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I. CONCEPTS OF PUBLIC OWNERSHIP AND PRIVATE RIGHTS

Throughout history the idea is recurrent that private rights to water supplies must be curtailed in favor of public interest.[1] The roots of this idea are clearly visible in the Roman civil law[2] and probably extend back to the earliest notion of community rights as distinguished from those of a single member. In Roman and Anglo-American law the common water supply has been likened to air, light, and wild animals; these commodities have been called a "negative community" because private property rights do not vest in them until they have been separated in some explicit way from their natural state. The right to exclude public use of such commodities or to restrain unreasonably their availability to the public was strictly limited by this concept of the law. The natural water supply was considered so essential to the survival of society that Vattel cited with approval the Roman description of this resource as *"res communes"*.[3] In English law the water supply has been variously described by phrases such as *"res publicae,"* *"res nullius,"* "common," and *"publici juris."* The classic decision in *Embrey v. Owens*[4] adhered to the rule that no one owns the actual corpus of naturally flowing water; private rights in this commodity are limited to a *"usufruct,"* a right to use water while it flows on or past one's land. The reasons for rejection of private ownership of a water supply are not difficult to see.[5] In ancient times the lives of natives and travelers were equally dependent on access to water. Today hydrologic investigation has demonstrated that the water

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1. Wiel, **Running Water,** 22 Harv. L. Rev. 190 (1908-1909).
2. 2 Justinian, Inst., tit. I, s. 1; Addy and Walker's translation 71 (1876).
3. I. VATTEL, LAW OF NATIONS, c. 20; Chitty's translation 109, s. 234 (1870).
4. 6 Exch. 353, 155 Eng. Rep. 579 (1851).
5. Bageley, **Some Economic considerations in Water Use Policy,** 5 Kan. L. Rev. 499, 502 (1955-1956).

supply is constant, that it may be used as it passes from one location or form to another, and that efforts to permanently withhold it from society are largely ineffectual. From a practical standpoint denial of private ownership does not reduce the value of water so long as rights to user are allowed; furthermore, use of water for one purpose often leaves it free to be used again for various other purposes. Additional reasons for recognizing public ownership of water include its effect upon land values, its use by the public for collective functions such as navigation, recreation, and fishing, and the enormity of projects necessary to develop a water supply. A final justification for public ownership is that the economic loss of water through waste, exploitation, or pollution is in the long run borne by society rather than by the individual.[6]

The denial of private ownership of water supplies does not preclude private rights from operating in a more limited manner; the law has long recognized that the *"usufructuary"* right to water is a legally protected property interest. This interest is capable of acquisition and transfer according to recognized rules of law and is often spoken of as "real property".[7] The extent and nature of the right varies from one jurisdiction to another, but the designation as "private property" and as "realty" appears frequently in American jurisdictions.[8] The legally protected right to use water from a natural supply is commonly termed a "water right". This label includes both positive right to use the water and negative right to exclude others from using the water in ways which are inconsistent with the right as defined by governing law.

The foregoing distinction between public "ownership" of water and private ownership of the "water right" is basic in all American jurisdictions, whether resting on common law, constitutional provisions or statutes. Disputes in water law are ordinarily over water rights rather than over water ownership, with the exception hereinafter discussed relating to percolating ground waters. The extent and nature of a water right in a particular jurisdiction depends on its theory of water rights and on its statutes and decisions. Let us turn first

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6. **Ibid.**
7. Bigelow v. Draper, 6 N.D. 152, 162, 69 N.W. 570 (1896). I. WIEL, WATER RIGHTS IN THE WESTERN STATES, 18-20 (3d ed., 1911).
8. New Mexico Products Co. v. New Mexico Power Co., 42 N.M. 311, 77 P.2d 634 (1937); Robbins v. Rapid City, 71S.D. 171, 23 N.W.2d 144 (1946).

to the theory of water rights and trace the evolution of the two major doctrines in America.

II. DEVELOPMENT OF THE BASIC WATER RIGHTS DOCTRINES

The power to govern the acquisition of private water rights is not expressly granted by the United States Constitution. In accordance with the theory that the federal government is limited to powers expressly granted to it or reasonably implied as necessary to carry out its enumerated powers,[9] power over water rights is reserved to the states by virtue of the Tenth Amendment. The states have consistently asserted this power and their claims have been repeatedly upheld by the United States Supreme Court.[10] In the leading case of *Kansas v. Colorado*,[11] Mr. Justice Brewer considered the division of powers between state and federal governments and succinctly stated, "Congress cannot enforce either (of the two main doctrines of water rights) upon any State." State power over rights to water within its boundaries is plenary within the limits of the due process clause of the Fourteenth Amendment,[12] provided the exercise of the power does not interfere with powers expressly delegated to the federal government.[13]

Exercise of the states' power over water rights has led to recognition in various degrees of the doctrine of riparian rights in forty states. The essence of this doctrine is recognition of equal rights to the use of water by all owners of land abutting a natural watercourse as long as there is no resulting interference with the rights of other riparian owners. The rights of other riparian owners in the stricter theory included a right to receive the flow of the stream undiminished in its natural quantity and quality.[14] In practice this meant denial of the right to divert streams beyond riparian lands or to consume water beyond the so-called "natural" uses for human requirements, domestic needs, and stockwatering purposes. This strict "natural flow" theory of riparian rights has been generally modified in practice by "reasonable use" interpreta-

9. McCulloch v. Maryland, 4 Wheat. 316, 405 (1819).
10. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 164 (1935); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).
11. Kansas v. Colorado, 206 U.S. 46, 94 (1907).
12. Bigelow v. Draper, **supra**, note 7, at 163.
13. Kansas v. Colorado, **supra**, note 11, at 86, 94.
14. Harvey Realty Co. v. Wallingford, 111 Conn. 352, 359-360, 150 Atl. 60 (1930).

tions, which allow a riparian owner to consume within the natural watershed amounts of water reasonable in light of the similar reasonable requirements of other riparian owners.[15] This liberalizing interpretation permitted use of a limited amount of water for such purposes as irrigation,[16] but variations in water supply due to drouth or increased needs of other riparians would reduce the amount available for private uses. Furthermore, the rules generally forbade use of the water on non-riparian lands, whether inside or outside the natural watershed of the stream.[17] It may be seen that the flexibility of this doctrine is both a strength and a weakness to riparian owners: although they can, except in times of abnormal drouth, depend on rights to sufficient water for "natural" needs, they can not depend on rights to a constant amount of water for any other purpose. From the viewpoint of a person lacking ownership of riparian lands, the doctrine is a harsh one; he has no right to use the water in any way, apart from sharing in such public rights as navigation easements. To a large extent the social desirability of the doctrine depends upon the easy availability of adequate water supplies to the bulk of society. If a region has sufficient rainfall there is likely to be no real shortage of water for the needs of nonriparian owners, and an abundance of natural rivers, streams, and lakes means that riparian land is not difficult to acquire if it is necessary for special purposes.

Speculation and research concerning the origin of the doctrine of riparian rights has created a certain amount of controversy in recent years. For many years the widely-held notion that riparian rights were a product of the common law was rejected by experts on the subject. The conclusion of most authorities was that the doctrine had in fact been incorporated into the common law by Chancellor Kent and Mr. Justice Story, who adopted it from French civil law. The French had supposedly in turn taken the idea from the civil law of Rome.[18] The belief that the doctrine was not generally recognized in

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15. Stratton v. Mt. Herman Boys School, 216 Mass. 83, 85, 103 N.E. 87 (1913).

16. Barrett v. Metcalfe, 12 Tex. Civ. App. 247, 33 S.W. 758 (1896); Frizell v. Bindley, 144 Kan. 84, 58 P.2d 95 (1936).

17. 2 FARNHAM, LAW OF WATERS, 1570-1571 (1904).

18. Wiel, **Waters: American Law and French Authority,** 33 Harv. L. Rev. 133 (1919).

English law until after 1849[19] was based on the assumption that Kent and Story were responsible for its injection into the common law. The accuracy of this assumption has recently been challenged vigorously by intensive research indicating presence of the riparian doctrine in the common law of England and America long before the time of Story and Kent.[19 1] In addition, there is some suggestion that in the Southwest the doctrine had come from Roman Law through the law of Spain and Mexico.[20] The accuracy of this idea has also been the subject of recent investigations resulting from water rights litigation in Texas.[20 1]

It is accepted, however, that the widespread adoption of the doctrine resulted from its enunciation by common law judges in the mid-nineteenth century. For the Eastern United States it has on the whole proved to be a workable foundation for water law, although efforts to replace or amend it are being made with increasing frequency.[21]

The authentic contribution of English common law to American water law was in an area where the riparian system could not practicably be applied. The riparian doctrine dealt with rights to the use of a stream or defined body of water, whether on the surface of the earth or underground.[22] It was felt that a different theory should apply to diffused underground ("percolating") waters, since lack of hydrologic knowledge made determination of the rate and direction of flow of such water virtually impossible. The rule applied to these waters was essentially one of absolute ownership by the owner of the overlying land.[23] The landowner was free under English law to pump water from underground percolating sources without limitation even though malice was the sole motivation of his action.[24] The untrammeled license of this rule has been restricted in America by applying variations of a "reasonable

19. See Hutchins, **Western Water Rights Doctrines and Their Development in Kansas,** 5 Kan. L. Rev. 533, 536 (1955-1956).
19. 1 See Maass and Zobel, Anglo-American Water Law: Who appropriated the Riparian Doctrine?, Graduate School of Public Administration, Harvard X Public Policy 109-156 (1960); and Proceedings, Water Law Conference University of Texas, 38, 44 (1955).
20. Motl v. Boyd, 116 Tex. 82 107-108, 286 S.W. 458 (1926).
20. 1 State v. Valmont Plantations, 346 S.W.2d 853 (Tex. Civ. App., 1961, error granted).
21. Haar & Gordon, **Riparian Water Rights vs. A Prior Appropriation System: A Comparison,** 38 B.U.L. Rev. 207, 254 (1958).
22. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 40 (U.S. Dept. of Agriculture, 1942).
23. Howard v. Perrin, 8 Ariz. 347, 353, 76 Pac. 460 (1904); **aff'd** 200 U.S. 71 (1906).
24. Mayor of Bradford v. Pickles, (1895) A.C. 587.

use" test,[25] but within these broad limits the right remains unrestricted in jurisdictions following the common law rule.

