1988

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Recommended Citation
19 Pac. L.J. 1031

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Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations

Clifford W. Schulz* and Gregory S. Weber**

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I. INTRODUCTION

Prior to 1928, California courts repeatedly affirmed that water rights were vested property, subject to divestment only upon just compensation. With the exception of disputes between riparians and appropriators, exercise of all such water rights was subject to reasonable use limitations. Under this reasonable use doctrine, courts required reasonable efficiencies, in light of community standards and long-standing traditions, to prevent waste. Where a riparian or prior appropriator reasonably exercised its right, the courts did not require such users to bear expensive costs of improving their water use efficiency in order to make additional water available to subsequent users.

In 1928, however, the people of California adopted a constitutional amendment now known as article X, section 2. On its face, that
amendment merely extended the existing reasonable use restrictions to all water users, including conflicts between riparians and appropriators. However, in the sixty years subsequent to the 1928 amendment, the courts have seized upon it to redefine the meaning and scope of the property interest in water. In particular, the courts have used the reasonableness doctrine alone, or in conjunction with the public trust doctrine, to authorize broad judicial or administrative reallocation of water resources without triggering constitutional requirements for due process and payment of just compensation.

This article compares the differences in express judicial treatment of property rights in water before and after the 1928 amendment. In particular, it focuses on several decisions from the last twenty years that discuss reasonable use in light of changing social perceptions of proper resource allocation. Since the California courts show no great reluctance towards judicial redefinition of property interests in water, the only possible limitation on further reallocations by judicial fiat may be the United States Constitution. The article concludes by raising some initial questions which must be addressed in any takings or due process analysis under the federal Constitution.

II. THE NATURE OF PROPERTY INTERESTS

A starting point in a discussion of "property" interests in water rights is some understanding of the meaning of "property." While philosophers and economists debate the theories of property, and anthropologists and sociologists critique its origins, to the person on


2. See, e.g., Nichols on Eminent Domain, supra note 1, at 5-11 to 5-13 (citing Thurnwald, Economics in Primitive Communities (1932); Herskovits, The Economic Life of Primitive Peoples (1940); Dixon, Economic Institutions and Cultural Change (1941); Hallowell, The Nature and Function of Property as a Social Institution, 1 J. Leg. & Pol. Soc. 115 (1943). See also Property, 12 Encyclopedia of the Social Sciences 528 (1934) (tracing the history of property).
the street, "property" normally constitutes objects, such as land or personal possessions. Within American jurisprudence, however, "property" has a broader meaning. Indeed, "property" may have a multitude of meanings. For example, property may mean one thing for welfare reimbursement purposes, another in a division of marital assets, another in a licensing context, and still another for purposes of the due process and "takings" provisions of the fifth and fourteenth amendments to the United States Constitution.

Because this article focuses on the redefinition of property rights in water, some definitions will provide a point of origin. Various formulations exist for a comprehensive legal definition of "property." For example, in the Restatement of Property, "property" denotes "legal relations between persons with respect to a thing." Alternatively, legal lexicographers have defined "property" as "an aggregate of rights which are guaranteed and protected by the government" and "that dominion or indefinite right of use, control, and disposition which one may lawfully exercise over particular things

7. The fifth amendment's two property clauses state: No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. amend. V. The fourteenth amendment's property clause states: No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . Id. amend. XIV, § 1. The fifth amendment's prohibition against takings of private property without just compensation became applicable to the states, through the fourteenth amendment, in Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 239 (1897). The meaning of "property" for purposes of these amendments is much debated and discussed more fully infra at notes 303-46 and accompanying text.
8. RESTATEMENT OF PROPERTY, Introductory Note to Chapter 1, at 3 (1936). Chapter 1 of the Restatement contains 13 basic definitions. The Restatement, however, does not devote a specific definitional section to "property." Section 5 however, defines "interest" to mean: "both generically [as including] varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them." Id. § 5, at 9. In the comment to section 5, the Restatement describes "complete property" as:

The totality of [the] rights, privileges, powers and immunities which it is legally possible for a person to have with regard to a given piece of land, or with regard to a thing other than land, that are other than those which all other members of society have as such. . . . This totality varies from time to time, and from place to place, either because of changes in the common law, or because of alterations by statute.
or objects.” Professor Michelman defines “property” even more broadly as “the pattern of behavioral assumptions and ethical values which have come to be associated with institutions dictating some degree of permanence of distribution.”

An abstract definition of property, however, rapidly appears unsatisfying since it merely begs the question: What are the particular interests which the law recognizes as protected rights? More useful than a definition of “property” is a description of the primary attributes of “property.” While the exact composition of property rights may well differ with respect to different things or entities, or to the same things or entities but under the laws of different jurisdictions, several fundamental attributes are shared by all species of private property.

Among the commentators who have elaborated upon the fundamental attributes of property, Dean Roscoe Pound has summarized six fundamental incidents of ownership outlined by 19th century analytical jurists. First, ownership included a right of possession or complete physical control of a thing until dispossession voluntarily or by legal process. Second, ownership included the right to compel legal assistance to restrain unauthorized use or possession by others. Third, ownership included a right of use, tempered, as in the case of cruelty to animals, by some general moral limitations. Fourth, ownership included a right to enjoyment of the benefits or profits produced by the right of use. Fifth, ownership included a right to abuse or even destroy the property owned. As with the right of use, the right of abuse was tempered by similar moral considerations and by concerns over impairment of other owners’ use of their property. Finally, ownership entailed a power to transfer itself in whole or in parts to others.

11. [no page number]
   [No general definition can be framed which will give a concrete indication whether any claim of personal interest falls within the constitutional safeguard. Although the courts struggle valiantly to make clear the full implications of the term "property," its meaning is so enmeshed in centuries of Anglo-American legal development that general definitions are misleading at best and a true working definition impossible.
Id. at 142.
13. Pound, The Changing Role of Property in American Jurisprudence, 12 Univ. Chi. Conf. 31, 33-34 (1953) [hereinafter Pound]. Dean Pound used six Latin terms to describe the fundamental attributes: (1) Jus possidenti; (2) Jus prohibendi; (3) Jus utendi; (4) Jus fruendi; (5) Jus abutendi; and (6) Jus disponendi. Id.
More recently, Judge Oakes similarly restated property's essential attributes. Of particular importance to this article is his point that property expressly includes an immunity from uncompensated expropriation by the state.

Oakes' contemporary formulation largely reiterates Pound's expression of classical nineteenth century understanding of property. Thus, at least superficially, little change appears in the labels applied to property's attributes. In the last century, however, great changes have occurred in the meaning of the individual attributes. For example, Pound's fundamental attributes of "use" and "enjoyments of fruits of use" included any or all reasonable uses. In contrast, courts today uphold government regulations, under the police power, so long as they allow some (i.e., at least one) use. In the end, description leaves the inquiry as unsettled as definition, since it, too, begs the question as to the content and applicability of the attributes described.

14. 1. [The right of a person to possess the thing, or, in the case of incorporeal things, to exclude others from possessing it; 2. the right to use the thing; 3. the right to manage the thing; 4. the right to the income or profits from use of the thing; 5. the right to the capital in the thing, i.e., the power to consume, waste, modify, sell or alienate, or even destroy it; 6. the immunity from expropriation of the thing by another or the state; and 7. the power to transmit the thing by gift, bequest, or devise.


15. This immunity, codified in the constitutional provisions against "takings," supra note 7, was a post-revolutionary war American contribution to property law. See Note, The Origins and Original Significance of the Just-Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694 (1985).

16. For example, in Pound's view, 20th century jurisprudence has moved "from consideration of legal rights to interests, i.e., to the reasonable expectations involved in life in civilized society which are behind and recognized and secured by the rights." Pound, supra note 13, at 35. Pound explores, attribute by attribute, the increasing regulatory grasp of the state through the "socialization" of property. Id. at 37-40. For example, uses of property "reasonable" in and of themselves may be forbidden by the state "on a weighing of more socially advantageous possible uses of the land than the owner wishes to make." Id. at 39. In sum, an individual's expectations as an owner of property have increasingly given way to "a great volume of expectations of others than the owner." Id. at 36.

17. See, e.g., Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 556-57, 193 A.2d 232, 241-42 (1963) (court upheld zoning laws restricting use of undeveloped land to wild life sanctuary and water retention area). See also Sibson v. New Hampshire, 115 N.H. 124, 127, 336 A.2d 239, 243 (1975) (court upholds development ban on marshland since property was still available for "the normal traditional uses of the marshland including wildlife observation, hunting, harvesting of marshgrass, clam and shellfish harvesting, and aesthetic purposes").
An alternative to definition involves an examination of the social functions of property. A primary social function of property is to delineate the respective rights between an individual and other individuals or society as a whole. The history of property is etched by the movement of that line separating individuals from state.

Judge Oakes has suggested that two fundamental attitudes towards private property pervade American jurisprudence. One view, originally championed by James Madison, adopts the views of John Locke and William Blackstone and equates property with individual dominion. The other view, originally championed by Thomas Jefferson, views property as "a common stock for man." Over the last hundred years courts have generally moved from Madisonian "dominion" towards Jeffersonian "common control" over natural resources. The remainder of this article traces that movement, in California, with respect to water.

III. COMMON LAW AND CIVIL LAW SOURCES FOR PRIVATE PROPERTY INTERESTS IN CALIFORNIA'S WATERS

California's initial water law decisions emerged shortly after the formulation in both common and civil law jurisdictions of the riparian theory of private property interests in water. Although

18. Reich, The New Property, 73 Yale L.J. 733, 771 (1964) ("property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.")
20. Blackstone described property as:
[i]t is sole and despotic dominion which one man claims and exercises over the external things of the world and total exclusion of the right of any other individual in the universe.

22. In two pivotal cases, a generation apart, the California Supreme Court recognized both the prior appropriation doctrine and the riparian doctrines. Irwin v. Phillips, 5 Cal. 140, 146 (1855) (prior appropriation approved upon public domain lands); Lux v. Haggin, 69 Cal. 255, 315, 10 P. 674, 706 (1886) (riparian rights adopted by California Legislature in 1850). See infra notes 72-75, 94-107 and accompanying text. For a general description of the two theories in California, see Attwater and Markle, Overview of California Water Law, 19 Pac. L.J. 957 (1988) (also part of this Symposium). See also W. Hutchins, THE CALIFORNIA LAW OF WATER RIGHTS, 40-55 (1956) [hereinafter W. Hutchins]; 1 H. Rogers & A. Nichols, WATER FOR CALIFORNIA 156-212, at 216-304 (1967); 1 S. Wiel, WATER RIGHTS IN THE WESTERN STATES 66-85, 123-37 (3d ed. 1911) [hereinafter WATER RIGHTS IN THE WESTERN STATES]; D. Anderson, Riparian Water Rights in California, Governor's Commission to Review California Water Rights Law (Staff Paper No. 4, 1977) [hereinafter Anderson]; M. Archibald,
scholars debate the exact ancestry of the riparian theory, both legal systems had protected private interests in water to some extent prior to the nineteenth century.

A. Roman and Civil Law Sources

Roman law provided two foundational elements developed by later common and civil law courts and commentators. From Roman law comes the fundamental distinction between ownership of the corpus of a watercourse and the rights of use of the watercourse. In his Institutes, the Emperor Justinian classified flowing water within the "negative community" of things which cannot be owned privately.


25. H. ALTHAUS, supra, at 2. The Romans used several different concepts to describe the negative community and rights to objects within such community. *Res nullius* meant "property of no one." See, e.g., *WATER RIGHTS IN THE WESTERN STATES*, supra note 22, at 3. The Romans classified such members of the negative community into two principal
Yet, the Institutes also recognized the concept of "usufruct"—"the right to the use, enjoyment, profits, and avails of property belonging to another." Romans enjoyed their usufructuary rights in waters as members of the public and as individual landowners.

Although Roman law itself recognized usufructs, it was left to the civilians to develop more fully the incidents of private usufructuary rights in water. In Samuel Wiel's view, not until the Napoleonic Code of 1804 did the civil law fully adopt the incidents of riparian ownership.
Usufructuary rights belonged only to the riparian proprietors for water was not within the public domain.  

**B. Common Law Development of Property in Water**

Medieval English law was more preoccupied with questions of navigation, fishing, drainage and flood prevention than questions involving rights to use water consumptively or to power mills. Thus, scant mention of water rights, as known today, appears in the leading texts. Nevertheless, the Roman concepts of the negative community and the usufruct were well known in medieval England. Some tension did exist between these Roman concepts and the later English concept that a landowner's domain extends from the depths of the

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The law of watercourses did not become well established in the Civil law until the Code Napoleon (Articles 644-645) in 1804 established the riparian doctrine in France and in the countries upon which Napoleon forced his jurisdiction, which included, among others, Italy and Spain.

_id._ at 254-55 (footnotes omitted), quoting 1 Picard, 1 Traite des Eaux, 203 (2d ed.).

Article 644 of the Code states:

He whose property borders on a running water course, other than that which is declared an appurtenance of the public domain by article 538, may supply himself from it in its passage for the irrigation of his properties. He whose estate uses water crosses is at liberty to use it within the space which it crosses, but on condition of restoring it, at its departure from his land to its ordinary course.

**Code Civil (Napoleon),** art. 644 (1804), quoted as translated in _Waters: American Law & French Authority_, supra note 22, at 134.

Article 645 states:

If a dispute arises between the proprietors to whom these waters may be of use, the courts, in giving judgment, should reconcile the interest of agriculture with the consideration due to property rights; and in all cases special and local rules upon the flow and use of water should be observed.

**Code Civil (Napoleon),** art. 645 (1804), quoted as translated in _Waters: American Law & French Authority_, supra note 22, at 134.

30. _Waters: American Law & French Authority_, supra note 22, at 134 ("the allowance of special right to an appropriator prior in time . . . is negatived by those limitations").

While the French civilians articulated riparianism, Spanish and Mexican civilians generally retained broader public rights in water. See L. Teclaff, _supra_ note 28, at 28-31. By 1813, Spain had abolished the power of feudal lords to grant rights in public waters; by 1846, it had installed a permit system for most uses of public waters. _Id._ at 28. At the time of California's transfer to the United States, Mexico, however, retained the sovereign's right to grant exclusive rights in water. See _id._ at 30-31; Lux v. Haggan, 69 Cal. at 319-22 ("[Appropriators under government concession] acquired an exclusive right to the use of that which they diverted, because, if they complied with the established conditions, their rights were required under and in accordance with law, and the waters they diverted were no longer portions of the waters of a river, or subject to the common use.") _Id._ at 322.


32. _Common Law Background of the Riparian Doctrine_, supra note 25.

33. See _Murphy, English Water Law Doctrine Before 1400, 1 Am. J. Legal Hist. 103, 103-04 (1957); Common Law Background of the Riparian Doctrine, supra note 25, at 66, 70-71. Water Rights in the Western States, supra note 22, at 4-5, 10-11.

Much of the discussion that follows draws heavily on Professor Lauer's article, _The Common Law Background of the Riparian Doctrine, supra_ note 25.
earth to the heavens. Under Blackstone's influence, however, late 18th century English law turned its attention towards articulating the scope of the usufruct in waters.

A doctrinal choice confronted late 18th and early 19th century English jurists between recognition of temporal priority in uses or affirmation of equality among landowners adjoining a watercourse. In his Commentaries, Blackstone developed the prior use theory. He adopted wholeheartedly the Roman concept of the negative community:

But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common. Such (among others) are the elements of light, air and water. . . .

A man can have no absolute permanent property in [fire, light, air and water], as he may in the earth and land, since these are of a vague and fugitive nature. In addition, Blackstone followed the civilians' idea of usufructuary right of private individuals to take water. To this usufructuary principle, however, Blackstone developed his novel theories of "occupancy" and "prior use." "Occupancy" included some sense of reduction into possession by an individual water user. Thus, for

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34. For example, the writings of Sir Edward Coke and Sir Matthew Hale suggested that the ownership of land encompassed the ownership of all water found upon it, including running water and ponds. Id. at 74-76. Coke's scant mention of water rights occurred primarily in conjunction with land ownership, "to which he applied the maxim cuius est solum, ejus est usque ad coelum—he who owns the soil owns the sky." Id. at 74. Hale wrote largely on principles of navigation, shipping and fishing. Id. at 76 n.85. Lauer cautions against overgeneralizations from Hale's work. Id. In contrast to Coke and Hale, however, Robert Callis drew more heavily from the Roman authors and developed a water rights theory more closely approximating 19th century riparian rights. Id. at 76-79.


36. 2 Blackstone, Commentaries, 14, 18, quoted in Water Rights in the Western States, supra note 22, at § 6-7.

37. Id.

38. Common Law Background of the Riparian Doctrine, supra note 25, at 94-99. Blackstone's prior use doctrine arose out of the 17th century's "ancient use" doctrine. Id. at 83-89; Water Rights in the Western States, supra note 22, at 736-38. As originally formulated, this theory depended upon proof of a use from time immemorial. Water Rights in the Western States, supra note 22, at 736-38; Common Law Background of the Riparian Doctrine, supra note 25 at 87-89. Compare Maass & Zobel, supra note 23, at 125-26 "A plaintiff [riparian owner] need not prove prescription or a grant when bringing an action for the obstruction of a stream." Id. at 126. Given such ancient use, the courts recognized a prescriptive right in that user to have the watercourse flow in its ancient manner and to prohibit diversion or impairment of the watercourse by a subsequent user. Common Law Background of the Riparian Doctrine, supra note 25, at 84-85. The courts soon expanded the ancient rights concept to give one using a watercourse a right: "not to have the watercourse diverted, without regard to whether the use was ancient or the watercourse was alleged to have existed since time out of mind, at least where the diverter could show no right to do so." Id. at 86.
example, an individual water user "occupied" water actually withdrawn from a watercourse, at least during the period of use.

Blackstone's theory of prior use resembles the prior appropriation doctrine later recognized in the Western United States in the 19th Century. Under Blackstone's theory, a prior user could prevent a later user from interfering with the quantity of water in the watercourse necessary for the prior user's mill works.

Blackstone's prior use theory was largely adopted by the English courts in a series of decisions between 1785 and 1824. The cases in this era, however, were not uniform. For example, in Wright v. Howard, the court reviewed a diversion by an upstream owner to the alleged detriment of a downstream user. In that case, the court elaborated a "natural flow" theory:

Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above.

The court required either an express grant or twenty years adverse use to circumvent the natural flow right.

39. Indeed, Wiel found much of his support for the French origins of riparianism through Blackstone's work. Maass & Zobel, supra note 23, at 127. Maass and Zobel, however, claim that Blackstone unnecessarily confused the laws of natural rights and easements with the law governing the action for nuisance. Id. at 128-29.


43. Common Law Background of the Riparian Doctrine, supra note 25, at 102. Furthermore, opinions not only differed between cases but also among justices in a particular decision. Id. at 103-04. For example, in William v. Morland, 107 Eng. Rep. 620 (K.B. 1824), though the three judges who decided the case each used Blackstone's prior use theory, they expressed widely different views of the doctrine's consequences. For example, Justice Bayley stated:

Flowing water is originally publici juris. So soon as it is appropriated by an individual, his right is coextensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains publici juris. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public.

