

prepared a background report in 1995, which can be found on that bureau's site on the Internet.

14. *State of Nevada vs. U. S. 512 F Supp 166*. The decision was written in 1981 by Edward Reed, a Nevada native, as judge for the U. S. District Court in Nevada.
15. The idea is developed as a central theme in *It's Your Misfortune and None of My Own, A New History of the American West*, by Dr. Richard White, 1990.

PART IV

POLICY FOCUS: WATER

A SHORT HISTORY OF NEVADA WATER LAW

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Introduction

Nevada water law has an interesting and varied history. As a dry, frontier state, the early legal principles developed in the 19th century fostered both the development of local economic interests and the concomitant population growth. Since cattle ranching and mining were the predominant industries, legal developments, including statutory pronouncements and case law, attempted at various times to balance these often competing industries, favoring one or the other as political and economic trends affected the state. Competition for water in arid regions is presumptively fierce; this has been true of Nevada as elsewhere and sometimes violence has erupted before disputes were settled and relevant issues addressed. Traditional common law notions of riparian water rights were developed in Medieval England where rain was plentiful and agricultural lands were well drained; two characteristics not typical for most of Nevada, particularly in the latter half of the century, water as an already scarce resource, took on an even more important role and became a political issue often beyond its economic value originally placed upon it as a most valuable commodity in a desert environment.

Many have concluded over the years that Nevada water law has essentially developed as an adjunct to Nevada mining law. While that position is not without some merit, the following discussion will attempt to illustrate that water law in Nevada was developed with purpose and design to support growing commercial enterprises in the states while protecting and promoting "reasonable use" under such circumstances as would not allow unfettered water usage by any quarter of water users. While it is not the intent of the authors to be exhaustive or comprehensive herein, the objective of this chapter is to provide an overview of the legal environment affecting water usage in Nevada and describe how our history has brought us to this point.

We should begin the discussion of Nevada water law by reviewing development in several recent state and federal court rulings, and defining some basic water law terms and concepts for the lay reader. Much of the discussion of Nevada's early water laws is summarized from a recent water treatise by Hugh Shamberger, former State Engineer and Director of the Nevada Department of Conservation and Natural Resources.¹ Later in this chapter we will also examine the developments of Nevada water practice vis-à-vis tribal water rights as they are affected in several recent federal and state water law cases.

Surface Water and Groundwater

To begin, water flows in two forms, surface water and groundwater. Surface waters, the streams, lakes and rivers with which we are all familiar, are much easier to locate, describe, quantify, and trace than groundwater, which percolates at sometimes nearly imperceptible rates at unknown levels through the various strata of earth. Early water law focused almost exclusively on surface waters for these reasons.² Logically, if we could see it, use it or sell it, lawyers could soon find a way to regulate it and a large body of jurisprudence grew up around riparian usage within real property law.

The Riparian, California and Appropriation Doctrines

Water rights, the rights to divert and use a given quantity of water from a stream or lake, generally are applied according to one of three doctrines: the riparian doctrine, the "California" doctrine, or the appropriation doctrine. Most states east of the Mississippi River follow the riparian doctrine. Nine states follow some form of the "California" doctrine³ and eight states, including Nevada, follow the appropriation doctrine.⁴

The riparian doctrine of water law was originally part of English common law. Under this doctrine, owners of land adjacent to natural streams retained the right to have the stream continue to flow in its natural condition, undiminished. Owners of riparian lands had equal rights to the water, regardless of whether they ever actually used the water. They could make reasonable use of the water, and "reasonable" depended on the circumstances of the time and place. Their right to the water depended on their ownership of the land abutting the water. Riparian water rights could not be sold separately from the land, these rights were part-and-parcel of property ownership and hence could make an otherwise inexpensive holding quite dear.

