

The Presiding Commissioner
Productivity Commission
P.O. Box 80 Belconnen 2616.

10-8-99

Dear Sir,

Following a submission (214) to your commission in Canberra I have become aware of your interest in water rights in N.S.W. I enclose the following information & contacts in the hope that you can become better informed.

- 1 3 pages from Aust Surveyor 1947, outlining NSW water rights.
- 2 Irrigation Water Rights in California by W.A. Hutchins.
- 3 NSW Water Act sections 17 & 22C
- 4 A recent newspaper article regarding determination of a licencing issue.

The D.L.W.C. retain a legal team at Parramatta to write legislation and defend D.L.W.C. decisions/policies in court.

I believe you will obtain a very professional and informed opinion of the need for strengthening of water rights from the following:

Mr Tom McCue

Chairman of Land Boards (travels all over NSW hearing cases)
level 1, 23-33 Bridge St
Sydney Ph. 02 922 86 304.

Mr Frank Donahoe QC. (Ph 02 9232 8661)

(a barrister with many years experience dealing with D.L.W.C. licencing matters.) (also has an interest in an irrigation farm at Forbes.)

I recommend you make an appointment and have a discussion for a few hours. I am sure you will find them most approachable. This will give you an alternate view to that of D.L.W.C.

your faithfully *R Caldwell* R. Caldwell.

perennial stream running in a defined course and channel. He has the right to have the stream flow through or past his land with its quality unimpaired and its quantity undiminished except in such manner and to such an extent as will result from a reasonable use of the stream by riparian properties above him.

Much solemn argument seems to have revolved around the word "reasonable." It seems that even irrigation might come within its compass, if diversion was from a large stream that underwent no "sensible diminution" in the process.

In vulgar parlance, any fellow damming up water on to his upstream neighbour, or using, affecting, reducing or withholding it to the annoyance of those below, had it coming to him.

Although perhaps tolerable under English conditions, it did not suit Australia.

In addition to the Common Law of England, it seems that the early pioneers imported the English or Continental conceptions of what rivers ought to be.

This pre-conception is exemplified in Evans, when he discovered and explored part of the Lachlan River downstream from Cowra in 1815. He visualised it as a navigable river joining the Macquarie or some such river, and growing to great magnitude.

Oxley went out in 1817 to trace the course of this great river; this water-highway that was to carry the produce of the Bathurst District down to the sea at a point well on the way to the markets of India and England.

Oxley had difficulty in recognising the Lachlan in its lower reaches, and hopes of great navigation were soon dissipated in the swamps and effluents. Governor Macquarie, writing home, spoke bitterly about the river which failed to behave in the best river tradition.

So, too, was the story of the Macquarie River in its dissipation into the Macquarie Marshes.

Oxley believed he had reached the inland sea when the marshes baulked further progress. Had he visited them late in 1946, I believe he would have found graziers and wild pigs looking for water. In a recent visit to the edge of the marshes, I was told the water was six miles wide. Such is the uncertainty of our rivers.

The Lachlan River was an early lesson showing that English conditions were not repeated in Australia. Notwithstanding the great dissimilarity, the Common Law of England governed disputes along our rivers until the Colony of New South Wales introduced the Water Rights Act of 1898.

I noticed also a Victorian case, where much argument hedged about the terms "ordinary use of water," "extraordinary use" and "sensibly diminish."

In a Supreme Court case of 1869—Howell against Prince—there were learned references to Roman Law. The gist of the judgment was, that, where the flow of a running stream in its natural course is interfered with, every person injured in any degree, however unascertainable, may maintain an action for the obstruction without proof of actual damage.

These few cases convey an impression of the discouraging effect of the law. One desirous of using the water for positive or productive purposes could be assailed apparently from many directions.

In this case, in 1869, Hargrave, J., expressed his concern. He thought that some Acts were necessary for the protection of those who had enjoyed the use of water, it may be for many years and whose enjoyment had been acquiesced in. He stated that "land will not be able to be properly improved until some such Act is in force."

Another Judge said :—

"I concur in the opinion that it is desirable to introduce a law settling the rights of riparian proprietors. There are intermittent streams in this colony in which some enactment regulating the rights of the proprietors along the banks is necessary."

A case of interest, but subsequent to the passing of the Water Rights Act of 1896 is that of *Hanson v. The Grassy Gully Gold Mining Company* in 1900. The essential feature of this case was the ruling that the Water Rights Act (60 Vic. No. 20) vests in the Crown the common law rights of the riparian owners as to the use and flow of water, and no action will be against an owner for penning back the water in the channel and obstructing the flow through the plaintiff's lands. So you see, the Common Law rights of the riparian owners as to the use and flow of water were vested in the Crown by the Water Rights Act of 1896. The vesting of these rights in the Crown was the fundamental change. The reign of the Common Law as applied to riparian rights was over. It was not a happy reign, unless to the lawyers.

May I quote from *Stephens, J.*, in this 1900 case :—

"It cannot be denied that for years past the question of the rights of riparian owners in this country, where the conditions are so totally different from the conditions of things in England, has been a source of almost insuperable difficulty. There has been a great deal of expensive litigation, and I suppose for that reason the Legislature passed this Act in order to prevent riparian owners above and below from bringing action against one another. If this Act does not aim to take the old law rights from the riparian owners and vest them in the Crown, then I do not know what it was passed for, nor what it means. It was passed in the public interest to prevent litigation, and to determine rights which, up to the passing of the Act, it was almost impossible for the best lawyers to determine."

Before leaving this aspect of the case, I refer to a well known and very important case where a prominent pastoralist in the Riverina was sued by a downstream riparian owner for the obstruction and diversions, etc., of the water of certain streams and watercourses. The jury awarded damages to the extent of £2,000.

A reference to Section 4A of the Act illustrates the broad powers conferred.

Section 4A (1). The right to the *use and flow* and to the *control* of the water in all rivers and lakes which flow through, or past, or are situate within or are adjoining the land of two or more occupiers, and of the water contained in or conserved by any works shall, subject only to the restrictions hereinafter mentioned, vest and be deemed to have vested in the Commission for the benefit of the Crown. And in

After a cursory examination of this Section, it may be thought that the control is limited to the main streams only, because of the use of the word "rivers." A perusal of the definition of "River" soon dispels that impression.

"River" includes any stream of water, whether perennial or intermittent, flowing in a natural channel, or in a natural channel artificially improved, or in an artificial channel which has changed the course of the stream of water, and any effluent, confluent, branch, or other stream into or from which the river flows.

