

University of Colorado Law School

Colorado Law Scholarly Commons

Water Resources Allocation: Laws and
Emerging Issues: A Short Course (Summer
Conference, June 8-11)

1981

6-8-1981

Development of the Appropriation Doctrine: Outline

Charles F. Wilkinson

Follow this and additional works at: <https://scholar.law.colorado.edu/water-resources-allocation-laws-and-emerging-issues>

 Part of the Agriculture Law Commons, Animal Law Commons, Contracts Commons, Dispute Resolution and Arbitration Commons, Energy and Utilities Law Commons, Environmental Law Commons, Indigenous, Indian, and Aboriginal Law Commons, Legislation Commons, Litigation Commons, Natural Resources and Conservation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Oil, Gas, and Mineral Law Commons, Property Law and Real Estate Commons, Recreation, Parks and Tourism Administration Commons, State and Local Government Law Commons, Urban Studies Commons, Water Law Commons, and the Water Resource Management Commons

Citation Information

Wilkinson, Charles F., "Development of the Appropriation Doctrine: Outline" (1981). *Water Resources Allocation: Laws and Emerging Issues: A Short Course (Summer Conference, June 8-11)*. 3.
<https://scholar.law.colorado.edu/water-resources-allocation-laws-and-emerging-issues/3>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



Charles F. Wilkinson, *Development of the Appropriation Doctrine: Outline*, in *WATER RESOURCES ALLOCATION: LAWS AND EMERGING ISSUES* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1981).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

OUTLINE

DEVELOPMENT OF THE APPROPRIATION DOCTRINE

BY

CHARLES F. WILKINSON
PROFESSOR OF LAW
SCHOOL OF LAW
UNIVERSITY OF OREGON

WATER RESOURCES ALLOCATION
LAWS AND EMERGING ISSUES

UNIVERSITY OF COLORADO SCHOOL OF LAW

I. INTRODUCTION

The riparian system was unsuited for the American West. Water was needed for different uses, principally mining and irrigation. Further, the scarcity of water in the West caused economic users to demand a system of water allocation that established fixed, quantifiable rights to water. The shifting, correlative rights recognized by the riparian doctrine failed to meet these utilitarian needs. Local communities developed the prior appropriation doctrine -- "first in time, first in right" -- which established vested property rights in senior appropriators. The courts, and later Congress and the state legislatures, acknowledged these local customs and incorporated them into the case law and the statutes.

Initially, western states with dual riparian and appropriation systems ("California" doctrine states) moved to the appropriation doctrine as the sole basis for acquiring rights to water. Today, faced with ever increasing demands to conserve water and to recognize the instream values of water, most western legislatures have taken steps to alter some of the basic elements of the prior appropriation doctrine as it existed in its historic form. The courts are also beginning to develop doctrines that square the historic prior appropriation doctrine with contemporary needs.

The modern treatises are R. Clark, Waters and Water Rights (Allen Smith Co.; 1967, with pocket parts) (seven-volume

treatise; comprehensive treatment of state and federal issues); W. Hutchins, Water Rights Laws in the Nineteen Western States (U.S. Department of Agriculture; 1971) (three volume treatise; emphasis on state law including summaries of the laws of the individual states). The standard casebooks are C. Meyers and A. D. Tarlock, Water Resource Management (Foundation Press; 1980, 2d ed.); F. Trelease, Water Law (West Publishing Co.; 1979, 3rd ed.).

II. REJECTION OF THE RIPARIAN DOCTRINE

A. The Land Ownership Requirement

Valid appropriations can be made by a non-riparian landowner or by a person occupying public lands.

Irwin v. Phillips, 5 Cal. 140 (1855).

B. The Rule of Correlative Rights

Deficits are not prorated in times of shortage; rather, there is no balancing of interests and any deficit is borne entirely by junior appropriators. Irwin v. Phillips, supra.

C. The Watershed Limitation

Water may be appropriated in one watershed, then transported and used in another watershed. Coffin v. Left Hand Ditch, 6 Colo. 443 (1882).

