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AMERICAN WATER RIGHTS LAW:

A Brief Synopsis of Its Origin and Some of Its Broad Trends with Special Reference to the Beneficial Use of Water Resources†

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Water problems arise out of too little or too much water. Too little water results from drought, rapid or over development, lack of storage or replenishment, and impairment in water quality by sediment, industrial and human wastes, and by salt encroachment. Too much water results from excessive precipitation and runoff, poor land use practices, and barriers to its movement over and through the land. Water may be an asset or a liability depending upon how it is used and managed. It has seldom been in exactly the right amount, at the right time, and in the right place.[1]

After it falls upon the land, water is retarded or accelerated in its movements by land use and water management practices and structures. This affects its availability for use and its capacity to cause damage. Much of this management situation is in the hands of farmers and ranchers of the nation but part is in the hands of non-agricultural groups. Severe erosion, sedimentation and water management problems arising out of improper land use have given rise to one of the most important movements and legal devices for group action in conservation ever to be experienced by agricultural peoples.[2] This democratic and thoroughly American approach to the solution of local problems might prove useful in other spheres of activity.

Often the upstream portion of drainage areas or basins is dominated by one combination of water supply and damage conditions while the downstream portion is dominated by another. Seasonal changes alter this situation somewhat. Thus, for centuries there have been sharp conflicts among land and water users, states and nations owing to the fact that the source of water and the damage caused by it

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†This article does not necessarily represent the views of the U. S. Department of Agriculture.

1. BENNETT, H. H., WATER IN THE GROUND: TOO MUCH OR TOO LITTLE WATER. Soil Conservation, vol. XVI, pp. 153-157. February, 1951.

2. SOIL CONSERVATION DISTRICTS. (Mimeographed report by U. S. Soil Conservation Service released July, 1952.) Note: This report shows more than 2,400 districts organized in 48 states, Puerto Rico, the Virgin Islands, Hawaii, and Alaska, including 84 per cent of the farms in the United States.

often arise in different localities and jurisdictions from the place where water is used and the damage takes place.[3] The resolving of these conflicts among water users and governments has presented monumental tasks for engineers, lawyers and statesmen in many parts of the world.[4]

Different systems of custom and law affecting the use and management of water seem to have arisen out of these basic physical and human relationships. In our 17 western States, which are generally considered a shortage region but have also conditions of excess water, a system of prior appropriation has emerged. This emphasizes exclusive rights of use for specific quantities, times and places, subject to the rule of reasonable beneficial use but not depending upon ownership of land contiguous to the water supply.[5-6] Here there is nearly uniform state-wide administration of water development and use,[7] since ordinary processes of law are inadequate[8] and entire sources of supply are considered.[9] But of course this system is supperimposed upon a residual one of the modified common law in the Pacific Coast and Great Plains states, especially in California where it is still very important.[10]

In the eastern 31 States, however, which are generally considered a water excess region but have also conditions of shortage, a system of the modified common law of water rights obtains. This emphasizes rights of water use in common without regard to specific quantities, times and places of use, subject to the rule of reasonable use, but depending in the first instance upon ownership of land contiguous to the water supply.[11] Here there is a lack of state-wide administra-

3. WIEL, S. C., FIFTY YEARS OF WATER LAW, 50 HAR. L. REV., 252, 254, 267 (1916); NEWELL ON IRRIGATION MANAGEMENT (1916); REPORT, PRESERVATION OF THE INTEGRITY OF STATE WATER LAWS, NAT. RECL. ASSOC., Appendix G, pp. 165-168 (1943); U. S. v. Gerlach Live Stock Co., 339 U. S. 725, 746-747 (1949).

4. See, for example, report on the Colorado Basin, House Document 717, 80th Congress, 2d Session, 1948.

5. HUTCHINS, WELLS A., SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST, pp. 80-107 (1942).

6. REPORT, PRESIDENT'S WATER POLICY COMMISSION, WATER RESOURCES LAW, vol. III, pp. 154-167 (1950) with footnotes thereto and including particularly Appendix B by Wells A. Hutchins.

7. Hutchins, *op. cit.* (footnote 5), p. 77.

8. Report, *op. cit.* (footnote 6), p. 158.

9. Rasmussen v. Moreni Irr. Co., 56 Utah 140, 153, 189 Pac. 572 (1920); Richlands Irr. Co. v. Westview Irr. Co., 96 Utah 403, 418, 80 Pac. (2d) 458 (1938); Hutchins, *op. cit.* (footnote 5), pp. 128-129. See also *infra,* cases cited under footnote 62.

10. Hutchins, *op. cit.* (footnote 5), pp. 42-64; U. S. v. Gerlach Live Stock Co., *supra;* Report, *op. cit.* (footnote 6), p. 156 with footnote.

11. Heath v. Williams, 43 Am. Dec. 265, 270-276 (1845); and cases therein cited; Shively v. Bowlby, 152 U. S. 1, 14-15 (1894) and cases therein cited.

tion of water development and use in the comprehensive sense in which it is carried out in the West. But there is present in some states a limited appropriation and administrative system imposed upon the modified common law.[12] Each of these systems of custom and law recognizes water rights acquired by adverse use.[13]

In several states, the civil law rule of diffused surface waters is in effect while in others the common law rule applies.[14] But in the West, the unrestricted use of diffused surface waters by the landowner may be limited because these waters constitute one source of stream flow to which other rights attach.[15]

The main differences in the riparian and prior appropriation systems, aside from the extent of development of the rules of law applying to specific circumstances, (and there are differences in this regard too), are the greater emphasis which the system of prior appropriation places upon the beneficial use of water, the exercise of statewide administration of rights and development, and protection for and encouragement of investments dependent upon water resources.[16] Here is where practical problems of policy arise having effect upon the development, use, conservation and protection of land and water resources.

It has been said that "moderating principles of correlative rights and reasonable use seem to be outstripping exclusive rights by priority of appropriation in general esteem"[17] but, in the West, this view is not borne out in respect of rights as the recorded decisions and statutes show a steady trend toward restricting the application of the common-law doctrines. In fact, the rule of reasonable use seems to be employed as one method for accomplishing such a restrictive policy.[18] In a very broad sense, it appears that as our economy expands and demands for water tend to outstrip the available supply, the policy of the law of water rights tends to move more and more toward principles of exclusive use in the western States, the exclu-

12. MCGUINESS, C. L., WATER LAW WITH SPECIAL REFERENCE TO GROUND WATER. U. S. G. S. Cir. 117, pp. 17-30 (1951); Report, *op. cit.* (footnote 6).
13. 56 AM. JUR. 323-339; Hutchins, *op. cit.* (footnote 5), p. 397.
14. Levene v. Salem, 191 Oreg. 182, 191-192, 229 Pac. (2d) 255 (1951); 56 AM. JUR. 550.
15. Hutchins, *op. cit.* (footnote 5), p. 127.
16. Report to the Governor of Kansas, THE APPROPRIATION OF WATER FOR BENEFICIAL PURPOSES, p. 19 *et seq.*, December, 1944; Hutchins, *op. cit.* (footnote 5, pp. 42, 72-77, 298-313, 326-336.
17. Wiel, *op. cit.* (footnote 3), p. 252.
18. Hutchins, *op. cit.* (footnote 5), pp. 42, 116; CALIF. CONST., Art. XIV, Sec. 3; U. S. v. Gerlach Live Stock Co., *supra;* Report, *op. cit.* (footnote 6), App. B, note especially summary for Oregon and Kansas; Bristor v. Cheattam, ...Ariz. ....., 240 Pac. (2d) 185 (1952). See also Report, State Water Law in the Development of the West, Nat. Rec. Plan Bd., p. 9 (1943).

sive use to be a reasonable, beneficial use.

