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A Golden State Solution to the Israeli-Palestinian Water Conflict

By BRANDON HOLLINDER*

I. Introduction

Water plays a central role in the conflict and lives of those who inhabit Israel and the Palestinian territories. Without it, the desert would remain barren, the crops would not grow, the cities would not survive, and the economies of both Israel and the Palestinian territories would collapse. At its root, the Israeli-Palestinian conflict is a fight over the land and who has a right to it. Both sides claim a right to the land based on ancient traditions and thousands of years of history dating back to pre-biblical times. In modern times, the Zionist movement that established the Jewish state of Israel was based on re-establishing ties with the ancient land of Israel. To achieve this goal, agriculture was idealized because of its physical connection with the soil and because it is a basic source of sustenance. Obtaining water was a crucial component to establishing a Jewish state, as most of the region receives little rain and is too dry to support agriculture without irrigation.

Likewise, the Palestinian people, especially those displaced from their land and living abroad or in refugee camps, have idealized agriculture and a connection to the land. Even those Palestinians who have never seen Palestine emphasize the “plentiful orchards and rich water sources” when telling stories of their country. Trees rooted in the soil are an especially important symbol for the

2. See id.
3. Id.
Palestinians, as they symbolize individuals rooted in the land and the resources of Palestine. No matter where in the world they may be, it is the connection to the land and water of Palestine that keeps the Palestinians together and defines them as a people. Because there is such a strong connection to the land for both Israelis and Palestinians, and because water is essential to this connection, it should not come as a surprise that water is at the heart of the political and social conflict. The settlement of this issue is crucial to any sustainable peace and prosperity.

This paper proposes a solution to the problem of how water resources should be allocated and divided. Part II gives a brief discussion on the history of the Israeli-Palestinian conflict in general. Part III describes the current condition of water resources and use in Israel and the Palestinian territories, focusing on the disparity between the copious amounts of superior-quality water that Israel uses, and the limited and externally controlled amounts of poor-quality water the Palestinians use. This is despite the fact that most water resources lie wholly or partially within the occupied Palestinian territories. Part IV proposes a solution to the disparity and tension by recommending a water regime based upon the California State Water Resources Control Board and California water law. The section will briefly explain California water law and why it would be a sound and workable solution for Israel and the Palestinian territories. The section will conclude with suggested changes to California water law to both eliminate problems in the law itself, as well as to adapt it to the social, political, and geographical conditions that exist in Israel and the Palestinian territories.

This solution does have limits. It is a proposed settlement that would aid both sides greatly, but it is predicated upon the willingness of both sides to negotiate and cooperate. The proposed solution is only possible as a part of the process for creating peace. The solution offers Israelis and Palestinians a way to work together on an important issue, building confidence for future negotiations and settlements. Furthermore it would allow the water basin to be treated as a whole legally, allowing for an improved and more effective use of water resources. Obtaining a solution for water allocation could increase stability among the average population, make life better for many, and eliminate one major source of conflict and anxiety among the two parties. The caveat is that it requires each side to give up

5. See id.
some autonomy and to work together. Should they choose to do so, the following is a viable option for them.

II. A Brief and General History of the Israeli-Palestinian Conflict

The modern Israeli-Palestinian relationship is an uneasy one at best. The parties resent each other and have used violence before there ever was a state of Israel. From the beginning of Zionism's impact on the region in the 1880s, there has been conflict over land and water between Jewish immigrants and Palestinians. Episodic violence and friction lasted through the Mandate period and only intensified since the birth of Israel in 1948. Since Israel has become a state, the violence has increased; there have been seven wars, two intifadas, and thousands of acts of daily violence which have been perpetrated by all sectors of society, by both Palestinians and Israelis. The political landscape of the region today is predominantly defined by the results of the 1967 Six-Day War.

The June 1967 War was a watershed event in the history of Israel and the Middle East. After only six days of fighting, Israel had radically altered the political map of the region. By June 13, Israeli forces had captured the Golan Heights from Syria, Sinai and the Gaza Strip from Egypt, and all of Jerusalem and the West Bank from Jordan. The new territories more than doubled the size of pre-1967 Israel, placing under Israel's control more than one million Palestinian Arabs.

The West Bank, and until recently the Gaza Strip, have remained occupied by Israel since the Six-Day War in 1967. Approximately

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7. Id. at 102-166.
8. Israeli-Palestinian ProCon.org, Israeli/Palestinian Issues, at <www.israelipalestinianprocon.org/?OVRAW=palestinian%20conflict&OVKEY=conflict%20palestinian&OVMTC=standard> (visited, Feb. 20, 2006). The wars include the 1948 War, the 1956 Suez War, the 1967 or Six-Day War, 1970 Black September, the 1973 War, and the 1982 Lebanon War. Id.
9. Id. The two intifadas are the 1987-1993 Intifada and the Al-Aqsa Intifada which began in 2000 and is ongoing.
1.4 million Palestinians, many of whom live in refugee camps, reside in Gaza, and approximately 2.4 million Palestinians inhabit the West Bank. Together the Gaza Strip and West Bank form the essential part of any future Palestinian state, and are the focal point of the fight for land and water resources between the Israelis and Palestinians.

One of the major causes of the Six-Day War was control of water resources. After Israel gained statehood, it began to develop plans to exploit the waters of the Jordan River. By the early 1960s, Israel was nearing completion of a project known as the National Water Carrier (NWC). This project was crucial to Israel's planned growth and development of the coastal and desert regions, especially the Negev. The Arab states in the region viewed the NWC as a major threat because it diverted large amounts of water from the Jordan River, which also runs through Lebanon, Syria, Jordan, and the West Bank. The Arab states responded to Israel's construction by initiating a project to dam the tributaries of the Jordan River and divert the waters around the Sea of Galilee, which was the main diversion point for Israel's NWC. When the Syrians began building one of the proposed dams, the Israelis destroyed it with bombs in 1967. After this event, tensions escalated further, and within a couple of months the Six-Day War began.

