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"PRIORITY" IN WESTERN WATER LAW

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Beginning with *Irwin v. Phillips,* 5 Cal. 140, decided in 1855, a series of decisions, and thereafter of statutes, established in all Western jurisdictions the system of appropriation of waters as distinguished from the common law of riparian rights. The generally accepted idea, supported by most authority, is that an appropriator's rights are governed only by priority and beneficial use; that a prior appropriator, so long as he (without change)[1] devotes the water to a beneficial use,[2] has an exclusive right, independent of and paramount to any subsequent appropriator on the same stream.[3]

[1] The prior appropriator cannot change his use to the injury of subsequent appropriators. This is established by both statutes and decisions. *Water Rights in the Western States,* (2nd Ed.) Sect. 178, *et seq.*

[2] The prior appropriator is universally limited to the quantity beneficially used, and cannot waste the water as against subsequent appropriators. Statutes usually so expressly provide. *e. g. Cal. Civ. Code,* Sect. 1411; Nev. Stats. 1907. p. 30; New Mex. Stats. 1907. p. 71, Sect. 2; N. Dak. Stats. 1905. p. Sect. 2; S. Dak. Stats. 1905. p. 201, Sect. 2; Utah Sats. 1905. c. 108, Sect. 49; Montana Stats. 1907. c. 185, pp. 109, 489; Washington, *Pierce's Code.* 1905. Sect. 5836. This limitation is firmly established by decision of courts as well. *Water Rights in the Western States,* (2nd Ed.) Sect. 168.

[3] That priority gives the better right than any subsequent appropriation, is enacted by statute in all the Western States, and in some, appears in the Constitution; *e. g. Colorado Constitution,* Art. 16, Sect. 6; *Wyoming Constit.,* Art 8, Sect. 3. For decisions see *Water Rights in the Western States,* (2nd Ed.) Sect. 44, note 2. Even to the extent of using the whole stream. *Bolter v. Garrett,* 44 Ore. 304, 75 Pac. 143; *Malad etc. Co. v. Campbell,* 2 Idaho 411, 18 Pac. 52; *Moe v. Harger,* 10 Idaho 302, 77 Pac. 645; *Hammond v. Rose,* 11 Colo. 524, 19 Pac. 466; *Meng v. Coffey,* 67 Neb. 500, 93 N. W. 715; *Trade Dollar etc. Co. v. Fraser,* 148 Fed. 587; *Drake v. Earhart,* 2 Idaho, 750, 23 Pac. 541. And even in times of scarcity of supply: *Wellington v. Beck,* 30 Colo. 409, 70 Pac. 687; *Sayre v. Johnson,* 33 Mont. 15, 81 Pac. 389; *Kirk v. Bartholomew,* 3 Idaho, 367, 29 Pac. 40; *Hillman v. Hardwick,* 3 Idaho, 255, 28 Pac. 438; Kinney on *Irrigation.* Sects. 173, 225, 229, 240; Long on *Irrigation,* Sect. 57; *Water Rights in the Western States,* (2nd Ed.) Sects. 46, 51, 52, 62. See also *Strickler v. Colorado Springs,* 16 Colo. 61, 26 Pac. 317; *Armstrong v. Larimer etc. Co.,* 1 Colo. App. 49, 27 Pac. 235; *Montrose v. Loutsenhizer etc. Co.,* 23 Colo. 233, 48 Pac. 532; *Broadmoor etc. Co. v. Brookside etc. Co.,* 24 Colo. 541, 52 Pac. 792; *Town of Sterling v. Pawnee etc. Co.* (Col.), 94 Pac. 341; *Farmers etc. Co. v. Southworth,* 13 Colo. 111, 21 Pac. 1028; *Alhambra etc. Co. v. Mayberry,* 88 Cal. 74, 25 Pac. 1101.

Yet there has always been a minority current of authority contending that the exclusiveness of a prior right should be recognized only to a certain degree, and that priorities should not be enforced when to do so would be "unreasonable" to water users upon the same stream, though subsequent in time of use. It is this minority current of authority that this article will try to set forth.

