Basis of South Dakota Water Law

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BASIS OF SOUTH DAKOTA WATER LAW

COOPERATIVE EXTENSION SERVICE
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The question of who has the first claim to water in South Dakota has been complicated not only by scarcity and competing uses, but by our state's location and early settlement and by state, federal, and Indian claims on that water.

This fact sheet describes the status of legal claims to the use of water that is under the jurisdiction of the state of South Dakota.* Federal and Indian claims are not dealt with.

Water laws are different from land laws—they involve different concepts of property. Generally, the private individual is given a great deal more control over his land ownership than over his water rights. Rights in water are merely rights to use the water. Rights to use the water are distributed by the state, primarily for the purpose of supporting economically beneficial uses.

Early development of water law

An understanding of South Dakota's present system of water law requires a review of some history. It provides us with important background.

At the time Dakota territory was being settled, there was no agreed-upon legal system for the distribution of water. There were, however, two distinct approaches commonly used.

The first was the riparian system, which developed in early England and prevailed in the wet eastern United States. The second system came to be known as the appropriation system, and it developed in the western United States. The two types are fundamentally different.

Riparian

Riparian is the Latin word for river bank. It is a system of laws used most frequently in the eastern region of the United States where water is abundant.

Its outstanding feature is that legal rights in water arise from, and only from, ownership of land which adjoins or underlies a stream. Land of this type is called " riparian" land.

Rights to use water in a stream are created only by owning the land which is riparian to that stream. That is, if you buy the land you get the riparian water rights. This right cannot be lost by nonuse. It is always part of the rights in the land itself.

A riparian owner may use water only on the riparian tract of land and may not use it or sell it to another for use on another parcel of land.

Of course, conflicts may arise among riparian owners on the same stream. In response to this familiar controversy, riparian doctrine developed two branches. The "natural flow" branch stated that no riparian user may impair or diminish the flow of the stream to the detriment of any other riparian. This meant that everyone on a stream was entitled to have a stream flow past his land just as it would have in its natural state.

The second approach—known as the "reasonable use"—is far more common and holds that each riparian is entitled to make a "reasonable use" of the water, taking into consideration the needs and uses of other riparians. Where there are competing uses (such as for irrigation) which together would exceed the stream capacity, courts will determine what is a "reasonable" amount for each user. In some riparian states courts will prefer domestic uses; in other states they will not.

The riparian system was not widely adopted in the western United States because it was not suited for an area where

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*In the winter 1976 issue of the South Dakota Law Review, the late Professor William A. Garton published a complete legal history of South Dakota water law—state and federal—under the title "South Dakota system of water management and its relation to land use and economic development." Copies are available from the USD School of Law. The present fact sheet is heavily indebted to the work of this distinguished South Dakotan.
water was scarce and found only in a few select streams. To have adopted a system of water law that limited water use to those lands located adjacent to streams would have interfered materially with the economic and social development of the western United States. The riparian doctrine also contributed to insecurity and uncertainty in the use of water. With riparianism, subsequent development can substantially reduce the right of a present user to divert water. Where irrigation is common, for example, there is a need to rely upon the availability of a specific amount of water at a particular time, regardless of future developments and other changes.

For these and other reasons, the appropriation system was adopted in most of the western states.

**Appropriation**

Under the appropriation system land ownership is not relevant to the acquisition of water rights. A water right is obtained by diverting water and applying it to a beneficial use. A beneficial use is normally considered an economically valuable use. The right to use water can be lost by failing to make continued use of it. There are no limitations on the place of use; the water is available for use off riparian land and even in different watersheds. When there are competing uses among appropriators the traditional rule was "first in time, first in right."

Thus in times of shortage, the appropriator most junior in time must cease using water, if necessary, in order to allow senior appropriators to take the amount of water to which they have a right. Under a pure appropriation system, if a stream becomes so dry that there is only enough to accommodate the first user in time, then all subsequent water claims must cease.