Our common-law system of water rights seems to have had its inception in a simple economy of natural water uses in continental Europe where the supply of water was generally in excess of requirements.[19] But our prior appropriation system has had its inception in a more complex economy of artificial uses in the West.[20] The experience in the West may prove useful in pointing the way for adjustments in the policy of the law in other areas. If so, it may be of interest to consider the manner in which the two American systems originated and what they mean to our expanding economy in which water is playing and may be expected to continue to play such a vital if not dominating role.[21]

ORIGIN OF THE AMERICAN COMMON LAW SYSTEM OF WATER RIGHTS

The English common law was in effect in the original thirteen colonies as the rule of decision before the Revolution.[22] But it is doubtful if the original adoption of such a vast body of legal principles was made with conscious regard of an English system of water rights for there appears to have been none at that early date.[23] As late as 1929, the Supreme Court of Hawaii declined to follow the so-called English common law on ground waters for these very reasons.[24] It has also been held as a general principle that the common law developed in England after the American Revolution is not part of the common law which is to be applied in the courts of the States.[25] In view of these circumstances the question arises as

19. WIEL, S. C., ORIGIN AND COMPARATIVE DEVELOPMENT OF THE LAW OF WATERCOURSES IN THE COMMON LAW AND CIVIL LAW. 6 CALIF. L. REV. 245 (1918); U. S. v. Gerlach Live Stock Co., *supra.*

20. Hutchins, *op. cit.* (footnote 5), pp. 66-67; Report, *op. cit.* (footnote 16).

21. Note: Much of this article is based upon the thorough and very scholarly treatment of the subject of water rights by two American authorities, Samuel C. Wiel and Wells A. Hutchins. Mr. Hutchins indicates that Mr. Wiel was a master of the French language and thus was able to go directly to the original sources used by Story and Kent, as hereafter referred to. The very able contributions of these two American authorities are gratefully acknowledged.

22. 12 C. J. 184-186 and cases there cited.

23. WIEL, S. C., WATER RIGHTS, 3d ed., ch. 28, 29; Wiel, *op. cit.* (footnote 19), p. 246. See also 24 MINN. L. REV. 891 (1940) in respect of the "common enemy" rule and the English common law.

24. HUTCHINS, WELLS A., THE HAWAIIAN SYSTEM OF WATER RIGHTS, p. 97 (1946); City Mill Co. v. Honolulu Sewer & Water Comm., 30 Haw. 912, 938-943 (1929) and cases therein cited. See Acton v. Blundell, *infra.* (footnote 32), p. 1234 — "No case has been cited on either side bearing directly on the subject in dispute." See also 3 KENT COM. 440, footnote c (12th ed.).

25. 12 C. J. 192; 15 C. J. S. 623; see also Mr. Justice Story in Van Ness v. Pacard, 2 Pet. 137, 143, 144, 7 L. Ed. 374 — "The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them the general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their

to what principles of water law existed in England prior to and after the Revolution in America, the extent to which these were recognized and enforced by the courts, if at all, and how a system became established there which had influence in America.

INFLUENCE OF EARLY ENGLISH AUTHORITIES: THE YEAR BOOKS, LORD COKE, AND BLACKSTONE

We are told that the Year Books reflect no system of water-rights law in England but that they did recognize established customary or adverse uses in streams, not as rule of property law but rather as recognized forms of pleading. The assize of nuisance, and later, trespass on the case seem to have been recognized forms of action for wrongful diversion of a stream from one who had long enjoyed its use.[26-27] However, little seems to have been said about ground water.

These early beginnings of water law seem to be similar in a general way with respect to the development of custom to those which took place in California and other parts of the Southwest.[28] The natural outgrowth of such an approach, if it had continued and received final sanction of the courts, might have been the establishment of a system of water law adapted to the early industrial conditions of England where artificial uses were then being made in a limited way. Whereas use for mining and irrigation seems to have been the impetus for the development of water customs in California and the Southwest,[29] use for mills and the watering of meadows seems to have been the impetus in England.[30] However, the beginnings of customs in England did not appear to have reached the stage where they were given final sanction of the courts and legislature such as took place in our western States.[31]

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situation." Note: No attempt is here made to consider the full application of these and related authorities to the field of water rights or the effect of constitutional, statutory, and judicial adoption of the English common law after the American Revolution.

26. Wiel, *op. cit.* (footnote 23).

27. WIEL, S. C., WATERS: AMERICAN LAW AND FRENCH AUTHORITY, 33 HAR. L. REV., 133, 141 with citations and references there noted.

28. Hutchins, *op. cit.* (footnote 5), p. 67; Wiel, *op. cit.* (footnote 23), p. 68.

29. Hutchins, *op. cit.* (footnote 5), p. 67; RICKETTS, A. H., AMERICAN MINING LAW, pp. xxii-xxiii (1931 ed.).

30. 2 BLKS. COM. 403; WOOLRYCH ON WATERS, p. 177; 9 S. C. 294 (1837); 13 S. C. 63 (1845); Heath v. Williams, *supra;* Wiel, *op. cit.* (footnote 27), p. 141.

31. Note: The courts in Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Rep. 692 (1833), Wood v. Waud, 3 Exch. 748, 154 Eng. Rep. 1047 (1849), and Omelvany v. Jaggers, 2 Hill. 634, 9 S. C. 294 (1837) treated Blackstone as dicta.

We are told that Lord Coke did not erect a system of water law though he did include water with land under the adopted maxim *"Cujus est solum ejus usque ad collum et ad inferos."* This appears to have led toward decisions which did affect ground-water law in England and later in America but which, in some respects, seem to have been unfortunate when considered from the standpoint of sound development and conservation.[32] Lord Coke's thinking may be excusable, however, because the behavior of surface water has always been more readily understood than that of ground water. The latter often has been thought of as quite mysterious when in fact it is not. The main problem has been the lack of reliable information concerning the occurrence and behavior of ground waters. Engineers, geologists and others have severely criticized principles of ground-water law based upon the type of thinking expressed by Lord Coke.[33] His influence does not seem to have extended very far into the surface-water field, though he was cited in the early cases.[34]

The recognition of customary uses of streams in England seems to have influenced Blackstone, though he may also have been influenced by the Roman law.[35] From recognition of long established uses, he appears to have attempted to erect a system of water rights for water-courses but it was not given final acceptance as such.[36] He outlined, among others, two broad principles. The first was based upon long continued use of and access to a stream. In this respect it was not far removed from the riparian principles later adopted in England but he did not emphasize use in common nor ownership of lands

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In contrast the courts of the West and the Congress of the United States recognized the customs of the miners and sanctioned them as law. See Hutchins, *op. cit.* (footnote 5), pp. 67-73; Ricketts, *op. cit.* (footnote 29), pp. xxiv, xxv.

32. Wiel, *op. cit.* (footnote 19), p. 246; Wiel, *op. cit.* (footnote 27), pp. 141-143 with footnotes thereto; Acton v. Blundell, 12 M. & W. 324, 354, 152 Eng. Rep. 1223, 1228, 1233, 1235 (1843) with references particularly to Blackstone and Story.

33. THOMPSON, D. G. AND FIELDER, A. G., SOME PROBLEMS RELATING TO LEGAL CONTROL OF USE OF GROUND WATERS, JOUR. AM. WATER WORKS ASSOC., vol. 30, No. 7, July, 1938; TOLMAN, C. F. AND STIPP, AMY C., ANALYSIS OF LEGAL CONCEPTS OF SUBFLOW AND PERCOLATING WATERS, TRANS. AM. SOC. CIVIL ENG., vol. 67, No. 8, Part 2, October, 1941; THOMAS, HAROLD E., THE CONSERVATION OF GROUND WATER, pp. 243-267, 1951, New York, Toronto and London.

