



# Water Rights

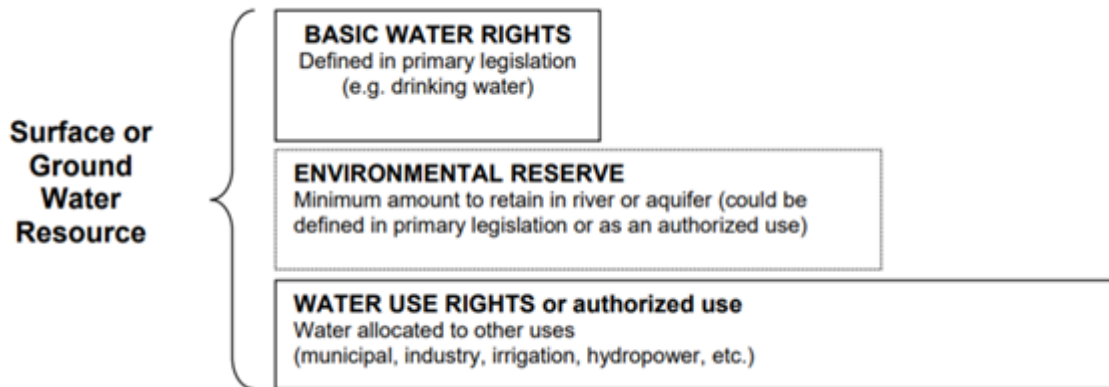


## Summary

Water rights determine which users can use water, how much, and for what purpose. Water rights provide a framework that prevent uncontrolled use, which in turn, reduces the risk of running into water resource conflicts, over abstraction, and environmental depletion. This Tool introduces the key terms related to water rights, presents the types of water use rights, discusses two main approaches to determine water use rights, and describes the processes related to water rights abandonment and termination.

## Basic Concepts Related to Water Rights

A water right is essentially a "a right to abstract and use a quantity of water from a natural source such as a river, stream or aquifer" (Hodgson, 2006). Formal rights to use or withdraw water can be divided into two main categories. First, there are "basic water rights" which are those that are conferred automatically through primary legislation , i.e., rights that are incorporated into acts, policies, laws, and regulatory principles and mechanisms (Burchi, 2005). Rights to drinking water and water for sanitation and hygiene fall under this first category, for instance (Tool A2. 05). Second, there are "water use rights" acquired through an administrative process involving water allocation, such as permitting or licensing authorising particular uses of water. This involves all other rights to abstract or use water resources, such as using water for irrigation, industry, hydroelectricity, etc. This is also a third category of water rights known as the "environmental reserve rights". In some countries, governments have decided to set a minimum amount of water aside and reserved for ensuring the sustainability of the environment, which therefore cannot be allocated for any other usage. Figure 1 provides an illustration of those three categories of water rights.



**Figure 1.** Categories of Water Rights (Bird et al, 2009).

Water allocation is a process that defines how water resource is distributed to its users. This creates a water use right for a licence or permit holder. A system for the granting water rights needs to be competitive and differentiate among various water uses (Rijswick, 2014). Since a water right entails a legal entitlement to divert, store, and regulate for any use extracting benefits for the user, these systems are often more advanced in regions where demand equals or exceeds proposition. Each water allocation system refers to a certain list of priorities for water use defined in laws and policies. Thus each water right granted by a regulatory authority (Tool B1.01) will be subject to specific terms and conditions that regulate how this right can be enjoyed, transferred, adapted, and revoked (Bird et al, 2009).

### Types of Water Use Rights

Water resources may be used for multiple purposes, such as drinking, agriculture, industry, fishing, navigation, access for recreational purposes (U.S. Geological Survey, 2019). To allow a balance in authorizing such uses and allocating respective water resource to the right owner, states have developed various approaches to help define public and private water rights such a right to navigation, fishing rights, and right to access the water bodies. Below is an overview of what each of these rights entail.

- **Right to Abstract Water:** this right entails the right to use water for abstraction and/or diversion and can be granted to individuals, public agencies, or private entities. This right is usually granted by the governmental bodies, such as a water agency, local administration, river basin organisation etc. The right to use abstract water does not guarantee its availability so a number of aspects has to be taken into account, such as duration of such right, specific points of abstraction, purpose of use – consumptive and non-consumptive, and the cost.
- **Right to Navigation:** The freedom of navigation is typically stipulated in primary legislation and does not require individual rights to navigation to be allocated since internal freshwater bodies (such as rivers, lakes, and canals) are part of the state territory which they flow through which means a state has full freedom to regulate their use. Therefore, in case an internal waterway (lake, river, canal) has been determined by the state bodies as navigable, it will create a universal public right of navigation, e.g., a right to use the river to its full capacity. Private rights also confer a possibility to use the water body for navigation. For example, riparian rights include the right to dock a boat within a navigable water body located on riparian’s land. Regulating navigation will be more complex in case said river, lake or canal

stretches over several states. In that case it will be necessary to conclude a special agreement for each shared river with other riparian states that will define the navigation rights and other water uses (Tool A2.02). The United States have adopted a doctrine of *navigation servitude* which gives the government a right to regulate navigable waterways for commercial purposes, i.e. commercial uses would have priority over other uses and the federal government reserves a right to make necessary adjustments to the waterway in spite of the public interest