The common law of riparian rights regards all riparian proprietors as upon an equal footing, giving each a right to a "reasonable" use of the stream at any time. Their rights are correlative, and no one of them can use the water in any manner that would, under all the surrounding facts and circumstances, be *unreasonable* in its effect upon the capacity of use by the others.[4] The California legislature in 1850,[5] had adopted the common law, by statute, as the general rule of decision, and when the Supreme Court five years later, began to recognize exclusive rights by priority in time of use, it was in some quarters accused of judicial legislation.[6] This criticism induced in some of the judges a desire to reconcile the new decisions, as much as possible, to the common law rules; resulting in expressions in several early cases that the rights of appropriators were correlative as between riparian proprietors at common law, and that the prior appropriator must be confined to a "reasonable" use as determined by the effect of his use upon subsequent appropriators, just as between riparian proprietors at common law.

Conger v. Weaver[7] is a direct reply by the Court to the charge that it was guilty of judicial legislation. It declared that the common law had not been departed from; that the common law itself was merely being applied to new conditions, and it expressly declared the intention of the Court to apply the common law rules so far as conditions permitted. The Court, after saying, "We claim that we have neither modified its rules, nor have we attempted to legislate upon any pretended ground of their insufficiency," proceeds: "That new conditions and new facts may produce the novel application of a rule which has not been before applied in like manner, does not make it any the less the common law," etc. The opinion then proceeds to reconcile the new de-

[4] *Water Rights in the Western States,* (2nd Ed.) Sect. 294, *et seq.*
[5] Stats. 1850. p. 219. Now *Pol. Code.* Sect. 4468.
[6] Yale on *Mining Claims and Water Rights,* p. 129.
[7] 6 Cal., 548.

cisions to the common law upon a point with which we are not here concerned; it shows the desire which immediately arose, among some members of the Court, to depart from the common law as little as possible.[8]

In a case decided soon after, the Court said it had applied "the analogies of the common law," and refused an action to the prior appropriator for mining, against a subsequent claimant who polluted the stream in legitimate mining, considering it unreasonable for one miner, under the claim of priority, to withold the stream entirely from use by other miners.[9]

Thereafter, the early California decisions twice, in important cases, declared the doctrine of appropriation as conforming to the common law in regard to the requirement, now in question, that the prior use must be "reasonable" in its effect upon subsequent locators (similar to the correlative rights of riparian owners) and not exclusive or arbitrary. In *Phoenix W. Co. v. Fletcher,*[10] the law was said to be: "The rule of law is well established, that the owner of hydraulic works on the stream above, has no right to detain the water *unreasonably.* He must so construct his mill, or other works, and so use the water, that all persons below him, who have a prior *or equal* right to the use of the water, may participate in its use and enjoyment without interruption," and adds, that all appropriators have a right to a *reasonable* use of the water, in conjunction with appropriators

[8] The Chief Justice, however, was not convinced that the reasoning of the case was an answer to the complaint of judicial legislation; he opposed the recognition of appropriation at all on that account, and dissented. Accordingly, in his opinion in *Hill v. King,* 8 Cal., 338, he practically admits the charge of judicial legislation, and enforces the rule of priority only because bound by the weight of cases already decided against his own opinion. In doing so, he says: "If the parties both claimed as riparian proprietors, then each alike would be entitled to the reasonable use of the water for proper purposes," but, that under the new rule, the first appropriator must be held entitled to the exclusive enjoyment, which he need not share with any subsequent claimant, however extensive might be the prior use. As already above remarked, this is the general rule today. The Chief Justice in *Hill v. King* used the word "reasonable," but only with reference to the subsequent claimant, and without any attempt to place such a restriction on the prior appropriator.

[9] *Bear R. Mng. Co. v. New York M. Co.,* 8 Cal. 327, modifying *Hill v. King, supra,* decided just a short time before, though the rule of *Hill v. King* has since prevailed as a general principle. *Conrad v. Arrowhead etc. Co.,* [illegible] Cal. 399.

