

**WATER RIGHTS LAWS
IN THE
NINETEEN WESTERN STATES**

Volume I

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SRP0001

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waterpower rights and properties. Municipal water rights acquired before February 24, 1909—the effective date of the water code of 1909—are confirmed. The State Engineer is directed to reject, or to grant subject to municipal use, all appropriations where, in his judgment, appropriation of the waters applied for impairs a municipal water supply. Municipal corporations are to advise him on request as to the amount and source of the municipal water supply, and any probable increase or extension of the same.¹²⁹

Some of the western water appropriation statutes provide for preferences in appropriating water and for preferred uses of appropriated water, in which domestic and municipal uses are favored.¹³⁰

The State

General observations.—It is within the province of the legislature to declare generally that the State or its agencies may appropriate water. It is likewise the legislature's prerogative to provide special procedure for such appropriation, or even to ignore the subject completely.

If nothing is said in the statute about State appropriations of water, the State executive branch could not be viewed as being thereby precluded from appropriating water for its proper functions. For example, if a water supply were needed for a State administrative or medical or penal institution, and unappropriated water is found available therefor, the State agency in charge of the institution's affairs would be no less competent to appropriate the water for its official functions than would be any other intending appropriator of water for his private needs. Some western State statutes expressly recognize the State or agencies thereof as possible appropriators.

Some individual State situations.—(1) Oregon and Utah. Waters may be withdrawn from general appropriation for specific purposes, including State use, if the legislature chooses to do this or to permit it to be done. The Oregon legislature has so withdrawn waters of a number of streams for purposes, among others, of "maintaining and perpetuating the recreational and scenic resources of Oregon," for public park purposes, and for protection and propagation of game fish.¹³¹ And the State Water Resources Board of Oregon is authorized to make withdrawals of water from appropriation when necessary to comply with requirements of the State water resources policy.¹³² In Utah, water may be withdrawn from appropriation by the Governor, on recommendation of the State Engineer, for the purpose of preserving it for use by

¹²⁹Oreg. Rev. Stat. §§ 537.230, .290, .410 (Supp. 1969), and 538.410 (Supp. 1967).

¹³⁰These matters are discussed later under "Methods of Appropriating Water of Watercourses—Restrictions and Preferences in Appropriation of Water."

¹³¹Oreg. Rev. Stat. §§ 538.110-.300 (Supp. 1967). For a different approach (appropriation of the unappropriated water of a lake by the governor, in trust for the people), see Idaho Code Ann. § 67-4301 (1949), discussed in chapter 8 under "Elements of the Appropriative Right—Purpose of Use of Water—Other Purposes of Use of Water—Recreation".

¹³²Oreg. Rev. Stat. § 536.410 (Supp. 1969).

irrigation districts and organized agricultural water users, or "for any use whatsoever," when the welfare of the State demands it. It may be restored to appropriation under the same procedure.¹³³

(2) Montana and North Dakota. The Montana Water Resources Board has constructed irrigation projects and acquired and exercised water rights therefor.¹³⁴ Neither this Board nor any other public agency has jurisdiction over the acquisition of appropriative water rights. But the Board does have authority to bring action to adjudicate the waters of any stream.¹³⁵

In North Dakota, the State Water Conservation Commission, which likewise has been engaged in water development, is given by the legislature full control over all unappropriated public water of the State to the extent necessary to fulfill the purposes of the statute. The North Dakota State Engineer is the secretary and chief engineer of the Commission and, subject to its approval, may grant water rights under the procedure provided by the statute. For its own purposes, the Commission may initiate a water right by executing a written declaration of intention and filing it in the office of the State Engineer. On completion of construction and application of water to beneficial use, a declaration of completion of the appropriation is filed.¹³⁶

(3) California. The California Water Code specifically confers upon the State the privilege of appropriating water,¹³⁷ and contains a part entitled "Appropriation of Water by Department of Water Resources" which is applicable in connection with the State Water Plan.¹³⁸

Restrictions imposed by the California legislature on taking water away from counties and watershed areas in which it originates, in such quantities as to interfere with the proper development of such counties and areas, are mentioned later in connection with preferences in appropriating water resulting from location of land.¹³⁹

¹³³Utah Code Ann. §§ 73-6-1 and 73-6-2 (1968). Such matters are noted later in discussing "Methods of Appropriating Water of Watercourses—Restrictions and Preferences in Appropriation of Water."

¹³⁴See, regarding one aspect of this, *Allendale Irr. Co. v. State Water Conservation Board*, 113 Mont. 436, 127 Pac. (2d) 227 (1942).

