

November 1928

## Modernizing the Water Law

Edward F. Treadwell

Follow this and additional works at: <https://scholarship.law.berkeley.edu/californialawreview>

---

### Recommended Citation

Edward F. Treadwell, *Modernizing the Water Law*, 17 CALIF. L. REV. 1 (1928).

### Link to publisher version (DOI)

<https://doi.org/10.15779/Z38X51N>

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# California Law Review

---

Volume XVII

NOVEMBER, 1928

Number 1

---

## Modernizing the Water Law\*

### THE PROBLEM

IN ORDER to adequately discuss the matter before the Committee, a clear understanding of the exact problem before us is both desirable and essential. The problem, stated in a broad way, is the desire that the most extensive use practicable be made of the waters of the state. The obstacle in the way is the claim that a riparian owner is entitled to the full flow of the stream past his land, at least so far as it is in any way beneficial to him, no matter how extravagant and wasteful his use or enjoyment of the water may be, and although it may result in a very low duty being achieved by the water before it is ultimately lost in the sea.

The obstacle, therefore, is not the general existence of riparian rights, but the existence of this particular incident of riparian rights. This distinction is most fundamental and important, because there seems to be no reason or well founded desire of any one to take away, even by condemnation, the amount of water which riparian land reasonably needs for its irrigation by such ordinary means as are customary in the state. To destroy or even condemn such rights would be, first, economically undesirable, and, second, practically impossible. This distinction should be carefully observed and the important and controlling feature of it will become more apparent as we proceed with our consideration of the entire subject.

I repeat, therefore, that the only problem is the removal, by some method, of the claim to the flow of the entire stream, and the claim of right to use it by methods that are generally conceded to be wasteful. With this idea of the problem, we may proceed with a discussion of the best manner in which the problem may be solved and this obstacle removed. In passing, it might be said that so far as the problem itself is concerned, and the propriety of removing the obstacle, there is no difference in opinion, but when we come to the method by which it can be removed with due respect to the rights of the public, and of private interests, there is room for much difference of opinion, and the aim, therefore, should be to try and develop a remedy which will likewise receive general approval.

---

\*An address delivered before the Joint Committee of the California Senate and Assembly on Water Resources, September 19, 1928.

## JUDICIAL DECISION

There are many people who still feel that the pronouncement by the courts of this principle of riparian rights was erroneous and should not be adhered to.<sup>1</sup> They not only do not themselves accept the correctness of the decision, but from time to time have indulged in more or less abuse of the courts which have pronounced the law on the subject. The courts, however, are not entirely responsible for the present condition of the law. The fact is that the legislature in 1850 adopted the common law of England in its entirety, except so far as it was contrary to the constitution and statutes of the state. In doing so, it did not even embody the clause embodied in like laws of other states limiting the adoption of the common law so far as it was applicable to conditions in the state.<sup>2</sup> It has been suggested that the adoption of the common law, together with the riparian doctrine which was part of it, was accomplished by the legislature after careful consideration of the subject. So far as I have been able to ascertain, there is no evidence that the legislature realized or discussed the fact that it was adopting the riparian doctrine of water rights. In fact, the adoption *en masse* of the common law of England was a necessary result of the general hatred of the gringo for anything Spanish or Mexican. After this enactment in 1850, the legislature practically passed no law making any definition whatever of water rights until the adoption of the codes in 1872. When the codes were adopted they codified the customary law regarding appropriations of water, but were careful to add that "the rights of riparian proprietors are not affected by the provisions of this title."<sup>3</sup> Certainly, no criticism could be made of a court arriving at the conclusion that the legislature had not only intended to recognize, but to thereby protect riparian rights. The legislature passed no other law on the subject until 1887 when it repealed this provision, but in the repealing act expressly provided "that the repeal of this section shall not in any way interfere with any rights already vested."<sup>4</sup> Again, the courts could hardly be criticized if they held that this was intended to protect all riparian rights which had vested at that time. It would be an interesting judicial question in some individual case as to whether or not this repeal had the effect of preventing any riparian right attaching to lands acquired from the state or United States after the passage of this act in 1887, but we hardly believe that the matter is material to this discussion, because, as a general

---

<sup>1</sup> The principal cases establishing the right of the riparian owner to the full flow and overflow of the stream, irrespective of the reasonableness or economy of its use, are *Lux v. Haggin* (1886) 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Miller & Lux v. Madera Canal & Irrigation Co.* (1909) 155 Cal. 59, 99 Pac. 502; and *Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81, 252 Pac. 607.

<sup>2</sup> LAWS OF 1850, c. 95, p. 219.

<sup>3</sup> CAL. CIV. CODE, § 1422.

<sup>4</sup> Cal. Stat. 1887, p. 114.

proposition, such a large part of the lands of the state and United States vested in private ownership, particularly on the great streams of the state, prior to 1887, that even if this contention were upheld, it would not, as a general proposition, solve the problem before us. The courts, therefore, being unaided by the legislature, and all of the meager legislation on the subject indicating that riparian rights did exist in the state, could hardly be seriously criticized for so deciding. True the court might have held that the riparian doctrine should only be deemed to have become the law of the state so far as applicable to our conditions which require the use of all of the waters of the state on arid lands, and that, therefore, the right was limited to the quantity of water reasonably required when economically applied. The courts, however, felt that this would be in the nature of legislation, and, having adopted the contrary view respecting these property rights, it is too much to expect that at this day the courts would reverse that ruling. This, however, does not prevent the court from deciding as original propositions any particular features of the riparian right not decided in previous cases. But, as a general proposition, the general right and its incidents must be deemed to have become so fixed that they are not likely to be changed by mere judicial decision.