The allocation of water rights effected for watercourses by the riparian rule and for percolating waters by the absoluted ownership rule are most satisfactory under conditions of ample water supply; in such conditions few landowners are deprived of sufficient water for their needs and lack of riparian status is ordinarily not an economic hardship. Waste of water may be permitted with relatively few ill effects; society is willing to bear the nominal cost of loss of potential benefits when the loss may easily be deplaced by utilizing alternative sources of water supply.

Conditions in the Western States have required a different policy of water law. The arid and semiarid states west of the Mississippi River have from the beginning of settlement faced severe shortages of water. The result has been evolution of a system of water rights based on the need to apply every available source of water to greatest social advantage. The system is known generally as the doctrine of appropriation. The origin of the doctrine has been attributed by some courts to practices of the Indian natives and of Spanish and Mexican settlers in Arizona, New Mexico, and Colorado;[26] others have found its initiation in Mormon rules followed in Utah.[27] It is, however, generally agreed that the firm establishment of the doctrine resulted from Congressional approval of the customs of miners and settlers on federal lands.[28] When the gold rushes of 1849 and 1859 enticed prospectors and settlers to move into the Southwest, one of the major obstacles to successful development of the region was its shortage of water. The solution for both miners and farmers was to divert the few mountain streams and rivers into areas where they could be used to greater economic advantage. Since settlement and development of many areas were absolutely dependent on diversions of water, the application of the riparian doctrine of water rights was intolerable from an economic standpoint. In addition to its practical unsuitability there was a legal obstacle to invocation of the riparian doctrine—no individual could be

25. Bassett v. Salisbury Manufacturing Co., 43 N.H. 569, 577, 82 Am. Dec. 179 (1862).
26. Clough v. Wing, 2 Ariz. 371, 380-381, 17 Pac. 453 (1888); United States v. Rio Grande Dam & Irrigation Co., 9 N.M. 292, 305-307, 51 Pac. 674 (1898).
27. Hutchins, **Mutual Irrigation Companies in Utah,** Utah Agr. Expt. Sta. Bull. 199, 9-16 (1927), Cited in 5 Kan. L. Rev. 538.
28. 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, § 66-99 (3d ed., 1911).

heard to assert riparian rights because the owner of all public lands was the federal government. As trespassers on the public domain, the settlers' very tenure was at the sufferance of the federal government. Even if the riparian doctrine were to be followed, private rights under it could not be acquired until legal title to the land was transferred to private hands.[29] In the meantime the riparian rights owned by the federal government were suspended; neither party to a private dispute could rely on them.[30] The courts turned to other criteria to settle conflicting claims. At hand was the custom of miners and settlers who habitually allowed better right to the first person who actually appropriated water for beneficial purposes. The California court seized upon this test in *Irwin v Phillips*[31] in 1855 and the doctrine of prior appropriation was judicially born. As precedents the court cited the customs of the region. Noting that these customs represented necessity and propriety in the minds of the people the court pronounced upon them the blessings of *res judicata.*

After its initial judicial recognition the doctrine gained rapid acceptance in the courts of the West.[32] It was eminently suited to the needs of the region. Water was too precious an asset to be wasted, and the new rule allowed it to be fully appropriated by claimants who could apply it for beneficial purposes. As expounded by the courts, the doctrine came to have the following four basic tenets:[33]

1. Water in its natural course is the property of the public and is not subject to private ownership.[34]

2. A vested right to use the water may be acquired by appropriation and application to beneficial use.[35]

3. The person first in time is first in right.[36]

4. Beneficial use is the basis, the measure, and the limit of the right.[37]

29. McKinley Bros. v. McCauley, 215 Cal. 229, 231, 9 P.2d 298 (1932); Norwood v. Eastern Oregon Land Co., 112 Ore. 106, 111, 227 Pac. 1111 (1924).
30. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142,154, 158 (1935).
31. 5 Cal. 140 (1855).
32. Logan v. Driscoll, 19 Cal. 623 (1862).
33. Clyde, **Current Developments in Water Law,** 53 Nw. U. L. Rev. 725, 727 (1958-1959).
34. Palmer v. Railroad Commission, 167 Cal. 163, 168, 138 Pac. 997 (1914); Adams v. Portage Irrigation, Reservoir & Power Co., 95 Utah 1, 11, 72 P.2d 648 (1937).
35. Hoffman v. Stone, 7 Cal. 47, 49 (1857); Whitmore v. Salt Lake City, 89 Utah 387, 399, 57 P.2d 726 (1936).
36. Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 26, 276 Pac. 1017 (1929); Dameron Valley Reservoir & Canal Co. v. Bleak, 61 Utah 230, 232, 211 Pac. 974 (1922).
37. Trimble v. Hellar, 23 Cal. App. 436, 138 Pac. 376 (1913); Dick v. Caldwell, 14 Nev. 167, 170 (1879).

It should be noted that the doctrine was developed and recognized while the federal government was still the owner of virtually all the lands west of the Mississippi River. As owner of these lands, Congress had power under the property clause[38] of the United States Constitution "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." By virtue of this authority Congress could dispose of public lands on such conditions as it saw fit to impose on title of the grantee. Land grants were being made in wholesale fashion after the Homestead Act of 1862,[39] the Pacific Railway Act of 1864,[40] and other legislation designed to encourage rapid settlement and development of the West. It was conceded that although each state was free to adopt its own system of water rights, the state could not thereby impose limitations on the rights of powers of the federal government arising from its capacity as proprietor of public lands.[41] Therefore the adoption by state legislatures and courts of the doctrine of appropriation could not divest the United States of its riparian rights to waters flowing through federal lands. This limit on state power existed even though the United States acquiesced in private appropriation of water on federal lands for non-riparian uses and allowed application of the doctrine of prior appropriation to settle water disputes between private parties on federal lands. The state law, in other words, could not operate to remove the shadow on an appropriator's rights cast by the overriding federal ownership of both land and water on the public domain. It was therefore possible for the grantees of federal riparian lands to argue that their grants included riparian rights which formerly could have been asserted by the federal government to defeat state-created rights held by non-riparian appropriators. The argument was successfully made in a few cases regarding land patents granted prior to 1866.[42] Such decisions posed a threat to the whole state doctrine of prior appropriation, since it meant that the constitutional power of a state to adopt its own system of water rights could be almost completely nullified by a combination of the property clause of Article IV and the due process clause of Amendment XIV of

38. U.S. Const., Art. IV, § 3, cl.2.
39. 12 Stat. 392, 43 U.S.C. 161 et seq. (1958).
40. 13 Stat. 356 (1864).
41. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).
42. Union Mill & Mining Co. v. Ferris, 24 Fed. Cas. 594 (No. 14371, C.C.D. Nev., 1872); Vansickle v. Haines, 7 Nev. 249 (1872).

the United States Constitution. In order to prevent this result, Congress passed a series of acts designed to protect state-recognized water rights and to preserve to a large extent the power of the Western States to create their own systems of water law. An indication of the method which would be used to accomplish this appeared in a statute of 1865 providing that in federal court actions over mining titles "each case shall be adjudged by the law of possession;" the paramount land title of the United States was not to affect the rights of litigants *inter se*.[43]

The first federal provision directly affecting water rights was included in the Act of 1866 opening mining lands for preemption. Section 9 of the Act read:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . .[44]

Although a few state courts interpreted this provision to be only prospective in its effect,[45] the United States Supreme Court declared that it constituted a voluntary recognition of pre-existing rights rather than creation of new rights.[46] In effect the Act declared that water rights which had vested under state law could not be overturned by a patentee of mining lands under the Act. His grant was not a complete transfer of the full title previously held by the government. This interpretation was affirmed in 1870 by amending the prior Act so as to provide in express terms that "all patents granted, or preemption of homesteads allowed, shall be subject to any vested and accrued water rights . . . recognized by the ninth section of the Act."[47]

The second major federal legislative recognition of the new water doctrine applied to grants of desert lands in vast areas of California, Oregon, Nevada, Colorado, and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona,

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43. 13 Stat. 441.
44. 14 Stat. 251, 253, 43 U.S.C. 661 (1958).
45. Union Mill & Mining Co. v. Ferris, Vansickle v. Haines, **supra**, note 55.
46. Broder v. Water Co., 101 U.S. 274, 276 (1879).
47. 16 Stat. 218, 43 U.S.C. 661 (1958).