¹³⁵Mont. Rev. Codes Ann. §§ 89-848, -849, -851 (Supp. 1969), -850, and -852 to -855 (1964).

¹³⁶N. Dak. Cent. Code Ann. §§ 61-02-32 to 61-02-34, 61-03-01 (1960), 61-02-31, and 61-02-32 (Supp. 1969).

¹³⁷Cal. Water Code § 1252.5 (West 1956).

¹³⁸*Id.*, Div. 6, Pt. 2. The 1959 California Water Resources Development Bond Act (Stats. 1959, ch. 1762) which provided for a 1.75 billion dollar bond issue, was approved by the electorate in 1960. See "Implementation of the California Water Plan," Cal. Dept. of Water Resources Bul. 160-66, p. 18 (March 1966). See also, regarding the California Water Plan, "Water For California, The California Water Plan, Outlook in 1970" (Dec. 1970); *Id.*, Summary Report (Dec. 1970).

¹³⁹See "Methods of Appropriating Water of Watercourses—Restrictions and Preferences in Appropriation of Water—Preferences in Water Appropriation—Acquisition of rights to appropriate water."

The United States

Specific authorization in most statutes.—Most of the western water appropriation statutes specifically include the United States among those who may appropriate water pursuant to the statutes. Kansas and South Dakota include in the definition of "person" any agency of the Federal Government.¹⁴⁰ The North Dakota State Water Conservation Commission, which has supervisory control over the acquisition of all water rights in the State, is fully empowered to contract with the United States, or any of its departments, agencies, or officers, with respect to planning, developing, and handling of any or all waters of the State, whether considered as intrastate or interstate.¹⁴¹

Appropriation without specific statutory authorization.—Appropriations of water by the United States pursuant to State laws are recognized in all Western States, regardless of specific enabling mention in the State statute. For example, the Wyoming water rights statute, from the time of its first enactment, has applied in specific terms only to persons, associations, or corporations. Yet in its decision in a leading interstate suit, in which the United States was granted leave to intervene, the United States Supreme Court pointed out that pursuant to the Reclamation Act¹⁴² the Secretary of the Interior made filings for lands in both Wyoming and Nebraska in compliance with the Wyoming water appropriation law, and that these filings were accepted by the State officials as adequate under State law and established the priority dates for the projects.¹⁴³

Special statutory provisions relating to the United States.—Several of the western water appropriation statutes contain special provisions concerning appropriation of water by the United States. These are directed chiefly, but not entirely, at facilitating construction of Federal projects under the Reclamation Act of 1902 as amended.¹⁴⁴

Thus in Montana, New Mexico, and Oklahoma, prospective appropriations of water are held valid for 3 years in order to afford opportunity for investigation by the Federal Government before actually initiating the appropriative right.¹⁴⁵ The Washington statute authorizes a 1 year period for preliminary investigation of a proposed Federal project, a further period of 3 years, and even more time for detailed investigation if the undertaking appears feasible.¹⁴⁶ In South Dakota, unappropriated waters—except "for uses under

¹⁴⁰ Kans. Stat. Ann. § 82a-701(a) (1969); S. Dak. Comp. Laws Ann. § 46-1-6(1) (1967).

¹⁴¹ N. Dak. Cent. Code Ann. §§ 61-02-24, 61-02-24.1, 61-02-28 (Supp. 1969), and 61-02-25 to 61-02-27 (1960).

¹⁴² 32 Stat. 388, § 8, 43 U.S.C. §§ 372, 383 (1964).

¹⁴³ *Nebraska v. Wyoming*, 325 U. S. 589, 611-615 (1945).

¹⁴⁴ 32 Stat. 388, 43 U.S.C. § 371 *et seq.* (1964).

¹⁴⁵ Department of Interior: Mont. Rev. Codes Ann. § 89-808 (1964); Reclamation Act: N. Mex. Stat. Ann. § 75-5-31 (1968); United States: Okla. Stat. Ann. tit. 82, § 91 (1970).