It will be appreciated that the powers are broad indeed. Many troublous and urgent problems arise in the administration of Part II of the Act, but the large ambit of its powers are not conducive to the facile escape "of passing the buck."

It would take too long to attempt an adequate description of Part II of the Water Act. I must content myself with a somewhat brief and discursive reference to what may be deemed the routine or salient aspects.

For brevity, it might be stated that certain works and operations may be sanctioned under:—

- (1) Permit;
- (2) License;
- (3) Authority for a Joint Water Supply Scheme.
- (4) Riparian Rights (or Rights of Occupiers of riparian land—Section 7).
- (5) And in some cases ordinary approval.

Permits are generally issued for works of a temporary nature, to cover operations of such a nature, and particularly to cover irrigation of impermanent plantings pending the issue of a License. They have not the status of a license and are limited to a period of 12 months, and in the case of irrigation, to an area of 10 acres. A permit may be renewed, provided its currency is not extended beyond two years from its date of issue.

Licenses are of course the most important; they are generally issued for a period of five years.

Subject to certain exceptions, it may be said, that any occupier of land must apply for and obtain a license before obstructing the flow of a river, diverting water, erecting levees, or changing the course of a river, etc. He must also apply for and obtain a license for purposes of drainage, such drainage being confined to the waters of rivers or lakes, as distinct from ordinary surface drainage. Important exceptions are that he may take and use the water for domestic purposes, and for irrigating gardens not exceeding five acres in extent, used in connection with a dwelling house where the produce of such garden is not offered for sale. He may also take and use the water for watering stock, but not of course to construct a dam for that purpose, or to use a pump with a capacity exceeding 600 gallons per minute.



IRRIGATION WATER RIGHTS IN CALIFORNIA

California farmers who use irrigation water . . .

or plan to use it . . . need to know something about water rights. The subject is not a simple one, for there are several kinds of water rights in this state and each is subject to a somewhat different set of laws. This circular explains, in layman's language, the principles set forth in these laws and in laws on water wells and dams.

If a farmer plans to acquire a water right . . .

this will outline the ways of doing it.

If he has a water right already . . .

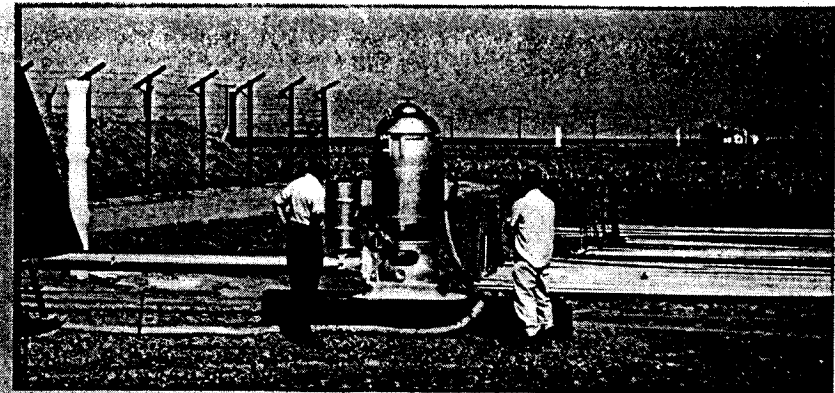
this will explain how it is used, held, protected . . . and how it can be lost.

Even if he gets his water from an organization . . .

an irrigation district, say, or a mutual, public-utility, or private-contract company . . . the circular may help him understand his water situation. It explains briefly the kinds of rights these organizations may hold and the various bases on which they distribute water to farmers.

But this circular doesn't take the place of a lawyer

It doesn't give legal advice. It simply explains general principles. If a farmer is in doubt about his water right, or if he is having a conflict over it, he should consult a lawyer.



WATER RIGHTS ARE PROPERTY RIGHTS

THE AUTHOR

Wells A. Hutchins is Agricultural Economist, Natural Resource Economics Division, Economic Research Service, United States Department of Agriculture, Berkeley. At the time the original version of this revised circular was written, he was part-time Lecturer in Irrigation, and Specialist in the Experiment Station, Davis.

FEBRUARY, 1967

If there are specific questions about water rights, the table of contents on the next page may help in finding the answers.

CONTENTS

Glossary of terms	6	Prescriptive rights	45
Water rights are property rights	11	Conflicts of rights in percolating waters	45
Water rights are limited to reasonable beneficial use	12	Rights in overdrawn ground-water supplies	45
Water rights in surface watercourses	13	Regulations applying to water wells	46
The riparian right	13	Reports of intention and completion	46
Acquiring and holding	13	Waste of water from flowing artesian wells	47
Utilizing	13	Water rights in spring waters	47
Severance	19	Water rights in interconnected water supplies	47
The appropriative right	23	Spring and connected water supplies	48
Acquiring	23	Surface waters and ground waters	48
Holding	27	Main stream and tributary sources	49
Utilizing	27	Water rights and irrigation organizations	49
Loss	34	Irrigation districts	49
The prescriptive right	35	Mutual irrigation companies	50
Acquiring	35	Commercial irrigation companies	50
Utilizing	37	Determination of water rights	51
Loss	38	Ordinary civil action	51
Rights to store water	38	Court-reference procedure	51
Conflicts of water rights in watercourses	38	Statutory adjudication	52
Relative superiority of rights	39	Administration of water rights	53
Quantities of water	39	State supervision of dams and reservoirs	53
Reasonable beneficial use	40	Dams and reservoirs subject to state supervision	53
Physical solution	40	Operations subject to supervision	54
Water rights in definite underground streams	41	Construction and enlargement	54
Riparian rights	41	Repairs, alterations and removals	54
Appropriative rights	41	Continued supervision	54
Water rights in percolating ground waters	42		
The correlative right	42		
Analogy to the riparian right	42		
Relative rights of overlying landowners	43		
Place of use	43		
Loss	43		
The appropriative right	43		
Water	43		
Acquiring	44		
Utilizing	44		
Loss	44		

Irrigation Water Rights In California

This circular summarizes the principles upon which irrigation water rights of California farmers are based. These principles govern chiefly the acquiring, determining, administering, holding, utilizing, and loss of water rights.

The discussion relates solely to water rights recognized by the water laws of California. These laws comprise both statutes and court decisions, as well as a constitutional amendment, which differ in many important respects from those of other states.

Basically, all water rights in California are governed by the same principles and laws, regardless of use. However, the specific nature and extent of the right may depend on the particular use, such as irrigation, domestic use, generation of power, mining, and recreation. Although generally applicable to all water rights in California, this circular considers water rights primarily as they are applied to use of water for irrigation.

