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CHAPTER 1
GENERAL PROVISIONS

Section 73-1-1. Waters declared property of public.

All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof.

History: L. 1919, ch. 67, § 1; R.S. 1933, 100-1-1; L. 1935, ch. 105, § 1; C. 1943, 100-1-1.

Compiler’s Notes. — The early laws relating to irrigation and water rights may be found in 2 Comp. Laws 1888, ch. 2, p. 132; R.S. 1898, Title 33, p. 342; Comp. Laws 1907, Title 40, p. 541.

Cross-References. — Befouling waters, § 76-10-802.

NOTES TO DECISIONS

Analysis

Constitutionality.
In general.
Common-law doctrine of riparian rights.
Condemnation proceedings.
—Compensation.
Flood control.
Ground water.
—In general.
—Interference with use.
—Means of appropriating.
—Right to use.
Lapse of appropriation application.

Nonprofit Corporation and Co-operative Association Act, application to mutual irrigation, canal, ditch, reservoir and water companies and water users' associations, § 16-6-20.
Replacement of appropriated underground water, § 73-3-23.
Water rights to lands granted under Carey Act, § 65A-13-3.
Well and tunnel reports, § 73-3-22.

Navigability.
Navigable waters.
Ownership rights in water.
Public policy of state.
Title to water.
Waters subject to appropriation.

Constitutionality.


Act of 1919 (Laws 1919, ch. 67) was not unconstitutional as containing a multiplicity of
In general. The early history of water laws in this state is traced in Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 P. 116 (1930).

Common-law doctrine of riparian rights. Notwithstanding the provisions of § 68-3-1 (common law adopted), the common-law doctrine as to riparian owners does not exist and has never existed in this state (State v. Rolio, 71 Utah 91, 262 P. 987 (1927), a leading case reviewing the law at length on this point; Stowell v. Johnson, 7 Utah 215, 26 P. 290 (1891); Robinson v. Thomas, 75 Utah 446, 286 P. 625 (1930); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194 (1930); Hardy v. Beaver County Irrigation Co., 65 Utah 28, 234 P. 524 (1924); Albion-Idaho Land Co. v. Naf Irrigation Co., 97 F.2d 439 (10th Cir. 1938), "for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doctrine of riparian proprietorship." Stowell v. Johnson, 7 Utah 215, 26 P. 290 (1891).

The common-law doctrine of riparian rights is "in the main, at war with the law of appropriation." Whitmore v. Salt Lake City, 89 Utah 387, 57 P.2d 726 (1936), cert. denied, 300 U.S. 644, 57 S. Ct. 673, 81 L. Ed. 858 (1937), reviewing earlier cases. The reasons why such a doctrine is not suited to the conditions of such a state as Utah are forcibly pointed out in Stowell v. Johnson, 7 Utah 215, 26 P. 290 (1891).

Neither the common law relating to riparian rights nor the so-called English rule of percolating or underground waters has any recognition in this state. Hardy v. Beaver County Irrigation Co., 65 Utah 28, 234 P. 524 (1924); Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935).

In arid and semiarid sections, water of natural stream is not subject to private ownership but is property of public or of state, subject to existing and vested rights of those appropriating water and making beneficial use of it. Oldroyd v. McCrea, 65 Utah 142, 235 P. 580 (1925).

Under both common-law doctrine of riparian right or ownership and doctrine of appropriation, one located nearer to source was not permitted to cut off or interrupt or diminish or pollute source, and right once established upon a stream or source of supply vested in the owner of that right is an interest in the stream to the source. Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935).

Condemnation proceedings.

—Compensation.
In an action to condemn lands for a canal where the part of land not taken may be damaged by loss of subirrigation rights, the trial court should retain jurisdiction until completion of canal and thereafter take evidence to determine damages, if any. Weber Basin Water Conservancy Dist. v. Gailey, 5 Utah 2d 385, 303 P.2d 271 (1956), reversed on rehearing on another point, 8 Utah 2d 55, 328 P.2d 175 (1958).

Flood control.
A landowner may take such reasonable flood control measures on his own land as he sees fit, and also remedy the effects of floods, provided he does not interfere with the water rights of others. Lasson v. Seely, 120 Utah 679, 238 P.2d 418 (1951).

Ground water.

—In general.
The common-law rule that underground waters, where not moving in known and defined channel, are part of land in which they are found and belong absolutely to its owner is not applicable to conditions in Utah, which has always regarded waters percolating underground, when within public lands, as open to appropriation for irrigation or other beneficial uses, subject only to reasonable use. Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co., 260 U.S. 596, 43 S. Ct. 215, 67 L. Ed. 423 (1923).

—Interference with use.
When percolating waters are intercepted and collected by landowner, they may not be diverted away from land where found to be used elsewhere if by so doing sources of supply of natural springs and streams, waters of which have been appropriated by prior appropriators when lands in or through which they percolate were public lands at time of appropriation, are diminished or depleted or otherwise adversely affected by the diversion. Silver King Consol. Mining Co. v. Sutton, 85 Utah 297, 39 P.2d 682 (1934).

Complaint asserting that for 35 years plaintiff had used percolating waters under premises for domestic and irrigation purposes, that defendants drilled wells upon adjoining land, withdrawing water from the artesian basin, and that as a result, plaintiff had been deprived of water theretofore used by him stated cause of action, and court erred in sustaining a demurrer to it. Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935).

Where it was necessary to interfere with underground waters in order to improve property for use as a residential subdivision, the prop...
Right to use.

In absence of valid claim by either prior appropriator under federal or state law or owner of adjacent land claiming right by virtue of any common or correlative interest, percolating waters intercepted and brought to surface by owner of freehold are property of that land. Where a water user tunneled into an area surrounding a spring for the purpose of developing water, it was correctly regarded as underground water and, because the development was made prior to 1935, no application to appropriate such water was necessary. Silver King Consol. Mining Co. v. Sutton, 85 Utah 297, 39 P.2d 682 (1934).

Burden is upon one who has discovered subterranean waters and claims them as his own to prove by preponderance of evidence that he is not intercepting tributaries of appropriated streams or sources of supply of prior appropriators. Silver King Consol. Mining Co. v. Sutton, 85 Utah 297, 39 P.2d 682 (1934).

Contention that § 73-3-1 et seq., with reference to appropriation, was not applicable to initiate right to use of subterranean waters unless flowing in known or defined channels held without support. Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935).

A landowner under whose land there exists a source of water supply may draw therefrom to the full supply of his needs as long as no prior appropriator’s supply is appreciably or sensibly diminished; but when rights have vested, there may not then be a diminution of natural supply to the injury of the prior appropriator or user. Melville v. Salt Lake County, 570 P.2d 687 (Utah 1977).

Lapse of appropriation application.

Until an applicant for appropriation of water has made his proof of appropriation and has been issued a certificate by the state engineer, any right that he has to use the water is inchoate and, where an application lapses for failure to submit proof of appropriation on the due date, the consequent reduction in its priority is not a taking of property without due process of law. Mosby Irrigation Co. v. Criddle, 11 Utah 2d 41, 354 P.2d 848 (1960).

Navigability.

Navigability does not establish the extent of the state’s interest in the waters of this state; this section declares all waters in this state, whether above or under the ground, are the property of the public, subject to all existing rights to the use thereof. J.J.N.P. Co. v. State
I judicial notice of the fact that Great Salt Lake is a navigable body of water and that it contains about 22 per cent salt in solution. Because it is a navigable body of water, its bed belongs to the state subject to the control of Congress for navigation in commerce, and the state as the owner of the beds of navigable bodies of waters is entitled to all valuable minerals in or on them. Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946).

Navigable waters.

Findings that certain sections of Green, Grand, and Colorado rivers were navigable, and that title to beds of these sections of rivers vested in Utah when that state was admitted to Union, held justified by evidence. United States v. Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931).

The Supreme Court of this state will take judicial notice of the fact that Great Salt Lake is a navigable body of water and that it contains about 22 per cent salt in solution. Because it is a navigable body of water, its bed belongs to the state subject to the control of Congress for navigation in commerce, and the state as the owner of the beds of navigable bodies of waters is entitled to all valuable minerals in or on them. Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946).

Ownership rights in water.

It has always been the law in this state that a landowner may not successfully assert a right to water merely because it is flowing in a natural stream which passes over his land. To hold otherwise would render impotent the law of appropriation. Whitmore v. Salt Lake City, 89 Utah 387, 57 P.2d 726 (1936), cert. denied, 300 U.S. 644, 57 S. Ct. 673, 81 L. Ed. 858 (1937).

Fact that water in natural lake is entirely surrounded by land of property owner does not give the property owner an ownership interest in the water; individuals have no ownership interest as such in natural waters, only the right to put the water to certain uses. J.J.N.P. Co. v. State ex rel. Division of Wildlife Resources, 655 P.2d 1133 (Utah 1982).