New Mexico, and Dakota. In 1877 the Desert Land Act permitted entries on the condition that

> . . . the right to the use of water . . . shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.[48]

The intent of this provision was to separate the titles to land and non-navigable waters on the public domain and to confirm that land patents in the future should carry with them only such rights to water as might be acquired under state law.[49] Congressional power to do this was derived from the property clause of Article IV of the Constitution.[50] The Acts of 1866 and 1877 specifically applied only to mining and desert land patents; this limitation was found to be unintentional by the Supreme Court, which declared it "inconceivable" that Congress would intend a different rule to apply to grants under the homestead and preemption acts.[51]

The foregoing process has been widely regarded as having constituted a complete surrender of federal control over rights to non-navigable waters located on lands conveyed from the federal government. This conclusion has been more recently challenged by the following argument of the federal government.[52] The Acts of 1866, 1870, and 1877 severed water rights from federal land patents without going as far as to surrender the water rights to the states. The Act of 1877, in particular, declared that all unappropriated non-navigable waters should be held free for appropriation. As owner of the waters the federal government could reserve them for its own use, provided it did not infringe upon state-created rights. When the government reserved lands for reclamation and power proj-

48. 19 Stat. 377, as amended, 43 U.S.C. 321 (1958).
49. California-Oregon Power Co. v. Beaver Portland Cement Co., **supra,** note 30, at 162, 164.
50. **Id.,** at 162.
51. **Ibid.**
52. See Brief for the United States of America, Intervenor, Nebraska v. Wyoming, October Term, 1944, No. 6 Original at 53-72, decided 325 U.S. 589, 611-616 (1945); cited in U.S. President's Water Resources Commission, Vol. 3, Water Resources Law 41-42 (1950).

ects, largely in the period from 1910 to 1915, it by implication also reserved water rights necessary for these projects. Therefore no private rights to waters flowing by or through the reserved federal lands are enforceable against the federal government if they vested after reservation of the land for federal projects. This argument was upheld in *Federal Power Commission v. Oregon*,[53] where the government was allowed to withdraw water from a non-navigable stream without compensating private owners for loss of water rights acquired after 1910. In light of the vast number of water rights which have vested since 1910 and the large number of streams and rivers which flow through lands reserved in the period from 1910 to 1915 for power and reclamation projects, the decision in this case poses a threat to a large number of private rights.[54] Considering the present extent of federal water activities the issue is a serious one. A partial refutation of the government's assertions would seem to be implied from frequent indications of Congressional intent to recognize state-created water rights. The most notable example of this intention is contained in the 1902 Reclamation Act which declares that nothing in the Act "shall be construed as affecting or intended to affect or to in any way interfere with" state-created water rights systems; the Secretary of the Interior is directed to conform to state water rights laws in acquiring water for reclamation purposes.[55] Similar provisions appear in other federal statutes.[56] Taken together they would seem to refute a furtive Congressional intention to reserve paramount water rights for the federal government. The refutation is not explicit and a contrary decision can logically be reached, but as a matter of policy the resulting defeasance of expectations and investments of the public should weigh strongly against asserting a claim so long dormant.[57]

Except for the foregoing argument and its acceptance by the court in *Federal Trade Commission v. Oregon*, the assumption has prevailed that, after 1877 at the latest, state control over water rights in regions formerly owned by the

53. 349 U.S. 435 (1954).
54. Martz, **The Role of the Federal Government in State Water Law**, 5 Kan. L. Rev. 626, 645 (1955-1956).
55. 32 Stat. 390, § 8, U.S.C. 383, 372 (1958).
56. See Rights of Way Act of 1891, 26 Stat. 1101, 43 U.S.C. 946 (1958); Black Hills Forest Reservation Act, 34 Stat. 234 (1906), 16 U.S.C. 508 (1958); Federal Power Act, 41 Stat. 1063 (1920), 16 U.S.C. 821 (1958); Martz, **The Role of the Federal Government in State Water Law, op cit., supra** note 54, at 632-634.
57. Clyde, **Current Development in Water Law, supra**, note 33.

federal government is on a par with state control over water rights in the original thirteen states.[58] In exercise of this power states are free to recognize riparian rights,[59] appropriative rights,[60] a combination of both,[61] or some other system.[62] A state is also free to change from one system to another, subject to limits imposed by the due process clause of the Fourteenth Amendment, discussed hereinafter.[63]

States east of the Mississippi River have retained riparian rights. The fact that the prior appropriation doctrine was well-adapted to arid regions and that it was evolved during a period concurrent with settlement and organization of the West has resulted in its recognition in all of the 17 Western states. In addition to appropriative rights, the six states lying on the hundredth meridian (from North Dakota to Texas) and the three Pacific coast states have recognized riparian rights in one form or another.[64] Some of the problems arising from this dual recognition are discussed in Part III.

Before analyzing the operation of state water rights systems it is necessary to realize that despite the recognition of state power to control its water rights doctrine there are two types of constitutional limitations on its exercise. The first type is the "due process" limit of the Fourteenth Amendment and its counterparts in the various state constitutions.

The second type is the limit indirectly imposed on state powers by the granting of enumerated powers to the federal government. These limitations result in withdrawal of significant amounts of water from the state's control and are therefore important to an adequate understanding of the range of state power.

Since water rights constitute property the states are pro-

58. Platt v. Rapid City, 675 S.D. 245, 248-250, 291 N.W. 600, (1940).
59. Revell v. State, 177 Ill. 468, 479, 52 N.E. 1052 (1898).
60. Atchison v. Peterson, 87 U.S. (20 Wall.) 507 (1874).
61. Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).
62. Kansas v. Colorado, **supra,** note 11, at 94.
63. California-Oregon Power Co. v. Beaver Portland Cement Co., United States v. Rio Grande Dam & Irrigation Co., **supra,** note 10; Clyde, Current Developments in Water Law, **supra,** note 33.
64. HUTCHINS, SELECTED PROBLEMS, **supra,** note 22, at 30, 31. The statement is frequently made by water law authorities and courts that certain states have entirely rejected riparian rights. It may be pointed out that the use of the term "riparian rights" is by common practice taken to refer generally to rights concerning the diversion and consumptive use of water and ordinarily is not used with any intent to comprehend other incidental rights, such as fishing and ice-cutting rights, rights of access to streams, and rights related to land adjacent to or under stream-beds, such as rights to accretions. But these incidental rights are not allowed to affect the over-riding **water** rights and hence are ordinarily excluded from the scope of discussion over riparian rights. The author is indebted to Dr. Wells M. Hutchins for discussion on this point. Also, see 9 Wyo. L. J. 130 (1954-1955).

hibited from depriving any person of lawful vested water rights "without due process of law."[65] The usual interpretation of this phrase is to require a lawful application of the power of eminent domain for a public purpose with compensation for private property acquired by the taking.[66] The limitation would apply directly to the situations where a state seeks to acquire vested water rights for its own purposes.[67] The more controversial application of the limit arises when a state wishes to change from one water rights doctrine to another or when the state seeks to narrow the definition of a water right. To the extent that water rights are privately vested, the courts have often held that they could not constitutionally be divested without compensation;[68] protection is derived from "due process" clauses[69] and from specific clauses protecting against deprivation of private property without compensation.[70] The requirement seems eminently fair where the individual has actually been using the water of which he is deprived;[71] a more perplexing issue is whether compensation ought also to be required for the divestiture of *unused* riparian rights. The riparian water right, it will be recalled, vests in riparian owners irrespective of actual use of the water and therefore would seem to be constitutionally protected even though unused. Strict regard for such rights would virtually preclude public water development programs and changes from a system of riparian rights to one of appropriation, at least in any area where most of the land is privately owned. Various solutions have been suggested. The most direct solution is to deny the existence of water rights unless they are used;[72] another answer is to narrow the definition of protected riparian rights to include only those uses which were the original basis of the doctrine, i.e., the "natural" uses of water for domestic and stockwatering purposes.[73] A different approach is to recognize that the rights are vested but to hold that damages for loss of unused riparian rights are

65. U.S. Const., Amend. XIV; Bigelow v. Draper, **supra,** note 7.
66. Crawford Co. v. Hathaway, **supra,** note 61.
67. McCook Irrigation & Water Power Co. v. Crews, 70 Neb. 115, 121, 102 N.W. 249 (1905).
68. Durkee v. Board of County Com'rs., 142 Kan. 690, 51 P.2d 984 (1935); Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930).
69. Bigelow v. Draper, **supra,** note 7.
70. For example, see N.D. Const. § 14.
71. Bauman v. Smrha, 145 F. Supp. 617, 624-625 (D. Kan., 1956), **aff'd per curiam,** 352 U.S. 863 (1956).
72. **Ibid.**
73. Hough v. Porter, 51 Ore. 318, 404-405, 95 Pac. 732, 98 Pac. 1083, 1095-1098; California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

so nominal that a riparian owner will find no incentive to demand them. Variations of the effect of the due process clause as a limit on power to alter existing water rights are discussed further in Part III, but it should be pointed out here that the problem is a general one requiring solution by any state seeking to narrow the scope of water rights previously recognized by the law.