#### FLOOD AND FRESHET WATERS

It has been frequently suggested that the difficulty could be avoided by holding that the riparian right does not extend to what is sometimes called "flood" or "freshet" water. These terms are frequently used with various meanings, but, in their broadest signification, would mean waters which the streams are not able to hold within their banks, but which, either on account of heavy rains or melting snows, so swell the stream that large areas of land are overflowed and inundated. Some support has been given by decisions of the courts for this contention, but the only cases which can now be thought to represent the present view of the court in which this doctrine has been given any effect is in regard to water of coastal streams in which extraordinary freshets are sometimes caused by excessive and extraordinary rainfall.<sup>5</sup> Such water has been held to be no part of the water to which the riparian owner is entitled. On the other hand, the court has quite definitely held that with respect to the great rivers of the state which are affected primarily by the melting snow, the floods caused by such melting regularly occur, and can be foreseen, and are expected, and, therefore, are part of the regular flow of the stream to which riparian owners are entitled.<sup>6</sup> Even, therefore, if a person deemed it economically feasible to reservoir the waters

<sup>5</sup> Gallatin v. Corning Irr. Dist. (1912) 163 Cal. 405, 126 Pac. 869.

<sup>6</sup> Miller & Lux v. Enterprise C. & I. Co. (1915) 169 Cal. 447; 157 Pac. 579; Herminghaus v. Southern Cal. Edison Co., *supra* n. 1.

of extraordinary and unforeseen freshets,<sup>7</sup> and it was held that this might legally be done, it would not solve the problem which we have before us, which has to do with the great rivers of the state which are filled primarily by the melting snow, and with respect to which it has been held that the floods caused thereby belong to the riparian owners. Both the melting of the snow and the ordinary rainfall can be foreseen, and the floods which result are not extraordinary, but, under the decisions, would seem to constitute a part of the regular flow of the stream to which the riparian owner is entitled. The result is, that while in individual cases it might be that a decision might be obtained, with respect to a particular stream, that there are certain classes of water that might thus be taken from the riparian owner, as a general proposition, such does not seem to be the situation, and, since we are dealing primarily with streams of a different character, it would seem that this doctrine must be generally disregarded as offering any general solution of the problem before us.

#### DEDICATION TO PUBLIC USE AND PRESCRIPTION

There is no doubt that where the public has taken the water of a stream away from the lands riparian thereto, and used it for five years, a prescriptive title is obtained, and even where it is used for a shorter period with the knowledge and apparent acquiescence of the riparian owner and the rights of the public have intervened, the right to continue the use exists subject to the payment of compensation, if demanded within the statutory period. As a practical proposition, it is true that these doctrines have operated to avoid the claims of riparian owners which we are discussing. It is a well known fact that huge irrigation developments, as well as water power developments, have been successfully carried out both by public, *quasi*-public and private interests, without any objection whatever from riparian owners who might have claimed the right to the full flow of the stream. Generally speaking, it seems to be the fact that where these developments do not actually deprive persons of water which they actually need for beneficial purposes, they have made no objection to such developments. This fact should be very carefully considered by the committee before reaching any conclusion, with the point in mind that any new legislation might possibly constitute an invitation to riparian owners to make objection, or offer them a ready means to enforce their objection, whereas, they would otherwise remain entirely acquiescent. However, our present investigation is being conducted on the theory that objection may arise to any project of the state, as it has in individual cases arisen with

---

<sup>7</sup> See *Heilbron v. Fowler Switch Canal Co.* (1888) 75 Cal. 426, 432, 17 Pac. 535.

respect to other projects, and we must advise as to the best way to obviate such objection, if made. At the same time, in determining the best method, it is clearly advisable not to adopt a method which will invite such opposition, or facilitate the power of a riparian owner to make the opposition effective. To use a commonplace term, it is frequently better to let a sleeping dog lie.

#### POLICE POWER

Naturally, one of the suggestions which occur in this regard is the suggestion that in some manner the desired result could be accomplished by the exercise of the police power. In connection with this, it should be noted that the courts, in deciding riparian rights as between individuals, have not generally been called upon to pass upon the right of the state in case it asserted it under the police power. The courts have had occasion to refer to certain acts of the legislature which merely undertook to permit private persons to appropriate and take water away from the riparian owners on the theory that the state had a proprietary interest in the water, and to hold that this could not constitutionally be done.<sup>8</sup> The courts have never deemed that they have been called upon to pass upon the question as to the power of the legislature to in any way deal with or regulate riparian rights for the public good under what is generally known as the police power.

Specifically, therefore, the problem presented is whether the legislature under the police power could limit the right of a riparian owner to such water as he required when economically diverted and applied, and whether, if it could do so, that would prevent the riparian owner from objecting to a diversion which deprived him of the right to the full flow, but did not deprive him of the amount economically required. This question presents the broadest field for philosophical discussion. The leading cases by the Supreme Court of the United States involving the police power are, in fact, philosophical discussions, and the conclusions arrived at even by a four to five decision are controlled by the peculiar philosophy of the individual justices pronouncing the conclusion of the court, and the consequent dissenting opinions. Many generalizations have been attempted in regard to the police power, but it will be found that almost all of them break down when put to the test of judicial decision. It has frequently, for instance, been said that there is a clear and marked distinction between the regulation of property under the police power and the taking of property under the power of eminent domain, but under the latest pronouncement of the Supreme Court of the United States, there is no such clear demarcation.<sup>9</sup> On the contrary,

<sup>8</sup> *Palmer v. Railroad Commission* (1914) 167 Cal. 163, 138 Pac. 997; *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 198 Pac. 784.

