

# Water Code

*of the*

## State of Arizona

### CHAPTER 81

Article I — Revised Code, 1928

Amended 1929

Amended 1931

Amended 1934



Compiled by

**EDWIN T. STEWART**

State Water Commissioner

**PHOENIX, ARIZONA**

June, 1937

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**EDWIN T. STEWART**

State Water Commissioner

PHOENIX, ARIZONA

June, 1937

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## TABLE OF EQUIVALENTS

**1 second-foot** expresses a rate of flow of water equal to one cubic foot each second and is equivalent to the following:

- 7.48 U. S. gallons per second.
- 448.8 U. S. gallons per minute.
- 646,317 U. S. gallons per day.
- 1.98 acre-feet per day.
- 40 miner's inches.

**1 acre-foot** expresses a definite volume of water which will cover one acre to a depth of one foot. It is equivalent to the following:

- 43,560 cubic feet.
- 325,851 U. S. gallons.

**1 theoretical horsepower** is a power unit which may be calculated by multiplying vertical fall of water in feet by the amount of water in second-feet and dividing the product by 8.8 and is equivalent to the following:

- 550 foot-pounds per second.
- 746 watts.

1,000,000 U. S. gallons per day equals 1.55 second-foot.

1,000,000 U. S. gallons equals 3.07 acre-feet.

DEPARTMENT OF  
AGRICULTURE  
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WASHINGTON, D. C.

## CHAPTER 81

After the Water Code went into effect (June 12, 1919) it was no longer possible to appropriate water under the law of Arizona for the purpose of irrigation by mere beneficial use, as certain formalities are required to initiate and perfect the right. *Tattersfield v. Putnam*, 45 Ariz., 156, 41 P. (2d) 228.

Water commissioner is required to act judicially when passing upon application for permit to appropriate water, since permit in effect is a judgment that applicant is entitled to proceed with work necessary to complete appropriation. *Parker v. McIntyre*, 47 Ariz. 484, 56 P. (2d) 1337.

### Article 1. State water code.

**§ 3280. Waters of state public, and subject to beneficial use.** The water of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belongs to the public, and is subject to appropriation and beneficial use, as herein provided. Beneficial use shall be the basis, measure and limit to the use of water. Whenever the owner of a right to the use of water shall cease or fail to use the water appropriated for five successive years, the right to the use shall cease, and the water shall revert to the public and be again subject to appropriation. (§1, Ch. 164, L. '19, am., 1, Ch. 64, L. '21, rev.)

See notes under § 3281, *infra*.

R. S. 1913, § 5344, cited without construction or application. *George v. Gist*, (1928), 33 Ariz. 93, 263 Pac. 10.

**Constitutionality of statute.** The Water Code is constitutional; it does not vest water commissioner with judicial power, or violate the constitutional guarantee of due process of law. *Stuart v. Norviel*, (1924), 26 Ariz. 493, 226 Pac. 908.

**Riparian doctrine abolished.** The common law doctrine of riparian right was expressly repudiated by R. S. 1887, § 3198. *Chandler v. Austin*, (1895), 4 Ariz. 346, 42 Pac. 483.

The adoption of the common law by Howell Code of 1864, ch. 61, sec. 7 did not include the doctrine of riparian rights. *Boquillas Land & Cattle Co. v. Curtis*, (1908), 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. 493, affirming 11 Ariz. 128, 89 Pac. 504.

The right to use water is not confined to riparian owners. *Boquillas Land & Cattle Co. v. Curtis*, (1908), 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. 493, affirming 11 Ariz. 128, 89 Pac. 504.

**Water subject to appropriation.** Flood waters may be appropriated. *George v. Gist*, (1928), 33 Ariz. 93, 263 Pac. 10.

Subterranean streams, flowing in natural channels, between well defined banks, are subject to appropriation under the same rule as surface streams. *Howard v. Perrin*, (1904), 8 Ariz. 347, 76 Pac. 460.

**Drainage waters.** Since in view of this section an appropriator of water has the better right thereto, unless the owner of water abandoned the excess without the intention of repossession after it has been allowed to flow over irrigated lands, the drain waters do not become in character waste water; and thereby become subject to capture by any one else. *Lambeye v. Garcia*, (1916), 18 Ariz. 178, 185, 157 Pac. 977, per opinion of Cunningham, J., concurring.

Drainage waters placed in the ground by means of artificial irrigation are not subject to appropriation under this section, and a person or corporation recovering such waters has the legal right to dispose of them by sale or otherwise, if he so chooses. *Brewster v. Salt River, etc. Assn.*, (1924), 27 Ariz. 23, 229 Pac. 929.

**Percolating waters.** In Arizona the right to appropriate water for any beneficial purpose is limited to the appropriation of water declared public by this section, and does not include percolating water. *McKenzie v. Moore*, (1918), 20 Ariz. 1, 5, 176 Pac. 568.

Percolating water oozing through the soil beneath the surface in an undefined and unknown channel is not subject to appropriation. *Howard v. Perrin*, (1906), 200 U. S. 71, 50 L. Ed. 374, 26 Sup. Ct. 195.

Percolating waters collected in a ditch or canal are not subject to appropriation. *Wattson v. United States*, (1919), 260 Fed. 506.

**Use of water.** An appropriator of water for irrigation is entitled to so much water only as is necessary to irrigate his land, and is bound to make a reasonable use of it. Subsequent appropriators are entitled to the residue of the stream or to the whole thereof at times the water is not needed by prior appropriators. *Clough v. Wing*, (1888), 2 Ariz. 371, 17 Pac. 453.

**Forfeiture of rights.** Whether there has been a forfeiture of water rights involves no question of intention; it is merely a question whether, as provided in Civ. Code, 1913, § 5338, the party has, since the destruction of a dam, used due diligence under all the circumstances of the case to reconstruct and maintain it, which is a question of fact for the jury. *Gila Water Co. v. Gillespie*, (1925), 29 Ariz. 304, 241 Pac. 307.

The contention that Civ. Code, 1913, § 5338 provided only for forfeiture of water rights and not the reservoir rights, and the forfeiture of the latter incidentally worked a forfeiture of the former. *Gila Water Co. v. Gillespie*, (1925), 29 Ariz. 304, 306, 241 Pac. 307.

Under doctrine of prior appropriation, waters of an underground flowing stream are as available to appropriation as waters of surface stream and governed by same principals of law, but those appropriating such waters must adopt means to preserve to the prior appropriator his rights without

injury to him. *Pima Farms Company v. Proctor*, 30 Ariz. 96, 245 P. 369.

In an application to the state water commission for the appropriation of water, no appeal lies to the supreme court. *Smith v. Trott*, 36 Ariz. 166, 283 P. 726.

Percolating waters are generally the property of the owner of the land and not subject to appropriation. *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P. (2d) 369.

Subterranean waters flowing in well-defined natural channels are public waters and subject to appropriation. *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P. (2d) 369.

Underground waters are presumed to be percolating in nature and one asserting such waters are not percolating must prove assertion affirmatively by clear, convincing evidence. *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P. (2d) 369.

Characteristics of "water course," whether surface or subterranean, are "channel," consisting of well defined "bed" and "banks," and "current" of water, and to establish existence of subterranean stream, there must be convincing proof that subterranean waters have definite bed, banks, and current, and of location of bed and banks. *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P. (2d) 369.

