

VOLUME 3

Water Resources Law

THE REPORT OF THE PRESIDENT'S

WATER RESOURCES POLICY COMMISSION

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Water
Resources
Law

THE REPORT OF THE PRESIDENT'S

WATER RESOURCES POLICY COMMISSION

1950

IN THREE VOLUMES

Volume 1: General Report

Volume 2: Ten Rivers in America's Future

Volume 3: Water-Resources Law

UNITED STATES GOVERNMENT PRINTING OFFICE, WASHINGTON : 1950

For sale by the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C

THE PRESIDENT'S
WATER RESOURCES POLICY COMMISSION
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December 1, 1950.

Mr. Morris L. Cooke,
Chairman, The President's Water
Resources Policy Commission,
Washington 25, D. C.

Dear Mr. Chairman:

There is submitted herewith a survey of federal legislation concerning water resources, entitled "Water-Resources Law." This survey summarizes materials assembled during a comprehensive study and review of all existing water-resources legislation, a study and review undertaken pursuant to the President's letter to you of January 3, 1950. There is a very large amount of relevant legislation, a century's accumulation governing and affecting the activities of many federal agencies.

In the main, the survey groups laws on the basis of the functional purpose served. Thus, after a preliminary examination of certain constitutional considerations, attention is given to statutes relating to navigation, flood control, irrigation, power, other public purposes, and related land uses. These groupings are followed by an examination of the trends in the different statutes moving toward comprehensive development. Finally, the different bodies of law are laid side-by-side and comparatively summarized.

Obviously, such a process makes for unavoidable duplication. But this organizational treatment seems best adapted to a review of the evolutionary development of the several bodies of law relating to the single subject of water resources.

It may also be noted that each chapter excepting the last concludes with a summary. A brief summary of the entire survey is printed as chapter 19 of volume 1 of the Commission's report. Also included as an appendix to volume 3 are independently prepared summaries of the water-law doctrines of the seventeen Western States.

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I take this opportunity to express to the legal staff my deep gratitude for their unfailing cooperation, and also my thanks to the numerous individuals in the various agencies who generously aided by consultation and otherwise.

Your legal staff joins in expressing our appreciation for the privilege of working with the Commission, and of undertaking this assignment in the public service.

Yours very sincerely,



Bernard A. Foster, Jr.,
General Counsel.

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Summaries of the Water-Law Doctrines of the Seventeen Western States

¶ These summaries include condensed statements of the principles relating to rights to the use of water for beneficial purposes as developed by constitutional and statutory provisions and judicial decisions.

They reflect the scope and application of the appropriation doctrine with respect to watercourses, waters subject to appropriation, the method or methods of acquiring appropriative rights, preferential use of water, and conditions under which rights are lost by statutory forfeiture.

For states in which riparian rights are recognized, the summaries include indications of the degree of recognition, the conflict of riparian and appropriative principles, and the extent to which conflicts have been reconciled.

Similarly indicated are principles governing the use of defined underground streams and of percolating waters, together with the statutory provisions, if any, relating to administrative control over rights to the use of ground waters. Brief reference is also made to methods of adjudicating water rights and the degree of participation of state officials in statutory adjudications, and to the public administration of water rights and distribution of water to holders of rights of use. ¶

These summaries have been independently prepared by Wells A. Hutchins, Department of Agriculture.

Arizona

Appropriations of water may be made under an exclusive procedure prescribed by statute, the first step being the making of an application to the State Land Commissioner for a permit to appropriate water, and the final step being the issuance of a certificate to the applicant after he has satisfied all requirements.¹ Appropriations for the generation of hydroelectric energy are subject to certain special limitations; if the development is to exceed 25,000 horsepower, approval of the

¹ *Ariz. Code Ann. 1939, §§ 75-101 to 75-113. Exclusiveness of statutory procedure: Tattersfield v. Putnam, 45 Ariz. 156, 174, 41 Pac. (2d) 228 (1935); Parker v. McIntyre, 47 Ariz. 484, 489, 56 Pac. (2d) 1337 (1936).*

application must be authorized by an act of the legislature; and a certificate for the right to use water for power development must limit the right to a period of 40 years from the date of application, subject to a preference right of renewal under the laws existing at the time of expiration of the period.³

The general statute governing the appropriation of water and the State administrative functions relating to water rights, known as the State Water Code, was enacted in 1919. According to this statute, "The water of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface," is declared to belong to the public and to be subject to appropriation for beneficial use.⁴ Unappropriated water may be appropriated for domestic, municipal, irrigation, stock watering, water power, wildlife (including fish), or mining uses, for the personal use of the appropriator or for delivery to consumers.⁴ The foregoing uses of water are grouped by the statute according to their relative values to the public in the following order: First, domestic and municipal uses, domestic uses to be construed to include gardens not exceeding one-half acre to each family; second, irrigation and stock watering; third, water power and mining uses; and last, wildlife uses (including fish). If applications pending before the commissioner conflict, preference must be given according to the relative values to the public of the proposed uses as so declared.⁵ Furthermore, applications for municipal uses may be approved to the exclusion of all subsequent appropriations if the commissioner determines that the estimated needs of the municipality so require.⁶ Water may be appropriated for projects that overlap the State boundary line, as well as for those lying entirely within the State; but the commissioner, at his discretion, may decline to issue a permit if the proposed point of diversion is within Arizona and the place of beneficial use is in another state.⁷ An applicant or any person whose rights are affected by the commissioner's decision may appeal to the superior court.⁸ The water right is forfeited if the holder fails to exercise it for five successive years.⁹

"Any person," according to the literal terms of the statute, may appropriate water for the uses above noted,¹⁰ and "Any person, includ-

³ Ariz. Code Ann. 1939, §§ 75-106 and 75-111.

⁴ Ariz. Code Ann. 1939, § 75-101.

⁴ Ariz. Code Ann. 1939, § 75-102.

⁵ Ariz. Code Ann. 1939, §§ 75-102 and 75-106.

⁶ Ariz. Code Ann. 1939, § 75-106.

⁷ Ariz. Code Ann. 1939, § 75-112.

⁸ Ariz. Code Ann. 1939, § 75-113.

⁹ Ariz. Code Ann. 1939, § 75-101.

¹⁰ Ariz. Code Ann. 1939, § 75-102.

ing a municipality, the state, or the United States," intending to acquire the right to the beneficial use of water shall apply to the commissioner for a permit.¹¹ However, the Arizona Supreme Court has held that in order to appropriate water for irrigation purposes, the appropriator must be the owner or possessor of land susceptible of irrigation, and that if only a possessor, he must have a present intent and apparent future ability to acquire ownership of the land.¹²

Arizona water law is free from complications of conflicting riparian rights, because the riparian doctrine never has been recognized in that State. The Territorial legislature in 1887 declared that the "common-law doctrine or riparian water rights" should not obtain or be of any force or effect in the Territory,¹³ and the State constitutional convention in 1910 adopted a similar provision for insertion in the ensuing State constitution.¹⁴ In the meantime the Territorial supreme court also had disapproved of the common-law doctrine,¹⁵ one such decision having been affirmed by the United States Supreme Court.¹⁶ The State supreme court has taken the same position.¹⁷

Ground water flowing in "definite underground channels" is subject to appropriation under the Water Code, as noted above. Long prior to that enactment the Territorial supreme court had stated that subterranean streams flowing in natural channels between well-defined banks were subject to appropriation under the same rules as those relating to surface streams, but that waters percolating through the soil in undefined and unknown channels were not subject to appropriation but belonged to the owner of the soil.¹⁸ This view of the ownership status of percolating water as against an attempted appropriation has been

¹¹ Ariz. Code Ann. 1939, § 75-105.

¹² *Tattersfield v. Putnam*, 45 Ariz. 156, 168-174, 41 Pac. (2d) 228 (1935). For earlier development of the principle, upon which the court in the *Tattersfield* case relied, see *Slosser v. Salt River Valley Canal Co.*, 7 Ariz. 376, 385-386, 65 Pac. 332 (1901); appeal dismissed, 195 U. S. 639 (1904).

¹³ Ariz. Rev. Stats. 1887, § 3198. The foundation for this repudiation of the riparian doctrine was laid at the first Territorial legislative session in 1864; see Terr. Ariz. Bill of Rights, art. 22, and Howell Code, ch. LV, §§ 1 and 3 (October 4, 1864).

¹⁴ Ariz. Const. art. XVII, § 1. Arizona was admitted to Statehood February 14, 1912.

¹⁵ *Clough v. Wing*, 2 Ariz. 371, 380-381, 17 Pac. 453 (1888); *Chandler v. Austin*, 4 Ariz. 346, 350, 42 Pac. 483 (1895).

¹⁶ *Boquillas Land & Cattle Co. v. Curtis*, 213 U. S. 339 (1909); affirming *Boquillas Land & Cattle Co. v. St. David Cooperative Commercial & Development Assn.*, 11 Ariz. 128, 135-139, 89 Pac. 504 (1907).

¹⁷ *Pima Farms Co. v. Proctor*, 30 Ariz. 96, 102, 245 Pac. 369 (1926); *Tattersfield v. Putnam*, 45 Ariz. 156, 165, 41 Pac. (2d) 228 (1935).

¹⁸ *Howard v. Perrin*, 8 Ariz. 347, 353-354, 76 Pac. 460 (1904); affirmed, *Howard v. Perrin*, 200 U. S. 71 (1906).

consistently held by the Arizona courts,¹⁹ although it does not appear that in any of the cited cases were the rights of rival owners of lands overlying a common supply of percolating water in issue. In one of these decisions there is a dictum favoring the rule of reasonable use.²⁰

In 1948 the legislature enacted a law (which "may be cited as the groundwater code of 1948") providing for the regulation of certain uses of ground water, which specifically "does not include water flowing in underground streams with ascertainable beds and banks."²¹ This act defines a "critical groundwater area" as a ground-water basin or designated subdivision thereof not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal, and provides for the designation of such areas. With certain exceptions, no irrigation well may be installed in any critical ground-water area without obtaining a permit therefor from the State Land Commissioner; and no permit may be issued for the installation of any irrigation well within any critical ground-water area for the irrigation of lands which at the effective date of the act were not irrigated, or which had not been cultivated within five years prior thereto.

Procedure for the determination of relative rights to the use of waters of streams or other water supplies, and for the reconciliation of determinations in different proceedings, is provided in the Water Code.²²

¹⁹ *McKenzie v. Moore*, 20 Ariz. 1, 5, 176 Pac. 568 (1918); *Brewster v. Salt River Valley Water Users' Assn.*, 27 Ariz. 23, 41, 229 Pac. 929 (1924); *Maricopa County M. W. C. Dist. v. Southwest Cotton Co.*, 39 Ariz. 65, 80-85, 4 Pac. (2d) 369 (1931); *Fourzan v. Curtis*, 43 Ariz. 140, 147, 29 Pac. (2d) 722 (1934); *Campbell v. Willard*, 45 Ariz. 221, 224-225, 42 Pac. (2d) 403 (1935). In the *Maricopa* case, *supra*, at 39 Ariz. 82-83, the supreme court stated that whether or not the statement in *Howard v. Perrin* was dictum, it had been accepted as the law in Arizona and still was the law.

²⁰ The point was raised, but not decided, in the *Maricopa* decision, *supra*, at 39 Ariz. 83-84. In *Fourzan v. Curtis*, *supra*, at 43 Ariz. 147, the court stated: "It is the law of Arizona that percolating waters belong to the owner of the land on which they are found. * * * And he may convey them to other premises than those on which they are originally found, *provided no other rights are injured thereby.* * * *" [Emphasis supplied.] In this case plaintiffs were claiming as landowners and defendants as appropriators, the rights of owners of other overlying lands being not involved.

²¹ Ariz. Code Ann. 1939, Cum. Pocket Supp. 1949, §§ 75-145 to 75-160; Ariz. Laws 1948, 6th Special Session, ch. 5, approved April 1, 1948. In 1945 an act was passed providing, among other things, that all persons owning or operating irrigation or drainage wells should report certain data concerning such wells to the State Land Commissioner, and that in the future no person should drill or cause to be drilled any well for the development of ground water without first filing notice with the commissioner: Ariz. Code Ann. 1939, Cum. Pocket Supp. 1949, §§ 75-2101 to 75-2109; Ariz. Laws 1945, 1st Special Session, ch. 12.

²² Ariz. Code Ann. 1939, §§ 75-114 to 75-127. The constitutionality of the procedure was upheld, under attack, in *Stuart v. Norviel*, 26 Ariz. 493 226 Pac. 908 (1924).

The State Land Commissioner, on his own initiative, may determine the rights of the various claimants, and is required to do so when petitioned by one or more water users if the circumstances justify it. Any State court in which an action is brought to determine such rights may transfer the action to the commissioner for determination. The Commissioner is authorized to make investigations, take testimony, and make findings of fact and an order of determination of the relative rights; and thereupon he is required to file the record in the superior court for a judicial determination of such rights. The court proceedings are comparable to those of a suit in equity, culminating in a judgment of adjudication affirming or modifying the order made by the commissioner.

Administration of the Water Code and of the distribution of waters according to rights of use is vested in the State Land Commissioner, excepting distribution reserved to water commissioners appointed by the courts under decrees existing when the Water Code was enacted.²³ Provision is made for the creation by the commissioner of water districts when necessary, for the appointment, duties, and powers of water superintendents for such districts, and for control structures at sources of supply.²⁴

California

California water law includes rights of use acquired by prior appropriation, and rights inherent in the ownership of lands riparian to natural streams or lakes and lands overlying ground-water supplies. The riparian and overlying rights are paramount, but all water rights of whatever character are now limited by constitutional mandate to the reasonable beneficial use of water.

The riparian doctrine is based upon the adoption of the common law in 1850, the year in which California was admitted to the Union.²⁵ Important as the riparian doctrine eventually became, it had no effect upon the use of water for mining during the years immediately following the discovery of gold in 1848; for the mining lands were part of the public domain, and the miners (in many cases technically trespassers) simply followed the expedient course of making and enforcing their own rules governing claims to the use of water as well as mining claims. These customs and rules, based upon priority of possession, diligence in constructing works and putting water to use, and beneficial use of the water, varied from one mining camp to another but followed the same general pattern. As such, they were recognized by the courts as

²³ Ariz. Code Ann. 1939, § 75-103.

²⁴ Ariz. Code Ann. 1939, §§ 75-128 to 75-136.

²⁵ *Lux v. Haggin*, 69 Calif. 255, 379-387, 10 Pac. 674 (1886).

valid local law, suited to the environment,²⁶ and became the basis of the first State legislation authorizing the appropriation of water, enacted in 1872.²⁷ Appropriations of water under the 1872 statute were initiated by posting notices, and by recording the notices and commencing construction of works within prescribed periods of time—a procedure that had been developed in the mining camps. An act known as the Water Commission Act, passed in 1913²⁸ and effective December 19, 1914, established State administrative control over the appropriation of water other than percolating ground water, and prescribed a procedure for making appropriations which the California Supreme Court has held to be exclusive of any other method.²⁹ This legislation was reenacted in 1943 as part of the Water Code.³⁰

It was not until 1886, in the case of *Lux v. Haggin*,³¹ that the riparian doctrine became firmly established in California jurisprudence. The court held that the right of a riparian proprietor to the natural flow of a watercourse is inseparably annexed to the soil of the tract contiguous thereto, and passes with the land, not as an easement or appurtenance, but as a parcel; that use does not create the right, and that disuse cannot destroy it except as a result of prescription; and that the riparian owner in California is entitled to a reasonable use of the water for irrigation in relation to the reasonable needs of all other riparian proprietors on the same stream. Subsequent litigation over water rights, including conflicts between riparian and appropriative claims on the same stream system, has been extensive. The appropriator, as time went on, was held to an increasing measure of reasonable beneficial use as a necessary element of his water right, not only as against other appropriators, but also when a claim of prescriptive title was being asserted against a riparian owner.³² But until within the past quarter-century the converse was not true. That is, as stated by the supreme court in 1909,³³ the limitation of a riparian owner to reasonable use of water applied only as between different riparian proprietors; as against an appropriator, "He is not limited by any measure of reasonableness." The public became deeply interested in the ever-recurrent conflict as

²⁶ *Stiles v. Laird*, 5 Calif. 120, 122, 123, 63 Am. Dec. 110 (1855); *Irwin v. Phillips*, 5 Calif. 140, 145-147, 63 Am. Dec. 113 (1855); *Tartar v. Spring Creek Water & Min. Co.*, 5 Calif. 395, 399 (1855).

²⁷ Calif. Civ. Code, § 1410 *et seq.*

²⁸ Calif. Stats. 1913, ch. 586.

²⁹ *Crane v. Stevinson*, 5 Calif. (2d) 387, 398, 54 Pac. (2d) 1100 (1936).

³⁰ Calif. Water Code, §§ 100 to 4407.

³¹ *Lux v. Haggin*, 69 Calif. 255, 390-409, 10 Pac. 674 (1886).

³² *California Pastoral & Agricultural Co. v. Madera Canal & Irr. Co.*, 167 Calif. 78, 83-87, 138 Pac. 718 (1914).

³³ *Miller & Lux v. Madera Canal & Irr. Co.*, 155 Calif. 59, 64, 99 Pac. 502 (1907, 1909).

the result of a decision in 1926⁸⁴ which accorded to a riparian owner the right to the full flow of a river in order to support a flow over the riparian lands of a small fraction of the stream, the outcome of which was the adoption in 1928 of a constitutional amendment restricting riparian and other rights to the flow of watercourses to reasonable beneficial use under reasonable methods of diversion and use, and acknowledging riparian rights to that extent.⁸⁵ The supreme court has sustained the validity of this amendment and has declared it to be effective in all controversies relating to the use of water.⁸⁶ The riparian owner has a prior and paramount right to the reasonable beneficial use thus safeguarded him by the constitution; but excess waters above the quantities to which riparian and other lawful rights attach are public waters of the State, to be used, regulated, and controlled by the State or under its direction.⁸⁷

Rights to the use of ground waters follow the legal distinction made in many jurisdictions between definite underground streams and percolating waters. A few decisions relating to defined underground streams have held that rights of use are subject to the same rules of law as those applying to surface streams;⁸⁸ and such ground waters—and only such—are subjected to appropriation by the provisions of the Water Code.⁸⁹

Most of the rather numerous cases dealing with ground waters in California have involved so-called percolating waters, including waters

⁸⁴ *Herminghaus v. Southern California Edison Co.*, 200 Calif. 81, 107-108, 252 Pac. 607 (1926).

⁸⁵ Calif. Const. art XIV, § 3. A synopsis of the development of the two conflicting theories in California water law and of events leading up to the adoption of the constitutional amendment is given in the recent decision of the Supreme Court in *United States v. Gerlach Live Stock Co.*, 70 S. Ct. 955, 964-969 (1950). The United States Court of Claims, in *Gerlach Livestock Co. v. United States*, 76 Fed. Supp. 87 (1948), had allowed compensation to the owners of riparian lands that benefited from only the peak flood flows of San Joaquin River over their lands, such flows being eliminated by the operation of Friant Dam of the Central Valley Project. The court believed that these riparian landowners had not been deprived of all their rights by the 1928 amendment, and that they were entitled to continue to receive water that they could use beneficially, or else to compensation for deprivation of the right. The Supreme Court agreed that the Court of Claims had correctly applied the California law; and concluded that even if it were assumed that since the constitutional amendment claimants' right was no longer enforceable by injunction, it nevertheless would remain compensable (70 S. Ct. 969-970).

⁸⁶ *Peabody v. Vallejo*, 2 Calif. (2d) 351, 365-368, 40 Pac. (2d) 486 (1935).

⁸⁷ *Meridian v. San Francisco*, 13 Calif. (2d) 424, 445, 90 Pac. (2d) 537 (1939).

⁸⁸ *Los Angeles v. Pomeroy*, 124 Calif. 597, 632, 57 Pac. 585 (1899); *Vineland Irr. Dist. v. Azusa Irrigating Co.*, 126 Calif. 486, 495, 58 Pac. 1057 (1899). See dictum in *Hanson v. McCue*, 42 Calif. 303, 308, 10 Am. Rep. 299 (1871); and the refusal of the court to commit itself in *Hale v. McLea*, 53 Calif. 578, 584 (1879).

⁸⁹ Calif. Water Code, § 1200.

of artesian areas not shown to be parts of definite underground streams. After the rendition of several decisions following or at least favoring the English rule of absolute ownership of percolating waters, the supreme court in 1903, in *Katz v. Walkinshaw*,⁴⁰ discarded that principle and applied what has come to be known as the California doctrine of correlative rights. The controversy in question involved the relative rights of owners of land overlying a common artesian belt, the water of which was found to be broadly diffused, not part of a definite underground watercourse, and hence subject to the laws applicable to percolating waters. The new rule accorded to the owners of lands overlying the common supply equal rights for use on or in connection with their overlying lands, each to have a fair and just proportion in cases in which the supply should be not sufficient for all. The landowner's right extends only to the quantity of water necessary for use on his land, and any surplus that exists may be appropriated for distant use. Subsequent decisions have followed the rules suggested in *Katz v. Walkinshaw*, which were summarized in the syllabus of a case decided several years later.⁴¹ It should be noted at this point, as indicated hereinafter, that there is no statutory procedure applicable to the appropriation of surplus percolating water. Such appropriations are effected as the result of diversion and use of the water.

As a result of appellate court decisions during the past half-century, and of noninterference by the Legislature, the correlative doctrine appears to be firmly established as the law of percolating waters in California. The supreme court as recently as 1949, in *Pasadena v. Alhambra*,⁴² made the following comments: "Generally speaking, an overlying right, analogous to that of a riparian owner in a surface stream, is the right of the owner of the land to take water from the ground underneath for use on his land within the basin or watershed; the right is based on ownership of the land and is appurtenant thereto. * * * Although the law at one time was otherwise, it is now clear that an overlying owner or any other person having a legal right to surface or ground water may

⁴⁰ *Katz v. Walkinshaw*, 141 Calif. 116, 128-137, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

⁴¹ *Burr v. Maclay Rancho Water Co.*, 154 Calif. 428, 98 Pac. 260 (1908). For various points involved in applying the doctrine, see *Cohen v. La Canada Land & Water Co.*, 142 Calif. 437, 439-440, 76 Pac. 47 (1904); *Newport v. Temescal Water Co.*, 149 Calif. 531, 537-539, 87 Pac. 372 (1906); *Barton v. Riverside Water Co.*, 155 Calif. 509, 516-519, 101 Pac. 790 (1909); *Hudson v. Dailey*, 156 Calif. 617, 625-628, 105 Pac. 748 (1909); *Corona Foothill Lemon Co. v. Lillibridge*, 8 Calif. (2d) 522, 530-532, 66 Pac. (2d) 443 (1937); *Hillside Water Co. v. Los Angeles*, 10 Calif. (2d) 677, 685-688, 76 Pac. (2d) 681 (1938).

⁴² *Pasadena v. Alhambra*, 33 Calif. (2d) 908, 925-926, 928-933, 207 Pac. (2d) 17 (1949); cert. den., *California-Michigan Land & Water Co. v. Pasadena*, 70 S. Ct. 671 (1950).

take only such amount as he reasonably needs for beneficial purposes. * * * Any water not needed for the reasonable beneficial uses of those having prior rights is excess or surplus water. In California surplus water may rightfully be appropriated on privately owned land for non-overlying uses, such as devotion to a public use or exportation beyond the basin or watershed. * * * Proper overlying use, however, is paramount, and the right of an appropriator, being limited to the amount of the surplus, must yield to that of the overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the taking of nonsurplus waters. As between overlying owners, the rights, like those of riparians, are correlative and are referred to as belonging to all in common; each may use only his reasonable share when water is insufficient to meet the needs of all."

