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Governor's Commission
To Review California Water Rights Law

APPROPRIATIVE WATER RIGHTS
IN CALIFORNIA

Background And Issues

By Marybelle D. Archibald



Staff Paper No. 1

May 1977

GOVERNOR'S COMMISSION
TO REVIEW CALIFORNIA WATER RIGHTS LAW

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THIS PAPER HAS NOT BEEN REVIEWED
OR APPROVED BY THE COMMISSION

This paper is part of a series of background and issue papers prepared by the staff of the Governor's Commission to Review California Water Rights Law. The background material is intended to assist persons who may lack detailed knowledge of California's water rights law and procedures. The issues have been listed as a basis for discussion by the public and for the Commission when it considers various legislative options. Initial papers in the series are as follows:

- Staff Paper No. 1: Appropriative Water Rights in California
- Staff Paper No. 2: Groundwater Rights in California
- Staff Paper No. 3: Legal Aspects of Water Conservation in California
- Staff Paper No. 4: Riparian Water Rights in California
- Staff Paper No. 5: The Transfer of Water Rights in California
- Staff Paper No. 6: Legal Aspects of Instream Water Uses in California

* * * * *

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. HISTORICAL BACKGROUND OF APPROPRIATIVE RIGHTS	3
III. THE MECHANICS OF PRIOR APPROPRIATION	15
Application for a Permit	15
Notice	20
Protests of Applications	21
Environmental Quality	23
Issuance of a Permit	24
Temporary Permits	26
The Diligence Requirement and Exceptions	27
Issuance of a License	29
IV. STATEMENTS OF WATER DIVERSION AND USE	32
V. DISPUTES OVER RIGHTS TO WATER	34
Court References	34
Statutory Adjudications	35
VI. ENFORCEMENT	42
VII. LOSS OF APPROPRIATIVE RIGHTS	47
VIII. CRITICISMS OF THE PRIOR APPROPRIATION DOCTRINE.	48
IX. WATER USE PLANNING AND ALLOCATION	54
Surface Water Planning	54
Surface Water Allocation	57
ISSUES	61

I. INTRODUCTION

The 1976-1977 drought is the worst recorded dry spell in California history.^{1/} Almost daily, newspaper headlines dramatically document the gravity of the situation:

"Farmers Face Drought Dilemma", "Cutoff Looms for San Joaquin Water Users", "Ground Water Hits Record Lows."^{2/}

The drought has focused attention upon the value of water as a public resource, and has emphasized why, according to state law, "the people ... have a paramount interest in the use of all the water...."^{3/}

In California's complex system of water rights, the appropriative water right occupies a lead position. The basic principle of the prior appropriation doctrine is "first in time, first in right." The person who first appropriates water and puts it to a reasonable and beneficial use has a right superior to later appropriators. In water-short years, junior appropriators with low priorities may be barred from exercising their rights in order to satisfy the rights of earlier, senior appropriators. This

^{1/} This conclusion was reached by the United States Geological Survey. Reported in San Diego Union, May 5, 1977, at A25, col. 1, and San Francisco Chronicle, May 6, 1977, at 2, col. 4.

^{2/} Amador Dispatch, April 6, 1977, pt. 3, at 1, col. 1. Sacramento Bee, April 21, 1977, at B1, col. 5; Los Angeles Times, March 8, 1977, pt. 1, at 3, col. 1.

^{3/} Cal. Water Code Section 104 (West 1971).

process has occurred numerous times this year. For example, approximately 800 appropriators on the Sacramento River and its tributaries have been notified that, beginning in May, water may be unavailable under their priorities.^{4/}

The California Water Code establishes the procedure for acquiring appropriative rights to use surface water and water in subterranean streams flowing through known and definite channels. This paper discusses the historical background of the prior appropriation doctrine, the procedure for obtaining and maintaining appropriative rights to use such water, and some of the criticisms of the doctrine. A final portion of the paper lists issues related to appropriative water rights in California to be considered by the Governor's Commission to Review California Water Rights Law.

^{4/} News release by California State Water Resources Control Board (April 1, 1977), reported in Sacramento Bee, April 2, 1977, at A5, col. 1.

II. HISTORICAL BACKGROUND OF APPROPRIATIVE RIGHTS

Water rights literature distinguishes two major trends in the development of water rights law in the West. Most states followed either the "Colorado doctrine" or the "California doctrine."^{5/}

The "Colorado doctrine" is based upon that state's determination that priority of appropriation, not ownership of riparian land, always governs the right to use surface water. Colorado rejected the riparian rights doctrine as fundamentally incompatible with the physical conditions of the state:

The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity . . . It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; . . . the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation,

^{5/} An extensive discussion of these doctrines is found in 5 R. Clark, Waters and Water Rights Sections 405-433.7 (1972). Western states classified as "Colorado doctrine" states include Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. Those classified as "California doctrine" states include California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. The doctrine of prior appropriation is not recognized in Hawaii.

and a great part of the value of all this property is at once destroyed.^{6/}

The United States, which initially owned the vast majority of western land, acquiesced to the determination by each state of the water rights doctrine it would observe.^{7/}

In California, the courts took another approach. They developed a doctrine which recognizes both appropriative and riparian rights. California's acceptance of the prior appropriation doctrine was based not upon its compatibility with the physical environment, but rather upon the desire to validate customary water rights practices. In the early years, water disputes arose primarily among miners trespassing on public land. The miners had developed principles regarding the legitimacy of claims to land based on the rule "first come, first served." They allocated the water necessary for placer mining on the same basis. A miner was expected to act diligently to put his land and water allotment to beneficial use or forfeit all "rights" to it.

^{6/} Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882). See also Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 (1900); Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921).

^{7/} Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866); Act of July 9, 1870, ch. 235, 16 Stat. 217 (1870); Desert Land Act, ch. 107, 19 Stat. 377 (1877). See also Justice Sutherland's analysis of these acts in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142 (1935).

In 1855, the California Supreme Court in Irwin v. Phillips^{8/} was confronted with a conflict between competing water users. Plaintiff owned a canal used to divert water to miners working some distance from the stream. Defendants were miners who came later and established themselves on public riparian land. The court noted that the latter, who asserted the riparian doctrine, lacked the required ownership of the land. The court decided the case according to the "first in time, first in right" prior appropriation doctrine:

Courts are bound to take notice of the political and social condition of the country, which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other.^{9/}

In 1872, the Legislature formally recognized the prior appropriation doctrine by enacting Sections 1410-1422 of the Civil Code.^{10/} This provided an alternative procedure to

^{8/} Irwin v. Phillips, 5 Cal. 140 (1855).

^{9/} Id. at 146.

^{10/} Act of March 27, 1872, ch. 424, 1871-1872 Cal. Stats. 622 (1872).

the miners' custom. These sections applied to "running water flowing in a river or stream or down a canyon or ravine."^{11/} Civil Code Section 1414 states that "As between appropriators, the one first in time is the first in right."^{12/}

According to the Civil Code procedure, a person who wanted to appropriate water had to post written notice in a conspicuous place at the intended point of diversion and record a copy of the notice with the county recorder.^{13/} The notice had to contain such information as the amount and means of diversion and the purpose and place of use.^{14/} Within 60 days of posting notice, the claimant was required to begin excavation or construction work "or the survey, road or trail building, necessarily incident thereto"^{15/} and to work diligently to bring the water to the intended place of use.^{16/}

The purpose of the Civil Code procedure:

"was to provide evidence whereby parties claiming under hostile diversions could establish their respective priorities and corresponding

^{11/} Cal. Civ. Code Section 1410 (repealed 1943).

^{12/} Cal. Civ. Code Section 1414 (West 1954).

^{13/} Cal. Civ. Code Section 1415 (West 1954).

^{14/} Id.

^{15/} Cal. Civ. Code Section 1416 (West 1954).

^{16/} Cal. Civ. Code Sections 1416-1417 (West 1954).

rights to the water and avoid the former difficulties in establishing the precise date of the inception of their respective enterprises."^{17/}

The advantage of using the procedure was that compliance assured that the claimant's right to use the water "relate[d] back to the time the notice was posted."^{18/} The defect in the Civil Code system was that its procedures were not mandatory. Unrecorded nonstatutory appropriations could still be made legally, even though they lacked the protection of the doctrine of relation back. Their priority dated from the time the appropriator commenced work.^{19/}

While water was being appropriated according to the miners' custom and the Civil Code system, it was also being taken by riparian users. Anti-riparian organizations were formed to combat the acceptance of the riparian doctrine.^{20/} However, in the 1886 Lux v. Haggin decision,^{21/} the California Supreme Court held that riparian rights exist concurrently with appropriative rights. In a four to three decision, the majority of the court affirmed the existence of riparian rights despite earlier opinions based upon appropriative principles and despite the codification of the prior

^{17/} Palmer v. Railroad Commission, 167 Cal. 163, 172, 138 P. 997 (1914).