Id. at 621. Justice Holroyd, however, found "quasi" private property in flowing water:

Running water is not in its nature private property. At least it is private property no longer than it remains on the soil of the person claiming it. Before it came there,
Despite its similarities to "prior appropriation," the English "prior use" theory was short lived. In the 1833 decision of Mason v. Hill\textsuperscript{44} the court adopted the natural flow doctrine asserted in Wright v. Howard.\textsuperscript{45} In Mason v. Hill, Lord Denman extensively surveyed the common and civil watercourse laws. He rejected the prior use doctrine as a mistaken view of Williams v. Morland\textsuperscript{46} and a misconception of Blackstone:

> The position that the first occupant of water for a beneficial purpose has a good title to it is perfectly true in this sense, that neither the owner of the land below can back the water, nor the owner of the land above divert it, to his prejudice. In this, as in other cases of real property, possession is a good title against a wrong-doer. . . . But it is a very different question whether he can take from the land below one of its natural advantages, which is capable of being applied to valuable purposes, and generally increases the fertility of the soil even when unapplied; and deprive him of it altogether by anticipating him in its application to a useful purpose.\textsuperscript{47}

The natural flow theory itself was short lived. In the 1861 case of Embrey v. Owen,\textsuperscript{48} the English jurists borrowed from American law and limited "natural flow" rights to reasonable use.\textsuperscript{49} Thereafter, the riparian rights doctrine, with its reasonable use formulation, remained an essential formulation of English common law until replaced by a permit system in the 1960s.\textsuperscript{50}

\textsuperscript{44} Mason v. Hill, 110 Eng. Rep. 692 (K.B. 1833).
\textsuperscript{45} Wright v. Howard, 57 Eng. Rep. 76 (Ch. 1823). See supra notes 41-43 and accompanying text.
\textsuperscript{46} Williams v. Morland, 107 Eng. Rep. 620 (K.B. 1824); see supra note 43 and accompanying text.
\textsuperscript{49} Id. at 585-86. See Common Law Background of the Riparian Doctrine, supra note 25, at 107.
\textsuperscript{50} See L. Teclaff, supra note 28, at 16-17. Although English Constitutional law does not guarantee compensation for compulsory acquisition of a vested common law right, courts
C. Early Cases From the Eastern United States

Courts in the United States in the late 18th and early 19th century matched the English struggle to adapt the laws affecting property interests in water with the tumultuous changes brought by the industrial revolution. Prior to 1827, when Justice Story wrote *Tyler v. Wilkinson*, a range of opinions existed in the courts of the young American states that echoed the uncertainty in English law between the prior use and the natural flow theories. Although the economic consequences of the adaption of the competing paradigms were profoundly different, the earliest opinions often failed to distinguish between the two.

In *Tyler v. Wilkinson*, however, Justice Story drew upon both Chancellor Kent's civilian influenced *Commentaries* and the English tradition and gave the common law the riparian doctrine in its first modern articulation. While largely a "natural flow" decision, *Tyler v. Wilkinson* added a "reasonable use" limitation to the rights held by riparian properties.

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53. Horwitz, *supra* note 52, at 250.
56. See Horwitz, *supra* note 52, at 256-57.
57. Justice Story stated:

When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution in quantity, or a retardation or acceleration whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There maybe, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right.

24 F. Cas. at 474. He continued:

The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, "Sic utere tuo, ut non alienum laedas."

Id.
Soon after the announcement of the "reasonable use" limitation, courts began to articulate its meaning. Evidence suggests that Justice Story practically equated "reasonable use" with "natural flow" rights. Thus, absent a prescriptive right in a competing user, a riparian owner could prohibit any subsequent upstream use that led to any harm not labeled "de minimis." Later, the courts began to recognize the concept of proportionate use. Under this view, each riparian user had a right to a reasonable share of the water; that reasonable use was determined according to all the circumstances prevailing on the watercourse. This entailed a balancing of uses and made "reasonable use" of a stream "depend on the extent of detriment to the riparian proprietors below." For a time, other Eastern courts went even further. These courts rejected proportionality in favor of a more utilitarian "community needs and wants" theory. Other courts used some variants of priority theories. Ultimately, however, the Eastern states rejected priority as encouraging monopoly; the perceived competitive advantages from a reasonableness doctrine based on proportionate use became the hallmark of post-Civil War riparian rights in the East.

IV. TRADITIONAL JUDICIAL ATTITUDES IN CALIFORNIA TOWARDS PROPERTY INTERESTS IN WATER

If the California courts in 1850 only had to decipher the tangled changes in the law of watercourses produced by rapid industrialization in the water rich eastern United States and England, their task would still have been great. As described above, the law in those areas was still evolving at the time of California's statehood. Although riparian rights were now recognized by name, uncertainty existed as to whether those rights entailed undiminished natural flow, or natural flow beyond a de minimis diminution, or some proportionate theory of water use. Moreover, vestiges existed of both "prior use," with its suggestion of temporal priority, and pure utilitarianism, with its suggestions of allocation according to political or economic agenda.

58. Horwitz, supra note 52, at 257 n.25.
59. Id.
60. Id. at 259 (quoting Snow v. Parsons, 28 Vt. 459, 462 (1858)).
61. Id. at 259-61.
62. Id. Additionally, the American courts began to attack the English notion of prescriptive rights to water use based on ancient use. Id. at 264-70. The courts rejected mere ancient use and required an adverse use, i.e., legal injury or practical inconvenience. Id. at 267-68. This reformation further weakened the monopolistic tendencies of appropriative rights. Id.
Additionally, changes in the theory of prescriptive use were under way.

To this great tumult, California’s unique circumstances added three new elements. First, the Gold Rush had effectively visited upon the State a period of near lawlessness. In conjunction with the transition between rule by Mexico and the United States, the applicable law, much less its enforcement, was uncertain. Moreover, in place of *de jure* rule, miners’ customs had developed as a *de facto* law. Second, most of the land in California was held publicly. Thus, English common law rules regarding privileges of real property owners were not direct precedent. Third, and perhaps most importantly, the largely arid western climate made competition over water fierce. With the advent of hydraulic mining,66 great works were constructed to store and transport water over often large distances for uses neither on riparian land nor traditionally recognized as pertaining to riparian rights. Against this backdrop of tremendous change and novelty, early California jurists were confronted with establishing the nature of rights to the use and development of California’s waters.

A complete analysis of property rights in California’s water resources would entail a full description of all the incidents of ownership recognized under riparianism and prior appropriation. Such a task is beyond the scope of this article and, indeed, has already been outlined above in another contribution to this *Symposium.* Instead, the following section of this article focuses on two primary aspects of the history of judicial protection of private property interests in California’s water resources. First, we catalog those statements from the 19th and early 20th century cases indicating express judicial recognition of private property interests in water. These statements set the tone for the sweeping changes occurring in judicial attitudes after 1928. Second, we explore the contours of the reasonableness doctrine, and prevention of waste, as developed prior to 1928. As will be discussed more fully below, this doctrine has been the fulcrum


64. Shaw, *supra* note 63, at 446-47, 189 Cal. at 781, 783.


66. J. Umbeck, *supra* note 63, at 76.

upon which post-1928 judicial decisions have shifted control of water resources from private to public administration. The reasonableness doctrine was well defined prior to 1928, but, as we will show, it had not been used to divest water rights holders of their beneficial uses of water.

A. Express Judicial Recognition of Private Property Interests in Water

1. From Prior Appropriation to Recognition of Riparian Rights

Against the common law riparian doctrine and the prior appropriation doctrine, the "California doctrine" of water rights developed over a thirty year period in the mid-19th century. As it initially emerged, the doctrine attempted to recognize broad private interests in water resources. Unlike the English courts, which chose between prior use and riparianism, the California courts recognized two distinct sets of property interests: riparian and appropriative rights. The tension between these two sets of rights grew until they reached their climax with *Herminghaus v. Southern California Edison Company*. At least during the law's formative years, however, the cases discussing the two sets of rights demonstrate great judicial concern with protecting private interests in water from impairment by other private or public interests.

The development of water law in California occurred in several distinct phases. The first phase began with the Gold Rush. Against the common law riparian background, the California courts were asked to address an entire set of questions not theretofore decided. While riparian rights were incidents of common law ownership of land, California miners had mere possession, not title to, public domain land largely owned by the federal government. Facing disputes between water users on these public lands, the courts had their initial opportunity to define property rights in California water. Ultimately, the California Supreme Court had a clear choice: either adopt the miners' customs, which recognized a priority based upon time of putting water to use, or adapt the riparian doctrine to the

68. The California doctrine entails the blend of appropriative and riparian rights. See *WATER RIGHTS IN THE WESTERN STATES*, supra note 22, at 744.
69. 200 Cal. 81, 252 P. 607 (1926).
70. See, e.g., Shaw, supra note 63, 189 Cal. at 782-84.
unique circumstances of mining district disputes. The court chose the former.

Judicial recognition in California of private property interests in water began in 1855 with *Irwin v. Phillips.* In that case, the court ruled that between two users of water on public domain lands, the user first in time held the superior right. By recognizing the prior appropriation doctrine, the court began the long line of cases still evolving today that determines the relative contours of this appropriative right.

The court’s decision in *Irwin* was quite sensible under the circumstances. First, the court’s creation of appropriative rights accommodated the common law’s protection of possessory rights to the exigencies of California’s mining districts. A few of the early cases involve disputes between appropriators and users who possessed land—albeit without the benefits of title—along the banks of a watercourse. Thus, the courts could have directly adapted riparianism, at least in such instances, and given the streamside squatter a priority. But most of the early disputes were strictly between two appropriators using water far from its point of diversion. In these cases, the riparian doctrine’s “natural rights” and “natural benefits” to the land were inappropriate, since the waters were not being used on lands past which they naturally flowed.

The court’s decision also preserved the status quo. Miners had themselves accepted the first in time, first in right, system. Thus, the courts were merely confirming working understandings already prevalent in the mining districts. Upholding the importance of certainty to property law, the courts chose to maintain a system already well in place.

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72. *Id.*
73. *Id.* at 147. The court quoted equity’s maxim: “*qui prior est in tempore potior est in jure.*” *Id.* (“He who is first in time is first in right.” BALLANTINE’S LAW DICTIONARY 1043 (3d ed. 1969)) The court elaborated:

The miner, who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal recognition from the sovereign power. If it is upon a stream the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted, and for as high, and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.

5 Cal. at 147. The court’s discussion of the equal value of the purposes made by the junior and senior appropriators suggests that a junior appropriator who diverted for a "higher” purpose might have some superior right. No subsequent decision, however, has followed this suggestion.

74. See, e.g., Crandall v. Woods, 8 Cal. 136 (1857).
75. *Irwin v. Phillips,* 5 Cal. at 146 (miners’ appropriative system had “the force and effect of res judicata.”).
Although the courts began to recognize this new class of common law rights as early as the 1850s, it took them several years for courts to become comfortable with the incidents of ownership and to speak of these rights as “property.” Indeed, in its initial formulations, the California Supreme Court only hesitantly described these interests in water as “property.” For example, in *Tartar v. Spring Creek Water & Mining Company*, the court labeled an appropriation of water as “a *quasi* private proprietorship.” Likewise, in *Hoffman v. Stone*, the court recognized a “special property” in the waters appropriated. The *Hoffman* court noted that its decisions on appropriated waters were based on four principles: community needs, California’s unique and unprecedented circumstances, an absence of legislation, and an intent to conform to analogous common law rules. The court stated:

The fact early manifested itself, that [mines] could not be successfully worked without a proprietorship in waters, and it was recognized and maintained. To protect those who, by their energy, industry, and capital, had constructed canals, and races, carrying water for miles into parts of the country which must have otherwise remained unfruitful and undeveloped, it was held that the *first appropriator acquired a special property in the waters thus appropriated, and as a necessary consequence of such property, might invoke all legal remedies for its enjoyment or defense. A party appropriating water, has the sole and exclusive right to use the same for the purposes for which it was appropriated.*

Similarly, in *Crandall v. Woods*, decided roughly six months after *Hoffman*, the court stated:

Since [*Irwin v. Phillips*], a special property has been recognized in water, *not in the sense in which the word property is ordinarily used;* but the Courts have held, that a right to water as a *usufruct*, may be acquired by appropriation, as against a subsequent appropriator, who shows no title to the soil; and that by the appropriation of water, and the construction of a canal, the party acquires an easement or franchise, which he may enjoy and protect. If this is an innovation upon the old rules of law upon this subject, it is

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76. 5 Cal. 395 (1855).
77.  Id. at 399 (emphasis in original). The court noted that the “*quasi private proprietorship,...* entitles the holder to be protected in its quiet enjoyment against all the world but the true owner ...” *Id.*
78. 7 Cal. 46 (1857).
79.  Id. at 49.
80.  Id. at 48.
81.  Id. at 49 (emphasis added).
82. 8 Cal. 136 (1857).
such a one as the peculiar circumstances of the country, and the immense importance of our mining interest will justify.\textsuperscript{83}

The \textit{Crandall} court recognized the usufructuary nature of an appropriative right. Although it labeled the usufruct a "special interest," it described it as an "easement" or "franchise."\textsuperscript{84} Thus, nothing about the right's "specialness" made it appear any less vested to the court than an easement.

In \textit{McDonald v. Bear River & Auburn Water & Mining Co.},\textsuperscript{85} decided fours years after \textit{Irwin v. Phillips}, the court considered a dispute over ownership of water needed for a mill. The court described the property interest in water "as a substantial and valuable property, distinct, sometimes, from the land through which it flows . . . [which right] draws to it all the legal remedies for its invasion."\textsuperscript{86} The court further noted: "This right of water may be transferred like other property."\textsuperscript{87}

In \textit{Kidd v. Laird},\textsuperscript{88} decided five years after \textit{Irwin v. Phillips}, the court's uncertainty continued over the exact category of property interests held by an appropriator. Nevertheless, the court was clear that property interests were created by appropriation:

This Court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership. \textit{A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself.} We are not called upon to determine the character of the property which the owner of the ditch has in the water actually diverted by and flowing in his ditch. With reference to such water, his power of control and right of enjoyment are exclusive and absolute, and \textit{it is a matter of little practical importance whether, in the strict legal sense, it be or be not private property.}\textsuperscript{89}

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\item \textsuperscript{83} \textit{Id.} at 142 (emphasis added).
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} 13 Cal. 220 (1859).
\item \textsuperscript{86} \textit{Id.} at 232.
\item \textsuperscript{87} \textit{Id.} at 233.
\item \textsuperscript{88} 15 Cal. 161 (1860).
\item \textsuperscript{89} \textit{Id.} at 179-80 (emphasis added). The argument over the character of the interest in appropriated water echoes similar debates in both the civil and common law. See \textit{WATER RIGHTS IN THE WESTERN STATES}, supra note 22, 690, at 755-58. Once withdrawn, appropriated, or severed, "the particles of water that have passed into private control in a reservoir, ditch or other passed artificial structure or appliance . . . have been taken from their natural haunts, so to speak, and passed into private possession and control, and become private property."
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The court then approved a jury instruction authorizing a defendant to change the place of diversion so long as others were not harmed. The court rejected plaintiff's assertion that such an instruction implied private ownership of the water itself, rather than an interest in the water's use.\(^9\)

Despite the halting language in these early cases, the outline of the property interests in an appropriative right had emerged. Like a riparian right, an appropriative right was usufructuary, and did not include ownership of the water while flowing. The appropriative right holder was entitled to judicial relief against a subsequent diverter upon a showing of harm. The holder could convey the right. By 1863, only eight years after *Irwin v. Phillips*, the court had begun to describe appropriative rights as "vested right[s] of property."\(^91\)

By 1912, the courts had settled the primary incidents of ownership of an appropriative right. In *Thayer v. California Development Co.*\(^92\), the court summarized:

Under the law of this state as established at the beginning, the water-right which a person gains by diversion from a stream for a beneficial use is a private right, a right subject to ownership and disposition by him, as in the case of other private property. All the decisions recognize it as such. Many of them refer to it in terms

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\(^{90}\) Id. at 756 (footnote omitted) (analogizing to capture of wild animals).

\(^{91}\) Professor Lauer argues that "the term 'vested' is used solely as a make-weight." *Riparian Rights as Property*, supra note 12, at 141. He further notes, "'It is incorrect to say that the judiciary protected property; rather they called that property to which they accorded protection.'" Id. at 142 (quoting *Property*, 12 Encyclopedia of the Social Sciences, 528, 536 (1934)). Although the appellation "vested" may not add much analytically to determining whether some unlabeled item deserves constitutional protection, the courts' use of the term certainly signals their attitude towards the necessity of protecting any item so labeled. *See Riparian Rights as Property*, supra note 12, at 141. Thus, within eight years of judicial recognition of appropriative rights, the California courts were indicating that such rights deserved constitutional protection.

\(^{92}\) 164 Cal. 117, 128 P. 21 (1912).
which can have no other meaning than that the right is private property.\textsuperscript{93}

The second major period of development of California water law climaxed in \textit{Lux v. Haggin}\textsuperscript{94} with the formal confirmation of California's adoption of riparian rights. By the time of \textit{Lux v. Haggin}, the development climate in California had changed dramatically. Whereas early California development occurred largely on public domain land by miners, the California economy had greatly changed by 1886. Much land had passed out of the public domain and into private hands. Moreover, the character and relative importance of the mining industry to the state's overall economy had changed. Indeed, just prior to \textit{Lux v. Haggin}, the courts had effectively ended hydraulic mining with their decision in \textit{People v. Gold Run Ditch & Mining Co.}\textsuperscript{95}

As mining waned, irrigated agriculture waxed in the second half of the 19th century. Water's value for irrigation in California's arid climate soon became apparent.\textsuperscript{96} Owners of land adjoining waters were in a position to use such waters on riparian lands. At the same time, ranchers attempted to construct irrigation works to transport waters to non-riparian lands.\textsuperscript{97} Inevitable conflict arose between the appropriators and the riparian owners. The clash came to a head in \textit{Lux v. Haggin}.

As early as 1865, the court had decided a water dispute between riparian proprietors solely upon common law riparian rules.\textsuperscript{98} Over the next twenty years, the court decided another nine cases upon riparian principles.\textsuperscript{99} Indeed, in an 1882 decision, \textit{St. Helena Water Co. v. Forbes},\textsuperscript{100} the court discussed the nature of the riparian owner's property interest as "part and parcel of the land."\textsuperscript{101}

In \textit{Lux v. Haggin}, the court reaffirmed that California had indeed adopted riparian rights with passage in 1850 of a statute enacting

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\textsuperscript{93} \textit{Id.} at 125, 128 P. at 24 (emphasis added).
\textsuperscript{94} \textit{69} Cal. 235, 10 P. 674 (1886).
\textsuperscript{95} \textit{66} Cal. 138, 4 P. 1152 (1884). In \textit{Gold Run}, the California Supreme Court upheld an injunction against hydraulic mining on the theory that the prodigious debris resulting from such operations impaired navigability and constituted a public nuisance. \textit{Id.} at 152, 4 P. at 1159-60.
\textsuperscript{96} Shaw, supra note 63, at 452-53, 189 Cal. at 789.
\textsuperscript{97} \textit{Id.} at 789-90.
\textsuperscript{98} \textit{Ferrea v. Knipe}, 28 Cal. 340, 343-45 (1865).
\textsuperscript{99} See cases collected in W. Hutchins, supra note 22, at 53 n.7.
\textsuperscript{100} \textit{62} Cal. 182 (1882).
\textsuperscript{101} \textit{Id.} at 184.
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England's common law as California's law. The case involved a dispute between a downstream riparian rancher and an upstream diverter. The upstream diversion reduced the flow available to the plaintiff downstream. In its famous, exhaustive opinion, the California Supreme Court upheld riparian rights against every conceivable argument.

*Lux v. Haggin* has been discussed at length in legal literature. Several of its points are also germane to the purposes of this Article.

Of particular importance is the court's rejection of "public policy," and utilitarian gains as grounds for abrogating riparian rights. The court stated:

> But the policy of the state is not created by the judicial department, although the judicial department may be called upon at times to declare it.... But if [an appropriator] shall consume the water himself, one may thus, for his own benefit, arbitrarily deprive many of an advantage, which, whether technically private property or not, is of great value, and thus secure to himself that which, by every definition, is a species of private property in him.... If, in accordance with the law, such lands may be deprived of the natural irrigation without compensation to the owners, we must so hold; but we fail to discover the principles of "public policy" which are of themselves a paramount authority and demand that the law shall be so declared. In our opinion, it does not require prophetic vision to anticipate that the adoption of the rule, so called, of "appropriation" would result in time of a monopoly of all the waters of the state by comparatively few individuals, or combination of individuals controlling aggregated capital, who could either apply the water to purposes useful to themselves, or sell it to those from whom they had taken it away, as well as to others.... Whatever the rule laid down, a monopoly or concentration of the waters in a few hands may occur in the future. But surely it is not requiring too much to demand that the owners of land shall be compensated for the natural advantages of which they are to be deprived."

