

1-1-2012

Reserved Public Rights in Water

Joseph L. Sax
Berkeley Law

Follow this and additional works at: <http://scholarship.law.berkeley.edu/facpubs>



Part of the [Law Commons](#)

Recommended Citation

Joseph L. Sax, *Reserved Public Rights in Water*, 36 *Vt. L. Rev.* 535 (2012)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

RESERVED PUBLIC RIGHTS IN WATER

Joseph L. Sax*

INTRODUCTION

It seems odd that the three great natural resources on which we depend—air, water, and land—are governed by three entirely different legal concepts. Air is unowned and unownable, land is as fully privatizable as law allows, and water is publicly owned but amenable to private rights of use—a usufruct, to give it its formal name. Yet, if modern environmental awareness has taught us anything, it is that each of these resources is like the other in at least one very important respect. Each is a field of contention between private-use rights and public claims of entitlement. Climate change has brought dispute over control of the ambient air front and center, as the Clean Air Act had done in a less momentous way some forty years ago. The Endangered Species Act has given us the concept of habitat and forced us to think anew about traditional notions of land ownership—“[g]ood fences make good neighbours.”¹ And then there is water. Hardly anyone outside the arid West knows much about water law, but it embraces one of the most extraordinary conceptions of property in our jurisprudence. Until quite recently, the fundamental precepts of water law have been largely untested. But that is no longer the case. Water controversies have become important not only in themselves, but also because water jurisprudence has something powerful to say about our conceptions of land and air as we seek to manage today’s environmental challenges.

I begin with a mini-review of water history in America. Until very recently, water has been plentiful in the East and much of the Midwest and has been minimally regulated except for flood control, navigation, and issues like well contamination. But in the West, which is generally thought of as land beyond the 100th meridian (i.e., west of Dallas), the country is mostly semi-arid. There, water has been a subject of great legal and economic importance, and water law has developed very elaborately.

Because water was both scarce and essential, two basic ideas dominated thinking about it in the western states. First, water ought to be freely available to those who needed it, and thus not subject to the prospect of private monopolization; and second, that water should be used to promote public policies such as population growth and economic prosperity. Because of the first concern, it was never believed that market

* House and Hurd Professor of Law (emeritus), University of California, Berkeley.

1. ROBERT FROST, *Mending Wall*, in *NORTH OF BOSTON* 11, 12 (2d ed. reprt. 1917).

forces alone would suffice. In addition, it shortly became clear that private investment alone could not generate the needed capital to build the necessary water infrastructure. For that reason, government was a central player in the water economy from an early date.

From these beginnings—and in the setting of Progressive Era politics—came two remarkable ideas: (1) the legal precept that water belongs to the people of the state and that only use rights could be obtained in water; and (2) that water law must embrace a panoply of public-interest restrictions on those use rights quite unlike those that apply to property generally.

I. WATER LAW IN CALIFORNIA AND THE WEST

California law is similar to that in other western states, and I shall largely use it to illustrate the implementation of these principles. Article 10, section 2, of the California Constitution says,

[T]he general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented . . . in the interest of the people and for the public welfare.²

That concept is spelled out in the very first sections of the California Water Code. Section 100 provides that “[t]he right to water or to the use or flow of water . . . shall be limited to such water as shall be reasonably required for the beneficial use to be served.”³ Section 102 provides that “[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.”⁴ Sections 104 and 105 set out the primacy of the State, providing that “the State shall determine what water . . . can be converted to public use or controlled for public protection”;⁵ and that “the protection of the public interest in the development of the water resources of the State is of vital concern to the people . . . and . . . the State shall determine in what way the water of the State . . . should be developed for the greatest public benefit.”⁶

2. CAL. CONST. art. 10, § 2.

3. CAL. WATER CODE § 100 (West 2011).

4. *Id.* § 102. The language derives from a 1911 statute, 1911 Cal. Stat. 821, and has been held not to apply to riparian rights acquired prior to that date. *Tyndale Palmer v. R.R. Comm'n*, 138 P. 997, 1001 (Cal. 1914).

5. WATER § 104.

6. *Id.* § 105.