Waters may be subject to appropriation as being "subflow" of river. The "underflow," "subflow," or "undercurrent," as it is variously called, of surface stream, may be defined as those waters which slowly find their way through sand and gravel constituting bed of a stream, or lands under or immediately adjacent to stream and are themselves part of surface stream, and in determining whether waters are subject to appropriation as subflow, inquiry is whether drawing off of subsurface water tends to diminish appreciably and directly flow of surface stream. *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P. (2d) 369.

The right of appropriation, both in quantity and quality, depends on their natural condition, and not on what may occur after that condition is artificially changed. *Fourzan v. Curtis*, 43 Ariz. 140, 29 P. (2d) 722.

"Springs on the surface" refers only to the waters which emerge from the earth without artificial assistance, and that no appropriation can be made of percolating waters developed through the means of tunnels, cuts, wells, or other artificial structures, even though those waters may by such structures be brought to the surface at the place where a "spring on the surface" already exists. *Fourzan v. Curtis*, 43 Ariz. 140, 29 P. (2d) 722.

To constitute a valid appropriation the water must be put to some beneficial use. *Fourzan v. Curtis*, 43 Ariz. 140, 29 P. (2d) 722.

Waters developed by tunnel and open cut that collected at damp place, where there was no flow

before, held not subject to appropriation. *Fourzan v. Curtis*, 43 Ariz. 140, 29 P. (2d) 722.

Percolating waters belong to the owner of the land on which they are found, and he may convey them to other premises than those on which they are originally found, providing no other rights are injured thereby. *Fourzan v. Curtis*, 43 Ariz. 140, 29 P. (2d) 722.

Owners, securing title from one filing scrip on the land, are the equitable owners of percolating waters found thereon, with power to convey the waters to other lands over right of way, if properly acquired. *Fourzan v. Curtis*, 43 Ariz. 140, 29 P. (2d) 722.

Where pleadings characterized percolating water as "South Grass Seep or Springs" in amended complaint, it did not make the water subject to appropriation as "spring on the surface." *Fourzan v. Curtis*, 43 Ariz. 140, 29 P. (2d) 722.

Water which percolates into land owner's well and then rises to surface is not subject to appropriation, but belongs to owner of land upon which found, and owner of land upon which well is situated and from which percolating water arose was entitled to use water therefrom not as appropriator, but as owner of the land. *Campbell v. Willard*, 45 Ariz. 221, 42 P. (2d) 403.

In determining whether percolating waters are subject to appropriation, Supreme Court must consider them in their natural state and not as developed artificially. *Campbell v. Willard*, 45 Ariz. 221, 42 P. (2d) 403.

Waters of springs used for stock watering purposes held appropriable, notwithstanding springs were insufficient to cause flow of water beyond boundaries of lands located by defendants. *Parker v. McIntyre*, 47 Ariz. 484, 56 P. (2d) 1337.

Parties who attempted to acquire title to open unoccupied government land took land subject to any water rights which might have been initiated according to law, provided that such rights had not lapsed nor become void. *Parker v. McIntyre*, 47 Ariz. 484, 56 P. (2d) 1337.

Contention that plaintiffs were not entitled to restrain defendants from interfering with plaintiffs' appropriation of water because of laches resulting from delay between making of application for permit and attempted application of water held collateral attack on decision granting permit, and hence not sustainable, where delay was in granting the permit. *Parker v. McIntyre*, 47 Ariz. 484, 56 P. (2d) 1337.

Defendants who attempted to acquire title to open, unoccupied government land could not contend in plaintiffs' suit to restrain interference with water right that defendants had no constructive notice of pending application, since defendants had duty to examine records of water commissioner to ascertain if any application for appropriation of waters of springs had been allowed or was pending. *Parker v. McIntyre*, 47 Ariz. 484, 56 P. (2d) 1337.

Where water commissioner did not issue permit for appropriation of waters of springs until two and one-half years after application therefor, re-

viewing court presumed, in absence of contrary evidence, that there was sufficient reason for the delay so as to relieve applicants from defense of laches in applicants' action to restrain defendants from interfering with their application of such waters pursuant to permit. *Parker v. McIntyre*, 47 Ariz. 484, 56 P. (2d) 1337.

The mere existence of Boulder Canyon Project Act authorizing construction of dam, storage reservoir, and hydro-electric plant at Black Canyon on Colorado river, held not to invade quasi sovereign rights of state of Arizona expressed in its laws regulating appropriation of unappropriated waters. *State of Arizona v. State of California*, 283 U. S. 451, 51 S. Ct. 523.

Periodical, seasonal, or intermittent stream as a watercourse. 40 A. L. R. 839.

Right to follow accretions across divisional line previously submerged by action of water. 8 A. L. R. 640; 41 A. L. R. 395.

Subterranean and percolating waters; springs; wells. 55 A. L. R. 1385.

Title to beds of natural lakes or ponds. 23 A. L. R. 757.

See the article "Waters," 25 Cal. Jur. 985; 27 R. C. L. 1052.

**§ 3281. Right of appropriation.** Any person may appropriate any unappropriated water for domestic, municipal, irrigation, stock watering, water power, or mining uses, for his personal use or for delivery to consumers; the person first appropriating shall have the better right. Such person, to effect the beneficial use, may construct and maintain reservoirs, dams, canals, ditches, flumes, and other necessary waterways. (§4169, R. S. '01; 5337, R. S. '13, rev.)

See notes under § 3280, supra.

What constitutes an appropriation is largely a question of fact. Appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use. *Clough v. Wing*, (1888), 2 Ariz. 371, 17 Pac. 453.

Under this act a corporation was recognized as possessing the same right as an individual to appropriate water, but the restriction upon the subject of appropriations of water from a public stream apply alike to individuals and corporations. *Slosser v. Salt River Valley Canal Co.*, (1901), 7 Ariz. 376, 387, 65 Pac. 322.

The right to appropriate water depends upon whether the water is unappropriated and upon the purpose for which it is to be applied after appropriation. The person first in time who uses unappropriated water for any of the purposes mentioned in the statute acquires the better right thereto, and may construct and maintain reservoirs, dams, canals, ditches, flumes and other necessary waterways. *Daggs v. Howard Sheep Co.*, (1914), 16 Ariz.

283, 145 Pac. 140.

One cannot acquire title to an easement in land withdrawn from public entry by the Secretary of Interior. *Verde Water & Power Co. v. Salt River Valley Water Users' Assn.*, (1921), 22 Ariz. 305, 317, 197 Pac. 227.

Prescriptive right of lower as against upper owner to flow of stream. 53 A. L. R. 201.

See 26 Cal. Jur. 44; 27 R. C. L. 1258.

**§ 3282. Water commissioner; appointment; powers and salary.** The governor shall appoint a state water commissioner, who shall be familiar with water law, hydraulics and irrigation. The commissioner shall hold office for a period of six years, be removable by the governor for cause, maintain his office at the capitol and receive a salary of four thousand dollars per annum and his necessary traveling expenses; he shall have general control and supervision of the waters of the state, and of the appropriation and of the distribution thereof, excepting the distribution reserved to water commissioners appointed by the courts under existing decrees. (§2, Ch. 164, L. '19, rev.)

See 25 Cal. Jur. 1013.

