Municipalities are given certain preferences

Municipalities are granted by the Water Code certain preferences in appropriating water for domestic and municipal purposes. Such application by a municipality for municipal purposes or the domestic needs of its inhabitants is first in right irrespective of whether it is first in time (sec. 1460). This preference relates to future appropriations. It does not authorize a muncipality to take away existing vested rights. Vested rights may be taken for public use only by purchase or condemnation.

A municipality may appropriate quantities of water for its municipal purposes based upon estimated future requirements. Pending the use by the municipality of the entire appropriation, the Board may issue permits for the temporary appropriation of the excess over current needs. When the municipality is ready to take the water used by a temporary permittee, it must compensate him for the value of the works by means of which he has been using the water. Or the Board may authorize the municipality to distribute the surplus temporarily under the jurisdiction of the California Public Utilities Commission. (Secs. 1461 to 1464.)

Gradual or progressive development. An irrigation project may be developed *gradually,* or in *progressive units,* if the circumstances justify it. This is particularly true with respect to large projects. But even a single farmer may require more than one season in which to get his entire farm irrigated after the water is ready for use.

A large project need not be finished at once

The length of time which an appropriator may have in progressively completing his appropriation depends upon the circumstances. His original plan must be to include the entire area in one appropriation. His intention must be to proceed promptly and diligently with the construction of works and application of the water to beneficial use. And he must carry out the intention to conclusion of the project with all reasonable diligence.

The Board allows such time for completion in each case as appears to be justified by the local conditions. But it will not authorize a reservation of water if there is no immediate plan or purpose to proceed promptly and to continue diligently to completion. (Cal. Administrative Code, title 23, secs. 776 to 778.)

Holding

The appropriative right is held by *exercising it properly.*

he right must be ercised properly

Unlike the riparian right, right of appropriation is based upon use and may be lost by nonuse of water. The Water Code provides that when the appropriator or his successor in interest ceases to use the appropriation for some useful or beneficial purpose, the right ceases (sec. 1240).

Utilizing

Important *elements* of the appropriative right are (1) the priority of the right, (2) the quantity of water to which the right relates, (3) the period of use of the water, (4) the point of diversion of the water, (5) the place of use of the water, and (6) the purpose of use of the water. These elements are discussed in that order.

"First in time is first in right"

Priority of the right. *Priority* in time of making the appropriation gives the *superior right.* This principle was expressed in the Civil Code of 1872 (sec. 1414) as follows: "As between appropriators, the one first in time is the first in right." Aside from certain exceptional deviations authorized in acquiring rights under the Water Code (see "Preferences in acquiring the right," p. 25, above), this is still a fundamental principle of California water law.

Each appropriation of the water of a stream is superior to all later appropriations in point of time and is subordinate to all that were made at earlier times. If the water of a stream at a particular time is just enough to supply part of the appropriative rights that attach to the stream, the earliest priorities are entitled to the entire flow and the later ones must do without any water at all. As the flow of the stream decreases, the headgates of the appropriators must be closed in the reverse order of priorities until, if there is no more water than enough to supply the first priority, the holder of that right is entitled to it all. As the flow increases, the headgates may be opened in the order of priorities.

Where water is diverted doesn't affect priority

Relative *locations of diversions* of appropriators along the stream have nothing to do with relative priorities. Headgates of senior appropriators may be upstream from those of junior appropriators, or may be downstream from them. The several priorities depend only upon the respective times of acquiring the rights.

The priority of an appropriative right is represented by a date, called the *date of priority.* If the right is consummated in accordance with law, and with reasonable diligence, it dates back to the time of beginning the acquirement of the right. This is called the *doctrine of relation.*

In the early history of California, the priority of an appropriation upon its completion related back to the time of taking the first step in appropriating the water if the appropriator was diligent throughout. This first step may have been the posting of notice of appropriation, or the beginning of construction of the diversion works or of the ditch if no notice was posted. If the appropriator was not reasonably diligent, the priority was

fixed as of the time of completion of the appropriation.

There aren't many excuses for delay in completing right

In appropriating water under the Water Code the same principle of relation back applies, namely, the date of filing the application with the Board is the date of priority if all subsequent steps are properly taken (sec. 1450). Sickness, lack of finances, and other conditions incident to the person and not to the enterprise are not generally accepted by the Board as excuses for delay. (See Cal. Administrative Code, title 23, sec. 779.)

The license is for a definite amount of water

Quantity. The appropriative right relates to a *specific quantity* of water. For irrigation purposes, this is usually expressed in cubic feet per second or in miner's inches of flowing water, and in acre-feet per annum of stored water.

But the holder has no title to any excess over needs

The measure and limit of the appropriative right is reasonable beneficial use of water. Regardless of the extent of a particular appropriator's right as stated in his permit or license or court decree, at no time is he entitled to divert more water than the quantity required to satisfy his reasonable requirements at that time. He has no title to any excess water that he may divert. If he diverts more water than he needs, it is his duty to return the surplus to the stream.

The right may be for a given time of year

Period of use. The appropriative right may be acquired for use throughout the year if the circumstances justify it, or during a specific part of the year.

or day

The appropriation may be *measured by time* as well as by quantity. If one person appropriates a supply of water for use, say, during April to October, inclusive, of each year, another person may make an equally valid appropriation of the same supply during the remainder of the year, November through March. Or one person may have a right to the water during the daytime and another a right to that same water at night. Each has a prior right during his period of use so far as the other is concerned, regardless of which of the two rights was first acquired.

Water must be diverted at a certain place

Point of diversion. The water that one appropriates is taken from the stream at a specified *point or points of diversion*. The appropriator has no right to take the water out at any other place unless his point of diversion is changed in the manner prescribed by the Water Code (secs. 1700 to 1706).

and for a certain tract

Place of use. The appropriative right is perfected by applying the water to the irrigation of land or to some other use on or in connection with a particular tract of land. That land—whether irrigated, or the site of use for domestic purposes, power development, or other lawful purpose—becomes the *place of use*. It remains so unless and until the use is changed to other land in the

manner authorized by the Water Code (secs. 1700 to 1706).

It is not necessary that the place of use of appropriated water shall be land contiguous to the stream from which the water is taken. The land may border the stream, or it may be miles away from it.

Under certain circumstances the place of use may be established in a *watershed* other than the one in which the diversion is made. This is subject to the condition that preëxisting rights in the original watershed may not be impaired by the exportation of the water. Furthermore, in the development of State projects, areas in which water originates may not be deprived of water reasonably required for the beneficial needs of the inhabitants (Water Code, secs. 10505 and 11460).

Water may be appropriated for any beneficial purpose

Purpose of use. Water may be appropriated for *any beneficial purpose*. Purposes that are recognized as beneficial include, among others, domestic, municipal, irrigation, power, mining, industrial, recreational, and stock-watering uses.

Use of scarce water to kill pests is not beneficial

The California Supreme Court has held that a use of water for the sole purpose of exterminating pests, in an area in which water is in great need for the irrigation of crops, is not a beneficial use for which an appropriation may be made. (*Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 567–568, 45 Pac. (2d) 972 (1935)). Other means must be taken to get rid of the pests.

but irrigating native grasses is

Appropriations of water may be made for the irrigation of uncultivated lands that are producing native grasses, whether pastured or cut for hay, as well as lands in cultivated crops. A use for such purpose that exceeds 2½ acre-feet of water per acre in any one year, however, is not a beneficial use in connection with any appropriation to which the Water Code relates (sec. 1004).

The purpose of use of appropriated water may be changed only in the manner and under the conditions prescribed by the Water Code (secs. 1700 to 1706).