Elsewhere, the court stated: "The right to the use of the waters as part of the land once vested in its private grantee, the state has no

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105. *Id.* at 307-08, 10 P. at 701-02.
106. *Id.* at 307-10, 10 P. at 702-03 (emphasis in original).
power to divest him of the right, except upon due compensation.’

Lux v. Haggin thus refused to divest riparian owners of their common law rights by mere appeal to public policy or perceived social gains. The court insisted that any divestment of such rights for public uses could come only upon payment of just compensation. As Justice Shaw later described:

The obvious answer on the question of policy is that the objection comes too late, that it should have been made to the legislature in 1850, prior to the enactment of the statute adopting the common law. When that was done, the riparian rights became vested and thereupon the much more important public policy of protecting the right of private property, became paramount and controlling. This policy is declared in our constitutions, has been adhered to throughout our national history, and it is through it that the remarkable progress and development of the country has been made possible.

In the forty years following Lux v. Haggin, the court took numerous opportunities to expound upon the riparian right’s constitutional sanctity. For example, in Southern California Investment Company v. Wilshire, the court noted:

As [a] riparian owner, [plaintiff] has the right to have the stream continue to flow through its lands in the accustomed manner, and to use the same to irrigate an additional area thereof, undiminished by any additional or more injurious use or diversion of the water upon the stream above. This right is a part of the estate of the plaintiff—parcel in its land,—and whether it is or is not as valuable in a monetary point of view, or as beneficial to the community in general, as would be the use of a like quantity of water in some other place, it cannot be taken by the defendants without right, or, in case of a public use elsewhere, without compensation.

2. Clash Between Competing Theories: Herminghaus v. Southern California Edison Company and Fall River Valley Irrigation District v. Mt. Shasta Power Corporation

107. Id. at 374-75, 10 P. at 743.
108. Shaw, supra note 63, at 456, 189 Cal. at 792.
109. 144 Cal. 68, 77 P. 767 (1904).
110. Id. at 73, 77 P. 770. In San Bernardino v. City of Riverside, 186 Cal. 7, 198 P. 784 (1921) the court stated:

The original rights to the waters of the streams in this state are those which by the common law were vested in the owners of the land abutting upon the stream, under the doctrine of riparian rights, as it is commonly termed. [citations omitted] Such rights are attached to the land as parcel thereof, and, of course, are private property.

Id. at 13, 198 P. at 709. See also Antioch v. Williams Irrigation Dist., 188 Cal. 451, 462-63, 205 P. 688, 693-94 (1922).
a. *Herminghaus* Majority Opinion

The pinnacle of express judicial protection of vested rights in California water is *Herminghaus v. Southern California Edison Company*.111 *Herminghaus* involved a clash between downstream riparian ranchers and an upstream power company appropriator. The ranchers depended upon the annual peak flow of the unregulated San Joaquin River to overflow and inundate their lands and foster grass production.112 The power company sought to construct a large reservoir upstream from plaintiff's ranch. This dam would have regulated the variable river flows to plaintiffs' harm.

The power company challenged the reasonableness of the ranchers' large flow requirements for natural pasture irrigation. It claimed that the volume of water necessary to raise the San Joaquin River's level above its banks to inundate plaintiffs' lands wasted huge amounts of water. The power company argued that the actual quantum of water required on plaintiffs' field could be supplied without such waste through construction of irrigation works.113 The *Herminghaus* court reviewed the relationship between the power company's appropriative rights and the ranchers' riparian rights. While the court found a reasonable use rule between two riparian right holders, it found no such reasonableness limitation between a riparian and an appropriator.114 Instead, the court reaffirmed the riparian's priority over appropriators.115

In an extensive quote from *Miller & Lux v. Madera Canal & Irrigation Co.*,116 the *Herminghaus* court rejected an attempt to reallocate water from an "inefficient" riparian to a more efficient appropriator even though greater net social benefits might flow from the appropriator's use. The court stated:

It may be that, if nonriparian owners are permitted to intercept the winter flow of streams, in order to irrigate nonriparian lands, or to develop power, the water so taken will permit the cultivation of more land and benefit a greater number of people than will be served if the flow continues in its accustomed course . . . Neither

111. 200 Cal. 81, 252 P. 607 (1926).
112. *Id.* at 86-87, 93-94, 252 P. at 609, 612.
113. *Id.* at 105-08, 252 P. at 617-18.
115. *Id.* at 94-98, 252 P. at 612-13, (citing Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886), and quoting at length from Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 73, 77 P. 767, 769 (1904)).
a court nor the legislature, however, has the power to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. 117

Applying general riparian law to the plaintiffs' lands, the court initially left room for limiting its ruling to the case's peculiar topography. 118 Nevertheless, it quickly dispelled any notions that it intended its ruling to be limited to similar topography. 119 The court refused to order plaintiffs to put their property to a high economic use. 120

The court also rejected forced conservation at the plaintiffs' ex-

117. Herminghaus, 200 Cal. at 101, 251 P. at 615. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owner of these lands and transferred to others. Id. at 102, 251 P. at 615, ( quouing 155 Cal. at 65, 99 P. 502, 505 (1909)).

118. The Supreme Court noted:

[T]hat apart from certain general similarities of location, topography, adaptability, and quality, the plaintiffs' tract of land as to its position, adaptability, and soil qualities, when taken in its relation to the San Joaquin River and the foresaid natural distribution of the waters thereof, is peculiar, and in fact unique. From the evidence in the case as reflected by the finding of the trial court it would seem to be a tract of land especially designed and equipped by nature for pastoral uses. . . .

Id. at 105, 252 P. at 617.

119. [E]ven if [plaintiffs' land] were not thus peculiarly adaptable to the irrigation and growth of wild grasses for the pasture of stock, even if it were equally or even more advantageously susceptible of adaptation to more intensive and even more profitable agricultural, horticultural, or viticultural uses, we are unable to perceive under what showing or claim of right any other land owner along said river, or any would-be appropriator of waters thereof, or any aggregation of individuals, or any court or even the state itself, would have the right to dictate to these plaintiffs, choosing to devote their said lands and the water which, in its ordinary and usual flow, as an integral part and parcel thereof, to its present beneficial uses, that they should devote their said lands and the water flowing thereon to other and more intensive uses which such individuals or such aggregation or such court or such state might deem to be more in keeping, and, so to speak, more up to date with modern development in the productive uses of property. To admit the right to such interference to the extent of taking away from the individual his initiative in deciding to which of several adaptable uses he shall devote his property would be to divest him to that extent of his most precious right of ownership therein.

Id. at 105, 252 P. at 617 (emphasis added).

120. Id.
pense for the benefits of upper riparian or appropriators. The court considered that such forced "expensive improvements" would . . . impose a radical and, in its outworking, an utterly impracticable limitation upon the doctrine of riparian rights. The court thus rejected an implicit attempt to restrict plaintiffs' riparian rights to that portion of the river which flowed over the banks and actually entered upon plaintiff's soil. Rather, the court held that plaintiffs beneficially used the river's entire underflow, i.e., that portion of flow that lifted up the water actually deposited for irrigation. In essence the court ruled that the plaintiffs' natural irrigation methods were indeed reasonable and beneficial.

In addition to a sweeping affirmation of vested rights, the court discounted attempts at legislative redefinition of riparian rights under the guise of the police power. In particular, the court focused on the legislature's attempt to limit riparian irrigation by defining the amount of water that could be applied for specific "useful or beneficial purposes." In reviewing a claimed police power basis

121. The fact that these plaintiffs might by artificial contrivances through dams and ditches and reservoirs, involving large expenditures of money, so interrupt or so regulate the present natural flow of said river as to render a smaller quantum of its water sufficient to satisfy the beneficial uses which they are now making of such waters in their entirety, could not possibly operate to limit or lessen their riparian right to the usufruct of said waters in their natural course and under plaintiffs' unique relation thereto.

Id. at 106, 252 P. at 617 (emphasis added).

122. Id. Thus, the court rejected a physical solution at the riparians' expense. See infra notes 152-63, 216-30 and accompanying text.

123. Id. at 106-07, 252 P. 617.

124. Id. at 107, 252 P. 617.

125. Id.

126. Id. See Wiel, The Pending Water Amendment to the California Constitution and Possible Legislation, 16 CALIF. L. REV. 169, 175-76 n.10, 187-88 (1928) [hereinafter The Pending Water Amendment].

127. In 1913, the California Legislature adopted the Water Commission Act ("Act"). 1913 Cal. Stat. Ch. 586 at 1012. Section 11 of that Act stated in part:

[A]ll waters flowing in any river, stream, canyon, ravine, or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purpose upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the State of California and subject to appropriation in accordance with the provisions of this act. If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years after the passage of this act, such non-application shall be deemed to be conclusive presumption that the use of such portions of the waters of such stream is not needed upon said riparian lands for any useful or beneficial purpose; and such portion of the waters of any stream so non-applied, unless otherwise appropriated for a useful and beneficial purpose is hereby declared to be in the use of
for legislative delineation of "useful or beneficial purposes," the court raised three principal objections.

First, it noted that the plaintiffs' uses neither created a nuisance nor contravened public welfare. Thus, the traditional bases for police power regulation were absent. Second, the court found a judicial, case by case definition of "useful and beneficial purpose" more appropriate than an absolute legislative rule: "To concede this would be to concede to the legislative department of the state government the arbitrary power to destroy vested rights in private property of every kind and character." Third, the court rejected the proffered police power arguments as inappropriate where the State of California was not itself actively attempting to adjust the private rights under a comprehensive scheme to optionally develop state waters. The court left open the possibility that under circumstances of comprehensive state action, "a most liberal interpretation of the police powers of the state might rightfully be invoked in support of such an effort."

### b. Herminghaus Dissenting Opinion

The tensions between judicial protection of vested rights and governmental allocation of water are prevalent within Herminghaus itself. Although the majority opinion vigorously upheld the propriety of judicial protection of vested rights, the dissent objected strenuously. The debate between the majority and dissenting opinions has kindled much of the development in California water law over the past sixty years.

In his dissent, Justice Shenk argued that plaintiff's use of ninety-nine percent of the San Joaquin River's flow to provide lift for a mere one percent used for direct irrigation was unreasonable as a

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128. 200 Cal. at 117, 252 P. at 622.
129. Id. at 118, 252 P. at 622.
130. Id. at 120, 252 P. at 623.
131. Id.
matter of law.\textsuperscript{132} He discussed the legislature's power to define common law riparian rights. Without authority, Justice Shenk asserted: "The legislature has the right in the first instance to prescribe the standards of beneficial use and reasonable necessity that may be applied to the use of water."\textsuperscript{133} He noted that courts in other states had limited riparian rights.\textsuperscript{134} He argued that the riparian rights' common law basis carried with it its own repealer.\textsuperscript{135} He stated that plaintiffs had never obtained a vested right to waste water.\textsuperscript{136}

In addition, the dissent addressed the particular remedy sought. Even after conceding that plaintiffs rightfully used the overflow for irrigation lift, Justice Shenk argued that the injunction granted by the trial court and upheld by the majority was inappropriate.\textsuperscript{137} He wished to limit the plaintiffs to damages. Damages would be measured by the cost of irrigation facilities\textsuperscript{138} sufficient to provide plaintiffs with the amount of water actually required on the field for irrigation.

c. \textit{Fall River Valley Irrigation District v. Mt. Shasta Power Corporation}

Eight months after announcing its decision in \textit{Herminghaus}, the Supreme Court reiterated the vested nature of riparian rights for perhaps the last meaningful time. In \textit{Fall River Valley Irrigation District v. Mount Shasta Power Corp.},\textsuperscript{139} the court considered the inverse of the \textit{Herminghaus} facts. In \textit{Herminghaus}, an upstream appropriator sought to use water for hydropower purposes over the objections of downstream riparian irrigators. In \textit{Fall River Valley
I.D., a downstream riparian hydropower project fought the upstream
diversion of water for irrigation.\textsuperscript{140} Plaintiff appropriators had filed
their briefs prior to the court's decision in 
\textit{Herminghaus}. They argued
that the court should "define[.] the riparian right to be a \textit{mere rule of property and not a vested estate}."\textsuperscript{141} Relying upon \textit{Herminghaus},
however, the court soundly rejected plaintiff's argument: "at no time
has there been any uncertainty as to the ingredients, quality, or
strength of the right . . . . In [\textit{Herminghaus}], we reexamined the
question and pronounced the riparian right a vested one."\textsuperscript{142}

\textbf{B. The Reasonableness Doctrine Prior to the 1928 Amendment}

As will be discussed below, courts have seized upon the 1928
constitutional amendment's "reasonableness" provision to justify

\begin{footnotesize}
\begin{enumerate}
\item[140.] \textit{Id.} at 58, 259 P. at 445. The riparian's right to store water for hydropower came by
virtue of its condemnation of all competing riparian claims between its point of diversion and
its power house. \textit{Id.} at 71-73, 259 P. at 451.
\item[141.] \textit{Id.} at 63, 259 P. at 447 (emphasis added).
\item[142.] \textit{Id.} at 63-64, 259 P. at 447. The court noted how \textit{Fall River} differed from \textit{Herminghaus}.
\textit{Id.} at 64, 259 P. 447-48. The case did not involve questions of underflow, overflow, or
"greedy or selfish" riparian owners seeking "the entire hydraulic effect of the stream to
'boost' to its own lands the small amount of water required for irrigation or domestic
purposes." \textit{Id.}, 259 P. at 448. Indeed, even Justice Shenk, author of the dissent in \textit{Hermin-
ghaus}, agreed with the majority that the power company "has upon its own riparian land put
the whole of said stream to a recognized beneficial use." \textit{Id.} at 64, 73, 259 P. at 448, 451
(Shenk, J., concurring).

The court rejected plaintiff's attempt to quantify the natural flow of \textit{Fall River}:
To curtail the [riparian] right by a fixation of rigid and inelastic boundaries is to
destroy the right altogether, for in such case it would become a mere right of
priority, or, in other words, it would be tantamount to the substitution of the
doctrine of appropriation for the doctrine of riparian rights . . . . We, therefore,
here, reassert the riparian right to be a vested property right inhering in and a part
and parcel of the abutting lands . . . . This right to use the water of the stream we
hold to be entitled to the same respect and protection at the hands of the law as
any other vested property right.
\textit{Id.} at 65, 259 P. at 448.

The court also attempted to limit \textit{Herminghaus}' discussion about the Water Commission
Act's impact on riparian rights. \textit{Id.} at 66-69, 259 P. at 448-50. The court distinguished between
legislative powers to \textit{redefine} rights and requirements for due process and just compensation:
No question can arise as to the power of the legislature to modify or abrogate a
rule of the common law. The question is: Can any such change affect the previously
vested rights of property owners? We need here only say that the legislative
department of the state may not take any portion of a vested property right from
one person and invest another with it and be justified in so doing in view of the
[due process and takings clauses in the state and federal constitutions].
\textit{Id.} at 67, 259 P. at 449 (emphasis added). The court again acknowledged that "proper
circumstances" might exist under which riparian rights could "yield to the police power in the
interest of public health, safety, comfort, or welfare . . . ." \textit{Id.} at 68, 259 P. at 449. Never-
theless, the court found that the Water Commission Act did not purport to exercise such
police power; moreover, had it so purported, it could not apply to a situation such as \textit{Fall
River} where no surplus water existed for subsequent appropriation. \textit{Id.} at 68-69, 259 P. at
449-50.
\end{enumerate}
\end{footnotesize}
divestment of previously protected property interests in water without payment of compensation. The reasonableness doctrine, however, was not itself a product of the 1928 amendment. Rather, as Justice Shenk in his *Herminghaus* dissent noted, California courts had already imposed a reasonable use limitation upon many classes of water users.\(^{143}\) Thus, this reasonableness doctrine did not arise *sua sponte* after the 1928 amendment; rather, it arose out of a background of judicial interpretation of the term's meaning. In particular, courts had already interpreted the reasonableness doctrine in discussions of duties to conserve water, to prevent waste, and to pay for physical solutions that enlarged the surplus of water available for use by subsequent appropriators.

As described above, the reasonableness doctrine first arose in riparian theory under Justice Story's decision in *Tyler v. Wilkinson*. Early decisions ascribed various meanings to "reasonable" riparian use, ranging from natural flow to correlative shares. In California, courts quickly rejected the natural flow theory in favor of correlative rights of all riparians to a proportionate share of flow.\(^{144}\) In *Harris v. Harrison*, the court described some of the factors that determine the reasonableness of one riparian's use:

> The length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each, - all these, and many other considerations, must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream so as to allow none to flow down to its neighbor.\(^{146}\)

The courts also applied a reasonableness doctrine in disputes between appropriators. For example, in *Phoenix Water Co. v. Fletcher*, a downstream prior appropriator challenged the timing and quality of flows released from a subsequent appropriator's upstream dam. The court noted:

\(^{143}\) 200 Cal. 81, 124, 252 P. 607, 625 (1926).

\(^{144}\) See, e.g., *Lux v. Haggin*, 69 Cal. 255, 408, 10 P. 674, 763 (1886).

\(^{145}\) 93 Cal. 676, 29 P. 325 (1892).

\(^{146}\) *Id.* at 681, 29 P. at 326-27. *See also* *Gould v. Stafford*, 91 Cal. 146, 152, 27 P. 543, 544-45 (1891).

\(^{147}\) 23 Cal. 482 (1863).
The rule of law is well established, that the owner of hydraulic
works on the stream above, has no right to detain the water
unreasonably. It is said that the proprietors above have a right to
a reasonable use of the water; but the true test of this is, whether
such use causes any positive or sensible injury to the prior appro-
priator or proprietor below, by diminishing the value of the right.\textsuperscript{148}

In \textit{Hill v. Smith},\textsuperscript{149} another early case, the court applied the maxim
"sic utere tuo et alienum nom laedas"\textsuperscript{150} to competing appropriators. In
other cases, the courts clarified that an appropriator’s right only
extended to the waters reasonably necessary for the purposes for
which the diversion was made.\textsuperscript{151} Thus, pre-1928 case law had sketched
the contours of the reasonableness doctrine during the same period
that the courts were most concerned with protection of vested prop-
erty rights.

A number of pre-1928 reasonableness cases involved duties to use
water efficiently and prevent waste.\textsuperscript{152} The courts held that the duty
to conserve water and prevent waste required only reasonable water
use efficiency. For example, in \textit{Barrows v. Fox},\textsuperscript{153} the court considered
a dispute between an upstream appropriator and downstream ripar-
ians. The plaintiffs appropriated water from a diversion dam into
an unlined ditch. The riparian defendants sought to limit the plain-
tiffs' appropriative rights to that quantity which actually reached
plaintiffs' non-riparian lands after conveyance losses.\textsuperscript{154} Although
substituion of iron pipe for plaintiffs’ ditch would have reduced
conveyance losses, thereby freeing surplus for defendant riparians’
use, the court refused to force plaintiff appropriators to endure such
expense.\textsuperscript{155} Rather, the court implicitly distinguished unnecessary waste
from reasonable conveyance losses.\textsuperscript{156} It determined reasonableness

\begin{itemize}
\item \textsuperscript{148} \textit{Id.} at 486.
\item \textsuperscript{149} Hill \textit{v. Smith}, 27 Cal. 476, 482-83 (1865).
\item \textsuperscript{150} "So use your own property as not to injure that of another." \textit{Ballentine's Law Dictionary} 1178 (3d ed. 1969).
\item \textsuperscript{151} See, e.g., California Pastoral \& Agric. Co. \textit{v. Madera Canal \& Irrigation Co.}, 167 Cal. 78, 84, 138 P. 718, 721 (1914).
\item \textsuperscript{152} See, e.g., Joerger \textit{v. Pacific Gas \& Elec. Co.}, 207 Cal. 8, 276 P. 1017 (1929); Barrows \textit{v. Fox}, 98 Cal. 63, 32 P. 811 (1893); Natoma Water \& Mining Co. \textit{v. Hancock}, 101 Cal. 42, 31 P. 112 (1894).
\item \textsuperscript{153} 98 Cal. 63, 32 P. 811 (1893).
\item \textsuperscript{154} \textit{Id.} at 66, 32 P. at 812.
\item \textsuperscript{155} Ditches and flumes are the usual and ordinary means of diverting water in this
state, and parties who have made their appropriations by such means cannot be
compelled to substitute iron pipes, though they may be compelled to keep their
flumes and ditches in good repair so as to prevent any unnecessary waste.
\textit{Id.} at 67, 32 P. at 812.
\item \textsuperscript{156} \textit{Id.}
\end{itemize}
by reference to local custom. It recognized a duty to maintain a system at its designed efficiency level. But, the court refused to compel the senior rights holder to pay for the cost of a physical solution that freed additional waters for other users.