Public policy of state.


Conservation of water is of utmost importance to public welfare in Utah, and to waste water is to injure that welfare. Brian v. Fremont Irrigation Co., 112 Utah 220, 186 P.2d 588 (1947).

Policy established by this section is that of ensuring highest possible development and most continuous beneficial use of all available water with as little waste as possible. Wayman v. Murray City Corp., 23 Utah 2d 97, 458 P.2d 861 (1969).

Title to water.

This section does not vest title to water in state, and water is community property available upon compliance with law. Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935).

The rights of the public guaranteed by this section are in no way affected by private contract, which merely fixes parties' title and right with respect to quantity of water they may use. Minersville Reservoir & Irrigation Co. v. Rocky Ford Irrigation Co., 90 Utah 283, 61 P.2d 605 (1936).

"Water rights," as acquired by private persons or companies, means right to use thereof, and does not, except under certain limited conditions, vest any title to corpus of water in appropriator or user. Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937).

Water right is in effect usufruct in stream, consisting of right to have water flow so that legal portion of it may be reduced to possession and be made private property. Ronzio v. Denver & Rio Grande W.R.R., 116 P.2d 604 (10th Cir. 1940).

Where articles of agreement of water company set forth object of company to be "the controlling, managing and distribution" of certain waters of a certain river, it was held that such limited and restrictive words did not constitute a conveyance separating a water right appurtenant to land from the land, and did not vest the title or right of use in the corporation within provisions of this section. East River Bottom Water Co. v. Boyce, 102 Utah 149, 128 P.2d 277 (1942).

This section may not vest the state with the proprietary ownership of the water, but it clearly does enjoin upon the state the duty to control the appropriation of the public waters in a manner that will be for the best interest of the public. Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943).

Waters subject to appropriation.

This section includes all public or unappropriated water that flows. Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935).

Water reaching a stream, lake, pond, artesian area, or other source, and constituting a supply from which it may be diverted or drawn, and which continues to reach point of diversion by movement from natural source or artificial source so remote as to be considered natural source of supply, is subject to law of appropriation. Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935).

Water from source to point where appropriator or user captures or diverts it into his conveying channels or containers is publici juris, and others have same right to use it as appropriator so long as they do not interfere with appropriator's use, by diminishing his quantity or impairing the quality. Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935).

Waters that have been appropriated and reduced to possession cease to be public waters.
and are not subject to appropriation. Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943).

"Our appropriation laws apply to water as such, and not to minerals valuable for their own sake which may be found therein." By the provisions of this section all waters in the state were dedicated to the public subject to existing rights to the use thereof. Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946).

By the terms of this section, the legislature intended, as far as it was legally possible, to declare all waters of the state, whether under or above surface of ground and whether flowing or not, to be public property subject to existing rights to use thereof. Riordan v. Westwood, 115 Utah 215, 203 P.2d 922 (1949).

Defendant's application to appropriate water from a spring area located on plaintiff's land was approved, where the water supported only limited beneficial plant life but was never sufficient in quantity to flow above ground in any channel except temporarily from rains, and where it seemed probable that there was more than sufficient water in spring area to sustain this plant life. Riordan v. Westwood, 115 Utah 215, 203 P.2d 922 (1949).

The waters of artesian basins are subject to appropriation in Utah. Hanson v. Salt Lake City, 115 Utah 404, 205 P.2d 255 (1949).

The wording of this section eliminates all question of whether or not the waters are diffused, seeping, percolating, flowing, or stagnant. The statute does not even exclude waters which were once appropriated, and were allowed to flow beyond the control of the appropriator. McNaughton v. Eaton, 121 Utah 394, 242 P.2d 570 (1952).

This section makes no distinction between previously appropriated waste waters which are beyond the control of the original appropriator, and flow of natural streams. McNaughton v. Eaton, 121 Utah 394, 242 P.2d 570 (1952).

The waters of Utah, whether upon the surface or percolating in the soil underneath, belong to the public and are subject to appropriation for beneficial use; and when rights to such use have been established in accordance with law, they must be safeguarded. Stubbs v. Ercanbrack, 13 Utah 2d 45, 368 P.2d 461 (1962).

COLLATERAL REFERENCES

The Utah Law of Oil and Gas, 7 J. Energy L. & Pol'y 191 (1986).
Political Water Rights, 10 Calif. L. Rev. 111.
The Development of the Law of Waters in the West, 10 Calif. L. Rev. 443.

Unregistered Water Appropriations of Law and Equity, 14 Calif. L. Rev. 427.
Columbia Law Review. — Public Control of Irrigation, 10 Colum. L. Rev. 506.
Natural Resources Journal. — Background and Modern Developments in Water Law in the United States, 2 Natural Resources J. 416.
Water Law — Legal Impediments to Tr ansfers of Water Rights, 7 Natural Resources J. 433.
Diffused Surface Water: Scourge or Bounty?, 8 Natural Resources J. 72.
Rocky Mountain Law Review. — Appropriations of Water for a Preferred Purpose, 22 Rocky Mtn. L. Rev. 422.
73-1-2. Unit of measurement — Of flow — Of volume.

The standard unit of measurement of the flow of water shall be the discharge of one cubic foot per second of time, which shall be known as a second-foot; and the standard unit of measurement of the volume of water shall be the acre-foot, being the amount of water upon an acre covered one foot deep, equivalent to 43,560 cubic feet.

History: L. 1919, ch. 67, § 2; R.S. 1933 & C. 1943, 100-1-2.

NOTES TO DECISIONS

Purpose of standard.
The purpose of fixing a standard of measurement is to determine exactly the quantity of water to which a party is entitled; but where a party alleges and proves that he is entitled to all the waters of a certain stream, at least as against his adversary who proves no right whatever, the allegation and proof is sufficiently certain as to quantity upon which to base a judgment; therefore in such a case it is unnecessary at the trial to establish the exact quantity in second-feet or acre-feet which under this section are the standards of measurement. Anderson v. Hamson, 50 Utah 151, 167 P. 254 (1917).

COLLATERAL REFERENCES

C.J.S. — 93 C.J.S. Waters § 186.

73-1-3. Beneficial use basis of right to use.

Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.

History: L. 1919, ch. 67, § 3; R.S. 1933 & C. 1943, 100-1-3.

NOTES TO DECISIONS

Analysis
In general.
Condemnation proceedings.
— Compensation.
Disposition of surplus appropriated.
Judicial determination of rights.
Nonuse of rights.
Percolating water.
Purposes and uses for which taken.

Compiler's Notes. — This section is identical to Comp. Laws 1907, § 1288x20.

Key Numbers. — Waters and Water Courses ⇒ 128.

Volume of water subject to appropriation.
Title and rights of appropriator.
Who may complain.

In general.
In Utah the doctrine of prior appropriation for beneficial use is the basis of acquisition of water rights. Gunnison Irrigation Co. v. Gunnison Highland Canal Co., 52 Utah 347, 174 P. 862 (1918).
Property rights in waters of a natural stream may be acquired only to use such water for beneficial purposes. Oldroyd v. McCrea, 65 Utah 142, 235 P. 580 (1925).

The doctrine announced in this statute has always been the basis of the right to appropriate and use waters in this state; accordingly, it is merely declaratory of pre-existing law. Sigurd City v. State, 105 Utah 278, 142 P.2d 154 (1943).

For analysis of the basis upon which the doctrine of appropriation is applied in Utah, see Moyle v. Salt Lake City, 111 Utah 201, 176 P.2d 882 (1947).

Policy established by this section is that of ensuring highest possible development and most continuous beneficial use of all available water with as little waste as possible. Wayman v. Murray City Corp., 23 Utah 2d 97, 458 P.2d 861 (1969).

Condemnation proceedings.

—Compensation.

Where landowner had not appropriated underground waters or controlled waters of a river adjacent to his land, landowner was not entitled to damages for any diminution of the moisture in his soil by reason of water conservancy district's impounding, under an established right, the river's waters in a reservoir. Weber Basin Water Conservancy Dist. v. Gailey, 8 Utah 2d 55, 328 P.2d 175 (1958).

Disposition of surplus appropriated.

The rights of prior appropriator are measured and limited by extent of his appropriation and application to beneficial use, and if he diverts more water than he is entitled to, he must return surplus to stream for use of subsequent appropriators. Gunnison Irrigation Co. v. Gunnison Highland Canal Co., 52 Utah 347, 174 P. 862 (1918).

Under this section any excess in the stream, or any increase therein over the appropriator's preferential right, is subject to appropriation or to the general rights of the public therein. And even if the flow is within the amount to which an appropriator has a preferential right, during any time it is not being used beneficially and economically, it still is, remains, or becomes publici juris, subject to all common rights of the public and to appropriation and use by another, for the appropriator's right is merely a preferential right to the beneficial and economical use of the water up to his given quantity. Adams v. Portage Irrigation Reservoir & Power Co., 95 Utah 1, 72 P.2d 648 (1937).

