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## Review of *Forging New Rights in Western Waters* By Robert G. Dunbar

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*Forging New Rights in Western Waters.* By Robert G. Dunbar. Lincoln: University of Nebraska Press, 1983. Map, notes, bibliography, index. xii + 217 pp. \$19.95.

After briefly sketching the beginnings of Native American, Spanish, Mormon, and Hudson Bay Company attempts to divert

waters, Robert Dunbar's message begins with the water situation in early Colorado. From there he moves to a thorough discussion of the Wyoming System of water distribution, adopted with modifications by other states, and its chief architect, water engineer and reclamation specialist Elwood Mead.

Basically the Wyoming System acknowledged the right of the state to create a water czar, the state water engineer. In accordance with the customs of prior appropriation and beneficial use, the state engineer issued permits for the use of water. This orderly system helped to remove the courts from the process and to impose order upon a chaotic process of water rights appropriation. The federal government also promoted control from one central office in the state after the passage of the National Reclamation Act in 1902. Surface waters were regulated first, but New Mexico soon adopted a permit system for underground waters. In this system (rather contrary to surface appropriation doctrine) the first user does not have the right to all of the water nor does the first user have the right to maintain an unusually high water level to the exclusion of other users.

Two more areas are of primary importance in the distribution of western waters—rights to the waters of interstate rivers and water rights for federally reserved land in the West. States circumvented the courts with a system of interstate compacts to achieve agreements (allowed by the U.S. Constitution) on the distribution of water and hydroelectric power from interstate rivers. The Colorado River Compact among six western states in the 1920s led the way in this type of water resource distribution. Water law legislation is a state-by-state undertaking having its own peculiar state-based history, which is further complicated by the federal government's ownership of public lands and Indian reservations, forest reserves, and military reservations. The U.S.

Supreme Court's Winters decision in 1908 increased the federal government's right to command water for its land reservations by asserting the doctrine of "reserved rights."

Many will be thankful that Dunbar has presented a comprehensive survey of water rights systems in the western states, including the illusory California doctrine, rather than a historical discussion of the origins of water law modification from the traditional riparian rights in humid states to the prior appropriation doctrine in arid western states. The subject has consumed some historians, but Dunbar matter-of-factly assumes modification came in response to environmental conditions in the West à la Walter Prescott Webb in *The Great Plains* (1931).

Others, however, have been more troubled by this question. Legal historians Harry N. Scheiber and Charles W. McCurdy (*Agricultural History*, January 1975) stress the rise of the doctrine of "takings" or eminent domain in eastern states. When the court system endorsed the diversion of waters and the denial of riparian rights based upon "unique climatic and soil considerations in the arid Western states," it "tended to obscure the fact that its decision culminated a long—and historically continuous—tradition in American property law."

Dunbar does not address this thorny question. What has resulted is a remarkably useful survey of the flourishing of these "new" rights in western waters. Students of resource policy as well as water law historians will find this volume crucial to any beginning studies on this complex topic. It offers encouragement and understanding even to the timid who previously had avoided the jungle of water resource law in the West.

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