WATER RIGHTS ON WESTERN MILITARY RESERVATIONS

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The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School or any other governmental agency. References to this study should include the foregoing statement.

by

Major Paul E. Beckman, 066135

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SCOPE

A study of the problems arising from the appropriation, use, and distribution of water within military reservations of the western states, to include a consideration of the power of a state to determine water rights and to regulate its use incident to lands within the exclusive legislative jurisdiction of the Federal Government and to lands reserved from the public domain.

THE AUTHOR

This thesis was written by Major Paul E. Beckman while he was a student in the Tenth Career Class at The Judge Advocate General's School, United States Army.

The author received the degree of LL.B. from Stanford University in 1950. He is a member of the California and Iowa Bars. Since becoming a member of the Judge Advocate General's Corps in 1951, he has served in division, post, continental army, and major oversea commands participating as counsel, law officer, and foreign claims commissioner.

PREFACE

An inquiry into the nature and extent of water rights possessed by the Federal Government as an incident to those lands which comprise its military establishments in the western United States immediately leads into an old but current conflict. The courts frequently have been asked to resolve the conflicting claims of private persons to water on public lands, founded upon acts of Congress and state laws, and the water rights believed to remain incident to such lands when they are withdrawn from the public domain for a Federal use. Private parties have sought to maximize their rights to use this scarce requisite of life and industry in an arid region while the Executive has tried to retain its use for Federal purposes.

Although the problem of reconciling uses of water and maximizing the benefits to be derived therefrom are complex, the consideration of this one aspect of the problem does not ignore the need for an integrated and workable legal theory. The conclusions reached preserve to each interest its vested, acquired or equitable rights without relinquishing Federal property contrary to present legislation.

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I.

INTRODUCTION

A. Background

In the settlement and development of the semi-arid lands of the western United States it was readily apparent that the common law rules relating to water rights would not serve its needs. Water was taken freely by miners and settlers from public and private lands and appropriated to uses deemed beneficial without regard for the prevailing law in the remainder of the United States. This was true even though such use required the water to be diverted a great distance from its overlying, littoral or riparian source and irrespective of whether it was to be used for mining, irrigation or manufacturing, frequently to the point of total consumption. It must be remembered, however, that at the time these areas were settled as territories, and as they acquired statehood, the great bulk of the land was in the public domain and subject to little or no supervision by the distant Federal Government.

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[1] "Western Military Reservations" as here used refers to lands within States which lie wholly or in part westward of the 98th Meridian, excluding Alaska and Hawaii.

It is generally conceded that the Federal Government permitted great parts of this public domain to be occupied, the minerals to be mined, and the water used and diverted according to whatever rules could be made applicable to the particular circumstance. In contests between claimants the courts were left to decide the issue without reference to Federal ownership as it was neither urged nor represented. Thus a system grew into being which recognized the rights of locators and possessors without regard for the paramount title.

The military commander of the area was aware that the Federal Government held the paramount title. However, he declined to act against these trespassers as their acts benefited the general Government.[2]

The miners with their wealth and industry became a potent political force and the California legislature recognized this by enacting Section 621, Civil Practice Act, April 29, 1851, which provided:

> In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar, or diggins embracing such claim; and such customs, usages, or regulations, when not in conflict with the Constitution and laws of this State, shall govern the decisions of the action.

Water was an essential of their mining operations.

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[2] 1 Wiel, Water Rights in the Western States 72 (3d ed. 1911).

Other semi-arid land states faced similar problems. The view that use by appropriation was a right to water which required protection became so firmly established in the local rules and custom that it was later sanctioned by both the state and Federal laws.[3] It is this sanctioning of the individual state's law by Congress with respect to water on public lands and its enactment of legislation designed to promote the beneficial use of water resources that has caused the water rights of the United States to become clouded. This is particularly so with respect to military reservations in these states.

B. Problems Involved

The problem areas confronting the managers of the military establishments may be highlighted by paraphrasing some current questions: (1) Do the laws of the several states define what property rights, if any, the United States has in water incident to its reserved public lands? (2) Does the method or manner or original acquisition of the land affect the present right to water?

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[3] California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). "The rights of the miners were those of the possessor, only, and such possession was the sole foundation and evidence of their title to the land they occupied, to the water they used in mining, and to the gold which they obtained thereby." Shaw, The Development of the Law of Waters in the West, 10 Cal. L. Rev. 443, 445.

(3) To what extent are these rights affected by Federal compliance or noncompliance with state laws which regulate the appropriation, distribution and use of waters? (4) To what extent does the position of the United States as a sovereign enter into the determination or delineation of these rights? (5) To what extent and for what purposes may managers of a military reservation use water which is found thereon or which is brought there from other public lands? (6) After the water is acquired lawfully, is its use on a Federal enclave subject to state regulation? (7) What must be done to acquire, perfect or protect water rights the military will need on future reservations when the lands therefor are to be withdrawn from the public domain or are to be otherwise acquired?

C. Approach To Problems

As this area is one in which our dual system of sovereignty has been particularly vexacious and as the need for uniformity of property rights within each of the several states is manifest, it is first necessary to determine what law or laws govern water rights on military reservations. Thereafter, the manner in which Federal authority over its water rights may be exercised and the particular law or laws governing the use or uses permitted will be discussed.

In the discussion that follows the common law property rights incident to the land of overlying, littoral or riparian owners will be used in their commonly accepted meanings, except where modification to accord with a particular state's law is required and noted. Riparian owners will be deemed to have a usufructary right to the undiminished flow, both as to quality and quantity, of adjacent stream waters subject only to the rights of lower riparian owners. However, it must be remembered that these common law rights either co-exist with appropriation rights or have been displaced by such laws in the western states.

II.

RIGHTS TO WATER ON FEDERAL LANDS

A. Law Which Defines Water Rights

It is firmly established that the power of Congress "to dispose of and make all needful Rules and Regulations respecting the territory or other Property belonging to the United States"[4] extends to all public lands, "and it is not for the courts to say how that trust shall be administered."[5] Congress has utilized this grant of power

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[4] U.S. Const., art. IV, sec. 3.

[5] Light v. United States, 220 U.S. 523, 537 (1910).

over the years to accommodate the national interest inherent in the ownership of vast tracts of land to the ever changing national need. Notable instances have included the homestead acts, land grants to colleges and universities, land grants for the construction of railroads, and set-asides of land in the public domain for power and reclamation projects.

It is equally well established that the interest of the United States in its public lands located within the several states is that of a proprietor subject only to the terms of the state's admission and Constitutional limitations.[6] The United States does not possess exclusive legislative jurisdiction over these lands unless such is retained at the time of a state's admission to the Union[7] or such is acquired by a later cession from the state concerned.[8]

In 1866 Congress yielded to the manifest needs of the western states and recognized the rights acquired by the appropriation of water on public lands by enacting:

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[6] Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753, 772 (Cal. D.C. 1884).

[7] Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885).

[8] Benson v. United States, 146 U.S. 325 (1892).

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; . . . .[9]

Because the conduct of the Federal Government had encouraged the artificial use of water where such use was an absolute necessity, this was but a voluntary recognition of a pre-existing right founded upon possession.[10]

This act was later amended to provide that all grantees from the Government would take their land subject to the rights to water so acquired.[11] These acts have been held to apply to rights already acquired in non-navigable waters on the public domain and to after acquired rights as well.[12]

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[9] Rev. Stat. sec. 2339, 43 U.S.C. 661 (1958).

[10] Broder v. Water Co., 101 U.S. 274 (1879).

[11] "All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section." Rev. Stat. sec. 2340, 43 U.S.C. 661 (1958).

[12] "The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for beneficial use, as recognized by local rules and customs, and the legislature and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain." California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935).

A caveat should be noted here. These and other acts do not permit appropriations that would impair such overriding national interests as are found in the navigability of a water course or the valid exercises of other Constitutional functions.[13]

Then, with the passage of the Desert Land Act on March 3, 1877,[14] the United States constructively severed the water and all rights thereto from the public lands in these arid land states.[15] The inter-relation of these laws

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13 United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 706-7 (1899); United States v. Fallbrook Public Utility District, 165 F.Supp. 806, 835-837 (S.D. Cal. 1958).

14 "It shall be lawful . . . to file a declaration that he intends to reclaim a tract of desert . . . by conducting water upon the same . . . Provided, however, that the right to the use of water . . . shall depend upon bona fide prior appropriation, . . . and all surplus water . . . together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights . . . ." 19 Stat. 377, 43 U.S.C. 321 (1958).

