

THE NEVADA LAW OF WATER RIGHTS

By

WELLS A. HUTCHINS, LL.B.

**Production Economics Research Branch
Agricultural Research Service
United States Department of Agriculture**



**HUGH A. SHAMBERGER
STATE ENGINEER OF NEVADA**

In cooperation with

**Production Economics Research Branch
Agricultural Research Service
United States Department of Agriculture**

Carson City, Nevada

1955

PREFACE

This statement of the Nevada law of water rights was prepared as part of the revision of "Selected Problems in the Law of Water Rights in the West," which was issued in 1942 as Miscellaneous Publication 418 of the United States Department of Agriculture. The completed revision will comprise an overall discussion of water-rights law for the 17 Western States. This overall discussion will be followed by separate statements for each of the States concerned. If practicable, the separate for each State is to be issued in advance of publication of the complete revision.

The study reported here was prepared by the author under a cooperative arrangement with the Office of the General Counsel of the United States Department of Agriculture. The State Engineer of Nevada cooperated with the Department by publishing the separate for his State.

FOREWORD

The office of the State Engineer is pleased to be able to publish the "Nevada Law of Water Rights" prepared by Wells A. Hutchins, LL.B, Production Economics Research Branch, Agricultural Research Service, United States Department of Agriculture, in cooperation with the Office of the General Counsel, United States Department of Agriculture. This statement will be welcomed by attorneys, engineers, and state and government officials who are concerned with the law of water rights as applied in Nevada. No comparable works are available for ready reference. Therefore, Mr. Hutchins' statement, as set forth herein, will be of great value.

In 1942 the United States Department of Agriculture published Miscellaneous Publication No. 418, "Selected Problems in the Law of Water Rights in the West" by Mr. Hutchins. This publication was well received throughout the West as there had been no study of a similar nature for many years. Mr. Hutchins is presently revising the publication in greater detail and the statement on the "Nevada Law of Water Rights" is a part of his revision. As it is likely to be some time before the completed revision can be published by the United States Department of Agriculture, the Department has offered to make the separate statements for each of the 17 western states available to the respective states for printing if they wish to do so. Realizing the importance of making this study as it applies to Nevada immediately available, we welcome the opportunity to be the first State to take advantage of this offer.

Mr. Hutchins and the Office of the General Counsel, United States Department of Agriculture, are to be highly commended for the manner and detail in which this matter is presented.



State Engineer of Nevada.

Carson City, Nevada
January, 1955

TABLE OF CONTENTS

| | PAGE |
|--|------|
| STATE WATER POLICY..... | 1 |
| WATERCOURSES..... | 2 |
| CHARACTERISTICS OF WATERCOURSE..... | 2 |
| ESTABLISHMENT OF THE APPROPRIATION DOCTRINE..... | 3 |
| Legislation..... | 4 |
| Court Decisions..... | 4 |
| THE RIPARIAN DOCTRINE..... | 5 |
| Early Recognition..... | 5 |
| Repudiation..... | 6 |
| APPROPRIATION OF WATER..... | 8 |
| Waters Subject to Appropriation..... | 8 |
| Who May appropriate Water..... | 8 |
| Indian..... | 8 |
| Commercial Companies..... | 8 |
| United States..... | 9 |
| Relation of Land to Appropriation of Water..... | 9 |
| Public Domain..... | 9 |
| Purpose of Act of 1866..... | 9 |
| Appropriations of water on the public domain..... | 10 |
| Trespass on Private Land..... | 11 |
| Rights of Way..... | 11 |
| Public Domain..... | 11 |
| Acquirement over Private Lands by Condemnation..... | 12 |
| Rights of Holders of Dominant and Servient Estates..... | 12 |
| Methods of Appropriating Water..... | 12 |
| Nonstatutory Appropriation..... | 12 |
| Statutory Appropriation..... | 12 |
| Procedure..... | 12 |
| Exclusiveness of statutory procedure..... | 13 |
| Constitutionality of statute..... | 13 |
| Restrictions upon the Right to appropriate Water..... | 13 |
| Completion of Appropriation..... | 14 |
| Acts and Time of Completion..... | 14 |
| The Question of an Actual Diversion from the Stream..... | 14 |
| Irrigation of land..... | 15 |
| Watering of livestock..... | 15 |
| Doctrine of Relation..... | 15 |
| Nonstatutory appropriation..... | 16 |
| Extant statutory appropriation..... | 16 |
| Diligence..... | 16 |
| Gradual or Progressive Development..... | 17 |
| THE APPROPRIATIVE RIGHT..... | 17 |
| Property Characteristics..... | 17 |
| Right of Beneficial Use..... | 17 |
| Property rights in water..... | 17 |
| The appropriative right as property..... | 18 |
| Real property..... | 18 |
| Appurtenance of Land..... | 19 |
| Water right appurtenant to place of use..... | 19 |
| Exception in case of trespass..... | 19 |
| Shares in mutual irrigation company..... | 19 |
| Public-service companies..... | 19 |
| Conveyance of Title..... | 20 |
| Application or permit to appropriate water..... | 20 |
| Mortgage and conveyance of land..... | 20 |
| Instruments of conveyance..... | 21 |
| Attempted lease of abandoned waste water..... | 21 |
| Privity between claimant and original appropriator..... | 21 |
| Elements of the Appropriative Right..... | 22 |
| Priority of Right..... | 22 |

| APPROPRIATIVE RIGHT, ELEMENTS OF— <i>Continued.</i> | PAGE |
|--|-----------|
| Measure of the Right..... | 22 |
| Capacity of ditch discarded..... | 22 |
| Needs of appropriator..... | 23 |
| Beneficial use..... | 23 |
| Economical and reasonable use..... | 24 |
| Conveyance losses..... | 25 |
| Excess waters in source of supply..... | 25 |
| Statutory duty of water..... | 26 |
| Point of measurement of water..... | 26 |
| Standard of measurement of water..... | 26 |
| Period of Use of Water..... | 26 |
| Point of Diversion..... | 27 |
| Purpose of Use of Water..... | 27 |
| Irrigation..... | 27 |
| Irrigation of uncultivated lands..... | 27 |
| Stock watering..... | 28 |
| Domestic use..... | 28 |
| Mining and milling..... | 28 |
| Storage of Water..... | 29 |
| Sale or Rental of Water..... | 29 |
| Relative Rights of Senior and Junior Appropriators..... | 30 |
| Rights of Senior Appropriators..... | 30 |
| Rights of Junior Appropriators..... | 30 |
| Surplus over needs of senior appropriators..... | 31 |
| Continuance of conditions at time of junior appropriation..... | 31 |
| Enlargements by senior appropriators..... | 31 |
| Effect of Losses in Stream Channel..... | 32 |
| Protection of the Appropriative Right..... | 32 |
| Protection on Tributary Sources of Supply..... | 33 |
| Remedies for Infringement..... | 33 |
| EXERCISE OF THE APPROPRIATIVE RIGHT..... | 34 |
| Diversion and Distribution Works..... | 34 |
| Right to Means of Delivery of Water..... | 34 |
| Means of Diversion..... | 34 |
| Use of Natural Channel to Convey Water..... | 34 |
| Efficiency of Practices..... | 35 |
| Rotation in Use of Water..... | 35 |
| Exchange of Water..... | 36 |
| Changes in Exercise of Rights..... | 36 |
| Place of Use..... | 37 |
| Purpose of Use..... | 38 |
| Means of Diversion..... | 38 |
| LOSS OF WATER RIGHTS..... | 38 |
| Abandonment..... | 38 |
| Statutory Forfeiture..... | 39 |
| Distinction between Abandonment and Forfeiture..... | 39 |
| Adverse Possession and Use..... | 40 |
| Analogy to Adverse Holding of Land..... | 40 |
| Possibility of Acquiring Water Right by Adverse Use..... | 40 |
| Distinguished from Appropriative Right..... | 41 |
| Elements of Prescriptive Right..... | 41 |
| Invasion of right..... | 41 |
| Exclusive use..... | 41 |
| Uninterrupted use..... | 42 |
| Claim of right..... | 42 |
| Statute of limitations..... | 42 |
| Burden of Proof..... | 42 |
| Extent of Easement..... | 43 |
| Equitable Relief to Prevent Vesting of Prescriptive Right..... | 43 |
| Estoppel..... | 43 |

| | PAGE |
|---|------|
| ADJUDICATION OF WATER RIGHTS | 43 |
| Nature of Actions..... | 43 |
| Purpose of Suit to Quiet Title..... | 43 |
| Relation to Contempt Proceeding..... | 43 |
| Reference to State Engineer in Case of Private Suits..... | 44 |
| Special Statutory Procedure..... | 44 |
| Statutory Provisions..... | 44 |
| Character of Proceeding..... | 45 |
| Purpose and Scope of Proceeding..... | 45 |
| Constitutionality of Procedure..... | 46 |
| Force and Effect of State Engineer's Determination..... | 47 |
| Pleadings..... | 47 |
| Appeals..... | 48 |
| ADMINISTRATION OF WATER RIGHTS AND DISTRIBUTION OF WATER | 48 |
| Duties of State Administrative Officials..... | 48 |
| Constitutionality of Statute..... | 49 |
| Scope of Administrative Procedure..... | 50 |
| INTERSTATE MATTERS | 51 |
| Appropriation in One State for Use in Another State..... | 51 |
| Rights to the Use of Water of Interstate Streams..... | 51 |
| Relative Rights of Claimants in Different States..... | 51 |
| Carson River..... | 51 |
| Walker River..... | 52 |
| Jurisdiction of Court..... | 52 |
| Carson River..... | 52 |
| Walker River..... | 52 |
| Salmon River and Goose Creek..... | 53 |
| DIFFUSED SURFACE WATERS | 54 |
| CHARACTERISTICS | 54 |
| RIGHTS OF DRAINAGE | 54 |
| SALVAGED AND DEVELOPED WATERS | 55 |
| SALVAGED WATERS | 55 |
| DEVELOPED WATERS | 55 |
| WASTE AND RETURN WATERS | 55 |
| WASTE WATERS | 55 |
| Characteristics..... | 55 |
| Rights of Use..... | 55 |
| Users of Original Flow..... | 55 |
| Users of Waste Water..... | 56 |
| Appropriability of Waste Water..... | 56 |
| Abandonment of Waste Water..... | 57 |
| Disposal of Waste Water..... | 57 |
| RETURN WATERS | 58 |
| SPRING WATERS | 58 |
| PROPERTY RIGHTS IN SPRINGS AND THEIR IMPORTANCE | 58 |
| APPROPRIATION OF SPRING WATERS | 58 |
| Source of Spring..... | 58 |
| Spring as Source of Watercourse..... | 58 |
| Means of Effectuating Appropriation..... | 59 |
| Protection of Appropriative Right..... | 59 |
| Loss of Appropriative Right..... | 59 |
| GROUND WATERS | 59 |
| COURT DECISIONS ON RIGHTS OF USE | 60 |
| Definite Underground Stream..... | 60 |
| Percolating Waters..... | 60 |
| APPROPRIATION OF GROUND WATERS | 61 |
| Ground-Water Statute..... | 61 |
| Probable Effect of Court Decisions..... | 61 |

THE NEVADA LAW OF WATER RIGHTS

By WELLS A. HUTCHINS, LL.B.
Production Economics Research Branch
Agricultural Research Service
U. S. Department of Agriculture

STATE WATER POLICY

All of the area within the present State of Nevada except that south of the 37th parallel was included in the Territory of Utah, which was established September 9, 1850.¹ The separate Territory of Nevada was created March 2, 1861.²

Nevada was admitted to the Union as a State by proclamation of the President October 31, 1864.³

The necessity of practicing irrigation in the production of crops, in view of the semiarid conditions prevailing in Nevada,⁴ and the vital importance of water for other purposes as well,⁵ have been recognized repeatedly by the courts. As a Federal court said:⁶

The court knows judicially that water in many sections of this great Western country is its very lifeblood. The evidence shows that it is so with respect to the properties here in question. * * *

In an arid region, water is too precious to be wasted,⁷ and "it is, and always has been, against public policy in this state to permit any waste of water."⁸ On the other hand, reasonable and economical use of water is the announced policy of the State.⁹ The wants and necessities of the State could not be served by the principles of the riparian doctrine, but required the doctrine of prior appropriation for beneficial use.¹⁰

The public welfare, say the courts, is very greatly concerned with "the largest economical use of the waters of the state for agricultural, mining, power, and other purposes," and in their conservation for the

¹ 9 Stat. L. 453.

² 12 Stat. L. 209.

³ 13 Stat. L. 749. The enabling act was passed March 21, 1864: 13 Stat. L. 30.

⁴ *Twaddle v. Winters*, 29 Nev. 88, 106, 85 Pac. 280 (1906), 89 Pac. 289 (1907); *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 161-162, 140 Pac. 720, 144 Pac. 744 (1914); *In re Humboldt River*, 49 Nev. 357, 361-362, 246 Pac. 692 (1926).

⁵ *Reno Power, Light and Water Co. v. Public Service Commission*, 300 Fed. 645, 652 (D. Nev., 1921); *Adams-McGill Co. v. Hendrix*, 22 Fed. Supp. 780, 791 (D. Nev., 1938).

⁶ *Pacific Live Stock Co. v. Read*, 5 Fed. (2d) 466, 468 (C.C.A. 9th, 1925).

⁷ *Roeder v. Stein*, 23 Nev. 92, 97, 42 Pac. 867 (1895); *Tonkin v. Winzell*, 27 Nev. 88, 100, 73 Pac. 593 (1903); *Pacific Live Stock Co. v. Read*, 5 Fed. (2d) 466, 468 (C.C.A. 9th, 1925).

⁸ *Reno Power, Light and Water Co. v. Public Service Commission*, 300 Fed. 645, 652 (D. Nev., 1921).

⁹ *Kent v. Smith*, 62 Nev. 30, 39, 140 Pac. (2d) 357 (1943).

¹⁰ *Jones v. Adams*, 19 Nev. 78, 84-88, 6 Pac. 442 (1885); *Bliss v. Grayson*, 24 Nev. 422, 456, 56 Pac. 231 (1899); *Twaddle v. Winters*, 29 Nev. 88, 106-107, 85 Pac. 280 (1906), 89 Pac. 289 (1907). In the case last cited the court said, at 29 Nev. 106, that irrigation agriculture in the State would be strangled by the enforcement of the riparian principle.

purpose of bringing the largest possible area of land under cultivation; the policy of the State being to promote such development to the highest degree.¹¹ The State is interested likewise in having rights to the use of the waters of the public streams determined without great delay and expense,¹² and in the regulation and protection of such determined rights.¹³ The water of the State has been said to be the property of the State¹⁴ or of the public.¹⁵ Aside from the protection of any proprietary interest that the State might have in the waters of the public streams, the State and Federal courts are agreed that the regulation of such waters is clearly within the lawful exercise of the police power of the State.¹⁶ This regulation includes the appropriation, ascertainment, and protection of appropriative rights, and the distribution of water to those entitled to receive it. To accomplish its purposes, the State has a right to exercise a superintending control over entire stream systems. A Federal court stated that:¹⁷

The idea that the individual has a vested right to enjoy the use of running water without public regulation or control is subversive of the sovereignty of the state. The state cannot divest itself of, or surrender, grant, or bargain away, this authority. * * *

The Supreme Court of Nevada, in 1903, stated that: "The conservation of the waters in this state is the order of the day, and will increase the population and wealth, and is for the public good."¹⁸ However, the court cautioned that while this objective should be encouraged by all legitimate means, it must not be pushed to the extent of depriving one of water already acquired by prior appropriation to a beneficial use; that prior appropriators down the stream could not be deprived of their equities and vested rights simply because the water could be put to a better over-all use if allowed to be taken by junior appropriators upstream.

WATERCOURSES

Characteristics of Watercourse

The Nevada Supreme Court held in one of the early water-right cases that in order to maintain the right of use of a watercourse, it must be made to appear that the water usually flows in a certain direction and by a regular channel, with banks or sides.¹⁹ The fact that the source of supply at certain seasons of the year is from snows

¹¹ *Ormsby County v. Kearney*, 37 Nev. 314, 336-337, 337-338, 142 Pac. 803. (1914); *In re Humboldt River*, 49 Nev. 357, 361-362, 246 Pac. 692 (1926).

¹² *Carpenter v. Sixth Judicial District Court*, 59 Nev. 42, 54, 84 Pac. (2d) 489 (1938).

¹³ *Humboldt Land and Cattle Co. v. Allen*, 14 Fed. (2d) 650, 653 (D. Nev., 1926).

¹⁴ *In re Munse Spring and Its Tributaries*, 60 Nev. 280, 287, 108 Pac. (2d) 311 (1940).

¹⁵ Nev. Comp. Laws 1929, sec. 7890. See *Bergman v. Kearney*, 241 Fed. 884, 893 (D. Nev., 1917).

¹⁶ *Ormsby County v. Kearney*, 37 Nev. 314, 336-337, 337-338, 142 Pac. 803 (1914); *Humboldt Land and Cattle Co. v. Allen*, 14 Fed. (2d) 650, 653 (D. Nev., 1926); *Humboldt Lovelock Irr. Light & Power Co. v. Smith*, 25 Fed. Supp. 571, 573 (D. Nev., 1938).

¹⁷ *Bergman v. Kearney*, 241 Fed. 884, 893 (D. Nev., 1917).

¹⁸ *Toukin v. Winsell*, 27 Nev. 88, 99, 100, 73 Pac. 593 (1903).

¹⁹ *Barnes v. Sabron*, 10 Nev. 217, 236-239 (1875).

on the mountains above the valley, and from springs having their rise and flow along the banks and bed of the stream, gives to the stream the character of a natural watercourse. It is not necessary that the stream flow continually; it may be dry at times, but it must have a well-defined and substantial existence.

Continuity of a watercourse in legal contemplation is not broken by the fact that at certain places and at certain seasons the waters disappear in the bed of the channel and reappear downstream.²⁰ The fact that streams spread over ponds, swamps, and level places, again running into channels from which the waters have been diverted, does not prevent them from being held by right of prior appropriation as securely as if they had followed narrow courses all the way.²¹

A Federal court also has held that a break in the continuity of a channel does not affect the continuity of the stream in legal contemplation, provided the evidence shows that the stream in the upper channel naturally is the source of the water in the lower channel.²² In this case a stream entered an area of meadowlands, across which the waters flowed in a number of broken or partial channels, which generally followed a definite course through low depressions until they united in a natural channel that left the meadow. It was admitted that the source of water in the lower channel was the stream flowing in the upper channel. Hence an appropriator of water on the lower channel was entitled to restrain a diversion from the upper channel that interfered with his own use of the water.

The channel of a watercourse that has been in existence for more than 60 years, throughout which period claimants of rights to the use of the stream acquiesced in the situation, is to be considered the legal channel of the watercourse regardless of the fact that another channel may have been utilized at some time in the distant past.²³

Establishment of the Appropriation Doctrine

Irrigation in Nevada began about 1849, as an incident to the early development of mining. It remained supplementary to the mining industry until about 1860.

As noted above, most of the area of the present State was a part of the Territory of Utah from September 1850 to the establishment of the Territory of Nevada in March 1861.

²⁰ *Barnes v. Sabron*, 10 Nev. 217, 236-239 (1875).

²¹ *Tonkin v. Winzell*, 27 Nev. 88, 99, 73 Pac. 593 (1903).

²² *Anderson Land & Stock Co. v. McConnell*, 188 Fed. 818, 829-831 (D. Nev., 1910). The court referred to the decision of the Nevada Supreme Court in *Strait v. Brown*, 16 Nev. 317 (1881), in which the waters of springs had left their natural channel and flowed underground for a distance of one-half mile into a creek, an appropriation from the creek being protected as against a diversion from the springs on the ground that even in the absence of a definite surface channel the continuity of the stream was established by reason of the fact that the springs were the definite source of supply. The Federal court stated, at 188 Fed. 831: "Whether, therefore, we consider Eight Mile creek and Eight Mile slough a continuous stream in visible fact, or decide its continuity on the ground adopted in *Strait v. Brown*, it appears sufficiently clear that an appropriator from Eight Mile slough may restrain a diversion from Eight Mile creek."

²³ *In re Bassett Creek and Its Tributaries*, 62 Nev. 461, 465-467, 155 Pac. (2d) 324 (1945).

LEGISLATION

The first legislative assembly of the Territory of Utah passed an act giving the county courts control of all water privileges not previously granted by the legislature, and authorized them to exercise such powers as in their judgment should subserve the interests of the settlements in the distribution of water.²⁴ This act remained in force throughout the existence of Nevada as a part of the Territory of Utah.

For several years after the organization of the Territory of Nevada, there were no statutory laws concerning water rights, although there were references in several laws to irrigation.²⁵ It was not until after the formation of the State government that there was any general legislation on the subject of irrigation water rights.

The State legislation provided that any person desiring to construct or maintain any ditch or flume should make a certificate, describing the ditch, before some officer competent to take acknowledgment of deeds, and have it recorded in the county.²⁶ The act was made to apply to persons who had previously constructed and then were maintaining works, the rights and privileges of the act to inure to such persons upon the filing of their certificates; it being provided that the act should not be construed to interfere with any prior or existing claim or right. An act passed in 1889 and repealed four years later provided for the distribution of water under court decrees by water commissioners, for the filing of statements of existing claims with the county recorders, for the issuance of water-right certificates by the courts, and for determinations by the courts of priorities of rights to the use of water.²⁷ In 1899 provision was made for appropriating water solely upon application to the county commissioners and county surveyors in counties electing to follow the procedure.²⁸ The office of State Engineer was created in 1903,²⁹ but the State Engineer was not vested with jurisdiction over the acquirement of water rights until 1905.³⁰ The latest reenactment of the present "water code" was in 1913.³¹

COURT DECISIONS

It was the opinion of the Supreme Court of Nevada, as expressed in a decision rendered in 1875, that there was then no statute of the State that recognized the right of prior appropriation of water for purposes of irrigation, and that the legislation of 1866 was not applicable to the case.³² In 1914 the court said that the greater portion of

²⁴ Laws Terr. Utah, "An act in relation to the judiciary," sec. 39, approved February 4, 1852.

²⁵ Certain parties were given the right to improve West Walker River, but not to interfere with taking of the water by others for irrigation and other purposes (Nev. Laws 1864, ch. XXXI); and pollution of streams to the detriment of drinking and irrigation purposes was forbidden (Laws 1864-1865, ch. C).

²⁶ Nev. Laws 1866, ch. C.

²⁷ Nev. Laws 1889, ch. CXIII, repealed by Laws 1893, ch. CXXVII.

²⁸ Nev. Laws 1899, ch. XCVII.

²⁹ Nev. Laws 1903, ch. IV.

³⁰ Nev. Laws 1905, ch. XLVI.

³¹ Nev. Laws 1913, ch. 140. This law appears in Nev. Comp. Laws 1929, sec. 7890 and following.

³² *Barnes v. Sabron*, 10 Nev. 217, 232 (1875).

the water rights upon the streams of the State had been acquired before any statute had been passed prescribing a method of appropriation, and that such rights had been recognized uniformly by the courts as vested under the common law of the State.³³

The supreme court recognized and applied the doctrine of appropriation in its first reported decision in a controversy over water rights, where the parties relied solely on prior actual appropriation of the water.³⁴ During the two following decades the rule of priority of appropriation was consistently recognized and applied where the parties based their rights upon appropriation and not upon "an ownership in the soil."³⁵ And beginning in 1885, as noted below, the appropriation doctrine has been recognized exclusively with reference to rights to the use of surface streams regardless of claims of riparian rights incident to land ownership. The court said in 1940:³⁶

So we find the doctrine of appropriation the settled law of this state.

* * *

The Riparian Doctrine

The applicability of the riparian doctrine to the use of water under some circumstances was recognized in several decisions rendered by the Nevada Supreme Court prior to 1885. The riparian rule was repudiated in that year and has been completely superseded by the doctrine of prior appropriation.

EARLY RECOGNITION

The supreme court, in its first reported decision on water-right law, followed the "doctrine * * * well settled in California" that as between persons claiming rights to the use of water, merely by the appropriation of the water, the one "has the best right who is the first in time."³⁷ The court discussed the rights of a riparian proprietor, but specifically withheld comment as to what it might have held if the plaintiff had relied upon his rights as a riparian proprietor rather than as an actual appropriator. References to the riparian doctrine were made by the court in two later cases in which there was no occasion to apply that doctrine.³⁸

The Nevada Supreme Court held in *Vansickle v. Haines*, in 1872,³⁹ that the common law was the law of Nevada and must prevail in all

³³ *Ormsby County v. Kearney*, 37 Nev. 314, 352, 142 Pac. 803 (1914).

³⁴ *Loddell v. Simpson*, 2 Nev. 274, 278-279 (1866).

³⁵ *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 543-544 (1869); *Covington v. Becker*, 5 Nev. 281, 282-283 (1869); *Proctor v. Jennings*, 6 Nev. 83, 87 (1870); *Barnes v. Sabron*, 10 Nev. 217, 233 (1875).

³⁶ *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 286, 108 Pac. (2d) 311 (1940).

³⁷ *Loddell v. Simpson*, 2 Nev. 274, 277, 278 (1866).

³⁸ In *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 543 (1869), the court stated that where the right to the use of running water is based upon appropriation and not upon an ownership in the soil, it is the generally recognized rule in Nevada that priority of appropriation gives the superior right. In *Covington v. Becker*, 5 Nev. 281, 282-283 (1869), the parties had agreed that the only title to the lands of plaintiffs and defendants was a possessory one, the fee being in the Federal government; hence there could be no basis for a claim of riparian rights in the case.