[10] 23 Cal. 4[illegible].

below. In support of this statement of the law of appropriation, the Court cites the classical authorities upon the common law of riparian rights, Angell on *Watercourses,* and the opinion of Justice Story in *Tyler v. Wilkinson.*[11] Again, in *Hill v. Smith,*[12] the Court speaks of the "notion which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this State upon the theory that they were inapplicable to the condition found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights." And says: "This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, *sic utere tuo ut alienum non laedas,* upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this State, as operative a test of the lawful use of water as at any time in the past, or in any other country. This maxim is one which every riparian proprietor is bound to respect, and it is no less obligatory upon those who use and divert water for mining purposes. So that in all controversies like the present, *the question to be determined after all, is the same as that presented by a like controversy between riparian proprietors,*" etc. The rule which the Court then lays down is not by any means the rule of the common law of riparian rights. That rule of correlative use is that "each must submit to that degree of inconvenience and hardship in the exercise of his rights which results from the existence of like rights in others," [13] and instead of laying down such a rule, *Hill v. Smith,* speaks of it disparagingly as a notion which "tolerates and winks at some uncertain and indeterminate amount of injury by the one" to the other. *Hill v. Smith* did not in actual decision attempt to restrict the exclusiveness of the prior right; its language, however, in the above passage, is, nevertheless, a general declaration that the analogies of riparian rights should be applied, and it has been regarded as supporting the rule that the law of appropriation should be made to conform to that of riparian rights in limiting the prior appropriator to a "reasonable" use so as not unreasonably to prevent use by others on the arbitrary claim of priority.

[11] 4 Mason 401.

[12] 27 Cal. 481.

[13] *Parker v. American etc. Co.,* (Mass.) 81 N. E. 468.

These early California attempts to minimize the departure of the law of appropriation from the common law of riparian rights and to declare the appropriator limited to a "reasonable" use correlatively to the use of subsequent appropriators, are now almost forgotten. They are due largely to the reluctance of the California Court to admit that it had taken upon itself to set up an entirely new system of law. To-day, the great weight of authority denies the idea that there can be an "unreasonable" priority, because of any policy favoring subsequent claimants. The explanation of the above cases is probably historical, as an attempt to controvert criticism, rather than an attempt to formulate a policy.

Possibly, however, it was with these cases in mind, that Mr. Justice Field (who was thoroughly familiar with them, having been Chief Justice of California, though not having sat upon any of the above cases) said in *Basey v. Gallagher*:[14] "Water is diverted to propel machinery in flour mills and saw mills, and to irrigate lands for cultivation as well as to enable miners to work their claims; and in all such cases the right of the first appropriator, *exercised within reasonable limits,* is respected and enforced. We say within *reasonable limits,* for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual."

Mr. Justice Beatty, in Idaho, now Judge of the United States Circuit Court, in commenting upon this passage, reflects what, as said above, is undoubtedly the general law to-day, saying: "This language has been seized upon as justifying the equitable, if not equal, division of the water among all desiring or needing it, regardless of the claim of the prior appropriator. Such a construction is not justified, and would make the decision inconsistent with itself as well as with the other decisions of the same Court.[15] It is evident that all the Court means by this language, is that the first appropriator shall not be allowed more than he needs for some useful purpose; that he shall not, by wasting or misusing

[14] 87 U. S. 670, 22 L. Ed. 452, italics ours.

[15] Citing *Jennison v. Kirk,* 98 U. S. 461; *Broder v. Water Co.,* 101 U. S. 276.

it, deprive his neighbor of what he has not actual use for. In 98 U. S. 461, *supra,* the Court says: 'The owners of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation—the first in time being the first in right; but when both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.' It clearly follows, as the Courts have certainly held, that when all cannot use the water without injury to the prior appropriator, the other must yield to his superior right." [16] Mr. Kinney after quoting this, and other similar authorities,[17] says: "From these authorities it is apparent that the rule in the arid region is settled that a prior appropriator can take the waters of a stream to the full extent of his original completed appropriation, and others claiming an appropriation in the waters subsequent to the first appropriation can not divest the first of his rights, even if the first diverts all the water of the stream, provided he applies it all to some beneficial use or purpose." [18] And he also says: "A construction of the sentence from *Basey v. Gallagher,* quoted above, that an equitable if not an equal division of the water among all desiring or needing it, regardless of the claim of the prior appropriator, was intended, cannot be justified." [19]

If we were to regard the contention of "reasonable priority" to rest solely on the few early California attempts to establish it, together with *Basey v. Gallagher,* it could be regarded as discarded. But the decisions which, as a whole, so firmly hold to the exclusiveness of priority, were given while the public domain was a vast unsettled region, and rights were to be adjusted between a few individuals rather than whole communities. To-day the lands have been far more fully settled, the water users on many streams are beginning to crowd each other, and the "exclusiveness" rule of priority comes more and more in conflict with the community idea. Justice is coming more and more to demand an equitable co-relation of the users for the common good, and these changed conditions have caused here and there revivals of the idea that the priority must be reasonable, all things and evidence being considered, or it will not be fully enforced.