15 "The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights on public lands asserted under local laws and customs. . . . The Desert Land Act severed, for purposes of private acquisition, soil and water rights on public lands, and provided that such rights were to be acquired in the manner provided by the law of the State of location." Federal Power Commission v. Oregon, 349 U.S. 435, 447-48 (1955); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155-58 (1935). The Desert Land Act applies to public lands in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. 19 Stat. 377, 26 Stat. 1096, 41 Stat. 1086, 43 U.S.C. 323 (1958).

was discussed in the definitive case of California Oregon Power Co. v. Beaver Portland Cement Co.[16] Here the issue concerned riparian rights in a non-navigable stream claimed by the petitioner who was a successor in interest to a patentee of the United States. The patentee had acquired his interest in 1885 pursuant to the Homestead Act of 1862. Oregon's law made riparian rights turn on the actual use thereof. Neither petitioner nor any predecessor had actually appropriated or made beneficial use of the waters of the river and petitioner relied solely upon common-law riparian rights which it alleged had attached to these lands when the patent was first issued. The Supreme Court found that a severance of soil and water had occurred with the passage of the Desert Land Act and held that petitioner acquired no water rights incident to this land except as these were given by Oregon's laws. It is to be further noted that the court recognized a conflict in the decisions as to whether this severance of soil and water related only to entries made upon desert lands or to all public lands in these arid western states and expressly adopted the view that ". . . Congress intended to establish the rule that for the future the land should be patented separately;

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[16] 295 U.S. 142 (1935).

and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named."[17] Further, it was concluded that by so doing Congress had assented to the appropriation of water on public lands contrary to the common law rules[18] and had subjected the determination of such rights "to the plenary control of the designated States."[19] Petitioner found that it owned a riparian power site without water.

Now, as a product of this earlier legislation, court decisions, and continuing Congressional enactments,[20]

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17 Id. at 162.

18 Id. at 162, United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 706 (1899).

19 Id. at 163-64. But cf., United States v. McIntire, 101 F.2d 650 (9th Cir. 1939) (Montana water laws do not apply to Indian Reservations therein).

20 "When in any State of the United States under the irrigation district laws of said State . . . there shall be included any of the public lands of the United States, such lands so situated in said irrigation district, when subject to entry, and entered lands within such district . . . are made and declared to be subject to all the provisions of the laws of the State . . . relating to . . . reclamation and irrigation of arid lands for agricultural purposes, to the same extent . . . in which lands of a like character held under private ownership are or may be subject to said laws . . . ." 67 Stat. 30, 43 U.S.C. 1311 (1958) (concerning lands beneath navigable waters within state boundaries). "Nothing in the chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian,

it is a firmly entrenched principle that the laws of the state within which Federal lands are situate will define and control the rights to water thereon whenever the rights of a state or a private person are involved. In addition, the United States may be made a party to such suits in the courts of such state and the judgments thereof affecting the rights to water will be binding upon the United States without regard for its sovereignty.[21] At this juncture this is but a faltering step short of stating that all Federal rights to non-navigable

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20 (Cont'd) relating to the ownership and control of ground waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States." 39 Stat. 506, 43 U.S.C. 621 (1958).

21 "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange or otherwise, and the United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgment, orders, and decrees of the court having jurisdiction . . . ." 66 Stat. 560, 43 U.S.C. 666 (a) (1958).

waters will be determined by state law since it is only when issues are raised involving others with a non-Federal interest that a determination of Federal rights becomes critical. Further, "The United States of America, as any other owner of property, is entitled to have its rights in that property adjudicated by a court of competent jurisdiction."[22] When this occurs, the law of the state of location must necessarily apply in order to determine what non-Federal interests, if any, are involved.[23] There is, however, at least one area in which state law is not controlling. That is when there are rights incident to, or derived from, Indian land or water within an Indian Reservation. These remain subject to the "absolute jurisdiction and control of the Congress of the United States" because of some of the enabling acts and the treaty power of the Federal Government.[24]

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[22] United States v. Fallbrook Public Utility District, 110 F.Supp. 767, 784 (S.D. Cal. 1953).

[23] United States v. Fallbrook Public Utility District, 109 F.Supp. 28, 30 (S.D. Cal. 1953).

[24] P. 14, infra, 25 Stat. 676, 36 Stat. 557.

B. Exercise of Federal Authority Over Its Water Rights

It is unquestioned that the Government may reserve its waters (to the extent that it possesses a proprietary interest therein) and thus exempt them from subsequent appropriation.[25] The problems occur in determining (1) when this has been done and (2) who has the authority to reserve lands and the water needed therefor on behalf of the Government.

1. Express Act Required

It is well established that "lands which have been appropriated or reserved for a lawful purpose are not public and are to be regarded as impliedly excepted from subsequent laws, grants and disposals which do not specifically disclose a purpose to include them."[26] However, a withdrawal of the land from entry under public land laws is not enough to preserve or withdraw the water incident to, or available on, such land in these western states. This is because the Desert Land Act,

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[25] Winters v. United States, 207 U.S. 564, 577 (1907).

[26] United States v. Minnesota, 270 U.S. 181, 206 (1925). "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." United States v. O'Donnell, 303 U.S. 501, 510 (1938).

as mentioned earlier,[27] severed the water from the soil. As a consequence, water on public lands in these states must be reserved by express provision[28] or become affixed thereto by operation of the particular state's law.[29]

The courts have departed from this view and have been willing to imply a reservation of waters for Indians as an incident to lands reserved for their uses, but this has been predicated upon the need for a liberal construction to fulfill treaty obligations and to protect the Indians as wards of the Government.[30] Conversely, this same implied withdrawal of the rights to water has not

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27 Pp. 9-10, supra.

28 "The United States claims that it owns all the unappropriated water in the river . . . . The argument is that the United States acquired the original ownership of all rights in the water as well as the lands in the North Platte basin by cessions from France, Spain, and Mexico in 1803, 1819, 1848, and by agreement with Texas in 1850. It says it still owns those rights in water to what extent it has not disposed of them . . . . Whether they might have been obtained by federal reservation is not important. Nor, /is it important/ . . . that there may be unappropriated water to which the United States may in the future assert rights through the machinery of state law or otherwise. . . . We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made." (Emphasis added.) Nebraska v. Wyoming, 325 U.S. 589, 611-12, 15 (1945).

29 Pp. 30-32, infra.

30 United States v. Ahtanum Irrigation District, 236 F.2d 321, 328 (9th Cir. 1956); United States v. Walker River Irrigation District, 104 F.2d 334, 337 (9th Cir. 1939).

been read into reservations of public lands for military purposes since Congressional enactments support the opposite conclusion.[31] This requires that water rights expressly be reserved by a duly constituted authority in a fashion that will receive recognition by the courts.

It should be noted parenthetically at this point that even though waters are expressly reserved they remain subject to the water laws of the state in which such lands are situate.[32] Once the right to water is secured by the Federal Government as a proprietary interest, the concept that "officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to loose its valuable rights by their acquiescence, laches, or failure to act,"[33] will come into play so as to preclude an inadvertent loss through a failure to comply with state law.

2. Officer Authorized to Act

Turning to the problem of who is authorized to act on behalf of the Government with respect to its lands

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[31] United States v. Fallbrook Public Utility District, 165 F.Supp. 806, 833-46 (S.D. Cal. 1958).

[32] United States v. Ballard, 184 F.Supp. 1 (N.M.D.C. 1958); pp. 10-12, supra.

[33] United States v. California, 332 U.S. 19, 40 (1946).

and water rights, it has long been held that the Executive holds this right without special authority from Congress[34] and that ". . . the acts of the heads of departments, within the scope of their powers, are in law the acts of the President."[35] However, Congress has from time to time limited this authority. The act of June 25, 1910,[36] pertaining to withdrawals of public lands "for water power sites, irrigations, classification of lands, or other public purposes to be specified in the orders of withdrawals,"[37] was construed as affirming this implied power of the President since it related to temporary withdrawals only.[38] The most recent legislation adds further support to this view since it places a limitation upon the Executive only with respect to lands

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[34] United States v. Midwest Oil Company, 236 U.S. 459, 471 (1915).

[35] Wolsey v. Chapman, 101 U.S. 755, 769 (1879).

[36] 36 Stat. 247, 43 U.S.C. 141-143 (1958).

[37] 36 Stat. 847, 43 U.S.C. 141 (1958).

[38] Letter from Robert H. Jackson, Attorney General, to Harold Ickes, Secretary of Interior, June 4, 1941.

withdrawn for military purposes and then only when such withdrawals aggregate more than 5,000 acres.[JJ]

[39] 72 Stat. $7, 43 U.S.G. 155-15$ (195$). "The broad purpose and objective of the bill is to return from the executive branch to the Congress—to the extent such lands are involved—the responsibility imposed by the Constitution on the Congress for their management. . . .

"Having in mind the foregoing, and considering statutory enactments presently in effect, it may be ascertained in summary that withdrawals today are made under four major bases of authority:

"(1) The first of these is the implied authority of the Executive. It has been the practice since the early days of the Republic as the necessities of the public service required, for the President to withdraw public lands from the operation of the public land laws and to reserve them for specific purposes . . . .

"(2) The second basis for current withdrawals is the act of June 25, 1910, supra (43 U.S.C. 141). It is pointed out that while withdrawals under the General Withdrawal Act of 1910 are termed 'temporary,[1] the act specified that they shall remain in force until revoked by the President or by an act of Congress; further that such lands remain at all times open to location under the mining laws as the same apply to metalliferous minerals.

