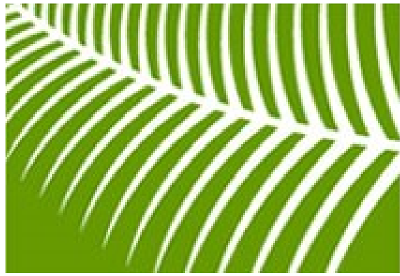


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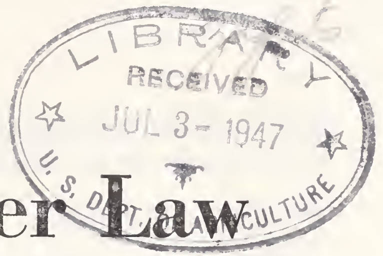
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# Western Water Law

Presented here is a brief discussion of the origins and purposes of water law in the Western States, and of the part which water law plays in determining the uses made of western land. The discussion summarizes the chapter on State Water Laws, in the Department publication, State Legislation for Better Land Use. This leaflet is designed for use by persons and groups interested in water use planning.

IN THE GREATER part of the West, land use planning begins with water use planning. Good land is so much more abundant than water in most agricultural areas that water, rather than soil, is generally the limiting factor in land use. Even if all available water in the West were put to the fullest use, there still would not be enough water to bring the total cultivable land into farming and keep it there. Poor water use is poor land use in this region.

Seventy or eighty years ago the western supply of water was larger than the demand for it. Thus the irrigation of favorably situated land was easy and inexpensive, and neither custom nor law required that the available water be applied to the land best suited for development. As the Western States became more thickly settled, however, the demand upon the water supplies has increased. At the same time, the public interest in encouraging the best possible use of water has been growing. Reasonable beneficial use has become the standard of legislative action and court determinations.

There remains, however, a constant need for local adustments in water use. Local community customs usually determine what is reasonable water use. These customs, inherited from the days when unclaimed water was more plentiful than now, often do not promote best land and water use. The need for obtaining adjustments may be acute, therefore, in many communities. Local and State land use planning committees particularly, may frequently

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wish to study and analyze the problems involved, with a view to recommending specific action toward needed adjustments.

**Water for Irrigation.**

Water in quantities sufficient for irrigation is not readily available in all parts of the West. Frequently the places where water is most accessible and abundant are not those in which it can be used to greatest individual and community advantage. Potentially good land, requiring only water to make it support an agricultural economy, may be far away from a good source of water, whereas land with a smaller promise of productivity may be close to a supply source. Heavy use of the water supply by farms closest to the source in some instances may cause better land to remain uncultivated, even when its development would be desirable.

In many of these cases, of course, the cost of bringing water to the more distant land would be prohibitive. In many others, development of small tracts of potentially good land in isolated locations would be too costly to the community, in terms of roads, schools, and other public services. But in some instances a consideration of all these factors may still lead to the conclusion that beneficial changes should be made in the use of water. Some of the planning committees in the West, therefore, are attempting to help plan for more effective use of water and land in their areas.

**The Riparian Doctrine.**

The task of planning for wise water use—and therefore wise land use—is complicated by the fact that the rights to use of water from watercourses in the West are governed by two frequently conflicting legal doctrines. The older of these, inherited from English common law, holds that the owner of land which adjoins a stream has certain rights to the water in the stream, solely because he owns the land. These are "riparian rights." They permit the owner to use the water for domestic purposes and for domestic animals, as well as for irrigation, provided the amount of irrigation is reasonable

and does not interfere with similar rights and uses of other owners of land adjoining the stream.

The newer doctrine, developed in the West from the customs of miners on public land, is known as the appropriation doctrine. It holds that the first beneficial user of water from a stream—whether or not his land adjoins the stream—gains a right to continue this use. The rights of any later user must defer to his.

Inevitably, conflicts often arise between claimants under these two opposed doctrines. The riparian right is rooted in English common law and is part of the ownership of land; the appropriation right, on the other hand, is a right to use, acquired by conforming to State statutes, which in turn are based on local customs. The task of reconciling the conflicts over these rights has been left principally to the courts.

**The Appropriation Doctrine.**

The riparian doctrine originated under climatic and land conditions vastly different from those of the arid and semiarid West. Laws based on it were unsuited to Western water development, especially in the more arid States. As a result, these laws were discarded in some States and very much modified in others. The appropriation doctrine, on the other hand, was better suited to conditions of abundant land and limited water supplies. Most of the water development in the West has taken place under it.

The appropriation doctrine permits the use of water on any land, regardless of whether it is riparian land. This principle has brought about better land use than would have been possible under the strict riparian doctrine because it allows greater freedom in selection of the land upon which a water supply may be used. It may sometimes be advantageous to all persons concerned, for example, to transfer water from poor riparian land to good nonriparian land. The riparian doctrine does not allow this; the appropriation doctrine does.