^{18/} Cal. Civ. Code Section 1418 (West 1954).

^{19/} Osgood v. El Dorado Water and Deep Gravel Mining Co., 56 Cal. 571, 581 (1880).

^{20/} S. Harding, Water in California 39 (1960).

^{21/} Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886).

appropriation doctrine in 1872. Cases like Irwin v. Phillips^{22/} were distinguished as dealing only with conflicts between non-riparians. The court based its conclusion primarily upon 1850 California legislation which had adopted that part of the English common law which was "not repugnant to or inconsistent with" the United States Constitution or the California Constitution or California law.^{23/} Under the common law rule, water rights are based upon ownership of riparian land.

In 1911, the Legislature created the California Conservation Commission.^{24/} The Commission was granted the authority to investigate the state's natural resources, including water, and to recommend revisions to existing law. The Conservation Commission was concerned that existing law would allow growth of a water power monopoly to the detriment of the public:

'Caveat emptor' may apply well where only individuals are the parties in interest. But the whole people of this State are vitally interested in seeing to it that no appropriative water monopolies are created, and that any unused portion of this invaluable natural resource shall be at the disposal of those who, in good faith, desire to appropriate and use it.^{25/}

^{22/} Irwin v. Phillips, 5 Cal. 140 (1855).

^{23/} Act of April 13, 1850, ch. 95, 1850 Cal. Stats. 219 (1850).

^{24/} Act of April 8, 1911, ch. 408, 1911 Cal. Stats. 822 (1911).

^{25/} California Conservation Commission, Report 33 (1913).

California's prior appropriation system was revised in 1911, 1912, and 1913.^{26/} The 1911 revision created a Board of Control to regulate appropriation of water for generating electricity. The Board was empowered to issue licenses for such use for terms not to exceed 25 years. The 1911 revision was repealed by the 1912 revision, which created a Water Commission to regulate appropriation of water for power purposes. Licenses for such use were valid for terms no longer than 40 years. The Conservation Commission criticized the second revision because the Water Commission had no power to investigate appropriations to determine which were made in good faith and which were speculative, which were diligently completed and which were unused.^{27/}

The Conservation Commission proposed further revisions in the law, prompting legislative enactment of the Water Commission Act of 1913. However, the Act was challenged by a group of power and water companies who alleged that it

^{26/} Act of April 8, 1911, ch. 406, 1911 Cal. Stats. 813 (1911); Act of January 2, 1912, ch. 41, 1911 Cal. Stats. Extra Sess. 175 (1912); Water Commission Act, ch. 586, 1913 Cal. Stats. 1012 (1913). See California Conservation Commission, Report (1913).

^{27/} California Conservation Commission, Report 20-21 (1913).

would stifle enterprise, increase litigation, involve unlimited expense, and create a "political" commission.^{28/} Following submission on referendum and approval by the voters, the Water Commission Act went into effect December 19, 1914.^{29/} The Act was an attempt to create a more orderly method of appropriating unappropriated waters. In essence, that system appears today in the Water Code.^{30/}

^{28/} California Secretary of State, Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same to be Submitted to the Electors of the State of California at the General Election on Tuesday, November 3, 1914, at 49-50 (1914). See also Address by G. C. Pardee, Hanford Session of the California Development Board (November 7, 1913). Pardee, a former Governor of California, chaired the California Conservation Commission and campaigned for approval of the Water Commission Act.

^{29/} However, it was not until 1923 that the Water Commission Act was amended to state explicitly that the permit system is the exclusive method of acquiring appropriative rights (Act of May 2, 1923, ch. 87, 1923 Cal. Stats. 162 (1923) codified at Cal. Water Code Section 1225 (West Supp. 1977)). While at least one California court found the Act to be the sole method of acquiring rights from the date it went into effect in 1914 (Crane v. Stevinson, 5 Cal. 2d 387, 398, 54 P. 2d 1100 (1936)), a federal court was not so confident:

"If this procedure was not the exclusive method of appropriating water after 1914, it became so in 1923.... Appropriation by pre-emption or self help was thus terminated at least by 1923."

United States v. Fallbrook Public Utility District, 165 F. Supp. 806, 830 (S. D. Cal. 1958).

^{30/} The California Water Code was established in 1943 to consolidate the law relating to water (Act of May 13, 1943, ch. 368, 1943 Cal. Stats. 1604 (1943)).

Prior to the enactment of the Water Commission Act, no state agency was empowered to regulate appropriations other than for power purposes. The Act provided the Water Commission with a procedure to regulate appropriations from surface water and subterranean streams flowing through known and definite channels.^{31/} The Act also provided the Commission with the authority to bring actions for trespass against illegal diversions.^{32/}

To spare the public costly and time-consuming individual lawsuits to determine the legality of water rights, the Act created a procedure for statutory adjudications.^{33/} The Water Commission was empowered to investigate and ascertain in one action the rights of various claimants to a water source. Claimants could contest the findings and obtain judicial review prior to a final decree.

The Act also created a court reference procedure.^{34/} When individuals sued in a state court, the court was permitted to transfer the case to the Water Commission to act

^{31/} Water Commission Act, ch. 586, Section 42, 1913
Cal. Stats. 1012 (1913).

^{32/} Water Commission Act, ch. 586, Section 38, 1913
Cal. Stats. 1012 (1913).

^{33/} Water Commission Act. ch. 586, Section 24, 1913
Cal. Stats. 1012 (1913).

^{34/} Id.

as referee.^{35/} The Act provided for creation of districts in which a watermaster would supervise appropriations to assure they were made in accordance with the priorities of the various rights as determined by the courts.^{36/}

Initially, the Water Commission's permit-issuing function was ministerial: if a person made application according to the procedures specified and unappropriated water was available, the permit had to be issued.^{37/} As the limits of available water resources were recognized, the ministerial system was modified and gradually strengthened to protect the public interest. The Commission was given some discretion in 1917 to refuse applications detrimental to the public welfare.^{38/} In 1921, the Commission was given the power to grant rights to use water

"under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated"^{39/}

^{35/} References from federal courts were provided for by later legislation (Act of June 19, 1931, ch. 1135, 1931 Cal. Stats. 2421 (1931)).

^{36/} Act of May 23, 1921, ch. 365, 1921 Cal. Stats. 543 (1921).

^{37/} Tulare Water Co. v. State Water Commission, 187 Cal. 533, 536, 202 P. 874 (1921).

^{38/} Act of April 25, 1917, ch. 133, 1917 Cal. Stats. 194 (1917).

^{39/} Act of May 18, 1921, ch. 329, 1921 Cal. Stats. 443 (1921).

and to reject applications which "would not best conserve the public interest."^{40/}

In addition, the Legislature declared domestic use as the highest use of water, and irrigation as the next highest use, giving the Commission criteria for preferences in issuing permits.^{41/} Further recognition of the public interest appeared when the last remnants of the ministerial theory of issuing permits were totally abandoned by court decision in 1955.^{42/}

In 1928, California voters used the initiative process to adopt a constitutional amendment expressing a water conservation policy. The amendment was a response to the California Supreme Court decision in Herminghaus v. Southern California Edison Company,^{43/} which held that in a conflict between a riparian and an upstream appropriator, the riparian's use of water was not limited to reasonable use. The new section of the Constitution, Article 14, Section 3 (now renumbered Article 10, Section 2) applies to all types of water rights:

^{40/} Id.

^{41/} Id. (Codified at Cal. Water Code Section 1254 (West 1971).)

^{42/} Temescal Water Co. v. Department of Public Works, 44 Cal. 2d 90, 99-100, 280 P. 2d 1 (1955).

^{43/} Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607 (1926).

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 reasonable 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 the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator 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.44/

44/ Cal. Const. art. 10, section 2.

III. THE MECHANICS OF PRIOR APPROPRIATION

The responsibility for administering the prior appropriation system now rests with the State Water Resources Control Board (Board).^{45/} The following discussion highlights the basic steps of the existing procedure required to obtain and maintain an appropriative right.