Other cases repeat this theme. For example, in *Natoma Water & Mining Co. v. Hancock*, an appropriator had constructed a dam to raise the streamflow into his diversion ditches. During low flow periods, the appropriator temporarily raised the dam’s height by adding a “false crest of lumber, or riprap and gunnysacks.” A subsequent appropriator constructed his diversion facility in the slack-water above plaintiff’s dam. The defendant only sought to divert waters surplus to plaintiff’s needs. Appropriating that surplus, however, reduced the head available to raise the water behind plaintiff’s diversion dam for conveyance through plaintiff’s ditch.

The court found that the defendant’s diversion of the surplus created mere “inconvenience and trouble which was ... damnum absque injuria.” Where a prior appropriator can use reasonable diligence and ordinary means of diversion to obtain all that he is entitled to, no actionable injury results. Thus, the court required the prior appropriator to raise the crest of his dam—as he did otherwise during low flow periods—to make some surplus available to the subsequent user.

*Natoma* and *Barrows* illustrate the alternatives presented by challenges to the reasonableness of water use. If the court found a reasonable use in reference to local custom and efficiency, the court would only order the senior rights holder to bear the cost of an improvement in water use efficiency if that improvement is otherwise an ordinary means of diversion, or a “usual and reasonable meas-

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157. 101 Cal. 42, 35 P. 334 (1894).
158. Id. at 45, 35 P. at 335.
159. Id. at 50, 35 P. at 337.
160. Id. (emphasis in original).
161. Id. at 50-51, 35 P. at 336-37. The court elaborated:

While the right of the prior appropriator is carefully protected, he is compelled to exercise it with due regard to the rights of others and the paramount interests of the public. The quantity of his lawful appropriation cannot be diminished, but he must return the surplus to the stream without unnecessary waste, and he must use reasonable diligence and reasonably efficient appliances in making his diversion in order that the surplus may not be rendered unavailable to those who are entitled to it. . . . [A] prior appropriator whose means of diversion become insufficient for his purposes, by reason of their inherent defects, when the surplus is diverted above him, must take the usual and reasonable measures to perfect such means.

Id. at 51-52, 35 P. at 337.

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Perfect water use efficiency was not required. Only if a water use was unreasonably inefficient, or again, if mere minor inconveniences resulted to the senior holder from changes in diversion methods, did the court order the senior rights holder to improve efficiency at its own expense.

V. Changes in Judicial Attitudes Towards Protection of Property Rights Since 1928

By 1926, the year of the Herminghaus decision, California law had firmly established that water rights were compensable property interests and the courts had developed a comprehensive body of precedent defining their scope and limitations. The remainder of this article will focus on the redefinition of that property right which has occurred since 1928. In the years since Herminghaus, the law, primarily through court decisions, has extensively redefined the scope of the property right in water. The changes can only be viewed as a broad retreat from protection of private property aspects in favor of utilitarian reallocations.

The first major redefinition was the 1928 adoption of article X, section 2, to the California Constitution. While the amendment was extremely important, its scope is often misstated. As described previously, it did not add the reasonableness doctrine to California law. That doctrine had been evolving for more than fifty years prior to the amendment’s approval. Instead, the amendment incorporated the doctrine, as it had been historically interpreted by the courts, into the Constitution, and extended it to competition between riparians and appropriators.

The cases decided during the first forty years after the amendment’s adoption did not further redefine the nature or extent of private property rights in water. They did firmly establish that the amend-

162. Id. at 52, 35 P. at 337.

While an appropriator can claim only the amount which is necessary to properly supply his needs, and can permit no water to go to waste, he is not bound . . . to adopt the best method for utilizing the water or take extraordinary precautions to prevent waste. He is entitled to make a reasonable use of the water according to the custom of the locality and as long as he does so, other persons cannot complain of his acts. The amount of water required to irrigate his lands should, therefore, be determined by reference to the system used, although it may result in some wastes which might be avoided by the adoption of another or more elaborate and extensive distribution system.

Id. (citing Barrows v. Fox, 98 Cal. 63).
ment had extended the reasonableness doctrine to riparians’ disputes with appropriators. But the cases did so in a way that interpreted the riparians’ reasonableness obligations in a manner consistent with the pre-amendment precedent.

In four landmark decisions since 1967, however, the courts have redefined the nature of the protectible property interest in water so as to leave no water right, riparian or appropriative, privately or publicly held, unscathed. Indeed, the courts are propelling California into a new era of judicially and administratively supervised reallocations of its water resources, on the premise that water use is more a governmentally granted privilege than a privately held property right.

Since 1928, the courts have primarily used two doctrines to redefine the scope of the vested property right in water and thereby avoid possible compensation requirements when curtailing water rights. First, the courts have relied upon the state’s police powers to redefine all water rights and limit their future exercise. Second, the courts have greatly expanded the scope of the public trust doctrine. Under this theory, courts hold that the state, when it granted water rights to individuals, retained certain overriding ownership rights later assertable to the detriment of riparian or appropriative water rights holders.

A. Judicial Approval of Greatly Broadened Police Power as a Basis For Reallocation of California Water Resources

1. The 1928 Constitutional Amendment

The constitutional amendment passed in 1928 is the fulcrum upon which rests most judicial efforts to shift control of California waters from private to public hands. On its face, the amendment passed by the voters limited all rights in California water resources to beneficial and reasonable uses. The amendment’s actual impact, however,

164. See infra notes 192-264 and accompanying text.
165. See infra notes 265-302 and accompanying text.
166. In addition to these two principal bases for state reallocation of resources without payment of compensation, the possibility exists for the courts to further state control by creation of new water rights. See, e.g., Note, The Public Trust Doctrine as a Source of State Reserved Water Rights, 63 Dén. U.L. Rev. 585 (1986) (advocating recognition of state reserved rights on the model of federal reserved rights) [hereinafter State Reserved Water Rights].
167. The 1928 Amendment added Article XIV, Section 3, to the California Constitution. As enacted, Section 3 read:
was more modest. As discussed earlier, for over fifty years prior to the amendment's passage, California had recognized and enforced a reasonable use limitation on both appropriative water users and on riparians in disputes with other riparians. There is no evidence that the amendment was offered or passed to change the scope or meaning of that preexisting limitation. Rather, the amendment appears to be a constitutional reaffirmation of existing law. The amendment broadened the existing reasonableness doctrine to encompass conflicts between riparians and appropriators, thereby reversing *Herminghaus*.

Prior to its enactment and initial interpretation by the Supreme Court, substantial uncertainty existed over the amendment's actual meaning. Before the 1928 election, the Commonwealth Club of California sponsored discussions concerning the amendment's possible meaning. At least four separate interpretations were offered. Mr. Charles Albert Adams argued that the amendment improperly took riparian property without compensation. Mr. A. Kempkey

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 or 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.

On November 5, 1974, two gender references in the section's third sentence were eliminated with the substitution of "the owner's land" for "his land" and "the appropriator is lawfully entitled" for "he is lawfully entitled." See CAL. CONST. CODE art. X §2 (Deering 1981). On June 8, 1976, article XIV, section 3, was repealed and reenacted without change as article X, section 2. For convenience, we refer to this section of the Constitution as "the 1928 Amendment" or "article X, section 2."


169. 23 Transactions of the Commonwealth Club of California (No. 8), published in 4 THE COMMONWEALTH 329 (No. 37, Sept. 11, 1928).

170. Mr. Adams stated:

In California a riparian right is just as much a part and parcel of the land as is the soil itself. There is no more justification for taking a part of the water than there would be for taking a part of the land; and in the opinion of many, no more, and
argued that the amendment merely declared state policy. Mr. Kempkey further elaborated on prevention of waste and anticipated the California Supreme Court’s decision in *Peabody v. City of Vallejo*. Commenting upon a proposed diversion to storage by a city, he argued that the amendment would allow diversion of waters that would otherwise run to waste in a bay. Justice John Preston argued that the amendment was harmless if not intended to change riparian law, but unconstitutional, under the federal constitution, if it did. Finally, Mr. C. Grunsky argued that the proposed amendment addressed the “unfortunate definition” that riparian rights included a right of potential future use. He argued that the amendment merely sought to allow appropriation of surplus water that riparian owners could not otherwise use beneficially.

perhaps not so much, reason .... We may concede that the so-called Colorado theory best subserves the need of this day and age. It should have been perhaps adopted as the law of this state; but it wasn’t and under our law the riparian right is a vested property right and part and parcel of the land itself. As I have said, if a part of the water a man owns may be taken from him without compensation because he is not putting it to beneficial use, so may a part of his land be taken. There are those who approve of that sort of think [sic] (of course where it is not their property that is taken) I do not.

171. Mr. Kempkey stated:

The amendment speaks for itself. It is a declaration of policy. What you are asked to vote upon is not taking somebody's riparian right or taking his water. The amendment specifies particularly that, if possible, he shall have all the water that he can use, either now or later on. I do not know that this amendment will accomplish that. But such water as he cannot use will be subjected to beneficial use otherwise. The amendment is purely a statement of policy, a statement that the water in the streams shall be used to the greatest beneficial degree, and shall not be claimed by a riparian owner to the exclusion of the use by everybody else.

*Id.* at 330-31.

172. *Id.* at 332. Mr. Kempkey further noted the relationship between the proposed amendment and *Herminghaus*: “The Herminghaus case is probably the cause [of the amendment], but whether this will get around the Herminghaus case is a matter for the future to determine.”

*Id.*

173. Justice Preston stated:

If this amendment does not change the law so as to take private property for public use without compensation, it is perfectly harmless; it is all right. And if it does take private property without compensation, it is all right too for the Constitution of the United States will step in and declare that this may not be done. So I do not think that action by the electors on this amendment will cut very much of a figure; the question will be as to the interpretation placed upon it should it be adopted.

*Id.* at 331. Justice Preston wrote the opinion in *Fall River*, 202 Cal. at 58. See supra notes 139-42 and accompanying text. In his first judicial opportunity to discuss the 1928 Amendment after its passage, Justice Preston dissented without opinion in *Gin S. Chow*, 217 Cal. at 707. He disqualified himself from *Peabody* because he had been one of the attorneys in the case prior to his election to the Supreme Court. 2 Cal. 2d at 384.


175. *Id.* Mr. Grunsky stated:

It is not proposed to take away any property from anyone. If there is any method
To a generation of attorneys raised under the Supreme Court’s definitive interpretation of article X, section 2, in Peabody v. City of Vallejo, this divergence of opinion on the amendment’s purpose and meaning is surprising. As discussed more fully below, Peabody held that the 1928 Amendment was intended to overturn Herminghaus. Yet, prior to the 1928 Amendment’s adoption, Samuel Wiel, the foremost proponent of riparian interests in California at the time, argued precisely the opposite. Wiel proclaimed that the pending amendment constitutionalized Herminghaus and thus likely offered greater protection to riparian rights.

Wiel based his argument on several rules of statutory interpretation. He began by reviewing the amendment’s legislative history. The amendment’s promoters originally acted in response to the trial court’s ruling in Fall River. During the pendency of the Fall River appeal, the plaintiffs attempted to get the legislature to change riparian rights. Before the legislature could consider the proposal, the Herminghaus decision was issued.

Wiel examined Herminghaus and found two grounds for the decision.

First and principally that section 11 of the Water Commission Act [requires compensation for damages to riparian interests] since the ranching was a useful and beneficial purpose and the natural flow was reasonably needed for it. (Also—secondarily only, however, that if the [Water Commission] Act purported to let the power company impoverish the ranchers without compensation it would be confiscatory and unconstitutional.)

Thus, in Wiel’s view, the plaintiffs’ use in Herminghaus had been judicially determined to be a reasonable use of water for irrigation.

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176. 2 Cal. 2d 351, 40 P.2d 486 (1935). See infra notes 199-211 and accompanying text.
177. See infra note 202 and accompanying text.
178. The Pending Water Amendment, supra note 126, at 176-77.
179. Id. at 171-73. The trial court’s decision came out before the Supreme Court’s Herminghaus opinion. “The initial purpose was to read into the Constitution section 11 of the Water Commission Act which enacted, in brief, that the protection [to riparians] should apply only insofar as such waters are or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto.” Id. at 171.
180. Id. at 172-73 (emphasis added).
181. Wiel quoted with approval that portion of Herminghaus where the trial court found that the San Joaquin River overflow benefited the plaintiff’s ranches. Id. at 173 n.6 (quoting Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 104-5, 251 P. 607, 613). The Supreme Court described these beneficial uses as “reasonable.” 200 Cal. at 104.
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After Herminghaus, the movement to legislate limitations on riparian rights took two prongs. The legislature appointed a joint committee to meet with legal representatives from the major concerned public service corporations. These lobbyists proposed two separate amendments. The first amendment would have constitutionalized the Water Commission Act’s definition of reasonable use and "ousted the common law protection of [riparian interests] retroactively to the year 1850." The second proposal sought to "reconstitute the Water Commission, possibly with the view of bringing it under control of the public service corporations." The final version of the proposed amendment, however only incorporated the "reasonable and beneficial use" provisions of the Water Commission Act into the Constitution.

183. Id. at 174. See Senate Journal, 47th Session, 444, 450 (Mar. 4, 1927). This proposal stated in part:
Riparian rights in a stream or watercourse attach to no more than so much of the flow thereof, as may be required or used consistently [for reasonable and beneficial purposes]. The flow of a stream or watercourse is that flow which is confined within the natural banks thereof. The definition of riparian rights made in this article is to be observed in the future, and is intended also as a statement of the law as the same has existed continuously since by act of the Legislature of California the common law of England was declared to be the rule of decision in all the courts of this State.

184. The Pending Water Amendment, supra note 126, at 174.
185. Id. at 175. Wiel described the legislative machinations between the initial proposals and the final versions:
Publication of these drafts drew remonstrances to Governor Young. When the Joint Committee reported to the legislature its report was in favor of the Water Commission reconstitution, but it was against the dispossession measure as confiscatory. The original measure and the Joint Committee were then abandoned by the proponents, and the proposals were re-introduced as new measures in the two branches of the legislature separately. In the discussions which this opened, the measure to reconstitute the Water Commission, which adherence to the Joint Committee would have obtained, was decisively defeated on the Senate floor. The other, affecting the common law right of [riparians] to compensation, went through successive alterations. The two new committees examining it were the Assembly and Senate Committees on Constitutional Amendments. These, like the Joint Committee before (making three committees that it went through in all), would not approve it. Presented in both houses without committee approval, it was found necessary to relinquish the
After reviewing the proposed amendment’s legislative history, Wiel gave his opinion of its likely effect. He noted that both *Herminghaus* and *Fall River* had already interpreted the meaning of “reasonable and beneficial use” as used within the Water Commission Act.\(^\text{186}\)

According to Wiel:

The Herminghaus and Fall River cases have passed upon [these words] as leaving compensation to [riparians] unimpaired, with the Supreme Court of the United States saying that it cannot interfere;\(^\text{187}\) and the courts have often said that a substantial difference must appear in a re-enactment before it can give rise to re-interpretation. The words introduced to make a difference were, however, excluded by the legislature.

By the “familiar rule,” therefore, whether the Heringhaus [sic] interpretation of the same wording be right or wrong, it would seem that it will, as an adjudged matter not debatable again, pass into the Constitution and be part of it. The legal effect of the legislature’s unwillingness to include the proposals that would have effected a change, will probably be to put the Herminghaus ruling into the Constitution attached to the re-enacted words.\(^\text{188}\)

As emphatically as Wiel, but with opposite opinions, the authors of the ballot argument in favor of the proposed amendment urged the voters to overturn *Herminghaus*. The authors, two assemblymen, focused their arguments on the elimination of waste.\(^\text{189}\) No argument features which would have made it do more than repeat the Water Commission Act’s provision of “reasonable use.” In this form it passed in the final days of the session. It came out declaring “reasonable use” to be the universal test for natural water resources, controlling not alone riparians but everyone.

\(^{186}\) *Id.* at 174-75 (footnotes omitted).

\(^{187}\) *Id.* at 176.

\(^{188}\) *The Pending Water Amendment, supra* note 126, at 176-77 (emphasis added, footnotes omitted).

\(^{189}\) *Argument in Favor of Assembly Constitutional Amendment No. 27* (November 6, 1928).
was submitted in opposition to the proposed amendment. On November 6, 1928, the amendment passed overwhelmingly.190

2. The Method of Use and Physical Solution Cases

Samuel Wiel's prediction as to the amendment's likely interpretation was as far from reality as possible. The California Supreme Court quickly moved to dispel any doubt that Herminghaus was no longer California law.191

The earliest California Supreme Court opinion interpreting the scope of article X, section 2, was Gin S. Chow v. City of Santa Barbara.192 The case was an unlikely vehicle for the first pronouncement of the scope of this important new provision. It is clear that the case would have been decided in the same manner even if the amendment had been rejected by the voters. The Supreme Court's new majority, however, was ready to accept any invitation to thoroughly repudiate the Herminghaus doctrine.

interpreted as a beneficial use of the waters in this semi arid state, where all lands, including riparian lands, need artificial irrigation in summer and fall, and all our cities need stored water for domestic use.
Under present interpretations, the riparian owner is not bound by any rule of reasonableness in the use of water.
For example, in the Herminghaus case, it was held that approximately 97 percent of the water of the streams should flow by the land, in order that 3 percent might be used for irrigation.
The development of California requires that a different rule from this be adopted. The amendment preserves to the riparian owner all of the water to which he may be entitled for beneficial use by reasonable methods of use, but requires that the unwarranted and needless waste of water should be prevented.
This is a common sense rule of the utmost importance to, and should be adopted for, the future growth of our state and cities.

Id. (emphasis added).

In contrast, Wiel had argued that "waste" only encompassed "man-made losses, occurring after the water has been taken out of its natural channel. The individual has then assumed control of it and can properly be held responsible, at least to a considerable degree, for his good or bad handling of it. That is his own conduct." The Pending Water Amendment, supra note 126, at 186 (emphasis deleted). "Losses which are natural are necessarily unavoidable until such time as we can find a way of penalizing the Almighty, who is the guilty party." Id.

190. The votes for passage totalled 913, 125; the votes against were only 270, 163. Statement of Vote of California 33 (Nov. 6, 1928).

191. While an investigation and discussion of California's social makeup during the late 1920s and early 1930's is beyond the scope of this article, one can hypothesize that the amendment's adoption and the judicial attitude evidenced by the cases which will be discussed infra reflected the significant social changes which accompanied the State's rapid economic and population growth. This growth created needs for water on vast areas of land which while fertile or valuable for urban growth, did not enjoy riparian status. Under these circumstances the Herminghaus doctrine was unlikely to and did not survive. In addition, by the time the first post-amendment case was decided only two members of the Herminghaus majority remained on the Court. However, Justice Shenk, the author of the strong Herminghaus dissent, was still on the Court and represented the new majority.

