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**Water Issues in Real Estate Law: Rights, Easements, Transactions, and More**

1. **Water Rights Explained**

Water law, and the enforcement of “water rights” varies from state to state. However, there are two main doctrines that fundamentally govern water use in each state: the riparian doctrine, almost uniformly applied in the eastern United States, and the prior appropriation doctrine, applied in a variety of ways in the western states. For real estate professionals, it is important to understand how the water right system works in the states you work in. Ownership of water rights is not necessarily guaranteed upon conveyance of property, nor is their effect upon other water rights and other water users easily ascertainable.

* 1. **Riparian Rights vs. Prior Appropriation**

**Adoption of the English Common Law Riparian Doctrine in Colonial and Water-Rich States:** In England, “the King was presumed to hold title to the riverbed and soil” of “royal rivers” which were “waterways subject to the ebb and flow of the tide and large enough to accommodate boats” while the public retained the right of passage and the right to fish” while “[t]he riparian appropriator was presumed to hold title to the stream to the center thread of the waters (*usque ad filium aquae*), which accorded him the exclusive right of fishery in the stream and entitled him to compensation for any impairment of his right to the enjoyment of his property caused by construction.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 285, 117 S.Ct. 2028, 2042 (1997).

“In eastern states[,] the riparian rights doctrine prevails as the legal framework for mediating competing demands for the waters of rivers and lakes.” *Mattaponi Indian Tribe v. Commonwealth of Virginia*, 72 Va. Cir. 444 (2007 WL 6002103, \*5) (Not Reported). “It is, in large measure, a self-regulating system that authorizes proportional use of water among riparian owners in times of plenteous water supply, as well as in periods of scarcity.” *Id*., citing *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.D.R.I.1827).

The American Riparian Doctrine, “based on the old common law which gave to the owners of land bordering on streams the right to use the water therefrom for certain purposes” is a right “considered an incident to ownership of the land.” *Harris v. Brooks*, 255 Ark. 436, 441, 283 S.W.2d 129, 132 (1955). “Originally it apparently accorded the landowner the right to have the water maintained at its normal level, subject to use for strictly domestic purposes[]” but “it became evident that this strict limitation placed on the use of water was unreasonable and **\*\*\*** unutilitarian.” *Id.,* 255 Ark. At 441-42, 283 S.W.2d at 132. “Consequently it was not long before the demand for a greater use of water caused a relaxation of the strict limitations placed on its use and this doctrine came to be divided into (a) the natural flow theory [maintaining the water at its normal level and taking water for domestic purposes only] and (b) the reasonable use theory.” *Id*.

The reasonable use theory “recognizes that there is no sound reason for maintaining our lakes and streams at a normal level when the water can be beneficially used without causing unreasonable damage to other riparian owners.” *Id.,* 255 Ark. At 442, 283 S.W.2d at 133. Subject to slightly different interpretations and limitations in each state that utilizes the reasonable use theory of the riparian doctrine, the theory generally provides:

‘The rights of riparian proprietors on both navigable and unnavigable streams are to a great extent mutual, common, or correlative. The use of the stream or water by each proprietor is therefore limited to what is reasonable, having due regard for the rights of others above, below, or on the opposite shore. In general, the special rights of a riparian owner are such as are necessary for the use and enjoyment of his abutting property and the business lawfully conducted thereon, qualified only by the correlative rights of other riparian owners, and by certain rights of the public, and they are to be so exercised as not to injure others in the enjoyment of their rights.’ It has been stated that each riparian owner has an equal right to make a reasonable use of waters subject to the equal rights of other owners to make the reasonable use, *United States v. Willow River Power Co*., 324 U.S. 499, 65 S.Ct. 761, 89 L.Ed. 1101. The purpose of the law is to secure to each riparian owner equality in the use of water as near as may be by requiring each to exercise his right reasonably and with due regard to the rights of others similarly situated. *Meng v. Coffey*, 67 Neb. 500, 93 N.W. 713, 60 L.R.A. 910.

*Id*., 255 Ark at 443, 283 S.W.2d at 133, quoting 56 Am. Jur. p. 728.

Thus, riparian rights are not ownership of the water itself, but a usufructuary right to the use of the water while it is flowing over or bordering the riparian lands. *Koch v. Aupperle,* 274 Neb. 52, 64, 737 N.W.2d 869, 878 (2007). Importantly, riparian rights are unlike prior appropriative rights, discussed *infra*, in the following ways:

* “[T]here is no priority among riparian proprietors utilizing the supply” rather, “[a]ll riparian proprietors have an equal and correlative right to use the waters of an abutting stream.” *Id*.; *See also, Tyler v. Wilkinson*, 4 Mason 397, 24 F.Cas. 472 (C.C.D.R.I. 1827): (“the owners on Sergeant's trench have a right to the flow of the quantity of water which was accustomed to flow therein antecedent to 1796; … in case of a deficiency; that, if there be a deficiency, it must be borne by all parties, as a common loss, wherever it may fall, according to existing rights; … the trench proprietors have no right to appropriate more water than belonged to them in 1796, and ought to be restrained from any further appropriation[.]”).
* “[U]se of the water does not create the riparian right and disuse neither destroys nor qualifies the right.” *Id*., 274 Neb. At 64, 737 N.W.2d at 878-79; See also, Hite v. Town of Luray, 175 Va. 218, 8 S.E.2d 369 (1940): (“These respective riparian rights of user are no sense easements, but are qualified property rights incident to the ownership of the soil through or by which the waters of a stream flow.”); *But see, id:* (“all rights which depend primarily upon ownership of the soil upon which the water rests may be separated from the ownership of the shore… riparian rights are property that may be the subject of bargain and sale” but “cannot be separated from the uplands because of the physical impossibility of such a course …. there is no doubt, however, that the owner of the riparian land might contract not to utilize such right for the benefit of the owner of the stream, and such a contract would have practically the same effect as a separation of the right from the land.”
* Riparian rights are typically restricted to the use of water on riparian lands only, which means that riparian owners cannot divert water to non-riparian lands. *Id.*

Today, however “as the shortcomings of pure riparian rights became more apparent, the eastern states began to overlay regulatory requirements on water withdrawals that slowly eroded pure riparianism … ‘regulated riparianism,’ is now the prevalent model in the non prior appropriation rights states.” John M. Lain, *Water at the Crossroads: The Intersection of Water Supply and Water Quality Issues and the Resulting Effect on Development*, 4 (2004).

**Evolution of the Prior Appropriation Doctrine in the Arid Western States**: As explained by the Nevada Supreme Court:

“[T]he common law regarding the flow of streams, which may be unobjectionable in such localities as the British Isles and the coast of Oregon, Washington, and northern California, where rains are frequent and fogs and winds laden with mist from the ocean prevail and moisten the soil, is unsuitable under our sunny skies, where the lands are so arid that irrigation is required for the production of crops necessary for the support and prosperity of the people. Irrigation is the life of our important and increasing agricultural interests, which would be strangled by the enforcement of the riparian principle.”

*Twaddle v. Winters,* 29 Nev. 88, 85 P. 280, 284 (1906).

“Generally speaking, under this doctrine, some governmental agency, acting under constitutional or legislative authority, apportions water to contesting claimants” and has been adopted in about 17 western states.” *Harris v. Brooks*, 255 Ark. 436, 441, 283 S.W.2d 129, 132 (1955). The Supreme Court in *California v. United States* explained:

“The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress. The rivers, streams, and lakes of California were acquired by the United States under the 1848 Treaty of Guadalupe Hidalgo, with the Republic of Mexico, 9 Stat. 922. Within a year of that treaty, the California gold rush began, and **the settlers in this new land quickly realized that the riparian doctrine of water rights that had served well in the humid regions of the East would not work in the arid lands of the West**. Other settlers coming into the intermountain area, the vast basin and range country which lies between the Rocky Mountains on the east and the Sierra Nevada and Cascade Ranges on the west, were forced to the same conclusion. In its place, the doctrine of prior appropriation, linked to beneficial use of the water, arose through local customs, laws, **\*\*\*** and judicial decisions. Even in this early stage of the development of Western water law, before many of the Western States had been admitted to the Union, Congress deferred to the growing local law.