APPLICATION FOR A PERMIT

The Water Code requires those who wish to appropriate surface water or water in subterranean streams flowing in known and definite channels to obtain a permit.^{46/} Of those categories of water, the water which may be appropriated is limited to:

"All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated...."^{47/}

^{45/} A history of the Board and its predecessors is found in Craig, California Water Law in Perspective, West's Annotated California Codes, Water, vol. 68 at LXXXV et seq. (1971).

^{46/} Cal. Water Code Section 1200 (West 1971); Cal. Water Code Section 1225 (West Supp. 1977).

^{47/} Cal. Water Code Section 1201 (West 1971).

It is the Board's responsibility to calculate the availability of unappropriated water.^{48/} The Board must also consider, whenever it is in the public interest, the amount of water which must remain in the source for the protection of other beneficial uses. This consideration must also include those uses to be protected by water quality control plans.^{49/}

^{48/} Cal. Water Code Section 1202 (West 1971) defines "unappropriated water" as:

(a) All water which has never been appropriated.

(b) All water appropriated prior to December 19, 1914, which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of the appropriation, or which has not been put, or which has ceased to be put to some useful or beneficial purpose.

(c) All water appropriated pursuant to the Water Commission Act or this code which has ceased to be put to the useful or beneficial purpose for which it was appropriated, or which has been or may be or may have been appropriated and is not or has not been in the process of being put, from the date of the initial act of appropriation, to the useful or beneficial purpose for which it was appropriated, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of the appropriation.

(d) Water which having been appropriated or used flows back into a stream, lake or other body of water.

^{49/} Cal. Water Code Section 1243.5 (West 1971).

The permit system is not comprehensive. Many individuals and entities hold rights to surface water who are not required to comply with the administrative procedure.^{50/} For example, those claiming riparian rights, those who appropriated water according to customs and laws in effect before 1914, those with spring waters that originate and remain on their property, and cities with pueblo rights,^{51/} need not obtain water right permits.

Controversy exists as to whether one who acquires appropriative rights by prescription must comply with the Board's permit procedure. One view evaluates prescriptive rights and concludes:

"As prescription of land has been excepted from the recording acts, so the prescription of rights to water should be outside the analogous laws."^{52/}

^{50/} For detailed information regarding the various categories of water rights recognized in California, see W. Hutchins, The California Law of Water Rights (1956) and I. H. Rogers and A. Nichols, Water for California (1967).

^{51/} A "pueblo right" is:

"the paramount right of an American city as successor of a Spanish or Mexican pueblo (municipality) to the use of water naturally occurring within the old pueblo limits for the use of the inhabitants of the city."

W. Hutchins, supra note 50, at 256.

^{52/} Kletzing, Prescriptive Water Rights in California: Is Application a Prerequisite?, 39 Calif. L. Rev. 369, 376 (1951).

The opposite view^{53/} relies upon Water Code Section 1225:

"No right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division."^{54/}

This view would require persons acquiring "prescriptive rights" after the permit system became effective to obtain a permit. California appellate courts have not yet ruled on the necessity for a permit in this situation. The Board policy is

"to disregard a claim to water subject to the permit procedure which is based only upon use initiated subsequent to 1914 unless it is supported by a permit."^{55/}

The Board requires persons who wish to appropriate water to provide information regarding the source of water supply, nature and amount of use, place of diversion, place of use, and time necessary for constructing the diversion works and applying the water to the proposed use.^{56/}

^{53/} Craig, Prescriptive Water Rights in California and the Necessity for a Valid Statutory Appropriation, 42 Calif. L. Rev. 219 (1954).

^{54/} Cal. Water Code Section 1225 (West Supp. 1977).

^{55/} California State Water Resources Control Board, Information Pertaining to Water Rights in California 5 (1976).

^{56/} Cal. Water Code Section 1260 (West 1971). With the Board's permission, the applicant may change the point of diversion, place of use, or purpose of use (Cal. Water Code Section 1700 et seq. (West 1971)).

Once an application has been properly filed, the Board will determine the availability of unappropriated water. The mere filing of an application does not give a person the right to begin appropriating water.

An application filed in compliance with the Board's requirements secures a priority of right as of the date of the application, and the priority is retained "until such application is approved or rejected."^{57/} The applicant must comply with the Water Code and the Board's rules and regulations in order to maintain the priority.^{58/} An application which is defective when filed, but made in a bona fide attempt to comply with the required procedure, will give the applicant a priority of right as of the date of the application. The applicant will be notified of the defect and then has sixty days to correct the application in order to retain the priority.^{59/} Currently there are approximately 800 applications for water awaiting processing and approval by the Board.^{60/}

^{57/} Cal. Water Code Section 1450 (West 1971).

^{58/} Id.

^{59/} Cal. Water Code Section 1270 (West 1971); 23 Cal. Admin. Code Section 695.

^{60/} California State Water Resources Control Board and California Regional Water Quality Control Boards, Program Guide -- 1976 to 1981, at 66 (1976); California Legislature. Joint Legislative Budget Committee. Analysis of the Budget Bill ... for the Fiscal Year July 1, 1977, to June 30, 1978, at 449 (1977).

NOTICE

The public must be notified that an application to appropriate water has been filed. A copy of the notice is delivered to the applicant, and to the district attorney and the board of supervisors of each county in which diversion is planned.^{61/} The notice must contain the information included in the application and state that protests to the application may be filed within 40 days or 60 days from the date the notice is issued, depending on the size of the diversion.^{62/}

Applications for more than three cubic feet per second^{63/} or more than 200 acre-feet^{64/} per year of storage require public notice by newspaper publication at the applicant's expense.^{65/} An applicant for a smaller amount of water

^{61/} Cal. Water Code Section 1300 (West 1971).

^{62/} Cal. Water Code Sections 1301-1304 (West 1971).

^{63/} "1 cubic foot per second (cfs) expresses a rate of flow of water equivalent to the following:
= 7.48 U.S. gallons per second.
= 448.8 U.S. gallons per minute.
= 646,317 U.S. gallons per day.
= 1.98 acre-feet per day."

California State Water Resources Control Board,
Information Pertaining to Water Rights in California
16 (1976).

^{64/} "1 acre-foot is equivalent to a volume of water which will cover one acre to a depth of one foot.
= 43,560 cubic feet.
= 325,851 U.S. gallons."

Id.

^{65/} Cal. Water Code Sections 1310-1317 (West 1971).

must post the notice in at least two conspicuous places in the locality which will be affected by the proposed appropriation.^{66/} The Board also is required to send a copy of the notice by registered mail to:

"each person who is known to the board and who in its judgment is interested in the application because of ownership or location in the vicinity of the proposed appropriation."^{67/}

The Board may cancel an application for failure to comply with the publication requirements.^{68/}

PROTESTS OF APPLICATIONS

Any person may protest the approval of an application.^{69/} A protestant need not be a water right holder, but may protest on the basis that the application is not in the public interest, or would have an adverse environmental impact, or is contrary to the law. It is the applicant's responsibility to file an answer to each protest with the Board within 15 days following the expiration of the time allowed for filing protests.^{70/} A copy of the answer must be sent to the protestant. The Board may then

^{66/} Cal. Water Code Section 1322 (West 1971).

^{67/} Cal. Water Code Section 1321 (West 1971).

^{68/} Cal. Water Code Sections 1317, 1324 (West 1971).

^{69/} Cal. Water Code Section 1330 (West 1971).

^{70/} 23 Cal. Admin. Code Section 723; however, there is no specific penalty for failure to answer protests.

conduct a field investigation of the water resources affected.^{71/} In some circumstances, the protest may be resolved during the field investigation, with the applicant and the protestant present, and the protest may be withdrawn.

The Board holds formal hearings on protested applications. Notice is mailed to the protestant and the applicant.^{72/} The hearing is usually held before one member of the Board, and parties may present their cases and evidence in a procedure which is

"most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and to the board."^{73/}

Final decisions on protested as well as unprotested applications are made by the full Board.^{74/}

As an alternative to a potentially lengthy and expensive formal hearing process, the parties may agree to a "proceeding in lieu of hearing."^{75/} Under this arrangement, the parties stipulate that the protested application is to

^{71/} 23 Cal. Admin. Code Section 728.