User of water had duty to return surplus or waste water into the stream from which it was taken so that further use can be made by others. Brian v. Fremont Irrigation Co., 112 Utah 220, 186 P.2d 588 (1947).

Judicial determination of rights.

The right of an appropriator of public waters to the use thereof is subject to regulation and limited to the amount required with reasonable efficiency to satisfy the beneficial use of his appropriation. McNaughton v. Eaton, 121 Utah 394, 242 P.2d 570 (1952). However, detailed regulation by a court of the right to use water should be imposed with great caution, for usually the parties are better situated to agree upon the necessary regulations. McNaughton v. Eaton, 4 Utah 2d 223, 291 P.2d 886 (1955).

Nonuse of rights.

In action for determination of water rights between city and cemetery association, evidence that, after city acquired lands and water rights appurtenant thereto, thirty years lapsed during which city made no beneficial use of water foreclosed claim of city to use of any such waters, and evidence supporting claim of right by virtue of exchange with appropriators was too indefinite. Mt. Olivet Cemetery Ass'n v. Salt Lake City, 65 Utah 193, 235 P. 876 (1925).

Percolating water.

Percolating water that neither supports plant life nor confers any other natural benefit to the land is not owned by the landowner, and the landowner's interest in the water is his right to use the water measured by his beneficial use of the water. Melville v. Salt Lake County, 570 P.2d 687 (Utah 1977).

Purposes and uses for which taken.

Mere fact that a city had for many years diverted water from a creek did not give it the right to the use of such water or establish a right thereto, since it was necessary that it appear that water diverted had been put to beneficial use, and as bearing upon that question, "area irrigated and the duty of water on land irrigated are of controlling importance." Richfield Cottonwood Irrigation Co. v. City of Richfield, 84 Utah 107, 34 P.2d 945 (1934).

The right of grazers of sheep to take water for camp and grazing purposes is a lawful right recognized by the Constitution and statute, unless in so doing the quality or quantity of the waters due to others is appreciably diminished. Adams v. Portage Irrigation Reservoir & Power Co., 95 Utah 1, 72 P.2d 648 (1937).

Quantity of water subject to appropriation.

Under this section the rights of prior appropriators of the water of a lake as against subsequent applicants to appropriate water therefrom depends, not on how much the prior appropriators required, but on the amount they have applied to an original and beneficial purpose within a reasonable time after making their appropriation and before defendants ap-
applied for an appropriation. Salt Lake City v. Gardner, 39 Utah 30, 114 P. 147 (1911).

The actual amount of water needed for the use to which it is to be applied is the limit to which a party is entitled to water for irrigation. Even a prescriptive right to waters gives no right except to put the water to a beneficial use. Big Cottonwood Tanner Ditch Co. v. Shurtliff, 49 Utah 569, 578, 164 P. 856 (1916), applying Comp. Laws 1907, § 1288x20, which is identical with present section; Cleary v. Daniels, 50 Utah 494, 167 P. 820 (1917).

Right of control exercised by virtue of § 10-8-16, giving city power to control water and watercourses, did not give city any proprietary right to use of such waters, since beneficial use is measure of all rights to use of water. Mt. Olivet Cemetery Ass'n v. Salt Lake City, 65 Utah 193, 235 P. 876 (1925).

The quantity necessary for irrigation and domestic uses was measure of right of successor of one conveying by deed all waters flowing from certain spring, the deed excepting that it. Landowner was not entitled to take all the water he wanted, so as to entitle grantee only to waste or surplus permitted to flow off land. Big Cottonwood Lower Canal Co. v. Cook, 73 Utah 383, 274 P. 454 (1929).

It is a cardinal principle of law of prior appropriation that while prior rights to use are obtained by those who first apply water to a beneficial use, those rights are limited to the quantities reasonably necessary for the uses to which it is applied. Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 P. 116 (1930).

The quantity of water that an appropriator of water for irrigation purposes is entitled to have decreed to him, when his right is brought in question, depends in great part upon the amount of land that he has irrigated with the water diverted. Generally, the greater the area to be irrigated, the greater will be the quantity of water required. Jensen v. Birch Creek Ranch Co., 76 Utah 356, 289 P. 1097 (1930).

An appropriator has no right to divert more waters than he can put to a beneficial use, and should waste as little as possible. Smithfield West Bench Irrigation Co. v. Union Cent. Life Ins. Co., 105 Utah 468, 142 P.2d 866 (1943).

Title and rights of appropriator.

As a consequence of this section, prior appropriator of water does not acquire title thereto but merely obtains right to use a specific quantity of water from a certain stream upon condition that the water shall be used for a beneficial purpose. United States v. Caldwell, 64 Utah 490, 231 P. 434 (1924).

Since the state is the owner of the salt contained in the waters of Great Salt Lake, it follows that the appropriator is in no position, until it acquires rights to the salt therein, to place that water to a beneficial use, if its sole purpose for its attempted appropriation is to extract the salt from the water. If it cannot place the water to a beneficial use, it cannot appropriate the water, because beneficial use is the only basis upon which water can be appropriated in this state. Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946).

Waters diverted from natural source, applied to irrigation and recaptured before escaping from original appropriator's control, still belong to original appropriator and, if original appropriator has beneficial use for the waters, he may again reuse them and no one can acquire right superior to that of original appropriator. Smithfield West Bench Irrigation Co. v. Union Cent. Life Ins. Co., 113 Utah 356, 195 P.2d 249 (1948).

An appropriator of water may in good faith utilize the quantity of water to which he is entitled, although his previous methods of use were inefficient, and resulted in returning surplus or waste water into the stream. Lasson v. Seely, 120 Utah 679, 238 P.2d 418 (1951).

In order to preserve his right to use water which he is entitled to use as a shareholder of an irrigation company, a landowner must keep that water not only on his own land, but also under his control. Lasson v. Seely, 120 Utah 679, 238 P.2d 418 (1951).

While irrigation water is under his dominion and control, a shareholder in an irrigation company who has the right to draw on a certain portion of the irrigation canal stream is entitled to use it on his own land in such a beneficial manner as he sees fit, or he may use it or any part thereof on other land under his control, or he may lease to others the right to use such water or some portion of it. Lasson v. Seely, 120 Utah 679, 238 P.2d 418 (1951).

A change in place of diversion or the place or nature of use or a combination of such changes cannot be made if the vested rights of lower users would be impaired thereby. East Bench Irrigation Co. v. Deseret Irrigation Co., 2 Utah 2d 170, 271 P.2d 449 (1954).

Who may complain.

Prior appropriator cannot prevent use of surplus waters; that is, he cannot prevent another from using water while he cannot use it or make it available for use. Cleary v. Daniels, 50 Utah 494, 167 P. 820 (1917).

The grantor of water rights will not be heard to say that his grantee cannot make beneficial use thereof. Campbell v. Nunn, 76 Utah 316, 2 P.2d 899 (1931).

Water lost by seepage and evaporation before it gets to adverse claimant's land cannot be beneficially used by him, and, therefore, applicant for appropriation of such water, by taking it, cannot deprive claimant of the water.
73-1-4. Reversion to public by abandonment or failure to use within five years — Extending time.

(1) (a) When an appropriator or his successor in interest abandons or ceases to use water for a period of five years, the right ceases, unless, before the expiration of the five-year period, the appropriator or his successor in interest files a verified application for an extension of time with the state engineer.

(b) The extension of time to resume the use of that water shall not exceed five years unless the time is further extended by the state engineer. The provisions of this section are applicable whether the unused or abandoned water is permitted to run to waste or is used by others without right.

(2) (a) The state engineer shall furnish an application blank that includes a space for:

(i) the name and address of applicant;
(ii) the name of the source from which the right is claimed and the point on that source where the water was last diverted;
(iii) evidence of the validity of the right claimed by reference to application number in the state engineer's office;
(iv) date of court decree and title of case, or the date when the water was first used;
(v) the place, time, and nature of past use;
(vi) the flow of water that has been used in second-feet or the quantity stored in acre-feet;
(vii) the time the water was used each year;
(viii) the extension of time applied for;
(ix) a statement of the reason for the nonuse of the water; and
(x) any other information that the state engineer requires.

(b) Filing the application extends the time during which nonuse may continue until the state engineer issues his order on the application for an extension of time.

(c) Upon receipt of the application, the state engineer shall publish, once each week for three successive weeks, a notice of the application in a newspaper of general circulation in the county in which the source of the water supply is located that shall inform the public of the nature of the right for which the extension is sought and the reasons for the extension.

(d) Within 30 days after the notice is published, any interested person may file a written protest with the state engineer against the granting of the application.