During the war, Israel captured the headwaters of the Jordan River in the Golan Heights, access to the lower Jordan River, and large underground aquifers in the newly captured West Bank. By capturing and occupying the Golan Heights, the West Bank, and the Gaza Strip, Israel secured access to, and control of, the major surface...
and groundwater resources of the region, while simultaneously depriving its enemies of those same sources. Thus, when the war ended, Israel's direct control of water resources had increased by nearly 50 percent, all of which it still controls to this day. While water was certainly not the only reason for the war, it nevertheless played a key role.

Today, political instability and uncertainty have reached an all-time high in Israeli-Palestinian relations. The Al-Aqsa Intifada continues, and a new era of politics and leaders is about to begin in the region. In the January 25, 2006, Palestinian elections, Hamas, a political party that the United States considers a terrorist group, won a majority in the Palestinian legislature. As for Israel, its political future is uncertain as Ariel Sharon recedes from the political scene and Ehud Olmert begins to assert his authority and create his own image and policy. The 34-day war in Lebanon between Israel and Hezbollah, as well as the assault on the Gaza Strip during the


25. Israeli-Palestinian ProCon.org supra note 8. The Intifada has continued since 2000 when Ariel Sharon incited Muslims by appearing at a Muslim holy site with armed guards and proclaimed that Israel would never relinquish control of the site. These actions caused protests and violence between Palestinians and Israelis. Since that time there have been numerous attacks and counterattacks by parties on each side, and the Israeli Defense Force has closed down the West Bank and Gaza Strip numerous times and has made incursions into towns, assassinating suspected Palestinian leaders as well as killing innocent people.


28. CNN ONLINE, Sharon's Stroke Prompts Questions for Israel, at <www.cnn.com/2006/WORLD/meast/01/06/sharon.main/index.html> (visited, Feb. 20, 2006). Sharon has been a key player in both Israeli military policy and success, as well as politics where he has been a major force for decades. He founded the Likud Party, which is a right-wing party and one of two main parties in Israeli politics, in 1973. He initiated and completed the withdrawal of Israeli troops from the Gaza Strip in 2005 and at the end of 2005 Sharon split from the Likud Party to form a centrist party called Kadima.

29. The Daily Star, Timeline of July War 2006: Key Events in the Latest Crisis Between Israel and Lebanon, at <www.dailystar.com.lb/July_War06.asp> (visited, Sept. 02, 2006). The Israeli offensive against Lebanon that culminated in a land invasion began after Hezbollah kidnapped two Israeli soldiers. The war produced 5,341 casualties, and over 88 percent of those killed were civilians. Much of Lebanon's infrastructure was destroyed in the fighting and the northern portion of
summer of 2006, suggest tensions will continue to run high and armed conflict will be the norm rather than the exception. No matter who is in control, however, water will continue to be a key issue in the peace process, and any permanent arrangement must resolve the control and distribution of water resources in the region. This proposal gives the parties a viable option to do just that.

III. The State of Water Resources in Israel and the Palestinian Territories

The current supply and management of water in the region is poor. There is a lack of general information and knowledge concerning the state of resources because of technological, economic, and political realities. Additionally, there is disagreement over who “owns” what water and who gets to use those sources. Many of the problems derive from the inequitable use and control of the water by Israel, both in the West Bank and Israel proper. The emphasis and goal of the solution proposed in this paper is to remedy this situation. This can be done by managing the water as one system and dividing the water supply more equitably through joint management and cooperation, which will benefit the people of both Israel and the Palestinian territories.

A. The Water Shortage

The region of Israel and the Palestinian territories is semi-arid and arid with little rain or other water resources. This lack of supply is a main reason for the current conflict over water. The Jordan River is the only significant source of surface water in the region. For this reason its waters are heavily contested and have been stretched to their limits, as all states bordering the Jordan River have sought to utilize the river as much as possible. Although the Jordan River is the main source of surface water in the region, it actually provides a minor amount of water from a global perspective; its annual flow of water is only about 2 percent of the Nile’s flow and 1 percent of the Congo’s flow. The Jordan River’s ability to support a sizeable population is limited.

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Israel sustained substantial damage from Hezbollah rocket attacks.

30. KLARE, supra note 1, at 165.
31. Id.
32. Id.
33. Id.
The Jordan River begins in the mountains of Syria and Lebanon. It then flows south into Israel and into the Sea of Galilee, also known as Lake Tiberias. The Jordan River is Israel's main source of fresh water, and just north of where it flows into the Sea of Galilee is the major point of extraction for transport in the NWC, which delivers water to much of Israel. The Jordan River then flows south out of the Sea of Galilee, at a rate regulated by Israel, along the border of Israel and Jordan, and eventually the West Bank, before ending in the Dead Sea.

Aside from the Jordan River, the other major source of water for Israel and the Palestinian territories are large underground aquifers. These aquifers often cross political lines, complicating the issues of ownership and control. The largest of the aquifers, the Mountain Aquifer, lies underneath the West Bank as well as Israel. The majority of recharge water for this aquifer comes from rainfall over the West Bank, while the majority of the aquifer's storage is under Israel. The Palestinians and Israelis both use water from this aquifer, which has become a point of contention between them. Additionally, the Coastal or Gaza Aquifer lies over Israel and the Gaza Strip. This aquifer is utilized by both Israelis and Palestinians who reside in the Gaza Strip. Since 1967, Israel has controlled the supply and distribution of water in Israel as well as the Palestinian territories.

B. The Misuse and Inequitable Control of Water Resources

The political conflict between Israelis and Palestinians extends to the struggle for control over water and has resulted in instances of waste, inefficiency, and shortages of water. One of the most significant problems in the region is the pollution of the Jordan River.

34. Id.
35. Id. at 166.
36. See id. at 168-169.
38. KLARE, supra note 1, at 166.
40. Id. at 4.
41. Id.
42. Id. at 6.
43. Id. at 8.
44. ELMUSA, supra note 37, at 78.
While Israel does take large quantities of high-quality river water from the Sea of Galilee, water nevertheless flows out of the lake in the south, where the river continues along the border of the West Bank and Jordan. The problem is that south of the Sea of Galilee, evaporation increases and the water becomes so degraded in quality that it is virtually useless. This leaves those who live near the Jordan River south of Israel's extraction point with no useful water.

