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## Water and Water Courses: Diversion--Right of a Riparian Owner to Damages under Article XIV

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## NOTES

**WATERS AND WATER COURSES: DIVERSION—RIGHT OF A RIPARIAN OWNER TO DAMAGES UNDER ARTICLE XIV, SECTION 3 OF THE CALIFORNIA CONSTITUTION.**—One of the purposes of the Central Valley project is to redistribute the water resources in California. Briefly the plan is to arrest the water in the highland basins by Shasta Dam in the north, and Friant Dam in the south. By a system of smaller dams, canals, and pumping stations, the water is to be distributed so as to make more land available for cultivation. Under the plan former riparian owners are to receive sufficient water, either from the depleted river supply or the redistribution system, to satisfy their irrigation needs.

After the construction of Friant Dam, the claimants, in a recent case before the United States Supreme Court (*United States v. Gerlach Live Stock Co.*, 70 S. Ct. 955), brought a claim against the United States to recover damages resulting from the diversion. These claimants owned land riparian to the San Joaquin river. The seasonal overflow of the river annually submerged their lands, and they contended that by impounding the water the government deprived them of the *right* to the annual inundation of their land. The Supreme Court held (Douglas dissenting) that the project was one of reclamation, rather than of navigation, and, thus, the claimants were entitled to recover damages under the Reclamation Act if they could establish their rights under the state law. The court concluded that the state law permitted the recovery of damages, and it affirmed an award of the Court of Claims.

The long standing controversy as to the applicable water law in California has resulted from the attempt to reconcile and harmonize two conflicting water law theories.<sup>1</sup> The "prior appropriation theory" in substance is that priority in time establishes priority in right. Such a theory had its inception during the pioneer development of California. The early pioneers and gold miners found the unrestricted use of the natural resources a necessity in their conquest of the wilderness. In this case necessity made its own law. The Civil Practice Act of 1851<sup>2</sup> provided that "in actions respecting mining claims . . . customs, uses or regulations, when not in conflict with the laws of this state shall govern the decision." Thus "prior appropriations" was recognized as a California rule of water law.

The "riparian theory," prevailing at common law, seeks to apportion the available water between the users. This system recognizes no priority in rights but rather establishes a common right of all abutting owners to the use of the water. When California became a state it adopted the common law of England as the basis for decision in its courts, when the same was not inconsistent with the federal or state Constitution or state legislation.

In the early case of *Crandall v. Woods*, 8 Cal. 136, and later in *Lux v. Haggin*, 69 Cal. 255, the State Supreme Court concluded that a riparian owner acquired rights subject to prior appropriations antedating the time at which the riparian land first passed into private ownership, but that such rights were superior to the claims of subsequent appropriators who had not acquired prescriptive rights. Also, as between appropriators not claiming riparian rights, priority of time prevailed. Thus, California recognized both theories and sought to bring them into harmony.

In 1926 the important case of *Herminghaus v. Southern California Edison Co.*,

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<sup>1</sup>See discussion by Wiel: 27 Harv. Law Rev. 530; also, 1 Calif. Law Rev. 11; and *U. S. v. Gerlach Live Stock Co.*, 70 S. Ct. 955.

<sup>2</sup>In substance now section 748, Code of Civil Procedure.

200 Cal. 81, was decided. The plaintiff, a small downstream landowner, asserted a right to have the river flood his land every year and naturally irrigate it. He was granted an injunction enjoining the upstream appropriator, a large power company, from constructing a dam which was to be part of a system providing electrical power. At this time the need for water supplies and electrical power for the rapidly growing urban areas was strongly felt. The riparian rights doctrine, which seemed to frustrate this development, was termed socialistic; while the advocates of this doctrine contended that the law of appropriations would result in monopoly.

In 1928 California adopted a constitutional amendment (art. XIV, sec. 3) providing: ". . . The right to water or 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 uses 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. . . ."

This amendment was held to be a valid exercise of the state police power to preserve the general welfare and not violative of the due process clause of the federal Constitution. (*Gin S. Chow v. Santa Barbara*, 217 Cal. 673.)

It was in the light of this constitutional amendment and the history preceding its adoption that the U. S. Supreme Court concluded in the Gerlach case, *supra*, that the right of downstream riparian owners to have their land submerged annually still exists—at least to the extent that a deprivation of such right gives rise to a claim for damages. As pointed out in the Gerlach case, the California decisions have not decided this precise point.