A more recent addition, in recognition of changing technologies and new demands, is codified as section 100.5. It states that customary use “shall not be solely determinative of its reasonableness, but shall be considered as one factor to be weighed in the determination of the reasonableness of the use.”⁷

These powerful but general restrictions are accompanied by numerous specific code provisions and court decisions that give content to the concept of beneficial use as a public responsibility of rights-holders. Among those limits is the rule that water may only be used for a state-designated “beneficial” use: Water cannot be held simply as an investment or for speculation, but must be utilized currently.⁸ Under the doctrine of forfeiture, a water right is lost if it is not used for a statutorily designated period of time; water cannot be wasted.⁹ For example, riparian irrigators cannot demand continuation of natural flood flows to irrigate their land when users upstream seek to divert some of that water. Such use is considered an unnecessarily extravagant irrigation technique, and thus wasteful.

Restrictions also apply to transfers under the no-injury rule, designed to protect other users (since water is a shared resource, and a given river’s flow will usually be used over and over before it reaches the sea).¹⁰ In general, this means that one can only transfer the consumed portion of one’s use, not what has flowed back into the river, such as agricultural runoff or treated municipal wastewater, and has been used by downstream diverters. The no-injury rule also provides that transfers of use may “not unreasonably affect fish, wildlife, or other instream beneficial uses.”¹¹ We also have area-of-origin laws, which protect source communities from the adverse impacts of inter-regional transfers.¹² These are just a few examples of the numerous and distinctive laws in the California Water Code that vest the decision as to how to employ water rights in the public, rather than in a user/proprietor.

As contrasted with general property law, water law mandates not only that a user refrain from injuring others but also that the user owes a positive duty to employ the resource prudently and in ways that benefit the public. These are real and consequential differences. A rich person can own a half-

7. *Id.* § 100.5.

8. *Id.* § 1240. A long-standing provision of the Code declares domestic use to be the highest use, and “the next highest use is for irrigation.” *Id.* § 106. There is no example of an existing non-irrigation use being displaced in favor of irrigation. The general understanding of this provision is that among competing uses for a permit for future use, assuming inadequate supply, irrigation would be preferred over other beneficial uses. However, I am not aware of such a preference being implemented in any reported case.

9. *Id.* § 1241.

10. *Id.* § 1725.

11. *Id.*

12. *See, e.g., id.* §§ 10,505, 10,505.5, 11,128, 11,460, 12,200–12,205.

dozen houses and rarely or never occupy most of them. But no matter who you are, you cannot deal that way with water. The distinctive message of the law is that water ultimately belongs to the community, and while individuals should of course benefit from it, water must always be used in ways that also benefit the community.

That precept also embraces recognition of changing public needs over time. The provision in the California Water Code dictating that customary use is not determinative of beneficiality or non-waste is an explicit recognition of changing standards, as was the repudiation of natural overflow irrigation.¹³ There are many other notable instances. For example, recreation is today considered a beneficial use. Additionally, states now allow rights to instream flows to be acquired, whereas in previous times the only way to obtain a water right was physically to divert water out of the stream.¹⁴ It was formerly thought wasteful to allow water simply to flow out to the sea. California's area-of-origin laws are also unique. For many years they had never been invoked (that is no longer the case), but they also implement a unique principle, which the California Court of Appeals described as "reserv[ing] to the areas of origin an undefined preferential right to future water needs."¹⁵

Similarly, in a famous early Colorado case, a federal court held that leaving water instream to run down a waterfall as an aesthetic amenity was not a beneficial use, though it was economically valuable as the central feature of a popular resort.¹⁶ The explanation was that Colorado needed to husband its water for the kind of economic development the public wanted, such as mining, irrigated agriculture, and municipal growth. Indeed, employing water to meet public goals was the justification for the western states' abolition of riparian rights in favor of prior appropriation, which allowed a user to move water to where it was most needed, rather than limiting application to the riparian tract.¹⁷ In an early case, the Colorado Court rejected claims of riparian property rights in water by riparian-tract land grantees, citing what it called the doctrine of "[i]mperative necessity."¹⁸

13. Article 10, section 2 of the California Constitution was inserted in 1928 specifically to overrule the decision in *Herminghaus v. S. Cal. Edison Co.*, 252 P. 607, 623-24 (Cal. 1926), that had allowed riparians to command the entire flow of the river for flood irrigation when the water was needed for development. ARTHUR LITTLEWORTH & ERIC GARNER, CALIFORNIA WATER 90-91 (1995).

14. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 141 (4th ed. 2006); see WATER § 1707 (listing recreation as one of many beneficial uses).

15. *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 194 (Cal. Ct. App. 1986).

16. *Empire Water & Power Co. v. Cascade Town Co.*, 205 F. 123, 129 (8th Cir. 1913).

17. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446-47 (Colo. 1882).

18. *Id.* at 447.

II. THE CHANGING STATUS OF WATER

Until quite recently, water-use rights were treated much like ordinary property rights in the sense that the desired uses were overwhelmingly conventional private or utility-type uses such as irrigation, industrial cooling, hydropower, and municipal supply. That is what users wanted water for, and that was what the public wanted as well. Thus, while some of the special rules that govern water use have been implemented—such as restrictions on wastefully extravagant use, forfeiture, and anti-speculation—the potential implications of the status of water as public property were not until recently brought into question.

In my opinion, the reasons for this, in addition to those just stated, are two. First, scarcity was alleviated by the construction of huge publicly subsidized reservoirs and transmission projects that increased usable supply. As a result, the greatest fears of shortage and monopolization did not eventuate, and the perceived need for stringent public controls and reallocation, built into western constitutions and water codes, were not activated. Now, however, the public dam-building and supply-subsidization era has largely ended. Second, adverse impacts on instream uses (in particular declining fish populations and greatly increased recreational demand) were not until recently a matter of significant public concern. Public enterprise also played a role here. The state fish hatchery was viewed as a technological substitute for instream habitat, and deferred concern about the loss of wild species, which contemporary environmental policies have brought to the fore. As a result, the full potential of the law had not been put to the test. But now, the public claim on water is very much in play as traditional users and uses confront the contemporary demand to protect and restore diminished instream resources. The significance and meaning of the public-rights status of water rights is unfortunately misunderstood.

It is best to begin by clarifying what public ownership of water does *not* mean. It does not mean that holders of state water-use rights have no legally protected property interests. As a practical matter, between water users themselves, one has rights quite like those one has in other kinds of property. For example, a water-rights holder is protected in its priorities against junior users and is protected against trespass or unpermitted diversions by others, and so on. It is a serious misstatement to assert, as is sometimes done, that there are no private property rights in water. Similarly, where government seeks water for a conventional use—to shift water from one group of private users to another—or for its own account as a user, it needs to acquire the water, as would any private user. A classic

example was the construction of Friant Dam, where the government cut off existing downstream irrigation users in order to capture the full flow of the river and divert the water to serve other offstream irrigators.¹⁹ The same is true if the government wants to displace some existing users in order to produce hydropower for its own account, as for use by a military facility.²⁰ That said, it is a mistake to conclude that because a water-use right granted by a state permit is proprietary in these important respects, it is therefore like any other private property right.

The important question is how to conceive of water rights where the state claims a need to return to public-use water that has previously been permitted for private use and is being used pursuant to that permit.²¹ What is the scope of the state's entitlement against the holder of a permit or license? As I noted earlier, while the statutory provision that "[a]ll water within the State is the property of the people"²² has never been fully tested, the law powerfully supports the authority of the state to reclaim for public use private rights it has previously granted.

19. *E.g.*, *Dugan v. Rank*, 372 U.S. 609, 610 (1963) (considering a suit brought "to prevent the storing and diverting of water at the dam"); *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 754-55 (1950) (finding a taking where the Friant Dam interfered with natural seasonal overflow into nearby grasslands).

20. *E.g.*, *Int'l Paper Co. v. United States*, 282 U.S. 399, 405 (1931) (discussing litigation of property rights to the Niagara River hydropower facility, which was occupied by the federal government for war purposes).

21. This distinction between rights as between private users, and rights as between a private user and the public, is well-established:

Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

United States v. Willow River Power Co., 324 U.S. 499, 510 (1945).