The second major set of limits on state power over water rights arises from the fact that a state may not interfere with the operation of federal powers.[74] Chief among these powers is the regulation of interstate and foreign commerce, one incident of which is control over waterways to the extent necessary to promote navigation.[75] This power has been extended by cases which hold that Congress is its own judge of whether a given water project having beneficial navigational effects is in truth designed for that purpose.[76] This is an important question when multi-purpose projects like TVA are involved. The courts have also held that non-navigable tributaries are subject to federal control when necessary to prevent detrimental navigation effects on navigable streams.[77] It has been observed that if this power were exercised to its full extent, i.e., to prevent diversion of water from all navigable waters and their non-navigable tributaries, there would in fact be practically no water available for diversion under state law.[78] The power of the United States over navigable waters has, as far as state water rights law is concerned, been limited to prevention of diversions or obstructions deemed harmful to navigation and to construction of projects which in Congressional opinion will aid navigation. The United States has not asserted proprietary right to such waters because of the decision in *Martin v. Waddell*,[79] which held that ownership was in the states. Therefore, federal power in this area does not in theory contradict state ownership of water and state power to allocate water rights, but it does operate to prevent assertion of any rights which would hinder navigation.[80] The important effect of this power on private rights is that since the navi-

74. McCulloch v. Maryland, 4 Wheat. 316, 405, 4 L. Ed. 579 (1819).
75. Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23 (1824).
76. Oklahoma v. Atkinson, 313 U.S. 508, 527 (1941).
77. United States v. Rio Grande Dam & Irrigation Co., **supra**, note 41.
78. Martz, **The Role of the Federal Government in State Water Law, supra**, note 54.
79. 16 U.S. (Pet.) 367, 410 (1842).
80. For example, Rivers and Harbors Act of 1890, 26 Stat. 454, prohibiting creation of obstructions to navigable waters without federal authorization.

gation power of Congress is an "overriding servitude", injury to private rights resulting from assertion of the navigation power does not require compensation.[81]

Another important federal power affecting state-created water rights is the property clause[82] under which the development of the doctrine of appropriation was encouraged. The federal government is still the largest landowner in the country; and, under its right to govern its property, federal riparian rights have successfully been asserted to waters flowing by or through federal lands even though the lands are located in states recognizing the doctrine of prior appropriation.[83] Lower appropriators are remediless if assertion of the federal right injures their private water rights.

In addition to those already discussed, there are certain federal powers which to date have not been utilized to any great extent to interfere with state power over water rights; they are nevertheless important in light of their potential expansion for federal purposes in the future.[84] These include the war power,[85] the power over Indian affairs,[86] the treaty power,[87] the general welfare power,[88] and the control over inter-state compacts.[89] Another federal power over water allocation has been found in the judicial power to take jurisdiction over cases and controversies between states. In water disputes between states, the Supreme Court has applied the doctrine of equitable apportionment to allocate the water without being bound by the law of either state.[90]

The foregoing enumeration of limits on a state's power to regulate and dispose of water rights indicates that the theoretical plenary state power is in fact subject to federal powers and constitutional limitations of no small importance.[90 1] One despairing authority, after surveying the extended activities

81. United States v. Willow River Power Co., 324 U.S. 499 (1945); **cf.** dicta by Douglas, J., in United States v. Gerlach Livestock Co., 339 U.S. 725, 756 (1950).
82. U.S. Const. Art. IV, § 3, cl. 4.
83. Winters v. United States, 207 U.S. 564, 577 (1907).
84. See generally, 3 U.S. President's Water Resources Policy Commission, Report, Water Resources Law (1950).
85. U.S. Const. Art. 1, § 8, cl. 1, 11; Art. I, § 9, cl. 7.
86. U.S. Const. Art. I, § 8, cl. 3; United States v. Morrison 203 Fed. 364 (10th Cir., 1910); Winters v. United States, **supra,** note 83.
87. U.S. Const. Art. 11, § 2, cl. 2; Art. VI, cl. 2.
88. U.S. Const. Art. I, § 8, cl. 1; Art. I, § 9, cl. 7.
89. U.S. Const. Art. I, § 10, cl. 3.
90. Wyoming v. Colorado, 295 U.S. 419 (1922).
90. 1 The frequent failure of the federal government to recognize private water rights has been severely criticized. See Martz, **The Role of the Federal Government in State Water Law, supra,** note 54. The problem is aggravated by the frequency with which the federal government has asserted its sovereign immunity to prevent suits by injured parties.

of the federal government, has concluded, "The non-(federal)-project appropriator has little security in the continued operation of his diversion facilities and little opportunity for independent development of new sources of supply."[91] Although this statement may be true, state law continues to govern water rights in countless private disputes; furthermore, even through federal *power* to overrule state-created rights may exist, there are strong policy reasons for recognizing vested rights.[92] The prospective defeat of private expectations, discouragement of private development and loss of private investments have undoubtedly been strong factors influencing such Congressional legislation as the 1902 Reclamation Act, which directs the Secretary of the Interior to acquire water for projects in accordance with the appropriate state laws. Present executive recommendations are to continue this policy in future federal legislation affecting water rights.[93] The problems and policies of state water law may therefore be expected to continue to play an important role in the allocation of private water rights.

III. A CASE STUDY: THE LAW AND PROBLEMS OF WATER RIGHTS IN NORTH DAKOTA.

A student of North Dakota water rights will soon discover that the present law represents an amalgam of early statutes and cases recognizing riparian rights and subsequent statutory adoption of the prior appropriation system. The basic inconsistency of the two doctrines has received scant attention, except for a recent and perhaps constitutionally questionable amendment to the Water Code. The impact of recent water projects under the Missouri Valley Authority and prospective projects will no doubt be felt in this area of the law as the plans come to fruition.[93] [1] Satisfactory adjustment of

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91. Martz, **The Role of the Federal Government in State Water Law, supra,** note 54.
92. Clyde, **Current Development in Water Law,** 53 Nw. U. L. Rev. 725, 740 (1958-1959).
93. 1 U.S. President's Water Resources Policy Commission, A Water Policy for the American People 17 (1950).
93. 1 Present Missouri Valley Authority projects in North Dakota will irrigate 250,000 acres of land in the initial phases of the program; another 750,000 acres will be irrigated by complete development of the contemplated federal projects. Smaller projects under the State Water Conservation Commission will add an undetermined amount to this acreage, since technical assistance from the state is on the increase at present. Speech of Maj. Gen. Keith R. Barney, Missouri River Diversion engineer of the Corps of Army Engineer, reported in Minot (North Dakota) Daily News, April 20, 1960, at page 1. For report on state activities in water development, see page 1 of same.

existing conflicts in the law and adoption of a sound water policy will become increasingly desirable and necessary as the national shortage of water combines with state developments to bring water issues into sharper focus. The following analysis offers illustrative problems and policies which must receive concentrated attention if the challenge is to be met.

The earliest statutory provisions of North Dakota water law, adopted in 1866 by the Territorial Legislature,[94] read as follows:

> The owner of land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there; but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

The section remains in the current statutes.[95] It appears to express the old English doctrine of absolute ownership of subterranean percolating waters, applying it to diffused surface waters as well. For water in a definite stream, on the other hand, the section seems prima facie to adopt the theory of riparian rights. The distinction between water running in a definite stream and diffused water has long been recognized by courts.[96] The "definite stream" test has at common law generally been equated with the question of whether the water flows in a defined natural watercourse.[97] The common law definition of a watercourse[97 1] is not dissimilar from the statutory definition provided in the North Dakota statutes:[98]

> A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and well-defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of permanent character.