^{72/} Cal. Water Code Section 1340 (West 1971). The Board may also elect to hold a hearing on an unprotested application (Cal. Water Code Section 1351 (West 1971)).

^{73/} 23 Cal. Admin. Code Section 733(c).

^{74/} Cal. Water Code Section 183 (West Supp. 1977).

^{75/} 23 Cal. Admin. Code Section 737.

be submitted to the Board on the basis of the Board's own records, studies, and research, as well as materials prepared by the parties and other interested persons. The stipulation is not binding upon the Board; if it feels that a formal hearing is necessary, it may require one. More than 100 applications are awaiting a hearing or proceeding in lieu of hearing.^{76/}

The Board may reconsider its decisions on its own motion or on the motion of any interested person.^{77/} Judicial review is available by petition for a writ of mandate to inquire into the validity of the Board's action. Any interested person may file a petition for judicial review.^{78/}

ENVIRONMENTAL QUALITY

Prior to issuing a permit, the Board sends each application to its Environmental Assessment Unit. That unit reviews the project in light of the California Environmental Quality Act (CEQA) and its guidelines^{79/} and determines

^{76/} California State Water Resources Control Board and California Regional Water Quality Control Boards, Program Guide -- 1976 to 1981, at 66 (1976).

^{77/} Cal. Water Code Section 1357 (West 1971).

^{78/} Cal. Water Code Section 1360 (West 1971).

^{79/} Cal. Pub. Res. Code Sections 21000-21176 (West Supp. 1977); 14 Cal. Admin. Code Sections 15000 et seq. The regulations of the State Water Resources Control Board implementing CEQA are found at 23 Cal. Admin. Code Section 2700 et seq.

whether CEQA applies. If CEQA does apply, the unit decides whether a negative declaration is sufficient, or if a categorical exemption applies, or if an environmental impact report is necessary. The State Clearinghouse must review and circulate any draft declarations and environmental impact reports before the Board considers the application further. Most applications for water rights permits are treated as being either categorically exempt from CEQA's procedures or as requiring only negative declarations.^{80/}

ISSUANCE OF A PERMIT

When a permit is issued, the applicant has a conditional right to appropriate water and apply it to beneficial use. The permittee may change the point of diversion, place of use, or purpose of use from that specified in the permit only with the approval of the Board.^{81/}

Permits are issued subject to various standardized terms and conditions.^{82/} For example, since 1973, all new

^{80/} Supervising Engineer W. Pettit of the Board's Water Rights Division indicates that the water rights applications fall into the following classifications: 65 percent require negative declarations; 29 percent are categorically exempt; 5 percent require environmental documents prepared by other lead agencies; 1 percent require environmental impact reports for which the Board is responsible.

^{81/} Cal. Water Code Section 1700 et seq. (West 1971).

^{82/} Cal. Water Code Section 1382 (West 1971).

permits, and permits for which extensions of time to begin or complete construction work are granted, include a term giving the Board the continuing authority to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.^{83/} The Board's use of the various terms and conditions for protection of the public interest is an important source of protection for California's water resources.^{84/}

There are two situations in which the Board may reserve jurisdiction to change terms and conditions of a permit.^{85/} The first occurs when the Board has insufficient information to determine which terms and conditions will be necessary, and therefore, it must observe the project in operation. The second occurs when the permit is part of a multi-faceted project and related applications are pending. Reserved jurisdiction may continue only as long as is reasonably necessary, and it may not be exercised after a license is issued.^{86/}

^{83/} 23 Cal. Admin. Code Section 761(a).

^{84/} E. Clyde and D. Jensen, Administrative Allocation of Water (National Water Commission Legal Study No. 3, 1971). The authors propose specific criteria to be used for the administrative allocation of water. They believe legislatures should enact similar guidelines to ensure that economic, environmental, and social values will be considered.

^{85/} Cal. Water Code Section 1394 (West 1971).

^{86/} Id.

The exercise of its authority regarding permit terms and conditions has involved the Board in controversy. A recent example is Board Decision 1422,^{87/} in which the United States Bureau of Reclamation was granted a permit subject to several conditions. One condition required release of stored water to maintain water quality standards in the Sacramento-San Joaquin Delta. In United States v. California,^{88/} the Ninth Circuit Court of Appeals recently held that the Board's permit jurisdiction over the United States does not extend to the imposition of terms and conditions. The Board's authority is limited to a determination of the availability of unappropriated water.

TEMPORARY PERMITS

A person who has an urgent need to appropriate water may obtain a temporary permit by means of a special expedited procedure.^{89/} If unappropriated water is available, the rights of downstream users are not injured, and the environment will not be unreasonably affected, the Board may issue a permit for a period lasting no longer than six

^{87/} New Melones Project Water Rights Decision, California State Water Resources Control Board, Decision 1422 (1973).

^{88/} United States v. California, No. 75-3554 (9th Cir., filed April 1, 1977). A detailed discussion of the facts and issues is contained in the district court decision, 403 F. Supp. 874 (E. D. Cal. 1976).

^{89/} Cal. Water Code Section 1425-1430 (West Supp. 1977).

months. The Board has the power to renew the temporary permit once. No vested rights are created by these temporary permits.

The Board can also issue permits for interim use of water already appropriated but not yet needed by a municipality.^{90/} Excess municipal water may be used only until the municipality needs it, at which time the municipality must compensate the interim permittee for the value of his facilities.^{91/}

THE DILIGENCE REQUIREMENT AND EXCEPTIONS

Diligence was an essential element of the miners' procedure for appropriating water in California. In order to maintain a right to water, a miner had to demonstrate that he had acted diligently to put the water to beneficial use. Today, permittees still must demonstrate "due diligence",^{92/} which varies according to the circumstances of each project.^{93/} An extension of time for beginning or completing construction or for putting the water to beneficial use may be granted for good cause.^{94/} Permittees

^{90/} Cal. Water Code Sections 1203, 1462 (West 1971).

^{91/} Cal. Water Code Section 1463 (West 1971).

^{92/} Cal. Water Code Section 1396 (West 1971).

^{93/} 25 Ops. Cal. Atty. Gen. 32 (1955).

^{94/} Cal. Water Code Section 1398 (West 1971).

must file annual reports of their progress with the Board.^{95/} The Board may revoke a permit if:

"the work is not commenced, prosecuted, and completed, or the water applied to beneficial use as contemplated...."^{96/}

Two major exceptions to the diligence requirement involve appropriations by municipalities^{97/} and "state filings."^{98/} Municipalities can file applications for more water than they can immediately use. However, unlike other applicants who must apply the water to beneficial use before a date set by the Board or lose the right to its use, municipalities are not bound by the diligence requirement.

"State filings" refer to water rights applications filed by the Department of Water Resources

"for any water which in its judgment is or may be required in the development and completion of the whole or any part of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the state."^{99/}

^{95/} 23 Cal. Admin. Code Section 782.

^{96/} Cal. Water Code Section 1410 (West Supp. 1977).

^{97/} Cal. Water Code Sections 106.5, 1203, 1462 (West 1971).

^{98/} Cal. Water Code Section 10500 (West Supp. 1977).

^{99/} Id.

The standard diligence requirement does not apply to these applications unless the Board assigns all or a portion of them, in which case the assignee must comply with the diligence requirement.^{100/}

ISSUANCE OF A LICENSE

When a permittee has completed necessary construction and has applied water to beneficial use, he must notify the Board.^{101/} An investigation follows to confirm that construction has been completed and that water is being used in conformance with the Water Code and the Board's rules and regulations. The Board will then issue a license.^{102/} If the Board decides to issue a license for an amount of water or season of use which is less or different than the permit allowed, it must have the permittee's consent, give him an opportunity to show why the change should not be made, or allow him to request an extension of time.^{103/}

A license may be issued subject to those terms and conditions considered necessary by the Board which were included in the permit.^{104/} Any change in point of

^{100/} Cal. Water Code Section 10504 (West 1971).

^{101/} Cal. Water Code Section 1600 (West 1971).

^{102/} Cal. Water Code Section 1605-1610 (West 1971).

^{103/} Cal. Water Code Section 1610.5 (West 1971). The permittee may request judicial review of the issuance of a license for less water or a shorter season (Cal. Water Code Section 1615 et seq. (West 1971)).