…

[R]eclamation of the arid lands began almost immediately upon the arrival of pioneers to the Western States. **Huge sums of private money were invested in systems to transport water vast distances for mining, agriculture, and ordinary consumption**. Because a very high percentage of land in the West belonged to the Federal Government, the canals and ditches that carried this water frequently crossed \*\*\* federal land. In 1862, Congress opened the public domain to homesteading. Homestead Act of 1862, 12 Stat. 392. And in 1866, Congress for the first time expressly opened the mineral lands of the public domain to exploration and occupation by miners. Mining Act of 1866, ch. 262, 14 Stat. 251. Because of the fear that these Acts might in some way interfere with the water rights and systems that had grown up under state and local law, Congress explicitly recognized and acknowledged the local law: ‘[W]henever, 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.’ § 9, 14 Stat. 253.

438 U.S. 645, 653-56, 98 S.Ct. 2985, 2990-91 (1978) (emphasis added).

In a nutshell, the doctrine of prior appropriation “provides that rights to water for irrigation are perfected and enforced in order of seniority, starting with the first person \*\*\* to divert water from a natural stream and apply it to a beneficial use (or the begin such a project, if diligently completed)[]” and “[t]he scope of the right is limited by the concept of ‘beneficial use’” which “restricts a farmer ‘to the amount of water that is necessary to irrigate his land by making a reasonable use of the water.’” *Montana v. Wyoming,* 563 U.S. 368, 375-76, 131 S.Ct. 1765, 1772 (2011), quoting 1 C. Kinney, Law of Irrigation and Water Rights § 586, pp. 1007-1008 (2d ed. 1912). “Once such a water right is perfected, it is senior to any later appropriators' rights and may be fulfilled entirely before those junior appropriators get any water at all.” *Id*. These junior appropriators, however, “are not completely without rights, … [a]s they come online, appropriators acquire rights to the stream basically as it exists when they find it.” *Id*. 563 U.S. at 376-77, 131 S.Ct. at 1772, citing 2 Kinney § 803, at 1403–1404. “Accordingly, subject to the fulfillment of all senior users' existing rights, under the no-injury **\*\*\*** rule junior users can prevent senior users from enlarging their rights to the junior users' detriment.” *Id*., citing 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, p. 573 (1971) (hereinafter Hutchins).

**Dual Administration States:** The specific application of the prior appropriation doctrine in the western states is extremely state-specific, as each state has a different system of laws for how prior appropriators’ rights are created. Thus, there are some instances where the riparian doctrine is applied in western states in addition to the prior appropriation doctrine, although “dual administration of water resources under the doctrines of riparian rights and of prior appropriation results in a hydra of perplexity” as “the two methods are incompatible.” *Koch v. Aupperle*, 274 Neb. 52, 68, 737 N.W.2d 869, 881 (2007) quoting *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966).

The following list summarizes generally which doctrine each western state follows:

**Alaska: Prior Appropriation**. In Alaska, “[a]nyone who diverts, impounds, withdraws or uses a significant amount of water, without a permit, certificate, or authorization is guilty of a misdemeanor.”[[1]](#footnote-1) “Significant amount of water” is defined in Alaska statute as the consumptive use of more than 5,000 gallons per day from a single source, or 500 gallons per day from a single source for more than 10 days a year, or nonconsumptive use of 30,000 gallons per day from a single source, or “any water use that may adversely affect the water rights of other appropriators or the public interest.” *Id*.Alaska has a filing fee associated with water right applications that are scaled based on the amount of water sought and the time taken by staff to process the application. *Id*. Water right holders have priority over persons with junior water right priority dates, however, in Alaska, “[p]riority of appropriation does not include the right to prevent changes in the condition of water occurrence, such as the increase or decrease of stream flow, or the lowering of a water table, artesian pressure, or water level, by later appropriators, if the prior appropriator can reasonably acquire the appropriator's water under the changed conditions.” *Id*., quoting AS 46.15.050.

**Arizona: Prior Appropriation.** Arizona’s waters “flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use” Arizona Revised Statutes § 45-141. Arizona’s water right system is temporally bifurcated, whereby water rights created prior to June 12, 1919 “a person could acquire a surface water right simply by applying the water to a beneficial use and posting a notice of the appropriation at the point of diversion.”[[2]](#footnote-2) Any water use arising after June 12, 1919, requires a permit and certificate to use the water. *Id*.

**California: Dual/Hybrid, but Mostly Prior Appropriation**. Upon California’s statehood, “California adopted the English common law familiar to the eastern seaboard” which included riparianism. However, following water development incidental to the flock of “49ers”, “[t]he self-governing, maverick miners applied the same ‘finders-keepers’ rule to water that they did to their mining claims.”[[3]](#footnote-3) Thus, shortly after California’s statehood in 1850, the California legislature recognized the appropriative right system as having the force of law. *Id.* However, “the clash of rights” between riparian users and appropriative users resulted in a constitutional amendment to the California Constitution which requires all use of water be “reasonable and beneficial.” *Id.,* citingArt. X, § 2, Cal. Const. In 1914, the California Water Commission Act established the permit process which continues today. *Id*. In summary, “post-1914 appropriative rights are governed by the aforementioned hierarchy of priorities developed by the 49ers … [i]n times of shortage the most recent (‘junior’) right holder must be the first to discontinue such use; each right’s priority dates to the time the permit application was filed with the State Board.” *Id.* And, “[a]lthough pre- and post- 1914 appropriative rights are similar, post-1914 rights are subject to a much greater degree of scrutiny and regulation by the Board.” *Id*.

**Colorado**: **Prior Appropriation**. Colorado follows the typical prior appropriation doctrine of “first in time, first in right” which is limited by beneficial use. In Colorado, “Failure to apply a water right to beneficial use when water was available for a period of ten or more years results in a rebuttable presumption of abandonment” whereupon “the burden shifts to the owner of the water right to prove that they did not intend to abandon the water right.”[[4]](#footnote-4) This is also applied in Montana. However, unlike Montana, “[e]very 10 years, the division engineer is required to present to the water court a list of water rights that the division engineer has found to be abandoned.” *Id*. In Montana, allegations of abandonment outside of the adjudication are shouldered upon individual water users to prosecute such claims against other water users.

Unlike other western states, applications for water rights are filed with the Colorado Water Court, not the state agency in charge of administering water rights. The Colorado Water Court explains:

“Water matters are generally commenced in a water court by the filing of an application with the water clerk. The water clerk publishes a summary of each application that is filed in the monthly water court “resume” and in a legal notice in one or more newspapers. Interested persons may then file statements of opposition to an application within the time allowed by statute. Because claims in water rights adjudications may affect, in priority or otherwise, any water right claimed or previously adjudicated within each division, *owners of affected rights must appear to object and protest as provided in the 1969 Act or be barred from claiming injury to their water rights as a result of claims made in an application*.”[[5]](#footnote-5)

**Hawaii: Hybrid.** “Hawai’i’s water law is an amalgamation of the ancient and historical Native Hawaiian water management system, surviving Kingdom law, and modern constitutional and statutory mandates.”[[6]](#footnote-6) Specifically, “[t]he State Water Code preserved **appurtenant rights** [“*rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple lands i.e., when land allotted by the 1848 Mahele was confirmed to the awardee by the Land Commission and/or when the Royal Patent was issued*”] but not **correlative** [*Hawaiian Correlative Rights are,“[u]nder the common law, owners of land overlying a ground water source have the right to use that water on the overlying land, as long as the use is reasonable and does not injure the rights of other overlying landholders.”*]and **riparian rights** [*Riparian Rights are defined in Hawaii as rights of land adjoining natural watercourses and are the surface water equivalent of correlative rights to ground waters”]* in designated water management areas.” *Id*, (emphasis added). There are also “**appropriated uses**” which “are uses of surface or ground waters on non-riparian or nonoverlying lands” and “are not based on water rights but are allowed as long as they are reasonable and do not actually impinge on correlative and riparian rights.” *Id*. Finally, “**Native Hawaiian Rights**” are “traditional and customary rights” of “descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778” which include, but are not limited to “cultivation or propagation of taro on one’s own kuleana” and the gathering of customary and medicinal plants “for subsistence, cultural, or religious purposes.” *Id*. “[T]he Hawai’i Supreme Court recognized that the State has an obligation to protect Hawaiian traditional and customary practices to the extent feasible, and that the proponent of an action must show sufficient evidence that these types of practices are protected, if they exist in the location in question.” *Id*.