"(3) The third category includes withdrawals made under various acts establishing particular fields of activity, relating to the responsibility of the several executive agencies. Better known examples in this category include; . . . authorizing the President to reserve lands as national forests; . . . authorizing the Secretary of the Interior to withdraw lands for Reclamation purposes; . . . national monuments . . . water power project . . . fish and game sanctuaries • • » *

"(4) Finally, the fourth category involves special acts of Congress designating specific areas to be withdrawn for a specific purpose, e.g., national parks . . . naval petroleum reserves, etc.

"It is the first of these . . . which the provisions of H.R. 553$ would modify . . . .» S. Rep. No. $57, $5th Cong., 1st Sess. 3, 12, 13 (1957) (Concerning future withdrawals of public lands for military purposes) . (Citation added to (2) above.)

Another enactment has limited the Executive with respect to withdrawals for Indian reservations,[40] but none has required that he not act at all with respect to public lands unless he is first given express authority to do so.

An argument has been advanced that even though the President once had the power to withdraw all the property interests in public lands, he cannot now withdraw that which Congress has disposed of under the terms of the Desert Land Act or otherwise. As to land and rights to water which have vested in private persons, organizations, or state governments pursuant to valid entry, use or grant, this argument is, of course, valid. But as the President in these regards merely exercises that power which Congress possesses, it seems clear beyond cavil that he could take any action with respect to the withdrawal of a remaining interest in, or incident to, public land that Congress might take provided he has not been otherwise proscribed.

The powers which the President has with respect to public lands were delegated by Executive Order Number 10355 to the Secretary of the Interior.[41] Although the

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[40] 41 Stat. 34, 43 U.S.C. 150 (1958).

[41] ". . . I hereby delegate to the Secretary of the Interior the authority vested in the President by . . . 36 Stat. 847 . . . and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States . . . ." 17 Fed. Reg. 251 (1952).

right to withdraw or reserve water is not expressly included within this delegated authority, it is submitted that the President's power to withdraw water rights is sustained by the same legal reasoning as his authority to withdraw land and that acts by the Secretary of the Interior to withdraw water would likewise be valid. An additional executive order would, however, clarify this area and permit a further delegation by the Secretary of the Interior.

In the event water is to be withdrawn from the public domain, such withdrawal must comply with Public Law 85-337 (72 Stat. 87) as this legislation concerns the withdrawal of "public land, water, or land and water area" of more than 5,000 acres for defense purposes. Scrupulous adherence to this proscription is a patent prerequisite of valid Executive action.

C. Attachments of Water Rights to Severed Or Reserved Lands

At what time, if at all, do riparian rights attach to lands conveyed or severed from the public domain? Here the problem is in determining first whether the state in which the lands are situate recognizes riparian rights as an incident to land and then in determining when such rights re-attach, if ever, to Federal lands since Congress has severed the water from the soil.

Although apparently contradictory language will be found in the cases, a harmonizing thread is discernible. In one of its early determinations, the United States Supreme Court considered the conflicting claims of a bona fide homestead entryman on Dakota Territory land and those of an appropriator of the water from a stream which flowed across such land. The appropriation occurred subsequent to the homesteader's entry but prior to his use of the water. The question for determination was whether the homesteader occupied "the position of a riparian proprietor or a prior appropriator" with respect to the claimant by appropriation.[42] The Court, after considering a territorial statute which recognized riparian water rights and the local custom of appropriation where such appropriation did not interfere with vested rights, held: (1) Lands cease to be public after bona fide entry,[43] (2) "When, however, the government ceases to be the sole proprietor, the right of riparian owner attaches, and cannot be subsequently invaded,"[44] and (3) "Thus, under the laws of Congress and the Territory, and under the applicable custom, priority of

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[42] Sturr v. Beck, 133 U.S. 541, 547 (1899).
[43] Id. at 548-49.
[44] Id. at 551.

possession gave priority of right."[45] Although the last finding of the court, (3) above, was not in strict accord with the facts and appears to have been the product of confusion caused by familiarity with the common law riparian concept, later decisions of Federal and state courts have developed along each of these three lines depending upon the interests then involved.

The first proposition has been expanded into a rule which may be stated as: the actual or constructive severance of lands from the public domain may be effected by lawful entry, withdrawal for other government uses, sale, or other transfer of interest and when such occurs the water incident to such lands are no longer subject to appropriation by entry thereon under the Public Land Act (Rev. Stat. 2339) or the Desert Land Act (19 Stat. 377).[46] Although this permits Federal use of water rights which are not otherwise vested at the time of withdrawal from the public domain without making an application to the state of location, affirmative action

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[45] Id. at 552.

[46] Pp. 13-15, supra (withdrawals for public purposes); United States v. Walker Irrigation District, 104 F.2d 334 (9th Cir. 1939) (withdrawals for Indian Reservations); Newton v. Weiler, 87 Mont. 164, 286 Pac. 133 (1930) (lands conveyed to state for school purposes).

may be required to gain or preserve appropriation rights in accordance with state law.

The second proposition is now found in those states which recognize riparian rights in some form in addition to rights by appropriation, frequently referred to as the California doctrine States. This view may be stated as: riparian rights are superior to those of an appropriator from the time of their attachment,[47] that these rights attach to public lands at the time a parcel is severed therefrom,[48] and that these rights exist because of, and have their source in, the law of the state in which the lands are situate.[49]

Lastly, the third viewpoint is followed by those states which do not recognize riparian rights at all--the Colorado doctrine States. Colorado has long held the view that the common law concept of riparian rights to water was never a part of its law.[50] This law has been summarized in the following fashion:

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47 Ringe v. Crags Land Co., 56 Cal. App. 247, 205 Pac. 36 (1922) (Hearing denied by Supreme Court, March 23, 1922).

48 Id., pp. 32-35, infra, In re Rights to use Water of Sinlahern Creek, etc., 162 Wash. 635, 299 Pac. 649 (1931) (as to private patent).

49 Williams v. San Francisco, 24 Cal. App.2d 630, 76 P.2d 182 (1938).

50 Hammond v. Rose, 11 Colo. 524, 19 Pac. 466 (1888).

> The power of Congress to make all needful rules and regulations respecting the territory or other property belonging to the United States, . . . is without limitation, and is free from state interference. . . . But this supreme power is an attribute of sovereignty, not one of ordinary proprietorship; and when in the disposition of the public domain lands are conveyed to private individuals no special rights or exemptions, which might have been, but were not, prescribed, pass to the patentee. In the absence of anything showing the contrary, the government will be presumed to have taken the position of a private owner and to have intended that its conveyance as regards incidents of title not mentioned in the instrument should be construed according to the law of the state where the land lies. . . . Moreover, the common law of riparian ownership, . . . never obtained in Colorado . . . . It was unsuited to the region . . . . Express recognition of local conditions and necessities is found in the Acts of Congress . . . .[51]

In these states, only those rights acquired by appropriation under the laws of the state concerned obtain.

These three views may be formulated into the following view: the sale or withdrawal of public land removes it from entry otherwise allowed by Federal law but all private rights affected thereby (to include the necessary extent of any United States interest therein) are to be determined by the law of the state in which it is situate, that riparian rights will then attach to the extent such rights exist within such state, and that all rights to

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[51] Empire Water & Power Co. v. Cascade Town Co., 205 Fed. 123, 127 (8th Cir. 1913).

obtain water by appropriation must be acquired under the laws of that state.

Note that this accords with all current court decisions except the Indian ward cases. These latter cases may likewise be harmonized into this systemic analysis if we add one more well settled view--that valuable rights of the United States cannot be lost through its officer's or agent's failure to act where such action is required, i.e.: to preserve the water needed by its wards pursuant to its treaty commitments. Further, the logical extension of this view that government rights cannot be lost by a failure to act would permit an application for the appropriation of water under a state's laws to be back dated to that point in time when the need therefor accrued and use began.

D. Constitutionality of Fees Assessed by State

Concluding, as we have, that rights by appropriation are obtainable under state laws[52] and by action in compliance with its laws,[53] it is necessary to consider briefly whether such compliance would impose an unconstitutional burden upon the United States with respect to the payment of fees should any be involved. An

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[52] Pp. 45-49, 55, 58, infra.

[53] United States v. Fallbrook Public Utility District, 165 F.Supp. 806, 831, 841-43 (S.D. Cal. 1958).

examination of case law discloses that so long as it remains clear that state laws such as these are directed against proprietors or would be proprietors of a property right in their capacity as proprietors (without singling out the United States or treating it by a different and prejudicial standard) and so long as the United States continues to subordinate its property interests in water to state control; a substantial constitutional issue does not exist.^ The view now generally accepted was stated as "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents."[55] (Emphasis added.) Such fees should be regarded as costs incident to the acquisition of property and not as a license for a privilege or as a burden upon sovereignty. This xs just one more example ol* the courts not permitting a claim of sovereign capacity to be extended to what is essentially a property transaction involving like

[5if] See United States v. Detroit, 355 U.S. 466 (1957); Howard v. Commissioners, 344 U.S. 624 (1953)J Penn Dairies v. Milk Control Coram., 318 U.S. 26l (1943); Alabama v. King & Boozer, 314 U.S. 1 (1941).