One can appropriate only public water

Waters. In general, appropriations may be made only of waters (1) in a *public source* of supply, (2) occurring there *naturally*, or after *escape or release* from irrigated lands or water works, and (3) in *excess* of the requirements of existing riparian and appropriative rights that attach to the source of supply. An appropriation necessarily is subject to all valid water rights in existence at the time the appropriation is made.

that is in excess of earlier rights in good standing

Appropriations may be made under the *Water Code* of (1) waters to which riparian or prior appropriative rights have not attached, and (2) waters claimed under

existing appropriations, but either (*a*) not beneficially used, or (*b*) not in process of being put to beneficial use, according to the standards that govern the completion and exercise of appropriative rights. Such appropriable waters may comprise (1) water flowing in a natural surface channel or in a known and definite underground channel, (2) water in a lake or other natural body of water, and (3) water which after having been appropriated and used flows back into a stream, lake, or other body of water. (Secs. 1200 to 1202.)

The water may be in streams or lakes or may be return flow

An appropriative right that is made of the water of a stream attaches to the *underflow,* and likewise, to the waters of all *upstream tributaries.*

Waters that have been lawfully *taken into possession* by a person under a valid right of use are his private property. Such waters may be flowing in an artificial ditch, or impounded in an artificial reservoir, or commingled with natural stream waters for purposes of transportation. They are not subject to appropriation by anyone else.

Navigable as well as *nonnavigable* waters are subject to appropriation. Diversions of water from a navigable stream, however, are permissible only if they do not interfere with navigation on the stream. While the right of navigation is superior, as it is to riparian rights also, it will not be asserted so as to prevent the making of diversions by appropriators so long as enough water is flowing in the stream to accommodate the actual needs of navigation.

Navigation comes first

Who may appropriate water? *Any person,* even a riparian owner (see pp. 17–19), may appropriate water under the Water Code. Such an appropriation also may be made by the United States, the State of California, or any entity or organization capable of holding an interest in real property in the state. (Secs. 1252 and 1252.5.)

Any person can appropriate water for use on a particular tract

Lands. Certain points concerning this topic are noted above under "Place of Use" (see p. 28).

It is not necessary that the appropriator shall own outright the land on which the water is to be used. Appropriations may be made by individuals on either public or private lands. A person who is in lawful possession of land—such as an entryman on public land, or a lessee of private land—may appropriate water for the irrigation of that land.

The appropriator need not own the land

The rules and regulations of the State Water Rights Board pertaining to the appropriation of water require an applicant who does not own the land on which the water is to be used to show the arrangements that he has made with the owner for control of the place of use

of the water (Cal. Administrative Code, title 23, sec. 670 (k) (6)).

The appropriative right is *appurtenant* to the land on which the water is used. This means that it is attached to the land; but it is not inseparably attached.

When the irrigated land is sold, the appropriative right is included in the sale—unless the parties agree otherwise. That is, in conveying the land the water right may be reserved by the seller from the conveyance. Furthermore, the appropriator may sell his water right to one person and his land or his interest in the land to another person. Or he may sell the water right and keep the land. Or he may transfer the water right to other land of his own.

Such transfers of appropriative rights to other lands may be made only under certain conditions, noted below under "Changes in the exercise of appropriative rights" (see pp. 32–33). Upon such a transfer, the right ceases to be appurtenant to the original tract and becomes simultaneously appurtenant to the new tract.

Handling of water. In the handling of appropriated water, *artificial control works* are in most cases necessary.

Artificial control works include dams and headgates; storage reservoirs; pumps, ditches, flumes, and pipes for conveying the water to the place or places of use and distributing it there; and structures for controlling the flow of water through the system.

A natural channel may be used to convey water, where this can be done instead of digging a ditch for that purpose (Water Code, secs. 7043 and 7044).

An appropriator may turn his appropriated water into a stream in which it may be *mingled* with the water already flowing there, and may divert at a downstream point the quantity of water that he has turned in minus conveyance losses. A condition of exercising this privilege is that the quantity of water already in the stream to which others have rights shall not be diminished by the use of the stream as a carrier. (Water Code, sec. 7075.)

He must handle the water efficiently

Reasonable efficiency is required by law in the operation of an appropriator's works for diverting, conveying, and distributing water, and in his methods of applying the water to the land. In determining whether his irrigation works and practices are reasonably efficient, the *standards generally accepted* in the community are taken as a general guide. That is, if the best local practices are to divert and convey water with the use of wood structures and earth ditches, an appropriator will not be required to install a masonry dam, concrete headgate, and cement-lined ditches or steel pipe. But even though

the appropriator is not held to 100 per cent efficiency so that "the last drop of water" may be saved from loss, nevertheless it is necessary that his works be kept in a good state of repair and that his methods of applying water be such as to avoid unnecessary waste of water.

Rotation in the diversion of water may be practiced by appropriators. The courts also have authority, in settling water controversies among appropriators, to impose rotation plans upon these appropriators without their consent if this will result in a better use of the stream and at the same time will not impair the priority or the extent of any of the water rights in the stream.

Some changes in using the right may be made

Changes in exercise of appropriative rights. Changes may be made under certain conditions in some of the elements of an appropriative right, but without altering fundamental features of priority and quantity of water.

The principal changes that may be made are in (1) the *point of diversion,* (2) the *place of use,* and (3) the *purpose of use* of the water.

So far as appropriations made under the *Water Code,* or the *Water Commission Act* which preceded it, are concerned, changes in these features may be made only by following a prescribed procedure (Water Code, secs. 1700 to 1705).

The applicant, permittee, or licensee under the Water Code who wishes to make one of these changes must petition the State Water Rights Board for permission to do so. If the Board requires it, the petitioner must give notice. If the proposal is protested, a hearing is held. The Board grants or refuses permission to make the change, depending upon the circumstances. But the Board may grant the permission only if it is satisfied that the change will not injure any other lawful user of water of the same source of supply. However, in view of the administrative discretion recognized in some western jurisdictions as inherent in such a state agency, it is possible that if the person who would be injured would agree to such a change upon receiving compensation for injury, it would be allowed. A suggested alternative is adoption by the administrative agency of an acceptable physical solution, such as is discussed hereinafter (under "Conflicts of water rights in watercourses") with respect to powers accorded to the California courts to adopt or accept physical solutions in the water-rights controversies.

A person who holds an appropriation of water *other than under* the Water Code or the Water Commission Act is likewise authorized to make such changes, and to extend his conveyance works to places beyond the first place of use (Water Code, sec. 1706). There is no formal procedure for making such changes, and the permission

of the Board is not required. The only limitation is that others shall not be injured by the change.

Changes may also be made in the *means* by which an appropriator diverts water from a streams. A necessary condition is that no injury shall result to other holders of water rights.

Relative rights of appropriators. In a controversy between appropriators, the ones with the earlier priorities are called *senior* or *prior appropriators,* and those with later priorities are *junior* or *subsequent appropriators.*

The senior right must be fully satisfied

The *senior appropriator* is entitled to the use of all of the water naturally flowing in the stream, to the extent of his appropriative right, in preference to any use by any junior appropriator. This is the case, regardless of whether the senior appropriator's headgate is upstream or downstream from those of later appropriators. If a junior appropriator diverts water upstream from a senior, it must be done with no material diminution in the quantity or material deterioration in the quality of water available to satisfy the senior's rights.

The fact that heavy losses of water may occur in the bed of a stream between the headgate of a junior appropriator and the downstream headgate of a senior appropriator does not affect the superior right of the latter. If he can make beneficial use of whatever quantity of water would reach his headgate under natural conditions, undisturbed by later appropriators upstream, he is entitled to it.

but the junior's rights must be respected

The *junior appropriator,* however, has rights that must be respected by those senior to him. Granted that senior rights must be fully satisfied first, when this has been done the junior appropriators are entitled to the use of all *surplus* waters, in the order of their priorities, to the extent of their several rights. Surplus waters in this connection comprise all waters in excess of the quantities required to satisfy all prior rights. Surplus waters may be present in the stream at one time and not at another time. When they do occur, junior rights attach to them.