(e) In any proceedings to determine whether or not the application for extension should be approved or rejected, the state engineer shall follow the procedures and requirements of Chapter 46b, Title 63.
or failure to time.

After further investigation, the state engineer may allow or reject the application.

(3) (a) Applications for extension shall be granted by the state engineer for periods not exceeding five years each, upon a showing of reasonable cause for such nonuse.

(b) Reasonable causes for nonuse include:

(i) financial crisis;
(ii) industrial depression;
(iii) operation of legal proceedings or other unavoidable cause; and
(iv) the holding of a water right without use by any municipality, metropolitan water district, or other public agency to meet the reasonable future requirements of the public.

(4) (a) If the appropriator or his successor in interest fails to apply for an extension of time, or if the state engineer denies the application for extension of time, the appropriator's water right ceases.

(b) When the appropriator's water right ceases, the water reverts to the public and may be reappropriated as provided in this title.

(5) (a) Sixty days before the expiration of any extension of time, the state engineer shall notify the applicant by registered mail of the date when the extension period will expire.

(b) Before the date of expiration, the applicant shall either:

(i) file a verified statement with the state engineer setting forth the date on which use of the water was resumed, and whatever additional information is required by the state engineer; or
(ii) apply for a further extension of time in which to resume use of the water according to the procedures and requirements of this section.

In action to determine title to waters of a spring having its source on plaintiffs' land, fact that neither plaintiffs nor their grantors made any use of the water, and permitted it to continue to flow through an artificial watercourse which they had purchased from one having a right thereto, was not sufficient to show abandonment, so as to render the water subject to appropriation, especially in view of other affirmative acts of plaintiffs tending to show that they had no intention of abandoning their rights. Gill v. Malan, 29 Utah 431, 82 P. 471 (1905).

Abandonment, as applied to doctrine of appropriation of water to a beneficial use, means an intentional relinquishment of a known right. Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937).

Abandonment of water rights is not based upon a time element, and mere nonuse will not establish abandonment for any less time, at least, than the statutory period, the controlling element being a matter of intent. Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937).

In action to quiet title to waters of a spring, finding of court that defendants said plaintiff was stealing their water negated an abandonment of the water by defendants, so it could not revert to public and again be subject to appropriation. Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937).

Abandonment is a separate and distinct concept from that of a forfeiture. Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co., 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 276 (1943); In re Drainage Area of Bear River, 12 Utah 2d 1, 361 P.2d 407 (1961).

The burden is on the person asserting abandonment of water rights to prove it and proof of abandonment must fail in absence of showing of an intent to abandon. Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co., 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 276 (1943); Smithfield West Bench Irrigation Co. v. Union Cent. Life Ins. Co., 113 Utah 356, 195 P.2d 249 (1948); Fairfield Irrigation Co. v. Carson, 122 Utah 225, 247 P.2d 1004 (1952); In re Escalante Valley Drainage Area, 12 Utah 2d 112, 363 P.2d 777 (1961).

Abandonment differs from the nonuse provided by this section in that abandonment requires proof of an intent to abandon the water right. In re Escalante Valley Drainage Area, 12 Utah 2d 112, 363 P.2d 777 (1961).

Adverse possession.

Adverse possession is not founded upon or dependent on the doctrines of abandonment, or forfeiture for nonuse, of water rights. Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937).

Appropriation after forfeiture.

When vested right is forfeited by nonuse, there is reversion to public, and right to use water so abandoned can only be initiated by making new appropriation after water is available for appropriation. Whitmore v. Welch, 114 Utah 578, 201 P.2d 954 (1949).

Forfeiture of rights.

Nonuser of appropriated waters for statutory period, as well as intentional abandonment, results in loss of rights thereto. Deseret Livestock Co. v. Hooppiania, 66 Utah 25, 239 P. 479 (1925).

Forfeiture of a water right for nonuser during the statutory time may occur despite a specific intent not to surrender the right, since it is based, not upon an act done, or an intent had, but upon failure to use the right for the statutory time. Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937).

Forfeiture will not operate when the failure to use is a result of physical causes beyond the control of the appropriator, such as floods that destroy his dams and ditches, troughs, and the like, if the appropriator is ready and willing to divert the water when it is naturally available. Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co., 104 Utah 202, 135 P.2d 108 (citing textbooks, decisions from other western states, and federal court cases), rehearing denied, 104 Utah 216, 140 P.2d 638 (1943).

Under Laws of 1880 (Laws 1880, ch. 20, § 9), failure to keep a dam in repair, or failure to use the water for seven years, would work a forfeiture. Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co., 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943).

Under this section a forfeiture is based upon the failure to use the water. Accordingly, there is no forfeiture where there is no showing that appropriator or his successor in interest has failed to use the water for a beneficial purpose for a period of five years. This principle does not, however, imply that an appropriator can, without getting the approval of the state engineer, change the nature of the use or the place of diversion. Nor may an appropriator who has a supplemental storage right, without completing construction of storage facilities in the allotted time, and without getting an extension of time for the completion of construction, keep his storage right alive indefinitely by making direct flow diversions from the river. Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co., 104 Utah 216, 140 P.2d 638 (1943).

Pledgee of certificate of mutual irrigation company cannot be charged with abandonment by nonuser because certificate was not used for
a period of more than five years, where certificate was void, and, therefore, the holder thereof was never entitled to any water rights thereunder. In other words, the right to the use of water cannot logically be said to have been lost by nonuse when in fact the right never had any legal existence. Commercial Bank v. Spanish Fork South Irrigation Co., 107 Utah 279, 153 P.2d 547 (1944).

Statutes fixing the maximum time limit for the nonuser of a water right, when free from ambiguity, should be strictly construed, and a case clearly made out before any relief should be extended to the delinquent thereunder. Baugh v. Criddle, 19 Utah 2d 361, 431 P.2d 790 (1967).

Ground water.
Before the 1945 amendment, this section did not apply to underground or subterranean waters. Fairfield Irrigation Co. v. Carson, 122 Utah 225, 247 P.2d 1004 (1952).

The prior exemption of underground waters in this section indicated a recognition of some kind of personal right to such waters and this legislative disposition to protect the right was emphasized by the passage of the statute giving landowners one year in which to file claims to such waters (§ 73-5-10, repealed by Laws 1955, ch. 160, § 2). In re Escalante Valley Drainage Area, 6 Utah 2d 344, 313 P.2d 803 (1957).

Time extension.
State engineer’s proposed determination in a drainage area which disallowed plaintiffs’ water rights in their wells interrupted the running of this section against the plaintiffs and the fact that plaintiffs did not file a protest within five years after the effective date of the statute was not controlling since they did file within the time extended by the court. In re Escalante Valley Drainage Area, 12 Utah 2d 112, 363 P.2d 777 (1961).

Right to use water nonconsumptively to run power mill wheel lapsed when owner failed to file engineer’s form stating that beneficial use had been resumed within extension of time to resume granted when mill burned down, notwithstanding argument that resumption of use had actually occurred within extension period. Baugh v. Criddle, 19 Utah 2d 361, 431 P.2d 790 (1967).

Party applying to state engineer for extension of time in which to resume use of water does not have to pay filing fee in advance. Glenwood Irrigation Co. v. Myers, 24 Utah 2d 78, 465 P.2d 1013 (1970).

In action to have defendant’s right to use water declared forfeited for nonuse and to enjoin any further use, trial court improperly granted summary judgment for plaintiff since state engineer had granted extension of time for defendant to resume use and plaintiff did not use proper remedy of civil action in district court for review of state engineer’s decision, but rather filed action to have defendant’s rights declared forfeited, which resulted in an attempt by plaintiff to exercise authority granted specifically to state engineer to enjoin unlawful diversion. Glenwood Irrigation Co. v. Myers, 24 Utah 2d 78, 465 P.2d 1013 (1970).

Waste water.
Portion of appropriated water allowed to run waste cannot be appropriated by another unless owner intentionally abandons right to its use, or fails to apply it to beneficial purpose for statutory period, and owner may reclaim exclusive rights to such water by applying it to beneficial use at any time before lapse of statutory period, in absence of earlier intentional abandonment of rights thereto. Torsak v. Rukavina, 67 Utah 166, 246 P. 367 (1926).

Question of waste water or excess water is discussed at length in majority and concurring opinions in Smithfield West Bench Irrigation Co. v. Union Cent. Life Ins. Co., 105 Utah 468, 142 P.2d 866 (1943).

COLLATERAL REFERENCES


Key Numbers. — Waters and Water Courses = 151.
73-1-5. Use of water a public use.

The use of water for beneficial purposes, as provided in this title, is hereby declared to be a public use.

History: L. 1919, ch. 67, § 4; R.S. 1933 & C. 1943, 100-1-5.

