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Who Owns Reclaimed Wastewater

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Who Owns Reclaimed Wastewater?

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There has been amazingly little written about the ownership of treated wastewater.[1] This is probably a result of the nature of the resource and the fact that, until the development and utilization of increasingly efficient treatment technologies, treated wastewater was dealt with primarily as a health-related environmental issue.[2] In the past, treated wastewater had little value; treatment plant owners did not want it, water suppliers often disclaimed any interest in it, and downstream water users often complained about its discharge.

In recent years, however, two factors have encouraged increased interest and focus on the ownership of this resource. First, the quality of wastewater has improved because of the strict requirements of the Clean Water Act,[3] and high quality wastewater has increased the potential and desirability for re-use.[4] Second, as more of California's available water

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1. At present, the author is only aware of the following: Ernest C. Brown & Nathaniel Weinstock, *Legal Issues in Implementing Water Reuse in California*, 9 ECOLOGY L.Q. 243 (1981); Kendall Layne, *Wastewater Reuse in California*, 3 STAN. ENVTL. L. ANN. 71 (1980-81); Adolphus Moskovitz, *Quality Control and Re-Use of Water in California*, 45 CAL. L. REV. 586 (1957); Robert A. Pulver, Comment, *Liability Rules as a Solution to the Problem of Waste in Western Water Law: An Economic Analysis*, 76 CAL. L. REV. 671 (1988); Ann J. Schneider, *Groundwater Recharge with Reclaimed Wastewater: Legal Questions in California*, *in* ARTIFICIAL RECHARGE OF GROUNDWATER, 683-88 (Takashi Asano ed., 1985); Michele A. Staples, How to Promote Water Reclamation and Reuse Through the California Water Rights System (1992) (unpublished manuscript, on file with the *Pacific Law Journal*).

2. The actual operation of a wastewater treatment plant, and the discharge of treated wastewater are highly regulated and must undergo strict environmental review and permitting. For example, the plant's operation and discharges are subject to regulation pursuant to the Clean Water Act. *See* 33 U.S.C. §§ 1251-1387 (1988) (codifying the Clean Water Act); *id.* § 1342 (1988 & Supp. 1992) (including the National Pollutant Discharge Elimination System (NPDES) process within the Clean Water Act); *see also* CAL. WATER CODE §§ 13000-13389 (West 1992 & Supp. 1994) (enabling legislation for the state implementation of the provisions of the Clean Water Act). In California, most wastewater treatment plants are Publicly Owned Treatment Works (POTW) and, as a consequence, are also subject to general environmental review such as is provided for under the California Environmental Quality Act (CEQA). *See* CAL. PUB. RES. CODE §§ 21000-21069 (West 1986 & Supp. 1994).

3. *See* 33 U.S.C. §§ 1251-1387 (1988).

4. *See* GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 63-64 (1978) [hereinafter GOVERNOR'S FINAL REPORT].

supplies are allocated for fishery and instream uses,[5] competition for the remaining supplies has intensified and wastewater is now viewed as a resource rather than as a waste.[6] As a consequence, ownership of that resource is a matter of great interest.

It is the author's view that the law solidly supports the concept that the owner of a wastewater treatment facility holds the exclusive right to treated wastewater as against anyone who has supplied the water discharged into a wastewater collection and treatment system, or as against any downstream water user. The concept itself can perhaps be best understood through consideration of the following four questions: First, what if the owner of a wastewater treatment plant, for whatever reason, decided not to discharge wastewater but, rather, decided to "hold it,"[7] that is, retain that water on-site, or in some similar fashion re-use that water without discharging it? Second, could someone, anyone, compel the owner to make the discharges? Third, what if the owner of a wastewater treatment plant decided to relocate its facility and, as a consequence, discharge wastewater in a new or different location? Finally, could someone, anyone, compel the owner to continue the discharges in the old location?

Assuming no environmental or permitting problems[8] (or contractual obligations to do otherwise), the answer to these questions would be that the wastewater treatment plant owner could refuse to make releases of wastewater and could relocate its facilities. The wastewater treatment plant operator is under no obligation to continue the discharges in order to meet the needs of either the individual or entity that supplied water discharged into a wastewater collection and treatment system, or any downstream

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5. For example, the Central Valley Project Improvement Act will reduce water supplies available to federal Central Valley Project contractors by about 800,000 acre-feet through reallocation of that supply for fish and wildlife purposes. Central Valley Project Improvement Act of 1992 (CVPIA), Pub. L. No. 102-575, 106 Stat. 4600, 4706 (1992); *see* National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 437, 658 P.2d 709, 721, 189 Cal. Rptr. 346, 357 (1983) (noting that the public trust doctrine, which requires protection of navigable waters from harm caused by diversion of water from non-navigable tributaries, reduces the Mono Lake water supply to the City of Los Angeles); *see also* United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 103, 227 Cal. Rptr. 161, 170 (1986) (stating that the State Water Resources Control Board must consider all beneficial uses, including fish and wildlife uses, and has power to curtail current uses of water, even uses under vested rights, in order to achieve a balance).

6. GOVERNOR'S FINAL REPORT, *supra* note 4, at 63-64.

7. When dealing with treated wastewater, it is unwise to forget exactly what it is that we are talking about..

8. *See supra* note 2 and accompanying text (providing examples of various regulatory requirements).

water users.[9] There is simply no legal authority that could compel the continued discharges.[10]

Additional and perhaps more complicated questions arise, however, when the owner of a wastewater treatment plant decides to re-use wastewater (or sell it to another) within the original place of use, or outside of the original place of use. In these scenarios, what are the rights of a wastewater treatment plant owner as against third party claimants to the wastewater? To answer this question, one must understand the ownership rights of the wastewater treatment plant owner. The answer to this question has important ramifications in this era of water shortages where conservation and re-use of water are looked at as crucial elements of the water supply equation. The ownership rights of a wastewater treatment plant owner can be based upon either one of two independent threads of analysis.

