lowney,* 20 Mont. 273, 277-278, 50 Pac. 794 (1897); *Featherman* v. *Hennessy,* 42 Mont. 535, 539-540, 113 Pac. 751 (1911).

[125] *Griseza* v. *Terwilliger,* 144 Cal. 456, 461-462, 77 Pac. 1034 (1904).

[126] *Hindman* v. *Rizor,* 21 Oreg. 112, 118-119, 27 Pac. 13 (1891); *Watts* v. *Spencer,* 51 Oreg. 262, 268-271, 94 Pac. 39 (1908); *Smith* v. *North Canyon Water Co.,* 16 Utah

author is aware, it was not adopted in any State except California and Montana. In addition to being clearly irrational in its disregard of the fundamental rule that abandonment is an *intentional* process, it tended to operate on the parties to the transaction with unnecessary severity. The importance of the concept in the jurisdictions in which it was adopted or considered diminished or ended long ago.[127]

Effect of Abandonment

Instant effect.—"Abandonment is a matter of intention, and operates instanter."[128] The moment the intention to abandon the right and the relinquishment of possession thereof unite, abandonment is complete.[129] An earlier statement by a Federal court respecting abandonment was that "It is a question of intention, and occurs the instant the intention is formed."[130] This of course is inaccurate, for one might form a positive intention to abandon a mining claim or water right without ever thereafter relinquishing possession. An abandonment of property held by possessory title takes place instantly when the occupant deserts it without an intention of ever reclaiming it for himself and does not care what may thereafter become of it.[131]

The moment that the abandonment of an appropriative right is complete, the rights of the appropriator "cease and determine."[132] "The abandonment [of a mining claim] determines the right of the party from the day of the act, and the property is to him as though he had never owned or occupied it."[133]

No revival of abandoned right.—After a water right has been abandoned, a subsequent sale of the right, whether made in good faith or not, cannot revive the abandoned right.[134] Neither the original appropriator nor any person now attempting to connect himself with the original right can thereafter successfully assert ownership as against other persons holding rights in the water supply.[135]

194, 200, 52 Pac. 283 (1898); *Whalon* v. *North Platte Canal & Colonization Co.*, 11 Wyo. 313, 349-350, 71 Pac. 995 (1903).

[127] The question of validity of executed parol licenses, under circumstances of equity, is an entirely different matter. This facet of conveyance of title to water rights is discussed in chapter 8, under "Property Characteristics—Conveyance of Title to Appropriative Right—Some Aspects of Conveyance of Appropriative Titles—Formalities of conveyance," in paragraph 5 thereof.

[128] *Derry* v. *Ross,* 5 Colo. 295, 300 (1880); accord, *In re Umatilla River,* 88 Oreg. 376, 382, 168 Pac. 922 (1917), 172 Pac. 97 (1918).

[129] *Wimer* v. *Simons,* 27 Oreg. 1, 13, 39 Pac. 6 (1895); *Chill* v. *Jarvis,* 50 Idaho 531, 537, 298 Pac. 373 (1931).

[130] *Inez Min. Co.* v. *Kinney,* 46 Fed. 832, 835 (C.C.D. Idaho 1891).

[131] *Farmers' Irr. Dist.* v. *Frank,* 72 Nebr. 136, 155, 100 N.W. 286 (1904).

[132] *Smith* v. *Hawkins,* 110 Cal. 122, 126, 42 Pac. 453 (1895).

[133] *Davis* v. *Butler,* 6 Cal. 510, 511-512 (1856).

[134] *Davis* v. *Gale,* 32 Cal. 26, 35 (1867); *Derry* v. *Ross,* 5 Colo. 295, 300-301 (1880); *Anderson Land & Stock Co.* v. *McConnell,* 188 Fed. 818 (C.C.D. Nev. 1910); *Watts* v. *Spencer,* 51 Oreg. 262, 272-273, 94 Pac. 39 (1908).

[135] *Kirman* v. *Hunnewill,* 93 Cal. 519, 529, 29 Pac. 124 (1892).

Where an appropriator abandons a right and thereafter reasserts his right to the abandoned appropriation, it amounts to a new appropriation.[136]

Reversion of water to which the right formerly attached.—Upon the abandonment of a water right, the water so lost again becomes *publici juris*, subject to appropriation by others.[137] Likewise, upon abandonment of the use of any part of the water to which an appropriative right attaches, that part becomes subject to new appropriation.[138]

The water rights statutes of some States provide that if the owner of land to which water has become appurtenant abandons the use of such water upon such land, such water shall become public water, subject to general appropriation.[139] Elsewhere it has been provided or said that upon abandonment by an appropriator, the water reverts to the State, whereupon it is subject to new appropriation.[140] In a Colorado case it was held that certain waters in controversy had been "abandoned to the stream," not to other individual appropriators.[141] The general question was thus summed up in 1947 by a California district court of appeal:[142]

> When water rights have been abandoned they may be claimed by other persons who are so situated as to use the water, and when a mining claim has been abandoned it returns to the public domain. In such cases the abandonment is accomplished by the affirmative acts of the claimant or user or by his failure to make use of that which he has claimed. Such abandonment leaves the property as though he had never owned or occupied it and it is subject to appropriation by any other person who desires to use it in the manner provided by law.

The Hawaii Supreme Court held that the ancient water rights held for irrigation purposes by certain individuals who had abandoned them must be regarded as having reverted to the Territory.[143] Presumably the reversion to the Territory resulted from the adjudicated ownership by the Territory of all the waters of the ordinary or normal flow of the stream, subject to vested appurtenant rights.[144]

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[136] *O'Shea* v. *Doty,* 68 Mont. 316, 320-321, 218 Pac. 658 (1923).

[137] *Wimer* v. *Simons,* 27 Oreg. 1, 6, 39 Pac. 6 (1895); *Barkley* v. *Tieleke,* 2 Mont. 59, 64 (1874). An abandoned mining claim likewise becomes *publici juris,* open to new location by the first comer. *Derry* v. *Ross,* 5 Colo. 295, 300-301 (1880).

[138] *Smith* v. *Green,* 109 Cal. 228, 235, 41 Pac. 1022 (1895).

[139] Okla. Stat. Ann. tit. 82, § 34 (1970); S. Dak. Comp. Laws Ann. § 46-5-36 (1967).

[140] Alaska Stat. § 46.15.140(a) (Supp. 1966); Wash. Rev. Code § § 90.14.160, 90.14.170, and 90.14.180 (Supp. 1970); *In re Manse Spring & Its Tributaries,* 60 Nev. 280, 286-287, 108 Pac. (2d) 311 (1940); *Bowers* v. *McFadzean,* 82 Colo. 138, 142, 257 Pac. 361 (1927).

[141] *Kaess* v. *Wilson,* 132 Colo. 443, 447-448, 289 Pac. (2d) 636 (1955).

[142] *Helvey* v. *United States Bldg. & Loan Assn. of Los Angeles,* 81 Cal. App. (2d) 647, 650, 184 Pac. (2d) 919 (1947).

[143] *Carter* v. *Territory of Hawaii,* 24 Haw. 47, 52, 68 (1917).

[144] In *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 15 Haw. 675 (1904), a

Some Other Aspects of the Doctrine

Abandonment of part of water right.—"One who has acquired the right to use of certain waters may abandon the right to use of a portion thereof in the same manner as there may be an abandonment of the whole."[145] Upon abandonment of the use of any part of the water to which an appropriative right attaches, that part becomes subject to new appropriation.[146]

A Colorado appropriator had a decree for 500 second-feet of floodwater. Later he built a reservoir in the stream channel, which made it impossible to use more than 90 second-feet of the priority. The Colorado Supreme Court held that the effect of this appropriator's voluntary act, which of necessity made it permanently impossible to use his entire decreed appropriation, was an abandonment. "We can conceive of no higher evidence of abandonment than this. It is nonuser coupled with the presumption of permanence, and proof of intent more persuasive than any mere oral declaration could possibly be. It is comparable to proof of a man's abandonment of his right hand by voluntarily cutting it off."[147]

Tenancy in common.—Several cases have come to the attention of the author involving abandonment of water rights held by tenants in common. An early mining ditch owned by several parties in Montana had been used for some years and then abandoned, one of the parties later recapturing a part of the water formerly used for mining and putting it to use for irrigating his land. The Montana Supreme Court held it to be well settled that one tenant in common might preserve the entire estate or right held in common, and that it would seem to follow that one tenant might preserve a part of the common estate or right but only, in the case of water rights, to such extent as he can beneficially use it.[148]

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contention was made that the rights of ancient taro lands, claimed to have been abandoned, had reverted by operation of law to the konohiki. The claim of abandonment was not sustained; but had it been upheld, the reversion necessarily would have been to the konohiki, against whom the ancient rights had been established. The waters of privately owned ahupuaas are in private—not public—ownership; hence in such case there would be no question of reversion to the public.

[145] *Anson* v. *Arnett,* 250 S.W. (2d) 450, 453 (Tex. Civ. App. 1952, error refused n.r.e.); accord, *Affolter* v. *Rough & Ready Irrigating Ditch Co.,* 60 Colo. 519, 520, 524, 154 Pac. 738 (1916); *Peterson* v. *Colorado River Water Conservation Dist.,* 127 Colo. 16, 24, 254 Pac. (2d) 422 (1953); *Twin Falls Canal Co.* v. *Shippen,* 46 Idaho 787, 791, 271 Pac. 578 (1928); *Cundy* v. *Weber,* 68 S. Dak. 214, 225-226, 300 N.W. 17 (1941).

The court in the *Anson* case, *supra,* was dealing with Tex. Rev. Civ. Stat. Ann. art 7544 (1954) which provides for the loss of appropriative rights that are willfully abandoned during any 3 successive years. See also the subsequently enacted Tex. Rev. Civ. Stat. Ann. art. 7519a, § 2 (Supp. 1970), dealing with the loss of part of an appropriative right. The statutes are discussed at notes 336-347 *infra.*

[146] *Smith* v. *Green,* 109 Cal. 228, 235, 41 Pac. 1022 (1895).

[147] *King* v. *Henrylyn Irr. Dist.,* 88 Colo. 8, 11-13, 291 Pac. 820 (1930).

[148] *Meagher* v. *Hardenbrook,* 11 Mont. 385, 390, 28 Pac. 451 (1891).

The Colorado Supreme Court held that water decreed to a ditch owned by tenants in common is not abandoned by reason of the failure of one of them to use his share, if it is used by other tenants in common for a beneficial purpose. This applies to a mutual irrigation company, to which the water rights of the tenants in common have been transferred in exchange for shares of capital stock.[149]

The Idaho Supreme Court declared that the law presumes that the possession of one co-tenant is the possession of them all, and that no presumption of abandonment arises in such cases. Water was annually diverted and impounded in a reservoir pursuant to appropriations made by several parties, who were held to be co-tenants in the reservoir and the impounded water. Destruction of the flume of one co-tenant led to several years' failure to use his share of the impounded water, but much of it was used by one of the others. The supreme court rejected a claim by the latter that this co-tenant had abandoned his water right.[150]

In a 1951 case, the Colorado Supreme Court declared that "Each of several water appropriators using a ditch in common may separately abandon his right thereto, and injury to one by virtue of the other's abandonment of all or part of the ditch by change of point of diversion or of place of use is not an actionable injury."[151]

Abandonment of adjudicated water right.—Whether or not a water right has been adjudicated does not determine its potentiality for abandonment. It has been long recognized that an appropriative right may be abandoned after its adjudication as well as before.[152] However, declared the Colorado Supreme Court, "Evidence of abandonment must, of course, be of facts which occur after the decree which awards the priorities, but previous conditions, declarations of the parties and the proceedings in the suit of which that decree is the result, are competent to show conditions and intent subsequent to the decree."[153] Another pertinent comment by this court in a 1953 case was that, "True, as plaintiff urges, even rights so adjudicated may be lost by abandonment, but, in such case, the priority abandoned does not continue and go to another by virtue of his use of the water; rather, the right itself ceases to

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[149] *Cache la Poudre Irrigating Co.* v. *Larimer & Weld Res. Co.,* 25 Colo. 144, 153, 53 Pac. 318 (1898).

[150] *Washington County Irr. Dist.* v. *Talboy,* 55 Idaho 382, 393, 43 Pac. (2d) 943 (1935). The court held that actual diversion and impounding of the water each year demonstrated that the water right had not been abandoned, and no other appropriator was contesting the right of the reservoir owners to divert and impound the water.

[151] *Brighton Ditch Co.* v. *Englewood,* 124 Colo. 366, 373, 237 Pac. (2d) 116 (1951).

[152] See *St. John Irrigating Co.* v. *Danforth,* 50 Idaho 513, 516, 298 Pac. 365 (1931). See also *State* v. *Hidalgo County Water Control & Improvement Dist. No. 18,* 443 S.W. (2d) 728, 761 (Tex. Civ. App. 1969, error refused n.r.e.).

[153] *Colorado Springs* v. *Yust,* 126 Colo. 289, 293, 249 Pac. (2d) 151 (1952). See *Peterson* v. *Colorado River Water Conservation Dist.,* 127 Colo. 16, 24, 254 Pac. (2d) 422 (1953).

exist and the water theretofore properly claimed under it goes to fill subsequent appropriations in their order of decreed priority."[154]

In another Colorado case, it was held that a junior appropriator who would benefit from the declaration of abandonment of a senior priority has the right to bring an action praying for a judgment declaring such right to have been abandoned, and without uniting all other appropriators from the same source of supply.[155]

Abandonment of inchoate appropriative right.—The last topic in chapter 8 is entitled "Inchoate Appropriative Right"—an incomplete appropriative right that ripens into a complete right when the last step required by law has been taken. Questions of abandonment of inchoate rights have been raised from time to time. Although the relationship currently appears to be of very little, if any practical importance, it merits some brief mention.

In Colorado the possibility of abandoning a conditional decree of appropriation was the subject of judicial debate and of criticism by a well-known water law authority.[156] In the opinion in a 1923 decision the previous literature was discussed, but the court found it unnecessary to decide the question. No subsequent litigation in Colorado has come to the attention of the author.[157] The opinion in a case decided by the Wyoming Supreme Court in 1940 contains the statement that "No testimony was offered to show any intention of abandonment, and it has been held that in order that an initiated, inchoate water right may be held to be abandoned, such intention must be shown." The court also said that "while there may be exceptions, the statute of non-user seems, primarily at least, to apply only to a perfected right in case a water right is initiated under a permit and not to an inchoate right, since the statute gives the State Engineer the right not only to extend but also to cancel a permit."[158]

A permit to appropriate water, issued by the State administrator under the

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[154] *Granby Ditch & Res. Co.* v. *Hallenbeck,* 127 Colo. 236, 241-242, 255 Pac. (2d) 965 (1953).

[155] *Affolter* v. *Rough & Ready Irrigating Ditch Co.,* 60 Colo. 519, 521-522, 154 Pac. 738 (1916).

[156] *Conley* v. *Dyer,* 43 Colo. 22, 28-29, 95 Pac. 304 (1908); *Crawford Clipper Ditch Co.* v. *Needle Rock Ditch Co.,* 50 Colo. 176, 182, 114 Pac. 655 (1911); *Bieser* v. *Stoddard,* 73 Colo. 554, 560, 216 Pac. 707 (1923); Kinney, C. S., "A Treatise on the Law of Irrigation and Water Rights," 2d ed., vol. 2, § § 1102 and 1118 (1912).

[157] Colorado legislation enacted in 1969 defines "abandonment of a *conditional water right*" as the "termination of a conditional water right as a *result of the failure to develop with reasonable diligence* the proposed appropriation upon which such water right is to be based." This is to be contrasted with the definition of "abandonment of a *water right*" which is the "termination of a water right in whole or in part as a *result of the intent* of the owner thereof *to discontinue permanently* the use of all or part of the water available thereunder." [Emphasis added.] Colo. Rev. Stat. Ann. § § 148-21-3 (13) and (14) (Supp. 1969). In these regards, see chapter 8 at notes 736-742.

[158] *Campbell* v. *Wyoming Development Co.,* 55 Wyo. 347, 400, 402, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

statutory procedure of the majority of Western States, is an inchoate appropriative right. Because of the nature of these formal procedures, questions of abandonment of such an inchoate right probably seldom arise. For example, the California Water Code provides that if the work authorized by a permit is not commenced, prosecuted, and completed or the water applied to beneficial use as contemplated in the permit and in accordance with the statute "and the rules and regulations" of the State Water Resources Control Board, the latter (after a hearing) may revoke the permit and declare the water subject to further appropriation.[159] The rules and regulations of the Board provide that "Prior to issuance of license, annual progress reports shall be filed promptly by permittee upon forms which will be provided by the board."[160] If a permittee should actually abandon his project by relinquishing possession with the intention of never resuming it, the Board presumably would be alerted by the failure to receive an annual report—or by a protest from some interested party—to the need for an investigation and a decision as to revoking the permit. In this statutory proceeding, then, the inchoate right evidenced by the permit would end with the permit's revocation, not with the act of abandonment.[161]

Abandonment by municipality.—The city of Cheyenne at the time of its decree was diverting 9 second-feet of water through a ditch, which was subsequently abandoned and the water diverted instead through pipelines. It was contended that the city had abandoned by nonuse the 9 second-feet of water formerly carried by the city ditch. "Counsel for the city contend that in order to find that this water was abandoned, an intent to abandon must be shown, and that this has not been done in this case. We agree that no such intent has been shown, and that it is necessary to be shown in the ordinary case, in order to prove abandonment." Furthermore, nonuse of a particular ditch or other conveyance is distinguished from nonuse of the water formerly carried in it.[162]

In a condemnation suit in Texas, to which the City of Corpus Christi was not a party, the jury found that this city had abandoned most of its right to the waters of Nueces River under a permit from the State Board of Water Engineers. The court of civil appeals expressed grave doubts as to the sufficiency of the evidence to support the jury's finding of abandonment. Nor did it seem to the court that the failure of the city to make immediate use of all the water specified in the permit would support the hypothesis of "willful abandonment" of the water right. "A city may be reasonably expected to grow

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[159] Cal. Water Code § 1410 (West Supp. 1970).

[160] Cal. Admin. Code, tit. 23, § 782 (1969).

[161] Compare *Rocky Ford Irr. Co.* v. *Kents Lake Res. Co.*, 104 Utah 216, 220-221, 140 Pac. (2d) 638 (1943).

[162] *Van Tassel Real Estate & Live Stock Co.* v. *Cheyenne*, 49 Wyo. 333, 349, 54 Pac. (2d) 906 (1936).

and develop over a period of years, and if it does so, its demands for water, as well as other necessaries, would naturally increase."[163]

An interstate case.—The State of Washington brought suit in the United States Supreme Court against the State of Oregon, charging that Oregon was wrongfully diverting the waters of Walla Walla River to the prejudice of inhabitants of Washington. The special master appointed by the Supreme Court found that to limit the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users. "These findings are well supported by the evidence."[164]

Much of the Court's opinion is devoted to this finding of the special master and its implications, such, for example, as the fact that there would be little benefit to Washington if all the waters in controversy were not obstructed within Oregon—that in all likelihood they would be lost in the deep gravel of the channel. However, abandonment was one of the issues. In this regard, the Court said:[165]

> A priority once acquired or put in course of acquisition by the posting of a notice may be lost to the claimant by abandonment or laches. There must be no waste in arid lands of the "treasure" of a river. * * * The essence of the doctrine of prior appropriation is beneficial use, not a stale or barren claim. Only diligence and good faith will keep the privilege alive. * * * When these are shown to be lacking, the water right will fail, or fail to the extent that equity requires. Such, according to the master, has been the fate of the Gardena [Washington] filing. True, a court in Washington determined in 1928 that the priority was to be recognized as of 1892. The decree was of no force against Oregon or Oregon appropriators not parties to the suit. * * * As to them priority had lapsed, if the claimant had forfeited it by inequitable conduct. The label of the acts is unimportant, whether laches or estoppel or abandonment. What matters is their quality. Persistence in such conduct may extinguish the equitable right. It may bar an equitable remedy. Irrigators in another state, unaffected by the decree, are at liberty to show the facts, and upon the basis of that showing to fix their user of the stream.
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> Laches and abandonment, chargeable to the Gardena users, are found in the report. * * *
>
> We have dwelt upon the question of abandonment, for it has been much considered in the report and in the arguments of counsel. In so doing we have not meant to hold that, in the absence of abandonment, there would be an inequitable apportionment calling for relief by injunction, unless indeed the flow of the stream should unexpectedly increase. We are to bear in mind steadily that

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[163] *Lower Nueces River Water Supply Dist.* v. *Cartwright*, 274 S.W. (2d) 199, 208 (Tex. Civ. App. 1954, error refused n.r.e.).

[164] *Washington* v. *Oregon*, 297 U.S. 517, 523 (1936).

[165] *Id.* at 527-529.

> the controversy is between states, and not between private litigants; the burden and quantum of the proof being governed accordingly.

The Supreme Court ordered that a decree be entered confirming the report of the master and dismissing Washington's complaint upon the merits.

Some Statutory Provisions

The laws relating to abandonment have generally been a matter of court-created law. There are, however, some States that have statutory provisions expressly dealing with the subject. Following is a summary of the provisions in seven States. These provisions generally appear to be essentially a codification of the common law principles. The abandonment provisions of five of these seven States (Alaska, Montana, Oklahoma, South Dakota, and Washington) are like court-created abandonment in that they do not specify any particular length of time. Colorado provides for a rebuttable presumption of abandonment arising from nonuse for a term of years, for purposes of tabulating water rights. Texas provides for the loss of a water right following willful abandonment for a term of years. Some of the statutes provide for declarations of abandonment by State agencies.

Alaska.—If an appropriator, with an intention to abandon, does not beneficially use all or part of his appropriated water, the Commissioner of Natural Resources may declare the appropriation wholly or partially abandoned and revoke the certificate of appropriation. Appropriations so abandoned revert to the State and the water becomes unappropriated water.[166]

Colorado.—The statute defines abandonment of a water right as the whole or partial termination of the water right as a result of the owner's intent to permanently discontinue the use of all or part of the water available under his right.[167] For purposes of the procedures for tabulating water rights by the State Engineer and the division engineers, when the person entitled to use water fails, for 10 years or more, to beneficially apply the water available under a water right, this creates a rebuttable presumption of abandonment of a water right with respect to so much of the available water as has not been used.[168]

Montana.—When an appropriator or his successor in interest abandons and ceases to use the water for a useful or beneficial purpose, the right ceases. Questions of abandonment shall be questions of fact and shall be determined as other questions of fact.[169] Referring to an earlier version of this statute, the Montana Supreme Court declared:[170]

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[166] Alaska Stat. §46.15.140(a) (Supp. 1966).

[167] Colo. Rev. Stat. Ann. § 148-21-3(13) (Supp. 1969).

[168] *Id.* § 148-21-28(2)(j). With respect to so-called abandonment of conditional water rights, see note 157 *supra* and chapter 8 at notes 736-742.

[169] Mont. Rev. Codes Ann. § 89-802 (1964).

[170] *Thomas* v. *Ball,* 66 Mont. 161, 213 Pac. 597, 599-600 (1923).

> To constitute abandonment there must be a concurrence of act and intent—the relinquishment of possession and the intent not to resume it for a beneficial use * * *.
>
> * * * *
>
> As we understand this record, there is not any evidence of abandonment except the bare fact of nonuser; while, on the contrary, the resumption of the use of the water in 1900 is some evidence, however slight, that the owners did not intend to abandon the appropriation by their failure to employ it from 1893, and the sale of the right * * * for valuable consideration in 1909 is some evidence that they had not abandoned it in 1905.

Oklahoma.—If the owner of land to which water is appurtenant abandons the use of the water upon such land, such water shall become public water subject to appropriation.[171]

South Dakota.—If the owner of land to which water is appurtenant abandons the use of the water upon such land, such water shall become public water subject to appropriation.[172]

Texas.—If any lawful appropriation or use of water is willfully abandoned during any 3 successive years, the right to use the water shall be forfeited and the water shall be again subject to appropriation.[173] A Texas court of civil appeals has declared that under this provision the appropriator must *intend* to abandon the water. Said the court, "Mere nonuser for the three-year period prescribed by Article 7544 without a wilful intention to abandon will not result in the loss of rights under a permit. This seems clear from the language of the statute which uses the words, 'wilfully abandoned.' "[174]

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[171] Okla. Stat. Ann. tit. 82, § 34 (1970).

[172] S. Dak. Comp. Laws Ann. § 46-5-36 (1967).

[173] Tex. Rev. Civ. Stat. Ann. art. 7544 (1954).

[174] *Anson* v. *Arnett,* 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.), discussed in *Texas Water Rights Comm'n* v. *Wright,* 464 S.W. (2d) 642, 644, 646 (Tex. Sup. Ct. 1971), in which the Texas Supreme Court said this statute "authorized the termination of water permits upon proof of three years of willful abandonment." *Id.* at 646.

A Texas court of civil appeals did not believe that failure of a city to make immediate use of all water specified in its permit would support the hypothesis of "wilful abandonment." "A city may be reasonably expected to grow and develop over a period of years, and if it does so, its demands for water, as well as other necessaries, would naturally increase." *Lower Nueces River Water Supply Dist.* v. *Cartwright,* 274 S.W. (2d) 199, 208 (Tex. Civ. App. 1954, error refused n.r.e.).

Another Texas statute, relating to *partial* loss of a water right, provides that if any portion of the water authorized to be diverted and used under a permit or certified filing is not beneficially used for 10 consecutive years, and if the holder of the right has not been diligent in applying the unused portion of the water to beneficial use and has not been justified in such nonuse or *does not have a bona fide intention of putting the unused water to beneficial use* under the terms of the permit or certified filing *within a reasonable time* after a hearing by the Texas Water Rights Commission, then the Commission shall cancel such permit or certified filing with respect to the unused

Washington.—Any person entitled to divert or withdraw waters of the State through any appropriation authorized by legislation prior to the enactment of chapter 117, Laws 1917, or by custom or general adjudication, or any "person hereafter [after July 1, 1967] entitled to divert or withdraw waters of the state through an appropriation authorized under" the pertinent statutes, who abandons the same, shall relinquish such right or portion thereof, which right shall revert to the State and the affected waters become available for appropriation.[175]

Statutory Forfeiture

Rights Subject to Forfeiture

Chiefly appropriative rights.—The statutory provisions governing forfeiture of water rights generally pertain solely to appropriative rights.[176] Failure to exercise an appropriative right to use water of a watercourse subjects it to loss by forfeiture pursuant to the statutory provisions.[177]

Generally not riparian rights.—(1) The riparian right, in jurisdictions in which it has full recognition, is a right in perpetuity whether it is exercised or not, in the absence of loss or separation from the land in one of the ways described in chapter 10.[178] A number of State statutes may limit or cut off unused riparian rights as of a certain date or time, as against appropriators.

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portion of the water. Such water shall again be subject to appropriation. Tex. Rev. Civ. Stat. Ann. art. 7519a, § 2 (Supp. 1970). The Texas Supreme Court has said that an action to partially cancel a permit or certified filing under this section "allows the defenses of bona fide *intention*, diligence, and justification." [Emphasis added.] *Texas Water Rights Comm'n* v. *Wright*, *supra* at 650. Tex. Rev. Civ. Stat. Ann. art. 7519a, § 1, relating to *complete* cancellation of permits or certified filings, and § 2 (Supp. 1970) and the *Wright* case, as well as article 7544 mentioned above, are discussed later under "Abandonment and Forefeiture Interrelated—Some State Situations—Texas."

[175] Wash. Rev. Code § § 90.14.160 and 90.14.180 (Supp. 1970), enacted in 1967. Section 90.14.170, relating to abandonment of rights to divert or withdraw State waters by virtue of ownership of land abutting a stream, lake, or watercourse, is noted under "Rights in Watercourses Subject to Abandonment," *supra*. The other portions of these three provisions are noted in the subtopics "Rights Subject to Forfeiture—Generally not riparian rights" and "Statutory Provisions: By States—Washington" under "Statutory Forfeiture," *infra*.

[176] Regarding the loss of prescriptive rights by statutory forfeiture, see "Prescription—Loss of Prescriptive Rights," *infra*.

[177] In addition, in California, the Water Resources Control Board is given authority to revoke a license, subject to judicial review, "at any time" after its issuance if any of its terms and conditions are not being observed. Cal. Water Code § § 1675-1677 (West Supp. 1970). Most State statutes, however, have no similar provision for revocation or cancellation of a certificate or license as such.

[178] See "The Riparian Right—Property Characteristics—Severance of Riparian Right from Land."

(This is also described in chapter 10.[179]) But in only two States that have come to the attention of the author (Kansas and Washington) may they subsequently become subject to statutory forfeiture for nonuse for a certain period of time.[180]

(2) Kansas. Although nowhere in the 1945 Kansas water rights statute or in the 1957 amendment thereof is the term "riparian" used, the terms "common law claim" and "vested right" are employed.[181] "Vested right" is the right of a common law or statutory claimant to continue the use of water that was actually applied to beneficial use on or before the effective date of the 1945 act, or within a reasonable time thereafter for works then under construction;[182] and it may not be impaired *except for nonuse.*[183] The statute also provides that every water right of *every kind* shall be deemed abandoned and shall terminate when, without due and sufficient cause, no lawful beneficial use is made of water under such right for 3 successive years.[184] Thus, without calling a vested common law claim to the use of surface water a riparian right, the Kansas statute provides for cancellation and termination of such right, as well as other rights, in the event the holder fails, without good cause, to make beneficial use of the water over a consecutive 3-year period. This provision has not been construed by the Kansas Supreme Court.

(3) Washington. Washington legislation enacted in 1967 provides that any person entitled to divert or withdraw waters of the State by virtue of his ownership of land abutting a stream, lake, or watercourse, who voluntarily fails, without sufficient cause (as defined in the statute), to beneficially use all or any part of such right for any period of 5 successive years after the act's effective date (July 1, 1967), shall relinquish such right or portion thereof, which shall revert to the state and the affected waters become available for appropriation.[184a] Certain uses of water relating to power development, reserve

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[179] See the subtopics "Cutoff dates" and "Unused riparian rights" under "The Riparian Right–Measure of the Riparian Right–As Against Appropriators."

[180] Alaska's statutory forfeiture provision applicable to appropriative rights may apply to any appropriative rights that *were formerly riparian rights* by virtue of another provision that apparently purports to convert riparian rights to appropriative rights as of the effective date of the 1966 Water Use Act. This is discussed in chapter 6 under "Interrelationships of the Dual Water Rights Systems–The Status in Summary: By States–Alaska." This legislation has not been construed by the Alaska Supreme Court.

[181] Kans. Laws 1945, ch. 390, Laws 1957, ch. 539, Stat. Ann. § 82a-701 *et seq.* (1969).

[182] Kans. Stat. Ann. § 82a-701 (1969). With respect to claimants *without* vested rights, see chapter 10 at notes 522a-523.

[183] Kans. Stat. Ann. § 82a-703 (1969).

[184] *Id.* § 82a-718.

[184a] Wash. Rev. Code § 90.14.170 (Supp. 1970). Sections 90.14.160 and 90.14.180 (containing similar language relating to appropriations authorized by the legislature prior to enactment of Laws 1917, ch. 117, or by custom or general adjudication, or appropriations by any "person hereafter [after July 1, 1967] entitled to divert or withdraw waters of the state . . . authorized under" the pertinent statutes) are noted under "Statutory Provisions: By States–Washington," *infra.* The other portions of these

supplies, determined future developments, municipal supplies, and waters not subject to appropriation are expressly exempted from these provisions.[185] This legislation has not been construed by the Washington Supreme Court.

(4) South Dakota. The South Dakota Supreme Court held in 1913 that the forfeiture provision then in force[186] (included in an early water administration act being considered by the court)—which provided that "when the party entitled to the use of water" failed to beneficially use all or any portion of the waters that he claimed for a period of 3 years, such unused waters reverted to the public—was "void as to a riparian owner but valid as to one who is no more than an appropriator without riparian right. A riparian right to use such waters of a flowing stream cannot be lost by disuse."[187]

In *Belle Fourche Irrigation District* v. *Smiley* (upholding the validity of the 1955 reenactment of the State's water rights law which, among other things, undertook to eliminate both unused riparian rights existing at the time of enactment and the future acquisition of riparian rights as against appropriative rights)[188] the South Dakota Supreme Court noted generally that in the 1913 case, "The act there considered contained no provisions comparable to existing statutory provisions defining, determining and protecting vested rights * * *."[189]

In this 1955 legislation, the legislature had also reenacted the forfeiture provision, not considered in the *Belle Fourche* case, to provide that when any person entitled to *appropriate* water fails to beneficially use the water, in whole or in part, for the purpose of which it was appropriated, for 3 years, such unused appropriated water shall revert to the public and be regarded as unappropriated public water.[190] Thus the present forfeiture statute of South Dakota pertains specifically to appropriative rights and it mentions no other kind of water right. Riparian rights, therefore, are not subject to it.

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three statutes are noted in the subtopics "Rights in Watercourses Subject to Abandonment" and "Some Statutory Provisions" under "Abandonment," *supra.*

[185] Wash. Rev. Code §90.14.140 (Supp. 1970).

[186] S. Dak. Laws 1907, ch. 180, §46.

[187] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 268, 143 N.W. 124 (1913).

[188] The legislature defined and protected as "vested rights" the common law riparian rights to the continued use of water to the extent of actual application thereof to beneficial use at the time of enactment, or within 3 years immediately prior thereto, or within a reasonable time thereafter for works then under construction. Thereafter, all surplus unappropriated flowing waters were subject to appropriation under the statute. S. Dak. Laws 1955, ch. 430, Comp. Laws Ann. §46-1-9 (1967). This legislation includes the additional qualifications that vested rights include rights granted before July 1, 1955, by court decree, as well as uses under diversions and applications of water prior to the 1907 water law and not subsequently abandoned or forfeited. Domestic uses, apparently both used and unused, are included in the definition of "vested rights" and are exempt from the appropriation permit requirements."

[189] *Belle Fourche Irr. Dist.* v. *Smiley*, 176 N.W. (2d) 239, 244 (S. Dak. 1970).

[190] S. Dak. Comp. Laws Ann. §46-5-37 (1967).

(5) California. The California courts frowned upon the legislature's one attempt to subject the riparian right to forfeiture for failure to exercise the right, and expressed it in several decisions. Eventually the legislature discarded the judicially objectionable provision.

The California Water Commission Act of 1913[191]—with amendments and deletions, reenacted in 1943 as a part of the present Water Code—contained a provision to the effect that nonapplication of water to riparian land for any continuous period of 10 years after passage of the act should be conclusive presumption that the water was not needed thereon for any useful or beneficial purpose, such water thereupon being subject to appropriation. After twice deciding that the provision had no application to the riparian rights in litigation, which had been exercised for many years,[192] the California Supreme Court stated that the legislature was not justified in taking any portion of a vested property right from one person and investing it in another; and that while not saying that riparian rights might not under proper circumstances yield to the police power, this legislation did not purport to be an exercise of such power for any purpose.[193]

Shortly thereafter, in 1928, the voters added a section to the California constitution declaring, among other things, that "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 * * *."[194] In one of the early major decisions construing and applying the constitutional amendment, the California Supreme Court held the legislative provision contrary to the letter and spirit of the constitutional amendment, which "expressly protects the riparian not only as to his present needs, but also as to future or prospective reasonable beneficial needs."[195] Thus after having, on three occasions, expressed at least by *dicta* its belief that the provision was invalid, the supreme court now expressly held the provision unconstitutional. This portion of the section was omitted from the Water Code when enacted in 1943.

Not pueblo water rights.—The pueblo water right, recognized in California and New Mexico, has been expressly said to be not subject to statutory

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[191] Cal. Stat. 1913, ch. 586, § 11.

[192] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 115-116, 252 Pac. 607 (1926); *Scott* v. *Fruit Growers' Supply Co.*, 202 Cal. 47, 54, 258 Pac. 1095 (1927).

[193] *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.*, 202 Cal. 56, 67-69, 259 Pac. 444 (1927).

[194] Cal. Const. art. XIV, § 3.

[195] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 530-531, 45 Pac. (2d) 972 (1935). The California Supreme Court discussed the history of the cases under the amendment in *Joslin* v. *Marin Mun. Water Dist.*, 67 Cal. (2d) 132, 429 Pac. (2d) 889, 60 Cal. Rptr. 377 (1967).

forfeiture in California;[196] and no method by which the right can be lost has yet been declared by the high courts of either State.

Not ancient Hawaiian water rights.—In Hawaiian water law there is no provision for loss of surface water rights by statutory forfeiture, which applies to appropriative water rights in most Western States.[197]

Forfeiture Statutes

Cancellation of unperfected rights to appropriate water generally not included.—This subject is discussed in chapter 7.[198] It is there pointed out that most Western States, through legislative declarations relating to forfeiture and abandonment, take cognizance of inactive appropriative rights *after their maturity*, but that statutes of some States are silent as to the status of a permit the requirements of which are not being met by the holder, and as to what should be done about it. Several States have self-executing statutes terminating the unperfected rights of a permittee who fails to comply with the legislative requirements. Still other statutes call for direct action upon the part of the State administrator, subject to judicial review.

Inchoate appropriative right.—Very little on the statutory forfeiture of an inchoate appropriative right has come to light in the course of this study.[199] In 1940 the Wyoming Supreme Court stated that "while there may be exceptions, the statute of non-user seems, primarily at least, to apply only to a perfected right in case a water right is initiated under a permit and not to an inchoate right, since the statute gives the State Engineer the right not only to extend but also to cancel a permit."[200] Compare the previous discussion under "Abandonment—Some Other Aspects of the Doctrine—Abandonment of inchoate appropriative right."

Perfected appropriative rights.—The ensuing discussion under this topic,

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[196] *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 75-76, 142 Pac. (2d) 289 (1943). See in chapter 11 "Pueblo Water Rights in California—Extent of the Pueblo Water Right—Superiority of the Pueblo Water Right—Preservation of the pueblo right."

[197] See, in chapter 12, "Some Aspects of the Ancient Hawaiian Surface Water Right." See also Hutchins, W. A., "The Hawaiian System of Water Rights" 140 (1946).

With respect to extinguishment of rights to ground waters, see Haw. Rev. Stat. § 177-18 (1968), mentioned in chapter 20 *infra.*

[198] See "Methods of Appropriating Water of Watercourses—Current Appropriation Procedures—Administrative—Procedural steps in appropriating water—(4) Permit to appropriate water," para. d.

[199] With respect to so-called "abandonment" of unperfected, or conditional, water rights in Colorado, see, in chapter 8, "Inchoate Appropriative Right—Conditional Decrees and Water Rights in Colorado." See also the discussion of the Nebraska forfeiture statute at notes 217-219 *infra.* The North Dakota statute contains language similar to that of the Nebraska statute. See note 226 *infra.*

[200] *Campbell* v. *Wyoming Dev. Co.,* 55 Wyo. 347, 402, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

"Statutory Forfeiture," generally relates only to completed and perfected appropriative rights.

Classification of statutes.—The State statutes relating to forfeitures and so-called abandonments generally pertain to nonuse of a water right for a specified period of years. Some also provide for administrative declarations of abandonment or forfeiture or both. A subsequent topic, "Abandonment and Forfeiture Distinguished," points out the fundamental differences between these two ways of losing appropriative rights and the extent to which some of the State statutes and court decisions have confused them.

Prior to the adoption of California's Water Commission Act[201]—its first State administrative water rights statute—there was no statutory period resulting in forfeiture for nonuse. However, the State supreme court held that as 5 years was the period fixed by law for the ripening of an adverse possession into a prescriptive title, and was also the period declared by law after which a prescriptive right depending upon enjoyment was lost for nonuse, "for analogous reasons we consider it to be a just and proper measure of time for the forfeiture of an appropriator's rights for a failure to use the water for a beneficial purpose."[202] This 5-year period was replaced by a 3-year period in the Water Commission Act and its successor Water Code with respect to water of surface and subterranean watercourses appropriated under a State license or permit,[203] but it is still in effect with respect to ground water not flowing in a known and definite channel.[204]

Statutory Provisions: By States

In the following abstracts of State enactments, the provisions for administrative declarations are mentioned. Such provisions are discussed later under "Establishment of Forfeiture: Administrative Procedures."

Note the varying use of the terms "abandonment" and "forfeiture" in these enactments. This is commented upon later under "Abandonment and Forfeiture Distinguished" and "Abandonment and Forfeiture Interrelated."

Alaska.—If an appropriator voluntarily fails or neglects, without sufficient cause, to use all or part of his appropriated water for 5 successive years, the Commissioner of Natural Resources may declare an appropriation to be wholly or partially forfeited and shall revoke the certificate of appropriation.[205]

Arizona.—If the owner of a right to the use of water ceases or fails to use the appropriated water for 5 successive years, the right to the use

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[201] Cal. Stats. 1913, ch. 586.

[202] *Smith* v. *Hawkins*, 110 Cal. 122, 126-127, 42 Pac. 453 (1895).
See also note 219 *infra* regarding Nebraska.

[203] Cal. Water Code § 1241 (West 1956).

[204] *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 933-934, 207 Pac. (2d) 17 (1949).

[205] Alaska Stat. § 46.15.140(b) (Supp. 1966).

shall cease and the water shall revert to the public and be again subject to appropriation.[206]

California.—When an appropriator, or his successor in interest, ceases to use the appropriated water for a useful or beneficial purpose, the right ceases.[207]

When the holder of a vested right to water fails to beneficially use all or any part of the water claimed by him, for the purpose for which it was appropriated or adjudicated, for 3 successive years, such unused water reverts to the public and shall be regarded as unappropriated public water.[208]

Special provisions apply to nonuse of water rights appurtenant to lands held by the United States in trust for Indians.[209] Others apply to nonuse of appropriative irrigation water rights by reason of crop control or soil conservation contracts with the United States; and to other cases of hardship prescribed by rule by the State Water Resources Control Board. In the cases of hardship or contracts with the United States, the forfeiture period shall be extended no more than 10 years or for the duration of any such contract if less than 10 years.[210]

Colorado.—None.[211]

Hawaii.—None.[212]

Idaho.—All rights to the use of water, whether acquired under this statute or otherwise, not beneficially used for 5 years for the purpose for which appropriated shall be lost and forfeited. Any right to the use of water lost through nonuse or forfeiture shall revert to the State and be again subject to appropriation under the statute. The statute provides procedures authorizing the State Reclamation Engineer to extend the time for forfeiture for an additional period not to exceed 5 years upon a showing of good and sufficient cause for the nonuse.[213]

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[206] Ariz. Rev. Stat. Ann. § 45-101(C) (1956).

[207] Cal. Water Code § 1240 (West 1956). This section of the Water Code reenacted in 1943, practically verbatim, a section of the California Civil Code enacted in 1872 reading: "Sec. 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases."

[208] Cal. Water Code § 1241 (West 1956). This section of the Water Code reenacted in 1943, in much the same language, § 20a which was added to the Water Commission Act by Stats. 1917, ch. 544, § 2, and read, "When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated, or adjudicated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water."

[209] Cal. Water Code § 1241.5 (West Supp. 1969).

[210] *Id.* § 1241.6.

[211] With respect to so-called "abandonment" of unperfected, or conditional, water rights in Colorado, see, in chapter 8, "Inchoate Appropriative Right—Conditional Decrees and Water Rights in Colorado."

[212] With respect to extinguishment of rights to ground water, see Haw. Rev. Stat. § 177-18 (1968), mentioned in chapter 20.

[213] Idaho Code Ann. § 42-222(2) (Supp. 1969).

The Idaho Supreme Court held that to consummate a forfeiture under the statute, nonuse of the water must have been continuous for 5 *consecutive* years.[214]

Kansas.—If an appropriator fails to continuously apply appropriated water to lawful and beneficial uses, for 3 years, without due and sufficient cause, such failure shall constitute a forfeiture and surrender of the right.[215]

"Every water right of every kind" shall be deemed abandoned and shall terminate if, without due and sufficient cause, there is no lawful, beneficial use of the water under such right for 3 successive years. The statute provides procedures for declarations of abandonment and termination.[216]

Montana.—None.

Nebraska.—When an appropriator, or his successor in interest, ceases to use the water appropriated for some beneficial or useful purpose, the right ceases. The statute provides procedures for declarations of forfeiture and annulment of any water appropriation that has not been used for some beneficial purpose or, having been so used at one time, has ceased to be used for such purpose for more than 3 years.[217]

The constitutionality of this statute providing procedures for declaring

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[214] *Carrington* v. *Crandall,* 65 Idaho 525, 531, 147 Pac. (2d) 1009 (1944).

[215] Kans. Stat. Ann. §42-308 (1964).

[216] *Id.* §82a-718 (1969).

[217] Nebr. Rev. Stat. §§46-229 to -229.05 (1968).

The Nebraska Supreme Court appears to have indicated in a 1956 case that this statute does not affect the question of the *perfection* of an appropriative right based on an application since the 1911 enactment. *North Loup River Pub. Power & Irr. Dist.* v. *Loup River Pub. Power Dist.,* 162 Nebr. 22, 26-28, 74 N.W. (2d) 863 (1956). ("The granting of the application * * * is a conditional right which becomes a perfected and completed appropriation only when the works are completed and the waters put to a beneficial use in compliance with the conditions and limitations of the grant." 162 Nebr. at 28.) The court said: "[W]e take note of the fact that the irrigation law of this state was substantially changed in 1895 in that the department was then charged with the duty of adjudicating the rights of appropriators. Laws 1895, c. 69, §16, p. 248. It is evident, also, that there were numerous applications not perfected and many appropriations which had been abandoned that required legislative attention. The Legislature in 1911 directed the department to proceed to adjudicate all rights of appropriators which had not been adjudicated, and directed the department to forfeit and annul all appropriation rights where it appeared that any water appropriation had not been used for some beneficial or useful purpose, or having been so used at one time had ceased to be used for such purpose for more than 3 years. Laws 1911, c. 153, §17, p. 503. We do not construe this to mean that the statute requires that an appropriator is necessarily limited to such period of 3 years in putting appropriated waters to beneficial use under a new application. We think the time in which such waters must be put to a beneficial use must be determined from the terms, conditions, and limitations of the adjudicated appropriation right." 162 Nebr. at 27-28. [Regarding extant provisions concerning the perfection of water appropriations, see Nebr. Rev. Stat. §46-238 (1968).] For some subsequent discussions of the statute, see *State* v. *Nielsen,* 163 Nebr. 372, 380-387, 79 N.W. (2d) 721 (1956); *Hickman* v. *Loup River Pub. Power Dist.,* 176 Nebr. 416, 126 N.W. (2d) 404, 407 (1964).

forfeitures of water appropriations because of failure to make beneficial use of the water was sustained by the Nebraska Supreme Court.[218] The procedure was validly applied to applications to appropriate water made before the enactment as well as after it.[219]

Nevada.—When an owner fails to use the water for the beneficial purposes for which the right exists for any 5 successive years, the right shall be deemed as having been abandoned and the owner shall forfeit all the water rights, easements, and privileges appurtenant thereto. Such unused water is again subject to appropriation.[220] The Nevada Supreme Court approved the application of this statute to appropriative rights acquired *after* the enactment of this provision.[221]

New Mexico.—When the party entitled to the use of water fails to beneficially use all or any part of the water for the purpose for which the vested right was appropriated or adjudicated, for 4 years, such unused water shall, if the appropriator fails to beneficially use the water for 1 year after notice and declaration of nonuse given by the State Engineer, revert to the public and be regarded as unappropriated water.[222] Upon a showing of reasonable cause for delay or nonuse or upon a finding by the State Engineer that it is in the public interest, the State Engineer is authorized to grant extensions of time, not to exceed 1 year for each extension, in which to apply the water to beneficial use. The forfeiture shall not occur for certain stated exceptions nor shall it necessarily occur if circumstances beyond the control of the owner caused the nonuse such that the water could not be diligently placed to beneficial use.[223] A lawful exemption from the requirements of beneficial use, either by an extension of time or other statutory exemption, stops the running of the forfeiture period for the period of the exemption, and such period shall not be included in computing the forfeiture period.[224]

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[218] *State* v. *Birdwood Irr. Dist.*, 154 Nebr. 52, 56-57, 46 N.W. (2d) 884 (1951); *Dawson County Irr. Co.* v. *McMullen*, 120 Nebr. 245, 247-251, 231 N.W. 840 (1930).

[219] *Kersenbrock* v. *Boyes*, 95 Nebr. 407, 409-411, 145 N.W. 837 (1914); *In re Birdwood Irr. Dist., Water Div. No. 1-A*, 154 Nebr. 52, 46 N.W. (2d) 884, 888 (1951).

In addition to this statutory procedure for forfeiture of water rights, the Nebraska Supreme Court recognizes another method—nonuse for a time equal to the statutory limitation upon actions to recover the possession of real property (10 years). *State* v. *Nielsen*, 163 Nebr. 372, 381-382, 79 N.W. (2d) 721 (1956); *Farmers' Irr. Dist.* v. *Frank*, 72 Nebr. 136, 156, 100 N.W. 286 (1904).

[220] Nev. Laws 1913, ch. 140, § 8, Rev. Stat. § 533.060(2) (Supp. 1967).

[221] *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 287, 288, 289-291, 108 Pac. (2d) 311 (1940).

[222] See *State ex rel. Reynolds* v. *South Springs Co.*, 80 N. Mex. 144, 452 Pac. (2d) 478, 480-481 (1969).

[223] In the latter regard, see *W. S. Ranch Co.* v. *Kaiser Steel Corp.*, 79 N. Mex. 65, 439 Pac. (2d) 714, 717 (1968); *State ex rel. Reynolds* v. *South Springs Co.*, 80 N. Mex. 144, 452 Pac. (2d) 478, 482 (1969).

[224] N. Mex. Stat. Ann. § 75-5-26 (1968).

Prior to enactment of the statute, the New Mexico Supreme Court stated that an appropriative right might be lost by nonuse. After its enactment the supreme court referred to the forfeiture provision and stated that it was merely declaratory of the law as already established in the jurisdiction by repeated judicial decisions, except that by those decisions the time element was not a definite period but a reasonable time, depending to some extent on the circumstances.[225]

North Dakota.—When an appropriator or his successor in interest ceases to use the appropriated water for a beneficial or useful purpose for 3 successive years, unless the failure was due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause, the State Engineer shall declare such "water permit or right" forfeited. The statutes provide procedures for the forfeiture and cancellation of the right.[226]

Oklahoma.—When the party entitled to beneficially use all or any part of the water claimed by him, for which a right of use has vested, fails to use the water for the purpose for which appropriated, for 7 continuous years, such unused water shall revert to the public and be regarded an unappropriated public water. The statute includes procedures whereby the administrative agency *may* cancel such unused rights. Failure of the agency to determine that a water right has been lost in whole or in part through nonuse shall not in any way revive or continue the right.[227]

Oregon.—When the owner of a perfected and developed water right ceases or fails to use the appropriated water for 5 successive years, the right ceases and the nonuse shall be conclusively presumed to be an abandonment of the right. Such unused water reverts to the public and is again subject to appropriation. Cities and towns are exempted from this provision.[228] This provision was

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[225] *Albuquerque Land & Irr. Co.* v. *Gutierrez,* 10 N. Mex. 177, 237-238, 61 Pac. 357 (1900); *Hagerman Irr. Co.* v. *McMurry,* 16 N. Mex. 172, 179-180, 113 Pac. 823 (1911).

[226] N. Dak. Cent. Code Ann. §§61-04-23 to 61-04-26 (Supp. 1969). Section 61-04-24 provides, "If it shall appear that any water appropriation or portion thereof, whether issued prior or subsequent to July 1, 1963, has not been used for a useful or beneficial purpose, or having been so used at one time has ceased to be used for such purpose for more than three successive years," unless the failure was due to the unavailability of water, a justifiable inability to complete the work, or other good and sufficient cause, the State Engineer shall set a time and place for hearing for the purpose of cancelling such unused water rights. For judicial interpretation of similar language in the Nebraska statutes, see the discussion at notes 217-219 *supra.*

Section 61-04-23 of the statute provides that a water permit or right held by a State agency, department, board, commission, or institution may be declared forfeited only by the North Dakota Legislative Assembly.

Section 61-04-24 provides *inter alia* that a "prescriptive water permit" acquired under the statute may be lost by forfeiture. It is described under "Prescription—Elements of the Prescriptive Right—Statute of Limitations—Abstracts of Western State statutory provisions limiting or pertaining to adverse possession of water rights," *infra.*

[227] Okla. Stat. Ann. tit. 82, §§32A and 32B (1970).

[228] Oreg. Rev. Stat. §540.610 (Supp. 1969).

enacted by the legislature following a decision in which the Oregon Supreme Court stated that to constitute abandonment of a water right by nonuse alone, such nonuse must have been continuous for a period equal to that of the statute of limitations, that is, 10 years.[229] Administrative procedures for cancelling abandoned water rights was provided in 1955.[230]

The Oregon Supreme Court took cognizance of the exception of cities and towns from the operation of the forfeiture statute, and noted that special provision was made for them in view of their need to anticipate their supplies of water because of the growth of population. But the State was not mentioned; and the supreme court held that the legislation must be held to apply to the State of Oregon as well as to any private owner of a water right.[231]

South Dakota.—When any person entitled to appropriate water fails to beneficially use the water, in whole or in part, for the purpose for which it was appropriated, for 3 years, such unused appropriated water shall revert to the public and be regarded as unappropriated public water.[232]

In a case decided in 1913, in which the validity of an earlier forfeiture statute[233] was under attack, the South Dakota Supreme Court held that this provision was "void as to a riparian owner but valid as to one who is no more than an appropriator without riparian right. A riparian right to use such waters of a flowing stream cannot be lost by disuse."[234] In 1955, the South Dakota Legislature enacted the forfeiture provision summarized above which expressly only applies to "appropriated water."

Texas.—Permits issued by the Texas Water Rights Commission or certified filings[235] are presumed to have been willfully abandoned when no part of the water to which they pertain has been put to beneficial use for 10 consecutive years under the terms of the permit or certified filing. The statute provides procedures for cancellation proceedings by the Commission.[236]

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[229] *Hedges* v. *Riddle,* 63 Oreg. 257, 259, 127 Pac. 548 (1912).

[230] Oreg. Laws 1955, ch. 670, Rev. Stat. § § 540.621-.650 (Supp. 1969).

[231] *Withers* v. *Reed,* 194 Oreg. 541, 558-560, 243 Pac. (2d) 283 (1952).

[232] S. Dak. Comp. Laws Ann. § 46-5-37 (1967).

[233] S. Dak. Laws 1907, ch. 180, § 46, which provided that when a party entitled to the use of water failed to beneficially use all or any portion of the water that he claimed for a period of 3 years, such unused waters reverted to the public.

[234] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.,* 32 S. Dak. 260, 268, 143 N.W. 124 (1913).

[235] Declarations of appropriation or affidavits filed with the State pursuant to the water appropriation act of 1913.

[236] Tex. Rev. Civ. Stat. Ann. art. 7519a, § 1 (Supp. 1970). This provision is discussed at notes 339-345 *infra.* Article 7519a, § 2, regarding the loss of a *portion* of one's appropriative water right for 10 consecutive years' nonuse under certain conditons, is discussed at note 346 *infra.*

Another statute, art. 7544 (1954), previously enacted, provides that a statutory appropriation "wilfully abandoned" during any 3 successive years is forfeited, and the

Utah.—When an appropriator, or his successor in interest, abandons or ceases to use water for 5 years, the right shall cease. Such unused water reverts to the public and is again subject to appropriation. The statute provides procedures for an extension of time, not to exceed an additional 5 years, which may be granted by the State Engineer upon a showing of reasonable cause, for nonuse of the water.[237] "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."[238] The Utah Supreme Court held that statutory forfeiture requires a *continuous* 5-year period during which failure to make use of water takes place.[239]

Washington.—Washington legislation enacted in 1967 provides that any person entitled to divert or withdraw waters of the State through any appropriation authorized by legislation prior to the enactment of chapter 117, Laws 1917, or by custom or general adjudication, or any "person hereafter [after July 1, 1967] entitled to divert or withdraw waters of the state through an appropriation authorized under" the pertinent statutes who voluntarily fails, without sufficient cause,[240] to beneficially use all or any part of such right for any period of 5 successive years after the effective date of the act (July 1, 1967), shall relinquish such right or portion thereof, which shall revert to the State and the affected waters become available for appropriation.[241] Certain uses of water relating to power development, reserve supplies, determined future developments, municipal supplies, and waters not subject to appropriation are expressly exempted from these provisions.[242] However, certain actions

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water is again subject to appropriation under the statutory procedure. This is discussed at notes 336-338 *infra.*

[237] Utah Code Ann. § 73-1-4 (1968), discussed in *Baugh* v. *Criddle,* 19 Utah (2d) 361, 431 Pac. (2d) 790 (1967).

The statute defines reasonable cause for nonuse as "Financial crisis, industrial depression, operation of legal proceedings or other unavoidable cause, or the holding of a water right without use by any municipality, metropolitan water districts or other public agencies to meet the reasonable future requirements of the public * * *."

[238] Utah Code Ann. § 73-1-4 (1968). Regarding this provision, see the later discussion pertaining to Utah under "Prescription—Establishment of Prescriptive Title—Possibility of Establishing Prescriptive Water Right Negated or Questioned—Negations."

[239] *Rocky Ford Irr. Co.* v. *Kents Lake Res. Co.,* 104 Utah 216, 218, 140 Pac. (2d) 638 (1943).

[240] Sufficient cause is defined as drought or other unavailability of water, service in the armed forces during a military crisis, nonvoluntary service in the armed forces, operation of legal proceedings, or Federal laws imposing land or water use restrictions, acreage limitations, or production quotas. Wash. Rev. Code § 90.14.140 (Supp. 1970).

[241] *Id.* § § 90.14.160 and 90.14.180. Section 90.14.170, containing similar language relating to rights to divert or withdraw State waters by virtue of ownership of land abutting a stream, lake, or watercourse is noted under "Rights Subject to Forfeiture—Generally not riparian rights," *supra.* The other portions of these three statutes are noted in the subtopics "Rights in Watercourses Subject to Abandonment" and "Some Statutory Provisions" under "Abandonment," *supra.*

[242] Wash. Rev. Code § 90.14.140 (Supp. 1970).

relating to water for public and industrial purposes are conclusive evidence of abandonment of rights to use water for *power* purposes.[243]

Wyoming.—If the owner of a ditch, canal, or reservoir fails to use the water therefrom for irrigation or other beneficial purposes for any 5 successive years, he shall be considered as having abandoned the same and shall forfeit all water rights, easements, and privileges appurtenant thereto. Such unused water may again be appropriated for irrigation or other beneficial purposes. The statutes provide procedures for administrative declarations of "abandonment."[244] The Wyoming Supreme Court has held that administrative declarations of "abandonment" may be made either in whole or in part.[245]

Computation of the Forfeiture Period

All of the 16 States having forfeiture statutes pertaining to surface watercourses provide for the cessation of the right for nonuse for a specified period of years, ranging from 3 to 10 years. In addition, two States (California and Nebraska) have statutes containing general provisions declaring that the right ceases for failure to exercise it, without any reference to a period of years.[246] The legislatively declared number of years over which nonuse must

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[243] *Id.* § 90.16.060 (Supp. 1961).

[244] Wyo. Stat. Ann. § § 41-47 to -53 (1957).

[245] *Yentzer* v. *Hemenway,* 440 Pac. (2d) 7, 11, rehearing denied, 441 Pac. (2d) 320 (Wyo. 1968). See note 282 *infra.*

Regarding administrative procedures and related matters, see "Establishment of Forfeiture: Administrative Procedures—Wyoming," *infra.*

[246] Cal. Water Code § 1240 (West 1956); Nebr. Rev. Stat. § 46-229 (1968).

The California statute declares, as it did when enacted [Cal. Civ. Code § 1411 (1872)]: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases." The California courts agreed that one who has made an appropriation of water is not allowed to retain indefinitely as against other appropriators a right to the water while failing to apply it to some useful or beneficial purpose. *Bazet* v. *Nugget Bar Placers,* 211 Cal. 607, 296 Pac. 616 (1931); *Duckworth* v. *Watsonville Water & Light Co.,* 150 Cal. 520, 533-534, 89 Pac. 338 (1907). "Under the law of appropriation the right to the use of water lasts only so long and is effective only to such an extent as the actual use is exercised." *Mt. Shasta Power Corp.* v. *McArthur,* 109 Cal. App. 171, 192, 292 Pac. 549 (1930). For a discussion of beneficial use of appropriated water, see, in chapter 8, "Elements of the Appropriative Right—Measure of the Appropriative Right."

In a statutory provision such as this, there is no guideline for determining what is cessation of a possessory right to divert and use water, and how it is to be evidenced. Unless administrative declarations are provided for, it is for the courts to determine, in litigated cases, under the facts and circumstances of each situation, whether or not cessation of a right has occurred. One such circumstance might be the unreasonableness of the length of time of nonuse, unexplained. Or the court might find that nonuse had prevailed for a period so long as to be unreasonable in relation to the requirements of other appropriators on the stream, with no evidence of any intent on the part of the appropriator to resume use of the water. From that there might result a presumption of

occur is of assistance in determining whether or not the right is forfeited. If the unused right is exercised before the expiration of the stated period, the right is not forfeited. If not so resumed, then cessation of the right may occur upon termination of the period. Unless administrative declarations are provided for, as shown below,[247] it is for the courts to determine from the evidence whether forfeiture has occurred and, if decided in the affirmative, to carry out the legislative declaration of principle. The advantage that may inhere in these statutes is most pronounced when the court takes into consideration the distinctions between abandonment and statutory forfeiture. When it fails to do so, and on the contrary confuses them to the extent of requiring an intent to abandon the right to coincide with nonuse for the statutory period, which has occurred, complications may ensue.[248]

In providing for cessation of the appropriative right because of nonuse for specified periods of years, some statutes say "successive" years and others do not. However, in the laws that speak of "periods" of years or simply "years," there is nothing to indicate that the years need not necessarily be consecutive. A parallel situation is the State statute of limitation in the law of adverse possession. If not specifically stated in the forfeiture period for nonuse of water, continuance—unbroken succession—of years of nonuse up to the statutory number would seem to be necessarily implied.[249]

In the States in which the forfeiture statute stops with designation of the controlling term of years of nonuse and makes no exceptions on account of extenuating circumstances, computation of the forfeiture period may present little or no difficulty, provided of course that convincing proof of nonuse for the entire period is presented. In a proven case, the forfeiture period would normally begin with the first year of nonuse[250] and may end with the last year prescribed by the statute, whereupon forfeiture would become effective. However, some high courts in the West expressed disfavor with the view that

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intention to abandon the right, whereupon the decision could be based on the principles of abandonment.

[247] A number of States have statutes providing administrative procedures for declaring forfeitures. See "Establishment of Forfeiture: Administrative Procedures," *infra.*

[248] See "Abandonment and Forfeiture Distinguished," *infra.*

[249] For example, the Utah statute provided *inter alia* with respect to forfeiture in 1943, as it still does [Utah Code Ann. § 73-1-4 (1968)], that when the holder of an appropriative right "shall abandon or cease to use water for a period of five years the right shall cease, and thereupon such water shall revert to the public." Although neither the word "continuous" nor "successive" was then or is now included in this legislative declaration, the Utah Supreme Court held in that year that statutory forfeiture requires a *continuous* 5-year period during which failure to make use of water takes place. In this case, beneficial use during 1 year in the 5-year period was held to prevent the application of the statute. *Rocky Ford Irr. Co.* v. *Kents Lake Res. Co.,* 104 Utah 216, 218, 140 Pac. (2d) 638 (1943).

[250] The forfeiture period begins at the time the appropriator fails or ceases to apply the water to a beneficial use. *Albrethsen* v. *Wood River Land Co.,* 40 Idaho 49, 68, 231 Pac. 418 (1924); *Chill* v. *Jarvis,* 50 Idaho 531, 536-537, 298 Pac. 373 (1931).

water rights might be lost because of nonuse occasioned by uncontrollable circumstances. For example, prior to amendment of the New Mexico statute to include a proviso with respect to uncontrollable circumstances, that supreme court stated with respect to the statute as then worded, "When 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, there is no forfeiture of his right for nonuse."[251] And the Utah Supreme Court stated with respect to the applicable forfeiture provision of the water appropriation law:[252]

> This statute was in effect during all times involved in this suit. In construing statutes similar to this, the courts have uniformly held that forfeiture will not operate in those cases where the failure to use is the result of physical causes beyond the control of the appropriator such as floods which destroy his dams and ditches, droughts, etc., where the appropriator is ready and willing to divert the water when it is naturally available.

(See "Abandonment—Some Circumstances Not Constituting Abandonment," above, and "Negating Circumstances," below.)

When the matter goes to litigation and the court holds that circumstances over which the appropriator had no control intervened during the period of nonuse and that therefore the statute was inapplicable at such times, the court faces the problem of computation in the absence of a legislative provision for such contingency. For example, the Utah Supreme Court, after carefully reviewing the evidence, thus resolved the problem:[253]

> We therefore have this situation. In 1932, 1933, 1935, and 1936 Kents Lake [Reservoir Company] neglected to use all the available water either by storage or by direct flow diversions. In 1937 it stored 950 acre feet and used 710 acre feet by direct diversions from the River. Since 1937 there has not been sufficient time up to the filing of this suit for another five year period of nonuse to run. Since no water was available in 1934, it must be disregarded. Hence, there were only four years between 1932 and 1937 when water was available and not used. In 1937 all the 1660 acre feet was used, thus cutting short at 4 years the period of nonuse. The plaintiffs concede that the beneficial use by the appropriator during at least one out of every five years is sufficient to protect his right against the operation of the forfeiture statute. This leads

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[251] *New Mexico Products Co.* v. *New Mexico Power Co.*, 42 N. Mex. 311, 321, 77 Pac. (2d) 634 (1937). After adoption of this proviso, the supreme court said, "Our statutes recognize the unfairness in loss of a water right through nonuse where conditions beyond the control of the owner of such right prevent use." *Chavez* v. *Gutierrez*, 54 N. Mex. 76, 82, 213 Pac. (2d) 597 (1950).

[252] *Rocky Ford Irr. Co.* v. *Kents Lake Res. Co.*, 104 Utah 202, 207-208, 135 Pac. (2d) 108 (1943).

[253] 104 Utah at 210-211.

us to the inevitable conclusion that there has been no forfeiture of any rights by Kents Lake.

Similar complications may arise in finding a computation formula when, as in some States, the statutes themselves, after stating that forfeiture shall occur as a result of nonuse of the water for a specified number of years, provide that under certain conditions nonuse may be excused.[254]

The New Mexico statute provides that periods of nonuse of water, when irrigated farm lands are placed under the Federal Soil Bank Act programs or when the person not using acquired water rights is on active military duty, shall not be computed as part of the 4-year forfeiture period. It also retains an earlier provision that forfeiture shall not necessarily occur if circumstances beyond the control of the owner cause nonuse, such that the water could not be put to beneficial use by his diligent efforts;[255] but prior to 1965 it prescribed no method of computing the 4-year forfeiture period if excusable nonuse occurred. What method of computation should be used in such event was argued before the New Mexico Supreme Court, but was not decided, in 1957.

In this 1957 case, one view expressed by counsel was that if inexcusable nonuse occurs for 3 successive years, such as in 1933, 1934, and 1935, but in 1936 water cannot be beneficially applied because of a flood or other uncontrollable condition, then a new starting point for limitations takes place and 4 continuous years' nonuse subsequent to the flood must occur before a forfeiture can be completed. The contrary view of opposing counsel was that under such assumed conditions, running of the statute is merely suspended for the 1 year of flood and that an additional year of inexcusable nonuse immediately following the flood will complete the time essential for a forfeiture. However, as the question and its answer were held to have no application to the facts of the instant case, the supreme court decided to "pass the question until it arises in a case where its decision is absolutely necessary."[256]

In 1965 the New Mexico statute was amended to provide that "A lawful exemption from the requirements of beneficial use, either by an extension of time or other statutory exemption stops the running of the four-year period

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[254] For example, the New Mexico statute contains a proviso with respect to uncontrollable circumstances. N. Mex. Stat. Ann. § 75-5-26(A) (1968). Other examples include provisions that forfeiture will result in case of nonuse without sufficient cause [see, e.g., Alaska Stat. § 46.15.140(b) (Supp. 1966)]; or the forfeiture will not result if nonuse is due to the unavailability of water or a justifiable inability to complete the works [see, e.g., N. Dak. Cent. Code Ann. § 61-04-24 (Supp. 1969)]; or the forfeiture period may be extended for a maximum stated number of years upon a showing of good and sufficient reason for the nonuse [see, e.g., Idaho Code Ann. § 42-222(2) (Supp. 1969)]. Such provisions are described in the preceding subtopic.

[255] N. Mex. Stat. Ann. § 75-5-26(A) (1968).

[256] *State* v. *Davis*, 63 N. Mex. 322, 331, 319 Pac. (2d) 207 (1957).

for the period of the exemption, and the period of exemption shall not be included in computing the four-year period." [257] (Emphasis added.) This would appear to suggest that the 4-year period need not necessarily be computed as 4 *successive* years; that is, if there is an exempted period of nonuse, any period of nonuse that may have immediately *preceded* the exempted period is to be added to any period of nonuse that may have immediately *followed* the exempted period.

The New Mexico forfeiture statute has been said to refer to "quantity of water and not to periods of use." It was said not to apply to a case in which the holder of the water right used the entire appropriated quantity of water beneficially each year after initiation of the right, although no use was made in the winter. Even though the appropriator had not used the water in the winter, he did not lose his right to do so under the circumstances of this case. The court said, among other things, that an earlier court decree had "awarded to plaintiffs' predecessors in interest the right to determine the seasons when they would use the water."[258]

Establishment of Forfeiture

Forfeitures must be clearly established.[259] Clear and convincing evidence is required to support a claim of forfeiture under the applicable statute.[260] It must be remembered, said the Idaho Supreme Court in a 1942 case, "that it requires very convincing and satisfactory proofs to support a forfeiture by abandonment of a real property right."[261]

The Idaho Supreme Court held that in any action to determine the question of forfeiture, evidence is admissible which shows or tends to show that after the water was decreed, it had not been put to a beneficial use for the statutory period after the entry of such decree. One of the most conclusive methods of showing failure to make beneficial use of the full quantity of water decreed to

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[257] N. Mex. Stat. Ann. §75-5-26(D) (1968).

[258] The court said generally that under the New Mexico legislation regulating the acquisition and use of water rights "the right of the water user is measured by the permit of the state engineer or the decree of the court." *Harkey* v. *Smith,* 31 N. Mex. 521, 527-529, 247 Pac. 550 (1926).

[259] *Ada County Farmers' Irr. Co.* v. *Farmers' Canal Co.,* 5 Idaho 793, 800, 51 Pac. 990 (1898).

[260] *Graham* v. *Leek,* 65 Idaho 279, 287-288, 144 Pac. (2d) 475 (1943).

[261] *Perry* v. *Reynolds,* 63 Idaho 457, 464, 122 Pac. (2d) 508 (1942). This statement apparently applies both to statutory forfeiture and genuine abandonment of appropriative rights.

The Idaho Supreme Court also has said "The courts abhor a forfeiture, and where no public interest is favored thereby equity leans against declaring a forfeiture." *Hurst* v. *Idaho Iowa Lateral & Res. Co.,* 42 Idaho 436, 442, 246 Pac. 23 (1926). "Forfeitures are abhorrent and all intendments are to be indulged against a forfeiture." *Application of Boyer,* 73 Idaho 152, 159, 248 Pac. (2d) 540 (1952).

an appropriator, said the supreme court, is to show that the works do not have the requisite carrying capacity.[262]

A party who bases his right on the forfeiture of a prior right has the burden of proving that such forfeiture has taken place.[263]

Establishment of Forfeiture: Administrative Procedures

The forfeiture statutes of several States implement their purpose by providing administrative procedures for declaring water rights forfeited for nonuse and formally canceled.[264]

Kansas.—Declaration of abandonment and termination of a water right is initiated by the Chief Engineer of the Division of Water Resources, who notifies the water user and gives him an opportunity to appear and show cause why such action should not be taken. Within 60 days after such hearing, the Chief Engineer makes an order determining whether such water right should be held abandoned and terminated and notifies the holder of the contents thereof. His verified report that the water right is abandoned and terminated is *prima facie* evidence thereof; and it is in effect from the date of its entry in his records unless and until its operation is stayed by an appeal to the district court pursuant to the procedure for taking appeals from orders or decisions of the Chief Engineer.[265]

Nebraska.—If the Department of Water Resources, in examining the conditions of constructed or partially constructed ditches and water appropriations, finds indications of nonuse of an appropriation or cessation of use for more than 3 years, it serves notice on the owners, as well as on the landowners interested, to appear at a hearing and show cause why such appropriation should not be declared forfeited and annulled. At such hearing, the verified report of the administrative officer declaring such forfeiture and annulment is *prima facie* evidence thereof. The appropriation is declared forfeited and

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[262] *Albrethsen* v. *Wood River Land Co.*, 40 Idaho 49, 59-60, 231 Pac. 418 (1924).

[263] *Lema* v. *Ferrari*, 27 Cal. App. (2d) 65, 73, 80 Pac. (2d) 157 (1938); *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 137 Pac. (2d) 634 (1943); *Ramsay* v. *Gottsche*, 51 Wyo. 516, 529, 69 Pac. (2d) 535 (1937); *Laramie Rivers Co.* v. *LeVasseur*, 65 Wyo. 414, 449, 202 Pac. (2d) 680 (1949); *Miocene Ditch Co.* v. *Campion Min. & Trading Co.*, 3 Alaska 572, 585 (1908).

[264] In addition, some other statutes provide administrative procedures for extending the time before the forfeiture shall occur. See Idaho Code Ann. § 42-222(2) (Supp. 1969); Utah Code Ann. § 73-1-4 (1968). New Mexico provides for such extension of time by the State Engineer without including any special administrative procedures in this regard. N. Mex. Stat. Ann. § 75-5-26(B) (1968). A California provision for such extensions, which also does not include any special administrative provisions in this regard, provides that the Water Resources Control Board shall extend the forfeiture period in instances where water has been appropriated for irrigation purposes and is not used by reason of Federal crop control or soil conservation contracts, or other cases of hardship as determined by the Board. Cal. Water Code § 1241.6 (West Supp. 1969).

[265] Kans. Stat. Ann. § § 82a-718 and -724 (1968).

annulled if (1) no one appears at the hearing, or (2) on hearing evidence at the appearance of a contestant, the Department finds that the nonuse has occurred. Appeal may be taken to the Nebraska Supreme Court from the Department's decision as in other cases of dissatisfaction with the orders or decisions of the Department.[266]

Previously under "Statutory Provisions: By States" it has been noted that the Nebraska Supreme Court sustained the constitutionality of the procedure, and held that it properly applied to applications to appropriate water filed prior to the enactment as well as those that came after it.

North Dakota.—If it appears that any water appropriation or portion thereof has not been put to useful or beneficial purpose, or having been so used has ceased to be so used for more than 3 successive years (unless the nonuse shall be due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause), the State Engineer shall set a time and place for hearing. Any water-permit owner using water from a common supply, any applicant therefor, or any interested party may request the State Engineer to conduct a hearing to cancel such rights. A denial by the State Engineer of such a request may be appealed to the district court in accordance with the applicable statute. The State Engineer shall give notice to the owners of such water appropriation or works and to the owners of land benefited by such water appropriation or works to show cause at the hearing why such appropriation or part thereof should not be declared forfeited and canceled. At such hearing, the verified report of the State Engineer or engineers of the State Water Commission shall be *prima facie* evidence for the forfeiture and cancellation. If no one appears at the hearing, the permit or portion thereof shall be declared forfeited and canceled. If the cancellation is contested, the State Engineer shall hear the evidence and if it appears that there is no justification for the nonuse, the permit or portion thereof shall be declared forfeited and canceled. Appeals may be taken from the decision of the State Engineer in accordance with the applicable statutes. [267]

Oklahoma.—When the party entitled to beneficially use all or any part of the water claimed by him, for which a right of use has vested, fails to use the water for the purpose for which appropriated, for 7 continuous years, such unused water shall revert to the public and be regarded as unappropriated public water. The Water Resources Board *may* administratively cancel such right. The Board shall notify the claimant of the right, or his successor in interest, that the right is subject to review by the Board and that there is reasonable cause for believing that he has lost his water rights. At the hearing set by the Board, the claimant shall have the right to show cause why the right should not be declared to have been lost through nonuse. The claimant may

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[266] Nebr. Rev. Stat. § § 46-229 to -229.05, and -210 (1968).

[267] N. Dak. Cent. Code Ann. § § 61-04-23 to 61-04-26 (Supp. 1969). Appeals are to be taken under § 61-04-07 and titles 28-32 (1960).

appeal the Board's determination in accordance with the statute. Failure of the Board to determine that a water right has been lost in whole or in part through nonuse shall not in any way revive or continue the right.[268]

Oregon.—Administrative procedures were enacted in 1955 for canceling perfected and developed water rights that have been conclusively presumed to be abandoned for 5-years nonuse.[269]

(1) This cancellation may be done by order of the State Engineer if the owner of such a water right certifies under oath that the water right has been abandoned and that he desires that it be canceled. Effective on the date of entering the order, the water involved reverts to the public and is again subject to appropriation, subject to existing priorities.[270]

(2) This action may also be taken if the State Engineer has reason to believe that such a water right has been abandoned as provided in the statute. In this case, the State Engineer initiates proceedings by giving written notice to the legal owner and to the occupant of land to which the water right is appurtenant, giving them 60 days within which to protest the application. (a) If no protest is received within this period, the State Engineer may enter an order canceling the water right. (b) If either party protests, a hearing is held, at which interested parties may be heard. Thereafter the State Engineer enters an order canceling the water right, in whole or in part, or modifying the water right, or declaring that it shall not be canceled or modified. Appeal may be taken to the circuit court as in other cases of appeal from the State Engineer's orders. Recordation is provided for.[271]

Texas.—The Texas Water Rights Commission is empowered to cancel permits or certified filings[272] under which no part of the water to which they pertain has been put to use for 10 consecutive years. Such permits or certified filings "shall be presumed to have been wilfully abandoned."[273] When the Commission's records fail to show the required beneficial use, it shall give notice of a public hearing, at which the record holder and other interested persons or organizations may appear and present evidence pro or con as to beneficial use of the water. If there is a finding of no beneficial use for 10 consecutive years next preceding the date of the cancellation proceedings, the permit or certified filing is null and void and "shall be forfeited, revoked and cancelled" by the Commission.[274] Certain exceptions are provided in regard to

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[268] Okla. Stat. Ann. tit. 82, § § 32A, 32B, and 5 (1970).

[269] Oreg. Laws 1955, ch. 670.

[270] Oreg. Rev. Stat. § 540.621 (Supp. 1969).

[271] *Id.* § § 540.631-.650 and 536.060.

[272] Certified filings are defined in the statute as declarations of appropriation or affidavits filed with the State pursuant to the water appropriation act of 1913.

[273] The presumption is conclusive and intent need not be considered. *Texas Water Rights Comm'n* v. *Wright*, 464 S.W. (2d) 642, 646 (Tex. Sup. Ct. 1971). See the discussion of the statutory provision at notes 339-345 *infra*.

[274] Under a similar procedure, a permit or certified filing may be subject to cancellation as to such portion of the waters to which it relates as were not beneficially used during

facilities for conservation reservoir storage, and municipal rights under certified filings. Appeal from a Commission order of cancellation may be taken under the special procedure for judicial review of the Commission's acts.[275]

Washington.—When it appears to the Director of Ecology that a person entitled to use water has not beneficially used all or part of his water and that the right has or may have reverted to the State because of such nonuse for 5 years,[276] the Director shall give notice of a hearing to such person to show cause why the right or portion thereof should not be declared relinquished. The notice shall contain, among other things a statement that unless sufficient cause[277] is shown, the water right will be relinquished.[278] Any person feeling aggrieved by any order of the Director may have the order reviewed by the superior court of the county in which the waters under consideration are located. In such review the Director's findings of fact in his report shall be *prima facie* evidence of the relinquishment or waiver.[279]

Wyoming.—Any water user who might be affected by a declaration of abandonment for nonuse for 5 successive years, and who desires to bring about such declaration, shall submit a written petition to the Wyoming Board of Control which, if the facts so justify, shall refer the matter to the appropriate Division Superintendent.[280] The latter shall give notice to the owners of property to which the water rights were originally attached, who are designated as contestees, and to all who desire the declaration, known as contestants, of a hearing at which testimony will be taken. The Superintendent transmits the evidence taken and a written report of the proceeding to the Board of Control, which holds a final hearing at which further evidence may properly be submitted. "After the board has become fully informed, it shall enter an order as to its findings either declaring the right in question abandoned or declining so to do, as the facts presented to the board may justify." Contestants and contestees are provided with certified copies of the declaration or decision, after which any of them may petition the district court to hold a hearing *de novo* on the decision. The court may either affirm the

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the prescribed period. In such instance, the Commission's finding is that the holder was not diligent in making the application to beneficial use and was not justified in such negligence or does not have a bona fide intention of making beneficial use within a reasonable time after the hearing. In determining what constitutes such reasonable time, consideration of certain factors is prescribed. See text at notes 346-347 *infra.*

[275] Tex. Rev. Civ. Stat. Ann. arts. 7519a and 7477 (Supp. 1970).

[276] Under Wash. Rev. Code § § 90.14.160 - 90.14.180 (Supp. 1970).

[277] *Id.* § 90.14.140 defines sufficient cause, summarized in note 240 *supra.*

[278] *Id.* § 90.14.130.

Proceedings under this statute are "contested cases" within the meaning of the Administrative Procedure Act. *Id.* § 90.14.200.

[279] *Id.* § 90.14.190.

[280] "[I]ntent is not essential to a forfeiture under the provisions of" this statute. *Ward* v. *Yoder,* 355 Pac. (2d) 371, 376, rehearing denied, 357 Pac. (2d) 180 (Wyo. 1960). In this regard see the discussion at notes 355-362 *infra.* With respect to the question of voluntariness and the availability of water, see note 362 *infra.*

decision and declare the water right abandoned, or may make such other order as it shall see fit.[281]

The Wyoming Supreme Court has held that administrative declarations of "abandonment" may be made either in whole or in part.[282] The court also said:[283]

> Nonavailability [of water], as well as other factors not under the appropriator's control, is properly a matter of defense, and contestants in a water abandonment case are not obligated to show availability over the period of nonuse. * * * [I]n order to bring themselves under the protection of this court's holding that a water right cannot be held to be abandoned if nonuse is caused by facts not under the appropriator's control, appellants were bound to establish the unavailability of water to them for the entire period (proof of their allegation before the trial court of the unavailability of water during "a part" of the irrigation season being per se insufficient as a defense).

In a recent case, the Wyoming Supreme Court said:[284]

> [I]n view of the provisions of the Wyoming Administrative Procedure Act, § § 9-276.19 to 9-276.33, W.S. 1957 (1969 Cum. Supp.), which inter alia gives to the board [of control] discovery powers, it would appear that the usual abandonment proceeding

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[281] Wyo. Stat. Ann. § § 41-47 to -53 (1957). For construction of the provision that "any water user who might be affected" might initiate proceedings for a declaration, see *Horse Creek Conservation Dist.* v. *Lincoln Land Co.*, 54 Wyo. 320, 342, 344-345, 92 Pac. (2d) 572 (1939); *Kearney Lake, Land & Reservoir Co.* v. *Lake De Smet Reservoir Co.*, 475 Pac. (2d) 548, 549 (Wyo. 1970), supplemented and reaffirmed in other regards in 487 Pac. (2d) 324 (Wyo. 1971). For some further constructions of the statute, see the *Horse Creek* case, *supra*, 54 Wyo at 335, 340-342; *Sturgeon* v. *Brooks*, 73 Wyo. 436, 457-458, 281 Pac. (2d) 675 (1955).

With respect to the forfeiture of storage water rights, see *Wheatland Irr. Dist.* v. *Pioneer Canal Co.*, 464 Pac. (2d) 533, 538-541 (Wyo. 1970); *Kearney Lake, Land & Reservoir Co.* v. *Lake De Smet Reservoir Co., supra*, 475 Pac. (2d) at 550-552.

[282] In *Yentzer* v. *Hemenway*, 440 Pac. (2d) 7, 11, rehearing denied, 441 Pac. (2d) 320 (Wyo. 1968), the court said: "Adverting to the asserted impropriety of a partial abandonment, it is true that neither the statutes nor any prior opinion of this court deals expressly with the abandonment of a portion of a water right. The legislature did provide in § 41-53 that 'Whenever the board has declared any water right abandoned, either in whole or in part * * * it shall cause * * * a certified copy of such * * * decision to be delivered to the contestants and contestees,' and 'or in part' would seem to uncontrovertably import an intention to permit abandonment of less than the whole. Moreover, in other jurisdictions which deal with prescriptive rights, under statutes similar to those in this State, it has long been recognized that the power to cancel the whole of an appropriation for irrigation purposes for nonuser carries with it the right to cancel a part."

[283] 440 Pac. (2d) at 13-14.

[284] *Kearney Lake, Land & Reservoir Co.* v. *Lake De Smet Reservoir Co.*, 475 Pac. (2d) 548, 549-550 (Wyo. 1970).

> should be initiated before the board of control. Even in actions of which the district court has jurisdiction and the question of abandonment, not previously litigated, becomes an issue, there should be utilization of the board of control—perhaps somewhat along the lines provided in Rule 53, W.R.C.P., for masters.

On rehearing, the court said with respect to this quoted language:[285]

> We intended thereby a clear caveat that henceforth, in view of the provisions of the Wyoming Administrative Procedure Act * * * supplementing the board's power with respect to the essentials necessary to assure a full and fair hearing, the lower courts should see to it that questions of abandonment be first determined by the board. The purpose, of course, was to remedy a need, long recognized by this court, to correlate the function of the courts with respect thereto within their jurisdiction and the function of the board within its jurisdiction in order that there be uniformity in decision and in order to utilize the expertise of the board.

The court decided to resort to the doctrine of "primary jurisdiction" in the Board of Control, although in applying this doctrine "much must, of course, be left to the discretion of the district court."[286] The court further concluded that[287]

> the board following the issuance of this opinion should promptly proceed to adopt a rule or amend its present rules whereby upon certification to the board by the district court of a factual issue, such as the issue of abandonment, for initial determination the board would accept jurisdiction and proceed in its regular manner or in a legal manner acceptable to it to make that determination. Upon completion of the board's proceeding, the findings, conclusions, and order determining the matter, including the record made if a party or the parties desire it, could then be certified by the board to the district court.[288]

Negating Circumstances

Some examples.—(1) Maintenance of a reserve supply of water under a California appropriative right, for the purpose of protecting the holder in the event of failure of a district to supply (pursuant to agreement) a certain quantity of water from another source, was held by a Federal court to be a beneficial use of the water within the meaning of the forfeiture section of the

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[285] 487 Pac. (2d) 324, 325, (Wyo. 1971).

[286] *Id.* at 327-328.

[287] *Id.* at 328.

[288] The court added, "This would enable the district court first to review the board's proceedings in keeping with the provisions of § 9-276.32, W.S. 1957 (1969 Cum. Supp.), and our Rule 72.1, W.R.C.P., if a party so desires. Upon completion of that task the district court would then be enabled to consider and dispose of whatever matters remained for disposal of the litigation." *Id.*

California Water Code,[289] even though the reserve supply was not actually applied to land but was returned to the stream because no deficiency in the contractual supply resulted. The right to use of the quantity of water thus held in reserve, therefore, was not forfeited for failure to make beneficial use of it; but the quantity to which the holder had appropriative rights in excess of the reserve was lost because of failure for a period of more than 3 years to use river water except in the quantity so held in reserve.[290]

(2) A right to the use of water is not lost solely by failure to keep an agreement to share the expense of repairing and renewing a ditch. Failure to repair the ditch in such case would merely give rise to a suit to recover a proportionate part of the amount expended by the other parties. "Equity abhors a forfeiture and, in the absence of a positive rule of law attaching such a penalty in a case like the present, the courts will not enforce so drastic a remedy."[291]

(3) The New Mexico statute providing for forfeiture of a water right because of nonuse over a period of 4 years[292] has been said to refer to quantity of water and not to period of use. It was said not to apply to a case in which the holder used the entire appropriated quantity beneficially each year since initiation of the right, although no use was made in the winter. Despite nonuse of water in the winter, the right was not lost under the circumstances of this case.[293]

(4) At issue in a Texas case was the status of a water right for a period of at least 3 successive years after the deterioration of an impounding dam to such an extent that very little water could be held in the reservoir. The owner was not responsible for the breaking of the dam; and although he had allowed it to remain in a state of disrepair for some 6 years, he discussed the matter of repair on several occasions during that time. It was held that there had been no "wilful abandonment" of use of the water during the statutory period of forfeiture.[294]

(5) Beneficial use of water during 1 year in the 5-year forfeiture period prescribed by the Utah statute prevented application of the statute.[295]

(6) The Utah statute authorizes extensions of time by action of the State

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[289] Cal. Water Code § 1241 (West 1956).

[290] *East Side Canal & Irr. Co.* v. *United States,* 76 Fed. Supp. 836, 839-840 (Ct. Cl. 1948), certiorari denied, 339 U.S. 978 (1950). "At any rate, the California courts not having held to the contrary we now hold that the maintenance of this reserve supply was a beneficial use of the water within the meaning of the quoted section from the laws of California."

[291] *Hand* v. *Cleese,* 202 Cal. 36, 46, 258 Pac. 1090 (1927).

[292] N. Mex. Stat. Ann. § 75-5-26 (1968).

[293] *Harkey* v. *Smith,* 31 N. Mex. 521, 528-529, 247 Pac. 550 (1926), discussed at note 258 *supra.*

[294] *Anson* v. *Arnett,* 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.).

[295] *Rocky Ford Irr. Co.* v. *Kents Lake Res. Co.,* 104 Utah 216, 218, 140 Pac. (2d) 638 (1943).

Engineer for periods not exceeding 5 years each, upon a showing of reasonable cause for nonuse. The first application for an extension is to be filed with the State Engineer before expiration of the initial 5-year period of nonuse. "Financial crisis, industrial depression, operation of legal proceedings or other unavoidable cause, or the holding of a water right without use by any municipality, metropolitan water districts or other public agencies to meet the reasonable future requirements of the public, shall constitute reasonable cause for such nonuse."[296]

(7) There is no nonuse of water leading to forfeiture of the right when the ditch under which the water was first diverted was abandoned and the water was conveyed in another conduit. The statute is aimed at the nonuse of water, not at the nonuse of any particular ditch, canal, or reservoir.[297] Nor does exercise of the statutory right to change one's point of diversion or place of use of water work a forfeiture of the water right, provided that in doing so the rights of others are not impaired.[298]

(8) In several cases, the Idaho Supreme Court declared the rule that even though a water right has been forfeited by reason of the 5-year statute, if thereafter and prior to an appropriation made by another party, the holder of the original right rediverts and applies such water to a beneficial use, there is no forfeiture that can inure to the benefit of such later claimant.[299]

(9) A forfeiture must be promptly asserted, or it will be treated as waived. In a 1955 case, the Wyoming Supreme Court indicated that waiting 16 or 17 years to bring an action for forfeiture is an unreasonable time, especially in this case as the action was brought after the reservoir owner had twice repaired it and had resumed use of the water.[300]

Enforced discontinuance of use of water.—(1) It is a general rule in the Western States that provide for statutory forfeiture of appropriative rights

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[296] Utah Code Ann. § 73-1-4 (1968).

In 1943, the Utah Supreme Court held that, prior to the 1939 legislation preventing the acquisition of prescriptive rights to water, the forfeiture statutes *did not* apply to a situation in which failure to use water was the result of an adverse use by another. *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 448, 456-457, 462, 137 Pac. (2d) 634 (1943). This is discussed further under "Prescription—Establishment of Prescriptive Title—Possibility of Establishing Prescriptive Water Right Negated or Questioned—Negations," *infra.*

[297] *Van Tassel Real Estate & Live Stock Co.* v. *Cheyenne,* 49 Wyo. 333, 350, 353, 54 Pac. (2d) 906 (1936).

[298] *Graham* v. *Leek,* 65 Idaho 279, 292, 144 Pac. (2d) 475 (1943); *In re Johnson, Appeal from Dep't of Reclamation,* 50 Idaho 573, 578-579, 300 Pac. 492 (1931).

[299] *Application of Boyer,* 73 Idaho 152, 159-160, 248 Pac. (2d) 540 (1952); *Carrington* v. *Crandall,* 65 Idaho 525, 531-532, 147 Pac. (2d) 1009 (1944), citing *Ramshorn Ditch Co.* v. *United States,* 269 Fed. 80, 84 (8th Cir. 1920); *Wagoner* v. *Jeffery,* 66 Idaho 455, 459-460, 162 Pac. (2d) 400 (1945); *Zezi* v. *Lightfoot,* 57 Idaho 707, 713, 68 Pac. (2d) 50 (1937).

[300] *Sturgeon* v. *Brooks,* 73 Wyo. 436, 458-59, 281 Pac. (2d) 675 (1955).

that the holder of the right shall not be penalized for his nonuse of the water while discontinuance of the use is forced upon him.

(2) Previously, under "Computation of the Forfeiture Period," it has been shown that some State statutes (after providing that forfeitures shall occur as a result of nonuse for specified periods) go on to state that under certain conditions nonuse may be excused, or the forfeiture period may be extended or both.

(3) The New Mexico statute includes a proviso that "forfeiture shall not necessarily occur if circumstances beyond the control of the owner have caused non-use, such that the water could not be placed to beneficial use by diligent efforts of the owner * * *."[301]

Prior to enactment of this provision, the supreme court held, "When 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, there is no forfeiture of his right for nonuser."[302]

In a case decided after enactment of the New Mexico amendment, the evidence showed that throughout periods of nonuse, droughts producing shortages of water and the progressively increasing depth and width of a canyon across a part of the tract to which the water right had been appurtenant, all combined to render irrigation impracticable or impossible. The evidence convincingly established to the court the fact that the holders of the water right irrigated their land when they could get water to and for it. "Our statutes recognize the unfairness in loss of a water right through nonuse where conditions beyond the control of the owner of such right prevent use."[303]

(4) With respect to the Utah forfeiture statute,[304] the Utah Supreme Court

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[301] N. Mex. Stat. Ann. § 75-5-26(A) (1968).

[302] *New Mexico Products Co.* v. *New Mexico Power Co.*, 42 N. Mex. 311, 321, 77 Pac. (2d) 634 (1937).

[303] *Chavez* v. *Gutierrez*, 54 N. Mex. 76, 82, 213 Pac. (2d) 597 (1950).

In *State ex rel. Reynolds* v. *South Springs Co.*, 80 N. Mex. 144, 452 Pac. (2d) 478, 482 (1969), the court said, *inter alia*, that in the *Chavez* case "there was no constructive abandonment of the water rights, but rather nonuse was caused by droughts producing a water shortage; however, the ditch was used when water was available.

"In the case before us, the ditches (if any) were not usable and appellants made no effort to recover their water rights for a period from 1958 to 1965, showing a definite lack of diligence.

"In New Mexico, where the statute excuses forfeiture when 'circumstances beyond the control of the owner have caused nonuse,' the trier of fact must weigh the evidence in each case to determine whether a sufficient showing of excuse for nonuse has been made."

In *W.S. Ranch Co.* v. *Kaiser Steel Corp.*, 79 N. Mex. 65, 439 Pac. (2d) 714, 717 (1968), the court had said, *inter alia*, that "the year or years in question were particularly dry ones, and if there is no water available, the owner of the water right is not to be penalized."

[304] Utah Code Ann. § 73-1-4 (1968).

stated in a 1943 case, "In construing statutes similar to this the courts have uniformly held that forfeiture will not operate in those cases where the failure to use is the result of physical causes beyond the control of the appropriator such as floods which destroy his dams and ditches, droughts, etc., where the appropriator is ready and willing to divert the water when it is naturally available."[305]

In a 1961 case, plaintiffs based claims of water rights on wells from which no water had been used since 1931.[306] In 1949, about 13 months before 5 years had elapsed after the effective date of the statute, the State Engineer filed a proposed general determination of water rights in the area which did not allow plaintiffs' claims of rights in their wells. The supreme court concluded that the filing of this proposed determination before the 5 years had run interrupted the running of the nonuse statute against the plaintiffs.[307]

(5) Prior to adoption of the California Water Commission Act, while the judicially adopted 5-year forfeiture period was in effect,[308] the supreme court held that inability to obtain water because of a natural shortage did not of itself cause a forfeiture of an appropriative right. The court said:[309]

> That a part of the lands of each of the plaintiffs had been, for many years, irrigated by means of water taken from the stream whenever the supply of water premitted was fully shown by the evidence. The last seven years preceding the trial of the action had been exceptionally "dry," and during them the flow of water had ceased earlier in the spring than in former years. The fact that during this period the plaintiffs had not been able to get as much water as theretofore did not destroy the continuity of their use, nor deprive them of the right to use the amount formerly diverted in the event that the flow of the stream should again furnish such amount.

In a much later California action a party had appropriated 20 cubic feet per second of foreign water (water originating in a different watershed) and used it all when available, and when not all available he used what he could get. The supreme court held that this appropriative right was not lost or diminished by the fact that the quantity of such foreign water flowing into the stream was thereafter reduced by circumstances beyond the owner's control.[310]

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[305] *Rocky Ford Irr. Co.* v. *Kents Lake Res. Co.*, 104 Utah 202, 207-208, 135 Pac. (2d) 108 (1943).

[306] In 1945, the Utah Legislature amended the forfeiture statute to delete the provision that "nothing in this section shall apply to underground or subterranean waters." Utah Laws 1945, ch. 134, § 1.

[307] *In re Escalante Valley Drainage Area*, 12 Utah (2d) 112, 113-114, 363 Pac. (2d) 777 (1961).

[308] See the discussion at notes 201-202 *supra.*

[309] *Huffner* v. *Sawday*, 153 Cal. 86, 92, 94 Pac. 424 (1908).

[310] *Bloss* v. *Rahilly*, 16 Cal. (2d) 70, 78, 104 Pac. (2d) 1049 (1940). In the opinion in this case, reference was made to a previous decision concerning foreign waters wherein

(6) The question of enforced discontinuance of use of water in relation to operation of the Wyoming forfeiture statute has appeared from time to time in court decisions since early in the 20th century. In *Morris* v. *Bean*, decided in 1906, a Federal court construed the Wyoming statute as not applicable to an enforced discontinuance; that it could not have been intended to apply to anything more than failure to use from an available supply.[311] In a 1937 case, the Wyoming Supreme Court quoted with approval from the opinion in *Morris* v. *Bean* and stated:[312]

> It would seem logical that the doctrine of the case last cited, as quoted above, should be applicable as well to a situation where, as here, the owner of the water rights during several years was prevented by disastrous flood waters from using the dams and ditches originally constructed. Under such circumstances it can hardly be said that the non-use of the waters for a beneficial purpose was due to any fault or neglect on his part, either intentional or unintentional.

The same doctrine was invoked in a case decided in 1939, holding that the Wyoming statute does not apply in instances of enforced discontinuance of use.[313]

In a 1968 case, the court said:[314]

> Nonavailability [of water], as well as other factors not under the appropriator's control, is properly a matter of defense * * *. [A]ppellants were bound to establish the unavailability of water to them for the entire period (proof of their allegation before the trial court of the unavailability of water during "a part" of the irrigation season being per se insufficient as a defense).

Effect of Forfeiture

Disposition of water supply involved.—Of the 14 States that prescribe specified periods of nonuse of water that result in forfeiture of the right (see

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the court said that when 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 abandonment of the particles of water, which necessarily affects the *value* of the subsequent appropriation right; but that this does not affect the *existence* of the right, subject to the limitation caused by the nature of the water supply in question. *Crane* v. *Stevinson,* 5 Cal. (2d) 387, 394, 54 Pac. (2d) 1100 (1936).

[311] *Morris* v. *Bean,* 146 Fed. 423, 434 (C.C.D. Mont. 1906), affirmed, 159 Fed. 651 (9th Cir. 1908), 221 U.S. 485 (1911).

[312] *Ramsay* v. *Gottsche,* 51 Wyo. 516, 532, 69 Pac. (2d) 535 (1937).

[313] "That the defendant did not use all the water to which it was entitled when it could not get it, hardly makes a case of non-user within the principle invoked in *Ramsay* v. *Gottsche* * * *." *Horse Creek Conservation Dist.* v. *Lincoln Land Co.*, 54 Wyo. 320, 335, 92 Pac. (2d) 572 (1939).

[314] *Yentzer* v. *Hemenway,* 440 Pac. (2d) 7, 13-14, rehearing denied, 441 Pac. (2d) 320 (Wyo. 1968). With respect to the question of voluntariness and the availability of water, see note 362 *infra.*

"Statutory Provisions: By States," above), 11 provide for some sort of disposition: four declare that the unused water reverts to the public and is regarded as unappropriated water; three declare that the water reverts to the public and is subject to appropriation; two declare that the formerly appropriated water may be again appropriated; and two declare that the right reverts to the State and the water is again subject to appropriation.

The important thing in this connection, of course, is that upon cessation and extinction of an appropriative right to divert and use water of a stream as a result of forfeiture, the quantity of water thereby left flowing in the stream instantaneously either (1) ceases to be appropriated water and instead becomes unappropriated water available for reappropriation, or else (2) it becomes part of the supply to which existing junior rights theretofore not fully satisfied immediately attach to the extent of their lawful requirements.

As noted in chapter 5, under "Water Flowing in Natural Stream—Rights of Ownership of the Water," although there are some real or apparent contradictions, it is the general rule in western water law that water flowing in a natural stream is not the subject of private ownership. Private rights that attach thereto are strictly usufructuary rights to take water from the stream into physical possession for the purpose of putting it to beneficial use. Ownership of a flowing stream in a particular area may be in the public, or in the State or the United States, or in no one, as the case may be, subject to private water rights validly acquired. A statement in the statute that the water to which a forfeited right formerly attached reverts to the public neither strengthens nor weakens the practical result of forfeiture—that this formerly appropriated water becomes, both *ipso facto* and *ipso jure*, either unappropriated water or water needed to satisfy the lawful requirements of existing junior appropriators.

Judicial comments.—With respect to a failure of appropriators for many years to make use of about one-half of an appropriated water supply, the right thereto having long since been lost, the California Supreme Court said, "They have permitted the water to go back into the creek where, if not since appropriated by other persons below, they have, at least for years, been subject thereto * * *."[315]

In 1943 the Utah Supreme Court stated:[316]

> Even though title [to the water] were to revert to the public, it is unlikely that it would be available for appropriation by filing with the State Engineer for on practically every stream in this State there are junior appropriators whose applications have been approved by the State Engineer for a total of more water than ordinarily is available in the stream. The reversion of this water would then go to feed these rights of the junior appropriators. The

[315] *Hufford* v. *Dye*, 162 Cal. 147, 154-155, 121 Pac. 400 (1912).

[316] *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 462, 137 Pac. (2d) 634 (1943).

> net result of a holding that forfeiture resulted after five years of adverse use would be to have the water revert to the junior appropriators to feed their rights.[317]

The Utah Supreme Court later stated that when a vested right is forfeited by nonuse, there is a reversion to the public and a right to use such water "can only be initiated by making a new appropriation after the water is available for appropriation." Hence the State Engineer and the courts are without authority to add to an approval of an application a proviso concerning possible abandonment or forfeiture of a prior right. However, said this court, this does not mean that the State Engineer may not approve an application for water alleged to have been abandoned by a prior appropriator. "Where such claim of abandonment is advanced, the state engineer should approve the application, for in such case the question whether there is unappropriated water in the proposed source depends upon determination in a proper proceeding of the fact of legal abandonment, and approval of the application would be a condition precedent to the subsequent claimant asserting a right to the water involved."[318]

The foregoing holding is sound with respect to a stream the waters of which prior to the abandonment or forfeiture are adequate for the lawful requirements of all water users who hold rights of use therein. The water released into such a stream because of the forfeiture is truly unappropriated until the filing of a claim therefor with the State Engineer, when it again becomes appropriated. But in a situation such as that described above in the 1943 case, that obtains on so many overappropriated streams, the results differ. There, part or all of the water released by consummation of forfeiture does not become unappropriated, because the stream is already *overappropriated*. Therefore, part or all of such released water, as the case may be, instantly and automatically, with no lapse of time, inures to the benefit of junior appropriators who have first claim upon the increment for the purpose of "feeding" their rights up to the maximum to which they are entitled when water is available therefor.

Forfeiture of Part of Water Right

Statutes.—Forfeiture statutes of several States provide specifically that forfeiture and cessation because of nonuse may apply not only to an entire appropriative right, but to only a part of such right if only the quantity of water to which such part relates was not used.[319]

[317] This case also dealt with the relationship between forfeiture of an appropriative right and adverse use of water. In that regard, see the later discussion pertaining to Utah under "Prescription—Establishment of Prescriptive Title—Possibility of Establishing Prescriptive Water Right Negated or Questioned—Negations."

[318] *Whitmore* v. *Welch*, 114 Utah 578, 589, 590-591, 201 Pac. (2d) 954 (1949).

[319] Alaska Stat. § 46.15.140(b) (Supp. 1966); Cal. Water Code § 1241 (West 1956); N. Mex. Stat. Ann. § 75-5-26 (1968); S. Dak. Comp. Laws Ann. § 46-5-37 (1967); Wash.

Some judicial holdings and comments.—That a portion of an appropriative right may be forfeited without affecting the validity of the part maintained in effect by beneficial use was held by the California Supreme Court in *Smith* v. *Hawkins* in 1898. In reasserting its judicial adoption of a 5-year period (prior to the Water Commission Act) for forfeiture of an appropriative right, the court said:[320]

> If plaintiffs could forfeit their entire right of appropriation by nonuser, equally will they be held to forfeit less than the whole by like failure. * * * [N]o matter how great in extent the original quantity may have been, an appropriator can hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser.

A half-century later it was urged upon the Nebraska Supreme Court that if the Department of Water Resources has authority to cancel an appropriation for nonuse, it has no right to cancel a part of an appropriation for the reason that only a part of the acreage described in the adjudication has been irrigated. "We do not think the question assumed by the appellants on this question is the correct one."[321] The court quoted with approval from the opinion in *Smith* v. *Hawkins*, remarking, among other things, that the fact that many of the provisions of the Nebraska irrigation statute came from California made the interpretations of the California statute by the courts of that State of particular application in Nebraska. "We conclude that the power to cancel the whole of an appropriation for irrigation purposes for nonuser carries with it the right to cancel a part."[322] This the supreme court believed to be consistent with the irrigation statutes enacted from time to time, with the public policy of the State with reference to appropriation of public waters, and with the Department's duty to determine all or parts of appropriations subject to forfeiture and to act upon them.[323]

The Utah Supreme Court stated in 1943, "If there were a five year continuous period during which Kents Lake failed to use material amounts of

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Rev. Code §§ 90.14.160 and 90.14.180 (Supp. 1970). See *Yentzer* v. *Hemenway,* 440 Pac. (2d) 7, 11, rehearing denied, 441 Pac. (2d) 320 (Wyo. 1968), discussed at note 282 *supra,* regarding the words "either in whole or in part" in Wyo. Stat. Ann. § 41-53 (1957). See also Tex. Rev. Civ. Stat. Ann. art. 7519a, § 2 (Supp. 1970), discussed at notes 346-347 *infra.*

[320] *Smith* v. *Hawkins,* 120 Cal. 86, 88, 52 Pac. 139 (1898). See *Lindblom* v. *Round Valley Water Co.,* 178 Cal. 450, 456, 173 Pac. 994 (1918); *Gray* v. *Magee,* 108 Cal. App. 570, 579, 292 Pac. 157 (1930); *East Side Canal & Irr. Co.* v. *United States,* 76 Fed. Supp. 836, 839 (Ct. Cl. 1948), certiorari denied, 339 U.S. 978 (1950).

[321] *State* v. *Birdwood Irr. Dist.,* 154 Nebr. 52, 57, 46 N.W. (2d) 884 (1951).

[322] 154 Nebr. at 57-58.

[323] 154 Nebr. at 59.

available water, we should hold that a forfeiture of at least part of its right has occurred by virtue of this nonuse."[324]

Abandonment and Forfeiture Distinguished

Plain, Fundamental Distinctions

Abandonment is entirely distinct from forfeiture, when the two terms have been strictly construed by the courts. The distinctions are plain and fundamental. The terms are entirely different in their operation, and there is a decided distinction in their legal significance.

Intent is an essential element of abandonment; but it is not material to a forfeiture, which may take place regardless of the appropriator's intent.

Time is not an essential element of abandonment, which may take place instantly; but it is an essential element of forfeiture, because forfeiture is not effective until expiration of the applicable period of time.[325]

Intent.—(1) Abandonment. Strictly construed, the necessary and controlling element in loss of a water right by abandonment is the matter of intent to forsake and desert the water right. Establishment of abandonment requires (a) intent of the owner permanently to relinquish the possession and enjoyment of a property right, (b) the actual relinquishment thereof, and (c) proof of concurrence of the acts of the appropriator with his intent to accomplish this result.

(2) Forfeiture. The element of intent is not necessary in the case of forfeiture, as strictly construed. Forfeiture is the involuntary or forced loss of a right, caused by failure to perform some act required by statute. In the case of a water right it is based, not on an act or intent, but on failure to exercise the

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[324] *Rocky Ford Irr. Co.* v. *Kents Lake Res. Co.*, 104 Utah 202, 209, 135 Pac. (2d) 108 (1943).

[325] Authorities for the foregoing statements, and for the details that follow under the immediately ensuing subtopics include: *Gila Water Co.* v. *Green*, 29 Ariz. 304, 306, 241 Pac. 307 (1925); *Smith* v. *Hawkins*, 110 Cal. 122, 126, 42 Pac. 453 (1895); *Lindblom* v. *Round Valley Water Co.*, 178 Cal. 450, 455, 173 Pac. 994 (1918); *Sieber* v. *Frink*, 7 Colo. 148, 154, 2 Pac. 901 (1884); *Carrington* v. *Crandall*, 65 Idaho 525, 531-532, 147 Pac. (2d) 1009 (1944); *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 287-288, 290-291, 108 Pac. (2d) 311 (1940); *Cundy* v. *Weber*, 68 S. Dak. 214, 225-226, 300 N.W. 17 (1941); *Deseret Live Stock Co.* v. *Hooppiania*, 66 Utah 25, 32-33, 239 Pac. 479 (1925); *Hammond* v. *Johnson*, 94 Utah 20, 31, 66 Pac. (2d) 894 (1937); *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 467-468, 137 Pac. (2d) 634 (1943); *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 4, 361 Pac. (2d) 407 (1961); *In re Escalante Valley Drainage Area*, 12 Utah (2d) 112, 114, 115, 363 Pac. (2d) 777 (1961); *East Side Canal & Irr. Co.* v. *United States*, 76 Fed. Supp. 836, 839 (Ct. Cl. 1948), certiorari denied, 339 U.S. 978 (1950); Kinney, C.S., "A Treatise on the Law of Irrigation and Water Rights," 2d ed., vol. 2, § 1118 (1912).

right for a period of time prescribed by the statute. Forfeiture results from nonuse of water, regardless of the intent or purpose of the one claiming the right. There can be a forfeiture directly against and contrary to the intention of the party alleged to have forfeited his right; it may occur despite a specific intent not to surrender the right. Regardless of the owner's intent, then, forfeiture, whether judicial or statutory, ends the right.

The time element.—(1) Abandonment. Strictly construed, abandonment of a water right is not based upon a time element. Mere nonuse of water for any length of time does not of itself constitute abandonment. It is true that nonuse may continue for such an unreasonable period of time as fairly to create a presumption of intention to abandon the right, but this presumption nevertheless is only *prima facie* and not conclusive and it may be overcome by satisfactory evidence to the contrary. When intent to abandon the right and relinquishment of possession concur, abandonment takes place instantly. If an appropriator has in fact abandoned his right, it matters not how long he had ceased to use the water, for on completion of abandonment the right ceased.

(2) Forfeiture. Loss by forfeiture results from failure to make beneficial use of the water throughout a prescribed period of years, and the right does not cease until the end of this period. By contrast with abandonment, the essential elements of forfeiture are nonuse of water and lapse of time.

Abandonment and Forfeiture Interrelated

The purpose of the foregoing topic has been to present with as much clarity as possible the important differences between these ways of losing water rights as strictly construed by the courts. In some of the States that have forfeiture statutes,[326] these distinctions are observed but in others they are not or are only partially observed. The interrelationship of abandonment and forfeiture provisions often may be as important as their distinctions. Of six states considered in the ensuing discussion, all have statutes using the word "abandon"; some statutes use "forfeit" as well as "abandon" or their derivatives. Difficulties and complications in construing these provisions and related provisions in these States are the principal subject of this discussion.[327]

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[326] These provisions are summarized under "Statutory Forfeiture—Statutory Provisions: By States," *supra.*

[327] Idaho legislation enacted in 1969 provides that all rights to the use of water, whether acquired under this statute or otherwise, that are not beneficially used for 5 years for the purpose for which appropriated "shall be lost and forfeited." Idaho Laws 1969, ch. 303, § 2, Code Ann. § 42-222(2) (Supp. 1969). Previously, the situation in Idaho with respect to abandonment and forfeiture of appropriative rights was complicated by the wording of an earlier provision, Idaho Code Ann. § 42-222 (1948), which provided that the right "shall be lost and abandoned" by failure to apply it to beneficial use for a prescribed period of years. Over the years the Idaho Supreme Court decided controversies over claimed abandonments of water rights in which the statute was not involved, and others in which the statute was invoked. In these latter cases, the court formerly

Some State Situations

Kansas.—Kansas has two provisions relating to loss of water rights as a result of 3-years' inexcusable nonuse. One provision, enacted as a part of the 1945 water rights statute, says that nonuse of an appropriative right "shall constitute a forfeiture and surrender of such right."[328] This is merely a legislative declaration of principle. The other provision, added to the statute by amendment in 1957 (without disturbing the 1945 declaration), says that as a result of such nonuse every water right "shall be deemed abandoned and shall terminate;" but it requires an administrative declaration of the abandonment and termination, subject to judicial appeal.[329] Despite the basic differences between abandonment and forfeiture when strictly construed, the phrase "shall be deemed abandoned" probably indicates that the legislative declaration of abandonment and termination discards any necessity of intent on the part of the water right holder. No judicial construction of this section has come to the attention of the author.

Nevada.—Upon failure to use water in Nevada for 5 successive years, "the right to so use shall be deemed as having been abandoned, and any such owner or owners shall thereupon forfeit all water rights, easements, and privileges appurtenant thereto * * *."[330] The cases having to do with abandonment were decided prior to enactment of the forfeiture law in 1913, and it was not until 1940 that the Nevada Supreme Court had occasion to construe the act with respect to the use of these contradictory terms.[331]

In the 1913 statute, said the court, "both the words 'abandonment' and 'forfeiture' are used, and the said terms are entirely different in their operation." In this decision, the court devoted considerable attention to the

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referred to such losses either as abandonments—as indeed the statute had so designated them—or as forfeitures and abandonments, with understandable confusion in terminology. See *Albrethsen* v. *Wood River Land Co.*, 40 Idaho 49, 59-60, 231 Pac. 418 (1924); *Chill* v. *Jarvis*, 50 Idaho 531, 536-537, 298 Pac. 373 (1931); *Zezi* v. *Lightfoot*, 57 Idaho 707, 713, 68 Pac. (2d) 50 (1937); *Graham* v. *Leek*, 65 Idaho 279, 286-291, 144 Pac. (2d) 475 (1943); *Wagoner* v. *Jeffery*, 66 Idaho 455, 459-460, 162 Pac. (2d) 400 (1945).

However, in a case decided in 1944, the Idaho Supreme Court distinguished statutory forfeiture from true abandonment. It pointed out that although the statute designated the loss of the water rights as "abandonment," it was in fact a statutory forfeiture, in which case an intent to abandon the water right was not required so long as the nonuse occurred throughout the full period prescribed by the statute (in this case, 5 years). That is to say, nonuse for the period ended the right, regardless of the appropriator's intent. In addition, the court said, there is "another kind of abandonment which is *actual*, not dependent upon length of time, the essential element of which is *intent*" to abandon the right by giving it up absolutely. *Carrington* v. *Crandall*, 65 Idaho 525, 531-532, 147 Pac. (2d) 1009 (1944).

[328] Kans. Stat. Ann. § 42-308 (1964).

[329] *Id.* § 82a-718 (1969).

[330] Nev. Rev. Stat. § 533.060(2) (Supp. 1967).

[331] *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 287-291, 108 Pac. (2d) 311 (1940).

fundamental distinctions between abandonment and statutory forfeiture, emphasizing the points that abandonment is the relinquishment of the right by the owner with the intention of forsaking and deserting it, whereas forfeiture is the involuntary or forced loss of the right caused by failure of the appropriator to utilize the water throughout the period required by the statute. The element of intent, so necessary in the case of an abandonment, is not a necessary element in the case of forfeiture. On the contrary, a forfeiture may be worked directly against the intent of the owner of the right to continue in its possession and use. The court took the view that loss of a water right by forfeiture presents a much stricter and more absolute procedure than loss by abandonment.

The Nevada Supreme Court thus chose to treat the water-right nonuse statute of 1913 as solely a forfeiture statute, despite the legislature's use of the word "abandon" as well. The section was held in the *Manse* case to apply to rights acquired after its enactment. With respect to rights that had vested prior to the enactment, however, agreement was expressed with the conclusion of the trial court that to apply the statutory terms would have the effect of impairing such rights; that such rights could be lost only in accordance with the law in existence at the time the forfeiture statute was enacted, namely intentional abandonment.[332]

Oregon.—The controlling sentence in the Oregon statute reads: "Whenever the owner of a perfected and developed water right ceases or fails to use the water appropriated for a period of five successive years, the right to use shall cease, and the failure to use shall be *conclusively presumed* to be an abandonment of water right." [Emphasis added.][333] This goes beyond the Kansas Legislature's "shall be deemed abandoned" and makes it clear that if "conclusively presumed" means anything at all, it completely rules out the element of intent. Its ingredients are those of forfeiture—nonuse and lapse of time. Although this may purport to be an abandonment statute, it is in effect a forfeiture statute.

In two decisions rendered in the early 1930's, the Oregon Supreme Court made some confusing statements about abandonment and the statutory nonuse period.[334] Since the priorities under discussion in these cases—1892 in the *Broughton* case and 1870 in the *Hutchinson* case—long antedated the 1913 Oregon statute, with its positive declaration that nonuse for 5 years shall be

[332] See also *Franktown Creek Irr. Co.* v. *Marlette Lake Co.*, 77 Nev. 348, 364 Pac. (2d) 1069, 1072 (1961).

[333] Oreg. Rev. Stat. § 540.610 (Supp. 1969).

[334] To constitute abandonment of a water right, there must be a concurrence of an intention to abandon and an actual failure in its use for the statutory period. *Broughton* v. *Stricklin,* 146 Oreg. 259, 277, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934). The right to use of water cannot be deemed forfeited by nonuse short of the time period prescribed by the statute, and nonuse will not effect an abandonment in absence of proof of intent to abandon. *Hutchinson* v. *Stricklin,* 146 Oreg. 285, 301, 28 Pac. (2d) 225 (1933).

conclusively presumed to be an abandonment of the water right, it may be assumed that the court was not thinking about the 1913 statute. However, by confusing actual abandonment as construed generally in the West with statutory forfeiture for a designated period of years, the general rule that abandonment can take place instantly upon concurrence of nonuse and intent to abandon—and therefore at any time prior to expiration of the statutory period—was disregarded.

In a 1965 case, without mentioning anything about intent or the *Broughton* and *Hutchinson* cases, the Oregon Supreme Court quoted the Oregon statutory provision set out above and held "that the plaintiffs' predecessor forfeited by nonuse any right of appropriation he had." The court noted that the trial court had concluded that the plaintiffs and their predecessor in interest had failed to use the appropriated water for a period of more than 5 successive years and that such failure constitutes an abandonment of their water rights.[335]

Texas.—In Texas, *willful abandonment* is essential to loss of water rights by reason of nonuse for 3 successive years. The applicable statute, article 7544, reads: "Any appropriation or use of water heretofore made under any statute of this State, or hereafter made under provisions of this chapter, which shall be wilfully abandoned during any three successive years, shall be forfeited and the water formerly so appropriated shall be again subject to appropriation for the purposes stated in this Act."[336]

The intent of the legislature to integrate the appropriator's intent to abandon his statutory appropriation with a definitely prescribed period of years seems clear. In construing these features of the 3-year nonuse statute, a Texas court of civil appeals took this view:[337] "Mere nonuser for the three-year period prescribed by Article 7544 without a wilful intention to abandon will not result in the loss of rights under a permit. This seems clear from the language of the statute which uses the words, 'wilfully abandoned.' " The Texas Supreme Court recently said this statute "authorized the termination of water permits upon proof of three years of wilful abandonment."[338]

Another Texas statute, article 7519a, enacted in 1957, regarding permits or certified filings authorizing appropriation and use of water, provides for their cancellation for 10-years' nonuse.[339] This has been recently construed by the

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[335] *Day* v. *Hill*, 241 Oreg. 507, 406 Pac. (2d) 148, 149 (1965).

[336] Tex. Rev. Civ. Stat. Ann. art. 7544 (1954).

[337] *Lower Nueces River Water Supply Dist.* v. *Cartwright*, 274 S.W. (2d) 199, 208 (Tex. Civ. App. 1954, error refused n.r.e). See also *Anson* v. *Arnett*, 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.), discussed in *Texas Water Rights Comm'n* v. *Wright*, 464 S.W. (2d) 642, 644, 646 (Tex. Sup. Ct. 1971).

[338] *Texas Water Rights Comm'n* v. *Wright*, 464 S.W. (2d) 642, 646 (Tex. Sup. Ct. 1971). See also *State* v. *Hidalgo County Water Control & Improvement Dist. No. 18*, 443 S.W. (2d) 728, 759 (Tex. Civ. App. 1969, error refused n.r.e.).

[339] Tex. Rev. Civ. Stat. Ann. art. 7519a (Supp. 1970). Certain exceptions are provided in regard to facilities for conservation reservoir storage and municipal rights under certified filings.

Texas Supreme Court.[340] "Section 1 of the statute concerns total non-use of appropriated water; Section 2 concerns the partial non-use of appropriated water."[341] In quoting the statute the court emphasized the provision in section 1: that if there has been total nonuse for 10 consecutive years the permit or certified filing "shall be presumed to have been wilfully abandoned in that the holder has not been diligent in applying any of such unused water to beneficial use under the terms of the permit or certified filing for each year during the ten-year period and has not been justified" in such nonuse for each year during the 10-year period. The court also emphasized the provision in the last sentence of section 1 that at the conclusion of the required hearing, "if the [Commission] finds that no water has been beneficially used for the purposes authorized during such ten-year period, such permit or certified filing shall be deemed as wilfully abandoned, shall be null, void and of no further force and effect, and shall be forfeited, revoked and cancelled." In construing this and the other language of section 1, the court said:[342]

> The statute, as appears from the first emphasized portion of Section 1 confuses the concept of abandonment with that of forfeiture. Abandonment is the relinquishment of a right by the owner with the intention to forsake and desert it. The statute speaks of diligence and justification and indicates that the Legislature thought those elements were essential to proof of abandonment. The statutory use of the terms abandonment and forfeiture do not fit the common law meaning of either term. In our opinion, however, the emphasized part of the last sentence of Section 1 makes the legislative purpose clear. Even though the Legislature was describing a kind of abandonment or forfeiture which was different from the usual common law concepts, that last sentence shows that the purpose of the statute was to terminate water permits after a hearing upon proof that no water had been beneficially used for a ten-year period. Intent was not to be an element. Moreover the sentence shows that the presumption in the statute was meant to be a conclusive presumption. It was not to be a rebuttable presumption, which could stand only in the absence of evidence to the contrary. In a cancellation proceeding based upon total non-use, justification and diligence were to be immaterial. We regard the statute's reference to those elements as the Legislature's reasons for its enactment of the law, and not as requirements that they be proved. Viewing the statute as a whole, we understand the Legislature to be indicating its intent to provide a cancellation procedure to terminate water permits upon timely proof that no water had been used by force of the permits for a period of ten consecutive years. In acting as it has, the Legislature has not only retained Article 7544, which authorized the termination of water permits upon proof of three years of willful abandonment, but has added a new basis for termination, that of ten consecutive years of non-use of water permits.

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[340] *Texas Water Rights Comm'n* v. *Wright*, 464 S.W. (2d) 642 (Tex. Sup. Ct. 1971).
[341] 464 S.W. (2d) at 646.
[342] *Id.*

The court indicated that under the circumstances this 10-year nonuse provision was valid, including its effect upon appropriative rights perfected before its enactment.[343] In regard to its retroactive effect, the court's attention was called to the decision of the Nevada Supreme Court in the *Manse* case[344] regarding a Nevada statute pertaining to 5-years' nonuse. The court said in part: "We do not know what that court would have held had it been faced with the ten-year non-use statute which we have before us. We do not choose to follow the holding of the Nevada Court, a holding which is apparently the rule only in that state."[345]

The court also construed section 2 of the statute in certain respects. The court said that while section 1 authorizes cancellation of a permit for 10-years' total nonuse without consideration of the permittee's diligence or intentions, "In contrast, Section 2, authorizing the partial cancellation of permits which have been only partially utilized, allows the defenses of bona fide intention, diligence, and justification."[346] Section 2 provides in part that if the

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[343] Among other things, the court said: "We conclude that the permittees could reasonably expect that their rights would be subjected to a remedy enforcing the conditions inherently attached to those rights and enabling the state to assert and protect its own rights and interests in the water. They knew their permits were only usufructuary and that the State was charged by the Constitution to conserve its water. Moreover, the permittees were afforded a reasonable time after the enactment of Article 7519a in which to put their system into operation and to preserve their rights. The Commission did not institute proceedings until nine and one-half years after the effective date of Article 7519a and their permits were valid until the State instituted its proceedings and obtained an order of cancellation. The court of civil appeals found as a fact that there was a total non-use of the water continuously during the full ten-year period prior to the institution of the cancellation proceedings. The fact that six months of the ten-year period is drawn from the time antecedent to the statute's effective date does not defeat the fair notice to which the permittees were entitled. * * *

"We hold that the two water permits were grants to the permittees of usufructuary rights to the State's water upon the implied condition subsequent that the waters would be beneficially used. * * * We hold further that Article 7519a provided a reasonable remedy for the State's enforcement of the condition subsequent after fair opportunity and the failure on the part of the permittees to protect their rights." 464 S.W. (2d) at 649.

[344] *In re Manse Spring & Its Tributaries,* 60 Nev. 280, 108 Pac. (2d) 311 (1940), discussed above at the end of the subtopic "Nevada."

[345] 464 S.W. (2d) at 650.

[346] 464 S.W. (2d) at 650. The court concluded that this distinction did not violate the constitutional requirement of equal protection of the law. In this regard, the court said in part: "The Legislature could have a number of reasonable bases for treating one who had completely failed to use his water permit for a period of ten years differently from a party who had at least partially utilized his permit. For example, a partial user is more likely to be using less than the full amount of water allowed under his permit because of actual unavailability of the water supply. Under these conditions, he should be accorded the opportunity to justify his non-use. On the other hand, one who has made absolutely no use at all of his water rights could rarely, if ever, assert as justification for non-use that there was a total lack of water for ten continuous years." 464 S.W. (2d) at 651. (Footnote continued.)

Commission should find after the required hearing

> that any portion of the water authorized to be diverted and used under such permit or certified filing has not been put to an authorized beneficial use during said ten-year period, *and that reasonable diligence has not been used* by the holder or holders in applying such unused portion of said water to beneficial use under the terms of the permit or certified filing, *and that such holder has not been justified in such nonuse or does not have a then bona fide intention of putting such unused water to beneficial use* under the terms of the permit or filing *within a reasonable time* after such hearing, the [Commission] shall enter its order cancelling such permit or certified filing as to the portion of the water as to which such findings are made, and said portion of said water shall again be subject to appropriation."[347] [Emphasis added.]

Utah.—In a decision rendered in 1937, *Hammond* v. *Johnson*, the Utah Supreme Court stated with clarity the fundamental distinctions between statutory forfeiture and abandonment as methods of losing appropriative rights. Among these are the basic concepts that abandonment is not based upon a time element, whereas forfeiture depends on nonuse for a definite period of years; in abandonment, the controlling element is a matter of intent, whereas forfeiture may occur despite a specific intent not to surrender the right.[348]

Only a few years later, in *Tanner* v. *Provo Reservoir Company*, the Utah Court surprisingly stated that abandonment of a water right requires concurrence of intent to abandon and actual failure in its use for the statutory period, citing an Oregon case which is cited and criticized above under the subtopic "Oregon."[349] Because the Utah Legislature's declaration begins: "When an appropriator or his successor in interest shall *abandon or cease to use*

On rehearing, the court said in part: "In our original opinion we held that Article 7519a was not unconstitutionally retroactive because of its alteration of the status of rights fixed by Article 7544. The reasoning advanced in relation to Article 7544 is equally applicable to Article 7474." *Id.*

[347] The statute also provides that "In determining what constitutes a reasonable period of time in this paragraph, the Board shall give consideration to expenditures made or obligations incurred by the owner of such permit or certified filing in connection therewith, the purpose to which the water is to be applied, the priority under the general law of such purpose, and the amount of time usually necessary to put such water to a beneficial use for the same purpose when diligently developed.

The statute is set out in 464 S.W. (2d) at 645-646.

[348] The court also said that abandonment depends upon a concurrence of the acts of the appropriator with his intent to desert or forsake the right; whereas forfeiture is based, not on an act done nor an intent had, but upon failure to use the right for the statutory time. *Hammond* v. *Johnson,* 94 Utah 20, 31, 66 Pac. (2d) 894 (1937). See *Deseret Live Stock Co.* v. *Hooppiania,* 66 Utah 25, 32-33, 239 Pac. 479(1925).

[349] *Tanner* v. *Provo Res. Co.,* 99 Utah 139, 152, 98 Pac. (2d) 695 (1940), citing *Broughton* v. *Stricklin,* 146 Oreg. 259, 277, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934).

water for a period of five years the right shall cease * * *."[350] [Emphasis added], this coupling of "abandon" and "cease to use water" before a definite time period in the same sentence lends itself to some confusion as to just what the legislature meant.[351] But it seems to be a strange interpretation of the legislative language to conclude that the two conflicting concepts, separated by the word "or," were intended to be essential elements of one extraordinary concept, as was done in the *Tanner* decision. Particularly is this strange in view of the distinctions between abandonment and statutory forfeiture that previously had been so well pointed up in the *Hammond* decision and in Kinney's 1912 treatise on water rights.[352]

However, from subsequent decisions it is clear that the ill-advised deviation in the *Tanner* case did not disturb the theretofore sound Utah judicial concept. In rejecting defenses in one case that there had been both statutory forfeiture and abandonment, the Utah Supreme Court said in 1943 that "Abandonment is a separate and distinct concept from that of forfeiture" and quoted the pertinent observations to that effect from the *Hammond* case.[353] And in a 1961 opinion the Utah court said:[354]

> Although the statute uses the term "abandon or cease to use water for a period of five years," we have recognized that abandonment is a separate and distinct concept from that of forfeiture in that an abandonment requires a definite intent to relinquish the right to use and ownership of such water right and does not require any particular period of time, but the forfeiture herein provided for requires that the appropriator cease to use the water for a period of five years before it is complete.

Wyoming.—Wyoming is one of the States that use both "abandon" and "forfeit" in providing by statute for loss of water rights as a result of failure to use for a specific period of years. In fact, the consistent Wyoming habit goes back to a Territorial statute.[355]

The current Wyoming statute, entitled "Abandonment of Water Rights,"

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[350] Utah Code Ann. § 73-1-4 (1968).

[351] In contrast to Washington legislation enacted in 1967 which states *inter alia* that any person entitled to divert or withdraw waters of the state "who abandons the same, or who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to divert or withdraw for any period of five successive years * * * shall relinquish such right or portion thereof * * *." Wash. Rev. Code § § 90.14.160 - 90.14.180 (Supp. 1970). Although this has not been construed by the Washington Supreme Court, it appears to provide for both (1) loss by abandonment and (2) loss by voluntary nonuse for 5 successive years.

[352] Kinney, *supra* note 325.

[353] *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 467-468, 137 Pac. (2d) 634 (1943).

[354] *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 4, 361 Pac. (2d) 407 (1961). See also *In re Escalante Valley Drainage Area*, 12 Utah (2d) 112, 114-115, 363 Pac. (2d) 777 (1961).

[355] Wyo. Laws 1888, ch. 55, § 14.

contains seven sections.[356] In the first of these sections,[357] the title to which includes "forfeiture by abandonment," is the statement of principle that "in case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for irrigation or other beneficial purposes during any five successive years, they shall be considered as having abandoned the same, and shall forfeit all water rights, easements and privileges, appurtenant thereto * * *." However, in the procedural provisions that follow,[358] which were first enacted in 1913,[359] "abandon" is used exclusively.

Inasmuch as in the judicial nomenclature of western water law distinctions are commonly made between abandonment and statutory forfeiture as methods of losing appropriative water rights, the Wyoming Supreme Court eventually found it necessary to construe the statute in this respect. Whether the nonuse statute contemplated abandonment and therefore an intention to abandon the right, or forfeiture without such intention, was apparently first discussed by the supreme court in 1925.

In 1925, the supreme court said, "It is further contended that, before a water right can be forfeited, there must be proof not only of non-user for the statutory period, but also of a concurring intention to abandon the right; that the evidence fails to meet this test, and is therefore insufficient to support the decree of forfeiture." The supreme court believed that in consideration of all the facts and circumstances the trial court was justified in finding that not only was there nonuse for more than the statutory period, but it was accompanied by an intention to abandon the rights. "It is unnecessary to say whether under the statute a forfeiture may be decreed upon evidence showing non-user for the statutory period where the circumstances would not justify a finding of an intention to abandon the right." Hence the supreme court refused to pass on the question.[360]

In a 1936 case, the issue was again raised as to whether an intent to abandon must be shown. The supreme court said: "We agree that no such intent has been shown, and that it is necessary to be shown in the ordinary case, in order to prove abandonment. * * * But in many of the states, including our own, a statute of nonuser, or forfeiture (which, however, is strictly construed * * *), has been enacted, in which case it is generally, though not universally, held that the element of intent is not necessary." The court said that the point had been raised in the 1925 case discussed above, "but was not decided. We think that we need not decide the point here." So again the Wyoming Supreme Court refused to pass on the question.[361]

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[356] Wyo. Stat. Ann. § § 41-47 to -53 (1957).

[357] *Id.* § 41-47.

[358] *Id.* § § 41-48 to -53.

[359] Wyo. Laws 1913, ch. 106.

[360] *Wyoming Hereford Ranch* v. *Hammond Packing Co.,* 33 Wyo. 14, 23-25, 236 Pac. 764 (1925).

[361] *Van Tassel Real Estate & Live Stock Co.* v. *Cheyenne,* 49 Wyo. 333, 349-350, 54 Pac. (2d) 906 (1936).

In a 1960 case, in litigation originating in a legal declaration of abandonment by the Board of Control, the Wyoming Supreme Court rejected an argument that before an abandonment under the statute could be declared, it was necessary to prove intent. Even if quoted western authorities were less emphatic as to the unimportance of intent in statutory forfeiture, said the court, it would be reluctant to insert the word "intent" in a statute in which the legislature has seen fit to omit it. The court's conclusion with respect to the Wyoming nonuse statute was that "We think that intent is not essential to a forfeiture under the provisions of § 41-47."[362]

Summation of State Situations

Of the six State situations described immediately above, in which abandonment and statutory forfeiture are interrelated, no two are exactly alike.

(1) Kansas has two extant nonuse statutes. The earlier one provides that nonuse (for the designated period) constitutes forfeiture; the later one, that the right shall be deemed abandoned, which probably renders intent unnecessary. Administrative declaration of abandonment is included in the later enactment.

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[362] *Ward* v. *Yoder,* 355 Pac. (2d) 371, 375-376, rehearing denied, 357 Pac. (2d) 180, 181-182 (Wyo. 1960). The court referred to an Idaho case in which the Idaho Supreme Court said that while the water rights statute of that State designated the loss by nonuse as "abandonment," it was in fact a "statutory forfeiture." *Carrington* v. *Crandall,* 65 Idaho 525, 532, 147 Pac. (2d) 1009 (1944), discussed in note 327 *supra.*

In a 1968 case, in holding that the nonavailability of water is properly a matter of defense in an action to declare an abandonment under the Wyoming forfeiture statute for 5 years' nonuse, the court quoted the following language from a 1939 opinion (which was not mentioned in the 1960 *Ward* case): "An abandonment of a water right * * * must be voluntary. It cannot be held to be abandoned, if non-user is caused by factors not under the appropriator's control." *Yentzer* v. *Hemenway,* 440 Pac. (2d) 7, 13, rehearing denied, 440 Pac. (2d) 320 (Wyo. 1968), quoting from *Scherck* v. *Nichols,* 55 Wyo. 4, 95 Pac. (2d) 74, 80 (1939). But the court failed to note, contrary to its implication, that the quoted case did not expressly refer to the forfeiture statute in this regard and hence conceivably dealt instead with the question of common-law abandonment. Nevertheless, the court's language, coupled with the fact that two earlier cases [*Ramsey* v. *Gottsche,* 51 Wyo. 516, 69 Pac. (2d) 535 (1937), *Morris* v. *Bean,* 146 Fed. 423 (C.C.D. Mont. 1906)] that it had cited in its quoted 1939 opinion did expressly deal with Wyoming's forfeiture legislation, may suggest that the court felt the question of voluntariness is involved whenever the question of availability of water is considered. But in this respect, voluntariness need not necessarily depend on one's "intention" if the court meant by this simply that one's failure to use water is not "voluntary" if there was no water available. The court mentioned the 1960 *Ward* case in only one regard: the court cited it and the *Scherck* and *Ramsey* cases in support of its assertion that none of its opinions had construed the forfeiture legislation as making "availability of water an element of proof in order to effect an abandonment." This 1968 case also is discussed earlier under "Statutory Forfeiture," at note 282 under the subtopic "Establishment of Forfeiture: Administrative Procedures–Wyoming" and at note 314 under the subtopic "Negating Circumstances–Enforced discontinuance of use of water."

(2) Nevada uses both terms—abandonment and forfeiture. Despite this, the supreme court has pointed out the fundamental distinctions and has construed the statute as providing solely for forfeiture.

(3) Oregon provides that failure to use for the statutory period is *conclusively presumed* to be an abandonment. *Conclusive* presumption rules out the element of intent and leaves only two factors to be considered—nonuse and lapse of time. These are the essential ingredients of forfeiture, not of abandonment. Hence, although this may purport to be an abandonment statute, it is in effect a forfeiture statute.

(4) A Texas statute combines *willful abandonment* with nonuse of water for a 3-year period. The legislative intent to integrate intent to abandon and failure to use the water is frank and clear, and it is so recognized by the courts. Another Texas statute has been construed to provide that total nonuse for 10 years shall be *conclusively* presumed to constitute willful abandonment, whereas in the event of partial nonuse for 10 years, bona fide intention, diligence, and justification shall be considered.

(5) Utah uses the phrase "abandon or cease to use water" in providing that as a result of nonuse for a prescribed period the right shall cease. With one exception, the Utah Supreme Court has distinguished clearly between abandonment and forfeiture, and while acknowledging the unfortunate legislative terminology, it has construed the statute as providing for forfeiture only.

(6) Wyoming's legislature began using both "abandon" and "forfeit" during the Territorial regime and it still does. In the earlier supreme court decisions the contradiction of terms was recognized, but because of the circumstances of the cases it was not resolved. In 1960, the Wyoming Supreme Court held that intent is not essential to a forfeiture under the statute, which appears to have set it off as providing for forfeiture and not true abandonment.[363]

PRESCRIPTION

The terms "adverse possession and use" and "prescription" are often used interchangeably. However, a more nearly accurate statement of their relationship would be that in a situation in which *A* uses adversely the water to which *B* has a valid water right under all the circumstances and conditions imposed by law, the result in loss by *B* of his title to the right and simultaneous acquisition of title thereto by *A*, whose newly acquired water right is denominated a prescriptive water right. In other words, as a result of such transaction, adverse possession and use on the part of *A* ripens into prescription—the acquisition of a prescriptive right.

In a number of States, the possibility of establishing a prescriptive right as

[363] Regarding the question of voluntariness and the availability of water, discussed in a 1968 case, see note 362 *supra*.

against one or more kinds of water rights has been negated or questioned by legislation or in one or more reported court decisions. This is discussed later under "Establishment of Prescriptive Title–Possibility of Establishing Prescriptive Water Right Negated or Questioned."

Prescription Distinguished From Other Methods of Loss

The loss of a water right or portion thereof by either abandonment or statutory forfeiture results in a termination of the right or portion thereof, and, unlike prescription, the water thereby represented may again become unappropriated water. Abandonment of a water right to the public requires that the appropriator intentionally release or surrender such right to the public. Such loss of a water right does not necessarily depend upon a forfeiture statute, nor does it require nonuse of such right for any particular length of time. A forfeiture of such right under such a statute, however, does require nonuse of the water right for the statutory period.

The loss of a water right by either abandonment or statutory forfeiture does not contemplate transfer of a water right from one person to another. "But," said the Idaho Supreme Court, "a right to use water which is lost by prescription or adverse user is in effect a passing of such water right from the original appropriator to the adverse user."[364] Such transfer requires adverse use with the original owner's acquiescence, which means that he neither interrupts nor asserts his right to interrupt the adverse user. The adverse use must be open, notorious, and under a claim of right–not under the original appropriator but adverse to him and without his interruption or permission.

Character of Water Rights Affected

The foundation of the law of adverse possession and use or prescription is that possession of the rightful owner is invaded by an outsider who claims a

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[364] *In re Drainage Area of Bear River in Rich County,* 12 Utah (2d) 1, 4-5, 361 Pac. (2d) 407 (1961). In this regard, see "Character and Quality of Prescriptive Title–Passing of Title," *infra.* The Utah Supreme Court pointed out this and other ways in which the concepts of abandonment and statutory forfeiture of water rights differ from the method of loss of his water right by an appropriator to another by prescription. 12 Utah (2d) at 5.

A prescriptive right often may be applicable to only a part of another's water right. (See "Measure of the Prescriptive Right–Part of Invaded Right Only," *infra.*) In that event, only the title to that part of the right is affected.

A prescriptive right usually is acquired as against only one or more water rights holders, leaving the rights of others unaffected. (See "Establishment of Prescriptive Title–Adverse Parties–Owners of rights affected," *infra.*) And prescriptive rights ordinarily do not run upstream. (See "Establishment of Prescriptive Title–Relative Locations on Stream Channel," *infra.*).

title adverse to the rightful owner's claim and who continues his unlawful possession and use, without substantial interruption by the rightful owner and without his permission, for a continuous period of time and under other conditions prescribed by law. At the end of that period, the unlawful intruder becomes the lawful owner of the property, whether land or water right.

It was said by the Montana Supreme Court that the right of adverse use or prescription is acquired in some measure by an invasion of the rights of others, and is based upon a positive assertion of right in and by the water user in derogation of the rights of everyone else.[365]

Under "Basis of the Prescriptive Right," below, some mention is made of the presumption of a lost grant as initiating prescriptive title, derived from the English decisions and appearing in some of the American State cases. This feature of the law of adverse possession arose in England at a time when grants from the Government and exchanges of possession of land were poorly recorded or not recorded at all. As explained by Wiel, "The supposed grant, however, is merely a fiction of the law. It is not a reward of adverse diligence, but a punishment for delay; the law will not look into stale demands."[366]

This, then, was the justification for allowing a wrongdoer to acquire a complete title to the property—land or water right—which he unlawfully invaded and continued to invade. It is no longer necessary to indulge in such a fiction; the statutes of limitation, plus the other safeguards recognized by law, when properly enforced, take care of avoidance of stale claims to the ownership and exercise of water rights, with which this discussion is concerned.

Rights Subject to Loss by Prescription

Rights to use water of watercourses may be subject to loss by prescription in the majority of the Western States. In a number of States, however, the possibility of establishing title to a prescriptive water right as against one or more kinds of water rights has been negated or questioned by legislation or court decisions. See the later discussion, "Establishment of Prescriptive Title—Possibility of Establishing Prescriptive Water Right Negated or Questioned."[367]

Appropriative right.—As early as 1864 the California Supreme Court held that "The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another."[368] And 2 decades later the same court said "That an action to enforce the right to water can be barred by five years' adverse possession we consider settled in this state."[369]

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[365] *Smith* v. *Duff*, 39 Mont. 374, 378, 102 Pac. 981 (1909).

[366] Wiel, S.C., "Water Rights in the Western States," 3d ed., vol. 1, § 580 (1911).

[367] See also "Character of Right—Pueblo Right," *supra,* regarding the nonrecognition of such loss of a pueblo water right.

[368] *Union Water Co.* v. *Crary*, 25 Cal. 504, 509 (1864).

[369] *Evans* v. *Ross*, 67 Cal. XIX, 2 Cal. U. 543, 545, 8 Pac. 88 (1885). See "Establishment

In 1872, the Nevada Supreme Court stated, "The presumption respecting the adverse user of water and the adverse holding of land stands upon the same footing, and the reason which will sustain the one will likewise uphold the other."[370]

Some early statements by other western courts recognized the applicability of the principle of loss by prescription to appropriative rights.[371]

Riparian right.—In a number of the Western States in which the riparian doctrine has been recognized, recognition was extended also to the possibility of loss of a riparian right by prescription.[372]

That prescription is a generally recognized method of losing title to a riparian right was indicated in the leading California riparian case of *Lux* v. *Haggin*[373] and this has been restated or actually decided in many cases in that State. In an action to maintain a riparian water right in which the defense was a prescriptive right of diversion, the California Supreme Court held that a right to property founded on the statute of limitations is a prescriptive right and that it is the settled rule in California "that the possession of property of the requisite character and time confers a title to the property."[374]

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of Prescriptive Title—Relation of the Necessity for a Valid Statutory Appropriation" *infra*, concerning some questions that have been raised in that regard with respect to California.

With respect to statutory periods of years in this and other Western States, see the abstracts of statutory provisions relating to land and water rights under "Elements of the Prescriptive Right—Statute of Limitations," *infra.*

[370] *Vansickle* v. *Haines,* 7 Nev. 249, 283-284 (1872).

[371] *Wimer* v. *Simons,* 27 Oreg. 1, 18-19, 39 Pac. 6 (1895); *Smith* v. *North Canyon Water Co.,* 16 Utah 194, 201-202, 52 Pac. 283 (1898); *Brossard* v. *Morgan,* 7 Idaho 215, 218, 61 Pac. 1031 (1900); *Gould* v. *Maricopa Canal Co.,* 8 Ariz. 429, 448, 76 Pac. 598 (1904). "Many cases are cited by the appellants in support of their contention that 'The right to use water for irrigation may be acquired, not only by original appropriation or by grant, but also against individuals in whom the right is vested, by adverse possession and use.' The proposition has the support of many adjudicated cases." *Clark* v. *Ashley,* 34 Colo. 285, 288, 82 Pac. 588 (1905); accord, *State* v. *Quantic,* 37 Mont. 32, 54, 94 Pac. 491 (1908); *Gustin* v. *Harting,* 20 Wyo. 1, 19, 121 Pac. 522 (1912); *Allen* v. *Roseberg,* 70 Wash. 422, 426, 126 Pac. 900 (1912).

[372] See, in chapter 10, "The Riparian Right—Severance of Riparian Right from Land—Prescription."

[373] *Lux* v. *Haggin,* 69 Cal. 392, 4 Pac. 919 (1884), 10 Pac 674 (1886).

[374] *Alhambra Addition Water Co.* v. *Richardson,* 72 Cal. 598, 600-601, 14 Pac. 379 (1887). See *E. Clemens Horst Co.* v. *Tarr Min. Co.,* 174 Cal. 430, 438, 163 Pac. 492 (1917). See also *Davis* v. *Chamberlain,* 51 Oreg. 304, 316-317, 98 Pac. 154 (1908); *Mally* v. *Weidensteiner,* 88 Wash. 398, 405, 411, 153 Pac. 342 (1915).

A trespasser on riparian land in California, even if he actually uses water on a portion of the tract, takes nothing from the true owner if the running of the statute of limitations is broken. In holding that the unlawful use of the water under the circumstances of this case did not affect the riparian right inhering in the riparian tract, the supreme court said, "Nor can the area of the lands to which riparian rights are appurtenant be diminished, by the acts of a trespasser segregating for the time being the

In 1903, the South Dakota Supreme Court held, "The right of a riparian owner to the use of the water of a creek flowing over or through his land is not an easement, but an incident to and a part of the land itself, which can only be lost by adverse prescriptive right, grant, or actual abandonment."[375]

Ancient Hawaiian right.—Ancient Hawaiian surface water rights may be lost by prescription. See, in chapter 12, "Water Rights in Surface Watercourses—Some Aspects of the Ancient Hawaiian Surface Water Right."

Prescriptive right.—"Prescriptive title is as good as that acquired by deed or otherwise and can be alienated only in the same way as such other title."[376]

Prescriptive as well as appropriative rights may be lost by adverse use on the part of others under the circumstances necessary to constitute prescription.[377] "A title so acquired [by prescription] is as effectual and complete as one obtained by a conveyance, and unless extinguished by virtue of some special statutory provision such as section 811 of the Civil Code, continues until conveyed by the possessor or lost by another adverse possession for the required time."[378]

The Civil Code section referred to is that a servitude is extinguished, among other ways, "When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment."[379] Citing this Civil Code section, as well as section 1007 referring to the 5-year period for obtaining title by prescription,[380] the California Supreme Court said:[381]

> With respect to the claim to a greater quantity it may be further stated that there was evidence of use for a period of five years, continued in such a manner as to create a prescriptive title. Such

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actual occupancy, without segregation of title." *Alta Land & Water Co.* v. *Hancock,* 85 Cal. 219, 223, 228-230, 24 Pac. 645 (1890).

[375] *Stenger* v. *Tharp,* 17 S. Dak. 13, 23-24, 94 N.W. 402 (1903), repeated in *Redwater Land & Canal Co.* v. *Reed,* 26 S. Dak. 466, 487, 128 N.W. 702 (1910); *Redwater Land & Canal Co.* v. *Jones,* 27 S. Dak. 194, 204, 130 N.W. 85 (1911).

[376] *George* v. *Gist,* 33 Ariz. 93, 98, 263 Pac. 10 (1928).

[377] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 927, 207 Pac. (2d) 17 (1949); *Gardner* v. *Wright,* 49 Oreg. 609, 628, 91 Pac. 286 (1907).

[378] *Strong* v. *Baldwin,* 154 Cal. 150, 162, 97 Pac. 178 (1908).

[379] Cal. Civ. Code § 811(4) (West 1954).

[380] Cal. Civ. Code § 1007 (West Supp. 1969) incorporates, by reference, the 5-year period in Cal. Civ. Pro. Code § 318 (West 1954).

With respect to statutory periods of years in this and other Western States, see the abstracts of statutory provisions relating to land and water rights under "Elements of the Prescriptive Right—Statute of Limitations," *infra.*

[381] *Northern Cal. Power Co., Consol.* v. *Flood,* 186 Cal. 301, 305-306, 199 Pac. 315 (1921). Compare Wiel, *supra* note 366, at 625, n. 22, questioning whether this Civil Code provision applies to a water right acquired by adverse use. "It would seem not, since a water-right is not a servitude." Wiel's comment was published in 1911, a decade before the *Northern Cal. Power Co.* decision was rendered. See also the discussion at notes 890-891 *infra.*

> title would not be lost by subsequent interruption for less than five years. Such a right constituted a servitude upon the original title of Asbury, and the nonuse thereof would not extinguish it unless the nonuse continued for the period of five years.

For further discussion of the loss of prescriptive rights by adverse use and in other ways, see "Loss of Prescriptive Rights," *infra.*

Right acquired or reserved under contract.—In an early Colorado case it was held that a perpetual right to the use of water from an irrigation ditch, acquired or reserved under contract, is an easement in the ditch which cannot be lost by nonuser alone. Loss may occur by adverse use for the period of limitation of actions to recover real property.[382]

Purpose of Right Gained by Prescription

Character of injuries to rightful owner.—In a very early Texas case it was pointed out that at both the common law and civil law, the riparian proprietor might turn the water on his own land by a dam or other appropriate means, but "unless he has acquired the right of doing so by grant, license, or *such adverse possession as will give him the right by prescription*, he cannot do it in a manner that will unreasonably detain the water, not consumed, from the riparian owners below, or throw it back beyond the line where it passes from the land of the owner above him."[383] [Emphasis added.]

