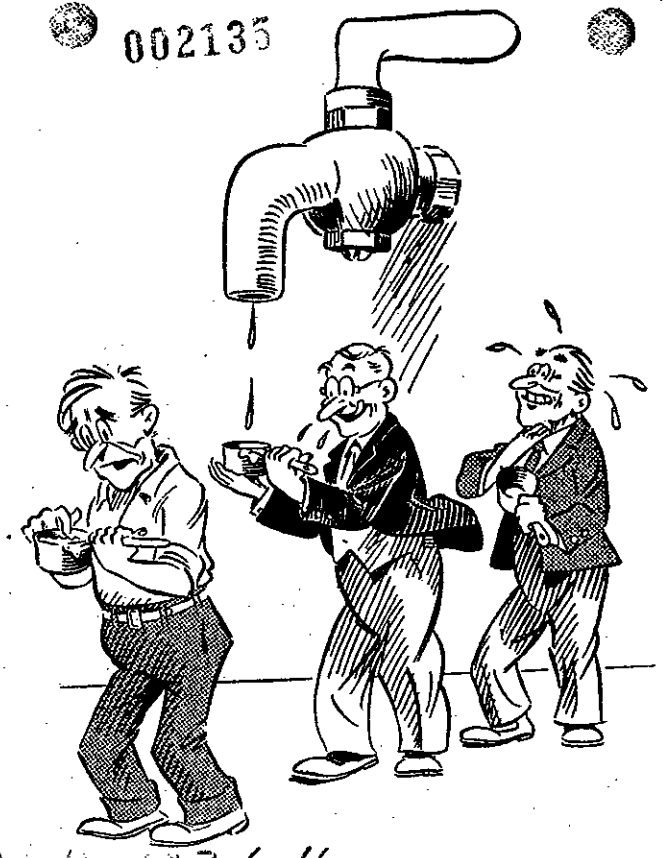

Reasonable Use by Reasonable Men

Policy and Legal Aspects in the Solution of California's Water Problem

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ABOUT THE AUTHOR

Harold W. Kennedy is fully qualified to speak as an authority on policy problems and legal aspects of California's water problem. As County Counsel of Los Angeles County for the past ten years he has been deeply involved in the complications of the water and flood control problem. Since 1933 he has represented the Los Angeles County Board of Supervisors as Legislative Representative at Sacramento and has taken part in the drafting and presenting of more than 500 bills which have become a part of the statutory law of California.

In 1944 at the request of the late Senator Bradford Crittenden of San Joaquin County, who was then Chairman of the Joint Water Problems Committee, Kennedy drafted the State Water Resources Act of 1945 and presented the measure to the Legislative Committees, to representatives of organizations and associations interested in water problems.

As County Counsel, Kennedy is attorney for the Los Angeles County Flood Control District, and the County Waterworks District. He has served as chairman of the Legal Advisory Committee of the County Supervisors Association and is currently President of the National Association of County and Prosecuting Attorneys.

Kennedy received his legal training at the University of California at Berkeley and graduated with an A.B. degree in 1923 and a Doctor of Jurisprudence from the law school in 1925. He took graduate work at the University of Southern California and holds the degree of Master of Science in Public Administration.

HIGHLIGHTS

[illegible]e long and romantic history of California thre[illegible]ds of "gold" have vitally affected our history, economy and welfare—the true gold discovered by John Marshall in the mill race of Sutters Saw Mill at Coloma on January 24, 1848, on the American River; the black gold discovered here in Los Angeles by Governor Don Gaspar de Portola when he camped on the site of the present Brea Pits on August 3, 1769, (he thus being the first white man to discover oil in California)[1]; and the God-given and indispensable flowing gold—water, without which man would perish.

"W-A-T-E-R" is thus the big five-letter word all over the country—and the lack of it has crippled our largest cities. It is becoming one of the most, if not the most important issue before the people of California today. The problem **challenges our unselfish interest, our best thinking, our intelligent planning and greatest engineering skill.**

THE PROBLEM

The estimated population of the State at present is 12,300,000 persons. In the next 25 years or by 1980 there will be an estimated population of 19,000,000 persons in all of California.[2] California contains 17,750,000 acres of irrigable land, of which 6,700,000 acres are presently under irrigation[3].

It requires an annual average of three acre-feet of water per year to irrigate one acre of land in most of the state, and five acre-feet or more for the desert areas. An acre-foot of water is the volume that would cover a one-acre area to a depth of one foot. An acre-foot of water contains 43,560 cubic feet or 325,853.16 gallons. At present rates of consumption, one acre-foot of water will serve five persons one year. Most experts figure the urban per capita use of water at 180 gallons per day (180 g.p.d.).