Gin Chow involved plans by Montecito County Water District to construct Juncal Dam and Reservoir on Santa Ynez River and a conveyance tunnel through the mountains to the growing areas just south of Santa Barbara. A lawsuit was brought by downstream riparians to enjoin the District's diversion to the coastal Santa Barbara area. After trial, the riparians were denied any relief based upon lengthy findings of fact. In particular, the court found that the disputed waters were unusual flood water "in excess of the regularly recurring and of the usual, ordinary and customary flow of said river. . . ."\(^{193}\)

The case was appealed on the judgment roll and the findings were accepted as true. As a result, the trial court's characterization of the waters as flood waters was dispositive. Even under all of the pre-amendment cases,\(^{194}\) including Herminghaus, riparian rights did not attach to extraordinary flood waters.\(^{195}\) Thus, these waters were surplus, and available for appropriation by the District, even before passage of the amendment.

Therefore, the California courts first analyzed article X, section 2, in the context of a trial court decision rendered prior to the amendment's adoption which had, nevertheless, upheld an appropriator's right against downstream riparian claims. Justice Shenk wrote boldly and broadly:

[The amendment's] language is plain and unambiguous. In the main it is an endeavor on the part of the people of the state, through its fundamental law, to conserve a great natural resource, and thereby render available for beneficial use that portion of the waters of our rivers and streams which, under the old riparian doctrine, was of no substantial benefit to the riparian owner and the conservation of which will result in no material injury to his riparian right, and without which conservation such waters would be wasted and forever lost. It was because this court felt impelled to adhere to the long-established rule of Lux v. Haggin that a constitutional amendment was made necessary. Upon the adoption of the amendment, it superseded all state laws inconsistent therewith.\(^{196}\)

He then continued:

It requires no extraordinary foresight to envision the great and increasing population of the state and its further agricultural and

\(^{193}\) 217 Cal. at 682, 22 P.2d at 8.

\(^{194}\) See id.


\(^{196}\) 217 Cal. at 700, 22 P.2d at 16 (citations omitted).
industrial enterprises dependent upon stored water—water that is now wasted into the sea and lost to any beneficial use. The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence. The police power is an attribute of sovereignty and is founded on the duty of the state to protect its citizens and provide for the safety, good order and well being of society. It is coextensive with the right of self-preservation in the individual.197

These phrases have appeared repeatedly in later cases that discuss the constitutional amendment; but Gin Chow's other passages reflecting the court's recognition that the amendment did not divest riparian owners of their vested property rights are seldom quoted. Justice Shenk wrote that the amendment "is an effort 'on the part of the state, in the interest of the people of the state, to conserve our waters' without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners.' "198

While the court's language in Gin Chow gave the amendment a broad scope, most of it was dicta. The decision "took" nothing from the riparian owners since even prior to 1928 they had no rights under common law to these flood waters. From a vantage point more than 50 years after the case, the decision to appeal on the judgment roll is surprising given the content of the trial court's findings.

Less than two years after Gin Chow, Justice Shenk, in Peabody v. City of Vallejo,199 had a second opportunity to review the amendment. Peabody, however, squarely required full consideration of the amendment's scope. The trial court had enjoined the City of Vallejo from operating a dam on a small stream in Solano County. It found that the entire flow of the stream was required to serve plaintiffs' riparian needs and that "the impounding of any portion of these waters by the defendant would result in material and substantial damage to the plaintiffs. . . ."200

Vallejo only proposed to impound water during high flow periods. The evidence showed that the additional benefits which the riparians were gaining by receiving the entire flow of the stream, rather than

197. Id. at 702, 22 P.2d at 16.
198. Id. at 700, 22 P.2d at 16 (emphasis added).
199. 2 Cal. 2d 351, 40 P.2d 486 (1935).
200. Id. at 362, 40 P.2d at 489.
the entire flow minus the impounded high flows, were quite small. Thus, the applicability of the reasonableness doctrine to competition between riparians and appropriators was squarely before the court.\textsuperscript{201}

In \textit{Peabody}, the Supreme Court specifically ruled that article X, section 2, had extended the reasonableness test to competing riparians and appropriators:

The right to the waste of water is not now included in the riparian right. As to what is waste water depends on the circumstances of each case and the time when waste is required to be prevented. In sections of the state, few in number, where the rivers and streams are plentifully supplied, and there is no need for the conservation of the product thereof, the water flows freely to the sea. When needed for beneficial uses it may be stored or restrained by appropriation subject to the rights of those who have a lawful priority in a reasonable beneficial use. That priority has been subjected to limitations and regulations prescribed by the Constitution, but it has by no means been abolished. Under the new policy the vested right theory, that is, the right of the riparian owner to all of the waters of the stream as it is wont to flow in the state of nature, and without regard to the reasonableness of such use as against an appropriator, has been subjected to such limitations that the old doctrine declared in \textit{Miller & Lux v. Madera Canal & Irr. Co.}, 155 Cal. 59 [99 Pac. 502, 22 L.R.A. (N.S.) 391], is no longer the law of this state. Also distinctions heretofore made between the unusual or extraordinary and the usual or ordinary flood and freshest waters of a stream are no longer applicable.\textsuperscript{202}

While \textit{Peabody} is extremely important for its clear development and articulation of the constitutional amendment's primary impact, the context within which the decision was rendered must be kept in focus. The Supreme Court reversed the trial court because the trial court judge had ruled in favor of the riparians without determining whether the riparians' uses or methods were reasonable in the context before him. The trial judge had believed that the amendment had \textit{not} changed the old rule that no reasonableness constraint applied to a riparian-appropriator conflict. Under these circumstances the Supreme Court could not and, with one exception,\textsuperscript{203} did not deter-

\textsuperscript{201} See supra notes 143-63 and accompanying text for a discussion of the preexisting judicially declared reasonableness doctrine between competing riparians and between competing appropriators.

\textsuperscript{202} \textit{Peabody}, 2 Cal. 2d at 368, 40 P.2d at 492.

\textsuperscript{203} While \textit{Peabody} is best classed as a case dealing with methods of use of diversion, and not with the reasonableness of the uses themselves, there is one notable exception. The
mine if the riparians' use or methods of use were reasonable. The court therefore could only remand to the lower court for a trial on the factual issues necessary to determine reasonableness. Along the way it tried to provide as much legal guidance as the record before it allowed.

In guiding the trial court, the Peabody opinion clearly signaled that a decision upholding the reasonableness of the riparians' methods of use would be viewed with extreme disfavor. Yet the opinion also demonstrated that at this stage in California's water history the judiciary was still concerned with the need to treat the right to use water as vested property. For example, the court cited Burr v. Maclay Rancho Water Co. as follows:

The court unquestionably has the power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right and to prevent its ultimate destruction.

After a lengthy discussion of an overlying owner's right to receive the flows needed to protect this underground supply, the court continued:

There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of the riparian owner, the owner of an underground and percolating water right, and the prior appropriator are entitled to the protection of the courts at law or in equity. . . . If the exercise of the appropriative right cause a substantial diminution of the supply the owner is entitled to compensation for the resulting damage to his lands.

The Peabody court was also confronted by an argument that Antioch v. Williams Irrigation District required a ruling "that mere

court explicitly ruled that to demand that the full flood flow of the stream overflow onto one's land to deposit silt or remove the saline content of the soil "involves an unreasonable use or an unreasonable method of use or an unreasonable method of diversion of water as contemplated by the Constitution." Id. at 369 40 P.2d at 492. This statement, however, may be classified as dictum, as the court also stated, "So far as we are advised, this asserted right does not inhere in the riparian at common law, and as a natural right cannot be asserted as against the police power of the state in the conservation of its waters." Id.

204. See id. at 364, 375-76.
205. 154 Cal. 428, 98 P. 260 (1908).
206. 2 Cal.2d at 371, 40 P.2d at 493 (emphasis added).
207. Id. at 374, 40 P.2d at 494.
208. 188 Cal. 451, 205 P. 688 (1922).
inconvenience or extra expense suffered by the overlying land owner would not justify an absolute injunction, nor require that damages for the interference with the right be paid. The court distinguished Antioch on its "unusual factual background." The court then concluded: "Here again we state that any interference with the prior right which would cause substantial damage is actionable."  

Peabody, thus, points in two directions. It established the universal applicability of the reasonableness doctrine in California law; yet it also adhered to the traditional concept that any "substantial damage [to a prior right] is actionable." Peabody, therefore, supports the conclusion that even after the amendment, water rights constitute compensable property.

The third case decided in the amendment's first decade was Tulare Irrigation District v. Lindsay-Strathmore Irrigation District. Tulare involved competing claims of riparian/overlying owners and appropriators of surface and subsurface flows of the Kaweah River. While it added little to the rules declared in Peabody, several significant holdings appear in the opinion.

First, the case described for the first time the type of trial court proceedings and findings which are now the hallmark of water right adjudications. The court ruled that the trial judge must quantify the amount of water reasonably needed by the riparians so the amount of water available to appropriators can also be determined. Second,

209. Peabody, 2 Cal. 2d at 376, 40 P.2d at 495-96.
210. Id. at 376-77, 40 P.2d at 496 (emphasis in Peabody). It is sometimes implicitly assumed that the rule of reasonableness was a new concept first articulated in article X, section 2. Therefore, the pre-1928 decisions are sometimes treated as objects of historical interest only. See supra notes 143-63 and accompanying text. The Peabody case demonstrates the error of this approach. Its use of Burr v. McClay Rancho Water Co. and Waterford Irrigation District v. Turlock Irrigation District demonstrates that the Supreme Court viewed article X, section 2, as extending the preexisting reasonableness doctrine to a new category of competing water rights. It is clear from the way this quotation from Peabody uses the Waterford Irrigation District case that the California Supreme Court in 1935 did not believe that the 1928 constitutional amendment had created any greater reasonableness burden on riparians than had been placed on senior appropriators by the courts through the pre-1928 cases. It is, therefore, proper to measure the change in judicial deference to vested property rights in water by comparing the pre-1928 and post-1928 decisions and to treat the constitutional amendment as a constitutional codification of an existing rule and an extension of that rule to a new group of water users.
211. Id. at 377, 40 P.2d at 496.
212. 3 Cal. 2d 489, 45 P.2d 972 (1935).
213. It is now necessary for the trial court to determine whether such owners, considering all the needs of those in the particular water field, are putting the waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion. From a consideration of such uses, the trial court must then determine whether there is a
the court held that unused (dormant) riparian rights must be protected, and when exercised, riparians retain their superiority over appropriative rights.\textsuperscript{214} Finally, the court rejected the riparians' demand that sufficient flow remain in the river to allow them to subirrigate their property naturally. The court found that claim to be unreasonable "in an area of such need as the Kaweah Delta."\textsuperscript{215}

The fourth case decided in this early period, \textit{City of Lodi v. East Bay Municipal Utility District},\textsuperscript{216} has been largely ignored in subsequent cases and by most commentators writing in this area. Yet, it contains some of the most illuminating language concerning the Supreme Court's continued adherence to traditional vested property based concepts even after Article 10, section 2 had been passed.

\textit{Lodi} involved construction by the East Bay Municipal Utility District of Pardee Reservoir on the Mokelumne River in the mountains east of the City of Lodi. For some years prior to the litigation, the City had obtained its municipal water supply from groundwater aquifers which the trial court found were replenished almost exclusively by the river's flow. The City, therefore, sought to enjoin any operation of the District's facilities that would impair percolation of surface and subsurface river flows into the aquifer which supported surplus in the water field subject to appropriation. If the riparian is putting the water to any reasonable beneficial uses, it is now necessary for the trial court to find expressly the quantity so required and so used. A finding...to the effect that the riparian requires a "reasonable" amount for such uses, under the new doctrine, is clearly insufficient.... The trial court, under the new doctrine, must fix the quantity required by each riparian for his actual reasonable beneficial uses, the same as it would do in the case of the appropriator.

\textsuperscript{3} Cal. 2d at 524-25, 45 P.2d at 986.

\textsuperscript{214} The new doctrine not only protects the actual reasonable beneficial uses of the riparian but also the prospective reasonable beneficial uses of the riparian. As to such future or prospective reasonable beneficial uses, it is quite obvious that the quantity of water so required for such uses cannot be fixed in amount until the need for such use arises. Therefore, as to such uses, the trial court, in its findings and judgment, should declare such prospective uses paramount to any right of the appropriator.... The trial court might well... retain jurisdiction over the cause so that when a riparian claims the need for water, the right to which was awarded him under such a declaratory decree, the trial court may determine whether the proposed new use under all the circumstances, is a reasonable beneficial use, and, if so, the quantity required for such use.

\textsuperscript{3} Cal. 2d at 525, 45 P.2d at 986.

\textsuperscript{215} \textit{Id.} at 526, 45 P.2d at 987.

The further finding that each riparian requires the "whole of the under underground flow of said stream... to moisten said land from beneath," etc., is not sufficient under the new doctrine. The use of the entire flow of a stream, surface or underground, for subirrigation cannot be held to be a reasonable use of water in an area of such need as the Kaweah Delta.

\textit{Id.} (citations omitted).

\textsuperscript{216} 7 Cal. 2d 316, 60 P.2d 439 (1936).
its diversions. At trial, both sides suggested differing physical solutions which might mitigate or eliminate the damages claimed by the City. However, the trial judge ruled that he lacked the authority unilaterally to impose a physical solution and that a physical solution was only proper if it was stipulated and agreed to by all parties. The California Supreme Court, with Justice Shenk once again writing the opinion, reversed. The court held that it is not only proper to entertain evidence of physical solutions, it is constitutionally mandated. Further, "the court possessed the power to enforce such solution regardless of whether the parties agree."\(^{217}\)

In reaching this conclusion, the Supreme Court accepted certain fundamental propositions related to the vested status of Lodi's prior rights and the resulting cost burden of providing a physical solution. First, the court accepted the lower court's finding that the District's method of operation of Pardee Dam and Reservoir would, over a period of years, lower the water table to the material injury of the City.\(^{218}\) The court then recognized that the City's rights deserved full protection even though "tremendous releases" were required and that "[t]hose releases, after they serve the purpose of forcing a relatively small quantity of water into the surrounding underground water table, for the most part, waste into the sea."\(^{219}\)

In spite of these findings the court ruled that merely because "Lodi's right is small as compared either with the District's wants or the flow of the stream, in no way detracts from that right, which is entitled to both legal and equitable protection."\(^{220}\) The decision then specifically addressed the cost allocation issues involved in a physical solution:

If a physical solution is to be worked out which would require the City to change its method of appropriation, any substantial expense incidental thereto should be borne by the District. The City is a prior appropriator and as such cannot be compelled to incur any material expense in order to accommodate the subsequent appropriator. Although the prior appropriator may be required to make minor changes in the method of appropriation in order to render available water for subsequent appropriators, it cannot be compelled to make major changes or to incur substantial expense.\(^{221}\)

\(^{217}\). \textit{Id.} at 341, 60 P.2d at 450.
\(^{218}\). \textit{Id.} at 339, 60 P.2d at 449.
\(^{219}\). \textit{Id.}
\(^{220}\). \textit{Id.}
\(^{221}\). \textit{Id.} at 341, 60 P.2d at 450 (citations omitted).
One final conclusion can be drawn from *Lodi* concerning prior water rights and their entitlement to protection. The Supreme Court discussed how the principles described above should be applied to the specific facts before it. In doing so, the court pointed out that the record conclusively established that the City’s water supply had not yet been materially diminished by the District’s operations.222 Under these circumstances the court held:

The decree should then be reframed to provide that the duty rests upon the District to maintain the levels of the plaintiff’s wells above the danger level so fixed by the trial court; that in the event the levels of the wells reach the danger point, the duty be cast upon the District to supply water to the City, or to raise the levels of the wells above the danger mark; and if the District does not comply with this order within a reasonable time, then the injunction decree already framed, or upon a proper showing as modified by the court under its continuing jurisdiction, shall go into effect.223

Thus, the Supreme Court believed that it was proper to impose upon the City, as a prior appropriator, the burden of accepting some increase in power costs caused by a decline in the level of the water table as long as this decline did not reach the “danger point.” At that point, however, the City’s duty to bear inconvenience would end and the District’s obligation to implement and pay for the physical solution to protect the prior appropriator would begin. This passage constitutes one of the few judicial pronouncements defining the line between mere inconvenience and substantial expense.

The only California case which relies on *Lodi* is *Erickson v. Queen Valley Ranch*.224 *Erickson* involved a dispute on Morris Creek, a small interstate stream which flows from Nevada into Mono County, California. The Ericksons and their predecessor had diverted and used the full flow of Morris Creek on their nonriparian land since 1902.225 Many years after this California appropriation had vested, the Nevada State Engineer granted a competing appropriation for land in Nevada, subject to prior vested rights.226 The litigation was filed after disputes arose concerning the extent of the Ericksons’ prior rights.

222. *Id.* at 343, 60 P.2d at 451.
223. *Id.* at 344, 60 P.2d at 452.
226. *Id.*
The trial court ruled in favor of the Ericksons. It held that their method of diversion and the conveyance losses associated therewith were not unreasonable and were similar to the custom or practice prevailing in the locality. These diversions, however, presented striking circumstances:

According to measurements . . . the Pedro ditch contained a flow of 2.585 cubic feet per second at a point 100 yards below the diversion dam, while only 0.424 cubic feet per second was delivered at the Pedro Ranch. The major part, that is, five-sixths of the flow was lost en route to the point of use.

Thus, this case involved the reasonableness of a method of diversion and the financial responsibility for implementing a physical solution when approximately eighty-three percent of the water diverted was lost in transit! In a series of passages, the appellate court found that the Ericksons' method of conveyance was wasteful, yet placed the burden of paying for system improvements on the junior appropriator. The court ruled:

Plaintiffs' existing appropriative right is measured not by the flow originally appropriated and not by the capacity of the diversion ditch, but by the amount of water put to beneficial use at the delivery point plus such additional flow as is reasonably necessary to deliver it.

An appropriator cannot be compelled to divert according to the most scientific methods; he is entitled to make a reasonable use of the water according to the general custom of the locality, so long as the custom does not involve unnecessary waste.

Article [X], section [2], of the California Constitution declares the state's policy to achieve maximum beneficial use of water and prevention of waste, unreasonable use and unreasonable method of use. The constitutional policy applies to every water right and every method of diversion. It imposes upon trial courts an affirmative duty to fashion a decree which will simultaneously protect the paramount right of established appropriator and prevent waste.

The findings and decree in this case fail to accomplish the second of these objectives. By holding that transmission losses amounting to five-sixths of the flow are reasonable and consistent with local custom, the court effectually placed the seal of judicial approval on what appears to be an inefficient and wasteful means of trans-

227. Id. at 582, 99 Cal. Rptr. at 448.
228. Id. at 584, 99 Cal. Rptr. at 450.
mission. Such a holding is not in conformity with the demands of article [XI], section [2].

It is doubtless true that water in the arid desert areas of Mono County is frequently transported by open ditch; also, that much of the flow may be lost by absorption and evaporation. Moreover, an appropriator who has for many years conveyed water by early ditches may not be compelled at his own expense to install imperious conduit. Nevertheless, an excessive diversion of water for any purpose is not a diversion for beneficial use. Water of Morris Creek which is presently wasted becomes excess water available for appropriation. Another would-be appropriator may be willing to invest in a more efficient conveyance system in order to capture and use the water now lost en route.229

These fascinating passages use terms such as "waste" and "excessive diversion" but seem to carefully and intentionally refrain from finding that the Ericksons' conveyance practices were constitutionally unreasonable. If the court had found that the senior right holders (the Ericksons) were acting unreasonably, the court would also have been required to find that no water right attached to the unreasonably wasted water and that the would-be junior appropriator could take the water without impairing any protectable interest of the seniors. In particular, the junior would have had no obligation to construct, at its expense, a physical solution.230 Indeed, only after the senior rights holders' activities have been found reasonable should the court determine whether a judicially imposed or supervised physical solution would reduce waste and thereby further the policies of article X, section 2.