There were thus emphasized (in the pre-appropriation period) two different ways of invading the rights of other riparians: (1) injury to the rights of those downstream by wrongful deprivation of water, and (2) injury to upstream or opposite owners by flooding their lands without permission. Most prescription cases involving western watercourses deal with claimed rights to divert water as against downstream claimants. That results, of course, from the physical interrelationships of upstream and downstream claimants. Seldom, it is said, does prescription "run upstream." However, a few high court decisions have involved actual invasion of the upper claimant's property in making the downstream diversion. This constituted the initiation of an adverse use. See the later discussion, "Establishment of Prescriptive Title—Relative Locations on Stream."

For the purpose of this discussion, the water rights gained by prescription may be grouped into rights of use, rights of drainage, and ditch and reservoir easements. The cases involved deal chiefly, but not wholly, with water of watercourses. To round out the presentation, it is deemed advisable to include a few decisions relating to certain other waters connected with (although distinguished from) watercourses—diffused surface waters and spring waters.

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[382] *People ex rel. Standart* v. *Farmers High Line Canal & Res. Co.,* 25 Colo. 202, 213, 54 Pac. 626 (1898).

[383] *Rhodes* v. *Whitehead,* 27 Tex. 304, 310 (1863). See *Haas* v. *Choussard,* 17 Tex. 588, 590 (1856).

Rights of use.—(1) Water of watercourses. As stated under the immediately preceding subtopic, most western cases involving prescription in relation to watercourses deal with claimed rights to divert water therefrom, as against downstream claimants of rights to do the same thing—in other words, prescriptive claims to divert water from watercourses and to put it to use. The many and varied facets of this controversial feature constitute the bulk of this chapter.

(2) Waste or seepage water from land of another. In early cases it was decided that the mere use by a lower party of water wasted from lands on which originally used gives no right to have the supply continued.[384]

As in most instances, uses of waste water are necessarily made after the water has left the land and control of the original landowner or water user. Such uses usually are either permissive or are not challenged by the original owner or user. He ordinarily is not concerned with use of the water after it has left his premises and control; he generally has no right to complain about what is done with water that he has abandoned. In the absence of purchase or grant of an irrevocable license, use of seepage and waste waters by permission of the owner of lands from which they flow cannot be the foundation of a right against him. So long as the waste water user takes possession only after it has left the property of the original owner or user, the rights of the latter are not being invaded.[385]

In a recent decision, the Idaho Supreme Court, citing cases from various jurisdictions, declared it to be a rule long recognized that a landowner cannot acquire a prescriptive right to the continued flow of waste or seepage water from the land of another. Such water running from one's land to that of another need not be continued against the will of the upper owner, but may be intercepted by him at any time before it leaves his land and applied there to a beneficial use. "Hence, as against the original appropriator and owner, an adjoining land owner cannot acquire a prescriptive right to waste or seepage water."[386]

(3) Storage of water by California riparian owner. The California Supreme Court has indicated that a riparian proprietor may detain the flow of water in the stream to which his land is contiguous, temporarily in forebays or reservoirs, in order to implement his use of the stream in developing power.[387]

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[384] *Dougherty* v. *Creary,* 30 Cal. 290, 298-299 (1866); *Correa* v. *Frietas,* 42 Cal. 339, 344-345 (1871). A prescriptive right cannot be acquired by a lower landowner to the flow of mere drainage from higher lands, where the water is not flowing in known and well defined channels, or is not being received in accordance with an ancient appurtenant right. *Peck* v. *Bailey,* 8 Haw. 658, 669-670 (1867).

[385] *Joerger* v. *Pacific Gas & Elec. Co.,* 207 Cal. 8, 34, 276 Pac. 1017 (1929); *Davis* v. *Martin,* 157 Cal. 657, 661, 108 Pac. 866 (1910); *Hunceker* v. *Lutz,* 65 Cal. App. 649, 658, 224 Pac. 1001 (1924).

[386] *Thompson* v. *Bingham,* 78 Idaho 305, 308, 302 Pac. (2d) 948 (1956).

[387] *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.,* 209 Cal. 206, 219, 287 Pac. 93 (1930). See *Herminghaus* v. *Southern Cal. Edison Co.,* 200 Cal. 81, 111, 252 Pac. 607 (1926).

It would appear that such use generally is not adverse to the rights of downstream riparian owners.

However, seasonal storage—impounding water during a wet season and holding it for use in a dry season—is held to be not a proper riparian use.[388] Such storage by a riparian owner violates the correlative rights of downstream proprietors and so is adverse to them.[389] It follows that such seasonal storage, if continued by the upstream riparian for the statutory period openly, continuously, and under a claim of right, may ripen into a prescriptive right against the lower owners.[390] The downstream riparian is entitled to an injunction or damages for substantial interference with his right.[391]

The matter of acquisition of prescriptive title to a reservoir easement for storage of water is noted under "Ditch and reservoir easements," below.

(4) Spring on vacant land. The Washington Supreme Court held in a 1957 case that "While it is true that the nature of the property may be a consideration in determining whether a prescriptive right therein has been acquired by open, notorious, continuous, exclusive, hostile, and adverse user, it does not follow, as a matter of law, that a prescriptive right cannot be acquired in vacant, unimproved, unused, wild, and uninhabited land." The evidence was held to support the conclusion that use of the water by the adverse claimant, and maintenance by him of the water system leading from the spring on the rightful owner's land, at least since 1914, gave the requisite reasonable notice to the owner that a claim was made in hostility to his title.[392]

Rights of drainage.—(1) Flood plain of watercourse. "That an easement may be acquired by prescription for the flow of waters there can be no doubt," said the Nebraska Supreme Court in 1950. The court went on to say that this rule has application to watercourses and their flood plains, but never to diffused surface waters. The flood plain of a live stream was defined as the adjacent

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[388] *Colorado Power Co.* v. *Pacific Gas & Elec. Co.,* 218 Cal. 559, 564-566, 24 Pac. (2d) 495 (1933).

[389] *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.,* 209 Cal. 206, 215-219, 287 Pac. 93 (1930).

[390] *Moore* v. *California Oregon Power Co.,* 22 Cal. (2d) 725, 734-735, 140 Pac. (2d) 798 (1943); *Colorado Power Co.* v. *Pacific Gas & Elec. Co.,* 218 Cal. 559, 564-566, 24 Pac. (2d) 495 (1933).

[391] *Colorado Power Co.* v. *Pacific Gas & Elec. Co.,* 218 Cal. 559, 564-566, 24 Pac. (2d) 495 (1933).

Moore v. *California Oregon Power Co.,* 22 Cal. (2d) 725, 734, 738-739, 140 Pac. (2d) 798 (1943), dealt with periodic storage which the court said was similar in effect to seasonal storage. The court said, *inter alia,* that "The next contention is that the use of the waters of a stream is adverse to the rights of a lower riparian owner's rights whether or not he is damaged. A number of cases are cited in support of this contention. The cases cited are all in actions in which injunctive relief was asked and we are in thorough accord with the rulings contained therein. But our attention has not been called to any authority holding that damages may be awarded a riparian owner of lands for an interference with his riparian rights without proof on his part that he has actually been damaged by reason of such interference."

[392] *Malnati* v. *Ramstead,* 50 Wash. (2d) 105, 108-109, 309 Pac. (2d) 754 (1957).

lands overflowed in times of high water from which floodwaters return to the channel at lower points. This plain is regarded as a part of the watercourse, and the water flowing within the channel or its flood plain is characterized as floodwater. (See, in chapter 3, "Elements of Watercourse—Channel—The Flood Plain.")[393]

(2) Diffused surface water. The decisions with respect to the right to acquire an easement for the discharge of diffused surface waters from an upper ownership to a lower one conflict.

Thus in California it has been held in a series of cases that the right to turn diffused surface waters from one's land upon the land of another by artificial ditches or other means may be acquired by prescription.[394] "Although a person has no right to divert surface waters onto his neighbor's land, if he does so for the period of time required to establish a right by adverse possession it may ripen into an easement by prescription."[395]

Likewise, in a 1963 Oklahoma case, the supreme court held it to be "well-established that an easement to cause surface waters to flow over adjoining land may be acquired by prescription without regard to whether the resulting condition constitutes a waterway or merely spreads over the surface."[396]

On the other hand, the Nebraska Supreme Court has held that an easement for the flow of diffused surface water from one's land to that of another cannot be obtained by prescription.[397]

The South Dakota Supreme Court recognized the rule, as prevailing at all times in the jurisdiction, that the lower property is burdened with an easement under which the owner of the upper property may discharge diffused surface waters over the lower property through such channels as nature has provided. Also recognized was the rule that the right to be free from the flow of such diffused surface waters may be acquired by the servient tenement by prescription. In the court's opinion the principle that governs the extinguishment of an easement should control in determining whether such a natural servitude is extinguished—such adverse, continuous, and uninterrupted use of the servient tenement for the prescriptive period by the possessor thereof as would be privileged only if the easement or servitude did not exist.[398]

(3) Drainage of waste water from irrigated land. In 1964 the Colorado Supreme Court affirmed a judgment that the owner of a tract of land, across a

[393] *Courter* v. *Maloley*, 152 Nebr. 476, 486, 490, 41 N.W. (2d) 732 (1950).

[394] *Galbreath* v. *Hopkins,* 159 Cal. 297, 302, 113 Pac. 174 (1911); *Hahn* v. *Curtis*, 73 Cal. App. (2d) 382, 386, 166 Pac. (2d) 611 (1946); *Woo* v. *Martz,* 110 Cal. App. (2d) 559, 562-563, 243 Pac. (2d) 131 (1952).

[395] *Hails* v. *Martz,* 28 Cal. (2d) 775, 778, 172 Pac. (2d) 52 (1946).

[396] *Hargraves* v. *Wilson,* 382 Pac. (2d) 736, 738-739 (Okla. 1963). The court saw no reason why a "water course" or any fixed channel should be required.

[397] *Courter* v. *Maloley,* 152 Nebr. 476, 489-490, 41 N.W. (2d) 732 (1950), approved in *Elsasser* v. *Szymanski,* 163 Nebr. 65, 70, 77 N.W. (2d) 815 (1956).

[398] *Kougl* v. *Curry,* 73 S. Dak. 427, 430-432, 44 N.W. (2d) 114 (1950).

portion of which a ditch owned by another party extended, had acquired a prescriptive right to discharge into the ditch such waste water as might be reasonably necessary in the careful irrigation of that part of his tract.[399]

Early in the 20th century the Washington Supreme Court observed that in the irrigation of arid lands, waste ditches for disposal of the surplus water are as necessary as the irrigation itself, and held that the record in the instant case disclosed all the elements of a prescriptive right on the part of the upper owner to use the waste ditch across the land of another.[400] In a Nevada case decided in the last century, the supreme court recognized the possibility of acquiring a prescriptive right of drainage from irrigated land, but held that under the existing circumstances this had not been accomplished.[401]

At the turn of the century the Supreme Court of Hawaii declared that a large proprotion of a rice plantation had acquired by prescription the right of drainage of waste water into an adjacent river.[402]

Ditch and reservoir easements.—(1) Ditch. In a controversy over ditch rights for conveyance of water, the Idaho Supreme Court cited a number of authorities as supporting the proposition that an easement for the flow of water through a ditch or other artificial watercourse on the land of another may be acquired by prescription. Here the uninterrupted and continuous use of a ditch for more than the prescriptive period raised the presumption that the use was adverse and under a claim of right; and there was no evidence of parol or other license to overcome this presumption. It was held that the claimant had acquired and owned the easement or right of way in the ditch for the flow of the full quantity of water to which he was entitled.[403]

The Idaho Supreme Court emphasized that in Idaho a ditch right for conveyance of water is recognized as a property right apart from and independent of the right to the use of the water conveyed therein. In Montana, also, it was held that acquisition of a right to the use of a ditch across the land of another by adverse use may come about even though the claimant of the easement does not own the water right under which water is carried in the ditch, but depends for the use of the ditch upon water right leased or otherwise acquired from year to year.[404]

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[399] *Feit* v. *Zoller*, 155 Colo. 64, 392 Pac. (2d) 593, 130 Pac. 1147 (1964).

[400] *Brand* v. *Lienkaemper*, 72 Wash. 547, 549 (1913).

[401] *Boynton* v. *Longley*, 19 Nev. 69, 76-77, 6 Pac. 437 (1885).

[402] *Cha Fook* v. *Lau Piu*, 10 Haw. 308, 309 (1896). See the comments on this decision in Hutchins, W.A., "The Hawaiian System of Water Rights" 206 & n. 5 (1946).

[403] *Ramseyer* v. *Jamerson*, 78 Idaho 504, 511, 305 Pac. (2d) 1088 (1957). See *Geary* v. *Harper*, 92 Mont. 242, 251, 12 Pac. (2d) 276 (1932).

[404] *McDonnell* v. *Huffine*, 44 Mont. 411, 423, 120 Pac. 792 (1912). For some other facets, see *Te Selle* v. *Storey*, 133 Mont. 1, 319 Pac. (2d) 218 (1957). Adverse use of an artificial acequia in New Mexico for a period of 40 years, continuously and uninterruptedly, with the knowledge and acquiescence of the owner of the land crossed by the acequia, was held to be sufficient proof of the existence of an easement in the absence of evidence of any permission or license. *Trambley* v. *Luterman*, 6 N. Mex. 15, 23-24, 26, 27 Pac. 312 (1891).

For right to improve a ditch enjoyed under a prescriptive easement, see "Measure of the Prescriptive Right," below.

(2) Reservoir. "In the matter of acquiring title by prescription, there is no distinction between ditches and reservoirs for irrigation."[405] The reservoir involved in the quoted court opinion had been used by plaintiff and his grantor, as well as by defendants and their predecessors in interest, for 34 years prior to the beginning of the suit. The Colorado Supreme Court said:[406]

> Such period is unquestionably long enough to enable the plaintiff to claim the right to store water in the reservoir, as an easement acquired by prescription. The evidence shows that the use was uninterrupted for that length of time. The presumption is, therefore, that such use was adverse and under a claim of right. The testimony shows that the use of the reservoir, for the purpose of storing water, by the plaintiff and his grantor, was with the knowledge and acquiescence of the defendants and their predecessors in interest.

In a case arising in Kansas, which was an action to recover damages for loss of crops resulting from seepage of water on plaintiff's land from an irrigation reservoir owned by defendants, a Federal court said:[407]

> There is no merit to the defendants' contention that they acquired a prescriptive right to maintain a reservoir in the manner in which they did. It seems quite clear that, in Kansas, one may acquire a prescriptive right to maintain a dam or even a flowage right if they are maintained continuously over a statutory period. * * * To establish the right, the use must be substantially the same as that required to obtain title to land by adverse possession. * * * The defendants had a legal right to maintain their dam and reservoir, and no prescriptive right was necessary. The complaint and the evidence refer only to that seepage which occurred in 1949 and thereafter and a prescriptive right could not mature in that time.

Easement on public land.—Inasmuch as there can be no adverse use against the United States, and hence no prescriptive title to water or land while title remains in the Government, this has reference, according to Wiel, only to the point of diversion or to the land through which the stream or ditch runs, and not to the place of the adverse use. "Title to the place of use is immaterial, and the use may be made upon public land and nevertheless be adverse to private rights in the water."[408]

In an early case the Oregon Supreme Court held that if one goes upon the public lands of the United States and appropriates water lawfully there, and is

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[405] *Haines* v. *Marshall*, 67 Colo. 28, 31-32, 185 Pac. 651 (1919).

[406] 67 Colo. at 31-32.

[407] *Garden City Co.* v. *Bentrup*, 228 Fed. (2d) 334, 340-341 (10th Cir. 1955).

[408] Wiel, *supra* note 366, § 591.

permitted to continue in its adverse enjoyment and use for more than 10 years, "such appropriation ripens into a title which cannot be disturbed by one succeeding to the rights of the United States."[409] And in 1903 the Nebraska Supreme Court held that while there was no general custom of appropriating water in the jurisdiction prior to State legislation authorizing it, nevertheless a settler on public land who then appropriated water, and afterward duly entered and received a patent to the land from the Government, might—as against other patentees from the Government on the same stream—count the time during which he appropriated the water as a mere squatter in making out the statutory period of prescription.[410]

In a 1922 case, the Washington Supreme Court commented generally on a conflict of authority as to whether a prescriptive right can be initiated on public lands, even after homestead entry, and whether the commencing period of a prescriptive right can be earlier than the date of issuance of the patent. However, "It is not necessary for us to decide this question because the testimony conclusively shows that this ditch was constructed many years before this land was patented in 1895, and that in that year the ditch was on the land in question and was then serving, and has continued to serve, the purposes of its construction."[411]

Basis of the Prescriptive Right

Primitive

According to Wiel, writing in 1911, "Prescription is the primitive basis of water-rights. At one time most of the common law of watercourses was based upon prescription, and such is to-day the basis of most water-rights in the Hawaiian Islands."[412]

The statement with respect to Hawaii is not entirely correct. It is true that in the Islands, it has been recognized in many decisions that rights to use water may be acquired by prescription, or adverse use against the rightful holder for the period prescribed by the statute of limitations under all conditions imposed upon such acquisition. It is equally true that actual prescriptive rights differ basically from the ancient appurtenant rights of Hawaii, despite the fact that in early cases the term "prescriptive" was sometimes loosely applied to the latter class.[413]

There is a clear legal distinction between a prescriptive right, or right to use water acquired adversely, and a right that is claimed to be based on a use

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[409] *Tolman* v. *Casey,* 15 Oreg. 83, 88, 13 Pac. 669 (1887).

[410] *Meng* v. *Coffee*, 67 Nebr. 500, 518-520, 93 N.W. 713 (1903).

[411] *Ochfen* v. *Kominsky*, 121 Wash. 60, 63, 207 Pac. 1050 (1922).

[412] Wiel, *supra* note 366, § 863.

[413] This is discussed in chapter 12 under "Water Rights in Surface Watercourses—Prescriptive Rights."

that was permissive in its inception and that continued to be permissive thereafter (see discussion of permissive use under "Elements of the Prescriptive Right," below). The latter has none of the characteristics of hostility. The ancient uses of water in Hawaii by taro (kalo) cultivators were not hostile to the landlord (konohiki or chief) by any means; they were made with his permission, with water distributed through systems that he controlled. The ripening into legal rights of the enjoyment of such privileges as against the konohiki evolved from the land reform policy of vesting in native tenants the "rights" that equitably were theirs by ancient custom, even though related to and based upon uses that had been essentially permissive. The historical inaccuracy in confusing the terms in Hawaiian court decisions was pointed out and explained in opinions in a 1904 case;[414] and in a decision rendered in 1930 the supreme court again emphasized the earlier confusion of terms and under the facts of the instant case actually applied the distinction.[415]

Said the Montana Supreme Court:[416]

> The right by adverse user, or prescription, is acquired, in some measure, by an invasion of the rights of others—it bears a sort of kinship, by refined descent, to the "possession by bow and spear" of an earlier time; it is based upon a positive assertion of right in and by the water user in derogation of the rights of everyone else.

Presumption of a Grant

The Texas Supreme Court said in *Austin* v. *Hall* that "A right claimed by prescription rests upon the presumption that the owner of the land has granted the easement and the grant has been lost."[417] However, Gavin Craig has stated, "Title by prescription in California is not based upon a fictitious lost grant but rests upon the more realistic statutes of limitation."[418] The term "loss grant" has been used in only a few of the western water rights cases examined in the course of this study. Usually, it has been simply "presumption of a grant." In most of these cases, the presumption appears to have been associated with a statutory period of time. For example, in an early California case, when a person has had the continued, uninterrupted, and adverse enjoyment of the water during the period limited by the statute of limitations for entry upon lands, "the law will presume a grant of the right so held and enjoyed by him."[419] In *Austin* v. *Hall*, the Supreme Court of Texas went on to say that

[414] *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 683, 16 Haw. 113, 115-116 (1904).

[415] *Territory of Hawaii* v. *Gay*, 31 Haw. 376, 383-384 (1930). See Hutchins, *supra* note 402, at 108-111.

[416] *Smith* v. *Duff*, 39 Mont. 374, 378, 102 Pac. 981 (1909).

[417] *Austin* v. *Hall*, 93 Tex. 591, 596, 57 S.W. 563 (1900). See also *Hill Farms, Inc.* v. *Hill County*, 436 S.W. (2d) 320, 323 (Tex. Civ. App. 1969).

[418] Craig, G.M., "Prescriptive Water Rights in California and the Necessity for a Valid Statutory Appropriation," 42 Cal. Law Rev. 219-220 (1954).

[419] *Union Water Co.* v. *Crary*, 25 Cal. 504, 509 (1864).

"To sustain this claim, it must appear that the use upon which the right is predicated has continued for the requisite time, during which the owner was not under disability to resist the claim."[420] Some other courts have held to the same effect.[421]

The Texas Supreme Court in another early case indicated that the purpose of presuming a grant is to sustain rights that might otherwise fail. But it is a mere presumption made by the law from a given state of facts in furtherance of public policy, or to accomplish the ends of justice; therefore it cannot be done against the law, or in violation of settled usage and public policy. The title by prescription does not depend upon the *actual* belief of the fact presumed for its support. Hence, to sustain such a title, the claimant, "must show a concurrence in his favor of all the facts necessary to constitute the title by prescription, or authorize the court to presume the fact which it was incumbent upon him to establish."[422]

Other Texas cases have indicated that the presumption of a grant from long continued enjoyment—the period of which is controlled by the statutes of limitation[423]—may arise only when the person against whom it is claimed might have prevented or interrupted the exercise of the subject of the supposed grant.[424]

Statutes of Limitations

Replacement of lost grant fiction in California.—As previously noted, in California, title by prescription is based on the statutes of limitation rather than the fictitious lost grant. The fiction of a lost grant was discarded in a long line of California decisions, beginning at least as early as 1863, which relate to the basis of prescriptive title and the remedies available to quiet possession of the party whose adverse possession has ripened into a title. This new prescriptive title may be defended by the holder.[425]

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[420] *Austin* v. *Hall,* 93 Tex. 591, 596, 57 S.W. 563 (1900).

[421] "One who claims a right by prescription must use the water continuously, uninterruptedly, and adversely for at least the prescriptive period, after which time the law will conclusively presume an antecedent grant to him of such asserted right." *State* v. *Quantic,* 37 Mont. 32, 54-55, 94 Pac. 491 (1908). The Wyoming Supreme Court said, "The actual and continuous use of an easement, as of right, for the period of limitation for bringing an action to dispossess the claimant creates the presumption of a grant." *Gustin* v. *Harting,* 20 Wyo. 1, 19, 121 Pac. 522 (1912).

[422] *Rhodes* v. *Whitehead,* 27 Tex. 304, 311-312, 315 (1863).

[423] See *Haas* v. *Choussard,* 17 Tex. 588, 590 (1856).

[424] *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian,* 74 Tex. 170, 174-175, 11 S.W. 1078 (1889). An act that is not inimical to the rights of another raises no presumption against him. *Houston Transp. Co.* v. *San Jacinto Rice Co.,* 163 S.W. 1023, 1028 (Tex. Civ. App. 1914). The presumption of a grant, to divest one of a right and to invest it in another, involves a grantor *sui juris. Martin* v. *Burr,* 111 Tex. 57, 66-67, 228 S.W. 543 (1921).

[425] "Lapse of time not only applies as defense to an action, but it forms the basis of a new

The California Civil Code provides that occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all; and the Code of Civil Procedure provides that no action for the recovery of real property can be maintained unless the plaintiff or his predecessor was seized or possessed of the property within 5 years before commencement of the action.[426] That these legislative declarations form the basis of the adverse party's title, irrespective of the existence of a lost grant, has long been recognized by the California Supreme Court.[427] In a case decided in 1915, the supreme court said that under the Civil Code provision "the presumption that there was an ancient grant is not necessary."[428]

Recognition of limitation in Hawaii.—That rights to the use of water may be acquired by prescription, or adverse use against the rightful holder for the period prescribed by the statute of limitations, is recognized in many Hawaiian decisions, as well as on the mainland. "We deem it to be well settled law in this Kingdom that the right to use water for irrigation purposes can be acquired by adverse and continuous use for twenty years."[429] "The statute of limitations as to land was not passed until 1870, although the principle of adverse possession running against land had been recognized by this court prior to that time."[430] The principles that govern the acquisition of titles to land by adverse possession and use have been applied to water rights to the extent to which they are applicable. In such cases the actual use of water for the statutory prescriptive period by the claimant of adverse title is the foundation of the right.[431]

Analogy to Adverse Holding of Land

The principle that title to land may be lost to the rightful owner by reason of adverse possession by an intruder over a long period of time was introduced

title acquired by prescription which is founded upon the statute." *Grattan* v. *Wiggins,* 23 Cal. 16, 36 (1863); accord, *Arrington* v. *Liscom,* 34 Cal. 365, 380-386 (1868); *Williams* v. *Sutton,* 43 Cal. 65, 73 (1872); *Alhambra Addition Water Co.* v. *Richardson,* 72 Cal. 598, 600-601, 14 Pac. 379 (1887); *Montecito Valley Water Co.* v. *Santa Barbara,* 144 Cal. 578, 593, 77 Pac. 1113 (1904).

[426] Cal. Civ. Code § 1007 (West Supp. 1967), incorporating by reference Cal. Civ. Pro Code § 318 (West 1954).

[427] *Thomas* v. *England,* 71 Cal. 456, 458, 12 Pac 491 (1886). See, in *People* v. *Banning Co.*, 167 Cal. 643, 649, 140 Pac. 587 (1914), the supreme court's comprehensive answer to a contention by counsel that the presumption of an ancient grant is the basis of the doctrine of prescription and that there can be no such presumption where no grant could have been legally made.

[428] *Beckett* v. *Petaluma,* 171 Cal. 309, 316, 153 Pac. 20 (1915).

[429] *Heeia Agric. Co.* v. *Henry,* 8 Haw. 447, 448 (1892).

[430] *Galt* v. *Waianuhea,* 16 Haw. 652, 656 (1905). The period provided by the original statute of limitations was 20 years. Haw. Laws 1870, ch. 22, § 1. In 1898 it was changed to 10 years. Haw. Laws 1898, Act 19, § 1, Rev. Stat. § 657-13 (1968).

[431] Hutchins, *supra* note 402, at 111-120.

into American law from the common law of England, where it had a long history. As property rights in the use of water in the United States were developed, the historical concepts of adverse user and prescription were applied along with them, with such changes from land law principles as were indicated by the physical differences between the two kinds of real property.[432] The land law of adverse possession is thus much older than that of water law. However, in expounding water law principles, analogies to adverse holding of land are noted in a number of high court decisions.

The general rule.—It has been the consensus of most western decisions that courts of equity, by analogy, apply the statute of limitations relating to the possession of real estate to the establishment of a prescriptive right to the use of water, which is property.[433] This concept developed from the long established rule that a right to the use of water of a watercourse is real property, and from the close association of irrigation water rights with the lands on which they were exercised from the earliest part of the development of western water rights laws.

The Texas situation.—(1) In early Texas cases, the prescriptive period with respect to water rights was held to be 10 years, "by analogy to our longest period of limitation."[434] In 1918, the matter of analogy was elaborated upon by a court of civil appeals.[435]

> The uses of water for irrigation are so nearly akin to land and the uses of land, and in this sense is land, and the right of its use so runs with the land to which the right becomes appurtenant by its

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[432] In the case of land, unlawfully taking possession of it is an invasion of the landowner's right, because the owner holds actual title to the land. But riparian proprietors or appropriators do not hold title to the running water; their property in the water comprises their right to use the water. To invade this right it ordinarily is necessary to interfere with their use of the water.

[433] See, e.g., *Heeia Agric. Co.* v. *Henry,* 8 Haw. 447, 448 (1892); *Bachman* v. *Reynolds Irr. Dist.,* 56 Idaho 507, 519, 55 Pac. (2d) 1314 (1936); *Cook* v. *Hudson,* 110 Mont. 263, 281, 103 Pac. (2d) 137 (1940); *Kuhlmann* v. *Platte Valley Irr. Dist.,* 166 Nebr. 493, 512, 89 N.W. (2d) 768 (1958); *Vansickle* v. *Haines,* 7 Nev. 249, 283-284 (1872); *Baker* v. *Brown,* 55 Tex. 377, 381 (1881); *Ochfen* v. *Kominsky,* 121 Wash. 60, 62, 207 Pac. 1050 (1922); *Morris* v. *Bean,* 146 Fed. 423, 433 (C.C.D. Mont. 1906); *Garden City Co.* v. *Bentrup,* 228 Fed. (2d) 334, 340-341 (10th Cir. 1955). Various aspects of prescription in relation to water rights are discussed in *In re Drainage Area of Bear River in Rich County,* 12 Utah (2d) 1, 361 Pac. (2d) 407 (1961).

[434] *Baker* v. *Brown,* 55 Tex. 377, 381 (1881). The court referred to the earliest Texas water rights case—*Haas* v. *Chousssard,* 17 Tex. 588, 590 (1856)—in which the supreme court quoted from Kent's *Commentaries* with respect to the acquisition of prescriptive rights to the use of streamflow after a period of 20 years and stated, "Ten years in this state would afford the same presumption of a grant that twenty years would in England, and in other states having the like limitations as to real actions."

With respect to statutory periods of years in this and other Western States, see the abstracts of statutory provisions relating to land and water rights under "Elements of the Prescriptive Right—Statute of Limitations," *infra.*

[435] *Kountz* v. *Carpenter,* 206 S.W. 109, 112 (Tex. Civ. App. 1918).

> use in connection with the land, that in considering the question of limitation of 10 years we think the statute of limitation of 10 years applied to land would, by analogy, more nearly apply to diversion and use of water for irrigation than would any other rule.

The 10-year period for the establishment of prescriptive water rights has been consistently recognized in Texas.

(2) In a case decided in 1921, the Texas Supreme Court Distinguished (a) a defense of bar by limitation over a statutory period of 4 years[436] from (b) an affirmative assertion of paramount right acquired by prescription over a statutory period of 10 years, and held that both should have gone to the jury. This action occasioned comment and question, on the ground that the adverse user would have been in as good a position as against his opponent after 4 years as after 10 years, and hence would not need to rely on prescription. The court did not expound the historical basis of its distinction between limitation and prescription, nor its reason that both should have gone to the jury, but it did make the distinction unequivocally. The reasoning may only be conjectured.[437]

(3) The Texas water appropriation statute contains a provision that an appropriator who makes use of the water under a permit or certified filing for a period of 3 years shall be deemed to have acquired title to the appropriation by limitation as against all other claimants and all riparian owners concerned.[438] The courts of Texas apparently have not construed this statutory period of 3 years as a substitute for the 10-year statutory period theretofore accepted by analogy as controlling the vesting of prescriptive rights.

The supreme court observed in one opinion that, according to this statute, 3 years' limitation is required to establish title to an appropriation under State-issued permits as against other claimants on the stream. The grant of a permit, said the court, concludes no one's rights, and all who are aggrieved by such issuance have 3 years within which to file suit against the permittee or his successor. The court did *not* say that failure to file suit within the 3-year period would result in the loss of a downstream prior appropriative right or riparian right, the exercise of which was subsequently interfered with by the permittee's diversion and use of the water; in fact, the implications of the

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[436] Now Tex. Rev. Civ. Stat. Ann. art. 5529 (1958) which provides, "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward."

[437] *Martin* v. *Burr*, 111 Tex. 57, 64-66, 228 S.W. 543 (1921). A summary of the decision is given in Hutchins, W. A., "The Texas Law of Water Rights," 442-444 (1961). Compare the situation in California, under "Statutes of Limitation," *supra*. In *Alhambra Addition Water Co.* v. *Richardson*, 72 Cal. 598, 600-601, 14 Pac. 379 (1887), the court said that possession of property of the requisite character and time confers a title to the property, so that so far as title to property or, in any event, real property is concerned, "prescription and limitation are convertible terms; and a plea of the proper statute of limitations is a good plea of a prescriptive right."

[438] Tex. Rev. Civ. Stat. Ann. art. 7592 (1954).

court's lengthy discussion of the relationship between the appropriation statutes and vested riparian rights are quite to the contrary.[439]

In a subsequent case, a court of civil appeals had for decision a claim of title by limitation and prescription to water in a bayou as against riparian owners, the chief issue being the application of the 3-year limitation in the water appropriation statute to the taking of riparian rights. Claimants did not complain of the verdict against them on the issue of limitation of 10 years, but they did complain about the exclusion of certain evidence and also contended that the issue of their right and title under the 3-year statute of limitation should have gone to the jury. The appellate court held that waters necessary to the use of a riparian owner could not be taken under the appropriation statutes. However, the court ended its opinion with a *dictum* to the effect that "the mere use by pumping during the crop season of a large portion or all of the normal flow of a stream *for any number of years* could [not] deprive a riparian land owner of his riparian right in the water in the stream. Such right, in our opinion, can only be taken by condemnation, or lost by estoppel, neither of which is pleaded nor shown by any evidence in this case."[440] [Emphasis added.] In addition to the fact that this observation is *dictum*, the case has no writ history—that is, the Texas Supreme Court was not called upon to review it. This means that in the absence of supreme court approval, the appellate court's holdings and comments can have no standing as authority in opposition to anything held by the supreme court.

Trespass

Prescription generally begins with a trespass. In California, for example, whether under the common law presumption of a lost grant, or under the Civil Code, "in every case where, as a matter of fact, it is the true owner's title that is taken by prescription, the adverse claimant, with respect to the true owner, must have entered and held wrongfully, that is, as a trespasser."[441] The Oregon Supreme Court pointed out in a 1920 case that the Desert Land Act authorizes one to appropriate water but not to exercise the right by trespassing on the lands of a settler; however, access may be obtained by adverse possession for the statutory prescriptive period. "A court of equity will not aid one who takes the water without right in the first instance, unless his possession has been continued adversely long enough to give him title by prescription."[442]

To constitute an adverse use there must be an actual invasion of another's right. In the case of land, unlawfully taking possession of it is such an invasion

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[439] *Motl* v. *Boyd*, 116 Tex. 82, 125, 286 S.W. 458 (1926).

[440] *Freeland* v. *Peltier*, 44 S.W. (2d) 404, 409 (Tex. Civ. App. 1931).

In the latter regard, see the discussion of this case under "Establishment of Prescriptive Title—Possibility of Establishing Prescriptive Water Right Negated or Questioned—Questionings," *infra*.

[441] *Beckett* v. *Petaluma*, 171 Cal. 309, 316, 153 Pac. 20 (1915).

[442] *Allen* v. *Magill*, 96 Oreg. 610, 619, 189 Pac. 986, 190 Pac. 726 (1920).

because the owner holds actual title to the land. But riparian proprietors or appropriators do not hold title to the running water; their property in the water comprises their right to use the water. To invade this right it ordinarily is necessary to interfere with their use of the water. Prescription is a long recognized means by which one may take advantage of his own wrongdoing and eventually obtain title to the property right that he originally invaded. But the rightful owner must have known of the activities during the prescriptive period, or the circumstances must have been such as to impute knowledge to him, and he must have failed to take any physical or legal steps—the judicial remedy being available—to interrupt the wrongful taking of the water. To accomplish the conversion of a legal wrong into a legal right, the trespasser must meet all the requirements prescribed by law for the acquisition of a prescriptive right.[443] And the requirements that the law imposes upon one who seeks to acquire a prescriptive right are severe. Adverse use does not necessarily mature into a prescriptive right. In many litigated cases throughout the West it failed to do so.

"The mere fact of trespass does not give a right of user unless such is claimed adversely to the owner."[444] In an 1890 California case, the use of water by two trespassers on a small part of a tract of riparian land was interrupted by the bringing of an action of ejectment shortly before expiration of the period of limitation, which stopped the running of the statute. This prevented acquisition of a prescriptive right to the land and also to the riparian water right. In holding that under the circumstances the unlawful use of the water did not affect the riparian right of the riparian land, the California Supreme Court said, "Nor can the area of the lands to which riparian rights are appurtenant be diminished, by the acts of a trespasser segregating for the time being the actual occupancy, without segregation of title."[445]

Coincidence of Loss and Acquisition of Water Right

The Montana Supreme Court said, "That the right to the use of water for irrigation or other lawful purposes may be lost by one and acquired by another by prescription is settled beyond controversy in this jurisdiction."[446]

The Washington Supreme Court held in a 1932 case that as a prescriptive right is a corresponding loss or forfeiture of right by another, and as the law does not favor forfeitures, it is absolutely essential that all of the elements

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[443] "We do not intend to say that a party may not, for the purpose of asserting title resulting from adverse possession, take advantage of his own wrong; but in all such cases the possession must be open, notorious, and adverse, and under claim of right or title." *Miller & Lux* v. *San Joaquin Light & Power Corp.*, 8 Cal. (2d) 427, 438, 65 Pac. (2d) 1289 (1937).

[444] *Cook* v. *Maremont-Holland Co.*, 75 Nev. 380, 344 Pac. (2d) 198, 202 (1959).

[445] *Alta Land & Water Co.* v. *Hancock*, 85 Cal. 219, 223, 228-230, 24 Pac. 645 (1890).

[446] *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 577, 227 Pac. 68 (1924).

necessary to establish adverse possession amounting to a prescriptive right shall be present.[447]

The loss of a water right by reason of the adverse use of the water on the part of another for the prescriptive period, then, necessarily coincides with the acquisition of the prescriptive right by the adverse party.[448] Under the fiction of a lost grant, as previously noted, it is presumed that the actual title of the rightful owner passed to the adverse claimant. However, in discarding this fiction, as well as the presumption of a grant upon establishment of all elements of prescription, the California courts took the position that the adverse party has a new and independent title, founded on the statute of limitation rather than derived from the former title.[449] This has been noted earlier under "Presumption of a Grant" and "Statutes of Limitation."

Distinguished From Appropriative Right

Although appropriative and prescriptive rights are sometimes interrelated (see "Character and Quality of Prescriptive Title—Relation to Appropriative and Riparian Rights in California," below), there are important differences between them.

(1) As pointed out by the California Supreme Court, an appropriator on the public domain is a licensee of the Federal Government; and when the land on which the diversion or ditch or both are located passes to private ownership, it is burdened by the easement granted by the United States under the Act of 1866 to the appropriator, who holds his rights against this land by such express grant. In the origin of the title under which the servient tenement is subjected to the use, one who holds water rights by such appropriation differs from one holding water rights by prescription. A prescriptive right cannot be acquired against the United States. Again, perfection of the appropriative right does not necessitate use of the water for any given length of time, whereas time and adverse use are necessary elements of prescription.[450]

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[447] *Downie* v. *Renton,* 167 Wash. 374, 377, 9 Pac. (2d) 372 (1932).

[448] A prescriptive right often may be applicable to only a part of another's water right. (See "Measure of the Prescriptive Right—Part of Invaded Right Only," *infra.*) In that event, only the title to that part of the right is affected.

[449] "Lapse of time not only applies as a defense to an action, but it forms the basis of a new title acquired by prescription which is founded upon the statute." *Grattan* v. *Wiggins,* 23 Cal. 16, 36 (1863). Under the Civil Code provision to the effect that occupancy for the statutory period of limitation (5 years) confers a title to the property, denominated a title by prescription, which is sufficient against all, "the presumption that there was an ancient grant is not necessary." *Beckett* v. *Petaluma,* 171 Cal. 309, 316, 153 Pac. 20 (1915).

[450] *Smith* v. *Hawkins,* 110 Cal. 122, 125-126, 42 Pac. 453 (1895). The Nevada Supreme Court used much the same reasoning in a later case. *Application of Filippini,* 66 Nev. 17, 22-23, 202 Pac. (2d) 535, 538 (1949). The fact that no State statute of limitation can defeat the title of the United States to its public lands was emphasized in one of the early Nevada cases. *Vansickle* v. *Haines,* 7 Nev. 249, 256, 284 (1872).

(2) The Montana Supreme Court held that findings by a trial court that certain claimants had acquired water rights by prescription and also by appropriation were inconsistent, the distinction being important with respect to the priority that would apply to the water right in question.[451] The trial court had found that *A* had appropriated 150 inches in 1866, and that *B* and *C* had, since 1867, held and used adversely to all the world 100 of the 150 inches; but it also found that *B* and *C* had obtained this 100 inches and owned it by reason of having appropriated the same in 1867. Accordingly the trial court decreed this 100 inches to *B* and *C*. The supreme court said, "The difficulty as to this one hundred inches of water is that the findings of the court in respect thereto are apparently wholly inconsistent." If *B* and *C* obtained their title to the means described in one finding, they did not obtain it as set out in the other. The supreme court refused to determine whether title was obtained by adverse possession against *A* or by an appropriation from the creek, and remanded the case to the trial court for testimony, findings, and judgment on this one point only. The importance of the determination was that if *B* and *C* obtained the right by prescription against *A*, such right would be superior to his to the extent of 100 inches; if only by appropriation it could be junior to *A*'s to that extent because their 1867 appropriation would be junior to *A*'s 1866 appropriation.

(3) As between the parties to the foregoing case, the Montana Supreme Court was undoubtedly correct in requiring the trial court to make findings and render judgment as to where title to the disputed 100 inches vested. Apparently no other interested parties were involved. But assume a situation on a stream in which *A* has the first appropriative priority to the extent of 100 inches, *B* upstream has the next 50 inches, and *C* downstream from *A* has the third priority for 50 inches, all being decreed rights. *B* begins the practice of diverting his 50 inches at times when *A* is in need of it and in due time completes a prescriptive right for 50 inches as against *A*. *B*'s prescriptive right for 50 inches is then equal in priority to *A*'s remaining 50 inches if the prescriptive user thereby acquires the same priority as the appropriative right prescribed against;[452] but *B*'s decreed appropriative right to the use of that same water is still a prior appropriative right as against *C*. In other words, his appropriative right has become prescriptive as against his senior appropriator but has not changed in relation to his junior.

(4) Necessarily a subsequent appropriation of unappropriated water is not an adverse claim against a prior appropriator.[453] In the assumed set of circumstances postulated in the immediately preceding paragraph, *B*'s upstream junior appropriation was not notice of an adverse claim as against *A*, the prior

[451] *Johnson* v. *Bielenberg*, 14 Mont. 506, 507, 37 Pac. 12 (1894).

[452] See Kinney, C.S., "A Treatise on the Law of Irrigation and Water Rights," 2d ed., vol. II, § 1058 (1912); contrast with Wiel, S. C., "Water Rights in the Western States," 3d ed., vol. I, § 580 (1911).

[453] *Sherlock* v. *Greaves,* 106 Mont. 206, 216, 76 Pac. (2d) 87 (1938).

appropriator. Notice of an adverse claim was given by means of the beginning of *B*'s wrongful diversion of the water when *A* was in actual need of it, which was the beginning of adverse use and which set the statute of limitations in motion. For further discussion of appropriative-prescriptive relationships, see the subsequent discussions under "Elements of the Prescriptive Right" in the subtopics "Open and Notorious Use–Notice" and "Statute of Limitations–Statute set in motion," and under "Character and Quality of Prescriptive Title–Relation to Appropriative and Riparian Rights in California."

Effect on Irrigation Development in California

Prescription, a long-established rule of property, was introduced into California water law in its early development along with other established rules of property. Undoubtedly it facilitated, in marked degree, the growth of irrigation in California under appropriative water rights during the long period in which appropriations of water were considered valid chiefly on public lands and, where made on private lands, were regarded in most cases as acts of trespass against the paramount rights of riparian landowners.[454]

The reasons why the California courts have adhered so firmly to the riparian philosophy and why, despite that doctrine, irrigation development has been enabled to proceed so extensively on nonriparian land, were stated by Chief Justice Shaw of the California Supreme Court in an address before the American Bar Association at San Francisco, August 9, 1922.[455]

> If the doctrine of the 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 non-riparian land. The rightful use of such waters on non-riparian 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 such 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

[454] In chapter 7, see "The Land Factor in Appropriating Water–Historical Development of the Relationship–Public Domain." See also Hutchins, W.A., "The California Law of Water Rights" 71-77, 301 (1956).

[455] Shaw, L., "The Development of the Law of Waters in the West," 10 Cal. Law Rev. 443, 455-456 (1922); 189 Cal. 779, 792-793 (1922).

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.

Notwithstanding the existence of these vested rights, there has been a very general use of water on non-riparian 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 prescription, 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 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.[456]

Elements of the Prescriptive Right

"The facts or elements which are necessary to the existence of a prescriptive water right have been set forth in a veritable forest of cases."[457]

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[456] With respect to general rules applicable to nonriparian use of water before (and after) the 1928 California constitutional amendment, see, in chapter 10, "The Riparian Right–Exercise of the Riparian Right–Place of Use of Water–Nonriparian land."

[457] *Peck* v. *Howard*, 73 Cal. App. (2d) 308, 325, 167 Pac. (2d) 753 (1946).

In a number of States, the possibility of establishing a prescriptive right as against one or more kinds of water rights has been negated or questioned by legislation or in one or more reported court decisions. This is discussed later under "Possibility of Establishing Prescriptive Water Right Negated or Questioned."

List of Elements

To establish a prescriptive right to the use of water in the Western States that recognize the possibility that such a right may be established, it is well settled that the use must have been actual, open, and notorious on the part of the adverse claimant; adverse and hostile to the claim of the rightful owner; exclusive; continuous and uninterrupted; under claim of right, with payment of taxes whenever taxes have been levied upon the water right; and must have been made throughout the period prescribed by the statute of limitations to recover real property.[458]

The widespread acceptance by so many western courts of so many conditions prerequisite to establishing prescriptive title negates any serious concept that mere use of water, *standing alone*, however long continued, can give rise to a title by prescription.[459]

Actual Use of Water

Adverse use of water that will mature into a prescriptive right must be accompanied, among other things, by *actual* control and use of the water.[460]

Open and Notorious Use

The Montana Supreme Court observed that although the authorities use both of the words "open" and "notorious," the use of either would appear to

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[458] Lists of necessary elements are contained in the following western cases. In a few instances, these are land title cases, but the comments are equally applicable to water rights.

Alta Land & Water Co. v. *Hancock,* 85 Cal. 219, 226, 24 Pac. 645 (1890); *Kraemer* v. *Kraemer,* 167 Cal. App. (2d) 291, 334 Pac. (2d) 675, 684-685 (1959); *Pleasant Valley & Lake Canal Co.* v. *Maxwell,* 93 Colo. 73, 78, 23 Pac. (2d) 948 (1933); *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 383 (1930); *Kaaihue* v. *Crabbe,* 3 Haw. 768, 774 (1877); *Hall* v. *Blackman,* 8 Idaho 272, 283, 68 Pac. 19 (1902); *Linford* v. *Hall & Son,* 78 Idaho 49, 54, 297 Pac. (2d) 893 (1956); *Jobling* v. *Tuttle,* 75 Kans. 351, 362-364, 89 Pac. 699 (1907); *Havre Irr. Co.* v. *Majerus,* 132 Mont. 410, 415, 318 Pac. (2d) 1076 (1957); *Oliver* v. *Thomas,* 173 Nebr. 36, 112 N.W. (2d) 525, 528 (1961); *Union Mill & Min. Co.* v. *Dangberg,* 81 Fed. 73, 91-92 (C.C.D. Nev. 1897); *Martinez* v. *Mundy,* 61 N. Mex. 87, 95, 295 Pac. (2d) 209 (1956); *Nolte* v. *Sturgeon,* 376 Pac. (2d) 616, 621 (Okla. 1962); *Ebell* v. *Baker,* 137 Oreg. 427, 440, 299 Pac. 313 (1931); *Henderson* v. *Goforth,* 34 S. Dak. 441, 447, 148 N.W. 1045 (1914); *Heard* v. *Texas,* 146 Tex. 139, 146, 204 S.W. (2d) 344 (1947); *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 498, 500, 143 Pac. (2d) 278 (1943); *Downie* v. *Renton,* 167 Wash. 374, 377-378, 382-384 (1932); *Campbell* v. *Wyoming Dev. Co.,* 55 Wyo. 347, 394, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[459] *Hunziker* v. *Knowlton,* 78 Wyo. 241, 251, 322 Pac. (2d) 141 (1958); *Campbell* v. *Wyoming Dev. Co.,* 55 Wyo. 347, 414, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[460] *Ketchum* v. *Modesto Irr. Dist.,* 135 Cal. App. 180, 191, 26 Pac. (2d) 876 (1933); *Territory of Hawaii* v. *Gay,* 31 Haw. 376, 383 (1930); *Worm* v. *Crowell,* 165 Nebr. 713, 721-722, 87 N.W. (2d) 384 (1958); *Heard* v. *Texas,* 146 Tex. 139, 146, 149, 204 S.W. (2d) 344 (1947).

be sufficient, inasmuch as they are practically synonymous when used in this connection.[461] In order to be open and notorious, a use of water obviously cannot be furtive or clandestine.[462]

Visibility.—In some of the cases, the term "visible" has been used in connection with "open" and "notorious."[463] This does not necessarily mean complete visibility of the entire operation. Under some circumstances, it may mean that something connected with the undertaking is of such character as to warn the true owner that possibly his possession is being interfered with. It was said in a 1959 California decision that "circumstances have sometimes arisen such as to give even buried conduits notoriety adequate to base a prescriptive easement. This has usually occurred where, even though the pipes themselves were not apparent, there were accessory installations on the surface which were plainly apparent."[464] In other cases, the test of visibility was met by use of a diversion "effected by means of artificial contrivances" which could be seen,[465] as well as by ditches that were visible from a road, even though the spring from which the ditches led was not itself visible.[466]

However, "the use of a pipe covered with earth was not open or notorious" where there were otherwise no visible evidences of the diversion of the water sufficient to put a prudent purchaser of land on inquiry.[467] Nor was open or notorious use shown where the dam and ditch were small, temporary in character, located in broken and brushy land, and not visible from the roadway crossing the tract on which located; with no evidence in the case going to show that the landowner actually knew about this construction on his land.[468]

It follows that whether, in a given case, "visibility" is a component of "open and adverse use" depends upon the facts and circumstances of that particular case.

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[461] *Smith* v. *Duff,* 39 Mont. 374, 378, 102 Pac. 981 (1909).

[462] *Alta Land & Water Co.* v. *Hancock,* 85 Cal. 219, 226, 24 Pac. 645 (1890). Although a furtive use of water could, of course, be made as a matter of fact, it could not be the basis of a prescriptive right. In one of the early Hawaiian cases, some of the witnesses said that the water had been taken "furtively." But the fact was that the kalo patches had no regular days allotted in which to receive water but were watered as they needed irrigating. The court was not impressed by the "furtiveness" of the taking. *Davis* v. *Afong,* 5 Haw. 216, 221 (1884).

[463] *Fairview* v. *Franklin Maple Creek Pioneer Irr. Co.,* 59 Idaho 7, 12-14, 79 Pac. (2d) 531 (1938); *Glantz* v. *Gabel,* 66 Mont. 134, 141, 212 Pac. 858 (1923); *Krumwiede* v. *Rose,* 177 Nebr. 570, 129 N.W. (2d) 491 (1964); *Dry Gulch Ditch Co.* v. *Hutton,* 170 Oreg. 656, 676, 133 Pac. (2d) 601 (1943); *Ephraim Willow Creek Irr. Co.* v. *Olson,* 70 Utah 95, 112, 258 Pac. 216 (1927); *Downie* v. *Renton,* 167 Wash. 374, 377-378, 9 Pac (2d) 372 (1932); "Open, plain, and notorious," *Motl* v. *Boyd,* 116 Tex. 82, 127-128, 286 S.W. 458 (1926).

[464] *Jones* v. *Harmon,* 175 Cal. App. (2d) 869, 879, 1 Cal. Rptr. 192 (1959).

[465] *Evans Ditch Co.* v. *Lakeside Ditch Co.,* 13 Cal. App. 119, 129, 108 Pac. 1027 (1910).

[466] *Wood* v. *Davidson,* 62 Cal. App. (2d) 885, 891, 145 Pac. (2d) 659 (1944).

[467] *Powers* v. *Perry,* 12 Cal. App. 77, 81-83, 106 Pac. 595 (1909).

[468] *Davey* v. *Grigsby,* 51 Cal. App. 220, 223, 196 Pac. 296 (1921).

Notice and knowledge compared.—The use of the water by the adverse claimant must have been not only open and notorious, but must have been made with the knowledge and acquiescence of the party against whom the adverse claim is asserted, or under such circumstances as to bring home to him either actual or presumptive notice of the adverse claim. Otherwise there would be little basis for the legal fiction of a presumed grant from the rightful owner which has been indulged in various cases.

In determining open and notorious use, notice and knowledge are closely related. Strictly speaking, "notice" relates to the actual or implied assertion by the adverse party of his adverse claim, and "knowledge" relates to the actual or implied enlightenment of the rightful owner as to the assertion by the adverse party of an adverse and hostile claim which threatens to ripen into a prescriptive right against him. However, the two terms are often used interchangeably, particularly with respect to the presumed or imputed bringing home to the injured party of warning that the loss of his water right is threatened.

Notice.—In order to make good a title by prescription grounded on adverse possession, the adverse claim must have been brought home to all whose rights the claim infringed.[469] And the adverse use must have been of such character as to deprive the owners of the superior right of the benefit of their use of the water in such substantial manner as to notify them that their rights were being invaded.[470]

Inasmuch as an appropriator can claim no more water than is reasonably necessary for the purpose of his appropriation, a riparian owner or other appropriator against whom an adverse claim is asserted by virtue of the appropriation cannot be held to have notice of any greater claim.[471] An appropriator of surplus or excess water (above the requirements of paramount or prior rights) of course gains nothing by prescription, because such waters are open to appropriation without compensation.[472] And so, necessarily, a subsequent appropriation of unappropriated water is not notice of an adverse claim against a senior appropriator.[473]

In a situation in which an upstream junior appropriator acquires a prescriptive right against a downstream senior appropriator by wrongfully

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[469] *Cook* v. *Hudson,* 110 Mont. 263, 282, 103 Pac. (2d) 137 (1940); *Hammond* v. *Johnson,* 94 Utah 20, 34-35, 66 Pac. (2d) 894 (1937).

[470] *Sherlock* v. *Greaves,* 106 Mont. 206, 216, 76 Pac. (2d) 87 (1938); *Watts* v. *Spencer,* 51 Oreg. 262, 274, 94 Pac. 39 (1908); *Henderson* v. *Goforth,* 34 S. Dak. 441, 448-449, 148 N.W. 1045 (1914); *Sander* v. *Bull,* 76 Wash. 1, 6, 135 Pac. 489 (1913). "One who never told anyone of his adverse claim to another's right must show possession of such character as to give the owner notice of his hostile claim." *Cook* v. *Hudson,* 110 Mont. 263, 282, 103 Pac. (2d) 137 (1940).

[471] *California Pastoral & Agric. Co.* v. *Madera Canal & Irr. Co.,* 167 Cal. 78, 85-86, 138 Pac. 718 (1914).

[472] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 926, 207 Pac. (2d) 17 (1949).

[473] *Sherlock* v. *Greaves,* 106 Mont. 206, 216, 76 Pac. (2d) 87 (1938).

diverting water at times the senior actually needs it and by continuing to do so under all the elements of prescription, it is not the initiation of an upstream appropriation—necessarily junior in priority—that gives notice of an adverse claim; it is the *beginning of wrongful diversion* by the junior that gives the notice. Whether that begins immediately upon completion of the diversion works or long afterward does not affect the principle.

In a 1957 Washington case to quiet title in plaintiff to a spring, use of water, and facilities located on defendant's land, the two parties were abutting property owners. In 1914, when plaintiff began using the water, the spring was on vacant, wild, and uninhabited land; his use of the water on his land continued until the time of the trial. In 1915, a predecessor in interest of defendant objected to such use of the water, whereupon plaintiff filed in the county records a notice of appropriation of the water, purportedly in compliance with then existing statutes. No other adverse claim was made against plaintiff's use of the water until defendant attempted to interfere with the water system, which provoked the instant quiet title proceeding. The case was decided entirely on principles of adverse possession and use; title was quieted in plaintiff on the ground that his use of the water and facilities met all the tests of prescription. The evidence was held to support the conclusion that plaintiff's activities since 1914 gave reasonable notice of his hostile claim. The supreme court concluded by saying: "We do not find it necessary to pass on the legal sufficiency of the notice of appropriation of water, recorded in 1915. It is sufficient to note that it is a tangible manifestation of plaintiff's intention to claim the water and water system by adverse user."[474] It may also be noted that this was not a contest between appropriative claimants. No other claim of appropriation on anybody's part is mentioned in the opinion.

Presumption of notice.—"It is the general rule that open, visible and notorious possession will raise a presumption of notice."[475] If the rightful owner does not have actual knowledge of the assertion of an adverse claim, the position of the adverse claimant must be so open, visible, and notorious that it will raise a presumption of notice thereof.[476]

Opinions in decisions issued by several western courts have contained statements acknowledging, in effect, that absence of actual notice does not, of itself, defeat the acquisition of a prescriptive right provided the circumstances are such as to justify a presumption of notice.[477]

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[474] *Malnati* v. *Ramstead,* 50 Wash. (2d) 105, 108-109, 309 Pac. (2d) 754 (1957).

[475] *Hails* v. *Martz,* 28 Cal. (2d) 775, 778, 172 Pac. (2d) 52 (1946).

[476] *Wood* v. *Davidson,* 62 Cal. App. (2d) 885, 889-890, 145 Pac. (2d) 659 (1944). The use must have been attended by such circumstances of notoriety as would reasonably impart notice to the person whose right was thus being invaded. *Salem Mills Co.* v. *Lord,* 42 Oreg. 82, 102, 69 Pac. 1033, 70 Pac. 832 (1902). Other elements being established, "the use must at least be such as to convey to the absent owner *reasonable notice* that a claim is made in hostility to his title." *Malnati* v. *Ramstead,* 50 Wash. (2d) 105, 109, 309 Pac. (2d) 754 (1957).

[477] Although actual notice of claim of paramount right was not shown, "there was

And so the use of all the water of a stream, in the absence of actual notice, will raise a presumption of notice of an adverse claim against a lower riparian proprietor in California, provided that the circumstances are such as to bring home to the lower proprietor that the upstream owner is asserting a right other than, or in addition to, his normal correlative right.[478] (See "Establishment of Prescriptive Title—Adverse Parties—Riparian proprietor," below.)

Whether notice will be presumed in a given case depends, of course, upon the circumstances. It was said in a California case that "The question whether the structures on adjacent property, visible from the land she proposed to purchase, were such as to charge appellant with constructive notice of the existence of the pipeline running under her property was a question of fact for the trial court."[479] In an early case, in which the diversion of water by the adverse claimants took place at a point nearly 30 miles above the lands of the rightful owner, it was held that neither the owner nor his tenants had knowledge or notice of the diversion. "It was not incumbent upon Clark or his tenants to take notice of what was going on at that distance above their property, to ascertain whether any one was diverting water from the channel of the river."[480]

Knowledge.—Holders of water rights are not affected by acts that do not bring them knowledge of the assertion of an adverse claim.[481] But where the owner has knowledge or means of knowledge of the adverse claim and makes no objection thereto, the use is adverse.[482]

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evidence of circumstances from which notice might have been reasonably presumed; and constructive notice has the same effect as actual notice." *Martin* v. *Burr*, 111 Tex. 57, 65-66, 228 S.W. 543 (1921). In holding that adverse use cannot be initiated without notice of some definite character the Montana Supreme Court said, "We do not hold that it was absolutely necessary that defendants should have served actual notice upon plaintiffs that they were taking the water adversely and against their rights, but it was necessary that defendants' use be adverse and hostile to the right of plaintiffs." *Irion* v. *Hyde,* 107 Mont. 84, 92-94, 81 Pac. (2d) 353 (1938). The Utah Supreme Court said, "This court is apparently committed to the view that while it need not be shown that notice of the use was actually brought home to the owner so that he had actual notice of the claimed right, it is nevertheless necessary that the facts be such that it would be inferable that the owner knew of the adverse use." *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 498, 500, 143 Pac. (2d) 278 (1943).

[478] *Pabst* v. *Finmand,* 190 Cal. 124, 130, 211 Pac. 11 (1922); *Scott* v. *Fruit Growers' Supply Co.,* 202 Cal. 47, 52, 258 Pac. 1095 (1927); *Morgan* v. *Walker*, 217 Cal. 607, 615-617, 20 Pac. (2d) 660 (1933).

[479] *Jones* v. *Harmon,* 175 Cal. App. (2d) 869, 879, 1 Cal. Rptr. 192 (1959).

[480] *Heilbron* v. *Kings River & Fresno Canal Co.,* 76 Cal. 11, 16, 17 Pac. 933 (1888).

[481] *Peck* v. *Howard*, 73 Cal. App. (2d) 308, 329, 167 Pac. (2d) 753 (1946).

[482] *Cheda* v. *Southern Pacific Co.,* 22 Cal. App. 373, 376, 134 Pac. 717 (1913).

There have been several other decisions in which the element of knowledge has been included in the opinions. These include *Kuhlmann* v. *Platte Valley Irr. Dist.*, 166 Nebr. 493, 512, 89 N.W. (2d) 768 (1958); *Franktown Creek Irr. Co.* v. *Marlette Lake Co.,* 77 Nev. 348, 364 Pac. (2d) 1069, 1071 (1961); *Dry Gulch Ditch Co.* v. *Hutton,* 170 Oreg.

Presumption of knowledge.—In the absence of some special statutory provision to the contrary, said the Idaho Supreme Court, it is not necessary that the true owner of the water right shall have had actual knowledge or notice of the adverse claim.[483] This is the case, provided the circumstances are such that actual knowledge can be implied.[484] The invasion of a water right may be so open and notorious and otherwise of such a nature as to impute knowledge.[485]

Therefore, open and notorious use—a use of water that is not secret or clandestine, but is open, visible, and continuous—raises a presumption of knowledge on the part of the true owner of the water right which becomes the equivalent of actual knowledge; and such presumption may be rebutted or overcome by positive evidence.[486] If the circumstances are sufficient to raise a presumption of knowledge on the part of the true owner, and he "fails to look after his interests and remains in ignorance of the claim, it is his own fault."[487] Where these requirements are met, the court is justified in finding that the record owner had constructive knowledge of the adverse use.

For example, the court might presume knowledge from a long-continued use of the water (in this case, for more than 20 years) by parties who exercised the usual acts of ownership and diverted the water with the use of facilities that not only could be seen but actually were seen by representatives of the parties against whom the adverse right was claimed.[488]

Acquiescence.—(1) In various cases over the years, western courts have used the multiple term "knowledge and acquiescence" in designating the failure of the rightful owner of a water right to object by word or deed to a use of water adverse to him that he knows about or must be presumed to have known about.[489] In a very early case, the California Supreme Court stated that had

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656, 676, 133 Pac. (2d) 601 (1943); *Mitchell* v. *Spanish Fork West Field Irr. Co.,* 1 Utah (2d) 313, 317, 265 Pac. (2d) 1016 (1954); *Campbell* v. *Wyoming Dev. Co.,* 55 Wyo. 347, 415, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940); " * * * with the knowledge of the owner while he was able in law to assert and enforce his rights * * *," *Brand* v. *Lienkaemper,* 72 Wash. 547, 549, 130 Pac. 1147 (1913).

[483] *Pflueger* v. *Hopple,* 66 Idaho 152, 157-158, 156 Pac. (2d) 316 (1945). "There is no requirement in the law that the record owner must have actual knowledge of the claims of the adverse claimant." *Wood* v. *Davidson,* 62 Cal. App. (2d) 885, 889-890, 145 Pac. (2d) 659 (1944).

[484] *Northern Cal. Power Co., Consol.* v. *Flood,* 186 Cal. 301, 306, 199 Pac. 315 (1921).

[485] *Crain* v. *Hoefling,* 56 Cal. App. (2d) 396, 402, 132 Pac. (2d) 882 (1942).

[486] *Fairview* v. *Franklin Maple Creek Pioneer Irr. Co.,* 59 Idaho 7, 12-14, 79 Pac. (2d) 531 (1938); *Downie* v. *Renton,* 167 Wash. 374, 377-378, 9 Pac. (2d) 372 (1932).

[487] *Wood* v. *Davidson,* 62 Cal. App. (2d) 885, 889-890, 145 Pac. (2d) 659 (1944).

[488] *Evans Ditch Co.* v. *Lakeside Ditch Co.,* 13 Cal. App. 119, 129, 108 Pac. 1027 (1910).

[489] *Smith* v. *Green,* 109 Cal. 228, 233-235, 41 Pac. 1022 (1895); *Haines* v. *Marshall,* 67 Colo. 28, 32, 185 Pac. 651 (1919); *Kuhlmann* v. *Platte Valley Irr. Dist.,* 166 Nebr. 493, 512, 89 N.W. (2d) 768 (1958); *Union Mill & Min. Co.* v. *Dangberg,* 81 Fed. 73, 91 (C.C.D. Nev. 1897); *Smith* v. *North Canyon Water Co.,* 16 Utah 194, 201-202, 52 Pac. 283 (1898); *Downie* v. *Renton,* 167 Wash. 374, 377-378, 9 Pac. (2d) 372 (1932);

there been no knowledge or acquiescence on the part of the party against whom the right was claimed, no presumption of a grant against him could arise.[490]

(2) Acquiescence, while associated with knowledge, is not synonymous with it. An explanation of the distinction is that acquiescence is presumed to result from unexplained failure of the rightful owner to act upon knowledge. In the words of a California district court of appeal:[491]

> I do not understand that the element of "acquiescence" is to be shown independently of knowledge, in the common acceptation of that term; i.e., that an affirmative permission or consent be given in addition to knowledge of the hostile claim of right. If the owner has the knowledge which the law requires shall be imputed to him, and takes no steps to prevent the adverse claimant from his continuous enjoyment of the right claimed by him, such owner will be deemed to have acquiesced in such use.

(3) When the other facets of open and notorious use are shown, therefore, acquiescence may be implied;[492] and accordingly, the circumstances that impute knowledge will impute acquiescence if the rightful owner fails to object.[493] "The rule is well settled that courts of equity do not favor antiquated or stale demands, and will refuse to interfere where there has been * * * long acquienscence in the assertion of adverse rights."[494]

Illustrative circumstances appear in a California case in which plaintiffs and their predecessors in interest for more than 34 years had diverted and used substantially all the water of a stream under a claim of right, openly, notoriously, and adversely to all downstream claims, and for more than 20 years had paid all taxes assessed against the water used by them, and in which defendant and her grantors–downstream riparian proprietors–had actual knowledge of the diversion and adverse claim and had made but slight use of the land. The upper owners thereby acquired a prescriptive right against the lower owners to the use of the water of the stream.[495] (See "Establishment of Prescriptive Title–Adverse Parties–Riparian proprietor," below.)

Campbell v. *Wyoming Dev. Co.*, 55 Wyo. 347, 415, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[490] *American Co.* v. *Bradford*, 27 Cal. 360, 368 (1865).

[491] *Silva* v. *Hawn*, 10 Cal. App. 544, 552, 102 Pac. 952 (1909).

[492] *Oregon Land & Constr. Co.* v. *Allen Ditch Co.*, 41 Oreg. 209, 216, 69 Pac. 455 (1902); *Downie* v. *Renton*, 167 Wash. 374, 377-378, 9 Pac. (2d) 372 (1932).

[493] *Evans Ditch Co.* v. *Lakeside Ditch Co.*, 13 Cal. App. 119, 129, 108 Pac. 1027 (1910).

[494] *Johnson* v. *Strong Arm Res. Irr. Dist.*, 82 Idaho 478, 487, 356 Pac. (2d) 67 (1960); accord, *Greeley & Loveland Irr. Co.* v. *McCloughan*, 140 Colo. 173, 342 Pac. (2d) 1045, 1049 (1959).

[495] *Morgan* v. *Walker*, 217 Cal. 607, 616-617, 20 Pac. (2d) 660 (1933). "Having stood by for all these years and without protest or objection having acquiesced in the use of practically the entire flow of the stream by respondents during the irrigating season, the defendant must be held to have lost any right to the waters of said stream inconsistent

Adverse and Hostile Use

In opinions in various cases, adverse use and hostile use have been included in lists of elements necessary to acquire a prescriptive title—in some instances separately, and in others as though they were synonymous.[496] In a 1957 case, the Montana Supreme Court (after listing what the proof must show in order to acquire a water right by prescription) said, "Assuming arguendo, defendants have established the first four elements, have they established the fifth element, that of *hostility or adverse user,* which is basically the fundamental issue in this case?" [Emphasis added.][497]

Adverse use.—(1) To perfect a prescriptive right, the use of the water must have been adverse to the right of the rightful owner.[498]

(2) "To say that a use is *adverse* is equivalent to the declaration that it is *open, notorious, under a claim of right and with the knowledge* of the owner of the legal title."[499] To be adverse, the use of water by the adverse party must interfere with the use thereof by the rightful owner;[500] and such interference must result in depriving him of the water when he has actual need of it.[501]

This appears to be the consensus of most western authorities. But modifications have been declared or intimated by some court decisions in California and Texas, as is shown later under "Statute of Limitations—Statute set in motion."

(3) The adverse use must in fact conflict with the true owner's right; hence it cannot be initiated until the owners of the water right are deprived of the

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with the beneficial use to which said waters were put by the plaintiffs during said period of time."

[496] *Kraemer* v. *Kraemer,* 167 Cal. App. (2d) 291, 334, Pac. (2d) 675, 684-685 (1959); *Krumwiede* v. *Rose,* 177 Nebr. 570, 129 N.W. (2d) 491, 497-498 (1964); *Franktown Creek Irr. Co.* v. *Marlette Lake Co.,* 77 Nev. 348, 364 Pac. (2d) 1069 (1961); *Ison* v. *Sturgill,* 57 Oreg. 109, 118, 109 Pac. 579, 110 Pac. 535 (1910); *Smith* v. *North Canyon Water Co.,* 16 Utah 194, 201-202, 52 Pac. 283 (1898); *Rhoades* v. *Barnes,* 54 Wash. 145, 148, 102 Pac. 884 (1909).

[497] *Havre Irr. Co.* v. *Majerus,* 132 Mont. 410, 415, 318 Pac. (2d) 1076 (1957).

[498] *Hubbs & Miner Ditch Co.* v. *Pioneer Water Co.,* 148 Cal. 407, 416-417, 83 Pac. 253 (1906); *Gross* v. *MacCornack,* 75 Ariz. 243, 248, 255 Pac. (2d) 183 (1953); *Kuhlmann* v. *Platte Valley Irr. Dist.,* 166 Nebr. 493, 512, 89 N.W. (2d) 768 (1958).

[499] *Johnstone* v. *Gloster,* 49 Cal. App. 750, 754, 194 Pac. 504 (1920). The adverse use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. *Kuhlmann* v. *Platte Valley Irr. Dist.,* 166 Nebr. 493, 512, 89 N.W. (2d) 768 (1958).

[500] *Head* v. *Merrick,* 69 Idaho 106, 108, 203 Pac. (2d) 608 (1949).

[501] *Talbott* v. *Butte City Water Co.,* 29 Mont. 17, 26-27, 73 Pac. 1111 (1903). In *Farwell* v. *Brisson,* 66 Wash. 305, 308, 119 Pac. 814 (1911), the evidence was held sufficient to sustain findings, *inter alia,* that defendant's diversion of water had been made "adversely to the plaintiffs and to all the world, and has been made at times when the plaintiffs were desirous of irrigating their said lands, and were demanding said waters for use in the irrigation thereof."

benefit of its use in such a substantial manner as to notify them that their rights are being invaded.[502] "To take the water when the prior appropriator has no use for it, invades no right of his, and cannot even initiate a claim adverse to him."[503]

(4) Uninterrupted and continuous use of water for more than the prescriptive period raises a presumption that the use is adverse and under claim of title.[504] But in an early Oregon case, while acknowledging that "The adverse use of water from a stream for a period of ten years raises a presumption of title to the same as against a right in any other person, which might have been, but was not, asserted," the supreme court subsequently cautioned that "ten years' use of the water cannot raise a presumption against a prior appropriator that the use is adverse, without the additional showing that the other's right was invaded."[505]

(5) The use by a California riparian owner of his reasonable share of the water of a stream is not adverse to those located above and below him.[506] "In the absence of a showing that the upper owner is using the water under a claim of prescriptive right the lower owner has the right to presume that such owner is only taking that to which he is entitled as a riparian owner by virtue of his riparian right."[507] The riparian situation in California with respect to prescription has been previously touched upon in the subtopics "Presumption of notice" and "Acquiescence," under "Open and Notorious Use," and will be further discussed later under "Establishment of Prescriptive Title—Adverse Parties—Riparian proprietor."

Hostility.—(1) To be adverse to the rightful owner, the use of the water must be hostile to the title of that owner.[508]

(2) To be hostile, the adverse use must actually deprive the rightful owner of water to which he is entitled when he needs it, as brought out earlier, or

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[502] *Mountain Home Irr. Dist.* v. *Duffy,* 79 Idaho 435, 443, 319 Pac. (2d) 965 (1957).

[503] *Talbott* v. *Butte City Water Co.,* 29 Mont. 17, 26-27, 73 Pac. 1111 (1903). "Limitation did not begin to run from the date water was used by defendants; but from the date their use deprived plaintiffs of their appropriated water, which was in 1945." *Bounds* v. *Carner,* 53 N. Mex. 234, 245, 205 Pac. (2d) 216 (1949); accord, *Ison* v. *Sturgill,* 57 Oreg. 109, 121, 109 Pac. 579, 110 Pac. 535 (1910); initiation of adverse possession of right of way over lands of a settler on the public domain, *Allen* v. *Magill,* 96 Oreg. 610, 619, 189 Pac. 986, 190 Pac. 726 (1920).

[504] *Pflueger* v. *Hopple,* 66 Idaho 152, 155, 156 Pac. (2d) 316 (1945). "Respondent's uninterrupted and continuous use of the East Ditch for more than the prescriptive period of five years raises the presumption that his use was adverse and under a claim of right. * * * [A]nd here there was no evidence of parol or other license to overcome this presumption. *Ramseyer* v. *Jamerson,* 78 Idaho 504, 511, 305 Pac. (2d) 1088 (1957).

[505] *Ison* v. *Sturgill,* 57 Oreg. 109, 119, 122, 109 Pac. 579, 110 Pac. 535 (1910).

[506] *Turner* v. *Eastside Canal & Irr. Co.,* 168 Cal. 103, 110, 142 Pac. 69 (1914).

[507] *Pabst* v. *Finmand,* 190 Cal. 124, 128-129, 211 Pac. 11 (1922).

[508] *Alta Land & Water Co.* v. *Hancock,* 85 Cal. 219, 226, 24 Pac. 645 (1890); *Morris* v. *Bean,* 146 Fed. 423, 433 (C.C.D. Mont. 1906); *Toyaho Creek Irr. Co.* v. *Hutchins,* 21 Tex. Civ. App. 274, 280-281, 52 S.W. 101 (1899, error refused).

compel him to change the accustomed manner of his use.[509] Hence, it results in injury and detriment to the rightful owner.[510] The California Supreme Court has said: "The requirement of 'hostility' * * * means not that the parties must have a dispute as to the title during the period of possession, but that the claimant's possession must be adverse to the record owner, 'unaccompanied by any recognition, express or inferable from the circumstances of the right in the latter.' "[511]

(3) A use of water is not hostile unless there is an actual clash with the rights of the actual owners.[512] There is no such clash, and hence no hostility to the title of an upstream appropriator, in the taking of foreign water (water brought into an area from a different watershed) by a downstream claimant, where the upstream appropriator had relinquished all claim in the *corpus* of the water released from the area served by its system of works.[513]

(4) In a very early California case, it was held that the adverse possession of an upstream claimant, as against downstream appropriators, remained hostile and was not prejudiced by the fact that from time to time he yielded to the demands of others to allow a certain quantity of water to flow downstream to their diversion, which was between his diversion and that of the prior appropriators. Such action taken for that one reason was held to be no concession to the claim of the downstream appropriators; it was not a factor in the actual clash between the claims of the parties to this dispute.[514]

Invasion of prior right.—(1) A use of water that does no injury to a prior right is not adverse.[515] To establish a prescriptive right, the acts must operate as an invasion of the right of the party against whom the adverse right is set up.[516]

(2) Any taking by another party of water to which one is entitled, without his consent, is *prima facie* an invasion of the latter's right. However, to be actionable, it is subject to certain qualifications, among them: It is an invasion of another's right which the latter has a chance to prevent;[517] an invasion or

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[509] *Lonoaea* v. *Wailuku Sugar Co.*, 9 Haw. 651, 661-662 (1895). In this case, the hostility of an adverse claim to a change in the use of water was indicated by the fact that the changed use, which was open and notorious, was enforced.

[510] *Martin* v. *Burr*, 111 Tex. 57, 65, 228 S.W. 543 (1921).

[511] *Kraemer* v. *Kraemer*, 167 Cal. App. (2d) 291, 334 Pac. (2d) 675, 685 (1959).

[512] *Peck* v. *Howard*, 73 Cal. App. (2d) 308, 329, 167 Pac. (2d) 753 (1946).

[513] *Stevens* v. *Oakdale Irr. Dist.*, 13 Cal. (2d) 343, 353, 90 Pac. (2d) 58 (1939).

[514] *Davis* v. *Gale*, 32 Cal. 26, 36 (1867).

[515] *Peck* v. *Howard*, 73 Cal. App. (2d) 308, 328, 167 Pac. (2d) 753 (1946); *Los Angeles* v. *Glendale*, 23 Cal. (2d) 68, 78-80, 142 Pac. (2d) 289 (1943).

[516] *San Diego* v. *Cuyamaca Water Co.*, 209 Cal. 105, 133, 287 Pac. 475 (1930). "It is settled that an appropriation must invade the rights of another before it can destroy them by the establishment of a prescriptive title." *Los Angeles* v. *Glendale*, 23 Cal. (2d) 68, 79, 142 Pac. (2d) 289 (1943); accord, *Application of Filippini*, 66 Nev. 17, 23, 202 Pac. (2d) 535, 538 (1949); *Boyce* v. *Cupper*, 37 Oreg. 256, 259, 61 Pac. 642 (1900); *Henderson* v. *Goforth*, 34 S. Dak. 441, 447-448, 148 N.W. 1045 (1914).

[517] *Havre Irr. Co.* v. *Majerus*, 132 Mont. 410, 415, 318 Pac. (2d) 1076 (1957).

infringement of the rightful owner's claim which he may at any time assert but fails to do so until the full statutory period has passed.[518] And it must be a substantial invasion.[519] "Prescriptive rights to water cannot be acquired until the owner of the water has been deprived of its use in such substantial manner and degree as to notify him that his right is being invaded."[520]

(3) In California, a taking of surplus or excess water above the reasonable beneficial requirements of prior appropriators and riparian and overlying landowners is not injurious and hence not an invasion of prior or paramount rights. This is because, since adoption of the constitutional amendment of 1928,[521] all rights of whatever character are limited to reasonable beneficial use.[522]

Deprivation of use of water.—(1) To constitute an invasion of the right of a prior claimant, he must be deprived of the use of water to which he is entitled. "One of the essential elements of claim of prescriptive right to the use of water for irrigation, is that the claimant must show that he has used the water during each of the irrigation seasons of the five-year period when it was actually needed by the prior owner."[523] There is no such deprivation, and consequently no basis upon which to found a prescriptive right, in the use of waters at times when the owner of record does not require them for his own purposes.[524]

(2) Later, under "Statute of Limitations—Statute set in motion," it is brought out that, although the consensus of most western authorities is that to set the statute of limitations in motion there must be an actual deprivation of the rightful owner's use of the water, modifying factors have appeared in some court decisions in California and Texas, chiefly with respect to the necessity of showing actual present damage.

(3) While there is sufficient water flowing in a stream to supply the wants of all parties, the use of water by any one does not deprive others of their water supply and hence is not an invasion of their rights. This principle has been recognized generally throughout the West over a long period of time.[525]

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[518] *Bullerdick* v. *Hermsmeyer,* 32 Mont. 541, 554, 555, 81 Pac. 334 (1905).

[519] *Campbell* v. *Wyoming Dev. Co.,* 55 Wyo. 347, 414, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[520] *In re Alpowa Creek,* 129 Wash. 9, 14, 224 Pac. 29 (1924); accord, *Mountain Home Irr. Dist.* v. *Duffy,* 79 Idaho 435, 443, 319 Pac. (2d) 965 (1957).

[521] Cal. Const. art. XIV, § 3.

[522] See *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 926, 207 Pac. (2d) 17 (1949); *Orchard* v. *Cecil F. White Ranches, Inc.,* 97 Cal. App. (2d) 35, 43, 217 Pac. (2d) 143 (1950).

[523] *Mountain Home Irr. Dist.* v. *Duffy,* 79 Idaho 435, 440, 319 Pac. (2d) 965 (1957). "That the claimant used water at a time when plaintiff had need of it * * * ." *Havre Irr. Co.* v. *Majerus,* 132 Mont. 410, 415, 318 Pac. (2d) 1076 (1957); accord, *Bounds* v. *Carner,* 53 N. Mex. 234, 245, 205 Pac. (2d) 216 (1949); *Henderson* v. *Goforth,* 34 S. Dak. 441, 447-449, 148 N.W. 1045 (1914); *Farwell* v. *Brisson,* 66 Wash. 305, 308, 119 Pac. 814 (1911); *Sander* v. *Bull,* 76 Wash. 1, 6, 135 Pac. 489 (1913).

[524] *Stepp* v. *Williams,* 52 Cal. App. 237, 258, 198 Pac. 661 (1921). One is not injured by any other diversion so long as his own lands are supplied. *Ison* v. *Sturgill,* 57 Oreg. 109, 120, 109 Pac. 579, 110 Pac. 535 (1910).

[525] *Egan* v. *Estrada,* 6 Ariz. 248, 253, 56 Pac. 721 (1899); *San Diego* v. *Cuyamaca Water*

And so the mere use of water by a claimant during seasons of abundance of supply for all holders of rights gives him no prescriptive right to continue the use in a season of shortage.[526] As several courts have more picturesquely expressed it, "A mere scrambling possession of the water * * * gives no prescriptive right * * *."[527]

(4) The foregoing principle was developed in controversies dealing with the claimed invasion of rights in the direct flow of surface streams. The physical situation to which it was thus made applicable was distinguished by the California Supreme Court, in a landmark ground water case, from a situation in which water of an underground basin was being depleted by repeated overdrafts upon the common supply:[528]

> Cases are cited for the proposition that an appropriator's rights are not invaded if he continues to receive the quantity of water to which he is entitled. These cases, however, do not deal with the problem of gradual depletion of water stored in a basin or lake, but, rather, with surface streams or ditches in which water flows but is not retained for future use. The type of injury there considered would immediately deprive the owner of water, and the language in the opinions does not apply to an invasion of rights in a stored supply of water to be used only in future years.

Ground of action.—(1) To be adverse, the use of water must have been such an invasion of the rights of the person against whom it is claimed that he would have had a cause of action against the invader.[529] This is a well settled general rule of law.[530]

Co., 209 Cal. 105, 133, 287 Pac. 475 (1930); *Clark* v. *Allaman*, 71 Kans. 206, 246, 80 Pac. 571 (1905); *Boehler* v. *Boyer*, 72 Mont. 472, 476, 234 Pac. 1086 (1925); *Meng* v. *Coffee*, 67 Nebr. 500, 520, 93 N.W. 713 (1903); *Dick* v. *Bird*, 14 Nev 161, 166 (1879); *Masterson* v. *Kennard*, 140 Oreg. 288, 296, 12 Pac. (2d) 560 (1932); *Henderson* v. *Goforth*, 34 S. Dak. 441, 449, 148 N.W. 1045 (1914); *Spring Creek Irr. Co.* v. *Zollinger*, 58 Utah 90, 97, 197 Pac. 737 (1921); *Miller* v. *Wheeler*, 54 Wash. 429, 438, 103 Pac. 641 (1909); *Campbell* v. *Wyoming Dev. Co.*, 55 Wyo. 347, 394, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[526] *Last Chance Water-Ditch Co.* v. *Heilbron*, 86 Cal. 1, 20, 26 Pac. 523 (1890).

[527] *Union Mill & Min. Co.* v. *Dangberg*, 81 Fed. 73, 91 (C.C.D. Nev. 1897); accord, *Bullerdick* v. *Hermsmeyer*, 32 Mont. 541, 554, 81 Pac. 334 (1905); *Morris* v. *Bean*, 146 Fed. 423, 433 (C.C.D. Mont. 1906); *Carrington* v. *Crandall*, 65 Idaho 525, 532, 147 Pac. (2d) 1009 (1944).

[528] *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 931, 207 Pac. (2d) 17 (1949).

[529] *Pabst* v. *Finmand*, 190 Cal. 124, 128, 211 Pac. 11 (1922); *Mountain Home Irr. Dist.* v. *Duffy*, 79 Idaho 435, 443, 319 Pac. (2d) 965 (1957); *King* v. *Schultz*, 141 Mont. 94, 375 Pac. (2d) 108, 111 (1962); *County of Scotts Bluff* v. *Hartwig*, 160 Nebr. 823, 831, 71 N.W. (2d) 507 (1955); *Authors* v. *Bryant*, 22 Nev. 242, 247, 38 Pac. 439 (1894); *Dry Gulch Ditch Co.* v. *Hutton*, 170 Oreg. 656, 682, 133 Pac. (2d) 601 (1943); *Henderson* v. *Goforth*, 34 S. Dak. 441, 448, 148 N.W. 1045 (1914); *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian*, 74 Tex. 170, 174-175, 11 S.W. 1078 (1889); *Mally* v. *Weidensteiner*, 88 Wash. 398, 405, 153 Pac. 342 (1915).

[530] *San Diego* v. *Cuyamaca Water Co.*, 209 Cal. 105, 133, 287 Pac. 475 (1930).

(2) The mere exercise of a riparian right in States that give full recognition to the riparian doctrine—notably California—can never be hostile to riparian landowners below who hold equally paramount water rights.[531] It is adverse to the rights of the lower riparian owner only when there is an actual interference with the rights of the lower owner.[532]

(3) A use by a downstream claimant of water that has left the premises of an upstream appropriator or riparian proprietor ordinarly does not interfere with the flow before it leaves such premises. Hence it generally invades no right of the upstream claimant and usually affords him no ground for an action.[533]

Permissive use distinguished.—(1) "A prescriptive right cannot be founded upon a use permissive in character."[534] "In the instant case," said the California court in *Heinkel* v. *McAllister,* "the arrangement was a neighborly arrangement or an accommodation without any agreement or understanding that it was to continue for any definite time. A reasonable inference is that the parties understood the license to be terminable at will."[535]

(2) Obviously, a use of water cannot be adverse and hostile to the claim of the rightful owner if it is made with his permission; and so a prescriptive right to the use of water cannot be acquired by the use of such water with the consent or permission of the owners of the water right.[536] Permissive use ordinarily negates "any idea or possibility" of adverse use;[537] it is a mere

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[531] See *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 134, 287 Pac. 475 (1930).

[532] *Oliver* v. *Robnett,* 190 Cal. 51, 55, 210 Pac. 408 (1922).

With respect to the effect of the California constitutional amendment of 1928, notably on the competing rights of riparians and appropriators, see the later discussion under "Statute of Limitations—Statute set in motion."

[533] See *Pyramid Land & Stock Co.* v. *Scott,* 51 cal. App. 634, 637-638, 197 Pac. 398 (1921).

This matter is discussed later under "Establishment of Prescriptive Title—Relative Locations on Stream Channel."

[534] *Heinkel* v. *McAllister,* 113 Cal. App. (2d) 500, 502, 248 Pac. (2d) 438 (1952); accord, *Schluter* v. *Burlington Ditch, Res. & Land Co.,* 117 Colo. 284, 290, 188 Pac. (2d) 253 (1947); *Linford* v. *Hall & Son,* 78 Idaho 49, 54, 297 Pac. (2d) 893 (1956); *Colarchik* v. *Watkins,* 144 Mont. 17, 393 Pac. (2d) 786, 789-790 (1964); *Franktown Creek Irr. Co.* v. *Marlette Lake Co.,* 77 Nev. 348, 364 Pac. (2d) 1069, 1071-1072 (1961); *Martinez* v. *Mundy,* 61 N. Mex. 87, 95, 295 Pac. (2d) 209 (1956); *Smyth* v. *Jenkins,* 148 Oreg. 165, 169, 33 Pac. (2d) 1007 (1934); *Francis* v. *Roberts,* 73 Utah 98, 101, 272 Pac. 633 (1928); *Weidensteiner* v. *Mally,* 55 Wash. 79, 81, 104 Pac. 143 (1909); *Gustin* v. *Harting,* 20 Wyo. 1, 19, 121 Pac. 522 (1912).

[535] *Heinkel* v. *McAllister,* 113 Cal. App. (2d) 500, 504, 248 Pac. (2d) 438 (1952).

[536] *Hall* v. *Blackman,* 8 Idaho 272, 282, 68 Pac. 19 (1902); accord, *Smith* v. *Hallwood Irr. Co.,* 67 Cal. App. 777, 782-783, 228 Pac. 373 (1924). "Prescriptive rights are established only when the enjoyment thereof is adverse, continuous and under the claim of legal right, and not by consent, permission or mere indulgence of the owner of the alleged servient estate." *Peck* v. *Howard,* 73 Cal. App. (2d) 308, 328, 167 Pac. (2d) 753 (1946).

[537] *Hion* v. *Hyde,* 107 Mont. 84, 92, 81 Pac. (2d) 353 (1938).

license to use water or a right of way therefor, as the case may be, which can never ripen into a prescriptive title or easement.[538]

(3) Executed parol licenses to the use of water have been upheld in favor of the licensees as against claimants by adverse possession.[539]

(4) Where the claimant has shown open, visible, continuous, and unmolested use for the statutory period, such use will be presumed to be under a claim of right and not by license. The burden of showing otherwise is on the owner.[540]

An Idaho watermaster delivered water to the holder of a decreed right in time of scarcity of water, in preference to the holder of an undecreed right initiated by application and permit prior in point of time to that upon which the decree was based, as the appropriation statute specifically directed him to do. The supreme court held that this receipt of water by the holder of the decreed right was not an adverse use, but a permissive use, based on the watermaster's statutory duty; hence it could not be the basis of a prescriptive right.[541]

Revocation of permission–(1) Even though a use of water may have been permissive in the first instance, nevertheless if thereafter exercised under a claim of right, the original character of the use does not prevent the acquisition of a prescriptive right. But in order to initiate the acquisition of a prescriptive right after exercise of the right has been made under permission of the rightful owner, there must be some change of condition–notice of some definite character on the part of the adverse user to the rightful owner that the permission was repudiated and that the adverse user was establishing a right antagonistic and adverse to that of the rightful owner.[542]

(2) Convincing evidence of the repudiation of a license and of an unequivocal assertion of a right hostile to the licensor, brought home to him, would be required to set the statute in motion.[543]

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[538] *Heinkel* v. *McAllister,* 113 Cal. App. (2d) 500, 502, 504, 248 Pac. (2d) 438 (1952); *Bowen* v. *Shearer,* 100 Colo. 134, 136, 66 Pac. (2d) 534 (1937); *Jobling* v. *Tuttle,* 75 Kans. 351, 362-364, 89 Pac. 699 (1907); *Motl* v. *Boyd,* 116 Tex. 82, 127-128, 286 S.W. 458 (1926); *Yeager* v. *Woodruff,* 17 Utah 361, 369, 53 Pac. 1045 (1898).

[539] *Ortman* v. *Dixon,* 13 Cal. 33, 36 (1859); *Northern Cal. Power Co., Consol.* v. *Flood,* 186 Cal. 301, 305, 199 Pac. 315 (1921).

[540] *Te Selle* v. *Storey,* 133 Mont. 1, 5-6, 319 Pac. (2d) 218 (1957); *Kougl* v. *Curry,* 73 S. Dak. 427, 432-433, 44 N.W. (2d) 114 (1950).

In a 1960 Nebraska case, the supreme court could not regard as credible the evidence that possession and use of land was permissive and not under claim of ownership. *Jones* v. *Schmidt,* 170 Nebr. 351, 102 N.W. (2d) 640, 646-647 (1960).

[541] *Big Wood Canal Co.* v. *Chapman,* 45 Idaho 380, 405, 263 Pac. 45 (1927).

[542] *Irion* v. *Hyde,* 107 Mont. 84, 92, 95, 81 Pac. (2d) 353 (1938); *Farmers' Coop. Irr. Co.* v. *Alsager,* 47 Idaho 555, 558, 277 Pac. 430 (1929); *Bachman* v. *Reynolds Irr. Dist.,* 56 Idaho 507, 517-519, 55 Pac. (2d) 1314 (1936); *Weidensteiner* v. *Mally,* 55 Wash. 79, 81, 104 Pac. 143 (1909); *Gustin* v. *Harting,* 20 Wyo. 1, 19, 121 Pac. 522 (1912).

[543] *Jensen* v. *Hunter,* 108 Cal. XVII, 5 Cal. U. 83, 91, 41 Pac. 14 (1895).

(3) In a 1963 decision, the Montana Supreme Court included in its opinion several quotations from authorities, among which are the following:[544]

> "While a permissive possession may subsequently become hostile * * * to make it so there must be a repudiation of the permissive possession and of the recognition of ownership implicit therein, and the repudiation must be brought home to the owner by actual notice, or at least by acts of hostility so manifest and notorious that actual notice must be presumed. * * * "
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> " 'The law is very rigid with the respect to the fact that a use permissive in the beginning can be changed into one which is hostile and adverse only by the most unequivocal conduct on the part of the user. The rule is that the evidence of adverse possession must be positive, must be strictly construed against the person claiming a prescriptive right, and that every reasonable intendment should be made in favor of the true owner.' "

Exclusive use

In a very early case, the California Supreme Court acknowledged that "The general and established doctrine is that an *exclusive* and uninterrupted enjoyment of water, in any particular way, for a period corresponding to the time limited by statute within which an action must be commenced for the recovery of the property or of the assumed right held and enjoyed adversely, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been, but was not asserted." [Emphasis added.][545]

Exclusion of rightful owner by adverse claimant.—In order to bar the claim of a prior appropriator to the use of water appropriated by him on the ground of continuous adverse use by a junior appropriator, the former must be excluded from such use by the latter; the adverse use must be made at a time when the rightful holders of title actually need the water, and it must deprive them—exclude them—of the use at such times.[546]

Claim of exclusive right.—Adverse use of water, to the exclusion of the rightful owner, must be made "under a claim of exclusive right;" the possession

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[544] *Drew* v. *Burgraff,* 141 Mont. 405, 378 Pac. (2d) 232, 234 (1963), quoting from *Kelley* v. *Grainey,* 113 Mont. 520, 129 Pac. (2d) 619 (1942), and *Price* v. *Western Life Ins. Co.,* 115 Mont. 509, 146 Pac. (2d) 165 (1944).

[545] *American Co.* v. *Bradford,* 27 Cal. 360, 366 (1865); accord, *Cox* v. *Clough,* 70 Cal. 345, 347, 11 Pac. 732 (1886); *Kuhlmann* v. *Platte Valley Irr. Dist.,* 166 Nebr. 493, 512, 89 N.W. (2d) 768 (1958); *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 584-585, 86 S.W. 733 (1905).

[546] *Brossard* v. *Morgan,* 7 Idaho 215, 218-219, 61 Pac. 1031 (1900); *Head* v. *Merrick,* 69 Idaho 106, 108, 203 Pac. (2d) 608 (1949); *Bishop* v. *Kala,* 7 Haw. 590, 593 (1889); *Stearns* v. *Benedick,* 126 Mont. 272, 277-278, 247 Pac. (2d) 656, 659 (1952); *Malnati* v. *Ramstead,* 50 Wash. (2d) 105, 107-108, 309 Pac. (2d) 754 (1957).

"must be held under a claim of title, exclusive of any other right, as one's own."[547]

Some circumstances negating exclusiveness.—(1) In a Colorado case in which title to a lake and waters impounded therein was in controversy, possession was held to be not exclusive. Plaintiff's use of the waters was under "recreational rights, that is fishing, propagation of fish, and boating * * *." Defendant was entitled to one-half of the stored water for irrigation, under certain withdrawal restrictions. "It was * * * a joint possession, and this cannot be used as the basis of adverse possession."[548]

(2) The New Mexico Supreme Court said in one case: "The claim by the appellants that they have acquired by grant or prescription, the right to cut wood, water livestock, pasturage and the use of roads was not shown to have been exclusive to the appellants but on the contrary was claimed by many others. The claim being in common with and similar to that of the general public in this area, the appellants certainly could not acquire a private easement unto themselves."[549]

(3) According to the trial court in a Montana case, the proof failed to show any use or appropriation of spring waters by plaintiffs to the exclusion of others having stock running at large in the area. Their own testimony showed that other owners of livestock had enjoyed the same rights and privileges with respect to the spring waters as had the plaintiffs themselves. "In other words, the ownership and use proven by the plaintiffs were in no sense exclusive or subject to the complete dominion and control of plaintiffs." The supreme court agreed that plaintiffs acquired no rights by prescription.[550]

(4) However, the requirement that the claim of title be one's own and exclusive of any other right does not mean that all other persons are necessarily excluded from the use of the ditch that conveys the water, so long as the adverse claimant's right is not interfered with. A prescriptive right can be acquired for the use of only part of the capacity of a ditch for the conveyance of water in which the claimant claims an exclusive right.[551]

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[547] *San Francisco Bank* v. *Langer,* 43 Cal. App. (2d) 263, 269, 110 Pac. (2d) 687 (1941); accord, *Lee* v. *Pacific Gas & Elec. Co.,* 7 Cal. (2d) 114, 120, 59 Pac (2d) 1005 (1936); *Authors* v. *Bryant,* 22 Nev. 242, 247, 38 Pac. 439 (1894); *Ebell* v. *Baker,* 137 Oreg. 427, 440, 299 Pac. 313 (1931); *Heard* v. *Texas,* 146 Tex. 139, 146, 204 S.W. (2d) 344 (1947).

[548] *Surface Creek Ditch & Res. Co.* v. *Grand Mesa Resort Co.,* 114 Colo. 543, 546, 558-559, 168 Pac. (2d) 906 (1946).

[549] *Martinez* v. *Mundy,* 61 N. Mex. 87, 95, 295 Pac. (2d) 209 (1956).

[550] *Jones* v. *Hanson,* 133 Mont. 115, 123-124, 320 Pac. (2d) 1007 (1958).

[551] *Silva* v. *Hawn,* 10 Cal. App. 544, 551, 102 Pac. 952 (1909); *Bashore* v. *Mooney,* 4 Cal. App. 276, 281, 87 Pac. 553 (1906). The case in which this principle was apparently first laid down in California with respect to water rights—*Smith* v. *Hampshire,* 4 Cal. App. 8, 10, 87 Pac. 224 (1906)—was relied upon by the California Supreme Court to some extent in an important ground water case, *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 932, 207 Pac. (2d) 17 (1949).

Continuous and Uninterrupted Use

In what appears to have been its first decision with respect to the loss of a water right by adverse possession, the California Supreme Court states that the person claiming a right by such adverse possession must have had the continued, uninterrupted, and adverse enjoyment of the right for the period prescribed by the statute of limitations.[552] Both of the terms "continuous" and "uninterrupted" have been frequently used in discussions of elements of the prescriptive right.[553]

The association of these terms is indeed close; in fact, to be continuous, the use under many circumstances must have been uninterrupted.[554] However, although nearly alike, the two terms are not always exactly synonymous in law. For example, it has been held or suggested in some cases that the institution of a suit brought by the true owner against the adverse claimant during the statutory prescriptive period stops the running of the statute. In a California case, *Alta Land & Water Company* v. *Hancock*, two squatters on private land used water thereon adversely and continuously for 11 years, but just before expiration of the period of limitation, the use was interrupted by the bringing of an action in ejectment. Although this interruption did not break the continuity of use until final judgment and writ of possession 6 years later, nevertheless it stopped the running of the statute. After that, no right could be acquired by adverse use during the pendency of the suit.[555] By contrast, the Oregon Supreme Court held that a decree adjudicating water rights did not toll the statute of limitations where it was not followed by the taking of possession or by the use of the water by the successful party until a time later than the period of the statute of limitations, reckoned from the date of the decree.[556]

Continuous use.—(1) To acquire the acquisition of a prescriptive right, adverse use of the water must have been continuous for the period prescribed by the statute of limitations.[557]

A prescriptive right often may be applicable to only a part of another's water right. See "Measure of the Prescriptive Right—Part of Invaded Right Only," *infra.*

[552] *Union Water Co.* v. *Crary,* 25 Cal. 504, 509 (1864).

[553] *Hays* v. *De Atley,* 65 Mont. 558, 561, 212 Pac. 296 (1923); *Kuhlmann* v. *Platte Valley Irr. Dist.,* 166 Nebr. 493, 512, 89 N.W. (2d) 768 (1958); *Heard* v. *Texas,* 146 Tex. 139, 146, 204 S.W. (2d) 344 (1947); *Ephraim Willow Creek Irr. Co.* v. *Olson,* 70 Utah 95, 113, 258 Pac. 216 (1927); *Downie* v. *Renton,* 167 Wash. 374, 382, 9 Pac. (2d) 372 (1932).

[554] See, e.g., *Haas* v. *Choussard,* 17 Tex. 588, 590 (1856).

[555] *Alta Land & Water Co.* v. *Hancock,* 85 Cal. 219, 227-228, 24 Pac. 645 (1890). See also *Baker* v. *Brown,* 55 Tex. 377, 382 (1881); *Biggs* v. *Leffingwell,* 62 Tex. Civ. App. 665, 668, 132 S.W. 902 (1910); *Hammond* v. *Johnson,* 94 Utah 20, 34, 66 Pac. (2d) 894 (1937).

[556] *Ebell* v. *Baker,* 137 Oreg. 427, 437-438, 299 Pac. 313 (1931).

[557] *Smith* v. *Hallwood Irr. Co.,* 67 Cal. App. 777, 782-783, 228 Pac. 373 (1924); *Dunn* v. *Thomas,* 69 Nebr. 683, 684, 96 N.W. 143 (1903); *Little Walla Walla Irr. Union* v. *Finis*

(2) Many courts have expressed their views as to the meaning of "continuous use" in this context when at issue in litigated cases. It does not mean that the use of the water must be literally constant or incessant—for the pragmatic reason that that is not the way in which irrigation water is generally applied to land. "[T]he use does not have to be of a continuous flow in order to establish a prescriptive right * * *."[558] Continuity of possession is not broken by reason of the fact that the ditch used for conveying water is in fact used only during the portion of each season when the water is needed for irrigation purposes.[559] "The sufficiency of the continuity must depend largely on the nature of the use."[560] And it is required that there be "only a use such as is normally exercised."[561]

(3) The California Supreme Court summed up the problem by saying:[562]

> A right to the use of water for irrigation of land may be acquired by prescription without showing that the water is actually kept running upon the land all the time. Irrigation, as usually practiced, is required only at intervals during the season. If the claimant takes the water and uses it at the time when it is necessary to do so, and does this under claim of right, without molestation by others interested in the stream or ditch, and with their knowledge, actual or implied, it will be sufficient with respect to the continuity of use, although there may be many days or weeks during which he does not use it at all.

(4) In a 1932 case in which the right claimed by prescription was to

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Irr. Co., 62 Oreg. 348, 353, 124 Pac. 666, 125 Pac. 270 (1912); *Farwell* v. *Brisson*, 66 Wash. 305, 308, 119 Pac. 814 (1911); *Campbell* v. *Wyoming Dev. Co.*, 55 Wyo. 347, 414-415, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[558] *Warren* v. *Crafton Water Co.*, 139 Cal. App. (2d) 314, 324, 293 Pac. (2d) 506 (1956); accord, *McGlochlin* v. *Coffin*, 61 Idaho 440, 445-449, 103 Pac. (2d) 703 (1940); *Glantz* v. *Gabel*, 66 Mont. 134, 142, 212 Pac. 858 (1923); *Te Selle* v. *Storey*, 133 Mont. 1, 6, 319 Pac. (2d) 218 (1957); *Hargraves* v. *Wilson*, 382 Pac. (2d) 736, 739-740 (Okla. 1963); *Ephraim Willow Creek Irr. Co.* v. *Olson*, 70 Utah 95, 112, 258 Pac. 216 (1927).

[559] *Strong* v. *Baldwin*, 154 Cal. 150, 162, 97 Pac. 178 (1908). "If plaintiff and his predecessors used the ditch whenever needed, as they did, without regard to the rights of others, the requirements of the rule were met." *Glantz* v. *Gabel*, 66 Mont. 134, 142, 212 Pac. 858 (1923); accord, *McDougal* v. *Lame*, 39 Oreg. 212, 215, 64 Pac. 864 (1901). Adverse use only at the times when water is needed constitutes a sufficient continuous use of the water, whether this be every day, or once a week, or twice a week, or whenever his need calls for it; omission to use when not needed does not break continuity in establishing a prescriptive right. *Martin* v. *Burr*, 111 Tex. 57, 66, 228 S.W. 543 (1921). As water ordinarily is used according to need, a right to use it intermittently according to definite periods or according to need may be established. *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 463, 137 Pac. (2d) 634 (1943).

[560] *Brand* v. *Lienkaemper*, 72 Wash. 547, 550, 130 Pac. 1147 (1913).

[561] *Hargraves* v. *Wilson*, 382 Pac. (2d) 736, 739 (Okla. 1963).

[562] *Northern Cal. Power Co., Consol.* v. *Flood*, 186 Cal. 301, 306, 199 Pac. 315 (1921).

discharge refuse water from a reservoir onto and across lands of another, the Washington Supreme Court made this differentiation:[563]

> A different rule applies where the user, as here, consists of occasional acts of trespass, and cases where water is appropriated during long periods of time and the amount appropriated varies according to the seasons. In the latter class of cases, the law seems to be that, if the claimant makes use of the water from time to time as his needs require, there is a continuity of use. A stricter rule applies where the prescriptive right is based upon occasional torts spread over the statutory period. In the latter class of cases, the rule is quite general that isolated cases of trespass, though repeated over a long period of time, do not constitute use so as to support a claim of prescriptive right.

Uninterrupted use.—(1) To enable adverse claimants to maintain a prescriptive right to water flowing in a stream as against another claimant, there must have been, among other things, "an uninterrupted enjoyment by them, under claim of right," for the prescriptive period.[564]

(2) In one of the earliest California cases decided with respect to prescriptive rights to the use of water, the supreme court observed that if an adverse use and enjoyment of water have been interrupted, no presumption of a grant can arise.[565]

(3) In a 1957 Washington case, occasionally a surplus of water was not used by plaintiff but flowed to the river, from which defendant argued that plaintiff's use was not exclusive. Rejecting this contention, the supreme court quoted the following statement from Wiel: " 'The terms "exclusive" and "uninterrupted" probably represent the same thing in this connection; namely, that to the extent of the right claimed, the claimant must not have shared the use with the true owner, nor suffered any act of dominion by him, such as an interruption.' "[566]

(4) There are numerous examples of long continued uninterrupted use in the reported cases.[567] However, in each instance that has come to the attention

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[563] *Downie* v. *Renton,* 167 Wash. 374, 382-383, 9 Pac. (2d) 372 (1932).

[564] *Union Mill & Min. Co.* v. *Dangberg,* 81 Fed. 73, 91-92 (C.C.D. Nev. 1897); *Morris* v. *Bean,* 146 Fed. 423, 433 (C.C.D. Mont. 1906); *Webster* v. *Lomas,* 112 Colo. 74, 75, 145 Pac. (2d) 978 (1944); *Franktown Creek Irr. Co.* v. *Marlette Lake Co.,* 77 Nev. 348, 364 Pac. (2d) 1069, 1071 (1961); *Baker* v. *Brown,* 55 Tex. 377, 381 (1881); *Malnati* v. *Ramstead,* 50 Wash. (2d) 105, 108, 309 Pac. (2d) 754 (1957).

[565] *American Co.* v. *Bradford,* 27 Cal. 360, 368 (1865).

[566] *Malnati* v. *Ramstead,* 50 Wash. (2d) 105, 108, 309 Pac. (2d) 754 (1957), quoting from Wiel, S.C., "Water Rights in the Western States," 3d ed., vol. 1, § 584 (1911).

Washington legislation enacted in 1967 provides that "No rights to the use of surface or ground waters of the state affecting either appropriated or unappropriated waters thereof may be acquired by prescription or adverse use." Wash. Rev. Code § 90.14.220 (Supp. 1970).

[567] For example, more than 30 years except for one 41-day interference in 1940, *Gross* v. *MacCornack,* 75 Ariz. 243, 248, 255 Pac. (2d) 183 (1953); more than 26 years,

of the author, there was associated with it, in the court's opinion, one or more of the long recognized elements of the prescriptive right, specifically: open, notorious, adverse, exclusive, knowledge, acquiescence, claim of right. In fact, the Wyoming Supreme Court stated that mere use of water, *however long continued,* does not give rise to a title by prescription, but that the adverse claimants are bound to show an invasion in a substantial manner of the rights of the true owner and the extent of that invasion during a continuous prescriptive period, and that the adverse use was made with the knowledge and acquiescence of the true owner.[568]

Interruption of adverse use.—(1) An interruption of the use of the water by the adverse party necessary to defeat the claim of a prescriptive right on his part must be deliberate, open, substantial, and with the intention of reestablishing the claim of the party whose right has been invaded.

(2) It is said in some of the cases that any interruption of adverse use, however slight, prevents the acquisition of title by prescription.[569] But it is also said that occasional suspensions or interruptions of use, such as placing of obstructions in the ditch which are immediately removed, do not constitute an interruption of an adverse use,[570] so long as such obstructions are not "such as to frequency or persistence as to manifest a definite purpose on the part of the defendant to so interrupt the plaintiffs' otherwise open, peaceable, and continuous use of said ditch as to prevent the running of the prescriptive period."[571]

(3) An attempt to regain possession of a water right the use of which has been under the actual control of another must be successful and must lead to a change in its control before the prescriptive claim can be defeated; for the statute of limitations does not contemplate that slight interruptions will stop its running in favor of one who for all practical purposes maintains possession of the property.[572]

(4) After adverse possession begins, continuity of possession and use by the adverse party can be broken only by the rightful owner's interference with

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Progress Co. v. *Salt Lake City,* 53 Utah 556, 568, 173 Pac. 705 (1918); more than 30 years, *Allen* v. *Swadley,* 46 Colo. 544, 547-548, 554, 105 Pac. 1097 (1909); *Pleasant Valley & Lake Canal Co.* v. *Maxwell,* 93 Colo. 73, 74-75, 78, 23 Pac. (2d) 948 (1933); little interruption for more than 50 years, *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 448, 478-479, 137 Pac. (2d) 634 (1943).

[568] *Campbell* v. *Wyoming Dev. Co.,* 55 Wyo. 347, 414-415, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[569] *In re Ahtanum Creek,* 139 Wash. 84, 92-93, 245 Pac. 758 (1926); *Bree* v. *Wheeler,* 129 Cal. 145, 147, 61 Pac. 782 (1900); *Center Creek Water & Irr. Co.* v. *Lindsay,* 21 Utah 192, 200, 60 Pac. 559 (1900).

[570] *Big Rock Mutual Water Co.* v. *Valyermo Ranch Co.,* 78 Cal. App. 266, 272, 248 Pac. 264 (1926); *Thomas* v. *Spencer,* 69 Wash. 433, 436, 125 Pac. 361 (1912).

[571] *Scott* v. *Henry,* 196 Cal. 666, 671, 239 Pac. 314 (1925).

[572] *Gardner* v. *Wright,* 49 Oreg. 609, 631-632, 91 Pac. 286 (1907).

such possession, with an intention on his part not only to deprive the adverse party of possession but also to oust him from his claimed title.[573]

(5) The necessary continuity of use is interrupted if the rightful owner diverts the water for his own use during a fraction of the prescriptive period and thus prevents use by the adverse claimant at a time when needed.[574] One interruption during the entire prescriptive period is sufficient to prevent acquisition of title by the adverse user if made under circumstances as to reassert ownership of the water right.[575] The California Supreme Court has said, "A single interruption once every five years, under such circumstances as to challenge the right of the adverse claimant, will prevent the acquisition of a title by prescription, for there would then be no period of continuous user for five years." (Five years is the prescriptive period in California.)[576]

(6) A clandestine entry will not set the statute in motion, because the owner of the land cannot be said to have acquiesced in the wrongful entry or possession; and by the same reasoning, a clandestine interruption will not constitute a tolling of the statute.[577] Therefore, an entry by the injured party by stealth and without the knowledge of the party in possession is not sufficient to break the continuity necessary to establish a right by prescription.[578] The California Supreme Court has said:[579]

> Without further citation of authorities or a critical analysis of those already cited, it is clear that in order to interrupt the running of the statute of limitations, as to flowing water, there must be a resumption of the possession thereof under a claim of right brought home to the adverse claimant either by express notice to that effect or by conduct so notorious and unquivocal as to imply such notice. In other words, the interruption of the possession must rise in dignity and character to that required to initiate an adverse possession.

(7) The acts of interruption may be of various kinds, provided they are effective for the purpose. "To interrupt the continuity of the adverse occupant's possession, there must be a physical interruption of the adverse possession, or a suit or some unequivocal act of ownership which interrupts the exercise of the right claimed and being enjoyed by the adverse claimant."[580]

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[573] *Ebell* v. *Baker,* 137 Oreg. 427, 440, 299 Pac. 313 (1931).

[574] *Kohala Sugar Co.* v. *Wight,* 11 Haw. 644, 649 (1899).

[575] *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 448, 463, 137 Pac. (2d) 634 (1943); *Armstrong* v. *Payne,* 188 Cal. 585, 596, 206 Pac. 638 (1922).

[576] *Armstrong* v. *Payne,* 188 Cal. 585, 596, 206 Pac. 638 (1922).

[577] *Morgan* v. *Walker,* 217 Cal. 607, 617-618, 20 Pac. (2d) 660 (1933); *Brattain* v. *Conn,* 50 Oreg. 156, 158, 91 Pac. 458 (1907); *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 448, 463, 137 Pac. (2d) 634 (1943).

[578] *Armstrong* v. *Payne,* 188 Cal. 585, 596-597, 206 Pac. 638 (1922).

[579] 188 Cal. at 597.

[580] *Hammond* v. *Johnson,* 94 Utah 20, 34, 66 Pac. (2d) 894 (1937); actual physical

These effective interruptions may consist of diversions of the water upstream by the rightful holder of the water right.[581] Other interruptions have been caused by physical force.[582] As noted at the outset of this discussion of "Continuous and Uninterrupted Use," and also later under "Statute of Limitations—Tolling of the statute," there have been holdings or expressions to the effect that the institution of a suit brought by the true owner against the adverse claimant during the statutory prescriptive period stops the running of the statute of limitations, together with a deviation from that literal rule.

(8) From a review of the authorities in 1943, the Utah Supreme Court summarized the situation by concluding: (a) there must be an actual physical interruption, mere words alone not being sufficient; (b) a single interruption will suffice even though the owner knows that the adverse party will turn the water back into his ditch as soon as the owner leaves; (c) the interruption must rise in dignity and character to that required to initiate an adverse possession, that is, it must be open, notorious, under claim of right, and there must be no attempt at concealment; and (d) the interruption must be under such circumstances as to constitute a reassertion of ownership under a claim of right.[583]

Lest a part of the foregoing be misconstrued, it is well to state here that although words alone are not sufficient, as emphasized under the next subtopic, demands by the rightful owner that are acquiesced in and complied with by the adverse party fall into an entirely different category.

Some circumstances negating interruption of adverse use.—(1) The mere protest of the record owner of the right, or his disputing of the invading party's right to the claimed possession, will not prevent the running of the statute of limitations.[584] In other words, mere denials (on the part of the rightful owner of the claim of the adverse claimant), complaints, remonstrances, or prohibitions of use, unaccompanied by any act which in the law would amount to a disturbance and be actionable as such, will not prevent the acquisition of a prescriptive right.[585]

It is implicit from the court cases discussed above, and others to like effect, that the adverse claimant's possession and use continued despite the rightful owner's protests and remonstrances unaccompanied by some positive action on

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interruption of the use of water, *Authors* v. *Bryant,* 22 Nev. 242, 246-247, 38 Pac. 439 (1894).

[581] *Rice* v. *Meiners,* 136 Cal. 292, 293, 68 Pac. 817 (1902).

[582] *Anderson* v. *Bassman*, 140 Fed. 14, 25 (C.C.N.D. Cal. 1905); *Armstrong* v. *Payne,* 188 Cal. 585, 598, 206 Pac. 638 (1922).

[583] *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 448, 466, 137 Pac. (2d) 634 (1943).

[584] *Cox* v. *Clough,* 70 Cal. 345, 347, 11 Pac. 732 (1886); *Conness* v. *Pacific Coast Joint Stock Land Bank,* 46 Ariz. 338, 340-341, 50 Pac. (2d) 888 (1935). "Nor would mere words alone suffice." *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 448, 463, 137 Pac. (2d) 634 (1943).

[585] *Oregon Land & Constr. Co.* v. *Allen Ditch Co.,* 41 Oreg. 209, 220, 69 Pac. 455 (1902).

his part to stop the invasion. If, as stated at the end of the immediately preceding subtopic, the adverse claimant voluntarily ceases his unlawful taking of the water because of the rightful owner's demands that he do so, it is important to note than an entirely different situation is presented. In a 1901 Utah case, competent and material evidence tending to show a recognition or acknowledgment on the part of the adverse parties of the possession and use of the waters in the rightful owners, and compliance with their demands, was held to defeat the operation of the statute and procuring of any title by prescription.[586]

(2) "An occasional suspension of interruption of the enjoyment will not defeat the right, if it arises from such causes as the dryness of the season; a temporary failure to exercise the right to the extent claimed; or fluctuations in the flow of the stream."[587]

Peaceable possession.—The word "peaceable" has been used in a number of cases in connection with continuous and uninterrupted uses, such as that the use of water was "continuous, uninterrupted, peaceable."[588]

The possession is peaceable if it has not been disturbed or molested,[589] or if the use of the water has not been interrupted.[590] And so, said the California Supreme Court, the statement that the adverse use must be peaceable means no more than that it must be uninterrupted: "If the possession has been uninterrupted, of necessity it has been peaceable. If it had been interrupted, of necessity it has not been peaceable. The words are therefore interchangeable and synonymous in the pleading of prescriptive title."[591]

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[586] *Wasatch Irr. Co.* v. *Fulton,* 23 Utah 466, 468, 65 Pac. 205 (1901). The evidence showed that the demands of the rightful parties were acquiesced in at a meeting; as a consequence, water which had been diverted by the adverse claimants was turned down the stream for the rightful owners' use. "This tended to establish an interruption of the continuity of the defendants' possession, and negative any assent by the plaintiffs to the use of the water by the defendants."

[587] *Warren* v. *Crafton Water Co.*, 139 Cal. App. (2d) 314, 324, 293 Pac. (2d) 506 (1956); interruptions by dry season, *Hargraves* v. *Wilson,* 382 Pac. (2d) 736, 739 (Okla. 1963).

[588] *Spargur* v. *Heard,* 90 Cal. 221, 229, 27 Pac. 198 (1891); *Kountz* v. *Carpenter,* 206 S.W. 109, 110 (Tex. Civ. App. 1918); " 'Peaceable possession' is such as is continuous and not interrupted by adverse suit to recover the estate." Tex. Rev. Civ. Stat. Ann. art. 5514 (1958); *Center Creek Water & Irr. Co.* v. *Lindsay,* 21 Utah 192, 200, 60 Pac. 559 (1900); "While it is true that some courts in enumerating the elements necessary to acquire title by prescription delcare that the possession must be peaceable, they mean nothing more than that it must be continuous—that is, that it must not be interrupted by the owner of the servient estate," *Hays* v. *De Atley,* 65 Mont. 558, 561, 212 Pac. 296 (1923); *Havre Irr. Co.* v. *Majerus,* 132 Mont. 410, 415, 318 Pac. (2d) 1076 (1957); *Henderson* v. *Goforth,* 34 S. Dak. 441, 447, 148, N.W. 1045 (1914).

[589] *Northern Cal. Power Co., Consol.* v. *Flood,* 186 Cal. 301, 306, 199 Pac. 315 (1921).

[590] *Campbell* v. *West & Mathis,* 44 Cal. 646, 648 (1872).

[591] *Montecito Valley Water Co.* v. *Santa Barbara,* 144 Cal. 578, 596-597, 77 Pac. 1113 (1904).

Claim of Right

Essential facets.—(1) To be adverse, the use of the water must have been made under a claim of right or, as it is sometimes stated, under color of title and not by virtue of another right.[592] "Color of title" is considered later.

(2) A mere claim to the use of water, however long continued, cannot of itself establish a prescriptive right.[593] In establishing actual possession there must be an intent to hold the property as its owner,[594] a positive assertion of title inconsistent with and in derogation of the rights of everyone else, coupled with acts of ownership which proclaim to the world and bring notice to the owner that a right is claimed in the property over which the claimant is seeking to exercise dominion.[595] A sufficient showing of such claim of right may be made by evidence of the conduct of the parties, such as where they exercised the usual acts of ownership.[596] But in order to make good a claim of title by prescription grounded on adverse possession, notice of the adverse claim must have been brought home to all whose rights the claim infringed.[597]

(3) This adverse assertion of a right to divert and use water must be not only a claim of right, but also a claim of paramount right[598]—otherwise stated as "unmistakably an assertion of a claim of exclusive ownership in the occupant."[599]

(4) In establishing a prescriptive right, the rightfulness or wrongfulness of the claim is immaterial.[600] The reason there is such an institution as

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[592] *Furtado* v. *Taylor,* 86 Cal. App. (2d) 346, 352, 194 Pac. (2d) 770 (1948); *Warren* v. *Crafton Water Co.,* 139 Cal. App. (2d) 314, 321, 293 Pac. (2d) 506 (1956); "Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely," Cal. Civ. Pro. Code § 324 (West 1954); *Bowen* v. *Shearer,* 100 Colo. 134, 136, 66 Pac. (2d) 534 (1937); *Linford* v. *Hall & Son,* 78 Idaho 49, 54, 297 Pac. (2d) 893 (1956); "The claim must be hostile to that of the person against whom it is asserted," *Morris* v. *Bean,* 146 Fed. 423, 433 (C.C.D. Mont. 1906); *Jones* v. *Schmidt,* 170 Nebr. 351, 102 N.W. (2d) 640, 646 (1960); The use "must be held under a claim of title, exclusive of any other, as one's own * * *," *Authors* v. *Bryant*, 22 Nev. 242, 247, 38 Pac. 439 (1894); *Dry Gulch Ditch Co.* v. *Hutton*, 170 Oreg. 656, 676, 133 Pac. (2d) 601 (1943); *Heard* v. *Texas*, 146 Tex. 139, 146, 204 S.W. (2d) 344 (1947); *Farwell* v. *Brisson*, 66 Wash. 305, 308, 119 Pac. 814 (1911).

[593] *Turner* v. *East Side Canal & Irr. Co.,* 169 Cal. 652, 657, 147 Pac. 579 (1915); *Cox* v. *Clough,* 70 Cal. 345, 347, 11 Pac. 732 (1886).

[594] *Elsasser* v. *Szymanski,* 163 Nebr. 65, 68, 77 N.W. (2d) 815 (1956).

[595] *Smith* v. *Duff,* 39 Mont. 374, 378, 102 Pac. 981 (1909); *Fairview* v. *Franklin Maple Creek Pioneer Irr. Co.,* 59 Idaho 7, 17, 79 Pac. (2d) 531 (1938); *Furtado* v. *Taylor,* 86 Cal. App. (2d) 346, 352, 194 Pac. (2d) 770 (1948).

[596] *Evans Ditch Co.* v. *Lakeside Ditch Co.*, 13 Cal. App. 119, 129, 108 Pac. 1027 (1910).

[597] *Cook* v. *Hudson,* 110 Mont. 263, 282, 103 Pac. (2d) 137 (1940).

[598] *Martin* v. *Burr,* 111 Tex. 57, 65-66, 228 S.W. 543 (1921).

[599] *Heard* v. *Texas,* 146 Tex. 139, 146, 204 S.W. (2d) 344 (1947).

[600] *Gardner* v. *Wright,* 49 Oreg. 609, 626-627, 91 Pac. 286 (1907).

prescription was thus explained by the Oregon Supreme Court:[601]

> It is the office of the statute of limitations, as enacted by our legislatures, as well as recognized by the courts from earliest history on the subject, to prevent and avoid the uncertainty in titles and property rights which would necessarily exist if persons were permitted to wait until after a generation had passed away, taking with it the most capable witnesses, before questioning another's rights. It is therefore settled that title by adverse possession may be acquired regardless of the good faith of the claimant, if accompanied by even a pretense, commonly known as a claim of title.

(5) Where the conduct of prescriptive claimants is such as to indicate a recognition of a paramount right in others, there can be no basis for a finding of adverse possession by such claimants.[602]

(6) In an action to quiet title to a spring located on defendants' land and to other facilities necessary to convey the water to plaintiff's adjoining property, the fact that plaintiff testified that he laid no claim to ownership of any of defendants' *land* on which the spring was located did not affect plaintiff's right to a title to the *water right* by prescription.[603]

Presumption of claim of right.—When the adverse claimant shows open, visible, continous, and unmolested use for the statutory period, such use will be presumed to be under a claim of right, and not by license.[604]

Color of title.—(1) Color of title is a pretext, guise, or semblance of a title, as distinguished from a complete, formal, unassailable title of public record.

(2) In the statutes of limitation of actions to recover real property in a number of the Western States, color of title is included as an element of adverse possession. In most of these particular statutes, color of title appears in one or two out of several categories; and in various instances this is designated "claim and color of title." However, the applicable statutes in a number of other States do not mention color of title.[605] According to the Wyoming Supreme Court, "In this state * * * it is not necessary that adverse possession be founded upon color of title."[606]

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[601] 49 Oreg. at 627.

[602] *Sherlock* v. *Greaves*, 106 Mont. 206, 216, 76 Pac. (2d) 87 (1938).

[603] *Malnati* v. *Ramstead*, 50 Wash. (2d) 105, 108-109, 309 Pac. (2d) 754 (1957).

[604] *Te Selle* v. *Storey*, 133 Mont. 1, 5-6, 319 Pac. (2d) 218 (1957); *Ramseyer* v. *Jamerson*, 78 Idaho 504, 511, 305 Pac. (2d) 1088 (1957); *Kougl* v. *Curry*, 73 S. Dak. 427, 432-433, 44 N.W. (2d) 114 (1950).

[605] Details are shown later under "Statute of Limitations—Abstracts of Western State statutory limitation periods pertaining to adverse possession of land."

[606] *Gustin* v. *Harting*, 20 Wyo. 1, 20, 121 Pac. 522 (1912).

More recent court decisions in this and some other States have raised questions concerning whether prescriptive water rights can any longer be acquired. See "Establishment of Prescriptive Title—Possibility of Establishing Prescriptive Water Right Negated or Questioned—Questionings," *infra.*

Payment of taxes.—(1) Statutes of limitation of actions to recover real property in a majority of the Western States specifically include some requirement relating to payment by the adverse claimant (which includes, specifically or by necessary implication, his predecessors or grantors) of taxes levied on the property as an element of adverse use. In some States in this group, this is a general requirement; in others it is included in only one or two out of several categories. For details, see "Statute of Limitations—Abstracts of Western State statutory limitation periods pertaining to adverse possession of land," below.

(2) According to Wiel, "The requirement that taxes be paid is purely statutory, and does not exist at common law."[607]

(3) Although the land limitation statutes of a substantial percentage of Western States do not require payment of taxes to establish a prescriptive right, the high courts of several Western States have indicated that regardless of the lack of legal necessity of payment of taxes by an adverse claimant, a showing of such payment has a positive and important value in supporting his claim of ownership by adverse possession, and that the failure to make such showing over a long period of time tends to weaken his claim. For example, the Oregon Supreme Court said in 1949: "While payment of taxes if not essential to adverse possession, the failure to pay the same by a person claiming title by adverse possession is important evidence tending to refute such claim. * * * As a general rule, a person pays taxes on that which he claims to own."[608]

(4) In a jurisdiction in which legislation requires payment of such taxes as are levied and assessed against the property, prescription fails if there is no evidence of payment of taxes.[609] The vital importance of this element of a prescriptive right in such a jurisdiction was thus emphasized in the language of the Colorado Supreme Court:[610]

> Continuous use of a water right vests possession; if this possession of such water right, considered as land, is adverse and

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[607] Wiel, *supra* note 566, § 590.

[608] *Volchers* v. *Seymour,* 187 Oreg. 170, 210 Pac. (2d) 484 (1949).

According to the Oklahoma Supreme Court (and the Kansas Supreme Court before it), "The payment of taxes is not a controlling circumstance, but it is one of the means whereby a claim of ownership is asserted, and the failure to pay taxes for so long a time tends to weaken a claim of ownership by adverse possession." *Anderson* v. *Francis,* 177 Okla. 47, 57 Pac. (2d) 619 (1936); *Finn* v. *Alexander,* 102 Kans. 607, 171 Pac. 602 (1918).

In a 1958 decision, the Nebraska Supreme Court included a quotation from one of its very early opinions to the effect that, with respect to adverse possession, " ' * * * taxation of the land for a series of years to the person claiming it, and the payment of taxes by him are competent evidence tending to show ownership.' " *Worm* v. *Crowell,* 165 Nebr. 713, 722, 87 N.W. (2d) 384 (1958), citing *Horbach* v. *Miller,* 4 Nebr. 31 (1875).

[609] *Carrington* v. *Crandall,* 65 Idaho 525, 532, 147 Pac. (2d) 1009 (1944); *Kraemer* v. *Kraemer,* 167 Cal. App. (2d) 291, 334 Pac. (2d) 675, 684-685 (1959).

[610] *Kountz* v. *Olson,* 94 Colo. 186, 192, 29 Pac. (2d) 627 (1934).

> continuous for the period contemplated by the 7-year statute of limitations, and those in possession have paid all taxes legally assessed, the title becomes fixed; and as real property it may be passed by deed. The testimony that plaintiffs and their grantors have so paid their taxes on the land is undisputed. These taxes have been so paid on land assessed and recognized as irrigated land. This is persuasive evidence of the use, by those in possession, of the water rights.[611]

(5) The requirement to pay taxes in order to establish a title by adverse possession may apply to water rights and to ditch and reservoir easements as well as to land. But where no taxes are levied or assessed, there is no requirement that they be paid in order to establish adverse possession.[612] Where nothing appeared in a California case to show that an irrigation ditch for which a prescriptive right was claimed was assessed for taxation separately from the land, or at all, it was not necessary to show payment of taxes.[613]

In another California case, in which each defendant owned a piece of land near a ditch and had been taking water from the ditch upon his land and using it there, such interest in the ditch and water right having become appurtenant to the respective tracts of land, and in which the evidence further showed that the defendants had paid all taxes that had been levied and assessed upon their lands, the appellate court said, "The decisions seem to hold that under such conditions no separate payment of taxes on the ditch involved here, or of the water right claimed by the defendants, is necessary to give them a prescriptive right."[614]

The Montana Supreme Court took the view that a water right—a right to the use of water—while it partakes of the nature of real estate, is not land in any sense and, when considered alone and for the purpose of taxation, is personal property. Further:[615]

> When considered otherwise, it is not subject to taxation independently of the land to which it is appurtenant, and we are satisifed that the language of section 9024 [now 93-2513] is not open to the construction that, before any one may acquire title to

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[611] With respect to statutory periods of years in this and other Western States, see the abstracts of statutory provisions relating to land and water rights under "Statute of Limitations," *infra.*

[612] *Helland* v. *Custer County,* 127 Mont. 23, 30-31, 256 Pac. (2d) 1085 (1953); *Gilroy* v. *Kell,* 67 Cal. App. 734, 741-742, 228 Pac. 400 (1924).

[613] *Silva* v. *Hawn,* 10 Cal. App. 544, 551, 102 Pac. 952 (1909). The question of payment of taxes was not in controversy or in any way involved, and hence was eliminated from consideration, in findings that all elements of prescription were present. *Evans Ditch Co.* v. *Lakeside Ditch Co.,* 13 Cal. App. 119, 129, 108 Pac. 1027 (1910); *Turner* v. *Bush,* 43 Cal. App. 309, 311-314, 185 Pac. 190 (1919).

[614] *Ayer* v. *Grondoni,* 45 Cal. App. 218, 222, 187 Pac. 137 (1919).

[615] *Verwolf* v. *Low Line Irr. Co.,* 70 Mont. 570, 578, 227 Pac. 68 (1924). This and other Montana cases are discussed in chapter 5 at notes 85-88.

the whole or a part of a water right by adverse possession, he must pay all taxes upon the land to which the water right is appurtenant for the full period of ten years.

Statute of limitations

Applicability to adverse possession of water rights.—(1) In one of its earliest decisions on water rights, the California Supreme Court held that to acquire a title to the use of a stream "by adverse enjoyment or prescription," it was necessary that the adverse use should continue for the period fixed by the statute of limitations as a bar to an entry on land. Several years later the principle that the statutory period relating to adverse possession of land applied likewise to the adverse possession of the use of a watercourse, or of some portion of it, was reaffirmed.[616]

(2) A year before the first California decision, the Texas Supreme Court, with respect to control of a stream by one riparian owner adversely to others "without a grant or an uninterrupted enjoyment of twenty years, which is an evidence of it," said that: "Ten years in this state would afford the same presumption of a grant that twenty years would in England, and in other states having the like limitations as to real actions."[617] Referring to this decision, the supreme court said years later that the time required for adverse use and enjoyment of water to ripen into a right by prescription in Texas would be 10 years, by analogy to the longest period of limitation.[618]

(3) It is the general rule in the West that the principles of adverse possession of land and the ripening into prescriptive rights therein pertain—insofar as physical differences permit—equally to streams and rights to the use of waters thereof. This of course includes analogy to the real estate statutes of limitation.[619]

(4) Although the foregoing is the general rule in the West, statutes of several Western States contain specific provisions concerning adverse possession in relation to rights to the use of water. In view of this, it is believed that clarification will be furthered by presenting separately abstracts of Western State statutory limitation periods pertaining to adverse possession of land, followed by abstracts of statutory provisions limiting or otherwise pertaining to adverse possession of water rights.[620]

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[616] *Crandall* v. *Woods,* 8 Cal. 136, 144-145 (1857); *Union Water Co.* v. *Crary,* 25 Cal. 504, 509 (1864); *Davis* v. *Gale,* 32 Cal. 26, 35 (1867); "That an action to enforce the right to water can be barred by five years' adverse possession we consider settled in this state * * * ," *Evans* v. *Ross,* 67 Cal. XIX, 2 Cal. U. 543, 545, 8 Pac. 88 (1885).

[617] *Haas* v. *Choussard,* 17 Tex. 588, 590 (1856).

[618] *Baker* v. *Brown,* 55 Tex. 377, 381-382 (1881); *Kountz* v. *Carpenter,* 206 S.W. 109, 112 (Tex. Civ. App. 1918); *Martin* v. *Burr,* 111 Tex. 57, 67, 228 S.W. 543 (1921). In regard to this and related matters in Texas, see "Basis of the Prescriptive Right—Analogy to Adverse Holding of Land—The Texas situation," *supra.*

[619] See "Basis of the Prescriptive Right—Analogy to Adverse Holding of Land," *supra.*

[620] In addition to such statutory provisions, there are laws in some States relating to adverse possession of rights-of-way for irrigation ditches. See, e.g., N. Mex. Stat. Ann. §

Abstracts of Western State statutory limitation periods pertaining to adverse possession of land.–

(1) Alaska. Seven years, except as against State or United States.[621]

(2) Arizona. (a) Right of possession only, 2 years. (b) Peaceable and adverse possession, under title or color of title, 3 years. (c) Peaceable and adverse possession, using the property and paying taxes thereon, claiming under recorded deed, 5 years. (d) Peaceable and adverse possession and using the property, not exceeding 160 acres, but when held under written recorded memorandum of title other than a deed which fixes boundaries in which case peaceable possession construed to be coextensive with boundaries so specified, 10 years.[622]

(3) California. (a) General, 5 years. (b) In no case shall adverse possesion be considered established under any section of the code without showing land occupied and claimed for 5 years continuously, and payment by claimant of all taxes (State, county, or municipal) levied and assessed thereon. (c) Actions by State, 10 years.[623] (d) Exempted from prescription are public uses by a public utility, and the State or any public entity.[624]

(4) Colorado. (a) Adverse possession of any land after first accrual shall be conclusive evidence of absolute ownership, 18 years, but not applicable as against State or any public entity. (b) Possessor under claim and color of title, made in good faith, with payment of all taxes legally assessed, adjudged to be the legal owner to the extent and according to the purport of the paper title, 7 years. (c) Person having color of title, made in good faith, to vacant and unoccupied land, who pays all taxes legally assessed thereon for 7 successive years, adjudged to be the legal owner to the extent and according to the purport of the paper title.[625]

(5) Hawaii. (a) General, 10 years. (b) In escheat proceedings, no person may defend against the State on the ground of being in possession of the property without proving possession by color of title, or adverse possession for 10 years and payment of all taxes during last 6 years.[626]

(6) Idaho. (a) General, 5 years. (b) In no case shall adverse

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75-14-5 (1968) which provides that in all cases where there has been continuous use of a ditch for irrigation purposes for 5 years, it shall be conclusively presumed that as between the parties a grant has been made by the owners of the land upon which the ditch is located for the use of such ditch; Haw. Rev. Stat. § 501-87 (1968) which provides that no title or right to or *across* registered land (for example, for an irrigation ditch) in derogation of that of the registered owner shall be acquired by prescription or adverse possession, except as against a person registered as the first owner with a possessory title only.

[621] Alaska Stat. § 09.25.050 (Supp. 1962).

[622] Ariz. Rev. Stat. Ann. § § 12-522, -523, -525, -526 (1956).

[623] Cal. Civ. Pro. Code § § 318, 325, 315 (West 1954).

[624] Cal. Civ. Code, § 1007 (West Supp. 1970).

[625] Colo. Rev. Stat. Ann. § § 118-7-1 (Supp. 1967), 118-7-8, 118-7-9 (1963).

[626] Haw. Rev. Stat. § § 657-31, 665-1 to -3 (1968).

possession be considered established under any section of the code without showing land occupied and claimed for 5 years continuously, and payment by claimant of all taxes (State, county, or municipal) levied and assessed thereon according to law. (c) Action by State, 10 years.[627]

(7) Kansas. Fifteen years.[628]

(8) Montana. (a) General, 5 years. (b) In no case shall adverse possession be considered established under any section of the code without showing land occupied and claimed for 5 years continuously, and payment by claimant of all taxes (State, county, or municipal) legally levied and assessed thereon. (c) Actions by State, 10 years.[629]

(9) Nebraska. Ten Years.[630]

(10) Nevada. (a) General, 5 years. (b) In no case shall adverse possession be considered established without showing land occupied and claimed for 5 years continuously, and payment by claimant of all taxes (State, county, and municipal) levied and assessed thereon or tendered payment thereof.[631]

(11) New Mexico. Adverse possession of land continuously and in good faith under color of title for 10 years, without effective legal opposition, gives a good and indefeasible title in fee simple; adverse possession defined as actual and visible appropriation of land, commenced and continued under color of title and claim of right inconsistent with and hostile to claim of another; and in no case must adverse possession be considered established without payment by claimant continuously of all taxes (State, county, and municipal) assessed thereon during that period.[632]

(12) North Dakota. (a) General, 20 years. (b) Title to real property, vested in person in actual open adverse and undisputed possession of land thereunder, who paid all taxes and assessments legally levied thereon shall be valid in law, 10 years. (c) Actions by State, 40 years.[633]

(13) Oklahoma. Fifteen years.[634]

(14) Oregon. Ten years.[635]

(15) South Dakota. (a) General, 20 years. (b) Person in possession of land under claim and color of title made in good faith, who paid all taxes legally assessed thereon, adjudged to be legal owner to extent and according to purport of paper title 10 successive years. (c) Person having color of title made in good faith to vacant and unoccupied land, who paid all taxes legally assessed thereon for 10 consecutive years, adjudged to be legal owner to

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[627] Idaho Code Ann. § § 5-203, -210, -202 (1948).

[628] Kans. Stat. Ann. § 60-503 (1964).

[629] Mont. Rev. Codes Ann. § § 93-2504, -2513, -2501 (1964).

[630] Nebr. Rev. Stat. § 25-202 (1964).

[631] Nev. Rev. Stat. § § 11.080, .150 (Supp. 1967).

[632] N. Mex. Stat. Ann. § 23-1-22 (1953).

[633] N. Dak. Cent. Code Ann. § § 28-01-04, 47-06-03, 28-01-01 (1960).

[634] Okla. Stat. Ann. tit. 12, § 93(4) (Supp. 1968).

[635] Oreg. Rev. Stat. § 12.050 (Supp. 1969).

extent and according to purport of the paper title. (d) Actions by State, 40 years.[636]

(16) Texas. (a) Peaceable and adverse possession under title or color of title, 3 years. (b) Peaceable and adverse possession, using property and paying taxes thereon if any, claiming under registered deed, 5 years. (c) Peaceable and adverse possession and using the property, not exceeding 160 acres, but when taken under written registered memorandum of title other than a deed which fixes boundaries in which case peaceable possession construed to be coextensive with boundaries so specified, 10 years. (d) In the case of a tract of 5,000 acres or more, under prescribed circumstances, an exception is provided to the adverse possession contemplated in the immediately preceding category relating to 160 acres or less.[637]

(17) Utah. (a) General, 7 years. (b) Any person has color of title who occupies a tract of real estate for 5 years, or for less time if at any time during such occupancy he pays the ordinary county taxes thereon for 1 year and 2 years have elapsed without repayment of same by the owner, and occupancy continues up to the time action is brought by which recovery of the real estate is obtained. (c) In no case shall adverse possession be considered established under any section of the code without showing land occupied and claimed for 7 years continuously, and payment by claimant of all taxes levied and assessed thereon according to law. (d) Action by State, 7 years.[638]

(18) Washington. (a) Actual open notorious possession, having a connected title in law or equity deducible or record from the State, United States, sale for nonpayment of taxes, judgment, or decree, 7 successive years. (b) Actual open notorious possession of land under claim and color of title, made in good faith, with payment of all taxes legally assessed thereon, claimant adjudged to be the legal owner to the extent and according to the purport of his paper title, 7 successive years. (c) Person having color of title made in good faith to vacant and unoccupied land who pays all taxes legally assessed for 7 successive years adjudged to be the legal owner to extent and according to the purport of his paper title.[639]

(19) Wyoming. Ten years.[640]

Abstracts of Western State statutory provisions limiting or pertaining to adverse possession of water rights.–

(1) Alaska. No right to the use of water, either appropriated or unappropriated, shall be acquired by adverse use or possession.[641]

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[636] S. Dak. Comp. Laws Ann. § § 15-3-1, 15-3-15, 15-3-16, 15-3-4 (1967).

[637] Tex. Rev. Civ. Stat. Ann. arts. 5507, 5509, 5510, 5512 (1958). In addition, art. 5529 provides, "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward."

[638] Utah Code Ann. § § 78-12-5 (1968), 57-6-4 (1963), 78-12-12, 78-12-2 (1968).

[639] Wash. Rev. Code § § 7.28.050, 7.28.070, 7.28.080 (Supp. 1956).

[640] Wyo. Stat. Ann. § 1-13 (1957)

[641] Alaska Stat. § 46.15.040(a) (Supp. 1966).

(2) California. No possession by any person, firm, or corporation of any land, *water, water right,* easement or other property dedicated to public use by a public utility or dedicated to or owned by the State or any public entity, no matter how long continued, shall ever ripen into any title, interest or right against the owner thereof.[642]

(3) Colorado. No possession by any person, firm, or corporation of any land, *water, water right,* easement or other property dedicated to or owned by the State or any public entity, no matter how long continued, shall ever ripen into any title, interest or right against the State or public entity.[643]

(4) Kansas. No water right of any kind may be acquired solely by adverse use, adverse possession, or estoppel.[644]

(5) Nevada. No prescriptive right to the use of abandoned or forfeited water or any public water appropriated or unappropriated can be acquired by adverse user or adverse possession for any period of time whatsoever.[645]

(6) North Dakota. Those who have beneficially used water for 20 years prior to July 1, 1963, "shall be deemed to have acquired a right to the use of such water without having filed or prosecuted an application to acquire the beneficial use of such waters," if claims for such water are filed under the permit procedures within 2 years from July 1, 1963. If the State Engineer finds that the application and supporting documents substantiate the claim he shall approve the application. If no claim is filed within the 2 year period by the "prescriptive user," the right shall be "abandoned and forfeited." Any such "prescriptive water permit" acquired under this provision is subject to forfeiture for nonuse in the same manner as perfected appropriative rights.[646]

(7) Texas. The holder of a statutory appropriative right who makes use of the water pursuant thereto for 3 years is deemed to have acquired a title to such appropriation by limitation as against all other claimants of water from the same stream and all riparian owners thereon.[647]

(8) Utah. No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession.[648]

(9) Washington. No rights to use "appropriated or unappropriated" surface or ground waters of the State may be acquired by prescription or adverse use.[649]

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[642] Cal. Civ. Code § 1007 (West Supp. 1970).

[643] Colo. Rev. Stat. Ann. § 118-7-1(2) (Supp. 1967).

[644] Kans. Stat. Ann. § 82a-705 (1969).

[645] Nev. Rev. Stat. § 533.060(3) (Supp. 1967).

[646] N. Dak. Cent. Code Ann. § 61-04-22 (Supp. 1969).

[647] Tex. Rev. Civ. Stat. Ann. art. 7592 (1954). The courts of Texas have not construed this statutory period of 3 years as a substitute for the 10-year statutory period theretofore accepted by analogy as controlling the vesting of prescriptive rights. See the earlier discussion of this situation under "Basis of the Prescriptive Right–Analogy to Adverse Holding of Land–The Texas situation."

[648] Utah Code Ann. § 73-3-1 (1968).

[649] Wash. Rev. Code Ann. § 90.14.220 (Supp. 1970).

The statutes of five of these States (Alaska, Kansas, Nevada, Utah, and Washington) are discussed later under "Establishment of Prescriptive Title—Possibility of Establishing Prescriptive Water Right Negated or Questioned—Negations." In four additional States (New Mexico, Oregon, Texas, and Wyoming) the possibility of establishing a prescriptive right as against one or more kinds of water rights has been questioned in one or more reported court decisions. This is noted later under the aforementioned topic in the subtopic "Questionings."

Statute set in motion.—(1) In general. (a) The statute of limitations is set in motion at the time when the person suffering the damage first has a cause of action arising from the adverse use.[650]

To constitute adverse use, there must be an actual invasion of another's right. In the case of land, unlawfully taking possession of it is such an invasion because the owner holds actual title to the land. But riparian proprietors or appropriators do not hold title to the running water; their property in the water comprises their right to use the water. To invade this right it ordinarily is necessary to interfere with their use of the water.

(b) "When there is sufficient water in the river to supply all parties, there can be no such thing as adverse use of the water to start the statute of limitations running. Each is entitled to the use of the water, and it is only when the water becomes so scarce that all of the parties cannot be supplied, and that one appropriator takes water which by priority belongs to another appropriator, that there is an adverse use."[651] This early statement by the Arizona Supreme Court represents the consensus of most authorities.[652]

(c) Most authorities agree that there must be an actual deprivation of the rightful owner's use of the water. Modifying factors which have appeared in some court decisions in California and Texas are stated at the close of this subtopic.[653] Thus, it was said by the courts in New Mexico and Washington that limitation did not begin to run from the date water was first used by defendants, but from the date their use deprived plaintiffs of their appropriated water.[654] Furthermore, the owners of the water right must be drprived of

[650] *St. Martin* v. *Skamania Boom Co.*, 79 Wash. 393, 398-399, 140 Pac. 355 (1914).

The general rules of law which provide the basis for causes of action with respect to appropriative, riparian and other water rights to use watercourses under various circumstances have been discussed in previous chapters.

[651] *Egan* v. *Estrada*, 6 Ariz. 248, 253, 56 Pac. 721 (1899).

[652] See, e.g., *Masterson* v. *Kennard*, 140 Oreg. 288, 296, 12 Pac. (2d) 560 (1932).

The Montana Supreme Court has indicated that if the rightful owner is not deprived of any water to which he is entitled at any time he actually requires use of the water, he has no such ground for complaint as to start the statute of limitations running. *Galliger* v. *McNulty*, 80 Mont. 339, 358-359, 260 Pac. 401 (1927).

[653] See also modifying factors discussed under "Establishment of Prescriptive Title—Relative Locations on Stream Channel—Downstream prescriptive claimant: Actual interference with upstream property or water right," *infra*.

[654] *Bounds* v. *Carner*, 53 N. Mex. 234, 245, 205 Pac. (2d) 216 (1949); *Madison* v. *McNeal*, 171 Wash. 669, 676-678, 19 Pac. (2d) 97 (1933).

the use of the water "in such a substantial manner as to notify them that their rights are being invaded."[655] Thus prescription does not begin to run until the party against whom the prescriptive right is claimed has notice, actual or constructive; that is, where in the absence of actual notice there is evidence of circumstances from which notice may be reasonably presumed, constructive notice has the same effect as actual notice.[656]

(d) Prescription or adverse use will not mature into a title as against the United States. Hence, in the case of a claim of adverse use against an entryman or patentee of downstream riparian land, the statute of limitations does not begin to run until title to the downstream land has passed from the United States.[657]

(e) Inasmuch as permissive use is not adverse to the claim of the rightful owner, where the evidence clearly shows that the entry and use were under a license only, "convincing evidence of the repudiation of the license, and an unequivocal assertion of a right hostile to the licensor, brought home to him, should be required to set the statute in motion."[658]

(f) In one of its decisions respecting appropriation of water by private enterprises for sale to the public, the California Supreme Court rejected an argument that such an appropriator at once institutes an effectual adverse claim to all the water that it intends to take or use in the future. "The taking of water into a canal and allowing it to run to waste in the expectation that customers may be found who will use it at some future time does not constitute a present beneficial use of the wasted water, so as to initiate the period of prescription therefor."[659]

(2) California. (a) Prior to the constitutional amendment of 1928 limiting riparian and all other rights to the use of water to reasonable beneficial use,[660] the rule of the California courts, as expressed in several decisions rendered during this period,[661] was that where it appeared that continuance of an appropriator's acts complained of would ripen into an adverse right and thereby deprive the riparian owner of a right of property, it was not necessary

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[655] *Sander* v. *Bull,* 76 Wash. 1, 6, 135 Pac. 489 (1913).

[656] *Martin* v. *Burr,* 111 Tex. 57, 65-66, 228 S.W. 543 (1921).

[657] *Mathews* v. *Ferrea,* 45 Cal. 51, 53 (1872).

[658] *Jensen* v. *Hunter,* 108 Cal. XVII, 5 Cal. U. 83, 91, 41 Pac. 14 (1895).

[659] *Turner* v. *East Side Canal & Irr. Co.,* 169 Cal. 652, 657, 147 Pac. 579 (1915).

[660] Cal. Const. art. XIV, § 3.

[661] *Stanford* v. *Felt,* 71 Cal. 249, 250, 16 Pac. 900 (1886); *Mott* v. *Ewing,* 90 Cal. 231, 237, 27 Pac. 194 (1891); *California Pastoral & Agric. Co.* v. *Enterprise Canal & Land Co.,* 127 Fed. 741, 742-743 (C.C.S.D. Cal. 1903); *Southern Cal. Inv. Co.* v. *Wilshire,* 144 Cal. 68, 74, 77 Pac. 767 (1904); *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327, 333-334, 88 Pac. 978 (1907); *San Joaquin & Kings River Canal & Irr. Co.* v. *Fresno Flume & Irr. Co.,* 158 Cal. 626, 112 Pac. 182 (1910); *Shurtleff* v. *Bracken,* 163 Cal. 24, 26, 124 Pac. 724 (1912); *Fresno Canal & Irr. Co.* v. *People's Ditch Co.,* 174 Cal. 441, 445-446, 163 Pac. 497 (1917); *Pabst* v. *Finmand,* 190 Cal. 124, 132, 211 Pac. 11 (1922); *Gould* v. *Eaton,* 117 Cal. 539, 543, 49 Pac. 577 (1897); *Huffner* v. *Sawday,* 153 Cal. 86, 91, 94 Pac. 424 (1908).

before obtaining an injunction to show actual present damage. The California Supreme Court indicated that it was then the California law that as against an appropriator the riparian owner was not limited by any measure of reasonableness. The court said:[662]

> [A] riparian owner, as against a nonriparian owner, is entitled to the full flow of the stream without the slightest diminution. The initial step in the diversion of the water by the nonriparian owner is therefore an invasion of the right of the lower riparian owner, and every subsequent diversion is a further invasion of that right. Against a person who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion, and he is not required to show any damage to his use. Although no damage to the present use of the riparian owner results from the diversion, yet damage to the future use may result, and an injunction will be granted to prevent the diversion from growing into a right by the lapse of the statutory period.