Both the influx of water from the Sea of Galilee itself and the evaporation cause the Jordan River's water to become extremely saline, which renders it unusable for crops or drinking without extensive treatment. Such treatment requires resources that the Palestinians simply lack. Because of the diversions by the Israelis and other states along tributaries from the river, little fresh water flows out of the Sea of Galilee. Additionally, the Sea of Galilee itself lies over saline springs which make the lake water extremely salty. This natural condition has been exacerbated by the fact that Israel diverted the springs on the Sea of Galilee's shore into the river channel. This, combined with agricultural runoff and untreated wastewater from Israeli settlements that flow into the river, makes the water virtually unusable. The water quality is so bad by the time it reaches the West Bank that it has been described more as a "drainage ditch" than as a river.

Additionally, the farther south the river flows towards the Dead Sea, the more desert-like the climate becomes. Little rain falls in this region to flush the river of pollution, and river water is one of the only possible water resources in the area. Finally, an additional impediment to Palestinian utilization of river water is that the Palestinians are often denied access to the river by Israeli military forces. Thus, the Jordan River is currently only a significant water source for Israel.

45. KLARE, supra note 1, at 166.
46. Id. at 165.
47. Id.
48. Sabbah & Isaac, supra note 39, at 3.
49. Id. at 4.
50. ELMUSA, supra note 37, at 60.
53. Sabbah & Isaac, supra note 39, at 3.
54. Id. at 4.
The control and management of the region’s underground aquifers is much like that of the Jordan River: Israel controls the underground water of the West Bank and Gaza Strip. Israel uses this control to ensure supplies of water for both its citizens in Israel proper as well as the Israeli settlements within the Palestinian territories, regardless of the consequences to the Palestinians. Israel currently uses 85 percent of the water from the groundwater aquifers that lie beneath the Palestinian territories, and as described above, it takes the majority of the water from the Jordan River, leaving little if any usable water for Palestinians.

The Mountain Aquifer, which lies under both Israel and the Palestinian territories, can be divided into three sub-basins: the Western, Northeastern, and Eastern basins. The Western sub-basin is shared by Israel and the Palestinian territories. There is great debate over who is entitled to what amount of this water. Eighty percent of the recharge of the aquifers (whether from rain, natural springs, or streams) comes from the West Bank, but 80 percent of the storage area is under Israel; the water originates in the Palestinian territories, but comes to rest in Israel. In 1992, the Israelis consumed more than 12 times as much water as the Palestinians did from this sub-basin, including extractions from wells that lie on the Palestinian side of the Green Line.

The Northeastern sub-basin is also shared, but like the Western sub-basin, the Israelis took considerably more water from this basin than did Palestinians in 1992. The Eastern sub-basin is completely within the West Bank. Despite this, Israel taps into this source through deep wells that it uses to supply its settlements in the West

55. Elmusa, supra note 37, at 78.
56. Sabbah & Isaac, supra note 39, at 1-2.
57. Id. at 5-6.
58. Id. at 6.
59. Id.
60. Id. at 7. Israelis consumed 333 million cubic meters (MCM) of water, and the Palestinians took 27 MCM. Figures from the year 1992 are used because they are the most recent figures available. The Green Line is the term used to refer to the armistice lines that were established after the 1949 War. Essentially, they mark the boundary between Israel proper and the West Bank and Gaza Strip. Wikipedia, Green Line (Israel), at <http://en.wikipedia.org/wiki/Green_line_%28Israel%29> (visited, Mar. 4, 2006).
61. Sabbah & Isaac, supra note 39, at 7. Israel seized 115 MCM, and the Palestinians took 25 MCM.
62. Id.
This sub-basin also is not capable of being fully exploited, as there are problems with salinity in the top levels of the aquifer, which is where the Palestinian wells usually draw from.\textsuperscript{64}

The Gaza Aquifer suffers from many of the same problems as the other aquifers. It lies under both Israel and the Palestinian territories, is overdrafted, and is of degraded quality, as there are intrusions of saline water due to its close proximity to the Mediterranean Sea.\textsuperscript{65} Also, because the Israelis extract large quantities of water from the Gaza Aquifer, the portion that lies under the Gaza Strip is prohibited from recharging, because the water, which naturally flows south from Israel into the Gaza Strip, is no longer there.\textsuperscript{66} The water is being extracted from the aquifer at a rate of about twice that at which it can be naturally recharged.\textsuperscript{67} Consequently, the water quality will continue to degrade, and eventually the aquifer will become useless as a source of water.

Whether intentional or not, the Israeli policy on groundwater use has had major negative consequences on the Palestinians. These consequences are magnified because of the Palestinians’ reliance on groundwater as their main source of water since they lack access to any usable water from the Jordan River, as described above.\textsuperscript{68} Another consequence of Israel’s use has been the overdrafting of the aquifers.\textsuperscript{69} This has resulted in implementation of restrictions on uses and pumping from the aquifers. Often these restrictions are placed on the Palestinians and not on the Israelis even when the water is being supplied to settlements in the West Bank.\textsuperscript{70}

The main tool for access to groundwater is a well. The Palestinians have dug shallow wells to access the water of the aquifers, while the Israelis have dug deep wells.\textsuperscript{71} The deeper wells provide access to higher quality water,\textsuperscript{72} but as a side effect, they can lower the water table and render the shallower Palestinian wells dry and useless. The Israelis use wells within the West Bank to supply

\begin{itemize}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.} at 8.
\item \textsuperscript{66} \textit{Id.} at 9.
\item \textsuperscript{67} ELMUSA, \textit{supra} note 37, at 95.
\item \textsuperscript{68} Sabbah & Isaac, \textit{supra} note 39, at 11.
\item \textsuperscript{69} ELMUSA, \textit{supra} note 37, at 88.
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} Sabbah & Isaac, \textit{supra} note 39, at 6.
\item \textsuperscript{72} \textit{Id.}
\end{itemize}
their settlements, which receive more water per person than do the Palestinian households.\textsuperscript{73}

The reasons for Israeli supremacy in well-ownership and control can be traced to the politics of occupation. Palestinians who wish to drill a new well face a rigorous procedure to garner approval from the occupying Israeli government. Obtaining the proper license to drill a new or replacement well\textsuperscript{74} involves an 18-step process, and a wait of up to five years after the application has been approved.\textsuperscript{75} The entire process can take eight years or longer.\textsuperscript{76}