Some Western States do not recognize the riparian doctrine. States where it has never been recognized or where it has been abrogated include Arizona, Colorado, Idaho, Montana,

Nevada, New Mexico, Utah, and Wyoming. In most of the other States this doctrine is still recognized, more or less. In Oklahoma, however, its status is uncertain, and in Oregon it is seldom followed strictly.

Priority is an essential part of the doctrine of appropriation—"first in time, first in right." The appropriation theory was adopted throughout the West not only to bring about a better use of water than was possible under the riparian doctrine, but also to protect the people who constructed irrigation works. It was recognized that without assurance of such protection, few persons would risk their money and labor on irrigation projects. The appropriation doctrine provided this necessary protection and has undoubtedly helped encourage the present widespread use of water for irrigation in the West.

### Beneficial Use a Qualification.

Priority is not the only element upon which the appropriation doctrine is based, however. An equally essential part is the underlying qualification of beneficial use, which grants preference to water users in the order in which they appropriated water and put it to beneficial use. When beneficial use is not made of the water, the right may be lost. The causes for losing this right vary from State to State.

The priority right may work hardships upon part of the people under special and unusual circumstances. During exceptionally long periods of drought, for instance, users accustomed to having plenty of water in their canals in most years may have to watch water flow past their locked headgates month after month, so that holders of prior rights downstream may be supplied. Meanwhile their own crops may die from drought. The rule of strict priority permits no exceptions in times of scarcity; it was designed to protect the first user of water under just such circumstances. Under long-established law and custom, of course, the first user is entitled to this protection, as his claim is older than that of subsequent users.

To meet this and similar problems, however, the appropria-

tion right in some places has been set aside temporarily during great emergencies and the water distributed where it would do the most good. The principle of beneficial use underlies this action. Under such circumstances, better water use is obtained by diverting *some* of the stream flow to other users, to save their crops, than by giving *all* the water to the holder of prior rights, when its use by the latter would add much less to crop yields. In these instances, the compensation owed to the holder of prior rights for his actual loss is outweighed by the gain to the other users.

The laws of several States provide that when the water from a natural stream is not sufficient to supply the needs of all people who want to use it, people using the water for domestic purposes shall have preference over those wanting water for other purposes. Similarly, users of water for agricultural purposes may have preference over manufacturing users.

Under either the riparian or the appropriation doctrine, water for irrigation purposes is assigned for use on specific tracts of land. However, under the appropriation doctrine, the user in most States has the right to transfer the water to other land, provided the transfer does not injure other users. The right to use of water continues in force as long as the holder uses the water beneficially whenever available and as long as State laws are observed.

### Rights to Ground Waters.

Public control over rights to the use of ground waters not in definite streams is a comparatively recent legislative development. The rules of law and public control of surface watercourses generally apply equally to well-defined streams under the surface. As yet, such control is effective in very few States. In States where water use planning has not yet resulted in legislation to control use of these ground waters, the judicial doctrine of "reasonable use" on the part of the owner of overlying land is a distinct advance over the rule of absolute ownership of percolating waters, a rule which once prevailed in many Western States and still does in some.

This rule of reasonable use protects each owner against unreasonableness on the part of his neighbors.

The appropriation doctrine, protecting water users according to their priority rights, has been applied to ground waters in some Western States.

The correlation of rights to the use of ground waters which feed a surface stream with rights established on the stream itself is still a problem in some States. In one, an adjustment has been made by the courts on the basis of reasonable use. In several others, an adjustment has been made either by the courts or by the legislatures on the basis of prior appropriation.

### Rights to Diffused Surface Waters.

Adjustment of rights to the use of diffused surface waters (surface waters not in definite watercourses, lakes, or ponds), in order to iron out conflicts with rights to the use of water from the stream that is fed by the diffused water, has not been worked out by the legislatures or courts in any of the Western States. The needed adjustment probably could be made on the basis of reasonable use of the common supply, if sufficient consideration is given to both public and private interests involved in conservation of water and soil resources.

### Need for Planning.

On the whole, adoption of the doctrine of prior appropriation for beneficial use in the West was a long step forward in obtaining better land and water use. Western land users unquestionably have tried to make possible a complete use of their water resources. Although wasteful methods of use have been common in many communities, waste has never been sanctioned by the appropriation doctrine.

This doctrine cannot be enforced everywhere in exactly the same manner. Local conditions and customs have to be taken into account, a job in which cooperative planning may well assist. Local and State land use planning committees may often be especially interested.

Obtaining new legislation upon water use is usually a slow

process. Laws which attempt to change, however slightly, rights and practices that have long existed cannot and should not be passed in a hurry. Even so, many of the really serious problems that must be met in order to make the most effective use of land and water in the West are subject to legislative correction. Planning groups can undoubtedly help to bring about some of the adjustments needed.

Previous publications in this series:

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No. 4—The Scope of Land Use Planning.
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