(b) Since the adoption of the constitutional amendment, the rule in California is that any use of water by an appropriator that causes substantial damage to the paramount riparian right, taking into consideration all of the present and reasonably prospective recognized uses, is an impairment of the right entitling the riparian proprietor to injunctive relief. But that when the use causes no substantial infringement of the riparian right by materially diminishing the water supply which the riparian proprietor is presently putting to beneficial use, instead of such injunctive relief he 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.[663]

In view of the current California State water policy commanded by the constitution, an appropriative diversion would not be wrongful so long as it is confined to surplus waters, that is, waters in excess of the reasonable beneficial requirements of riparian owners and prior appropriators. The statute of limitations would be set in motion only at such time as the appropriative diversion exceeds such surplus quantities of water and actually infringes the superior right.[664]

(c) Correlative rights of riparian owners. With respect to their respective uses of stream waters on riparian lands, riparian owners are possessed of correlative rights and no riparian is a trespasser unless he diverts more than his share.[665] In the absence of a showing that the upper riparian is using the water under a claim of prescriptive right, the lower owner has the right to presume

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[662] *Pabst* v. *Finmand,* 190 Cal. 124, 132, 211 Pac. 11 (1922).

[663] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 374-375, 40 Pac. (2d) 486 (1935); *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.,* 3 Cal. (2d) 489, 524-525, 45 Pac. (2d) 972 (1935).

[664] The impact of the California constitutional amendment is discussed in some detail in chapter 13 under "Injunction or Damages or Both—Some State Riparian-Appropriation Situations—California."

[665] *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327, 334-335, 88 Pac. 978 (1907).

that he is taking only that to which he is entitled by virtue of his riparian right.[666] The mere exercise of a riparian right gains no title by prescription; it is necessary that there be an actual interference with the rights of the party against whom the prescriptive right is claimed.[667]

(3) Texas. (a) In Texas, the rules appear to be unsettled or imprecise as to when the cause of action of the injured party accrued as against an adverse water user and the period of limitation begins to run.[668] Specifically, as to the circumstances under which a substantial diversion of water will set the statute of limitations in motion as against a downstream claimant, may the statute begin to run as against a claimant who is presently making no use of the water and therefore is suffering no immediate present damage; or must he be actually deprived of its use at a time when he really needs the water for his current or immediately prospective operations?

(b) Two pertinent cases were decided early in the 20th century by the old court of civil appeals. In the first case, a cause of action against an upper riparian proprietor's use of water on nonriparian land was held to arise even though the lower one then suffered no actual damage, because if he delayed long enough a prescriptive right would arise upstream. In the later case, it was held that the only immediate necessity alleged for a requested temporary injunction was to prevent defendants from obtaining a prescriptive right, but that the institution of the suit by the riparian owner for such an injunction restraining diversion of water to nonriparian lands had the effect of preventing defendants from obtaining a prescriptive right, hence the temporary injunction was denied.[669]

(c) Subsequently, in *Humphreys-Mexia Company* v. *Arseneaux,* the Texas Supreme Court observed:[670]

> [I]t is obvious that a court of equity would not, even at the suit of a riparian owner, enjoin the diversion of riparian water, unless the complainant was injured thereby, or under circumstances that would reasonably show a hostile and adverse user of sufficient moment to set in motion the statute of limitation, or prescription. The oil company in this case, however, not being a riparian owner, could not object to the diversion of riparian water, and was not entitled to an injunction to prevent such diversion, if any. This is so for the reason that the oil company had no justiciable interest in the riparian water.

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[666] *Pabst* v. *Finmand,* 190 Cal. 124, 128-129, 211 Pac. 11 (1922).

[667] *Oliver* v. *Robnett,* 190 Cal. 51, 55, 210 Pac. 408 (1922).

[668] See Carter, J.D., "The Position of the Board of Water Engineers on the Scope of Riparian Rights," Proc., Water Law Conferences, Univ. of Tex. 194 (1952, 1954); Hildebrand, I.P., "The Rights of Riparian Owners at Common Law in Texas," 6 Tex. L. Rev. 19 (1928); Hutchins, W.A., "The Texas Law of Water Rights," 452 (1961).

[669] *Hall* v. *Carter,* 33 Tex. Civ. App. 230, 234-235, 77 S.W. 19 (1903, error refused); *Biggs* v. *Leffingwell,* 62 Tex. Civ. App. 665, 667-668, 132 S.W. 902 (1910).

[670] *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 610, 610-611, 297 S.W. 225 (1927).

The court was not specific as to what would constitute an adverse use of sufficient moment to set the statute in motion. (The court said the riparian proprietor could use the stream water on either riparian or nonriparian land "unless it thereby interfered with some other riparian owner.")[671] The supreme court has not elucidated the matter further. In a more recent decision in *Woody* v. *Durham* by the Fort Worth Court of Civil Appeals, the court stated that in the *Humphreys-Mexia* case "it was intimated but not decided that injunction would lie to prevent diversion of water in such manner as would set in motion the statute of limitations, irrespective of actual damage."[672]

(d) The case of *Woody* v. *Durham,* mentioned above, involved a suit by riparian owners, who had not yet put the stream water to use but planned to do so when preparation of their farm was completed, to enjoin the diversion of water to nonriparian land which threatened to injure them materially when they were ready to use the water to which their riparian rights attached. The Fort Worth court took the position that damage to the present or potential enjoyment of a riparian owner's property by nonriparian diversion gives rise to a cause of action for injunction; and that injunction should be granted to restrain the wrongful continuing diversion or threatened diversion to prevent irreparable damage or to avoid vexatious litigation or a multiplicity of lawsuits. The court said, "We do not believe that appellants ought to be put to the trouble and expense of filing a suit each time appellee starts pumping water from that creek, or to risk losing their rights by prescription, and we think the injunction should have been granted."[673] Accordingly, an injunction was granted. The Texas Supreme Court refused to issue a writ of error. Hence the appellate court's holdings and comments can have no standing in opposition to anything the supreme court may have held in these regards.[674]

Tolling of the statute.—(1) In a 1953 case, the California Supreme Court stated that ordinarily the filling of an action, either by the person asserting a prescriptive right or by the person against whom the statute of limitations is running, will interrupt the running of the prescriptive period, and that the statute will be tolled while the action is actively pending. This does not apply to an action that has been dismissed or abandoned.[675] In 1890, this court had

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[671] 116 Tex. at 610.

[672] *Woody* v. *Durham,* 267 S.W. (2d) 219, 221 (Tex. Civ. App. 1954, error refused).

[673] *Id.*

[674] Related aspects of this case are discussed in chapter 13 under "Remedies for Infringement—Injunction—Riparian Owners—Texas." With respect to nonriparian use of water, see also the discussion in chapter 10 at notes 204 and 710.

Regarding the apparent attempt in a 1931 court of civil appeals case to negate the possibility of acquiring prescriptive water rights as against riparians, notwithstanding statements to the contrary by the Texas Supreme Court, see "Establishment of Prescriptive Title—Possibility of Establishing Prescriptive Water Right Negated or Questioned—Questionings," *infra.*

[675] *Yorba* v. *Anaheim Union Water Co.*, 41 Cal. (2d) 265, 270, 259 Pac. (2d) 2 (1953).

held that the bringing of an action in ejectment against trespassers on riparian land stopped the running of the statute of limitations, after which no right to the use of the water could be acquired by its use during the pendency of the suit.[676]

(2) In Texas, also, it is the rule that the running of the statute of limitations may be interrupted by the institution of a suit brought by the injured party against the adverse user.[677] Said the Utah Supreme Court in 1937, "To interrupt the continuity of the adverse occupant's possession, there must be a physical interruption of the adverse possession, *or a suit* or some unequivocal act of ownership which interrupts the exercise of the right claimed and being enjoyed by the adverse claimant." [Emphasis added.][678]

(3) The Oregon Supreme Court held that a decree adjudicating water rights did not toll the statute of limitations where it was not followed by the taking of possession or by the use of the water by the successful party until a time later than the period of the statute of limitations, reckoned from the date of the decree.[679]

(4) In order to interrupt the running of the statute of limitations as to rights to the use of water, there must be a resumption of the possession thereof under a claim of right brought home to the adverse claimant, either by express notice or by conduct so notorious and unequivocal as to imply such notice. The interruption of the possession must rise in dignity and character to that required to initiate an adverse possession. If secret or surreptitious, it is unavailing.[680]

Plaintiffs' predecessors in interest had been among the defendants in an early action brought by the present defendants to establish their respective water rights and had been restrained, by a preliminary injunction entered in 1891 and still in effect, from interferring with the present defendants' diversion. Although the preliminary injunction prevented plaintiffs' predecessors from physically interfering with the diversion, it did not prevent them from asserting or establishing their rights by legal action and hence did not toll the statute. The California Civ. Pro. Code § 356 (West 1954) provides that "when the commencement of an action is stayed by injunction or statutory prohibition, the time of continuance of the injunction or prohibition is not part of the time limited for commencement of the action." The running of the statute of limitations is not interrupted by the bringing of a suit by a third party—a total stranger to the adverse transactions—against the adverse claimant. *Montecito Valley Water Co.* v. *Santa Barbara,* 144 Cal. 578, 592-593, 77 Pac. 1113 (1904).

[676] *Alta Land & Water Co.* v. *Hancock,* 85 Cal. 219, 227-228, 24 Pac. 645 (1890).

[677] *Baker* v. *Brown,* 55 Tex. 377, 382 (1881); *Biggs* v. *Leffingwell,* 62 Tex. Civ. App. 665, 668, 132 S.W. 902 (1910); *Woody* v. *Durham,* 267 S.W. (2d) 219, 221 (Tex. Civ. App. 1954, error refused).

[678] *Hammond* v. *Johnson,* 94 Utah 20, 34-35, 66 Pac. (2d) 894 (1937).

[679] *Ebell* v. *Baker,* 137 Oreg. 427, 437-438, 299 Pac. 313 (1931).

[680] *Armstrong* v. *Payne,* 188 Cal. 585, 596-597, 206 Pac. 638 (1922); *Hammond* v. *Johnson,* 94 Utah 20, 34-35, 66 Pac. (2d) 894 (1937).

Also see the earlier discussion in the subtopics "Interruption of adverse use" and "Some circumstances negating interruption of adverse use" under "Continuous and Uninterrupted Use."

Limitation and prescription.—(1) In 1887, the California Supreme Court held that a right to property founded upon the statute of limitations is a prescriptive right. The settled rule in California, said the court, is "that the possession of property of the requisite character and time confers a title to the property. * * * So far, therefore, as the title to property is concerned,—or, at all events, so far as the title to real property is concerned,—prescription and limitation are convertible terms; and a plea of the proper statute of limitations is a good plea of a prescriptive right. The language of decisions with reference to water rights has been in accordance with this view."[681]

(2) In 1921, the Texas Supreme Court distinguished a defense of bar by limitation from an affirmative assertion of paramount right acquired by prescription. Plaintiffs, lower riparian owners, brought suit to establish their riparian rights as against defendants, who were upstream riparian owners. The supreme court held that both (a) the defense of bar by limitation after 4 years[682] and (b) the affirmative claim of paramount prescriptive right after 10 years—by analogy to the longest period of limitation—should have gone to the jury to decide. This holding occasioned comment and question, on the ground that the adverse user would be in as good a position as against his opponent after 4 years as after 10 and hence would not need to rely upon prescription. The supreme court did not expound the historical basis of its distinction between limitation and prescription, nor its holding that both should have gone to the jury, but it did make the distinction unequivocally. The reasoning can only be conjectured.[683]

Establishment of Prescriptive Title

Title to a prescriptive right is determined only by a judicial decree in an action in which the right is established by the adverse claimant.

In a number of States, the possibility of establishing a prescriptive right as against one or more kinds of water rights has been negated or questioned by legislation or in one or more reported court decisions. This is discussed later under "Possibility of Establishing Prescriptive Water Right Negated or Questioned."

Adverse Parties

Prescription arises as a result of acts performed by the adverse claimant against the party whose right is thereby invaded.

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[681] *Alhambra Addition Water Co.* v. *Richardson,* 72 Cal. 598, 600-601, 14 Pac. 379 (1887).

[682] Now Tex. Rev. Civ. Stat. Ann. art. 5529 (1958) which provides "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward."

[683] *Martin* v. *Burr,* 111 Tex. 57, 64-66, 228 S.W. 543 (1921). See discussion at note 437 *supra.*

Owners of rights affected.—(1) A prescriptive right to the use of water out of a common supply to which a number of different rights attach may be acquired as against only one or some of the parties,[684] leaving the rights of others unaffected. This indeed is the usual situation that prevails on stream systems; the prescriptive right runs against only those who are injured by the unauthorized diversion.

(2) In 1899, the Supreme Court of Hawaii had occasion to declare that an adverse right does not run against another tract in the same ownership; that until the lands have separate owners, no adverse use of the water can be made in favor of one tract as against the other.[685]

(3) It is an elementary principle, said the Washington Supreme Court, that: "Ordinarily, a tenant cannot adversely hold the real property of his landlord for the purpose of acquiring title by prescription." In this case, the owner of a lower tract rented an adjoining upper tract on which there was located a spring, the water of which was used by the lower owner on his own land. Under these circumstances, it was held that an easement in the flow of the spring had not been acquired by the latter.[686]

(4) The exclusive occupancy of a cotenant is deemed permissive and does not become adverse until the tenant out of possession has had notice, either actual or constructive, that the possession of the cotenant is hostile to him. When entry into occupancy is avowedly as a tenant in common with others, the possession thus gained is the possession of the others and continues as such until the tenancy in common is disclaimed.[687]

Corporation.—(1) Early in the 20th century, in rejecting a contention that a corporation had no power under the law to acquire title by prescription, but was limited strictly in its mode of acquisition to purchase and to condemnation, the California Supreme Court stated, "In this state a corporation's title to water either by appropriation or prescription has been recognized and upheld from the very earliest day."[688]

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[684] *Lonoaea* v. *Wailuku Sugar Co.*, 9 Haw. 651, 662 (1895).

Moreover, a prescriptive water right often may be applicable to only a part of another's water right. See "Measure of the Prescriptive Right—Part of Invaded Right Only," *infra.*

[685] *Kohala Sugar Co.* v. *Wight,* 11 Haw. 644, 648 (1899).

[686] *Rogers* v. *Cation,* 9 Wash. (2d) 369, 374-375, 115 Pac. (2d) 702 (1941); accord, *Heeia Agric. Co.* v. *Henry,* 8 Haw. 447, 448 (1892); *Gill* v. *Malan,* 29 Utah 431, 438, 82 Pac. 471 (1905).

[687] *Kraemer* v. *Kraemer,* 167 Cal. App. (2d) 291, 334 Pac. (2d) 675, 685 (1959); *Smith* v. *North Canyon Water Co.,* 16 Utah 194, 200, 52 Pac. 283 (1898); *Beers* v. *Sharp,* 44 Oreg. 386, 394, 75 Pac. 717 (1904); *Church* v. *State,* 65 Wash. 50, 55, 117 Pac. 711 (1911).

[688] *Montecito Valley Water Co.* v. *Santa Barbara,* 144 Cal. 578, 594, 77 Pac 1113 (1904). "The same presumptions [with respect to prescription] apply to corporations as to private persons." *Gurnsey* v. *Antelope Creek & Red Bluff Water Co.,* 6 Cal. App. 387, 392, 92 Pac. 326 (1907).

(2) A public service corporation—private corporation serving the public—may acquire title by prescription against riparian owners in California, just as an individual may do with respect to the irrigation of his own land.[689] And on the other hand, a public service corporation is no more exempt from prescription on the part of an upstream taker of water than is any other owner of a water right.[690]

Public Entities or agencies.—(1) The California Civil Code provides that no possession by any person, firm, or corporation, however long continued, of any "land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof."[691]

(2) It "may be stated as a general rule that no invasion of the rights of property which are held by a public or municipal corporation in perpetual trust for public uses can be held sufficient to furnish the basis of a defense based solely upon prescription."[692]

(3) The Texas statute of limitations contains a provision forbidding acquisition by any person of any right by adverse possession to any part of any road, street, alley, sidewalk, or grounds belonging to any town, city, or county or dedicated for public use therein.[693]

(4) The Wyoming Supreme Court stated in 1914 that in that State there was no express statutory provision as to acquisition of title to municipal property, held in trust for the inhabitants, by adverse use as against the municipality; "in such case the right is denied by the great weight of authority." This principle was held applicable to the instant case, on the ground that the City of Cheyenne, in acquiring and holding the right to the use of water for the benefit of the whole public, "acts as the agent of the State in exercising * * * governmental functions as distinguished from private capacity and powers."[694]

(5) On the other hand, in 1931, the Oregon Supreme Court held that the statute of limitations runs against a city in its proprietary or business capacity, and that the city can lose its water rights by prescription. "The power to provide a water system is not governmental or legislative in character, but strictly proprietary, and the city engaged in the prosecution of such an

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[689] *California Pastoral & Agric. Co.* v. *Madera Canal & Irr. Co.*, 167 Cal. 78, 88, 138 Pac. 718 (1914).

[690] *San Joaquin & Kings River Canal & Irr. Co.* v. *Worswick*, 187 Cal. 674, 694, 203 Pac. 999 (1922).

[691] Cal. Civ. Code § 1007 (West Supp. 1970). See also Colo. Rev. Stat. Ann. § 118-7-1(2) (Supp. 1967).

[692] *San Diego* v. *Cuyamaca Water Co.*, 209 Cal. 105, 135, 287 Pac. 475 (1930).

[693] Tex. Rev. Civ. Stat. Ann. art. 5517 (1958).

[694] *Holt* v. *Cheyenne*, 22 Wyo. 212, 232-234, 137 Pac. 876 (1914).

improvement and selling water for gain, is clothed in such authority and subject to the same liabilities as a private person."[695]

(6) In a Washington case decided in 1912, the supreme court expressed the opinion that the act of a board of county commissioners in buying waters from a spring and conveying them in a pipe to a watering trough on a long stretch of road in a semiarid region would not be questioned. "If we admit this right, the legal conclusion quickly follows: that which the county can buy, it can acquire by prescription."[696]

The public.—(1) The Colorado Supreme Court has said, "The unappropriated water of every stream is the property of the public against which title by adverse user may not be acquired."[697]

(2) In a Texas case it was adjudged that the public had acquired an easement by prescription across shore land for access to the beach for recreational purposes. Even though the property was used by the owners and others at the same time, the jury found that there was no permissive use. Under all circumstances, it was found that the nature of public use was adverse.[698]

The State.—(1) Whether prescription against a particular State is allowed depends upon the legislature and courts of the jurisdiction. In the absence of legislation, most courts have declared the broad general proposition that statutes of limitation do not operate against the State. Thus, while the State retains title to the land, title to such land cannot be acquired by adverse possession or prescription.[699]

(2) Legislation in California specifically provides that "no possession by any person, firm or corporation no matter how long continued of any land, *water, water right*, easement, or other property whatsover * * * dedicated to or owned by the state * * * shall ever ripen into any title, interest or right against the owner thereof."[700] Colorado has a similar provision.[701]

(3) It is provided in the Texas statute of limitations that "The right of the State * * * shall not be barred by any of the provisions of this Title * * *."[702] According to the supreme court, "Title cannot be acquired by adverse possession of land belonging to the state, and such possession is not evidence that the land possessed is not the property of the state."[703]

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[695] *Ebell* v. *Baker*, 137 Oreg. 427, 439-440, 299 Pac. 313 (1931).

[696] *Kiser* v. *Douglas County*, 70 Wash. 242, 250, 126 Pac. 622 (1912).

[697] *Mountain Meadow Ditch & Irr. Co.* v. *Park Ditch & Res. Co.*, 130 Colo. 537, 539-540, 277 Pac. (2d) 527 (1954). The riparian water rights doctrine has not generally been recognized in Colorado.

[698] *Seaway Co.* v. *Attorney General*, 375 S.W. (2d) 923, 937-938 (Tex. Civ. App. 1964, error refused n.r.e.).

[699] Annot. 55 A.L.R. 2d 554, 578 *et seq.* (1957). See also, 3 Am. Jur. 2d *Adverse Possession* § 205 (1962).

[700] Cal. Civ. Code § 1007 (West Supp. 1970).

[701] Colo. Rev. Stat. Ann. § 118-7-1(2) (Supp. 1967).

[702] Tex. Rev. Civ. Stat. Ann. art. 5517 (1958).

[703] *Weatherly* v. *Jackson*, 123 Tex. 213, 222, 71 S.W. (2d) 259 (1934); accord, *Jackson* v.

(4) In Hawaii, it was held that while the statute of limitations cannot be invoked against the State (then Territory), nevertheless where sufficient facts are shown, the common law presumption of a lost grant may be invoked either against the State or in favor of it.[704]

The United States.—Adverse use will not mature into a title as against the United States.[705] As to public lands of the United States, Congress alone can deal with the title, and no State statute of limitation can defeat the Federal Government's title.[706] Proof that the land was owned by the Government at any time during the prescriptive period is usually a sufficient defense to a claim of right by adverse use. "One may not adverse the sovereign."[707]

Appropriator.—In many Western States, prescriptive titles have been acquired by appropriators, and appropriative titles likewise have been lost by prescription. That is to say, appropriative titles have become superior to those of prior appropriators or riparian proprietors by reason of adverse use against them under all the circumstances necessary to establish prescription.[708] However, as is indicated later under the subtopic "Possibility of Establishing Prescriptive Water Right Negated or Questioned," courts in some states have indicated doubts as to the soundness of this proposition under the prevailing statutory appropriation law, and some legislatures have declared that no right to the use of water, either appropriated or unappropriated, can now be acquired by adverse use or adverse possession.

Riparian proprietor.—In the relatively few Western States in which litigation concerning the effect of prescription upon riparian rights has reached the high courts, the courts have generally favored the applicability of the principles of prescription. In some States, the possibility of establishing a prescriptive water right as against riparian as well as other water rights appears to have been negated or questioned by legislation or one or more reported court decisions. See the later discussion under "Possibility of Establishing Prescriptive Water Right Negated or Questioned."

Relative Locations on Stream Channel

Importance contrasted with appropriative priorities.—(1) Relative locations of water diversion facilities on a stream channel have no bearing on relative priorities of appropriative rights to divert water from the stream. As pointed out in chapter 7 under "Methods of Appropriating Water of Watercourses—Priority

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Nacogdoches County, 188 S.W. (2d) 237, 238 (Tex. Civ. App. 1945). This principle is so well established it is now regarded as elementary. *Humble Oil & Refining Co.* v. *State,* 162 S.W. (2d) 119, 134 (Tex. Civ. App. 1942, error refused.)

[704] *In re Title of Kioloku,* 25 Haw. 357 (1920), affirmed, *Territory of Hawaii* v. *Hutchinson Sugar Plantation,* 272 Fed. 856 (9th Cir. 1921). See Hutchins, W. A., "The Hawaiian System of Water Rights" 117-118 (1946).

[705] *Smith* v. *Hawkins,* 110 Cal. 122, 126, 42 Pac. 453 (1895).

[706] *Vansickle* v. *Haines,* 7 Nev. 249, 256, 284 (1872).

[707] *Cassity* v. *Castagno,* 10 Utah (2d) 16, 18, 347 Pac. (2d) 834 (1959).

[708] *Allen* v. *Roseberg,* 70 Wash, 422, 426, 126 Pac. 900 (1912).

of Appropriation—The Priority Principle in Operation—Location of diversion works on watercourse," there may be a physical advantage in the location of a junior diversion high up the stream at times when the late season flow at such diversion point is large enough to be taken out there, but not large enough to reach downstream appropriators in sufficient quantity to be useful to them if left alone. The law does not require the upstream junior appropriator to do such a vain thing as to release water that would simply be lost in the stream channel and hence be of no benefit to those downstream. But from a strict legal standpoint, location of diversion works on source of supply has nothing to do with priority of right. The first priority may be located near the headwaters or near the mouth of the stream or at any intermediate point, and each subsequent priority likewise at any point.

(2) In determining acquisition of prescriptive rights, on the other hand, relative locations on a stream channel have an important bearing on relative possibilities of acquiring such rights. This results from the natural law of gravitation which causes water to constantly seek a lower level. Therefore, if left alone, water will flow down the channel past all diversions in turn from the highest upstream to the lowest downstream. After a given segment of the flow has passed a particular headgate or the lower boundary of the tract served thereby, the owner of the water right related to it ordinarily has no further interest in that segment of the flow in its inevitable course downstream. He has no claim upon the water after it has passed his physical control; consequently he generally is not injured by what is done with it by downstream water users and has no cause of action against them, provided, of course, that they do not back the water up over his land without having acquired a legal right to do so.[709] By contrast, if this assumed riparian owner or appropriator does have a right to divert and use this particular segment of the flow and, therefore, to have it come down to his headgate substantially undiminished in quantity, he is very much concerned with anything that is done at upstream diversions that results in preventing him from receiving his rightful share of the water. In other words, he conceivably can be injured by wrongful operations upstream and thus have a cause of action against the offending parties.

(3) As noted below, it is sometimes said that, in general, prescription or adverse use does not "run upstream."[710] From the general physical upstream-downstream interrelationship, it may be appreciated that by far the largest number of claims of adverse possession are made by those upstream. In only exceptional cases is a prescriptive right established by a downstream user as against an appropriator or riparian owner above him on the stream.

Prescriptive claimant usually upstream.—In the usual case in which the acquisition of prescriptive rights to the use of water is allowed by law, such

[709] Regarding this and other possible exceptions, see "Downstream prescriptive claimant: Actual interference with upstream property or water right," *infra.*

[710] *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 448, 482, 137 Pac. (2d) 634 (1943).

prescriptive rights are claimed and acquired by reason of upstream diversions of water as against downstream lands and holders of water rights that are injured because water that should have been allowed to flow downstream has been thereby prevented from doing so.[711]

It is often said, "prescription does not run upstream." This follows from the fundamental concept that "To perfect a claim based upon prescription there must, of course, be conduct which constitutes an actual invasion of the former owner's rights so as to entitle him to bring an action."[712] As noted below, the landowner generally has no right to complain of the use of water after it has left his premises with his acquiescence; hence in such case the grant of an easement would not be presumed.[713]

Whether the upstream claimant is an appropriator or a riparian proprietor, and whether the downstream claim is appropriative or riparian, should make no difference.[714] In 1931, a Federal court said:

> Under the decisions of the state of California a lower riparian owner, or appropriator, gains no title to the water by prescription or use as against an upper riparian owner or appropriator, for the reason that the use of the water after it leaves the lands of the riparian owner is in no sense an interference with the rights of an upper riparian owner which are fully satisfied at the time the water reaches his lower boundary line.[715]

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[711] *Crawford Co.* v. *Hathaway,* 67 Nebr. 325, 374-375, 93 N.W. 781 (1903); *Martin* v. *Burr,* 111 Tex. 57, 65-66, 228 S.W. 543 (1921); *Spring Creek Irr. Co.* v. *Zollinger,* 58 Wash. 90, 97, 197 Pac. 737 (1921); *Farwell* v. *Brisson,* 66 Wash. 305, 308, 119 Pac. 814 (1911); *Day* v. *Hill,* 241 Ore. 507, 406 Pac. (2d) 148, 149 (1965).

[712] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 927, 207 Pac. (2d) 17 (1949); accord, *Lakeside Ditch Co.* v. *Crane,* 80 Cal. 181, 183, 22 Pac. 76 (1889); *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 448, 482, 137 Pac. (2d) 634 (1943).

[713] *Hanson* v. *McCue,* 42 Cal. 303, 310 (1871).

[714] See, e.g., *United States* v. *Central Stockholders' Corp. of Vallejo,* 52 Fed. (2d) 322, 339 (9th Cir. 1931); *Cory* v. *Smith,* 206 Cal. 508, 511, 274 Pac. 969 (1929). See also *Lakeside Ditch Co.* v. *Crane,* 80 Cal. 181, 183, 22 Pac. 276 (1899); *Fort Quitman Land Co.* v. *Mier,* 211 S. W. (2d) 340, 344 (Tex. Civ. App. 1948, error refused n.r.e.); *Santa Rosa Irr. Co.* v. *Pecos River Irr. Co.,* 92 S.W. 1014, 1016-1017 (Tex. Civ. App. 1906, error refused); *Pecos County W. C. & I. Dist. No. 1* v. *Williams,* 271 S.W. (2d) 503, 506 (Tex. Civ. App. 1954, error refused n.r.e).

But see *Allen* v. *Roseberg,* 70 Wash. 422, 426-427, 126 Pac. 900 (1912), in which there was a contention that there can be no adverse use by a lower proprietor as against those above, inasmuch as the use below does not interfere with, and hence is no invasion of, the rights of the upper owner. The supreme court answered: "It is no doubt true that a lower use is, as a general rule, in its very nature not adverse. But this rule is applicable *in its full sense only as between upper and lower riparian proprietors,* and only where the lower use does not interfere with the upper."[Emphasis added.]

[715] *United States* v. *Central Stockholders' Corp. of Vallejo,* 52 Fed. (2d) 322, 339 (9th Cir. 1931).

In *Cory* v. *Smith,* 206 Cal. 508, 511, 274 Pac. 969 (1929), the California Supreme Court said, "[A]s lower riparian owners or as appropriators upon privately owned land,

The upper riparian owner or appropriator ordinarily is not concerned with the use of the water after it has passed beyond the boundaries of his land or his point of diversion, as the case may be. On the contrary, generally he no longer has any right or interest in such water.[716] The downstream diversion ordinarily does not interfere with the flow of the water above; and so the lower owner invades no right of the upper owner which the latter is called upon to notice.[717] The upper riparian proprietor or appropriator, being uninjured by another's use of the water that has passed his land, has no cause for complaint or redress and no right of action to prevent the lower diversion and use.[718] It is not such an overt act as to constitute an ouster or sufficient to impart notice of a hostile intention to assert a right by prescription in the absence of injury to the upstream party; hence evidence of such downstream use generally is not sufficient to set the statute of limitations in motion.[719]

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they could acquire no rights against an upper riparian owner by diversion and user for the period required to gain a title by prescription, or for any period, however long. This principle of law is too well settled to merit discussion. * * * The upper riparian proprietor has no cause for complaint or redress concerning the use of water after it has passed his land. * * *"

In *Lakeside Ditch Co.* v. *Crane,* 80 Cal. 181, 183, 22 Pac. 76 (1889), the court said, in an action between rival appropriators, "If the plaintiff's ditch was simply diverting water which the defendants allowed to pass down the stream while the head-gate of their ditch was closed, the act of the plaintiff in diverting the water thus permitted to pass down the stream could not, in the nature of things, be adverse to the right of the defendants. The latter could not complain, and title by prescription cannot be acquired, unless the acts constituting the adverse use are of such a nature as to give a cause of action in favor of the person against whom those acts are performed. * * *"

A Texas court of civil appeals has indicated that a riparian owner is in no position to claim that a downstream owner diverts water to nonriparian land, because he is in no way injured thereby. *Fort Quitman Land Co.* v. *Mier,* 211 S.W. (2d), 340, 344 (Tex. Civ. App. 1948, error refused n.r.e.).

[716] *Peake* v. *Harris,* 48 Cal. App. 363, 382, 192 Pac. 310 (1920); *Dalton* v. *Kelsey,* 58 Oreg. 244, 253-254, 114 Pac. 464 (1911); *Davis* v. *Chamberlain,* 51 Oreg. 304, 317, 98 Pac. 154 (1908), cited in *Day* v. *Hill,* 241 Oreg. 507, 406 Pac. (2d) 148, 150 (1965).

The Kansas Supreme Court, in *Clark* v. *Allaman,* 71 Kans. 206, 245-246, 80 Pac. 571 (1905), adopted the principle in the following language: "The judgment in favor of the plaintiff cannot be justified on the ground of prescription. Her acceptance and use of water flowing down Rose creek to her land involved the exercise of a right which she herself possessed, without encroachment upon the rights of upper proprietors, and they lost all property in the water when it left their land. Hence, her conduct lacked the adversary quality necessary to the foundation of prescriptive rights."

[717] *Pabst* v. *Finmand,* 190 Cal. 124, 128, 211 Pac. 11 (1922); *Holmes* v. *Nay,* 186 Cal. 231, 235-236, 199 Pac. 325 (1921); *Crawford Co.* v. *Hathaway,* 67 Nebr. 325, 374-375, 93 N.W. 781 (1903); *Dunn* v. *Thomas,* 69 Nebr. 683, 684, 96 N.W. 142 (1903).

[718] *Cory* v. *Smith,* 206 Cal. 508, 511, 274 Pac. 969 (1929); *Bathgate* v. *Irvine,* 126 Cal. 135, 141, 58 Pac. 442 (1899); *Morgan* v. *Walker,* 217 Cal. 607, 615, 20 Pac. (2d) 660 (1933).

[719] *Beers* v. *Sharpe,* 44 Oreg. 386, 394-395, 75 Pac. 717 (1904); *Harrington* v. *Demaris,* 46 Oreg. 111, 115, 77 Pac. 603, 82 Pac. 14 (1904).

The Idaho Supreme Court added another facet to the effect that under the law, it is the duty of a prior appropriator to allow the water, which he has the right to use, to flow down the channel for the benefit of junior appropriators at times when he has no immediate need for its use. "To allow a junior, or other, appropriator to establish an adverse right to such water during times when it is not required, and not being used, by the original appropriator, on the theory that such adverse use was inconsistent with the right of the prior appropriator, would subvert the purpose of the law and encourage wasteful diversion and use of water in violation thereof."[720]

From all this it follows that mere nonuse on the part of the upper proprietor cannot make the lower use of the water adverse; hence acquiescence on the part of the upper owner to the flow of the water away from his premises does not support a prescriptive right on the part of the lower owner.[721] The downstream owner, say the courts, should not be permitted to acquire a right in this manner which the upper owner is powerless to prevent.[722] And so it results that the lower owner or appropriator ordinarily gains nothing against the upper owner or proprietor by the mere use of water on his downstream land, no matter how long such use may have continued.[723]

The rule that a lower use does not impair an upper right was applied in California as between an owner of land riparian to a stream and an owner of land overlying percolating water tributary to the stream above the riparian land.[724] In an early California case the rule also was applied to the use of water of a spring after the water had flowed away in an artificial channel from the land on which the spring was situated.[725]

Downstream prescriptive claimant: Actual interference with upstream property or water right.—(1) Applicability of the foregoing rule. The applicability of the foregoing rule—that a use of water diverted or used at a point below the land of a riparian owner or diversion of an appropriator ordinarily gives no right by adverse possession against the holder of the upstream right—is predicated on the condition that there be no interference with the use of the stream at the upstream riparian land or appropriative

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[720] *Moutain Home Irr. Dist.* v. *Duffy,* 79 Idaho 435, 442-443, 319 Pac. (2d) 965 (1957).

[721] *Rogers* v. *Overacker,* 4 Cal. App. 333, 339, 87 Pac. 1107 (1906); *Hargrave* v. *Cook,* 108 Cal. 72, 78-79, 41 Pac. 18 (1895).

[722] *Bathgate* v. *Irvine,* 126 Cal. 135, 141, 58 Pac. 442 (1899); *Pyramid Land & Stock Co.* v. *Scott,* 51 Cal. App. 634, 637-638, 197 Pac. 398 (1921).

[723] *Peake* v. *Harris,* 48 Cal. App. 363, 382, 192 Pac. 310 (1920); *Cory* v. *Smith,* 206 Cal. 508, 511, 274 Pac. 969 (1929).

[724] *Hudson* v. *Dailey,* 156 Cal. 617, 627, 105 Pac. 748 (1909). The riparian's use of the water, after it had passed through the overlying tributary lands and become a part of the surface stream, "would not injure them [the overlying owners], nor constitute a trespass upon their property, and, hence, it would not be adverse to them and could not be the foundation of a title by prescription as against them."

[725] *Hanson* v. *McCue,* 42 Cal. 303, 310 (1871).

diversion, and no trespass upon the upstream property.[726] Thus the rule applies generally; that is, it governs unless the upstream use has been actually interfered with by the adverse use below, "a thing which can seldom occur."[727]

However, such things have occurred. In the water rights prescription cases that have reached the courts of the West, there have been instances of actual trespass by the lower claimant, and of actual interferences with the exercise of the upstream right. The general rule thus lacked its foundation in these cases and hence was not applied.

(2) Some examples of nonapplicability of the general rule. (a) Texas. In a case involving backflow from a dam, the Texas Supreme Court cited authority to the effect that a riparian owner cannot throw the water back upon the proprietors above, without a prescriptive right.[728]

(b) Washington. For a period of nearly 25 years, a landowner and her predecessors used water on their land obtained from springs on upper land of another, which they conveyed through ditches that they constructed onto the upper land of origin. To this they were held to have acquired a prescriptive right.[729]

The same principle was invoked in a case in which a lower landowner built an irrigation ditch to his land from a watercourse on upper land which was fed primarily from a spring located on such upper land, having previously filed a claim to the spring waters. It was held that the lower owner acquired a prescriptive right because he built his diversion works, not for the purpose of taking whatever waters came down the stream, but to acquire the waters of the spring. The upper landowner had a right of action because of the invasion of his property by the ditch and diversion works and could have prevented their use.[730]

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[726] Title by prescription cannot be acquired against a tract of riparian land by diverting the water from the stream at a point below such land, and not interfering with the stream at the riparian land. *Miller & Lux* v. *Enterprise Canal & Land Co.*, 169 Cal. 415, 423, 147 Pac. 567 (1915). Rule applicable only where the lower use does not interfere with the upper. *Allen* v. *Roseberg*, 70 Wash. 422, 426-427, 126 Pac. 900 (1912). See *Mally* v. *Weidensteiner*, 88 Wash. 398, 405, 411, 153 Pac. 342 (1915).

[727] *Perry* v. *Calkins*, 159 Cal. 175, 177-178, 113 Pac. 136 (1911).

[728] *Haas* v. *Choussard*, 17 Tex. 588 (1856). The court observed that "Whether an action for throwing back water will lie for merely nominal damages, where there has been no actual injury, is not free from doubt, though supported by American authorities." *Id.* at 590.

[729] *Mason* v. *Yearwood*, 58 Wash. 276, 277-278, 280-281, 108 Pac. 608 (1910). "While there is no direct statute governing the matter, the courts generally hold that an easement is acquired in the lands of another by an adverse user for the period of the statute of limitations * * *."

[730] *Donatanello* v. *Gust*, 86 Wash. 268, 271-272, 150 Pac. 420 (1915).

In a different instance, the lower owner went upon the upper lands to clear obstructions from the stream, but he did not interfere with the upper appropriator's diversion and use. The supreme court recognzied that a prescriptive right can be obtained against an upper owner by a lower claimant, citing its own decisions, but

Another Washington controversy involved a situation in which the opposing parties were not upper and lower riparian owners in the usual sense. Rather, one party held land riparian to the north branch of a stream and the other land riparian to the south branch. Both diverted water below the forks. The use by plaintiff's predecessor was an interference with the use by defendant's and hence was adverse—so adverse as to lead to a physical conflict and was recognized as adverse by an agreement to divide the water into two parts by arbitration. Under the evidence, plaintiff was held entitled to the sole use of one-half of the stream.[731]

(c) California. An appropriative right had become vested by prescription against certain downstream riparian owners. Thereafter, they wrongfully obstructed the flow of water in to the appropriator's ditch and threatened to continue doing so. The appropriator was held entitled to an injunction restraining further infringement of his right; otherwise, had the threatened continuance of the obstruction been carried out, the upstream appropriative-prescriptive right would have been in danger of loss by prescription on the part of the downstream riparians.[732]

In another case, owners of lands distant from a stream and not riparian thereto had gone upon the lands of another through which the stream was flowing, and by means of dams and ditches diverted water thereon and conveyed it away to their own lands. The California Supreme Court held they had acquired a prescriptive right to the use of both ditch and water:[733]

> The lands of the plaintiffs herein are not riparian as to the waters in question, nor is the point of their diversion of such waters below the lands of the defendants which are riparian to such waters, but is upon the lands of the defendants at a point which would constitute an interference with their riparian rights therein. The cases cited by appellants which deny to a lower riparian proprietor

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emphasized that "it is only by the actual interference with the rights of the upper riparian owner." Under the facts of the instant case, prescription was denied. *Smith* v. *Nechanicky,* 123 Wash. 8, 11-15, 211 Pac. 880 (1923).

See also *In re Ahtanum Creek,* 139 Wash. 84, 99-101, 245 Pac. 758 (1926).

[731] *Allen* v. *Roseberg,* 70 Wash. 422, 126 Pac. 900 (1912).

Washington legislation enacted in 1967 provides that "No rights to the use of surface or ground waters of the state affecting either appropriated or unappropriated waters thereof may be acquired by prescription or adverse use." Wash. Rev. Code § 90.14.220 (Supp. 1970).

[732] *Spargur* v. *Heard,* 90 Cal. 221, 230, 27 Pac. 198 (1891). Although the trial court found that the appropriator had been damaged in only the nominal sum of $1, it was held that under the circumstances he was entitled to an injunction without proof of damages.

[733] *Smith* v. *Gaylord,* 179 Cal. 106, 108-109, 175 Pac. 449 (1918). The adverse parties had done this for a period much longer than that prescribed by the statute of limitations. The fact that a prescriptive right both as to the ditch and to the waters flowing therein might thus be acquired was not seriously disputed by the owners of the invaded land, their contention being reduced to the question of sufficiency of the evidence.

> the power of acquiring prescriptive rights to the use of the waters of a stream by the mere user thereof for any period after they have passed the lands of the upper proprietor, have no application to the facts of the case at bar.

(d) Misunderstanding of California decision. The opinion in a Federal case stated that, admittedly, the proposition "that a lower riparian owner cannot, *ordinarily,* acquire any adverse rights to the same stream against an upper owner * * * is a correct general statement of the law of California, although there have been deviations in the cases." A footnote lists several cases that support the general principle and adds: "For a deviation from principle, see, Larsen v. Appollonio, 1936, 5 Cal. 2d 440, 55 P. 2d 196." No other cases are cited as deviations.[734]

It is true that in *Larsen* v. *Appollonio* the California Supreme Court held that plaintiffs had acquired a prescriptive water right against the proprietor of upstream land.[735] The reported opinion discloses no facts that would take the case out of the rule, theretofore held to be the settled law in California, that prescription does not run against upstream water rights; yet the only authority cited on this phase was *Smith* v. *Gaylord,* in which, as noted above, the general rule was not applied because of actual trespass.[736]

However, the true factual situation in *Larsen* v. *Appollonio,* and the reason for holding that the diversion was a trespass, appear in the court record. The findings of fact of the trial court, as set forth in the clerk's transcript on appeal, show that although it was true that defendants' lands were then located upstream from plaintiffs' point of diversion, it was "also true that for more than five years after the original diversion and taking of water by the plaintiffs herein and their predecessors, and at the time of said diversion, and for a long time prior thereto, the land upon which the said diversion was made and the lands now owned by the defendant were a part and parcel of a single tract of land, the ownership of which was vested in and located in one person, as the owner in fee simple thereof."[737] With this explanation, *Larsen* v. *Apollonio* is not a deviation from the established California rule, but is in accord with those cases in which the rule was not invoked for the sole reason that there was an actual trespass.

Some Circumstances Negating Establishment of Prescription

It is not unusual to find an assertion of prescription lacking in many of the essential requirements.[738] Although actual use of water is one of the requisites,

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[734] *United States* v. *Fallbrook Pub. Util. Dist.,* 108 Fed. Supp. 72, 84 (S.D. Cal. 1952).

[735] *Larsen* v. *Apollonio,* 5 Cal. (2d) 440, 443, 55 Pac. (2d) 196 (1936).

[736] *Smith* v. *Gaylord,* 179 Cal. 106, 108-109, 175 Pac. 449 (1918).

[737] Clerk's transcript on appeal, on file with the Clerk of the Supreme Court, Sac. No. 4911, beginning at page 33, finding 111, page 35.

[738] For example, a trial court found: "That neither the defendant nor his grantors or predecessors in interest, or any of them, have been in the exclusive, open, notorious,

it "would not, standing alone, give them any rights to title by prescription."[739] Some circumstances negating the establishment of prescription include:

No adverse and hostile use.—Not adverse or hostile.[740] No proof that use was adverse rather than permissive.[741] No adverse and hostile use for statutory period.[742] No adverse use with knowledge and acquiescence of owner.[743] Absence of convincing evidence when adverse use began.[744] Not sufficiently hostile to give the injured party a cause of action.[745] Use of water by downstream claimants not hostile to rights of upstream users.[746] Failure to show invasion of prior right by adverse party.[747]

No deprivation of rightful owner's use of water.—No deprivation of use when water needed.[748] No continued deprivation; claimants were but periodic trespassers.[749] Isolated cases of trespass, even over a long period of time.[750] Water supply sufficient for needs of all users.[751]

No knowledge and acquiescence.—No proof that the rightful owner knew about the adverse taking or acquiesced in it.[752]

No exclusiveness.—"The defendants' testimony fails when it comes to proving the elements of exclusiveness and continuousness."[753] "The proof fails

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continuous and adverse possession of any water right as against the plaintiff, nor have they used any water right from McClellan Creek, or at all, openly, notoriously, adversely, continuously and exclusively against the world, or against the rights of the plaintiff, under a claim of right." *Lamping* v. *Diehl,* 126 Mont. 193, 203-204, 246 Pac. (2d) 230 (1952).

[739] *Hunziker* v. *Knowlton,* 78 Wyo. 241, 251, 322 Pac. (2d) 141 (1958).

[740] *Franktown Creek Irr. Co.* v. *Marlette Lake Co.,* 77 Nev. 348, 364 Pac. (2d) 1069, 1071-1072 (1961); *Motl* v. *Boyd,* 116 Tex. 82, 127-128, 286 S.W. 458 (1926); *Francis* v. *Roberts,* 73 Utah 98, 101, 272 Pac. 633 (1928); use no more than permissive, *Colarchik* v. *Watkins,* 144 Mont. 17, 393 Pac. (2d) 786, 789-790 (1964).

[741] *Kilpatrick Bros. Co.* v. *Frenchman Valley Irr. Dist.,* 101 Nebr. 155, 156, 162 N.W. 422 (1917).

[742] *Madison* v. *McNeal,* 171 Wash. 669, 676-678, 19 Pac. (2d) 97 (1933); *Drew* v. *Burgraff,* 141 Mont. 405, 378 Pac. (2d) 232, 234-235 (1963).

[743] *Campbell* v. *Wyoming Dev. Co.,* 55 Wyo. 347, 415, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[744] *Kuhlmann* v. *Platte Valley Irr. Dist.,* 166 Nebr. 493, 513, 89 N.W. (2d) 768 (1958).

[745] *Houston Transp. Co.* v. *San Jacinto Rice Co.,* 163 S. W. 1023, 1028 (Tex. Civ. App. 1914).

[746] *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian,* 74 Tex. 170, 174-175, 11 S.W. 1078 (1889).

[747] *Havre Irr. Co.* v. *Majerus,* 132 Mont. 410, 416, 318 Pac. (2d) 1076 (1957); *Madison* v. *McNeal,* 171 Wash. 669, 676, 19 Pac. (2d) 97 (1933).

[748] *Linford* v. *Hall & Son,* 78 Idaho 49, 54, 297 Pac. (2d) 893 (1956); *Maranville Ditch Co.* v. *Kilpatrick Bros. Co.,* 100 Nebr. 371, 372, 160 N.W. 81 (1916).

[749] *Barnes* v. *Belsaas,* 73 Wash. 205, 208, 131 Pac. 817 (1913).

[750] *Downie* v. *Renton,* 167 Wash. 374, 382-384, 9 Pac. (2d) 372 (1932).

[751] *Meng* v. *Coffee,* 67 Nebr. 500, 520, 93 N.W. 713 (1903); *Redwater Land & Canal Co.* v. *Jones,* 27 S. Dak. 194, 208, 130 N.W. 85 (1911).

[752] *Clark* v. *Ashley,* 34 Colo. 285, 288-289, 82 Pac. 588 (1905).

[753] *Krumwiede* v. *Rose,* 177 Nebr. 570, 129 N. W. (2d) 491, 498 (1964); appropriation of

to show any use or appropriation of the waters of the springs by plaintiffs or their predecessors in interest to the exclusion of others having stock running at large upon the public domain in their vicinity."[754]

No claim of right.—No unqualified claim of right.[755]

Interruption of running of statute.—Interruption by filing of suit by rightful owner.[756] Acquiescence in demands of rightful owner.[757] No continuous period; actual, physical interruption occurred nearly every year.[758]

Other.—(1) Lack of satisfactory evidence.[759]

(2) Water right claimed to have been invaded by adverse possession found to have been abandoned; hence water had reverted to the State and again become subject to appropriation.[760]

(3) Those claiming to be the legal owners of the adversed right were not made parties.[761]

(4) Use of riverbed as a convenience and privilege, by reason of ownership of riparian land, held not hostile to claim of town of title to riverbed, and could not support riparian owner's claim of title thereto by limitation.[762]

Prescription not favored

"Prescriptive rights are not favored by the law."[763] "A prescriptive easement is not looked upon with favor by the law and it is essential that all

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one-half the flow of a spring not exclusive, *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 584-585, 86 S.W. 733 (1905); no claim of exclusive right to pump all the water out of a lake, *Lakeside Irr. Co.* v. *Kirby,* 166 S.W. 715, 717 (Tex. Civ. App. 1914, error refused). For several years no one had the exclusive use of the water in controversy, sometimes one using it and then another, but possession of none of the claimants was continuous; hence no adverse possession. *Faull* v. *Cooke,* 19 Oreg. 455, 467, 26 Pac. 662 (1890).

[754] *Jones* v. *Hanson,* 133 Mont. 115, 123-124, 320 Pac. (2d) 1007 (1958).

[755] *St. Martin* v. *Skamania Boom Co.,* 79 Wash. 393, 398-399, 401, 140 Pac. 355 (1914); no adverse or hostile assertion of rights as a matter of fact, *Raymond* v. *Willapa Power Co.,* 102 Wash. 278, 282-283, 172 Pac. 1176 (1918); "The mere fact of trespass does not give a right of user unless such is claimed adversely to the owner," *Cook* v. *Maremont-Holland Co.,* 75 Nev. 380, 344 Pac. (2d) 198, 202 (1959).

[756] *Alta Land & Water Co.* v. *Hancock,* 85 Cal. 219, 227-228, 24 Pac. 645 (1890); *Baker* v. *Brown,* 55 Tex. 377, 381-382 (1881); *Biggs* v. *Leffingwell,* 62 Tex. Civ. App. 665, 668, 132 S.W. 902 (1910).

[757] *Wasatch Irr. Co.* v. *Fulton,* 23 Utah 466, 468, 65 Pac. 205 (1901).

[758] *In re Ahtanum Creek,* 139 Wash. 84, 92-93, 245 Pac. 758 (1926).

[759] "It is not reasonable to suppose that priority of right to water, where water is scarce, or likely to become so, will by lightly sacrificed or surrendered by its owner," *Loshbaugh* v. *Benzel,* 133 Colo. 49, 61-62, 291 Pac. (2d) 1064 (1956); no satisfactory proof as to when ditches were built; no evidence of diversion or use by adverse claimant or predecessors, *Vennes* v. *Nollmeyer,* 144 Mont. 43, 394 Pac. (2d) 178, 182 (1964).

[760] *Chill* v. *Jarvis,* 50 Idaho 531, 536-537, 298 Pac. 373 (1931).

[761] *Forrester* v. *Rock Island Oil & Refining Co.,* 133 Mont. 333, 342, 323 Pac. (2d) 597 (1958).

[762] *Heard* v. *Texas,* 146 Tex. 139, 148-149, 204 S.W. (2d) 344 (1947).

[763] *Downie* v. *Renton,* 167 Wash. 374, 377, 9 Pac. (2d) 372 (1932).

the elements of use and enjoyment necessary to give title to real estate concur in order to create an easement by prescription."[764] Forthermore, the elements must be "clearly, convincingly, and satisfactorily established."[765]

Presumption against acquisition of title by adverse use.—"The presumption is against the acquisition of such a right."[766]

Burden of proof: Adverse use.—"It is elementary that the burden is upon one claiming the acquisition of a right by prescription to prove same * * * by the clearest and most satisfactory proof * * * and to establish all of the elements essential to such title * * * ."[767]

This obligation upon the prescriptive claimant must be discharged by a preponderance of the evidence.[768] It was observed in an early case that if the claimant leaves this matter doubtful, it is not conclusive in his favor.[769] "The law will not allow the property of one person to be taken by another, without any conveyance or consideration, upon slight presumptions or probabilities."[770] As said by the Nebraska Supreme Court, " 'One claiming ownership of real estate by adverse possession must recover upon the strength of his title and not because of a possible weakness in the title of his adversary.' "[771]

There must be proof of and a finding as to the specific quantity of water to which the prescriptive right attaches, which quantity is that reasonably necessary for the use to which the water is being put under the adverse claim.

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[764] *Wemmer* v. *Young*, 167 Nebr. 495, 93 N. W. (2d) 837, 850 (1958).

[765] *Kuhlmann* v. *Platte Valley Irr. Dist.*, 166 Nebr. 493, 512-513 (1958).

[766] *In re Use of Water Within Drainage Area of Green River*, 12 Utah (2d) 102, 106, 363 Pac. (2d) 199 (1961). In *Spring Creek Irr. Co.* v. *Zollinger*, 58 Utah 90, 97, 197 Pac. 737 (1921), the court conceded it far more probable that a right by adverse use may be acquired by parties on the upper portions of a stream than by parties below, "but in either case the presumption is against acquisition of title in any such manner."

[767] *Hahn* v. *Curtis*, 73 Cal. App. (2d) 382, 389, 166 Pac. (2d) 611 (1946).

That this is the consensus of the high courts of the West is shown in the following cases: *Leialoha* v. *Wolter*, 21 Haw. 624, 630 (1913); *Fairview* v. *Franklin Maple Creek Pioneer Irr. Co.*, 59 Idaho 7, 15, 79 Pac. (2d) 731 (1938); *Loosli* v. *Heseman*, 66 Idaho 469, 480, 162 Pac. (2d) 393 (1945); *Drew* v. *Burggraf*, 141 Mont. 405, 378 Pac. (2d) 232, 234 (1963); *Worm* v. *Crowell*, 165 Nebr. 713, 722, 87 N.W. (2d) 384 (1958); *Cook* v. *Maremont-Holland Co.*, 75 Nev. 380, 344 Pac. (2d) 198, 202 (1959); *Masterson* v. *Kennard*, 140 Oreg. 288, 296, 12 Pac. (2d) 560 (1932); *Henderson* v. *Goforth*, 34 S. Dak. 441, 448, 148 N.W. 1045 (1914); *Scoggins* v. *Cameron County W. I. Dist. No. 15*, 264 S.W. (2d) 169, 172 (Tex. Civ. App. 1954, error refused n.r.e.); *Rhodes* v. *Whitehead*, 27 Tex. 304, 312-313 (1863); *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 6, 361 Pac. (2d) 407 (1961); *Downie* v. *Renton*, 167 Wash. 374, 378, 9 Pac. (2d) 372 (1932); *Union Mill & Min. Co.* v. *Dangberg*, 81 Fed. 73, 91 (C.C.D. Nev. 1897); *Morris* v. *Bean*, 146 Fed. 423, 434 (C.C.D. Mont. 1906); *Garden City Co.* v. *Bentrup*, 228 Fed. (2d) 334, 340-341 (10th Cir. 1955).

[768] *Skelley* v. *Cowell*, 37 Cal. App. 215, 217, 173 Pac. 609 (1918).

[769] *American Co.* v. *Bradford*, 27 Cal. 360, 367 (1865).

[770] *Peck* v. *Howard*, 73 Cal. App. (2d) 308, 326, 167 Pac. (2d) 753 (1946).

[771] *Oliver* v. *Thomas*, 173 Nebr. 36, 112 N.W. (2d) 525, 528 (1961), quoting from *Ohm* v. *Clear Creek Drainage Dist.*, 153 Nebr. 428, 45 N.W. (2d) 117, 118 (1950).

The absence of such a finding is fatal to a judgment establishing a prescriptive right.[772]

In 1908, the Oregon Supreme Court held that when the claimant of a prescriptive right has made a *prima facie* showing of adverse use, based upon facts necessary to establish it, "the burden of showing that such user was not a substantial interference with the rights of others was thereby shifted to the parties questioning such claim."[773]

The relation of disabilities to burden of proof of prescriptive rights was litigated in at least two Texas cases.[774]

Burden of proof: Permissive use.—The burden in the first instance is upon the adverse claimant to prove his title by prescription, as noted under the immediately preceding subtopic. After such claimant has shown open, visible, continuous, and unmolested use of the water for the statutory period, he established a *prima facie* case and his use will be presumed to be under a claim of right and not by license. The burden of rebutting this presumption by showing that the use was permissive then devolves upon the true owner.[775]

Possibility of Establishing Prescriptive Water Right Negated or Questioned

In a number of States, the possibility of establishing a prescriptive right as against one or more kinds of water rights has been negated or questioned by legislation or in one or more reported court decisions.[776]

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[772] *California Pastoral & Agric. Co.* v. *Madera Canal & Irr. Co.,* 167 Cal. 78, 89-90, 138 Pac. 718 (1914); *Crain* v. *Hoefling,* 56 Cal. App. (2d) 396, 402, 132 Pac. (2d) 882 (1942).

[773] *Hough* v. *Porter,* 51 Oreg. 318, 433, 95 Pac. 732 (1908), 98 Pac. 1083, 102 Pac. 728 (1909).

[774] *Austin* v. *Hall,* 93 Tex. 591, 596-597, 57 S. W. 563 (1900); *Martin* v. *Burr,* 111 Tex. 57, 66-67, 228 S. W. 543 (1921).

[775] *Te Selle* v. *Storey,* 133 Mont. 1, 5-6, 319 Pac. (2d) 218 (1957); *Kougl* v. *Curry,* 73 S. Dak. 427, 432-433, 44 N.W. (2d) 114 (1950); *Lalakea* v. *Hawaiian Irr. Co.,* 36 Haw. 692, 708 (1944); *Morgan* v. *Walker,* 217 Cal. 607, 615, 20 Pac. (2d) 660 (1933); *Gardner* v. *Wright,* 49 Oreg. 609, 628, 91 Pac. 286 (1907).

[776] In addition to the legislation and court decisions discussed below, statutes or court decisions in some States have specifically limited the acquisition of prescription as against water or water rights held by the State, the United States, or other public entity. (See the subtopics "Public entities or agencies," "The public," "The State," and "The United States" under "Establishment of Prescriptive Title—Adverse Parties," *supra.*) Similar limitations expressly included in statutes of limitations with respect to land, or applied in court decisions construing such statutes, may apply by analogy to prescription with respect to water rights.

Regarding some related questions, see the later discussion of "Relation to Necessity for a Valid Statutory Appropriation."

It also may be noted that a Hawaiian statute provides that no title or right to or *across* registered land (for example, for an irrigation ditch) in derogation of that of the registered owner shall be acquired by prescription or adverse possession except as

Negations.—(1) Alaska. The Alaska Water Use Act provides that "No right to the use of water either appropriated or unappropriated shall be acquired by adverse use or possession."[777]

(2) Kansas. The water appropriation act, as amended in 1957, provides that: "No person shall have the power or authority to acquire an appropriation right to the use of water for other than domestic use without first obtaining the approval of the chief engineer, and no water rights of any kind may be acquired hereafter solely by adverse use [or] adverse possession * * * ."[778]

(3) Nevada. In 1949 the supreme court considered it settled that a right to use water might be acquired by adverse use prior to enactment of the Nevada water law. The court was not prepared to overrule a previous holding to that effect, nor to read into the water statute something that it did not find stated there even by implication.[779]

The foregoing decision was made reluctantly, by a vote of two to one; and the majority opinion stated that "adverse use is wholly unwarranted, unnecessary and clearly dangerous to the appropriation and distribution of public property."[780] The legislature was then in session, so the court specifically called the problem to its attention. Accordingly, the legislature at that 1949 session so amended the water rights statute to include a proviso, which now reads as follows:[781]

> No prescriptive right to the use of such water or any of the public water appropriated or unappropriated can be acquired by adverse user or adverse possession for any period of time

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against a person registered as first owner with a possessory title only. Haw. Rev. Stat. § 501-87 (1968).

[777] Alaska Stat. § 46.15.040(a) (Supp. 1966).

[778] Kans. Stat. Ann. § 82a-705 (1969).

In a 1936 case, prior to this enactment, the Kansas Supreme Court said *inter alia* that "no prescriptive rights to water for irrigation purposes can be acquired by one riparian landowner to the detriment of other riparian landowners. Clark v. Allaman [71 Kans. 206, 80 Pac. 571 (1905)] Syl. 10, 11, and 14." *Frizell* v. *Bindley*, 144 Kans. 84, 93, 58 Pac. (2d) 95 (1936). However, this appears to have been mere *dictum* and to have been an erroneous interpretation of the earlier *Clark* case which the court cited as support. Syllabus 14 of the *Clark* case, which it relied upon, states: "A lower riparian owner acquires no prescriptive right *against upper proprietors* to receive a given quantity of the flow of a stream *by diverting and using it after it has left their land;* and an upper proprietor can acquire no prescriptive right to divert water, as against owners down the stream, *so long as the flow is sufficient for the needs of all.*" [Emphasis added.] See the use of the *Clark* case in the discussion at note 525 and in note 716 *supra.* This *dictum* from the *Frizell* case, *supra,* was subsequently repeated, again as *dictum,* in *Heise* v. *Schultz,* 167 Kans. 34, 204 Pac. (2d) 706, 712 (1949).

[779] *Application of Filippini,* 66 Nev. 17, 26-27, 202 Pac. (2d) 535 (1949), citing *Authors* v. *Bryant,* 22 Nev. 242, 38 Pac. 439 (1894).

[780] 66 Nev. at 28-29.

[781] Nev. Rev. Stat. § 533.060(3) (Supp. 1967).

> whatsoever, but any such right to appropriate any of such water shall be initiated by first making application to the state engineer for a permit to appropriate the same as provided in this chapter and not otherwise.[782]

(4) Utah. In the late 1930's, the relationships of abandonment and forfeiture to adverse use in connection with title to Utah water rights were in a state of considerable uncertainty.[783]

In 1939, the Utah Legislature took action by so amending the water appropriation statute as to prevent the acquisition of a right to the use of water already appropriated by another, solely by adverse use. To this end, the general statement of the exclusive method of appropriating water by first making application to the State Engineer in the manner provided in the statute, and not otherwise, ends with the declaration, "No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."[784] In addition, the statutory forfeiture section includes the following sentence: "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."[785]

In the opinions in a number of subsequent cases, the Utah Supreme Court has noted that since this enactment, it is no longer possible to acquire a right to use of water in Utah by adverse possession and use.[786]

However, after the 1939 legislation was enacted, a period of uncertainty ensued as to whether title by adverse possession could have been acquired between 1903 and 1939. Prior to 1903, when the legislature provided for an exclusive method of appropriating water, the Utah law was well settled that title could be acquired by adverse use. What, then was the situation between

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[782] In a 1961 case, the Franktown Creek Irrigation Company contended that it had acquired a prescriptive water right before the enactment of this statute in 1949. In this regard, the Nevada Supreme Court said *inter alia* that "To establish a right by prescription in Franktown [Irrigation Company] before 1949 to the use of water claimed by the predecessor of Marlette, the use and enjoyment must have been uninterrupted, adverse, under a claim of right, and with the knowledge of such predecessor." *Franktown Creek Irr. Co.* v. *Marlette Lake Co.*, 77 Nev. 348, 364 Pac. (2d) 1069, 1071 (1961).

[783] *Clark* v. *North Cottonwood Irr. & Water Co.*, 79 Utah 425, 437, 11 Pac. (2d) 300 (1932); *Hammond* v. *Johnson*, 94 Utah 20, 28-33, 35, 39-40, 66 Pac. (2d) 894 (1937), 75 Pac. (2d) 164 (1938); *Adams* v. *Portage Irr., Res. & Power Co.*, 95 Utah 1, 11-16, 20, 21, 72 Pac. (2d) 648 (1937), 81 Pac. (2d) 368 (1938).

[784] Utah Laws 1939, ch. 111, Code Ann. § 73-3-1 (1968).

[785] *Id.* § 73-1-4.

[786] *Smith* v. *Sanders*, 112 Utah 517, 520-521, 189 Pac. (2d) 701 (1948); *Jackson* v. *Spanish Fork West Field Irr. Co.*, 119 Utah 19, 31, 223 Pac. (2d) 827 (1950); *Mitchell* v. *Spanish Fork West Field Irr. Co.*, 1 Utah (2d) 313, 317, 265 Pac. (2d) 1016 (1954); *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 5-6, 361 Pac. (2d) 407 (1961); *In re Use of Water Within Drainage Area of Green River*, 12 Utah (2d) 102, 105-106, 363 Pac. (2d) 199 (1961).

1903 and 1939? The uncertainty, according to the Utah Supreme Court in the 1943 *Wellsville* case, resulted from litigation in the 1937-1938 *Hammond* and *Adams* cases[787] and the 1903 and subsequent 1939 legislation.[788] So, to settle the question, the Utah court in the *Wellsville* case reverted to the *Hammond* case, in which it was held that the forfeiture statutes prior to 1939 *did not* apply to a situation in which failure to use water was the result of an unlawful diversion by another, and that title could therefore be acquired by adverse use.[789] "We think that this attains a desirable result and conclude that title could between 1903 and 1939 be acquired by adverse possession. *Implicit in this holding is the holding that adverse use will not work a statutory forfeiture.*" [Emphasis added.][790]

(5) Washington. The Washington statutes provide that "No rights to the use of surface or ground waters of the state affecting either appropriated or unappropriated waters thereof may be acquired by prescription or adverse use."[791]

Questionings.—(1) New Mexico. In 1937, the New Mexico Supreme Court, in referring to the testimony introduced in the trial in the lower court, said that the testimony did not prove an abandonment of the water right in question, "nor a prescriptive right (if such a right can be acquired under our law) * * * ."[792]

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[787] *Hammond* v. *Johnson,* 94 Utah 20, 66 Pac. (2d) 894 (1937), 75 Pac. (2d) 164 (1938); *Adams* v. *Portage Irr., Res. & Power Co.,* 95 Utah 1, 72 Pac. (2d) 648 (1937), 81 Pac. (2d) 368 (1938).

[788] *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.,* 104 Utah 448, 456-457, 462, 137 Pac. (2d) 634 (1943).

[789] In *Hammond* v. *Johnson,* 94 Utah 20, 33, 66 Pac. (2d) 984 (1937), 75 Pac. (2d) 164 (1938), the court had said *inter alia:* "It will thus be seen, both from the provisions of the statute and from the inherent nature of the terms and situations from which they arise that adverse possession is not founded upon or dependent on the doctrines of abandonment, or forfeiture for nonuser, of water rights. The state is interested in the matter of abandonment of water rights and nonuser thereof, because of the importance of water due to the arid conditions of the state. Abandonment and nonuser of water rights presupposes that such waters are thereby permitted to run to waste, to prevent which the state steps in and permits others, who will put the water to beneficial use, to do so. As long as water which has passed to private hands is put to a beneficial use, the state has no vital interest as to who the user is. That is, as long as the use granted and recognized by the state is exercised, the state has no interest in what may be the name of the person who exercises it. It follows, therefore, that notwithstanding the statute of appropriation, as between private claimants, water rights in Utah can be acquired by adverse user and possession."

[790] With respect to the distinction between prescription and statutory forfeiture, see also the discussion of *In re Drainage Area of Bear River in Rich County,* 12 Utah (2d) 1, 4-5, 361 Pac. (2d) 407 (1961), under "Prescription Distinguished from Other Methods of Loss," *supra.*

[791] Wash. Rev. Code § 90.14.220 (Supp. 1970).

[792] *Pioneer Irrigating Ditch Co.* v. *Blashek,* 41 N. Mex. 99, 102, 64 Pac. (2d) 388 (1937).

In *Bounds* v. *Carner,* 53 N. Mex. 234, 205 Pac. (2d) 216, 223 (1949), in response to the defendants' claim of a prescriptive right based on 10-years' use, the court said:

In a 1961 New Mexico case, the supreme court included in its opinion the following statement: "The trial court did not determine, nor do we, whether a water right is subject to being acquired by prescription. A determination of that legal question, likewise, requires the presence of all persons who would be affected by the question being resolved."[793]

(2) Oregon. Various decisions of the Oregon Supreme Court concerning the acquisition of water rights by prescription were rendered prior to the adoption of the water appropriation statute of 1909.[794] Subsequently, the supreme court held that a prescriptive water right had been acquired against the City of Baker, the priorities in controversy having been decreed in 1918, but apparently dating back into the 19th century.[795]

In *Tudor* v. *Jaca,* decided in the 1940's, the Oregon Supreme Court said: "It is a debatable question, under the water code, whether, subsequent to 1909, an appropriation of water can be initiated by adverse use, or in any other manner than under the statutory procedure. * * * Such procedure is declared to be exclusive. * * * It is unnecessary for us to discuss this question, however."[796] Not long afterward the supreme court pointed out that in *Tudor* v. *Jaca* "our dictum referred only to the *initiation* of an appropriation by adverse use," whereas in the instant case the appropriation was initiated by diversion and use under the old law prior to adoption of the 1909 code.[797]

Further questioning in Oregon occurred in 1957 in the following language of the supreme court:[798]

> We have grave doubts as to whether it is possible for a person to acquire title to water by prescription under the Water Code and after a blanket adjudication of water rights by the courts.[799] The intent of the statute appears to be hostile to the acquisition of rights except as prescribed in the statute. We find persuasive reasoning and authorities which are contrary to that part of the decision in the Ebell case which recognized the right to acquire water rights by prescription.

"Limitation did not begin to run from the date water was used by defendants; but from the date their use deprived plaintiffs of their appropriated water, which was in 1945 * * *.

"Defendants acquired no right to the use of plaintiffs' appropriated water by limitation or prescription."

[793] *State* v. *W. S. Ranch Co.,* 69 N. Mex. 169, 364 Pac. (2d) 1036, 1040 (1961).

[794] See, e.g., *Davis* v. *Chamberlain,* 51 Oreg. 304, 316-317, 98 Pac. 154 (1908); *Gardner* v. *Wright,* 49 Oreg. 609, 628, 91 Pac. 286 (1907).

[795] *Ebell* v. *Baker,* 137 Oreg. 427, 438-440, 299 Pac. 313 (1931).

[796] *Tudor* v. *Jaca,* 178 Oreg. 126, 152, 164 Pac. (2d) 680 (1945), 165 Pac. (2d) 770 (1946).

[797] *Staub* v. *Jensen,* 180 Oreg. 682, 687, 178 Pac. (2d) 931 (1947).

[798] *Calderwood* v. *Young,* 212 Oreg. 197, 207-208, 315 Pac. (2d) 561 (1957), rehearing denied, 319 Pac. (2d) 184 (1957).

[799] In the latter regard, see "Character and Quality of the Prescriptive Title—Relation to Statutory Adjudication," *infra.*

> The court is always reluctant to overrule a previous decision unless the necessity therefor is apparent in the subsequent litigation. It is not necessary to decide the question in this case and we therefore refrain from so doing.

In a 1965 case, without specifically deciding this issue and without mentioning any previous Oregon cases in this regard, the court said, among other things:[800]

> Plaintiffs further contend that even if it should be found that they did not secure any statutory rights by appropriation or that they lost such rights by nonuse, they nevertheless have water rights to Walker Creek by prescriptive use. Assuming water rights could have been acquired by prescription at the time claimed, plaintiffs do not have prescriptive rights. As is true in other instances of adverse possession, the use establishing the right must be adverse.

(3) Texas. In 1921 the Texas Supreme Court said, in *Martin* v. *Burr,* "It is not an open question in Texas that an upper riparian proprietor may, by prescription, acquire the right to use the water of a running stream, in a special way and in excess of the right arising from ownership of his land, to the injury and detriment of lower riparian proprietors."[801] That this might be done by analogy to the statute of limitations barring the right of entry upon lands was acknowledged by the supreme court in the earliest cases.[802]

However, in 1931 the Galveston Court of Civil Appeals, referring to a dictum of the Texas Supreme Court in *Motl* v. *Boyd,*[803] considered it "no authority for the proposition that the mere use by pumping during the crop season of a large portion or all of the normal flow of a stream for any number of years could deprive a riparian land owner of his riparian right in the water in the stream. Such right, in our opinion, can only be taken by condemnation, or lost by estoppel, neither of which is pleaded nor shown by any evidence in this case."[804] With respect to the Galveston court's apparent attempt to negate the

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[800] *Day* v. *Hill,* 241 Ore. 507, 406 Pac. (2d) 148, 149 (1965).

[801] *Martin* v. *Burr,* 111 Tex. 57, 65, 228 S.W. 543 (1921).

And in a 1927 case, the court said, "[I]t is obvious that a court of equity would not, even at the suit of a riparian owner, enjoin the diversion of riparian water, unless the complainant was injured thereby, or under circumstances that would reasonably show a hostile and adverse user of sufficient moment to set in motion the statute of limitation, or prescription * * *." *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 610-611, 297 S.W. 225 (1927).

[802] *Haas* v. *Choussard,* 17 Tex. 588, 590 (1856); *Rhodes* v. *Whitehead,* 27 Tex. 304, 310-313 (1863); *Baker* v. *Brown,* 55 Tex. 377, 381 (1881). See also *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian,* 74 Tex. 170, 174, 11 S. W. 1078 (1889); *Gibson* v. *Carroll,* 180 S.W. 630, 634 (Tex. Civ. App. 1915).

With respect to the Texas 10-year statute and another 3-year statute of limitations, see "Basis of the Prescriptive Right—Analogy to Adverse Holding of Land—The Texas situation," *supra.*

[803] *Motl* v. *Boyd,* 116 Tex. 82, 127-128, 286 S.W. 458 (1926).

[804] *Freeland* v. *Peltier,* 44 S.W. (2d) 404, 409 (Tex. Civ. App. 1931).

possibility of acquiring prescriptive rights as against riparian rights, it may be noted that in addition to the fact that this was mere *dictum* rather than a direct holding, the case has no writ history. That is, the Texas Supreme Court was not called upon to review it. This means that in the absence of supreme court approval, the appellate court's holdings and comments can have no standing as authority in opposition to anything that the supreme court may have held with respect to loss of riparian rights by prescription.[805]

In 1947, the San Antonio Court of Civil Appeals said:[806]

> Appellants claim paramount rights to the use of the water of Las Moras Creek, acquired by prescription. An upper riparian proprietor may, by prescription, acquire the right to use the water of a running stream, in a special way and in excess of the right arising from ownership of his land, to the injury and detriment of lower riparian proprietors, and the time to perfect such a right by prescription is ten years. Martin v. Burr, 111 Tex. 57, 228 S.W. 543. [1921].[807]

(4) Wyoming. In a case decided in 1940, questions of prescriptive title to water rights *inter alia* were argued and decided. In its original opinion the supreme court stated:[808]

> 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 Company, 33 Wyo. 14, 236 P. 764.

And in its opinion on petition for rehearing, which was denied, the Wyoming Supreme Court stated:[809]

> Counsel have again argued the question of prescription at length. That no prescriptive title was obtained up to the time of the adjudication of the Little Laramie in 1892 was so clearly pointed out in the original opinion that we need not say anything

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[805] In a 1949 case, the Texas Supreme Court, without referring to the *Freeland* or *Martin* cases, dealt with prescriptive rights to the bed of a navigable stream. *Heard* v. *Texas,* 146 Tex. 139, 141, 145-146, 204 S.W. (2d) 344 (1947).

[806] *Stratton* v. *West,* 201 S.W. (2d) 80, 80-81 (Tex. Civ. App. 1947).

[807] Also see the discussion of *Woody* v. *Durham,* 267 S.W. (2d) 219, 221 (Tex. Civ. App. 1954), at notes 672-673 *supra,* in which the Forth Worth Court of Civil Appeals referred to *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 297 S.W. 225 (1927), discussed in note 801 *supra,* without referring to any other cases, in regard to the possibility of acquiring prescriptive water rights as against riparians.

[808] *Campbell* v. *Wyoming Dev. Co.,* 55 Wyo. 347, 395, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[809] 55 Wyo. at 413-414.

more on that point. The only possible question is as to prescription since that time, if a prescriptive title may be obtained at all in this state, which we refused to decide.[810]

Relation to Necessity for a Valid Statutory Appropriation

It is an elemental principle of western water rights law that one who obtains a permit and perfects a right to appropriate water holds a right that is junior to all previously existing appropriative rights on the same stream and, in a dual system State, may be inferior to existing riparian rights. If for the prescriptive period (in a State in which it is possible to acquire title to water rights by adverse possession and use) this junior appropriator diverts the entire quantity of water to which his right related and thereby precludes senior downstream appropriators and riparian owners from exercising their own rights when they need to do so, under all the circumstances necessary to establish prescriptive title, he renders his claim to the use of this full quantity immune to attack by those whose right he has invaded. In addition to having a valid appropriative right, subject to prior and superior downstream rights, he now has a prescriptive right which is prior and superior to them. The practical effect is to enhance materially his validly acquired appropriative right.

As discussed under the immediately preceding subtitles, the question has arisen in certain States as to whether a prescriptive claimant must follow the prevailing and purportedly exclusive appropriative rights law, as well as the law of adverse possession and use, or whether—unless halted by court order—he may simply make his adverse diversion of water and continue diverting it throughout the prescriptive period, carefully taking all the steps requisite to the fulfillment of a prescriptive right. In some States, as noted above, the legislatures forbid the acquisition of water rights by prescription; in some others the possibility has been judicially questioned.

In these situations it is not prescription *per se* that is objected to so much as acquisition of rights to the use of water without appropriating it under the orderly statutory procedure—which purports to be exclusive—in which the first and indispensable step ordinarily is the filing of an application to make the appropriation, and in which everything done in the process of acquiring the right is under the supervision of a central State administrative agency and is a matter of official record in its office.

The riparian doctrine has been one of the major parts of California water rights law and, as stated earlier under "Basis of the Prescriptive Right—Effect

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[810] In a subsequent case, without specifically deciding this issue, the Wyoming Supreme Court said: "Some more or less casual reference has been made in both the pleadings and the evidence to the use of irrigation water by the plaintiffs. However, no claim was based on this fact; and even though it had been, use of the water would not, standing alone, give them any rights to title by prescription. See *Campbell* v. *Wyoming Development Company,* 55 Wyo. 347, 100 P.2d 124, 102 P.2d 745 [1940]." *Hunziker* v. *Knowlton,* 322 Pac. (2d) 141, 145, rehearing denied, 324 Pac. (2d) 266 (Wyo. 1958).

on Irrigation Development in California," prescription undoubtedly facilitated, in marked degree, the growth of irrigation in the early decades of that State's water development. Since adoption of the permit system of appropriating water under the Water Commission Act[811] (now a part of the California Water Code), the question as to whether a riparian right may be taken by prescription without conforming to the statutory formalities for appropriating the water has been the subject of some disagreement, but not of court decision. The point was argued by counsel in a case decided in 1954, but was not discussed by the court because of its conclusion that no question of prescriptive rights was there involved.[812] But, as stated by Gavin M. Craig, who has examined the matter deeply, it "cannot indefinitely escape judicial inquiry."[813]

Mr. Craig made a comprehensive study of the nature of prescriptive water rights in California and concluded, among other things, that no "right of possession" is acquired by use of water of watercourses without a permit from the State, issued pursuant to the Water Code, because such policy is contrary to the policy and letter of the law; and that consequently no prescriptive title "good against the world" is acquired from such use by reason of the running of the statute of limitation against the cause of action of the former owner.[814] A literal interpretation and full application of the statute governing the appropriation of water, he says, would require that as a prerequisite to acquisition of a prescriptive water right, a permit to appropriate water be issued to the adverse user.[815]

Administrative interpretation of the necessity of complying with the Water

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[811] Cal. Stats. 1913, ch. 586.

[812] *Chuck* v. *Alves,* 124 Cal. App. (2d) 144, 148, 268 Pac. (2d) 94 (1954).

See also the majority opinion of Justice Traynor and the dissenting opinion of Justice Schauer in *Hudson* v. *West,* 47 Cal. (2d) 823, 306 Pac. (2d) 807, 808, 820 (1957), regarding the court's determination not to make a decision in this regard in the *Hudson* case. Justice Traynor said, *inter alia,* that "The parties have not raised this issue * * * and the judgment quieting title in defendants prejudices no right of the state of California, for neither it nor the Department of Public Works was a party to this action." 306 Pac. (2d) at 808. Justice Schauer, in dissent, contended *inter alia* that "the determination of the law on this question is material * * * to the issues in this case. Furthermore, this issue of law is important generally to the people of California. * * *" 306 Pac. (2d) at 820.

[813] Craig, G.M., "Prescriptive Water Rights in California and the Necessity for a Valid Statutory Appropriation," 42 Cal. Law Rev. 219 (1954). Mr. Craig undertook this analysis because the view had been expressed that the statute should not be given such interpretation and application, and that it does not affect prescriptive rights based upon adverse use without conforming to statutory water appropriation formalities: Kletzing, R.R., "Prescriptive Water Rights in California," 39 Cal. Law Rev. 369 (1951); Trowbridge, D., "Prescriptive Water Rights in California: An Addendum," 39 Cal. Law Rev. 525 (1951). Corwin W. Johnson undertook a somewhat similar analysis pertaining to Texas in "The Challenge to Prescriptive Water Rights," 30 Tex. Law Rev. 669 (1952).

[814] Craig, *supra* note 813, at 242.

[815] *Id.* at 219.

Code procedure in acquiring a prescriptive water right in California is stated in a publication prepared by the State Water Resources Control Board for the use of intending appropriators, as follows:[816]

> Since enactment of the Water Commission Act (effective December 19, 1914), it has not been possible to secure a right to appropriate or use water (other than as a riparian or overlying owner, or appropriator of percolating ground water), without first obtaining a permit from the State (see Water Code Section 1225 and *Crane* v. *Stevinson,* 5 Cal. 2d 387, 54 P. 2d 1100). It would appear to follow that although one who now uses water without a permit for a sufficient period of time may, under certain circumstances, foreclose objection by those who have been adversely affected, he does not thereby acquire a right to prevent diversions by others which deplete the supply of water available to him. Although California courts have not been called upon to determine this precise question, in view of the uncertainty in this respect and because in any event a prescriptive right can be finally determined only by a court of competent jurisdiction, it is the policy of the board to disregard a claim to water subject to the permit procedure which is based only upon use initiated subsequent to 1914 unless it is supported by a permit.

The relation of prescription to statutory adjudication is considered later under "Character and Quality of Prescriptive Title—Relation to Statutory Adjudication."

Character and Quality of Prescriptive Title

Characteristics

Usufructuary.—The prescriptive right is a usufructuary right, not a part or parcel of any particular land.[817]

Exclusive.—As noted earlier, under "Elements of the Prescriptive Right," there must be in the establishment of a prescriptive right, among other things, a claim of exclusive right. Also, as noted earlier under "Establishment of Prescriptive Title—Prescription not Favored—Burden of proof: Adverse use," the quantity of water to which the right attaches is a specific quantity that must be found by the court to be reasonably necessary for the requirements of the land for which the right was acquired. The right to this quantity of water is exclusive with respect to those against whom it has vested.[818]

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[816] California State Water Resources Control Board, "Regulations and Information Pertaining to Appropriation of Water in California," Cal. Admin. Code, tit. 23, p. 50 (1969).

[817] *Albaugh* v. *Mt. Shasta Power Corp.,* 9 Cal. (2d) 751, 765, 73 Pac. (2d) 217 (1937); *Alpaugh Irr. Dist.* v. *County of Kern,* 113 Cal. App. (2d) 286, 295, 248 Pac. (2d) 117 (1952).

[818] *E. Clemens Horst Co.* v. *Tarr Min. Co.,* 174 Cal. 430, 436-438, 163 Pac. 492 (1917); *Akin* v. *Spencer,* 21 Cal. App. (2d) 325, 332, 69 Pac. (2d) 430 (1937).

Effectiveness of Title

"A title by prescription is as effective as though evidenced by deed."[819] Likewise, once having been acquired, a prescriptive right "gives the acquirer as good a title as a decree, and if acquired against a decreed right, a better title to that water, although it may require a new decree as to the particular adversed water to gain a good record of the title."[820]

The Supreme Court of Hawaii rendered two early decisions pertaining to the conditions of a prescriptive easement. In one of these, where parties had acquired by prescription a right to water flowing from springs into kalo patches and thence into an auwai (ditch), they had an easement in the auwai which could not be cut, narrowed, or otherwise interfered with to their injury.[821] In another case in which plaintiff claimed a prescriptive right to divert water through a ditch located partly on defendant's land, the supreme court stated that the law "is well settled that when one has acquired, either by express grant or by prescription, an easement in the land of another, he may not substantially alter the mode of using it without the consent, express or implied, of the owner of the servient estate."[822]

This matter of conditions of prescriptive easement is more fully discussed later under "Measure of the Prescriptive Right."

Passing of Title

Prescriptive title, which is as good as that acquired by deed or otherwise, can be alienated only in the same way as such other title.[823] As in the case of adverse possession of land[824] for the statutory period, the prescriptive right to divert water not only bars a remedy, but extinguishes the right of the title holder of record and vests a title in the adverse holder.[825] The Utah Supreme

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[819] *Te Selle* v. *Storey,* 133 Mont. 1, 5, 319 Pac. (2d) 218 (1957); accord, *Waianae Co.* v. *Kailwilei,* 24 Haw. 1, 7 (1917); *George* v. *Gist,* 33 Ariz. 93, 98, 263 Pac. 10 (1928); *Ebell* v. *Baker,* 137 Oreg. 427, 440, 299 Pac. 313 (1931); *Pioneer Irr. Dist.* v. *Smith,* 48 Idaho 734, 738, 285 Pac. 474 (1930); *Dontanello* v. *Gust,* 86 Wash. 268, 270-271, 150 Pac. 420 (1915); *Strong* v. *Baldwin,* 154 Cal. 150, 162, 97 Pac. 178 (1908).

[820] *Jackson* v. *Spanish Fork West Field Irr. Co.,* 119 Utah 19, 31, 223 Pac. (2d) 827 (1950).

A prescriptive right usually is acquired as against only one or more water rights holders, leaving the rights of others unaffected. (See "Establishment of Prescriptive Title–Adverse Parties–Owners of rights affected," *supra.*) And prescriptive rights ordinarily do not run upstream. (See "Establishment of Prescriptive Title–Relative Locations on Stream Channel," *supra.*) Moreover, a prescriptive right often may be applicable to only a part of another's water right. (See "Measure of the Prescriptive Right–Part of Invaded Right Only," *infra.*)

[821] *Davis* v. *Afong,* 5 Haw. 216, 224 (1884).

[822] *Scharsch* v. *Kilauea Sugar Co.,* 13 Haw. 232, 236 (1901).

[823] *George* v. *Gist,* 33 Ariz. 93, 98, 263 Pac. 10 (1928).

[824] *Waianae Co.* v. *Kaiwilei,* 24 Haw. 1, 7 (1917).

[825] *Wutchumna Water Co.* v. *Ragle,* 148 Cal. 759, 764, 84 Pac. 162 (1906); *E. Clemens Horst Co.* v. *Tarr Min. Co.,* 174 Cal. 430, 436-437, 163 Pac. 492 (1917).

Court said that "a right to use water which is lost by prescription or adverse user is *in effect* a passing of such water right from the original appropriator to the adverse user."[826] [Emphasis added.] But the California Supreme Court has said that this is a new title, which can be held by a corporation as well as by an individual.[827] The loss of a water right by reason of adverse use of the water on the part of another for the statutory prescriptive period coincides with the acquisition of a right to the use of that water by the adverse party.[828]

In a case cited frequently with respect to prescriptive rights to the use of water in Texas, the Texas Supreme Court held that claimants had connected themselves with any prescriptive claims of their predecessors in title by means of the deeds to their lands. It was not denied that the deeds would have passed matured prescriptive rights appurtenant to the lands, any more than it would be denied that the inchoate title or claim of an adverse possessor, without lawful right, would pass by his deed to the land possessed. It seemed manifest, said the court, that it could not be the intent of the grantor and grantee that the grantor's deed to land together with all rights and appurtenances thereto should not pass that which the grantor claimed as an appurtenant right to the land.[829]

Relation to Appropriative and Riparian Rights in California

In the earlier discussion, under "Character of Water Rights Affected—Rights Subject to Loss by Prescription," some of the facets of prescriptive losses of appropriative and riparian rights are discussed. Owing to the important role that both major doctrines have had in California and the extensive amount of litigation in the high courts concerning them, it is appropriate to emphasize, at this point, some of the interdoctrinal relationships of prescriptive, appropriative, and riparian rights as they have developed in that State.

Classification of rights.—Although prescriptive rights are sometimes listed with appropriative and riparian rights as though the California law of watercourses comprised a threefold, rather than a dual, system of water rights—or listed with appropriative and overlying (ground water) rights where percolating ground waters are involved—in the author's opinion it is doubtful that the California decisions actually support such a classification.

A prescriptive right often may be applicable to only a part of another's water right. (See "Measure of the Prescriptive Right—Part of Invaded Right Only," *infra.*) In that event, only the title to that part of the right is affected.

[826] *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 361 Pac. (2d) 407 (1961).

[827] *Alhambra Addition Water Co.* v. *Richardson*, 72 Cal. 598, 608-609, 14 Pac. 379 (1887); *Montecito Valley Water Co.* v. *Santa Barbara*, 144 Cal. 578, 594, 77 Pac. 1113 (1904).

[828] Regarding this and related matters, see "Basis of the Prescriptive Right—Coincidence of Loss and Acquisition of Water Right."

[829] *Martin* v. *Burr*, 111 Tex. 57, 67, 228 S.W. 543 (1921).

Appropriative-prescriptive rights.—Various decisions have dealt with appropriative rights that have become prescriptive against downstream riparian owners. The right of one who appropriates water under the current laws governing acquisition of appropriative rights may be either senior or junior to other appropriative rights in the same source of supply, depending upon their respective priorities; but it will become superior to paramount riparian rights only after having, by reason of 5 years' adverse use and all other elements of prescription, become prescriptive with respect to them.[830]

As a result of the constitutional amendment of 1928,[831] the California courts now hold that surplus or excess water above the reasonable beneficial requirements of riparian or overlying owners or prior appropriators may be appropriated without giving compensation, but that "an appropriative taking of water which is not surplus is wrongful and may ripen into a prescriptive right" under all the circumstances necessary to constitute prescription.[832] Appropriative rights in nonsurplus waters that have thus become prescriptive are still appropriative rights. They differ from rights to the use of surplus waters in that the latter are solely appropriative, while the former are both appropriative and prescriptive.

The taking of water on public lands for nonriparian purposes, under grant from the United States under the Act of 1866, was formerly considered by some California courts to be the only pure form of appropriation—appropriation under the Civil Code on private lands for use on private lands being "but another form of prescription" in that the original rights of the downstream riparian landowners could not be thereby divested until the period of prescription had run in favor of the appropriator.[833] The term "appropriation" is now used in California, however, to refer to "any taking of water for other than riparian or overlying uses."[834]

The identity of certain appropriative rights with prescriptive rights has been recognized in numerous California court decisions. From the recognition of this identity it followed that the principle of "first in time, first in right" imposed upon appropriators in the Civil Code applied to appropriative-

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[830] Most California law with respect to conflicting riparian-appropriation interrelationships was made in controversies in which the riparian right was adjudged superior. Regarding differences, as against appropriative rights, that may arise due to the time that lands passed into private ownership, and related factors, see, in chapter 6, "Interrelationships of the Dual Water Rights Systems—The Status in Summary: By States—California."

[831] Cal. Const. art. XIV, § 3.

[832] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 925-927, 207 Pac. (2d) 17 (1949). "As to the exported water it is clear that the rights of appellant could not be overlying in character and must be either appropriative or prescriptive or an aggregation of the two." *Alpaugh Irr. Dist.* v. *County of Kern,* 113 Cal. App. (2d) 286, 292-293, 248 Pac. (2d) 117 (1952).

[833] *San Bernardino* v. *Riverside,* 186 Cal. 7, 13-14, 198 Pac. 784 (1921). See chapter 7 at notes 166-167.

[834] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 925, 207 Pac. (2d) 17 (1949).

prescriptive rights against private lands as well as to appropriative rights acquired on the public domain;[835] that in the case of either, the diversion could be made "by means of an artificial and a natural channel":[836] that an appropriator who claimed a prescriptive right against riparian owners must be limited to reasonable beneficial use as against them as well as against other appropriators;[837] and that the position of an appropriator who fails to apply the water to a beneficial use is not strengthened by resting his claim on the basis of prescription.[838]

An appropriation made under the Civil Code did not of itself deprive the riparian owner of any right.[839] It extinguished the riparian right only when combined with a completed prescriptive right.[840] This could be accomplished as well by a nonstatutory appropriation—an appropriation made otherwise than under the provisions of the Civil Code—prior to the time the Water Commission Act went into effect in 1914, when combined with prescription.[841]

After noting that some authorities say that the term "appropriation" is properly used only with reference to the taking of water from a surface stream on public land for nonriparian purposes, the supreme court said: "The California courts, however, use the term to refer to any taking of water for other than riparian or overlying uses. * * * Where a taking is wrongful, it may ripen into a prescriptive right."[842]

Prescription by riparians.—The owner of riparian land may acquire a prescriptive right as against a downstream riaprian owner.[843] A California appellate court has said that riparian rights are separate and distinct from prescriptive or contractual rights to water, and "an owner of land adjacent to a stream may acquire prescriptive title to water therefrom, distinct from, or even in addition to his normal riparian rights."[844]

Many statements with respect to improper riparian uses on riparian land, in controversies between riparian owners only, have referred to the adverse rights simply as prescriptive rights when so acquired, without using the term "appropriation," there being no reason to do otherwise. For example, the California Supreme Court has said, "It has repeatedly been held that the

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[835] *San Bernardino* v. *Riverside,* 186 Cal. 7, 28, 198 Pac. 784 (1921).

[836] *Evans Ditch Co.* v. *Lakeside Ditch Co.,* 13 Cal. App. 119, 130, 108 Pac. 1027 (1910).

[837] *California Pastoral & Agric. Co.* v. *Madera Canal & Irr. Co.,* 167 Cal. 78, 85-87, 138 Pac. 718 (1914).

[838] *Bazet* v. *Nugget Bar Placers,* 211 Cal. 607, 617-618, 296 Pac. 616 (1931).

[839] *Palmer* v. *Railroad Comm'n,* 167 Cal. 163, 172-173, 138 Pac. 997 (1914); *Duckworth* v. *Watsonville Water & Light Co.,* 150 Cal. 520, 531, 89 Pac. 338 (1907).

[840] *San Bernardino* v. *Riverside,* 186 Cal. 7, 13-14, 198 Pac. 784 (1921); *Turner* v. *East Side Canal & Irr. Co.,* 169 Cal. 652, 657-658, 147 Pac. 579 (1915).

[841] *Alta Land & Water Co.* v. *Hancock,* 85 Cal. 219, 223-224, 24 Pac. 645 (1890).

[842] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 925, 207 Pac. (2d) 17 (1949).

[843] *Moore* v. *California Oreg. Power Co.,* 22 Cal. (2d) 725, 735, 140 Pac. (2d) 798 (1943).

[844] *Mt. Shasta Power Corp.* v. *McArthur,* 109 Cal. App. 171, 191, 292 Pac. 549 (1930).

seasonal storage of water is * * * not within the rights of the riparian owner and is adverse to the rights of the lower owner on the stream."[845] But in a few instances, the view has been expressed that such improper riparian use on riparian land is appropriative as well as prescriptive, thus: "Seasonal storage of water for power purposes is not a proper riparian use, but constitutes an appropriation, so that if continued for the time prescribed by the statute of limitations, it will ripen into a prescriptive right."[846]

Relation to Statutory Adjudication

A fundamental facet of this relationship has been declared in Colorado and Oregon. In a Colorado case, in which the priorities of the appropriators had been previously established in a statutory adjudication proceeding, according to the supreme court, these priorities thereby became *res judicata.* The court said:[847]

> It was incumbent on plaintiff also to appear at such proceeding and establish its date of priority out of Sand Creek. Having failed so to do, the priorities as decreed became final, and plaintiff lost its relative right as to those so decreed * * * . True, * * * as plaintiff urges, a water right may be acquired by prescription in proper case, but where, as here, the water rights on a stream are decreed, prescriptive right must result from adverse use of an already existing and decreed priority, not from an independent and undecreed claim against all other users from the stream.[848]

And the Oregon Supreme Court said:[849] "We think it clear that the general adjudication of the rights of the parties clearly establishes their rights as of the date of the decree. If adverse possession can upset the decree it must be by virtue of events occurring subsequent to the decree." After making the

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[845] *Moore* v. *California Oreg. Power Co.,* 22 Cal. (2d) 725, 734, 140 Pac. (2d) 798 (1943).

[846] *Colorado Power Co.* v. *Pacific Gas & Elec. Co.,* 218 Cal. 559, 564, 24 Pac. (2d) 495 (1933). In another case the court said, "[T]o what extent may such owner detain, store or impound the waters before the right ceases to be a riparian one and becomes an adverse or appropriative right which may ripen into a prescriptive right, is the question?" *Senaca Consol. Gold Mines Co.* v. *Great Western Power Co.,* 209 Cal. 206, 215, 287 Pac. 93 (1930). Seasonal storage was held to be adverse to the downstream riparian owners.

[847] *Granby Ditch & Res. Co.* v. *Hallenbeck,* 127 Colo. 236, 242, 255 Pac. (2d) 965 (1953).

[848] In earlier Colorado cases, it was likewise indicated that in exceptional circumstances a prescriptive right to the use of water might be established, but not in derogation of the statutory provisions relating to water adjudications by one who had full opportunity to previously assert his right under such proceedings. *Bieser* v. *Stoddard,* 73 Colo. 554, 558-559, 216 Pac. 707 (1923); *German Ditch & Res. Co.* v. *Platte Valley Irr. Co.,* 67 Colo. 390, 392-394, 178 Pac. 896 (1919).

[849] *Calderwood* v. *Young,* 212 Oreg. 197, 207, 315 Pac. (2d) 561 (1957), rehearing denied, 319 Pac. (2d) 184 (1957). See *Ebell* v. *Baker,* 137 Oreg. 427, 436-438, 299 Pac. 313 (1931).

foregoing declaration, the Oregon court referred to the water appropriation act and stated its doubts as follows:[850]

> We have grave doubts as to whether it is possible for a person to acquire title to water by prescription under the Water Code and after a blanket adjudication of water rights by the courts. The intent of the statute appears to be hostile to the acquisition of rights except as prescribed in the statute. We find persuasive reasoning and authorities which are contrary to that part of the decision in the Ebell case which recognized the right to acquire water rights by prescription. * * * It is not necessary to decide the question in this case and we therefore refrain from so doing.[851]

The relation of prescription to the necessity for a valid statutory appropriation has been considered earlier under "Establishment of Prescriptive Title—Relation to Necessity for a Valid Statutory Appropriation."

Changes in Exercise of Prescriptive Right

The prescriptive right is limited to the extent of the use that ripened into the right. (See "Measure of the Prescriptive Right," below.) It cannot be increased to a greater extent, or in such a way as to increase the burden upon the party whose title was divested.[852] An additional prescriptive right would need to be perfected for this purpose.

Easements in land for use of water.—Where the right to make use of another's land is involved, the prescriptive right must be exercised in a reasonable manner; and while the right to make necessary repairs is incident to the use of the property, the burden of the dominant tenement cannot be enlarged to the manifest injury of the servient tenement by any alteration in the mode of exercising the prescriptive right.[853]

Thus, a person who acquires a prescriptive right to use the land of another for a dam and ditch in a particular place has no right to change the site of those facilities.[854] The right of prescription is no more subject to variation than one created by deed; hence the right to maintain a ditch acquired by prescription does not carry with it the right to enlarge the ditch, change its course materially, or make a new ditch over the servient property.[855]

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[850] 212 Oreg. 207-208.

[851] See "Establishment of Prescriptive Title—Possibility of Establishing Prescriptive Water Right Negated or Questioned—Questionings," *supra.*

[852] *North Fork Water Co.* v. *Edwards,* 121 Cal. 662, 665-666, 54 Pac. 69 (1898).

[853] *Id.*

[854] *Hannah* v. *Pogue,* 23 Cal. (2d) 849, 854, 147 Pac. (2d) 572 (1944); *Dunn* v. *Thomas,* 69 Nebr. 683, 684, 96 N.W. 142 (1903). See *Vestal* v. *Young,* 147 Cal. 715, 717-718, 82 Pac. 381 (1905); *Wanders* v. *Nelson,* 98 Cal. App. (2d) 267, 270, 219 Pac. (2d) 852 (1950).

[855] *Babcock* v. *Gregg,* 55 Mont. 317, 320, 178 Pac. 284 (1918). See *Stalcup* v. *Cameron Ditch Co.,* 130 Mont. 294, 295-296, 300 Pac. (2d) 511 (1956).

However, it is only material changes in the nature or extent of the servitude that are so precluded.[856] Hence the enlargement of a dam does not defeat the right to an easement by prescription if there is no evidence that the burden on the servient tenement was increased by the change in the dam, that any larger area was flooded, or that the use was changed.[857] In a 1909 case, the Kansas Supreme Court said, the prescriptive right "does not depend upon the use to which a dam is put, and the riparian owners can make no complaint of a change in that respect, unless of course it is one which results in an increased obstruction to the flow of the stream, which is not found to be the case here."[858]

It is a well recognized rule that an express or implied grant of an easement carries with it certain secondary easements essential to its enjoyment, such as the right to make repairs, renewals, and replacements. Such incidental easements may be exercised so long as the holder uses reasonable care and does not increase the burden on or go beyond the boundaries of the servient tenement, or make any material changes therein.[859]

For example, it was held in Utah that an irrigation company which held a prescriptive easement for its ditch across defendants' land was entitled to go upon such land for the purpose of waterproofing its ditch, and still retain its easement, notwithstanding the fact that this improvement would cut off the benefit to defendants of having their shrubbery nurtured by seepage from the ditch, provided that the work was done in a reasonable manner. The supreme court believed that the servient owners had not shown the method proposed to be unreasonable, and held that they be restrained from interfering with prosecution and completion of the waterproofing.[860]

Rights to the use of water.—(1) General. Where the use of water is concerned, other considerations apply. The land of the party whose water right is divested by prescription is injured by the taking away of the water for use on the adverse party's land, but it may or may not be further injured by a subsequent change in the manner of exercising the prescriptive right. And so it is held that a person entitled to the use of water by prescription is not bound to use the water in exactly the same manner or to continue the same precise application of the water as was exercised during the time when the right was being acquired, provided the altered use does not impose an added burden on the servient tenement.[861]

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[856] *Ward* v. *Monrovia,* 16 Cal. (2d) 815, 821, 108 Pac. (2d) 425 (1940); *Burris* v. *People's Ditch Co.,* 104 Cal. 248, 252, 37 Pac. 922 (1894).

[857] *Chapman* v. *Sky L'Onda Mutual Water Co.,* 69 Cal. App. (2d) 667, 681, 159 Pac. (2d) 988 (1945).

[858] *Whitehair* v. *Brown,* 80 Kans. 297, 300, 102 Pac. 783 (1909).

[859] *Ward* v. *Monrovia,* 16 Cal. (2d) 815, 821-822, 108 Pac. (2d) 425 (1940).

[860] *Big Cottonwood Tanner Ditch Co.* v. *Moyle,* 109 Utah 213, 229-241, 174 Pac. (2d) 148 (1946).

[861] *De la Cuesta* v. *Bazzi,* 47 Cal. App. (2d) 661, 671, 118 Pac. (2d) 909 (1941).

Regardless of whether the party whose right has been prescripted is injured by a change in the manner of exercising the right, other parties may be so injured. Therefore, the rules with respect to changes in the exercise of appropriative rights apply to rights vested by prescription. For example, the principle expressed in the California Civil Code[862]—and reenacted in the Water Code[863]—with respect to changes in the exercise of appropriative rights acquired thereunder has been expressly applied in several cases of change or attempted change in the exercise of prescriptive rights without regard to whether such rights represented appropriations made pursuant to the statute.[864]

The proper form of judgment in a case in which a riparian owner sues to establish his riparian rights, but in which defenses of prescription are established, said the California Supreme Court, is "to declare the right of the respective defendants to make the diversions of water from * * * [the source of supply] to the quantity as to which the prescriptive right was found to be established and to permit them to continue the diversion of such quantity, but to enjoin them from making any greater diversion of the water of the river by means of improved dams or canals or otherwise."[865]

(2) Point of diversion. As between cases of statutory appropriation on the one hand, and cases of prescription without appropriating water under the statute on the other hand, "there can be no difference in principle as to a change in the point of diversion."[866] That is to say, the change may be lawfully made if others are not thereby injured and if the change does not conflict with some controlling statutory provision.

In a 1915 Washington case, after noting that the law seems to be well settled that an appropriator may change his point of diversion so long as such change does not result in damage to others, the supreme court held:[867]

> While this general rule seems to have been applied for the most part to appropriators strictly speaking, which it must be conceded respondent is not, but one claiming the water [by prescription] irrespective of appropriation laws, yet it seems applicable by analogy here. * * * We think these changes in points of diversion did not affect the continuity of respondent's adverse use.

(3) Place of use. The same rule applies to changes in place of use. "The owner of a prescriptive right to the waters of a stream has not the unconditional right to change the place of its use at his pleasure." Where others

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[862] Cal. Civ. Code § 1412 (1872).

[863] Cal. Water Code § 1706 (West 1956).

[864] *Cheda* v. *Southern Pac. Co.*, 22 Cal. App. 373, 376-377, 134 Pac. 717 (1913); *Willits Water & Power Co.* v. *Landrum*, 38 Cal. App. 164, 174, 175 Pac. 697 (1918); *Scott* v. *Fruit Growers' Supply Co.*, 202 Cal. 47, 52-53, 258 Pac. 1095 (1927).

[865] *E. Clemens Horst Co.* v. *Tarr Min. Co.*, 174 Cal. 430, 438, 163 Pac. 492 (1917).

[866] *Willits Water & Power Co.* v. *Landrum*, 38 Cal. App. 164, 174, 175 Pac. 697 (1918).

[867] *Mally* v. *Weidensteiner*, 88 Wash. 398, 403-404, 153 Pac. 342 (1915).

have subordinate rights in the waters of the stream, "the right to change the place of use can only be exercised when, and to the extent that, such change will not injure the subordinate right."[868]

Such change will result in injury, for example, where the quantity of water used by the prescriptive holder is increased at the expense of others;[869] or where others are deprived of the benefit of the return flow from land irrigated under the prescriptive right.[870]

(4) Purpose of use. Changes in the purpose of use under prescriptive rights are governed by the same principles. The California Supreme Court said: "The right being a prescriptive one, it is a usufructuary right, not a part or parcel of any particular land. As long as the beneficial use is continued, the owners of the prescriptive right may change their place or character of use, provided vested rights are not injured thereby."[871]

Measure of the Prescriptive Right

The Use Which Conferred the Title

Many western decisions are authority for the proposition that rights by prescription are limited by the extent of the use which conferred the title. The right cannot be enlarged to place a greater burden or servitude on the property. Such rights are *stricti juris*, and should not be extended beyond the actual user.[872]

In 1902, the Oregon Supreme Court summed up this principle in a statement that is as valid now in jurisdictions in which prescriptive water rights are recognized as it then was:[873]

> It is axiomatic that the right acquired by prescription is exactly commensurate with the right enjoyed; that is, the extent of the

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[868] *Southern Cal. Inv. Co.* v. *Wilshire,* 144 Cal. 68, 71-72, 77 Pac. 767 (1904).

[869] *Southside Improvement Co.* v. *Burson,* 147 Cal. 401, 410-411, 81 Pac. 1107 (1905).

[870] *Scott* v. *Fruit Growers' Supply Co.,* 202 Cal. 47, 52-53, 258 Pac. 1095 (1927).

[871] *Albaugh* v. *Mt. Shasta Power Corp.,* 9 Cal. (2d) 751, 765-766, 73 Pac. (2d) 217 (1937).

[872] *Moore* v. *California Oregon Power Co.,* 22 Cal. (2d) 725, 735-736, 740, 140 Pac. (2d) 798 (1943); *Loosli* v. *Heseman,* 66 Idaho 469, 481, 162 Pac. (2d) 393 (1945); *Wallace* v. *Winfield,* 96 Kans. 35, 38, 149 Pac. 693 (1915); *Chessman* v. *Hale,* 31 Mont. 577, 584, 79 Pac. 254 (1905); *Paloucek* v. *Adams,* 153 Nebr. 744, 746, 45 N.W. (2d) 895 (1951); *Boynton* v. *Longley,* 19 Nev. 69, 76, 6 Pac. 437 (1885); *Hall* v. *Carter,* 33 Tex. Civ. App. 230, 234, 77 S.W. 19 (1903, error refused); *Nielson* v. *Sandberg,* 105 Utah 93, 103-104, 141 Pac. (2d) 696 (1943); *Dontanello* v. *Gust,* 86 Wash. 268, 270-271, 150 Pac. 420 (1915); *Union Mill & Min. Co.* v. *Dangberg,* 81 Fed. 73, 91 (C.C.D. Nev. 1897); *Garden City Co.* v. *Bentrup,* 228 Fed. (2d) 334, 340-341 (10th Cir. 1955). In a case involving a spring, if it were true that the flow of the spring had gradually increased from year to year, the claimant would not be entitled to any increase that accrued after the inception of the adverse right. *Hall* v. *Taylor,* 57 Idaho 662, 669, 67 Pac. (2d) 901 (1937).

[873] *Salem Mills Co.* v. *Lord,* 42 Oreg. 82, 103, 69 Pac. 1033, 70 Pac. 832 (1902).

> enjoyment measures the extent of the right. Furthermore, the right gained is always confined to the right as exercised during the full period required by the statute of limitations * * * . This being so, it is essential that he who seeks to establish such a right must show definitely what right he has enjoyed, the extent of it, and that it has been continuous in that relation for the statutory period.

Quantity of Water Diverted

From the foregoing it follows that the prescriptive right cannot exceed the quantity of water actually diverted and put to beneficial use.[874] "In the absence of a finding of the actual diversion of some definite quantity of water, sufficiently supported by evidence, the plea of prescriptive right to take water * * * must necessarily fail."[875]

The prescriptive right extends only to the quantity of water taken during the prescriptive period, and does not include the taking of an additional quantity in the future.[876] Furthermore, in California it has been held that *even for public use* a prescriptive right cannot be acquired for water to be used in the future in excess of that used during the prescriptive period.[877] With respect to California municipal water supplies, therefore, the growing needs of a city—which may be taken into consideration in acquiring *appropriative* rights—nevertheless do not measure the city's *prescriptive* rights:[878]

> The future need of the city is not a measure of the servitude upon the lands represented by plaintiff. The right of these lands cannot be made to decrease with the future increasing needs of the city. The only safe rule is that defendant be restricted to the maximum amount of water heretofore actually diverted and beneficially applied during a given period of time. In other words, the extent of its previous beneficial use is the measure of its exsiting right.

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[874] *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 14 Haw. 50, 62 (1902); *Turner* v. *East Side Canal & Irr. Co.,* 169 Cal. 652, 655-658, 147 Pac. 579 (1915); *Eden Township County Water Dist.* v. *Hayward,* 218 Cal. 634, 638-639, 24 Pac. (2d) 492 (1933). Hence, "The fact that one has a ditch running through his land which he keeps full of water diverted from a stream does not give him any right to such water as against others who have rights therein," for the right extends only to the quantity actually put to a beneficial use. *Northern Cal. Power Co., Consol.* v. *Flood,* 186 Cal. 301, 304, 199 Pac. 315 (1921). The use of a given quantity of water, no matter how long continued, would give no right to the use of a greater quantity. *Hall* v. *Carter,* 33 Tex. Civ. App. 230, 234, 77 S.W. 19 (1903, error refused).

[875] *Logan* v. *Guichard,* 159 Cal. 592, 597, 114 Pac. 989 (1911).

[876] *San Bernardino* v. *Riverside,* 186 Cal. 7, 25, 31, 198 Pac. 784 (1921).

[877] *Turner* v. *East Side Canal & Irr. Co.,* 169 Cal. 652, 657, 147 Pac. 579 (1915). The taking of water into a canal, where it is allowed to run to waste pending the finding of customers who will use it at some future time, does not constitute a present benificial use of the wasted water so as to initiate the period of prescription therefor.

[878] *Eden Township County Water Dist.* v. *Hayward,* 218 Cal. 634, 638, 24 Pac. (2d) 492 (1933).

A right gained by prescription is always confined to the right exercised for the full period of time required by the statute of limitations; and one who enlarges the use within that time cannot, at the end of the period, claim the use as so enlarged within the period.[879]

Capacity of the diversion ditch necessarily limits the quantity of water to which a prescriptive right may be acquired, where the ditch in question is the only means of diverting the water.[880] On the other hand, the fact that claimants' ditches were capable of carrying more water than they needed did not strengthen their claim of prescriptive title to all the waters of the stream as against another water user who had held prescriptive rights for a longer period of time.[881]

In California, it is necessary that the water be put to a *reasonable beneficial* use; that is, the amount actually used and reasonably necessary for the useful purpose to which the water has been applied. The necessary quantity is a question of fact in each case.[882] "[T]here is no such thing as the acquirement by such an appropriator of a title by prescription" of any right to divert more water than is reasonably necessary for a useful or beneficial purpose, no matter how long a diversion in excess thereof has continued. His "color of title" in acquiring a prescriptive right against a riparian owner extends to no other water.[883]

Period of Use

Portion of the time only.—The use of a certain quantity of water during only a portion of the time is not sufficient to give title to that quantity continuously. One cannot acquire a prescriptive right to use water during a particular period of the year—say, from November to April or May—in which he has not made use of the water. Nor, if he uses water during only 2 days of each month, can he claim the right during the intervals of nonuse.[884]

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[879] *Loosli* v. *Heseman,* 66 Idaho 469, 481, 162 Pac. (2d) 393 (1945); *Boynton* v. *Longley,* 19 Nev. 69, 76, 6 Pac. 437 (1885).

[880] *Edendale Land Co.* v. *Morgan,* 93 Wash. 554, 557, 161 Pac. 360 (1916).

[881] *Weitensteiner* v. *Engdahl,* 125 Wash. 106, 116-117, 215 Pac. 378 (1923).

[882] *Pabst* v. *Finmand,* 190 Cal. 124, 133, 135, 211 Pac. 11 (1922).

[883] *California Pastoral & Agric. Co.* v. *Madera Canal & Irr. Co.,* 167 Cal. 78, 85-86, 138 Pac. 718 (1914).

Cal. Const. art. XIV, § 3, adopted in 1928, provides *inter alia* that "The right to water or to the use of 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."

[884] *Pabst* v. *Finmand,* 190 Cal. 124, 134, 211 Pac. 11 (1922); *Witherill* v. *Brehm,* 74 Cal. App. 286, 299, 240 Pac. 529 (1925); *Bazet* v. *Nugget Bar Placers,* 211 Cal. 607, 616, 296 Pac. 616 (1931); *Northern Cal. Power Co., Consol.* v. *Flood,* 186 Cal. 301, 304-306, 199 Pac. 315 (1921).

In an Oregon case, the use of water by upstream appropriators during the months of July and August of each year throughout the statutory period of limitation, adversely and under a claim of right, was held to have ripened into prescriptive rights against a downstrean mill that had shut down during that period of months each year, the prescriptive rights extending to the use of the water during these 2 months only. The issue, which the supreme court decided in the negative, was whether the mill owner could lawfully sell a part of its appropriation for use above the diversions of the appropriative-prescriptive users during the 2 months of milling inactivity each year.[885]

Rotation.—The time of use of water under a prescriptive claim would be involved in the alteration of or complete departure from a rotation system under which water had been distributed to holders of established rights, or vice versa.

In one of the earliest Hawaiian water rights decisions, it was said that to change the system by which water was originally distributed—that is, an allotment by time—"is to change the water rights themselves."[886] A change made adversely, then, would be an infringement of the rights of others who depended on the system, and it undoubtedly would ripen into a right if all of the elements of prescription were satisfied.

The right to use water by day, as against others who formerly enjoyed use both by day and by night, was recognized in Hawaii as having been acquired by prescription.[887] This was the exact opposite of a prescriptive right to deviate from an established rotation system. It was, in effect, the conversion by prescription of rights to continuous flow of water into rights by rotation, that is, alternate day and night rights.

It follows that a right to a change in the time of use of water may be acquired by prescription without disturbing in any way the actual quantity of water to which the right attaches. If in a given case the net use is the same under a system of continuous flow as under a system of rotation, the right to a given quantity of water would not be affected by a change from one system to the other. It so happens that the net use of water for irrigation under the continuous delivery method often proves to be greater than the net use on the same lands under rotation.[888] In such case, of course, one who effected by

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[885] *In re North Powder River,* 75 Oreg. 83, 98-100, 144 Pac. 485 (1914), 146 Pac. 475 (1915).

[886] *Wilfong* v. *Bailey,* 3 Haw. 479, 480 (1873).

[887] *Lonoaea* v. *Wailuku Sugar Co.,* 9 Haw. 651, 661-662 (1895). Kalo lands had had the right of use of water both by day and night. With the introduction of cane in the district, and the acquisition and use on cane lands of some of the old kalo water rights, a custom resulted of using water on the cane lands by day and on most of the kalo lands at night. The cane growers now claimed, and were decreed, a prescriptive right to their day use under these rights.

[888] Hutchins, W. A., "Delivery of Irrigation Water," U.S. Dept. Agr. Tech. Bul. 47, pp. 7-24 (1928).

prescription a change from continuous flow to rotation can claim only the quantity that he has actually used under the new prescriptive system.

Part of Invaded Right Only

A water right may be lost, not only wholly but even in part, by prescription.[889] The prescriptive title acquired by the adverse claimant extends to only the quantity of water actually applied to reasonable beneficial use. Such quantity of water often may be only a portion of the quantity of water to which the invaded right originally extended, thus leaving the remaining portion of the invaded right intact.

Loss of Prescriptive Rights

Under a provision of the California Civil Code to the effect that a servitude is extinguished, among other ways, when the servitude was acquired by enjoyment, "by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment,"[890] it has been held that nonuse for a period of 5 years would extinguish a prescriptive water right.[891] According to a California court opinion, prescriptive rights may be lost by "abandonment, forfeiture, or by operation of law."[892] And such rights may be lost by adverse use on the part of others.[893]

In an early Texas decision, it was stated that a prescriptive right may be lost by abandonment.[894]

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[889] *Hubbs & Miner Ditch Co.* v. *Pioneer Water Co.,* 148 Cal. 407, 417, 83 Pac. 253 (1906); *Allen* v. *Swadley,* 46 Colo. 544, 547-548, 554, 105 Pac. 1097 (1909); *Haines* v. *Marshall,* 67 Colo. 28, 31-32, 185 Pac. 651 (1919); *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.,* 14 Haw. 50, 62, 63 (1902); *Mally* v. *Weidensteiner,* 88 Wash. 398, 411, 153 Pac. 342 (1915).

[890] Cal. Civ. Code § 811 (4) (West 1954).

[891] *Garbarino* v. *Noce,* 181 Cal. 125, 130, 183 Pac. 532 (1919); *Northern Cal. Power Co., Consol.* v. *Flood,* 186 Cal. 301, 305-306, 199 Pac. 315 (1921). See also the discussion at notes 379-381 *supra.*

[892] *Lema* v. *Ferrari,* 27 Cal. App. (2d) 65, 72, 80 Pac. (2d) 157 (1938), cited in 93 C.J.S. *Waters* § 166 (1956). As to forfeiture, see *Lindblom* v. *Round Valley Water Co.,* 178 Cal. 450, 456, 173 Pac. 994 (1918); *Bazet* v. *Nugget Bar Placers,* 211 Cal. 607, 617-618, 296 Pac. 616 (1931). In the *Bazet* case, the California Supreme Court said *inter alia,* quoting from the *Lindblom* case, that " 'The defendant's prescriptive rights do not extend to the impounding of the water for the mere purpose of holding it in storage. If, then, the defendant has ceased for a period of more than five years to apply to a beneficial use any part of the water so retained * * * it shall not be permitted to continue the diversion and storage of the excess over its legitimate needs, and thus prevent the application of such excess to the needs of others * * *.' " 211 Cal. at 617-618.

[893] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 927, 207 Pac. (2d) 17 (1949).

[894] *Rhodes* v. *Whitehead,* 27 Tex. 304, 315-316 (1863).

A North Dakota statute provides, among other things, that a "prescriptive water permit" acquired under the statute may be lost by forfeiture.[895]

For further discussion of the loss of prescriptive rights by adverse use, see the earlier discussion under "Character of Water Rights Affected—Rights Subject to Loss by Prescription—Prescriptive right."

ESTOPPEL

An Equitable Principle

The loss of a water right by estoppel results from the fact that the holder is barred, because of circumstances for which he is held responsible, from asserting his title before a court of equity. This principle "involves an equitable concept whose animating principle is natural or abstract right and justice—a principle which justly discountenances or frowns upon transactions the consummation of which would work a gross injustice upon the rights of a person."[896] As stated by the California Supreme Court:[897]

> The defense of estoppel rests upon the doctrine that a right conceded for the purpose of such defense to exist in a party, he shall not be permitted to assert against another to the latter's injury because of the existence and proof of certain facts and conditions which would render its assertion inequitable. The question as to the application of this well-defined legal proposition as between the parties to an action in the nature of things depends upon the facts of each particular case.

The various elements of equitable estoppel are discussed immediately below. Some other facets of estoppel, including estoppel by deed and estoppel by judgment, are discussed later.[898]

Elements of Equitable Estoppel

Under the following subtopics, the elements of estoppel are considered separately, chiefly with respect to only one or the other of the parties. But throughout the discussion it is implicit that no estoppel can be created unless the one party either does something, or fails to do something that he should do, and the other party in his turn responds thereto. Both cause and effect must be definite.

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[895] N. Dak. Cent. Code Ann § 61-04-22 (Supp. 1969), described at note 646 *supra.*

[896] *Stepp* v. *Williams,* 52 Cal. App. 237, 254-255, 198 Pac. 661 (1921).

[897] *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 137, 287 Pac. 475 (1930).

[898] Regarding estoppel by deed, see "Some Other Facets—Grant of Riparian Right," *infra.*

Parties

Commonly private parties.—Litigated cases in which questions of estoppel arise with respect to claims of rights to the use of water commonly involve private parties—individuals and private corporations or other organizations. Estoppel ordinarily has not been invoked against public entities. Following, however, are some decisions concerning estoppel as against public entities.

Some decisions regarding public entities.—(1) Municipal corporation. In a case in which the pueblo rights of the City of San Diego were first litigated and established, the California Supreme Court held that the position of public trust which a municipal corporation occupies in the handling of water supplies for the needs of its inhabitants controls the question of estoppel against such municipality. Even if it were to be conceded that a right based upon estoppel could arise by virtue of mere acquiescence in its assertion as between private persons, the supreme court was "satisfied that no such claim of right could come into being as against a municipal corporation, founded upon its mere acquiescence or that if its officials in the diversion by any number of upper appropriators, or even of upper riparian owners of the waters of a stream, to the use of the waters of which such public or municipal corporation was entitled as a portion of its public rights and properties held in perpetual trust for public use."[899]

(2) Irrigation district. The Idaho Supreme Court held that water owned by an irrigation district and dedicated to the irrigation of lands within it could not be supplied to lands outside its boundaries so long as needed within it; that a contract purporting to impose such an obligation on the district is *ultra vires* and void. Nor could it be made the basis of estoppel against the district. "Otherwise, the will and purpose of the legislature, and the public policy established by its dedication of such water to the lands within the district, could be defeated by ill-advised contracts of the directors. * * * Estoppel cannot be invoked in aid of such a contract."[900]

(3) The State. (a) Texas. According to the Texas Supreme Court, mistakes on the part of public officials in giving tentative opinions following preliminary investigations do not estop the State nor deprive it of its property. The failure of public officers to perform their duties will not work an estoppel against the State.[901]

The Austin Court of Civil Appeals stated subsequently that the State is not estopped nor its title to land adversely affected by the dereliction or failure to act of its officers.[902] More recently, however, this court declared it to be well

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[899] *San Diego* v. *Cuyamaca Water Co.*, 209 Cal. 105, 143, 287 Pac. 475 (1930). See also *Los Angeles* v. *Glendale*, 23 Cal. (2d) 68, 142 Pac. (2d) 289, 296 (1943).

[900] *Jensen* v. *Boise-Kuna Irr. Dist.*, 75 Idaho 133, 140-142, 269 Pac (2d) 755 (1954).

[901] *Weatherly* v. *Jackson*, 123 Tex. 213, 225, 71 S.W. (2d) 259 (1934).

[902] *Humble Oil & Refining Co.* v. *State*, 162 S.W. (2d) 119, 134 (Tex. Civ. App. 1942, error refused).

settled that when the State makes itself a party to an action in its proprietary capacity, it is subject to the law of estoppel, as are other parties litigant; the situation being different from situations in which the State is exercising its power of sovereignty.[903]

(b) Colorado. In an action by a reservoir owner to enjoin the State Engineer's ruling on water rights, plaintiff asserted, in effect, that the State Engineer was estopped to administer plaintiff's decrees pursuant to the questioned ruling because for many years plaintiff stored quantities of water exceeding the decreed capacity of the reservoir and that such storage was sanctioned, permitted, or authorized by other State Engineers and water officials. If this were done, the supreme court held, it could not alter or modify plaintiff's decreed rights. One of the trial court's specific findings was "That the doctrine of estoppel cannot be invoked against the state engineer acting in his public capacity." To this the Colorado Supreme Court agreed, holding that "The doctrine of estoppel cannot be invoked against a government agency acting in its public capacity."[904]

(c) New Mexico. In a 1957 case the State of New Mexico obtained a judgment against a person who allowed water from an artesian well to flow 24 hours per day over grazing land, without a constructed irrigation system, and who was held to have lost his appropriative right by nonbeneficial user for more than the statutory period because of waste of water. The defendant contended that the action against him was barred on the ground of estoppel by reason of laches on the part of the artesian well supervisor, who had knowledge of defendant's method of watering his grass and livestock. The State contended that estoppel and laches do not run against it to prevent its acting in a governmental capacity. The supreme court said, in part:[905]

> To govern themselves, the people act through their instrumentality which we call the State of New Mexico. The State of New Mexico functions through persons who are for the time being its officers. The failure of any one of these persons to enforce any law may never estop the people to enforce that law either then or at any future time. * * *
>
> The doctrine of estoppel by reason of laches does not aid the defendant. Public policy forbids the application of the doctrine of estoppel to a sovereign state where public waters are involved. The general rule is, that neglect or omission of public officers to do their duty cannot work an estoppel against the state.

In a decision rendered by the New Mexico Supreme Court later in the same year—an action brought by the State to enjoin water diversion—injunction was refused on the merits. Pointing out that much of the time and space in the

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[903] *State* v. *Bryan,* 210 S.W. (2d) 455, 464 (Tex. Civ. App. 1948, error refused n.r.e.). See Annot., 1 A.L.R. (2d) 338 (1948), L.C.S. § 6 (1971).

[904] *Orchard City Irr. Dist.* v. *Whitten* 146 Colo. 127, 361 Pac. (2d) 130, 133, 135 (1961).

[905] *State ex rel. Erickson* v. *McLean,* 62 N. Mex. 264, 273-274, 308 Pac. (2d) 983 (1957).

briefs of the parties was devoted to the question whether the State Engineer, as an alter ego of the State in this proceeding, was estopped to claim a forfeiture of the water right in question, even if otherwise he might have prevailed, the supreme court concluded that the findings on the merits made it unnecessary to determine "the interesting question raised by the parties on the issue of estoppel, particularly, whether the State itself can be estopped to assert its right in the administration of the public waters of the State. Hence, we pass a decision on this matter raised in the case. Compare, State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P. 2d 983."[906]

In a subsequent case, the court said "Appellant's contention is in the nature of an estoppel, which does not apply to a sovereign state where public waters are involved."[907]

Party Making Admission

Knowledge of his own title.—To establish an estoppel, it must appear that the party making the admissions by his declarations or conduct was surprised of the true state of his own title.[908]

Representations.—It is necessary that the party making the admission shall "always intend, or at least must be so situated that he should be held to have expected, that the other party shall act."[909]

But it is not necessary that there should be "direct or affirmative verbal representations," for such representations may arise by implication. If a person by his conduct induces another to believe in the existence of a particular state of facts, such conduct constitutes an implied representation of the truth of that state of facts.[910]

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[906] *State* v. *Davis,* 63 N. Mex. 322, 334, 319 Pac. (2d) 207 (1957).

[907] *State ex rel. Reynolds* v. *Fanning,* 68 N. Mex. 313, 361 Pac. (2d) 721, 724 (1961), citing *State ex rel. Erickson* v. *McLean,* 62 N.M. 264, 308 Pac. (2d) 983 (1957).

[908] *Biddle Boggs* v. *Merced Min. Co.,* 14 Cal. 279, 367-368 (1859); *Campbell* v. *Shivers,* 1 Ariz. 161, 172-173, 25 Pac. 540 (1874); *New Mercer Ditch Co.* v. *New Cache la Poudre Irrigating Ditch Co.,* 70 Colo. 351, 354-355, 201 Pac. 557 (1921); *Farmers Res. & Irr. Co.* v. *Fulton Irrigating Ditch Co.,* 108 Colo. 482, 500, 120 Pac. (2d) 196 (1941); *State* v. *Nielsen,* 163 Nebr. 372, 388-389, 79 N.W. (2d) 721 (1956); *In re Ahtanum Creek,* 139 Wash. 84, 95, 245 Pac. 758 (1926); *Trambley* v. *Luterman,* 6 N. Mex. 15, 26, 27 Pac. 312 (1891); *Martinez* v. *Cook,* 56 N. Mex. 343, 352, 244 Pac. (2d) 134 (1952); *Staub* v. *Jensen,* 180 Oreg. 682, 689, 178 Pac. (2d) 931 (1947); *Bennett* v. *Salem,* 192 Oreg. 531, 541, 235 Pac. (2d) 772 (1951); *Heidelberg* v. *Harvey,* 366 S.W. (2d) 121, 123-124 (Tex. Civ. App. 1963).

[909] *Verdugo Canyon Water Co.* v. *Verdugo,* 152 Cal. 655, 673-674, 93 Pac. 1021 (1908); *Smyth* v. *Neal,* 31 Oreg. 105, 112-113, 49 Pac. 850 (1897); *Bennett* v. *Salem,* 192 Oreg. 531, 541, 235 Pac. (2d) 772 (1951); *Rigney* v. *Tacoma Light & Water Co.,* 9 Wash. 576, 586, 38 Pac. 147 (1894).

[910] *Irrigated Valleys Land Co. of Cal.* v. *Altman,* 57 Cal. App. 413, 428, 207 Pac. 401 (1922); *State* v. *Nielsen,* 163 Nebr. 372, 388, 79 N.W. (2d) 721 (1956); *Risien* v. *Brown,* 73 Tex. 135, 142-143, 10 S.W. 661 (1889).

Estoppel was held not to have been created in a case where the holder of the water right resisted adverse use on the part of others and finally turned to the courts for relief.[911]

Turpitude.—The party against whom an estoppel is declared must have been guilty of fraud, misrepresentation, or concealment of essential facts.[912] There must have been an express intention on his part to deceive, or such culpable negligence as to amount to constructive fraud.[913]

Before a court of equity will estop the holder of a water right from asserting the right—the result being to deprive him of the right and to transfer its enjoyment to someone else—there must have been some degree of turpitude on his part.[914] "Constructive fraud underlies every equitable estoppel * * * ."[915]

In a New Mexico case, it was observed: "Appellant urges that, in order to create estoppel, there must be a degree of moral turpitude involved. This is another way of saying that there can be no estoppel without fraud. But, conceding this to be the law, still it is fraud to deny that which has been previously affirmed."[916]

In 1901, the Utah Supreme Court declared:[917] "It has frequently been held that an estoppel will not arise simply from a breach of promise as to future conduct, or from a mere disappointment of expectations. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing [water] right."

Effect of silence.—Mere silence on the part of the holder of the right, "disconnected from other circumstances in evidence," does not create an estoppel.[918] "A mere passive acquiescence where one is under no duty to speak does not raise an estoppel."[919]

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[911] *Anderson* v. *Bassman,* 140 Fed. 14, 25 (C.C.N.D. Cal. 1905).

[912] *Anaheim Union Water Co.* v. *Semi-Tropic Water Co.,* 64 Cal. 185, 194-195, 30 Pac. 623 (1883); *Sherlock* v. *Greaves,* 106 Mont. 206, 217, 76 Pac. (2d) 87 (1938); *Bennett* v. *Salem,* 192 Oreg. 531, 541, 235 Pac. (2d) 772 (1951).

[913] *Biddle Boggs* v. *Merced Min. Co.,* 14 Cal. 279, 367-368 (1859); *Farmers Res. & Irr. Co.* v. *Fulton Irrigating Ditch Co.,* 108 Colo. 482, 500, 120 Pac. (2d) 196 (1941).

[914] *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 142, 287 Pac. 475 (1930); *Farmers Res. & Irr. Co.* v. *Fulton Irrigating Ditch Co.,* 108 Colo. 482, 500, 120 Pac. (2d) 196 (1941); *Kramer* v. *Deer Lodge Farms Co.,* 116 Mont. 152, 174-175, 151 Pac. (2d) 483 (1944).

[915] *Moore* v. *Sherman,* 52 Mont. 542, 547, 159 Pac. 966 (1916).

[916] *La Luz Community Ditch Co.* v. *Alamogordo,* 34 N. Mex. 127, 141, 145, 279 Pac. 72 (1929).

[917] *Elliot* v. *Whitmore,* 23 Utah 342, 354, 65 Pac. 70 (1901).

[918] *Lux* v. *Haggin,* 69 Cal. 255, 278-279, 4 Pac. 919 (1884), 10 Pac. 674 (1886); *Moore* v. *Sherman,* 52 Mont. 542, 548, 159 Pac. 966 (1916); *Scott* v. *Jardine Gold Min. & Mill Co.,* 79 Mont 485, 495-496, 257 Pac. 406 (1927); *Bolter* v. *Garrett,* 44 Oreg. 304, 306-307, 75 Pac. 142 (1904).

[919] *Verdugo Canyon Water Co.* v. *Verdugo,* 152 Cal. 655, 674, 93 Pac. 1021 (1908); accord, *Nahaolelua* v. *Kaaahu,* 10 Haw. 18, 21 (1895); *Sherlock* v. *Greaves,* 106 Mont. 206, 216-217, 76 Pac. (2d) 87 (1938); *Brown* v. *Gold Coin Min. Co.,* 48 Oreg. 277,

Failure to object to the diversion of water by another, when there is no infringement of one's rights and when he is not called upon to object and in fact has no right to object, does not estop him from subsequently asserting his right.[920] And so mere silence will not work an estoppel, except where the party against whom the estoppel is invoked has stood by and has seen the other party infringing his rights, the circumstances being such that he was under an obligation to speak.[921]

Inequitable conduct.—Throughout the foregoing statement of elements of estoppel with reference to the party who is or is not estopped, as the case may be, there runs the expressed or implied theme—the injustice of allowing such party to hold his water right intact despite his *inequitable conduct,* active or passive, in misleading the other party concerning such right to the serious injury of the latter. In a 1957 decision, the Arizona Supreme Court stated:[922]

> Estoppel arises where one with knowledge of the facts has acted in a particular manner so that he ought not to be allowed to assert a position inconsistent with his former acts to the prejudice of others who have relied thereon. * * * Essentially the doctrine of estoppel requires of a party consistency of conduct when inconsistency would work substantial injury to another.

And the Nebraska Supreme Court has said:[923] "[W]hen a person knowing his rights takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right."

A striking illustration of estoppel based upon inequitable conduct appears in the circumstances of a Utah Case. Because of his extensive knowledge of a stream system and water rights therein, plaintiff was employed by a company—defendant in this case—which was preparing for an adjudication of all existing water rights. One of plaintiff's duties was to advise the company as to any adverse claims of which he knew, but he remained silent as to his own adverse claim. In addition he appeared as a witness, rendered much advice to

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284, 86 Pac. 361 (1906); *Oakes* v. *Dickson,* 225 Oreg. 95, 357 Pac. (2d) 385, 387 (1960). "Silence can never be the basis of an estoppel unless there is a duty to speak." *Willadsen* v. *Crawford,* 75 S. Dak. 161, 165, 60 N.W. (2d) 692 (1953).

[920] *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 142, 287 Pac. 475 (1930); *Wimer* v. *Simons,* 27 Oreg. 1, 21-22, 39 Pac. 6 (1895).

[921] *Hall* v. *Webb,* 66 Cal. App. 416, 425-426, 226 Pac. 403 (1924); *Carson* v. *Hayes,* 39 Oreg. 97, 107, 65 Pac. 814 (1901).

[922] *Tucson* v. *Koerber,* 82 Ariz. 347, 356-357, 313 Pac. (2d) 411 (1957).

[923] *State* v. *Nielsen,* 163 Nebr. 372, 388-389, 79 N.W. (2d) 721 (1956). For other statements concerning inequitable conduct and consequences, see *Moore* v. *Sherman,* 52 Mont. 542, 547, 159 Pac. 966 (1916); *Sherlock* v. *Greaves,* 106 Mont. 206, 217, 76 Pac. (2d) 87 (1938); *Smyth* v. *Neal,* 31 Oreg. 105, 112-113, 49 Pac. 850 (1897); *Tanner* v. *Provo Res. Co.,* 76 Utah 335, 344-345, 289 Pac. 151 (1930).

the company's attorneys, and recommended that the company enter into a stipulation. The company relied heavily on his counsel and judgment. The Utah Supreme Court held:[924]

> To us there appears to be an overwhelming preponderance of evidence to the effect that defendant relied greatly on the knowledge and advice of plaintiff, and that by his conduct, active and passive, plaintiff misled defendant to its detriment. We hold, therefore, that plaintiff is now estopped to assert his claim as against defendant which has changed its position in reliance on plaintiff's advice and conduct.

Some miscellaneous circumstances wherein estoppel was held to have arisen.—(1) Where opposing parties acquiesced in an equal or equitable distribution of water for several years, the older users were estopped from claiming priority or precluding the later ones from participating in the common water supply.[925]

(2) A ditch owner who allowed others to settle along and use the ditch to take water to their lands for years, was estopped by his course and conduct from excluding them now.[926]

(3) The conduct and silence of parties in failing to assert their claims when certain deeds were executed were estopped from doing so later.[927] "It is elementary that he who fails to assert his alleged rights, when in good faith he should have done so, is estopped from afterwards asserting the same."[928]

(4) One who sold land to another for development of water for distribution to consumers outside the State, knowing the latter's purpose, was estopped from questioning the latter's right to take the water outside the State.[929]

(5) Long continued use of a ditch for conveying water purchased from an irrigation company, under a claim of absolute and permanent right, was held to amount to more than a mere revocable license. Acquiescence by another—not only by silence but by affirmative conduct—was held to estop him from denying the right.[930]

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[924] *Tanner* v. *Provo Res. Co.*, 99 Utah 139, 155-157, 98 Pac. (2d) 695 (1940).

In *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 472-473, 137 Pac. (2d) 634 (1943), the court considered the requirements of estoppel and held that the facts necessary to constitute estoppel did not exist in the case.

[925] *Dalton* v. *Rentaria*, 2 Ariz. 275, 279-280, 15 Pac. 37 (1887); *Biggs* v. *Utah Irrigating Ditch Co.*, 7 Ariz. 331, 351-352, 64 Pac. 494 (1901).

[926] *Lehi Irr. Co.* v. *Moyle*, 4 Utah 327, 342-343, 9 Pac. 867 (1886).

[927] *Fabian* v. *Collins*, 3 Mont. 215, 229, 231 (1878).

[928] *Orient Min. Co.* v. *Freckleton*, 27 Utah 125, 130-131, 74 Pac. 652 (1903).

[929] *Newport Water Co.* v. *Kellogg*, 31 Idaho 574, 579-580, 174 Pac. 602 (1918).

[930] *Wedgworth* v. *Wedgworth*, 20 Ariz. 518, 522, 181 Pac. 952 (1919). "Long and continuous knowing acquiescence in another's use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim." *Hillcrest Irr. Dist.* v.

(6) The officers of an organization who stood by and allowed another organization to enlarge the ditch which they controlled, and to expend money and labor on the common ditch with the understanding that the second organization had acquired an interest in the same, were estopped to deny the right of the latter.[931]

Other Party

Lack of knowledge.—Various courts have indicated that in establishing an estoppel, it must appear that the other party was destitute not only of all knowledge of the true state of the title, but also of the means of acquiring such knowledge.[932]

Reliance upon admission.—It must also appear that the other party relied directly upon the admission of the water right holder, and that he will be injured by allowing its truth to be disproved.[933]

The elements constituting estoppel must be found in some representations made or some position assumed, upon which the other party, having the right so to do, in good faith relied and from which inequitable consequences must follow if the representations be repudiated or the position be changed.[934]

The party who claims the estoppel obviously could not have relied upon the conduct of the other had he known the true state of the latter's title; hence his lack of such knowledge is essential to the estoppel.[935]

"All these authorities agree that no estoppel can exist unless the party invoking it was led to place himself in the prejudicial position, in part, at least, by his own ignorance of the rights of the other party, his own lack of knowledge of the true state of the title." In the absence of such knowledge as to the true state of the water title, it is necessary that the party claiming the

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Nampa & Meridian Irr. Dist., 57 Idaho 403, 411, 66 Pac. (2d) 115 (1937). However, it is not considered adverse possession by a junior appropriator when it is the duty of the prior appropriator to allow the junior appropriator's use of the water when the prior appropriator has no immediate need. Thus, since such use is not adverse, the prior appropriator could not have lost his prior right by laches or acquiescence. *Martiny* v. *Wells*, 91 Idaho 215, 217-219, 419 Pac. (2d) 470, 473 (1966).

[931] *Halford Ditch Co.* v. *Independent Ditch Co.*, 22 N. Mex. 169, 175, 159 Pac. 860 (1916).

[932] *Biddle Boggs* v. *Merced Min. Co.*, 14 Cal. 279, 367-368 (1859); *Farmers Res. & Irr. Co.* v. *Fulton Irrigating Ditch Co.*, 108 Colo. 482, 500, 120 Pac. (2d) 196 (1941); *Smyth* v. *Neal*, 31 Oreg. 105, 112-113, 49 Pac. 850 (1897); "the other party must have been ignorant of the truth," *Bennett* v. *Salem*, 192 Oreg. 531, 541, 235 Pac. (2d) 772 (1951).

[933] *Biddle Boggs* v. *Merced Min. Co.*, 14 Cal. 279, 367-368 (1859); *Tucson* v. *Koerber*, 82 Ariz. 347, 356-357, 313 Pac. (2d) 411 (1957); *La Luz Community Ditch Co.* v. *Alamogordo*, 34 N. Mex. 127, 141, 145, 279 Pac. 72 (1929); *Bennett* v. *Salem*, 192 Oreg. 531, 541, 235 Pac. (2d) 772 (1951); *Willadsen* v. *Crawford*, 75 S. Dak. 161, 164, 60 N. W. (2d) 692 (1953); *Risien* v. *Brown*, 73 Tex. 135, 142-143, 10 S. W. 661 (1889); *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 586, 38 Pac. 147 (1894).

[934] *Moore* v. *Sherman*, 52 Mont. 542, 547, 159 Pac. 966 (1916).

[935] *Biddle Boggs* v. *Merced Min. Co.*, 14 Cal. 279, 367-368 (1859).

benefit of an estoppel must, by the words, conduct, or silence of the first party, be induced or led to do what he would not otherwise do.[936] He must have acted thereon to his prejudice;[937] or "the person sought to be estopped must have failed to do some act which it was within his power to do and the person claiming the estoppel must have relied on such failure to such an extent and for such a period that the subsequent doing of such act would cause him injury."[938]

In one of its important estoppel decisions the Utah Supreme Court observed:[939]

> It has been repeatedly held that a person by accepting benefits from a contract may be estopped from questioning its existence, validity, and effect. Furthermore, where a person with knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction or will offer no opposition, and the other one in reliance upon such belief alters his position, such person is estopped from repudiating the transaction to the other's prejudice.

Measure of Right

In holding that one is not called upon to object to a diversion that does not reduce his own water supply, and that there must be some degree of turpitude in the conduct of a party in order to raise an estoppel, the California Supreme Court stated:[940]

> It is to be noted in this immediate connection that the claim of estoppel which the upper appropriator of the waters of a stream undertakes to assert against a lower claimant thereto, based upon the latter's acquiescence, must be founded not upon the amplitude of the former's claim as set forth in his recorded appropriation of such waters, nor by the carrying capacity of his ditches or flumes, but upon the actual diversion and use of said waters and only to the extent thereof.

Some Other Facets

Procedure

Estoppel must be pleaded.[941] In a 1908 case the South Dakota Supreme Court said:[942]

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[936] *Verdugo Canyon Water Co.* v. *Verdugo,* 152 Cal. 655, 673-674, 684, 93 Pac. 1021 (1908).

[937] *Irrigated Valleys Land Co. of Cal.* v. *Altman,* 57 Cal. App. 413, 428, 207 Pac. 401 (1922).

[938] *San Joaquin & Kings River Canal & Irr. Co.* v. *Worswick,* 187 Cal. 674, 693, 203 Pac. 999 (1922).

[939] *Tanner* v. *Provo Res. Co.,* 76 Utah 335, 344-345, 289 Pac. 151 (1930).

[940] *San Diego* v. *Cuyamaca Water Co.,* 209 Cal. 105, 142-143, 287 Pac. 475 (1930).

[941] *Sturgeon* v. *Brooks,* 73 Wyo. 436, 461-462, 281 Pac. (2d) 675 (1955).

[942] *Edgemont Improvement Co.* v. *N.S. Tubbs Sheep Co.,* 22 S. Dak. 142, 145-146, 115 N.W. 113((1908).

> 'Defendants contend that the court erred in not finding that the plaintiff was estopped from now claiming the property.' This contention is not available, for the reason there is no assignment of error to support it. A finding to that effect was not requested, and the absence of such a finding was not specified in the bill of exceptions or statement of the case upon which the motion for a new trial was based.

Relation to Prescription

At issue in a 1953 South Dakota case was whether defendant had acquired the right to burden the land now owned by plaintiff with the continued maintenance of a dam. The supreme court said, "To hold that plaintiff is estopped as claimed by appellants would simply result in a reduction of the statutory time required to acquire such right by prescription. We do not determine that an estoppel may never be asserted which will result in a shortening of the statutory time, but if such be the result the elements of the estoppel should clearly appear."[943]

Estoppel by Judgment

As stated by the South Dakota Supreme Court:[944]

> The salutary doctrine of estoppel by judgment has so established the adjudications of the courts in the confidence of mankind as to result in their universal recognition and acceptance as the highest order of indisputable evidence of rights. Such a judgment as is here under consideration which has stood as an unquestioned record of the priority and extent of a valuable property right in the use of water, and upon which successive grantees have depended as a record of title, should not be nullified except for the most cogent and impelling reasons.

Executed Parol License

The validity of parol sales of water rights has been sustained under circumstances of equity, where the transferee entered into possession, made use of the water, and made investments on the strength of the parol title. It was said late in the 19th century by the California Supreme Court that in many cases a mere parol license which had been executed, and upon the faith of which investments had been made, had been held irrevocable.[945] During the same general period, it was held in Oregon that this principle rested upon equitable estoppel; that after one has acted on the faith of a parol license and

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[943] *Willadsen* v. *Crawford,* 75 S. Dak. 161, 164, 60 N.W. (2d) 692 (1953).
[944] *Cundy* v. *Weber,* 68 S. Dak. 214, 221, 300 N.W. 17 (1941).
[945] *Smith* v. *Green,* 109 Cal. 228, 234, 41 Pac. 1022 (1895).

made permanent improvements, the owner will be estopped from revoking his license to prevent injustice.[946]

In a 1959 opinion, the Oregon Supreme Court advanced what it considered a more nearly accurate statement than previously made in the many cases that accepted the theory that an oral agreement may be taken out of the statute of frauds by part performance:[947]

> Although we have said in some of our cases that the doctrine of part performance rests upon the theory of equitable estoppel, it would be more accurate to state the doctrine more broadly and recognize that the terms of an oral agreement will be enforced (1) if there is conduct corroborating and unequivocally referable to the oral agreement sufficient to satisfy the policy of the statute designed to minimize perjured claims and the opportunities for fraud, and (2) if there are equitable grounds for enforcing the contract whether those grounds are found in facts establishing the basis for a true estoppel or in facts justifying the avoidance of unjust enrichment or relief from fraud.

These parol transfers have been enforced in equity not only as between the parties to the transactions, but also with respect to successors in interest of the original parties.[948]

Executed parol licenses to the use of water have also been upheld in favor of the licensees as against claimants by adverse possession.[949]

Grant of Riparian Right

In Chapter 10, under "The Riparian Right–Property Characteristics–Severance of Riparian Right From Land–Grant," there are provisions relating to conveyance and estoppel and to the effect on other riparians. Salient points insofar as the doctrine of estoppel is concerned are summarized here.

It is competent for an owner of riparian land to grant the use of the water in whole or in part, leaving the fee of the land vested in the grantor.[950] As

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[946] *Curtis* v. *La Grande Water Co.*, 20 Oreg. 34, 43-44, 23 Pac. 808, 25 Pac. 378 (1890); *Lavery* v. *Arnold*, 36 Oreg. 84, 86-87, 57 Pac. 906, 58 Pac. 524 (1899).

[947] *Luckey* v. *Deatsman*, 217 Oreg. 628, 343 Pac. (2d) 723, 725 (1959).

[948] *Churchill* v. *Russell*, 148 Cal. 1, 4-5, 82 Pac. 440 (1905); *Fogarty* v. *Fogarty*, 129 Cal. 46, 47-49, 61 Pac. 570 (1900); *Stepp* v. *Williams*, 52 Cal. App. 237, 253, 198 Pac. 661 (1921); *Irrigated Valleys Land Co. of Cal.* v. *Altman*, 57 Cal. App. 413, 426-427, 207 Pac. 401 (1922).

Additional cases dealing with parol licenses, grants, or agreements are discussed at notes 955-956 *infra*.

[949] *Ortman* v. *Dixon*, 13 Cal. 33, 36 (1859). *Northern Cal. Power Co., Consol.* v. *Flood*, 186 Cal. 301, 305, 199 Pac. 315 (1921).

[950] *Alta Land & Water Co.* v. *Hancock*, 85 Cal. 219, 223, 24 Pac. 645 (1890); *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 346-347, 349, 93 N.W. 781 (1903); *Johnson* v. *Armour & Co.*, 69 N. Dak. 769, 776-779, 291 N.W. 113 (1940); *Fitzstephens* v. *Watson*, 218 Oreg. 185, 344 Pac. (2d) 221, 229 (1959); *Redwater Land & Canal Co.* v. *Reed*, 26 S.

between the riparian owner and his grantee, such a deed is binding,[951] providing conveyancing requirements have been met. It is held that the effect of such a grant is an estoppel against the grantor.[952] This "self-created estoppel runs not merely against the consenting riparian owner but likewise against the riparian lands."[953] In such cases of estoppel by deed, the courts apparently have not required the establishment of all the elements of equitable estoppel discussed previously.[954]

The effect of estoppel upon riparian rights was involved in several Texas cases, including *Motl* v. *Boyd*, best known for its *dicta* concerning the origin and extent of riparian rights in Texas. The actual holding was that the superior right of riparian defendants as against plaintiff appropriators was denied them, not because it did not exist, but for the reason that in this case defendants were estopped to assert it. The basis of estoppel was a "grant, license, or easement"—given verbally by Lee, predecessor in title of defendants, to plaintiffs' predecessors—to construct a dam and ditch on Lee's riparian land, from and by means of which water would be taken to plaintiffs' lands

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Dak. 466, 487, 128 N.W. 702 (1910); *Corpus Christi* v. *McLaughlin,* 147 S.W. (2d) 576, 578 (Tex. Civ. App. 1940, error dismissed).

[951] *Spring Valley Water Co.* v. *Alameda County,* 88 Cal. App. 157, 164, 263 Pac. 318 (1927, hearing denied by supreme court). See *Gould* v. *Eaton,* 117 Cal. 539, 543, 49 Pac. 577 (1897); *Fitzstephens* v. *Watson,* 218 Oreg. 185, 344 Pac. (2d) 221, 228 (1959).

