Some Elements of Western Water Law in Washington

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The question of water rights is a legal one and the writer is not an attorney. Basic water right laws referred to are therefore by specialists in such matters.

Referring to "Elements of Western Water Law" by A. E. Chandler, he illustrates how the Riparian rights as used in England and our Eastern states is not workable in the arid and semi-arid Western states. Quoting from that volume we have: "According to the common law doctrine of riparian rights in the law of waters, each owner along a stream was entitled to have the waters thereof flow in the natural channel, unpolluted in quality and undiminished in quantity. A strict interpretation would therefore forbid any use of the stream whatsoever. It was early modified in England so that two uses are recognized - ordinary or natural, including the use for domestic and stock purposes, and extraordinary or artificial, including the use for irrigation along the banks and also for mechanical purposes. For 'ordinary' uses the upper riparian owner is allowed to take the entire stream if necessary; but for 'extraordinary' uses he is entitled to water only when such use will not interfere with a like use by other riparian owners - that is, he must share the stream with others along its banks."

It is apparent from the foregoing riparian rights would, where applied literally, prevent the most desireable development of a watershed, and subsequent legal decisions have, in some cases, been detrimental to the overall good.

Contrast this with the Doctrine of Appropriation or priority of use which grew out of the occupancy of public lands during the development of Western mining and irrigation.

This principle is seldom recognized outside the western mining and irrigation states. However, many western court decisions upheld it. It appears to the writer to be more equitable than riparian rights. For example, one of the oldest diversion ditches in the Yakima Valley was built by the pioneer cattlemen, Snipes and Allen, primarily to produce hay and other livestock feed. The irrigable areas of the tracts served were generally not adjacent to the river bank and some of the area along the river was then in other ownerships. It is the writers understanding there was never any serious conflict with those owners. But under a strict application of the riparian principle the then riverbank owners and other upstream land-owners could have deprived the Snipes and Allen ditch of water years after it had been operated continuously each irrigation season.

Referring to an old Arizona decision (Clough vs Wing) the court states in part, "And the right to appropriate and use water for irrigation has been recognized longer than history, and since earlier times than tradition.....The native tribes, the Pimas and Papages and other Pueblo Indians, now, as they for generations have done, appropriate and use the waters of these streams in husbandry, and sacredly recognize the rights acquired by long use, and no right of a riparian owner is

thought of."

Apparently the gold rush to the early placer mines was the source of sufficient legal and other controversies to concentrate attention on the Doctrine of Appropriation. Early court decisions set forth the rights of the first appropriators to their conveyance works and the water to meet their needs.

In many cases flumes and ditches representing hundreds of thousands of dollars were essential to the full development of an area. Such works required measuring devices and that most generally used was the "miner's" inch" orifice with the areas of openings varied to the customers or claim owners needs.

During this era a movement gained weight in many Eastern states to have the Federal Government take over all claims and irrigation or placer water supply works on public lands. As the greater part of the claims and works were on such lands this was a very serious matter, however, in 1866 the congress passed an act which stated in part, "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 decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same....."

Then in 1870 another act was passed to further strengthen the Doctrine of Appropriation, "....or homesteads allowed, shall be subject to any vested or accrued water-rights....."

Despite all of this background one of the first important decisions by the Nevada Supreme Court went against the lower court and ruled in favor of a riparian appropriation made long after the original appropriater had constructed his works under the Doctrine of Appropriation.

This and many other similar cases naturally led to an appeal to the U. S. Supreme Court which in October 1879 upheld the Doctrine of Appropriation on the grounds it was the proper and equitable basis for Western arid areas.

However, there are many cases upholding limited riparian rights in arid areas. For example upstream storage works have been enjoined from storing winter flows to the point of depriving downstream riparian owners of domestic and stock water.

Regardless of which principle of rights is regarded as most equitable the principle of beneficial use set forth in the water code of this state certainly is desirable. This limits any right to the amount of water that can be beneficially used on the area granted the right. Generally this is at the maximum rate of one cubic foot per second per fifty (50) acres, in Central Washington. For ground water supplies the average limit is four (4) feet per acre per season.

Along this line practically all of the early appropriation notices filed with county auditors called for large amounts in proportion to the areas to be served. In one case near Okanogan the filing called for nearly one cubic foot per second per acre. Despite the fact that rate of flow would cover the land nearly sixty feet deep in one month it was some time before the owner could be persuaded to

relinquish the excess.

In another case the original Notice of Appropriation in 1887 called for 500 c.f.s. to serve a total of 6,000 acres. The area was later extended to a total of over 10,000 acres. However the Yakima River Limiting Agreement of 1905 reduced the maximum flow to 105 c.f.s. since the project had not up to that time serve enough acreage to justify a greater flow.

There are many areas in this state where the water rights have been "adjudicated". In this procedure the state supervisor sits as a referee collecting evidence as to earliest useage and the areas irrigated. This takes considerable time where several thousands of acres are involved. Upon the conclusion of the hearings a tabulated list in the order of use, acres irrigated and descriptions of tracts together with the flows allowed is presented to the superior court of the county in which the lands lie and if approved becomes the basis of rights.

The order of prior use is generally called class or classification of water right. In other words if the first lands were irrigated in 1852 (as in one case) these are given Class I rights and are to have water at all times there is sufficient flow to supply those rights. When the flow falls below that allocated to Class I lands or other classes in order of priority then they are to be prorated proportional to each tract in the class affected. During the past season there was not enough natural flow in either of two areas to serve the Class I and II lands although the total areas in those classes are small in proportion to the total irrigated. Return flows to a stream should be divided in relation to priorities for the downstream lands so

located as to be able to obtain such flows.