**§ 3283. Survey of water resources; record; rules and regulations.** The commissioner may make surveys, investigations and compilations of the water resources in the state, and their potential development, and may cooperate for such purposes with the United States; he shall maintain a permanent public depository for existing and future records of stream flow, and other data relating to the water resources of the state; he may formulate and prescribe rules and regulations governing the appropriation and distribution of water. The commissioner shall have an official seal bearing the words, "Arizona State Water Commissioner" which shall be affixed to certificates, maps, plans and like instruments issued from his office. (§ § 3-4, Ch. 164, L. '19, cons. & rev.)

**§ 3284. Application to appropriate.** Any person, including a municipality, the state, or the United States, intending to acquire the right to the beneficial use of water, shall make an application to the commissioner for a permit to make an appropriation of water. The application shall state the name and address of the applicant; the water supply from which the appropriation is applied for; the nature

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and amount of the proposed use; the location, point of diversion and description of the proposed works by which it is to be put to beneficial use; the time within which it is proposed to begin construction and the time required for the completion of the construction and the application of the water to the proposed use. If the application is for agricultural purposes it shall give the legal subdivisions of the land and the acreage to be irrigated; if for power purposes, the nature of the works by which power is to be developed, the pressure head and amount of water to be utilized, the points of diversion and release of the water, and the uses to which the power is to be applied; if for the construction of a reservoir, the dimensions and description of dam, the capacity of the reservoir for each foot in depth, the description of the land to be submerged, and the uses to be made of the impounded waters; if for municipal uses, the present population to be served, and an estimate of the future requirements; if for mining purposes, the location and the nature of the mines to be served, and the methods of supplying and utilizing the waters. The application shall be accompanied by such maps, drawings and data as prescribed by the commissioner. (§ § 5-6, Ch. 164, L. '19, am., 2-3 Ch. 64, L. '21, cons. & rev.)

See notes under § 3280, supra.

See 26 Cal. Jur. 86.

**§ 3285. Approval or rejection of application; legislative authorization; relative value of uses.** Upon receipt of the application, the commissioner shall indorse thereon the date of its receipt and keep a record thereof. If the application is defective, he shall return the same for correction or completion, indorse thereon the date of and reasons for the return, and keep a record thereof. The application shall not lose its priority of filing on account of such defects if corrected, completed and refiled in the office of the commissioner within sixty days from its return to the applicant, or within such further time as the commissioner may, by an order of record, allow. Applications shall be recorded in a book kept for that purpose. The commissioner shall approve all applications, made in proper form, contemplating the application of water to a beneficial use; but, when the ap-

plication or the proposed use conflicts with vested rights, is a menace to the safety, or against the interests and welfare of the public, he shall reject the application. An application for the appropriation of the waters of a stream within the state for the generation of electric energy in excess of twenty-five thousand horsepower, or an application for a permit to build a dam for the generation of hydro-electric energy on a stream within the state in excess of twenty-five thousand horsepower, shall not be approved or granted unless authorized by an act of the legislature. A change in the use of water appropriated for domestic, municipal or irrigation uses, shall not be made without the approval of the commissioner; if the change contemplates the generation of hydro-electric energy or power of over twenty-five thousand horsepower, such approval shall not be granted unless authorized by an act of the legislature.

Before approving or rejecting the application, the commissioner may require additional information to enable him to properly guard the public interest, and may, on applications proposing to divert more than ten cubic feet of water per second, require a statement of the following facts: If a corporation, a copy of the articles of incorporation, the names and residences of directors and officers, and the amount of its authorized and paid up capital; if not a corporation, the name of the party proposing to construct the works, and a showing of his financial ability to carry out the proposed work. He may also require the applicant to show that the proposed diversion will not conflict with vested rights.

An application may be approved for less water than applied for, if substantial reasons exist therefor, and shall not be approved for more than can be applied to a beneficial use. Applications for municipal uses may be approved to the exclusion of all subsequent appropriations, if the estimated needs of the municipality so demand, upon consideration and order by the commissioner. As between two or more pending conflicting applications for the use of water from a given water supply, where the capacity of the supply is not sufficient for all applications, preference shall be given by the commissioner according to the

relative values to the public of the proposed use. The relative values to the public for this purpose are: 1. Domestic and municipal uses, domestic uses to be construed to include gardens not exceeding one-half acre to each family; 2. irrigation and stock watering; 3. water power and mining uses. (§7, Ch. 164, L. '19, am., 4, Ch. 64, L. '21; 1, Ch. 109, L. '27, rev.)

If the commissioner proceeding under this section grants the permit, his action is absolutely void in so far as it conflicts with vested rights. A prior appropriator objecting before the commissioner is not bound by his action in granting the permit. *Salt River Valley Water Users' Assn. v. Norviel*, (1926), 29 Ariz. 499, 242 Pac. 1013.

In an application to the state water commission for the appropriation of water, no appeal lies to the supreme court. *Smith v. Trott*, 36 Ariz. 166, 283 P. 726.

Water Commissioner is required to act judicially when passing upon application for permit to appropriate water, since permit in effect is a judgment that applicant is entitled to proceed with work necessary to complete appropriation. *Parker v. McIntyre*, 47 Ariz. 484, 56 P. (2d) 1337.

See 26 Cal. Jur. 86.

**§ 3286. Effect of approval or rejection.** The approval or rejection of the application shall be indorsed thereon, a record thereof kept by the commissioner, and the application returned immediately to the applicant. If approved, the applicant may construct the necessary works, take steps to apply the water to a beneficial use and perfect the appropriation. If the application is rejected, the applicant shall take no steps toward the construction of the proposed work or the diversion of the water. (§ 8, Ch. 164, L. '19, rev.)

See notes under § 3280, supra.

**§ 3287. Permit may be assigned; rights of assignee; disclaimer of franchise; value of permit.** A permit to appropriate water may be assigned, subject to the conditions of the permit, but shall not be binding, except upon the parties thereto, unless the assignment is approved by and filed with the commissioner. The permittee, if he accepts such permit, shall accept the same upon the condition that no value, in excess of the amount paid to the state, shall be claimed for such permit, or for the rights acquired thereby, when any public authority is regulating, or fixing the rate or charges of the services to be rendered by the permittee, his successors or assigns, or when

the state, a city, county, municipal water or irrigation district, or any political subdivision of the state is seeking to acquire the rights and property of the permittee, his successors or assigns. (§ 9, Ch. 164, L. '19, rev.)

See notes under § 3280, supra.

See Ch. 10, Laws '34, 3'd Sp. Ses.

**§ 3288. Time of construction.** Actual construction, except under applications by a city or town for its municipal uses, shall begin within one year from the approval of the application, be prosecuted with reasonable diligence and completed within a reasonable time, to be fixed in the permit, not to exceed five years from the date of such approval. The commissioner shall, for good cause shown, extend the time beyond the five years if the magnitude, physical difficulties and cost of the work merit such extension. (§ 10, Ch. 164, L. '19, rev.)

See notes under § 3280, supra.