“[W]hen a ground water management area is designated, existing correlative uses within that area can be issued water use permits under the existing use provisions of the State Water Code, but unexercised correlative rights are extinguished.” “Overlying landowners who have not exercised their correlative rights cannot prevent other landowners from using the water on the theory that they are using more than their reasonable shar” rather, “[t]hey must suffer actual, not potential, harm” and it is “[o]nly when landowners try to exercise their correlative rights and the remaining water is insufficient to meet their needs, that they can “take action to require existing users to reduce their use.” *Id*. “[W]hen a surface water management area is designated, existing riparian uses within that area are eligible for water use permits as existing uses, but unexercised riparian rights are extinguished.” *Id*. For appropriated uses, “when a water management area is designated, appropriated uses become superior to unexercised water rights, because appropriated uses become existing uses and are eligible for water use permits, while unexercised correlative and riparian rights are extinguished.” *Id*.

Generally, “water use permits are required only in designated water management areas” but “well construction and pump installation permits are required for any new or modified ground water use, and stream diversion and stream alteration permits are required for any new or modified surface water diversions[]” and “[i]f the proposed stream diversion will affect the existing instream flow standard, a successful petition to amend the interim instream flow standard is also required.” *Id*.

Importantly, in Hawaii, the public trust doctrine is heavily incorporated into Hawaiian water law. “The state water code” was declared to “be liberally interpreted to obtain maximum beneficial use of the waters of the State … [h]owever, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation[,] [s]uch objectives are declared to be in the public interest.” *See,* HRS § 174C-2.

**Idaho: Prior Appropriation**. “Water law in Idaho is based on the appropriation doctrine, because water rights in Idaho are base upon diversion and beneficial use of water … [a] water right under the law of the state of Idaho can be established only by appropriation, and once established, it can be lost if it is not used.”[[7]](#footnote-7) Idaho water rights are temporally bifurcated, whereby water rights to surface water could be developed prior to May 20, 1971, either by “simply divert[ing] water and apply[ing] it to beneficial use” a.k.a., “beneficial use, historic use, or constitutional water rights” or by “comply[ing] with the statutory method in effect at the time the water right was established.” *Id*. After May 20, 1971, water rights to surface water [except for instream watering of livestock] may only be established through the application and permitting procedure with the Idaho Department of Water Resources. *Id*.

**Kansas: Prior Appropriation**. In Kansas, “[t]he Kansas Water Appropriation Act protects both the people’s right to use Kansas water and the state’s supplies of groundwater and surface water for the future” as “administered by the Kansas Department of Agriculture’s Division of Water Resources.”[[8]](#footnote-8) Kansans using water without a vested right or a permit from the Division of Water Resources may be subject to a $500 fine or a maximum of six months in jail. *Id*. However, no permit is needed for “water used solely for domestic purposes – that is, water primarily used for the household, watering livestock on pasture, or watering up to two acres of lawn and gardens.” *Id*. Permits are also not required for ponds of 15 Acre-Feet capacity of less and the water used out of it is less than 15 Acre-Feet.[[9]](#footnote-9) After receiving a permit to appropriate water, permit holders are “required to complete and return a yearly report of water use no later than March 1 of each year … [t]he Kansas legislature has made the report of water use mandatory and authorized fines for late reporting” and “[d]eliberate falsification of data on a report is a class C misdemeanor.” *See, Water Law Basics*. These reports “are used to perfect the water right and prove it has not been abandoned” as such, “[r]eports must be submitted even if water was not used in the previous year and the reason for nonuse explained." *Id*. Water rights in Kansas are “considered abandoned after five successive years of nonuse without due and sufficient cause” such as, “water being unavailable from the source of supply, adequate moisture is provided by natural precipitation … or temporary pollution of the water supply.”

Unlike most of the other western states, in Kansas, “appropriation water rights” which were established after June 23, 1945, the date of the Kansas Water Appropriation Act, are “by far the most common type of water right in the state.”[[10]](#footnote-10) “Vested water rights are based on water put to use before June 23, 1945,” and are “senior to any appropriation right.” *Id*. However, “[t]here are not many vested rights and they tend to have been appropriated in small quantities.” *Id*.

**Montana:** **Prior Appropriation.** The “first-in-time, first-in-right” prior appropriation doctrine is strictly enforced in Montana. According to the Montana Department of Natural Resources and Conservation:

“The State of Montana owns the waters within the state on behalf of its citizens. Citizens do not own the water but can possess a legal right to use the water within state guidelines. By law, a recorded water right is required for the majority of water uses to be valid, legal, and defensible against other water users. A water right protects the use of that water from other uses later in time, from unrecorded, illegal uses, or from others who exceed their rights.”[[11]](#footnote-11)

Montana’s water right system is temporally bifurcated, whereby water rights created prior to July 1, 1973 are considered “existing” or “historical” water rights subject to the ongoing adjudication by the Montana Water Court. Any water use arising after July 1, 1973, may only be authorized by the Montana Department of Natural Resources with a beneficial water use permit or groundwater certificate. Water use that is not considered an “existing/historical” water right or documented by the Montana Department of Natural Resources with a permit or certificate is considered an illegal use of water in violation of the Montana Water Use Act.

**Nebraska: Prior Appropriation.** Similar to all the prior appropriation states, “[t]he water of every natural stream within the State … is hereby declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation.”[[12]](#footnote-12) However, Nebraska goes further to declare that “[w]ater for the purposes of irrigation in the State of Nebraska is hereby declared to be a natural want.” *Id*. Nebraskans using surface water “are required in most instances to obtain a surface water right/permit from the Nebraska Department of Natural Resources [“DNR”] The permits “are approved for a specific location, amount of water and purpose.” *Id.* Nebraskan water users “must use the water for the purposes specified in the appropriation permit at least every five years or the appropriation may be canceled by the [DNR]” subject to certain “acceptable reasons for not using the water.”[[13]](#footnote-13)

The procedure for “cancelling” appropriations is also referred to as the adjudication in Nebraska, because it is initiated by a field investigation by the DNR or the DNR’s review of “information received from the public or other governmental entities.” *Id.* Whereupon, the DNR makes a preliminary determination, and if “the water right has not been used in the last five years and there is no apparent reasons why the water right should not be canceled[,]” the water user is provided “an opportunity to contest it.” *Id*. “[I]f the cause for the nonuse was the unavailability of water” “sufficient cause” for that nonuse is deemed to exist for up to thirty (30) consecutive years, and if in a “fully appropriated” or “overappropriated basin[] sufficient cause may extend beyond thirty years.” *Id*.