Junior appropriators are also entitled to divert quantities of water covered by prior rights during such times as the senior appropriators are not making use of those quantities. No one is entitled to divert, at any time, water that he does not need at that particular time, despite the fact that his right may entitle him to divert a greater quantity *when he needs it.* When he does not need the water, junior appropriators benefit.

Additional water means a new appropriation

A senior appropriator *cannot enlarge his right* at the expense of a junior appropriator. If the first appropriator on a stream wishes to divert water in addition to the quantity covered by his original right, he must make a

new appropriation of the additional quantity. This new right will have a priority as of the time the right is acquired, which necessarily will be junior to that of any intervening appropriator. This does not prohibit an appropriator from developing his original project gradually, with reasonable diligence, as noted on pages 25–27.

Changes that hurt someone else can't be made

An appropriator is entitled to have the *stream conditions remain substantially as they were* when his appropriation was made, so far as the activities of other appropriators are concerned. This means that an appropriator may insist that another appropriator shall not change the exercise of his right to the injury of the former. The junior appropriator is entitled to this protection against a senior appropriator, as well as a senior against a junior.

Loss

There are four ways in which one may lose his appropriative right:

The right may be lost . . .

1. Abandonment. An appropriative right may be *abandoned* by voluntarily discontinuing the use of the water with the intention of giving up the right permanently. It is necessary that the *intent* shall concur with the *actual relinquishment* of possession of the water and of the right. When they do concur, abandonment takes place instantly.

Nonuse of the water is not of itself alone an abandonment. Nor does abandonment depend upon nonuse for any particular length of time. Nonuse for a long period of time may be an *indication* that the owner of the right intended to abandon it, but that is only a presumption that may be disproved by evidence that no such intention existed.

by abandoning it

2. Forfeiture. The appropriative right is *forfeited* by the failure of the holder to use the water, for the purpose for which it was appropriated or for another purpose to which the right has been lawfully transferred, for a period of years prescribed by law.

The *Water Code* provides that the period of nonuse that will result in forfeiture of the right shall be *3 years* (sec. 1241). This time period was prescribed by the Legislature in an amendment to the Water Commission Act in 1917. It applies at least to appropriations made, after the date of the amendment, under the Water Commission Act or the Water Code.

by not using it for 3 (or 5) years

The *Civil Code* had provided in 1872 for the forfeiture of appropriative rights but had not prescribed any period of time (sec. 1411). The courts decided that the period should be *5 years,* which was the same time period as that fixed by statute for the loss of a water right by prescription. Whether the loss now of any of these earlier rights of use of the water of watercourses would depend upon 3 years' nonuse or 5 years' nonuse has not been specifically decided by the California Supreme Court.

3. Prescription. An appropriative right may be lost as the result of adverse diversions of water that ripen into a *prescriptive right* against the appropriator.

To cause loss of the right, these diversions must have been made under certain conditions prescribed by law for the acquirement of prescriptive rights. Under ordinary circumstances prescription results from upstream diversions only.

If the appropriator fails to interrupt the adverse diversion by persuasion or by physical means or by the filing of a court action that proves to be successful, then at the end of the 5-year period he loses his right to object to it. The adverse diversion has then ripened into a prescriptive right that is superior to any further claim that the appropriator may make to the use of the water.

by failing to prevent adverse use

4. Estoppel. An appropriator's conduct toward another person may be such as to result in a court order prohibiting him from asserting a right superior to the right of the latter. This may come about, for example, where the appropriator, knowing his representations to be false, induces another person to proceed with the development of a water supply in the belief that the water supply will be adequate and his water right good. Having done that, the appropriator is *estopped* or forbidden by the court from asserting that his own water right is superior to that of the person whom he has misled.

or by court order if others have been misled

Before a person will be estopped from asserting his right, it must appear that his conduct has been inequitable, or fraudulent. He must have been guilty of misleading statements or acts, or of concealing facts by silence when he was under a duty to speak. Mere silence, if one is under no duty to speak, is not grounds for estoppel. And it is necessary that the other party must have been ignorant of the true state of facts and must have acted, to his injury, upon the appropriator's misrepresentations.

Part of an appropriative right may be lost in any of the above ways, without the loss of the remaining portion of the right.

THE PRESCRIPTIVE RIGHT

Acquiring

A *prescriptive right* is acquired by diverting and putting to beneficial use, for a period of 5 consecutive years, water to which some other party or parties have prior claims, thereby depriving the rightful water-right owners of their use of the water or of the possibility of using it.

A right can be established by taking water 5 years IF . . .

The 5-year period is prescribed by the State statute of limitations.

The law prescribes *certain conditions* that must be fulfilled by the claimant of an adverse or prescriptive right before he may successfully assert it and thereby take away from the injured party his lawful water right. The essential conditions are:

it is done openly

1. The diversion of water by the prescriptive claimant must have been made *openly,* without any attempt at concealment.

the act is against someone else's interest

2. His diversion of water must have been *adverse* or *hostile* to the right of the appropriator or riparian owner which he is invading. This means that the appropriator or riparian owner must have been deprived, because of the adverse diversion, of the use of his water to such an extent that he could have successfully maintained a court action to stop the unlawful interference with his right.

water that someone else claims and needs is taken

3. The rightful owner—that is, the appropriator or riparian owner whose lawful right is being invaded—must have been *excluded* by the adverse claimant from the use of the water during the times at which he had the right to use it.

it is done with no interruption

4. The adverse diversion must have been made without any actual *interruption* on the part of the rightful owner.

it is done under claim of right

5. The adverse claimant must have made his diversion under a *claim of right.* This requirement would be satisfied, for example, if an appropriator is seeking to acquire a prescriptive right against a riparian owner, or a junior appropriator against a senior appropriator—in either case asserting openly his own appropriative right. If any taxes have been separately assessed against the water right of the rightful owner, the prescriptive claimant must have paid them.

and it is done whenever water is needed

6. The prescriptive claimant must have diverted the water, not incessantly, but *whenever he needed it* throughout the 5-year statutory period.

The diversions of water by the prescriptive claimant during the prescriptive period are *unlawful.* This is necessarily the case, because he is invading the valid prior right of someone else, and is subject to a court injunction if the rightful holder seeks one. But if these unlawful practices continue without interruption for 5 consecutive years under the conditions outlined above, they *cease to be unlawful* as against the injured party. The adverse claimant, at the end of the statutory period, acquires a *prescriptive right*—a superior right—against the person whose right he has invaded. This right, when perfected, is in the eyes of the law as valid as if it had been acquired by deed from the true owner.

During the 5-year prescriptive period the rightful owner

of the water right may be able to *break the continuity* of the adverse use. Continuity is broken if the adverse user, upon the insistence of the rightful owner, releases the water that he demands. This also occurs if the rightful owner effectively prevents the diversion by physical means. And it results if he initiates a successful legal action to restrain the continuance of the adverse diversion and use. To break the continuity of the adverse use, it is not necessary that judgment in such a lawsuit be rendered before the prescriptive period expires; but it is necessary that the suit be filed during the prescriptive period and that it be prosecuted to a successful conclusion. If the continuity of adverse use is broken in any of these ways, the running of the statutes of limitations is stopped and the prescriptive right consequently does not mature.

But if the rightful owner *fails to interrupt* the adverse use before the end of the 5-year prescriptive period, he thereupon loses his right to object to it. The prescriptive right, upon the conclusion of the statutory period, vests against him.

Upstream diversions. In the usual case, a prescriptive right may be acquired only against *downstream* riparian owners or appropriators. This is because a water right is seldom infringed by any use of the water of a stream that is made after the water has flowed downstream past the headgate or land of the holder of the right.

