A. Introduction and Fundamentals of Prior Appropriation Systems

Water is one of the most precious natural resources on the planet and, particularly in arid regions such as the western United States, has been subject to numerous legal and physical disputes over the course of history. Referring to water in the American West, Samuel Clemens once said “whisky is for drinkin’ and water is for fightin’.”

Many laws govern how the waters of the United States are used and by gaining an understanding of these laws, we can better manage and protect this precious resource. This presentation provides a brief overview of the fundamentals of the prior appropriation doctrine, including how it came to exist in the West, the various types of water rights available and how they are established under this system, and concludes with a brief discussion of the major basin-wide water rights adjudications ongoing across the West.

1. Nature and Types of Water Rights

Water rights are judicially protected property rights. Unlike other property rights, however, water rights are held "in common for the public good" and are not subject to a possessory interest. A person with a water right does not own the water, rather owns the right to use water - a usufructuary right. In most western states the usufruct becomes personal property.

A water right can take a number of forms, with the following being the most common:

- **Direct flow** - This means a diversion from the natural flow of a specifically identified surface water source such as a stream or river, and is generally measured in cubic feet per second ("cfs").

- **Storage** - Water stored in an on or off channel reservoir, or even potentially an underground reservoir, and is measured in volume, such as acre-feet. Generally, water, once stored, is no longer part of the natural flow of the stream, but has become personal property of the diverter.
c. **Groundwater** - The right to withdraw and use water from a specified aquifer. Depending on the resource and the particular state, such rights are subject to highly variable rules and regulations.

d. **Instream flow** - The right to protect or maintain a certain flow of water in a reach of stream or a lake. These non-consumptive rights are either based on state law or federal reserved rights and are highly variable and limited, depending on the particular state.

2. **Prior Appropriation Doctrine**

In the arid regions of the American West the riparian system (based on reasonable use) was quickly replaced by a system where the first person to put water to use obtained a superior right to use the water above all later users, regardless of the location of the water source. In the West, rivers and streams are less abundant and less reliable than in the East and much of the land is owned by the federal government. A system that limited water rights to owners of land bordering streams would have stifled development and created economic inefficiencies. In such arid environments, “control of the water means control of the land.” It was against this backdrop, where large areas of land required water for agriculture, mining, and development, that the principle, "first in time, first in right" evolved.

First, the miners, and then the courts, recognized a prioritization of the right to use water based upon the date the water was first placed to beneficial use, regardless of whether it was on riparian land or transported to non-riparian land many miles away from the water source. The water rights depended on the use of the water and not the land ownership. This system has evolved and is now followed by nine western states (Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) and is governed by each states’ specific statutory requirements. Additionally, ten other states follow a hybrid system, as discussed in the following section.

Shortly after the Civil War, the Congress of the United States expressly confirmed the rights of miners and appropriators of water on the public lands in section nine of the 1866 Mining Act, 43 U.S.C. § 661. Specifically, Congress formally sanctioned many of the appropriations of water on the public lands, made before or after passage of the Act, and included protections for the rights of way used for transporting the water to the land on which it was used. The 1870 Amendment to the Mining Act clarified that anyone who acquired title to public lands through federal patents, homestead rights, or rights of preemption took that title subject to any water rights or rights of way established while the lands were still public. Act of July 9, 1870. Further, the Desert Land Act of 1877, 43 U.S.C. § 321, provided that water on the public lands was available specifically for appropriation for irrigation, mining and manufacturing purposes subject to existing rights.

In Federal Power Commission v. Oregon (Pelton Dam), 349 U.S. 435, 447-48 (1955), the Supreme Court held that the 1866, 1870, and 1877 acts applied only to "public land" and that these Acts, therefore, do not apply to federal **reserved** lands. Water rights associated with federal
reservations are unique water rights and are discussed later in this outline.

