

Water Law: An Overview

Reviewed May 20, 2009

Background

Water is at the heart of agriculture. Without water, crops and livestock would not be able to survive. Water used in agricultural production can come from surface waters, such as rivers, lakes, streams, and ponds, or from groundwater, such as an aquifer. The allocation of this important resource is left up to each state, with very little federal intervention. Each state has its own regulatory system to allocate both the surface waters and the groundwater in the state.

Many important legal issues are presented by the use of water in agriculture. This reading room will deal with quantity issues, such as, allocation, irrigation, and other problems common to agriculture's use of water. For quality issues involving water please see the [Clean Water Act Reading Room](#), [Environmental Law Reading Room](#), and [Pesticides Reading Room](#). These reading rooms look closely at the quality issues in water.

Surface Waters

Allocation of surface waters is dependent on state law. Three different allocation systems have developed in the United States. The first is the riparian doctrine, which developed in the water-abundant eastern United States. The western United States developed the system of prior appropriation. Finally, a handful of states adopted a hybrid system, which contains parts of both the prior appropriation and the riparian systems.

Riparianism

Riparianism limits the use of water to only those landowners with riparian land. In order to be classified as a riparian landowner, the landowner must own a parcel of land adjacent to a watercourse, such as streams, lakes, and ponds. The water may only be put to a reasonable use, and the courts can enjoin unreasonable uses.

The riparian landowner has the right to make "reasonable use" of the watercourse. This means that the riparian landowner may make a reasonable use of the waters, as long as that use does not interfere with the reasonable use of another downstream riparian landowner. Reasonableness is a comparison of the proposed use with the other riparians' uses. The law considered any natural uses, such as water for drinking, watering livestock, or watering a garden, as reasonable. Artificial uses, such as those for irrigation or industry, are considered reasonable uses under most states' laws.

Non-riparian landowners generally have no right to use water, although some riparian jurisdictions may allow it. A majority of jurisdictions require proof of actual harm from the use of water on non-riparian land. The minority follows the Restatement (Second) of Torts § 855, which allows for the reasonable use of water on non-riparian land, but only if the user also owns riparian land.

Under riparian rights, use of the water is not required to keep the right alive. New uses may be started at any time as long as the new use is a reasonable one. Because the right is attached to the riparian land, non-use does not extinguish the right.

Today, almost all riparian states have enacted some form of a permit system, moving towards what has been described as a "regulated riparian" system. Regulated riparianism allows for a permit system to allocate water usage. Each state that uses a form of regulated riparianism has a central state agency with the control to say who may use the water, how much they can use, and when they can use it. Regulated riparianism departs from common law riparianism by looking at the projected use before any water is ever actually used. The state will use the same reasonable use criterion as with the common law but determine beforehand if the new use is reasonable. This allows the state to take into account both the potential benefits to society and the compatibility with current uses before

granting a new permit. In many cases, the permit is only required on consumptive uses and excludes nonconsumptive uses, or those that do not require a diversion or removal of water from the watercourse.

The permitting system allows the state to plan for the future, and maximize water usage in the future. Even if a use is exempt from a permit, the user may still have to file a water use plan with the state in order to help with planning. However, the rules governing whether a use requires a permit vary from state to state. Further, in many states, agricultural uses are exempt from permit requirements.

Regulated riparian permits are not for indefinite periods of time, like those in prior appropriation states, but for a fixed period of years. The quantity of water allowed, under the permit, can also be adjusted in the public interest, in times of shortages, to protect environmental resources. Also during times of shortages, the state can require a pro rata reduction across the board, or a reduction based on seniority of use. The permit also gives priority to users holding permit over non-permitted users whose withdrawals maybe hurting the permitted users. Finally, riparian landowners who do not obtain a permit within the required statutory time period may see a reduction or a forfeiture of their common law riparian rights.

Prior Appropriation

Miners, who first settled the West, needed water to develop their mining claims. However, they could not use the riparian system because the land needed was not adjacent to a watercourse. The miners used a system already in place to solve disputes over water use, "first in time, first in right." This was the birth of the prior appropriation doctrine, where the first user had the right to continue using the water to the exclusion of the rights of those who came later.

The prior appropriation system is based on priority. The most senior appropriator has the highest priority and can defeat all other less senior appropriators in times of shortages. Unlike riparianism, there is no requirement that a senior appropriator use less water in times of a shortage. Water users may take in order of their respective priorities, each taking their full appropriative right until the water is gone.