It seems that this definition would be applicable to "water

94. Terr. Dak. Civ. Code, § 255 (1866).
95. N.D. Cent. Code, § 47-01-13 (1961).
96. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 12 (Dept. of Agriculture, 1942).
97. **Id.**, at 9, for a discussion of the elements of a watercourse.
97a. Luther v. Winnisimmet Co., 63 Mass. (9 Cush.) 171, 174 (1851). For a discussion of common law watercourses, see Snodgrass & Davis, **The Law of Surface Water in Missouri**, 24 Mo. L. Rev. 137 (1959).
98. N.D. Cent. Code, § 61-01-06 (1961).

running in a definite stream" as well as to sections of the statute where the word "watercourse" is expressly used,[99] especially in light of the common law background which places heavy emphasis on the existence of a watercourse as a prerequisite to the attachment of riparian rights.[100] The statute purports to vest the actual *ownership* of diffused water, i e., water "not in a definite stream," in the owner of overlying or underlying land, whereas water in a natural definite stream "may be used by him". This matches the accepted idea that a riparian water right is to the *use* of running water rather than to its *ownership*. The suspension of ownership in running water was reinforced by an 1881 statute adopted by the Territorial Legislature and later translated into Section 210 of Article 17 of the North Dakota Constitution: "All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes."[101]

The United States Supreme Court, in an early territorial case, held that the Dakota statute protected riparian rights which had vested prior to the rights of an appropriator.[102] It is worthy of note that the Court rested its decision on the fact that the riparian owner had taken lawful possession of his land prior to the diversion of water by the non-riparian appropriator. This paid lip service to the prevalent western custom that the first appropriator in time is first in right. But the stipulated fact to which the court did not advert was that the riparian owner was asserting rights which had gone unused until after the appropriator had been using the water for several years. The decision therefore must be read as holding that unused riparian rights are protected from non-riparian appropriations. This proposition is not new in the riparian theory, of course, but the court seemed to feel that its holding was also consistent with the rules of prior ap-

99. N.D. Cent. Code, § 61-01-05 (1961).
100. Hutchins, **supra,** note 96, at 40.
101. This provision bears a clear resemblance to section 1 of the Desert Land Act of 1877 and was no doubt intended to take advantage of the federal government's declaration that unappropriated waters were available for appropriation for these purposes. By immediately vesting ownership of flowing streams and watercourses in the state, the section apparently sought to emphasize that private rights to use the water must not be confused with the paramount ownership and interest of the state in furthering the specified purposes. Since either the common law or the prior appropriation doctrine would equally have limited vested rights to the **use** of water, it is difficult to see any actual necessity or purpose for the section.
102. Sturr v. Beck, 133 U.S. 541 (1890).

propriation. This assumption ignored the cardinal principle of the appropriation doctrine that an appropriative right depends on actual beneficial use of the water. In construing the territorial statute of 1866, the Court interpreted what prima facie seemed to be a "natural flow" theory of riparian rights to be a recognition of the right to have water "flow undiminished except by the reasonable consumption of upper proprietors." The court also recognized that by prevailing local customs a reasonable riparian use would include water for irrigation. This first decision on riparian rights in Dakota seems therefore to have recognized the "reasonable use" theory of riparian rights and the vesting of legally protected riparian rights in the landowner even though no use is made of the water.

Subsequent cases have tended to approve these interpretations and to affirm that other aspects of the common law riparian doctrine are also in force in the state. An early case reiterated the proposition that riparian rights constitute real property within the protection of the Fourteenth Amendment to the United States Constitution, that they may not be taken by eminent domain proceedings unless compensation is paid, and that compensation is to be determined by a jury.[103] The "use" to which a riparian owner is entitled has been held to extend "not only to the use thereof for domestic purposes, but where the circumstances of the case make the use a reasonable one, it extends also to the use thereof for manufacturing, agricultural, or similar purposes."[104] The right to have the stream flow "in its natural quantity and purity" is subject to rights of reasonable use in each owner, and reasonableness is primarily a question of fact.[105] Riparian rights may be released through contract, and, if properly recorded, the contract will bind subsequent owners of the particular tract.[106] The features of the riparian rights doctrine as applied by the courts of North Dakota are not unique; in general the cases have affirmed that riparian rights in North Dakota are recognized[107] and that the common low doctrine was in force both before

103. Bigelow v. Draper, 6 N.D. 152, 163, 69 N.W. 570 (1896).
104. McDonough v. Russell-Miller Milling Co., 38 N.D. 465 (headnote by court), 165 N.W. 504 (1917).
105. **Id.** at 472.
106. Johnson v. Armour & Co., 69 N.D. 769, 777, 291 N.W. 113 (1940).
107. McDonough v. Russell-Miller Milling Co., **supra,** note 104.

and after the adoption of statehood.[108] The important aspects from the standpoint of considering changes in the law are that the rights have been recognized as constitutionally protected property and that they vest upon possession of the land despite lack of use of the water.

The next major addition to water rights was statutory authorization of the Irrigation Code in 1905.[109] The primary features of the Code were four:

1. A declaration that all water within the state from all sources of supply belong to the public and are subject to appropriation for beneficial use.[110]

2. Establishment of the test of prior appropriation for beneficial use as giving the better right to use of the water.[111]

3. Declaration that application of water to beneficial uses constitutes a public purpose in furtherance of which eminent domain is available when necessary.[112]

4. Creation of administrative machinery headed by a state engineer and water commissioners charged with the duty of recording water rights and supervising the system, subject to the right of an injured party to appeal to the district court.[113]

The only amendments to these features important to the present analysis occurred in 1955 and 1957.[114] Since no cases on the original 1905 Code provisions or the 1955 amendments reached the North Dakota Supreme Court, the following discussion considers the present amended version. This version includes a specific delineation of waters which "belong to the public" and also defines riparian rights (other than those of a municipality) as "the ordinary and natural use of water for domestic and stockwatering purposes." The provisions raise serious constitutional issues as well as problems of interpretation and therefore merit close analysis.

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108. Bigelow v. Draper, **supra**, note 103, at 163; Brignall v. Hannah, 34 N.D. 174, 185, 157 N.E. 1042 (1916); Henderson v. Hines, 48 N.D. 152, 161, 183 N.W. 531 (1922).
109. N.D. Laws 1905, ch. 34, as amended N.D. Cent. Code, Title 61 (1961).
110. N.D. Laws 1905, ch. 34, sec. 1, as amended N.D. Cent. Code, § 61-01-01 (1961).
111. N.D. Laws 1905, ch. 34, s. 2, as amended N.D. Cent. Code, § 61-01-02 (1961).
112. N.D. Laws 1905, ch. 34, s. 3, as amended N. D. Cent. Code, § 61-01-04 (1961).
113. N.D. Laws 1905, ch. 34, s. 5-65, as amended N.D. Cent. Code, ch. 61-02, -03 (1961).
114. Laws of N.D., ch. 345 (1955); ch. 372 (1957).

Waters specifically declared to belong to the public and to be subject to appropriation include:

> 1. Waters on the surface of the earth excluding diffused surface waters but including surface waters whether flowing in well-defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes; and
>
> 2. Waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating waters.
>
> 3. All residual waters resulting from beneficial use and all waters artificially drained; and
>
> 4. All waters, excluding privately owned waters in areas determined by the state engineer to be non-contributing drainage areas. A non-contributing drainage area is hereby defined to be any area which does not contribute naturally flowing surface water to a natural stream or watercourse at an average frequency oftener than once in three years over the latest thirty year period.[115]

The enumeration covers all the traditional classifications of natural water supply.[116] Only "privately owned waters" in noncontributing drainage areas and diffused surface water in other areas seem to be outside the broad sweep of the claims of public ownership. The meaning of "privately owned waters" is not entirely clear; if one were to turn for aid to the 1866 territorial statute previously discussed, the phrase would seem to recognize private ownership rights in underground percolating water and diffused surface water. Rights to both of these, however, are expressly declared to be owned by the public when located in a noncontributing drainage area. Hence, the only other possible meaning of the phrase would seem to be water which has been physically separated from its natural condition so as to become personal property, i.e., water held in private tanks, basins, or receptacles in which there is no flow or drainage in the natural manner. If this is what is meant by "privately owned waters", there can be no quarrel; not only have such waters always been recognized as private property, but the total amount involved would be infinitesimal compared to the total natural water supply. Therefore, for all practical purposes, the only water not subject to claims of public ownership is diffused surface water outside noncontributing drainage areas. The effect so far as *ownership* is

115. N.D. Cent. Code, § 61-01-01 (1961).
116. HUTCHINS, SELECTED PROBLEMS, **supra**, note 96, at 1.

considered would challenge the previous law only in relation to underground percolating water, which under the 1866 provision is apparently "owned" by the overlying landowner. The ownership of other waters affected by the new section has long been recognized as being in the public under either the riparian or appropriation theory. Accordingly, the only "vested right" of *ownership* which is challenged by the terms of the new section relates to underground percolating water. The loss seems to be largely a matter of terminology; American courts have long recognized that the right is one of reasonable use rather than the "absolute ownership" recognized in England.[117]

The more important result of the new amendment is to declare that all these publicly owned waters may be appropriated for beneficial use.[117 1] If this section is valid, the water rights of riparian owners have been abolished in one fell swoop except in so far as they can be saved in one of the following ways:

1. They can, of course, be registered under the appropriation procedure, but not as a riparian right.

2. The statutes recognize prescriptive water rights if the claimant "used or attempted to appropriate" water "over a period of twenty years prior to January 31, 1934.[118] To identify this with any form of riparian right is also impossible.