The State has a mean annual runoff of 70,798,000 acre-feet which indicates the maximum available surface waters. This figure is considerably lower during dry-cycle years. During the years 1927 to 1937 only 69% of the average runoff occurred, or 48,850,620 acre-feet.[4]

In addition, California has available (if we get our fair share from the Colorado River) an average of 5,000,000 acre-feet per year from streams arising outside of the state, principally the Colorado and Klamath Rivers.[5] Underground sources furnish about one-half of the domestic, municipal, industrial and irrigation water.[6]

Competent water engineers, including State Engineer A. D. Edmonston, are of the opinion that if

[1] "California Through Four Centuries," Phil Townsend Hanna (Farrar & Rinehard, Inc., 1935).
[2] Estimates by Research Department, Security-First National Bank of Los Angeles.
[3] Report of Water Committee, Agricultural Council of California, June 10, 1954.
[4] Bulletin No. 1, "Water Resources of California," State Water Resources Board (1951).
[5] S. T. Harding "Background of California Water and Power," 38 California Law Review 547 (1950).
[6] Bulletin No. 1, "Water Resources of California," State Water Resources Board (1951).

all the state's waters are conserved and used, there will be sufficient water to take care of present needs and future developments.[7]

A full use and conservation of all the state's waters presupposes a solution of a variety of problems—legal, engineering, financial, administrative, and political.

DISTRIBUTION

Probably the most vexing cause of water problem in California is the uneven distribution of natural supply throughout the State. About two-thirds of the supply is found in the northern one-third of the State, whereas the consumption for domestic, agricultural, and industrial uses is greatest in the southern and central sections.[8]

In Southern California, the situation is particularly acute. Studies have determined that with all the local water supplies in that area fully developed and conserved, together with California's rights to the Colorado River in the amount of 5,362,000 acre-feet annually, the area south of the Tehachapi Mountains will still require some 5,000,000 acre-feet of additional water annually to meet its future needs.[9]

Shortage of available surface waters has resulted in alarming depletions in our underground basins. In some coastal areas the wells that in 1907 maintained a static water level of 35 feet above sea level, have now dropped to 90 feet to 100 feet below sea level. The resulting hydraulic gradient, or ground water table slope, has resulted in salt water invasion from the ocean. A great many wells have consequently been abandoned.[10] Drafts of three times the inflow are reported in some areas. Logically these natural storage reservoirs should be replenished rather than depleted so that a sufficient reserve will be available for dry-cycle years.

PLANS AND PROJECTS

The State has been intermittently studying and planning in the field of water use since the early investigation made in 1878. In 1921 substantial funds were appropriated by the Legislature to investigate the State's water resources. The water situation worsened and in 1929 enabling legislation for the development of the State Water Plan was adopted. The Plan itself was presented to the Legislature in 1931.

Except for the Feather River Project, the actual construction of the Central Valley Project, as conceived in the State Water Plan was done by the United States Bureau of Reclamation due to the State's lack of funds.

The Feather River Project was finally approved in 1951, and filings for the appropriation of 1,773,000 acre-feet of water have already been made by the Department of

[7] Report of Water Committee, Agricultural Council of California, June 10, 1954.
[8] Bulletin No. 1, "Water Resources of California," State Water Resources Board (1951).
[9] Assembly Concurrent Resolution No. 8, 1952, First Extraordinary Session (Chapter 21).
[10] Sixth Partial Report by Joint Committee on Water Problems of California Legislature (1953 Regular Session).

Finance. Many problems are yet to be determined here, including finance (an estimated 1½ billion dollars would be required) and the final determination of the route to be followed.

A consideration of the Feather River Project points up with emphasis the need for an orderly administrative reorganization of a new Department of Water Resources. Actually the State never has been in the water business before. Mr. Samuel B. Morris, General Manager and Chief Engineer of the Los Angeles Department of Water Power, who is recognized as one of the outstanding water engineers in the whole country is authority for the statement that "All existing large water systems are owned by local governmental agencies." In considering the Feather River Project he stated, "It should be made certain that the State will have the necessary machinery to build and operate the project [Feather River]. Devising the most satisfactory plan to do so is of the greatest urgency and should be under study right now, while preliminary engineering surveys are being made. Before going further into a discussion of what we should be doing about this plan, it would be of interest to know the physical features of the Feather River and of the preliminary plans initially prepared by the State Engineer . . ."

Mr. Morris points out that there is much to be done in determining the best and most economic location for bringing Feather River water to Southern California in that the preliminary route selected provides for conveying all of the 1,773,000 acre-feet of water for use south of the Tehachapi to an elevation of at least 3,375 feet and then into the Antelope Valley. As late as June 10, 1954, this outstanding expert stated:

> **"We face the challenge of finding an alternate route that would cut the present planned pump lift to an elevation 3,375 feet to somewhere around the 1,600 foot level. At the higher elevation, at full capacity, it would require more than twice the firm power output of Hoover Dan to operate the pumps. This is a big factor in the cost of Feather River water, which at the estimated amount of $50 an acre-foot under full capacity use will be expensive by comparison with present supplies. It is too costly for agricultural use in the high desert areas south of the Tehachapi."**

Using the Feather River Project as illustrative it points up the need for careful consideration of all of the proposals and all of the sources of supply. It is inconceivable that the many important decisions can be made at one and the same time or even as part of the compromised plan. A great deal of time will be required to solve these problems and it is my view that we must adhere to the 100-year principle that has had so much in making California probably the greatest state in the Nation and has certainly kept California counties strong—the principle of grass-roots and local home rule government must continue to be applied in solving California's water problems. In order that I may not be misunderstood I wish to make it crystal clear that nothing presented in this paper is recommending an overall water authority that would transfer from the people and

the duly elected representatives in the Senate and the Assembly the final determination of the policies and political questions involved.