The circular is intended to acquaint California farmers with the nature of water rights for irrigation in this state and with the way such rights are acquired, held, utilized, and lost. Its purpose is purely educational, with no thought of furnishing legal advice. Anyone who is involved in a controversy over water rights, or concerned about his water-right situation—or perhaps even planning some substantial change in his rights—should consult a lawyer.

*We focus on
IRRIGATION
water rights*

*If there are
difficulties,
consult a lawyer*



GLOSSARY

Many of the terms used in this circular have technical meanings in the field of water law. The following definitions (pages 6-8) present the terms accurately in nontechnical language.

IRRIGATION WATER SUPPLIES

*Does the water
come from ...*

The chief sources from which the California farmer obtains his supplies of irrigation water are defined in the following paragraphs.

*a watercourse
(natural stream)?*

A *watercourse* comprises (1) a natural stream of water (2) flowing in a definite natural channel (3) from a definite source or sources of supply. It includes both the surface flow and the underflow.

It is not necessary that the stream shall flow constantly. The requirements of a watercourse are satisfied even if the stream flow is intermittent, provided that that is characteristic of streams in the general area.

A watercourse includes connected springs, lakes, ponds, sloughs, and tributary streams.

A watercourse is distinct from water flowing vagrantly over the surface of the ground from a temporary source such as local rainfall. Such water is called *diffused surface water*.

*underground
stream?*

Ground water is water in the ground that is capable of being extracted by pumping or otherwise. In California water law, ground water is divided into (1) definite underground streams and (2) percolating waters.

A stream of water flowing through the ground in a known and definite channel is called a *definite underground stream* or *defined underground stream*. It has the same essential features as a surface watercourse, except that it is buried in the ground.

*percolating
ground water?*

The *underflow* or *subflow* of a surface stream comprises the ground water flowing in the same direction as the surface water and in intimate contact with the surface flow. It is one phase of the term definite underground stream.

Water moving slowly through the soil, not a part of any definite underground stream, is called *percolating water*. Percolating water may or may not be under artesian pressure.

A *spring* is a place where water issues naturally from the ground upon the surface of the earth.

spring?

Water brought into one watershed from another watershed is called *foreign water*.

The portion of a supply of foreign water that escapes or is released from the lands or works of the water user into a natural channel is *return flow from foreign water*.

*or another
watershed?*

WATER RIGHT

An irrigation *water right* is a right, granted by law, to take possession of water occurring in a natural source of water supply and to divert the water and put it to a beneficial use on or in connection with land.

Water rights may be impaired or lost because of certain processes that are recognized by law. In the following definitions it is assumed that the water right came into being unimpaired and that it suffered no impairment or loss after it was acquired.

*A water right in
good standing
may be ...*

The principal types of irrigation water rights are given below. Each is discussed in more detail in later sections.

Riparian right. The owner of land that is contiguous to or borders a natural stream or lake is entitled to take water from that source for use upon that contiguous land. This right is called a *riparian right*. The land to which it relates is called *riparian land*.

*riparian
if the land
borders a stream*

The riparian right exists solely by reason of location of the land with respect to the water supply.

Appropriative right. A person may acquire a right to the use of water for the irrigation of a particular tract of land, or for other beneficial purposes, by performing certain acts required by law. These acts include taking or diverting the water from a stream or other source and applying it to use on or in connection with the land. If the source of water is a surface or underground watercourse, certain formalities for acquiring the right are prescribed by statute.

*appropriative
if all acts
required by law
are performed*

The person who performs these acts *appropriates* the water, or *makes an appropriation* of the water. Such person is an *appropriator*. The right that he acquires is called an *appropriative right*.

The land to which the appropriative right relates may either be contiguous to the stream, or may be located at a distance from it. In some instances it may lie in a different watershed.

When a supply of water to which several appropriative rights have attached is not enough for them all, the earlier rights have preference over rights of later date. Each right

is entitled to its full quantity of water before any water may be taken for rights that are later in time. This superiority over later rights is called the *priority* of an appropriate right.

correlative if the land lies over percolating ground water

Correlative right. A person who owns land overlying a body of percolating ground water is entitled to extract water from the ground for use upon his overlying land. This right is called a *correlative right*.

The correlative ground water right exists solely because the percolating ground water in question underlies the land of the holder of the right.

prescriptive if obtained by infringing others' rights

Prescriptive right. A person may possibly divert to his own uses water to which riparian or overlying landowners or appropriators have prior claims, thereby depriving them of the use of water to which they are entitled. If he does this without interruption for a period of five consecutive years prescribed by the State statute of limitations, and if he fulfills certain other legal requirements, he gains a *prescriptive right* against the parties whose rights he has invaded.

The prescriptive right gives the holder a valid right, so far as the parties he has dispossessed are concerned, to continue diverting and using the water to the extent that he has been doing throughout the five-year period.

Under the usual circumstances prescriptive rights can be acquired against downstream parties only.

Pueblo rights are ones cities inherit from Spanish or Mexican pueblos

Pueblo right. A California city that succeeded a Spanish or Mexican pueblo (municipality) has the paramount right to the use of water of a stream that flowed through the old pueblo limits, for the use of the inhabitants of the city. This is called the *pueblo water right*. It is not discussed in detail in this circular.

ROTATION

Generally speaking, the holder of a water right is entitled to divert or take his water from the source of supply continuously throughout the portion of the year in which his right is effective. Under certain circumstances, however, better results are obtained by an arrangement under which the total quantity of water to which a number of water-right holders are entitled is diverted by each one for a specified period of time, in turn. The use of the stream is prorated among them according to their respective interests by time, rather than by quantity of water. This plan of arranging diversions is called *rotation*.

The operation of a plan of rotation is subject in all cases to the condition that the water is equitably appor-

tioned among the participants and that other water users on the stream are not injured by it.

WATER CODE

The California Legislature in 1943 passed an act consolidating and revising many of the then-existing statutes relating to water. This act is called the *Water Code*. It has been amended and enlarged at succeeding sessions of the Legislature. The portions of the Water Code that relate to the subject matter of this circular are: Division 1. General State Powers Over Water; Division 2. Water; Division 3. Dams and Reservoirs; Division 4. Wells, Pumping Plants, Conduits and Streams; Division 11. Irrigation Districts.

