

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

Volume I

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of another or to inundate other than his own land, a verified copy of written conveyance of easement or option therefor.²³⁰ After all, the granting of a permit to one who does not have access to the source of supply would scarcely be a business-like proceeding. It could easily lead to trouble.

Late in the 19th century, long before the California Water Commission Act was passed, the supreme court of that State held that one might make an appropriation of water by taking peaceable possession of a constructed ditch, which would be good as against all the world except the true owner and those holding under or through him. Such appropriator, said the court, must account to the true owner until his possession ripens into a title by prescription. When this transpires, his right as against other appropriators would have priority from the date of his own possession and appropriation.²³¹

RIGHTS-OF-WAY FOR WATER CONTROL AND RELATED PURPOSES

Public Lands

Public Lands of the United States

Early Acts of Congress.—Under "The Land Factor in Appropriating Water," above, attention is called to the effect of the Congressional legislation of 1866 and 1870²³² on the development of the appropriation doctrine in the West. These statutes related not only to water rights on the public lands, but also to rights-of-way necessary for their effectuation and enjoyment. Section 9 of the Act of 1866 provided that the right-of-way for construction of ditches and canals, for the purpose of effectuating appropriative rights on the public domain that had vested and accrued under local customs, laws, and court decisions, should be acknowledged and confirmed. The amendatory Act of 1870 was passed to clarify the Congressional intent that grantees of the United States would take their lands charged with the existing servitude.²³³ This statute provided that all patents, preemptions, and homesteads should be subject, not only to vested and accrued water rights, but also to ditch and reservoir rights connected therewith, acquired or recognized by section 9 of the 1866 statute. In 1879, the United States Supreme Court construed the legislation in two decisions of major importance, both of which went to the United States Supreme Court from the Supreme Court of California.²³⁴

²³⁰Tex. Water Rights Comm'n, "Rules, Regulations and Modes of Procedure," rule 215.9 (1970 Rev., Jan. 1970).

²³¹*Utt v. Frey*, 106 Cal. 392, 396, 39 Pac. 807 (1895).

²³²14 Stat. 253, § 9 (1866); 16 Stat. 218 (1870).

²³³*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154-155 (1935).

²³⁴*Jennison v. Kirk*, 98 U.S. 453, 456-457, 459 (1879); *Broder v. Water Co.*, 101 U.S. 274, 275-277 (1879).

(1) *Jennison v. Kirk*. Counsel contended that only the right to the use of water on public lands acquired by priority of possession is dependent on local customs, laws, and decisions of courts, and that the rights-of-way over such lands for construction of ditches and canals is conferred absolutely on those who have acquired the water right. In rejecting this contention, the Supreme Court said that the object of the section was to give the sanction of the proprietor, the United States, to possessory rights and to prevent them from being lost on a sale of the lands. The section proposed no new system; it sanctioned, regulated, and confirmed a system already established. As so expounded, the section foreclosed further proprietary objection by the United States to applications that rested on local custom.²³⁵

(2) *Broder v. Water Company*. In this case private rights of ownership of lands of two groups were involved—those in one group acquired *after* the date of passage of the Act of 1866, and those of the other acquired *before* the enactment. As to a canal of one of the parties, so far as it ran on the date of enactment through land of the United States—in which private rights were subsequently acquired—“this act [of Congress] was an unequivocal grant of the right of way, if it was no more.”²³⁶ As to the other lands granted under an earlier act containing a reservation in favor of pre-existing rights, an appropriator who had constructed a canal across the lands before they were granted in 1862 and 1864 need not rely on the Act of 1866. The Court considered that legislation “rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one.”²³⁷

That the Supreme Court in *Broder v. Water Company* regarded the Act of 1866 as “an unequivocal grant” for existing diversions on the public lands was reiterated by that Court in 1950.²³⁸ “Thus Congress made good appropriations in being as against a later patent to riparian parcels of the public domain, and removed the cloud cast by adverse federal claims.” And in 1935, the Court held that the effect of the Acts of 1866 and 1870 was not limited to rights acquired before 1866 but reach into the future as well.²³⁹

(3) Other cases. Although these Congressional statutes speak only of ditches, canals, and reservoirs, it was the view of a United States Court of Appeals that such terms are broad enough to include rights-of-way for “dams, flumes, pipes, and tunnels as analogous or incidental to, and discharging the functions of, such reservoirs, ditches and canals.”²⁴⁰

²³⁵ *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 748 (1950).

²³⁶ *Broder v. Water Co.*, 101 U.S. 274, 275 (1879).