The reader should note that the word "riparian" is often used to describe both a system of water law and land that abuts a stream or lake, regardless of whether the drainage is subject to the riparian doctrine or appropriation doctrine of water rights. The riparian doctrine of water law applied primarily in the states east of the Mississippi River developed as a means to control flow in states with abundant water supplies.

As settlement moved into the arid regions of the West, newcomers quickly realized the importance of water rights. Under the Homestead Act of 1862, an individual could acquire title to 160 acres of the public domain by residing upon and improving the property. Subsequently, the Desert Land Act of 1877 was passed to aid reclamation. Under this law, an individual could acquire title to 640 acres, later reduced to 320 acres, if he irrigated and reclaimed 20 percent of the land. The public policy of the day was to stimulate settlement of the country. In the far west, where the great majority of unsettled territory was quite arid, this additional stimulus was needed so that these relatively unproductive lands would become more attractive for potential settlement and capable of sustaining a reasonable economic return for the efforts and expenditures needed to bring them into production.

The Reclamation Act of 1902 authorized federally subsidized water projects for irrigation and created the precursor of the U.S. Bureau of Reclamation. The old riparian doctrine laws would not work in the West because riparian lands and water were scarce. Miners and mining companies were especially sensitive to protecting their water sources because, unlike settlers, they did not have a means of registering their water claims. Hence, they needed to own large tracts of riparian lands or secure usage from those who did.

The "California" doctrine of water law, first recognized by California in 1866⁵, developed in the mining camps of California as a means of protecting access to water used to work the sluices and placer mines. The "California" doctrine involved a dual system that recognized both riparian rights along a stream and appropriation rights on waters diverted from public lands. Variations of this doctrine were adopted in the states along the 100th meridian from North Dakota to Texas and the Pacific Coast States.⁶ Each state following the "California" doctrine has substantially

limited application of the riparian doctrine to its waters.⁷ Since great expanses of western lands were held in public trust, throughout the west this doctrine would receive wide application in mineral rich water deprived areas. Of course, if a dense population developed, having one local user garner the majority of the local water resources, this doctrine could prove problematic. So, this doctrine needed additional water supplies on an intermittent basis, e.g., dry valleys which could be supported by spring run-off from nearby mountain ranges.

The "California" doctrine did not work well in a desert territory like Nevada, which developed a boom population. Discovery of the Comstock Lode in Virginia City in 1859, together with the need for another "free state" to pass Reconstruction policy and the 13th and 14th Amendments to the U.S. Constitution, prompted Congress to admit Nevada as a state in 1864.⁸ Two years later, U.S. Senator Stewart of Nevada sponsored the Lode Mining Act of 1866, which legitimized mining water law customs. This custom of "first in time, first in right" limited water right to the amount the individual originally used to operate his mine. This system became known as the appropriation doctrine and marked the beginning of western water law.⁹ The appropriation doctrine involves three principles:

1. priority is determined by the date on which the water is appropriated;
2. appropriation requires a diversion of the water from the watercourse; and
3. perfection of the water right requires that the water be applied to a beneficial use.

Congress passed other laws in its effort to aid the development of Nevada. The Desert Land Act of 1877, for example, recognized the practice of reserving unused water for future appropriations,¹⁰ while the Carey Act of 1894 was enacted to aid public land reclamation in the desert. Unfortunately, only one project was completed in Nevada under this Act.¹¹

Nevada Water Law

Nevada's Irrigation Law of 1903 created the State Engineer's Office, whose duty it was to record water rights and settle water rights disputes. This law was enacted to cooperate with the Secretary of Interior in reclamation projects like the Truckee-Carson Irrigation Project, later called the Newlands Project. The Newlands Project was one of the first reclamation projects begun under the Reclamation Act of 1902. Derby Dam, the first dam constructed under the 1902 Act, was completed in 1905.¹²

The Nevada legislature took other steps to assure development of the state's water rights. Nevada's Stock Watering Act of 1925 declared that watering livestock was a beneficial use, a move designed to protect Nevada's growing cattle industry.¹³