In 1956 the administrative powers and duties prescribed in divisions 1, 2, and 3 of the Water Code were transferred from the State Department of Public Works to two newly created agencies of the state government. Most of such functions, including supervision over distribution of water in watermaster service areas, were vested in a Department of Water Resources. Those vested in a Water Rights Board comprised control of the acquisition of rights by appropriations, assistance to the courts in the adjudication of water rights, and administration of legislation applicable to certain southern California counties concerning extraction of ground water.

Division 2 contains procedure for the appropriation of water, for the determination of water rights, and for the distribution of water in watermaster service areas. The procedure for appropriating water under the Water Code applies to watercourses and to subterranean streams flowing in known and definite channels. It does not apply to percolating ground water. Percolating ground water is likewise excluded from one of the two statutory procedures for determining water rights.

The portions of the Water Code relating to water rights were taken from the California *Water Commission Act*, which became effective December 19, 1914, and remained in effect until it was superseded in 1943 by the Water Code. The Water Code did not change the essential provisions of the Water Commission Act. It restated and rearranged them.

These State agencies have adopted rules and regulations pertaining to their administrative functions under the Water Code. They have been published in pamphlet form under the following titles:

Water Rights Board:

"General Information Pertaining to Water Rights in California. 1964."

State statutes on water make up the Water Code

There are also State rules and regulations

Holders of rights may take turns in diverting water

"Regulations and Information Pertaining to Appropriation of Water in California. 1964."

"Rules and Regulations Pertaining to Protests and Hearings. 1960."

"Rules, Regulations and Information Pertaining to Determination of Rights to the Use of Water in California. 1959."

"Rules, Regulations and Information Pertaining to Recordation of Water Extractions and Diversions, effective in Riverside, San Bernardino, Los Angeles and Ventura Counties. 1959."

Department of Water Resources:

"Rules and Regulations Pertaining to Supervision of Dams in California. 1963."

*Court decisions
are part of the law*

Court decisions are part of the State law. They have been taken into consideration in this circular, and a few of the more important are mentioned specifically.

IRRIGATION ORGANIZATIONS

*Irrigation
organizations
may be districts*

An *irrigation district* is a public corporation organized under the *Irrigation District Law*, which is part of the Water Code (division 11, secs. 20500 to 29978). Its chief function is to provide water for irrigating the lands within its boundaries. It may issue bonds, and may tax the included lands to pay its obligations, acquire water rights and physical properties, and operate and maintain the irrigation system. The lands of an objecting minority may be included and assessed if they will be benefited by the district.

or mutual

A *mutual irrigation company* is a private, voluntary association of irrigation farmers, its chief purpose being to provide water at cost for the use of its members. The members own the irrigation system in common. The mutual company may be either incorporated or unincorporated. Many mutual companies are incorporated under the *General Corporation Law* of California, which is a part of the *Corporations Code* (Calif. Corp. Code, title 1, division 1).

or commercial

A *commercial irrigation company* is an organization that provides irrigation water for persons who have no ownership in the company.

Commercial irrigation companies in California are chiefly of two kinds:

A *private-contract irrigation company* serves water to persons, of its own choosing, with whom it enters into contracts for that purpose.

A *public-utility irrigation company* serves water to the public within its service area, under the regulation of the State Public Utilities Commission (Calif. Pub. Util. Code, secs. 2701 to 2712).

WATER RIGHTS ARE PROPERTY RIGHTS

So long as water remains in its natural environment, the ownership of the water is *in the public* and not in the holders of water rights that attach to that source of supply. The ownership that individuals acquire with respect to such public water is ownership of rights to divert the water from the source of supply and to put it to use.

Water that is impounded in a reservoir, taken into a conduit, or otherwise reduced to possession and control in the exercise of a lawful water right, however, becomes the *private property* of the holder of the right.

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

The water right *may be protected by court proceedings* against unlawful acts that infringe the right, just as any other right of property may be so protected.

The protection that the law affords the water right relates to acts that cause *material or substantial injury* to the holder of the right. It does not extend to minor interruptions or interferences with the flow of water in the stream that do no real damage.

Acts that infringe the right may consist of unlawful upstream diversions. These diversions may prevent the full quantity of water to which the user is entitled from reaching his headgate or point of diversion, thus interfering with his use of the water. Or they may deprive him of the water at the times he is entitled to receive it. In either case the value of the water in producing crops may be impaired, perhaps seriously.

Other acts that infringe the right may be upstream operations that result in polluting the water, or in deteriorating its quality to such an extent as to render the water unfit for proper use downstream. The holder of the water right is entitled to receive the water in such state of purity as is necessary for the purposes to which his right applies.

Still other acts of infringement may consist of unlawful interferences with one's diversion of water or with the operation of his irrigation works.

*The water right is a
property right. It
is a valuable right.
And it is real estate.*

*Courts protect
the water right*

*The right may be
infringed if ...*

*someone unlawfully
diverts water
upstream*

*or pollutes the
water*

*or interferes with
diversion or
irrigation works*

The holder of the water right is entitled to damages for past unlawful acts that have caused him substantial injury. And if future injury is threatened, he may be protected by the issuance of a court decree of injunction commanding the offending party to refrain from performing those acts.

Water rights are limited to REASONABLE BENEFICIAL USE

It has long been the law in California that the use of water by an appropriator must not only be beneficial, but also reasonable in relation to the rights of other appropriators and of riparian owners. The *riparian* owner has long been held to a reasonable beneficial use of water as against the owners of other lands riparian to the same stream; but as against appropriators, the riparian owner, prior to 1928, was not limited by any measure of reasonableness in his use of the water.

In 1928 the California voters adopted an *amendment to the State Constitution* (art. XIV, sec. 3) relating to water rights and uses of water. The amendment provides that water rights in watercourses are limited to the quantities of water reasonably required for the beneficial uses to which the rights relate. Such rights do not include (1) waste of water or (2) unreasonable use or (3) unreasonable methods of use or (4) unreasonable methods of diversion of water. As a result of this amendment, riparian owners are now held to the same standards of use in relation to appropriators as those imposed upon appropriators in relation to riparian owners. This does not mean that riparian and appropriative rights are wholly equal in status. As noted hereinafter under "Conflicts of water rights in watercourses," in conflicts between appropriative and riparian rights, certain appropriative rights may be superior to certain riparian rights, and vice versa.

The California Supreme Court has held that the declarations in the amendment are not confined to water rights in watercourses (*Peabody v. Vallejo*, 2 Cal. (2d) 351, 372, 383, 40 Pac. (2d) 486 (1935)). They apply to all uses of water of all natural water supplies to which water rights attach.