"Prescription does not run upstream"

There are exceptions to this rule—for example, where a person locates his diversion and part of his ditch upon upstream land, without the consent of the landowner, in order to divert water there for use on downstream land. The general rule, however, is sometimes expressed thus: "Prescription does not run upstream."

Who may acquire a prescriptive right? The right of an *appropriator* of water may become prescriptive against either prior appropriators or riparian owners.

An appropriator may acquire such right

A *riparian* owner may acquire a prescriptive right, in addition to his normal riparian right, against the rights of downstream riparian lands. It is necessary, however, that the upstream riparian owner, in making his diversion of water, shall bring home to the downstream owners notice that he is diverting more than his share of the water, that he is claiming a right to make the excessive diversion, and that the diversion of the excess is adverse to their interests.

or a riparian owner may do so

Utilizing

The holder of a prescriptive right may continue to exercise it under the *same conditions* that prevailed while the right was being acquired.

This right must be used in the way it was acquired

The quantity of water to which a prescriptive right relates cannot exceed the quantity that was used throughout the full 5-year statutory period. A prescriptive claimant who enlarges his use of the water during the period is entitled, at the end of the period, to only the quantity that he has used for 5 years. The right to the excess does not mature until it also has been used for 5 years.

The right to make any change in the exercise of a prescriptive right is limited by the usual condition that the rights of other persons shall not be impaired by the change.

Loss

The prescriptive right may be lost in the same manner as that in which it was acquired by *prescription* on the part of another person.

A prescriptive right can be lost

An appropriative right that has become prescriptive may be lost in any of the ways in which appropriative rights generally may be lost. That is, the fact that it has become prescriptive does not render it less immune from loss than it was before.

RIGHTS TO STORE WATER

Water can be appropriated for storage

Water may be *appropriated* for *storage* in reservoirs pending later use, as well as for diversion for immediate use.

An application to appropriate water under the Water Code that contemplates reservoir storage must describe the reservoir by location, height of dam, capacity of the reservoir, and use to be made of the impounded waters (sec. 1266).

An appropriation of water to be stored in the ground for later recovery and use may also be made under the Water Code (sec. 1242). This includes the diversion of streams and the flowing of water on lands for such purpose, commonly known as "water spreading."

Riparian water can't be stored for later use

A *riparian owner* may not store water for future use by virtue of his riparian right. His riparian right entitles him to detain water temporarily in forebays or small reservoirs for immediate use in the development of hydroelectric power. But it does not entitle him to store water from one year to another, or from a wet season to a dry one. To do this, he must make an appropriation of the water for storage purposes.

CONFLICTS OF WATER RIGHTS IN WATERCOURSES

In conflicts, which right is superior?

Lawsuits over water rights in which only appropriative right are involved are decided according to the principles and rules of the *appropriation doctrine*. If only riparian rights are at issue, the *riparian doctrine* governs. And if

the rights in controversy are both appropriative and riparian rights, *both doctrines* must be taken into account in adjusting the conflicts.

Relative Superiority of Rights

The *pueblo water right* is superior to the rights of all riparian owners and appropriators on the same stream. The pueblo water rights of Los Angeles in Los Angeles River, and of San Diego in San Diego River, have been established by decisions of the California Supreme Court.

In conflicts between *appropriative* and *riparian* rights, certain appropriative rights may be superior to certain riparian rights, and vice versa. The question of relative superiority depends upon several factors—chiefly the respective times of accrual of the rights, and whether the appropriation was made on public or private land. If the appropriation was made on private land, the relative locations of diversions on the stream in certain cases are decisive. The relationships are as follows:

Riparian rights begin with private ownership

When public lands contiguous to streams pass to private ownership, they become possessed of riparian rights at that time. That is the time when the rights accrue, or come into existence. Appropriative rights accrue when the appropriations are made.

Riparian rights of lands contiguous to streams are *inferior* to appropriative rights (on the same streams) that were acquired on public lands before the riparian lands passed to private ownership. Riparian rights are *superior* to appropriative rights acquired subsequently on public lands.

Riparian rights are *superior* to appropriations made subsequently on private lands, whether upstream or downstream. They are also *superior* to earlier appropriations made on downstream private lands. Whether they are superior to earlier appropriations made on upstream private lands has not yet been decided by the California Supreme Court.

This means that if on a particular stream certain appropriative rights are superior, they must be satisfied out of the stream flow before the inferior riparian lands are entitled to any use of the water. If the riparian rights are superior, then their use of the water comes first, and the inferior appropriative rights have recourse only to the surplus water, if any, after the needs of the superior riparian rights and of any earlier appropriative rights on the stream are fully satisfied.

Quantities of Water

In the settlement of any conflict, each *appropriative right* is allotted a specific quantity of water. In conflicts

Ways of settling quantities differ with the rights involved

between *riparian owners only*, the allotments usually are made on a proportional basis. When *appropriative and riparian rights* are in conflict, the owners of those riparian rights that are superior must first show what their reasonable water requirements are with respect to areas of land and quantities of water, and the holders of inferior appropriative rights must then show that there is a surplus in the water supply available for their use. These inferior appropriative rights attach only to the surplus.

Reasonable Beneficial Use

All water rights in California, by reason of the constitutional amendment of 1928 (see pp. 12–13), are now limited to what the courts have termed *reasonable beneficial use of water.*

ALL users must use water reasonably

This means that in the adjustment of conflicts between the users of water of watercourses, *all claimants*, whether riparian or appropriative, are held to *reasonable beneficial uses* of water under reasonable methods of diversion and use. Practices that prevail generally in the community are given considerable weight in the setting the *immediate standards* by which reasonableness is determined in such a controversy.

Physical Solution

The courts in some cases adopt *physical solutions* of water-rights controversies. A physical solution—for example, making available a substitute supply of water at no increase in cost to the prior user—protects a downstream superior or prior right, without enjoining the exercise of an upstream inferior or junior right, or requiring the upstream parties to buy out the superior rights downstream.

Substitute supply to a prior user may avoid waste . . .

This type of adjustment of water controversies has come about because in certain situations the settlement of conflicting water rights in strict accordance with the relative superiority or priority of the rights might result in a substantial waste of water, which is against the State water policy. For example, to require water to flow in its natural course for a long distance in order that the holder of a superior or prior right shall receive his full supply at his point of diversion may necessitate the loss of a large quantity of water in conveying a relatively small quantity to that point.

The right of an appropriator or riparian owner to receive his water supply in the quantity and quality and at the times nature provides is a property right, of which he may not be deprived arbitrarily. However, to supply him at his place of use an equivalent quantity of water of the same quality and during the same period of use, at no greater expense to him than he has been incurring,

is not to deprive him of any part of his property right.

The courts have authority to accept physical solutions agreed to by the parties to water controversies, and to impose physical solutions upon them if they cannot agree, provided that the superior or prior rights are fully protected. The purpose of physical solutions is to avoid unnecessary and unconscionable waste of water and at the same time protect existing rights of use.

but all rights must be protected

Water rights in DEFINITE UNDERGROUND STREAMS

The rules of law that govern water rights in surface watercourses apply equally to watercourses under the surface. Therefore, rights of use may be either *riparian rights* or *appropriative rights. Prescriptive rights* may vest against riparian owners or appropriators, just as in the case of surface streams.

Laws about surface streams apply to underground ones

The *underflow* of a surface watercourse is a part of the watercourse. Rights of use that attach to the surface stream attach equally to its underflow. Persons who hold superior or prior rights of use in a surface stream are entitled to protection against abstractions of water from the underflow that would result in depleting the surface flow.

RIPARIAN RIGHTS

Lands that overlie *definite underground streams* have *riparian or overlying* rights in their waters solely by reason of the situation of the lands with respect to the water supply.