³⁹ *Vansickle v. Haines*, 7 Nev. 249, 256, 257, 260-261, 265, 285 (1872).

cases where the right to water was based upon absolute ownership of the soil; that running water was primarily an incident to or part of the soil over which it naturally flowed; that the right of the riparian proprietor was a right incident to his ownership of the land to have the water flow in its natural course and condition, subject only to certain uses by other riparian proprietors; and that a patent from the United States issued prior to the passage of the Act of 1866⁴⁰ conveyed to the patentee not only the land, but the stream naturally flowing through it. The court admitted that doubtless all patents issued, or titles acquired from the United States, since July 1866 were obtained subject to rights existing at that time. In the same year in which *Vansickle v. Haines* was decided, a Federal court applied the riparian doctrine as between two patentees of land whose patents had been issued before the passage of the Act of 1866.⁴¹

The existence of the riparian doctrine was recognized in subsequent decisions of the Nevada Supreme Court.⁴² The appropriation doctrine was applied as between the parties in another case in which it was said that the facts did not call in question the correctness of the decision in *Vansickle v. Haines*, title to the land in the instant case having been obtained prior to the Congressional acts referred to.⁴³ Decrees of riparian rights were issued in various suits, which became *res judicata* of the subject matter of the suits as between the parties and their successors in interest.⁴⁴

REPUDIATION

The Nevada Supreme Court in 1885, in the case of *Jones v. Adams*,⁴⁵ reversed its stand with respect to riparian rights. The court concluded in *Jones v. Adams* that the riparian doctrine as applied in the Pacific Coast States and Territories did not serve the wants and necessities of the people for either mining or agriculture, and that in consequence the doctrine of prior appropriation had been universally applied. It was the court's opinion that the ninth section of the Act of 1866 was not intended to introduce any new system, or to evince any new or different policy on the part of the Federal Government, but that "it recognized, sanctioned, protected and confirmed the system already established by the customs, laws and decisions of courts, and provided

⁴⁰ 14 Stat. L. 253, sec. 9, U. S. Rev. Stats., sec. 2339 (July 26, 1866); amended 16 Stat. L. 218, U. S. Rev. Stats., sec. 2340 (July 9, 1870).

⁴¹ *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, 24 Fed. Cas. 594, 597-598, 601-602 (D. Nev., 1872).

⁴² *Dalton v. Bowker*, 8 Nev. 190, 201 (1873); *Lake v. Tolles*, 8 Nev. 285, 291 (1873).

⁴³ *Barnes v. Sabron*, 10 Nev. 217, 233 (1875).

⁴⁴ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 116 (D. Nev., 1897). The court said, at 81 Fed. 120, that: "This court must follow its former decrees, in so far as they were based on riparian proprietorship."

⁴⁵ *Jones v. Adams*, 19 Nev. 78, 84-88, 6 Pac. 442 (1885). Plaintiff and defendant both owned lands contiguous to Sierra Creek, plaintiff's title having been acquired in 1865. In the decree, plaintiff was awarded the first right by prior appropriation to seven-tenths of the water of the creek, and defendant was awarded three-tenths. On the appeal, plaintiff (appellant) claimed that the doctrine of appropriation had no application to a case in which the parties, or either of them, had procured land title from the United States prior to the Act of July 26, 1866, and that the case should have been determined upon the principles of the common-law doctrine of riparian rights.

for its continuance." (19 Nev. at 86.) Hence, although plaintiff had acquired title to land on both sides of the watercourse in question in 1865, the case was not determined upon the principles of the common-law doctrine of riparian rights. The doctrine of appropriation, it was held, was properly applied regardless of whether title to the land had been acquired from the United States prior to or after the passage of the Act of 1866. In rendering this decision, the court specifically overruled *Vansickle v. Haines*,⁴⁶ insofar as that decision was in conflict with the views expressed in the instant case.

Several years after the rendering of the decision in *Jones v. Adams*, the supreme court had occasion to approve its overruling of *Vansickle v. Haines*.⁴⁷ It was stated that the intention of the legislature, in providing that the common law of England should be the rule of decision in the courts of the State, was to adopt only so much of the common law as was applicable to the conditions of the State. The applicability of the common law to the physical characteristics of the State should be considered. Its inapplicability to the Pacific States applied forcibly in Nevada. It was further stated (at 20 Nev. 282) that:

Our conclusion is that the common-law doctrine of riparian rights is unsuited to the condition of our state, and that this case should have been determined by the application of the principles of prior appropriation.

* * *

The unsuitability of the riparian doctrine to conditions prevailing in Nevada was stressed in a later case in which defendants unsuccessfully claimed rights as riparian proprietors under patents of land issued prior to 1866, the court saying that:⁴⁸

Irrigation is the life of our important and increasing agricultural interests, which would be strangled by the enforcement of the riparian principle.

The repudiation of the riparian principle has been reiterated in a number of other decisions of both State and Federal courts.⁴⁹ Toward the close of the nineteenth century, the supreme court said that the doctrine of riparian rights had been entirely swept away because of the conditions of the State, and a rule suited to the requirements of

⁴⁶ *Vansickle v. Haines*, 7 Nev. 249 (1872).

⁴⁷ *Reno Smelting, Mill. and Reduction Works v. Stevenson*, 20 Nev. 269, 275-276, 280, 282, 21 Pac. 317 (1889). In *Jerrett v. Mahan*, 20 Nev. 89, 98, 17 Pac. 12 (1888), the court had said that the case of *Jones v. Adams* spoke for itself and that in the instant case no question of the rights of riparian proprietors was raised.

⁴⁸ *Twaddle v. Winters*, 29 Nev. 88, 105-107, 85 Pac. 280 (1906), 89 Pac. 289 (1907). The quoted statement is at 29 Nev. 106.

⁴⁹ *Walsh v. Wallace*, 26 Nev. 299, 327, 67 Pac. 914 (1902); *Anderson v. Bassman*, 140 Fed. 14, 21-22 (N.D. Calif., 1905); *Anderson Land & Stock Co. v. McConnell*, 188 Fed. 818, 822 (D. Nev., 1910); *In re Humboldt River*, 49 Nev. 357, 361-362, 246 Pac. 692 (1926); *United States v. Walker River Irr. Dist.*, 11 Fed. Supp. 158, 165 (D. Nev., 1935); *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 286, 108 Pac. (2d) 311 (1940). In *Ronnow v. Delmue*, 23 Nev. 29, 34, 41 Pac. 1074 (1895), it was held that one who was not a prior appropriator on a stream had no more right to interfere with the stream upon his own land than he had upon any other land. The court stated, in *Steptoe Live Stock Co. v. Gulley*, 53 Nev. 163, 171-172, 295 Pac. 772 (1931), that while it had been held in *Vansickle v. Haines* that the doctrine of riparian rights prevailed, that rule never was fully accepted and was finally unequivocally overruled in *Reno Smelting, Mill. and Reduction Works v. Stevenson*, 20 Nev. 269, 21 Pac. 317 (1889).

the State adopted to the complete exclusion of the riparian doctrine.⁵⁰ It was stated further that:

It is now the settled doctrine of this state that a person can acquire the right to use the waters flowing in a stream, for the purpose of irrigation, by appropriation as against riparian proprietors or other persons, the priority of rights of various claimants to the use thereof to be determined by the priority of time in making the various appropriations. * * *

Appropriation of Water WATERS SUBJECT TO APPROPRIATION

The water-rights statute of Nevada provides that:⁵¹

The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public.

Subject to existing rights, all such water may be appropriated for beneficial use as provided in this act and not otherwise.

WHO MAY APPROPRIATE WATER

The water-rights statute authorizes the making of appropriations of water by any corporation authorized to do business in the State, or any person, or any citizen of the United States or any person who has legally declared his intention to become such, over the age of 21 years.⁵² "Person" for the purposes of the act includes a corporation, an association, the United States, and the State of Nevada, as well as a natural person.⁵³

Indian.

In an early case the supreme court recognized the right of an Indian to appropriate water on the public lands of the United States and to maintain an action for the diversion of that water against his interests.⁵⁴

Commercial Companies.

The statute governing the appropriation of water recognizes appropriations by commercial water companies for transmission to lands of persons for compensation in a proviso, inserted in a section concerning the appurtenance of water to the place of use, to the effect that the provisions of the section should not apply to cases of companies which had appropriated water for diversion and transmission to the lands of private persons at an annual charge.⁵⁵

The foregoing section was referred to, but was not construed, by the supreme court in a case concerning the status of commercial companies and consumers, inasmuch as the rights therein involved had been acquired prior to the passage of the statute.⁵⁶ However, the supreme court held that a company owning a distribution system and diverting water solely for the purpose of compensation through sale of the water to others who would actually apply it to the soil, could acquire no right

⁵⁰ *Bliss v. Grayson*, 24 Nev. 422, 456, 56 Pac. 231 (1899).

⁵¹ Nev. Comp. Laws 1929, secs. 7890 and 7891.

⁵² Nev. Comp. Laws 1929, sec. 7944.

⁵³ Nev. Comp. Laws 1929, sec. 7933.

⁵⁴ *Loddell v. Hall*, 3 Nev. 507 (1868).

⁵⁵ Nev. Comp. Laws 1929, sec. 7893.

⁵⁶ *Prosole v. Steamboat Canal Company*, 37 Nev. 154, 158-162, 140 Pac. 720, 144 Pac. 744 (1914).

to the water except the right to dispose of its use, and in making the appropriation was only the agent of the water users who actually would apply the water to beneficial use. The court concluded (at 37 Nev. 162) that:

Hence it follows, as it has been reasoned out by many courts of last resort in able and well-considered opinions, that he who applies the water to the soil, for a beneficial purpose, is in fact the actual appropriator, although the application may be made through the agency of another, who by and through his own means and instrumentalities diverts the water, in the first instance, from its natural course.

A Federal court, however, in a case involving valuation of properties for rate-making purposes, believed that the legislature had authorized the appropriation of water for distribution and sale, and that the theory that the right vests exclusively in the customer is illogical under a statute declaring that his use of the water is not appurtenant to the land on which he uses it.⁵⁷ The court said that by diverting the water of a stream and applying it to a beneficial use a water company acquired a right prior to rights acquired by subsequent diversions. A customer of the company was entitled not only to water service, but to an interest in the company's priority proportionate to the quantity of water beneficially used by him, and to priority over other customers later in line. The rights of the consumers as against the company, however, did not extinguish such rights as the company had acquired for the beneficial purpose of supplying their needs. It was held, consequently, that the reasonable value of the water right, insofar as it was used and useful in supplying the customers of the company, was a part of the total value on which the company was entitled to a fair return.

United States.

The water-rights statute accords the same privileges to the United States as to any other public or private entity in making an appropriation of water, as indicated above. Compliance of the Federal Government with the laws of the State in the acquirement of water rights has been noted in several cases.⁵⁸

The Federal Circuit Court of Appeals of the Ninth Circuit held that in the establishment of the Walker River Indian Reservation there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians, even though there was no agreement or treaty with the Indians in connection therewith, the Indians being at that time at war with the whites.⁵⁹

RELATION OF LAND TO APPROPRIATION OF WATER

Public Domain.

Purpose of Act of 1866.—The early view taken by the courts of Nevada was that the Act of 1866 indicated the grant of a new right, rather than the confirmation of an existing one.⁶⁰ The act was con-

⁵⁷ *Reno Power, Light & Water Co. v. Public Service Commission*, 300 Fed. 645, 648-650 (D. Nev., 1921).

⁵⁸ *Bergman v. Kearney*, 241 Fed. 884, 892 (D. Nev., 1917); *United States v. Humboldt Lovelock Irr. Light & Power Co.*, 97 Fed. (2d) 33, 42-45 (C.C.A. 9th, 1938).

⁵⁹ *United States v. Walker River Irr. Dist.*, 104 Fed. (2d) 334, 335-336, 339-340 (C.C.A. 9th, 1939).

⁶⁰ *Hobart v. Ford*, 6 Nev. 77, 80-81 (1870).

sidered to be prospective in its operation, and hence not to be so construed as to divest a part of an estate granted before its passage.⁶¹

Several decisions were rendered by the United States Supreme Court, after the dates of the cases cited in the immediately preceding paragraph, in which the purpose of the Act of 1866 was considered and construed. The Supreme Court held that persons who had constructed canals and developed water on the public domain had rights which the Government, by its conduct, had recognized and encouraged and was bound to protect, prior to the passage of the Act of 1866, and that section 9 of that act "was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one."⁶² Following that interpretation of the Congressional act by the highest court, the Nevada Supreme Court reversed its stand and adopted the view that the legislation did not introduce any new system but simply confirmed the system already established by local authority and provided for its continuance.⁶³

A Federal court held in 1939 that while the Act of 1866 was no more than a formal confirmation of local law and usage which theretofore had met with silent acquiescence on the part of the National Government, nevertheless it did not follow that the Government could not, independently of the formalities of an actual appropriation, reserve the waters of nonnavigable streams on the public domain if needed for governmental purposes.⁶⁴ In this case it was held that water had been impliedly reserved for the use of Indians on an Indian reservation at the time the reservation was established.

Appropriations of water on the public domain.—The Nevada Supreme Court in one of its earliest water-right cases held that where conflicting claimants to water rights held only possessory title to public lands, the law of prior appropriation would be applied regardless of a claim of riparian rights by one of the parties.⁶⁵ Following the repudiation of the doctrine of riparian rights, as noted above, riparian claims have been rejected regardless of the date of acquisition of patent to land. The courts have consistently recognized appropriations of water on the public domain.⁶⁶

In a case decided in 1877, the United States Supreme Court affirmed a decree dismissing a bill in a suit brought to enjoin the collection of a tax imposed by the State of Nevada upon the property of a mining

⁶¹ *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, 24 Fed. Cas. 594, 597 (D. Nev., 1872); *Vansickle v. Haines*, 7 Nev. 249, 280 (1872). In both cases riparian rights were held to attach to lands passing to private ownership prior to the passage of the act. This principle has been repudiated, as noted above under "The riparian doctrine," p. 6.

⁶² *Broder v. Water Co.*, 101 U. S. 274, 276 (1879). The Court cited and relied upon its own recent decisions in *Atchison v. Peterson*, 87 U. S. 507 (1874); *Bacey v. Gallagher*, 87 U. S. 670 (1875); *Forbes v. Gracey*, 94 U. S. 762 (1877); *Jennison v. Kirk*, 98 U. S. 453 (1879).

⁶³ *Jones v. Adams*, 19 Nev. 78, 86, 6 Pac. 442 (1885). This was reiterated in *Twaddle v. Winters*, 29 Nev. 88, 105-106, 85 Pac. 280 (1906), 89 Pac. 289 (1907).

⁶⁴ *United States v. Walker River Irr. Dist.*, 104 Fed. (2d) 334, 336-337, 339-340 (C.C.A. 9th, 1939).

⁶⁵ *Covington v. Becker*, 5 Nev. 281, 282-283 (1860).

⁶⁶ See *Silver Peak Mines v. Valcalda*, 79 Fed. 880, 888, 890 (D. Nev., 1897); *Doherty v. Pratt*, 34 Nev., 343, 349, 124 Pac. 574 (1912); *Pacific Live Stock Co. v. Read*, 5 Fed. (2d) 466, 468 (C.C.A. 9th, 1925); *Adams-McGill Co. v. Hendrix*, 22 Fed. Supp. 789, 791 (D. Nev., 1938).

company, where title to the land from which the mineral was taken was in the United States.⁶⁷ The Court stated that the United States had recognized the possessory rights of miners as ascertained among themselves by the rules that had become the laws of mining districts regarding mining claims; that in doing this the Government had not parted with title to the land; that claims might be conveyed from one claimant to another without infringing the title of the United States; and that therefore there was no reason why such claims should not be made subject to a lien for taxes.

Waters developed on public land with consent of the United States were differentiated by the Nevada Supreme Court from waters running in streams on the public domain.⁶⁸ Such waters, having been produced by the capital, labor, and enterprise of those developing them, became, it was held, the property of such persons.

Trespass on Private Land.

The supreme court recognized, in a fairly early case, the acquisition of a water right in connection with land on which the irrigator was a trespasser.⁶⁹

On the other hand, an intending appropriator has no right to go upon the land of another, without the latter's permission (or without condemning a right of way), for the purpose of appropriating water. Acts of trespass that threaten to become the foundation of a prescriptive right may be enjoined.⁷⁰

RIGHTS OF WAY

Public Domain.

The Act of Congress of 1866⁷¹ authorized any person wishing to construct a canal or ditch for mining or agricultural purposes to construct it over any public land of the United States.⁷² By virtue of that act:⁷³

* * * the prior appropriator is entitled to a right of way for conveying his water along its natural channel, and through ditches constructed prior to the time that other rights attached to the land traversed by these water courses. All locators, patentees, owners, and claimants whose rights are initiated after the appropriation of the water hold subject to this easement. * * *

⁶⁷ *Forbes v. Gracey*, 94 U. S. 762, 766-767 (1877).

⁶⁸ *Cardelli v. Comstock Tunnel Co.*, 26 Nev. 284, 293-295, 66 Pac. 950 (1901).

⁶⁹ *Smith v. Logan*, 18 Nev. 149, 154, 1 Pac. 678 (1883). Smith and Logan each endeavored to purchase a certain tract from a railroad company, and although Smith occupied and irrigated the land, Logan was successful in acquiring a contract of sale with the company. Logan claimed that the waters of the stream had become appurtenant to the land and went with it when Smith lost and Logan acquired the land. The supreme court refused to admit this claim, stating that as to the true owner of the land Smith was a trespasser, and that Logan had not connected himself with Smith's right to the use of the water. The court stated that Smith could have changed its use to other lands.

⁷⁰ In *Bidleman v. Short*, 38 Nev. 467, 471, 150 Pac. 834 (1915), a landowner was held entitled to equitable relief by injunction against one who, without his permission, went upon his land in an attempt to appropriate waste water thereon, under an alleged right and threat of continuance. Such water was held to be the property of the landowner, and not subject to appropriation by the trespasser.

⁷¹ 14 Stat. L. 253, sec. 9.

⁷² *Hobart v. Ford*, 6 Nev. 77, 80-81 (1870).

⁷³ *Ennor v. Raine*, 27 Nev. 178, 213, 74 Pac. 1 (1903).

Hence, after title to a right of way for a canal across public land has been thus acquired from the Government, the Government can convey no title to the right of way when it conveys title to the land so encumbered.⁷⁴

Acquirement over Private Lands by Condemnation.

The water-rights statute contains two provisions reading:⁷⁵

The beneficial use of water is hereby declared a public use, and any person may exercise the right of eminent domain to condemn all lands and other property or rights required for the construction, use and maintenance of any works for the lawful diversion, conveyance and storage of waters.

The word "person," where used in this act, includes a corporation, an association, the United States, the state, as well as a natural person.

Rights of Holders of Dominant and Servient Estates.

It is the right of both parties to insist that the easement for a ditch shall remain substantially as it was at the time of its execution.⁷⁶ The authorities that define what constitutes the bank of a river have no application to the banks of a ditch.⁷⁷ Determination of the amount of land necessary for the banks of a ditch, and along the banks, to secure the owner in the reasonable and proper enjoyment of his easement, is a question for the trial court to decide, on the evidence.

METHODS OF APPROPRIATING WATER

Nonstatutory Appropriation.

Irrigation development had been proceeding for decades in Nevada before the legislature provided any method by which an appropriative right could be acquired. The greater portion of the water rights in the State had been acquired prior to that time, according to the supreme court, and such rights were uniformly recognized by the courts as vested rights.⁷⁸

Such nonstatutory appropriations were made by actually diverting the water from the source of supply, with intent to apply the water to a beneficial use, followed by an application to such beneficial use within a reasonable time.⁷⁹

Statutory Appropriation.

Procedure.—The water-rights law of Nevada provides complete procedure for the appropriation of water. Before performing any work

⁷⁴ *Sheehan v. Kasper*, 41 Nev. 27, 33, 165 Pac. 632 (1917). The patentee takes title subject to the existing easement, and his grantee can acquire no better or greater right.

⁷⁵ Nev. Comp. Laws 1929, secs. 7895 and 7933, respectively.

⁷⁶ *Thomas v. Blaisdell*, 25 Nev. 223, 228, 58 Pac. 903 (1899); *Ennor v. Raine*, 27 Nev. 178, 213, 74 Pac. 1 (1903); *Malstrom v. People's Drain Ditch Co.*, 32 Nev. 246, 253, 255, 107 Pac. 98 (1910).

⁷⁷ *Schultz v. Mexican Dam and Ditch Co.*, 47 Nev. 453, 463, 224 Pac. 804 (1924).

⁷⁸ *Ormsby County v. Kearney*, 37 Nev. 314, 352, 142 Pac. 803 (1914). See *In re Humboldt River*, 49 Nev. 357, 361-362, 246 Pac. 692 (1926). See also *Doherty v. Pratt*, 34 Nev. 343, 349, 124 Pac. 574 (1912); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 20 (C.C.A. 9th, 1917).

⁷⁹ *Walsh v. Wallace*, 26 Nev. 299, 327, 67 Pac. 914 (1902); *Miller & Lux v. Rickcy*, 127 Fed. 573, 584 (D. Nev., 1904); *Rodgers v. Pitt*, 129 Fed. 932, 939-940 (D. Nev., 1904); *Application of Filippini*, 66 Nev. 17, 22, 202 Pac. (2d) 535, 537 (1949).

in connection with the proposed appropriation, the intending appropriator must make an application to the State Engineer for a permit to make the appropriation. The holder of an approved application, or permit, is required to make certain reports, and upon completing proof of beneficial use is entitled to the issuance of a certificate from the State Engineer evidencing his appropriation.⁸⁰

Exclusiveness of statutory procedure.—The statute provides that "water may be appropriated for beneficial use as provided in this act and not otherwise."⁸¹ This long-established provision was supplemented by an amendment to another section in 1949, which declared that no prescriptive right could be obtained to the use of any waters, either appropriated or unappropriated, and that:⁸²

* * * any such right to appropriate any of said water shall be initiated by first making application to the state engineer for a permit to appropriate the same as in this act provided and not otherwise.

In upholding a finding by the State Engineer that a certain party had not acquired an appropriative right in certain waters, the supreme court said that:⁸³

There may be surplus water in Bassett Creek. If so, the law provides the method by which it may be appropriated. That method has not been followed. * * *

The relation of prescription to the acquirement of an appropriative water right is discussed below under "Loss of water rights—Adverse possession and use—Possibility of acquiring water right by adverse use."

Constitutionality of statute.—The Nevada statute providing for the appropriation of water does not deprive one who feels aggrieved by any order or decision of the State Engineer, of any constitutional rights.⁸⁴

A Federal court, in a proceeding involving the valuation of a water right for rate-making purposes, observed that the power of the State to authorize an appropriation of water for distribution and sale "cannot be disputed."⁸⁵

RESTRICTIONS UPON THE RIGHT TO APPROPRIATE WATER

The State Engineer is required by the water appropriation statute to reject an application to appropriate water if there is no unappropriated water in the proposed source of supply, or if the proposed use conflicts with vested rights or threatens to prove detrimental to the

* Nev. Comp. Laws 1929, sec. 7944 and following. Sec. 7945 provides that a defective application that is returned to the applicant for correction or completion shall not lose its priority if refiled in proper form in the office of the State Engineer within 60 days from the date of its return to the applicant. The supreme court has held that the 60-day period begins to run from the date of return endorsed on the defective application, and not from the date of receipt of the returned application by the applicant: *In re McGregor*, 56 Nev. 407, 418-420, 48 Pac. (2d) 418 (1935), 55 Pac. (2d) 10 (1938).

* Nev. Comp. Laws 1929, sec. 7891.

* Nev. Comp. Laws 1929, sec. 7897, amended by Stats. 1949, ch. 83.

* *In re Bassett Creek and Its Tributaries*, 62 Nev. 461, 469, 155 Pac. (2d) 24 (1945).

* *Humboldt Lovelock Irr. Light & Power Co. v. Smith*, 25 Fed. Supp. 571, 171 (D. Nev., 1938).

* *Reyno Power, Light & Water Co. v. Public Service Commission*, 300 Fed. 645, 648 (D. Nev., 1921).

public interest; and he may issue a permit for a less quantity of water than that named in the application.⁸⁶

COMPLETION OF APPROPRIATION

Acts and Time of Completion.

The Nevada Supreme Court, in one of its earliest water decisions, stated that the appropriation of water is not deemed complete until the actual diversion or use of the water has been made.⁸⁷ Much later, the court said that:⁸⁸

In order, therefore, to constitute a valid appropriation of water, within the meaning of that term as understood by the decisions of this court and the laws of the state, and, as we believe, by the decisions of the courts and laws of other states in the arid region, there must be an actual diversion of the same, with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time. * * *

The court has also emphasized that no right is created by the mere diversion of water from a public watercourse.⁸⁹ When the act of diversion is coupled with the act of application of the water to beneficial purposes, said the court, then the appropriation is accomplished. This case involved the diversion of water by a company for profit through the sale and distribution of the water to irrigation farmers who would actually apply it to the soil. With reference to the completion of such an appropriation, the court stated further (at 37 Nev. 161) that:

It required more than the mere diversion of the water to complete the appropriation under the doctrine as heretofore referred to. Hence the diversion of the water from the canal of the appellant company and its application to a beneficial use by the owners or possessors of irrigable lands constituted the culminating act in perfecting the appropriation. This latter step, namely, the application of the water itself to the lands for the purpose of reclamation and irrigation, fulfilled the primal and essential object to all legislation and judicial expression upon this subject, *i.e.*, the cultivation of the soil.

The Question of an Actual Diversion from the Stream.