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[16] *Drake v. Earhart,* 2 Idaho 750, 23 Pac. 541.

[17] *e. g. Hillman v. Hardwick,* 3 Idaho 255, 28 Pac. 438.

[18] Kinney on *Irrigation,* p. 369.

[19] Kinney on *Irrigation,* p. 390.

This is likely to be a growing doctrine, with its leading authority in the case of *Union Mng. Co. v. Dangberg.*[20] This opinion was written by the late Judge Hawley, one of the ablest of those judges who had grown up with the West from pioneer times. In a previous decision while Chief Justice of Nevada, he had said: "The law which recognizes the vested rights of prior appropriators has always confined such rights within reasonable limits. . . . What is a reasonable use depends upon the peculiar circumstances of each particular case."[21] This he applied in *Union Mining Co. v. Dangberg,*[22] when later Judge of the United States Circuit Court in Nevada. In that case he decided that the rights of the many water users involved could be adjusted on the same basis as though they were riparian proprietors, though they were also appropriators having differing priorities. After saying that Courts have, in the application of riparian rules, in order to allow all riparian proprietors "to make a *reasonable use* of the water," decreed a full flow for a definite period of time as reasonable, he asks, "why should not such a rule be followed in the present case?" Such a decree, he says, promotes peace, prevents litigation, and substantially reaches the end of justice. "The endless complications that have arisen in this case, the exigencies and necessities of the parties, as well as the number of parties involved, justify this Court in adopting this rule." He accordingly decrees to defendants at all times use for domestic purposes, to complainant a full flow of 6,000 inches of water to run its seven mills *except* during the irrigating season, during which season the defendants (irrigators) may take the whole if necessary. This decree thus placed all the one hundred and twenty-six defendants on the same footing against complainant, though complainant was prior in his appropriation to some of them, and subsequent in time to others; and gave complainant a "reasonable" use of the river for all its seven mills taken together, though each mill had a different priority as against different defendants; and it gave to all subsequent appropriators a right to domestic use against the complainant, though complainant was, as to most of them, the prior appropriator. The result practically ignores priorities and proceeds on independent

[20] 81 Fed. 73.

[21] *Barnes v. Sabron,* 10 Nev. 243. This is the language of the common law of riparian rights.

[22] 81 Fed. 73.

lines simply to settle equitably and upon moral fairness, the conflict between the mill community and the irrigation community. That such a "reasonable" result, fair to all, was warranted by the common law of riparian rights between riparian proprietors, as Judge Hawley first points out, would seem clear enough as the doctrine of riparian rights is understood in the West; but it is reached under the law of appropriation only by refusing to accept the details of what took place in the fifties and sixties, when Nevada was sparsely settled, as measuring (on the principle of priorities) what would be just when the lands had been settled up after the lapse of a generation.

Judge Morrow, of the United States Circuit Court for the Ninth Circuit, has accepted this as his rule of decision. In *Anderson v. Bassman,*[23] he refers to Judge Hawley's opinion as all controlling. A large community of water users on a stream lying in both California and Nevada was involved, some claiming riparian rights under the common law of riparian rights as in force in California, side by side with the law of appropriation,[24] some claiming as appropriators in California under the law of appropriation also recognized there,[25] and others claiming in Nevada as appropriators under the law of appropriation as the sole law recognized in Nevada.[26] To have attempted to sift out the priorities in this seething mass of conflicting rights would have been an immense task, and would have resulted in preferences to some over others; wherefore Judge Morrow ignored priorities and proceeded simply to an equitable apportionment among all, declaring that under the law of appropriation, just as well as that of riparian rights, the use must be "reasonable." It probably reached a just result, and, it may be, the only practical one, but, as has been said,[27] it finds explanation only in the desire to curtail what has hitherto been the doctrine of appropriation, in order to reach justice among large communities.

In his opinion, Judge Morrow said: "Whether the water is taken from the stream in California by the riparian owner for the purpose of irrigation, or is taken from the stream in Nevada by the appropriator for the same purpose, the right is equally sanc-

[23] 140 Fed. 14.