[55] Penn Dairies v. Milk Control Comm.. 318 U.S. 261, 270 (1943).

interests with those who must compete in a private, non-sovereign, capacity. Should a desire to seek further persist, the authority of the state to require payment of fees to defray administrative costs would seem, to the extent they may be found to impinge upon sovereignty, to be but a minor incident of that sovereign immunity which Congress expressly waived.[56]

E. Conclusion As To the Effect of Sovereignty And Exclusive Legislative Jurisdiction

It should be apparent from the foregoing discussion that no plausible basis exists for the Federal Government to assert a special position with respect to property interests in land and rights to water because of its sovereignty. This seems to be the clear import of Congressional enactments[57] and court decisions.[58] These court decisions have been limited to states affected by the Desert Land Act, but it is submitted that state law will define and control the right to water in the western states irrespective of whether the particular state is subject to the Desert Land Act. In support of this ultimate conclusion, it must be recognized that

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[56] Note 21, supra.
[57] Notes 11, 12, 14, 15, 20, 21, supra.
[58] Pp. 9-10, supra.

property interests are defined by the legislative authority of a sovereign. The Federal Government's legislative authority is limited by the Constitution. Although the authority to acquire property is found among the incidental powers of the Government,[59] its legislative authority with respect to property is contained in Article IV, section 3, clause two,[60] of the Constitution. This authority is not so broad as to include the power to define the Federal interest in property where such property had been obtained from a source within, or had been subject to, a state's legislative jurisdiction. It merely permits the Federal Government to exercise proprietary rights and to dispose of such property once it has been obtained. Defining or determining the extent of such a property interest would not be a making of "needful Rules and Regulations." Rather, it would be a usurpation of authority reserved to the several states. (Recall that all states have been "admitted into the Union on an equal footing with the original States in all respects whatever.")[61]

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59 Van Brocklin v. Tennessee, 117 U.S. 151 (1886).

60 "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

61 9 Stat. 452.

Even though the United States Supreme Court has left the issue of legislative authority to define the property rights in water undecided with respect to western states which are not affected by the Desert Land Act,[62] its holdings provide guidance as to the law which will control the rights to water on lands located within these states.[63] In California Oregon Power Co. v. Beaver Portland Cement Co., the Court held:

> . . . that following the act of 1877 /Desert Land Act/ if not before, all non-navigable waters then a part of the public domain become publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. /Emphasis added./

The Court continued by way of further explanation:

> For since "Congress cannot enforce either rule upon any state," Kansas v Colorado 206 U.S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. /Emphasis added./ /295 U.S. at 163-64/

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62 Note 15, supra.

63 Kansas, Nebraska, Oklahoma, and Texas.

Viewed in this light the legislation of 1866 concerning the appropriation of water upon public lands (R.S. 2339, 43 U.S.C. 661)[64] is more than a Congressional acquiescence in a state's law, it is an affirmative acknowledgment that such legislative authority rested with the state. This also provides a clear basis for sustaining the view of the Colorado doctrine States, the earlier laws of the territories, and it accounts for the careful language found in subsequent legislation.

In addition, note that in so far as current Federal rights to water are concerned, it is immaterial whether the United States possesses exclusive, concurrent or no legislative jurisdiction over the land area on which such waters are located. Again, this is because (1) the property interest of the Federal Government will have been acquired from a source within the state of location and thus be measured by its laws, (2) the Federal Government will have agreed to measure its interest by the laws of such state,[65] or (3) because the Federal Government will be carrying out its Constitutionally delegated functions which are independent of legislative authority to define interests in property. In this latter category will be found the powers exercised under the commerce clause, those that relate to

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[64] P. 7, supra.

[65] Note 21, supra.

navigable waters, the fulfillment of treaty obligations and others.

The ultimate protection required for Federal interests may be found in its power of eminent domain and in this authority to carry out its Constitutionally delegated functions. Congress may, of course, alter the effect of local property law pursuant to its valid exercise of other Constitutional powers by affixing conditions to the acquisition of ownership in Federal property. This has been done in one notable, but limited, regard, i.e.:

> The right to the use of water acquired under the provision of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.66

This, then, leaves to the several states the full power to define the interests in water. See Chapter III, infra, for a dicussion of these laws and their impact on Federal activities.

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66 32 Stat. 390, 43 U.S.C. 372 (1958) (Emphasis added). Note that Congress in this Act went on to provide that nothing in the cited provision "shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior . . . shall proceed in conformity with such laws, and nothing . . . shall in any way affect any rights of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." (43 U.S.C. 383 (1958).)

III

DEFINITION AND EXPLANATION OF WATER RIGHTS

As the rights to water are determined by state law, it is necessary to examine the law of the particular state concerned. However, in the interest of time and immediate clarity, only the laws of California and Colorado will be examined to determine their impact upon the uses of water on a military reservation located within their borders. Similar laws will be found to exist in the other western states even though they will not be uniform in content or application to those discussed here.

A. California--Riparian and Overlying Rights

The State of California has long recognized the existence of riparian rights to water[67] but has modified the common law concept by Constitutional

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67 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, 692-3 (1886), citing section 801 of the Civil Code as providing in part "the right of having water flow without diminution or disturbance of any kind" and construing it to mean the "right to have a natural water course flow, subject to such diminution as results necessarily from a reasonable use by a superior riparian proprietor."

Amendment[68] to permit a "beneficial use" only. However, when, and to what extent, riparian rights attach to lands of the public domain or to lands severed or withdrawn therefrom provides the first point for consideration.

1. Attachment of Riparian Water Right to Land Severed or Withdrawn From the Public Domain

California decisions have determined that riparian rights attach to public domain lands of the Federal Government when such lands have been transferred to private hands. Decisions have stated this proposition variously as:

> . . . /F/or it is settled that riparian rights do not attach to lands held by the government until such land has been transmitted to private ownership.[69]

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68 "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled . . . ." Cal. Const., art. 14, sec. 3 (1928).

69 McKinley Bros. v. McCauley, 215 Cal. 229, 9 P.2d 298 (1932).

> And thus it may happen that a riparian owner, being insufficiently supplied with water by the flow of a stream, and anticipating the attachment of other riparian claims when the government land above him may be transferred to private ownership, may, upon such government land, make an appropriation which will be good, although it may have the effect to rob entirely the property of any riparian right in the stream--this to be qualified only with the condition that the total water claimed under the combined rights does not amount to more than is reasonably necessary to satisfy the necessary uses to which it is designed to be put.[70]

and

> These decisions show that while an appropriation or diversion made upon lands of the United States gives the appropriator or diverter a right to the water as against the United States it does so solely because, by the act of Congress of July 26, 1866 . . . (R.S. 2339, 43 U.S.C. 661 (1958)), the United States declared that such diversions, if recognized by local laws, should be effectual to confer upon the diverter the riparian rights in the stream pertaining to the land of the United States abutting thereon, that it gives no right as against other landowners, that it does not take place upon the theory that the water is held by the United States for public use, but because, as proprietor of the land, the United States, by that act, granted a part of its property to such diverter.[71] /Emphasis and citation added./

An indiscriminate application of these decisions which relate to public domain lands to reserved lands

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[70] Rindge v. Crags Land Co., 56 Cal. App. 247, 205 P.36 (1922) (Hearing denied by Supreme Court, March 23, 1922).

[71] Duckworth v. Watsonville Water & Light Co., 170 Cal. 425, 432, 150 Pac. 58, 61 (1915).

would result in no riparian water right attaching to military reservations withdrawn, reserved or set aside from the public domain. It is submitted, however, that this result does not obtain. Looking to the underscored portion of the quotation just above, it will be seen that the right to deprive riparian public domain land of its riparian right to water depends upon the Act of July 26, 1866 (R.S. 2339, 43 U.S.C. 661 (1958)). It was shown earlier that neither this public lands act nor the Desert Land Act applies to lands withdrawn, reserved, or set aside from the public domain.[72] Next recall that Congress, in so far as private interests are concerned, has confirmed that the authority to define the rights to water rests with the particular state involved,[73] and that California permits riparian rights to be defeated only on those public lands which are then subject to appropriation pursuant to the public lands act (R.S. 2339, 43 U.S.C. 661 (1958)).[74] It follows

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[72] Note 20, supra. "'Public lands' are lands subject to private appropriation and disposal under public land laws. 'Reservations' are not so subject. . . . Even if formerly they may have been open to private appropriation as public lands; they were withdrawn from such availability before any vested interests conflicting with the Pelton Project were acquired." Federal Power Commission v. Oregon, 349 U.S. 435, 443-4 (1955).

[73] Pp. 8-10, supra, cf. San Joaquin & Kings River Canal & Irr. Co. v. Worswick, 187 Cal. 674, 203 Pac. 999 (1922) (cert. den. 258 U.S. 625).