The senior appropriator may enforce his rights by "calling the river." This is a process that allows the senior appropriator to ensure that junior appropriators do not use water out of turn. The senior appropriator will either go to court or the state water agency to have their right enforced against a junior appropriator. If no water would reach the senior appropriator, because the water would be lost through evaporation as it flowed, then the senior has made a "futile call," and the state will not enforce his right against the junior. The rationale is that it is better for water to be used by the junior appropriator, than lose the water through transport to the senior appropriator.

The prior appropriation doctrine varies somewhat from state to state, although there are three general requirements: (1) the appropriator must intend to apply water to a beneficial use, (2) the water must be diverted from a natural course, and (3) the water must be applied to a beneficial use. A beneficial use is any use recognized by the state as being an appropriate use of water, such as domestic, municipal, agricultural, industrial and recreational uses. In all prior appropriative states, agricultural uses are considered beneficial uses. The beneficial use is the measure of the appropriative right, and is a limitation of the appropriative right. Once the water is put to a beneficial use, the right is perfected and has priority over later appropriators. Even if a better use of the water arises later, the senior appropriator still has the right to use his original right, no matter how wasteful the use may seem.

In order to have a valid appropriation, an appropriator must show the necessary intent to make an appropriation. The intent necessary is usually just the intent to divert water and apply the water to a beneficial use. In states that require a permit, application for the permit shows the objective evidence of the necessary intent. A valid appropriation will be given a priority date, or the date the water was first used. Some states have developed the doctrine of relation back that allows the appropriator to use the date that the intent was formed as the priority date.

Historically, the appropriator was required to divert, or build some form of a diversion, in order to provide notice that the water was appropriated. A diversion is typically any alteration to a portion or a stream's entire natural course. In many cases, the capacity of the diversion could be used to determine the extent of the quantity of water appropriated. Today, most prior appropriation states have adopted a permit system that satisfies the notice requirement a diversion.

Hybrid Systems

Some states have developed hybrid allocation systems, which combine aspects of both the riparian and the appropriative rights systems. California and Oklahoma are two such states. There is no uniform system that fits all

hybrid states. What they have in common is the existence of both riparian and prior appropriative rights working together. For more information please see [Water Appropriation Systems](#).

Groundwater

Water used in agriculture can also come from underground aquifers. Even though many of these aquifers are connected to surface waters, many states have a different allocation system for groundwater. Groundwater allocation systems often differentiate between on-tract and off-tract uses. On-tract use is where water is used on the tract where the pump is located. Off-tract use is where water is transferred to another location for use.

States often may not fall clearly within a particular doctrine, and may use components of two or more systems. For this reason, it is best to contact your state water agency to determine the allocation system that is used by your state.

List of State Water Offices

Absolute Dominion Rule

Under the Absolute Dominion Rule, also called the "Absolute Ownership Rule" or the "English Rule," a landowner may use as much ground water as possible. The rule does not take into account impacts on neighboring users, and as a result, one owner could monopolize the entire aquifer without incurring liability. This doctrine gave the incentive to pump as much water as possible, without fear of incurring penalties from a neighboring user. Most states have rejected this doctrine, because malicious withdrawals of water could not be enjoined. The states that do continue to follow this doctrine allow for remedies for willful injury. States following this doctrine are Connecticut, Georgia, Indiana, Louisiana, Maine, Minnesota, Massachusetts, Mississippi, Rhode Island, Texas, and Vermont.

Correlative Rights Doctrine

The Correlative Rights Doctrine distributes water on an equitable basis among landowners and allows off-tract uses, although these uses are subordinate to on-tract uses. Like the Absolute Dominion Rule, Correlative Rights determine rights in groundwater based on ownership of land. The difference is that landowners overlying the same aquifer are limited to a reasonable share of the aquifer's total supply, and there is not an absolute right to groundwater or an unlimited right to pump.

The doctrine was first recognized in California in *Katz v. Walkinshaw*, 74 P. 766 (Cal. 1903). The decision places the authority to allocate groundwater in the court's hands. The court held that in times of shortages an overlying owner must limit withdrawals to a "fair and just proportion" of the underlying supply. In fights between two users, whom are both exporting the water, the court would use the doctrine of prior appropriation. Finally, in disputes between an overlying landowner and an exporter, the overlying landowner receives a reasonable share of the water, even if the overlying owner is junior to the exporter. The states applying this doctrine include: California, Minnesota, Iowa, Arkansas, Vermont, and Oklahoma. Nebraska follows a combination of this doctrine and the Reasonable Use doctrine.