22. CAL. WATER CODE § 102 (West 2011).

III. CALIFORNIA WATER CODE SECTIONS 1392 & 1629

Without doubt, the most powerful, and least explicated, statutes authorizing California to recall water for public use are the twin Water Code provisions sections 1392 and 1629²³:

Every permittee [or licensee], if he accepts a permit [or license], does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit [or license] . . . in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State . . . of the rights and property of any permittee [or licensee] . . . of any rights granted, issued, or acquired under the provisions of [the law governing the appropriation of water].²⁴

This rather extraordinary provision has its own remarkable history. Dating back to the original 1914 Water Code, which first instituted a permit system for appropriations,²⁵ the provision was quite in tune with Progressive Era thinking of the time, reflecting concern about monopolization of essential goods and services and excessive charges by private utilities.²⁶ The idea that water must remain “public” was central to the politics, and the experience, of the economic overreaching that characterized the Progressive Era. In the course of time, private municipal water companies largely disappeared in favor of public entities, and water prices to agricultural users were self-controlled by statutorily authorized water districts, and later through generous federal subsidies. Therefore, the immediate economic fears that gave rise to those Water Code provisions never came to pass. And, as noted earlier, the perceived potential need for the public to take back water was avoided by increasing supplies via huge federal and state projects like

23. *Id.* §§ 1392, 1629. The provisions are identical, except that the former deals with permits and the latter with licenses. Permits are usually issued prior to actual application of the water to beneficial use, and the use right only matures upon application, at which point the permit can be converted to a license. *Id.* §§ 1600–1610.

24. *Id.* § 1392.

25. Notably, the provisions only apply to permits and licenses granted by the state subsequent to enactment of the Water Code. They do not apply to pre-1914 appropriations, riparian rights, or percolating ground water.

26. EDMUND MORRIS, *THEODORE REX* 417 (2001); ALLAN NEVINS & HENRY COMMAGER, *A POCKET HISTORY OF THE UNITED STATES* 340 (1956).

Boulder Dam, the federal Central Valley Project, and the State Water Project.

In light of that history, it is not surprising that sections 1392 and 1629 remained on the books largely unremarked and unused. In 1978, a comprehensive and carefully researched review of California water law was issued by a Governor's Commission.²⁷ Among its many recommendations, one—given only passing attention in the Report—was a suggestion to repeal sections 1392 and 1629 on the ground that they could interfere with desired water marketing by limiting the ability of sellers to charge more than the fee they had paid to obtain their permit/license.²⁸ The Report did not deal with a possible effort by the state to reclaim instream water for public use.

A bill incorporating many of the Commission's recommendations did include the repeal of the sections; but before enactment an amendment was offered deleting the repeal of the sections, and the bill passed with that amendment.²⁹ So sections 1392 and 1629 remained (and remain) on the books. No legislative history of that amendment has been found, and the assumption of those who recall the events is that there was a generalized concern about the possibility of undermining the fundamental principle that water was a public resource that ultimately belonged to the people of the state.

The only reported case on the laws involved a private company that sought to appropriate water and subsequently sell it for irrigation and municipal use.³⁰ A claim that the sale of water at a profit by a water company to an ultimate user was prohibited by section 1392 was briefly rejected by the court on the narrow ground that the statute referred to a transaction involving sale of a permit, rather than of the water itself.³¹ The case did not deal with that part of the statute that limits what a permit or license holder may claim when water is taken back for public use by the state or other public entity by purchase or condemnation or otherwise. Application of the law to such a situation has not yet arisen in any reported case.

27. GOVERNOR'S COMM'N TO REVIEW CAL. WATER RIGHTS LAW, STAFF PAPER NO. 6: LEGAL ASPECTS OF INSTREAM WATER USES IN CALIFORNIA (1978).

28. *Id.* at 101 n.424.

29. See Kimberly A. Felix, *Improving Efficiency in Water Use: An Overview of the Recommendations of the Governor's Commission to Review California Water Rights Law*, 36 MCGEORGE L. REV. 165, 172–74 (2005).

30. *Cent. Delta Water Agency v. State Water Res. Control Bd.*, 20 Cal. Rptr. 3d 898, 900 (Cal. Ct. App. 2004).

31. *Id.* at 917.

Strange as it may seem, in all the years sections 1392 and 1629 have been on the books, the provisions have given rise to almost no consideration in literature.³²

However, as we shall see presently, the essential idea embodied in sections 1392 and 1629—that the state is entitled freely to recover permitted rights for the general use and benefit of the public³³—has been long recognized in California water law, giving content to the precept that water always remains the property of the public.