[74] P. 7, supra.

that no private interest may be acquired in California which would be superior to riparian rights remaining incident to public land in California which is withdrawn, reserved or set aside from the date of such withdrawal action by a proper official. Further, reasonable beneficial use by the Government of such riparian rights would not be adverse to any other interest, but the proper extent and measure of such use by the Government would be determined by the laws of the State of California.[75]

2. Riparian Water Incident to Acquired Private Land

As to the lands acquired by the Federal Government from private persons it has, of course, been held that the laws of the State of California define and limit the riparian rights to such water regardless of the later jurisdictional status of such land. Federal authorities can acquire from a private person only that interest in land which he has, and a later cession of exclusive legislative jurisdiction over these lands would not, by such act above, enlarge the property interest obtained.

'•> P. 10, supra. See also United States v. Central Stockholders Corporation of Yallejo, 43 F.2d 977 {N.D. Gal. 1*30).

[76] United States v. Burnison, 339 U.S. 87, 90 (1950); United States v. Fallbrook Public Utility District, 108 F.Supp. 72, 87 (S.p. Gal. 1952}.

3. Riparian Concept

The riparian water right as currently recognized in California[77] is a usufructary, prior and paramount right to the full flow, if necessary, for beneficial use incident to such land.[78] It is a right in common with all other riparian owners,[79] to the extent that it exists in its natural state,[80] and is appurtenant to the land.[81] However, it may be appropriated by another until it is required for a beneficial use on the riparian land.[82]

An overlying owner has rights in a subsurface stream, circulating water beneath his land, and water in underground basins to the extent that such waters flow or are present naturally. These rights are analogous to those of a riparian owner and permit the use of

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77 Cal. Water Code sec. 101.

78 Rank v. Krug, 90 F.Supp. 773, 787 (D.C. 1930); Prather v. Hoberg, 24 Cal. 2d 549, 150 P.2d 405 (1944).

79 Carlsbad Mut. Water Co. v. San Luis Rey Development Co., 78 Cal. App.2d 900, 178 P.2d 844 (1947).

80 Los Angeles County Flood Control District v. Abbot, 24 Cal. App.2d 728, 76 P.2d 188 (1938).

81 Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 Pac. 93 (1930).

82 Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 525, 45 P.2d 972, 986 (1935).

such water on his land provided it overlies the basin or watershed.[83]

Although the riparian right may not be enlarged by use or lost through disuse,[84] it may be acquired by prescriptive use for the statutory period[85] to the extent that it interferes with a present riparian use.[86] In this regard, it should be noted that it is a necessary prerequisite to the acquisition of prescriptive rights that the use complained of be one which may be abated by self-help or enjoined.[87] The former view that the Federal Government could not acquire prescriptive right because of its immunity from suit may no longer be valid as the Government may now be made a party to such actions.[88] However, property of the Federal Government

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[83] United States v. 4.105 Acres of Land in Pleasanton, 68 F.Supp. 279 (D.C. 1946); City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 925-27, 207 P.2d 17, 28 (1949); Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748 (1909).

[84] Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 Pac. 444 (1927).

[85] Arroyo Ditch & Water Co. v. Baldwin, 155 Cal. 280, 100 Pac. 874 (1909).

[86] Peabody v. City of Vallejo, 2 Cal.2d 351, 367-8, 40 P.2d 486, 494-5 (1935).

[87] People of State of California v. United States, 235 F.2d 647, 661 (9th Cir. 1956); Meridian, Ltd. v. City & County of San Francisco, 13 Cal.2d 424, 445, 90 P.2d 537, 548 (1939).

[88] 66 Stat. 560, 43 U.S.C. 666 (1958), cf. People of the State of California v. United States, 235 F.2d 647, 661.

could not be acquired through prescription by private persons.[89]

A riparian owner may take such measures as are necessary to confine the waters to their customary channel and thus protect his own lands, but he may not obstruct or divert the water from its natural course so as to damage another.[90] Further, he is entitled to insist that the water reach his land in its natural, unpolluted state except as such results reasonably from an upper riparian's proper beneficial use.[91] He is not, however, affected adversely by any riparian use of a lower riparian.[92]

It should be noted that a riparian right may be preserved in a parcel of land severed from an original riparian tract by conveyance[93] where the conveyance so provides or the circumstances are such as to show that this was the intention of the parties.[94] Once land has

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89 United States v. California, 332 U.S.19,39-40 (1957).

90 Weck v. Los Angeles County Flood Control District, 80 Cal. App.2d 182, 181 P.2d 935 (1947).

91 Holmes v. Nay, 186 Cal. 231, 199 Pac. 325 (1921).

92 Id.

93 Miller & Lux v. J. G. James Co., 179 Cal. 689, 178 Pac. 716 (1919).

94 Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748 (1909).

been severed so as to deprive the part so severed of a riparian water right, such right can never be regained.[95] Further, a riparian owner may not transfer his water right for use on non-riparian lands when to do so would impair the rights of another riparian owner.[96] This latter view must, however, be reconciled with the established rule that riparian water may be severed from the riparian land by grant, condemnation, or prescription.[97]

It is necessary to determine what constitutes riparian land as water rights attach only to such land and at the point where the water first reaches it. First of all, it is the present topography that is determinative[98] and the same rules will apply irrespective of the size of the tract involved or the extent of its watershed.[99] The land must be contiguous to, have access to or abut on the stream and must be within the watershed of the stream. Then the riparian rights extend only to the smallest tract held under one title in the chain of title.[100] Ownership of

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95 Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978 (1907).

96 Mt. Shasta Power Corp. v. McArthur, 109 Cal. App. 171, 292 P.549 (1930).

97 Carlsbad Mut. Water Co. v. San Luis Rey Development Co., 78 Cal. App.2d 900, 178 P.2d 844 (1947).

98 Smith v. Wheeler, 107 Cal. App.2d 451, 237 P.2d 325 (1952).

99 Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533, 549-50 (1938).

100 Id. at Cal.2d 529, P.2d 547.

the bed of a stream does not include riparian rights[101] nor does land overlying an underground flow connected with a surface stream have riparian rights in the surface stream.[102] Further, the rights of a riparian owner may be lost through avulsion.[103]

Knowing the land to which the riparian right attaches leads to a consideration of what constitutes the water encompassed by the riparian concept. It includes all water flowing in, affected by, or which affects a natural water course from the time the water in such water course first reaches riparian land and so long as it continues to flow past his land,[104] to include the waters of a stream, pond or lake,[105] slough,[106] spring,[107] swamp or marsh,[108] or an arroyo.[109] Further,

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101 Lux v. Haggin, 8 PCLJ 455 (1881).

102 Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P.978 (1907).

103 McKissack Cattle Co. v. Alsaga, 41 Cal. App. 380, 182 Pac. 793 (1919).

104 Miller & Lux v. Enterprise Canal & Land Co., 169 Cal. 415, 147 Pac. 567 (1915).

105 Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 Pac. 338 (1907).

106 Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 Pac. 607 (1926).

107 San Francisco Bank v. Langer, 43 Cal. App.2d 263, 110 P.2d 687 (1941); Eckel v. Springfield Tunnel & Development Co., 87 Cal. App. 617, 262 Pac. 425 (1927).

108 Hall v. Webb, 66 Cal. App. 416, 226 Pac. 403 (1924).

109 Los Angeles County Flood Control District v. Abbot, 24 Cal. App.2d 728, 76 P.2d 188 (1938).

it extends to underground waters the extraction of which will diminish in some substantial extent water flowing in an underground stream[110] and to flood waters that flow in a continuous stream with such regularity that they may be anticipated annually[111] but not to flood waters which are of no benefit to the land.[112]

4. Beneficial Riparian Use

A riparian owner may use his riparian waters so as to make the most beneficial use of his land[113] for whatever purpose such lands are or may be adaptable.[114] However, this right does not extend to waste, unreasonable use, or unreasonable methods of diversion,[115] and the determination of these matters is a judicial one dependent upon the facts of a particular case.[116]

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110 McClintock v. Hudson, 141 Cal. 275, 281, 74 Pac. 849, 851 (1903).

111 Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59, 99 Pac. 502 (1909).

112 Gin S. Chow v. City of Santa Barbara, 217 Cal. 789, 22 P.2d 5 (1933).

113 Cowell v. Armstrong, 210 Cal. 218, 290 Pac. 1036 (1930).

114 Cal. Const. art. XIV, sec. 3.

115 Peabody v. City of Vallejo, 2 Cal.2d 351, 367-68, 40 P.2d 486, 493 (1935).

116 Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933).