Similar to Kansas, “anyone who uses, or allows to be used, surface water for any purpose, without authority from the DNR shall, if convicted, be guilty of a Class II misdemeanor” the penalty for which “is a maximum of six months imprisonment or one thousand dollars fine, or both” and “[e]ach day that water is allowed to run without authority from the DNR constitutes a separate offense.”[[14]](#footnote-14)

**Nevada: Prior Appropriation.** Similar to other prior appropriation states, Nevada recognizes “vested rights” that were established prior to the existence of statutory filing or application procedures for water rights, however, the comprehensive adjudication process has yet to begin[[15]](#footnote-15). “Any claimant of a pre-statutory water right must submit proof of the water use to the Nevada State Engineer on or before December 31, 2027 pursuant to NRS 533.087” and “[i]f a claimant fails to submit such proof by that deadline, the claim is deemed abandoned.” *Id*. “Vested rights to surface waters are those rights for which the work to establish beneficial use was initiated prior to March 1, 1905,” while “[v]ested rights from an underground source are those rights initiated prior to March 22, 1913, for artesian water and prior to March 25, 1939, for percolating water.”[[16]](#footnote-16) The process for determining “the extent of all vested rights on a water source is called an adjudication” which “is initiated by order of the State Engineer.” *Id*. However, “[o]ne or more water users on a stream system or within a groundwater hydrographic basin may petition the State Engineer to begin adjudication proceedings.” *Id*., citing Chapter 533 of the Nevada Revised Statutes. For non-vested water rights, applications for such water use must be filed with the Nevada Division of Water Resources. *Id*. “Certificates of Appropriation” will be prepared by the State Engineer upon filing of the proofs and compliance with terms of any permits. Id. “[C]ertificated underground water right[s] may be lost by forfeiture and/or abandonment” but “certificated surface water right[s] may only be lost by abandonment.” *Id*., citing NRS 534.090 and NRS 533.060.

**New Mexico: Prior Appropriation.** In New Mexico, “[t]he Water Code gave the State Engineer jurisdiction over all new surface water appropriations in 1907” after which, “no one can appropriate surface water except by application to the State Engineer.”[[17]](#footnote-17) Similar to Nevada, the “State Engineer is responsible for active adjudications[.]”[[18]](#footnote-18) Adjudications “are required by the statute” and the purpose “is to obtain a judicial determination and definition of water rights within each stream system or underground basin so that the State Engineer may effectively perform water rights administration and meet New Mexico’s interstate stream obligations.” *Id*. “About 20 percent of the state has been adjudicated” and “[m]ore than 50 percent of the state has adjudications in progress” “in federal and state courts in New Mexico.” *Id*.

**North Dakota: Hybrid, mostly Prior Appropriation**. North Dakota’s territorial statutes expressly adopted the common law doctrine of riparianism. *See,* Terr. Dak. Laws 1865-66, ch. 1, § 256, Civ. Code § 255 (1877). Territorial Civil Code Section 255 “was carried over into the laws of both North Dakota and South Dakota on their certification in 1889.” Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, (1971) Vol 1, p. 190. However, South Dakota repealed it in 1955, and North Dakota repealed it in 1963. *Id.,* p. 191. Different statutes “were enacted which relate to priority of water rights and preferences in the use of water.” *Id*., p. 198, citing N. Dak. Laws 1963, ch. 419, Cent. Code Ann. § 61-01-01.1 (Supp. 1969). At least as early as 1905 North Dakota indicated “the legislature’s approval of the doctrine of prior appropriation[.]” *Baeth v. Hoisveen*, 157 N.W.2d 728, 731 (N. Dak. 1968). As of 1971, Wells Hutchins explains:

“[I]n all cases where the use of water for different purposes conflicts, such uses shall conform to a specified order of priority. Domestic use, as defined, has first priority. As between appropriations for the same type of use, priority in time shall give the better right. No permit shall be required for domestic and livestock uses. Regardless of the proposed use, however, all water users shall secure a permit before constructing an impoundment capable of retaining more than 12 ½ acre feet of water.”

Hutchins, *supra*, at pp. 213-14, citing Cent. Code Ann. § 61-01-01.1 and Laws 1965, ch. 447. North Dakota reconciled the territorial riparian doctrine with the prior appropriation doctrine by finding “inasmuch as the right of a riparian landowner to use an underground stream for irrigation purposes had not been exercised before the 1955 legislation, the unused right could be validly abrogated without compensation by the legislation, at least as against appropriative rights acquired thereafter, and that the riparian owner could validly be required by the legislation to apply for and be governed by an appropriative-right permit.” *Id*., at p. 214, citing *Baeth, supra*.

Today, permits are “required from the [North Dakota] Department of Water Resources for all uses of water, except in cases when both the amount of water to be impounded, diverted, or withdrawn is less than 12.5 acre-feet (4,073,137 gallons), and the contemplated use is domestic, livestock, or fish, wildlife, and other recreational uses” or is “being used to irrigate less than 5 acres.” [[19]](#footnote-19) Where permits are required, temporary uses require temporary water permits, while uses exceeding a twelve-month period require a conditional water permit. *Id*.

**Oklahoma: Hybrid.** Similar to North and South Dakota, the Oklahoma Territorial legislature adopted the riparian doctrine. *Hutchins, supra*, at p. 215, citing Terr. Okla. Stat. 1890, § 4162, Stat. Ann. Tit, 60, § 60 (Supp. 1961). In 1963, the territorial statute was amended, such that “water running in a definite natural stream may be used by the landowner *for domestic purposes* as long as it remains there, but he may not prevent the natural flow of the stream nor pursue nor pollute it, *as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the State as provided by law*.” *Id.,* at pp. 215-16, quoting Okla. Stat. Ann. Tit. 60, 60 (Supp. 1970) (emphasis in original). Today, “[a]ll uses of surface water must be permitted by the [Oklahoma Water Resources Board] with the exception of domestic use and the capture and storage of diffused surface water on the landowner’s property, provided the natural flow of the stream is maintained.”[[20]](#footnote-20)

**Oregon: Prior appropriation.** “Although the riparian doctrine is historically an important part of the water law of Oregon … except for certain vested rights chiefly for domestic and stockwatering purposes, very little vestige of the [riparian] doctrine remains as against appropriative rights under the water code[.]” Hutchins, *supra,* at pp. 194-195. Today Oregon follows the typical prior appropriation system, whereby “[i]f there is a conflict between users, the date of priority determines who may use the available water.” [[21]](#footnote-21) However, “[i]f the rights in conflict have the same date of priority, then the law indicates domestic use and livestock watering have preference over other uses” and “if a drought is declared by the Governor, the [Water Resources] Commission can adopt rules that give preference to stock watering and human consumptive purposes, regardless of the priority dates.” *Id.* “Once established, a water right must be used as provided in the right at least once every five years” because “after five consecutive years of non-use, the right is considered forfeited and is subject to cancellation.” *Id*.

Uses of surface water require a permit, except for “exempt uses” which include: natural springs that do not form a natural channel or flow off of the property where it originates, stock watering, fish protection (water used for egg incubation projects and fish screens, fishways, and bypass structures), fire control, forest management activities such as slash burning and mixing pesticides, certain land management practices where water use is not the primary intended activity, collection and use of rainwater, and reuse of water. *Id*, citing ORS 537.141 through .142, 537.800, and 537.132.

**South Dakota: Hybrid.** See discussion above regarding North Dakota’s hybrid riparianism which was similarly applicable to South Dakota.