D. Adoption of the Prior Appropriation Doctrine

1. The hybrid system, recognizing both riparian and appropriative rights (the "California doctrine"), has been adopted in the Pacific North-

west and in states along the 100th Meridian: Calif., Oregon, and Washington; North Dakota, South Dakota, Nebraska, Kansas, Oklahoma and Texas.

2. The pure appropriation (or "Colorado doctrine") states are Alaska and the Rocky Mountain States: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

III. ELEMENTS OF THE PRIOR APPROPRIATION DOCTRINE

A. Diversion

Water must be physically removed from the water-course. State ex rel. Reynolds v. Miranda, 83 N.M. 443, 493 P.2d 409 (1972); Fullerton v. State Water Resources Control Bd., 90 Cal.App.3d 590, 153 Cal.Rptr. 518 (1979). The diversion requirement is included in three state constitutions. See, e.g., Idaho Dep't. of Parks v. Idaho Dep't. of Water Administration, 94 Idaho 440, 530 P.2d 924 (1974); Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd., 197 Colo. 469, 594 P.2d 570 (1979).

B. Beneficial Use

Water cannot be validly appropriated unless it is applied without waste to a beneficial use which, under case law or statutes in most states, has been defined as domestic use or commercial uses such as mining, manufacturing, stock watering, and agriculture.

See generally, Comment, Minimum Streamflows: The Legislative Alternatives, 57 Neb.L.Rev. 704, 711-13 (1978). Thus, unless a statute expressly so provides, water cannot be appropriated to preserve fish and wildlife or scenic values. Empire Water and Power Co. v. Cascade Town Co., 205 F. 123 (8th Cir. 1913).

C. Intent to appropriate and Due Diligence

An appropriator may claim a priority date relating back to the time work began if intent to appropriate and reasonable diligence are shown. City and County of Denver v. Northern Colorado Water Conservancy Dist., 130 Colo. 375, 276 P.2d 992 (1954).

IV. FEDERAL-STATE RELATIONSHIPS AND THE APPROPRIATION DOCTRINE

Many early appropriations in the West were made by miners on the federal lands. In addition, federal patents were issued; it was unclear when, if ever, federal patents would carry riparian rights. Thus it became important to reconcile the extent to which state or federal law governed the acquisition of private water rights on the public lands.

A. The Traditional Approach: Express Federal Statutory Deference to State Law

In 1866 Congress protected appropriations on public lands from claims by the United States. 43, U.S.C. Sec. 661. In 1870 Congress provided that any federal patents would be subject to existing appropriations,

ditches, and rights-of-way. Id. In 1877, The Desert Lands Act provided that all water on non-navigable watercourses on the public lands "shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." 43 U.S.C. Sec. 321. The Supreme Court held that this provision in the 1877 Act "severed" water rights from rights to land. Thus as of 1877, "if not before," water rights in non-navigable watercourses became "subject to the plenary control of the designated states." California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

B. The Modern Approach: Lack of Federal Preemption

Reliance upon the 1866, 1870, and 1877 acts and upon the California Oregon rationale fails to resolve many questions. The Desert Lands Act of 1877 applies only in designated states and to non-navigable watercourses. What rule applies in other states and on navigable waterways? What rule applies to appropriations before 1877? Before 1870 or 1866? The best answer is that states are free to develop their own rules, not because land and water rights were "severed" in 1877, but because Congress never preempted state law. Thus states have the prerogative of recognizing either riparian or appropriative rights on the public lands, no matter when acquired,

because there never has been a general federal law to the contrary. See generally Kleppe v. New Mexico, 425 U.S. 529 (1976); United States v. New Mexico, 438 U.S. 696 (1978). The exceptions are those specific instances in which state law has been preempted, the most notable examples being Indian reserved rights.

C. Access Across Federal Lands for Water Works

Rights-of-way are now governed primarily by the Federal Land Policy and Management Act of 1976, 43 U.S.C. Sections 1761-71. See also 16 U.S.C. Sections 478, 481 (access and use of waters in national forests).