Further, his prospective rights to reasonable use remain paramount, but an appropriator may use such water until the riparian need has become manifest.[117] As between riparians, each is an owner in common with the others and is limited to reasonable use of the surface and subsurface waters on his land, but if he has no present need for his water the other riparians may use it.[118] In addition, the riparian owner has no right to a specific quantity, only a right in common to take a proportional share, and his right may vary with the circumstances of each case or from year to year, season to season.[119] A court, in order to apportion the water among qualified users, may divide the waters (to include both surface and subsurface waters) on a time or rotation basis, or quantitively.[120]

In the apportionment of water among riparian owners the first preference is given to domestic purposes which includes the sustenance of humans (and does not necessarily exclude occupants of hotels, apartments, resorts, or

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117 Carlsbad Mut. Water Co. v. San Luis Rey Development Co., 78 Cal. App.2d 900, 178 P.2d 844 (1947).

118 Id.; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533 (1938).

119 Prather v. Hoberg, 24 Cal.2d 549, 150 P.2d 405 (1944).

120 Carlsbad Mut. Water Co. v. San Luis Rey Development Co., 78 Cal. App.2d 900, 178 P.2d 844 (1947).

the operation of household conveniences) and the care of livestock.[121] Although irrigation is also recognized as a beneficial use even though it may result in the diminution of the natural flow, it may not be exercised to the point of depriving domestic uses or to the extent of diverting more than a proportionate share.[122] Other agricultural uses allowed include the growing of natural grasses for reclaiming alkali land[123] and the propogation of fish.[124]

When commercial uses are considered, greater care is required to assure that injury does not result to other riparians. Water may be rented or sold,[125] but it must not be taken for use upon non-riparian land,[126] and the proprietor's business of serving guests may not be so extensive as to prejudice the rights of lower riparians.

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121 Prather v. Hoberg, 24 Cal.2d 549, 150 Pac.2d 405 (1944). "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." Cal. Water Code, sec. 106.

122 Miller & Lux v. Enterprise Canal & Land Co., 169 Cal. 415, 147 Pac. 567 (1915); Drake v. Tucker, 43 Cal. App. 53, 184 Pac. 502 (1919).

123 Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 Pac. 607 (1926).

124 Ex Parte Elam, 6 Cal. App. 233, 91 Pac. 811 (1907).

125 Joeger v. Pacific Gas & Electric Co., 207 Cal. 8, 276 Pac. 1017 (1929).

126 Miller & Lux v. J. G. James Co., 179 Cal. 689, 178 Pac. 716 (1919).

Water may be diverted to provide motive power for machinery[127] or used to generate electric power.[128] Although the artificial storage of water--whether a cyclical or seasonal impounding or otherwise--and regardless of whether it is for flood control or power uses--is not a riparian beneficial use, a temporary impounding to provide a head for generation of power is a riparian right.[129] Additionally, riparian users must return the water to the stream before it passes the land.[130]

Military use has been held to be a beneficial riparian use,[131] but it has been limited in the amount of such use to that which the riparian land would require reasonably for its maximum potential future agricultural purposes.[132] This view is consistent with an

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127 McArthur v. Mt. Shasta Power Corp., 3 Cal.2d 704, 45 P.2d 807 (1935).

128 Moore v. California Oregon Power Co., 22 Cal.2d 725, 140 P.2d 798 (1943).

129 Id.; City of Lodi v. East Bay Municipal Utility Dist., 7 Cal.2d 316, 60 P.2d 439 (1936); Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 219, 287 Pac. 93, 97 (1930).

130 Mentone Irr. Co. v. Redlands Electric Light & Power Co., 155 Cal. 323, 100 Pac. 1082 (1909).

131 United States v. Fallbrook Public Utility District, 108 F.Supp. 72, 79-82 (S.D. Cal. 1952).

132 United States v. Fallbrook Public Utility District, 109 F.Supp. 28 (S.D. Cal. 1952).

earlier decision that when a riparian has been allotted water for irrigation purposes, he may use it for other beneficial uses.[133] It would seem that the same reasoning would apply to allow consumption of that amount available for commercial use where reasonable and beneficial commercial use would be permitted if the land were in private hands.

B. California--Appropriation Rights

Perhaps the first thing that should be noted is that water available by appropriation is in excess of that available to the proprietor of land under the common law concept of riparian ownership and irrespective of whether such proprietor is a riparian or non-riparian user. When the Federal Government has a need for water in excess of its riparian entitlement, it must purchase the needed water from a private source, acquire that water which has not been appropriated from its own reserves by the proper action of a recognized authority, obtain the water through condemnation proceedings or become an appropriator in accordance with state law. Even though the California Department of Water Resources has no direct jurisdiction over a

[133] Half Moon Bay Land Co. v. Cowell, 173 Cal. 543, 160 Pac. 675 (1916).

Federal enclave situate in California,[134] whatever property the United States acquires in water by appropriation must be obtained through compliance with the California law and procedures.[135] This is because there is no other source for such water when interests within California are involved. Further, the Federal Government has determined that it will accommodate its proprietary actions with respect to water to state law.[136]

1. What Constitutes Appropriation

Any diversion and use of water on non-riparian land or use in excess of a riparian right on riparian land constitutes appropriation,[137] and, in the absence of adverse use for the statutory period, this may only be done as a matter of right when it is accomplished in accordance with statute.[138] The California Water Code provides:

> Public water of state; appropriation. All water flowing in any natural channel excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so

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134 United States v. Fallbrook Public Utility District, 108 F.Supp. 72, 87 (S.D. Cal. 1952).

135 United States v. Fallbrook Public Utility District, 165 F.Supp. 806, 831 (S.D. Cal. 1958).

136 Note 21, pp. 11, 26-30, supra.

137 Montecito Valley Water Co. v. City of Santa Barbara, 151 Cal. 377, 90 Pac. 935 (1907).

138 Crane v. Stevinson, 5 Cal.2d 387, 54 P.2d 1100 (1936).

far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated,[139] is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code.[140]

Compliance with division provisions. No right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division.[141]

Purpose of appropriation; cessation of right. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.[142]

Reversion of unused water. When the person entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused

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139 "Unappropriated water. The following are hereby declared to constitute unappropriated water:
"(a) All water which has never been appropriated.
"(b) All water appropriated prior to December 19, 1914, which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of the appropriation, or which has not been put, or which ceased to be put to some useful or beneficial purpose.
"(c) All water appropriated pursuant to the Water Commission Act or this code which has ceased to be put to the useful or beneficial purpose for which it was appropriated . . . .
"(d) Water which having been appropriated or used flows back into a stream, lake or other body of water." Cal. Water Code sec. 1202.

140 Cal. Water Code sec. 1201.

141 Id. at sec. 1225.

142 Id. at sec. 1240.

> water reverts to the public and shall be regarded as unappropriated public water.[143]
>
> Underground storage of water. The storing of water underground, including the diversion of streams and the flowing of water on lands necessary to the accomplishment of such storage, constitutes a beneficial use of water if the water so stored is thereafter applied to the beneficial purposes for which the appropriation for storage was made.[144]

At this point the caveat that valuable property of the Government may not be lost by failure of its officers to act[145] may take on a renewed significance. Full use of this principle would preclude the loss of a priority to the United States caused solely by the failure to make a timely application for appropriative use in accordance with the state law and would seem to preclude the application of Sections 1240 and 1241, California Water Code, supra, concerning loss through cessation of use where the need therefor continues. Here the particular language used by the United States Supreme Court seems particularly apt:

> The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces

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[143] Id. at sec. 1241.

[144] Id. at sec. 1242.

> of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to loose its valuable rights by their acquiescence, laches, or failure to act.[146]

This avenue of approach may prove to be the most fruitful in this difficult area of trying to unscramble conflicting interests.

2. Procedural Requisites

As the right to appropriate is now dependent upon compliance with procedural prerequisites, the law concerning application for such rights and the priorities, policies, and fees involved as well as the effect of filing will be noted. The Department of Water Resources is charged with considering and acting upon all applications to appropriate water,[147] including applications by the Federal Government and State municipalities,[148] and allowing the applicant to prevail who ". . . in its judgment will best develop, conserve and utilize in the public interest the water sought to be appropriated,"[149]

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146 Id.

147 Cal. Water Code sec. 1250.

148 Id. at 1252.5. "All rights . . . conferred . . . upon any person . . . are likewise conferred upon the United States, the State and any entity or organization capable of holding an interest in real property . . . ."

149 Cal. Water Code sec. 1253.

recognizing that "domestic use is the highest use and irrigation the next,"[150] and that an application "by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective or whether it is first in time."[151] "Any application properly made[152] gives to the applicant a priority of right . . .,"[153] but this filing gives no right to use the water prior to the issuance of a permit.[154] A schedule of fees for the filing of the application, graduated according to the amount and method of use permitted, is also provided.[155]

3. Appropriative Right

Turning again to the substantive law it is well to recall that all Federal lands within a state to which the state has not ceded jurisdiction lie within the jurisdiction of that state,[156] that water on the public

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150 Id. at 1254.