^{104/} Cal. Water Code Section 1625-1626 (West 1971).

diversion, place of use, or purpose of use contemplated by the licensee must be approved by the Board.^{105/}

Although early legislative revisions of California's prior appropriation system incorporated restrictions on how long licenses for power purposes would be valid, a license for any use is now granted in perpetuity. A license is "effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose."^{106/} The National Water Commission has suggested the use of permits which are valid only for a fixed term of years.^{107/} Several western states have instituted the

^{105/} Cal. Water Code Section 1700 et seq. (West 1971).

^{106/} Cal. Water Code Section 1627 (West 1971).

^{107/} United States National Water Commission, Water Policies for the Future 287 (1973). The Commission suggests that the best choice among proposals is a system of

"limited term permits with automatic renewal except for water to be re-allocated to a higher public purpose.... It strikes a balance between the security needed for private investment and the flexibility desired for public purposes."

use of fixed term permits for certain types of uses.^{108/}
Fixing the term of a permit may provide a tool for comprehensive planning and for periodic administrative reallocation of water.

Licenses may be revoked for failure to use the water in a useful or beneficial manner, or for failure to comply with applicable terms and conditions.^{109/} A license may also be revoked for unreasonable use of the water.^{110/}

^{108/} Utah Code Ann. Section 73-3-8 (Interim Supp. 1976) authorizes the state engineer to grant applications to appropriate water for industrial, power, mining development, or manufacturing purposes "for a specific and certain period from the time the water is placed to beneficial use." The period shall be not less than that "ordinarily needed to satisfy the essential and primary purpose of the application." Washington's Department of Ecology has promulgated Procedures and Policies Governing Appropriations of Significant Amounts of Water for Agricultural Irrigation Use, Wash. Admin. Code, ch. 173-596. These regulations provide for renewable permits of 50 years duration.

^{109/} Cal. Water Code Section 1675 (West Supp. 1977).

^{110/} 23 Cal. Admin. Code Section 764.12.

IV. STATEMENTS OF WATER DIVERSION AND USE

Because permits or licenses are not required for the exercise of many types of water rights, there is no centralized record of all the water used in California. In 1965, the Legislature enacted a procedure which requires each person diverting water after December 31, 1965, whose diversion is not already recorded with the Board, to file a "statement of water diversion and use."^{111/} Riparians, pre-1914 appropriators of surface water, and any other non-permit users must file. Statements must be updated by supplemental filings every three years.^{112/}

The statement must include such information as the source of the water, the capacity of the diversion works or reservoir, and the months in which water is used. The nature and purpose of the use must be described in terms of the people served, the acreage irrigated, and the number of stock watered.^{113/}

The making of any willful misstatement is a misdemeanor punishable by a fine not exceeding \$500 or by imprisonment in the county jail for no longer than six months, or both.^{114/}

^{111/} Act of July 23, 1965, ch. 1430, 1965 Cal. Stats. 3358 (1965).

^{112/} Cal. Water Code Section 5104 (West 1971).

^{113/} Cal. Water Code Section 5103 (West 1971).

^{114/} Cal. Water Code Section 5107 (West 1971).

Failure to file the statement does not result in any penalty or ~~the~~ loss of the claimed water right:

"Statements filed pursuant to this part shall be for informational purposes only, and neither the failure to file a statement nor any error in the information filed shall have any legal consequences whatsoever other than those specified in this part."115/

After giving the water user a 60-day grace period in which to file the statement, the Board may investigate and determine the facts needed at the water user's expense.116/

115/ Cal. Water Code Section 5108 (West 1971).

116/ Cal. Water Code Section 5105 (West 1971).

V. DISPUTES OVER RIGHTS TO WATER

The Board may assist courts in determining water rights through court reference procedures and the statutory adjudication process.

COURT REFERENCES

In a lawsuit concerning water rights, courts may, at their discretion, refer the suit to the Board for a determination of physical facts^{117/} or for a study of any or all issues involved in the case.^{118/} The Division of Water Rights of the Board investigates the water source and the use of the water supply. It then prepares an engineering report and maps. A draft report is circulated to the parties, who have 30 days in which to file objections with the Board.^{119/} The Board considers any objections and may hold a hearing, after which it files the final report with the court.^{120/} The parties have another 30 days in which to file exceptions with the court.^{121/} Following any

^{117/} Cal. Water Code Section 2001 (West 1971); Cal. Water Code Section 2075 (West 1971) authorizes the Board to act as referee in federal court suits involving disputed water rights in California.

^{118/} Cal. Water Code Section 2000 (West 1971).

^{119/} Cal. Water Code Section 2015 (West 1971).

^{120/} Cal. Water Code Section 2016 (West 1971).

^{121/} Cal. Water Code Section 2017 (West 1971).

hearings on exceptions to the report, which is considered prima facie evidence of the physical facts,^{122/} the court enters its decree. The parties to the suit reimburse the Board for its cost of investigation.^{123/}

STATUTORY ADJUDICATIONS

The purpose of the statutory adjudication procedure is to determine all rights to the water of a stream system "whether based upon appropriation, riparian right, or other basis of right."^{124/} In 1976, the first major revision of the procedure occurred since it was created by the Water Commission Act in 1913.^{125/} The revision consolidated the required procedures and documents, and it is "expected to shorten staff time involvement by at least one year."^{126/}

Currently the scope of the procedure does not include underground water supplies other than subterranean streams flowing through known and definite channels.^{127/} However, a

^{122/} Cal. Water Code Section 2019 (West 1971).

^{123/} Cal. Water Code Section 2040-2048 (West 1971).

^{124/} Cal. Water Code Section 2501 (West 1971).

^{125/} Act of August 24, 1976, ch. 545, 1976 Cal. Legis. Serv. 1476.

^{126/} 7 California Waterscape 5 (September 1976).

^{127/} Cal. Water Code Section 2500 (West 1971).

specific exception was made by the Legislature in 1971, after a petition was filed for adjudication of the Scott River stream system in Siskiyou County.^{128/} An investigation revealed that portions of the groundwater supplies are so interconnected with surface flow in the Scott River area that extraction of such groundwater causes a reduction in surface flow. In order to achieve a "fair and effective" determination of water rights, interconnected groundwater was included in the adjudication.^{129/}

In California, a statutory adjudication may only be initiated by petition to the Board by one or more claimants to the water of the stream system.^{130/} The Water Commission Act permitted initiation of statutory adjudications by the

^{128/} Cal. Water Code Section 2500.5 (West Supp. 1977).

^{129/} The condition of interconnected groundwater which occurs in the Scott River stream system is not unique in California. See, City of Lodi v. East Bay Municipal Utility District, 7 Cal. 2d 316, 60 P. 2d 439 (1936).

^{130/} Cal. Water Code Section 2525 (West 1971).

Board's predecessor, the Water Commission, but in 1935, the Legislature removed the agency's initiation authority.^{131/} Some of the other western states which have statutory adjudication procedures provide for state initiation.^{132/}

The Board will grant a petition requesting a statutory adjudication if, after investigation,

"it finds the facts and conditions are such that the public interest and necessity will be served by a determination of the water rights involved...."^{133/}

Although a hearing to determine the public interest and necessity is not required, the Board has held such hearings.^{134/}

Claimants are notified that a statutory adjudication has been initiated and that they must notify the Board by a

^{131/} Act of July 15, 1935, ch. 647, 1935 Cal. Stats. 1795 (1935).

^{132/} Alaska, Arizona, Idaho, Kansas, Nevada, New Mexico, Texas, and Wyoming allow initiation of statutory adjudication proceedings by water agencies, commissioners, or state engineers. For a description of state water rights laws, see A Summary-Digest of State Water Laws (R. Dewsnap and D. Jensen, eds. 1973).

^{133/} Cal. Water Code Section 2525 (West 1971).

^{134/} Such a hearing was held March 10, 1977, on the proposed Cache Creek adjudication in Yolo County.

specific date if they intend to file a proof of claim.^{135/}
Notice is published at least once a week for four consecutive weeks in newspapers in counties where the stream system is located.^{136/} In addition, individual notice must be mailed

"to all persons known to the board who own land that appears to be riparian to the stream system or who divert water from the stream system."^{137/}

The Board makes a detailed field investigation of each claimant's use of water.^{138/} The information is sent to the claimant, who files a proof of claim under penalty of perjury.^{139/} If no proof of claim is filed, the Board can enter a determination based upon its investigation.^{140/} The Board prepares a report indicating water availability and use, and a preliminary order determining individual water rights, and sends a copy to each claimant and water

^{135/} Cal. Water Code Section 2526 (West Supp. 1977). A "proof of claim" is a document which includes information about the nature of the right claimed and the purpose for which the water is used (Cal. Water Code Section 2575 (West Supp. 1977)).