If the Palestinians are unable to obtain enough water through pumping groundwater, using rain water catchments, or any surface water that may be available, they are, in an ironic and cruel twist, forced to resort to purchasing expensive water from Israeli settlements. The Israeli settlements pump water from the same sources within the Palestinian territories that the Palestinians themselves are restricted from using.\textsuperscript{77}

Within their own territory, the Palestinians also suffer from a lack of coordination and knowledge about their own resources, which adds to the inefficient use of water resources.\textsuperscript{78} As of 1992, only 60 percent to 74 percent of households in the Palestinian territories were connected to a water distribution system, compared with nearly 100 percent of those in Israel.\textsuperscript{79} This is at least partially due to Israeli policy. Until the early 1990s when various agreements surrounding the peace talks in Oslo were signed, the State of Israel, and later a private Israeli water company, Mekorot, managed the entire system of water distribution and access in the occupied territories.\textsuperscript{80} At the very least, Israel has not helped the situation in the Palestinian territories; it has not initiated any water conservation programs, and has even discouraged independent efforts.\textsuperscript{81} To this day, the situation and conditions remain inadequate.

One example of Israel's inefficient and, one could argue, wasteful use of water is in the Negev region of the country. Israel

\textsuperscript{73} Id. at 8.
\textsuperscript{74} ELMUSA, supra note 37, at 87.
\textsuperscript{75} Id. at 86.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 90.
\textsuperscript{78} Sabbah & Isaac, supra note 39, at 8.
\textsuperscript{79} Id.
\textsuperscript{80} ELMUSA, supra note 37, at 83.
\textsuperscript{81} Id. at 103.
uses the majority of water it carries in the NWC from the Jordan River for irrigation in the Negev,\textsuperscript{82} which is a desert region with little rainfall and high daily temperatures.\textsuperscript{83} As a result of the climate, the region requires copious amounts of water to grow crops.\textsuperscript{84} If Israel and the Palestinian territories were governed by a water board and the doctrine of reasonable use, as this paper proposes, water could be diverted from the Negev region to farms in the West Bank, where less water is needed to grow the same crops. Such a policy would result in more produce for the same amount of water. This would enable the Palestinians to sell produce to Israel, replacing that which would have been grown in the Negev. Palestinians could keep the remainder crops for themselves or sell them to another source, thereby helping the Palestinian economy while maintaining the status quo in Israel. Alternatively, Israel could keep the extra water and use it within its own territory. This is a simplified example, but it shows an instance of inefficient use and the potential positive impact this type of solution could have.

Natural dearth and the inequitable control and distribution of water by Israel combine to create a great deal of anger and resentment in the Palestinians who often believe water is being taken from them. There is also the Palestinian belief that Israel is using water as a political weapon to oppress the Palestinians and leave them in an economically depressed state incapable of surviving without outside help. If more efficient uses are not designed and implemented, there will be serious shortages for both Israel and the Palestinians over the coming years. The natural resources of the region are already being utilized to their limits, and Israel's non-agriculture water demand alone is projected to double during the period of 1993-2023.\textsuperscript{85} If serious steps and actions are not taken, there will be significant problems for the people of the region.

\textsuperscript{82} Sabbah & Isaac, \textit{supra} note 39, at 10.
\textsuperscript{83} ELMUSA, \textit{supra} note 37, at 19.
\textsuperscript{84} Id.
IV. A Proposed Solution to the Myriad of Problems: Implementing a Water Regime Based Upon California Water Law

To help alleviate the current water tensions, inequalities, and shortages that exist in the region of Israel and the Palestinian territories, a system based upon the California water law regime should be implemented and given authority over the entire region of Israel and the Palestinian territories. This water board would treat the entire region as one, making no distinctions based upon political boundaries, state affiliations, citizenship, or any other factor except water law and policy. The law and procedures that would govern would be similar to those of California and used by the State Water Resources Control Board with some adjustments to correct deficiencies in the California system and to better accommodate the geopolitical conditions that exist in Israel and the Palestinian territories.

A. The California Water Regime and California Water Law

The following is a brief overview of the major principals of California water law. It is not an attempt to recite the entire California Water Code or case law, but rather a general overview of the major points of the system currently in use in California, and how the system can be successfully transplanted to Israel and the Palestinian territories.

1. Three Types of Water Rights

There are essentially three types of water rights in California: riparian rights, appropriative rights, and overlying landowner rights. Riparian rights are gained by owning land bordering a body of water and apply only to surface water. Overlying landowner rights are the equivalent for groundwater resources. Appropriative rights are applicable to both groundwater and surface water, but unlike riparian rights or overlying landowner rights, they are not predicated on land ownership. 86

Riparian rights are the original type of water rights in California and are based in common law. 87 A riparian rights holder does not
receive a fixed amount of water. Rather, the water is shared between all riparian rights holders for the same body of water. Each person’s right is equal to that of the other rights holders and they share what water is available in that source. In times of shortage, water is first given to all rights holders to meet their domestic needs (such as drinking and other basic functions). After all basic needs have been met, water is then distributed based upon whose use is most reasonable. As a result, all users will usually not receive the same amount of water in times of shortage. Additionally, how much water a riparian rights holder receives in times of shortage will depend directly upon their use as compared to all other users. For example, riparian A’s use may be more reasonable than riparian B’s use, but less reasonable than C’s use. The outcome of any dispute depends on who is complaining and the nature of their use. For this reason, riparian rights are very uncertain. Additional uncertainty is created by the fact that a riparian rights holder has a right to future or dormant use of the water. Thus, at any time a riparian rights holder could begin using more of the water source, which could potentially leave less for others. Therefore, investment in projects dependent on water subject to riparian rights is risky, as any investment could be rendered useless at the whim of any more reasonable use that was previously dormant in status.88

In California law, two doctrines limit the use of water by riparian rights holders. First, the land limitation doctrine states that the land where the water is used must itself be riparian. Thus, if a person owns land riparian (i.e., bordering) to River X, that person cannot take water from River X and use it on land that is not riparian to River X. The second limitation is the watershed doctrine. This doctrine prescribes that water taken from a water source must be used on land within that source’s watershed. The rationale is that if water is used within the watershed, the return flow will go back to the source and other users will then be able to reuse that water. Both doctrines operate at the same time, and both must be complied with for the use of water obtained by a riparian to be valid. These doctrines make it impossible to use such water away from the source, which can be a major hindrance in a desert region where most towns and people are not located near substantial water sources.89