In the case of *Gin S. Chow v. Santa Barbara*, *supra*, the court held that under the amendment a downstream riparian landowner could not enjoin the defendant city from impounding and diverting "extraordinary storm waters" which were not a "part of the usual and customary flow of the stream." The trial court found as a fact that the water left in the stream would be sufficient to serve the beneficial uses of the plaintiffs. The amendment was interpreted as *limiting* the riparian right to reasonable and beneficial use. In a similar suit for an injunction, *Peabody v. Vallejo*, 2 Cal. 2d 351, the defendant city was permitted to impound the water in excess of the normal flow. The plaintiffs, downstream owners, contended that the storm and flood flows were necessary to maintain the water table at its normal level. The court determined that the water flowing in excess of the normal flow was waste and that the riparian right under the amendment does not extend to the waste of water. As a practical solution to this problem, in *City of Lodi v. East Bay Municipal Utility District*, 7 Cal. 2d 316, the court remanded the case to the trial court to determine what quantity of flow would be necessary to maintain the water table level so as not to "substantially endanger the city's water supply." The lower court was then to issue a mandatory injunction requiring the defendant, a subsequent appropriator, to release this quantity. Thus, as between two appropriators, it was decided that the court should determine the "correlative rights of prior and subsequent appropriators." In another case between two appropriators, *Los Angeles v. Glendale*, 23 Cal. 2d 68, the court held that the subsequent appropriators' rights attached only to so much of the water as was not required to satisfy the beneficial use of the prior appropriator. This rule should apply, notwithstanding the fact that the needs of the first appropriator had increased. Thus, that which was surplus and subject to subsequent appropriation may later be diverted by the prior appropriator if his beneficial use becomes greater.

The case of *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 Cal. 2d 489, determined that under the 1928 amendment the trial court must consider

all of the reasonable beneficial uses to which the water is being put by the prior appropriator in order to decide whether there is any surplus subject to appropriation. This doctrine was extended by the case of *Meridian Ltd. v. San Francisco*, 13 Cal. 2d 424, which held that the downstream riparian owner was entitled to no more than he could put to beneficial use and the court would not consider whether all of the water diverted by the upstream defendant city was used beneficially by it. There was a dissenting opinion to the effect that the upstream appropriator could be enjoined from diverting more than it could put to beneficial use.

In the case of *Hillside Water Co. v. Los Angeles*, 10 Cal. 2d 677, concerning the right of the city of Los Angeles to lower the water table by pumping from a well, it was held that under the Lodi case, *supra*, the trial court should determine what level must be maintained so as not to substantially interfere with the beneficial use by the plaintiff, a school district, and should grant a mandatory injunction accordingly. With respect to the rights of other plaintiffs who were putting the ground water to beneficial use, the court concluded that damages would provide an adequate remedy and denied an injunction as to them.

The preceding summary of the leading cases after the 1928 amendment has been made to establish a basis for a criticism of the Gerlach case. The Federal Supreme Court reached its conclusion, that the claimants, downstream owners, were entitled to have damages where the upstream diversion prevented their lands from being inundated every year, on the following grounds: (1) A joint committee, appointed to report on the state water problems preparatory to the adoption of the 1928 amendment, rejected a proposal to revoke all common law riparian rights; and (2) a California superior court decision, which was settled prior to an appeal, had awarded damages under a similar state of facts. The court assumes that under the California authorities the claimants here would not be entitled to injunctive relief.

In the course of the opinion it is stated that: "The waters of which the claimants are deprived are taken for resale largely to other private land owners not riparian to the river. . . . Thereby private lands will be made more fruitful, more valuable, and their operations more profitable. The reclamation laws contemplate that those who share these advantages shall, through water damages, reimburse the Government for its outlay." It is submitted that the contemplations of the federal reclamation laws have no bearing on the claimant's right to recover under California law.

Mr. Justice Jackson's view in the Gerlach case seems to be that the amendment was adopted merely to circumvent the decision in the Herminghaus case, *supra*, which permitted a downstream owner—in the preservation of his right to have his land submerged—to enjoin the construction of a sorely needed power generating plant. Thus he concludes that, after the amendment, the claimant in a case substantially similar to the Herminghaus situation could recover damages, although he would not be entitled to injunctive relief.

As will be noted, the 1928 amendment refers only to *rights* and makes no distinctions as to remedies available to the riparian owner. In the Peabody case, *supra*, it was held that the *rights*, under the amendment, were limited to reasonable and beneficial use "and . . . (did) . . . not extend to the waste of water." The amendment provides "that 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 general welfare. . . ." (Art. XIV, sec. 3.) In the Gerlach case, by assuming as it did an injunction

would be denied, the court necessarily assumed that the claimant's use was not reasonable, though beneficial, or that such use constituted a waste of water. In either event it would seem that the claimants were deprived of no right which could be asserted in an action for damages.