The actual decision in *Pasadena v. Alhambra, supra*,⁴⁸ is of fundamental importance in California ground-water law because of the principles therein applied to the adjustment of rights to the use of waters of a ground-water area (Raymond Basin) that had been overdrawn for many years. Claimants of most of the water rights, including "overlying" landowners and appropriators for distant use or for public service, were parties to the adjudication. The supreme court stated that there was an invasion to some extent of the rights of both overlying landowners and appropriators commencing in 1913-14, when the overdraft first occurred. From then until the suit was brought in 1937, the pumpage from the basin exceeded the safe yield in all excepting two years; but notwithstanding the overdraft, the parties continued their pumping, the effect of which was to continue the overdraft and lowering of the water table. Hence no user was immediately prevented from taking the water he needed; the injury "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." The invasion thus was a partial one; but the pumping by each party necessarily interfered with the future possibility of pumping by each of the other parties. The court held that prescriptive rights were established by appropriations made after 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 production of water should be limited by a proportionate reduction in the amount each party had taken throughout the statutory period. The effect of the decision is that where overlying landowners and appropriators had been pumping from a ground-water basin for many years after the safe yield had been over-

⁴⁸ See *supra*, n. 42, p. 718.

drawn, no overlying owner or appropriator could claim a paramount right to the full quantity of water he had been pumping, nor had he fully lost his right to pump by reason of the continued pumping by others. 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.

Administration of the Water Code provisions relating to the appropriation of water, determination of water rights, and distribution of water is vested in the State Department of Public Works and exercised through the State Engineer.⁴⁴ It is declared to be the established policy of the State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation;⁴⁵ and an application by a municipality to appropriate water for its use or the use of its inhabitants for domestic purposes is to be considered first in right, irrespective of whether it is first in time.⁴⁶ The right of a municipality to acquire and hold water rights not only for existing but for future use is specifically provided for, temporary appropriations by others being authorized with respect to the surplus over the existing needs of the municipality pending the time it is ready to use the surplus.⁴⁷

Waters made subject to appropriation by the Water Code are only surface water, and "subterranean streams flowing through known and definite channels."⁴⁸ This necessarily excludes percolating water, the surplus of which over the needs of overlying landowners is appropriable pursuant to decisions of the supreme court, noted above, but not under the statutory procedure. The appropriability of return flow is indicated by the declaration that unappropriated water subject to appropriation includes "Water which having been appropriated or used flows back into a stream, lake or other body of water."⁴⁹ An appropriation is initiated by applying to the Department for a permit, the holder being issued a license upon completion of the project.⁵⁰ This is the exclusive method of acquiring an appropriative right to the use of any water to which the

⁴⁴ Calif. Water Code, § 1050.5.

⁴⁵ Calif. Water Code, § 106. The supreme court, in *East Bay Municipal Utility Dist. v. State Department of Public Works*, 1 Calif. (2d) 476, 477-481, 35 Pac. (2d) 1027 (1934), upheld the action of the State agency in imposing a condition, in issuing a permit to appropriate water for power purposes, that the right to store and use water under the permit should not interfere with future appropriations of such water for agricultural or municipal purposes.

⁴⁶ Calif. Water Code, § 1460.

⁴⁷ Calif. Water Code, §§ 106.5, 1203, and 1460 to 1464.

⁴⁸ Calif. Water Code, § 1200.

⁴⁹ Calif. Water Code, § 1202 (d).

⁵⁰ Calif. Water Code, §§ 1250 to 1677.

statute applies.⁵¹ Failure to make use of the water for a period of three years results in forfeiture of the right.⁵²

Procedure is provided in the Water Code for the determination of rights to the use of water (excluding percolating water) by the Department, upon petition by one or more claimants on a stream system; the order of determination being filed in the superior court, the proceedings therein following as nearly as practicable the rules governing civil actions, and culminating in a decree determining the rights of all parties.⁵³ It is also provided that in any suit brought to determine water rights, the court may order a reference to the Department, as referee, of any or all issues involved, or may refer the suit to the Department for investigation and report upon any or all of the physical facts involved.⁵⁴ This reference procedure is discretionary with the trial court; and it is subject to no limitation upon classes of water to which it is applicable.⁵⁵

The Water Code makes provision for the creation of watermaster service areas by the Department when and where needed, for the appointment and duties of watermasters, and for the distribution of water in the service areas in accordance with rights of use.⁵⁶

Colorado

The constitution of Colorado declares that the unappropriated water of every natural stream is the property of the public, subject to appropriation, and that the right to divert such waters to beneficial uses shall never be denied.⁵⁷ It is also declared that priority of appropriation

⁵¹ Calif. Water Code, § 1225; *Crane v. Stevinson*, 5 Calif. (2d) 387, 398, 54 Pac. (2d) 1100 (1936).

⁵² Calif. Water Code, § 1241. Section 1411 of the Civil Code had declared that an appropriative right should cease when the appropriator ceased to use the water, but prescribed no time period. The supreme court, in *Smith v. Hawkins*, 110 Calif. 122, 127, 42 Pac. 453 (1895), by analogy to the periods fixed by law for the acquisition and loss of prescriptive rights, held that a continuous nonuser for five years would forfeit the appropriative right.

⁵³ Calif. Water Code, §§ 2500 to 2900.

⁵⁴ Calif. Water Code, §§ 2000 to 2050.

⁵⁵ The reference procedure was applied to the waters of Raymond Basin in *Pasadena v. Alhambra*, *supra*, footnote. 42. The trial court had referred the matter to the Department for a determination of the facts, and the report of the Department was received in evidence, pursuant to section 24 of the Water Commission Act and §§ 2000 to 2050 of the Water Code which replaced it. The reference in this case was approved by the supreme court.

⁵⁶ Calif. Water Code, §§ 4000 to 4407.

⁵⁷ Colo. Const., art. XVI, §§ 5 and 6.

shall give the better right as between those using water for the same purpose; but that in event of insufficiency of the supply, domestic purposes shall have first preference, and agricultural purposes shall have preference over manufacturing.⁵⁸ However, the Colorado Supreme Court has held that this section does not entitle one desiring to use water for domestic purposes to take the water from a prior appropriator for some other purpose, without just compensation.⁵⁹ The Colorado Supreme Court has recognized the right of the City of Denver to appropriate water not only for immediate use but for the needs resulting from a normal increase in population within a reasonable time in the future, and to lease the use of water pending its need by the city;⁶⁰ and the city is protected by statute against the vesting of rights under such leasing that would defeat the city's right to make eventual use of the water.⁶¹

The method of acquiring appropriative rights to the use of waters of natural streams in Colorado is a logical result of the constitutional prohibition against denying the right to make such appropriations. The intending appropriator does not apply to a State agency for a permit to appropriate water, subject to refusal if statutory conditions require or authorize denial of the application, as is the case in many of the Western States. In Colorado, one who proposes to appropriate unappropriated water of a stream commences the construction or enlargement of the necessary diversion or storage works, and within 60 days thereafter he files a claim therefor with the State Engineer. If the facts are adequately presented, the State Engineer accepts the claim for filing, after which reproductions are made and filed in the appropriate county records.⁶² The foregoing is the statutory procedure for initiating an appropriation; but the requirements for filing maps and statements have been so construed by the supreme court as to restrict their purpose and effect to matters of evidence.⁶³ That is to say, it

⁵⁸ Colo. Const., art. XVI, § 6.

⁵⁹ *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233, 236-237, 48 Pac. 532 (1896); *Sterling v. Pawnee Ditch Extension Co.*, 42 Colo. 421, 426-427, 94 Pac. 339 (1908). And see *Strickler v. Colorado Springs*, 16 Colo. 61, 72-75, 26 Pac. 313 (1891).

⁶⁰ *Denver v. Sheriff*, 105 Colo. 193, 203-208, 96 Pac. (2d) 836 (1939).

⁶¹ Colo. Stats. Ann. 1935, ch. 193, § 398 (Laws 1931, ch. 172). This statute provides that if a city with population of 200,000 or more leases water not needed for immediate use, no rights shall become vested to a continued leasing or to a continuance of conditions concerning return water from irrigation so as to defeat the right of the city to terminate the leases or to change the place of use.

⁶² Colo. Stats. Ann. 1935, ch. 90, §§ 27 to 33.

⁶³ *De Haas v. Benesch*, 116 Colo. 344, 351-352, 181 Pac. (2d) 453 (1947); *Schulter v. Burlington Ditch, Res. & Land Co.*, 117 Colo. 284, 289, 188 Pac. (2d) 253 (1947); *Archuleta v. Boulder & Weld County Ditch Co.*, 118 Colo. 43, 52, 53, 192 Pac. (2d) 891 (1948).

is held that water rights in Colorado are not based upon the filing of maps or statements and that the lack thereof does not invalidate the appropriations; the question as to whether or not the documents were filed being a matter of evidence only and not the substance of the appropriation. "A compliance with the statutory requirements in question is not strictly a part of the act of appropriation; the appropriation is completed when the ditch or conduit is constructed and the water is diverted therethrough and applied to a beneficial use. The filing of maps and statements under our irrigation statutes is a means of fixing and holding the rights which a party already has acquired by appropriation and are only prima facie evidence of the appropriation."⁶⁴

The riparian doctrine never has been a part of the water law of Colorado. The repudiation of that doctrine was foreshadowed in very early cases,⁶⁵ and became specific when the supreme court declared, in 1882, that the common-law doctrine of riparian rights was inapplicable to Colorado and that the doctrine of appropriation had existed from the time of the earliest appropriations of water within the boundaries of the State.⁶⁶ True, there were some later observations by the same court concerning common-law rights of riparian owners to take water for domestic purposes,⁶⁷ but the statements to that effect in both of the cited cases were dicta; in neither case was there an actual adjudication of a water right based upon ownership of riparian land. Also, shortly thereafter, a Federal court decided that insofar as diversions of water from streams for manufacturing, mining, or mechanical purposes were concerned, the riparian doctrine was the law in Colorado;⁶⁸ but that decision was expressly disapproved in a later decision by a higher Federal court as being not in accord with the decisions of the Colorado Supreme Court and as being not sustained by the better reasoning.⁶⁹

⁶⁴ *Archuleta v. Boulder & Weld County Ditch Co.*, 118 Colo. 43, 53, 192 Pac. (2d) 891 (1948).

⁶⁵ *Yunker v. Nichols*, 1 Colo. 551, 553-555, 570 (1872); *Schilling v. Rominger*, 4 Colo. 100, 103, 104 (1878).

⁶⁶ *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446-447 (1882).

⁶⁷ *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, 546, 550, 52 Pac. 792 (1898).

⁶⁸ *Schwab v. Beam*, 86 Fed. 41, 43-44 (C. C. D. Colo., 1898).

⁶⁹ *Snyder v. Colorado Gold Dredging Co.*, 181 Fed. 62, 68 (C. C. A. 8th, 1910). The court stated, at 181 Fed. 65: "The common-law doctrine in respect of the rights of riparian proprietors in the waters of natural streams never has obtained in Colorado. From the earliest times in that jurisdiction the local customs, laws, and decisions of courts have united in rejecting that doctrine and in adopting a different one which regards the waters of all natural streams as subject to appropriation and diversion for beneficial uses and treats priority of appropriation and continued beneficial use as giving the prior and superior right." The United States Supreme Court, in *Wyoming v. Colorado*, 259 U. S. 419, 459 (1922), stated with respect to Colorado and Wyoming: "The common-law rule respecting riparian rights in flowing water never obtained in either State."

Notwithstanding these few inconsistencies, a long and unbroken line of decisions of the State courts of Colorado has followed the appropriation doctrine exclusively in settling controversies over rights to the use of stream waters, and with the one exception above noted the Federal courts have followed the same course; the question of repudiation of the riparian doctrine so far as Colorado is concerned having been settled definitely a long time ago.⁷⁰

The law with respect to the use of waters of definite underground streams, of the subflow of surface streams, and of ground waters tributary to watercourses, apparently is well settled in Colorado—rights to the use of all such ground waters are governed by the doctrine of prior appropriation. This excludes percolating waters occurring naturally in the ground but not tributary to watercourses, concerning which it may be reasonably assumed—but only assumed—that the appropriation doctrine applies. The rules are as follows:

Waters flowing in well-defined and known underground channels the course of which can be distinctly traced are governed by the same rules as the waters of streams flowing upon the surface.⁷¹ The underflow is as much a part of a watercourse as is the surface flow, and the rights of prior appropriators on the stream are protected against such interference with the underflow as would impair the proper exercise of their rights.⁷² All sources of supply of a stream, whether they reach it by percolation through the soil, by subterranean channels, or by surface channels, are a part of the stream system and are open to appropriation, subject to prior appropriative rights that have attached to the stream.⁷³ A statute declares that the utilization of waste, seepage, and spring waters shall be governed by the same laws of priority of right as the utilization of water of running streams; "provided, that the person upon whose lands the seepage or spring waters first arise, shall have the prior

⁷⁰ In *Sternberger v. Seaton Min. Co.*, 45 Colo. 401, 402-404, 102 Pac. 168 (1909), plaintiffs asserted common-law riparian rights with respect to lands acquired prior to the adoption of the State constitution and before defendant's appropriation was made. The supreme court stated: "At this late day it would seem to us, as it evidently did to the trial court, idle to make such contention in this state. The latter has long ago been set at rest. * * * The doctrine in this state that the common-law rule of continuous flow of natural streams is abolished, is so firmly established by our constitution, the statutes of the territory and the state, and by many decisions of this court, that we decline to reopen or reconsider it, however interesting discussion thereof might otherwise be, and notwithstanding its importance."

⁷¹ *Medano Ditch Co. v. Adams*, 29 Colo. 317, 326, 68 Pac. 431 (1902).

⁷² *Platte Valley Irr. Co. v. Buckers Irr., Mill. & Improvement Co.*, 25 Colo. 77, 82, 53 Pac. 334 (1898); *Buckers Irr., Mill. & Improvement Co. v. Farmers' Independent Ditch Co.*, 31 Colo. 62, 71, 72 Pac. 49 (1903).

⁷³ *McClellan v. Hurdle*, 3 Colo. App. 430, 434, 33 Pac. 280 (1893); *In re German Ditch & Res. Co.*, 56 Colo. 252, 268, 271, 139 Pac. 2 (1913); *Faden v. Hubbell*, 93 Colo. 358, 368-369, 28 Pac. (2d) 247 (1933).

right to such waters if capable of being used upon his lands.”⁷⁴ The supreme court has held that where the waters of a spring form no part of a natural stream, and cannot reach a stream except when carried along by a flood, the proviso above quoted is applicable;⁷⁵ but that notwithstanding the proviso, where such water would reach a natural stream if not intercepted, it does not belong to the landowner but is a part of the stream and subject to prior rights thereto.⁷⁶ A considerable part of the percolating water that feeds the streams flowing through irrigated regions consists of return flow from irrigation. All such water that escapes from the control of the original appropriator, and that would, if left to itself, reach a natural stream by underground percolation, is a part of the stream to the same extent as tributary percolating water originating from natural sources.⁷⁷

No rule appears to have been announced by the courts with respect to rights of use of percolating water occurring naturally in the ground but not tributary to any watercourse, such as water cut off from a stream by an impervious formation. If such waters are added to a stream as developed, or foreign waters, they may be taken by the person so making them available, or appropriated independently, according to the circumstances.⁷⁸ Otherwise, however, in view of the consistent water-law philosophy of Colorado, it is reasonable to assume that the

⁷⁴ Colo. Stats. Ann. 1935, ch. 90, § 20.

⁷⁵ *Haver v. Matonock*, 79 Colo. 194, 196-197, 244 Pac. 914 (1926); *Lomas v. Webster*, 109 Colo. 107, 110, 122 Pac. (2d) 248 (1942); *Webster v. Lomas*, 112 Colo. 74, 75, 145 Pac. (2d) 978 (1944).

⁷⁶ *Neuius v. Smith*, 86 Colo. 178, 180-183, 279 Pac. 44 (1928, 1929); *Faden v. Hubbell*, 93 Colo. 358, 368-369, 28 Pac. (2d) 247 (1933); *De Haas v. Benesch*, 116 Colo. 344, 351, 181 Pac. (2d) 453 (1947).

⁷⁷ In *Fort Morgan Res. & Irr. Co. v. McCune*, 71 Colo. 256, 261, 206 Pac. 393 (1922), the supreme court stated: "Beginning with the Ramsay case the principle upon which the decisions are based appears to be that water escaping from a reservoir, or ditch, *underground*, and becoming percolating water which will naturally reach a public stream, must be regarded as a part of the stream.

* * * These cases show that it has been held by this court that the question of diligence in attempting a recapture, or the time during which the seepage has run, or the question whether or not the water was appropriated when not needed for direct irrigation, is not material. When it has become, potentially, under the rule above stated, a part of the river, it belongs to the appropriators in the order of their priorities whenever needed." The decision usually referred to as the starting point of the Colorado rule is *Comstock v. Ramsay*, 55 Colo. 244, 133 Pac. 1107 (1913). For the development of the Colorado rule, see National Resources Planning Board, "State Water Law in the Development of the West", pp. 30-32 (1943).

⁷⁸ *Ripley v. Park Center Land & Water Co.*, 40 Colo. 129, 133, 90 Pac. 75 (1907); *San Luis Valley Irr. Dist. v. Prairie Ditch Co. and Rio Grande Drainage Dist.*, 84 Colo. 99, 106, 268 Pac. 533 (1928). A person who claims that by his own efforts he has increased the flow of a stream has the burden of proving his contention: *Leadville Mine Development Co. v. Anderson*, 91 Colo. 536, 537-538, 17 Pac. (2d) 303 (1932).

appropriation doctrine would be applied as against a claim by a landowner that, irrespective of whether or not he has made actual use of the water percolating through his land, he has a paramount right thereto.

The statutes of Colorado do not provide for the forfeiture of appropriative rights by reason of failure to use the water for specified periods of time, as is the case in many Western States. Many decisions of the supreme court, however, have been concerned with the loss of water rights by abandonment. In a recent case involving abandonment there was no dispute as to the nonuse of the ditch and the water for almost 40 years, and the trial court found that the ditch and its priority had been abandoned.⁸⁷ In affirming the judgment of the trial court, the supreme court reviewed various decisions relating to abandonment of water rights and thus summarized the controlling principles:

We conclude from these statements that while the burden of proof of intent to abandon is on him who asserts it, yet such intent may be proved by evidence of acts and failure to act as well as by mere words; that nonuse constitutes such failure to act; that proof of nonuse for an unreasonable period establishes a presumption of abandonment and is prima facie proof thereof; that nonuse for the period here proved is an unreasonable period; that to rebut the presumption of abandonment arising from such 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. In the instant case, the existence of such a fact or condition was an issue to be determined by the trial court and the evidence amply supports its determination.

Jurisdiction of all questions concerning the determination of water rights is vested exclusively in the courts.⁸⁸ The State Engineer is called upon by the courts in adjudication proceedings for filings of appropriations in his office,⁸¹ and decrees of adjudication become effective when certified copies thereof have been filed in the offices of the State Engineer and of the irrigation division engineer for the guidance of the State water officials in regulating the distribution of water accordingly;⁸²

⁸⁷ *Mason v. Hills Land & Cattle Co.*, 119 Colo. 404, 407, 408-409, 204 Pac. (2d) 153 (1949). The principles so stated would be generally applicable in other Western jurisdictions as well, with respect to abandonment as distinguished from statutory forfeiture of appropriative rights.

⁸⁸ Colo. Stats. Ann., 1947, Cum. Supp., ch. 90, § 189 (2). The statutory provisions governing the adjudication of priority rights to the use of water were repealed and replaced by new provisions in 1943: Colo. Laws 1943, ch. 190, codified in 1947 Cum. Supp., ch. 90, §§ 189 (1) to 189 (25).

⁸¹ Colo. Stats. Ann. 1935, ch. 90, § 193.

⁸² Colo. Laws 1943, ch. 190, § 15; 1947 Cum. Supp., ch. 90, § 189 (15).

but the adjudication proceedings from start to finish are judicial. However, a large, active organization headed by the State Engineer administers the decrees of adjudication of water rights and distributes the water according to them.⁸⁵ The State is divided by statute into irrigation divisions comprising principal drainage areas, administered by irrigation division engineers who are under the general supervision of the State Engineer.⁸⁶ Each division in turn comprises a number of water districts, likewise created by statute, which are administered by water commissioners under the supervision of the irrigation division engineer.⁸⁶

Idaho

The constitution of Idaho declares that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied, except that the State may regulate and limit the use thereof for power purposes.⁸⁶ Other provisions of the same section of the constitution are: Priority of appropriation gives the better right; but when the waters of a stream are not sufficient for all who desire to use them, domestic purposes (subject to such limitations as may be prescribed by law) have the first preference, and agricultural purposes have preference over manufacturing. In any organized mining district, mining purposes or milling purposes connected with mining have preference over manufacturing or agricultural purposes. The usage by such subsequent appropriators, however, is subject to the laws regulating the taking of private property by condemnation for public and private use. The Idaho Supreme Court has recognized the preference thus accorded users of water for domestic purposes, expressly subject, however, to the payment of compensation by those taking for superior purposes water already appropriated by others.⁸⁷ The court has also held that the constitutional preference accorded to mining and milling purposes in an organized mining district does not authorize parties engaged in mining or any other occupation to fill up the natural channel of a public stream to the injury of any other user of the water of such stream.⁸⁸

The statute relating to the appropriation of water declares that all waters when flowing in their natural channels, including the waters

⁸⁵ Colo. Stats. Ann. 1935, and 1947 Cum. Supp., ch. 90, §§ 201 to 345; Laws 1943, ch. 190, § 15, codified 1947 Cum. Supp., ch. 90, § 189 (15).

⁸⁶ Colo. Stats. Ann. 1935, and 1947 Cum. Supp., §§ 224 to 248.

⁸⁷ Colo. Stats. Ann. 1935, and 1947 Cum. Supp., §§ 249 to 345.

⁸⁸ Idaho Const., art XV, § 3.

⁸⁹ *Montpelier Mill. Co. v. Montpelier*, 19 Idaho 212, 219, 220, 113 Pac. 741 (1911); *Basinger v. Taylor*, 30 Idaho 289, 294, 295, 164 Pac. 522 (1917).

⁹⁰ *Hill v. Standard Min. Co.*, 12 Idaho 223, 233, 85 Pac. 907 (1906); *Ravndal v. North Fork Placers*, 60 Idaho 305, 311, 91 Pac. (2d) 368 (1939).

of natural springs and lakes, are the property of the State, and that the right to the use of the waters of "rivers, streams, lakes, springs, and of subterranean waters" may be acquired by appropriation.⁹⁰ The statute also provides that all rights to the use of water shall be "lost and abandoned" by failure for a period of five years to make the beneficial use for which the water was appropriated; such loss of right being stated by the supreme court to be in fact a statutory forfeiture as distinguished from a true abandonment.⁹⁰

As a result of the constitutional prohibition against the denial of appropriations of water, there are two methods of appropriating water in Idaho, of equal validity. One method is the procedure provided by statute, under which the right originally was initiated by posting and recording a notice of appropriation, but now is initiated by filing with the State Department of Reclamation an application for a permit to make the appropriation. The Department issues a certificate to the water user upon completion of construction of the works; and upon application of the water to beneficial use and a showing that the law has been fully complied with, the Department issues to the water user a license confirming such use.⁹¹ The extant water appropriation statute declares that all rights to divert and use the waters of the State for beneficial purposes shall be acquired and confirmed under the provisions of the statute.⁹² Notwithstanding this declaration, it is well settled in Idaho that the statutory procedure in effect at the time of making a particular appropriation (initiation by posting and recording notice, or by applying to the State for a permit, as the case may be) has not been and is not now the exclusive method of appropriating water, and that equally valid rights may be acquired by diverting water and applying it to beneficial use without pursuing the statutory method.⁹³ The method of appropriating water by mere diversion and use is often referred to as the "constitutional" method, as distinguished from the

⁹⁰ Idaho Code, §§ 42-101 and 42-103.

⁹¹ Idaho Code, § 42-222. In *Carrington v. Crandall*, 65 Idaho 525, 532, 147 Pac. (2d) 1009 (1944), the court pointed out that while the statute designates the loss as "abandonment," it is in fact a statutory forfeiture; that there is another kind of abandonment that is *actual*, not dependent upon length of time, the essential element of which is intent to relinquish the right.

⁹² Idaho Code, §§ 42-202 to 42-311. The license is only prima facie evidence of the water right: *Basinger v. Taylor*, 36 Idaho 591, 597-598, 211 Pac. 1085 (1922).

⁹³ Idaho Code, sec. 42-201.