88. See generally LITTLEWORTH & GARNER, supra note 86, at 27-39, 89-98.
89. See generally id.
The groundwater equivalent to riparian rights is the right of the overlying landowner. As with riparian rights holders, all overlying landowners are correlative rights holders. Each overlying landowner has no quantified amount of water they can use, but rather all have an equal right to use the water in the aquifer they overlie, and any use is governed by the reasonable use doctrine. An overlying landowner may only use water on land that overlies the aquifer.90

The third type of water right, and the most common and flexible, is an appropriative right to water, which was established in California law in the case of Irwin v. Phillips.91 To obtain this right to surface water, one must apply for a permit from the State Water Resources Control Board (Water Board). The Water Board considers the application in light of how reasonable the proposal is, taking into consideration the type of use, amount of use, point of diversion, and amount of diversion. The Water Board also considers how much water is available for use in the source proposed. Permits are subject to revocation, and do not give the holder an absolute right to water even while it is in possession.92

Groundwater is not subject to the permit system in California, so to obtain an appropriative right in groundwater, the user need only take the water and apply it to a reasonable use. Appropriative rights are only available in groundwater if the overlayers have not used all of the water that can be safely withdrawn from the aquifer without permanently lowering its level.93

In California a hierarchy of water rights determines who gets water in times of shortage. Riparian rights holders (or overlying landowners when the source is groundwater) are at the top of the hierarchy, and if their reasonable use takes all of the water available, then an appropriative rights holder does not get any water. Among appropriative rights holders, the doctrine of "first in time, first in right" is applicable. The appropriative rights holder with the oldest right to water, or in other words, the one who has been using the water the longest, has first priority after the riparian rights holders. The person who holds the newest appropriative right is the last to receive water, and with a heavily used water source, new rights holders rarely receive water from the source. Finally, all uses of

90. See generally id. at 27-29, 47-57.
91. 5 Cal. 140, 146-147 (1855).
92. See generally LITTLEWORTH & GARNER, supra note 86, at 27-29, 39-47.
93. See generally id. at 27-29, 47-57.
water are subject to the doctrine of reasonable use, as discussed below.\textsuperscript{94} A major benefit of holding an appropriative right is that the water is not restricted by the land, watershed, or overlying limitations. Water obtained by an appropriative rights holder can be used anywhere, which is a benefit in water scarce regions. Any appropriative rights holder who has excess water can sell it and transport it to an area more in need of water and willing to pay for it. Additionally, the amounts of water are quantified in the permit, so the Water Board has exact knowledge of how much water is available for use and who can use how much, thereby making administration much more effective and simplified.\textsuperscript{95}

\textbf{2. The State Water Resources Control Board}

The Water Board is the ultimate water authority in California. It has direct control over the permit system, through which it controls all new appropriations of surface water.\textsuperscript{96} Additionally, the Water Board has considerable control over all types of surface water rights, including riparian rights and pre-1914 appropriative rights, through statutory adjudication,\textsuperscript{97} and through its continuing authority to ensure the state’s water is being used in the most reasonable way.\textsuperscript{98}

The current Water Board is composed of five members, who possess a range of skills and training including law, engineering, water quality control, and business.\textsuperscript{99} The Water Board’s mission statement is to “preserve, enhance and restore the quality of California’s water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations.”\textsuperscript{100} This includes “[t]he task of protecting and enforcing the many uses of water, including the needs of industry, agriculture, municipal districts, and the environment.”\textsuperscript{101}

The Water Board’s predecessor was created under the Water

\begin{footnotes}
\item[94] See generally id. at 27-47, 65-67.
\item[95] See generally id. at 27-39, 39-47, 114-117.
\item[97] \textsc{CAL. WATER CODE} § 2501 (2005).
\item[98] Gray, \textit{supra} note 96, at 747-757.
\item[99] State Water Resources Control Board Website, at <www.swrcb.ca.gov> (visited, Feb. 20, 2006).
\item[100] Id.
\item[101] Id.
\end{footnotes}
Commission Act of 1913.\textsuperscript{102} Around this period cities like Los Angeles were beginning to grow and take more water from around the state. Seeing the need for control, the Act sought to give power over the appropriation of water to one entity controlled by the state, which would decide allocation and use based on the state’s best interest rather than any one actor or entity’s interest.\textsuperscript{103} Initially, the Water Board’s role was limited – it only determined whether water was available in the source in question.\textsuperscript{104} If water was available, the Water Board was required to give the permit.\textsuperscript{105} Over time, as water use became more complicated and demand for water increased, the power and reach of the Water Board expanded as well. Today, “[t]he board may grant, or refuse to grant a permit and may reject any application,”\textsuperscript{106} and it “exercises a broad discretion.”\textsuperscript{107} The Water Board may also revoke permits once granted.\textsuperscript{108}

Today, aside from granting and revoking permits for appropriation, the Water Board performs statutory adjudications,\textsuperscript{109} and resolves disputes among water users. A statutory adjudication is a procedure where the Water Board determines all of the water rights in a certain water system.\textsuperscript{110} A procedure is initiated by petition to the Water Board. The Water Board investigates the system and each claimant’s use of water in that system.\textsuperscript{111} The Water Board then makes a report based upon its investigation, determining the amount of water each user has a right to, the order of the hierarchy, what season users may take water, the point of diversion, and how much, if any, water is left in the stream for further use.\textsuperscript{112} This decision is then binding upon the rights holders, and gives the Water Board a large amount of power to control and manage the water of the state. The Water Board has no jurisdiction over groundwater, and any dispute

\begin{itemize}
\item \textsuperscript{102} Gray, supra note 96, at 747-757.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} \textsc{Cal.Water Code} § 1350 (2005).
\item \textsuperscript{107} Tulare Water Co. v. State Water Commission, 187 Cal. 533, 536 (1921).
\item \textsuperscript{108} Gray, supra note 96, at 747-757.
\item \textsuperscript{110} Id. at 35.
\item \textsuperscript{111} Id. at 36-38.
\item \textsuperscript{112} Id. at 38-39.
\end{itemize}
regarding groundwater is adjudicated before a court of law under the California system.\textsuperscript{113}

3. The Reasonable Use Doctrine

The doctrine of reasonable use is the single most important doctrine in California water law. When the Water Board makes any decision, whether it be granting a permit or completing a statutory adjudication, it must always consider this doctrine. The reasonable use doctrine applies to all water rights and has the power to eliminate them due to noncompliance. The doctrine was codified in California’s state constitution in Article X, § 2, in 1928.\textsuperscript{114}

According to the doctrine, all use must be reasonable, and when a rights holder’s use is not reasonable, the holder loses those rights to that water.\textsuperscript{115} This doctrine applies between riparian and appropriative rights holders,\textsuperscript{116} so if an appropriative rights holder has a more reasonable use than a riparian rights holder, the appropriative rights holder will receive the water despite being lower in the water hierarchy.