Compiler's Notes. — This section is identical with the first sentence of Comp. Laws 1907, § 1288x21.

Cross-References. — Eminent domain, Title 78, Chapter 34.

NOTES TO DECISIONS

ANALYSIS

Condemnation proceedings.
Right to take.

Condemnation proceedings.

Condemnation proceedings under § 78-34-1(5) may be resorted to for purpose of building pipeline on adjoining lands to divert waters impregnated with copper from plaintiff's mine dump. Utah Copper Co. v. Montana-Bingham Consol. Mining Co., 69 Utah 423, 255 P. 672 (1926).

In condemnation proceedings, where condemnor has constructed a pipeline and a system for the distribution of the waters claimed by defendants, it is not necessary that such waters be actually taken into plaintiff's pipelines. All that is necessary is that the defendants be deprived of the use of the waters by some action of the plaintiff. Sigurd City v. State, 105 Utah 278, 142 P.2d 154 (1943).

COLLATERAL REFERENCES

Key Numbers. — Eminent Domain => 13.

73-1-6. Eminent domain — Purposes.

Any person shall have a right of way across and upon public, private and corporate lands, or other rights of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, pipelines and areas for setting up pumps and pumping machinery or other means of securing, storing, replacing and conveying water for domestic, culinary, industrial and irrigation purposes or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not unnecessarily to impair the practical use of any other right of way, highway or public or private road, or to injure any public or private property.

History: L. 1919, ch. 67, § 4; R.S. 1933, 100-1-6; L. 1935, ch. 105, § 1; C. 1943, 100-1-6.

Cross-References. — Eminent domain, Title 78, Chapter 34.

Easements on state lands for ditches, § 65 A-7-12.
NOTES TO DECISIONS

ANALYSIS

Constitutionality.

Easement.

Interest condemned.

Loss of right of way.

Right to acquire right of way.

Constitutionality.

This section is within the legislative power of the state of Utah and does not violate the Constitution of the United States. Himonas v. Denver & Rio Grande W.R.R., 179 F.2d 171 (10th Cir. 1949).

Easement.

The right of condemnation under this section does not nullify the possibility of acquiring an implied easement under the doctrine of reasonable necessity. Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947).

In a suit to establish right of way for an irrigation ditch by prescriptive easement, where the pleadings made an issue of whether easement had been acquired and it was clear that the ditch had been used for more than twenty years to irrigate lands of plaintiffs, trial court was required to make a direct finding on that issue. Harmon v. Rasmussen, 13 Utah 2d 422, 375 P.2d 762 (1962).

Interest condemned.

Where action was brought under this section, which provides only for condemnation of rights of way, but judgment entered granted land to condemnor in fee simple, court in subsequent action to quiet title to mineral rights in condemnees would construe prior judgment to conform to pleadings, and therefore, since only condemnation of right of way was sought, condemnees’ title to mineral rights would be confirmed. Moon Lake Water Users Ass'n v. Hanson, 535 P.2d 1262 (Utah 1975).

Loss of right of way.

If water right is lost by abandonment of ditch by nonuser or failure to repair, the right of way is thereby lost, and entry upon land is a trespass. Stalling v. Ferrin, 7 Utah 477, 27 P. 686 (1891).


Although owner of alleged irrigation ditch easement filled dirt around headgate for the purpose of preventing unwanted water from being turned into the ditch and the ditch was not used for several years, these facts did not establish intentional abandonment of prescriptive right to use the ditch. Harmon v. Rasmussen, 13 Utah 2d 422, 375 P.2d 762 (1962).

Right to acquire right of way.

Right of way for an irrigation ditch and flume can be acquired by prescription across a right of way of railroad. Himonas v. Denver & Rio Grande W.R.R., 179 F.2d 171 (10th Cir. 1949).

Where there is a right to certain unappropriated water around a spring area on defendants’ land, plaintiff may have a right to acquire a right of way across defendants’ land if the defendant is justly compensated for the taking and so long as plaintiff does not interfere with the rights and use of the defendants’ water. Dalton v. Wadley, 11 Utah 2d 84, 355 P.2d 69 (1960).

COLLATERAL REFERENCES


C.J.S. — 29A C.J.S. Eminent Domain § 45 to 47.

Key Numbers. — Eminent Domain = 28.

73-1-7. Enlargement for joint use of ditch.

When any person desires to convey water for irrigation or any other beneficial purpose and there is a canal or ditch already constructed that can be used or enlarged to convey the required quantity of water, such person shall have the right to use or enlarge such canal or ditch already constructed, by compensating the owner of the canal or ditch to be used or enlarged for the damage caused by such use or enlargement, and by paying an equitable proportion of the maintenance of the canal or ditch jointly used or enlarged; provided, that such enlargement shall be made between the 1st day of October and the 1st
day of March, or at any other time that may be agreed upon with the owner of such canal or ditch. The additional water turned in shall bear its proportion of loss by evaporation and seepage.

History: L. 1919, ch. 67, § 5; R.S. 1933 & C. 1943, 100-1-7.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Compensation or damages.
Evaporation and seepage not waste.
Exchange of water.
Procedure in general.
Right to maintain proceeding.

Constitutionality.
This section is not invalid because it does not provide for making compensation contemplated by Utah Const. Art. I, § 22, for taking or damaging private property for public use. Salt Lake City v. East Jordan Irrigation Co., 40 Utah 126, 121 P. 592 (1911).

Compensation or damages.
In proceeding to obtain permission to enlarge certain irrigating canals belonging to irrigation company, irrigation company was limited in its recovery by amount of damages suffered, and could not recover for any benefit plaintiff might receive. Tanner v. Provo Bench Canal & Irrigation Co., 40 Utah 105, 121 P. 584 (1911), aff'd, 239 U.S. 323, 36 S. Ct. 101, 60 L. Ed. 307 (1915).

If the parties can agree on the joint use of the ditch, condemnation is not necessary. In that event if the parties agree on the amount to be paid for the use, or on the basis for determination of the amount, the contract controls. If, however, the parties cannot agree on the price to be paid for the use, the ditch owner can close the ditch against the other party's water until he gets his price, but the party who desires to use may exercise the right of eminent domain to acquire such use. Peterson v. Sevier Valley Canal Co., 107 Utah 45, 151 P.2d 477 (1944).

Evaporation and seepage not waste.
Under last sentence of this section, reasonable losses from evaporation and seepage are not classified as willful waste or a wrongful use of water. Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 P. 116 (1930).

Exchange of water.
Water may be diverted by a subsequent appropriator from a stream, and water from the same stream or another stream, if equal in quantity and quality, may be returned into the stream or into the ditch or canal of the prior appropriator, if that is done at a point where the prior appropriator can make full use of the water without injury or damage to him. United States v. Caldwell, 64 Utah 490, 231 P. 434 (1924).

Procedure in general.
In proceeding by city against irrigation company to obtain right to enlarge irrigating canal owned by defendant to convey water from river for use of its inhabitants, use that city sought to make of canal when enlarged was public use, proceeding was controlled by principles involved in exercise of right of eminent domain, and the measure of damages defendant was entitled to was amount of decrease, if any, in value of use of canal, for canal purposes, caused by enlargement thereof by city for its purposes and by joint use by city and defendant. Salt Lake City v. East Jordan Irrigation Co., 40 Utah 126, 121 P. 592 (1911).

Proceedings under this section are controlled by the principles involved in eminent domain. Nielsen v. Sandberg, 105 Utah 93, 141 P.2d 696 (1943), following Salt Lake City v. East Jordan Irrigation Co., 40 Utah 126, 121 P. 592 (1911).

Right to maintain proceeding.
In proceeding to obtain permission to enlarge certain irrigating canals belonging to irrigation company, held it was no objection to maintenance of proceeding that plaintiffs' right was right to divert water at point farther upstream than point of diversion of defendants' canals, or that plaintiff had not shown that he had an actual and subsisting right to use of water which he sought to convey through canals, where he had some water and had made application to appropriate portion of surplus waters of river, or that his application for unappropriated water was made by plaintiff in his official capacity as state engineer. Tanner v. Provo Bench Canal & Irrigation Co., 40 Utah 105, 121 P. 584 (1911), aff'd, 239 U.S. 323, 36 S. Ct. 101, 60 L. Ed. 307 (1915).
73-1-8. Duties of owners of ditches — Safe condition — Bridges.

The owner of any ditch, canal, flume or other watercourse shall maintain the same in repair so as to prevent waste of water or damage to the property of others, and is required, by bridge or otherwise, to keep such ditch, canal, flume or other watercourse in good repair where the same crosses any public road or highway so as to prevent obstruction to travel or damage or overflow on such public road or highway, except where the public maintains or may hereafter elect to maintain devices for that purpose.

History: L. 1919, ch. 67, § 12; R.S. 1933 & C. 1943, 100-1-8.