Although surveys, studies, reports, recommendations and engineering plans are properly made by the experts, the material to be gathered together and collated by a newly formed Department of Water Resources under the direction of an able administrator, staffed with competent water and project engineers, the final answers must always be made by the representatives of the people in the manner described.

By 1945 the need for a comprehensive reappraisal of resources and plans was clearly apparent. In that year the Legislature under the fine leadership of Senator Bradford Crittenden of San Joaquin County created the State Water Resources Board through the adoption of the State Water Resources Act (Stats. 1945, Chapter 1514) and empowered it to make a complete examination of State water resources, and to devise a comprehensive "California Water Plan." The work of this Board is now nearing completion and will probably be reported to the California Legislature at the 1955 session.

IMPORTANT AND CONTROVERSIAL PROBLEMS

Colorado River

Continuous problems regarding California's rights in the water from the Colorado River arise. Since the Colorado River is an interstate stream, its flow has been divided among the seven states concerned—Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming—by interstate compact. The compact was signed in November of 1922. In addition a treaty with Mexico [United States Treaty Senate No. 994; 59 Stats. 1219 (1945)] reserves to that country 1,500,000 acre-feet per year from the Colorado River.

A great deal of litigation has arisen regarding the interpretation of the compact, most of it between California and Arizona. The controversy over definition of "beneficial consumptive use" of water, and surplus water, the method of figuring evaporation losses from Lake Mead; and in particular, whether Arizona is to be charged for water from the Gila River, has continued for 32 years.

California is very much concerned also about such Federal proposals as the recently defeated Frying Pan-Arkansas Project, which would result in a diversion of Colorado River to states other than Arizona and California.

INTERSTATE PROBLEMS WITH NEVADA, ARIZONA, AND OREGON

Litigation is now in progress concerning water rights in the Carson River and Little Cherokee River streams flowing from California into Nevada. A commission was appointed by the 1953 Legislature to negotiate a compact with Oregon regarding the waters of the Klamath River.

TRINITY RIVER

The Trinity River Diversion has been approved administratively by the United States Bureau of Reclamation as

a division of the Central Valley Project. Construction of such diversion raises many problems including questions as to acquisition of water rights and application of "county of origin" provisions.

SACRAMENTO RIVER SALT WATER BARRIER REBER PLAN

John Reber and others have urged for many years that a salt water barrier across San Francisco Bay be operated in conjunction with the Central Valley Project, at a great saving of fresh water. The proposal raises problems such as interference with flood control, navigation, national defense, availibility of water and possible flooding of delta lands.

SEA WATER CONVERSION, CLOUD SEEDING, AND RECLAMATION OF SEWAGE AND WASTE WATER

Sea water conversion, and reclamation of sewage and waste waters are practical from an engineering standpoint and using known methods. At present salt water conversion is economically unfeasible although reclaiming sea water should be explored to the fullest as a distant future source of supply. The economic practicality of reclamation of sewage, and the practical value of cloud seeding are now under consideration.

Among other problems that must be solved are the Kings' River Controversy, State acquisition of Central Valley Project, allocation of waters of the Tia Juana River, Feather River Project, recharging depleted underground basins, finance, water pollution.

The mere recital of all of the above problems and projects stresses again that there are many decisions to be made and a great deal of work ahead. By simply listing the possibilities for future sources of supply, possibilities for reclamation of water and without at this time giving a priority to any of them, shows how desperately California is in need of giving cabinet status to water and how very important it is to at least make a start by first putting our administrative machinery in order so one by one these problems can be presented to the various official agencies charged with the responsibility to consider them, and recommend priorities and methods of financing them to the Legislature.

WHAT LAW CONTROLS

It is important to note that in general the states are free to adopt whatever legal policies they find appropriate to their local conditions. As was stated in the case of ***Peabody v. City of Vallejo.*** 2 Cal. 2d 351 at 365 (1935):

> **"The attitude of the Supreme Court of the United States has been consistent in leaving the question of private water rights, which do not involve federal or interstate interest, to the control of local state policies. *(United States v. Rio Grande Dam and Irr. Co.,* 174 U.S. 690 702 [19 Sup. Ct. 770, 43 L. Ed. 1136]; *Hudson County Water Co. v. McCarter,* 209 U.S. 349,356 [28 Sup. Ct. 529, 52 L. Ed. 828, 14**

Cas. 560]; State of Conn. v. Commonwealth of Massachusetts, 282, U.S. 660, 670 [51 Sup. Ct. 286, 75 L. Ed. 602])."