**Texas: Prior Appropriation**. “Legal scholars suggest that the history of water regulation in Texas began in the 1600s with the establishment of Spanish missions and presidios in dry areas of the state where water was available for irrigation” and at that time, Spanish law “encouraged the formation of community irrigation ditches, or acequias.”[[22]](#footnote-22) Mexican rule between 1821 and 1836 continued the Spanish system. *Id.* In 1840, the Republic of Texas adopted English common law, whereby landowners bordering streams “were allowed to use the ordinary flows (but not flood flows) of the streams for domestic, livestock, and ultimately irrigation purposes (a base stream-flow was required to be passed downstream for other potential users).” *Id.* In 1895, however, “the Texas Legislature declared that lands patented from the state after July 1, 1895, did not include riparian rights, thus making the appropriation system the only means to acquire water rights on later patented lands.” *Id.* While “[t]he riparian and appropriation system continued to co-exist in Texas[,] … the nature of riparian rights made it difficult to determine the extent of such rights, and to manage the streams of Texas.” *Id*. During a drought in the 1950s, “Claimed water rights exceeded water available in the Rio Grande Valley” and “an extensive lawsuit brought by the state resulted in the adjudication” of “all rights to the Rio Grande.” *Id*. The “Adjudication Act” was passed in 1967, “which merged riparian and appropriation systems together on a statewide basis” where “any person claiming a riparian right other than for domestic use and livestock watering” was required “to file a claim for the right by 1969[.]” *Id*.

Thus, today, surface water rights require permits from the state, unless they are for “exempt uses,” which include domestic and livestock use, wildlife management, and wildfires.[[23]](#footnote-23) While the Texas Commission on Environmental Quality administers water rights, there are also Watermaster Programs in certain parts of Texas that enforce water rights within their jurisdiction.[[24]](#footnote-24) For example, in the Brazos Watermaster Program, Watermaster duties include: “allocating water per the adjudicated water rights, monitoring stream flow, reservoir levels, and water use within the basin, enforcing compliance with water rights, [and] responding to complaints.”[[25]](#footnote-25) “Diverters [aka water users] in the watermaster area will be responsible for: installing a measuring device, *notifying the watermaster before diverting water*, submitting a report when pumping is completed, [and] complying with the rules of the [Texas] Commission [on Water Quality].” *Id*, (emphasis added). The typical process in Watermaster Programs has been summarized as:

“The watermaster office receives a steady flow of calls from surface water rights holders requesting permission to divert water from the river. These requests are verified against computer databases of contract and water rights accounts, certified, and then entered into a constantly evolving flow chart of scheduled diversions. In addition, the office serves as a clearinghouse for contract water sales and, as such, usually has information on the farmers or ranchers that have water for sale.”[[26]](#footnote-26)

**Utah: Prior Appropriation.** “The Utah pioneers, in the late 1840’s, were the first Anglo-Saxons to practice irrigation on an extensive scale in the United States[]” however, “[b]eing a desert, Utah contained much more cultivated land than could be watered from the incoming mountain streams.”[[27]](#footnote-27) Thus, the doctrine of prior appropriation governed water use. *Id.* As early as 1852 a “county courts water allocation system was enacted” until it was replaced in 1880 “by a statute providing for county water commissioners” followed by the Office of the State Engineer being established in 1897. *Id.* This office is now known as the Division of Water Rights which administers water rights in Utah. *Id*. Typical among the other arid prior appropriation states, “[r]ights for water diversion and use established prior to 1903 [the date “[a] complete water code was enacted”] for surface water or prior to 1935 for ground water can be established by filing a ‘diligence claim’ with the Division” which “are subject to public notice and judicial review[.]” *Id.* “All other rights to the use of water in the State of Utah must be established through the appropriation process administered by the Division[.]” *Id.* However, “[m]any areas of the state are administratively ‘closed’ to new appropriations of water” which means that in these areas, “new diversions and uses of water are established by the modification of existing water rights” via “the filing of ‘change applications’” with the Division. *Id*.

**Washington: Prior Appropriation.** Similar to other states heavily influenced by the influx of settlers for mining purposes, Washington’s initial Water Rights Statute of 1891 required water users to “post[] a claim on a post or tree just like you posted a mining claim,” or “simply [write] your claim down on a piece of paper kept in your property records.” [[28]](#footnote-28) Washington’s Water Code was passed in 1917, which established “that those who first put water to a good use retain the right to continue using it in the future.” *Id*. One year after the Water Code was adopted, water right adjudications began, however it was not comprehensive. *Id*. In short, “vested rights to water” are those that are based on “statements of beneficial use of water that began prior to 1917 for surface water and prior to 1945 for groundwater.” *Id.* These vested rights “remain valid until an adjudication occurs in which their validity must be determined in a court of law.” *Id.* The Washington Department of Ecology is currently recommending areas for future adjudications, where it is difficult to regulate water use, or water users “face uncertainty about their own legal rights and vulnerability to each other’s potential claims” as they “rely on very old water rights that have not been evaluated or verified.”[[29]](#footnote-29)

Note also, that fish habitat, and the propagation of fish in Washington streams and rivers, is extremely important. So much so, that in 1955 the Washington legislature stated “that it is the policy of the state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.”[[30]](#footnote-30) In 1971, Washington passed the “Water Resources Act” which “mandated retaining flows to preserve fish, game, birds and other wildlife, as well as recreational and aesthetic values, and navigation.” *Id*. Beginning in 1991, certain salmon species in Washington were declared “endangered” or “threatened” species under the federal Endangered Species Act. *Id*. While not entirely instigated by the listing status in the Endangered Species Act, the Washington Department of Ecology, and federal agencies, have established instream flow water rights across the state, which have a priority date at the time they are established and can therefore cease more junior appropriations when flows in the source fall below the “instream flow” set by the right, which includes the cessation of junior groundwater rights hydrologically connected to the instream flow source. *Id*. Additionally, tribes in Washington “retained the right to fish, hunt, and gather in all their off-reservation traditional places” as part of their treaty negotiations with the territorial governor in 1854-55. *Id*. The United States Supreme Court determined in *Winters v. United States*, a precedent-setting decision for tribal and federal reserved rights across the nation, that the tribes possessed an implied water right “because without a reserved source of water a reservation would be practically valueless[.]” *Id*. Tribal water rights often date back to the creation of the reservation or “time immemorial” and are thus more often than not senior to all other private appropriations. *Id*.

**Wyoming: Prior Appropriation.** The Wyoming Historical Society summarizes the history of Wyoming Water Law as follows:

“Wyoming had become a territory in 1869, in the aftermath of the Civil War. Most of its early leaders were veterans of that war, as were most of its early male citizens. After the tribes were driven onto reservations in the late 1870s, these white newcomers saw the chance here to start fresh and make something new — new lives and new profits. … they borrowed ideas about water and water rights from California and Colorado, places transformed by gold rushes years before people chose to settle Wyoming. In California and Colorado, gold miners came up with a system under which people could take water from a stream, first-come first-serve, and move it where they needed it.”[[31]](#footnote-31)

In 1886, “all appropriators claiming water in the territory” were required “to file a statement of claim to their ditch and appropriation with the local district court by September of 1886” thereafter, users could “petition the district court for a decree establishing” a “determination of priorities of the rights[.]”[[32]](#footnote-32) Subsequent laws passed in 1888 “identified domestic use as being able to preferentially supersede earlier priority dates for all other uses during times of water shortage, and agricultural uses to be preferred to manufacturing uses.” *Id*. Thus, water rights pre-dating 1890 are “territorial” water rights, and after Wyoming’s statehood, water rights can only be acquired by a permit from the state engineer.[[33]](#footnote-33) However, Wyoming has established additional limits on direct-flow irrigation water rights: “Water rights for irrigation are adjudicated on the basis of one [CFS] per 70 acres” but “[w]ater rights with priority dates of March 1, 1945, or earlier are entitled to an additional 1 cfs per 70 acres” however, “[i]f there is not sufficient water to furnish 2 cfs to each pre-March 1, 1945, water right, but more than enough to furnish 1 cfs to each of such rights, then the surplus water is divided among those rights on a pro rata basis” but if there is not enough water for that, “they are regulated on a strict priority basis.” *Id*.

* 1. **Groundwater Rights**

Similar to surface water rights discussed above, restrictions (or the lack thereof) on the use of groundwater varies state to state.

**Alaska:** As stated above, only “significant amounts of water” require water rights in Alaska. Thus, uses of groundwater less than 500 gallons per day do not require water rights.