NOTES TO DECISIONS

Analysis

Action against land commissioners.
Contributory negligence.
Duty imposed.
Liability.
—Attractive nuisance doctrine.
Prescriptive easement in ditch.

Action against land commissioners.
An action against board of land commissioners for damages to land caused by break in irrigation canal constructed by state was an action against the state and district court did not have jurisdiction. Wilkinson v. State, 42 Utah 483, 134 P. 626 (1913).

Contributory negligence.
In an action to recover for damage done by irrigation water flowing onto plaintiff’s land, plaintiff failed to establish negligence on the part of defendant and moreover plaintiff had contributed to his own injury through construction of a driveway over a barrow ditch without providing a culvert and the driveway acted as a dam diverting the irrigation water from the barrow ditch to plaintiff’s house and its foundation. Erickson v. Bennion, 28 Utah 2d 371, 503 P.2d 139 (1972).

Duty imposed.
This section imposes upon owners of canals or ditches used for irrigation the duty of exercising ordinary care so as to prevent injury and damage to others; failure to exercise ordinary care and prudence may constitute actionable negligence. Jensen v. Davies & Weber Counties Canal Co., 44 Utah 137 P. 635 (1913).

Under this section, plaintiff claiming damages caused by seepage must allege and prove negligence or want of ordinary care on defendant’s part in the construction, operation or maintenance of irrigation ditch. The degree of care required is commensurate with the damage or injury that will probably result if water does escape. Mackay v. Breeze, 72 Utah 305, 269 P. 1026 (1928).

In action by stockholder against irrigation company, which was organized to distribute waters from natural stream to stockholders according to their prorata shares, for flooding of plaintiff-stockholder’s adjacent land, sustaining of general demurrer to complaint was proper where complaint did not allege that company contracted to keep waters in that stream from overflowing its banks and damaging its stockholders’ lands, or that means used by company in distributing its water were inadequate, improper or done in negligent manner so as to cause such flooding. Brian v. Fremont Irrigation Co., 112 Utah 220, 186 P.2d 588 (1947).

In action by stockholder against irrigation company which was organized to distribute waters from natural stream to stockholders according to their prorata shares, mere allegation that defendant company diverted and permitted others to divert surplus and waste waters into stream above plaintiff’s point of diversion and that, because of this and failure of defendant to install headgates or other means of diversion, such surplus and waste waters overflowed and flooded plaintiff’s adjacent land failed to state cause of action. However, court pointed out that plaintiff might have stated cause of action had he alleged some act of defendant causing natural channel to become burdened with much greater amount of water than would naturally drain or be in it, and that this excessive water was cause of damage to plaintiff’s land. Brian v. Fremont Irrigation Co., 112 Utah 220, 186 P.2d 588 (1947).

Irrigation company was liable for flooding of nonstockholder’s basement due to overflow water notwithstanding contention that neither it nor its servant had any duty to see where its water went after notice of each stockholder’s turn to take water had been given to him. An-
Where cloudburst and hailstorm caused utility company's canal to overflow, and there was evidence that not everything was done which might have been done to prevent this, company was liable to landowners adjacent to canal for damages sustained by them when their property was flooded. Dougherty v. California-Pacific Utils. Co., 546 P.2d 880 (Utah 1976).

Liability.
—Attractive nuisance doctrine.
Canals and irrigation ditches do not fall within the attractive nuisance doctrine and owners and operators of canals are not liable for personal injuries or deaths that result when children play in or fall into the water. Trujillo v. Brighton-North Point Irrigation Co., 746 P.2d 780 (Utah 1987).

COLLATERAL REFERENCES


73-1-9. Contribution between joint owners of ditch or reservoir.

When two or more persons are associated in the use of any dam, canal, reservoir, ditch, lateral, flume or other means for conserving or conveying water for the irrigation of land or for other purposes, each of them shall be liable to the other for the reasonable expenses of maintaining, operating and controlling the same, in proportion to the share in the use or ownership of the water to which he is entitled.

History: L. 1919, ch. 67, § 13; R.S. 1933 & C. 1943, 100-1-9.

NOTES TO DECISIONS

Analysis

Application.
Burden of proof.
Division of cost of maintenance and operation.
Enforcement proceeding.
Expenses for which water users liable.
Method of determining expenses.

Application.
This section was not intended to abrogate or disturb the rights of parties in an irrigation canal founded upon a valid and existing contract, and hence where rights of parties were so founded, irrigation company was not entitled to contribution for maintenance of a canal.

West Union Canal Co. v. Thornley, 64 Utah 77, 228 P. 199 (1924).
This section, and not contract between parties, governed mutual irrigation company’s obligation to contribute to expenses of maintaining part of canal used by that company and another company, where provision in contract for designated annual payment had ceased to operate by virtue of its express terms respecting happening of contingency. Hodges Irrigation Co. v. Swan Creek Canal Co., 111 Utah 405, 181 P.2d 217 (1947).
In the absence of an enforceable agreement between joint users of a canal specifying the rights and obligations of the parties with re-

This section did not authorize a water company to require additional contributions from a water user to whom it was obligated to deliver water at a fixed annual price. Warren Irrigation Co. v. Brown, 28 Utah 2d 103, 498 P.2d 667 (1972).

This section was applicable to assessments made by mutual ditch company for new water provided the users where the users did not have shares of stock on the new water and there was no other agreement as to the cost of using the canal. Swasey v. Rocky Point Ditch Co., 617 P.2d 375 (Utah 1980).

Burden of proof.
A ditch owner, under this section, has the burden of proving that all expenses for which it seeks contribution are reasonably related to the cost of distributing the user's waste water. Swasey v. Rocky Point Ditch Co., 660 P.2d 224 (Utah 1980).

Division of cost of maintenance and operation.
Under this section it is proper to divide the cost of maintenance and operation of an irrigation ditch on the basis of ownership of the water. If anyone infringes upon the rights of parties so entitled, depriving them of their water, the parties may, of course, have redress in a proper action. Perry Irrigation Co. v. Thomas, 74 Utah 193, 278 P. 535 (1929).

Water users were liable to the corporate operator of a water-canal system for a proportionate share of the expense of the operation and maintenance of the system based on the amount of water used even though the water users used only six miles of the fifteen-mile canal. Gunnison-Fayette Canal Co. v. Roberts, 12 Utah 2d 153, 364 P.2d 103 (1961).

Expenses for which water users liable.
There must be a reasonable relationship between the proportion of the cost of distribution to be individually borne and the benefits and services to be received, and it was error to hold defendant water users proportionally liable for the total expenses of plaintiff-operator, where a number of the expenditures had no relation to benefits received by the defendants. Gunnison-Fayette Canal Co. v. Roberts, 12 Utah 2d 153, 364 P.2d 103 (1961).

Method of determining expenses.
Assessments made by mutual ditch company on shareholders derived by soliciting estimates from the shareholders, averaging these estimates, and then setting the amount of the assessment was not in accord with this section because there was no evidence the assessments represented an amount reasonably related to the company's actual expenses in distributing the water to its shareholders. Swasey v. Rocky Point Ditch Co., 617 P.2d 375 (Utah 1980).

Where those who used any part of the ditch were assessed by the ditch company for new water improvements to the entirety of the ditch, the assessments were based upon the use or ownership of the water, and not upon the proportion of the ditch used, and were proper under this section. Swasey v. Rocky Point Ditch Co., 660 P.2d 224 (Utah 1980).

73-1.10. Conveyance of water rights — Deed — Exceptions — Filing and recordation of deed.

Water rights, whether evidenced by decrees, by certificates of appropriation, by diligence claims to the use of surface or underground water or by water users' claims filed in general determination proceedings, shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, in which case water shall not be deemed to be appurtenant to the land; and such deeds shall be recorded in books kept for that purpose in the office of the recorder of the county where the place of diversion of the water from its natural channel is situated and in the county where the water is applied. A certified copy of such deed, or other instrument, transferring such water rights shall be promptly transmitted by the county recorder to the state engineer for filing. Every deed of a water right so recorded shall, from the time of filing the same with the
recorder for record, impart notice to all persons of the contents thereof, and
subsequent purchasers, mortgagees and lien holders shall be deemed to pur-
chase and take with notice thereof.

History: L. 1919, ch. 67, § 16; R.S. 1933 &
C. 1943, 100-1-10; L. 1943, ch. 105, § 1; 1945,
ch. 134, § 1; 1958, ch. 137, § 1.

NOTES TO DECISIONS

Appurtenant waters.
Discharged water.
Reservations in conveyance.
Rights represented by shares of stock.