Prior Appropriation

Many western states have adopted a prior appropriation doctrine. Similar to the prior appropriative system for surface water, the first landowner to beneficially use or divert water from a groundwater source is given a priority over later users. The right, similar to the surface water system, is limited to the amount that is put to a beneficial use. Today many states have replaced this doctrine with a permit system, similar to the surface water permit system. This is the doctrine applied in Alaska, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

Reasonable Use Rule

Some states have adopted the doctrine of reasonable use or the American rule, which requires the water to be put to a reasonable use on the overlying tract of land and does not permit water to be taken to another tract. Reasonable use has been construed broadly, and almost any use is considered reasonable as long as the water is used on the overlying land. The rule is considered a modification of the Absolute Dominion Rule with exceptions for wasteful uses and off-tract uses. This system is used in Alabama, Arizona, Delaware, Illinois, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Virginia, and West Virginia. Other states have adopted the Reasonable Use Rule in conjunction with another groundwater rule. Florida has abolished all common law groundwater rights for a permit system, but uses the Reasonable Use doctrine in

granting permits. Wyoming uses the Reasonable Use doctrine along with the Prior Appropriative system for groundwater. Finally, Nebraska uses Reasonable Use along with the Correlative Rights Doctrine.

The Restatement (Second) of Torts Rule

Finally, Wisconsin and Ohio have adopted the Restatement (Second) of Torts approach, which utilizes a variety of factors to determine if a use of water is appropriate. The Restatement's rule is seen as a merger of the Absolute Dominion Rule and the Reasonable Use rule. Section 858 of the Restatement (Second) of Torts states:

Liability for Use of Groundwater

(1) A proprietor of land or his grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

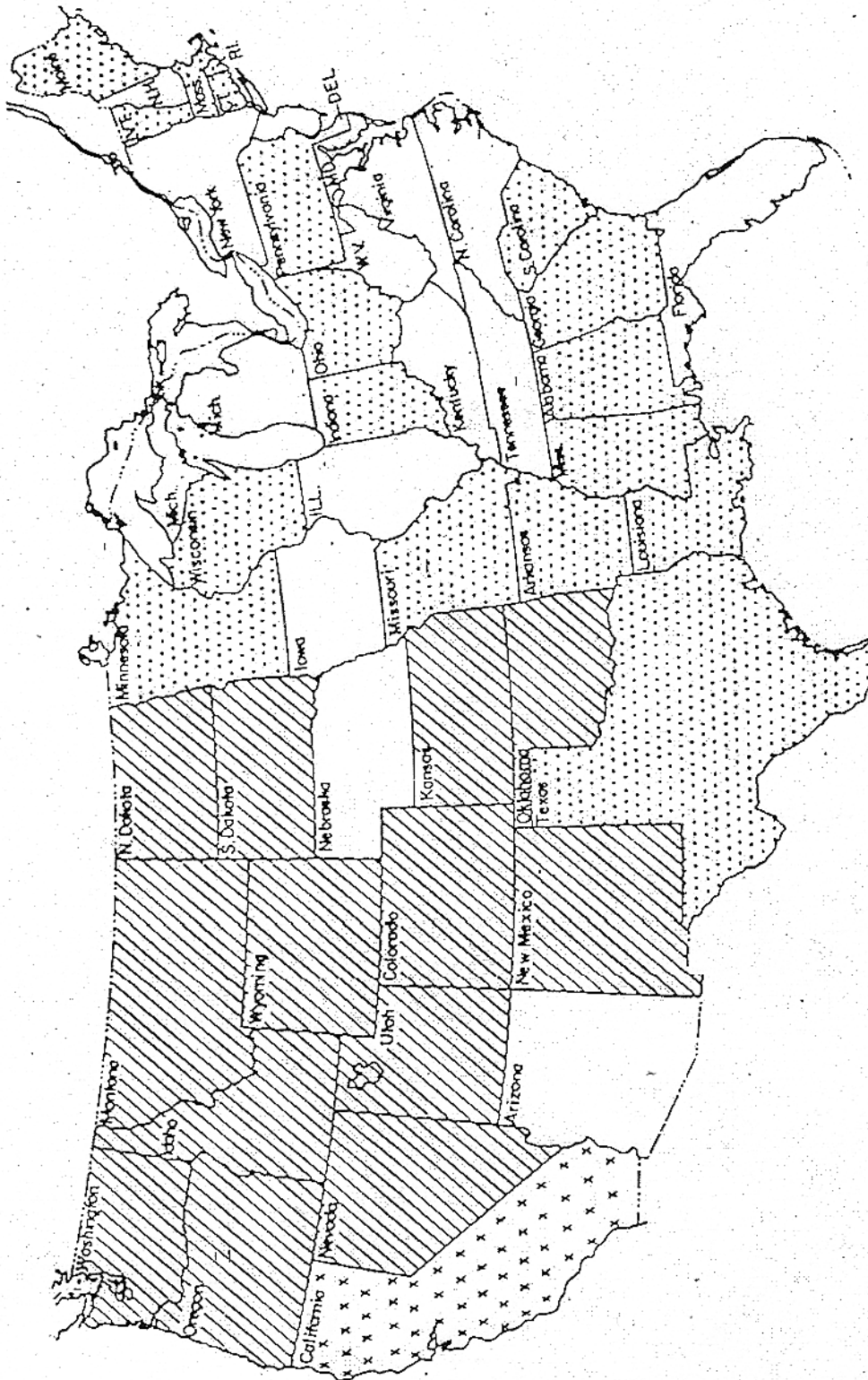
- (a) the withdrawal of groundwater unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,
- (b) the withdrawal of groundwater exceeds the proprietor's reasonable share of the annual supply or total store of groundwater, or
- (c) the withdrawal of the groundwater has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