⁹⁴ *Sand Point Water & Light Co. v. Panhandle Development Co.*, 11 Idaho 405, 413, 83 Pac. 347 (1905); *Nielson v. Parker*, 19 Idaho 727, 730-731, 733, 115 Pac. 488 (1911); *Youngs v. Regan*, 20 Idaho 275, 279, 118 Pac. 499 (1911); *Furey v. Taylor*, 22 Idaho 605, 611, 612, 127 Pac. 676 (1912); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 38, 147 Pac. 1073 (1915); *Bachman v. Reynolds Irr. Dist.*, 56 Idaho 507, 514, 55 Pac. (2d) 1314 (1936).

"statutory" method.⁹⁴ The advantage of following the statutory method lies in the application of the doctrine of relation, or "relation back" as it sometimes is termed. That is, the priority of a right acquired by the so-called "constitutional" method dates from the completion of the appropriation, which takes place upon the application of the water to beneficial use; whereas the priority of a right perfected by strict compliance with the statute relates back to, and therefore dates from, the time of filing the application with the State agency, the statutory procedure being the exclusive method by which the right can relate back to the initiation of the appropriation.⁹⁵

The riparian doctrine is not recognized in Idaho with respect to the use of water of streams. The supreme court, in its first reported decision in a controversy over rights to the use of water, stated the law of the Territory to be that the first appropriation of water for a useful or beneficial purpose gave the better right thereto.⁹⁶ And in its second reported decision in this field of law, the supreme court affirmed the judgment of the trial court in favor of a prior appropriator of water of a stream as against a party who, after the making of such appropriation, entered and patented land contiguous to the stream and claimed the right to use the stream water as a riparian proprietor.⁹⁷ In 1909 the court held that the legislature had full authority to provide the method of appropriating public waters by all persons, whether riparian owners or not.⁹⁸ The court held, in the same year, that a riparian proprietor in Idaho could not successfully assert a prior or superior right to the right of an appropriator, to which extent the common-law doctrine or riparian rights had been abrogated by the constitution and statutes; but that the riparian owner's right to use the water for domestic- and stock-watering purposes was "superior to any right of a stranger, intermeddler or interloper," that is, under the facts of the case, one who had interfered with the flow of the water at a time when he did not occupy the status of a legal appropriator.⁹⁹ Notwithstanding this statement based upon the circumstances of the case, no question

⁹⁴ *Pioneer Irr. Dist. v. American Ditch Assn.*, 50 Idaho 732, 737, 1 Pac. (2d) 196 (1931).

⁹⁵ *Crane Falls Power & Irr. Co. v. Snake River Irr. Co.*, 24 Idaho 63, 81-82, 133 Pac. 655 (1913); *Reno v. Richards*, 32 Idaho 1, 10-11, 178 Pac. 81 (1918); *Silkey v. Tiegs*, 51 Idaho 344, 353, 5 Pac. (2d) 1049 (1931). Only when there is a full compliance with the statutes can the doctrine of relation be invoked: *Rabido v. Furey*, 33 Idaho 56, 63, 190 Pac. 73 (1920); *Bachman v. Reynolds Irr. Dist.*, 56 Idaho 507, 520, 55 Pac. (2d) 1314 (1936).

⁹⁶ *Malad Valley Irr. Co. v. Campbell*, 2 Idaho 411, 414, 18 Pac. 52 (1888).

⁹⁷ *Drake v. Earhart*, 2 Idaho 750, 757, 23 Pac. 541 (1890).

⁹⁸ *Idaho Power & Transportation Co. v. Stephenson*, 16 Idaho 418, 429, 101 Pac. 821 (1909).

⁹⁹ *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 491-494, 101 Pac. 1059 (1909).

remains or has remained for many years as to the repudiation of the riparian doctrine in Idaho.¹⁰⁰

The appropriation statute, as noted above, includes "subterranean waters" in the classes of waters named as subject to appropriation. The supreme court has rendered several decisions with respect to rights to the use of ground waters which, while not uniform in the development of principles, with one exception have tended toward the doctrine of appropriation¹⁰¹ and finally have embraced that doctrine completely.¹⁰² Percolating waters, like waters of surface streams, may be appropriated either by the statutory permit method or by actual diversion and application to a beneficial use; and "a valid appropriation first made under either method will have priority over a subsequent valid appropriation however made."¹⁰³

Water rights in Idaho may be adjudicated only in proceedings initiated by claimants of rights to the use of water. The water-rights statute originally provided for the bringing of suits by State water commissioners for the adjudication of water rights, but the sections in question were declared unconstitutional by the State supreme court.¹⁰⁴ However, the supreme court has upheld the validity of a section authorizing the judge, if a suit is brought for the purpose of adjudicating water rights, to request the State Department of Reclamation to make and furnish a hydrographic survey of the stream in litigation.¹⁰⁵ The statutes provide for the distribution of water under the immediate direction and control of the Department of Reclamation; for the crea-

¹⁰⁰ *Jones v. McIntire*, 60 Idaho 338, 352, 91 Pac. (2d) 373 (1939); *Schodde v. Twin Falls Land & Water Co.*, 224 U. S. 107 (1912).

¹⁰¹ For decisions prior to 1922, apparently leaning toward the appropriation doctrine, see: *LeQuime v. Chambers*, 15 Idaho 405, 413-414, 98 Pac. 415 (1908); *Bower v. Moorman*, 27 Idaho 162, 181, 147 Pac. 496 (1915); *Jones v. Vanauddeln*, 28 Idaho 743, 156 Pac. 615 (1916). In *Public Utilities Commission v. Natatorium Co.*, 36 Idaho 287, 300, 305, 306, 211 Pac. 533 (1922), it was held that percolating water, as distinguished from water in a defined underground stream, was not public water but belonged to the owner of the soil, hence a company delivering such water to consumers was not a public utility. In *Union Central Life Insurance Co. v. Albrethsen*, 50 Idaho 196, 202-204, 294 Pac. 842 (1930), waters of a natural ground-water storage basin supplying the flow of a stream were held subject to appropriation.

¹⁰² *Hinton v. Little*, 50 Idaho 371, 379-380, 296 Pac. 582 (1931); *Noh v. Stoner*, 53 Idaho 651, 652-653, 26 Pac. (2d) 1112 (1933).

¹⁰³ *Silkey v. Tiegs*, 51 Idaho 344, 351-353, 5 Pac. (2d) 1049 (1931).

¹⁰⁴ *Bear Lake County v. Budge*, 9 Idaho 703, 75 Pac. 614 (1904).

¹⁰⁵ Idaho Code, § 42-1401. The section states that the judge "shall" request the Department to make the examination. The supreme court, in *Boise City Irr. & Land Co. v. Stewart*, 10 Idaho 38, 57, 77 Pac. 25, 321 (1904), held that this legislative declaration was directory, the question of making the request being left to the sound discretion of the judge. See *Blaine County Investment Co. v. Gallet*, 35 Idaho 102, 204 Pac. 1066 (1922), for a construction of the legislative provision for payment of costs.

tion by the Department of water districts to include stream systems or independent sources of supply the rights of use of which have been adjudicated; for the election of watermasters by holders of adjudicated rights; and for the powers and duties of the watermasters and the responsibilities of the water users.¹⁰⁶

Kansas

The water law of Kansas is particularly noteworthy in the fundamental change that has occurred recently in the relative importance of the appropriation and common-law doctrines. In 1944 the Kansas Supreme Court rendered a decision strongly reaffirming the common-law right of the landowner to running water and ground water on his land, as against an attempted appropriation. In 1945 the legislature passed an act intended to establish the effectiveness of the appropriation doctrine, as against claimants under the common law. In 1949 this legislation was approved unqualifiedly by the supreme court.

The first legislation authorizing the appropriation of water, enacted in 1886, provided for the posting and filing of notices of appropriation.¹⁰⁷ In 1917 the legislature authorized appropriations of surface or ground waters initiated by application to the Kansas Water Commission, the duties of which were transferred in 1927 to the Division of Water Resources of the State Board of Agriculture.¹⁰⁸ The two methods of making appropriations were in effect until 1941, when the original 1886 provisions were repealed.¹⁰⁹ In 1945 the legislature declared that no appropriative right could be acquired without first obtaining the approval of the Chief Engineer of the Division of Water Resources, except in the case of persons using water for domestic purposes as defined in the statute.¹¹⁰ Apparently, the exclusiveness of the statutory procedure is established for uses of water other than those so excepted.¹¹¹

Prior to the enactment in 1886 of the earliest appropriation statute, the Kansas Supreme Court had stated, first, that the riparian right extended to the entire flow of the stream "without diminution or altera-

¹⁰⁶ Idaho Code, §§ 42-601 to 42-802.

¹⁰⁷ Kans. Laws 1886, ch. 115.

¹⁰⁸ Kans. Laws 1917, ch. 172; Gen. Stats. Ann. 1935, §§ 24-901 to 24-905.

¹⁰⁹ Kans. Laws 1941, ch. 261.

¹¹⁰ Kans. Laws 1945, ch. 390; Gen. Stats. Supp. 1947, § 82a-705. "Domestic uses" means the use of water for household purposes, the watering of livestock, poultry, farm and domestic animals and the irrigation of gardens and lawns."

¹¹¹ The Kansas Supreme Court, in *Clark v. Allaman*, 71 Kans. 206, 240, 80 Pac. 571 (1905), stated that prior to 1886 there had been no recognition in Kansas of rights to the use of water by priority of possession, and that local customs to that effect had been invalid.

tion,"¹¹² and later that the riparian owner might lawfully use water for his own domestic and stock-watering purposes.¹¹³ In 1905, in *Clark v. Allaman*,¹¹⁴ the court extensively reviewed the subject of riparian and appropriative rights; held that the common-law doctrine of riparian water rights was fundamental in the jurisprudence of the State; that the common-law doctrine included the reasonable use of water for irrigation purposes after the primary uses for domestic purposes had been subserved; and that the common-law doctrine had been modified by statutes authorizing the appropriation of water which, however, could not lead to the destruction of previously vested common-law rights. The two doctrines, it was believed, could exist in the same State. There was no departure from these principles until the supreme court rendered its decision in 1949 construing the legislation of 1945, although the cases involving riparian rights that reached the supreme court during that period were not numerous.¹¹⁵ It was held in 1936 that the appropriation statute of 1886 did not confer upon a riparian owner any priority as against other riparian owners whose titles antedated the statute.¹¹⁶ In 1944, in a case involving ground waters, the common-law doctrine was reaffirmed with respect to both surface and ground waters;¹¹⁷ and in 1949 theories concerning the relative rights of upper and lower riparian owners to the use of water were expounded.¹¹⁸

Various legislative acts relating to the use of ground waters were passed and some of them amended from time to time,¹¹⁹ and a few decisions of the supreme court prior to 1944 indicated an early adoption of the rule of absolute ownership of percolating waters and a later tendency toward modification of the strict rule;¹²⁰ but the status of the law of ground waters seemed uncertain. In 1944 the supreme court

¹¹² *Shamleffer v. Council Grove Peerless Mill Co.*, 18 Kans. 24, 33 (1877).

¹¹³ *Emporia v. Soden*, 25 Kans. 588, 604, 606, 37 Am. Rep. 265 (1881). In *Campbell v. Grimes*, 62 Kans. 503, 505, 64 Pac. 62 (1901), the upper riparian owner was limited to such water as was needed "for his own beneficial uses."

¹¹⁴ *Clark v. Allaman*, 71 Kans. 206, 80 Pac. 571 (1905).

¹¹⁵ For statements by the court during the earlier part of the period, see *Wallace v. Winfield*, 96 Kans. 35, 40, 149 Pac. 693 (1915); *Atchison, Topeka & Santa Fe Ry. v. Shriver*, 101 Kans. 257, 258, 166 Pac. 519 (1917).

¹¹⁶ *Frizell v. Bindley*, 144 Kans. 84, 92, 58 Pac. (2d) 95 (1936). See also *Smith v. Miller*, 147 Kans. 40, 42, 75 Pac. (2d) 273 (1938).

¹¹⁷ *State ex rel Peterson v. State Board of Agriculture*, 158 Kans. 603, 605, 610, 149 Pac. (2d) 604 (1944).

¹¹⁸ *Heise v. Schulz*, 167 Kans. 34, 41-44, 204 Pac. (2d) 706 (1949).

¹¹⁹ See "Selected Problems in the Law of Water Rights in the West," U. S. Dept. Agr. Misc. Pub. No. 418, pp. 219-223.

¹²⁰ *Emporia v. Soden*, 25 Kans. 588, 608-609, 37 Am. Rep. 265 (1881); *Jobling v. Tuttle*, 75 Kans. 351, 360, 89 Pac. 699 (1907); *Gilmore v. Royal Salt Co.*, 84 Kans. 729, 731, 115 Pac. 541 (1911).

rendered a decision in an original action in quo warranto to inquire into the authority of the Division of Water Resources to regulate the taking of ground waters for beneficial uses; the State agency being involved because of its hearing of protests against the application of a city to appropriate ground water.¹²¹ The court held that water rights in Kansas were governed by the common law except as modified by statute; that ground waters were a part of the real property in which they occurred, and that both surface and ground waters were owned by the owner of the soil; and that no statute authorized the State administrative agency to regulate or otherwise to interfere with the use and consumption of ground waters or to conduct a hearing upon the application of anyone who desired to use them.

Later in the same year (1944) a committee appointed by the Governor recommended legislation that would modify the common law sufficiently to effectuate rights of prior appropriation, and at the ensuing session in 1945 the legislature took action accordingly.¹²² The act provided that "All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed." It also provided that subject to vested rights, all waters within the State might be appropriated for beneficial use, and specifically stated that surface or ground waters might be so appropriated. Nothing in the act was to impair the vested right of any person except for nonuse. Vested rights were defined as rights to continue the use of water actually applied to any beneficial use at the time of passage of the act or within three years prior thereto, as well as rights to begin use with works then under construction provided the works were completed and the water applied to beneficial use within a reasonable time thereafter. Common-law claimants were declared to be entitled to compensation in an action at law for proved damages for property taken by an appropriator in connection with an appropriation. Appropriators under the statute were afforded injunctive relief against subsequent diversions by common-law claimants "without being required to first condemn possible private rights," as well as against uses of water by subsequent appropriators if necessary to protect their prior rights.

The supreme court upheld the validity of the foregoing legislation in an action in the nature of quo warranto for determination as to its constitutionality, upon questions submitted for determination and facts stipulated by the parties.¹²³ The court frankly took a different approach

¹²¹ *State ex rel. Peterson v. State Board of Agriculture*, 158 Kans. 603, 149 Pac. (2d) 604 (1944). See also *Arensman v. Kück*, 160 Kans. 783, 791, 165 Pac. (2d) 441 (1946).

¹²² Kans. Laws 1945, ch. 390; Gen. Stats. Supp. 1947, ch. 82a, art. 7.

¹²³ *State ex rel. Emery v. Knapp*, 167 Kans. 546, 555-556, 207 Pac. (2d) 440 (1949).

from that taken in the solution of water-right questions in previous decisions. Theretofore the court had approached these questions largely on the basis of individual interest alone; but under the declaration that all water within the State was dedicated to the use of the people, subject to State control and regulation, "we now approach them upon the basis of the interest of the people of the state without losing sight of the beneficial use the individual is making or has the right to make of the water. Unused or unusable rights predicated alone upon theory become of little if any importance." Broad statements in earlier opinions—such as statements to the effect that the riparian owner is entitled to the flow of the stream without diminution or alteration—must now be disregarded or modified to harmonize with this declaration. All of the questions submitted to the court, asking if the legislation was unconstitutional upon specific grounds, were answered in the negative.

The 1945 law vests control of the water resources of the State in accordance with rights of prior appropriation in the Chief Engineer of the Division of Water Resources. Appropriations for different purposes that conflict take precedence in the following order: "Domestic, municipal, irrigation, industrial, recreational, and water power uses." The right terminates when the holder ceases for three years or more to use it for the purposes authorized in his permit or certificate. Provision is made for determinations of rights by the Chief Engineer, subject to appeal to the district court, and for the distribution of water according to decrees of adjudication.

Montana

The statutes provide that "the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply" may be appropriated. Also, "an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same."¹²⁴

Montana has no centralized State administrative procedure for the acquisition of appropriative water rights. A statutory procedure governs the appropriation of water from adjudicated streams, and a separate procedure provided by statute applies to unadjudicated streams but apparently is optional with the intending appropriator; but the State Engineer has no control in any case. The procedures are as follows:

With respect to *unadjudicated* waters, the statute provides that the appropriator shall post a notice at the point of intended diversion, file a notice of appropriation in the county records and begin construction within prescribed periods of time, and prosecute the appropriation

¹²⁴ Mont. Rev. Codes 1947, Ann., § 89-801.

diligently to completion. It is further provided that failure to comply with the statutory requirements deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, and that by compliance, the right of use relates back to the date of posting notice, the first step in the procedure.¹²⁵ This method of appropriation was first prescribed by statute in 1885.¹²⁶ Prior to that enactment, no notice or record of appropriation was required; "A person acquired a right to the use of water by digging a ditch, tapping a stream, and turning water into it, and applying the water so diverted to a beneficial use. This constituted a valid appropriation of water."¹²⁷ In such cases, if the appropriator exercised reasonable diligence in completing his appropriation, the priority of his right related back to the date of commencement of the work.¹²⁸ The Montana Supreme Court has held that the legislature, by the law of 1885, did not abolish the preexisting method of appropriating water by diversion and use; it provided an additional and alternative method of making an appropriation which controlled exclusively the doctrine of relation with respect to appropriations thereafter made.¹²⁹ That is, only by compliance with the statute could the benefits of the doctrine of relation be claimed with respect to an appropriation made after the enactment.¹³⁰ But, in the view of the supreme court, the legislature did not intend that one who failed to comply with the statute, but who nevertheless actually diverted water, could be deprived of it by another who complied with the statute at a time subsequent to the former's completed appropriation.¹³¹ It seems to be settled that with regard to unadjudicated waters, a valid appropriation of water can be made even where there is no compliance with the statute, where water actually is diverted and

¹²⁵ Mont. Rev. Codes 1947, Ann., §§ 89-810 to 89-812.

¹²⁶ Mont. Laws 1885, p. 130 (March 12, 1885).

¹²⁷ *Murray v. Tingley*, 20 Mont. 260, 268, 50 Pac. 723 (1897).

¹²⁸ *Wollman v. Garringer*, 1 Mont. 535, 544 (1872); *Murray v. Tingley*, 20 Mont. 260, 268, 50 Pac. 723 (1897); *Wright v. Cruse*, 37 Mont. 177, 181-183, 95 Pac. 370 (1908); *Bailey v. Tintinger*, 45 Mont. 154, 171, 122 Pac. 575 (1912); *Maynard v. Watkins*, 55 Mont. 54, 56, 173 Pac. 551 (1918).

¹²⁹ *Murray v. Tingley*, 20 Mont. 260, 268-269, 50 Pac. 723 (1897); *Bailey v. Tintinger*, 45 Mont. 154, 171-172, 122 Pac. 575 (1912).

¹³⁰ *Murray v. Tingley*, 20 Mont. 260, 269, 50 Pac. 723 (1897); *Bailey v. Tintinger*, 45 Mont. 154, 168-170, 122 Pac. 575 (1912); *Maynard v. Watkins*, 55 Mont. 54, 56, 173 Pac. 551 (1918); *Allen v. Petrick*, 69 Mont. 373, 384, 222 Pac. 451 (1924). Necessity of diligence in completing a statutory appropriation: *Anaconda National Bank v. Johnson*, 75 Mont. 401, 408-410, 244 Pac. 141 (1926); *Anderson v. Spear-Morgan Livestock Co.*, 107 Mont. 18, 29, 79 Pac. (2d) 667 (1938).

¹³¹ *Murray v. Tingley*, 20 Mont. 260, 269, 50 Pac. 723 (1897).

applied to beneficial use; that "compliance is important only with regard to the doctrine of 'relation back' * * *, on due compliance."¹³³

With respect to *adjudicated* waters, the appropriator must employ an engineer to make a survey of the diversion works, and must file a petition with the county court containing a declaration that the water rights sought to be acquired shall be subject to the terms of any adjudication decree. Parties who may be affected are made defendants; and on conclusion of the trial the court may enter an interlocutory or permanent decree allowing the appropriation subject to prior adjudicated rights. Failure to comply with the statutory provisions deprives the appropriator of the right to use water as against a subsequent appropriator mentioned in or bound by a decree of the court.¹³³ The procedure under the present law, originally enacted in 1921, replaced a procedure provided for in 1907 which included posting of notice, prosecuting the work to completion with reasonable diligence, filing of application with the court to have the ditch capacity determined, examination by an engineer, and order by the court after hearing of objections if any should be filed.¹³⁴ The supreme court held that insofar as the act of 1907 was concerned, the legislature did not intend to declare that one who failed to comply with the terms of the statute, but who in the absence of any conflicting adverse right nevertheless had actually impounded, diverted, and put the water to a beneficial use, should acquire no title thereto;¹³⁵ but that the 1921 legislature unquestionably intended that an appropriation of the waters of an adjudicated stream should not be made thereafter without a substantial compliance with the requirements of the statute then enacted, and that the method prescribed therein must be held to be exclusive.¹³⁶ One who thus appropriates water from an adjudicated stream is simply a junior appropriator, with the rights and disabilities of an appropriator whose right is junior to the rights adjudicated in the original decree.¹³⁷

¹³³ *Vidal v. Kensler*, 100 Mont. 592, 594-595, 51 Pac. (2d) 235 (1935). As recently as 1949 the supreme court stated that a person may make a valid appropriation of water by actual diversion and use thereof without filing a notice of appropriation as defined in the sections of the statute relating to the appropriation of unadjudicated waters: *Clausen v. Armington*, — Mont. —, 212 Pac. (2d) 440, 447-448 (1949).

¹³⁴ Mont. Rev. Codes 1947, Ann., §§ 89-829 to 89-844; Mont. Laws 1921, ch. 228.

¹³⁵ Mont. Laws 1907, ch. 185.

¹³⁶ *Donich v. Johnson*, 77 Mont. 229, 246, 250 Pac. 963 (1926). The question as to whether the method provided by the 1907 law was intended to be exclusive had been reserved in *Anaconda National Bank v. Johnson*, 75 Mont. 401, 409, 244 Pac. 141 (1926).

¹³⁷ *Anaconda National Bank v. Johnson*, 75 Mont. 401, 411, 244 Pac. 141 (1926); *Donich v. Johnson*, 77 Mont. 229, 246, 250 Pac. 963 (1926).

¹³⁸ *Quigley v. McIntosh*, 88 Mont. 103, 109, 290 Pac. 266 (1930).

The riparian doctrine has been repudiated in Montana. For many years there was doubt as to the proper classification of the State with respect to this feature of water law, occasioned by observations concerning the riparian doctrine made from time to time in decisions of the supreme court. Those comments, however, were characterized as purely dicta by that court in a decision rendered in 1921 in a case in which, for the first time in the judicial history of Montana, there was squarely presented for consideration a claim of riparian right as against a claim of appropriative right.¹³⁸ The court, feeling at liberty to treat the matter as one of first impression, concluded that the common-law doctrine of riparian rights had never prevailed in the jurisdiction since the enactment of the Bannack Statutes in 1865.¹³⁹ The repudiation of the riparian doctrine is complete; it applies to the use of water for "the so-called natural purposes: domestic use and watering livestock," as well as to irrigation.¹⁴⁰

The distinction commonly made between ground waters flowing in defined subterranean channels and percolating waters is observed in Montana. It is held that subsurface water flowing in defined channels reasonably ascertainable is subject to the same rules of law as water flowing in surface streams, which in this jurisdiction is the appropriation doctrine.¹⁴¹ The subsurface supply of a stream, whether coming from tributary swamps or flowing in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules.¹⁴² In the very few decisions in which rights of use of percolating waters were discussed, the rule of ownership by the owner of the overlying land, subject to the limitation that the use be made without malice or negligence, has been acknowledged or conceded.¹⁴³ The supreme court stated, in a recent decision involving water deposited in "pot holes" which soon thereafter disappeared entirely in the earth below: "When that happens, it loses its character as flow water and is no longer subject to the regulations of law which govern while it is capable of direction and control. Its identity and its ownership then become the same as that of the soil of

¹³⁸ *Mettler v. Ames Realty Co.*, 61 Mont. 152, 165, 166, 170-171, 201 Pac. 702 (1921).