THE LEGAL ASPECTS

The formulation of the above plans and others, and putting them into operation, bringing them to successful fruition requires some knowledge of what can legally be accomplished. What is the legal framework within which this State must work in addressing itself to this maze of complicated water problems? Constitutionally, how far can the Legislature now go if it wants to as a matter of sound public policy? What are the equitable legal principles that protect those who have vested water rights? What are vested water rights? These things we must know, in order to make progress in solving California's water problems.

The evolution of the law of waters has gone hand and hand with the progress of the State, each stage being accompanied by a restatement of such law in the light of new needs for water. [See ***Imperial Water Co. No. 5*** **v.** ***Holabird,*** 197 Fed. 4, 15, 116 C.C.A. 526].

As observed by Chief Justice Shaw,

> **"The development of the law [of water] in California is part of the history of the development and growth of the state. The first industry pursued here, that of placer mining, required the liberal use of water to separate the gold from the soil, sand, and gravel in which it was imbedded. It was confined to the mining regions. The latter and more widespread industry of agriculture requires still larger quantities of water to grow the annual crops, trees, and vines to which the climate and the soil were so well adapted. The recent use of water to produce electrical energy adds another valuable use to that element. The increase in population and the corresponding increase in these various industries have produced a demand for water which has taxed all possible sources of supply. The controversies arising from these conditions have been taken to the court and have compelled decisions upon various phases of the law of waters. Our reports contain more decisions on that subject than any other." [Address printed in 189 Cal. 779-797 1922)][11]**

LEGAL HISTORY

The gold miners who came to this territory in the summer of 1849 found that there were few streams, and most of those existing had little water. The land belonged to the United States, but the Federal government had no real control over it. There was no real government, no established law, and no authority. The rights of the miners were those of the possession, only, and such possession was the sole foundation and evidence of their title to land they occupied, to the water they used in mining, and the gold they obtained thereby.

Prior to the treaty with Mexico in 1848, property rights were governed by Mexican law. On April 13, 1850, the legislature of the infant state enacted a statute adopting the common law of England, so far as it was in harmony with the state and federal constitutions, as the rule of decisions in this state. [Stats. 1850, p. 219]

The common law of England provided for the doctrine of riparian rights, but there were no specific common law rules that had ever been applied to the conditions unique to western United States. ["Riparian" means belonging or relating to the bank of a river, thus a riparian owner is one who owns lands on the bank of a river or stream.]

The miners were later followed by the agriculturalists who needed water for irrigation and it was inevitable that the appropriation system and the English common law rule of riparian rights eventually came into conflict. The climax came in 1886. Earlier Henry Miller and his partner Lux, known as Miller and Lux, acquired a large amount of land in the San Joaquin Valley. James B. Haggin and Lloyd Tevis also owned large holdings, and began to construct irrigation canals up the Kern River from the lands of Miller and Lux. The importance of the issue, and the wealth and influence of the parties centered public attention on the case. The case reached the Supreme Court in 1886 under the names of ***Lux*** **v.** ***Haggin,*** [69 Cal. 255 (1886)]

Probably no case that ever came before the Supreme Court of California was more fully argued by more distinguished counsel. In the longest opinion to be found in the decisions of the Supreme Court extending 126 pages, the court split 4 to 3. **The majority, in an opinion written by Justice McKinstry, declared that the rights of riparian owners to the use of waters of the abutting stream were paramount to those of the appropriator, that this water right was a "parcel" of the land likened to the land itself.**

With a judicial recognition of such vested property rights, it became obviously apparent that such rights could not be taken without compensation. The policy of protecting such rights is declared in our constitution and has been adhered to throughout our national history.

In 1926 the State Supreme Court went so far in protecting riparian rights of any kind as against any extent of benefit to an appropriator that public concern was aroused. The historical case involved was that of ***Herminghaus*** **v.** ***Southern California Edison Co.*** reported in 200 Cal. 81 (1926).[12] The plaintiff, Herminghaus and others, owned 18,000 acres of land bordering on the San Joaquin River. Overflow from the river at annual flood stage naturally irrigated this land and deposited silt upon it. The Southern California Edison Company desired to impound and divert some of the water on upstream lands for generating electric power.

Justice Richards, writing for the court, reaffirmed the principles of ***Lux*** **v.** ***Haggin,*** pointed out that the rights

[11] It is interesting to note that the above statement from Chief Justice Lucien Shaw is taken not from an official case decided by the Supreme Court of California but was an address on water law prepared by Judge Shaw and printed as an appendix to the Official Reports of the California Supreme Court, 189 Cal. at pages 779 to 797.

[12] Eminent counsel represented on this case included Edward F. Treadwell, Roy V. Reppy, and George E. Trowbridge for the Appellates: and John W. Preston, James F. Peck, and Robert E. Hatch for the Respondent.

involved were vested property rights and concluded that therefore the Constitution forbade the Legislature from interfering with it, as had been attempted by the Water Commission Act of 1913. (Stats. 1913, p. 1012). It was clear that under the holding of the case the right to waste vast amounts of water in order to give some small benefit to riparian lands was recognized.