Riparian rights attach to them

The *underflow* of a stream may not only lie immediately beneath the surface stream, but may extend for considerable distances beyond the surface banks on one or both sides. A tract of land therefore may overlie the underflow of a stream without being contiguous to the surface stream itself. Such land has a riparian or overlying right in the underflow. But that right does not entitle the owner to divert water from the surface stream to the injury of owners of land riparian to the surface channel, even if the owner of the intervening land grants him a right of way. His access to the water by reason of the location of his land is downward through the soil, and his right may be exercised by pumping from the ground.

APPROPRIATIVE RIGHTS

The waters can also be appropriated

The waters of *definite underground streams*, including the *underflow* of surface streams, may be *appropriated* in the same manner and under the same limitations as in the case of surface watercourses. Such a right acquired

in the underflow relates to the entire watercourse, surface and subterranean, and is junior to all appropriative rights previously acquired in any part of the watercourse.

The Water Code makes the current appropriative procedure specifically applicable to "subterranean streams flowing through known and definite channels" (sec. 1200).

Water rights in PERCOLATING GROUND WATERS

Some laws deal specially with percolating water

In California water law, waters in the ground that are not moving in definite underground streams are *percolating waters*. The waters of a *common artesian basin* that are broadly diffused are classed as percolating waters in determining rights of use, provided that the physical characteristics of a definite underground stream are not present.

Originally, rights of use of percolating waters were governed by rules that were entirely different from those applicable to definite underground streams. Changes that have taken place in the law during the past 50 years have considerably lessened the differences, so that the rights that pertain to waters of the two classes are now in many respects alike. Nevertheless, in any consideration of California ground-water law, it is necessary to keep these two classes of ground water distinct.

Rights to the use of percolating ground waters consist of *correlative rights* and *appropriative rights*. Against either, *prescriptive rights* may vest.

THE CORRELATIVE RIGHT

Analogy to the Riparian Right

Overlying land has a correlative right

The *correlative right*, like the riparian right, exists solely by reason of the situation of the land with respect to the water supply. Land that borders a surface stream is riparian land and has a riparian right in the water of the stream, while land that overlies a body of percolating water is overlying land and has a correlative right in the water of that ground water supply. Title to riparian and correlative water rights is acquired in the same way—by acquiring title to the land. The rights of overlying owners as against each other, and of riparian owners as against each other, are based upon the same reciprocal principles, and the landowners in the two groups have the same fundamental rights as against appropriators. Neither right is forfeited solely by disuse, but can be lost by adverse use on the part of others under circumstances that result in the vesting of prescriptive rights.

Relative Rights of Overlying Landowners

All overlying owners have coequal rights

The owners of lands that overlie a common ground water supply, whether artesian or nonartesian, have *coequal* rights to the use of the water on or in connection with their overlying lands. For such purpose, the right of each landowner extends to, but to no more than, the quantity of water required for *reasonable beneficial use*.

None has priority because he used water first

The correlative right, like the riparian right, is not subject to forfeiture solely by disuse of the water. No overlying landowner can acquire *exclusive or paramount* rights as against any other owner solely because he began to use the water first, or because of the nonuse of others, or for any reason other than grant, condemnation, or prescription. Each owner can begin his reasonable use of the water at pleasure.

Courts may apportion

If the common supply of percolating water is not adequate for the needs of all overlying lands, each landowner is entitled to an *equitable portion*. The courts have power to make such apportionments and to enforce them by their judgments and decrees.

Place of Use

The correlative right entitles the holder to use the water only on or in connection with his *overlying land*, just as is the case with the riparian right. Nonoverlying uses of the water are appropriative, and may possibly become prescriptive as well.

Loss

The correlative right may be lost by adverse use that ripens into *prescription*.

A correlative right can be lost by prescription

The essential requirements of prescription with respect to the waters of surface watercourses apply to percolating waters as well. However, the general statement that "prescription does not run upstream" does not have the same application to percolating waters as to stream waters. This is because of differences in the movements of stream and percolating waters—the one flowing over the soil and the other moving through the spaces between the soil particles—and the resulting response of percolating water to pumping operations in the area.

but not solely by nonuse

Forfeiture of water rights *because of nonuse* of water *does not apply* to correlative rights in percolating waters.

THE APPROPRIATIVE RIGHT

Water

The overlying landowner's correlative right is limited to reasonable beneficial use not only as against other overlying landowners but against all other claimants as well.

Surplus percolating water can be appropriated

Any surplus in a supply of percolating water above the aggregate quantities required for the reasonable beneficial use of the overlying lands may be *appropriated.*

Acquiring

but only by withdrawing and using it

An *appropriation of percolating water* may be made only by acts of withdrawing the water from the ground, conveying it to the place of use, and using it.

The procedure in the Water Code for the appropriation of water *does not apply to percolating water.* That procedure applies only to surface water, and to subterranean streams flowing through known and definite channels (sec. 1200). Necessarily that excludes percolating water.

The fact that percolating water may be appropriated only by diversion and use, and not under the procedure prescribed in the Water Code, does not in any way affect the validity of the appropriative percolating water right. However, as the Water Code does not provide procedure for filing and recording claims of such rights (with the exception of certain southern counties, as noted on pp. 45–47), it is advisable that the appropriator keep complete and accurate records of his operations in order to preserve specific data for eventual use in protecting and adjudicating his right.

If this is done, a record should be kept

Utilizing

Such water may be used outside the area

An appropriation of surplus percolating water may be made for *distant use*—that is, use on or in connection with lands away from the water-bearing ground water area. This is a common type of nonoverlying use.

Public-utility use likewise is a nonoverlying use, wherever made. A public-utility company or a city that pumps percolating water for the service of the public and delivers it to overlying landowners for compensation is not thereby exercising correlative rights of its own or of the overlying landowners. Such public use of percolating water, whether within or outside the ground water area, is made in the exercise of appropriative rights only. These appropriative rights in time may vest by prescription against the overlying landowners.

Public-utility use of such water is appropriative only

The use must be reasonable

The exercise of appropriative percolating water rights, as well as all other water rights in California, is limited to *reasonable beneficial use* under reasonable methods of diversion and use.

Loss

The right may be lost by abandonment, prescription, or estoppel, as in the case of appropriative rights in watercourses.

Appropriated percolating water rights can be lost

However, the provision in the Water Code (sec. 1241) for the forfeiture of water rights not beneficially used for 3 years does not apply to percolating waters. That the period of nonuse of water that subjects an appropriative right in percolating water to loss by forfeiture is 5 years is apparently the holding in a leading ground water decision. (*Pasadena* v. *Alhambra,* 33 Cal. (2d) 908, 933–934, 207 Pac. (2d) 17 (1949).)

PRESCRIPTIVE RIGHTS

Prescription must be adverse to another's right

Uses of percolating waters may become *prescriptive* against the rights of overlying landowners and of prior appropriators, if made adversely for 5 years under all the circumstances necessary to establish prescription. Prescriptive rights may be established either within the ground water area or outside of it.

Appropriative uses of surplus percolating water—that is, waters in excess of the reasonable beneficial requirements of overlying landowners and prior appropriators—are not wrongful, and therefore cannot become prescriptive. It is only unauthorized uses of nonsurplus water that are adverse to existing rights and that hence may ripen into prescriptive rights.

CONFLICTS OF RIGHTS IN PERCOLATING WATERS

Overlying land has first rights

In the absence of prescription, the right of the *owner of overlying land* to make reasonable beneficial use of the percolating ground water in his land is *paramount.* Appropriators for distant use or for public-utility use may take only the surplus above the proper requirements of the overlying owners, if and when there is a surplus. In the event of a shortage of water, the rights of appropriators must yield to those of the overlying owners, the available supply to be divided among the overlying owners equitably under all the circumstances.

RIGHTS IN OVERDRAWN GROUND-WATER SUPPLIES

Water in overdrawn supplies may be apportioned

A ground-water supply is *overdrawn* when the average annual withdrawals in the area, by pumping or otherwise, exceed the safe yield, or safe annual replenishment from the sources that provide the area with its supply of ground water. A continuing overdraft is accompanied by a general lowering of the water levels from year to year. If continued indefinitely, the water users eventually would be unable to obtain enough water for their established uses.