34. See, for example, Shury v. Pigot, 3 Bulst. 339, 81 Eng. Rep. 1163 (1625).

35. Shury v. Pigot, *supra;* 2 BLKS. COM. 403 with footnote No. 7 thereto; Wiel, *op. cit.* (footnote 27), p. 143. See also Report to Governor of Kansas, *op. cit.* (footnote 16), p. 21.

36. 2 BLKS. COM. 403; 3 BLKS. COM. 218; Wiel, *op. cit.* (footnote 19), p. 246. Note: Blackstone was born in 1723 and died in 1780. Most of his legal work was done after 1746 when he was admitted to the Bar. Some American colonies adopted the English common law before Blackstone was born — South Carolina in 1712, State v. Charleston Bridge Co., 113 S. C. 116, 125, 126, 101 S. E. 657 (1919).

contiguous to the stream as prerequisite to its use.[37] In fact, he could not very well do so because his second principle, being based upon priority of occupation on the stream, constituted a limitation upon the first principle and was diametrically opposite to the concept of use in common.[38] It appears that Blackstone attempted to move beyond recognition of procedural rights to those of substantive rights of property in waters which counsel in some of the cases had indicated were implied from those procedural rights, and which later courts, in looking back, seemed to consider as if there had been substantive rights.[39] The second principle seems to have been tentatively accepted by the courts as the doctrine of prior occupancy of those times and was held to be the law of England as late as 1831.[40] These principles were followed to some extent in America but there was a wavering away from them at an early date.[41] In view of our extensive Western experience in which the policy of the law seems to be moving steadily toward the views expressed by Blackstone, it appears that he was a hundred or more years ahead of his contemporaries in this field. However, his influence does not seem to have extended to ground waters, possibly because there appears not to have been many cases during his time that raised fundamental issues concerning ground waters.

Although Blackstone's thinking was adopted in some early American decisions, some courts, notably New Jersey, began to veer away from his concept of exclusive rights by reason of prior occupancy toward the riparian theory of rights in common. One early New Jersey case used Latin words much the same as those later used in connection with the statement of the riparian principles but did not use the word riparian.[42]

And then came the American and French revolutionary movements with special emphasis upon the rights of man.

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37. 3 BLKS. COM. 218 — "it is a nuisance to stop or direct water that uses to run to another's meadow (6) or mill (k); to corrupt or poison a watercourse * * * in the upper part of the stream (1) * * * ". See also Haymes v. Gault, 1 McCORD. 543, 545 (1822).

38. 2 BLKS. COM. 403 — "If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's mill, or his meadow; for he hath by the first occupancy acquired a property in the current."

39. Acton v. Blundell, *supra;* GRAY, CASES ON PROPERTY, Vol. II, 2d ed., pp. 81-82, concerning Shury v. Pigot and particularly footnote 1, p. 82 concerning Shotwell v. Dodge, 8 Wash. 337, 339-340 (1894).

40. Liggins v. Inge, 7 Bing. 682, 893, 131 Eng. Rep. 263 (1831); Wiel, *op. cit.* (footnote 27), p. 133.

41. Wiel, *op. cit.* (footnote 27), p. 140 with footnotes. See also Haymes v. Gault, *supra.*

42. Merrit v. Parker, 1 Coxe (N. J.) 460, 463 (1795); Wiel, *op. cit.* (footnote 27), p. 140 with footnote and p. 146 with footnote.

INFLUENCE OF THE AMERICAN AND FRENCH REVOLUTIONARY MOVEMENTS

Blackstone died in 1780. In 1804 the Code Napoleon was promulgated in France. In 1812, it was adopted in the State of Louisiana.[43] The Revolution in America and its aftermath took place during this general period. The French helped the American colonies gain their independence. Feelings were running very high in favor of the philosophy of the natural rights of man and the concept of equality. Feelings in the new states and nation were running equally high against England and everything English. In some states, such as New Jersey, Kentucky and New Hampshire, authorities went so far as to refuse to permit English decisions to be relied upon.[44] This turning away from English guidance to that of France seems to have been one of the most significant factors in the trend of surface-water law. But it did not extend to ground-water law. And in fact the turning away did not last many years, insofar as the law was concerned, for the key decisions of the English courts, subsequently cited in American courts, were taken between 1830 and 1850.

INFLUENCE OF THE EARLY AMERICAN AUTHORITIES: STORY AND KENT

It was in the midst of this period of political adjustment, with all its emotional overtones, that the English common law of waters was established and also the strict French riparian law as set forth in the Code Napoleon. Some American courts had looked to the civil law for illustration and explanation but most of them did not seem to draw upon this source for decision until Story and Kent appeared on the scene with their new ideas gleaned from France and Rome, and until the Code Napoleon was adopted in Louisiana. It has been said that the early judges could not use French, so could not go directly to French civil law.[45] But under the influence of these two eminent American jurists, who happened to be masters of the French language, and through them and the English decisions based upon their thinking, a considerable number of American courts are said to have adopted the main principles of the French civil law of water-

43. Wiel, *op. cit.* (footnote 27), p. 134.

44. Wiel, *op. cit.* (footnote 27), p. 134; GRAY, NATURE AND SOURCES OF THE LAW, 323; POUND, 3 ILL. L. REV. 354, 357-359 with footnotes; MEMOIRS OF CHANCELLOR KENT, 117-118; PAINE, THOMAS, RIGHTS OF MAN; FEDERALIST PAPERS, No. 10 (Madison), pp. 58-59.

45. Orleans Navigation Co. v. New Orleans, 2 Martin (O.S.) 214 (1812); Fable v. Brown, 2 HILL EQ. 378 (1835); Wiel, *op. cit.* (footnote 19), pp. 249-252; 3 ILL. L. REV. 354.

courses and diffused surface waters.[46] Here is where the concept of equality of right among riparian proprietors, modified by the rule of reasonable use seems to have been introduced into English and American water law. Here is where the concept of the right of the upper landowner to have his drainage waters flow unobstructed onto the lower tenement seems to have become adopted.[47]

Until 1827, no American decision or treatise appears to have used the word riparian, though as indicated previously the New Jersey courts had used language peculiar to riparian law and the Code Napoleon had been adopted in Louisiana at earlier dates. Story used the word riparian for the first time in *Tyler v. Wilkinson* and spelled out there the rights of riparian proprietors, both individually and collectively. His expressions regarding their collective rights, above those of prescriptive or other right holders, is interesting when considered with respect to the concept of the "negative community" which underlies our entire system of the law of watercourses, except as modified by constitutional provisions and statutory declarations of public policy.[48]

Kent's statements on the riparian doctrine came in 1828.[49] His most recent decision prior to that date did not contain reference to the word "riparian" or the riparian concept as such.[50] Angell, who published his second edition in 1833, attributed first use of the word to Story. But we do not know exactly where Story got it or some of his ideas concerning the doctrine. However, we are sure regarding the origin of Kent's words and ideas for his works are replete with material and citations from the Code Napoleon, the Institutes of Justinian, the works of Pothier, and others. We also have his reasons for adopting and modifying these authorities.[51] He seems

46. 56 AM. JUR. 550; 67 C. J. 864-866; Wiel, *op. cit.* (footnote 19), pp. 249-250; Wiel, *op. cit.* (footnote 27), p. 135; POUND, 3 ILL. L. REV. 354, 360 with footnotes; Hutchins, *op. cit.* (footnote 5), p. 30; 24 ILL. L. REV. 896-897 (1940).