V. MODERN LEGACIES OF THE HISTORIC APPROPRIATION DOCTRINE

State legislatures have moved on a number of fronts to build upon the common law system of prior appropriation as developed by the courts. Beginning with Wyoming in 1890, all states have now established administrative agencies to issue permits, enforce priorities, approve transfers, and designate forfeitures. General stream adjudications are conducted in the agencies or in court. Procedures for setting minimum stream flows have been instituted in most states. Groundwater codes have been enacted to fill the void left by the appropriation doctrine, which dealt only with surface waters.

In spite of the statutory reform, many of the basic notions in the early cases remain alive and continue to influence water law and policy. The following are examples of conceptual issues that remain important to the practicing lawyer as doctrine continues to evolve.

A. The Primacy of State Law

The major decisions demonstrate that the Supreme Court will presume deference to state water law unless Congressional intent to the contrary is clearly expressed. California v. United States, 438 U.S. 645 (1978) (Section 8 of Reclamation Act requires that federal reclamation projects comply with state laws concerning construction and operation); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (McCarran Amendment allows suit in state court for adjudication of Indian water rights); United States v. New Mexico, 438 U.S. 696 (1978) (Forest Service Organic Act of 1897 did not reserve water for aesthetic, recreational, or wildlife preservation purposes).

B. Property Rights and Governmental Jurisdiction

Historically water has been treated as property belonging to the states. Future decisions may more squarely recognize that the states do not "own" the water; rather, the states have governmental authority to regulate the use of water in the state. A similar development has already occurred in the law

of wildlife -- also dealing with a moving resource and competing governmental and private claims -- where 19th century formulations of "ownership" have given way to a jurisdictional analysis. See Hughes v. Oklahoma, 441 U.S. 322 (1979), overruling Geer v. Connecticut, 161 U.S. 519 (1896).

C. Permit Denial Based on the Public Interest

Historically, water rights were obtained, whether by local custom or by statute, simply by meeting the requirements of a valid appropriation. There was no mechanism for denial on the ground that the appropriation might be contrary to the public interest. Recent statutes have included provisions for such a denial. See Alaska Stat., 46.15.080; Robie, The Public Interest in Water Rights Administration, 23 Rocky Mtn. Min. L. Inst. 917 (1977). The public trust doctrine may also apply. United Plainsmen Ass'n. v. North Dakota State Water Conservation Comm'n., 247 N.W.2d 457 (N.D. 1976); Johnson, The Public Trust Doctrine in Western Water Law, 14 U.Cal-Davis L.Rev. _____ (1981).

D. Decreed Rights Based on Waste

Large numbers of western irrigators have water rights based on wasteful irrigation works. In many cases those uses, including the waste, have been recognized by court decrees. Because the rights are conceptualized

as vested property rights, some courts have held that the waste cannot be abated by later conservation legislation without causing a compensable taking. Enterprise Irrigation District v. Willis, 135 Neb. 827, 284 N.W. 326 (1939). Allowing administrative officials and courts to order such waste discontinued, however, would free up water for uses such as instream flows and energy development.

A number of modern cases have moved to eliminate waste on a variety of grounds. Wasted water has been found not to be a beneficial use, In re Water Rights of Escalante Valley Drainage Area, 10 Utah2d 77, 348 P.2d 679, 681-82 (1960), or maximum utilization of water. A-B Cattle Co. v. United States, 196 Colo. 539, 589 P.2d 57, 60-61 (1978). Wasted water has been held to be forfeited. State v. McLean, 62 N.M. 264, 308 P.2d 983, 988-89 (1957). In Idaho, waste through carriage loss is discouraged by measuring water rights from the point of discussion, not the place of use. Glenn Dale Ranches, Inc. v. Shaub, 94 Idaho 585, 494 P.2d 1029, 1032 (1975). The transfer of wasted water has been denied. Basin Electric Power Coop. v. State Board of Control, 578 P.2d 557, 569-70 (Wyo. 1978). Whatever specific theories may be employed, it appears increasingly likely that courts will proceed on the conceptual basis that no vested rights are acquired in wasted

water and that appropriations of water based in part on wasteful practices can be decreased over time as new technologies become reasonable feasible. See generally Note, Water Waste--Ascertainment and Abatement, 1972 Utah L. Rev. 449.