It has been stated in various decisions that one of the elements of an appropriation of water is an actual diversion from the stream or other source of supply. A Federal court said that:⁹⁰

It is claimed by counsel that, "to establish an appropriation of water,

⁸⁶ Nev. Comp. Laws 1929, secs. 7948 and 7950.

⁸⁷ *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 543-544 (1869).

⁸⁸ *Walsh v. Wallace*, 26 Nev. 299, 327, 67 Pac. 914 (1902).

⁸⁹ *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 160, 161, 140 Pac. 720, 144 Pac. 744 (1914).

⁹⁰ *Rodgers v. Pitt*, 129 Fed. 932, 939-940 (D. Nev., 1904). In another case it was said that the law is well settled that a right to the waters of a stream may be acquired by appropriation and actual diversion and application to a beneficial use, although it is immaterial whether the water is taken from the stream by means of a canal, ditch, flume, or pipe, or by any other method: *Miller & Lux v. Rickey*, 127 Fed. 573, 584 (D. Nev., 1904). By means of a dam on public land, an appropriator has a right to divert water to any extent that he may apply to a beneficial use: *Doherty v. Pratt*, 34 Nev. 343, 349, 124 Pac. 574 (1912). The taking of waste water from irrigated land is not an appropriation of the surplus water of the stream from which the original land is irrigated: *In re Bassett Creek and Its Tributaries*, 62 Nev. 461, 465-466, 469, 155 Pac. (2d) 324 (1945). The term "vested right" applies to a water right that has become established either (a) by actual diversion and application to beneficial use, or (b) by permit procured pursuant to the statutory water law relative to appropriation: *Application of Filippini*, 68 Nev. 17, 22, 202 Pac. (2d) 535, 537 (1949).

the proof must show intent to apply it to a beneficial purpose existing at the time, an actual diversion from the stream, and the application of it to a useful purpose." This is correct. * * *

Irrigation of land.—The Nevada Supreme Court held in *Walsh v. Wallace*⁹¹ that to constitute a valid appropriation of water there must be an actual diversion of the same and that the cutting of wild grass produced by the overflow of a stream, or "by the water of Reese river coming down and spreading over the land," was not an appropriation of the water within the meaning of that term. A Federal court stated several years later that the watering of meadowland by the use of natural overflow would found no right of appropriation, citing *Walsh v. Wallace*.⁹²

Watering of livestock.—The supreme court has held that the decision in *Walsh v. Wallace* must be limited to the facts of that case, and that it did not apply to an appropriation for watering livestock in natural watering places formed by natural depressions, such appropriation having been made prior to the time of the passage of any statute specifying the manner of appropriating water.⁹³

The court stated, in the *Steptoe* case, that the method of taking water from streams by the use of dams, ditches, or other artificial structures in the irrigation of land was the natural thing to do. But while it was absolutely necessary to divert water from a stream for agricultural uses in an economical manner, it did not necessarily follow that a diversion by artificial means was necessary to constitute an appropriation of water where the water could be put to a beneficial use without such diversion, where there was a practice of doing so, where it could be done just as well or better, at less cost and economically, so far as the use of the water was a factor, and where the practice of so doing had developed into a well-established custom. Under such circumstances, the court saw no reason for holding that such an appropriation was not valid.

An act of the Nevada legislature relates to the appropriation of water for watering livestock, and provides that in such cases a sufficient measure of the quantity of water is to specify the number and kind of animals to be watered.⁹⁴ Such rights relate to particular watering places. Nothing in the statute indicates that the water must be diverted from the source of supply before the stock may drink.

Doctrine of Relation.

The principle of "relation back" was established early in the judicial history of water rights in Nevada.

If the work of constructing facilities, diverting, and using water is prosecuted with reasonable diligence, the date of priority of the right relates back to the time when the first step was taken to obtain the right.⁹⁵ If, however, the work is not prosecuted with reasonable diligence, then the priority of the right does not relate back, but generally dates from the time when the work is completed or the appropriation fully perfected.

⁹¹ *Walsh v. Wallace*, 26 Nev. 209, 327-328, 67 Pac. 914 (1902).

⁹² *Anderson Land & Stock Co. v. McConnell*, 188 Fed. 818, 822 (D. Nev., 1910).

⁹³ *Steptoe Live Stock Co. v. Gullett*, 53 Nev. 163, 171-173, 295 Pac. 772 (1931).

⁹⁴ Nev. Comp. Laws 1929, secs. 7979 to 7985. This act was passed in 1925.

⁹⁵ *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 543-544 (1869).

Nonstatutory appropriation.—Prior to the enactment of any statute prescribing a method of initiating an appropriative right, the first step in appropriating water ordinarily would be the beginning of the dam or ditch or flume, as the case may be, by means of which the appropriation would be effected, and that would be the date of initiating the appropriation for the purposes of the doctrine of relation.⁹⁶

Extant statutory appropriation.—In appropriating water under the extant statutory procedure, the first step taken in making the appropriation, which means the first step in the inception of the appropriative right, is the filing of the application in the office of the State Engineer.⁹⁷

The general appropriation statute does not state in so many words that the date of filing the application shall constitute the date of priority of an appropriation made in strict compliance with the statutory procedure, but it seems to be clearly implied. The State Engineer is required to endorse on each application the date of its receipt and to keep a record of the same; and if the application is returned for correction and is refiled in proper form within a period of time prescribed by the statute, the application does not "lose its priority of filing on account of such defects." Furthermore, the ground-water statute of 1939 states explicitly that the date of filing an application to appropriate ground water is the date of filing the application in proper form pursuant to the general water law, and there is no apparent reason to conclude that the legislature intended to discriminate in this matter.⁹⁸

Diligence.

To invoke the doctrine of relation the law does not require unusual or extraordinary efforts, but only that which is usual, ordinary, and reasonable. The supreme court said that:⁹⁹

The diligence required * * * is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. * * *

What constitutes a reasonable time within which water must be applied to a beneficial use is a question of fact, depending upon the

⁹⁶ *Irrin v. Strait*, 18 Nev. 436, 437, 4 Pac. 1215 (1884); *Union Mill & Min. Co. v. Danberg* 81 Fed. 73, 109 (D. Nev., 1897). See also *Rodgers v. Pitt*, 129 Fed. 932, 941 (D. Nev., 1904).

⁹⁷ Nev. Comp. Laws 1929, secs. 7944 and 7945.

⁹⁸ Nev. Comp. Laws 1929, Supp. 1943-1949, sec. 7993.18, provides in part: "The date of priority of all appropriations of water from an underground source, mentioned in this section, is the date when application is made in proper form and filed in the office of the state engineer pursuant to the general water laws of this state."

⁹⁹ *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 531, 542-543, 546 (1869). Rose, grantor of defendants, constructed a ditch in 1858. In the fall of 1862, Rose entered into a contract for the enlargement of the ditch. The grantors of the plaintiff made no claim to any water until 1879, and completed their ditch to its present capacity in 1860. The court conceded that Rose intended to enlarge his ditch when he constructed it in 1858, but he was unable to show that the intention had been prosecuted with reasonable diligence to completion. In the

circumstances of each particular case.¹⁰⁰ A Federal court, in emphasizing that diligence is largely a relative term, stated that a person appropriating water for the irrigation of a small tract of open land ready for cultivation would be expected to apply the water to the beneficial use intended in a much shorter time than one making a diversion for application upon a large tract, where it is necessary to clear the land first.¹⁰¹

Gradual or Progressive Development.

In applying the rule of reasonable diligence, the Nevada Supreme Court has held that an appropriator is not limited to the quantity of water he has used or the acreage of land he has irrigated during the first year or so of his development, but that he has a right to develop his project gradually, within his reasonable means, provided that he exercises reasonable diligence in doing so.¹⁰² The object of the appropriator at the time the water was diverted must be considered in connection with the actual extent of the appropriation.

The Federal courts have held to the same effect.¹⁰³

The Appropriative Right

PROPERTY CHARACTERISTICS

Right of Beneficial Use.

An appropriative right is a usufructuary right, and the basis of its acquisition is beneficial use.¹⁰⁴ In order to effectuate this right of beneficial use, the right acquired by an appropriation of water includes the right to have the water flow in the stream to the point of diversion.¹⁰⁵

Property rights in water.—Absolute property in the corpus of the water of a natural stream while flowing therein does not exist; the only right that one can acquire to such water, and the only right by

court's opinion at 4 Nev. 544, "the evidence shows an utter failure on the part of Rose to prosecute his original design with that diligence which the law requires."

¹⁰⁰ *Rodgers v. Pitt*, 129 Fed. 932, 941-942 (D. Nev., 1904). Where it is necessary to drain land in order to put it in condition for cultivation, and where enough water is not obtained to irrigate land, there is no lack of diligence on the part of a claimant in completing his work, even though it takes considerable time, if he conforms as closely as possible to the necessities of the situation.

¹⁰¹ *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 21-22 (C.C.A. 9th, 1917). Lack of diligence was indicated by the fact that more than 14 years elapsed between the time notice of an intention to appropriate water was given and the date of an appropriation by other parties, yet the ditch had not been constructed more than a short distance from its beginning and no attempt had been made to reduce the sagebrush land to cultivation.

¹⁰² *Barnes v. Sabron*, 10 Nev. 217, 239-240, 244 (1875).

¹⁰³ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 113 (D. Nev., 1897); *Rodgers v. Pitt*, 129 Fed. 932, 941-942 (D. Nev., 1904).

¹⁰⁴ *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 236, 108 Pac. (2d) 311 (1940); *Application of Filippini*, 66 Nev. 17, 21-22, 202 Pac. (2d) 535, 537 (1949).

¹⁰⁵ *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 18 (C.C.A. 9th, 1907).

reason of which one can divert such waters from their natural course, is for a usufructuary purpose.¹⁰⁶ A Federal court stated that:¹⁰⁷

Water is not capable of permanent private ownership; it is the use of water which the state permits the individual to appropriate. The water itself, so the statute declares, belongs to the public. * * *

The appropriative right as property.—It was stated in a fairly early case to be well settled that a right to the use of water flowing in a natural channel may be acquired by appropriation, "which will be regarded and protected as property."¹⁰⁸ It is a valuable property right.¹⁰⁹

Real property.—According to the Nevada Supreme Court, "It is well settled that a water right is realty."¹¹⁰ An action to quiet title to an appropriative right and to establish the right to divert and use the water is in the nature of an action to quiet title to real estate.¹¹¹ Such a right cannot be adjudicated incidentally to a proceeding in which the adjudication of such right is not the main question involved; and specifically, it cannot be adjudicated in a contempt proceeding.¹¹²

It is generally held, according to a Federal court, that the right of the prior appropriator to have the water flow in the stream to the head of his ditch is an incorporeal hereditament appurtenant to his ditch and coextensive with his right to the ditch itself.¹¹³ The Nevada Supreme Court said later that:¹¹⁴

The right of a direct appropriator to use the waters of a public stream and to apply the same to beneficial use has been termed an "incorporeal hereditament," and it has been said that a consumer under a ditch, constructed and maintained for the sole purpose of distribution and sale, possesses a like property. (Weil on Water Rights, 3d ed. 1240, and authorities there cited.)

The court stated that the appropriative right, relating as it does to the land upon which it is applied, although in a sense incorporeal,

¹⁰⁶ *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 160-161, 140 Pac. 720, 144 Pac. 744 (1914); *State ex rel. Hinckley v. Sixth Judicial District Court*, 53 Nev. 343, 352, 1 Pac. (2d) 105 (1931); *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 286, 108 Pac. (2d) 311 (1940); *Application of Filippini*, 66 Nev. 17, 21-22, 202 Pac. (2d) 535, 537 (1949).

¹⁰⁷ *Bergman v. Kearney*, 241 Fed. 884, 893 (D. Nev., 1917).

¹⁰⁸ *Dalton v. Bowker*, 8 Nev. 190, 201 (1873). See *Application of Filippini*, 66 Nev. 17, 21-22, 202 Pac. (2d) 535, 537 (1949).

¹⁰⁹ *In re Barber Creek and Its Tributaries (Scossa v. Church)*, 46 Nev. 254, 262, 205 Pac. 518, 210 Pac. 563 (1922).

¹¹⁰ *Nenzel v. Rochester Silver Corp.*, 50 Nev. 352, 357, 259 Pac. 632 (1927). See *Application of Filippini*, 66 Nev. 17, 21-22, 202 Pac. (2d) 535, 537 (1949). See also *Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 25, 171 Pac. 166 (1918). It is stated in *Adams-McGill Co. v. Hendrix*, 22 Fed. Supp. 789, 791 (D. Nev., 1938): "We may assume that a right in or to a spring, whether the spring is upon land of the vendor or upon the public domain, is real property."

¹¹¹ *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 14, 15 (C.C.A. 9th, 1907).

¹¹² *In re Barber Creek and Its Tributaries (Scossa v. Church)*, 46 Nev. 254, 260, 262, 205 Pac. 518, 210 Pac. 563 (1922).

¹¹³ *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 14 (C.C.A. 9th, 1907). Nevertheless, said the court, at 152 Fed. 15, the right, while an incorporeal hereditament, is "appurtenant to the realty in connection with which the use is applied. It savors of, and is a part of, the realty itself."

¹¹⁴ *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 164, 140 Pac. 720, 144 Pac. 744 (1914).

nevertheless by reason of its application to the soil becomes an integral part of the freehold.

Appurtenance of Land.

Water right appurtenant to place of use.—The statute provides that all water used in the State for beneficial purposes shall remain appurtenant to the place of use, subject to change to other places under certain conditions.¹¹⁵

The fact that the appropriative right is an appurtenance of the realty in connection with which the use of water is made has been recognized by the courts.¹¹⁶

Exception in case of trespass.—The supreme court held, in a fairly early case, that the use of water on land by a trespasser did not make the water appurtenant to the land, and consequently that the use of the water thereon by the trespasser did not inure to the benefit of one who subsequently acquired valid title to the land.¹¹⁷ This case did not involve the section of the water-rights statute relating to appurtenance, which had not been enacted at that time.

Shares in mutual irrigation company.—It has been stated to be a generally accepted principle in the arid States that shares in a mutual irrigation company, a nonprofit enterprise, are appurtenant to the land of the shareholder irrigated through the system of the company.¹¹⁸

Public-service companies.—The section of the water-rights statute providing that water shall remain appurtenant to the place of use contains a proviso reading:¹¹⁹

* * * and provided, that the provisions of this section shall not apply in cases of ditch or canal companies which have appropriated water for diversion and transmission to the lands of private persons at an annual charge.

This proviso, which was part of a statute enacted in 1913, was referred to by the Nevada Supreme Court in the following year, but

¹¹⁵ Nev. Comp. Laws 1929, sec. 7893. Provisos concerning public-service companies, and concerning severance of rights from the place of use and transfer to another place of use, are referred to below. See "Public-service companies" and "Changes in exercise of rights," respectively.

¹¹⁶ *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 15 (C.C.A. 9th, 1907). To be available and effective, a water right for agricultural purposes must be attached to the land and become in a sense appurtenant thereto by actual application; the water by reason of necessity becomes appurtenant to the land: *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 161, 164, 140 Pac. 720, 144 Pac. 744 (1914). It is well settled in Nevada and in the arid region generally that irrigation water is appurtenant to the lands irrigated and hence the property of the owner of the land so irrigated: *United States v. Humboldt Lovelock Irr. Light & Power Co.*, 19 Fed. Supp. 489, 491 (D. Nev., 1937); *Reconstruction Finance Corp'n. v. Schmitt*, 20 Fed. Supp. 816, 819 (D. Nev., 1937).

¹¹⁷ *Smith v. Logan*, 18 Nev. 149, 154, 1 Pac. 678 (1883). The court said that the subsequent land-title holder had not connected himself with the trespasser's right to the use of the water, and that the latter could have changed its use to other lands. The section of the statute relating to appurtenance is Nev. Comp. Laws 1929, sec. 7893.

¹¹⁸ *Pacific States Savings & Loan Corp'n. v. Schmitt*, 103 Fed (2d) 1002, 1004 (C.C.A. 9th, 1939). The court stated that for certain purposes shares of this character are personal property and that their independent transfer may operate as a severance of the appurtenant water or ditch rights which they evidence.

¹¹⁹ Nev. Comp. Laws 1929, sec. 7893.

was held not applicable to water rights that had been acquired prior to the passage of the statute.¹²⁰ The court held, however, that a water right for agricultural purposes, to be available and effective, must be attached to the land and become in a sense appurtenant thereto by actual application of the water to beneficial use. The water and the land to which it is applied, said the court, become so interrelated and dependent on each other in order to constitute a valid appropriation that the former becomes, by reason of necessity, appurtenant to the latter.

A Federal court took a somewhat different view of the question of appurtenance in a case involving, among other things, the right of a public-service corporation to include in its rate base the value of the right it had obtained to divert water and sell it to consumers.¹²¹ The court construed the proviso relating to nonappurtenance of water in the case of water distributed for compensation, as a legislative recognition of the right to appropriate water for the purpose of distribution and sale. It was considered that the theory that the water right vests exclusively in the customer is illogical under a statute that declares that his use of the water is not appurtenant to the land on which he uses it. The court believed that the public-service company had a right that was prior to the rights acquired by subsequent diverters from the stream system, and was entitled to have the reasonable value of the water right included in the total value of properties on which the company was entitled to receive a fair return.

Conveyance of Title.

Application or permit to appropriate water.—An application to the State Engineer to appropriate water, or a permit issued by him, may be assigned to one authorized under the statute to acquire the same in the first instance; but no such assignment is binding, except between the parties to the transaction, unless filed for record in the office of the State Engineer.¹²²

Mortgage and conveyance of land.—A Federal court said that:¹²³

As heretofore stated, it is settled law that water diverted from a natural water channel for irrigation of arid land becomes appurtenant to the land and is subject to any mortgage of such land and passes with any conveyance thereof. As water for the reclamation of arid lands by means of irrigation may not be supplied thereto without the aid of ditches or canals for that purpose, and, in some cases, also, the use of storage reservoirs, the right to the water carries with it rights in the means of delivery thereto. * * *

Likewise, shares of stock in a mutual irrigation company are appurtenant to the land of the shareholder, and pass upon conveyance of the land and appurtenant water rights, although the stock may not be mentioned or the certificates formally transferred.¹²⁴

¹²⁰ *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 158, 160-161, 164, 140 Pac. 720, 144 Pac. 744 (1914).

¹²¹ *Reno Power, Light & Water Co. v. Public Service Commission*, 300 Fed. 645, 647-648, 650 (D. Nev., 1921).

¹²² Nev. Comp. Laws 1929, secs. 7944 and 7951.

¹²³ *Reconstruction Finance Corp'n. v. Schmitt*, 20 Fed. Supp. 816, 820 (D. Nev., 1937).

¹²⁴ *Pacific States Savings & Loan Corp'n. v. Schmitt*, 103 Fed. (2d) 1002, 1004-1005 (C.C.A. 9th, 1939). The court conceded that for certain purposes shares of this character are personal property, and that their independent transfer

Instruments of conveyance.—During the period of recognition of riparian rights in Nevada, the supreme court had occasion to construe a deed of land which specifically included “the prior right to use for irrigation and other farming purposes the one-half of the waters of Thomas Creek, the natural channel of which is situate in and through the above described land.”¹²⁵ The court said that if the only interest the grantor had with respect to the water of the creek was that of a riparian owner, then it was entirely useless to insert the language relating to water in the deed, because such right to the use of the water would have passed with the land without the additional clause. But the grantor may have had or claimed to have had an additional appropriate right, and so the natural inference to be drawn from the transaction was that some additional right was intended to be conveyed.

A partition deed purporting to divide a stream into fractional parts has some evidentiary value, but should not be given controlling consideration in determining the quantity of water to which a party is entitled.¹²⁶ The right to water in a stream must rest upon proof of actual appropriation and application to a beneficial use, so that a description of a water right in a deed ordinarily would not be conclusive as to the quantum of such right.

The Nevada Supreme Court held, in one of the earliest of its water-right decisions, that a person who purchased a ditch from Indians and obtained from them a transfer of their claim to the use of the water, by parol, had the same right to operate and maintain the ditch as the Indians had.¹²⁷

Attempted lease of abandoned waste water.—Waste water discharged by a user, after application to his use, for the purpose of getting rid of the water without intention of further reclaiming it, has been abandoned.¹²⁸ Hence a purported lease of the waste water for a valuable consideration could convey no rights to the lessee, because, inasmuch as the waters had been abandoned prior to the transaction, nothing could pass by the lease.

Privity between claimant and original appropriator.—A Federal court stated in 1897 that the law was well settled that persons could not avail themselves of the rights of early settlers with whom they had in no manner connected themselves by title.¹²⁹ Therefore, one who has not connected himself in interest with those who first appropriated water and cultivated land that he now occupies and uses, cannot claim any priority to the use of the water that they may have established on that land; his own appropriation must be treated as the inception of his right.¹³⁰

may operate as a severance of the appurtenant water or ditch rights which they evidence. In this case, however, no prior transfer had been made of the stock. On the other hand, the deed of conveyance expressly included all water and distribution rights and all shares in water corporations; therefore the subsequent attempt of the grantor to pledge the shares was ineffectual, for they no longer were his to pledge.

¹²⁵ *Dalton v. Bowker*, 8 Nev. 190, 194, 200-201 (1873).

¹²⁶ *Ranelli v. Sorgi*, 38 Nev. 552, 559, 149 Pac. 71 (1915).

¹²⁷ *Lobdell v. Hall*, 3 Nev. 507, 517 (1868).

¹²⁸ *Schulz v. Sweeney*, 19 Nev. 359, 360-361, 11 Pac. 253 (1886).

¹²⁹ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 103 (D. Nev., 1897).

¹³⁰ *Chiatovich v. Davis*, 17 Nev. 133, 136, 28 Pac. 239 (1882).

Another fairly early case, which did not involve the appurtenance section of the water-rights statute (not then enacted), dealt with the relation of appurtenance to trespass.¹³¹ The holding was to the effect that one who obtains title to land formerly irrigated by a trespasser, but who has not connected himself with the trespasser's right to the use of the water, has no ground for claiming that the water had become appurtenant to the land and passed with it when the trespasser lost possession and the present owner acquired title to the land.

ELEMENTS OF THE APPROPRIATIVE RIGHT

Priority of Right.

Priority in time of appropriating water gives the better right.¹³²

Likewise, the rule that a prior appropriation constitutes a prior right applies as among the consumers of water supplied by a commercial irrigation company or other agency, where the appropriation is made by and through such agency, as well as where the appropriation is made by the water user directly from a public stream.¹³³

Measure of the Right.

The water-rights statute provides that:¹³⁴

Rights to the use of water shall be limited and restricted to so much thereof as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes, irrespective of the carrying capacity of the ditch; * * *

Capacity of ditch discarded.—The capacity of the diversion ditch measured the appropriation in the case of various early water rights, but this measure has since been discarded by the courts and, as above noted, by the legislature.

The supreme court in one of its early decisions stated that counsel on both sides of the controversy conceded "that the quantity of water appropriated in any given case is to be measured by the capacity of the ditch or flume at its smallest point; that is, at the point where the least water can be carried through it."¹³⁵ However, it was not long before the capacity of the ditch came to be taken as only one of the yardsticks by which the appropriation should be measured. That is to say, if the capacity of the ditch was not greater than necessary to supply the quantity of water required by the appropriator, the appropriation would be measured by that capacity; but if the capacity of the ditch exceeded such quantity, the appropriation then would be restricted to the quantity needed for irrigation and other purposes.¹³⁶

¹³¹ *Smith v. Logan*, 18 Nev. 149, 154, 1 Pac. 678 (1883). The appurtenance section is Nev. Comp. Laws 1929, sec. 7893.

¹³² *Proctor v. Jennings*, 6 Nev. 83, 87 (1870); *Barnes v. Sabron*, 10 Nev. 217, 233 (1875); *Jerrett v. Mahan*, 20 Nev. 89, 98, 17 Pac. 12 (1888); *Bliss v. Grayson*, 24 Nev. 422, 456, 56 Pac. 231 (1899); *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 Fed. 30, 34 (C.C.A. 9th, 1917).

¹³³ *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 165-166, 140 Pac. 720, 144 Pac. 744 (1914); *Reno Power, Light & Water Co. v. Public Service Commission*, 300 Fed. 645, 648-649 (D. Nev., 1921).

¹³⁴ Nev. Comp. Laws 1929, sec. 7897.

¹³⁵ *Ophir Silver Min. Co. v. Carpenter*, 6 Nev. 393, 394 (1871).

¹³⁶ *Barnes v. Sabron*, 10 Nev. 217, 244 (1875). See also *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 110 (D. Nev., 1897), in which the court stated that the quantity of water is generally to be measured by the capacity of the ditch

Needs of appropriator.—The appropriative right is restricted to the quantity of water actually needed for irrigation, watering of stock, domestic use, or other beneficial purpose for which the appropriation is made.¹³⁷ It is recognized that the quantity of water needed varies with the seasons, and that a decree that authorizes the diversion of a specific quantity at all times regardless of necessity is erroneous.¹³⁸ The appropriator is entitled to enough water for his reasonable needs;¹³⁹ but any quantity of water diverted in excess of existing needs is not taken in the exercise of a right, but is part of the water to which junior appropriators are entitled.¹⁴⁰

Beneficial use.—The water appropriation statute provides that:¹⁴¹

Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

The Nevada Supreme Court has stated that:¹⁴²

All of the authorities hold that no one can appropriate for irrigation purposes more water than he can put to a beneficial use, * * *

It has been said otherwise that one does not appropriate, in a legal sense, any water except such as he uses beneficially.¹⁴³

The beneficial use must be made at such times as the water is needed.¹⁴⁴ Hence one cannot use beneficially any more water than he needs for irrigation or other purposes.¹⁴⁵ As stated by a Federal court:¹⁴⁶

An excessive diversion of water for any purpose cannot be regarded as a diversion to a beneficial use. Water in this state is too scarce, needful, and precious for irrigation and other purposes, to admit of waste. * * *

at its lowest point, but: "The true test of the extent of an appropriator's rights in and to the waters of a stream, in all cases, is the actual amount that is applied, without waste, to some beneficial use within a reasonable time after he has given notice of his intention to appropriate the water." In a decision rendered in 1902, the supreme court held erroneous a decree that allowed certain parties all the water their ditch would carry during the irrigation season irrespective of its necessity: *Gotelli v. Cardelli*, 26 Nev. 382, 386-387, 69 Pac. 8 (1902). Previously the court had held that the quantity of water to which a prior appropriator was entitled was limited to the quantity actually applied to the purposes of irrigation: *Simpson v. Williams*, 18 Nev. 432, 434-435, 4 Pac. 1213 (1884).