[952] *Fitzstephens* v. *Watson,* 218 Oreg. 185, 344 Pac. (2d) 221, 228 (1959); *Duckworth* v. *Watsonville Water & Light Co.,* 158 Cal. 206, 213, 110 Pac. 927 (1910), 170 Cal. 425, 429-430, 150 Pac. 58 (1915).

In *California Pastoral & Agric. Co.* v. *Madera Canal & Irr. Co.,* 167 Cal. 78, 86, 138 Pac. 718, 721 (1914), partially quoted approvingly in *Fitzstephens* v. *Watson,supra* at 229, the court said with respect to "a riparian owner who has purported to grant to another his riparian right without granting the land of which that right is part and parcel[:] The effect of such a grant is simply to convey the grantor's right to the use of the water on his own riparian land, and to estop the grantor to complain against any use of the water which the grantee may make to the injury of such riparian right. * * * Such estoppel is effective as to the whole riparian right of the grantor, simply because of the terms of his purported grant thereof. By reason of his voluntary act, he has waived for himself and his successors all claims based on the doctrine of riparian rights, and is in no position to complain of any invasion thereof by the grantee or his successors." Related matters are discussed in the part of chapter 10 referred to at the outset of this subtopic.

[953] *Spring Valley Water Co.* v. *Alameda County,* 88 Cal. App. 157, 168, 263 Pac. 318 (1927).

[954] 31 C.J.S. *Estoppel* § 10, at 297 (1964) states that "Estoppel by deed is distinguishable from estoppel in pais [a term often used interchangeably with 'equitable estoppel' (see § 59 (c), at 374-375)] in that it appears from the face of the deed, and it does not require all of the elements of an estoppel in pais. [The elements of 'equitable estoppel' or 'estoppel in pais' are described in § § 67-77.]

"The operation of an estoppel by deed is different in scope from the operation of an estoppel in pais, and, unlike estoppels in pais, a technical estoppel by deed may conclude a party without reference to the moral qualities of his conduct."

downstream.[955] In another case, wherein a written agreement with respect to the use of riparian land and water rights was extended orally, it was held that where one party to an oral contract has, in reliance thereon, so far performed his part of the agreement that it would be perpetrating a fraud on him to allow the other party to repudiate the contract and set up the statute of frauds in justification thereof, equity will regard the case as being removed from the operation of the statute and will enforce the contract.[956]

Even if a grant to a nonriparian is verbal or oral and usual conveyancing requirements have not been met, under some circumstances a riparian owner's conduct may be such as to estop him from asserting his riparian water rights in derogation of the claims of others. Questions as to whether this completely bars or only partially restricts his diversion and use of water, or whether it results in an actual severance of the riparian right from the land, depend on the circumstances of the particular case.

Mutual Estoppel

In an Idaho case, it was stated in the syllabus by the court:[957]

> Where prior and subsequent locators of the waters of a stream have misunderstandings and differences with reference to the right to divert the waters of a stream and convey them to distant points for use, and they reach an agreement and understanding whereby each shall be permitted to construct his diverting works and ditches, and in reliance thereon they do construct such works and expend money thereon, each will therefore be estopped from denying the right of the other to divert and use the waters in accordance with such agreement or understanding.

In a controversy in the Federal court for the District of Montana between claimants of water rights on both sides of the state line separating Montana and Wyoming the district court said:[958]

> 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

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[955] *Motl* v. *Boyd,* 116 Tex. 82, 128-130, 286 S.W. 458 (1926). No compensation was paid or asked for, but in reliance on this verbal consent, works were constructed and put to use at considerable expense and water was taken by means thereof for 35 years without protest by the riparian owners.

[956] *Texas Co.* v. *Burkett,* 117 Tex. 16, 30-33, 296 S.W. 273 (1927); temporary estoppel to revoke a revocable permission or license, under the facts, *Risien* v. *Brown,* 73 Tex. 135, 142-143, 10 S.W. 661 (1889). See *Fort Quitman Land Co.* v. *Mier,* 211 S.W. (2d) 340, 343 (Tex. Civ. App. 1948, error refused n.r.e.).

Other cases pertaining to similar or related matters are discussed in the preceding subtopic, "Executed Parol License."

[957] *Saunders* v. *Robison,* 14 Idaho 770, 95 Pac. 1057 (1908).

[958] *Morris* v. *Bean,* 146 Fed. 423, 434 (C.C.D. Mont. 1906), affirmed, 159 Fed. 651 (9th Cir. 1908), 221 U.S. 485 (1911).

> uniformly unsuccessful. The estoppel argued for here is that the parties now seeking to assert their rights ought not to be allowed to do so, because they knew that the defendants were building up their improvements, and relying on the use of the water to maintain them. An all-sufficient answer to this is that the defendants knew also that the complainant and intervener were relying upon the same water to maintain their improvements already made, and to carry on their farming operations already begun. Under this view of it, the one side is as much estopped as the other.

The Washington Supreme Court could find no element of estoppel where "it is plain from the record that the respondents have asserted the same right to the use of the water as is asserted by appellants * * * ."[959]

Watercourse Made Artificially

In chapter 3, under "Collateral Questions Respecting Watercourses–Watercourse Originally Made Artificially," important factors including "Estoppel" are discussed. With respect to this factor the Washington Supreme Court declared in 1909:[960]

> These authorities maintain the principle that the proprietor of a stream, by diverting it into an artificial channel, and suffering it to remain in its changed condition for a period of time exceeding the statute of limitations, is estopped, as against a person making a beneficial use of the water, from returning it to its natural channel to that person's loss and injury; that the user does not have to show a prescriptive right in himself, or a use by himself for the period of the statute of limitations in order to prevent its return; all he needs to show is that the person diverting it has suffered it to remain in its changed state for that period and that he has made a beneficial use of the water relying upon the permanency of the change.

Statutory Prohibition

The Kansas water rights statute, as amended in 1957, provides that "no water rights of any kind may be acquired hereafter solely * * * by estoppel."[961]

Estoppel and Laches Distinguished

Characteristics of Laches

Defined.–The essential ingredient of laches is inexcusable delay. "Laches means negligence in the assertion of a right, and exists where there has been a

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[959] *Wilson* v. *Angelo,* 176 Wash. 157, 163, 28 Pac. (2d) 276 (1934).

[960] *Hollett* v. *Davis,* 54 Wash. 326, 332-333, 103 Pac. 423 (1909). This case is discussed in chapter 3 at note 394.

[961] Kans. Stat. Ann § 82a-705 (1969).

delay of such duration as to render enforcement of the asserted right inequitable."[962]

The Supreme Court of Colorado has held:[963]

> A casual glance at any general statement of the doctrine of laches makes it clear that the Great Western Company is now barred thereby. Extraordinary lapse of time, the running of all statutes of limitation, knowledge of rights, complete failure to assert them, presumption of prejudice arising from that failure, absence of evidence to rebut that presumption, and passive assent to adverse claims, all are here. * * *
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> * * * Nor can we close our eyes to the fact, well known to all persons in the commonwealth having any interest in or knowledge of the subject of irrigation and the conditions on the principal streams and watersheds of the state, that such delay as is disclosed by this record could not possibly take place on any of them without serious prejudice to junior appropriators.

In the interstate case of *Washington* v. *Oregon* the United States Supreme Court said: "The essence of the doctrine of prior appropriation is beneficial use, not a stale or barren claim. Only diligence and good faith will keep the privilege alive. * * * When these are shown to be lacking, the water right will fail, or fail to the extent that equity requires."[964]

Laches, as well as estoppel, is an affirmative defense which must be pleaded.[965]

Public works.—In 1895 the Nebraska Supreme Court declared:[966]

> The rule which denies relief in equity to one who has slept upon his rights applies in all its force to cases where the defendant is engaged in a work of public interest. In fact, there is no principle more firmly established in the jurisprudence of this country than that a suitor who has, by his laches, made it impossible to restrain the completion or use of public works without great injury to his adversary or the public, will be left to pursue his ordinary legal remedies.

The principle was first announced in California in the leading ground-water case of *Katz* v. *Walkinshaw:* "Where the complainant has stood by while the

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[962] *Rhodes* v. *Weigand,* 145 Mont. 542, 402 Pac. (2d) 588, 592 (1965).

[963] *Great Western Res. & Canal Co.* v. *Farmers Res. & Irr. Co.,* 109 Colo. 218, 221, 222, 124 Pac. (2d) 753 (1942). Compare *Lower Latham Ditch Co.* v. *Louden Irrigating Canal Co.,* 27 Colo. 267, 273-274, 60 Pac. 629 (1900).

[964] *Washington* v. *Oregon,* 297 U.S. 517, 527-528 (1936). Compare *Morris* v. *Bean,* 146 Fed. 423, 434-435 (C.C.D. Mont. 1906), affirmed, 159 Fed. 651 (9th Cir. 1908), 221 U.S. 485 (1911).

[965] *Johnston* v. *Woodard,* 376 Pac. (2d) 602, 604 (Okla. 1962).

[966] *Clark* v. *Cambridge & Arapahoe Irr. & Improvement Co.,* 45 Nebr. 798, 808, 64 N.W. 239 (1895).

development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused, and the party left to his action for such damages as he can prove."[967]

Distinctions

Wiel sums up the basic distinctions by stating:[968] "Laches or acquiescence must be distinguished from estoppel, elsewhere considered, as estoppel would bar a right, and there must be some degree of turpitude to raise it, whereas laches but bars an injunction because of lack of diligence in seeking the remedy while leaving an action at law for damages."

In the interstate case referred to above, the Supreme Court stated with respect to the possible forfeiture of a water right by inequitable conduct under the circumstances of this case: "The label of the acts is unimportant, whether laches, estoppel or abandonment. What matters is their quality. Persistence in such conduct may extinguish the equitable right. It may bar an equitable remedy."[969]

Estoppel by Reason of Laches

Despite the distinctions previously pointed out, there are circumstances under which laches was held to be an important or even a controlling element of estoppel.

In an 1894 case, the Washington Supreme Court held the principle of estoppel inapplicable, and in declaring laches also inapplicable, the court said the record was destitute of proof that the wrongful acts complained of were ever acquiesced in or assented to, "unless the mere abstaining from legal proceedings must necessarily be regarded as such proof, and we must decline to so regard it." Where a legal right is involved, said the court, mere laches without estoppel cannot defeat such right.[970]

The Idaho Supreme Court has said:[971]

> It satisfactorily and conclusively appears that, even though appellant's title may have been originally questionable or uncertain, nevertheless, respondents have stood by, with full knowledge of all the facts, and for more than twenty years have allowed appellant to proceed on the theory that it had valid title to these water rights and a legal right to have the water diverted from the New York Canal; and in the meanwhile has incurred large indebtedness on the strength of its title and right until now

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[967] *Katz* v. *Walkinshaw,* 141 Cal. 116, 136, 70 Pac. 663 (1902), 74 Pac. 766 (1903).
[968] Wiel, S.C., "Water Rights in the Western States," 3d ed., vol. 1, § 644 (1911).
[969] *Washington* v. *Oregon,* 297 U.S. 517, 528 (1936).
[970] *Rigney* v. *Tacoma Light & Water Co.,* 9 Wash. 576, 588, 590, 38 Pac. 147 (1894).
[971] *Hillcrest Irr. Dist.* v. *Nampa & Meridian Irr. Dist.,* 57 Idaho 403, 408-409, 66 Pac. (2d) 115 (1937).

> respondents are, and should be, estopped by laches from questioning appellant's title.

However, in a 1966 case, the Idaho Supreme Court indicated that it is not considered adverse possession by a junior appropriator when it is the duty of the prior appropriator to allow the junior appropriator's use of the water when the prior appropriator has no immediate need; thus, since such use is not adverse, the prior appropriator could not have lost his prior right by laches or acquiescence.[972]

The following statements were made by the Idaho Supreme Court in a 1969 case:[973]

> Appellants assert that since the irrigation district has functioned as a mutual ditch company and delivered water outside the boundaries of the district for many years, the district is therefore estopped by laches from discontinuing such deliveries. Appellants rely on Johnson v. Strong Arm Reservoir Irrigation District, 82 Idaho 478, 356 P.2d 67 (1960), and Hillcrest Irrigation District v. Nampa and Meridian Irrigation District, 57 Idaho 403, 66 P.2d 115 (1937) as authorities for this proposition. However in both those cases the period of time involved during which the irrigation district functioned as a mutual ditch company was over 20 years. In the case at bar the appellants for three and one-half years previous to 1959 made use of water which ran down the Arco Canal which was diverted from the Big Lost River. These waters were flood waters and were available to appellants as such and not dependent upon any decrees or water rights. The doctrine of estoppel does not apply to use of surplus or waste water. Jensen v. Boise-Kuna Irr. Dist., [75 Idaho 133, 269 Pac. (2d) 755 (1954)]. Also no appropriator can compel any other appropriator to continue the waste of water so that he can benefit. Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952). We therefore cannot agree with the appellants' contention that the short three and one-half year period during which appellants made use of these run-off waters entitled them to assert an estoppel by laches.

In a 1957 suit brought by the State of New Mexico, defendant claimed that the action against him was barred on the ground of estoppel by reason of laches on the part of the local State official, who had knowledge of his grass and livestock watering methods. The State contended that estoppel and laches do not run against the State to prevent its acting in a governmental capacity, and the supreme court agreed. The court concluded:[974] "The doctrine of estoppel by reason of laches does not aid the defendant. Public policy forbids the application of the doctrine of estoppel to a sovereign state where public waters are involved. The general rule is, that neglect or omission of public officers to do their duty cannot work an estoppel against the state."

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[972] *Martiny* v. *Wells,* 91 Idaho 215, 217-219, 419 Pac. (2d) 470, 473 (1966).

[973] *Jones* v. *Big Lost River Irr. Dist.,* 93 Idaho 227, 459 Pac. (2d) 1009, 1012 (1969).

[974] *State ex rel. Erickson* v. *McLean,* 62 N. Mex. 264, 273-274, 308 Pac. (2d) 983 (1957).

Chapter 15

ADJUDICATION OF WATER RIGHTS IN WATERCOURSES

INTRODUCTION

Under the applicable laws in the Western States, rights to the use of water of watercourses may be adjudicated under one, or some variation, of two broadly classified procedures: (1) ordinary civil actions between claimants of water rights, and (2) special statutory adjudication procedures.

Various aspects of ordinary civil suits between individuals have been discussed in chapter 13. There may be one plaintiff and one defendant, or there may be many parties. Whether the State in its governmental or proprietary capacity, or any of its agencies or officials, may participate in such proceedings depends upon the applicable laws and the circumstances of the case. Such participation often has been in cases in which the State's proprietary interests were involved. On a particular stream, many decrees may have been rendered in which one's claim of a water right may have been litigated and relitigated with respect to various other claimants.

All of the Western States have special statutory adjudication procedures of one kind or another, several of which are discussed below. The purposes of a number of these procedures apparently have included, among other purposes, a desire to prevent a multiplicity of suits and to provide for more comprehensive adjudications of water rights.

The ensuing discussion of statutory adjudication procedures is followed by some general procedural matters in water rights litigation. These include matters pertaining to ordinary civil actions or special statutory adjudication procedures, or both.

SPECIAL STATUTORY ADJUDICATION PROCEDURES

General Classification of Statutory Procedures

Although water rights in many areas may be adjudicated in ordinary civil actions, statutory procedures of one kind or another are available in all Western States and are extensively utilized in some of them. These may include (1) special statutory proceedings for the adjudication or determination of water rights by a State agency or court, some principal variations of which include the Colorado, Wyoming, Oregon, and Bien Code systems; and (2) statutory procedures under which State administrators participate in private suits,

including court reference procedures. Some States also have provisions for transferring private actions to statutory adjudication proceedings.

Purposes of Statutory Procedures

The State legislatures appear to have had several purposes in mind in enacting the special statutory adjudication procedures. A number of such purposes are suggested by the following description of statements by some of the State courts.

The Nevada Supreme Court has indicated that the purpose of the statutory adjudication procedure in Nevada was to provide a workable, comprehensive procedure for the determination of relative rights on a stream system, with as little delay and expense as possible as a prerequisite to State control of distribution of the water for the protection of all users in the exercise of their rights.[1] It was intended to bring about a speedy, summary, and effectual determination of the relative rights of various claimants to the use of water of a stream or stream system for administrative and regulative purposes;[2] and to protect rights to the use of water, secure a just distribution, and perpetuate water rights in a public record.[3]

The Utah Supreme Court has said, "One of the purposes of the general adjudication statute is to prevent a multiplicity of suits."[4] It was stated in the opinion in another Utah case that the old system of trying water rights controversies piecemeal had often proved ineffectual "and was in the highest degree unsatisfactory."[5] Apparently, the intent of the legislature and the purpose of the statute were to remedy the problem then existing in determining the rights of parties in cases of this character. In a later case, the Utah Supreme Court characterized the purpose of the statutory procedure for determination of water rights as a measure to prevent piecemeal litigation and to provide a means of determining all rights in a given source of water supply in one action.[6]

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[1] *Ormsby County* v. *Kearney*, 37 Nev. 314, 336-338, 142 Pac. 803 (1914); *Vineyard Land & Stock Co.* v. *District Ct.*, 42 Nev. 1, 13-14, 171 Pac. 166 (1918); *State ex rel. Hinckley* v. *Sixth Judicial Dist. Ct.*, 53 Nev. 343, 352, 1 Pac. (2d) 105 (1931); *Ruddell* v. *Sixth Judicial Dist. Ct.*, 54 Nev. 363, 367, 17 Pac. (2d) 693 (1933).

[2] *Pitt* v. *Scrugham*, 44 Nev. 418, 427-428, 195 Pac. 1101 (1921).

[3] *Humboldt Land & Cattle Co.* v. *District Ct.*, 47 Nev. 396, 407, 224 Pac. 612 (1924).

[4] *Rocky Ford Canal Co.* v. *Cox*, 92 Utah 148, 160, 59 Pac. (2d) 935 (1936).

[5] *Huntsville Irr. Assn.* v. *District Ct.*, 72 Utah 431, 438, 270 Pac. 1090 (1928).

[6] *In re Bear River Drainage Area*, 2 Utah (2d) 208, 211, 271 Pac. (2d) 846 (1954). Although in essence an action to quiet title to water rights, said the supreme court in this decision, it differs from the ordinary private suit in that it is a statutory procedure which may be commenced by the State Engineer for the purpose of bringing into the suit all water claimants or users on a single water source or system and to require them to litigate and settle their relative rights in one proceeding. See *Huntsville Irr. Assn.* v. *District Ct.*, 72 Utah 431, 438, 270 Pac. 1090 (1928); *Hardy* v. *Beaver County Irr. Co.*, 65 Utah 28,

However, in a number of Western States, the courts have indicated that the jurisdiction of the courts to try water rights controversies in ordinary civil suits is not divested by these statutes. (See the later discussion, "Statutory Procedures Generally Not Exclusive.")

In an early decision, the Colorado Supreme Court said:[7]

> The object of these irrigation statutes was to settle questions of the relative priorities of the claimants of water for the purposes of irrigation. The decrees rendered thereunder embody in a permanent form the evidence of those previously acquired, while the statutes further provided certain regulations for the distribution by the state of the water according to the priorities thus ascertained.

Other principal purposes of the statutory procedures usually have included provision for the participation or assistance of a State administrative agency in the adjudication process. Such participation or assistance may include the submission of certain public records, the making of hydrographic surveys, investigations, or reports, or participation in the adjudication of water rights. In a number of States, a State agency makes the statutory adjudication of water rights or makes an initial determination or suggested determination of water rights, which is then filed in court for final adjudication. Among other purposes, such a function may tend to accomplish a centralization of the adjudication process, since only one agency plays a central role in each such adjudication.

In the leading case in which the Wyoming statutory procedure for adjudication by an administrative board was assailed and sustained, the Wyoming Supreme Court expressed its approval of the practical advantages of the technical administrative aid to be derived from such a proceeding, thus:[8]

> In the development of the irrigation problem, under the rule of prior appropriation, perplexing questions are continually arising of a technical and practical character. As between an investigation in the courts, and by the board, it would seem that an administrative board, with experience and peculiar knowledge along this particular line, can, in the first instance, solve the questions involved with due regard to private and public interest, conduct the requisite investigation, and make the ascertainment of individual rights, with greater facility, at less expense to interested parties, and with a larger degree of satisfaction to all concerned.

The purposes of procedures for State agency assistance in *private suits* appear to include provisions for the help of a State administrative agency and

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44-45, 234 Pac. 524 (1924); *Mammoth Canal & Irr. Co.* v. *Burton, Judge,* 70 Utah 239, 256, 259 Pac. 408 (1927).

[7] *New Mercer Ditch Co.* v. *Armstrong,* 21 Colo. 357, 361, 40 Pac. 989 (1895).

[8] *Farm Inv. Co.* v. *Carpenter,* 9 Wyo. 110, 135, 61 Pac. 258 (1900).

the benefit of public records and surveys in the making of investigations and reports upon which the trial court bases its adjudication.

Evolvement and Implementation of the Statutory Adjudication Concept

In chapter 7, under "Methods of Appropriating Water of Watercourses," there is a discussion of the inadequacies of the pre-administrative procedures for appropriating water in the West and the evolution of the threefold State administrative systems pertaining to watercourses—appropriation, adjudication, and supervised diversion and distribution of waters pursuant to decrees of the courts. Before the appropriation of water was first put under State administrative control in Wyoming—combined with adjudication and supervision over distribution—Colorado had provided a special statutory procedure for determining controversies over water rights and an accompanying special statutory proceeding for administering these diversion rights and distributing the water pursuant to court decrees.

In Colorado, *adjudication* and *supervision over diversion* have gone hand in hand since 1879 and 1881;[9] yet, unlike most Western States, State administrative control over the *appropriation* of stream waters, such as through the issuance of permits, has never been provided. This is consonant with a provision in the Colorado Constitution that "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."[10]

Elwood Mead played an important role in creating Wyoming's complete and unprecedented threefold administrative system. Mead had been Assistant State Engineer of Colorado before being appointed the first Territorial Engineer of Wyoming in 1888 and first State Engineer in 1890. He brought to this new State intimate knowledge of the workings of the Colorado system of adjudication and distribution of water, and took active leadership in having incorporated in the State constitution and statutes not only the bases for

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[9] Colo. Laws 1879, p. 94, Laws 1881, p. 142.

Earlier legislation enacted in 1860 by the Legislature of the Kingdom of Hawaii provided a system for hearing and determining all controversies respecting rights in water by appointed commissioners, subsequently replaced by the circuit judges. See "Some Other Statutory Provisions—Hawaii," *infra*. See also Hutchins, W. H., "The Hawaiian System of Water Rights" 48-58 (1946). It is unlikely that this Hawaiian legislation had any effect upon the Colorado Legislatures of 1879 and 1881. There was no similarity between the Hawaiian and the subsequent Colorado system of adjudication except that they were both judicial systems. Insofar as the mainland Western States are concerned, Colorado was undoubtedly the pioneer in this field.

[10] Colo. Const. art. XVI, § 6. See, in chapter 7, "Methods of Appropriating Water of Watercourses—Current Appropriation Procedures—Not Administratively Controlled—Colorado."

adjudication and supervision over diversion, but a concept never before legislated in the West—administrative control over the appropriation of the State's unappropriated water.

The Wyoming Constitution created, for the purpose of administering these functions, a Board of Control consisting of the State Engineer as president and the superintendents of the four water divisions.[11] Mead held the office of Wyoming State Engineer for 8 years, during which he succeeded—despite great difficulties—in getting the State administration embarked upon a policy of continuing solutions of its constantly arising water rights problems.

From Colorado and Wyoming the concept of a special statutory procedure for adjudicating rights to the use of stream flow spread throughout the mainland Western States.

Characterization and Validity of the Administrative Function

Separation of powers among the three fundamental branches of American State governments—legislative, executive, and judicial—has led to a number of questionings as to the constitutional authority of officials in the executive branch to act in a judicial capacity in establishment of appropriative water rights, chiefly because of the powerful factor of priority in acquisition of such rights.

Although the originally invariable factor of "first in time, first in right" has been considerably qualified in the matter of obtaining permits to appropriate water under the several State water codes,[12] it had a dominant place in the development of western water law. Jurisdiction over the acquisition of appropriative rights has generally become an administrative function. Likewise, supervising the distribution of water pursuant to the terms of court decrees has generally become an administrative function. But is the adjudication of water rights—private property rights—solely judicial, or may it be constitutionally delegated to administrative officials acting in a quasi-judicial capacity?

In *Wyoming*, the statutory adjudication proceedings are carried out by administrative officers,[13] and their adjudications are final unless appealed to the courts.[14] The Constitution of Wyoming created a Board of Control and vested it with supervision of the waters of the State and of their appropriation, distribution, and diversion.[15] Adjudication of rights was not in the list specifically named in the constitution, but the first State legislature vested the

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[11] Wyo. Const. art. VIII, § § 2, 4, and 5.

[12] See, in chapter 7, under "Methods of Appropriating Water of Watercourses," "Priority of Appropriation," and "Restrictions and Preferences in Appropriation of Water."

[13] Wyo. Stat. Ann. § 41-165 *et seq.* (1957).

[14] *Id.* § 41-190.

[15] Wyo. Const. art VIII, § 2.

Board of Control with authority to adjudicate rights to the stream waters, subject to appeal to the judiciary.[16] In a 1937 case, the Wyoming Supreme Court held this to be constitutionally unobjectionable; the basic right to adjudicate water rights was implied and was incident to the general power of supervision over waters of the State.[17] Previously the Wyoming Supreme Court had held to the same effect, being not impressed with the objection that the statute conferred judicial power on the Board of Control. On the contrary, it was the court's opinion that the determination required to be made by the Board was primarily administrative rather than judicial in character.

> The determination required to be made by the board is, in our opinion, primarily administrative rather than judicial in character. The proceeding is one in which a claimant does not obtain redress for an injury but secures evidence of title to a valuable right—a right to use a peculiar public commodity. That evidence of title comes properly from an administrative board, which, for the state in its administrative capacity, represents the public, and is charged with the duty of conserving public as well as private interests. The board, it is true, acts judicially, but the power exercised is quasi-judicial only, and such as under proper circumstances may appropriately be conferred upon executive officers or boards.[18]

Essential parts of the Wyoming statutory adjudication procedure were embodied in the *Nebraska* statute enacted several years later, but in much briefer form.[19] The Wyoming feature to the effect that the administrative determination of water rights is final unless appealed to the courts was adopted by Nebraska[20] and was held constitutional there. These duties of the administrative agency, the court held, are supervisory and administrative, not judicial, even though they be of a quasi-judicial character.[21]

It is true that there have been some subsequent questionings and careless phraseology in court opinions, particularly as to whether this jurisdiction extended to rights acquired prior to the statute of 1895, but not yet adjudicated. However, in a decision rendered in 1947, with citations of numerous authorities, the Nebraska Supreme Court held it to be well settled by its own decisions that the State administrative agency "has jurisdiction to hear, determine, and make adjudication upon irrigation appropriation rights and priorities, and in the absence of an appeal as provided by law, the orders made in a proper proceeding in reference thereto are final and binding upon the parties."[22]

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[16] Wyo. Laws 1890-91, ch. 8.
[17] *Simmons* v. *Ramsbottom*, 51 Wyo. 419, 432-433, 68 Pac. (2d) 153 (1937).
[18] *Farm Inv. Co.* v. *Carpenter*, 9 Wyo. 110, 132-135, 143, 61 Pac. 258 (1900).
[19] Nebr. Rev. Stat. § 46-226 *et seq.* (1968).
[20] *Id.* § 46-229.05.
[21] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 365-371, 93 N.W. 781 (1903).
[22] *Parsons* v. *Wasserburger*, 148 Nebr. 239, 243, 27 N.W. (2d) 190 (1947).

The *Colorado* statutory adjudication procedure is judicial.[23] By virtue of 1969 legislation, this procedure has been augmented by statutory proceedings in which the division engineer in each division, with the approval of the State Engineer, provides the water clerk in his division with tabulations of priorities of decreed water rights. The tabulations to be completed in 1974 and thereafter are to be approved by the water judge, with or without modifications. These tabulation proceedings are termed "general adjudication proceedings."[24] Even as augmented by such tabulation proceedings, however, the Colorado statutory procedure is predominantly judicial.

The *Oregon* statutory system of adjudicating water rights[25] combines features of both the Wyoming and Colorado adjudication systems but, in its totality, differs from them both. Specifically, Colorado statutory adjudications are predominantly made by the judiciary; those in Wyoming are made by an administrative agency and are final unless appealed to the courts. Oregon has an integrated proceeding, the first part of which is an administrative determination by the State Engineer[26] which must be filed in court as the basis of a civil action. This procedure ends with the court's approval or modification of the State Engineer's determination, subject to appeal,[27] thus throwing over the whole proceeding the cloak of judicial finality.

The Oregon Supreme Court had occasion to construe the statutory powers of the administrative agency as executive or administrative in their nature. "It might be said that the duties * * * are *quasi* judicial in their character." Their findings and orders are only "*prima facie* final and binding * * *."[28] The United States Supreme Court has expressed its approval of the Oregon procedure.[29]

The *Texas* Legislature included in its 1917 water rights statute a statutory adjudication provision[30] (based largely upon those of Wyoming and Nebraska), which the Texas Supreme Court held unconstitutional. In *Board of Water Engineers* v. *McKnight* the supreme court concluded that as the legislature had attempted to confer on persons belonging to the executive branch of the State governmental powers that properly attached to another branch, without express permission of the constitution, the statute was void. Referring to the

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[23] See Colo. Rev. Stat. Ann. § § 148-21-18 to 148-21-23 (Supp. 1969).

[24] *Id.* § § 148-21-27(1)(a) and (4), 148-21-28(1) and (2)(d) to (g) and (l). These proceedings are discussed later at notes 238 *et seq. infra.*

[25] Oreg. Rev. Stat. § 539.020 *et seq.* (Supp. 1955).

[26] *Id.* § 539.130.

[27] *Id.* § 539.150.

[28] *In re Willow Creek,* 74 Oreg. 592, 610-611, 144 Pac. 505 (1914), 146 Pac. 475 (1915).

[29] *Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 451-452, 454 (1916). The administrative agency merely paves the way for a court adjudication of all rights involved, its duties being much like those of a referee. "That the State, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court, is not debatable."

[30] Tex. Laws 1917, ch. 88, § § 105-129.

adjudication statutes of Wyoming and Nebraska, the validity of which had been sustained by the supreme courts of those States, the Texas Supreme Court pointed out that in Wyoming the State constitution was the applicable authority, and in Nebraska, although with a differently constituted administrative agency, the supreme court felt constrained to follow the Wyoming lead. The Texas Constitution contained no such provision as that of Wyoming. Hence the Texas Supreme Court refused to give controlling effect to these decisions.[31]

Years later, in an oil and gas case, the Texas Supreme Court decided a parallel question of fundamental policy as to which the *McKnight* decision was held not to be controlling.[32] The policy change resulted from adoption of a constitutional amendment[33] *after* the effective date of the statutes found objectionable in the *McKnight* case.[34] In 1967, the legislature enacted provisions[35] similar to the Oregon system discussed later.

The validity of the *California* statute authorizing courts of the State to refer water rights issues to the State administrative agency[36] was attacked and its constitutionality was upheld by the California Supreme Court. According to the court:[37]

> Neither the section nor the order of the trial court may be construed as vesting in or delegating to the Division of Water Resources any judicial power. The division operates merely in an advisory capacity to the court, and the court itself performs the judicial function of finally determining the issues and rendering the decision and judgment. It must be taken as settled that the division does not exercise judicial functions.

Some Principal Variations in Statutory Adjudication Proceedings

Some of the principal types of systems with respect to statutory adjudication proceedings include the Colorado, Wyoming, Oregon, and Bien

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[31] *Board of Water Engineers* v. *McKnight,* 111 Tex. 82, 229 S.W. 301 (1921).

[32] *Corzelius* v. *Harrell,* 143 Tex. 509, 186 S.W. (2d) 961 (1945). This case is briefly discussed in a subsequent lower appellate court case involving water resources. *State* v. *Starley,* 413 S.W. (2d) 451, 460 (Tex. Civ. App. 1967).

[33] Tex. Const. art. XVI, § 59(a), adopted August 21, 1917, which provides, "The conservation and development of all of the natural resources of this State * * * are * * * hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto."

[34] For a more detailed discussion of these matters in Texas, see Hutchins, W. A., "The Texas Law of Water Rights" 477-484 (1961). See also the Texas State summary in the appendix.

[35] Tex. Rev. Civ. Stat. Ann. art 7542a (Supp. 1970).

[36] Cal. Water Code § 2000 (West Supp. 1970).

[37] *Fleming* v. *Bennett,* 18 Cal. (2d) 518, 523-524, 116 Pac. (2d) 442 (1941).

Code systems. Brief discussions of these systems are included immediately below. While the early Colorado system influenced the later adoption of variations such as the Wyoming, Oregon, and Bien Code systems, it was not adopted in any other Western State. A discussion of the States that have followed or have provisions that are more or less similar to the Wyoming, Oregon, or Bein Code systems is included at the end of the discussions of each of these systems. The statutory adjudication proceedings and other statutory procedures in Colorado, Wyoming, Oregon, and North Dakota (which closely followed the Bien Code system), are discussed in more detail later under "Statutory Adjudication Procedures in Selected States." Discussions of the statutory adjudication procedures in each of the 19 Western States are included later in the appendix.

The Colorado System

"The Colorado system for the adjudication of water rights * * * is noteworthy as the first important attempt made by any State legislature to provide a special proceeding for the determination of controversies over water rights."[38]

Prior to 1969, jurisdiction of all questions concerning the determination of water rights was vested in the district court of the proper county.[39] One who claimed a water right in a water district in which rights had not been adjudicated could petition the court for an original adjudication.[40] All claimants were given notice to appear and make proof of their claims, and to resist other claims if they wished to do so. The court commanded the State Engineer to certify a complete list of filings in his office of appropriations in good standing; called upon the water commissioner or irrigation division engineer for information concerning diversion and storage structures; and sent to all persons on each list a copy of notice of the pending proceeding.[41] A referee could be appointed if necessary.[42] Based on the evidence, a decree was issued by the court determining and establishing the several priorities of right.[43] Appeal could be taken to the State supreme court.[44] Supplemental adjudications (that is, adjudications subsequent to the original adjudication) were initiated and conducted in much the same manner as an original adjudication.[45]

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[38] Long, J. R., "A Treatise on the Law of Irrigation" 193 (1902).

The earliest statutory provisions in Colorado were enacted in 1879 and 1881. Colo. Laws 1879, p. 94, Laws 1881, p. 142. Regarding earlier legislation in Hawaii, see note 9 *supra.*

[39] Colo. Rev. Stat. Ann. § 148-9-2 (1963).

[40] *Id.* § 148-9-3.

[41] *Id.* § 148-9-5.

[42] *Id.* § 148-9-4.

[43] *Id.* § § 148-9-11 to 148-9-14.

[44] *Id.* § 148-9-21.

[45] *Id.* § 148-9-7.

A noteworthy and distinctive feature of the Colorado system of adjudicating water rights was that it was a judicial proceeding from start to finish. The only duty required of the State water administrative organization was to send to the court officially known names of claimants and owners of structures. The administrators did not participate in the proceedings at any time in any respect. This feature was distinctive in that, despite its pioneering in this field, the Colorado statutory system for determining and establishing water rights *without State administrative participation* was not adopted in any other Western State.

With the enactment of the Water Right Determination and Administrative Act of 1969, the Colorado system of determining water rights continues as a judicial proceeding but with variations in such proceedings and associated provisions. Jurisdiction to determine water matters arising in each water division is vested exclusively in the district courts collectively acting through the water judge in that division.[46] Any person desiring, among other things, a determination of a water right shall file a verified application with the water clerk, setting forth facts in support of the application.[47] Following the publication of notice[48] and investigation by the referee,[49] a ruling is made by the referee, subject to review by the water judge.[50] Rulings of the referee which are protested within a specified time shall be confirmed, modified, reversed, or reversed and remanded by the water judge. Rulings of the referee which have not been protested shall be confirmed in the judgment and decree of the water judge, except that the water judge may reverse or reverse and remand any such ruling which he deems contrary to law.[51] After the hearings on all matters have been concluded, the water judge shall enter a judgment and decree[52] subject to appellate review except for those decrees which confirm a ruling with respect to which no protest was filed.[53]

This procedure is augmented by statutory proceedings in which the division engineer in each division, with the approval of the State Engineer, provides the water clerk in his division with tabulations of all decreed water rights and conditional water rights in the division, in order of seniority.[54] Following required publication and notice of the tabulations, opportunity is provided for filing protests within a specified time. After the division engineer makes such revisions as he deems proper, further opportunity is provided for filing protests, whereupon the water judge shall hold a hearing and enter a judgment and decree which shall either incorporate the tabulation of the division

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[46] Colo. Rev. Stat. Ann. § 148-21-10(1) (Supp. 1969).
[47] *Id.* § 148-21-18(1).
[48] *Id.* § 148-21-18(3).
[49] *Id.* § 148-21-18(4).
[50] *Id.* § 148-21-19(1).
[51] *Id.* § 148-21-20(5).
[52] *Id.* § 148-21-20(7).
[53] *Id.* § 148-21-20(9).
[54] *Id.* § § 148-21-27 (1)(a) and (4), 148-21-28(1) and (2)(d).

engineer or incorporate it with such modifications as the water judge may determine proper after the hearings.[55] If no protests are filed, the water judge shall enter a judgment and decree incorporating and confirming the tabulations of the division engineer without modification.[56] These tabulation proceedings shall be considered general adjudication proceedings.[57] The judgment and decree of the water judge are subject to appellate review except for that part of the judgment or decree which confirms a part of a tabulation with respect to which no protest was filed.[58]

The Wyoming System

The Wyoming system for adjudicating water rights came into being with the attainment of statehood in 1890.[59] It thus followed the existing Colorado system in providing a special statutory adjudication procedure, but with a highly important addition—it introduced administrative functioning into this procedure, instead of leaving it all to the courts. This feature—administrative participation in adjudication of water rights—was followed in most of the other Western States.

The Wyoming Constitution, which became effective with statehood, directed the legislature to divide the State into four water divisions. It also provided for a State Engineer and for a Board of Control, the Board to be comprised of the State Engineer and the four water Division Superintendents.[60] This Board is an administrative agency of the State with quasi-judicial powers,[61] its decisions being subject to review by the courts. It is this agency that "adjudicates and determines" rights to the use of streamflow in Wyoming.[62]

In the original adjudication of a stream the State Engineer makes a hydrographic survey, and the Division Superintendent takes testimony as to

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[55] *Id.* § § 148-21-28(2)(b) - (f).

[56] *Id.* § 148-21-28(2)(g).

The described procedures apply to tabulations to be made by July 1, 1974, and thereafter. Similar procedures are provided for the original tabulations to be made in 1970 [and completed in 1973 (see note 239 *infra*)], although it is provided that if objections are filed after such original tabulations are filed with the water clerk, "the water judge shall order such notice, conduct such proceedings and enter such orders as he deems appropriate to deal with such protest pending the proceedings in Section 148-21-28," which section pertains to the later tabulations. *Id.* § 148-21-27(5).

[57] *Id.* § 148-21-28(2)(l).

[58] *Id.* § 148-21-28(2)(i).

[59] Wyo. Laws 1890-91, ch. 8.

[60] Wyo. Const. art. VIII, § § 2, 4, and 5.

[61] *Farm Inv. Co.* v. *Carpenter*, 9 Wyo. 110, 61 Pac. 258 (1900).

[62] In the statutes and court decisions of Wyoming, the terms "adjudication" and "determination" are used interchangeably with respect to the functions of the Board of Control in establishing water rights. Wyo. Stat. Ann. § 41-165 *et seq.* (1957); *Campbell* v. *Wyoming Dev. Co.*, 55 Wyo. 347, 378, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940); *Laramie Irr. & Power Co.* v. *Grant*, 44 Wyo. 392, 414, 13 Pac. (2d) 235 (1932).

the rights of claimants.[63] All claimants are notified, and all must appear and submit proof of their claims.[64] Hearings are held upon contests.[65] When the superintendent's record and the State Engineer's hydrographic study have been received, the Board of Control reviews the materials and enters an order determining and establishing the several priorities of water rights.[66] Any aggrieved party may appeal to the district court and thence to the State supreme court.[67] But subject to the right of rehearing, reopening of the order or decree, and appeal, the administrative determination of the Board of Control is final—it is conclusive as to all prior appropriations and rights of existing claimants lawfully embraced in the adjudication.[68] Any claimant who fails to appear and submit proof of his claim, as specified above, "shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings and shall be held to have forfeited all rights to the use of said stream theretofore claimed by him."[69]

The validity of this Wyoming legislation was upheld by the Wyoming Supreme Court.[70]

The Wyoming system, with some variations and considerable brevity, was adopted in Nebraska.[71] It was adopted and rejected in two other States: (1) Nevada. The constitutionality of a provision purporting to make the administrative determination conclusive, subject to the right of appeal,[72] was questioned by the supreme court,[73] whereupon the legislature eliminated the provision and adopted the Oregon system discussed later.[74] (2) Texas. Legislation adopted in 1917[75] was declared unconstitutional as attempting to confer upon persons belonging to the executive branch of the State government powers that properly attached to another branch without express permission of the constitution.[76] In 1967, the Texas Legislature enacted an integrated administrative-judicial procedure[77] similar to the Oregon system discussed later.[78]

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[63] Wyo. Stat. Ann. § § 41-180 and -172 (1957).
[64] *Id.* § 41-166 to -171.
[65] *Id.* § § 41-176 and -177.
[66] *Id.* § 41-181.
[67] *Id.* § 41-193 to -200.
[68] *Id.* § 41-190; *Parshall* v. *Cowper*, 22 Wyo. 385, 394, 143 Pac. 302 (1914).
[69] Wyo. Stat. Ann. § 41-174 (1957).
[70] *Farm Inv. Co.* v. *Carpenter*, 9 Wyo. 110, 132-135, 61 Pac. 258 (1900), discussed at notes 277-278 *infra.*
[71] Nebr. Rev. Stat. § 46-226 *et seq.* (1968).
[72] Nev. Laws 1913, ch. 140.
[73] *Ormsby County* v. *Kearney*, 37 Nev. 314, 142 Pac. 803, 810-812 (1914).
[74] Nev. Laws 1915, ch. 253, Rev. Stat. § 533.160 *et seq.* (1969).
[75] Tex. Laws 1917, ch. 88, § § 105-129.
[76] *Board of Water Engineers* v. *McKnight*, 111 Tex. 82, 229 S.W. 301 (1921).
See the discussion of this matter at notes 30-31 *supra.* See also the discussion at notes 32-33 *supra.*
[77] Tex. Rev. Civ. Stat. Ann. art. 7542a (Supp. 1970).
[78] Details for Nevada and Texas are included in the appendix.

The first section of Alaska's 1966 Water Use Act provides that "The Department of Natural Resources shall determine and adjudicate rights in the waters of the state, and in its appropriation and distribution."[79] Procedures somewhat similar to those in Wyoming are provided by which the commissioner shall determine "existing rights," as of the act's effective date, and issue certificates of appropriation therefor.[80] While the first section of the act perhaps contemplates the determination and adjudication of other water rights in addition to such "existing rights," no specific procedure for the determination and adjudication of such other rights is included in the act. The commissioner possibly could formulate such procedure under the act's general provision that he "shall adopt procedural and substantive regulations to carry out the provisions" of the act,[81] and he might draw upon the statutory procedure provided for the determination of "existing rights." However, the relevant administrative regulations promulgated under the act in 1967 pertain only to the determination of such "existing rights."[82]

The 1966 Alaska act requires that a claimant of an existing right shall file a declaration of appropriation with the commissioner. If the claimant who has received notice does not file such a declaration, there is no provision similar to that in Wyoming declaring that the claimant shall be thereafter barred and estopped from asserting the right and shall be held to have forfeited the right.[83] However, the penalty provision of the act provides that any "person who constructs works for an appropriation, or diverts, impounds, withdraws or uses a significant amount of water from any source *without a* permit or *certificate of appropriation* * * * is guilty of a misdemeanor."[84]

The Oregon System

The Oregon water code of 1909 created a third major system of adjudication of water rights.[85] It comprises features of both Colorado and

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[79] Alaska Laws 1966, ch. 50, Stat. § 46.15.010 (Supp. 1966).

[80] Alaska Stat. § 46.15.135 (Supp. 1966). The section entitled "Existing Rights" states that "a water right acquired by law before the effective date of this [act] or a beneficial use of water on the effective date of this [act], or made within five years before the effective date, or made in conjunction with works under construction on the effective date, under a lawful common law or customary appropriation or use, is a lawful appropriation under this [act]." *Id.* § 46.15.060.

[81] *Id.* § 46.15.020(b)(1).

[82] See Alaska Regs. § 11-1.801.03 (Reg. 23, March 1967).

The 1966 Water Use Act apparently has not yet been construed by the Alaska Supreme Court.

[83] Nor is there a provision similar to the Wyoming provision that final orders or decrees by the board are conclusive as to all prior appropriations and existing claimants as to the waters involved, subject to rehearings, reopenings, and appeals.

[84] Alaska Stat. § 46.15.180 (Supp. 1966). Emphasis added.

[85] Oreg. Laws 1909, ch. 216, § § 11-35, Rev. Stat. ch. 539 (Supp. 1955). This chapter of the Oregon statutes is entitled "Determination of Water Rights Initiated Before

Wyoming procedures, and its constitutionality has been upheld by the United States Supreme Court.[86]

The first part of the Oregon procedure substantially follows that of Wyoming.[87] However, although the determination of water rights by the Wyoming Board of Control is final, subject to the right of appeal, the Oregon State Engineer's determination is not final. On completion of hearings and findings, he makes an order of determination, and files the record with the clerk of the proper trial court, whereupon the proceedings become as nearly as possible like those of a suit in equity.[88] After final hearing, the court enters a decree affirming or modifying the order of the State Engineer and adjudicating the several water rights, subject to appeal to the State supreme court.[89]

In contrast to Wyoming, the Oregon administrative determination must be heard and passed on by the court before the water rights to which it relates are adjudicated. Both the administrative and judicial components of the procedure are necessary to this statutory adjudication.[90] However, if no objections to the administrative determination have been filed, the court is required to affirm it.

This Oregon administrative-judicial process has been substantially adopted also in Arizona, California, Nevada, and Texas, except that in Nevada, even if no objections to the administrative determination are filed, the court may take further testimony if deemed proper and then enter its findings of fact and judgment and decree.[91] The Texas statute is silent on the matter of what is to happen if no objections are filed.

Utah has a statutory procedure for the determination of water rights that resembles the Oregon system except that it is initiated by bringing a court action and the court has certain initial functions prior to the State Engineer's proposed determination of water rights.[92] In 1969, Idaho adopted a statutory

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February 24, 1909," although the body of the chapter does not expressly limit its application to such rights. In this regard, see the discussion at notes 306-307 *infra*.

[86] *Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 451-452, 454 (1916). "That the State, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court, is not debatable."

[87] Oreg. Rev. Stats. § § 539.020 to .130 (Supp. 1955).

[88] *Id.* § § 539.130 and .150.

[89] *Id.* § 539.150(4).

[90] The United States Supreme Court pointed this out in affirming the constitutionality of the Oregon procedure. Referring to a contention of counsel, the Court said: "A serious fault in this contention is that it does not recognize the true relation of the proceeding before the board to that before the court. They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board and the later stages before the court." *Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 451 (1916).

[91] Nev. Rev. Stat. § 533.170(3) (1969).

[92] Utah Code Ann. § 73-4-1 *et seq.* (1968).

After completion of notice and service upon the claimants, the parties must file their claims with the court. *Id.* § 73-4-3. The State Engineer then tabulates the facts as set

procedure that also is rather similar to the Oregon system except that it is initiated by bringing a court action and a court order is required which authorizes the State Reclamation Engineer to make an examination of the water system, join water-rights claimants, and determine the various water rights.[93] Another State, Washington, has a statutory procedure that may be rather similar to the Oregon system. However, the Washington procedure is initiated by bringing a court action and the Director of Ecology is appointed by the court to act as its referee. Moreover, the extent to which the Director is to make a determination of water rights is unclear.[94]

In Oregon, the determination of water rights may be undertaken after receipt of a petition from one or more claimants. In a number of the other States, such as Nevada and Arizona, the administrator may also initiate the determination on his own initiative.[95]

The Bien Code System

In 1903, at the request of commissions appointed by the governors of Oregon and Washington, a draft for a code was prepared by Mr. Morris Bien of the United States Reclamation Service.[96] The draft prepared by Mr. Bien, which became known as the "Bien Code," was a comprehensive code relating

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forth in the claims, making such investigations as deemed necessary, and prepares a report and proposed determination of water rights. *Id.* § 73-4-11.

[93] Idaho Code Ann. § § 42-1406 to -1413 (Supp. 1969). See § § 42-1406 to -1409.

The district judge may determine whether the waters in the water system to be adjudicated are interconnected and whether the engineer's petition embraces some waters which are not tributary or excludes some waters which should be included to achieve adjudication of all rights that might be affected thereby, and if funds are available for the engineer's investigation, the judge shall issue an order defining the boundaries of the water systems to be adjudicated and authorize the engineer to begin his investigation and determination of the various rights existing in the system. *Id.* § 42-1407.

[94] Wash. Rev. Code § § 90.03.110 - 90.03.240 (Supp. 1961). Among other provisions, the court shall refer the proceeding to the Director or his representative "to take testimony" and file with the court "a transcript of such testimony for adjudication thereon by the court." *Id.* § 90.03.160. If no exceptions to the Director's report are filed, the court enters a decree determining the water rights "according to the evidence and report of the [Director]." *Id.* § 90.03.200. During pendency of the proceedings, or upon appeal, the water involved shall be regulated "according to the schedule of rights specified in [the Director's] report," upon an order of the court authorizing such regulation, unless stayed by a stay bond. *Id.* § 90.03.210.

[95] In some States, such as Texas, a petition from a minimum number of water users may be required. See Tex. Rev. Civ. Stat. Ann. art. 7542a, § 1 (Supp. 1970).

In Utah, which with certain exceptions resembles the Oregon system, as noted above, the proceeding may be initiated by an action in court brought by the State Engineer upon his receipt of a petition from claimants, or such an action may be initiated by claimants' direct petition to the court under particular circumstances. Utah Code Ann. § § 73-4-1, 73-4-3, 73-4-18 (1968).

[96] Wiel, S. C., "Water Rights in the Western States," 3d ed., vol. II, § 1428, pp. 1327-1332 (1911).

to the State statutory administration of water rights. The portions of the Bien Code relating to adjudication of water rights provided: (1) that the State administrative agency make hydrographic surveys of each stream system and source of water supply in the State, including available data for the determination, development and adjudication of the water supply; (2) that on completion of any such survey, the administrative agency deliver a copy to the Attorney General; (3) that the Attorney General, shall enter suit on behalf of the State within 60 days for an adjudication of such rights, and prosecute the same diligently to final adjudication by the court; (4) but that if suit for adjudication of such rights has been begun by private parties, the Attorney General is not required to bring suit, although he is required to intervene in such suit on behalf of the State if notified by the administrative agency that in its opinion the public interest requires such action. In any suit for the determination of a right to use the waters of any stream system, all parties claiming the right to use such waters shall be made parties. The court shall call upon the administrative agency to make or furnish a hydrographic survey. The costs of such suit and of such surveys shall be charged against each of the private parties in proportion to the amount of the water right allotted.[97]

One writer has said that "although Mr. Bien aimed to take what he considered best from all the existing codes, [the Bien Code] most closely follows the 1903 Utah statute."[98] However, among other differences, the 1903 Utah legislation did not provide that the action would be brought by the Attorney General. It instead provided that when a statement of a completed hydrographic survey and related data had been filed with the district court, the court itself would initiate and conduct the action.[99]

The Bien Code provisions described above have been closely followed in North Dakota legislation. They have been largely followed in New Mexico and more or less similar legislation has been enacted in South Dakota, Oklahoma, and Montana.[100]

Some Other Statutory Provisions

Kansas

The Chief Engineer of the Division of Water Resources, State Board of Agriculture, is directed by statute to gather data and other information

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[97] A somewhat more detailed description of such provisions, as adopted in North Dakota, is included at notes 320-325 *infra*.

[98] Chandler, A. E., "Elements of Western Water Law" 67-68 (Rev. ed. 1918).

For a discussion of the draft code by Bien himself, see Bien, Morris, "Proposed State Code of Water Laws," in U.S. Geol. Survey, Water Supply and Irrigation Papers, No. 146, pp. 29-34 (1905). See also his letter to Samuel C. Wiel reproduced in Wiel, *supra* note 96, at 1329-1332.

[99] See Utah Laws 1903, ch. 100, § § 11, 12.

The current Utah legislation, with some exceptions, resembles the Oregon system, as discussed at note 92 *supra*.

[100] See the State summaries in the appendix.

"essential to the proper understanding and determination of the vested rights of all parties using water for beneficial purposes other than domestic."[101] Based upon his observations and measurements, it is his duty to make an order determining the rights of all such parties as of or before the effective date of the enactment (June 28, 1945), and the then extent of their uses. All water users whose rights are so determined must be notified as to the contents of the order of determination. Any such water user who deems himself aggrieved by the order of determination may appeal to the district court. The order of determination is in full force and effect from the date of its entry in the Chief Engineer's office unless and until its operation is stayed by an aggrieved water user's appeal to the district court.[102] However, among other amendments in 1957, the following proviso was added: "Provided, that no such determination shall be deemed an adjudication of the relation between any vested right holders with respect to the operation or exercise of their vested rights."[103]

Hawaii

In 1860, the legislature amended a statute which had provided for commissioners to hear and determine all controversies respecting rights of way, by giving such commissioners corresponding power to settle controversies respecting rights in water.[104] A reenactment in 1907 provided that the term "commissioner" as used therein should refer to the judge of the circuit court within which the affected property is situated.[105] This vested in the circuit judges (rather than appointed commissioners) jurisdiction over water-rights controversies arising under the statute. It is the duty of such judges, within their respective circuits, to hear and determine all controversies respecting water rights between private individuals, or between them and the State. Any interested person or the State may apply for the settlement of the rights involved. The judges may exercise the same authority in regard to this special jurisdiction as is conferred upon circuit judges at chambers.[106] Jurisdiction in equity, in a proper case for it, exists concurrently with this special statutory jurisdiction of the judges.[107]

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[101] Kans. Stat. Ann. § 82a-704 (1969).

[102] *Id.*

[103] Kans. Laws 1957, ch. 539, § 6, Stat. Ann. § 82a-704 (1969). For a similar proviso in Oklahoma legislation enacted in 1963, see Okla. Stat. Ann. tit. 82, § 6 (1970), repealed, Laws 1972, ch. 256, § 33.

This Kansas legislation is discussed in more detail in the State summary for Kansas in the appendix.

Kansas also has a statutory court reference procedure which is discussed under "Private Actions in Which State Agencies Participate—Court Reference Procedure," *infra.*

[104] Haw. Laws 1860, p. 12, originally enacted, Laws 1856, p. 16.

[105] Haw. Laws 1907, Act 56.

[106] Haw. Rev. Stat. § § 664-31 to -37 (1968).

[107] *Wailuku Sugar Co.* v. *Cornwell,* 10 Haw. 476, 477-480 (1896).

Comprehensiveness of Statutory Adjudication Proceedings

As suggested by a number of statements in reported Western court decisions,[108] one of the purposes of the State legislatures in enacting statutory adjudication procedures often appears to have been to provide a more comprehensive proceeding for the determination of relative rights on a stream system than might have been accomplished in an ordinary civil action. The comprehensiveness of such statutory procedures has, however, varied from State to State and in various ways.[109]

The statutory adjudication procedures in a number of States specify that the geographical scope of the adjudication proceeding may include a stream or stream system, or a more or less comparable geographic area. The Nevada statute provides that the proceeding may encompass a stream or "stream system" which may include "any stream, together with its tributaries and all streams or bodies of water to which the same may be tributary."[110] The

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[108] See "Purposes of Statutory Procedures," *supra.*

[109] One or more of the following and other variations are mentioned or suggested in the foregoing discussion, in the subsequent discussion of "Statutory Adjudication Procedures in Selected States," and in the State summaries for each of the 19 Western States in the appendix.

The following does not attempt to portray the comprehensiveness of the adjudications (with respect to their geographical scope and other factors) that have in fact been made under the statutory procedures in the several Western States.

[110] Nev. Rev. Stat. § § 533.090 and 533.020 (Supp. 1967).

The North Dakota statute, discussed at note 320 *et seq. infra* refers to a "stream system" without defining the term. The Wyoming and Oregon statutes, discussed at notes 260-263 and 287-290 *infra,* respectively, refer to streams and, in separate sections, mention tributaries.

There are specific provisions in some statutes pertaining to situations where there have been different adjudication proceedings regarding a stream or a stream and its tributaries. See Oreg. Rev. Stat. § 539.220 (Supp. 1955); Wyo. Stat. Ann. § 41-175 (1957).

With respect to adjudications of water rights within specified districts in Colorado, see the discussion at note 183 *et seq. infra.* With respect to legislative modifications in Colorado, see the discussion at note 215 *et seq. infra.*

With respect to whether a "stream system" may include ground waters, the California statute states that a "stream system" includes a "stream, lake, or other body of water, and tributaries and contributory sources, but does not include an underground water supply other than a subterranean stream flowing through known and definite channels." Cal. Water Code § 2500 (West 1956). On the other hand, the New Mexico Supreme Court has held that a statutory suit to adjudicate water rights of a stream system includes rights of appropriators of water of an artesian basin who claim that the surface waters contribute to the recharge of their artesian water supply. *El Paso & R. I. Ry.* v. *District Ct.,* 36 N. Mex. 94, 8 Pac. (2d) 1064 (1931). The New Mexico statutory adjudication provisions include no definition of a "stream system" to which they refer. N. Mex. Stat. Ann. § § 75-4-2 to 75-4-8 (1968).

Arizona statute refers to waters of a stream or water supply,[111] while the Washington statute refers to "any waters within the state."[112] The Texas statute provides that the proceeding may encompass any stream or segment of a stream.[113]

In Idaho, the district judge may determine whether the waters in the water system to be adjudicated are interconnected and whether the State Reclamation Engineer's petition embraces some waters which are not tributary or excludes some waters which should be included to achieve adjudication of all rights that might be affected thereby, and if funds are available for the engineer's investigation, the judge shall issue an order defining the boundaries of the water systems to be adjudicated and authorize the engineer to begin his investigation and determination of the various rights existing in the system.[114]

In some States, a State agency has been directed or authorized to survey the State area by area and to initiate adjudication proceedings upon the completion of each survey.[115] This would be subject, of course, to the availability of funds for such purposes.

Among other important variations, there are variations in the extent to which all or fewer water rights claimants within the encompassed area are brought into the proceeding and are bound by the final adjudication.[116]

In some respects a statutory adjudication proceeding may be less comprehensive than an ordinary civil action. For example, in a statutory adjudication proceeding, the administrative agency or court is confined to the subject matter covered by the statute, as construed by the court, and is without jurisdiction to hear or determine other matters.[117]

Moreover, in a statutory adjudication proceeding, if an administrative agency makes the determination of water rights it is not also authorized to grant injunctive relief or damages. The Wyoming Supreme Court, in an action to quiet plaintiff's title to water rights as against a number of defendants,

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[111] Ariz. Rev. Stat. Ann. § 45-231(A) (1956).

[112] This may embrace waters in more than one county. Wash. Rev. Code § 90.03.110 (Supp. 1961).

[113] Tex. Rev. Civ. Stat. Ann. art. 7542a, § 5(a) (Supp. 1970).

[114] Idaho Code Ann. § 42-1407 (Supp. 1969).

[115] See, e.g., the Wyoming provision discussed in note 260 *infra* and the North Dakota provision discussed at notes 320-321 *infra*.

In Colorado, division engineers, with the approval of the State Engineer, are to make tabulations of decreed water rights within each of the seven divisions in the State, which are to be approved by a water judge with or without modification. Such proceedings "shall be considered general adjudication proceedings." See the discussion at notes 238-252 *infra*.

[116] In this regard compare the Wyoming and Colorado procedures discussed under "Statutory Adjudication Procedures in Selected States," *infra*.

[117] In this regard, see, e.g., the discussion at notes 306-307 *infra*, regarding a possible limitation to water rights initiated before 1909 in Oregon; at notes 79-84 *supra*, regarding "existing rights" in Alaska; and at notes 202 and 285 *infra*, regarding "ditches" in Colorado and Wyoming, respectively.

decided in 1900, said at one point that the Wyoming statutory adjudication proceeding conducted by the Board of Control "is one in which a claimant does not obtain redress for an injury, but secures evidence of title to a valuable right * * *" and at another point said that "affirmative relief in favor of one party as against another is not its object."[118]

Even in some of the States where a court takes part in the statutory adjudication, it perhaps may not be authorized to grant injunctive relief or damages as a part of such adjudication proceedings. The applicable statutes do not appear to expressly deal with this matter. In a 1944 case, the Utah Supreme Court concluded that "While there is no express provision in the [Utah water adjudication] statute granting the district court equitable powers in this particular type of case, neither is there any provision depriving the court of any of the jurisdiction granted by Article VIII, Section 19 of the [Utah] Constitution."[119] However, the court mentioned, among other things, that in an earlier case[120] the court had said, " 'The statute provides no remedy for any relief except the determination of rights to the use of water and as a necessary corollary thereto such injunctive relief as may be necessary to protect and enforce such rights.' " The court concluded that, "This language does not restrict the injunctive relief in its operation until after the controversy has been determined. * * *

"We are of the opinion the District Court has the power and jurisdication to issue temporary injunctive orders prior to judgment under the general statutory adjudication procedure."[121]

Statutory Procedures Generally Not Exclusive

The statutory adjudication provisions do not declare that their procedures are the exclusive method for determining water rights on an area-wide basis or that they are exclusive of other forms of actions; nor do these statutes appear to clearly imply such exclusiveness except to the extent that the Utah and Texas statutes discussed below may do so. In fact, some statutes imply that they are *not* exclusive. For example, the North Dakota statutes provide that if the suit for the adjudication of water rights shall have been begun by private parties, the Attorney General is not required to bring suit, but he shall intervene in such suit if notified by the State Engineer that in his opinion the

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[118] *Farm Inv. Co.* v. *Carpenter,* 9 Wyo. 110, 61 Pac. 258, 267, 268 (1900).

[119] *Salt Lake City* v. *Anderson,* 106 Utah 306, 148 Pac. (2d) 350 (1944). Utah Const. art. VIII, § 19, provides, "There shall be but one form of civil action, and law and equity may be administered in the same action."

[120] *Huntsville Irr. Assn.* v. *District Ct.,* 72 Utah 431, 438, 270 Pac. 1090, 1093 (1928).

[121] 148 Pac. (2d) at 351.

The related considerations of (1) the extent to which statutory procedures may be exclusive, and of (2) transfer of private actions to statutory adjudication proceedings, are discussed under the immediately succeeding topics.

public interest requires such action.[122] And in Oregon, if an action to determine water rights is begun in court, the court may, in its discretion, transfer the case to the State Engineer for determination under the statutory procedure.[123]

Furthermore, courts in a number of Western States have indicated that the statutory adjudication procedures do not exclude the jurisdiction of the courts in ordinary civil actions in proper cases.[124] For instance, there may be numerous ordinary civil actions brought to determine particular disputes between individuals regarding the alleged infringement or exercise of their alleged water rights. The Colorado Supreme Court in an action for damages and injunctive relief said, "One is not required to resort to the particular court authorized to conduct a general adjudication proceeding in the several water districts in order to secure redress in an action involving an alleged infringement of a right to the use of water."[125]

Moreover, in an action to quiet plaintiff's title to water rights as against a number of defendants, the Wyoming Supreme Court said:

> The district court is, by the constitution, vested with original jurisdiction, both at law and in equity. The jurisdiction of equity to entertain suits for quieting title to the use of water is well settled. The legislature has not attempted to devest [sic] the courts of that jurisdiction, and we do not think it could successfully do so. Although in the statutory proceeding for the determination of water rights the courts obtain jurisdiction only by way of appeal from the decisions of the board of control, all the ordinary remedies known to the law, pertinent to the use and appropriation of water, are open to all interested in such rights, equally with all other persons in respect to any other kind of right or property. The courts possess ample jurisdiction to redress grievances growing out of conflicting interests in the use of the public waters, and to afford appropriate relief in such cases. Nothing can be plainer, it seems to us, than that, in the absence of a previous determination by the board or in the courts of the priorities or rights of claimants upon a particular stream, an interested party may resort to the courts to obtain such relief as he may show himself to be entitled to. The jurisdiction of the courts remains as ample and complete after as well as before an adjudication by the board. But the principle applies here, as in other cases, that a party may not relitigate a question which has passed into final adjudication.[126]

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[122] N. Dak. Cent. Code Ann. § 61-03-16 (1960). See also S. Dak. Comp. Laws Ann. §§ 46-10-5 and 46-10-6 (1967); N. Mex. Stat. Ann. § 75-4-4 (1968).

[123] Oreg. Rev. Stat. § 539.020 (Supp. 1955). See also Ariz. Rev. Stat. Ann. § 45-231(A) (1956); Nev. Rev. Stat. § 533.240(4) (Supp. 1967).

[124] See, e.g., *Genoa* v. *Westfall,* 141 Colo. 533, 349 Pac. (2d) 370, 377 (1960); *Wailuka Sugar Co.* v. *Cornwell,* 10 Haw. 476, 477-480 (1896); *Farm Inv. Co.* v. *Carpenter,* 9 Wyo. 110, 61 Pac. 258, 269 (1900).

[125] *Genoa* v. *Westfall,* 141 Colo. 533, 349 Pac. (2d) 370, 377 (1960).

[126] *Farm Inv. Co.* v. *Carpenter*, 9 Wyo. 110, 61 Pac. 258, 269 (1900).

However, in a 1944 case the Utah Supreme Court said:

> [T]his case is clearly one which should be maintained only as a statutory proceeding [under the Utah water adjudication statute] because the scope and character of this water suit made it a suit for adjudication of a comprehensive river system.
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> Controversies may arise in which the District Court could exercise its discretion and determine whether to proceed as a private suit or under a statutory adjudication, but the scope and character of this water suit is such that the District Court abused its discretion in not granting the petition of various of the defendants who sought to have this case proceed as a statutory adjudication.[127]

The Utah statute provides that, "Whenever any civil action is commenced in the district court involving fewer than ten water claimants or less than the major part of the rights to the use of water from any river system, lake, underground water basin, or other source, the court in its discretion may, if a general determination of the rights to the use of water from said water source

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This quoted statement was quoted in a later action to declare and quiet title to a plaintiff's water rights against a defendant and for injunctive relief, in which the defendant contended that only the Board of Control, not the courts, is vested with the power to determine priority of water rights. In that regard, the court said that "the language here used is so clear and explicit, and is so complete an answer to the contention of counsel for the defendant, that we do not know how to add to the force of it. The contention, accordingly, must be overruled." *Simmons* v. *Ramsbottom,* 51 Wyo. 419, 68 Pac. (2d) 153, 159 (1937). The court also said *inter alia* that "The Legislature in some instances made but limited appropriations, so that a number of years elapsed before the Board of Control was able to make even a small percentage of adjudications necessary or advisable to be made. In view of these facts, many appropriators might often have been substantially remediless, if the contention now made by counsel for the defendant is correct, for if courts have no jurisdiction to determine disputes as to water rights now, they had none in the years immediately following the adoption of the Constitution. Counsel contend that the statutes of this state, rightly construed, provide for exclusive jurisdiction to make such adjudications. Conceding for the moment the power of the Legislature to give such exclusive jurisdiction to the board—which would be inconsistent with the holding in Farm Investment Company v. Carpenter, 9 Wyo. 110, 61 P. 258, 269 [*supra*], * * * we know of no provision to that effect." 68 Pac. (2d) at 156-157. See also *Louth* v. *Kaser,* 364 Pac. (2d) 96, 99 (Wyo. 1961).

With respect to the Washington statutory procedure not being exclusive, at least as to existing rights, see *State ex rel. Roseburg* v. *Mohar,* 169 Wash. 368, 13 Pac. (2d) 454, 455-456 (1932), discussed in the State summary for Washington in the appendix.

[127] *Salt Lake City* v. *Anderson,* 106 Utah 306, 148 Pac. (2d) 346, 349-350 (1944). The case involved an action by a number of plaintiffs against approximately 2430 defendants. 148 Pac. (2d) at 347.

In this case, the court refuted the plaintiffs' assertion that proceeding as a statutory general adjudication would deprive them of the right to equitable injunctive relief. 148 Pac. (2d) at 350. In this regard, see the discussion at notes 119-121 *supra.*

has not already been made, proceed, as in this chapter provided, to make such a general determination."[128]

The Texas statute states, "Nothing in this subchapter [G, relating to water rights adjudication] prevents or precludes a person who claims the right to divert water from a stream from filing and prosecuting to a conclusion a suit against other claimants of the right to divert or use water from the same stream * * *."[129] However, the statute continues on to state that "if the [Texas Water Rights Commission] has ordered a determination of water rights as provided in this subchapter, or if the commission orders such a determination within 90 days after notice of the filing of a suit, the suit shall be abated on the motion of the commission or any party in interest as to any issues involved in the water rights determination."[130] Thus, the Texas statutory adjudication procedure may be considered exclusive to the extent that a private action involving a determination of water rights is filed during the time that the Commission has ordered a statutory determination of those rights, or if the Commission orders such a determination within 90 days of the filing of the private action, and the Commission or any interested party moves to abate the private action as to the issues involved in the statutory determination.

Transfer of Private Actions to Statutory Adjudication Proceedings

The Oregon statutory adjudication provisions contain a section which states that if a suit is brought in the circuit court for a determination of water rights, the court may, in its discretion, transfer the case to the State Engineer for determination under the statutory adjudication procedure.[131] The statutory adjudication provisions in Arizona and Nevada contain a similar provision.[132]

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[128] Utah Code Ann. § 73-4-18 (1968).

This provision was originally enacted in 1919 and provided simply, that in any civil action involving the use of water from any river system or water source, the court *in its discretion* could proceed as a general statutory determination if one had not already been made. Utah Laws 1919, ch. 67, § 38; R.S.U. 1933, § 100-4-18. This provision was changed to its current form in 1943. Utah Laws 1943, ch. 107, § 1. In the 1944 case of *Salt Lake City* v. *Anderson*, 106 Utah 306, 148 Pac. (2d) 346 (1944), discussed at note 127 *supra*, the court did not expressly mention the current version of the statute but it did refer to the former version by noting that in an earlier case it had been stated that "The majority of the court are of the opinion that it is a 'private' suit, which the lower court may, if it finds a general adjudication admissable, conduct as a general statutory adjudication under and pursuant to section 100-4-18, R.S.U. 1933." 148 Pac. (2d) at 349, quoting from *Spanish Fork West Field Irr. Co.* v. *District Ct.*, 99 Utah 558, 562, 110 Pac. (2d) 344, 346 (1941). The former version of the statute is set out in 110 Pac. (2d) at 345.

[129] Tex. Rev. Civ. Stat. Ann. art. 7542a, § 7 (Supp. 1970).

[130] *Id.*

[131] Oreg. Rev. Stat. § 539.020 (Supp. 1955).

[132] Ariz. Rev. Stat. Ann. § 45-231(A) (1956); Nev. Rev. Stat. § 533.240(4) (Supp. 1967).

In Idaho, a somewhat different provision, but one that may in effect amount to a transfer similar to that in Oregon, or may be no more than a court reference procedure, as discussed below, declares that whenever a suit is filed in court by private parties for the purpose of adjudicating the priority of water rights, prior to such adjudication that judge may request the Department of Reclamation to make an examination of the water system in the manner provided for in sections 42-1408 to 42-1412, which are part of the statutory adjudication provisions. The Department is directed to prepare a map of the area and "a report in the nature of a proposed finding of water rights," as provided in sections 42-1408 to 42-1412.[133] Sections 42-1408 to 42-1412, referred to in this provision, contain the procedures for examining the stream system, joining the parties, the hearing and report by the State Reclamation Engineer, the court hearing, and provisions with respect to the decree and appeal to the supreme court. In directing the Department to examine the stream system and prepare a map and proposed finding of water rights in accordance with these sections, among other difficulties, it is unclear whether the legislature intended that the provisions in those sections also should be followed regarding the role of the court upon the receipt of the State Reclamation Engineer's report,[134] or whether the court is to proceed in this regard as in an ordinary civil action.[135] If the former course was intended, this may in effect constitute a transfer of the action to a statutory adjudication proceeding, similar to the Oregon provision discussed above. But if the latter course was intended, this may constitute no more than a court reference procedure such as those described below.[136]

Private Actions in Which State Agencies Participate

The water rights statutes of a majority of the Western States provide for some form of State participation or intervention in a suit brought by private parties to determine water rights; and in most of these jurisdictions this is in addition to some form of a special statutory procedure previously described.

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[133] Idaho Code Ann. § 42-1401 (Supp. 1969).

[134] It is unclear, for example, whether the following provision in § 42-1410 must be followed: "Where no objection is filed with regard to any right found to exist by the state reclamation engineer as evidenced by his report, the district judge shall affirm the right as therein found."

[135] While it is not expressly provided that § § 42-1408 to 42-1412 shall be followed by the court in this regard, one of the sections referred to (42-1411) pertains only to the court, rather than the State Reclamation Engineer, and another section (42-1412) pertains to appeals from the court's decree.

[136] Except that, unlike the California and Kansas court reference procedures described below, the Idaho procedure expressly incorporates by reference at least some portion of the State's general statutory adjudication provisions.

Court Reference Procedure

The California court reference procedure authorizes trial courts of the State, in any suit brought for "determination of rights to water," to order a reference to the State Water Resources Control Board, as referee, of any or all issues involved.[137] Or the court may refer the suit to the Board for investigation of and report upon any or all of the physical facts involved.[138]

The Board may make investigations and may hold hearings and take testimony.[139] After considering objections of the parties, the Board's report is filed with the court,[140] where it is subject to the review on exceptions taken by parties and where evidence may be heard in rebuttal.[141]

Ordering the reference is discretionary with the trial court;[142] and it may make the reference either with or without a request from the parties.[143]

"[I]n view of the complexity of the actual issues in water cases and the great public interests involved," the California Supreme Court has commended this statutory plan to the trial courts for expediting the determination of conflicting water rights by reference to the State agency;[144] and its constitutionality was sustained under attack.[145]

The Board is also authorized to accept a reference, as master or referee, from a Federal court in case suit is brought therein for determination of rights to water within or partially within the State.[146]

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[137] Cal. Water Code § 2000 (West Supp. 1970). The report of the Board may include such opinions upon the law and facts as it deems proper and such findings of fact and conclusions of law as may be required by the court's order of reference. *Id.* § 2011; Cal. Water Code § 2012 (1956).

[138] Cal. Water Code § 2001 (West Supp. 1970).

[139] *Id.* § 2010.

[140] *Id.* § 2016.

[141] *Id.* § § 2017 and 2019.

[142] *Allen* v. *California Water & Tel. Co.*, 29 Cal. (2d) 466, 489, 176 Pac. (2d) 8 (1946).

[143] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 575, 45 Pac. (2d) 972 (1935).

[144] *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 917, 207 Pac. (2d) 17 (1947). "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." *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 575, 45 Pac. (2d) 972 (1935). "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." On the other hand, individual suits in which the issues are confined to those of a few parties have been said to constitute a method of resolving controversies that is "necessarily piecemeal, unduly expensive and obviously unsatisfactory." *Meridian* v. *San Franciso*, 13 Cal. (2d) 424, 457-458, 90 Pac. (2d) 537 (1939). See *Fleming* v. *Bennett*, 18 Cal. (2d) 518, 527-528, 116 Pac. (2d) 442 (1941).

[145] *Fleming* v. *Bennett*, 18 Cal. (2d) 518, 523-528, 116 Pac. (2d) 442 (1941); *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 917, 918, 207 Pac. (2d) 17 (1949).

[146] Cal. Water Code § § 2075 and 2076 (West Supp. 1970).

Part of California's well-developed court reference procedure for water rights cases has also been adopted in Kansas. In any suit involving a determination of water rights, to which the State is not a proper party, the court may order a reference to the Division of Water Resources or its Chief Engineer, as referee, for investigation and report respecting any or all of the physical facts involved.[147] Such reports are to be considered as evidence of the physical facts found by the referee,[148] although the court must hear such further evidence as may be offered by any party in rebuttal. Likewise, in any suit brought in a Federal court for determination of water rights within or partly within the State, the Division or its Chief Engineer may accept a reference as master or referee for the Federal court.[149]

A provision in the Idaho Code declares that whenever a suit is filed in court by private parties for the purpose of adjudicating the priority of water rights, prior to such adjudication the judge may request the Department of Reclamation to make an examination of the water system in the manner provided for in the statutory adjudication provisions. The Department is directed to prepare a map of the area and "a report in the nature of a proposed finding of water rights," as provided in the statutory adjudication provisions.[150] As discussed above,[151] it is unclear whether this provision is a court reference procedure or a transfer procedure.

Some of the statutory provisions in some other States, discussed immediately below, also may have some similarity to certain features of these court reference provisions, such as the provisions for making hydrographic surveys.

More Ways in Which State Agencies May Participate in Private Actions

Upon the filing of a private action to determine water rights, one or more of the following procedures may follow, depending upon the jurisdiction. The court *may* order the State agency to provide a hydrographic survey;[152] or the court *must* make such an order;[153] or the court *may* request the State agency to make an examination of the stream and all diversions;[154] or the court *may*

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[147] Kans. Stat. Ann. § 82a-725 (1969).

[148] The referee's report shall contain such findings of fact as may be required by the court's order of reference and such opinion upon the facts as deemed proper in view of the issues submitted. *Id.*

[149] *Id.*

[150] Idaho Code Ann. § 42-1401 (Supp. 1969).

[151] See notes 133-136 *supra.*

[152] Utah Code Ann. § 73-4-1 (1968).

[153] N. Dak. Cent. Code Ann. § 61-03-17 (1960), discussed at note 323 *infra*; Nev. Rev. Stat. § 533.240(2) (Supp. 1967); N. Mex. Stat. Ann. § 75-4-6 (1968); S. Dak. Comp. Laws Ann. § 46-10-4 (1967). See also Oreg. Rev. Stat. § 541.310 (Supp. 1969) which provides that when the State is a party to a suit for the determination of water rights, the court shall call upon the State Engineer for a complete hydrographic survey of the stream system.

[154] Idaho Code Ann. § 42-1401 (Supp. 1969).

order the agency to furnish the data necessary to determine the rights involved.[155] In such a private action, all claimants *may* be made parties;[156] or they *must* be made parties.[157] Moreover, in some States, such as North Dakota, whose statutory adjudication procedures are more or less similar to the Bien Code, the Attorney General must intervene on behalf of the State if, in the judgment of the State agency, the public interest requires such action.[158]

Statutory Adjudication Procedures in Selected States

Following are discussions of the statutory adjudication proceedings and other statutory adjudication procedures in four selected States–Colorado, Wyoming, Oregon, and North Dakota. These represent, respectively, each of the four systems listed earlier as subtopics under "Some Principal Variations in Statutory Adjudication Proceedings." The statutory adjudication procedures in each of the 19 Western States are included later in the appendix.

Colorado

"The Colorado system for the adjudication of water rights * * * is noteworthy as the first important attempt made by any state legislature to provide a special proceeding for the determination of controversies over water rights."[159]

As indicated earlier,[160] *adjudication* and *supervision over diversion and distribution* have gone hand in hand in Colorado since 1879 and 1881. Yet, unlike most Western States, State administrative control over the *appropriation* of stream water, such as through the issuance of permits, has never been provided.

Following are some of the principal facets of the historical development of the statutory adjudication procedures in Colorado. The described early procedures have been superseded by the 1969 and subsequent legislation discussed later. However, substantial portions of the basic features formulated

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[155] Okla. Stat. Ann. tit. 82 § 13 (1970).

[156] *Id.*

[157] N. Dak. Cent. Code Ann. § 61-03-17 (1960), discussed at note 323 *infra*; Nev. Rev. Stat. § 533.240(1) (Supp. 1967); N. Mex. Stat. Ann. § 75-4-6 (1968); S. Dak. Comp. Laws Ann. § 46-10-3 (1967). See also Oreg. Rev. Stat. § 541.310 (Supp. 1969), which provides that when the State is a party to a suit for the determination of water rights, all claimants must be made parties.

[158] N. Dak. Cent. Code Ann. § 61-03-16 (1960), discussed at note 322 *infra*; N. Mex. Stat. Ann. § 75-4-4 (1968); S. Dak. Comp. Laws Ann. § 46-10-7 (1967); Okla. Stat. Ann. tit. 82, § 4 (1970).

[159] Long, J. R., "A Treatise on the Law of Irrigation" 193 (1902).

[160] See note 9 *supra*.

in the early statutes is still reflected in the current legislation, including the predominantly judicial nature of the adjudication procedures.[161]

Original adjudication statutes.—The earliest statutory adjudication legislation was enacted in 1879 and 1881.[162] Concurrent legislation provided administrative machinery for dividing the waters of streams among the several diversion ditches according to their prior rights—in other words, for carrying out and enforcing decrees of adjudication issued by the courts pursuant to the contemporaneous legislation.[163] The combination of these Colorado water rights adjudication and administration systems, first authorized in these years, was the pioneer in this field in the West.[164]

In the 1879 act, jurisdiction to hear, adjudicate, and settle all questions concerning priority of appropriations for irrigation purposes, from the same stream or its tributaries, was vested exclusively in the district courts. This act contained detailed procedures for making the adjudications.

After 2 years' experience, which apparently was not wholly satisfactory, an entirely new act was passed in 1881 for the declared purpose of making further provisions for settling priorities of rights to the use of water for irrigation, in the district courts and supreme court, and for recording such priorities. The owner or claimant of an interest in any ditch, canal, or reservoir in any water district was required to file, on or before June 1, 1881, a sworn statement of such claim with the clerk of the district court that had jurisdiction. After that date any such owner or owners, by petition to the district court, could initiate proceedings for an adjudication of all priorities in a water district resulting in a decree determining and establishing them.[165] The legislation also required the filing of a sworn statement with the county clerk within a certain period of time after commencement of work.[166] But in construing somewhat similar provisions in subsequent legislation, the Colorado Supreme Court made it clear that the filing requirements were restricted to matters of evidence and that the lack thereof did not invalidate the appropriation.[167]

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[161] With respect to 1943 and earlier Colorado legislation, see Chilson, H., "Adjudication and Administration of Water Rights in the State of Colorado," Proc., Water Law Conference, Univ. of Tex. 80, 86 (1956).

[162] Colo. Laws 1879, p. 94, Laws 1881, p. 142.

[163] See the State summary for Colorado in the appendix.

[164] An authoritative description of the origin and development of this combination of systems, including an appraisal of its effectiveness in operation, was contributed by an eminent Colorado water lawyer. Chilson, *supra* note 161.

[165] Colo. Laws 1881, p. 142.

[166] Colo. Laws 1881, p. 161, § 2. This section of the 1881 act was held unconstitutional on the ground that the subject mater was not adequately stated in the title of the act. *Lamar Canal Co.* v. *Amity Land & Irr. Co.*, 26 Colo. 370, 376-377, 58 Pac. 600 (1899).

[167] *De Haas* v. *Benesch*, 116 Colo. 344, 351-352, 181 Pac. (2d) 453 (1947); *Black* v. *Taylor*, 128 Colo. 449, 457-458, 264 Pac. (2d) 502 (1953). These cases are discussed in chapter 7 at note 584. See also *Archuleta* v. *Boulder & Wild County Ditch Co.*, 118 Colo. 43, 192 Pac. (2d) 891, 894-895 (1948).

Although the early legislation related to the use of water for irrigation only, an amendment in 1903 extended it to "any beneficial purpose other than irrigation."[168]

Adjudication and Limitation Act of 1919.[169]—All claimants of water rights on file in the office of the State Engineer[170] not adjudicated or in process of adjudication were required by this 1919 statute to file supplemental statements of their claims with the State Engineer by January 1, 1921[171]—subsequently extended to January 1, 1922[172]—in default of which their claims would be conclusively presumed to have been abandoned, and hence canceled.[173] However, the Colorado Supreme Court held that "defendant's failure to comply with the provisions of the 1919 act by filing a supplemental statement as therein provided did not amount to abandonment or in any wise invalidated [sic] its appropriation."[174]

In any general adjudication[175] of rights to the use of water for irrigation and other beneficial purposes in any water district, the court was required to command the State Engineer to certify to the court a complete list of his filings not canceled or submitted for adjudication. Provision was made for recording transfers of claims in the State Engineer's office.[176]

Conditional decrees were provided for.[177] After notice of adjudication proceedings was given (following receipt of the list from the State Engineer) each claimant for appropriation of water in the water district, whether the appropriation was wholly or partially completed, had to appear and file his statement of claim and offer proof, the manner of presentation being the same whether the appropriation was only partially completed or was perfected. If proof of partial completion was satisfactory to the court, a conditional decree was issued, conditioned upon application of the water to beneficial use within a reasonable time thereafter. The final decree in a subsequent proceeding to fix

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[168] Colo. Laws 1903, ch. 30.

[169] Colo. Laws 1919, ch. 148, Rev. Stat. Ann. § 148-10-1 *et seq.* (1963).

[170] These filings were made pursuant to an earlier version of Colo. Rev. Stat. Ann. § 148-4-1 (1963).

[171] *Id.* § 148-10-1.

[172] *Id.* § 148-10-3.

[173] *Id.* § 148-10-2.

[174] *Archuleta* v. *Boulder & Weld County Ditch Co.,* 118 Colo. 43, 192 Pac. (2d) 891, 896 (1948). The court, *inter alia,* indicated that this provision should be construed along with § 5 of the 1919 act which it is said provided "for adjudication of priorities where no filing whatever was made." 192 Pac. (2d) at 895. Section 5 of this act was incorporated in Colo. Rev. Stat. Ann. § 148-10-6 (1963).

[175] This is discussed in the immediately succeeding subtopic.

[176] Colo. Rev. Stat. Ann. § 148-10-4 (1963).

[177] Such decrees, which are discussed at the end of chapter 8, were recognized by the courts in earlier times. *Conley* v. *Dyer,* 43 Colo. 22, 24-25, 95 Pac. 304 (1908); *Drach* v. *Isola,* 48 Colo. 134, 141-145, 109 Pac. 748 (1910). Conditional decrees were granted by the courts prior to legislation on the subject. *Taussig* v. *Moffat Tunnel Water & Dev. Co.*, 106 Colo. 384, 388, 106 Pac. (2d) 363 (1940).

a quantity of water was not to exceed the maximum fixed in the conditional decree. In this way, rights of partially completed appropriations are safeguarded pending completion and final adjudication, or cancellation and forfeiture, as the case may be.[178]

Application of the principle of conditional decrees to the future requirements of the City of Denver was before the Colorado Supreme Court in a 1954 case. The court said, among other things:[179]

> We cannot hold that a city more than others is entitled to decree for water beyond its own needs. However, an appropriator has a reasonable time in which to effect his originally intended use as well as to complete his originally intended means of diversion, and when appropriations are sought by a growing city, regard should be given to its reasonably anticipated requirements. * * * Particularly is this true in considering claims for conditional decrees.

In subsequent cases, the Colorado Supreme Court has held that one who had taken the first necessary step to initiate an appropriation of waters, and thereafter proceeded with diligence to finance and construct the works necessary to make an application of water to beneficial use, was entitled to a conditional decree defining his rights as of the date of the first step taken, regardless of compliance with the map and statement requirements pertaining to water appropriation.[180] "It follows that one who is entitled to a conditional decree defining his rights to water for future application to use has a vested right which he may protect in case of any action by others which threaten to destroy or injure that right."[181]

Adjudication Act of 1943.[182]—Colorado was divided into 70 water districts,[183] for purposes of adjudicating and administering water rights. Jurisdiction to adjudicate water rights pertaining to the same source within the

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[178] Colo. Rev. Stat. Ann. § § 148-10-6 to 148-10-9 (1963).

[179] *Denver* v. *Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 384, 276 Pac. (2d) 992 (1954).

[180] Colo. Rev. Stat. Ann. § 148-4-1 *et seq.* (1963).

[181] *Rocky Mountain Power Co.* v. *White River Elec. Assn.*, 151 Colo. 45, 50, 376 Pac. (2d) 158, 162 (1962); *Metropolitan Suburban Water Users Assn.* v. *Colorado River Water Conservation Dist.*, 148 Colo. 173, 365 Pac. (2d) 273, 286-287 (1961).

[182] Colo. Laws 1943, ch. 190, Rev. Stat. Ann. § 148-9-1 *et seq.* (1963).

[183] Colo. Rev. Stat. Ann. § 148-13-1 *et seq.* (1963).

In addition to these districts, Colorado was also divided into seven irrigation divisions, six of which were headed by division engineers and the seventh by a Special Deputy State Engineer. *Id.* § § 148-12-1 *et seq.* and 148-11-10. The primary purpose of these divisions (comprising the principal drainage areas of the State) was the administrative distribution of water in accordance with the right of priority of appropriation as established by judicial decrees. Another use for these divisions is noted at note 193 *infra.*

same water district was vested exclusively in the district court[184] for the county in which the water district was located.[185]

An original adjudication, defined as the first adjudication in a particular water district,[186] was initiated with the filing of a petition with the court by or on behalf of an owner or claimant of an unadjudicated water right.[187] A day for commencing hearings in open court was appointed or, if it was not possible to proceed in open court, a referee was appointed by the court to hear the testimony.[188] Notice was given to "all owners or claimants of any water right in the water district * * * to file a statement of claim * * * in regard to all water rights so owned or claimed by them" and "all water users, within the water district" were notified "in case they wish to resist a claim" made by others. The State Engineer was ordered to furnish the court with a certified list of all uncanceled claims of water rights in the water district on file in his office.[189] A supplemental adjudication, defined as any adjudication subsequent to the original adjudication,[190] was initiated in much the same manner as an original adjudication, except that it was not necessary to submit a previously adjudicated water right in a supplemental adjudication unless the proceeding was supplemental as to one class of rights, such as irrigation, and original as to another class, such as nonirrigation. In this latter event, service of notice on those whose rights were already adjudicated was necessary.[191]

The act provided complete procedures for adjudicating any water right for which a statement of claim was filed,[192] including a provision that an appropriator from outside the water district, but within the irrigation division,[193] could also cross-examine the witnesses and introduce evidence upon a satisfactory showing that his water rights might be materially affected by any resulting decree.[194] The proceedings culminated in a decree which

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[184] The 22 judicial districts provided for in Colo. Rev. Stat. Ann. § 37-12-1 *et seq.* (Supp. 1965) are to be distinguished from the 70 water districts.

[185] Colo. Rev. Stat. Ann. § 148-9-2 (1963). If the water district extended into two or more counties, jurisdiction vested in the district court for the county in which the first regular term after December 1 first occurred. Any court that issued an adjudication decree retained jurisdiction thereafter of all water rights in the water district unless otherwise provided by statute. *Id.*

[186] *Id.* § 148-9-1(3).

[187] *Id.* § 148-9-3.

[188] *Id.* § 148-9-4.

[189] *Id.* § 148-9-5.

[190] *Id.* § 148-9-1(4).

[191] *Id.* § 148-9-7.

[192] *Id.* § 148-9-10.

[193] These divisions are referred to in note 183 *supra.*

[194] Colo. Rev. Stat. Ann. § 148-9-10(4) (1963). All appropriators from other water districts who thus appeared were bound by the orders and decrees to the same degree as the other parties in the adjudication suit and had the same rights of reargument, review, appeal, or writs of error. *Id.*

specified, as to each appropriation concerning which testimony was offered, the source, point of diversion, location of storage works, purpose, priority date, and amount of water.[195] Certain permissable alternative classifications were specified in the statute for numbering the priorities awarded.[196]

With respect to supplemental adjudications, the act provided that, regardless of the dates of appropriation:[197]

> In case a prior decree has been rendered by the court in any adjudication fixing irrigation or nonirrigation priorities from the same source, each priority adjudicated shall be junior and inferior to those theretofore adjudicated, and the decree shall so indicate as to each such junior priority which bears a date earlier than the latest priority date awarded in the last prior adjudication.

This provision meant, as stated by one author, that:[198]

> [A]ny appropriation or priority decreed in a supplemental proceeding is subject to all rights decreed in any previous adjudication proceeding. For example, an adjudication proceeding in a certain water district may have been held in the year 1882. X Ditch Company may have a water right initiated in 1870. But X Ditch Company may have neglected to have its rights adjudicated in the adjudication proceeding held in 1882. The non-adjudication of X Ditch Company's rights does not destroy X Ditch Company's water right. The failure to appear in the adjudication proceeding and have its claim adjudicated merely subordinates its rights to a position junior to all rights which were adjudicated in that proceeding. Let us assume that in 1905 a supplemental adjudication proceeding was held in the same water district, and X Ditch Company filed its claim and had its right adjudicated. Although the supplemental decree may very properly find that X Ditch Company's appropriation was initiated in 1870, nevertheless X Ditch Company's priority number in order of time will be subsequent to all rights which were adjudicated in the prior adjudication proceeding, although the date of initiation of many of the appropriations decreed in the original proceeding may be subsequent in time to the initiation of X Ditch Company's appropriation.

In a recent case, the Colorado Supreme Court said, "We are presently well ingrained with the proposition that, no matter how early an appropriation date may be in a later decree, it has a lower priority than a much later appropriation date contained in an earlier decree."[199]

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[195] *Id.* §§ 148-9-11 to 148-9-13.

[196] *Id.* § 148-9-14.

[197] *Id.* § 148-9-13(3).

[198] Chilson, *supra* note 161, at 87.

[199] *Luis Coppa & Son* v. *Kuiper*, 171 Colo. 315, 467 Pac. (2d) 273, 276 (1970). See also, with respect to similar former legislation, *Huerfano Valley Ditch & Reservoir Co.* v.

With respect to the relationship between priority numbers in decreed water rights in one water district and those in another district, the priority number had no effect; the decreed priority number established only the priorities among water users within the district in which the adjudication occurred. As between districts, the date of appropriation governed the priority of use.[200] The statutes provided:[201]

> The irrigation division engineer * * * shall make out a list of all ditches, canals and reservoirs entitled to appropriations of water within his division, arranging and numbering the same in consecutive order, according to the dates of their respective appropriations within his division, and without regard to the number such ditches, canals or reservoirs may bear within their water districts. * * *
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> [I]f it shall appear that in any district in that division any ditch, canal or reservoir is receiving water whose priority postdates that of the ditch, canal or reservoir in another district as ascertained from [the irrigation division engineer's] register, he shall at once order such postdated ditch, canal or reservoir shut down and the water given to the elder ditch, canal or reservoir. His orders being directed at all times to the enforcement of priority of appropriation, according to his tabulated statement of priorities, to the whole division, and without regard to the district within which the ditches, canals and reservoirs may be located.

Decrees under the water adjudication statute determined the priorities of the several ditches and the quantities of water awarded thereto; they did not identify ownership of the ditches or who had rights to use the water decreed to the various ditches.[202] A general water adjudication proceeding differed

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Hinderlider, 81 Colo. 468, 256 Pac. 305, 307 (1927); *In re Water Rights in Water Dist. No. 17*, 85 Colo. 555, 277 Pac. 763, 765 (1929).

[200] With respect to similar former legislation, see *Fort Lyon Canal Co.* v. *Arkansas Valley Sugar Beet & Irrigated Land Co.*, 76 Colo. 278, 230 Pac. 615 (1924); *O'Neill* v. *Northern Colo. Irr. Co.*, 56 Colo. 545, 139 Pac. 536 (1914). See also Chilson, *supra* note 161, at 86.

[201] Colo. Rev. Stat. Ann. § § 148-12-9(2) and 148-12-10(2) (1963), respectively.

[202] For a discussion of these or predecessor provisions, see *Robinson* v. *Alfalfa Ditch Co.*, 89 Colo. 567, 568, 5 Pac. (2d) 1115 (1931). Nothing else could be adjudicated therein. *Burke* v. *South Boulder Canyon Ditch Co.*, 76 Colo. 354, 356, 231 Pac. 674 (1925). "The title to the canal, its right of way, or whether it owns its right of way, or how it may have acquired it, are matters that cannot be gone into or determined in a statutory adjudication proceeding." *Snyder* v. *Colorado Gold Dredging Co.*, 58 Colo. 516, 518, 147 Pac. 330 (1915). It was a fundamental rule of water law in Colorado, according to the supreme court in a 1959 decision, that a decree entered in a ditch adjudication proceeding could not and did not determine ownership of the various water priorities awarded to any given ditch. The decree merely awarded the ditch its proper number, adjudicated the quantity of water to which it was entitled under its various priorities, and set forth the dates thereof as related to those of other ditches and reservoirs within the water district. *Saunders* v. *Spina*, 140 Colo. 317, 344 Pac. (2d) 469, 473 (1959). Insofar as a decree purported to settle and fix relative rights of individuals to the water

materially from a suit to determine particular disputes involving use of water which may have arisen between residents of any community, over which the district courts in the several counties had general jurisdiction. "One is not required to resort to the particular court authorized to conduct a general adjudication proceeding in the several water districts in order to secure redress in an action involving an alleged infringement of a right to the use of water."[203]

The decree of adjudication became effective when certified copies thereof were filed with the State Engineer and the irrigation division engineer. Such decree was then the warrant of the state water officials for regulating the distribution of water accordingly.[204]

The decrees were *res judicata* between those who were parties to or participated in the proceedings in which they were rendered, and they could have been attacked, reviewed, or modified only in the manner provided by law.[205] "This court has never recognized the right of parties to a water adjudication to complain of the results after the expiration of the statutory time for review, except on the ground of fraud."[206]

With respect to those who were not parties to a water adjudication suit, two statutes of limitation concerning the finality and binding force of a decree provided that: (1) The owner or claimant of a water right *within* the water district whose claimed priority antedated the latest priority fixed by the decree and who filed no claim therefor in the adjudication proceeding and who had no notice of such proceeding served on him (or his predecessor in interest) personally or by registered mail, could have had the decree reopened, for good cause, within 2 years after having been rendered. (2) Any person whose water right was decreed or subject to decree in *another* water district could bring an action in the court which rendered the decree to determine any claim of

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in a ditch, it was ineffectual. *Rollins* v. *Fearnley*, 45 Colo. 319, 323-324, 101 Pac. 345 (1909). "The district court can go no further than determine the priorities of the several ditches and amount of water awarded thereto." *Central Trust Co.* v. *Culver*, 23 Colo. App. 317, 323, 129 Pac. 253 (1912), affirmed, 58 Colo. 334, 145 Pac. 684 (1915). "While the adjudication settled the priority of rights as between the two ditches, it did not, and could not, adjudge the respective rights and claims of water users under either ditch." *Caldwell* v. *States*, 89 Colo. 529, 534, 6 Pac. (2d) 1 (1931).

The decree was only confirmatory of preexisting rights. It did not create or grant any rights, but served as evidence of rights previously acquired. *Cresson Consol. Gold Min. & Mill. Co.* v. *Whitten*, 139 Colo. 273, 338 Pac. (2d) 278, 283 (1959); *Cline* v. *Whitten*, 144 Colo. 126, 355 Pac. (2d) 306, 308 (1960). That is, it measured the rights of the claimant at the time it was issued and applied only to appropriations actually made prior to that time. "It does not curtail the right of the landowner to make further appropriations as needed." *Nicoloff* v. *Bloom Land & Cattle Co.*, 100 Colo. 137, 139-140, 66 Pac. (2d) 333 (1937).

[203] *Genoa* v. *Westfall*, 141 Colo. 533, 349 Pac. (2d) 370, 377 (1960).

[204] Colo. Rev. Stat. Ann. § 148-9-15 (1963).

[205] With respect to similar former legislation, see *Fort Lyon Canal Co.* v. *Arkansas Valley Sugar Beet & Irrigated Land Co.*, 39 Colo. 332, 337, 341, 90 Pac. 1023 (1907).

[206] *Reagle* v. *Square S. Land & Cattle Co.*, 133 Colo. 392, 395, 296 Pac. (2d) 235 (1956).

priority at any time within 4 years after the rendering of such decree.[207] After the expiration of 2 or 4 years, as the case might have been, from the time of rendering a final decree, the decree became binding and final, except in

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[207] Colo. Rev. Stat. Ann. § § 148-9-16 and 148-9-17 (1963).

For a discussion of these or predecessor provisions, see *Rogers* v. *Nevada Canal Co.*, 60 Colo. 59, 71-72, 151 Pac. 923 (1915); *O'Neil* v. *Northern Colo. Irr. Co.*, 242 U.S. 20, 25-27 (1916), affirming 56 Colo. 545, 550-552, 139 Pac. 536 (1914); *Fort Lyon Canal Co.* v. *Arkansa Valley Sugar Beet & Irrigated Land Co.*, 76 Colo. 278, 230 Pac. 615, 617 (1924); *Huerfano Valley Ditch & Reservoir Co.* v. *Hinderlider*, 81 Colo. 468, 256 Pac. 305, 307 (1927).

In *Quirico* v. *Hickory Jackson Ditch Co.*, 126 Colo. 464, 251 Pac. (2d) 937, 940 (1952), the court stated, *inter alia*: "It could hardly be successfully contended that a decree is valid against those not participating where process has not been served, or notice given as required by statute. Such a decree is not res adjudicata. No more can it, we think, be considered a valid decree to start the running of the period of limitation as to those who do not participate in its benefits or even have knowledge of its rendition. * * * [I]n a situation such as alleged in plaintiff's complaint, the adjudication decree could not become final as to parties without notice who did not participate or accept its benefits or have knowledge of its rendition * * * and, if it was not a final decree as to them, under the very terms of the statute it could not start the beginning of the period of limitation." This apparently was a retreat from the position taken earlier to strictly apply the statutes of limitation. However, in a later case involving the same parties, the court said, "Under conditions generally prevailing in proceedings for the adjudication of priority rights to the use of water, the provisions of the two and four year statutes of limitation have been strictly enforced." *Quirico* v. *Hickory Jackson Ditch Co.*, 130 Colo. 481, 276 Pac. (2d) 746, 748 (1954). The 1954 court also said: "While no charge of fraud against plaintiff is alleged by defendants, nevertheless in their behalf it is strongly represented that plaintiff and the water officials co-operated in an effort to keep defendants and their predecessor in ignorance of plaintiff's 1934 adjudication decree until after the expiration of the four-year period following its entry. If ever justified under any circumstances, the situation with which defendants apparently were confronted, if credence be given to the allegations of their cross complaint, presents an illustration where the tolling of the statute of limitation might be recognized." 276 Pac. (2d) at 748-749. However, the plaintiff apparently was unable to prove such facts and the court went on to conclude, *inter alia*: "It may well be that notice in the original adjudication proceeding actually was defective and if subjected to timely objection might have been deemed insufficient, but such is the nature of property rights to the use of water that there must come a time beyond which all such objections are barred. It is important that decrees determining priority rights to use of water have both vitality and finality." 276 Pac. (2d) at 750. In *Hallenbeck* v. *Granby Ditch & Reservoir Co.*, 160 Colo. 555, 420 Pac. (2d) 419, 424 (1966), the court stated, "Each such decree was open to attack * * * only for the statutory periods prescribed by C.R.S. '53, 147-9-16 and 147-9-17 * * *. Having failed to challenge within the time allowed, Hallenbeck cannot do so now except by asserting and proving abandonment or fraud."

According to Comment, "Developments in Colorado Water Law of Appropriation in the Last Ten Years," 35 U. Colo. L. Rev. 493, 494 (1962-1963), in 1957 the Colorado Legislature, apparently in response to the *Quirico* decisions, *supra*, enacted a statute which provided: "A decree * * * awarding a priority right * * * shall not be set aside or declared invalid because of any irregularity, failure to give proper notice, or other

instances of applications or suits filed prior thereto.[208] Pending the determination of any suits brought under these limitation provisions, the water officials were required to distribute the water according to the decree under attack until the priorities established under such decree might otherwise have been determined and the water officials received official notice of any such alterations from the court.[209]

Writs of error to review final orders or decrees of the court in adjudication proceedings were allowed to be taken to the supreme court.[210]

The act required that certified copies of such decreed rights be furnished to and kept by the irrigation division engineer in a register and further provided that such engineer[211]

> shall make out a list of all ditches, canals and reservoirs entitled to appropriations of water within his division, arranging and numbering the same in consecutive order, according to the dates of their respective appropriations within his division, and without regard to the number of such ditches, canals or reservoirs may bear within their respective water districts. Said irrigation division engineer shall make from his register a tabulated statement of all the ditches, canals and reservoirs in his division whose priorities have been decreed, which statement shall contain the following information concerning each ditch, canal and reservoir arranged in separate columns: The name of the ditch, canal or reservoir; its number in his division; the district in which it is situated; the number of it in its proper district; and the number of cubic feet of water per second to which it is entitled, and such other and further information as he may deem useful to the proper discharge of his duty.

Water Right Determination and Administration Act of 1969.[212]—With the enactment of the Water Right Determination and Administration Act of 1969, repealing, among other provisions, the previously discussed 1919 and 1943 legislation,[213] the Colorado system of determining water rights continues as a

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defect in the adjudication proceeding * * * or because of any other jurisdictional ground when" (1) more than 18 years have elapsed after the decree was awarded, (2) during the 18 or more years the water was continuously and openly beneficially used when needed for the purposes for which it was appropriated, and (3) during the 18 or more years the water official having jurisdiction over the decreed water exercised that jurisdiction in accordance with the decree. Colo. Rev. Stat. Ann. § 148-19-1 (1963).

[208] Colo. Rev. Stat. Ann. § § 148-9-16(3) and 148-9-17(2) (1963).

[209] *Id.* § 148-9-17(2).

[210] *Id.* § 148-9-21.

[211] *Id.* § 148-12-9. See also *id.* § § 148-12-10(2) and 148-12-6.

[212] Colo. Laws 1969, ch. 373, Rev. Stat. Ann. § 148-21-1 *et seq.* (Supp. 1969).

[213] Colo. Laws 1969, ch. 373, § 20, repealed Colo. Rev. Stat. Ann. ch. 148, arts. 9 (Adjudication Act of 1943) and 10 (Adjudication and Limitation Act of 1919) (1963, as amended). Colo. Laws 1969, ch. 373, § 20, also repealed Colo. Rev. Stat. Ann. ch. 148, arts. 4 (filing of maps and statements of claims), 12 (Irrigation Divisions—Division

judicial proceeding but with variations in such proceedings and associated administrative provisions.[214]

For purposes of determining, tabulating, and administering water rights, the Colorado Legislature abolished the previously existing 70 water districts[215] and replaced them with seven water divisions that generally follow major watershed boundaries.[216] Jurisdication over "water matters" arising in each water division is vested exclusively in the district courts acting collectively through the water judge in that division.[217] "Water matters" include only such matters as the 1969 act or any other law shall specify to be heard by such water judges.[218]

Any person[219] desiring, among other things, a determination of a water right or a conditional water right[220] and the amount and priority thereof, shall file a verified application with the water clerk, setting forth facts in support of the application.[221] Following the publication of notice[222] and investigation by

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Engineers), and 13 (Water Districts) (1963), and 14 (Special Jurisdication of Courts), 15 (Water Commissioners), and 19 (Limitation of Actions–Decrees) (1963, as amended), and §§ 148-2-8, 148-3-12, 148-11-10, 148-11-12, 148-11-17 and 148-11-18 (1963), 148-2-7 and 148-11-22(3) (Supp. 1965), and 148-2-9 to 148-2-12 (Supp. 1967).

With respect to the disposition of proceedings pending on June 7, 1969, the effective date of the act, see Colo. Rev. Stat. Ann. § 148-21-44 (Supp. 1969).

[214] In addition to other features discussed below, the 1969 act included a number of provisions for integrating the determination of rights in surface and physically connected ground waters, as discussed in chapter 20. See Colo. Rev. Stat. Ann. §§148-21-2 (1), 148-21-3 (3), (4), and (8), 148-21-17 to 148-21-20 and 148-21-34 (Supp. 1969).

[215] Colo. Laws 1969, ch. 373, §20(1).

[216] Their areas are specified in Colo. Rev. Stat. Ann. § 148-21-8 (Supp. 1969). These divisions are geographically similar to the previously existing divisions under the 1943 act, which were primarily used for administrative purposes. The former divisions and districts are referred to at note 183 *supra.*

[217] Colo. Rev. Stat. Ann. § 148-21-10(1) (Supp. 1969). The "water judge" shall be a judge of the district courts in the manner provided in § 148-21-10(2). "The services of the water judge shall be in addition to his regular duties as a district judge but shall take priority over such regular duties." *Id.*

[218] *Id.* § 148-21-10(1).

[219] Person is defined as "an individual, a partnership, a corporation, a municipality, the state of Colorado, the United States of America, or any other legal entity, public or private." *Id.* § 148-21-3(2).

[220] A conditional water right is defined as "a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is based." *Id.* § 148-21-3(9). Conditional water rights are discussed at the end of chapter 8, and conditional decrees under the 1919 legislation are discussed at notes 177-181 *supra.*

[221] Colo. Rev. Stat. Ann. § 148-21-18(1) (Supp. 1969).

[222] *Id.* § 148-21-18(3). Under this provision, each month the water clerk prepares a resume of all applications filed in his office during the preceding month. This resume is published in newspapers having general circulation in each county in the division and a copy of the resume is mailed to each person who the referee has reason to believe might be affected or who has requested a copy of the resume. A 1971 amendment to

the referee,[223] a ruling is made by the referee (unless he determines to rerefer the matter to the water judge), subject to review by the water judge. Copies of the referee's ruling are then filed with the division engineer and the water clerk of the division.[224] Applications that are granted by the referee shall be stayed by the water judge upon a showing of material damage pending review of the referee's ruling by the water judge.[225] Rulings of the referee which are protested within a specified time shall be confirmed, modified, reversed, or reversed and remanded by the water judge. Matters which have been rereferred to the water judge by the referee shall be fully disposed of by the water judge who may make such provisions as he deems appropriate. Rulings of the referee which have not been protested shall be confirmed in the judgment and decree of the water judge except that the water judge may reverse, or reverse and remand, any such ruling which he deems contrary to law.[226]

After the hearings on all matters have been concluded, the water judge shall enter a judgment and decree indicating, among other things, the amount and priority of the water right or conditional water right.[227] The division engineer and the State Engineer then regulate the distribution of water according to the determination of the judgment and decree.[228]

> In the distribution of water, the division and the state engineer shall be governed by the priorities for water rights and conditional water rights established by adjudication decrees entered in proceedings concluded or pending on the effective date of this [act] and by the priorities for water rights and conditional water rights determined pursuant to the provisions of this [act]. All such priorities shall take precedence in their appropriate order over other diversions of waters of the state.[229]

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this provision allows the water judge, in his discretion, to augment these means of notification by using AM and FM radio, TV stations and cable television. Colo. Laws 1971, ch. 371.

[223] Colo. Rev. Stat. Ann. § 148-21-18(4) (Supp. 1969). The water judge is directed to appoint such referees as he deems necessary, from a list of not less than three qualified persons submitted by the Executive Director of Natural Resources; but the functions of the referee under this act may be performed by the water judge. *Id.* § § 148-21-10(4) and (5).

[224] *Id.* § 148-21-19(1).

[225] *Id.* § 148-21-20(11).

[226] *Id.* § 148-21-20(5).

[227] *Id.* § 148-21-20(7).

[228] *Id.* § 148-21-20(8).

A division engineer is appointed for each of the seven divisions by the State Engineer with the approval of the Executive Director of the Department of Natural Resources. *Id.* § 148-21-9(1)(a).

[229] *Id.* § 148-21-17(3)(a). Section 148-21-35 includes more detailed provisions regarding the distribution of water, including administration of any plan for augmentation, discussed later.

The judgment and decree of the water judge are subject to appellate review except for that part of the judgment or decree which confirms a part of a ruling with respect to which no protest was filed.[230]

> Clerical mistakes in said judgment and decree may be corrected by the water judge on his own initiative or on the petition of any person, and substantive errors therein may be corrected by the water judge on the petition of any person whose rights have been adversely affected thereby and a showing satisfactory to the water judge that such person, due to mistake, inadvertence, or excusable neglect, failed to file a protest with the water clerk within the time specified in this section. Any petition referred to in the preceding sentence shall be filed with the water clerk within two years after the date of the entry of said judgment and decree.[231]

The act provides that "In the determination of a water right the priority date awarded shall be that date on which the appropriation was initiated if the appropriation was completed with reasonable diligence."[232] Within each water division, the "priorities awarded in any year for water rights or conditional water rights shall be junior to all priorities awarded in previous years and junior to all priorities awarded in decrees entered prior to the effective date of this article or in decrees entered in proceedings which are pending on such date * * *."[233]

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[230] *Id.* § 148-21-20(9).

[231] *Id.* § 148-21-20(10). As amended by Colo. Laws 1970, ch. 103, § 4, the time allowed for filing petitions was changed from 2 years to 3 years.

[232] Colo. Rev. Stat. Ann. § 148-21-21(1) (Supp. 1969). "If the appropriation was not completed with reasonable diligence following the initiation thereof, then the priority date thereof shall be that date from which the appropriation was completed with reasonable diligence." *Id.*

With respect to conditional water rights (which are discussed at the end of chapter 8), in every second calendar year following the year in which a conditional water right has been determined, the owner or user of the right, if he wishes to maintain the right, must obtain a finding by the referee of reasonable diligence in the development of the appropriation; failure to do so shall be considered an abandonment of the conditional water right. *Id.* § 148-21-17(4).

[233] *Id.* § 148-21-22. Certain exceptions are made in this section with respect to waters diverted by means of wells.

As amended in 1971, this section was reenacted so as to provide: "With respect to each division described in section 148-21-8, the priority date awarded for water rights or conditional water rights adjudged and decreed on applications for a determination of the amount and priority thereof filed in such division during each calendar year shall establish the relative priority among other water rights or conditional water rights awarded on such applications filed in that calendar year; provided that such water rights or conditional water rights shall be junior to all water rights or conditional water rights awarded on such applications filed in any previous calendar year and shall also be junior to all priorities awarded in decrees entered prior to June 7, 1969, or decrees entered in proceedings which were pending on such date * * *." Colo. Laws 1971, ch. 373, § 1. The exceptions with respect to wells were retained. June 7, 1969, was the effective date of the 1969 act.

The act also provides for various changes of water rights[234] and for a "plan for augmentation," which means "a detailed program to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water or by any other appropriate means."[235] Procedures are provided for filing and acting upon applications for such changes or plans for augmentation.[236] Such applications shall be approved "if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."[237]

The foregoing judicial proceedings have been augmented by statutory proceedings in which the division engineer in each division, with the approval of the State Engineer, provides the water clerk in his division with a tabulation of all decreed water rights and conditional water rights in the division, in order of seniority.[238] The tabulations of decreed water rights, to be made in 1970,[239] shall set forth the decreed priority and amount of each decreed right. The act further provided:[240]

> In making such tabulation, the division engineer may use such system or systems of numbering and listing water rights and conditional water rights in order of seniority as is suited to the

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[234] Colo. Rev. Stat. Ann. § 148-21-3(11) (Supp. 1969).

[235] *Id.* § 148-21-3(12).

[236] See, *inter alia, id.* § § 148-21-17 to 148-21-21 and 148-21-23.

[237] *Id.* § 148-21-21(3). If it would cause such an injurious effect, the applicant or anyone in opposition to the application shall be allowed (by the referee or water judge, as the case may be) to propose terms or conditions which would prevent such injurious effect, including certain specified types of terms or conditions. *Id.* § § 148-21-21(3) and (4).

Any decision of a water judge dealing with a change of water right or plan for augmentation may include, *inter alia,* the condition that its approval shall be subject to reconsideration on the question of injury to vested rights of others during any hearing commencing in the 2 calendar years succeeding the year in which such decision is rendered. *Id.* § 148-21-20(6).

[238] *Id.* § § 148-21-27(1)(a) and (4), 148-21-28(1) and (2)(d).

See the discussion at note 211 *supra* regarding prior legislation pertaining to tabulation of water rights. This 1969 act contains more detailed provisions in this regard. Among other differences, the tabulations under the 1969 act are to be filed with the water clerk, as noted above; tabulations to be completed in 1974 and thereafter are to be approved by the water judge (with or without modifications) and such tabulation proceedings are termed "general adjudication proceedings," as discussed below.

[239] Colo. Rev. Stat. Ann. § 148-21-27(1)(a) (Supp. 1969). As amended in 1971, the time for completing revisions in such tabulations and filing them with the water clerk was extended from October 10, 1970, to October 10, 1973. Colo. Laws 1971, ch. 375, § 1, amending § 148-21-27(4).

[240] Colo. Rev. Stat. Ann. § 148-21-27(1) (Supp. 1969).

administrative needs of the particular division or portion thereof. He shall have separate priority lists so that only those water rights and conditional water rights which take or will take water from the same source and are in a position to affect one another will be on the same priority list.[241]

(b)(i) In determining the priority of a water right in relation to other water rights deriving their supply from the same common source, the following procedures and definitions shall apply:

(ii) A common source shall mean and include all of those waters in a water division, either surface or underground, which if left in their natural state would join together to form a single natural watercourse prior to exit from the water division.

(iii) As among water rights decreed in the same water district[242] in the same adjudication suit, the historic date of initiation of appropriation shall determine the relative priorities, beginning with the earliest right.

(iv) As among water rights decreed in the same water district in different adjudication suits, all water rights decreed in an adjudication suit shall be senior to all water rights decreed in any subsequent adjudication suit.

(v) As among water rights decreed in the various original adjudication suits in the various water districts of the same water division, the decreed date of initiation of appropriation shall determine the relative priorities in numbered sequence, beginning with the earliest right.

(vi) As among water rights decreed in the various supplemental adjudication suits in the various water districts of the same water division, the actual priority date of any decree in any district shall not extend back further than the day following the entry of the final decree in the preceding adjudication suit in such district.

(vii) If the preceding principles would cause in any particular case a substantial change in the priority of a particular water right to the extent theretofore lawfully enjoyed for a period of not less than eighteen years, then the division engineer shall designate the priority for the water right in accordance with historic practice.[243]

These tabulations shall be used for administrative purposes and for the purpose of preparing the following later tabulations.[244]

By July 1, 1974, and July 1 of each even-numbered year thereafter, a new tabulation of all water rights and conditional water rights in each water division shall be prepared by the division engineer with the State Engineer's approval.

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[241] A provision similar to this quoted paragraph is applicable to 1974 and subsequent tabulations discussed below. See *id.* § 148-21-28(1).

[242] The water districts and water divisions referred to in this and succeeding subsections (iii to vii) relate to the previously existing 70 water districts and seven water divisions which were repealed in 1969. See the discussions at notes 183 and 215-216 *supra*.

[243] With respect to interrelationships among decreed water rights under prior legislation, see the discussion at notes 197-201 *supra*.

[244] Colo. Rev. Stat. Ann. § 148-21-27(5) (Supp. 1969).

The 1974 tabulation shall reflect any changes in the 1970 tabulation[245] deemed advisable[246]

> to reflect correctly the priority of water rights, and the 1974 tabulation and succeeding tabulations shall include the priorities awarded subsequent to those listed in the preceding tabulation, shall incorporate any changes of water rights that have been approved, shall note any changes from conditional water right to water right, shall modify any water rights or conditional water rights which the division engineer determines to have been abandoned in part, and shall omit any water rights or conditional water rights which the division engineer determines have been totally abandoned. Except as specified in the preceding sentence, each tabulation pursuant to this section shall make no changes in the listings in previous tabulations except changes to correct clerical errors and changes ordered by the water judge pursuant to subsection (2)(j) of this section * * *.[247]

Following required publication and notice of the tabulations,[248] opportunity is provided for filing protests within a specified time, whereupon the division engineer shall consult with the State Engineer and make such revisions as the latter determines to be necessary or advisable. The tabulation shall then be filed with the water clerk.[249] Further opportunity is provided for filing protests, whereupon the water judge shall hold hearings and enter a judgment and decree which shall either incorporate the tabulation of the division engineer or incorporate it with such modification as the water judge may determine proper after the hearings.[250] If no protests are filed, the water judge shall enter a judgment and decree incorporating and confirming the tabulations of the division engineer without modification.[251] (The proceedings set forth in

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[245] See note 239 *supra* regarding the extension of time for completion of the 1970 tabulation until 1973.

[246] Such changes shall be based on the principles set forth in Colo. Rev. Stat. Ann. § 148-21-27 (Supp. 1969), quoted at note 240 *supra*.

[247] Colo. Rev. Stat. Ann. § 148-21-28(1) (Supp. 1969). See the end of note 251 *infra*, regarding clerical errors and substantive changes under subsection (2)(j). Regarding the statutory definition of, and other provisions relating to, abandonment, see chapter 14 at notes 167-170.

[248] Colo. Rev. Stat. Ann. § 148-21-28(2)(b) (Supp. 1969). The tabulation is published in newspapers having general circulation in each county in the division and a copy of the tabulation is mailed to each person whose name is on the list specified in § 148-21-18(3).

[249] *Id.* § § 148-21-28(2)(b), (c) and (d).

[250] *Id.* § § 148-21-28(2)(e) and (f).

[251] *Id.* § 148-21-28(2)(g).

The described procedures apply to tabulations to be made by July 1, 1974, and thereafter. Similar procedures are provided for the original tabulations to be made in 1970 [and completed in 1973 (see note 239 *supra*)], although it is provided that if objections are filed after such original tabulations are filed with the water clerk, "the water judge shall order such notice, conduct such proceedings and enter such orders as

regard to the tabulations to be made by July 1, 1974, and thereafter "shall be considered general adjudication proceedings."[252]) The division engineer and the State Engineer then regulate the distribution of water according to the determinations of the judgment and decree.[253] The judgment and decree of the water judge are subject to appellate review, except for that part of the judgment or decree which confirms a part of a tabulation with respect to which no protest was filed.[254]

Wyoming

Previously, under the discussion of Colorado procedures, the Colorado system for the adjudication of water rights was noted as the first important attempt made by any State legislature to provide a special proceeding for the determination of controversies over water rights.

The Wyoming system of adjudicating water rights is equally noteworthy as the first State statutory adjudication procedure in which the first part of the proceeding is a determination of the water rights by a State administrative agency, initiated on its own motion. In Wyoming, this administrative determination is *final unless appealed* to the courts. It is distinctive in this respect, because statutory proceedings in most other States that begin administratively end with court adjudications in which the administrative findings are tested under judicial rules, culminating in a decree that modifies or affirms the administrative determination.

Territorial procedure.—The Territorial irrigation water rights act of 1886 provided that jurisdiction of suits to adjudicate water rights should be vested in the district courts. It required all claimants of water rights to file statements in the proper courts. It also provided a special water rights adjudication procedure in the district courts, with appeal to the Wyoming Supreme Court.[255] This Territorial procedure was replaced by that enacted by the first State legislature.

State statutory adjudication procedure.—The article in the Wyoming statutes which contains the adjudication provisions is entitled "Adjudication."[256] Both that term and "determination" are used in the body of the statute to indicate this function of the State Board of Control.[257] The

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he deems appropriate to deal with such protest pending the proceedings in section 148-21-28," which section pertains to the later tabulations. *Id.* § 148-21-27(5).

Section 148-21-28(2)(j) includes provisions with respect to the correction of clerical mistakes and substantive errors that are identical to those in § 148-21-20(10) set out at note 231 *supra* without the 1970 amendment thereof described in that note.

[252] *Id.* § 148-21-28(2)(l).

[253] *Id.* § 148-21-28(2)(h). Section 148-21-17(3)(a), quoted at note 229 *supra*, provides that water shall be distributed in accordance with the decreed priorities.

[254] *Id.* § 148-21-28(2)(i).

[255] Wyo. Laws 1886, ch. 61.

[256] Wyo. Stat. Ann. § 41-165 *et seq.* (1957).

[257] For example, Wyo. Stat Ann. § 41-174 (1957) reads: "[T]he state board of control

Wyoming Supreme Court held that under the Wyoming water rights statutes, the term "adjudication" is generally considered the equivalent of "determination" and is used interchangeably with it.[258]

The Wyoming Constitution created a Board of Control, composed of the State Engineer (as president) and the superintendents of the four water divisions. The Board was given, under such regulations as may be prescribed by law, supervision of the waters of the State and their appropriation, distribution, and diversion, its decision being subject to review in the State courts.[259]

The first State legislature vested the Board of Control with authority to adjudicate rights to use stream waters within the State.[260] In initiating the adjudication of a stream, the Board of Control fixes a time for the beginning of taking of testimony and such examinations as will enable it to determine the rights of the various claimants.[261] The Board prepares a notice, for newspaper publication, setting the date when the State Engineer will begin a measurement of the stream and ditches diverting therefrom, and a date and place for the taking of testimony by the Division Superintendent as to the rights of the parties claiming water therefrom.[262] The Division Superintendent similarly notifies, by registered mail, each party having a recorded claim to the waters of the stream and its tributaries, instructing each party to submit a verified statement of the details of his claim.[263] The examination of the stream, ditches, and irrigated lands is then made by or under the direction of the State Engineer[264] and testimony is taken by the Division Superintendent.[265]

Upon the completion of the taking of testimony, all of the evidence is open

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shall, as provided by law, proceed to adjudicate and determine the rights of the various claimants to the use of water upon any stream or other body of water * * * ."

[258] *Campbell* v. *Wyoming Dev. Co.*, 55 Wyo. 347, 378, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940); *Laramie Irr. & Power Co.* v. *Grant*, 44 Wyo. 392, 414, 13 Pac. (2d) 235 (1932).

[259] Wyo. Const. art. VIII, § § 2, 4, and 5.

[260] Wyo. Laws 1890-1891, ch. 8.

Under provisions which are still extant, the Board was given the duty at its first meeting to make proper arrangements for beginning the determination of priorities of water rights to decide the streams to be first adjudicated, to begin on streams most used for irrigation, and to continue making determinations as rapidly as practicable until all claims for appropriation on record shall have been adjudicated. *Id.* § 20, Stat. Ann. § § 41-159 and -165 (1957).

Wyo. Stat. Ann. § 41-152 (1957) also provides that "After issuance of the permit under legislative authority and completion of the work according to the terms of the permit, the board of control may adjudicate said water rights upon proof of beneficial use * * *."

[261] Wyo. Stat. Ann. § 41-165 (1957).

[262] *Id.* § 41-166.

[263] *Id.* § § 41-167 to -170.

[264] *Id.* § 41-180.

[265] *Id.* § 41-172.

to the inspection of the various claimants.[266] Any interested party involved in the adjudication may contest the rights of other parties, who have submitted evidence to the superintendent, in a hearing before the superintendent who may compel the attendance of witnesses to give testimony.[267]

Upon the completion of the State Engineer's stream measurement and receipt of the Division Superintendent's evidence, the Board of Control issues an order determining and establishing the several priorities of rights to use the water of the stream, the amounts of the appropriations, and the character and kind of uses. Each priority shall date from the time of appropriation.[268] Each party represented in the determination is then issued a certificate indicating, among other things, the priority date and number of the appropriation, the amount of water appropriated, and, if the appropriation is for irrigation, a legal description of the land to be irrigated.[269]

The final orders or decrees of the Board in the adjudication proceeding are conclusive as to all prior appropriations and rights of all existing claimants upon the stream or other body of water lawfully embraced in the adjudication, subject to rehearings, reopening of orders or decrees, and appeals to the courts.[270] Pending an appeal to the district court, the water is divided in accordance with the Board's order.[271] The operation of the decree appealed from may be stayed by that court upon the filing of a bond by the appellant.[272]

In the adjudication and determination of water rights it is the duty of all claimants interested therein to appear and submit proof of their claims. Any claimant who fails to so appear and submit such proof "shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said stream theretofore claimed by him."[273] However, any claimant upon whom no service of notice was made, other than by newspaper publication, may, within 1 year following the decree or order of the Board, have the same opened to give proof of his appropriation. Notice of such opening must be given to all interested parties and it must appear to the satisfaction of the Board that the petitioning claimant had no actual notice of the original proceedings.[274]

Whenever the rights to the waters of any stream and all its tributaries have been adjudicated in different proceedings, the Board of Control may open to

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[266] *Id.* § 41-173.
[267] *Id.* § § 41-176 and -177.
[268] *Id.* § 41-181.
[269] *Id.* § 41-189.
[270] *Id.* § 41-190; *Parshall* v. *Cowper*, 22 Wyo. 385, 394, 143 Pac. 302 (1914).
[271] Wyo. Stat. Ann. § 41-200 (1957).
[272] *Id.* § 41-197.
[273] *Id.* § 41-174.
[274] *Id.*

public inspection all proofs or evidence of appropriation of water and the findings of the Board in relation thereto. Any person may then contest the claims in the manner provided for in an original adjudication proceeding, provided that contests may not be maintained between appropriators who were parties to the same adjudication proceedings in the original hearings.[275] Upon the completion of testimony taken under this provision, the Division Superintendent forwards all testimony and evidence to the Board which then proceeds in accordance with the statutory provisions applicable to contests in original adjudication proceedings.[276]

Constitutionality of adjudication statute.—Validity of the adjudication statute was assailed in the Wyoming Supreme Court and was sustained there.[277] In answer to a contention that the act was unconstitutional on the ground that the term "supervise" in the act's title did not include adjudication of water rights, the supreme court held that the general subject of the statute was supervision of the waters of the State, of which determination of priorities was a part and, therefore, germane to the general subject. The court was not impressed with the objection that the act confers judicial power on the Board of Control. There was created a purely statutory proceeding which did not depend on the complaint of an injured party, and did not result in a judgment for damages nor issuance of any customary judicial process. The supreme court thought well of the policy of entrusting to an administrative board, with experience and peculiar knowledge along this particular line, the answering of technical and practical questions that continually arise in development of irrigation under the principle of prior appropriation. Hence:[278]

> The determination required to be made by the board is, in our opinion, primarily administrative rather than judicial in character. The proceeding is one in which a claimant does not obtain redress for an injury but secures evidence of title to a valuable right—a right to use a peculiar public commodity. That evidence of title comes properly from an administrative board, which, for the state in its administrative capacity, represents the public, and is charged with the duty of conserving public as well as private interests. The board, it is true, acts judicially, but the power exercised is quasi-judicial only, and such as under proper circumstances may appropriately be conferred upon executive officers or boards.

That there is no express provision in the State constitution for adjudication of water rights by an administrative board was recognized by the Wyoming Supreme Court in a much later case. However, the view was expressed that having been given such jurisdiction by the legislature, the basic right to

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[275] *Id.* § 41-175.

[276] *Id.* § 41-179.

[277] *Farm Inv. Co.* v. *Carpenter,* 9 Wyo. 110, 132-135, 61 Pac. 258 (1900). See *Hamp* v. *State,* 19 Wyo. 377, 388-393, 118 Pac. 653 (1911).

[278] 9 Wyo. at 143.

adjudicate water rights was implied and was incident to the general power of supervision over waters of the State.[279]

Some aspects of the adjudication.—(1) Binding on water distributors. The adjudication by the Board of Control as to the quantity of water to which an appropriator is entitled is as conclusive upon the water distributors as is its determination of priorities, although the water official may regulate a headgate so as to prevent waste.[280]

(2) Relation to tributaries. An adjudication of the waters of Big Laramie River was held by the supreme court to include the waters of the Little Laramie insofar as the appropriators on the main stream were concerned.[281]

Some aspects of the Board's jurisdiction.—(1) Not exclusive. The jurisdiction which the State Board of Control has to adjudicate water rights under the statutory procedure is not exclusive of jurisdiction of the courts. Nothing in the legislation indicates that the power of the courts to make such adjudications has been superseded.[282] In its opinion in a leading case decided in 1900, the Wyoming Supreme Court said:[283]

> Although in the statutory proceeding for the determination of water rights, the courts obtain jurisdiction only by way of appeal from the decisions of the Board of Control; all the ordinary remedies known to the law pertinent to the use and appropriation of water, are open to all interested in such rights, equally with all other persons in respect to any other kind of right or property. The courts possess ample jurisdiction to redress grievances growing out of conflicting interests in the use of the public waters, and to afford appropriate relief in such cases. * * * The jurisdiction of the courts remains as ample and complete after, as well as before, an adjudication by the board. But the principle applies here as in other cases, that a party may not re-litigate a question which has passed into final adjudication.

(2) Duty to act. On an application to adjudicate a water right, it is the duty of the Board in the first instance to determine under the law whether the applicant has a water right. The Board has jurisdiction and should act upon the

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[279] *Simmons* v. *Ramsbottom,* 51 Wyo. 419, 432-433, 68 Pac. (2d) 153 (1937).

[280] *Parshall* v. *Cowper,* 22 Wyo. 385, 394, 143 Pac. 302 (1914), consturing Wyo. Comp. St. § 802 (1910), now Wyo. Stat. Ann. § 41-63 (1957).

This and related considerations are discussed in the State summary for Wyoming in the appendix.

[281] *Campbell* v. *Wyoming Dev. Co.,* 55 Wyo. 347, 412-413, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940). The court further stated it to be unnecessary for one who makes an appropriation upon a main stream to proclaim that he also makes claim to the waters of a tributary. The act of appropriation constitutes a sufficient and continuous claim which is effectual for such purpose.

[282] *Simmons* v. *Ramsbottom,* 51 Wyo. 419, 432-433, 68 Pac. (2d) 153 (1937); *Farm Inv. Co.* v. *Carpenter,* 9 Wyo. 110, 61 Pac. 258, 269 (1900). See also *Louth* v. *Kaser,* 364 Pac. (2d) 96, 99 (Wyo. 1961).

[283] *Farm Inv. Co.* v. *Carpenter,* 9 Wyo. 110, 150, 61 Pac. 258 (1900).

proofs, from which the applicant may take an appeal to the court for judicial determination.[284]

(3) Not rights among ditch owners. The Board of Control has no authority to determine, as between parties, ownership or rights to the use of a ditch.[285]

Oregon

Statutory adjudication procedure.—In the water code of 1909, a special procedure was established for determining and adjudicating stream water rights.[286] The first part of this procedure substantially follows that of Wyoming. However, under the Oregon system, the State Engineer's determination is not final, but must be filed in court as the initiation of a judicial action and is subject to further affirmance or alteration by the court. The Wyoming system, on the contrary, contemplated adjudications by the State Board of Control which are final *unless* appealed to the courts.

Upon the petition to the State Engineer by one or more water users of any stream requesting a determination of the relative rights of the various claimants to the waters of that stream, the State Engineer shall undertake an investigation of the stream system if in his opinion the circumstances justify it.[287] Notice of the pending investigation is given by means of newspaper publication with instructions to all claimants to file a notification of intention to file a claim and to state, among other things, whether the right "to be claimed" is described in a permit or water right certificate issued by the State Engineer under the appropriation statutes.[288] A notice containing similar instructions is also sent, by registered mail, to each owner or person in possession of land bordering on and having access to the stream or its tributaries, insofar as they can be reasonably ascertained.[289] The State Engineer or his representative then proceeds to make an examination of the stream and the works diverting water therefrom used in connection with water rights issued prior to February 24, 1909, for which a notification of intention to file a claim was filed. The State Engineer measures the discharge of the stream, the capacity of the various diversion and distribution works, and the lands irrigated from these works and gathers such other data and information as may be essential to the proper understanding of the relative rights of interested parties. The State Engineer then prepares a map or plat indicating, in part, each diversion point and the location of the lands being irrigated.[290]

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[284] *State ex rel. Mitchell Irr. Dist.* v. *Parshall,* 22 Wyo. 318, 329-330, 140 Pac. 830 (1914).

[285] *Bamforth* v. *Ihmsen,* 28 Wyo. 282, 317-318, 204 Pac. 345 (1922); *Collett* v. *Morgan,* 21 Wyo. 117, 122-123, 128 Pac. 626 (1912), 129 Pac. 433 (1913); *Hamp* v. *State,* 19 Wyo. 377, 406-407, 118 Pac. 653 (1911).

[286] Oreg. Laws 1909, ch. 216, § § 11-35.

[287] Oreg. Rev. Stat. § 539.020 (Supp. 1955).

[288] *Id.* § 539.030(1).

[289] *Id.* § 539.030(2).

[290] *Id.* § 539.120.

Following this examination, notice by means of newspaper publication is given, setting a date to take testimony of the various claimants, and notice is also sent by registered mail to each claimant or owner who filed a notification of intention to file a claim.[291] Thereafter a hearing is held and testimony is taken;[292] on completion, all of the evidence may be inspected by the various claimants or owners.[293] Any interested person may contest any of the evidence and a hearing shall be held on the contested evidence by the State Engineer or his authorized assistant.[294] Based upon his data and compilation of evidence, the State Engineer makes findings of fact and issues an order determining and establishing the various water rights.[295]

A certified copy of the State Engineer's order of determination and findings of fact, the original evidence, and certified copies of maps and data are filed with the clerk of the circuit court wherein the determination is to be heard and a certified copy of the order of determination and findings is filed with the county clerk of every other county in which the stream or any portion of a tributary is situated.[296] In the court proceedings, which in general are like those of a suit in equity, interested parties may file written exceptions to the findings and order of determination. If no exceptions are filed, the court is required to enter a decree affirming the State Engineer's determination. But if exceptions are taken a hearing is held thereon. After final hearing, the circuit court enters a decree affirming or modifying the State Engineer's order, subject to appeal to the supreme court,[297] and transmits a certified copy of the decree to the State Engineer.[298]

While the matter is pending in the circuit court, and until a certified order of the court is transmitted to the State Engineer, the determination of the State Engineer is in full force and effect and water is distributed accordingly from the date of entry in his records unless and until stayed by a stay bond.[299]

Upon the final determination of rights to waters of any stream, the State Engineer shall issue to each person represented therein a certificate stating, among other things, the date of priority, the extent and purpose of the right, and a legal description of any irrigated land to which the water right is appurtenant.[300]

A section of the 1905 law, still extant,[301] provides that upon adjudication of rights to waters of a stream system, a certified copy of the decree to be filed

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[291] *Id.* § 539.040.
[292] *Id.* § 539.070.
[293] *Id.* § 539.090.
[294] *Id.* § § 539.100 and .110.
[295] *Id.* § 539.130(1).
[296] *Id.*
[297] *Id.* § 539.150.
[298] *Id.* § 539.160.
[299] *Id.* § § 539.130(4), .170, and .180.
[300] *Id.* § 539.140.
[301] Oreg. Laws 1905, ch. 228, § 5, Rev. Stat. § 541.320 (Supp. 1969).

in the State Engineer's office "shall declare, as to the water right adjudged to each party, whether riparian or by appropriation, the extent, the priority, amount, purpose, place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority."

The determination of the State Engineer, as confirmed or modified by the court, shall be conclusive as to all prior rights and rights of all existing claimants lawfully embraced in the determination.[302]

In the determination of water rights it is the duty of all claimants interested therein to appear and submit proof of their claims. Any claimant who fails to so appear and submit such proof "shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by him."[303] Any person interested in the determination of the rights to use water of a stream who did not receive notice and had no actual knowledge of such proceedings may, within 1 year after the entry of the State Engineer's determination, intervene in the proceedings upon such terms as may be equitable.[304]

Whenever rights to waters of any stream have been determined in different proceedings, all proofs or evidence of rights to water and the State Engineer's findings in relation thereto may be opened by the State Engineer to public inspection. Any person may then contest the proofs or evidence and findings in the manner provided for contesting the State Engineer's original determination, provided that contests may not be made between claimants who were parties to the same adjudication proceedings in the original hearings.[305]

Chapter 539 of the Oregon statutes, which includes this special procedure for determination and adjudication of water rights in stream systems, is entitled "Determination of Water Rights Initiated Before February 24, 1909," although the body of the chapter does not expressly so limit its application. In a 1959 case, the Oregon Supreme Court said, "We note first a division in the Oregon Revised Statutes between the procedure set out in Ch. 539 for the determination of water rights initiated before the adoption of the water code on February 24, 1909, and the procedure incident to the granting, denying and cancellation of permits after that date."[306]

An informational pamphlet issued by the State Engineer states, among other

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[302] Oreg. Rev. Stat. § 539.200 (Supp. 1955).

[303] *Id.* § 539.210.

[304] *Id.*

[305] *Id.* § 539.220.

[306] *Warner Valley Stock Co.* v. *Lynch,* 215 Oreg. 523, 548, 336 Pac. (2d) 884 (1959). The court, however, did not directly deal with the question of whether the application of chapter 539 is limited to the determination of water rights initiated before February 24, 1909.

The procedure regarding water permits is contained in chapter 537 of the statutes.

things, that:

> The adjudication proceeding is principally for the purpose of determining rights initiated prior to the passage of the water code, February 24, 1909. * * * The water code enacted in 1909 provided that thereafter all water rights must be initiated by the filing of an application with the State Engineer and the securing of a permit to appropriate the water.
>
> Those having rights under such permits or under certificates issued by the State Engineer, may appear and file claims in the adjudication proceeding. By so doing they become eligible to contest claims of other parties to such proceeding.
>
> * * * *
>
> If you claim a right prior to February, 1909, failure to make an appearance in the adjudication proceeding and file proof of your claim will bar the subsequent assertion of a right by you.[307]

Constitutionality of the statutory adjudication procedure.—Decisions of both Federal and State courts have upheld the validity of the Oregon adjudication procedure as not violating the constitutional prohibition against denial of due process of law.[308]

In the *Pacific Live Stock Company* case, the United States Supreme Court pointed out that proceedings before the State Water Board (now State Engineer) and the court are not independent or unrelated, but are parts of a single statutory proceeding, the earlier stages of which are before an administrative agency and the later ones before a judicial tribunal. The administrative agency merely paves the way for a court adjudication of all rights involved, its duties being much like those of a referee. "That the State, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court, is not debatable."[309] Further, in the Court's view, use of the administrative report as evidence, which claimants might oppose with other evidence, does not violate due process; nor is the requirement that water be distributed

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[307] "Information Relative to Statement of Intention to File Claim In Connection With Adjudication of Water Rights" (no date), pp. 2-3.

In the "Notice to Water Users" of the Santiam and South Santiam Rivers and their tributaries (excluding the North Santiam River and its tributaries) situated in Linn and Marion Counties, dated April 12, 1971, it was stated that: "The owners of land benefited by a permit or water right certificate acquired after February 24, 1909, are not required to enter this proceeding to maintain the use evidenced by the permit or certificate. However, they must appear and file in this proceeding to become a party hereto in order to contest the claims of those exerting a right hereunder."

[308] *Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 454 (1916), affirming 217 Fed. 95, 98 (D. Oreg. 1914); *In re Hood River,* 114 Oreg. 112, 162, 227 Pac. 1065 (1924); *In re Willow Creek,* 74 Oreg. 592, 620, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *Oregon Lumber Co.* v. *East Fork Irr. Dist.,* 80 Oreg. 568, 572-573, 157 Pac. 963 (1916).

[309] *Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 451-452 (1916).

according to the administrative order pending final adjudication, unless stayed by a stay bond, objectionable.

Some other judicial views regarding the statutory adjudication procedure.—Establishment of an administrative system for the regulation and determination of water rights, such as that of Oregon, is a legitimate exercise of the police power of the State.[310]

The statute does not confer judicial power upon State officials. Their duties are executive or administrative, their findings and orders being *prima facie* final and binding until changed by the courts as part of the designated procedure. It might be said that these duties are quasi-judicial in character.[311]

The statute providing that the final determination shall be conclusive[312] has been noted with approval by the Oregon Supreme Court.[313] In such an adjudication of water rights the circuit court is a court of general jurisdiction, and its decrees are *res judicata* and conclusive upon the parties and their successors in interest.[314]

In a case in which a claim of deprivation of adjudicated priorities by prescription was made—which the Oregon Supreme Court viewed with disfavor although not finding it necessary to pass on the question—the supreme court considered it clear that a general adjudication of water rights clearly establishes their rights as of the date of the decree. It was held that if adverse possession can upset the decree, it must be by virtue of events occurring subsequently.[315]

Court transfer provision.—In case suit is brought in the circuit court for determination of rights to the use of water, the case may, at the court's discretion, be transferred to the State Engineer for determination under the statutory adjudication procedure.[316]

The fact that transfer of such a case to the State Engineer is a matter within the discretion of the trial court judge was emphasized by the Oregon Supreme Court.[317] Water claims by persons not party to a suit, and the necessity for impartial water measurements and land examinations, were believed to be good reasons for transferring the action to the State Engineer and bringing in all claimants.[318]

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[310] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 73 Fed. (2d) 555, 567 (9th Cir. 1934).

[311] *In re Willow Creek*, 74 Oreg. 592, 610-611, 144 Pac. 505 (1914), 146 Pac. 475 (1915).

[312] Oreg. Rev. Stat. § 539.200 (Supp. 1955).

[313] *In re Willow Creek*, 74 Oreg. 592, 618, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *Abel* v. *Mack*, 131 Oreg. 586, 594-597, 283 Pac. 8 (1929).

[314] *Bennett* v. *Salem*, 192 Oreg. 531, 543, 235 Pac. (2d) 772 (1951). No appeal having been taken from the decree by certain parties, it must be regarded as conclusive upon them and their successors in interest. *Tudor* v. *Jaca*, 178 Oreg. 126, 139, 164 Pac. (2d) 680 (1945), 165 Pac. (2d) 770 (1946).

[315] *Calderwood* v. *Young*, 212 Oreg. 197, 207-208, 315 Pac. (2d) 561 (1957).

[316] Oreg. Rev. Stat. § 539.020 (Supp. 1955).

[317] *Dill* v. *Killip*, 174 Oreg. 94, 105, 147 Pac. (2d) 896 (1944).

[318] *Pacific Livestock Co.* v. *Balcombe*, 101 Oreg. 233, 237-239, 199 Pac. 587 (1921). An-

Early water rights.—In any suit brought for protection of water rights acquired under the law of 1891,[319] the plaintiff may join as parties all persons who have diverted water from the same source. Any interested person not made a party may become so; and the court on its own motion may require all claimants to be brought in. All relative priorities may be determined in one decree.

North Dakota

Bien Code provisions.—The statute, which closely follows the Bien Code, as discussed earlier, provides that the State Engineer shall make hydrographic surveys and investigations of each stream system and source of water supply in the State, beginning with those most used for irrigation. He shall obtain and record all available data for the determination, development, and adjudication of the water supply of the State.[320] On completing such a survey of any stream system, the State Engineer is to deliver a copy thereof, together with copies of all data necessary to determine all rights to use water of the stream system surveyed, to the Attorney General who, within 60 days thereafter, is to bring suit on behalf of the State to determine all rights to use such water.[321]

If suit for the adjudication of rights to use water of a stream system shall have been begun by private parties, the Attorney General is not required to bring suit, but he shall intervene in such suit if notified by the State Engineer that in his opinion the public interest requires such action.[322]

In any suit for the determination of water rights, all who claim the right to use such waters shall be made parties. When any suit has been filed, the court shall direct the State Engineer to make or furnish a complete hydrographic survey of the stream system in order to obtain all data necessary to the determination of the rights involved.[323] The cost of such suit, including costs on behalf of the State, and of such surveys, shall be charged against each of the private parties to the suit in proportion to the amount of the water right allotted to him.[324] Upon the completion of the adjudication, a certified

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other statute, originally enacted in 1905 and still extant, provides that in any suit for the determination of stream water rights wherein the State is a party, the court is directed to call upon the State Engineer for a complete hydrographic survey of the stream system. All claimants must be made parties. Oreg. Laws 1905, ch. 228, § 4, Rev. Stat. § 541.310 (Supp. 1969).

[319] Oreg. Laws 1891, pp. 52-60, Rev. Stat. § 541.080 (Supp. 1969).

[320] N. Dak. Cent. Code Ann. § 61-03-15 (1960).

[321] *Id.* § 61-03-16.

[322] *Id.* § 61-03-16.

[323] *Id.* § 61-03-17.

In any water suit, the court is authorized to appoint a referee or referees, not to exceed three, to take testimony and report upon rights of the parties, as in other equity suits. *Id.* § 61-04-16.

[324] *Id.* § 61-03-17.

Section 61-03-18 provides for a permanent hydrographic survey fund to be used

copy of the decree is filed with the State Engineer, stating the amount, purpose, priority and place of use of the right and, if the water is for irrigation, the tracts of land to which the water right shall be appurtenant, and such other conditions necessary to define the right and its priority.[325]

Another statutory adjudication provision.—In addition to the foregoing statutory provisions, which closely follow the Bien Code, as noted above, the State Water Conservation Commission is authorized (a) to prosecute suits to adjudicate all water rights upon any watercourse or source of water supply from which waters are derived for reservoirs and other distribution works; and (b) to join in any action all owners of vested water rights in order to adjudicate "all surplus water upon all of the watercourses and sources, water supplies or any project constructed under the supervision and control of the commission * * *."[326]

SOME GENERAL PROCEDURAL MATTERS IN WATER RIGHTS LITIGATION

Following are some general procedural matters in water rights litigation. These include matters pertaining to ordinary civil actions or special statutory adjudication procedures, or both. Certain aspects of such procedural matters have been referred to at various places in the preceding discussion of statutory adjudication procedures.

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only for the payment of the expenses of the surveys ordered by the court under § 61-03-17. The monies paid under § 61-03-17 by the parties to these suits, on account of such surveys, are credited to this fund.

The South Dakota Supreme Court declared void a South Dakota provision similar to § 61-03-17 for assessing costs against private parties. It noted that the cost of a hydrographic survey might be considerable and held that to require a riparian proprietor or appropriator who makes proper use of the stream water to pay any part of the cost, without his consent, would deprive him of property without due process of law. *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 269, 143 N.W. 124 (1913). The North Dakota Supreme Court apparently has not dealt with this question.

The South Dakota adjudication statutes now provide that no part of the State or hydrographic costs may be charged against the private parties without their consent expressly stipulated. S. Dak. Comp. Laws Ann. § 46-10-4 (1967).

[325] N. Dak. Cent. Code Ann. § 61-03-19 (1960).

[326] *Id.* § 61-02-23.

Another statute provides that every State agency and officer authorized to take any action concerning the use or disposition of waters or water rights within the State is required to submit any plans, purposes, and contemplated action with respect to the use or disposition of such waters, or water rights, to the State Water Conservation Commission and shall receive the consent and approval of the Commision "before making any agreement, contract, purchase, sale, or lease to carry into execution any works or projects authorized under the provisions of this chapter." *Id.* § 61-02-26.

Parties

Following are some considerations regarding parties to water rights litigation.

Proper and Necessary or Indispensable Parties

The Idaho Supreme Court has indicated that in an ordinary civil action, an appropriator of water from a stream is a proper party to a suit affecting rights of appropriation of the waters of such stream, but he may not be an indispensable party because the judgment and decree in the suit will be effective as to the rights and interests of the parties to the action, as between themselves, regardless of the fact that other claimants on the stream have not been parties to the suit.[327] Nor, in a suit brought to adjudicate water rights on a stream system, are the consumers under a company which appropriated water for the purpose of sale, rental, and distribution, indispensable parties in determining and adjudicating their various rental rights.[328]

In several Texas water rights cases decided early in this century, which in our classification would be ordinary civil actions, questions of proper and necessary parties were raised. Thus, it was observed that these words were often used loosely in the decisions, making it difficult to determine their proper classification. "It is apparent, however, that necessary parties, in the strict sense of that word, are indispensable parties—parties so vitally interested in the subject-matter of the suit as that a final decree cannot be rendered without their presence."[329] On the other hand, persons who would not be bound by any judgment that might be entered in a suit, and whose rights could not be affected in any way, are not necessary parties.[330] In a suit brought by a riparian owner to establish water rights as against a water improvement district and certain others, a Texas court of civil appeals indicated that other water users on the same stream may be interested because the subject matter relates to their own water supply. But such a mere interest, which does not rise to the dignity of a material or substantial interest, does not necessitate the joinder of

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[327] *Frost* v. *Idaho Irr. Co.*, 19 Idaho 372, 114 Pac. 38 (1911). In an action to set aside or interpret parts of a decree fixing water priorities, all parties to the decree, although they may be proper parties, are not indispensable parties. *Gile* v. *Laidlaw*, 52 Idaho 665, 20 Pac. (2d) 215 (1933).

[328] *Farmers' Co-operative Ditch Co.* v. *Riverside Irr. Dist.*, 14 Idaho 450, 458, 94 Pac. 761 (1908).

[329] *Biggs* v. *Miller*, 147 S.W. 632, 636-638 (Tex. Civ. App. 1912). "The rule applicable here is that where others not parties to the proceedings have a direct interest in the subject-matter of the suit, and a final decree cannot be made without affecting their interest in such manner as may be wholly inconsistent with equity and good conscience, the persons so affected are necessary parties to the proceedings." *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1180 (Tex. Civ. App. 1913).