151 Id. at 1460.

152 Id. at 1270. ". . . application made in a bonafide attempt to conform to the rules and regulation . . . ."

153 Id. at 1450.

154 Id. at 1455; Rank v. Krug, 142 F.Supp. 1, 179-80 (S.D. Cal. 1956).

155 Cal. Water Code secs. 1525-1560.

156 Wilson v. Cook, 327 U.S. 474, 487 (1945).

domain lands is subject to state control,[157] and that water rights on Federal enclaves are measured by the law of the state of location.[158] The declaration by the State of California that all water not beneficially used by riparians or lawful appropriators is "public water"[159] then assumes its proper posture and the regulated disposition of such excess or surplus waters becomes understandable. Note that such statutes do not vest title to, or ownership of, these waters in the State and that the State, like any other party, must make application for a permit to appropriate the water and then use it beneficially.[160]

Section 1201, California Water Code, applies only to "water flowing in any natural channel." Consequently, spring waters which do not flow onto other lands or belong to a percolating water course are not within a "natural channel" and may be used in their entirety for any purpose by the owner of the land without a permit to appropriate.[161] However, a dry channel through which

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157 Pp. 10-12, supra.

158 Pp. 11, 26-30, supra.

159 Cal. Water Code sec. 1201.

160 Wrothhall v. Johnson, 86 Utah 50, 40 P.2d 755 (1933).

161 York v. Horn, 154 Cal. App.2d 209, 315 P.2d 912 (1957).

freshets and flood waters flow is a natural water course[162] and waters therein are subject to appropriation.

Whenever the water in a natural water course, irrespective of whether it is foreign water or part of the natural flow, is excess to the reasonable needs of owners with paramount rights it is surplus and subject to appropriation. Its taking may not be enjoined and the appropriator is not required to give compensation therefor.[163]

The amount of water which may be appropriated depends upon the amount put to a beneficial use and is not measured by the amount diverted.[164] Once entitled to a certain amount of water the appropriator may sell it to any willing purchaser for beneficial purposes but he cannot compel compensation from an appropriator of water unused by him or his transferees.[165] An appropriator retains title to the extent the water is used beneficially,[166] and a change in the place or purpose of use does not constitute a new appropriation.[167]

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162 Podesta v. Linden Irr. District, 141 Cal. App.2d 38, 296 P.2d 401 (1956).

163 Stevinson Water District v. Roduner, 36 Cal.2d 264, 223 P.2d 209 (1950).

164 Thorne v. McKinley Bros., 5 Cal.2d 704, 56 P.2d 204 (1936).

165 Stevinson Water District v. Roduner, 36 Cal.2d 264, 223 P.2d 209 (1950).

166 Mt. Shasta Power Corp. v. McArthur, 109 Cal. App. 171, 292 Pac. 549 (1930).

167 Orange County Water District v. City of Riverside, 173 Cal. App.2d 137, 343 P.2d 450 (1959); But cf. California Water Code secs. 1700-1706.

Whenever water is taken wrongfully, such taking may ripen into a prescriptive right.[168] However, an appropriation must, in fact, invade another's paramount rights to gain title thereto by prescription.[169] For this reason a lower riparian cannot acquire prescriptive title to the riparian waters of a stream against an upper riparian owner.[170] But an appropriation of water from upstream riparian lands by a lower riparian, when such appropriation is adverse to the actual needs of the upper riparian appropriator, may ripen into a prescriptive title as to that upper riparian's appropriative rights.[171] However, an appropriator also must have complied with Section 1225, California Water Code, to gain prescriptive title. The amount of water to which a prescriptive title may be obtained depends upon the amount put to a beneficial use.[172] ihen such water has been actually and continuously used for the statutory period (5 years) title is acquired.[173]

[158] City of Pasadena v. City of Alhambra, 33 Cal.2d 90S, 207 P.2d 17 (1949).

[169] Id.

[170] McKissick Cattle Co. v. Anderson, 62 Gal. App. *55$,* 217 Pac. 779 (19235.

[171] San Joaquin &>>Kings River Canal & Irr. Co. v. Worswiek, 187 Cal. 674, 203 Pac. 999 (1922).

[172] Dykaeul v. Mansur, 65 Cal. App.2d 503, 150 P.2d 95S (1947).

[17^] Mt. Shasta Power Corp. v. McArthur, 109 Cal. App. 171, 292 Pac. 549 (1930).

Thereafter, it may be lost by abandonment, forfeiture or operation of law.[174]

C. Colorado--Appropriation Rights

As was noted earlier Colorado, and States which follow its view, never adopted the common law concept of riparian right to water as it was unsuited to their conditions.[175] Article XVI, Constitution of Colorado, provides:

> Section 5. Water of streams public property.--The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provides.
>
> Section 6. Diverting unappropriated water--priority preferred uses. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and whose using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

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174 Lema v. Ferrari, 27 Cal. App.2d 65, 80 P.2d 157 (1938).

175 Pp. 22-23, supra, Hutchins, Selected Problems in the Law of Water Rights in the West, Dep't of Agriculture Misc. Pub. 418 (1942), 30, 80-109. (States following the Colorado view are Arizona, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming.)

Accordingly, a conveyance only of the title to land conveys no interest in water rights,[176] and a patent from the United States does not include a common law riparian water right.[177] It follows that a withdrawal of land from the public domain would not affect water rights and no such rights would be withdrawn incident to the land. Water would be obtained only by appropriation and this would have to be done in accordance with Colorado's law.

1. Appropriative Right

All waters in natural streams are subject to appropriation. These include the waters in underground streams--ground waters are presumed tributary to a stream--,[178] seepage or spring waters that eventually become part of a stream,[179] and water in natural courses that are dry part of the year.[180]

An appropriation is not effected until the waters have been put to a beneficial use,[181] but priority in

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176 Clark v. Ashley, 34 Colo. 285, 82 Pac. 588 (1905).

177 Sternberger v. Seaton Mountain Electric Light, Heat & Power Co., 45 Colo. 401, 102 Pac. 168 (1909).

178 Hehl Engineering Co. v. Hubbell, 132 Colo. 96, 285 P.2d 593 (1955); Fadden v. Hubbell, 93 Colo. 388, 28 P.2d 247 (1934).

179 Nevius v. Smith, 86 Colo. 178, 279 Pac. 44 (1929).

180 In re German Ditch and Reservoir Co., 56 Colo. 252, 139 Pac. 2 (1914).

181 Archuleta v. Boulder & Weld Co. Ditch Co., 118 Colo. 43, 192 P.2d 891 (1948).

time will relate back to the time the work commenced provided it has been completed with reasonable diligence.[182] Although the right to water may be gained through adverse use such right does not begin until the true owner is deprived of his right to use the water in such a substantial manner that he is on notice of the invasion.[183]

An owner of riparian land, though denied the common law riparian rights to water, finds some measure of consideration in section 147-2-1, Colorado Revised Statutes, Annotated, which provides:

> Rights of owner of riparian land.--All persons who claim, own, or hold a possessory right or title to any land or parcel of land within the boundary of the state of Colorado, . . . when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water of said stream, creek or river for the purposes of irrigation, and making said claims available to the full extent of the soil, for agricultural purposes.

This statute has been limited by case law since a senior riparian appropriator may appropriate all the water,[184] it may be diverted by one not a riparian owner,[185] and a prior appropriator may not be divested of his right

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[182] Sieber v. Frink, 7 Colo. 148, 2 Pac. 901 (1884).

[183] Clark v. Ashley, 34 Colo. 285, 82 Pac. 588 (1905).

[184] Wellington v. Beck, 43 Colo. 70, 95 Pac. 297 (1908).

[185] Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. 339 (1908).

by one having a higher priority under the statute above without being compensated for such right. Further, such water may be appropriated by a municipality and removed to another watershed in such amount as will provide for a normal increase in the municipality's population.[186] However, where a spring does not flow with sufficient volume to become a stream it belongs to the land upon which it is found and is not subject to appropriation by another.[187] Adverse use for twenty years[188] will allow the adverse user to obtain prescriptive title.

Other statutes notable for the purposes herein discussed provide that water acquired for domestic purposes may not be used for irrigation,[189] that waters not needed for immediate domestic or irrigation uses may be stored in reservoirs,[190] and that well water shall not be wasted.[191]

2. Procedural Requisites

In administering the use of its public waters, Colorado has divided the State into irrigation districts

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[186] Denver v. Sheriff, 105 Colo. 193, 96 P.2d 836 (1939).
[187] Haver v. Matonock, 79 Colo. 194, 244 Pac, 914 (1926).
[188] Colo. Rev. Stat. Ann. sec. 147-2-3.
[189] Colo. Rev. Stat. Ann. sec. 137-2-6.
[190] Colo. Rev. Stat. Ann. sec. 147-5-1.
[191] Colo. Rev. Stat. Ann. sec. 147-18-11.

and priorities are fixed by decrees in accordance with its adjudication acts.[192] The state engineer is charged with the "general supervising control over the public waters of the state."[193] To aid him in this responsibility, all users of water who construct, change the location of or enlarge any reservoir, ditch, canal or feeder canal for the same are encouraged to file a map with the state engineer and such filing constitutes prima facie evidence of their claim.[194] However, the right to appropriate water is given by the Constitution and is not dependent upon a compliance with procedural requisites. Fees, graduated by cubic feet of water involved, are required to be collected,[195] and the state

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192 Colo. Rev. Stat. Ann. Arts. 147-9 and 10.

