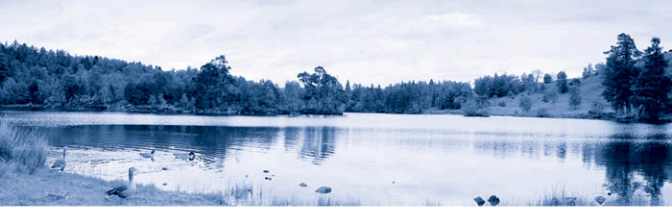
Appropriative Rights

Model Water Code



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APPROPRIATIVE RIGHTS MODEL WATER CODE

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Dedication

The Appropriative Rights Model Water Code is dedicated to the memory of Ray Jay Davis. Professor Davis—Ray Jay as he was known to all—was a professor of law at Brigham Young University with a distinguished career practicing, teaching, and writing about water law when he undertook to direct the preparation of this Code and a related code addressing riparian rights. He directed the project from 1990 to 1995, during which time he assembled a large team of contributors and took the two codes through three drafts. Upon his retirement from Brigham Young University, he undertook to teach at the undergraduate level in Brigham Young's Hawaii campus. Because of the constraints this placed upon his ability to continue to direct the project, he then stepped down as Director of the Model Water Code Project of the American Society of Civil Engineers. Further information regarding the course of the project is provided in the Preface. There is no question that without Ray Jay Davis, the American Society of Civil Engineers would never have begun a Model Water Code project, and there would not be either of the two Model Water Codes upon which work is now complete. Regrettably, Ray Jay did not live to see the entire project completed, passing away on August 10, 2000.

Ray Jay was born on December 4, 1927, in Rexburg, Idaho. He earned a B.A. from Idaho State University in 1948, a J.D. from Harvard Law School in 1953, and an LL.M. from the Columbia University School of Law in 1956. Ray Jay taught law throughout his legal career, serving as a Professor of Law at Brigham Young University from 1979 until his retirement in April 2000. He had also taught law at the University of Arizona, the University of Arkansas, and Temple University. His legal research focused primarily on the law governing the appropriation and use of water and on the law governing weather modification. He himself described his dedication to teaching in these words:

> By profession I am a teacher. Few joys can equal the thrill of sharing learning with others and of watching their growth and development come about. I teach law. There is no subject other than the gospel more exciting to teach. I firmly believe that laws are "those wise restraints which make men free." I am proud of the role I have had in making our legal system function.

In addition to his work on the Appropriative Rights Model Water Code, Ray Jay served as chair, member, principal investigator, or advisor to countless committees and state or federal governmental agencies. He represented the United States at the UN Conference on International Legal Principles for Weather Modification, and made presentations at number conferences in foreign countries. Some of his writings have been translated into French, Russian, and Spanish. His production actually increased as he approached retirement, even though he never mastered the computer

as a substitute for the typewriter. As noted above, Ray Jay's particular expertise and contribution was in the field of appropriative rights and in the field of weather modification. Both fields are prominently the subject of this model code. The Laws and Institutions Committee—the body to which the Model Water Code Task Committee reported—therefore unanimously voted at its meeting in Orlando, Florida, on May 20, 2001, to dedicate the Appropriative Rights Model Water Code to his memory

Preface

The Model Water Code Project of the American Society of Civil Engineers (ASCE) began in 1990 under the direction of Professor Ray Jay Davis of the Brigham Young University School of Law. Its purpose was to develop proposed legislation for adoption by state governments for allocating water rights among competing interests and for resolving other quantitative conflicts over water. Professor Davis enlisted the active aid of a large number of engineers, lawyers, government administrators, business people, environmental activists, economists, hydrologists, political scientists, and just plain folks. Several dozen people from such varied backgrounds gave detailed critiques of the several drafts of the project; many of these also attended two or more meetings per year where the drafts were discussed in detail. Probably each person who contributed to this project could pick at least a few points where he or she thinks the end products could be improved—the end products are not any single person's efforts, interests, or conclusions. Those involved in the project agree that overall the end products are carefully balanced to represent a coherent body of law that would markedly improve the law of water allocation as presently found in many States. (The term "State" is used throughout this Code to refer to a State of the United States, and not to States in the international sense, although such States might also find a useful model in this report.)