**§ 3289. Applications for reservoir permits; secondary permits for water.** Applications for reservoir permits shall be governed by the foregoing sections, except that the lands proposed to be irrigated therefrom need not be enumerated in the primary permit. The party proposing to apply to a beneficial use the water stored in such reservoir shall file an application for a permit, to be known as the secondary permit, which application shall refer to such reservoir as the supply of water, and shall show that a written agreement has been entered into with the owners of the reservoir for a permanent interest in said reservoir sufficient for the purposes set forth in the application. When the beneficial use has been perfected under the secondary permit, the final certificate of appropriation shall issue and refer to both the ditch described in the secondary permit and the reservoir described in the primary permit. If at any time it shall appear to the commissioner, after a hearing, that the holder of the primary permit will not, or cannot, within a reasonable period develop the supply of water or complete the works, the commissioner may, upon application of the holder of the secondary permit, permit to such holder joint occupancy and use under the primary permit with the holder thereof, to the extent deemed advisable by the commissioner; provided that the applicant shall

pay to the holder of the primary permit a pro rata portion of the total cost of the works, such pro rata cost to be based on the proportion of water used by the original and the additional users of such works. (§ 12, Ch. 164 L. '19, rev.)

§ 3290. **Certificates; date of rights.** Upon it being made to appear to the satisfaction of the commissioner that an appropriation has been perfected and a beneficial use completed in accordance with the provisions of this article, he shall issue to the applicant a certificate, like in form and substance to, and recorded and transmitted to the applicant in the same manner as, the certificate required to be issued upon the final determination of the rights to the waters of a stream. Certificates for rights to use of water for power development shall limit the right or franchise to a period of forty years from the date of application, subject to a preference right of renewal under the laws existing at the date of expiration of such franchise or right. The right acquired by such appropriation shall date from the filing of the application in the office of the commissioner. (§ § 13-14, Ch. 164, L. '19, cons. & rev.)

§ 3291. **Reciprocity between states.** An application for the appropriation of water shall not be denied because the point of diversion of water described in the application, or any portion of the works to be constructed for the purpose of storing, diverting or distributing such water, or the place of intended use, or the lands to be irrigated by such water, or part thereof, may be situate in some other state; but where either the point of diversion, or any of such works, or the place of intended use, or the lands, or part of the lands, to be irrigated by means of such water, are situated within the state, the permit shall issue. The commissioner may, however, in his discretion, decline to issue a permit where the point of diversion is within the state, but, the place of beneficial use is in some other state. (§ 15, Ch. 164, L. '19, rev.)

§ 3292. **Appeal from commissioner's decisions.** An applicant, or any person whose rights are affected by the decision of the com-

missioner, may appeal to the superior court of the county in which the water proposed to be diverted is situate, which court may modify the decisions of the commissioner if he has abused his authority. The appellant, within sixty days from the decision by the commissioner, shall file with the clerk of the court a copy of the order appealed from, together with a petition stating the grounds of the appeal. A copy of the petition shall be served upon the commissioner, who shall answer the same within thirty days from the service, and with the answer transmit to the court the records and files of his office in the matter on appeal. The appellant may have summons issued for any other party in interest. The appeal shall be determined upon the records and files of the commissioner and upon such further evidence as may be adduced by the parties. (§ 11, Ch. 164, L. '19, am., 2; Ch. 109, L. '27, rev.)

This section does not authorize an appeal by one aggrieved by any action of the water commissioner, except the applicant for a permit. *Salt River Valley Water Users' Assn. v. Norviel*, (1926), 29 Ariz. 499, 503, 242 Pac. 1013.

The Water Code provides for no hearing when prior appropriators object to the issuance of a permit, and the appearance of such an appropriator before the commissioner as a matter of courtesy does not give him jurisdiction either of the subject matter or the parties for any purpose except to grant or deny the permit; his orders can in no way interfere with vested rights, and no decision by him can be conclusive as to the facts. *Salt River Valley Water Users' Assn. v. Norviel*, (1925), 29 Ariz. 360, 241 Pac. 503.

In application to the state water commission for the appropriation of water, no appeal lies to the supreme court. *Smith v. Trott*, 36 Ariz. 166, 283 P. 726.

See notes under § 3285, supra.

**§ 3293. Determination of conflicting rights.** The commissioner may, and upon a petition signed by one or more water users upon any stream or water supply requesting the determination of the relative rights of the various claimants to the waters of that stream or supply shall, if the facts and conditions justify, determine the rights of the various claimants; and shall fix a time for the taking of testimony and make such examinations as will enable him to determine such rights. If an action has been brought in a state court for the deter-

mination of such rights, the court may transfer such action to the commissioner for determination as herein provided, but no proceedings shall be had in such action by the commissioner until such transfer is made. Where rights to the use of water, or dates of appropriation have been determined in a judgment of a court, the commissioner shall accept such rights and dates of appropriation as found in such judgment; and the owner of an appropriation adjudicated in such judgment need not appear in, or take notice of the proceedings, investigations or hearings of the commissioner except to disprove abandonment or other loss of the right adjudicated by such judgment. (§ 16, Ch. 164, L. '19, rev.)

In the proceeding provided by this and ensuing sections the commissioner's jurisdiction is in the nature of the jurisdiction of a referee or similar to that of a master under the old chancery practice, save that he has original jurisdiction to initiate the proceeding, whereas the referee or master can only determine such issues as are directly referred to him by the court; both are subject to revision by the court, and in no sense are the commissioner's findings conclusive as to the facts. *Salt River Valley Water Users' Assn. v. Norviel*, (1926), 29 Ariz. 499, 242 Pac. 1013.

In a proceedings hereunder the water commissioner acts as a referee for the superior court; and the proceedings in effect originates in the superior court, so that an appeal will lie to the supreme court. *Smith v. Trott*, 36 Ariz. 166, 283 P. 726.

See 26 Cal. Jur. 88.

**§ 3294. Publication of notice of investigation.** The commissioner shall prepare a notice of the place and date when he will begin the investigation of the flow of the stream or supply, the ditches diverting water therefrom, and the land irrigated thereby, and requiring all claimants to rights in the waters thereof to make proof of their claims when called upon by the commissioner. The notice shall be published in two issues of one or more newspapers having general circulation in the counties in which such supply is situated. (§ 17, Ch. 164, L. '19, am., 5, Ch. 64, L. '21, rev.)

**§ 3295. Examination of stream and lands irrigated.** The commissioner shall examine: The stream or supply; the works diverting water therefrom; the discharge of said stream as shown by existing data and additional measurements; the carrying capacity to the various

ditches and canals; the lands irrigated or susceptible of irrigation from the various ditches and canals, and make measurement thereof; and take such other steps and gather such other information as may be essential to the proper understanding of the relative rights of the parties. The investigations shall be reduced to writing, and kept of record in his office conveniently accessible to the public. He shall make or cause to be made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of said stream or supply, the location of such ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or are susceptible of irrigation from the ditches and canals already constructed. (§ 18, Ch. 164, L. '19, am., 6, Ch. 64, L. '21, rev.)

**§ 3296. Notice to claimants.** During the investigation the commissioner shall send by registered mail to each claimant to the use of any waters of said stream or supply, so far as such claimants can reasonably be ascertained, a notice stating the date and place when and where the commissioner will take testimony of the rights to the waters of said stream or supply. Such notice must be mailed at least thirty days prior to the date set therein for the taking of testimony, and shall be published in two issues of one or more newspapers having general circulation in the counties in which such stream or supply is situated. The taking of testimony may be adjourned from time to time and from place to place to suit the convenience of those interested. (§ 19, Ch. 164, L. '19, am., 7, Ch. 64, L. '21, rev.)