Discharged water.
Irrigation company which discharged, at cer-
tain flume, excess waste and seepage water ac-
cumulating in its canal, and whose only inter-
est therein after discharge was that of getting
rid of such water so as not to damage adjacent
landowners as water sought lower levels, did
not have sufficient interest in that water to
sustain conveyance thereof. Smithfield West
Bench Irrigation Co. v. Union Cent. Life Ins.

Reservations in conveyance.
Reservation, in conveyance to water com-
pany, of right to winter waters theretofore used
for irrigation, is limited to use of same amount
of water and same land previously irrigated
thereby, and waters may not be used to irri-
gate land formerly irrigated by summer
waters, though in using such winter waters on
lands formerly irrigated by same, user is not
limited to same ditches used prior to date of
conveyance and reservation of rights. East
Grouse Creek Water Co. v. Frost, 66 Utah 587,
245 P. 338 (1926).

Trial court erred in finding that a town had
the right to determine the point of connection
of residents' culinary waterline with the town's
water system, where, due to a reservation in a
deed given to the town by their predecessors in
interest, the residents were entitled to receive
their water from a spring and not the town's
general culinary water supply. Cornish Town

Rights represented by shares of stock.
The amendment in 1943 made water rights
represented by shares of stock in a corporation
presumptively not appurtenant; hence such a
water right, even though not expressly re-
served in the deed, would not pass to the
grantee in the absence of clear and convincing
evidence that the grantor so intended. But the
amendment does not foreclose the water right
from passing if the grantee can show such was
the intention of the grantor. The amendment
has the effect of placing the burden of proof on
the party who alleges that despite the fact that
the certificate of stock was not endorsed and
delivered to the grantee, the water right repre-
sented by the certificate was as a matter of fact
appurtenant to the land conveyed and that the
grantor intended that it pass with the land.
Brimm v. Cache Valley Banking Co., 2 Utah

Where it was contended that water repre-
sented by shares of stock not included in a con-
tract of sale of land was appurtenant, and
other stock certificates were mentioned in an
escrow agreement made at the time of the sale,
the agreement was not ambiguous and parol
evidence was not admissible to prove the inten-
tion that the certificates not mentioned in the
agreement would pass. Hatch v. Adams, 7
Utah 2d 73, 318 P.2d 633 (1957), aff'd on re-

Where water stock certificates were not in-
cluded in the contract of sale of land, proof that
the water was used by the owner during the
entire period of his ownership was not alone
sufficient to rebut the presumption that the
water is not deemed appurtenant. Hatch v.
Adams, 7 Utah 2d 73, 318 P.2d 633 (1957), aff'd on

This section establishes a rebuttable pre-
sumption that the water right represented by
shares of stock in an irrigation company does
not automatically pass to a grantee as appurte-
nant to the land upon which the water is being
used at the time of the grant; however, irriga-
tion company stock will pass under the deed
where the grantee or those claiming under
him, who have the burden of proof on the issue, can show by clear and convincing evidence that the water right represented by the stock was as a matter of fact appurtenant to the land conveyed and that the grantor intended that it pass with the land. Abbott v. Christensen, 660 P.2d 254 (Utah 1983).

Party failed to rebut, by clear and convincing evidence, the statutory presumption that water represented by shares of stock shall not be deemed to be appurtenant to the land where only a small portion of the water represented by the stock shares was ever used on the land, and when used it was with the share owner's permission; the value of the land was not dependent upon the use of the water; the water was used only once or twice a month; other water was supplied by the city water system and was used on the land; and there was no agreement or understanding that the purchase of the land included any water. Roundy v. Coombs, 668 P.2d 550 (Utah 1983).

COLLATERAL REFERENCES


73-1-11. Appurtenant waters — Use as passing under conveyance.

A right to the use of water appurtenant to land shall pass to the grantee of such land, and, in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; subject, however, in all cases to payment by the grantee in any such conveyance of all amounts unpaid on any assessment then due upon any such right; provided, that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such reservation in express terms in such conveyance, or it may be separately conveyed.

History: L. 1919, ch. 67, § 15; R.S. 1933 & C. 1943, 100-1-11.

NOTES TO DECISIONS

Analysis

Conveyance by deeds.
— By tax deed.
— By mortgage.
— By devises.

Express reservation.
Measure of right reserved.
Reservation of mineral rights.
Rights of strangers.

Waters appurtenant to land.

Conveyance by deeds.

A conveyance of land passes an appurtenant water right unless the same is expressly reserved, Cortella v. Salt Lake City, 93 Utah 236, 72 P.2d 630 (1937), at least where beneficial use of water upon land conveyed is shown. Anderson v. Hamson, 50 Utah 151, 167 P. 254 (1917), applying Comp. Laws 1907.

Under this section, a deed to land in statutory form, without reservation of the water, conveys whatever right the grantor has to the water appurtenant to the land. Anderson v. Hamson, 50 Utah 151, 167 P. 254 (1917).

Holder of appurtenant water right had right to convey the right with the land upon which he had utilized the water, even though the tract irrigated included thirty acres not within the description of deed creating the water rights. Warren Irrigation Co. v. Brown, 28 Utah 2d 103, 498 P.2d 667 (1972).

— By tax deed.

Since deed to land in statutory form without reservation of water conveys whatever right grantor has to water appurtenant to land, tax deed conveyed such water rights. Black v. Johanson, 81 Utah 410, 18 P.2d 901 (1933).

— By mortgage.

Mortgage in statutory form, without reserva-
tion of water, conveys whatever rights grantor has to water appurtenant to land. Thompson v. McKinney, 91 Utah 89, 63 P.2d 1056 (1937).

Water rights that were found to be appurtenant to land, and that were not reserved to mortgagor in mortgage or otherwise separately conveyed to another, were included in the mortgage and passed with the land on foreclosure. Thompson v. McKinney, 91 Utah 89, 63 P.2d 1056 (1937).

—By devises.

Where land devised was of little value without water rights, water rights passed to devisees as appurtenant to, and part of, the land. In re Johnson's Estate, 64 Utah 114, 228 P. 748 (1924).

Express reservation.

Declaration in deed stating that the conveyance included "a stock water right from the pipeline crossing the property" was not an express reservation of the rights to any flow of water not necessary to meet stock watering requirements; therefore, all water rights appurtenant to tract conveyed in the deed passed to grantee. Stephens v. Burton, 546 P.2d 240 (Utah 1976).

Measure of right reserved.

Where stockholders of a water company transferred their water rights to the city but reserved to themselves a specific number of gallons per day per acre, the number of acres then owned by them was the measure of the water right that they reserved. Salt Lake City v. McFarland, 1 Utah 2d 257, 265 P.2d 626 (1954).

Reservation of mineral rights.

Where owner of land conveyed it to defendant's predecessor in title, reserving minerals on or in land conveyed, and subsequently conveyed mineral rights to plaintiff, held, in action by plaintiff to quiet title to water containing copper, that such water was not mineral, and hence, defendant was entitled to remove copper from water. Stephen Hays Estate, Inc. v. Togliatti, 85 Utah 137, 38 P.2d 1066 (1934).

Rights of strangers.

Under former statute, held that, where deed included appurtenances to land, right to water passed to grantee, and that stranger to conveyance was not in position to dispute title to water right obtained under deed by grantee who, as to third persons, might exercise all of rights of absolute owner, without regard to whether, as between parties to deed, transaction was mortgage or conditional sale. Smith v. North Canyon Water Co., 16 Utah 194, 52 P. 283 (1898).

Waters appurtenant to land.

Perpetual right to take water from city's canal, in exchange for water rights in creek that had formerly been used for irrigation, was for benefit of irrigation of land, and would be in the nature of an appurtenance to the land. Cortella v. Salt Lake City, 93 Utah 236, 72 P.2d 630 (1937).

Water appurtenant to a tract of land is the amount that was beneficially used upon it before and at the time of the conveyance. Stephens v. Burton, 546 P.2d 240 (Utah 1976).

COLLATERAL REFERENCES


Key Numbers. — Waters and Water Courses = 154 to 156, 240.

73-1-12. Failure to record — Effect.

Every deed of a water right which shall not be recorded as provided in this title shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same water right, or any portion thereof, where his own deed shall be first duly recorded.

History: L. 1919, ch. 67, § 17; R.S. 1933 & C. 1943, 100-1-12.
73-1-13. Corporations — One water company may own stock in another.

Any irrigation or reservoir company incorporated and existing under the laws of this state may purchase or subscribe for the capital stock of any other similar corporation which at the time of such purchase or subscription shall be or is about to be incorporated; provided, that such purchase or subscription shall be made only when permitted by the articles of incorporation, and such corporations are hereby permitted and authorized to amend their articles of incorporation so as to authorize such purchase or subscription.


Cross-References. — Nonprofit Corporation and Co-operative Association Act, application to mutual irrigation, canal, ditch, reservoir, water companies and water users’ associations, § 16-6-20.