^{136/} Cal. Water Code Section 2527 (West Supp. 1977).

^{137/} Id.

^{138/} Cal. Water Code Section 2550-2555 (West Supp. 1977).

^{139/} Cal. Water Code Sections 2553, 2576 (West Supp. 1977).

^{140/} Cal. Water Code Section 2577 (West Supp. 1977).

user designated in the preliminary order.^{141/} Any claimant or water user may object to the report and the preliminary order.^{142/} The Board holds hearings on any objections.^{143/}

The Board makes a final order determining and establishing the rights to water of the stream system^{144/} and files a copy with the superior court of the county in which the stream system is located.^{145/} The court sets a time for hearing, and notice is given by mail and newspaper publication. Claimants are given the opportunity to file exceptions to the order.^{146/} Parties who had no knowledge of the proceedings are given the opportunity to intervene.^{147/}

The court then enters a decree establishing the rights to the use of water. The decree includes the priority, quantity of water, season of use, point of diversion and place of use for each right, and the relation of each right to every other right on the stream system.^{148/} The decree

^{141/} Cal. Water Code Section 2600-2604 (West Supp. 1977).

^{142/} Cal. Water Code Section 2604 (West Supp. 1977).

^{143/} Cal. Water Code Section 2650 (West Supp. 1977).

^{144/} Cal. Water Code Section 2700 (West Supp. 1977).

^{145/} Cal. Water Code Section 2750 (West 1971).

^{146/} Cal. Water Code Section 2757 (West 1971).

^{147/} Cal. Water Code Sections 2780-2783 (West 1971).

^{148/} Cal. Water Code Section 2769 (West 1971).

is recorded in those counties "in which any part of the stream system is situated and also in the office of the board."^{149/}

In order to keep the decrees up to date, the court may enter supplemental decrees. For example, a person who originally claims under an incomplete appropriation, then completes the appropriation and receives a license, may petition the court to enter a supplemental decree confirming the right.^{150/} A person who complies with the procedures for changing point of diversion, place of use, or purpose of use^{151/} may also request a supplemental decree. If the Board revokes a permit or license included in the decree, a supplemental decree may be entered.^{152/} The Board may also request the court to enter supplemental decrees in these circumstances.^{153/}

^{149/} Cal. Water Code Section 2772 (West 1971).

^{150/} Cal. Water Code Section 2819 (West 1971).

^{151/} Cal. Water Code Sections 1700 et seq. (West 1971).

^{152/} Cal. Water Code Section 2820 (West 1971).

^{153/} New rights to water in an adjudicated stream system are not recorded in supplemental decrees.

The Board is required to furnish a copy of the decree to each claimant whose rights are decreed.^{154/} However, when supplemental decrees are issued, the Board need only furnish copies to claimants "who could be significantly affected."^{155/}

^{154/} Cal. Water Code Section 2825 (West 1971).

^{155/} Cal. Water Code Section 2826 (West Supp. 1977).

VI. ENFORCEMENT

The enforcement powers of the Board with regard to water rights are of two types: those which are conducted with the assistance of the California Attorney General and those which the Board may exercise itself. These powers relate to suing persons who illegally divert water and to revoking permits and licenses.

Water Code Section 1052 provides the Board with the power to file an action for trespass for "[t]he diversion or use of water subject to the provisions [of the permit system] ... other than as authorized."^{156/} The Board may not act alone, but must request the assistance of the Attorney General. The Attorney General may file suit and request the court to enjoin the diversion on behalf of the Board. The Board has no power to order a party to cease diverting illegally.

The Board itself may enforce the terms and conditions of permits and licenses. On the basis of a complaint filed,^{157/} or on its own motion,^{158/} the Board may

^{156/} Cal. Water Code Section 1052 (West 1971).

^{157/} 23 Cal. Admin. Code Section 764.

^{158/} 23 Cal. Admin. Code Section 764.7.

investigate to determine if the terms and conditions have been violated.^{159/} The Board may revoke the license or permit or take other appropriate action.^{160/}

The Board also has the authority to investigate waste, unreasonable use, method of use, or method of diversion, and to investigate any uncapped artesian well which constitutes a public nuisance.^{161/} If any of these conditions are found, the Board notifies the interested or affected persons and, upon petition, holds a hearing.^{162/} If no corrective action is taken to remedy the situation, the Board may begin action to revoke the license or permit.^{163/} If the situation involves a person not subject to the Board's permit and license authority, or if the situation involves an artesian well considered to be a public nuisance, the Board may request the Attorney General to take appropriate action.^{164/}

One important tool for enforcing a senior appropriator's prior right to available water is the watermaster service program.^{165/} A watermaster is responsible for determining

^{159/} 23 Cal. Admin. Code Section 764.5.

^{160/} 23 Cal. Admin. Code Section 764.6.

^{161/} 23 Cal. Admin. Code Section 764.10.

^{162/} 23 Cal. Admin. Code Section 764.11.

^{163/} 23 Cal. Admin. Code Section 764.12.

^{164/} 23 Cal. Admin. Code Section 764.13.

^{165/} Cal. Water Code Section 4000 et seq. (West 1971).

the amount of available water and supervising its distribution according to the amounts and priorities provided in permits and licenses, court decrees, and written agreements among claimants.^{166/} A watermaster has the authority to arrest any person who fails to construct and maintain such required devices as headgates and water flow measuring apparatus.^{167/} The watermaster is also justified in arresting

"[e]very person who wilfully and without authority opens, closes, changes, or interferes with any headgate, waterbox, or measuring device while it is under the control of the watermaster, or who wilfully takes or uses water which has been denied him by the watermaster...."^{168/}

A fine, or imprisonment in the county jail, or both, can be imposed upon violators of these provisions.^{169/}

Originally, the watermasters were under the supervision of the predecessors of the Board; they are now part of the Department of Water Resources (Department). A court may ask the Department to serve as watermaster under the court's continuing jurisdiction.^{170/} Appointment of a watermaster may also be made at the discretion of the

^{166/} Cal. Water Code Sections 4027, 4151 (West 1971).

^{167/} Cal. Water Code Section 4178 (West 1971).

^{168/} Cal. Water Code Section 4175 (West 1971).

^{169/} Cal. Water Code Section 4177 (West 1971).

^{170/} City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 207 P. 2d 17 (1949).

Department upon the request of owners of at least 15 percent of the conduits entitled to divert water in the service area.^{171/}

The Department has a great deal of discretion with regard to the watermaster program. It can refuse to appoint a watermaster if it feels there is no necessity,^{172/} it can discontinue service,^{173/} or it can change the boundaries or abolish service areas.^{174/} In contrast with the Department, the authority of the Board over water distribution problems is limited to supervising trial distribution programs that are being carried out in accordance with agreements and court orders.^{175/}

^{171/} Cal. Water Code Section 4050 (West 1971).

^{172/} Id.

^{173/} Cal. Water Code Section 4051 (West 1971).

^{174/} Cal. Water Code Section 4032 (West 1971).

^{175/} Cal. Water Code Section 1051.5 (West 1971). The Board has been conducting such a program for several years on the Napa River in an attempt to reach a binding agreement defining water rights.

There are now 20 surface water service areas in which watermasters police the distribution of available water. Several benefits are derived from the watermaster service program:

court litigation and physical violence, which in past years occurred quite frequently, are essentially eliminated. Under watermaster service each water right owner is assured that his rights are being protected without his having to take legal action against other users. Another important benefit results from increased use of available supplies through reduction of waste.^{176/}

^{176/} California Department of Water Resources, Bulletin No. 177-74, Watermaster Service in Northern California, 1974 Season I (1976).

VII. LOSS OF APPROPRIATIVE RIGHTS

An appropriative right can be lost in several ways. A right to water may be lost if that water is not put to a beneficial use. A right which has been acquired under the permit system may be lost by three years of nonuse.^{177/} Rights acquired prior to the effective date of the Water Commission Act, the "pre-1914" rights, may be lost if not used over a five-year period.^{178/} A right may be lost by prescription: if a continuous use of water is made that is adverse to an existing right, and that use is uninterrupted for five years and is open, notorious, exclusive, and under claim of right, that prior right may be lost. However, a right held by a public entity, including the State and the federal government, may not be lost by prescription.^{179/} Appropriative rights may also be lost by condemnation or inverse condemnation. In a statutory adjudication procedure, any claimant who fails to appear and submit a proof of claim is estopped from subsequently asserting rights to the stream system, and is held to have forfeited all rights other than those which appear in the court's decree.^{180/} Finally, appropriative rights may be lost if a claimant defaults after he is served in a court action for quiet title or determination of water rights.

