

The Water Rights Situation

increasing population and complexities of distribution of state's water supply comprise problem of major proportions

Wells A. Hutchins

Basic riparian and appropriation doctrines have governed rights to the use of waters of California streams for more than a century and—during the last half of that period—the correlative doctrine of rights in percolating ground waters has prevailed.

Riparian and correlative rights are much alike because each arises out of ownership of land contiguous to the water supply and is acquired with the title to the land. Neither right is created by use of water, nor lost solely by disuse; but either one can be lost by adverse use on the part of someone else—for five years—under all the circumstances necessary to establish prescription.

Each right entitles the owner of land riparian to a stream, or overlying a percolating ground-water supply—as the case may be—to use the water on or in connection with his riparian or overlying land.

Under the riparian doctrine, domestic use has preference over irrigation and other so-called commercial or business purposes. Otherwise, riparian and overlying landowners are entitled to make reasonable beneficial use of the water, and no more. To that extent, the rights of all landowners are coequal as among themselves, and are paramount to any claim of an appropriator that is not based on prescription. But the landowners have no title to the use of any surplus in the supply above the aggregate quantity necessary to satisfy their reasonable beneficial requirements. If there is a surplus, it is public water of the State, subject to appropriation for nonriparian or non-overlying purposes, which themselves must likewise be reasonable and beneficial.

Likewise, appropriative rights in stream waters and in percolating waters are in most respects similar. Each right extends to a specific quantity of water, which is a part of the surplus above the quantities allocated to riparian or overlying and other pre-existing rights. Each appropriative right relates to a specific point of diversion, place of use, and purpose of use. Any of these may be changed if injury is not thereby inflicted on others.

Each right has a date of priority, which is the date on which it was acquired and—in the event of water short-

age—the date of acquisition operates to subordinate that right to all rights earlier in time and to give it preference over all rights acquired later. Each right arises out of use of water, and either right may be lost by nonuse: it may be abandoned, or forfeited for failure to exercise it for a certain period of years—three years for stream waters and five years for per-

Irrigation in California

California has some 84,500 farms—68.7% of all farms in the state—that require 19 million acre-feet of water annually to irrigate more than 7 million acres. The water used for irrigated farming represents more than 90% of California's developed water supply.

To assure the success and permanence of California's irrigated agriculture requires knowledge of water supply problems, water quality, land preparation and irrigation systems, water-soil-plant relationships and drainage

Research designed to yield information on irrigation problems has been conducted for many years—and is continuing—by members of the staff of the University of California Agricultural Experiment Station.

Collected in this issue of California Agriculture are 24 reports of progress in research on some of the many problems affecting irrigated agriculture. —Ed.

colating waters—or the right may be lost by prescription as in the case of riparian and correlative rights.

However, there is a radical difference in the ways of acquiring appropriative rights in streams and in percolating waters. Appropriation of stream water must follow the specific procedure prescribed by the Water Code. That procedure begins with an application to the State Water Rights Board for a permit to make the appropriation, and ends with the issuance by the Board of a certificate of appropriation when all prerequisites have been fulfilled. There is no other way in which water of a California stream may be appropriated. But the Water Code procedure does not apply to percolating water rights. Those rights are acquired informally by extracting the water from the ground and applying it to a beneficial use. The only statutory requirement is that in certain southern counties, extractions of ground water—with certain ex-

ceptions, but without regard to character of water right—must be reported to the Board. Failure to file the report works to the disadvantage of the water user, but it does not impair the validity of his water right.

A development of major importance in the law of water rights was an amendment to the California constitution which limits all holders of rights, attaching to all kinds of water supplies, to the same standards of reasonable beneficial use of water.

In the field of percolating water rights, the outstanding feature in recent years was the decision of the California Supreme Court in 1949 in the Raymond Basin suit by the City of Pasadena against the City of Alhambra. That decision added a new element to the California doctrine of correlative rights when applied to a long overdrawn percolating water supply. The court held that when the overdraft in the Raymond Basin first occurred, prescriptive rights in favor of those who caused it began to be acquired against overlying owners and prior appropriators. But the original holders of rights continued to pump, despite the lowering of the water table. By that means they either preserved rights or acquired new rights to pump some water in the future. As a result of this novel application of the law of prescription, the

Continued on page 39

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ALLOCATION

Continued from page 3

resources, to undertake capital expenditures, to commit resources other than the water resources to long-time development, it is desirable that there exist a certain degree of security over time with respect to use of the resource. Also, the ability to change commitments and decisions in response to changes in the economy creates the desire for a reasonable degree of flexibility with respect to availability of the resource and the use to which that resource may be put.