First, one can support the treatment plant owner's claim of ownership of wastewater using fairly traditional concepts of water rights law.[11] Water rights law concepts seem an appropriate way to analyze the issue because the wastewater, after all, has all of the physical properties of water. In order for this analysis to be complete, three variables must be considered which would allow one to take the rights of all possible persons claiming an interest in the wastewater:

(1) The Source of the Wastewater. One must trace the source of the wastewater upstream (so to speak) to determine its origin and whether something about its origin would allow someone else besides the wastewater treatment plant owner to claim the wastewater.

(2) Downstream Use. One must look downstream of the historic wastewater discharge to determine if anyone downstream, for whatever reason, could have gained a right, as against the treatment plant owner, to wastewater discharges.

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9. *See infra* note 50 and accompanying text (providing authority that supports the notion that treatment plant operators are not required to continue discharges).

10. *Id.*

11. *See infra* notes 27-62 and accompanying text (discussing the traditional water rights law as the first strand of analysis).

(3) Place of Use. One must look at the intended place of use of the wastewater to determine if this somehow will affect the analysis.

The second thread of analysis upon which to base the ownership rights of a wastewater treatment plant owner is by exploring the nature of wastewater and questioning whether traditional concepts of water rights can even have application in this area. It may be that "wastewater" is, by nature, a different type of property or commodity than "water." If this is the case, it would presumably matter little what the water law claims of upstream or downstream individuals or entities were.[12]

This Article attempts to answer the question of ownership of treated wastewater by exploring the foregoing threads of analysis. Also discussed, in summary fashion, are instream flow and environmental considerations,[13] as well as procedural considerations associated with securing the right to use reclaimed wastewater.[14] First, however, no water rights discussion is complete without initially viewing the statutory scheme under which water rights are determined.[15]

I. THE WATER CODE TREATMENT OF WASTEWATER

At first blush, the California Water Code would appear to be determinative on the question of who owns treated wastewater.[16] Water Code section 1210 states that:

> The owner of a waste water treatment plant operated for the purpose of treating wastes from a sanitary sewer system shall hold the exclusive right to the treated waste water as against anyone who has supplied the water discharged into the waste water collection and treatment system, including a person using water under a water service contract, unless otherwise provided by agreement.

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12. *See infra* notes 63-81 and accompanying text (describing this second thread of analysis).
13. *See infra* notes 82-86 and accompanying text.
14. *See infra* notes 87-93 and accompanying text.
15. *See supra* notes 16-26 and accompanying text (discussing the California Water Code's treatment of wastewater).
16. CAL. WATER CODE § 1210 (West Supp. 1994).

> Nothing in this article shall affect the treatment plant owner's obligation to any legal user of the discharged treated waste water.[17]

However, two immediate questions are raised after reading Water Code section 1210:

(1) What claim can be made by a "legal user of the discharged wastewater" and who are these people?
(2) What is the claim, if any, of the "water supplier?"

The answer to these two questions is found not in the Water Code, or its non-existent legislative history,[18] but in an analysis of the basic wastewater ownership concepts summarized above. The California Water Code merely articulates and restates in statutory form the nature of the law that existed prior to its enactment.[19] The Water Code provision and, in particular, its assertion that "[n]othing in this article shall affect the treatment plant owner's obligation to any legal user of the discharged treated wastewater . . . ."[20] does not add, as has been suggested by others,

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17. *Id.*

18. Today's practitioners of California water law, including the author, find that, as a practical matter, one cannot look primarily to the Water Code to find the law of water rights. This is so because much of the law is not codified, but is a judicial refinement and revision of common law. The law of water rights in California grew out of any early judicially mandated departure from English common law, and the adoption of the rule of "first in time, first in right" applied by miners to both their claims and the allocation of surface waters used to develop their claims. Irwin v. Phillips, 5 Cal. 140, 147 (1855); GOVERNOR'S FINAL REPORT, *supra* note 4, at 6-7. This appropriative rights doctrine was a judicial doctrine used to resolve water rights disputes between miners from 1855 through the mid-1880s. GOVERNOR'S FINAL REPORT, *supra* note 4, at 7. It was codified "in a few brief sections" in the California Civil Code of 1872. *Id.* The major development and refinement of California water law continued to be within the judicial system, and 19th century water rights law "dealt primarily with disputes among individual users of water — miner v. miner, farmer v. farmer, miner v. farmer." *Id.* at 7-8. Most water legislation, including the 1928 amendment of the California Constitution to limit all water rights to reasonable use (CAL. CONST. art. X, § 2), responded to court decisions or codified them. *Id.* at 8-9. A more complete history and explanation of the development of California water rights law is beyond the scope of this paper. The point of this Article is that the Water Code codifies and refines the common law and supplements the common law with administrative provisions. Consequently, apart from the administrative provisions, the legislative history is not found within the records of the California Legislature but in the common law. *See, e.g., Review of Selected California Legislation, Property; water use,* 12 PAC. L.J. 525-531 (1980) (analyzing 1980 California Statutes chapter 933, sec. 1-16, at 2954-61, and noting that, among other things, it "redefines the effect that conformity with local custom has on the determination of reasonable use . . ." and notes that "under prior law, *courts* would look to local custom . . . ." (emphasis added)).

19. *See supra* note 18 (discussing the judicial and legislative development of California water law).