Justice John Shenk clearly comprehended this, and in a strong dissent pointed out the unreasonableness of the plaintiff's wasteful use as a matter of law. It can be said without fear of contradiction that in the whole history of California there is no single individual who has contributed more to the substance and development of California's water law than Justice John Shenk, the senior member of the California Supreme Court. For it was Justice Shenk who courageously wrote the dissenting opinion in the ***Herminghaus*** case and since that time by assignment of the Chief Justice has authored nearly all of the far-reaching decisions of the Supreme Court in the field of water law since 1926. He pointed out that the enjoyment of all property was subject to the police power of the state, and said at page 128,

> **"A more extravagant or wasteful use of water could not well be imagined. Two and one-half acre-feet of water is more than annually sinks into their lands. The balance is excess as to them and so far as they are concerned passes on to the sea and is utterly wasted. This waste is not only contrary to statutory regulation but it works an injustice on the state, which is endeavoring to conserve such waters for useful and beneficial uses by appropriator under the laws of the state."**

Public reaction to the shockingly wasteful doctrine of the ***Herminghaus*** decision soon led to the enactment of the 1928 constitutional amendment that has been characterized as "the fountainhead of California water law." (38 Cal. Law Rev. 572). The new doctrine, usually referred to as the ***"reasonable use doctrine"*** is found in Article XIV, Section 3 of the State Constitution, adopted by the people on November 6, 1928. The section reads as follows:

> **"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.**
>
> **Riparian rights in a stream of water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."**

The policy of restriction on the riparian rights enumerated in this section was not a unique development. As Justice Shenk stated in ***Peabody*** v. ***Vallejo,*** 2 Cal. 2d 351, 365 (1935),

> **"In adopting a policy modifying the long-standing riparian doctrine of the state, California has done by constitutional amendment what many of the western states have done by statute or court decisions. Of the seventeen western states, generally referred to as the irrigation states, nine now recognize the modified doctrine of riparian rights and eight have entirely abrogated the doctrine of riparian rights and recognize only the doctrine of appropriation. The nine are North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Washington, Oregon, and California, and the eight are Montana, Idaho, Wyoming, Nevada, Utah, Colorado, Arizona, and New Mexico."**

The first case interpreting the new constitutional section was ***Gin S. Chow*** v. ***City of Santa Barbara,*** 217 Cal. 673 in 1933. In that case, the plaintiff was a riparian owner on the Santa Ynez River. The defendants were the City of Santa Barbara and the Montecito County Water District. Defendants were located over the divide and out of the Santa Ynez watershed. The City of Santa Barbara appropriated water on the river, and the plaintiff asked an injunction against storing, impounding and diverting river water and percolating water. The court found that defendants' action left enough water for riparian owners' use, and that defendant was only taking "storm, flood, and freshet water."

In holding that plaintiff's use was not unreasonably interfered with, the court adopted much of the reasoning of Judge Shenk's now famous dissent in the ***Herminghaus*** case. At page 701 the court stated:

> **"That the constitutional amendment now under consideration is a legitimate exercise of the police power of the state cannot be questioned."**

Regarding "due process" under the Federal Constitution, the court pointed out (at page 705):

> **"Furthermore, that court (United States Supreme Court) has said that 'every state is free to change its laws governing riparian ownership and to permit the appropriation of flowing water for such purposes as it may deem wise' (citing cases)."**

The next case in point was ***Peabody*** v. ***City of Vallejo,*** 2 Cal. 2d 351 (1935) which involved an injunction against the City of Vallejo, as an appropriator under a permit, from storing any water of Gordon Valley Creek. Plaintiffs were riparian owners who claimed defendants' project permanently injured their water supply. Various plaintiffs alleged the normal runoff benefited them by depositing silt, washing salt out of land, seepage into the land, and maintaining the water table.

The court cited the new, at that time, amendment to the Constitution—Article XIV, Section 3—and held:

1. That the riparian use for silting and removing salinity is an unreasonable use.

2. Held the same for flood and freshet waters overflowing land and never returning to the channel.

3. That the right to percolating water is also subject to reasonable use.

4. That the appropriator may use the stream, surface, or underground or percolating water, so long as the land having the paramount right is not materially damaged.

At page 367 of the opinion, the court pointed out,

> **"The rule of reasonableness of use as a measure of water rights has been applied by the court as between riparian owners . . . ; as between owners overlying an underground water supply . . . ; as between appropriator . . . ; as between overlying owners and exporter from an underground basin to nonoverlying lands . . . ; and as between riparian owners and overlying owners under the doctrine of common source of supply; . . .**
>
> **"Epitomized the amendment declares:**
>
> **(1) The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.**
>
> **(2) Such right does not extend to the waste of water.**
>
> **(3) Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.**
>
> **(4) Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.**
>
> **"The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of water under whatever right the use may be enjoyed . . .**
>
> **"When the supply (of water) is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield."**

The court did not overlook the rights in prospective or future uses, saying at page 368:

> **"The problem now has three aspects: First, after excluding all of the reasonable and beneficial uses *present* or *prospective* (considering in connection therewith reasonable methods of use and reasonable methods of diversion) to which the water of the stream are put, either under riparian right or by prior appropriation, is there then water wasted or unused or not put to any beneficial use?" (Emphasis added.)**