¹³⁹ The First Territorial Legislative Assembly passed an act, approved January 12, 1865, authorizing owners or holders of possessory rights in land on or in the neighborhood of any stream to use the water for irrigation and to have rights of way for ditches over intervening property: Bannack Statutes, p. 367.

¹⁴⁰ *Wallace v. Goldberg*, 72 Mont. 234, 244, 231 Pac. 56 (1925).

¹⁴¹ *Hilger v. Sieben*, 38 Mont. 93, 95, 98 Pac. 881 (1909); *Ryan v. Quinlan*, 45 Mont. 521, 533-534, 124 Pac. 512 (1912).

¹⁴² *Smith v. Duff*, 39 Mont. 382, 390, 102 Pac. 984 (1909).

¹⁴³ *Ryan v. Quinlan*, 45 Mont. 521, 532-533, 124 Pac. 512 (1912); *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 260, 17 Pac. (2d) 1074 (1933).

which it forms a part."¹⁴⁴ Seepage water forming a natural accretion to a stream is a part of the stream; an appropriator on the stream has the right to all such tributary flow even as against the owner of the land on which it rises.¹⁴⁵

Appropriative rights in Montana are not subject to statutory forfeiture, that is, to loss for nonuse occurring over a prescribed period of years. The statutes provide that upon abandonment and cessation of use of water by the appropriator or his successor in interest, the right ceases; but that questions of abandonment shall be questions of fact, to be determined as other questions of fact.¹⁴⁶ Issues of abandonment of water rights have been raised in a number of cases decided by the supreme court.¹⁴⁷

Determinations of water rights are made solely by the courts, but a procedure is provided by statute under which the State Water Conservation Board may initiate adjudications of rights of use of the waters of streams by directing the State Engineer to bring actions. The State Engineer or any party may apply to the court for the appointment of a referee to whom the court may submit any and all issues of fact. The making of hydrographic surveys by the State Engineer, to be introduced in evidence, is provided for.¹⁴⁸ Commissioners may be appointed by the courts, upon petition of parties affected, for the purpose of distributing water to the holders of decreed water rights.¹⁴⁹

Nebraska

The constitution of Nebraska dedicates the use of the water of every natural stream to the people of the State, and provides that the right to divert unappropriated waters thereof for beneficial use shall never be denied except when such denial is demanded by the public interest.¹⁵⁰ It is also declared that the necessity of water for domestic and irrigation purposes is a natural want;¹⁵¹ that priority of appropriation shall give the better right as between users of water for the same purpose, but that in the event of insufficiency of supply domestic purposes have first preference and agriculture has preference over manufacturing; pro-

¹⁴⁴ *Woodward v. Perkins*, 116 Mont. 46, 52, 147 Pac. (2d) 1016 (1944), citing *Ryan v. Quinlan*, 45 Mont. 521, 532, *supra*, footnote 143.

¹⁴⁵ *Beaverhead Canal Co. v. Dillon Electric Light & Power Co.*, 34 Mont. 135, 140-141, 85 Pac. 880 (1906); *Woodward v. Perkins*, 116 Mont. 46, 53-54, 147 Pac. (2d) 1016 (1944).

¹⁴⁶ Mont. Rev. Codes 1947, Ann., § 89-802.

¹⁴⁷ The principles of abandonment are well stated in *Thomas v. Ball*, 66 Mont. 161, 166-168, 213 Pac. 597 (1923).

¹⁴⁸ Mont. Rev. Codes 1947, Ann., §§ 89-847 to 89-855.

¹⁴⁹ Mont. Rev. Codes 1947, Ann., §§ 89-1001 to 89-1024.

¹⁵⁰ Nebr. Const., art. XV, §§ 5 and 6.

¹⁵¹ Nebr. Const., art. XV, § 4.

vided, that no inferior right may be acquired by a superior right without just compensation.¹⁵² The constitution provides further that the use of water for power purposes shall never be alienated, but may be leased or otherwise developed as prescribed by law.¹⁵³ The statute governing the appropriation of water requires the holder of an approved application for water power, before using the water, to lease from the State the use of all water so appropriated, such lease to run for not more than 50 years. Upon expiration of the lease the value of improvements is to be appraised by the State Department of Roads and Irrigation, subject to appeal to court, and the value as finally determined is to be paid to the lessee owning such improvements by any subsequent lessee.¹⁵⁴

Jurisdiction over all matters pertaining to water rights for irrigation, power, or other useful purposes is vested in the Department of Roads and Irrigation.¹⁵⁵ The statute provides an exclusive procedure for appropriating water, the first step being the making of an application to the Department for a permit, the Department to issue a certificate when the prerequisites for a completed appropriation have been complied with.¹⁵⁶ When the use of appropriated water ceases, the right ceases. It is the duty of the Department, if it finds that an appropriation has not been used beneficially for more than three years, to hold a hearing to determine whether the right shall not be declared forfeited,

¹⁵² Nebr. Const., art. XV, § 6. The preference in favor of domestic purposes was placed in the constitution in 1920. A similar statutory preference (Rev. Stats. 1943, § 46-204), enacted much earlier, did not provide for compensation; but the Nebraska Supreme Court held that vested rights of completed appropriations could not be destroyed without compensation: *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation Dist.*, 97 Nebr. 139, 146, 149 N. W. 363 (1914). In a case decided in 1942, a public power and irrigation district contended that it had the right to take water in excess of its appropriation as against a prior appropriation for power purposes, as long as the water could be put to beneficial use in the irrigation of farm lands: *Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist.*, 142 Nebr. 141, 151-152, 156, 5 N. W. (2d) 240 (1942). The supreme court stated: "It was clearly the intention of the framers of our Constitution to provide that water previously appropriated for power purposes may be taken and appropriated for irrigation use upon the payment of just compensation therefor. It never was the intention of the framers of the Constitution to provide that water appropriated for power purposes could thereafter arbitrarily be appropriated for irrigation without the payment of compensation. * * * We necessarily come to the conclusion that a senior appropriative right for power purposes may not be destroyed by a superior user except by the employment of formal condemnation proceedings and the tender of compensation prior to interference."

¹⁵³ Nebr. Const., art. XV, § 7.

¹⁵⁴ Nebr. Rev. Stats. 1943, § 46-236.

¹⁵⁵ Nebr. Rev. Stats. 1943, § 46-209.

¹⁵⁶ Nebr. Rev. Stats. 1943, §§ 46-233 to 46-243. Exclusiveness of present statutory procedure: *Enterprise Irr. Dist. v. Tri-State Land Co.*, 92 Nebr. 121, 147-148, 138 N. W. 171 (1912); *Kersenbrock v. Boyss*, 95 Nebr. 407, 409-411, 145 N. W. 837 (1914).

appeal lying to the supreme court from the Department's decision.¹⁵⁷

The riparian doctrine is a part of the water law of Nebraska, but its practical importance in relation to that of the appropriation doctrine has been substantially reduced as the result of decisions of the supreme court. The existence of the riparian doctrine, as modified by the irrigation statutes, was recognized in several early decisions.¹⁵⁸ Two decisions rendered in 1903, on the same day, thoroughly considered the law of riparian rights and held it applicable to every part of the State except as altered or supplemented by legislation.¹⁵⁹ Two other decisions, rendered on rehearing in 1905 on the same day, had the effect of putting the riparian owner who does not make actual use of the water before the time of vesting of appropriative rights in a position where he has no recourse other than to recover such damages for the impairment of his riparian rights as he can actually prove, thus eliminating much of the common-law advantage of location of the riparian land with respect to appropriative rights on the same stream.¹⁶⁰

The Nebraska Supreme Court in 1933 approved what it termed the American rule of reasonable and beneficial use of percolating ground waters upon the overlying land, with a reasonable proportion to each owner of overlying land if the supply is insufficient for all.¹⁶¹ Such approval was given in a decision in which it was not necessary, in sustaining the trial court's judgment, to adopt the rule in question. However, the supreme court stated subsequently, referring to that case: "We are committed to the rule: "The owner of land is entitled to appro-

¹⁵⁷ Nebr. Rev. Stats. 1943, § 46-229, amended Sess. Laws 1947, ch. 172. Prior to the 1947 amendment, the section had provided that an appeal might be taken to the district court of the county in which the point of diversion was situated. Based upon that statutory authorization, the supreme court held in 1930 that the taking of appeal to the district court instead of directly to the supreme court was proper: *State v. Oliver Bros.*, 119 Nebr. 302, 303, 228 N. W. 864 (1930). The provision is not unconstitutional: *Kersenbrock v. Boyes*, 95 Nebr. 407, 409-411, 145 N. W. 837 (1914); *Dawson County Irr. Co. v. McMullen*, 120 Nebr. 245, 247, 250, 231 N. W. 840 (1930).

¹⁵⁸ *Eidemiller Ice Co. v. Guthrie*, 42 Nebr. 238, 253, 60 N. W. 717 (1894); *Clark v. Cambridge & Arapahoe Irr. & Improvement Co.*, 45 Nebr. 798, 806, 64 N. W. 239 (1895); *Slattery v. Harley*, 58 Nebr. 575, 577, 79 N. W. 151 (1899).

¹⁵⁹ *Crawford Co. v. Hathaway*, 67 Nebr. 325, 339, 342, 93 N. W. 781 (1903); *Meng v. Coffee*, 67 Nebr. 500, 511-512, 93 N. W. 713 (1903).

¹⁶⁰ *McCook Irr. & Water Power Co. v. Crews*, 70 Nebr. 109, 121-127, 96 N. W. 996 (1903), 102 N. W. 249 (1905); *Cline v. Stock*, 71 Nebr. 70, 80-83, 98 N. W. 454 (1904), 102 N. W. 265 (1905). For later decisions in which riparian rights were considered, see: *Southern Nebraska Power Co. v. Taylor*, 109 Nebr. 683, 686-687, 192 N. W. 317 (1923); *Slattery v. Dost*, 121 Nebr. 418, 420, 237 N. W. 301 (1931); *Fairbury v. Fairbury Mill & Elevator Co.* 123 Nebr. 588, 592, 243 N. W. 774 (1932); *Osterman v. Central Nebraska Public Power & Irr. Dist.*, 131 Nebr. 356, 362-366, 268 N. W. 334 (1936); *McGinley v. Platte Valley Public Power & Irr. Dist.*, 132 Nebr. 292, 296-298, 271 N. W. 864 (1937).

¹⁶¹ *Olson v. Wahoo*, 124 Nebr. 802, 811, 248 N. W. 304 (1933).

private 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.' ”¹⁶² Even more recently, in affirming judgment for damages against a public power district, the supreme court rejected the district's contention that the common law was in force in Nebraska as to subsurface percolating waters and that it had a lawful right to dig on its own land without liability for resulting drainage of subsurface waters from adjacent lands, and reaffirmed the principle that the American rule of reasonable use, in conflict with the common law, had been adopted in Nebraska and was the law in that State.¹⁶³

Determinations of water rights are made by the Department,¹⁶⁴ from which appeal may be taken to the supreme court.¹⁶⁵ If not appealed from, these determinations constitute final adjudications and cannot be collaterally attacked.¹⁶⁶ This statutory procedure of adjudication of water rights was taken from the procedure established in Wyoming. The supreme court held in 1943 that the legislative grant of jurisdiction to the Department did not include the power to adjudicate vested rights or to make an adjudication with respect to the apportionment of water between users after diversion into common private ditches, that being a function belonging to the courts.¹⁶⁷ Distribution of water from streams to the holders of water rights is made, under the direction of the Department, by superintendents of two statutory water divisions and

¹⁶² *Osterman v. Central Nebraska Public Power & Irr. Dist.*, 131 Nebr. 356, 365, 268 N. W. 334 (1936), citing *Olson v. Wahoo*, *supra* (footnote 161).

¹⁶³ *Luchsinger v. Loup River Public Power Dist.*, 140 Nebr. 179, 181-183, 299 N. W. 549 (1941). The supreme court stated that subirrigation in the natural condition of land used for farming was a valuable property right attached to the land itself, citing the *Osterman* case (footnote 162) which in turn cited *Olson v. Wahoo* (footnote 161). The court went on to state that a rule of law in conflict with the common law of England had been adopted in Nebraska in language quoted from *Olson v. Wahoo* stating the principles of the American rule. "It is argued, however, that this is dictum in the opinion in which it appears and not binding on defendant in the present controversy. Whatever may be thought of its applicability to the case in which the rule was adopted, it answers for itself as a sound proposition of law essential to the protection of property rights of private individuals and is consistent with the Constitution and with morality and justice. * * * The American rule is not only law in Nebraska, but it applies to property damaged for public use as well as to property taken for public use. * * *

¹⁶⁴ Nebr. Rev. Stats. 1943, §§ 46-226, 46-230 to 46-232.

¹⁶⁵ Nebr. Rev. Stats. 1943, § 46-210.

¹⁶⁶ *Farmers' Irr. Dist. v. Frank*, 72 Nebr. 136, 152, 100 N. W. 286 (1904); *Enterprise Irr. Dist. v. Tri-State Land Co.*, 92 Nebr. 121, 135, 149-150, 138 N. W. 171 (1912), writ of error dismissed, *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U. S. 157 (1917); *In re Claim Affidavit of Parsons*, 148 Nebr. 239, 243, 27 N. W. (2d) 190 (1947).

¹⁶⁷ *Plunkett v. Parsons*, 143 Nebr. 535, 540, 10 N. W. (2d) 469 (1943).

by commissioners of water districts created by the Department within the water divisions.¹⁷⁰

Nevada

The water of all sources of water supply, whether above or below the surface of the ground, is declared by statute to belong to the public and, subject to existing rights, to be available for appropriation for beneficial use.¹⁷⁰ An exclusive procedure for the appropriation of water is provided, the first step being an application to the State Engineer for a permit; the applicant being entitled to the issuance of a certificate upon making satisfactory proof that the appropriation has been completed in accordance with the requirements of the statute.¹⁷¹ Appropriations of water for watering range livestock are subject to special procedure, which includes applications to the State Engineer, and which protects subsisting rights to water range livestock at particular places.¹⁷¹ In case of failure to make beneficial use of water during five successive years, the right is forfeited and the water so formerly appropriated may be appropriated again by any qualified person.¹⁷²

The Nevada Supreme Court had for decision in 1949¹⁷³ the question as to whether a water right could be acquired by prescription against the owner of a right vested by diversion and beneficial use prior to 1903,¹⁷⁴ the adverse use beginning in 1933. The court cited an early decision¹⁷⁵ as authority for the settled principle that prior to the enactment of the water law, a water right already in existence might be acquired by another by adverse use, and stated that it was not then prepared to overrule that decision nor to read into the water law something not found there even by implication. However, this conclusion was reached reluctantly; the court believed "that adverse use is wholly unwarranted, unnecessary and clearly dangerous to the appropriation and distribution of public property" and expressly invited the attention

¹⁷⁰ Nebr. Rev. Stats. 1943, §§ 46-215 to 46-225.

¹⁷¹ Nev. Comp. Laws 1929, §§ 7890 and 7891.

¹⁷² Nev. Comp. Laws 1929, §§ 7944 to 7962.

¹⁷³ Nev. Comp. Laws 1929, §§ 7979 to 7985.

¹⁷⁴ Nev. Comp. Laws 1949 Supp., § 7897 (amendment by Sess. Laws 1949, ch. 83). The legislature had the right to provide for forfeiture of appropriative rights acquired after the date of enactment; but the only way in which preexisting rights could be lost was by intentional abandonment, for forfeiture would impair such rights contrary to another section of the statute providing that nothing contained therein should impair any vested right to the use of water: *In re Mouse Spring and Its Tributaries*, 60 Nev. 280, 289-291, 108 Pac. (2d) 311 (1940).

¹⁷⁵ *Application of Filippini*, — Nev. —, 202 Pac. (2d) 535, 539-541 (1949).

¹⁷⁶ The office of State Engineer was created by Nev. Sess. Laws 1903, p. 18; and the procedure of initiating appropriations of water by making application to the State Engineer was provided by Sess. Laws 1905, p. 66.

¹⁷⁷ *Authors v. Bryant*, 22 Nev. 242, 38 Pac. 439 (1894).

of the legislature to the problem. The legislature, then in session, amended the water appropriation statute to provide that no prescriptive right to the use of any public water whether appropriated or unappropriated could be acquired by adverse use or adverse possession for any period of time whatsoever; that any such right to appropriate any water must be initiated by making application to the State Engineer for a permit and not otherwise.¹⁹⁶

The riparian doctrine, although at one time recognized in Nevada, was repudiated in 1885.¹⁹⁷ The supreme court, in so rejecting that doctrine, specifically overruled a former decision¹⁹⁸ in which land patented by the United States prior to the congressional enactment of July 26, 1866¹⁹⁹ was held to have riparian rights as against a prior appropriator. There has been no recognition of the riparian doctrine in subsequent decisions.²⁰⁰

Early decisions or expressions of opinion by the Nevada Supreme Court were to the effect that percolating waters belonged to the owner of the overlying land, except in the case of water percolating to a creek from a spring which supplied water to the creek.²⁰¹ In 1939 a comprehensive act relating to the appropriation of ground waters was passed,²⁰² which repealed and replaced earlier legislation²⁰³ and which was extensively amended in 1947 and 1949.²⁰⁴ All ground waters are declared to belong to the public and to be subject to appropriation only

¹⁹⁶ Nev. Sess. Laws 1949, ch. 83, amending Comp. Laws 1929, § 7897; Comp. Laws 1949 Supp., § 7897.

¹⁹⁷ *Jones v. Adams*, 19 Nev. 78, 84-88, 6 Pac. 442 (1885). Riparian rights were referred to, but were not the basis of decision in: *Lobdell v. Simpson*, 2 Nev. 274, 276-278 (1866); *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 543 (1869); *Covington v. Becker*, 5 Nev. 281, 282-283 (1869).

¹⁹⁸ *Vansickle v. Haines*, 7 Nev. 249, 256-257 (1872). To the same effect: *Union Mill & Min. Co. v. Ferris*, 2 Saw. 176, 24 Fed. Cas. 594 (1872).

¹⁹⁹ 14 Stat. L. 253, § 9, U. S. Rev. Stats., § 2339.

²⁰⁰ See *Reno Smelting, Mill & Reduction Works v. Stevenson*, 20 Nev. 269, 21 Pac. 317 (1889); *Twaddle v. Winters*, 29 Nev. 88, 105-107, 85 Pac. 280 (1906), 89 Pac. 289 (1907); *In re Humboldt River*, 49 Nev. 357, 361-362, 246 Pac. 692 (1926); *Steptoe Live Stock Co. v. Gully*, 53 Nev. 163, 172, 295 Pac. 772 (1931); *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 286, 108 Pac. (2d) 311 (1940).

²⁰¹ *Mosier v. Caldwell*, 7 Nev. 363, 366-367 (1872); *Strait v. Brown*, 16 Nev. 317, 321, 323 (1881). See comments and citations in *Cardelli v. Comstock Tunnel Co.*, 26 Nev. 284, 295-297, 66 Pac. 950 (1901), in which, however, the question of rights of owners of overlying lands to percolating waters was not passed upon.

²⁰² Nev. Sess. Laws 1939, ch. 178; Comp. Laws 1941 Supp., §§ 7993.10 to 7993.24.

²⁰³ Nev. Sess. Laws 1915, ch. 210; Comp. Laws 1929, §§ 7987 to 7993; amended Sess. Laws 1935, ch. 184, and Sess. Laws 1937, ch. 149.

²⁰⁴ Nev. Sess. Laws 1947, ch. 43, and Sess. Laws 1949, ch. 103; Comp. Laws 1949 Supp., §§ 7993.11 to 7993.21.

under the State laws relating to the appropriation of water; but the development of ground water for domestic purposes where the draught does not exceed two gallons per minute is exempted from regulation. Appropriations are made under the procedure provided in the general water law, the first step in which is an application to the State Engineer for a permit to make the appropriation. Certain provisions, however, relate to the time of installation of the well in relation to the dates of enactment of earlier legislation.¹⁸⁵ Failure for five successive years to make beneficial use of ground water works a forfeiture of an undetermined right and an abandonment of a determined right. Administration of the provisions of the act, which cover the acquirement and loss of rights, adjudication of rights, and withdrawal of water in time of shortage, is vested in the State Engineer.

| The State Engineer, either upon his own initiative or upon petition of one or more water users, may determine the rights to the use of the waters of a stream. His order of determination is filed in court, whereupon it has the legal effect of a complaint in a civil action. At the conclusion of the trial a decree is entered affirming or modifying the order of the State Engineer.¹⁸⁶ The administration of the statutes providing for the distribution of water and for the creation of water districts is vested in the State Engineer.¹⁸⁷ |

New Mexico

The constitution of New Mexico declares that the unappropriated water of every natural stream, perennial or torrential, belongs to the public and is subject to appropriation for beneficial use, priority of appropriation giving the better right.¹⁸⁸

The general water appropriation statute contains a provision with respect to appropriable waters similar to the constitutional provision above noted.¹⁸⁹ It provides also that flood waters may be appropriated upstream under conditions that would result in a considerable return flow above the works of other appropriators.¹⁹⁰ "Artificial surface waters" escaping from projects or constructed works are declared to be primarily private and subject to beneficial use by the owner or developer. However, when such waters pass unused beyond his control and into a natural stream, and have not been used beneficially by him for a period of four years from their first appearance, they are subject to appropriation, but the appropriator gains no right to compel the

¹⁸⁵ Nev. Sess. Laws 1947, ch. 43, § 9; Comp. Laws 1949 Supp., § 7993.18.

¹⁸⁶ Nev. Comp. Laws 1929, §§ 7905 to 7923.

¹⁸⁷ Nev. Comp. Laws 1929, §§ 7939 to 7942.

¹⁸⁸ N. Mex. Const., art XVI, § 2.

¹⁸⁹ N. Mex. Stats. 1941, Ann., § 77-101.

¹⁹⁰ N. Mex. Stats. 1941, Ann., § 77-528.

owner or developer to continue the water supply otherwise than by contract, grant, dedication, or condemnation.¹⁹¹ An intending appropriator must make application to the State Engineer for a permit; upon completion of works the State Engineer issues to the permittee a certificate of construction, and upon application of the water to beneficial use, a license to appropriate the water.¹⁹² Apparently this is the exclusive procedure for appropriating waters to which the statute applies.¹⁹³ The water right is forfeited if the holder fails to use the water beneficially for a period of four years, except in the case of water for storage reservoirs; but the present statute contains a proviso to the effect that forfeiture shall not necessarily occur if circumstances beyond the control of the holder have caused nonuse, such that the water could not be placed to beneficial use by his diligent efforts.¹⁹⁴ Stockmen or stock owners who construct water tanks or ponds having a capacity of 10 acre-feet or less, for watering stock, are exempted from the requirements of the water appropriation statute.¹⁹⁵ An early statute, still extant, accords certain preference rights to the use of waters to unincorporated communities in which the population exceeds 3,000.¹⁹⁶

The riparian doctrine has been consistently rejected in New Mexico. The Territorial supreme court held that the common law as to rights

¹⁹¹ N. Mex. Stats. 1941, Ann., § 77-525.

¹⁹² N. Mex. Stats. 1941, Ann., §§ 77-501 to 77-521.

¹⁹³ See *Farmers' Development Co. v. Rayado Land & Irr. Co.*, 28 N. Mex. 357, 368, 213 Pac. 202 (1923).

¹⁹⁴ N. Mex. Stats. 1941, Ann., § 77-526. The proviso was enacted in 1941: N. Mex. Laws 1941, ch. 126. Prior to the enactment of this proviso, the section had been construed by the New Mexico Supreme Court in several cases. The court held in 1911 that this legislation was declaratory of previous judicial law, except that previously no specific time limit had been set: *Hagerman Irr. Co. v. McMurry*, 16 N. Mex. 172, 179-180, 113 Pac. 823 (1911). The court held later that this section refers to quantity of water and not to period of use; that is, the appropriator under the present statute may hold his right by using, in good faith, at any time during the year, the quantity of water so appropriated: *Harkey v. Smith*, 31 N. Mex. 521, 528-529, 247 Pac. 550 (1926). In 1937 it was stated that 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: *New Mexico Products Co. v. New Mexico Power Co.*, 42 N. Mex. 311, 321, 77 Pac. (2d) 634 (1937). In 1950 the court held that a forfeiture did not take place where, throughout the periods of nonuse, irrigation was impractical or impossible because of droughts: *Chavez v. Gutierrez*, 54 N. Mex. 76, 213 Pac. (2d) 597, 600 (1950). Referring to § 77-526 of the 1941 Compilation, which contained the proviso above noted, the court stated: "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."