<sup>9</sup> *Miller v. Schoene* (1928) 276 U. S. 250, 48 Sup. Ct. 246.

it has recently been pointed out that when the legislature forbids a man from erecting more than a five story building on his property, it does *pro tanto* take his property from him. Still, in a proper case, it may be fully justified under the police power without compensation. It, of course, is deemed that the very nature of water makes it peculiarly a subject of the exercise of the police power.<sup>10</sup> There can not be much serious question that the legislature has full power to require such economy in the use of water as is necessary, at all events, in order that all those entitled to use the water may enjoy it.<sup>11</sup> But, whether it can make like regulations for the purpose of extending the right of enjoyment to persons not otherwise entitled, or whether it can thereby make the taking of the surplus water from the riparian owner *damnum absque injuria*, presents a question clearly debatable, and on which there is certain to be a division of opinion. I believe, that in view of the latest decision of the Supreme Court that it did not intend to prejudice the question as to the power of the state under the police power,<sup>12</sup> this committee should not assume that the legislature could not supply the remedy. On the other hand, I believe that it would be an unfounded assumption of knowledge for this committee to presume to decide that the legislature could under the police power accomplish this result, in view of the absence of any controlling decision on the question. We know that the legislature could not, by the exercise of the police power, take away from the riparian owners waters which they reasonably require for their needs when reasonably and economically applied, and, we presume, it would be equally recognized that from a standpoint of fairness and justice the legislature would not desire to do so if it could. Whether it could limit, so to speak, the riparian owners to a quantity of water economically needed by them, is a question which should not be foreclosed by us, nor should we attempt to advise that the legislature has or has not such power. If the legislature exercises such power, there is adequate machinery in the law for the determination of its validity.

#### NAVIGABLE WATERS

The principal rivers of the state, the waters of which the state desires to take for public use, are navigable streams. In the decisions of the courts regarding water rights between private individuals, the courts have had little or no occasion to consider the nature of the rights of the state in navigable waters. The suggestion has been made that the state has the right to use the navigable waters of the state either for navigation

<sup>10</sup> Pacific Live Stock Co. v. Lewis (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 Sup. Ct. 637.

<sup>11</sup> *Ex parte* Elam (1907) 6 Cal. App. 233, 91 Pac. 811.

<sup>12</sup> *Herminghaus v. Southern Cal. Edison Co.*, *supra* n. 1.

or other public uses, and that any rights of riparian owners must be held subject to the superior right of the state. The far reaching effect of this contention can readily be seen.

Assuming that the state had any such power, it is inconceivable that it would desire to exercise it so as to in any way interfere with the enjoyment by riparian owners of the waters of streams, so far as the same were reasonably necessary for their lands. It is equally inconceivable that it would desire to exercise it so as to in any way question the right of appropriators to continue to enjoy waters appropriated by them and reasonably needed for the purposes for which the appropriation was made. Whether it might desire to exercise the right as against the claim of a riparian owner to the full flow of the stream, although such flow was not reasonably necessary for his use, presents a question of public policy, on which this committee could not well pass. The attitude, however, of the legislature in Assembly Constitutional Amendment No. 27,<sup>13</sup> adopted at the last session of the legislature, might be construed as indicating that the legislature did not have a high regard for this claim.

Here, again, we have no authoritative decision by the courts of this state on the subject. Examining the decisions of the courts of other states, we find, first, that the courts of some states have held that the state is the owner of all navigable waters, is entitled to take them in aid of navigation, or for any other public use, and that the rights of riparian owners are entirely subordinate to the right of a state; second, in other states the courts have held that the state only owns the navigable waters for the purpose of navigation, and that it can not take the water for other public purposes, as against riparian owners; third, in some states it is held that whether or not the state may take the water as against the claims of riparian owners, depends on the question whether

---

<sup>13</sup> "Sec. 3. It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonableness and beneficial uses; *provided however*, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

the state or the riparian owner owns the bed of the navigable stream; and fourth, in many states it is held that even where the state owns the navigable waters for all public purposes, it may grant rights therein which would become superior to any right of the state, and the question as to whether such rights have been granted, of course, involves many considerations of law and fact.<sup>14</sup>

In attempting to apply these decisions to this state, we find many difficulties. We find it clearly held that the state did succeed to the title of the beds of all navigable streams.<sup>15</sup> We find, however, that the legislature