- **Right to Access the Water:** this right relates to free access of public to water bodies. Under the public trust doctrine mostly found in common law, the public is entitled to natural resources such as water, air, seas and their shores where a state effectively holds these resources on trust for its citizens (Orangias, 2021). Essentially the government undertakes a responsibility to protect natural resources for present and future generations, as well as to guarantee access to them for the public. In this case the doctrine applies to navigable waterways and seashores and the government ensures that they public may enjoy the right to navigation, commerce, fishing for personal use and access without interference from private landowners (Ryan, 2022). Under the public trust doctrine states might be prompted to take action against neighbouring states in case of potential transboundary harm to their natural resources on behalf of its citizens (Smith-Carrier & Manion, 2022).
- **Right to Fishing:** fishing rights include several aspects of fishing, such as public fishing within its exclusive economic zone; private fishing licenses which allows a person to fish within specific time and place; and indigenous land rights which might entitle them to fish within the water bodies on traditionally occupied land even though they do not possess the land (Song & Soliman, 2019). Private right to fishing entails that a riparian owner has the sole right to fish in the water within their boundary, however this right might be limited and subject to discretion of state bodies. In case of riparian rights, a landowner has the right to use the water on its property, but this right is not absolute and the state remains a sole owner of these natural resources. Therefore, states often introduce a licensing system for fishing rights subject to revocation and amendment. This way the state is able to ensure that the resource is not depleted and adequately used in light of the public interest (Saxer, 2011).

## Approaches to Determining Water Rights

In water law, there has been two main approaches to determine water use rights:

- **Riparian Rights:** This system is based on the principle of riparianism, which grants water rights to landowners whose property is adjacent to a water source, such as a river or a lake. Under riparian rights, landowners have the right to reasonable and beneficial use of the water, but this right is subject to the same rights of other riparian owners (Hodgson, 2006). This system is commonly used in common law jurisdictions like England and some states in the United States. These natural riparian rights could be supplemented by any water rights acquired from land tenure. The use of public waters, for water located next to public land could be utilised freely, unless there was some limitation such as to right of passage or land tenure defined by the government. This leads to the common law distinction between riparian and littoral rights, where former concern the rights of a landowner if their land is adjacent to navigable streams and owners, and the latter deal with legal use and enjoyment of the shoreline for land that borders non-flowing body of water like a pond, lake, or sea. Overlap of riparian and littoral rights could results in clashes between right to use of water for private landowners, hence reasonable use doctrine plays crucial role to resolve potential interference with neighbouring landowner's rights.
- **Prior Appropriation Rights:** Also known as the "first in time, first in right" system, prior appropriation rights grant water rights to individuals or entities who first divert water from a

source for a beneficial use ([Hodgson, 2006](#)). In this system, the priority of water rights is determined by the order of appropriation, and senior water rights holders have priority over junior rights holders during times of scarcity. This system is commonly used in western states of the United States, such as Colorado and California. Such doctrine led to development of detailed administrative procedures for water allocation and permitting system, to ensure that earlier users enjoy their allocations without prejudice to the later user needs. The principles of prior appropriation doctrine include the following ([Gopalakrishnan, 1973](#)):

1. Exclusive right is given to the original appropriator, and all following privileges are conditional upon precedent rights;
2. All privileges are conditional upon beneficial use;
3. Water may be used on riparian lands or non-riparian lands (i.e., water may be used on the land next to the water source, or on land removed from the water source);
4. Diversion is permitted, regardless of the shrinkage of the river or stream;
5. The privilege may be lost through non-use.

## **Water Right Abandonment and Termination**

Since a water right is a legal entitlement authorizing a water use, it might be revoked or terminated in case of non-use or violation of its terms and conditions, or upon request of the right holder.

One of the ways to forfeit your water right would be failing to demonstrate benefits and prove reasonableness of their water use. This doctrine primarily refers to the prior appropriation rights and essentially means that a user must either '*use it or lose it*'. For example, following the provisions of 1928 California Constitution, all water users must beneficially use a reasonable quantity of water through reasonable diversion methods. The users will forfeit their water rights if they fail to attain a beneficial purpose and demonstrate reasonable use ([Schroeder, 2023](#)).

Another instance when a user might lose their water right is through abandonment which is a doctrine applied in the United States. A water right is deemed abandoned by failing to use water or having no clear intent to resume water user later ([Schroeder, 2023](#)). Hence abandonment requires a prolonged period of non-use and a clear intent of the user to abandon their water right. Abandonment will result in cancellation of a water right ([Schroeder, 2023](#)).

If said user wants to renew their water right, they will have to prove they did not intent to abandon their right through various evidence of diligent efforts and any possible obstacles to use the right. Some of the justifications to prove the intent to use the water might include ([Holsinger, Kueter, 2020](#)):

- Attempting to place the water right to beneficial use
- Repair or maintenance of diversions and conveyance structures
- Filing documents to protect or preserve the water right, such as a water court
- application or prior abandonment protest
- Leasing the water right to others or attempting to sell the water right
- Legal or financial obstacles to placing the water right to beneficial use
- Enrolment of the water right in land or water conservation programmes

## **Thematic Tagging**

Water services

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