20. CAL. WATER CODE § 1210 (West Supp. 1994).

any rights in downstream water users.[21] This section does not create any legal rights in anyone other than the wastewater treatment plant owner. Water Code section 1210 merely recognizes the treatment plant owner's obligation to any "legal user" of the discharged water.[22] To be a legal user of the discharged water, one must have perfected, in some articulable manner, a right to that water.[23]

Similarly, the rights of a "water supplier" are not at all modified or impaired by the enactment of Water Code section 1210. To the extent that any person or entity has acquired a right to treated wastewater superior to the wastewater treatment plant operator, it must be by means independent of Water Code section 1210.[24] Prior to the enactment of this section, the only rights that a water supplier could have to the discharged wastewater were the rights that had been agreed to by contract between the water supplier and the wastewater treatment plant owner.[25] As a consequence, Water Code section 1210 merely articulates what had been prior law.[26]

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21. There has been some suggestion that this language provides some new right not otherwise recognized or that this language confuses what may have been preexisting legal concepts. *See* Schneider, *supra*, note 1, at 683; Staples *supra* note 1, at 1 (contending that water rights are "uncertain" as to ownership of reclaimed wastewater). As will be shown, this contention is weak and not credibly supported. *See infra* notes 22-26 and accompanying text.

22. CAL. WATER CODE § 1210 (West Supp. 1994).

23. Discharged wastewater is not subject to riparian rights. *See* E. Clemens Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 637-39, 171 P. 417, 419-20 (1918) (stating that riparian rights do not attach to foreign waters in a stream to which riparian lands are contiguous). However, such flows are appropriable, within limits. *See* Moskovitz, *supra* note 1, at 600. The exclusive method of acquiring appropriative rights, as provided by the Water Commission Act of 1913, is through application to the State Water Resources Control Board for a permit. People v. Shirokow, 26 Cal. 3d 301, 308, 605 P.2d 859, 865, 162 Cal. Rptr. 30, 35 (1980); United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 102, 227 Cal. Rptr. 161, 168 (1986).

24. CAL. WATER CODE § 1210 (West Supp. 1994).

25. *See* GOVERNOR'S FINAL REPORT, *supra* note 4, at 63 (noting that as between water suppliers and the wastewater treatment facility, parties commonly settled questions of ownership through private agreements).

26. *Id.*; CAL. HEALTH & SAFETY CODE §§ 4950-5063 (West 1970 & Supp 1994) (discussing sewer revenue bonds); *see also* CAL. HEALTH & SAFETY CODE § 5008(a)-(b) (West 1970) (stating that a municipality who owns or operates a sewer system has the authority to sell or otherwise dispose of the water, sewage effluent, or other by-product resulting from the operation of the system or to conserve any water or effluent received from the system and to put it to beneficial use by spreading for groundwater recharge).

II. THE FIRST THREAD OF ANALYSIS — TRADITIONAL CONCEPTS OF WATER RIGHTS LAW

A. *The Source of the Wastewater*

There are three basic sources of water that would be processed in a wastewater treatment plant: (1) Appropriative rights to surface water;[27] (2) water obtained contractually as, for example, federal Central Valley Project water obtained from the United States Bureau of Reclamation (USBR);[28] and (3) water extracted from groundwater.[29] In the normal situation, water obtained from these sources is supplied or purveyed by a public agency or private entity. Sometimes water is wholesaled by one public agency or private entity and retailed by another. In any event, the water in question is not supplied to the wastewater treatment plant owner directly by the water supplier. Rather, the water is supplied to an industrial or residential customer who then disposes of water through the sanitary sewer system to the wastewater treatment plant. As a consequence, in order to deal with the question of a wastewater supply, in the water rights context, one needs to create a fiction which ignores the fact that the water supplied to the wastewater treatment plant is sewage discharged by an individual or entity who, in fact, was supplied with water by the water purveyor. In other words, one must assume that it is the water purveyor which has directly supplied water to the wastewater treatment plant.

One theory that has been advanced to explain the status and ability of the wastewater treatment plant owner to dispose of wastewater is that, by virtue of its accepted function of receiving and conveying wastewater, the

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27. An appropriative water right is the right to divert and use water "provided that the water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier [senior] appropriators." United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 101, 227 Cal. Rptr. 161, 167-68 (1986).

28. The Central Valley Project is a major water resource project constructed by the United States, which serves the Sacramento and San Joaquin valleys of California, and is operated by the USBR under the federal Reclamation Act laws. *See* Act of June 17, 1902, ch. 1093, 32 Stat. 390 (1902) (codified at 43 U.S.C. §§ 372, 373, 381, 391, 392, 411, 414, 419, 421, 431, 432, 434, 439, 461, 491, 498, 1457 (1902)); Act of May 20, 1920, ch. 192, 41 Stat. 605 (codified at 43 U.S.C. § 375 (1920)); Reclamation Reform Act of 1982, Pub. L. 97-293, title II, 96 Stat. 1263 (codified at 43 U.S.C. §§ 373a, 390aa to 390zz-1, 425b, 485h (1982)), as amended by Pub. L. 100-203, Title V, § 5302(a), (b), Dec. 22, 1987, 101 Stat. 1330-268, 1330-269 (codified at 43 U.S.C. §§ 390uu, 390ww (1987)); Central Valley Project Improvement Act, Pub. L. 102-575, Title XXXIV, 106 Stat. 4706 (1992). For a full description of the project, see United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

29. There are, of course, other types of water rights in California. However, as a practical matter, the rights articulated above are the most significant and relevant to the instant discussion.

sewage system and treatment plant owner has been impliedly granted the right by the water purveyor to re-use it or reconvey it to someone else.[30]

In some situations, it is not necessary to grope for a relationship between a water purveyor and the wastewater treatment plant owner because there are numerous instances where the owner of the wastewater treatment plant is also the water retailer. In this case, the wholesale of water is, in truth, the source of supply of the owner of the wastewater treatment plant. In these situations no conflict, of course, exists between the water supplier and the owner of the wastewater treatment plant since they are the same. This is, in fact, a fairly common situation.