TABLE 9-4. GENERAL THEORY OF STATE GROUND-WATER LAW IN THE UNITED STATES

Reasonable Use	Correlative Rights	Absolute Ownership	Appropriation
Alabama	California	Connecticut	Alaska
Arizona		Hawaii	Colorado
Arkansas		Indiana	Florida
Delaware		Louisiana	Idaho
Georgia		Maine	Montana
Illinois		Massachusetts	Nevada
Iowa		Mississippi	New Mexico
Kansas		Ohio	North Dakota
Kentucky		Pennsylvania	Oklahoma
Maryland		Rhode Island	Oregon
Michigan		South Carolina	South Dakota
Minnesota		Texas	Utah
Missouri		Vermont	Washington
Nebraska			Wyoming
New Hampshire			
New Jersey			
New York			
North Carolina			
Tennessee			
Virginia			
West Virginia			
Wisconsin			

This table is subject to change through permit legislation and exemptions.

Source: Driscoll, F.G., 1986, Ground Water and Wells. Copyright Johnson Division. Reprinted with permission. Original source: Smith, R.J., 1980, Current Trends in Ground Water Law; paper presented at the Water Well and Construction Institute, University of Wisconsin Extension, Madison, WI



WESTERN UNITED STATES - "Appropriation Doctrine"

- Riparian Doctrine was not applicable to the arid west.
- Western water law is based on a mix of Spanish law, Moslem precedents to Spanish law, Mormon, and miner law.
- Miners did not own riparian lands; they needed water and took it (appropriated it). First miner took what he needed; later miners took what was left - the doctrine of "prior appropriation."
- Appropriation rights may be sold, but date of sale is established as the new data of the right.

NEEDS CHANGE, POLICIES AND PRIORITIES CHANGE.

- Urbanization in west needs water.
- Indian Water Rights: 1908 Supreme Court decision - when tribes were settled on reservations, they were given implicit rights to the water. Those rights would have seniority.
- Protection of in-stream uses: Support recreation and maintain natural ecosystem.
- Reallocation of water varies from state to state.
 - Voluntary transfers:
 - Short-term and seasonal are common.
 - Some are permanent.
 - No restriction on transfer of rights if there is no change in use of the right.
 - Review is required if transfer involves change of use of the transferred water, place, or purpose of use.
 - Public Trust doctrine in several states questions some existing water rights.
 - Review questions effect on:
 - In-stream uses.
 - Economy of local area.
 - Endangered species.