The Supreme Court, in interpreting the amendment, has adopted the term *reasonable beneficial use* as expressing the restricting of water rights to uses of water that are both beneficial in themselves and reasonable in relation to other rights that attach to the same water supply.

The purpose of use, such as irrigation or domestic, as distinguished from the handling of water, to which the

amendment was directed, is discussed under the several kinds of water rights.

Water rights in SURFACE WATERCOURSES

The Riparian Right

Acquiring and Holding

The riparian right is acquired by *acquiring title to the riparian land*.

So far as a tract of riparian land that is now in private ownership is concerned, its riparian right originally accrued or came into being at the time title to the tract passed from the government to private ownership. The government granted the riparian land to the patentee; according to the California State law, the patentee thereby became possessed of a riparian right. Therefore his title to the riparian land includes the title to the riparian right that relates to that land.

The patentee of the land was not required to file a claim to the riparian right in any federal, state, or county office either before or after beginning use of the water. Nor is it necessary that any of his successors in title shall do so.

The riparian right is said to be "part and parcel of the riparian land." When the land is sold, the riparian right passes as a part of the conveyance unless the deed declares to the contrary. Other exceptions are noted below under "Severance" (pp. 19-23.)

The riparian right is held by holding the land. It is *not based upon use* of the water and is *not lost solely by disuse*. So long as loss of the riparian right by prescription is not threatened, the landowner need not make use of the water nor perform other acts in order to hold his riparian right.

Utilizing

Riparian waters. Waters to which riparian rights apply are only those of *natural sources*, chiefly watercourses.

Riparian rights in a watercourse extend to its tributaries that enter the stream above or at the riparian land. This includes tributary spring waters. Riparian rights in the waters of a slough connected with a river apply also to the waters of that river during the times water is flowing from the river into the slough.

Lakes and ponds are included within riparian waters, regardless of whether they are parts of stream systems or have no visible or known connections with surface streams.

Riparian rights in a stream attach to the *underflow* as well as to the surface flow.

No one has a right to waste water or use it in unreasonable ways

regardless of the kind of water right

The riparian right is part of the land

It is not lost solely by disuse

The right in a stream extends to its sources

Navigation
comes before
riparian rights

Riparian rights attach to *navigable* as well as to *non-navigable* waters. The exercise of the riparian right in a navigable stream, however, is subject to the exercise of the public right of navigation. That is, if a proposed diversion of water by a riparian owner interferes with the use of the stream for navigation at a time the public wishes to use it for that purpose, the navigation right takes precedence.

Certain waters are *not available* for the use of riparian owners as part of their riparian rights. These are chiefly as follows:

Riparian rights
attach only to
natural flow

Riparian rights do not apply to waters flowing in *artificial watercourses*, such as canals and other conduits constructed for the purpose of conveying water. However, in determining whether riparian rights exist, there are exceptional circumstances under which a watercourse that was originally made artificially will be treated by the courts as though it were a natural watercourse. This has been done in cases in which, for a great length of time, interested parties have utilized and looked upon an artificial channel as a natural channel and the owners of bordering lands have come to depend upon it as such.

Nor do riparian rights attach to *artificial flows* of water carried in natural watercourses. These include appropriated waters that are purposely commingled with natural flows for the purpose of carrying the appropriated waters from one point on the channel to another.

The *return flow from foreign waters* is not part of the flow of a stream to which riparian rights attach. Foreign waters released into a stream with no intent to recapture them are subject to appropriation in the order of priority, and if such waters are not already appropriated by someone else and the riparian owner wishes to use them, he must appropriate them.

Riparian lands. To be riparian to a particular watercourse and entitled to riparian rights in it, a tract of land must meet these requirements:

1. The tract must be *contiguous* to or border the stream and thus give the owner access to the stream waters.

The length of actual frontage on the stream is not material. For example, the entire area of a square 40-acre tract is considered to be contiguous to a stream even though the contact with the stream is only 200 feet or so at one corner.

2. The tract must be the *smallest* tract held in any single ownership in the chain of title leading to the present owner.

A tract having
riparian status
may be reduced

This means that the area of land that has riparian status may be reduced by successive conveyances, in which portions of the land away from the stream are sold to other parties without reserving riparian rights in the severed parcels. But the area that is riparian can never be increased.

but never
increased

3. The tract must lie within the *watershed* of the stream.

A grant from the government may have included land bordering a stream in watershed A and extending across the divide into watershed B. The portion of the tract in watershed B is not riparian to the stream in watershed A.

Land situated in a *delta* formation at the mouth of a stream that is adjacent to the stream, but that slopes away from its banks, is not considered as being outside of the watershed. It is considered riparian to the stream.

Land contiguous to a stream and within the limits of a *municipality* is entitled to riparian rights to the same extent as though it were outside the municipality. If the municipality owns such land, it has the same rights with respect to it as any individual would have. But a city, simply because it lies upon a stream or owns land contiguous to the stream, has no right to take water from the stream for the use of its inhabitants who live on non-riparian land within the city.

Place of use. The water of the stream in which riparian rights are claimed must be used on or in connection with the *riparian land* only.

The landowner's riparian right does not entitle him to take the water away for use on nonriparian land. Nor does it entitle him to let someone else do it. If he grants his riparian right to another party he simply waives his own right to object to his grantee's diversion. The effect of such a grant is stated under "Severance" (pp. 19-22).

Diversion. The riparian owner may divert the water from the stream at *any convenient point* on his riparian land.

The quantity of water to which the riparian owner is entitled may likewise be diverted by him at some point *upstream* from his riparian land under the following conditions only:

1. The quantity which the riparian owner has the right to take from the stream on his land may be diverted upstream only during such periods of time as the water would reach his land under natural conditions. That is, if the water would be lost by seepage and evaporation before reaching his land, the riparian owner has no right to go above the place of loss and make his diversion there.

2. Owners of riparian land lying between his proposed point of diversion and his own riparian land are not

Land not in a
stream's watershed
is not riparian
to that stream

Riparian water for
riparian land only

It may be
diverted at any
point on the
riparian land

or upstream under
some conditions

deprived of water reasonably required for their intervening land.

3. The necessary easements or rights of way for his head-gate and canal are obtained.

The water may be diverted either by gravity or by pumping from the stream. In general, *any method of diversion* may be used that results in getting the water from the stream onto the land without causing injury to other landowners or holders of water rights in the stream, and that is reasonable under all of the circumstances.