**§ 3297. Statement of claimant.** The commissioner shall enclose with said notice a blank form on which the claimant shall present in writing the particulars of his claim of right to the waters. The statement shall include: The name and address of the claimant; the nature of the right or use on which the claim is based; the time of initiation of such right and the commencement of such use; if distributing works are used or required, the date of beginning and completion of construction or of enlargements, the dimensions of the ditch as originally constructed and as enlarged; the date when water was first used

for beneficial purposes; if used for irrigation, the amount of land reclaimed the first year and in subsequent years, and the amount and general location of the land, the character of the soil, and the kind of crops cultivated; and such other facts as will show a compliance with the law in acquiring the right. The statement shall be verified by the claimant. The commissioner or his deputy, if the oath be taken before him, shall administer such oath without charge. (§ § 20-1, Ch. 164, L. '19, am., 8-9, Ch. 64, L. '21, cons. & rev.)

**§ 3298. Opening and inspection of evidence.** Upon the completion of the taking of testimony the commissioner shall give notice by registered mail to the claimants that at a time and place named in the notice, not less than ten days thereafter, said evidence will be open to inspection by the claimants. The commissioner shall keep the evidence open to inspection at such place not less than thirty days, or such further time as fixed in the notice. (§ 23, Ch. 164, L. '19, am., 11, Ch. 64, L. '21, rev.)

**§ 3299. Contest; notice of; hearing.** Should any claimant desire to contest the rights asserted in the evidence submitted by another claimant, he shall, within five days after the expiration of the period fixed in the notice for public inspection of the evidence, notify the commissioner in writing under oath, stating with reasonable certainty the grounds of his proposed contest. The commissioner shall notify, by registered mail or by personal service, the said contestant and the claimant whose rights are contested, to appear before him at such time and place as he shall designate in said notice, not less than thirty days nor more than sixty days from the date the notice is served. The commissioner may adjourn the hearing from time to time upon reasonable notice to the parties, may issue subpoenas and compel the attendance of witnesses, take evidence, order the taking of depositions and issue commissions therefor. Said witnesses shall receive fees as in civil actions, the costs to be taxed in the same manner as are the costs in suits in equity. The evidence in such hearing shall be limited to the subjects enumerated in

the notice and statement of contest. (§ § 24-5, Ch. 164, L. '19, am., 12-13, Ch. 64, L. '21, cons. & rev.)

**§ 3300. Order of determination; court hearing; notice to claimants.** After the completion of the taking of testimony or the hearing of a contest, the commissioner shall file the evidence in his office, and make, and enter of record in his office, findings of fact and an order determining and establishing the several rights to the waters of said stream or supply. The original evidence and certified copies of the measurements and maps and of the order of determination and findings of the commissioner, as they appear of record in his office, shall be thereupon filed by the commissioner with the clerk of the superior court in the county in which reside the greatest number of water users whose rights are determined by such order of determination. Upon the filing of such evidence and order, the court shall by an order fix a time of hearing in said court, which shall be at least forty days subsequent to the date of such order. The clerk of said court shall forthwith deliver a certified copy of such order to the commissioner, who shall immediately upon receipt thereof notify each claimant who has appeared in the proceeding, of the time and place for such hearing. Service of such notice shall be deemed complete upon depositing such notice in the post office as registered mail, addressed to such claimant at his address as set forth in his statement of claim. Proof of such service shall be made and filed with the court by the commissioner as soon as possible after the mailing of such notices. (§ 26, Ch. 164, L. '19, rev.)

**§ 3301. Filing exception to order; hearing and decree.** The proceedings in court shall thereafter be as near as may be like a suit in equity. At any time prior to the hearing, any party interested may file exceptions in writing to such findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds of the exceptions and shall specify the part of such findings and order to which exceptions are made. A copy of such exceptions shall be served upon any adverse party affected thereby; such service may be made upon such ad-

verse party in person, upon his attorney if he has appeared by attorney, upon his agent, or if a non-resident of the state, by registered mail addressed to his place of residence as set forth in the proceedings. If no exceptions are filed, the court shall on the day set for the hearing enter a decree affirming the determination of the commissioner; if exceptions are filed the court shall fix a time, not less than thirty days thereafter, at which time a hearing will be had upon such exceptions. All parties may be heard upon the consideration of the exceptions, and the commissioner may appear on behalf of the state. The court may remand the action to the commissioner for further testimony and a further order of determination, or affirm or modify the order of the commissioner, and assess the costs as it deem just. The clerk of the court, immediately upon the entry of the judgment of determination shall transmit a certified copy of such judgment to the commissioner, who shall immediately enter the same of record in his office and file a certified copy of such judgment with the county recorder of each county wherein such stream or supply, or any portion or a tributary thereof, is situated. (§ 27, Ch. 164, L. '19, am., 14, Ch. 64, L. '21, rev.)

A court does not abuse its discretion in denying a re-reference to the water commissioner on the ground of newly discovered evidence where the motion therefor was not supported by any showing of the proposed evidence claimed to be newly discovered. *Stuart v. Norviel*, (1924), 26 Ariz. 493, 226 Pac. 908.

**§ 3302. Division of water pending hearing; determination conclusive.** The determination of the commissioner shall be in full force and effect from the date of its entry in his records; and during its pendency in the court, and until a certified copy of the judgment of the court is transmitted to the commissioner, the division of water from the stream or supply involved in such appeal shall be made in accordance with the order of the commissioner. The determination of the commissioner, as confirmed or modified by the judgment of the court, shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or body of water embraced in the determination. (§ 28, Ch. 164, L. '19, am., 15, Ch. 64, L. '21, cons.; 31, Ch. 164, L. '19, rev.)

**§ 3303. Certificate after final determination.**

Upon the filing of such judgment the commissioner shall issue to each person represented in such determination a certificate, signed by the commissioner and attested under his seal, setting forth the name and address of the owner of the right, the priority of date and the extent and purpose of such right, and, if such water be for irrigation purposes, a description of the legal subdivisions of land to which said water is appurtenant. He shall transmit such certificate, and the recording fee to the county recorder of the county in which such right is located, who shall record the same in a book kept for that purpose, and thereupon immediately transmit the certificate to the owner. (§ 29, Ch. 164, L. '19, am., 16, Ch. 64, L. '21, rev.)

**§ 3304. Rehearing.** Within six months from the date of the judgment of determination by the court, the commissioner or any party interested may apply to the court for a rehearing. If it shall appear to the court that there are good grounds for a rehearing, the court shall enter an order fixing the time for the hearing of the application, and the clerk of the court shall, at the expense of the petitioner, forthwith mail to the commissioner and to every party interested a notice of such application and of the time and place of the hearing thereof. (§ 30, Ch. 164, L. '19, rev.)