The Colorado River Commission was created in 1921 to represent Nevada's interests in the Colorado River Compact, an agreement of seven states on the use of the Colorado River water, but was never approved by Congress.¹⁴ The Owyhee River Commission was also created in 1921. Its purpose was to investigate and develop storage capacity of the South Fork of the Owyhee River in Elko County for the transfer to the Little Humboldt River. This project likewise was never completed.¹⁵

In Nevada, the first major groundwater statute was the 1913 General Water Law, enacted March 22, 1913. For the first time, groundwater was treated like surface water, subject to the same appropriation rules. Later, the Nevada Legislature passed the 1939 Underground Water Act, destined to become one of the most comprehensive groundwater laws in the western states.¹⁶

Nevada has two classifications of water rights, vested (created before March 1, 1905) and permitted (created after March 1, 1905).¹⁷ Nevada water can not only be acquired according to provisions of statute.¹⁸ The appropriation of water requires diverting water from the mainstream and applying the water to a beneficial use.¹⁹ Physical diversion and the beneficial use are essential elements of a valid appropriation in Nevada.²⁰ The amount of water acquired by appropriation is determined by the original use of the water when first diverted.²¹ Nowadays, little concern is shown over whether the water has been diverted; most litigation involves proper registration of water rights and whether the water has been put to beneficial use.²² This situation can make for extremely litigious circumstances surrounding the ownership of desert land parcels and can easily hamper the development of commercially viable holdings.

Nevada, as do most western states, requires that water rights be registered with the State Engineer, who then issues a certificate of ownership, which vests, or grants, the water right to the individual if un-appropriated waters are found.²³ The State Engineer is, by statute, given the responsibilities of processing water rights applications, adjudicating vested water rights, distributing water on the adjudicated streams and participating in various water programs such as the snow survey.²⁴

Water rights that were vested after March 22, 1913, can be lost by forfeiture if the water is not used during a consecutive five-year period.²⁵ This rule applies only to the water rights perfected after this date, the effective date of the forfeiture provision (NRS sec. 533.060). Water rights that vested before that date can be lost only by abandonment. To show abandonment, one must show that the owner intended to abandon the water right.²⁶ This intent is not needed to prove forfeiture.²⁷ Water rights can be transferred away from the land to which they are attached, by its very nature. Nevada law regulates water transfers.²⁸

Some Nevada water sources have been adjudicated; that is, a Water master (an administrative law judge) has determined and decreed the right and extent of each individual's water rights in a particular drainage basin. The waters of the Truckee River were decreed in 1944 in what is known as the "Orr Decree."²⁹ Carson River

water rights were determined in the 1980 "Alpine Decree."³⁰ This decree system may illustrate the most regulated water usage pattern in the nation. However, without using the decrees the amount of litigation in the local courts to decide water resource disputes would effectively mean every real estate sale in a rural area would require a court decree to determine who owned what water and in what amount.

Tribal Water Rights

Nevada's rivers and lakes subject to tribal water rights include the Truckee River, Carson River, and Pyramid Lake. These water sources abutted lands that were historically used and occupied by various Paiute and Shoshone tribes. The federal government is responsible for managing tribal water rights in trust for members of the Tribes.

The Pyramid Lake Paiute Indian tribe historically used Pyramid Lake and the Truckee River for fishing and agriculture. This Tribe has water rights dating from 1859, when the reservation was established.³¹ Two primary food sources for the Paiutes, the Cui-ui (a sucker) and the Lahontan cutthroat trout, spawned in Pyramid Lake.³² This Tribe has been involved in numerous court battles over water rights for these fish and the related fishing industry in Pyramid Lake.³³

In a number of these tribal claims where nearby towns are involved there has been a growing trend to seek negotiated settlements and avoid costly and protracted litigation. Each of the parties involved agrees to enter into a negotiation that will attempt to determine a "fair" allocation of the available water. The obvious advantages to this procedure are that changing conditions of population, commercial use, climate, etc, can be taken into account in seeking a compromise shared usage scheme rather than relying on a rule based schematic that will not interject enough flexibility to compensate for real-time circumstances that should otherwise alter the result. The Walker River is subject to a negotiated settlement and there is continuous pressure to "modify" the terms. It is a developing situation, but the process seems to offer the best opportunity for divergent communities to "share" a resource vital to both. This process does not completely remove the court from the decision but does tend to make deliberations take place among the involved parties.