By so carefully distinguishing waste from unreasonable behavior, Erickson raised more important issues which should have been, but were not, considered in the Forni case discussed below. Erickson is by far the most recent statement of the long established California doctrine that custom and usage are relevant to a reasonableness inquiry. Erickson also reiterates that a senior rights holder, even though his methods of diversion and use may result in some loss, may not be compelled at his own expense to improve an otherwise reasonable method of diversion or use to make the water lost during conveyance or use available to a third party.231

229.  Id. at 584-85, 99 Cal. Rptr. at 449-50 (citations deleted).
230.  See supra notes 143-63, 216-23 and accompanying text.
231.  Erickson, 22 Cal. App. 3d at 584, 99 Cal. Rptr. at 449. See Tulare Dist. v. Lindsay-Strathmore Dist. 3 Cal. 2d 489, 547, 45 P.2d 972, 976 (1935).
Tulare, Lodi and Erickson demonstrate that many learned justices believed that these concepts survived the passage of article X, section 2. Yet as discussed below, the doctrine is not even mentioned in the pivotal Forni decision.

The Gin Chow, Peabody, Tulare and City of Lodi decisions represent a fair overview of contemporary opinion in the 1930s as to the intended sweep of article X, section 2. It was intended to redefine the private property scope of riparian rights and to limit them in the same manner as both appropriative rights and correlative riparian rights had been limited years before. However, the perceived scope of the redefinition was relatively minor. It primarily prevented the riparian from demanding that vast quantities of water and high springtime water volume flow past his property so the natural overflow could irrigate the land without the expense of constructing and operating headworks and canals. But in circumstances where the riparian (or for that matter an appropriator) had constructed ditches or flumes or other customarily used conveyance facilities, the courts were very hesitant to demand that the senior rights holder take substantial or expensive steps for the sole purpose of making water available for a junior use. Thus, the early cases, and the later Erickson decision, distinguished waste from unreasonable use. They recognized that all water use entails some losses which one could call waste. However, if the loss (waste) was not excessive and the method of diversion and use was customary, the courts refused to equate the waste with constitutionally unreasonable conduct. Under those conditions the obligation to pay for facilities to eliminate the waste was cast onto the junior appropriator. Any other result would, in the opinion of those courts, improperly invade the private property rights of the senior water user.

The next series of cases radically altered nearly one hundred years of precedent. Although chronologically out of sequence, we begin with State Water Resources Control Board v. Forni. Forni involved Napa River water used for vineyard frost protection. This important case is inconsistent with the Lodi decision in its approach to allocating the cost of a physical solution.

Forni involved regulations adopted by the State Water Resources Control Board (Board) which read:

Because of the high instantaneous demand for water in the Napa River in Napa County for frost protection and the inadequacy of

the supply to satisfy the demand during the frost season after March 15 in most years, diversion of water from the Napa River after March 15 for frost protection except to replenish water stored in reservoirs prior to March 15 is an unreasonable method of diversion within the meaning of Article [X], Section [2] of the California Constitution and Section 100 of the Water Code. No permits for the appropriation of water from the Napa River after March 15 of any year for frost protection shall be granted except to replenish winter storage and such permits shall not be granted until a water distribution program among the water users is established that will assure protection to prior rights. Regardless of the source of the water, the Board will retain jurisdiction to revise the terms and conditions of all permits issued for frost protection should future conditions warrant.233

While the second sentence of this regulation established guidelines for considering new applications to appropriate frost protection water from the Napa River, the first sentence was interpreted by the Board to apply to riparian diversions. Thus, in place of direct diversions within riparian rights, the Board sought to require riparians to build storage facilities under appropriative rights. The Board sued the riparian owners to enjoin their diversions for frost protection as an unreasonable method of use. The riparian landowners sought judgment on the pleadings, arguing that the regulation was invalid as a matter of law. The motion was granted and the Board’s regulation was ruled invalid.234

Since the trial court had, in essence, sustained a demurrer to the Board’s complaint, the primary question before the appellate court was whether the complaint stated a cause of action. The court of appeal found that the reasonableness of the riparians’ methods of diverting for frost protection raised a question of fact that “renders the judgment on the pleadings erroneous as a matter of law.”235 The appellate court, however, did not, and could not without a factual record, decide that the riparians could be required to pay the cost of the required reservoirs. Instead, the court merely asserted:

As we have repeatedly underscored, the overriding constitutional consideration is to put the water resources of the state to a reasonable use and make them available for the constantly increasing needs of all the people. In order to attain this objective, the riparian

233. Id. at 752 n.4, 126 Cal. Rptr. 857 n.4.
234. Id. at 751.
235. Id.
owners may properly be required to endure some inconvenience or to incur reasonable expenses. Whether the requirement of building water reservoirs in the case at bench is the only feasible method for achieving the constitutional mandate of reasonableness is manifestly a question of fact.236

While this quotation cites the earlier cases which hold that the riparians' obligation is to bear only "some" inconvenience and "reasonable" expense, the quotation's last sentence is inconsistent with City of Lodi v. East Bay Municipal Utility District.237 Forni states the test as whether the "building [of] reservoirs. . .is the only feasible method for achieving the constitutional mandate of reasonableness." To be consistent with Lodi, however, Forni should have also referenced the physical solution doctrine and dealt with the Supreme Court's Lodi ruling: if the physical solution requires the holder of the prior right to change its method of appropriation, the subsequent appropriator should bear any substantial expense incident thereto.238

The failure of Forni to discuss, much less recognize the existence of the physical solution cases is one of its most significant aspects. Forni suggests the automatic equation of "waste," or any inefficiency which impacts a stream's potential for maximum development, with unconstitutional conduct. If this is Forni's holding, private property interests in water have been significantly redefined.

236. Id. at 751-52, 126 Cal. Rptr. 856 (citations omitted). One of the more unusual aspects of this passage is the Forni court's apparent assumption that the riparians could utilize storage reservoirs pursuant to their riparian rights. In fact, the riparian right does include a regulatory storage right. Cal. Admin. Code tit. 23, § 657 (1987). Regulatory storage, however, is defined as storage for 30 days or less and does not include storage in one season for use during another season. Id. The court failed to address whether the reservoir use contemplated by the Board's regulation was within the scope of the riparian right; instead it seem simply to assume so. After remand, Forni was settled prior to trial, so this element of the case was never judicially decided. However, the settlement, in an innovative approach to a difficult problem, treats the pre-March 15 diversions to storage as appropriations and the riparians were required to file applications and obtain appropriative rights permits. Since during the winter season there is usually enough water in the river to accommodate all of the diversions to storage, all the applications were granted and there is sufficient water in the river to fill all the reservoirs without disputes over priorities. Refilling the reservoirs after March 15, however, is treated as a regulatory storage. The riparian owners are thus accorded a first priority for this water over nonriparian water users during the time of year when water shortages are more likely to be a problem. Interview with James T. Markle, Staff Counsel, State Water Resources Control Board, March 22, 1988 (notes on file at the Pacific Law Journal). See also Cal. Admin. Code tit. 23, § 735(c).

237. 7 Cal. 2d 316, 60 P.2d 439 (1936).
238. 54 Cal. App. 3d at 752, 126 Cal. Rptr. at 856.
239. 7 Cal. 2d at 341, 60 P.2d at 450.
Forni’s importance to contemporary California water law stems equally from the role played by the Board. For some years prior to filing its complaint in Forni, the Board had been gaining more strength and stature as the administrative interpreter of article X, section 2’s mandate. In filing Forni, and in adopting the challenged administrative regulation, the Board had made a rather fundamental policy decision. Forni presented the Board with a situation in which the Napa River apparently had insufficient water to serve, by direct diversion, the legitimate needs of both riparian and non-riparian vineyards. Faced with this shortage, the Board decided, in effect, to equalize the relative priorities of the riparians and appropriators. It thus sought to impose an equal obligation on all users, irrespective of their priorities, to bear the cost of constructing needed storage facilities. The Board apparently made no preliminary consideration regarding the substantiality of the burden being placed on the riparians. Further, the Board apparently did not consider whether the riparians’ methods were customary and whether the regulation required a diverter “to change his system. . .so that others may perhaps be benefited thereby.” In other words, there never seemed to be any consideration of whether, as an alternative to the regulation, the appropriators should pay for a physical solution. Instead the Board boldly and unprecedentedly required cost sharing among identical uses without regard to the “accident” of whether the benefited land abutted the river or was located 500 yards inland.

After remand Forni was settled before trial. Therefore, no California reported decision discusses the continued vitality of Lodi, or applies Peabody’s admonitions concerning the extent of the inconvenience or expense that can be imposed on the owners of prior vested water rights. Although specific decisions may not be available, the direction in which the cases are moving is clear. On the one hand, as long as sufficient water remains available to support the beneficial uses under examination, the Board or the courts will assert nearly unfettered discretion to regulate the method of diversion.

240. Compare Forni, 54 Cal. App. 3d 743, 126 Cal. Rptr. 851, with Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 P.2d 767 (1904). If Forni is taken to its extreme, a riparian would be required to undertake, from time to time, additional improvements to his diversion, distribution, and delivery systems, at his sole cost, to make water available for newly developed demands because “it is beneficial to the community in general.” Southern Cal. Investment Co., 144 Cal. at 73, 77 P.2d at 80. See infra notes and accompanying text. This extension of Forni is even more striking when used to argue that the right itself is terminated.

or use. Further, the increased cost to a water rights holder from such regulation is largely irrelevant.

On the other hand, the continued existence of the physical solution cases provides an escape valve for certain difficult cases. If the court does not want to impose the financial burden of constructing conservation facilities on the senior rights holder, it can simply find his methods reasonable and shift the financial obligation to the junior would-be appropriator.

3. The Purpose of Use Cases

While Forni deals with that portion of article X, section 2, which regulates the way water is used for beneficial purposes, two recent cases, Joslin v. Marin Municipal Water District and United States v. State Water Resources Control Board, attack the fundamental existence of a private property right in water.

Joslin is difficult to analyze logically. The Supreme Court's intent, however, and the ruling's importance is unmistakable. The Court, faced with a fact pattern that would have supported a three line opinion citing Peabody, established instead a sweeping doctrine that property rights in water had been redefined by "constitutional fiat" to exclude unreasonable uses. Moreover, the Court declared that "what is reasonable use ... cannot be resolved, in vacuo, isolated from statewide importance." The plaintiff in Joslin sought damages for interference with his riparian right to have Nicasio Creek deposit sand and gravel on his land for subsequent extraction and sale. The defendant District's upstream dam intercepted and held the suspended materials carried by the creek, thereby eliminating the "normal and usual replenishment of rocks and gravel" to plaintiff's property.

The Supreme Court properly turned to Peabody v. Vallejo: In Peabody, several lower riparian owners sought to enjoin the City of Vallejo, as an appropriator, from storing the waters of a creek by the construction of a dam and thereafter diverting them...
to municipal uses. Peabody, one of the plaintiffs, asserted a right to have all the waters flow without interruption since by normally overflowing his land they not only deposited silt thereon but also washed out salt deposits on portions of the land. The court held that "this asserted right does not inhere in the riparian right at common law, and as a natural right cannot be asserted as against the police power of the state in the conservation of its waters. This asserted right involves an unreasonable use or an unreasonable method of use or an unreasonable method of diversion of water as contemplated by the Constitution." (Peabody v. City of Vallejo, 2 Cal. 2d 351, 369)\textsuperscript{248}

The Supreme Court's opinion could have ended here. Peabody's holding that silt deposition does not inhere in the riparian right fully supported the trial court's ruling without a constitutional interpretation. No legal difference appears between silt deposition and replenishment of rocks and gravel. Further, if the last phrase of the Peabody quotation is interpreted as a ruling that as a matter of law—without the need for factual balancing—silt, rock, or gravel deposition is an unreasonable use of water, that should also have ended the inquiry and the opinion.\textsuperscript{249} Despite the several available nonconstitutional bases for deciding the case, the Supreme Court went on and made broad quasi-legal and quasi-policy statements. These statements were only necessary, however, if the Court was also deciding that rock and gravel replenishment (1) is encompassed within the riparian right and (2) can constitute a reasonable riparian use in certain factual circumstances. If one does not make this assumption, the vast majority of Joslin is dicta.

The analysis of Joslin's implications which follows assumes, arguendo, that the plaintiff's riparian right included rock and gravel replenishment and that, prior to the urban growth that made the district's project necessary, the use of Nicasio Creek's water for

\textsuperscript{248} Id. at 139, 60 Cal. Rptr. at 382 (citations omitted). As indicated above, the Peabody court took an unnecessary step in this quotation. If silt deposition is not included in the riparian right as a matter of common law, the reference to the Constitution is surplusage; the reasonableness doctrine presupposes a water right recognized by California law. See supra notes and accompanying text.

\textsuperscript{249} The court, however, was faced with a case which was difficult to reconcile. Los Angeles County Flood Control Dist. v. Abbott, 24 Cal. App. 2d 728, 76 P.2d 188 (1938). In Abbott, the court sustained a condemnation award for loss of gravel replenishment caused by construction of a concrete lined flood channel. Joslin weakly distinguishes Abbott, but did not overrule the decision. See also Malakoff, Erosion of a Water Right or Just a Pile of Sand, 5 CAL. W.L. REV. 44, 54-59 (1968).
gravel deposition was reasonable. In other words, at some point prior to the litigation, a vested property right existed.

The Supreme Court first reviewed the policy considerations relevant to its reasonableness determination:

Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved in vacuo isolated from statewide considerations of transcendent importance. Paramount among these we see the water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment. On the other hand, unlike the unanimous policy pronouncements relative to the use and conservation of natural waters, we are aware of none relative to the supply and availability of sand, gravel and rock in commercial quantities. Plaintiffs do not urge that the general welfare or public interest requires that particular or exceptional measures be employed to insure that such natural resources be made generally available and should there be carefully conserved.

Is it “reasonable,” then, that the riches of our streams, which we are charged with conserving in the great public interest, are to be dissipated in the amassing of mere sand and gravel which for aught that appears subserves no public policy? We cannot deem such a use to be in accord with the constitutional mandate that our limited water resources be put only to those beneficial uses “to the fullest extent to which they are capable,” that “waste or unreasonable use” be prevented, and that conservation be exercised “in the interest of the people for the public welfare.” (Cal. Const. art. [X], § [2].) We are satisfied that in the instant case the use of such waters as an agent to expose or to carry and deposit sand, gravel and rock, is as a matter of law unreasonable within the meaning of the constitutional amendment. (See Peabody v. City of Vallejo, 2 Cal. 2d 351, 369.)

After finding that plaintiff’s use was unreasonable, the court eliminated any right to compensation:

[Plaintiffs assert that the amendment] was only a procedural as opposed to a substantive change in the law and had the effect of merely denying injunctive relief to protect certain riparian uses. . . .

While plaintiffs correctly argue that a property right cannot be taken or damaged without just compensation, they ignore the necessity of first establishing the legal existence of a compensable property interest. Such an interest consists in their right to the reasonable use of the flow of the water. Their riparian rights attach

250. 67 Cal.2d at 104-41, 60 Cal. Rptr. at 382-83 (emphasis in original).
to no more of the flow of the stream than that which is required for such use. [Citation deleted.] As we said in Ivanhoe Irr. Dist. v. All Parties, [47 Cal. 2d 597, 623]: "Within the scope of reasonable beneficial use, vested rights of the riparian owner continued to attach to his land as a part and parcel of the land itself, and as such was necessarily protected from unlawful encroachment by both state and federal Constitutions. The result is that this vested right as now defined may not be destroyed or infringed upon without due process of law or without just compensation under either Constitution." There is now no provision of law which authorizes an unreasonable use or endows such use with the quality of a legally protectible interest merely because it may be fortuitously beneficial to the lands involved.\textsuperscript{251}

The court then concluded "that since there was and is no property right in an unreasonable use there has been no taking or damaging of property by the deprivation of such use and, accordingly, the deprivation is not compensable."\textsuperscript{252}

These statements constitute a major redefinition of the private property nature of water rights in California. The first two quoted paragraphs compare, in pure public policy terms, the relative importance of water for use by the people of California in their expanding agricultural and industrial enterprises with "the amassing of mere sand and gravel which for aught that appears subserves no public policy."\textsuperscript{253} Both that comparison and the court's resulting conclusion that Joslin's riparian right deserved no protection imply remarkable and largely unprecedented redefinitions of traditional property concepts. Joslin seems to hold that the issue of which competing water user possesses the superior right is no longer to be decided by reference to riparian rights or temporal priority, but by which water use best serves perceived public policies at the time the dispute is resolved.

Arguably Joslin is limitable to its peculiar facts of replenishing a gravel pit and cannot be used to support a more expansive view.\textsuperscript{254} However, the decision in United States v. State Water Resources Control Board,\textsuperscript{255} discussed below, shows that one appellate court relied on the very language quoted above to conclude that Joslin

\textsuperscript{251} Id. at 143-44, 60 Cal. Rptr. at 385 (emphasis in original; footnote omitted).
\textsuperscript{252} Id. at 145, 60 Cal. Rptr. at 386.
\textsuperscript{253} Id. at 140-41, 60 Cal. Rptr. at 383 (emphasis in original).
\textsuperscript{254} See, e.g., Anderson, supra note 22, at 60-61.
\textsuperscript{255} 182 Cal. App. 3d 82, 227 Cal. Rptr 161 (1986). See infra notes 257-64 and accompanying text.
does countenance reprioritization of rights on the basis of social utility.

One can replace gravel replenishment with any other water use and speculate how Joslin's language applies. What if the plaintiffs were irrigating a tobacco crop which was used to make cigarettes? Would any public policy support protecting the water supply for a product that causes cancer and heart disease, when the water is otherwise needed to serve California's growing population and industrial base? Has Joslin turned the Board and courts into super regulators, determining what crop or products are made, where made, and by whom made?

The statement of the question is enough to illustrate the problem. Absent use creating a nuisance, Anglo-American jurisprudence has been very hesitant to change the definition of property based on one particular court's view of proper social balancing. But that is exactly what Joslin may authorize in the area of water rights.256

256. There is one passage in Joslin which may enable the decision to be more narrowly construed than described above. The Supreme Court was forced to distinguish the United States Supreme Court decision in United States v. Gerlach Livestock Co., 339 U.S. 725 (1950), Gerlach interpreted article X, section 2, and subsequent California cases, with respect to certain riparians' rights to compensation for water taken for a federal reclamation project. 339 U.S. at 751-55. Joslin distinguished Gerlach by stating:

Plaintiffs direct our attention to United States v. Gerlach Live Stock Co. (1950) [339 U.S. 725] as compelling a different conclusion. In that case riparian owners sought compensation for the loss of irrigating waters which overflowed the banks of the San Joaquin River onto their lands when the river flooded each year. There was no question but that the use of water for irrigating riparian lands was a reasonable use, within the meaning of the constitutional amendment. The court concluded that the use in question was a property interest which survived the amendment and was compensable.

Gerlach, of course, is distinguishable from the instant case in that plaintiffs here are not making a use of the natural flow of waters which can be deemed reasonable, and it was on the determination of a reasonable use that Gerlach turned. . . .

67 Cal. 2d at 145, 60 Cal. Rptr. at 386. This distinction withstands scrutiny only if Joslin applies just to situations closely analogous to gravel pits. The Gerlach plaintiffs sought compensation for loss of their ability to irrigate their lands with water which naturally overflowed the banks of the San Joaquin River during high spring flows. These flows were to be eliminated by construction of Friant Dam, a component of the federal Central Valley Project. In other words, they irrigated in exactly the same manner as the Herminghaus plaintiffs irrigated. The United States Supreme Court, in spite of the similarity of both the Gerlach facts to the Herminghaus facts and the post-Herminghaus passage of article X, section 2, sustained the riparians' rights to compensation. If the passage from Joslin quoted above is read as approving Gerlach, it would confirm the Herminghaus plaintiffs' right to compensation even after the amendment’s adoption. Given how unlikely it is the Joslin Court intended that such a result would follow (indeed Peabody asserts that the 1928 amendment overruled Herminghaus), Joslin's discussion of Gerlach most likely merely distinguishes, in a very broad way, a utilitarian balancing involving irrigation rights from a balancing involving less useful "mere sand and gravel."
By defining the property right in water according to which uses are held to be reasonable from time to time in view of other competing demands for the same water, *Joslin* implies that public acquisition of water rights (or at least attempted acquisition) may be accomplished in water short areas without compensating the owners of land from which the needed water is taken. Why should a public agency properly representing its taxpayers/users agree to condemn needed water if it can circumvent compensation on mere utilitarianism? Such an argument might assert, for example, that in light of the extreme need for water by the residents of Metropolis, it is constitutionally unreasonable to use that water for irrigating surplus wheat and corn for cattle feed and that, therefore, no compensable property right exists.