**Arizona:** In Arizona, “Groundwater is Arizona’s most abundant water resource” and has “some of the largest and most productive aquifers in the southwest.”[[34]](#footnote-34) Generally, “well drilled outside Active Management Areas (AMAs) or Irrigation Non-Expansion Areas (INAs) are less regulated and have less requirements than wells drilled within AMAs or INAs.”[[35]](#footnote-35) Similar to Montana, wells “having a pump with a maximum capacity of not more than thirty-five gallons per minute which is used to withdraw groundwater” are “exempt” from permitting. *Id.*

**California:** the California State Water Resources Control Board summarizes Ground Water Rights in California as follows:

“In most areas of California, overlying land owners may extract percolating ground water and put it to beneficial use without approval from the State Board or a court. California does not have a permit process for regulation of ground water use. In several basins, however, groundwater use is subject to regulation in accordance with court decrees adjudicating the ground water rights within the basins. The California Supreme Court decided in the 1903 case *Katz v. Walkinshaw* that the “reasonable use” provision that governs other types of water rights also applies to ground water. Prior to this time, the English system of unregulated ground water pumping had dominated but proved to be inappropriate to California’s semiarid climate. The Supreme Court case established the concept of overlying rights, in which the rights of others with land overlying the aquifer must be taken into account. Later court decisions established that ground water may be appropriated for use outside the basin, although appropriator’s rights are subordinate to those with overlying rights.”[[36]](#footnote-36)

However, the “Sustainable Groundwater Management Act” was recently passed in 2014, which “aims to address the depletion of groundwater resources due to irrigation” by dividing “the state in 515 basins or subdivisions, each of which will create a Groundwater Sustainability Plan (GSA) designed to recharge aquifers in the most at-risk basins.”[[37]](#footnote-37)

**Colorado**: As explained by the Colorado Division of Water Resources, “Colorado water law recognizes the connection between surface and groundwater. When wells are pumped, there is usually a delayed impact on the stream system. Although a groundwater right may be in priority today, the pumping may cause stream depletions in the future on a day the groundwater right is not in priority. In most river drainages a person cannot obtain an underground water right or a permit for a well without a plan for augmentation that replaces the depletions associated with that diversion. In those same drainages, new surface water rights may be decreed if they can be shut off when a senior water right is calling for water. For the most part, only small residential and livestock wells (exempt from water rights administration and meet strict criteria set forth by the legislature) are allowed to be drilled without providing for protection to senior water rights.).”[[38]](#footnote-38)

**Hawaii:** See discussion above regarding correlative rights.

**Idaho:** The Idaho Department of Water Resources explains that prior to March 25, 1963, rights to groundwater could be established under the same methods for surface water, described above.[[39]](#footnote-39) After March 25, 1963, permits are required, except for “domestic purposes … defined by statute as a) the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or (b) any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second [“CFS”] and a diversion volume of twenty-five hundred (2,500) gallons per day [“GPD”].” *Id*. The permitting exception for domestic purposes “does not include water for multiple ownership subdivision, mobile home parks, commercial or business establishments unless the use does not exceed a diversion rate of [0.04 CFS] and a diversion volume of [2,500 GPD].” *Id*.

**Kansas:** See, discussion above regarding Kansas water rights generally. Additionally, when the Ogallala Aquifer began to decline, the Groundwater Management District Act was established in 1972.[[40]](#footnote-40) The establish of Groundwater Management Districts “allow local water users more input into determining the policies for water use in their areas[]” although they “still must operate within the basic water law doctrine of the state.” *Id*.

**Montana:** Generally, groundwater use less than 35 GPM and 10AF/Year is considered “exempt” and need not be permitted, but only recognized by the Montana Department of Natural Resources and Conservation (“DNRC”) with a groundwater certificate. Any use beyond that threshold will require a beneficial water use permit from the DNRC.

**Nebraska:** According to the Nebraska Department of Natural Resources, in 1957, the Nebraska “legislature decided that it would aid the development of sound ground water policy if all water wells in the state were registered… [s]tate law requires any person who constructs a water well to register it and provide certain information collected during the excavation of the well[]” and “only licensed water well contractors and landowners may dig a well so it is their responsibility to register the water well.”[[41]](#footnote-41) When land is transferred, “[i]t is the responsibility of the landowner(s) to make sure their water well information is registered both accurately and properly.” *Id*.

**Nevada:** *See* discussion above regarding the adjudication of vested rights and permits required for non-vested rights. Generally, “the State Engineer is required by statute to approve the application” for a new water use when “there is unappropriated water in the source, and where the proposed use or change does not tend to impair existing rights or conflict with protectable interest in existing domestic wells, or to be otherwise detrimental to the public interest[.]”[[42]](#footnote-42) Specific to groundwater, however:

“The general policy of the State Engineer is to limit groundwater withdrawals from a basin to the average annual recharge to the groundwater basin or its perennial yield. Perennial yield of a groundwater basin may be defined as the maximum amount of natural discharge that can be salvaged each year over the long term by pumping without bringing about some undesired result. An example of an undesirable result would be a significant decline in the static water level. … In cases where a well is drilled in a river plain the permit terms usually contain the provision that perforations shall not start less than 100 feet from the surface.”

*Id*.

**New Mexico:** The New Mexico State Engineer “can assert jurisdiction over any groundwater basin in the state by issuing a basin declaration” which has the effect of forcing all new appropriations to acquired by application to the State Engineer.[[43]](#footnote-43) As of 2022, “[a]ll groundwater in New Mexico (absent some non-potable aquifers) is now part of a declared basin.” *Id*. For groundwater wells in New Mexico, “[u]nless prohibited by a local ordinance, wells to be used for domestic purposes [use of water for household purposes, which includes the non-commercial watering of domesticated animals and the irrigation of non-commercial lawn, garden, trees, or landscaping up to one-acre] are allowed by state law.”[[44]](#footnote-44) “Domestic wells are essentially *de minimus* exceptions to the stringent permitting requirements” and “cannot be transferred to other uses.”[[45]](#footnote-45) For groundwater “to supply water for drinking and sanitary purposes at a governmental or commercial facility” or “livestock purposes” permits may be obtained. *Id*. Such permits “automatically expire unless a well is completed within one year of the date of issuance of the permit” which is common among the prior appropriation states, where the rights to water hinge on beneficial use.[[46]](#footnote-46)

**North Dakota:** See discussion above regarding permits required for water use in North Dakota.

**Oklahoma**: “In Oklahoma, groundwater is considered private property that belongs to the overlying surface owner[]” thus, “[a] water permit is not required for domestic use of groundwater, but for all other uses, groundwater is subject to reasonable regulation by the [Oklahoma Water Resources Board].”[[47]](#footnote-47) Groundwater “[a]pplicants are allotted two acre-feet/year per acre of land in basins where maximum annual yield studies have not yet been completed, and an amount more or less than that in basins where studies have determined how much water may be withdrawn.” *Id*. Additionally, “[t]here are well spacing restrictions in some groundwater basins, typically 660 feet for alluvial aquifers and 1,320 feet for bedrock aquifers[]” but “[n]ot all groundwater basins have spacing requirements” and in “sole source groundwater basins” there are additional restrictions.[[48]](#footnote-48)

**Oregon**: Permits are required for appropriating groundwater except for “exempt uses” which include: stock watering, lawn or noncommercial garden (not more than ½ acre), single or group domestic purposes not to exceed 15,000 gallons per day, single industrial or commercial purposes not to exceed 5,000 gallons per day, down-hole heat exchange uses, watering school grounds less than 10 acres within critical groundwater areas, fire control, and reuse of water.[[49]](#footnote-49) However, while these exempt uses “do not require a permit, the use is only allowed if the water is used for a beneficial purpose without waste and may be subject to regulation in times of water shortage.” *Id.* Oregon also has specific restrictions in place which effect the usual application of the prior appropriation doctrine:

“The Water Resources Commission may declare a **critical groundwater area** to restrict water withdrawal where the resource is overdrawn or where a pattern of interference between wells and other groundwater or surface water users exists. The law is designed to prevent excessive declines in groundwater levels and protect the right of senior users. **The order setting the limits of the critical area may restrict both existing and future uses in order to stabilize the resource and may also provide for certain uses of water to have preference over other uses, regardless of established water right priority dates**. Critical groundwater areas also can be declared if there is deterioration of groundwater quality, although this has not been the reason for any critical groundwater area to date. … The Commission has established 12 “groundwater classified areas” (also referred to as limited areas) in the northern Willamette Valley. The classified areas generally allow for new exempt groundwater uses but place restrictions on new uses that require a permit. … The Commission may withdraw aquifers from new appropriations where additional use is not sustainable.”

