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Harrison C. Dunning

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Article X, Section 2: From Maximum Water Development to Instream Flow Protection

By HARRISON C. DUNNING*

Brian Gray's paper convincingly demonstrates the major role that social utility considerations have played in the development of California water rights law. The judiciary has modified definitions of water rights, as it has altered definitions of other kinds of property rights, to accommodate changing circumstances and perceptions of desirable social policy. This modification has occurred with no constraint from the federal constitutional provision that provides that just compensation be paid for the "taking" of private property.¹

In water rights law, social utility concerns have been manifested in part by the imposition of a "reasonableness" requirement. This requirement has long been invoked in disputes among riparians and in disputes among appropriators, but California courts once refused to use the same requirement to limit riparian rights where the competitors were appropriators. Article X, section 2² was intended to plug that gap.

Article X, section 2 purported, however, to do more. It stated clearly and forcefully a more general public policy on water: "the general welfare" requires the "beneficial use" of water resources "to the fullest extent of which they are capable."³ To accomplish this public welfare goal, water users in the state were to implement water "conservation."⁴

When Article X, section 2 was added to the state constitution in 1928, there were common understandings as to what constituted both "beneficial use" and "water conservation." As was pointed out in a re-

* Professor of Law, University of California at Davis. A.B. 1960, Dartmouth College; LL.B. 1964, Harvard Law School.

1. U.S. CONST. amend V. I should note, however, that there has recently been a serious federal constitutional attack on taking grounds on certain judicial changes in state water rights law in Hawaii. See *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated and remanded*, 477 U.S. 902 (1986).

2. CAL. CONST. art. X, § 2 was enacted in 1928 as article XIV, § 3. Although the numbering was changed in 1976, the wording has remained unchanged since 1928.

3. CAL. CONST. art. X, § 2.

4. *Id.*

cent study of irrigation and democracy in the American West by Professor Donald Worster, conservation of water meant "putting rivers, and eventually their entire watersheds, to work in the most efficient way possible for the purpose of maximizing production and wealth. The first stage in that intensification of use was to dam and store the natural flow, until not a single drop escaped control."⁵ The "work" Professor Worster mentions was beneficial use, usually by way of irrigation, power production, or municipal water supply.

Thus, Article X, section 2 was written not only to generalize an evolving reasonableness standard, but also to give constitutional dimension to the prodevelopment water policy of the day. That policy of promoting water conservation, as then understood, by preventing the "waste to the sea" of fresh water, was inspired by some of the great municipal water development projects in California in the early 1900s.⁶ It looked forward to state involvement in such projects in the near future.⁷

California's current water policy differs significantly from that laid down in Article X, section 2. Although, in my opinion, we have yet to strike a fair balance between the need to divert water and the need to leave it in place, our state water policy today unquestionably gives substantial protection to the so-called "instream" values—water for uses such as fishing, boating, or simply quiet contemplation. We have set aside certain rivers as "wild and scenic," where most development is prohibited, and in a number of other ways we do protect instream flows. How could this have happened if Article X, section 2 mandated a public policy of maximum water development?

Unquestionably, the leading decisions on Article X, section 2 have often favored water development by making it less expensive. For example, after its litigation loss prior to the enactment of Article X, section 2, Southern California Edison had to pay Herminghaus before it could go ahead with its upstream storage project.⁸ With the amendment on the books, however, the Marin Municipal Water District was not required to

5. D. WORSTER, *RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST* 155 (1985).

6. By 1928 the City of Los Angeles had completed its aqueduct from the Owens Valley to the San Fernando Valley. E. COOPER, *AQUEDUCT EMPIRE: A GUIDE TO WATER IN CALIFORNIA, ITS TURBULENT HISTORY AND ITS MANAGEMENT TODAY* 54 (1968). The City of San Francisco was similarly bringing water from Hetch Hetchy Valley in the Sierra Nevada to San Francisco and the Bay Area. *Id.* at 57. The East Bay Municipal Utility District had been formed in 1923 to bring water from the Mokelumne River in the Sierras to the East Bay, and in 1928 the Metropolitan Water District of Southern California was established to bring water from the lower Colorado River to metropolitan Southern California. *Id.* at 56.