While it must be emphasized that no subsequent case has extended *Joslin* beyond its possibly unique facts, the ability to construe the decision narrowly has been severely undercut by the First District Court of Appeal's monumental decision in *United States v. State Water Resources Control Board.* Although the facts and holding of this case are described in detail in Judge Robie's article in this symposium, the decision's significant discussion implicitly redefining property demands attention here.

Primarily, *Racanelli* interprets California's water quality and water rights law as they relate to the complex, ongoing administrative proceedings involving the Sacramento-San Joaquin Delta and San Francisco Bay. In two separate portions of the seventy page opinion, however, the court describes its view of article X, section 2, and *Joslin.*

One issue before the appellate court was the Board’s authority to modify appropriative water rights permits in a manner which could reduce the quantity of water available to the rights holder. After discussing certain reserved powers contained in the permits themselves, the court turned to the Board’s powers under the state constitution:

> Independent of its reserved powers, we think the Board was authorized to modify the permit terms under its power to prevent waste or unreasonable use or methods of diversion of water. All

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257. 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986). This decision has become commonly known within the water bar as the “Racanelli decision” after its author. That term will be used in this article.

water rights, including appropriative, are subject to the overriding constitutional limitation that water use must be reasonable. The Board is expressly commissioned to carry out that policy.

Here, the Board determined that changed circumstances revealed in new information about the adverse effects of the projects upon the Delta necessitated revised water quality standards. Accordingly, the Board had the authority to modify the projects’ permits to curtail their use of water on the ground that the projects’ use and diversion of the water had become unreasonable.

We perceive no legal obstacle to the Board's determination that particular methods of use have become unreasonable by their deleterious effects upon water quality. Obviously, some accommodation must be reached concerning the major public interests at stake: the quality of valuable water resources and transport of adequate supplies for needs southward. The decision is essentially a policy judgment requiring a balancing of the competing public interests, one the Board if uniquely qualified to make in view of its special knowledge and expertise and its combined statewide responsibility to allocate the rights to, and to control the quality of, state water resources. We conclude, finally, that the Board's power to prevent unreasonable methods of use should be broadly interpreted to enable the Board to strike the proper balance between the interests in water quality and project activities in order to objectively determine whether a reasonable method of use is manifested.

This quotation extends Joslin to its logical extreme. Racanelli leaves no vested property right in a water supply for any purpose. Unlike Joslin, which dealt with “mere gravel,” Racanelli dealt with projects that delivered irrigation water to several million acres of land and provided domestic municipal and industrial water to millions of people. The Racanelli pronouncements, while sweeping in scope, did not shift water among competing users. The language quoted above was used in a portion of the opinion dealing with the Board’s jurisdiction over the United States. It is, therefore, too early to judge how this

260. Unlike Joslin, which dealt with “mere gravel,” Racanelli dealt with projects that delivered irrigation water to several million acres of land and provided domestic municipal and industrial water to millions of people.
261. The Racanelli decision has another important attribute. It is the first case which deals expressly with competition between a consumptive user and a water quality standard designed to protect instream values such as fish and wildlife resources. The balancing doctrine announced in Racanelli likely extends to non-quality related instream flow needs.
language will be applied to specific fact situations in future cases. However, an additional passage in *Racanelli* may presage how the courts will interpret the Board’s and the courts’ powers to adjust water rights to achieve the “best” balance of public interests. As can be seen from the quotation immediately above, *Racanelli* granted the Board the power “to modify the projects’ permits to curtail their use of water”\(^2\) if their uses had become unreasonable. In another section of the decision, the court stated:

Moreover, the power of the Board to set permit terms and conditions (Water Code § 1253) includes the power to consider the “relative benefit” to be derived. ([Water Code] § 1257.) If the Board is authorized to weigh the values of competing beneficial uses, then logically it should also be authorized to alter the historic rule of “first in time, first in right” by imposing permit conditions which give a higher priority to a more preferred beneficial use even though later in time.\(^3\)

This quotation does not cite article X, section 2, as authority. Nevertheless, if a water use can be totally curtailed on constitutional grounds, the less drastic step of altering relative priorities among competing water uses to achieve a constitutional balance is also permissible. *Racanelli* thus represents the current high watermark of the post-1928 police power assault, under the reasonableness doctrine, upon vested property rights in California water resources.\(^4\)

VI. THE USE OF THE PUBLIC TRUST DOCTRINE AS A MEANS TO AVOID COMPENSATION FOR REALLOCATION OF PRIVATE INTEREST IN WATER RESOURCES

In addition to substantial reliance upon the police power as a de facto means of reallocating California’s water supplies, recent Cali-

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262. *Id.*, 227 Cal. Rptr. at 187.

263. *Id.* at 132, 227 Cal. Rptr. 189.

264. Ironically, *Racanelli* cited *Long Valley* as partial support for the broad authority granted the Board to adjust water use in the name of prevention of waste and unreasonable use. *Racanelli*, 182 Cal. App. 3d at 144, 227 Cal. Rptr. at 198. In *Long Valley*, the California Supreme Court allowed the Board, in the limited context of a statutory adjudication of all rights in a stream system, to reprioritize dormant riparian rights. 25 Cal. 3d 339, 358-59 & n.15, 599 P.2d 656, 669 & n.15, 158 Cal. Rptr. 350, 363 & n.15 (1979). Notably, the court refused to uphold a Board decision to extinguish a dormant riparian claim. *Id.* at 357-59, 599 P.2d at 668-69, 158 Cal. Rptr. at 363-63. It did, however, allow the Board to give the dormant riparian right the lowest priority of all claimants, regardless of the date of the riparian right’s inception. *Id.* It justified its action as “promot[ing] finality and certainty.” *Id.* at 359 n.15, 599 P.2d at 669 n.15, 158 Cal. Rptr. at 363 n.15. In contrast, *Racanelli’s* extension of the reprioritization principle, outside of the context of a stream wide, statutory adjudication, effectively reduces certainty in all water rights. Cf. In re Water of Hallet Creek Stream System, 44 Cal. 3d 448, 470-72 & n.16 749 P.324, 337 & n.16, 243 Cal. Rptr. 887, 890 & n.16 (1988).
California decisions have also relied upon expanded public trust doctrine to authorize state water reallocation without just compensation to the water rights holders. Historically confined to navigable waters, the doctrine in recent years has shed its navigable past in hopes of a greater non-navigable future. While some have argued that the California Supreme Court's decision in *National Audubon Society v. Superior Court* represents "the consistent evolution of California water rights," others have attacked the decision as having "a greater destabilizing effect on California water rights than any single development since the initial recognition of riparian rights 100 years ago." The outworkings of *National Audubon Society* and the relationship to takings law remain unaddressed judicially.

Whereas judicial manipulation of the reasonableness doctrine rests upon the state's police power, the assertion of the public trust doctrine appeals to another source of supposed state power: a pre-existing state title in the water rights conveyed. Whether the the-

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265. Over the last two decades, an extensive literature on the origins, history and significance of the doctrine has sprung up, largely in response to Professor Joseph Sax's provocative work, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MicU. L. REV. 471 (1970) [hereinafter Sax]. Perhaps the most extensive discussion of the Roman, civilian, and common law origins and articulations of the trust doctrine can be found in H. ALTHAUS, supra note 24. A partial but nonetheless extensive list of post-1970 articles advocating trust values appears in Professor Richard Lazarus's recent article, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 643-44 n.75-76 (1986) [hereinafter Lazarus]. Professor Lazarus' article also lists over 50 cases arising since 1970 raising public trust issues. *Id.* at 644-46 n.77-81.

266. In *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, cert. denied, 464 U.S. 977 (1983), the court extended the public trust doctrine to non-navigable tributaries of navigable streams. The court also extended the doctrine to disturb longstanding state licensed appropriative rights held by a major public water supply.


270. Following the California Supreme Court's decision in *National Audubon Society*, the real party in interest, the City of Los Angeles, moved for a writ of certiorari in the United States Supreme Court on the takings issue. The Supreme Court, however, denied the writ without comment. 464 U.S. 977 (1983). See Note, *The Fifth Amendment as a Limitation on the Public Trust Doctrine in Water Law*, 15 FAC. L.J. 1291 (1984) [hereinafter Fifth Amendment

In practice, the distinction between the state’s asserted proprietary interests and the state’s sovereign interests blurs. See, e.g., *State Reserved Water Rights*, supra note 166, at 597 (discussing state’s “sovereign ownership interests”). Furthermore, the relationship between the police power and the sovereignty interest also remains conceptually undefined. *Compare Sax*, supra note 265, at 484-85 (public trust is an aspect of a state’s police power) with *State Reserved Water Rights*, supra note 166, at 596 (police power characterized by affirmative conduct furthering public health, safety and welfare; public trust doctrine constrains states actions even though they might further public health, safety and welfare).

272. The United States Supreme Court recently addressed the scope of the doctrine’s application over tidal but non-navigable waterways. In *Phillips Petroleum Co. v. Mississippi & Sage Petroleum U.S., Inc.*, 108 S. Ct. 791 (1988), the Court announced that state ownership extends to all lands beneath waters subject to the tide’s influence whether or not navigable-in-fact. *Id.* at 795. The court thus ruled that American common law had rejected the English rule limiting sovereign ownership to lands lying under navigable waters. *Id.* at 794-95.

273. 6 N.J.L. 1 (1821).
274. *Id.* at 78.
276. 146 U.S. 387 (1892).
277. The Supreme Court’s language in *Illinois Central* exemplifies the 19th century public trust doctrine’s blend of sovereignty and proprietorship. For example, when comparing the Great Lakes to tidal waters, the Court states:

*We hold, therefore, that the same doctrine as to the dominion and sovereignty over an ownership of lands under the navigable waters of the Great Lakes applies which*
the four justices of the court's majority distinguished the state's title in submerged lands from its title in other public lands. The court approved in principle grants of small portions of trust affected land that facilitated improvements to further trust purposes. Further, the court approved conveyance of parcels of submerged lands that could be "disposed without any substantial impairment of the public interest in the lands and waters remaining." But the court refused to "sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake." Thus, the court principally objected to the grant of an entire lakefront harbor equivalent in size to any of the world's greatest harbors. The court, however, did not hold that the grant was void on its face.

The public trust doctrine as announced in Illinois Central has been refined in many American jurisdictions. California has developed it most extensively. A substantial line of California cases addressed traditional trust concerns over state ownership or grants of tidal and submerged lands. These cases discuss traditional states' rights to

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obtains at the common law as to the dominion and sovereignty over an ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trust and limitations. Upon that theory we shall examine how far such dominion, sovereignty, and proprietary right have been encroached upon by the railroad company, and how far the company had at the time the assent of this date state to such encroachment.

Illinois Cent., 146 U.S. at 436-37 (emphasis added).

278. The Court split 4 to 3; two justices did not participate. In dissent, Justice Shiras argued that the state qua proprietor had as much right to convey its interest in submerged lands as in any other public lands. Id. at 465. Justice Shiras argued that changed circumstances would authorize the state to condemn previously conveyed submerged lands upon compensation. Id. at 474.

279. Id. at 452.

280. Id.

281. Id. at 453.

282. Id. at 452-53.

283. Id. at 454-55.

284. Id. at 453. See Lazarus, supra note 263, at 638 ("The Court could have relied easily on the theory that the initial enactment was devoid of legitimate public purpose, especially given that the Court could have done so merely by referring to the subsequent legislature's considered judgement."). Further, the Court noted that upon revocation of such a grant, the state ought to pay for expenses incurred and improvements made while the grantee held the property. Illinois Cent., 146 U.S. at 455.

285. See, e.g., cases cited in Lazarus, supra note 263, at 644-46 n.77. See also State Reserved Water Rights, supra note 166, at 594-95 n.74 (additional recent authorities).

286. State Reserved Water Rights, supra note 166, at 590.

287. See, e.g., City of Berkeley v. Superior Court, 26 Cal. 3d 515, 605 P.2d 362, 162 Cal. Rptr. 327, cert. denied, 449 U.S. 840 (1980); City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970). Other cases have involved the incidents of retained
control navigation, fishing, or commerce over submerged lands granted away by the State. Another class of cases involves the State's ability to prioritize between competing public trust uses.288

The most significant developments in California law, however, have come from extensions of both the interests protected by the doctrine and the private rights it controls. For example, in *Marks v. Whitney*,289 the court extended the interests protected to include recreational and an aesthetic concerns.290 In *State v. Superior Court (Fogerty)*,291 the California Supreme Court extended the zone of public trust protection to lands underlying navigable waters that had been artificially raised by an impoundment.292 The broadest extension of the doctrine, however, came in the landmark case of *National Audubon Society v. Superior Court*.293

The *National Audubon Society* case has already prompted extensive discussion by commentators.294 Its facts and principles are already well known in the water community. Briefly, in *National Audubon Society*, the California Supreme Court extended the state's public trust control to diversions from non-navigable tributaries of navigable waterways.295 Although the diverter, the City of Los Angeles, held valid state appropriative water rights licenses dating back nearly forty years, the court held that under the public trust doctrine the City's permits created no vested rights that barred reconsideration of the diversion's propriety.296 Moreover, the court announced that the state may reconsider even those allocations that had previously included public trust review.297

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289. *See, e.g.*, Colberg, Inc. v. State, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967) (state had power to promote commerce over navigation); Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917) (state has power to destroy navigability of some waters for the benefit of others); County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (1973) (legislature has power to prefer one trust use over another). *See Walston, supra note 269, at 71.

290. *Id.* at 259-60.


296. *Id.* at 447, 189 Cal. Rptr. 365.

297. *Id.* The California Supreme Court embraced the sovereignty theory as the source of the state's public trust powers. *Id.* at 445, 189 Cal. Rptr. at 364.
National Audubon Society’s attempted accommodation between the public trust doctrine and the appropriative water rights system has left many questions unsettled about the scope of private property interests in California water rights. Three questions are primary. First, the opinion does not itself address the impact of the public trust doctrine upon other state recognized water rights. The Rancanelli decision, however, suggests that the public trust doctrine, at least in combination with the police power, authorizes the state to reconsider and reprioritize any water right. Second, National Audubon Society does not establish a rule for determining who among all the water rights holders on a watercourse must bear any flows necessary to satisfy a reallocation under the public trust doctrine. Alternatives include equitable apportionment among all water rights holders, prioritization upon order of perfection of rights, or perhaps, limitation to the holder that triggered the complaint. Finally, the court left undescribed the circumstances that would trigger an administrative or judicial reevaluation of an allocation decision that had been made with prior consideration of public trust concerns.

If nothing else, the unanswered questions implicitly posed by National Audubon Society have greatly unsettled the expectations previously enjoyed by California’s water rights holders. Even if subsequent decisions address the unanswered questions suggested above, the extension of the public trust doctrine into heretofore uncharted waters clearly comes at the expense of water rights holders. The ultimate question left unanswered by National Audubon Society is whether the state’s belated assertion of trust interests to the detriment of water rights holders may go uncompensated. Since the entire tenor of National Audubon Society suggests that California would not compensate a public trust influenced reallocation, a California water rights holder can likely look only to the federal Constitution for possible relief.

298. In addition to appropriative rights, California recognizes riparian, prescriptive, and pueblo rights. See, e.g., W. Hrutcsms, supra note 22.
299. See Unsettled Law, Unsettled Rights, supra note 269, at 15-16.
301. As described above in Illinois Central Railroad, the Supreme Court suggested that compensation would have to be made for the value of any improvements taken as a result of the revocation of the state's grant of submerged lands. See supra notes 277-84 and accompanying text. At the very least, this dicta suggests that the City of Los Angeles has a claim to the value of any improvements made useless as a result of a reallocation of water. See also City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).
302. See infra notes 303-49 and accompanying text.
VII. IMPLICATIONS OF THE RETREAT FROM PROTECTION OF PRIVATE PROPERTY INTERESTS IN WATER: PROLOGUE TO A TAKINGS ANALYSIS

The extension of California's police powers over private property in water parallels similar legislative and judicial alterations of private property in water in other states.\[303]\ Other states have also asserted broadened public trust interests over water resources.\[304]\ While a few early police power cases did invalidate legislative attempts to modify private property interests in water,\[305]\ the vast majority of courts have approved extensive modifications or eliminations of private rights and property without payment of compensation.\[306]\ Although these police power cases stretch back to the early years of this century, to date the United States Supreme Court has not squarely addressed the limits of a state's power to adjust private interests in water, without compensation.\[307]\ Similarly, no United States Supreme Court

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303. Most of the limitations have involved legislative retrenchment from the riparian doctrine. Oregon's 1909 Water Appropriations Statute provides the general model. 1987 Or. Laws 539.010-240. Among other things, this statute required all water users to obtain appropriative permits and limited theretofore vested riparian rights to the quantities of water actually beneficially used as of the statute's enactment. Id. at 539.010. Subsequently, similar legislation has been passed in several other states. See, e.g., IOWA CODE ANN. §§ 455A.1.40 (West 1971); KAN. STAT. ANN. §§ 82a-701 to 82a-725 (1984); S.D. CODIFIED LAWS ANN. ch. 46-1-9 (1987); WASH. REV. CODE ANN. §§ 90.14.010-910 (Supp. 1988). Some of these statutes have legislated forfeitures of vested riparian rights for nonuse over some period of time. See, e.g., WASH. REV. CODE ANN. § 90.14.070 (Supp. 1988) (five consecutive years). North Dakota enacted a statute repealing prior legislative recognition of riparian rights. 1963 N.D. Laws, ch. 419, Sec. 7. See also Comment, Modification of the Riparian Theory and Due Process in Missouri, 34 Mo. L. REV. 562 n.2 (1969) (listing 10 eastern states that had modified riparian law prior to 1969); Note, The Constitutional Sanctity of a Property Interest in a Riparian Right, 1969 WASH. U.L.Q. 327 (1969) [hereinafter The Constitutional Sanctity]; King, Regulation of Water Rights Under the Police Power, in WATER RESOURCES AND THE LAW 271 (1958) [hereinafter King].

304. See cases collected in Lazarus, supra note 263, at 644 n.77.


307. Four cases are commonly cited by state courts as indicating the United States Supreme Court's tacit approval of state redefinition of water rights. Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931); Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339 (1909); Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 202-03 (1899). See, e.g., Peabody, 2 Cal.2d at 366 (citing Connecticut v. Massachusetts, Hudson County, and Rio Grande Dam); King, supra note 1, at 292 (citing Connecticut v. Massachusetts, Boquillas and Rio Grande Dam). None of these cases, however, directly addresses the compensability of a change in a previously recognized, state created vested water right. Cf. Ohio Oil Co. v. Indiana, 177 U.S. 190, 204-11 (1900)
holding has reviewed the takings issues raised by the recent extension of the public trust doctrine.\textsuperscript{308}

A complete "takings" analysis for water rights is beyond the scope of this article. Rather, in the space remaining, we wish to raise some initial questions which must be addressed by any court that ultimately confronts a takings challenge to a redefinition of water rights.