¹³⁷ *Barnes v. Sabron*, 10 Nev. 217, 243-244 (1875); *Roeder v. Stein*, 23 Nev. 92, 96, 42 Pac. 867 (1895); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 22 (C.C.A. 9th, 1917); *Reno Power, Light & Water Co. v. Public Service Commission*, 300 Fed. 645, 652 (D. Nev. 1921).

¹³⁸ *Gotelli v. Cardelli*, 26 Nev. 382, 386-387, 69 Pac. 8 (1902); *Twaddle v. Winters*, 29 Nev. 88, 103, 109-110, 85 Pac. 280 (1906), 89 Pac. 289 (1907).

¹³⁹ *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 Fed. 30, 34 (C.C.A. 9th, 1917).

¹⁴⁰ *Anderson Land & Stock Co. v. McConnell*, 188 Fed. 818, 830 (D. Nev., 1910).

¹⁴¹ Nev. Comp. Laws 1929, sec. 7892.

¹⁴² *Steptoe Live Stock Co. v. Gullett*, 53 Nev. 163, 172, 295 Pac. 772 (1931). See also *Barnes v. Sabron*, 10 Nev. 217, 233 (1875); *Doherty v. Pratt*, 34 Nev. 343, 349, 124 Pac. 574 (1912); *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 110, 119 (D. Nev., 1897).

¹⁴³ *Dick v. Caldwell*, 14 Nev. 167, 170 (1879); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 22 (C.C.A. 9th, 1917).

¹⁴⁴ *Twaddle v. Winters*, 29 Nev. 88, 103, 85 Pac. 280 (1906), 89 Pac. 289 (1907).

¹⁴⁵ *Dick v. Caldwell*, 14 Nev. 167, 170 (1879).

¹⁴⁶ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 97 (D. Nev., 1897).

Irrigation is a beneficial use. The Federal court stated, in another case, that:¹⁴⁷

It is true that the diversion of the water only ripens into a valid appropriation when it is utilized by the appropriator for a beneficial use. But it need not be alleged in the complaint that the irrigation of lands is a beneficial use. If irrigation in a dry and arid climate like Nevada is not a beneficial use of the water, it would be difficult to determine what is.

But the mere watering of land with intent to promote plant growth cannot be classed as beneficial if the conditions are such as to produce only meager, insubstantial results.¹⁴⁸

Economical and reasonable use.—The courts, in defining the measure of the appropriative right, came to qualify the requirement of beneficial use by adding to it the element of reasonableness, thus:¹⁴⁹

It logically follows from the legal principles we have announced that the plaintiff, as the first appropriator of the waters of Carrant Creek, has the right to insist that the waters flowing therein shall, during the irrigating season, be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use. * * *

The court went on to say (at 10 Nev. 243-244) that the plaintiff was bound under the law to make a reasonable use of the water, and that what is a reasonable use depends upon the peculiar circumstances of each particular case.

Later the courts further qualified "beneficial and reasonable" by the term "economical";¹⁵⁰ that is, the appropriator "should be required to make an economic as well as a reasonable use of the water."¹⁵¹ That the appropriative right is measured by economical and reasonable use of the water has been repeatedly asserted by the courts for more than a half-century.¹⁵² The following statement is typical:¹⁵³

Under the law and the specific terms of the decree as it has been directed to be modified, the allowance of a prior right to plaintiffs for one hundred and eighty-four inches is limited to such times as that quantity, by reasonable and economical use, is necessary for the irrigation of their lands.
* * *

¹⁴⁷ *Miller & Lux v. Rickey*, 127 Fed. 573, 585 (D. Nev., 1904).

¹⁴⁸ *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 21-22 (C.C.A. 9th, 1917). Water was simply thrown out over sagebrush land for the purpose of producing in greater abundance the native grasses found there. The grasses were scanty and sparse, and irrigation did not serve to promote their growth largely. "The employment of water for this purpose can scarcely, in this day of agricultural progress in the arid states, be classed as a beneficial use." For irrigation of this character, the court did not allow a prior right.

¹⁴⁹ *Barnes v. Sabron*, 10 Nev. 217, 233 (1875).

¹⁵⁰ *Roeder v. Stein*, 23 Nev. 92, 96-97, 42 Pac. 867 (1895). See also *Gotelli v. Cardelli*, 26 Nev. 382, 386, 69 Pac. 8 (1902); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 25 (C.C.A. 9th, 1917); *Robison v. Mathis*, 49 Nev. 35, 45, 234 Pac. 690 (1925); *Steptoe Live Stock Co. v. Gully*, 53 Nev. 163, 172, 173, 295 Pac. 772 (1931).

¹⁵¹ *Union Mill & Mtn. Co. v. Dangberg*, 81 Fed. 73, 113 (D. Nev., 1897).

¹⁵² *Roeder v. Stein*, 23 Nev. 92, 96, 42 Pac. 867 (1895); *Anderson v. Bassman*, 140 Fed. 14, 28 (N.D. Calif., 1905); *Doherty v. Pratt*, 34 Nev. 343, 350, 124 Pac. 574 (1912); *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 Fed. 30, 33, 34 (C.C.A. 9th, 1917); *Kent v. Smith*, 62 Nev. 30, 39, 140 Pac. (2d) 357 (1943).

¹⁵³ *Twaddle v. Winters*, 29 Nev. 88, 109-110, 85 Pac. 280 (1906), 89 Pac. 289 (1907).

The present Nevada statute governing the appropriation of water provides that water rights shall be limited to the quantity of water necessary "when reasonably and economically used" for beneficial purposes.¹⁵⁴

The limitation of the appropriative right to economical and reasonable use thus precludes any waste of water that can be reasonably avoided.¹⁵⁵ It is recognized that while theoretically under the rule of economical use there should be no surplus or waste water, nevertheless absolute efficiency in the diversion, conveyance, and application of water is not practicable and hence at times some so-called waste is unavoidable.¹⁵⁶ In determining the question of reasonable and economical use of water under the system of use employed by the appropriator, the courts will consider the methods of use prevalent throughout the area and will not penalize an appropriator whose system is as economical and as reasonable as the others in the area, even though the typical system of irrigation may not be the best that could be devised.¹⁵⁷

Conveyance losses.—A certain amount of loss in conveying water from the point of diversion to the place of use is in most cases unavoidable, and an appropriator is entitled to an allowance for a necessary loss if his facilities are reasonable and economical under the circumstances.¹⁵⁸ But a loss of two-thirds of the water in conveying it about three miles, in the absence of any showing justifying the loss, does not indicate that the means of diversion are reasonable and economical.¹⁵⁹ The appropriator is required to continue his use of water, after junior rights have attached to the stream, in at least as economical a manner as before, and he cannot change the method of use so as to increase the waste materially.¹⁶⁰

Excess waters in source of supply.—The appropriative right does not extend to waters in the source of supply in excess of the quantities required at any particular time for the economical and reasonable needs of the appropriator within the limits of his appropriation.¹⁶¹ The statute, in declaring that water rights are limited to quantities of water necessary for reasonable and economical use, states further:¹⁶²

* * * and all the balance of the water not so appropriated shall be allowed to flow in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby; * * *

¹⁵⁴ Nev. Comp. Laws 1929, sec. 7897.

¹⁵⁵ *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 Fed. 30, 33-34, 35 (C.C.A. 9th, 1917). A claimant, whose method of irrigation was wasteful according to modern standards, was allowed only enough water to irrigate the land in a reasonably efficient manner, which was less than had been used prior to the decree.

¹⁵⁶ *Bidleman v. Short*, 38 Nev. 467, 470-471, 150 Pac. 834 (1915).

¹⁵⁷ *Rodgers v. Pitt*, 89 Fed. 420, 423-424 (D. Nev., 1898), 129 Fed. 932, 943-944 (D. Nev., 1904).

¹⁵⁸ *Rodder v. Stein*, 23 Nev. 92, 97, 42 Pac. 867 (1895); *Doherty v. Pratt*, 34 Nev. 343, 348, 124 Pac. 574 (1912).

¹⁵⁹ *Doherty v. Pratt*, 34 Nev. 343, 348, 124 Pac. 574 (1912).

¹⁶⁰ *Rodder v. Stein*, 23 Nev. 92, 97, 42 Pac. 867 (1895).

¹⁶¹ *Proctor v. Jennings*, 6 Nev. 83, 87 (1870); *Barnes v. Sabron*, 10 Nev. 217, 233, 245 (1875); *Walsh v. Wallace*, 26 Nev. 299, 330, 67 Pac. 914 (1902); *Anderson Land & Stock Co. v. McConnell*, 188 Fed. 818, 830 (D. Nev., 1910); *Doherty v. Pratt*, 34 Nev. 343, 349, 124 Pac. 574 (1912); *Robison v. Mathis*, 49 Nev. 35, 45, 234 Pac. 690 (1925).

¹⁶² Nev. Comp. Laws 1929, sec. 7897.

Statutory duty of water.—The water-rights statute provides that the quantity of water from either a surface or an underground source to be appropriated in the State shall be limited to such quantity as shall be reasonably required for the beneficial use to be served.¹⁰³

The section above cited formerly prescribed quantitative limitations upon the quantity of water for which a permit could be acquired for irrigation purposes. As amended in 1945, it provides that the State Engineer, in determining the quantity of water to be diverted under a permit for irrigation purposes, or where the water is to be stored for later use for irrigation, shall take into consideration the irrigation requirements in the section of the State in which the appropriation is to be made. The State Engineer is required to consider the duty of water as theretofore established by court decree or by experimental work in such area or as near thereto as possible. He is required to consider the growing season, type of culture, and reasonable transportation losses of water to the point at which the conduit enters the land to be irrigated, and any other pertinent data deemed necessary to arrive at a reasonable duty of water. In addition, in the case of storage, reservoir evaporation losses are to be taken into consideration in determining the quantity of acre-feet to be allowed in a permit.

Point of measurement of water.—The section of the water-rights statute relating to the duty of water, formerly prescribing maximum quantities of water that might be appropriated for irrigation purposes, specified that water diverted for direct irrigation should be measured at the land and stored water measured in the reservoir. The provisions of the section as amended in 1945 are summarized in the immediately preceding paragraph.¹⁰⁴

The importance of having a designated point upon the stream at which waters subject to rights of diversion could be measured was emphasized by the supreme court.¹⁰⁵

Standard of measurement of water.—The statute provides that the cubic foot per second shall be the legal standard for the measurement of water in the State.¹⁰⁶

The supreme court has refused to sustain a decree that adjudicated fractional parts of a stream to various water users, where no reason existed why the adjudication should not conform to the standard of measurement prescribed by the statute, "or some measurement readily translatable therein."¹⁰⁷

Period of Use of Water.

The rule is that if the first appropriator appropriates a part of the water supply for a certain period of time, a later appropriator may acquire a right to the same water during periods of time for which

¹⁰³ Nev. Comp. Laws 1929, sec. 7899, amended Stats. 1945, ch. 56.

¹⁰⁴ Nev. Comp. Laws 1929, sec. 7899, amended Stats. 1945, ch. 56.

¹⁰⁵ *Ramelli v. Sorgi*, 38 Nev. 552, 559, 149 Pac. 71 (1915).

¹⁰⁶ Nev. Comp. Laws 1929, sec. 7898.

¹⁰⁷ *Ramelli v. Sorgi*, 38 Nev. 552, 558-559, 149 Pac. 71 (1915). The court stated that under the peculiar circumstances of a particular case a court might be justified, notwithstanding the statute, in entering a judgment decreeing fractional parts of the stream to various parties, that question, however, being not determined in the instant case.

the first appropriator did not acquire his right.¹⁶⁸ Hence, if the plaintiff appropriated water during certain days in the week only, or during a certain number of days in a month, then the defendant would be entitled to its use on the other days of the week, or the other days in the month, respectively. A Federal court has held, likewise, that where an appropriator limits himself to the use of the water on certain specified dates, subsequent appropriators may acquire a vested right to the water to be used at times not embraced in the claim of the first appropriator.¹⁶⁹

Point of Diversion.

The Nevada Supreme Court, in a fairly early case, saw no reason to deny the right of an appropriator to continue the use of alternative points of diversions, taking out all the water at one point at one time and all the water at another point at another time as his convenience dictated, where the practice had been begun before an objecting party purchased lands lying on the stream between the two points of diversion.¹⁷⁰

Purpose of Use of Water.

There is no limitation upon the character of the use for which water may be appropriated, so long as it is a beneficial use. The water-rights statute does not purport to list all the uses of water for which appropriative rights may be acquired, but it specifies certain information that must be included in an application for a permit to appropriate water for certain uses, namely, irrigation, power, municipal, mining, and stock-watering purposes.¹⁷¹

Irrigation.—Most of the controversies over water rights that have reached the supreme court have involved use of water for irrigation. The use of water in irrigating agricultural lands has been recognized from the very earliest times not only as a beneficial use of water, but as an essential use in preserving the life of the State. This matter has been discussed under the topic "State water policy," pages 1, 2.

Irrigation of uncultivated lands.—A Federal court in 1904 denied a contention by certain parties that the rights of the opposing party should be limited to the area of lands actually cultivated, stating that the use of water for pasture and for wild hay is a beneficial purpose.¹⁷² The courts have recognized the practice in other cases,¹⁷³ and decrees allowing water for such purposes have been sustained.¹⁷⁴

¹⁶⁸ *Barnes v. Sabron*, 10 Nev. 217, 245 (1875).

¹⁶⁹ *Rodgers v. Pitt*, 129 Fed. 932, 938 (D. Nev., 1904). In the instant case, however, the claim in controversy had been made for the use of water without reference to any particular period of the year. Hence there was nothing to limit the use to a period contended for by the opposing party. In *Pacific Live Stock Co. v. Read*, 5 Fed. (2d) 466, 468, 469 (C.C.A. 9th, 1925), a decree was authorized allowing a certain quantity of water up to June 15 of each year and a less quantity of water thereafter.

¹⁷⁰ *Hobart v. Wicks*, 15 Nev. 418, 420-421 (1880).

¹⁷¹ Nev. Comp. Laws 1929, sec. 7944.

¹⁷² *Rodgers v. Pitt*, 120 Fed. 982, 942 (D. Nev., 1904).

¹⁷³ *Anderson Land & Stock Co. v. McConnell*, 188 Fed. 818, 822 (D. Nev., 1910).

¹⁷⁴ *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 Fed. 80, 83, 85 (C.C.A. 9th, 1917); *Pacific Live Stock Co. v. Read*, 5 Fed. (2d) 400, 408 (C.C.A. 9th, 1925).

In one case, however, while the Federal Circuit Court of Appeals approved an allowance for irrigated pasture land equal to one-half of the quantity allowed for hay and grain land, it did not approve any prior right for a practice under which water was simply thrown out over sagebrush land for the purpose of increasing the growth of native grasses found among the sagebrush, such grasses being scanty and not largely increased in growth by the irrigation.¹⁷⁵

Stock watering.—A statute enacted in 1925 supplements the general water-rights statute by prescribing certain conditions with respect to the acquirement of rights for the watering of livestock, particularly range livestock.¹⁷⁶

The use of water for watering livestock is declared by the statute to be a beneficial use, except that no appropriation may be made in close proximity to a watering place at which there are subsisting rights to water range livestock in sufficient numbers to utilize substantially all that portion of the public range readily available to livestock watering at that place. Subject to that exception, the right to use water for the watering of livestock may be acquired in the same manner as the right to use water for any other beneficial purpose; there being a proviso that it is not necessary to determine in cubic feet per second the quantity of water to be appropriated, a sufficient measure of the quantity being a specification of the number and kind of animals to be watered or which have been watered. If a right applied for will contravene the policy stated in the act—of protecting the grazing use of the portion of the public range already fully utilized by holders of stock-watering rights—the application must be rejected.

The constitutionality of the stock-watering act of 1925 has been upheld, under attack, by the Nevada Supreme Court.¹⁷⁷

As noted above (see "Watering of livestock," page 15), a mechanical means of diverting water has been held not necessary in the case of an appropriation of water for watering livestock under the circumstances relating peculiarly to that industry.¹⁷⁸

Domestic use.—The appropriation of water for culinary and domestic purposes has been specifically recognized by the courts.¹⁷⁹

Mining and milling.—A Federal court pointed out in one of the leading cases on water rights that ores could not be reduced successfully without the aid of expensive machinery and the building of mills to be propelled by water power, and that:¹⁸⁰

Water for this purpose is as much a want or necessity of the community as it is for the purpose of irrigating the land. The mining industry of this

¹⁷⁵ *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 12-13, 21-22, 25 (C.C.A. 9th, 1917).

¹⁷⁶ Nev. Comp. Laws 1929, secs. 7979 to 7985.

¹⁷⁷ *In re Calvo*, 50 Nev. 125, 131-141, 253 Pac. 671 (1927). See also *Adams-McGill Co. v. Hendrix*, 22 Fed. Supp. 789, 791 (D. Nev., 1938).

¹⁷⁸ *Steptoe Live Stock Co. v. Gullett*, 53 Nev. 163, 171-173, 295 Pac. 772 (1931). See also *Robison v. Mathis*, 49 Nev. 35, 42, 45, 234 Pac. 690 (1925).

¹⁷⁹ In *Silver Peak Mines v. Valcalda*, 79 Fed. 886, 890 (D. Nev., 1897), the court said: "The fact that the water was used for culinary and domestic purposes by plaintiff, its agents and employees, was of itself sufficient to establish a beneficial use of the water."

¹⁸⁰ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 98-99, 113 (D. Nev., 1897). The quotation is at 81 Fed. 98.

state has always been considered of as great importance as the agricultural interests. The right to the water of a stream for any beneficial use should always be protected and encouraged. * * *

The court stated further (at 81 Fed. 99) that there was no superiority of right acquired for the purpose of irrigating lands as against rights acquired for mining and milling purposes, but that:

The general rights of each stand upon the same plane. Both are entitled to the equal and due protection of the law. Both must be protected, and both governed by the general principles of law pertaining to water rights which have been clearly established and defined. * * *

Storage of Water.

The water-rights statute provides that "Water may be stored for a beneficial purpose."¹⁸¹ In an appropriation of water to be stored for subsequent irrigation use, reservoir evaporation losses are to be taken into consideration,¹⁸² in addition to the factors prescribed for direct-irrigation rights (see "Statutory duty of water," page 26).

Sale or Rental of Water.

A canal company that owns and operates a system for diverting water from a stream, solely for the purpose of gain through the sale and distribution of that water to others who apply it to the soil in irrigation, said the supreme court, can acquire no right to the waters except the right to dispose thereof.¹⁸³ For the exercise of this right, the company is entitled to a reasonable monetary benefit. The company is the agent of the consumers in making the appropriation of the water; the consumers who apply the water to the beneficial use contemplated by the appropriation are the actual appropriators. Having applied the water to a beneficial use, they acquire a right of user equivalent to an easement in the canal of the water-selling organization to the extent of the quantity of water delivered to them by the latter. This right of the consumer is contingent only upon his acts in meeting the reasonable demands of the company for services rendered.

The Federal court for the District of Nevada expressed its disbelief that the water right of a commercial water company in Nevada rested exclusively in the customer.¹⁸⁴ It was stated that:

By diverting the water of a natural stream, and applying it to a beneficial use, a water company secures a right prior to rights acquired by subsequent diversions. A bona fide customer of the company receives, not only the service of the company, but also an interest in such priority proportionate to the amount of water beneficially used by him. He also has a prior right to purchase, and to compel delivery to himself of, such water as he has been accustomed to receive in preference to any other customer, whose initial purchase and use from the company commenced at a later date than his, and these rights continue as long as he pays the reasonable charges of the company, and conforms to its reasonable regulations, but do not extinguish such rights as the company had acquired for the beneficial purpose of supplying the needs of customers. *Prosole v. Steamboat Canal Co.*, * * *

¹⁸¹ Nev. Comp. Laws 1929, sec. 7896.

¹⁸² Nev. Comp. Laws 1929, sec. 7899, amended Stats. 1945, sec. 56.

¹⁸³ *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 159, 162-165, 140 Pac. 720, 144 Pac. 744 (1914).

¹⁸⁴ *Reno Power, Light & Water Co. v. Public Service Commission*, 300 Fed. 645, 648-649 (D. Nev., 1921).

This matter has also been discussed from the standpoint of the right to appropriate water (see "Who may appropriate water").

A canal company engaged in the business of supplying water to consumers for agricultural purposes, for compensation, has been held to be a "public utility" subject to the regulation of the State Public Service Commission.¹⁸⁵ The Federal court held in the *Reno Power* case that a company that supplies water for compensation for the needs of its customers is entitled to have the reasonable value of the water right included in the total value on which the company is entitled to a fair return.¹⁸⁶

RELATIVE RIGHTS OF SENIOR AND JUNIOR APPROPRIATORS

Rights of Senior Appropriators.

The first appropriator of the water of a stream has a right to the quantity of water he has appropriated as against subsequent appropriators from the same source;¹⁸⁷ and the rights of the latter are subject to that of the one who was first in time, regardless of their relative locations on the stream.¹⁸⁸ The first appropriator has the right to insist that the waters he has appropriated be available for his proper use;¹⁸⁹ he has the right to their exclusive use up to the amount of his appropriation.¹⁹⁰

The prior appropriator has the right to the flow of whatever amount of water will reach his headgate within the limits of his appropriation, regardless of natural losses in the stream channel above his point of diversion, even though the water could be put to a better use by junior appropriators upstream.¹⁹¹ (See "Effect of losses in stream channel," page 32.)

Rights of Junior Appropriators.

The Nevada Supreme Court, after stating that the first appropriator has the better right and that the rights of all later claimants are subject to his, went on to say:¹⁹²

But others coming on the stream subsequently may appropriate and acquire a right to the surplus or residuum, so the rights of each successive person appropriating water from a stream are subordinate to all those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. * * *

The subsequent appropriator only acquires what has not been secured by those prior to him in time. But what he does thus secure is as absolute and perfect and free from any right of others to interfere with it, as the rights of those before him are secure from interference by him. * * *

The right of the subsequent appropriator thus attaches to surplus water over the quantities appropriated by those prior in time. But

¹⁸⁵ *Garson v. Steamboat Canal Co.*, 43 Nev. 298, 305-306, 185 Pac. 801 (1919), 185 Pac. 1119 (1920).

¹⁸⁶ *Reno Power, Light & Water Co. v. Public Service Commission*, 300 Fed. 645, 647-652 (D. Nev., 1921).

¹⁸⁷ *Loddell v. Simpson*, 2 Nev. 274, 279 (1866); *Doherty v. Pratt*, 34 Nev. 343, 349, 124 Pac. 574 (1912).

¹⁸⁸ *Proctor v. Jennings*, 6 Nev. 83, 87 (1870). No one has the right to curtail or interfere with the prior acquired rights of those either above or below him on the same stream.

¹⁸⁹ *Barnes v. Sabron*, 10 Nev. 217, 233 (1875).

¹⁹⁰ *Jerrett v. Mahan*, 20 Nev. 89, 98, 17 Pac. 12 (1888).

¹⁹¹ *Tonkin v. Winzell*, 27 Nev. 88, 96-97, 99-100, 73 Pac. 593 (1903).

¹⁹² *Proctor v. Jennings*, 6 Nev. 83, 87-88 (1870).

there may be portions of the season during which the prior appropriator does not need all the water to which his right relates. Subsequent appropriative rights attach to such quantities of water at such times.¹⁹³

The right of a junior appropriator extends to reasonable and economical use, and is limited by that same rule, to the same extent as that of the prior appropriator.¹⁹⁴

Surplus over needs of senior appropriators.—Junior appropriators are entitled to appropriate and divert waters in excess of the quantities to which prior appropriators are entitled,¹⁹⁵ whether the junior appropriators are located upstream or downstream from the diversion points of the prior appropriators.¹⁹⁶ The prior appropriator cannot prevent others from using the surplus above his own economical and reasonable needs.¹⁹⁷

The statute governing the appropriation of water provides that the balance of the water in a stream above the reasonable and economical requirements of existing rights shall not be considered as having been appropriated by the holders of such rights, but shall be left in the stream.¹⁹⁸

Junior upstream appropriators are not obligated to allow waters to flow downstream to the headgates of prior appropriators at times when the latter are unable to make any beneficial use of the water but when the upstream junior appropriators can make beneficial use of them.¹⁹⁹ (See "Effect of losses in stream channel," page 32.)

Continuance of conditions at time of junior appropriation.—The junior appropriator has a right to have the conditions on the stream, existing at the time he made his appropriation, maintained subsequently as they then were.²⁰⁰ Hence the first appropriator has no right to make any change in the channel of the stream, or in his own use of the water, that would result in lessening the quantity of water that otherwise would flow down to the headgate of the junior appropriator.