²³⁷ *Id.* at 276.

²³⁸ *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 748 (1950).

²³⁹ *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154-155 (1935).

²⁴⁰ *Utah Light & Traction Co. v. United States*, 230 Fed. 343, 345 (8th Cir. 1915).

For a recent case discussing these statutes, see *Hunter v. United States*, 388 Fed. (2d) 148, 154-155 (9th Cir. 1967).

No right vests as against the Government under these statutes until the work is completed. The United States Supreme Court held that the statutes create no title, legal or equitable, in the one who simply takes possession of the land. Under the statutes "no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the government, in the party entering upon possession from the mere fact of such possession unaccompanied by performance of any labor thereon."²⁴¹

As the pueblo rights of the City of San Diego accrued prior to the passage of the Congressional acts granting rights-of-way over the public domain, rights-of-way acquired under such legislation were held by the California Supreme Court to be subordinate to the already vested rights of the city derived from its succession to the Mexican pueblo.²⁴² (See "The Pueblo Water Right," chapter 11.)

Later Acts of Congress.—An act passed in 1890 provided that all patents taken up after its date for lands west of the 100th meridian should contain reservations of rights-of-way thereon for ditches or canals constructed by authority of the United States.²⁴³ A number of enactments regarding water and hydroelectric power followed.²⁴⁴

Legislation enacted in 1941 relates to grants of rights-of-way to States or political subdivisions thereof.²⁴⁵

Some other United States Supreme Court interpretations.—According to the United States Supreme Court, the Congressional Acts of 1866 and 1870 were primitive and works for generating and distributing electric power were unknown; hence, they were not in the mind of Congress. These pioneer statutes were limited to ditches, canals, and reservoirs; they did not cover power houses, transmission lines, or necessary subsidiary structures. So, when such modern works came into use, the early statutes were found inadequate. To meet this situation, Congress passed the Act of 1896, which related exclusively to rights-of-way for electric power purposes. The Court considered it plain that the Act of 1896 superseded those of 1866 and 1870 so far as they were applicable to such rights-of-way.²⁴⁶

The Supreme Court held in another decision that the difference of most significance between the acts of 1891 and 1896 related to the nature of

²⁴¹ *Bear Lake & River Waterworks & Irr. Co. v. Garland*, 164 U.S. 1, 18 (1896). See *United States v. Rickey Land & Cattle Co.*, 164 Fed. 496, 499 (N.D. Cal. 1908).

²⁴² *San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, 131-132, 287 Pac. 475 (1930).

²⁴³ 26 Stat. 391 (1890), 43 U.S.C. § 945 (1964).

²⁴⁴ Of these, see 26 Stat. 1101 (1891), 43 U.S.C. §§ 946-949 (1964); 29 Stat. 120 (1896), 43 U.S.C. § 957 (1964); 30 Stat. 404 (1898); 43 U.S.C. § 951 (1964); 31 Stat. 790 (1901), 43 U.S.C. § 959 (1964). The Federal Power Act of 1920 provided that rights-of-way acquired prior to June 10, 1920, were not affected by this act. 41 Stat. 1063, 16 U.S.C. § 816 (1964).

²⁴⁵ 55 Stat. 183, 43 U.S.C. § 931a (1964).

²⁴⁶ *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405-406 (1917), affirming in part and reversing in part, 209 Fed. 554 (8th Cir. 1913), reversing 208 Fed. 821 (D. Utah 1913).

the respective rights-of-way. The right-of-way intended by the 1891 act was neither a mere easement nor a fee simple absolute, but a limited fee on an implied condition of reverter in the event that the grantee ceased to use it or retain the land for the purpose indicated in the act. Under the Act of 1896, however, the beneficiary was intended to receive a revocable permit or license, not a limited fee.²⁴⁷

State Lands

Laws of some Western States grant the right-of-way across lands of the State for diversion and distribution works required in effectuating an appropriation. Some require the payment of compensation, others not. Some examples follow:

Nebraska.—Nebraska accords the right to occupy State lands and to obtain rights-of-way over highways, without compensation, to those who wish to construct the necessary water control works.²⁴⁸

South Dakota.—South Dakota grants to any person holding a valid statutory water right, over all school and public lands belonging to the State, a right of way for the construction of necessary waterworks when constructed by authority of the commissioner of School and Public Lands. The statute makes no mention of compensation.²⁴⁹

Idaho.—The Idaho statute grants the right-of-way over State lands to any person for construction and maintenance of works for conveyance of water. Just compensation, to be ascertained as provided for taking of private property for public use, must first be paid.²⁵⁰