3. The 1955 amendments declared, "The several and recipcal rights of a riparian owner, other than a municipal corroporation, in the waters of the state comprise the ordinary or natural use of water for domestic and stockwatering purposes."[119]

This last provision is the only recent statutory recognition of rights even faintly analogous to common law riparian rights. But as a definition of the scope of riparian rights, the provision is considerably narrower than the formerly prevailing common law rights to natural flow and reasonable use; it is

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117. Bassett v. Salisbury Manufacturing Co., **supra,** note 25.
117. 1 The statute fails to accord any recognition to riparian rights in use at the time the statute was passed. In Kansas, which recently adopted the appropriation system, it has been indicated that the legislation would have been unconstitutional if no provision had been made to preserve existing rights. Bauman v. Smrha, 145 F. Supp. 617 (D. Kansas, 1956), **aff'd per curiam,** 352 U.S. 863 (1956).
118. N.D. Cent. Code, s. 61-04-22 (Supp. 1957). The reason for the choice of twenty years prior to 1934 as the prescriptive period is not apparent to this author, especially since the prescriptive right was first recognized in 1957. Laws of N.D., ch. 375 (1957).
119. Laws of N.D., ch. 345, s. 2 (1955); N.D. Cent. Code, § 61-01-01.1 (1961).

also narrower than the earlier statutory section (as yet unrepealed) declaring that water in a definite natural stream "may be used by (the landowner) . . . as long as it remains on his land." The North Dakota courts, it will be recalled, had recognized that riparian rights included reasonable use for irrigation, manufacturing, agricultural, and similar purposes,[120] that they vested in the riparian owner irrespective of actual use,[121] and that they could not be taken without compensation.[122] On this basis the legislation limiting riparian rights and declaring that water in streams in or along privately owned land is available for appropriation faces serious constitutional problems of due process and deprivation of private property without compensation. The same problem is encountered in regard to subterranean percolating water, which was formerly "owned" by the overlying landowner but which under the new statute is declared to be subject to appropriation by anyone securing a license in accordance with the statutory procedure.

The ramifications of the problem are extended by statutory declaration that application of water to beneficial purposes constitutes a public use and that eminent domain is available where necessary to realize those purposes.[123] The riparian may by virtue of this not only find his water rights taken without compensation, but his land may be condemned to enable the appropriator to reach the water.

Another aspect of this constitutional problem arises in the provision that the right to use water may be forfeited by non-use for three years.[124] As applied to the appropriator whose water rights have been acquired under the statutory authorization, the provision seems to be a lawful exercise of the state's power to create water rights on such conditions as it sees fit. But in so far as the section applies to riparian rights, which traditionally have existed independent of use, the forfeiture would seem to constitute a legislative deprivation of property.[125]

The due process issue has been raised in other states facing essentially the same problem of entrenched riparian rights.

120. Sturr v. Beck, **supra**, note 102; McDonough v. Russell-Miller Milling Co., 38 N.D. 465, 165 N.W. 504 (1917).
121. Sturr v. Beck, **supra**, note 102.
122. Bigelow v. Draper, **supra**, note 103.
123. N.D. Cent. Code, § 61-01-04 (1961).
124. N.D. Cent. Code, § 61-14-02 (1961).
125. See 20 Mont. L. Rev. 60.

Early decisions tended summarily to declare invalid an appropriation statute which without compensation overturned vested riparian rights.[126] This ban was also extended to requirements forcing riparian owners to secure water permits and to forfeitures of riparian rights for non-use.[127] Some courts indicated that appropriation by non-riparians could be allowed only in streams having more water than could lawfully be required by a riparian, or only in lands which the state owned at the time of enactment of the appropriation statute.[128] Some judges in riparian states have gone so far as to hold that statutes imposing upon landowners a duty to prevent wasteful flow of artesian wells are unconstitutional, the theory being that percolating waters are owned absolutely.[129] The trend of cases has gone increasingly in favor of recognizing an overriding public interest in requiring vested riparian and overlying landowner's rights to be subject to reasonable regulation.[130] The path to reasonable regulation has naturally been easier for courts in states which have never recognized riparian rights or absolute ownership doctrines.[131] From the standpoint of achieving equity it seems fair to protect riparian rights which are in actual use or in the process of being put to use at the time the switch to an appropriation system is made. Recent cases in states now in the process of changing systems have indicated that such protection is constitutionally required.[132] Even this proposition overlooks the fact that former riparian property rights in unused waters are deftly being circumvented and ignored. It has been urged that a constitutional distinction should be drawn between water rights and other property rights, on the ground that the former deal only with a *usufruct* which the state has an interest in maximizing.[133] A more sound approach would seem to be frank recognition that unusued private rights will not be al-

126. Clark v. Cambridge & Arapahoe Irrigation & Improvement Co., 45 Neb. 798, 807, 64 N.W. 239 (1895); Neilson v. Spooner, 46 Wash. 14, 89 Pac. 155 (1907).
127. St. Germain Irrigation Ditch Co. v. Hawthorne Ditch Co., 32 S.D. 260, 268-269, 143 N.W. 124 (1913).
128. Palmer v. Railroad Commission, 167 Cal. 163, 172-174, 138 Pac. 997 (1914).
129. Huber v. Markel, 117 Wis. 355, 366, 94 N.W. 354 (1903).
130. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811 (1907); Eccles v. Ditto, 23 N.M. 235, 240, 167 Pac. 726 (1917).
131. Bristor v. Cheatham, 73 Ariz. 228, 240, 240 P.2d 185 (1952).
132. Bauman v. Smhra, 145 F. Supp. 617 (D. Kansas, 1956), **aff'd per curiam**, 352 U.S. 863 (1956).
133. Scurlock, **Constitutionality of Water Rights Legislation**, 1 Kan. L. Rev. 125, 136 (1952-1953).

lowed to prevent utilization of water resources for the public good.[134]

The recent liberalizing attitude of courts in states striving to achieve transition to an appropriation system is illustrated in Kansas. The court there upheld a recent appropriation code which preserved riparian rights actually in use or development within a specified period of the time the code became effective.[135] The court decided that effective use of natural resources for the public good justified changing the system of water rights and requiring the reversion of unused rights to the public.

The courts in Oregon reached essentially the same result on the basis of the 1877 Desert Land Act; noting that the Act purported to allow appropriation of water "for irrigation, mining, and manufacturing purposes," the court in *Hough v. Porter*[136] found that common law water rights for those purposes had been abrogated by the statute. On the other hand, the court found that riparian rights to water for domestic and stockwatering purposes were not mentioned in the act and therefore were not affected. The result seems to be exactly what the North Dakota legislature tried to achieve by the amendment in 1955; the difficulty is greater in North Dakota, however, because of more definite recognition of wider riparian rights in both statutory and case law. Whether the final result be reached by one of the above methods or by the limitation of damages to actual losses flowing from interference with riparian rights, it is submitted that the modern trend ought to be followed in North Dakota because of the acute water shortage which has long been a major problem of the state.

If the foregoing constitutional problems presented by the current North Dakota water legislation are overcome, the remaining question is whether there is still vitality in the old but unrepealed s. 47-01-13 which provides that the owner of land owns surface and subterranean diffused water and may make reasonable use of water in running streams as long as it remains on his land. Prima facie, the answer seems to be that

134. California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 567 (9th Cir., 1934) (dictum).
135. State ex rel. Emery v. Knapp, 167 Kan. 546, 555, 207 P.2d 440 (1949).
136. 51 Ore. 318, 383-386, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909), upheld in California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 160-163 (1935).

the section is now effective only as regards disputes between persons whose claims are not based on compliance with the appropriation statute. As against the claims of one who has complied with the appropriation procedure, the only rights which the old section could support are rights to diffused surface water implicitly recognized by the appropriation statute (s. 61-01-01) and the riparian rights for domestic and stock-watering purposes expressly allowed by the 1955 amendments (s. 61-01-01.1). Diminution of the importance of the old section is also blessed by modern hydrologic knowledge which deprecates separate treatment of diffused water and water running in definite streams.[137]

Adoption of a prior appropriation system is but one aspect of the recognition of public interest in maximum utilization of water resources. The claim of the public to reversion of unused rights is merely another way of saying that the water resources of the state may not be wasted if another has need of them. This is in fact a choice between competing claims to the water, a preference for socially desirable uses over less efficient or merely potential uses. The next logical step toward effective utilization of water, as well as toward smoother functioning of the administrative machinery of an appropriation system, is the construction of a heirarchy of beneficial uses, or, as it is commonly called, a preference system. This is intended to improve the prior appropriation system in two ways. Administratively, a problem arises when choice must be made between two or more applications to appropriate the same water. Reference to the bare test of beneficial use may be insufficient because both applicants would put the water to "beneficial" use. If the choice is to be other than arbitrary, there must be standards for selecting one application as being for uses more "beneficial" than others. Beyond the administrative problem is a more serious effort to realize the underlying intent of the appropriation system, which is to see that water is devoted to "beneficial" uses when measured by the relative test of greatest social utility. Accordingly, it has been pointed out that as long as the appropriation system is bound by the rule that first in time is first in right the question of social utility is largely ignored; the exception is in a society

137. Foley, **Water and the Laws of Nature**, 5 Kan. L. Rev. 492, 497 (1957); Hutchins, **Trends in the Statutory Law of Ground Water in the Western States**, 34 Tex. L. Rev. 157, 158 (1955-1956).

where the most important social goals are incidentally realized because of the way the prior appropriator uses the water.[138] When this coincidence is not present, conflict emerges between beneficial use and the rule that priority in time gives the better right. The assumption behind the principle of beneficial use is that society has a right to determine by its own standards what constitutes a beneficial use and to disallow uses not meeting the social test. The relative nature of this test has not always been clearly recognized. For example, the owner of so-called "unused" riparian rights might well insist that he was "using" the water for an aesthetic purpose by watching it flow past his land and that in his opinion this use was "beneficial". "Pure appropriation" states would reject his claim by incorrectly saying that his right is "unused"; a more accurate reason would be to say that his use is less beneficial from the standpoint of fulfilling social needs. Once the power of the state to define beneficial use in relative terms is admitted, it becomes clearer that the allocation of water rights in accordance with the rule that priority in time shall give the better right can be allowed only under very special circumstances. In the West these circumstances were present at the time the appropriation system was being constructed. The region was so undeveloped that the obvious and most profitable use to which the first appropriator would put the water also resulted in meeting the region's social needs—settlement and economic development.