[330] *Ward County W. I. Dist. No. 2* v. *Ward County Irr. Dist. No. 1*, 222 S.W. 665, 667 (Tex. Civ. App. 1920, error refused).

these parties who will not be bound by the decree and who may proceed independently if they wish. It would be unreasonable, useless, and impractical in some cases to join those whose rights are not affected by the relief sought. On the other hand, the court indicated that there was no reason why those beyond the jurisdiction of the court (who, by virtue of riparian or other right, are entitled to use water supplied by the water improvement district, and are making use of the water through their agents or employees) could not and should not be joined and their right to use the water determined *in rem*. Although an injunction could not be granted against them unless jurisdiction in some manner were to be obtained *in personam*, yet it could be granted against the district as the distributing agency of the water.[331]

The Idaho and Texas cases discussed immediately above were ordinary civil actions. One of the purposes of the State legislatures in enacting statutory adjudication procedures often appears to have been to provide a more comprehensive proceeding for the determination of relative rights on a stream system than might have been accomplished in an ordinary civil action.[332] To the extent that such statutory adjudication proceedings are substantially more comprehensive than an ordinary civil action, different considerations with respect to "parties" may apply. If, for example, the intended result of such a proceeding is to bring in and adjudicate *all* claimants and water users, it presupposes that every claimant and water user is a necessary party, for if some are not brought in, the ultimate purpose is not achieved. However, there are variations throughout the Western States in the extent to which all or fewer water rights claimants within the encompassed area are brought into the proceeding and are bound by the final determination.[333]

Section 666(a) of title 43 of the United States Code provides:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to

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[331] *Wilson* v. *Reeves County W. I. Dist. No. 1,* 256 S.W. 346, 348 (Tex. Civ. App. 1923). For some other Texas State and Federal decisions concerning parties and class actions, see *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 584, 86 S.W. 733 (1905); *Hidalgo County W. I. Dist. No. 2* v. *Cameron County W. C. & I. Dist. No. 5,* 253 S.W. (2d) 294, 299-300 (Tex. Civ. App. 1952, error refused n.r.e.); *Board of Water Engineers* v. *Briscoe,* 35 S.W. (2d) 804, 806 (Tex. Civ. App. 1930, error dismissed); *Hudspeth County Conservation & Reclamation Dist.* v. *Robbins,* 213 Fed. (2d) 425, 432 (5th Cir. 1954), certiorari denied, 348 U.S. 833 (1954); *Martinez* v. *Maverick County Water Control & Improvement Dist. No. 1,* 219 Fed. (2d) 666, 672-673 (5th Cir. 1955).

[332] This is suggested by a number of statements in reported Western court decisions. See "Special Statutory Adjudication Procedures–Purpose of Statutory Procedures." *supra.*

[333] In this regard, see "Judgments and Decrees–Binding Effect: Conclusiveness," *infra.*

> any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.[334]

In regard to this legislation, various and rather complicated questions have arisen concerning circumstances in which the sovereign immunity of the Federal government may or may not be invoked.[335]

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[334] 66 Stat. 560 (1952), 43 U.S.C. § 666(a) (1970).

Section 666 also provides:

"(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

"(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream."

[335] In regard to such matters, see, e.g., E. H. Morreale, "Federal-State Rights and Relations," in 2 "Waters and Water Rights" § 106 (R. E. Clark ed. 1967); Comment, "Adjudication of Water Rights Claimed by the United States–Appreciation of Common-Law Remedies and the McCarran Amendment of 1952," 48 Cal. L. Rev. 94 (1960).

In a recent opinion the United States Supreme Court said *inter alia*: "The consent to joint the United States 'in any suit (1) for the adjudication of rights to the use of water of a river system or other source' would seem to be all-inclusive. We deem almost frivolous the suggestion that the Eagle [River, a tributary of the Colorado River] and its tributaries are not a 'river system' within the meaning of the Act. No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The 'river system' must be read as embracing one within the particular State's jurisdiction. With that to one side, the first clause of § 666(a)(1), read literally, would seem to cover this case for 'rights to the use of water of a river system' is broad enough to embrace 'reserved' waters.

"* * * § 666(a)(1) has no exceptions and * * *, as we read it, includes appropriative rights, riparian rights, and reserved rights.

"It is said that this adjudication is not a 'general' one as required by *Dugan* v. *Rank*, 372 U.S. 609, 618 [1963]. This proceeding, unlike the one in *Dugan*, is not a private one to determine whether named claimants have priority over the United States. The whole community of claims is involved and as Senator McCarran, Chairman of the Committee reporting on the bill, said in reply to Senator Magnuson: 'S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.'

"It is said, however, that since this is a supplemental [Colorado] adjudication only those who claim water rights acquired since the last adjudication of that water district are before the court. It is also said that the earliest priority date decreed in such an adjudication must be later than the last priority date decreed in the preceding

Appropriators and Riparian Owners

In most water rights litigation in the Western States, appropriators and intending appropriators have been made parties. Moreover, in many cases in those Western States that recognize riparian rights, owners of riparian lands have been parties. Some such controversies have involved riparian proprietors only—one riparian or group as against another single owner or group. In many other cases litigated in the high courts, parties have comprised riparian proprietors on the one hand and appropriators or appropriative claimants on the other. Much of the present law of western water rights has grown out of this widespread antagonism between proponents of these respective fundamental systems and the many riparian-appropriation conflicts in the courts.[336]

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adjudication. [See the discussion at notes 197-201 *supra.*] * * *

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"* * * The absence of owners of previously decreed rights may present problems going to the merits, in case there develops a collision between them and any reserved rights of the United States. All such questions, including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court."

The court preceded the quoted language with the statement, *inter alia,* that "Here the United States is primarily concerned with reserved waters for the White River National Forest, withdrawn in 1905, Colorado having been admitted into the Union in 1876." *United States* v. *District Court in and for the County of Eagle,* 401 U.S. 520, 523-526 (1971).

A companion case involved water rights with respect to some national forests; national recreational and other water-use purposes by the Department of the Interior (by its National Park Service and Bureaus of Land Management, Mines, and Sport Fisheries and Wildlife); and naval petroleum and oil shale reserves. In this case, suit had been brought under a new (1969) Colorado water-rights determination statute. The court, *inter alia,* said: "It is pointed out that the new statute contemplates monthly proceedings before a water referee on water rights applications. These proceedings, it is argued, do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. It is also said that the Act makes all water rights confirmed under the new procedure junior to those previously awarded. [See the discussion at notes 222 and 233 *supra.*]

"It is argued from those premises that the proceeding does not constitute a general adjudication which 43 U.S.C. § 666 contemplated. As we said in the *Eagle County* case, the words 'general adjudication' were used in *Dugan* v. *Rank,* 372 U.S. 609, 618, to indicate that 43 U.S.C. § 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review." *United States* v. *District Court in and for Water Division No. 5,* 401 U.S. 527, 529-530 (1971).

[336] Chapter 10 contains as its first topic "The Riparian Doctrine in the West." This includes brief statements as to what the doctrine applies, its importance in some States

In States that recognize riparian as well as appropriative rights, there are variations in the extent to which both kinds of rights may be adjudicated in special statutory adjudication proceedings. In California, it is expressly provided by statute that "The [Water Resources Control Board] may determine * * * all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right."[337] In Oregon, however, it has been held that one who claims a riparian right in a special statutory adjudication proceeding, but who asserts a right to a specific quantity of water with a fixed time of beginning use—which he must establish in order to have an enforceable priority—thereby claims essentially as an appropriator and waives his riparian claim for the purpose of that proceeding.[338]

Venue

Generally speaking, the county or locality in which a suit to adjudicate water rights must be brought bears some relation to location of the lands to which the rights in litigation apply. Some judicial holdings or expressions or legislative directives on this matter follow.[339]

California

The water right, whether appropriative or riparian, is real property. Hence an action to quiet title to such a property right must be commenced in the county in which the land to which the right is attached, or some part of it, is situated.[340] Determinations made by the State Water Resources Control Board under the statutory adjudication procedures are to be filed in the superior court of the county in which the stream system or some part thereof is situated.[341]

Colorado

Jurisdiction to adjudicate water matters arising in each water division is vested exclusively in the district courts of all of the counties or portions thereof situated in the division, acting collectively through the water judge in that division.[342]

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and its downgrading or outright repudiation in others, and a summary of recognition, repudiation, and status in individual Western States.

[337] Cal. Water Code § 2501 (West Supp. 1970).

[338] See the discussion in chapter 10 at notes 509-515.

[3-9] For some related considerations, see "Jurisdiction—Stream Crossing State Line," *infra.*

[340] *Miller & Lux* v. *Madera Canal & Irr. Co.,* 155 Cal. 59, 73, 99 Pac. 502 (1907), construing Cal. Const. art. VI, § 5. This may be any county in which any part of such land is situated. *Sutter-Butte Canal Co.* v. *Great Western Power Co. of California,* 65 Cal. App. 597, 599-600, 224 Pac. 768 (1924).

[341] Cal. Water Code § 2750 (West Supp. 1970).

[342] Colo. Rev. Stat. Ann. § 148-21-10(1) (Supp. 1969). Section 148-21-8 establishes the

Hawaii

In this State judges of the circuit courts have jurisdiction, both as courts of equity and as commissioners of water rights.[343] In proper cases, courts of equity have jurisdiction over water rights controversies even where the lands and waters are situated in another circuit. Hence the judge of the first circuit, sitting as a court of equity, has jurisdiction to enjoin the illegal diversion of water when the land involved is situated in another circuit. But when the same judge of the first circuit sits as a commissioner of water rights, his jurisdiction is limited to cases in which the land is within his own circuit.[344]

Idaho

An action to determine and decree the extent and priority of a water right, being in the nature of an action to quiet title to realty, should be maintained in the jurisdiction in which the *res* or subject matter is situated.[345] The statutory adjudication provisions declare that the State Reclamation Engineer shall commence an action to adjudicate water rights "by filing a petition in the district court [for the district] in which any part of the water system is located * * *."[346]

Texas

In a suit to adjudicate the relative appropriative rights of contesting irrigation companies on the use of streamflow, the Texas Supreme Court, in answering a certified question of venue, agreed that an action to quiet title and determine and establish rights to divert and use water is in the nature of an action to quiet title to real estate. From that, it necessarily followed that the injunctive relief sought was auxiliary to the main purpose of the suit, which was properly brought in the county in which the affected land was situated. The district court of such county, having jurisdiction to determine and establish plaintiffs' title to the water and to quiet such title, also acquired jurisdiction of the defendants and was entitled to issue any writ necessary to accomplish the purpose of the suit.[347]

Under the 1967 Water Rights Adjudication Act, the final determination of the Texas Water Rights Commission, together with accompanying evidence, is filed in the district court of the county in which the stream or segment thereof

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seven water divisions for the entire State which generally follow major watershed boundaries.

[343] *Wailuku Sugar Co.* v. *Cornwell,* 10 Haw. 476, 477-480 (1896); *McBryde Sugar Co.* v. *Koloa Sugar Co.,* 19 Haw. 106, 116-119 (1908). The provisions governing "commissioner" proceedings are encompassed within Haw. Rev. Stat. § § 664-31 to -37 (1968).

[344] *Territory of Hawaii* v. *Gay,* 32 Haw. 404, 410-414, 418 (1932).

[345] *Taylor* v. *Hulett,* 15 Idaho 265, 269, 97 Pac. 37 (1908).

[346] Idaho Code Ann. § 42-1407 (Supp. 1969).

[347] *Lakeside Irr. Co.* v. *Markham Irr. Co.,* 116 Tex. 65, 77-78, 285 S.W. 593 (1926).

under adjudication is located. However, if the adjudicated waters are located in three or more counties and ten or more affected parties who appeared in the proceedings petition the Commission, the Commission shall file the action in a convenient district court of a judicial district which is not within the river basin of the stream or segment thereof under adjudication.[348]

Jurisdiction

General

The jurisdiction of the courts in settling water controversies and adjudicating rights to use water has been exercised in the Western States for more than a century. This jurisdiction includes power not only to ascertain and determine the several rights in litigation, but also to regulate their exercise.

Statutory adjudication proceedings often may be more comprehensive than ordinary civil actions in a number of respects, such as their geographic scope. But the jurisdiction of the court or administrative agency that determines water rights may be confined to the subject matter covered by the statute. If the determination is made by an administrative agency, injunctive relief or damages is not authorized as a part of such adjudication proceedings. Even if the court takes part in the adjudication, it perhaps may not be authorized to grant injunctive relief or damages as a part of such adjudication proceedings.[349] But, statutory procedures generally do not exclude other forms of actions.[350]

In an early case the California Supreme Court stated, "There is no doubt of the power of a court of equity to ascertain and determine the extent of the rights of property in water, flowing in a natural watercourse, acquired by persons who hold and are entitled to them * * *."[351] And in a case decided in 1940, the Washington Supreme Court said, "We are clearly of the opinion that, under the water code, the court has jurisdiction to adjudicate the amount of water to which all claimants on the stream being adjudicated are entitled, and the priorities as between such claimants * * *."[352]

Relation to Actions of Other Types

(1) Contempt. The Montana Supreme Court had occasion to declare that title to a water right cannot be tried in a contempt proceeding, but must be determined in a civil action to which others interested may be made parties.[353]

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[348] Tex. Rev. Civ. Stat. Ann. art. 7542a, § 5(g) (Supp. 1970).

[349] Such matters are discussed earlier under "Special Statutory Adjudication Procedures–Comprehensiveness of Statutory Adjudication Proceedings."

[350] See "Special Statutory Adjudication Procedures–Statutory Procedures Generally Not Exclusive," *supra.*

[351] *Frey* v. *Lowden,* 70 Cal. 550, 551-552, 11 Pac. 838 (1886).

[352] *Thompson* v. *Short,* 6 Wash. (2d) 71, 88, 106 Pac. (2d) 720 (1940).

[353] *State ex rel. Zosel* v. *District Ct.,* 56 Mont. 578, 581, 185 Pac. 1112 (1919).

"To hold otherwise, or to permit in a summary proceeding the determination of such a substantive property right would constitute the taking of property or property rights without due process of law."[354]

In a Nevada case, counsel for a party in a proceeding to determine relative rights to waters of a stream system insisted that the judgment of dismissal in a contempt proceeding was *res judicata* of the issues in the adjudication proceeding. This the supreme court rejected, for it was never contemplated that a valuable property right could be adjudicated incidentally to a proceeding in which the adjudication was not the main question involved.[355]

(2) Mandamus. The extent and priority of a water right, which is real property appurtenant to land irrigated thereby, and the ascertainment and determination of which partake of the nature of an action to quiet title to real estate, cannot be litigated in a mandamus proceeding.[356]

Reservation of Continuing Jurisdiction

"The retention of jurisdiction to meet future problems and changing conditions is recognized as an appropriate method carrying out the policy of the state to utilize all water available."[357] It is regarded "as an appropriate exercise of equitable jurisdiction in litigation over water rights, particularly when the adjustment of substantial public interests is involved. * * * In giving declaratory relief a court has the powers of a court of equity."[358]

In several cases,[359] the Arizona Supreme Court has approved the continuance of jurisdiction in the trial court of suits between private parties for the

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[354] *State ex rel. Reeder* v. *District Ct.*, 100 Mont. 376, 382-383, 47 Pac. (2d) 653 (1935).

[355] *In re Barber Creek & Its Tributaries (Scossa* v. *Church)*, 46 Nev. 254, 259-262, 205 Pac. 518, 210 Pac. 563 (1922). A contempt proceeding is a special proceeding, criminal in character. It is not an appropriate action in which to determine that the rights of parties as fixed and established by a decree of adjudication are no longer so fixed and established, or that the adjudication decree is no longer binding upon such parties.

[356] *Nampa & Meridian Irr. Dist.* v. *Welsh*, 52 Idaho 279, 284, 15 Pac. (2d) 617 (1932).

[357] *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 937-938, 207 Pac. (2d) 17 (1949).

[358] *Los Angeles* v. *Glendale*, 23 Cal. (2d) 68, 81, 142 Pac. (2d) 289 (1943); accord, *Allen* v. *California Water & Tel. Co.*, 29 Cal. (2d) 466, 488, 176 Pac. (2d) 8 (1946); *Smith* v. *Wheeler*, 107 Cal. App. (2d) 451, 456-457, 237 Pac. (2d) 325 (1951). See also *Williams* v. *Rankin*, 245 Cal. App. (2d) 803, 54 Cal. Rptr. 184, 194 (1966).

[359] *Maricopa County M. W. C. Dist.* v. *Southwest Cotton Co.*, 39 Ariz. 367, 370, 7 Pac. (2d) 254 (1932); *Pima Farms Co.* v. *Proctor*, 30 Ariz. 96, 101, 245 Pac. 369 (1926); *Taylor* v. *Tempe Irrigating Canal Co.*, 21 Ariz. 574, 578-580, 193 Pac. 12 (1920).

Later, under "Judgments and Decrees–Physical Solution–California," attention is called to a declaration by the California Supreme Court that a trial court, on ordering a physical solution, should reserve unto itself the right to change and modify its orders and decree as occasion may demand. *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 383-384, 40 Pac. (2d) 486 (1935).

Chapter 16 mentions various aspects of the administration of water rights and the distribution of water, such as by watermasters, in carrying out judgments and decrees adjudicating water rights.

settlement of water rights controversies, for the purpose of supervising the distribution of water pursuant to the decrees and, if necessary, modifying the orders. Decisions in some other States are in accord.[360]

Stream Crossing State Line

Questions as to the jurisdiction of courts of one State to determine the rights of parties on both sides of an interstate line to the use of waters of a stream crossing such line, and to enjoin unlawful diversions in the other State, have been litigated in a number of cases. In the following paragraphs some cases are discussed with respect to the areas in which they arose. Each paragraph heading gives first the State above the boundary line and then the State into which the stream flowed. In general, they are presented in chronological order.

(1) Idaho-Utah. In a suit to determine rights to the use of waters of a stream flowing through Idaho into Utah, brought in the Idaho court, but in which all parties both diverted and used the water in Utah, a decree of adjudication was entered by the Idaho court. The Utah Supreme Court held that since an action to quiet title and to establish a water right is in the nature of an action to quiet title to real estate, it must be brought and prosecuted in the courts of the State in which the land is situated.

It was further held by the Utah court that although the Idaho court had jurisdiction to protect the rights of appropriators who divert in Utah to have the water flow down the stream and to determine the rights of Idaho proprietors thereto, "this rule of law can not be so extended as to give to the Idaho court jurisdiction to adjudicate and determine the rights, as between themselves, of the several appropriators who divert water from said stream in Utah, and use the same for irrigation upon lands in this State, and to quiet their titles thereto. Such matters are exclusively within the jurisdiction of this State * * *."[361]

(2) California-Nevada. Controversies were settled in the Federal courts with

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[360] From the nature and object of a water rights adjudication, the process of enforcing it is continuous; it must therefore remain the continuing function of the court that enters it. *Weiland* v. *Reorganized Catlin Consol. Canal Co.*, 61 Colo. 125, 131, 156 Pac. 596 (1916); *Ward County W. I. Dist. No. 3* v. *Ward County Irr. Dist. No. 1*, 117 Tex. 10, 16, 295 S.W. 917 (1927). In the latter case, the Texas Supreme Court, after approving the rotation method of distributing water, took measures to forestall possible waste of water. To this end, the judgment of the court of civil appeals was reformed to expressly adjudge that nothing contained in the judgment should prevent the trial court from modifying the judgment at any time in the future, on proper application and showing, in such manner as to prevent defendants in error from withholding from plaintiffs in error water in excess of the quantities for which defendants in error have use on their lands both riparian and nonriparian.

[361] *Conant* v. *Deep Creek & Curlew Valley Irr. Co.*, 23 Utah 627, 629-632, 66 Pac. 188 (1901).

respect to two streams that flow from California into Nevada—the Carson River and the Walker River.

A suit was brought in the Federal court for the Northern District of California by users of water of Carson River in Nevada, against users from the same stream in California, to determine the respective rights of use. The court held that it had jurisdiction to determine the rights of the complainants to a specific quantity of the stream waters, as against an objection that in doing so it was being asked to pass upon titles to real property in another State.[362]

Another suit, relating to waters of Walker River, was brought in the Federal court for the District of Nevada by Nevada complainants against a California defendant. The defendant appeared, entered a plea to the jurisdiction of the court which was overruled, and afterward filed an answer to the complaint. The court held that having acquired jurisdiction to the person of the defendant, it had jurisdiction to try the case. Where the necessary parties are before the court, it is immaterial that the *res* of the controversy is beyond its territorial jurisdiction; it has power to compel the defendant to do things necessary to give full effect to the decree against him. In other words, without regard to the subject-matter, the courts consider the equities between the parties; they decree *in personam* according to these equities, and enforce obedience to their decrees by process *in personam*.[363]

While the foregoing controversy over Walker River was being tried in Nevada, the defendant organized a company to which he conveyed the water rights and lands (the ownership of which he had set up as a defense in his answer) and commenced two suits in the State superior court of Mono County, California, involving the same issues. The Federal court in Nevada reasserted its conclusion that it had obtained jurisdiction and granted an injunction against prosecution of the suits in the California court.[364] This decision was affirmed by both the United States Court of Appeals and the United States Supreme Court.

The Court of Appeals held that although the Nevada court was not empowered to settle the rights of the parties in California, it might nevertheless look behind the defense answer to the appropriation in California, in order to ascertain and determine whether such an appropriation was prior and paramount to the appropriation of the Nevada complainant and, if not, then to settle and quiet complainant's title and rights therein. It may become necessary, therefore, in determining the right of appropriation in one State, to ascertain what are the rights in another. The "firmly established" rule that the court first acquiring jurisdiction of the subject-matter of the suit, and of the parties, is entitled to maintain it until the controversy ends and the rights of

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[362] *Anderson* v. *Bassman*, 140 Fed. 14, 15, 20-21 (C.C.N.D. Cal. 1905).
[363] *Miller & Lux* v. *Rickey*, 127 Fed. 573, 580-581 (C.C.D. Nev. 1904).
[364] *Miller & Lux* v. *Rickey*, 146 Fed. 574, 581-588 (C.C.D. Nev. 1906).

the parties are fully administered, without interference from and to the exclusion of the other, was reaffirmed.[365]

In affirming the decisions of the Federal courts in the foregoing case, the United States Supreme Court stated:[366]

> Full justice cannot be done and anomalous results avoided unless all the rights of the parties before the court in virtue of the jurisdiction previously acquired are taken in hand. To adjust the rights of the parties within the State requires the adjustment of the rights of the others outside of it. Of course, the court sitting in Nevada would not attempt to apply the law of Nevada, so far as that may be different from the law of California, to burden land or water beyond the state line, but the necessity of considering the law of California is no insuperable difficulty in dealing with the case. Foreign law often has to be ascertained and acted upon, and one court ought to deal with the whole matter.
>
> We are of the opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seized should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the States.

(3) Wyoming-Idaho. A diversion on an interstate stream took place in Wyoming, but the injury flowing from the wrongful act occurred downstream in Idaho. In this action to determine the extent and priority of water rights, the Idaho State court had jurisdiction not only of the *res*, but also of the person of the defendant. Therefore, according to the Idaho Supreme Court, the trial court had the right and authority to hear and determine all questions that occurred in the case and that were essential to a decision of the merits of the issues. This included rights and priorities on the same stream located beyond the State line. "Streams rise in one state and flow into another irrespective of boundary line, and still the rules and doctrines of priority of appropriation and use are the same in most of the arid states." [367]

(4) Nevada-Idaho. Two decisions were rendered in immediate sequence by the Federal Court of Appeals, 9th Circuit, with respect to the same defendant, in suits to determine conflicting water rights on two different streams—Salmon River and Goose Creek—rising in Nevada and flowing into Idaho.[368]

The court stated that it had already determined in *Rickey Land & Cattle*

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[365] *Rickey Land & Cattle Co.* v. *Miller & Lux,* 152 Fed. 11, 15-22 (9th Cir. 1907).

[366] *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U.S. 258, 261-263 (1910).

[367] *Taylor* v. *Hulett,* 15 Idaho 265, 97 Pac. 37, 39 (1908). "This is particularly true with respect to this case. Here the riparian doctrine of the common law has been abrogated in both Idaho and Wyoming, and the rule of 'first in time is first in right' is recognized and enforced in both states." *Id.*

[368] *Vineyard Land & Stock Co.* v. *Twin Falls Salmon River Land & Water Co.,* 245 Fed. 9 (9th Cir. 1917); *Vineyard Land & Stock Co.* v. *Twin Falls Oakley Land & Water Co.,* 245 Fed. 30 (9th Cir. 1917). Questions relating to the extent to which the judgment

Company v. *Miller & Lux*[369] that such a suit is essentially one to quiet title to real property and is local, not transitory. Where a party has been personally served and appears in court, the court may compel such party to act in relation to property not within its jurisdiction. Its decree does not operate directly upon such property not affect the title, but is made effective through coercion of the party. It was further said: "[T]he rem may not be affected by the direct operation of the decree where it is beyond the territorial jurisdiction of the court, but the court may, acting in personam, coerce action respecting it."[370]

Hence the Federal court, having jurisdiction in Idaho, had ample power to protect Idaho water users from a diversion of water within Nevada by a party to the action that would conduce to the injury of the Idaho appropriators.[371]

(5) New Mexico-Arizona. A controversy arose over the waters of Gila River, arising in New Mexico and flowing into Arizona. The Federal decision in the matter dealt with the power of the Arizona court to act where all the parties were before it and were consenting to a decree therein with relation to both Arizona and New Mexico water users. Defendants had been adjudged guilty of contempt of court for violating a decree defining water rights on the Gila River, issued by the Federal court for the District of Arizona. It was a consent decree, and defendants, who owned land in New Mexico irrigated from the river, had been parties to it. Each of the parties had been enjoined from interfering with the water rights of the other parties to the decree. Defendants now claimed that the Arizona court had no right to consider or determine the rights of the defendants in the waters in New Mexico.

The Federal Court of Appeals held that the court in the lower State had the power to adjudicate water rights of the users from the same stream in the upper State, because that was necessary to a determination of the rights of the lower users. "[J]urisdiction is concurrent with that of [the court in] the upper state, and * * * as an incident thereto the court in the lower state first securing jurisdiction had power to prevent the parties thereto from litigating their rights in either a state or federal court in any actions subsequently commenced in the upper state." The uniform holding is that an action to determine such rights is not a transitory action. Nevertheless, in order for the Arizona court to exercise its unquestioned power to settle effectively Arizona water rights on the river, it must also reach out and consider the amount of water which should rightly be in the stream when it enters Arizona. Hence, the trial court must consider the question of the rights of the upper owners to interfere with the waters in the upper State.[372]

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and decree of a court exercising jurisdiction in one State may become operative in another State are discussed chiefly in 245 Fed. at 25-29.

[369] *Rickey Land & Cattle Co.* v. *Miller & Lux,* 152 Fed. 11 (9th Cir. 1907), *supra* note 365.

[370] 245 Fed. at 26.

[371] 245 Fed. at 29.

[372] *Brooks* v. *United States,* 119 Fed. (2d) 636, 639-641 (9th Cir. 1941).

Judgments and Decrees

Binding Effect: Conclusiveness

As indicated by the California Supreme Court, no binding determination of specific water rights ordinarily can be made in a private action in which the holders of these particular water rights are not parties.[373] And, as indicated by the Idaho Supreme Court, the court's judgment or decree in such an action, subject to appeal, is final and binding upon the parties.[374] Statements to the same general effect were made by the Supreme Court of Hawaii with respect to the commissioners' awards or decrees.[375]

A Texas court of civil appeals, in a case which can be regarded as an ordinary civil action, stated, "Our understanding is that a judgment is only determinative of the issues raised by the pleadings, or which were fairly within the scope of the pleadings."[376] And according to the Supreme Court of Texas, a consent decree of a court of competent jurisdiction will not be pronounced a nullity where it adjudges, within the issues made by the pleadings, the respective priorities of conflicting claimants to the use of waters of a river.[377]

Statutory adjudication proceedings often appear to have been intended to provide a more comprehensive proceeding than might have been accomplished in an ordinary civil action.[378] There are variations, however, in the extent to which all or fewer water rights claimants within the encompassed area are brought into the proceeding and are bound by the final determination. The fact that not all claimants have submitted proof and are entered may not affect the force of the final decree as to those whose rights are covered thereby. But, whether, after a final decree is entered, a claimant who has failed to appear and submit proof is barred and estopped from thereafter asserting any rights theretofore acquired on the stream system, or whether he may appear within a limitation period prescribed by statute, or whether he is entitled to relief of

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[373] *Strong* v. *Baldwin,* 154 Cal. 150, 163, 97 Pac. 178 (1908). "The persons not made parties are, of course, not bound by the judgement, nor are they injured by the injunction." *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 920, 207 Pac. (2d) 17 (1949). The rule ordinarily applicable is that parties are not bound by an adjudication of water rights in an action to which they are not made parties. *Merrill* v. *Bishop,* 69 Wyo. 45, 62, 237 Pac. (2d) 186 (1951).

[374] *Farmers' Co-operative Ditch Co.* v. *Riverside Irr. Dist.,* 14 Idaho 450, 458, 94 Pac. 761 (1908); *Frost* v. *Idaho Irr. Co.,* 19 Idaho 372, 114 Pac. 38 (1911); *Lambrix* v. *Frazier,* 31 Idaho 382, 386, 171 Pac. 1134 (1918); *Mays* v. *District Ct.,* 34 Idaho 200, 207, 200 Pac. 115 (1921).

[375] *Palolo Land & Improvement Co.* v. *Wong Quai,* 15 Haw. 554, 564 (1904); *Appeal of A. S. Cleghorn,* 3 Haw. 216, 218 (1870).

[376] *Biggs* v. *Miller,* 147 S.W. 632, 635 (Tex. Civ. App. 1912).

[377] *Ward County W. I. Dist. No. 3* v. *Ward County Irr. Dist. No. 1,* 117 Tex. 10, 13-14, 295 S.W. 917 (1927).

[378] This is suggested by a number of statements in reported Western court decisions. See "Special Statutory Adjudication Procedures—Purposes of Statutory Procedures," *supra.*

some other kind, largely depends upon the laws of the State in which the situation arises.[379]

With respect to conclusiveness of a statutory adjudication decree on appeal, the Washington Supreme Court held that while its prerogative is to disturb the decree if necessary on questions of law, it would be slow to do so on questions of fact found by the highly skilled administrative officer acting as referee.[380] On the other hand, where a trial court familiar with such controversies sees and weighs the evidence and determines from law and evidence that there should be modifications of the referee's report, "we are loath to disturb the findings of the trial court upon such very complicated matters."[381]

With respect to the binding effect and conclusiveness of a former appellate decision by the South Dakota Supreme Court, that court said in a later case in 1941 involving a private action for the adjudication of water rights:[382]

> The salutary doctrine of estoppel by judgment has so established the adjudications of the courts in the confidence of mankind as to result in their universal recognition and acceptance as the highest order of indisputable evidence of rights. Such a judgment as is here under consideration which has stood as an unquestioned record of the priority and extent of a valuable property right in the use of water, and upon which successive grantees have depended as a record of title, should not be nullified except for the most cogent and impelling reasons.

Quantity of Water

Specific statement of the quantity of water to which an appropriative right attaches is generally recognized as a necessary element of an enforceable decree of adjudication. Despite some deviations, the principle is well established.

As said by the Idaho Supreme Court, a decree that fails to state, definitely and certainly, the quantity of water appropriated and necessarily used by the appropriator, is uncertain and ineffectual.[383] A claimant for a decree of a water right should present to the trial court sufficient evidence to enable it to make definite and certain findings as to the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed.[384]

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[379] For the various procedures in the different Western States, see "Special Statutory Adjudication Procedures–Statutory Adjudication Procedures in Selected States," *supra.* (Compare, for example, the procedures in Wyoming at notes 270-274, and Colorado at notes 205-208 and at note 231.) Also see the State summaries for each of the 19 Western States in the appendix.

[380] *In re Crab Creek & Moses Lake,* 134 Wash. 7, 17-18, 235 Pac. 37 (1925).

[381] *In re Ahtanum Creek,* 139 Wash. 84, 91, 245 Pac. 758 (1926).

[382] *Cundy* v. *Weber,* 68 S. Dak. 214, 221, 300 N.W. 17 (1941).

[383] *Lee* v. *Hanford,* 21 Idaho 327, 332, 121 Pac. 558 (1912).

[384] *Graham* v. *Leek,* 65 Idaho 279, 299, 144 Pac. (2d) 475 (1943); *Head* v. *Merrick,* 69 Idaho 106, 109, 203 Pac. (2d) 608 (1949). (Footnote continued.)

In a 1969 case, the Idaho Supreme Court, among other things, said:

> The Court has required [a specific water] measurement when the decree is intended to settle the rights of various appropriators who claim and use fluctuating amounts of water from the same source. Thus, if the decree awards an uncertain amount of water to one appropriator whose needs are vague and fluctuating, it is likely that he will waste water and yet have the power to prevent others from putting the surplus to any beneficial use.[385]

The court concluded, however:

> In the present case, the Village has shown that it had used for beneficial purposes all of the water from springs A and B until appellants interfered with their right. Appellants have never applied any of this water to beneficial use. They do not allege that there is any excess which the Village cannot use. In these circumstances, it is not necessary that the decree set forth a specific amount of water to which the Village is entitled. A decree giving "all" of the water from a certain source to a senior appropriator is valid when all of the water is beneficially used, for there is then no waste. [386]

The Nevada Supreme Court made an early observation to the effect that a decree that is not certain and definite with respect to the quantity of water appropriated, or that does not provide a basis for ascertaining such quantity, cannot be upheld.[387] The main purpose of a suit to quiet title to water rights is to determine the respective rights of the parties to the use of the water. Hence a decree that leaves the controversy undetermined and subject to future litigation defeats the purpose for which the action was brought.[388]

In Oregon, it has been held that one who claims a riparian right in a special statutory adjudication proceeding, but who asserts a right to a specific quantity of water with a fixed beginning use—which he must establish in order to have an enforceable priority—thereby claims essentially as an appropriator and waives his riparian claim for the purpose of that proceeding.[389]

In California, as elsewhere in the West, the appropriative right generally relates to a specific quantity of water. It therefore differs markedly from the

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In three of the earliest decisions of the Idaho Supreme Court, judgments of the trial courts were reversed because their decrees did not determine the rights of the parties according to their priorities of appropriation. *Hillman* v. *Hardwick,* 3 Idaho 255, 28 Pac. 438 (1891); *Geertson* v. *Barrack,* 3 Idaho 344, 29 Pac. 42 (1892); *Kirk* v. *Bartholomew,* 3 Idaho 367, 29 Pac. 40 (1892). In ordering the reversals, the supreme court stated the essential points that the trial courts should have determined and decreed.

[385] *Village of Peck* v. *Denison,* 92 Idaho 747, 450 Pac. (2d) 310, 313 (1969).

[386] 450 Pac. (2d) at 314.

[387] *Walsh* v. *Wallace,* 26 Nev. 299, 330, 67 Pac. 914 (1902).

[388] *Pacific Live Stock Co.* v. *Ellison Ranching Co.,* 52 Nev. 279, 296, 286 Pac. 120 (1930).

[389] See the discussion in chapter 10 at notes 509-515.

riparian right and the correlative percolating ground water right as they exist in the water rights laws of California. Hence in most contests between appropriators it generally is necessary that the judgment fix definitely the quantity of water to which each party is entitled. Under some circumstances in California it has been considered more practical and at the same time equitable to allot to each party a certain proportion of the total flow.[390] This, however, undoubtedly is most exceptional.

As a general rule, the California *riparian right,* as against another riparian in a private suit, does not relate to a specific quantity of water for the reason that it is normally a correlative right. However, in various cases the courts have been called upon to define the extent of riparian rights in a particular stream and to apportion the water among the owners accordingly. Furthermore, when paramount riparian rights are asserted against the exercise of appropriative rights, it is now necessary in California, under the judicial interpretation of the constitutional amendment of 1928, to ascertain the reasonable beneficial requirements of the riparian proprietors before enjoining interference with their exercise by appropriators. These matters are considered in some detail in chapter 10 under "The Riparian Right—Measure of the Riparian Right."

A Texas court of civil appeals held that the trial court's decree establishing the right of a downstream riparian owner to the flow of water should be certain and definite in that it should establish the quantity of water reasonably necessary for the riparian lands and, if the owner is found to have a preference right as against an appropriator, it should adjudicate the necessary quantity applicable thereto.[391]

Conditional Decree

Prior to 1969, provisions for conditional decrees in Colorado recognized that one who had initiated but had not consummated an appropriation had an inchoate right that was entitled to protection. The conditional decree became final on completion of the appropriation with due diligence.[392] In 1969, the Colorado Legislature provided for determinations of, among other things, a conditional water right and the amount and priority thereof, including a

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[390] *Trimble* v. *Hellar,* 23 Cal. App. 436, 446-447, 138 Pac. 376 (1913). See *Watson* v. *Lawson,* 166 Cal. 235, 243, 135 Pac. 961 (1913). See also chapter 8 at notes 267-268 regarding some early Utah allocations.

[391] *Biggs* v. *Lee,* 147 S.W. 709, 709-710, 711 (Tex. Civ. App. 1912, error dismissed). A trial court decree "absolutely enjoining the appellants from taking any water to nonriparian lands under their system, except when the river is in flood and overflowing its bank at appellee's land, which is 25 to 30 miles below by the river, and at which point the banks are 14 to 15 feet high," failed to take account of the riparian's lack of right, as against an upstream appropriator, to the use of any water in excess of his reasonable needs and necessarily, therefore, was fundamentally erroneous.

[392] Colo. Rev. Stat. Ann. § § 148-10-6 to 148-10-9 (1963), repealed, Laws 1969, ch. 373, § 20.

determination that a conditional water right has become a water right by virtue of a completed appropriation.[393] In every second calendar year following the year in which a conditional water right has been determined, the owner or user of the right, if he wishes to maintain the right, must obtain a finding by the referee of reasonable diligence in the development of the appropriation; failure to do so shall be considered an abandonment of the conditional water right.[394] These conditional decrees and conditional water rights have been discussed previously under "Special Statutory Adjudication Procedures–Statutory Adjudication Procedures in Selected States–Colorado."[395] The California adjudication statutes also include provisions with respect to the completion and eventual determination of incomplete appropriations.[396]

Declaratory Decree

In California, when the riparian owner's right is prior and paramount to that of an appropriator, the riparian owner is entitled, in case of a mere technical and unsubstantial interference with his right, to a judgment declaring his right and enjoining the assertion of an adverse use which might otherwise ripen into a prescriptive right.[397] The future or prospective reasonable beneficial uses of the riparian proprietor are likewise entitled to protection in a declaratory judgment and decree pending the time the owner actually needs the water in the exercise of his riparian right.[398] In giving declaratory relief, the court has the powers of a court of equity.[399]

A Texas case in the United States Court of Appeals was held to be not a true class suit, so that a declaratory judgment would be binding on only those parties actually before the court. Every question of law presented was one of local State law, as to which the decisions of Texas State courts would be controlling as precedents.[400]

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[393] Colo. Rev. Stat. Ann. § 148-21-18(1) (Supp. 1969).

[394] *Id.* § 148-21-17(4).

[395] See the discussion at notes 177-181 and 220 *supra.*

[396] Cal. Water Code § 2801 *et seq.* (West 1956).

[397] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 374, 382-383, 40 Pac. (2d) 486 (1935).

Most California law with respect to conflicting riparian-appropriation interrelationships was made in controversies in which the riparian right was adjudged superior. Regarding differences, as against appropriative rights, that may arise due to the time that lands passed into private ownership, and related factors, see in chapter 6, "Interrelationships of the Dual Water Rights Systems–The Status in Summary: By States–California."

[398] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.,* 3 Cal. (2d) 489, 525, 529-530, 45 Pac. (2d) 972 (1935); *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.,* 78 Cal. App. (2d) 900, 911-912, 178 Pac. (2d) 844 (1947).

[399] *Los Angeles* v. *Glendale,* 23 Cal. (2d) 68, 81, 142 Pac. (2d) 289 (1943).

[400] *Martinez* v. *Maverick County W. C. & I. Dist. No. 1,* 219 Fed. (2d) 666, 672-673 (5th Cir. 1955).

Physical Solution

Following are two States in which physical solutions have been applied or suggested.

Arizona.—In the interest of economy of water and equity to all parties under the circumstances involved, the Arizona Supreme Court has suggested physical solutions in the settlement of conflicting claims to water rights. In each decision, it was recommended that the organization obligated to yield water to other parties do so through its own canal system at no greater expense to the prevailing parties than would be occasioned by their own methods of diversion, rather than to release the water through natural channels with resulting losses.[401]

California.—(1) Development of the principle. The finding and application of the principle of physical solutions in the settlement of water controversies, in furtherance of more complete utilization of the State's water resources, have engaged the attention of the California courts in a number of cases decided since adoption of the California constitutional amendment of 1928.[402] It proved to be a valuable concomitant in implementation of the new State water policy.

Before issuing a decree entailing a great waste of water in order to safeguard a prior right to a small quantity of water, the constitutional amendment compels trial courts in water cases to ascertain whether there exists a physical solution of the problem that will avoid the waste and at the same time not unreasonably and adversely affect the property right of the paramount holder.[403]

That the idea of physical solution was not altogether new when this new State water policy was adopted, however, is shown by decisions rendered in 1904 and 1927.[404] Furthermore, while the doctrine of physical solution was not involved in a leading case decided in 1931, it was foreshadowed in that decision.[405]

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[401] *Pima Farms Co.* v. *Proctor,* 30 Ariz. 96, 112-113, 245 Pac. 369 (1926); *Maricopa County M. W. C. Dist.* v. *Southwest Cotton Co.,* 39 Ariz. 367, 370, 7 Pac. (2d) 254 (1932).

[402] Cal. Const. art. XIV, § 3. The amendment provides *inter alia* that water rights are to be limited to such quantity as is reasonably required and are not to extend to the waste or unreasonable use of water. This amendment is discussed in chapter 13 at notes 236-251.

[403] *Lodi* v. *East Bay Municipal Util. Dist.,* 7 Cal. (2d) 316, 339-340, 60 Pac. (2d) 439 (1936). "In attempting to work out such a solution the policy which is now part of the fundamental law of the state must be adhered to."

[404] *Montecito Valley Water Co.* v. *Santa Barbara,* 144 Cal. 578, 592, 602, 77 Pac. 1113 (1904); *Eckel* v. *Springfield Tunnel & Dev. Co.,* 87 Cal. App. 617, 625, 262 Pac. 425 (1927).

[405] *Collier* v. *Merced Irr. Dist.,* 213 Cal. 554, 562-563, 2 Pac. (2d) 790 (1931).

(2) Power of trial court. The power of the courts to impose physical solutions in the settlement of water controversies had never been broadly declared by the California Supreme Court prior to its interpretation of the 1928 amendment. Indeed, in 1936, this court declared that: "It may also be assumed that it was the law prior to 1928 that the prior appropriator could not be compelled to accept in lieu of his vested prior property right a physical solution, other than the actual maintenance of the water table."[406]

In its first comprehensive interpretation of the constitutional amendment, the principle of physical solutions was approved and adopted by the California Supreme Court. If the trial court could find a physical solution which would minimize or eliminate damages to landowners by reason of the defendant's project, then in lieu of damages it should prescribe such solution and direct the defendant city to provide and maintain it permanently at its own expense, and should enforce such requirements by prohibitory or mandatory injunction. The trial court had the power to do this, and should retain jurisdiction to modify its orders as occasion might demand.[407]

The principle was further developed in subsequent cases. For example, if the trial court should conclude that substantial saving could be effected at reasonable cost by repairing or changing some of the ditches, it undoubtedly had the power to make its injunctive order subject to conditions which it might suggest and to apportion the cost as justice might require, keeping in mind that the holders of the prior rights could not be required lawfully to incur any material expense in order to accommodate the junior claimant.[408]

(3) Duty of trial court. In various decisions, the California Supreme Court has gone farther and has held that it is the *duty* of the trial courts to seek physical solutions in controversies over the use of water. In one such case, the court was concerned over the "tremendous releases" of water from a river that would be required to maintain the water levels of a city's ground water supply, which releases after serving their purpose for the most part waste into the sea. Under such circumstances, it was held, the 1928 constitutional amendment[409] compels the trial courts before issuing such a decree to explore the possibility of a physical solution. Other suggestions as to possible physical solutions were made during the trial. With respect to this the supreme court said:[410]

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[406] *Lodi* v. *East Bay Municipal Util. Dist.*, 7 Cal. (2d) 316, 337, 60 Pac. (2d) 439 (1936).

[407] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 379-380, 383-384, 40 Pac. (2d) 486 (1935).

[408] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 573-574, 45 Pac. (2d) 972 (1935). See *Hillside Water Co.* v. *Los Angeles*, 10 Cal. (2d) 677, 688, 76 Pac. (2d) 681 (1938); *Allen* v. *California Water & Tel. Co.*, 29 Cal. (2d) 466, 485-486, 488, 176 Pac. (2d) 8 (1946). See also *Williams* v. *Rankin*, 245 Cal. App. (2d) 803, 54 Cal. Rptr. 184, 191-194 (1966), indicating that the trial court's physical solution was apparently reasonable and would not be changed on appeal.

[409] See note 402 *supra*, regarding the 1928 constitutional amendment.

[410] *Lodi* v. *East Bay Municipal Util. Dist.*, 7 Cal. (2d) 316, 339-344, 60 Pac. (2d) 439 (1936).

> 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 physical solutions, and if none is satisfactory to it to suggest on its own motion such physical solution. * * * The court possesses the power to enforce such solution regardless of whether the parties agree.

The principle was implemented in this case by providing that the district had the duty of maintaining the levels of plaintiff's wells above the danger level fixed by the trial court; that in the event that the levels of the wells reached the danger point, it was the district's duty either to supply water to the city or to raise the levels of the wells above the danger mark; and that in the event of noncompliance with the order within a reasonable time, injunctive decree should go into effect.

In another decision the trial court's duty was thus restated:[411]

> With the small quantity of water available in this stream in the summer months, the trial court should thoroughly investigate the possibility of some such physical solution, before granting an injunction that may be ruinous to either or both parties. It must be remembered that in this type of case the trial court is sitting as a court of equity, and as such, possesses broad powers to see that justice is done in the case. The state has a definite interest in seeing that none of the available waters of any of the streams of the state should go to waste. Each case must turn on its own facts, and the power of the court extends to working out a fair and just solution, if one can be worked out, of those facts.

Furthermore, under the State water policy commanded by the constitutional amendment of 1928, means of protecting water supplies of riparian lands from pollution resulting from upstream storage by appropriators should be applied by the trial court, if practicable, without absolutely prohibiting the diversions and rendering the storage project useless.[412]

A federal court cautioned that the constitutional amendment does not permit an appropriator to disregard the rights of riparian owners and others who may have prior or paramount rights to the use of all waters of a stream which they can put to reasonable beneficial use under reasonable methods of

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[411] *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 560-561, 81 Pac. (2d) 533 (1938).

[412] *Meridian* v. *San Francisco,* 13 Cal. (2d) 424, 451-452, 90 Pac. (2d) 537 (1939). The pollution, which resulted from operations of irrigation districts located above the riparian lands and below the increased storage diversions of the City of San Francisco, was not yet enough to render the water unfit for irrigation at the riparian lands. The supreme court held that if the storage diversions should so deplete the flow as to result in making the water unfit for irrigation at the riparian lands, the trial court had power by proper order to require the city to release enough water when necessary to freshen the flow, without rendering useless the city's increased storage facilities.

use. If under such circumstances "one seeks to appropriate the water wasted or not put to any beneficial use, it is obligatory that he find some physical solution, at his expense, to preserve existing prior rights, or if this cannot be done, and the water is to be appropriated, nonetheless, under the right of eminent domain, the riparian owners, prior appropriators and overlying landowners must be compensated for the value of the rights taken."[413]

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[413] *Gerlach Livestock Co.* v. *United States,* 76 Fed. Supp. 87, 94-95 (Ct. Cl. 1948), affirmed, 339 U.S. 725 (1950). See particularly 339 U.S. at 752-755.

Chapter 16

ADMINISTRATION OF STREAM WATER RIGHTS AND DISTRIBUTION OF WATER

IMPORTANCE

In the expanding agriculture of the West, increasing water rights litigation over the years has emphasized the advisability or necessity of a practicable means of continually enforcing court decrees. Particularly in times of fluctuating streamflow, the complexities of carrying out a decree adjudicating many priorities called for continued supervision at least during critical periods.

The power of a court of equity to provide enforcement of its own water decrees through a watermaster responsible to the court has been recognized since early in the history of water rights litigation.[1] Supervision by administrative officials (which has been practiced almost as long) accomplishes the same purpose, although by a different legal process. In addition, in some States, such administrative supervision goes farther and extends not only to rights adjudicated by court decrees, but also to undecreed rights evidenced by permits, licenses, or certificates of appropriation, or by agreements between water users.

DEVELOPMENT OF THE PRINCIPLE

Chapter 7 includes a brief summary of the threefold State administrative procedure pertaining to appropriative rights in watercourses—appropriation of water, adjudication of water rights, and administration of water rights and distribution of water to those entitled to receive it. (See "Methods of Appropriating Water of Watercourses—Water Rights Administration—Administrative Control of Surface Water Rights—The threefold State administrative systems pertaining to watercourses.") The adjudication and water distribution facets of the complex whole of water administration pertaining to appropriative rights in watercourses are discussed in chapters 8 and 9, whereas chapter 7 concerns appropriation procedures. Certain other aspects of water rights administration and matters bearing on the distribution of water are discussed in chapter 14 regarding forfeiture of water rights. Chapter 15 is concerned with

[1] *Frey* v. *Lowden,* 70 Cal. 550, 551-552, 11 Pac. 838 (1886); *Watkins Land Co.* v. *Clements,* 98 Tex. 578, 586, 86 S.W. 733 (1905); *Montezuma Canal Co.* v. *Smithville Canal Co.,* 218 U.S. 371, 385 (1910); *Silkey* v. *Tiegs,* 51 Idaho 344, 349, 357-358, 5 Pac. (2d) 1049 (1931).

the adjudication of water rights in watercourses. Various procedures for enforcing or carrying out such adjudications are discussed in this chapter.

All 19 Western States (except Hawaii) have some kind of statutory provisions respecting the distribution of water to holders of rights to its use. (Statutes of Hawaii confer upon commissioners, now circuit judges, the authority to enforce specific performance of judgments.[2] This, however, does not fit into the category we are here considering.) The existence and extent of water administrative organizations, the degree to which they are being utilized, and their relative importance in the State water control programs all vary considerably. For instance, Montana has provisions for courts to appoint water commissioners to act under the courts' orders; however, no administrative function is involved.[3] In Nevada, the State administrative officials, in distributing water pursuant to a court adjudication, are deemed to be officers of the court, under its supervision and control.[4]

The other Western States have statutory administration provisions of varying character. The Colorado system set the pattern for the numerous procedures which followed, beginning with Wyoming. Colorado's is a purely administrative proceeding. Its original and still primary purpose is to execute and enforce the water rights decrees of the courts. After adjudicating the water rights in such an action, the courts generally do not again become involved unless and until called upon to settle some particular controversy connected with the administrative program or for injunctive relief or damages.

As stated in chapter 15, State supervision of adjudication and diversion procedures in Colorado have gone hand in hand since 1879-1881.[5] The earliest Colorado provision—which was the earliest in the history of statutory administration procedures—was for water commissioners to supervise diversions pursuant to decreed priorities.[6] Later the organization was expanded to include superintendents of water divisions—subsequently called irrigation division engineers[7]—who supervised the work of the water district commissioners, and who in turn were under the general supervision of the State Engineer.[8]

Currently, the State of Colorado is divided into seven water divisions that generally follow major watershed boundaries.[9] Each division is headed by a division engineer[10] who, under the general supervision of the State Engineer,[11]

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[2] Haw. Rev. Stat. § 664-37 (1968).
[3] Mont. Rev. Codes Ann. § § 89-1001 to -1024 (1964).
[4] Nev. Rev. Stat. § 533.220 (Supp. 1967).
[5] Colo. Laws 1819, p. 94, Laws 1881, p. 142.
[6] Colo. Laws 1879, p. 94.
[7] Colo. Rev. Stat. Ann. § 148-12-1 (1963).
[8] Colo. Laws 1887, p. 295.
[9] Colo. Rev. Stat. Ann. § 148-21-8 (Supp. 1969).
[10] *Id.* § 148-21-9.
[11] *Id.* § 148-11-5.

is responsible for the administration and distribution of water in his division.[12] The State Engineer and the division engineers are authorized to issue orders with respect to partial or total discontinuance of the use of water not applied to beneficial use or the use of water required by senior appropriators, the release from storage of illegally stored waters, the movement of water involved in plans for augmentation, the installation of measuring devices, and entry upon private property to inspect the use of water.[13]

The Wyoming procedure is an adaption of the Colorado system. The State Engineer has general supervision over water division superintendents, and the latter over water district commissioners. Their authority extends to the regulation and control of 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.[14]

An unusual feature of the Wyoming system—not duplicated elsewhere in the West—is the dual relationship of the State Engineer to the four water division superintendents, all five of whom are constitutional officials.[15] In the supervision of diversion and distribution of water, the State Engineer is chief.[16] But in adjudicating water rights, the State Engineer and the superintendents are coequal members of the Board of Control,[17] except that the State Engineer is president of the Board.[18] He has one vote, and he can be, and sometimes is, outvoted by the superintendents.

Various methods of administering water rights and distributing water are found in the statutes of most Western States. Many of the systems were taken, in whole or in part, from Colorado and Wyoming. Some statutes authorize the State administrator to create water supervision districts only when and as the need arises. This depends in some instances on receipt of a petition from a specified percentage of water users affected. Methods of selecting watermasters, commissioners, or patrolmen, as they are variously termed, and of distributing the costs of supervision, vary from State to State.

The primary duty of the watermaster is to distribute, under the supervision of the chief administrator or an intermediate superintendent, the water of streams within his district to those who are entitled to receive it. He is the stream policeman. In order to prevent unauthorized diversions of water, he usually has authority to open, close, adjust, and lock headgates. In various States he has the power to make arrests. Persons dissatisfied with any act of a

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[12] *Id.* § 148-21-17(1). The division engineer, with the approval of the State Engineer, may establish one or more field offices within his division and appoint a water commissioner for each such office. *Id.* § 148-21-9(3).

[13] *Id.* § 148-21-35.

[14] Wyo. Stat. Ann. § 41-57 (1957).

[15] Wyo. Const. art. VIII, § § 2, 4, and 5.

[16] See Wyo. Const. art. VIII, § 5; Wyo. Stat. Ann. § 41-57 (1957).

[17] See Wyo. Stat. Ann. § 41-165 *et seq.* (1957).

[18] Wyo. Const. art. VIII, § 5.

watermaster in the performance of his duties may complain to his superiors, whose duty is to investigate and, if appropriate, to take corrective action.

It is the duty of a watermaster in charge of distribution of water of an adjudicated stream—whether appointed by court or by the State—to distribute the water according to the rights of those entitled to receive it. As between appropriative rights, in the watermaster's routine of opening, closing, and adjusting diversion headgates, his guide is a schedule of all appropriative rights in good standing that attach to the stream system, ordinarily arranged in the chronological order of their respective dates of priority.[19] Each right relates to a specific flow of water, usually in cubic feet per second. As the natural streamflow diminishes with the advancing season, headgates generally are lowered or closed in the reverse order of priorities, beginning with the latest in time and working backward in time, always reserving sufficient water to fill completely the requirements of the earlier rights. Should there be an increase in the natural flow, the gates are opened and raised to give the junior appropriators the benefit of the available supply.

As a practical matter, the wide divergence from one State to another in the importance and utilization of this arm of the water administrative program results from the volume of demands for its functioning. In general, statutes require water distribution areas to be established and put into operation as the need develops. This need may vary with the rate of water development in the State, but not necessarily so.

California, with its vast and widespread water uses, has one of the simpler distribution plans. An outstanding use of this plan in California is on the Kings River, in San Joaquin Valley, where for many decades the water rights situation has been extremely complicated.[20]

North and South Dakota started out with ambitious water distribution schemes inspired by those of Colorado and Wyoming, yet with very small aggregate areas under irrigation. Not only this, but the watered areas were concentrated mostly in the extreme western regions. Both States eventually discarded these plans as obsolete. Instead, North Dakota simply places all water distribution functions under the Water Conservation Commission.[21] South Dakota authorizes organization of water use control areas and appointment of watermasters when necessary.[22]

Idaho also started out with a statewide plan which was never put into operation. Instead, there is an operating plan of districts for adjudicated streams and elected watermasters under central State supervision.[23] The Kansas

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[19] This is subject to restrictions and preferences as discussed at the end of chapter 7.

[20] For an interesting and authoritative account of that era on this important stream system, see Kaupke, C. L., "Forty Years on Kings River, 1917-1957" (1957).

[21] N. Dak. Cent. Code Ann. § 61-02-29 (1960).

[22] S. Dak. Comp. Laws Ann. § 46-10-9 and 46-10-14 (1967).

[23] Idaho Code Ann. § 46-602 (1948).

water rights law contains provisions for appointment of water commissioners to serve under central control in field offices.[24]

CURRENT STATUS

The procedures that have been found constitutionally unobjectionable—and this includes most of them in the jurisdictions in which the question has been raised in judicial proceedings—have by now weathered long experience and are on the whole an essential part of Western water rights law. Following are brief abstracts of some principal features of provisions or procedures for administration of stream water rights and distribution of water, by States. Additional details are included in the State summaries in the appendix.

Abstracts of Procedures in the Several States

Alaska

The first section of Alaska's 1966 Water Use Act provides, "The Department of Natural Resources shall determine and adjudicate rights in the waters of the State, and in its appropriation and distribution."[25] This and other provisions pertaining to the adjudication of water rights are discussed in chapter 15.[26] While this first section of the act may contemplate the "distribution" of water, no specific procedures for such distribution are included. However, the penalty provision of the act, among other things, provides:

> [A] person who violates an order of the commissioner to cease and desist from preventing any water from moving to a person having a prior right to use the same; or who disobeys an order of the commissioner requiring him to take steps to cause the water to so move; or who fails or refuses to install meters, gauges or other measuring devices or control works; or who violates an order establishing corrective controls for an area or for a source of water * * * is guilty of a misdemeanor.[27]

This implies authority in the commissioner to perform at least the designated functions relating to the distribution of water.[28]

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[24] Kans. Stat. Ann. § 82a-706e (1969).

[25] Alaska Stat. § 46.15.010 (Supp. 1966).

[26] See notes 79-84 thereof.

[27] Alaska Stat. § 46.15.180 (Supp. 1966).

[28] The act, however, apparently does not otherwise contain provisions pertaining to the distribution of water, unlike its provisions regarding the determination of existing water rights, discussed in chapter 15 at notes 81-82.

For rather similar views regarding the applicability of this act to the distribution of water, see Trelease, F. J., "Alaska's New Water Use Act," 2 Land & Water L. Rev. 1, 36 (1967).

Arizona

The State Land Department is directed to divide the State into water districts, with reference to drainage watersheds, from time to time as they become necessary, but not until then.[29] For each such district, a superintendent and assistants[30] divide the waters among holders of rights thereto and regulate control works to prevent waste[31] in accordance with decreed rights. Any injured party may obtain an injunction if it appears that the superintendent failed to effectuate a departmental order or court decree determining existing rights.[32]

California

The Department of Water Resources shall create watermaster service areas[33] and, at its discretion, on written request of a specified part of those controlling diversions therein, may appoint a watermaster and deputies[34] to divide the waters according to the respective rights thereto.[35] Provision is made for construction and maintenance of diversion works and measuring devices;[36] remedies for persons injured by improper distribution;[37] punishment of offenses;[38] and handling expenses of distribution.[39] If it appears that any statutory provisions are inconsistent with provisions of a court decree of adjudication, the Department may instead conform to requirements of the decree.[40]

The California Supreme Court has held that a trial court which had made a court reference had power, by supplementary order following judgment, to appoint the Department to supervise, through the agency of a watermaster, the distribution of waters in accordance with the final decree.[41]

Colorado

The State Engineer is responsible for administration and distribution of the waters of the State.[42] The State is divided into seven water divisions that

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[29] Ariz. Rev. Stat. Ann. § 45-105(A) (1956).
[30] *Id.* § 45-105(B).
[31] *Id.* § 45-106(A).
[32] *Id.* § 45-106(C).
[33] Cal. Water Code § § 4025 and 4026 (West 1956).
[34] *Id.* § 4050.
[35] *Id.* § 4151.
[36] *Id.* § § 4100-4126.
[37] *Id.* § § 4160 and 4161.
[38] *Id.* § § 4175-4178.
[39] *Id.* § § 4200-4335.
[40] *Id.* § 4401.
[41] *Fleming* v. *Bennett*, 18 Cal. (2d) 518, 529, 116 Pac. (2d) 442 (1941).
[42] Colo. Rev. Stat. Ann. § 148-21-17(1) (Supp. 1969). See also Colo. Rev. Stat. Ann. § 148-11-3 (1963).

generally follow major watershed boundaries.[43] Each division is headed by a division engineer,[44] who (under the general supervision of the State Engineer)[45] is responsible for the administration and distribution of water in his division.[46]

In distributing water, the State Engineer and division engineers are to be governed by the priorities for water rights and conditional water rights established by adjudication decrees.[47]

The State Engineer and division engineers are authorized to issue orders with respect to (1) partial or total discontinuance of the use of water not applied to beneficial use or required by senior appropriators that would cause material injury to them,[48] (2) release from storage of illegally or improperly stored waters, (3) movement of water involved in plans for augmentation, (4) installation of measuring devices, and (5) entry by the State Engineer and division engineers and their assistants upon private property to inspect the use of water.[49] If any order has not been complied with, the violator may be enjoined.[50] Any person injured by the violation of a properly enjoined order, may recover treble damages.[51]

Hawaii

In Hawaii, there is no special statutory procedure for administering water rights and distributing water.

Idaho

The State Reclamation Engineer, who heads the Department of Reclamation,[52] administers laws relative to distribution of water in accordance with rights of prior appropriation.[53] The State is, by statute, divided into three water divisions[54] and the Department is authorized to create water districts for administration of stream systems or independent sources of water supply, the appropriative priorities of which have been adjudicated.[55] Watermasters and their regular assistants are elected by eligible persons owning or having a right

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[43] Colo. Rev. Stat. Ann. § 148-21-8 (Supp. 1969).
[44] *Id.* § 148-21-9.
[45] *Id.* § 148-11-5.
[46] *Id.* § 148-21-17(1).
[47] *Id.* § 148-21-17(3). See also § 148-21-28(2)(h) regarding tabulation decrees.
[48] In this regard each diversion shall be evaluated and administered on the basis of the circumstances and in accord with governing provisions in this article and the court decrees adjudicating water rights.
[49] *Id.* § 148-21-35.
[50] *Id.* § 148-21-36(1).
[51] *Id.* § 148-21-37.
[52] Idaho Code Ann. § 42-1804 (1948).
[53] *Id.* § 42-602.
[54] *Id.* § 42-601.
[55] *Id.* § 42-604.

to use water, the right being defined for the purposes of the distribution chapter as "any water right which has been adjudicated by the court or is represented by valid permit or license issued by the department of reclamation."[56] Water is distributed by watermasters on the basis of priority of right.[57]

Kansas

The Chief Engineer of the Division of Water Resources administers laws pertaining to beneficial use of water in accordance with rights of prior appropriation. He promulgates and enforces rules and regulations, requires installation of measuring devices, and regulates control works. Subject to approval of the State Board of Agriculture, he establishes field offices and appoints water commissioners to represent him in performing these duties.[58] A further function of the Chief Engineer is to aid in the distribution of water pursuant to court decrees of adjudication. He is authorized to adjust headgates and regulate controlling works. Copies of such decrees must be sent to the Chief Engineer by the clerk of the court.[59] It is the duty of the Attorney General, upon request of the Chief Engineer, to bring suit in the name of the State to enjoin unlawful diversions, uses, and waste of water.[60]

Montana

No State administrative authority has control over the exercise of water rights and distribution of water. On application of owners of at least 15 percent of water rights affected by an adjudication decree or decrees, it shall be the duty of the district judge, at his discretion, to appoint one or more commissioners to distribute the water. If the petitioners are unable to obtain applications of at least 15 percent of the owners, and they are unable to obtain the water to which they are entitled, the judge still may, in his discretion, appoint a water commissioner. Owners of stored waters, including the State Water Resources Board and its contractors, may petition the court to provide water commissioner distribution of the waters.[61] Commissioners have power to make arrests.[62] They do not have complete and exclusive jurisdiction to control the stream as such. Their authority, as well as that of the court in issuing instructions to them, depends upon the controlling provisions of the decree.[63]

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[56] Idaho Code Ann. § 42-605 (Supp. 1969).
[57] *Id.* § 42-607.
[58] Kans. Stat. Ann. § § 82a-106 to -106e (1969).
[59] *Id.* § § 82a-719 and -720.
[60] *Id.* § 82a-706d.
[61] Mont. Rev. Codes Ann. § 89-1001 (1964).
[62] *Id.* § 89-1008.
[63] *Quigley* v. *McIntosh*, 110 Mont. 495, 499-500, 510-511, 103 Pac. (2d) 1067 (1940); *State ex rel. Reeder* v. *District Ct.*, 100 Mont. 376, 382, 47 Pac. (2d) 653 (1935).

In an action to determine rights of parties in an irrigation ditch owned by a partnership, tenants in common, or corporation, the judge may appoint a water commissioner to serve during pendency of the action. After such adjudication, on application of owners of at least 10 percent of the ditch waters, the judge may appoint a commissioner to distribute water according to provisions of the decree.[64]

Nebraska

The Department of Water Resources has jurisdiction over all matters pertaining to water rights for useful purposes,[65] including supervisory control over water distribution in accordance with rights of prior appropriation.[66] The State is divided into two water divisions, each of which crosses the entire State from west to east.[67] The Department divides each water division into subdivisions and each subdivision into water districts.[68] Divisions are headed by division engineers and water districts by water commissioners.[69] Under the direction of the Department, division engineers have immediate direction and control of the water commissioners, who perform such duties as are assigned to them by the Department.[70]

Nevada

The State Engineer divides the State into water districts as necessary,[71] and divides or causes to be divided the waters of natural sources among claimants, according to their several rights.[72] He appoints water commissioners, subject to court confirmation.[73] After an order of determination in a special statutory proceeding has been filed in court, distribution by the State Engineer and commissioners is under the court's supervision and control. These adminstrative officials are deemed officers of the court in making distribution pursuant to such determination or to the court's decree.[74]

In addition, in a private suit, water rights may be administered by the State Engineer pursuant to the final decree—a separate and distinct matter from administration of a decree entered in a special statutory proceeding. It is effected by order of the court that entered the decree, after petition of water users and hearing of objections, and its use is within the discretion of the court

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[64] Mont. Rev. Codes Ann. § § 89-1017 to -1024 (1964).
[65] Nebr. Rev. Stat. § 46-209 (1968).
[66] *Id.* § 46-219.
[67] *Id.* § § 46-215 to -217.
[68] *Id.* § 46-222.
[69] *Id.* § § 46-218 and -223.
[70] *Id.* § § 46-218 and -224.
[71] Nev. Rev. Stat. § 533.300 (Supp. 1967).
[72] *Id.* § 533.305(1).
[73] *Id.* § 533.270(1).
[74] *Id.* § 533.220(1).

that entered the decree. At the court's discretion, a hydrographic survey of the stream may be ordered. In administering the decree, State officials are officers of the court.[75]

The State Engineer also has authority to regulate distribution of water among various users under any ditch or reservoir whose rights have been adjudicated, or whose rights are listed with the clerk of a court pursuant to the water rights statute.[76]

New Mexico

Supervision of apportionment of water in accordance with licenses and court decrees is vested in the State Engineer.[77] He may create or change water districts from time to time when necessary.[78] Upon written application of a majority of water users in a water district, the State Engineer appoints a watermaster who has immediate charge over the apportionment of water (under the general supervision of the Engineer) and he shall so appropriate, regulate, and control the waters as to prevent waste. In the absence of such an application, the State Engineer may appoint a watermaster for either temporary or permanent service if local conditions require it.[79] The watermasters are to report such information to the State Engineer as he may require, such as the adequacy or inadequacy of the water supply, and the State Engineer shall correct any errors of apportionments as may be needed.[80] During the existence of an emergency, and only during such time, he may employ assistants to serve under a watermaster.[81] Any person may appeal from the acts or decisions of a watermaster to the State Engineer and thence to the district court.[82]

When water rights of New Mexico landowners have been litigated in the State or Federal courts of an adjoining State, the State Engineer's duty is to assume control over all or any part of such stream and to administer the same in the public interest. However, this does not apply to conservancy districts, irrigation districts, and Federal reclamation projects in the State.[83]

North Dakota

This state originally had an ambitious statutory program of water rights administration, comprising water divisions, water districts, water commissioners, watermasters, and the Board of Water Commissioners with the State

[75] *Id.* § 533.310.
[76] *Id.* § 533.305(2).
[77] N. Mex. Stat. Ann. § 75-2-9 (1968).
[78] *Id.* § 75-3-1.
[79] *Id.* § 75-3-2.
[80] *Id.* § 75-3-5.
[81] *Id.* § 75-3-4.
[82] *Id.* § 75-3-3.
[83] *Id.* § 75-4-11.

Engineer as president.[84] These provisions were never put into effect, for they were too elaborate for a State with a very small total irrigated acreage (in comparison with Colorado and Wyoming), most of it concentrated in the extreme Western region of the State. They were omitted from the North Dakota Revised Code of 1943 as "obsolete."

All functions relating to distribution of water are now exercised through the Water Conservation Commission, which is accorded full control over all unappropriated waters of the State, whether above or in the ground, to the extent necessary to fulfill its functions.[85] The Commission may take any action to prevent any unauthorized diversion of its waters.[86] When engaged in controlling and diverting the natural flow of any stream, the Commission is deemed to be exercising a police power of the State;[87] but it is required to take into consideration court decrees of adjudication,[88] and holders of vested rights who claim that the Commission is not respecting their rights may resort to the courts for protection.[89]

Oklahoma

The Oklahoma Water Resources Board, which is vested with supervision over apportionment of water according to licenses and court adjudications,[90] is required to divide the State into water districts as necessity arises. Watermasters may be appointed for such districts.[91] Watermasters are to report such information to the Water Resources Board as the Board may require, such as the adequacy or inadequacy of the water supply, and the Board shall correct any errors of apportionment that may be needed.[92]

Oregon

The State Engineer administers State laws governing the distribution of water.[93] He divides the State into water districts as necessary,[94] and for each such district appoints a watermaster[95] who, under his general direction,[96] regulates distribution of water to those entitled to receive it.[97] Assistant

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[84] N. Dak. Laws 1905, ch. 34, § § 37-46.
[85] N. Dak. Cent. Code Ann. § 61-02-29 (1960).
[86] *Id.* § 61-02-37.
[87] *Id.* § 61-02-44.
[88] *Id.* § 61-02-42.
[89] *Id.* § 61-02-44.
[90] Okla. Stat. Ann. tit. 82, § 81 (1970).
[91] *Id.* § § 71-75.
[92] *Id.* § 75.
[93] Oreg. Rev. Stat. § 540.030(2) (Supp. 1969).
[94] *Id.* § 540.010.
[95] *Id.* § 540.020.
[96] *Id.* § 540.030(1).
[97] *Id.* § 540.040(1).

watermasters may be appointed.[98] The watermaster and his assistants have power to make arrests.[99] It is a continuing duty of the watermaster to so regulate use of water within his district by closing or partially closing control works as to prevent waste of water by use in excess of the quantity to which the water right owner is rightfully entitled, or in excess of his need for such maximum quantity.[100]

Whenever any water users are unable to agree upon the distribution of water, a majority of them may apply to the watermaster for a just distribution.[101] Distribution schemes may be altered by parties who enter into written agreements to rotate the use of water which the watermaster shall distribute accordingly.[102]

South Dakota

As with North Dakota, this State originally had an unnecessarily elaborate statutory program of water rights administration, considering the small total acreage of irrigated land (in comparison with Colorado and Wyoming) and the fact that nearly all of it was concentrated in the two tiers of counties lying between the 102d meridian and the western State boundary. The program was put into effect to some extent, but never completely. After various judicial and legislative vicissitudes, all water rights statutes pertaining to watercourses were repealed and replaced by new sections in 1955.

The South Dakota Water Resources Commission is vested with functions of administering water rights and supervising distribution of water to those entitled to receive it.[103] The Commission passes on designs for headgates and other measurement devices and apportionment structures; it may order their installation by ditch owners under penalty of nondelivery of water if they fail to comply.[104] It appoints watermasters to act under its orders for distributing water from any stream system or water source when deemed necessary by the Commission or by the court having jurisdiction, after consultation with the water users.[105] If a majority agree, it shall make a determination for them.[106] The Commission may remove watermasters for cause, or it may be required by the court to do so and to appoint successors after petition by water users,

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[98] *Id.* § 540.080.
[99] *Id.* § 540.060.
[100] *Id.* § 540.040(5).
[101] *Id.* § 540.100. See also §§ 540.210 to .270 containing similar provisions relating to the distribution of water by a watermaster from a ditch or reservoir. These provisions are not applicable to works of irrigation districts or district improvement companies, unless the watermaster has been requested by the district to distribute the water.
[102] *Id.* § 540.150.
[103] S. Dak. Comp. Laws Ann. § 46-2-9 (1967).
[104] *Id.* § 46-7-2.
[105] *Id.* §§ 46-10-9 and 46-10-12.
[106] *Id.* § 46-10-10.

notice, and hearing.[107] The watermaster has authority to regulate and to lock headgates and measuring devices in enforcing proper distribution of water under any adjudication decree or, if none, any temporary schedule of water deliveries the water users may agree upon.[108]

Water use control areas may be established after petition to the Water Resources Commission by a specified percentage of those claiming rights in either surface or ground waters in the proposed area, investigation and public hearings by the Commission, and determination by it of the necessity and feasibility of establishing the area.[109] If the control area is established, the Commission appoints a watermaster for the area and exercises, in general, the same functions with respect to the area as it does elsewhere in the State.[110]

Actions of the watermaster may be appealed to the Commission;[111] and actions of the Commission concerning establishment of a water use control area and administration therein may be appealed to the court having jurisdiction.[112]

Texas

A special statutory adjudication procedure enacted in 1917 and held unconstitutional in 1921[113] was accompanied by several sections relating to supervision of diversions of water pursuant to the determination.[114] Nullification of the adjudication procedure necessarily rendered useless the procedures that were provided to enforce the adjudications. All sections pertaining to both procedures were omitted from the Revised Civil Statutes of 1925.[115]

In 1967 the Texas Legislature enacted a different statutory adjudication procedure which includes, as did the 1917 legislation, provisions for the administration of water rights. The Water Rights Commission is directed to divide the State into water divisions, as necessary, for the administration of adjudicated water rights. It may appoint one watermaster for each division.[116] The watermaster is to divide the waters of his division in accordance with adjudicated water rights; he shall regulate or cause to be regulated the controlling works of reservoirs and diversion works during water shortages as is necessary because of existing stream water rights or to prevent waste of water

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[107] *Id.* § 46-10-11.
[108] *Id.* § 46-10-12.
[109] *Id.* § § 46-10-14 to 46-10-17.
[110] *Id.* § 46-10-19 *et seq.*
[111] *Id.* § 46-10-13.
[112] *Id.* § 46-10-27.
[113] *Board of Water Comm'rs* v. *McKnight*, 111 Tex. 82, 229 S.W. 301 (1921).
[114] Tex. Laws 1917, ch. 88, § § 130-134.
[115] Tex. Rev. Civ. Stat. 1925, Final Title, § 2.
[116] Tex. Rev. Civ. Stat. Ann. art. 7542a, § § 8(a) and 8(b) (Supp. 1970). Each division shall be constituted to best protect water rights holders and secure the State's most economical supervision. *Id.* art. 7542a, § 8(a).

or its diversion, storage, or use in excess of the quantities water rights holders are entitled to; and he may regulate the distribution from any system of works that serves users whose rights have been separately determined.[117] If water rights of record in the office of the Commission have not been adjudicated, the claimants of the rights and the Commission may enter into a written agreement for their administration.[118] Permits, other than temporary permits, issued by the Commission to appropriate water from an adjudicated stream are subject to administration in the same manner as adjudicated water rights.[119]

In any suit to which the State of Texas is a party, the purpose of which is to determine the rights of parties in not more than four counties to divert and use waters of a surface stream, the court is authorized to appoint a watermaster to distribute, under orders of the court, waters taken into judicial custody. However, the court may not appoint a watermaster to act both upstream and downstream from any reservoir constructed on such a stream.[120]

In litigation initiated in 1952 in the lower Rio Grande valley, a court of civil appeals expressed its belief that the trial court had effectively met a pressing need for maintaining the *status quo* under a voluntary rationing agreement "by means of the equity arm of the court aided by a Master in Chancery," who performed all the duties required of him by the court and acted under its orders. Thus, among all water users, the court maintained substantially the same status that had existed for a long time previously.[121]

Utah

The State Engineer establishes water districts and defines their boundaries.[122] He annually appoints water commissioners to distribute water from all or parts of any river system or water source, or a single commissioner for several distinct sources, when this is necessary in his judgment or that of the district court. The State Engineer must consult with the water users before making an appointment. If a majority agree, he acts in accordance therewith; if not, he makes a determination for them. The State Engineer may remove water commissioners for cause; or the water users may petition the district court for removal, whereupon the court after notice and hearing may order the removal and direct the State Engineer to appoint necessary successors.[123]

A major function of the State Engineer is to carry into effect judgments of courts respecting administration of water rights and distribution of water. This includes division of water within any district in accordance with the several

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[117] *Id.* § 8(c).
[118] *Id.* § 8(g).
[119] *Id.* § 6.
[120] *Id.* art. 7589b.
[121] *Hidalgo County W.I. Dist. No. 2* v. *Cameron County W.C. & I. Dist. No. 5*, 253 S.W. (2d) 294, 300-301 (Tex. Civ. App. 1952, error refused n.r.e.).
[122] Utah Code Ann. § 73-2-1 (1968).
[123] *Id.* § 73-5-1.

appropriative rights and regulation of diversion and storage control works. He may enter upon private property for these purposes, with court permission after notice and hearing.[124] Every water user must install adequate diversion and storage controls and measuring devices approved by the State Engineer when required by him to do so.[125]

With certain exceptions, the State Engineer has supervision over construction, repair, and operation of dams in the interest of security, safety, and protection of property;[126] and he may require such additions to or alterations of ditches or diversion works as are needed to attain these goals.[127] He may require such changes in water control works as are necessary to prevent waste, loss, pollution, or contamination of any water whether above or in the ground.[128] He may require reports from water users.[129] Any person aggrieved by a decision of the State Engineer may bring civil action in the district court for a plenary review thereof.[130]

Washington

The Director of Ecology designates water districts from time to time as needed.[131] He appoints watermasters for such water districts whenever he finds that the interests of the State or water users require them. These officers are under the supervision of the Director, and must be technically qualified in knowledge of elementary hydraulics and irrigation and ability to measure flowing water.[132] Under the Director, watermasters divide the waters of their districts pursuant to rights of prior appropriation. They may open, close, and fasten headgates, regulate controlling works of reservoirs, and make arrests.[133]

For administration of streams, the water rights of which have been adjudicated, and for such periods as local conditions warrant, the Director appoints a stream patrolman—with approval of the district watermaster if there is one—on application of interested parties who make a reasonable showing of necessity. The powers of a stream patrolman are the same as those of a watermaster but are confined to regulation of a designated stream or streams. He is under supervision of the Director or the district watermaster and must enforce rules and regulations prescribed by the former.[134]

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[124] *Id.* § 73-5-3.
[125] *Id.* § 73-5-4. See also § 73-5-12.
[126] *Id.* § § 73-5-5 and 73-5-6.
[127] *Id.* § 73-5-7.
[128] *Id.* § 73-5-9.
[129] *Id.* § 73-5-8. See also § 73-5-12.
[130] *Id.* § 73-5-14.
[131] Wash. Rev. Code § 90.03.060 (Supp. 1961), as amended, Wash. Laws 1967, ch. 80, § 1.
[132] *Id.*
[133] Wash. Rev. Code § 90.03.070 (Supp. 1961), as amended, Wash. Laws 1961, ch. 80, § 2.
[134] Wash. Rev. Code § 90.08.040 (Supp. 1961).

Wyoming

The Board of Control, created by the State constitution, administers water rights and distribution of water. It is composed of the State Engineer, as president, with the superintendents of the four divisions as members.[135] Pursuant to this constitutional direction, the legislature divided the State into four divisions,[136] and provided for the appointment of a superintendent for each division.[137]

The Board of Control has the responsibility of creating water districts within the water divisions,[138] each district having a water commissioner appointed by the Governor if needed.[139] Each Division Superintendent has general control of the water commissioners within his division, and under the general control of the State Engineer the Division Superindendent has charge of regulating and controlling "the storage and use of water under all rights of appropriation which have been adjudicated by the board of control or by the courts, and * * * under all permits approved by the state engineer whether the rights acquired thereunder have been adjudicated or not."[140]

The powers of district water commissioners include dividing, regulating and controlling stream waters within their districts by closing or partially closing and fastening headgates and regulating controlling works of reservoirs,[141] including exchange of stored water for direct flow.[142] District water commissioners have power to make arrests,[143] and may employ assistants in case of emergency.[144]

Any person injured by an act of a water commissioner, or by his failure to act, may appeal to the Division Superintendent and thence to the State Engineer, and from the latter's decision to the district court.[145]

Any person who deems himself injured or discriminated against by an order or regulation of the Division Superintendent may appeal to the State Engineer who, after hearing the case, has the power through the Division Superintendent to suspend, amend, or confirm the order.[146]

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[135] Wyo. Const. art. VIII, § § 2, 4, and 5.
[136] Wyo. Stat. Ann. § 41-54 (1957).
[137] Wyo. Stat. Ann. § 41-55 (Supp. 1969).
[138] Wyo. Stat. Ann. § 41-61 (1957).
[139] *Id.* § 41-62.
[140] *Id.* § 41-57.
[141] *Id.* § 41-63; Wyo. Stat. Ann. § 41-64 (Supp. 1969).
[142] Wyo. Stat. Ann. § 41-44 (1957).
[143] *Id.* § 41-65.
[144] *Id.* § 41-69.
[145] *Id.* § 41-63.
[146] *Id.* § 41-60.

Chapter 17

DIFFUSED SURFACE WATERS

PHYSICAL CHARACTERISTICS OF DIFFUSED SURFACE WATERS

General Definition of Diffused Surface Waters and Their Importance

Definitions

In general, diffused surface waters are waters which, in their natural state, occur on the surface of the earth in places other than natural watercourses or lakes or ponds–floodwaters that have escaped from streams being exceptions in some jurisdictions. (See "Essential Characteristics of Diffused Surface Waters–Origin," below.) Where such exceptions do not prevail, diffused surface waters may originate from any natural source. They may flow vagrantly over broad lateral areas or occasionally for brief periods in natural depressions; or they may stand in bogs or marshes. The essential characteristics of diffused surface waters are that they 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 natural bodies of water conforming to the definition of lakes or ponds.

In chapter 3, relationships of diffused surface waters to streamflows are discussed under two categories. Under "Elements of Watercourse–Source of Supply–Diffused Surface Water," it was shown that a large majority of decisions in Western courts accept diffused surface waters as sources of watercourses, and they are supported by the better reasoning. Under "Floodflows–Flood Overflows," attention is called to a case in which the Washington Supreme Court spoke of the "almost incredible conflict of authorities" as to when and under what circumstances floodwaters of a stream become diffused surface waters, so as to be governed by the rules relating to the latter rather than by the rules applicable to waters of watercourses.[1]

The classification of stream waters–whatever their origin–overflowing stream banks in times of flood has involved both real and apparent conflicts. Under the topic "Floodflows–Flood Overflows," in chapter 3, the cases are considered with respect to (1) overflows not separated from the stream, (2) overflows permanently escaped from the stream, (3) rejoinder with original watercourse, and (4) joinder with another watercourse.

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[1] *Sund* v. *Keating*, 43 Wash. (2d) 36, 42, 259 Pac. (2d) 1113 (1953).

Diffused surface waters—which the courts have quite commonly termed simply "surface waters," due to careless phraseology—were thus defined in 1941 by the California Supreme Court:[2]

> Surface waters are those falling upon, arising from, and naturally spreading over lands produced by rainfall, melting snow, or springs. They continue to be surface waters until, in obedience to the laws of gravity, they percolate through the ground or flow vagrantly over the surface of the land into well defined watercourses or streams. * * * After they have been gathered into a natural channel, however, they become stream waters.

More recently, the Utah Supreme Court defined diffused surface waters as "[W]ater diffused over the surface of the ground and derived generally from falling rain or melting snow, and it continues to be such until it reaches well defined channels wherein it customarily flows at which time it becomes part of a stream."[3]

Gradation of Diffused Surface Waters Into Watercourse

In the eyes of the law, diffused surface waters flowing toward a watercourse retain their identity until they actually enter that watercourse. Then their former classification ceases and they become water of a watercourse. It is a legal, not a physical metamorphosis. The water is in motion both before and after the change; furthermore, where diffused surface waters naturally converge so as to form a defined channel that carries initially only their own flows, the transition from diffused surface waters to watercourse may be a gradual one, difficult to determine as a matter of fact.[4] "While this dividing point may be

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[2] *Everett* v. *Davis,* 18 Cal. (2d) 389, 393, 115 Pac. (2d) 821 (1941).

[3] *McKell* v. *Spanish Fork City,* 6 Utah (2d) 92, 96, 305 Pac. (2d) 1097 (1957). For some other definitions or applications, see *Washington County Irr. Dist.* v. *Talboy,* 55 Idaho 382, 389, 43 Pac. (2d) 943 (1935); *Gibbs* v. *Williams,* 25 Kans. 214, 215-216, 220-221 (1881); *Dyer* v. *Stahlhut,* 147 Kans. 767, 770, 78 Pac. (2d) 900 (1938); *Doney* v. *Beatty,* 124 Mont. 41, 51, 220 Pac. (2d) 77, 82 (1950); *Jack* v. *Teegarden,* 151 Nebr. 309, 314, 37 N.W. (2d) 387 (1949); *Barnes* v. *Sabron,* 10 Nev. 217, 236-237 (1875); *Jefferson* v. *Hicks,* 23 Okla. 684, 692, 102 Pac. 79 (1909), quoting from *Cairo, Vincennes & Chicago R.R.* v. *Brevoort,* 62 Fed. 129, 133 (C.C.D. Ind. 1894); *Dahlgren* v. *Chicago, M. & P. S. R.R.,* 85 Wash. 395, 405, 148 Pac. 567 (1915); *Wyoming* v. *Hiber,* 48 Wyo. 172, 181, 44 Pac. (2d) 1005 (1935).

[4] "The question of the existence of a watercourse is often one of fact to be determined by a jury or the court." *Costello* v. *Bowen,* 80 Cal. App. (2d) 621, 627, 182 Pac. (2d) 615 (1947). In a specific case, it is not always easy to determine whether the facts and circumstances indicate a watercourse or diffused surface water. *Wyoming* v. *Hiber,* 48 Wyo. 172, 181, 44 Pac. (2d) 1005 (1935). Each case must stand or fall upon the factual situation disclosed by the record. See *Doney* v. *Beatty,* 124 Mont. 41, 51, 220 Pac. (2d) 77, 82 (1950); *Muhleisen* v. *Krueger,* 120 Nebr. 380, 381-382, 232 N.W. 735 (1930); *International & Great Northern R.R.* v. *Reagen,* 121 Tex. 233, 239-240, 49 S.W. (2d) 414 (1932).

difficult to define physically, its meaning in law is definite."[5] At this dividing line, wherever fixed, the law of diffused surface water ceases to be applicable and the law of watercourses begins to apply.

This vitally important question of gradation of diffused surface waters into a watercourse appears in court opinions in many cases, a few of which are cited in the accompanying footnote.[6]

Importance of the Problem

Originally, questions concerning diffused surface waters arose chiefly between neighboring landowners, when one wanted 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. They arose likewise in connection with the protection of land from overflow from streams. A few of the controversies dealt with the right of the landowner to make beneficial use of the water; such controversies were primarily between individuals. For a long period the problem of riddance of diffused surface waters was generally of greater importance from a legal standpoint than was the right to make use of them.

Soil and water conservation and other governmental programs have raised important questions concerning the control and use of diffused surface waters. It became necessary to ascertain the landowner's rights as well as liabilities with respect to such waters while they were on his land, not only as against his neighbor under common law, common enemy, and civil law principles, but also as against the claims of appropriators on watercourses of which the diffused surface waters constituted 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 whose lands the waters would flow if not interfered with, and whose appropriative rights may be adversely affected by the upper landowner's operations? The growing importance of the problem arose from the fact that large-scale operations for controlling diffused surface waters throughout the upper portions of a watershed conceivably might materially alter the flow in the streams that naturally drained the watershed.

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[5] Harding, S. T., "Water Rights for Irrigation–Principles and Procedure for Engineers" 9 (1936).

[6] *Mogle* v. *Moore*, 16 Cal. (2d) 1, 8-9, 104 Pac. (2d) 785 (1940); *Weck* v. *Los Angeles County Flood Control Dist.*, 80 Cal. App. (2d) 182, 196, 181 Pac. (2d) 935 (1947); *Scott* v. *Watkins*, 63 Idaho 506, 517-518, 122 Pac. (2d) 220 (1942); *Rait* v. *Furrow*, 74 Kans. 101, 106-107, 85 Pac. 934 (1906); *Town* v. *Missouri Pac. R.R.*, 50 Nebr. 768, 774-775, 70 N.W. 402 (1897); *Chicago, R. I. & P. R.R.* v. *Groves*, 20 Okla. 101, 117-118, 93 Pac. 755 (1908); *Gramann* v. *Eicholtz*, 36 Tex. Civ. App. 309, 310, 81 S.W. 756 (1904); *Alexander* v. *Muenscher*, 7 Wash. (2d) 557, 559-560, 110 Pac. (2d) 625 (1941).

Essential Characteristics of Diffused Surface Waters

Essential characteristics of diffused surface waters may be broadly classified as those relating to their origin, their situation, and their duration.

Origin

No permanent source of water supply.—Diffused surface water may originate from any natural source. But, as contrasted with water of a watercourse, diffused surface waters have no *permanent* source of water supply.[7]

Precipitation, springs, swamps.—Diffused surface waters may originate from rain and melting snow.[8] Precipitation falling upon the land is the chief source of these waters.

Diffused surface waters may likewise have their origin in springs.[9] They also may originate in swamps.[10]

In a North Dakota case, the waters of a stream emptied into a swale and there spread over considerable areas and lost all identity as a stream. Being commingled there with diffused surface waters from other sources, they were held to have become diffused surface waters.[11]

Flood overflows.—In times of flood, water may overflow the banks of a stream, part or all of which may either drain back into the stream channel as

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[7] *County of Scotts Bluff* v. *Hartwig,* 160 Nebr. 823, 828-829, 71 N.W. (2d) 507 (1955); *Froemke* v. *Parker,* 41 N. Dak. 408, 416, 171 N.W. 284 (1919). "Surface waters, in a technical sense, are waters of a casual or vagrant character having a *temporary* source, and which diffuse themselves over the surface of the ground, following no definite course or defined channel * * *." *Dahlgren* v. *Chicago, M. & P. S. R.R.,* 85 Wash. 395, 405, 148 Pac. 567 (1915). [Emphasis supplied.]

[8] *Everett* v. *Davis,* 18 Cal. (2d) 389, 393, 115 Pac. (2d) 821 (1941); *Johnson* v. *Johnson,* 89 Colo. 273, 276-277, 1 Pac. (2d) 581 (1931); *Washington County Irr. Dist.* v. *Talboy,* 55 Idaho 382, 389, 43 Pac. (2d) 943 (1935); *Gibbs* v. *Williams,* 25 Kans. 214, 215-216, 220-221 (1881); *Doney* v. *Beatty,* 124 Mont. 41, 51, 220 Pac. (2d) 77 (1950); *Block* v. *Franzen,* 163 Nebr. 270, 277-278, 79 N.W. (2d) 446 (1956); *Barnes* v. *Sabron,* 10 Nev. 217, 236-237 (1875); *Froemke* v. *Parker,* 41 N. Dak. 408, 415, 171 N.W. 284 (1919); *Jefferson* v. *Hicks,* 23 Okla. 684, 692, 102 Pac. 79 (1909); *Wellman* v. *Kelley,* 197 Oreg. 553, 560, 252 Pac. (2d) 816 (1953); *Terry* v. *Heppner,* 59 S. Dak. 317, 318, 239 N.W. 759 (1931); *McKell* v. *Spanish Fork City,* 6 Utah (2d) 92, 96, 305 Pac. (2d) 1097 (1957); *Alexander* v. *Muenscher,* 7 Wash. (2d) 557, 559-560, 110 Pac. (2d) 625 (1941); *Riggs Oil Co.* v. *Gray,* 46 Wyo. 504, 509, 512, 30 Pac. (2d) 145 (1934); *Cairo, Vincennes & Chicago R.R.* v. *Brevoort,* 62 Fed. 129, 133 (C.C.D. Ind. 1894).

[9] *San Gabriel Valley Country Club* v. *County of Los Angeles,* 182 Cal. 392, 398, 188 Pac. 554 (1920); *Lackaff* v. *Bogue,* 158 Nebr. 174, 186-187, 62 N.W. (2d) 889 (1954); *Anderson* v. *Drake,* 24 S. Dak. 216, 220-221, 123 N.W. 673 (1909); *Alexander* v. *Muenscher,* 7 Wash. (2d) 557, 559-560, 110 Pac. (2d) 625 (1941).

[10] *Weck* v. *Los Angeles County Flood Control Dist.,* 80 Cal. App. (2d) 182, 193, 181 Pac. (2d) 935 (1947).

[11] *Davenport Township* v. *Leonard Township,* 22 N. Dak. 152, 157-158, 133 N.W. 56 (1911).

the flood subsides, or may become completely and permanently separated from the stream.

In chapter 3 it was shown, in discussing "Floodflows–Flood Overflows," that the more generally accepted rule is that floodwater overflows that recede into the main channel as the flood subsides are regarded as a part of the stream, not as diffused surface water.

It was also brought out that in most Western jurisdictions in which the question has been adjudicated, overflow water that escapes from a stream and that does not return to its banks nor find its way to another watercourse is classified as diffused surface water. In a minority of jurisdictions, as shown in chapter 3, overflows that escape from a stream and remain outside as the flood subsides are classified as flood waters, not diffused surface waters. With respect to overflows that escape from the original stream but eventually rejoin it, the decisions conflict.

Some authorities hold that water escaping from one stream and joining another does not become diffused surface water.

Situation

In general, diffused surface waters are waters which, in their natural state, occur on the surface of the earth in places other than natural watercourses or lakes or ponds. 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 essential characteristics of such waters are that their flows are short-lived and that the waters are spread over the ground and not concentrated or confined in channel flows of regular watercourses nor in natural bodies of water conforming to the definitions of lakes or ponds.[12]

Diffused surface waters have also been broadly defined as surface drainage falling upon and naturally flowing from and over land before such waters have found their way into a natural watercourse;[13] as "a mere collection of flood waters from rains and melting snow that runs off in the winter and spring and does not actually comprise or enter any natural stream or body of water";[14] as temporary accumulations of rainwater in natural depressions in sloping land, without distinct banks and without any cut in the soil caused by the frequent flow of water;[15] and, in a very early case, as occasional bursts of water which, in times of freshets or melting of ice and snow, descend from high land and inundate the country–in other words, water flowing through hollows, gulches, or ravines only in times of rain or melting snow.[16]

Essential criteria, therefore, are that, as the name implies, such waters are

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[12] *Doney* v. *Beatty*, 124 Mont. 41, 51, 220 Pac. (2d) 77, 82 (1950).
[13] *Mogle* v. *Moore*, 16 Cal. (2d) 1, 8-9, 104 Pac. (2d) 785 (1940).
[14] *Washington County Irr. Dist.* v. *Talboy*, 55 Idaho 382, 389, 43 Pac. (2d) 943 (1935).
[15] *Gibbs* v. *Williams*, 25 Kans. 214, 215-216, 220-221 (1881).
[16] *Barnes* v. *Sabron*, 10 Nev. 217, 236-237 (1875).

spread over the surface of the ground without being collected into a definite body of water[17] or into a definite channel having the characteristics of a watercourse.[18]

On the contrary, in a 1950 case, the Nebraska Supreme Court quoted a characterization in one of its earlier decisions to the effect that "The term 'surface water' includes such as is carried off by surface drainage, that is, drainage independently of a water-course * * *."[19]

In another case, a survey showed that while there was no regular watercourse, there were elongated depressions or drainways showing natural drainage of the water.[20] In still another, the mere fact that surface or swamp water accumulated on a tract of land and moved across it by following the lowest contours did not, under the evidence of the case, support a finding that there was a natural watercourse at that location.[21]

It is not necessary that diffused surface waters be spread broadly over the land at all times.[22] They may include errant water passing through a low depression, swale, or gulley.[23] They may be occasioned by unusual precipitation "falling over the entire surface of the tract of land, and filling up low and marshy places, and running through adjacent lands and into hollows and ravines which are in ordinary seasons destitute of water and dry."[24]

In an Alaska case decided in 1963, the evidence showed that water normally flowed through a slough only during the spring thaw and on infrequent

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[17] *San Gabriel Valley Country Club* v. *County of Los Angeles,* 182 Cal. 392, 398, 188 Pac. 554 (1920); casual, vagrant, diffused over the ground, *Dahlgren* v. *Chicago, M. & P. S. R.R.,* 85 Wash. 395, 405, 148 Pac. 567 (1915); accumulating and spreading in consequence of heavy precipitation, *Miller* v. *Eastern R.R. & Lumber Co.,* 84 Wash. 31, 34-35, 146 Pac. 171 (1915).

[18] *Weck* v. *Los Angeles County Flood Control Dist.,* 80 Cal. App. (2d) 182, 193, 181 Pac. (2d) 935 (1947); no definite course or defined channel, *Dahlgren* v. *Chicago, M. & P. S. R.R.,* 85 Wash. 395, 405, 148 Pac. 567 (1915); *Cass* v. *Dicks,* 14 Wash. 75, 77, 44 Pac. 113 (1896); not a running stream; the water in the canyon came entirely from rainfall in the surrounding hills, *Denver, Texas & Fort Worth R.R.* v. *Dotson,* 20 Colo. 304, 305, 38 Pac. 322 (1894); no permanent stream, occasional flow for brief periods, *Wyoming* v. *Hiber,* 48 Wyo. 172, 187-188, 44 Pac. (2d) 1005 (1935); *Thorpe* v. *Spokane,* 78 Wash. 488, 489, 139 Pac. 221 (1914).

[19] *Courter* v. *Maloley,* 152 Nebr. 476, 485, 41 N.W. (2d) 732 (1950).

[20] *Lemer* v. *Koble,* 86 N.W. (2d) 44, 47 (N. Dak. 1957).

[21] *Harmon* v. *Gould,* 1 Wash. (2d) 1, 8, 94 Pac. (2d) 749 (1939).

[22] Such waters resulting from an extraordinary rainfall flowed in a sheet across plaintiff's almost level farm. *Robinson* v. *Central Nebr. Pub. Power & Irr. Dist.,* 146 Nebr. 534, 543, 20 N.W. (2d) 509 (1945). As a result of a very heavy rain, "the water ran in a sheet 500 feet wide from one farm to the other." *Hengelfelt* v. *Ehrmann,* 141 Nebr. 322, 327, 3 N.W. (2d) 576 (1942).

[23] *Horton* v. *Goodenough,* 184 Cal. 451, 453, 194 Pac. 34 (1920); *McManus* v. *Otis,* 61 Cal. App. (2d) 432, 439-440, 143 Pac. (2d) 380 (1943); *Sun Underwriters Ins. Co. of N.Y.* v. *Bunkley,* 233 S.W. (2d) 153, 155-156 (Tex. Civ. App. 1950, error refused.)

[24] *Mader* v. *Mettenbrink,* 159 Nebr. 118, 127, 65 N.W. (2d) 334 (1954).

occasions during the summer months when there were heavy rains. Such periodic flow is not of such frequency or duration as to make it practicable to classify the slough as a watercourse. "Instead, it must be classified as a drainway for surface waters, that is, waters from melting snow or rain which flow on the surface of the earth but do not form part of a watercourse."[25]

Duration

One of the outstanding characteristics of diffused surface waters is that their flows are short-lived.[26] Diffused surface waters lose their character as such when they are gathered into a definite body of water flowing as a stream in a natural watercourse.[27] As the California Supreme Court said, "Streams are usually formed by surface waters gathering together in one channel and flowing therein. The waters then lose their character as surface waters and become stream waters."[28] The weight of authority in the West is undoubtedly to this effect. Certainly, it is a general rule, as exemplified by numerous cases.[29]

Comparably, upon entrance into a lake,[30] or into a pond or other permanent body of water,[31] such water ceases to be diffused surface water and becomes water of the lake or pond. Likewise, it has been held that diffused surface water loses its character as such when it feeds a well.[32] This loss of character of diffused surface waters also occurs when these waters, instead of directly joining a surface stream or lake or pond, percolate into the ground.[33]

Diffused surface waters "may, without artificial aid, converge so as to form a defined channel and if they would naturally flow therein it would be

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[25] *Weinberg* v. *Northern Alaska Dev. Corp.*, 384 Pac. (2d) 450 (Alaska 1963).

[26] *Doney* v. *Beatty*, 124 Mont. 41, 51, 220 Pac. (2d) 77, 82 (1950).

[27] *San Gabriel Valley Country Club* v. *County of Los Angeles*, 182 Cal. 392, 398, 188 Pac. 554 (1920); *Everett* v. *Davis*, 18 Cal. (2d) 389, 393, 115 Pac. (2d) 821 (1941).

[28] *Mogle* v. *Moore*, 16 Cal. (2d) 1, 9, 104 Pac. (2d) 785 (1940).

[29] See, e.g., *Popham* v. *Holloron*, 84 Mont. 442, 449-450, 275 Pac. 1099 (1929); *County of Scotts Bluff* v. *Hartwig*, 160 Nebr. 823, 828-829, 71 N.W. (2d) 507 (1955); *Walla* v. *Oak Creek Township in Saunders County*, 167 Nebr. 225, 228, 92 N.W. (2d) 542, 545 (1958); *Jefferson* v. *Hicks*, 23 Okla. 684, 692, 102 Pac. 79 (1909); *Price* v. *Oregon R.R.*, 47 Oreg. 350, 358, 83 Pac. 843 (1906); compare *Terry* v. *Heppner*, 59 S. Dak. 317, 319, 239 N.W. 759 (1931); *International & G. N.R.R.* v. *Reagan*, 121 Tex. 233, 239-240, 49 S.W. (2d) 414 (1932); *McKell* v. *Spanish Fork City*, 6 Utah (2d) 92, 95, 305 Pac. (2d) 1097 (1957); *Sund* v. *Keating*, 43 Wash. (2d) 36, 42, 259 Pac. (2d) 1113 (1953); *Wyoming* v. *Hiber*, 48 Wyo. 172, 181, 44 Pac. (2d) 1005 (1935).

[30] *Block* v. *Franzen*, 163 Nebr. 270, 277, 79 N.W. (2d) 446 (1956); *Wyoming* v. *Hiber*, 48 Wyo. 172, 181, 44 Pac. (2d) 1005 (1935).

[31] *Froemke* v. *Parker*, 41 N. Dak. 408, 415, 171 N.W. 284 (1919); *Anderson* v. *Drake*, 24 S. Dak. 216, 223, 123 N.W. 673 (1909); *Wyoming* v. *Hiber*, 48 Wyo. 172, 181, 44 Pac. (2d) 1005 (1935).

[32] *Anderson* v. *Drake*, 24 S. Dak. 216, 223, 123 N.W. 673 (1909).

[33] *Everett* v. *Davis*, 18 Cal. (2d) 389, 393, 115 Pac. (2d) 821 (1941); *Sun Underwriters Ins. Co. of N.Y.* v. *Bunkley*, 233 S.W. (2d) 153, 155 (Tex. Civ. App. 1950, error refused).

construed to be a natural watercourse from the point at which the channel begins to take form."[34]

RIGHTS OF LANDOWNERS IN DIFFUSED SURFACE WATERS

Rights of owners of lands on which diffused surface waters occur may be classified in two groups: (1) avoidance, that is, drainage, obstruction, and riddance of diffused surface waters that are *not* wanted by such landowners; and (2) rights to use such waters that *are* wanted by such landowners. In the Western States there is a considerable body of law concerning avoidance of such waters; comparatively little on rights to their retention and use.

Drainage, Obstruction, Riddance

Many courts have followed or at least discussed several rules with respect to this aspect of the handling of diffused surface waters. The following classification portrays the sometimes complex judicial distinctions: (1) civil law or natural flow rule, (2) common enemy and/or common law rules, and (3) rule of reasonable use.

Civil Law or Natural Flow Rule

Some judicial views and distinctions.—The civil law rule (inadvertently adopted by the California Supreme Court in 1873 under the misapprehension that it was a statement of the common law, which prevailed in California, "for otherwise it could not have been the law of this state,"[35]) was thus stated by that court in the 1873 decision:[36]

> The prevailing doctrine appears to be that when two fields are adjacent and one is lower than the other, the owner of the upper field has a natural easement to have the water that falls upon his land flow off from the same upon the field below, which is charged with a corresponding servitude.

Having stood unchallenged for 17 years before the supreme court's attention was called to this early misinterpretation, the court held in 1890 that the civil law rule had become a rule of property and must be adhered to from then on. Subsequent decisions down to 1966 recognized that the civil law rule thus adopted had become a rule of property in California.[37]

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[34] *Weck* v. *Los Angeles County Flood Control Dist.*, 80 Cal. App. (2d) 182, 196, 181 Pac. (2d) 935 (1947).

[35] *McDaniel* v. *Cummings*, 83 Cal. 515, 519, 23 Pac. 795 (1890).

[36] *Ogburn* v. *Connor*, 46 Cal. 346, 350-353 (1873).

[37] See, e.g., *Weinberg Co.* v. *Bixby*, 185 Cal. 87, 96, 196 Pac. 25 (1921); *Coombs* v. *Reynolds*, 43 Cal. App. 656, 660, 185 Pac. 877 (1919).

In 1966, however, the California Supreme Court reviewed the entire subject extensively and concluded that "in the total spectrum of American case law, California may be considered a devotee of a modified civil law rule." Superimposed upon this, however, is an application of a rule of reasonable conduct pertaining to every party.[38]

The Montana Supreme Court in an early case observed that if a stream channel in controversy was only a passageway for the flow of diffused surface waters, the upper proprietors under the civil law had an easement over the lower land for the flow of such waters from their lands, which could not be interfered with or enjoined; however, under the common law, to which the court adhered, there was no such easement.[39]

A bare statement that as between owners of adjacent tracts of land, one lying higher than the other, the upper has an easement against the lower for the discharge of diffused surface water from the upper to the lower tract, and that the lower tract is burdened with a corresponding servitude to receive such flows, falls far short of stating the civil law rule as it has been stated and applied in most or all of the Western States where the courts have purported to recognize this rule. The judiciary has taken a much more realistic attitude in settling such controversies under the actual facts and circumstances pertinent to such disputes in the growing West, aided in a few instances by State statutes.

Thus, the Nevada Supreme Court has indicated that while any damage occasioned thereby is *damnum absque injuria*, the easement applies only to waters *naturally* flowing from the upper to the lower tract. "Wherever courts have had occasion to discuss this question they have generally declared that the servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man."[40]

In a 1958 case, the Oregon Supreme Court noted that the civil law rule as established orginally by the courts of this country did not permit any alteration in the natural flow of diffused surface water, and that any right to do this by artificial means had been granted by modification or qualification of this civil law rule.[41]

The South Dakota Supreme Court criticized an asserted rule that would permit the upper owner to transfer the burdens imposed by nature on his land to that of the lower owner.[42]

> To artificially drain a land-locked basin on the upper estate to a like basin on the lower estate is to relieve the upper estate of a

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[38] *Keys* v. *Romley*, 64 Cal. (2d) 396, 412 Pac. (2d) 529, 50 Cal. Rptr. 273 (1966), discussed at notes 86-91 *infra*.

[39] *Campbell* v. *Flannery*, 29 Mont. 246, 251, 74 Pac. 450 (1903).

[40] *Boynton* v. *Longley*, 19 Nev. 69, 72-73, 6 Pac. 437 (1885). See also, *Loosli* v. *Heseman*, 66 Idaho 469, 477, 162 Pac. (2d) 393 (1945).

[41] *Garbarino* v. *Van Cleave*, 214 Oreg. 554, 556, 558-559, 330 Pac. (2d) 28 (1958).

[42] *La Fleur* v. *Kolda*, 71 S. Dak. 162, 167-168, 22 N.W. (2d) 741 (1946); *Bruha* v. *Bochek*, 76 S. Dak. 131, 134, 74 N.W. (2d) 313 (1955).

> burden at the expense of the lower estate. Such a rule could not have been anticipated by either the settler of the upper or the lower estate. It is unjust and unsound. It gains no support from the civil law rule, which obtains in this jurisdiction, or from more modern authority.

And in a 1968 case, the court said:

> The [trial] court concluded that the actions of the defendant county in causing the land of these plaintiffs to be flooded by diverting water from another watershed resulted in the taking and damaging of private property for public use for which they were entitled to be compensated. This is in accord with our holdings that such flooding of land is compensable under eminent domain provisions. *La Fleur* v. *Kolda,* 71 S.D. 162, 22 N.W. 2d 741 [1946]; *Bogue* v. *Clay County*, 75 S.D. 140, 60 N.W. 2d 218 [1953]. This rule is not pertinent when the owner of dominant land drains surface waters from his land into a natural watercourse. This feature distinguishes *Johnson* v. *Metropolitan Life Insurance Co.*, 71 S.D. 155, 22 N.W. 2d 737 [1946], relied on by the appellants, from the situation here involved.[43]

The New Mexico Supreme Court stated that it had limited the operation of the common law and had refused to follow it where its rules were not deemed suitable to local conditions. "Particularly, we have never followed it in connection with our waters, but, on the contrary, have followed the Mexican or civil law * * *."[44]

Some State statutes.—Following are some Western State statutes that appear to follow some version, variation, or modification of the civil law or natural flow rule.

(1) A section of the South Dakota statutes provides in part:

> Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural watercourse or into any natural depression whereby the water will be carried into some natural watercourse * * * and when such drainage is wholly upon the owner's land he shall not be liable in damages therefore to any person.[45]

In construing an earlier, but identical version of the 1967 statutory provision, the South Dakota Supreme Court said the legislative policy thus manifested

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[43] *Heezen* v. *Aurora County*, 83 S. Dak. 198, 157 N.W. (2d) 26, 30 (1968).

The South Dakota Supreme Court in a recent case said that the so-called civil law rule has governed surface water drainage in South Dakota; however, it decided to adopt the "reasonable use" rule with respect to the drainage of surface waters in *urban* areas. *Mulder* v. *Tague*, 85 S. Dak. 544, 186 N.W. (2d) 884, 887-888 (1971), discussed in note 96 *infra.*

[44] *Martinez* v. *Cook*, 56 N. Mex. 343, 349, 244 Pac. (2d) 134 (1952).

[45] S. Dak. Comp. Laws Ann. § 46-20-31 (1967).

and construed by decisions of this court is that the owner of the dominant land, in the exercise of a reasonable use of his property, has the right by means of ditches and drains on his property to accelerate the flow of surface waters into a natural watercourse, and into which such waters naturally drain, provided he does not permit an accumulation of water on his property and cast the same on the servient land in unusual or unatural quantities.[46]

(2) In Kansas, prior to 1911, the common law or common enemy rule had obtained.[47] In that year, however, the legislature changed the rule pertaining to lands used for agricultural purposes.[48] With respect to such lands,[49]

> It shall be unlawful for a landowner or proprietor to construct or maintain a dam or levee which has the effect of obstructing or collecting and discharging with increased force and volume the flow of surface water to the damage of the adjacent owner or proprietor; * * * the provisions of this section shall apply only to lands used for agricultural purposes and highways lying wholly outside the limits of any incorporated city * * *.

"As to the treatment of such water on agricultural land we have substituted the civil law for the common law."[50] In passing upon the constitutionality of the statutory change, the supreme court held the legislature competent to adopt the rule of the civil law, providing for disposal of diffused surface water so that its obstruction or accumulation should not operate to the injury of an adjacent landowner.[51]

(3) Texas has two statutes relating to interferences with diffused surface waters—(a) statutory liability of railroads, and (b) general statutory liability.

(a) The railroad statute.—A statute providing for the organization and incorporation of railroads and construction of their roads, originally enacted in

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[46] *Bruha* v. *Bochek,* 76 S. Dak. 131, 133-134, 74 N.W. (2d) 313 (1955).

See note 43 *supra,* regarding the recent adoption of the reasonable use rule with respect to drainage in urban areas.

[47] *Singleton* v. *Atchison, T. & S. F. R.R.,* 67 Kans. 284, 287-291, 72 Pac. 786 (1903).

[48] *Goering* v. *Schrag,* 167 Kans. 499, 500, 207 Pac. (2d) 391 (1949).

[49] The original statute was enacted by Kans. Laws 1911, ch. 175, now Stat. Ann. § 24-105 (1964).

[50] *Dyer* v. *Stahlhut,* 147 Kans. 767, 770, 78 Pac. (2d) 900 (1938).

[51] *Martin* v. *Lown,* 111 Kans. 752, 754-755, 208 Pac. 565 (1922); *Skinner* v. *Wolf,* 126 Kans. 158, 160-161, 266 Pac. 926 (1928).

Another section of the Kansas statutes authorizes landowners to drain their lands, in the course of natural drainage, into channels leading to natural watercourses, or into drains on public highways. Kans. Stat. Ann. § 24-106 (1964). This does not specify the source or sources of water of which the landowner is authorized so to dispose. In one case in which there was a controversy over the right to discharge, into a watercourse, drainage water "that ordinarily would reach such stream in the general course of natural drainage," the water so drained comprised both overflow from the stream and "the natural drainage" of diffused surface water. *Horn* v. *Seeger,* 167 Kans. 532, 535, 544, 207 Pac. (2d) 953 (1949). The statute, said the supreme court, "expressly authorizes action of that character."

1876, contained a provision which now reads: "In no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices as the natural lay of the land requires, for the necessary draining thereof."[52]

In tracing the development of the law of interferences with diffused surface waters in the leading case of *Miller* v. *Letzerich* (which did not involve railroad liability), the Texas Supreme Court observed that this statute of 1876 was a mere adoption of the civil law rule relating to such interferences, insofar as it could be made applicable to railroads. The statute applied to all grants of land in the State, regardless of their dates, on which or conterminous with which a railroad should be constructed.[53]

(b) The general statute.—In 1915, the Texas Legislature enacted a law forbidding the diversion or impounding of diffused surface waters in such manner as to damage the property of another.[54] The current statute relating to alterations in the natural flow of diffused surface waters provides in part as follows:[55]

> That it shall hereafter be unlawful for any person, firm or private corporation to divert the natural flow of the surface waters in this State or to permit a diversion thereof caused by him to continue after the passage of this Act or to impound such waters, or to permit the impounding thereof caused by him to continue after the passage of this Act in such manner as to damage the property of another, by the overflow of such water so diverted or impounded, and that in all such cases the injured party shall have remedies, both at law and in equity, including damages occasioned thereby * * *.[56]

The foregoing was followed by several provisos, including one that construction and maintenance of flood control works pertaining to flows in watercourses and construction of water conduits should not be affected. Validity of the statute was sustained by the Texas Supreme Court.[57]

The statute relates only to "natural flow." It imposes on land no servitude to receive water that does not naturally flow upon it.[58] A rule of the civil law is that lower lands owe a service to receive diffused surface water which may flow upon them *untouched and undirected by the hands of man.*[59] This rule

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[52] Tex. Laws 1876, ch. 97, § 23, p. 147, Rev. Civ. Stat. Ann. art. 6328 (1925).

[53] *Miller* v. *Letzerich,* 121 Tex. 248, 256, 49 S.W. (2d) 404 (1932).

[54] Tex. Gen. Laws. 1915, 1st Called Sess., ch. 7.

[55] Tex. Rev. Civ. Stat. Ann. art. 7589a (1954).

[56] This statute, which pertains to "any person, firm or private corporation," has been held not to apply to a municipal corporation. *Houston* v. *Renault, Inc.,* 431 S.W. (2d) 322, 324 (Tex. 1968). This case is discussed at note 93 *infra.*

[57] *Miller* v. *Letzerich,* 121 Tex. 248, 253, 263, 267, 49 S.W. (2d) 404 (1932).

[58] *Higgins* v. *Spear,* 118 Tex. 310, 313, 15 S.W. (2d) 1010 (1929).

[59] *Miller* v. *Letzerich,* 121 Tex. 248, 254, 49 S.W. (2d) 404 (1932).

with its essential qualification was not changed by the act of 1915,[60] and it became the settled law in Texas.[61] To be entitled to have such water flow from one's land onto lower property, therefore, the water must follow its usual course and run in its natural quantities.[62]

Common Enemy Rule

The strict common enemy rule is exemplified by the following statement of the Washington Supreme Court in a 1963 case: "* * * surface waters are to be regarded as outlaw or common enemy waters, against which every proprietor of land may defend himself even to the consequent injury of others."[63] But this rule has been modified in various ways by most of the States that still adhere to some version of it.[64]

Common Enemy and/or Common Law Rules

This subtitle is so worded as to emphasize that in some States the controlling decisions recognized no distinctions between the common enemy and common law rules but used the terms interchangeably, whereas others viewed the two rules as having little or no relation to each other.

Not distinguished.—Thus, the Montana Supreme Court purported to adopt the "common-law rule" by which liability for the obstruction of diffused surface waters is measured, viz.: The lower landowner owes no duty to the upper landowner to refrain from obstructing the flow upon his land; each may appropriate all the diffused surface water that falls upon his premises; and one is under no obligation to receive from the other the flow of any such water, but may in the ordinary prosecution of his business and the improvement of his premises, by embankments or otherwise, prevent any portion of the diffused surface water from flowing upon his land. Each landowner, therefore, has the right to protect his land from the flow of diffused surface water.[65]

Bouldin, V. W., "Rights in Diffused Surface Water in Texas," Proc., Water Law Conference, Univ. of Tex., p. 5, 13-14 (1955), includes a summary of principles followed in the Texas cases to the date of presentation since Tex. Rev. Civ. Stat. Ann. art. 7589a (1954) was enacted and *Miller* v. *Letzerich, supra,* was decided.

[60] *Higgins* v. *Spear,* 118 Tex. 310, 313, 15 S.W. (2d) 1010 (1929).

[61] *Bunch* v. *Thomas,* 121 Tex. 225, 229, 49 S.W. (2d) 421 (1932); *Tennyson* v. *Green,* 217 S.W. (2d) 179, 181 (Tex. Civ. App. 1948, error refused n.r.e.).

[62] *Samples* v. *Buckman,* 246 S.W. (2d) 283, 285 (Tex. Civ. App. 1951, error refused).

[63] *Kelly* v. *Gifford,* 63 Wash. (2d) 221, 222, 386 Pac. (2d) 415, 416 (1963). But in another 1963 case, the Washington court added a modification of this strict common enemy rule, as discussed at note 75 *infra.*

[64] See "Modifications of Civil Law and Common Enemy or Common Law Rules," *infra.*

[65] *Le Munyon* v. *Gallatin Valley R.R.,* 60 Mont. 517, 523-525, 199 Pac. 915 (1921); *Tillinger* v. *Frisbie,* 138 Mont. 60, 353 Pac. (2d) 645, 646-647 (1960).

In the latter case, the court added, 353 Pac. (2d) at 647, that: "The case of O'Hare v. Johnson, 116 Mont. 410, 153 Pac. (2d) 888 [1944] did not change this rule in Montana. That case was an injunction suit brought to restrain a landowner from diverting surplus

Although the court did not discuss the question, the "common law" rule adhered to by the court is substantially like the "common enemy rule."

Distinguished.—In 1923, the Colorado Supreme Court held that the so-called common enemy rule was not the one that prevailed at the common law, and that it was inapplicable to conditions in Colorado.[66]

In 1932 the Texas Supreme Court held that the "common enemy doctrine" had been adopted by the courts of that State under the mistaken view that it was the common law rule, although they did depart from it to the extent of limiting its sweeping effect. However, the confusion and injustice engendered by adoption of this "common enemy doctrine" led in 1915 to enactment by the legislature of the general liability statute discussed previously under "Civil Law or Natural Flow Rule—Some State statutes." The supreme court held this act to be valid and constitutional, and applicable to all lands of the State whether granted under the civil law or the common law.[67] In a 1968 case,[68] the court reexamined its common law rule and decided to apply the rule of the *Restatement of Torts*, section 833, at least as to drainage of urban property by municipalities, as discussed later under the "Rule of Reasonable Use."

The Nebraska Supreme Court went into the instant topic quite thoroughly. Some excerpts from the opinion follow:[69]

> What is known as the common enemy doctrine originated in Massachusetts and is no part of the common-law rule. It has been adopted in some other states, generally with exceptions and modifications. While it is sometimes referred to in our cases as the common-law rule, it actually has no relation thereto. * * * It was assumed, and we now think incorrectly, that the common enemy doctrine originated in the common law dealing with surface waters. We now hold that the common enemy doctrine is not the law of this state, and that the true doctrine of the common law in regard to surface waters is as a general rule in force and controls in this state.

It was concluded that, in Nebraska, diffused surface waters may be dammed, diverted, or otherwise repelled if necessary and in the absence of negligence. But when diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale, or other drainway, then as against the rights of the upper proprietor the lower proprietor cannot

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irrigation water originating in the Bitter Root River and also surface waters onto the plaintiff's land. It cannot be construed as prohibiting a landowner from protecting his land from the encroachment of surface waters." See also *State Highway Comm'n* v. *Brastoch Meats, Inc.*, 145 Mont. 261, 400 Pac. (2d) 274 (1965).

[66] *Boulder* v. *Boulder & White Rock Ditch & Res. Co.*, 73 Colo. 426, 430-431, 216 Pac. 553 (1923).

[67] *Miller* v. *Letzerich*, 121 Tex. 248, 263-267, 49 S.W. (2d) 404 (1932).

[68] *Houston* v. *Renault, Inc.*, 431 S.W. (2d) 322 (Tex. 1968).

[69] *Nichol* v. *Yocum*, 173 Nebr. 298, 113 N.W. (2d) 195, 200 (1962).

obstruct them. At common law, the right to drain surface waters into depressions, draws, swales, and drainways which existed in the state of nature was recognized. Lower lands were and are at common law under a natural servitude to receive the surface water of higher lands flowing along natural depressions on the surface of the ground; and this is so, whether or not a live watercourse occupies the natural course.

> We point out that the owner of land is in the position of an owner of all surface waters which fall or arise on it, or flow upon it. He may retain them for his own use. He may change their course on his own land by ditch or embankment, but he cannot divert their flow upon the lands of others except in depressions, draws, swales, gulches, or other drainways through which such waters were wont to flow in a state of nature.[70]

The court cited a number of its own decisions that were consistent with the common law rule, "although they appear to be treated as exceptions to the common enemy doctrine. In other words, the court has resorted to exceptions to what was thought to be the common-law rule when, in fact, resort to exceptions was not required if the true common-law rule were properly applied."[71]

Modifications of Civil Law and Common Enemy or Common Law Rules

Following are judicial comments that indicate some of the several modifications that have been made in the civil law and common enemy or

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[70] 113 N.W. (2d) at 201.

[71] *Id.*

In *Nickerson Township, County of Dodge* v. *Adams,* 185 Nebr. 31, 173 N.W. (2d) 387, 390 (1970), the court said: "Diffused surface waters may be used in such manner as the owner of the land sees fit, provided that he does not concentrate them and dump them unlawfully on the land of another to his damage. He may change their course, store them, or reuse them, but he may divert them on the land of another only through depressions, draws, or other drainways as they were wont to flow in the state of nature. See, Nichol v. Yocum, 173 Neb. 298, 113 N.W. (2d) 195 [1962]; Muft v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N.W. (2d) 73 [1969]. It should be noted that the element of injury or damage has been an essential part of the rule, at least since Clare v. County of Lancaster, 160 Neb. 622, 71 N.W. (2d) 190 [1955]. There is also statutory authority for landowners to drain land by constructing open ditches under specified conditions without liability for damages. See § 31-201, R.R.S. 1943."

Nebr. Rev. Stats. § 31-201 (1968) provides that "Owners of land may drain the same in the general course of drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefore to any person or corporation."

See also *Linch* v. *Nichelson,* 178 Nebr. 682, 134 N.W. (2d) 793, 795 (1965); *Rolfsmeyer* v. *Seward County,* 182 Nebr. 348, 154 N.W. (2d) 752, 754 (1967); *Kuta* v. *Flynn,* 182 Nebr. 479, 155 N.W. (2d) 795, 797 (1968).

common law rules. Some Western State statutes which may in effect constitute modified civil law rules are discussed earlier under "Civil Law or Natural Flow Rule—Some State statutes." The trend appears to be away from strictness and toward modification in the direction of reasonable use, discussed in the next subtopic.

In a 1965 case, the Oklahoma Supreme Court said:

> The long-standing rule in this jurisdiction is stated in Gregory v. Bogdanoff, Okl., 307 P. 2d 841, p. 843 [1957]:
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> "This court has long given its approval to the 'Common Enemy Doctrine' in a modified and restricted sense. In cases approving same we have said that each proprietor may divert the water, cast it back or pass it along to the next proprietor, provided he can do so without injury to such adjoining proprietor. However, in all such cases we have laid down the rule that no one is permitted to sacrifice his neighbor's property in order to protect his own. See Gulf, C. & S.F. Ry. Co. v. Richardson, 42 Okl. 457, 141 P. 1107 [1914]."
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> The quoted rule was referred to in Syllabus 1 of Haskins v. Felder, Okl., 270 P. 2d 960, [1954] as follows:
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> "The common law governing the diversion of surface waters as adopted and applied in this state has been modified by the rule of reason."[72]

The Washington Supreme Court pointed out in 1896 that courts of some States had adopted the civil law rule, under which a lower estate is held subject to the easement or servitude of receiving the flow of surface water from the upper estate, without obstruction or diversion to the damage of the lower tract. "But the contrary rule of the common law has been adopted in many of the states and must be followed in this case * * *. By that law, surface water, caused by the falling of rain or the melting of snow * * * is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others."[73] By reference to this case, the supreme court declared in 1963 that "It is well established in this State that surface waters are to be regarded as outlaw or common enemy waters, against which every proprietor of land may defend himself, even to the consequent injury of others."[74] But in a previous 1963 case the court, after similarly adhering to and stating the common enemy rule, added that, "Surface waters may not be artificially collected and discharged upon adjoining lands in quantities greater than, or in a manner different from, the natural flow thereof."[75] This is a modification of the common enemy rule.

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[72] *Lynn* v. *Rainey*, 400 Pac. (2d) 805, 813 (Okla. 1965). See also *Iven* v. *Roder*, 431 Pac. (2d) 321 (Okla. 1967).

[73] *Cass* v. *Dicks*, 14 Wash. 75, 78, 44 Pac. 113 (1896).

[74] *Kelly* v. *Gifford*, 63 Wash. (2d) 221, 222, 386 Pac. (2d) 415, 416 (1963).

[75] *King County* v. *Boeing Co.*, 62 Wash. (2d) 545, 384 Pac. (2d) 122, 126 (1963), citing

In 1965, in a case in which a definite choice of drainage rules was necessary to the decision, the North Dakota Supreme Court made several statements of doctrine which, while not given a name, form an excellent explanation of the modified civil law rule. Several of these statements follow:[76]

> The owner of the lower, or servient, estate must receive surface water from the upper, or dominant, estate, in its natural flow. While the owner of such upper land has a right to drain and dispose of surface water on his property, he may not concentrate such water and pour it through an artificial drain in unusual quantities and in greater-than-normal velocity upon a lower landowner's property.
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> Subject to certain restrictions, and provided he acts reasonably and with prudent regard for the interests of adjacent owners so as not to increase the burden on the lower owner or injure his property, the upper owner may artificially drain his land. And he is not liable for damages for draining his land where water went over the lower owner's land before such draining and where such draining did not send the water down in a manner or quantity different from formerly. * * *
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> However, the upper owner has no right to increase materially the quantity or the volume of water discharged on the lower estate or discharge it in a different manner than it usually or ordinarily would have gone in the natural course of drainage.

In a later (1967) case, the North Dakota court adopted the reasonable use rule.[77]

According to the Arizona Supreme Court, under neither the civil law nor the common law does one have the right to collect diffused surface water in an artificial channel and cast it in large quantities upon the land of a lower owner to his damage.[78]

Similarly, the Colorado Supreme Court examined the "many apparently conflicting decisions" on the subject here under consideration and concluded that under the facts of the case it was immaterial which rule was to be followed. Under neither the "civil law, or the common law, or the so-called modified rule" has one owner the right to collect diffused surface water in an artificial channel, reservoir, or pond and discharge it upon his neighbor's lands to his injury—that is, in a different manner from its natural flow, or in greater

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several prior Washington cases. See also *Colella* v. *King County*, 72 Wash. (2d) 386, 433 Pac. (2d) 154, 157 (1967).

[76] *Rynestad* v. *Clemetson*, 133 N.W. (2d) 559, 563 (N. Dak. 1965).

[77] *Jones* v. *Boeing Co.*, 153 N.W. (2d) 897, 899-900 (N. Dak. 1967), discussed at note 96 *infra*.

[78] *Roosevelt Irr. Dist.* v. *Beardsley Land & Inv. Co.*, 36 Ariz. 65, 71, 282 Pac. 937 (1929); *Maricopa County M. W. C. Dist.* v. *Warford*, 69 Ariz. 1, 11, 206 Pac. (2d) 1168 (1949); *Tucson* v. *Koerber*, 82 Ariz. 347, 353, 313 Pac. 411 (1957); compare *Diedrich* v. *Farnsworth*, 100 Ariz. 269, 413 Pac. (2d) 774, 781 (1966).

volume, or otherwise more injuriously either on or under the surface of the ground.[79] In a 1967 case, the court said, "The modified civil law rule which has been adopted by Colorado has been summarized as follows: Natural drainage conditions may be altered by an upper proprietor provided the water is not sent down in manner and quantity to do more harm than formerly. City of Boulder v. Boulder and White Rock Ditch and Reservoir Co., 73 Colo. 426, 216 P. 533 [1923] * * *."[80]

In a 1958 case, the Oregon Supreme Court noted that the civil law rule as established orginally by the courts of this country did not permit any alteration in the natural flow of diffused surface water, and that any right to do this by artificial means had been granted by modification or qualification of this civil law rule. By the great weight of authority in these jurisdictions that had adopted the civil law rule, the owner of the upper land may accelerate the flow by such drainage system as may be required by good husbandry, without liability for damages to the owner of the lower land if the water is not diverted from its natural channels.[81] The court acknowledged that "The rule of the civil law regarding surface waters is now firmly established as the law of Oregon."[82] To support this statement, the supreme court cited certain cases of its own and quoted from several opinions. One reads in part as follows:[83]

> The defendant as a land owner had the right to turn or expel, upon the land of an adjacent owner, surface water that would naturally flow there, and in such quantities as would naturally drain in such direction, without liability for damages. * * * The owner of upper lands is not prohibited by the rule from cultivating his lands or draining them by artificial ditches, though surface water is thereby precipitated more rapidly upon the lands of the adjacent owner below, provided he does not cause water to flow on such lands which, but for the artificial ditches, would have flowed in a different direction, and provided he acts with a prudent regard for the interests of such adjacent owner.

Toward the end of the opinion in this case, the Oregon Supreme Court commented that "The 'prudent regard' expressions would seem to be more consonant with the reasonable use rule regarding surface waters adopted by the Restatement (Torts, § 833, p. 269) than with either the common enemy rule or the rule of the civil law."[84] The reaction of the court to this expression was

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[79] *Canon City & Cripple Creek R.R.* v. *Oxtoby,* 45 Colo. 214, 217-218, 100 Pac. 1127 (1909); *Boulder* v. *Boulder & White Rock Ditch & Res. Co.,* 73 Colo. 426, 430-431, 216 Pac. 553 (1923).

[80] *Hankins* v. *Borland,* 163 Colo. 575, 431 Pac. (2d) 1007, 1010 (1967).

[81] *Garbarino* v. *Van Cleave,* 214 Oreg. 554, 558-559, 330 Pac. (2d) 28 (1958).

[82] 214 Oreg. at 556.

[83] 214 Oreg. at 556-557, quoting from *Rehfuss* v. *Weeks,* 93 Oreg. 25, 32, 182 Pac. 137 (1919).

[84] 214 Oreg. at 561. The "Restatement of Torts" § 833 is discussed under "Rule of Reasonable Use," *infra.*

then explained as follows:[85]

> The expression as used in our decisions may be an admonition in general terms against damaging the lower owner by changing the place at which surface waters are discharged onto his land or by concentrating into one place the flow of water that would naturally flow onto the lower land in a more diffused form. Whether they intended to mean that or something more or less, we need not decide in this case. There may be circumstances under which the extraordinary acceleration of the flow of surface water in its natural channels may be enjoined. Since there is no evidence of any such extraordinary circumstances in this case, we need not consider that question at this time.

In 1966 the California Supreme Court was faced with the problem of determining whether the long established civil law rule was adaptable to urban development.[86] The civil law rule has not been universally accepted in its application to urban land, said the court; and as a result it has been suggested in the cases that an undefined exception to the rule exists in California with respect to urban land.[87]

> Admittedly the rule was adopted when California was primarily a rural society, and apparently it has never been strictly applied in a case involving urban land. On the other hand, no documentation has been produced to establish that the rule has in fact impeded urban development in the state. A number of highly urbanized states follow the rule, and California's phenomenal growth rate, to which no one can be oblivious and of which this court may take judicial notice, appears unstunted by the existence and application of the civil law rule since 1873.

Litigants contended that California had never observed the civil law rule with respect to urban property, but the supreme court could find little precedent for concluding that a different rule was essential for urban areas. Said the court:[88]

> It appears, therefore, that the civil law rule has been well settled and generally applied in California for almost a century, although it may be unnecessarily rigid and occasionally unjust, particularly in heavily developed areas. It places the entire liability for damages on one owner on the basis of the unvarying formula that he who changes conditions is liable. Furthermore, the rule creates a not infrequent onerous burden of proof as to what the natural

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[85] 214 Oreg. at 561-562.

[86] *Keys* v. *Romley*, 64 Cal. (2d) 396, 412 Pac. (2d) 529, 50 Cal. Rptr. 273 (1966). See also *Pagliotti* v. *Acquistapace*, 64 Cal. (2d) 873, 412 Pac. (2d) 538, 50 Cal. Rptr. 282 (1966).

[87] *Keys* v. *Romley*, 64 Cal. (2d) 396, 412 Pac. (2d) 529, 535, 50 Cal. Rptr. 273, 279 (1966).

[88] 414 Pac. (2d) at 535-536, 50 Cal. Rptr. at 279-280.

> conditions were or would be if not altered. As a result, there has been an understandable reluctance of courts to strictly apply the rule to urban property, but no clearly defined alternative rule has emerged.

Turning then to its decision to superimpose a rule of reasonableness of conduct upon the modified civil law rule, the California Supreme Court thus expounded its thesis:[89]

> We find the law in Calfornia, both as to urban and rural areas, to be the traditional civil law rule which has been accepted as the basis of harmonious relations between neighboring landowners for the past century. But no rule can be applied by a court of justice with utter disregard for the peculiar facts and circumstances of the parties and properties involved. No party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability.
>
> It is therefore incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner. It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury.
>
> If the actions of both the upper and lower landowners are reasonable, necessary, and generally in accord with the foregoing, then the injury must necessarily be borne by the upper landowner who changes a natural system of drainage, in accordance with our traditional civil law rule.

With respect to determination of the question of reasonableness, the supreme court stated, among other things:[90]

> * * * the question of reasonableness of conduct is not related solely to the actor's interest, however legitimate; it must be weighed against the effect of the act upon others. (For a discussion of the elements of liability, see Rest., Torts, § § 822-833.)
>
> The issue of reasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter. * * * It is properly a consideration in land development problems whether the utility of the possessor's use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters. * * * The gravity of harm is its seriousness from an objective viewpoint, while the utility of

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[89] 412 Pac. (2d) at 536-537, 50 Cal. Rptr. at 280-281.

[90] 412 Pac. (2d) at 537, 50 Cal. Rptr. at 281.

> conduct is its meritoriousness from the same viewpoint. * * * If the weight is on the side of him who alters the natural watercourse, then he has acted reasonably and without liability; if the harm to the lower landowner is unreasonably severe, then the economic costs incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage. If the facts should indicate both parties conducted themselves reasonably, then courts are bound by our well-settled civil law rule.[91]

The case was remanded with directions to the trial court to redetermine the issues in conformity with the views expressed in this opinion.

The rule of reasonable use, adopted in various States, is discussed immediately below.

Rule of Reasonable Use

The *Restatement of Torts* contains a declaration that "Where the invasion of a person's interest in the use and enjoyment of land by another's interference with the flow of surface waters is intentional, the determination of its reasonableness or unreasonableness is ordinarily a question for the trier of fact in each case in accordance with the rules stated in § § 826-831."[92]

In a 1968 case, the Texas Supreme Court referred to this section of the *Restatement* and said that "In our opinion this is the sound and better rule in the absence of a statute governing the rights and obligations of the parties, at least with respect to urban property where conditions are constantly changing and it is generally difficult or even impossible to establish how surface water flowed 'when untouched and undirected by the hand of man.' "[93]

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[91] Subsequent interpretations of the rules adopted in this case in lower appellate court opinions in California include *Burrows* v. *State,* 260 Cal. App. (2d) 29, 66 Cal. Rptr. 868, 870-872 (1968); *Western Salt Co.* v. *Newport Beach,* 271 Cal. App. (2d) 397, 76 Cal. Rptr. 322, 326-327 (1969); *Sheffet* v. *County of Los Angeles,* 3 Cal. App. (3d) 720, 84 Cal. Rptr. 11, 14-18 (1970).

[92] "Restatement of Torts" § 833, comment *b* at 271 (1939).

[93] *Houston* v. *Renault, Inc.*, 431 S.W. (2d) 322, 325 (Tex. 1968). The court's quoted language apparently also referred to another part of this section of the "Restatement of Torts" (§ 833) which it described as follows: "According to the American Law Institute, the liability of one who causes an *unintentional* but substantial invasion of the land of another by interfering with the flow of surface water depends upon whether his conduct was negligent, reckless or ultrahazardous." (Emphasis added.) And the court held that "The invasion here was unintentional." The court said, "An invasion is *intentional* within the meaning of these rules when the defendant acts for purpose of causing it or knows that it is resulting or is substantially certain to result from his conduct." (Emphasis added.) *Id.* For a later case involving an intentional invasion, see *Perryton* v. *Houston,* 454 S.W. (2d) 435, 437-438 (Tex. 1970).

The court also held that Tex. Rev. Civ. Stat. Ann. art. 7589a (1954), pertaining to "any person, firm or private corporation," did not apply to municipal corporation, which this case involved. *Houston* v. *Renault, Inc.,* 431 S.W. (2d) 322, 324 (Tex. 1968). The court indicated that for several years "most controversies over damage caused by

In an excellent law review article published in 1940,[94] it was pointed out that the reasonable use rule differs markedly from the strict civil law and common enemy rules, in that each possessor of land is legally privileged to make a reasonable use thereof, even though the flow of surface waters is altered thereby and causes some harm to others, liability being incurred only when his harmful interference with the flow is unreasonable under the circumstances. This rule often does not purport to lay down any specific rights or privileges. Each case is usually decided on its own facts in accordance with pragmatic concepts of fairness and common sense.

In a 1963 case, the Alaska Supreme Court said:

> * * * we adopt the rule of reasonable use with respect to one's right to drain his land of surface waters. That rule, as stated by the New Jersey Supreme Court, provides "that each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable".[95]

And in its syllabus in a 1967 case the North Dakota Supreme Court stated:

> The casting of surface waters from one's own land upon the land of another under circumstances where the resulting damage was foreseen or foreseeable, is tortious and liability results if the interference with the flow of surface waters is found to be unreasonable under the "reasonable use" rule. The issue of reasonableness or unreasonableness is a question of fact to be determined by a consideration of all the relevant circumstances.[96]

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surface water have been governed by that or some similar statute and we have not reexamined our common law rule in the light of developments in other jurisdictions." *Id.* at 325. See the discussion at note 67 *supra,* regarding the common law rule and at notes 55-62 *supra,* regarding art. 7589a of the Texas statutes.

The Utah Supreme Court in a recent case also adopted the reasonable use rule of the "Restatement of Torts" § 833. *Sanford* v. *University of Utah,* 26 Utah (2d) 285, 488 Pac. (2d) 741, 743-745 (1971).

The "Restatement of Torts" § 833, was referred to in *Garbarino* v. *Van Cleave,* 214 Oreg. 554, 330 Pac. (2d) 28 (1968), as discussed at notes 84 and 85 *supra.*

[94] Kinyon, S. V., & McClure, R. C., "Interferences with Surface Waters," 24 Minn. Law Rev. 904 (1940).

[95] *Weinberg* v. *Northern Alaska Dev. Corp.,* 384 Pac. (2d) 450, 452 (Alaska 1963), quoting in part, *Armstrong* v. *Francis Corp.,* 20 N.J. 320, 120 Atl. (2d) 4. 8 (1956).

[96] *Jones* v. *Boeing Co.,* 153 N.W. (2d) 897, 899-900 (N. Dak. 1967). See also the court's discussion at pages 903-904, drawing upon *Armstrong* v. *Francis Corp.,* 20 N.J. 320, 120 Atl. (2d) 4 (1956).

In *Jacobsen* v. *Pedersen,* 190 N.W. (2d) 1, 7 (N. Dak. 1971), the court said *inter alia*: "We will reaffirm the reasonable use rule that we adopted in Jones v. Boeing Company, 153 N.W. 2d 897 (N.D. 1967), as this rule is stated and explained in Armstrong v. Francis Corp., 20 N.J. 320, 120 A. 2d 4 [1956], and Enderson v. Kelehan, 226 Minn. 163, 32 N.W. 2d 286 (1948) [in which, said the court, the reasonable use rule

Rights of Use

As stated at the beginning of this main topic "Rights of Landowners in Diffused Surface Water," in the Western States there is a considerable body of law pertaining to avoidance of such waters where *not* wanted by the owners of lands on which they occur, and comparatively little on rights to their retention and use when they *are* wanted by such landowners. Following are some reported court decisions and legislation pertaining to the latter subject.

California

In California, there is little authority with respect to rights to the use of diffused surface waters. The chapter on "General State Policy" in the California Water Code contains a section declaring that "All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."[97] However, in the part of the Water Code that deals with waters subject to appropriation, specific references are only to "stream, lake or other body of water," "subterranean streams flowing through known and definite channels," and "All water flowing in any natural channel."[98] And in the chapter on "Applications to Appropriate Water" is a section reading:[99]

> An appropriation of water of any stream or other source of water under this part does not confer authority upon the appropriator to prevent or interfere with soil conservation practices

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is more clearly defined], in all those factual situations where the provisions of Section 61-01-22, North Dakota Century Code, do not apply." Section 61-01-22, set out in the *Jacobsen* case, 190 N.W. (2d) at 5, pertains to permits from the State Water Conservation Commission to drain waters from a pond, slough, or lake draining an area of 80 acres or more into a natural watercourse as defined by § 61-01-06 or into a draw or natural drainway.

In a recent case the Hawaii Supreme Court also adopted the reasonable use rule. *Rodrigues* v. *State,* 52 Haw. 156, 472 Pac. (2d) 509, 516 (1970). The court said, "We believe our decisions so closely approach the reasonable use rule that it is incumbent on us to adopt it."

The South Dakota Supreme Court in a recent case said that the so-called civil law rule has governed surface water drainage in South Dakota, but it decided to adopt the "reasonable use" rule with respect to the drainage of surface waters in *urban* areas. Under this rule, each owner "is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface water is unreasonable." *Mulder* v. *Tague,* 85 S. Dak. 544, 186 N.W. (2d) 884, 887-888 (1971), quoting in part from 1A "Thompson on Real Property" § 266, p. 384.

As discussed at note 89-91 *supra,* the California Supreme Court superimposed a rule of reasonable conduct upon the modified civil law in a 1966 case.

[97] Cal. Water Code § 102 (West 1956).

[98] *Id.* § § 1200 and 1201.

[99] *Id.* § 1252.1.

> above the point of diversion in the watershed in which such stream or other source originates, which practices do not themselves constitute an appropriation for which a permit is required by this part.

The only reference to the applicability of appropriative rights to use diffused surface waters that has been found in the California Supreme Court decisions is as follows:[100]

> It is not perceived why surface water from rains and melting snow, which naturally drained into this ditch (though not the subject of appropriation), to the extent to which it adds to the quantity of water which was received into the ditch from Connor's Creek, does not add to the value of the ditch, nor why its loss does not cause injury.

Insofar as the author is aware, no appellate court of California has ever held that riparian rights can attach to diffused surface waters; but there appears to be little direct authority for the proposition that riparian rights *cannot* attach to such waters—perhaps because it appears so obvious. Direct support seems to rest chiefly on the holding in *Lux* v. *Haggin*, that if plaintiffs were owners only of swamplands through which there was no watercourse, they could not have a cause of action for invasion of riparian rights because they would then not be *riparian* proprietors.[101] Indirect support may be derived from California Supreme Court decisions defining and acknowledging the existence under specific circumstances of watercourses to which riparian rights attach, as against contentions to the contrary; thus at least by implication excluding from attachment of riparian rights waters existing under circumstances that fail to meet the requirements of a watercourse.[102] And in a 1964 case dealing with a claim of interference with downstream riparian rights, a district court of appeal stated:[103]

> [D]efendants set up several defenses. The one which was successful in the trial court was based on the theory that defendants' right to impound water was not governed by the law applicable to riparian owners; that defendants were not riparian owners, there being no "watercourse" on defendants' property; rather that defendants' dam and reservoir collected only vagrant and flood waters, the use of which according to existing law can be unrestricted.

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[100] *Jacob* v. *Lorenz*, 98 Cal. 332, 339-340, 33 Pac. 119 (1893).

[101] *Lux* v. *Haggin*, 69 Cal. 255, 413, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[102] See *Lindblom* v. *Round Valley Water Co.*, 178 Cal. 450, 453, 173 Pac. 994 (1918); *Huffner* v. *Sawday*, 153 Cal. 86, 90-91, 94 Pac. 424 (1908).

[103] *South Santa Clara Water Conservation Dist.* v. *Johnson*, 231 Cal. App. (2d) 388, 41 Cal. Rptr. 846, 848 (1964). The court of appeals cited no authority for its quoted statement indicating a lack of riparian rights with respect to "vagrant and flood waters."

The court of appeals upheld the trial court's determination that defendants' dam was not situated on a watercourse.

Idaho

The right of an individual to appropriate, under a permit from the State, water of an artificial lake lying wholly upon the land of another, the sources of water being wholly rainfall and melting snow not flowing in a defined stream, was denied by the Idaho Supreme Court in a decision rendered November 3, 1911.[104] In that year, the legislature so amended the water appropriation statute as to forbid the issuance of a permit to appropriate water from any lake of 5 acres or less, pond, pool or spring, located entirely on the lands of a person or corporation, except to such landowner or with his or its written permission.[105]

In a later case, there appeared to be some question as to whether waters collected in a certain reservoir were in fact taken from a natural stream, or on the contrary were a mere collection of flood waters from rains and melting snow that ran off in the winter and spring and did not actually comprise or enter any natural stream or body of water. If the water impounded belonged to the latter class, said the supreme court, then it was the unqualified private property of the owners of the reservoir with which they might do as they saw fit.[106] *Dicta* in a subsequent case suggests that the right to diffused surface water may not be absolute. In *Franklin Cub River Pumping Company* v. *LeFevre* the court said that a landowner "would own and be entitled to recapture the natural precipitation falling on his land *so long as he applied it to beneficial use*."[107] (Emphasis added.) The latter proviso was not necessary to the decision, however, since the court agreed with the finding of the lower court that no measurable amount of water from the hollow reached the Cub River from which the plaintiff appropriator drew his water.

Kansas

In a case that involved the obstruction, rather than use, of the flow of diffused surface water, the Kansas Supreme Court stated as *dictum* that the landowner had the right "to use and accumulate all the water falling upon his own land."[108] This right was considered to be of definite value because farmers on upland prairies, away from streams, frequently made small dams on lower

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[104] *King* v. *Chamberlin,* 20 Idaho 504, 509-513, 118 Pac. 1099 (1911).
[105] Idaho Laws 1911, ch. 230, § 1, Code Ann. § 42-212 (1948).
[106] *Washington County Irr. Dist.* v. *Talboy,* 55 Idaho 382, 389, 43 Pac. (2d) 943 (1935).
[107] *Franklin Cub River Pumping Co.* v. *LeFevre,* 79 Idaho 107, 311 Pac. (2d) 763, 766 (1957).
[108] *Gibbs* v. *Williams,* 25 Kans. 214, 217 (1881).

portions of their farms and thereby obtained supplies of stock water entirely from rainfall.[109]

Montana

Owners of lands on which diffused surface water originating from melting snows or rains collects or stands at times in low places, depressions, potholes, and shallow basins, have the right to capture and impound such diffused surface drainage while it is on their lands and farms for use thereon.[110]

Nebraska

The rights to use diffused surface waters in Nebraska are summed up in brief sentences in two opinions of the supreme court: "We point out that the owner of land is in the position of an owner of all surface waters which fall or arise on it, or flow upon it. He may retain them for his own use."[111] "It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, or pond them upon his land, or cast them into a natural drain without liability."[112]

Oklahoma

The Oklahoma statutes provide, "The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream."[113] In a case involving obstruction of water flowing through a natural drainway, the Oklahoma Supreme Court determined the water was not water from a definite stream:[114]

> This provision [tit. 60, § 60] vests the ownership of surface water upon the defendant's property in the defendant. * * * * * * *

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[109] This principle was restated as *dictum* in *Kansas City & Emporia R.R.* v. *Riley,* 33 Kans. 374, 380, 6 Pac. 581 (1885).

[110] *Doney* v. *Beatty,* 124 Mont. 41, 50, 220 Pac. (2d) 77, 82 (1950). In an earlier case involving liability for the obstruction of diffused surface waters, the court stated that each landowner may appropriate all the diffused surface water that falls upon his own premises. *LeMunyon* v. *Gallatin Valley R.R.,* 60 Mont. 517, 523-525, 199 Pac. 915 (1921).

[111] *Nichol* v. *Yocum,* 173 Nebr. 298, 113 N.W. (2d) 195, 201 (1962). The court continued: "He may change their course on his own land by ditch or embankment, but he cannot divert their flow upon the lands of others except in depressions, draws, swales, gulches, or other drainways through which such waters were wont to flow in a state of nature." *Id.*

[112] *Linch* v. *Nichelson,* 178 Nebr. 682, 134 N.W. (2d) 793, 795 (1965).

See also *Nickerson Township, County of Dodge* v. *Adams,* 185 Nebr. 31, 173 N.W. (2d) 387, 390 (1970), discussed in note 71 *supra.*

[113] Okla. Stat. Ann. tit. 60, § 60 (Supp. 1970).

[114] *Nunn* v. *Osborne,* 417 Pac. (2d) 571, 574 (Okla. 1966).

> It is clear from the evidence that defendant's dam was built in a natural basin to collect and contain surface water primarily from his own watershed and, to a lesser degree, from the property adjoining to the north. This the defendant had a right to do even though it prevented such surface water from flowing through the drainway and onto the land of the plaintiff. * * * [A] lower land owner has no riparian right to the surface water of another.

In a syllabus, the court stated:[115]

> Under 60 O.S. 1965 Supp., § 60, an owner of land owns the surface water flowing across his land but not forming a definite stream, and he has the right to collect and appropriate it to his own use without liability to others. Riparian rights do not attach to such surface waters, and a lower proprietor has no right to have surface water flow to his land from higher land.

South Dakota

The South Dakota Supreme Court declared in *Benson* v. *Cook* that it is the settled rule that the landowner has the absolute right to diffused surface water found on his land, and that he may retain such water for his own use and prevent it from flowing upon the land of another.[116] Some years later this declaration—with some additions—was repeated in *Terry* v. *Heppner:*[117]

> No riparian rights attach to surface waters, nor does the arid region theory of appropriation apply thereto. 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.