Originally, the hope was to prepare a single Model Water Code suitable for any or every State. While there has been notable convergence among the water laws of eastern and western States over recent decades, there continues to be more divergence than convergence, and divergence will almost certainly continue for many years. Therefore, it proved impossible to craft a single code appropriate for all States. In the end, two different Model Water Codes were prepared, reflecting the different needs and legal traditions of eastern and western States—the Regulated Riparian Model Water Code and the Appropriative Rights Model Water Code. The original goal is reflected in that each Code contains as much language identical to that in the other Code as possible. A legislature considering revision of its water laws therefore would benefit from examining both Model Codes.

In part because of the decision, made fairly late in the drafting process, to prepare two Model Water Codes, the project remained unfinished when Professor Davis retired from Brigham Young University. In August 1995, Professor Joseph W. Dellapenna, of the Villanova University School of Law, succeeded Professor Davis as director of the project. Professor Dellapenna had chaired the working group that drafted the Regulated Riparian Model Water Code. The Regulated Riparian Model Water Code was published as a final report of the Water Laws Committee in February 1997. The Water Regulatory Standards Committee, chaired by Professor Dellapenna, then undertook the balloting process for approval of the Regulated Riparian Model Water Code as a "standard" of the American Society of Civil Engineers. The first

phase of balloting for formal approval by the entire committee was accomplished in December 1998, and all remaining negative ballots were resolved on August 21, 2001. The Water Regulatory Standards Committee is now preparing to conduct a public ballot seeking approval by the entire Society for the Regulated Riparian Model Water Code.

This document represents the final report of a Task Committee on the Appropriative Rights Model Water Code under the direction of the Laws and Institutions Committee (formerly the Water Laws Committee) of the Environmental and Water Resources Institute of the American Society of Civil Engineers. The final draft of this report was prepared by Professor Dellapenna, with the assistance of many members of the Water Laws Committee and its Task Committee on the Model Water Code Project, and with the particular assistance of Steven Harris of Harris Water Engineering, Inc. (Durango, CO), Professor Olen Paul Matthews, Chair of the Department of Geography at the University of New Mexico (Albuquerque, NM), and Jerry Sehlke of the Idaho Engineering and Environmental Laboratory (Idaho Falls, ID). Three prominent experts in western water law who were not actively involved in the drafting of the two Model Codes independently reviewed this report. They were Robert Abrams of Wayne State University, Robert Beck of Southern Illinois University, and Neil Grigg of Colorado State University.

The preface to the Regulated Riparian Model Water Code explored in some detail why it was felt necessary to create two complete, separate Model Water Codes. As the Regulated Riparian Model Water Code reflects a more recent pattern of legislation and had been subjected to less legal and scholarly scrutiny, it was appropriate to explain why that body of law deserved its own Model Code. Appropriative rights have a much older pedigree, having emerged in the mining camps of the '49ers in California about one-and-a-half centuries ago. Since then it has spread across the western States to become the primary body of law for the 18 States between Kansas City and the Pacific Ocean. *See* Joseph Dellapenna, *Dual Systems,* in 1 WATERS AND WATER RIGHTS §§ 8.01, 8.02 (7 vols., Robert Beck ed., 1991) ("Dellapenna").