The California Supreme Court held in the case of *Pasadena* v. *Alhambra* (33 Cal. (2d) 908, 933, 207 Pac. (2d) 17), decided in 1949, that prescriptive rights against both overlying landowners and prior appropriators in the Raymond Basin had been established by appropriations made after the commencement of the overdraft. Even after the overdraft had begun, all parties continued to pump. Hence no water rights had been completely lost and none had been completely gained by prescription. The court ordered the pumping by all parties to be proportionately reduced, the total annual pumpage not to exceed the safe yield.

Overdrafts upon ground-water supplies have led to the enactment of two recent statutes pertaining to ground-water rights in certain counties only:

1. In any of the counties of Santa Barbara, Ventura, Los Angeles, Orange, San Diego, Imperial, Riverside and San Bernardino, the water right of a ground-water user will not be impaired by ceasing or reducing his extraction of ground water if he uses instead water from an alternate source that is not tributary to the ground-water supply. Reports must be filed with the State Water Rights Board. (Water Code, secs. 1005.1 and 1005.2.)

2. In Riverside, San Bernardino, Los Angeles, and Ventura counties, extractions of ground water in excess of 25 acre-feet per year, with certain exceptions, must be reported to the Board. Diversions of surface water by such ground-water users must also be reported. Persons required to file the reports who fail to do so cannot base prescriptive rights upon uses of ground water during periods for which reports are not filed. (Water Code, secs. 4999 to 5008.)

Regulations applying to WATER WELLS

Reports of Intention and Completion

Any work done on water wells must be reported

Every person who intends to dig, bore, or drill a water well, or to deepen or reperforate one, is required by the Water Code to file with the Department of Water Resources a notice of intent on forms furnished by the Department, and in like manner to report its completion. These provisions apply likewise to the conversion, for use as a water well, of any oil or gas well originally constructed under the jurisdiction of the Department of Conservation. Failure to comply with any of the foregoing provisions is a misdemeanor. (Water Code, secs. 7076 to 7082.)

Waste of Water from Flowing Artesian Wells

Flow from artesian wells must be controlled

The Water Code contains provisions aimed at the *prevention of waste* of the water of *flowing artesian wells* (secs. 300 to 311). The statute applies to any artificial hole in the ground through which ground water naturally flows to the surface for any length of time.

Any flowing artesian well not equipped with a mechanical device which will control the flow is declared to be a public nuisance, and the person responsible for its continued existence is guilty of a misdemeanor. Any person responsible for the waste of water of flowing artesian wells likewise is guilty of a misdemeanor. Penalties for violation of the statute are prescribed.

Water rights in SPRING WATERS

The *source* of a spring is *ground water*. The waters of a spring are simply ground waters that have risen naturally to the surface at that particular place.

The landowner may use spring water that does not flow from his land

The water of a spring that *does not flow from the tract* on which the spring is located, either on the surface or beneath it, is subject to the use of the landowner. Other persons may share in the rights to the sources of the spring, but they have no concern with the landowner's use of the water after it reaches his spring.

But if it does, others share the rights to it

The rights of the landowner in a spring that *flows from his tract,* however, are qualified by the rights of others in the water supply of which the spring water becomes a part. If the spring *flows into a watercourse* it becomes a part of that watercourse, and the owner of the land on which the spring rises has only the right of a riparian owner. The water of such a spring may be appropriated in the same manner and to the same extent as any other part of the watercourse. If the spring water *sinks into the ground* and becomes part of a supply of percolating water, the landowner has the correlative right of an overlying landowner.

The right to spring water can be lost

Rights in waters of a spring that do not flow from the land *may be lost* by prescription. The respective ways in which rights in springs that flow from the land may be lost are those pertaining to watercourses and ground waters.

Water rights in INTERCONNECTED WATER SUPPLIES

Water supplies that are interconnected—so that, for

Rights to a common supply must be correlated

example, one water supply is replenished from another one and contributes water to a third supply—are considered in California to comprise one common water supply. Rights to the use of the various parts of the common supply are correlated when controversies over them arise.

SPRING AND CONNECTED WATER SUPPLIES

Springs and their sources

A *spring* and its source and outlet provide an example of an interconnected or common water supply.

If the spring *does not flow from the tract of land* on which it is located, and if there is no evidence of a subterranean outlet by which the spring water that sinks into the ground leaves the tract, the owner of the tract and the owners of lands overlying the ground water which is the source of the spring have correlative rights of reasonable beneficial use in the common supply. The overlying owners may extract from the ground no more than their reasonable shares of the percolating water that feeds the spring if the result is to deprive the owner of the land containing the spring of his reasonable share of the aggregate water supply.

and streams that flow from them

A spring that *flows from the land,* either on or under the surface, adds another element to the problem, namely, the water supply to which the spring makes its natural contribution. This may be a watercourse, or it may be a body of percolating water. In this case the holders of rights of use of the common supply comprise (1) the owners of lands overlying the ground water that feeds the spring, (2) the owner of the land on which the spring rises, and (3) the holders of riparian and appropriative rights in the stream into which the spring flow is discharged, or the owners of lands overlying the ground water supply to which the spring is tributary and appropriators of the water, as the case may be. All of these rights are likewise coördinated on the same basis of reasonable beneficial use.

SURFACE WATERS AND GROUND WATERS

Streams and percolating waters

The physical interconnection of *surface waters* and *ground waters* is pronounced and widespread. Springs derive their entire water supplies from the ground, and watercourses are fed in part from that source. Ground waters, in turn, are supplied not only directly by rain and melting snow, but also by diffused surface waters, spring waters, and percolation from surface watercourses.

The major water supplies of California are surface streams and percolating ground waters. In many situations these supplies are directly and closely related. There is in the state a high degree of coördination of rights in these interrelated water supplies.

From the standpoint of rights of use, the surface and ground waters that feed a watercourse, the surface flow and underflow of the stream itself, and the ground waters that break away from the stream, are considered a common source of water supply. Certain water rights attach directly to the separate parts of the common supply, but they are nevertheless related to the water rights in the other parts. For example, owners of lands that overlie percolating water that feeds a stream are limited to reasonable use of the water not only as among themselves, but also in consideration of the rights in the stream itself. And the rights in the stream are qualified likewise by rights in percolating waters that have escaped from the stream and of which the stream therefore is the source.

MAIN STREAM AND TRIBUTARY SOURCES

Upstream tributaries with their main streams

The holder of a water right in a watercourse has rights in the waters of streams, lakes, sloughs, springs, and ground waters that join the stream above his point of diversion. *Upstream tributaries* are all part of his source of water supply. If this were not the case, the waters of the main stream might be so depleted by diversions from tributary sources as to impair or destroy the water rights in the main stream.

Water rights and IRRIGATION ORGANIZATIONS

IRRIGATION DISTRICTS

The privilege of obtaining water from an *irrigation district* is conferred upon the holders of lands included within the boundaries of the district and assessed for the benefits received from its operation. Each landowner is entitled to a proportionate part of the total water supply, based upon his proportion of the total district assessment. The district, however, in lieu of part or all of its assessment, may levy tolls or charges which must be paid by those who wish to use the water.

An irrigation district may *appropriate* water for the service of lands within its boundaries.

A district may appropriate water for its lands . . .

An irrigation district may be formed to serve lands the owners of which hold individual appropriative rights. In

that case, if the district does not purchase or condemn these appropriative rights, it may deliver water to the owners according to some equitable arrangement.

or act as agent in delivering water

As *riparian rights* are held only by the owners of riparian lands, any riparian rights that may pertain to lands within an irrigation district (other than lands owned by the district itself) belong to the landowners, not to the district. The district and the riparian landowners, however, may contract for the delivery by the district to the landowners of the water to which the latter are entitled under their riparian rights. The district in doing that is the agent of those landowners.