The *Benson* case relied upon section 348 of the 1919 South Dakota Code which provided in part that "The owner of the land owns the water standing thereon, or flowing over or under the surface, but not forming a definite stream." The *Benson* case was the sole authority relied upon in the *Terry* case regarding a landowner's right to use diffused surface waters. Another provision of the South Dakota statutes provides that an owner or occupant of agricultural land may for any purpose dam any dry draw with a drainage area not in excess of 160 acreas, provided irrigation therefrom does not interfere with domestic uses of water downstream.[118] But the court in the *Terry* case

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[115] *Id.* at 572.

[116] *Benson* v. *Cook,* 47 S. Dak. 611, 616-617, 201 N.W. 526 (1924).

[117] *Terry* v. *Heppner,* 59 S. Dak. 317, 318-319, 239 N.W. 759 (1931).

[118] S. Dak. Comp. Laws Ann. § 46-4-1 (1967). Such impoundment of waters in a dry draw may be done without a permit from the Water Resources Commission except for filing

asserted a constitutional right of the landowner to diffused surface water of which the court indicated he could not be deprived by this dry draw law.

However, the language of section 348 was deleted in 1955.[119] A new statutory provision declares that "*all water* within the state is the property of the people of the state, but the right to the use of water may be acquired in the manner provided by law."[120] (Emphasis supplied.) One writer has suggested that the vitality of the *Benson* and *Terry* cases may be impaired by the deletion of the language of old section 348 and the enactment of this new provision.[121]

Texas

The Texas statutes provide that "storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression and watershed in the state is the property of the state" and is subject to appropriation.[122] The Texas Supreme Court has held that owners of land granted prior to the enactment of this statute have the right to rainwater falling on their lands. The court stated that under both the common law and the Mexican civil law, owners of land on which rains may fall and surface waters gather are proprietors of the water so long as it remains on their land, and prior to its passage into a natural watercourse to which riparian rights may attach. This right is a property right vested in the owner when the grant was made. Hence the legislature has no power to take it from the owner and declare it public property and subject to appropriation or otherwise to the use of another. If the statutory article were to be so construed as to make diffused surface water public water and subject to appropriation, it would be clearly unconstitutional. "Whether or not the Article in this respect could be applied under our constitution to grants made

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a location notice. *Id.* See § § 46-4-7 and 46-4-8 regarding location certificates. "Dry draw" is defined in § 46-1-6(3) as "any ravine or watercourse" not having an average daily flow of at least 0.4 c.f.s. from May 1 to Sept. 30, exluding any natural or publicly owned lake. Previous versions of this statutory provision are discussed in the *Benson* and *Terry* cases.

[119] S. Dak. Laws. 1955, ch. 430 § 1.

[120] S. Dak. Comp. Laws Ann. § 46-1-3 (1967).

For another State with a more or less similar provision, see "Utah," *infra.*

[121] Note, "The Ownership of Diffused Surface Waters in the West," 20 Stan. L. Rev. 1205, 1223 (1968).

Another statutory provision, S. Dak. Comp. Laws Ann. § 46-5-5 (1967), in part provides that "Subject to vested rights and prior appropriations, all waters flowing in definite streams of the state may be appropriated as herein provided." Another section, § 46-5-10, states that "Any person, association, or corporation, public or private, intending to acquire the right to the beneficial use of any surface waters shall, before commencing any construction for such purpose or before taking the same from any constructed works, make an application to the water resources commission for a permit to appropriate, in the form required by the rules and regulations established by it." Neither of these statutory provisions were dealt with in the *Benson* and *Terry* cases and § 46-5-10 was not mentioned in Note, 20 Stan. L. Rev., *supra.*

[122] Tex. Rev. Civ. Stat. Ann. art. 7467 (Supp. 1970).

subsequent to the passage of the law is not before us in this case, and no opinion is expressed relative thereto."[123]

Utah

The prevailing theme in the discussions for several preceding States is that the landowner has ownership or right of control of the diffused surface water that occurs on his land, or that at least the tendency is in that direction. But this appears not to be the case in Utah. There is little authority in Utah concerning the right to use diffused surface water. Although references have been made to such waters in a number of decisions, none has directly involved a dispute over the landowner's right to use them.

A broad statement made by the supreme court in a general adjudication of rights for a river system in 1938 probably reflects the court's view at that time:[124]

> We must know judicially that the water in a river between any two points is not accumulated there solely from the contributions thereto from marginal sources, but that the major portion thereof comes by natural flow from upstream sources which have fed the channel itself, step by step, clear back to its ultimate source or sources. The entire watershed to its uttermost confines, covering thousands of square miles, out to the crest of the divides which separate it from adjacent watersheds, 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.

With the 1935 statutory amendments declaring all waters in Utah, whether above or under the ground, to be public property, subject to all existing rights to their use,[125] it would appear to be reasonably certain that the landowner has no inherent right to use diffused surface water by virtue of his ownership of the land. In a 1952 decision, the Utah Supreme Court stated that the 1935 amendment encompassed diffused waters and rights to the use thereof could only be acquired by filing an application in the office of the State Engineer.[126]

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[123] *Turner* v. *Big Lake Oil Co.*, 128 Tex. 155, 169-170, 96 S.W. (2d) 221 (1936).
[124] *Richlands Irr. Co.* v. *Westview Irr. Co.*, 96 Utah 403, 418, 80 Pac. (2d) 458 (1938).
[125] Utah Code Ann. § 73-1-1 (1968).
[126] *McNaughton* v. *Eaton*, 121 Utah 394, 400-401, 242 Pac. (2d) 570 (1952).

Wyoming

In 1934, the Wyoming Supreme Court held that the water in dispute was diffused surface water and, as such, possessed the status indicated by the authorities to which it referred. Included was a quotation to the effect that diffused surface water could be captured and impounded by the owner of the land on whose lands the waters occur, using any available method, and when so impounded it becomes the absolute property of such landowner and not subject to appropriation by others.[127]

In the following year, there was much contention as to whether a certain draw was a watercourse. On this phase of the case the supreme court concluded:[128]

> The watershed is small; at least half of it, if not more, is confined to the lands of the defendant, and it would seem that the case may be said to resolve itself into the question as to whether or not the defendant has the right to impound water coming from melting snows and heavy rains, which fall onto his lands and on a small adjoining area, and which drain into a depression on defendant's lands. We think he has that right under the circumstances disclosed herein, or, at least, the trial court had the right to so find.

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[127] *Riggs Oil Co.* v. *Gray,* 46 Wyo. 504, 512-515, 30 Pac. (2d) 145 (1934), cited with approval in *Binning* v. *Miller,* 55 Wyo. 451, 466-467, 102 Pac. (2d) 54 (1940).

[128] *Wyoming* v. *Hiber,* 48 Wyo. 172, 187-188, 44 Pac. (2d) 1005 (1935), cited with approval in *Binning* v. *Miller,* 55 Wyo. 451, 466-467, 102 Pac. (2d) 54 (1940).

Chapter 18

OTHER WATERS AT THE SURFACE

SALVAGED AND DEVELOPED WATERS

Physical Distinctions

Salvaged waters are parts of a particular stream or other water supply that have been lost, as far as any beneficial use is concerned, to any of the established users, but are saved from further loss from the supply by artificial means and so are made available for use.[1]

Developed waters, on the other hand, are new waters which prior to the work of the developer were not part of the source of supply,[2] but are added to a stream or other source or area by artificial means.[3] In a Colorado case the court said, "The flow may have been hastened, but it was not augmented." The doctrine of developed waters does not apply to the mere removal of obstructions or hastening of the flow, but only to the adding of a new supply to the stream–one that otherwise would not have been there.[4] And the Oregon Supreme Court has said, "We do not think that any new water was developed. The construction of the drains merely accelerated the flow of seepage and waste water back into the river, but no new water was developed."[5]

Hence, salvaged waters are already in the area or close to it and are saved and restored to the supply within the area by artificial means; developed waters are not present in the area until brought there by means of artificial devices.[6]

The waters of the two classes are similar in that in both cases the water is made available as a result of artificial work and artificial devices through the efforts of man.[7]

Rights of Use

The rights to use both salvaged and developed waters are governed by the same general rule; namely, that the person who makes such water available is

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[1] *Big Cottonwood Tanner Ditch Co.* v. *Shurtliff,* 56 Utah 196, 189 Pac. 587 (1919).

[2] *Silver King Consol. Min. Co.* v. *Sutton,* 85 Utah 297, 307, 39 Pac. (2d) 682 (1934).

[3] *Cardelli* v. *Comstock Tunnel Co.,* 26 Nev. 284, 293-295, 66 Pac. 950 (1901).

[4] *Bieser* v. *Stoddard,* 73 Colo. 554, 562-564, 216 Pac. 707 (1923).

[5] *Jones* v. *Warmsprings Irr. Dist.,* 162 Oreg. 186, 202, 91 Pac. (2d) 542 (1939).

[6] *Vernon Irr. Co.* v. *Los Angeles,* 106 Cal. 237, 253, 39 Pac. 762 (1895).

[7] For a discussion of storage waters, see, in chapter 7, "Storage Water Appropriation" regarding appropriative water rights and, in chapter 10, "Exercise of the Riparian Right–Storage of Water."

entitled to its use. This rule is based upon the general equity concept that he who invests time and funds in such a project is entitled to receive the fruits of his labor.[8] The question for the court to determine in such cases is whether additional water was in fact made available for use and, if so, in what quantity.[9]

The burden of proof rests upon the party claiming to have salvaged water to prove that his proposal will, in fact, effect a saving.[10] Similarly, the person claiming to have developed water in close proximity to a fully appropriated source of supply has the burden of proving that he is not intercepting water which supplies the prior rights.

> It is a well recognized rule of law in this arid region, that where as in the case at bar, a party goes upon a stream, the waters of which have been appropriated and put to a beneficial use by others, and drives a tunnel into the mountain or watershed drained by the stream, and immediately under or in close proximity to the stream collects water which he claims to be developed water, he must make satisfactory proof that such water is in fact "developed water."[11]

The Utah Supreme Court has held that as the burden of proof rests upon the party claiming to have developed water, he will be required to bear the expense of employing a water official to obtain information to prove his claim,[12] and that the same rule applies where it is necessary to have measurements taken of the water supply to determine the amount of developed water, if any, produced.[13]

It is important to note the proviso that attaches to the right of the salvager and the developer to take the water he salvages or develops, that in doing so he is not infringing the prior rights of others. The reason for the rule is simply that, if one who is entitled to use a given quantity of water at a given point gets such use, he may not complain of any prior use which does not impair the quality or diminish the quantity of the water to which he is entitled.[14] In other

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[8] *Santa Cruz Res. Co.* v. *Rameriz*, 16 Ariz. 64, 70-71, 141 Pac. 120 (1914), dealing with salvaged waters.

See chapter 9 at note 269 regarding a 1966 opinion of the Arizona Court of Appeals, subsequent to this 1914 opinion of the Arizona Supreme Court, regarding the question of *conserved* water. The 1914 opinion was not mentioned in the 1966 opinion which discussed different considerations and took a somewhat different approach to the question of conserved water.

[9] *Mt. Lake Min. Co.* v. *Midway Irr. Co.*, 47 Utah 346, 361, 149 Pac. 929 (1915).

[10] *Howcroft* v. *Union & Jordan Irr. Co.*, 25 Utah 311, 71 Pac. 487 (1903).

[11] *Mt. Lake Min. Co.* v. *Midway Irr. Co.*, 47 Utah 346, 360, 149 Pac. 929 (1915). See also *Peterson* v. *Wood*, 71 Utah 77, 85, 262 Pac. 828 (1927); *Silver King Consol. Min. Co.* v. *Sutton*, 85 Utah 297, 306, 39 Pac. (2d) 682 (1934).

[12] *Silver King Consol. Min. Co.* v. *Sutton*, 85 Utah 297, 39 Pac. (2d) 682 (1934).

[13] *Bastian* v. *Nebeker*, 49 Utah 390, 400, 163 Pac. 1092 (1916).

[14] *Pomona Land & Water Co.* v. *San Antonio Water Co.*, 152 Cal. 618, 622-624, 93 Pac. 881 (1908).

words, he is not injured and hence has no logical claim upon the surplus salvaged and developed water made available by the efforts of others.

In its decision in a water adjudication proceeding in 1932, the Colorado Supreme Court summed up the foregoing restrictions as follows:[15] Where a person by his own efforts has increased the flow of water in a natural stream, he is entitled to the use of 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. * * *
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> * * * *
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> It is not enough to show that the flow of water to the river was hastened by the construction of the tunnel, but it must be shown that the flow of the river was augmented.[16]

With respect to the importation of foreign water from another area, a Colorado statute provides:[17]

> Whenever an appropriator has heretofore, or shall hereafter lawfully introduce foreign water into a stream system from an unconnected stream system, such appropriator may make a succession of uses of such water by exchange or otherwise to the extent that its volume can be distinguished from the volume of the streams into which it is introduced. Nothing herein shall be construed to impair or diminish any water right which has become vested.

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[15] *Leadville Mine Dev. Co.* v. *Anderson,* 91 Colo. 536, 537-540, 17 Pac. (2d) 303 (1932). For some other decisions pertinent to the general topic, see *Reno* v. *Richards,* 32 Idaho 1, 6, 13, 178 Pac. 81 (1918), cited in *Basinger* v. *Taylor,* 36 Idaho 591, 211 Pac. 1085 (1922); *Hill & Gauchay* v. *Green,* 47 Idaho 157, 158-160, 274 Pac. 110 (1928); title to such water rights cannot be litigated in a *mandamus* proceeding, *Nampa & Meridian Irr. Dist.* v. *Welsh,* 52 Idaho 279, 284, 15 Pac. (2d) 617 (1932); nor in a *contempt* proceeding, *State ex rel. Zosel* v. *District Ct.,* 56 Mont. 578, 581, 185 Pac. 1112 (1919); *Woodward* v. *Perkins,* 116 Mont. 46, 51-53, 55, 147 Pac. (2d) 1016 (1944); *Perkins* v. *Kramer,* 121 Mont. 595, 597-600, 198 Pac. (2d) 475 (1948); *Perkins* v. *Kramer,* 148 Mont. 355, 361-365, 423 Pac. (2d) 587 (1966); *Smith* v. *Duff,* 39 Mont. 382, 391, 102 Pac. 984 (1909); *Cardelli* v. *Comstock Tunnel Co.,* 26 Nev. 284, 293-295, 66 Pac. 950 (1901); *Harrell* v. *Vahlsing, Inc.,* 248 S.W. (2d) 762, 786 (Tex. Civ. App. 1952, error refused n.r.e.); *United States* v. *Haga,* 276 Fed. 41, 43-44 (D. Idaho 1921).

[16] This language was approvingly quoted in *Pikes Peak Golf Club, Inc.* v. *Kuiper,* 169 Colo. 309, 455 Pac. (2d) 882, 884 (1969), in which the court held that where prior to the time that the golf club salvaged water from swampy ground the salvaged water had been consumed in subirrigation of native hay crops and had never reached the natural stream leaving the lower boundary of the swamp, the golf course was entitled to retain the salvaged water for its golf course and was not required to release it into the stream.

[17] Colo. Rev. Stat. Ann. § 148-2-6 (1963), as reenacted and amended by Laws, 1969, ch. 373, § 21, Rev. Stat. Ann. § 148-2-6 (Supp. 1969).

WASTE, SEEPAGE, AND RETURN WATERS

Waste, seepage, and return waters are closely related. To some extent, their classifications overlap.

As discussed in this topic, waters of all three classes usually originate on irrigation projects or irrigated lands as a result of the conveyance, distribution, and application of irrigation waters. Where considered separately, the following distinctions are made herein:

Waste waters are taken to include (1) water purposely discharged from the project works because of operation necessities, (2) water leading from ditches and other works, and (3) excess water flowing from irrigated lands, either on the surface or seeping under it.

Seepage waters are waters seeping through the soil from ditches or other works and from irrigated lands and entering stream channels or appearing elsewhere on the surface.

Return waters are waters diverted for irrigation or other uses that return to the stream from which they were diverted, or to some other stream, or that would do so if not intercepted by some obstacle. Thus, return waters include both waste water and seepage water.

Water pollution is not dealt with *per se* in this discussion. Water can be waste, or seepage, or return water, or even the natural flow of a watercourse without regard to the question of whether or not it is polluted. That question has nothing to do with the foregoing classification, and should not be confused with or by it.

This study of the State water rights laws of the Western States focuses upon water rights—rights to the use of water. Ways in which pollution questions may impinge upon this overall study are discussed in chapter 8 under "Property Characteristics—Right of Property—Right to the Flow of Water—Quality of the water," in chapter 10 under "The Riparian Right—Property Characteristics—Right to the Flow of Water—Quality of the water," and in chapter 13 under "Quality and Quantity of the Water—Quality of the Water."

Waste and Seepage Waters

The owner of the land on which waste and seepage waters originate and from which they flow to other lands is not ordinarily obliged to continue the conditions that lead to the supply of the waste or seepage water. On the contrary, he may retain part or all of the entire supply and put it to beneficial use on his own land. The rules of law pertaining to this class of surface waters have been made chiefly in the courts, although several controlling statutes have been enacted.

It has been noted in various decisions of Western courts that with the establishment and expansion of irrigated areas, seepage into stream channels over a period of years may develop substantial streams of water. In some

instances, such accumulations may create watercourses where none previously existed, by raising the flows in the channels to the status of definite streams.[18]

The fact that waste and seepage waters contribute to and therefore are sources of supply of watercourses is not to be confused with questions of rights to the use of waste and seepage waters before they actually enter the stream channel, and with rights of use, recapture, and reuse after they have mingled with the waters already flowing there. Following are several State situations.

Several State Situations

Arizona.—The waters subject to appropriation by the terms of the State Water Code include "flood, waste or surplus water."[19] Drainage waters, put into the ground by means of artificial irrigation, are not of the class specified by the statute as subject to appropriation. "The person or corporation recovering such waters has the legal right and power to dispose of them by sale or otherwise, if he so chooses."[20]

A lower owner has no vested right in waste water flowing from another's land. The upper owner "could deprive him of his employment thereof without incurring any legal liability, either by preventing any waste, or by recapturing the waste or surplus water from his land and appropriating it to some beneficial use or purpose."[21] If waste water runs upon one's land, "he may capture and use it; but that is the limit and extent of his right." He cannot establish a property right in the use of waste water.[22]

Waters collected in the canal of a drainage district in Arizona are not subject to general appropriation, according to a Federal decision.[23]

California.—In early mining cases, it was held that the fact that others had built ditches or flumes to intercept waste waters would not preclude the original users, in the legitimate exercise of their water rights, from ceasing to abandon the waste waters at the particular point at which the waste water users had intercepted the water.[24]

The permanent right to use waste water from one's land can be obtained as against the owner by purchase or grant, and in other ways as well.[25]

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[18] In this regard, see chapter 3 at notes 186 and 187.

[19] Ariz. Rev. Stat. Ann. § 45-101(A) (1956).

[20] *Brewster* v. *Salt River Valley Water Users' Assn.*, 27 Ariz. 23, 38-40, 229 Pac. 929 (1924).

[21] *Lambeye* v. *Garcia*, 18 Ariz. 178, 182, 157 Pac. 977 (1916).

[22] *Wedgworth* v. *Wedgworth*, 20 Ariz. 518, 523, 181 Pac. 952 (1919).

[23] *Wattson* v. *United States*, 260 Fed. 506, 508-509 (9th Cir. 1919).

[24] *Dougherty* v. *Creary*, 30 Cal. 290, 298-299 (1866); *Correa* v. *Frietas*, 42 Cal. 339, 344-345 (1871).

[25] *Davis* v. *Martin*, 157 Cal. 657, 661, 108 Pac. 866 (1910). After long-continued use of water leaking from defective diversion works—thus taking on the semblance of a permanent situation—the downstream appropriator was held to have a right to such water as against the owner of the works. *Dannenbrink* v. *Burger*, 23 Cal. App. 587,

The original holder of a water right who has never released title to the *corpus* of the waters diverted in the exercise of his right may refuse to allow such waters to pass beyond his land for the use of the waste water claimant.[26]

In 1853, in the first controversy decided by the California Supreme Court over rights to the use of water, it was held that a party cannot reclaim waters that he has lost.[27] This is a different matter from the right to recapture excess waters before they have been abandoned or lost from the control of the original user. The relinquishment from control of specific particles of water is not an abandonment of a water right; it is an abandonment of those specific portions of the water. But when they are discharged without intent to recapture them, property in such particles of abandoned water ceases.[28]

"We think it is now too late in this state to say that waste waters cannot be discharged into natural water courses."[29] An important limitation upon this right is that there be discharged only such reasonable quantities of excess water as can be borne away in the channels without injury to the lands which they cross.[30]

Colorado.—A statute originally enacted in 1889 reads as follows:[31]

> All ditches 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.[32]

The courts of Colorado have held uniformly that the proviso at the end of

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593-595, 138 Pac. 751 (1913). The right of the upper owner to cut off the supply may perhaps be defeated if it is done wantonly in order to harm the user, without any legitimate purpose of use of the water. See *Stevens* v. *Oakdale Irr. Dist.*, 13 Cal. (2d) 343, 352, 90 Pac. (2d) 58 (1939), and compare *Correa* v. *Frietas*, 42 Cal. 339, 344-345 (1871). It may also be defeated if the circumstances are such as to create an estoppel. See *Davis* v. *Martin*, *supra*.

[26] *Davis* v. *Martin*, 157 Cal. 657, 661-662, 108 Pac. 866 (1910).

[27] *Eddy* v. *Simpson*, 3 Cal. 249, 252 (1853). See *Kelly* v. *Natoma Water Co.*, 6 Cal. 105, 106-108 (1856).

[28] *Stevens* v. *Oakdale Irr. Dist.*, 13 Cal. (2d) 343, 350, 90 Pac. (2d) 58 (1939).

[29] *Cheesman* v. *Odermott*, 113 Cal. App. (2d) 26, 29, 247 Pac. (2d) 594 (1952).

[30] *Provident Irr. Dist.* v. *Cecil*, 126 Cal. App. (2d) 13, 14, 16, 271 Pac. (2d) 157, 158-159 (1954); *Phillips* v. *Burke*, 133 Cal. App. (2d) 700, 703, 284 Pac. (2d) 809, 812 (1955). Anything in excess of reasonable and noninjurious discharge of irrigation water through natural drains upon lower lands is wrongful; it may ripen into an easement if continued under all conditions necessary to a prescriptive right. *Fell* v. *M. & T., Inc.*, 73 Cal. App. (2d) 692, 695, 166 Pac. (2d) 642 (1946). To accomplish this, a showing of damage to the lower owner must be made.

[31] Colo. Laws 1889, § 1, p. 215, Rev. Stat. Ann. § 148-2-2 (1963).

[32] With respect to the application of this statute to spring waters, see "Spring Waters—State Situations—Colorado," *infra*.

the foregoing statute applies when "waste, seepage or spring waters" are not tributary to a natural stream. "It is only when such seepage water would ultimately reach and become part of a natural stream that an appropriator thereof can acquire a right to the use of such superior to that of the owner of the land."[33] On a second appeal in the foregoing case, the following holding was adhered to: A person upon whose lands seepage waters first arise, which are not tributary to a natural stream, has the prior right to apply such waters to a beneficial use on his lands, but may lose his prior right by acquiescence in an adverse use thereof by another continued uninterruptedly for the prescriptive period.[34]

"Whatever may be the right of the owner of the lands upon which seepage * * * waters first arise, as against a prior appropriator where such waters are not tributary to a stream, the law is well settled that waters which are tributary to a stream, belong to the stream and are subject to appropriation for beneficial use the same as other waters of the stream."[35]

Nevertheless, in a case where defendants' waste waters flowed onto plaintiff's lands, the court said this did not obligate defendants "to continue or maintain conditions so as to supply plaintiff's appropriation of waste water at any time or in any quantity, when acting in good faith."[36]

Idaho.—The Idaho code provides:[37]

> 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.

The Idaho Supreme Court concluded in 1927 that surface waste and seepage water may be appropriated under these provisions of the statute,[38]

> * * * subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use. His control is not dependent upon continuous actual possession, and in the absence of abandonment or forfeiture of his right to its use, he may assert his right, which is not affected by his once having applied it to a beneficial use.

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[33] *Lomas* v. *Webster,* 109 Colo. 107, 110, 122 Pac. (2d) 248 (1942).

[34] *Webster* v. *Lomas,* 112 Colo. 74, 75, 145 Pac. (2d) 978 (1944).

[35] *De Haas* v. *Benesch,* 116 Colo. 344, 351, 181 Pac. (2d) 453 (1947), citing *Nevius* v. *Smith,* 86 Colo. 178, 279 Pac. 44 (1928), and *Faden* v. *Hubbell,* 93 Colo. 358, 28 Pac. (2d) 247 (1933).

[36] *Green Valley Ditch Co.* v. *Schneider,* 50 Colo. 606, 115 Pac. 705, 707 (1911); accord, *Tongue Creek Orchard Co.* v. *Town of Orchard City,* 131 Colo. 177, 280 Pac. (2d) 426, 428 (1955).

[37] Idaho Code Ann. § 42-107 (1948).

[38] *Sebern* v. *Moore,* 44 Idaho 410, 418-419, 258 Pac. 176 (1927).

Furthermore, according to the supreme court, the prior appropriator of waste water under the statute would have the right to reclaim the same from a drainage canal subsequently installed which cuts off his waste water supply ditch, provided he does not substantially injure the drainage works or materially interfere with the control or management of the drainage system. On the other hand, where there has been no appropriation of waste or seepage water prior to construction of the drain in which such water collected, such water would continue in possession of the owner of the drain and therefore would not be subject to appropriation under the statute.

In a 1945 case, the Idaho Supreme Court repeated that the right given by statute to appropriate seepage water is subject to the right of the owner to cease wasting his water or to change the place or manner of using it. It must be conceded, said the court, that the original owners could not be required to continue to irrigate their ranch land nor to continue to waste 75 percent of the decreed water for the benefit of the waste water claimant.[39]

An irrigation company is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who have been making use of the waste. While such company cannot maliciously divert the waste water away from the users, it has the superior right of use for its own purposes in good faith.[40]

Kansas.—A statute originally enacted in 1891 provides that the proprietor of any lands saturated by seepage waters from water works may drain the water "into any natural stream, arroyo, or watercourse, or may at his election convey such waters to other lands or places whatsoever, and apply the same to domestic, argicultural, manufacturing or other purposes in his pleasure."[41]

Montana.—The proprietor of land has the right to use the land as he pleases, and has the right to change the flow of the waste waters thereon in the reasonable employment of his own property, subject to the limitation that the use be made without malice or negligence.[42] The owner of the right to use the

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[39] *Colthorp* v. *Mountain Home Irr. Dist.*, 66 Idaho 173, 179, 182, 157 Pac. (2d) 1005 (1945). This and other Idaho cases are discussed in chapter 9 at note 221.

A Federal court has said that "the section neither expressly nor impliedly authorizes citizens to construct ditches to utilize seepage or waste water rightfully under the control of another * * *." *United States* v. *Haga*, 276 Fed. 41, 44 (D. Idaho 1921).

[40] *Twin Falls Co.* v. *Damman,* 277 Fed. 331, 332 (D. Idaho 1920). "It is settled law that seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing and able to put it to a beneficial use." *Reynolds Irr. Dist.* v. *Sproat,* 70 Idaho 217, 222, 214 Pac. (2d) 880 (1950). To the same general effect, see *Sebern* v. *Moore,* 44 Idaho 410, 417, 258 Pac. 176 (1927); *Crawford* v. *Inglin,* 44 Idaho 663, 669, 258 Pac. 541 (1927).

[41] Kans. Stat. Ann. § 42-353 (1964), originally enacted, Laws 1891, ch. 133. Section 42-354 provides that a right-of-way be condemned for such purpose over intervening lands of others.

[42] *Newton* v. *Weiler,* 87 Mont. 164, 179-180, 286 Pac. 133 (1930).

water—his private property while in his possession—may collect and recapture it before it leaves his possession.[43] And so the landowner cannot be compelled, by the party using waste water from the landowner's land, to continue conditions resulting in waste of the water, or be prevented from draining his land in such manner as to cut off the flow of waste water.[44]

"This court, by a series of decisions, has adhered to the view that the ownership of land where water has its source does not necessarily give exclusive right to such waters so as to prevent others from acquiring rights therein."[45] Seepage water that has its rise along the bed of a stream and that forms a natural accretion thereto belongs to that stream as part of its source of supply. An appropriator on the stream has the right to all such tributary flow even as against the owner of the land.[46] As said by a Federal court, "It is established in Montana that the prior appropriator of water is entitled to the use of all the water in the stream to satisfy his appropriation, whether such water came from seepage or from the water naturally flowing in the stream."[47] But the owner of land on which waste water arises has no right to its use after it leaves his land and gets beyond his physical control.[48]

Nevada.—Waste water was defined by the Nevada Supreme Court as consisting of surplus water running off from irrigiaged land, not consumed by the process of irrigation, or which the irrigated land would not take up.[49]

So long as waste water exists upon the lands of those who have been using the original flow, it is the property of such persons. They may consent to the acquisition of rights therein by other persons upon their own property and in ditches constructed on their own property for the purpose of conveying such rights to the lands of such other parties. But without the original landowner's consent, such water is not subject to appropriation by anyone else.[50]

The rights of the owner of land from which waste water flows—that is, the

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[43] *Rock Creek Ditch & Flume Co.* v. *Miller,* 93 Mont. 248, 268, 17 Pac. (2d) 1074 (1933).

[44] *Popham* v. *Holloron,* 84 Mont. 442, 449-450, 275 Pac. 1099 (1929).

[45] *Woodward* v. *Perkins,* 116 Mont. 46, 53, 147 Pac. (2d) 1016 (1944).

[46] *Id.*

[47] *Marks* v. *Hilger,* 262 Fed. 302, 304 (9th Cir. 1920).

[48] *Rock Creek Ditch & Flume Co.* v. *Miller,* 93 Mont. 248, 268, 17 Pac. (2d) 1074 (1933). Appropriators for mining purposes who allowed water to drain away from their land after its use in placer mining had no longer any jurisdiction over the water or ownership of it, and an attempt on their part to sell any further right of use in the water was wholly void because they had nothing to sell. *Galiger* v. *McNulty,* 80 Mont. 339, 357-358, 260 Pac. 401 (1927). After water has been turned back by the appropriator into the channel from which it was diverted, without any intent to recapture, after having been used and having answered the purposes of the first appropriator, it thereby became *publici juris. Woolman* v. *Garringer,* 1 Mont. 535, 545 (1872).

[49] *Ryan* v. *Gallio,* 52 Nev. 330, 344, 286 Pac. 963 (1930). Water seeping from irrigated land onto the adjoining land of another person was subsequently held to be waste water as so defined. *In re Bassett Creek & Its Tributaries,* 62 Nev. 461, 465-466, 155 Pac. (2d) 324 (1945).

[50] *Bidleman* v. *Short,* 38 Nev. 467, 471, 150 Pac. 834 (1915).

user of the original flow—are not subject to any rights of use of the waste water acquired by persons after the waste water has left the land of origin. That is to say, the owner of the land of origin is not required "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."[51] The user of the waste water does not become vested with any control of the irrigation ditches or of the water flowing therein on the land of origin. The original landowner cannot be compelled to continue wasting water for the benefit of any claimant of the waste water flowing from his land.[52]

New Mexico.—Rights to use seepage water appearing from an unknown source were involved in a decision rendered by the Territorial Supreme Court in 1910.[53] The water increased in extent until it crossed a road and entered adjoining land of a party who used the water for irrigation of such land. A third party applied to the territorial engineer for a permit to appropriate the water. The supreme court held that the then existing statute concerning appropriation of seepage water applied only to seepage from constructed works, which was not the case here. Therefore, the territorial engineer had no authority to issue a permit to appropriate the water. This water, while on the land on which it rose and on the land on which it was being used was not subject to appropriation by any other party without the consent of the owners of such lands. The court concluded that the rights of the existing user were subject to the prior right of the party on whose land the water rose to apply the water to a beneficial use thereon, the surplus being appropriable for use by the adjoining user. Any surplus that might exist beyond the requirements of these two parties would not be subject to appropriation under the statute, but if appropriable at all without their consent, would be governed by the general Western law of prior appropriation.

Drainage water flowing in an artificial drainage system has been held not subject to appropriation as against the owner of the works. The creator of such flow is the owner of the water so long as it is confined to his own property. When such waters are deposited in a natural stream and the creator of the flow has lost dominion over the same, they then become a part of the stream and are subject to appropriation and use therefrom; but the appropriator can acquire no right as against the creator of the flow to require him to continue supplying such waters to the stream. Artificial waters are not appropriable under the statutes or constitution of New Mexico, nor in the absence of statute.[54]

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[51] *Ryan* v. *Gallio,* 52 Nev. 330, 344-345, 286 Pac. 963 (1930).

[52] *In re Bassett Creek & Its Tributaries,* 62 Nev. 461, 466, 155 Pac. (2d) 324 (1945).

[53] *Vanderwork* v. *Hewes & Dean,* 15 N. Mex. 439, 445-449, 110 Pac. 567 (1910).

[54] *Hagerman Irr. Co.* v. *East Grand Plains Drainage Dist.,* 25 N. Mex. 649, 653-658, 187 Pac. 555 (1920).

A statute enacted in 1941 provides:[55]

> Artificial surface waters, as distinguished from natural surface waters, are hereby defined for the purpose of this act as waters whose appearance or accumulation is due to escape, seepage, loss, waste, drainage, or percolation from constructed works, either directly or indirectly, and which depend for their continuance upon the acts of man. Such artificial waters are primarily private and subject to beneficial use by the owner or developer thereof; Provided, that when such waters pass unused beyond the domain of the owner or developer and are deposited in a natural stream or watercourse and have not been applied to beneficial use by such owner or developer for a period of four [4] years from the first appearance thereof, they shall be subject to appropriation and use; Provided, that no appropriator can acquire a right, excepting by contract, grant, dedication, or condemnation, as against the owner or developer compelling him to continue such water supply.

Oregon.—A statute originally enacted in 1893 provides that:[56]

> All ditches now or hereafter constructed, for the purpose of utilizing waste, spring, or seepage waters, shall be governed by the same laws 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.

Two other extant statutory provisions are in point: (1) No application for a permit to appropriate waste or seepage water to be conveyed through a conduit not owned wholly by the applicant shall be approved without the filing of an agreement between the applicant and the conduit owner. (2) The holder of a right to the use of waste or seepage water may, under certain circumstances, be required to pay the total cost of installing measuring devices in the ditch and the expenses of measuring and distributing the water.[57]

Waters released from control works when not necessary for use of the appropriator, after having been diverted or impounded in good faith, are waste waters,[58] as are waters released from lands after having been used to irrigate them.[59] The excess water used in irrigation, however, is not waste so long as it

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[55] N. Mex. Laws 1941, ch. 126, § 21, Stat. Ann. § 75-5-25 (1968). This enactment replaces a section of the original 1907 water appropriation statute giving the owner of constructed works the first right to the use of seepage waters therefrom upon filing an application with the State Engineer within 1 year after completion of the works or appearance of the seepage, any party thereafter being allowed to appropriate the seepage water upon application to the State Engineer and upon paying the owner of the works reasonable compensation for storing or carrying the water.

[56] Oreg. Laws. 1893, § 1, p. 150, Rev. Stat. § 537.800 (Supp. 1969).

[57] Oreg. Rev. Stat. §§ 537.160(2) and 540.230 (Supp. 1969).

[58] *Vaughn* v. *Kolb*, 130 Oreg. 506, 511, 513, 280 Pac. 518 (1929).

[59] *Oliver* v. *Skinner & Lodge*, 190 Oreg. 423, 441, 226 Pac. (2d) 507 (1951).

remains on the land of the original appropriator, who is considered by the court to be justified in recapturing waste water remaining on his land and in applying it to a beneficial use.[60]

The Oregon Supreme Court recognized a distinction between seepage and waste water. In one decision it was stated, with reference to the appropriator's claim to water that he termed "waste and seepage water," that if those above his premises followed the economical methods required by law there would be no waste water, though there might be some seepage.[61] In a later case, waste waters in controversy were waters that had been used for irrigation and that had collected in a gulch which an irrigation district appropriated as a part of its ditch system, for the purpose of conveying the captured waste waters to places of use. Seepage water, on the other hand, was water that rose on the land of one of the parties. Thus waste water came to the land of this party in the gulch, and seepage water rose independently on his own land.[62] It was further held in this later case[63] that in view of the proviso in the above-quoted statute favoring the person on whose land seepage or spring waters first arise, the landowner needs no permit to use seepage water that rises on his own lands. And no one has the right to go upon the premises of such landowner for the purpose of appropriating such water without permission of the latter.

To be entitled to the statutory preference accorded him, the landowner must use the water before it leaves his land. The court said:[64]

> 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. No doubt, all streams are fed more or less by seepage water which gets into the channel from no visible source. * * * [I]t would destroy the whole irrigation system of the arid states, if such water could be pursued into the stream by the land owner on whose premises the seepage began.

"The water of the stream, when released by the defendant and his predecessors after having been spread over their land and used to irrigate a crop, was waste water and subject to appropriation by the plaintiff * * *."[65] But an appropriator who uses water from which waste develops cannot be compelled by the user of the waste water to maintain an excessive use of water so that the waste water user may get the benefit of the surplus.[66] On the contrary, if an upper appropriator violates the rule against using more water

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[60] *Barker* v. *Sonner,* 135 Oreg. 75, 79-80, 294 Pac. 1053 (1931).
[61] *Hough* v. *Porter,* 51 Oreg. 318, 432, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).
[62] *Barker* v. *Sonner,* 135 Oreg. 75, 79-85, 294 Pac. 1053 (1931).
[63] 135 Oreg. at 83-85.
[64] *Broshan* v. *Boggs,* 101 Oreg. 472, 476, 198 Pac. 890 (1921).
[65] *Oliver* v. *Skinner & Lodge,* 190 Oreg. 423, 441, 226 Pac. (2d) 507 (1951).
[66] *Tyler* v. *Obiague,* 95 Oreg. 57, 61-62, 186 Pac. 579 (1920).

than can be beneficially applied, by making excessive use of the water, he has no title to the surplus and the claimant of the excess water likewise can acquire no ownership therein.[67]

The character of an appropriative right to the use of waste water was thus described by the Oregon Supreme Court:[68]

> 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 though the use thereof may be interrupted, that is, the right exists to be exercised when there is water available.

It was also held in this case[69] that a city that had allowed excess water to escape from its reservoir from time to time with no intent of recapturing or enjoying it, and allowed the water to find its way to the natural level of the country, had no interest therein and could not confer any right to the use of such water upon any party. "The waste water was then subject to appropriation under the statute the same as any other water." And the supreme court carefully distinguished between the abandonment of specific parcels or water (such as composed the waste water released by the city) and abandonment of a water right. The city had absolute control of the water that it had diverted and impounded in the exercise of its water right, and by the release of the excess water had abandoned no water right.[70]

Utah.—As between two adjoining tracts of land, the owner of the upper property from which waste and seepage waters pass to the lower tract, to the benefit of the latter, is under no obligation to continue wasting water to supply this use in the future. In an early decision where irrigation waste waters had been used for many years by a lower landowner, the Utah Supreme Court announced:[71]

> The law is well settled, in fact the authorities all agree, that one landowner receiving waste water which flows, seeps, or percolates

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[67] *Hill* v. *American Land & Livestock Co.*, 82 Oreg. 202, 209-210, 161 Pac. 403 (1916).

[68] *Vaughn* v. *Kolb*, 130 Oreg. 506, 517-518, 280 Pac. 518 (1929).

[69] 130 Oreg. at 516-517.

[70] 130 Oreg. at 512-513.

[71] *Garns* v. *Rollins*, 41 Utah 260, 272, 125 Pac. 867 (1912). In a case involving the rights of stockholders in an irrigation company to use waste and seepage waters produced by the irrigation of their lands, the court concluded that these waters could be captured by the individual shareholders at the lower ends of their fields and reused, *Smithfield West Bench Irr. Co.* v. *Union Cent. Life Ins. Co.*, 105 Utah 468, 472, 142 Pac. (2d) 866 (1943), 113 Utah 356, 363, 195 Pac. (2d) 249 (1948).

> 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.

The Utah Supreme Court subsequently declared:[72]

> The original appropriator as long as he has possession and control thereof may sell or transfer the right to the use of such waters to someone other than the reappropriator as long as he does so in good faith and they are beneficially used, or he may recapture and use them for further beneficial use if he does so before they get beyond his property and control.

However, any part of the water used on the original appropriator's land that seeps therefrom back into the main channel loses its identity and becomes a part of the natural flow therein.[73] The same loss of identity occurs when water used for irrigation becomes commingled with the waters of the ground water table.[74]

In 1919, the Utah Supreme Court took the view that waste and seepage waters from irrigation were not subject to appropriation, this being an artificial source of supply rather than a natural one.[75] Subsequently, however, the court announced that while a person could acquire no right to have the flow of seepage water kept up, once it found its way back to the natural stream from which diverted, it could be appropriated therefrom.[76] The question of appropriability of waste and seepage waters appears to have been settled by the 1935 amendment to the Utah water law, which declared that all waters in the State "whether above or under the ground" are the property of the public, subject to existing rights of use.[77] Said the supreme court:[78]

> Section 100-1-1, U. C. A. 1943, dedicates all the water of this state to the public use subject only to existing rights to the use thereof. It makes no distinction between previously appropriated waste waters which are beyond the control of the original appropriator and the flow of natural streams, and under section 100-3-1 U.C.A. 1943 and the following sections of that chapter all unappropriated public waters are subject to appropriation by compliance with the statutory regulations.

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[72] *McNaughton* v. *Eaton,* 121 Utah 394, 404, 242 Pac. (2d) 570 (1952). See also *Lasson* v. *Seely,* 120 Utah 679, 238 Pac. (2d) 418 (1951).

[73] *Salt Lake City* v. *Telluride Power Co.,* 82 Utah 607, 616, 17 Pac. (2d) 281 (1932); *Smithfield West Bench Irr. Co.* v. *Union Cent. Life Ins. Co.,* 105 Utah 468, 473, 142 Pac. (2d) 866 (1943).

[74] *Stubbs* v. *Ercanbrack,* 13 Utah (2d) 45, 368 Pac. (2d) 461 (1962).

[75] *Stookey* v. *Green,* 53 Utah 311, 319, 178 Pac. 586 (1919). See also *Roberts* v. *Gribble,* 43 Utah 411, 416, 134 Pac. 1014 (1913).

[76] *Clark* v. *North Cottonwood Irr. & Water Co.,* 79 Utah 425, 433, 11 Pac. (2d) 300 (1932).

[77] Utah Code Ann. § 73-1-1 (1968).

[78] *McNaughton* v. *Eaton,* 121 Utah 394, 403, 242 Pac. (2d) 570 (1952).

Even though the party using waste and seepage waters resulting from irrigation of the original appropriator's land acquires no permanent right to have water wasted for his benefit, he is entitled to use them as long as these waters are available.[79]

Once waste and seepage waters pass from the control of the original appropriator, return to the natural channel and become a part of the supply for downstream users, the landowner cannot, by an application for change, change his point of diversion, place or manner of use if it interferes with the rights of a downstream user.[80] An appropriator is entitled to rely on stream conditions remaining substantially as they were when he made his appropriation.

Return Waters

The definition of return flow included in an earlier publication by the author[81] is much the same as that given at the outset of this topic, "Waste, Seepage, and Return Waters." Some important facets of the physical subject follow:

Return flow includes both avoidable and unavoidable losses from the project on which water is used. Part of the return water is water which escaped from control by leaking through and around structures, seeping through canal banks, and penetrating below the root zones of plants; and part is water purposely released from the ends of canals and over wasteways.

Return water normally returns to the stream from which diverted. However, if transported to another watershed, in which case it would naturally drain toward a different channel, such water would nevertheless be properly classed as return water. It is foreign to the stream toward which it now drains, but is nevertheless return water from irrigation. Return flow on its way back to the stream may be intercepted by a subterranean dike; or it may be collected in drainage ditches or pumped from underground and reused for irrigation before reaching the stream, without losing its character as return flow.

Visible return flow is that portion of the return water which appears at the surface of the ground before reaching the stream. It collects and is returned to the stream in aritificial or natural drains, or appears in small rivulets or waterfalls, and therefore is often directly measurable.

Invisible return flow is that portion which seeps into the river channel through the banks, below the surface of the stream, or which rises through the

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[79] *Smithfield West Bench Irr. Co.* v. *Union Central Life Ins. Co.*, 105 Utah 468, 142 Pac. (2d) 866 (1943).

[80] *East Bench Irr. Co.* v. *Deseret Irr. Co.*, 2 Utah (2d) 170, 180, 271 Pac. (2d) 449 (1954).

[81] Hutchins, W. A., "Policies Governing the Ownership of Return Waters from Irrigation," U.S. Dept. Agric. Tech. Bull. 439 (1934). This reported a study of the practical features of return flow made in 13 of the conterminous mainland Western States—the 11 States farthest West and Nebraska and Texas.

bottom. Obviously, it is seldom directly measurable. For a given stream section, the nearest quantitative approximation that can be made of invisible return flow is a calculation of invisible net gain (or net loss) within the section, made by deducting the sum of all measured inflows from the sum of all measured outflows.

However, all accretions to a stream within an irrigated region, even where no surface importations are evident, may not be return water from irrigation. The problem of measuring the quantity of return is often complicated by additions to the ground water supply caused by seepage into the basin from surrounding elevations and by rainfall within the basin. Likewise, excessive return flow shown by measurements taken during the falling stages of streams has been attributed partly to the release of water stored in adjacent sands during the rising stages.[82]

Return Flow Within the Watershed

Western streams commonly lose water by seepage and evaporation after leaving the mountains in which they arise. Return flow from irrigation partly offsets this loss in certain localities and may completely overcome it with resulting net gains in others.

The phenomenon of return flow from irrigation had early recognition in the West, chiefly in Colorado and later in other States and territories.

The downstream flow of many Western streams has been augmented by seepage from 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, problems of which are noted below), 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 court decisions have been rendered to this effect.[83]

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[82] Fortier, S., assisted by Stover, A. P., and Baker, J. S., "Irrigation in Montana," U.S. Dept. Agric., Off. Expt. Sta. Bull. 172, pp. 96-98 (1906); Parshall, R. L., "Return of Seepage Water to the Lower South Platte River in Colorado," Colo. Agric. Expt. Sta. Bull. 279, p. 48 (1922).

[83] See, e.g., *Woolman* v. *Garringer,* 1 Mont. 535, 545 (1872); *Hagerman Irr. Co.* v. *East Grand Plains Drainage Dist.,* 25 N. Mex. 649, 653-658, 187 Pac. 555 (1920); *Marks* v. *Hilger,* 262 Fed. 302, 304 (9th Cir. 1920); *Brosnan* v. *Boggs,* 101 Oreg. 472, 476, 198 Pac. 890 (1921); *Popham* v. *Holloron,* 84 Mont. 442, 451, 275 Pac. 1099 (1929); *Las Animas Consol. Canal Co.* v. *Hinderlider,* 100 Colo. 508, 511, 68 Pac. (2d) 564 (1937); *Jones* v. *Warmsprings Irr. Dist.,* 162 Oreg. 186, 198-199, 91 Pac. (2d) 542 (1939).

This general subject has been comprehensively litigated in Colorado, and to a lesser extent in some other States.

Colorado.—The principle has been established in Colorado that return waters from a diversion under an appropriative right are a part of the streamflow 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. Consequently, they belong to that stream system and are subject to the rights of appropriators thereon in the order of their priorities. Diligence in attempting to recapture the waters after leaving the boundaries is not material. In other words, such waters belong to the stream even before they commingle with the waters naturally flowing there.[84]

On the South Platte in Colorado, upstream development occurred first and the resultant increasing return flow made progressive downstream development possible and eventually added materially to the value of the junior downstream rights.

Oregon.—In the early 1930's the Oregon Supreme Court decided two important cases relating to return flow within the watershed. In one case the court stated that after water used to operate a mill had served its purpose and was allowed to flow back into the river, although often termed "waste water," it nevertheless became a part of the stream so that the milling company had no further control over it. "Such water has no earmarks to enable its former possessor to follow it and exercise ownership over it."[85]

Another case concerned the right of an appropriator who depended upon water released upstream (under an earlier right) after being used for power purposes. The power appropriator had no authority or right to change the place of use of the water for power purposes, a nonconsuming use, to another place upstream to be used for irrigation purposes, a consuming use, to the injury of this later appropriator.[86]

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[84] 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); contra, *McKelvey* v. *North Sterling Irr. Dist.*, 66 Colo. 11, 179 Pac. 872 (1919), 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).

But 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), discussed at note 126 *infra.*

[85] *Hutchinson* v. *Stricklin*, 146 Oreg. 285, 294, 28 Pac. (2d) 225 (1933).

[86] *Broughton* v. *Stricklin*, 146 Oreg. 259, 267, 271, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934).

Utah.—The return flow from irrigation is an important factor in making up the water supply for downstream users on many of Utah's river systems.[87] In a relatively early decision, the Utah Supreme Court announced that an upstream junior appropriator was not entitled to intercept seepage and runoff water from irrigation which, if not intercepted, would return to the stream from which it was diverted and supply the rights of the prior appropriator further downstream.[88] And in a later case the court said, "The lower users have acquired a vested right to use all the unconsumed waters which would come down to them under the use made of the water by the upper users and the conditions existing at the time they made their appropriations."[89]

However, where the original appropriator retains possession and control of the waste and seepage water from irrigation of his lands, he is entitled to reuse these waters for his own benefit and need not return them to the channel from which they were diverted. (See "Waste and Seepage Waters—Several State Situations—Utah," above.) In defining what is meant by retaining possession and control of these waters, the Utah court has apparently limited this to an element of physical control where the water is retained on the owner's property,[90] or if returned in a gully adjacent to the land, then to the waters which return above the user's lowest dam.[91]

By contrast with the upstream development on the South Platte in Colorado, noted above, on the Provo River in Utah, downstream development occurred first, and return flow from junior upstream diversions not only satisfied the requirements of earlier downstream appropriators but actually benefitted them by prolonging the seasonal supply.

Idaho.—If a downstream user loses return flow on which he has been depending when an upstream use is changed to a new locality, the change may be enjoined if the original use was not excessive.[92] But the Idaho Supreme Court has denied a downstream user's claim of a right to the continuance of the upstream return flow where the return flow was so excessive as to impute wastefulness rather than beneficial use of the upstream appropriative right. Thus, in one case it was held that the upstream owner could not be required to continue to irrigate the original land nor to waste 75 percent of the decreed water for the benefit of the lower appropriator.[93] And in another case, the

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[87] *East Bench Irr. Co.* v. *Deseret Irr. Co.*, 2 Utah (2d) 170, 175, 271 Pac. (2d) 449 (1954).

[88] *Rasmussen* v. *Moroni Irr. Co.*, 56 Utah 140, 156, 189 Pac. 572 (1920).

[89] *East Bench Irr. Co.* v. *Deseret Irr. Co.*, 2 Utah (2d) 170, 177, 271 Pac. (2d) 449 (1954). See also, *Provo Bench Canal & Irr. Co.* v. *Lake*, 5 Utah (2d) 53, 57, 296 Pac. (2d) 723 (1956).

[90] *Smithfield West Bench Irr. Co.* v. *Union Cent. Life Ins. Co.*, 113 Utah 356, 195 Pac. (2d) 249 (1948).

[91] *McNaughton* v. *Eaton*, 121 Utah 394, 404, 242 Pac. (2d) 570 (1952). See also *Lehi Irr. Co.* v. *Jones*, 115 Utah 136, 145, 202 Pac. (2d) 892 (1949).

[92] *Hall* v. *Blackman*, 22 Idaho 556, 558, 126 Pac. 1047 (1912).

[93] *Colthorp* v. *Mountain Home Irr. Dist.*, 66 Idaho 173, 179-182, 157 Pac. (2d) 1005 (1945), discussed at note 39 *supra*.

court said, "It is axiomatic that no appropriator can compel any other appropriator to continue the waste of water whereby the former may benefit."[94]

Some other situations.—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 the question of abandonment is immaterial. Elsewhere it is material and the question of intention becomes important.[95] The Oregon Supreme Court said that in order to retain title to excess water discharged into a stream, the intent must exist at the time the increment to the stream is produced, not to abandon it but on the contrary to reclaim it, and that the intent must be carried out within a reasonable time.[96]

The Wyoming Supreme Court 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, because otherwise the city might be hampered in its problem of sewage disposal.[97] 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.[98]

In a Federal case arising in Idaho, the district court 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.[99]

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 the United States in lieu of storage water or direct flow.[100]

In one of its earliest decisions, the Montana Supreme Court declared that water released by an appropriator without any intention of recapture, after having been used and having answered his purposes, thereby becomes *publici*

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[94] *Application of Boyer,* 73 Idaho 152, 162-163, 248 Pac. (2d) 540 (1952). These and other cases are discussed in chapter 9 at note 221.

[95] *Jones* v. *Warmsprings Irr. Dist.,* 162 Oreg. 186, 91 Pac. (2d) 542 (1939).

[96] 162 Oreg. at 197.

[97] *Wyoming Hereford Ranch* v. *Hammond Packing Co.,* 33 Wyo. 14, 236 Pac. 764 (1925).

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

[99] *United States* v. *Haga,* 276 Fed. 41 (D. Idaho 1921).

[100] *Ramshorn Ditch Co.* v. *United States,* 269 Fed. 80 (8th Cir. 1920), affirming 254 Fed. 842 (D. Nebr. 1918).

juris and subject to appropriation.[101] In 1896, this court stated:[102]

> It will not be disputed, we think, that a prior appropriator of water cannot so change the use of the water as to deprive the subsequent appropriator of his rights. If the prior appropriator cannot encroach upon the rights of the subsequent appropriator by changing the use, we think, for the same reasons, he cannot do so by changing the place of the use. This view, we think, is in accordance with the authorities, as well as reason and justice.

The New Mexico State Engineer is authorized by statute to approve applications to appropriate flood waters upstream under conditions that 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.[103] Another New Mexico statute provides that waste and seepage waters from constructed works are primarily private and subject to the owner or developer thereof. However, if such waters are returned to a natural watercourse and are not applied to beneficial use within 4 years of their first appearance, the return waters are subject to appropriation.[104]

The California Water Code contains a declaration as to what constitutes unappropriated water, including "Water which having been appropriated or used flows back into a stream, lake or other body of water."[105]

Riparian lands in California benefit from the return to the stream of that portion of the water diverted upstream that is not consumed.[106] The riparian rights of such lands entitle the owners to the natural flow in the stream, including such portions of the natural flow diverted upstream as are allowed to flow back into the stream after use.[107] The fact that such water has once been used on upstream land does not deprive it of the character of natural flow when it has returned to the stream from which diverted.[108]

The claim of the California riparian owner upon the natural flow of the stream is such that he may enjoin an upstream diversion of water out of the watershed, to a point from which the excess waters after their use cannot return to the stream above his riparian lands, to the injury of his riparian right.[109]

The same inhibition against injuring the riparian owner by depriving him of

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[101] *Woolman* v. *Garringer,* 1 Mont. 535, 545 (1872).

[102] *Gassert* v. *Noyes,* 18 Mont. 216, 223, 44 Pac. 959 (1896).

[103] N. Mex. Stat. Ann. § 75-5-28 (1964).

[104] *Id.* § 75-5-25. The entire section is set out at note 55 *supra.*

[105] Cal. Water Code § 1201(d) (West 1956).

[106] *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327, 330, 88 Pac. 978 (1907).

[107] *Southern Cal. Inv. Co.* v. *Wilshire,* 144 Cal. 68, 72-73, 77 Pac. 767 (1904).

[108] A California case regarding salt impregnation from irrigation return flow is discussed in chapter 10 at note 158.

[109] See *Southern Cal. Inv. Co.* v. *Wilshire,* 144 Cal. 68, 72-74, 77 Pac. 767 (1904); *Huffner* v. *Sawday,* 153 Cal. 86, 90, 91, 94, 94 Pac. 424 (1908); *Scott* v. *Fruit Growers' Supply Co.,* 202 Cal. 47, 51, 55, 258 Pac. 1095 (1927).

return waters that are still part of the natural flow of the stream, by diverting the original supply out of the watershed, applies to depriving a California appropriator of the use of return waters upon which he has been depending for the enjoyment of his appropriative right.[110]

The right of a California riparian owner to the natural flow of the stream to which his lands are contiguous extends to the tributaries that enter the stream above his land. Hence the riparian owner has rights in the return flow from waters diverted upstream, taken into another watershed for use there, and allowed thence to escape into a tributary which enters the main stream above his riparian lands.[111] In such a case, the waters are not deemed to have been taken out of the aggregate watershed tributary to the riparian lands.

Distinguished from right to convey water in watercourse.—This question of the right to recapture return waters from a watercourse is not to be confused with the right to use a watercourse to convey appropriated water. 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 is such waters has ceased and he no longer has any title to them.[112]

Return Flow From Foreign Waters

Foreign water is water brought by artificial means into an area from a different watershed.[113] These waters are termed "foreign" in that they are not naturally a part of the water supply of the area in which used.

In the first reported decision of the California Supreme Court in the field of water law, it was held that a party cannot reclaim water that he has lost.[114] And with respect to this decision, the supreme court several years later stated that "it regarded the water as having been abandoned."[115]

In 1939, the California Supreme Court sustained 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 that had drained into the creek from lands irrigated by the district with water brought from another watershed, as

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[110] See *Scott* v. *Fruit Gorwers' Supply Co.*, 202 Cal. 47, 51, 55, 258 Pac. 1095 (1927).

[111] *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 399-400, 54 Pac. (2d) 1100 (1936). See *Holmes* v. *Nay*, 186 Cal. 231, 240-241, 199 Pac. 325 (1921); *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 529-532, 81 Pac. (2d) 533 (1938).

[112] *Fort Morgan Res. & Irr. Co.* v. *McCune*, 71 Colo. 256, 206 Pac. 393 (1922).

[113] In *E. Clemens Horst Co.* v. *New Blue Point Min. Co.*, 177 Cal. 631, 634, 171 Pac. 417 (1918), it was said, "It was found by the court that Wolf Creek receives, and for more than half a century has received, in addition to its natural flow, water coming from sources without its watershed and known as 'foreign water.'"

[114] *Eddy* v. *Simpson*, 3 Cal. 249, 252 (1853).

[115] *Butte Canal & Ditch Co.* v. *Vaughn*, 11 Cal. 143, 151-152 (1858).

against downstream appropriators of water from this increased flow in the creek.[116] The court summed up its views as follows:[117]

> To summarize, one who produces a flow of foreign water for beneficial use and thereafter permits it to drain down a natural stream channel, is ordinarily under no duty to lower claimants to continue importing the supply or to continue maintaining the volume of discharge into the second stream channel at any fixed rate. The rule may have exceptions, as perhaps where the artificial condition has become inherently permanent and there has been a dedication to the public use, or where the drainage is stopped wantonly to harm a lower party, without other object. But as a general proposition, an irrigation district, after importing water from one river, passing it through irrigation works, and discharging it into a natural creek bed in the second watershed, may change the flow of water imported or the volume of water discharged from its works into the second stream, or stop the flow entirely, so long as this is done above the point where the water leaves the works of the district or the boundaries of its land. An exception to the rule is not created by the fact that the district may act upon the water a second time while in its possession, by retaking it at a point of drainage for further beneficial application.

Waters brought into an area from a different watershed and reduced to private possession, then, are private property during the period of possession. There may be a mere abandonment of *specific parcels of the water* that are discharged or have escaped from control, but this is not the abandonment of a water right. Past abandonment of certain water, as distinguished from a water right, does not confer upon lower claimants any right to compel a like abandonment in the future.

The question of the right to use return flow from foreign waters by appropriators or riparians is the subject of the ensuing discussion.

Appropriators.—The California decisions are to the effect that where those who have imported foreign waters and released them into a watercourse make no claim to their further use, such waters become subject to appropriation in order of priority by those who can have access to them. These appropriative rights attach only to such foreign waters as have been abandoned, and are always subject to the right of the importer or producer to cease his abandonment thereof in whole or in part.

In 1918 the California Supreme Court in the *Horst* case stated, in discussing riparian rights, "The court does not construe the opinion herein as deciding the question as to what rights may be acquired in so-called 'foreign waters,' as

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[116] *Stevens* v. *Oakdale Irr. Dist.*, 13 Cal. (2d) 343, 350-353, 90 Pac. (2d) 58 (1939). Several years later the rule so announced was approved and applied in *Los Angeles* v. *Glendale*, 23 Cal. (2d) 68, 76-78, 142 Pac. (2d) 289 (1943). See *Haun* v. *De Vaurs*, 97 Cal. App. (2d) 841, 844, 218 Pac. (2d) 996 (1950).

[117] 13 Cal. (2d) at 352.

between appropriators or by prescription."[118] Referring to this statement in a later case, *Crane* v. *Stevinson*, the court said:[119]

> The quoted statement implies recognition of the possibility of appropriation of foreign waters. * * * [T]here should remain no present doubt that the so-called foreign waters are now subject to appropriation under the laws of this State. 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.

In a later case, the supreme court held it to be well settled in California that so-called foreign waters are subject to appropriation.[120]

The right of the appropriator, however, extends only to such portions of the foreign flow as have been abandoned by the producer and thus made available for uses other than his own; and "these rights are always subject to the contingency that the supply may be intermittent or may be terminated entirely at the will of the producer."[121] The importer may sell or otherwise dispose of his imported waters at any time before abandoning the same.[122]

In a Montana case decided in 1933, 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.[123]

The Montana Supreme Court has rendered several other decisions pertaining to return flow from foreign waters. One dealt with an appropriator who diverted waters from one watershed to another for the purpose of placer mining and who thereupon released the waters so that they flowed into a

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[118] *E. Clemens Horst Co.* v. *New Blue Point Min. Co.*, 177 Cal. 631, 641, 171 Pac. 417 (1918).

[119] *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 394-395, 54 Pac. (2d) 1100 (1936).

[120] *Bloss* v. *Rahilly*, 16 Cal. (2d) 70, 74-76, 104 Pac. (2d) 1049 (1940).

[121] *Stevens* v. *Oakdale Irr. Dist.*, 13 Cal. (2d) 343, 348, 90 Pac. (2d) 58 (1939). This case is also discussed at notes 116-117 *supra*.

[122] *Haun* v. *DeVaurs*, 97 Cal. App. (2d) 841, 844, 218 Pac. (2d) 996 (1950).

[123] *Mannix & Wilson* v. *Thrasher*, 95 Mont. 267, 271-272, 26 Pac. (2d) 373 (1933).

natural channel. The supreme court stated that after these foreign waters had served the purpose of their appropriation and could not drain back into the stream from which diverted, they became waste, fugitive, and vagrant water and subject to being treated as such. The original appropriators no longer had any jurisdiction over the waters, and did not own the *corpus* of the water; hence they had nothing to sell, and their attempted sale of the water or the right to use the same was wholly void.[124] Nor does the owner of land on which return flow from foreign water feeds a spring that is one of the sources of a watercourse have any right to use such water as against prior appropriators of water from the watercourse thus augmented by the return flow.[125]

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.[126]

An Idaho decision likewise held that seepage from a canal, which has its source in a different watershed, is separately appropriable under the statute providing that ditches for the utilization of seepage shall be governed by the same laws relating to priority as ditches diverting from running streams.[127]

An early 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. 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 spring waters 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.[128]

A later decision by the Washington Supreme Court held such waters to be of a vagrant or fugitive nature coming from another watershed, "and do not become a part of the natural waters of the creek, even after they have entered it, and that since such waters do not belong to any person, the first taker has the prior right."[129]

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[124] *Galiger* v. *McNulty*, 80 Mont. 339, 357-358, 260 Pac. 401 (1927).

[125] *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 258-268, 17 Pac. (2d) 1074 (1933).

[126] *San Luis Valley Irr. Dist.* v. *Prairie Ditch Co. & Rio Grande Drainage Dist.*, 84 Colo. 99, 268 Pac. 533 (1928).

[127] *Breyer* v. *Baker*, 31 Idaho 387, 171 Pac. 1135 (1918), construing Idaho Rev. Code § 3246, now Code Ann. § 42-107 (1948).

[128] *Miller* v. *Wheeler*, 54 Wash. 429, 103 Pac. 641 (1909).

[129] *Elgin* v. *Weatherstone*, 123 Wash. 429, 432-433, 212 Pac. 562 (1923).

Riparians.—The courts of California and Washington have held that the return flow from foreign waters is not subject to the rights of owners of riparian lands on a stream into which these waters drain because they do not become a part of the natural waters of such stream.[130] If the riparian owner wishes to obtain a right to the use of such waters, he must appropriate them. Said the California Supreme Court, "[T]he right to take surplus foreign water does not depend upon a riparian interest but is appropriative in nature."[131]

The foregoing principle was established in the *Horst* case, wherein the California Supreme Court said:[132]

> A riparian owner has a right to the usufruct of the natural water of the stream, but an appropriator of the waters artificially added is a taker of the *corpus* of that which exists in the stream only by virtue of its abandonment. * * *
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> * * * *
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> So in the present case it may be said that as the surplus waters would not in the course of nature reach appellant's land, that corporation may not complain of being deprived thereof either by the producers of the excess, by their assignees, or by a stranger to their title who appropriated the abandoned excess for proper purposes.
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> * * * *
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> We are convinced that plaintiff and respondents were upon an equal footing with reference to the surplus water, and that the ones who first secured it may not be deprived of the right to the use of it, even outside of the watershed of Wolf Creek, by the person or corporation claiming as a lower riparian proprietor on Bear River. * * * The case of *Davis* v. *Gale* [32 Cal. 26 (1867)] * * * is of little value to us here, because the points decided were so different from those involved in this controversy. That was a suit between appropriators, each claiming a priority, not a controversy based upon riparian rights of either party.

The principle was reasserted by the California Supreme Court in a later decision wherein it was contended by counsel that a lower riparian owner may

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[130] *E. Clemens Horst Co.* v. *Tarr Min. Co.*, 174 Cal. 430, 440, 163 Pac. 492 (1917); *E. Clemens Horst Co.* v. *New Blue Point Min. Co.*, 177 Cal. 631, 635-641, 171 Pac. 417 (1918); *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 392-395, 399-400, 54 Pac. (2d) 1100 (1936); *Elgin* v. *Weatherstone*, 123 Wash. 429, 432-434, 212 Pac. 562 (1923). See *Bloss* v. *Rahilly*, 16 Cal. (2d) 70, 75-76, 104 Pac. (2d) 1049 (1940).

The Texas Supreme Court, in holding that riparian rights attach to streamwaters that do not rise above the line of highest ordinary and normal flow, added that this includes all such waters *regardless of source.* This apparently might sometimes include return flows from foreign waters, but the court did not expressly consider this question. *Motl* v. *Boyd*, 116 Tex. 82, 122, 286 S.W. 458 (1926).

[131] *Stevinson Water Dist.* v. *Roduner*, 36 Cal. (2d) 264, 270, 223 Pac. (2d) 209 (1950).

[132] *E. Clemens Horst Co.* v. *New Blue Point Min. Co.*, 177 Cal. 631, 637-639, 171 Pac. 417 (1918), noted previously at note 118.

not take all the foreign waters in a stream by virtue of an appropriation as against an upper riparian owner who needs such water for use on his riparian land. Nothing in the Water Commission Act (Water Code), said the court, purported to enlarge the rights of riparian owners as such or to curtail the rights of appropriators. On the contrary, the evident purpose of that act was to declare the waters of the State to be subject to appropriation insofar as that can be done without interfering with vested rights. The clause excepting from that declaration waters required for reasonable beneficial purposes on riparian lands constitutes no more than an affirmation of existing rights of riparian owners in and to the natural flow. It is not to be construed, contrary to the express provisions of the act, 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.[133]

It is important to note, in connection with the statement of the principle that riparian rights do not attach to the return flow from foreign waters, that waters diverted from one tributary of a stream, taken across a divide, and discharged into another tributary of the same stream, while foreign to the watershed into which they are introduced, are not foreign with respect to riparian lands lying on the main stream below the confluence or mouths of both upstream tributaries.[134]

So far as the particular riparian lands described above are concerned, this return water is still part of the natural tributary flow to which they are entitled. To illustrate, if water is brought from tributary A into the watershed of tributary B and discharged into B, riparian rights in the return flow cannot be claimed successfully for lands riparian only to B; and appropriative rights therein claimed for lands along B must defer to paramount riparian rights of lands riparian to the main stream below the mouths of both tributaries.[135] To particularize, in *Crane* v. *Stevinson*,[136] as in the *Horst* case, the claim of a riparian owner to the return from foreign waters was denied; but it was held that waters from Merced River abandoned into Bear Creek, which flowed into San Joaquin River above the point at which Merced River flowed into San Joaquin River, were foreign waters with respect to land riparian solely to Bear Creek, but not with respect to land fronting on San Joaquin River below the mouth of Merced River. The riparian rights of this latter land applied to Merced River waters abandoned into Bear Creek as well as to the natural flow in that stream.

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[133] *Bloss* v. *Rahilly*, 16 Cal. (2d) 70, 75-76, 104 Pac. (2d) 1049 (1940). See *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 398-400, 54 Pac. (2d) 1100 (1936).

[134] *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 399-400, 54 Pac. (2d) 1100 (1936). See *Holmes* v. *Nay*, 186 Cal. 231, 240-241, 199 Pac. 325 (1921); *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 529-532, 81 Pac. (2d) 533 (1938).

[135] *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 399-400, 54 Pac. (2d) 1100 (1936). See also *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 330-331, 88 Pac. 978 (1907).

[136] *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 399-400, 54 Pac. (2d) 1100 (1936).

Return Waters in International Stream

Waters, which having been stored and used in Mexico find their way back into the surface and underground channel of a river and flow therein across the international boundary into California and thence to the sea, upon entering the United States, are held subject to appropriation under the laws of California just as any other waters of the State.[137]

Return Waters in Interstate Stream

In a Federal case arising in Nevada, the effect of return flow from irrigation upon downstream water rights was considered in a controversy over the waters of an interstate stream. Of a quantity of water to which the upper appropriator had the prior right, about two-thirds found its way back into the stream by reason of percolation. Use of the water by the upstream prior appropriator was confined by the court decree to the locality in which it was being used at the time the downstream appropriation was made, the junior appropriator being entitled to a continuance of conditions then existing.[138]

Claim of Equivalent Diversion for Return Flow

Two cases arising in Montana, one decided by the Montana Supreme Court and the other by the United States Court of Appeals, involved appropriators who claimed that they were entitled to divert water in excess of their decreed appropriative rights as compensation for return flow from their lands during the period of such excess diversions.

In the case decided by the Montana Supreme Court in 1919, an appropriator had been adjudged guilty of contempt for opening his headgates and using water after the commissioner had closed them for the benefit of prior appropriators. Zosel, the relator, claimed that his use of the water did not impair the right of any prior appropriator; that by means of early irrigation of his land there was created on his land a subterranean storage system from which, during the later irrigation season, as much water as he was using through his ditches seeped back to the stream; and that this condition prevailed at the time of the alleged contemptuous action.[139]

The supreme court stated that for the purpose of exonerating himself from a charge of contempt, *and for that purpose only*, it was competent for the relator to show that by his own efforts he had developed an independent source of supply and that the quantity of water used by him did not exceed the amount so developed. He could not, in this proceeding, establish his right to the use of the so-called developed water as against prior appropriators,

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[137] *Allen* v. *California Water & Tel. Co.*, 29 Cal. (2d) 466, 482, 176 Pac. (2d) 8 (1946).

[138] *Vineyard Land & Stock Co.* v. *Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 28-29 (9th Cir. 1917).

[139] *State ex rel. Zosel* v. *District Ct.*, 56 Mont. 578, 580-581, 185 Pac. 1112 (1919).

because title to property cannot be tried in a contempt proceeding. If the relator had acquired the right to which he laid claim, he must have it determined in a civil action to which others interested might be made parties.

The Federal case, decided in 1920, was also a contempt proceeding, in which Marks was adjudged in contempt on petition of Hilger. Marks had a decreed right for 15 inches of water from a creek flowing through his land, but claimed the right to divert a much larger quantity. His attempted justification was that at the beginning of the season when there was an abundance of water he diverted such quantities that his lands became saturated and discharged considerable seepage into the stream later in the season. In exchange for this seepage he claimed the right to divert water from the creek to the extent of the capacity of his ditches.[140]

The court noted the difficulty of proving the extent to which seepage operates in adding to the flow of a stream. It was held that the prior appropriator is entitled to use all water flowing in the stream system above the head of his ditch, regardless of where the waters come from—specifically including seepage water—"limited of course to the extent of the quantity of water judicially decreed" to him from the creek. "In the present case it must therefore follow that, inasmuch as the decree awarded Marks only 15 inches of water from Dutchman creek, he had no right to take from that stream 50 inches of water, and that he cannot justify his action upon the ground that he has benefited the lower appropriators, or has given to them the equivalent of what he has taken."

A Wasington decision rendered in 1925 involved adjudication of the waters of a creek into which seepage waters from springs found their way. The landowners could not use these springs or their seepage, apparently because of gravity. The court decided in effect that if the parties have the right to use this seepage water and permit it to flow into the creek, "then it would seem but just and equitable that they should be permitted to take an equal amount of water, less transportation loss, from some point higher up the creek, from which point it can be conveyed to their land by gravity; provided, of course, that by doing so they do not injure or interfere with the rights of anyone else."[141] The sole controversy was over the matter of substitution. The right to use the seepage water was not being contested, and the supreme court therefore specifically refrained from passing upon that right.

SPRING WATERS

Nature of Spring Water

Spring waters are waters that break out upon the surface of the earth through natural openings in the ground. They necessarily originate from the

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[140] *Marks* v. *Hilger,* 262 Fed. 302, 303-306 (9th Cir. 1920).

[141] *State* v. *American Fruit Growers, Inc.,* 135 Wash. 156, 160-164, 237 Pac. 498 (1925).

ground-water 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 may form marshes or bogs, with no natural outlet. The ground water that supplies the spring has come from some higher elevation. The discharge from the spring may sink into the ground again, or it may evaporate, or it may create a seepage area and become diffused surface water, or it may flow away in a definite surface channel that constitutes a watercourse.

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 ordinarily 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 generally applies, which means that he has no exclusive right to use the spring solely by virtue of land ownership.

Source of Watercourse

The uniform holding in most high-court Western cases in which the question has been litigated is that a spring that constitutes the source of a watercourse is subject to the law of watercourses.

Statutes of Colorado and Oregon accord to the owner of land a prior right to spring waters arising on his land.[142] A similar Washington statute was repealed in 1917.[143] Notwithstanding these statutes, the courts in these States 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.[144]

Thus, the doctrine of prior appropriation applies to the waters of such springs which supply watercourses throughout the West. In most Western

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[142] Colo. Rev. Stat. Ann. § 148-2-2 (1963); Oreg. Rev. Stat. § 537.800 (Supp. 1969).

Another Colorado statutory provision, § 148-2-3 (Supp. 1969), provides in part, "If it shall be found that the water of any such springs is not tributary to any natural stream the determinations shall fix the rights of appropriators from such springs among themselves." For a more detailed discussion of the situation in Colorado, see "State Situations–Colorado," *infra.*

[143] Wash. Laws 1889-90, § 15, p. 710, repealed, Laws 1917, ch. 117, § 47, p. 468.

[144] *Nevius* v. *Smith,* 86 Colo. 178, 279 Pac. 44 (1928); *Hildebrandt* v. *Montgomery,* 113 Oreg. 687, 234 Pac. 267 (1925); *Hollett* v. *Davis,* 54 Wash. 326, 103 Pac. 423 (1909).

States, there are court decisions to this effect. An appropriation of such spring water may be made for a certain period of the year, and a subsequent appropriation by others during the balance of the year.[145] Likewise, a flow that does not reach the prior appropriator during the dry season may be appropriated during such period by others.[146]

The riparian doctrine likewise applies to waters of springs that feed watercourses, to the extent that such doctrine is recognized as applicable to watercourses in the West. In several States, there are court decisions applying the riparian doctrine to such springs. Such decisions, 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.[147]

Confined to Tract on Which Located

Natural springs, if supplied by percolating waters, which do not flow from the land on which located, ordinarily belong to or are subject to the prior right of the owner of the land on which they arise. By statute or court decision, or both—with certain exceptions—this is the general rule throughout the West.[148]

Spring on Public Land

The rule throughout the West is that appropriations of water on public lands of the United States are protected, notwithstanding the passing of title to 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, providing that the possessors of water rights vested under local customs, laws, and court decisions should be protected; the act of 1870, making all patents, preemptions, and homesteads subject to vested and accrued water and ditch rights; and the Desert Land Acts of 1877 and 1891, 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.[149] The United States Supreme Court has held that following the Act

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[145] *Suisun* v. *de Freitas,* 142 Cal. 350, 75 Pac. 1092 (1904); *Cleary* v. *Daniels,* 50 Utah 494, 167 Pac. 820 (1917).

[146] *Beaverhead Canal Co.* v. *Dillon Elec. Light & Power Co.,* 34 Mont. 135, 85 Pac. 880 (1906).

[147] *Scott* v. *Fruit Growers' Supply Co.,* 202 Cal. 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).

[148] See, e.g., the subtopics "Springs not flowing from land on which located" for California, Idaho, and Oregon, under "State Situations," *infra.*

[149] 14 Stat. 253, § 9 (1866); 16 Stat. 218 (1870); 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964); 26 Stat. 1096, 1097 (1891), 43 U.S.C. § 321 *et seq.* (1964).

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.[150]

Source of Spring

The sources of springs are ground waters; therefore it is inevitable that controversies would arise between claimants to the right to use springs and those who claim the right to intercept 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 often been accorded the right of an owner of land overlying 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.[151]

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. On this question, there are varying rules in the several jurisdictions.

Several decisions are to the effect 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 either from percolating water or from a definite underground stream.[152]

Developed Spring Water

The use of the word "develop" in this context means to enlarge in size, by artificial means, with a resulting increase in yield of water. This refers essentially to new water in the area.

Decisions from several States have been to the effect that the person responsible for developing a spring by artificial means, is entitled to the increased flow resulting from such development.[153]

This doctrine was applied in a Washington case in which the increase was caused by return from irrigation water brought from another watershed, as

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[150] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

[151] Ground water doctrines are discussed in chapters 19 and 20 *infra.*

If such a spring is the origin of diffused surface waters, applicable rules of law regarding such waters may apply. With respect to such rules, see chapter 17 *supra.*

[152] *LeQuime* v. *Chambers*, 15 Idaho 405, 98 Pac. 415 (1908); *Peterson* v. *Wood*, 71 Utah 77, 262 Pac. 828 (1927).

[153] *Churchill* v. *Rose*, 136 Cal. 576, 578-579, 69 Pac. 416 (1902); *Gutierrez* v. *Wege*, 145 Cal. 730, 734, 79 Pac. 449 (1905); *St. John Irrigating Co.* v. *Danforth*, 50 Idaho 513, 517, 298 Pac. 365 (1931).

against the claim of an appropriator on the stream into which the spring flowed.[154] On the other hand, the Montana Supreme Court held that an increase in the flow of a spring, one of the sources of a watercourse on which appropriative rights were established (the increase resulting from irrigation of higher lands) did not belong to the company supplying the irrigation water nor to the owner of the land on which the spring rose. Such increase was not developed water, said the court. When the waters escaped from the irrigated lands and reached the spring, they became tributary to the stream which it supplied.[155]

State Situations

Alaska

No reported Alaska court decisions or statutes relating expressly to spring waters have come to the attention of the author. The Alaska statutes provide, "Whenever occurring in a natural state, the waters are reserved to the people for common use and are subject to appropriation and beneficial use * * *."[156] "A right to appropriate water can be acquired only as provided in this chapter."[157] "Water" is defined as "all water of the state, surface and subsurface occurring in a natural state, except mineral and medicinal water * * *."[158]

Arizona

Prior to enactment of the Water Code, the Arizona Supreme Court pointed out that springs had not been included in the sources of water to which the appropriation statutes referred. It held that no right in the water of a seeping spring (which did not constitute the source of a watercourse) could be obtained by posting a notice of appropriation or doing any work pursuant thereto.[159]

The Water Code includes water of "springs on the surface" among waters declared to belong to the public and subject to appropriation and beneficial use as provided by the law.[160] As first enacted in 1919, this statute referred to the water of "springs," the present designation having been made by amendment in 1921.[161] The 1919 legislation constituted the first statutory authority for the appropriation of spring waters in Arizona.

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[154] *Miller* v. *Wheeler,* 54 Wash. 429, 103 Pac. 641 (1909).
[155] *Rock Creek Ditch & Flume Co.* v. *Miller,* 93 Mont. 248, 256-268, 17 Pac. (2d) 1074 (1933).
[156] Alaska Stat. § 46.15.030 (Supp. 1966).
[157] *Id.* § 46.15.040.
[158] *Id.* § 46.15.260(5).
[159] *McKenzie* v. *Moore,* 20 Ariz. 1, 4-6, 176 Pac. 568 (1918).
[160] Ariz. Rev. Stat. Ann. § 45-101(A) (1956).
[161] Ariz. Laws 1919, ch. 164, § 1, amended, Laws 1921, ch. 64.

The authorization in the Water Code to appropriate water of "springs on the surface" was construed by the Arizona Supreme Court to refer only to waters that emerge from the earth without artificial assistance. No appropriation can be made of percolating waters developed through the means of artificial structures, even though such waters may be brought to the surface thereby at a place where a "spring on the surface" already exists; only the natural flow is appropriate. Furthermore, the water of a damp place claimed to be a "spring on the surface" must, in its natural and undeveloped state, be sufficient in quantity to apply to a beneficial use, in order to be within the statutory authorization to appropriate spring water; otherwise it belongs to the owner of the land on which the damp place is located.[162]

If the water of a spring in its undeveloped state is sufficient in quantity to apply to a beneficial use, the fact that it is not sufficient to cause a flow beyond the boundaries of the tract on which the spring is located does not affect the appropriability of the spring water. The statute imposes no such requirement.[163]

The springs in litigation in the *Parker* case were located on lands that were part of the public domain at the time the appropriation was initiated but on which entry subsequently was made by adverse parties. The Arizona Supreme Court held that an entryman on Government land takes the land subject to all valid prior water rights—in this case, subject to the prior appropriation of the spring water.[164]

A decision rendered in 1946 involved rights to use springs on public lands, the waters of which had been developed and put to beneficial use by a settler who later conveyed his interest. There was no claim of a prior appropriation by anyone else. In answer to a contention that under the decisions of the Arizona court such waters were not appropriable prior to 1919, the court held that under the circumstances of the case that question was immaterial; that by settlement and making improvements on the public domain, and actually developing and putting the water to use, the settler had acquired an interest in the right to use the water which was subject to sale and conveyance.[165]

California

Property characteristics.—It was said in one case, in which plaintiffs had brought action to quiet title to waters of a spring located on lands of

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[162] *Fourzan* v. *Curtis,* 43 Ariz. 140, 145-147, 29 Pac. (2d) 722 (1934).

[163] *Parker* v. *McIntyre,* 47 Ariz. 484, 491, 56 Pac. (2d) 1337 (1936). "We hold, therefore, that under the law of Arizona, as it existed in 1931, the waters of the springs in question were subject to appropriation."

[164] 77 Ariz. at 486-487.

[165] *Hamblin* v. *Woolley,* 64 Ariz. 152, 157-158, 167 Pac. (2d) 100 (1946). See also *Gross* v. *MacCornack,* 75 Ariz. 243, 255 Pac. (2d) 183 (1953); *Mullen* v. *Gross,* 84 Ariz. 207, 326 Pac. (2d) 33 (1958).

defendants, that "There is no legal proposition better settled in this state than that the interest here claimed by the plaintiffs is an estate in real property * * *."[166]

As the spring is real property, an agreement to convey such an interest is within the statute of frauds and must be in writing, unless the circumstances are such as to constitute an executed parol grant,[167] such as in a case where plaintiff's predecessor agreed with the owner of a tract of land, on which there was a tank to which appropriated spring water was piped, that he should have surplus water from the tank. He thereupon replaced the pipe leading from the spring to the tank, and installed another pipeline from the tank to his own land. The court held that under such agreement, plaintiff's predecessor acquired an equitable title to use the surplus water. Although the agreement was oral, it was made for a valuable consideration and was carried into execution.[168]

Spring tributary to watercourse.—A spring supplying a natural stream is itself a part of the stream. This is so whether the water from the spring percolates into the stream through the soil, or reaches it in one or more running streams.[169] It follows that as springs that supply streams are a part thereof, such springs in California are subject to the dual doctrines of appropriation and riparian rights. The owners of the lands that contain such springs have no greater rights therein solely by reason of such location than they would have in any other part of the watercourse to which their lands might be contiguous. Their rights in the springs, therefore, are limited by any prior appropriative rights or by any correlative riparian rights that others may have in the waters of the stream.

A district court of appeal said, in a 1907 case involving a claim of appropriation of water flowing from abandoned oil wells on the public domain:[170]

> Water passing through the soil, not in a stream but by way of filtration, is not distinctive from the soil itself; the water forms one of its component parts. In this condition it is not the subject of appropriation. When, however, it gathers in sufficient volume, whether by percolation or otherwise, to form a running stream, it no longer partakes of the nature of the soil, but has become separate and distinct therefrom and constitutes a stream of flowing water subject to appropriation.

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[166] *Stepp* v. *Williams,* 52 Cal. App. 237, 253, 198 Pac. 661 (1921).

[167] *Id.*

[168] *Fogarty* v. *Fogarty,* 129 Cal. 46, 47-49, 61 Pac. 570 (1900).

[169] *Gutierrez* v. *Wege,* 145 Cal. 730, 734, 79 Pac. 449 (1905). Waters that passs from springs into a watercourse become a part of it. *Barneich* v. *Mercy,* 136 Cal. 205, 206-207, 68 Pac. 589 (1902).

[170] *De Wolfskill* v. *Smith,* 5 Cal. App. 175, 181, 89 Pac. 1001 (1907). See *Simons* v. *Inyo Cerro Gordo Min. & Power Co.,* 48 Cal. App. 524, 536, 192 Pac. 144 (1920).

An appropriation of water of a spring rising on one's land and flowing therefrom can be made by the owner of the land during only certain seasons of the year, and by other parties during other seasons.[171]

The owner of land that contains a spring from which a stream of water flows has only such rights in the spring as he may be entitled to as a riparian owner, or as an appropriator if he himself has appropriated water from the spring. He may make such an appropriation; but his appropriative right in the spring water will be limited, as against the rights of junior appropriators, by the circumstances of his acquisition and perfection of the right, just as in case of appropriations of water generally.[172]

It is well settled in California that the owner of land upon which there is located a spring, the water from which flows in a natural channel across his land and thence upon or through lands belonging to others, does not have, solely by virtue of his location with respect to the spring, exclusive rights therein, but on the contrary has only the rights of a riparian owner.[173] The riparian doctrine applies both to the spring and to the natural watercouse that flows away from it.[174]

The same rule applies with respect to a spring on one's land that supplies water to a watercourse by percolation through the soil, rather than in a defined channel.[175] In either case, the spring supplying the stream is a part of the stream.[176] The riparian owner's right to have the water of a stream flow to his land does not depend upon the length of the stream above him, but "is the same, whether the stream commences on his neighbor's land or fifty miles away."[177]

The riparian rights of the landowner, with respect to a spring on his land that is tributary to a watercourse, as against downstream appropriative rights, are the same as those of any upstream riparian owner. His rights in the spring supplying the stream accrue when title to the land on which the spring is located passes to private ownership. These rights are not impaired by a downstream appropriation made on private land, either before or after private title is obtained to the land containing the spring.[178]

Developed spring water.—A riparian owner, who, by artificial means increases the flow of a spring on his land, the water being tributary to a creek,

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[171] *Suisun* v. *De Freitas,* 142 Cal. 350, 351-353, 75 Pac. 1092 (1904).

[172] *Id.*

[173] *Scott* v. *Fruit Growers' Supply Co.,* 202 Cal. 47, 52, 258 Pac. 1095 (1927); *L. Mini Estate Co.* v. *Walsh,* 4 Cal. (2d) 249, 254, 48 Pac. (2d) 666 (1935); *San Francisco Bank* v. *Langer,* 43 Cal. App. (2d) 263, 268, 110 Pac. (2d) 687 (1941).

[174] *Holmes* v. *Nay,* 186 Cal. 231, 234-235, 199 Pac. 325 (1921).

[175] *Gutierrez* v. *Wege,* 145 Cal. 730, 734, 79 Pac. 449 (1905).

[176] *Id.*

[177] *Chauvet* v. *Hill,* 93 Cal. 407, 408, 28 Pac. 1066 (1892). See *Eckel* v. *Springfield Tunnel & Dev. Co.,* 87 Cal. App. 617, 622, 262 Pac. 425 (1927).

[178] *Holmes* v. *Nay,* 186 Cal. 231, 234-235, 199 Pac. 325 (1921).

has been held entitled to the increased quantity of water thus developed as against a downstream claimant.[179] In another case involving a similar situation, the court said:[180]

> It may be that the fact that the defendant as a riparian proprietor had worked upon the spring and increased its flow would entitle him to a greater portion of the water on a fair division of the same than would otherwise fall to his lot. But he certainly did not by increasing the flow become the owner of all the flow.

The question as to whether the water so "developed" would have reached the stream by percolation in its natural course, had it not been artificially drawn into the spring by the riparian owner's work, apparently was not raised in these two cases. If this portion of the water would have eventually entered the stream in any event by natural processes, then, according to the present water law philosophy of California, it is not subject to the rules governing developed water, but is part of a common water supply in which all rights of use are now coordinated.

Spring not flowing from land on which located.—Springs are fed by ground water, which has emerged on the surface at a particular place. If there is not sufficient water to constitute a definite flow from the spring, or if the flow is not sufficient to pass beyond the boundaries of the tract on which located—and if it does not appear from the evidence that water percolating from the spring is tributary to a watercourse—questions of relative rights to the use of spring and connected stream waters do not arise. These kinds of questions may arise between the landowner and a claimant of appropriative rights in the spring who shows no privity of title with the owner, or between the landowner and persons claimed by him to be intercepting the ground waters tributary to the spring. On public lands, there may be controversies between conflicting claimants of appropriative rights in the spring, or between a spring water appropriative claimant and an entryman of the tract on which the spring rises.

There has been little litigation in the higher courts of California on this phase of the general subject. A district court of appeal observed in 1920, in a case that involved conflicting appropriative rights to use springs situated on vacant public lands, that "There no more could be private ownership in the springs themselves than there could be private ownership in the *corpus* of a stream of running water. There could be but a usufructuary right." The supreme court, although denying a petition for hearing of this case, withheld its approval from two points, including the following:[181]

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[179] *Churchill* v. *Rose*, 136 Cal. 576, 578-579, 69 Pac. 416 (1902).

[180] *Gutierrez* v. *Wege*, 145 Cal. 730, 734, 79 Pac. 449 (1905).

[181] *Simons* v. *Inyo Cerro Gordo Min. & Power Co.*, 48 Cal. App. 524, 535, 192 Pac. 144 (1920), hearing denied by supreme court. See 48 Cal. App. at 542 for the supreme court's comments.

> We also refuse to approve the broad statement that there cannot be a private ownership in springs of water. The case is not parallel to the question of the ownership of the water of a stream. A spring may have no natural outlet, in which case the owner of the land in which it lies, under ordinary circumstances, owns the water as completely as he does the soil.

A year later, a district court of appeal quoted with approval a statement that where the natural flow of a spring does not pass beyond the boundaries of the land on which the spring is located, the owner may use all of its water.[182]

With respect to the waters of a spring rising on private land, the natural flow from which does not pass on the surface beyond the boundaries of the land, the rights of the landowner in California as against the usual adverse parties in such cases may be stated as follows:

(1) As against a stranger who undertakes to appropriate the flow at the spring, the landowner may use all the water of the spring.

(2) As against appropriators or riparian owners on a stream who claim that the flow from the spring passes naturally into the stream by subterranean means, the landowner may use all the water from the spring if the evidence fails to show such underground connection; but if the interconnection is proved, his rights must be coordinated with theirs.

(3) As against holders of rights in the ground waters that supply the spring, the rights of the landowner are correlative with theirs, but he may use all the water that reaches and flows from the spring.

Spring on public land.—Rights to the use of springs located on the public domain of the United States may be acquired by appropriation under the laws of the State pursuant to authority granted by Congress in the Act of 1866 and in subsequent legislation.[183] No prescriptive title to the use of a spring on the public domain can be asserted while the land remains in public ownership, "for the reason that there can be no prescription as against the Government."[184] Hence, one who wishes to acquire a right to use water on the public domain can do so "only by an 'appropriation' made in the manner provided by law, that is, by reducing the water to actual possession for a beneficial use." The Federal Government, as proprietor of the public domain, early recognized the necessity of permitting acquisition of such rights distinct from the lands themselves and provided authority therefor as stated above.[185]

That appropriations of water on the public domain must conform to State laws is specifically provided by Congressional legislation recognizing and

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[182] *San Francisco Bank* v. *Langer*, 43 Cal. App. (2d) 263, 268, 110 Pac. (2d) 687 (1941). The quoted statement was from 25 "California Jurisprudence" 1106, § 113.

[183] 14 Stat. 253, § 9 (1866); 16 Stat. 218 (1870); 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964).

[184] *Wilkins* v. *McCue*, 46 Cal. 656, 661 (1873).

[185] *Simons* v. *Inyo Cerro Gordo Min. & Power Co.*, 48 Cal. App. 524, 535, 536, 192 Pac. 144 (1920).

protecting water rights that "have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts." Further, rights of appropriation that accrued under whatever State law was then in effect have been protected as against the claims of subsequent entrymen of the lands on which the diversions were located.[186]

In various instances, water was diverted on one tract of public land and conveyed to another tract for use there. The fact that the land to which the water was taken was then unsurveyed public land did not prevent the water from becoming appurtenant thereto, because the settler-appropriator was a lawful occupant, not a trespasser. The California Supreme Court stated in 1898 that "the law is settled that the water flowing from springs on public lands may be diverted to other public lands and there used for irrigation or other necessary purposes, and a right to the same acquired as against anyone who subsequently obtains title to the land on which the springs are situated."[187]

The appropriability of spring waters on the public domain does not appear to have depended upon their being flowing waters, or tributary to a watercourse. The Government, as owner of the public domain, possessed the power to dispose of the land and the water thereon, either together or separately.[188] Having elected to dispose of the water separately from the land, the Congress, pursuant to its unquestionable authority, provided in 1877 that "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 * * * subject to existing rights."[189] The language "all * * * other sources of water supply" is broad enough to include springs that do not feed living streams but that nevertheless are capble of being put to beneficial use.

The water of a tributary spring on public land, being a part of the stream into which it flows, bears the same relation to downstream appropriative rights as that of any other part of the watercouse upstream from the lands on which the appropriations are made. The result is:

(1) While land on which the tributary spring is located remains in public ownership, appropriative rights in the watercourse acquired on downstream *public* lands attach to the waters of such upstream tributary spring, and are superior to the riparian rights of subsequent grantees of the land on which the spring rises.

(2) But appropriations made on downstream *private* lands vest in the holder no rights as against upstream Government lands. Consequently, when title to

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[186] *Ely* v. *Ferguson,* 91 Cal. 187, 190, 27 Pac. 587 (1891); *Williams* v. *Harter,* 131 Cal. 47, 50, 53 Pac. 405 (1898). See *Cohen* v. *La Canada Land & Water Co.,* 142 Cal. 437, 439-440, 76 Pac. 47 (1904).

[187] *Williams* v. *Harter,* 121 Cal. 47, 50, 53 Pac. 405 (1898).

[188] *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 296 U.S. 142, 162 (1935).

[189] 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1964).

such upstream lands on which tributary springs are located passes to private ownership, the grantees acquire riparian rights in the springs that are superior to appropriative rights in the watercourse that have already accrued on downstream private lands as well as rights that may accrue subsequently.[190]

Sources of spring water.—The fact that springs have their sources in ground water affects the rights of the claimant of spring water as against those who intercept the sources of supply. Waters of definite underground streams and percolating waters are distinguished in California water law. The former are subject to the law of watercourses, and the latter are now subject in California to legal principles similar in many respects to those of the law of watercourses. This phase of the subject involves principles of ground water rights, which will be dealt with in chapter 20.

The owner of land on which a spring rises, as well as other claimants of rights in the spring, now have certain rights in the sources of supply of the spring, whether those sources consist entirely of percolating water, or consist partly or wholly of water flowing in a definite underground stream.

The owner of land containing tributary percolating water is entitled only to a reasonable use of such water for the benefit and enjoyment of his land, such use being consistent with the rights of others in the percolating water and in the spring or stream to which it is naturally tributary. In California, "the term 'reasonable use' * * * does not mean that one of two or more persons having correlative rights in a common supply of water may take all that is reasonably beneficial to his land, regardless of the needs of the others, as the defendant contends, but only his reasonable share thereof, if there is not enough to supply the needs of all."[191]

Under present California law, all rights in a spring, its sources, and the watercourse of which it forms a part would be correlated under the rule of reasonable beneficial use.

Colorado

Section 148-2-3 of the Colorado statutes provides:[192]

> The waters of natural flowing springs may be appropriated for all beneficial uses and the priorities of such appropriations may be determined as provided by law. If it shall be found that the water of any such springs is not tributary to any natural stream the determinations shall fix the rights of appropriators from such springs among themselves.

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[190] *Holmes* v. *Nay,* 186 Cal. 231, 234-235, 199 Pac. 325 (1921).

[191] *Eckel* v. *Springfield Tunnel & Dev. Co.,* 87 Cal. App. 617, 622, 624, 262 Pac. 425 (1927).

[192] Colo. Rev. Stat. Ann. § 148-2-3 (1963), as reenacted and amended by Laws, 1969, ch. 373, § 3, Rev. Stat. Ann. § 148-2-3 (Supp. 1969).

In addition, section 148-2-2 provides:[193]

> All ditches 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.[194]

The Colorado Supreme Court has held that the latter 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.[195] In another decision concerning the same statute the court said, "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."[196]

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.[197]

In Colorado, it is a well settled presumption that all waters are tributary to a stream.[198] And this presumption has been applied expressly to spring waters.[199] That being so, ground water feeding the spring in controversy was subject to appropriation under the doctrine of *Nevius* v. *Smith.*[200]

> In [*Nevius* v. *Smith*] this Court determined that the statute giving the landowner priority over seepage water rising on his land *did not* mean "prior right," as against established right by appropriation. When this rule is applied to the present case, we find plaintiff as having established rights by appropriation which defeats any claim of defendant to the water arising on its land under the conditions here presented.[201]

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[193] Colo. Rev. Stat. Ann. § 148-2-2 (1963).

[194] With respect to the application of this section to waste and seepage waters, see "Waste and Seepage Waters–Several State Situations–Colorado," *supra.*

[195] *Clark* v. *Ashley,* 34 Colo. 285, 82 Pac. 588 (1905).

[196] *La Jara Creamery & Live Stock Assn.* v. *Hansen,* 35 Colo. 105, 83 Pac. 644 (1905).

[197] *Bruening* v. *Dorr,* 23 Colo. 195, 47 Pac. 290 (1896).

[198] *Hehl Engineering Co.* v. *Hubbell,* 132 Colo. 96, 99-100, 285 Pac. (2d) 593 (1955).

[199] *Ranson* v. *Boulder,* 161 Colo. 478, 424 Pac. (2d) 122, 123-124 (1967).

But 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." *Colorado & Utah Coal Co.* v. *Walter,* 75 Colo. 489, 226 Pac. 864 (1924).

[200] *Nevius* v. *Smith,* 86 Colo. 178, 182-183, 279 Pac. 44 (1928).

[201] *Hehl Engineering Co.* v. *Hubbell,* 132 Colo. 96, 100, 285 Pac. (2d) 593 (1955).

In *Nevius* v. *Smith,* the court held that the prior right to use spring waters belonging to a stream (or which, if not diverted, 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. The supreme court, however, quoted the trial court's finding "that the water in question did not reach the river; and that said water, if not diverted but left to itself, would reach the river," and emphasized that the rule was limited strictly to such waters as "belong to the stream."[202]

Another decision, which preceded *Nevius* v. *Smith* by a few years, was to the effect that under the statute, the use of a spring is accorded to the owner of the land on which it arises, if capable of use thereon, where the flow is shown not to constitute a natural watercourse.[203] In *Cline* v. *Whitten,* decided in 1960, the supreme court declared, "There are no Colorado constitutional or statutory inhibitions against a person on whose lands spring water arises, which water is not tributary to and does not enter a natural stream, from using said water on his lands."[204] On the contrary, section 148-2-2 of the statutes, quoted at the outset of this topic, was quoted in full.[205] The supreme court further declared, "An owner of water rights is entitled to injuctive relief against anyone who interferes with and threatens to continue to interfere with the exercise of such rights. Faden v. Hubbell, 93 Colo. 358, 28 P. 247."[206]

Section 148-2-3 of the Colorado statutes, quoted at the outset of this subtopic, among other things, provides that "If it shall be found that the water of any such spring is not tributary to any natural stream the determinations shall fix the rights of appropriators from such springs among themselves." This quoted provision does not appear to have been mentioned or construed in any reported decision of the Colorado Supreme Court.

Hawaii

Controversies that have reached the Supreme Court of Hawaii over rights to use water of springs have arisen, in the usual case, between the owner of the

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[202] *Nevius* v. *Smith,* 86 Colo. 178, 182-183, 279 Pac. 44 (1928).

In a 1962 case, the court said, "[O]nce such [spring] waters have been established as tributary to a stream * * * they cannot be interrupted in their course and diverted from the stream; they belong to the creek, which in turn belongs to the people of the state by Article 16, Section 5 of the Constitution. Nevius v. Smith, 86 Colo. 178, 279 P. 44 [1929]." *Cline* v. *Whitten*, 150 Colo. 179, 372 Pac. (2d) 145, 148 (1962).

[203] *Haver* v. *Matonock,* 79 Colo. 194, 195-197, 244 Pac. 914 (1926).

[204] *Cline* v. *Whitten,* 144 Colo. 126, 355 Pac. (2d) 306, 308 (1960), quoted in *Pikes Peak Golf Club, Inc.* v. *Kuiper,* 169 Colo. 309, 455 Pac. (2d) 882, 884 (1969).

The 1960 *Cline* opinion preceded the 1962 *Cline* opinion, *supra* note 202, in the same case.

[205] The court quoted Colo. Rev. Stat. § 147-2-2 (1953) which was identical to and has since become § 148-2-2 (1963), the current version.

[206] *Cline* v. *Whitten,* 144 Colo. 126, 355 Pac. (2d) 306, 308 (1960).

land on which the spring originated, and claimants to the use of that portion of the spring water flowing away to other land, in excess of the quantity consumed in crop production on the land of origin. It appears to be settled that the owner of land on which a spring is located has the "ownership" or at least the right to the use of such spring, qualified to the extent of specific easements that may have been acquired by others.[207]

In a case in which water originating in springs was divided into two streams, water was taken from one of them (Kaluaolohe) through a canal to irrigate land of the owner of the springs; but he subsequently placed a dam on the other (Kamoiliili) stream to irrigate his land. The court held that it was error for the commissioners to rule that the later dam on the Kamoiliili was not entitled to water from that stream. It was stated that the change did not affect the rights of others, and that the latter were not concerned as to the stream from which the upper land received its water supply originating in these springs.[208]

While the landowner is entitled to use water sufficient for his needs, from a spring that originates on his land, it is equally well settled that rights in the surplus over his needs may be acquired by others.[209] Such rights may have been acquired by prescription against the konohiki (landlord), on the part of holders of kuleanas (hoaainas, or native tenants), through a sufficiently long and adverse use of water that flowed from a pond supplied by a spring into an auwai (ditch) constructed to carry overflow away for irrigation.[210] Or such right may have been established from ancient usage and an award therefor as a result of the great land reform in the first half of the nineteenth century.[211]

Similarly, in a case in which the overflow from kalo (taro) patches, supplied by springs on the land of the owner, constituted part of the source of supply of a natural watercourse, a prescriptive right against the owner of the land on which the springs arose has been recognized in favor of the party using water from the watercourse; and to protect the right of this downstream user in the continuance of the overflow from the kalo patches, the owner of the latter was ordered to remove a flume by means of which he was diverting the flow elsewhere.[212]

A case decided in 1899, in which the testimony was voluminous, involved a water head which appeared to be a hole in which water collected from a large area of swampy ground above it. Although the court stated the water head was not strictly a "spring" (in the sense that the water came perennially to the surface from invisible subterranean sources), the court called it a spring. The

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[207] *Davis* v. *Afong,* 5 Haw. 216, 221-222 (1884); *Kahookiekie* v. *Keanini,* 8 Haw. 310, 312 (1891); *Kohala Sugar Co.* v. *Wight,* 11 Haw. 644, 651 (1899).

[208] *Liliuokalani* v. *Pang Sam,* 5 Haw. 13 (1883).

[209] *Kahookiekie* v. *Keanini,* 8 Haw. 310, 312 (1891).

[210] *Davis* v. *Afong,* 5 Haw. 216, 221, 224 (1884).

[211] *Mele* v. *Ahuna,* 6 Haw. 346, 349 (1882).

[212] *Kahookiekie* v. *Keanini,* 8 Haw. 310, 311-312 (1891).

question of the source of supply of the spring was not in issue. The spring was located on the land of the defendant, and the sole issue was whether plaintiff had acquired by prescription an exclusive right to the flow of water from the spring. On the facts, it was held that a prescriptive right had not been established. In discussing the ownership of the spring, and the fact that rights in the water had been acquired for individual ancient kalo patches, the court stated:[213]

> One thing we find to be proved—that the Kupunaokane water was situated in and appurtenant to the land of Halawa and properly speaking "belonged" to its owners, and to the holders of the kalo patches within its boundaries, for it is conceded that ancient kalo patches have acquired easements in the water for their sustenance.

Idaho

Spring tributary to watercourse.—In Idaho, it is well settled that waters of a natural spring which form a natural stream flowing off the premises on which the spring rises are public waters of the State, subject to acquisition by appropriation.[214] The fact that the spring and the stream flowing therefrom into a watercourse are located wholly on private land does not alter the rule.[215]

Furthermore, the water from a natural spring located on one's land and flowing therefrom in a natural channel upon the land of another was held subject to appropriation by the lower landowner on his own land, as against the claim of the owner of the land on which the spring arose, where the lower landowner had first applied the water to beneficial use in 1885 and had continuously and uninterruptedly made such beneficial use ever since.[216]

In the first reported decision of the Idaho Supreme Court in a controversey between claimants of rights to the use of water, it was held that prior appropriation of all waters of a stream carried with it waters of tributaries, including springs.[217] Subsequently, it was held that an adjudication of stream waters carried with it waters of tributaries and tributary springs above the

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[213] *Kohala Sugar Co.* v. *Wight,* 11 Haw. 644, 651 (1899).

[214] *Jones* v. *McIntire,* 60 Idaho 338, 352-353, 91 Pac. (2d) 373 (1939); *Maher* v. *Gentry,* 67 Idaho 559, 566, 186 Pac. (2d) 870 (1947); *Martiny* v. *Wells,* 91 Idaho 215, 419 Pac. (2d) 470 (1966). See also *Village of Peck* v. *Denison,* 92 Idaho 747, 450 Pac. (2d) 310, 312-313 (1969).

[215] *Marshall* v. *Niagara Springs Orchard Co.,* 22 Idaho 144, 154, 157, 125 Pac. 208 (1912); *Bachman* v. *Reynolds Irr. Dist.,* 56 Idaho 507, 513, 55 Pac. (2d) 1314 (1936). "It is only when the waters of natural srpings flow off privately owned lands into a natural channel that such waters when flowing in the natural channel become public waters subject to appropriation, diversion and application to a beneficial use. I.C. § § 42-101, 42-103." *Nordick* v. *Sorensen,* 81 Idaho 117, 338 Pac. (2d) 766, 773 (1959).

[216] *Jones* v. *McIntire,* 60 Idaho 338, 352-353, 91 Pac. (2d) 373 (1939).

[217] *Malad Valley Irr. Co.* v. *Campbell,* 2 Idaho 411, 415, 18 Pac. 52 (1888).

points of diversion involved.[218] Such an appropriation, of course, does not include nontributary waters developed by others and brought into the stream for their own use, to which they are thereby entitled.[219]

Spring not flowing from land on which located.—Waters of natural springs are declared by statute to be the property of the State and subject to appropriation.[220] The appropriability of springs located wholly upon private lands, however, is limited by other provisions of the statute prohibiting the State Department of Reclamation from issuing a permit to divert or appropriate such water, except to the owner of the land or with his written permission.[221]

The Idaho Supreme Court has made broad statements to the effect that spring water rising on private land and not flowing off of the premises is private water—a part of the land, and the exclusive property of the landowner.[222] If the landowner consents, such water may be appropriated.[223]

In a 1922 case involving the question as to whether certain ground waters had been dedicated to public use, there was a disagreement among members of the supreme court as to the implication of the above cited statute prohibiting State officials from issuing permits to appropriate springs lying wholly on private lands, except to the landowner, without his written permission. According to the prevailing opinion, however, this statute constitutes a statutory recognition of the private ownership of such springs.[224]

Spring on the public domain.—An appropriation of water from a spring on the public domain is valid as against the claim of a subsequent private owner of such land.[225] In one case, the Idaho Supreme Court concluded that the fact

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[218] *Josslyn* v. *Daly,* 15 Idaho 137, 148-149, 96 Pac. 568 (1908). See also *Fairview* v. *Franklin Maple Creek Pioneer Irr. Co.,* 59 Idaho 7, 17, 79 Pac. (2d) 531 (1938).

[219] *Rabido* v. *Furey,* 33 Idaho 56, 61, 63, 190 Pac. 73 (1920); *St. John Irrigating Co.* v. *Danforth,* 50 Idaho 513, 517, 298 Pac. 365 (1931).

[220] Idaho Code Ann. § § 42-101 and -103 (1948). *Short* v. *Praisewater,* 35 Idaho 691, 700, 208 Pac. 844 (1922).

[221] Idaho Code Ann. § § 42-212 and -213 (1948).

[222] *Hall* v. *Taylor,* 57 Idaho 662, 667-668, 67 Pac. (2d) 901 (1937); *Jones* v. *McIntire,* 60 Idaho 338, 352, 91 Pac. (2d) 373 (1939); *Maher* v. *Gentry,* 67 Idaho 559, 566-567, 186 Pac. (2d) 870 (1947). In *Maher* v. *Gentry,* it was held that water from a spring which sank into the soil and did not flow off the premises upon which the spring rose constituted "private waters" and that an adjoining landowner had no right to the use thereof in the absence of strict compliance with the provisions of the statute prohibiting the State officials from issuing permits to divert such waters except to the person or corporation owning the land or with his written permission.

[223] *Short* v. *Praisewater,* 35 Idaho 691, 701, 208 Pac. 844 (1922); *Harris* v. *Chapman,* 51 Idaho 283, 293, 5 Pac. (2d) 733 (1931); *Maher* v. *Gentry,* 67 Idaho 559, 567, 186 Pac. (2d) 870 (1947). See *LeQuime* v. *Chambers,* 15 Idaho 405, 413, 98 Pac. 415 (1908).

[224] *Public Util. Comm'n* v. *Natatorium Co.,* 36 Idaho 287, 301, 319, 211 Pac. 533 (1922).

[225] *Mahoney* v. *Neiswanger,* 6 Idaho 750, 752-754, 59 Pac. 561 (1899). See also *Youngs* v. *Regan,* 20 Idaho 275, 279-280, 118 Pac. 499 (1911); *Keiler* v. *McDonald,* 37 Idaho 573, 578, 218 Pac. 365 (1923).

that the water of such a spring in its natural state, before diversion, was lost in the adjacent soil and did not flow away in a definite stream could make no difference in the result and in no way altered the right of the first comer to appropriate the water for a useful purpose.[226]

In the latter case, the fact that an appropriation of spring water was initiated on entered public land with consent of the entryman (whose entry was subsequently cancelled) was held not to defeat the right of the appropriators (appellants) as against a later entryman (respondent). The court thought that the correct proposition was that this land was segregated from the public domain until the cancellation of the first homestead entry, whereupon it reverted to the public domain and remained such until the later entry was made by respondent; and that in this case there must have been a period of time during which the land was part of the public domain and subject to the rights and claims of appellants, at which time their rights properly and legally attached under Congressional legislation.[227]

In another case, the court held that the water of a spring situated wholly upon a Government homestead entry was subject to appropriation for beneficial use, with the consent of the entryman. The homstead entryman had conveyed to a stranger the right to use the water of a spring on the land, with the right of way. This was held to be not contrary to the Federal statutes relating to the transfer and alienation of homestead rights.[228]

Kansas

Rights of ownership.—Discussion of rights of use or ownership of spring waters in the few Kansas decisions thereon is inextricably bound with that of ground water rights. Thus, in a 1962 case, the supreme court explained a 1907 decision[229] in the following language:[230]

> The Jobling case is relatively unimportant so far as ground water law of this state is concerned. It did not involve any question of relative rights of neighboring landowners overlying a common ground water supply. Rather, it involved an oral agreement and a claim of prescriptive rights to the use of mineral spring waters on an overlying owner's land. The Soden case was cited with approval, and the common-law rule was reaffirmed, "That percolating waters, such as these springs are, belong to the owner of the land as much as the land itself, admits of no doubt."

Spring as source of watercourse.—A watercourse may have its origin in a spring. The watercourse becomes such at the point at which spring water comes

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[226] *LeQuime* v. *Chambers,* 15 Idaho 405, 414, 98 Pac. 415 (1908).
[227] 15 Idaho at 413.
[228] *Short* v. *Praisewater,* 35 Idaho 691, 696-701, 208 Pac. 844 (1922).
[229] *Jobling* v. *Tuttle,* 75 Kans. 351, 360-364, 89 Pac. 699 (1907).
[230] *Williams* v. *Wichita,* 190 Kans. 317, 374 Pac. (2d) 578, 586-587 (1962), appeal dismissed, 375 U.S. 7, rehearing denied, 375 U.S. 936 (1963).

to or collects on the surface and flows therefrom in a channel with well-defined bed and banks.[231]

In a case decided in 1956, the evidence showed that a natural watercourse was fed largely by water flowing from a spring. The Supreme Court of Kansas held that the relative rights of the owner of the land on which the spring arose, and of the owners of lands contiguous to the watercourse, were those of upper and lower riparian proprietors, and that the lessee of the upper land had no right to divert the entire flow of the spring to the injury of the downstream owner-users.[232]

However, insofar as the riparian relationship is concerned, the legislature in 1945 passed an act dedicating all water within the State to the use of the people of the State, and providing that, subject to vested rights, surface or ground water rights might be appropriated under the procedure provided therein.[233] The validity of this statute was sustained by both State and Federal courts on the several points presented for determination.[234]

Montana

The water rights statute provides that the right to use unappropriated water of various sources, including springs, may be acquired by appropriation.[235]

An appropriator of water of a stream has the right to the flow of a spring subsequently appearing as a result of natural causes in the bed of a tributary. However, if the flow would not reach the diversion point of such appropriator during the dry season, it may be appropriated during such period by others.[236] Furthermore, an appropriator on a stream cannot claim the flow of a spring which in its natural state does not reach the stream during the irrigation season.[237]

The fact that marshes, the water from which naturally flows into natural watercourses, are located on one's land does not, of itself, necessarily give the owner an exclusive right to use the water so as to prevent others from acquiring appropriative rights therein.[238]

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[231] *Rait* v. *Furrow,* 74 Kans. 101, 106-107, 85 Pac. 934 (1906).

[232] *Weaver* v. *Beech Aircraft Corp.,* 180 Kans. 224, 303 Pac. (2d) 159 (1956). See *Atchison, Topeka & S. F. R.R.* v. *Long,* 46 Idaho 701, 27 Pac. 182 (1891).

[233] Kans. Stat. Ann. § § 82a-701 to -722 (1969).

[234] *State ex rel. Emery* v. *Knapp,* 167 Kans. 546, 555-556, 207 Pac. (2d) 440 (1949); *Baumann* v. *Smrha,* 145 Fed. Supp. 617 (D. Kans. 1956), affirmed per curiam, 353 U.S. 863 (1956); *Williams* v. *Wichita,* 190 Kans. 317, 374 Pac. (2d) 578 (1962), appeal dismissed "for want of a substantial Federal question," 375 U.S. 7 (1963), rehearing denied, 375 U.S. 936 (1963); *Hesston & Sedgwick* v. *Smrha,* 192 Kans. 647, 391 Pac. (2d) 93 (1964). In this regard, see chapter 6, note 245.

[235] Mont. Rev. Codes Ann. § 89-801 (1964).

[236] *Beaverhead Canal Co.* v. *Dillon Elec. Light & Power Co.,* 34 Mont. 135, 140-141, 85 Pac. 880 (1906).

[237] *Leonard* v. *Shatzer,* 11 Mont. 422, 426-427, 28 Pac. 457 (1892).

[238] *Quinlan* v. *Calvert,* 31 Mont. 115, 119, 77 Pac. 428 (1904); *West Side Ditch Co.* v. *Bennett,* 106 Mont. 422, 431, 78 Pac. (2d) 78 (1938).

An increase in the flow of a spring which is one of the sources of a watercourse on which appropriative rights have been established—the increase resulting from irrigation of higher lands—does not belong to the company supplying the irrigation water or to the owner of the land on which the spring rises.[239]

In a case decided early in the present century, a claim to the right of a spring was held to have been lost by abandonment.[240]

Nebraska

The Nebraska appropriation statutes make no specific reference to springs. They provide that unappropriated water of every natural stream is subject to appropriation; they refer also to appropriation of "any of the public waters of the State," to the "unappropriated waters of any natural lake or reservoir," and to "running water flowing in any river or stream or down any canyon or ravine."[241]

The Nebraska Supreme Court has held:[242]

> A conveyance of land upon which a perpetual spring is the fountainhead of a stream, flowing naturally in a well-defined channel in the course of drainage through other lands, grants riparian rights in the waters of the stream, but not absolute ownership and exclusive use of such waters without regard to the rights of lower riparian proprietors.

In a later decision this case was cited, but the corresponding language in this later opinion reads as follows:[243]

> Where the waters flowing from springs flow naturally in a well-defined channel in the course of drainage through other lands, the owner of the land upon which the springs are located does not have an exclusive right to control and use the waters to the injury of lower riparian owners or senior appropriators. Slattery v. Dout, 121 Neb. 418, 237 N.W. 301.[244] But where the waters flowing

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[239] *Rock Creek Ditch & Flume Co.* v. *Miller,* 93 Mont. 248, 256-268, 17 Pac. (2d) 1074 (1933). The court held that such an increase was not developed water, and that when the waters escaped from the irrigated lands and reached the spring, they became tributary to the stream which they supplied.

[240] *Goon* v. *Proctor,* 27 Mont. 526, 528, 71 Pac. 1003 (1903).

[241] Nebr. Rev. Stat. § § 46-202, -233(1), -240, -259 (1968).

[242] *Slattery* v. *Dout,* 121 Nebr. 418, 420, 237 N.W. 301 (1931).

[243] *Rogers* v. *Petsch,* 174 Nebr. 313, 117 N.W. (2d) 771, 774 (1962).

[244] The *Rogers* and *Slattery* cases were later cited for this same general proposition in *Brummund* v. *Vogel,* 184, Nebr. 415, 168 N.W. (2d) 24, 27 (1969). In the *Brummund* case, the court held that waters from springs on defendant's land "flow generally, although not continuously, in a well-defined channel and in a sufficient quantity and direction across plaintiff's land into another stream of water to constitute a watercourse within the meaning of section 31-202 R.R.S. 1943." *Id.* This section of the

> from springs do not form a watercourse or lake they are surface waters until they empty into and become part of a natural stream or lake. Lackaff v. Bogue, 148 Neb. 174, 62 N.W. 2d 899. * * * The owner of land upon which surface waters arise may retain them for his own use and change their course upon his own land by ditch or embankment. Nichol v. Yocum, 173 Neb. 298, 113 N.W. 2d 195.

The clear implication would seem to be that water in a spring at the source of a stream is equally open to appropriation as at any place in the channel leading therefrom, subject of course to existing rights on the stream.

Nevada

Property rights in springs.—A Federal court stated in 1938:[245]

> We may assume that a right in or to a spring, whether the spring is upon land of the vendor or upon the public domain, is real property. Such a right, particularly for stock watering purposes for stock grazing upon the public domain, may be held by more than one individual or interest although usually but one interest controls. Because of natural conditions particularly, an arid mountainous region covering the major portion of the state's areas of more than 100,000 square miles, the state has recognized and provided for the protection of stockmen who have been first to make use of springs and small water channels to enable them to graze their live stock in adjacent regions which, with the possible exception of mining, is not adaptable to any other use.

Appropriation of spring waters.—The water-rights statute provides that 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 and is subject to appropriation for beneficial use.[246] It is the settled law of the State that this applies to spring water, rights to the beneficial use of which may be acquired only by appropriation.[247]

In 1897, a Federal court held that in appropriating waters of a spring upon public lands, the only acts necessary were those appropriate to the circumstances and physical conditions and practicable to accomplish the appropriator's purpose in making beneficial use of the water. The fact that the water was used for culinary and domestic purposes by the appropriator and its agents and employees was sufficient in itself to establish a beneficial use of the water.[248]

Nebraska statutes provides that "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."

[245] *Adams-McGill Co.* v. *Hendrix,* 22 Fed. Supp. 789, 791 (D. Nev. 1938).

[246] Nev. Rev. Stat. § § 533.025 and .030 (Supp. 1969).

[247] *In re Manse Spring & Its Tributaries,* 60 Nev. 280, 286, 108 Pac. (2d) 311 (1940).

[248] *Silver Peak Mines* v. *Valcalda,* 79 Fed. 886, 888, 890 (C.C.D. Nev. 1897).

The Nevada Supreme Court indicated in a 1925 case that an appropriative right to use water of a spring will be protected by injunction against an interference by another party which, by the lapse of time, could become the foundation of an adverse right.[249]

In an early case, the Nevada Supreme Court held that the owner and appropriator of a spring fed by percolating waters on the land of another, could not enjoin interference with the source of supply on the other's land, because the absolute use of percolating waters belonged to the owner of the land on which they were found.[250] The rule relating to percolating waters as stated in this decision has been changed by statute.[251] Hence, except where vested rights are involved, this case now is probably of only historical importance.

Springs constituting the source of a creek were held subject to appropriative rights established on the creek, even though waters from the springs flowed underground in unknown courses part of the way to the creek.[252] In 1913 the supreme court stated, "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 watercourse, the source of which is a spring."[253]

Notwithstanding statements in some of the earlier cases concerning sources of spring waters and rights to use springs from which water does not flow, there seems to be no question that the waters of springs in Nevada are now governed by the appropriation doctrine, regardless of whether or not they feed watercourses.

New Mexico

In an early case, a lower appropriator of the flow of springs fed by an underground stream was protected against interference with water in a marsh which was shown to be a part of the stream. The court considered the law clear that. "A subterranean stream which supplies a spring with water, cannot be diverted by the proprietor above, for the mere purpose of appropriating the water to his own use * * *."[254]

As against an attempted appropriation under the statute, the New Mexico Supreme Court held in *Vanderwork* v. *Hewes & Dean* that seepage or spring water appearing on the surface from an unknown source, which did not flow upon the premises in a defined stream, belonged to the landowner.[255]

In 1951, the supreme court again held in *Burgett* v. *Calentine* that waters from springs which do not flow in a natural channel, but sink in the soil, are

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[249] *Robison* v. *Mathis,* 49 Nev. 35, 43-44, 234 Pac. 690 (1925).
[250] *Mosier* v. *Caldwell,* 7 Nev. 363, 366-367 (1872).
[251] Nev. Rev. Stat. § § 533.025 and .030 (Supp. 1969).
[252] *Strait* v. *Brown,* 16 Nev. 317, 323-324 (1881).
[253] *Campbell* v. *Goldfield Consol. Water Co.,* 36 Nev. 458, 462, 136 Pac. 976 (1913).
[254] *Kenney* v. *Carillo,* 2 N. Mex. 480, 495-496 (1883).
[255] *Vanderwork* v. *Hewes & Dean,* 15 N. Mex. 439, 445-449, 110 Pac. 567 (1910).

not subject to appropriation.[256] "The law of appropriating water does not apply to springs which do not have a well defined channel through which the water can flow." The waters of the small springs in litigation, which did not flow from the tract but sank into the ground, were not included within the constitutional and statutory declarations of appropriable waters. Such waters, under the holding in the *Vanderwork* case belong to the owner of the land upon which the springs occur. "However," continued the supreme court in the *Burgett* case, "if the water rises to the surface and thereafter flows in a stream so as to form a definite channel, it may be appropriated."[257]

The springs in the *Burgett* case were situated on land owned by the State of New Mexico. Title to this land had been conveyed to the State by the United States after the first purported appropriation of the spring waters by a settler on adjacent public land for use thereon. This settler was predecessor in title of the plaintiffs. After stating the general principle that in the absence of a provision making the State subject to the statute of limitations, no title by adverse possession can be acquired against either the State or the United States, no matter how long continued, the court held, "Thus, the mere fact that the plaintiffs and their predecessors in title made improvements on land owned by the United States and later by the State and thereafter used the water of the springs in question, continously for over sixty years, did not vest them with an easement."[258]

In its opinion in this case, the supreme court concentrated most of its attention on two general principles: (1) the law of appropriation of spring waters, and (2) nonacquisition of an easement by adverse possession against either the State or Federal government. The court mentioned neither the Congressional acts of 1866, 1870, and 1877,[259] nor the interesting question of their applicability or nonapplicability to Hunter's appropriation of these spring waters while the land on which they occurred was (1) still part of the public domain and (2) had become so before the United States granted it to the State of New Mexico. Possibly the court felt that the 1866 Congressional requirement concerning vested and accrued water rights recognized "by the local customs, laws, and decisions of courts" was inapplicable here because the State had not then committed itself on the question of appropriating spring water and, when it did, held that spring waters that sank in the soil from which they rose were not subject to appropriation. Notwithstanding this, some comment would have been preferable.

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[256] *Burgett* v. *Calentine,* 56 N. Mex. 194, 196-197, 242 Pac. (2d) 276 (1951).

[257] 56 N. Mex. at 196. The only New Mexico case cited was *Keeney* v. *Carillo,* 2 New Mex. 480 (1883).

[258] 56 N. Mex. at 197.

[259] 14 Stat. 253, § 9 (1866); 16 Stat. 218 (1870); 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964).

North Dakota

No reported North Dakota court decisions or statutes relating expressly to spring waters have come to the attention of the author. A section of the North Dakota statutes provides in part that: "Waters on the surface of the earth excluding diffused surface waters but including surface waters whether flowing in well defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes * * * belong to the public and are subject to appropriation for beneficial use * * *."[260] In view of this language and since both riparian and appropriation doctrines have been recognized in North Dakota, it may be inferred that: (1) rights to use natural springs which form the source of watercourses will be governed by laws pertaining to watercourses, and (2) specifically, appropriations of the flow of such springs may be perfected, subject to whatever riparian or other rights may have vested along the watercourse as a whole.

The riparian doctrine has been recognized in several court decisions in North Dakota, but without involving any relationship to the appropriation doctrine.[261] The legislature likewise recognized riparianism from time to time, including a major declaration as to what are the "several and reciprocal rights of a riparian owner, other than a municipal corporation," without mentioning appropriators.[262] But, in 1963, all mention of riparianism was deleted by the legislature and other provisions were substituted.[263]

Oklahoma

No court decisions on the ownership or appropriability of spring waters in Oklahoma have come to the attention of the author.

A statute relating to ownership of water and use of running water provides that water running in a definite stream, formed by nature over or under the surface, may be used by the landowner for domestic purposes 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, as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the State, as provided by law * * *." It is further provided that this is not to prevent the landowner from damming or otherwise using the streambed for collecting or storing water under certain limiting conditions.[264]

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[260] N. Dak. Cent. Code Ann. § 61-01-01 (1960).

[261] *Sturr* v. *Beck*, 6 Dak. 71, 50 N.W. 486 (1888), affirmed, 133 U.S. 541 (1890); *Bigelow* v. *Draper*, 6 N. Dak. 152, 69 N.W. 570 (1896); *Brignall* v. *Hannah*, 34 N. Dak. 174, 157 N.W. 1042 (1916); *McDonough* v. *Russell-Miller Mill. Co.*, 38 N. Dak. 465, 165 N.W. 504 (1917); *Johnson* v. *Armour & Co.*, 69 N. Dak. 769, 291 N.W. 113 (1940); *Ozark-Mahoning Co.* v. *State*, 76 N. Dak. 464, 37 N.W. (2d) 488 (1949).

[262] N. Dak. Cent. Ann. § 61-01-01.1 (1960).

[263] N. Dak. Laws 1963, ch. 419, § 1. See chapter 6, at note 258 *et seq.*

[264] Okla. Stat. Ann. tit. 60, § 60 (Supp. 1970).

Oregon

Definition of spring.—The Oregon Supreme Court has said, "A spring, for the purposes of this discussion, may be defined as a place where water issues naturally from the surface of the earth."[265]

Conveyance of title.—Deeds purporting to convey rights to use spring waters located on one's land and not flowing naturally therefrom have been held valid, the deed constituting a severance of the water from the land.[266]

Agreements for the use of spring water were involved in some cases.[267] In at least two decisions, the conditions of a revocable license were explained;[268] others explained the conditions for creation of an easement.[269]

Statutes.—Public ownership of waters: "All water within the State from all sources of water supply belongs to the public."[270]

Right of appropriation:[271]

> Subject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of water.

Waste, spring, and seepage waters:[272]

> All ditches now or hereafter constructed, for the purpose of utilizing waste, spring, or seepage waters, shall be governed by the same laws relating to priority of rights 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.

Spring not flowing from land on which located.—The first reported decision of the Oregon Supreme Court on rights to use water was to the effect that the

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[265] *Beisell* v. *Wood,* 182 Oreg. 66, 71, 185 Pac. (2d) 570 (1947).

[266] *Messinger* v. *Woodcock,* 159 Oreg. 435, 436, 444-445, 80 Pac. (2d) 895 (1938); *Beisell* v. *Wood,* 182 Oreg. 66, 71-73, 185 Pac. (2d) 570 (1947). Likewise, a deed to a portion of water from a spring fed by a definite natural stream. *Hayes* v. *Adams,* 109 Oreg. 51, 60-61, 218 Pac. 933 (1923). See *Skinner* v. *Silver,* 158 Oreg. 81, 96, 100, 75 Pac. (2d) 21 (1938).

[267] See, e.g., *Klamath Dev. Co.* v. *Lewis,* 136 Oreg. 445, 450, 299 Pac. 705 (1931).

[268] *David* v. *Brokaw,* 121 Oreg. 591, 596-601, 256 Pac. 186 (1927); *Shepard* v. *Purvine,* 196 Oreg. 348, 248 Pac. (2d) 352 (1952).

[269] *Dressler* v. *Isaacs,* 217 Oreg. 586, 343 Pac. (2d) 714 (1959), attempted appeal dismissed, 236 Oreg. 269, 387 Pac. (2d) 364 (1963); *Luckey* v. *Deatsman,* 217 Oreg. 628, 343 Pac. (2d) 723 (1959); *Fitzstephens* v. *Watson,* 218 Oreg. 185, 344 Pac. (2d) 221 (1959).

[270] Oreg. Rev. Stat. § 537.110 (Supp. 1969).

[271] *Id.* § 537.120.

[272] *Id.* § 537.800.

owner of land on which a spring arose had no recourse against the owner of another tract of land who diverted percolating water from his land and thereby prevented it from flowing to the spring of the first-named owner; that is, the owner of a spring fed by percolating water or by water flowing through the soil in unknown and undefined channels had no claim upon the sources of the spring.[273] The widely recognized rule that such waters are a constituent part of the land and belong to its owner, with the right to make any reasonable use thereof even though such use prevents the flow of percolating waters from his neighbor's spring, was held not to extend to water which flows underground in a constant stream in a known and well-defined natural channel.[274] Such waters constitute a natural watercourse. A spring fed thereby is entitled to protection to the same extent as though the source of supply were a watercourse on the surface.

The Oregon Supreme Court stated in an early case that when a spring furnishes a stream of water that rises to the surface, the right of appropriation attaches. When, however, as in the instant case, the admitted quantity is so insignificant that a surface stream is impossible, use of the water belongs to the person upon whose land it first arises. Referring to the statute and quoting the landowner-preference clause, the court continued:[275]

> The clause adverted to is, in our opinion, a grant of the exclusive right to the use of the unappropriated water specified to the person upon whose land such water first arises, and was probably a recognition of a practice prevailing in the arid region of the United States, that the title to lands containing water issuing from the sources mentioned had been secured, so that the water might be used for domestic and stock purposes, and that the quantity indicated did not appear to the legislative assembly to be more than was reasonably necessary to supply such use.

It would seem reasonably likely that the court, in stating these reasons for the statutory preference, was thinking of small flows of water useful primarily for domestic or stock purposes, and that the landowner preference probably would not apply to a spring furnishing a stream flowing away from the premises.

In a later case, the supreme court held that it was perfectly competent for the legislature to avoid confusion by providing that the owner of the land on which the seepage or spring waters first arose should have the right to use such waters.[276] In applying the landowner preference to the use of these small springs, the supreme court has stated that landowners "own the spring," and

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[273] *Taylor* v. *Welch*, 6 Oreg. 198, 200-201 (1876).

[274] *Hayes* v. *Adams*, 109 Oreg. 51, 58-60, 218 Pac. 933 (1923). See *Bull* v. *Siegrist*, 169 Oreg. 180, 186, 126 Pac. (2d) 832 (1942).

[275] *Morrison* v. *Officer*, 48 Oreg. 569, 570, 87 Pac. 896 (1906).

[276] *Skinner* v. *Silver*, 158 Oreg. 81, 97-98, 75 Pac. (2d) 21 (1938).

that the spring and its waters are their exclusive property, "a part and parcel of the land itself."[277]

Thus, the water of such a spring is not subject to appropriation by any person other than the landowner.[278] A permit received by an outsider from the State Engineer is of no avail, because the power to appropriate private property does not reside in the law-making body of the State.[279] However, the supreme court has taken notice that landowners themselves may sometimes appropriate waters of a spring arising on their own lands. In one such case, the court said:[280]

> As we view it, the filing upon the water of the springs before the state engineer, and obtaining a permit and certificate, would have only the effect of protecting the right of the owner of the land to the water in case there should be an increase of the flow from the springs so as to pass from the land in question to other lands. In such case it is possible that it would be a protection to the owner of the lands and springs after the water had escaped from the land. The owner of the land making an application for and obtaining a permit and certificate of water right would not separate the water or the right thereto from the land.

In 1947, the Oregon Supreme Court summed up the principles relating to the use of water of such a spring as follows:[281]

> The water of the spring involved in the present case does not pass from the tract of land upon which it arises, or become the source of any watercourse. It merely seeps or flows directly into a small marsh upon the same tract, having no perceptible outlet. Such a spring is not subject to appropriation by any person other than the owner of such land. It is private water, a part of the land upon which it arises, and belongs to the owner of that land.

Spring tributary to watercourse.—Where a spring is not only tributary to a watercourse, but flows into a well-defined channel, the right of the prior appropriator of the watercourse is paramount to that of a subsequent use, or right of use, by the owner of land on which the spring rises.[282] Such a spring is

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[277] *Henrici* v. *Paulson,* 128 Oreg. 514, 515, 274 Pac. 314 (1929); *Henrici* v. *Paulson,* 134 Oreg. 222, 224, 293 Pac. 424 (1930); *Skinner* v. *Silver,* 158 Oreg. 81, 94, 96, 75 Pac. (2d) 21 (1938).

[278] *Klamath Dev. Co.* v. *Lewis,* 136 Oreg. 445, 450, 299 Pac. 705 (1931); *Messinger* v. *Woodcock,* 159 Oreg. 435, 444, 80 Pac. (2d) 895 (1938).

[279] *Henrici* v. *Paulson,* 134 Oreg. 222, 224, 293 Pac. 424 (1930); *Klamath Dev. Co.* v. *Lewis,* 136 Oreg. 445, 450, 299 Pac. 705 (1931).

[280] *Skinner* v. *Silver,* 158 Oreg. 81, 97, 75 Pac. (2d) 21 (1938).

[281] *Beisell* v. *Wood,* 182 Oreg. 66, 71, 185 Pac. (2d) 570 (1947).

[282] *Low* v. *Schaffer,* 24 Oreg. 239, 244, 33 Pac. 678 (1893); *Morrison* v. *Officer,* 48 Oreg. 569, 570, 87 Pac. 896 (1906); *Henrici* v. *Paulson,* 134 Oreg. 222, 224, 293 Pac. 424 (1930). See also *Cleaver* v. *Judd,* 238 Oreg. 266, 272, 393 Pac. (2d) 196 (1964).

a part of the stream for the purpose of determining rights of use. In 1900, the court said, "If such springs have a well-defined channel which conducts the water into a stream, an appropriation of the waters of the latter is *ipso facto* an application of the waters of the springs to a beneficial use.[283] Later the court said, "If the water in these springs was of sufficient quantity to rise to the surface and to flow out in a definite channel with a tendency to regularity, it was subject to appropriation."[284]

However, even though spring water flowing away in a definite stream is subject to appropriation, the holder of a permit to appropriate such water has no authority to trespass upon the land of the person on whose land the spring arises.[285] Such trespasser has no interest in or to the waters arising upon the lands trespassed upon, by virtue of the permit or certificate of water rights acquired through the State administrative office.

In the 1900 case of *Boyce* v. *Cupper,*[286] the supreme court agreed with the principle governing nontributary spring waters—that water seeping into the soil from a spring having no perceptible outlet becomes percolating water, and continues to be the property of the landowner, so long as it remains a part of the soil with which it became intermingled. But the court emphasized that when such water reaches the channel of a creek, it ceases to be the property of the landowner, because the water has passed beyond his power of ordinary control.

In the course of this study of spring water rights, all decisions of the Oregon Supreme Court consulted on the subject, in which the landowner preference was invoked, related to small springs that did not flow from the land of origin. In no case was the landowner preference extended to a spring found to be tributary to a watercourse.

Spring on the public domain.—Necessarily, the landowner preference is not applicable to a spring on the public domain, regardless of size, because the United States, owner of the public domain, granted the right to use surplus water above vested appropriative rights (together with the water of all sources of water supply upon the public lands and not navigable) to the appropriation and use of the public.[287]

In an early case concerning an appropriation of water of a spring on the public domain, not forming a part of a watercourse, the Oregon Supreme Court referred to the permission granted by Congress[288] to appropriate waters from their natural source on the public domain and to continue such diversion and use as against subsequent settlers upon the land. The court stated that "it is

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[283] *Boyce* v. *Cupper,* 37 Oreg. 256, 261, 61 Pac. 642 (1900).
[284] *Hildebrandt* v. *Montgomery,* 113 Oreg. 687, 690, 234 Pac. 267 (1925).
[285] *Minton* v. *Coast Property Corp.,* 151 Oreg. 208, 213, 216-217, 46 Pac. (2d) 1029 (1935).
[286] *Boyce* v. *Cupper,* 37 Oreg. 256, 61 Pac. 642 (1900).
[287] 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964).
[288] 14 Stat. 253 (1866); 16 Stat. 218 (1870).

unimportant whether the diversion is from a natural watercourse, or a spring, or a well formed by percolation. Whatever doubt may exist elsewhere upon the question, it would seem that the right to make such an appropriation of waste, spring, or seepage water finds recognition in the legislation of this state."[289]

The foregoing decision was distinguished in a later decision of the Oregon court as obviously dealing only with claims of water rights on the public domain, and not relating to a spring on land in which the title in fee simple is in private ownership.[290]

The grantee of public land takes title subject to any vested and accrued water rights to which the tract in question has been subjected, including rights to use springs rising on such lands and contributing to the water supply of a watercourse.[291]

South Dakota

In 1955, the South Dakota Legislature repealed important sections of its water rights law, substituting, in most instances, new provisions for surface and ground waters.[292] The validity of these 1955 statutes was sustained by the South Dakota Supreme Court.[293]

The general State policy in the 1955 statutes provided, among other things:

"[A]ll water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation in the manner provided by law."[294]

"[T]he people of the state have a paramount interest in the use of all the water of the state and * * * the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection."[295]

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[289] *Brosnan* v. *Harris,* 39 Oreg. 148, 151, 65 Pac. 867 (1901). The court thereupon referred to the act of 1893 [now Oreg. Rev. Stat. § 537.800 (Supp. 1969)] concerning priorities as among ditches constructed to utilize waste, spring, or seepage waters, but did not quote the landowner preference.

[290] *Henrici* v. *Paulson,* 134 Oreg. 222, 226, 293 Pac. 424 (1930). Plaintiffs had relied on the opinion in *Brosman* v. *Harris,* 39 Oreg. 148, 65 Pac. 867 (1901), but the supreme court reminded them that that case was a suit to restrain the diversion and interference with water of a certain spring located upon unoccupied public land of the United States.

[291] *Hildebrandt* v. *Montgomery,* 113 Oreg. 687, 692-693, 234 Pac. 267 (1925).

[292] S. Dak. Laws 1955, chs. 430 and 431, Comp. Laws Ann. chs. 46-1 to 46-8 (1967).

[293] *Belle Fourche Irr. Dist.* v. *Smiley,* 176 N.W. (2d) 239 (S. Dak. 1970); *Knight* v. *Grimes,* 80 S. Dak. 517, 127 N.W. (2d) 708 (1964).

For some early decisions of the South Dakota Supreme Court relating to spring waters, see *Metcalf* v. *Nelson,* 8 S. Dak. 87, 65 N.W. 911 (1895); *Farwell* v. *Sturgis Water Co.,* 10 S. Dak. 421, 73 N.W. 916 (1898); *Madison* v. *Rapid City,* 61 S. Dak. 83, 246 N.W. 283 (1932).

[294] S. Dak. Comp. Laws Ann. § 46-1-3 (1967).

[295] *Id.* § 46-1-1.

"[P]rotection of the public interest in the development of the water resources of the state is of vital concern to the people of the state and * * * the state shall determine in what way the water of the state, both surface and underground, should be developed for the greatest public benefit."[296]

Whatever may have gone before, the current legislative interest in the law of *spring water rights* is declared as follows:[297]

> 46-5-1 * * * A landowner 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 as provided by § 46-5-2.
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> 46-5-2 * * * 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 purposes has been secured.
>
> 46-5-3 * * * Nothing in § 46-5-1 and § 46-5-2 shall 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 by law for the appropriation of waters.

Texas

Property characteristics.—A right created by a grant to enter upon land and to take the waters of a spring or well located thereon amounts to an interest in real estate,[298] whether or not held to be an easement (as it is in some States).

A spring that neither contributes to the flow of a watercourse nor is connected with a subsurface stream flowing in a defined channel is the exclusive property of the landowner. He may grant a right of access to the spring. He has, in addition, all other rights incident to it that one might have with respect to any other species of property.[299]

Spring tributary to watercourse.—The owner of a tract of land on which a spring arises and from which the spring water flows in the channel of a stream is not the absolute owner of all the spring water.[300] The opinion in a case decided during the reconstruction period treated the head spring of a stream as a part of the stream and accorded to the owner of the land containing the spring no special rights—only the right of a riparian owner to make reasonable

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[296] *Id.* § 46-1-2.
[297] S. Dak. Comp. Laws. Ann. § § 46-5-1 to 46-5-3 (1967).
[298] *Evans* v. *Ropte,* 128 Tex. 75, 79, 96 S.W. (2d) 973 (1936).
[299] *Texas Co.* v. *Burkett,* 117 Tex. 16, 28-29, 296 S.W. 273 (1927).
[300] *Cluck* v. *Houston & T. C. R.R.,* 34 Tex. Civ. App. 452, 453, 79 S.W. 80 (1904).

use of the water for irrigation as against similar rights of owners of land contiguous to the stream flowing from the spring.[301]

In the opinion written in the important riparian case of *Watkins Land Company* v. *Clements*, it seems implicit that the owner of the head spring site has riparian rights, and only such rights.[302]

Spring not flowing from land on which located.—A court of civil appeals has said, "It must certainly be held that the owner of lands owns also all ordinary springs and waters arising thereon."[303]

In a case in which the evidence failed to show whether springs fed by percolating waters issuing from the banks of a stream were of value to the riparian owners or added perceptibly to the general volume of water in the bed of the stream, the Texas Supreme Court assumed that the owner of the land from which the springs issued had the right to grant access to them and use their waters for any purpose on either riparian or nonriparian land. Insofar as the record disclosed, they were neither surface water nor subsurface streams with definite channels, nor riparian water in any form.[304]

Sources of spring water.—In *Cantwell* v. *Zinser*, the court said that the owner of land has the right to use all percolating water that he can capture with the aid of wells on his land—a right that is not lessened by the fact that the percolating water, if allowed to take its natural course, feeds a spring on a neighbor's adjoining land.[305]

All ground waters are *presumed* to be percolating; hence proof must be shown if they are to be held to be waters of a definite underground stream. In *Pecos County Water Conservation and Irrigation District Number 1* v. *Williams* the court said it seemed to be well decided that the mere fact that the wells of one man dried up springs or wells of another neither proves nor indicates the existence of a well-defined channel of ground water. Furthermore, the court held it to be clear that an appropriation of waters of a spring could extend only to waters at and after their emergence from the ground, and that the same is true of riparian rights.[306]

Neither *Cantwell* v. *Zinser* nor the *Pecos County District* case contains a square ruling that would be applied if the proof were to establish positively that pumping from wells intercepts the flow of water in a definite subterranean

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[301] *Fleming* v. *Davis*, 37 Tex. 173, 194-201 (Semicolon Ct. 1872).

[302] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585-590, 86 S.W. 733 (1905). See *Sun Co.* v. *Gibson*, 295 Fed. 118, 119-120 (5th Cir. 1923). See also *Great American Dev. Co.* v. *Smith*, 303 S.W. (2d) 861, 862, 864 (Tex. Civ. App. 1957).

[303] *Toyaho Creek Irr. Co.* v. *Hutchins*, 21 Tex. Civ. App. 274, 282, 52 S.W. 101 (1899, error refused).

[304] *Texas Co.* v. *Burkett*, 117 Tex. 16, 28-29, 296 S.W. 273 (1927).

[305] *Cantwell* v. *Zinser*, 208 S.W. (2d) 577, 579 (Tex. Civ. App. 1948). See *Corpus Christi* v. *Pleasanton*, 154 Tex. 289, 294, 276 S.W. (2d) 798 (1955).

[306] *Pecos County W. C. & I. Dist. No. 1* v. *Williams*, 271 S.W. (2d) 503, 506-507 (Tex. Civ. App. 1954, error refused n.r.e.).

channel that feeds springs on a neighbor's land, to the substantial impairment of the latter. However, both decisions recognize clearly that if and when it becomes necessary to decide the issue, in fixing the rights of an upper owner with respect to ground water moving through his land en route to his neighbor's springs, a distinction *may* have to be made between percolating waters and definite underground streams.

Utah

Definition.—"Springs may be defined as those places where water issues naturally from the surface of the earth."[307]

Conveyance of title.—In a case brought to quiet title to shares of stock in an irrigation company, the water being supplied by springs, the evidence was held sufficient to overcome the statutory presumption that water rights represented by shares of stock in an irrigation company were not appurtenant to the land.[308]

Rights of use.—(1) Appropriation. All unappropriated water in Utah has been declared public property;[309] hence, the exclusive manner of acquiring the right to use spring waters is by filing an application in the office of the State Engineer.[310] Appropriations of spring water prior to 1903 could be accomplished by merely diverting the spring water and using it beneficially.[311] A user who has appropriated a spring for only a portion of the year has no cause to complain about the subsequent appropriation of the spring waters for that portion of the year when he has no rights.[312]

(2) Stockwatering from springs. In *Adams* v. *Portage Irrigation, Reservoir & Power Company*,[313] the Utah Supreme Court concluded that stockmen who had watered their sheep from springs were entitled to have this right protected from other appropriators from these sources. The court also stated, though, that in order to perfect an appropriation of water, there must be a diversion of the water by the efforts of man; in consideration of the holding in the case, this latter statement is probably *dictum*. In a recent decision, the supreme court confirmed a lower court ruling that an appropriation had not been accomplished by allowing stock to drink from a waterhole, but did not repudiate the concept announced in the *Adams* case.[314]

Spring located on private property.—Prior to 1935, the rule recognized by

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[307] *Holman* v. *Christensen*, 73 Utah 389, 397, 274 Pac. 457 (1929).
[308] *Brimm* v. *Cache Valley Banking Co.*, 2 Utah (2d) 93, 269 (2d) 859 (1954).
[309] Utah Code Ann. § 73-1-1 (1968).
[310] *Smith* v. *Sanders*, 112 Utah 517, 520, 189 Pac. (2d) 701 (1948). See also *Adams* v. *Portage Irr., Res. & Power Co.*, 95 Utah 1, 72 Pac. (2d) 648 (1937); *Lehi Irr. Co.* v. *Jones*, 115 Utah 136, 202 Pac. (2d) 892 (1949).
[311] *Patterson* v. *Ryan*, 37 Utah 410, 108 Pac. 1118 (1910).
[312] *Cleary* v. *Daniels*, 50 Utah 494, 501, 167 Pac. 820 (1917).
[313] *Adams* v. *Portage Irr., Res. & Power Co.*, 95 Utah 1, 72 Pac. (2d) 648 (1937).
[314] *Cassity* v. *Castagno*, 10 Utah (2d) 16, 347 (2d) 834 (1959).

the Utah courts was that a spring arising on private property was owned by the owner of the soil and not subject to appropriation, even though the water flowed into a natural channel.[315] However, legislation in 1935 made these waters subject to the appropriation doctrine.[316]

A spring on private property, producing water in excess of existing rights, is subject to appropriation; and the applicant is entitled to obtain a right of way from the landowner in order to proceed with his appropriation.[317] An application to appropriate water was held not void where the applicant, in good faith, trespassed upon the lands of another to appropriate the surplus waters of a spring in the belief that the land was part of the public domain.[318]

Spring on the public domain.—Prior to 1903, a right to spring water located on the public domain could be established by simply diverting the water and putting it to beneficial use, and could be acquired even by a trespasser if he had taken possession of the property.[319] It was not necessary to own the land on which the spring was located to acquire a water right from the spring located thereon.[320] The person who subsequently acquired the property where the spring was located took it subject to existing rights.[321] An acquisition of title to public lands does not vest the owner with any title to the springs located on such lands.

Since 1903, rights to these spring waters can be established only by means of a valid appropriation. Until this is accomplished, the general public has equal rights to use the spring.[322]

Furthermore, in order to perfect a right to waters of a spring located on the public domain, the user must show that he has appropriated the water to his exclusive benefit. His use on public lands in conjunction with the public at large is not sufficient to vest the water right in an individual.[323]

Spring tributary to a watercourse.—Springs supplying a natural stream are a part of the stream; the prior appropriator is entitled to the tributary spring waters.

> Should it develop upon the taking of further evidence that there are springs and seeps of water arising in the bed of the reservoir

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[315] *Willow Creek Irr. Co.* v. *Michaelson,* 21 Utah 248, 60 Pac. 943 (1900); *Peterson* v. *Eureka Hill Min. Co.,* 53 Utah 70, 176 Pac. 729 (1918); *Deseret Live Stock Co.* v. *Hooppiania,* 66 Utah 25, 38, 239 Pac. 479 (1925).

[316] Utah Laws 1935, ch. 105, Code Ann. § 73-3-1 (1968).

[317] *Dalton* v. *Wadley,* 11 Utah (2d) 84, 355 Pac. (2d) 69 (1960).

[318] *Riordan* v. *Westwood,* 115 Utah 215, 232, 203 Pac. (2d) 922 (1949).

[319] *Patterson* v. *Ryan,* 37 Utah 410, 108 Pac. 1118 (1910).

[320] *Munsee* v. *McKellar,* 39 Utah 282, 116 Pac. 1024 (1911).

[321] *Holman* v. *Christensen,* 73 Utah 389, 395, 274 Pac. 457 (1929); *Thomas* v. *Butler,* 77 Utah 402, 276 Pac. 597 (1931); *Cleary* v. *Daniels,* 50 Utah 494, 167 Pac. 820 (1917).

[322] *Deseret Livestock Co.* v. *Sharp,* 123 Utah 353, 360, 259 Pac. (2d) 607 (1953).