<sup>14</sup>The following are the principal cases dealing with this subject: Fox River Paper Co. v. Railroad Commission (1927) 274 U. S. 651, 71 L. Ed. —, 47 Sup. Ct. 669; Appleby v. New York (1925) 271 U. S. 364, 70 L. Ed. 992, 46 Sup. Ct. 569; Massachusetts v. New York (1926) 271 U. S. 65, 70 L. Ed. 838, 46 Sup. Ct. 357; Port of Seattle v. Oregon and Washington R. Co. (1920) 255 U. S. 56, 65 L. Ed. 500, 41 Sup. Ct. 237; Darling v. City of Newport News (1919) 249 U. S. 540, 63 L. Ed. 759, 39 Sup. Ct. 371; United States v. Chandler-Dunbar Co. (1912) 229 U. S. 53, 57 L. Ed. 1063, 33 Sup. Ct. 667; Hudson County Water Co. v. McCarter (1907) 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. 529; St. Anthony Falls W. & P. Co. v. Commissioners (1897) 168 U. S. 349, 42 L. Ed. 497, 188 Sup. Ct. 157; Shively v. Bowlby (1893) 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. 548; Illinois Central Ry. Co. v. Illinois (1892) 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. 110; Packer v. Bird (1890) 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. 210; Hoboken v. Penn. R. Co. (1887) 124 U. S. 656, 31 L. Ed. 543, 8 Sup. Ct. 643; Cardwell v. American Bridge Co. (1884) 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. 423; Pound v. Turch (1877) 95 U. S. 459, 24 L. Ed. 425; McCready v. Virginia (1876) 94 U. S. 391, 24 L. Ed. 248; Weber v. Harbor Commissioners (1873) 85 U. S. 57, 21 L. Ed. 854; Gilman v. Philadelphia (1865) 70 U. S. (3 Wall) 713, 18 L. Ed. 96; Rundle v. Delaware etc. Co. (1852) 55 U. S. (14 How.) 80, 14 L. Ed. 335; Pollard v. Hagan (1845) 44 U. S. (3 How.) 212, 11 L. Ed. 565; Martin v. Waddell (1842) 41 U. S. (16 Pet.) 367, 10 L. Ed. 997; Willson v. Blackbird etc. Co. (1829) 27 U. S. (2 Pet.) 245, 7 L. Ed. 411; Doboy etc. Co. v. De Magathias (1885) 25 Fed. 697; Turner v. Peoples Ferry (1884) 21 Fed. 90; Wright v. Seymour (1886) 69 Cal. 122, 127, 10 Pac. 323; Heilbron v. Fowler Switch Canal Co. (1888) 75 Cal. 426, 17 Pac. 535; Heckman v. Swett (1895) 107 Cal. 276, 40 Pac. 420; People ex rel. Robarts v. Russ (1901) 132 Cal. 102, 64 Pac. 111; San Francisco Savings Union v. R. G. R. Petroleum (1904) 144 Cal. 134, 77 Pac. 823; Forestier v. Johnson (1912) 164 Cal. 24, 127 Pac. 156; People v. California Fish Co. (1913) 166 Cal. 576, 138 Pac. 79; Patton v. City of Los Angeles (1915) 169 Cal. 521, 147 Pac. 141; Koyer v. Miner (1916) 172 Cal. 448, 156 Pac. 1023; Ord Land Co. v. Alamitos Land Co. (1962) 199 Cal. 380, 249 Pac. 178; Beidler v. Sanitary District (1904) 211 Ill. 628, 71 N. E. 1118; State v. Sunappee Dam Co. (1900) 70 N. H. 458, 50 Atl. 108; Watervliet Hydraulic Ct. v. State (1922) 197 N. Y. Sup. 348, 356, 119 Misc. 743; In re City of New York (1901) 168 N. Y. 134, 61 N. E. 158, 56 L. R. A. 500; Sage v. City of New York (1897) 154 N. Y. 61, 47 N. E. 1069, 38 L. R. A. 606, 61 Am. St. Rep. 592; Cull v. City of Rome (1873) 47 How. Pr. (N. Y.) 398; People v. Canal Appraisers (1865) 33 N. Y. 461; Smith v. City of Rochester (1863) 92 N. Y. 463, 38 Hun 612, 44 Am. Rep. 393; Canal Appraisers v. People (1836) 17 Wend. (N. Y.) 571; Minneapolis Mill Co. v. Water Coun. (1893) 56 Minn. 485, 58 N. W. 33; Morrill v. St. Anthony Falls Water Co. (1879) 26 Minn. 222, 2 N. W. 842; Filbert v. Deihart (1903) 22 Pa. Sup. Ct. 362; Filmer v. Williams (1888) 122 Pa. 191, 15 Atl. 669; Stover v. Jack (1869) 60 Pa. 339, 100 Am. Dec. 564; Carson v. Blazer (1810) 2 Binney (Pa.) 475, 4 Am. Dec. 463; Hewett-Lea Lumber Co. v. Kings Co. (1920) 113 Wash. 43, 144 Pac. 377, 21 A. L. R. 201; State v. Superior Court, Grant County (1912) 70 Wash. 442, 126 Pac. 945; Eisenback v. Hatfield (1891) 2 Wash. 236, 26 Pac. 539; State v. Bancroft (1912) 148 Wis. 124, 134 N. W. 330, 38 L. R. A. (N. S.) 526; Black River Imp. Co. v. La Crosse etc. Co. (1882) 54 Wis. 659, 11 N. W. 443; Bingham Bros. v. Port Arthur C. & C. Co. (1900) 100 Tex. 192, 97 S. W. 686, 13 L. R. A. (N. S.) 636.

<sup>15</sup>Packer v. Bird (1886) 71 Cal. 134, 11 Pac. 873.

in defining the effect of deeds and patents, has apparently left the title in the state to the bed of all tidal streams, and to the beds of non-tidal navigable streams below low water.<sup>16</sup>

We find that as between private individuals, the courts have recognized the rights of riparian owners on navigable streams,<sup>17</sup> but find that the courts have had no occasion to determine whether such rights are subordinate to the superior right of the state for purposes other than navigation. In view, therefore, of the fact that the courts of different states have come to different conclusions on this subject, we do not believe that it would be of any benefit for this committee to attempt to express an opinion on this very important question. All that we can say is that the contention does exist, and it can not be said to be without merit, nor can it with any degree of certainty be said to be well founded.

There is also some doubt as to how far a decision in favor of the state on this question would solve the present difficulty. The decisions in other states seem to very generally hold that even where the state has a right to use the waters of navigable streams for any public purpose as against the claims of riparian owners, the state can not do so to the injury of riparian owners on non-navigable portions of the streams, or upon non-navigable branches or tributaries. Undoubtedly, in certain cases, the riparian owners claiming the right to the full flow of the stream would own lands upon non-navigable branches of the river, and it might be those very branches that were most affected by the taking of the water.