^{177/} Cal. Water Code Section 1241 (West 1971).

^{178/} Smith v. Hawkins, 110 Cal. 122, 127, 42 P. 453 (1895).

^{179/} Cal. Civ. Code Section 1007 (West Supp. 1977).

^{180/} Cal. Water Code Section 2774 (West 1971).

VIII. CRITICISMS OF THE PRIOR APPROPRIATION DOCTRINE

Although most western states have chosen the prior appropriation doctrine as best suited to allocate water resources, the doctrine is not without its critics:

It has been claimed that the appropriative system leads to the most beneficial use of water by placing emphasis on the sound development, wise use, conservation and protection of water. Experience indicates, however, that in many cases the effect of prior appropriation is to waste water that otherwise could be put to beneficial use.^{181/}

One type of waste attributed to the prior appropriation doctrine is that it fosters premature or excessive development. The earlier a person appropriates and puts water to reasonable beneficial use, the higher the priority.

"[U]nder this doctrine, one seeks to capture submarginal waters in order to enjoy their later rents. To capture the waters one must invest real social capital in diverting, storing, and applying water. Capital is diverted from socially productive uses to this factitious task of capturing submarginal resources."^{182/}

^{181/} Maloney and Ausness, A Modern Proposal for State Regulation of Consumptive Uses of Water, 22 Hastings L. J. 523, 527 (1971).

^{182/} Gaffney, Economic Aspects of Water Resources Policy, 28 Am. J. Econ. and Soc. 131, 139 (1969).

In California, municipalities may file applications for water to satisfy future needs.^{183/} This may lead to attempts to justify early necessity in order to prevent interim use by someone else.^{184/}

In addition, the use requirement of the prior appropriation doctrine has been faulted for inefficiency and for encouraging waste of water.^{185/} Appropriators must

^{183/} Cal. Water Code Sections 106.5, 1462 (West 1971).

^{184/} Los Angeles is charged with this type of action in Petitioner's Objections and Brief in Answer to Respondents' Return to the Writ of Mandate at 84, County of Inyo v. City of Los Angeles, 3 Civ. 13886 (3d Cal. Ct. App.) brief filed October 1, 1976.

In its initial 1963 study to justify construction of the second barrel, the City admitted that the second barrel's 'need' was not to supply additional waters to Los Angeles, but to enable the City to export waters from the City's unexercised filings in the Mono Basin:

'Because of the pressure put on us by the State of California Water Rights Board either to use the water or to let someone else use it, as well as the pressure by local people to use this water for their benefit, alleging that we are not making the most beneficial use of it, our position is becoming untenable.'

^{185/} C. Meyers, A Historical and Functional Analysis of the Appropriation System 18-19 (National Water Commission Legal Study No. 1, 1971); Milliman, Water Law and Private Decision-Making, 2 J. Law and Econ. 41, 49 (1959).

use their allotment "for some useful or beneficial purpose" or lose the right to use the water.^{186/} "[A]ppropriators learn to live in an environment where it is considered socially creditable to overirrigate."^{187/} Secretary of the Interior Cecil D. Andrus has expressed concern over the "use or lose" requirement:

"The process of developing new projects and the water doctrines have combined to create a 'use or lose' syndrome, which, when coupled with generous federal financing, has led to a water development system which does not adequately consider the conservation of this precious resource."^{188/}

In California, forfeiture is the legal result of failure to use water beneficially. The unused water reverts to the public and is considered unappropriated public water.^{189/} For example, if an appropriator reclaims and reuses a portion of his water allotment, thereby not using his entire permitted share, he risks forfeiting his right to the unused

^{186/} Cal. Water Code Section 1240 (West 1971).

^{187/} Gaffney, supra note 182, at 140.

^{188/} Letter from Cecil D. Andrus, Secretary of the Interior, to President Carter (April 13, 1977). Reported in Sacramento Bee, May 18, 1977, at A1, col. 3, A23, col. 1.

^{189/} Cal. Water Code Section 1241 (West 1971).

amount. Unlike groundwater users,^{190/} California surface water appropriators have no method of preserving their right if they cease or reduce use of water by using another source of water.^{191/}

The prior appropriation doctrine has also been criticized because it is based upon the use of chronological priorities. The first person to appropriate, no matter where he is located on the stream system, always has the first priority to take available water. On long stream systems, the priorities of the various appropriative rights may jump up and down the length of the stream in a random fashion. This gives rise to a serious practical problem in distribution of available water. An upstream appropriator may have no knowledge of the availability of water for his priority or for downstream appropriators, and his normal conduct may well be to continue appropriating water as long as it is available at his upstream diversion point. Unless enforcement of rights is stringent, downstream senior appropriators may find themselves without water.

^{190/} Cal. Water Code Sections 1005.1, 1005.2 (West Supp. 1977).

^{191/} On March 17, 1977, California Senators R. Ayala and R. Johnson introduced Senate Bill 595 (1977-1978 Legislative Session) which would amend the Water Code so that the cessation of or reduction in the use of water under any existing right as the result of use of reclaimed water, would be considered a reasonable beneficial use to the extent of the reduction, and would preclude loss of the existing right under those conditions.

The chronological priority aspect of the prior appropriation doctrine has also been criticized because there is no pooling of the risk. In times of shortage, losses fall entirely upon the most junior appropriators, and this failure to pool the risk among appropriators may be economically detrimental.^{192/} In some states, this problem has been addressed by suspending priorities during periods of water scarcity and allocating water among preferred users.^{193/}

It is important to note that in California chronologically based cutbacks during water shortages will generally apply only to about 25 percent of all appropriated water.^{194/}

^{192/} Gaffney, supra note 182, at 140.

^{193/} For example, Idaho Constitution, Article 15, Section 3, provides that when water in any natural stream is insufficient to supply all users, those using the water for domestic purposes have preference over any other user. Those using water for agricultural purposes have preference over those using water for manufacturing purposes. Utah Code Ann. Section 73-3-21 (1968) provides that in "times of scarcity", priority of appropriation determines rights between users for the same purpose. However, domestic use, "without unnecessary waste", has preference over all other uses, and agricultural use has preference over all uses except domestic use. See, Trelease, Preferences to the Use of Water, 27 Rocky Mtn. L. Rev. 133 (1955).

California provides a system by which public or private agencies which distribute public water supplies may declare a water shortage emergency condition and may adopt regulations establishing priorities for the use of water (Cal. Water Code Section 350 et seq. (West 1971)).

^{194/} However, if water were unavailable for holders of rights dating from, or prior to, 1927 (the year of priority of a number of state filings) more than 25 percent of the appropriations would be affected.

Most appropriated water is subject to rights obtained by water wholesalers such as the United States Bureau of Reclamation or the California Department of Water Resources. Of the 19,500,000 acre-feet of water which would be used by appropriators in California if normal conditions existed in 1977, 15,000,000 acre-feet would go to federal and state projects.^{195/} These wholesalers distribute water to others on the basis of contracts. When shortages occur, cutbacks in water allocation to the customers are made according to specific contractual provisions.

^{195/} Interpolated from statistics in California Department of Water Resources, Bulletin No. 160-74, The California Water Plan Outlook in 1974, at 147 (1974).

IX. WATER USE PLANNING AND ALLOCATION

SURFACE WATER PLANNING

The Board and the Department of Water Resources are the primary state agencies responsible for water planning in California.^{196/} The Department completed the California Water Plan in 1957.^{197/} It has updated that plan three times.^{198/} The plan provides for the "orderly and coordinated control, protection, conservation, development, and utilization of the water resources of the State...."^{199/}

The Board is authorized to adopt state policy for water quality control.^{200/} The Board and the nine Regional Water Quality Control Boards have adopted water quality

^{196/} The history of these agencies and the division of power between them is summarized in Craig, California Water Law in Perspective, West's Annotated California Codes, Water, vol. 68 at LXXXV-XCVI (1971).

^{197/} California Department of Water Resources, Bulletin No. 3, The California Water Plan (1957).