7. WORSTER, *supra* note 5, at 236.

8. *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81, 112, 252 P. 607, 620 (1926).

pay Joslin before proceeding with a comparable project.⁹ Indeed, the California Supreme Court in *Joslin* was so influenced by the strength of the constitutional provision that it dismissed in summary fashion an excellent statutory argument on Joslin's behalf.¹⁰

A variation on the "wasteful downstream riparian inhibits needed upstream storage" theme of *Herminghaus* and *Joslin* is provided by cases in which the method of diversion of a water right holder threatens to preclude additional diversions from the stream. Two decisions from the California Court of Appeal are illustrative. In *Erickson v. Queen Valley Ranch Co.*,¹¹ the method of diversion was a leaky earthen ditch that carried water used for domestic purposes and irrigation. The ditch lost water that more junior claimants could have used. The appellate court required the trial court to go beyond a generalized finding as to the reasonableness of the diversion and use of water.¹²

In *People ex rel. State Water Resources Control Board v. Forni*,¹³ defendant Forni pumped water directly from the Napa River to provide frost protection for vineyards. The state feared that the river might not have enough water to meet all the frost protection water demand. In that case, although the riparians held rights far more senior than others—rights apparently dating back to the time Hastings subdivided much of the Napa Valley—the court declared that direct diversion by those riparians in those circumstances would violate Article X, section 2.¹⁴ "Reasonableness," the court indicated, required the riparians to join a water distribution program run by the State Water Resources Control Board, with the prospect that they might have to build storage facilities if they wanted to use water for frost protection.¹⁵ The riparians thus lost

9. *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 60 Cal. Rptr. 377, 429 P.2d 889 (1967).

10. Section 1245 of the California Water Code imposes liability upon municipal entities for damage caused by a municipal water supply project to any "property, business, trade, profession or occupation." CAL. WATER CODE § 1245 (West 1971). The *Joslin* court decided that since Joslin had no protectible property right in the continued transport of suspended rock, sand, and gravel by the stream to which his land was riparian, there was no statutory liability for damage to his business when the water district's dam cut off the flow of building materials. *Joslin*, 67 Cal. 2d at 146, 60 Cal. Rptr. at 386, 429 P.2d at 898.

11. 22 Cal. App. 3d 578, 99 Cal. Rptr. 446 (1971).

12. *Id.* at 585-86, 99 Cal. Rptr. at 450-51. See *Krieger v. Pacific Gas & Electric Co.*, 119 Cal. App. 3d 137, 173 Cal. Rptr. 751 (1981), for an entirely different analysis of a similar problem.

13. 54 Cal. App. 3d 743, 747-48, 126 Cal. Rptr. 851, 853 (1981).

14. *Id.* at 751, 126 Cal. Rptr. at 856.

15. *Id.* at 751-53, 126 Cal. Rptr. at 856-57. Ultimately the *Forni* case was settled, and although the riparians must participate in and pay their share for the distribution program, they have not had to build storage facilities. Apparently enough other users did so to eliminate the threat of inadequate water supply in the river.

the practical advantage of their senior position. In effect, their use of direct diversion was limited by Article X, section 2 and held to be a beneficial use not reasonable in the circumstances because of its actual or potential adverse impact on other water claimants. The public policy of maximizing the development of California's water resources was, as in *Joslin*, supported by requiring established water right holders to change their operation and potentially to make expensive water development investments.