A classic example of this is Joslin v. Marin Municipal Water District.\textsuperscript{117} In Marin, the appropriative rights holder (the Water District) was awarded use of the water of a creek over a riparian rights holder (the Joslins).\textsuperscript{118} The Joslins were a local couple who owned land near the stream at issue.\textsuperscript{119} Their “use” was extracting and then selling gravel and rocks from the creek bed that were washed downstream by the force of the flowing water.\textsuperscript{120} When the Water District extracted water, it caused a reduction in the stream’s

\begin{footnotesize}
\begin{enumerate}
\item[113.] Brian E. Gray, California Water Resources Assignment 10, University of California, Hastings College of the Law, (Fall 2005).
\item[114.] The Article reads in part:
\begin{quote}
General welfare requires that 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 water is to be exercised with a view to the reasonable and beneficial use . . . [T]he right to water or to the use . . . of water . . . shall be limited to such water as shall be reasonable required for the beneficial use to be served.
\end{quote}
\item[116.] Peabody v. City of Vallejo, 2 Cal.2d 351, 367 (1935).
\item[117.] 67 Cal.2d 132 (1967) (superceded on other grounds).
\item[118.] \textit{Id.} at 145-146.
\item[119.] \textit{Id.} at 134.
\item[120.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
flow.\textsuperscript{121} The reduction in flow resulted in less gravel and rocks that could be sold after being washed downstream to the Joslins.\textsuperscript{122} The court believed that the Water District’s use of water, supplying residents with water for domestic use, was more reasonable than the Joslins’.\textsuperscript{123} As a result, the court ruled that the appropriative rights holder could take the water to the detriment of the riparian rights holder despite the water hierarchy.\textsuperscript{124}

The definition of reasonable use is complicated. Almost any factor may be examined and considered to determine which use is more reasonable, but essentially it boils down to the social utility of each use.\textsuperscript{125} This doctrine forces users to consider their use of water and to make it as efficient as possible. Thus, the reasonable use doctrine is a powerful tool that all water rights holders must be ever cognizant of, and it has played a prominent role in the development of water law and the use of water resources in California. The doctrine is the centerpiece of the system and one that should be a part of the newly created water regime being proposed for Israel and the Palestinian territories.

While the reasonable use doctrine is embodied in California’s state constitution, that does not limit its applicability to the proposal that encompasses two state or quasi-state entities. The simplest way to include the reasonable use doctrine into this solution is to incorporate it into the new water board’s mandate and rules and to make it obligatory upon the board to consider reasonable use when making all water decisions in the Israeli-Palestinian territories.

The doctrines of riparian rights, overlying rights, and appropriative rights; the existence of a controlling body such as the Water Board that has authority over the distribution and use of all the water within its jurisdiction; and the reasonable use doctrine are the core of the California water law regime. These policies shape California water law’s basic form and determine how it functions, but there are many other laws and doctrines in California water law that Israel and the Palestinian authorities may want to include in the adopted water law. Some of these doctrines include prescription, the public use doctrine, in-stream uses, and environmental protection.

\textsuperscript{121} Id.
\textsuperscript{122} Id. at 134-135.
\textsuperscript{123} Id. at 143-145.
\textsuperscript{124} Id. at 145-146.
\textsuperscript{125} Gray, supra note 115, at 251.
These other doctrines form a major part of California water law, but they are secondary to the doctrines discussed here. Hence, their inclusion is not crucial to the functioning of the system or the distribution of water rights, at least not initially. It would be prudent to leave the decision on inclusion of these principals and doctrines to the new water board, as local customs and traditions may influence these choices.

B. Suggested Changes to California Law to Improve Its Application

This proposal is a starting point for the two parties that allows them to implement a sophisticated system proven to work. But these changes are not intended to displace or overpower local laws or custom. Rather, this proposal is designed to mesh with local systems and traditions. This is important to recognize, as traditional and local systems often have auras of respect, authority, and sophistication of their own. Past attempts and proposals regarding water allocation have tended to apply traditional notions of international water law, such as riparian rights. However, because riparian rights are based upon ownership of land, there is an increased importance placed on land possession and ownership, which has simultaneously heightened tensions and undermined the peace process. This proposal seeks to avoid focusing on riparian rights and allows for local tradition and custom to blend into a system styled on the current Californian water regime.

While the California water regime works well and has been proven in practice, California’s system is not perfect. Because this proposal requires adapting California’s regime to Israel and the Palestinian territories, it is also a great opportunity to examine the problems of the California water regime.

Five changes must be made to the California water system for application in Israel and the Palestinian territories. First, riparian and overlying landowner water rights must be eliminated. The primary reason for this change is that these two types of rights are inherently unstable and unpredictable, making administration of the system and future use and permit applications difficult to process and analyze in a manner that leads to the most efficient and equitable use of water resources. Furthermore, deciding who is a riparian rights holder and

who has the rights to land is the centerpiece of the Israeli-Palestinian water conflict. Utilizing the riparian rights doctrine would focus on those conflicts and in so doing, exacerbate the situation rather than resolve it. Additionally, most other water regimes in the western United States—a region much like the Middle East in terms of climate and scarcity of water resources—have abandoned riparian rights (only Oklahoma and California still include riparian rights in their water law).127

The second proposed change is to give the Water Board jurisdiction over groundwater. Groundwater and surface water are interconnected, and the use and management of one affects the health and viability of the other. Managing them separately, as is the current practice in California, results in problems of control and improper utilization.128 Extensive control of both groundwater and surface water by experts would increase efficient use of water in an equitable manner in a way that can improve the current problems in groundwater overdraft, water pollution, and saltwater intrusion.