- Emphasis on more efficient use:
 - Subsidies reduced or removed.
 - Prices increased to reflect true value of water.
 - Changes in design and operation of storage and delivery systems to conserve water.
- Private marketing of water rights will increase.
 - Transfers to high value use.
 - Cities will buy water rights from agriculture.
 - Transferring of water will become increasingly important.

WATER LAW

EASTERN UNITED STATES - "Riparian Doctrine"

- Body of document developed from judge-made common law.
- Dates from 1927 and evolved in early 1800s when:
 - Water was plentiful.
 - Primary needs were for domestic use and transportation.
 - Few cities.
 - Water not needed for irrigation or mining in eastern U.S.
- Is thought to have developed from English Common Law and the Code of Napoleon, 1804, but
- May have originated in U.S. and taken to England.
- Riparian Doctrine governs private rights and responsibilities toward water. There are two interpretations:
 1. Continuous flow theory.
 - Riparian landowners can use the water on riparian land so long as it does not adversely affect downstream riparians.
 2. Reasonable use theory.
 - Each riparian may use waater on riparian lands so long as it does not interfere with reasonable use by lower riparians.
- Riparian rights arise from ownership of land bordering a stream. They are automatically transferred with land title.
- Permit systems by States:
 - May be for a fixed time period.
 - Are subject to conditions and limitations.
 - May be revocable.

**TABLE 9-2. WATER LAW IN THE UNITED STATES-SUMMARY AND COMPARISON OF THE
DOCTRINES OF APPROPRIATION AND RIPARIAN RIGHTS**

Appropriation

1. Beneficial use, independent of land ownership, is the basis of the water right.
2. Priority of use is the basis of allocation between rival claimants. Rights of the appropriators are not equal.
3. Rights are to a definite quantity of water.
4. Water may be used on nonriparian land.
5. Right may be lost by nonuse or abandonment.
6. There is no natural flow requirement.

Riparian

1. Land ownership is the basis of the water right. Water may be used for any reasonable purpose.
2. Co-sharing equality is the basis of allocation between rival claimants.
3. Rights not fixed to a definite quantity of water.
4. Use of water may be restricted to riparian land.
5. Right does not depend on use and is not subject to abandonment.
6. There is a qualified right to natural flow in some jurisdictions.

Source: Driscoll, F.G., 1986, Ground Water and Wells. Copyright Johnson Division, Reprinted with permission. Original source: Tank, R.W., 1983, Legal Aspects of Geology. Plenum Press, NY

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1996

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may not know all the answers to the hypothetical situation presented in the first paragraph but you should be able to ask the right questions to determine those answers.

Riparian Rights

The concept of riparian rights in the United States is believed to have originated in English common law and is the basis of the existing water law in nearly all of the states in the eastern United States. Riparianism arose in the humid, water-rich eastern states where the demand for water centered around mill operation, stock watering, and domestic usage. Agricultural and industrial pressures were minor; the main concern of water regulation was the prevention of pollution to allow the downstream user an unadulterated supply of water.

The basic premise of riparianism is that the right to use water is a property right. Only persons who own land that is in actual contact with inland waters such as streams, rivers, lakes, or bays are granted riparian rights. Swamps and overflow lands are excluded; only land that is inundated at the average high tide is considered to be riparian land. Furthermore, the owner of riparian land is precluded from transferring his or her riparian rights to another parcel of property—such rights are limited to the riparian property.

Riparian rights emphasize water usage for natural purposes such as taking care of the necessities of life. Riparian owners may take stream-flow for domestic use but not for large-scale irrigation or industrial uses. These owners do not have an assigned quantity of water that they may take. Upper riparian owners may not obstruct the water flow or injure the lower riparian owner. Lower riparian owners are prohibited from back-flooding an upstream owner. If these restrictions are violated, the injured riparian owners are entitled to collect damages for their losses. Riparian users can only lose their riparian rights voluntarily; there are no provisions for forfeiture of riparian rights.

The riparian rights doctrine has evolved to include two derivations: (1) "reasonable use" and (2) "correlative rights." The reasonable use rule allows upper riparian owners to take any amount of water they desire as long as this usage does not interfere with the reasonable needs of the lower riparian owners.

In states that utilize the correlative rule, riparian owners are assigned a proportional share of the water based upon landownership. This method of water allocation has the benefit of providing riparian

owners with a minimum amount of water that they can reasonably anticipate. It reinforces the concept that water users are interdependent with their neighbors. Furthermore, in times of drought, each riparian owner's share is proportionally reduced; no one riparian owner is forced to bear the loss of more than his proportional share of water.