193 Colo. Rev. Stat. Ann. sec. 147-11-3.

194 Colo. Rev. Stat. Ann. sec. 147-4-1: "Appropriations of water in Colorado made by diversion and application of the water to beneficial use. The appropriator commences his surveys or construction work, and then files his statement of claim with the State engineer. He is not required to apply to the State for a permit to divert water, and the statutes do not empower the State engineer to reject a filing on the ground that there may be no unappropriated water in the stream. A separate filing is required for the appropriation of water for storage.

"Adjudications of water rights are made exclusively by the district courts . . . ." Hutchins, Selected Problems of Water Rights in the West, Dep't of Agri. Misc. Pub. 418 (1942) 86.

195 Colo. Rev. Stat. Ann. sec. 147-11-15.

engineer is to receive a certified copy of each judicial decree "fixing the priorities of appropriation of water for irrigation and other beneficial purposes."[196]

Once the right to use water from any ditch or reservoir is established it will continue.[197] The rate of compensation to be paid for the use of water is to be set by the county commissioners.[198] Irrigation division engineers[199] and water commissioners[200] aid the state engineer in his supervision and control of the public waters.

D. Right to Construct Ditches or Canals On Military Reservations

The right to enter the land of another, by condemnation proceedings where necessary, in order to construct ditches or canals, with necessary access thereto, is recognized by both California[201] and Colorado[202] to permit the enjoyment of a valid water right. The right to enter public lands for such purposes is found in

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196 Colo. Rev. Stat. Ann. sec. 147-12-6.
197 Colo. Rev. Stat. Ann. sec. 148-8-1.
198 Colo. Rev. Stat. Ann. sec. 148-8-2&5.
199 Colo. Rev. Stat. Ann. Art. 147-12.
200 Colo. Rev. Stat. Ann. Art. 147-15.
201 Cal. Water Code sec. 7026.
202 Colo. Rev. Stat. Ann. secs. 147-3-1-6.

R. S. 2339, 43 U.S.C. 661 (1958).[203] Lastly, Congress has seen fit to permit entry on reserved lands by individuals, associations of individuals,[204] canal or ditch companies, and irrigations or drainage districts organized under local law[205] provided such entry does not interfere with proper government occupation.

E. Conclusions As To Particular Rights

From the above discussion, it will be noted that water rights are not incident to land in the Colorado doctrine States. Accordingly, whatever rights the United States may have to water on its military reservations situate in Colorado must have been obtained pursuant to Colorado's law, except for such rights as were in fact extant because of actual appropriation prior to the time Colorado adopted its Constitution in 1876. Subsequent and continued use or acquisitions by the United States must comply with those state laws which define and limit the property aspect of water.

In those States such as California where a riparian interest is recognized as an incident to land, the United States possesses all such interest in the public lands

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203 "And the right of way for the construction of ditches and canals is acknowledged and confirmed."

204 60 Stat. 1100, 43 U.S.C. 948 (1958).

205 44 Stat. 668, 43 U.S.C. 946 (1958).

except in so far as these have been granted to, or have been appropriated by, others in accordance with the acts of Congress and State law. Reserved lands take as an incident thereto all riparian rights remaining at the time of their reservation. The extent and measure of such riparian rights is, however, subject to the definition and limitation of the laws of the state of location. In California riparian owners are limited to reasonable beneficial use and military use has been so considered. Although the extent of riparian military use is measured by the maximum riparian agricultural use under current decisions, it seems reasonable to conclude that it may be extended to equal the reasonable riparian commercial use allowable.

There are certain general principles concerning the appropriative right to use water in effect and recognized throughout these arid land states. These include such concepts as (1) the first appropriation in time is the first in right, (2) one purpose of use may be preferred over, or to the exclusion of, another as a matter of public policy (domestic or municipal use usually has the greater priority and commercial use the lowest), (3) need is the basis for, and the measure of, the right acquired, (4) any use which does not impinge upon

another's right with the same or higher priority or preference and which is not contrary to law will be allowed, and (5) waste in the method or manner of acquisition, diversion, use, or storage will not be permitted.

The laws of the several states are not, of course, uniform in their definition of terms or in their application of these terms to similar fact situations. However, each state strives to maximize the benefit that may be achieved through the productive use of water by encouraging diligent, effectual and reasonable methods of use and diversion.

IV.

GENERAL CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Returning to the problems which confront the managers of military establishments in the western states as posed in Chapter I, a solution to each may now be suggested.

It may be stated categorically that the laws of the state of location define what property rights, if any, the United States Government has in water incident to its lands whenever non-Federal interests are involved. This is accomplished in one of two ways. Either (1) the land, water, or land and water was acquired by the Federal Government from a source within a particular state

or it is property that has been subject to the legislative authority of that particular state; or (2) the Federal Government has agreed to measure its interest by the law of the state of location when an interest within that state also is at issue.

It is proper to conclude, then, that in determining the extent of the Federal interest involved, that neither the method nor manner of original acquisition of the land or water will effect the determination as to which law will apply so long as an interest within a particular state also is involved. However, the extent of the interest owned will be affected by the time, method and manner of acquisition just as any other interest within the particular state would be so affected.

To what extent will Federal rights be affected by Federal compliance or non-compliance with state laws regulating the appropriation, distribution, and use of water? To answer this inquiry, it must first be decided whether the right in question (1) originated from a source within, or subject to, the state's jurisdiction, e.g., purchase from a private person or reservation from the public domain or (2) is a product of that state's law, e.g., water obtained by appropriation. Next, it must be determined whether compliance with the particular state's law (a) is a condition precedent to the vesting

of a right to this use of the water, (b) is the method for preserving this use as a vested right in the water, or (c) is a process for the divestment of a right to this use of the water. The first of these latter circumstances, (a) above, is the most important to managers of a military establishment as it is a prerequisite to lawful use. Compliance with state laws under the second circumstance, (b) above, would denote prudent property management. The last circumstance, (c) above, should be a facet of every decision which will change the need for a use of the water since a change in need may result in an unwitting loss of the right to use the water for any purpose.

The fact that the Federal Government possesses a superior sovereign status to that of state authority in some regards does not enter into, or alter, the extent of Federal proprietary interest in water. This does not mean, however, that Federal sovereignty is not important. The other attributes of Federal sovereignty must be kept in mind. These include the need to provide for the common defense (and precludes a state from determining that a military use of water is not a beneficial use), the need for water to fulfill treaty commitments in behalf of its Indian wards, and the

exercise of other constitutionally delegated responsibilities.

In considering the practical aspect of what may be done with water found on military reservations or obtained on other Federal lands, it is necessary first to locate the land or water involved within the boundaries of a given state. Thereafter, it must be determined from what source or sources the land, water, or land and water was obtained and to what extent the proposed Federal use of the water will affect non-Federal interests. At this point, the law of the state of location should be examined to determine the extent of the property interest possessed by the Federal Government. This, in turn, will define the use allowable. If it is riparian water, it must be used on riparian land for a riparian purpose. If it is water obtained by appropriation, it may be used in any manner consistent with such right as defined by that particular state's law.

Even after the water has been lawfully obtained, the law of the state of location must be followed. This is because Federal sovereignty in no way controls the proprietary interest when an interest within a state is involved. Although there is no reasonable

alternative to compliance with state law, adequate safeguards are available to the Federal Government. Constitutional functions cannot be impaired by state regulation, Federal property cannot be lost through the negligence of its officers or agents and the power of eminent domain remains.

Lastly, what must be done to acquire, perfect or protect the water rights the military will need on future reservations when the lands therefor are to be withdrawn from the public domain or are to be otherwise acquired? First, the withdrawal from the public domain expressly must include all rights to the water that will be needed and which may be withdrawn for such use under the law of the state of location. Then, the withdrawal must be accomplished by an appropriate authority--that is, action either by the Executive or his designee in accordance with legislative proscriptions or pursuant to an express Congressional enactment. Here it must be remembered that the right to withdraw water has not been delegated to an authority below the Secretary of the Interior. Then the state law involved must be understood and followed from the moment of acquisition until such time that an authorized disposition of the interest occurs. This merely requires that the user know the law of the place in which he acts.

Recommendations

In so far as Federal law relating to the right to use water is concerned, further legislation does not seem to be required or desired. The current view which leaves this matter to the plenary control of the several states is the most feasible. Accordingly, no change should be considered in this regard.

Added clarity may be obtained within the Executive Branch by an amendment of Executive Order 10355 (17 Fed. Reg. 251 (1952)), which delegates the President's authority to withdraw public lands, so as to include water within its express terms. The authority to withdraw water from the public domain would then be held by the same authorities that now may withdraw the land.

Lastly, Federal authorities should comply with state laws pertaining to the use of water. This will preserve the Federal proprietary interests and foster the state government's efforts to conserve this valuable resource.

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