^{198/} Cal. Water Code Section 10004-10007 (West 1971). The latest bulletin updating the plan is Bulletin No. 160-74, supra note 195.

^{199/} Cal. Water Code Section 10004 (West 1971).

^{200/} Cal. Water Code Section 13140 (West 1971).

control plans (basin plans) for all surface water and groundwater of the State.^{201/} The Water Code provides that state policy for water quality control and the basin plans will become part of the California Water Plan when they "have been reported to the Legislature."^{202/}

The Department and the Board are currently working on a joint publication^{203/} which will update the California Water Plan. The scope of the report will encompass Board activities to a greater extent than previously.

The report will contain a summary of factors affecting water supply, use, and water quality conditions. It will define potential water projects, water management actions, key water right decisions, beneficial uses, water quality objectives, water quality control implementation actions and describe the interrelation and timing of actions to achieve joint goals. The report will be set in a framework of water management and water quality policy as authorized by legislation governing activities of the respective organizations.^{204/}

^{201/} Cal. Water Code Section 13240-13247 (West 1971 and West Supp. 1977).

^{202/} Cal. Water Code Section 13141 (West Supp. 1977).

^{203/} A draft "Memorandum of Understanding Between Department of Water Resources and State Water Resources Control Board to Undertake a Joint Updating of the California Water Plan" will become effective on July 1, 1977, if accepted by both the Department and the Board.

^{204/} Id. at 3.

The Department is also involved now in a planning process which it calls its Water Action Plan.^{205/} The Water Action Plan has four elements: water conservation, studies of major water problems and issues in ten areas, water project operation studies, and review of State Water Project requirements.^{206/} Pursuant to this plan, the Department is revising the water management element of the California Water Plan.

The California Water Plan is a factor in the Board's administrative water rights allocation process. When the Board decides whether it is in the public interest to grant a permit application, it must take the California Water Plan into consideration.^{207/} The California Third District Court of Appeal in the Johnson Rancho case held, however, that the California Water Plan is only a "guide", that the plan is "flexible", and that:

^{205/} California Department of Water Resources, Water Action Plan Prospectus (1975).

^{206/} 1 Water Action Plan Newsletter 1-2 (October 3, 1975).

^{207/} Cal. Water Code Section 1256 (West 1971).

"[t]he direction to consider does no more than command the board to hold in mind and pay regard to the plan and its projects in passing on water rights applications. Having paid that regard, the board may accept or reject a specific project."^{208/}

SURFACE WATER ALLOCATION

The power to allocate and suballocate water rights is widely dispersed in California.^{209/} As has been noted, new appropriative rights can only be acquired by filing an application with the Board.^{210/} Once the Board has granted a

^{208/} Johnson Rancho County Water District v. State Water Rights Board, 235 Cal. App. 2d 863, 871, 45 Cal. Rptr. 589 (1965). The court found that the Board did not violate its statutory duties when it granted appropriative rights to the Yuba County Water Agency for an integrated development that precluded the construction of a project which is included in the California Water Plan.

^{209/} The term "administrative allocation" includes the allocation of water rights by the State and the suballocation of water by other entities (for example, the Bureau of Reclamation, municipalites, and water districts). Suballocation can be based on such elements as contracts, shares held, or provisions set by districts. E. Clyde and D. Jensen, Administrative Allocation of Water 25 (National Water Commission Legal Study No. 3, 1971) distinguish administrative allocation from market allocation:

In general, we would note that market allocation relates to the sale or transfer of a vested water right from one user to another. In market allocation price is usually the controlling factor. Administrative allocation from the state to the applicant does not involve a sale. Even where the applicant is not the intended user, the reallocation of water to the intended user by contract is usually based on public interest considerations other than price.

^{210/} Cal. Water Code Section 1225 (West Supp. 1977).

permit or license to appropriate, however, it generally does not control suballocation decisions by its permittees or licensees. For example, once the Department has appropriated water for the State Water Project, its suballocation of that water is based on contracts with large water wholesalers, such as the Metropolitan Water District of Southern California.^{211/}

The Board can affect suballocation decisions to some extent under its power to enforce the water conservation policy expressed in Article 10, Section 2 of the California Constitution. Water Code Section 275 provides for the implementation of this constitutional mandate by authorizing the Board to:

"take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."^{212/}

Several regulations elaborate on the Board's power under Water Code Section 275. One regulation provides that the Board can ask the Attorney General to act when the Board finds that a person not subject to a permit or license is wasting or unreasonably using water.^{213/} Another regulation

^{211/} See, California Department of Water Resources, Contract Between the State of California Department of Water Resources and the Metropolitan Water District of Southern California for a Water Supply (November 4, 1960, as amended to February 1, 1973).

^{212/} Cal. Water Code Section 275 (West Supp. 1977).

^{213/} 23 Cal. Admin. Code Section 764.13.

provides for a standard permit term which gives the Board the power to exercise continuing authority over a permittee.^{214/} The Board may require the permittee to implement various programs which, after notice and hearing, are found to be "physically and financially feasible and ... appropriate to the particular situation."^{215/} If actions were taken pursuant to these sections, suballocation decisions might consequently be affected.

One example of the Board's influence on the suballocation process is the recent Lake Mission Viejo order.^{216/} In that order the Board found that

"the proposed filling of Lake Mission Viejo under the current circumstances constitutes both a waste and an unreasonable use of water in violation of Section 2, Article X, of the California Constitution."^{217/}

^{214/} 23 Cal. Admin. Code Section 761(a).

^{215/} Id. "Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project."

^{216/} California State Water Resources Control Board, Decision 1463 (1977).

^{217/} Id. at 4.

In making this finding, the Board affected a remote element in the allocation-suballocation process. Mission Viejo received water from the Santa Margarita Water District, through the El Toro Water District, through the Municipal Water District of Orange County, through the Metropolitan Water District of Southern California, which receives water from both the Colorado River and from the Department of Water Resources' State Water Project.^{218/}

^{218/} California State Water Resources Control Board, Mission Viejo Company hearing, February 23, 1977. Exhibit No. 7 of Metropolitan Water District of Southern California. Lake Mission Viejo was supplied by Colorado River water according to its Exhibit No. 5.

ISSUES

- A. Should state administration of appropriative water rights be made more or less comprehensive?
1. Should pre-1914 appropriative rights be brought within the permit system?
 2. Should the ability to acquire a prescriptive water right be clarified, expanded or restricted? Should it be necessary to perfect a prescriptive right by obtaining a permit?
 3. Are there other types of water rights for which a permit should be required? (Issues related to riparian, groundwater, salvage, and reclaimed water rights will be treated in other background papers.)
 4. If for pre-1914, prescriptive and other water rights a permit requirement is inappropriate, should requirements to report on diversion and use be strengthened?
- B. Should licenses for appropriative water rights continue to be issued for so long as the water is put to reasonable beneficial use?
1. Should new licenses be issued on a fixed-term basis?
 2. If fixed terms are used, should minimum and/or maximum terms be provided by statute?

3. If fixed terms are used, what standards should govern setting the term of the license?
What standards should govern relicensing?
- C. What criteria should be followed in regulating appropriative water rights in the public interest?
1. Should preferences for domestic, irrigation or municipal use continue to be considered when permits are issued? Should these or other preferences be used more widely?
 2. Should statutory standards be set as to what types of permit and license conditions may be used to regulate in the public interest? If so, what should these be?
- D. Should a priority system continue to be used in granting permits and licenses?
- E. Should the requirement of continued beneficial use be modified?
1. In what circumstances should non-use be treated as beneficial use?
- F. Should present provisions for court references and statutory adjudications of surface water disputes be modified?
1. Should the State have the power to initiate statutory adjudications? If so, who should bear the costs of such adjudications?
 2. Should provision be made for keeping adjudications up to date?

3. Should the State adjudicate all stream systems?
 4. Are modifications possible to make the statutory adjudication process more expeditious?
- G. Should present provisions for administration and enforcement be modified?
1. Are modifications of the law possible which would streamline water rights application procedures?
 2. Should the Board supervise the watermaster service area program? Should this program be used more widely?
 3. Is the existing law of trespass sufficient to deter illegal diversions? Should the Board have the power to issue cease and desist orders? Are other measures needed?
- H. Should water rights allocation and suballocation be made according to a water management plan? If so, what type of plan is appropriate and how should the allocation decision be linked to the planning process?