More recently decided was the case of ***City of Pasadena*** v. ***City of Alhambra,*** 33 Cal. 2d 908 (1949). This case, involving several users of water from an underground basin reaffims the principal of the ***Peabody*** case as to reasonable use, stating:

> **"In California surplus waters may rightfully be appropriated on privately owned land for nonoverlying uses, such as devotion to a public use or exportation beyond the basin or watershed (citing cases) . . . As between appropriators, however, the one first in time is first in right, and a prior appropriator is entitled to all the water he needs, up to the amount he has taken in the past, before a subsequent appropriator may take any. *(City of San Bernardino* v. *City of Riverside,* 186 Cal. 7, 26-28)."**

The latest case is ***United States*** v. ***Gerlach Live Stock Co.,*** 339 U.S. 725 decided in 1950 which involved the right of inundation of grasslands and resulting absorption of water. Plaintiff was deprived of such inundation by the construction of Friant Dam, a part of the Central Valley Project. The United States Supreme Court held that plaintiffs were entitled to compensation for their loss. Justice Jackson wrote the opinion for the court, stating at page 751:

> **"Riparianism, pressed to the limits of its logic, [illegible] one to play dog-in-the-manger. The shore proprietor could enforce by injunction his bare technical right to have the natural flow of the stream, even if he was getting no substantial benefit from it. This canine element in the doctrine is abolished."**

He concluded however, at page 752 that,

> **". . . public welfare, which requires claimants to sacrifice their benefits to broader ones from a higher utilization, does not necessarily require that their loss be uncompensated any more than in other takings where private rights are surrendered in the public interest."**

It is clear that the "reasonable use" doctrine is now the law of this state as to flowing waters, and waters in underground basins. Its development was inevitable in the development of a semi-arid state in which most of the area depends upon imported water for irrigation and domestic use.

The Legislature has recognized and amplified the doctrine in numerous sections of the Water Code. For example, Water Code Section 101 adopted in 1943 provides:

> **"Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used consistently with this and the next preceding section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing in this or the next preceding section shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled."**

Water Code Section 102 provides:

> **"All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."**

Water Code Section 104 provides:

> **"It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection."**

Water Code Section 105 provides:

> **"It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit."**

Water Code Section 1201 provides:

> **"All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or insofar as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code."**

Section 106 of the Water Code enunciates the State policy as to what is the highest use of water as follows:

> **"It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation."**

COUNTY OF ORIGIN PROTECTION

A great deal of concern is being expressed with regard

to protection of the "counties of origin." It is feared that allocation of water for future use outside these areas will lead to the deprivation of needed water rights in the areas where the water originates.

Present legislation is as follows:

Under Part 2 of Division 6 of the Water Code, the Department of Finance is directed to appropriate water for prospective needs in development of a general water plan. (Water Code Section 10500) Section 10505 forbids the Department of Finance from releasing or assigning any appropriator if these would deprive the county of origin of water necessary for its future development.

Another separate and distinct provision is found in Division 6, Part 3, Chapter 3, Article 4 of the Water Code (Section 11460 et seq.). This provision applies only to the Water Projects Authority relative only to the Central Valley Project authorized by State law (not the existing federal Central Valley Project). The three sections involved read as follows:

Water Code Section 11460:

> **"In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."**

Water Code Section 11461:

> **"In no other way than by purchase or otherwise as provided in this part shall water rights of a watershed, area, or the inhabitants be impaired or curtailed by the authority, but the provisions of this article shall be strictly limited to the acts and proceedings of the authority as such, and shall not apply to any persons or State agencies."**

Water Code Section 11463:

> **"In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of such exchange."**

Thus, it is crystal clear and should be strongly emphasized, that future plans require that the counties of origin be protected, both in their current and prospective needs.

WHAT IS SOLUTION TO PROTECTION OF COUNTIES OF ORIGIN

Based upon the legal doctrine that ***all*** of the water belongs to ***all*** of the people of the State, if the engineers are correct that properly distributed there could be enough water for ***all*** the State's needs, consideration might be given to giving the counties of origin a guarantee along the following lines:

POLICY OF GUARANTEE TO COUNTIES OF ORIGIN

Possibly the solution lies in some type of legislative or

legal guarantee that would permit immediate diversion of more water to areas of need, pending development of counties of origin, at which time they could demand return of some of that which had been originally relinquished. Such a policy or formula would place the risk of making the capital investment upon the area calling for the water. That is, if Southern California needed the water to the extent that it would be willing to pay for its appropriation and diversion for say 20 or 30 or 40 years, with the legal right of the county of origin to later cut off a portion of what was relinquished, the counties of origin would be fully protected. This policy of course would involve careful engineering studies to determine whether or not the use of the water for the interim period, subject to later loss of such supply, would economically justify the cost of building the canals and physical facilities to get the water to the areas of need. However, it is not too fantastic to contemplate that in another quarter century, perhaps less, a practical and economically feasible method of reclaiming sea water will have been developed. At least, the need is great enough to keep working on the plan.