47. Orleans Navigation Co. v. New Orleans, *supra;* 3 KENT COM. 353, 355 (1828); Overton v. Sawyer, 46 N. C. 308 (1854); Kauffman v. Griesener, 26 Pa. St. 407, 413 (1856); Butler v. Peck, 16 Ohio St. 334 (1865); Gillham v. Madison R. Co., 49 Ill. 484, 486-487 (1869); Ogburn v. Conner, 46 Calif. 346, 351-352 (1873); Omelvany v. Jaggers, *supra;* White v. Whitney Mfg. Co., 60 S. C. 254, 265, 266, 38 S. E. 456 (1901); Wiel, *op. cit.* (footnote 27), p. 138; Wiel, *op. cit.* (footnote 19), p. 252; Pound, *op. cit.* (footnote 46).

48. Tyler v. Wilkinson, 4 Mason 397, Fed. Case No. 14, 312 (1827); 3 KENT COM. 439 (1828); Wiel, *op. cit.* (footnote 23) including ch. 41; Wiel, *op. cit.* (footnote 19), p. 254; Hutchins, *op. cit.* (footnote 5), pp. 27-29. Statutory declarations of public policy relate to declarations that the waters of a state are public property and belong to the people of the state, as in several western States.

49. 3 KENT COM. 353, 355 (1828).

50. Van Bergens v. Van Bergens, 3 Johns Ch. (N. Y.) 282 (1818); Wiel, *op. cit.* (footnote 27), p. 140.

51. 3 KENT COM. 353, *et seq.;* Wiel, *op. cit.* (footnote 27), p. 136.

to have drawn upon most of the civil law sources then available to him. In this connection it should be noted in passing that his adoption of the broad principles of the Roman law may be as important as those of the French law. Kent seems to have been in the forefront of this movement to use civil law principles. It seems unfortunate that his concepts or those of Blackstone were not given more consideration in respect of ground water during this formative period.[52]

It appears that Kent was more influential of the two great jurists in the field of American water law because of his full consideration of French and Roman principles; and because of the fact that his summation of civil law principles, as he had adapted them to conditions then existing, has been quoted with approval by American and English courts when establishing definitive statements of the law.[53]

But there is no aspect of Kent's thinking which should be noted further. In applying the principle of reasonable use as a limitation on the strict French riparian law of the Code Napoleon, he emphasized that this was necessary to aid in making beneficial use of streams. This certainly was a step in the right direction from the standpoint of beneficial use of the natural flow. But he does not appear to have recognized the monopoly aspects of the doctrine as he modified it in respect of the surplus flow above the normal requirements of riparian proprietors. The principles of the Code Napoleon had tended to give downstream proprietors a monopoly of the natural flow, thus limiting the use of the stream in the upper reaches of a watershed. Story seems to have recognized a collective monopoly in the hands of all riparian proprietors on a stream because he indicates that all waters not belonging to prescriptive or other holders belong to riparian proprietors. In any event, either concept, Story's or Kent's, tends to hold the surplus stream flow in a nonuse or nonconsumptive use reserve to satisfy the natural flow rights of riparian proprietors.[54] This is a very vital aspect of water law for it concerns artificial uses and needs, especially for those enterprises not contiguous to streams but dependent thereon for water supplies. The use of the surplus stream flow has been a very important factor in the growth of the West. The doctrine of prior appropriation has played

52. 3 KENT COM. 354, 355 (1828) noting comment at footnote, p. 439; Wiel, *op. cit.* (footnote 19), pp. 251-254; INST. JUST. Lib. 2, sec. 1; Wiel, *op. cit.* (footnote 23) including ch. 41.

53. See, for example, Omelvany v. Jaggers, *supra*, Embrey v. Owen, 6 Ex. 353 (1851) and White v. Whitney Mfg. Co., *supra;* POUND, 3 ILL. L. REV. 360, including footnote 29 thereto; Wiel, *op. cit.* (footnote 19), pp. 250-251.

54. Tyler v. Wilkinson, *supra.*

a significant part as a legal device in reaching that surplus flow to meet reasonable non-riparian needs.

The riparian principles of Story and Kent did not appear in English decisions, as such, until 1849, though the prior appropriation doctrine of Blackstone had begun to be rejected much earlier. In the key case, *Wood v. Waud,* the English court drew freely upon the views of the two American jurists for guidance.[55] Thus we are advised that civil law principles were received into the English common law of surface waters by way of Story and Kent.[56] The key case has been cited in American courts ever since as authority on riparian law, though it was distinguished shortly thereafter in respect of diffused surface waters and ground waters.[57]

This paper does not attempt to trace the origin of the English common law of ground waters much beyond the thinking of Lord Coke and the holding in *Acton v. Blundell* for they seem to have been the principal sources of authority until the strict common law rule was later modified in several of our states by application of the rule of reasonable use. This modification seems to have started first in New Hampshire in 1862.[58]

The case of diffused surface waters appears to be more complex and confusing but nevertheless important from the standpoint of conservation, both of water and soil. The law of England apparently places ownership of these diffused surface waters in the owner of the land on which they arise. Kent and the French civil law seem to be the main sources for civil law principles adopted in America. But the problem involves both the right to use those waters and the right to pass them or have them passed from higher to lower lands. We are told that there are considerable dicta in American cases on the subject of use. In view of the confusion which seems to exist in the decisions, a specific statement on this subject will be left to later and special treatment.[59]

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55. Wood v. Waud, *supra;* Mason v. Hill, *supra;* Wiel, *op. cit.* (footnote 19), pp. 246-247; Hutchins, *op. cit.* (footnote 5), pp. 38-39.
56. Wiel, *op. cit.* (footnote 19), pp. 245, 248, 253.
57. Wiel, *op. cit.* (footnote 27), p. 145; Arkwright v. Gill, 5 M&W 203, 151 Eng. Rep. 87 (1839); Acton v. Blundell, *supra.* Note that the court in Acton v. Blundell seems to rely upon Roman law in view of the lack of "no direct authority".
58. Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179 (1862); Hutchins, *op. cit.* (footnote 5), p. 158.
59. Hutchins, *op. cit.* (footnote 5), pp. 111-114; Rawstron v. Taylor, 11 Ex. 369, 156 Eng. Rep. 873 (1855); Broadbent v. Ramsbothom, 11 Ex. 602, 156 Eng. Rep. 971 (1856); 24 MINN. L. REV. 891-939 (1940); DOMAT, J., THE CIVIL LAW IN ITS NATURAL ORDER, vol. I, par. 1583, p. 616, CUSHING ED. (1853).

ORIGIN OF THE AMERICAN SYSTEM OF PRIOR APPROPRIATION

The American system of prior appropriation has been said to have had its origin in the mining camps of the western States, particularly in California, and in the irrigated areas of Arizona and New Mexico established originally under the Indian, Spanish and Mexican occupations.[60]

This system recognizes water rights as real property, limited to a right of use until the water is taken into possession when it becomes, in most States, personal property. In this general respect of the rights of use, the prior appropriation and common law systems for watercourses are very much alike. They are also alike in that the rule of reasonable use applies, though its underlying basis differs in the two systems, the appropriation system placing greater emphasis upon the beneficial nature of the use and the common law system placing greater emphasis upon the claims to water rights of all other riparian proprietors. In California, where the distinction formerly prevailed, the two doctrines are now exactly alike in this respect.[61]

There is some disagreement among students as to the origin of our Western custom of appropriating water. One view is that it came from the Indian, Spanish and Mexican occupations. Another view is that it was born of necessity in the California gold mining camps. The weight of opinion seems to favor the latter in view of the specific procedure which these customs left to us and which have been followed in many western States. It is clear that the mining customs which recognized property rights by reason of discovery and development, as the basis for establishment and continuance of title, have had an important bearing upon the adoption of the doctrine of prior appropriation since the latter depends upon the taking of possession of water and putting it to beneficial use within a reasonable time as the basis for establishment and continuance of title. Both in the case of irrigation and in the case of mining, the use of land and the use of water are very closely associated for one without the other has limited value. Water is generally considered appurtenant to the land, though not inseparably so.[62]

60. YALE, MINING CLAIMS AND WATER RIGHTS (1869); LINDLEY ON MINES, 3d ed., §§ 40-49 (1914); COLBY, W. E., 4 CALIF. L. REV., 437-452 (1916); Ricketts, *op. cit.* (footnote 29); Hutchins, *op. cit.* (footnote 5), pp. 27-29, 64-69; Report to Governor of Kansas, *op. cit.* (footnote 16), p. 21; COLBY, 33 CALIF. L. REV. 371 (1945); U. S. v. Gerlach Live Stock Co., *supra,* together with footnote on historical background of water doctrine.