For these reasons, we feel that no definite opinion can be expressed as to the right of the state in this particular, or how far a decision favorable to it would solve the difficulty in any particular case.

#### EMINENT DOMAIN AND COMPENSATION

Of course, it is elementary that the state, in order to take the water for public use, would be entitled to do so, at all events, against riparian owners through eminent domain or condemnation proceedings in which compensation to the riparian owner would be made. So that, in all events, the state has in its hands one method by which it can effectively remove the obstacle in its path.

This principle is so elementary that it is needless to enlarge upon it, and the only suggestions that this committee could make would be with regard to the procedure by which the property might be condemned and compensation fixed. In this regard, several distinct procedures naturally have been suggested: first, the present statutory method of a proceeding

---

<sup>16</sup> CAL. CIV. CODE, §§ 670, 830.

<sup>17</sup> *Miller & Lux v. Enterprise C. & I. Co.*, *supra* n 6; *Heilbron v. Fowler Switch Canal Co.*, *supra* n. 7.

in the superior court in which the judge decides all questions except the amount of compensation, and the amount of compensation is fixed by the jury, unless a jury is waived by the parties. This procedure, of course, has the advantage, first, of being the procedure in vogue, and it also has the advantage that it would only be invoked when and if a riparian owner insisted on his right to the full flow of the stream. In other words, it is not subject to the criticism that it either invites or encourages riparian owners to insist upon that right. That procedure has the additional advantage that the court in the same proceeding can decide all conflicting claims of the parties with regard to the water of the stream, and the compensation is fixed in one proceeding, subject, of course, to right of appeal.<sup>18</sup> Secondly, it has been suggested that an administrative proceeding be devised by which some administrative tribunal would inquire into the damage which would result to riparian owners, and that the findings of such administrative body should be binding unless excepted to, and a jury trial in court demanded, in which case they would be *prima facie* evidence of the amount of the damages. With respect to this administrative proceeding, some have suggested that the matter be handled by the present Division of Water Rights, while others have suggested that the Division is too closely connected with the program of the state to take these waters to be deemed an impartial tribunal, and for that reason they have suggested that a new commission be created for this particular purpose.

It is obvious that much can be said in favor of and against each of these proposals. They involve largely a question of policy, and the partiality for one or the other depends largely upon the point of view of the individual, and it is hardly within the purview of the duties of this committee to express any preference on the subject. It is sufficient to say that any of these methods which the legislature desires to adopt can be used.

Considering a choice, however, and in determining whether any of these methods adequately meet the situation, this controlling feature should not be overlooked, namely, that the state does not desire to condemn the rights of riparian owners generally, nor the right of a riparian owner to the quantity of water which he reasonably and economically requires. The great difficulty in any condemnation proceeding, whether strictly judicial or administrative, is in devising a procedure which will only take away from the riparian owner that excess of water which is desired to be taken.

In the ordinary proceeding in condemnation, the plaintiff states what water he wishes to take, and the question is to what extent will that

---

<sup>18</sup> *City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597, 57 Pac. 583.

damage the riparian owner. The difficulty is that it is impossible, or, at all events, extremely impracticable in such a proceeding to ascertain whether such a taking will only deprive the riparian owner of the excessive quantity of water which he really does not need or whether it will deprive him of the quantity of water which he absolutely requires for his uses. This will readily be seen when we consider that the right of a riparian owner on one of our great rivers is entirely correlative with the rights of many other riparian owners, and, unless there is sufficient water left in the stream after the condemnation to supply the reasonable needs of all riparian owners on the stream, the defendant in the condemnation suit may be deprived, as a result of the proceeding, of water which he absolutely requires for his needs. This, in turn, can only be determined by an investigation of the entire stream and the needs of all parties upon it. Such an investigation in each individual condemnation proceeding would be impracticable, unduly expensive and place a burden upon the parties that would be unbearable, and this would be true whether the proceeding was before the court or before an administrative body.<sup>19</sup> Whatever procedure is, therefore, adopted, should be adequate in some way to ascertain the water which the riparian owner does require, and in some way assure him of that quantity, and then, if necessary, condemn the right to take the surplus as against his legal right to the full flow of the stream.

The suggestion has been made that the damages which a riparian owner claiming the full flow of the stream would recover would generally be small. This suggestion entirely overlooks the difficulty which has just been suggested. If the trier of the fact, whether it be a jury or an administrative office, is left in doubt as to whether the condemnation will leave the riparian owner with a clear right to the sufficient quantity of water for his reasonable economical uses, the damages awarded must, in the nature of things, be large and not small. If, therefore, justice is to be done to the riparian owner and at the same time to the public in its desire to take the surplus water, some proceeding must be devised which will assure to the riparian owner water for his reasonable needs and limit his damages to such amount, if any, as is caused to him by the appropriation of the surplus.

#### PROPOSED PLAN

I think it was in 1917 that the State Water Problems Conference had this general subject under consideration, and at that time I reduced certain views to writing to submit to that conference. Subsequently, I con-

---

<sup>19</sup> See opinion of District Court of Appeal in *San Joaquin & Kings River Canal Co. v. Stevinson* (1923) 63 Cal. App. 767, 209 Pac. 427, not approved in this regard by the Supreme Court (See p. 774).

cluded that the general policy of the conference was to entirely ignore riparian rights,<sup>20</sup> and I concluded that it was useless to attempt such a statesmanlike solution of the problem as is now recognized to be necessary.