¹⁴⁶ Wash. Rev. Code § 90.40.030 (Supp. 1961).

vested rights and dry draw uses"—may be withdrawn from appropriation for periods not specified in the statute pending the making of investigations by the United States.¹⁴⁷

Nebraska specifically authorizes the United States to appropriate, develop, and store unappropriated flood or unused waters in compliance with Nebraska law in connection with any project constructed under the Reclamation Act. Detailed provisions, including conducting of water along natural streams, are contained in the enactment.¹⁴⁸

Under the Idaho statute, the Division of Grazing, United States Department of the Interior, may appropriate water for the purpose of watering livestock on the public domain, subject to certain restrictions on use of the water and duration of the appropriation so required. The statute provides that this authorization shall not be construed to prevent the Bureau of Reclamation from filing application for or completing appropriation of water under the general water appropriation laws of the State.¹⁴⁹

Oregon provides, among other things, that on any stream system where construction is contemplated by the United States under the Reclamation Act, the State Engineer shall make a hydrographic survey of the stream system and shall furnish to the Attorney General all data necessary for a determination of water rights. On request of the Secretary of the Interior, the State Attorney General and district attorneys in the areas affected are required to bring suit on behalf of the State for such determination of all water rights concerned.¹⁵⁰

Without reliance upon any statute relating specifically to projects under the Reclamation Act, the Colorado Supreme Court held in 1967 that under the facts in that case there was no intent to take water and no physical demonstration from which such an intent could be inferred so as to constitute the initial step in an appropriation where the Bureau of Reclamation had made only a preliminary study "for information" along with several other studies throughout virtually all of the river basin without any determination as to which particular project might be undertaken.¹⁵¹ In another case also decided in 1967, the court noted that similar studies had been made by the Bureau of Reclamation except that, since the projects involved in the latter case had been specifically identified in Congressional legislation, they were studied in more

¹⁴⁷S. Dak. Comp. Laws Ann. § 46-5-42 (1967).

¹⁴⁸Nebr. Rev. Stat. § 46-273 (1968).

¹⁴⁹Idaho Code Ann. §§ 42-501 to -505 (1948).

¹⁵⁰Oreg. Rev. Stat. § 541.220 (Supp. 1969). Other provisions also relate to Federal reclamation. Section 537.290 exempts the United States from provisions relating to public recapture of water used for power purposes.

¹⁵¹*Four Counties Water Users Assn. v. Colorado River Water Conservation Dist.*, 161 Colo. 416, 425 Pac. (2d) 259 (1967), cert. denied, 389 U.S. 1049 (1967), reh. denied, 390 U.S. 976 (1968).

detail. But the court concluded that this did not constitute a determination to pursue the particular projects with a definite intention to actually go ahead with them and thereby appropriate water for such purposes.¹⁵²

THE LAND FACTOR IN APPROPRIATING WATER

The general rule in the West is that one at least rightfully in possession of land, even though not the owner, may appropriate water for use in connection with such land. Suggestions have been made that under some circumstances a trespasser on land may appropriate water in connection with that land. Assertions pro and con on these matters of landownership qualification in appropriating water are discussed under succeeding topics. The matter of apurtenance of the appropriative right to land is dealt with in chapter 8.

Historical Development of the Relationship

Public Domain

Prior to Congressional legislation.—In California water law, the appropriative doctrine originated and developed on the public domain without specific guidance from either the California legislature or Congress, but as a result of local customs formulated and applied in the mining camps of the Sierra Nevada foothills, and of interpretations by the State courts of pertinent common law principles. The early California courts held that locations on public land for mining purposes and diversions of water from their natural channels stood on the same footing. Each was the exercise of an implied license from the State with the acquiescence of the Federal Government. As between conflicting claims of location of land and appropriation of water, priority in time would govern.¹⁵³ Thus, as between possessors of land or water, where the true owner was not intervening, principles of equity were applied. The presumed license to work the mines and to appropriate water was dependent upon a proviso that the prior rights of others be not thereby infringed.

The principle was thus established that the first appropriator of water of a stream passing over Federal public lands—who had no title to the soil because it was still in the Government—had the right to insist that the water be subject to

¹⁵² *Four Counties Water Users Assn. v. Middle Park Water Conservation Dist.*, 161 Colo. 429, 425 Pac. (2d) 262 (1967), cert. denied, 389 U.S. 1049 (1967), reh. denied, 390 U.S. 976 (1968).

¹⁵³ See *Jennison v. Kirk*, 98 U. S. 453, 457-458 (1879); *Irwin v. Phillips*, 5 Cal. 140, 146-147 (1855); *Hill v. Newman*, 5 Cal. 445, 446 (1855); *Conger v. Weaver*, 6 Cal. 548, 555-556 (1856); *Hoffman v. Stone*, 7 Cal. 46, 48 (1857); *Crandall v. Woods*, 8 Cal. 136, 141, 144 (1857); *Bear River & Auburn Water & Min. Co. v. New York Min. Co.*, 8 Cal. 327, 332-333 (1857); *Palmer v. Railroad Commission*, 167 Cal. 163, 170-171, 138 Pac. 997 (1914).