61. Wiel, *op. cit.* (footnote 23), p. 20; Hutchins, *op. cit.* (footnote 5), pp. 28-29; Report, Water Resources Law, *op. cit.* (footnote 6), pp. 175-178.

62. Ricketts, *op. cit.* (footnote 29), p. xxiii; Hutchins, *op. cit.* (footnote 5),

INFLUENCE OF THE INDIAN, SPANISH AND MEXICAN OCCUPATIONS: IRRIGATION

Prior to the American occupation of the West, this vast area was under the control of Indian tribes and subsequently, the French, Spanish, Mexican, and British Governments. The area involved in the Louisiana Purchase was acquired from France in 1803, a year before the Code Napoleon was promulgated in France and nine years before it was adopted in Louisiana. Mexico gained her independence from Spain in 1821 and Texas, her independence from Mexico in 1836. California and adjacent territory, which later became part of Arizona, were acquired from Mexico in 1848 and 1853. The Northwest Territory was acquired from England during the same general period. These changes in jurisdiction took place shortly before or shortly after the decisive water rulings in England. Thus, except for the State of Texas and scattered localities held in private ownership and recognized as such, the entire West became public domain under the control of the Federal Government. This has profoundly affected all Western water law and programs. It contrasts sharply with the situation in the eastern States, though the original thirteen states ceded to the Federal Government much of their lands lying toward the Mississippi River. In turn, the Federal Government granted large areas of wet lands to the newly formed states east of the Mississippi but west of the original states. Later the Government granted vast acreages of both wet and dry lands beyond the Mississippi to private individuals, transportation companies, and the states which were formed out of the public domain. In the Great Plains almost all of the public domain passed into private ownership but in the Intermountain Plateau country, most of the land remained public domain.[63]

It appears that there were local Indian water customs in effect in this territory, especially in the States of Arizona and New Mexico. Water was diverted from streams for irrigation of alluvial valleys without regard to whether or not lands were contiguous to the streams. Diffused surface waters were caught and distributed by crude rock-spreading devices over sloping mesa lands.[64] But it is not clearly evident as to the extent to which Indian customs of water

pp. 67, 385; U. S. v. Gerlach Live Stock Co., *supra.* See, especially, COLBY, THE FREEDOM OF THE MINER AND ITS INFLUENCE ON WATER LAW IN LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY (1935).

63. Colby, *op. cit.* (footnote 55), p. 370; COLBY, 36 CALIF. L. REV. 355-389 (1949); COLBY, JOUR. OF MINES AND GEOL., vol. 46, No. 4, pp. 483-508 (October, 1950).

64. Personal observations of relic and other works near Mesa and Safford,

use found their way into and were specifically sanctioned by law, except for those affecting community irrigation systems known as acequias under Spanish and Mexican rule. These were and still are protected and recognized by later occupation authorities.[65]

The Spanish and Mexican occupations brought water customs to the West, especially the Southwest, and continued to recognize some of the Indian customs. These customs not only concerned rights to water by reason of diversion and use under a policy of appropriation but extended to the formation of group water organizations.[66] There were also grants of water rights by the governments along with grants of lands, especially for towns known then as pueblos. The rights of these pueblos have been protected and extended by American law.[67]

INFLUENCE OF THE EARLY UNITED STATES OCCUPATION: MINING AND IRRIGATION

In 1847 the Mormon colonists reached Salt Lake Valley and started the practice of cropland irrigation during that year through direct diversion from streams. The next year gold was discovered in California. These two new developments attracted settlers, miners and fortune seekers from all over the world. We are told that the miners brought with them customs from other mining areas.[68]

The gold and water were part of the public domain for the most

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Arizona and Taos, New Mexico; Clough v. Wing, 2 Ariz. 371, 380, 17 Pac. 451, 455-456 (1888); Hagerman Irr. Co. v. McMurray, 16 N. M. 172, 113 Pac. 823 (1911); SOILS AND MEN, Yearbook of Agriculture, USDA, p. 693 (1938); Hutchins, *op. cit.* (footnote 5), pp. 66-67; Report, Water Resources Law, *op. cit.* (footnote 6), p. 175. See also existing community system of irrigation at Isleta, New Mexico.

65. HUTCHINS, WELLS A., THE COMMUNITY ACEQUIA: ITS ORIGIN AND DEVELOPMENT, SOUTHWESTERN HISTORICAL QUARTERLY, vol. XXXI, No. 3, pp. 261-272 (Jan., 1928) with references therein. See also Act of Congress, March 3, 1851, 9 STAT. 631. No attempt is here made to consider recognition of Indian water rights on reservations.

66. U. S. v. Rio Grande Dam & Irr. Co., 9 N. M. 292, 51 Pac. 674 (1898); Boquillas Land & Cattle Co. v. St. David Coop. Comm. & Devel. Assoc., 11 Ariz. 128, 89 Pac. 505 (1907); Maricopa County N. W. C. Dist. v. Southwest Cotton Co., 39 Ariz. 65, 4 Pac. (2d) 369 (1931); Tatterfield v. Putnam, 45 Ariz. 156, 41 Pac. (2d) 228 (1935); Hutchins, *op. cit.* (footnote 60), pp. 263-272; U. S. v. Gerlach Live Stock Co., *supra.*

67. Felix v. Los Angeles, 58 Calif. 73, 79-80 (1881); Lux v. Haggin, 69 Calif. 255, 328-331, 4 Pac. 919 (1884); Vernon Irr. Co. v. Los Angeles, 106 Calif. 237, 250-251 (1895); Los Angeles v. Pomeroy, 124 Calif. 597, 639-640, 57 Pac. 585 (1899); Los Angeles v. Los Angeles Farm. & Mill. Co., 152 Calif. 645, 650-653, 93 Pac. 869, 1135 (1908); Los Angeles v. Hunter, 156 Calif. 603, 608-609, 105 Pac. 755 (1909); San Diego v. Cuyamaca Water Co., 209 Calif. 105, 116-132, 152-165, 287 Pac. 475, 287 Pac. 496 (1930).

68. Colby, *op. cit.* (footnote 55), p. 370; Report, Water Resources Law, *op. cit.* (footnote 6), p. 177; MEAD, IRRIGATION INSTITUTIONS, pp. 42-48.

part. Placer mining and irrigation required enormous quantities of water. These were artificial uses and required diversion and conveyance of water to lands not contiguous to the streams.