*Id,* (emphasis added).

**Texas**: Texas follows the “rule of capture” a.k.a. the “English Rule” for groundwater rights which “allows landowners to withdraw water under their property with little regard to other groundwater users, as long as the water is beneficially used and isn’t intentionally wasted or negligently result in the subsidence of neighboring lands.”[[50]](#footnote-50) The Texas Supreme Court summarized the rule as:

“[P]ercolating waters are regarded as the property of the owner of the surface who may, ‘in the absence of malice,’ intercept, impede, and appropriate such waters while they are on their premises, and make whatever use of them they please, regardless of the fact that use cuts off the flow of such waters to adjoining land, and deprives the adjoining owner of their use.”

*Id*. However, in recent decades, Groundwater Districts have been formed by the state, “with limited power to regulate withdrawals” that has subsequently been expanded to “prevent the depletion of water tables, the loss of artesian pressure, waste, and subsidence” by forming “rules that may restrict pumping, require permits for wells, delineate well spacing, establish maximum rates of water use, and define out-of-district export requirements.” *Id*. Thus, the “rule of capture does not fully apply within an active groundwater district.” *Id*.

**Utah:** Utah has apportioned its state into “open,” “restricted,” or “closed” areas for appropriations of groundwater.[[51]](#footnote-51) Within these, the state of Utah has established a number of “Groundwater Management Plans” under Section 73-5-15 of the Utah Code. For example, the Beryl Enterprises Groundwater Management Plan limits “groundwater withdrawals to safe yield, protect[s] the physical integrity of the aquifer, and protect[s] water quality” by setting forth phased regulation schedules which reduce total depletion until safe yield for the groundwater basin is achieved.[[52]](#footnote-52) In the Beryl Enterprise area, “safe yield for the groundwater basin has been determined to be approximately 34,000 acre-feet per year[]” but “[t]he current average depletion from the groundwater system is estimated to be approximately 65,000 acre-feet per year.” *Id*. There are many groundwater management plans similar to the Beryl Management Plan in Utah.[[53]](#footnote-53)

**Washington:** See discussion above regarding Washington water rights and the adoption of the prior appropriation doctrine. In the 1930s and ‘40s, “many wells were drilled to supply homes and farms with water” that were not located near surface water sources.[[54]](#footnote-54) “[M]any parts of eastern Washington could see dwindling groundwater supplies and ownership disputes if the rate of groundwater resource development continued[.]” *Id*. In 1945, the Washington legislature passed a groundwater code that “regulated groundwater in many of the same ways as surface water, but also created exemptions from the water right permitting system to help drive settlement of new land and commercial growth.” *Id*. Similar to Montana, “[c]oncerns over the proliferation of single domestic wells has spurred citizens to push for stricter enforcement of growth management regulations[]” because, while “a single well withdraws a minimal amount of water for domestic purposes, the cumulative impacts of numerous wells could have a negative effect of stream and river flows in some places.” *Id*.

**Wyoming:** “The first Wyoming ground-water laws were enacted in 1945” which was later repealed and replaced by a 1958 Act. [[55]](#footnote-55) Groundwater wells have different priority dates depending on the date they were completed, if prior to April 1 1947, and if statutory filing procedures were followed, or when the application for a permit for the well was filed with the state engineer’s office, if after March 1, 1958. *Id.* Wells “used solely for stock and/or domestic purposes” [not exceeding 25 gpm or 1 acre of lawn/garden] were exempt from filing until 1969 and hold “a preferred right over wells used for all other purposes.” *Id.* After 1969, all wells drilled for any purpose require a permit, and their priority date is the date of the application for the permit. *Id*. Water rights for springs require either a groundwater right or a surface water right, depending on the flow rate and use: “[i]f the spring flows 25 [gpm] or less, and if the water is to be used only for stock watering and/or domestic uses … the spring shall be filed as groundwater” but “[i]f the spring flows in excess of 25 gpm [] and is to be used for stock purposes only, surface water special application procedures must be followed” and “[a]ll Springs flowing in excess of 25 gpm [] or for other uses will be filed using surface water filing procedures.” *Id*.

1. **Water Access and Easements**
   1. **Water Access: Private and Public**

Water rights are usufructuary rights regulated by the various states, and access easements are grounded in property law, similarly governed by the statutes and regulations of the various states. *See, Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155, 64 S.Ct. 474, 480-81 (1944): (“The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.”). This is subject of course to federal property interests, governed by federal laws, discussed below.

* 1. **Determining Navigability**

**Title Navigability**: Under the Equal Footing Doctrine, “[u]pon statehood, the State gains title within its borders to the beds of waters then navigable []or tidally influenced” and “[t]he United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses.” *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591, 132 S.Ct. 1215, 1227-28 (2012). The origin of this rule was aptly explained by the Supreme Court of the United States in *PPL Montana* as follows:

The rule that the States, in their capacity as sovereigns, hold title to the beds under navigable waters has origins in English common law. See *Shively v. Bowlby,*152 U.S. 1, 13, 14 S.Ct. 548, 38 L.Ed. 331 (1894). A distinction was made in England between waters subject to the ebb and flow of the tide (royal rivers) and nontidal waters (public highways). With respect to royal rivers, the Crown was **\*\*\*\*** presumed to hold title to the riverbed and soil, but the public retained the right of passage and the right to fish in the stream. With respect to public highways, as the name suggests, the public also retained the right of water passage; but title to the riverbed and soil, as a general matter, was held in private ownership. Riparian landowners shared title, with each owning from his side to the center **\*\*\*** thread of the stream, as well as the exclusive right to fish there. See *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 285, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (summarizing J. Angell, A Treatise on the Common Law in Relation to Water–Courses 14–18 (1824)); 3 J. Kent, Commentaries on American Law 528–529 (9th ed. 1858).

While the tide-based distinction for bed title was the initial rule in the 13 Colonies, after the Revolution American law moved to a different standard. Some state courts came early to the conclusion that a State holds presumptive title to navigable waters whether or not the waters are subject to the ebb and flow of the tide. See, *e.g., Carson v. Blazer,* 2 Binn. 475 (Pa.1810); *Executors of Cates v. Wadlington,* 12 S.C.L. 580 (1822); *Wilson v. Forbes,* 13 N.C. 30 (1828); *Bullock v. Wilson,* 2 Port. 436 (Ala.1835); *Elder v. Burrus,* 25 Tenn. 358 (1845). The tidal rule of “navigability” for sovereign ownership of riverbeds, while perhaps appropriate for England's dominant coastal geography, was ill suited to the United States with its vast number of major inland rivers upon which navigation could be sustained. See L. Houck, Law of Navigable Rivers 26–27, 31–35 (1868); *Packer v. Bird,* 137 U.S. 661, 667–669, 11 S.Ct. 210, 34 L.Ed. 819 (1891). By the late 19th century, the Court had recognized “the now prevailing doctrine” of state sovereign “title in the soil of rivers really navigable.” *Shively, supra,* at 31, 14 S.Ct. 548; see *Barney v. Keokuk,* 94 U.S. 324, 336, 24 L.Ed. 224 (1877) (“In this country, as a general thing, all waters are deemed navigable which are really so”). This title rule became known as “navigability in fact.”