A takings or due process analysis begins where this article also started, with a definition of "property."\textsuperscript{309} Within the linguistic context of the due process and takings clauses, "property's" uncertain meaning\textsuperscript{310} becomes bound up within the equally fugitive meanings of "due process" and "takings."\textsuperscript{311} Nevertheless, the Supreme Court has developed several rules about "property" for constitutional analysis. Principally, the Supreme Court defers to state law for definitions of property interests.\textsuperscript{312} This deference to the states' power to create or define property interests is not, however, absolute. Two main qualifications exist. First, private expectations under state law must also be reasonable in light of substantive federal law.\textsuperscript{313} Second, states may not redefine property interests arbitrarily. For example,
in *Hughes v. Washington*, Justice Stewart suggested in a concurrence that a sudden judicial redefinition of a common law property right could itself trigger the due process or compensation provisions of the federal constitution. Similarly, in *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, the Court held that neither a state court nor legislature could redefine property “ipse dixit” without triggering the fifth amendment prohibitions.

Despite its erstwhile deference to state property law, the Supreme Court, in cases involving the validity of regulatory activities affecting property, has developed a “takings” analysis which in part has federalized the definition of property. The Court has focused upon the entire “bundle of rights” which constitutes ownership under a given state’s law. Ruling metaphorically, it has refused to find a compensable taking where only one “strand” or “stick” of the “bundle” or state created ownership rights has been impaired. Rather, the court in these regulatory cases, has introduced the concept of “investment backed expectations” as a functional, federal definition of property. Under this formulation, the Court has asked whether the government’s “interference” with “reasonable” or “distinct” investment backed expectations has been so egregious as to warrant compensation. So long as some reasonable return exists, no “taking” will occur.

On the other hand, if the character of governmental action is not “regulatory” but constitutes a physical invasion of the property or dispossession for public use, the Supreme Court has generally refused to apply the economic backed expectation approach.

In short, when the “character of the governmental action,” is a permanent physical occupation of property, our cases uniformly

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319. *See, e.g.,* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (regulation effects a “taking if owner has no "economically viable use of his land"). Compare state cases cited *supra* note (discussing reasonable use in development cases).
have found a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owners.  

An unexplored issue in the water rights area is whether governmental actions of the type described in this article are "regulatory" or are more properly characterized as physical invasions. As demonstrated below, this determination is not always easy to make.

Before translating this discussion of property rights in California water into "takings" language, two interrelated problems that often arise in any such discussion deserve attention. The first problem can be called the "water-is-different syndrome." This label addresses the host of commonly held beliefs that water's status as a fluid, or its necessity for life, require different property rules. The second problem involves a more juristically sophisticated formulation of the same thesis and can be called the "mere usufruct" syndrome. Under this rubric, holders of water rights have only a "mere" or "simple" right of use. Thus, the theory goes, because the bundle of ownership rights to waters is supposedly less ab initio than rights pertaining to other property, the state is more justified in removing whatever sticks in the bundle it had previously vested. Upon closer inspection, however, neither syndrome hold much water as a basis for singling out holders of water rights to bear the uncompensated burden of financing social improvements.

Adherents of the "water if different" philosophy point to the physical differences between water and other natural resources to justify imposition of different property rules on water. These different rules have restricted application of market principles to water re-

321. Id. at 458 U.S. at 434-35 (citations deleted).
324. Blackstone states: "For water is a movable, wandering thing and must of necessity continue common by the law of nature, so that I can only have a temporary transient, usufructuary property therein." 18 W. BLACKSTONE'S COMMENTARIES, (emphasis in original), quoted in, WATER RIGHTS IN THE WESTERN STATES, supra note 1, at 15. Blackstone further describes the "qualified property" interest in fire, light, air and water. 2 BLACKSTONE'S COMMENTARIES 395, quoted in WATER RIGHTS IN THE WESTERN STATES, supra note 22, at 15.
325. See supra notes 13-14, 317 and accompanying text.
sources in favor of rules which limit certainty and transferability. Ultimately, these different rules lead to ad hoc judicial or administrative reallocations of water from perceived changes in social needs.\textsuperscript{326}

Without doubt, water has unique physical attributes. Twenty years ago, Professor Kelso summarized water’s three principal differences from other resources.\textsuperscript{327} First, water has an “externality” feature: “Because it flows, quantity and quality changes resulting from its use at one place and time may affect other users at other places and times.”\textsuperscript{328} Second, water has a “cyclic peculiarity:” “Because water is generally not consumed in use, because it enters readily into the soil and the atmosphere, and because it flows, its supply is generally replenished continuously and may be used repeatedly though frequently only with quality deterioration.”\textsuperscript{329} Finally, water has a “collective consumption property:” “Because many of the products of water use are available without restraint to everyone in a position to use them, the producer of those products cannot withhold them from consumption until he ‘gets his price’ as can the producer of most other natural resource products.”\textsuperscript{330}

Nothing in these physical attributes, however, by itself requires that a system of water rights, and an owner’s expectations, develop differently from any other system of rights in natural resources. More importantly, nothing within these physical attributes justifies an American state that has once created or recognized private property rights in water from modifying, reallocating or abandoning those rights without payment of compensation.

Equally unavailing to defeat investment backed expectations is an appeal to water’s necessity for life. Water is no more essential to life than food. One could hardly argue with impunity that a state may send its sheriff into someone’s kitchen in order to seize food without compensation for redistribution to the needy. Similarly, land is absolutely essential for all human activities. Yet, as Hirshleifer noted, a statute unilaterally changing the common law and making all land public property would be laughable.\textsuperscript{331}

\textsuperscript{326} See generally Water Rights (T. Anderson ed. 1983) (advocating development of market alternatives for allocation of water resources).
\textsuperscript{327} Kelso, supra note 322, at 178.
\textsuperscript{328} Id.
\textsuperscript{329} Id.
\textsuperscript{330} Id. at 179-80.
\textsuperscript{331} See, e.g., Herminghaus, 200 Cal. at 125, 252 P.2d at 625 (quoting In re Waters of Hood River, 114 Or. 112, 227 P. 1065, 1087 (1924)) (“simple usufruct”); English v. County of Alameda, 70 Cal. App. 3d, 226, 243-44, 138 Cal. Rptr. 634, 645 (1977) (right to reside in tax exempt property) (“mere usufruct”).
A corollary to the "water is different" syndrome is the argument that owners of water rights hold "mere" or "simple" usufructs. Because water rights owners hold only the right to use and enjoy the fruits of their uses of waters, the argument goes, the state may reappropriate water at its whim without payment of compensation to the water rights owners.

In this simple form, the argument breaks down upon closer inspection. Nothing within the nature of a "usufruct" itself mandates such a result. Indeed, the California Supreme Court has used "usufruct" in the same breath as "vested right." Although usufructuary rights are most frequently associated with rights in watercourses, they also arise in other contexts. For example, a leasehold has been equated with a usufruct. In addition, profits-a-prendre are in essence usufructuary rights. They grant the holder no right of possession in land but only the right to come upon and harvest timber or mine minerals. It would be unthinkable that a grantor of a profit could unilaterally take back the grantee's right and leave the grantee no remedy. Similarly, a life estate in property is merely a


Usufructuary rights have advantages over ownership rights. . . . [U]sufructuary rights avoid the "taking" problem potentially created when regulatory legislation limits a landowner's rights to withdraw water. If the prevailing legal scheme vests actual ownership of ground water instead of protecting rights to the use of water, regulation of ground water withdrawal may raise constitutional problems. By defining the rights as usufructuary, the constitutional issue does not arise.

Id. at 461 (emphasis added, footnote omitted). The author of the Note cited no authority for the last sentence quoted above.

333. See, e.g., Note, supra note 331.

334. In Dannenbrink v. Burger, 23 Cal. App. 587, 595, 138 P. 751, 754-55 (1913), the court stated: "it follows that the waters so escaping from the Waste [sic] ditch... having been appropriated and for about twenty-five years used and applied by the defendants to a beneficial purpose, they thus acquired a vested right or usufruct therein of which they cannot now justly be divested by the plaintiffs." (emphasis added.)

335. See State v. Moore, 12 Cal. 56, 70 (1859).

336. See, e.g., 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 439, at 620 (9th ed. 1987) (hereinafter B. WITKIN) ("[A] right to take something from the land of another, either a part of the soil or its products") (emphasis in original). One common profit is an exclusive oil lease. Id. § 737, at 919. Oil leases have been described as usufructs. See, e.g., Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 143, 99 P. 483, 485 (1909). See also Smith v. Cooley, 65 Cal. 46, 48, 2 P. 880, 881 (1884) (mining rights as usufructs); McCord v. Oakland Quicksilver Mining Co., 64 Cal. 134, 141, 27 P. 863, 865 (1883) (mining rights as usufructs). But see Richardson v. Callahan, 213 Cal. 683, 684, 3 P.2d 927, 928 (1931) (comparing oil and gas indenture with "mere" usufruct).

337. In California, and in jurisdictions following the Restatement of Property, remedies for interference with an interest under a profit are the same as those for interference with an easement. B. WITKIN, supra note 336, § 439, at 620.
usufructuary right.\textsuperscript{338} Again, however, once granted, such a usufruct’s
gantee is not without relief should the grantor attempt unilaterally
to take back the grant. In both of the above examples, it is even
more apparent that a \textit{state} has no justification to seize without
compensation either the profit or the life estate and dedicate it to
the public good solely because such rights are “mere” usufructs.

Thus, it is not the “mere” \textit{usufructuary} nature of the water right
that allegedly authorizes uncompensated reallocation of water rights.
Rather the argument that the nature of water rights authorizes greater
state intervention without compensation flows from the states’ pur-
ported “ownership” rights in their waters.\textsuperscript{339} Whatever the ultimate
determination of state claims to pre-existing but previously undis-
posed state title,\textsuperscript{340} such arguments have nothing to do with the
usufructuary nature of a water right. Furthermore, by themselves,
they do not justify curtailing a water right, such as through Califor-
nia’s 1928 Amendment.\textsuperscript{341} upon police power grounds. Rather, the
long history of cases describing “mere” usufructs should simply be
understood as distinguishing rights of use from ownership of the
\textit{corpus} of a body of water. Thus, nothing about a “usufruct”
authorizes an uncompensated judicial redefinition of the usufructuary
right.

As described above, California courts have redefined heretofore
vested property rights in several ways. Prediction of the rights to
compensation arising out of these redefinitions is uncertain, however,
since the court’s analysis proceeds case by case.\textsuperscript{342} Absent a specific

\textsuperscript{338} See, e.g., \textit{In re Shaw’s Estate}, 198 Cal. 352, 363, 246 P. 48, 52 (1926) (trust beneficiary
received life interest in usufruct of trust corpus); Title Ins. & Trust Co. v. Duffill, 191 Cal.
629, 648, 218 P. 14 (1923) (quoting Gray v. Union Trust Co., 171 Cal. 637, 640, 154 P. 306,
308 (1915) (trust beneficiary’s usufruct). \textit{See also} Richards v. Donner, 72 Cal. 207, 209, 13
P. 584, 585 (1887) (grantor sought right of control and usufruct during his life).

\textsuperscript{339} \textit{See generally} Note, \textit{Water Rights: A Question of Ownership}, 10 \textit{WASHBURN L.J.} 465
(1971); \textit{Trelease, Government Ownership and Trusteeship of Water}, 45 \textit{CALIF. L. REV.} 638
(1957). Walston argues that a state’s public trust obligations arising out of sovereignty over
its waters, in effect, mandate a state to allow \textit{only} nonvesting usufructuary rights in its waters.
Walston \textit{supra} note 269, at 83-88. Walston’s argument, however, ignores the history of
usufructuary rights in water. Water rights were not traditionally viewed as grants by the
sovereign of a sovereign’s resource. Rather, the usufructuary principle arose out of the
distinction between ownership of the \textit{corpus} and ownership of the use of water. Walston has
improperly elevated this civil and common law distinction into an essential attribute of
sovereignty. At least one civil law commentator, however, has questioned the civil law’s ancient
conclusion that the corpus of certain resources, such as water, cannot properly be “owned.”
\textit{See Yiannopoulos, supra} note 25, at 699-700.

\textsuperscript{340} \textit{See, e.g., State Reserved Water Rights, supra} note 166.

\textsuperscript{341} \textit{See supra} notes 167-90 and accompanying text.

\textsuperscript{342} \textit{See, e.g., Hodel v. Virginia Surface Mining \\& Reclamation Ass’n, Inc.} 452 U.S. 264,
factual context, few conclusions can be reached in the abstract. Moreover, the two extreme situations contemplated by the *Racanelli* and *National Audubon Society* decisions have not yet been reduced to a specific factual context; rather, the courts in those two decisions have merely announced reallocation principles for future application to specific water rights disputes.

With the above qualifications in mind, it is nevertheless possible to sketch several different factual scenarios arising after the *Racanelli* and *National Audubon Society* decisions and suggest how the different scenarios call for different results under the federal Constitution’s due process and takings challenges. The simplest scenario envisions a dispute between appropriators. Assume that the prior appropriator is a farming family that has appropriative rights dating back to the Gold Rush. The family uses 600 acre feet of water per year to raise non-surplus crops at a profit on their 200 acres of Class I agricultural land. Further assume that the farmers use state-of-the-art technology to maximize their water use efficiency. Now assume that a large municipality also appropriates water from the same river as the farm family. The municipality’s rights arose after the farming family’s rights. The 600 acre-feet of water used by the farming family might supply the domestic needs of 600 families.

If a drought strikes, may the State Water Board or a court declare the farming family’s agricultural use “unreasonable” and authorize the municipality to use such rights without compensating the farm family? Surely, if compensation is not made under these circumstances, prospects are dim that it would be awarded in any circumstance. In this circumstance, declaration of an unreasonable use, or a trust-based reallocation, would effectively deny the farming family all return from their water right. Even if such reallocation were limited to the period of a drought, it appears as a temporary deprivation of the farming family’s entire use of their water right. In such circumstances, the sudden redefinition of the farming family’s use as “unreasonable” must constitute a taking.

The above situation differs from the early post-1928 amendment cases since no question arises as to the reasonableness of the farming family’s method of use. By assumption, their use is as efficient as

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343. Alternatively, given the public trust doctrine’s protection of “commercial” uses of water, might the state declare that such commercial interests were better served by supporting the municipal workers, whose economic output (we assume) exceeds greatly the farming family’s production?
possible. Moreover, the scenario assumes a dispute between two appropriators. As described above, well prior to the 1928 amendment, a reasonable use limitation appeared between appropriators. Thus, the 1928 amendment by itself should not affect the outcome of the above scenario. In no case arising prior to the 1928 amendment, however, did a court determine that a subsequent appropriator could take all of a stream's flow to the detriment of any use by a prior appropriator.

Thus, in this circumstance, absolutely no precedent exists for authorizing an uncompensated reallocation of the farming family's vested right. Moreover, under the circumstances sketched above, fairness requires compensation. The farming family should not have to shoulder the entire burden of providing water for the urban dwellers. If the economic value produced by the municipal residents so greatly exceeds that of the farming family, then it should be no great cost to the urban dwellers to share with the farming family some of the benefits derived from their use of the waters. Under these circumstances, only a bald appeal to an unfeeling utilitarianism supports an argument that this reallocation go uncompensated. Mere utilitarian considerations alone, however, do not justify uncompensated governmental reallocation of other resources. A reallocation of water under the above circumstances likewise should not go uncompensated.

A slight modification of the circumstances just described will demonstrate how difficult it may be to determine in a water rights context whether the courts should apply the regulatory taking doctrine (with its investment backed expectations element) or the physical invasion doctrine (which would grant compensation without regard to the extent of economic impact on the owner). If the drought needs of the municipality can be met by temporarily using only one-half of the farming family's water and if the farming family can make a small profit with that amount of water (but much less profit than would be made if all the water were available), is the farm family entitled to compensation?

If the answer to this inquiry is in the negative, one must be applying the regulatory line of cases and arguing that the farm family has been left a sufficient number of sticks from their bundle of rights to defeat a takings claim.44 One the other hand, if the answer is in

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44. If the ability to make some profit with the reduced water supply is eliminated from the hypothetical, the farm family should be entitled to compensation even under the regulatory line of cases.
the affirmative, one is equating the loss of water with a direct expropriation of property. In other words, the taking of the water is treated the same as if the government had taken one half of the farm family's land for a year for some proper governmental purpose. Which of these approaches will be adopted by the United States Supreme Court when a proper case reaches it is unknown at this time. However, Joslin's and Racanelli's utilitarian allocation approach to water rights will certainly engender some significant test cases.

A public trust based reallocation of water might also not implicate the regulatory takings cases with their investment backed expectations language. National Audubon Society was premised not on the police power but on a pre-existing title held by the state as an aspect of sovereignty. The primary focus of a takings challenge under the public trust will likely be whether the state's belated assertion of a superior title is valid on any grounds or, rather, an artifice to avoid compensation. Relevant evidence to that validity determination will likely include both the notice, if any, received by the water rights holders of the state's paramount interest and the prior history of legislative and judicial conduct towards vested water rights.

It appears that it will be much more difficult to sustain a takings claim when the use of the water is not challenged, but rather the method of use is being regulated. At some hypothetical point, however, regulations governing methods of diversion and use may become so expensive that they effectively confiscate property and thus constitute a taking. Other than this extreme situation, the Board and the courts apparently have broad authority to require efficient use of this vital natural resource. The issue, therefore, in the "methods of use" arena is much more a matter of policy than it is of law: How much of the ever increasing expense of conserving the state's

345. See Fifth Amendment Limitation, supra note 270, at 1307-17.
346. This discussion assumes that the state's public trust reallocation attempts to shift water from a consumptive use to an instream use. The due process and takings analysis might differ, however, if the state shifts water from one consumptive use to another. The public trust's commerce prong theoretically supports state supervision of any commercial uses of water. While the trust purposes normally are focused on nonconsumptive public uses, in theory the courts could find the public's interest in commerce best subserved by a trust based reallocation of rights from one private user to another.

If the state proceeds under a commerce guise to shift water from agriculture to industry on the basis of perceived utilitarian gains, the takings analysis should be identical here with the police power cases. Clearly, the state has never so extended its trust protected "commerce" interest as to prefer one consumptive user over another. Such an extension now would constitute an extreme redefinition of property and trigger a due process analysis.
waters should be borne by the senior rights holders and how much should be borne by junior would-be appropriators. Appropriate cost allocation is the primary inquiry.

VIII. Conclusion

Historically, the courts have recognized that judicial decisions represent the primary way rules of property, and therefore vested property rights, are created. Once rules of property have been sanctioned by the courts, they become the basis for all social and economic decisions involving acquisition, use, and transfer of that property. Therefore, the courts have been hesitant and cautious in changing the rules and thereby retroactively impacting the reasonable expectations of property owners. Stare decisis has a special importance in property law, which was described by the United States Supreme Court as follows:

Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . . Where courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.347

Early California water law followed this admonition. The cases decided prior to the late 1960s rejected all arguments that water should be taken from one user and given to another because of the greater importance of one of the competing uses. The striking difference between these earlier cases and the “modern” view can be graphically demonstrated by comparing, side by side, quotations from two cases, one decided in 1904 and the other in 1986:

[The riparian] right is a part of the estate of the plaintiff—parcel in its land,— and whether it is or is not as valuable in a monetary point of view, or beneficial to the community in general, as would be the use of a like quantity of water in some other place, it cannot be taken by the defendants without right, or in the case of a public use elsewhere, without compensation.348

The decision [as to which water use to prioritize] is essentially a policy judgment requiring a balancing of the competing public interests, one the Board is uniquely qualified to make in view of its special knowledge and expertise and its combined statewide responsibility to allocate the rights to, and control the quality of, state water resources.349

It is difficult to conceptualize a more fundamental departure from stare decisis and the traditional rules of property than that evidenced by the Audubon and Racanelli decisions. California law has truly moved into an era where water use is viewed as a government granted privilege to be monitored by the Board and the courts and, when necessary, reallocated among competing users to achieve the greatest social good. The questions which remain are: is this good policy and, if so, can this new order be accomplished without compensation to those who thought they held vested water rights or will some future judicial decisions require a reappraisal of the state’s reallocation powers?