At that time there were no water or mining laws applicable to the public domain because Congress had not legislated on the matter. Other foreign laws were not considered applicable to the new developments. In these circumstances the miners were technical trespassers and the gold and water are said to have belonged to the government. Competition over mining claims and water supplies brought on serious conflicts. Rules of conduct had to be developed to reduce bloodshed and facilitate work. Here is where the "custom of the diggins" is said to have originated in which priority of discovery and diligent prosecution of development of claims became the custom and policy. The system of holding local meetings, formation of mining districts, and recording of claims, together with development of rules of conduct, are said to have led to the establishment of the doctrine of prior appropriation and beneficial use of water, and the administration of water rights, first on a county and later on a statewide basis.[69]

From 1848 to 1850, when California was admitted to the Union, there were no territorial water laws in that area. Upon its admission, the new state adopted the common law of England as the rule of decision. In 1851 the legislature adopted the Civil Practices Act recognizing the custom of the miners as local rule of law. These recognized customs continued in effect in technical conflict with the adopted common law principles for many years. This presented the courts with new problems for here were two opposing systems of water law, one growing out of custom and the other being borrowed from other jurisdictions.[70] This did not reach decisive issue, however, until 1886.[71]

As each succeeding state on the Pacific Coast and in the Great Plains was admitted to the Union, it adopted the English common law as the rule of decision. The courts of these states and California held this to have included the common law of watercourses. But states formed in the Intermountain Plateau region, where water shortage conditions have always been extremely critical and the land

69. Colby, *op. cit.* (footnote 55), pp. 370-371; Ricketts, *op. cit.* (footnote 29); Hutchins, *op. cit.* (footnote 5), p. 67.

70. CALIF. CIVIL PRACTICE ACT, April 29, 1851, § 621, now § 748, CODE CIVIL PROCEDURES; Colby, *op. cit.* (footnote 55), pp. 370-371; U. S. v. Gerlach Live Stock Co., *supra.*

71. Lux v. Haggin, 69 Calif. 255, 10 Pac. 674 (1886). See summary of this and subsequent cases reported by Hutchins, *op. cit.* (footnote 50), pp. 45-48 and U. S. v. Gerlach Live Stock Co., *supra.*

is primarily in Federal ownership, never did adopt the common law of watercourses or completely abrogate it as entirely inapplicable.[72] This decision accorded with practical considerations and seems to have been a very sound one.

These two broad approaches to the establishment of a system of water rights resulted in two different concepts of the derivation of title, one called the California doctrine (dual system of riparian and appropriative rights) and the other called the Colorado doctrine (the single appropriative rights system).[73]

The California concept rested on the theory of the right to appropriate water upon the public domain derived from the United States as owner, first by implication and later through confirmation by Congress. The Colorado concept rested upon the theory that these rights derived from the public ownership of the waters by the people of the states involved in which the United States had no greater proprietary capacity than a private landowner and particularly because the common law of watercourses was wholly unsuited to the semi-arid conditions. In other words, the California concept started with a Federal title from which riparian rights are deduced while the Colorado concept started with a rejection of riparian rights from which rejection of Federal title follows.[74] It would seem that if one recognizes, as Congress and the western States did, the custom of prior appropriation as suited to the West, then the existence of the riparian doctrine is thereby negatived and the common law so modified; for, the two doctrines of water law are directly in opposition in respect of water use and its relationship to the land.

In 1866 and 1870 Congress acted to recognize and confirm the customs of prior appropriation by suitable legislation. This was followed by other important legislation which strengthened water rights customs as having sanction of law and also encouraged the development of water. These legislative pronouncements have been interpreted as having constituted recognition of pre-existing rights of possession and to have severed the water from the land in the public domain.[75] The right of the states to adopt whatever systems of water rights law they choose, so long as these do not violate con-

72. Hutchins, *op. cit.* (footnote 5), pp. 30-31, 38-39.
73. Wiel, *op. cit.* (footnote 23), pp. 173-228; Hutchins, *op. cit.* (footnote 5), p. 31.
74. Hutchins, *op. cit.* (footnote 5), p. 31.
75. Hutchins, *op. cit.* (footnote 5), pp. 36, 70-73; REPORT, PRESERVATION OF INTEGRITY OF STATE WATER LAWS, NAT. RECL. ASSOC., pp. 49-54 (1943); Colby, *op. cit.* (footnote 55), pp. 371-374; U. S. v. Gerlach Live Stock Co., *supra.*

stitutional provisions was also upheld.[76]

Other western States as well as California recognized prior appropriation customs and also adopted statutes providing for state-wide administration, except in Montana where the county basis still exists.[77] A few states adopted the strict English common law for ground waters, some the doctrine of correlative rights, and others the appropriation doctrine. But the extent of adoption in each case varies with respect to well defined subterranean channels and percolating waters.[78] A decision of the Arizona Supreme Court rendered in January, 1952, purported to adopt the appropriation doctrine for percolating ground waters.[79] However, a rehearing has been granted and the decision thereon is still pending.

Determinations with respect to diffused surface waters in the West have been made mainly by the courts. It seems that the owner of the land on which they arise may make reasonable use of these waters but this is not an absolute right, as it appears to be in England, for downstream interests are involved. These interests have rights to stream flow which originates, in part at least, upon watershed lands.[80]

In addition, the so-called California-doctrine States further modified the riparian doctrine. These changes are briefly summarized hereafter because of their bearing upon problems involved in shifting from a riparian system to a dual system and finally to the appropriation system in large part. Since this seems to be a broad but slowly developing trend, it may have implications for some of the eastern States as their population, industry and agriculture expand to anticipated levels, and as competition for water becomes more acute.

EXTENSION OF THE SYSTEM OF PRIOR APPROPRIATION AND RESTRICTION OF THE COMMON LAW SYSTEM IN THE WEST

The adoption of the two divergent systems of water rights by the different groups of states, above referred to, did not settle the problems of Western water development and use, by any means. The two systems did open the way for and aided materially the establishment of title to waters, as the vast majority of cases indicates.

The major problems of reconciling conflicting uses and balancing supply of and demand for water presented difficult issues for the

76. Hutchins, *op. cit.* (footnote 5), p. 34 with cases cited in footnote 33 thereto.
77. Wiel, *op. cit.* (footnote 23), pp. 177-180; Hutchins, *op. cit.* (footnote 5), pp. 31, 68, 74-107.
78. Hutchins, *op. cit.* (footnote 5), pp. 147-151; Part III, 182-264.
79. Bristor v. Cheatham, *supra.*
80. Hutchins, *op. cit.* (footnote 5), pp. 110-145.

courts and the legislatures. Whereas, in the beginning of the United States occupation, mining in upstream areas was the dominant enterprise in many watersheds, use for production of hay and crops of all kinds in the valleys below became increasingly important with industrial expansion and the consequent need for food and fiber. These aspects were also reflected in increased use of water by municipalities.[81]

With the needs for water outrunning the supply in recent years, the question of conservation seems to have been emphasized more than the question of establishment of title to waters. As a result, the decisions reflect greater emphasis upon the rule of reasonable beneficial use. But the judicial standard of what constitutes reasonable beneficial use for irrigation seems to have lagged far behind that of the better scientific practices now being carried out in soil conservation districts. As these practices become more widely accepted in local areas, it is to be hoped that the courts will thereby find an adequate basis for emphasizing judicial standards more nearly approaching scientific standards.

The influence of and changes which took place in the two systems of law may be seen by review of decisions in a few of the states which made up the two broad groups. Though their divergent concepts were very important when originally developed, there now seems to be a tendency among all western States for gradually developing one broad theory of water law directed toward development and beneficial use.[82]

INFLUENCE OF AND CHANGES WHICH DEVELOPED IN THE CALIFORNIA CONCEPT OF WATER RIGHTS

The practice of hydraulic gold mining caused so much damage to lower lying areas that it was nearly put out of business after the famous *Debris cases.* But the canals which had supplied water for this activity and then ceased to be used for some time were later found to be suitable in providing water for irrigation and power purposes. The mining, irrigation, power and municipal uses were often appropriative in nature but not entirely so; for, some were considered riparian uses. These and the lower valley uses, which had become established during and shortly after the *Debris cases,* later came into conflict.[83] Subsequently there were conflicts between the irrigation, power and municipal uses.[84]

81. Wiel, *op. cit.* (footnote 3), p. 253.
82. Hutchins, *op. cit.* (footnote 5), pp. 78-80. Note: Most western States have dedicated unappropriated waters of the state to public purposes.
83. Wiel, *op. cit.* (footnote 3), pp. 254, 260, 266, 268.
84. See cases *op. cit.* (footnote 62); Holt v. Cheyenne, 22 Wyo. 212, 137 Pac.