[323] *Robinson* v. *Schoenfeld,* 62 Utah 233, 218 Pac. 1041 (1923); *Patterson* v. *Ryan,* 37 Utah 410, 108 Pac. 1118 (1910).

> that find their way into the natural water channel, this water, if flowing in any substantial amount, should be awarded and decreed to the Nebekers as tributary to the main stream appropriated and used by them.[324]

An appropriator of water from a stream is entitled to change his point of diversion from the stream to a spring which is tributary to the stream, provided that vested rights are not thereby impaired.[325]

Developed spring water.—Where "all of the evidence definitely without dispute indicates that by tunneling and improving the diversion system the flow of water from these springs into the system can be greatly increased," an application to appropriate the quantity of water developed will be approved.[326] The party who claims to have developed additional water has the burden of proving his claim.[327]

Source of spring water.—(1) Spring supplied by definite underground stream. Since streams flowing in defined subterranean watercourses have always been governed by the law of watercourses, an appropriator of a spring supplied by water flowing in a known and defined underground stream acquired a right to this source of supply as a part of his appropriation of the spring.[328]

(2) Spring supplied by percolating water. In the early part of the 20th century, the rights of the prior appropriator extended to percolating waters supplying a spring, if the land on which the spring was located was part of the *public domain* at the time of the appropriation.[329] Springs on *private land* supplied by percolating water were considered, prior to 1935, as owned by the property owner solely by virtue of his ownership of the land. "The waters of the springs are therefore percolating waters and if such springs are located on private lands the waters arising therefrom are not subject to appropriation."[330]

In 1935, the legislature amended sections of the State water rights laws to declare that all waters in the State, whether above or under the ground, are the property of the public, subject to all existing rights, and that rights to use

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[324] *Bastian* v. *Nebeker,* 49 Utah 390, 401, 163 Pac. 1092 (1916). See also *Sigurd City* v. *State,* 105 Utah 278, 142 Pac. (2d) 154 (1943); *Yates* v. *Newton,* 59 Utah 105, 202 Pac. 208 (1921).

[325] *Salt Lake City* v. *Boundary Springs Water Users Assn.,* 2 Utah (2d) 141, 270 Pac. (2d) 453 (1954).

[326] *Bullock* v. *Tracy,* 4 Utah (2d) 370, 374-375, 294 Pac. (2d) 707 (1956). See also *Riordan* v. *Westwood,* 115 Utah 215, 203 Pac. (2d) 922 (1949).

[327] *Mountain Lake Min. Co.* v. *Midway Irr. Co.,* 47 Utah 346, 360, 149 Pac. 929 (1915). See also *Peterson* v. *Wood,* 71 Utah 77, 85, 262 Pac. 828 (1927); *Silver King Consol. Min. Co.* v. *Sutton,* 85 Utah 297, 306, 39 Pac. (2d) 682 (1934).

[328] *Whitmore* v. *Utah Fuel Co.,* 26 Utah 488, 73 Pac. 764 (1903). See also *Howcroft* v. *Union & Jordan Irr. Co.,* 25 Utah 311, 71 Pac. 487 (1903).

[329] *Peterson* v. *Wood,* 71 Utah 77, 262 Pac. 828 (1927); *Stookey* v. *Green,* 53 Utah 311, 178 Pac. 586 (1919).

[330] *Deseret Live Stock Co.* v. *Hooppiania,* 66 Utah 25, 38, 239 Pac. 479 (1925).

unappropriated public waters may be acquired only by first applying to the State Engineer for a permit to make such appropriation.[331]

Loss of spring water rights.—(1) Prescription. Originally, the right to the use of spring water in Utah could be lost by prescription.[332] In 1939, however, one of the amendments to the State water rights statutes provided that: "No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."[333]

(2) Statutory forfeiture. An appropriator of spring water who fails to exercise his right for the 5-year period prescribed by the statute[334] forfeits his right by his nonuse. This concept is based upon the physical nonuse of the water, and it does not require any intent on the part of the owner to forsake his right.[335]

(3) Abandonment. In order to find that the owner has abandoned his right to use spring waters, it must be demonstrated that in addition to nonuse of the water there was an intent to relinquish the right.[336] The party who asserts that a right has been abandoned has the burden of proving that there was in fact an intentional abandonment.[337]

(4) Estoppel. A party is estopped to assert that he has rights to a spring where he stands by while another, through considerable expense and labor, develops the flow of the spring. "It is elementary that he who fails to assert his alleged rights, when in good faith he should have done so, is estopped from afterwards asserting the same."[338]

Washington

Statutes.—Subject to existing rights, all waters within the State belong to the public, and any right thereto or to the use thereof may be acquired only by appropriation for a beneficial use in the manner provided by the statute and not otherwise.[339]

A statute enacted in 1890,[340] and repealed in the enactment of the water code in 1917,[341] had provided that ditches for the utilization of waste, seepage, and spring waters should be governed by the same laws as those

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[331] Utah Laws 1935, ch. 105, Code Ann. § § 73-1-1 and 73-3-1 (1968).

[332] *Hammond* v. *Johnson,* 94 Utah 20, 34, 66 Pac. (2d) 894 (1937); *Adams* v. *Portage Irr., Res. & Power Co.,* 95 Utah 1, 72 Pac. (2d) 648 (1937).

[333] Utah Code Ann. § 73-3-1 (1968).

[334] *Id.* § 73-1-4.

[335] *Deseret Live Stock Co.* v. *Hooppiania,* 66 Utah 25, 239 Pac. 479 (1925).

[336] *Promontory Ranch Co.* v. *Argile,* 28 Utah 398, 407, 79 Pac. 47 (1904); *Gill* v. *Malan,* 29 Utah 431, 82 Pac. 471 (1905).

[337] *Dalton* v. *Wadley,* 11 Utah (2d) 84, 355 Pac. (2d) 69 (1960).

[338] *Orient Min. Co.* v. *Freckelton,* 27 Utah 125, 74 Pac. 652 (1903).

[339] Wash. Rev. Code § 90.03.010 (Supp. 1961).

[340] Wash. Laws 1889-90, § 15, p. 710.

[341] Wash. Laws 1917, ch. 117, § 47, p. 468.

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.

Spring source of natural watercourse.—It was said in some of the early decisions that water from a spring which forms a natural watercourse is subject to appropriation, since such a spring is part and parcel of the stream.[342] Such a watercourse is established where there is a substantial flow from the spring in a defined stream running in a definite direction for a certain distance, even though the water then disappears into the ground; and the fact that beneficial use could be and is being made should be considered in determining the appropriability of the water.[343]

It was also held in the early decisions that a watercourse originating from a spring was subject to the riparian doctrine.[344] The fact that water originates on another's land was held not to defeat the rights of the lower landowner; and that such a vested riparian right, actually exercised, could not be divested by a subsequent statute[345] giving the prior right to spring waters to the landowner.[346]

In considering the foregoing cases, it is important to note that the riparian doctrine in Washington was modified in the 1920's by requiring the riparian owner to show with reasonable certainty, as against the claim of an appropriator, that either at present or within the near future, he will use the water for beneficial purposes.[347] During the same period, the Washington Supreme Court stated that "The common-law rule of riparian rights has been stripped of some of its rigors,"[348] and that "For years past, the trend of our decisions and the tenor of our legislation have been to restrict and narrow the common law of riparian rights * * *."[349]

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[342] *Geddis* v. *Parrish*, 1 Wash. 587, 21 Pac. 314 (1889); *Miller* v. *Wheeler*, 54 Wash. 429, 103 Pac. 641 (1909); *In re Ahtanum Creek*, 139 Wash. 84, 245 Pac. 758 (1926).

[343] *Allison* v. *Linn*, 139 Wash. 474, 477-478, 247 Pac. 731 (1926). The court also said, "While the formal notice of appropriation, posted by appellant's predecessors in interest at the place of diversion, may not have been authorized by law, and may not have, in itself, created a legal appropriation, yet it did give notice of claimed rights, and that fact, taken with the fact of actual appropriation, would be amply sufficient to establish appellant's rights as appropriator." See *Pays* v. *Roseburg*, 123 Wash. 82, 211 Pac. 750 (1923).

[344] See, e.g., *Geddis* v. *Parrish*, 1 Wash. 587, 21 Pac. 314 (1889).

[345] Wash. Laws 1889-90, § 15, p. 710, repealed, Laws 1917, ch. 117, § 47, p. 468.

[346] *Nielson* v. *Sponer*, 46 Wash. 14, 89 Pac. 155 (1907); *Miller* v. *Wheeler*, 54 Wash. 429, 103 Pac. 641 (1909); *Hollett* v. *Davis*, 54 Wash. 326, 103 Pac. 423 (1909).

[347] *Brown* v. *Chase*, 125 Wash. 542, 553, 217 Pac. 23 (1923); *State* v. *American Fruit Growers, Inc.*, 135 Wash. 156, 161, 237 Pac. 498 (1925). See chapter 10 at notes 227 and 526. See also chapter 10 at note 527 regarding 1967 Washington legislation pertaining to the nonuse of riparian rights.

[348] *In re Alpowa Creek*, 129 Wash. 9, 13, 224 Pac. 29 (1924).

[349] *Proctor* v. *Sim*, 134 Wash. 606, 616, 236 Pac. 114 (1925).

Spring on public land.—Under the Federal statutes, an appropriation of a spring on public land will be protected against the claims of a subsequent patentee.[350] Although, as noted above, the riparian doctrine applies in Washington to streams having their sources in springs, an appropriator may acquire a right superior to a title subsequently derived from the Government.[351]

Spring with no surface inlet or outlet.—A spring that forms a bog, with no surface inlet or outlet, is not subject to appropriation as against the landowner.[352]

New spring flowing to other land.—It was also held that 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, it was held, is not subject to appropriation; nor is it subject to the riparian doctrine unless flowing from time immemorial.[353]

Percolating water feeding spring on another's land.—In 1935, it was held by the Washington Supreme Court that percolating water feeding a spring on another's land is 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.[354]

Increase in flow of spring resulting from return water from irrigation brought from another watershed.—Such water was held to be developed water, belonging to the person responsible for the development.[355]

Loss of spring water right.—(1) Abandonment. In *Malnati* v. *Ramstead*, the defendant contended that plaintiff had abandoned the water system in controversy, basing it on two facts: Defendant interfered with the spring on his land by bulldozing a basin, which diverted the flow, whereupon to restore the sytem it was necessary for plaintiff to make a new channel for a short distance. Also, for several years, plaintiff supplemented the water supply on his property from a second spring on defendant's land. The court said: "Neither of these facts support a conclusion that plaintiff has abandoned the water system. The first was made necessary by defendant's own actions and resulted in this proceeding; the second simply supplemented or added to the existing system."[356]

(2) Adverse possession and use. In the *Malnati* case, the principle issue was acquisition of a prescriptive right by adverse possession. The supreme court declared:

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[350] 14 Stat. 253, § 9 (1866); 16 Stat. 218 (1870); 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1964).

[351] *Geddis* v. *Parrish,* 1 Wash. 587, 21 Pac. 314 (1889).

[352] *Dickey* v. *Maddux,* 48 Wash. 411, 93 Pac. 1090 (1908).

[353] *Mason* v. *Yearwood,* 58 Wash. 276, 108 Pac. 608 (1910).

[354] *Evans* v. *Seattle,* 182 Wash. 450, 47 Pac. (2d) 984 (1935).

[355] *Miller* v. *Wheeler,* 54 Wash. 429, 103 Pac. 641 (1909).

[356] *Malnati* v. *Ramstead,* 50 Wash. (2d) 105, 109, 309 Pac. (2d) 754 (1957).

> Adverse user is such use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right. Hostile use of real property by an occupant or user does not import ill will, but imports that the claimant is possessing or using it as owner, in contradistinction to possessing or using the real property in recognition of or subordinate to the title of the true owner.
>
> * * * *
>
> While it is true that the nature of the property may be a consideration in determining whether a prescriptive right therein has been acquired by open, notorious, continuous, exclusive, hostile, and adverse use, it does not follow, as a matter of law, that a prescriptive right cannot be acquired in vacant, unimproved, unused, wild, and uninhabited land. Other elements being established,
>
> > "* * * the use must at least be such as to convey to the absent owner *reasonable notice* that a claim is made in hostility to his title."[357]

The supreme court concluded that the evidence was sufficient to sustain a finding that plaintiff's use since 1914 had been both adverse and hostile and that defendant had reasonable notice of plaintiff's claim.

(3) Estoppel. The Washington Supreme Court has declared 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 lower land and makes improvements relying on the continued flow.[358]

Easement in spring.—A 1956 case involved the judicial construction of a contract providing that in the event parties should partition property owned in common on which there was a spring, each parcel carved out of the original tract should have a right to use water from the spring. Under this contract each such parcel had an easement in the spring and the right to use water therefrom, which included by necessary implication, said the court, the right to run water pipes to the spring. An additional right was granted by the contract to take water from the existing system and to repair and maintain it. However, the purchaser of part of a tract not served by the existing system thereby obtained the right to bring water from the spring to his land, which right was not governed by the terms of the agreement pertaining to the old system.[359]

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[357] 50 Wash. (2d) at 108-109, quoting from *Watson* v. *County Comm'rs of Adams County*, 38 Wash. 662, 665, 80 Pac. 201, 202 (1905). For some earlier Washington decisions on this matter, see *Mason* v. *Yearwood*, 58 Wash. 276, 108 Pac. 608 (1910); *Kiser* v. *Douglas County*, 70 Wash. 242, 126 Pac. 622 (1912); *Dontanello* v. *Gust*, 86 Wash. 268, 150 Pac. 420 (1915); *In re Ahtanum Creek*, 139 Wash. 84, 245 Pac. 758 (1926); *Dickey* v. *Maddux*, 48 Wash. 411, 93 Pac. 1090 (1908); *Church* v. *State*, 65 Wash. 50, 117 Pac. 711 (1911).

[358] *Hollett* v. *Davis*, 54 Wash. 326, 103 Pac. 423 (1909).

[359] *White* v. *Paque*, 49 Wash. (2d) 481, 303 Pac. (2d) 524 (1956).

Wyoming

The State constitution provides that waters of natural springs are the property of the State, subject to appropriation.[360]

Generally, sources of an appropriable stream entitled to protection on behalf of prior appropriators therefrom include springs that feed the stream.[361] A spring tributary to a surface stream gives no riparian rights to the owner of the land on which found, as riparian rights are not recognized in Wyoming. Regardless of the ownership of the land, such spring is subject to appropriation.[362]

However, the constitution refers only to *natural* springs. A spring developed artificially, and supplied by percolating waters, is not subject to appropriation, since it is the private property of the landowner.[363]

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[360] Wyo. Const. art. VIII, § § 1 and 3.
[361] *Ryan* v. *Tutty,* 13 Wyo. 122, 78 Pac. 661 (1904).
[362] *Moyer* v. *Preston,* 6 Wyo. 308, 44 Pac. 845 (1896).
[363] *Hunt* v. *Laramie,* 26 Wyo. 160, 181 Pac. 137 (1919).

Chapter 19

GROUND WATER RIGHTS

By William M. Champion *

CLASSIFICATION

Although geologists may not be in complete accord, the law has traditionally treated all waters appearing beneath the surface of the earth as ground waters. This arbitrary dividing line between surface and ground waters is neither readily discernable nor universally recognized in classifications such as underflow of surface streams, seepage, or waters occurring at or near a spring and forming a part thereof.

Ground water is broadly divided into: (1) definite underground streams, and (2) percolating waters. This classification has been important in applying statutory procedures and in ascertaining rights to withdraw waters in the absence of applicable statutes. However, several States have eliminated such categorizations with respect to their current procedures for appropriation of water, subject necessarily to vested rights. The water appropriation statutes of some States have purported to subject both surface and ground water sources to appropriation. States that provide for the appropriation of both surface and ground water sources, without distinguishing between percolating waters, underground streams, or other ground waters, include Alaska,[1] Kansas,[2] Nevada,[3] North Dakota,[4] and Oregon.[5] A number of these States also have provisions specifically providing for the appropriation of ground water sources, again without distinguishing between percolating waters and underground streams. These include Kansas,[6] Nevada,[7] and Oregon.[8]

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[1] Alaska Stat. §§ 46.15.010, 46.15.040(a), and 46.15.260(5) (Supp. 1966).

[2] Kans. Stat. Ann. §§ 82a-703 and -707 (1969).

[3] Nev. Rev. Stat. §§ 533.025 and .030 (Supp. 1969).

[4] N. Dak. Cent. Code Ann. § 61-01-01 (1960).

[5] Oreg. Rev. Stat. § 537.120 (Supp. 1969).

[6] Kans. Stat. Ann. § 82a-707 (1969).

[7] Nev. Rev. Stat. §§ 534.010 and .020 (Supp. 1967).

[8] Oreg. Rev. Stat. §§ 537.515 and .525 (Supp. 1969).

While the distinction between percolating waters and underground streams is not important in Colorado, important distinctions are made between tributary and non-tributary ground waters.[9]

Whether or not ground waters are artesian waters ordinarily has no bearing on basic rights to use ground water. There are, however, some special provisions applicable to such waters in a number of States, which are discussed later.[10]

DEFINITE UNDERGROUND STREAMS

Stream and Channel

Waters in definite underground streams flow within definite and ascertainable boundaries. Definite underground streams have been defined as streams that possess all the attributes of a surface body of water except location upon the surface;[11] and as "underground streams, channels * * * having reasonably ascertainable boundaries."[12] The Oregon Supreme Court defined such waters as waters that flow "underground in a constant stream in a known and well-defined natural channel, however small, but reasonably ascertainable from the surface, without excavation."[13] The Arizona Supreme Court, on the other hand, said:

> While surface indications such as trees, shrubs, bushes, and grasses growing along the course and the topographical features of the surface are the simplest and surest methods of proof, we think they are by no means exclusive. Other methods may be used, such as a series of wells or borings, tunnels, the color and character of the water, the sound of water passing underneath the earth, the interruption of the flowing of other wells on the line of the alleged subterranean stream, geologic formation, and perhaps others.[14]

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[9] See *Whitten* v. *Coit*, 153 Colo. 157, 385 Pac. (2d) 131 (1963).

[10] See "Artesian Waters," *infra.*

The foregoing and other factors bearing on the subject of classification are discussed in chapter 7 under "Waters Subject to Appropriation," in the State summaries for each of the 19 Western States in the appendix, and for selected States in chapter 20.

[11] *Pasadena* v. *Alhambra,* 180 Pac. (2d) 699, 720 (Cal. App. 1947), modified in other respects, 33 Cal. (2d) 908, 207 Pac. (2d) 17 (1949), certiorari denied, 339 U.S. 937 (1950).

[12] N. Mex. Stat. Ann. § 75-11-1 (1968).

[13] *Hayes* v. *Adams,* 109 Oreg. 51, 218 Pac. 933, 935 (1923).

[14] "But all of these, when examined, must be such as to afford clear and convincing proof to the satisfaction of a reasonable man, not only that there are subterranean waters, but that such waters have a definite bed, banks and current within the ordinary meaning of the terms as above set forth, and the evidence must establish with reasonable certainty the location of such bed and banks. 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

Burden of Proof

Whenever the classification of particular ground waters is in question, the presumption is that the water is percolating groundwater,[15] discussed in the next topic. The burden of proof is normally on the one asserting that the waters constitute a definite underground stream.[16]

In Colorado, however, the presumption is that all ground water situated in the basin or watershed of a stream is tributary to the stream. Thus, the burden of proof rests upon one asserting that the ground water is nontributary water.[17]

Rights of Use

When the existence of a definite underground stream is established, the right to use the waters of such a stream generally is governed by the laws pertaining to surface watercourses, discussed in previous chapters.

Subject to vested rights, waters in definite underground streams are subject to appropriation in most Western States.[18] In a number of States, the riparian doctrine also is recognized concurrently with the appropriation doctrine. But the degree of its recognition varies widely. In Hawaii, which recognizes ancient Hawaiian water rights and certain riparian rights, rights to use underground streams have been unsettled. Their use is subject to regulation by permit or otherwise under Hawaii's 1959 Ground Water Use Act.[19] Rights to use underground streams also are unsettled in some other Western States, notably Texas.[20] Rights to use underground streams in each of the 19 Western States are discussed in the appendix and for selected States in chapter 20.

PERCOLATING WATERS

Nature of Percolating Waters

Percolating ground water may be defined in several ways. The common law definition of percolating water is wandering drops of water, moved by gravity

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certainly does exist *somewhere. There must be certainty of location as well as of existence of the stream before it is subject to appropriation.*" *Maricopa County Municipal Water Cons. Dist. No. 1* v. *Southwest Cotton Co.*, 39 Ariz. 65, 4 Pac. (2d) 369, 377 (1931), modified in other respects, 39 Ariz. 367, 7 Pac. (2d) 254 (1932).

[15] See *Wilkening* v. *State*, 54 Wash. (2d) 692, 344 Pac. (2d) 204 (1959).

[16] *Pasadena* v. *Alhambra*, 180 Pac. (2d) 699 (Cal. App. 1947), modified, 33 Cal. (2d) 908, 207 Pac. (2d) 17 (1949), certiorari denied, 339 U.S. 937 (1950).

[17] *Safranek* v. *Town of Limon*, 123 Colo. 330, 228 Pac. (2d) 975 (1951).

[18] See, e.g., Cal. Water Code § § 1200 and 1201 (West 1956); N. Mex. Stat. Ann. § § 75-11-1 and 75-11-4 to 75-11-6 (1968); Wash. Rev. Code § § 90.44.040 and 90.44.050 (Supp. 1961).

[19] See the discussion of Hawaii in chapter 20.

[20] Hutchins, W. A., "The Texas Law of Water Rights" 560-563 (1961).

or changing conditions of humidity, which follow no particular course.[21] The second definition enlarges upon the first by including additional waters, such as those diffused through well-defined subterranean basins.[22]

In some jurisdictions, percolating waters are defined by statute.[23]

Rights of Use

Rights to the use of percolating waters rest upon one or some variation of three bases—prior appropriation, the English rule of absolute ownership, and the American rule of reasonable use. Some Western States have specifically imposed prior appropriation on percolating waters. Other States have included percolating waters within broad appropriation statutes. In some Western jurisdictions, percolating waters are subject to the basic common law rules, rather than statutory appropriation.

The English rule of absolute ownership holds that the owner of overlying lands is the absolute owner of all percolating waters thereunder. Under the rule of capture, the owner generally may withdraw as much as he desires, regardless of the effect on other wells or of the reasonableness of his use.[24] The American rule of reasonable use modifies the English rule by limiting the landowner's water use to the amount necessary for some reasonable beneficial purpose in connection with his land. Waste of water or its export for distant use are not reasonable if other overlying landowners are thereby deprived of reasonable use of the water on their lands.

The common law rules are not invariably applied in their purest form. They may be modified or qualified, thereby producing a rule such as the California rule of correlative rights.

Alaska

The definition of percolating waters is of little importance in Alaska because all surface and subsurface waters occurring in the natural state are subject to appropriation. No classifications are made by the statute.[25]

Prior to the enactment of the 1966 Water Code, a Federal district court in Alaska held that percolating waters may be used by the owner of the land as he sees fit.[26] This decision appears to be an application of the English rule of absolute use. It was a decision on a motion to dismiss in which there was no evidence of unreasonable use or allegations to that effect.

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[21] See *Los Angeles* v. *Hunter,* 156 Cal. 603, 105 Pac. 755 (1909).
[22] *Katz* v. *Walkinshaw,* 141 Cal. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).
[23] Nev. Rev. Stat. § 534.010(1)(d) (Supp. 1967).
[24] See *Acton* v. *Blundell,* 12 M. & W. 324, 152 Eng. Rep. 1223 (Ex. 1843).
[25] Alaska Stat. § 46.15.030, 46.15.040(a) and 46.15.260(5) (Supp. 1966).
[26] *Trillingham* v. *Alaska Housing Authority,* 109 Fed. Supp. 924 (D. Alaska 1953).

Arizona

The Arizona Supreme Court has consistently held that percolating waters are not subject to appropriation, but belong to owners of the soil.[27] The court has accepted the American rule of reasonable use. It has declared that an overlying owner has a right to withdraw and use percolating water even though he harms his neighbor thereby, provided the withdrawal is for the purpose of making reasonable use of the land from which the water is taken.[28] In the same case, the court specifically rejected the doctrine of correlative rights.[29] The foregoing rule is qualified to some extent by a statute on critical groundwater areas prohibiting drilling wells in designated critical areas without a permit from the State Land Department.[30]

Arizona has not defined percolating waters. Water in "definite underground channels, whether perennial or intermittent, flood, waste or surplus water" is subject to appropriation.[31] In *Bristor* v. *Cheatham*,[32] the court held that "ground water" was subject to the American rule of reasonable use, rather than to appropriation or the rule of correlative rights. This apparent contradiction suggests that all subterranean waters not described by the appropriation statute are percolating waters in Arizona.

California

Historically, the California courts applied both the English rule of absolute ownership and the American rule of reasonable use.[33]

In the original decision in *Katz* v. *Walkinshaw*,[34] the court clearly rejected the English rule. On rehearing,[35] the court reaffirmed this rejection, but modified its earlier opinion by departing from the purely American rule of reasonable use and enunciating the California doctrine of correlative rights.

The doctrine of correlative rights, as first stated in the *Katz* case in 1902, is a variation of the American rule. The doctrine provides for a sharing of the waters of the common source, even by those transporting it for distant use. Because of "the novelty of the doctrine" the court provided guidelines for

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[27] See *Maricopa County Municipal Water Conservation Dist. No. 1* v. *Southwest Cotton Co.*, 39 Ariz. 65, 4 Pac. (2d) 369 (1931); *Bristor* v. *Cheatham*, 75 Ariz. 227, 255 Pac. (2d) 173 (1953).

[28] *Bristor* v. *Cheatham*, 75 Ariz. 227, 255 Pac. (2d) 173, 179-180 (1953).

[29] 255 Pac. (2d) at 178-179.

[30] Ariz. Rev. Stat. Ann. § § 45-313 to -324 (1956).

[31] *Id.* § 45-101.

[32] *Bristor* v. *Cheathem*, 75 Ariz. 227, 255 Pac. (2d) 173 (1953).

[33] See *Cross* v. *Kitts*, 69 Cal. 217, 10 Pac. 409 (1886) (the court purports to apply English rule, but actually applies a liberal construction of the American rule); *Gould* v. *Eaton*, 11 Cal. 639, 44 Pac. 319 (1896) (English rule).

[34] *Katz* v. *Walkinshaw*, 141 Cal. 116, 70 Pac. 663 (1902).

[35] 74 Pac. 766 (1903).

resolution of future disputes.[36] These guidelines are: (1) As between those transporting for use beyond the overlying land, the right is only usufructuary and priority of appropriation applies. (2) As between an appropriator transporting beyond the overlying land and one using the water on overlying land, two situations arise: (a) Where the landowner was using the water before the appropriator began, the former's rights are paramount to the extent of the quantity necessary for use on his land and the appropriator may take the surplus. (b) Where the appropriator was using the water before the landowner's use began, the landowner's rights are restricted to the quantity necessary for use. (3) Where two overlying landowners are competing for a limited supply of water, both are to be given a fair and just proportion. The court chose not to answer the question of priority of rights where the competing users commenced their withdrawals at different times. This strongly suggests that "correlative rights" may embrace more than co-equal or proportionate sharing. The court held that the above defined rights could be impaired by laches in certain circumstances or by non-exercise. In a brief dissent, Justice F. M. Angellotti concurred in the desirability of the American rule, but characterized the clarification of the doctrine of correlative rights as *dictum* only.[37]

Regardless of the observations in the dissent, the *Katz* case has been accepted by the California courts and the *dictum* applied as though it had been essential to the decision.[38] Some significant decisions have further clarified or modified the rule of this case.

The unanswered question of conflicting rights between an appropriator who commenced his use prior to that of the overlying owner was reached in *Burr* v. *Maclay Rancho Water Company.*[39] The court held that the overlying owner's rights to the quantity of water necessary for use were unaffected by the fact his use was commenced after the appropriator's had begun. In a subsequent decision in the same controversy[40] the court held that priority of use was not a factor in adjusting rights of competing overlying owners.

In 1949, the case of *Pasadena* v. *Alhambra*[41] was decided by the Supreme Court of California. This case added a new principle to the long-established correlative doctrine of California. The locus of the controversy was Raymond Basin, a "field of ground water"[42] from which the parties to this litigation had been pumping for many years. The safe yield was shown to be 18,000 acre-feet per year and the average annual draft was 24,000 acre-feet. The safe yield had been exceeded in all except 2 years since 1913.

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[36] 74 Pac. at 772.

[37] 74 Pac. at 773.

[38] See Hutchins, W. A., "The California Law of Water Rights" 436-444 (1956).

[39] *Burr* v. *Maclay Rancho Water Co.*, 154 Cal. 428, 98 Pac. 260 (1908).

[40] *Burr* v. *Maclay Rancho Water Co.*, 160 Cal. 268, 116 Pac. 715 (1911).

[41] *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 207 Pac. (2d) 17 (1949), modifying 180 Pac. (2d) 699 (Cal. App. 1947), certiorari denied, 339 U.S. 937 (1950).

[42] 207 Pac. (2d) at 25.

The principal dispute between parties concerned water rights and the possibility of their becoming prescriptive. Said the court:[43]

> Respondents assert that the rights of all the parties, including both overlying users and appropriators, have become mutually prescriptive against all the other parties and, accordingly, that all rights are of equal standing, with none prior or paramount. Appellant, on the other hand, contends that in reality no prescriptive rights have been acquired, and that there has been no actionable invasion or injury of the right of any party using water because each party has been able to take all the water it needed and no party has in any manner prevented a taking of water by any other party.

The supreme court held that there was an invasion, to some extent at least, of the rights of both overlying owners and appropriators when the overdraft first occurred. No user was immediately prevented from taking the quantity of water he needed. The invasion was only a partial one because it did not completely oust the original owners of the water rights; both original owners and appropriators continued to pump all the water they needed. But the pumping by each group produced an overdraft which "necessarily interfered with the future possibility of pumping by each of the other parties by lowering the water level."[44]

With respect to a matter that has been the subject of controversy, the California Supreme Court observed:[45]

> We need not determine whether the overlying owners involved here retained simply a part of their original overlying rights or whether they obtained new prescriptive rights to use water. (See *Glatts* v. *Henson*, 31 Cal. (2d) 368-371 (188 P. 2d 745).) The question might become important in order to ascertain the rights of the parties in the event of possible future contingencies, but these may never happen.

The conclusion of the supreme court with respect to the main issue was:[46]

> We hold, therefore, that prescriptive rights were established by appropriations made in the Western Unit subsequent to the commencement of the overdraft, that such rights were acquired against both overlying owners and prior appropriators, that the overlying owners and prior appropriators also obtained, or preserved, rights by reason of the water which they pumped, and that the trial court properly concluded that the production of water in the unit should be limited by a proportionate reduction in the amount which each party had taken throughout the statutory period.

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[43] 207 Pac. (2d) at 30.
[44] 207 Pac. (2d) at 30, 32.
[45] 207 Pac. (2d) at 32.
[46] 207 Pac. (2d) at 32-33.

This case gave protection to both the overlying owner and the appropriator. Thus, the final result was a true correlative rights application. An application of *Katz* v. *Walkinshaw*[47] in its purest form would have resulted in a finding that the overlying owners had priority over the appropriators. To the extent that the overlying owners did not exceed the safe yield of Raymond Basin, they had established no prescriptive rights. The appropriators would have been primarily, if not entirely, responsible for the overdraft. Their use would ripen into a prescriptive right. Therefore, under the correlative rights doctrine, the overlying owners would be required to reduce their withdrawals in order to keep the total draft within the safe yield and the appropriators would be allowed to continue their usage to the full extent of their respective prescriptive rights.

The above argument was made in *California Water Service Company* v. *Edward Sidebotham & Son, Incorporated*,[48] but the court rejected it. The court based its holding on the reasoning of *Pasadena* v. *Alhambra* which held that it is preferable for those contributing to the overdraft to proportionately share in curtailing it, rather than having a few users carry the entire burden.

Percolating waters in California were earlier described as not including those waters that "form a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet, in the effort, in conformity with physical law, to attain a uniform level."[49] The court indicated that the common law concept of "vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance" might prevail.[50]

It must be noted that the court also said that the common law doctrine of percolating waters had been modified in California to meet local conditions which the authors of that body of law had never encountered nor conceived as being possible. It is clear that the court was referring to the right to use percolating waters, but it is not clear whether it also referred to the common law definition of the term.[51]

The court subsequently defined subterranean streams as possessing "all the attributes of a surface body of water except location upon the surface," concluding that ground water not classified as a subterranean stream must be classified as percolating.[52]

In California, a collection of ground water which lacks any of the characteristics of surface streams other than location is subject to withdrawal

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[47] *Katz* v. *Walkinshaw*, 141 Cal. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[48] *California Water Serv. Co.* v. *Edward Sidebotham & Son, Inc.*, 202 Cal. App. (2d) 256, 37 Cal. Rptr. 1 (1964).

[49] *Los Angeles* v. *Hunter*, 156 Cal. 603, 105 Pac. 755, 757 (1909).

[50] *Id.*

[51] Regarding other considerations in the case, see chapter 20 at note 165.

[52] *Pasadena* v. *Alhambra*, 180 Pac. (2d) 699, 720 (Cal. App. 1947), modified in other respects, 33 Cal. (2d) 908, 207 Pac. (2d) 17 (1949), certiorari denied, 339 U.S. 937 (1950).

under the doctrines of the *Katz* case and the numerous decisions clarifying or modifying it.

Colorado

In Colorado, the classic distinction between percolating ground waters and those in definite subterranean streams is not important. Rather, distinctions of great legal significance are found between ground waters which are tributary to a watercourse and those which are not[53] and between ground waters in designated ground water basins and those outside such basins.[54] Percolating ground waters tributary to surface streams are subject to appropriation, as are surface watercourses.[55] The Water Right Determination and Administration Act of 1969 includes a number of provisions for integrating the determination and administration of rights in surface watercourses and tributary ground waters.[56]

Prior to passage of the 1965 Colorado Ground Water Management Act,[57] ground water not tributary to a stream was not subject to any theory of appropriation.[58] Users could sink wells and make any reasonable use of the water thereby acquired.[59] The court specifically declined to fully enunciate the doctrine to be followed with regard to these non-tributary waters, other than to reject the English rule of absolute ownership.[60] The court declared that it need not decide whether it would follow "the California doctrine of reciprocal rights, * * * or whether we should extend one step further our Colorado doctrine of first in time, first in right * * *."[61]

The passage of the Colorado Ground Water Management Act appears to have materially altered the situation with respect to these waters. The act affirms prior appropriation with respect to "designated ground waters," although its policy is that prior appropriation should be modified to permit full economic development of these designated ground water resources.[62] Designated ground water is ground water found in a designated ground water basin, and (1) which is not available to and required for the fulfillment of decreed surface rights, or (2) is in areas not adjacent to a continuously flowing natural

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[53] See *Whitten* v. *Coit*, 153 Colo. 157, 385 Pac. (2d) 131 (1963).

[54] See Colo. Rev. Stat. Ann. § 148-18-1 *et seq.* (Supp. 1965).

[55] See *Whitten* v. *Coit*, 153 Colo. 157, 385 Pac. (2d) 131 (1963); *Black* v. *Taylor*, 128 Colo. 440, 264 Pac. (2d) 502 (1953).

[56] Colo. Laws 1969, ch. 373, Rev. Stat. Ann. § 148-21-1 *et seq.* (Supp. 1969).

[57] Colo. Rev. Stat. Ann. § 148-18-1 *et seq.* (Supp. 1965).

[58] *Whitten* v. *Coit*, 153 Colo. 157, 385 Pac. (2d) 131 (1963), construing Colo. Rev. Stat. Ann. § 148-18-1 *et seq.* (1963), the predecessor to the Colorado Ground Water Management Act.

[59] Kelly, "Colorado Ground Water Act of 1957—Is Ground Water Property of the Public?" 31 Rocky Mt. L. Rev. 165, 171 (1959).

[60] *Nevius* v. *Smith*, 86 Colo. 178, 279 Pac. 44 (1929).

[61] *Safranek* v. *Town of Limon*, 123 Colo. 330, 228 Pac. (2d) 975, 978 (1951).

[62] Colo. Rev. Stat. Ann. § 148-18-1 (Supp. 1965).

stream where ground water withdrawals have constituted the principal water usage for at least 15 years prior to January 1, 1965.[63] A designated ground water basin is a basin determined by the Ground Water Commission and based on actual water bearing geological formations, including their boundaries, estimated quantity stored in such formation, and estimated annual rate of recharge.[64]

If any user wants to withdraw designated ground water, he must first obtain a permit from the Ground Water Commission.[65] Relative rights among all users in the basin, including permittees and those exercising their rights prior to passage of the act, are governed by priority of appropriation.[66]

This act appears to change Colorado law with respect to those waters in a designated basin that are not tributary to a watercourse. These waters are subject to appropriation under a permit system. Most ground waters will be tributary, since the basin is designated on the basis of the presence of water bearing geological formations. The act does not, however, exclude from the category of designated ground waters those ground waters found within the geographic perimeter of a basin but not within the geologic formation. It would appear that any ground water found within these designated basins not excluded as previously mentioned is designated ground water.

Hawaii

In Hawaii there are few cases litigated dealing with water rights. While the Hawaiian courts have recognized a distinction between ground water flowing in definite channels and percolating waters, they have not elaborated upon the significance of the distinction. Nor have they clarified the rules with respect to withdrawals of percolating waters.[67]

Idaho

Prior to 1951, Idaho's law on percolating ground water was somewhat uncertain. In 1922, the court considered a case in which the issue was whether or not a company selling percolating ground water was actually selling public water and was therefore a public utility.[68] Holding for the company, the court ruled that these waters were not public waters and observed that percolating ground water was not subject to appropriation.[69] In a 1931 case concerning

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[63] *Id.* § 148-18-2(3).
[64] *Id.* § 148-18-5.
[65] *Id.* § 148-18-6.
[66] *Id.* § 148-18-8.
[67] Hutchins, W. A., "The Hawaiian System of Water Rights" 172-190 (1946).
Legislation affecting percolating waters is discussed later under "Designated Critical or Other Ground Water Areas–Hawaii."
[68] *Public Util. Comm'n* v. *Natatorium Co.*, 36 Idaho 287, 211 Pac. 533 (1922).
[69] 211 Pac. at 535.

appropriation of artesian waters, the court concluded that the foregoing rule on appropriation of percolating waters was *dictum* and declined to follow it.[70] The court considered it impossible to establish different rules for subterranean waters found "as a relatively stationary body of water" and those "in which there is decided movement." The court noted, that in the case before it, there was a movement of the waters and held that there was no need to pass on any other situation.[71] These artesian waters were held to be subject to appropriation.

In another case involving artesian waters, the court held that subterranean percolating waters are subject to appropriation either by the statutory permit method applicable to surface waters or actual diversion and use.[72]

In 1951, Idaho amended its water appropriation statute by adding new provisions that expressly make ground water subject to a permit system of prior appropriation.[73] Under the present law which clarifies prior case law, all ground waters within the State are declared to be public waters.[74] As amended in 1963, no rights to use may be acquired except under the provisions of the act. However, if an appropriation had been commenced prior to the effective date of the 1963 amendment, it could be perfected under such method of appropriation.[75]

The term "ground water" means all water under the surface of the ground regardless of the geologic structure in which it is standing or moving.[76] In order to obtain the right to withdraw ground water, one must apply to the State Department of Reclamation for a permit to so act.[77] Once a permit is issued, the work completed in accordance therewith, and the water applied to a beneficial use, the permittee is then issued a license, reflecting the priority date of the appropriation.[78] This license is binding on the State and passes with a conveyance of the land.[79]

Provisions concerning critical ground water areas are discussed later under "Designated Critical or Other Ground Water Areas—Idaho."

Kansas

The early Kansas law with respect to ground water was uncertain. Although several statutes apparently placed legislative or administrative controls on

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[70] *Hinton* v. *Little*, 50 Idaho 371, 296 Pac. 582, 584 (1931).
[71] 296 Pac. at 583.
[72] *Silkey* v. *Tiegs*, 51 Idaho 344, 5 Pac. (2d) 1049 (1931).
[73] Idaho Code Ann. § § 42-226 to -239 (Supp. 1969).
All rights to ground water acquired before the effective date of the amendment are specifically "validated and confirmed" in all respects. *Id.* § 42-226.
[74] *Id.* § 42-226.
[75] *Id.* § 42-229.
[76] *Id.* § 42-239(a).
[77] *Id.* § 42-202.
[78] *Id.* § 42-219.
[79] Idaho Code Ann. § 42-220 (1948).

withdrawals of ground water, they were given little effect by the courts. In 1944 the court held that the common law of England was the basis of Kansas law and that Kansas had followed riparian rules and a modified English rule with regard to ownership of ground water.[80] Although giving English law credit for the riparian doctrine might be questionable, the holding of this case was that under the statutes before the court, the State could not regulate withdrawals of ground water. Earlier the court had approved a very strong statement of the English rule of absolute ownership of percolating water, which was modified to prohibit the drainage of a surface water supply through the use of adjacent wells.[81]

This situation was remedied in 1945 when the legislature enacted a comprehensive water appropriation scheme[82] which includes surface and ground waters without distinction.[83] This act requires an application for a permit before withdrawals commence.[84] When the Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture approves the application, the work is completed in accordance therewith, and the water applied to a beneficial use, the Chief Engineer issues the applicant a certificate of appropriation.[85] The rule of "first in time is first in right" ordinarily governs priorities and the priority date is the date of filing the application.[86]

Common law and statutory claimants' rights to continue the beneficial use of water actually being used on or before June 28, 1945, are protected to the full extent of such use.[87] The extent of such right is to be determined by the Chief Engineer, but the determination of such rights is not an adjudication of the relative rights as between holders of these vested rights.[88] Although all these vested rights are superior to the appropriative rights of the permittees, there is no order of seniority among the prior rights.

This statute has been tested by two leading cases, *State ex rel. Emery* v. *Knapp*[89] and *Baumann* v. *Smrha*,[90] which admitted its constitutionality.

In the *Knapp* case, the court recognized prior error concerning England's contribution to the riparian doctrine, thereby lessening a restraint on approval of statutory regulations. It went on to observe that because the act dedicates all waters to the use of the people, the court must depart from past practices of

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[80] *State* v. *Kansas Bd. of Agric.*, 158 Kans. 603, 149 Pac. (2d) 604, 606-607 (1944).
[81] *Emporia* v. *Soden*, 25 Kans. 588 (1881).
[82] Kans. Stat. Ann. § § 82a-701 *et seq.* (1969).
[83] *Id.* § § 82a-702, -703, and -707.
[84] *Id.* § 82a-709.
[85] *Id.* § 82a-714.
[86] *Id.* § 82a-707(c).
[87] *Id.* § 82a-701(d).
[88] *Id.* § 82a-704.
[89] *State ex rel. Emery* v. *Knapp*, 167 Kans. 546, 207 Pac. (2d) 440 (1949).
[90] *Baumann* v. *Smrha*, 145 Fed. Supp. 617 (D. Kans.), affirmed per curiam, 352 U.S. 863 (1956).

considering these cases in light of individual interests alone and now consider them on the basis of interests of the people. It found no reason why the legislature could not so alter water rights and held the act to be constitutional.

In the *Baumann* case, a case involving ground water rights, the Federal district court was asked to declare the act unconstitutional under the Fourteenth Amendment to the Federal Constitution. It declined to do so on the ground that a State may alter its system of water rights because of its unsuitability to conditions in the State, provided vested rights are protected. The court also construed the *Knapp* case as having overruled earlier Kansas cases.

Thus, the act clearly overcomes prior objections to legislation that regulates withdrawal of ground water.

Montana

Prior to the enactment of a controlling statute, the Montana court announced several times in *dicta* that percolating ground waters were subject to the American rule of reasonable use.[91]

In 1961, the legislature adopted a prior appropriation law for ground water.[92] Under this act "ground water" means any fresh water under the surface of the land, including water under any surface body of water.[93]

Any person claiming a right to withdraw ground waters or the administrator of the Montana Water Resources Board may initiate a hearing to ascertain existing rights in the area involved.[94] At this hearing, the administrator may modify or confirm the boundaries of the area, determine priority of rights, and define quantitatively the extent of all rights being there considered.[95]

Although the Montana system is basically not a permit system, where the evidence shows a ground water shortage has occurred or is likely to occur, the administrator may designate certain areas as controlled ground water areas.[96] Permits must be obtained to initiate appropriations therefrom.[97]

Nebraska

There is no general ground water allocation statute in Nebraska. The law of rights in percolating water is provided primarily by case law.

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[91] See Hutchins, W. A., "The Montana Law of Water Rights" (1958).
[92] Mont. Rev. Codes Ann. § § 89-2911 *et seq.* (1964).
[93] Mont. Rev. Codes Ann. § 89-2911(a) (Supp. 1965).
[94] Mont. Rev. Codes Ann. § 89-2916 (1964).
[95] *Id.* § 89-2917.
[96] *Id.* § § 89-2914 and -2915, discussed under "Designated Critical or Other Ground Water Areas," *infra.*
[97] *Id.* § 89-2918.

In *Olson* v. *City of Wahoo*,[98] the court observed that common law principles, rather than prior appropriation, pertained to ground waters, and applied the American rule of reasonable use to such percolating water.

In the more recent case of *In re Metropolitan Utilities District of Omaha*,[99] the court reaffirmed this rule and held that where no damage was done by a trans-watershed diversion of percolating ground waters for municipal uses, such was reasonable and in keeping with the American rule. A strong dissent argued that these waters were actually a part of the flow of the Platte River and not subject to the rules affecting ground water.[100]

Although Nebraska has no general statutory ground water allocation scheme, it does have a legislative requirement for a permit to withdraw ground water for irrigation purposes from pits located within 50 feet of a natural stream.[101] There also are provisions regarding spacing between wells.[102]

Nevada

Nevada has a ground water allocation statute based on prior appropriation. Prestatute law concerning percolating waters rejected prior appropriation[103] and adopted the English rule of absolute ownership.[104]

With the passage of the ground water statute in 1939,[105] all ground waters became public waters subject to the appropriation doctrine.[106] Anyone wishing to appropriate percolating waters after March 25, 1939, must comply with the provisions of the surface water appropriation statute.[107] However, the permit to appropriate need not be requested until after the well is bored.[108] But where there is need for special administration, the State Engineer classifies a basin as a "designated ground water basin"[109] and permits to appropriate must be obtained before constructing the well. In nondesignated areas, no permit is needed before constructing a well, but a permit is needed before any legal diversion can be made from the well.[110]

In Nevada, percolating ground water is defined as "underground waters the course and boundaries of which are incapable of determination."[111]

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[98] *Olson* v. *City of Wahoo*, 124 Nebr. 802, 248 N.W. 304 (1933).
[99] *In re Metropolian Util. Dist. of Omaha*, 179 Nebr. 783, 140 N.W. (2d) 626, 637 (1966).
[100] 140 N.W. (2d) at 638.
[101] Nebr. Rev. Stat. § § 66-636 and -637 (1968).
[102] *Id.* § § 46-608 to -612 and 46-651 to -655.
[103] See *Strait* v. *Brown*, 16 Nev. 317 (1881).
[104] *Mosier* v. *Caldwell*, 7 Nev. 363 (1872).
[105] Nev. Rev. Stat. § 534.010 *et seq.* (Supp. 1967).
[106] *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 108 Pac. (2d) 311 (1940) (*dictum*).
[107] Nev. Rev. Stat. § 534.080(1) (Supp. 1967), referring to ch. 533.
[108] *Id.* § 534.050(2).
[109] *Id.* § 534.030.
[110] *Id.* § 534.050(1).
[111] *Id.* § 534.010(d).

New Mexico

In *Vanderwork* v. *Hewes*,[112] the first New Mexico decision concerning percolating waters, the court was faced with a situation where admittedly percolating or seepage waters rose to the surface and ran off the land to an adjacent tract. Both landowners were using the water, but a third party claimed a statutory right to appropriate it as diffused surface water and to carry it to his lands. The court ruled against this contention, because the Territorial Engineer was without power under the statutes to allocate this water, inasmuch as it was not in a watercourse or seepage from some constructed works. The court rejected the California rule of correlative rights on the ground that it applied to percolating waters in large identifiable basins, but indicated that if that were the fact in other situations. this rule might be persuasive.[113]

In the *Vanderwork* case, the New Mexico court followed what appears to be the English rule in regard to the rights of the owner of the land on which the water rose. It allowed the owner of the adjacent tract to utilize all he wanted of the water which flowed to his land, holding his rights inferior to those of his neighbor; and held that the appropriator was entitled to the common law appropriation of any surplus, subject to the wants of the others.[114] Although the court appeared to announce the English rule of absolute ownership with regard to the land where the water rose, this was not a competition between adjacent well owners and cannot be construed as a rejection of the American rule of reasonable use.

The question of American rule versus English rule had not been resolved at the time New Mexico passed ground water legislation which, without defining percolating waters, declares all ground waters to be public waters, prohibits their removal for transportation outside New Mexico, and specifies that no permit and license shall be required to appropriate ground waters—except those in basins declared by the State Engineer to have reasonably ascertainable boundaries.[115]

In a subsequent act,[116] the legislature provided that when a person was drilling a well or had drilled one and thereby proved the existence of a water supply in an area that the State Engineer thereafter declared to be an underground water basin, such person may protect his rights by filing an application therefor with the State Engineer. The priority relates to the date the person first drilled the well or wells. This is the same result reached in a

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[112] *Vanderwork* v. *Hewes*, 15 N. Mex. 439, 110 Pac. 567 (1910).

[113] 110 Pac. at 569.

[114] 110 Pac. at 570.

[115] N. Mex. Stat. Ann. § § 75-11-19 to 75-11-22 (1968).

[116] *Id.* § § 75-11-26 to 75-11-36. Sections 75-11-33 and 75-11-34 were repealed by Laws 1967, ch. 308, § 7.

case decided after the act was passed, which was based on pre-statute law.[117] This act was subsequently repealed.[118]

In *Burgett* v. *Calentine*,[119] the New Mexico court held that spring waters which did not flow in a natural channel, but sank into the ground, were not subject to appropriation. Although this case does not deal directly with percolating waters, it is reasonable to assume that had the court considered them subject to appropriation it would have expressed a caveat against the unrestrained use of the source of these waters.[120] Thus, the *Burgett* and *Vanderwork* cases appear as clear authority for the proposition that percolating ground water was not subject to appropriation prior to 1953. Although the 1953 act makes no reference to priorities, and exempts from permit requirements users of waters outside of basins having reasonably ascertainable boundaries, it appears that it was intended as a prior appropriation statute with respect to such users.[121]

North Dakota

An early North Dakota statute provided that the owner of the land owned water flowing over or under its surface, although it did not form a definite stream.[122]

In the 1963 case of *Volkmann* v. *Crosby*,[123] the court ruled that percolating water was the property of the landowner, subject to reasonable beneficial use. The court held that it was unreasonable for the City of Crosby to construct and operate a well withdrawing percolating waters when such an action dried up a nearby irrigation well and where the city piped the water a distance from the well for municipal uses, including sale to individuals.[124] The statute upon which this decision was based was repealed that same year.[125]

At the time of the *Volkmann* decision, there was an apparent statutory conflict surrounding rights in percolating waters. The Code provides, as it then provided, that percolating ground waters belong to the public and are subject to appropriation in accordance with statutory provisions that apply to surface and ground waters alike.[126] In the *Volkmann* case, the court sought to reconcile these provisions and the rule of reasonable use by stating that the landowner may appropriate his right of reasonable use. The clear implication of

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[117] *State* v. *Mendenhall,* 68 N. Mex. 467, 362 Pac. (2d) 998 (1961).
[118] N. Mex. Laws 1969, ch. 51, § 1.
[119] *Burgett* v. *Calentine,* 56 N. Mex. 194, 242 Pac. (2d) 276 (1951).
[120] See *Templeton* v. *Pecos Valley Artesian Conservatory Dist.*, 65 N. Mex. 59, 332 Pac. (2d) 465 (1958).
[121] See Clark, R. E., "New Mexico Water Resources Law" 20 (1964).
[122] N. Dak. Comp. Laws 1913, § 5341, Cent. Code Ann. § 47-01-13 (1960).
[123] *Volkmann* v. *Crosby,* 120 N.W. (2d) 18 (N. Dak. 1963).
[124] *Id.* at 22-23.
[125] N. Dak. Laws 1963, ch. 419, § 7.
[126] N. Dak. Cent. Code Ann. § 61-01-01 (1960).

the legislature's prompt repealing action is that it did not agree with the court's basic holding nor with the court's attempt at reconciliation.

The result of the legislature's action is that percolating ground water is subject to a permit system of prior appropriation.[127] The Code provides that, where the use of water for different purposes conflicts, domestic and livestock uses are preferred over irrigation and industrial uses which, in turn, are preferred over outdoor recreational uses.[128] No other possible uses are mentioned, although municipal uses appear to be included in domestic uses. The only apparent acknowledgment of the legislative change made with regard to percolating waters is an amendment to the section dealing with prescriptive rights which gives a claimant 2 years after July 1, 1963, to claim a right based on 20 years' use prior to that date. The right was previously based on usage before January 1, 1934.[129]

In the *Volkmann* case the court stated that where a landowner had applied percolating waters to a reasonable beneficial use on his land and thereby acquired a vested right to such water, the State may not, by subsequent legislation, deprive him of that right without just compensation.[130]

Oklahoma

Prior to the enactment of the Oklahoma Ground Water Law of 1949,[131] the American rule of reasonable use governed withdrawals of percolating ground water.[132] This was not only the result of following common law principles, but was also the effect of a statute declaring that the owner of land also owned the waters flowing under its surface, but not forming a definite stream.[133]

The Oklahoma Ground Water Act was adopted in 1949. The ownership statute was amended in 1963 to provide that the landowner owns the percolating water, but that the use of ground water shall be governed by the ground water law.[134]

The Oklahoma Ground Water Law of 1949, as amended, established a system of prior appropriation applicable to water under the surface of the earth, regardless of the geologic structure in which found.[135] Priorities ordinarily are based on first in time, first in right. Those using water prior to the date of the act were given a priority date as of the day upon which they

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[127] *Id.* § 61-04-01 *et seq.*

[128] N. Dak. Cent. Code Ann. § 61-01-01.1 (Supp. 1969).

[129] Compare N. Dak. Cent. Code Ann. § 61-04-22 (Supp. 1969) with the same section in the 1960 volume.

[130] *Volkmann* v. *Crosby,* 120 N.W. (2d) 18, 24 (N. Dak. 1963).

[131] Okla Laws 1949, p. 641, Stat. Ann. tit. 82, § 1001 *et seq.* (1970).

[132] See *Canada* v. *City of Shawnee*, 179 Okla. 53, 64 Pac. (2d) 694 (1937).

[133] Okla. Stat. Ann. tit. 60, § 60 (Supp. 1969). The original Oklahoma declaration was Terr. Okla. Stats. 1890, § 4162.

[134] Okla. Laws 1963, ch. 205 § 1. See Okla. Stat. Ann. tit. 60, § 60 (Supp. 1969).

[135] Okla. Stat. Ann. tit. 82, § 1002 (1970).

first applied the water to a beneficial use; those basing their claims on withdrawals made after the effective date of the act were given a priority as of the date they made application for the water.[136]

In order to establish a priority, the prospective user was required to file an application with the Oklahoma Water Resources Board, which was required to file the application, if in proper form, and notify the applicant of such filing.[137] No permit was required or issued except for designated critical ground water areas.[138]

However, recent legislation has repealed this ground water law and has substituted other provisions.[139] Among other changes, the new provisions do not include special procedures for critical ground water areas. The Board, following hydrographic surveys and hearings, shall make determinations of the maximum annual yield of fresh water from each ground water basin or subbasin. Following such a determination for a particular basin or subbasin, persons are required to obtain, and the board may issue, regular permits for nondomestic purposes. Temporary permits may be issued in areas where maximum yield determinations have not yet been made. Short-term special permits may be issued in any area. A regular permit shall allocate to the applicant his proportionate part of the maximum annual yield of the basin or subbasin. But persons shall not be deprived "of any right to use ground water in such quantities and amounts as were used or were entitled to be used prior to the enactment hereof."

Oregon

It was recognized at an early date in Oregon that rights in percolating ground waters were not subject to the rules applicable to rights in watercourses and subterranean streams.[140] This was reaffirmed in the more recent case of *Bull* v. *Siegrist*,[141] in which the court declared that the rule applicable to percolating waters is essentially the American rule of reasonable use.[142]

In the Ground Water Act of 1955,[143] Oregon adopted a scheme subjecting all ground waters, percolating or otherwise, to prior appropriation.

Under the act, rights to ground water already in existence through permits or actual use are protected.[144] Those basing their claim on actual prior use of ground water were required to file a claim therefor within 3 years after August

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[136] *Id.* § 1005.
[137] *Id.* § 1006.
[138] *Id.* § § 1007-1015.
[139] Laws 1972, ch. 248, § 23, repealing § § 1001-1019 and substituting § § 1020.1-.22, effective July 1, 1973.
[140] *Taylor* v. *Welch*, 6 Oreg. 198 (1876).
[141] *Bull* v. *Siegrist*, 169 Oreg. 180, 126 Pac. (2d) 832 (1942).
[142] 126 Pac. (2d) at 834, citing 3 Farnham, "Water and Water Rights" § 936 (1904).
[143] Oreg. Rev. Stat. § 537.505 *et seq.* (Supp. 1969).
[144] *Id.* § § 537.575 and .585.

3, 1955.[145] Anyone wishing to initiate or enlarge a ground water right after the effective date of the act is required to apply to the State Engineer for a permit and to receive a permit before withdrawing or using water.[146] The permit is merely an endorsement on the application which is returned to the applicant.[147] The priority date is the date on which the application is filed.[148]

South Dakota

When South Dakota was admitted to statehood, it retained a territorial law declaring the landowner to also own percolating waters found therein.[149] Ownership of percolating waters and their distinction from waters in subterranean streams were recognized early in both statute law and common law in South Dakota.[150] The court has long recognized that this is more in the nature of a right to use than absolute ownership.[151] This "ownership" statute, which had undergone a number of amendments, was finally repealed in 1955.[152]

In lieu of private ownership of percolating ground waters, South Dakota currently provides for public regulation of ground water through a system of prior appropriation.[153] Under this system, any person claiming a vested right based upon prior use of the water shall file with the Water Resources Commission of South Dakota a claim of his rights.[154] Those wishing to initiate appropriations of ground water after the act became effective must follow the procedures for appropriating surface water.[155] The Code requires filing an application[156] and publication of notice of such filing.[157] Applications are approved only if there is sufficient water to satisfy them.[158] Priority ordinarily is based on the date of filing.[159]

The constitutionality of this act as applied to percolating waters was challenged on the theory of taking rights vested by the ownership statute without compensation.[160] The court held that the statute actually granted a

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[145] *Id.* § 537.605(1).
[146] *Id.* § 537.615.
[147] *Id.* § 537.625(1).
[148] *Id.* § 537.625(2).
[149] Terr. Dak. Civ. Code § 255 (1877).
[150] *Metcalf* v. *Nelson*, 8 S. Dak. 87, 65 N.W. 911 (1895).
[151] 65 N.W. at 912; *Deadwood Cent. R.R.* v. *Barker*, 14 S. Dak. 558, 86 N.W. 619, 621 (1901).
[152] S. Dak. Laws 1955, ch. 430.
[153] S. Dak. Comp. Laws Ann. § 46-6-1 *et seq.* (1967).
[154] *Id.* § 46-6-2.
[155] *Id.* § 46-6-3.
[156] *Id.* § § 46-5-10 to 46-5-13.
[157] *Id.* § § 46-5-17 and 46-5-19.
[158] *Id.* § § 46-5-18 and 46-5-22.
[159] *Id.* § 46-5-16.
[160] *Knight* v. *Grimes*, 80 S. Dak. 517, 127 N.W. (2d) 708 (1964).

right to use, rather than a classic property ownership, and that such rights could be taken without compensation when necessary for the public welfare. It held that South Dakota's semi-arid conditions required the maximum protection and utilization of its water supply and that the act was constitutional.

Texas

The English rule of absolute ownership probably is followed as closely in Texas as in any other American jurisdiction. By statute, the owner of land is recognized as owning ground waters found therein.[161] Prior to enactment of the statute, case law had firmly established this doctrine. In *Houston & Texas Central Railroad* v. *East*[162] the court held that the English rule prevailed and that any injury suffered by the complaining party was *damnum absque injuria.* This was held despite an express finding of fact by the lower court that the use made of the waters by the defendant was unreasonable.

This basic rule was upheld in *Pecos County Water Control & Improvement District* v. *Williams*,[163] wherein the El Paso Court of Civil Appeals specifically rejected the concepts of appropriative and correlative rights. The theory of correlative rights as urged by the district was analogous to correlative production in oil and gas law and was not the California doctrine of correlative rights. The court also approved the general rule that ground waters are presumed to be percolating.

While the English rule was developing with great strength in Texas, the courts were also injecting the principle that percolating waters could not be wasted. In 1948, the Austin Court of Civil Appeals noted that in the *East* case the Texas Supreme Court had not passed on the right to *waste* percolating waters[164] and observed that such right did not exist.[165] Six years later, the El Paso Court of Civil Appeals agreed with this contention.[166]

In the following year, the questions of absolute ownership and wastage of water reached the Supreme Court of Texas.[167] The supreme court reaffirmed the rule of absolute ownership. In considering wastage, the court concluded that the English rule had been adopted subject only to such limitations as existed at common law. These limitations were primarily prohibitions against malicious taking of water and against willful and wanton wastage. The court went on to hold that transporting ground water through natural surface

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[161] Tex. Rev. Civ. Stat. Ann. art. 7880-3c(D) (1954).

[162] *Houston & T.C.R.R.* v. *East*, 98 Tex. 146, 81 S.W. 279 (1904), reversing 77 S.W. 646 (Tex. Civ. App. 1903).

[163] *Pecos County W.C. & I. Dist.* v. *Williams*, 271 S.W. (2d) 503 (Tex. Civ. App. 1954).

[164] *Houston T.C.R.R.* v. *East*, 98 Tex. 146, 149, 150-151, 81 S.W. 279 (1904).

[165] *Cantwell* v. *Zinser*, 208 S.W. (2d) 577, 579 (Tex. Civ. App. 1948).

[166] *Pecos County W.C. & I. Dist.* v. *Williams*, 271 S.W. (2d) 503 (Tex. Civ. App. 1954).

[167] *Corpus Christi* v. *Pleasanton*, 154 Tex. 289, 276 S.W. (2d) 798 (1955).

channels, where water was subject to loss by evaporation and seepage, did not constitute waste.

Utah

Originally, Utah followed the rule of absolute ownership of percolating waters.[168] This rule was abandoned in 1921 in favor of correlative rights.[169]

Early in 1935, the Utah Supreme Court, in two opinions,[170] indicated that all ground waters might be subject to prior appropriation. Thereupon the legislature amended the State's appropriation laws to include all ground water. Before discussing the statute it should be noted that ground waters on public lands in Utah have always been subject to appropriation.[171]

Rights to use unappropriated public waters may be acquired only by following the procedures provided by the Code.[172] Applications to appropriate waters are made to the State Engineer,[173] who then publishes notice thereof.[174] An application may be denied if, among other things, it will interfere with more beneficial use for various specified purposes or will be detrimental to the public welfare.[175] If, in the State Engineer's judgment there is sufficient unappropriated water available, he may issue a temporary permit to drill a well, but this does not dispense with publication of notice.[176] When an application is endorsed as approved, the applicant may proceed with his works.[177] Priority of appropriation ordinarily is based on the concept of first in time, first in right.[178]

The Utah act is silent on the status of withdrawals made before 1935. However, in *Hanson* v. *Salt Lake City*,[179] the court ruled that actual application of the water to a beneficial use by these prior users without permit was sufficient to establish their priority. Any questions as to the legislative intention to include percolating waters under this statute were resolved in *Riordan* v. *Westwood*,[180] wherein the court announced that the intention

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[168] See *Sullivan* v. *Northern Spy Mining Co.*, 11 Utah 438, 40 Pac. 709 (1895) (*dictum*); and *Herriman Irr. Co.* v. *Keel*, 25 Utah 96, 69 Pac. 719 (1902).

[169] *Horne* v. *Utah Oil Refining Co.*, 59 Utah 279, 202 Pac. 815 (1921).

[170] *Wrathall* v. *Johnson*, 86 Utah 50, 40 Pac. (2d) 755 (1935); and *Justesen* v. *Olsen*, 86 Utah 158, 40 Pac. (2d) 802 (1935).

[171] *Snake Creek Mining & Tunnel Co.* v. *Midway Irr. Co.*, 260 U.S. 596, 67 L.Ed. 423 (1923).

[172] Utah Code Ann. § 73-3-1 *et seq.* (1968).

[173] Utah Code Ann. § 73-3-2 (Supp. 1969).

[174] Utah Code Ann. § 73-3-6 (1953).

[175] *Id.* § 73-3-8.

[176] *Id.* § 73-3-5.

[177] *Id.* § 73-3-10.

[178] *Id.* § § 73-3-1 and 73-3-21.

[179] *Hanson* v. *Salk Lake City*, 115 Utah 404, 205 Pac. (2d) 255 (1949).

[180] *Riordan* v. *Westwood*, 115 Utah 215, 203 Pac. (2d) 922 (1949).

clearly was to include, so far as legally possible, all waters, whether above or in the ground, and whether flowing or not.[181]

Washington

There is no statutory law defining rights to the use of percolating ground water in Washington. The Washington ground water appropriation law[182] applies to "waters of underground streams or channels, artesian basins, underground reservoirs, lakes or basins, whose existence or whose boundaries may be reasonably established or ascertained."[183]

All ground waters are presumed to be percolating. It appears that percolating ground waters may not be subject to the statute.

The Washington Supreme Court has adopted what it refers to as a correlative rights doctrine, but which is essentially the American rule of reasonable use.[184] This was later recognized in *Evans* v. *Seattle*,[185] wherein the court reaffirmed the rule but expressly rejected the California doctrine of correlative rights.

Wyoming

In an early Wyoming case, it was held that percolating waters were owned by the owner of the land and hence were not public waters subject to appropriation.[186] This decision did not, however, elaborate on whether the English rule or American rule of ownership prevailed.

This holding was later reaffirmed in a case in which the court held that waste and seepage waters were percolating waters and part of the soil.[187] The court indicated, without deciding, that these waters could not be transported for use on lands other than those upon which they were found. This *dictum* strongly suggests the American rule.

Wyoming subsequently adopted a system of prior appropriation that applies to all ground water, including percolating ground water.[188] In order to protect his vested rights, anyone claiming such a right acquired before April 1, 1947, must have filed a statement thereof with the State Engineer on or before December 31, 1957. Anyone claiming such a right acquired on or after April 1, 1947, must have registered his well with the State Engineer before the effective date of this act.[189]

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[181] However, the court stated that certain percolating waters near the surface are excepted.
[182] Wash. Rev. Code § 90.44.010 *et seq.* (Supp. 1961).
[183] *Id.* § 90.44.035.
[184] *Patrick* v. *Smith*, 75 Wash. 407, 134 Pac. 1076 (1913).
[185] *Evans* v. *Seattle*, 182 Wash. 450, 47 Pac. (2d) 984 (1935).
[186] *Hunt* v. *Laramie*, 26 Wyo. 160, 181 Pac. 137 (1919).
[187] *Binning* v. *Miller*, 55 Wyo. 451, 102 Pac. (2d) 54 (1940).
[188] Wyo. Stat. Ann. § 41-121 *et seq.* (1957).
[189] Wyo. Stat. Ann. § 41-122 (Supp. 1969).

After March 1, 1958, anyone wishing to acquire rights to ground water must file an application for a permit with the State Engineer.[190] In areas not designated as critical ground water areas, the permit is granted as a matter of course if the proposed use is beneficial and the proposed means of diversion and construction are adequate. However, if the State Engineer finds that granting the permit would not be in the public interest, he may deny the application, subject to review at the next meeting of the State Board of Control.[191] Ground water rights are subject to the same preferences as are surface water rights.[192]

ARTESIAN WATERS

Most of the Western States have statutes regulating the drilling or operation of artesian wells. Many court decisions also deal with the subject, although at times the courts use the term "artesian" when they actually are considering ordinary percolating waters. This section will consider the laws of the Western States as they expressly relate to these waters. Such statutes and court decisions include those in the following discussions of the applicable laws in particular States.

Alaska

Artesian waters are given no special treatment in Alaska, but are subject to statutory appropriation as are other surface and ground waters.[193]

Arizona

Statutory regulations of artesian waters in Arizona empower the State Land Department to require that flowing wells be capped or equipped with valves and to be so constructed as to prevent waste.[194] A person who owns or is in charge of an artesian well and wilfully allows it to flow uncapped is guilty of a misdemeanor.[195]

California

The classification of waters as artesian or non-artesian has no bearing in determining relative rights to the waters.[196] In an early case,[197] it was stated

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[190] *Id.* § 41-138.

[191] *Id.* § 41-139.

Procedures applicable to critical ground water areas are discussed under "Designated Critical or Other Ground Water Areas–Wyoming," *infra.*

[192] Wyo. Stat. Ann. § 41-123 (1957).

[193] See, Alaska Stat. § 46.15.030 (Supp. 1966).

[194] Ariz. Rev. Stat. Ann. § 45-319 (1956).

[195] *Id.* § 13-1012.

[196] See Hutchins, W. A., "The California Law of Water Rights" 465-466 (1956).

[197] *Miller* v. *Bay Cities Water Co.*, 157 Cal. 256, 107 Pac. 115 (1910).

that rights to use ground water are not measured by whether the water is under pressure, but whether it is in a natural defined flow. Even earlier, in *Katz* v. *Walkinshaw*,[198] the doctrine of correlative rights to percolating waters was announced by the California Supreme Court in a situation where the waters were held in an artesian belt.

The Water Code provides for the appropriation of subterranean streams flowing through known and definite channels,[199] which would include artesian waters when flowing in such a channel. The Code defines an artesian well as "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."[200] An artesian well which is not capped or fitted with a device that can readily stop its flow is declared to be a public nuisance,[201] and the owner, tenant or occupant of the land who permits the public nuisance to continue is guilty of a misdemeanor,[202] as is the one who allows artesian water to flow or go to waste unnecessarily.[203] Each day's continuance of waste constitutes a new offense.[204]

Hawaii

The Hawaiian Code devotes a short chapter to artesian wells.[205] It provides that an artesian well which is uncapped or not fixed with an appliance which will readily prevent it from flowing is a common nuisance and the person in charge of such well is guilty of a misdemeanor, as is any such person who permits the waste or unnecessary flow of water from such a well.[206] It also provided that (1) anyone drilling an artesian well must first notify (in writing) the Board of Land and Natural Resources of such fact,[207] and (2) the owner of an artesian well may relieve himself of responsibility for such well by transferring it to the county wherein it is located.[208]

This statute has been recently amended to delete the word "artesian" and to apply to wells generally.[209] As amended, however, the statute still contains a provision that appears to relate particularly to artesian wells. It states:[210]

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[198] *Katz* v. *Walkinshaw*, 141 Cal. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).
[199] Cal. Water Code § 1200 (West 1956).
[200] *Id.* § 300.
[201] *Id.* § 305.
[202] *Id.* § 306.
[203] *Id.* § 307.
[204] *Id.* § 308.
[205] Haw. Rev. Stat. § 178-1 *et seq.* (1968).
[206] *Id.* § 178-2.
[207] *Id.* § 178-5.
[208] *Id.* § 178-8.
[209] Haw. Laws 1970, ch. 123.
[210] Haw. Rev. Stat. § 178-2 (Supp. 1970).

> A well through which water flows to the surface of the ground or to any porous substratum by natural pressure and is not capped, cased, equipped, or furnished with such control facilities as will readily and effectively arrest and prevent waste or unnecessary flow of any water from the well is declared to be a common nuisance. The owner, tenant, or occupant of the land upon which such a well is situated, or any person in charge of such a well, who causes, suffers, or permits such common nuisance, or suffers or permits it to remain or continue, is guilty of a misdemeanor.

Idaho

Neither case law nor statute law makes artesian characteristics a factor in determining rights to use ground water in Idaho. However, chapter 16 of the Code regulates waste or uncontrolled flow from artesian wells.[211]

An artesian well not capped or equipped with a device approved by the Commissioner of Reclamation to control its flow is a common nuisance.[212] It is unlawful for any owner, tenant, or occupant of the land to permit such a common nuisance or to permit the unnecessary flow and waste of artesian waters.[213]

Kansas

The regulation of artesian waters is statutory in Kansas. Anyone complying with the irrigation district act[214] and applying water obtained from an artesian well to beneficial uses shall be deemed to have appropriated such as of the day of the commencement of the works, unless the work was not completed diligently, in which case it is the date of first application of the water.[215]

An act regulating artesian wells defines an artesian well as a well sunk to an artesian stratum over 400 feet deep from which water is raised to or above the surface of the earth by artificial means.[216] An artesian well that is not capped or fixed with a device to readily prevent the flow of water from such well is a public nuisance, and the person who permits such nuisance is guilty of a misdemeanor.[217] Any person who permits water from such a well to flow or waste unnecessarily is also guilty of a misdemeanor.[218] Water may not be transported from an artesian well for a distance of: (1) more than 1½ miles through an earth ditch, or (2) 2½ miles through a concrete ditch, and (3) in

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[211] Idaho Code Ann. § § 42-1601 to -1605 (1948).
[212] *Id.* § 42-1601.
[213] *Id.* § 42-1602.
[214] Kans. Stat. Ann. § 42-302 *et seq.* (1964).
[215] *Id.* § 42-307.
[216] *Id.* § 42-401.
[217] *Id.* § 42-402.
[218] *Id.* § 42-404.

any manner for more than 2½ miles except for drilling purposes. Anyone wishing to use artesian waters for drilling purposes must obtain a permit therefor.[219]

Montana

All flowing wells must be capped so that the flow can be controlled.[220]

Nebraska

Rights to use ground water in Nebraska apparently are not affected by whether or not they are artesian waters. It is unlawful to allow artesian water to waste.[221] Whoever violates the statute is subject to a fine.[222]

Nevada

Since March 22, 1913, no rights to appropriate artesian water in Nevada have been obtainable except upon compliance with the general appropriation statutes.[223] Anyone allowing waste from an artesian well is guilty of a misdemeanor.[224]

New Mexico

There are two acts regulating artesian waters in New Mexico—one governing artesian wells[225] and one governing artesian conservancy districts.[226]

Artesian Wells

An artesian well is defined as an artificial well which derives its water supply from any artesian stratum or basin.[227] All artesian waters declared to be public are under the supervision of the State Engineer, but where the waters are in an artesian conservancy district, the district is given concurrent power and authority.[228] Any landowner wishing to drill, repair, plug, or abandon an artesian well must obtain a permit therefor from the State Engineer before

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[219] *Id.* § 42-406.
[220] Mont. Rev. Codes Ann. § 89-2926 (1964).
[221] Nebr. Rev. Stat. § 46-281 (1968).
[222] *Id.* § 46-282.
[223] Nev. Rev. Stat. § 534.080(1) (Supp. 1967), referring to ch. 533.
[224] *Id.* § 534.070.
[225] N. Mex. Stat. Ann. § 75-12-1 *et seq.* (1968).
[226] *Id.* § 75-13-1 *et seq.*
[227] *Id.* § 75-12-1.
[228] *Id.* § 75-12-2.

commencing such work.[229] Wells abandoned for more than 4 years may be plugged by the State Engineer or the district without notice to the owner.[230]

The waste of water from an artesian well is a misdemeanor and a public nuisance. The State Engineer, artesian well supervisor, or the district may abate this, with the costs therefor constituting a lien upon the land, if the well owner fails or refuses to abate the nuisance within 10 days of receipt of proper notice to do so.[231] The constitutionality of a similar provision under an earlier statute was upheld.[232] It is also unlawful to conduct water through a ditch, canal, or conduit under such conditions that more than 20 percent of the water is lost[233] or to use artesian wells for watering livestock, unless fitted with valves that control or prevent waste.[234]

Artesian Conservancy Districts

The purpose of the district is to conserve the waters of its artesian basin or basins where such waters have been beneficially appropriated.[235] The act provides a procedure for the formation of such districts.[236] The act also provides procedures for including additional land when the original boundaries of the artesian basin are extended.[237] The district is governed by a board of five directors,[238] charged with the duty of outlining the district's plans or programs of conservation and administration, which expressly include the plugging of leaking wells.[239] Taxes may be assessed and levied on lands within the district to meet operating costs and other expenses.[240] The district may also acquire the same rights, power, and authority over all ground waters within the district boundaries that it has over artesian waters, provided the boundaries of said ground waters have been reasonably ascertained and the waters appropriated to beneficial use.[241]

In *Pecos Valley Artesian Conservancy District* v. *Peters*,[242] the court ruled that a district could bring an action to enjoin the operation of a well located outside the boundaries of the district but draining waters from within the

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[229] *Id.* § 75-12-4.
[230] *Id.* § 75-12.7.
[231] *Id.* § 75-12-8.
[232] *Eccles* v. *Ditto*, 23 N. Mex. 235, 167 Pac. 726 (1917).
[233] N. Mex. Stat. Ann. § 75-12-9. (1968).
[234] *Id.* § 75-12-11.
[235] *Id.* § 75-13-1.
[236] *Id.* §§ 75-13-3 to 75-13-12.
[237] *Id.* §§ 75-13-31.1 and 75-13-13.2.
[238] *Id.* §§ 75-13-13 to 75-13-14.
[239] *Id.* § 75-13-18.
[240] *Id.* §§ 75-13-19 to 75-13-21.
[241] *Id.* §§ 75-13-22 and 75-13-23.
[242] *Pecos Valley Artesian Conservancy Dist.* v. *Peters*, 50 N. Mex. 165, 173 Pac. (2d) 490 (1945).

district. Where the defendant well owner had not acquired a permit as required by law, his withdrawals could be prohibited. The court did not rule on the question of whether the action could be successfully maintained if the well owner had acquired a permit.

North Dakota

There is no distinction in rights to use ground water based on its artesian character in North Dakota. There is a code chapter, however, on artesian wells.[243] This chapter requires each artesian well to be equipped with a valve capable of controlling its flow.[244] The chapter regulates drilling procedures and provides for valves located below the frost level.[245] It is a misdemeanor to waste artesian water.[246]

South Dakota

The South Dakota ground water statute prohibits the waste of artesian waters.[247] It further requires the reporting of uncontrolled wells[248] and authorizes the Water Resources Commission to plug abandoned or wild wells.[249]

Texas

Every artesian well must be tightly cased, capped, and fitted with a device that will effectively control its flow; a well not so equipped is a public nuisance.[250] Waste of artesian water is unlawful and punishable by fine, imprisonment, or both.[251] In *Corpus Christi* v. *Pleasanton*,[252] the court held that these statutes did not prohibit the transportation of artesian waters through natural stream beds and lakes with loss by transpiration, evaporation, and seepage. The court reasoned that the English rule concerning percolating waters was settled law before these statutes were passed; that the statutes made no attempt to modify this rule, which contained no prohibition against transportation of water; and that the statutes operated on the use to which the water would be put, rather than the method of transportation. This case also

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[243] N. Dak. Cent. Code Ann. § 61-20-01 *et seq.* (1960).
[244] *Id.* § 61-20-01.
[245] *Id.* § 61-20-02.
[246] *Id.* § 61-20-04.
[247] S. Dak. Comp. Laws Ann. § 46-6-14 (1967).
[248] *Id.* § § 46-6-15 and 46-6-16.
[249] *Id.* § § 46-6-17 and 46-6-18.
[250] Tex. Rev. Stat. Ann. art. 7601 (1954).
[251] *Id.* art. 7607; Penal Code Ann. art. 847 (1961).
[252] *Corpus Christi* v. *Pleasanton*, 154 Tex. 289, 276 S.W. (2d) 798 (1955).

illustrates the fact that the artesian character of the water does not affect the rules concerning ownership or use of it.

Utah

There is no difference in Utah between the treatment of artesian waters and other ground waters.[253] The Code does provide that the State Engineer may plug, repair, or otherwise control artesian wells wasting water.[254]

Washington

Artesian waters are subject to appropriation in the same manner as other ground waters in Washington.[255] It is unlawful in irrigation areas to allow an artesian well to flow during the period between October 15 and March 15 of each year, except for domestic and livestock watering purposes.[256] When anyone fails to cap his well properly during this period, any owner of neighboring land may enter and cap it and all expenses incurred in so doing are a lien on the well.[257]

DESIGNATED CRITICAL OR OTHER GROUND WATER AREAS

Many Western States have enacted laws providing for the designation of critical or other ground water areas. These laws are designed to conserve ground water in areas where the supply is in danger of exhaustion owing to excessive withdrawals, decreased recharge, or other factors.

Such statutes include those in the following discussions of the applicable laws in particular States.[258]

Arizona

The State Land Department designates critical ground water areas, although the act provides no criteria for such designation.[259] Such an area is designated only after public hearings and the filing by the department of an

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[253] See *Wrathall* v. *Johnson*, 86 Utah 50, 40 Pac. (2d) 755 (1935).

[254] Utah Code Ann. § 73-2-21 (Supp. 1969).

[255] Wash. Rev. Code § § 90.44.035 and 90.44.040 (Supp. 1961).

[256] *Id.* § 90.36.020.

[257] *Id.* § 90.36.040.

[258] States formerly having legislation regarding critical ground water areas include Colorado and Oklahoma. See Colo. Rev. Stat. Ann. § 148-18-3 (1963), repealed, Laws 1965, § 158; Okla. Stat. Ann. tit. 82, § § 1001-1019, repealed, Laws 1972, ch. 248, § 23.

[259] Ariz. Rev. Stat. Ann. § 45-308 (Supp. 1969).

order designating the area.[260] Once an area has been established, no one may construct an irrigation well within the area unless he has applied for and obtained a permit to do so from the department.[261] However, no one need obtain a permit if his well was substantially completed at the time the area was designated.[262] The Court of Appeals has held that a property owner may begin construction following a notice that his land will be included in such an area and still qualify for an exemption for a permit.[263]

Permits must also be obtained for relocating,[264] replacing, or deepening existing wells.[265]

Hawaii

The Board of Land and Natural Resources may designate ground water areas after a public hearing and after finding that within the area one of the following conditions exist: (1) the use of ground water exceeds the rate of recharge; (2) ground water levels are declining or have declined excessively; (3) chloride content is increasing to a level that materially reduces the value of the water; (4) excessive preventable waste of water is occurring; and (5) any proposed developments for the use of water would lead to one of the above.[266] Uses existing at the time the area is designated are protected by the act. These uses include withdrawals actually being made within 5 years of the time of the designation, withdrawals being made at the effective date thereof, and those to be made in conjunction with facilities under construction on such date.[267] After the designation of an area, withdrawals can be initiated only upon receipt of a permit by the board.[268] Permits are granted on the basis of the most beneficial use of water[269] and are issued for a definite term not exceeding 50 years.[270] Permits are conditional; and the holder thereof may be required to relinquish it upon receipt of reasonable compensation, if there are applications for more beneficial use of the water and his water is necessary to fill them.[271] Provisions are included for water shortages and emergencies.[272]

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[260] Ariz. Rev. Stat. Ann. § § 45-309 and -310 (1956).
[261] Ariz. Rev. Stat. Ann. § § 45-313 and -314 (Supp. 1969).
[262] *Id.* § 45-313(C).
[263] *Lassen* v. *Harpham*, 2 Ariz. App. 478, 410 Pac. (2d) 100 (1966).
[264] Ariz. Rev. Stat. Ann. § 45-315 (1956).
[265] *Id.* § 45-316.
[266] Haw. Rev. Stat. § 177-5(5) (1968).
[267] *Id.* § § 177-15 and -16.
[268] *Id.* § 177-19.
[269] *Id.* § 177-22.
[270] *Id.* § 177-24.
[271] *Id.* § 177-27.
[272] *Id.* § § 177-2, -33 and -34.

Idaho

The Idaho statute on critical ground water areas is one of the sections of the ground water appropriation act. It provides for the designation of such areas and requires an investigation of ground water supplies prior to issuance of a permit for withdrawals therefrom. If insufficient water is present, no permit is issued.[273] This requirement varies from the remainder of the act, which provides for the issuance of permits as a matter of course when the well is not to be drilled in a critical area.

Montana

Controlled ground water areas may be established by the State Water Conservation Board after notice and hearing, if: (1) ground water withdrawals are in excess of recharge in the area; (2) excessive withdrawals are likely to occur in the near future; or (3) significant disputes concerning rights are in progress in the area.[274] If the Board finds that withdrawals exceed the safe yield, it shall order the aggregate withdrawal decreased so that it does not exceed the safe yield. Except for domestical use, such decrease shall conform to priority of rights.[275] Anyone wishing to appropriate ground water from a controlled area must request a permit to do so; and the Board shall not grant such permit if the withdrawal would be beyond the capacity of the acquifer.[276]

Nebraska

Natural resource districts function somewhat as critical ground water areas. They may adopt regulations for the conservation of ground water after consultation with certain State agencies and upon the majority vote of owners of existing wells within the district. The regulations shall be in harmony with the State water plan developed by the Nebraska Soil and Water Conservation Commission.[277]

Nevada

When the State Engineer, upon his own initiative or upon petition, finds it necessary to administer the ground water law relating to designated areas, he shall designate the areas; his action may be reviewed by the district court of the county.[278] Thereafter no one may make withdrawals from the designated basin

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[273] Idaho Code Ann. § 42-233a (Supp. 1969).
[274] Mont. Rev. Codes Ann. § 89-2914 (1964).
[275] *Id.* § 89-2915.
[276] *Id.* § 89-2918.
[277] Nebr. Rev. Stat. § 2-3237 (1970).
[278] Nev. Rev. Stat. § 534.030 (Supp. 1967).

without first obtaining a permit to do so.[279] In instances where the designated area is wholly within a single county having three or more incorporated cities, a ground water board shall be established and the State Engineer shall not approve any requests for permits until he has conferred with the board and obtained its written advice and recommendations.[280]

Oregon

The State Engineer, on his own motion or on receipt of proper petition, may initiate a proceeding to establish a critical ground water area whenever he has reason to believe that: (1) ground water levels in the area are declining, or have declined excessively; (2) the wells of two or more claimants within the area interfere with each other; (3) the available ground water supply within the area is overdrawn or is about to be overdrawn; or (4) the purity of the water in the area is about to be harmed.[281] This same proceeding may also be undertaken in connection with the determination of rights to appropriate from ground water reservoirs.[282]

The State Engineer may also institute such proceedings if an application for a permit to appropriate ground waters shows probability of wasteful use or undue interference with existing wells.[283] If, after public hearing, the evidence discloses that any of the circumstances actually exist, and that public health, welfare, and safety require controls, the State Engineer shall by order declare the area to be a critical ground water area. This order may include any one or more of the following provisions: (1) closing the area to further appropriation; (2) determining total withdrawals each day, month or year and, insofar as possible, apportioning such withdrawals among appropriators within the area in accordance with priority dates; (3) according water uses to preferences rather than priorities; (4) reducing the permissible withdrawal by one or more appropriators or wells; (5) adjusting total withdrawal by one appropriator owning two or more wells, or forbidding completely his use of one or more of the wells; (6) requiring the abatement or sealing of any well polluting the ground water; (7) requiring a system of rotation of use; or (8) any other provisions necessary to protect public health, welfare, and safety.[284]

Texas

Texas has provisions for underground water conservation districts[285] which function somewhat as critical groundwater areas.

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[279] *Id.* § 534.050.
[280] *Id.* § 534.035.
[281] Oreg. Rev. Stat. § 537.730 (Supp. 1969).
[282] *Id.* § 537.675.
[283] *Id.* § 537.620(3).
[284] *Id.* § 537.735.
[285] Tex. Rev. Civ. Stat. Ann. art. 7880-3c *et seq.* (1954).

The districts are created for the conservation, preservation, protection, recharging, and prevention of waste of ground water of subterranean reservoirs.[286] The district may require permits for drilling wells and may provide for the spacing of wells.[287] However, the ownership and rights of the landowner are expressly recognized and the priorities relating to surface water do not apply.[288] No district can be created unless its area is coterminous with an underground reservoir or subdivision thereof which has been designated by the Texas Water Rights Commission as such.[289] Districts may award waters on the basis of specified preferences.[290]

Districts are organized after petition of landowners in the area to be included therein.[291] When the land to be included in the district is one county, the formation of the district shall be considered and ordered by the county commissioner's court. When the land is in two or more counties, such formation shall be considered and ordered by the Texas Water Rights Commission.[292]

Wyoming

Any ground water district may be designated as a critical ground water area by the Board of Control upon information supplied by the State Engineer when: (1) the rate of discharge nearly equals the rate of recharge; (2) ground water levels are declining, or have declined excessively; (3) conflicts between users are occurring or may occur; (4) waste of water is occurring or may occur; or (5) other conditions require regulation in the public interest.[293] After the boundaries of a critical area have been established, there shall be an adjudication of the waters of said area.[294]

The State Engineer may, on his own motion, or after proper petition, cause a hearing to be held to determine whether the ground waters in a critical area are adequate for the needs of all appropriators therein. After the hearing, he may adopt an order calling for, among other things, one or more of the following: (1) close the critical area to further appropriation; (2) determine permissible total withdrawals for each day, month, or year; (3) if he finds withdrawals by junior appropriators have a material adverse effect on senior appropriators, he may order the juniors to cease or reduce withdrawals; (4) he may require and specify a system of rotation of use.[295] Appropriators of

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[286] *Id.* art. 7880-3c(B).
[287] *Id.* arts. 7880-3c(B)(3) to (B)(8).
[288] *Id.* art. 7880-3c(D).
[289] *Id.* art. 7880-3c(C).
[290] *Id.* art. 7880-4a.
[291] *Id.* art. 7880-10.
[292] *Id.* art. 7880-13.
[293] Wyo. Stat. Ann. § 41-129 (1957).
[294] *Id.* § 41-131.
[295] *Id.* § 41-132(a).

ground water may agree to a method or scheme of control of withdrawals, apportionment, rotation, or proration, subject to approval of the State Engineer.[296]

Applications for permits to appropriate ground water from a designated critical area may be approved if there are unappropriated waters, the proposed means of diversion are adequate, the proposed location of the well does not conflict with any regulation on spacing or distributing wells, and the proposed use would not be detrimental to the public interest.[297]

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[296] *Id.* § 41-132(b).

[297] *Id.* § 41-140.

With respect to the issuance of ground water use permits outside of designated critical ground water areas, see "Percolating Waters—Wyoming," *supra.*

Chapter 20

GROUND WATER RIGHTS IN SELECTED STATES

This chapter includes more detailed discussions regarding the development and status of laws regarding ground water rights in selected Western States than the preceding chapter. Ground water rights in each of the 19 Western States are further discussed in the appendix. The opening discussion of ground water laws in California portrays many of the several facets of this subject. A number of the remaining States are covered in less detail.

CALIFORNIA

Classification

For the purpose of determining rights to use water, ground waters in California are classified as (1) definite underground streams, (2) underflow of surface streams, and (3) percolating waters.[1] For such purpose, artesian waters are not classified spearately from other ground waters.[2]

Definite Underground Streams

Characteristics

A subterranean watercourse has the same general characteristics as those of a watercourse on the surface: (1) it is a definite stream, and (2) it flows in a definite channel. The stream must be flowing through a known and defined channel.[3] "Defined" means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge, and "known" refers to knowledge of the course of the stream by reasonable inference.[4]

If underground water flows in a certain course through coarse, permeable

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[1] "It is essential to the nature of percolating waters that they do not form part of the body or flow, surface or subterranean, of any stream." *Vineland Irr. Dist.* v. *Azusa Irrigating Co.*, 126 Cal. 486, 494, 58 Pac. 1057 (1899). Cal. Water Code § § 1200 and 2500 (West 1956).

[2] *Miller* v. *Bay Cities Water Co.*, 157 Cal. 256, 268-269, 107 Pac. 115 (1910).

[3] *Los Angeles* v. *Pomeroy*, 124 Cal. 597, 633-634, 57 Pac. 585 (1899).

Ground waters are presumed to be percolating waters rather than in an underground stream, as discussed at notes 29-30 *infra*.

[4] *Id.* See also *Cave* v. *Tyler*, 147 Cal. 454, 456, 82 Pac. 64 (1905).

The California Water Code refers to "known and definite channels," as discussed at note 26 *infra*.

material where the existence and general course of the flowing or moving body of water can be easily determined, it may constitute a watercourse although not visible on the surface and although the space through which the channel extends may be largely filled with the material through which the water flows. Whether or not the subsurface flow has a definite direction corresponding to surface flow is a relevant factor.[5] Waters of a creek, according to the evidence in one case, sank into the ground above a cienaga, passed through it in the ground, and emerged into a creek below.[6] There also was evidence to the effect that "it was not mere percolating water, but constituted what has been defined as an underground stream."

Rights of Use

Subject to the law of watercourses.—"There is no dispute between the parties and no conflict in the authorities as to the proposition that subterranean streams flowing through known and definite channels are governed by the same rules that apply to surface streams."[7]

Appropriative rights.—Subject to vested riparian and appropriative rights, waters in definite underground streams are subject to appropriation.[8]

Riparian rights.—A definite underground stream is subject to the riparian rights of contiguous lands.[9] Subject to preferential domestic use rights, each landowner has a correlative right to take a proportionate share of the stream water, which right he shares reciprocally with the other riparian owners.

Burden of proof.—The presumption is that ground water is percolating—not part of a stream or watercourse, nor flowing in a definite channel.[10]

Underflow of Surface Streams

Characteristics

The underflow—or subflow or supporting flow—of a surface stream is the subsurface portion of a watercourse, the whole of which comprises waters flowing in close association both on and under the surface. The flow and the limits within which the waters that constitute the underflow are confined must be reasonably well defined. It consists of water in the soil, sand, and gravel

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[5] *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 57 Pac. 585, 596, 599 (1899).

[6] *Cave* v. *Tyler,* 147 Cal. 454, 456, 82 Pac. 64 (1905).

[7] *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 632, 57 Pac. 585 (1899).

[8] Cal. Water Code § § 1200 and 1201 (West 1956). See *Cross* v. *Kitts,* 69 Cal. 217, 222, 10 Pac. 409 (1886).

[9] *Prather* v. *Hoberg,* 24 Cal. (2d) 549, 557-562, 150 Pac. (2d) 405 (1944). Compare *Hale* v. *McLea,* 53 Cal. 578, 584 (1879).

[10] *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 633-634, 57 Pac. 585 (1899). See *Arroyo Ditch & Water Co.* v. *Baldwin,* 155 Cal. 280, 284, 100 Pac. 874 (1909). See also *Hanson* v. *McCue,* 42 Cal. 303, 308 (1871).

immediately below the bed of the open stream,[11] which supports the surface stream in its natural state or feeds it directly.[12] And it is essential that the surface and subsurface flows be in contact and that the subsurface flow shall have a definite direction corresponding to the surface flow.[13]

Lateral limits of underflow.—The underflow may include not only the water moving in the loose, porous material that constitutes the bed of the surface stream, but also the lateral extensions of the subsurface water-bearing material on each side of the surface channel. In other words, these lateral extensions are overlaid by dry ground.[14] In order that the existence and general direction of the body of water moving in the ground may be determined with reasonable accuracy, it must be moving in a course and confined within a reasonably well defined space.[15]

The underflow is a part of the watercourse.—It is "well established that the underground and surface portions of the stream constitute one common supply."[16]

Rights of Use

From the fact that the underflow or subflow of a watercourse is a part thereof, it follows (1) that rights to use the subterranean portion are governed by the law of watercourses, and (2) that rights in a watercourse include rights in its underflow.

Appropriative rights.—In one of its early decisions with respect to the underflow of streams, the California Supreme Court held that "one may, by appropriate works, develop and secure to useful purposes the subsurface flow of our streams, and become, with due regard to the rights of others in the stream, a legal appropriator of waters by so doing."[17]

Riparian rights.—The supreme court has held that the underflow belongs to the stream and must flow on to the lower riparian proprietor.[18] The underflow is no more waste water than is the surface flow which the riparian owner actually puts to use.[19]

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[11] *Verdugo Canyon Water Co.* v. *Verdugo,* 152 Cal. 655, 663, 93 Pac. 1021 (1908); *Perry* v. *Calkins,* 159 Cal. 175, 180, 113 Pac. 136 (1911).

[12] *Huffner* v. *Sawday,* 153 Cal. 86, 92-93, 94 Pac. 424 (1908); *San Bernardino* v. *Riverside,* 186 Cal. 7, 14, 198 Pac. 784 (1921).

[13] *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 617, 636-637, 57 Pac. 585 (1899).

[14] See *Larsen* v. *Apollonio,* 5 Cal. (2d) 440, 444, 55 Pac. (2d) 196 (1936); *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 375, 40 Pac. (2d) 486 (1935).

[15] *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 623-624, 57 Pac. 585 (1899).

[16] *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 555, 81 Pac. (2d) 533 (1938); *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 623-624, 631, 57 Pac. 585 (1899); *Barton Land & Water Co.* v. *Crafton Water Co.,* 171 Cal. 89, 95, 152 Pac. 48 (1915).

[17] *Vineland Irr. Dist.* v. *Azusa Irrigating Co.,* 126 Cal. 486, 495, 58 Pac. 1057 (1899). Cal. Water Code § § 1200, 1201 (West 1956).

[18] *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 630, 57 Pac. 585 (1899).

[19] *Herminghaus* v. *Southern Cal. Edison Co.,* 200 Cal. 81, 107, 252 Pac. 607 (1926).

Following the constitutional amendment of 1928,[20] referring to reasonable beneficial use, the overlying landowner's right to pump water from a stream's underflow in his land would stand as high as the right of an owner of land contiguous to the surface stream to pump water over the banks onto his land.

The watercourse in litigation in *Peabody* v. *Vallejo*, decided in 1935,[21] was not only a surface stream, but a subsurface stream as well, the latter extending a considerable distance on either side of the surface trough. In such a situation, said the court, the riparian landowners and the overlying landowners may be said to possess a right to the stream, surface and subsurface, analogous to the riparian right, which should be protected against an unreasonable depletion by an appropriator. "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."[22]

The riparian right, while including not only the surface flow but also the underground flow, is now "subject to the [reasonable beneficial use] limitations in the 1928 constitutional amendment."[23]

In a 1938 case, a downstream riparian owner contended that it was entitled to maintain its underground basins filled to capacity in order to support the surface stream flowing over them, so that its cattle could be watered from the surface flow. Whether that, said the supreme court, is or is not a reasonable beneficial use is a question of fact to be passed on in each case. Either or both riparian owners could be required to endure a reasonable inconvenience or incur a reasonable expense in order that the water might be reasonably used by the other, but not unreasonable inconvenience or expense therefor. Each may be required to bear a fair proportion of unreasonable expense.[24]

Percolating Waters

Nature of Percolating Waters

Physical characteristics.—(1) Distinct from definite underground stream. It is essential to the nature of percolating waters that they do not form part of the body or flow, surface or subterranean, of any definite stream.[25]

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[20] Cal Const. art. XIV, § 3. See "Effect of the Constitutional Amendment of 1928," *infra.*

[21] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 40 Pac. (2d) 486 (1935), discussed in chapter 10 at note 361.

[22] 2 Cal. (2d) at 375-376.

[23] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 526, 531, 45 Pac. (2d) 972 (1935).

See chapter 13 at notes 236-251 for a discussion of this amendment.

[24] *Rancho Santa Margarita* v. *Vail,* 11 Cal. (2d) 501, 556-562, 81 Pac. (2d) 533 (1938).

[25] *Vineland Irr. Dist.* v. *Azusa Irrigating Co.*, 126 Cal. 486, 494, 58 Pac. 1057 (1899).

The California Water Code does not use the term "percolating water" in its provisions relating to appropriation of water and statutory adjudication of water rights, but confines the operation of such provisions to surface waters and to "subterranean streams flowing through known and definite channels."[26] This effectively excludes all other ground waters; and owing to the judicial distinctions between percolating waters and waters of definite underground streams, it necessarily excludes percolating waters.

The decision in *Katz* v. *Walkinshaw* in 1902-1903 is of fundamental importance in California water law, not only in establishing a new ground water law (see "The California Doctrine of Correlative Rights," below), but also in broadening the concept of percolating water to include within that term well-defined subterranean basins filled with loose water-bearing materials through which the ground waters are broadly diffused.[27]

(2) Ground waters escaped from stream. Waters that have so far left the bed and other waters of a stream as to have lost their character as part of the flow, and that no longer are part of any definite underground stream, are percolating waters.[28]

(3) Ground waters are presumed to be percolating. The question of existence of percolating water in land is merely a question of fact.[29] But if it is known that ground waters exist, but not known that they are flowing in a defined and known channel, "The presumption is that they are not part of a stream or watercourse nor flowing in a definite channel." The burden of proof is upon the party asserting the contrary.[30]

Property characteristics.—Water percolating in soil is real property.[31]

The subject of ownership of percolating water is discussed later under "Former Doctrine of Rights of Use" and "The California Doctrine of Correlative Rights—Analogy between correlative and riparian rights."

Rights of Use as Property

Real property, parcel of the land.—The right to use percolating water, as well as the *corpus* of the water itself, is real property.[32] In *Pasadena* v.

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[26] Cal. Water Code § § 1200 and 2500 (West 1956).

[27] *Katz* v. *Walkinshaw*, 141 Cal. 116, 138-140, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[28] *Vineland Irr. Dist.* v. *Azusa Irrigating Co.*, 126 Cal. 486, 494, 58 Pac. 1057 (1899). See *Montecito Valley Water Co.* v. *Santa Barbara*, 144 Cal. 578, 588, 77 Pac. 1113 (1904).

[29] *Hooker* v. *Los Angeles*, 188 U.S. 314, 317 (1903).

[30] *Los Angeles* v. *Pomeroy*, 124 Cal. 597, 628, 633-634, 57 Pac. 585 (1899). See *Hanson* v. *McCue*, 42 Cal. 302, 308 (1871); *Arroyo Ditch & Water Co.* v. *Baldwin*, 155 Cal. 280, 284, 100 Pac. 874 (1909).

Regarding factors considered in ascertaining whether there may be an underground stream, see the discussion at notes 3-6 *supra*.

[31] *Stanislaus Water Co.* v. *Bachman*, 152 Cal. 716, 725, 93 Pac. 858 (1908). This case did not involve ground water.

[32] *Burr* v. *Maclay Rancho Water Co.*, 154 Cal. 428, 439, 98 Pac. 260 (1908); *Rank* v. *Krug*, 90 Fed. Supp. 773, 787 (S.D. Cal. 1950).

Alhambra, the California Supreme Court stated that the "overlying right," or right of the owner of the land to take water from the ground underneath for use on his overlying land, "is based on ownership of the land and is appurtenant thereto."[33]

Grant of right of use.—A right to use percolating water in one's land may be granted by the owner. Such grant will be protected against impairment by adverse use.[34]

Former Doctrine of Rights of Use

The English rule of absolute ownership.—As late as 1899 the California Supreme Court had said, "Percolating waters are a part of the soil, and belong to the owner of the soil. He may impound them at will, and the proprietor of lower lands injuriously affected cannot be heard to complain."[35]

Qualification regarding absence of malice.—The English rule, then, allowed the landowner the free and unlimited use of such percolating water as he could reduce to physical possession while still in his land, but with one exception: That in so depriving others of the use of the water he be not actuated solely by malice, without seeking some benefit to his own land, such as "intentionally, unnecessarily, and without benefit" to himself injuriously divert the water. "This the law characterizes as a malicious injury."[36]

The California Doctrine of Correlative Rights

The doctrine of correlative rights to the use of percolating waters in California accords to each owner of land overlying a common water supply a right to the reasonable beneficial use of the water of that supply on or in connection with his overlying land. Such right of use of each landowner is correlative with similar rights of all other overlying owners. An insufficient supply may be apportioned among them by a court decree. Any surplus may be appropriated for nonoverlying uses.

This principle supplanted the formerly recognized English doctrine of absolute ownership. It was established by the California Supreme Court in 1902-1903 in *Katz* v. *Walkinshaw,* which departed from the English doctrine and adopted what was referred to therein both as "the doctrine of reasonable use" and "this rule of correlative rights."[37] Several decisions of the courts of

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[33] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 925, 207 Pac. (2d) 17 (1949).

[34] *United States* v. *4.105 Acres of Land in Pleasanton,* 68 Fed. Supp. 279, 289 (N.D. Cal. 1946).

[35] *Vineland Irr. Dist.* v. *Azusa Irrigating Co.,* 126 Cal. 486, 494, 58 Pac. 1057 (1899). See also *Hanson* v. *McCue,* 42 Cal. 303, 309 (1871); *Cross* v. *Kitts,* 69 Cal. 217, 222, 10 Pac. 409 (1886); *Southern Pac. R.R.* v. *Dufour,* 95 Cal. 615, 617-620, 30 Pac. 783 (1892); *Copper King* v. *Wabash Min. Co.,* 114 Fed. 991, 993-994 (S.D. Cal. 1902).

[36] *Bartlett* v. *O'Connor,* 102 Cal. XVII, 4 Cal. U. 610, 613, 36 Pac. 513 (1894).

[37] *Katz* v. *Walkinshaw,* 141 Cal. 116, 136-137, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

Eastern States, which had departed from the English rule and had developed in place thereof the American rule of reasonable use, were cited or reviewed with approval. The new California rule was an outgrowth of the American rule of reasonable use in the East, but with some new features of considerable importance.

Development of the correlative doctrine.—Development of the new California doctrine began with *Katz* v. *Walkinshaw*[38] and continued in the numerous ground-water cases that succeeded it.

There were two hearings in the *Katz* case; the first decision was rendered in 1902 and the second, on rehearing, in 1903. The supreme court adopted the "doctrine of reasonable use," but reference was also made in the opinion to "this rule of correlative rights," which became and remained the chosen designation.

The opinion on rehearing went beyond the actual decision and included some observations on the making of "new applications of old principles to the new conditions." Largely *dicta* insofar as the issues of the *Katz* case were concerned, they have all become part of the correlative doctrine in California. This results from the repeated statement and restatement of principles in various decisions whether or not necessary thereto. It is safe to say that, on the whole, there has been enough factual basis for and enough reassertion of each important facet of the correlative doctrine, over a long enough period of time, to make each essential element of the doctrine an acknowledged rule of property in the State.

Rights of overlying landowners as against each other.—Owners of lands overlying the same supply of percolating ground water have equal rights therein—correlative rights—for use on their overlying lands.[39] Each right extends only to the reasonable use of the water for the benefit of the overlying land, in such quantity as is reasonably necessary, provided the supply is sufficient therefor. If not sufficient for all, each is entitled to a reasonable share.[40] The overlying owner may make this reasonable use according to the custom of the locality.[41] The fact that the water is moving through one's land to that of a neighbor, or that by making his proper use he may thereby prevent the water from entering his neighbor's land or may withdraw it therefrom is immaterial, provided that he conforms to the legal maxim *Sic utere tuo ut alienum non laedas*—use your property so as not to injure that of others.[42]

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[38] *Katz* v. *Walkinshaw*, 141 Cal. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[39] 141 Cal. at 135-136, 70 Pac. 663 (1902), 74 Pac. 766 (1903); *Burr* v. *Maclay Rancho Water Co.*, 160 Cal. 268, 273, 116 Pac. 715 (1911).

[40] *Cohen* v. *La Canada Land & Water Co.*, 142 Cal. 437, 439-440, 76 Pac. 47 (1904); *Corona Foothill Lemon Co.* v. *Lillibridge*, 8 Cal. (2d) 522, 525, 66 Pac. (2d) 443 (1937); *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 925-926, 207 Pac. (2d) 17 (1949); *Hudson* v. *Dailey*, 156 Cal. 617, 625-626, 105 Pac. 748 (1909).

[41] *Allen* v. *California Water & Tel. Co.*, 29 Cal. (2d) 466, 484, 176 Pac. (2d) 8 (1946).

[42] *O'Leary* v. *Herbert*, 5 Cal. (2d) 416, 422, 55 Pac. (2d) 834 (1936). See Cal. Civ. Code § 3514 (West 1970).

The owner of overlying land who first begins to use percolating water thereon gains no priority in the use of the water as against other overlying owners solely because he used the water first. In the absence of a prescriptive right against it, the correlative right, like the riparian right, does not depend upon use and is not lost by disuse. And superior rights against other overlying owners may be obtained by grant, prescription, and condemnation—not by being first to exercise the correlative right.[43]

The correlative right may be exercised for any beneficial purpose of use on or in connection with the overlying land, so long as the taking of the water pursuant thereto works no unreasonable injury to other overlying land.[44] With respect to the use of percolating ground waters as supporting subterranean supply for the benefit of farming operations, the California Supreme Court held that an injunctive order preventing the beneficial use of water beneath 98 percent of the area in litigation, in order to maintain the natural condition of the water table beneath 2 percent of the area, did not conform to the policy of reasonable beneficial use commanded by the constitutional amendment of 1928.[45]

A drainage operation that effects the removal from overlying land of a quantity of water greatly exceeding its reasonable proportion of that drained from the common source, and results in its waste, is not a reasonable use of the common water supply.[46] Nor does the flooding of lands with well water pumped thereon in order to attract wild game and birds constitute a reasonable beneficial use of the land and water.[47]

Apportionment of water among overlying landowners.—The term "reasonable use" does not mean that one of two or more persons having correlative rights in a common supply of water may take all that is reasonably beneficial to his land, regardless of the needs of others, if there is not enough to supply the needs of all. Each is entitled to a fair and just proportion.[48]

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[43] *Hudson* v. *Dailey,* 156 Cal. 617, 628-629, 105 Pac. 748 (1909). See *Burr* v. *Maclay Rancho Water Co.,* 154 Cal. 428, 436, 438-439, 98 Pac. 260 (1908); *Burr* v. *Maclay Rancho Water Co.,* 160 Cal. 268, 281-282, 116 Pac. 715 (1911).

[44] *San Bernardino* v. *Riverside,* 186 Cal. 7, 15, 198 Pac. 784 (1921); *Revis* v. *I. S. Chapman & Co.,* 130 Cal. App. 109, 113, 19 Pac. (2d) 511 (1933).

[45] *Hillside Water Co.* v. *Los Angeles,* 10 Cal. (2d) 677, 685-688, 76 Pac. (2d) 681 (1938). Compare the holding in *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.,* 3 Cal. (2d) 489, 526, 45 Pac. (2d) 972 (1935), respecting the claimed riparian requirement of underground flow to moisten the land, under the new doctrine of reasonable beneficial use.

Regarding the constitutional amendment, see "Effect of Constitutional Amendment of 1928," *infra.*

[46] *Revis* v. *I. S. Chapman & Co.,* 130 Cal. App. 109, 112-113, 19 Pac. (2d) 511 (1933).

[47] *In re Maas,* 219 Cal. 422, 426, 27 Pac. (2d) 373 (1933). The fact that this may contribute to the enjoyment of the owner of the hunting privilege is immaterial in this context.

[48] *Katz* v. *Walkinshaw,* 141 Cal. 116, 135-136, 70 Pac. 663 (1902), 74 Pac. 766 (1903);

When the natural supply of water is not sufficient for all overlying owners, each is entitled to a reasonable proportion of the whole, and "may apply to the courts to restrain an injurious and unreasonable taking by another and to have the respective rights adjudicated and the use regulated so as to prevent unnecessary injury and restrict each to his reasonable share."[49]

Correlative rights to water needed are paramount.—The rights of the overlying owner to the quantity of water necessary for use on his overlying land are paramount to an appropriation for distant use.[50] In the event of a shortage, the right of an appropriator, being limited to the surplus, must yield to that of the overlying owner unless the appropriator has gained prescriptive rights through the adverse taking of nonsurplus waters.[51]

The question as to whether equity could be invoked to protect the unused overlying right after an appropriation for distant use had begun was unanswered in the *Katz* case[52] but was decided several years later in *Burr* v. *Maclay Rancho Water Company.*[53] Important points are:

(a) No overlying owner can, to the injury of others, take water from the water-bearing strata and conduct it to distant nonoverlying lands.

(b) As between an appropriator for distant use and an overlying owner already using water, the overlying owner's rights are paramount but extend only to needed water. The appropriator may take the surplus.

(c) After an appropriator has begun to take water to distant land for use thereon, the overlying owner may invoke the aid of a court of equity to protect him in his latent right of use and thus prevent the appropriator from defeating his right by prescription.

(d) The appropriator for distant use has the right to any surplus, whether or not overlying owners have previously used the water, and may take the regular supply to distant land until the overlying owners are ready to use it.

(e) In controversies between overlying owners and an appropriator for distant use, the court has power to make reasonable regulations for use of water by all parties, fixing the times and quantity of use by each.

Correlative rights are limited to reasonable beneficial use, as held in the *Katz* and *Burr* cases. An exception was provided in a case decided in 1910,[54] in

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Eckel v. *Springfield Tunnel & Dev. Co.*, 87 Cal. App. 617, 624, 262 Pac. 425 (1927); *Orchard* v. *Cecil F. White Ranches, Inc.*, 97 Cal. App. (2d) 35, 42-43, 217 Pac. (2d) 143 (1950).

[49] *San Bernardino* v. *Riverside*, 186 Cal. 7, 15, 198 Pac. 784 (1921). See *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 924, 207 Pac. (2d) 17 (1949).

[50] *Allen* v. *California Water & Tel. Co.*, 29 Cal. (2d) 466, 483-486, 176 Pac. (2d) 8 (1946).

[51] *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 926, 207 Pac. (2d) 17 (1949). See *Alpaugh Irr. Dist.* v. *County of Kern*, 113 Cal. App. (2d) 286, 292, 248 Pac. (2d) 117 (1952).

See chapter 14 for elements of prescription pertaining to watercourses.

[52] *Katz* v. *Walkinshaw*, 141 Cal. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[53] *Burr* v. *Maclay Rancho Water Co.*, 154 Cal. 428, 435-437, 98 Pac. 260 (1908).

[54] *Miller* v. *Bay Cities Water Co.*, 157 Cal. 256, 272, 281, 107 Pac. 115 (1910).

which the owner of land containing a water-bearing stratum supplied by the floodwaters of a stream was held to have a primary right to the full flow of the waters in order to bring his stratum up to its full water-bearing capacity, such right being paramount to the right of an appropriator to divert any of the waters for use beyond the watershed. However, since the inauguration of the new State water policy by the constitutional amendment of 1928, the principle of reasonable beneficial use governs all uses of water in the State under all kinds of water rights.[55] "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."[56]

Analogy between correlative and riparian rights.—The correlative right of an owner of land overlying a percolating ground water supply and the riparian right of an owner of land contiguous to a surface watercourse are in many respects analogous. The analogy was recognized early in the correlative doctrine's existence, but full acceptance came later, after some uncertainties had been clarified. To make the correlative right a real counterpart of the riparian right, the concept of individual ownership in the water while in the overlying land must yield to that of public ownership—at least that part of the public represented by the owners of all overlying lands—subject to individual rights of use, all of which are correlative with each other.

As previously noted, under "Development of the correlative doctrine," there were two hearings and two decisions in *Katz* v. *Walkinshaw.*[57] The view taken in the first opinion was that the English common law was only being modified, by adding, in certain cases, the element of reasonable use. The view taken in the second opinion (written by a different justice, the first one having died) proceeded on the theory of repudiation rather than modifications of the common law of absolute ownership. This difference of opinion is chiefly of historical interest; the view that the new rule adopted in the *Katz* case not only is not that of the common law, but is fundamentally different therefrom, has been indicated in later decisions. Thus, the California Supreme Court said, in 1935, "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."[58]

With respect to the question of public ownership of percolating water, the only dissident note appears to have been in a case decided in 1921 to the effect

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[55] See "Effect of Constitutional Amendment of 1928," *infra.*

[56] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 372, 40 Pac. (2d) 486 (1935).

[57] *Katz* v. *Walkinshaw,* 141 Cal. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[58] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 372, 40 Pac. (2d) 486 (1935); accord, *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.,* 3 Cal. (2d) 489, 525, 45 Pac. (2d) 972 (1935); *Hillside Water Co.* v. *Los Angeles,* 10 Cal. (2d) 677, 686, 76 Pac. (2d) 681 (1938); *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 925, 926, 207 Pac. (2d) 17 (1949); *United States* v. *4.105 Acres of Land in Pleasanton,* 68 Fed. Supp. 279, 288 (N.D. Cal. 1946); *Rank* v. *Krug,* 90 Fed. Supp. 773, 787 (S.D. Cal. 1950).

that the owner of private land has title to the water in his land.[59] However, it was ownership of *rights to the use* of the percolating waters, rather than ownership of the *corpus* of the water, with which the court was really concerned. It is doubtful that anything said by the court in that decision had any effect on the prevailing concept of the principle of common ownership of percolating waters as opposed to individual private ownership.

The analogy between the correlative and riparian doctrines, close as it is in most essential respects, is not quite complete. Because of the hydrologic differences between flowing streams and percolating ground waters, the concept of upper and lower uses of stream waters is not, in the usual case, pragmatically applicable to percolating ground waters.

The analogy between the two doctrines, noted above, is closer now than it was prior to the formulation of the State water policy associated with and commanded by the constitutional amendment of 1928.[60] Before that time, the riparian owner was not held to a reasonable use of the water as against an appropriator. But as a result of the amendment, the rule of reasonable beneficial use applies equally to overlying and riparian uses of water.[61]

Adjustment of rights in Pasadena v. Alhambra.—This prominent and outstandingly important percolating water case[62] involved the waters of a ground water area,[63] which had been overdrawn for many years. In fact, the overdraft upon the ground water supply first occurred in 1913-1914. From then until suit was first brought in 1937, withdrawals from the basin exceeded the safe yield in all except 2 years. Despite this, the parties continued their pumping, the effect of which was to continue the overdraft and lowering of the water table. Hence there was an invasion of the rights of both overlying owners and appropriators; but it was only a partial one because it did not completely oust the original owners of their water rights. Pumpage by each group actually interfered with the other group in producing an overdraft and thereby making it impossible for all to continue at the same rate in the future.

The California Supreme Court held that the appropriations that caused the overdraft were invasions of the rights of overlying owners and prior appropriators, and that prescriptive rights were thereby established to whatever

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[59] *San Bernardino* v. *Riverside,* 186 Cal. 7, 25, 198 Pac. 784 (1921).

[60] Cal. Const. art. XIV, § 3.

[61] *Peabody* v. *Vallejo,* 2 Cal. (2d) 351, 372, 40 Pac. (2d) 486 (1935). See "Effect of Constitutional Amendment of 1928," *infra.*

[62] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 207 Pac. (2d) 17 (1949), certiorari denied, 339 U.S. 937 (1950).

This case was followed in 1964 by a decision in which a district court of appeal reviewed the principles established in this case and considered the current contentions in the light of the rules regarding ground water rights laid down therein. *California Water Serv. Co.* v. *Edward Sidebotham & Son, Inc.,* 202 Cal. App. (2d) 256, 37 Cal. Rptr. 1 (1964).

[63] See 33 Cal. (2d) at 921 for a description of the basin.

extent those rights were invaded throughout the statutory periods for acquiring prescriptive rights. But by their own acts in continuing to pump water, these original holders of water rights either retained or acquired rights to continue to take some water in the future. Hence the prescriptive rights acquired against them were limited to the extent that the original owners retained or acquired rights by their pumping. The supreme court considered it unnecessary to determine, for the purpose of this adjudication, whether the overlying owners "retained simply a part of their original overlying rights or whether they obtained new prescriptive rights to use water." All parties were restricted to a proportionate reduction in the quantities of water they had been pumping, the total annual pumpage from the basin being limited to the safe yield.

Mutual prescription: A troublesome, controversial concept.—(1) Erroneous use of words. Certain writers have used the term "mutual prescription" and have cited the California Supreme Court's decision in the *Pasadena* case as their authority. This is incorrect. It is true that a new principle was added to the long established correlative doctrine in California—that the production of water in the unit should be limited by a proportionate reduction in the quantity of water each party had taken throughout the statutory period. In other words, it was a successful effort to spread the production and use of water among all users in proportion to their several takings, an application of equitable principles to an unusual and difficult situation. Obviously, however, this bore no relation to so-called "mutual prescripton."

(2) A concept not adopted in California water rights law.[64] In *Pasadena* v. *Alhambra,*[65] which dealt with the determination of rights in ground waters only, a new dimension was added to the established doctrine of correlative rights in California. The parties to the action included overlying landowners and appropriators. A number of the appropriators were public service companies and/or persons who planned to use the appropriated waters at great distances from the Raymond Basin, the source of the ground waters. A number of relatively small users were not made parties to the litigation, but the court concluded that it would not have been practical to make a determination of the issues if jurisdiction to allocate the limited supplies of ground water was dependent upon the joinder of every person having some real or potential interest in the Raymond Basin. The court accordingly indicated that those not joined as parties to the litigation were not bound by the judgment nor by any decree which the court might enter.[66]

Pursuant to statutory authority, the trial court referred the controversy to the State Department of Public Works for a determination of the facts.[67] The

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[64] This subsection was prepared by John Lowell Fruth, who assisted the author in work on State water rights laws while a law student in his last year at the University of California. The author is in full accord with Mr. Fruth's statements and conclusions.

[65] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 207 Pac. (2d) 17 (1949).

[66] 33 Cal. (2d) at 919-920.

[67] Cal. Water Code §§ 2000 to 2050 (West 1956). The State Water Rights Board

facts revealed an overdraft of the ground water supply of the Raymond Basin which first started in 1913-1914. Between 1913-1914 and 1937 when the suit was brought, the pumpage from the Raymond Basin exceeded the safe yield in all but 2 years. Despite the overdraft, the parties continued to pump water from the basin which resulted in a continued overdraft with consequent lowering of the water table.[68] The overdraft was plainly observable in the wells of the parties.

The supreme court held that when the overdraft first occurred there was an invasion to some extent of the rights of the overlying owners and prior appropriators. Although no taker was prevented from taking the amount of water which he needed, the injury commenced from the date of the first overdraft (since a continuation of the overdraft would eventually lead to a depletion of the supply of ground water in the Raymond Basin, thereby rendering the supply of ground water inadequate to satisfy the needs of all takers). "The injury thus did not involve an immediate disability to obtain water, but, rather, it consisted of the continual lowering of the level and gradual reducing of the total amount of stored water, the accumulated effect of which, after a period of years, would be to render the supply insufficient to meet the needs of the rightful owners."[69]

The supreme court held that prescriptive rights had been acquired by appropriations which occurred after the start of the overdraft and that such rights were acquired against both the overlying owners and the prior appropriators. The court further held that the overlying owners and the prior appropriators acquired, or retained, rights by reason of their continued pumping of water from the Raymond Basin. The supreme court adopted the trial court's conclusion that "the production of water in the unit should be limited by a proprortionate reduction in the amount which each party had taken throughout the statutory period."[70]

In the presentation of the case by the respondents, a stipulation was entered by the appellant and the respondents which provided that "all of the water taken by each of the parties to this stipulation and agreement was, at the time it was taken, taken openly, notoriously, and under a claim of right, which claim of right was continuously and uninterruptedly asserted by it to be and was adverse to any and all claims of each and all of the other parties joining herein."[71] On the basis of this stipulation, the respondents argued that all rights had become "mutually prescriptive" with no rights prior or paramount. This stipulation was the subject of extensive attention and comment by all the

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succeeded to this function previously performed by the State Department of Public Works, and in turn was succeeded by the State Water Resources Control Board.

[68] 33 Cal. (2d) at 922, 930.

[69] 33 Cal. (2d) at 929.

[70] 33 Cal. (2d) at 933.

[71] 33 Cal. (2d) at 928.

courts which made determinations at various stages of the proceedings.[72] Although the supreme court determined that those appropriators who commenced their appropriations after the start of the overdraft acquired prescriptive rights, the supreme court did not adopt the argument that prescriptive rights were acquired by the overlying owners. This would have been necessary if the doctrine of mutual prescription were to be applied according to the stipulation of the parties. In fact, in the writer's opinion, the supreme court did not decide the case upon the basis of any theory of mutual prescription, but rather on the basis of the concept of prescriptive rights in the classical sense and on the doctrine of correlative rights as developed in California. At no point in stating its holdings did the supreme court use the term mutual prescription. The following language from the court's opinion is indicative that mutual prescription was not adopted as a part of the law of water rights in California:

> We need not determine whether the overlying owners involved here retained simply a part of their overlying rights or whether they obtained new prescriptive rights to use water. [Citation omitted.] The question might become important in order to ascertain the rights of the parties in the event of possible future contingencies, but these may never happen.[73]

The reluctance of the supreme court to determine the controversy upon the basis of the novel concept of mutual prescription can, in part, be attributed to the forgotten opinion of the court of appeal in this controversy. The court of appeal decision indicated the lack of legal authority for the contention that mutual prescription was a part of the California law of water rights. Indeed, the argument for mutual prescription was not urged with much force according to the scathing opinion of the court of appeal.[74] Although the court of appeal reversed the trial court while the supreme court modified and affirmed the decision of the trial court, the court of appeal—particularly the concurring opinion of Judge Shinn—set forth the troublesome nature of the doctrine of mutual prescription in the law of water rights. Representative of the reaction of the court of appeal to the argument for mutual prescription are the following excerpts from that opinion. The majority opinion stated:

> Respondents argue that the existence of the overdraft rendered the takings mutually adverse and, as a consequence, the missing

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[72] 33 Cal. (2d) at 928.

[73] 33 Cal. (2d) at 932.

Following the preparation of this subtopic by Mr. Fruth, in *Los Angeles* v. *San Fernando,* 28 Cal. App. (3d) 905, 105 Cal. Rptr. 77, 85-86 (1972), a California court of appeal said that the *Pasadena* case, "relied upon by the [lower] court for its application of the doctrine of mutual prescription, is not binding here" in part because "the cities there had stipulated that their water usage was *adverse*, open and notorious and under a claim of right, and that issue was accordingly not raised upon appeal."

[74] *Pasadena* v. *Alhambra,* 180 Pac. (2d) 699 (Cal. App. 1947).

> element of adverse use was supplied by the existence of the overdraft. We cannot agree with the conclusion of the trial court as to the prescriptive character of all ground water rights in issue or with the argument of respondents in support thereof. It is thoroughly established that the existence of adverse use is fundamental to the acquisition of prescriptive status.[75]

The concurring opinion of Judge Shinn added, "It is a novel theory, unsupported by authority and in my opinion, insupportable in reason."[76]

The only authorities which the respondents cited in support of the argument for mutual prescription which were discussed by the court were *Burr* v. *Maclay Rancho Water Company*[77] and *San Bernardino* v. *Riverside*.[78] Both of these were summarily dealt with in Judge Shinn's concurring opinion. Judge Shinn rejected these cases as authority for the concept of mutual prescription, but rather found these cases to be authority for a decree ordering reduction of use of the available supply of percolating water upon a basis which gives effect to priorities previously established.[79]

In sum, the decision of the court of appeal in this case expressly rejected, and the opinion of the supreme court did not adopt, the doctrine of mutual prescription as part of the law of water rights in California. The theoretical complexities of establishing mutual prescription are manifold and probably insurmountable. For rights in the same supply of water to be mutually prescriptive in time and in the same particles can best be described as a "slight of hand" repugnant to the concept of prescriptive rights. Aside from the stipulation and argument of respondents in this case, there never has been any doctrine of mutual prescription as part of the California law of water rights.

Appropriation of Surplus Percolating Waters

The principle that percolating waters may be appropriated, subject to the paramount right of the overlying landowner to the reasonable use of the water on his overlying land, was acknowledged by *dictum* in *Katz* v. *Walkinshaw*[80]

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[75] *Id.* at 721. See also pp. 722-725.

[76] *Id.* at 731.

[77] *Burr* v. *Maclay Rancho Water Co.*, 154 Cal. 428, 98 Pac. 260 (1908).

[78] *San Bernardino* v. *Riverside*, 186 Cal. 7, 198 Pac. 784 (1921).

[79] 180 Pac. (2d) at 731-732.

[80] *Katz* v. *Walkinshaw*, 141 Cal. 116, 134-136, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

Several years after the decision in *Katz* v. *Walkinshaw*, a district court of appeal stated that water percolating in the soil is not distinctive from the soil itself and is not in that condition subject to appropriation, but when gathered into a stream it becomes separate and distinct from the soil and becomes subject to appropriation. *De Wolfskill* v. *Smith*, 5 Cal. App. 175, 181-183, 89 Pac. 1001 (1907). It is necessary to consider this statement in relation to the facts of the case and to the actual decision therein. The water in question was artesian water flowing from abandoned oil wells on unoccupied government land. That water was held subject to appropriation "to the same extent as the waters of a natural spring likewise located." Accordingly, under Congressional authority contained in the Act of 1866 (14 Stat. 253, § 9) and under the laws of the

and has been actually adopted and applied in a number of succeeding cases. Only surplus or excess waters above the quantities to which the paramount rights of the overlying owners attach are subject to appropriation for nonoverlying uses.

What constitutes surplus water.—Surplus water, in this context, is the excess over quantities needed for prior rights. Hence, insofar as excess or surplus water is concerned, what an intending appropriator may take is "Any water not needed for the reasonable beneficial uses of those having prior rights"—the prior rights consisting of both overlying and prior appropriative rights.[81] After the holder of the prior right in a ground water supply has proved the extent of his right, the burden is upon the claimant of a right in the surplus water to prove that a surplus exists.[82]

Appropriative rights.—The California courts use the term "appropriation" to refer to "any taking of water for other than riparian or overlying uses." In this State, "surplus water may rightfully be appropriated on privately owned land for nonoverlying uses, such as devotion to a public use or exportation beyond the basin or watershed."[83]

As with rights of appropriation generally, the appropriative right in percolating water is usufructuary only.[84] While the surplus continues, the condition of the respective appropriators is substantially the same as that of several appropriators from a surface stream in which there is more than enough water for all. And, as in the case of surface streams, priorities govern the respective rights of appropriators of percolating water.[85]

California has never had a statutory procedure for appropriating percolating ground water. The Civil Code simply provided that "running water flowing in a river or stream or down a canyon or ravine" might be appropriated.[86] The Water Code expressly limits the appropriative procedure therein contained to surface water courses "and to subterranean streams flowing through known and definite channels."[87] The only way percolating water can be appropriated in California is by taking the water and applying it to beneficial use.[88]

From the foregoing comments, it follows that if an appropriative claimant takes only surplus water, he is not taking the property of the overlying owner, is not causing him injury, and is not required to give compensation for such

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State, subsequent entrymen took the property subject to the right of the appropriator in the water flowing from the wells, together with the right to construct ditches necessary for its diversion.

[81] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 925, 207 Pac. (2d) 17 (1949).

[82] *Lodi* v. *East Bay Municipal Util. Dist.,* 7 Cal. (2d) 316, 339, 60 Pac. (2d) 439 (1936).

[83] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 925-926, 207 Pac. (2d) 17 (1949).

[84] *Katz* v. *Walkinshaw,* 141 Cal. 116, 135, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[85] *San Bernardino* v. *Riverside,* 186 Cal. 7, 20, 30-31, 198 Pac. 784 (1921).

[86] Cal. Civ. Code § 1410 (1872), repealed, Stats. 1943, ch. 368.

[87] Cal. Water Code § 1200 (West 1956).

[88] Compare Justice Shaw's suggestion in *Katz* v. *Walkinshaw,* 141 Cal. 116, 135, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

taking; nor is the taking subject to injunction.[89] But an overlying owner not presently injured by such a taking may apply to the court for a judgment declaring his right to be paramount and protecting it against future impairment.[90] Necessarily, however, if there is *no surplus* in the ground water area, no right to appropriate the water can be acquired in that supply and hence exportation of the water from the area is subject to injunction,[91] without acquiring such a right as against particular overlying owners by such means as purchase, condemnation, or prescription.

In addition to the right that an appropriator may acquire in the surplus percolating water, he may acquire a provisional right in the supply allocated to the use of the overlying owner during such times—and only during such times—as the overlying owner does not himself make use of the water. The court has power to make reasonable regulations for the use of such water by the respective parties, provided that the paramount right be adequately protected.[92]

Many of the leading cases decided by the California courts with respect to rights in percolating waters involved controversies between (1) claimants of overlying rights and (2) claimants of appropriative rights to take water and export it from the area for distant use. In summary, rights of exportation are confined to the surplus water in the area, or to situations in which no injury results to overlying rights from the taking; and such rights are denied if the taking to distant points deprives landowners within the area of their rightful supply of the ground water.[93]

Public use.—Public use of percolating water ordinarily is treated as a non-overlying use, whether the lands that receive such public service are overlying lands or whether they are located outside of the ground water area. Such public use is therefore an appropriative use of the water.

The owner of overlying land served with water taken from the underlying ground water supply by the administrator of a public use, and delivered thereby to his land in the execution of that public trust, ordinarily is not receiving the water in fulfillment of his overlying right. On the contrary, the landowner receives the water as a member of the public and a beneficiary of the public use

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[89] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 368-369, 40 Pac. (2d) 486 (1935); *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 926, 207 Pac. (2d) 17 (1949); *Cohen* v. *La Canada Land & Water Co.*, 151 Cal. 680, 692, 91 Pac. 584 (1907).

[90] *San Bernardino* v. *Riverside*, 186 Cal. 7, 15-16, 198 Pac. 784 (1921).

[91] *Moreno Mut. Irr. Co.* v. *Beaumont Irr. Dist.*, 94 Cal. App. (2d) 766, 779, 211 Pac. (2d) 928 (1949); *Corona Foothill Lemon Co.* v. *Lillibridge*, 8 Cal. (2d) 522, 525, 529, 532, 66 Pac. (2d) 443 (1937).

[92] *Burr* v. *Maclay Rancho Water Co.*, 154 Cal. 428, 436-437, 98 Pac. 260 (1908).

[93] See, e.g., *Moreno Mut. Irr. Co.* v. *Beaumont Irr. Dist.*, 94 Cal. App. (2d) 766, 779, 211 Pac. (2d) 928 (1949); *Cohen* v. *La Canada Land & Water Co.*, 151 Cal. 680. 692, 91 Pac. 584 (1907); *Orchard* v. *Cecil F. White Ranches, Inc.*, 97 Cal. App. (2d) 35, 42, 217 Pac. (2d) 143 (1950).

and public trust. The agency that serves him has formal appropriative title to the use of the water, impressed with this public use and trust.[94]

In *San Bernardino* v. *Riverside,*[95] the plaintiff city of San Bernardino contended that the ground waters of the underlying artesian basin were subject to public use for the common benefit of the overlying lands, of which the city had become the administrator. The California Supreme Court, however, rejected this theory and held that the city had not acquired this status unless it had acquired the right from the landowners and then only for use on their particular lands. This was not the case here.

However, the validity and effectiveness of a statute providing that county water districts authorized under it should proceed in a representative capacity to protect the rights of all landowners, and other users of water within the district, were sustained by the supreme court.[96] The fact that the district, as such, was not asserting title in itself to any of such rights was deemed of no consequence.

In 1953, the California Legislature added to the Water Code two sections relating to purposes and powers of irrigation districts, authorizing them to engage in litigation respecting waters and water rights useful to their purposes. This includes proceedings to prevent interference with or diminution of the natural flow of any stream, or any natural or artificially created subterranean supply of waters.[97]

Effect of wrongful taking of water.—A purported appropriative taking of water that is not surplus is wrongful and may ripen into a prescriptive right "where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right."[98]

When the prescriptive period has run, an appropriative right to take water from a ground water basin for public use both within and without the area of production becomes vested as against the overlying landowners, to whatever extent it infringes their rights.[99]

Effect of Constitutional Amendment of 1928

Ever since the initial decision in *Katz* v. *Walkinshaw,*[100] with one exception noted below, the overlying landowner under the California correlative doctrine

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[94] *San Bernardino* v. *Riverside,* 186 Cal. 7, 10-11, 24-26, 198 Pac. 784 (1921); *Eden Township County Water Dist.* v. *Hayward,* 218 Cal. 634, 640, 24 Pac. (2d) 492 (1933).

[95] *San Bernardino* v. *Riverside,* 186 Cal. 7, 198 Pac. 784 (1921).

[96] *Coachella Valley County Water Dist.* v. *Stevens,* 206 Cal. 400, 409-410, 274 Pac. 538 (1929).

[97] Cal. Stats. 1953, chs. 226 and 227, Water Code § § 22654 and 22655 (West 1956).

[98] *Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 926-927, 207 Pac. (2d) 17 (1949).

[99] *Eden Township County Water Dist.* v. *Hayward,* 218 Cal. 634, 640, 24 Pac. (2d) 492 (1933).

[100] *Katz* v. *Walkinshaw,* 141 Cal. 116, 135, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

has been limited, as against an exporter of the percolating water for distant use, to the quantity of water reasonably necessary for beneficial use on his overlying land. The one exception was the *Miller* decision in 1910,[101] in which the supreme court in effect applied to the settlement of this controversy the then prevailing riparian principle of absence of any limitation to reasonableness on the part of the riparian.

That principle is no longer effective in California. The constitutional amendment of 1928, provides, among other things, that water rights are to be limited to such quantity as is reasonably required and are not to extend to the waste or unreasonable use, method of use, or method of diversion of water.[102] In its first major construction of this amendment in *Peabody* v. *Vallejo*, the supreme court concluded 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 landowner, or the percolating water right, or the appropriative right."[103]

In the *Peabody* case, the court noted that some of the parties placed "great reliance on the decision" in the *Miller* case, but declared, "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."[104]

Whether a particular use of percolating water is or is not a reasonable beneficial use under the amendment is a question of fact that must be passed upon in each case.[105]

Artesian Waters

Rights of Use

The artesian or nonartesian character of ground waters makes no difference in determining relative rights of use. The ground waters in *Katz* v. *Walkinshaw* were held under pressure within a "so-called artesian belt," but that fact did not determine either the classification of the waters as percolating waters, or the relative rights of the owners of overlying lands.[106] In some of the subsequent cases, the waters in controversy were under artesian head and in others they were not.[107] Artesian waters flowing from abandoned oil wells on the

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[101] *Miller* v. *Bay Cities Water Co.*, 157 Cal. 256, 272, 278, 281, 107 Pac. 115 (1910).

[102] Cal. Const. art. XIV, § 3, discussed in chapter 13 at notes 236-251.

The constitutional amendment, *inter alia*, fostered the principle of physical solutions in the settlement of water controversies. See "Exercise of Ground Water Rights–Substitution of Water and Physical Solutions," *infra*.

[103] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 371, 40 Pac. (2d) 486 (1935).

[104] 2 Cal. (2d) at 372.

[105] See *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 556, 81 Pac. (2d) 533 (1938).

[106] *Katz* v. *Walkinshaw*, 141 Cal. 116, 138-140, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[107] Compare *Burr* v. *Maclay Rancho Water Co.*, 154 Cal. 428, 433-434, 98 Pac. 260 (1908).

public domain were held subject to appropriation and superior to the claims of subsequent entrymen.[108]

Public Regulation of Artesian Wells

Statutory regulation of artesian wells is designed to prevent waste of the water and thus to serve the public welfare. It has no bearing upon the relative rights of individual owners of wells, except to prevent each one from 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 owner of the well whether his is the only one in the area or is one of many.

Since early in the State's history, California has had statutes regulating artesian wells.[109] The current act, as codified in the Water Code, provides, among other things, that an artesian well is any artificial hole in the ground through which water naturally flows from subterranean sources to the surface of the ground for any length of time. Waste is the causing or allowing any flow of water from an artesian well to run into a natural watercourse upon private or public land (unless used for certain beneficial purposes), or upon a highway. Waste also includes the use of any water flowing from an artesian well for irrigation whenever over 5 percent of the water received on the land for irrigation is permitted to escape from the land. Artesian water may be stored for later beneficial uses; such beneficial use shall not exceed one-tenth miner's inch per acre, perpetual flow, which may be cumulated to that amount within any period of each year. Any artesian well that is not capped or equipped with a mechanical appliance that will readily and effectively arrest and prevent the flow of any water from the well is a public nuisance.[110]

The validity of the early artesian well control statute of 1907 was sustained by a district court of appeal in *Ex parte Elam*, under the State police power, as not violating either the Federal or the State Constitutions.[111] Under the doctrine laid down in the *Katz* case,[112] the court held in the *Elam* case that the original ownership of water in the artesian belt was in the public, or at least that part of the public owning the surface of the soil within the artesian belt. Hence the act of 1907 affected the public welfare; and the right to legislate concerning it was referable to the police power of the State.

There is no report of a hearing of this decision by the State supreme court; but that court 24 years later based its decision in *In re Maas*[113] upon *Ex parte Elam.* What the supreme court sustained in the *Maas* case was the validity of an ordinance of Orange County making it unlawful to pump water from any water

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[108] *De Wolfskill* v. *Smith*, 5 Cal. App. 175, 181-183, 89 Pac. 1001 (1907).

[109] Cal. Stats. 1877-1878, ch. CLIII, p. 195, Stats. 1907, ch. 101, p. 122, amended, Stats. 1909, ch. 427, p. 749, repealed, Water Code § 150003 (West 1966).

[110] Cal. Water Code § § 300-311 (West 1956).

[111] *Ex parte Elam,* 6 Cal. App. 233, 236-241, 91 Pac. 811 (1907).

[112] *Katz* v. *Walkinshaw,* 141 Cal. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[113] *In re Maas,* 219 Cal. 422, 27 Pac. (2d) 373 (1933).

well except for a beneficial use for irrigation, domestic purposes, or propagation of fish.[114] This ordinance was held to be not unreasonable. In answer to a contention of counsel, the court expressed its belief that while maintenance of duck ponds contributed to enjoyment of the owner of the hunting privilege, it could scarcely be contended that this use of the water well was beneficial to the land.

Exercise of Ground Water Rights

Storage of Water in the Ground

The California Water Code provides that the storing of water in the ground, including diversion of streams and flowing of water on lands necessary to accomplish storage, constitutes a beneficial use if the water so stored is thereafter applied to the beneficial purposes for which the appropriation for storage was made.[115] This handling of the water diverted for this purpose is known as "water spreading."

Substitution of Water and Physical Solution

In some of the ground water cases the courts have issued injunctions against excessive takings of the water, to the injury of other claimants, conditioned upon the failure of the party so restrained to restore to the injured party, by some equitable and suitable arrangement, water in the quantity and quality to which he is entitled.[116]

The principle of physical solutions in the settlement of water controversies, in furtherance of more complete utilization of the State's water resources, has engaged the attention of the California courts in a number of ground water cases decided since adoption of the policy of reasonable beneficial use in the California constitutional amendment of 1928.[117] That the idea of physical solution was not altogether new when this new State water policy was adopted, however, is shown by the 1904 and 1927 court decisions discussed above.[118]

In its first comprehensive interpretation of the constitutional amendment, the principle of physical solutions was approved and adopted by the California Supreme Court. If the trial court could find a physical solution which would minimize or eliminate damages to landowners by reason of the defendant's project, then in lieu of damages it should prescribe such solution and direct the defendant city to provide and maintain it permanently at its own expense, and

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[114] 219 Cal. at 424-426.

[115] Cal. Water Code § 1242 (West 1956).

[116] *Montecito Valley Water Co.* v. *Santa Barbara,* 144 Cal. 578, 592, 602, 77 Pac. 1113 (1904); *Eckel* v. *Springfield Tunnel & Dev. Co.,* 87 Cal. App. 617, 625, 262 Pac. 425 (1927).

[117] Such cases involving ground waters, surface watercourses, or both, are discussed in chapter 15 at notes 402-413. Regarding the 1928 amendment, see "Effect of Constitutional Amendment of 1928," *supra.*

[118] See note 116 *supra.*

should enforce such requirements by prohibitory or mandatory injunction. The trial court had the power to do this, and should retain jurisdiction to modify its orders as occasion might demand.[119]

In another case, the California Supreme Court indicated that the constitutional amendment compels trial courts, before issuing a decree entailing great waste of water in order to safeguard a prior right to a small quantity of water, to ascertain whether there exists a physical solution of the problem that will avoid the waste and at the same time not unreasonably and adversely affect the property right of the paramount holder.[120] The principle was implemented in this case by providing that the district had the duty to maintain the levels of plaintiff's wells above the danger level fixed by the trial court; that in event that the well levels reached the danger point, it was the district's duty either to supply water to the city or to raise the levels of the wells above the danger mark; and that in the event of noncompliance with the order within a reasonable time, an injunctive decree should go into effect.[121]

Diversion Facilities

The particular means of diverting water from the ground is not an element of the right to make the diversion, unless the right is obtained by grant or contract.

In the absence of any agreement to the contrary, persons associated by agreement in the use of a conduit (including ditch, pipe line, and flume), well, or pumping plant for the handling of water, are liable to each other for the reasonable expenses of maintaining and repairing such works in proportion to the use actually made thereof.[122]

Changes in Exercise of Rights

Point of diversion.—In an early case decided a few years after adoption of the correlative doctrine, it was held that the use of new pumping wells, by an appropriator of percolating water, to replace flowing wells (located in a different part of the ground water area) which had failed, constituted a mere change of the place of diversion of the water without injury to others.[123] Change in the place of taking the ground waters "becomes wrongful only in the event that others are injured thereby."[124]

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[119] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 379-380, 383-384, 40 Pac. (2d) 486 (1935).

[120] *Lodi* v. *East Bay Municipal Util. Dist.*, 7 Cal. (2d) 316, 339-340, 60 Pac. (2d) 439 (1936).

[121] This case involved an application of a physical solution in the coordination of rights in ground water and a surface watercourse. See the discussion at note 173 *infra*.

[122] Cal. Water Code §§ 7000-7010 (West 1956).

[123] *Barton* v. *Riverside Water Co.*, 155 Cal. 509, 517-518, 101 Pac. 790 (1909).

[124] *San Bernardino* v. *Riverside*, 186 Cal. 7, 29, 198 Pac. 784 (1921). See *Lodi* v. *East Bay Municipal Util. Dist.*, 7 Cal. (2d) 316, 340, 60 Pac. (2d) 439 (1936); *Vineland Irr. Dist.* v. *Azusa Irrigating Co.*, 126 Cal. 486, 495-497, 58 Pac. 1057 (1899).

Method of diversion.—In a case decided after the *Katz* case,[125] an appropriator changed the means of diverting percolating water from open cuts to wells. Said the California Supreme Court, "It is at least doubtful if the wells of this defendant affect the water in his land, but conceding that they do diminish his supply and that of some other of the plaintiffs, they cannot complain of the action of this defendant in simply adopting different means of collecting the water to which it had by means of long use acquired an undoubted right."[126] In its "concession," the court's failure to recognize that a diminution of one's water supply is an injury weakens its conclusion that the plaintiffs "cannot complain." The assertion that defendant "by means of long use acquired an undoubted right" does not remedy the situation. That the diminution of one's water supply by another is an injury is inescapable. The "doubt" expressed in the first clause of the statement is effectively submerged by the conclusion that follows. That an injury is not compensable runs counter to many succeeding pertinent California decisions, both before and after adoption of the constitutional amendment of 1928, discussed earlier under "Effect of Constitutional Amendment of 1928."

Place of use and purpose of use.—In its decisions, the California Supreme Court has not only applied the long-established rule with respect to waters of surface streams (as noted above) to changes in the point of diversion of appropriated percolating waters, but it has also recognized, at least by implication, similar applicability of the rules with respect to changes in the place and purpose of use of appropriated waters generally.[127]

Some Miscellaneous Statutory Provisions

Some Statutes Regarding Protection of Water Quality

(1) After notice and hearing, the State Water Resources Control Board may file an action in court, or intervene in pending or continuing adjudication proceedings in court, to restrict pumping or to impose physical solutions, or both, to the extent necessary to prevent destruction of or irreparable injury to the quality of ground water. If the Board decides that ground water rights should be adjudicated for such purpose, it shall first give any local public agency in the affected area 90 days to bring such action before initiating such action itself.[128]

(2) Any person who intends to install, deepen, reperforate, abandon, or destroy a water well or cathodic protection well, shall file a notice of intent to so act with the Department of Water Resources.[129] A report of completion of

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[125] *Katz* v. *Walkinshaw*, 141 Cal. 116, 70 Pac. 633 (1902), 70 Pac. 766 (1903).
[126] *Barton* v. *Riverside Water Co.*, 155 Cal. 509, 518, 101 Pac. 790 (1909).
[127] *San Bernardino* v. *Riverside*, 186 Cal. 7, 29, 198 Pac. 784 (1921).
[128] Cal. Water Code §§ 2100-2102 (West Supp. 1970).
[129] *Id.* § 13750. If immediate action must be taken in order to prevent damage to persons

the well is also required and must be made within 30 days of completion.[130] Failure to comply with these provisions, or willful and deliberate falsification of the required reports, shall be a misdemeanor.[131]

The Department of Water Resources is directed to investigate and survey conditions of damage to ground waters caused by improperly constructed, abandoned, or defective wells.[132] After making such investigations, if the Department determines that standards for the construction, maintenance, abandonment, and destruction of water wells and cathodic protection wells are necessary in an area in order to protect the quality of ground water for beneficial use, the Department shall so report to the appropriate regional water quality control board and the State Department of Public Health. The report of the Department of Water Resources shall recommend such standards for construction, maintenance, destruction, and abandonment of such wells as are necessary to protect the quality of the affected water.[133] The regional board shall hold public hearings on the need to establish such well standards and it may do so without a report from the Department, if it has information that such standards are needed.[134] If the regional board finds that such standards are needed, it shall define the area and notify the cities and counties affected.[135] The affected cities and counties are directed to adopt an ordinance establishing the necessary well standards within specified times.[136] If any city or county fails to adopt or modify such well standards within specified periods in the manner determined necessary by the regional board, the board may adopt such standards for the city or county.[137] The statutes provide for review by the State Water Resources Control Board of any act or failure to act by any regional board, city, or county.[138]

Water Replenishment District Act

This act[139] authorizes formation of water replenishment districts to replenish ground water in such districts by several methods including buying,

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or property due to the loss of an existing water supply, the notice of intent must be filed no later than 5 days after the construction, alteration, destruction, or abandonment. *Id.*

[130] *Id.* § 13751.

Any person who converts an oil or gas well (originally constructed under the jurisdiction of the Department of Conservation) to a water well or cathodic protection well must also comply with these provisions. *Id.* § 13753.

[131] *Id.* § 13754.

[132] *Id.* § 231.

[133] *Id.* § 13800.

[134] *Id.* § 13801.

[135] *Id.* § 13802.

[136] *Id.* § 13803.

[137] *Id.* § 13805.

[138] *Id.* § 13806.

[139] Cal. Water Code § 60001 *et seq.* (West 1956).

selling, and exchanging water, distributing water to persons in exchange for ceasing or reducing ground water extractions, and spreading, sinking, and injecting water into the ground.[140] Such districts are also authorized, among other things, to commence or intervene in actions and proceedings to determine or adjudicate all or a portion of water rights to divert, extract, or use waters within the district.[141] They may levy replenishment assessments to finance all or part of the costs of replenishing ground water.[142] Commencing with the third fiscal year after a final adjudication of all or substantially all of the rights to extract ground water and a determination of natural safe yield within the district and the extent to which the adjudicated rights may be exercised without exceeding the safe yield, the district's board shall recognize such judicial determination by exempting from replenishment assessments the amount of water pumped by each person whose rights have been so adjudicated which does not exceed his proportionate share of the natural safe yield.[143]

Statutes Relating to Overdrawn Ground Water Supplies in Specified Areas

In 1951, 1953, and 1955 the California Legislature enacted statutes in recognition of the serious situation that prevails with respect to overdrafts upon important ground water supplies in the southern part of the State. Each statute applies only to specified counties. None of this legislation purports to restrict the exercise of the overlying landowner's or appropriator's ground water right. The statute of 1951 is designed to encourage him to obtain an alternate supply of water from a nontributary source, the use of which will be deemed equivalent to a reasonable beneficial use of the ground water which he has ceased to extract by reason of having the substitute supply.[144] The 1955 statute requires him to make annual reports of information essential to adjustments and determinations of ground water rights, thus speeding up and reducing the cost of the requisite studies; and it contains important provisions respecting the applicability of the law of adverse possession to persons who are required to file such reports.[145] The 1953 legislation relates to preliminary injunctions for protection of ground water basins while rights therein are being determined.[146]

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[140] *Id.* §§ 60003, 60220-60221.
[141] *Id.* § 60230(7).
[142] See, *inter alia, id.* § 60306.
[143] *Id* § 60350.
[144] *Id.* §§ 1005.1 and 1005.2, as amended.
[145] *Id.* §§ 4999-5008.
[146] *Id.* §§ 2020 and 2021.