This writer's irrigation experience has been principally in the Yakima Watershed. From the official history maintained by the U. S. Bureau of Reclamation one can obtain an overall picture of the development.

At the turn of the century over 100,000 acres were being irrigated in this watershed. The picture as to water rights was confused with conflicting claims as to amounts of flow and filings for storage rights on the natural lakes by different companies. When the U. S. Bureau of Reclamation (then the U. S. Reclamation Service) entered the picture about 1903 or 1904 one of the first steps was to try to bring order to the picture. At that time as now by far the greater part of the lands irrigated did not have riparian rights. For example the Roza Project has only a very little area, probably not over 20 acres, out of the approximate 70,000 total, that could try to advance a riparian claim. Even the oldest diversion ditches built about eighty years ago then based their rights on prior use.

The early investigations by the U. S. Bureau of Reclamation showed clearly that large volumes of storage were needed as summer flows were usually below the needs even in 1900. Many others in the watershed had long realized something should be done. For example take the controversy between the Washington Irrigation Company (now the Sunnyside Project) and the Lombard-Horsley interests (now the Union Gap Irrigation District) as an example of the controversy over summer flows and needs for storage. The Lombard-Horsley interests were developing the present Union Gap Irrigation District as a private venture. To protect their summer needs they had filed for storage

rights on Lake Cle Elum and constructed a low log dam. (The U. S. Bureau of Reclamation history states it cost about $400.00). The Washington Irrigation Company contended the storage was interference with natural flow to which they were entitled and sent their Chief Engineer, Mr. R. K. Tiffany (later state supervisor) to blow up the dam. He did, was arrested and I understand later fined. While this was going on the stored water ran down to anyone who could divert it.

All of this confusion and controversy was of course hampering any orderly plan of development so the U. S. Bureau of Reclamation stated the department could not proceed without a clarification of the numerous rights and claims in the entire watershed.

Judging by the volume of records filed with the county auditor this was a tremendous task but from it emerged the "Limiting Agreement of 1905". This agreement limited the amount of water to each claimant to what could be benefically used under each small ditch or larger projects such as the Naches-Selah Irrigation District and the Selah-Moxee Irrigation District. This cleared the legal obstruction to the later developments which are now nearly completed. Basically this agreement recognized the Doctrine of Prior Appropriation and the 1917 code passed in this state also stresses the doctrine and the principle of limiting consumptive diversions to the amounts that can be benefically used.

As you know titles to real property are now generally insured rather than being supported by abstracts but I am told title insurance does <u>not</u> guarantee your water right regardless of its source. By the last phrase is meant either on a government project or by adjudication or otherwise.

My informant on this point is one of the oldest abstractors and title insurance men in the business and he further states the reason is water rights may be challenged at any time to the detriment of the landowner while title to property can and will be defended by the Title Insurance Companies. This is not generally known by landowners and some attorneys. Another point is use of waste water from lands above. This is being done in innumerable cases but a right cannot be obtained in any area where all of the waters of the watershed have been appropriated. The only clearly defined wastewater rights are those of a landowner who may recover and re-use waste water originating on his own land or a regularly organized project may recover and re-use on that project waste originating thereon. Liability for damage from waste water has been the source of several conflicting court decisions.

As the farm population changes there are many people from non-irrigated farms shifting to irrigation farming. In a large number of cases they have no knowledge of water right requirements or for example just what a Class 6 water right means. There was one case where the landowner had sufficient water as long as he could use the wastewater on his own land. The lower landowner's deed stated after the description of the area conveyed to him "together with any and all water rights pertaining thereto". His attorney was forced to advise him the latter transfer was of no value and he had to spend about $1,000.00 on a well and pump to obtain sufficient water. Fortunately water was close to the surface in his area.

In another case the owner had used surface water on a small tract for over fifteen years even though he knew he could not obtain a water right. In that area a well could have been constructed at a low cost and a right established under the Ground Water Code of 1945. However, he did not take advantage of this opportunity. The end result was his heirs lost a cash sale at 25% over the amount they finally took because of this lack of water right.

Another case that may have a future trouble potential is a system now being used by two friendly neighbors. The upper tract has drains installed in about 25% of the area and the owner of the lower tract is using the drainage and wastewater flows to supplement his inadequate right. This is now working well for both owners but what will happen if there is a disagreement or both tracts are sold to separate owners? The purchaser of the lower tract cannot establish a legal water right. Would a contract between the present owners as to cooperative use be legal and binding on future owners? An attorney experienced in such matters can probably work out an answer. Some method should be found to protect both owners investments as the works constructed are in the best interests of soil conservation.

As previously stated this writer is not an attorney so only examples of how some faulty conceptions of water rights have worked out to the cost of the landowners have been given. As to specializing in water right law an attorney friend explained that his past experience indicates it would take the greater part of his professional life to become expert enough to be recognized in several states and by that time he would be past seventy with most water right cases decided so he would have very little or no practice. Actually the number of water right cases before the courts are now very few so there is

little occasion for previews by attorneys.

In conclusion, it seems appropriate to again stress checking your water rights when purchasing land and also the writer's belief the Doctrine of Appropriation is the most equitable basis of rights. I thank you.