Alongside these cases, in which beneficial use is for domestic purposes or irrigation, and conservation involves capture and physical control of free-flowing water, we must now consider the instream flow situation. Changing conceptions of social utility have led to legislative as well as judicial changes in definitions. Some of the most important changes have legislatively altered the definition of "beneficial use." Since 1959, the legislature has added to the California Water Code to define recreation, fish and wildlife preservation and enhancement, and uses necessary for water quality control as beneficial uses of water.¹⁶ Keeping in mind that the declared policy of Article X, section 2 is to maximize beneficial use through water conservation, we see that the latter term must now have a second sense—precisely the opposite of the first one! Water conservation now allows leaving water in rivers, for example to sustain a fishery, as well as taking it out for a use such as irrigation.¹⁷ It includes free-flowing rivers as much as developed rivers—indeed, the initial provision of the California Wild and Scenic Rivers Act states that the highest and most beneficial use of protected stretches of some rivers is to flow undisturbed to the sea.¹⁸ The "waste to the sea" so denigrated at the time of *Herminghaus* has now become legislative policy for parts of a number of our rivers.

If the state constitution requires maximum water development and if legislative protection of instream uses precludes certain water projects, it of course might be argued that the statutes must yield to the constitution. Significantly, that argument is rarely heard, even from those who represent water development interests.¹⁹ In practice, the idea from 1928

16. CAL. WATER CODE §§ 1243, 1243.5 (West 1971 and Supp. 1989).

17. WORSTER, *supra* note 5, at 154, points out that this sense of "conservation" seems to be closer to the word's origin. Compare the statutory definition of water conservation in one context as "the use of less water to accomplish the same purpose." CAL. WATER CODE, § 1011(a) (West Supp. 1989).

18. CAL. PUB. RES. CODE § 5093.50 (West 1984). The section also states that flowing free "is a reasonable and beneficial use within the meaning of Section 2 of Article X of the California Constitution." *Id.*

19. In 1977, however, that point was made by the late Donald Stark, a noted water lawyer, to the Governor's Commission to Review California Water Rights Law.

that there is a state constitutional mandate for water development has gradually vanished. Although one can never be certain when a theory may surface in our judicial system, it would amaze me to find a California court today questioning the constitutionality of the state's multiple instream preservation efforts when they impinge on water development.²⁰ Notably, no constitutional objection of this sort has been raised regarding the major limitations on water projects imposed to achieve water quality objectives in the Sacramento-San Joaquin Delta. Indeed, in the litigation that did take place over those limitations, the court of appeal noted that Article X, section 2 authorizes the modification of permit terms,²¹ something that would most likely be done to protect instream values.

Thus, an element of Article X, section 2, deemed highly important in 1928, has passed from the scene without even a good fight. I suggest this has occurred because it is so obvious to all the relevant players that interpretations of constitutional provisions, like definitions of property rights, are developed with a concern for social utility, and the exclusive emphasis on water development found in Article X, section 2 has no social utility for the late twentieth century. Our only Article X, section 2 concern today should be with "reasonableness," elusive as that concept may remain.

20. One such important, albeit long-neglected, effort is reflected in provisions which require the owner of a dam to allow "sufficient water at all times . . . to pass over, around or through the dam to keep in good condition any fish that may be planted or exist below the dam." CAL. FISH & GAME CODE § 5937 (West 1984). Recently the court of appeal held that the State Water Resources Control Board must attach to certain licenses held by the City of Los Angeles conditions which incorporate the Fish & Game Code requirements. The court noted its decision "will require reduced diversions from the Mono Lake tributary creeks" *California Trout, Inc. v. State Water Resources Control Bd.*, 207 Cal. App. 3d 585, 632, 255 Cal. Rptr. 184, 213 (1989), *rev. denied*, 1989 Cal. App. Lexis 63. Los Angeles advanced several arguments to support the position that it is not subject to the statutory fish protection requirements, including an argument that to construe the legislation to require the preservation of minimum instream flows for fish would be a violation of Article X, section 2. *Id.* at 622, 255 Cal. Rptr. at 206. Significantly, the city did *not* argue that minimum instream flows would violate a constitutional policy of maximum water development. Instead, its position—rejected after a detailed analysis by the court—was that a priority for one type of use of water is unreasonable, "because reasonableness of use requires comparison of contending alternative uses which is an adjudicative question that cannot be constrained by a statutory rule." *Id.*

21. *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 129, 227 Cal. Rptr. 161, 187 (1986).