ADMINISTRATION PROBLEMS

If a student of government were to analyze the administration of water law in the State of California, he would probably be impressed at first glance with, (1) the fact that such an all-important duty is being performed by a Division of the Department of Public Works, rather than by a Department of cabinet status; and (2) the multifarious structure of boards, divisions and commissions, involved in the administration of water policies. In addition to the Division of Water Resources under existing California law there are fourteen State agencies involved in water problems. They are:

(1) Water Project Authority
(2) State Water Resources Board
(3) State Water Pollution Control Board (and nine regional boards)
(4) Department of Health
(5) Board of Health
(6) State Soil Conservation Commission
(7) Department of Fish and Game
(8) Department of Natural Resources
(9) Department of Finance
(10) Public Utilities Commission
(11) California District Securities Commission
(12) State Reclamation Board
(13) Colorado River Board
(14) Klamath River Board

While from the standpoint of organization efficiency a more streamlined Department of Water Resources than contemplated by already suggested legislation might be desirable, it is of more importance to maintain the integrity of the several separate and independent boards and commissions that have already been created by action of the legislature, because they are already thoroughly conversant with the responsibilities assigned to them.

By experience and after the expenditure of many hours of work by the members, engineers, statisticians, and lawyers these boards and agencies have a definite and accu-

rate and precise knowledge of the problems assigned to them. By way of example, from the standpoint of Southern California it would be a catastrophe to at this time or in the near future abolish the Colorado River Board which is in the middle of a desperate fight with Arizona, Colorado, the United States government and possibly other states, to protect the allocation of Colorado River Water arising out of the Colorado River Compact of 26 years ago. The same can be said for some of the other boards and commissions in the fields of endeavor placed in their charge.

CALIFORNIANS SHOULD BE ALERT TO INCREASING CRISIS OF THE COLORADO RIVER CONTROVERSY

With respect to the long-standing and increasingly complicated Colorado River controversy, the people of this State must realize to a greater extent than they now do that California is in a desperate legal and political fight to protect its share of the Colorado River Water.

While currently a part of the problem is in the hands of the Supreme Court of the United States and the master appointed by that court to ascertain the facts to aid the court, every Californian who is interested in the future of his State should be alerted to the political threat constantly arising in Washington, D.C. As late as September 2, 1954, Congressman Harry Sheppard of San Bernardino County, in an Associated Press dispatch, reported "that spokesmen for several Colorado River Basin States have continued a slanderous and malevolent campaign against water agencies and officials of California." Congressman Sheppard stated that officials of Colorado, Utah, Arizona, Wyoming and New Mexico have for years "stormed Capitol Hill with fantastic and costly water and power projects," such as the Central Arizona Project and the upper Colorado River Storage Project.

It is clear, of course, that the approval by the Congress of any such projects would seriously damage California's right to the waters of the Colorado River, waters which California must have, waters which we own under the original Colorado River compact, waters that the Metropolitan Water District and the taxpayers of Southern California have spent hundreds of millions of dollars to develop and bring into Southern California in order to serve this vast and ever-expanding industrial empire.

It must be remembered that the Colorado River project is of great importance to all of California—South, Central, or North. The tendency for people in the north is to think of it in terms of Southern California only. Under the "legal concept of most beneficial use" the more water from the Colorado, the less will be needed from the river systems of the North.

RECOMMENDATION FOR LEGISLATIVE ACTION IN 1955

Proposals directed toward creating a Department of Water Resources are being prepared for the coming session and will receive the careful attention of the 35 members of the seven organizations making up the State-wide Water Problems Committee.

Although the proposals vary in approach and in methods of organization, all are aimed at raising water to a cabinet status, and to accomplish closer administrative coordination among the various boards, agencies, commissions, and divisions mentioned earlier.

It is imperative that, in order to effectively turn the extensive existing and prepared plans from blueprints into reality, that California must first put its administrative house in order. This should be done at the 1955 session of the Legislature if possible. Every effort should be made to write a bill and get it passed so California can make a start on solving the many difficult and controversial problems related to water.

The need is also apparent for the centralization of the construction of water projects under a reorganized Water Project Authority. At present the Authority is composed of the Director of Public Works, Chairman, the Attorney General, State Controller, State Treasurer, and the Director of Finance. All of these officers are already burdened with the responsibilities of their offices and should not be called upon to perform such complex and important work in addition. Senator Edwin J. Regan has proposed an authority composed of full-time salaried engineers appointed by the Governor for terms of from 8 to 10 years.

Serious study should be given to such proposals with the view to enacting them into law at the earliest possible date without creating an autocratic State Water Bureau or Authority.

Those of you who have followed the problem closely know that on the recommendation of the Joint Interim Committee on Water headed by Senator Howard Williams and with the assistance of the Legislative Counsel there was prepared Assembly Bill 863 which would have accomplished the cabinet status and orderly arrangement of a Department of Water Resources. Assembly Bill 863 passed both houses of the Legislature but did not go to the Governor because he had indicated that he would veto the bill. The reason was that the proposal took from the Attorney General his exclusive power of representing the State as legal adviser and in his place substituted an independent State Water Attorney.