In western states recognizing the prior appropriation doctrine, once the water is put to use, for a beneficial purpose and in accordance with all statutory requirements, the water right is perfected and continues as long as it is used beneficially. Further, these rights can be transferred to other persons, lands or even watersheds, if statutory requirements are met. Today, most states require some form of authorization or permitting for water rights established after specific cut-off dates for historic water uses (the historic uses are often uncertain and contested, and are subject to water rights adjudications to determine ownership, quantity and priority dates of these rights).

a. **Elements of a Valid Appropriation**

Traditionally, there are certain elements required for a valid appropriation. Once these elements are met, as well as any other procedures specified by state law, the appropriation is complete. Generally, the date of the appropriation determines the water user’s priority date, with the earliest date being the most superior. The three traditional elements are as follows:

1. **Intent** to appropriate or apply the water to a beneficial use.
   i. Relation-back doctrine - Priority of appropriation can relate back to the date steps were first taken if appropriation is completed by application of water to beneficial use with due diligence.
   ii. **Conditional Water Right** (Colorado) - Coexistence of intent to appropriate and overt act providing notice of intent to others, such as a survey. An absolute decree is obtained once water is actually put to beneficial use, assuming reasonable diligence until that time. There is a requirement of showing that water is available under the "can and will doctrine" (C.R.S. 37-92-305(9)(b)).

2. An actual diversion of the water from the source.
   i. Physical diversion from the stream is a traditional requirement, with occasional exceptions. See e.g. *Empire Water & Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913) (mist from waterfall as agricultural use).
   ii. There has been some progress in the recognition of appropriations for instream uses in some states, but it is frequently limited to state programs, and may specifically be designed to exclude federal interests from acquiring such water rights.

3. Application of the water to a beneficial use within a reasonable period of
time. This is usually defined by state statutes, which are increasingly recognizing non-traditional uses, such as recreation and instream flows for habitat protection, as beneficial.

b. **The Priority System**

Under the appropriative rights system, water rights are subject to those other water rights which preceded it on a source, and are superior to those initiated after it. In the event water flow is insufficient to satisfy all of the water rights on a water source, shortages are not shared among water users. The more senior water right holders still have the right to obtain their full entitlement of water, as defined by their water right. The more junior holders are curtailed or “cut-off” so long as any senior water right is short of water. Thus, the “first in time, first in right” name. Because senior water rights can be located at a variety of locations within a drainage, administration can be relatively complex. The methods, efficiency and success of administration varies considerably among the states.

Generally, the only exception to priority administration is the “futile call doctrine” which prevents a senior water right holder from cutting off junior water right holders upstream, when the water would not actually reach the more senior “calling” appropriator downstream.

c. **Limitations on Appropriative Rights**

Water rights may be lost if they are not used. Statutes in most western states provide that non-use of the water right, coupled with the intent to relinquish the right constitutes abandonment. Forfeiture, unlike abandonment, does not require an intent to abandon the water right and is triggered simply by not using the water right for a specific, statutory period of time. Most states also specifically prohibit the wasting of water.

The right to use water is limited by the specific parameter of the water right as defined by its decree or permit. For example, a typical water right decree will specifically define a point of diversion, place of use, purpose of use, period of use and quantity. The use of the water right may not be changed without complying with statutory requirements. Under the "no injury rule," a change will usually be disallowed if it adversely impacts any other water user, whether junior or senior to the changed right. Additionally, in some states, public interest considerations are taken into account when changes are sought to an existing water right or when a new water right is sought.

3. **Hybrid Systems and Specific Water Laws**

The “hybrid system,” often referred to as the “California Doctrine,” is followed in ten states (California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington). These states originally recognized riparian rights but later determined that the prior appropriation system also had benefits and decided to recognize both types of water rights in one form or another.
Hawaii and Louisiana follow unique systems for determining water rights. Hawaii recognizes water rights established under the laws of the ancient Hawaiian Kingdom and Louisiana has adopted its water laws from the French Civil Code.