B. Appropriative[31] Rights to Natural Flow

The general rule is that the appropriator has a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever.[32] If the appropriator decides to attempt to increase benefits by increasing consumption, the appropriator may recapture water once used before it returns to the stream and re-use it on the land for which it was originally appropriated.[33] The appropriator may do this even though junior appropriators[34] have come to rely upon the return flows and

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30. *See* Moskovitz, *supra* note 1, at 600.

31. There may, in fact, be water treated within some wastewater treatment plants that is derived from riparian uses. However, because riparian rights are limited and may only be used on riparian lands for riparian purposes, the quantity of riparian water treated in wastewater treatment plants is extremely small. Because quantities of water derived from riparian sources are not significant, this analysis will not focus on these rights. Although riparian rights permit land owners to divert to their use the water flowing by their land without regard to the extent of such use or priority in time, during times of water shortage all riparians on a stream system must reduce their usage proportionately since they are all vested with a common ownership in the water. United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 101, 227 Cal. Rptr. 161, 167-68 (1986).

32. Arizona v. California, 283 U.S. 423, 459 (1931).

33. Los Angeles v. Glendale, 23 Cal. 2d 68, 73-74, 142 P.2d 289, 293 (1943); Stevens v. Oakdale Irrigation Dist., 13 Cal. 2d 343, 348-49, 90 P.2d 58, 61-62 (1939); Cleaver v. Judd, 393 P.2d 193, 195-96 (Or. 1964); *see* United States v. Haga, 276 F. 41, 43 (D. Idaho 1921) (holding that public policy and notions of natural justice support the rule that one who expends labor and money to divert appropriable water from a stream, is entitled to its exclusive control to the extent that it is applied to beneficial uses, and such rights of control extend to wastage from surface run-off and deep percolation); *see also* Ide v. United States, 263 U.S. 497, 506 (1924) (quoting *Haga* with approval); City and County of Denver Bd. of Water Comm'rs v. Fulton Irrigation Ditch Co., 506 P.2d 144, 147 (Co. 1972) (citing *Stevens* with approval).

34. A junior appropriator's right is perfected later in time to the senior appropriator's right; the senior, or priority, right, goes to the appropriator who is "first in time" and is therefore "first in right" according to the basic role of the appropriation doctrine. *See* United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 101-02, 227 Cal. Rptr. 161, 167-69 (1986) (describing the priority system in California water rights law); WELLS A. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 41-51 (1956) (discussing the establishment of the appropriation doctrine).

have re-appropriated it from the stream or intercepted it before it reaches the stream.[35]

Return flow that has re-entered a natural stream is considered unappropriated water.[36] The courts have held that the appropriator has lost control over such flows, and protected downstream junior appropriators of this natural return flow from attempts by the upstream senior appropriator to reclaim natural return flows.[37] In addition, when an upstream senior appropriator attempts to reclaim natural return flow and use it on new lands, the senior appropriator's interests are also secondary to the rights of the downstream junior appropriators.[38] Finally, a downstream riparian may also have rights, superior to the senior appropriator's rights, to the re-use of the natural flow once it escapes the original place of use.[39]

Assuming the validity of the implied grant theory advanced above, the owner of the wastewater treatment plant stands in the place of the water supplier and, as a consequence, has an absolute right to recapture and re-use wastewater derived from a natural source.[40] This right applies as long

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35. Binning v. Miller, 102 P.2d 54, 60-61 (Wyo. 1940); *see* HUTCHINS, *supra* note 34, at 387 (noting that in early mining cases courts held that simply because others intercepted and used wastewaters flowing from mining lands, nothing precluded original users, in the legitimate exercise of their water rights, from ceasing to abandon the waste waters); *id.* at 388 (explaining further that an original holder of a water right, who has not released title to the body of waters appropriated under that right, may lawfully refuse to allow those waters to pass beyond his land for the use of the wastewater claimant); *id.* at 390 (recognizing that, while a usufruct cannot be acquired in them, wastewaters that are of a vagrant or fugitive character are subject to appropriation by others). The appropriator takes only the corpus of the water thus escaping as a personalty. Dannenbrink v. Burger, 23 Cal. App. 587, 596-597, 138 P. 751, 755-56 (1913). No permanent right to have the wastewater supply continued can be obtained by the appropriation. Joerger v. Pacific Gas & Elec. Co., 207 Cal. 8, 24, 276 P. 1017, 1025 (1929).

36. CAL. WATER CODE § 1202(d) (West 1971). *See* Dannenbrink v. Burger, 23 Cal. App. 587, 594-95, 138 P. 751, 754 (1913) (holding that appropriated water resumes the status of unappropriated water when it flows back into a stream, lake or other body of water).

37. Eddy v. Simpson, 3 Cal. 249, 252 (1853) (holding that a party cannot reclaim water he has lost); *see* Cleaver v. Judd, 393 P.2d 193, 195 (Or. 1964) (stating that defendants lost their right to recapture waste and seepage waters flowing from their irrigation project when that water joined with the waters of a natural stream); Dannenbrink v. Burger, 23 Cal. App. 587, 594-95, 138 P. 751, 754 (1913) (holding that holders of appropriated water wasted back into a stream through defective structures for a long period of time lost whatever right they may have originally possessed to the use of the waters wasted). *See generally* HUTCHINS, *supra* note 34, at 390 (discussing the appropriability of waste and seepage waters).

38. Ortman v. Dixon, 13 Cal. 33, 38-40 (1859); *see* HUTCHINS, *supra* note 34, at 154-60 (discussing the relative rights of junior and senior appropriators).

39. Crane v. Stevinson, 5 Cal. 2d 387, 399-400, 54 P.2d 1100, 1106-07 (1936); Scott v. Fruit Growers Supply Co., 202 Cal. 47, 55, 258 P. 1095, 1098 (1927); Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 330, 88 P. 978, 980 (1907).