¹⁹⁵ N. Mex. Stats. 1941, Ann., § 77-803. Applied in: *First State Bank of Alamogordo v. McNew*, 33 N. Mex. 414, 427, 269 Pac. 56 (1928).

¹⁹⁶ N. Mex. Laws 1889, ch. 70; Stats. 1941, Ann., § 14-4501.

of riparian owners was not in force in that jurisdiction;¹⁹⁷ that the law of prior appropriation had existed under the Republic of Mexico and had been the settled law of the Territory by legislation, custom, and judicial decision;¹⁹⁸ and that the appropriation doctrine had superseded the riparian doctrine as a matter of necessity arising from the climatic and agricultural conditions of the region.¹⁹⁹ The State supreme court has held to the same effect.²⁰⁰

New Mexico, while not the first State to enact ground-water legislation, has pioneered in this field in that its ground-water administrative statute, after having been declared unconstitutional and subsequently reenacted in corrected form, was the first of the Western State ground-water statutes to be put into active operation and has set the pattern for much of the subsequent legislation in that field in the West. The first New Mexico statute, enacted in 1927,²⁰¹ was declared invalid in *Yeo v. Tweedy*²⁰² because it violated a constitutional prohibition against legislation by mere reference to title of preexisting legislation. However, the supreme court held in that case that the 1927 statute, while objectionable in form, was declaratory of existing law, was not subversive of vested rights of owners of lands overlying the waters of an artesian basin the boundaries of which had been ascertained, and was fundamentally sound. At the ensuing session of the legislature the present law was enacted; and it has been amended or supplemented subsequently in various particulars.²⁰³ This law provides that the waters of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, belong to the public and are subject to appropriation. Intending appropriators for *irrigation or industrial uses* of water must first make application to the State Engineer for permits. Claimants of vested ground-water rights may file declarations of their claims. Water rights not exercised for four years are forfeited. In certain instances artesian conservancy districts and the State Engineer have concurrent authority in regulating the installation and use of artesian wells.²⁰⁴

¹⁹⁷ *Trambley v. Luteran*, 6 N. Mex. 15, 25, 27 Pac. 312 (1891).

¹⁹⁸ *United States v. Rio Grande Dam & Irr. Co.*, 9 N. Mex. 292, 306, 51 Pac. 674 (1898).

¹⁹⁹ *Albuquerque Land & Irr. Co. v. Gutierrez*, 10 N. Mex. 177, 236-237, 61 Pac. 357 (1900); *Hagerman Irr. Co. v. McMurry*, 16 N. Mex. 172, 181-182, 113 Pac. 823 (1911).

²⁰⁰ *Snow v. Abalos*, 18 N. Mex. 681, 693, 140 Pac. 1044 (1914); *Carlsbad Irr. Dist. v. Ford*, 46 N. Mex. 335, 341, 128 Pac. (2d) 1047 (1942).

²⁰¹ N. Mex. Laws 1927, ch. 182.

²⁰² *Yeo v. Tweedy*, 34 N. Mex. 611, 286 Pac. 970 (1930).

²⁰³ N. Mex. Laws 1931, ch. 131; Stats. 1941, Ann., §§ 77-1101 to 77-1111; Laws 1943, ch. 70; Laws 1947, ch. 21; Laws 1949, ch. 178.

²⁰⁴ N. Mex. Stats. 1941, Ann., §§ 77-1201 to 77-1212. See *Pecos Valley Artesian Conservancy Dist. v. Peters*, 50 N. Mex. 165, 183, 173 Pac. (2d) 490 (1945, 1946).

The constitutionality of the ground-water law, which for nearly two decades has been taken for granted, now is under attack in a group of cases on appeal to the Supreme Court of New Mexico.²⁰⁵ The trial court held in these cases that both the artesian waters and the shallow ground waters in litigation were public waters, a valid right to the use of which could be obtained after the effective date of the 1931 law only by compliance with the provisions of that law. It was further held that the law of 1931 did not infringe either the State constitution or the Federal constitution, but was a valid exercise of the police power of the State in the regulation of the use of its public waters; and that the decision in *Yeo v. Tweedy* had become a rule of property and should not be disturbed or reconsidered. The appeal was argued before the supreme court in August 1950. Counsel for the defendants contended in the argument, according to a newspaper account,²⁰⁶ that there was no basis in law or custom for the decision in *Yeo v. Tweedy*, which resulted in enactment of the 1931 law, whereas counsel for the State contended that that decision had become a rule of property in the State and that upsetting it would involve millions of dollars in damages.

Adjudications of water rights are made exclusively in the courts. Upon completion of the hydrographic survey of any stream system by the State Engineer, the Attorney General is authorized to initiate a suit on behalf of the State to determine all water rights concerned, unless such suit has been brought by private parties. In any suit to determine water rights all claimants are to be made parties, and the court is required by statute to direct the State Engineer to furnish a complete hydrographic survey.²⁰⁷ The State Engineer has supervision over the apportionment of waters, may create water districts, and may appoint watermasters upon application of water users within districts.²⁰⁸ The statute provides that such supervision shall extend to the apportionment of water according to licenses issued by the State Engineer and adjudications of the courts.²⁰⁹ The old established "community acequias", which base their rights upon Spanish and Mexican laws and customs and some of which antedated the acquisition of the territory by the United States, are accorded certain preferences in respect to public regulation.²¹⁰

²⁰⁵ *State ex rel. Bliss, State Engineer v. Doritz et al.*, in the District Court of Chavez County, New Mexico, Nos. 13791, 13883, and 14928.

²⁰⁶ Albuquerque Journal, Albuquerque, N. Mex., August 29, 1950.

²⁰⁷ N. Mex. Stats. 1941, Ann., §§ 77-402, 77-404 to 77-410.

²⁰⁸ N. Mex. Stats. 1941, Ann., §§ 77-201 to 77-305.

²⁰⁹ N. Mex. Stats. 1941, Ann., § 77-209. See *Vanderwork v. Hewes*, 15 N. Mex. 439, 443-446, 449, 110 Pac. 567 (1910); *Pueblo of Isleta v. Tondre*, 18 N. Mex. 388, 392, 137 Pac. 86 (1913).

²¹⁰ N. Mex. Stats. 1941, Ann., §§ 77-502 and 77-802. *Pueblo of Isleta v. Tondre*, 18 N. Mex. 388, 392, 137 Pac. 86 (1913).

North Dakota

The constitution of North Dakota provides that all flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigating, and manufacturing purposes.²¹¹

It is provided by statute that all waters from all sources of supply belong to the public and are subject to appropriation for beneficial use.²¹² Appropriations of water are initiated by making application to the State Engineer for permits; the State Engineer, subject to the approval of the Water Conservation Commission, may grant water rights. On completion of works a certificate of construction is issued, and on application of the water to beneficial use, a license to appropriate the water is issued.²¹³ Failure to use water beneficially for three years results in forfeiture of the right.²¹⁴ Another statute provides for the reversion to the public of water formerly appurtenant to land but the use of which has been abandoned.²¹⁵

The possessor or owner of agricultural land desiring to utilize for irrigation or stock watering purposes the flood waters of any draw, coulee, stream, or watercourse having a flow of not to exceed one-third cubic foot per second during the greater part of the year, may file a location certificate with the State Engineer. This is approved and becomes a permit to appropriate water if no objection is filed; if objections are filed, the general appropriation procedure governs.²¹⁶

Riparian rights in the Territory of Dakota were recognized by the United States Supreme Court in *Sturr v. Beck*,^{216a} a case appealed from the supreme court of the Territory. Reference was made in that decision to a Territorial statute to the effect that the owner of land owned water standing on or flowing over or under the surface of the ground but not forming a definite stream, and that the landowner might use the water of a definite natural surface or subterranean stream while on his land but that he might not prevent its natural flow.²¹⁷ That statute was carried over into the laws of the State of North Dakota and is still on the statute books.²¹⁸ The State supreme court held that the common-law doctrine of riparian rights was in force in the Territory at the time of the adoption of the State constitution, and that such rights could not be divested by the constitutional provision declaring that all streams and watercourses shall remain the property of the State for

²¹¹ N. Dak. Const., § 210.

²¹² N. Dak. Rev. Code 1943, § 61.0101.

²¹³ N. Dak. Rev. Code 1943, §§ 61.0230, 61.0402 to 61.0415.

²¹⁴ N. Dak. Rev. Code 1943, § 61.1402.

²¹⁵ N. Dak. Rev. Code 1943, § 61.1404.

²¹⁶ N. Dak. Rev. Code 1943, §§ 61.0418 to 61.0421.

^{216a} *Sturr v. Beck*, 133 U. S. 541, 547, 551 (1890).

²¹⁷ Terr. Dak. Civ. Code, § 255.

²¹⁸ N. Dak. Rev. Code 1943, §47.0113.

certain designated purposes,²¹⁹ referred to above.²²⁰ The supreme court has adhered to the riparian doctrine in the very few cases in which riparian rights have been considered.²²¹

The statute relating to the ownership of water above noted, originally enacted by the Territory of Dakota and still a part of the State law,²²² states a rule of unqualified ownership of ground water not forming a definite stream—that is, percolating water—on the part of the owner of overlying land; and it accords only a right of use of a definite underground stream to the landowner, no greater and no less than in case of a surface stream. Apparently no decisions of the supreme court have been rendered with respect to ground waters.

The water appropriation statute provides procedure for the adjudication of water rights in actions brought by the Attorney General upon completion of hydrographic surveys by the State Engineer, and for the making of such surveys for use in complete stream adjudications initiated by private parties.²²³ The State Engineer is appointed by the Water Conservation Commission and is the Commission's secretary and chief engineer.²²⁴ He is authorized to make rules and regulations for the discharge of his functions; but his rules and regulations relating to applications to appropriate water, inspection of works, issuance of licenses, and determination of rights are subject to modification if required by a vote of the Commission on appeal from a decision of the State Engineer.²²⁵ The Commission is vested with full control over all unappropriated public waters to the extent necessary to discharge its functions,²²⁶ and is granted certain powers with respect to the control of the flow of streams.²²⁷

Oklahoma

A statute, copied from a very early enactment of the Territory of Dakota,²²⁸ and retained by the legislatures of both North Dakota and South Dakota, declares that the owner of land owns water standing

²¹⁹ See *supra*, n. 211, p. 748.

²²⁰ *Bigelow v. Draper*, 6 N. Dak. 152, 162–163, 69 N. W. 570 (1896).

²²¹ See *supra*, n. 217, p. 748, and n. 218, p. 748.

²²² See *McDonough v. Russell-Miller Mill. Co.*, 38 N. Dak. 465, 471–473, 165 N. W. 504 (1917); *Johnson v. Armour & Co.*, 69 N. Dak. 769, 776–779, 291 N. W. 113 (1940). Reference was made in both cases to the statute according to the owner of land the right to use the water of a definite stream so long as it remains on his land, now N. Dak. Rev. Code 1943, § 47.0113, footnote 9 above.

²²³ N. Dak. Rev. Code 1943, §§ 61.0315 to 61.0319.

²²⁴ N. Dak. Rev. Code 1943, § 61.0301.

²²⁵ N. Dak. Rev. Code 1943, §§ 61.0313 and 61.0314.

²²⁶ N. Dak. Rev. Code 1943, §§ 61.0226 and 61.0229.

²²⁷ N. Dak. Rev. Code 1943, § 61.0214, amended by Laws 1944–1945, ch. 328, and §§ 61.0235 to 61.0245.

²²⁸ Terr. Dak. Civ. Code, § 255.

on or flowing over or under the surface, but not forming a definite stream, and that he may use the water of a definite natural surface or underground stream so long as it remains on his land but may not prevent its natural flow.²²⁹

Acquisition of the right to make beneficial use of any water is initiated by making application to the Oklahoma Planning and Resources Board for a permit to appropriate the water. On completion of the works a certificate of completion of construction is issued, and on application of the water to beneficial use, a license to appropriate the water.²³⁰ The Oklahoma Supreme Court has placed a construction upon the procedure for acquiring appropriative rights for irrigation purposes that is unique in Western water law; viz., that a hydrographic survey and court adjudication of existing water rights are conditions precedent to the granting by the State administrator of a valid permit to appropriate water for irrigation.²³¹ The court in 1943 referred to the fact that in *Owens v. Snider*²³² a court decree determining water rights for irrigation under the general water appropriation act had been held to be a condition precedent to the issuance of a permit to irrigate; but decided that a determination of water rights had not been made a preliminary requirement to the issuance by the Conservation Commission (predecessor of the Planning and Resources Board) of a permit to a power corporation to develop water power.²³³ Forfeiture of the appropriative right results from failure to use the water for a period of two years;²³⁴ and on abandonment of the use of water appurtenant to land, the water becomes public water subject to appropriation.²³⁵

The riparian doctrine has been referred to in various cases decided by the Oklahoma Supreme Court, chiefly in controversies relating to stream pollution or interference with the natural flow of streams for purposes other than irrigation.²³⁶ The court, in a controversy over the use of a pond, formed in a former stream channel, for a fish hatchery and fishing resort, quoted the statute relating to the use by the land-

²²⁹ Okla. Stats. 1941, Tit. 60, § 60.

²³⁰ Okla. Stats. 1941, Tit. 82, §§ 21 to 59.

²³¹ *Gay v. Hicks*, 33 Okla. 675, 684-685, 124 Pac. 1077 (1912); *Owens v. Snider*, 52 Okla. 772, 775, 778-781, 153 Pac. 833 (1915).

²³² See *supra*, n. 231.

²³³ *Grand Hydro v. Grand River Dam Authority*, 192 Okla. 693, 695-696, 139 Pac. (2d) 798 (1943).

²³⁴ Okla. Stats. 1941, Tit. 82, § 32.

²³⁵ Okla. Stats. 1941, Tit. 82, § 34.

²³⁶ See *Markwardt v. Guthrie*, 18 Okla. 32, 37, 54, 90 Pac. 26 (1907); *Chicago, R. I. & P. Ry. v. Groves*, 20 Okla. 101, 111, 93 Pac. 755 (1908); *Zalaback v. Kingfisher*, 59 Okla. 222, 223, 158 Pac. 926 (1916); *Burkett v. Bayes*, 78 Okla. 8, 10, 187 Pac. 214 (1918, 1920); *Enid v. Brooks*, 132 Okla. 60, 61-63, 269 Pac. 241 (1928); *Oklahoma City v. Tytenicz*, 171 Okla., 519, 520-521, 43 Pac. (2d) 747 (1935); *Martin v. British American Oil Producing Co.*, 187 Okla. 193, 195, 102 Pac. (2d) 124 (1940).

owner of a definite stream²³⁷ and stated that the stream in litigation was a definite stream; that the parties had reciprocal rights; and that each was entitled to a reasonable use of the stream.²³⁸ In 1946 a controversy between riparian owners was decided, the lower owners having brought suit to enjoin the upper owners and their lessees from obstructing the stream and taking water to nonriparian lands for drilling operations.²³⁹ The court referred to the statute above noted, and to previous decisions; stated that in Oklahoma "the common law definition of riparian rights substantially obtains"; and held that as between riparian owners each was limited to a reasonable use with regard to the rights and necessities of the others, and that to be entitled to relief, lower owners must show that they have suffered injury to their riparian rights. The doctrine of appropriation likewise has been recognized by the Oklahoma Supreme Court as applicable to conditions in Oklahoma,²⁴⁰ and the extant appropriation statute has been construed by that court.²⁴¹ However, apparently no decisions have been rendered by the supreme court in controversies involving conflicts between claimants of riparian rights on the one hand and of appropriative rights on the other to the use of the same water supply.

A statute to be cited as the "Oklahoma Ground Water Law," providing for State control over rights to the use of ground water other than ground water flowing in underground streams with ascertainable beds and banks, was enacted in 1949.²⁴² Previously, the statute declaring the ownership of ground water not forming a definite stream—that is, percolating water—to be vested in the owner of overlying land²⁴³ had been construed by the supreme court as not intended to convey such an absolute ownership as to result in unreasonable injury to one's neighbor, who has a similar ownership.²⁴⁴ On the contrary, according to the court, each landowner must be restricted to a reasonable exercise of his own rights in view of the similar rights of others, and exhaustion of a neighbor's ground-water supply for transport to distant lands does not conform to this requirement of reasonableness. The 1949 law provides for priority of claims for the appropriation of ground water according to priority of right, but exempts uses for domestic purposes

²³⁷ See *supra*, n. 229, p. 750.

²³⁸ *Broady v. Furray*, 163 Okla. 204, 205, 21 Pac. (2d) 770 (1933).

²³⁹ *Smith v. Stanolind Oil & Gas Co.*, 197 Okla. 499, 501-502, 172 Pac. (2d) 1002 (1946).

²⁴⁰ *Gates v. Settlers' Mill., Canal & Res. Co.*, 19 Okla. 83, 89-91, 91 Pac. 856 (1907).

²⁴¹ *Gay v. Hicks*, 33 Okla. 675, 682-685, 124 Pac. 1077 (1912); *Owens v. Snider*, 52 Okla. 772, 775, 778-781, 153 Pac. 833 (1915).

²⁴² Okla. Laws 1949, Tit. 82, Chap. 11, p. 641; Stats., 1949 Cum. Supp., Tit. 82, §§ 1001 to 1019.

²⁴³ See *supra*, n. 229, p. 750.

²⁴⁴ *Canada v. Shawnee*, 179 Okla. 53, 54-57, 64 Pac. (2d) 694 (1936).

and the watering of stock that are made without waste. Claims of rights in basins, the waters of which have not been adjudicated, are recorded by means of applications filed with the Oklahoma Planning and Resources Board. Provision is made for adjudications by the courts of rights to the use of waters of ground-water basins upon completion of surveys by the Board, and for decrees of adjudication containing findings of safe yield and annual recharge. After an adjudication, the remaining ground water subject to appropriation may be taken only by license issued by the Board upon application therefor. The Board is prohibited from issuing a permit where the result would be depletion of the ground-water supply in excess of the average annual rate of recharge; and likewise may not issue a permit to an applicant who does not own land overlying the ground-water basin or hold a valid lease from a landowner permitting withdrawal of water from the basin. Administration of rights of priority is vested in the Board.

The general water appropriation statute provides for determinations of water rights, in suits brought by the Attorney General upon completion of hydrographic surveys by the Board, as well as in suits initiated by private parties.²⁴⁵ The Board is given supervision over the apportionment of water according to licenses and decreed rights, with power to create water districts and appoint water masters.²⁴⁶

Oregon

All water from all sources of water supply is declared by statute to belong to the public and, subject to existing rights, to be available for appropriation for beneficial use under the exclusive procedure provided in the statute.²⁴⁷ However, certain waters of the State have been withdrawn from appropriation in a series of enactments, chiefly to preserve the natural flow for scenic and recreational purposes and the protection of fishlife. It is provided by statute that the laws relating to priorities of right to utilize the waters of running streams shall apply likewise to waste, spring, or seepage waters, but that the person on whose lands the seepage or spring waters first arise shall have the right to the use of such waters.²⁴⁸ The preference thus accorded to the landowner has been upheld by the Oregon Supreme Court in cases in which the flow from the spring did not pass from the land on which the spring was located, or did not form a natural stream.²⁴⁹ However,

²⁴⁵ Okla. Stats. 1941, Tit. 82, §§ 11 to 14, 29.

²⁴⁶ Okla. Stats. 1941, Tit. 82, §§ 57 to 83.

²⁴⁷ Oreg. Comp. Laws Ann., §§ 116-401 and 116-402.

²⁴⁸ Oreg. Comp. Laws Ann., § 116-701.

²⁴⁹ *Morrison v. Officer*, 48 Oreg. 569, 570, 87 Pac. 896 (1906); *David v. Brokaw*, 121 Oreg. 591, 601, 256 Pac. 186 (1927); *Henrici v. Paulson*, 134 Oreg. 222, 224-225, 293 Pac. 424 (1930); *Klamath Development Co. v. Lewis*, 136

if the flow from the spring constitutes or discharges into a natural stream, it is subject to the law of watercourses.²⁵⁰

The appropriative right for most uses of water is initiated by making application to the State Engineer for a permit to appropriate the water; and upon perfection of the appropriation, a certificate is issued.²⁵¹ Appropriations of water for the generation of electricity, however, are governed by the hydroelectric act, except in the case of developments by the United States or by cities, towns, municipal corporations, or utility districts.²⁵² The needs of municipalities for water are provided for by declaring that applications for municipal water supplies may be approved by the State Engineer to the exclusion of all subsequent appropriations, if the exigencies of the case so demand;²⁵³ that water may be appropriated for such future reasonable and usual municipal purposes as may be reasonably anticipated;²⁵⁴ and that the State Engineer shall reject, or grant subject to municipal uses, all applications where in his judgment the appropriation of the waters applied for would impair a municipal water supply.²⁵⁵ An early statute provides that when the waters of a natural stream are inadequate for all users, first preference shall be given to domestic purposes, subject to such limitations as may be prescribed by law, and that agricultural purposes shall have preference over manufacturing purposes.²⁵⁶ Apparently this statute has not been interpreted by the supreme court; but that court, in referring to the statute providing that applications for the appropriation of municipal water supplies may be approved to the exclusion of subsequent appropriations,²⁵⁷ noted that no precedence was thereby given to a municipal corporation as such, as against prior claimants, and that priorities of appropriation constitute a species of property which cannot be taken from the holder without compensation.²⁵⁸ If the owner of a perfected and developed water right fails to use the appropriated water for a period of five successive years, abandonment of the water right is

Oreg. 445, 450, 299 Pac. 705 (1931); *Skinner v. Silver*, 158 Oreg. 81, 96-98, 75 Pac. (2d) 21 (1938); *Messinger v. Woodcock*, 159 Oreg. 435, 443-444, 80 Pac. (2d) 895 (1938).

²⁵⁰ *Low v. Schaffer*, 24 Oreg. 239, 244, 33 Pac. 678 (1893); *Low v. Rizer*, 25 Oreg. 551, 559, 37 Pac. 82 (1894); *Boyce v. Cupper*, 37 Oreg. 256, 261, 61 Pac. 642 (1900); *Brosnan v. Harris*, 39 Oreg. 148, 150-151, 65 Pac. 867 (1901); *Morrison v. Officer*, 48 Oreg. 569, 570, 87 Pac. 896 (1906); *Hildebrandt v. Montgomery*, 113 Oreg. 687, 690, 693-694, 234 Pac. 267 (1925); *Minton v. Coast Property Corp.*, 151 Oreg. 208, 217, 46 Pac. (2d) 1029 (1935).

²⁵¹ Oreg. Comp. Laws Ann., §§ 116-419 to 116-427.

²⁵² Oreg. Comp. Laws Ann., §§ 119-101 to 119-302.

²⁵³ Oreg. Comp. Laws Ann., § 116-421.

²⁵⁴ Oreg. Comp. Laws Ann., § 116-437.

²⁵⁵ Oreg. Comp. Laws Ann., § 116-1021.

²⁵⁶ Oreg. Comp. Laws Ann., § 116-601.

²⁵⁷ See *supra*, n. 253.

²⁵⁸ *In re Schollmeyer*, 69 Oreg. 210, 215, 138 Pac. 211 (1914).

conclusively presumed; but the water rights of cities and towns for all reasonable and usual municipal purposes are exempted from this provision.²⁵⁹

As a result of legislation and judicial decisions, Oregon has become essentially an appropriation-doctrine State notwithstanding cases in which the riparian doctrine, to some extent at least, was considered to be a part of the State water law. In various decisions up to and including the first decade of the present century, the supreme court recognized that riparian owners had certain rights to the use of water,²⁶⁰ but also recognized the applicability of the appropriation doctrine to rights acquired on the public domain pursuant to authority contained in acts of Congress, as against riparian claims incident to lands subsequently passing to private possession,²⁶¹ and the resulting modification of the common-law doctrine.²⁶² The incompatibility of the riparian and appropriation doctrines was acknowledged, and there became established the principle that a settler upon public land contiguous to a stream could elect to make a prior appropriation of the water, or to insist upon his riparian right, but that he could not do both.²⁶³ In the leading case of *Hough v. Porter*,²⁶⁴ the supreme court held that

²⁵⁹ *Oreg. Comp. Laws Ann.*, § 116-437. Abandonment and forfeiture of water rights acquired under laws enacted prior to the "water code" of 1909 are covered in *Comp. Laws Ann.*, §§ 108-309, 116-411, and 116-417.

