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HOW GOOD IS AN OLD WATER RIGHT? THE APPLICATION OF STATUTORY FORFEITURE PROVISIONS TO PRE-CODE WATER RIGHTS

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I. INTRODUCTION

Old is good, at least for some things—wine, cheese (within limits), rare coins, and western water rights. In the West, where the doctrine of prior appropriation governs the allocation of water, water rights age well. A water right holder with a senior allocation date is entitled to cut off use by junior water right holders in times of shortage.[1] Since the arid western states experience water shortages not only during severe cyclical droughts, but often on an annual basis, a senior water right with an early priority date is among the most valuable of western property rights.[2]

In order to protect their valuable priorities, senior water users do have certain responsibilities, however. A central tenet of the prior appropriation system is "use it or lose it."[3] Since water is scarce and subject to many competing demands, water users are expected to make continuous productive use of their water or risk losing it.

All of the seventeen western states have codified their water laws in statute.[4] Nearly all of the states implement the "use it or lose it" requirement in a statutory forfeiture provision.[5] Under pre-code water law, one could only lose a vested water right by common law abandonment, which required finding both relinquishment of the water and intent to give it up.[6] In contrast, the water codes incorporated strict statutory forfeiture provisions under which non-use of the water for some specified—and usually short—period of time would result in the loss of the water right, without regard to intent.[7] The water codes intended statutory forfeiture to be quick, clean, and predictable.

Ironically, some water rights holders have questioned whether pre-code rights, the very rights that water codes were designed to clarify,

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1. *See, e.g.*, Robert E. Beck, *Prevalence and Definition, in* 2 WATERS AND WATER RIGHTS § 12.03(e) (Robert E. Beck ed., 1991 ed. Supp. 1999).

2. ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 209 (1983); B. Delworth Gardner, *Water Pricing and Rent Seeking in California Agriculture, in* WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT 83, 84 (Terry L. Anderson ed., 1983).

3. *See generally* C. Peter Goplerud III, *Protection and Termination of the Water Right, in* 2 WATERS AND WATER RIGHTS, *supra* note 1, § 17.03; Charles B. Roe, Jr. & William J. Brooks, *Loss of Water Rights – Old Ways and New*, 35 ROCKY MTN. MIN. L. INST. § 23.01, at 23-3 (1989); Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 919 (1998).

4. *See generally* C. Peter Goplerud III, *The Permit Process and Colorado's Exception, in* 2 WATERS AND WATER RIGHTS, *supra* note 1, § 14.01; *infra* note 33.

5. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:88 (2000); *see* Goplerud, *supra* note 3, § 17.03(b).

6. TARLOCK, *supra* note 5, § 5:87; *see* Goplerud, *supra* note 3, § 17.03(a).

7. TARLOCK, *supra* note 5, § 5:88; *see* Goplerud, *supra* note 3, § 17.03(b). Colorado, Hawaii, and Montana do not have forfeiture statutes and continue to use common law abandonment for loss of water rights. Nevada recently repealed its forfeiture statute. *See infra* notes 74 & 81 and accompanying text. Both Colorado and Montana have statutes that set up a presumption of abandonment from ten years of non-use. COLO. REV. STAT. § 37-92-402(11) (2000); MONT. CODE ANN. § 85-2-404(2) (1999).

should be fully governed by the water codes. In particular, can the codes modify vested rights by providing a new means of loss of that right, without running afoul of legal challenges? The argument is that a right that one can lose only by abandonment, including examination of the user's intent, is more secure and thus more valuable than a right that one can lose simply by non-use. Many western water rights are old enough to pre-date the various states' comprehensive water laws, and thus whether or not these rights are subject to statutory forfeiture is an important question. The purpose of this article is to compare the various approaches to applying statutory forfeiture to pre-code rights, and to suggest the better approach to those states that have not yet squarely faced the issue.

Part II discusses the extent and importance of pre-code water rights, and the potential significance of enforcing forfeiture provisions against unused rights. Part III explains how the statutes changed the pre-code law and describes the current treatment of forfeiture in various western water codes. Part IV compares and evaluates the approaches of those states that have addressed the application of statutory forfeiture provisions to pre-code water rights. Part V concludes that applying statutory forfeiture equally to pre- and post-code rights is the better reasoned approach.

II. THE SIGNIFICANCE OF PRE-CODE WATER RIGHTS

Why does it matter if states hold pre-code water rights to a different standard regarding loss by non-use than later acquired rights? The manner of loss matters because pre-code rights are significant and extensive in many states. Western states adopted the earliest water codes at the very end of the 1800s, but many of these states did not comprehensively codify their water laws until well into the 20th century.[8] By that time, appropriators had acquired rights to use water in many areas over several decades. Many streams of the West were already fully appropriated before the states were even admitted to the union, much less before they had adopted comprehensive water codes.

For example, in Colorado, miners and settlers began appropriating water in the Lower Arkansas River Valley in the 1850s and 60s.[9] By 1883, the river's summertime flows were fully appropriated.[10] In fact, the latest water right that reliably receives Arkansas River water in the summer has a priority date of 1874.[11] Colorado became a territory in

8. *See infra* note 36.

9. LAWRENCE J. MACDONNELL, FROM RECLAMATION TO SUSTAINABILITY: WATER, AGRICULTURE, AND THE ENVIRONMENT IN THE AMERICAN WEST 18–19 (1999). In fact, appropriations from the Arkansas River by settlers dated from as early as 1832 and 1847, but these early settlements were not successful and the diversions were thus not continuous, but re-initiated some years later. JAMES N. CORBRIDGE, JR. & TERESA A. RICE, VRANESH'S COLORADO WATER LAW 4 (revised ed. 1999).

10. MACDONNELL, *supra* note 9, at 26.

11. *Id.*

1861, but did not become a state until 1876 and adopted its first water code in 1881.[12]

Colorado is not unique in the importance and extent of pre-code water rights. In California, important water law history emerged from water disputes in the Kern River valley with James Ben–Ali Haggin on one side and Henry Miller and Charles Lux on the other.[13] Years before the state's comprehensive water code of 1914, these early entrepreneurs amassed huge landholdings and associated water rights claims amounting to millions of acres during the 1870s.[14]

Congress adopted the Reclamation Act in 1902 to foster irrigation in the western states. Several reclamation projects began soon after that, resulting in extensive appropriative irrigation rights that predate many of the applicable water codes. The Newlands Project in Nevada began in 1904 as the first reclamation project in the country.[15] The project resulted in the irrigation of over 70,000 acres. The Newlands Project has been the subject of both state and federal court actions for many years, attempting to sort out all of the claims to water from both the Truckee and Carson Rivers that reach back to 1902 and even earlier, well before Nevada's 1913 water code.[16]

The Klamath Project in southern Oregon began in 1905.[17] Oregon adopted its water code in 1909. A general stream adjudication is currently underway in the Klamath Basin to adjudicate pre-code rights, involving some 25,000 claimants, some of whose claims date back before the reclamation project to as early as the 1840s.[18] Major adjudications are also underway in Idaho, Washington, Montana, Wyoming, Arizona, and New Mexico.[19] In all of these adjudications, the declaration and quantification of extensive pre-code rights will affect significant amounts of water.[20]

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12. *Id.* at 19; CORBRIDGE & RICE, *supra* note 9, at 7, 19.

13. *See* discussion of the legendary *Lux v. Haggin* litigation in JOSEPH L. SAX, ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 295–301 (3d ed. 2000).

14. *Id.* at 295. Although California adopted irrigation statutes in 1872, a truly comprehensive codification was still more than three decades in the future. *See* 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 290 (1971).

15. JOHN M. TOWNLEY, TURN THIS WATER INTO GOLD: THE STORY OF THE NEWLANDS PROJECT 54 (Nev. Historical Society 1977); DEP'T OF CONSERVATION AND NAT. RES., DIV. OF WATER PLANNING, TRUCKEE RIVER CHRONOLOGY: A CHRONOLOGICAL HISTORY OF THE TRUCKEE RIVER AND RELATED WATER ISSUES 24, 26 (1995).

16. The Newlands Project irrigation rights date from 1902. Some area irrigators, however, also claimed earlier appropriation dates, and the Pyramid Lake Paiutes claimed rights predating settlement and irrigation, with a priority date of 1859. DEP'T OF CONSERVATION AND NAT. RES., *supra* note 15, at 13–14, 19, 27.