At that time I represented one of the largest riparian owners in the state, and at the present time I represent one of the largest users of water for public purposes in the state. Substantially, my general views for the solution of the problem are the same now as they were then. It is certain, therefore, that the plan intends no injustice to either party to the controversy, and I am, therefore, taking the liberty of here reproducing the suggestions which I reduced to writing at that time, and which are, and were then, as follows:

Responding to the invitation of the State Water Problems Conference to express my views as to what legislation regarding riparian rights might be proper, I would respectfully submit certain suggestions regarding such rights without attempting in all cases to suggest whether they can or should be reached by legislation, judicial decisions or other means. Before doing so, however, a few preliminary remarks might not be out of place.

There is a tendency in certain quarters to regard such rights with hostility, and this is due often quite as much to ignorance of the real nature of such rights as it is to any other cause. Others will never cease to contend that a radical mistake was made in 1850 when such rights were first recognized. However this may be, it occurs to me that the rights are now too well settled, and too much has been invested on the faith of them, to make it at all desirable or possible to approach this subject with any spirit of hostility or any desire to destroy. If those who laid the foundation for the prosperity of our state made any mistake in this regard, there is this consolation: That, either by reason of it, or in spite of it, irrigation has been developed in this state to an extent exceeding that of any other state in the Union, (and that, too, without those speculative enterprises which have been the curse of other states), and if any problems have been thus passed down to us to solve, we have the ability to meet and solve them in a statesmanlike manner, retaining the good and eliminating the evil.

Another suggestion I would venture is, that whatever good is to be accomplished by you is intended to be for the public welfare and should not be accomplished at the expense of the private individual. Let us be just before we are generous, especially when dealing with the rights of others. The wanton disregard of rights in one class of property today can only lead to a like attack on other classes of property tomorrow, and thus the ground work of our civilization is undermined.

In considering this matter, we must all be actuated by one cardinal rule, namely, the ultimate application of all water to a beneficial use. But do not make the mistake that this must be done in a day. A healthy, natural growth, made under circumstances of hardship, will produce in our state a citizenship which will make it what we desire it to be. A forced, unnatural, speculative growth will be enjoyed

---

<sup>20</sup> The extent to which the policy of ignoring riparian rights has gone is illustrated by the fact that the Water Commission Act only provides for the determination of water rights by *appropriation*.

not by those who have by hardship produced it, but by beneficiaries of wildcat schemes for the sale of land, bond issues on properties which have been developed by brain and brawn, and a class of emigrants who expect to find ready for them land, water and crops, which they may reap without sowing. This country is many thousands of years old, and still all that has been done in its development has been accomplished in some sixty-five years. While we want to do our share, let us not be too ambitious to leave nothing for posterity to do. An idle life is the worst legacy that either an individual or a people can transmit to posterity. Even today there is much land between Washington, D.C., and New York which has never felt the plowshare, so if our state is not yet all developed we need not feel at all ashamed of our progress.

Proceeding, however, with due regard to the progress of the age, we must admit that some way must be devised to remove those who are blocking progress, and we do find at times a riparian owner who is making little or no use of the water himself, and who still is in a legal position to prevent its use by others. Several methods suggest themselves to accomplish this end. It has been suggested that a limited time be given within which a riparian owner may make use of the water, and in event of failure to do so within that time that right be deemed abandoned.<sup>21</sup> The constitutionality of this is open to serious question. But if that plan is adhered to, the arbitrary limit of ten years in the present statute is far from satisfactory. In many cases the land must be reclaimed before the water can be beneficially applied, and the plan for the reclamation of our great valleys has been in more or less intangible shape for over twenty years and is still in its infancy.

But irrigation is only one of the riparian uses, and it is difficult to understand how it can be held that a riparian owner abandons his right because he fails to exercise one of the incidents of it. In fact, I feel that the only value of that enactment is that the threat contained therein may frighten some people into activity.

Another method of reaching this "dog in the manger" attitude is by the use of the power of eminent domain. This, it seems to me, is the most logical and effective way in which to reach this end. The legislature may very properly declare irrigation to be a public use, whether conducted by the public or by the individual for his private gain. Condemnation is, therefore, a remedy open to all. It answers the claim of the riparian owner that he has vested rights which should not be destroyed, for he is paid their value. The more this remedy can be strengthened, the better. One evil is the present condition of the law that the riparian owner in such a case can block it and make it as expensive as possible, compelling the condemning party to pay all the expenses. This unjust result could be relieved to some extent by providing that before instituting the proceeding the plaintiff might offer a certain amount of damages and unless the defendant recovered more he must pay the costs. Another change in the law should be made, allowing the condemnation proceeding to be brought in the county in which any part of the riparian land is situated. At present a separate suit must be brought against owners in different counties, whereas the effect on these lands should be determined in the same proceeding.

Another very effective measure would be to allow a defendant in a suit brought by a riparian owner to enjoin an appropriation of water to offer to pay the riparian owner the damages which would be caused to him by the taking. In other words, the defendant would be permitted by proper pleading to set up as a defense

<sup>21</sup> See Water Commission Act, § 11 (Cal. Stat. 1913, p. 1912).

a cause of action to condemn the riparian rights of the plaintiff so far as may be necessary in order to permit the desired appropriation. Possibly the same result could now be accomplished by staying the injunction suit until a condemnation suit might be tried, but the advantage of having the rights first settled and then paid for in the same proceeding is undoubted.<sup>22</sup>

Some of the suggestions made herein are not entirely original, but the one I am about to make, so far as I am informed, is somewhat novel. Most riparian owners in fact only want to be fair and to receive only a fair amount of water to irrigate their land. But under the law they can not afford to be fair, for if they permit any taking of the water, such taking will ripen into a right against them and be superior to their rights. Their only protection is to oppose all appropriations. To avoid this dilemma, I would provide for a proceeding *in rem* in the Superior Court to settle and determine all rights in a particular stream; provide that each riparian owner might, in lieu of his riparian rights, accept a certain quantity of water per acre, with a priority over all persons, except those who had already acquired better rights against him. In case any riparian owner refused to do this, his rights over and above that quantity of water would be valued and condemned and their value paid to him. The result would be an assurance to the riparian owner of his right to enough water for his land and no more, and an assurance that the balance of the water would be not only available for use on other land, but would be put in the hands of those who paid for it, and therefore actually intended to use it, and not merely in the hands of speculators; and finally the riparian owner would receive the full value of that which he owns. At the same time the rights of all persons in the stream would be settled and in a condition to have the water actually measured and delivered under the direction of a water master.