When the coincidence between social need and private opportunity ceases to exist, the rule of priority in time can defeat social need if applied inflexibly. The object of the rule is apparently to encourage development of untapped water supplies by assuring the enterprising person that his investment will be protected. Even though it be recognized that rights based on priority in time must give way to socially preferred uses of the water, the reward to the entrepreneur could be preserved in two ways: 1. where there is no clearly preferred user competing for the water, priority in time shall continue to give the better right, and 2. when society demands relinquishment of a right prior in time let the right be taken only

138. Trelease, **The Concept of Reasonable Beneficial Use in the Law of Surface Streams,** 12 Wyo. L. J. 1, (1957-1958). A hidden non-statutory "preference" exist to the extent that the courts are willing to hold that unused riparian rights are superior to appropriative rights. This question is unanswered in North Dakota to date.

through condemnation proceedings which will compensate the deprived owner for his loss.

Judicious application of a preference system seems especially worthy of consideration in arid regions such as North Dakota. The present statutory scheme contains only the barest minimum of preferred rights. Riparian rights to "the ordinary and natural use of water for domestic and stockwatering purposes" are apparently given a preferred position over all other uses.[139] Municipal riparian rights are excluded from this section, but there is little evidence to reveal whether the effect is to preserve for municipalities a greater riparian right or to exclude them from all riparian claims. Presumably, the intent of the statute is to eliminate all riparian rights except those expressly reserved. If so, then municipal claims are apparently subject to the ordinary rules of appropriation within the scope of municipal powers.[140] Other than for these riparian rights, the statute merely says water is subject to appropriation "for beneficial use." No definition of this concept is given in positive form; the only negative implication appears in s. 61-14-08, which makes a misdemeanor of "the unauthorized use of water to which another person is entitled, or the willful waste of water to the detriment of another." The concept of relative rights is again implied, however, in that waste is defined in relation to the rights and needs of other users. In issuing permits to appropriate water, the state engineer is directed to reject an application if in his opinion "no unappropriated water is available," and to refuse to approve an application if "in his opinion, the approval thereof would be contrary to the public interest."[141] The statute gives no further indication of standards to guide the state engineer. The only other provision indicating preferential selection of water uses is a direction to the state water commission that in planning irrigation projects "it shall be the policy of the Commission to give preference to the individual farmer or groups of farmers or irrigation districts who intend to farm the land themselves."[142]

These statutory directions are clearly inadequate to give

139. N.D. Cent. Code § 61-01-01.1 (1961).
140. See N.D. Cent. Code, § 40-05-01 §§ 36, 55, § 40-05-02 § 17, § 40-33-01, § 40-33-16, § 61-01-01.1 (1961).
140a. A similar but more specialized provision prohibits waste of water from artesian wells. The owner of land on which an artesian well is located is required to provide a valve capable of controlling the flow so that only enough water escapes "as is necessary for ordinary use by the owner" of the land. N.D. Cent. Code § 61-20-01 (1961).
141. N.D. Cent. Code § 61-01-01.1 (1961).
142. N.D. Cent. Code § 61-02-16 (1961).

more than the vaguest criteria by which to judge between competing uses of water. To the extent that any conflict develops over allocation of water rights, additional guides are needed if the standard of greatest utilization of water resources is to be realized. Development of a preference system requires determination of the optimum order of water uses in the state, but in the process care must be taken to preserve certainty in ascertainment of rights, dependability of allocated rights, and flexibility to accommodate new uses of water.[143] Provisions for reversion or forfeiture of rights must be designed so as to avoid encouragement of wasteful use of water for the express purpose of preserving one's right to a fixed amount of water.[143 1] Finally, maximization of water use should not ignore the need for judicious conservation of water resources.

In selecting the order of preferences, it seems obvious that one must give priority to those uses which are absolutely essential to life and organized society. Accordingly, domestic, municipal, and stockwatering requirements are generally acknowledged to be at the top level of preference.[144] It has been suggested that these uses are so essential that they should be allowed to be asserted at any time as against less essential uses and that their precedence should not be dependent upon payment of compensation for displaced subordinate rights.[145] To the extent that rights for domestic and stockwatering uses are asserted by riparian owners, the North Dakota statutes seem to provide absolute preference for such rights.[146] Extension of this preference to non-riparians should be considered,

143. See proposed draft of statutory sections for inserting a preference system into North Dakota water law, Appendix A.

143. 1 Flexibility under the present appropriation statute is preserved in a very limited fashion by § 61-04-15, which allows assignment of appropriated rights. The fact that an appropriator cannot be forced to assign his rights, even for purposes more beneficial to society, means that an assignment will ordinarily occur only when the price offered for the right clearly exceeds the financial value of the right as used by its owner. The result is that economic considerations are the sole determining factors in transfer of rights. This result is especially unfair in circumstances where the holder of a water right, knowing that it is desired by someone else, "holds out" for a price far exceeding the value of the present use of the water.

Transferability is also hindered by § 61-14-04 and § 61-04-15, which provide that water rights used for irrigation shall remain appurtenant to the irrigated land as long as the water may be used beneficially thereon. Once the water right is used for irrigation, it apparently becomes absolutely attached to that use unless the landowner abandons the right or forfeits it. The result seems to be that the owner of a water right used for irrigation is incapable of transferring it to another as long as his land may be irrigated by the water.

144. See Tex. Civ. Stat. § 7471 (1954); Kan. G.S. 82a-707 (1957 Supp.).

145. Trelease, **The Concept of Reasonable Beneficial Use in the Law of Surface Streams**, 12 Wyo. L. J. 1, 17, 20 (1957-1958).

146. N.D. Cent. Code § 61-01-01.1 (1961).

although their claims might fairly be placed second to the similar claims of riparian owners. In connection with such absolutely preferred uses, it is submitted that water taken from wells for these purposes ought to be exempted from the statutory controls on grounds of justified priority as well as administrative convenience.[147] If total exemption of such wells is thought to be unjustified, the same result could be largely realized by exempting all wells used for domestic and stock-watering purposes if the annual outflow does not exceed a specified maximum gallonage.

Securing a consensus on the next level of preferences is more difficult. It would seem that the basic economic needs of a region should be protected after essential human needs; this may be the reason why the statutes in different states vary as to uses included at this level. Irrigation, industrial uses, and water power are frequently specified.[148] The order of preference among these three uses raises several arguments. It is obvious that in arid agricultural regions, irrigation is almost a necessity. On the other hand, authorities entitled to reasonable credibility have estimated that industrial uses on the average yielded market returns fifty times greater than irrigation uses.[149] Perhaps a state with small industrial development would do well to encourage such remarkable returns, especially since the total water used for industry is almost certain to remain negligible compared to water remaining for agricultural purposes. In favor of preference for hydroelectric power uses, it may be pointed out that strategic placement of plants can result in securing the benefits of electricity without reducing the amount of water available for lower users. Where this is so, power uses ought to be given clear preference; the proposition that a use which does not affect the quantity or quality of water available for reuse ought to be encouraged seems irrefutable. But to the extent that reuse is not possible preference ought to be given to irrigation on the ground that there is no adequate substitute to meet agricultural needs whereas substitutes can be obtained for power sources.[150] It is submitted that the best order of preferences for North Da-

147. See Kan. G.S. § 82a-704 (1957 Supp.).
148. Tex. Civ. Stat. § 7471 (1954), Kan. G.S. 82a-707 (1957), Ariz. Code § 45-141 (1956).
149. U.S. President's Materials Policy Commission, Resources for Freedom V, at note 1, p. 86 (1952).
150. Trelease, **The Concept of Reasonable Beneficial Use in the Law of Surface Streams, supra,** note 145, at 20.

kota is the following: irrigation, industry, and power, with the reasonable rule that a use may take precedence whenever it will not, in the long run, interfere with other preferred uses.