Enlargements by senior appropriators.—A Federal court stated that:²⁰¹

The right of the first appropriator is fixed by his appropriation, and when others locate upon the stream, or appropriate the water, he cannot enlarge his original appropriation, or make any change in the channel, to their injury. * * *

The prior appropriator is limited to the rights he was enjoying at

¹⁹³ *Barnes v. Sabron*, 10 Nev. 217, 233, 245 (1875).

¹⁹⁴ *Doherty v. Pratt*, 34 Nev. 343, 350, 124 Pac. 574 (1912).

¹⁹⁵ *Barnes v. Sabron*, 10 Nev. 217, 233, 245 (1875); *Walsh v. Wallace*, 26 Nev. 299, 330, 67 Pac. 914 (1902); *Twaddle v. Winters*, 29 Nev. 88, 109-110, 85 Pac. 280 (1906), 89 Pac. 289 (1907); *Anderson Land & Stock Co. v. McConnell*, 188 Fed. 818, 830 (D. Nev., 1910); *Robison v. Mathis*, 49 Nev. 35, 45, 234 Pac. 690 (1925).

¹⁹⁶ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 106 (D. Nev., 1897).

¹⁹⁷ *Roeder v. Stein*, 23 Nev. 92, 97, 42 Pac. 867 (1895); *Doherty v. Pratt*, 34 Nev. 343, 349-350, 124 Pac. 574 (1912); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 22 (C.C.A. 9th, 1917).

¹⁹⁸ Nev. Comp. Laws 1929, sec. 7897.

¹⁹⁹ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 119 (D. Nev., 1897).

²⁰⁰ *Lobdell v. Simpson*, 2 Nev. 274, 279 (1866); *Proctor v. Jennings*, 6 Nev. 83, 87 (1870); *Roeder v. Stein*, 23 Nev. 92, 97, 42 Pac. 867 (1895); *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 106 (D. Nev., 1897).

²⁰¹ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 106 (D. Nev., 1897).

the time the subsequent rights attached.²⁰² Hence one who enlarges his ditch beyond the scope of his original appropriation thereby makes, to the extent of the enlargement, a new appropriation; and this new appropriation is subordinate to any intervening rights that may have been acquired on the stream between the time of the original appropriation and the time of the enlargement.²⁰³

Effect of Losses in Stream Channel.

One who appropriates water at a particular point is not penalized because of heavy losses in the bed of the stream above the point of his diversion.²⁰⁴ If enough water will reach the headgate of the prior appropriator under natural conditions to be of beneficial use to him, he is entitled to have the water flow there. Although every appropriator should be restricted to an economical and beneficial use from his point of diversion, nevertheless (at 27 Nev. 100):

* * * we cannot sanction a policy which inevitably would result in depriving the prior and lower appropriator for the benefit of the later claimant nearer the head of the stream, because the latter would have a greater quantity of water, and consequently more benefit, and would save the seepage and evaporation occasioned by the flow further down to the lands of the earlier settler.

The court stated that if junior appropriators could save water that otherwise would be wasted, they must do that at their own expense, or at least without detriment to existing rights whether up or down stream.

However, if the quantity of water that would reach the downstream prior appropriator is too small to be of any benefit to him, then upstream junior appropriators are not precluded from making use of such water as they can divert within their appropriative rights.²⁰⁵ With respect to this, the court stated that:

It would be unjust and inequitable to compel the farmers in the valley to allow the water to run down to the mills when the quantity of water was wholly insufficient, to enable the complainant to run its mills with water power. There must be a beneficial use before any protection can be invoked. No provisions should be contained in the decree which would result in depriving one party of the use of the water when the other party could make no beneficial use of it. This would amount to a destruction, instead of a protection, of the rights of the parties. In the appropriation of water, there cannot be any "dog in the manger" business by either party, to interfere with the rights of others, when no beneficial use of the water is or can be made by the party causing such interference. * * *

PROTECTION OF THE APPROPRIATIVE RIGHT

A right to use water beneficially is to be regarded and protected as real property.²⁰⁶

A Federal court has said that a State may not by its laws deprive a citizen of another State of a right to establish and protect his rights to property within the first State by a proceeding in a Federal court.²⁰⁷ The Nevada Supreme Court, in a very early case, stated that an Indian who had appropriated water on the public lands of the United States

²⁰² *Proctor v. Jennings*, 6 Nev. 83, 87 (1870).

²⁰³ *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 542-544, 548 (1869).

²⁰⁴ *Toukin v. Winzell*, 27 Nev. 88, 96-97, 99-100, 73 Pac. 593 (1903).

²⁰⁵ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 119 (D. Nev., 1897).

²⁰⁶ *Application of Filippini*, 66 Nev. 17, 21-22, 202 Pac. (2d) 535, 537 (1949).

²⁰⁷ *Ellison Ranching Co. v. Woodward*, 34 Fed. (2d) 820, 821 (D. Nev., 1929).

might maintain an action for the diversion of that water.²⁰⁸ It has been held that whereas parties who have separate interests in the water of a stream cannot unite in an action for damages for its past diversion, nevertheless they may unite in an action to restrain future diversions.²⁰⁹ In an action brought by a prior appropriator with respect to a diversion that interferes with the exercise of his rights, it is not necessary that he aver ownership of the waters, the averment of his own prior appropriation and of the defendant's diversion being enough.²¹⁰

Protection on Tributary Sources of Supply.

The appropriative right is entitled to protection on tributaries of the source of supply to which the appropriative right attaches.²¹¹ This includes the water of a spring which is a source of a natural water-course, regardless of the ownership of the land on which the spring is situated.²¹² This principle applies likewise to a case in which water originating in springs and tributary to a stream either percolates through the soil on the way to the stream or is conveyed thereto by unknown subterranean channels.²¹³ The court stated (at 16 Nev. 324) that:

It would be a mere pretense of protection of the rights acquired by the earlier appropriators of the waters of the creek to say that later appropriators could lawfully acquire rights to the springs which constitute the source of the creek simply because the means by which the waters are conveyed from springs to creek are subterranean and not well understood.
* * *

Remedies for Infringement.

Early in the judicial history of Nevada water rights, it was held that where a diversion injurious to a prior appropriator might ripen by lapse of time into a prescriptive right, even though the prior appropriator's crops were not actually damaged, it was nevertheless an injury to the appropriator's rights entitling him to recover nominal damages and to an equitable decree declaring the quantity of water to which he was entitled.²¹⁴ The court went on to say that:

The rule of law is, that in cases for the diversion of water, where there is a clear violation of a right and equitable relief is prayed for, it is not necessary to show actual damage; every violation of a right imports damage; and this principle is applied whenever the act done is of such a nature as that by its repetition or continuance it may become the foundation of an adverse right. * * *

The right of an appropriator to equitable relief by way of injunction, in cases in which there is an interference with his right under such conditions that by lapse of time the foundation for an adverse right would be laid, has been consistently recognized by the courts.²¹⁵

²⁰⁸ *Lobdell v. Hall*, 3 Nev. 507, 516 (1868).

²⁰⁹ *Ronnow v. Delmuc*, 23 Nev. 29, 30, 33, 41 Pac. 1074 (1895).

²¹⁰ *Jerrett v. Mahan*, 20 Nev. 89, 98, 17 Pac. 12 (1888). The court stated that allegation of ownership of the water was a conclusion of law and would add nothing to the pleadings.

²¹¹ *Tonkin v. Winzell*, 27 Nev. 88, 96-97, 73 Pac. 593 (1903).

²¹² *Campbell v. Goldfield Consolidated Water Co.*, 36 Nev. 458, 461-462, 136 Pac. 976 (1913).

²¹³ *Strait v. Brown*, 16 Nev. 317, 323-324 (1881).

²¹⁴ *Barnes v. Sabron*, 10 Nev. 217, 247 (1875).

²¹⁵ *Bidleman v. Short*, 38 Nev. 467, 471, 150 Pac. 834 (1915); *Robison v. Mathis*, 49 Nev. 35, 43-44, 234 Pac. 690 (1925).

While it is well settled, said the supreme court in a fairly early case, that equity will not enjoin mere trespass where no general claim of right or title is made by the defendant, and where there is no appreciable damage and the remedy at law is adequate, nevertheless where defendant claims a right which in time might ripen into an adverse right and deprive the plaintiff of his property, then plaintiff can both vindicate his right and preserve it.²¹⁶ It is not necessary in such case to show actual damages or present use of the water in order to get equitable relief by way of a perpetual injunction.

Where the title to water has been obtained by prior appropriation, a decree enjoining a party from wrongfully diverting it is not erroneous merely because the party so enjoined owns the land through which the water naturally flows.²¹⁷

The remedies of claimants of water rights who are parties to an adjudication under the special statutory procedure, who are aggrieved by an act of the State Engineer during the course of the adjudication proceedings, are limited to the adequate plan therein provided to protect their rights. (See discussion of special statutory procedure under "Adjudication of water rights," page 48.)

Exercise of the Appropriative Right DIVERSION AND DISTRIBUTION WORKS

Right to Means of Delivery of Water.

As water for the reclamation of arid lands by means of irrigation may not be supplied thereto without the aid of ditches or canals, and in some cases the use of storage reservoirs, the right to the water has been held to carry with it rights in the means of delivery to the lands.²¹⁸

Means of Diversion.

It is immaterial, in acquiring an appropriative right, whether the water is taken from the stream by means of a canal, ditch, flume, or pipe, or by any other method.²¹⁹

As noted above (see "Completion of appropriation," pages 14, 15), the use of natural overflow from a stream is not considered in Nevada an adequate diversion of the water from the standpoint of acquiring an appropriative right for agricultural purposes; but for stock-watering purposes, a mechanical means of diversion is not necessary if the stock-water right can be exercised adequately and economically without it and if the prevailing custom is to do so.

Use of Natural Channel to Convey Water.

The channel of a natural stream or watercourse may be used for the purpose of conveying stored water from the place of storage to the

²¹⁶ *Brown v. Ashley*, 16 Nev. 311, 315-317 (1881).

²¹⁷ *Ronnow v. Delmoe*, 23 Nev. 29, 30, 34, 41 Pac. 1074 (1895). The court stated that an owner of land has no more right to interfere with the flow of water across his land, if it has been appropriated by someone else, than if the water were flowing across the land of somebody else. "If the law were otherwise the right to the use of water would rest upon a very frail foundation."

²¹⁸ *Reconstruction Finance Corporation v. Schmitt*, 20 Fed. Supp. 816, 820 (D. Nev., 1937).

²¹⁹ *Miller & Lux v. Rickey*, 127 Fed. 573, 584 (D. Nev., 1904).

place of use, subject to existing rights, due allowance for transmission losses to be made, under the supervision of the State Engineer.²²⁰

The Nevada Supreme Court, in a case decided in 1886, referred to the principle applied in certain California cases to the effect that mingling artificial waters with the waters of a natural watercourse, in order to convey the artificial waters to the point of use, was not abandonment. This, said the court, did not apply to a situation in which waters had been discharged for the purpose of getting rid of them and without any intention of reclaiming them.²²¹

EFFICIENCY OF PRACTICES

The works for the diversion and conveyance of water to the irrigated land must be reasonably efficient, because the rule as to reasonable and economical use of water applies to methods of diversion and conveyance as well as to application of the water to the land.²²² The supreme court stated that:

The topography of the country and the character of the soil through which water is conveyed to the point of use must, of course, be taken into consideration in determining the amount of water to which an appropriator is entitled, but an appropriator has no right to run water into a swamp and cause the loss of two-thirds of a stream simply because he is following lines of least resistance. Such a method of diversion would not be an economical use of the water providing another reasonable method, under all the circumstances, could be devised to avoid such loss, even though it occasioned some additional expense to the appropriator. * * *

While the conveyance of water through a ditch always involves some loss of water, which without incurring unreasonable expense is generally unavoidable, nevertheless after others have acquired rights in the stream an appropriator cannot change the method of use if the effect is to increase materially the waste.²²³

ROTATION IN USE OF WATER

The statute authorizes water users to rotate in the use of the water supply to which they may be collectively entitled; it likewise authorizes a single water user having lands to which water rights of different priorities attach, to rotate in the use of the water, when such rotation can be made without injury to lands enjoying earlier priorities, to the end that each water user may have an irrigation head of at least two cubic feet per second.²²⁴

²²⁰ Nev. Comp. Laws 1929, secs. 8238, 7896, 7941, 7963.

²²¹ *Schulz v. Sweeny*, 19 Nev. 359, 361-362, 11 Pac. 253 (1886). The California cases relied upon by counsel were *Hoffman v. Stone*, 7 Calif. 46 (1857), and *Butte Canal & Ditch Co. v. Vaughn*, 11 Calif. 143 (1858).

²²² *Doherty v. Pratt*, 34 Nev. 343, 348, 124 Pac. 574 (1912). See also *Kent v. Smith*, 62 Nev. 30, 39, 140 Pac. (2d) 357 (1943). In *Robison v. Mathis*, 49 Nev. 35, 45, 234 Pac. 690 (1925), which was an action to obtain a decree establishing plaintiffs' right to the use of a certain quantity of water for watering sheep, the court said that the plaintiffs' means of utilizing their right to the use of the waters of the spring had been set out in the complaint and judgment, and must, in the absence of evidence to the contrary, be deemed a sufficiently economical method to accomplish that purpose and to leave any surplus available for the use of others.

²²³ *Roeder v. Stein*, 23 Nev. 92, 97, 42 Pac. 867 (1895). Such a change may be forbidden and parties compelled to keep their flumes and ditches in good repair, in order to prevent any unnecessary waste.

²²⁴ Nev. Comp. Laws 1929, sec. 7971.

Rotation questions have been involved in two Federal decrees affecting water users in Nevada. In one decision the court stated that where facts had existed similar to those in the instant controversy, the courts in the application of riparian rules had solved the difficulty by decreeing to the respective parties the use of the full flow of the stream during different periods of time, and believed that such rule could be properly applied in the instant case.²²⁵ Accordingly, the water of the stream was allocated between the parties with reference to certain periods of time.

In a later Federal case certain users of water from Carson River were located within California and others within Nevada.²²⁶ Riparian rights were held by some parties and appropriative rights by others. The court believed that the only practicable and fair method of dividing the water was by time during the dry season. Accordingly, alternate use of the entire stream flow was authorized to the groups on each side of the State line, each group to have the use for five days in each ten-day period during the months of June to October, inclusive.

EXCHANGE OF WATER

If waste by seepage and evaporation can be prevented by draining swamps and depressions, or by substituting improved methods of conveying water for inefficient methods, then, said the Nevada Supreme Court, the desired improvement should be made at the expense of the subsequent appropriator who desires to utilize the water thereby to be saved.²²⁷

CHANGES IN EXERCISE OF RIGHTS

The statute governing the appropriation of water authorizes changes in the point of diversion, place of use, or manner of use of water already appropriated, after first applying to the State Engineer for a permit to make the change, the right to be perfected under the procedure provided for the appropriation of water.²²⁸ This provision does not impair any vested right of persons who initiated and perfected their appropriative rights prior to the passage of the statute.²²⁹

The State Engineer is required to approve all applications in which the change does not tend to impair the value of existing rights, or to be otherwise detrimental to the public welfare; and it is his duty to reject the application in cases in which the proposed change conflicts with existing rights, or threatens to prove detrimental to the public interest.²³⁰

The right to make changes in the exercise of appropriative rights has been long recognized by the courts, provided in all cases that the change works no injury to other rights.²³¹ The statute prescribed a

²²⁵ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 121 (D. Nev., 1897). Although this case was not decided until 1897, it related to certain previous decrees in which riparian rights had been adjudicated.

²²⁶ *Anderson v. Bassman*, 140 Fed. 14, 21-24, 28, 29 (N. D. Calif., 1905).

²²⁷ *Tonkin v. Winzell*, 27 Nev. 88, 99-100, 73 Pac. 593 (1903).

²²⁸ Nev. Comp. Laws 1929, sec. 7944.

²²⁹ *Bergman v. Kearney*, 241 Fed. 884, 912 (D. Nev., 1917).

²³⁰ Nev. Comp. Laws 1929, sec. 7948.

²³¹ *Smith v. Logan*, 18 Nev. 149, 154, 1 Pac. 678 (1883), place of use; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 115 (D. Nev., 1897); *Miller & Lux v. Rickey*, 127 Fed. 573, 584 (D. Nev., 1904), point of diversion; *Twaddle v.*

method of administrative procedure by which such changes could be made. The supreme court has pointed out that the statute contains a positive admonition that the State Engineer shall not permit a change if the proposed change tends to impair the value of existing rights or to be otherwise detrimental to the public welfare.²³²

In *Kent v. Smith*, just cited, the action centered solely upon a construction of a decree of adjudication. The order authorizing the change in point of diversion and place of use was made long after the decree was issued and bore no relation to it. The supreme court felt that such suit was not a proper action in which to try the question of injury from the change; that that matter should be determined in a proper proceeding involving that specific issue, in which all parties whose interests might be affected could be given a chance to be heard.

Place of Use.

A Federal court approved a decree restricting the use of certain water to certain lands, by reason of the fact that approximately two-thirds of the water found its way back into the stream by percolation, so that junior appropriators downstream were afforded the opportunity of making use of that quantity.²³³ The court stated that in justice and equity the use of the water should be confined to the locality where it was being used by the prior appropriator at the time the junior appropriators acquired their right.

In a fairly early case the Nevada Supreme Court said that one who had appropriated water for use on land on which he was a trespasser, could have changed the use of the water to other lands.²³⁴

A section of the water-rights statute enacted in 1913 provides that:²³⁵

All water used in this state for beneficial purposes shall remain appurtenant to the place of use; *provided*, that if for any reason it should at any time become impracticable to beneficially or economically use water at the place to which it is appurtenant, said right may be severed from such place of use and simultaneously transferred and become appurtenant to other place or places of use, in the manner provided in this act, and not otherwise, without losing priority of right heretofore established; *and*

Winters, 29 Nev. 88, 103, 85 Pac. 280 (1906), 89 Pac. 289 (1907), point of diversion and purpose of use; *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 28 (C.C.A. 9th, 1917).

²³² *Kent v. Smith*, 62 Nev. 30, 39-40, 140 Pac. (2d) 357 (1943).

²³³ *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 28 (C.C.A. 9th, 1917).

²³⁴ *Smith v. Logan*, 18 Nev. 149, 154, 1 Pac. 678 (1883). The statement of the court was in answer to a contention by one who became the rightful owner of the land in question, that the use of the water on that land by the trespasser had made it appurtenant to the land, and that the one who acquired the title to the land likewise acquired the water right. The supreme court denied this claim. This case did not involve Nev. Comp. Laws 1929, sec. 7893, which had not then been enacted.

²³⁵ Nev. Comp. Laws 1929, sec. 7893. Certain parties to an action that reached the supreme court had been served with water by a commercial irrigation company for many years prior to the enactment of the foregoing statute: *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 158, 140 Pac. 720, 144 Pac. 744 (1914). The supreme court stated that whatever rights had been acquired by the consumers of water were not affected by the provisions of this section, inasmuch as it was not to be viewed as being retrospective insofar as such cases were concerned. The right to change the place of use, however, was not involved in this case. It concerned the right of a consumer to a continuance of delivery of his accustomed water supply.

provided, that the provisions of this section shall not apply in cases of ditch or canal companies which have appropriated water for diversion and transmission to the lands of private persons at an annual charge.

Purpose of Use.

A party who has no interest in a water supply by virtue of an appropriation, is in no position to complain of a change in the purpose of use of the water to a beneficial use different from that for which originally appropriated.²³⁶

Means of Diversion.

The rule to the effect that at any time after an appropriative right is acquired, the holder may change the point of diversion if such can be done without injury to others, applies to the means used in making the diversion.²³⁷ The court stated that:

It is immaterial, in acquiring the right, whether the water was taken from the river by means of a canal, ditch, flume, or pipe, or by any other method.

Loss of Water Rights ABANDONMENT

Abandonment is a voluntary matter, a question of intent,²³⁸ to be evidenced by overt acts.²³⁹ The discharge of water from a flume for the purpose of getting rid of it, without intention to reclaim it, is conclusive evidence of an abandonment of the water.²⁴⁰

Mere lapse of time does not of itself constitute an abandonment.²⁴¹ However, in determining the question of intent to abandon a right, the courts may take nonuse of the water and other pertinent circumstances into consideration.²⁴²

When the overt acts evidencing an intention to abandon an appropriative water right appear, the right ceases and cannot be resumed after the rights of others have intervened.²⁴³ Upon the voluntary abandonment of a right to use water, the water becomes a part of the natural stream or other source and reverts to the State absolutely, without any outstanding title to its use as against the State.²⁴⁴ Thus, abandoned water is immediately subject to appropriation by the first applicant.

²³⁶ *Campbell v. Goldfield Consolidated Water Co.*, 36 Nev. 458, 462, 136 Pac. 976 (1913).

²³⁷ *Miller & Luw v. Rickey*, 127 Fed. 573, 584 (D. Nev., 1904).

²³⁸ *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 286-287, 289, 290, 108 Pac. (2d) 311 (1940); *Valcalda v. Silver Peak Mines*, 86 Fed. 90, 95 (C.C.A. 9th, 1898).

²³⁹ *Anderson Land & Stock Co. v. McConnell*, 188 Fed. 818, 823 (D. Nev., 1910).

²⁴⁰ *Schulz v. Sweeny*, 19 Nev. 359, 361, 11 Pac. 253 (1886).

²⁴¹ *Valcalda v. Silver Peak Mines*, 86 Fed. 90, 95 (C.C.A. 9th, 1898).

²⁴² *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 290, 108 Pac. (2d) 311 (1940).

²⁴³ *Anderson Land & Stock Co. v. McConnell*, 188 Fed. 818, 823 (D. Nev., 1910).

²⁴⁴ *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 286-287, 108 Pac. (2d) 311 (1940).

STATUTORY FORFEITURE

The water-rights statute provides that:²⁴⁵

* * * in case the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water shall fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any five successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners shall thereupon forfeit all water rights, easements, and privileges appurtenant thereto theretofore acquired, and all the water so formerly appropriated by such owner or owners and/or their predecessors in interest may be again appropriated for beneficial use the same as if such ditch, canal, reservoir, or other means of diversion had never been constructed, and any qualified person may appropriate any such water for beneficial use; * * *

The Nevada Supreme Court has approved the application of the foregoing section to rights acquired under the statute.²⁴⁶ As water is State property, the State has a right to prescribe how it may be used and obtained, and to provide how long water may be permitted to run idly and not be beneficially used. Furthermore, the legislature has a right to prescribe a method by which rights acquired prior to the enactment of the law may be lost, providing that such prior and vested rights are not thereby impaired. Courts appreciate the necessity of requiring that water be beneficially used because of its public importance, but will take into consideration the circumstances of the particular case and "will not cause to be forfeited or taken away valuable rights when the nonuse of water was occasioned by justifiable causes. Especially is this true of rights which became vested prior to 1913." (60 Nev. at 290-291.)

There was substantial evidence in the record in the *Manse Spring* case upon which to base a finding that there had been no abandonment of the waters of the springs. To impose a stricter procedure than loss by abandonment upon rights acquired prior to 1913 would impair such rights. Hence, so far as this case is concerned, these rights could be lost only in accordance with the law in existence at the time of the enactment of the 1913 statute, which was by intentional abandonment.

DISTINCTION BETWEEN ABANDONMENT AND FORFEITURE

The section of the statute relating to forfeiture contains both the words "abandonment" and "forfeiture," although the two terms are entirely different in their operation.

The supreme court in the *Manse Spring* case²⁴⁷ devoted considerable attention to the fundamental distinctions between abandonment and statutory forfeiture, emphasizing the points that abandonment is the relinquishment of the right by the owner with the intention of forsaking and deserting it, whereas forfeiture is the involuntary or forced loss of the right caused by the failure of the appropriator to utilize the water throughout the period required by the statute. The element

²⁴⁵ Nev. Comp. Laws 1929, sec. 7897, as amended by Stats. 1949, ch. 83.

²⁴⁶ *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 287, 288, 289-291, 108 Pac. (2d) 311 (1940).

²⁴⁷ *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 287-288, 290-291, 108 Pac. (2d) 311 (1940). The court, at 60 Nev. 287-288, quoted from Kinney on Irrigation and Water Rights, 2d ed., vol. 2, p. 2020, sec. 1118, and Wiel on Water Rights in the Western States, 3d ed., vol. 1, p. 621, sec. 578, with respect to the distinctions between abandonment and forfeiture.

of intent, so necessary in the case of an abandonment, is not a necessary element in the case of forfeiture. On the contrary, a forfeiture may be worked directly against the intent of the owner of the right to continue in its possession and use.

The court in the *Manse Spring* case took the view that loss of a water right by forfeiture presents a much stricter and more absolute procedure than loss by abandonment; that courts will not cause the forfeiture of valuable rights when the nonuse of water was occasioned by justifiable causes, particularly with respect to rights vested prior to the enactment of the statute; and that it would seem that the circumstances preventing a loss because of nonuse should be much stronger in cases to which the forfeiture statute applies than in those to which it does not apply.

ADVERSE POSSESSION AND USE

Analogy to Adverse Holding of Land.

The Nevada Supreme Court stated:²⁴⁸

But no rule of law is more familiar than that the presumption resulting from adverse holding or user is not a grant against any particular person, but against the title under which he holds. * * * The presumption respecting the adverse user of water and the adverse holding of land stands upon the same footing, and the reason which will sustain the one will likewise uphold the other. * * *

Possibility of Acquiring Water Right by Adverse Use.

The supreme court in 1949 considered it settled that a right to use water might be acquired by adverse use prior to the enactment of the water law of Nevada.²⁴⁹ The court was not prepared to overrule a previous holding to that effect, nor to read into the water statute something that it did not find stated there even by implication.