40. *See* Binning v. Miller, 102 P.2d 54, 60-61 (Wyo. 1940). The implied grant theory may be affected by express agreements that provide otherwise. Nonetheless, unless the agreement is between the water supplier and the wastewater treatment plant owner, it is hard to understand what effect it would have on the rights of the

as the wastewater is captured before it returns to the stream and is used on the lands from which it was originally collected.[41] Moreover, while the place of use may vary, depending upon the actual underlying right, there is undoubtedly enough flexibility in the doctrine to allow re-use so long as the water is re-used to benefit lands within the area of use associated with the underlying right.[42] This is particularly true when one considers the fact that the return flow reaches the treatment facility through a sanitary sewer system.[43] In that sense the water never "escapes" from the lands in question, as is contemplated in the various legal theories dealing with return flow. Thus, without any consideration of any special rights which may inure to the owner of a wastewater treatment plant, it appears that wastewater, if it is considered as return flow from the natural flow of a stream, may be reclaimed for re-use within the service area or area of use associated with the underlying right.

Recaptured wastewater, if considered as return flow from the natural flow of a stream once it has been released to the stream, or the use of that recaptured wastewater on lands not within the original place of use, may be precluded under traditional concepts of water law. As will be discussed below, however, wastewater should not be dealt with as natural water, but rather as foreign water. As a consequence, even this limited exception to the ownership concept probably has no application when one is dealing with wastewater.

C. Appropriative Rights to Stored or Foreign Waters

Foreign waters are waters that are not "natural" to the area in which they are used or to the streams to which they are discharged.[44] There is little question that in some situations a great deal of the water that is processed through a wastewater treatment plant is derived from foreign water sources. This foreign water can derive from trans-basin diversions in which water is brought from one watershed to another,[45] or it can

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wastewater treatment plant owner.

41. *Id.*

42. Moskovitz, *supra* note 1, at 600.

43. *See* City & County of Denver v. Fulton Irrigation Dist., 506 P.2d 144, 149 (Colo. 1972) (stating that the City of Denver retained dominion over water which returned to its sewer after use by customers).

44. *See* HUTCHINS, *supra* note 34, at 69-70, 211, 393 (defining foreign waters and return flow from foreign waters).

45. Binning v. Miller, 102 P.2d 54, 60-61 (Wyo. 1940); Stevens v. Oakdale Irrigation Dist., 13 Cal. 2d 343, 345-346, 90 P.2d 58, 59 (1939); E. Clemens Horst Co. v. Tarr Mining Co., 174 Cal. 430, 440, 163 P. 492, 496 (1917).

derive from the extraction and release of groundwater that is not part of the natural stream system.[46] Water that is stored in upstream reservoirs, while natural to the stream, is foreign in time; that is, it would have naturally flowed within the stream but for the fact that it was diverted to storage.[47] Diversion to storage can be looked at as a diversion away from the stream, and a later release of this water from storage is not considered "natural" flow, but rather the flow of "foreign" waters.[48]

If one follows the logic associated with the concept of foreign waters, there is absolutely no reason why return flow from a wastewater treatment plant should not be considered "foreign." Water that passes through the sanitary sewer system and into a wastewater treatment plant is anything but natural. It has changed significantly, in one way or another, during the treatment process. (This change of character is so dramatic that the second analytical thread discussed below does not even deal with treated wastewater as water). As a consequence, to the extent that water law concepts are applied, treated wastewater, regardless of its source, should be treated as foreign waters.[49]

It follows that if wastewater discharged from the wastewater treatment plant derives from foreign sources, that wastewater, without limitation, belongs to the wastewater treatment plant owner. This is so because the return flow from foreign waters belongs to the entity which uses and discharges the foreign waters, and downstream users do not have the same rights to return flow from this water as they do with natural flow.[50]

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46. Los Angeles v. Glendale, 23 Cal. 2d 68, 76-77, 142 P.2d 289, 294 (1943).

47. *See* HUTCHINS, *supra* note 34, at 151 (noting that seasonal storage of water constitutes an appropriation of the water, since it is not a proper riparian use).

48. *Id.* at 150-51.

49. *See* 62 CAL. JUR. 3D *Water* §§ 277-289 (1984 & Supp. 1993) (discussing the nature of foreign waters).

50. *See* Stevens v. Oakdale Irrigation Dist., 13 Cal. 2d 343, 348-349, 90 P.2d 58, 61 (1939) (stating the general rule that, notwithstanding any rights lower users may acquire to abandoned foreign flows, the producer of an artificial flow is under no duty to continue maintaining the flow, and may abandon the practice at any time without becoming liable to lower users); E. Clemens Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 637-39, 171 P. 417, 419-20 (1918) (holding that riparian rights do not attach to foreign waters in a stream to which riparian lands are contiguous); Mayberry v. Alhambra Addition Water Co., 125 Cal. 444, 449, 54 P. 530, 531 (1898) (stating that the owner of a right to an artificial incremental flow may reclaim it, since such a right is wholly distinct from title to the flow); ; *see also* HUTCHINS, *supra* note 34, at 394 (stating that appropriative rights to abandoned foreign waters are *always* subject to the right of the importer or producer to cease abandonment of the waters, in whole or in part) (emphasis added).

D. Water Derived from Contractual Rights

It is often the case that the retail water purveyor obtains its water through contracts with a water wholesaler and, thus, the water rights at issue are contractual in nature. The fact that a contract is involved should not effect any of the concepts discussed above, unless perhaps the contract itself provides otherwise. Perhaps the best example of this is the USBR's Central Valley Project (CVP) contracts. USBR contracts generally contain a provision which provides that the USBR retains rights to return flows.[51] This provision comes into play once USBR water escapes the lands or area of use covered by the USBR contract.