**§ 3305. Estoppel; intervention by persons not notified.** Whenever proceedings hereunder are instituted for the determination of the rights to the use of any water all claimants interested therein shall appear and submit proof of their claims at the time and in the manner herein required; any claimant, not herein excused, who shall fail to appear in such proceedings and submit proof of his claim, shall be barred and estopped from subsequently asserting any right theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall forfeit all rights to the use of said water theretofore claimed by him. Any person interested in the water upon whom service of notice of the pendency of the proceedings was not had, and who did not have actual knowledge or notice of the pendency of

said proceedings, may, at any time within one year after the entry of the order of determination by the commissioner, file a petition with the commissioner to intervene in said proceedings. Such petition shall contain all matters required of claimants who<sup>e</sup> have been served with notice of said proceedings and a statement that the intervener had not actual knowledge or notice of the pendency of said proceedings. Upon the filing of the petition the petitioner shall be allowed to intervene upon such terms as may be equitable, and thereafter has the rights of a claimant served, and like proceedings shall be had upon the claim of such petitioner. (§ 32, Ch. 164, L. '19, rev.)

**§ 3306. Several determinations; reopening records.** Whenever the rights to the waters of a stream or supply have been determined by more than one and the same proceeding, the commissioner may open to public inspection, in the manner herein provided for the opening and inspection of evidence, all proofs and evidence of rights to the water, and his finding in relation thereto, in the proceedings affecting such stream or supply; and any person may contest the claims or rights of another to such water; provided, such contest may not be maintained except between claimants who were not parties to the same adjudication in the original hearings. (§ 33, Ch. 164, L. '19, rev.)

See notes under § 3293, supra.

**§ 3307. Water districts; superintendent.** The commissioner shall divide the state into water districts with reference to drainage watersheds so as to secure the best protection to the claimants to water and the most economical supervision by the state. Districts shall not be created until a necessity therefor arises, but shall be created from time to time as the claims thereof from the streams or supply of the state shall be determined. The commissioner shall appoint one water superintendent for each district, who shall receive such compensation as the commissioner may fix, to be paid by the water users of the district. Each superintendent shall keep an account of the time spent by him and his assistants in the duties of each county, and present a verified copy thereof to the superior court of each county at

the end of each month, whereupon the judge of the court shall order the same paid according to an equitable distribution of the amount among the water users. The superintendent may employ assistants, whose compensation shall be fixed and paid in like manner as the superintendent. (§ 34, Ch. 164, L. '19, am., 17, Ch. 64, L. '21, cons., 35, Ch. 164, L. '19, & rev.)

**§ 3308. Duties of superintendent; injunction against.** The superintendent shall divide the water of the sources of supply of his district among the several ditches and reservoirs taking water therefrom, and among the laterals and ditches according to the rights of each, shut and fasten the head gates of ditches, and regulate the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights existing from the supply of his district; he may regulate the distribution of water among the users under a partnership ditch or reservoir in accordance with existing decrees where the rights have been determined; he shall, as near as may be, divide, regulate and control the use of the water by such closing of the head gates as will prevent the waste of water, or its use in excess of the right. Any person interested may apply to the superior court of the county for an injunction against the superintendent, but such injunction shall not be issued unless it appears that the superintendent has failed to carry into effect the order of the commissioner or decrees of the court determining the existing rights to the use of water. Whenever the superintendent regulates a head gate to a ditch or the controlling works of reservoirs, he shall attach to such head gate or controlling works a written notice, dated and signed; stating that such head gate or controlling works has been regulated by him and is wholly under his control, and such notice shall be legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. The county attorney shall appear for the superintendent in any case which may arise in the pursuance of his official duties. (§ § 36-7, Ch. 164, L. '19, cons. & rev.)

**§ 3309. Head gates; measuring devices.** The owner of any ditch or canal shall maintain at

the point where the water is diverted, a substantial head gate, so constructed that it can be locked and kept closed by the water superintendent; and, when required by the commissioner, shall construct and maintain measuring devices at points along such ditch to assist the water superintendent in determining the amount of water to be diverted into said ditch from the stream, or taken from it by the users. The owner of a reservoir located across or upon the bed of a natural stream, shall, when required by the commissioner, construct and maintain a measuring device, approved by the commissioner, below such reservoir, a gauge graduated to feet and tenths of feet inside the reservoir, and a capacity table for same, and, if necessary, a measuring device above such reservoir on each source of supply discharging into such reservoir. When necessary for the protection of the other water users, the commissioner may require flumes to be installed along the line of any ditch. If any such owner of irrigation works shall refuse or neglect to construct and maintain such head gates, flumes, or measuring devices after twenty days' notice, the commissioner may close such ditch and the same shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of head gates lawfully closed, until the requirements of the commissioner have been complied with; and if any owner of a reservoir located across the bed of a natural stream shall neglect to put in such measuring device after twenty days' notice, the commissioner may open the sluice gate or outlet of such reservoir and the same shall not be closed, under penalties of the law for changing or interfering with head gates, until such measuring devices are installed. (§ 41, Ch. 164, L. '19, am., 18, Ch. 64, L. '21, rev.)

§ 3310. Repealed, Chapter 102, Session Laws of Arizona, 1929. (See Amendments.)

§ 3311. Repealed, Chapter 102, Session Laws of Arizona, 1929. (See Amendments.)

§ 3312. Use of bed of stream as carrier. Whenever the owner of a reservoir desires to use the bed of a stream or other watercourse for the purpose of carrying water from the reservoir to the consumer, he shall in writing

notify the water superintendent of the district in which the waters are to be used, giving the date when it is desired to discharge water from such reservoir, its volume, and the names of all persons and ditches entitled to its use. The superintendent shall then supervise the opening of such reservoir gates, and close or adjust the head gates of all ditches from the watercourse not entitled to the use of such stored water, that those, having the right, may secure the water to which they are entitled. (§ 44, Ch. 164, L. '19, rev.)

Liability for damages from obstruction of stream by debris or waste. 54 A. L. R. 358.

Right to drain surface water into natural watercourse. 28 A. L. R. 1262.

**§ 3313. Disagreement of water users; appeal to superintendent; rotation.** The water users from any ditch or reservoir unable to agree upon the distribution or division of water through or from said ditch or reservoir, may apply to the water superintendent of the district in which said ditch or reservoir is located, by written notice, stating such facts and requesting the superintendent to regulate such ditch or reservoir and make a just division or distribution of water therefrom to the parties entitled to the use thereof. The superior court may also direct the water superintendent of the district to take charge of and enforce any decree to water rights pending a determination of all the water rights of the watershed. Water users owning land with attached water rights may rotate in the use of the supply to which they may be entitled, and whenever two or more water users shall notify the superintendent that they desire to use the water by rotation, and shall present a written agreement as to the manner of such rotation, the superintendent shall distribute the water in accordance with such agreement. (§ § 45-6, Ch. 164, L. '19, cons. & rev.)

**§ 3314. Water to remain appurtenant to land; transfer of right where not practicable to continue use.** Water used for irrigation purposes shall remain a right appurtenant to the land upon which it is used; if, however, at any time for any natural cause beyond control of the owner it becomes impracticable to beneficially or economically use the water for

irrigation of the land to which it is appurtenant, the right may, with the approval of the commissioner, be severed from the land, and simultaneously transferred and become appurtenant to other land without losing priority theretofore established, if such change can be made without detriment to existing rights. Before the approval of such transfer an inspection shall be made by the commissioner and he shall approve or disapprove such transfer and prescribe the conditions therefore. (§ 48, Ch. 164, L. '19, am., '21, Ch. 64, L. '21, rev.)

