

# **Water Rights and the National Park Service**

*Editor's Note: This is the first of a 2-part article by the Chief, Water Rights Branch, NPS Water Resources Division in Fort Collins, CO. The opinions expressed are those of the author and do not necessarily reflect those of the Dept. of the Interior or of the National Park Service.*

The fundamental purpose of the NPS is defined in 16 U.S.C. #1 as follows:

...to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

This language is unequivocal and encompassing. It would appear that the land areas administered by the NPS are, by virtue of their designation, protected from impairment and that, reasonably, similar protection is afforded to streams, rivers, lakes, and other bodies of water. While land areas do enjoy this protection, water bodies in western NPS units do not enjoy the same guarantees.

This arises from the way state law treats water. In eastern states the use of water is governed by the Doctrine of Riparian Rights, which was largely imported from Great Britain with the settlement of the New World. The right to use of water is based on ownership of land adjacent to water bodies and the "reasonableness" of the use. In contrast, western states embrace the Doctrine of Prior Appropriation. In this doctrine the right to use water is based upon its diversion out of its natural course for "beneficial use" and priority in use as determined by time of first use.

What follows is a description of western water law and its relationship to NPS mandates.

### The Nature of Western Water Law

**Congressional Silence:** Congress encouraged settlement of the western frontier with a series of Acts such as the Homestead Act of 1862, the Act of May 10, 1872 (U.S. Mining Laws) and the Desert Land Act of 1887. With the settlement of these largely semi-arid lands, there arose conflicts over the right to use the limited supply of water. These conflicts were settled largely through local custom, which emphasized the interests of commerce and seniority of use.

Custom grew into law over time, in part because Congress was silent with regard to the law that would govern the use of water on lands of the Public Domain. As local customs were codified into statutes in the several western states, remarkably similar laws resulted. There were differences, of course, but these were mostly related to specifics.

**Roots of State Water Law:** The body of water law embraced in the west grew largely out of the necessities of mining and farming. The first and most fundamental principle of this law was the idea that the citizens of the state held an inherent right to take and use water. So fundamental was this principle that it was even incorporated into some state constitutions.

The next important principle underpinning western water law was found in the tenet that the person to **first** take and beneficially use water derived a better right as against all persons to do so later in

time. It is easy to see this idea evolving quickly out of the frenetic activity surrounding development of gold camps as the west's mineral riches were unearthed. This principle gave rise to the doctrine's common sobriquet, "First in Time, First in Right."

As irrigation farming took hold, the Doctrine of Prior Appropriation continued to evolve and proved especially adaptable to the needs of rapid agricultural and municipal growth. It rewarded the "old guard" who had first arrived to lay claim to land and water, and it penalized newcomers with failed crops during years of drought. Of course this changed when the newcomers added money to the recipe. With capital in hand, they could buy their way to the "front of the line."

**Elements of State Water Law:** Prior Appropriation varies a little from state to state, but certain elements of the doctrine are shared by all states that embrace it. Specifically:

- Persons have the right to appropriate and use water through an act to divert and apply it to beneficial use;

- The only uses deemed beneficial are those specified by the state, usually in statute;

- Once made, an appropriation creates a right to the **use** of water, not to the **corpus** (body) of the water; and

- The right enjoys as its priority the date upon which appropriation was made (in some cases—application for permission to appropriate)—and is superior to subsequent and inferior to prior appropriations.

The right is a property right, which may be sold without loss of priority. However, if sold, the amount of diversion that can be transferred is limited to the original appropriation and is further limited to that amount **actually** used beneficially. The type of beneficial use and its location may be changed, and so too, the location of the point of diversion. However, all transfers are conditioned with the proviso of no injury to other appropriators (senior and junior).

The right is not without its frailties. It can be forfeited if not beneficially used for a period of time specified in statute. Further, while a water right attaches to a quantity, a time of use, and a purpose, it generally does not guarantee any particular quality of water.

Water may be stored by an appropriator when abundant, for delivery during those times of shortage when the appropriator's junior priority would otherwise preclude diversion. However, a right to store does not create a right to divert, and vice versa.

**Federal Enclaves:** While Congress was ignoring the developing western water law, it continued to encourage settlement and sought to "pacify" the Indian. It attempted to change nomadic behavior into settled agrarian by "placing" tribes on reservations. "Reservations" also were created from the Public Domain for other federal purposes. This led to designations of areas as Forest Reserves, military Reservations, Power Site Withdrawals, and eventually Parks and Monuments.

Thus, with the passage of time, a complex pattern of land ownership evolved with particular parcels, or Federal Enclaves, being set aside and designated for specified Congressional or Procla-

mation purposes. Most of these areas also needed water, and a tension with accepted state water law soon developed.

The manner by which this tension was resolved and the long-term consequences to NPS management will be discussed in the conclusion of this article in the next issue of *Park Science*.