While each State has its own unique history of the evolution of its water law, there have emerged three broad patterns that capture the shared experiences of groups of the States. Generally these States developed their water law based upon Anglo-American roots that largely disregarded the earlier property systems of the Hispanic or earlier cultures in the region. *See generally* BETTY EARLE DOBKINS, THE SPANISH ELEMENT IN TEXAS WATER LAW (1959); NORRIS HUNDLEY, JR., THE GREAT THIRST: CALIFORNIANS AND THEIR WATER, 1770S-1990S (1992); MICHAEL MEYER, WATER LAW IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY (1984); DONALD PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY, 1848-1902 (1992); JOHN PHILLIP REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL (1980); CHARLES SHINN, MINING CAMPS: A STUDY IN FRONTIER GOVERNMENT (1985); SAMUEL WIEL, WATER RIGHTS IN THE WESTERN STATES (3rd ed. 1911); Peter Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law since 1850,* 69 WASH. L. REV. 869 (1994).

The first State to develop a system of appropriative rights was California. There, the courts early on recognized both the appropriative rights of the mining camps and the riparian rights of the farmers, creating a confused dual system in which holders of both types of water right competed uncertainly over the right to use water. This approach appears to have been adopted in two other States as well (Nebraska, and Oklahoma). A second set of seven States (Alaska, Kansas, North Dakota, Oregon, South Dakota, Texas, and Washington) also started out as dual system States, and in theory still recognize some vestigial riparian rights to the allocation of water. Courts in these States, however, were more aggressive in disfavoring riparian rights and they have, for all practical purposes, been eliminated—unless, as happened recently in Oklahoma, a court should revive them. *See* Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla. 1993); THE IMPACT OF *FRANCO-AMERICAN CHAROLAISE, LTD. V. OKLAHOMA WATER RESOURCES BOARD* (Okla. St. U. Envtl. Inst., Proj. Rep. No. A-130, David Kershaw ed. 1995); Gary Allison, Franco-American Charolaise*: The Never Ending Story,* 30 TULSA L.J. 1 (1994). Courts in the eight States within the Mountain Time Zone (Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) all managed to commit themselves wholly to appropriative rights and recognize no other form of quantitative rights to water. Mississippi also adopted a dual system in 1955, but abandoned it in 1985 in favor of regulated riparianism. *See* Dellapenna, *supra,* § 8.05.

Traditional riparian rights allocated the right to use water to the owners of land abutting ("riparian to") the water source. This was a system of common property under which courts resolved disputes in favor of the more reasonable use. In contrast, appropriative rights takes its name from the legal requirement that water be "appropriated" and applied to a "beneficial use" in order for one to acquire the right to use the water. In case of conflict between different appropriators, the first in time would be protected. Appropriative rights created a system of private property under which administrative agencies and courts exist largely to recognize and enforce the private rights. Under regulated riparianism, an administrative agency allocates water according to the reasonableness of the proposed use without limitation according to the location or the sequence of use. This could fairly be termed a system of public property. *See* Joseph Dellapenna, *Introduction to Riparian Rights,* in 1 WATERS AND WATER RIGHTS, *supra,* § 6.01(b).

Today, appropriative rights remain the predominant body of law for the quantitative allocation of water in the 18 States to the west of Kansas City, at least for surface sources. (This does not include Hawaii, a state with a unique body of water law derived in part from the traditional water law of its indigenous culture, and partly from common law riparian rights; today Hawaii follows a relatively straightforward version of regulated riparianism.) As already noted, in at least three of these States (and perhaps more) some aspects of riparian rights survive as a competing system of law. In addition, appropriative rights are increasingly applied as well to underground waters in the 18 western States. One finds greater variety regarding underground waters than regarding surface waters, with various system legal rights prevailing in some States. Arizona has even adopted a form of regulated riparianism for some of its

underground waters. *See* Arizona Groundwater Management Act of 1980, ARIZ. REV. STAT. §§ 45-401 to 45-655.