At the third level of preferences, various uses have been recognized as beneficial; a hierarchy among them is often not specified. They include such uses as recreation, mining, navigation, fish and game preserves, and dilution of polluting substances.[151] The list at this level should not be fixed. New possibilities constantly arise and circumstances, such as the amount of water needed, the effect of one use upon another, and the effect of a denial of user, should govern the decision. To attempt a comprehensive set of preference rules for such uses would be pointless. It seems desirable, at this point, to allow administrative discretion to deny uses clearly contrary to the public interest and to give preference otherwise on the basis of time, unless public interest clearly dictates a different rule. It should probably be conceded that at this level all beneficial uses are considered equal in the absence of clear contrary evidence. Appeal from the administrative decision should be allowed; this right is given under present North Dakota law.[152]

Granting the establishment and order of preferences, the next problem is determination of the method in which they are to be recognized. There are several alternatives.[153] One is to allow preferences to operate only at the stage of licensing appropriators, i.e., if there are competing applications, the preferences will operate; but, once rights are granted, priority in time will give better right. It is submitted that this solution is inadequate;[153 1] if preference operate only at the

151. Tex. Civ. Stat. § 7471 (1954), Kan. G.S. 82a-707 (1957 Supp.).
152. N.D. Cent. Code § 61-04-07 (1961).
153. Trelease, **The Concept of Reasonable Beneficial Use in the Laws of Surface Streams, supra,** note 145.
153. 1 One advantage of allowing the preferences to operate before the appropriative right vests is that the influence of economic power is reduced in determining the use of water; a beneficial use may secure a preferred position at this stage without having to buy the right from another appropriator. This result is most important in cases where the use, although beneficial, is not economically productive of great returns, **e. g.,** recreation or wildlife preserves. These uses could rarely be realized if they had to secure water on a competitive financial basis.
153. 2 The first step toward allowing eminent domain to secure beneficial use of water has been taken by the legislature in § 61-01-04. This provision allows condemnation of "any property or rights existing when found necessary for the application of water to beneficial uses." The section contemplates condemnation of canals, rights of way, etc., and is designed to allow an appropriator to get at the water and transfer it to the place of intended use. If a preference system were adopted, the section could be construed to allow a subordinate use to be condemned on the theory that the action is necessary "for the application of water to beneficial uses." However, for the removal of any doubts about the avail-

application stage, society is thereafter saddled with the old rule that priority in time governs. A second alternative is to allow a subsequent preferred use to condemn prior less beneficial uses.[153] [2] This is the more common effect of creating a preference system and seems to realize more fully the social objective of achieving optimum distribution of water rights.[154] If this system is used, one critical problem in drafting the grant of eminent domain is to protect against involuntary transfers of property in situations involving no substantial public interest.[155] Another problem relates to the payment of compensation. Requiring payment of compensation for condemned water rights seems desirable for several reasons:[156] first, it will reduce the number of unnecessary proceedings and hasty actions; second, the result is to give a closer correlation between economic value and preference, since a preference will rarely be asserted unless its economic value exceeds that of the right condemned; third, constitutional due process issues will be largely avoided; fourth, the use of condemnation and compensation allows recognition of rights based on priority in time without total sacrifice of the principle of social utility; priority in time governs allocation of the original right but social preference governs ultimate use of the water;[157] and fifth, compensation is a partial substitute for the certainty of rights which is essential to induce private development of water resources. Uncertainty is a deterrent to the investor and encourages rapid depletion of limited supplies of water in circumstances where the holder of the right feels that he must act before his right is lost.[158]

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ability of the section for this purpose, enactment of a scale of preferences should be accompanied by explicit authorization that eminent domain may be used to condemn inferior uses of water. The power of the legislature to authorize condemnation of property to enable water to be devoted to beneficial uses has been frequently upheld; for example, see Irrigation Co. v. Klein, 67 Kan. 484, 65 Pac. 684 (1901). Cases have implied that a private appropriator may condemn an inferior use, but so far no supreme court has directly ruled upon the issue. The question would seem to be almost foreclosed when the legislature declares certain beneficial uses of water to be in the public interest. For a discussion of the problems of condemnation of water rights, see 22 Rocky Mt. L. Rev. 422 (1949-1950).

154. Smrha, **Problems of Water Law Administration in Kansas,** 5 Kan. L. Rev. 649, 650 (1957).

155. National Water Resources Planning Board, State Water Law in the Development of the West 47 (1943).

156. Bageley, **Some Economic Considerations in Water Use Policy,** 5 Kan. L. Rev. 499 (1955-1956).

157. See Town of Sterling v. The Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. 339 (1908); Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 219, 113 Pac. 741 (1911).

158. Bageley, **Some Economic Considerations in Water Use Policy,** supra, note 156.

IV. CONCLUSION

Nearly fifty years ago Dean Pound observed:[159]

> Recently a strong tendency has arisen to regard (natural water supplies) . . . as *res publicae,* to hold that they are owned by the state, or better, that they are assets of society which are not capable of private association or ownership except under regulations that protect the general social interest . . . It is changing the whole water law of the western states. It means that in a crowded world the social interest in the use and conservation of natural media has become more important than individual interests of substance.

This prediction has been increasingly fulfilled in the Western states. With the approach of water shortage on a national scale, states are being forced to devise more efficient allocation of the natural water supply. The problems to be faced are not simple. Vested private rights must often give way to regulation in the public interest. At the same time, care must be taken to avoid stifling private development. This can be done only by giving certainty and protection to private rights. Solution to the problems is increasingly being sought through resort to water appropriation systems. The resulting conflict in states which have previously recognized riparian rights gives rise to problems of constitutional due process and also provokes consideration of the necessity for interweaving rights granted under both doctrines. As development of water resources increases in response to the growing problem of water shortage, the ultimate test of the right to use water is being found in the overriding interest which the public has in realizing the maximum beneficial return from natural assets.

159. Pound, **The End of Law as Developed in Legal Rules and Doctrines,** 27 Harv. L. Rev. 195, 234 (1914).

"*. . . As water spilt on the ground, which cannot be gathered up again . . .*"

II Samuel 14:14

APPENDIX A

DRAFT OF SUGGESTED AMENDMENTS TO NORTH DAKOTA CENTURY CODE, DESIGNED TO EFFECTUATE A PREFERENCE SYSTEM IN THE USE OF WATER.

(A. New section:)

Section 61-01-01.2. Preferences to the Use of Water. The application of publicly-owned waters to beneficial uses is hereby declared to be in furtherance of a public purpose. Beneficial use is a relative term in definition of which the following uses of water, within the limits of reasonableness, are to be recognized as preferred in the order stated:

1. Domestic uses,
2. Uses necessary for the functioning of existing essential municipal utilities,
3. Stockwatering uses,
4. Municipal uses which are not preferred under subsection 2,
5. Industrial uses,
6. Agricultural uses,
7. Uses for the generation of hydroelectric power,
8. Other uses which are not found by the state engineer to be contrary to the public interest. In determining whether a use or method of use is contrary to the public interest, the state engineer shall consider, among other criteria, whether the use or method of use is excessively wasteful in light of the public interest in conservation of natural water resources.

This section shall not be construed to affect riparian rights to use water for domestic and stockwatering purposes, as recognized in section 61-01-01.1.

(B. Replacement of old section 61-01-04:)

Section 61-01-04. Eminent Domain. As between completed appropriations of water, priority in time shall give the better right; however, the United States, or any person, corporation or association may exercise the right of eminent domain to acquire for a public use any property or rights existing when found necessary for the application of water to beneficial uses; the right of eminent domain may be exercised to acquire appropriated water being used for less beneficial uses, as determined in accordance with section 61-01-01.2, and to enlarge existing structures and use the same in common with the former owner. Any canal right-of-way so acquired shall be located so as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided in chapter 15 of the title Judicial Remedies, but in no event shall compensation for appropriated water rights exceed the fair market value of the water rights; the fair market value shall be determined on the basis of the use to which the water was appropriated at the time of commencing the eminent domain proceedings.

(C. Addition to present section 61-04-06:)

. . . When competing applications for a permit to appropriate the same

water have been filed with the state engineer, preference in granting the permit shall be given in accordance with the order of uses specified in section 61-01-01.2.

(D. New section:)

Section 61-04-07.1. Withdrawal of Waters from Further Appropriation. The state engineer shall have power, at the direction of the legislature, to withdraw specified public waters from further appropriation in order to reserve supplies needed for public uses and projects being contemplated by the legislature.

(E. New Section:)

Section 61-04-15.1. Effect of Assignments. The assignment of a permit or license to appropriate water shall not include any preference to which the right was entitled in the hands of the assignor by virtue of section 61-01-01.2; however, an assignment shall preclude any future claims by the assignor in defeasance of the right assigned.

(F. Replacement of old section 61-14-05:)

Section 61-14-05. Change of Use or Place of Diversion. Any appropriator of water may use the same for a purpose other than that for which it was appropriated or may change the place of diversion, storage, or use in the manner and under the conditions prescribed in section 61-14-04; but, in case any change of use of water pursuant to this section results in application of the water to a less preferred use, the preference accorded under section 61-01-01.2 to the use of the water shall be determined on the basis of its use after the change.

(G. New Section:)

Section 61-14-05.1. Change to More Preferred Use; Effect on Time Priority. The priority in time to which an appropriative right is entitled by virtue of sections 61-01-02 and 61-01-03 shall not be affected by an assignment of the permit or license pursuant to section 61-04-15 or by a change of use of the water pursuant to section 61-04-05, **provided** that, where the change in use of the water is to a more preferred use, the priority in time accorded to the new use shall be the time of filing the application for change with the state engineer.