Mr. Justice Jackson's view finds some support in Mr. Wiel's article (16 Cal. Law Rev. 169, 176) commenting on the proposed amendment prior to its adoption. Mr. Wiel was of the opinion that a right to damages would survive the amendment and that such damages should be measured by the fall-in-land-value. However, the numerous cases applying the amendment in the last 22 years all interpret it as limiting the right to the use of water. It is difficult to see how one can be awarded damages for the deprivation of a right which does not exist. Certainly where a prior appropriator is deprived of reasonable and beneficial use, as in the case of *Hillside Water Co. v. Los Angeles*, *supra*, he should be entitled to damages. And in a situation such as the Lodi case, *supra*, where a prior appropriator is deprived of reasonable and beneficial use under the "correlative rights doctrine," he ought to be awarded damages to the extent that his use is insubstantially hindered. But, in so far as the riparian owner's use is not "reasonable and beneficial" and, it constitutes a waste of water, the deprivation of this use should not give rise to an enforceable right to damages.

Prior to the adoption of the 1928 amendment it was established in California that a riparian owner could not enjoin an appropriator for public use if the latter set up his right to condemn property and in his answer prayed that damages for the riparian owner's loss be determined and awarded. This proceeding was termed an "inverse condemnation suit." (See Code Civ. Proc., sec. 534; *Collier v. Merced Irr. Dist.*, 213 Cal. 554, and discussion in *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 533.) With such a proceeding available to the appropriator diverting for a public use (the use must have intervened) the framers of the constitutional amendment probably intended that article XIV, section 3, should do more than merely abolish the right to injunctive relief. The amendment states that "the general welfare requires that water resources of the state be put to beneficial use to the fullest extent of which they are capable." It may be reasonably inferred that the framers intended that this policy should not be hindered even by the granting of damages to downstream riparian owners, who were not making a reasonable use of the water, or who asserted rights to waste water.

The question, whether damages survive the 1928 amendment, is a policy-question still open to the California courts, subject to the authority of the Gerlach case. Under the Gin S. Chow decision, *supra*, the constitutionality of the amendment was upheld, as it was found to be a valid exercise of the police power. In a future case before the state court it could be held, consistently with the California authorities, that in the exercise of such police power the right itself was abolished. Such a conclusion could be based on an interpretation of the declared policy of the amendment to require that "the water resources of the state be put to beneficial use to the fullest extent of which they are capable . . ." Mr. Wiel in his article<sup>3</sup> supporting the view of the case here noted, concluded that the Legislature should define the extent of the damages recoverable. Such legislation seems desirable if the Gerlach case is followed. The legislative determination could be based on the true issue, namely, to what extent the needs for the development of the water resources outweigh the preservation of the riparian owner's right to damages in the Gerlach situation.

Peter W. Fisher.

<sup>3</sup>16 Calif. Law Rev. 169, 182.

CONSTITUTIONAL LAW—HATCH POLITICAL ACTIVITY ACT—WHO CAN RAISE A CONSTITUTIONAL QUESTION.—Has a person admittedly injured in his legal property rights by an act of Congress and its execution, the act not directed at the complainant but at others, a right to be heard on the merits of his claim? The case of *International Workers Order v. McGrath*<sup>1</sup> presents this issue.

Complainant alleges that the Hatch Political Activity Act, section 9A,<sup>2</sup> the President's Executive Order<sup>3</sup> under authority of this act and the Civil Service Act<sup>4</sup> directing the Attorney General in the activities which caused it injury, is unconstitutional.

The government action above instituted the loyalty program for federal employees. As a fundamental segment of the program, the President ordered the Department of Justice to furnish a Loyalty Review Board with a list of subversive organizations, such determination to be made after appropriate investigation. No hearing was given to any organization being investigated. Membership in any denominated organization would then become one of the conditions or tests of retention in federal employment or dismissal to be based on grounds of disloyalty. It is to be noted here that it is basic that the Federal Government may put any conditions on the right to employment it desires. That is, there is not a constitutional right to federal employment.

The complainant is an incorporated fraternal organization issuing policies of insurance to its members, among whom are federal employees. It has alleged that, as a result of being branded as subversive by the Attorney-General, it has been seriously injured in its legal property rights.<sup>5</sup> The essence of the I. W. O.'s position was that it has a right to be given some opportunity in court to be heard on the merits of whether, in fact, it is subversive.

The holding of the court was that the I. W. O. is not "constitutionally entitled to judicial scrutiny of a part of the government's decisional process to employ or to retain in its services any of the I. W. O.'s members whom it suspects of disloyalty."<sup>6</sup> The basis of the decision was rested on the fact that no direct injury is suffered by anyone other than government employees due to the act. The admitted injuries to the legal property rights of the plaintiff are only incidental and unavoidable consequences of the process of effectuating the loyalty program.

