

73-2-16. Arbitration — Confirmation by district court.

The state engineer is authorized to conduct informal proceedings for the arbitration or settlement of disputes over water or the distribution thereof; provided all persons having an interest in the water in controversy shall in writing agree to any settlement effected thereby, and provided further that settlements shall be confirmed by decree of a court of competent jurisdiction.

History: R.S. 1933, 100-2-16, added by L. 1941, ch. 96, § 2; C. 1943, 100-2-16.

73-3-21. Priorities between appropriators.

Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right; provided, in times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use.

History: L. 1919, ch. 67, § 10; R.S. 1933 & C. 1943, 100-3-21.

Compiler's Notes. — This section was Comp. Laws 1907, § 1288x27. The wording of

the proviso of the present section differs materially from the proviso of the former section; in other respects, however, the two sections are identical.

NOTES TO DECISIONS

ANALYSIS

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In general.

This section in many respects resembles the California statute, and the Supreme Court of this state will defer to the construction given by courts of that state. *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).

Action to determine rights.

In action to determine conflicting claims to use of certain waters, court erred in not admitting proof by defendant that he filed application for appropriation of such waters. *Robinson v. Schoenfeld*, 62 Utah 233, 218 P. 1041 (1923).

In action to determine rights of irrigation companies to use of waters of a river where the respective water rights of the parties had been adjudicated in 1900, where it appeared that the parties had interpreted such adjudication as holding that among themselves there were no priorities, and where this interpretation of the decree was reasonable and the parties acted in accordance with this interpretation for sixty years before defendant claimed priority in time of water shortage, the trial court was justified in finding that the 1900 decree distributed the rights in the river in question on a basis proportional to the shares held by the parties, without regard to date or priority, and that this distribution had not been changed by subsequent related decrees. *Orderville Irrigation Co. v. Glendale Irrigation Co.*, 17 Utah 2d 282, 409 P.2d 616 (1965).

Administration of distribution.

It is an elementary doctrine in this state that where there is more than one appropriator on any stream, measurements and apportionments of water must be under control and direction of disinterested person such as the state engineer who is always under continuing jurisdiction of the court. *United States v. Caldwell*, 64 Utah 490, 231 P. 434 (1924).

Application of section.

This section applies only to vested rights, and not to the right to appropriate water in the future. *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).

Corporate water rights.

Where a corporation's charter expired and was not renewed, and the corporation was the holder of prior appropriative water rights in a certain stream, ownership of the water rights it left behind were not subject to new appropriation claims by outside parties, but reverted to the stockholders according to their fractional interests in the old corporation, and such stockholders were free to form a new corporation four years later, and vest the same water rights in it as had been held by the old corporation, notwithstanding claims of appropriation filed by other parties in the interim. *St. George City v. Kirkland*, 17 Utah 2d 292, 409 P.2d 970 (1966).

Developed water.

Whoever claims that he has developed water in close proximity to the source of a stream, previously appropriated by others, is charged with the burden of proving that his alleged development of water does not interfere with the waters theretofore developed. *Peterson v. Wood*, 71 Utah 77, 262 P. 828 (1927).

In action by mining company to quiet title to underground water flowing from its mine tunnel, where defendants appropriated water from springs and streams before mining company's lands were segregated from public domain, mining company's use of such water was subordinate rather than superior to use of prior appropriators. *Silver King Consol. Mining Co. v. Sutton*, 85 Utah 297, 39 P.2d 682 (1934).

Diversion required for priority.

This section presupposes that there has been an actual diversion of the water from its natural channel. If claimant made no diversion for watering livestock, he acquires no priority over right of city to use the water for culinary and domestic purposes, but would be subordinate to prior appropriation by city. *Bountiful City v. De Luca*, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930).

Intermediate or intervening appropriators.

As to rights of intermediate or intervening appropriators, see *Whitmore v. Murray City*, 107 Utah 445, 154 P.2d 748 (1944), quoting 2 *Kinney on Irrigation and Water Rights* (2nd Ed.) § 788, pp. 1374, 1375.

Interstate waters.

The doctrine of prior appropriation applies to interstate streams if all states in which appropriations are involved recognize doctrine. *Albion-Idaho Land Co. v. Naf Irrigation Co.*, 97 F.2d 439 (10th Cir. 1938).

Prior appropriator's rights.

First appropriator of any unused or unappro-

riated waters of public streams of Utah has better right than any subsequent appropriator. *Brady v. McGonagle*, 57 Utah 424, 195 P. 188 (1921).