There were strong reasons given by the Interim Committee for including a State Water Attorney and some equally strong reasons why the Attorney General should retain his exclusive jurisdiction. This phase of legislation must be carefully reviewed and here again the knowledge, experience, and recommendation of the 35 official representatives of the State-wide Committee on Water Problems will be valuable in reaching a proper solution.

By way of summary, from the natural viewpoint of supervisors, citizens, and representatives of the "counties of origin" it must be said that it is one thing to ascertain what the law of water is in

California, recite the "doctrine of reasonable use" but it is an entirely different thing to apply those principles in such a manner that is entirely fair to the counties of origin. The uncertain factors of course are at any given time to determine what the "reasonable and prospective needs" of an area will be. They too may become centers of population. They too may attract new industries with their consequent needs for large amounts of water.

It is easy for those of us who have built on the edge of a desert and having no water or little water to readily accept the legal doctrine of reasonable use. At this point the human factor becomes important and we immediately enter an area of controversy.

By way of assurance to our colleagues, the supervisors who represent the counties of origin, and in behalf of my client the great County of Los Angeles, I would like to point out that to my own knowledge during the 21 years that I have been attending sessions of the California Legislature as a legislative representative for my county, the fact is, and the record speaks for itself, that the Board of Supervisors of the County of Los Angeles has been mindful of the needs and the problems of other counties. In the several hundred bills which we have presented to the California Legislature since 1933 proposing legislation in many phases of public law—taxation, special assessments, public welfare, allocation of gasoline taxes and highway fund, subsidies for the building and maintenance of tubercular hospitals, all types and kinds of grants in aid from the state; with studied concern we have sought for a measuring stick and a formula that would adequately protect the basic requirements of small size counties, medium size counties, as well as the counties with the concentrations of great population.

A number of years ago this great state was distraught from Oregon to Mexico over a proposal sponsored by liberal groups in population areas proposing that the California Senate be reapportioned on a population basis. May I say with firmness and with proper modesty in behalf of the County of Los Angeles, and to refresh your memories, that if Los Angeles County was greedy for political power, that if it was thinking only of Los Angeles County—its problems, its people—that it had an opportunity to not only have 31 votes in the Assembly but it had an opportunity to secure a reapportionment of the Senate on a more nearly population basis. **To its credit under policies directed by its Board of Supervisors, the County of Los Angeles officially opposed such reapportionment, went on record against it and joined in defeating the constitutional amendment that had proposed it.**

As I have gone up and down the State, the mounting crescendo of impending crisis in solving the water problem has been impressed upon me. Some harsh things have been said and some of them reported in the press. Reference is made to these not to incite controversy but to allay it,

to plead for harmony, to emphasize over and over again that California and all of its 58 counties including the counties of origin and the desert counties must stand and work together. It was even suggested by a spokesman for a county of origin that if anyone came from Southern California to "steal our water" despite the established legal doctrine of "reasonable use" that the Vigilantes of the 1850's should be re-established and deal summarily with such "water thieves."

Of greater alarm was the whispered suggestion that as far as Northern California is concerned it would be better off if the State were severed and the seven Southern counties left to their own resources in developing their water.

There are many supervisors from the mountain counties, from the Mother Lode, from the Sacramento and San Joaquin Valleys who over the years (some of you for twenty years and more) have worked together for the best interests of all of California and as I have said I believe that Los Angeles County has played its part and made its contribution toward a strong and united California. Certainly there is no official representative from any county in California who would give encouragement to such a proposal of severing Northern California from Southern California. This state—all of it—must and will work together.

As the California poet John Steven McGroarty said in "California, Its History and Romance":

> **"The tide of power, ever shifting thru**
> **The countless ages of the world,**
> **Now to Tyre and now to Carthage,**
> **Again to Britain and again to Gaul,**
> **The steel leviathans of the oceans**
> **Dimming the glory of the Phoenician**
> **With his first little ragged sail —**
> ***This tide of power shifts* now to the**
> **Western Shores of America."**

California thus faces the awakening orient with its countless peoples, and its undreamed of and undeveloped wealth. And, in the days to be, shall outrival the achievements of all the past as she sits in queenly sway upon her golden throne of greatness and content.

In 1911, John Steven McGroarty wrote this poem about California which, viewed in the light of today's problems, presents a challenge to us all:

> **"Days rise that gleam in glory,**
> **Days die with sunset's breeze,**
> **While from Cathay that was of old**
> **Sail countless argosies;**
> **Morns break again in splendor**
> **O'er the giant, new-born West,**
> **But of all the lands God fashioned,**
> **'Tis this land is the best.**
>
> **"Sun and dews that kiss it,**
> **Balmy winds that blow,**
> **The stars in clustered diadems**
> **Upon its peaks of snow;**
> **The mighty mountains o'er it,**
> **Below, the white seas swirled —**
> ***Just California stretching down***
> ***The Middle of the World.***"

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