COLLATERAL REFERENCES


Key Numbers. — Waters and Water Courses ⇔ 232, 234.

73-1-14. Interfering with waterworks or with apportioning official — Penalty and liability.

Any person, who in any way unlawfully interferes with, injures, destroys or removes any dam, head gate, weir, casing, valve, cap or other appliance for the diversion, apportionment, measurement or regulation of water, or who interferes with any person authorized to apportion water while in the discharging of his duties, is guilty of a misdemeanor, and is also liable in damages to any person injured by such unlawful act.

History: L. 1919, ch. 67, § 18; R.S. 1933, 100-1-15; L. 1935, ch. 105, § 1; C. 1943, 100-1-15.

Cross-References. — Crimes relating to waters, § 76-10-201 et seq.

NOTES TO DECISIONS

Action for malicious destruction of dam.

An action under this section is governed by the general principles of the law of torts — in regard, for example, to the right to recover exemplary damages. Falkenberg v. Neff, 72 Utah 258, 269 P. 1008 (1928).

COLLATERAL REFERENCES

C.J.S. — 94 C.J.S. Waters § 368.

Key Numbers. — Waters and Water Courses ⇔ 266.
73-1-15. Obstructing canals or other watercourses — Penalties.

Whenever any person, partnership, company or corporation has a right of way of any established type or title for any canal or other watercourse it shall be unlawful for any person, persons or governmental agencies to place or maintain in place any obstruction, or change of the water flow by fence or otherwise, along or across or in such canal or watercourse, except as where said watercourse inflicts damage to private property, without first receiving written permission for the change and providing gates sufficient for the passage of the owner or owners of such canal or watercourse. That the vested rights in the established canals and watercourse shall be protected against all encroachments. That indemnifying agreements may be entered as may be just and proper by governmental agencies. Any person, partnership, company or corporation violating the provisions of this section is guilty of a misdemeanor and is subject to damages and costs.

History: L. 1919, ch. 67, § 19; R.S. 1933 & C. 1943, 100-1-16; L. 1965, ch. 156, § 1.

Cross-References. — Crimes relating to waters, § 76-10-201 et seq. Nuisances, § 76-10-801 et seq. Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

NOTES TO DECISIONS

Interference with irrigation ditch.
— Remedies. A company that sued an adjacent landowner for intentional interference with an irrigation ditch did not waive its claim by agreeing to the installation of a pipe to replace the ditch, since the adjacent landowner was doing nothing more than attempting to mitigate the harm he had caused. Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985).


Where any water users' association, irrigation company, canal company, ditch company, reservoir company, or other corporation of like character or purpose, organized under the laws of this state has entered into or proposes to enter into a contract with the United States for the payment by such association or company of the construction and other charges of a federal reclamation project constructed, under construction, or to be constructed within this state, and where funds for the payment of such charges are to be obtained from assessments levied upon the stock of such association or company, or where a lien is created or will be created against any of the land, property, canals, water rights or other assets of such association or company or against the land, property, canals, water rights or other assets of any stockholder of such association or company to secure the payment of construction or other charges of a reclamation project, the water users' association, irrigation company, canal company, ditch company, reservoir company or other corporation of like character or purpose may file in the district court of the county wherein is situated the office of such association or company a petition entitled "...... Water Users' Association" or "...... Company," as the case may be, "against the stockholders of said association or company and the owners and mortgagees of land within the ...... Federal Reclamation Project." No other or more
specific description of the defendants shall be required. In the petition it may be stated that the water users’ association, irrigation company, canal company, ditch company, reservoir company or other corporation of like character and purpose has entered into or proposes to enter into a contract with the United States, to be set out in full in said petition, with a prayer that the court find said contract to be valid, and a modification of any individual contracts between the United States and the stockholders of such association or company, or between the associations or company, and its stockholders, so far as such individual contracts are at variance with the contract or proposed contract between the association or company and the United States.

Thereupon a notice in the nature of a summons shall issue under the hand and seal of the clerk of said court, stating in brief outline the contents of said petition, and showing where a full copy of said contract or proposed contract may be examined, such notice to be directed to the said defendants under the same general designations, which shall be deemed sufficient to give the court jurisdiction of all matters involved and parties interested. Service shall be obtained (a) by publication of such notice once a week for three consecutive weeks (three times) in a newspaper published in each county where the irrigable land of such federal reclamation project is situated, and (b) by the posting at least three weeks prior to the date of the hearing on said petition of the notice and a complete copy of the said contract or proposed contract in the office of the plaintiff association or company, and at three other public places within the boundaries of such federal reclamation project. Any stockholder in the plaintiff association or company, or owner, or mortgagee of land within said federal reclamation project affected by the contract proposed to be made by such association or company, may demur to or answer said petition before the date set for such hearing or within such further time as may be allowed therefor by the court. The failure of any persons affected by the said contract to answer or demur shall be construed, so far as such persons are concerned as an acknowledgment of the validity of said contract and as a consent to the modification of said individual contracts if any with such association or company or with the United States, to the extent that such modification is required to cause the said individual contracts if any to conform to the terms of the contract or proposed contract between the plaintiff and the United States. All persons filing demurrers or answers shall be entered as defendants in said cause and their defense consolidated for hearing or trial. Upon hearing the court shall examine all matters and things in controversy and shall enter judgment and decree as the case warrants, showing how and to what extent, if any, the said individual contracts of the defendants or under which they claim are modified by the plaintiff’s contract or proposed contract with the United States. In reaching his conclusion in such causes, the court shall follow a liberal interpretation of the laws, and shall disregard informalities or omissions not affecting the substantial rights of the parties, unless it is affirmatively shown that such informalities or omissions led to a different result than would have been obtained otherwise. The Code of Civil Procedure shall govern matters of pleading and practice as nearly as may be. Costs may be assessed or apportioned among contesting parties in the discretion of the trial court. Review of the judgment of the district court by the Supreme Court may be had as in other civil causes.
73-1-17. Borrowing from federal government authorized.

That irrigation companies, drainage districts, and irrigation districts here­tofore organized under the laws of the state of Utah be and they are hereby authorized and empowered to borrow money from the Reconstruction Finance Corporation, organized pursuant to an Act of Congress of the United States, or from any other governmental loaning agency or agencies to aid them in re­funding or refinancing their obligations outstanding on the date of enactment by the Congress of the United States of the Emergency Relief and Construction Act of 1932 through the purchase and retirement of such obligations at a discount, or otherwise, if such obligations were issued in connection with irrigation and/or drainage projects of such companies and/or districts, respec­tively, which are self-liquidating in character, or where the loan can be repaid by the applicant for such loan by assessment on the issued and outstanding capital stock of the irrigation company, or by assessment on the land or lands within the exterior boundaries of the drainage district, or by assessments on the lands and/or water allotted to lands within the exterior boundaries of the irrigation district.

History: L. 1933, ch. 82, § 1; C. 1943, 100-1-19.
Compiler's Notes. — The Reconstruction Finance Corporation has been abolished and its functions transferred. See 5 U.S.C. App., Reorganization Plan No. 1 of 1957.

Collateral References

Am. Jur. 2d. — 45 Am. Jur. 2d Irrigation Key Numbers. — Waters and Water
§ 88 et seq. Courses ↔ 232.
73-1-19. **State, agency, county, city or town — Authority of — To procure stock of irrigation or pipeline company — To bring its land within conservation or conservancy district.**

The state of Utah, or any department, board or agency thereof, and any county, city, or town, owning or having control of land or improvements thereon which is in need of a supply of water for such land or the improvements thereon, or in need of facilities for conveyance of such water, is authorized to subscribe for or purchase corporate stock of irrigation companies, pipeline companies, or associations and take the necessary steps to bring the land owned or controlled by any of them within any conservation or conservancy district formed or to be formed under the laws of the state of Utah to procure such supply of water to all intents and purposes as if an individual.

73-1-20. **Repealed.**

Repeals. — Section 73-1-20 (L. 1973, ch. 189, § 1), relating to geothermal energy production, was repealed by Laws 1981, ch. 188, § 12. For present provisions regarding geothermal resources, see Chapter 22 of this title.

**CHAPTER 2**

**STATE ENGINEER — DIVISION OF WATER RIGHTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>73-2-1.1.</td>
<td>Division of Water Rights — Creation — Power and authority.</td>
</tr>
<tr>
<td>73-2-1.2.</td>
<td>Director of Division of Water Rights — Appointment of state engineer.</td>
</tr>
<tr>
<td>73-2-1.3.</td>
<td>Report to executive director of natural resources.</td>
</tr>
<tr>
<td>73-2-1.5.</td>
<td>Procedures — Adjudicative proceedings.</td>
</tr>
<tr>
<td>73-2-2.</td>
<td>Oath and bond.</td>
</tr>
</tbody>
</table>