²⁶⁰ *Taylor v. Welch*, 6 *Oreg.* 198, 200 (1876); *Coffman v. Robbins*, 8 *Oreg.* 278, 282 (1880); *Shively v. Hume*, 10 *Oreg.* 76, 77 (1881); *Shook v. Colohan*, 12 *Oreg.* 239, 244, 6 *Pac.* 503 (1885); *Weiss v. Oregon Iron & Steel Co.*, 13 *Oreg.* 496, 498-502, 11 *Pac.* 255 (1886); *Low v. Schaffer*, 24 *Oreg.* 239, 245-246, 33 *Pac.* 678 (1893); *Jones v. Conn.*, 39 *Oreg.* 30, 34, 36-37, 39-41, 44-46, 64 *Pac.* 855, 65 *Pac.* 1068 (1901); *Cox v. Bernard*, 39 *Oreg.* 53, 61, 64 *Pac.* 860 (1901); *Bauers v. Bull*, 46 *Oreg.* 60, 66, 78 *Pac.* 757 (1904); *Brown v. Gold Coin Min. Co.*, 48 *Oreg.* 277, 286, 86 *Pac.* 361 (1906).

²⁶¹ *Lewis v. McClure*, 8 *Oreg.* 273, 274-275 (1880); *Tolman v. Casey*, 15 *Oreg.* 83, 88, 13 *Pac.* 669 (1887); *Curtis v. LaGrande Water Co.*, 20 *Oreg.* 34, 42, 23 *Pac.* 808 (1890); *Speake v. Hamilton*, 21 *Oreg.* 3, 6, 8, 26 *Pac.* 855 (1890); *Simmons v. Winters*, 21 *Oreg.* 35, 42, 27 *Pac.* 7 (1891); *Brown v. Baker*, 39 *Oreg.* 66, 68-69, 65 *Pac.* 799, 66 *Pac.* 193 (1901); *Morgan v. Shaw*, 47 *Oreg.* 333, 337, 83 *Pac.* 534 (1906); *Porter v. Pettengill*, 57 *Oreg.* 247, 249, 110 *Pac.* 393 (1910).

²⁶² *Carson v. Gentner*, 33 *Oreg.* 512, 515-516, 52 *Pac.* 506 (1898).

²⁶³ *North Powder Mill. Co. v. Coughanour*, 34 *Oreg.* 9, 22, 54 *Pac.* 223 (1898); *Brown v. Baker*, 39 *Oreg.* 66, 70, 65 *Pac.* 799, 66 *Pac.* 193 (1901); *Davis v. Chamberlain*, 51 *Oreg.* 304, 311, 98 *Pac.* 154 (1908). See *Low v. Schaffer*, 24 *Oreg.* 239, 245-246, 33 *Pac.* 678 (1893). See also footnote 269, below.

²⁶⁴ *Hough v. Porter*, 51 *Oreg.* 318, 383-406, 95 *Pac.* 732 (1908), 98 *Pac.* 1083 (1909), 102 *Pac.* 728 (1909). Approved and applied in *Hedges v. Riddle*, 63 *Oreg.* 257, 259-260, 127 *Pac.* 548 (1912). Riparian rights for lands acquired from the Government prior to the enactment of the Desert Land Act were held to include irrigation purposes in *Norris v. Eastern Oregon Land Co.*, 112 *Oreg.* 106, 109-112, 227 *Pac.* 1111 (1924).

the effect of the Desert Land Act of 1877²⁶⁵ was to abrogate the modified common-law doctrine of riparian rights, except for domestic use and the watering of stock essential to the sustenance of riparian landowners, so far as public lands entered after the date of that act were concerned. The water appropriation statute of 1909 contained provisions defining and limiting vested riparian rights to the extent of the actual application of water to beneficial use prior to the passage of the act, or within a reasonable time thereafter by means of works then under construction, all such rights to be adjudicated under the statutory procedure therein provided;²⁶⁶ and the supreme court upheld the validity of this legislative definition of vested riparian rights, stating that it was within the province of the legislature, by that act, to define a vested riparian right or to establish a rule governing the conditions under which it should be deemed to be created.²⁶⁷ In the development of the principle that one cannot claim both riparian and appropriative rights for the same use of water,²⁶⁸ the court has held repeatedly that the election of one of these two claims is in substance a waiver of the other, and that to claim a right to use a specified quantity of water from a specified date, to the exclusion of use by others, is to waive one's riparian right for the purpose of the proceeding in which the claim is made and to assume the character of an appropriator.²⁶⁹ No right can be adjudicated under the statutory procedure except for the use of a specific quantity of water and with a fixed date of priority—in other words, on an appropriative basis.²⁷⁰ The measure of the vested right of a riparian landowner is beneficial

²⁶⁵ 19 Stat. L. 377 (March 3, 1877).

²⁶⁶ Oreg. Laws 1909, ch. 216, § 70; Comp. Laws Ann., § 116-403.

²⁶⁷ *In re Hood River*, 114 Oreg. 112, 174-182, 227 Pac. 1065 (1924). The Federal Circuit Court of Appeals, Ninth Circuit, concluded that the Oregon riparian owner's right to the natural flow of a stream, substantially undiminished, had been validly abrogated by the Oregon statute of 1909 as construed in the *Hood River* case: *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 Fed. (2d) 555, 567-569 (C. C. A. 9th, 1934). The United States Supreme Court affirmed the judgment of the Circuit Court of Appeals, but passed over this particular question inasmuch as the ground upon which the Supreme Court's affirmance was based made the consideration of this question unnecessary: *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 153, 165 (1935).

²⁶⁸ See *supra*, n. 263, p. 754.

²⁶⁹ *Caviness v. LaGrande Irr. Co.*, 60 Oreg. 410, 421-423, 119 Pac. 731 (1911); *Little Walla Walla Irr. Union v. Finis Irr. Co.*, 62 Oreg. 348, 358, 124 Pac. 666, 125 Pac. 270 (1912); *Bowen v. Spaulding*, 63 Oreg. 392, 395, 128 Pac. 37 (1912); *In re Schollmeyer*, 69 Oreg. 210, 212, 138 Pac. 211 (1914); *In re Sucker Creek*, 83 Oreg. 228, 234-237, 163 Pac. 430 (1917); *Norwood v. Eastern Oregon Land Co.*, 112 Oreg. 106, 111-112, 227 Pac. 1111 (1924); *In re Deschutes River and Tributaries*, 134 Oreg. 623, 692, 703-706, 286 Pac. 563, 294 Pac. 1049 (1930).

²⁷⁰ *In re Deschutes River and Tributaries*, 134 Oreg. 623, 704, 705, 286 Pac. 563, 294 Pac. 1049 (1930).

use of the water,²⁷¹ which right, to have an enforceable priority, must be adjudicated with the elements of an appropriative right. The net result of the Oregon legislation and court decisions has been a virtual abrogation of the substance of the riparian doctrine except as to certain vested rights chiefly for domestic and stock-watering purposes. That is to say, the riparian doctrine in Oregon appears to be little more than a legal fiction.

The Oregon Supreme Court has held that water flowing underground in a known and defined channel constitutes a watercourse and is governed by the laws applicable to surface streams, not by the laws applicable to percolating waters.²⁷² The few statements of the court with reference to the law of percolating waters are to the effect that such waters belong to the owner of the overlying land.²⁷³

A statute applicable only to the counties lying east of the summit of the Cascade Mountains provides that subject to existing rights, waters found in underground streams, channels, artesian basins, reservoirs, or lakes, the boundaries of which may reasonably be ascertained, belong to the public and may be appropriated for any purpose other than for domestic and culinary use, stock, or the watering of lawns and gardens not exceeding one-half acre in area.²⁷⁴ Appropriations are made under the procedure governing appropriations from surface streams, with certain modifications pertinent to the differences in character of surface and ground-water supplies. The issuance of permits is restricted to the safe yield of the ground-water basin, contingent upon a reasonable or feasible pumping lift in case of pumping developments, or a reasonable or feasible reduction of pressure in case of artesian developments.

The statutory procedure for the adjudication of water rights provides for determinations by the State Engineer, upon petition of one or more water users, the findings of fact and definitions of rights being filed with the circuit court, which hears the matter under proceedings similar to those of a suit in equity and upon final hearing enters a decree of adjudication affirming or modifying the order of the State Engineer.²⁷⁵ This method of statutory adjudication, which has been copied in several other States, is a variation from the previously developed Wyoming system; that is, under the Oregon system the State

²⁷¹ Concurring opinion, Justice Coshov: *In re Hood River*, 114 Oreg. 112, 207, 227 Pac. 1065 (1924).

²⁷² *Taylor v. Welch*, 6 Oreg. 198, 200 (1876); *Hayes v. Adams*, 109 Oreg. 51, 58, 218 Pac. 933 (1923); *Bull v. Siegrist*, 169 Oreg. 180, 186, 126 Pac. (2d) 832 (1942).

²⁷³ *Taylor v. Welch*, 6 Oreg. 198, 200-201 (1876); *Boyce v. Cupper*, 37 Oreg. 256, 260-261, 61 Pac. 642 (1900); *Hayes v. Adams*, 109 Oreg. 51, 57, 218 Pac. 933 (1923).

²⁷⁴ Oreg. Comp. Laws Ann., §§ 116-443 to 116-453.

²⁷⁵ Oreg. Comp. Laws Ann., §§ 116-801 to 116-823.

Engineer's determination is not final, but must be filed in court as the initiation of a judicial action and is subject either to affirmance or to alteration by the court as the result of hearings upon exceptions taken by interested parties, whereas the Wyoming system contemplates adjudications by the State Board of Control which are final unless appealed to the courts. The Oregon procedure has been upheld by the United States Supreme Court as not violative of the due process clause of the Federal constitution.²⁷⁶ The statute also provides for complete determinations in suits brought by private parties,²⁷⁷ for transference of such suits to the State Engineer at the court's discretion,²⁷⁸ and for hydrographic surveys by the State Engineer in suits in which the State is a party.²⁷⁹

The State Engineer is charged with the duty of administering the water laws of the State, and of dividing the State into water districts as the necessity therefor arises. He may appoint a watermaster for each district who, under the general control of the State Engineer, distributes water according to the several rights thereto.²⁸⁰

South Dakota

The water appropriation statute declares that subject to vested rights and with certain other exceptions, all waters belong to the public and, *except navigable waters*, are open to appropriation for beneficial use.²⁸¹ Subject to the laws relating to artesian wells and water, the owner of land owns water standing on or flowing over or under the surface but not forming a definite stream, and he may use the water of a definite natural surface or subterranean stream while on his land but may not interfere with the flow of the stream or its source other than under the laws relating to the appropriation of water; this law in its original form having been derived from a statute of the Territory of Dakota.²⁸² Beneficial use means the use of water for domestic, stock-watering, irrigation, mining, milling, power, fish culture, fire protection, and public recreational purposes.²⁸³ Appropriations of water for power purposes in excess of 25 horsepower may not be made for periods exceeding 50

²⁷⁶ *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 451-455 (1916).

²⁷⁷ *Oreg. Comp. Laws Ann.*, § 116-412.

²⁷⁸ *Oreg. Comp. Laws Ann.*, § 116-801.

²⁷⁹ *Oreg. Comp. Laws Ann.*, § 116-822.

²⁸⁰ *Oreg. Comp. Laws Ann.*, §§ 116-206 to 116-308.

²⁸¹ *S. Dak. Code 1939*, § 61.0101.

²⁸² *S. Dak. Code 1939*, § 61.0101. This declaration of ownership and/or rights of use of water by the landowner, without the qualifications relating to artesian wells and water and laws regarding the appropriation of water, was adopted by the State of South Dakota from a statute of the Territory of Dakota: *Terr. Dak. Civ. Code*, § 255.

²⁸³ *S. Dak. Code 1939*, § 61.0102, amended by *Laws 1939*, ch. 289.

years, but the appropriator and his assigns have the prior right of reappropriation.²⁸⁴

Appropriations are initiated by making application to the State Engineer for permits. A certificate of construction is issued on completion of construction, and a license to appropriate the water upon its application to beneficial use.²⁸⁵ Failure to use appropriated water beneficially for three years results in forfeiture of the right.²⁸⁶ Likewise, water appurtenant to land reverts to the public upon abandonment of the use of the water on the land.²⁸⁷

Holders of agricultural lands may obtain rights, for irrigation or livestock purposes, to the flood waters in any "dry draw" or watercourse not having a flow of at least 20 miner's inches during the greater part of the year. The prospective user files a location certificate in the county records, posts a copy, and sends a copy to the State Engineer. He may obtain from the State Engineer a certificate of right upon petition; but these dry-draw rights are not subject to the rules and regulations of the State Engineer or under his jurisdiction.²⁸⁸

Riparian rights in South Dakota have been recognized in a number of court decisions. The United States Supreme Court, in *Sturr v. Beck*,²⁸⁹ recognized the existence of such rights in the Territory of Dakota, and cited the statutory declaration by the Territory that the landowner may use the water of a definite stream while it remains on his land but may not prevent its natural flow.²⁹⁰ The State statute containing the same declaration, derived from the Territorial statute, was stated by the South Dakota Supreme Court to have been a concise statement of the common-law doctrine applicable to the rights of riparian owners,²⁹¹ and "should be regarded as merely declaratory of the common law as understood by the commissioners when their report was prepared."²⁹² Riparian rights are incident to and part of the

²⁸⁴ S. Dak. Code 1939, § 61.0152.

²⁸⁵ S. Dak. Code 1939, §§ 61.0122 to 61.0132.

²⁸⁶ S. Dak. Code 1939, § 61.0139.

²⁸⁷ S. Dak. Code 1939, § 61.0141.

²⁸⁸ S. Dak. Code 1939, § 61.0133; Laws 1947, ch. 420.

²⁸⁹ *Sturr v. Beck*, 133 U. S. 541, 547, 551 (1890).

²⁹⁰ See *supra*, n. 282, p. 757.

²⁹¹ *Lone Tree Ditch Co. v. Cyclone Ditch Co.*, 15 S. Dak. 519, 525-526, 91 N. W. 352 (1902).

²⁹² *Redwater Land & Canal Co. v. Reed*, 26 S. Dak. 466, 474, 128 N. W. 702 (1910). "Commissioners" refers to the Code commissioners of New York. The South Dakota court stated that section 278 of the Revised Civil Code of South Dakota (which was taken from section 255 of the Civil Code of the Territory of Dakota) was the same as section 256 of the New York Civil Code as proposed by the Code commissioners of that State. "There is no suggestion in the report of the commissioners of an intention to change the common law respecting riparian rights. Therefore section 278 of our Civil Code should be regarded as merely declaratory of the common law as understood by the commissioners when their report was prepared."

land itself;²⁹⁸ where vested, they could not be affected by the provision of the water appropriation act of 1907 dedicating all waters within the State to the public, nor by the provision for forfeiture of a right when not exercised for three years.²⁹⁴ Various features of the riparian doctrine and its operation in the State were involved in several decisions of the supreme court rendered in 1910 and 1911;²⁹⁵ and a decision in 1932 dealt with the rights of a city resulting from ownership of a tract of riparian land.²⁹⁶

The South Dakota Supreme Court ruled in 1922 that public lands entered after the enactment of the Desert Land Act in 1877²⁹⁷ were divested of all riparian rights except for domestic purposes,²⁹⁸ but rendered a decision to the contrary in 1940.²⁹⁹ The court stated in this later decision that it had erred previously in holding that Congress, by the Desert Land Act, had intended to set up "appropriation" as the governing rule under which rights in surplus water on the public domain were to be acquired; that inasmuch as the South Dakota decisions rendered prior to 1922 had held that riparian rights could be acquired by means of settlement on riparian land and appropriative rights by proceeding under the statute, the rights of a riparian owner must be determined by the law thus established.

Ground waters flowing in well-defined and known channels, the course of which can be distinctly traced, are governed by the same rules of law that govern streams flowing upon the surface; but in order that the riparian owner or appropriator may invoke these rules, the flows must constitute regular and constant streams, otherwise the presumption will be that they have their sources in ordinary percolations through the soil.³⁰⁰

Ground waters not forming a definite stream were declared by the early Territorial law to belong to the owner of overlying land, without qualification.³⁰¹ This law of unqualified ownership, carried over into

²⁹³ *Stenger v. Tharp*, 17 S. Dak. 13, 23-24, 94 N. W. 402 (1903).

²⁹⁴ *St. Germain Irrigation Ditch Co. v. Hawthorne Ditch Co.*, 32 S. Dak. 260, 266-267, 268, 143 N. W. 124 (1913). The statute referred to is S. Dak. Laws 1907, ch. 180, which with various amendments is a part of the extant code: S. Dak. Code 1939, Title 61, ch. 61.01.

²⁹⁵ *Lone Trees Ditch Co. v. Cyclone Ditch Co.*, 26 S. Dak. 307, 310-313, 128 N. W. 596 (1910); *Redwater Land & Canal Co. v. Reed*, 26 S. Dak. 466, 475-477, 481, 487-488, 489-490, 128 N. W. 702 (1910); *Redwater Land & Canal Co. v. Jones*, 27 S. Dak. 194, 202-204, 205-206, 130 N. W. 85 (1911).

²⁹⁶ *Sayles v. Mitchell*, 60 S. Dak. 592, 594-595, 245 N. W. 390 (1932).

²⁹⁷ 19 Stat. L. 377 (March 3, 1877).

²⁹⁸ *Cook v. Evans*, 45 S. Dak. 31, 40, 185 N. W. 262 (1921), 45 S. Dak. 43, 186 N. W. 571 (1922). See also *Haaser v. Englebrecht*, 45 S. Dak. 143, 146-147, 186 N. W. 572 (1922).

²⁹⁹ *Platt v. Rapid City*, 67 S. Dak. 245, 248-250, 291 N. W. 600 (1940).

³⁰⁰ *Deadwood Central R. R. v. Barker*, 14 S. Dak. 558, 565-566, 86 N. W. 619 (1901).

³⁰¹ Terr. Dak. Civ. Code, § 255.

the statutes of South Dakota, was cited by the State supreme court as authority for the principle that subterranean percolating water in South Dakota is a part of the realty.³⁰² The court stated in 1932 that in view of the rule announced in previous decisions (cited in footnote 302), which had been based upon the statute, "there can be no serious contention but that the owner of the soil is the absolute owner of percolating subterranean water."³⁰³ The right to install artesian wells on one's own land, within certain limitations, is accorded by statute.³⁰⁴ An act providing for the regulation of the use of artesian waters and taxation of artesian wells, and imposing certain duties upon the State Engineer with respect thereto, was passed in 1919 and extensively revised in 1939, the sections relating to taxation having been repealed in 1941.³⁰⁵ According to the supreme court, this law of 1919 did not change the statutory and judicial rule of ownership of percolating water by the owner of the overlying land; it "attempts to do nothing more than establish rules and regulations concerning artesian wells," leaving in effect the previous legislation (relating to unqualified ownership of ground water not forming a definite stream) except as to artesian water.³⁰⁶ As a result, the rule of absolute ownership of percolating waters still prevails; but artesian wells are subjected by statute to reasonable use, primarily to prevent waste of the water.³⁰⁷

Participation of the State Engineer in adjudications of water rights was made largely inoperative as the result of a supreme court decision in 1913 to the effect that a riparian proprietor or appropriator exercising a lawful right could not be required, without his consent, to bear any portion of the expense of a hydrographic survey in connection with a statutory adjudication.³⁰⁸ Amendments made in connection with the 1939 codification provide that when an action for the determination of water rights has been begun, the court shall request

³⁰² *Metcalf v. Nelson*, 8 S. Dak. 87, 89, 65 N. W. 911 (1895); *Deadwood Central R. R. v. Barker*, 14 S. Dak. 558, 565, 570-571, 86 N. W. 619 (1901).

³⁰³ *Madison v. Rapid City*, 61 S. Dak. 83, 87, 246 N. W. 283 (1932).

³⁰⁴ S. Dak. Code 1939, § 61.0401 to 61.0406.

³⁰⁵ S. Dak. Laws 191, ch. 100; Code 1939, §§ 61.0407 to 61.0415. S. Dak. Laws 1941, ch. 369, repealed §§ 61.0408, 61.0409, 61.0410, 61.0411, 61.0412, and 61.0413 of the Code of 1939.

³⁰⁶ *Madison v. Rapid City*, 61 S. Dak. 83, 87-88, 246 N. W. 283 (1932). The phrase "Subject to the provisions of this code relating to artesian wells and water" was placed at the head of the section declaring ownership of percolating water in the 1919 codification: S. Dak. Rev. Code 1919, § 348.

³⁰⁷ The supreme court stated by way of dictum in 1913: "The private owner of real estate, who sinks an artesian well on his premises, is the absolute owner of the water flowing therefrom and may control the whole thereof as he may see fit so long as he does no injury thereby to others; * * *." *St. Germain Irrigating Ditch Co. v. Hawthorne Ditch Co.*, 32 S. Dak. 260, 267, 143 N. W. 124 (1913).

³⁰⁸ *St. Germain Irrigating Ditch Co. v. Hawthorne Ditch Co.*, 32 S. Dak. 260, 269, 143 N. W. 124 (1913).

the State Engineer to make a complete hydrographic survey, the State Engineer to proceed therewith whenever funds are made available from legislative appropriations or other sources, no costs incurred on behalf of the State to be charged against private parties without their express consent.⁸⁰⁹ Water commissioners may be appointed for the distribution of water when the State Engineer or the court having jurisdiction considers such appointment necessary.⁸¹⁰ A statute enacted in 1935 vests the full control of waters of definite streams, so far as they relate to "irrigation or other riparian rights," in the State Engineer, whose duty it is to apportion the waters on request of five or more landowners having riparian rights.⁸¹¹

Texas

The constitution declares that the conservation and development of all of the natural resources of the State, specifically including waters, are public rights and duties, and directs the legislature to pass all such laws as may be appropriate thereto.⁸¹²

The statute relating to the appropriation of water declares that the "waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, and the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed" within the State are the property of the State, and that the right to the use thereof may be acquired by appropriation in the manner provided in the statute; and it vests in the State Board of Water Engineers the administration of the laws enacted for the maximum judicious employment of the State waters in the public interest.⁸¹³ Water may be appropriated for irrigation, mining, milling, manufacturing, development of power, construction and operation of waterworks for cities and towns, stock raising, public parks, game preserves, recreation and pleasure resorts, power and water supply for industrial purposes and plants, and domestic use.⁸¹⁴ The Supreme Court of Texas has held that this statute has no application to diffused surface waters on lands granted prior to its enactment.⁸¹⁵ Appropriations of water are initiated by application to the State Board of Water Engineers for permits to appropriate the water, the permittee being required to begin construction work within a period designated by the statute subject to extension by the Board and to prosecute the work diligently and continuously to completion.⁸¹⁶ It is not necessary

⁸⁰⁹ S. Dak. Code 1939, § 61.0119.

⁸¹⁰ S. Dak. Code 1939, § 61.0121.

⁸¹¹ S. Dak. Laws 1935, ch. 214; Code 1939, §§ 61.0104 and 61.0105.

⁸¹² Tex. Const., art XVI, § 59a.

⁸¹³ Tex. Vernon's Ann. Civ. Stats., arts. 7467 and 7472c.

⁸¹⁴ Tex. Vernon's Ann. Civ. Stats., arts. 7470 and 7470a.

⁸¹⁵ *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 170, 96 S. W. (2d) 221 (1936).