The first decision in California in a major controversy between claimants of riparian rights on the one hand and of appropriative rights on the other came in 1886.[85] This upheld the riparian rights of the landowners using flood waters for private meadow lands as against prior appropriators using water for irrigation. This decision in effect seems to have confined prior appropriation to public lands and recognized common law rights for private lands. Here is where the customs of the miners recognized by Congress and the legislature came up against the common law adopted when the state was admitted to the Union. The ruling in this case profoundly influenced California water law, and its effect is said to have spread to other California-doctrine States.[86]

The dominant position of riparian rights, requiring the maintenance of the natural flow of streams, became so restrictive of development of surplus stream flow that, following upon its reaffirmation in a subsequent major decision in 1926, and in spite of the possibility of alternative physical and financial solutions which might have been accepted by the court,[87] the state turned to constitutional amendment. All this harks back to the adoption of the English common law as rule of decision.[88]

The amendment adopted in 1928 not only limited riparian rights to reasonable use by reasonable methods of diversion but affected all other water rights too.[89] It was subsequently upheld as not subject to attack under the Federal Constitution.[90] And though injunction no longer lies in such situations, the right remains fully compensable.[91] Generally speaking, the amendment seems to have restricted riparian as well as other rights in such a way as to open up for development and use by appropriative and other means a considerable portion of the surplus reserves of stream flow and of ground water basins too.

876 (1914); Meridian v. San Francisco, 13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939); Denver v. Sheriff, 105 Colo. 193, 96 Pac. (2d) 836 (1939); Beus v. Soda Springs, 62 Idaho 1, 107 Pac. (2d) 151 (1940).

85. Lux v. Haggin, 69 Calif. 255, 10 Pac. 674 (1886); Wiel, *op. cit.* (footnote 3), pp. 256-259; Hutchins, *op. cit.* (footnote 5), p. 45.

86. Wiel, *op. cit.* (footnote 3), p. 259.

87. Herminghaus v. Southern Cal. Edison Co., 200 Calif. 81, 252 Pac. 607 (1926); Wiel, *op. cit.* (footnote 3), pp. 268, 269, 274; Hutchins, *op. cit.* (footnote 5), p. 45. Note: This ruling included all annual flood flows as natural flows.

88. SHAW, LUCIEN, THE DEVELOPMENT OF THE LAW OF WATERS IN THE WEST, 10 CALIF. L. REV. 443, 455; 189 Calif. 779, 791.

89. CALIF. CONST., Art. XIV, § 3; Peabody v. City of Vallejo, 2 Calif. (2d) 351, 366, 40 Pac. (2d) 486, 490 (1935); Wiel, *op. cit.* (footnote 3), pp. 274-294; Hutchins, *op. cit.* (footnote 5), p. 45.

90. Peabody v. Vallejo, *supra;* Hutchins, *op. cit.* (footnote 5), p. 45 with footnote citations.

91. U. S. v. Gerlach Live Stock Co., *supra.*

However, it left riparian and overlying rights (served by ground water) in a dominant position but not to the extent which previously existed.[92]

The developments in ground water law, aside from that already indicated, seem to have paralleled the developments in the law of watercourses to some extent at least. Following adoption of the common law as rule of decision, the courts established in 1871 the rule of absolute ownership.[93] This was replaced in 1903 by the rule of correlative rights, one effect of which was to protect local users from exportations of water to distant points of use. Surface waters and ground waters were recognized as one source of supply where they were shown to be interconnected.[94] But exportation was later permitted for surplus waters.[95] It was also held that rights in ground waters may be acquired by prescription though the landowner, upon timely action, may have a declaratory decree to protect his right.[96] Recently the rule of prescription has been extended to the new concept of mutual prescription.[97]

INFLUENCE OF AND CHANGES WHICH TOOK PLACE IN OREGON*

As in California, the existence of the riparian law was acknowledged early by the Oregon courts.[98] But the use of water for irrigation was permitted along with the domestic and livestock uses originally allowed.[99] These rights were held to attach upon acquisition of title to public domain.[100] But such rights could be lost by prescription.[101]

However, this common law trend of decisions was early affected by the Congressional acts, previously referred to, recognizing rights of appropriation on public domain.[102] This legislation was construed

92 Meridian v. San Francisco, *supra;* Hutchins, *op. cit.* (footnote 5), pp. 45-46; Report, Water Resources Law, *op. cit.* (footnote 6), p. 717.
93. Hanson v. McCue, 42 Calif. 303, 10 AM. REP. 299 (1871); Hutchins, *op. cit.* (footnote 5), p. 159.
94. Katz v. Walkinshaw, 141 Calif. 116, 128-137, 70 Pac. 663 (1902), 74 Pac. 766 (1903).
95. Burr v. Maclay Rancho Water Co., 154 Calif. 428, 98 Pac. 260 (1908).
96. Hutchins, *op. cit.* (footnote 5), p. 160.
97. Pasedena v. Alhambra, 33 Calif. (2d) 908, 925-926, 928-933, 207 Pac. (2d) 17 (1949).
*Note: The following material on Oregon and Kansas is based largely upon a recent summary, not as yet published, prepared for the writer by Wells A. Hutchins.
98. Taylor v. Welch, 6 Oreg. 198, 200 (1876).
99. Coffman v. Robbins, 8 Oreg. 278, 282 (1880).
100. Norwood v. Eastern Oregon Land Co., 112 Oreg. 106, 111, 227 Pac. 1111 (1924); Faull v. Cooke, 19 Oreg. 455, 464, 26 Pac. 662 (1890).
101. Norwood v. Eastern Oregon Land Co., *supra.*
102. 14 STAT. L. 353, § 9; U. S. REV. STATS., § 2339 (July 26, 1866); 15 STAT. 218; U. S. REV. STAT., § 2340 (July 9, 1870).

by the Oregon Supreme Court to permit appropriation of waters on the public domain as against the common law rule regarding continuous natural flow.[103] The Court indicated that riparian and appropriative rights could exist in the same locality,[104] but almost at the same time indicated that these rights were incompatible.[105] The court began to encounter difficulties, however, after recognizing and then attempting to apportion water among riparian proprietors.[106]

The court also developed another approach to the problem by holding that a water user must elect to stand on a riparian or an appropriative right.[107] And once one or the other is elected, the user thereby waives the other alternative.[108] This attempt at reconciling the two opposing theories of water rights seems to have had considerable effect upon the water law of Oregon.