Riparian proprietors may agree among themselves that their several diversions of water from the stream shall be made in *rotation*. And in contests between riparian owners, the courts are authorized to impose plans of rotation upon the parties whether or not they consent, if this will be generally beneficial and will not substantially injure any of them, nor impair other water rights in the stream.

Return of water. The portion of the water diverted by the riparian owner that is not consumed must be *returned* to the stream for the use of holders of rights downstream.

The general rule is that the water must be returned to the stream at or above the lower boundary of the riparian land. However, if the holders of rights downstream who wish to use the returned water are located some distance below the riparian land on which the water has been used, the water may be returned at any point above their places of diversion.

Purpose of use. The water may be put to *any use* on or in connection with the riparian land that is *beneficial*.

Irrigation, domestic use, watering of livestock, manufacturing, development of power, and recreational uses are all proper riparian uses of water.

The riparian rights of land contiguous to a natural lake may include the right to have the *water level in the lake* maintained at its natural elevation. This is the case where the value of the riparian land depends upon the maintenance of the lake level at that approximate elevation for recreational or other purposes.

Irrigation of land is a beneficial use and within the riparian right not only when the irrigated land is planted to cultivated crops, but also when it is in native grasses only.

Method of use. *Any method* of applying irrigation water that is reasonable under all of the circumstances, and that does not result in unnecessary waste of water or in injury to land (erosion, waterlogging, and so on), may be employed. This may be an artificial method, such as ditches or pipes. Or it may be simply natural overflow

from the stream, the excess water draining back into the stream as the flood subsides.

Preferences in use. Uses of water under the riparian right are divided into two classes: (1) Natural or ordinary uses, and (2) artificial or extraordinary uses.

Natural uses of water are those necessary to maintain the lives of the occupants of the riparian land. These comprise drinking, other household uses, and the watering of domestic animals necessary for the sustenance of the farm family.

Artificial uses of water are commercial or business uses. These include irrigation, the watering of large herds of livestock, manufacturing, and development of power.

The natural uses of water are *preferred uses*. The preferences may be exercised in two ways:

1. The riparian owner may take from the stream all the water that he needs for these purposes of sustaining human life on his farm. If the flow of the stream is only enough to supply his requirements, it is not necessary that he share the flow with downstream owners who may want it themselves for their own natural requirements.

2. When the supply of water in the stream is not enough to supply the requirements of all riparian owners for both natural and artificial purposes, the natural uses have the preference to the full extent of their water requirements. The excess water, if any, is prorated among the riparian owners for the partial satisfaction of their several requirements for irrigation and other artificial purposes.

The preference in favor of natural uses of water must be exercised in a reasonable manner. It applies only to the quantity of water that the preferred user actually needs, and it does not entitle him to waste any of the water.

Relative rights of riparian owners. The riparian irrigation water right is a *relative*, not an absolute right. The extent of each individual right is determined by considering all riparian rights in the stream.

For irrigation and other so-called *artificial* purposes, each riparian owner is entitled to make a reasonable use of the water of the stream on his riparian land. The question as to whether a particular riparian owner's use of the water is reasonable is determined by considering the reasonable water requirements of all of the lands that are riparian to the stream.

No riparian owner has priority over any other riparian owner simply because he *used the water first*. So long as one's riparian right is intact, he may begin use of the water at his pleasure, and may successfully demand his equitable share of the water even though other riparian owners may have been using it for a long time.

Needs for sustaining human life come first

Excess over this is prorated

"Reasonable" means in view of others' needs and rights

Priority in time of beginning use does not apply to a riparian right

Unused water must be returned

Water must be used for beneficial purposes

Lake-water rights include the water level

Water must be handled in reasonable ways

Courts may
apportion flow
among riparians

Apportionment of water. If the flow of the stream is not enough to supply the wants of all riparian proprietors for irrigation or other *artificial* purposes, each is entitled to a *fair share* of the available supply. The courts have power to *apportion* among the riparian proprietors the water to which they are collectively entitled.

There is no set formula for decreeing an apportionment of water among riparian owners. Matters that are taken into consideration include the quantity of water available; the extent of irrigable land of each proprietor; the character of the soil; the practicability and cost of irrigating the lands; and the uses to be made of the water.

As riparian rights are relative with respect to each other, an apportionment based upon proportions of the stream flow is more consistent with the nature of the riparian right than is the assignment to each riparian proprietor of a specific quantity of water.

An apportionment of the water is based upon the circumstances that prevail at the time the apportionment is made. It is subject to modification whenever the conditions change sufficiently to justify a new or modified apportionment.

The holder of a
riparian right may
appropriate water

Appropriation of water by riparian owner. In California, an owner of riparian land may make an *appropriation* of water of the stream to which his land is contiguous, for use in irrigating that land, without forfeiting or impairing his riparian right in any way.

Under some circumstances he may find it advantageous to exercise his riparian rather than his appropriative right. This might occur, for example, if the appropriative right had been acquired after most of the riparian lands had passed into private ownership and if the irrigation demands of other riparian owners were considerable. On the other hand, an appropriation of winter flood flow for storage might provide the riparian landowner with water late in the season after the normal flow had become too low to be of material use.

He can use either
or both rights

In controversies with other parties who claim water rights in a stream, one who possesses both riparian and appropriative rights in that stream with respect to the same tract of land may rely upon either or both of his water rights. It is important to note that such duplication of kinds of water rights does not necessarily result in giving the riparian owner the sum of the quantities of water claimed under each of his rights. The maximum quantity of water that may be successfully claimed under any water right, or any combination of rights, cannot exceed the quantity required for reasonable beneficial use in connection with the riparian owner's land.

but his total use
must not exceed
reasonable needs

Severance

Although the riparian right is "part and parcel" of the riparian land, it is not an inseparable part of the land.

There are ways in which the riparian right may be *separated or severed* from the land. There are also conditions under which the severance may be prevented and the right *preserved* in the land.

A riparian right
can be severed
from the land

Severance of the right from the land under some circumstances may involve a total uncompensated loss to the landowner. In other cases he may receive something in consideration for voluntarily agreeing to surrender the right. If his right is condemned for public use, he receives compensation for being deprived of the right.

Severance of the riparian right from the land, then, may mean a total loss to the landowner, or it may mean only a partial loss to him, or it may mean no loss at all in terms of money value of the right. Because it more accurately expresses the whole group of features relating to separation of the riparian right from the riparian land, *severance* of the right is being used in the heading of this topic rather than *loss* of the right.

Under each of the following subtopics, the principles relating to the *severance* of the riparian right from the land and to the *preservation* of the right and *prevention* of *severance* are considered together.

