

# Whiskey Is for Drinking; Water is for Fighting



(Above) Scratching a living from the arid grasslands of the American West often led to conflicts over water between neighbors - and sometimes between states. National Guard units and militias have been mobilized to protect water sources in the past, and a sound legal framework plays a crucial role in regulating the use and control of water.

By Buck Feist, GPRO

*“We do not know the value of water as long as the well isn’t dry.”*

-Thomas Fuller, Gnomologia, 1732

Water rights are primordial. Since the era of the woolly mammoth, humans have been developing and refining the customs, laws, practices and precedents governing the use and control of water.

In the United States, water rights are governed by an overlapping network of international

treaties, federally reserved water rights, interstate compacts and state laws.

All four methods impact water operations in the nine-state Great Plains Region.

“Water rights are critical to Reclamation operations,” said Mike Ryan, Great Plains Regional Director. “Water rights impact every citizen in the United States, whether they realize it or not.”

### **The Advent of Codified Water Rights:**

In purely biological terms, water is fundamental to life. Next to air,

water is the most vital element for short-term human survival. But while air is ubiquitous, access to water is limited and supplies are finite.

The earliest example of codified responsibilities and penalties related to water management sprang from the cradle of civilization, the Mesopotamia valley. The Code of Hammurabi is a set of Babylonian laws dating back to 1772 B.C.

The Code is among the most ancient texts in the world. The sixth Babylonian king, Hammurabi, enacted the Code, which was carved onto an eight-foot-high



black stone monument for public viewing.

The laws defined the most serious crimes and punishments, including the regulation of irrigation, water theft and the maintenance of weirs and canals.

As the global population has increased from about a million people at the dawn of the Neolithic Era, 12,000 years ago, to more than 7 billion today, the laws, customs and practices regulating the use and distribution of water have become more complex and more vital to the peaceful functioning of society.

### **Water Rights: Still the Law of the Land**

The concept of establishing water rights developed from the generally held idea of protecting the public interest to encourage economic development and prevent waste.

There are two types of water right systems in the United States: the *riparian doctrine* and the *appropriation doctrine*.

The riparian doctrine originated in England, and is suitable to a humid climate where supply exceeds demand.

Not surprisingly, the riparian doctrine was adopted in the eastern United States. The riparian doctrine grants rights to use water based on land ownership along a stream with equal rights to water use among land owners.

Beneficial use, not land ownership, is the basis under the appropriation doctrine. Priority of date of initiation of use, not equality of right, is the basis of allocation of water when supply is not sufficient to meet demand.

The West was first settled by miners and the appropriation doctrine evolved in a similar manner as applied to mining claims.



(Above) The Code of Hammurabi (1772 BC) is among the most ancient examples of codified water law. A nearly complete example of the Code survives today on a 7.4 ft diorite stele on display at the Louvre Museum in Paris, France. SOURCE: WIKIMEDIA COMMONS

Reminiscent of the mining days, many older water rights have the flow rate in units of miners-inches. In Montana, for instance, 40 miners-inches equal one-cubic-foot per second.

### **Water Rights in the Great Plains Region:**

All states in Great Plains Region follow the appropriation doctrine. The demarcation line between

the riparian and appropriation doctrines is generally the eastern boundary of the Great Plains Region.

Appropriative water rights are property rights. They have the same character of ownership as a house or car. The rights can be bought or sold, with some limitations depending on location.

The predominate characteristic of the appropriation doctrine is



that water rights can be administered or regulated when supply is not sufficient to meet demand.

This means that during water shortages, a water right with a junior priority date may be prevented from diverting water, so a more senior priority water right has sufficient water to meet their demand or beneficial use – in other words, “first in time, first in right.”

The appropriation doctrine is sometimes referred to as the *prior appropriation doctrine*.

Congress recognized the vital nature of water rights in Section 8 of the Reclamation Act of 1902, which states: “Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation or any vested right acquired there under, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws...”

Reclamation interprets Section 8 to mean that the United States is to comply with the substantive and procedural provisions of state law in the construction and operation of Reclamation projects by acquiring water rights under the laws of the state where a project is located.

To that end, there are approximately 800 water rights associated with Reclamation projects in the Great Plains Region. State administration procedures vary across the region.

In Colo., the State Engineers Office administers the water rights under decrees from the Colorado Water Court.

In Wyoming and Nebraska, state water agency personnel administer water rights.

In Montana, a majority of water users on a source of water supply must petition a state district court to appoint a water commission to administer water rights.

Some river systems in the region have water rights administered every year, while some river systems never have water rights administered.

“Even though water rights are regulated by the states, the on-the-ground implications of those rights vary by basin, even within state boundaries,” said Coleman Smith, Wyoming Area Manager.

“For example, disputes over water rights in the Wind/Bighorn Basin tend to be less contentious than in the North Platte Basin, since the North Platte is considered over-appropriated,” Smith said.

The nine states where the Great Plains Region operates each have different laws and processes for granting, perfecting and administering water rights. However, because the states all follow the appropriation doctrine, there are common elements of water rights across the region.

Each water right is defined by a priority date, source of water, quantity (such as a flow rate or volume), purpose of use, point of diversion, place of use and period of use.

Each state recognizes that beneficial use is the basis, measure and limit of a water right.

There are two primary differences in water right laws and processes among the states, such as ownership of the water right and how water rights are administered.

Water rights associated with Reclamation projects are owned by water-user entities such as irrigation districts, municipalities and conservancy districts; held jointly by the water user entities and Reclamation; or held solely by Reclamation.

Of the 800 water rights associated with Great Plains Region projects, about one-half are owned by water user entities.

Water rights used to divert water from the stream and used immediately for the intended purpose are usually held by water-user entities or owned jointly.

Water rights used to divert water to storage are usually held by Reclamation.

Great Plains Region projects are frequently the dominant facilities on their water sources because of the size, and scope of influence of those facilities.

Some projects have water rights that are very senior in priority, but some of the later projects are very junior in priority relative to other water rights on that source.

As the global population increases and escalating demands are placed upon our water resources, the administration and understanding of water rights are vital to towns, cities and farms across the United States.

Reclamation devotes considerable resources to protecting the federal investment in the nation’s projects. One element of protecting the taxpayer investment is protecting project water rights to ensure project water rights get the full benefit they are entitled to within each respective state.