17. Sue McClurg, *The Klamath River Basin: A Microcosm of Water in the West, in* WESTERN WATER, at 4, 7 (2000).

18. United States v. Oregon, 44 F.3d 758, 762 (9th Cir. 1994); *see also* McClurg, *supra* note 17, at 15. *See generally* Peter G. Scott, *State Certification of Inchoate Water Rights on the Upper Lost River: A Prelude to the Klamath Adjudication*, 13 J. ENVTL. L. & LITIG. 475 (1998).

19. *See* Colloquy, *Dividing the Waters: A Century of Adjudicating Western Rivers and Streams* (Oct. 1997) (unpublished presentation, Big Sky, Mont.) (on file with author).

20. *See id.*

Since pre-code rights lay claim to significant quantities of water, whether or not those rights are subject to statutory forfeiture has important consequences. If water rights holders can lose pre-code rights only by abandonment, but can lose post-code rights by forfeiture, post-code rights become second-class water rights. Further, retaining common law abandonment for large blocks of water rights hinders state water allocation agencies in achieving comprehensive water management because there is no definite point at which unused water becomes available for re-appropriation. Finally, even if water managers try to clean up the books by seeking out unused water rights for cancellation, it is a much more difficult, and thus likely more expensive, job to prove abandonment than forfeiture.[21]

Admittedly, most western water resource agencies are not queuing up to seek out and declare forfeitures of unused water rights.[22] Although Colorado seems to have a systematic approach[23] to getting unused water rights off the books, other states usually confront and resolve claims of forfeiture or abandonment only when pressed to do so by competing water rights claimants, such as in an application for transfer of water rights when the amount proposed to be transferred is challenged.[24] However, as western states seek additional water supplies to meet growing demands, cleaning up "paper water rights" that have in fact been forfeited is one area needing attention.[25] Thus, state attention to forfeiture will likely increase during the next decade.

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21. Goplerud, *supra* note 4, at 436.

22. See Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881, 890 (1998) (detailing northwest states' avoidance of strict enforcement of water rights' terms, including forfeiture); Krista Koehl, *Partial Forfeiture of Water Rights: Oregon Compromises Traditional Principles to Achieve Flexibility*, 28 ENVTL. L. 1137, 1146 (1998) (discussing how Oregon agency does not seek out forfeitures; more generally, recent Oregon statutory change "backtracks" on partial forfeiture, allowing water users to reduce water use without forfeiture as long as they are "ready, willing and able" to use full amount of paper right).

23. In Colorado, water division engineers publish a "decennial" list every ten years that lists water rights believed to have been abandoned in the past ten years. The record owners of the water rights are notified, and must file protests detailing factual and legal arguments that show why they should be removed from the list. The water court then tries the matter, and enters a decree either confirming abandonment of the rights or recognizing the continuing validity of the water rights. Thus, Colorado subjects its water rights to a regular periodic process of review for abandonment. COLO. REV. STAT. §§ 37-92-401 to -602 (2000). However, Colorado law retains common law abandonment rather than applying strict forfeiture. Thus, although Colorado maintains a systematic listing of water rights presumed to have been abandoned, the state must still have a full trial to show both non-use *and* intent to abandon. *See, e.g.*, Haystack Ranch, L.L.C. v. Fazzio, 997 P.2d 548, 551 (Colo. 2000) (detailing efforts to prove abandonment from non-use of two water rights for twenty-two years and fifty-four years, respectively).

24. *See* Neuman, *supra* note 3, at 960.

25. *Cf.* WESTERN WATER POL'Y REVIEW ADVISORY COMM'N, WATER IN THE WEST: THE CHALLENGE FOR THE NEXT CENTURY 5-20 (1998) (discussing future directions states should examine with respect to water rights); *see also* Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54–55 (Colo. 1999).

III. WATER CODES: CHANGES TO PRE-CODE LAW AND CODIFICATION OF FORFEITURE

The adoption of the prior appropriation doctrine and the eventual codification of the doctrine in water codes in the western states were both inventions born of necessity. The prior appropriation doctrine began as custom and practice in western mining camps. The miners followed a rule of "first in time, first in right," when it came to recognizing priorities in mining claims. As "the days of the pan and shovel gave way to ditches and sluiceboxes," the miners applied the same rules to resolve disputes over water as they had to the land.[26] In using a priority system of allocation, early miners and settlers adapted to two immutable facts that made the common law riparian doctrine followed in the eastern states unworkable for the western states: aridity and the vast public domain.[27] The relative lack of precipitation pulled the rug out from under the riparian doctrine, which depended on a relatively abundant resource that could be divided among all users in reasonable shares. The fact that the miners and other settlers were initially trespassers on huge expanses of federal land meant that there were few true riparian owners who could claim riparian rights, even if they could find a stream on which to locate. Thus, the realities of the West necessitated a different system of water allocation.

However, adopting prior appropriation as the allocating principle was only the beginning of clarifying water-use rights. As long as water rights were simply acquired by diverting and using the water, with only minimal requirements for recording the claims, uncertainty continued to plague water use.[28] Water rights claims, if recorded at all, were scattered among various county offices, with no central repository of claims.[29] Filing a notice did not necessarily mean that the diversion had been completed and still existed.[30] Nothing prevented water users from grossly overstating their claim.[31] Many streams quickly became overappropriated, either on paper or in reality, and no legal mechanisms existed to sort out valid claims and decree priorities except expensive, and not entirely effective, private adjudications among disputing parties.[32]

Some water users and western legislators began to recognize the need for legislation to assert a measure of state control over water

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26. DUNBAR, *supra* note 2, at 61.

27. *See* TIMOTHY D. TREGARTHEN, *Water in Colorado: Fear and Loathing in the Marketplace, in* WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT, *supra* note 2, at 119, 122–23. *See generally* TARLOCK, *supra* note 5, § 5:4; 1 CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS §§ 585–598, (2d ed. 1912); HUTCHINS, *supra* note 14, at 158–59, 166.

28. DUNBAR, *supra* note 2, at 86; Goplerud, *supra* note 4.

29. DUNBAR, *supra* note 2, at 86–87; HUTCHINS, *supra* note 14, at 293.

30. HUTCHINS, *supra* note 14, at 294–95; DUNBAR, *supra* note 2, at 87.

31. HUTCHINS, *supra* note 14, at 294–95 (the aggregate of all claims in California represents enough moisture to submerge the continent) (citation omitted); DUNBAR, *supra* note 2, at 98–99, 106.

32. *See* DUNBAR, *supra* note 2, at 101–02, 127; HUTCHINS, *supra* note 14, at 294–98.

resources and to regularize the acquisition, quantification, and retention of water rights by private parties.[33] The first state to adopt a comprehensive water code was Wyoming in 1890. The "essence" of the Wyoming system was "the subordination of the appropriator to the welfare of the state."[34] Key provisions of the Wyoming laws were a declaration of state ownership over all waters of the state, a permit system as the exclusive means of acquiring a water right, a requirement to determine water availability and to consider the public interest in granting new water rights, and an adjudication process to sort out and decree competing water rights and priorities.[35]

Over the next few decades, the codification of water laws in other western states followed Wyoming's code.[36] Some of the states copied Wyoming's code, drafted by Elwood Mead; others used a version drafted originally for Washington by Morris Bien; and still other states combined and adapted various provisions to suit their own preferences.[37] Nevertheless, common themes were present, such as clarifying the process for acquiring water rights, and confirming what valid rights were in fact outstanding and what water was available for future appropriation.[38]

Thus, most of the water codes followed a similar model. The state declared public ownership over the water, adopted prior appropriation as the governing principle of water-use rights, required permission from a state agency or official in order to initiate a water right from that time forward, established beneficial use as the basis, measure, and limit of the right, provided that non-use for a period of time would constitute forfeiture, and established some system of adjudication to test and determine the validity, priority, and amount of all water right claims to a particular source.[39]

Shortly after the adoption of the Oregon water code in 1909, the Oregon State Engineer proclaimed, albeit a bit dramatically, the

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33. In fact, the federal government also encouraged the codification of western water practices and customs by refusing to build reclamation projects in a state until it had a mechanism to sort out the validity of its water rights claims. Frederick Newell, the first chief engineer of the Reclamation Service, observed that "[t]he laws of many of the States and Territories relating to water are in a more or less chaotic condition." DUNBAR, *supra* note 2, at 115–16. Since this prevented the Reclamation Service from determining the amount of unappropriated water available for federal projects, the Service made eventual reformation of the laws a condition of project approval. *Id.*

34. DUNBAR, *supra* note 2, at 109.

35. *Id.* at 109–10.

36. Wyoming enacted its comprehensive water laws in 1890. Robert E. Beck, *Introduction and Background, in* 2 WATERS AND WATER RIGHTS, *supra* note 1, § 11.03(b)(3) n.67. The Wyoming code served as a blueprint for other states, with some variations: Arizona (1919), California (1914), Idaho (1903), Kansas (1917), Nebraska (1895), Nevada (1905), New Mexico (1905), North Dakota (1905), Oklahoma (1905), Oregon (1909), South Dakota (1905), Texas (1913), Utah (1903), Washington (1917). *Id.*

37. *See generally* DUNBAR, *supra* note 2, ch. 10 (discussing diffusion of the Wyoming system through the western states).

38. *Id.*

39. *Id.*; *see also* HUTCHINS, *supra* note 14, at 298–306.

emergence of a new era of water allocation:

> Under the old law, no foundation existed for titles to water. Utter confusion prevailed as to the legal status of a water right. Litigation among water users grew to such an extent as to prove a serious burden upon irrigated agriculture. Dams and flumes were destroyed and lives threatened in community quarrels to secure a proper division of streams. Under such conditions capital declined to invest, and home-seekers went to other states where the purchase of a water right did not mean the purchase of a lawsuit. To remedy these conditions, a complete code of law was enacted which became effective February 24, 1909.
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> Its enactment is of as great importance to Oregon as was the making of the "Doomsday Book" in 1085, by William the Conqueror, which was the first attempt in England to systematize land titles.[40]

The Wyoming Supreme Court provided a similar version of the story:

> [T]he cultivation and even the occupation of the lands within the territory had been attended with the expenditure of much capital and labor, and the very existence of the homes of a large class of citizens, as well as the productiveness of the soil, depended upon the security to be afforded the appropriations of water which had been made; and in view of the many rights already accrued, and the inception of new ones which would necessarily accompany the continued growth of the territory, the welfare of the entire people became deeply concerned in a wise, economical, and orderly regulation of the use of the waters of the public streams. It was realized that more adequate laws were demanded, to duly protect this important industrial interest, give stability to its values, assist in a desirable conservation of the waters, and avoid confusion and difficulty in their distribution.[41]

The codification of water laws had two primary and complementary purposes: (1) formal recognition and adoption of the customary practices that formed the evolving prior appropriation doctrine throughout the West; and (2) elimination of the unavoidable

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40. Third Biennial Report of the State Engineer to the Governor of Oregon for a period beginning December 1, 1908, and ending November 30, 1910, *quoted in* RICK BASTASCH, WATERS OF OREGON 44 (1998).

41. Farm Inv. Co. v. Carpenter, 61 P. 258, 260 (Wyo. 1900).

uncertainties and chaos resulting from allowing important property rights to be gained by custom rather than by clearly stated positive law.[42] Both of these purposes served the larger goal of enhancing the stability and security of western water rights, and aiding investment in land and generally promoting western economic development.

The codes ratified the pre-code customs in several ways. For example, "first in time, first in right," remains the main theme. And, the codes still require that an appropriator obtain water rights by beneficial use of water and diligence in completing and maintaining appropriations. But, the codes also altered pre-code practice in several important respects. Rather than merely posting notice near the intended diversion point and then taking the water, the appropriator must file for a permit with the state agency.[43] The state agency can deny or limit permits in the public interest or, in most states, because the stream is over-appropriated.[44] Thus, one can no longer simply divert water and have a legitimate appropriation. Finally, many states introduced statutes that could forfeit water rights for non-use.[45]

By replacing a custom-based set of practices with strict statutory provisions, including permit requirements, elimination of loosely-defined riparian rights, and short statutory forfeiture periods, the western states chose "crystals" over "mud."[46] Choosing crystalline rules for managing water in the West reflected the notion that "the more important a given kind of thing becomes for us, the more likely we are to have these hard-edged rules to manage it."[47] Western water was simply too scarce and too valuable to be allocated according to muddy legal doctrines like the "reasonableness" of the riparian system or the subjective intent associated with common law abandonment.

Of course, every way in which the water codes altered the pre-code custom and practice had the potential to threaten vested pre-code rights (assuming that the codes would be applied to those rights) or to create two different classes of water rights (if the codes were only to apply to post-code rights). However, the courts have upheld the codes in nearly every instance where the codes have been challenged for their effect on pre-code rights.

For example, in Oregon, as in many other states, water users challenged provisions in the early water code eliminating unexercised riparian rights. The state clearly recognized both riparian and appropriative rights before the 1909 code adopted prior appropriation as the exclusive method of obtaining a water right from that date

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42. *See* 1 HUTCHINS, *supra* note 14, at 293.

43. *See* Goplerud, *supra* note 4, at 170.

44. *Id.* at 175.

45. SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 576 (3 ed. 1911).

46. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (discussing how when resources are relatively abundant, muddy legal rules of allocation (such as the riparian doctrine's reasonable share of water) will suffice; but when resources are scarce, such as water in the arid west, more rigid, crystalline rules tend to replace the muddy rules).

47. *Id.* at 577.

forward.[48] In a 1914 case, the Oregon Supreme Court upheld the five-year-old code against several constitutional challenges, including a claim that its elimination of riparian rights not yet put to use was an unconstitutional taking.[49] The court noted the savings clause contained in the code, which declared that "nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association, to any water."[50] The court further emphasized that riparians had a valid and valuable property right that had arisen under previously prevailing laws.[51] However, the court also recognized that, like all property, riparian rights are subject to reasonable regulation.[52] The court then found that it was not an unconstitutional taking to limit the rights of riparians to water actually applied to beneficial use.[53]

Ten years later, the Oregon Supreme Court entertained another challenge to the limitation of riparian rights by the water code.[54] The court emphasized the authority of a state to change the common law over time and suit it to the state's particular conditions. The court quoted the Arizona Supreme Court with approval: "riparian rights . . . cannot be said to be vested in such a sense as that they may not be subsequently abrogated by statute, at any rate when the riparian owner has made no use of the water permitted him at common law."[55]

The court also gleaned support for the state's authority from a decision of the United States Supreme Court: "it is undoubtedly true that a state may change its common-law rule as to every stream within its dominion, and permit the appropriation of the flowing water for such purposes as it deems wise."[56] The court did not sugar coat the fact that the water code effected a material change in the common law previously governing riparian rights. Rather, the court declared that as long as actual water use was protected and preserved, the code did not impair anyone's actual water rights:

> The recognition by law of the right of an appropriation is of necessity an infringement or curtailment of the common-law rule as to a riparian owner. . . . When the state of Oregon recognized the right of appropriation of the waters of the streams of the state, the old riparian doctrine of "continuous flow" was materially changed.

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48. CHAPIN D. CLARK, WATER RESOURCES RES. INST., SURVEY OF OREGON'S WATER LAWS 93–95, 122 (1983).

49. *In re* Willow Creek, 144 P. 505 (Or. 1914).

50. *Id.* at 510.

51. *Id.* at 515–16.

52. *Id.* at 517.

53. *Id.*

54. *In re* Hood River, 227 P. 1065 (Or. 1924).

55. *Id.* at 1083 (quoting Boquillas Land & Cattle Co. v. Curtis, 89 P. 504, 507 (Ariz. 1907)).

56. *Id.* at 1084 (citing United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702 (1899)).

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> . . . [I]t is plain that the common-law rule . . . or riparian doctrine, may be changed by statute, except as such change may affect some vested right. . . .
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> No one has any property in the water itself, but a simple usufruct. It was within the province of the Legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor.[57]

Thus, Oregon courts found that it was acceptable and constitutional to codify the prior appropriation doctrine and limit riparian rights to those already being exercised at the time of the code's adoption. Other states mirrored Oregon's reasoning.[58] For example, the Washington Supreme Court, in the case of *Deadman Creek Drainage Basin v. Abbott,* held that the forfeiture of unexercised riparian rights under the 1917 water code was not an unconstitutional taking.[59] Stating "[t]here is no indication that rights which vested before the water code were to be excluded from general water rights adjudications or otherwise treated differently,"[60] the Washington Supreme Court adopted a pragmatic stance on water use. As the court noted, the "steady and gradual evolution" of water law favored the constitutionality of imposing state regulatory powers on water use.[61]

The challenges mounted against the early water codes on behalf of riparian rights holders were some of the most significant. However, courts also upheld other provisions of the codes against challenges. For instance, the provisions of the Oregon code requiring water users to "take measures for the ascertainment, certifying, and recording of their water rights" were initially attacked as "arbitrary, unreasonable, [and] unduly burdensome" as applied to existing users and therefore a violation of due process.[62] The Oregon Supreme Court found instead

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57. *Id.* at 1086–87.

58. California and Oklahoma were the only two states where the courts balked at statutory termination of riparian rights. *See* Waters of Long Valley Creek Stream Sys. v. Ramelli, 599 P.2d 656 (Cal. 1979); Franco–American Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568 (Okla. 1990).

59. Deadman Creek Drainage Basin v. Abbott, 694 P.2d 1071, 1077 (Wash. 1985) (en banc). The court found that fifteen years after the code's adoption was a reasonable period of time for riparians to exercise their rights or lose them. *Id.* at 1076.

60. *Id.* at 1075.

61. *Id.* at 1077; *see also* Boquillas Land & Cattle Co. v. Curtis, 89 P. 504 (Ariz. 1907), *aff'd,* 213 U.S. 339 (1909) (upholding statutory termination of unused riparian rights).

62. *In re* Willow Creek, 144 P. 505, 514 (Or. 1914).

that such requirements were not only allowable, but "salutary and in the interest of an orderly regulation of the use of water."[63]

Thus, with few exceptions, state courts ratified significant changes wrought by the water codes, even to the extent of eliminating riparian rights that an owner had not yet put to beneficial use. Yet, when it came to applying statutory forfeiture provisions to pre-code rights, seemingly a less significant change, the states split into two approaches. Nevada courts held that it would not apply statutory forfeiture to pre-code rights, and those rights would continue to be divested only by common law abandonment. Arizona tried to accomplish the same end by statute. Another group of states, including Nebraska, Washington, Texas, California, Oregon, Idaho, New Mexico, and South Dakota, have allowed statutory forfeiture to divest both pre- and post-code rights. The next section discusses each of these approaches.

IV. THE APPLICATION OF STATUTORY FORFEITURE TO PRE-CODE RIGHTS

A. STATES TREATING PRE-CODE RIGHTS DIFFERENTLY

1. Nevada

Nevada adopted its water code in 1913. Section 8 of the water code stated:

> [A]nd in case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for beneficial purposes for which right exists during any five successive years, the right to use shall be considered as having been abandoned, and they shall forfeit all water rights, easements and privileges appurtenant thereto, and the water formerly appropriated by them may be again appropriated for beneficial use, the same as if such ditch, canal or reservoir had never been constructed.[64]

In 1877, Joseph Yount began diverting waters from Manse Spring in Nye County, Nevada, for domestic purposes and for irrigation of 300 acres. This use continued until 1929, when Jean Cazaurang, Yount's successor in interest, died. During the next seven years, a caretaker hired by Cazaurang's estate used only a small amount of water on the land. In 1937, at the request of the parties who succeeded to the Cazaurang estate's interest, the state engineer began an adjudication of the rights to use the waters of Manse Spring. The trial court awarded a water right to Cazaurang's successors in spite of

63. *Id.*

64. 1913 NEV. STAT. 140, § 8, *amended by* 1917 NEV. STAT. 190, § 1.

the seven years of non-use, and another party to the adjudication appealed. The appellant argued that the Yount/Cazaurang property's water right had been lost under the five-year statutory forfeiture period.[65]

The Nevada Supreme Court refused to apply the statutory forfeiture provision to divest the appellee's water rights, because those rights had vested before adoption of the statute in 1913.[66] The Court began its analysis with the water code's "savings clause," which provided:

> Nothing in this act contained shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated in accordance with law prior to the approval of this act.[67]

The Court then posed the question: "Can a right be impaired by providing a different method for its loss than had theretofore existed?"[68] Before the code's adoption, an appropriator could lose a water right by abandonment, in which "the intent of the water user is controlling."[69] Under statutory forfeiture, the water right could be lost by five years of non-use, "irrespective of the intent," and the Court found that to be "a much stricter and more absolute procedure than loss by abandonment" that "certainly takes away much of the stability and security of the right to the continued use of such water."[70] On that basis, the court concluded that the change in method of loss of rights constituted an impairment of the early-acquired water right.[71]

In 1992, the Ninth Circuit Court of Appeals revisited the *Manse Spring* holding in *United States v. Alpine Land & Reservoir Co.*[72] Although not discussed in detail, the court confirmed the distinction formulated in *Manse Spring*. The Ninth Circuit seemed to agree that "a water right that can be lost through mere non-use is something less than a water right that may be lost only through intentional abandonment."[73] Thus, Nevada law took a stand squarely in the camp of giving pre-code rights

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65. *In re* Manse Spring, 108 P.2d 311, 314 (Nev. 1940).
66. *Id.* at 316.
67. *Id.* at 315–16 (citation omitted).
68. *Id.* at 316.
69. *Id.*
70. *Id.*
71. *In re* Manse Spring, 108 P.2d 311, 316 (Nev. 1940).
72. United States v. Alpine Land & Reservoir Co., 983 F.2d 1487 (9th Cir. 1992).
73. *Id.* at 1496. The *Alpine* court reviewed a slightly different savings provision than the *Manse* court: "Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913." NEV. REV. STAT. § 533.085(1) (1999).

special protection against loss by non-use.[74]

2. Arizona

The only other state to attempt explicitly to exempt pre-code water rights from divestiture by forfeiture is Arizona. Arizona's comprehensive water code was originally enacted in 1919.[75] The Code included a five-year forfeiture provision,[76] and also included a provision protecting pre-existing rights from impairment.[77] In 1995, the Arizona legislature amended the water code to declare that pre-code rights would *not* be subject to forfeiture proceedings.[78] Thus, Arizona's choice of how to treat pre-code rights became a matter of statute. However, the statutory resolution was short-lived, as the Arizona Supreme Court declared the provision unconstitutional in 1999.[79]

The Arizona court's discussion of the legislature's attempt to exempt pre-code rights from forfeiture is illuminating. The court said:

> It is true that even vested rights may be regulated. . . . The Legislature may certainly enact laws that apply to rights vested before the date of the statute. Such laws, however, may only change the legal consequences of *future* events. . . . The Legislature may not, however, change the legal consequence of events completed before the statute's enactment. For example, the Legislature cannot revive rights that have been lost or terminated under the law as it existed at the time of an event and that have vested in otherwise junior appropriators.[80]

This discussion contains three important points. First, the court makes what should be an obvious point—that a vested property right,

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74. In fact, as of the 1999 legislature session, Nevada may have decided that common law abandonment will apply to all water rights, since the five-year forfeiture statute has been repealed. The repeal was part of a larger legislative package of changes to the water statutes, and the legislative history does not illuminate the reason for this particular change. *See* Editor's Notes to NEV. REV. STAT. § 533.060 (2000).

75. *See* 1919 Ariz. Sess. Laws ch. 164 (current version at ARIZ. REV. STAT. § 45-101 to -400 (1999)).

76. *See* ARIZ. REV. STAT. § 45-141(C) (1999) (original version at 1919 Ariz. Sess. Laws ch. 164).

77. ARIZ. REV. STAT. § 45-171 (1999). The version of this provision adopted in 1919 read: "Nothing in this act contained, shall impair the vested rights of any person, association or corporation to the use of water." 1919 Ariz. Sess. Laws ch. 164, § 56.

78. ARIZ. REV. STAT. § 45-141(C) (1999) ("This subsection or any other statutory forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919").

79. San Carlos Apache Tribe v. Super. Ct., 972 P.2d 179, 201 (Ariz. 1999). For a discussion of this case, *see generally* Sean E. O'Day, *SAN CARLOS APACHE TRIBE V. SUPERIOR COURT*: REJECTING LEGISLATIVE FAVORITISM IN WATER RIGHT ALLOCATIONS, 4 U. DENV. WATER L. REV. 29 (2000).

80. *San Carlos Apache Tribe*, 972 P.2d at 189 (emphasis in original) (citations omitted).

just because it is vested, is not free of future regulation by the state. A contrary rule would prevent the state from properly and fairly exercising its police power.

Second, state regulation of vested rights is permissible when the regulation deals with legal consequences of future events. Conversely, the state might impair vested rights if the state tried to reach back to past events and attach new and different legal consequences to those events than existed at the time the events occurred.

Third, the court noted that the specific problem with the legislature's attempt to save pre-code rights from forfeiture was that doing so might interfere with someone else's vested water rights. If certain pre-code rights had in fact been lost due to non-use, and other appropriators had since acquired valid rights to use that water, then to revive the forfeited right by legislative decree would be to unlawfully divest the juniors of vested rights.[81]

With the rejection of Arizona's statutory exemption by its highest court, Nevada stands alone as the only state that has explicitly and successfully exempted pre-code water rights from the application of statutory forfeiture provisions. Of course, not all states have necessarily confronted the question directly, or even if they have, the reported opinions may not reflect the issue. Of the other states that have some record of taking up the issue, nine have treated pre-code rights the same as post-code permitted rights for forfeiture purposes. The remainder of this section describes those states' approach, followed by an evaluation of the various treatments.

B. STATES APPLYING FORFEITURE PROVISIONS EQUALLY TO PRE- AND POST- CODE RIGHTS

1. Nebraska

Nebraska began comprehensive water regulation with the Irrigation Law of 1895, and by at least 1919, the code included a three-year forfeiture provision.[82] In the 1951 case of *In re Birdwood Irrigation District*, the Nebraska court held that pre-code rights were susceptible to divestiture by forfeiture.[83] The right at issue in *Birdwood* had been adjudicated in 1898, and given an 1893 priority date, two years before the code's adoption.[84] The court's holding rested on traditional

81. From 1919 to 1995, the Arizona statute contained a forfeiture provision, with no reference to the date a right was initiated. Over the years, significant debate occurred concerning whether the forfeiture statute applied to pre-code rights, but a court had never addressed the question. LEGISLATIVE HISTORY OF HOUSE BILL 2276, 1st Sess., at 2 (Ariz. 1995). If Nevada's recent repeal of its forfeiture law is applied retroactively (to eliminate the effect of the five-year forfeiture period even during the time it was on the books), the law will raise the same question of unconstitutionality as the Arizona law. *See supra* note 74.

82. DUNBAR, *supra* note 2, at 111; NEB. REV. STAT. § 46-229 (1998).

83. *In re* Birdwood Irrigation Dist., 46 N.W.2d 884, 888 (Neb. 1951).

84. *Id.* at 887.

principles of prior appropriation and beneficial use: "It is the policy of the law in all the arid states to compel an economical use of the waters of natural streams."[85] To achieve economy in water use, "[t]he policy of the law is to require a continued beneficial use of appropriated waters to avert their loss under the nonuser provisions of the irrigation statutes."[86] The court noted specifically that when the right was adjudicated it was clearly the law that ceasing to use water beneficially could result in loss of the right.[87] Further, the court noted that a 1914 Nebraska case had specifically upheld the constitutionality of the forfeiture statute, even though it applied to both past and future appropriations.[88] Finally, the court noted that its decision "in no manner changes a substantive right," but "merely sustains the procedural remedy provided by the Legislature for enforcing a condition inherently in the appropriation to the effect that the rights attained thereby could be lost by nonuser."[89]

Thirty years later, in 1981, several water rights holders asked the Nebraska Supreme Court to overrule *Birdwood*, but the court declined to do so and affirmed the application of the forfeiture provision to pre-1895 water rights.[90] In addition to restating the policy upholding *Birdwood* (compelling an economical use of water), the court emphasized that the state's police power and constitutional provisions concerning water regulation gave the state ample authority for subsequent adoption of reasonable regulations. The court stated that "[t]o exempt from such control water rights acquired prior to the date of the act created for the specific purpose of preventing waste would be to ignore the mandate of our Constitution and make ineffective the very end sought to be obtained."[91]

2. Washington

The State of Washington enacted its comprehensive water code in 1917.[92] Like Nevada and most other states, Washington statutes recognized and affirmed existing vested rights: "Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise."[93]

Washington law addresses the issue of forfeiture of pre-code rights directly, with the following statutory language:

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85. *Id.*
86. *Id.* at 888.
87. *Id.* at 887–88.
88. *Id.* at 888 (citing Kersenbrock v. Boyes, 145 N.W. 837 (Neb. 1914)).
89. *In re* Birdwood Irrigation Dist., 46 N.W.2d 884, 889 (Neb. 1951).
90. *In re* Water Appropriation No. 442A, 313 N.W.2d 271, 274 (Neb. 1981).
91. *Id.*
92. *See* 1917 Wash. Laws ch. 117 (current version at WASH. REV. CODE ANN. §§ 90.03.005 to -611 (West 1999)).
93. WASH. REV. CODE ANN. § 90.03.010 (West 1999).

> Any person entitled to divert or withdraw waters of the state through any appropriation authorized by enactments of the legislature prior to enactment of chapter 117, Laws of 1917, or by custom, or by general adjudication, who abandons the same, or who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right . . . for any period of five successive years after the effective date of this act, shall relinquish such right or portion thereof . . . .[94]

However, this provision was not part of the original water code, but was added in 1967.[95] This provision withstood a takings challenge in 1993 in *State Department of Ecology v. Grimes* in which the Washington Supreme Court rejected a pre-code water right holder's argument that the diminishment of his water right in a general adjudication was unconstitutional.[96] The water rights at issue in *Grimes* predated the Washington water code by eleven years. However, the court held application of the relinquishment provision of the five-year forfeiture statute to these pre-code rights was not an unconstitutional taking.[97]

The holding of the *Grimes* court is entirely consistent with the history of beneficial use as a basic component of an appropriative right: a water right is only valid where an appropriator beneficially, continuously, and diligently uses the water. Thus, there can be no "taking" of a water right where an appropriator is not using water, because no valid right exists. The water referee's finding of diminishment was a result of the voluntary failure of the right holder to apply water beneficially; such is a permissible limitation on water rights. Thus, the Court recognized that the legislature specifically limited all water rights to an application of beneficial use.[98]

3. Texas

Texas follows the approach represented by Nebraska and Washington. The Texas Code is typical in that it contains both a statutory forfeiture provision and a non-impairment of vested rights provision. In *Texas Water Rights Commission v. Wright*, the Supreme Court of Texas considered the state's cancellation of water rights issued in 1918 and 1928, but not exercised from 1954 (when a flood washed out the diversion pumps) until 1971.[99] When the appropriator initiated the water uses, the applicable Texas statute provided for loss only by "willful abandonment" that included an intent element.[100] The

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94. *Id.* § 90.14.160. Two other statutory provisions also apply five-year forfeiture periods to riparian rights and permitted rights. *See id.* §§ 90.14.170, .180.

95. *See id.* § 90.14.160.

96. State Dep't of Ecology v. Grimes, 852 P.2d 1044 (Wash. 1993) (en banc).

97. *Id.* at 1054–55.

98. *Id.*

99. Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 644 (Tex. 1971).

100. *Id.* at 644. Strictly speaking, the water rights at issue in *Wright* were permitted rights under an earlier code, rather than true pre-code rights.

Texas legislature later amended the statute to include a ten-year statutory forfeiture period.[101] The court rejected the water users' argument that subjecting them to the later-enacted forfeiture statute, instead of the pre-existing abandonment statute, would be unconstitutional.[102] The court acknowledged that "a matured appropriation right to water is a vested right."[103] However, the court further emphasized the right is to *use* the water, and that "[t]he permittees did not acquire the right of non-use of water."[104] Thus, applying the statutory forfeiture period as a means of enforcing the ongoing beneficial use requirement was not unconstitutional.[105] The Texas court specifically declined to follow Nevada's decision in *Manse Spring*, although urged upon them by the water users.[106] The court, therefore, upheld the cancellation of the rights due to forfeiture by ten years of non-use.[107]

4. California

California adopted its comprehensive water code in 1914.[108] However, the state had statutes covering various aspects of water use dating from the late 1800s. In 1895, a state statute provided that water rights could be forfeited for non-use, but did not specify a time period.[109] In *Smith v. Hawkins*, the California Supreme Court found that the statute was meant to be a forfeiture provision rather than an abandonment provision. In the absence of a legislatively established time period, the court analogized to the law of adverse possession of land in California, and declared five years as a "just and proper measure of time" for the forfeiture of a water right.[110] On that basis, the court in *Smith* confirmed forfeiture of a right originating in 1862, but which had not been used for more than five years.[111]

5. Oregon, Idaho, New Mexico, and South Dakota

Some jurisdictions have applied statutory forfeiture provisions to pre-code water rights without any explicit discussion of the issue. For instance, in *Crandall v. Water Resources Department*, the Oregon Supreme Court affirmed a decision of the Water Resources Department to cancel an 1872 water right for five years of non-use.[112] The Oregon

101. *Id.* at 645–46.
102. *Id.* at 646–47.
103. *Id.* at 647.
104. *Id.*
105. Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 649 (Tex. 1971).
106. *Id.* at 650.
107. *Id.* at 651.
108. Beck, *supra* note 36.
109. Smith v. Hawkins, 42 P. 453, 453 (Cal. 1895). California originally enacted the statute in 1872.
110. *Id.* at 454.
111. *Id.* at 453. Current California law also contains an explicit five-year forfeiture period. ARTHUR L. LITTLEWORTH & ERIC L. GARNER, CALIFORNIA WATER 47 (1995).
112. Crandall v. Water Res. Dep't, 626 P.2d 877 (Or. 1981).

Legislature adopted their water code in 1909. In *Rencken v. Young*, the state's highest court upheld the Department's application of the statutory forfeiture period to an 1888 water right.[113] Neither case contained any discussion of the propriety of applying statutory forfeiture to pre-code rights.

Similar treatment, potentially allowing forfeiture of pre-code rights without discussion of any challenge, is found in Idaho,[114] New Mexico,[115] and South Dakota[116] judicial opinions. Applying statutory forfeiture periods to rights that had vested before the state adopted the applicable water code thus represents the majority approach. Arizona, though unsuccessful, and Nevada are the lone proponents of special treatment for pre-code rights. The next section compares and critiques the various states' treatment of this issue.

C. NEVADA VS. THE REST OF THE WEST: COMPARISON AND CRITIQUE

The Nevada approach, embodied in the *Manse Spring* and *Alpine* decisions, suffers from three flaws. First, exempting pre-code water rights from statutory forfeiture provisions creates a special class of "oldies, but really goodies." Essentially, some water rights, due only to their vintage, do not have to play by the same rules as those with somewhat later priority dates. Such special status is inconsistent with the goals of certainty, uniformity, and equity embodied in the western water codes. Second, treating pre-code water rights differently in this way not only distinguishes them inappropriately from other water rights, but also elevates them to a higher level of property protection than they require or deserve. Water rights are usufructuary by their very nature rather than hard-edged property rights. Finally, exempting the oldest rights from forfeiture deprives state water resource managers of a necessary tool for making allocation decisions and clearing up water use records as competition for water increases.

1. Old Rights as Special Rights

Treating pre-code water rights as special by exempting them from statutory forfeiture is contrary to the western states' original purpose in adopting their water codes. The overarching purpose of codification was to obtain certainty in water use and water rights. All of the various statutory provisions, including state assertion of control over water resources, permit requirements, beneficial use requirements, forfeiture provisions, and adjudication procedures, related to clarifying the terms under which the states would allow

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113. Rencken v. Young, 711 P.2d 954 (Or. 1985). The court, however, remanded the decision to the agency for reconsideration in light of possible error in assigning the burden of proof. *Id.* at 961.

114. *See* Sears v. Berryman, 623 P.2d 455 (Idaho 1981); Crow v. Carlson, 690 P.2d 916 (Idaho 1984).

115. *See* State v. Davis, 319 P.2d 207, 210–11 (N.M. 1957).

116. *See In re* Cancellation of the Stabio Ditch Water Right on Spearfish Creek, 417 N.W.2d 391 (S.D. 1987) (upholding the cancellation of an 1877, pre-code water right).

private parties to use a scarce and admittedly public resource. In order to provide as much certainty as possible to water users in an arid land, the states felt the need to bring some order to the chaotic system of water rights created by pre-statutory appropriations guided only by custom and self-help.[117]

The Nevada Supreme Court, in the 1940 *Manse Spring* case, focused on a water user's need for stability and certainty. However, the court viewed certainty too narrowly by using only the perspective of an individual pre-code water rights holder and ignoring the need for certainty in the entire system of water rights. The *Manse Spring* court noted the individual long-term water user's desire for stability, but then mistakenly elevated and expanded that desire into a long-term legal right. Instead of asking how much stability and security an individual water rights holder was entitled to as a minimum under the prevailing beneficial use requirements, the court decided that the user was entitled to insist on no change whatsoever. This degree of guaranteed stability is certainly inflated.

Furthermore, the need for stability and certainty is a collective need, not just an individual need. Junior water users, either upstream or downstream, need stability and certainty in understanding their water use limitations. A well-defined senior water right, therefore, can aid everyone in the chain of use. Instead, Nevada's approach allows water users with early priority dates to sit on their water rights and not use the water for long periods. However, these users still hold legal rights as long as they do not subjectively "intend" to relinquish the rights. Meanwhile, junior users appropriate this unused, but not abandoned, water at their own peril. There is no stability or certainty for the juniors in counting on the continuing availability of that water. Furthermore, the state lacks certainty in determining how much water is truly subject to valid claims of right, and how much is available for further appropriation. Thus, the Nevada approach provides a great deal of stability (and flexibility) for those water rights that pre-date 1913, while injecting uncertainty into the system as a whole. The *Manse Spring* court's decision seems to say that the stability of a very old water right, as perceived by the right holder alone, is more important than the continued efficient beneficial use of the state's water resources. The code drafters did not likely intend this result. Legislatures enacted the codes to provide stability and certainty, not just for any particular right holder, but for all users and the general public as well.

What the early western legislatures more likely had in mind when they adopted the initial water codes was preservation and protection of the pre-code rights, but not a special status giving those rights greater flexibility in use and non-use than all later acquired rights. The "savings clauses" universally included in the water codes certainly embody the intention of recognizing rights vested under pre-statutory

117. *See supra* notes 40 & 41 and accompanying text.

customs and methods. However, nothing in the history of these codification efforts suggests that the legislature intended something more to protect these early-acquired rights from uniform and equitable application of the states' police power as embodied in later legislation. There is no legitimate policy reason for creating two classes of water rights in this fashion. Old rights are already "better" and more valuable just because they are old. That is the whole point of the prior appropriation doctrine: "first in time is first in right." Priority is enough without adding an additional layer of superiority as well.

The discussion of abandonment by the *Manse Spring* court might suggest that the purpose of the common law abandonment doctrine was primarily to protect the water user's right. After all, the court's discussion emphasizes the user's perspective of the right's stability and security and the user's intent to keep the water despite non-use for a period of more than five years. However, this represents a misunderstanding of the purpose of the abandonment doctrine. Abandonment, in fact, favors the public interest. When beneficial use of water does not occur, the water rights revert to the state for reallocation, or to the next junior user who might have a valid claim to the water. This has been the settled law of every western state, both before and after the enactment of the water codes.[118]

Before the codification of the western water laws, however, there was also no codification of how this loss by non-use occurred. The courts had to develop the concept of divestiture of rights, just as they developed the general concept of beneficial use and waste.[119] The result was the doctrine of common law abandonment. The courts certainly could not legislate a uniform time period for non-use that would result in loss of the right, so the abandonment doctrine was crafted as a substitute.[120] Proof of non-use for some significant period of time created a presumption of abandonment, which could be rebutted by a showing that the water user did not intend to permanently relinquish the water. Without the ability to choose an objective cutoff for loss by non-use, the courts were forced to fall back on a subjective measure. Nonetheless, the point was to serve the public interest by providing some enforcement device, however imperfect, for the "use it or lose it" requirement. Allowing certain users to sit on their water rights and escape the beneficial use requirement was not the courts' purpose.[121]

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118. *See generally* Neuman, *supra* note 3.

119. *Id.* at 929–33.

120. *But see supra* text accompanying notes 109–111 discussing *Smith*, where the California Supreme Court legislated a uniform time period for non-use and read in a five-year forfeiture period when the legislature had not specified a time period. It seems that many courts would not be so willing to add to a statute in such a manner. *See* 2 SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 575 (3 ed. 1911) (claiming that the Smith v. Hawkins, 42 P. 453 (Cal. 1895) decision is "open to the charge of judicial legislation").

121. As noted by the Texas Supreme Court, a water user acquires a right to *use*

Indeed, the difficulty in proving the subjective intent element of abandonment led to the adoption of forfeiture periods as a more effective means of enforcing loss of rights by non-use. Thus, legislatures considered the clear, uniform, statutory forfeiture periods to be an improvement on the doctrine of abandonment. The two doctrines were not in opposition to each other, as the *Manse Spring* court seemed to believe, but were just different means of reaching the same end of maximum beneficial use of scarce water resources.

In fact, whether abandonment gives as much security to the pre-code water right holders as the *Manse Spring* opinion suggests is questionable. Although the doctrine allowed proof of subjective intent not to relinquish a water right, it does not follow that whenever a water user said "I didn't mean to give it up," the inquiry automatically ended. The possibility existed to overcome such a statement with objective proof that, no matter what the water user said in court, his or her conduct manifested a contrary intent. Thus, the doctrine never really provided much certainty to a water user. Water users had uncertainty over what a court would hold or a jury might find was sufficient proof of intent.[122] So, even for pre-code water rights holders, the bright line of a forfeiture statute provides better guidance and additional certainty.

It is possible that the court in *Manse Spring* was really bothered by the fact that the forfeiture provision was being applied strictly without allowing a defense concerning the circumstances of that particular case, rather than that it was being applied to a pre-code right. The non-use of water in question in that case occurred after the death of the landowner, while a caretaker for the estate lived on the property.[123] The court may have felt that the estate should be excused for its failure to operate the ranch for a seven-year period of time. The court noted that other jurisdictions provided leniency and protected a water right "where circumstances were such as to prevent the beneficial use."[124]

Rather than crafting a narrower holding to accommodate its apparently real concern, the court threw the baby out with the bath water, and held that forfeiture should never apply to pre-code rights. Many states provide for hardship or other defenses to forfeiture in statute, but some courts have done so by judicial decision as well.[125] The *Manse Spring* court could have done the same. In refusing to enforce the statutory forfeiture provision and injecting leniency instead, the *Manse Spring* court displayed an antipathy and aversion to forfeiture that is common among courts and other legal

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water, not a right of *non-use* of water. *See* Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 647 (Tex. 1971).

122. *See* Goplerud, *supra* note 3, § 17.03; 2 WIEL, *supra* note 120, §§ 567–570.

123. *In re* Manse Spring, 108 P.2d 311, 314 (Nev. 1940).

124. *Id.* at 316 (referring to case law and statutory construction of a similar statute in Wyoming).

125. *See, e.g.*, TEX. WATER CODE ANN. § 11.177(b) (1999) (discussing justified non-use); Scott v. McTiernan, 974 P.2d 966, 970 (Wyo. 1999) (listing judicially created defenses for non-use).

commentators.[126] In any event, later courts, such as the *Alpine* court, unfortunately have not seen fit to try to limit *Manse Spring* to its facts, or overrule it on this basis.

Curiously, in a 1914 case, the Nevada Supreme Court had already rejected the notion that the savings clause in the water code totally exempted pre-code water rights from regulation.[127] The court said that the savings clause

> must be construed in connection with other provisions of the act. The whole scope and purpose of the act show that it was intended to apply to all water rights, whether acquired before or after its adoption. There would be little or no use in attempting state control over a stream or stream system unless all water rights were brought under that control. . . . Nothing in the act shall be deemed to impair these vested rights; that is, they shall not be diminished in quantity or value. As they are all prior in time to water rights secured in accordance with later statutory provisions, such priorities must be recognized.[128]

The *Ormsby* court had it right, but for some reason, the *Manse Spring* court got it wrong. Apparently, the *Manse Spring* court thought that subjecting pre-code rights to the statutory forfeiture provision diminished their value.[129] However, the court misconstrued the nature

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126. *See* Rose, *supra* note 46, at 597–601 (discussing the common "abhorrence" to forfeiture, which often results in replacing a "crystalline" rule with a "muddy" rule when the enforcement of the crystal rule would create a dramatic loss for one party). In fact, the *Manse Spring* court referred to forfeiture as a "punishment." 108 P.2d at 315 (citation omitted). This seems like a bit of an overstatement regarding forfeiture, which, in the water rights context, is simply the consequence for knowing non-use. *See supra* note 7 and accompanying text.

127. Ormsby County v. Kearney, 142 P. 803 (Nev. 1914).

128. *Id.* at 810. Although the *Ormsby* court considered the code's adjudication process, the court's comments are equally compelling in the context of the forfeiture provisions.

129. Interestingly, the Nevada Supreme Court distinguished *Manse Spring* in a case involving a groundwater right. In *Town of Eureka v. Office of the State Eng'r*, 826 P.2d 948 (Nev. 1992), the court applied the five-year statutory forfeiture provision retroactively to effect a partial forfeiture of groundwater rights. The Town of Eureka had purchased the water rights and had filed a change of use application with the Nevada State Engineer. Other parties protested that Eureka had forfeited their rights by five years of non-use. Eureka made the same argument as in the *Manse Spring* case: the application of the forfeiture statute to its water rights would be unconstitutional because at the time its water rights vested, the only way a party could lose water rights was by abandonment. *Id.* at 950. The Nevada Supreme Court found that the groundwater code did not contain the same "savings" provision as the 1913 surface water code at issue in *Manse Spring*. *Id.* at 951. Instead, the groundwater code contained an affirmative statement that the forfeiture provision would apply to all groundwater rights, including those in existence at the time of the code's enactment. *Id.* at 950. The court seems to hold the statement of the legislature, in and of itself, makes the statute's retroactivity constitutional.

In some ways, the court made a similar mistake in *Eureka* as it did in *Manse Spring*. In *Manse Spring*, the court took the savings clause at face value. Without carefully analyzing just what the right was, and whether the statutory change truly impaired the right, the court held that a change in an existing right was not allowed. In *Eureka*, the court took the groundwater statute's retroactivity provision at face value,

of common law abandonment as a doctrine "allowing" substantial periods of non-use as long as the water user had a subjective "empty head, pure heart" intent to keep the water right. Instead, the abandonment doctrine simply represented the best the courts came up with to try to enforce the "use it or lose it" requirement. Pre-code water rights holders are not excused from the beneficial use requirement, and have no claim to a more flexible right than later users. Therefore, applying the statutory forfeiture provision would not impair those early rights.

D. THE USUFRUCTUARY NATURE OF WATER RIGHTS

Another reason there is no justification for special treatment of pre-code water rights is the inherent usufructuary nature of water rights. Long before codification of western water laws, and from the earliest days of the development of the prior appropriation doctrine as a mining camp custom, the concept of ongoing beneficial use limited water rights. "Use it or lose it" has been one of the most basic principles of prior appropriation from the very beginning.[130] As the Texas Supreme Court put it, the right is to use water, and there is no right to the non-use of water.[131] Of course, until the creation of state water regulatory agencies and adoption of forfeiture statutes, the only way to implement this concept was through the use of common law abandonment enforced in courts of law. However, the need to demonstrate continuous, ongoing, beneficial use has always been a central component of the prior appropriation doctrine. Therefore, western water users could hardly claim to be surprised that the early water codes attempted to give some clarity to the well-known potential for loss by non-use through enacting forfeiture time periods. The very point of these statutes was to give some actual objective meaning to the "use it or lose it" requirement.

Furthermore, a water user's right to the use of water has never been a hard-edged property right, which entitled the user to an absolute amount of specific molecules of water. Rather, the right is a much more malleable usufructuary right.[132] Black's Law Dictionary defines "usufructuary" as: "[a] person who has the right to the benefits of another's property."[133] State courts throughout the West have affirmed the "use only" nature of the property interest in water rights.[134] In 1900, the Wyoming Supreme Court described the interest

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and simply said it agreed with the lower court that the statute is constitutional. *Id.* at 951. If the *Manse* court was right, how could the *Eureka* court also be right? If the application of statutory forfeiture to rights acquired when only abandonment was recognized is an unconstitutional impairment of those rights, such application should be unconstitutional regardless of what the legislature purports to say about it.

130. *See generally* Neuman, *supra* note 3.

131. *See supra* note 104 and accompanying text.

132. *See* Neuman, *supra* note 3, at 922. *See generally* Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989).

133. BLACK'S LAW DICTIONARY 1543 (7th ed. 1999).

134. *See, e.g.*, Baeth v. Hoisveen, 157 N.W.2d 728, 732 (N.D. 1968) (water rights are

as follows:

> Although an appropriator secures a right which has been held with good reason to amount to a property right, he does not acquire a title to the running waters themselves . . . The title of the appropriator fastens, not upon the water while flowing along its natural channel, but to the use of a limited amount thereof for beneficial purposes in pursuance of an appropriation lawfully made *and continued.*[135]

The Wyoming court's statement emphasizes both that the property interest is usufructuary rather than a fee interest, and that in order to maintain the right, the use must be continuous. The concept of ongoing beneficial use was entrenched in western water law before the adoption of many of the western water codes.