The third change makes all uses of water subject to a permit. This would require extending the control of the new water board beyond that of the California Water Board, which does not currently have control over the allocation of groundwater. This change puts more responsibility on the new water board. Not only would the water board monitor the water, but it would give permits to users, which requires users to consider the impact of their water use on the entire system. Furthermore, if all uses are subject to a permit, then the water board can keep track of who is using how much water and where they are using it. This would lead to a better understanding of the system and enable authorities to determine where room for more and better use exists while eliminating waste and inefficiencies. By increasing efficiency, reducing waste, and helping ensure that the most reasonable user has access to water, the permit requirement benefits the entire region.

Additionally, a large percentage of the water in Israel and the Palestinian territories is groundwater. For many people, groundwater is their only source of water. Creating a water board with the power

128. For some general examples of poorly managed interconnected surface water and groundwater sources that have resulted in litigation lasting many years, see City of Barstow v. Mohave Water Agency, 23 Cal.4th 1224 (2000); City of Los Angeles v. City of San Fernando, 14 Cal.3d 199 (1975).
to control groundwater is thus vital.

Fourth, the logistics of the water board’s membership requires change. In California, there are five members on the Water Board, all of whom are from California and who have jurisdiction only over California. This system reduces bias between competing entities and loyalties. The California Water Board is only concerned with the economics and policies of the State of California; all of the people the Water Board serves are represented by one government. On the other hand, the proposed water board for Israel and the Palestinian territories would need to consider two states and their separate policies. The potential political situation facing the proposed water board therefore lacks the same neutral quality found in California. Biases, stereotypes, and nationalism are all potential problems.

To avoid bias, the water board should have seven members rather than five. The board should include two Israelis, two Palestinians, and three independent and neutral members with no connections to either Israel or the Palestinian territories. This mechanism would minimize bias and shift the focus to the water region as a whole. Such a water board would be better suited to ensure the highest reasonable quality for water in the region, and allocate that water to achieve the optimum balance of beneficial uses.

Having more than one neutral member makes it more difficult for one member to be bribed or persuaded to favor either Israel or the Palestinian territories. This is important because reasonable use of water is a malleable idea that could be used unfairly. While bias and favoritism can never be completely eliminated, they can be minimized, which is what this proposal accomplishes. This change is especially important because the water board will have jurisdiction over all water and will determine where it goes. Great power should be wielded by a neutral body that makes decisions based on law rather than political affiliations. The water board should also have more local members (those from Israel or the Palestinian territories) than foreign neutral members, since the people who live under the

130. The board could have more than seven members and still fulfill the purposes of the proposal. The important features that the board should have for optimum success are: an odd number of members, more than one neutral member, an equal number of members who represent Israel and the Palestinian territories, and fewer neutral members than there are Israeli and Palestinian members combined.
regime should also be able to control it.

This type of nonpartisan board has been successfully implemented by other supranational bodies. The Special Court for Sierra Leone has a court composed of eleven judges.132 A majority of the judges, six, are from Sierra Leone.133 The remaining five judges come from all over the world including North America, Egypt, Africa, and Asia.134 The majority of judges were appointed by the United Nations and the remainder by Sierra Leone.135 The Special Tribunal for Cambodia will likewise be composed of an international mix of judges but with a majority of local Cambodians.136 The existence and success of international bodies not only proves that these types of boards are workable, but they can serve as examples of how the board membership should be selected and composed.

The fifth and final recommended change is the elimination, or non-adoption, of the doctrine of prescription. This doctrine essentially allows one party to obtain, or take, another party's water right if certain conditions are met, including non-use by the original party. Although it is important to allow Israel and the Palestinian territories to include doctrines that they feel best reflect their culture, both parties would be better off not adopting the doctrine of prescription. Like riparian rights, prescription leads to uncertainty and conflict over land and resources. In a relationship marked by conflict and violence, the doctrine of prescription would only increase tensions and thus should be avoided if possible. Furthermore, it is not even entirely clear that the doctrine of prescription still exists within California law. Several decisions have raised this doubt, and have at a minimum sought to limit applications of the doctrine of prescription.137 This doctrine should not be included in the creation of a water board for Israel and the Palestinian territories.

133. Id.
134. Id.
135. Id.
137. See City of Barstow v. Mohave Water Agency, 23 Cal.4th 1224 (2000); People v. Shirokow, 26 Cal.3d 301 (1980); City of Los Angeles v. City of San Fernando, 14 Cal.3d 199 (1975); In re Waters of San Gregorio Creek Stream System, No. 355792 (San Mateo Supr. Ct. filed Apr. 28, 1992).
C. The Advantages of Using the California System

Applying California water law to the entire region of Israel and the Palestinian territories is viable because (1) California and the Israeli-Palestinian region have similar natural water supplies and similar demands on resources; (2) California water law is a mature system that can provide knowledge, commentary, and background and can be implemented immediately; and (3) a new alternative is needed since past attempts and applications of international law have not been successful.

1. Similarities of Water Supply and Demand

First, both California and the Israeli-Palestinian territories have similar climate conditions, a demand-supply imbalance, and types of competing uses. Large portions of the two regions are characterized as semi-arid\(^1\) and desert, with large disparities of rainfall between seasons. In both regions, water resources are not always located close to areas of demand, which means that water must be stored and transferred. Both regions typically get rain during the winter and spring months of the year, but not in the summer and fall seasons. Additionally, snowmelt in the spring creates a relative abundance of water for a few weeks a year and a shortage the remainder of the year. This means water is scarcer most of the year than annual statistics would reveal. For example, during some years, the flow of water in the Jordan River is 50 percent lower in September than in February.\(^{139}\)

Precipitation also varies greatly from year to year in both regions. Two or three years of drought may be followed by two or three years of abundance. For example, the lowest recorded annual flow of the Jordan River is 380 million cubic meters (MCM) per year, and the highest recorded annual flow is 1600 MCM, four times as much.\(^{140}\) All of this combines to make water management and allocation difficult, even without adding war and politics into the equation. Because the California water system is built around these types of constraints and is equipped to handle these types of problems, it is a nice fit for the climatic setting of Israel and the Palestinian territories.