⁸¹⁶ Tex. Vernon's Ann. Civ. Stats., arts. 7492 to 7519.

to obtain a permit, however, to construct on one's own property a dam and reservoir to impound not to exceed 50 acre-feet of water for domestic and livestock purposes.³¹⁷ Apparently the statutory procedure is the exclusive method of appropriating water in Texas.³¹⁸ Any appropriation of water "wilfully abandoned" during any three successive years is forfeited.³¹⁹

The statutes contain several provisions relating to preferences in the use of water. In the allotment and appropriation of water, preference is accorded in the following order: (1) Domestic and municipal uses, including water for domestic animals; (2) conversion of materials into higher forms, including electric power other than hydroelectric; (3) irrigation; (4) mining and mineral recovery; (5) hydroelectric power; (6) navigation; (7) recreation and pleasure.³²⁰ Preference is to be given also to applications contemplating the maximum utilization of waters.³²¹ Priority over all other applicants is accorded an intending appropriator of water for storage by channel dams for irrigation, mining, milling, manufacturing, development of power, water for cities and towns, or stock raising.³²² The owner of land through which water flows has preference for a designated period over an applicant for a permit to appropriate the water for mining purposes.³²³ Except on any stream constituting the international boundary between the United States and Mexico, appropriations for other than domestic or municipal purposes are to be granted subject to the right of any municipality to make further appropriation of such water thereafter without the necessity of condemnation or payment of compensation.³²⁴

The riparian doctrine has been recognized as a fundamental part of the water law of Texas from the time of the earliest litigation on the subject. That recognition has extended throughout the long series of conflicts between claimants of riparian lands and claimants of rights to use water on nonriparian lands under the irrigation statutes enacted from time to time, but the appropriation doctrine likewise has been recognized for many decades and has become of great importance in

³¹⁷ Tex. Vernon's Ann. Civ. Stats., art. 7500a.

³¹⁸ The statute provides no alternative method, but on the contrary makes the taking or appropriation of water, without first complying with all the provisions of the act, a misdemeanor: Tex. Vernon's Ann. Civ. Stats., art. 7520. See references to "statutory appropriation" in *Biggs v. Miller*, 147 S. W. 632, 636, 637 (Tex. Civ. App. 1912), decided prior to the enactment of the present law. See also reference to the extant statute in *Clark v. Briscoe Irr. Co.*, 200 S. W. (2d) 674, 682 (Tex. Civ. App. 1947).

³¹⁹ Tex. Vernon's Civ. Stats., art. 7544.

³²⁰ Tex. Vernon's Civ. Stats., art. 7471.

³²¹ Tex. Vernon's Civ. Stats., art. 7472c.

³²² Tex. Vernon's Civ. Stats., art. 7545.

³²³ Tex. Vernon's Civ. Stats., art. 7467.

³²⁴ Tex. Vernon's Civ. Stats., arts. 7472 and 7472a.

the water law of the State. The common-law doctrine was stated by the supreme court as early as 1863.³²⁵ Contention over the question as to whether irrigation was a "natural" use of the water, extending over many years, was settled by holding that domestic uses had preference over irrigation and manufacturing uses as among riparians, and that subject to this preferred right of "natural" domestic use by other riparian proprietors, each riparian owner was entitled to make a reasonable use of the stream for irrigation purposes, all having equal rights.³²⁶ The riparian right is a part and parcel of the land,³²⁷ but is not inseparable from riparian land because it may be sold to or condemned by an appropriator.³²⁸ Vested rights of riparian proprietors have been protected against infringement by claimants under legislative acts.³²⁹ However, while the riparian owner who holds a valid riparian right has first claim upon the quantity of water reasonably sufficient for his needs, as against the excess the statutory appropriation is effective.³³⁰ The supreme court in 1926, in *Mott v. Boyd*,³³¹ held that riparian waters are the waters of the ordinary flow and underflow of the stream, and that stream waters when they rise above the line of highest ordinary flow are flood waters to which riparian rights do

³²⁵ *Rhodes v. Whitehead*, 27 Tex. 304, 309, 315, 84 Am. Dec. 631 (1863).

³²⁶ *Watkins Land Co. v. Clements*, 98 Tex. 578, 585-589, 86 S. W. 733 (1905). Earlier Texas decisions were discussed in the *Watkins* case. The reasonable needs of riparian owners for domestic and stock-watering purposes have preference over irrigation requirements of other riparian owners: *Martin v. Burr*, 111 Tex. 57, 62, 228 S. W. 543 (1921). Apportionment of water among riparian owners: *Matagorda Canal Co. v. Markham Irr. Co.*, 154 S. W. 1176, 1180 (Tex. Civ. App. 1913). See also *Biggs v. Miller*, 147 S. W. 632, 636 (Tex. Civ. App. 1912).

³²⁷ *Parker v. El Paso County W. I. Dist. No. 1*, 116 Tex. 631, 642-643, 297 S. W. 737 (1927); *Zavala County W. I. Dist. No. 3 v. Rogers*, 145 S. W. (2d) 919, 923 (Tex. Civ. App. 1940). See *Bigham Bros. v. Port Arthur Canal & Dock Co.*, 91 S. W. 848, 853 (Tex. Civ. App. 1905).

³²⁸ *Matagorda Canal Co. v. Markham Irr. Co.*, 154 S. W. 1176, 1181 (Tex. Civ. App. 1913).

³²⁹ *Mud Creek Irr., Agricultural & Manufacturing Co. v. Vivian*, 74 Tex. 170, 173, 11 S. W. 1078 (1889); *Barratt v. Metcalfe*, 12 Tex. Civ. App. 247, 252-253, 33 S. W. 758 (1896); writ of error refused, 93 Tex. 679; *Bigham Bros. v. Port Arthur Canal & Dock Co.*, 100 Tex. 192, 201, 97 S. W. 686 (1906); *Matagorda Canal Co. v. Markham Irr. Co.*, 154 S. W. 1176, 1180 (Tex. Civ. App. 1913).

³³⁰ *Biggs v. Lee*, 147 S. W. 709, 710-711 (Tex. Civ. App. 1912); writ of error dismissed, 150 S. W. xix. See also *Santa Rosa Irr. Co. v. Pecos River Irr. Co.*, 92 S. W. 1014, 1016 (Tex. Civ. App. 1906); writ of error denied; *McGhee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, 589-592, 22 S. W. 398, 967 (1893); *Biggs v. Leffingwell*, 62 Tex. Civ. App. 665, 667-668, 132 S. W. 902 (1910).

³³¹ *Mott v. Boyd*, 116 Tex. 82, 108, 111, 124, 286 S. W. 458 (1926). See also *Humphreys-Mexia Co. v. Arsenaux*, 116 Tex. 603, 610, 611, 297 S. W. 225 (1927); *Parker v. El Paso County W. I. Dist. No. 1*, 116 Tex. 631, 643, 297 S. W. 737 (1927); *Texas Co. v. Burkett*, 117 Tex. 16, 28, 296 S. W. 273 (1927); *Chicago, R. I. & Gulf Ry. v. Tarrant County W. C. & I. Dist. No. 1*, 123 Tex. 432, 449, 73 S. W. (2d) 55 (1934).

not attach but which are subject to appropriation; that grantees of public land granted prior to the enactment of the appropriation act of 1889 had become invested with riparian rights in the waters of streams to which the lands were riparian; and that the appropriation acts of 1889 and following years down to and including the act of 1917 (the extant statute) were valid insofar as they authorized the appropriation of storm and flood waters and other waters without violation of existing riparian rights. A section of the statute provides that an appropriator, after three years' use of water under his statutory appropriation, shall be deemed to have acquired a title by limitation against other claimants including riparian owners;³³² but the Texas Court of Civil Appeals has held that this section is not operative as against the rights of riparian landowners.³³³ Various features of the riparian doctrine have been involved in other decisions of the Texas courts.³³⁴

The water appropriation statute includes the underflow of streams among waters subject to appropriation,³³⁵ and the supreme court has stated that riparian waters include the underflow of streams.³³⁶ The few court decisions relating to percolating waters have recognized the principle that such waters are the property of the owner of the overlying

³³² Tex. Vernon's Ann. Civ. Stats., art. 7592.

³³³ *Freeland v. Peltier*, 44 S. W. (2d) 404, 407-408 (Tex. Civ. App. 1931).

³³⁴ Navigable waters: *Barrett v. Metcalfe*, 12 Tex. Civ. App. 247, 254, 33 S. W. 758 (1896); *Bigham Bros. v. Port Arthur Canal & Dock Co.*, 91 S. W. 848, 852-853 (Tex. Civ. App. 1905); *Mott v. Boyd*, 116 Tex. 82, 111, 286 S. W. 458 (1926).

Spring source of watercourse: *Fleming v. Davis*, 37 Tex. 173, 194-195 (1872); *Watkins Land Co. v. Clements*, 98 Tex. 578, 584-585, 86 S. W. 733 (1905).

Limits of riparian land: *Watkins Land Co. v. Clements*, 98 Tex. 578, 585, 86 S. W. 733 (1905); *Matagorda Canal Co. v. Markham Irr. Co.*, 154 S. W. 1176, 1180 (Tex. Civ. App. 1913).

Use of water by riparian owner on nonriparian land: *Watkins Land Co. v. Clements*, 98 Tex. 578, 585, 86 S. W. 733 (1905); *Humphreys-Mexia Co. v. Arsenaux*, 116 Tex. 603, 610, 297 S. W. 225 (1927); *Texas Co. v. Burkett*, 117 Tex. 16, 25-26, 296 S. W. 273 (1927); *Fort Quitman Land Co. v. Mier*, 211 S. W. (2d) 340, 344 (Tex. Civ. App. 1948).

Storage of water: *Stacy v. Delery*, 57 Tex. Civ. App. 242, 248, 122 S. W. 300 (1909); *Chicago, R. I. & Gulf Ry. v. Tarrant County W. C. & I. Dist No. 1*, 123 Tex. 432, 448, 73 S. W. (2d) 55 (1934).

Appropriation of unappropriated water by riparian owner: *Mott v. Boyd*, 116 Tex. 82, 124, 286 S. W. 458 (1926).

City as riparian proprietor: *Grogan v. Brownwood*, 214 S. W. 532, 536-538 (Tex. Civ. App. 1919).

Prescription by riparian owner against downstream riparian owner: *Martin v. Burr*, 111 Tex. 57, 65-67, 228 S. W. 543 (1921).

Loss of riparian right: *Baker v. Brown*, 55 Tex. 377, 381 (1881); *Freeland v. Peltier*, 44 S. W. (2d) 404, 409 (Tex. Civ. App. 1931).

³³⁵ Tex. Vernon's Ann. Civ. Stats., art. 7467.

³³⁶ *Mott v. Boyd*, 116 Tex. 82, 111, 286 S. W. 458 (1926); *Texas Co. v. Burkett*, 117 Tex. 16, 28, 296 S. W. 273 (1927).

land.³³⁷ The Texas Court of Civil Appeals in 1948 adhered to that principle, but held that such ownership does not include the right to intercept and waste percolating water to the detriment of an adjoining landowner, waste of natural resources being against the public policy of the State.³³⁸

Two statutes providing for the regulation of water wells, in order to prevent waste of water and pollution of ground-water supplies, under the administration of the Board of Water Engineers, have been in existence for a number of years.³³⁹ In 1949 the legislature added to the water control and improvement district act a section authorizing the creation of underground water conservation districts, their purpose being the conservation, preservation, protection, and recharging and the prevention of waste of ground water in underground reservoirs or subdivisions thereof that have been designated by the Board of Water Engineers.³⁴⁰ The district may issue permits to drill wells, but no landowner may be denied a permit to drill a well on his own land and produce water therefrom, subject however to the district's rules and regulations designed to prevent waste. The statute specifically recognizes the ownership and rights of the owner of land in ground water, subject to the rules and regulations of the district; and it specifically provides that the priorities and provisions of the law of surface water shall not apply to ground water.

The water appropriation act of 1917 authorized the Board of Water Engineers, on petition of any water user, to make a determination of the relative rights to the use of waters of a stream or other source of supply; that appeals might be taken to the courts from the Board's order, the order to be in force pending the determination of the appeal; and that the Board might create water districts and appoint water commissioners to distribute water to the users in accordance with its determinations.³⁴¹ The supreme court in 1921, in *Board of Water Engineers v. McKnight*,³⁴² held that those portions of the statute relating to determinations of rights were invalid as attempting to vest judicial powers in a branch of the executive department of the State without the express permission of the Constitution; an inquiry involving the most intricate

³³⁷ *Houston & Texas Central Ry. v. East*, 98 Tex. 146, 149, 81 S. W. 279 (1904); *Texas Co. v. Giddings*, 148 S. W. 1142, 1144 (Tex. Civ. App. 1912); *Farb v. Theis*, 250 S. W. 290, 292 (Tex. Civ. App. 1923); *Texas Co. v. Burkett*, 117 Tex. 16, 29, 296 S. W. 273 (1927).

³³⁸ *Cantwell v. Zinser*, 208 S. W. (2d) 577, 579 (Tex. Civ. App. 1948).

³³⁹ Tex. Vernon's Ann. Civ. Stats., arts. 7600 to 7616; Vernon's Ann. Penal Code, art. 848a.

³⁴⁰ Tex. Laws 1949, ch. 306, amending Laws 1925, ch. 25, to include § 3c (Vernon's Ann. Civ. Stats., art. 7880-3c).

³⁴¹ Tex. Laws 1917, ch. 88.

³⁴² *Board of Water Engineers v. McKnight*, 111 Tex. 82, 92-97, 229 S. W. 301 (1921).

questions of law and of fact that are presented in a determination of water rights, and resulting in the adjudication of property rights, being strictly judicial. The provisions of the statute relating to the determination of rights and distribution of water were omitted from the Revised Civil Statutes of 1925 and were thereby repealed.³⁴³

The Texas Supreme Court distinguished *Board of Water Engineers v. McKnight* in a decision rendered in 1945 in a controversy involving the constitutionality of statutes relating to the conservation of oil and gas, in which counsel had contended that the statutes in question conferred purely judicial duties upon an administrative body and, on the authority of the *McKnight* case, were therefore invalid.³⁴⁴ The supreme court pointed out that the water legislation declared invalid in the *McKnight* case became effective June 19, 1917, whereas on August 21, 1917, there became effective a constitutional provision declaring the conservation and development of all natural resources to be public rights and duties and directing the legislature to pass all laws appropriate thereto.³⁴⁵ Therefore, the validity of the water legislation was to be determined by the terms of the constitution in force when that legislation was enacted, prior to the adoption of the constitutional provision of August 21, 1917. The oil and gas statutes, on the other hand, were adopted after the constitutional provision in question became effective, and hence must be considered in the light of that provision and not under the provisions of the constitution as they existed when the water legislation of June 19, 1917, was enacted. It was held, therefore, that the decision in the *McKnight* case did not control with respect to the validity of the oil and gas statutes.

Utah

All waters in the State, whether above or under the ground, are declared by statute to be the property of the public, subject to existing rights of use.³⁴⁶ A right to the use of unappropriated water is initiated by making an application to the State Engineer; and when the holder of an approved application has shown to the satisfaction of the State Engineer that he has perfected his appropriation, he receives a certificate of appropriation which is prima facie evidence of the holder's right to the use of the water as specified in the certificate, subject to prior rights.³⁴⁷ It is provided that in times of scarcity of water, the use for

³⁴³ Vernon's Tex. Stats., 1936 Rev. Civ. Stats., Final Title, § 2, p. 1569.

³⁴⁴ *Corzelius v. Harrell*, 143 Tex. 509, 511-514, 186 S. W. (2d) 961 (1945).

³⁴⁵ Tex. Const., art. XVI, § 59a.

³⁴⁶ Utah Code Ann., 1943, § 100-1-1.

³⁴⁷ Utah Code Ann., 1943, §§ 100-3-2 to 100-3-18. The statute contains a provision to the effect that before an application to appropriate water from a navigable lake or stream contemplating the removal of salts and other minerals therefrom may be approved, the applicant must file with the State Engineer a

domestic purposes without unnecessary waste shall have preference over all other uses, and that agricultural purposes shall have preference over all other purposes except domestic use.³⁴⁸ If the holder of an appropriative right abandons or ceases to use the water for a period of five years, the right ceases; but the holder may be granted extensions of time by the State Engineer, upon a showing of reasonable cause for nonuse of the water, after publication of the application and hearing of protests.³⁴⁹

The statutory procedure is the exclusive method of appropriating water in Utah. There was some question as to this as the result of a statement made in 1935 in the prevailing opinion in *Wrathall v. Johnson*,³⁵⁰ even though that statement appears to have been dictum; but shortly after the rendering of that decision, the legislature amended the appropriation statute to provide explicitly that no appropriation of water could be made and no right to the use thereof initiated otherwise than in the manner provided in the statute.³⁵¹ The Utah Supreme Court stated in 1948, with reference to a use of water first made in 1925 or 1926, that at that time the only way in which the right of use could be initiated was by filing an application with the State Engineer, and the only way in which the water could be appropriated was through the statutory procedure.³⁵² And in 1949 the court stated that the 1935 amendment, "enacted immediately after the Wrathall decision and undoubtedly with this holding in mind, leaves no doubt that thereafter no right to the use of the unappropriated public waters of this state can be acquired without complying with the statutory requirements."³⁵³ The question as to whether title to a water right might be acquired solely by adverse use, or after abandonment by a prior appropriator without making a new statutory appropriation, also was the subject of controversy;³⁵⁴ and again the legislature acted by providing that the statute relating to abandonment or forfeiture of the appropriative right should be applicable whether the unused or abandoned water is per-

copy of a contract for the payment of royalties to the State: Utah Code Ann. 1943, § 100-3-8. The enforcement of this requirement with respect to an application to appropriate water from Great Salt Lake for the purpose of recovering salt was approved by the supreme court: *Deseret Livestock Co. v. State*, 110 Utah 239, 243-245, 171 Pac. (2d) 401 (1946).

³⁴⁸ Utah Code Ann., 1943, § 100-3-21.

³⁴⁹ Utah Code Ann., 1943, § 100-1-4.

³⁵⁰ *Wrathall v. Johnson*, 86 Utah 50, 108-120, 40 Pac. (2d) 755 (1935).

³⁵¹ Utah Laws 1935, ch. 105; Utah Code Ann., 1943, § 100-3-1.

³⁵² *Smith v. Sanders*, 112 Utah 517, 520, 189 Pac. (2d) 701 (1948).

³⁵³ *Hanson v. Salt Lake City*, — Utah —, 205 Pac. (2d) 255, 260 (1949).

See also *Riordan v. Westwood*, — Utah —, 203 Pac. (2d) 922, 927 (1949).

³⁵⁴ *Hammond v. Johnson*, 94 Utah 20, 28-33, 66 Pac. (2d) 894 (1937), 94 Utah 35, 39-40, 75 Pac. (2d) 164 (1938); *Adams v. Portage Irr., Res. & Power Co.*, 95 Utah 1, 16, 72 Pac. (2d) 648 (1937), 95 Utah 20, 21-22, 81 Pac. (2d) 368 (1938).

mitted to run to waste or is used by others without right, and that no right to the use of water either appropriated or unappropriated could be acquired by adverse use or adverse possession.³⁵⁵

The doctrine of prior appropriation has been the law in Utah from the time the Mormon pioneers entered Great Salt Lake Basin in 1847, to the exclusion of any recognition of riparian rights. It was many years after the first settlement and use of water before the Territorial supreme court was called upon to recognize and apply the doctrine of appropriation,³⁵⁶ although in the meantime that doctrine had been adopted and applied by custom in the various irrigation communities.³⁵⁷ And it was not until 1891 that the supreme court had occasion to express its repudiation of the doctrine of riparian rights, in emphatic terms, as utterly inapplicable to the conditions within the Territory and as never having been recognized by the legislature or by the practices and usages of the inhabitants.³⁵⁸ "In Utah the doctrine of prior appropriation for beneficial use is, and always has been, the basis of acquisition of water rights."³⁵⁹

Waters in definite underground streams have been held consistently to be the subject of appropriation.³⁶⁰ With respect to other ground waters, however, the decisions of the supreme court have passed through the stages of recognizing first the rule of absolute ownership of percolating water as against appropriations initiated after the water-bearing lands had passed to private ownership, but of holding that

³⁵⁵ Utah Laws 1939, ch. 111; Code Ann., 1943, §§ 100-1-4 and 100-3-1.

³⁵⁶ *Crane v. Winsor*, 2 Utah 248, 253 (1878); *Munroe v. Ivie*, 2 Utah 535, 537-538 (1880); *Lehi Irr. Co. v. Moyle*, 4 Utah 327, 340, 9 Pac. 867 (1886); *Elliott v. Whitmore* (Utah), 24 Pac. 673 (1890).

³⁵⁷ The earliest legislation concerning water made grants of water privileges and authorized public officials to make grants: Laws and Ordinances of the State of Deseret (Utah), Compilation 1851, Shepard Book Co., Salt Lake City, Utah, 1919. A statute passed in 1880 recognized accrued rights to water acquired by appropriation or adverse use: Utah Laws 1880, ch. XX. The first statutory authorization for the future appropriation of water was provided by Laws 1897, p. 219, *et seq.*

³⁵⁸ *Stowell v. Johnson*, 7 Utah 215, 225-226, 26 Pac. 290 (1891). See also *Salt Lake City v. Salt Lake City Water & Electrical Power Co.*, 25 Utah 456, 464, 71 Pac. 1069 (1903); *State v. Rolio*, 71 Utah 91, 101-107, 262 Pac. 987 (1927); *Wrathall v. Johnson*, 86 Utah 50, 93-94, 40 Pac. (2d) 755 (1935); *Whitmore v. Salt Lake City*, 89 Utah 387, 398, 57 Pac. (2d) 726 (1936); *Spanish Fork West Field Irr. Co. v. District Court*, 99 Utah 527, 534, 104 Pac. (2d) 353 (1940); *Moyle v. Salt Lake City*, 111 Utah 201, 216, 176 Pac. (2d) 882 (1947); *Clark v. Nash*, 198 U. S. 361, 370 (1905).

³⁵⁹ *Gunnison Irr. Co. v. Gunnison Highland Canal Co.*, 52 Utah 347, 354, 174 Pac. 852 (1918).

³⁶⁰ *Willow Creek Irr. Co. v. Michaelson*, 21 Utah 248, 254, 60 Pac. 943 (1900); *Herriman Irr. Co. v. Keel*, 25 Utah 96, 110, 69 Pac. 719 (1902); *Howcroft v. Union & Jordan Irr. Co.*, 25 Utah 311, 316, 71 Pac. 487 (1903); *Whitmore v. Utah Fuel Co.*, 26 Utah 488, 497-498, 73 Pac. 764 (1903); *Chandler v. Utah Copper Co.*, 43 Utah 479, 486, 135 Pac. 106 (1913).

water taken from land on the public domain is subject to appropriation, whether it is percolating or stream water;³²² then the rule of correlative rights as between owners of land overlying a common artesian basin;³²³ and finally the doctrine of appropriation of artesian water.³²⁴

In 1935 the legislature amended the statute relating to the appropriation of water in order to bring the acquisition and administration of rights to the use of all ground waters under the State Engineer,³²⁵ and at subsequent sessions has further amended and enlarged the applicable sections of the law. Rights to the use of any unappropriated ground waters may be acquired only as provided by the statute, the first step being the making of an application to the State Engineer, as in case of appropriations from surface supplies. Claimants of rights are required to file notice of their claims with the State Engineer.³²⁶ The right of replacement of water may be exercised by a junior appropriator of ground water where the appropriation may diminish the quantity or impair the quality of ground water already appropriated.³²⁷ The State Engineer may hold hearings to determine if ground waters are inadequate for existing claims, a supply found to be inadequate to be divided in accordance with the respective rights of the claimants.³²⁸ The State Engineer is authorized to plug, repair, or otherwise control artesian wells that are wasting public water.³²⁹

In 1949 the Utah Supreme Court had for consideration a proposal to appropriate water from a small spring area on private land, which water was said to be widely diffused through the soil through which it slowly percolated, the course of which could not be traced to any lands other than those on which the water was found, and which in its natural state produced plant life and thereby beneficially affected the land.³³⁰ Such water, said the court, is percolating water, a part of the

³²² *Sullivan v. Northern Spy Min. Co.*, 11 Utah 438, 441, 40 Pac. 709 (1895); *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 451, 54 Pac. 244 (1898); *Willow Creek Irr. Co. v. Michaelson*, 21 Utah 248, 254, 257, 60 Pac. 943 (1900); *Herriman Irr. Co. v. Keel*, 25 Utah 96, 109-110, 69 Pac. 719 (1902); *Garns v. Rollins*, 41 Utah 260, 265-266, 125 Pac. 867 (1912); *Stokey v. Green*, 53 Utah 311, 317-318, 178 Pac. 586 (1919); *Holman v. Christensen*, 73 Utah 389, 395, 274 Pac. 457 (1929).