Purpose of statutes relating to water appropriation and its use is clearly to the effect that a prior appropriator may not prevent a subsequent appropriator from interfering with the prior appropriator's means and method of diverting and applying water if such interference is necessary in order to make larger and more beneficial use of waters of the state, and if it can be done without material injury to rights of prior appropriator, subsequent appropriator will be permitted to apply water to bring about largest beneficial use. *United States v. Caldwell*, 64 Utah 490, 231 P. 434 (1924).

An appropriation of water is limited by time as well as by amount; an appropriator's right is limited by quantity of water which he has beneficially used and seasonal period during which he has used it. *Hardy v. Beaver County Irrigation Co.*, 65 Utah 28, 234 P. 524 (1924).

Actual diversion of water and application of it to beneficial use, at a time when that was sufficient for an appropriation without filing with the state engineer, gave appropriator superior right as against right sought to be acquired based upon an application filed in state engineer's office subsequent to application of water to beneficial use by an actual appropriator and user. *Wrathall v. Johnson*, 86 Utah 50, 40 P.2d 755 (1935).

Property rights in water consist not alone in the amount of the appropriation, but, also, in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right. *Whitmore v. Murray City*, 107 Utah 445, 154 P.2d 748 (1944).

—Beneficial use as basis of rights.

The rights of prior appropriator are measured and limited by extent of his appropriation and application to beneficial use, and if he diverts more water than he is entitled to, he must return such surplus to stream for use of subsequent appropriators. *Gunnison Irrigation Co. v. Gunnison Highland Canal Co.*, 52 Utah 347, 174 P. 852 (1918).

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

In action to determine water rights, prior appropriators of water for irrigation purposes could not legally establish a prior right to use of water for such purpose merely by flooding

their lands and by permitting it to gather into pools on surface or raising water level underneath surface in hope of obtaining sufficient moisture to raise crops in following summer, since such use of water was too wasteful to be tolerated, and hence, in determining amount of water to which appropriator was entitled, its claim in that regard was disallowed. *Hardy v. Beaver County Irrigation Co.*, 65 Utah 28, 234 P. 524 (1924).

At such times as a prior appropriator is not using the water under his appropriation for a beneficial purpose, such waters are considered and treated, under the doctrine of appropriation, as unappropriated public waters, and for such periods of time are subject to appropriation and use by others. *Falkenberg v. Neff*, 72 Utah 258, 269 P. 1008 (1928).

While ordinarily prior appropriator has paramount right to divert water from stream and junior appropriator may not divert water unless waters flowing in stream are in excess of amount which prior appropriator has right to divert, if, due to seepage, evaporation, and channel absorption or other physical conditions beyond control of appropriators, the water flowing in stream will not reach diversion point of prior appropriator in sufficient quantity for him to apply it to beneficial use, then junior appropriator, whose diversion point is higher on stream, may divert the water. *Albion-Idaho Land Co. v. Naf Irrigation Co.*, 97 F.2d 439 (10th Cir. 1938).

Where, due to seepage, evaporation, and channel absorption, water flowing in stream, when average flow was below minimums fixed by decree, would not reach users in lower division in sufficient quantities to afford practical head for irrigation, trial court properly awarded waters to upper division during times the flow at the gauging station was below such minimums, even though rights of users in upper division were junior in right to those in lower division. *Albion-Idaho Land Co. v. Naf Irrigation Co.*, 97 F.2d 439 (10th Cir. 1938).

An order upholding the rights of certain farmers in an arid region, who had prior rights in an underground spring servicing the area, to flood their fields periodically in the winter months, and requiring a later appropriator of water from the same source to replace 4.50 cubic feet per second during the nongrowing season was not wasteful or unreasonable as a matter of law where it appeared that the parties with prior water rights had so used the water for a long period of time, that the agricultural use of their lands depended on such watering, that they had prepared their fields with ditches, furrows and dams to make efficient use of the water, and where the order specified such flooding, to assure absorption, could not be carried out when the land was frozen.

Fairfield Irrigation Co. v. White, 18 Utah 2d 93, 416 P.2d 641 (1966).

COLLATERAL REFERENCES

Journal of Energy Law and Policy. — A Primer of Utah Water Law, 5 J. Energy L. & Pol'y 165 (1984).

Am. Jur. 2d. — 78 Am. Jur. 2d Waters §§ 327, 338.

C.J.S. — 93 C.J.S. Waters § 182 et seq.
Key Numbers. — Waters and Water Courses ⇌ 140.