Flexible aspects of the riparian doctrine as applied to ground water—the correlative rights doctrine—have facilitated the development of the ground-water resource in the course of economic change. This aspect of the correlative rights doctrine has not yet been fully tested under economic conditions where ground-water development can not be firmed up subsequently by additional water development. The rationing induced in the Raymond Basin and West Coast Basin area merely provides for a reduction in use of relatively inexpensive local ground water and supplementation by making use of relatively expensive imported surface water.

Development, management, and use of water in ground-water basins requires long-run security for the individual developing or making use of the water. He must be certain that all deferred revenues and costs of the development and use can be accounted for and fully compensated over time. The adjudicated pumping shares of each individual based on the Referee's finding provide for a secure right to pump ground water and protect—to a degree, at least—previous commitments.

One of the key characteristics of an operating economy is the change inherent in that economy. Normal operations of an economy include the elements that allow for economic flexibility as well as economic security over time. The imposition of a legal framework upon the operation of an economy should allow for economic change of that economy. Thus, absolute dependence or reliance upon a single legal doctrine that provides some elements of flexibility, for example, but little or no security would not be conducive to the best operation of the economy. On the other hand a legal process that would establish security but not permit flexibility over time would be equally awkward. Thus a single legal process, if it is to allow for normal operations of an economy, must take into account both the security and flexibility aspects of the operation of that economy.

The Court Reference Procedure—as applied in the Raymond Basin case and as preliminarily applied in the West

Coast Basin case—has built into it both the flexibility and the security aspects necessary to normal operation of an economy. The procedure as a legal process appears to be adequate to adjudicate ground-water rights in well defined ground-water basins. It is a legally valid process that satisfies an immediate economic need. It can be improved and made more efficient, however, if basic data are gathered in advance, if interim agreements are used, and if only the major water rights are actually included in the process. The Court Reference Procedure provides for effective over-all allocation of ground water and protection of ground-water rights.

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RIGHTS

Continued from page 2

court ordered that all parties be allowed to continue to pump at a reduced rate, the total pumpage not to exceed the safe yield. Another comprehensive determination of ground-water rights, in the West Coast Basin, is still pending.

An increasingly serious problem is that of overdrawn ground-water supplies, particularly in the southern part of the state. In recognition of this situation, statutes applying only to specified southern counties were enacted in 1951, 1953, and 1955. None of these statutes purports to restrict the exercise of the overlying landowner's or appropriator's ground-water right.

One of the statutes encourages the ground-water user to obtain an alternate supply of water from a nontributary source, the use of which will be deemed equivalent to a reasonable beneficial use of the ground water which he has ceased to extract as a result of having the substitute supply.

Another statute requires the ground-water user to make—to the State Water Rights Board—annual reports of information essential to adjustments and determinations of ground-water rights, thus speeding up and reducing the cost of the requisite studies.

The third statute relates to preliminary injunctions equitably restricting and apportioning a reduction in pumping where it appears that unrestricted pumping would destroy or irreparably injure the ground-water supply, because of ocean water intrusion, while rights of use are being determined.

The steady increase in California population and the increasing costs of obtaining additional water supplies have led to an era of large projects: the State Water Plan; the Central Valley Project;

the Feather River Project; and the Metropolitan Water District of Southern California, in addition to many hundreds of district and mutual company enterprises.

The apparent trend is toward formal appropriations of water by large projects, which will either distribute the water or provide for its distribution to individual users pursuant to legal or contractual relationships. In many localities, the farmer's individual pumping plant on his own farm is an important exception. But even in that case, with increasing drafts on ground-water supplies, indications are mounting that community action will be needed in protecting and recharging many of the supplies.

In 1955, the legislature reorganized the State water agencies. The Division of Water Resources of the Department of Public Works was abolished and its functions pertaining to water and dams were transferred to two newly created agencies of the State government. A State Water Rights Board was vested with control of the acquisition of rights by appropriation, assistance to the courts in the adjudication of water rights, and administration of legislation applicable to southern California counties concerning extraction of ground water. Supervision over distribution of water in watermaster service areas, together with the remaining functions relating to water and dams, was transferred to a Department of Water Resources.

The extensive developments of California water resources and those being planned have created important water rights problems. Among these are some matters of Federal-State relationships, including the 160-acre limitation. Another problem is legal control over water brought into a ground-water area by artificial means without the consent of overlying landowners, without infringement of their correlative rights but with due protection of rights to the use of the imported water. A recent problem is the status of an entry on public lands, under the Desert Land Act, supported by an appropriation of percolating ground water, which under current California law is made by informal diversion and use and not pursuant to the California Water Code.

A major problem—still far from settlement—involves water rights of areas of origin of water. In existing law, certain restrictions are stated with respect to the taking of water, pursuant to State and Federal plans, away from the counties, watersheds, and areas in which it originates. The restrictions with respect to counties are statewide in application; those for watersheds and areas relate to the Central Valley Project. The restrictions are to the effect that in the develop-

Concluded on next page