These 1951, 1953, and 1955 statutes are discussed in Hutchins, W. A., "The California Law of Water Rights" 469-473 (1956).

Coordination of Rights in Ground Waters and Surface Watercourses

While there are several physical interconnections between ground waters and surface watercourses, rights to their use were not coordinated under early California water law principles. However, a considerable degree of coordination has since been achieved.

Percolating Water Tributary to Watercourse

Former rule.—While the doctrine of "absolute ownership" of percolating water remained in effect,[147] there was no coordination between rights in percolating waters in close proximity to a stream (but held from the evidence not to be a part of the underflow) and rights in the underflow itself. However difficult of determination, there was "a line, beyond which the water in the sands and gravels over which a stream flows and which supply or uphold the stream, ceases to be a part thereof and becomes what is called percolating water."[148] Those ground waters that were a part of the underflow were considered to be a part of the watercourse which consisted of both the surface stream and the underflow, and rights in the surface stream attached to the underflow as well.[149] But from the absolute ownership rule, it was held to follow that the owner of overlying land owned the percolating water in his land tributary to a stream just as fully as he owned nontributary percolations.[150] If waters intercepted by a tunnel on plaintiff's land were in fact percolating waters, that is, if they did not "form part of the body or flow, surface or subterranean, of any stream * * * then plaintiff had the unquestioned right to take them by its tunnel, and, even if injury resulted to other appropriators or riparian owners upon the stream, they could not be heard to complain."[151]

This meant that one rule of law (absolute ownership by the overlying owner) applied to tributary percolating water up to the point—so difficult to determine—at which it ceased to be percolating water and became part of the underflow of the stream, and another rule (the law of watercourses) applied thereafter.

Present rule.—Rights to the use of the waters of a common supply of ground waters and surface waters in California are now coordinated on a basis of reasonable beneficial use. This principle was made possible by the adoption of the correlative doctrine of percolating water rights,[152] and its development

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[147] See "Percolating Waters—Former Doctrine of Rights of Use," *supra.*

[148] *Hudson* v. *Dailey,* 156 Cal. 617, 627-628, 105 Pac. 748 (1909).

[149] *Los Angeles* v. *Pomeroy,* 124 Cal. 597, 630-632, 57 Pac. 585 (1899); *Vineland Irr. Dist.* v. *Azusa Irrigating Co.,* 126 Cal. 486, 495, 58 Pac. 1057 (1899).

[150] *Gould* v. *Eaton,* 111 Cal. 639, 644-645, 44 Pac. 319 (1896).

[151] *Vineland Irr. Dist.* v. *Azusa Irrigating Co.,* 126 Cal. 486, 494, 58 Pac. 1057 (1899).

[152] See "The California Doctrine of Correlative Rights," *supra.*

began shortly after the adoption of that doctrine, initiated in 1902-1903 in *Katz* v. *Walkinshaw*.[153]

The coordination of rights in interconnected surface and ground water supplies has minimized under some circumstances the importance of the distinction between subflow of a stream and percolating water tributary to the stream.[154] The supreme court in *Hudson* v. *Dailey*, a decision of considerable importance in the establishment of this principle of coordination of rights in stream waters and in "percolating waters feeding the stream and necessary to its continued flow," said, "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."[155]

With respect to the methods of acquiring and adjudicating appropriative rights in ground waters, the distinction between underflow and percolating water remains the same as it was prior to the adoption of the correlative doctrine.[156] But it is in the determination of claimed interferences that the question of physical interconnection of water supplies is particularly important; and in so doing, the classification of ground water does not determine the matter of liability for injury. So long as the facts of the case show that the extraction of ground water substantially diminishes the flow of the stream to the injury of those who hold rights therein, the question as to whether the ground water at the place of extraction is strictly a part of the stream, or is tributary percolating water on its way to the stream, is immaterial.[157]

In a case decided after the decision in *Katz* v. *Walkinshaw*, rights to use percolating water tributary to a watercourse were correlated with riparian rights in the waters of the stream. Referring to *Katz* v. *Walkinshaw*, the court said:[158]

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[153] *Katz* v. *Walkinshaw*, 141 Cal. 116, 134-137, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[154] Apparently there has never been much, if any, question concerning coordination of rights in watercourses and in tributary underground streams flowing in known and definite channels. Definite underground streams have been consistently recognized in California law as subject to the same rules as those applying to surface streams. (See "Definite Underground Streams," *supra*.) Hence the coordination of rights in the main stream of a watercourse and in its tributary surface streams necessarily extends also to underground tributaries that have the requisite elements of underground watercourses.

[155] *Hudson* v. *Dailey*, 156 Cal. 617, 628, 105 Pac. 748 (1909).

[156] The statutory procedures for acquiring and adjudicating appropriative rights are limited to waters in definite streams, their underflows, and underground streams. See Cal. Water Code §§ 1200 and 2500 (West 1956). The only way in which percolating water could be appropriated is by taking the water and applying it to beneficial use, as discussed at notes 87-88 *supra*.

[157] *McClintock* v. *Hudson*, 141 Cal. 275, 279-281, 74 Pac. 849 (1903).

[158] 141 Cal. at 281.

> By the principles laid down in that case it is not lawful for one owning land bordering upon or adjacent to a stream, to make an excavation in his land in order to intercept and obtain the percolating water, and apply such water to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream and causes damage to parties having rights in the water there flowing.

The same principle was decleared in a later case involving an interception of percolating water claimed to be the source of certain springs, as against one who claimed both as an appropriator of the spring water and also as an owner of land riparian to the stream fed by the springs.[159]

Thus, in the foregoing cases the rule of reasonable use was imposed upon owners of overlying lands adjacent to streams containing percolating waters that fed the streams, in correlation with riparian and appropriative rights in the stream waters. The principle was extended in *Hudson* v. *Dailey* to include owners of nonriparian lands overlying percolating waters that fed a stream and were necessary to its continued flow.[160]

The supreme court observed in *Hudson* v. *Dailey* that where ground water in the valley was in such immediate connection with the surface stream as to make it a part of that stream, then the lands overlying the ground water must be considered as riparian to the stream, so that under the rule of riparian rights these overlying lands and the lands contiguous to the stream would have a common right to use the water. But there always would be great difficulty in determining just where the ground water that was part of the stream ended and the percolating water in the valley began. In the instant case, it appeared that the water in the lands of many of the nonriparian overlying owners would be of the class ordinarily designated as percolating water. Hence it became "important to determine the relative rights of the owner of the nonriparian

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[159] *Cohen* v. *La Canada Land & Water Co.*, 142 Cal. 437, 439-440, 76 Pac. 47 (1904). On the second appeal in this case, *Cohen* v. *La Canada Land & Water Co.*, 151 Cal. 680, 692, 91 Pac. 584 (1907), it was found that there was no basis for a correlation of rights because the evidence showed on the retrial that the springs were not supplied by the percolating water in litigation.

The opinion of the court on the first appeal in the *Cohen* case contained a statement that the predecessors of the plaintiff had appropriated the water of the springs directly by going on the land on which the springs were located while that land was still unoccupied public land. Notwithstanding this, the principle was expressed that the owner of the overlying land was not entitled to intercept the percolating water to the injury of the plaintiff except for a reasonable use on the land from which it was taken. The question of public ownership of this land at the time the appropriation was made necessarily had no effect on the final decision on the second appeal, which was based upon the fact that the plaintiff had failed to prove injury to the water supply in question.

See also *Eckel* v. *Springfield Tunnel & Dev. Co.*, 87 Cal. App. 617, 622-625, 262 Pac. 425 (1927).

[160] *Hudson* v. *Dailey*, 156 Cal. 617, 626-628, 105 Pac. 748 (1909).

land containing percolating water, which feeds a surface stream and those who have acquired riparian or prescriptive rights in said stream," where the use of percolating water on the overlying land would deplete the surface stream to the injury of those having rights therein.

The relative rights in *Hudson* v. *Dailey* where determined and adjusted by recognizing the close analogy between overlying percolating water rights and riparian rights in streams, and by applying their common concepts to percolating waters feeding the stream and to the waters of the stream itself.[161]

The result of the California decisions rendered after the adoption of the correlative doctrine of percolating water rights has led to a considerable degree of coordination of rights in surface and ground waters that constitute a common source of water supply. One common supply is said to be formed where surface waters and ground waters are physically so related that portions of the aggregate depend for their replenishment upon other portions, or suffer a diminution in quantity by reason of the substantial depletion of other portions. The principle of extending the protection of water rights to the sources of supply is an essential feature of coordination of rights in interconnected supplies. Another essential feature is that correlative overlying and riparian rights and appropriative rights that attach to one portion are made applicable, so far as the circumstances permit, to the aggregate supply. Thus waters of a surface stream, ground waters that constitute the underflow, and ground waters that feed the stream and those that flow from it, so far as they

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[161] The reasoning of the court in establishing this important principle was as follows: "The owner of land has a natural right to the reasonable use of the waters percolating therein, although it may be moving through his land into the land of his neighbor, and, although his use may prevent it from entering his neighbor's land or draw it therefrom. This right arises from the fact that the water is then in his land so that he may take it without trespassing upon his neighbor. His ownership of the land carries with it all the natural advantages of its situation, and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim *sic utere tuo ut alienum non laedus*. It is upon this principle that the law of riparian rights is founded, giving to each owner the right to use the waters of the stream upon his riparian land, but limiting him to a reasonable share thereof, as against other riparian owners thereon. 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. The natural rights of these defendants and the plaintiff in this common supply of water would therefore be coequal, except as to quantity, and correlative." 156 Cal. at 628.

can be identified by competent evidence, are treated as one source of supply for all users who have access to it.

The similar riparian and correlative doctrines of rights to use water that vest in the owners of riparian and overlying lands, respectively, as developed by the California decisions, form the basis of titles to use waters. Superimposed upon this basis is the doctrine of prior appropriation, which ordinarily applies to any surplus above the reasonable requirements of the riparian or overlying landowners whose rights usually are paramount;[162] the statutory procedure for the acquisition of appropriative rights, however, is confined to waters in definite surface and subterranean streams.[163] And governing the exercise of all water rights, of whatever character, is the 1928 constitutional amendment creating a policy of reasonable beneficial use.[164]

An exceptional situation: Pueblo rights.—An exceptional situation was presented in *Los Angeles* v. *Hunter* because of the pueblo right of the City of Los Angeles.[165] The city was asserting its paramount pueblo right to the use of the waters of the Los Angeles river as against owners of lands overlying tributary ground waters in San Fernando Valley. These ground waters were held by the court not to be percolating waters in the common law sense of the term, but only in the sense that they formed a vast mass of water percolating toward the outlet of the river from the valley. In any event, they constituted the source of supply of the river, and their interruption would impair the flow of the river as certainly as would an interference with a flowing tributary on the surface. The paramount pueblo right of the city therefore extended to these tributary ground waters, so that the owners of the overlying lands had no correlative rights with the city when the city demanded the entire subterranean flow.

Ground Water Supply Fed by Percolation From Watercourse

Ground waters that have so far escaped from a watercourse as to be no longer a part of that or of any other definite stream may become percolating waters.[166] But their derivation from the watercourse makes them part of a common water supply of which the watercourse is also a part.

The principle of coordination of rights in common water supplies, developed in the cases involving stream waters and tributary percolating waters that are discussed above, was carried still further in *Miller* v. *Bay Cities Water*

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[162] Certain possible exceptions are explained in chapter 6 at notes 230-233.

[163] Also modifying the basis are the rules governing the acquisition of prescriptive titles to use waters.

[164] Cal. Const. art. XIV, § 3. See "Effect of Constitutional Amendment of 1928," *supra.*

[165] *Los Angeles* v. *Hunter,* 156 Cal. 603, 607-609, 105 Pac. 755 (1909). Regarding pueblo water rights, see chapter 11.

[166] *Vineland Irr. Dist.* v. *Azusa Irrigating Co.,* 126 Cal. 486, 494, 58 Pac. 1057 (1899). See *Montecito Valley Water Co.* v. *Santa Barbara,* 144 Cal. 578, 588, 77 Pac. 113 (1904).

Company to include rights in watercourses and in bodies of percolating water supplied therefrom.[167] The reasoning in the *Miller* case was similar to that in *Hudson* v. *Dailey*, in which the parallel principles of the riparian and correlative doctrines had been merged and applied between riparian and overlying owners.[168]

Nature, said the California Supreme Court in the *Miller* case, had given to lands contiguous to streams and lands overlying percolating waters the natural advantage of the use of the water on such contiguous lands. It is the law that no riparian owner is entitled to take waters of the stream to nonriparian lands for commercial purposes if such taking would prevent other riparian owners from using the waters on their riparian lands; and as between owners of lands overlying "a common substratum of percolating water" the authorities have likewise established that this cannot be done. "This being so, we perceive no reason why the same rule should not be applied as between owners of land overlying a substratum of water directly connected with either the surface or subsurface flow of the stream and deriving practically its exclusive supply from that source."[169] Accordingly, it was held that "The owner of land having an underground water-bearing stratum supplied by the flood waters of a stream has a primary right to the full flow of such waters, in order to bring his stratum up to its water-bearing capacity." Also, "his right to the accustomed flood flow of the stream for that purpose is paramount to that of the right of an appropriator to divert any of the waters for use beyond the watershed."[170] It was further held in the instant case that all of the flood or storm waters of the stream were "necessary of themselves or by their force to supply the underground waters."[171] An injunction was therefore issued against taking any of the stream waters for distant use.

However, the right of the owner of overlying land to the full flow of the stream for the purpose of pressing water into his lands, without limitation to reasonableness as against an appropriator of the stream water for distant use, which was so declared in the *Miller* case, is no longer the law in California. As a result of the constitutional amendment of 1928, the "asserted underground and percolating water right" is subjected to the same regulation as against an appropriator as is the riparian right.[172] 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."

Accordingly, a senior appropriator of ground waters supplied by percolation

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[167] *Miller* v. *Bay Cities Water Co.*, 157 Cal. 256, 272, 278-281, 107 Pac. 115 (1910).

[168] *Hudson* v. *Dailey*, 156 Cal. 617, 628, 105 Pac. 748 (1909), discussed at notes 160-161 *supra*.

[169] *Miller* v. *Bay Cities Water Co.*, 157 Cal. 256, 278, 107 Pac. 115 (1910).

[170] 157 Cal. at 272.

[171] 157 Cal. at 281, 283.

[172] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 372, 40 Pac. (2d) 486 (1935).

from a watercourse, while entitled as before to have enough stream water released to satisfy his prior right, is nevertheless subject as against a junior appropriator of the water of the stream, to the rule of reasonableness in both his use of the water and his method of diversion.[173] The junior appropriator must supply him a quantity of water equivalent to the quantity which he is entitled to withdraw from the ground for reasonable use under a reasonable method of diversion, in the exercise of a physical solution of the controversy.[174] In default of the fulfillment of his obligation, the junior appropriator must release the necessary water into the ground to supply the prior appropriator's full right. But if at all possible, a physical solution must be found and applied by the court to avoid any substantial waste of water that might be attendant upon the artificial releasing of water into the ground. The constitutional amendment makes this necessary in the interest of conserving the water resources of the State.

The result of the California decisions following the adoption of the correlative doctrine of percolating water rights and the constitutional amendment of 1928 has been a considerable degree of coordination of rights in ground waters and surface watercourses that constitute a common source of water supply.

COLORADO

Definite Underground Streams

Waters of definite underground streams do not constitute percolating water within the meaning of the law. In a 1902 case, the Colorado Supreme Court indicated that underground streams which flow in well-defined and known channels and which can be traced were governed by the same rules of law as surface streams.[175] In an 1882 case, it had indicated that the doctrine of prior appropriation applies to surface streams to the exclusion of the common law doctrine of riparian rights.[176]

Underflow or Subsurface Flow of Surface Stream

The underflow (water saturating the sand and gravel constituting the bed of a channel and the sources of a stream) is as much a part of the watercourse as the surface flow itself.[177] A party who seeks to divert water which reaches a

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[173] *Lodi* v. *East Bay Municipal Util. Dist.*, 7 Cal. (2d) 316, 337-343, 60 Pac. (2d) 439 (1936).

[174] See the discussion at notes 120-121 *supra.*

[175] *Medano Ditch Co.* v. *Adams,* 29 Colo. 317, 68 Pac. 431 (1902).

[176] *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443 (1882).

[177] *Buckers Irr. Mill & Improvement Co.* v. *Farmers' Independent Ditch Co.*, 31 Colo. 62, 72 Pac. 49 (1902).

stream and then disappears in the sand and gravel of the streambed has the burden of proving that such water does not become a part of the main stream.[178]

Ground Waters Tributary to a Surface Watercourse

Background

The Colorado Supreme Court has said, "[I]t is the presumption that all ground water so situated finds its way to the stream in the watershed of which it lies, is tributary thereto, and subject to appropriation as part of the waters of the stream. * * * The burden of proof is on one asserting that such ground water is not so tributary, to prove that fact by clear and satisfactory evidence."[179]

The right to use percolating waters tributary to a watercourse was correlated under the law with the right to use waters flowing in the watercourse itself. The right to use waters flowing in a watercourse was based upon the system of prior appropriation. In the logical application of this principle, the location of the point of diversion had no more bearing upon the priority attaching to tributary percolating waters than it had in adjusting priorities among appropriators who diverted directly from the watercourse.

The prior right to use percolating or seepage waters tributary to a stream, or which if not diverted would reach the stream, did not belong to the owner of the land on which such waters arose. Any appropriation of such waters was subject to all prior appropriation from the stream into which the waters would naturally flow or percolate.[180]

This has been the consistent holding of the Colorado courts notwithstanding the proviso in a statute enacted in 1889—and still in effect—declaring that ditches constructed for the purpose of utilizing the waste, seepage, or spring waters of the State shall be governed by the same priority laws as those relating to stream waters, provided that the owner of the lands of origin has the prior right to the water if capable of being used on his lands.[181] The courts of Colorado have held uniformly that the proviso at the end of this statute applies when "waste, seepage, or spring waters" are not tributary to a natural stream. "It is only when such seepage water would ultimately reach and become part of a natural stream that an appropriator thereof can acquire a right to the use of such superior to that of the owner of the land."[182]

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[178] *Platte Valley Irr. Co.* v. *Buckers Irr. Mill & Improvement Co.*, 25 Colo. 77, 53 Pac. 334 (1898).

[179] *Safranek* v. *Limon*, 123 Colo. 330, 228 Pac. (2d) 975, 977 (1951). See also *Whitten* v. *Coit*, 153 Colo. 157, 385 Pac. (2d) 131, 135 (1963).

[180] *Nevius* v. *Smith*, 86 Colo. 178, 279 Pac. 44 (1928).

[181] Colo. Rev. Stat. Ann. § 148-2-2 (1963).

[182] *Lomas* v. *Webster*, 109 Colo. 107, 110, 122 Pac. (2d) 248 (1942). See chapter 18 at notes 31 and 36.

A number of controversies in this area have involved attempts to divert seepage and waste waters from irrigation while flowing to a stream in which appropriative rights have 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.[183] The courts have applied the same rule to rights to use return waters from percolations from natural sources as to percolations from artificial sources.

Legislation in 1957 and 1965

Ground water legislation enacted in 1957[184] has been described in part by the Colorado Supreme Court as providing:

> [T]he Ground Water Commission may declare a given area to be a "tentatively critical ground water district" and once an area has been declared within such designation it "shall thereupon become subject to the regulations prescribed in this Article." The regulations are that after such designation no new wells can be dug, or the water drawn from existing wells be increased unless the user shall make application in writing to the state engineer for permission to do so and the application be approved.
>
> * * * [Section 147-19-10] is the only section in which the legislation has authorized participation by the state engineer in its administration. * * *
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> * * * *
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> * * * [T]he obvious intent is that nothing be done in respect to waste from existing wells.[185]

This legislation, which was applicable to all ground waters but was repealed in 1965, is discussed later in regard to nontributary waters.[186]

Legislation enacted in 1965 provided:

> The state engineer * * * shall execute and administer the laws of the state relative to the distribution of the surface waters of the state including the underground waters tributary thereto in accordance with the right of priority of appropriation, and he shall adopt such rules and regulations and issue such orders as are necessary for the performance of the foregoing duties.[187]

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[183] See *Comstock* v. *Ramsey*, 55 Colo. 244, 133 Pac. 1107 (1913).

[184] Colo. Laws 1957, ch. 289, p. 863, Rev. Stat. Ann. § 148-18-1 *et seq.* (1963), repealed, Laws 1965, ch. 319, § 1, p. 1246.

[185] *Whitten* v. *Coit*, 153 Colo. 157, 385 Pac. (2d) 131, 139 (1963).

[186] See the discussion at notes 207-209 *infra*.

[187] Colo. Rev. Stat. Ann. § 148-11-22(1) (Supp. 1965).

The legislation also provided, among other things, that in regulating wells tributary to surface streams, the State Engineer, through the Attorney General, could apply for injunctive relief when necessary to prevent a diversion of tributary percolating water from injuring the vested rights of prior appropriators. *Id.* § 148-11-22(2).

In regard to this legislation, the Colorado Supreme Court in a 1968 case said, among other things:

> Regulation of wells in the Arkansas Valley as contemplated by the 1965 act, in order to be valid and constitutional, must comply with the following three requirements:
>
> (1) The regulation must be under and in compliance with reasonable rules, regulations, standards, and a plan established by the state engineer prior to the issuance of the regulative orders.
> (2) Reasonable lessening of material injury to senior rights must be accomplished by the regulation of the wells.
> (3) If by placing conditions upon the use of a well, or upon its owner, some or all its water can be placed to a beneficial use by the owner without material injury to senior users, such conditions should be made.
>
> There is a temptation to be more definitive as to these requirements, but in doing so we would be usurping legislative and executive functions. We must confine ourselves to a few rulings on constitutionality and to only broad statements as to any possible future legislation and administration.[188]

This 1965 legislation was repealed after the enactment of the 1969 act discussed below.[189]

This legislation is discussed in Note, "A Survey of Colorado Water Law," 47 Denver L. Jour. 226, 324-327 (1970).

[188] *Fellhauer* v. *People*, 167 Colo. 320, 447 Pac. (2d) 986, 993 (1968). The court held that a water division engineer, who acted without any written rules or regulations and without any prescribed guidelines in shutting off only 39 wells out of the 1,600 to 1,900 wells pumping more than 100 gal. per min. in the area that affected the stream, in his attempted enforcement of the 1965 legislation had proceeded discriminatorily in violation of the due process clause of Colo. const. art. II, § 25, and the equal protection clause of U.S. Const. amend. XIV. 447 Pac. (2d) at 991-993. This case was distinguished in a later case dealing with other Colorado legislation, discussed in note 210 *infra*.

In this case, the court *inter alia* stated, "As administration of water approaches its second century the curtain is opening upon the new drama of *maximum utilization* and how constitutionally that doctrine can be integrated into the law of *vested rights*. * * *

"Colorado Springs v. Bender, 148 Colo. 458, 366 P. 2d 552 [1961], might be called the signal that the curtain was about to rise. * * *

* * * *

"* * * we have refrained from ruling at this time upon issues which were presented and which involve the following four matters:

"1. Whether the term 'subsurface channel' is sufficiently definite.

"2. Establishment of priorities to unadjudicated wells.

"3. The right to uplift.

"4. The duty of a senior user to pump in order to satisfy his surface decree." 447 Pac. (2d) at 994.

[189] Colo. Laws 1969, ch. 373, § 20, p. 1223, declared that this legislation was "amended as set forth in sections 148-21-34, 148-21-35 and 148-21-36" of the 1969 act. Colo. Laws 1971, ch. 372, § 3, p. 1332, expressly repealed this 1965 legislation.

Water Right Determination and Administration Act of 1969

This 1969 legislation provides, among other things, that any appropriator who desires a determination of his water right and its amount and priority shall file an application for such determination with the water clerk. Jurisdiction to hear and adjudicate such questions is vested exclusively in the water judges and their designated referees. This procedure is augmented by statutory proceedings in which the division engineer in each division, with the approval of the State Engineer, provides the water clerk in his division with tabulations of all decreed water rights and conditional water rights in the division, in order of seniority. Following prescribed proceedings, considered to be general adjudication proceedings, the water judge enters a decree incorporating or modifying such tabulations. In administering and distributing water, the State Engineer and division engineers are to be governed by priorities for water rights and conditional water rights established by adjudication decrees.[190]

Included in this 1969 legislation are significant provisions for intergrating the determination and administration of surface and physically interconnected ground waters.[191] The provisions of the 1969 act, as they pertain to surface watercourses, are discussed in chapters 15 and 16.[192] With certain exceptions, these provisions are also applicable to tributary ground waters.[193] In addition, the act includes a number of provisions relating specifically to tributary ground waters. The following discussion deals primarily with these provisions.

The legislature declared:[194]

> (1) It * * * shall be the policy of this state to integrate the appropriation, use and administration of underground water tributary to a stream with the use of surface water, in such a way as to maximize the beneficial use of all of the waters of this state.
>
> (2)(a) Recognizing that previous and existing laws have given

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[190] Colo. Rev. Stat. Ann. § 148-21-1 *et seq.* (Supp. 1969).

[191] The legislature had previously attempted, in a less significant manner, to integrate the administration of these waters in 1965. See Colo. Rev. Stat. Ann. § 148-11-22 (Supp. 1965), discussed above.

[192] For a summary description of the 1969 act as it relates to water rights determinations, see chapter 15 at notes 46-58. A more detailed discussion of the act, in this regard, appears in chapter 15 at notes 212-254. Its provisions with respect to water rights administration are discussed in chapter 16 at notes 42-51.

[193] The act exempts from its provisions waters of any designated ground water areas, discussed at notes 210-222 *infra,* and wells constructed for household or other specified limited purposes. Colo. Rev. Stat. Ann. § 148-21-45 (Supp. 1969), as amended, Laws 1971, ch. 378, p. 1341. However, § § 148-21-8 and 148-21-9, which divide the State into seven water divisions and provide for the appointment and general duties of division engineers, do apply to these waters.

The construction of wells for household and other limited purposes are regulated by permit by the State Engineer. Colo. Laws 1972, ch. 105, § 2, p. 629 [amending Rev. Stat. Ann. § 148-21-45 (Supp. 1969), as amended, Laws 1971, ch. 378, p. 1341].

[194] Colo. Rev. Stat. Ann. § 148-21-2 (Supp. 1969).

> inadequate attention to the development and use of underground waters of the state, that the use of underground waters as an independent source or in conjunction with surface waters is necessary to the present and future welfare of the people of this state, and that the future welfare of the state depends upon a sound and flexible integrated use of all waters of the state, it is hereby declared to be the further policy of the state of Colorado that in the determination of water rights, uses and administration of water the following principles shall apply:
>
> (b) Water rights and uses heretofore vested in any person by virture of previous or existing laws, including an appropriation from a well, shall be protected subject to the provisions of this article.
>
> (c) The existing use of ground water, either independently or in conjunction with surface rights, shall be recognized to the fullest extent possible, subject to the preservation of other existing vested rights, provided, however, at his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. * * *
>
> (d) The use of ground water may be considered as an alternate or supplemental source of supply for surface decrees heretofore entered, taking into consideration both previous usage and the necessity to protect the vested rights of others.
>
> (e) No reduction of any lawful division because of the operation of the priority system shall be permitted unless such reduction would increase the amount of water available to and required by water rights having senior priorities.

Although the legislature defined "waters of the state" as "all surface and underground water in or tributary to all natural streams within the state," this does not include waters of any designated ground water areas.[195] The legislature also defined "underground waters," for the purposes of this act, in defining the waters of a natural stream, as:[196]

> [T]hat water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials, and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or natural stream. Such "underground water" is considered different from "designated ground water" as defined in § 148-18-2(3).

Other provisions relating specifically to tributary ground waters include the provision that where the owner of an appropriative right supplies his water needs from a well, the water from that well may be charged to its own appropriation; or if the well draws from the same stream system as that from which the owner of an appropriative right has a right to divert or to have water

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[195] *Id.* § 148-21-3(3). Designated ground water areas are discussed at notes 210-222 *infra.*
[196] *Id.* § 148-21-2(4).

so diverted delivered to him, the owner may obtain the right to have such well or wells made alternate points of diversion.[197]

> In authorizing alternate points of diversion for wells, the widest possible discretion to permit the use of wells shall prevail. In administering the waters of a water course, the withdrawal of water which will lower the water table shall be permitted but not to such a degree as will prevent the water source to be recharged or replenished, under all predictable circumstances, to the extent necessary to prevent injury to senior appropriators in the order of their priorities, with due regard for daily, seasonal, and longer demands on the water supply.[198]

Where a well has been approved as an alternate means of diversion for a water right for which a surface means of diversion is decreed, the well and surface means of diversion must be utilized to the extent feasible and permissible to satisfy the water right before diversions under junior rights may be ordered discontinued.[199]

The act also provides that if an application for a determination of a well water right and priority (the priorities for which have not been established in decrees prior to the effective date of the act or in proceedings pending on that date) has been filed no later than July 1, 1971[200] (subsequently changed to July 1, 1972),[201] and if the application is approved and confirmed, the priority date shall be the date of the actual appropriation of the water, provided the appropriation was completed with reasonable diligence.[202] Applications filed after July 1, 1972, shall be awarded priorities junior to those awarded in preceding years.

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[197] *Id.* § § 148-21-17(3)(b) and (c). See also chapter 15 at notes 235-237 regarding plans for augmentation.

Until July 1, 1971, subsequently changed to July 1, 1972, by Colo. Laws 1971, ch. 370, § 4, p. 1324, all diversion by wells to supply a water use for which there was a surface decree could be charged against the surface decree, even if the owner had not secured the right to an alternate point of diversion at the well. Colo. Rev. Stat. Ann. § 148-21-17(3)(d)(Supp. 1969).

[198] Colo. Rev. Stat. Ann. § 148-21-17(3)(e) (Supp. 1969).

[199] *Id.* § 148-21-35(2).

[200] In water division three the date was July 1, 1972.

[201] Colo. Laws 1971, ch. 373, p. 1333.

[202] Colo. Rev. Stat. Ann. § 148-21-22 (Supp. 1969).

A 1970 article states, in regard to this provision of the 1969 act, that "notwithstanding the relation back provisions for unadjudicated well priorities, most well appropriations are in fact junior to most surface appropriations * * *." Note, "A Survey of Colorado Water Law," 47 Denver L. Jour. 226, 333 (1970). And a 1971 article states, "The vast majority of wells on the South Platte and Arkansas Rivers were drilled long after the surface stream was over-appropriated, and even with 'relation-back' the priorities assigned to these wells in an adjudication would be very junior." Comment, "The Groundwater-Surface Water Conflict and Recent Colorado Water Legislation," 43 Univ. of Colo. L. Rev. 1, 28 (1971).

The 1969 legislation directed the State Engineer and division engineers to administer, distribute, and regulate the waters of the State in accordance with the constitution and laws of the State.[203] A subsequent amendment added specific provisions relating to the correlation of rights to surface and tributary ground waters.[204]

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[203] *Id.* § 148-21-34.

In 1971, the Colorado Supreme Court, without considering the 1971 amendment discussed in note 204 *infra*, upheld the validity of the rules and regulations established in 1969 for the South Platte Basin. *Kuiper* v. *Well Owners Conservation Assn.*, 176 Colo. 119, 490 Pac. (2d) 268 (1971). The court *inter alia* indicated that the rules, requirements, and factors set forth in *Fellhauer* v. *People*, 167 Colo. 320, 447 Pac. (2d) 986 (1968), discussed at note 188 *supra*, had been adequately followed. The court said, *inter alia*: "In *Fellhauer*, we attempted to sound the note of a new era in the utilization and optimal use of water. It appears to us that the General Assembly reacted favorably to that attempt and in turn sought to promote in detail the general thought of *Fellhauer*. We have the same view of the acts of the State Engineer. We suggest that there is a slight indication of a feeling upon the part of the plaintiffs and on the part of the trial court that changes should not be required in the operation of wells on the Platte River. There must be change, and courts, legislators, the State Engineer and users must recognize it. We recognize that future research and testing may prove erroneous some of the things that we found were predominately shown in the record. By the same token, further research and testing will not only result in correction of past mistakes, but also will lead us closer to the goal of minimal waste of water." 490 Pac. (2d) at 283.

[204] Colo. Laws 1971, ch. 372, § 2, p. 1331 states: "(1) * * * It is the legislative intent that the operation of this section shall not be used to allow ground water withdrawal which would deprive senior surface rights of the amount of water to which said surface rights would have been entitled in the absence of such ground water withdrawal, and that ground water diversions shall not be curtailed nor required to replace water withdrawn, for the benefit of surface right priorities, even though such surface right priorities be senior in priority date, when, assuming the absence of ground water withdrawal by junior priorities, water would not have been available for diversion by such surface right under the priority system. The state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the performance of the foregoing duties.

"(2)(a) In the adoption of such rules and regulations the state engineer shall be guided by the principles set forth in Section 148-21-35(2) and by the following:

"(b) Recognition that each water basin is a separate entity, that aquifers are geologic entities and different aquifers possess different hydraulic characteristics even though such aquifers be on the same river in the same division, and that rules applicable to one type of aquifer need not apply to another type. All other factors being the same, aquifers of the same type in the same water division shall be governed by the same rules regardless of where situated.

"(c) Consideration of all the particular qualities and conditions of the aquifer.

"(d) Consideration of the relative priorities and quantities of all water rights and the anticipated times of year when demands will be made by the owners of such rights for waters to supply the same.

"(e) Recognition that one owner may own both surface and subsurface water rights.

"(f) All rules and regulations shall have as their objective the optimum use of water consistent with preservation of the priority system of water rights.

Ground Waters not Tributary to a Surface Watercourse

Appropriability of Nontributary Ground Water

Prior to the passage of the Colorado Ground Water Management Act in 1965, ground water which was not tributary to a surface stream was not subject to any theory of appropriation. In 1951, the Colorado Supreme Court held that, in the absence of statutory direction, it would not be correct to hold that the nontributary waters, not a part or source of a natural stream, belonged to the owner of the land under which they arose under the common law or English rule of absolute ownership.[205] The court did not formulate any rule with regard to the ownership of these waters, but stated, "Whether in such case we should follow the California doctrine of reciprocal rights, developed from its law of riparian rights, or whether we should extend one step further our Colorado doctrine of first in time, first in right, need not now be determined."[206]

In this case the town of Limon brought an action to condemn the land owned by defendants and sought the right to dig wells thereon and remove percolating waters located thereunder. Defendants' claim for compensation for the water hinged upon the ownership of the waters involved. The court held that the nontributary waters did not belong to the defendant company. The Colorado adjudication statute upon which the court based its holding was construed as not applying to wells drawing water from a closed artesian basin in which the waters were not tributary to any stream.

The Colorado Supreme Court has held that the 1957 ground water law,[207] which was applicable to all ground water, dealt only with prospective regulations and the manner of construction of wells in order to prevent waste. The court held:[208]

> [T]he Ground Water Commission may declare a given area to be a "tenatively critical ground water district" and once an area has been declared within such designation it "shall thereupon become subject to the regulations prescribed in this Article." The regulations are that after such designation no new wells can be dug, or the water drawn from existing wells be increased unless the user shall

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"(g) Rules and regulations may be amended or changed from time to time within the same aquifer dependent upon the then existing and forecast conditions, facts and conditions as then known, and as knowledge of the aquifer is enlarged by operating experience."

This 1971 amendment also provides for the publication of the proposed rules and regulations and procedures for protesting such rules and regulations.

[205] *Safranek* v. *Limon*, 123 Colo. 330, 228 Pac. (2d) 975 (1951).

[206] 228 Pac. (2d) at 978. See *Whitten* v. *Coit*, 153 Colo. 157, 385 Pac. (2d) 131, 135 (1963).

[207] Colo. Laws 1957, ch. 289, p. 863, Rev. Stat. Ann. § 148-18-1 *et seq.* (1963).

[208] *Whitten* v. *Coit*, 153 Colo. 157, 385 Pac. (2d) 131 (1963).

> make application in writing to the state engineer for permission to do so and the application be approved.
>
> * * * [Section 147-19-10] is the only section in which the legislation has authorized participation by the state engineer in its administration. * * *
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> * * * [T]he obvious intent is that nothing be done in respect to waste from existing wells.

Thus, nontributary ground waters were not subject to the doctrine of appropriation under the 1957 act. The act served to impose reasonable use facilities in order to prevent waste. The 1957 act was repealed in 1965.[209]

Ground Water Management Act of 1965

The passage of the Colorado Ground Water Management Act in 1965 made a significant change in Colorado water law. The act provides for appropriation of "designated ground waters."

> It is hereby declared that the traditional policy of the state of Colorado regulating the water resources of the state to be devoted to beneficial use in reasonable amounts through appropriation is affirmed with respect to the designated ground waters of this state, as said waters are hereinafter defined. While the doctrine of prior appropriation is recognized, such doctrine should be modified to permit the full economic development of designated ground water resources. Prior appropriations of ground water should be protected and reasonable ground water pumping levels maintained, but not to include the maintenance of historical water levels. All designated ground waters in this state are therefore declared to be subject to appropriation in the manner defined in this article.[210]

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[209] Colo. Laws 1965, ch. 319, § 1, p. 1246.

[210] Colo. Rev. Stat. Ann. § 148-18-1 (Supp. 1965).

After quoting the second and third sentences of this statutory provision, the Colorado Supreme Court said in a recent case: "Underground water basins require management that is different from the management of surface streams and underground waters tributary to such streams. In the case of the latter waters, seasonal regulation of diversion by junior appropriators can effectively protect the interests of more senior appropriators and no long range harm can come of over appropriations since the streams are subject to seasonal recharge. The underground water dealt with by 148-18-1 is not subject to the same ready replenishment enjoyed by surface streams and tributary ground water. It is possible for water to be withdrawn from the acquifer in a rate in excess of the annual recharge creating what is called a mining condition. Unless the rate of pumping is regulated, mining must ultimately result in lowering the water balance below a level from which water may be economically withdrawn. Due to the slow rate at which underground waters flow through and into the acquifer, it may be many years before a reasonable water level may be restored to a mined acquifer.

"It is clear that the policies of protecting senior appropriators and maintaining reasonable ground water pumping levels set forth by the underground water act require management which takes into account the long range effects of intermittent pumping in the acquifer. In this case all of the experts testifying before the commission and the

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The term "designated ground water" is that ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawls have constituted the principal water usage for at least fifteen years preceding January 1, 1965; and which in both cases is within the boundaries either geographic or geologic, of a ground water basin.[211]

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district court were in agreement that a mining condition exists in the Northern High Plains Designated Ground Water Basin. The commission has determined that proper use of the ground water resource requires that mining be allowed to continue. However, the maximum allowable rate of depletion, at least when considering applications for permits to drill new wells, has been set at 40% depletion in 25 years. * * * " *Fundingsland* v. *Colorado Ground Water Comm'n,* 171 Colo. 487, 468 Pac. (2d) 835, 839 (1970). In the latter regard, see the further discussion of this case in note 216 *infra.*

The court added that "If the plaintiff were permitted to proceed on his theory of 'unappropriated water' and pump water from his proposed well until such time as it was no longer economically feasible to withdraw water from the acquifer, then no subsequent regulation of his pumping could protect senior appropriators and all pumping from the basin within the area of influence of the plaintiff's well would have to cease until a reasonable pumping level was restored through the slow process of recharge. This is not the concept of appropriation contained in the statute, and not the one this court will follow.

"When as in this case, water is being mined from the ground water basin, and a proposed appropriation would result in unreasonable harm to senior appropriators, then a determination that there is no water available for appropriation is justified." 468 Pac. (2d) at 839-840.

The court also said: "The language of this court in *Fellhauer* v. *People,* Colo., 447 P. 2d 986 [(1968), discussed at note 188 *supra*] to the effect that wells in the Arkansas Valley could be regulated only in compliance with reasonable rules, regulations, standards and a plan established by the state engineer prior to the issuance of the regulative orders pertained to the duty of the state engineer to administer surface water and underground water tributary thereto under 1965 Perm. Supp., C.R.S. 1963, 148-11-22. In this case we are concerned with the management of underground water in designated ground water basins under 1965 Perm. Supp., C.R.S. 1963, 148-18-1 *et seq.* Our interpretation of the statutory requirements in Fellhauer does not apply here. The judgment of the district court is in accordance with the requirements of the appropriate statute and effectuates the policies of ground water management expressed in that statute." 468 Pac. (2d) at 840. The court noted that the plaintiff had not contested the validity of the 1965 act itself but had argued that the denial of his application for a permit deprived him of his constitutional right to appropriate. 468 Pac. (2d) at 836. The court also said, "The plaintiff calls our attention to Article XVI, Section 6 of the Colorado Constitution which provides: 'The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.' We find, however, that the record clearly supports the finding that there is no unappropriated water within the three mile circle surrounding the plaintiff's proposed well site." 468 Pac. (2d) at 839.

[211] Colo. Rev. Stat. Ann. § 148-18-2(3) (Supp. 1965), amended, Laws 1971, ch. 367, § 1, p. 1311.

The act provides for the formation of a 12-member Ground Water Commission. The functions of the Commision include the determination of designated ground water basins, holding hearings to determine the extent (by geographic description) of such designated ground water basins, supervision, control, and administration of the use of designated ground water, and creation of ground water management districts.[212] The State Engineer is the ex officio executive director of the Commission.[213]

Among other things, the act provides that permits to make withdrawals of designated ground water shall be obtained from the Ground Water Commission in the form prescribed by the Commision.[214] If, after required notice, objections are filed, a hearing is to be held.[215] The application shall be denied if it shall appear that there are no unappropriated waters or the proposed appropriation would unreasonably impair existing water rights or would create unreasonable waste:

> In ascertaining whether a proposed use will create unreasonable waste or unreasonably affect the rights of other appropriators, the commission shall take into consideration the area, and geologic conditions, the average annual yield and recharge rate of the appropriate water supply, the priority and quantity of existing claims of all persons to use the water, the proposed method of use, and all other matters appropriate to such questions. With regard to whether a proposed use will impair uses under existing water rights, impairment shall include the unreasonable lowering of the water level, or the unreasonable deterioration of water quality, beyond reasonable economic limits of withdrawal or use.[216]

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[212] Colo. Rev. Stat. Ann. §§ 148-18-1 to 148-18-36 (Supp. 1965) and subsequent amendments.

[213] *Id.* § 148-18-3(6). As amended by Laws, 1971, ch. 367, § 3, p. 1312, this subsection provides that the Commission may delegate to the executive director the authority to perform any of the Commission's functions under this act, subject to appeal to the Commission, except (1) determination of a designated ground water basin, (2) establishment of priority of claims for appropriation, and (3) creation of ground water management districts.

Colo. Rev. Stat. Ann. § 148-18-9 (Supp. 1965) grants certain specific powers to the State Engineer.

Appeals from decisions or actions of the State Engineer or the Commission may be taken to the appropriate district court. *Id.* § 148-18-14.

[214] Colo. Rev. Stat. Ann. § 148-18-6 (Supp. 1965), amended in some other respects by Colo. Laws 1971, ch. 367, § 5, p. 1313.

In contrast, there is no general permit system with respect to surface watercourses and tributary ground waters, although permits are required to construct wells for domestic and for other limited uses of tributary ground water, as discussed in note 193 *supra.*

[215] If *no* objections are filed, and if the Commission finds it will not unreasonably impair existing water rights or create unreasonable waste, the State Engineer shall issue a conditional permit as described below in instances where objections are filed. Colo. Rev. Stat. Ann. § 148-18-6(3) (Supp. 1965).

[216] *Id.* § 148-18-6(5). (Footnote continued)

If the Commission finds no grounds for denial of the application, a conditional permit shall be issued in whole or in part, subject to such reasonable conditions and limitations as the Commission may specify. After the permittee provides evidence and the Commission finds that the water has been put to beneficial use and that other terms of a conditional permit have been complied with, the Commission shall order the State Engineer to issue a final permit with such limitations and conditions as the Commission deems necessary to prevent waste and to protect other appropriators.[217] The act, as amended in 1967, exempts "[W]ells used for ordinary household purposes, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches, and the irrigation of home gardens and lawns, not exceeding fifty gallons per minute * * * unless otherwise specifically stated."[218]

Relative rights among users in the basin, including permittees and those exercising their rights prior to the effective date of the act, are governed by the doctrine of prior appropriation.[219] The act includes procedures for determining their relative priorities. The Commission shall determine tentative priorities as soon as practicable after the establishment of a designated ground water basin

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Under the circumstances of a recent case, the Colorado Supreme Court upheld the use of a so-called 3-mile test (said to have been developed for use in the Northern High Plains) in determining whether the proposed use of ground water would unreasonably impair existing water rights from the same source or create unreasonable waste. "Using that test, a circle with a three mile radius is drawn around the proposed well site. A rate of pumping is determined which would result in a 40% depletion of the available ground water in that area over a period of 25 years. If that rate of pumping is being exceeded by the existing wells within the circle, then the application for a permit to drill a new well may be denied." The court concluded that this test, including other factors considered in its application, "takes into account all of the considerations specified in the statute." The court denied the plaintiff's argument that the test was based on assumptions not present in the circumstances of this case. "We do not find that the evidence introduced by the plaintiff's expert is so conclusive in its effect that we can say that adherence to the three mile test by the court in this case was capricious and arbitrary. * * *

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" * * * Experts testifying for the commission stated that the three mile test is the best tool they presently have to work with, and that it will be refined as they continue to learn more about the area." *Fundingsland* v. *Colorado Ground Water Comm'n*, 171 Colo. 487, 468 Pac. (2d) 835, 836-838 (1970). This case also is discussed in note 210 *supra*.

[217] Otherwise, the conditional permit shall expire in 1 year, unless extended for a specified period for good cause. Colo. Rev. Stat. Ann. § 148-18-7 (Supp. 1965), amended in some other respects by Colo. Laws 1971, ch. 367, § 6, p. 1314.

With respect to conditional water rights to use surface watercourses in Colorado, see the discussion at the end of chapter 8.

[218] Colo. Rev. Stat. Ann. § 148-18-4 (Supp. 1967).

[219] Colo. Rev. Stat. Ann. § 148-18-8 (Supp. 1965).

and, after publication, notice, and hearing, shall establish priority dates of the respective wells and final permits therefor.[220]

The Commission "in the effectuation of the policy of this state to conserve its designated ground water resources and for the protection of vested rights" has been authorized generally by the 1965 act to "supervise and control the exercise and administration of all rights heretofore or hereafter acquired to the use of designated ground water." More specific powers of the Commission include the following provisions:

(1) "[I]t may, by summary order, prohibit or limit withdrawal of water from any well during any period that it determines that such withdrawals of water from said well would cause unreasonable injury to prior appropriators; provided, that nothing in this article shall be construed as entitling any prior designated ground water appropriator to the maintenance of the historic water level or any other level below which water still can be economically extracted when the total economic pattern of the particular designated ground water basin is considered."

(2) It may "establish a reasonable ground water pumping level or levels in an area or areas having a common designated ground water supply. Water in wells shall not be deemed available to fill the water right therefor if withdrawal therefrom of the amount called for by such right would, contrary to the declared policy of this article, unreasonably affect any prior water right, or result in withdrawing the ground water supply at a rate materially in excess of the reasonably anticipated average rate of future recharge."

(3) It may "issue permits for the construction of replacement or substitute wells. Any permits issued shall set forth the conditions under which a well may be modified by a change of the well itself, the pumping equipment therefor, by the drilling of a substitute well, or otherwise, in order to make it possible for the owner of a well to obtain the water to which such owner may be entitled by virtue of his original appropriation."[221]

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[220] *Id.* As amended by Laws 1971, ch. 367, § 7, p. 1314, separate lists may be published for subdivisions of the designated basin when it is shown that a subdivision or area does not affect the supply of water available to another subdivision or area.

With respect to the determination of priorities, the act provides, *inter alia*: (1) All claims based on beneficial use prior to its effective date shall relate back to the initial date of such use, while claims based on subsequent beneficial use shall date from the filing of an application therefor; (2) "All wells constructed as replacements for or as supplements to an original well or wells for the same beneficial use, shall be considered as a unit and awarded a priority date of the earliest well"; (3) If two or more appropriations "either heretofore or hereafter made, have a common date, the priority number shall be accorded by lot." Colo. Rev. Stat. Ann. § 148-18-8 (Supp. 1965).

[221] Colo. Rev. Stat. Ann. § 148-18-10 (Supp. 1965), as amended by Laws 1967, ch. 188, § 4, p. 276. As amended by Laws 1971, ch. 367, § 8, p. 1314, it is further provided *inter alia*: (1) "No supplemental wells or alternate point of diversion wells shall be allowed in any area of any designated ground water basin in which the proposed well or

Ground water management districts may be formed within designated ground water basins, provided that all ground water acquifers within the geographic boundaries of such a district have been designated as a part of the district by the Commission. The Commission shall approve or disapprove the proposed boundaries of such a district which may be formed upon (1) a petition, (2) a hearing on its feasibility and boundaries, and (3) the majority vote of the taxpaying electors in the district. The district's board of directors shall be resident landowners and have a variety of statutory powers, including: (1) consulting with the Commission on all ground water matters affecting the district, including the suitability of proposed restrictions or regulations; (2) cooperating with the Commission in their enforcement; (3) subject to consultation with the Commission, holding a public hearing, and approval by the Commission if there are objections, (a) to promulgate reasonable rules and regulations for conserving, preserving, protecting, and recharging the ground water, (b) to provide for the spacing of wells and regulating their production, (c) to require the closing or capping of unused open or uncovered wells, and (d) to prohibit "the use of ground water outside the boundaries of the district where such use materially affects the rights acquired by permit" within the district.[222]

With regard to the uses of ground water located outside a designated water basin, the 1965 act provided that after its effective date no new wells shall be constructed nor the supply from existing wells increased or extended without a "permit to construct a well" from the State Engineer. Upon application for such a permit, he shall determine whether or not the exercise of such a permit will materially injure the vested water rights of others. If it will, the application shall be denied; if not, he shall issue a "permit to construct a well" which "shall set forth such conditions for drilling, casing, and equipping wells and other diversion facilities as are reasonably necessary to prevent waste, pollution, or material injury to existing rights." The State Engineer shall record the date of the receipt of application and preserve it and the permit so indexed "as to be useful in determining the extent of the uses made of various ground water sources."[223]

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wells combined would deplete the aquifer in excess of the rate of depletion prescribed by the ground water commission or by the ground water management district rules and regulations [if any]." (2) "The ground water commission shall order the total or partial discontinuance of any diversion within a ground water basin to the extent the water being diverted is not necessary for application to a beneficial use."

[222] Colo. Rev. Stat. Ann. § 148-18-29 and 148-18-30 (Supp. 1965). As amended by Laws 1971, ch. 367, § § 13 and 14, p. 1316, these subsections also provide that district directors may adopt appropriate devices, procedures, measures, or methods in the control and administration of ground water extractions; the control measures are subject to the Commission's review and approval and to court appeal by dissatisfied persons.

With respect to consultation with the Commission, see also Colo. Rev. Stat. Ann. § 148-18-10(e) (Supp. 1965).

[223] Colo. Rev. Stat. Ann. § 148-18-36 (Supp. 1965).

HAWAII

Occurrences of Ground Water in Hawaii

The Hawaiian Islands were formed by volcanic action in the ocean. Therefore, the physical conditions that influence the occurrence of ground water in this archipelago differ in many important respects from those on the mainland.

All occurrences of ground water in the Islands have been grouped into (1) basal water, which consists of the great body of fresh water which lies below the main water table and which "floats" on salt water, and (2) high-level water, which comprises bodies of ground water held up above this main water table.[224]

Origin and Source of Ground Water

Ground water, to be usable, for most ordinary purposes, generally must be fresh water. On any island in this archipelago the fresh water apparently can come from no source other than precipitation upon that island, the presumption being that the salt water of the ocean originally saturated the permeable rocks below sea level to which it could gain access.

An intriguing concept has been developed in an effort to afford a logical explanation of the origin of ground water in the Islands. It assumes ideal conditions relating to an imaginary simple island which, however, do not fully obtain. With that warning to the reader, a cross-section of the island would comprise (1) a bottom section of rock entirely below sea level, having a concave upper surface with its edges at the seashore, the rock being saturated with salt water from the ocean and in contact with the ocean water; (2) an intermediate section in the shape of a double-convex lens, lying partly above but mostly below sea level and with its edges at the seashore, saturated with fresh water in contact with the salt water that saturates the rock in the bottom section, the contact area being a belt or zone of diffusion of fresh and salt water; and (3) an upper section of rock constituting an aerated zone, in which part of the water that is intermittently precipitated upon the island percolates downward to join the body of fresh water occupying the intermediate

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This section of the 1965 act also provided that "A permit to construct a well shall not have the effect of granting nor conferring a ground water right upon the user, nor shall anything in this section be so construed. Nevertheless, the permit shall be a necessary prerequisite for the initiation of a new or additional supply and shall be prima facie evidence of the date and extent thereof." However, this provision was repealed by Laws 1971, ch. 370, § 5, p. 1325.

Laws 1971, ch. 370, § 3, p. 1324, amended this section of the 1965 act so as to specifically require a finding "that there is unappropriated water available for withdrawal by the proposed well" before issuing a permit.

[224] Stearns, T., "Ground-Water Resources," First Progress Report, Territorial Planning Board of Hawaii, p. 142 (1939).

The physical and legal aspects of this topic are presented at length in Hutchins, W. A., "The Hawaiian System of Water Rights" (1946).

lens-shaped section, but without filling the voids in the rock of this upper zone through which it descends. In fact, the "lens" of water exists, but it is not symmetrical in configuration, and the occurrences of ground water throughout the island necessarily are not uniform.

The utlimate source of fresh ground water and of surface water is precipitation upon the island. The exposed portions of the original volcanic formation, particularly in the high mountain elevations, act as the intake area of the main ground water system of the island.

Basal Water

Basal water is characteristic of the large islands in the Hawaiian archipelago. On Oahu it is divided into (1) shallow water, usually without confining beds, and (2) water occurring in important basalts. This latter includes the greatest underground reservoir on Oahu, which is of outstanding importance in the economy of the Island. While the basal water table slopes toward the seashore, the gradient is relatively flat, indicating that the rocks are exceedingly permeable.

In portions of the coastal plains of Oahu and Kauai, water in the basalt under the relatively impermeable "caprock" is under artesian pressure, being confined between the caprock and the underlying salt water. These coastal areas are supplied from water in the much more extensive portions of the basalt inland from them. The artesian and nonartesian waters are thus in direct contact—a physical relationship that is important in its effect upon rights to the use of the waters.

High-level Water

The occurrences of high-level water in Hawaii consist chiefly of water (1) confined by intrusive rocks, mainly dike complexes, (2) perched on ash or tuff beds, (3) perched on soil beds, and (4) perched on alluvium. The term "perched" is used with referecne to water resting upon a relatively impervious body, which in turn rests upon an aerated zone.

Water confined by dikes.—The largest known bodies of high-level water on Oahu are those confined in the dike complexes associated with the rift zones. Water from precipitation on the high elevations enters and saturates the permeable rock within the dike complexes and is held up by relatively impermeable barriers, chiefly dikes. They act as natural reservoirs, part of the impounded water being held in storage and part being allowed to escape. Water confined by dikes and not floating on salt water has been found on several islands in addition to Oahu.

Perched-water supplies.—The second largest group of high-level water supplies of Oahu appears to be in perennial stream valleys where older alluvium has been covered by later lava flows. The Hawaiian alluvium is relatively impervious, the constituent grains being of basaltic debris which weathers and

rots rather readily. The weight of the later overlying lava flows tends to reduce greatly the porosity and permeability of the weathered materials, with the result that the older alluvium is characteristically less permeable than the overlying lava rock. In some areas, however, the alluvium is not everywhere rotted, water being allowed to percolate through the unfilled interstices.

Other supplies of ground water are perched upon ash and soil beds interstratified with lava flows.

High-level artesian water.—Artesian water, underlain by dense intrusive rock and capped with impermeable sediments, exists on Oahu. On Maui, a perched aquifer containing water under an artesian head was discovered in 1941, the water being confined under pressure in permeable basalt lying between dense lava flows.

The Coastal Artesian Areas of Oahu

It has been the view of knowledgeable ground water hydrologists that the main body of fresh basal water of Oahu and of other comparable islands conforms generally to the shape of a double-convex lens. This lens rests upon the underlying salt water. It arches above sea level, extending to distances below sea level about 40 times greater than the elevation of the arch above sea level, and tapering at the seashore. Along some portions of the seashore of two islands, overlying structures of caprock have altered the sharply tapering edge of the lens. In some places, artesian conditions have been created.

Character and functions of caprock.—Bodies of relatively impervious caprock rest upon the sloping surface of pervious rocks along a considerable portion of the Oahu seacoast. These caprock formations are far from homogeneous; they consist mostly of layers of sediments on older lava flows. Their mud and clay constituents are the most abundant and are far more compact than the underlying water-bearing basalt. The structure as a whole tends to be impervious to percolation of water, and to provide an effective barrier to the flow of the basal water that saturates the highly permeable basaltic rocks upon which it is superimposed.

There are continual accretions from rainfall to the water in the basal water lens. The water in the lens tends to move outward and to escape into the ocean at the tapering edge, although the sloping wall of caprock acts as a seaward barrier. The ground water at the edge of the lens is thus forced by this wall both upward and downward, the top of the blunted edge being forced above sea level about 1 foot for each 40 feet of the distance to which the lower point is forced below sea level. The effect of the caprock is to trap water that percolates into the permeable rock beneath it from the rock in the central portion of the island.

Creation of artesian conditions.—Pressure is exerted by the water that saturates the contiguous permeable rock inland or "mauka" from the caprock, and that presses the confined water against the sloping wall. The water-bearing

basalt or aquifer that underlies the caprock and extends inland from it constitutes one underground reservoir, the water in different portions of which is seeking to find a common level. But that part of the reservoir that lies inland from the caprock is, obviously, not confined by an overlying impervious stratum; it has what is called a "free" water table. This means that if a well is driven into that area of the water-bearing stratum, the water cannot rise naturally in the well above the free water table—for the reason that there is no natural pressure or "artesian head" that would force it to do so.

The free water table encounters the caprock along a line inland from and running in the same general direction as the seacoast, but not necessarily parallel to the shoreline. From that inland line seaward, the water is depressed because of the impervious character of the caprock—it is forced to stand below the level of the free water table inland from it and hence is under hydrostatic pressure. If a well is driven through the caprock and into the common water-bearing stratum in that area, the water will rise naturally in that well—it will rise in this artificial opening above the level to which it has been depressed by the caprock. Such water is called "artesian" water and such a well is an artesian well. The upper level, or highest point to which the water will rise naturally in such an artesian well, is called the "piezometric surface."

Pressure on these bodies of confined water, exerted by the inland body of basal water that supplies them, causes water to escape from the confined strata through all available avenues. Water may escape naturally through overflow springs at the top of the caprock, by leakage through the caprock, and presumably through submarine springs at the base of the caprock. Water may also be induced to escape from the artesian structure by artificial means; that is, by development or improvement of natural springs on the surface but principally by wells.

Artesian wells.—Where the piezometric surface is above the ground surface, the water of a well drilled into the water-bearing stratum will flow upon the ground. But where the piezometric surface is below the ground surface, the water will not flow from such a drilled well because it cannot rise naturally to that height. Such a well is an artesian well, despite the fact that it does not flow upon the surface, for it contains artesian water that rises in the bore hole to the piezometric surface. To be put to use, of course, the water must be pumped to the surface.

Inland from the line of contact between free water table and caprock, a well may penetrate the same body of ground water of which artesian water is a part. The water of such a well is not under pressure and is not artesian water.

Isopiestic areas.—Alternating ridges and valleys extend from the mountains down to and under the coastal plain. Under this plain, a buried ridge extends from each major exposed ridge; the same applies to each major existing valley. These buried valleys were filled with relatively impervious sediments, forming dams separating buried ridges of pervious water-bearing rock. The piezometric surface within each area differs from that of the others, but throughout each

area the piezometric surface is about the same. These are are called "isopiestic" areas, that is, areas of practically equal artesian pressure. Several isopiestic areas have been mapped on Oahu.

The Honolulu artesian system.—The Honolulu District contains four major isopiestic areas and one minor one. This artesian structure has been the principal source of domestic water supply for the city, and has served important industrial and agricultural purposes as well. Adjoining it on the west is an isopiestic area within which very large quantities of water have been withdrawn for use by sugar plantations.

Physical and Legal Interrelationships

Direct physical relationships exist among the large bodies of ground water in the Islands. Water in the dike reservoirs overflows or leaks at certain points in the form of springs, which contribute to the perennial water supplies of surface streams. Water leaks from the dike complexes and joins the body of basal water. Some water in the surface streams flows directly into the sea, while some leaks into bodies of perched water, the contents of which in turn may discharge into the sea at shallow depths or may percolate to the basal water table. Some water perched on alluvium in the stream bed may likewise reappear on the surface downstream; such waters, whether or not they reappear on the surface in substantial quantities, may conform to the legal classification of a "definite underground stream" and in places may conform to the phase known as the "underflow" of a surface stream. And the basal "percolating" water, while mostly nonartesian, consists in places of artesian water of great economic importance.

Following are two examples of the legal and physical interrelationships. (1) Water in a gravel stratum underlying the stream bed in a section of the channel of Wailuku (Iao) Stream, Maui, was involved in a controversy over water rights in that stream.[225] This water was not found to be contributing to the surface flow. The importance of the gravel stratum to the downstream night-time rights arose from the necessity of resaturating a portion of the gravels each evening because of the reduced level of the stream during the day, when water was being diverted under day-time rights that had been transferred upstream. This occasioned a lag in the flow over the gravels when the water was released upstream in the evening, and hence delayed its arrival at the downstream headgates.

(2) A second example was a case, of outstanding judicial importance in Hawaii, involving artesian waters under Honolulu.[226] A physical relationship existed, but was not in issue in the proceedings and was not established legally or even discussed in the opinion of the court. The decision purported to lay down the broad principle that the owners of land under which there is an

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[225] *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 693-694 (1904).
[226] *City Mill Co.* v. *Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929).

"artesian basin" are the owners of the artesian waters of the basin. But the legal relationship between the "owners" of this artesian water and possible claimants of rights in the directly connected nonartesian water was not established or even discussed.

Development of Ground Water Rights During Territorial Status

The following discussion pertains primarily to the development of principles of ground water rights in Hawaii during its territorial status. Nearly synonymous with its Statehood in 1959, the provisions of the Ground Water Use act have since been superimposed upon these principles. The act is discussed later under "Ground Water Use Act."

Definite Underground Streams

Physical characteristics.—As distinguished from physical conditions on the mainland, occurrences of ground water in the Hawaiian Islands have not been such as to bring forth many examples of the facet of ground water known as "definite underground stream." Resorting to mainland law, therefore, the essential characteristics of a subterranean watercourse, are (1) a definite stream (2) flowing in a definite channel, that is, through a known and defined channel.[227] For the purpose of determining the classification, "defined" means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge, and "known" refers to knowledge of the course of the stream by reasonable inference.[228]

Hawaii Supreme Court decisions rendered early in the 20th century[229] concerned a water-bearing gravel stratum 25 to 40 feet thick, composed of loose boulders, sand, and gravel, and resting on a practically impervious substratum. The court did not call the water in this gravel bed "underflow" or a "definite underground stream," and did not discuss the physical features necessary to constitute either. The physical conditions that controlled the decisions were previously noted under "Occurrences of Ground Water in Hawaii—Physical and Legal Interrelationships."

Other cases allude to the necessity of "known and well defined channels," but do not cite specific examples of subterranean flows of water conforming to this general legal classification.

Legal principles.—In a number of cases, the Hawaii Supreme Court has had occasion to discuss the matter of rights to the use of ground waters flowing in ascertained and defined streams. The court's view appears to be that the rules

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[227] *Los Angeles* v. *Pomeroy*, 124 Cal. 597, 633-634, 57 Pac. 585 (1899).

[228] See *Cave* v. *Tyler*, 147 Cal. 454, 456, 82 Pac. 64 (1905).

[229] *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 14 Haw. 50, 56-57 (1902); 15 Haw. 675, 693-694 (1904).

of law governing uses of waters of definite underground streams are not the same as those that apply to other ground waters. It would also appear that one who asserts a right in a definite underground stream must prove the existence of such stream by competent testimony, although under some circumstances a presumption may arise that a defined channel underlies a surface channel. The court has not intimated whether proof would necessarily include, not only the existence but also the extent, location, and characteristics of the subterranean channel within reasonable limits. Except in one case involving underflow, the existence of such a subterranean stream was not proved in any case that reached the supreme court, so that the general rules that apply to such streams have not been definitely announced. However, there is a strong intimation that the holders of established rights in a spring fed by a definite underground stream would be protected against interference with this source of supply of the spring.

(1) Supreme court decisions. The first case in which this general question was considered was decided in 1884.[230] Counsel contended that the opposing party had no right to the accretion to a spring by subterranean percolation or by surface flow from another spring. The court found that water from one spring flowed into another spring, and that water came from the springs into an auwai (ditch) in known and ascertained channels. Evidently only surface channels were involved. And apparently what the court actually decided was that a prescriptive right had been acquired to water flowing from a spring into an auwai in a known and ascertained channel, regardless of the suggestion that some of the spring water may have come by subterranean percolation from another spring. The court quoted principles to the effect that rights to subterranean waters not in known or defined courses are not the same as those governing surface and ground waters in known stream channels. *Washburn on Easements* was quoted as follows:

> The controlling circumstance is not whether the stream was above or below ground, but whether it was or was not *ascertained* and *defined* as a stream. If there is a natural spring, the water from which flows in a natural channel, it cannot be lawfully diverted by anyone to the injury of riparian proprietors. If the channel or course underground is known, it cannot be interfered with.

A few years later, the supreme court stated, "Subterranean waters, to be the subject of rights, must, like surface waters, in general flow in known and well defined channels."[231] It was not shown that the seepage from upstream lands that was claimed as an increment to lower springs would follow the course of the surface drainage, or if so, that it would reappear in the lower springs,

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[230] *Davis* v. *Afong,* 5 Haw. 216, 222-224 (1884).

[231] *Wong Leong* v. *Irwin,* 10 Haw. 265, 270 (1896), referring *inter alia,* to *Davis* v. *Afong,* 5 Haw. 216 (1884).

"much less that it would flow underground in known and well defined channels."

The question of existence of a definite underground stream was raised in a proceeding to establish a right to the use of all the surplus water of a lele (detached portion of an ahupuaa, or major land unit) of which the petitioner alleged ownership.[232] A stream arose near the upper end of the lele. Ordinarily it disappeared before reaching the lower end, but in times of freshet it flowed down to certain springs below the lele that were the ordinary source of supply of a stream from which numerous lands obtained water. The petition was dismissed on procedural grounds, but the court pointed out that it was a case brought by an owner of land proposing to divert water therefrom in unindicated quantities at unindicated points, and with the burden of showing that *any* diversion would not injure others "or that the water that sinks in Kaea does not flow underground to the Mahoe springs in a channel that is defined and capable of reasonable ascertainment." The petitioner could make a diversion if not injurious to others, but to effectuate the unlimited right that it sought, must prove that the diversion would not injure others. The decision, to have practical value, would have to include a finding to this effect, and such finding the court naturally declined to make in advance.

(2) The repeated *dicta*. In the absence of actual decisions, these *dicta* are important insofar as they disclose the view of the supreme court that: (a) definite underground streams are governed by different rules of law from those that apply to ground waters not in defined channels; (b) one who asserts a right to use water flowing in a defined subterranean channel has the burden of proving the existence of such channel, but that under strong circumstances, where an upstream party asserts the right to divert water that disappears in a stream bed in the downstream portion of which springs arise, that party has the burden of showing that the water does not reach the springs in a defined underground channel; and (c) that "rights" of some sort may attach to waters proved to be flowing in known and ascertained subterranean channels.

(3) Established mainland principle. The principle that rights to the use of waters of definite underground streams are governed by the same rules of law as those that pertain to surface watercourses is long and well established on the mainland.[233] The courts of most Western States have said, in one form or another, that the rules applicable to surface watercourses apply to definite under ground streams.[234] In 1899, the California Supreme Court declared, "There is no dispute between the parties and no conflict in the authorities as to

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[232] *Palolo Land & Improvement Co.* v. *Territory of Hawaii*, 18 Haw. 30 (1906).

[233] Wiel, S. C., "Water Rights in the Western States," 3d ed., vol. II, § 1077 (1911); Kinney, C. S., "A Treastise on the Law of Irrigation and Water Rights," 2d ed., vol. II, § § 1157-1160 (1912).

[234] Hutchins, W. A., "Selected Problems in the Law of Water Rights in the West" 151-152, 182-265 (1942).

the proposition that subterranean streams flowing through known and definite channels are governed by the same rules that apply to surface streams."[235]

It is believed that the Supreme Court of Hawaii has not yet passed judgment upon actual adjudications of rights in defined underground streams. However, there appears to be nothing in ancient Hawaiian water law or custom that would mitigate the application of the above principle.

Underflow of surface stream.—The underflow or subflow of a surface stream, in mainland legal contemplation, is that portion of a whole watercourse found in pervious material over which the surface stream flows, and that occurs within reasonably well defined limits which, however, may confine laterally a space substantially wider than that occupied by the surface portion of the stream. Where these surface and subsurface flows are found to be components of a single watercourse, and not to constitute two independent watercourses, it is held not only that the underflow is governed by the same rules of law that apply to the surface stream, but that rights in the underflow are included in rights in the surface stream as incident thereto.[236]

In *Hawaiian Commercial & Sugar Company* v. *Wailuku Sugar Company*, the Supreme Court of Hawaii decided a point concerning water which probably would conform to the mainland concept of "underflow," although it did not use this term.[237] A question was the extent to which respondent had exceeded its adjudicated rights by diverting water at Maniania dam, at which point no water was being diverted at the time of adjudication but at which water had since been taken pursuant to a transfer upstream of certain day-time rights held by respondent. It was found that the bed of the stream from above Maniania dam to the sea was underlain by a stratum estimated as 25 to 40 feet thick, composed of loose boulders, sand, and gravel, and resting on a practically impervious substratum. It was clearly established that in the absence of ordinary surface flow, no seepage or spring water ever had been known to appear in the stream bed; hence the respondent's theory (that the water in the gravel stratum passed underground to the sea without reappearing at any point in the river bed) was considered the correct one.

A brief comment on the importance of the gravel stratum to the downstream night-time rights in this case appears earlier under "Occurrences of Ground Water in Hawaii—Physical and Legal Interrelationships." Day-time rights had been transferred upstream to Maniania. After completing a diversion there each evening and returning the water into the stream, it required an appreciable period of time to flow down to the diversions for night-time rights. In addition, delay of part of the released water was occasioned by saturation of

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[235] *Los Angeles* v. *Pomeroy*, 124 Cal. 597, 632, 57 Pac. 585 (1899).

[236] See Wiel, *supra* note 233, at §§ 1078-1081; Kinney, *supra* note 233, at §§ 1161-1165; Smith, G. E. P., "Groundwater Law in Arizona and Neighboring States." Ariz. Agric. Expt. Sta. Tech. Bull. 65, pp. 64-70 (1936).

[237] *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 693-694 (1904).

part of the gravel bed made necessary by the reduced level of the stream during the day, with a resulting lag in movement of the water downstream. The downstream users who had night-time rights were entitled to begin diverting at 4 P.M., so that any substantial lag in the flow had a material bearing upon exercise of their rights. Respondent was restrained "from diverting water through the Maniania ditch by day at such time as to prevent the entire water in the Wailuku stream from being at 4 P.M. where it would be but for such diversion at Maniania."

In reaching this decision the court did not declare or expound any broad principles with respect to the "underflow" of a stream. The case was decided on the general principle, long established, that a change in exercise of a water right is permissible only to the extent that the change does not result in impairing the rights of others.

Ground Waters not Flowing in Defined Streams

Considered under this general heading are all ground waters—including both artesian and nonartesian waters—other than those flowing in what the evidence in a case would show to be "definite underground streams."

Nonartesian "percolating" waters.—Four cases in the Supreme Court of Hawaii have dealt more or less directly with ground waters that were not indicated in the opinions as being under artesian pressure, and that were not shown by the evidence to be flowing in "definite underground streams." In the absence of proof to the contrary, these waters are considered to be so-called percolating waters.

Three of these cases, previously considered in connection with defined underground streams, bear likewise upon the present topic.[238] Another case that was discussed concerning the underflow of a surface stream involved as a minor point the use of water developed from a tunnel.[239]

In the *Davis* case, the court upheld a prescriptive right to water flowing from springs into an auwai (ditch), the water of one of the springs being augmented by the overflow from a higher spring. The surface flow from the higher to the lower spring was in a "known and ascertained channel." The court quoted principles to the effect that the rules of law that apply to subterranean percolating waters are not the same as those that govern surface and ground waters in known stream channels. Apparently the court approved of the doctrine that "rights cannot be acquired in subterranean, unknown, percolating water."

In the *Wong Leong* case, owners of springs claimed an alleged flow of seepage from higher land. There was no showing as to the course of the seepage

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[238] *Davis* v. *Afong*, 5 Haw. 216, 222-224 (1884); *Wong Leong* v. *Irwin*, 10 Haw. 265, 270 (1896); *Palolo Land & Improvement Co.* v. *Territory of Hawaii*, 18 Haw. 30 (1906).

[239] *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 680, 691-692 (1904).

water, or whether it would reappear in the springs, much less that it would follow a definite underground channel. The court relied on the principle that "Subterranean waters, to be the subject of rights, must, like surface waters, in general flow in known and well defined channels." The claim of the spring owners was rejected.

In the *Hawaiian Commercial* case, a minor issue concerned the relation of developed tunnel water used at a mill to the mill owner's adjudicated rights in stream water used at the mill. The tunnel was dug on the mill owner's land after the date of the adjudication. The court stated that "It is undisputed and clear that such tunnel water is the property of the defendant [mill owner] and may be used by it as it sees fit." In other words, the quantity of tunnel water used for mill purposes was held to be in addition to the quantity of stream water adjudicated for such purposes before the tunnel was made.

In the *Palolo Land* case, the question as to whether a definite underground stream flowed from the upper area to the springs apparently was considered important. On the evidence, the question was decided in the negative. Although the court decision turned on points of procedure, there is a strong intimation in the opinion that the holders of rights in the springs would have no claim on ground water supposedly feeding the springs but which was not shown to be flowing thereto in a defined channel.

None of the principles suggested or acknowledged in these four early decisions—the only ones rendered down to the early part of the 20th century that bear upon this subject—have been specifically repudiated by the supreme court with respect to nonartesian waters. In summary: (1) No one of them actually adjudicated rights in nonartesian waters as between owners of land underlying a common body of such water; (2) none of them actually adopted any particular doctrine with respect to the use of nonartesian waters; (3) the two earliest ones questioned the possibility of the vesting of "rights" in such waters; (4) the purport of three of the cases is to the effect that ground waters are not legally tributary to springs unless proved to be flowing thereto in defined channels, and hence that "percolating" waters are not legally tributary even though physically tributary, although there was not proof in any of them that "percolating" waters actually were physically tributary to the springs; and (5) one of them acknowledged that the owner of land owned the tunnel waters that such owner had developed on such land, but the ownership so acknowledged by the court was "undisputed," that is, presumably, not disputed by the other party to the litigation.

Even aside from any doubt cast upon any of these cases by the court's later treatment discussed under "Artesian waters," below, it would appear that these earlier decisions did not have the effect of firmly establishing rules with respect to "rights" in nonartesian percolating waters, as against others who either owned lands overlying the same waters, or who held established rights in sources of supply fed by such waters. And certainly the treatment

of ground water law in *City Mill Company* v. *Honolulu Sewer & Water Commission*[240] does not strengthen the apparent earlier view that "rights" do not obtain with respect to nonartesian percolating waters. The reasonable conclusion appears to be that the question of ownership and rights of use of nonartesian percolating waters was not settled.

Artesian waters.—(1) Cases involving artesian waters but not fundamental rights of use. The use of water from artesian wells was involved in some cases dealing with the construction of land leases.[241] However, down to the time of the 1929 decision in the *City Mill* case, discussed immediately below, there was apparently no decision of the Supreme Court of Hawaii with respect to the fundamental character of the right to divert artesian water occurring in one's land.

(2) The *City Mill* case, defining the "ownership" of artesian waters. The decision in this case[242] proved to be of great importance in the water law of the Territory, particularly with respect to the ground water supply of the City of Honolulu. The opinion of the court was quite lengthy, without dissenting opinion. No appeal was taken to the Federal courts. No subsequent decision of the Territorial or State courts upon the points of water law involved in this case has been reported.

The case went to the Supreme Court of Hawaii on appeal from a ruling by the Honolulu Sewer and Water Commission, predecessor of the present Board of Water Supply, denying an application of the City Mill Company for a permit to drill a new artesian well on property owned by it within the District of Honolulu. The water was to be used for domestic purposes in certain buildings belonging to the company near the well, in an amount then being supplied from the city mains. The application was denied because of possible danger to the existing artesian water supply in the basin by opening up a new well. On appeal, the supreme court reversed and set aside the Commission's order. The court announced principles in its decision along the following lines:

(a) The question whether the territory might prohibit the boring of any new well while leaving users of existing wells alone was a new one in the jurisdiction.

(b) The Territory, as a landowner in the basin, has the same rights as a private owner; but it does not own all artesian waters in the Territory.

(c) If the doctrine of ownership of ground waters favored in this case is correct, it has been so since the establishment of titles in individuals.

(d) The so-called common law doctrine of absolute ownership of waters in one's land is unsound, has never been the rule in Hawaii, and does not

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[240] *City Mill Co.* v. *Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929).

[241] *Richards* v. *Ontai*, 19 Haw. 451, 453-454 (1909), 20 Haw. 335, 340-342 (1910); *Tsunoda* v. *Young Sun Kow*, 23 Haw. 660 (1917).

[242] *City Mill Co.* v. *Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929).

require adoption by virtue of the legislative adoption of the common law of England.

(e) The "doctrine of correlative rights" was believed to be the correct one. Accordingly, it was held that the owners of land overlying an artesian basin own the artesian waters; they have correlative rights therein; and each is entitled to a reasonable use thereof with due regard to the rights of co-owners.

(f) The legislative act giving the Sewer and Water Commission extensive control over the development and use of artesian water contained no finding or declaration that an emergency existed. Regardless of that, private water rights cannot be deliberately confiscated for community use in times of peace.

(g) The police power of the Territory extends to prescribing reasonable regulations governing installation and maintenance of private artesian wells.

(h) The police power of the Territory does not extend to prohibiting installation of a new well in an artesian basin, while permitting others to continue the operation and use of their existing wells without diminution.

The portion of the legislation found objectionable was held to be unconstitutional. A few weeks later, it was eliminated by the legislature.

Prior to the decision in the *City Mill* case, the basis of the right to use artesian waters had never been specifically decided. By this decision, such rights were declared to exist in the owners of overlying lands and were made, in substance, to relate back to the time of passing of original land titles to individuals. Thus, in declaring the existence of this property right, the supreme court introduced into Hawaiian water law an entirely new principle.

The extent and characteristics of the rights of co-owners, other than being "correlative" and inhering in the owners of overlying lands, were not defined by the court. There was no controversy between co-owners and no necessity for a definition.

(3) What the *City Mill* case actually decided. It was actually decided that the Territory was not the owner of all artesian waters in the basin, but that all owners of overlying land had property rights in the use of the artesian waters by virtue of their landownerships, which property rights the Territory could not take for the use of the community in time of peace without making due compensation to the landowners, regardless of the existence of a supposed emergency.

Regulation of Artesian Wells

General Territorial statute.—A statute providing for the regulation of artesian wells generally throughout the Territory was enacted in 1917.[243] For

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[243] Haw. Laws 1917, Act 156.

the purposes of the statute, an artesian well was defined as "an artificial well or shaft which is sunk or driven to an artesian stratum or basin, and through which water is raised or carried to or above the surface of the ground by natural pressure or gravity, or through which water is or may be raised or carried to or above the surface of the ground by artificial means."

An artesian well not equipped with an appliance for controlling the flow of water therefrom was declared to be a common nuisance, and the person responsible therefor guilty of a misdemeanor. Also guilty of a misdemeanor was any person in charge of an artesian well who allowed the water to waste. Public regulation of artesian wells was placed under the Superintendent of Hydrography, which has since been placed under the Board of Land and Natural Resources.

The statute provided further that the owner of an artesian well could relieve himself of further responsibility for it by transferring the well to the county in which located. This provision did not apply within the District of Honolulu, wherein a separate statute was in force.

This statute has been recently amended to delete the word "artesian" and to apply to wells generally. As amended, however, the statute still contains a provision that appears to relate particularly to artesian wells. It states:

> A well through which water flows to the surface of the ground or to any porous substratum by natural pressure and is not capped, cased, equipped, or furnished with such control facilities as will readily and effectively arrest and prevent waste or unnecessary flow of any water from the well is declared to be a common nuisance. The owner, tenant, or occupant of the land upon which such a well is situated, or any person in charge of such a well, who causes, suffers, or permits such common nuisance or suffers or permits it to remain or continue, is guilty of a misdemeanor.[244]

Wells in District of Honolulu.—A statute enacted in 1927 gave to the Honolulu Sewer and Water Commission jurisdiction over artesian wells in the District of Honolulu, comprising the area extending from Maunaloa to Moanalua, inclusive, along the south coast of Oahu. The Commission was abolished in 1929 and its powers and duties, including the regulation of artesian wells, were transferred to the Board of Water Supply, City and County of Honolulu.[245] This local jurisdiction was thus excepted from the general Territorial statute.

The test of constitutionality of this statute, the finding that a portion was not valid, and the legislative correction of this fault have been discussed previously under "Artesian Waters—(2) The *City Mill* case, defining the 'ownership' of artesian waters."

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[244] Haw. Rev. Stat. § § 178-1 to -10 (1968), amended, Laws 1970, ch. 123. The quoted provision is in § 178-2.

[245] Haw. Laws 1927, Act 222, Rev. Stat. § § 71-1 to -4 (1968).

Ground Water Use Act of 1959

The Hawaii "Ground Water Use Act"[246] relates to all ground water,[247] but, except for specified emergency powers, regulation of ground water use is limited to areas classified by the Board of Land and Natural Resources, which administers the act,[248] as designated ground water areas. " 'Designated groundwater area' means an area in which the board finds that the ground water must be regulated and protected for its best utilization, conservation, and protection in order to prevent threat of exhaustion, depletion, waste, pollution, or deterioration by salt encroachment * * *."[249]

After June 12, 1959, the effective date of the act, no use may be made of any water of a designated ground water area except in compliance with the act. And—a matter of so much importance—no ground water right can be acquired or recognized by prescription.[250]

The general powers of the Board are set out in considerable detail. Among other things, the Board may: (1) make and authorize investigations and collection of data concerning the State's ground water resources; (2) designate ground water areas for regulation where it is found that any of the following conditions exist now or in the foreseeable future: (a) use of ground water exceeds the rate of recharge, (b) excessive decline in ground water levels, (c) increase in chloride content of water materially reducing its value in use, (d) excessive preventable waste of water, (e) proposed water developments leading to any of the conditions; (3) retain establishment of a designated area while justifying factors remain, but rescind a designation after public hearing if factors no longer prevail; (4) intervene in any court action in which management of designated ground water areas is in issue; (5) require cessation of waste or dangerous practices involving water of designated areas; and (6) exercise its water shortage and emergency authority under the statute, described below.[251]

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[246] Haw. Rev. Stat. § 177-1 *et seq.* (1968).

The "Ground Water Use Act" of 1959 was enacted by the Legislature of the Territory of Hawaii in 1959. Haw. Laws 1959, ch. 274. The act went into effect upon its approval June 12, 1959. However, since Hawaii was admitted to the Union on August 21, 1959, the administration of the act has been performed by the State almost from its inception. The act was completely reenacted in 1961. Haw. Laws 1961, ch. 122.

The original 1959 version of the act contained a lengthy declaration of policy which is omitted from the 1968 version of the act.

[247] Ground water is defined as water under the earth's surface, whether or not in perched supply, dyke-confined, flowing or percolating in subterranean channels or streams, under artesian pressure, or otherwise. Haw. Rev. Stat. § 177-2(6) (1968).

[248] *Id.* § 177-4.

At all meetings of the Board, the chief officers of county water boards are invited to participate as ex officio members without voting power. *Id.*

[249] *Id.* § 177-2(3).

[250] *Id.* § 177-3.

[251] *Id.* § 177-5.

The Board may make, amend, and repeal rules and regulations concerning notices,

No State or local governmental agency may enforce any ordinance, rule, or regulation affecting the use of ground water from a designated ground water area, whether promulgated before or after June 12, 1959, without the Board's approval. Moreover, no State or local governmental agency or other person having the power of eminent domain or condemnation may thereby take any rights to ground water from designated areas without written consent of the Board.[252]

At its discretion the Board may: (1) make investigations through the Attorney General, to determine any actual or pending violation of the statute or any rule, regulation, or order of the Board, or to aid in enforcing them; (2) require or permit any person to file a statement concerning the matter; and (3) publish information concerning an investigation.[253] The Board may invoke a court action to enjoin a probable violation of the statute or of any Board rule, regulation, or order. On proper showing, the court must grant appropriate relief.[254]

Domestic uses of ground water, within or outside a designated area, being made on June 12, 1959, may be continued and new ones initiated thereafter, without certification of use or application for a permit.[255] Reports required by the Board must be filed.[256] Domestic uses are subject to the Board's water shortage and emergency powers.[257]

New domestic uses may be initiated without regard to whether the taking reduces the water supply or any preserved use or use made pursuant to permit. But, to make sufficient water available for domestic use, no person making a domestic use may initiate a court action to compel reduction of any preserved use or use made pursuant to a permit granted prior to initiation of that domestic use.[258]

Other existing uses, in addition to domestic uses, are also preserved. The direct withdrawal of water from a designated area for a lawful, beneficial use other than domestic use, (1) being made on the effective date of designation,

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hearings, and proceedings. For such purposes, and for forms and orders, the Board may classify uses, sources, methods of developments, and other related matters within its jurisdiction, and prescribe different requirements therefor. *Id.* § 177-7.

The act contains detailed provisions for the conduct of hearings. Any person aggrieved by an order or decision of the Board may appeal to the circuit court. *Id.* §§ 177-11 and -12.

[252] *Id.* § 177-8.

[253] *Id.* § 177-9.

[254] *Id.* § 177-10.

[255] *Id.* § 177-13. Domestic use is defined as use of water (1) by an individual, family unit, or household for drinking, cooking, laundering, and sanitation; (2) by stock for operating a farm; (3) for family or household food; or (4) for irrigation of lawn or garden not more than one-half acre in area. *Id.* § 177-2(4).

[256] *Id.* § 177-13.

[257] *Id.* § 177-14, referring to §§ 177-33 and -34.

[258] *Id.* § 177-13.

(2) in conjunction with facilities then under construction, or (3) within 5 years prior thereto, may be continued if the uses remain beneficial and the provision for the certification of existing uses are complied with.[259] Without Board authorization, no preserved use may be modified by increasing the quantity of water, or substantially changing the purpose or manner of use, time of taking, or point of diversion. Exceptions are made with respect to municipal corporations and persons supplying them.[260] Preserved uses may be conveyed to the same extent and in the same manner as they could prior to June 12, 1959.[261]

Any person making a preserved use may voluntarily exchange it for a permit. When a person materially violates the provisions relating to preserved uses, the Board at its discretion, after notice and hearing, may order that the violation constitutes an offer of exchange for a permit.[262]

All or part of a preserved use is extinguished if not used for 4 consecutive years or for any 5 out of 7 years. Three years of nonuse immediately prior to the effective date of the establishment of a designated area is conclusively presumed to be nonuse. If nonuse is caused by natural shortage of water, neither years of use nor of nonuse are considered. Years in which a declaration was required but none was filed are conclusively presumed to be years of nonuse.[263]

After designation of a ground water area, except with respect to domestic and preserved uses, water may be withdrawn therefrom only in accordance with a permit from the Board.[264]

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[259] After designating a ground water use, the Board rules that any person making a preserved use shall file a declaration within a prescribed time. The State may be divided into areas with different dates for filing. Any person making a preserved use may file a declaration at any time before the required date. The Board prescribes the form and content of declaration, including the quantity of water, purpose or manner of use, time of taking, and point of diversion. If no declaration is filed as required, the Board at its discretion may conclusively determine the extent of preserved uses. If the Board has not acted upon a declaration within 6 months, it shall certify the described uses.

The Board issues certificates describing preserved uses, including the maximum daily and annual drafts from each well. The certificate constitutes a description of the preserved use, but not an adjudication of property rights. The Board must hold a hearing on request of any person adversely affected by the certification or refusal to certify a water use. *Id.* § 177-16.

[260] Their usage from the designated ground water area without prior authorization may be increased up to 100,000 gallons, or 5 percent, whichever is greater, per day more than the average per day beneficial use during the year immediately prior to the establishment of the designated area.

[261] *Id.* § 177-15.

[262] *Id.* § 177-17.

[263] *Id.* § 177-18.

[264] *Id.* § 177-19.

After June 12, 1959, no State or local government agency shall contract to obtain ground water within a designated area from any person not holding a permit, and no person shall contract to supply or sell rights in a designated area to another person, unless permission is obtained from the Board. Permission shall not be withheld except

The Board's objective in granting permits is the most beneficial use of the State's ground water resources. Prerequisites for permits are: (1) water availability; (2) beneficial use;[265] (3) the most beneficial use and development of water resources will not be impaired; and (4) granting the permit will not substantially and materially interfere with preserved uses, or with previous domestic or permitted uses, except as provided in the act. Any person adversely affected by the grant or denial of a permit may request a hearing before the Board.[266]

The Board may establish classes of permits and exempt for specific periods minimal quantities of water or types of uses or users in specified areas from permit requirements when it finds that this is not an unreasonable impediment to beneficial use of the State's ground water resources.[267]

The permit is issued for a specified period not exceeding 50 years, determined by the Board, depending on the kind of water use.[268] Each permit is issued by the Board subject to the following conditions: (1) The use of water must be for the beneficial purpose described in the permit. (2) The use must not interfere substantially with preserved uses, nor previous domestic or permitted uses.[269] (3) The use is subject to the Board's water shortage and emergency powers. (4) The permit may be suspended or revoked. (5) Other conditions established by the Board's rules or regulations.[270]

Unless a specific exemption is authorized, each permit shall provide that at any time, or at a specified time after issuance of the permit, the holder may be required, on receipt of reasonable compensation, to relinquish his permit to the Board if it is determined that (1) there are one or more applicants for permits to make water uses which would be more beneficial, or would be as beneficial and would provide a more complete utilization of the available water than the permit holder is making; (2) additional permits to make such uses cannot be

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for good cause, and shall be deemed granted unless the Board acts within 90 days after application. *Id.* § 177-20.

[265] Beneficial use "means use of water, including the method of diversion, storage, transportation, and application, that is reasonable and consistent with the public interest in the proper utilization of water resources, including, but not limited to, domestic, municipal, military, agricultural, and industrial uses." *Id.* § 177-2(1).

[266] *Id.* § 177-22.

Permits may be granted without regard to whether, under the State law operative prior to date of designation of a designated area, use under the permit could have been maintained only in connection with specific lands or otherwise. *Id.*

[267] *Id.* § 177-23.

[268] *Id.* § 177-24.

[269] Where a permit application is made and sufficient water is available, but the permit use would interfere substantially with an existing domestic use, the ground water supply, water diversion facilities of a preserved use, or use under an existing permit, then a permit may be issued subject to the condition that the permit holder furnish to the injured person enough water of comparable quality to equal that lost because of the interference. *Id.* § 177-26.

[270] *Id.* § 177-25.

granted without acquiring the water use permit, because there is no reasonably available water; and (3) the applicants are willing and able to furnish reasonable compensation to the permit holder.[271]

A permit holder may apply for renewal after one-half of the original period has expired. Renewed permits take effect immediately. If a permit is issued for more than 1 year, and no application for renewal is filed 6 months before expiration, the Board—after 30 days' written notice during which the holder may apply for renewal—may immediately grant to another person a permit to use the water effective on expiration of the original permit. The Board must hold a hearing on the request of any person adversely affected by renewal or refusal to renew a permit.[272]

A permit may be revoked in whole or in part for: (1) any material falsification in the application or any statement of fact required by the statute; (2) violation of the provisions of the statute; (3) violation of permit conditions; or (4) nonuse. In any proceeding to wholly or partially revoke a permit, the Board must notify the permit holder of the reasons therefor and provide for a hearing.[273]

Except as provided in the statute,[274] no court may enjoin the use of water by any person who holds a valid permit therefor.[275] But if a permit use causes injury to property rights, compensation may be had for actual damages in a suitable action against the permit holder.[276] To obtain the most beneficial use of the State's water resources, and to protect the public health, safety, welfare, and the users' interests during a "water shortage"[277] in any designated area, the Board may, after hearing and notice: (1) establish rules, regulations, or orders affecting the use of ground water, as conditions warrant, and forbid construction of new diversion facilities or wells, initiation of new water uses, or modification of existing uses or diversion or storage facilities in the area; (2) regulate the use of ground water within the area by apportioning, limiting, or rotating uses of water, or by preventing uses that the Board finds are no longer reasonable or beneficial, although (a) domestic, municipal, and military uses shall always be preferred to other uses;[278] (b) preserved uses must always be preferred to permit uses; and (c) among substantially similar permitted uses,

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[271] *Id.* § 177-27.

[272] *Id.* § 177-28.

[273] *Id.* § 177-29.

[274] This apparently is referring to § 177-10, described at note 254 *supra.*

[275] *Id.* § 177-30.

[276] *Id.* § 177-31.

[277] Shortage is defined as "the absence of a sufficient quantity and quality of ground water in a designated ground-water area to supply lawful use of water." *Id.* § 177-2(11).

[278] "Municipal use" is use of water through public services available to the inhabitants of a community for (1) promotion and protection of their health, comfort, and safety, (2) protection of property from fire, and (3) purposes listed under "domestic use." as defined in note 255 *supra. Id.* § 177-2(7).

preference must be given to uses initiated prior in time unless it is determined that this would impair or be detrimental to the public interest in utilization of water resources; (3) make other rules, regulations, and orders necessary for preserving the public health, safety, and welfare and the interest of affected water users. On the motion of any affected person, the Board shall hold a hearing to determine whether any rules, regulations, or orders shall be amended, repealed, or revoked.[279]

If an "emergency"[280] exists and if the Board finds that the exercise of its powers relating to water shortages will not protect the public health, safety, and public welfare, it may after notice and hearing: (1) establish rules, regulations, or orders limiting, apportioning, rotating, or prohibiting use of water resources in the affected ground water areas; (2) authorize any affected State or local governmental agency or public water supplier to enter upon public or private lands in any ground water area and remove any quantity of ground water necessary to protect the public health, safety, and welfare, provided that if such entry or taking interferes with any property right other than any right that might be acquired under the statute, due compensation is payable; (3) designate the ground water area for regulation in accordance with section 177-5(5), if not so previously designated; (4) make other rules, regulations, and orders necessary with respect to such ground water areas to protect the public health, safety, and welfare during the emergency.[281]

On the motion of any affected person, the Board shall set a time and place of hearing to determine whether the emergency has terminated or whether any rules, regulations, or orders entered therein should be amended, repealed or revoked. The authority granted the Board under this section is in addition to the authority granted under other provisions of the statute.[282]

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Court Decisions Relating to Appropriability of Ground Waters

Definite Underground Streams

It was stated in the prevailing opinion in a 1922 ground water decision that

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[279] *Id.* § 177-33.

[280] Emergency is defined as "a shortage of ground water in any ground-water area, whether established as a designated ground-water area or not, which threatens the public health, safety, and welfare." *Id.* § 177-2(5).

[281] *Id.* § 177-34.

[282] *Id.*

This chapter (177) is not intended to repeal chapter 178, relating to regulation of wells generally, or §§ 71-1 to -4, relating to artesian wells under the control of the Board of Water Supply in the District of Honolulu. In the event of conflict, this chapter, and the rules and regulations established hereunder shall prevail. *Id.* § 177-35.

Haw. Rev. Stat. ch. 178 and §§ 71-1 to -4 (1968) are discussed at notes 243-245 *supra.*

there is a clear distinction between the right to appropriate subterranean stream waters and the right to appropriate percolating waters that form no part of such a stream.[283] As distinguished from a definite underground stream, it was contended, mere percolating waters or waters gathered together in wells on lands of the owner of the fee are not subject to appropriation by a third party, under either the constitution or the statutes of Idaho.

Percolating Waters

With one exception, the Idaho Supreme Court decisions respecting rights to use percolating ground waters have favored the doctrine of prior appropriation. Whether or not the waters were under artesian pressure has not determined the development of principles.

Early decisions.—The earliest decision in this category, *LaQuime* v. *Chambers*, involved waters of a spring. They were held subject to appropriation as they appeared on the surface, regardless of whether they came from a well-defined subterranean stream or were only seepage and percolating waters.[284]

In a later case, an entryman on unoccupied public land appropriated water of a spring and of an artesian well close by. This was recognized as valid.[285]

The next decision in point, involving artesian waters in *Bower* v. *Moorman*, was rendered in 1915.[286] This rejected the doctrine of absolute ownership of percolating ground waters and apparently leaned toward the appropriation doctrine. It was indicated that the court in the *LeQuime* case had construed the statute relating to appropriation of subterranean waters as applying to percolating waters. Despite some questioning, 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 *Bower* case.

A controversy between neighboring owners of artesian wells was decided the following year by the supreme court. Judgment was rendered for the defendant notwithstanding plaintiff's claim of prior use.[287] The evidence failed to prove a connection between the wells; and it was the court's view that convincing evidence should be adduced before a court of equity would be justified in issuing a permanent injunction.

A 1922 decision.—In 1922, the Idaho Supreme Court rendered a decision, in *Public Utilities Commission* v. *Natatorium Company*, that: (1) distinguished percolating ground water from water flowing in a defined underground stream; (2) held that percolating water is not public water of the State, but belongs to the owner of the soil as a part of the realty; (3) held that constitutional and statutory provisions relating to appropriability of water apply to waters

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[283] *Public Util. Comm'n* v. *Natatorium Co.*, 36 Idaho 287, 305, 211 Pac. 533 (1922).
[284] *LeQuime* v. *Chambers*, 15 Idaho 405, 413-414, 98 Pac. 415 (1908).
[285] *Youngs* v. *Regan*, 20 Idaho 275, 279-280, 118 Pac. 499 (1911).
[286] *Bower* v. *Moorman*, 27 Idaho 162, 181-184, 147 Pac. 496 (1915).
[287] *Jones* v. *Vanausdeln*, 28 Idaho 743, 746-751, 156 Pac. 615 (1916).

flowing in natural streams; and (4) concluded that as percolating waters are not public waters, a company serving consumers with such waters in the absence of an unequivocal intention to dedicate them to public use is not a public utility. One justice concurred and two dissented.[288]

Ground waters tributary to adjudicated stream.—Ground waters seeping from gravel underlying a large area, and which naturally constituted part of the natural underground supply of a surface stream, were held subject to appropriation in 1930.[289] The waters in litigation had been gathered into an artificial drain, but they were legally as well as physically part of the stream supply and had been included in the adjudication of rights to use its waters. The *Public Utilities Commission* case was distinguished because of the differences in character and sources of the waters involved.

Definite adoption of appropriation doctrine.—In 1931, the Idaho Supreme Court took a view directly opposed to that of the majority of justices in the *Public Utilities Commission* case and adopted the doctrine of prior appropriation in relation to a common body of artesian water underlying the lands of litigants.[290] The doctrine of absolute ownership of ground waters was rejected. Prior decisions of the Idaho court were examined and the conflicting ones distinguished. No decisions to the contrary have since been rendered.

Protection in Means of Diversion

In the *Bower* case, the supreme court held that if no permanent loss of water was caused by use of wells installed by junior appropriators, issuance of a perpetual injunction would not be justified if it should become necessary to destroy the means of diversion of the senior appropriator's wells. "While the subsequent appropriator would be liable in damages, he would have the right to divert surplus subterranean waters."[291]

It was held in another case that a landowner who obtained water collected beneath the ground surface by reason of percolation—with no proof that there was a natural subterranean stream—had no right to insist that the water table be maintained at the existing level for the sole purpose of safeguarding his use of it.[292]

In a later case, the Idaho Supreme Court affirmed judgment for plaintiff (a prior appropriator in an artesian basin) where the evidence showed that because defendants operated their pumps at a level below that of plaintiff's, the water level in the basin was lowered to such an extent that plaintiff's pumps went dry.[293] The court stated that if defendants could now compel plaintiff to

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[288] *Public Util. Comm'n* v. *Natatorium Co.*, 36 Idaho 287, 299-308, 211 Pac. 533 (1922).
[289] *Union Cent. Life Ins. Co.* v. *Albrethsen*, 50 Idaho 196, 202-204, 294 Pac. 842 (1930).
[290] *Hinton* v. *Little*, 50 Idaho 371, 374-380, 296 Pac. 582 (1931).
[291] *Bower* v. *Moorman*, 27 Idaho 162, 183, 184, 147 Pac. 946 (1915).
[292] *Nampa & Meridian Irr. Dist.* v. *Petrie*, 37 Idaho 45, 50-51, 223 Pac. 531 (1923).
[293] *Noh* v. *Stoner*, 53 Idaho 651, 652-657, 26 Pac. (2d) 1112 (1933).

lower his well below that of defendants, in order to receive again the quantity of water theretofore used, it would result ultimately in a race for the bottom of the artesian belt. "If subsequent appropriators desire to engage in such a contest the financial burden must rest on them and with no injury to the prior appropriators or loss of their water." Under such circumstances, this decision protects the prior appropriator of ground water in his method of diversion, in the absence of an undertaking by the junior appropriator to pay the expense of so altering the prior appropriator's diversion as to restore his previous water supply conditions.

However, subsequent legislation appears to have adopted a substantially different approach.[294]

Ground Water Legislation

The Idaho statutes provide that all waters of the State, when flowing in their natural channels, are the property of the State,[295] and that the right to use waters of rivers, streams, lakes, springs, and "subterranean waters" may be acquired by appropriation.[296]

A statute pertaining specifically to ground water appropriation and administration of rights was enacted in 1951. It was substantially enlarged in 1953 and has subsequently been amended in certain respects.[297]

Definition and Ownership of Ground Water

Ground water is defined as "all water under the surface of the ground whatever may be the geological structure in which it is standing or moving."[298]

All ground waters are the property of the State and must be developed to beneficial use in reasonable quantities by means of a reasonable exercise of the right of prior appropriation. Early appropriators are protected in the maintenance of "reasonable ground water pumping levels" as established by the State Reclamation Engineer.[299] All pre-existing ground water rights are validated. Exemptions apply to wells for domestic and drainage purposes.[300]

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[294] See the discussion at note 299 *infra.*

[295] Idaho Code Ann. § 42-101 (1948).

[296] *Id.* § 42-103.

[297] Idaho Laws 1951, ch. 200, Laws 1953, ch. 181, Code Ann. § § 42-226 to -239 (Supp. 1969).

[298] Idaho Code Ann. § 42-230 (Supp. 1969).

[299] *Id.* § 42-226. This section declares that "*while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided.*"

[300] *Id.* § § 42-227 and -228.

Appropriability of Ground Water

Ground water rights, except for domestic and drainage purposes, may be acquired only by appropriation. Until 1963 they could have been perfected either by means of diversion and application to beneficial use (the so-called constitutional method) or by following the statutory procedure. The 1963 amendment, however, restricts ground water appropriation to the statutory method;[301] its validity in this regard has been upheld by the Idaho Supreme Court.[302]

Appropriation Procedure, Including Critical Areas

The first step in appropriating ground water is to apply to the Department of Reclamation for a permit to make an appropriation.[303] If the locality in which the desired appropriation is to be made has *not* been designated as a critical ground water area, the State Reclamation Engineer shall issue a permit in accordance with the provisions governing applications to appropriate waters of the State, provided the application otherwise meets the requirements of those provisions.[304]

A critical ground water area is any ground water basin or portion thereof that does not have sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the State Reclamation Engineer.[305]

If the area has been designated as a critical ground water area, the State Reclamation Engineer may deny the application if, based upon investigation or other information, he has reason to believe that there is insufficient water

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[301] *Id.* § 42-229. " * * * provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation." *Id.*

[302] *State ex rel. Tappan* v. *Smith,* 92 Idaho 451, 444 Pac. (2d) 412, 417 (1968), in which the court said it "does not deny the right to appropriate water, but regulates the method and means by which one may perfect a right to the use of such water. The regulation is in accord with Article 15, Sections 1 and 3, of Idaho's Constitution, and with I.C. § § 42-103 and 42-226." Idaho Const. art. XV, § 3, is discussed in chapter 1 at note 85.

[303] Idaho Code Ann. § 42-202 (Supp. 1969).

[304] *Id.* § 42-233a, referring to § § 42-203 and -204.

[305] *Id.* § 42-233a.

If an area is designated a critical ground water area, the State Reclamation Engineer must hold a public hearing in the area concerned to apprise the public of such designation and the reasons therefore. Should the State Reclamation Engineer desire to remove the designation of a critical ground water area or modify the boundaries of the area, he must likewise hold a public hearing. *Id.*

The legislation regarding critical ground water areas was applied in *State ex rel. Tappan* v. *Smith,* 92 Idaho 451, 444 Pac. (2d) 412, 417 *et seq.* (1968).

available subject to appropriation at the location of the proposed well. An alternative to denial is the issuance of a permit for a lesser amount of water, to the extent it is available.[306]

When construction of works and application of water to beneficial use are completed, the permittee is entitled to make proof thereof and to receive a license.[307] This license "shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right * * *."[308]

Broadened Powers of Administrator

The State Reclamation Engineer's powers with respect to ground waters were considerably broadened by the 1953 legislation. His specific duty is to control the appropriation and use of ground water and to protect the people of the State from depletion of ground water resources.[309] He may take corrective action with respect to both flowing and nonflowing wells on both public and private lands and cessation of their use, pending correction of defects. He may: commence and appear in judicial or administrative actions; prohibit or limit withdrawals of water when not legally available; and establish pumping levels in making determinations.[310] It is specifically provided, "*Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.*"[311]

The State Reclamation Engineer also may determine areas of common ground water supply. If they affect streamflow in an organized water district, he may incorporate them therein, otherwise he is to create separate water districts based on common ground water supply.[312]

Administrative Determination of Adverse Claims

Holders of surface or ground water rights thought to be adversely affected by ground or surface water rights of later priority may complain under oath to the State Reclamation Engineer. A local ground water board, comprising the State Reclamation Engineer, an engineer or geologist, and a resident irrigation farmer—who hold office until and only until the matter is disposed of—holds a

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[306] Idaho Code Ann. § 42-233a (Supp. 1969).
[307] Idaho Code Ann. § 42-219 (1948).
[308] *Id.* § 42-220.
[309] Idaho Code Ann. § 42-231 (Supp. 1969).
[310] *Id.* § 42-237a.
[311] *Id.* § 42-237a(g). This provision was applied in *Stevenson* v. *Steele*, 93 Idaho 4, 453 Pac. (2d) 819, 827 (1969).
[312] Idaho Code Ann. § 42-237a (Supp. 1969).

hearing. The board determines the existence and nature of the water rights and whether prior rights are infringed, and may make corrective orders.[313]

Appeal to Court

Appeal may be taken to the district court from any decision, determination, order, or action of the State Reclamation Engineer, watermaster, or local ground water board, with right of appeal therefrom to the Idaho Supreme Court.[314]

Adjudication of Ground Water Right

This is made under the adjudicatory provisions of the general water law.[315]

Licensing of Well Drillers

Water well drillers must be licensed. They are required to keep logs of all water wells excavated and to furnish signed copies to the State Reclamation Engineer.[316]

Applicability of General Water Appropriation Statute

Unless otherwise provided, the provisions of the general water appropriation statute continue to govern ground water rights.[317]

Artesian Waters

In addition to the foregoing provisions, the Idaho statutes provide for administrative control of the flow of artesian waters by the State Reclamation Engineer. An artesian well is any artificial hole made in the ground through which water flows naturally from subterranean sources to the ground surface for any length of time.[318]

NEBRASKA

Court Decisions

There have been relatively few Nebraska cases decided on the subject of ground water.

Olson v. *City of Wahoo* arose between owners of land in a basin—a plaintiff who had an excavation in a gravel bed and a defendant city which pumped water for domestic use. The defendant city had begun pumping the water prior to plaintiff's purchase of land. In a dry year, the city replaced its pumps with a

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[313] *Id.* § § 42-237b to -237d.
[314] *Id.* § 42-237e.
[315] *Id.* § 42-237f.
[316] *Id.* § 42-238.
[317] *Id.* § 42-239.
[318] Idaho Code Ann. § § 42-1601 to 42-1605 (1948).

large one and plaintiff's water level dropped. On appeal, the supreme court stated that there is a distinction between rules affecting defined underground streams and pure percolating waters and that in this case it was doubtful if the water flowed in a defined underground stream. 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.[319]

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, judgment for the defendant was sustained.

In the *Olson* case, the court apparently adopted the American rule of reasonable use, with the factor of proportional distribution in the event of shortage. However, 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.

Whether or not it was necessary to adopt one rule or the other in the *Olson* case, the Nebraska court has considered that it has adopted the American rule. The court has stated, "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,' " citing the *Olson* case.[320]

In a more recent case,[321] the court affirmed the rule of reasonable use. In addition, the court held that where no damage was done by a transwatershed diversion of percolating ground waters for municipal use, such diversion was reasonable in keeping with the American rule.

Ground Water Statutes

The Nebraska statutes define ground water as "that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land."[322]

The Nebraska Legislature has declared that the conservation and beneficial

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[319] *Olson* v. *City of Wahoo*, 124 Nebr. 802, 248 N.W. 304 (1933).

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

[321] *In re Metropolitan Util. Dist. of Omaha*, 179 Nebr. 783, 140 N.W. (2d) 626 (1966).

[322] Nebr. Rev. Stat. § 46-635 (1968).

use of ground water are essential and that "Complete information as to the occurrence and use of ground water in the state is essential to the development of a sound ground water policy."[323] Consequently, the legislature has required the registration of all wells (except those used for domestic purposes[324] and wells of municipal suppliers, which require a permit[325]) and the regulation of well drillers.[326]

Domestic use of ground water is given a preference over all other uses; agricultural uses are given a preference over manufacturing or industrial uses.[327]

Brief provisions regarding artesian waters prohibit the waste of these waters and provide a penalty if waste occurs.[328]

The legislature has declared that the pumping of water for irrigation purposes from pits located within 50 feet of any natural stream bank may have a direct effect on the surface flow of such stream and requires a permit for pumping from such pits. In acting on such a permit application, the Director of Water Resources is directed to take into account the affect such pumping may have on the amount of water in the stream and its ability to meet the requirements of appropriators from the stream.[329]

The statutes provide for a minimum spacing of 600 feet between irrigation wells,[330] except that special permits for the location of such wells within less than this minimum space may be granted by the Director of Water Resources.[331] In acting on such special permit applications, the Director shall consider the size, shape, and irrigation needs of the property for which the permit is sought, the known ground water supply, and the effect on such supply and the surrounding land.[332]

Similarly, a minimum spacing requirement of 1,000 feet is specified between irrigation or industrial wells and municipal wells, except that a special permit may be granted by the Director for the location of wells within less than this minimum space.[333] In acting on such special permit applications, he

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[323] *Id.* § 46-601.

[324] Domestic use of ground water means "all uses of ground water required for human needs as it relates to health, fire control, and sanitation and shall include the use of ground water for domestic livestock as related to normal farm and ranch operations." *Id.* § 46-613.

[325] *Id.* § § 46-638 to -650.

[326] *Id.* § § 46-601 to -607.

[327] *Id.* § 46-613.

[328] *Id.* § § 46-281 and -282.

[329] *Id.* § § 46-636 and -637.

[330] But this does not apply to the location of more than one irrigation well by a landowner on his own farm, so long as each such well is at least 600 feet from another irrigation well on a neighboring farm under separate ownership. Nor does this apply to wells used for irrigation of no more than 2 acres of lawns and gardens for family use or profit, or wells used solely for domestic, culinary, or stock use on a ranch or farm.

[331] *Id.* § § 46-608 to -612.

[332] *Id.* § 46-610(2).

[333] *Id.* § 46-651 to -655.

shall consider the facts offered as justification, the known ground water supply, and such other pertinent information as may be available.[334]

The statutes also provided for the creation of ground water conservation districts;[335] the boards of directors of which are authorized to gather and disseminate information concerning ground water and adopt rules and regulations for the proper conservation of ground water within the district.[336]

After June 30, 1972, no new ground water conservation districts shall be created. Districts not completed by July 1, 1972, shall be null and void. All such districts validly created before July 1, 1972, shall continue to function under the provision of sections 46-614 to -634.[337]

In 1969, the Nebraska Legislature provided for the creation of natural resource districts for purposes of consolidating the functions previously performed by various special purpose districts and boards; and it "encouraged" other special purpose districts, including ground water conservation districts, to cooperate with and, where appropriate, to merge with natural resource districts.[338] The legislation declares that the purposes of the natural resource districts shall be to develop and execute, under this legislation, plans, facilities, works, and programs relating to, among other things, "development, management, utilization and conservation of ground water and surface water * * *."[339] Included among the numerous powers granted to these districts are the powers to (1) acquire and dispose of water rights,[340] (2) acquire, construct, operate and maintain ground water storage areas, and (3) promulgate and administer regulations relating to ground water.[341]

Whenever the board of directors of a natural resource district determines that regulations are necessary to ensure the proper conservation of ground water within the district, it shall consult with the State Department of Water Resources, the Conservation and Survey Division of the University of Nebraska, the Nebraska Soil and Water Conservation Commission and ground water users within the district. Regulations may be adopted only after (1) a public hearing, (2) a determination by the board of directors following the hearing that such regulations will be in the interest of public health, safety, and welfare and in harmony with the State water plan developed by the Nebraska Soil and Water Conservation Commission, and (3) a referendum in which only the owners of existing wells within the district shall be eligible to vote. If a majority of the votes cast favor the regulations, they shall be deemed in effect.[342]

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[334] *Id.* § 46-653
[335] *Id.* § § 46-614 to -634.
[336] *Id.* § 46-629.
[337] Nebr. Laws 1971, L. B. 544, § 9.
[338] Nebr. Rev. Stat. § 2-3201 (1970).
[339] *Id.* § 2-3229.
[340] *Id.* § 2-3233.
[341] *Id.* § § 2-3238 and -3237.
[342] *Id.*

NEVADA

Court Decisions

Definite Underground Streams

In an early case involving the right to use water flowing through the ground from a spring which constituted the source of a creek, the Nevada Supreme Court discussed the rules of law applicable to ground waters.[343] The subterranean flow in question was not a definite underground stream. With respect to such streams the court stated:

> No distinction exists in the law between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made 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.

Percolating Waters

The supreme court held in an early case that water percolating underground in "no known or defined 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 the water, even though the percolating water was the source of a spring on the land of someone else.[344]

The rule of absolute ownership of percolating waters was affirmed in *Strait* v. *Brown* in 1881.[345] However, the right of a landowner to divert water from springs on his land, the waters of which constituted the source of a creek but passed thereto either by percolation or conveyance by unknown subterranean channels, was denied by the court. This decision was reached because the diversion was made directly from the springs after the water had appeared on the surface. This taking would have the same effect as if the water were taken from the stream itself. The court reasoned that none of the reasons which supported the theory relating to percolating waters existed under these conditions.[346]

Ground Water Statutes

Legislation relating to ground waters was enacted in 1939 and has been amended at successive sessions of the legislature.[347] The act provides that all

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[343] *Strait* v. *Brown,* 16 Nev. 317, 321 (1881).

[344] *Mosier* v. *Caldwell,* 7 Nev. 363, 366-367 (1872).

[345] *Strait* v. *Brown,* 16 Nev. 317 (1881).

[346] In this situation, there was no uncertainty as to the existence of the water or the quantity that had been taken from streams against the interests of the appropriators of the stream. The spring waters were held to be subject to the rights of the stream appropriators, even though the means by which the waters were conveyed from springs to creek were subterranean and not well understood.

[347] Nev. Rev. Stat. § § 534.010 -.190 (Supp. 1967).

ground waters within the boundaries of the State belong to the public, are subject to all existing rights of use, and are appropriable for beneficial use only under the laws of the State relating to appropriation and use of water.[348] The statute does not apply to obtaining permits for the use and development of ground water from a well for domestic purposes when the draught does not exceed a daily minimum of 1800 gallons, except as to the furnishing of any information required by the State Engineer.[349]

Existing rights to use ground water are recognized. For the purposes of this act, vested rights are the rights to use water from (1) an artesian or definable aquifer acquired prior to March 22, 1913, and (2) percolating water (the course and boundaries of which are incapable of determination) acquired prior to March 25, 1939. The determination of whether the water is in a definable aquifer or whether it is percolating, shall be made by the State Engineer.[350] Claimants of vested ground water rights may petition the State Engineer to adjudicate such rights.[351]

Since March 22, 1913, no rights to appropriate artesian water in Nevada have been obtainable except upon compliance with the general appropriation statutes.[352] Anyone allowing the occurrence of waste from an artesian well is guilty of a misdemeanor.[353]

Under the 1939 legislation, when the State Engineer, either on his own initiative or upon the petition of at least 40 percent of the appropriators of record in his office, finds it necessary to administer the ground water law relating to designated areas, he shall designate such areas.[354] Thereafter, no one may make withdrawals from the designated basin without first obtaining a permit to appropriate such water in accordance with provisions relating to the appropriation of public waters.[355] In instances where the designated area is wholly within a single county having three or more incorporated cities, a ground water board shall be established, and the State Engineer shall not approve any requests for permits until he has conferred with the board and obtained its written advice and recommendations.[356]

In areas that have not been designated by the State Engineer, no application or permit to appropriate such water is necessary until after the well is sunk or bored and water developed; but a permit to appropriate such water must be obtained before any legal diversion can be made from the well.[357]

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[348] *Id.* § 534.020(1).
[349] *Id.* § 534.180.
[350] *Id.* § 534.100(1).
[351] *Id.* § 534.100(2).
[352] *Id.* § 534.080, referring to ch. 533.
[353] *Id.* § 534.070.
[354] *Id.* § 534.030.
[355] *Id.* § 534.050, referring to ch. 533.
[356] *Id.* § 534.035.
[357] *Id.* § 534.050, referring to ch. 533.

Each permitted appropriation must allow for a reasonable lowering of the static water level at the appropriator's point of diversion, considering the economics of pumping water for the general type of crops grown in the area and the effect of water use on the economy of the area.[358]

In any basin, or portion thereof, where it appears that the average annual replenishment may not be adequate for all permittees and vested-right claimants, the State Engineer may order that withdrawals be restricted to conform to priority rights.[359]

In any basin, or portion thereof, designated by the State Engineer, he may restrict drilling of wells if he determines that additional wells would cause an undue interference with existing wells, subject to review by the appropriate district court.[360]

In the event the State Engineer determines that the ground water in a designated basin is in his judgment being depleted, he is empowered to make such rules, regulations, and orders as he deems essential for the welfare of the area. He is expressly authorized to: designate preferred uses in these areas; issue temporary permits to appropriate ground water, which permits may be revoked when water can be furnished by a water supplier; deny applications to appropriate ground water when the area is served by a water supplier; limit the depth of domestic wells; or prohibit the drilling of domestic wells when the area is served by a water supplier.[361]

Any ground water rights may be forfeited for failure to beneficially use the water for 5 successive years. Such water reverts to the public and is available for further appropriation, subject to existing rights.[362] Any right to use ground water may also be abandoned.[363]

TEXAS

Characteristics of Ground Water

Definition

Groundwater is water under the surface of the ground, other than underflow, whatever may be the geological structure in which it is standing or moving.[364]

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[358] *Id.* § 534.110.
[359] *Id.*
[360] *Id.*
[361] *Id.* § 534.120.
[362] *Id.* § 534.090(1).
[363] *Id.* § 534.090(2).
[364] Tex. Water Rights Comm'n, "Rules, Regulations and Modes of Procedure," rule 115.1(h) (1970 Rev., Jan. 1970).

Classification

Texas still adheres to the historical distinction in classifying ground water. This distinction is made between waters of definite underground streams and percolating waters.

Definite Underground Streams

Characteristics

A definite underground stream has the same characteristics as those of a watercourse on the surface. In the few Texas decisions in which ground water rights have been involved, a distinction has been drawn between the characteristics of percolating waters and waters flowing in definite underground streams, with refinements in descriptions of the latter class.

Rights of Use

Court decisions.—The high courts of Texas have not yet squarely declared the principle that will govern rights to use water proved to be moving through the ground in a definite channel. The opinions of the courts in the ground water decisions so far indicate that the rules that should govern rights in definite streams are *not* the same as those which apply to percolating waters.[365] In the *East* case, on which the law of percolating water rights in this State is founded, the Texas Supreme Court adopted a rule applicable to rights to percolating waters, in litigation therein, and refused to apply any principle from the law of running streams.[366]

The district statute.—The underground water conservation district statute declares that the legislation applies solely to water percolating beneath the earth's surface "and does not include defined subterranean streams or the underflow of rivers."[367]

The same statute specifically recognizes the right of the owner of land to the ground water therein, and provides in this connection that "the priorities, regulations and provisions of the law relating to the use of surface waters shall in no manner apply to underground water."[368]

Underflow of Surface Streams

The underflow of surface streams—also called the subflow or supporting flow—is the subsurface portion of a watercourse, the whole of which comprises waters in close association both on and beneath the surface.

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[365] See *Houston & T.C.R.R.* v. *East*, 98 Tex. 145, 81 S.W. 279 (1904); *Texas Co.* v. *Burkett*, 117 Tex. 16, 296 S.W. 273 (1927); *Cantwell* v. *Zinser*, 208 S.W. (2d) 577 (Tex. Civ. App. 1948); *Pecos County W.C. & I. Dist. No. 1* v. *Williams*, 271 S.W. (2d) 503 (Tex. Civ. App. 1954, error refused n.r.e.).

[366] *Houston & T.C.R.R.* v. *East*, 98 Tex. 146, 81 S.W. 279 (1904).

[367] Tex. Rev. Civ. Stat. Ann. art. 7880-3c(A) (1954).

[368] *Id.* art. 7880-3c(D)(1).

The Texas statute that governs the appropriation of water declares that waters of the ordinary flow "and underflow" of every flowing river or natural stream within the State are the property of the State, subject to appropriation as provided by law.[369]

What little has been said with respect to underflow in Texas decisions is to the effect that the underflow (water flowing through the sand and gravel below the surface of the streambed) is riparian water to the same extent as water flowing in the channel or on the surface.[370]

Percolating Waters

Distinguished From Definite Underground Stream

The distinguishing feature of percolating waters in the laws governing rights to their use is that they are not moving through the earth in known and defined channels comparable to those on the surface.

Ground waters of this class are not "subsurface" or "underground streams with defined channels,"[371] or water flowing in a "well defined channel."[372] Rather, they are waters "percolating, oozing, or filtrating through the earth."[373]

Presumption That Ground Waters Are Percolating

In the absence of testimony to the effect that waters obtained by excavation are underground streams with defined channels, "the presumption is that the sources of water supply obtained by such excavations are ordinary percolating waters, which are the exclusive property of the owner of the surface of the soil, and subject to barter and sale as any other species of property."[374]

Right of Use

In *Corpus Christi* v. *Pleasanton*, the Texas Supreme Court reaffirmed the principle that it had established a half century earlier in the *East* case.[375] The supreme court stated that in *East* the court adopted, unequivocally, the English

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[369] Tex. Rev. Civ. Stat. Ann. art 7467 (Supp. 1970).

[370] See *Motl* v. *Boyd,* 116 Tex. 82, 286 S.W. 458 (1926); *Texas Co.* v. *Burkett,* 117 Tex. 16, 296 S.W. 273 (1927).

[371] *Texas Co.* v. *Burkett,* 117 Tex. 16, 28-29, 296 S.W. 273 (1927).

[372] *Cantwell* v. *Zinser,* 208 S.W. (2d) 577, 578-579 (Tex. Civ. App. 1948).

[373] *Houston & T.C.R.R.* v. *East,* 98 Tex. 146, 149, 81 S.W. 279 (1904), quoting from *Frazier* v. *Brown,* 12 Ohio St. 294 (1861).

[374] *Texas Co.* v. *Burkett,* 117 Tex. 16, 29, 296 S.W. 273 (1927). See *Pecos County W.C. & I. Dist. No. 1* v. *Williams,* 271 S.W. (2d) 503, 506 (Tex. Civ. App. 1954, error refused n.r.e.).

[375] *Corpus Christi* v. *Pleasanton,* 154 Tex. 289, 293-294, 276 S.W. (2d) 798 (1955), reaffirming *Houston & T.C.R.R.* v. *East,* 98 Tex. 146, 81 S.W. 279 (1904).

or common law rule with respect to rights in percolating water, instead of any modification thereof or departure therefrom in favor of reasonable use or correlative rights on the part of owners of land overlying the same physically common supply of ground water.[376] By adopting the English rule in the *East* case, the court, "[E]stablished at least this much: that an owner of land had a legal right to take all the water he could capture under his land that was needed by him for his use, even though the use had no connection with the use of land as land and required the removal of the water from the premises where the well was located."[377]

In the *Corpus Christi* case, the supreme court held that under the common law rule, percolating waters are regarded as the property of the owner of the surface. Thus a landowner could use all the percolating water he could capture from wells on his land for beneficial purposes either on or off the land. Likewise, the overlying owner could sell the water to others for beneficial purposes either on or off the land and outside the basin where produced, just as he could sell any other species of property. The supreme court disclaimed the possibility of any common law limitation of the means of transporting the water to the place of use. Furthermore, the statutes that prohibit waste of artesian water make use of any means of transportation therein enumerated both a civil and a penal wrong only if the water is to be put to an unlawful use, as distinguished from a lawful use.[378]

The Question of Waste

In *Cantwell* v. *Zinser*, the court observed that in the *East* case the supreme court did not pass upon the right of a person to intercept and waste percolating water to the detriment of an adjoining owner, such facts not being before the court in that case.[379]

In its opinion in the *Cantwell* case, the Austin court expressed agreement with the authorities cited in the *East* case to the effect that the right to waste water did not exist. The court stated that waste was against the public policy of the State as expressed in the conservation statutes. This effort on the part of the Austin court to engraft a prohibition against waste in the Texas law of percolating water rights was rejected in 1955 by the Texas Supreme Court in the *Corpus Christi* case, although in the meantime it had received the approval of the San Antonio and El Paso courts.[380]

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[376] 154 Tex. at 292-293.

[377] 154 Tex. at 293.

[378] Tex. Rev. Civ. Stat. Ann. art. 7602 (1954), Penal Code Ann. art. 846 (1961).

[379] *Cantwell* v. *Zinser,* 208 S.W. (2d) 577, 579 (Tex. Civ. App. 1948).

[380] *Corpus Christi* v. *Pleasanton,* 154 Tex. 289, 293-294, 276 S.W. (2d) 798 (1955); *Pleasanton* v. *Lower Nueces River Supply Dist.,* 263 S.W. (2d) 797, 799-800 (Tex. Civ. App. 1953); *Pecos County W.C.& I. Dist. No. 1* v. *Williams,* 271 S.W. (2d) 503, 505 (Tex. Civ. App. 1954, error refused n.r.e.).

In adopting the English rule in the *East* case, it may be assumed that the supreme court adopted it only with such limitations as existed at common law. These limitations ordinarily are that the owner may not maliciously take water for the sole purpose of injuring his neighbor, nor wantonly and willfully waste it. There are no limitations that prohibit the use of water off the premises on which it is captured or that restrict its use to a particular area. In *Texas Company* v. *Burkett*, the supreme court had established that under the common law rule there was no restriction against the sale of percolating waters for industrial uses off the land.[381] Concluding on the matter, the supreme court said, in the *Corpus Christi* case:[382]

> It thus appears that under the common-law rule adopted in this state an owner of land could use all of the percolating water he could capture from wells on his land for whatever beneficial purposes he needed it, on or off of the land, and could likewise sell it to others for use off of the land and outside of the basin where produced, just as he could sell any other species of property. We know of no common-law limitation of the means of transporting the water to the place of use. Neither do we know of any judicial modification in this state of the rule of the East case.

The main question presented to the Texas Supreme Court in the *Corpus Christi* case was whether the transportation of water from artesian wells down a natural streambed and through lakes with consequent natural losses in transit constitutes waste. Evidence in the case showed that losses in transit were very large. The court denied that owners of land situated over a common supply of percolating water have correlative rights therein. In construing the statutes that forbid waste of artesian waters,[383] the court held that a wrong consists only of putting the water to an unlawful as distinguished from a lawful use. The percentage of loss in conveyance is not a criterion of waste.[384]

The supreme court stated that the legislature could validly declare that the transportation of percolating or artesian water in conduits which permitted escape of a large percentage of water is wasteful and unlawful, but emphasized that it had not seen fit to do so.

The Landowner's Right as Property

Ground waters, which in the absence of evidence to the contrary are presumed to be ordinary percolating waters, are the exclusive property of the owner of the land in which they occur and are subject to the same disposition as any other species of land.[385]

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[381] *Texas Co.* v. *Burkett,* 117 Tex. 16, 28-29, 296 S.W. 273 (1927).
[382] *Corpus Christi* v. *Pleasanton,* 154 Tex. 289, 294, 276 S.W. (2d) 798 (1955).
[383] Tex. Rev. Civ. Stat. Ann. art. 7602 (1954), Penal Code Ann. art. 846 (1961).
[384] *Corpus Christi* v. *Pleasanton,* 154 Tex. 289, 294-295, 276 S.W. (2d) 798 (1955).
[385] *Texas Co.* v. *Burkett,* 117 Tex. 16, 296 S.W. 273 (1927).

The landowner's right in percolating water in his land is protected against acts of interference committed by trespass and, in some cases, acts proved to contaminate the quality of the ground water at his well.

Public Regulation of Artesian Water

An artesian well is "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."[386] An artesian well must be tightly cased, capped, and fitted with a device that will effectively control its flow. One not so equipped is a public nuisance.[387] Waste of artesian water is unlawful and punishable by fine or imprisonment or both.[388]

According to the supreme court in its decision in the *Corpus Christi* case, the legislature had declared that transportation of artesian water by specified means was unlawful, not if a high or any other proportion of water was lost thereby, but only if the water was to be put to an unlawful use as distinguished from a lawful use.

Underground Water Conservation Districts

In 1949, the Texas Legislature added to the water control and improvement district act a section authorizing the creation of "underground water conservation districts."[389] The purpose of the districts is the conservation, preservation, protection, and recharging, and prevention of waste of percolating ground water in subterranean reservoirs or subdivisions thereof designated by the State Board of Water Engineers (now the Texas Water Rights Commission).[390] The district may require and issue permits for drilling wells, subject to such terms and provisions as may be necessary to prevent waste, and may require the spacing of wells to minimize as far as practicable the draw down of the water table or the reduction of artesian pressure.[391] However, the ownership and rights of the landowner are expressly recognized, and the priorities relating to surface water do not apply.[392] No district can be created unless its area is conterminous with an underground reservoir or subdivision thereof which has been designated by the State Board of Water Engineers (Texas Water Rights Commission) as such.[393] Districts, in the discretion of their directors, may

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[386] Tex. Rev. Civ. Stat. Ann. art. 7600 (1954).
[387] *Id.* art. 7601.
[388] *Id.* art. 7607, Penal Code Ann. art. 847 (1961).
[389] Tex. Rev. Civ. Stat. Ann. arts. 7880-3c to 7880-19 (1954).
[390] *Id.* art. 7880-3c(B).
[391] *Id.* art. 7880-3c(B)(3) and (4).
[392] *Id.* art. 7880-3c(D).
[393] *Id.* art. 7880-3c(C).

award the use of water on the basis of the following preferences: (1) domestic and municipal use; (2) industrial use, other than the development of hydro-electric power; (3) irrigation; (4) development of hydro-electric power; (5) pleasure and recreation. The directors of each district may withdraw water from an inferior use for a superior use. Whenever vested rights will be affected by such withdrawal, the withdrawal must be made after condemnation proceedings.[394]

Districts are organized after petition of landowners in the area to be included therein.[395] When the land to be included in the district is one county, the formation of the district shall be considered and ordered by the State Board of Water Engineers (Texas Water Rights Commission).[396]

UTAH

Classification of Ground Water

Historically in ground water law, distinctions have been made according to occurrences of the following waters: (1) definite underground streams, having the same characteristics as a watercourse on the surface—a definite stream flowing in a definite channel from a definite source of supply; (2) underflow or subflow of a surface stream, constituting the subsurface portion of a watercourse, the whole of which comprises waters flowing in close association both on and beneath the surface; and (3) percolating water, comprising all ground water not included in the two previous categories.

The legislature and courts of Utah have followed the modern trend of regarding all water in the part of the earth known as the zone of saturation as ground water and have reached the stage of applying, with one minor variation, the appropriation doctrine to all water in the ground.

Appropriation of Ground Water

Ground Water Subject to Appropriation Doctrine

The Legislature of the State of Utah has declared "all waters in this state, whether above or under the ground," to be public property, "subject to all existing rights to the use thereof."[397]

In *Riordan* v. *Westwood*, the Utah Supreme Court summarized this legislative declaration by saying, "[I]t is clear that the legislature intended, as far as it was legally possible, to declare all waters of the state whether under or above

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[394] *Id.* art. 7880-4a.
[395] *Id.* art. 7880-10.
[396] *Id.* art. 7880-13.
[397] Utah Code Ann. § 73-1-1 (1968).

the surface of the ground and whether flowing or not, to be public property subject to the existing rights of the use thereof."[398]

With one exception, which will be subsequently discussed, the appropriation doctrine under current appropriation procedures, is applicable to all ground water flowing in defined channels,[399] existing in artesian basins,[400] or merely seeping and percolating through the soil.[401]

Certain Percolating Waters Excluded From Appropriation Doctrine

The *Riordan* decision[402] delineated the one exception to the otherwise all-inclusive language of the above statute. The court stated that those ground waters diffused and percolating through the soil near the surface, sustaining beneficial plant life on the property owner's land without artificial diversion and having no course traceable onto the lands of others, are considered part of the soil and not public property subject to appropriation.

Current Procedure for Appropriating Ground Water

The procedure for acquiring a right to use unappropriated water in Utah is the same regardless of the supply involved. The Utah Code expressly provides that all rights must be initiated by filing an application to appropriate in the Office of the State Engineer.[403]

This procedure has been exclusive since 1935. In January of that year, the Utah Supreme Court, in the case of *Wrathall* v. *Johnson*,[404] announced that the appropriation doctrine was applicable to the waters of an artesian basin. This decision and that of *Justesen* v. *Olsen*, which closely followed it (also involving artesian waters),[405] held by inference that in the future the appropriation doctrine would be applied to all waters.

Following these announcements by the court the legislature amended section 73-1-1 making it applicable to all water whether above or in the ground. Section 73-3-1 was amended to provide that no appropriation could be acquired except that it be initiated by filing an application in the Office of the State Engineer.[406]

In discussing the *Wrathall* case and the amendments to these sections, the Utah court, in *Hanson* v. *Salt Lake City*, stated, "Immediately following that

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[398] *Riordan* v. *Westwood*, 115 Utah 215, 224, 203 Pac. (2d) 922 (1949).
[399] *Little Cottonwood Water Co.* v. *Sandy City*, 123 Utah 242, 258 Pac. (2d) 440 (1953).
[400] *Hanson* v. *Salt Lake City*, 115 Utah 404, 205 Pac. (2d) 255 (1949).
[401] *Riordan* v. *Westwood*, 115 Utah 215, 203 Pac. (2d) 922 (1949). Also see *Bullock* v. *Tracy*, 4 Utah (2d) 370, 294 Pac. (2d) 707 (1956).
[402] *Riordan* v. *Westwood*, 115 Utah 215, 203 Pac. (2d) 922 (1949).
[403] Utah Code Ann. § 73-3-1 (1968).
[404] *Wrathall* v. *Johnson*, 86 Utah 50, 40 Pac. (2d) 755 (1935).
[405] *Justesen* v. *Olsen*, 86 Utah 158, 40 Pac. (2d) 802 (1935).
[406] Utah Laws 1935, ch. 105, § 1, amending Rev. Stat. §§ 100-1-1 and 100-3-1 (1933), now Code Ann. §§ 73-1-1 and 73-3-1 (1968), respectively.

decision the legislature amended the old statutes and enacted provisions which clearly showed that it was intended from then on that in order to acquire the right to use underground waters those statutory provisions must be complied with."[407]

Prestatutory Procedure for Appropriating Percolating Ground Water

In both the *Wrathall* and *Justesen* cases, the court announced that diversion and beneficial use of waters from an artesian basin prior to 1903 was all that was necessary to establish a right. Prior to this time, the court reasoned, there was no statutory procedure requiring the initiation of a water right by filing an application with the State Engineer and rights could be established by appropriating the water to a beneficial use.

In the *Hanson* case,[408] the court was presented with the question of the procedure for establishing a right to ground water, specifically artesian waters, subsequent to 1903 but prior to 1935. It concluded that although the 1903 statute required the initiation of new rights by filing an application with the State Engineer, the legislature did not intend this procedure to be exclusive prior to the 1935 amendment to the statutes. Thus, it was held in the *Hanson* case that rights to use ground water prior to 1935 could be acquired by diverting such waters from their natural source and placing them to a beneficial use. Priority dated from the first use. The statutes provide that rights established in this manner may be recorded by filing a claim in the Office of the State Engineer.[409]

The diversion and application to a beneficial use must have been accomplished by the effective date of the 1935 amendment.[410] The matter of intention is unimportant under the 1935 amendment. This statute contains no provision allowing rights to be perfected which were initiated prior to the amendment as was allowed by the 1903 statute relating to surface waters.[411]

Extent of Existing Rights

Limited to reasonable beneficial use.—In a statutory determination of water rights[412] in a ground water basin, the Utah court reiterated the concept that beneficial use constitutes the basis, the measure, and the limit of any water right in the state.[413] Affirming the trial court's fixing of a temporary duty of

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[407] *Hanson* v. *Salt Lake City*, 115 Utah 404, 205 Pac. (2d) 255 (1949).
[408] *Id.*
[409] Utah Code Ann. § 73-5-13 (1968).
[410] *Goodwin* v. *Tracy*, 6 Utah (2d) 1, 304 Pac. (2d) 964 (1956).
[411] Utah Laws, ch. 100, § 72 (1903).
[412] Utah Code Ann. § 73-4-1 *et seq.* (1968).
[413] *In re Water Rights of Escalante Valley Drainage Area*, 10 Utah (2d) 77, 348 Pac. (2d) 679, 681 (1960).

water, the court announced it subscribed to the rule that "the use of water must not only be beneficial to the lands of the appropriators, but it must also be reasonable in relation to the reasonable requirements of subsequent appropriators * * *."[414]

With respect to new appropriations.—Where the evidence indicates that development work on an unappropriated spring area developed the flow, a new application will be allowed if it appears the appropriation can be accomplished without interfering with existing rights.[415]

An applicant is entitled to have his application approved for wells near a fully appropriated surface stream where the evidence shows that the underflow or carrier water does not reach the surface for existing beneficial uses; and where pump tests of the wells demonstrate that the stream produces more water with the wells on than with them off.[416]

Early Decisions Relating to Ground Water

Under current appropriation procedures in Utah, the only classification of ground water of importance is that noted above in the 1949 *Riordan* case. However, for purposes of determining rights to ground water acquired prior to the complete adoption of the appropriation doctrine, these waters were classified as (1) defined underground streams, or (2) percolating waters.

Subterranean Watercourses

Definite underground stream.—Waters flowing in definite underground streams in Utah consistently have been held to be subject to appropriation to the same extent as those flowing in surface streams.[417]

Underflow of surface stream.—In an early case, the Utah court recognized the appropriability of stream underflow in these words:

> It is a matter of common knowledge that in this arid region the mountain streams generally have what is known as an "underflow," that is, the water sinks and flows slowly throught the rocks, gravel, and sand which form the bed of the stream. This subsurface flow in a known and well-defined channel constitutes a part of the stream, and is subject to the rights of appropriation the same as the surface flow.[418]

Percolating Waters

Announcement of the rule of absolute ownership.—In a number of early

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[414] 348 Pac. (2d) at 682.

[415] *Bullock* v. *Tracy*, 4 Utah (2d) 370, 294 Pac. (2d) 707 (1956); *Dalton* v. *Wadley*, 11 Utah (2d) 84, 355 Pac. (2d) 69 (1960).

[416] *Little Cottonwood Water Co.* v. *Sandy City*, 123 Utah 242, 258 Pac. (2d) 440 (1953).

[417] *Chandler* v. *Utah Copper Co.*, 43 Utah 479, 135 Pac. 106 (1913).

[418] *Howcroft* v. *Union & Jordan Irr. Co.*, 25 Utah 311, 316, 71 Pac. 487 (1903).

decisions, the Utah court announced that percolating waters belonged to the owner of the soil and were not subject to the appropriation doctrine.[419]

Water which accumulated in a spring-bog area on private property was presumed to be percolating water although it subsequently flowed into a natural channel; and even though this water made up a part of his supply, an appropriator from the stream could not prevent the landowner from diverting the water for his own use.[420] As long as these waters were in the possession and control of the property owner, they were not subject to adverse possession apart from the soil itself.[421]

Much of what was said in the early decisions concerning absolute ownership is *dicta*, because these cases involved disputes between landowners and appropriators and not rights between landowners.[422]

Correlative rights doctrine.—This doctrine, with some modification, existed as part of the ground water law in Utah from its adoption in 1921 in the case of *Horne* v. *Utah Oil Refining Company*[423] until the court's adoption of the appropriation doctrine in 1935.

In the *Horne* case, the court stated, "[E]ach proprietor of land within an artesian basin is entitled to water in proportion to his surface area, provided he make beneficial use of it."

In a subsequent decision, the court modified the rule announced in the *Horne* case.[424] The court held that since every owner of surface area was entitled to the same proportionate quantity of water, his share could be put to beneficial use outside the district as long as there was no injury to the rights of others. Under the correlative rights doctrine, the landowner was entitled to capture and use the percolating water while it was on his property, but he was not entitled to pursue it onto the lands of another.[425]

Exceptions to Rules Announced in Early Decisions

Percolating Waters on the Public Domain

An appropriator of percolating water by means of a well located on the public domain was entitled to have his rights protected against the owner of a mining claim which encompassed the land upon which the well was drilled.[426]

A mining company claiming to have developed water by means of a tunnel located in close proximity to a surface stream had the burden of proving that

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[419] *Willow Creek Irr. Co.* v. *Michaelson,* 21 Utah 248, 60 Pac. 943 (1900).
[420] *Id.*
[421] *Crescent Mining Co.* v. *Silver King Mining Co.,* 17 Utah 444, 54 Pac. 244 (1898).
[422] *Riordan* v. *Westwood,* 115 Utah 215, 203 Pac. (2d) 922 (1949).
[423] *Horne* v. *Utah Oil Refining Co.,* 59 Utah 279, 202 Pac. 815 (1921).
[424] *Glover* v. *Utah Oil Refining Co.,* 62 Utah 174, 218 Pac. 955 (1923).
[425] *Utah Copper Co.* v. *Stephen Hayes Estate,* 83 Utah 545, 31 Pac. (2d) 624 (1934).
[426] *Sullivan* v. *Northern Spy Mining Co.,* 11 Utah 438, 40 Pac. 709 (1895).

the water was in fact developed and not a part of the surface stream which had been appropriated prior to the time the land where the tunnel was located was severed from the public domain.[427]

The same presumption applied with regard to the claim that water had been developed in a well which was in close proximity to a fully appropriated spring,[428] or that water had been developed by means of digging trenches close to an appropriated spring.[429]

Waste Water From Irrigation

The owner of a surface irrigation right was entitled to intercept and drain off irrigation waste water before it left his premises, even though in the past it may have seeped and percolated through the soil to an adjoining landowner. It is nothing more than surface waste water and the adjoining landowner receiving such water established no permanent rights to it.[430]

A landowner had no right to extract percolating waters from his soil that resulted from the use of river water for surface irrigation where these percolating waters, if not interfered with, would have returned to the river to satisfy the right of a downstream prior appropriator.[431]

Some Other Features of Use and Control of Ground Water

Protection of Means of Diversion

A prior appropriator of ground water in Utah is not only entitled to the quantity and quality of water appropriated, but also protection for his means of diversion. When a subsequent appropriator, in pumping from an artesian basin reduced the pressure in the prior appropriator's well to the extent that the prior appropriator's existing means of diversion would no longer function, the Utah court announted that the prior right

> includes his means of diversion as long as such means are reasonably efficient and do not unreasonably waste water. It follows that where a subsequent appropriator draws a sufficient quantity of water out of an artesian basin to lower the static head pressure of prior appropriator's well so that additional costs are required to lift sufficient water from his well to satisfy his previously established beneficial use of such waters, the subsequent appropriator must bear the additional expense.[432]

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[427] *Mountain Lake Mining Co.* v. *Midway Irr. Co.*, 47 Utah 346, 149 Pac. 929 (1915).
[428] *Bastian* v. *Nebeker*, 49 Utah 390, 163 Pac. 1092 (1916).
[429] *Peterson* v. *Wood*, 71 Utah 77, 262 Pac. 828 (1927).
[430] *Garns* v. *Rollins*, 41 Utah 260, 125 Pac. 867 (1912).
[431] *Rasmussen* v. *Moroni Irr. Co.*, 56 Utah 140, 189 Pac. 572 (1920).
[432] *Hanson* v. *Salt Lake City*, 115 Utah 404, 205 Pac. (2d) 255, 263 (1949).

In 1959, the Utah court held that a prior appropriator of ground water through the beneficial use of natural springs and artesian wells was entitled to restrain subsequent appropriators from lowering the static head pressure of the underground basin unless they replaced the quantity and quality of the water and bore the cost of replacement.[433]

In the 1959 case, section 73-3-23 of the Utah statutes, granting the right of replacement to a junior appropriator where his use diminishes the quantity or quality of a prior groundwater appropriator's right,[434] was interpreted as the legislative expression of this same concept which the court was bound to enforce. Replacement is made at the sole expense of the junior appropriator and the right of eminent domain is granted for this purpose. No replacement may be made without approval of an application by the State Engineer.

A 1969 case involved Murray City, which had changed its diversion from old wells to a new well, as approved by the State Engineer under section 73-3-3 of the statutes. This section enables changes in the place of diversion or purpose of use, if no vested right is impaired, without compensation. The Utah Supreme Court said that "the trial court as authorized under Sec. 73-3-23, provided that Murray City 'must at [its] sole cost *permanently* replace to the plaintiffs water in amount and quality equal to the level of their prior use.' "[435] However, the Supreme Court required that this be modified. Among other things, the court stated:

> * * * there has come to be recognized what may be referred to as the "rule of reasonableness" in the allocation of rights in the use of underground water. This involves an analysis of the total situation: the quantity of water available, the average annual recharge in the basin, the existing rights and their priorities. All users are required where necessary to employ reasonable and efficient means in taking their own waters in relation to others to the end that wastage of water is avoided and that the greatest amount of available water is put to beneficial use.
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> We perceive nothing in our statutory law inconsistent with this "rule of reasonableness" just discussed, nor which compels a conclusion that owners of rights to use underground water have any absolute right to pressure. On the contrary, when our statutes are considered in the light of the policy considerations herein discussed, it seems more in harmony with the major objective of the law to conclude that the means of diversion must be reasonable and consistent with the state of development of water in the area and not such as to abort the declared purpose of the law of putting all available water to use.[436]

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[433] *Current Creek Co.* v. *Andrews,* 9 Utah (2d) 324, 344 Pac. (2d) 528 (1959).

[434] Utah Code Ann. § 73-3-23 (1968).

[435] *Wayman* v. *Murray City Corp.,* 23 Utah (2d) 97, 458 Pac. (2d) 861, 864 (1969).

[436] 458 Pac. (2d) at 865-866.

The court, *inter alia,* approvingly quoted from *Colorado Springs* v. *Bender,* 148

Loss of Water Rights

Statutory forfeiture.—The statutory provision section 73-1-4 providing for forfeiture of a water right upon 5 years' nonuse[437] is applicable to all appropriated water, without regard to the source of supply. The Utah court has held that the running of the forfeiture statute subsequent to 1949 was interrupted when the owner of a right to ground water was prevented by a legal barrier from using the water.[438]

Abandonment.—Abandonment is a distinct concept from forfeiture. In addition to nonuse of water, there must also be an intent to relinquish the right. A finding of abandonment requires proof of an intent to abandon;[439] the burden of proof is upon the party alleging an abandonment to demonstrate that the water user has in fact intentionally abandoned the water.[440]

Colo. 458, 366 Pac. (2d) 552, 555 (1961), and the following statement from Hutchins, W. A., "Selected Problems in the Law of Water Rights in the West" 179 (1942): "On the whole, it seems obvious that to accord the first appropriator under a groundwater 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." 458 Pac. (2d) at 865-866.

The court added, "That an efficient and practical allocation and regulation of underground waters requires a recognition of this principle is further indicated by the fact that several of our western neighbors have in substance codified such a rule." 458 Pac. (2d) at 866.

Later in its opinion the court said that section 73-3-23 "deals with the replacement by a junior appropriator (not specifically this case) which states the 'replacement shall be at the sole cost and expense of the applicant', but adds 'subject to such rules and regulations as the state engineer shall prescribe.' " 458 Pac. (2d) at 866.

The court at the outset of its opinion had noted that "this is not a situation where a party (Murray City) has initiated a *new* withdrawal in a basin which adversely affects the flow of wells prior in time and right. [Court's footnote: "Thus in that respect different from the case of Current Creek Irr. Co. v. Andrews, 9 Utah 2d 324, 344 P. 2d 528 (1959)" discussed at note 433 *supra*.] What the City has done is to create a more efficient means of taking [water] from this basin * * *." 458 Pac. (2d) at 863.

Section 73-3-23 and the *Current Creek* case were also cited in *Fairfield Irr. Co.* v. *White,* 18 Utah (2d) 93, 416 Pac. (2d) 641, 642 (1966); later decision, 28 Utah (2d) 414, 503 Pac. (2d) 853 (1972).

[437] Utah Code Ann. § 73-1-4 (1968).

[438] *Kirk* v. *Criddle,* 12 Utah (2d) 112, 363 Pac. (2d) 777 (1961).

[439] *Id.*

[440] *Dalton* v. *Wadley*, 11 Utah (2d) 84, 355 Pac. (2d) 69 (1960).

Drainage of Land Versus Interference With Ground Water Rights

A property owner who installs drains on his land to make property more usable, and not for the purpose of acquiring a water right, incurs no liability even though he may interfere with rights to the ground water unless he willfully or intentionally interfered with the plaintiff's water or is negligent or reckless in the installation of his drains.[441]

In a subsequent decision, the court held that a property owner in draining his land to make it usable could not acquire a right to the use of ground waters therein which had been previously appropriated by an adjoining landowner. Only the water in excess of established rights could be appropriated.[442]

Administration and Distribution of Ground Waters

The State Engineer has the power to appoint commissioners to distribute the waters of any river system or water source. He is authorized to determine whether the ground water supply in an area is adequate to supply existing claims. If he concludes the supply is inadequate for all claims he shall distribute the existing supply to the claimants, according to the priority of their rights.[443]

The State Engineer is authorized to prevent waste, pollution, or contamination of ground waters, and to require the repair or construction of facilities to accomplish the desired result.[444]

Wells and Well Drillers

Control of well drillers.—A well driller in Utah is required to obtain an annual permit from the State Engineer.[445] It is a misdemeanor to drill without a permit, or after a permit has expired or been revoked; or to drill a well in violation of the rules and regulations of the State Engineer's office.[446]

Replacement wells are provided for.—If an existing well has become useless because of structural difficulties, a replacement well may be drilled with approval of the State Engineer.[447]

Control of Artesian Wells

The State Engineer is authorized to control artesian wells wasting public waters.[448]

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[441] *N. M. Long & Co.* v. *Canon-Papanikolas Construction Co.*, 9 Utah (2d) 307, 343 Pac. (2d) 1100 (1959).

[442] *Stubbs* v. *Ercanbrack*, 13 Utah (2d) 45, 368 Pac. (2d) 461 (1962).

[443] Utah Code Ann. § 73-5-1 (1968).

[444] *Id.* § 73-5-9.

[445] *Id.* § 73-3-25.

[446] *Id.* § 73-3-26.

This legislation has been construed in *Mosley* v. *Johnson*, 22 Utah (2d) 348, 453 Pac. (2d) 149 (1969).

[447] Utah Code Ann. § 73-3-28.

[448] *Id.* § 73-2-21.

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