Texas.—In Texas, the grant of right-of-way, not to exceed 100 feet in width, and the necessary area for any dam and reservoir site, for any of the purposes authorized by the water rights law, includes rock, gravel, and timber and the right-of-way for construction purposes. The beneficiary pays such compensation as the Texas Water Commission may determine.²⁵¹

Oregon.—Oregon has several laws relating to grants of rights-of-way over State lands for ditches and other water facilities.²⁵² The earliest Oregon statute granting rights-of-way over State lands to individuals and corporations for the construction of water ditches was approved February 24, 1885.²⁵³ This law provided that all patents issued by the State for any of its tide, swamp, overflowed, and school lands should be subject to any vested rights of the owners of such water ditches acquired under the law. This statute, said the

²⁴⁷ *Kern River Co. v. United States*, 257 U.S. 147, 152 (1921).

²⁴⁸ Nebr. Rev. Stat. §§ 46-244 to -251 (1968).

²⁴⁹ S. Dak. Comp. Laws Ann. §§ 5-4-2 and 46-8-18 (1967).

²⁵⁰ Idaho Code Ann. § 42-1104 (1948).

²⁵¹ Tex. Rev. Civ. Stat. Ann. art. 7582 (1954).

²⁵² Ore. Rev. Stat. §§ 541.030, .130, and .240 (Supp. 1969).

²⁵³ Ore. Laws 1885, p. 73, Rev. Stat. § 273.761 (Supp. 1969).

Oregon Supreme Court in 1898, was a legislative sanction, confirmatory of the customs of miners and, like the Act of Congress of July 26, 1866, "was the recognition of a pre-existing right, rather than a granting of a new easement in real property."²⁵⁴

Oregon also accords to the United States, the State, or any person, firm, cooperative association, or corporation the right to acquire the right-of-way across public, private, and corporate lands, or other rights-of-way across public, private, and corporate lands, or other rights-of-way, for necessary construction, maintenance, and use of all necessary works for securing, storing, and conveying water for irrigation, drainage, or other beneficial purposes, on payment of just compensation under the laws of eminent domain. Similar provision is made for acquiring the right to enlarge an already constructed conduit to convey the required quantity of water, upon payment of compensation for the damage, if any, caused thereby.²⁵⁵

Utah.—The Utah statute likewise grants to any person a right-of-way "across and upon public, private, and corporate lands" for construction and use of all necessary water control facilities "upon payment of just compensation therefor."²⁵⁶ The authorization in another section,²⁵⁷ to enlarge an existing ditch owned by someone else on payment of compensation, has been construed by the Utah Supreme Court as invoking the principle involved in eminent domain in the event that the parties cannot agree.²⁵⁸

California.—California municipal corporations are granted the right-of-way over public lands of the State for waterworks and powerplants, and the right to take materials for construction and also State waters under certain circumstances.²⁵⁹

Federal projects.—In some State statutes, special provision is made for grants of rights-of-way across State lands for project development works constructed by authority of the United States.²⁶⁰

California legislation granting rights-of-way to the United States over public lands of the State for certain purposes, including ditches and canals constructed under the provisions of the Reclamation Act, and providing that subsequent patents or conveyances of such lands located or filed on should be issued subject thereto, was repealed.²⁶¹

²⁵⁴ *Carson v. Gentner*, 33 Oreg. 512, 523, 52 Pac. 506 (1898).

²⁵⁵ Oreg. Rev. Stat. § § 772.305 and .310 (Supp. 1963).

²⁵⁶ Utah Code Ann. § 73-1-6 (1968).

²⁵⁷ *Id.* § 73-1-7.

²⁵⁸ *Nielson v. Sandburg*, 105 Utah 93, 96-102, 141 Pac. (2d) 696 (1943), citing *Salt Lake City v. East Jordan Irr. Co.*, 40 Utah 126, 121 Pac. 592 (1911); *Peterson v. Sevier Valley Canal Co.*, 107 Utah 45, 50-51, 151 Pac. (2d) 477 (1944).

²⁵⁹ Cal. Pub. Utilities Code § § 10151-10155 (West 1956).

²⁶⁰ See Oreg. Rev. Stat. § 541.240 (Supp. 1969); S. Dak. Comp. Laws Ann. § § 5-4-2 and 46-8-18 (1967).

²⁶¹ Cal. Pub. Resources Code § § 8351 and 8352, repealed, respectively, Stats. 1943, ch. 1124, and Stats. 1953, ch. 501.