About this time the court had occasion to interpret the Desert Land Act of 1877,[109] together with the related acts of 1866 and 1870, to permit appropriation upon the public domain of surplus waters of non-navigable streams, subject to established rights; and to thereby abrogate the common law doctrine, except for domestic uses.[110] This was upheld by the U. S. Supreme Court.[111]

Then in 1909 the "Water Code" further limited vested riparian rights to the extent of actual application of water to beneficial use prior to the passage of the statute or actual application to beneficial use within a reasonable time thereafter by means of works then under construction. In either case the limitation applied to situations which existed prior to the statute. It thereby cut off future uses which had not been initiated prior to the establishment of the new policy. It also provided an exclusive procedure for the adjudication of these rights.[112] This code, including the new definitions contained therein,

103. Hough v. Porter, 51 Oreg. 318, 383-386, 95 Pac. 732 (1908); 98 Pac. 1083 (1909); 102 Pac. 728 (1909).
104. Williams v. Altnow, 51 Oreg. 275, 300, 95 Pac. 200, 97 Pac. 539 (1908).
105. In re Sucker Creek, 83 Oreg. 228, 234, 163 Pac. 430 (1917).
106. Jones v. Conn, 39 Oreg. 30, 37, 46, 64 Pac. 855, 65 Pac. 1068 (1901); Hough v. Porter, *supra;* Caviness v. La Grande Irr. Co., 60 Oreg. 410, 421-422, 119 Pac. 731 (1911); In re Sucker Creek, *supra.*
107. Low v. Schaffer, 24 Oreg. 239, 246, 33 Pac. 678 (1893); Williams v. Altnow, *supra;* State *ex rel.* Pacific Live Stock Co. v. Davis, 116 Oreg. 232, 236, 240 Pac. 882 (1925).
108. Davis v. Chamberlain, 51 Oreg. 304, 311, 98 Pac. 154 (1908); In re Sucker Creek, *supra.*
109. 19 STAT. L. 377 (March 3, 1877).
110. Hough v. Porter, *supra.*
111. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 160-163 (1935); Hedges v. Riddle, 63 Oreg. 257, 259-260, 127 Pac. 548 (1912).
112. OREGON LAWS 1909, ch. 216; OREG. COMP. LAWS ANN., §§ 116-40, 116-402 (1940).

was upheld by the Oregon Supreme Court as proper under the police power of the state.[113] It was also upheld in the Federal Circuit Court of Appeals.[114] The decree was affirmed by the U. S. Supreme Court but upon somewhat different grounds.[115]

Through the foregoing and other processes, it is clear that in Oregon the effect of court decisions and acts of the legislature was to reduce progressively the effectiveness of the common law doctrine and to increase the effectiveness of the doctrine of prior appropriation. This appears to have come about by reason of necessity. As a consequence the old doctrine has been reduced to the point where it has ceased to be of much importance.

CHANGES IN KANSAS

The changes which took place in Kansas were quite similar to those in Oregon but much more abrupt and this in very recent years. The common law doctrine was held to apply here by reason of adoption of the English common law when Kansas was still a territory.[116] Modification of the strict riparian principles was permitted, however.[117] It was upheld as late as 1944 as against an appropriator attempting to acquire water rights under the statutory procedure.[118] And even in 1949, prior to the interpretation of the new 1945 statute, the court discussed these same principles.[119] It should be kept in mind, in these connections, as indicated previously, that the Great Plains states, though originally public domain, were rapidly taken up as homesteads and state school sections or railroad lands. Thus, whereas in the far West much land remained and still is part of the public domain, this situation has not obtained in Kansas.

Faced with this limitation on the development and beneficial use of water, the legislature adopted a new appropriation statute after others had been found to be ineffective.[120] This new act strengthened

113. In re Willow Creek, 740 Oreg. 592, 610-620, 627-628, 144 Pac. 505 (1914), 146 Pac. 475 (1915); In re Hood River, 114 Oreg. 112, 173-182, 227 Pac. 1065 (1924).

114. California-Oregon Power Co. v. Beaver Portland Cement Co., 73 Fed. (2d) 555 (C.C.A. 9th, 1934).

115. California-Oregon Power Co. v. Beaver Portland Cement Co., *supra.*

116. Shamleffer v. Council Grove Peerless Mill Co., 18 Kans. 24, 31-33 (1877); Frizell v. Bindley, 144 Kans. 84, 91-92, 58 Pac. (2d) 95 (1936).

117. Emporia v. Soden, 25 Kans. 588, 606 (1881).

118. State *ex rel.* Peterson v. State Board of Agriculture, 158 Kans. 603, 605, 149 Pac. (2d) 604 (1944).

119. Heise v.Schulz, 167 Kans. 34, 41-43, 204 Pac. (2d) 706 (1949).

120. KANS. LAWS 1886, ch. 115; KANS. LAWS 1941, ch. 261; KANS. LAWS 1917, ch. 172. See State *ex rel.* Peterson v. State Board of Agriculture, *supra;* KANS. LAWS 1945, ch. 390, GEN. STATS. 1949, §§ 82a-701 to 82a-722. See also

the appropriation doctrine and reduced the advantage of the location of lands contiguous to streams. The experience in Oregon and Nebraska was drawn upon heavily in accomplishing this task. This statute was upheld by the Kansas Supreme Court.[121]

Kansas appears to have adopted the strict common law rule in respect to ground water but later modified this.[122] As late as 1944, it was held to prevent appropriation of ground waters under the statute.[123] This situation was shortly thereafter cured by the new appropriation statute.[124]

INFLUENCE OF AND CHANGES WHICH DEVELOPED IN THE COLORADO CONCEPT OF WATER RIGHTS

In 1872 the Territorial Supreme Court of Colorado enlarged the concept of prior appropriation to cover waters upon all lands in the area, public or private.[125] This was reiterated in 1882 by the State Supreme Court, after statehood was attained in 1876.[126] This trend seems to have spread among the other states in this group. In view of the rather uniform approach for running streams adopted by this group of states, only a brief statement will be made in respect of ground waters for three representative states, because changes are well summarized elsewhere.[127]

In Utah all waters, both above and under the ground, are declared to be public waters available for appropriation, subject to existing rights. The appropriation doctrine has existed from the beginning, though the common law doctrine was not declared to be repudiated until 1891. The statutory method is the exclusive method by which the appropriation of water is now made.[128]

The situation in Arizona has been similar to other Colorado doctrine states except for percolating ground waters. These were con-

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Report to Governor of Kansas, *op. cit.* (footnote 16), p. 79, prepared in connection with development of recommendations to the state legislature for the 1945 statute.

121. State *ex rel.* Emery v. Knapp, 167 Kans. 546, 555-556, 207 Pac. (2d) 440 (1949); Report to Governor of Kansas, *op. cit.* (footnote 16), pp. 25-31.

122. Emporia v. Soden, *supra;* Jobling v. Tuttle, 75 Kans. 351, 360, 89 Pac. 699 (1907); Gilmore v. Royal Salt Co., 84 Kans. 729, 731, 115 Pac. 541 (1911).

123. State *ex rel.* Peterson v. State Board of Agriculture, *supra.*

124. KANS. LAWS 1945, ch. 390; GEN. STATS. SUPP. 1947, ch. 82a, art. 7.

125. Yunker v. Nichols, 1 Colo. 551 (1872).

126. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

127. Wiel, *op. cit.* (footnote 3), p. 258; Hutchins, *op. cit.* (footnote 5), pp. 74-107.

128. See Water Resources Law, Appendix B, *op. cit.* (footnote 6), pp. 766-770 (1950).

sidered the property of land owners in 1906.[129] This year, 1952, the Arizona Supreme Court stated that the appropriation doctrine applies to these as well as other ground waters.[130] However, a rehearing has been granted and decision thereon is pending.

In New Mexico, the common law of riparian rights was early held not to be in force and the appropriation doctrine was held to have existed by custom, judicial decision and necessity.[131] This state pioneered in ground water control and its history is important from constitutional and administrative standpoints.[132]

129. Howard v. Perrin, 8 Ariz. 347, 353-354, 76 Pac. 460 (1904); Howard v. Perrin, 200 U. S. 71 (1906).

130. Bristor v. Cheattam, *supra.*

131. Trambley v. Luterman, 6 N. Mex. 15, 25, 27 Pac. 312 (1891); U. S. v. Rio Grande Dam & Irr. Co., 9 N. Mex. 292, 306, 51 Pac. 674 (1898); Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 236-237, 61 Pac. 357 (1900); Snow v. Abalos, 18 N. Mex. 681, 693, 140 Pac. 1044 (1914).

132. See, Water Resources Law, Appendix B, *op. cit.* (footnote 6), pp. 744-749.