IV. THE MONO LAKE CASE, THE FISH AND GAME CODE, AND THE PUBLIC TRUST

The decision popularly known as the *Mono Lake Case* involved a decades-old water-supply project in which Los Angeles had dammed and diverted water from several streams entering Mono Lake, lowering the lake level and impairing its usefulness as important habitat for nesting and migratory birds, including California Gulls, Eared Grebes, Northern Phalarope, and Wilson's Phalarope.³⁴ The California Supreme Court held that the water rights Los Angeles possessed, though perfectly valid when acquired, were subject to the public right to the water held in public trust, and that, however longstanding, the public trust imposed a continuing obligation that could be invoked when and as required to protect the resources at stake.³⁵ That principle had been established many years earlier in an offshore-oil-drilling case, where the California Supreme Court held that while the oil platform was not per se a violation of the public trust, if it could subsequently be shown to impair public rights in the waters, the oil-drilling activity could later be restricted as necessary to protect public-use rights.³⁶

The Mono Lake situation was not governed only by the common law public trust. Another long-standing pair of statutory provisions, which like California Water Code sections 1392 and 1629 had effectively been

32. For examples of the rare instances where sections 1392 and 1629 are mentioned in literature, see Andrew H. Sawyer, *Improving Efficiency Incrementally: The Governor's Commission Attacks Waste and Unreasonable Use*, 36 MCGEORGE L. REV. 209, 247-49 (2005), and Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W-N.W. J. ENV'TL. L. & POL'Y 1, 15 n.82 (2002).

33. Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 480 (1989).

34. Nat'l Audubon Soc'y v. Superior Court (*Mono Lake Case*), 658 P.2d 709, 711 (Cal. 1983).

35. *Id.* at 732.

36. Boone v. Kingsbury, 273 P. 797, 816 (Cal. 1928). "The state may at any time remove [the] structures . . . even though they have been erected with its license or consent, if it subsequently determines them to be purprestures or finds that they substantially interfere with navigation or commerce." *Id.* (citing People v. Cal. Fish Co., 138 P. 79 (1913); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892)).

moribund during the developmental era described earlier,³⁷ also applied to the Mono Lake diversions, and were in fact implemented in this litigation.³⁸ Section 5937 of the Fish & Game Code provides that “[t]he owner of any dam shall allow sufficient water at all times . . . to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.”³⁹ Notably, section 5937 does not merely reaffirm the bypass requirements that were incorporated in dam permits; it also states a continuing obligation to protect fish in the river, essentially importing the State’s right to reclaim water that it has always owned when necessary to protect an instream public value.⁴⁰ Likely for the reasons stated earlier, this obligation to protect fish was treated as a dead letter during the era of full-throated development of diversionary uses of water,⁴¹ though some bypass-flow requirements were routinely inserted into dam permits. However, the Fish & Game Code provisions are now regularly employed in California water law.

37. Notably, the Fish & Game Code provisions were invoked before the State Water Resources Control Board (WRCB) in an effort to keep some water in the upper San Joaquin River upon the authorization of Friant Dam. However, the provisions were rejected on the ground that “[t]here certainly is nothing in Federal law requiring a priority for fishlife over irrigation, but quite the contrary.” In the Matter of Application 234, No. D 935, 1959 WL 107444, at *16 (Cal. State Water Res. Control Bd. June 2, 1959). The WRCB found that bypassing water to maintain a salmon fishery in the river “is not in the public interest.” *Id.* at *18. After nearly twenty years of litigation, the de-watered upper San Joaquin is being restored under a litigation settlement and the Federal San Joaquin River Restoration Settlement Act. Omnibus Public Land Management Act of 2009, Pub. L. No. 91-611, § 10,001, 123 Stat. 991, 997 (2009).