**Both systems in South Dakota**

The unusual feature in South Dakota water law is that both riparian and appropriation systems were adopted. In South Dakota a person could own water by riparian right, or by the right of appropriation for beneficial use on non-riparian land. Both systems co-existed for more than a century.

Any conflicts between riparian and appropriation claims were resolved according to a strict order in time. For example, if an appropriation claim was made, followed by the acquisition of private ownership of riparian land, the appropriation rights would precede the riparian claim. The reverse was also true.

The riparian and appropriation systems were applicable to surface waters. They were also applicable to sub-surface water that formed a definite and chartable stream.

But a different rule applied to ground water. In the early years of South Dakota, the landowner was assumed at law to have absolute ownership of sub-surface water that did not form a definite stream.

**Our present water law**

In 1955 the South Dakota Legislature passed a major water act which forms the basis for the current law. All water is declared to be the property of the people, and the right to the use of water is subject to appropriation in the manner provided by the statute. The law requires that all waters be applied to the fullest beneficial use. Conservation is to be practiced with a view to the reasonable and beneficial use of water in the interest of the public.

The state (Legislature) has the power to determine what water, from whatever source, may be converted to public use or controlled for public protection, and the way in which the water shall be developed to the greatest public benefit.

Beneficial use is again declared the basis, the measure, and the limit of the right to use of waters, just as it was in prior appropriation law. Beneficial use is vaguely defined as any use of water that is reasonable and useful and beneficial to the appropriator and at the same time is consistent with the interest of the public and the best utilization of water supplies.

Water for domestic purposes is the highest use of water and takes precedence over all appropriated rights. The right of the state and municipalities to acquire and hold rights to the use of water is to be protected to the fullest extent necessary for existing and future uses.

The "ownership" of water by the state is not similar to "ownership" of property as the word is customarily used and understood. The state holds the water in trust for the use and benefit of the public. Any person, therefore, may apply the water to beneficial use in a manner provided by law. Such use, however, is the proper subject of state regulation for promoting the general welfare, provided that the regulation is reasonable and is not arbitrary.

**Effect of 1955 legislation on riparian and appropriated water rights**

Under the traditional riparian doctrine, riparian water rights could not expire due to disuse. The 1955 law changed this. From that time on, riparian rights could only exist in two ways. First, a riparian owner
who had been applying his water to a beneficial use within 3 years prior to passage of the 1955 act had a vested right to continue to use such water thereafter, so long as the water right was not abandoned by disuse. Riparian rights that might have existed before 1955 but which were not put to use within the 3-year period were terminated.

This termination was subject to the one limitation that if at the time of passage of the 1955 act the riparian user was engaged in the construction of works for the actual application of water to a beneficial use, that project created a valid water right if the water was put to use within a reasonable time. Thus, the priority date of a surviving riparian right is calculated by reference to the beginning date of the latest application to beneficial use which has been continuous to the present date.

The 1955 legislation converted South Dakota to a primarily appropriation-right state.

The law had no effect on pre-existing appropriation rights. Subject to any riparian rights that came into existence, and subject to priorities established by the legislature, from 1955 South Dakota is an appropriation state.

practicable. Priorities between ground water appropriators are to be determined, therefore, on a first-come, first-served basis.

Summary

Thus we see that the 1955 law made available for appropriation all waters flowing in definite streams on the surface and all ground waters. Such right to appropriate is, of course, limited by prior rights to use ground water, and prior riparian and appropriation surface rights.

The procedure for obtaining a water right, the powers of the Water Rights Commission, and the priority of domestic uses are described in FS 696, "Obtaining a water right." Also included are discussions on water mining, artesian pressure, and the reservation of water for future use.

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Ground water

The legislation also dealt specifically with ground water. Ground waters were defined as all water under the surface, whatever the geological reservoir in which it is standing or moving. There is no distinction between underground streams and percolating waters.

The ground water law provides that the procedure for appropriating stream waters shall be followed so far as