Stephanie Wildman, A.B., J.D.,
Visiting Professor of Law
Vivian Deborah Wilson, B.A., M.S., J.D.,
Professor of Law

C. Keith Wingate, B.S., J.D.,
Professor of Law
Wayne S. Woody, B.A., J.D.,
Professor of Law

Adjunct Faculty

Phyllis Andelin, A.B., J.D.,
Assistant Professor of Law
Chris Anderson, B.A., LL.B.,
Assistant Professor of Law
Jeffrey Banchemo, A.B., J.D.,
Assistant Professor of Law
Sandra Blair, B.A., M.A., J.D.,
Assistant Professor of Law
Neil Boorstyn, B.A., LL.B.,
Assistant Professor of Law
Chris Carpenter, B.A., J.D.,
Assistant Professor of Law
Louis C. Castro, B.A., J.D.,
Assistant Professor of Law
Matthew Coles, B.A., J.D.,
Assistant Professor of Law
Carol A. Corrigan, B.A., J.D.,
Assistant Professor of Law
Terry Kay Diggs, B.A., J.D.,
Assistant Professor of Law
Paulino Duran, B.A., J.D.,
Assistant Professor of Law
Lynn Duryee, A.B., J.D.,
Assistant Professor of Law
Judith Epstein, M.A., J.D.,
Assistant Professor of Law
James R. Frolik, A.B., M.A., LL.B., B.C.L.,
Associate Professor of Law
Karen Graf, B.A., J.D.,
Associate Clinical Professor of Law
Fred Hartwick, A.B., J.D.,
Assistant Professor of Law
Candace Heisler, B.A., J.D.,
Assistant Professor of Law
Nancy L. Hersh, B.A., J.D.,
Assistant Professor of Law
Allen Hymer, B.A., LL.B.,
Assistant Professor of Law
Richard B. Iglehart, B.S., J.D.,
Assistant Professor of Law
Robert N. Katz, B.A., J.D., M.B.A.,
Assistant Professor of Law
Marvin S. Kayne, B.S., J.D.,
Assistant Professor of Law
Peter Keane, B.A., J.D.,
Assistant Professor of Law

Michael Kelly, B.A., J.D.,
Assistant Professor of Law
Carole R. Kornblum, A.B., J.D.,
Assistant Professor of Law
Lita Krowech, A.B., M.Ed., J.D.,
Assistant Professor of Law
John Malone, A.B., J.D.,
Assistant Professor of Law
Fred G. Meis, A.B., J.D.,
Assistant Professor of Law
Beatrice A. Moulton, B.A., J.D., LL.M.,
Director of Clinical Instruction, Assistant Professor of Law
Steven C. Neustadter, B.A., J.D.,
Assistant Professor of Law
Richard Pearl, B.A., J.D.,
Assistant Professor of Law
Maude Pervere, B.A., J.D.,
Assistant Professor of Law
Wilma Rader, B.A., J.D.,
Assistant Professor of Law
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Assistant Professor of Law
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Assistant Professor of Law
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Assistant Professor of Law
Peter E. Sitkin, B.A., LL.B.,
Assistant Professor of Law
Kip Steinberg, B.A., J.D.,
Assistant Professor of Law
Kathleen Strickland, B.S., J.D.,
Assistant Professor of Law
Frank H. Trinkl, M.A., M.S., Ph.D.,
Director of Public Law Research Institute, Research Professor
Thomas Eugene Tyner, B.A., J.D.,
Assistant Professor of Law
Kathleen Umrein, B.A., J.D., LL.M.,
Assistant Professor of Law
Marc Van Der Hout, B.A., J.D.,
Assistant Professor of Law
Joanna K. Weinberg, A.B., J.D., LL.M.,
Assistant Professor of Law
Gail Winson, B.A., M.S., J.D.,
Associate Librarian, Assistant Professor of Law