MUTUAL IRRIGATION COMPANIES

A mutual company is owned by those it serves

The members of a *mutual irrigation company* are the owners of its properties. Because of their several interests in the company, the members are entitled to receive water from the company system. If the company is incorporated, the interests of the members are represented by the holding of shares of its capital stock. California has many incorporated mutual irrigation companies, and there are various arrangements for the relation of shares of stock to acres of land, for assessments against the stock shares, and for toll charges for the delivery of water. The water privilege of the member of an unincorporated company is stated in his contract with the other members. With the larger companies at least, this is in the form of written articles of agreement. Generally, the share of stock in an incorporated company entitles the holder to a proportionate part of the total water supply, unless otherwise provided in the articles of incorporation, bylaws, or stock certificates.

It may hold title to water rights or act as agent

A mutual irrigation company may *appropriate* water for delivery to its shareholders. In that case the company holds formal title to the water right, but the shareholders have a beneficial ownership in it. Or the shareholders may hold appropriative rights individually, the company acting as their agent in exercising the rights.

A mutual irrigation company does not hold *riparian rights* for any lands unless it holds title to the lands. In some mutual companies, shareholders who are riparian owners have made the companies their agents in diverting and delivering to them the water which they have individual rights to divert.

COMMERCIAL IRRIGATION COMPANIES

The holders of contracts with a *private-contract irrigation company* have such water privileges as are expressed in the contracts. These agreements specify the lands to be

served with water by the company, the quantities of water to be delivered, and the annual charges to be paid by the irrigator to the company.

A *public-utility irrigation company* is required to serve water to lands within its service area, so far as the water supply permits, upon the payment of reasonable rates regulated or subject to regulation by the State Public Utilities Commission.

A commercial company may appropriate water for consumers

A commercial irrigation company of either type may *appropriate* water for service to its contracting parties or consumers. These persons, upon establishing relations with the company, acquire a beneficial interest in the water right to which the company holds formal title. A public-utility company that pumps ground water for the service of the public is regarded as an appropriator, even though part or all of its consumers are the owners of overlying lands.

DETERMINATION of water rights

Many water rights are now well recognized

A water right is never established as against the holders of other water rights in the same source of supply—in the absence of binding agreements by the parties—until it has been *adjudicated* or *determined* in a court decree with respect to such other rights. On most California streams, however, it is probable that water rights have become so well recognized through use, or so well clarified by past litigation or by permits to appropriate and licenses issued by State officials, or in some cases by agreements, that there is little local controversy regarding them.

The procedures for determining water rights in California are as follows:

ORDINARY CIVIL ACTION

To determine one's water right, one may bring civil suit

The water right may be determined in a *civil lawsuit* in which there is *no participation by State officials*. There may be only two parties to such a suit, or there may be many parties. In any case, the judgment and decree at the conclusion of the action will bind only those persons who are parties to the litigation, and no others.

COURT-REFERENCE PROCEDURE

Courts may refer suits to the Board

The Water Code authorizes courts of the State to refer suits for the determination of water rights to the Water Rights Board, as referee. Such *reference* may cover any or all of the issues involved in the suit, or may call for an

investigation and report upon any or all of the physical facts involved. The Board may similarly accept references of water rights suits from federal courts. (Water Code, secs. 2000 to 2076.)

The purpose of the court-reference procedure is to enable the trial courts to avail themselves of the technical advice and assistance which the State organization can render in the solution of controversies over water rights, which so often involve complicated physical and legal problems.

STATUTORY ADJUDICATION

All rights in a stream system may be settled in one proceeding

The Water Code contains procedure under which all of the water rights that pertain to a stream system can be *finally determined and adjudicated* in *one comprehensive proceeding* (secs. 2500 to 2900).

A *stream system* to which this procedure applies includes a stream, lake, or other body of water and its tributaries and contributory sources, including definite underground streams. It *does not apply* to percolating ground water.

The Board makes a determination; files it in court

The first part of the proceeding consists of an *administrative determination* of the water rights by the Water Rights Board, upon a petition signed by one or more claimants of the water rights. The Board makes an investigation, takes proofs from claimants of water rights, hears contests by those who object to statements in the proofs, and makes a determination of the water rights. Each person who has filed a proof of claim receives a copy of the order of determination. This administrative determination is a preliminary proceeding. There is no final action on the water rights until the determination has been heard and passed upon in court.

The Board files its order of determination and all testimony taken by it with the clerk of the superior court of the county in which the stream system or some part of it is located. Any party interested in the determination may file exceptions to the order of determination. The court holds a hearing on all exceptions filed. At the conclusion of the proceeding, the court enters a *judgment and decree* which determines and *adjudicates* the water right of every person involved in the proceeding. Appeals may be taken from the decree.

The court enters judgment; appeals may be taken

The decree of the court is *conclusive* as to the rights of all existing claimants lawfully included in the determination. It therefore adjudicates the water right of every claimant as against all of the others.

The procedure for determining and adjudicating water

rights provided by California law is designed (1) to establish all existing rights, and (2) to provide a basis for public supervision of diversion if the latter is found necessary to insure to each user his rightful supply in accordance with his established priority. Insuring to each user his rightful supply without conflict and without litigation is the ultimate purpose of water-right administration, not only in California, but in all the western states; and this purpose may not be fully accomplished until the relative rights of all users on any stream are made certain by determination and court adjudication, and by public supervision of diversions if found desirable and necessary.

The procedure for determination and adjudication of water rights is being applied in California as the need develops and as the facilities at the disposal of the Board permit.

ADMINISTRATION of water rights

Water may be distributed by a State watermaster

The Department of Water Resources may create *watermaster service* areas for the distribution of water to those entitled to receive it. The Department may appoint a *watermaster and deputies* for this purpose in a service area if the owners of at least 15 per cent of the conduits request it. Half of the cost of administration and distribution of water within a service area is paid by the State, and half by the holders of the water rights. (Water Code, secs. 4000 to 4407.)

State supervision of

DAMS AND RESERVOIRS

Nonfederal dams of certain sizes must be supervised

The Water Code makes it the duty of the Department of Water Resources *to supervise* dams in order to prevent injury to life and property by reason of their failure (secs. 6000 to 6501).

DAMS AND RESERVOIRS SUBJECT TO SUPERVISION

Supervision of dams does not apply to those owned by the United States.

Other dams and reservoirs are subject to supervision if (a) they are 25 feet or more in height from streambed to downstream toe, or from lowest elevation of outside barrier limit if not across a stream channel, to maximum

possible water storage elevation, or (b) if impounding capacity is 50 acre-feet or more.

A barrier not exceeding 6 feet in height, regardless of storage capacity, or having storage capacity not exceeding 15 acre-feet, regardless of height, is not subject to supervision.

Other exceptions from supervision include levees for control of floodwaters, and channel obstructions 15 feet high or less for the sole purpose of spreading water in the streambed for percolation underground.

A city or county may regulate or supervise only such dams and reservoirs as are not within the State's jurisdiction or subject to regulation by another public agency or body.

OPERATIONS SUBJECT TO SUPERVISION

Construction and Enlargement of Dams

Construction of or *enlargement* of any dam or reservoir may not be commenced until the owner has applied to and obtained from the Department *written approval* of his plans and specifications. Printed forms for the application are furnished by the Department.

Plans must be approved

Filing fees are based upon the estimated cost of the dam or reservoir. As of 1965, the fee for the first $100,000 of cost is 1½ per cent of the estimated cost, with smaller percentages for higher costs (sec. 6300). The filing fee must be paid before an application will be considered; but the cost in many cases may be small in comparison with the benefits to be derived from the impounded water.