In those cases where the USBR contracts' (or other wholesale water supply contracts') recapture provision is implicated, the wastewater treatment plant owner would still have an unquestioned right to re-use the treated wastewater within the area of intended original use. Water which escapes from project lands would again belong to the USBR.[52]

E. Rights to Water Derived from Groundwater Extraction

A substantial quantity of water utilized within California derives from groundwater.[53] Groundwater is considered legally distinct from surface water,[54] and, thus, no downstream appropriator of surface waters can claim a right to groundwater which is processed through a wastewater treatment plant.[55] Consequently, so long as the water is used for

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51. For example, the Glenn-Colusa Irrigation District has a contract with the USBR which expressly reserves the right of the United States to the use of all waste, seepage, and return-flow water which escapes or is discharged beyond the District's boundaries and is derived from water diverted by the District under the terms of the contract. UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, CENTRAL VALLEY PROJECT, CALIFORNIA, CONTRACT BETWEEN THE UNITED STATES AND GLENN-COLUSA IRRIGATION DISTRICT, DIVERTER OF WATER FROM SACRAMENTO RIVER SOURCES PROVIDING FOR PROJECT WATER SERVICE AND AGREEMENT ON DIVERSION OF WATER 12 (copy on file with *Pacific Law Journal*).

52. Assuming the application of the implied grant theory, the wastewater treatment plant owner would stand in the shoes of the retail water supplier and, thus, be subject to the recapture provision.

53. *See* WILLIAM L. KAHRL, THE CALIFORNIA WATER ATLAS 68-69 (1979) (stating that California, which derives 40 percent of its water needs from groundwater, leads the nation in groundwater pumping).

54. *See* CAL. WATER CODE § 2500 (West 1971) (defining "stream system" as including any stream, lake, other body of water, tributary or contributory source, but not including underground water supplies except for subterranean streams flowing through known and definite channels); *see also* Katz v. Walkinshaw, 141 Cal. 116, 138-40, 70 P. 663, 664-65 (1902) (establishing new doctrine of correlative rights to the use of percolating waters); HUTCHINS, *supra* note 34, at 426-29 (noting that Water Code provisions relating to appropriation of water and statutory adjudication of water rights do not apply to percolating groundwater, and discussing the unique rules pertinent to such waters); 62 CAL. JUR. 3D *Water*, §§ 9, 386 (1981) (defining and distinguishing groundwaters).

55. Los Angeles v. Glendale, 23 Cal. 2d 68, 77-78, 142 P.2d 289, 295 (1943).

reasonable beneficial purposes, there is absolutely no limit on a treatment plant owner's ability to re-use wastewater derived from groundwater extractions.

III. POTENTIAL DOWNSTREAM CHALLENGES UNDER TRADITIONAL WATER RIGHTS LAW[56]

There really are only two potential areas of challenge which may exist that might arguably block the re-use of treated wastewater by the wastewater treatment plant owner: claims of downstream riparians and claims of appropriators. While these issues have been dealt with generally above, more specific analysis is beneficial. This is particularly true in those situations in which the wastewater treatment plant owner has discharged wastewater into the stream for a number of years, and that water, in the interim, has been used by downstream riparians or appropriators. It is also true in those situations where the wastewater treatment plant owner wishes to continue to discharge water into the stream in order to convey the water to a third party for use in a new area.

A. Abandonment

While one can lose title to the *corpus* of foreign waters through abandonment,[57] one cannot lose the right to the water itself. Past abandonment of water particles does not require the abandonment of other particles of water in the future.[58] Indeed, the law has developed in the

56. As noted above, the water supplier must, by virtue of its providing water to its customers, be considered as having, by implication, granted its rights to water to the wastewater treatment plant owner. This implied grant, also as noted above, may be rebutted if there is express contractual language to the contrary.

57. A right to appropriate is abandoned when the holder of the right actively relinquishes possession of it and does not intend to repossess the right. Active relinquishment may be accomplished by leaving the property or premises vacant. Utt v. Frey, 106 Cal. 392, 397, 39 P. 807, 809 (1895); *see also* HUTCHINS, *supra* note 34, at 285-88 (defining abandonment).

58. *See* Stevens v. Oakdale Irrigation Dist., 13 Cal. 2d 343, 350, 90 P.2d 58, 61-62 (1939) (explaining that, while a property right ceases to exist in actual water which has been abandoned without any intention to recapture, this does not constitute the abandonment of a water right, but only an abandonment of the specific portions of the water which have been discharged or have escaped from control); *see also* Cleaver v. Judd, 393 P.2d 193, 196 (Or. 1964) (explaining that the abandonment of the *corpus* of specific water is to be distinguished from an abandonment of a water right); *id.* at 196 n.6 (stating that *Stevens* clearly makes this distinction). *See, e.g.*, Binning v. Miller, 102 P.2d 54, 62 (Wyo. 1940) (using an analogy to a lost purse to explain the principle that one who has temporarily abandoned the right to appropriate certain waters is entitled to recapture it).

area of foreign waters to include a clear policy that favors the claims of those who import or produce foreign waters.[59]

B. Downstream Riparians

Riparian rights do not attach to foreign waters abandoned into the stream to which the riparian lands are contiguous.[60] As a consequence, to the extent that the waters in question are foreign waters, no riparian can claim any interest in those waters. The fact that the wastewater treatment plant owner has used and will continue to use the natural stream to convey its foreign waters does not alter this view. The wastewater treatment plant owner has the right to use a natural channel as a temporary conduit or as a drain for artificial flows.[61]

C. Appropriative Rights

Waters discharged by the wastewater treatment plant owner into the natural stream, if abandoned, may be subject to appropriation. The right to appropriate foreign waters is always subject, however, to the right of the importer or producer to cease the abandonment and claim the full use of the water in question.[62]

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59. *See* City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 257, 123 Cal. Rptr. 1, 43-44 (1975); Los Angeles v. Glendale, 23 Cal. 2d 68, 76-78, 142 P.2d 289, 294-95 (1943); Stevens v. Oakdale, 13 Cal. 2d 343, 350-353, 90 P.2d 58, 61-62 (1939).