Recent Federal and State Water Law Cases

The scope and extent of water rights has been the source of several significant cases in the state and federal courts. In *United States v. Alpine land & Reservoir Co.*³⁴ (1992) ("Alpine III"), the Ninth Circuit Court of Appeals again reversed a Nevada federal District Court's decision regarding Carson River water transfer requests. Earlier, in *United States v. Alpine*³⁵ (1989) ("Alpine II"), the Pyramid Lake Paiute Indian Tribe protested certain water rights transfers in the Carson River on the grounds that the water rights had never been perfected and that, if the transfers were not approved, more water would flow to Pyramid Lake according to the Tribe's water rights under "Alpine I."

The Ninth Circuit in Alpine II ruled that the State Engineer must first determine whether the rights sought to be transferred had been perfected, according to state law, before he approved the transfers. The case was sent back to federal District Court with instructions for reevaluation on the perfection issue by the State Engineer. On reconsideration, the State Engineer again approved the transfers and District Court again upheld the State Engineer's decision. The Tribe again protested the transfers, claiming that some of the water rights has not been perfected according to state law or that they had been abandoned or forfeited.

In Alpine III, the Ninth Circuit ruled that the State Engineer and the District Court must first examine the issues of perfection, abandonment and forfeiture before approving or denying the water transfers. The appellate court also held that Newlands Project farmers' water rights do not automatically date from 1902, the priority date awarded to the Newlands Project under the Orr Ditch Decree.³⁶ Rather, their individual priorities dated from when the farmers actually obtained their rights to irrigate their lands. The Ninth Circuit Court also ruled that the time when the water right vested must be determined first before whether the water rights have been forfeited is determined. If the right vested after March 22, 1913 and had not been used for the statutory five-year period, the appellate court said the rights would be subject to forfeiture under the NRS sec. 533.060.

Referencing Wyoming law, the Ninth Circuit said that in Nevada, water rights that have never been put to a beneficial use cannot be transferred.³⁷ However, the Nevada State Supreme Court recently decided a case involving the question of nonuse and abandonment. In *Town of Eureka v. Office of State Engineer of Nevada* (decided February 20, 1992), the town of Eureka applied to the State Engineer for transfer of groundwater for municipal purposes, which has been denied as a beneficial use under Nevada law.³⁸ The Nevada State Supreme Court ruled that, under Nevada law, transferred water rights subject to the five-year forfeiture statute could become active if beneficially applied to the transferee (Town) before anyone had filed a forfeiture claim. The Court stated that such a procedure would

prevent wasting water solely to protect water rights. The Court also strongly urged the state legislature to pass appropriate legislation that would formalize a procedure for filing on unused water rights.

This case is significant in that this was the first time the Nevada Court had considered this question of reviving inactive water rights. Equally significant in the context of the *Alpine III* decision is that the Ninth Circuit did not reference, mention or discuss the earlier *Eureka* decision. One wonders whether the Ninth Circuit considered *Eureka*'s ramifications and whether the Court's statement that "Under Nevada law, the appropriation of water requires, at a minimum the actual application of the water on the transferor property to beneficial use"³⁹ is an accurate interpretation of Nevada law. Reviving extinct claims could so complicate the water use patterns that an entirely new system might have to be developed to determine not only what use is beneficial but if "some uses are more beneficial than others." No doubt a difficult task for even one as wise as a federal appellate judge.