There is a filing fee

It is important to note that an *application for approval of a dam* and an *application for a permit to appropriate water* are two *entirely different things*. Approval of plans and specifications for a dam is not a permit or license to appropriate the water to be stored behind the dam. The right to impound the water must be initiated according to the procedure outlined above under "The appropriative right—acquiring" (pp. 23–26).

Approval is not a permit to appropriate water

Repair, Alteration, and Removal of Dams

Before the owner of a dam begins to make repairs or alterations or to remove it, he must apply to and obtain the *written approval* of the Department.

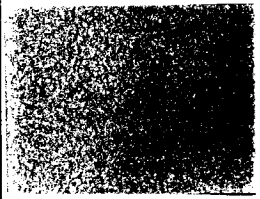
Approval must be had for any change in dams

Continued Supervision

The Department is required to *inspect* work done under approved plans and specifications, and may revoke its approval if the work is not done properly or if it develops that a safe dam cannot be constructed. Before any certificate of approval is revoked, the Department holds a hearing at which interested parties may appear and present their views and objections. Petition for a writ of mandate to inquire into the validity of the Department's action in revoking a certificate of approval may be filed in court.

The Department inspects dams later and may order repairs

"The water right is a property right. It is a valuable right. And it is real estate. . . . The holder of a water right in an area in which the competition for water is keen needs to be constantly on guard to protect his right against infringement or loss. It is said that 'Eternal vigilance is the price of a good water right.' "



Co-operative Extension work in Agriculture and Home Economics, College of Agriculture, University of California, and United States Department of Agriculture co-operating. Distributed in furtherance of the Acts of Congress of May 8, and June 30, 1914. George B. Alcorn, Director, California Agricultural Extension Service

NSW WATER ACT 1912

Ministerial Corporation may cancel licence if work not used for three years

13F. In any case where the work covered by a licence has not been used for a period of three years or more the Ministerial Corporation may give the holder of the licence notice by registered letter addressed to the holder at his address last known to the Ministerial Corporation that after the expiration of a period specified in the notice the licence will be cancelled. At the expiration of the period mentioned in the notice, the licence shall be deemed to be cancelled unless the Ministerial Corporation shall have annulled or withdrawn the notice in the meantime.

Ministerial Corporation may cancel authority if work not used for 3 years

20BC. In any case where the work in respect of which an authority is held has not been used for a period of 3 years or more, the Ministerial Corporation may give to the holders of the authority notice by letter sent to each of them by post addressed to them at their addresses last known to the Ministerial Corporation that, after the expiration of a period specified in the notice, the authority will be cancelled and, where any such notice is given, unless the Ministerial Corporation annuls or withdraws the notice before the expiration of the period so specified, the authority shall, on the expiration of that period, be deemed to be cancelled.

Powers to determine licence, group licence or authority

26B. The Ministerial Corporation may cancel at any time after giving reasonable notice a licence, group licence or an authority on payment of compensation to the person entitled to the benefit of the licence or authority or to the holder of the group licence, as the case may be.

The right to the water which was vested in that person shall thereupon vest in the Ministerial Corporation.

Such compensation shall be assessed by the local land board of the land district in which the licensed work, the work the subject of the group licence or the authorised work is situated.

|S17
RIGHTS OF HOLDER OF LICENSE OR GROUP LICENSE.

17. Subject to the provisions of this Part, or the regulations hereunder, the person holding a license or group license under this Part in respect of any work shall have absolutely, during his lawful occupation of the work, so far only as the said work is constructed or maintained on the land occupied by him, the quiet enjoyment and the sole and exclusive use of the work as against all other persons whomsoever, including the Crown and the Ministerial Corporation, and shall be entitled to take, use, and dispose of any water contained therein or conserved or obtained thereby to the extent and in respect of the land, and in the manner specified in the license or group license.

|S20W
POWER OF MINISTERIAL CORPORATION TO DECLARE WATER SOURCE TO BE SUBJECT TO VOLUMETRIC WATER ALLOCATIONS SCHEME.

20W. The Ministerial Corporation may, by order published in the Gazette, declare that any water source and all of the entitlements, which authorise the taking of water from that water source, shall, on and from such date as may be specified in the order (being the date of its publication or a later date), be subject to a volumetric water allocations scheme prepared under section 20X or may, by a like order, declare that a scheme already in force shall be subject to a modification so prepared.

|S20X
DETERMINATION OF WATER ALLOCATIONS IN RESPECT OF ENTITLEMENTS.

20X. |s1 (1) Before an order under section 20W may be made, the Ministerial Corporation shall prepare a volumetric water allocations scheme or a modification of such a scheme, in respect of the water source to which it is proposed that the order will, when made, apply.

|s2 (2) In preparing or modifying a scheme in respect of a water source, the Ministerial Corporation -

(a) shall assess the total quantity of water

(i) that is likely to be available in each year for apportionment among the holders of entitlements; and

(ii) that, in the opinion of the Ministerial Corporation, should be reserved for other uses or for future use; and

(b) shall then determine in respect of each entitlement the maximum quantity of water which may, subject to this Division, be taken from that water source in any year under the entitlement for the purpose or purposes specified in the entitlement.

ACTS AND REGULATIONS

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NEW SOUTH WALES

TABLE OF PROVISIONS

PART I - PRELIMINARY

PART II - WATER RIGHTS AND WORKS

DIVISION 1 - Interpretation

DIVISION 2 - Rights of the Crown and of riparian proprietors

DIVISION 3 - Licenses

DIVISION 3A

DIVISION 3B - Permits

DIVISION 4 - Joint water supply schemes

DIVISION 4A - Group licenses

DIVISION 4B - Volumetric Water Allocations Schemes

DIVISION 4C - Transfer of Water Allocations

DIVISION 4D - Sale by the Ministerial Corporation of Water Allocations

DIVISION 5 - Miscellaneous

PART III - WATER AND DRAINAGE

DIVISION 1 - Interpretation and general

DIVISION 2 - Constitution of trusts, construction of works and transfer to trust

Forbes Advocate

SATURDAY, AUGUST 7, 19

An illegal levee bank

A levee bank blocking the Buyuma flood runner is illegal and has to go.

A decision handed down by Justice Bignold on Thursday in Sydney completely reversed an earlier decision by the Land Board to approve the licence of the levee bank on the southern side of the Lachlan River.

The Land Board approved the application for the licence on November 24, 1997, after a lengthy hearing involving an investigation of the approval of the bank by the Department of Land and Water Conservation (DLWC), and after hearing objections.

Following the board's decision, four local landholders continued to object to the application and appealed to the Land and Environment Court.

The appeal was upheld by Justice Bignold who further ordered that the Land Board's decision be set aside.

The implication of the overturned approval of the licence is not yet known or its effect on DLWC guidelines, but it could affect the entire state of New South Wales, as well as the Forbes region.

"The implication is this; although the bank was within the guidelines and had been there for many years, the court cancelled its approval," barrister Frank Donahue QC. said yesterday.

"The consequence is that the bank is illegal."

Mr Donahue represented the four landholders appealing the Land Board decision - one of the objections to the bank was that the closure of the runner east of Forbes had contributed to tens-of-thousands of megalitres of water dumped on Forbes in the 1990 floods.

The act says that you can't build or allow a structure to remain in a floodway without approval, and a bank is a structure.

"The Buyuma runner is a major flood runner with an enormous capacity," Mr Donahue said.

Under this reversal, floodwater will now flow naturally into the Buyuma flood runner and into the Bundaburrah Creek - thus affecting the people downstream. On the other hand, it will reduce the amount of floodwater flowing through Forbes, he said.

The court found that evidence presented during the appeal hearing proved the bank and channels caused a bank-up of water on the four properties in question, and upheld the appeal.

Mr Donahue said as far as he knew, this was the first decision by the present Land Board to be challenged and overturned.