Appropriator of right to use water for irrigation must be owner or possessor of land susceptible of irrigation, and appropriation once made attaches permanently to such land and cannot be transferred therefrom, except when it becomes impracticable to use water economically or beneficially on land to which it is appurtenant. *Tattersfield v. Putnam*, 45 Ariz. 156, 41 P. (2d) 228.

Appropriation of water may not be made by temporary "possessor" of land. *Tattersfield v. Putnam*, 45 Ariz. 156, 41 P. (2d) 228.

Valid appropriation of water must be made with intent to appropriate. *Tattersfield v. Putnam*, 45 Ariz. 156, 41 P. (2d) 228.

Prior in time is prior in right in appropriation of water, and except where doctrine of relation is applicable, date of appropriation is time when actual beneficial use of water commences. *Tattersfield v. Putnam*, 45 Ariz. 156, 41 P. (2d) 228.

Landowner failed to acquire as appurtenant to land right to use water from creek for irrigation, where land was occupied and irrigated by corporation and predecessors under mistaken belief that they had title, and owner subsequently acquired title by homestead entry and leased land to corporation, since lessee cannot initiate appropriation of water which enures to lessor's benefit. *Tattersfield v. Putnam*, 45 Ariz. 156, 41 P. (2d) 228.

No right of appropriation of water for use of state land was initiated where land was leased to corporation. *Tattersfield v. Putnam*, 45 Ariz. 156, 41 P. (2d) 228.

§ 3315. Violations defined; water superintendent may arrest. Any person who shall: Wilfully and without authority open, close, change or interfere with any lawfully established head gate, measuring device, or water box; or, wilfully use water or conduct into or through his ditch water which has been lawfully denied him by the water superintendent or other competent authority; or, without authority use the water to which another is entitled; or, without authority divert water from a stream; or, wilfully waste water to the det-

riment of another; or, divert a stream to the injury or threatened injury of the lands of another; or, use, store, or divert water without or before the issuance of the permit to appropriate such waters; or, when an appropriator of water has the lawful right-of-way for the storage, diversion or carriage of water, place or maintain any obstruction interfering with the use of the works, or prevent convenient access thereto, is guilty of a misdemeanor. The possession or use of water when the same shall have been lawfully denied by the water superintendent or other competent authority is prima facie evidence of the guilt of the person using it. The water superintendent, or his assistants within his district, may arrest any person violating this section and deliver him to the sheriff or other police officer within the county, and upon delivery to the sheriff or officer shall immediately make complaint before the proper justice of the peace against the person so arrested. (§ § 39-40, 49-50, Ch. 164, L. '19, cons. & rev.)

§ 3316. Fees. The following fees shall be collected in advance by the commissioner: For examining an application for permit to appropriate water, three dollars; for filing and recording permit to appropriate water for irrigation purposes, twelve cents per acre for each acre to be irrigated up to and including one hundred acres, and ten cents per acre for each acre in excess of one hundred acres; if the application is for power purposes, twenty-five cents for each theoretical horsepower to be developed up to and including one hundred, ten cents for each horsepower in excess of one hundred and up to and including one thousand, and five cents for each horsepower in excess of one thousand; if the application is for any other purpose, five dollars for filing and recording each permit; for filing or recording any other water right instrument, one dollar for the first hundred words and ten cents for each additional hundred words or fraction thereof; for making copy of any document recorded or filed in his office, ten cents for each hundred words or fraction thereof; but where the amount exceeds five dollars, then only the actual cost in excess of that amount; for certifying copies, documents, records, or maps, one dollar for

each certificate; for blue print copy of any map or drawing, ten cents per square foot or fraction thereof; for such other work as may be required of his office, actual cost of the work. At the time of the submission of proof of appropriation, or the taking of testimony for the determination of rights to water, he shall collect from each claimant two dollars for recording the water right certificate in the office of the county recorder, together with an additional fee of twelve cents for each acre of irrigated lands up to and including one hundred acres, and ten cents per acre for each acre in excess of one hundred acres; also twenty-five cents for each theoretical horsepower up to and including one hundred horsepower, and fifteen cents for each horsepower in excess of one hundred up to and including one thousand horsepower, and five cents for each horsepower in excess of one thousand horsepower up to and including two thousand horsepower, and two cents for each horsepower in excess of two thousand horsepower as set forth in such proof, the minimum fee, however, for any claimant in such cases to be two dollars and fifty cents; also a fee of five dollars for any other character of claim to water. The two dollars recording fee shall be transmitted by the commissioner to the county recorder with the certificate when issued. ( § § 51, 21; Ch. 164, L. 19, am., 22, 10, Ch. 64, L. '21, cons. & rev.)

Statute requiring a fee on submission of proof of appropriation or on taking of testimony for determination of rights to water, and a fee for examining application for permit, for filing and recording permit and any other water right instrument, and for making and certifying copies, *held* to provide one schedule of fees to be paid once only for acquirement of such rights and another to be paid once only for establishment as between rival claimants of water rights already vested, and hence, did not take appropriator's property without due process. *Stewart, State Water Com'r., v. Verde River Irrigation & Power Dist., 49 Ariz....., 68, P. (2d) 329.*

Amount required of applicant seeking to appropriate waters for irrigation and development of electrical energy, as a condition precedent to filing and recording of permit applied for, *held* exacted from applicant as a "fee" and not as a "tax," and hence, constitutional inhibitions relating to taxes would not be applicable. *Stewart, State Water Com'r., v. Verde River Irrigation & Power Dist., 49 Ariz. ...., 68 P. (2d) 329.*

Statute fixing fee for filing and recording a per-

mit to appropriate water for irrigation purposes in accordance with amount of land within claim of each claimant, *held* not to fix an unreasonable classification for fees, since statute also imposes duty upon water commissioner to determine in advance of issuance of permit whether application and proposed use conflicts with vested rights, or is a menace to safety, or against interest and welfare of people, and such determination may require extensive investigation. *Stewart, State Water Com'r., v. Verde River Irrigation & Power Dist.*, 49 Ariz. ...., 68 P. (2d) 329.

Power of state to exact fee or require license for taking water from stream. 19 A. L. R. 649; 29 A. L. R. 1478.

§ 3317. **Vested rights not affected.** Nothing herein contained shall impair vested rights to the use of water, affect relative priorities to the use of water determined by decree of the court, nor impair the right to acquire property by the exercise of the right of eminent domain whenever conferred by law; nor shall the right to take and use water be impaired or affected by the provisions hereof where appropriations have been initiated under and in compliance with previous laws then existing, and such appropriators have, in good faith and in compliance with the laws then existing, commenced the construction of works for the application of the water so appropriated to a beneficial use and prosecuted such work diligently and continuously, but such rights shall be adjudicated as herein provided. (§ § 56, 58, Ch. 164, L. '19, rev.)

When one has complied with the local laws for the appropriation of water, and has constructed upon public vacant lands of the United States the works for the diversion of that water, he thereby acquires a vested and accrued right superior to that of a subsequent entryman upon such lands. *Gila Water Co. v. Green*, (1925), 27 Ariz. 318, 232 Pac. 318.

When a permit issued under this act constitutes a cloud upon the right of one who has appropriated all the water of a stream except in times of great floods, he may maintain an action for a decree adjudging his rights and canceling the permit. *Salt River Valley Water Users' Assn. v. Norviel*, (1925), 29 Ariz. 360, 241 Pac. 503.