Prescription. The riparian right may be severed from the land and lost to the landowner by adverse use on the part of another party under the circumstances necessary to vest in the adverse party a prescriptive right. This is called losing the riparian right, or a part of it, by *prescription*.

It can be lost
by prescription

In most cases it is necessary that the adverse use be made upstream from the riparian owner's land or place of diversion. This is because downstream use of water is seldom adverse to the rights above.

To result in loss of the right it is necessary, among other things, that the adverse use be made for a period of 5 consecutive years and that the riparian owner as a result be deprived of the use of the water or of the possibility of its use throughout that period.

The riparian owner, before the expiration of the 5-year prescriptive period, must take *measures to protect his right* if its threatened loss is to be averted. Effective measures include *actual physical interruptions* of the adverse diversion and use. They also include the *filing of suit* to stop the adverse use. Such a lawsuit need not be concluded before the end of the prescriptive period, but to be effective, it must be prosecuted to successful conclusion. Any of these protective measures, if successful,

But the holder can
prevent the loss
if he stops the
diversion...

or files suit in court

prevents the loss of the riparian right so far as that particular adverse use is concerned.

A riparian owner who is not making use of the water, but whose riparian right is threatened with loss by prescription, may obtain from the court a judgment and decree protecting his unused right. This is called a *declaratory judgment* or *declaratory decree*. It must be applied for prior to the expiration of the 5-year period of limitation.

The declaratory decree defines the right of the riparian owner; enjoins the adverse user from making use of the water to which the riparian owner is entitled during such times as the latter rightfully requires it; and enjoins the adverse party from asserting an adverse right, regardless of whether the riparian owner chooses to use the water or to refrain from using it. This not only prevents that particular adverse use from ripening into a prescriptive right, but also prevents the party against whom the injunction is directed from obtaining, in the future, a prescriptive right against the riparian owner with respect to the same water right.

Severance of contact of land with stream. A particular area of land that is part of a single tract of riparian land may *lose contact* with the stream channel in various ways. Loss of contact with the stream may involve *loss of riparian rights*. However, such loss of riparian rights may be prevented under certain circumstances.

The ways in which contact of land and stream may be severed and riparian rights as a result separated from the land, and the circumstances under which the rights may be preserved in the land notwithstanding the severance of contact, are chiefly as follows:

1. In the *subdivision* of a tract of riparian land, parcels lying along the stream may be sold to certain parties and parcels back from the stream to other parties. These back parcels therefore are no longer contiguous to the stream. Ordinarily, if the deeds conveying these parcels thus detached from the stream make no mention of water rights or uses of water, their riparian rights are *lost* by reason of the sale.

If the riparian right of a parcel detached from the stream is once lost, it can never be regained. This is the case even if the owner of the riparian land lying between that detached parcel and the stream should buy that parcel and thus make it again part of one ownership in contact with the stream.

There are ways in which the riparian rights of detached parcels of a subdivided riparian tract may be *preserved*.

The riparian rights of detached parcels may be preserved by showing that the parties to the transfer of the

land intended that the parcels should continue to have riparian rights. Such a showing is most satisfactorily made where the intention is expressed in specific terms in the deed of conveyance. But if the deed is silent on this matter, the intention still may be implied by the circumstances. Such circumstances may be the existence and prior use of irrigation ditches leading from the stream to the detached parcel, and the actual watering of that area of land.

Preservation of riparian rights in detached parcels has been effected by employing a *mutual irrigation company* for serving water to the subdivided lands as a part of the whole plan of development. The first step in one such case was the transfer of the riparian rights of the entire tract to the company in exchange for the shares of its capital stock. Purchasers of the various parcels of subdivided land then received shares of the mutual company stock in proportion to their acreage. The riparian rights remained with the land, whether bordering the stream or detached from it, regardless of the formal transfer of rights to the mutual company. And the irrigation company acted as the agent of the landowners in serving water to their lands.

2. The riparian rights of a tract of riparian land owned in common by several parties may be divided among them by a *court decree that partitions the land* among the several owners.

The decree may provide specifically that the riparian rights shall be preserved in all of the subdivided parcels. Or it may expressly provide for preserving the right in certain parcels and for not preserving it in others, or may allocate limited riparian rights to certain parcels.

If the decree of partition says nothing about water rights, riparian rights are *preserved* in all of the subdivided parcels, including those severed from contact with the stream.

3. The *channels of streams sometimes shift* as the result of floods. In the case of a gradual change, the legal boundary of riparian land bounded by the channel changes with the channel itself. If the change is sudden and violent, the legal boundary of the land remains where it was prior to the change. A sudden, violent change is called *avulsion*.

After a sudden change in the stream channel, the riparian owner may *restore the stream* to its original channel under certain conditions. These conditions are that the restoration be made within a reasonable time, and that it be made without trespassing on the lands of other persons. If this is done, the original boundary of the land and the status of its riparian rights are preserved.

but not if intent to continue them can be shown

A mutual company has been used in such divisions

Rights may be kept or lost in a partition decree

If the stream moves away from the riparian land . . .

the channel may be restored under some conditions

When a riparian tract is divided

back parcels may lose the rights

If the restoration of the stream to its original channel is not made under those conditions, land severed from contact with the stream by avulsion *loses its riparian rights*.

In subdividing, riparian rights may be reserved

Grant of contiguous land without water right. An owner of riparian land may sell the land without the riparian right. This may be effected by a deed that conveys the land but contains a clause reserving the riparian right from the conveyance.

In this way a riparian owner may sell part of his land bordering the stream on a dry-land basis, and at the same time *reserve* the entire water right for his own use on the portion of the land that he retains.

Riparian rights may be waived by a grant

Grant of riparian right. The riparian owner may grant his riparian right to another person who proposes to divert the water to nonriparian land.

Such a grant is not made in the exercise of a riparian right. Nor is it really a transfer of the riparian right to nonriparian land.

The riparian owner himself is not entitled to take the water away to nonriparian land; and he cannot authorize another person to do what he himself has no right to do. But he can lawfully contract with another party that he will make no objection to the acts of that party in diverting water from the stream to nonriparian land.