The rule for state riverbed title assumed federal constitutional significance under the equal-footing doctrine. In 1842, the Court declared that for the 13 original States, the people of each State, based on principles of sovereignty, “hold the absolute right to all their navigable waters and the soils under them,” subject only to rights surrendered and powers granted by the Constitution to the Federal Government. *Martin v. Lessee of Waddell,* 16 Pet. 367, 410, 10 L.Ed. 997. In a **\*\*\*** series of 19th-century cases, the Court determined that the same principle applied to States later admitted to the Union, because the States in the Union are coequal sovereigns under the Constitution. See, *e.g.,* *Lessee of Pollard v. Hagan,* 3 How. 212, 228–229, 11 L.Ed. 565 (1845); *Knight v. United States Land Assn.,* 142 U.S. 161, 183, 12 S.Ct. 258, 35 L.Ed. 974 (1891); *Shively, supra,* at 26–31, 14 S.Ct. 548; see *United States v. Texas,* 339 U.S. 707, 716, 70 S.Ct. 918, 94 L.Ed. 1221 (1950). These precedents are the basis for the equal-footing doctrine, under which a State's title to these lands was “conferred not by Congress but by the Constitution itself.” *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 374, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977). It follows that any ensuing questions of navigability for determining state riverbed title are governed by federal law. See, *e.g.,* *United States v. Utah,* 283 U.S. 64, 75, 51 S.Ct. 438, 75 L.Ed. 844 (1931); *United States v. Oregon,* 295 U.S. 1, 14, 55 S.Ct. 610, 79 L.Ed. 1267 (1935).

The title consequences of the equal-footing doctrine can be stated in summary form: Upon statehood, the State **\*\*\*\*** gains title within its borders to the beds of waters then navigable (or tidally influenced, see *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988), although that is not relevant in this case). It may allocate and govern those lands according to state law subject only to “the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.” *Oregon, supra,* at 14, 55 S.Ct. 610; see *Montana v. United States,* 450 U.S. 544, 551, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *United States v. Holt State Bank,* 270 U.S. 49, 54, 46 S.Ct. 197, 70 L.Ed. 465 (1926). The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses. See *Utah, supra,* at 75, 51 S.Ct. 438; *Oregon, supra,* at 14, 55 S.Ct. 610.

*Id*., 565 U.S. at 590- 591, 132 S.Ct. at 1226-1228.

Thus, “navigable” for navigability for title purposes are “public navigable rivers in law which are ***navigable in fact***” which means “they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *Id.,* 565 U.S. at 592, 132 S.Ct. at 1228, quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871) (emphasis added).

The test articulated in *The Daniel Ball* is applied slightly differently for different sub-types of navigability. “Each application of [the *Daniel Ball*] test … is apt to uncover variations and refinements which require further elaboration.” *U.S. v.* *Appalachian Elec. Power Co*., 311 U.S. 377, 406, 61 S.Ct. 291, 299 (1940). The Court in *PPL* summarized a few of those variations:

* “For **state title under the equal-footing doctrine**, navigability is determined at the time of statehood … and based on the ‘natural and ordinary condition’ of the water[.]” *PPL*, 565 U.S. at 592, 132 S.Ct. at 1228, quoting *Oklahoma v. Texas,* 258 U.S. 574, 591, 42 S.Ct. 406 (1922). *See also, U.S. v. Utah*, 283 U.S. 64, 75, 51 S.Ct. 438 (1931).
* “**[A]dmiralty jurisdiction** extends to water routes made navigable even if not formerly so[.]” *PPL,* 565 U.S. at 592, 132 S.Ct. at 1228, citing *Ex Parte Boyer,* 109 U.S. 629, 631-32, 3 S.Ct. 434 (1884).
* “**[F]ederal regulatory authority** encompasses waters that only recently have become navigable … were once navigable but are no longer, … or are not navigable and never have been but may become so by reasonable improvements.” *PPL,* 565 U.S. at 592, 132 S.Ct. at 1228, citing *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634-35, 32 S.Ct. 340 (1912), *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24, 41 S.Ct. 409 (1921), *Appalachian Elec. Power Co.,* 311 U.S. at 407-08, 61 S.Ct. 291. “With respect to the **federal commerce power**, the inquiry regarding navigation historically focused on interstate commerce … And, of course, the commerce power extends beyond navigation.” *PPL,* 565 U.S. at 592, 132 S.Ct. at 1228, citing *Kaiser Aetna v. U.S.*, 444 U.S. 164, 173-74, 100 S.Ct. 383 (1979) (a takings case about the public vs. private status of Kuapa Pond).

**Navigability for Federal Jurisdictional Purposes:** Unlike the strict test for navigability in fact, “congressional authority over the waters of this Nation does not depend on a stream’s ‘navigability.’” *Kaiser Aetna,* 444 U.S. at 174, 100 S.Ct. at 389-90. Rather, “a wide spectrum of economic activities ‘affect’ interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or indeed, water, is involved.” *Id*., 444 U.S. at 174, 100 S.Ct. at 390. “Congress' paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as ‘navigable water of the United States.’” *Id*.

The definition and scope of “navigable waters of the United States” (“WOTUS”) within the Clean Water Act’s statutory and regulatory language has evolved significantly over the years. The CWA was passed in 1972 and is administered by the EPA and the U.S. Army Corps of Engineers. The Army Corps (according to its website <https://www.usace.army.mil>): “*is one of the oldest in the Federal Government. Initially it served a fairly simple, straightforward purpose: to protect and maintain the navigable capacity of the nation’s waters. Time, changing public needs, evolving policy, case law, and new statutory mandates have changed the complexion of the program, adding to its breadth, complexity, and authority*. *The Regulatory Program is committed to protecting the Nation's aquatic resources and navigation capacity, while allowing reasonable development through fair and balanced decisions.  The Corps evaluates permit applications for essentially all construction activities that occur in the Nation's waters, including wetlands*.”

Thus, in navigability for title cases, much of the evidence relied upon are surveys and field notes collected by the Army Corps during their surveys of various rivers in the late 19th century, who were assessing the river’s needs for improvements or modifications to enhance their capacity to serve as highways for commerce and transportation by boat.

The objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 USC 1251(a). Relevant to environmental considerations in Montana, the CWA prohibits discharges of “pollutants” to “navigable waters” from “point sources” without a permit.

|  |  |  |
| --- | --- | --- |
| ***“Pollutants”*** | ***“Navigable Waters”*** | ***“Point Sources”*** |
| “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water” and “disease causing agents.” 33 USC 1362(6), (13). | “the waters of the United States, including the territorial seas” 33 USC 1362(7). | “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater dischargers and return flows from irrigated agriculture.” 33 USC 1362(14). |

Thus, “[u]nder section 402 of the [CWA], an NPDES permit is required where a point source discharges a pollutant to ‘waters of the United States’” and “section 404 requires a permit before dredged or fill material may be discharged to ‘waters of the United States’” subject to some regulatory exemptions. 88 Fed. Reg 3010 (Jan. 18, 2023). The definition of “WOTUS” is important because it determines which types of water bodies on any particular property are subject to the Clean Water Act’s restrictions. In short, the geographic scope of the CWA reaches well beyond waters that are “navigable in fact.”

What types of permits do you need to be compliant with the CWA?

* National Pollutant Discharge Elimination System (“NPDES”) Permits for discharge of pollutants
* 404 Permits for discharge of dredge or fill material

**Recreational Navigability:** While Navigability for title is governed by federal law, “[n]avigability for use is a matter governed by state law.” *Mont. Coalition for Stream Access, Inc. v. Curran,* 210 Mont. 38, 51, 682 P.2d 163, 170 (1984). Thus, the particular laws governing recreational use of waters is a governed by the various states.

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