§ 3318. **Biennial report.** The commissioner shall render to the governor biennially, and oftener if required, a full and true report of his work. The report shall be delivered to the governor on or before the thirty-first day of December of the year preceding the regular session of the legislature, and shall include therein such suggestions of amendments of

existing laws or for new laws as the commissioner may deem necessary. (§ 59, Ch. 164, L. '19, am., 24, Ch. 64, L. '21, rev.)

**§ 3319. Right to construct ditches and canals; eminent domain.** The owner of arable and irrigable lands may construct public or private canals for the carrying of water, and, whenever the same necessarily run through the lands of another, the right-of-way therefor through such land may be acquired by condemnation, under the laws of eminent domain. (§ § 4176-7, R. S. '01; 5346-7, R. S. '13, cons. & rev.)

R. S. 1913, § 5346, cited without construction or application. *McKenzie v. Moore*, (1918), 20 Ariz. 1, 4, 176 Pac. 568.

In R. S. 1901, § 4176, (R. S. 1913, § 5346), the term "inhabitants" was used as descriptive of those who possessed a right to appropriate water for agricultural purposes, and included corporations, provided they owned or possessed arable and irrigable lands. *Slosser v. Salt River Valley Canal Co.*, (1901), 7 Ariz. 376, 387, 65 Pac. 322.

Conceding that it was essential to a valid appropriation of water that the appropriator be an inhabitant of the state, a complaint in an action to adjudicate water rights was not subject to a general demurrer where it did not disclose that the appropriator was not an inhabitant of the state. *Bigler v. Welker*, (1914), 16 Ariz. 44, 141 Pac. 124.

**§ 3320. Preference in case of scarcity.** During years when a scarcity of water exists, owners of lands shall have precedence of the water for irrigation according to the dates of their appropriation or their occupation of the lands, either by themselves or their grantors. The oldest titles shall have precedence. (§ 4191, R. S. '01; 5358, R. S. '13, rev.)

Where the evidence shows that at all times there was sufficient water for the lands of both parties, plaintiff has no right to an injunction restraining defendant from diversion and use of water. *Clough v. Wing*, (1888), 2 Ariz. 371, 17 Pac. 453.

R. S. 1887, § 3215, was restricted to public acequias or ditches, and was construed as a declaration that priority of use and appropriation of water upon particular lands should govern in determining conflicting rights. While limiting the use of water to particular lands, it did not deny the right of alienation. *Biggs v. Utah Irrigation Co.*, (1901), 7 Ariz. 331, 349, 64 Pac. 494.

**§ 3321. Canal owner not to contract in excess of carrying capacity.** Any person owning or controlling any canal, flume, or other means for carrying water from a stream or supply to

lands for the irrigation of such lands, shall not contract to carry more water than such canal, flume or other means may be estimated to carry at any one time, whether such contract be made for measured time or acreage quantity. Such person shall keep the canal, flume or other means in good repair and condition so as to carry the full amount of water contracted to be carried or delivered. (§ §. 4171-2, R. S. '01; 5339-40, R. S. '13, cons. & rev.)

**§ 3322. Water users may clean canals and make repairs.** When any person owning or controlling any canal, flume or other means for carrying water, shall permit the same, or the dam head gates or other appliances for securing the water at the head, to get out of repair or reduced in capacity so that the same will not carry the amount of water contracted to be delivered to the users thereof, and shall not within a reasonable time repair, cleanse or restore the same, then the users may, after six days' notice in writing to the owner or person in control, enter in and upon said canal, flume or other means, and make repairs, clean or restore the same. The cost of such repairs, cleansing or restoration shall be a lien on such canal, flume or other carrying means, enforceable as other liens upon real property. Within thirty days after the completion of the repairs, cleansing or restoration, a verified notice of the lien claimed, stating the expenditures actually made, itemizing the sum expended and the purpose for which each was expended, and stating the facts upon which the lien is claimed, shall be filed in the office of the recorder of the county in which such work was done, and recorded in a book kept by him for that purpose. (§ 4173, R. S. '01; 5341, R. S. '13, rev.)

Right to hasten the flow and increase the volume of water in a stream by alterations or improvements in the bed. 9 A. L. R. 1211.

**§ 3323. Natural waterways.** Though the waters which naturally flow in the natural channels of streams have been previously appropriated and put to beneficial use by others, such channels may be used to carry water, without, however, diminishing the quantity of water which naturally flows therein, the use of which has been appropriated. Where the parties interested cannot agree upon the divi-

sion of the water turned into the natural channel from the water naturally flowing therein, or if it be difficult to ascertain the amount to which each party is entitled, then the water superintendent of the district shall make such division. (§ § 4202-3, R. S. '01; 5342-3, R. S. '13, cons. & rev.)

### AMENDMENTS

Chapter 102, Session Laws of 1929, repealed Sections 3310 and 3311 of the Water Code and thereby divested the State Water Commissioner of his jurisdiction over the construction of storage dams and vested this jurisdiction in the state engineer (Arizona state highway engineer). Chapter 47, Session Laws of 1931 amended Sec. 1, Chapter 102, Session Laws of 1929. Under the provisions of these two amendments the state engineer now has jurisdiction over the construction of all dams and appurtenant works for the impounding or diversion of water where the dam is fifteen feet or more in height from ground level to spillway crest or where the impounding capacity will be more than ten acre feet, excepting any dam, reservoir, or appurtenant works constructed or used exclusively for watering of live stock.

### CHAPTER 10

1934 Session Laws, Third Special Session,  
Eleventh Legislature.  
(Senate Bill No. 5)

#### An Act.

Extending the time for beginning construction under unexpired permits of state water commissioner where permittee is applicant for government funds; and declaring an emergency.

Be it enacted by the Legislature of the State of Arizona:

Section 1. **Definitions.** Whenever used in this Act, unless a different meaning clearly appears from the context:

(a) The term "district" shall include any irrigation district, drainage district, flood control district, agricultural improvement district, electrical district, water conservation district, or power district, organized under the laws of the State of Arizona.

(b) The term "Federal agency" shall mean

the United States of America, the President of the United States, the Federal Emergency Administrator of Public Works, or any such agencies or instrumentalities as may be designated or created to make grants or loans, or both, pursuant to any Act or Acts of the Congress of the United States of America.

**Section 2. Extension of unexpired permits.** Notwithstanding the provisions of any existing law, whenever the State Water Commissioner of Arizona shall have issued to any district a permit to make an appropriation of water, or reservoir permit, and actual construction work under such permit has not been begun, and the time prescribed in said permit for beginning such construction work has not expired, and such district has, or before the expiration of such prescribed time shall have, made application to any Federal agency for a loan or grant, or both, of moneys to be used for the construction of its works, or some part thereof, then the time for beginning actual construction under such permit is hereby extended until six months after the moneys so applied for shall become available to such district, but in no event to exceed two years after the time prescribed in such permit as that within which actual construction must be begun.

**Sec. 3. Declaration of emergency and time of taking effect.** To relieve unemployment and preserve the public peace, health and safety, it is necessary that this act become immediately operative. It is therefore declared to be an emergency measure, and shall take effect upon its passage in the manner provided by law.

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