Prior Appropriation

The doctrine of prior appropriation arose during the 1880s among the miners and new settlers in the western states. Because they were trespassing on government lands, they were unable to claim riparian rights. Furthermore, because their water uses—mining and irrigation—were much more intensive, a different system from riparian rights had to be devised. A system of water rights developed that resembled the manner in which the miners' gold claims were staked out. The first person to divert water from a stream or creek was granted a vested right to that amount of water. This right is superior to all rights gained by future appropriators. Thus, the "First in Time, First in Right" principle emerged.¹

The prior appropriation system created two types of users: senior appropriators and junior appropriators. A senior appropriator is a user whose appropriation is prior to all others. The rights that a senior appropriator possesses are impressive. The amount of water that a senior appropriator is authorized to use is dependent upon whether the particular state uses a permit system. In states without a permit system, the senior appropriator is entitled to a fixed amount of water equal to the amount that was originally withdrawn when the use first became vested.² Some western states have established a permit system by which the senior appropriator is entitled to the amount of water specified by the permit. In these states, this amount is derived through a mathematical formula that incorporates many of the variables that determine the amount of water needed. These variables include water quantity limitations, conditions of transmissions, locations of land, degree of slope, depth and character of soil, length of growing season, nature of crops, and climate. The holder of such a permit is perpetually entitled to the right to use this water allotment as long as the water is used beneficially.

Appropriators who enter into the unappropriated supply of water after the senior appropriators are known as junior appropriators. These

are mainly either downstream farmers possessing secondary rights to the river's water or people who have benefited from Bureau of Reclamation projects.³ Senior appropriators who desire to withdraw more water than their vested amount are considered to be a junior appropriator for that additional withdrawal.

Due to the fixed amount of water that each appropriator can use, junior appropriators are not at the mercy of senior upstream appropriators. They will receive their allotted water supply unless there is a reduction of total water available to all appropriators. For example, during a drought, senior appropriators continue to use their original ration of water. Once the senior appropriators' needs are fulfilled, any surplus may be used by the next-in-line appropriator. If there is no surplus, the junior appropriators are simply out of luck.

Unlike riparianism, the prior appropriation right can be lost involuntarily. Failure to exercise the water right in a beneficial use and nonuse of the water right for a specified period of time constitute grounds for forfeiture of the appropriation.⁴ Because prior appropriation was created by miners and settlers, it comes as no surprise that most of the beneficial uses are those that promote economic development. In many instances, this bias toward economic growth has resulted in detrimental environmental consequences. As a result of the environmental movement of the 1970s, some western states have included conservational, recreational, and aesthetic goals as beneficial uses.⁵ (See table 3.1 for a list of such uses.)

Appropriators do not have a free hand to change how they appropriate their water allocation. Their vested rights continue only for as long as the type and place of their beneficial use and point of diversion remain the same. Several states have established administrative systems from which an appropriator must receive permission before undertaking a new use; new uses cannot adversely affect other appropriators. In some states, there is an additional requirement for changes in the place of diversion: the user must show an expectation of greater profits.⁶

In the early years of prior appropriation, any transfer of water rights resulted in a change in priority. The new users were treated as junior appropriators even though the water rights they gained were from a senior appropriator. With the advent of state permitting systems, this procedure has changed. Permitting systems allow for a senior appropriator to transfer his or her seniority to another appropriator.

An appropriator's rights are protected against two types of interference: (1) interference with the diversion methods to the place of use,

Table 3.1
Beneficial Uses of Water

Domestic uses
Municipal uses
Irrigation uses
Stock watering
General railway
Power generation
Mining
Milling
Manufacturing
Refrigeration
Fire protection
Minerals recovery
Groundwater recharge
Log floating (California only)
Gravel recovery (California only)
Fish and wildlife preservation and propagation
Aesthetics (considered beneficial only in recent years)

Source: R. Clark, *Water and Water Rights*, vol. 1 (Indianapolis, Indiana: The Allen Smith Company, 1978).

and (2) interference with streamflow above a senior appropriator's diversion.⁷ Minor inconveniences or irregularities in the streamflow do not constitute cause for judicial relief from the interferences; there must be a material or substantial reduction of the quality or quantity of the senior appropriator's supply. If a junior appropriator takes water beyond his allotted amount, a senior appropriator may sue to recoup the lost value of water, labor, and crops.⁸

The doctrine of prior appropriation is divided into two branches: (1) the Colorado doctrine and (2) the California doctrine. The Colorado doctrine is a pure prior appropriation rights system, whereas the California doctrine consists of both riparian and prior appropriation rights. Completely rejecting riparian rights, the Colorado doctrine allows for streamwater diversions as long as the use fulfills the beneficial use provision.⁹ No appropriator, however, can divert more water than actually needed.