However, the decision was made reluctantly, by a vote of two to one. The majority opinion stated (at 66 Nev. 28-29) "that adverse use is wholly unwarranted, unnecessary and clearly dangerous to the appropriation and distribution of public property." Further, the problem "requires solving in order that the water law can be made more effective, and * * * in order that a water right may not be destroyed or extensive and expensive litigation incurred by reason of adverse use or attempted use." Inasmuch as the legislature was then in session, the court specifically called the problem to its attention. Accordingly, the legislature amended the water-rights statute to include, in the section limiting the right to reasonable and economical use, a proviso to the effect that:²⁵⁰

* * * *provided*, no prescriptive right to the use of such water or any of the public water appropriated or unappropriated can be acquired by adverse user or adverse possession for any period of time whatsoever, but any such right to appropriate any of said water shall be initiated by first making application to the state engineer for a permit to appropriate the same as in this act provided and not otherwise.

²⁴⁸ *Vansickle v. Haines*, 7 Nev. 249, 283-284 (1872).

²⁴⁹ *Application of Filippini*, 66 Nev. 17, 26-27, 202 Pac. (2d) 535 (1949). The court cited *Authors v. Bryant*, 22 Nev. 242, 38 Pac. 439 (1894).

²⁵⁰ Nev. Comp. Laws 1929, sec. 7897, as amended by Stats. 1949, ch. 83. Justice Eather, who dissented in the *Filippini* case, disagreed with the majority's interpretation and construction of the term "appropriation" as used in the statutes, and believed that the policy desired had already been made by the legislature. (66 Nev. at 31-33.)

Distinguished from Appropriative Right.

The Nevada Supreme Court pointed out in the *Filippini* case that an appropriation of water is an original acquisition from the Government by diversion and use.²⁵¹ The court went on to say that no rights can be acquired against or from the Government by prescription, and hence there can be no appropriation by prescription. In order that there may be an adverse use, a superior right must be invaded. Continuing, it was said (at 66 Nev. 23) that:

✓ Hence an appropriation is a method of acquiring a right to the use of water from the government and the acquisition of a right by adverse use contemplates a right already in existence, and acquired as such by adverse use from the owner thereof. * * *

The fact that no State statute of limitation can defeat the title of the United States to its public lands was emphasized in one of the early cases.²⁵²

Elements of Prescriptive Right.

In order to establish a prescriptive right, the use of the water must have been actual, open, notorious, and not clandestine; adverse and hostile to the right of the rightful party; exclusive; continuous and uninterrupted; under a claim of right; for the full period prescribed by the statute of limitations.²⁵³

Invasion of right.—A superior right must be invaded to make a use of water adverse.²⁵⁴ To support a claim of prescription, there must be a clear violation of the right of the rightful owner, even if there is no appreciable damage.²⁵⁵ It must be such an invasion of the rights of the party against whom the right is claimed that he will have a ground of action against the intruder.²⁵⁶

Exclusive use.—No support to a claim by prescription can be derived from the use of water by junior appropriators who did not use more water than remained in the stream after deducting all of the water that was claimed by prior appropriators.²⁵⁷ Under such circumstances the use by these parties was subordinate to and entirely consistent with the prior rights of the others. A prescriptive right cannot be acquired if, during the time in which such right is claimed to have accrued, there has been an abundant supply of water in the source of supply for all other claimants.²⁵⁸

In another decision the term "exclusive" was applied to a claim of title, which must be "exclusive of any other, as one's own."²⁵⁹

²⁵¹ *Application of Filippini*, 66 Nev. 17, 22-23, 202 Pac. (2d) 535, 538 (1949).

²⁵² *Vansickle v. Haines*, 7 Nev. 249, 256, 284 (1872). The court stated that as to public lands of the United States, Congress alone can deal with the title.

²⁵³ See *Boynton v. Longley*, 19 Nev. 69, 76-77, 6 Pac. 437 (1885); *Authors v. Bryant*, 22 Nev. 242, 247, 38 Pac. 439 (1894); *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 91-92 (D. Nev., 1897).

²⁵⁴ *Application of Filippini*, 66 Nev. 17, 23, 202 Pac. (2d) 535, 538 (1949).

²⁵⁵ See *Barnes v. Sabron*, 10 Nev. 217, 247 (1875); *Brown v. Ashley*, 16 Nev. 311, 315-317 (1881).

²⁵⁶ *Authors v. Bryant*, 22 Nev. 242, 247, 38 Pac. 439 (1894); *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 92 (D. Nev., 1897); *Anderson v. Bassman*, 140 Fed. 14, 25 (N. D. Calif., 1905).

²⁵⁷ *Dick v. Bird*, 14 Nev. 161, 166 (1879).

²⁵⁸ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 91 (D. Nev., 1897). The court said that "A mere scrambling possession of the water * * * gives no prescriptive right; * * *"

²⁵⁹ *Authors v. Bryant*, 22 Nev. 242, 247, 38 Pac. 439 (1894).

Uninterrupted use.—To maintain a prescriptive right, the claimant must have had an uninterrupted enjoyment of the same during the period claimed, for the time prescribed by the statute of limitations.²⁰⁰ An actual physical interruption of the use of water prevents the creation of a title by prescription.²⁰¹ And in a case in which the adverse use of water to the injury of the complainants was resisted and interrupted by physical force until a certain year, and an appeal was made to the courts for relief in the year following, it was held that the defense of the statute of limitations could not be sustained.²⁰²

Claim of right.—The use of water by the claimant of a prescriptive right must have been made "under claim or color of right."²⁰³ The defendant's interference with the rights of others to the use of certain waters, a threat to continue such interference, and a use of such waters for the defendant's own benefit for the irrigation of lands, "which, it is inferable, were under a claim of right, could become, by the lapse of time, the foundation for an adverse right in the defendant."²⁰⁴

Statute of limitations.—The use of water claimed as the foundation of a prescriptive right must have been made throughout the period prescribed by the statute of limitations.²⁰⁵ An appropriator who resumes possession of sufficient water to irrigate his land before the statute of limitations expires does not lose his right to the use of such waters by prescription.²⁰⁶

Burden of Proof.

The rule is that:²⁰⁷

The burden of proving an adverse uninterrupted use of water, with the knowledge and acquiescence of the party having a prior right, is cast on the party claiming it. * * *

²⁰⁰ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 91-92 (D. Nev., 1897).

²⁰¹ *Authors v. Bryant*, 22 Nev. 242, 246-247, 38 Pac. 439 (1894).

²⁰² *Anderson v. Bassman*, 140 Fed. 14, 25 (N. D. Calif., 1905).

²⁰³ *Winter v. Winter*, 8 Nev. 129, 135 (1872). In *Authors v. Bryant*, 22 Nev. 242, 247, 38 Pac. 439 (1894), the court said that the use "must be held under claim of title, exclusive of any other, as one's own; * * *"

²⁰⁴ *Robison v. Mathis*, 49 Nev. 35, 43, 234 Pac. 690 (1925). See *Brown v. Ashley*, 16 Nev. 311, 315-317 (1881).

²⁰⁵ *Authors v. Bryant*, 22 Nev. 242, 246-247, 38 Pac. 439 (1894).

²⁰⁶ *Smith v. Logan*, 18 Nev. 149, 154-155, 1 Pac. 678 (1883). The findings showed that from 1861 until 1867, inclusive, an appropriator irrigated from 10 to 35 acres of land; during the years 1868, 1869, and 1870 he made no use of the water; and in 1871 and 1872 he irrigated only 5 acres. During these last 5 years another party and his predecessors had used the waters adversely to the claim of the first party. It was held that the adverse parties acquired the right to so much of the waters appropriated by the first party as he had failed to use during the statutory period, but that his resumption of use with respect to 5 acres in 1871 was sufficient to maintain his right to the possession of sufficient water to irrigate that 5 acres of land.

²⁰⁷ *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 91 (D. Nev., 1897). The Nevada Supreme Court stated, in *Boynton v. Longley*, 19 Nev. 69, 76, 6 Pac. 437 (1885), with reference to a claim of prescriptive right to discharge waste water upon the land of another: "A mere acquiescence or permission on the part of the respondent to allow the flow of the waste or surplus water in such limited quantity as did his land no injury, cannot be so construed as to give appellant a prescriptive right to increase the flow to such an extent as to damage respondent's land. * * * Appellant failed to show to the satisfaction of the court and jury that he had continuously exercised the right of flowing the waste water upon respondent's land for the period of five years without any substantial change. * * *"

Extent of Easement.

The Nevada Supreme Court has held that:²⁶⁸

The right acquired by prescription is only commensurate with the right enjoyed. The extent of the enjoyment measures the extent of the right. The right gained by prescription is always confined to the right as exercised for the full period of time required by the statute, * * *. A party claiming a prescriptive right for five years, who, within that time, enlarges the use, cannot, at the end of that time, claim the use as enlarged within that period. * * *

Equitable Relief to Prevent Vesting of Prescriptive Right.

A party is entitled to injunctive relief in a case in which there is a clear violation of his right to the use of water, which is of such a nature that by its repetition or continuance it may become the foundation of an adverse right. (See the discussion of remedies for infringement under "Protection of the appropriative right," pages 33, 34.)

ESTOPPEL

It was held in a Federal case that a plea of equitable estoppel (as well as title by prescription) must fall, where it was shown that up to 1898 the parties' adverse use of water to the injury of other parties was resisted and interrupted by physical force, and that in 1899 an action was commenced in the courts to obtain relief.²⁶⁹

Adjudication of Water Rights**NATURE OF ACTIONS****Purpose of Suit to Quiet Title.**

The main purpose of a suit to quiet title to water rights is to determine the respective rights of the parties to the use of the water.²⁷⁰ Hence, a decree that leaves the controversy undetermined and subject to future litigation defeats the purpose for which the action was brought.

A decree that is not certain and definite with respect to the quantity of water appropriated, or that does not provide a basis for ascertaining such quantity, cannot be upheld.²⁷¹

Relation to Contempt Proceeding.

The trial court has the right to enforce its decrees of adjudication of water rights by contempt proceedings.²⁷² But when many appropriators are involved, the court may find it necessary to engage the services of a watermaster and, if available for the purpose, those of the State Engineer (69 Nev. at 225-226). (See "Administration of water rights and distribution of water," pages 48, 49.)

Counsel for one of the parties in a proceeding to determine relative rights to waters of a stream system insisted that the judgment of dismissal in a contempt proceeding was *res judicata* of the issues in

²⁶⁸ *Boynton v. Longley*, 19 Nev. 69, 76, 6 Pac. 437 (1885). See also *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 91 (D. Nev., 1897).

²⁶⁹ *Anderson v. Bassman*, 140 Fed. 14, 25 (N. D. Calif., 1905).

²⁷⁰ *Pacific Live Stock Co. v. Ellison Ranching Co.*, 52 Nev. 279, 296, 286 Pac. 120 (1930).

²⁷¹ *Walsh v. Wallace*, 26 Nev. 299, 330, 67 Pac. 914 (1902).

²⁷² *McCormick v. Sixth Judicial District Court*, 67 Nev. 318, 329-330, 218 Pac. (2d) 939 (1950); 69 Nev. 214, 225, 246 Pac. (2d) 805 (1952).

the adjudication proceeding.²⁷³ However, counsel had failed to furnish the court with any authority to the effect that a water right could be adjudicated in a contempt proceeding, and the court did not believe that it was ever contemplated that a valuable property right could be adjudicated incidentally to a proceeding in which the adjudication was not the main question involved. A contempt proceeding, said the court, is a special proceeding, criminal in character. It is not an appropriate action in which to determine that the rights of parties as fixed and established by a decree of adjudication are no longer so fixed and established, or that the adjudication decree is no longer binding upon such parties.

REFERENCE TO STATE ENGINEER IN CASE OF PRIVATE SUITS

The water-rights statute provides that in any suit brought to determine water rights, all persons who claim the right to use such waters shall be made parties.²⁷⁴ When any such suit has been filed, the court is required to direct the State Engineer to furnish a complete hydrographic survey of the stream system. It is also provided that in the case of any such suit pending at the time of the enactment or thereafter commenced, the same may at any time, at the court's discretion, be transferred to the State Engineer for determination under the special statutory procedure noted immediately below.

SPECIAL STATUTORY PROCEDURE

Statutory Provisions.

A special procedure for the determination of rights to the use of water of any stream or stream system is included in the water-rights statute.²⁷⁵

The State Engineer, if he finds the facts and conditions justify it, is required to commence a determination of the relative rights to the use of water of any stream or stream system, either upon petition signed by one or more water users or upon his own motion. The proceeding begins with an examination of water supplies, diversions, and irrigated lands, and taking of proofs of appropriations filed by all claimants. Based upon these findings, a preliminary order of determination of water rights is made. The State Engineer's final order of determination, made after the hearing of objections, together with evidence taken, are filed in the appropriate district court as the basis of a civil action. Hearings are held by the court upon the exceptions. At the conclusion of the proceeding, the court enters a decree affirming or modifying the order of the State Engineer.

Upon the final determination of the relative rights to the waters of any stream system, the State Engineer issues to each person represented therein a certificate.²⁷⁶ This certificate specifies the date of priority and extent and purpose of the right so adjudicated, including, if the water is to be used for irrigation purposes, a description of the land to which the water is appurtenant.

²⁷³ *In re Barber Creek and Its Tributaries (Scossa v. Church)*, 46 Nev. 254, 259-262, 205 Pac. 518, 210 Pac. 563 (1922).

²⁷⁴ Nev. Comp. Laws 1929, sec. 7930.

²⁷⁵ Nev. Comp. Laws 1929, secs. 7905 to 7929.

²⁷⁶ Nev. Comp. Laws 1929, sec. 7936.

Character of Proceeding.

The special statutory proceeding is divided into two parts, the first of which is administrative and the second judicial. The determination made by the State Engineer has been held to be primarily administrative in character, rather than judicial.²⁷⁷ The requirement that the order of determination be filed in court as the initiation of a judicial action means that the real adjudication is made by the court; and the proceedings before the State Engineer are nothing more than the routine of preparing and filing the complaint in the court, which invests the court with jurisdiction to act (at 42 Nev. 25-26).

The character of the proceeding negatives the idea that separate controversies may be involved.²⁷⁸

Purpose and Scope of Proceeding.

The purpose of the law is to provide a workable, comprehensive procedure for the determination of relative rights on a stream system, with as little delay and expense as possible, 'as a prerequisite to control by the State of distribution of the water for the protection of all users in the exercise of their rights, so that the greatest good may be obtained from use of the water in developing the State's agricultural resources.'²⁷⁹ It was intended to bring about a speedy, summary, and effectual determination of the relative rights of various claimants to the use of water of a stream or stream system for administrative and regulative purposes,²⁸⁰ and to protect rights to the use of water, secure a just distribution, and perpetuate water rights in a public record.²⁸¹

The whole scope and purpose of the act show that it was intended to apply to all water rights, whether acquired before or after its adoption.²⁸² The principle that the determination and control of all water rights, without regard to the date of acquisition, were contemplated and required by the water law of 1913, has been consistently approved by both State and Federal courts.²⁸³

²⁷⁷ *Ormsby County v. Kearney*, 37 Nev. 314, 339-341, 142 Pac. 803 (1914); *Bergman v. Kearney*, 241 Fed. 884, 906 (D. Nev., 1917); *Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 18-19, 171 Pac. 166 (1918).

²⁷⁸ *In re Silver Creek*, 57 Nev. 232, 237, 61 Pac. (2d) 987 (1936). An adjudication under the statute is a proceeding put in motion by an agent of the State to determine the relative rights of water claimants, which interrelated rights must be adjusted as a whole in order to reach an equitable settlement.

²⁷⁹ *Ormsby County v. Kearney*, 37 Nev. 314, 336-338, 142 Pac. 803 (1914); *Bergman v. Kearney*, 241 Fed. 884, 891 (D. Nev., 1917); *Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 13-14, 171 Pac. 166 (1918); *Humboldt Land & Cattle Co. v. Allen*, 14 Fed. (2d) 650, 653 (D. Nev., 1926); *State ex rel. Hinckley v. Sixth Judicial District Court*, 53 Nev. 343, 352, 1 Pac. (2d) 105 (1931); *Ruddell v. Sixth Judicial District Court*, 54 Nev. 363, 367, 17 Pac. (2d) 693 (1933).

²⁸⁰ *Pitt v. Scrugham*, 44 Nev. 418, 427-428, 195 Pac. 1101 (1921).

²⁸¹ *Humboldt Land & Cattle Co. v. District Court*, 47 Nev. 396, 407, 224 Pac. 612 (1924).

²⁸² *Ormsby County v. Kearney*, 37 Nev. 314, 352-353, 142 Pac. 803 (1914).

²⁸³ *Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 13-14, 171 Pac. 166 (1918); *Bergman v. Kearney*, 241 Fed. 884, 890-892 (D. Nev., 1917); *Humboldt Land & Cattle Co. v. Allen*, 14 Fed. (2d) 650, 654 (D. Nev., 1926). In the last cited case, the Federal court stated that more than 90 percent of the water rights on the Humboldt River system determined in the proceeding by the State Engineer were found to have been acquired prior to 1913, and that the holders of such rights were entitled to more than 95 percent of the total

Constitutionality of Procedure.

During the year following the enactment of the law of 1913, the Nevada Supreme Court held, in *Ormsby County v. Kearney*,²⁸⁴ that the provisions of the act with respect to an investigation and determination of water rights by the State Engineer were valid, but with the reservation that when questions of the constitutionality of particular features arose, it would then be time to consider them.

A provision then in the law, purporting to make the determination of the State Engineer conclusive, subject to the right of appeal, was believed by two of the three justices in the *Ormsby County* case to be unconstitutional.²⁸⁵ The statute was amended in 1915 to eliminate the objectionable provision and to prescribe the procedure now extant, which requires the State Engineer's order of determination to be filed in court as the basis of a civil action. As so amended, these provisions were held valid by both Federal and State courts.²⁸⁶ The Federal District Court stated (at 241 Fed. 906) that:

The power exercised in the ascertainment of water rights for administrative purposes only is not judicial power in the constitutional sense; nor, insofar as the engineer is authorized to take evidence and determine water rights for the final adjudication of the titles of various claimants among themselves, is he vested with judicial power. What he does is merely preliminary, the initial step in a proceeding which culminates in a final decree by the district court; thus it is not the engineer, but the court, which exercises the judicial power of the State of Nevada.

Certain sections of the act relating to contests during the administrative determination by the State Engineer were held unconstitutional by the Nevada Supreme Court because they attempted to give judicial powers to the State Engineer to hear and determine contests involving not relative but vested rights.²⁸⁷ The significant sections in this group were then amended, and as amended were held constitutional by the supreme court as not constituting an exercise of judicial power on the part of the State Engineer.²⁸⁸

The State and Federal courts have been in agreement that the provisions of the water law do not contemplate the deprivation of property without due process of law.²⁸⁹ The supreme court has emphasized the rule that no person has a vested right in any rule of law, nor in any

water flow of the system. Consequently, said the court, if the water law could apply only to rights initiated after its enactment, then as to the Humboldt River and probably as to every other considerable stream in the State, it would be utterly useless. "Such a construction of section 84 would completely defeat the objects and purposes of the law." The courts will not force a construction of a statute that would utterly destroy it.

²⁸⁴ *Ormsby County v. Kearney*, 37 Nev. 314, 351, 142 Pac. 803 (1914).

²⁸⁵ *Ormsby County v. Kearney*, 37 Nev. 314, 355-392, 142 Pac. 803 (1914).

²⁸⁶ *Bergman v. Kearney*, 241 Fed. 884, 906, 908-910 (D. Nev., 1917); *Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 14-26, 171 Pac. 166 (1918).

²⁸⁷ *Pitt v. Scrugham*, 44 Nev. 418, 427-428, 195 Pac. 1101 (1921).

²⁸⁸ *Humboldt Land & Cattle Co. v. District Court*, 47 Nev. 396, 408, 224 Pac. 612 (1924).

²⁸⁹ *Ormsby County v. Kearney*, 37 Nev. 314, 339, 142 Pac. 803 (1914); *Bergman v. Kearney*, 241 Fed. 884, 908-910 (D. Nev., 1917); *Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 14-22, 171 Pac. 166 (1918); *Humboldt Land & Cattle Co. v. District Court*, 47 Nev. 396, 403-407, 224 Pac. 612 (1924); *Humboldt Land & Cattle Co. v. Allen*, 14 Fed. (2d) 650, 653 (D. Nev., 1926).

particular mode of procedure;²⁹⁰ that due process does not require a judicial proceeding; and that in the operation of the law the right to have the matter finally adjudicated by the courts is not lost.²⁹¹ And nowhere, in the opinion of that court, "does the law contemplate or suggest the taking of private property for public use or any other use."²⁹²

After having considered and passed upon the validity of the water law of Nevada in various controversies, the supreme court concluded that the law is in all respects constitutional.²⁹³ The court said that:²⁹⁴

The law meets every demand for a full, fair, and just determination of the rights of every water user. * * * The law is constitutional, * * *

In a decision rendered in 1952,²⁹⁵ the court cited in a footnote a long list of cases to support the statement that "on numerous occasions" a large portion of the law "has been analyzed and passed upon section by section."

Force and Effect of State Engineer's Determination.

The ultimate findings of the State Engineer in connection with a determination of water rights are entitled to great respect, and in practice are not often disputed; but they do not take from the court the power to grant relief to a party whose rights the State Engineer may have infringed.²⁹⁶ It is necessary for the court, at the conclusion of proceedings for the adjudication of water rights, to make findings and to enter a decree of adjudication. The findings so made are entitled to the presumption that they are correct and that they support the decree.²⁹⁷

Pleadings.

The statute provides that the order of determination made by the State Engineer and the statements or claims of the claimants and exceptions made to the order of determination, shall constitute the pleadings, and that there shall be no other pleadings in the case.²⁹⁸

²⁹⁰ *Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 31, 171 Pac. 166 (1918); *Humboldt Land & Cattle Co. v. District Court*, 47 Nev. 396, 404, 224 Pac. 612 (1924).

²⁹¹ *Ormsby County v. Kearney*, 37 Nev. 314, 339-340, 142 Pac. 803 (1914). At 37 Nev. 339, the court stated: "It cannot, we think, be said that the provisions of the act contemplate the deprivation of property without due process of law. It should, we think, be assumed that water claimants or appropriators will present their claims according to their respective rights, and it must be presumed, until the contrary appears, that a public officer will perform his duties."

²⁹² *Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 28, 171 Pac. 166 (1918). This was in answer to a contention that the law was unconstitutional as being in violation of the provision of the State constitution prohibiting the taking of private property for public use without just compensation.

²⁹³ *Humboldt Land & Cattle Co. v. District Court*, 47 Nev. 396, 408, 224 Pac. 612 (1924). The legislature had authority to enact section 21, ch. 140, of the 1913 statute: *Mexican Dam & Ditch Co. v. District Court*, 52 Nev. 426, 431, 289 Pac. 303 (1930).

²⁹⁴ *In re Humboldt River*, 49 Nev. 357, 363-364, 246 Pac. 692 (1926).

²⁹⁵ *McCormick v. Sixth Judicial District Court*, 69 Nev. 214, 217-218, 246 Pac. (2d) 805, 807 (1952).

²⁹⁶ *Scossa v. Church*, 43 Nev. 407, 411, 187 Pac. 1004 (1920).

²⁹⁷ *In re Barber Creek and Its Tributaries (Scossa v. Church)*, 46 Nev. 254, 259, 205 Pac. 518, 210 Pac. 563 (1922).

²⁹⁸ Nev. Comp. Laws 1929, sec. 7922.

It is settled, according to the Nevada Supreme Court, that the water law and all proceedings taken under it are special in character and so the statement concerning what shall constitute the sole pleadings means just what it says.²⁹⁹ Hence, after the matter of determination of rights on a stream system has been heard and argued, and has been submitted for consideration and determination, the district court has no authority to entertain a petition filed by certain water users and to hear the same over the objections of others.

Appeals.

Appeal from the decree of adjudication may be taken to the supreme court by the State Engineer, or by any party in interest.³⁰⁰

The only appeal allowed by law in a statutory adjudication proceeding is an appeal from the decree of the court affirming or modifying the order of the State Engineer.³⁰¹ An appeal will not lie in such a proceeding until the decree of the court is entered.³⁰² The right of appeal in a water adjudication proceeding exists solely by virtue of the statute, and appeals are limited to the plan therein outlined to protect the rights of the parties.³⁰³

After the filing of an order of determination by the State Engineer, and the entering by the State Engineer upon the task of executing the order of determination pending the court adjudication, parties to the suit do not have the right, during the pendency of the adjudication proceedings, to obtain an injunction against the State Engineer restraining him from diverting water except under certain circumstances and hence they have no right to appeal to the supreme court from an order of the court denying application for the injunction.³⁰⁴

Administration of Water Rights and Distribution of Water

DUTIES OF STATE ADMINISTRATIVE OFFICIALS

The State Engineer is directed by the statute to divide the State into water districts, as the necessity therefor arises, for the purpose of supervision of the water on the part of the State.³⁰⁵ It is the duty of the State Engineer to divide or cause to be divided the waters of

²⁹⁹ *Ruddell v. Sixth Judicial District Court*, 54 Nev. 363, 365-368, 17 Pac. (2d) 693 (1933).

³⁰⁰ Nev. Comp. Laws 1929, sec. 7923.

³⁰¹ *Scossa v. Church (In re Barber Creek)*, 43 Nev. 403, 405, 182 Pac. 925 (1919). The order of determination of the State Engineer is not an appealable order, and an appeal direct to the supreme court from such order is irregular and of no effect.