[24] *Lux v. Haggin,* 69 Cal. 255, *Water Rights in the Western States,* (2nd Ed.) Ch. I, Part I.

[25] *Ibid.*

[26] *Water Rights in the Western States,* (2nd Ed.) Sect. 23.

[27] 19 *Harvard Law Review,* 475 note.

tioned by law *and is subject to the same limitations;* that is to say, the right to use the water from the stream for irrigation purposes in either State under either right *must be a reasonable use, to be determined by the circumstances of each case,* and with due regard to the rights of others having the *same* beneficial use in the water of the stream." Then follows, as a statement of the rights of the Nevada appropriators, a quotation from *Union Mng. Co. v. Bangberg,* setting forth the correlative rights of riparian owners. Judge Morrow then says: "But, in the view I take of this case, *the question of priority in the rights acquired by the original settlements along the river is not of great importance.*" He concludes: "The right of each is to have a reasonable apportionment of the water of the stream during the season of the year when it is scarce." [28]

Judge Morrow has very recently handed down another opinion on the same lines from the United States Circuit Court of Appeals,[29] in a case arising in Idaho, where appropriation is the sole law of waters. He says that appropriation does *not* give an exclusive right, but, to prevent monopoly, an equitable and reasonable use and adjudication must be made. The prior appropriation of the whole stream to run a current wheel was disallowed against a subsequent appropriation for the irrigation of a large community, saying that the preservation of a large river to run a single appropriator's current wheels would be highly unreasonable when it deprives vast regions of the right to irrigate. This may be good common law as to riparian proprietors, as understood in the West, none of whom can exclude other riparian owners entirely from reasonable use of the stream for irrigation; but it practically dissolves the law of appropriation in the law of riparian rights. In support of his opinion, Judge Morrow quotes the passage from *Basey v. Gallagher* above given, and also a case in Montana to the same effect,[30] that there should be an "equitable" division among appropriators in spite of priorities.

Beside this tendency in some judicial quarters, the recent *Irrigation Code* legislation also seems to have some tendency in

[28] Decreed, plaintiffs to have the full flow five days in every ten during June to October; defendants to have the water during the other five days.

[29] *Schodde v. Twin Falls L. & W. Co.,* 161 Fed. 43 (Idaho).

[30] *Fitzpatrick v. Montgomery,* 20 Mont. 181, 187, 50 Pac. 416, 417, 63 Am. St. Rep. 622. See also *Farmers Irr. Dist. v. Frank,* 72 Neb. 136, 100 N. W. 286.

this direction. The Wyoming Constitution provides,[31] "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied *except when such denial is demanded by the public interests.*" There was much debate over this section in the Constitutional Convention. Not over the clause we have italicized, but on the contrary, over the first clause, because, it was argued, it laid too great a stress on priority. For example,[32] "If this section is adopted it seems perfectly clear to me that no other consideration can matter or can be employed to aid in determination of rights. . . . I believe it [priority] should properly be the greater consideration, but to allow nothing else to determine, I think this is an extraordinary decision," and said all the "equities" should also be considered in each case. In reply, among other things, it was said: "To provide that priority of appropriation shall not give the better right, *but that other matters shall come in,* is simply, sir, to throw this matter into the Courts." This debate indicates the prevailing sentiment (and, as already said, the prevailing rule of law) that the Courts shall have no discretion in restricting the force of priority, but the last clause of the section certainly seems an adoption of the contrary rule.

Under the common law of riparian rights the ultimate test in each case is what is reasonable under all the circumstances. Each case practically comes down to the discretion of Court or jury deciding what is reasonable upon the entire evidence. The rulings of the Courts above referred to, are likewise shaping the law of appropriation into a discretionary system, with power in the Chancellor to apply his ideas of fairness whenever priorities would work injustice because of complication of the history of claims, or because of selfish results of enforcing them. Though it is a weakening of the strict rule of priority and contrary to the general rule to-day, yet this principle, which might be called "the principle of unreasonable priority," is likely to be a growing doctrine as the irrigated regions become more closely settled.

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[31] Art. VIII, Sect. 3.

[32] *Journal and Debates of the Wyoming Constitutional Convention,* pp. 534, 535.