Epilogue

Environmental concerns now predominate the discussion of water rights in the intermountain West. Scarcity remains the primary concern as more Nevadans become urban dwellers. The pressure that a growing population places on water resources is unparalleled in Nevada history, since we know from the 1990 U.S. census that Nevada is the most urbanized state in the Union and Clark County the fastest growing county in the United States. The public policy debate now revolves around growth controls as the preferred means of limiting the use of scarce water resources. However, balancing population growth with the economic health is a real concern for government policy makers at local, state, and federal levels. Future legislation affecting Nevada water rights must address these competing interests and be sensitive to the complex environmental issues that confront the state.

Endnotes

1. Hugh A. Shamberger, *Evolution of Nevada's Water Laws, as Related to the Development and Evaluation of the State's Water Resources, From 1866 to About 1960* (U. S. Geological Survey in cooperation with the Nevada Department of Conservation and Natural Resources, Nevada Division of Water Resources: Carson City, NV: 1991).
2. Nevada first passed comprehensive groundwater laws in 1913. Shamberger, *Evolution of Nevada's Water Laws*, p. 23.
3. California, Oregon, Washington, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas follow the "California" doctrine to a large degree. See, Albert W. Stone, *Selected Aspects of Montana Water Laws*, p. 23.
4. Arizona, New Mexico, Colorado, Nevada, Utah, Wyoming, Idaho, and Montana are appropriation states. Stone, p. 7.
5. *Ibid.*, pp. 3-14.
6. *Ibid.*, pp. 5-7.
7. *Ibid.*
8. See James W. Hulse, Chapter One in this volume.
9. Wells A. Hutchins, *The Nevada Law of Water Rights* (Prepared in cooperation with the U.S. Department of Agriculture: Carson City, NV, 1955), p. 5.
10. Stone, *op cit.* p. 14.
11. Shamberger, *op cit.*, p. 33.
12. *Ibid.*, pp. 17-19.
13. *Ibid.*, p. 32.
14. *Ibid.*, p. 46.
15. *Ibid.*, p. 47.
16. *Ibid.*, p. 31.
17. *Ibid.*, p. 5.
18. *United States v. Capaert*, 508 F.2d 313 (9th Cir. 1974) *aff'd* 426 U.S. 128 (1976). The Nevada Supreme Court, in *Application of Filippini*, 202 p.2d 535 (Nev. 1949), ruled that vested water rights are those that have become fixed either by actual diversion and application to beneficial use or by appropriation, according to the manner provided by the water law, and are regarded and protected as property. The Court further stated that a water statutory law relative to appropriation, or by an actual diversion with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time.
19. Robert E. Clark, *Waters and Water Rights* sec. 19.2 (1967). In *In re Waters of Manse Spring*, 108 P.2d 311 (Nev. 1940), the Nevada Supreme Court held that to constitute a valid appropriation of water, there must be an actual diversion of it, with intent to apply it to beneficial use, followed by an application to such use in reasonable time. The Court also held that the state legislature included an exemption for pre-1913 rights from forfeiture to refrain from infringing upon the rights that had accrued at that time. Prior to 1913, the law said that the water uses would have and hold the use of such water until the same should be abandoned. In *Nevada v. United States*, 463 U.S. 110 (1983), the United States Supreme Court held that Nevada law requires that the water must be beneficially used by actual application on the land for the perfection of a water right for agricultural purposes.

