

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

Volume I

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SRP0008

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State Lands

Appropriation of water by State for use of State lands.—The power of the legislature of a State to authorize, either expressly or by implication, the State government or any of its agencies to appropriate water for proper purposes is no more debatable than its power to authorize individuals to do so. This is mentioned earlier under "Who May appropriate Water." The instrumentality used in making water available for specific State lands, or for such lands in general—whether grant or appropriation, or as to permissible method of appropriation—is within the discretion of the law-making body.

Appropriation by others in relation to State lands.—In addition to what the State chooses to do in making unappropriated water available for use of its own lands, there is some legislation concerning appropriations by others in relation to State lands. Thus the State of California, by enactment of the Civil Code,¹⁷⁴ is held by its supreme court to have consented to the taking, by an appropriator pursuant to the code procedure, of the water of any stream in which the State held riparian rights, by virtue of its ownership of land contiguous to such streams, at the time of such appropriation. Appropriators under the Civil Code thereby acquired rights superior to the riparian rights of lands owned by the State on the same stream when the appropriations were made before the riparian lands passed into private ownership. But the riparian rights of lands acquired from the State are superior to appropriative rights of lands on the same stream which were *acquired after* the riparian lands passed into private ownership because, although the State might have reserved from its grants of land the waters flowing through them for the benefit of subsequent appropriators, it had not done so. Section 1422, which provided that the rights of riparian owners should not be affected by the provisions of the statute, saved and protected the rights of grantees who acquired land from the State before proceedings to appropriate water under the code provisions were initiated.¹⁷⁵

102 Pac. 728 (1909); *Caviness v. La Grande Irr. Co.*, 60 Oreg. 410, 424, 119 Pac. 731 (1911); *Davis v. Chamberlain*, 51 Oreg. 304, 315, 98 Pac. 154 (1908); *Laurance v. Brown*, 94 Oreg. 387, 395, 185 Pac. 761 (1919).

Some Federal court decisions: *Krall v. United States*, 79 Fed. 241, 242-243 (9th Cir. 1897), appeal dismissed, 174 U. S. 385, 389-391 (1899); *Almo Water Co. v. Jones*, 39 Fed. (2d) 37, 38-39 (9th Cir. 1930); *United States v. Walker River Irr. Dist.*, 104 Fed. (2d) 334, 336-337, 339-340 (9th Cir. 1939).

Some United States Supreme Court decisions: *Atchison v. Peterson*, 87 U. S. 507 (1874); *Bacey v. Gallagher*, 87 U. S. 670 (1875); *Sturr v. Beck*, 133 U. S. 541, 550-551 (1890); *United States v. Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 703-710 (1899); *Gutierrez v. Albuquerque Land & Irr. Co.*, 188 U. S. 545, 552-556 (1903); *San José Land & Water Co. v. San José Ranch Co.*, 189 U. S. 177, 183-184 (1903). See *Forbes v. Gracey*, 94 U. S. 762, 766-767 (1877).

¹⁷⁴ Cal. Civ. Code §§ 1410-1422 (1872).

¹⁷⁵ *Lux v. Haggin*, 69 Cal. 255, 368-376, 4 Pac. 919 (1884), 10 Pac. 674 (1886). See also *Antioch v. Williams Irr. Dist.*, 188 Cal. 451, 463, 205 Pac. 688 (1922); *Palmer v.*

The declaration in the California Civil Code, while binding the State as to its proprietary lands bordering on nonnavigable streams, does not affect lands of other persons or water rights pertaining thereto.¹⁷⁶

The Idaho Supreme Court held that a water right may be perfected by a lessee of State land for use in connection with such land. If a water right is initiated by a lessee of private land, according to the court, the water right is the lessee's property unless he was acting as agent of the owner. There is no reason why a lessee of State land should be excepted from this privilege.¹⁷⁷

Montana, according to its supreme court, by necessary implication assumed to itself the ownership, *sub modo*, of the rivers and streams of the jurisdiction. By legislation authorizing appropriation of the water—first adopted by the Territory¹⁷⁸ and continued by the State¹⁷⁹—Montana expressly granted the right to appropriate waters of such streams, and conferred upon anyone the right to make a valid appropriation of water on unsold State lands.¹⁸⁰ An appropriation of water for use on State school land, leased by the irrigator from the State, was held to be not invalid because title to the land was not in the appropriator.¹⁸¹

Under the facts and circumstances of an Oregon case, the supreme court held that a squatter on State land who initiated a water right thereon had a right to sell his improvements and water rights to one who later acquired title to the land.¹⁸²

The first Texas statute authorizing appropriation of water and providing procedure for acquiring rights of use, enacted in 1889, was applicable only to the arid regions of the State.¹⁸³ This statute, the supreme court held, could not operate and probably was not intended to operate on the rights of existing owners of private riparian lands. It was intended to operate only on such interests as were in the State by reason of its ownership of riparian lands. The court concluded that the State, in authorizing appropriation of unappropriated waters of every river or natural stream in the arid areas, thereby consented to the making of such appropriations insofar as the rights of its own lands were concerned.¹⁸⁴

Railroad Commission, 167 Cal. 163, 172, 138 Pac. 997 (1914); *Hand v. Carlson*, 138 Cal. App. 202, 209-210, 31 Pac. (2d) 1084 (1934).

¹⁷⁶ *Duckworth v. Watsonville Water & Light Co.*, 170 Cal. 425, 432, 150 Pac. 58 (1915).

¹⁷⁷ *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 745-746, 291 Pac. 1064 (1930).

¹⁷⁸ Mont. Laws 1885, p. 130.

¹⁷⁹ Mont. Rev. Codes Ann. § 89-801 *et seq.* (1964).

¹⁸⁰ *Smith v. Denniff*, 24 Mont. 20, 22, 60 Pac. 398 (1900).

¹⁸¹ *Sayre v. Johnson*, 33 Mont. 15, 20, 81 Pac. 389 (1905).

¹⁸² *Campbell v. Walker*, 137 Oreg. 375, 385, 2 Pac. (2d) 912 (1931).

¹⁸³ Tex. Laws 1889, ch. 88.

¹⁸⁴ *McGhee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, 591-592, 22 S.W. 398, 967 (1893).

Questions of rights-of-way granted by a State over its own lands are discussed later under "Rights-of-Way for Water Control and Related Purposes."