³⁰² *In re Humboldt River (Taylor v. Ruddell)*, 54 Nev. 115, 119, 7 Pac. (2d) 813 (1932). In this case an attempted appeal was taken from a judgment rendered prior to the entering of the final decree, and was held not effective.

³⁰³ *In re Silver Creek*, 57 Nev. 232, 238, 61 Pac. (2d) 987 (1936). Provisions concerning service of notice of appeal were held to be mandatory in form and jurisdictional in effect.

³⁰⁴ *In re Humboldt River*, 49 Nev. 357, 364-365, 246 Pac. 692 (1926). The parties have the option of obtaining a stay of operation by the State Engineer, upon the filing and approval of a stay bond, which is accorded by the statute: Nev. Comp. Laws 1929, sec. 7929. Inasmuch as the procedure under the statute is special in character, the parties are limited to the adequate plan therein outlined to protect their rights, and cannot ignore it and resort to a method of procedure recognized in general equity practice.

³⁰⁵ The provisions relating to the administration of water under the State Engineer are contained in Nev. Comp. Laws 1929, secs. 7931.01 to 7943.

the natural sources of supply in the State among the claimants of water rights according to their several rights. Water commissioners for any stream system or water district subject to regulation and control by the State Engineer are appointed by the Governor, on the recommendation of the State Engineer.

Distribution of water by the State Engineer and water commissioners, after the filing of an order of determination in court in a special statutory proceeding, is under the supervision and control of the court. The State Engineer and other administrative officials charged with distributing the waters are at all times to be deemed officers of the court in making the distribution pursuant to such order of determination or pursuant to a decree of the court.³⁰⁶

Procedure is also provided for the administration of water rights, under the State Engineer, pursuant to a final decree entered in a suit other than one brought under the special statutory procedure, to be effected by an order of the court that entered the decree, after the filing of a petition by one or more of the users of water under the decree and hearing of objections.³⁰⁷

The supreme court has held that the use of this authorized procedure is within the discretion of the court that entered the decree. After noting that prior to the enactment of this legislation there had been no statutory authority under which the court could have directed the State Engineer to administer the decree entered in a private suit, it was said that:³⁰⁸

The 1951 statute making that officer available to the court, left it entirely within the discretion of the court whether it should avail itself of his services, and only if one or more of the parties requested such procedure and the court thought it to be for the best interests of the water users after notice and hearing on such petition.

CONSTITUTIONALITY OF STATUTE

The Nevada Supreme Court has held that the statutory provisions for administration of water rights and distribution of water pursuant to statutory adjudications are clearly administrative, and that authorization of the control of distribution of water under the direction of the State Engineer is valid and within the lawful exercise of the police power of the State.³⁰⁹

The statute authorizes any person feeling himself aggrieved by any order or decision of the State Engineer or other administrative officer, relating to the administration of determined rights or the acquisition of appropriative rights, to have the same reviewed by a proceeding

³⁰⁶ Nev. Comp. Laws 1929, sec. 7926.

³⁰⁷ Nev. Comp. Laws 1929, Supp. 1943-1949, sec. 7931.01, as amended by Stats. 1951, ch. 121. The court may order the State Engineer to make a hydrographic survey and report, so as to enable the court to determine whether or not administration of the decreed rights by the State Engineer would be in the best interest of the water users. In the event that the court determines the matter affirmatively, the court "shall by its judgment" direct the State Engineer to make the distribution of the waters in strict accordance with the decree; the State administrative officials so engaged therein to be deemed officers of the court while engaged in such service.

³⁰⁸ *McCormick v. Sixth Judicial District Court*, 60 Nev. 214, 226, 246 Pac. (2d) 805, 811 (1952).

³⁰⁹ *Ormsby County v. Kearney*, 37 Nev. 314, 338, 351, 142 Pac. 803 (1914); *Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 15, 171 Pac. 166 (1918).

for that purpose in a designated court.³¹⁰ A Federal court has held that the State water law, particularly the above-cited section, does not deprive a water user of any constitutional rights, and that a complaint that it does so fails to set out a substantial Federal question.³¹¹

Excepting in a case in which it is sought to take away personal rights or property rights of a citizen, the law presumes the validity and regularity of the official acts of public officers, such as the State Engineer, within the line of their official duty.³¹² The presumption that the officials have performed and are performing their duties in conformity with the statute, while recognized by the courts, is disputable, its effect being to throw the burden of proof on those who allege the contrary.³¹³

The statutory provision³¹⁴ prescribing a special proceeding for bringing under State administrative control water-rights decrees issued in private suits—that is, suits other than those forming a part of the special statutory adjudication procedure—has been held constitutional by the supreme court, under an attack on several grounds.³¹⁵

SCOPE OF ADMINISTRATIVE PROCEDURE

The procedure for the administration of water rights applies to all determined rights, regardless of the dates of their acquisition, whether acquired before or after the enactment of the statute.³¹⁶ The court stated that:

The whole scope and purpose of the act show that it was intended to apply to all water rights, whether acquired before or after its adoption. There would be little or no use in attempting state control over a stream or stream system unless all water rights were brought under that control. The greater portion of the water rights upon the streams of the state were acquired before any statute was passed prescribing a method of appropriation. * * *

The State Engineer is not obliged to administer and enforce every adjudication of water rights in the State, regardless of whether or not the adjudication was made in conformity with the statute.³¹⁷ His duties are of a special nature, plainly restricted to determinations of water rights governed by the statute, and the courts cannot extend

³¹⁰ Nev. Comp. Laws 1929, sec. 7961.

³¹¹ *Humboldt Lovelock Irr. Light & Power Co. v. Smith*, 25 Fed. Supp. 571, 575 (D. Nev., 1938). The court said: "It is clear from a reading of the provision of the statute in question that it does not deprive the plaintiff of due process of law to enforce any rights it may have, which rights are of a nature subject to the police power of the state and, in the exercise of that power, may appropriately provide for a summary hearing which, however, does not deprive of a full opportunity to be heard before a court of competent jurisdiction with right of appeal to the Supreme Court."

³¹² *Knox v. Kearney*, 37 Nev. 393, 400, 142 Pac. 526 (1914).

³¹³ *Humboldt Land & Cattle Co. v. Allen*, 14 Fed. (2d) 650, 655 (D. Nev., 1926).

³¹⁴ Nev. Comp. Laws 1929, Supp. 1943-1949, sec. 7931.01, amended Stats. 1951, ch. 121.

³¹⁵ *McCormick v. Sixth Judicial District Court*, 69 Nev. 214, 220-230, 246 Pac. (2d) 805, 808-812 (1952).

³¹⁶ *Ormsby County v. Kearney*, 37 Nev. 314, 352-353, 142 Pac. 803 (1914). See also the discussion of scope and purpose of proceeding under "Special statutory procedure," p. 45.

³¹⁷ *Pacific Live Stock Co. v. Malone*, 53 Nev. 118, 123-127, 294 Pac. 538 (1931).

them to adjudications in equity actions. It was after the rendering of this decision that the legislature provided the special procedure (see "Duties of State administrative officials," pages 48, 49) by which water-right decrees issued in private suits could be brought within the State administrative system.

The waters of a stream system can be properly and legally distributed by the administrative officers only when done in accordance with the terms of the order of determination, or pursuant to a decree rendered in a suit governed by the statutory provisions.³¹⁸

Interstate Matters

APPROPRIATION IN ONE STATE FOR USE IN ANOTHER STATE

The water-rights statute provides that no permit for the appropriation of water shall be denied because of the fact that the point of diversion, or any portion of the works, or the place of intended use, or lands to be irrigated or any part thereof, may be situated in any other State, when such State authorizes the diversion of water therefrom for use in Nevada.³¹⁹

A statute enacted in 1951 reads in part as follows:³²⁰

Section 1. It is hereby declared to be contrary to the economic welfare and against the public policy of the State of Nevada to change the place of use or transfer, or to permit a change of the place of use or transfer of water or water rights for use beyond the borders of the State of Nevada, as to any water heretofore or hereafter appropriated and beneficially used in the State of Nevada for irrigation or other purposes, and no permit or authorization shall be issued or given for such change of use or transfer.

Sec. 2. This act shall not apply to nor is it intended to affect waters or water rights as to such waters as shall have heretofore been and which now are diverted in Nevada and which were heretofore and now are used for domestic or industrial purposes beyond the borders of the State of Nevada.

RIGHTS TO THE USE OF WATER OF INTERSTATE STREAMS

The rights of Nevada appropriators to the use of waters of interstate streams have been involved in several controversies in the Federal courts, and the jurisdiction of the courts has been considered and determined therein.

Relative Rights of Claimants in Different States.

Carson River.—A suit was brought in the Federal court for the Northern District of California, by users of water from the West Fork of the Carson River in Nevada, against users of water from the same stream within California, to determine the respective rights of use.³²¹ The court held that the equal right of inhabitants of each State to the waters of an interstate stream must always be recognized, and that persons on one side of a State boundary line have no right to divert waters of the stream to the injury of those on the other side of the line.

³¹⁸ *State ex rel. Hinckley v. Sixth Judicial District Court*, 53 Nev. 343, 353-354, 1 Pac. (2d) 105 (1931).

³¹⁹ Nev. Comp. Laws, sec. 7986.

³²⁰ Nev. Stats. 1951, ch. 325, p. 543. Sections 3, 4, and 5 deal with separability, repeals, and effective date.

³²¹ *Anderson v. Bassman*, 140 Fed. 14, 15, 20-21 (N.D. Calif., 1905).

Walker River.—The Federal Circuit Court of Appeals for the 9th Circuit said in another case that:³²²

The right of appropriation is recognized in law, which means the right of diversion and use. It is the right, not to any specific water, but to some definite quantity of that which may at the time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a state line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired although the stream is interstate and not local to one state; nor will the mere fact that the stream has its source in one state authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another state. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the state where made, is protected in such right as against subsequent appropriators, although the latter withdraw the water within the limits of a different state. * * *

Jurisdiction of Court.

Carson River.—The jurisdiction of the court was challenged by the California defendants in the suit relating to Carson River.³²³

The court held that it had jurisdiction to determine the rights of the complainants to a specific quantity of the waters of the stream, as against an objection that in doing so it was being asked to pass upon titles to real property in another State.

Walker River.—Another interstate controversy, relating to the waters of Walker River, which rises in California and flows into Nevada, began in the Federal circuit court for the District of Nevada and went through the circuit court of appeals to the Supreme Court.

The circuit court held that an action brought by an appropriator to enjoin a wrongful diversion, in another State, of waters naturally flowing down the river, is an action transitory in its nature, so that a court that acquires jurisdiction of the person of the defendant has jurisdiction to try the case.³²⁴ Where the necessary parties are before a court of equity it is immaterial that the *res* of the controversy is beyond its territorial jurisdiction. The court has the power to compel the defendant to do all things necessary to give full effect to the decree against him.

Subsequently the defendant in this case organized a company to which he conveyed the water rights and lands, the ownership of which he had set up as a defense in his answer, and commenced two suits in the superior court of Mono County, California, the issues being apparently the same as those then in litigation in the Federal court. The Federal court, in another opinion, reasserted its conclusion that it had obtained jurisdiction, and granted an injunction against the prosecution of the suits in the California court.³²⁵

The Circuit Court of Appeals for the 9th Circuit affirmed the decision of the circuit court.³²⁶ It was held that although the Nevada court

³²² *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 18 (C.C.A. 9th, 1907).

³²³ *Anderson v. Bassman*, 140 Fed. 14, 20-21 (N.D. Calif., 1905).

³²⁴ *Miller & Lux v. Rickey*, 127 Fed. 573, 580-581 (D. Nev., 1904).

³²⁵ *Miller & Lux v. Rickey*, 146 Fed. 574, 581-588 (D. Nev., 1906).

³²⁶ *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 15-22 (C.C.A. 9th, 1907).

was not authorized or empowered to settle the rights of the parties in California, nevertheless it might look under the defensive answer to the appropriation in California, to ascertain and determine whether such appropriation was prior and paramount to the complainant's appropriation, and if not, then to settle and quiet complainant's title and rights thereto. After discussing the right of appropriation of water of an interstate stream, and the protection to be afforded such right regardless of State boundary lines (quoted page 52, under "Relative rights of claimants in different States"), the court said (at 152 Fed. 18):

So that, in determining the right of appropriation in one state, it may become necessary to ascertain what are the rights in another, and a mere assertion of rights in the courts of the latter state cannot operate to preclude the courts of the former from exercising cognizance over the entire subject-matter before them. * * *

The "firmly established" rule that the court first acquiring jurisdiction of the subject matter of the suit, and of the parties, is entitled to maintain it until the controversy ends and the rights of the parties are fully administered, without interference from and to the exclusion of the other, was reaffirmed. Further (at 152 Fed. 18):

In the maintenance of such jurisdiction, it is a common remedy to invoke the injunctive process, not against the court offending, but against the parties, to restrain them from proceeding therein in antagonism to the jurisdiction first acquired; and the remedy is available either before or after judgment or decree, either to enable the court to render an effective adjudication, or to command full obedience to its mandates. * * *

The United States Supreme Court affirmed the decisions of the lower courts.³²⁷ The Court stated (at 218 U. S. 262) that:

Full justice cannot be done and anomalous results avoided unless all the rights of the parties before the court in virtue of the jurisdiction previously acquired are taken in hand. To adjust the rights of the parties within the State requires the adjustment of the rights of the others outside of it. Of course, the court sitting in Nevada would not attempt to apply the law of Nevada, so far as that may be different from the law of California, to burden land or water beyond the state line, but the necessity of considering the law of California is no insuperable difficulty in dealing with the case. Foreign law often has to be ascertained and acted upon, and one court ought to deal with the whole matter.

We are of opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seized should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the States. * * *

Salmon River and Goose Creek.—Two decisions were rendered in 1917 by the Federal Circuit Court of Appeals, 9th Circuit, with respect to the same defendant in suits to determine conflicting water rights on streams rising in Nevada and flowing into Idaho.³²⁸ The court referred to its decision rendered in *Rickey Land & Cattle Co. v. Miller*

³²⁷ *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 261-263 (1910).

³²⁸ *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 25-29 (C.C.A. 9th, 1917), relating to Salmon River; *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 Fed. 30, 35 (C.C.A. 9th, 1917), relating to Goose Creek. Questions relating to the extent to which the judgment and decree of a court exercising jurisdiction in one State may become operative in another State are discussed chiefly at 245 Fed. 25-29.

& *Lux* (page 53), in which it had determined that such a suit is essentially one to quiet title to real property, and is local, not transitory. When a party has been personally served and appears in court, the court may compel such party to act in relation to property not within its jurisdiction; its decree does not operate directly upon such property nor affect the title, but is made effective through coercion of the party. Even though the *res* may not be affected by the direct operation of the decree where it is beyond the territorial jurisdiction of the court, nevertheless the court may, acting *in personam*, coerce action respecting it. Hence the Federal court having jurisdiction in Idaho had "power in ample scope" to protect Idaho water users from a diversion of water within Nevada by a party to the action that would conduce to the injury of the Idaho appropriators.

DIFFUSED SURFACE WATERS

Characteristics

A distinction is made in law between a regular flowing stream of water which at certain seasons is entirely dry, and those occasional bursts of water which, in times of freshets or melting of ice and snow, descend from high land and inundate the country.³²⁹ A stream of water supplied at certain seasons of the year from snows and from springs adjacent to the bed and banks of the channel in which the stream flows, constitutes a watercourse as distinguished from water flowing through hollows, gulches, or ravines only in times of rain or melting snow.

Rights of Drainage

The Nevada Supreme Court stated in 1879 that the authorities declare that the owner of an upper tract of land has an easement in the lower tracts to the extent of the natural flow of water from the upper to and upon the lower tracts of land.³³⁰ This rule and its limitations were further expounded several years later, as follows:³³¹

As to the flow of water caused by the fall of rain, the melting of snow, or natural drainage of the ground, the prevailing doctrine is that when two tracts of land are adjacent and one is lower than the other, the owner of the upper tract has an easement in the lower land to the extent of the water naturally flowing from the upper land to and upon the lower tract, and that any damage that may be occasioned to the lower land thereby, is *damnum absque injuria*. * * * But this rule—this expression of the law—only applies to waters which flow naturally from springs, from storms of rain or snow, or the natural moisture of the land. Whenever courts have had occasion to discuss this question they have generally declared that the servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man. * * *

The foregoing statement was made in a controversy in which the parties were farmers, engaged in the ordinary cultivation of their respective lands by artificial irrigation. The point decided by the court was that the upper landowner, while having the undoubted right to make a reasonable use of the water for irrigation, "must so use, manage, and control it as not to injure his neighbor's land." (19 Nev. at 74.)

³²⁹ *Barnes v. Sabron*, 10 Nev. 217, 236-237 (1875).

³³⁰ *Blaisdell v. Stephens*, 14 Nev. 17, 23 (1879).

³³¹ *Boynton v. Longley*, 19 Nev. 69, 72-73, 6 Pac. 437 (1885).

SALVAGED AND DEVELOPED WATERS

Salvaged Waters

The prior appropriator of water of a stream is entitled to have the stream flow in its natural course to his headgate, and is not to be deprived of its use for the benefit of a later claimant upstream, "because the latter would have a greater quantity of water, and consequently more benefit, and would save the seepage and evaporation occasioned by the flow further down to the lands of the earlier settler."³³² The court suggested, however, that the upstream junior appropriator would have the right to salvage water from the stream, thus:

If waste by seepage and evaporation can be prevented by draining swamps and depressions or by substituting ditches, flumes, or pipes for wide, sandy and numerous channels, or by other means, let this desired improvement and economy be at the expense of the later claimant, who is desirous of utilizing the water thereby to be saved; or at least without detriment to existing rights, whether up or down the stream.

Developed Waters

Developed waters are the property of the persons who develop them.³³³ Such waters entered a tunnel on public land of the United States from three sources: (1) Drainage of adjacent land; (2) pumping from mines; and (3) waters discharged into the tunnel after being used in the machinery. It was held that such a stream is artificial and temporary, not a natural stream, and that the waters are not subject to appropriation. The court said (at 26 Nev. 295) that:

Such waters are not like waters running in streams on the public domain of the United States. They are produced by the capital, labor and enterprise of those developing them, and by such developing they become the property of those engaged in the enterprise.

WASTE AND RETURN WATERS

Waste Waters

CHARACTERISTICS

Waste water is stated by the Nevada Supreme Court to consist of surplus water running off from irrigated ground, not consumed by the process of irrigation, or which the irrigated land would not take up.³³⁴ Water seeping from irrigated land onto the adjoining land of another person was held subsequently to be waste water as so defined.³³⁵

RIGHTS OF USE

Users of Original Flow.

So long as waste water exists upon the lands of those who have been using the original flow, it is the property of such persons.³³⁶ Such landowners may consent to the acquirement of rights therein by other persons upon their own property and in ditches constructed on their own property for the purpose of conveying such rights to

³³² *Tonkin v. Winzell*, 27 Nev. 88, 99-100, 73 Pac. 593 (1903).

³³³ *Cardelli v. Comstock Tunnel Co.*, 26 Nev. 284, 293-295, 66 Pac. 950 (1901).

³³⁴ *Ryan v. Gallio*, 52 Nev. 330, 344, 286 Pac. 963 (1930).

³³⁵ *In re Bassett Creek and Its Tributaries*, 62 Nev. 461, 465-466, 155 Pac. (2d) 324 (1945).

³³⁶ *Bidleman v. Short*, 38 Nev. 467, 471, 150 Pac. 834 (1915).

the lands of such other parties. But without the landowner's consent, such water is not subject to appropriation by anyone else.

The rights of the owner of land from which waste water flows—that is, the users of the original flow—are not subject to any rights of use of the waste water acquired by persons after the waste water has left the land of origin. That is to say, the owner of the land of origin is not required "to continue or maintain conditions so as to supply the appropriation of waste water at any time or in any quantity, when acting in good faith."³³⁷ The user of the waste water does not become vested with any control of the irrigation ditches or of the water flowing therein on the land of origin. The original landowner cannot be compelled to continue wasting water for the benefit of any claimant of the waste water flowing from his land.³³⁸

Users of Waste Water.

One who takes waste water that has escaped from the lands of others, or is being conveyed therefrom in ditches, does not become vested with any control over the ditches of the upper owner or of the water flowing therein, nor can he require the owner to continue or to maintain conditions so as to supply the appropriation of waste water at any time or in any quantity, when acting in good faith.³³⁹ No permanent right can be acquired to have the discharge of waste water kept up, either by appropriation or by prescription, estoppel, or acquiescence in its use while it is escaping, unless some element other than the mere use of the water by the lower claimant has entered into the situation.

The right that a claimant to the use of waste water does acquire was thus summarized by the Nevada Supreme Court:³⁴⁰

These authorities are all to the effect that a claimant to waste water acquires a temporary right only to whatever water escapes from the works or lands of others, and which cannot find its way back to its source of supply; that such a use of the water does not carry with it the right to any specific quantity of water; nor the right to interfere with the water flowing in the ditches or works of others lawfully appropriating it. * * *

Appropriability of Waste Water.

Waste waters are not subject to appropriation so as to establish a permanent right therein, as in the case of an appropriation of the waters of a natural stream.³⁴¹ Waste water is subject to capture and use, but that is the limit and extent of the right, and such water is not subject to appropriation under the statutory procedure relating to the appropriation of waters of watercourses.³⁴²

One who claims an appropriation of waste water flowing away from the lands of another is in no position to complain that the upper landowner did not so manage his water supply as to permit water to

³³⁷ *Ryan v. Gallio*, 52 Nev. 330, 344-345, 286 Pac. 963 (1930).

³³⁸ *In re Bassett Creek and Its Tributaries*, 62 Nev. 461, 466, 155 Pac. (2d) 324 (1945).

³³⁹ *Ryan v. Gallio*, 52 Nev. 330, 344-345, 286 Pac. 963 (1930); *In re Bassett Creek and Its Tributaries*, 62 Nev. 461, 466, 155 Pac. (2d) 324 (1945).

³⁴⁰ *Ryan v. Gallio*, 52 Nev. 330, 344, 286 Pac. 963 (1930).

³⁴¹ *Bidleman v. Short*, 38 Nev. 467, 470, 150 Pac. 834 (1915).

³⁴² *Ryan v. Gallio*, 52 Nev. 330, 344, 345-348, 286 Pac. 963 (1930); *In re Bassett Creek and Its Tributaries*, 62 Nev. 461, 469, 155 Pac. (2d) 324 (1945).

waste or escape from his land at any time or in any quantity. The court stated in *Ryan v. Gallio* (at 52 Nev. 345-346) that:

His taking and use of the water made up from the defendant's irrigation system did not constitute an appropriation as that term is used in our statutes, as he acquired no such usufruct right in the water as to entitle him to compel the continuation of the condition furnishing him with water. * * * His taking and use of such water did not impose upon the owner of the ditch permitting the waste or escape of the water to cause it to be wasted or to require the continuance of its flow * * *, or prevent the owner of the land from draining it in such manner as to cut off the flow from the plaintiff. * * *

Hence the waste-water claimant had no valid appropriation of the waters of the watercourse from which the original flow had been diverted, regardless of the fact that he had obtained from the State Engineer a certificate of appropriation. In view of the fact that his claim related only to the waste water, the certificate of appropriation availed him nothing.

Abandonment of Waste Water.

Conclusive evidence of abandonment of waste water was held to have been established in a case in which the water was discharged from the works of the user for the purpose of getting rid of it, and left to find its way to the natural level of the country, without intention of reclaiming the waste water or exercising any control other than to direct the flow in such a way that it would do no injury to others.³⁴³ Inasmuch as such waters had been abandoned, a purported lease of the waters for a valuable consideration gave no rights to the lessee by reason of the lease, because nothing could pass by a lease of abandoned waters.

DISPOSAL OF WASTE WATER

Upper landowners who are entitled to irrigate their lands under appropriative rights may do so by use of the water under reasonable methods of irrigation, under which they must so use and control the water as not to injure the lands of their neighbors.³⁴⁴

The Nevada Supreme Court stated in 1921 that:³⁴⁵

Reaffirming the rule of the civil law as heretofore recognized by this court, we are of the opinion that, while the upper landowner has the undoubted right to make a reasonable use of water for irrigation, he must so use, manage, and control it as not to injure his neighbor's land. "*Sic utere tuo ut alienum non laedas.*" * * *

³⁴³ *Schulz v. Swecny*, 19 Nev. 359, 360-362, 11 Pac. 253 (1886).

³⁴⁴ *Blaisdell v. Stephens*, 14 Nev. 17, 23-24 (1879); *Boynton v. Longley*, 19 Nev. 69, 72-74, 76-77, 6 Pac. 437 (1885). In *Blaisdell v. Stephens*, it was held that an upper landowner who for the prescriptive period had enjoyed the privilege of running the waste water, from his own irrigation, upon lower lands, did not thereby acquire an easement to run such waste water in such unreasonable or unnatural quantities as to damage the property of the lower owners. In *Boynton v. Longley*, it was held that a mere acquiescence or permission on the part of the lower landowner, to allow the flow of waste water in such limited quantity as did his land no injury, could not be so construed as to give the upper landowner a prescriptive right to increase the flow to such an extent as to damage the lower land.

³⁴⁵ *Johnston v. Rosaschi*, 44 Nev. 386, 395, 194 Pac. 1063 (1921).

Return Waters

The effect of return flow from irrigation upon downstream water rights was considered in a controversy over the waters of an interstate stream.³⁴⁶ Of a quantity of water to which the upstream appropriator had the prior right, about two-thirds found its way back into the stream by reason of percolation. Use of the water by the upstream prior appropriator was confined by the court decree to the locality in which it was being used at the time the downstream appropriation was made, the junior appropriator being entitled to a continuance of conditions then existing.