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139. ELMUSA, supra note 37, at 70.
140. Id. at 69.
California and Israel and the Palestinian territories face the same problem of a growing demand for limited water resources that are already utilized to their limits or beyond. As discussed above, competition and scarcity are key problems to the current water conflict; the Israelis and Palestinians are fighting over water because supply cannot meet demand. The California system has also been molded and defined by competing parties, although less violently. There are legal fights between Northern and Southern California over water rights, just as Israel and the Palestinians have fought over water. Southern Californians have taken water and transported it to the south for their cities and farms; so too have the Israelis taken water from the Palestinian territories and moved it to their cities and farms. In this sense, the current water law of California is designed to cope with conditions that exist in Israel and the Palestinian territories.

Within the geographical context, there is a battle between environmentalists, agriculture proponents, and the people and industries located in the cities. In terms of water usage, these different groups align on different issues, creating a complex array of lobbyists. How to distribute water between these groups so as to best serve the culture, economy, and future of the state or region is complicated. The California system has experience working through these demands not only in the current modern context, but has consistently done so over the state’s history as well. The conflict for water between agriculture and urban uses is present in Israel and the Palestinian territories perhaps to an even greater extent than in California. Although environmental concerns may not be a top priority for Israelis and Palestinians (due to the shortage of water even for domestic needs), its legal system must nevertheless be able to handle such pressures effectively. California's water law system has proven adept at handling such pressures by making the Water Board a neutral arbitrator guided by established rules of law rather than emotion and politics.

Because of the similarities in supply and use of water resources in California and in Israel and the Palestinian territories, California water law is specifically adapted to handle the general type of conditions and situations that currently face Israel and the Palestinian

141. California water law was not only flexible but propelled change in the California economy when it was first developing and reliant on gold mining. Water law continued to facilitate change when the economy shifted away from gold mining to farming and agriculture, and more recently again when the economy shifted focus to large cities, micro-technology, and environmental protection.
territories. Therefore, the California water regime is a smart choice to employ there.

2. The California System is a Legal Transplant

The theory of legal transplants suggests that importing a system of law that is already developed and which has already worked out many of its problems is the best way, particularly for developing nations, to acquire working law quickly.\textsuperscript{142} Legal transplants are so important that they have been described as "the most fertile source of legal development."\textsuperscript{143} California water law can be one such legal transplant.

The California water law regime addresses some of the most complex conditions of water demand and supply in the world, and consequently has evolved to become one of the most sophisticated and complex legal water systems. It brings with it over 150 years of case law, discussion, legislation, and application to many of the same types of problems that are currently facing the people of Israel and the Palestinian territories. Additionally, it is still in use and developing further. California water law would provide any country with a rich source of history and analysis that would be invaluable to establishing a new system of law. It thus qualifies as a very competent legal transplant.

3. All Other Proposals Have Been Inadequate

Finally, the proposal is viable by default. There is currently no peace in Israel and the Palestinian territories and the distribution and use of water in the region is a mess. The current system is not working for either side, so there is no loss in forgoing it. Choosing to use the California water regime would be a negotiated solution that ignores the traditional ideas and principals of international water rights, and instead focuses on doctrines such as reasonable use and a neutral arbitrator.

Some may argue that Israel would not change the status quo since it currently has the advantage through control of water resources in the region. However, by depriving the Palestinians of water, while simultaneously using water for themselves, they are


\textsuperscript{143.} ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95 (2d ed. 1993).
creating unrest, violence, and instability in the region and teaching another generation of Palestinians to view the Israelis, rightly or wrongly, as their enemies. If Israel were to allocate water more fairly, it would enhance their image around the world, including within the Arab and Middle Eastern nations, where they find their most vocal critics and enemies. By making such an agreement, Israel itself actually has much to gain. Actors such as the United States, the United Nations, and European nations who have influence over the Israeli government should do what they can to stress this to them in promoting any solution. These advantages can only be realized if changes are made to the current distribution of water resources in the region, and such changes will likely involve a more integral peace agreement.

V. Conclusion

The sharing of transnational water resources is nothing new. Water has been the center of conflict and subsequent solutions throughout history. The proposal that Israel and the Palestinian territories adopt a modified version of California water law could work in theory, especially if the lessons and examples from past agreements and experiences can be observed and utilized.

The current situation of control, distribution, and use of water in Israel and the Palestinian territories is poor. There is excessive use of resources, water pollution, and inequitable control and distribution of water. Water is essential to life and the Israelis and Palestinians both idealize water as a connection to their holy land. All of these factors have contributed to inefficient use and waste of water.

To solve this problem, a water board that would have jurisdiction over the water in both Israel and the Palestinian territories should be created. This board would make all decisions regarding the use and allocation of water for the two entities, treating them equally and as one region. This board would apply the current system of California water law, with a couple of modifications. This proposal is viable because California is geographically similar to Israel and the Palestinian territories in terms of water supply and demand.

The description above about the transfer of water from the Negev to the West Bank may not be the outcome of a water board decision, but it is one possibility among many others that would exist if the parties adopted a system like this. This solution should alleviate fears of one side taking or withholding water because Israel and the
Palestinian territories would be considered one entity in regards to water resources. All the users within the region would have equal rights in front of the water board, and the board would make decisions to benefit the area as a whole. In essence, this proposal would remove politics from this subject area.

The existence of a water sharing agreement between Israel and Jordan over the waters of the Jordan River and its tributaries is clear evidence that a similar but broader agreement could be reached between Israel and the Palestinians, and this proposal is one that they should seriously consider.

As the late King Hussein of Jordan once remarked about his dealing with Israel:

[w]e are talking about two peoples who were destined to live together in a very small region, and who had to figure out how to resolve our common problems. . . . Every aspect of our lives was interrelated in some way or another. And simply to ignore that was something I could not understand. One had to do something, one had to explore what was possible.¹⁴⁴

In conjunction with King Hussein’s optimism, this note’s proposal can show Israelis, Palestinians, and the rest of the world what type of change is possible in the region.

¹⁴⁴ WARD, supra note 14, at 206.