

**ELEMENTS OF  
WESTERN  
WATER LAW**

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Elements of Western Water Law by A. E. Chandler

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**A. E. CHANDLER**

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WESTERN  
WATER LAW**



**ELEMENTS**  
**OF**  
**WESTERN WATER**  
**LAW**

**BY**

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### PREFACE

The following chapters were published as separate articles in the Journal of Electricity, Power and Gas. They present in abbreviated form part of a course in "Irrigation Institutions" given to advanced students in the Colleges of Agriculture and Civil Engineering of the University of California.

As the western law of waters has been developed by the courts it is necessary to quote freely from the cases, although the text is intended for those untrained in jurisprudence.

Owing to the restricted space available for the articles as first published, only the leading cases on each point have been cited, but an attempt has been made to refer to important cases not following the established rule.

So great is the public interest in our water resources today that no explanation is deemed necessary for the publication of a book on a legal topic to be read by laymen.

A. E. CHANDLER.

San Francisco, December, 1912.



Age Income Spending

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## CONTENTS

### CHAPTER I.

Early Development of The Doctrine of Appropriation....	1
Congressional Act of 1866.....	3
California Act of 1872.....	7

### CHAPTER II.

Riparian Rights in The Western States.....	11
Early Decisions .....	11
States Adopting and Those Rejecting .....	20
Lateral Limits .....	22
Riparian Rights Restricted to Riparian Land.....	26
Summary of Principles .....	27

### CHAPTER III.

The Law of Underground Waters.....	28
Percolating Waters .....	28
Contrast of California Rules of Percolating Waters and of Riparian Rights .....	35

### CHAPTER IV.

The Doctrine of Appropriation.....	38
Appropriations Not Restricted to Public Lands.....	38
Waters Open to Appropriation.....	39
Proceedings to Effect Appropriations.....	41
Incomplete Appropriations .....	43
The Measure of The Right .....	44
Principles of Prior Appropriation .....	45

### CHAPTER V.

Loss of Water Rights.....	47
Abandonment and Forfeiture .....	47
Adverse Use or Prescription.....	47
Estoppel .....	53
Rights of Way by Prescription .....	55

### CHAPTER VI.

Water Right Legislation.....	56
California .....	56
Colorado .....	57
Wyoming .....	61
Nebraska .....	65
Idaho .....	67
Utah .....	70
Nevada .....	73
New Mexico, North Dakota, Oklahoma and South Dakota .....	74
Oregon .....	76
Review of Legislation.....	77
Conclusion .....	82

### CHAPTER VII.

Water Rights on Interstate Streams.....	83
Court Decisions .....	84
Kansas v. Colorado .....	85
Legislation Regarding Interstate Streams .....	90



[VI]

CHAPTER VIII.

Rights of Way Over Public Lands for Ditches and Reservoirs ..... 94

Act of March 3, 1891..... 96

Act of May 11, 1898..... 98

Act of February 1, 1905 ..... 98

Act of February 15, 1901..... 99

Rights of Way for Power Purposes Through National Forests ..... 99

Special State Legislation Regarding Water Rights for Power Purposes ..... 101

Comments on Water Power Legislation ..... 102

State versus Nation ..... 103

CHAPTER IX.

Commercial Irrigation Enterprises ..... 106

Examples of Companies "Renting" Water ..... 108

Companies Selling Water Rights But No Interest in System ..... 109

Companies Selling Water Rights Carrying an Interest in System ..... 110

Colorado Anti-Royalty Act ..... 111

Regulation of Commercial Enterprises ..... 111

Who Owns the Water Right ..... 112

CHAPTER X.

The Desert Land Act and The Carey Act..... 115

The Desert Land Act ..... 115

The Carey Act ..... 117

State Legislation ..... 119

Development Under The Carey Act ..... 121

CHAPTER XI.

The Reclamation Act ..... 123

CHAPTER XII.

Irrigation Districts ..... 132

The California Irrigation District Act..... 132

Points of Difference in Irrigation District Acts..... 134

The Constitutionality of Irrigation District Acts.... 136

Operations Under Irrigation District Acts..... 136

Irrigation Districts in California ..... 137

Irrigation Districts in Colorado and Idaho..... 138

Advantages and Disadvantages of the District Organization ..... 139

CHAPTER XIII.

The Desideratum in Legislation Regarding The Public Waters ..... 143

Riparian Rights ..... 143

Percolating Waters ..... 145

Irrigation Versus Navigation..... 146

"Monopoly" in Public Waters ..... 146

Legislation Regarding Appropriations ..... 147

**EARLY DEVELOPMENT OF THE DOCTRINE  
OF APPROPRIATION.**

The doctrine of appropriation is one recognized in the law of waters as governing a class of rights markedly distinct from the riparian rights of the common law. It grew out of the occupancy of the public domain during the mining period and is not accepted outside of the western mining and irrigation States. Although of so recent origin as far as our own people are concerned, the following quotation from *Clough v. Wing* (2 Ariz. 371) shows its long standing in America:

And the right to appropriate and use water for irrigation has been recognized longer than history, and since earlier times than tradition. Evidences of it are to be found all over Arizona and New Mexico in the ancient canals of a prehistoric people, who once composed a dense and highly civilized population. These canals are now plainly marked, and some modern canals follow the track and use the work of this forgotten people. The native tribes, the Pimas and Papagos and other pueblo Indians, now, as they for generations have done, appropriate and use the waters of these streams in husbandry, and sacredly recognize the rights acquired by long use, and no right of a riparian owner is thought of. The only right in water is found in the right to conduct the same through their canals to their fields, there to use the same in irrigation. The same was found to prevail in Mexico among the Aztecs, the Toltecs, the Vaquis, and other tribes at the time of the conquest, and remained undisturbed in the jurisprudence of that country until now. *Clough v. Wing*, 17 Pac. 453.

As was to be expected from the great rush to the gold fields following the discovery in January, 1848, legal controversies early arose not only in regard to the mining claims but also in regard to the ditches and water rights used in connection therewith. One

of the very early cases often quoted is *Irwin v. Phillips* (5 Cal. 140) decided in 1855 and the following extract from the opinion clearly shows the necessity for the doctrine of prior appropriation:

Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right of intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary occupation of the mineral region has been *tacitly assented to* by the one government, and heartily *encouraged* by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that *they have come to be looked upon as having the force and effect of res judicata*. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become those rights, that, without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been *vested* by the most distinct expression of the will of the lawmakers \* \* \* This simply goes to prove what is the purpose of the argument, that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority, upon the maxim of equity, "*Qui prior est in tempore, potior est in jure.*"

Elsewhere in the above mentioned opinion it is stated: