THE ESTABLISHMENT OF PRIOR APPROPRIATION IN IDAHO

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FULL CITATION:

Paul R. Harrington, *The Establishment of Prior Appropriation in Idaho*, 49 IDAHO L. REV. 23 (2012).

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If you live in Idaho long enough, you will hear now and again about the doctrine of prior appropriation. It is the legal doctrine that governs the use of the state's water. Based on fundamental principles of beneficial use and first in time is first in right, the doctrine has been ingrained in Idaho law since statehood.[1] However, its origins in this state trace back to an even earlier time, when the common law rules of riparian rights dominated water law in the United States, and the doctrine of prior appropriation was relatively unknown. This article addresses the establishment of prior appropriation in Idaho, focusing on the state's formative years and those pioneering settlers who, out of necessity, initiated the departure from the common law rules of riparian rights.

I. HISTORICAL BACKGROUND

The first white men to lay eyes on the country destined to become Idaho were members of the Lewis and Clark expedition in 1805.[2] Thereafter, many ambitious individuals traversed Idaho for one reason or another. Some trapped fur, others proselytized religion, and a good many

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1. For a comprehensive study on the principles and tenets of the doctrine of prior appropriation as established in Idaho, see Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 IDAHO L. REV. 1 (1968).

2. LEONARD J. ARRINGTON, HISTORY OF IDAHO 67–68 (1994); MERRILL D. BEAL & MERLE W. WELLS, HISTORY OF IDAHO 60–77 (Lewis Historical Pub. Co., Inc., 1959).

simply passed through on their way to Oregon.[3] But few stayed in those early days.[4]

In fact, it was not until the 1860s that any considerable settlement of what was to become Idaho occurred.[5] Gold was the impetus.[6] It was discovered first along the Clearwater River with a strike at Pierce in the fall of 1860.[7] Additional strikes quickly followed in the Boise and Owyhee Basins.[8] Soon those with an entrepreneurial disposition were prospecting for gold all over the region and with a degree of success.[9]

The gold discoveries led to an influx of miners into the area in the early 1860s.[10] The lands mined were part of the Washington Territory at the time, and the eastern half of the Washington Territory (including what would become Idaho) was undeveloped politically and legally.[11] There was no law enforcement, no courts, and no county organizations.[12] Olympia, which was the territorial capital, could not effectively govern the region due to its distant location and the poor communication and transportation between the two locales.[13] For all practical purposes, the early miners found that they had arrived in this country before the law.

Not to be dissuaded, the miners took it upon themselves to establish a minimal measure of law and order. They banded together to organize localized mining districts, and each district established rules and regulations governing the local prosecution of mining.[14] The acquisition of mining claims was founded on the principle of first possession.[15] Once a claim was located, local rules generally required that the claim be marked and recorded to give notice of the claim to the world.[16] A properly noticed and recorded claim was valid against all subsequent comers

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3. ARRINGTON, *supra* note 2, at 87–182; WILLIAM J. MCCONNELL, EARLY HISTORY OF IDAHO 27–55 (Caxton Printers, 1913).

4. ARRINGTON, *supra* note 2, at 87–182.

5. MCCONNELL, *supra* note 3, at 55.

6. *Id.*

7. ARRINGTON, *supra* note 2, at 183–85; MCCONNELL, *supra* note 3, at 55–68.

8. ARRINGTON, *supra* note 2, at 194, 198; MCCONNELL, *supra* note 3, at 79–99.

9. MCCONNELL, *supra* note 3, at 57.

10. *Id.*

11. ARRINGTON, *supra* note 2, at 210; HISTORY OF NORTH IDAHO 29 (W. Historical Publ'g Co. 1903).

12. HISTORY OF NORTH IDAHO, *supra* note 11, at 29.

13. *Id.*

14. The rules and regulations reflected, in large part, customs developed over time in mining communities throughout the western United States, most notably in California during the gold rush. *See, e.g.*, ARRINGTON, *supra* note 2, at 188 (stating that Idaho's mining districts "set up a do-it-yourself kind of jurisprudence that had been widely applied in California, Nevada, and Colorado . . . .").

15. *See generally* BEAL & WELLS, *supra* note 2, at 288.

16. The mining laws of the Meadow Creek Mining District, for instance, were typical, requiring that "[c]laims shall be distinctly marked by notices at the end of the bounds thereof in the name of the claimant and no more ground shall be deemed claimed than is included in such notices," and additionally that each claim be "recorded within fifteen days from the date of location" with the district recorder. Mining Laws of Meadow Creek District, Art. 4 & 15 (adopted Oct. 11, 1862) *reprinted in* THE UNITED STATES MINING LAWS 497–98 (Wash. Gov't Printing Office 1885).

as long as it was diligently worked as required by the local rules so as not to be forfeited.[17] This principle of first possession would exert a major influence over Idaho's water law.

II. MINING CODES DEPART FROM THE COMMON LAW RULES OF RIPARIAN RIGHTS

Water was a necessity to the mining process, and issues regarding supply were quickly realized.[18] Captain Elias D. Pierce is credited with the first gold discovery of significance in what would become Idaho.[19] In an early 1861 correspondence to the *Pioneer and Democrat* (Olympia newspaper) he reported from the Oro Fino Mining District near Pierce that "[t]here is a small running stream of water all the year here, but not sufficient in all parts of the diggings for sluicing, as many discovered places are dry in summer."[20] Thus, even Idaho's earliest settlers comprehended the constraint the region's limited water supply would place on their endeavors.

Some written ground rules governing water use in the mining districts were needed. The common law prescribed to the rules of riparian rights.[21] Under those rules, a person who owned land bordering a water source was considered a riparian landowner.[22] Only riparian landowners acquired the right to use water from an adjacent water source as an incident to their ownership of riparian land.[23] Once acquired, riparian rights were limited to reasonable use on riparian land with the requirement that the water be restored to its natural course, undiminished in quality or quantity, for use by other riparian landowners.[24]

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17. BEAL & WELLS, *supra* note 2, at 288.

18. Most of Idaho's early miners engaged in placer mining. One historical account describes the placer mining process as follows:

> Placer mining . . . essentially is mechanical separation of gold from gravel by a washing process. Water carries the gold-bearing gravel over a separating device: the heavier gold moves more slowly and over less distance than the sand and gravel, and concentrates behind the lighter materials which are floated away. The separating device may be a sluice box (a flume with cleats to catch the gold) or a rocker (a cradle with two levels: holes bored in the upper level allow the gold and fine sand to work through to the lower one) or, most elementary of all, a circular pan in which the gravel can be swirled out slowly while the gold accumulates in the bottom. BEAL & WELLS, *supra* note 2, at 285.

19. ARRINGTON, *supra* note 2, at 183; MCCONNELL, *supra* note 3, at 55–56.

20. Correspondence from Elias D. Pierce to the *Pioneer and Democrat* (Olympia Newspaper, Mar. 20, 1861), *reprinted in* 3 IDAHO YESTERDAYS 21 (Winter 1959–60).

21. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 24 (4th ed. 2009); CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS § 451 (Bender-Moss Co. 2d ed. 1912).

22. GETCHES, *supra* note 21, at 24; KINNEY, *supra* note 21, § 451.

23. GETCHES, *supra* note 21, at 34; KINNEY, *supra* note 21, § 451.

24. KINNEY, *supra* note 21, § 585 (stating that "one of the fundamental principles of the common law was that the streams must be permitted to flow in their natural channels as they were wont to flow by Nature, without any material diminution in quantity or alteration in quality"); GETCHES, *supra* note 21, at 4.

The early miners could have adhered to the common law to govern their water use. Necessity, practicality, and convenience, however, dictated that they did not, and a review of the early mining codes shows a distinct departure from the common law rules of riparian rights.

The earliest mining laws in what would become Idaho were those of the Oro Fino Mining District at Pierce, adopted at a mass meeting of the miners on January 5, 1861.[25] The miners of the Oro Fino Mining District recognized only twenty-four sections of rules and regulations to govern their existence, all of which would fit nicely on one typewritten page.[26] With respect to the use of water, the miners adopted the following:

> Sec. 7. Every person shall have the privilege of the water to work his or their claim on any tributary or creek.
>
> Sec. 8. Any person taking the water from its natural channel, shall, when required, be compelled to leave at least one sluicehead of water running therein.
>
> Sec. 9. Thirty square inches of running water constitute a sluicehead.[27]

While simplistic, these three provisions—which may be the earliest rules governing the use of water written and adopted in what is now Idaho—show the beginnings of the departure from the common law rules of riparian rights.

Section 8 in particular, which authorized miners to remove water from its natural channel presumably without having to return it, hints at some of the fundamental problems with applying the common law to the circumstances faced by the miners. Not all mining claims were located on the banks of rivers and streams, or on what would be considered riparian land under the common law.[28] Therefore, there was a need to carry water to non-riparian land.[29] And miners often needed to carry water away without returning it to the source, utilizing ditches or other conduits.[30] A historical account from the Oro Fino Mining District is illustrative:

> The shortage of water hindered much of the mining operations. To help the situation several men built water ditches, which were often many miles long. To build a ditch, one man would go ahead with an ax or mattock, cutting the brush and sod, turning it over downhill, the next in line would go along taking out a spadeful or two; and a third man would finish the ditch . . . . Wa-

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25. *Mining Laws of the Oro Fino District* (adopted Jan. 5, 1861), *reprinted in* 3 IDAHO YESTERDAYS 18 (Winter 1959–1960).

26. *Id.*

27. *Id.*

28. SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN UNITED STATES § 3 (Bancroft-Whitney Co. 1905).

29. *Id.*

30. *Id.*

> ter from the ditches was leased to the miners for about $0.25 for twenty-four hours.[31]

Using water in this fashion was not contemplated by the common law, which generally prohibited water use on non-riparian land and required that water used be returned to its source.[32] Therefore, some of the earliest departures from the common law were made out of necessity to permit the removal of water from rivers and streams for the development of non-riparian mining claims.

The common law rules regarding the acquisition of the right to use water were also found unworkable by the miners. The common law granted riparian rights to riparian landowners.[33] The lands being mined, however, were part of the public domain, and title ownership to those lands, staying with the United States, did not vest in the miners.[34] Lack of ownership precluded miners from acquiring riparian rights under the common law, even if their mining claims were located on riparian land.[35] This result being unacceptable, the miners departed again from the common law in favor of an appropriative system where water rights were created by beneficial use and not land ownership.

The solution reached was to treat the acquisition of a water right similar to the acquisition of a mining claim.[36] In the same vein as mining claims, some districts required that a claim to the use of water be acquired by posting notice and recording the claim.[37] The mining laws of the Meadow Creek Mining District, adopted at a miner's meeting held on October 11, 1862, in what is now Idaho County contain a representative provision:

> Art. 19. Any person or persons locating water privileges for the purpose of conveying water from one point to another within the limits of this district shall declare their intention of doing so by a notice posted in a conspicuous place and have the line of said ditch surveyed and recorded within two weeks from the location there of or it shall be considered forfeited if actual work is not

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31. LAYNE GELLNER SPENCER, AND FIVE WERE HANGED: AND OTHER HISTORICAL SHORT STORIES OF PIERCE AND THE ORO FINO MINING DISTRICT 49–50 (Printcraft Printing, Inc., 1968).

32. WIEL, *supra* note 28, §§ 219–20.

33. GETCHES, *supra* note 21, at 34; KINNEY, *supra* note 21, § 451.

34. *See* KINNEY, *supra* note 21, § 451.

35. *Id.*

36. *See, e.g.*, *Mining Laws of Meadow Creek District*, Art. 19 (adopted October 11, 1862), *reprinted in* THE UNITED STATES MINING LAWS 498 (Wash. Gov't Printing Office) (1885). Other districts simply provided that "[a]ll water rights shall be subject to the same rules and restrictions as mining claims." *See, e.g.*, *Mining Laws of the Carson Mining District*, Art. 7 (adopted May 28, 1863), *reprinted in* THE UNITED STATES MINING LAWS 498 (Wash. Gov't Printing Office 1885).

37. *See, e.g.*, *Mining Laws of the Carson Mining District*, Art. 7 (adopted May 28, 1863), *reprinted in* THE UNITED STATES MINING LAWS 498 (Wash. Gov't Printing Office 1885).

> commenced and prosecuted there on within four months from date of its location.[38]

The requirements of marking and recording a water right claim represented another necessary departure from the common law, which required no affirmative action on the part of a riparian landowner in order to acquire a right to use water.[39]

The early miners found another concept necessary to govern their water use foreign to the common law—forfeiture due to nonuse.[40] Good mining claims and the water necessary to work them were scarce commodities and too valuable to go unused.[41] Additionally, the early miners were weary of speculative and monopolistic practices by those, especially corporations, who desired to acquire and hoard claims to sell later.[42] Local mining laws incorporated principles intended to thwart these practices. Requirements that a mining claim be worked by the claimant on a regular basis or the claim would be forfeited, for instance one out of every seven days during the mining season, was one such principle.[43] Water right claims were treated similarly. For instance, the laws adopted by the Carson Mining District in what is now Owyhee County required that, once acquired, "all workable claims shall be represented by one day's actual labor in every six" and that "all water rights shall be subject to the same rules and restrictions as mining claims."[44] Other districts provided that if actual work on a water diversion was not timely commenced once a water right was acquired, the right would be forfeited.[45] Such use requirements pertaining to the acquisition and retention

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38. *Mining Laws of Meadow Creek District*, *supra* note 36.

39. WIEL, *supra* note 28, § 209 (stating that "[u]nlike an appropriation, riparian rights need no act of the owner to acquire them; they attach to the land bordering on the stream of their own accord"); KINNEY, *supra* note 21, §§ 453, 585.

40. Janet C. Neuman, *Symposium on Water Law: Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 928 (1998).

41. *See, e.g.*, *id.* at 694.

42. *See, e.g.*, *id.* at 963–65; JOHN WESLEY POWELL, REPORT OF THE LANDS OF THE ARID REGION OF THE UNITED STATES 41 (Wash. Gov't Printing Office 2d ed. 1879). Powell asserts that there must be devised "some practical means by which water rights may be distributed among individual farmers and water monopolies prevented." *Id.*

43. *See, e.g.*, *Mining Laws of the Oro Fino District* (adopted Jan. 5, 1861), *reprinted in* 3 IDAHO YESTERDAYS 18 (Winter 1959–60) (stating that "[a]ll claims shall be worked at least one day in seven . . . otherwise they are considered forfeited"); *Mining Laws of the Elk Creek Mining District*, § XII (adopted Dec. 3, 1863), *reprinted in* THE UNITED STATES MINING LAWS 499–500 (Wash. Gov't Printing Office 1885) (providing that "[a]ll claims shall be considered forfeited if not worked one day in seven after the first day of April until the third day of December following"); Henry Williams, Henry's Williams Book: Mining Laws of the Surprise District, § 9 (adopted Dec. 2, 1868) (unpublished book) (on file with the Idaho State Archives) (stating that "any person or persons holding a claim by location or purchase shall represent the same by one days (sic) actual labor in each week any person failing to perform the required labor in this Section shall forfeit his claim").

44. *Mining Laws of the Carson Mining* District, Art. 7, 10 (adopted May 28, 1863), *reprinted in* THE UNITED STATES MINING LAWS 498–99 (Wash. Gov't Printing Office 1885).

45. *Mining Laws of Meadow Creek District*, Art. 19 (adopted Oct. 11, 1862), *reprinted in* THE UNITED STATES MINING LAWS 498 (Wash. Gov't Printing Office 1885) (provid-

of water rights were unknown to the common law, but were nonetheless utilized by the early miners to confront the realities they faced concerning limited water supplies.[46]

While the mining codes departed from the common law rules of riparian rights in various ways, they certainly did not represent a complete abrogation of the common law within the districts. To the contrary, some mining codes expressly retained certain riparian principles, often mixing them in with appropriative principles.[47] Others did not reference the acquisition or use of water at all, leaving the argument that the common law controlled the same.[48] But when viewed collectively, the early mining codes show a distinct recognition by this state's earliest settlers that the common law rules of riparian rights were unsuitable to the conditions of this country. They established the beginnings of an unmistakable trend away from the common law that would continue with the establishment of the Territory of Idaho.

III. THE TERRITORIAL LEGISLATURE AND COURTS FURTHER THE DEPARTURE FROM THE COMMON LAW RULES OF RIPARIAN RIGHTS

As miners continued to descend upon the lands destined to become Idaho, they were followed by the likes of farmers, ranchers, and merchants. The population of the eastern half of the Washington Territory swelled, and Congress soon deemed it prudent to sever the eastern portion of that territory in favor of a new territory to govern the growing populace.[49] The Organic Act of Congress, establishing the Territory of Idaho, was signed into law by President Lincoln on March 4, 1863.[50]

It was some time before the Territorial Legislature took up the pen to regulate water use. In fact, it was not until 1881 that an act on the subject of water rights was passed.[51] It was entitled "An Act to Regulate the Right to the Use of Water for Mining, Agriculture, Manufacturing, and Other Purposes" ("1881 Act") and provided the following requirements for the acquisition of the right to the use of water:

> Section 1. The right to the use of water flowing in a river, creek, cañon, ravine, or other stream, may be acquired by appropria-

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ing that a water right "shall be considered forfeited if actual work is not commenced and prosecuted there on within four months from the date of its location").

46. KINNEY, *supra* note 21, § 585 (stating that the rights of the riparian proprietor "existed whether they chose to exercise them or not . . .").

47. *Supra* note 43.

48. *Mining Laws of the Washington Gold and Silver Quartz Mining District* (adopted July 1866), *reprinted in* THE UNITED STATES MINING LAWS 501–02 (Wash. Gov't Printing Office 1885); Williams, *supra* note 43, § 9.

49. Idaho Act, ch. 117, 12 Stat. 808 (1863).

50. *Id.*

51. 1881 Idaho Terr. Sess. Laws 267.

> tion, and as between appropriations priority in time shall, subject to the provisions of this act, secure the priority of right.
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> Sec. 2. The appropriation must be in good faith, for some useful and beneficial purpose . . . .
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> . . .
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> Sec. 4. A person, company, or corporation, desiring to appropriate water, must post a notice in writing in as conspicuous a place as possible, at the point of intended diversion, stating therein: First, the quantity of water which is intended to be claimed and diverted, giving the number of inches, measures under a four-inch pressure, and accurately describing the point of its diversion. Second, the purpose for which the same is claimed and intended to be used, and the point or place of such intended use. Third, the means which are designed to be employed for diverting and conducting such waters, and the size or dimensions of the ditch, canal, pipe, flume, or other conduit therefor. A copy of the notice must, within the time allowed in case of a mining claim, be furnished for record to the officer of the county or district whose duty it may be to make record of mining claims . . . .
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> Sec. 5. Within sixty days after the notice is posted, the claimant or his or their successors in interest, must commence the making, digging, or constructing, of the ditch, canal, flume, or other conduit, by means of which it is intended to divert and conduct the waters claimed; and the work for the complete diversion and conducting of said waters shall be prosecuted diligently, and without unnecessary interruption . . . .
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> . . .
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> Sec. 7. By a compliance with the above conditions and requirements, the appropriation is perfected, and the right to the use of the waters claimed, which the ditch, canal, flume, or other conduit is capable of conducting, is hereby declared to relate back to the time of the posting of notice of the claim . . . .[52]

These sections, following the lead of the early mining codes, departed from the common law rules of riparian rights. They were based instead on the principles of prior appropriation and reflect many of the customs adhered to in the early mining districts, including those developed surrounding acquisition and forfeiture. However, other provisions contained in the 1881 Act smacked of riparian principles and arguably conflicted with the aforementioned prior appropriation principles. For instance, Section 10 provided that "[a]ll persons, companies, and corporations, owning or claiming any lands situated on the banks or in the

52. *Id.* at 267–68.

vicinity of any stream, shall be entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed."[53]

Section 14 of the 1881 Act further granted to riparian landowners the right to place in any adjacent stream "rams or other machines for the purpose of raising the waters thereof to a level above the banks" sufficient to permit the flow of water to reach the adjacent lands.[54] Riparian in nature, sections 10 and 14 of the 1881 Act appear to vest at least some riparian rights in riparian landowners limited to irrigation purposes.[55]

It was only a matter of time before water users would turn to the courts to resolve conflicts between riparian and appropriative claims. The first water contest to make its way to the Territorial Supreme Court was *Malad Valley Irrigation Co. v. Campbell*.[56] That case, however, did not pit a riparian claim against an appropriative claim. Both litigants involved claimed rights to the subject water based on prior appropriation, the material issue turning on who actually appropriated it first.[57] However, the case is notable as being the first time the Territorial Supreme Court espoused, albeit with little relevant discussion or insight, what it understood to be the state of the law. At least as between two appropriative claims, the court declared, "[T]he law of this territory is that the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld."[58]

The first case to squarely address a conflict arising between a riparian-based claim and an appropriative-based claim was *Drake v. Earhart*.[59] The plaintiffs, asserting a superior right to the water in a stream based on prior appropriation, sued to enjoin the defendant's use of the same water.[60] The defendant, a riparian proprietor through whose land the subject stream flowed, defended asserting a superior right under the common law rules of riparian rights.[61]

The issue, as framed by the court, was "what, if any, rights the [defendant] has to any of that water as a riparian proprietor."[62] For the first time, the Territorial Supreme Court engaged in a comprehensive discussion regarding the applicability of the doctrines of riparian rights and appropriative rights within the Territory. Unanimity was not reached, and both doctrines ultimately found a sympathetic ear on the court.

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53. *Id.* at 269.
54. *Id.* at 271.
55. Unfortunately, there is no legislative history in existence associated with the 1881 Act.
56. Malad Valley Irr. Co. v. Campbell, 2 Idaho 411, 18 P. 52 (1888).
57. *Id.* at 415, 18 P. at 54.
58. *Id.* at 414, 18 P. at 53.
59. Drake v. Earhart, 2 Idaho 750, 23 P. 541 (1890).
60. *Id.* at 751, 23 P. at 541.
61. *Id.* at 753, 23 P. at 542.
62. *Id.*

Chief Justice Beatty took up the cause of prior appropriation, drafting the majority opinion in favor of the prior appropriators. Speaking to the "phantom of riparian rights,"[63] as he referred to the doctrine, the chief justice rose up against its applicability in a passionate opinion appealing to the law of necessity:

> Whether or not it is a beneficent rule, [prior appropriation] is the lineal descendant of the law of necessity. When, from among the most energetic and enterprising classes of the east, that enormous tide of emigration poured into the west, this was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold, only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed, as they had been, to obedience to the laws they had helped make, as the settlements increased to such numbers as justified organization, they established their local customs and rules for their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it, had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine, to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take all he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire west, and became the basis of the laws we have to-day on that subject. Very soon these customs attracted the attention of the legislatures, where they were approved and adopted, and next we find them undergoing the crucial test of judicial investigation.
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> . . .
>
> It has been said that in the case at bar no custom has been shown. It is not necessary it should be; for, prior to the beginning of appellant's claim, the superior rights of prior appropriation were acknowledged by our territorial law of 1881, and by the decisions of our courts.[64]

63. *Id.*
64. *Id.* at 753–55, 23 P. at 542–43.

The chief justice's reasoning did not persuade all of his colleagues. Justice Berry retorted on behalf of the common law rules of riparian rights, drafting a thought-provoking dissent on the subject:

> The majority opinion pronounces the claim of a person whose lands lie upon a stream as resting on the "phantom of riparian rights." I deny that under the laws of this territory "riparian rights" are a "phantom," unless unlawfully and unjustly made so. The doctrine of riparian rights is a part of the common law; and the common law is the law of this territory, except as the statute steps in, and repeals or changes it. Section 18 of the Revised Statutes so declares. It provides that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution or laws of the United States, in all cases not provided for in these Revised Statutes, is the rule of decision in all the courts in this territory."[65]

Justice Berry found further support for his position in Section 10 of the 1881 Act, which by that time had been codified as Section 3180 of the territorial revised statutes. Justice Berry asserted that it expressly affirmed within the territory what is the equivalent of common law water rights in riparian landowners:

> The statutes of the territory previous to 1881 had no provision whatever on the subject of water rights. But in 1881 what are equivalent to common-law water rights were in some respects expressly affirmed, only those rights were enlarged. Section 3180 of the Revised Statutes provides that "all persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed." In the preceding chapter of the statutes it is provided that by complying with certain conditions (not one of which is pretended to be complied with in this case) a party may entitle himself to superior rights in the use of water. No one denies this fact. But it nowhere provides that any one may entitle himself to ownership of a stream, or to entirely exclude others "on the banks or in the vicinity of a stream" from some use of the water, as provided in section 3180, above quoted. Our statute is a little more comprehensive—a little stronger, in some respects, in favor of those needing water—than the common law of riparian rights; but it leaves many of those rights intact. It is wrong, then, to designate these common-law rights as a "phan-

65. *Id.* at 762, 23 P. at 546 (Berry, J., dissenting).

> tom." They are real, and the interests of our territory demand that they should be recognized.[66]

Justice Berry's dissent raised an interesting and legitimate question regarding the meaning and effect of Section 10 of the 1881 Act. Certainly the argument can be made that its plain language does, as stressed in the dissent, vest in riparian landowners some right to use the waters of an adjacent stream, at least for irrigation purposes. Yet the defendant in this case, a riparian landowner, was enjoined in total from using any portion of the waters flowing through his land for such purposes, notwithstanding the language of Section 10.[67] The majority opinion left the meaning and intent of Section 10 of the 1881 Act unanswered, choosing instead to be silent on that provision.[68] Nonetheless, the principles of prior appropriation ultimately won the day, with two of the three justices ruling in favor of the plaintiff.[69]

Meanwhile, a statehood movement had taken hold in the territory.[70] As the conflict between common law riparian rights and appropriative rights was playing out in the courts, it was simultaneously being addressed in a more significant venue—the floor of the Idaho Constitutional Convention.[71] The departure from the common law rules of riparian rights, initiated by the early mining codes and furthered by the laws and court decisions of the territory, would be fulfilled following statehood.

IV. THE IDAHO CONSTITUTION ADOPTS THE PRIOR APPROPRIATION DOCTRINE

Prior to the issuance of the *Drake* decision, Territorial Governor Edward A. Stevenson called a constitutional convention to begin on July 4, 1889.[72] With imminent statehood in mind, delegates from around the territory gathered in Boise to debate fundamental questions of law, including those surrounding the use of the territory's waters, and develop a constitution.[73] The Manufacturers, Agriculture and Irrigation Committee ("Committee") was called upon to draft an article for consideration at the convention pertaining to water use.[74]

The members of the Committee confronted a monumental task. The competing principles and interests to be considered were numerous, and

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66. *Id.* at 762–63, 23 P. at 546.

67. *Id.* at 757, 23 P. at 544.

68. Whatever ambiguities may have still existed in the territory following the court's decision in *Drake v. Earhart* regarding the status of riparian rights or the meaning of section 10 of the 1881 Act would ultimately become moot by the passage of the Idaho Constitution and the adoption of article XV, § 3.

69. *Drake*, 2 Idaho at 757, 23 P. at 544.

70. DENNIS C. COLSON, IDAHO'S CONSTITUTION: THE TIE THAT BINDS 4–5 (Univ. of Idaho Press) (1991).

71. *Id.* at 162–63.

72. *Id.* at 5.

73. *Id.* at 14.

74. *Id.* at 164.

the Committee openly admitted their struggles. One Committee member informed the delegation that when the Committee came to consider the matter of appropriation they found "there was something more than what appeared to the causal [sic] observer, or appeared to any of us who were on the committee at first glance," stressing the difficulties the Committee members encountered.[75] Another Committee member was frank in his admission that the "question of irrigation and the use of water is yet in its infancy," and "we do not know yet all the conflicting interests or all the circumstances, which it will be necessary to know, to exactly regulate it at this time."[76] Nevertheless, the Committee succeeded in drafting a proposed article consisting of six sections,[77] which were largely adopted into the Idaho Constitution intact as Article XV.

The article proposed by the Committee, particularly section 3, showed a preference for appropriative principles and contained no express recognition of the common law rules of riparian rights.[78] Section 3 was at the center of the debate and, as submitted by the Committee, read as follows:[79]

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.[80]

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75. 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, at 1120 (I.W. Hart ed., Caxton Printers, Ltd. 1912).

76. *Id.* at 1123.

77. COLSON, *supra* note 70, at 164.

78. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, *supra* note 75, at 1117.

79. University of Idaho Professor Dennis C. Colson, in his seminal work "Idaho's Constitution: The Tie That Binds," provides a summary of the proposed article's other five sections: Section 1 declared all water appropriated or to be appropriated a public use and subject to regulation and control by the State. Three sections dealt with the sale of water: § 2 declared the right to sell water was a franchise subject to the authority of the state, § 4 protected a purchaser of water with developed agricultural property by declaring the seller could never deprive the buyer of annual water; and, § 6 granted the legislature the authority to set reasonable maximum rates for the sale of water . . . . Section 5 spoke to settlers in a water district, and provided for priority according to the date of settlement, except that the legislature was empowered to limit that propriety in the interest of subsequent settlers.

Id.

80. *Id.* (same language found in PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, *supra* note 75, at 1117).

Riparian interests, recognizing that the language of section 3 did not represent the common law rules of riparian rights, quickly proffered an amendment.[81] The proposed amendment sought the recognition of riparian principles by adding the following language to the end of the above-quoted section: "but no appropriations shall defeat the right to a reasonable use of said water by a riparian owner for irrigation of the land through which said water may run."[82] From the proposed amendment a great debate ensued.[83]

The most outspoken in favor of the amendment was Lycurgus Vineyard, a delegate from Alturas County.[84] He was quick to recite the common law rules to the body of delegates and argue the value in retaining riparian principles.[85] "Can a man by prior appropriation exclude the riparian owner of the land through which that stream runs from a reasonable use of the water for irrigation?" Mr. Vineyard proposed to the convention delegates.[86] He continued, "I say no, unless you overturn the common law. That is all there is to it. I want that added by this amendment."[87]

The proposed amendment met strong opposition on the convention floor. One delegate retorted that if the proposed amendment were adopted, "we throw aside all the experience of California, Utah and Colorado and go back to the primitive age when the riparian doctrine was first established."[88] Another declared, "[A]s I said before, I say again, first in time, first in right, and that doctrine must be protected in this country."[89] The debate continued back and forth, each side conjuring up hypothetical water use scenarios and firing off inquiries to the other in furtherance of their respective positions.

In a final plea to the convention, Mr. Vineyard summed up the case of the riparian interests in the following terms:

> As between appropriators, Mr. Chairman, prior in time, prior in right, that is the doctrine, and I am not here contending against any such doctrine as that. That rule only applies as between appropriators; but where a man locates upon the soil and acquires a patent from the government of the United States, the stream running through the land in its natural channel as defined by nature, the reasonable use to that water is absolute, and I say

81. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, *supra* note 75, at 1131.
82. *Id.*
83. COLSON, *supra* note 70, at 168.
84. *Id.* at 165.
85. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, *supra* note 75, at 1133.
86. *Id.*
87. *Id.* at 1131.
88. *Id.* at 1134.
89. *Id.* at 1136.

> that it will be beyond the province of this convention to attempt to take that away from the locator . . . .[90]

The plea of the riparian interests was ultimately for naught, and the proposed amendment was defeated that same day by vote of the convention.[91] Despite the plea of the riparian interests, section 3 was adopted by the convention in the following form:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose. And those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in Section 14 of Article I of this Constitution.[92]

Idaho obtained statehood on July 3, 1890.[93] The Idaho Constitution was adopted by the constitutional convention, ratified by the people, and approved by congress with no recognition of the common law rules of riparian rights.[94] Section 3, as adopted by the convention, would subsequently be viewed as a constitutional recognition of the supremacy of the prior appropriation doctrine in Idaho over the common law rules of riparian rights, and if any lingering doubts remained at the time, the Idaho Supreme Court quickly put them to rest in subsequent decisions.[95] Most notable is the court's decision in *Hutchinson v. Watson Slough Ditch Co.*, wherein the court, relying on article XV, section 3 of the Idaho Constitution, proclaimed the following:

> A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the

90. *Id.* at 1160.
91. *Id.* at 1161.
92. IDAHO CONST. art. XV, § 3 (compiler's notes).
93. Idaho Organic Act, ch. 656, 26 Stat. L. 215 (1890).
94. *See* IDAHO CONST. art. XV, § 3.
95. *E.g.*, Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909); St. Dept. of Parks v. Idaho Dept. of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974).

> water of the stream and is applying it to a beneficial use. To this extent, therefore, the common-law doctrine of riparian rights is in conflict with the Constitution and statutes of this state and has been abrogated thereby.[96]

Thus the result of the convention was that the departure from the common law rules of riparian rights, initiated by the miners in the 1860s and furthered by the territorial authorities, was complete, and the doctrine of prior appropriation firmly established in Idaho.

V. CONCLUSION

History reveals that the foundation for the establishment of the doctrine of prior appropriation in the State of Idaho arose out of the necessities faced by its settlers during its formative years. The departure from the common law rules of riparian rights began when the miners of the early 1860s drafted the first functional rules and regulations regarding water use in what would become Idaho. The miners' departure from the common law was furthered by the laws and court decisions of the territory, which were guided by mining custom and favored appropriative principles over riparian rights. Within less than fifty years the departure from the common law would be complete, and the superiority of the doctrine of prior appropriation constitutionally recognized.

96. *Hutchinson*, 16 Idaho at 491, 101 P. at 1062; *see also* IDAHO CONST. art. XV, § 3.