At the same time, some States have begun to change from unequivocal support for the diversion and use of the waters of the State to a policy of protecting portions of those waters from diversion or use. States are now managing these waters in order to fulfill public values rather than only the private values that formerly were the almost exclusive concern of the appropriative rights system. The move towards protecting some water for public values derives as much from a fundamental change in the way natural resources are perceived as it does from changing patterns and demands for water use. For many, the change in how natural resources are perceived is epitomized by Aldo Leopold, A SAND COUNTY ALMANAC AND SKETCHES OF HERE AND THERE (1949), or Kenneth Boulding, *The Economics of the Coming Spaceship Earth,* in ENVIRONMENTAL QUALITY IN A GROWING ECONOMY 3 (Henry Jarrett ed. 1966). This change has such dramatic implications for western water law that one law professor has (somewhat prematurely) celebrated the demise of appropriative rights as a legal system. Charles Wilkinson, *In Memoriam: Prior Appropriation 1848-1991,* 21 ENVTL. L. v (1991). While this statement is overdrawn, it is certainly true that some western States are undertaking dramatic changes to water management with potentially far-reaching effects. *See generally* THE STATE ROLE IN WESTERN WATERSHED INITIATIVES (Frank Gregg *et al.* ed. 1998); Gregory Weber, *The Role of Environmental Law in the California Water Allocation and Use System: An Overview,* 25 PAC. L.J. 907 (1994)

Note: Form and Sources

Finally, a word about the form of this Code and how that form reflects the goals of the drafters. The Code follows the form commonly used today in the drafting of proposed uniform state laws under the auspices of the National Conference of Commissioners of Uniform Laws, as found in the Drafting Rules for Uniform and Model Acts (2003). That form consists of a statutory language in bold face that a legislature could enact with or without change. This language is arranged in sections, generally consisting of a single sentence, for ease of citation. The numbering of the sections consists of three parts, indicating the chapter of the Code, the part of the chapter, and the sequential numbering of each section within that part. Each section in this Code also contains an "A" to distinguish it from sections in the Regulated Riparian Model Water Code (denominated "R"). For example, § 2A-1-03 means section 3 of part 1 of chapter 2 of the Appropriative Rights Model Water Code. Although this is an appropriative rights model code, occasional references are made to the Regulated Riparian Model Code or to actual regulated riparian statutes where they provide useful models or sources for comparison.

Each section necessarily is optional in that a state legislature, even were it to decide to enact the bulk of this Code, could delete or change any particular section. Nonetheless, the drafters of this Code strove to create a complete, comprehensive, and well-integrated statutory scheme for creating or refining an appropriative rights system of water law capable of dealing with the water management problems of the twenty-first century. The drafters have concluded that nearly every section of this Code is necessary to achieve that goal. Several sections (*e.g.*, §§ 4A-4-01 to 4A-4-08, and 5A-5-09), however, are specifically denominated "optional." This indicates that the drafters consider that these sections might not be necessary or suitable to the needs of a particular state. These sections, therefore, merit special consideration should any legislature consider enacting this Appropriative Rights Model Water Code. A coherent and workable Code would still result were all of the "optional" sections to be omitted. If any or all of the "optional" sections are omitted, the cross-references will also require editing as they now include references to all "optional" sections.

This Code refers to current *ASCE Policy Statements* and to certain common references. *ASCE Policies Statements* normally are updated every three years, and should be consulted for changes occurring after this document is completed. For the western tradition of water law, the central source is 2 WATERS AND WATER RIGHTS chs. 11-17 (7 vols., Robert E. Beck ed., 1991) ["WATERS AND WATER RIGHTS"]. Other standard sources are LEONARD RICE & MICHAEL WHITE, ENGINEERING ASPECTS OF WATER LAW (1987) ["RICE & WHITE"]; JOSEPH SAX, ROBERT ABRAMS, & BARTON THOMPSON, JR., LEGAL CONTROL OF WATER RESOURCES (2d ed. 1991) ["SAX, ABRAMS, & THOMPSON"]; A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES (1988) ["TARLOCK"]; A. DAN TARLOCK, & JAMES CORBRIDGE, JR., &