In a 1989 article on the limited nature of the private property interest of water rights holders, Professor Joe Sax made the following statement:

> The rights of use in water, however long standing, should never be confused with more personal, more fully owned, property. Far from being a sudden and unpredictable change in the definition of property, recognition of the right of the state to protect its water resources is only a restatement of a familiar and oft-stated public prerogative.[136]

Although Professor Sax was discussing potential state regulation in relation to the public trust, his point is equally applicable to state regulation of the manner of loss of water rights by non-use. Certainly, the *Manse* court did not have the benefit of this statement, but it is as accurate in its description of the public/private interest in water resources fifty years ago as it is today.[137]

It is important to stress that the limitations on the nature of the private usufruct existed from the beginning, and later state regulation of the terms of the right's exercise was to be expected. As Professor Sax puts it: "Because rights granted in water have always been subject to what Justice Holmes called an initial limitation of private rights, the subsequent exercise of public authority as a limitation on such rights . . . is neither a redefinition nor a repudiation of property rights."[138] In particular, state regulation that simply puts a time limit

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usufructuary, not absolute); Knapp v. Colo. River Water Conservation Dist., 279 P.2d 420, 425 (Colo. 1955) (appropriative water rights are possessory, not freehold).

135. Farm Inv. Co. v. Carpenter, 61 P. 258, 265 (Wyo. 1900) (emphasis added).

136. Sax, *supra* note 132, at 482.

137. Indeed, Professor Sax's article discusses three early 20th century Supreme Court opinions by Oliver Wendell Holmes concerning the intersection of public and private rights in water and other natural resources. Sax notes that Holmes "took property rights very seriously," and thus his statements about the subordination of private rights in water to certain public rights "stands as a fundamental building block of property jurisprudence." Sax, *supra* note 132, at 480.

138. *Id.* at 481–82.

on how long a water right may remain unused before being lost, rather than allowing the water user to control loss subjectively with intent, is regulation that is completely consistent with the ongoing requirement of beneficial use as part of the maintenance of a water right. Thus, the Nevada approach (and the Arizona attempt), in elevating the status of pre-code water rights above those obtained under the code, arrogates to the pre-code rights characteristics that are inconsistent with the basic usufructuary nature of water rights.

Furthermore, not even the hallowed fee simple property interest in a parcel of land is immune from subsequent exercise of the police power by the state. This is true even if such regulation does, arguably, "take[] away much of the stability and security of the right to the continued use"[139] of such property. Zoning and land use regulations are the classic examples. For years, the owners of a parcel of property may have intended that property for a certain kind of development, yet the opportunity for such development may have become unavailable for such development due to subsequent land use regulation. Although claims of "regulatory takings" are frequently raised under these circumstances, few such claims are actually successful in defeating the regulation.[140] It is absolutely elementary that the state can legitimately and constitutionally regulate real property in ways that arguably change the "stability and security" of the property's use when viewed from the individual landowner's perspective at an earlier point in time. If this is so for land regulation, it is even more applicable to water rights regulation.

Perhaps the doctrine of adverse possession is an even better analogy than zoning regulations. In both forfeiture and adverse possession, owners may lose property rights, not just by later operation of law, but as a consequence of their own voluntary conduct in failing to use and protect their own property. Such a consequence hardly seems harsh or unreasonable, and is completely consistent with the usufructuary nature of water rights.

E. FORFEITURE AS A WATER MANAGEMENT TOOL

Exempting the oldest water rights from forfeiture deprives state water resource managers of a tool they will need as competition for scarce water increases. In recent decades, water managers in the western states have recognized a need to "tune the system," to tighten up former laissez faire management practices in order to get the most out of limited water resources.[141]

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139. *In re* Manse Spring, 108 P.2d 311, 316 (Nev. 1940).

140. *See generally* William Funk, *Evolution or Restatement? Awaiting Answers to* Lucas' *Unanswered Questions*, 23 ENVTL. L. 891 (1993); William Funk, *Reading* Dolan v. City of Tigard, 25 ENVTL. L. 127 (1995).

141. *See* BRUCE DRIVER, WESTERN WATER: TUNING THE SYSTEM: THE REPORT TO THE WESTERN GOVERNORS' ASSOCIATION FROM THE WATER EFFICIENCY TASK FORCE 24, 47, 59, 61 (1986) (discussing how states need to clarify water rights and tune the system so that it is sufficiently flexible to permit water to flow to its highest value and allow needs

The 1998 Report of the Western Water Policy Review Advisory Commission identified the number one "core challenge" facing western water managers as "[t]he sustainable use of existing supplies: balancing consumptive and nonconsumptive uses of existing water resources, including the problem of overallocation of supplies, groundwater overdraft, the augmentation of supplies, and using supplies more efficiently."[142] The Report stressed that in order to achieve sustainable use of existing water, the states will need to "define the baseline flows necessary for operative ecosystems" and then pursue innovative "[c]ombinations of physical solutions, conservation, and voluntary transfers" to obtain a sustainable balance between consumptive and nonconsumptive uses.[143]

In order to define baseline flows and determine if these flows are satisfied or if the streams are instead overappropriated, a state will need a full and accurate picture of both paper legal rights and actual water use. This includes reliable data about whether rights have been lost by non-use, and the ability to obtain administrative or judicial declarations to that effect.[144] Depriving water managers of statutory forfeiture for the oldest water rights and relegating them to the less predictable, less uniform, and ultimately more expensive process of proving intentional abandonment erects inefficient and unnecessary hurdles in the path of rational water management.[145]

Further, for conservation and voluntary transfers to be attractive, water rights must be clearly defined. Precise, or "crystalline," definitions of property rights facilitate market transfers, because both the buyer and seller know exactly what they are dealing with and can value the transaction accordingly.[146] On the other hand, open-ended

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to be met at the least cost; states can use forfeiture and abandonment authority to compel efficient water use).

142. WATER IN THE WEST, *supra* note 25, at 3-4.

143. *Id.* at 3-6.

144. *See* DRIVER, *supra* note 141, at 24 (arguing that states must "ratify" property rights in water and to do so they will need much more data and knowledge about existing water rights, return flows, etc.). Driver makes the point that aggressively pursuing declarations of waste, forfeiture, and abandonment may in fact discourage market transfers because it takes away the incentive for a water user to conserve and then transfer surplus or saved water to others. *Id.* at 58. However, he notes that a state could combine a regulatory and market facilitation approach by allowing a "grace period" of transfers and then following up with an aggressive regulatory approach. *Id.* at 61. Either way, clarity in the amount of water that water users are entitled to use is a basic need.

145. *See* 1 SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES §§ 567–570 (providing that abandonment is always a question of fact, with the burden of proof on the party arguing abandonment; non-use is not conclusive, but is merely evidence of intent to abandon, along with statements of the water user both in and out of court, and all the facts and circumstances of each particular case. Forfeiture is much easier to establish, simply by showing non-use for the statutory period; the burden is then on the water user (who is more likely to have access to such proof) to show a defense).

146. *See* Rose, *supra* note 46, at 590 (discussing the preference of legal academics for precise specifications of entitlements over open-ended entitlements as a way of facilitating markets). *See also* U.S. GEN. ACCOUNTING OFFICE, WATER TRANSFERS: MORE EFFICIENT WATER USE POSSIBLE, IF PROBLEMS ARE ADDRESSED 47 (1994) ("[E]ffective

or muddy entitlements make market transactions more difficult.[147] An old, but unused, water right that may or may not still be valid, depending on the outcome of a fact-specific and subjective abandonment case, is certainly a very muddy entitlement indeed. Such unclear rights do not provide either senior or junior users (or others who might want to deal with them) the requisite certainty needed to pursue efficiency improvements or market transactions.

Thus, for states to exercise comprehensive management and control over their water supplies, it is critical for the states to have complete and accurate data about water availability, existing legal rights, and actual water use. Allowing senior water users to hold but not exercise extensive inchoate water rights interferes with and frustrates state water managers' attempts at comprehensive water management.

V. CONCLUSION

Old is good for western water rights. A water right with a senior priority date on an overappropriated stream in an arid western state is a valuable property right, and the owners of such rights are in an enviable position. But just *how* good should these rights be? Senior rights, whether or not they predate a state's water code, should only be as good as their priority date and no better. Pre-code rights have always been subject to the same "use it or lose it" requirement of the prior appropriation doctrine, and thus they should be subject to the statutory forfeiture requirements just like later acquired rights. Giving old rights special status by exempting them from statutory forfeiture, as Nevada has done and Arizona tried to do, flies in the face of the purposes behind codification of the prior appropriation doctrine, is contrary to the usufructuary nature of water rights, and deprives state water managers of a necessary management tool. States faced with an exemption claim by pre-code water rights holders would be wise to follow the lead of the majority of the western states who have addressed this issue and apply forfeiture statutes uniformly, rather than muddying the waters and unnecessarily inflating the value of the most senior water rights by giving their owners a special right *not* to use their water.

markets require clear, secure property rights").

147. *See* Rose, *supra* note 46, at 590.