38. The law was finally applied to Los Angeles’s Mono Lake tributary diversions in *California Trout, Inc. v. Superior Court*, 266 Cal. Rptr. 788, 802–03 (Cal. Ct. App. 1990). In prior litigation, Los Angeles claimed that its rights vested prior to 1953, when the current version of the laws was enacted. *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 255 Cal. Rptr. 184, 199 (Cal. Ct. App. 1989). Even if that were a defense, the court held that the critical date was when diversions actually began, in the 1970s. *Id.* at 199–200; *see also* Brief for State of Cal. et al. as Amici Curiae Supporting the Respondents at 19, *Putah Creek Council v. Solana Irrigation Dist.*, No. 3 CIVIL C025527, 1998 WL 34341373, at *18 (Cal. Ct. App. May 21, 1998). And a number of suits have been initiated pursuant to the Endangered Species Act to increase instream flows, perhaps most notably the NRDC’s long, and finally successful, effort to get water flowing again past Friant Dam and into the upper San Joaquin River. *Natural Res. Def. Council v. Rodgers*, 381 F. Supp. 2d 1212 (D. Cal. 2005).

39. CAL. FISH & GAME CODE § 5937 (West 2011). This provision was enacted in 1957 but was derived from a 1937 provision. *See* Joel Baoicchi, Comment, *Use It or Lose It: California Fish and Game Code § 5937 and Instream Fishery Resources*, 14 U.C. DAVIS L. REV. 431, 432–34 n.7 & n.15 (1980) (explaining section 5937’s origins in 1937).

40. FISH & GAME § 5937.

41. *See* Harrison C. Dunning, *California Instream Flow Protection Law: Then and Now*, 36 MCGEORGE L. REV. 363, 366–68 (2005) (describing the increase in irrigation and hydropower projects in California in the first half of the twenty-first century without regard to fisheries maintenance).

V. NOT AS STRANGE AS IT MAY SEEM:
THE PRECEDENT OF *UNITED STATES V. FULLER*

It no doubt seems odd that something that has functioned for a long time as a conventional property right, that has evidenced the usual indicia of ordinary property and been valued in the market as such, can subsequently lose its proprietary status as against the public. It is indeed unusual, but by no means is it unprecedented.

That very circumstance was central to a 1973 case in the U.S. Supreme Court, *United States v. Fuller*.⁴² The Court's opinion was written by former Chief Justice Rehnquist,⁴³ a staunch defender of private property rights.⁴⁴ In that case, a rancher held a federal grazing permit for use on land adjacent to his own.⁴⁵ Such permits are regularly renewed and very rarely revoked. In practice they have considerable economic value and function like ordinary private property. For example, grazing permits serve as collateral for loans, and in the event of sale, their value is capitalized in the price of the private land to which they are adjacent. However, the law governing such permits, the Taylor Grazing Act, expressly states that "issuance of a permit . . . shall not create any right, title, interest, or estate in or to the lands" for which the permit is issued.⁴⁶ In *Fuller*, when the United States condemned the rancher's own land for a federal project, he claimed that the compensation due should include its pre-condemnation market value, which reflected the value of his grazing permit.

Justice Rehnquist's opinion held that because there was no property right in the grazing permit under the law, the landowner was not entitled to compensation for the value the permit added to the condemned tract.⁴⁷ The question, he noted, was not whether in practice the permit functioned and was treated as ordinary private property, which it plainly was, but what the

42. *United States v. Fuller*, 409 U.S. 488, 488–89 (1973).

43. *Id.* at 488.

44. John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339, 364 n.75 (1989) (explaining that Chief Justice Rehnquist vigorously urged a "larger protection of private property rights").

45. *Fuller*, 409 U.S. at 489.

46. 43 U.S.C. § 315(b) (2006). The non-property status of grazing permits was reaffirmed in FLPMA in 1976. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 402(h), 90 Stat. 2743, 2775 (1976) (codified at 43 U.S.C. § 1752). Following a case in which the United States exercised its servitude and denied compensation but then sold the land to the State at a price below the option it had to purchase it, Congress called for payment when the United States exercised the servitude. *See Rivers and Harbors Act of 1970*, Pub. L. No. 91-611, § 111, 84 Stat. 1818, 1821 (1970) (codified at 33 U.S.C. § 595(a)) (effectively overruling *United States v. Rands*, 389 U.S. 121, 125 (1967)).