20. Dan Tarlock, *Law of Water Rights and Resources*, sec.5.15 and sec. 5.16 (1990).
21. Under NRS sec. 533.035, beneficial use shall be the basis, the measure and the limit of the right to the use of water. NRS sec. 533.070 states that the quantity of water that may be appropriated shall be limited to such water as shall reasonably be required for the beneficial use to be served.
22. One notable exception to this statement is the case of *Nevada v. Morros*, 766 P.2d 263 (Nev. 1988). The Nevada Supreme Court recognized, for the first time, that water may be appropriated in situ (in place, without a diversion), for public recreation purposes.
23. *Office of the State Engineer, State of Nevada and R. Michael Turnipseed, State Engineer v. William W. Morris*, 819 P.2d 203 (Nev. 1991). This case concerned over appropriated groundwater in Clark County and diversion points in the delivery system. NRS sec.533.370 requires the State Engineer to deny applications when there is no unappropriated water in the proposed source or when the proposed use conflicts with existing rights or is detrimental to public interest. The amount of groundwater in the Pahump Valley was unknown; therefore, the Supreme Court upheld the State Engineer's decision.
24. Shamberger, *op cit.*, p. 50.
25. Forfeiture after five consecutive years of non-use applies only to water rights perfected after March 22, 1913, effective date of forfeiture provision (NRS sec.533.060). Also NRS sec.533.085 states that nothing in chapter shall impair vested rights where appropriation occurs prior to March 22, 1913.
26. *Revert v. Ray*, 603 P.2d 262, (Nev. 1979). The issue of abandonment is a question of fact to be determined from all the surrounding circumstances.
27. *Manse Spring*, *op cit.*, p. 315.
28. See for example NRS sec.533.345 and sec.533.425.
29. *United States v. Orr Ditch Water Company*, Equity No. A-3 (D. Nev. 1944).
30. *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), *aff'd as modified*, 697 F. 2d 851 (9th Cir.), *cert. Denied*, 464 U.S. 863 (1983) ("Alpine I"). This case adjudicates all rights of interested parties to the Carson River and its tributaries. The case also reviews the legislative history of the Reclamation Act of 1902.
31. Kramer, "Lake Tahoe, the Truckee River, and Pyramid Lake: The Past, Present, and Future of Interstate Water Issues," *Pacific Law Journal* 19 (1988), pp. 1343-1349.
32. Tina Nappe, "Negotiating the Future of Wildlife: Saving Wetlands and Fish Along the Truckee River" in the *High Desert Museum*, (1991), pp. 1-8.
33. For a detailed history of Pyramid Lake Paiute Tribe's legal battles, see Kramer, *op cit.*
34. *United States v. Alpine Land & Reservoir Company*, F.2d (9th Cir. 1992), Case No. 90-16460, pp. 5955-5973, decided May 26, 1992 ("Alpine III").
35. *United States v. Alpine Land & Reservoir Company*, F.2d (9th Cir. 1989) ("Alpine II").
36. Kramer, *op cit.*, p. 1349.
37. Alpine III, *supra* at p. 5963.
38. *Town of Eureka v. Office of State Engineer of Nevada* 826 P.2d 948 (Nev. 1992). Substantial use of water rights after the statutory period of non-use cures claims to forfeiture so long as no claim or proceeding of forfeiture has begun.
39. Alpine III, *supra* at p. 5967.

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WATER AND PUBLIC PERCEPTIONS IN SOUTHERN NEVADA

Frederic Cady and Dennis L. Soden

Introduction

Viewed from some perspectives, water policy and the politics that water issues generate may not appear to be the most critical issues we face. On the international stage, water disputes may seem minor in comparison to stability in Russia or peace in the Middle East. Nationally, the future of Social Security usually draws more attention than the future of the nation's water supply. Even on the state and local level, other policy areas surpass water in the concern expressed by politicians, the media, and the public at large. As long as water is running out of the faucet, municipal matters such as whether one is required to place his/her garbage on the curb for pickup is often given more consideration by policymakers than those issues associated with water.

Those familiar with the history and politics of the desert Southwest, however, seldom downplay the importance of water. In the desert Southwest, water may possibly be the most important long-term policy issue, an issue that will not lose importance as the 21st Century begins. Beginning in the late 19th Century, and continuing throughout the 20th Century, water-related conflicts have been among the most volatile that have occurred, leading one to coin the old western adage of "whiskey is for drinking and water is for fighting." Low levels of rainfall in the