This plan is not a thoughtless one, but is the result of the most profound study and observation which fifteen years of constant attention to matters of irrigation, water law and legislation has enabled me to bestow upon the subject. It combines the beneficent provisions of such laws as the McEnerney Act for the establishment of land titles, the laws of the New England states by which the riparian right was made to bend to the necessity of mill dams to run the wheels of manufacturing enterprises, the good features of laws for the adjudication of water rights, the law of eminent domain which has been developed during hundreds of years, and the law declaring irrigation to be a public use on account of the necessity of it in the development of the state.

#### ADMINISTRATIVE VS. JUDICIAL PROCEEDING

In the foregoing remarks I have suggested a proceeding in the Superior Court. As I have already stated, others have suggested an administrative proceeding. As I have already suggested, this is largely a matter of policy, not hardly within the scope of the duties of this committee. Personally, I have no particular preference for a proceeding before the ordinary courts as contrasted with a proceeding before such tribunals as the Industrial Accident Commission, or the Railroad Commission. In matters such as this, those commissions act judicially and their conclusions are final, and subject only to review by appellate courts. They are

---

<sup>22</sup> Probably under the present law a cross-complaint in eminent domain would be proper, but any doubt on that subject should be removed.

simply exercising certain judicial powers and are specialists in the particular matters with which they have to deal.

Considerable argument could be made in favor of the creation by constitutional amendment of such a tribunal to handle all matters involving water rights, or the same matter could be accomplished through the ordinary courts with proper legislative authority empowering the courts to employ expert assistants, referees, and so forth.<sup>23</sup>

While there are some arguments to be made also in favor of a mere administrative proceeding which is not judicially binding on anyone unless accepted by them, but is subject to exception and retrial before a jury, I feel that the terrific expense and annoyance of two trials, one before an administrative body and one before a jury, will quite outweigh the advantage of the administrative system.

While I doubt whether this committee should pass on the matter one way or the other, I think it would be preferable to either leave the matters before the present courts or create a tribunal which will have adequate judicial power to finally determine the matter.

#### POLICE POWER VS. CONDEMNATION

The foregoing plan is in no way dependent upon a termination of the question whether the state can or should accomplish the desired result through an exercise of the police power, or whether it must accomplish it by means of the power of eminent domain. By Assembly Constitutional Amendment No. 27, passed by the last legislature, and to be voted on at the coming election, the legislature clearly attempted to solve the matter under the police power by, first, forbidding any unreasonable method of use, or unreasonable method of diversion of water, and, second, declaring that the rights of riparian owners do not extend "to the waste or unreasonable use, or unreasonable method of use, or unreasonable method if diversion of water."

As I have already pointed out, the validity of this enactment is only a question for the courts. There is also apparently, from the article by Mr. Wiel,<sup>24</sup> room for dispute as to the meaning of the enactment, and particularly as to what is intended by "an unreasonable method of diversion." That probably would be a subject for legislative definition. At all events, if this enactment is adopted, my plan for the judicial determination of the quantity of water "reasonably required for the beneficial use to be served" becomes a necessity. In other words, a mere abstract limitation on the right without having it defined in any tangible manner would be of little use to persons seeking to acquire the surplus. On

---

<sup>23</sup> Under the present law creating the Judicial Council, that body could easily create a permanent division of the superior court to deal with proceedings of this character.

<sup>24</sup> Wiel, *The Pending Water Amendment to the California Constitution and Possible Legislation* (1928) 16 CALIFORNIA L. REV. 169, 257.

the other hand, if condemnation of the surplus is necessary, such a determination of the amount of water reasonably needed becomes essential, and the condemnation could take place in the same proceeding.

It should also be noted that the plan is in no way dependent upon the question as to exactly who may condemn the surplus. The condemnation may be either of all or any part of the surplus, and it may be by the state or by any public, *quasi*-public, or other person legally declared to be in charge of a public use and entitled to exercise the right of eminent domain.

#### MEASURE OF DAMAGES

In some of the suggestions which have been made, it has been suggested that the legislature in some way define the damages which a riparian owner should be entitled to recover. Personally, I see no merit in these suggestions. If it is decided that the riparian owner has a certain right, and that it can only be taken from him by condemnation, it is obvious that the measure of his damages is the difference in the value of his land with the right and without it. This measure of damages has been time and again announced by the courts, and is in accordance with common sense, and I can not see how it can in any way be improved upon. So far as the suggested rules simply codify well established rules already well established by judicial decision, it seems to me they are useless, and so far as they seem to encroach upon those rules, it seems to me that they are dangerous.

I think the best way to minimize the damages is to first have the legislature, by proper enactment, provide the character of diversion works which would be reasonable, and then guarantee to the landowner the quantity of water required for such works. The damages then, for taking the surplus, if it were held that the owner had any title thereto, might well be hoped, in most cases, to be nominal.