47. *Fuller*, 409 U.S. at 494. The Court split 5-4; Justice Powell's dissent was joined by Justices Douglas, Brennan, and Marshall. *Id.* at 488.

governing law provided.⁴⁸ In support of the decision, Rehnquist cited a long line of cases in which the Court held that when private land adjacent to a navigable river is condemned, the owner is not entitled to recover for any market value the land had because of its adjacency to the water (commonly its hydropower potential). Any private rights in the water, however valuable as against others, were subject to the federal navigation servitude—effectively the public’s ownership interest in the water.⁴⁹ Like the situation in *Fuller*, and like the case of water-rights users in California, the navigation servitude was infrequently exercised, and so the market did not discount their value in recognition of that possibility.⁵⁰ As Justice Jackson famously affirmed, navigation servitude decisions are simply modern applications of the time-honored precept “that the running water in a great navigable stream is capable of private ownership is inconceivable.”⁵¹ In the arid West, that principle applies not just to navigable streams, but to “[a]ll water within the State.”⁵²

CONCLUSION: WHERE SHOULD WE GO FROM HERE?

The remarkable provisions of California Water Code sections 1392 and 1629 on first consideration bring to mind the nuclear warfare dilemma: the ultimate weapon that is too powerful to be used.

So the question is whether we can use the existence of such tools to productively reshape the way we deal with the dislocation created by the need to return large quantities of water to instream use. The answer may be yes, in the sense that the potential power of these laws could be employed to bring all parties to the table in a newly configured search for a solution.

As I have already noted, the eminent domain provision of California Water Code sections 1392 and 1629 open an opportunity to reap a variety of benefits both for water users and for instream-use advocates:

48. *Id.* at 490–91.

49. *Id.*

50. *See, e.g.,* United States v. 42.13 Acres of Land, 73 F.3d 953, 956–57 (9th Cir. 1996) (holding that “[t]he government cannot pay less for *another’s* property, where the value is reduced by the project necessitating the taking” (citing United States v. Weyerhaeuser Co., 538 F.2d 1363, 1367 (9th Cir. 1976))).

51. United States v. Willow River Power Co., 324 U.S. 499, 509 (1945) (quoting United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913)).

52. CAL. WATER CODE § 102 (West 2011).

1. Avoidance of litigation and dispute over the regulatory takings issue.
2. Ability to spread the burden more widely and fairly by bypassing the usual priorities in California law, such as appropriation seniority and area-of-origin protection.
3. Ability to follow the scientific advice to restore uses that mimic the natural hydrograph (eminent domain can be used to get water from those places where it is wanted, rather than in accord with water law priorities).
4. Minimization of economic burden by taking water from all contributors to the problem who hold permits and licenses (whatever their position in the water law hierarchy), thus getting in tune with the economic precept that the last unit used is the least valuable; and that it is better to take one unit from each of ten users, than ten units from one.
5. Finally, and practically most importantly, giving to the public the opportunity to take back water from existing uses without either contributing nothing (uncompensated regulation) or contributing everything (regulatory taking or contract violation) by opening the way to a publicly determined and agreed-to payment, thus sharing the burden with existing water users.⁵³

As to this last item, I would emphasize several points. First, as a political matter, there is little reason to think the California Water Code sections in question would survive repeal if they were employed to take back major quantities of water with only the nominal compensation the statutes require. Or, at the very least, any such extreme use of the law would simply repeat the existing deadlock that has made water and environmental issues so protracted, bitter, and expensive.

The leverage created by the laws enables a fresh way of looking at the issue outside the all-or-nothing posture that the conventional legal structure promotes. The situation we face is not an ordinary regulatory situation, where an activity is found to be harmful to health or safety, or where a modest adjustment must be made between two legitimate but conflicting interests, or where future proposed economic activity is subject to limitations (i.e., a height or density limit on urban development). We might describe this situation as transformational change, where the society's view

53. *Id.* §§ 1392, 1629.

of what is good changes in a fundamental way. Where change is transformational—and where moral opprobrium is not attached to the change, as in the abolition of slavery—it seems reasonable to ask the public to share, in some measure, the burden of that change with those who are adversely affected, as it is also reasonable to expect members of a society to be adaptive in a world that is never static. From that perspective, the California Water Code may, however serendipitously, provide an opportunity to address major social change in a fair and fruitful manner.