60. *See* Bloss v. Rahilly, 16 Cal. 2d 70, 75-76, 104 P.2d 1049, 1051 (1940); Binning v. Miller, 102 P.2d 54, 60-61 (Wyo. 1940); E. Clemens Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 637-639, 171 P. 417, 419-20 (1918).

61. *See* CAL. WATER CODE § 7075 (West 1992) (providing that appropriated water may be mingled into water from another stream and then reclaimed); *see also Stevens*, 3 Cal. 2d at 352; 90 P.2d at 63; Martinson v. Hughey, 199 Cal. App. 3d 318, 327, 244 Cal. Rptr. 795, 800-01 (1988); Fell v. M&T Inc., 73 Cal. App. 2d 692, 694-96, 166 P.2d 642, 643-44 (1946); HUTCHINS, *supra* note 34, at 401 (stating that those who bring foreign waters into a watershed have the right to discharge the same in a reasonable manner into natural watercourses).

62. *See supra* note 58 (providing authority for the notion stated in the text).

IV. THE SECOND THREAD OF ANALYSIS — TREATING WASTEWATER AS SOMETHING OTHER THAN REAL PROPERTY

Traditional concepts of water rights law treat water as real property.[63] As a consequence, ownership of a water right is analyzed in a manner similar to that of any other real property right, with the limited exception that the right is relative, as opposed to absolute rights associated with the ownership of land.[64] It is this usufructuary rights concept which allows a junior right holder to claim an interest in return flow and provides for the exception in the wastewater treatment plant owner's ownership of wastewater that was noted above.[65]

Treating wastewater as something other than real property would presumably modify the relative rights that could otherwise be claimed under traditional water rights concepts. The second thread of analysis treats wastewater as abandoned personalty. This concept is fairly well expressed in *Lewis v. Scazighini.*[66]

In *Lewis*, the plaintiffs brought an action for an accounting and for twenty-five percent of money received for water sold on the defendant's ranch.[67] The parties had entered into a contract which provided that the plaintiff would be paid twenty-five percent of the proceeds from the sale of groundwater produced on the defendant's ranch.[68] The plaintiffs, subsequent to the execution of the contract, entered into negotiations and, pursuant to the agreement with the defendant landowner, sold water to surrounding oil companies to be used as part of the oil extraction process.[69] Thereafter, the plaintiffs complained that they were not being compensated, pursuant to their contract with the defendant landowner, for the full amount of water sold to the oil companies.[70] Rather, the plaintiffs

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63. United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 100-01, 227 Cal. Rptr. 161, 167-68 (1986); *see* HUTCHINS, *supra* note 34, at 36-40 (stating that waters flowing in a natural channel, waters flowing by right in a canal or pipe, and waters diverted from a natural supply source into artificial conduits for the purpose of transporting it to land for irrigation are considered real property in California); *id.* at 120 (observing the traditional recognition in California water law that an appropriator of water gains a private property right in the water).

64. *See* HUTCHINS, *supra* note 34, at 154-60 (discussing the relative rights of junior and senior appropriators).

65. *See supra* text accompanying note 35.

66. 130 Cal. App. 722, 20 P.2d 359 (1933).

67. *Id.* at 722, 20 P.2d at 359.

68. *Id.* at 723, 20 P.2d at 359.

69. *Id.*

70. *Id.*

claimed that the defendant ranch owner was retaining all of the proceeds from the sale.[71]

The defendants filed a general and special demurrer on the ground that the contract called for the sale of real property, and that plaintiffs were not licensed real estate brokers.[72] On this basis the defendants argued that the plaintiffs could not benefit from the sale since the sale of "water" is the sale of real property.[73] The demurrer was sustained by the trial court and the question on appeal was whether the water sold to the oil companies was real or personal property.[74]

In reversing the trial court, the appellate court determined that the water in question had lost its character as realty (to which traditional concepts of water law apply), stating:

> We have concluded that the water involved in this litigation no more partook of the characteristics of realty than does domestic water delivered by a municipality to its inhabitants for use within their homes or to an industrial plant for use within its factory . . . . In the character of personal property, water, separated from its source or from the body of which it constituted a part, may be bought and sold like other commodities, as when it is supplied through artificial conduits for domestic use.[75]

As noted above, one cannot lose sight of what one is dealing with when discussing treated wastewater,[76] nor can one lose sight of the actual pattern of use involved. The original water purveyor delivers water not to the water treatment plant owner, but to customers; and it is the customers, not the water purveyor, who abandon the water to the water treatment plant.

In *Heyneman v. Blake*,[77] the California Supreme Court stated that "water when collected in reservoirs or pipes and thus separated from the original source of supply is personal property . . . an article of commerce — as ordinary goods and merchandise."[78] This view was clarified in

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71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 724, 20 P.2d at 360.
76. *See supra* note 7.
77. 19 Cal. 579 (1862).
78. *Id.* at 594.

Copeland v. Fairview Land Etc., Co.,[79] where the court indicated that *Heyneman* was not intended to mean that water becomes personal property as soon as it is diverted from its natural channel or situation.[80] Rather, the *Copeland* court stated that severance takes place when the water is taken from the pipe by the customer.[81]

While the line of cases discussed above is fairly early, there is no reason to believe that they do not retain their vitality. Indeed, it is hard to argue that as a matter of law or common sense water does not change character when it is delivered to the customer. When one flushes a toilet or washes water down a sink, it is personalty that is being abandoned to the sanitary sewer system, not realty. As a consequence, it is also abandoned personalty that may be dealt with by the owner of a wastewater treatment plant in whatever manner it chooses.