SPRING WATERS

Property Rights in Springs and Their Importance

A Federal court stated in 1938 that:³⁴⁷

We may assume that a right in or to a spring, whether the spring is upon land of the vendor or upon the public domain, is real property. Such a right, particularly for stock watering purposes for stock grazing upon the public domain, may be held by more than one individual or interest although usually but one interest controls. Because of natural conditions particularly, an arid mountainous region covering the major portion of the state's areas of more than 100,000 square miles, the state has recognized and provided for the protection of stockmen who have been first to make use of springs and small water channels to enable them to graze their live stock in adjacent regions which, with the possible exception of mining, is not adaptable to any other use. * * *

Appropriation of Spring Waters

The water-rights statute provides that the water "of all sources of water supply within the boundaries of the State, whether above or beneath the surface of the ground," belongs to the public and is subject to appropriation for beneficial use.³⁴⁸ This applies to spring water, rights to the beneficial use of which may be acquired only by appropriation, the settled law of the State.³⁴⁹

SOURCE OF SPRING

The Nevada Supreme Court held in an early case that the owner and appropriator of a spring fed by percolating waters on the land of another, could not enjoin interference with the source of supply on the other's land, owing to the fact that the absolute use of percolating waters belonged to the owner of the land on which they were found.³⁵⁰ The rule relating to percolating waters so stated in this decision has been changed by statute, so this case now is probably only of historical importance.

SPRING AS SOURCE OF WATERCOURSE

Springs constituting the source of a creek were held subject to appropriative rights established on the creek, even though the waters

³⁴⁶ *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 28-29 (C.C.A. 9th, 1917).

³⁴⁷ *Adams-McGill Co. v. Hendrix*, 22 Fed. Supp. 789, 791 (D. Nev., 1938).

³⁴⁸ Nev. Comp. Laws 1929, secs. 7890 and 7891.

³⁴⁹ *In re Manso Spring and Its Tributaries*, 60 Nev. 280, 286, 108 Pac. (2d) 311 (1940).

³⁵⁰ *Mosier v. Caldwell*, 7 Nev. 363, 366-367 (1872).

from the springs flowed underground in unknown courses part of the way to the creek.³⁵¹ The supreme court stated in 1913 that:³⁵²

Whatever may be the law respecting a spring from which no water flows, there can be no question as to the right to appropriate water flowing in a natural water-course, the source of which is a spring. * * *

Notwithstanding statements in some of the earlier cases concerning sources of spring waters and rights to the use of springs from which water does not flow, there seems to be no question that the waters of springs in Nevada are now governed by the appropriation doctrine regardless of whether or not they feed watercourses.

MEANS OF EFFECTUATING APPROPRIATION

A Federal court held in 1897 that in appropriating the waters of a spring upon public lands, the only acts necessary were those appropriate to the circumstances and physical conditions, and practicable to accomplish the purpose of the appropriator in making a beneficial use of the water.³⁵³ The fact that the water was used for culinary and domestic purposes by the appropriator and its agents and employees was sufficient in itself to establish a beneficial use of the water.

The Nevada Supreme Court held that the means of utilizing a right to the use of waters for watering sheep that had been set out in a complaint and judgment, must, in the absence of evidence to the contrary, be deemed a sufficiently economical method to accomplish that purpose and to leave any surplus available for appropriation by others.³⁵⁴

PROTECTION OF APPROPRIATIVE RIGHT

An appropriative right to the use of water of a spring will be protected by injunction against an interference by another party which, by the lapse of time, could become the foundation of an adverse right.³⁵⁵

LOSS OF APPROPRIATIVE RIGHT

The loss of an appropriative right to the use of spring water may result from either abandonment or statutory forfeiture.³⁵⁶ (See discussion of distinction between abandonment and forfeiture under "Loss of water rights," pages 39, 40.) As noted immediately above ("Protection of appropriative right"), the possibility of loss of a right to the use of spring water by prescription was inferentially recognized by the court.

GROUND WATERS

A comprehensive statute governs the acquirement and exercise of rights of use of ground waters by prior appropriation, as noted below. This statute has not yet been subjected to interpretation by the Supreme Court of Nevada. Only a few decisions relating to ground waters have been rendered by the supreme court, and they are all

³⁵¹ *Strait v. Brown*, 16 Nev. 317, 323-324 (1881).

³⁵² *Campbell v. Goldfield Consolidated Water Co.*, 36 Nev. 458, 462, 136 Pac. 976 (1913).

³⁵³ *Silver Peak Mines v. Valcalda*, 79 Fed. 886, 888, 890 (D. Nev., 1897).

³⁵⁴ *Robison v. Mathis*, 49 Nev. 35, 45, 234 Pac. 690 (1925).

³⁵⁵ *Robison v. Mathis*, 49 Nev. 35, 43-44, 234 Pac. 690 (1925).

³⁵⁶ *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 286-291, 108 Pac. (2d) 311 (1940).

very old. The most recent one that discusses the subject was rendered more than a half-century ago; the others were much earlier.

Court Decisions on Rights of Use DEFINITE UNDERGROUND STREAM

In an early case involving the right to use water flowing from a spring which constituted the source of a creek, the Nevada Supreme Court discussed rules of law applicable to ground waters because the water from the spring passed through the ground before reaching the creek.³⁵⁷ The subterranean flow in question was not that of a definite underground stream, but with respect to such streams the court stated its understanding to be that:

No distinction exists in the law between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters running in distinct channels, whether upon the surface or subterranean, and those oozing or percolating through the soil in varying quantities and uncertain directions.

* * *

PERCOLATING WATERS

The supreme court held in an early case that water percolating underground in "no known and defined course" belonged to the owner of the land, and that such owner was not responsible for injury caused to others by reason of his diversion of the water, even though such percolating water was the source of a spring on the land of someone else.³⁵⁸

The rule of absolute ownership of percolating waters was affirmed in 1881 in *Strait v. Brown*,³⁵⁹ above noted in connection with rights to definite underground streams. However, the right of a landowner to divert water from springs on his land, the waters of which constituted the source of a creek but passed thereto either by percolation or by conveyance "by unknown subterranean channels," was denied by the court. This was because the diversion was made, not from percolating waters, but directly from the springs after the water appeared on the surface—from the source of the stream and hence with the same effect as though taken from the stream itself. The court held that none of the reasons upon which the law of percolating waters was based existed in this case. Here there was no uncertainty as to the existence of the water or as to the quantity that had been taken from the springs against the interests of the appropriators of water of the stream. Such spring waters were held to be subject to the rights of the stream appropriators, even though "the means by which the waters are conveyed from springs to creek are subterranean and not well understood."

It appears that the rights of owners of overlying land to percolating waters within their lands have not been specifically stated in subsequent decisions of the Nevada Supreme Court. In a decision rendered in 1901, which involved the right to water flowing from a tunnel, the authorities cited included those on nonappropriability of percolating waters as well as those concerning artificial streams; but the decision did not involve the rights of owners of overlying lands to

³⁵⁷ *Strait v. Brown*, 16 Nev. 317, 321 (1881).

³⁵⁸ *Mosier v. Caldwell*, 7 Nev. 363, 366-367 (1872).

³⁵⁹ *Strait v. Brown*, 16 Nev. 317, 321, 323-324 (1881).

such waters as percolated into the tunnel, the United States being the owner of the lands.³⁰⁰

Appropriation of Ground Waters

GROUND-WATER STATUTE

A statute relating to ground waters was enacted in 1939, and has been amended at several succeeding sessions of the legislature.³⁰¹

The act provides that all ground waters within the boundaries of the State belong to the public, and subject to all existing rights of use, are appropriable for beneficial use only under the laws of the State relating to the appropriation and use of water and not otherwise. The statute does not apply in the matter of obtaining permits for the developing and use of ground water from a well for domestic purposes where the draught does not exceed a daily maximum of 1,440 gallons, except as to the furnishing of any information required by the State Engineer.

Upon petition signed by not less than 15 percent of the owners of wells in a particular area having appropriated ground-water rights therein, the State Engineer may exercise supervision (except as to exempted domestic wells) over all wells tapping artesian water or water in definable underground aquifers drilled after March 22, 1913, and over all wells tapping percolating water the course and boundaries of which are incapable of determination, drilled after March 25, 1939. Rights to appropriate ground water from such wells can be acquired only by complying with the provisions of the general water law of the State pertaining to appropriation of water.

A distinctive feature of the Nevada ground-water appropriation statute is the relation of the water right to maintenance of the water level. Section 10 (7993.19) provides that it shall be an express condition of each appropriation of ground water acquired under the act that the right of the appropriator shall relate to a specific quantity of water and shall allow for a reasonable lowering of the static water level at his point of diversion. In determining such reasonable lowering, the State Engineer is required to consider the economics of pumping water for general types of crops, and may consider the effect of water use on the economy of the area. The act is not to be construed to prevent applicants later in time from obtaining permits on the ground that their diversions may cause a lowering of the water level at a prior appropriator's point of diversion, so long as existing appropriative rights can be satisfied under such express conditions.

Existing rights to the use of ground water are defined and recognized. Provision is made for the adjudication of ground-water rights. The circumstances under which rights to the use of ground waters may be forfeited or abandoned are set forth.

Several sections of the ground-water statute were amended by the 1955 Legislature, chiefly in the following matters: For the purpose of the Act, the words "domestic use" extend to culinary and household purposes, the watering of a family garden and lawn, and the watering

³⁰⁰ *Cardelli v. Comstock Tunnel Co.*, 26 Nev. 281, 293-295, 66 Pac. 950 (1901).

³⁰¹ Nev. Stats. 1939, ch. 178. The act and its amendments are to be found in Nev. Comp. Laws 1929, Supp. 1931-1941, and Supp. 1943-1949, secs. 7993.10 to 7993.24; Stats. 1953, ch. 162 and 163; and Stats. 1955, ch. 212.

of domestic animals. Provisions governing licensing of drillers of water wells are enlarged. Procedural changes relate to collection of costs of abating waste from artesian wells, and to restriction of withdrawals of water from ground-water supplies in time of shortage. A new section (sec. 10.5) considerably broadens the authority of the State Engineer within areas designated by him, where in his judgment the ground-water supply is being depleted. In such areas he may designate preferred uses of water, within prescribed limits, in acting upon applications to appropriate ground water; he may issue temporary permits to appropriate ground water; and, within the service area of an entity such as a water district or a municipality presently engaged in furnishing water to its inhabitants, he may deny applications to appropriate ground water for any purpose, and may impose restrictions upon the drilling and use of wells for domestic purposes. For good and sufficient reasons, he may exempt public housing authorities from the provisions of this new section.

PROBABLE EFFECT OF COURT DECISIONS

Nevada has had legislation of one form or another with respect to the appropriation of ground waters during the major part of the last half century, and it has had the comprehensive statute above noted in operation since 1939. Although legislation on ground waters has not been before the State Supreme Court, the legislative intent to subject to appropriation all ground waters capable of administrative control has been evident for a long time. The exercise of early rights to ground waters is safeguarded by statute. Notwithstanding the very early decisions purporting to adopt the rule of absolute ownership of percolating waters, there appears to be little question now that the appropriative principle applies to the use of ground waters of such character as to be susceptible to practical public control.³⁶²

³⁶² In a decision rendered after the enactment of the ground-water statute of 1939, but which did not involve a construction of that statute, the supreme court stated that it was in agreement with the argument of counsel that the legislature had declared all water within the State, whether above or beneath the surface of the ground, to belong to the State; and that the doctrine of appropriation was the settled law of the State: *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 286-287, 108 Pac. (2d) 311 (1940). The court said that: "Water being state property, the state has a right to prescribe how it may be used, and the legislature has stated that the right of use may be obtained in a certain way."

CASES CITED

NEVADA SUPREME COURT

- Application of Filippini, 66 Nev. 17, 202 Pac. (2d) 535 (1949), 12, 14, 17, 18, 32, 40, 41.
- Authors v. Bryant, 22 Nev. 242, 38 Pac. 439 (1894), 40, 41, 42.
- Barnes v. Sabron, 10 Nev. 217 (1875), 2, 3, 4, 5, 6, 17, 22, 23, 24, 25, 27, 30, 31, 33, 41, 54.
- Bidleman v. Short, 38 Nev. 467, 150 Pac. 834 (1915), 11, 25, 33, 55, 56.
- Blaisdell v. Stephens, 14 Nev. 17 (1879), 54, 57.
- Bliss v. Grayson, 24 Nev. 422, 56 Pac. 231 (1899), 1, 8, 22.
- Boynton v. Longley, 19 Nev. 69, 6 Pac. 437 (1885), 41, 42, 43, 54, 57.
- Brown v. Ashley, 16 Nev. 311 (1881), 34, 41, 42.
- Campbell v. Goldfield Consolidated Water Co., 36 Nev. 458, 136 Pac. 976 (1913), 33, 38, 59.
- Cardelli v. Comstock Tunnel Co., 26 Nev. 284, 66 Pac. 950 (1901), 11, 55, 61.
- Carpenter v. Sixth Judicial District Court, 59 Nev. 42, 84 Pac. (2d) 489 (1938), 2.
- Chiatovich v. Davis, 17 Nev. 133, 28 Pac. 239 (1882), 21.
- Covington v. Becker, 5 Nev. 281 (1869), 5, 10.
- Dalton v. Bowker, 8 Nev. 190 (1873), 6, 18, 21.
- Dick v. Bird, 14 Nev. 161 (1879), 41.
- Dick v. Caldwell, 14 Nev. 167 (1879), 23.
- Doherty v. Pratt, 34 Nev. 343, 124 Pac. 574 (1912), 10, 12, 14, 23, 24, 25, 30, 31, 35.
- Ennor v. Raine, 27 Nev. 178, 74 Pac. 1 (1903), 11, 12.
- Garson v. Steamboat Canal Co., 43 Nev. 298, 185 Pac. 801 (1919), 185 Pac. 1119 (1920), 30.
- Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. 8 (1902), 23, 24.
- Hobart v. Ford, 6 Nev. 77 (1870), 9, 11.
- Hobart v. Wicks, 15 Nev. 418 (1880), 27.
- Humboldt Land & Cattle Co. v. District Court, 47 Nev. 396, 224 Pac. 612 (1924), 45, 46, 47.
- In re Barber Creek and Its Tributaries (Scossa v. Church), 46 Nev. 254, 205 Pac. 518 (1922); Petition for rehearing, 210 Pac. 563 (1922), 18, 44, 47.
- In re Bassett Creek and Its Tributaries, 62 Nev. 461, 155 Pac. (2d) 324 (1945), 3, 13, 14, 55, 56.
- In re Calvo, 50 Nev. 125, 253 Pac. 671 (1927), 28.
- In re Humboldt River, 49 Nev. 357, 246 Pac. 692 (1926), 1, 2, 7, 12, 47, 48.
- In re Humboldt River (Taylor v. Ruddell), 54 Nev. 115, 7 Pac. (2d) 813 (1932), 48.
- In re Manse Spring and Its Tributaries, 60 Nev. 280, 108 Pac. (2d) 311 (1940), 2, 5, 7, 17, 18, 38, 39-40, 58, 59, 62.
- In re McGregor, 56 Nev. 407, 48 Pac. (2d) 418 (1935), 55 Pac. (2d) 10 (1936), 13.
- In re Silver Creek, 57 Nev. 232, 61 Pac. (2d) 987 (1936), 45, 48.
- Irwin v. Strait, 18 Nev. 436, 4 Pac. 1215 (1884), 16.

- Jerrett v. Mahan, 20 Nev. 89, 17 Pac. 12 (1888), 7, 22, 30, 33.
Johnston v. Rosaschi, 44 Nev. 386, 194 Pac. 1063 (1921), 57.
Jones v. Adams, 19 Nev. 78, 6 Pac. 442 (1885), 1, 6-7, 10.
Kent v. Smith, 62 Nev. 30, 140 Pac. (2d) 357 (1943), 1, 24, 35, 37.
Knox v. Kearney, 37 Nev. 393, 142 Pac. 526 (1914), 50.
Lake v. Tolles, 8 Nev. 285 (1873), 6.
Lobdell v. Hall, 3 Nev. 507 (1868), 8, 21, 33.
Lobdell v. Simpson, 2 Nev. 274 (1866), 5, 30, 31.
Malstrom v. People's Drain Ditch Co., 32 Nev. 246, 107 Pac. 98 (1910), 12.
McCormick v. Sixth Judicial District Court, 67 Nev. 318, 218 Pac. (2d) 939 (1950), 43.
McCormick v. Sixth Judicial District Court, 69 Nev. 214, 246 Pac. (2d) 805 (1952), 43, 47, 49, 50.
Mexican Dam & Ditch Co. v. District Court, 52 Nev. 426, 289 Pac. 393 (1930), 47.
Mosier v. Caldwell, 7 Nev. 363 (1872), 58, 60.
Nenzel v. Rochester Silver Corp., 50 Nev. 352, 259 Pac. 632 (1927), 18.
Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534 (1869), 5, 14, 15, 16-17, 32.
Ophir Silver Min. Co. v. Carpenter, 6 Nev. 393 (1871), 22.
Ormsby County v. Kearney, 37 Nev. 314, 142 Pac. 803 (1914), 2, 5, 12, 45, 46, 47, 49, 50.
Pacific Live Stock Co. v. Ellison Ranching Co., 52 Nev. 279, 286 Pac. 120 (1930), 43.
Pacific Live Stock Co. v. Malone, 53 Nev. 118, 294 Pac. 538 (1931), 50.
Pitt v. Scrugham, 44 Nev. 418, 195 Pac. 1101 (1921), 45, 46.
Proctor v. Jennings, 6 Nev. 83 (1870), 5, 22, 25, 30, 31, 32.
Prosole v. Steamboat Canal Co., 37 Nev. 154, 140 Pac. 720, 144 Pac. 744 (1914), 1, 8, 14, 18, 19, 20, 22, 29, 37.
Ramelli v. Sorgi, 38 Nev. 552, 149 Pac. 71 (1915), 21, 26.
Reno Smelting, Mill. and Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317 (1889), 7.
Robison v. Mathis, 49 Nev. 35, 234 Pac. 690 (1925), 24, 25, 28, 31, 33, 35, 42, 59.
Roeder v. Stein, 23 Nev. 92, 42 Pac. 867 (1895), 1, 23, 24, 25, 31, 35.
Ronnow v. Delmue, 23 Nev. 29, 41 Pac. 1074 (1895), 7, 33, 34.
Ruddell v. Sixth Judicial District Court, 54 Nev. 363, 17 Pac. (2d) 693 (1933), 45, 48.
Ryan v. Gallio, 52 Nev. 330, 286 Pac. 963 (1930), 55, 56, 57.
Schulz v. Sweeny, 19 Nev. 359, 11 Pac. 253 (1886), 21, 35, 38, 57.
Schultz v. Mexican Dam & Ditch Co., 47 Nev. 453, 224 Pac. 804 (1924), 12.
Scossa v. Church (In re Barber Creek), 43 Nev. 403, 182 Pac. 925 (1919), 48.
Scossa v. Church, 43 Nev. 407, 187 Pac. 1004 (1920), 47.
Sheehan v. Kasper, 41 Nev. 27, 165 Pac. 632 (1917), 12.
Simpson v. Williams, 18 Nev. 432, 4 Pac. 1213 (1884), 23.
Smith v. Logan, 18 Nev. 149, 1 Pac. 678 (1883), 11, 19, 22, 36, 37, 42.
State ex rel. Hinckley v. Sixth Judicial District Court, 53 Nev. 343, 1 Pac. (2d) 105 (1931), 18, 45, 51.

- Steptoe Live Stock Co. v. Gulley, 53 Nev. 163, 295 Pac. 772 (1931), 7, 15, 23, 24, 28.
 Strait v. Brown, 16 Nev. 317 (1881), 3, 33, 59, 60.
 Thomas v. Blaisdell, 25 Nev. 223, 58 Pac. 903 (1899), 12.
 Tonkin v. Winzell, 27 Nev. 88, 73 Pac. 593 (1903), 1, 2, 3, 30, 32, 33, 36, 55.
 Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280 (1906), 89 Pac. 289 (1907), 1, 7, 10, 23, 24, 31, 36-37.
 Vansickle v. Haines, 7 Nev. 249 (1872), 5-6, 7, 10, 40, 41.
 Vineyard Land & Stock Co. v. District Court, 42 Nev. 1, 171 Pac. 166 (1918), 18, 45, 46, 47, 49.
 Walsh v. Wallace, 26 Nev. 299, 67 Pac. 914 (1902), 7, 12, 14, 15, 25, 31, 43.
 Winter v. Winter, 8 Nev. 129 (1872), 42.

OTHER STATES

- Butte Canal & Ditch Co. v. Vaughn, 11 Calif. 143 (1858), 35.
 Hoffman v. Stone, 7 Calif. 46 (1857), 35.

FEDERAL

- Adams-McGill Co. v. Hendrix, 22 Fed. Supp. 789 (D. Nev., 1938), 1, 10, 18, 28, 58.
 Anderson v. Bassman, 140 Fed. 14 (N. D. Calif., 1905), 7, 24, 36, 41, 42, 43, 51, 52.
 Anderson Land & Stock Co. v. McConnell, 188 Fed. 818 (D. Nev., 1910), 3, 7, 15, 23, 25, 27, 31, 38.
 Bergman v. Kearney, 241 Fed. 884 (D. Nev., 1917), 2, 9, 18, 36, 45, 46.
 Ellison Ranching Co. v. Woodward, 34 Fed. (2d) 820 (D. Nev., 1929), 32.
 Humboldt Land & Cattle Co. v. Allen, 14 Fed. (2d) 650 (D. Nev., 1926); *affirmed*, Humboldt Land & Cattle Co. v. Allen, 274 U. S. 711 (1927), 2, 45, 46, 50.
 Humboldt Lovelock Irr. Light & Power Co. v. Smith, 25 Fed. Supp. 571 (D. Nev., 1938), 2, 13, 50.
 Miller & Lux v. Rickey, 127 Fed. 573 (D. Nev., 1904), 12, 14, 24, 34, 36, 38, 52.
 Miller & Lux v. Rickey, 146 Fed. 574 (D. Nev., 1906); *affirmed*, Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11 (C. C. A. 9th, 1907) and 218 U. S. 258 (1910), 52.
 Pacific Live Stock Co. v. Read, 5 Fed. (2d) 466 (C. C. A. 9th, 1925), 1, 10, 27.
 Pacific States Savings & Loan Corp. v. Schmitt, 103 Fed. (2d) 1002 (C. C. A. 9th, 1939), 19, 20.
 Reconstruction Finance Corp. v. Schmitt, 20 Fed. Supp. 816 (D. Nev., 1937); *reversed*, Pacific States Savings & Loan Corp. v. Schmitt, 103 Fed. (2d) 1002 (C. C. A. 9th, 1939), 19, 20, 34.
 Reno Power, Light & Water Co. v. Public Service Commission, 300 Fed. 645 (D. Nev., 1921), 1, 9, 13, 20, 22, 23, 29, 30.
 Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11 (C. C. A. 9th, 1907); *affirmed*, Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258 (1910), 17, 18, 19, 52, 53-54.

- Rodgers v. Pitt, 89 Fed. 420 (D. Nev., 1898), 25.
 Rodgers v. Pitt, 129 Fed. 932 (D. Nev., 1904), 12, 14, 16, 17, 25, 27.
 Silver Creek Mines v. Valcalda, 79 Fed. 886 (D. Nev., 1897); *affirmed*,
 Valcalda v. Silver Creek Mines, 86 Fed. 90 (C. C. A. 9th, 1898),
 10, 28, 59.
 Union Mill & Min. Co. v. Dangberg, 81 Fed. 73 (D. Nev., 1897), 6, 16,
 17, 21, 22, 23, 24, 28, 31, 32, 36, 41, 42, 43.
 Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, 24 Fed. Cas. 594 (D.
 Nev., 1872), 6, 10.
 United States v. Humboldt Lovelock Irr. Light & Power Co., 19 Fed.
 Supp. 489 (D. Nev., 1937); *reversed*, United States v. Humboldt
 Lovelock Irr. Light & Power Co., 97 Fed. (2d) 38 (C. C. A. 9th,
 1938), 19.
 United States v. Humboldt Lovelock Irr. Light & Power Co., 97 Fed.
 (2d) 38 (C. C. A. 9th, 1938); *certiorari denied*, Humboldt Love-
 lock Irr., Light & Power Co. v. United States, 305 U. S. 630
 (1938), 9.
 United States v. Walker River Irr. Dist., 11 Fed. Supp. 158 (D. Nev.,
 1935); *reversed*, United States v. Walker River Irr. Dist., 104
 Fed. (2d) 334 (C. C. A. 9th, 1939), 7.
 United States v. Walker River Irr. Dist., 104 Fed. (2d) 334 (C. C. A.
 9th, 1939), 9, 10.
 Valcalda v. Silver Creek Mines, 86 Fed. 90 (C. C. A. 9th, 1898), 38.
 Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.,
 245 Fed. 30 (C. C. A. 9th, 1917), 22, 23, 24, 25, 27, 53.
 Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water
 Co., 245 Fed. 9 (C. C. A. 9th, 1917), 12, 17, 23, 24, 28, 31, 37, 53, 58.

UNITED STATES SUPREME COURT

- Atchison v. Peterson, 87 U. S. 507 (1874), 10.
 Basey v. Gallagher, 87 U. S. 670 (1875), 10.
 Broder v. Water Co., 101 U. S. 274 (1879), 10.
 Forbes v. Gracey, 94 U. S. 762 (1877), 10, 11.
 Jennison v. Kirk, 98 U. S. 453 (1879), 10.
 Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258 (1910), 53.