One of the strongest criticisms of the Colorado doctrine is that it promotes waste, as it does not provide for effective measures to encourage conservation. Pursuant to the Colorado doctrine, when an appropriator takes measures to conserve water, the surplus water reverts back to the public and is subject to appropriation. Consequently, the appropriator who conserves water is not entitled to utilize

that water for other uses. Several states are attempting to address this dilemma by enacting statutes that enable the appropriator to use the conserved amount for other purposes before it can be further appropriated by other users.

The California doctrine incorporates riparian rights with the vested appropriation rights gained under prior appropriation.¹⁰ Both water systems are found in California because of its unique history: the settlers from the East brought the riparian rights systems, and the miners created the prior appropriation system. Each state that utilizes the California doctrine varies in the degree to which it recognizes riparian rights.

As would be expected, the California doctrine, consisting of both prior appropriation and riparian rights, creates many instances of conflict regarding which water system is applicable in a particular situation. Because riparian rights are vested with riparian land without regard for water use and prior appropriation is based upon the actual use of the water, the two doctrines seem to be irreconcilable. However, in California, the two systems have been merged into one system entitled "reasonable and beneficial use."¹¹ This system combines the concept of (1) the appropriator's beneficial use of the water and (2) the riparian landowner's reasonable use of the water. Riparian rights have been narrowed over the years due to a bias in favor of the prior appropriation system. Currently, riparian rights may be exercised only on riparian land—owners are not allowed to use riparian water on nonriparian land. Furthermore, Californian voters passed an amendment restricting all water rights to a beneficial test in an attempt to reduce waste.

Comparisons between Riparian and Prior Appropriation Rights

In summary, there are two major differences between riparianism and prior appropriation. Under riparianism, landowners can only gain surface water rights if they are riparian owners; water rights are property rights. The riparian owners do not have an assigned amount of water to be used solely for their needs. Instead, the riparian owners must return all of the water they divert back to the watercourse. The basic premise is that the streamflow can only be used temporarily; it is not a resource to be depleted.

A water user in a prior appropriation state need not have land abutting a waterbody. Thus, while riparian owners would lose their

water rights if the course of the stream changed, an appropriator would remain unaffected. Water users gain rights based upon the priority of their beneficial use and have an exclusive right to the allotted water. Therefore, unless the state has a minimum flow rule, appropriators can lawfully divert the entire quantity of streamflow if they can use it beneficially. The waterbody is viewed much as a mine would be—the water is the ore to be extracted.

Groundwater Law

Groundwater is divided into two legal classifications: (1) underground streams and (2) percolating waters. Underground streams are waters that flow in a known and defined channel. Percolating waters, on the other hand, are all other underground waters that do not flow in a definite channel. It is important to determine which type of underground water is present, as they are sometimes regulated differently.

Historically, land was developed with little or no consideration for groundwater protection. In English common law, landowners had absolute control of the groundwater beneath their property. They could dig a new well anywhere on their property even if it adversely affected a neighbor's existing well. Their neighbor's only recourse would be to dig a deeper well. There were three prevailing reasons why groundwater withdrawals were not regulated:

1. The existence, origin, and movement of such waters were so secret and concealed that an attempt to administer any set of legal rules in respect to them would result in hopeless uncertainty;
2. The damage to such waters could not be foreseen or avoided; and
3. Any other rule would prevent or interfere with the normal and legitimate use of the land.¹²

Rejecting the English system of absolute ownership, the American courts created a hybrid system. This system incorporated the reasonable use rule of riparianism and some principles from English common law. The new system allowed landowners to withdraw groundwater only for reasonable uses as long as the withdrawal did not harm the water supply of an adjoining landowner. Most eastern states use this hybrid rule. One problem with this system is that the courts have had difficulties determining what constitutes "reasonable." The courts have considered several factors: the effects of the withdrawal, the