V. INSTREAM FLOW/ENVIRONMENTAL CONSIDERATIONS

Depending upon the quantities of wastewater involved and the nature of prior discharges, a reduction in discharge or modification in the nature of re-use may have environmental impacts and may have some effect upon instream beneficial uses. From a private property water rights perspective, no instream flow[82] right superior to the right of an owner of a wastewater treatment plant should exist. However, as a practical manner, instream flow and environmental compliance will be mandated independent of private property ownership concepts.[83] They will be mandated pursuant to the normal regulation of instream flows or, in the case of publicly owned treatment plants, through the application of the provisions of the California Environmental Quality Act.[84] In this context, if it is determined that the re-use of treated wastewater will have significant adverse impacts on the environment, mitigation measures may be required.[85]

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79. 165 Cal. 148, 131 P. 119 (1913).

80. *Id.* at 154, 131 P. at 121.

81. *Id.*; *see* Stanislaus Water Co. v. Bachman, 152 Cal. 716, 725-26, 93 P. 858, 862 (1908) (holding that water which is severed from the land and confined in portable receptacles may become personalty). The *Stanislaus* court also noted that *Heyneman* does not stand for the proposition that water becomes personalty as soon as it is diverted from its natural channel or situation). *Id.*

82. Instream flows are flows which are to remain in the stream in order to promote beneficial uses, such as recreation and wildlife preservation. United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 103-04, 227 Cal. Rptr. 161, 169 (1986).

83. *See supra* note 2 (discussing various obstacles to compliance).

84. CAL. PUB. RES. CODE §§ 21000-21069 (West 1986 & Supp. 1994).

85. *Id.*

Water Code section 1212 allows the owner of a wastewater treatment plant to dedicate a portion of its discharges for the purpose of maintaining or enhancing fishery, wildlife, recreational or other instream beneficial uses.[86] This provision might be utilized as a mitigation measure if it appears that the re-use of treated wastewater would otherwise have a significant adverse environmental impact associated with instream beneficial uses. In many cases, dedication of flows, even if less than what historically was discharged, may result in better, more reliable protection than would otherwise exist because the wastewater treatment plant owner who has dedicated the flow to instream use may prevent the consumptive use of that.water through traditional water rights procedures.

VI. PROCEDURAL CONSIDERATIONS

Water Code section 1210 specifically makes the grant contained in that section subject to the regulatory authority of the State Water Resources Control Board (SWRCB) and the Regional Water Quality Control Boards, pursuant to their authority over the operation of a wastewater treatment plant under the Porter-Cologne Water Quality Control Act and the Federal Water Pollution Control Act.[87] As noted initially, all intended uses for the treated wastewater must be consistent with the relevant operating permits.[88] If not, those permits will need to be amended.[89] Water Code section 1211 provides that:

> Prior to making any change in the point of discharge, place of use, or purpose of use of treated wastewater, the owner of any wastewater treatment plant shall obtain approval of the [State Water Resources Control] Board for any such change . . . ."

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86. CAL. WATER CODE § 1212 (West Supp. 1994). Section 1212 reads as follows:

> The [State Water Resources Control] board shall not grant any permit or license to any person other than the treated waste water producer for the appropriation of treated waste water where the producer has introduced such water into the watercourse with the prior stated intention of maintaining or enhancing fishery, wildlife, recreational, or other instream beneficial uses. Holders of existing water rights may not use or claim such water.

Id.

87. *Id.*, § 1210 (West Supp. 1994); *see supra* note 17 and accompanying text (setting forth that language of § 1210).

88. *See supra* note 2 (providing examples of various regulatory requirements).

89. *Id.*

This provision is generally consistent with traditional water rights concepts. Changes in points of diversion, place and purpose of use normally require the approval of the SWRCB.[90] To the extent that water is to be discharged into a stream and the stream used to convey water to its intended new use, some accounting to the state is appropriate.[91] Without it, there would be little ability to monitor and insure that it is the treated wastewater rather than the natural flow that is being utilized for new uses or at the new place of use.

There are situations, however, where no discharge is contemplated and re-use is to be within the original area of use. Likewise, there are situations where water is to be conveyed to places of use through the use of facilities other than natural streams. In such situations no approval is probably needed since there is no "change in the point of discharge."[92] As a practical matter, however, it is undoubtedly prudent to seek SWRCB approval to avoid challenges on these grounds in the future. SWRCB approval is obtained through filing a petition or application with the SWRCB for this purpose.[93]

CONCLUSION

In light of the continued consumptive and environmental pressure on limited water supplies, the need to increase and maximize the re-use of treated wastewater is obvious. In order to facilitate this re-use, it is essential that some certainty exist as to who owns treated wastewater. The State Legislature has, in the enactment of Water Code section 1210, indicated a policy preference that treated wastewater be owned by the owners of wastewater treatment plants. This policy view is consistent with and confirms legal concepts of ownership of treated wastewater.

Traditional concepts of water rights law support the view that treated wastewater is owned by the owner of the wastewater treatment plant. Because treated wastewater should be dealt with as foreign water, the wastewater treatment plant owner may use or sell for re-use that wastewater within or without the original place of use. Even if treated wastewater is not dealt with as foreign waters, the wastewater treatment

90. CAL. WATER CODE §§ 1700-1740 (West 1971 & Supp. 1994).

91. *Id.*, §§ 7043-7044 (West 1992).

92. *Id.*, § 1211 (West Supp. 1994) (stating that approval of the SWRCB is needed to make a change in use, place of use, or point of diversion).

93. *Id.*

plant owner can, for the most part, exercise considerable ownership rights sufficient to re-use that wastewater within the original place of use.

The alternate view of the wastewater resource is that treated wastewater should not be dealt with as "water" at all, but rather should be dealt with as personalty abandoned to the owner of the wastewater treatment plant. In this situation, as long as the wastewater is utilized for reasonable, beneficial purposes, there should be no limit on how the owner of the wastewater treatment plant provides for the re-use of treated wastewater.