³²³ *Horns v. Utah Oil Refining Co.*, 59 Utah 279, 301-305, 202 Pac. 815 (1921); *Glover v. Utah Oil Refining Co.*, 62 Utah 174, 177-181, 218 Pac. 955 (1923); *Utah Copper Co. v. Stephen Heyes Estate*, 83 Utah 545, 555-556, 31 Pac. (2d) 624 (1934).

³²⁴ *Wrathall v. Johnson*, 86 Utah 50, 103-106, 126-127, 40 Pac. (2d) 755 (1935); *Justesen v. Olson*, 86 Utah 158, 170-172, 176-177, 40 Pac. (2d) 802 (1935); *Hanson v. Salt Lake City*, — Utah —, 205 Pac. (2d) 255, 258 (1949).

³²⁵ Utah Laws 1935, ch. 105.

³²⁶ Utah Code Ann., 1949 Cum. Supp., §§ 100-5-12 and 100-5-13.

³²⁷ Utah Code Ann., 1943, § 100-3-23.

³²⁸ Utah Code Ann., 1943, § 100-5-1.

³²⁹ Utah Laws 1945, ch. 136; Code Ann., 1949 Cum. Supp., § 100-2-21.

³³⁰ *Riordan v. Westwood*, — Utah —, 203 Pac. (2d) 922, 929-930 (1949).

soil; and not being public water, a right to the use thereof cannot be acquired by appropriation under the appropriation statute. But the court stated that waters, even though diffused and percolating through the soil, which do not sustain plant life or otherwise benefit the land, "are not necessarily a part thereof and to the end that they might be placed to a beneficial use should belong to the public and be subject to appropriation the same as other waters." Hence, as it seemed probable that there was more than sufficient water in this spring area to sustain the plant life, it was held that the application to appropriate excess water must be approved.

Procedure for the determination of water rights is provided by statute in suits filed by the State Engineer upon petition of water users or by private parties.³⁷⁰ In suits filed by the State Engineer, and in general determinations begun by private parties, the State Engineer provides the court with lists of all claimants so far as known, and makes hydrographic surveys and proposed determinations of water rights, the final judgment of the court determining and establishing the rights being entered after the hearing of objections by claimants. The State Engineer has general administrative supervision of the waters of the State.³⁷¹ He may appoint water commissioners for the distribution of water from any source of supply, after consultation with the water users and in accordance with their recommendations if they can agree.³⁷² He also has authority to establish water districts³⁷³ and to define ground-water administrative areas.³⁷⁴

Washington

The law regulating the appropriation of water provides that subject to existing rights, all waters within the State belong to the public, and that any right to the use thereof may be acquired by appropriation in the manner provided in the statute and not otherwise.³⁷⁵ The administration of the act is vested in an engineer designated as the State Supervisor of Hydraulics,³⁷⁶ who is an assistant director in the Department of Conservation and Development. An intending appropriator must apply to the State Supervisor of Hydraulics for a permit to make the appropriation; and when the permittee has made a satisfactory showing that his appropriation has been perfected, he receives a certificate of appropriation.³⁷⁷

³⁷⁰ Utah Code Ann., 1943, and 1949 Cum. Supp., §§ 100-4-1 to 100-4-24.

³⁷¹ Utah Code Ann., 1943, § 100-2-1.

³⁷² Utah Code Ann., 1943, § 100-5-1.

³⁷³ Utah Code Ann., 1943, § 100-2-1.

³⁷⁴ Utah Code Ann., 1943, § 100-5-1.

³⁷⁵ Wash. Rem. Rev. Stats., § 7351.

³⁷⁶ Wash. Rem. Rev. Stats., § 7355.

³⁷⁷ Wash. Rem. Rev. Stats., §§ 7378 to 7387, 7390.

Any person may condemn an inferior use of water for a superior use.⁸⁷⁸ The court in the condemnation proceedings is to determine what use will be for the greatest public benefit, and that use is to be deemed a superior one. However, the statute further provides that no person may be deprived of the use of water reasonably necessary for the irrigation of his land then under irrigation, by the most economical method of artificial irrigation, in favor of another irrigation use, the court to determine the most economical method. The Supreme Court of Washington allowed the condemnation, primarily for domestic purposes, of a water supply on another's land not then being used by the landowner, pursuant to this statute, holding that the use of water for domestic purposes is a public purpose when the domestic use desired is the foundation of an agricultural enterprise.⁸⁷⁹

The riparian doctrine has been recognized repeatedly in the court decisions of Washington. Very early decisions of the supreme court acknowledged the validity of appropriations of water on public lands of the United States pursuant to local laws and customs, under authority granted by Acts of Congress;⁸⁸⁰ and in a number of subsequent cases the supreme court, in stating the appropriative principle, carefully restricted its applicability to the public domain.⁸⁸¹ Adoption of the riparian principle likewise appeared in early cases,⁸⁸² qualified by the recognition of prior appropriations on public lands.⁸⁸³ In 1897 the Washington Supreme Court held that riparian rights existed in the arid as well as the humid portions of the State, and that such rights attached to lands passing to private ownership at the inception of title thereto and would be protected as against subsequent appropriations.⁸⁸⁴ But the time element works in favor of appropriative rights likewise; that is, an appropriation of water, validly acquired, is superior to riparian

⁸⁷⁸ Wash. Rem. Rev. Stats., § 7354.

⁸⁷⁹ *State ex rel. Andersen v. Superior Court*, 119 Wash. 406, 410-411, 205 Pac. 1051 (1922).

⁸⁸⁰ *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566, 569-570, 20 Pac. 588 (1889); *Geddis v. Parrish*, 1 Wash. 587, 589-592, 21 Pac. 314 (1889); *Isaacs v. Barber*, 10 Wash. 124, 128-132, 38 Pac. 871 (1894).

⁸⁸¹ See *Benton v. Johncox*, 17 Wash. 277, 289, 49 Pac. 495 (1897); *Sander v. Bull*, 76 Wash. 1, 5, 135 Pac. 489 (1913); *Hough v. Taylor*, 110 Wash. 361, 364-365, 188 Pac. 458 (1920); *in re Doan Creek*, 125 Wash. 14, 20, 215 Pac. 343 (1923).

⁸⁸² *Crook v. Hewitt*, 4 Wash. 749, 750, 754, 31 Pac. 28 (1892); *Shotwell v. Dodge*, 8 Wash. 337, 339, 36 Pac. 254 (1894); *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 582-583, 38 Pac. 147 (1894).

⁸⁸³ *Isaacs v. Barber*, 10 Wash. 124, 128-129, 38 Pac. 871 (1894).

⁸⁸⁴ *Benton v. Johncox*, 17 Wash. 277, 279-283, 288-290, 49 Pac. 495 (1897). Reaffirmed in *Nesalhou v. Walker*, 45 Wash. 621, 623-624, 88 Wash. 1032 (1907). See *In re Doan Creek*, 125 Wash. 14, 20, 215 Pac. 343 (1923).

rights of lands entered after the date of the appropriation.³⁸⁵ The common-law doctrine has been modified by imposing upon the riparian claimant the necessity of beneficial use of the water, and by subjecting to appropriation for use on nonriparian land the waters of nonnavigable streams in excess of the quantity that can be used beneficially, either directly or prospectively, within a reasonable time, on or in connection with riparian lands.³⁸⁶ The supreme court has stated that "The common-law rule of riparian rights has been stripped of some of its rigors * * *,"³⁸⁷ 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 * * *."³⁸⁸ As a result, the advantage of position of riparian lands with reference to water rights has been materially reduced.³⁸⁹

The supreme court stated in an early decision that an underground stream with defined course and boundaries would be protected to the same extent as such a stream on the surface, but that such rule would not apply to water percolating through sand or gravel the limits of which were not defined.³⁹⁰ Subsequently the court adopted a rule of reasonable use and correlative rights in percolating waters as among

³⁸⁵ *In re Doan Creek*, 125 Wash. 14, 20, 215 Pac. 343 (1923); *Weitensteiner v. Engdahl*, 125 Wash. 106, 108-116, 215 Pac. 378 (1923); *In re Alpowa Creek*, 129 Wash. 9, 13, 224 Pac. 29 (1924); *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 569-571, 250 Pac. 41 (1926); *In re Sinalhekin Creek*, 162 Wash. 635, 642-643, 299 Pac. 649 (1931).

³⁸⁶ *Brown v. Chase*, 125 Wash. 542, 549, 553, 217 Pac. 23 (1923). See also *Proctor v. Sim*, 134 Wash. 606, 616-619, 236 Pac. 114 (1925); *State v. American Fruit Growers*, 135 Wash. 156, 161, 237 Pac. 498 (1925); *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 569-571, 250 Pac. 41 (1926).

³⁸⁷ *In re Alpowa Creek*, 129 Wash. 9, 13, 224 Pac. 29 (1924).

³⁸⁸ *Proctor v. Sim*, 134 Wash. 606, 616, 236 Pac. 114 (1925).

³⁸⁹ Holdings and statements concerning the nature and extent of the riparian right, other than as noted above, are included in various cases of which typical ones are here noted. Reasonable use of water as among riparian owners: *McEvoy v. Taylor*, 56 Wash. 357, 358, 105 Pac. 851 (1909). Impounding of water: *Tacoma Eastern R. R. v. Smithgall*, 58 Wash. 445, 452, 108 Pac. 1091 (1910). Right to overflows of streams; impounding of water; applicability of Desert Land Act: *Still v. Palouse Irr. & Power Co.*, 64 Wash. 606, 610-613, 117 Pac. 466 (1911). Riparian lands: *Miller v. Baker*, 68 Wash. 19, 20-22, 122 Pac. 604 (1912). Relation to navigability of waters: *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 451-453, 126 Pac. 945 (1912). Impounding of water: *Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*, 72 Wash. 631, 640-641, 131 Pac. 220 (1913). Nonnavigable waters; applicability of Desert Land Act: *Bernot v. Morrison*, 81 Wash. 538, 559-560, 143 Pac. 104 (1914). Riparian lands; apportionment of water: *Mally v. Weidensteiner*, 88 Wash. 398, 402, 153 Pac. 342 (1915). Right to overflows of streams: *Longmire v. Yakima Highlands Irr. & Land Co.*, 95 Wash. 302, 305-306, 163 Pac. 782 (1917). Riparian lands: *Yearsley v. Cater*, 149 Wash. 285, 288-289, 270 Pac. 804 (1928).

³⁹⁰ *Meyer v. Tacoma Light & Water Co.*, 8 Wash. 144, 147, 35 Pac. 601 (1894).

owners of overlying lands;³⁰¹ and held in 1935 that in line with that doctrine, a city that had excavated a ditch in order to operate more efficiently a gravel pit, thereby cutting off percolating water supplying neighboring lands, was making a reasonable use of its own property and was not liable for the resulting effect on the ground-water supply.³⁰²

The legislature in 1945 enacted a statute for the express purpose of extending the application of the surface-water statutes to the appropriation and beneficial use of ground waters, and amended the act in 1947 and 1949.³⁰³ Ground waters are defined as all bodies of water that exist beneath the land surface and that there saturate the interstices of rocks or other materials—that is, the waters of underground streams or channels, artesian basins, underground reservoirs, lakes or basins, the existence or boundaries of which may be reasonably established or ascertained. The act recognizes a distinction between water that exists in underground storage wholly because of natural processes, which it terms “natural ground water”, and water that is made available in underground storage artificially, either intentionally or incidentally to irrigation, which is designated as “artificially stored ground water.” Subject to existing rights, all natural ground waters, and all artificial ground waters not abandoned or forfeited, are made subject to appropriation. Exempted are withdrawals of ground waters for stock-watering purposes, or for the watering of lawns or noncommercial gardens not exceeding one-half acre in area, or for single or group domestic uses or industrial purposes not exceeding 5,000 gallons per day; but the party using ground water not exceeding such quantity may elect to make a formal appropriation thereof under the procedure provided in the act for withdrawals of ground water in excess of that quantity. Provision is made for the filing of declarations of claims of preexisting vested rights and for the issuance of certificates of appropriation with respect thereto. The Supervisor of Hydraulics has authority to designate ground-water areas or subareas, and separate depth zones therein, after hearings, and to regulate withdrawals of water when the supply is inadequate to supply all rights. A proceeding is provided for the determination by the Supervisor of abandonment of ground-water rights where the withdrawal and use of the water has been discontinued for a period of five years.

The Supervisor of Hydraulics is authorized to initiate proceedings for the determination of water rights, upon petition of one or more claimants, or when in his judgment the interest of the public will be served thereby.³⁰⁴ A statement is filed with the court, which is required

³⁰¹ *Patrick v. Smith*, 75 Wash. 407, 414–415, 134 Pac. 1076 (1913).

³⁰² *Evans v. Seattle*, 182 Wash. 450, 457–460, 47 Pac. (2d) 984 (1935).

³⁰³ Wash. Laws 1945, ch. 263; Laws 1947, ch. 122; Laws 1949, ch. 63; Wash. Rem. Rev. Stats., Supps. 1945, 1947, and 1949, §§ 7400–1 to 7400–19.

³⁰⁴ Wash. Rem. Rev. Stats., §§ 7364 to 7377.

to refer the proceedings to the Supervisor for the taking of testimony as referee. When the transcript and report have been filed, the court hears the matter and renders its decree. Supervision of public waters and administration of the provisions of the water appropriation statutes are vested in the Supervisor of Hydraulics, who has supervision over the distribution of water according to rights and priorities.³⁹⁵ He is authorized to designate water districts from time to time as required, and to appoint watermasters therefor upon petition by interested parties. He is also required to appoint stream patrolmen for designated streams the water rights of which have been adjudicated, upon application of interested parties and approval of the district watermaster if one has been appointed for such area, for whatever periods of time local conditions justify.

Wyoming

The constitution of Wyoming declares that the control of water must be in the State, which in providing for its use shall guard equally all the various interests involved.³⁹⁶ It declares also that the water of all natural streams, springs, lakes or other collections of still water within the State are the property of the State; that priority of appropriation for beneficial uses shall give the better right; and that no appropriation shall be denied except when such denial is demanded by the public interests.³⁹⁷ The constitution provides for the appointment of a State Engineer; for the division of the State by the legislature into four water divisions and the appointment of superintendents thereof; and for a Board of Control to be composed of the State Engineer and superintendents of the water divisions, the State Engineer being president.³⁹⁸ The supervision of the waters of the State and of their appropriation, distribution, and diversion is vested by the constitution in the Board of Control, its decisions being made subject to review by the courts.³⁹⁹

An appropriative right is initiated by making application to the State Engineer for a permit to make the appropriation; and the final step, after the appropriation has been perfected in accordance with the permit, is the adjudication of the right by the Board of Control and the issuance by the Board of a certificate of appropriation.⁴⁰⁰ Since the adoption of the present water-appropriation statute in 1890, at the first session of the State legislature, compliance with the procedure so provided for the acquisition of water rights is a condition precedent to

³⁹⁵ Wash. Rem. Rev. Stats., §§ 7351-1 to 7351-4 and 7355 to 7363.

³⁹⁶ Wyo. Const., art. I, § 31.

³⁹⁷ Wyo. Const., art. VIII, §§ 1 and 3.

³⁹⁸ Wyo. Const., art. VIII, §§ 2, 4, and 5.

³⁹⁹ Wyo. Const., art. VIII, § 2.

⁴⁰⁰ Wyo. Comp. Stats., 1945, §§ 71-238 to 71-250.

the making of a valid appropriation.⁴⁰¹ Failure to make use of appropriated water for five successive years is to be considered an abandonment of the same, and works a forfeiture of the water right.⁴⁰² Procedure is provided for the declaration of such abandonment by the Board of Control after a hearing, on the initiative of any water user who might be affected thereby. The declaration is filed in court; if no objection is filed, judgment affirming the Board's order is issued; if there is objection, the water user who initiated the proceeding becomes plaintiff and the objector defendant, and the issue is tried as to whether or not the water right has in fact been abandoned.⁴⁰³

The water appropriation statute defines preferred uses as including rights for domestic and transportation purposes, and these include: First, drinking; second, municipal; third, steam engines and general railway use; and fourth, culinary, laundry, bathing, refrigeration, and heating plants. Likewise, the use of water for irrigation is to be preferred to any use through "turbine or impulse water wheels" for power purposes. Existing rights that are not preferred may be condemned to supply water for preferred uses.⁴⁰⁴ Procedure is provided for changing a use to a preferred use under the direction of the Board of Control, just compensation to be paid if the change of use is approved.⁴⁰⁵

Riparian rights never have been recognized in Wyoming. The unsuitability of the common-law doctrine to local conditions, and the fact that such rule never had obtained in that State, which on the contrary had recognized a "different principle better adapted to the

⁴⁰¹ *Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 30-38, 236 Pac. 764 (1925). See *Campbell v. Wyoming Development Co.*, 55 Wyo. 347, 388, 395, 100 Pac. (2d) 124 (1940). In 1949, in *Laramie Rivers Co. v. LeVasseur*, 65 Wyo. 414, 431, 202 Pac. (2d) 680 (1949), the court stated, citing the *Wyoming Hereford* case: "We have heretofore held that no water right may be initiated under our present laws except pursuant to a permit; that hence the requirement of such permit is mandatory."

⁴⁰² Wyo. Comp. Stats., 1945, § 71-701.

⁴⁰³ Wyo. Comp. Stats., 1945, §§ 71-702 to 71-707. The statute has been construed in several decisions. See *Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 23-27, 236 Pac. 764 (1925); *Van Tassel Real Estate & Livestock Co. v. Cheyenne*, 49 Wyo. 333, 349-355, 54 Pac. (2d) 906 (1936); *Horse Creek Conservation Dist. v. Lincoln Land Co.*, 54 Wyo. 320, 329-345, 92 Pac. (2d) 572 (1939); *Campbell v. Wyoming Development Co.*, 55 Wyo. 347, 400-404, 100 Pac. (2d) 124 (1940). In such proceeding the burden of proving the issue of abandonment rests upon the one who petitions to have the water right declared abandoned: *Ramsay v. Gottsche*, 51 Wyo. 516, 529-530, 69 Pac. (2d) 535 (1937). See also *Laramie Rivers Co. v. LeVasseur*, 65 Wyo. 414, 449, 202 Pac. (2d) 680 (1949). It was held in *Ramsay v. Gottsche*, *supra*, at 51 Wyo. 532, and in *Scherck v. Nichols*, 55 Wyo. 4, 23-24, 95 Pac. (2d) 74 (1939), that abandonment must be voluntary, and does not result if nonuse is caused by facts not under the appropriator's control.

⁴⁰⁴ Wyo. Comp. Stats., 1945, § 71-402.

⁴⁰⁵ Wyo. Comp. Stats., 1945, § 71-403. See *Newcastle v. Smith*, 28 Wyo. 371, 205 Pac. 302 (1922).

material conditions of this region"—that is, the doctrine of prior appropriation—were emphasized by the Supreme Court of Wyoming in the decision rendered in *Moyer v. Preston* in 1896.⁴⁰⁶ The court stated that it inclined strongly to the view that had been expressed some years before by the Supreme Court of Colorado⁴⁰⁷ to the effect that the right of prior appropriation, and the obligation to protect it, had existed prior to any legislation on the subject.

The supreme court held in 1919 that the constitutional declaration of public waters included natural but not artificial springs, and that a spring developed artificially, and supplied by percolating waters, is not subject to appropriation but is the private property of the landowner.⁴⁰⁸

The legislature in 1947 enacted a law extending the principle of prior appropriation to rights to the use of ground waters.⁴⁰⁹ Exempted are developments solely for domestic, culinary, or stock use on a ranch or farm, and irrigation of lawns and gardens not exceeding four acres in area. Claimants of ground-water rights antedating the enactment of the statute are required to file statements of their claims with the State Engineer on or before December 31, 1950.⁴¹⁰ Appropriations after the passage of the act are made by developing the ground water and filing with the State Engineer registrations of the wells or other means of obtaining the water. After the State Engineer has determined the water-bearing capacity of an underground formation, the Board of Control is authorized to adjudicate the water rights thereto and to issue certificates of appropriation based upon priority of appropriation. The procedure for declaring abandonments of surface-water rights is made applicable to ground waters.

Statutory adjudications of water rights are initiated and made by the Board of Control.⁴¹¹ The State Engineer in the original adjudication of a stream makes a hydraulic survey, and the water division superintendent takes testimony with respect to claims of water rights. The record is transmitted to the Board of Control, which enters an order determining and establishing the priorities, each party whose right is thus adjudicated being issued a certificate. Any aggrieved

⁴⁰⁶ *Moyer v. Preston*, 6 Wyo. 308, 318-319, 44 Pac. 845 (1896). See also *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 122, 61 Pac. 258 (1900). The United States Supreme Court, in *Wyoming v. Colorado*, 259 U. S. 419, 458-459 (1922), stated with regard to the litigant States: "The common-law rule respecting riparian rights in flowing water never obtained in either State."

⁴⁰⁷ *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446 (1882).

⁴⁰⁸ *Hunt v. Laramie*, 26 Wyo. 160, 168-169, 181 Pac. 137 (1919).

⁴⁰⁹ Wyo. Laws 1947, ch. 107; Comp. Stats., 1949 Cum. Supp., §§ 71-408 to 71-420.

⁴¹⁰ By amendment of § 5, ch. 107, Wyo. Laws 1947, the filing time was extended to December 31, 1950: Wyo. Laws 1949, ch. 22.

⁴¹¹ Wyo. Comp. Stats., 1945, §§ 71-203 to 71-216, 71-224 to 71-237. and 71-256 to 71-263.

party may appeal to the district court. The final orders or decrees of the Board in the adjudication of water rights are conclusive, subject to procedural provisions of law relating to rehearings and reopening of orders or decrees, and subject to the right of appeal to the courts.⁴¹² The Wyoming Supreme Court held this statutory determination of water rights to be a valid exercise of legislative authority, the power of the Board being quasi-judicial only, and properly conferred upon executive officers.⁴¹³ This "Wyoming method" of determining water rights by an administrative agency acting in a quasi-judicial capacity, without a court hearing unless an aggrieved party appeals to the court, was adopted by the legislature of Nebraska and was held constitutional by the supreme court of that State, and was also adopted in Texas but held invalid there.⁴¹⁴

Pursuant to constitutional mandate,⁴¹⁵ the legislature divided the State into four water divisions and provided for the appointment of superintendents thereof,⁴¹⁶ who together with the State Engineer constitute the Board of Control. The Board of Control has the responsibility of creating water districts within the water divisions, each district having a water commissioner. Each division superintendent has general control of the water commissioners within his division, and under the general supervision of the State Engineer, has charge of the distribution of water according to rights of appropriation.⁴¹⁷

⁴¹² Wyo. Comp. Stats., 1945, § 71-258.

⁴¹³ *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 132-135, 143, 61 Pac. 258 (1900).

⁴¹⁴ The Nebraska Supreme Court considered the validity of the procedure at length and upheld it, in *Crawford Co. v. Hathaway*, 67 Nebr. 325, 365-368, 93 N. W. 781 (1903). The Texas Supreme Court, in *Board of Water Engineers v. McKnight*, 111 Tex. 82, 92-97, 229 S. W. 301 (1921), ruled similar legislation invalid as being in conflict with the constitution of that State in effect when the legislation was enacted. However, in 1945, in *Corzelius v. Harrell*, 143 Tex. 509, 511-514, 186 S. W. (2d) 961 (1945), the Texas Supreme Court pointed out that a constitutional provision authorizing legislation for the conservation and development of natural resources was not in effect when the water statute was enacted but was in effect prior to the enactment of legislation for the control of oil and gas; hence the *McKnight* case did not control the validity of the oil and gas legislation, which was held constitutional.

⁴¹⁵ Wyo. Const., art. VIII, § 4.

⁴¹⁶ Wyo. Comp. Stats., 1934, §§ 71-101 and 71-102.

⁴¹⁷ Wyo. Comp. Stats., 1945, §§ 71-103 to 71-108, and 71-301 to 71-309.