The *only effect of the grant* of a riparian right to one who wishes to take the water to nonriparian land, then, *is to waive the right of the grantor to object* to the diversion by the grantee. The contract is binding not only upon the parties, but upon their successors in interest as well.

but this doesn't bind other owners

The grant of a riparian right to another person for use on nonriparian land is not binding upon the other riparian owners on the stream, unless of course they consent to it. If one riparian owner chooses to make no use of the water, the others are entitled to use his share if they need it. Notwithstanding his grant, the grantee of the riparian right will not be allowed to divert the water to nonriparian land if the other riparian owners need the water on their own riparian lands.

nor cause complete loss of the right

The grant of a riparian right does not effect a complete severance of the right from the land. The riparian owner has contracted to refrain from asserting his right against his grantee. But *the right still exists with respect to the other riparian owners*. As against them, the right may be exercised whenever the nonriparian grantee is not using the water.

The right may be condemned for public use

Condemnation. The riparian right may be condemned for public use under the laws relating to *eminent domain*. The landowner whose right is taken from him by emi-

nent-domain proceedings is entitled to just compensation for the taking away of his property. This is his constitutional right.

Forfeiture not applicable. The Water Code provides for the *forfeiture* of certain water rights for failure to use the water for the purpose for which it was appropriated or adjudicated for a specified period of years (sec. 1241). *This does not apply to riparian rights*.

Riparian rights are not lost solely by reason of nonuse of the water.

The Appropriative Right

Acquiring

By following the Water Code procedure. A person who wishes to appropriate water out of a watercourse is required to follow the detailed procedure set out in the Water Code (secs. 1200 to 1677).

The Water Code sets procedure for appropriation

1. The first step is to file, with the Water Rights Board, at Sacramento, an *application* for a permit to make the appropriation.

An application must be filed

The application is made on forms furnished by the Board. It must give details of the proposed undertaking, including nature and amount of use of the water, location and description of works, place of diversion, place of use, and times of beginning and completing construction and applying the water to the proposed use. Special information is required with respect to agricultural and other named uses of the water, and to storage features if storage is intended. The applicant must show that he has the necessary rights of way from the stream to his land, or at least a reasonable prospect of obtaining them (Cal. Administrative Code, title 23, art. 16). Appropriate maps and drawings are a part of the application.

Fees to be paid upon applications are prescribed by the Water Code (secs. 1525 to 1533).

and a fee paid

2. A *notice* of the application, summarizing its features, is prepared by the Board. If the application is for more than 3 cubic feet per second or for more than 200 acre-feet per annum of storage, the applicant must cause the notice to be published, at his own expense. If the application is for less than those quantities of water, copies of the notice must be mailed by the Board to interested local parties, and copies must be posted by the applicant in at least two conspicuous places in the locality.

and notice given

3. A written *protest* against approval of the application may be filed by any person interested. The Board holds a hearing upon a protested application. The Board may hold a hearing upon an unprotested application also, but it is not required to do so.

There may be protests and a hearing

The Board may grant or reject

4. The Board acts upon the application. It may grant the application; but, if the application is protested, only after a hearing. Or, after a hearing, the Board may reject the application.

If granted, a permit to start is issued

Any person interested in the application who objects to the final action of the Board may file suit in the superior court to inquire into the validity of the Board's action.

5. Upon approval of an action the Board issues a permit to the applicant.

The permit specifies the conditions under which the quantity of water authorized by the Board may be diverted and used. It specifies periods of time for beginning construction of work, for completing construction work, and for applying the water to the proposed beneficial use. These periods may be extended by the Board upon a showing of good cause for delay.

after permit fees are paid

If the permittee fails to carry out the terms of the permit, the Board may *revoke* the permit after a hearing. The permittee may file suit in the superior court to inquire into the validity of the Board's order.

Fees due upon the issuance of permits are specified by the Water Code (secs. 1540 to 1545).

6. Upon completion of a project the permittee reports the fact to the Board, which makes an inspection to determine whether the authorized work has been performed satisfactorily.

A license is issued when the project is completed

If the Board's determination is favorable, a *license* is issued to the permittee. This confirms his right to divert such quantity of water as he has applied to beneficial use.

If the determination is unfavorable to the permittee, the Board may revoke the permit. The permittee may file suit in the superior court to inquire into the validity of the Board's order.

It can be revoked later for cause

A license that is not being put to proper use may be *revoked* by the Board. The licensee may bring a court action to inquire into the validity of the Board's order.

It must be recorded

A copy of each license and revocation of license is filed by the Board with the *county recorder* of each county in which the points of diversion and places of use of the water are situated.

Priority depends on the date of filing application

7. If the appropriation is completed in conformity with the provisions of the Water Code and with the Board's rules and regulations, the *priority* of the right is represented by the date of filing the application with the Board (Water Code, sec. 1450).

The Water Code procedure is exclusive. The procedure contained in the Water Code for appropriating water from a watercourse is exclusive. There is *no other method* by which such an appropriation may be made.

As noted later (pp. 43-45), this procedure does not apply to percolating ground water.

Prior to the adoption of the California Civil Code in 1872, no method of appropriating water had been prescribed by the Legislature. An intending appropriator simply diverted the water from the stream and applied it to a beneficial use on or in connection with certain land.

Appropriation under the Civil Code began in 1872

The Civil Code in 1872 provided a formal procedure for appropriating water. The intending appropriator posted a notice at the proposed point of diversion, filed a copy with the county recorder and began construction within prescribed periods, carried out the construction work diligently, and applied the water to beneficial use. He obtained certain advantages by following the Civil Code procedure, but was not required to do so. He could still appropriate water lawfully by diversion and use, without following the statute.

The Water Commission Act, which became effective December 19, 1914, contained the procedure now codified in the Water Code. As of that date, previous methods of appropriation of water of watercourses were superseded by the present statutory method.

Restrictions in acquiring the right. The permit to appropriate water relates to *unappropriated* water only.

The Board in issuing a permit may impose *conditions* aimed at the best development, conservation, and utilization of the water. If in the judgment of the Board a proposed appropriation would conflict with the public interest, the application must be rejected. As indicated earlier, rejection of applications and the imposition of restrictions are subject to court inquiry into their validity.

Domestic use is the highest use

Preferences in acquiring the right. The Water Code declares the established policy of the State to be that the use of water for *domestic purposes* is the highest use of water and that the next highest use is for *irrigation* (sec. 106). The Board is directed to be guided by this policy in acting upon applications to appropriate water (sec. 1254). In acting upon applications to appropriate water, the Board must consider the relative benefit to be derived from all beneficial uses of the water concerned (sec. 1257).

If two or more conflicting applications for different purposes are pending at the same time, the first preference would be given to domestic use and the second to irrigation. Or in issuing a permit for a nonpreferred use of water, a condition may be inserted to the effect that the right shall not interfere with future appropriations for preferred uses.