This note raises the question: Does the Court of Appeals in the theory of its decision follow principles previously established by the Supreme Court in cases bearing fundamentally on the same issue? Have the Supreme Court cases required that the government action be intended for and directed at one injured before the latter can come into court and test the validity of the government action?

The Court of Appeals states the general rule on testing validity of federal action to be "that no person can attack the constitutionality of federal statute unless he can show sufficient interest in himself."<sup>7</sup> The decision is then based on a Supreme Court

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<sup>1</sup>182 F. 2d 368. Decided March, 1950, by the Court of Appeals, D. C.

<sup>2</sup>Hatch Political Activity Act, sec. 9A. 5 U. S. C. A. 118j.

<sup>3</sup>Executive Order No. 9835.

<sup>4</sup>Civil Service Act of 1883. 5 U. S. C. A. 631.

<sup>5</sup>The property rights the plaintiff alleges were injured because of its designation as subversive: It has lost certain tax exemptions, it has been subjected to investigation by insurance departments of several states. Many members have quit and prospective members refuse to join. Members have been fired because of association with the plaintiff.

<sup>6</sup>182 F. 2d at page 370 and page 372.

<sup>7</sup>182 F. 2d 372.

decision,<sup>8</sup> in which, as the dissent in the case here noted points out, no question of constitutionality is presented.

Three cases of the Supreme Court decided since 1915<sup>9</sup> show that the highest court does not require that the person litigating a question of constitutionality belong to the class primarily affected by the statute. Professor Dowling in his casebook also states that it is not necessary that the statute be directed at the complainant.<sup>10</sup> This is the position taken by the dissenting justice, Justice Edgerton, in this case citing his dissent in *Joint Anti-Fascist Refugee Committee v. Clark*.<sup>11</sup> The latter case varied slightly from the I. W. O. case, presenting a weaker claim on the question of standing-to-sue because of the doubt that the plaintiff, a nonprofit organization, has any property rights capable of invasion.

What then is a basis for "standing to sue"—still keeping within the general rule that complainant must show sufficient interest in himself? In *Pierce v. Society of Sisters*, noted above, Catholic schools were allowed to sue although the statute involved was directed at the parents of their students, it caused loss of tuition to the schools. In the Buchanan case, *supra*, a white owner of property covered by a restrictive covenant, who had contracted to sell to a Negro, was allowed to sue although the statute was directed at Negroes.

By analogy, the Supreme Court has limited the direct-indirect test in the field of interstate commerce. The cases of *N.L.R.B. v. Jones and Laughlin Steel Corporation*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, and *Wickard v. Filburn*, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122, exemplify in that field that Congress has power to regulate anything that burdens commerce, going as far as, that in *Wickard v. Filburn*, *supra*, a farmer growing wheat which was to be consumed on the farm and not to enter commerce, was subject to marketing quotas established by the Secretary of Agriculture under the authority of the Agriculture Adjustment Act of 1938. This shows the trend of the court to look to the substance and disregard form. In the commerce cases, in form, the acts of a person such as the wheat farmer were purely acts within one state and not commerce; but in substance commerce was affected indirectly but substantially. In the I. W. O. case, in form the administrative acts under the statute were purely matters directed from the government as employer to its employees, but the I. W. O. was affected *substantially*, albeit indirectly.

*Conclusion:* The I. W. O. case then seemingly is wrong in the theory of its decision. Whether or not the actual decision is correct seems to depend on two further questions: (1) Whether the statute and administrative action actually affected a sufficient interest of complainant. For example, in the Buchanan and Pierce cases the persons at which the act was directed were forbidden by the statute to have any relations with the complainant. In the I. W. O. case there is no such forbidding, as the Executive Order states, "Nowhere does the order prohibit persons from joining, supporting, and encouraging the organization."<sup>12</sup> (2) Whether the Truax and Pierce

<sup>8</sup>*Perkins v. Lukens Steel Co.*, 310 U. S. 113, 69 L. Ed. 1108.

<sup>9</sup>*Truax v. Raich*, 239 U. S. 33, 60 L. Ed. 131; *Buchanan v. Warley*, 245 U. S. 60, 62 L. Ed. 149; *Pierce v. Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070.

<sup>10</sup>Dowling, *Cases on Constitutional Law*. 3rd edition. See note page 90.

<sup>11</sup>177 F. 2d 70 at pages 88 and 89.

<sup>12</sup>Executive Order No. 9835.