#### HYDRAULIC POWER OF STREAM

In the foregoing discussion I have only considered the use of the water of the stream for irrigation, stock and domestic purposes as uses which should be permanently protected. Abstractly, the riparian owner has other rights which it is hardly necessary to refer to, but some special consideration must be given to the hydraulic force of the stream and how far the right to use the same should be permanently protected. There are several circumstances under which the hydraulic force of the stream as a valuable right might be claimed by the riparian owner, and I will therefore consider them separately.

1. *Production of power.* The right of the riparian owner to use the stream for the production of power is a well established one. In early days the power of the stream was directly applied to the operation of machinery, but under present conditions that method is but little used. The modern method is the use of the stream for the production of hydro-

electric power. So far as the valley lands are concerned, the use of the streams for this purpose may well be disregarded. Abstractly, the owner of a piece of riparian land near the mouth of one of our great rivers is entitled to the full flow of the stream for the propelling of machinery. But the stream is of little value for that purpose, is practically never utilized for that purpose and could not economically be maintained for such purpose. On the other hand, in the mountain regions the production of power is the important factor, and there would seem to be no reason why the exercise of the right to use the stream for the production of power should in any way interfere with the use of the stream below if the water were economically applied. The right to use the streams for power purposes in mountain regions, therefore, need in no way be disturbed. If, however, the production of power in those regions should go beyond the exercise of mere riparian rights, the damages, if any, caused thereby could be ascertained and determined in the proceeding above referred to.<sup>25</sup>

2. *Use of hydraulic force as a means of diversion.* In a state of nature the hydraulic force of the full flow of the stream undoubtedly at times either directly diverts water by way of overflow onto the adjoining land, or indirectly does so by raising it into high-water channels and thence over the land. Obviously, this condition can not ultimately be maintained. At the same time the owners of lands benefited thereby will naturally oppose any deprivation thereof. Undoubtedly in certain cases this could be avoided by the construction of proper means of artificially diverting the water. Whether that could be accomplished under the police power or whether the party desiring to take the water would be compelled to furnish such appliances is a matter comprehended in the general question of the extent of the police power, which we are not attempting to pass upon. However, if the right to construct such appliances, if necessary by means of the power of eminent domain, was granted, the situation could be satisfactorily handled. The question whether in any given case it would be better to condemn the overflow right entirely or substitute for it a more up-to-date method of irrigation would be a question of economics in any given case.<sup>26</sup>

3. *Use of hydraulic power to force water into underground channels.* There are cases where the high flow of the stream forces water into underground channels or permeable strata from which the water is later abstracted by means of pumps for irrigation. The best illustration of this situation is the Coyote Creek in Santa Clara County. Such a use of the water is of course of substantial value. Economically such areas could not well be deprived of the quantity of water naturally coming to the

---

<sup>25</sup> The cases dealing more particularly with this subject are *Mentone Irr. Co. v. Redlands El. Light & Power Co.* (1909) 155 Cal. 323, 100 Pac. 1082; and *Herminghaus v. Southern Cal. Edison Co.*, *supra* n. 1.

<sup>26</sup> The use of the hydraulic force of the stream for this purpose was considered in *Herminghaus v. Southern Cal. Edison Co.*, *supra* n. 1.

land. The water, however, which serves this hydraulic purpose, and then flows to the sea, never reaches the land, and, if the construction of artificial structures would cause the same quantity of water to naturally flow to the land, and at the same time conserve the surplus which would otherwise be lost, there would seem to be no substantial objection to such a procedure. We understand that some such solution was applied to a like situation on Alameda Creek. At all events, the situation does not seem to be one that could not be solved in most cases in some manner so as to preserve the water which under natural conditions is lost.<sup>27</sup>

4. *Use of hydraulic force to protect land from encroachment of salt water.* This situation presents itself on the delta of the Sacramento and San Joaquin rivers. There is some dispute as to whether or not lands thus situated have riparian rights. There is also some dispute as to whether the use of the water for the purpose mentioned is a riparian right. Without attempting to pass on those disputed questions, there is no doubt that from an economical standpoint the lands should be assured of the reasonable quantity of water needed for irrigation. The exact method by which the saline situation might best be handled is one upon which many persons are now working who are probably better advised than I am as to the physical situation. Of course the construction of some artificial barrier against the salt water is the method that naturally first suggests itself, and that is being seriously considered by both the state and federal governments. Others have suggested that it would be feasible to supply to these lands a sufficient quantity of water to hold back the salt water. Of course this would result in some loss of water, and the question would simply present itself as an economic one whether that were cheaper than building a barrier to keep the salt water out. The problem is a large one, and whether the owners of these lands are entitled to insist that anyone taking the surplus water must protect them, or whether they must protect themselves against the salt water, presents legal problems which are difficult of solution and which will probably disappear in view of the economic problems involved. In other words, as a practical proposition, the state may not find it advisable to permit damage to such lands in order to permit the irrigation of additional areas. At all events, the quantity of water needed to protect those lands could be ascertained and determined, and become a limiting factor in determining the surplus available for diversion and use.<sup>28</sup>

*Edward F. Treadwell*

SAN FRANCISCO, CALIF.

---

<sup>27</sup> The use of the hydraulic force of the stream for this purpose was considered in *Miller v. Bay Cities Water Co.* (1910) 157 Cal. 256, 107 Pac. 115.

<sup>28</sup> In *Town of Antioch v. Williams Irr. Dist.* (1922) 188 Cal. 451, 205 Pac. 688, it was held that an appropriator had no right to the hydraulic force of the stream to keep out the salt water of the sea. Whether a riparian owner has such a right was not decided.