

Water Appropriation Systems

Riparian:

The doctrine of riparian rights in the United States has its basis in case law which first involved *Tyler v. Wilkinson* in 1827. This case arose out of a dispute between mill owners over the right to use the flow of a river for mill power. The opinion in the case stated that all riparians had equal rights to the water in the river and that an upper proprietor could not diminish the quantity that would naturally flow to the lower proprietor. However, the case opinion also recognized that such an absolute right would not be practical and held that an upper proprietor could make "reasonable use" of the water, including consumptive withdrawals.

Riparian water rights, therefore, occur as a result of landownership. A landowner who owns land that physically touches a river, stream, pond, or lake has an equal right to the use of water from that source. This water right, however, is only a usufructuary right and not a property right in the water. The water may be used as it passes through the property of the land owner, but it cannot be unreasonably detained or diverted, and it must be returned to the stream from which it was obtained. The use of riparian water rights is generally regulated by "reasonable use." Reasonable use allows for the consumptive use of water, but what actually constitutes reasonable use has varied widely from state to state and continues to evolve.

Only certain waters are subject to riparian rights. Riparian rights only attach to water in watercourses and not to diffuse surface waters. Diffuse waters are waters that are spread over the surface, whereas a watercourse has a definite natural channel and a bed with banks. Diffuse waters are generally storm or flood drainage, and these do not constitute riparian rights.

Riparian water rights cannot be lost through non-use and are indefinite in duration. Therefore, a riparian landowner does not lose their riparian right by not putting the water to use. However, the courts tend to provide greater protection for existing uses, than for potential future uses. Riparian rights can, however, be lost through prescription. Prescription is a process of involuntary transfer from one party to another. Under prescription, a party making open use of water for the proper time period (usually 20 years) gains title to the water right superior to that of the original holder.

Riparian water rights are generally considered "part and parcel" to the land and are included if the property is sold. The law, in most cases, forbids transfers of riparian rights for use on non-riparian lands. This rule, however, has been amended in some instances to allow non-riparians to use the water so long as the use is "reasonable" with regards to other riparians.

The general characteristics of riparian rights can be summarized as follows:

- * Riparian rights are of equal priority.
- * Unless adjudicated, the right is not quantified, rather it extends to the amount of water which can be reasonably and beneficially used on the riparian parcel.
- * Riparian rights are correlative. During times of water shortage, the riparian proprietors share the shortage.
- * Water may be used only upon that portion of the riparian parcel which is within the watershed of the water source.
- * The riparian right does not extend to seasonal storage of water.
- * The riparian right is part of the riparian land and cannot be transferred for use on other lands.
- * The riparian rights remains with the land when riparian lands are sold.
- * When riparian lands are subdivided, parcels which are severed from the adjacent water source lose their riparian rights unless the rights are reserved.
- * A riparian right is not lost by non-use.

Prior Appropriation:

The prior appropriation doctrine, or "first in time - first in right", developed in the western United States in response to the scarcity of water in the region. The doctrine evolved during the California gold rush when miners in California needed to divert water from the stream to locations where it was needed to process ore. Customs and principles relating to water diversion developed in the mining camps, and disputes were resolved by simple priority rule. According to the rules of prior appropriation, the right to the full volume of water "related back" or had the priority date as of the time of first diverting the water and putting it to beneficial use. In other words, those with earliest priority dates have the right to the use of that amount of water over others with later priority dates.

Unlike a riparian right, an appropriative right exists without regard to the relationship between the land and water. An appropriative right is generally based upon physical control and beneficial use of the water. These rights are entitlements to a specific amount of water, for a specified use, at a specific location with a definite date of priority. An appropriative right depends upon continued use of the water and may be lost through non-use. Unlike riparian rights, these rights can generally be sold or transferred, and long-term storage is not only permissible but common.

There are four essential elements of the prior appropriation doctrine: Intent, Diversion, Beneficial Use, and Priority.

In all states with the prior appropriation doctrine, the acquisition of water requires that the appropriator demonstrate an intent to appropriate the water, divert the water, and apply it to beneficial use. Historically, intent was indicated by on-the-ground acts such as site surveys, land clearing, preparation of diversion points, and most importantly, posting of notice. Today, however, intent is generally indicated by the application for a permit.

Another essential component of a prior appropriation water right is diversion. Historically, a physical diversion of water was required in order to acquire a water right. This requirement has diminished as states have implemented various instream flow programs. A point of diversion, however, is still an essential element of a consumptive use water right.

Beneficial use is perhaps the most important characteristic in defining a prior appropriation water right. Beneficial use is used to determine whether a certain use of water will be recognized and protected by law against later appropriations. The justification for beneficial use criteria is to prevent waste. Since water is a scarce resource in the west, states must determine what uses of water are acceptable. Beneficial uses of water have been the subject of great debate, and each western state has an evolving system for evaluating what uses of water are considered "beneficial."

The final essential feature of the prior appropriation doctrine is the priority of a water right. As described above, the first appropriator on a water source has the right to use all the water in the system necessary to fulfill his water right. A junior appropriator cannot use water to satisfy his water right if it will injure the senior appropriator. A senior appropriator may "place a call" on the river. A call requires that the institution which manages the water source shut down a junior diverter in order to satisfy the senior right. Senior appropriators, however, cannot *change* any component of the water right if it will injure a junior appropriator. Therefore, if a senior wants to change his place of use and this change will adversely affect a junior's interest, the junior can stop the senior from changing the water right. Any change of a water right (time of use, place of use, purpose of use, point of diversion, etc.) cannot cause harm to another water user, regardless of priority.

In western states, there are few restrictions on who can hold an appropriative water right. Therefore, both private and public entities hold rights. An appropriative right does not depend on land ownership, but some states do require that the water is appurtenant to the land on which it is used. In general, appropriative water rights are transferable property. There are, however, three major requirements which inhibit the transfer of an appropriative water right:

1. Rules prohibiting the severance of water right from the land on which the water is appurtenant to;
2. Showing that there will be no injury to other appropriators; and
3. Establishing the extent of the water right for transfer.

The traditional means of losing appropriative water rights are non-use or abandonment. Loss through abandonment is a consequence of the essential role that "use" plays in the definition of the right. The right does not come into existence without application of water to beneficial use and cannot continue to exist without the continuance of beneficial use. Non-use in itself, however, does not always constitute abandonment. A finding of abandonment often requires a determination of an intent to relinquish the water right. A statutorily specified period of non-use can, in most states, serve as proof of intent to abandon. In other words, an appropriative right can be lost through non-use when intent to abandon can be demonstrated, or when the water right has not been used for a specified number of years.

Hybrid Doctrine:

The hybrid doctrine recognizes both riparian and appropriative water rights. Generally, states have this dual system because riparian rights were historically recognized, but the state has changed to an appropriative system. Hybrid states have integrated riparian rights into the doctrine of prior appropriation by converting riparian rights to appropriative rights. Generally, states have allowed riparian land owners to claim a water right by a certain time and incorporate it into the state's prior appropriation system. The riparian rights tend to be superior to the prior appropriative rights even if the water was not put to beneficial use until much later. Riparian rights are not recognized, however, if they are not claimed by a certain date (usually the date the state adopted the prior appropriation doctrine), or are not put to use within a certain number of years. States that have a hybrid system include California, Kansas, Nebraska, North and South Dakota, Oklahoma, Oregon, Texas, and Washington.