

USCID: Water Rights in the U.S. and Shortages

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Areas of Practice

- Justin Denham, JD : Groundwater interference/connection; irrigation and other special districts; petitions for judicial review and administrative appeals; federal land use; easements
- Cortney Duke, JD: Special districts/agricultural water organizations, formalities, transfers, certificates, contracts, instream leasing/transfers; surface/pond permitting; storage/ federal contracts; adjudications/Walton Rights; Bureau of Reclamation
- Colm Moore, JD: Domestic/Municipal purveyors (planning, water management/conservation, permitting, extensions, water quality), water sales/transactions, appeals, storm/drainage permits/ easements, dredge/fill permitting/wetlands, international water
- Wyatt Rolfe, JD: Water rights review, resort development/permitting, group systems (domestic/commercial/industrial), nursery and wine industry water use; groundwater interference/connection; water easements, extensions, water transfers, business incorporation and formalities
- Lynn Steyaert, JD: Mediation; representation before administrative agencies and State/Federal trial and appellate courts; tribal water claims; permitting of applications/transfers; water users' organizations; Bureau of Reclamation title transfer; NEPA and cultural resource compliance; conservation and other easements, water transactions
- Therese Ure, JD: Water use permitting, extensions, transfers, certificates; ground water interference/connection, critical/limited areas; cancellation for lack of perfection, forfeiture or abandonment; water right title/recording; special patron rights and responsibilities; public lands (easements/permitting uses/grazing permits BLM, USFS) private easements; agri-business; contracts; administrative appeals; civil litigation

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Water Law Blog

- www.water-law.com/wordpress
- Attorney and staff contributors
- Informal discussions and comments on:
 - Developing case law
 - Legislation
 - Water user experiences
- Regularly updated with information pertinent to Oregon, Nevada, Washington, Idaho and international water issues



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History of Water Use: Ancient Times to Present





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Throughout history, water availability
has been the major factor in
determining where people lived.



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Hohokam Irrigation System

In 300 AD, Hohokam devised the first irrigation system in the US, digging canals from the Salt and Gila Rivers. Mats woven of brush diverted water to cornfields.



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Water Law in the U.S.

- Two Primary Systems
 - Riparian Doctrine
 - Prior Appropriation Doctrine
- Some States have “hybrid” system
 - Recognize riparian rights established prior to enactment of state water code



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Water Rights Arising Under Other Laws

- Louisiana
 - based on French Civil Code
- Hawaii
 - established from former Hawaiian Kingdom
- Southwest States
 - “Pueblo Water Rights” established under Spanish and Mexican laws
 - Allows a municipality all the water within its boundaries needed for its residents
 - Utilized by some cities in California, including Los Angeles, and Indian tribes in New Mexico to establish senior water rights



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Eastern States: Riparian Rights

- Where water can only be used by persons who own the land adjacent to the watercourse;
 - Right to flow
 - Right to make reasonable use of the water





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Riparian Principles

- Pure riparianism allows any riparian landowner to make reasonable use of water to the extent that it does not interfere with other riparian landowners' reasonable uses.
- Resolving disputes requires equitable balancing – weighing the reasonableness of competing uses



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“Natural” v. “Artificial” Uses

- The reasonable use doctrine presumes that natural, or domestic, uses are reasonable even if such uses cause diminished flow and injures downstream users.
- Artificial uses, such as irrigation and industrial uses, are subject to reasonable restriction





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Riparianism Today

- Most states have now incorporated a permit system for certain uses
- Most domestic uses are still exempt, (whereas in west, few exempt surface uses exist)
- In order to foster certain kinds of uses and resolve certain disputes, some states have passed laws favoring particular artificial uses, such as irrigation and mining, over other uses
- Preferences establish a basis for determining the reasonableness of certain uses



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Shortages and Disputes

- Unlike prior appropriation states, there is no priority for prior-established uses
- Ratable (proportional) cut backs
- Essentially every riparian landowner has an equal right to water for natural/domestic uses, subject to preferences or statutes by legislature



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Challenges

- Rapid growth in many states forcing some agencies to adopt Basin Rules that control water development for certain purposes
- Inter-state conflicts persist between states with competing stakes in water sources
 - GA, FL, and AL fight over the Chattahoochee River
 - Climate change possibly contributing to surface water shortages in southeast



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Western States: Prior Appropriation Doctrine

- Water owned by the public
- Landowners have opportunity to put water to beneficial uses irrespective of proximity to water sources
- The first person to appropriate the water has priority over subsequent junior appropriators.
- Water must be beneficially used without waste.
- Matured from the English Rule of Capture and mining principles.
 - Water right obtained by a claim of right and putting to beneficial use



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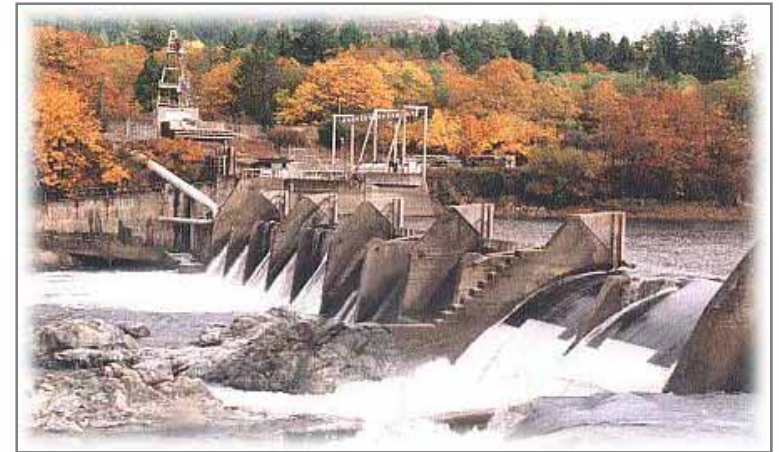
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3 Primary Principles

- **Beneficial Use**
 - The basis, measure and limit of all rights to use water
- **Diversion – “First in time, First in right”**
 - Priority to use awarded to first to divert it from the natural course
- **Appurtenance**
 - Water right appurtenant to the land where water used and perfected





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Water Codes

- Throughout the first half of the 20th century, western states codified the prior appropriation system
- All codes made *subject to existing rights*:
 - Some states recognize existing rights established only under the common law principles of prior appropriation
 - Others, “hybrid states,” recognize rights established under both riparian and prior appropriation doctrines
 - Hybrid rights usually recognized to extent water applied to beneficial use before enactment of water code or other specified date
 - Pueblo Rights can come into play as well



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Prior Appropriation Today

- Water rights only obtained through formal permitting system
- Some exceptions for certain uses, especially domestic groundwater use
- “Existing Rights” still being recognized through adjudication processes



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Shortages

- Protects senior rights and uses of water
 - Somewhat predictable mode of regulation in times of shortage
- New permits conditioned to protect existing rights
- Waste can subject a user to regulation and civil penalties
- Nonuse can result in cancellation
 - No inherent right to use due to landownership



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Challenges

- Over-appropriated watersheds
- Domestic exemptions a growing stress on resource
- Continued and new interstate conflicts
 - Colorado Basin
 - Columbia Basin?





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