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Water Under the Bridge?

Reliability and Conflict in California Water, Part 1

By Tim Stroshane

Water observers of yesteryear—like Henry Holsinger of the California Water Project Authority and water lawyer Walter M. Gleason—worried that the Central Valley Project (CVP), and later the State Water Project (SWP), would cause legal havoc, even though these big projects were to expand California's reliable water supply. They saw, even before construction of the CVP and SWP, the potential for constitutional, ecological, and economic controversies, and that resolving them would be highly political.

"Water rights are social policy in times of shortage," says water lawyer Scott Slater.[1]

To understand where California water politics is going, it helps to step back to explain California water through the trend of its human institutions. Some might consider this to be "water under the bridge," yesterday's news becoming today's fishwrap. So be it.

Institutions Californians create to govern water allocation, management, and stewardship define and structure the state's water future.[2] Two such institutions are the legal doctrines of riparian and appropriative rights. They historically shape two central concerns of California water policy: reliability and conflict.

Water supply reliability receded as developed supplies expanded, from the standpoint of water and environmental law. As supplies expanded and overreached the carrying capacity of California's rivers and streams, legal conflict flourished. Only institutional changes wrought by modern environmentalism, like the federal Clean Water Act, made possible the reality that Californians could control their water institutions and in the process dream of living within their hydraulic and hydrological means.

Violent Changes, Utopian Hopes

Decades before the remarkable spate of environmental legislation of the 1960s and 1970s, government officials still needed to know what impacts, consequences, or "critical paths" of actions would follow from choosing to build gargantuan water projects. Then, as now, they hired scientists, economists, engineers, and lawyers to do studies.

The U.S. Bureau of Reclamation undertook its "Central Valley Project Studies," a series of nearly 30 studies dealing with various technical, legal, economic, financial, and ecological issues that were posed by the prospect of actually constructing and operating the Central Valley Project. The CVP studies were directed by a University of Chicago geographer named Harlan Barrows.

In the fall of 1942, A.D. Edmonston, then acting director of the California Water Project Authority (CWPA), wrote to Dr. Barrows to recommend two questions that were in all likelihood crafted by Henry Holsinger, an associate lawyer with the CWPA:

"**Problem No. 25:** Is there necessity for a comprehensive adjudication of rights to the use of water on streams the natural regimen of which will be altered by operation of the [Central Valley Project]?

"**Problem No. 26:** If there is need for such comprehensive adjudication, can the same be accomplished under existing law, and if not, what enabling legislation is necessary?"

"Never in the history of the State has there been an instance where a water conservation project...involved such violent and extensive changes in the regimen of any stream."

Through Thanksgiving and early December 1942, Holsinger fashioned a memorandum arguing the Bureau should include these two problems in the CVP studies. Even today, it is a lucid statement of how property rights in water dictate operations and, indeed, the fundamental *design* of the Central Valley Project (CVP).[3]

The memo apparently persuaded Barrows in Chicago, who in turn recommended including the legal problems to Bureau Commissioner John C. Page in Washington, DC, in early 1943.

"Never in the history of the State has there been an instance where a water conservation project was put in operation which involved such violent and extensive changes in the regimen of any stream," a somber Holsinger wrote. These changes, he suggested, were to be inserted into a property regime whose "history is one of continuous conflict and the resolution thereof," a history that was hardly finished.[4]

"The enormous expense of litigation over water rights," continued Holsinger, "has often been deplored, involving time consuming, expensive and all too frequently fruitless

*Tim Stroshane edits and publishes **SPILLWAY**.*

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[lawsuits]; fruitless because decrees rendered were piecemeal and for that reason unenforcible [*sic*] and because other interests on the stream, although intimately involved[,] were not made parties or because of technical defects" in the cases themselves.

Holsinger sought to shatter any naive optimism in the Bureau's leadership about the CVP's legal status in California. "It would be pleasant to anticipate that all such difficulties are now at an end and that this vast project, notwithstanding its radical alteration of stream regimen, will be peaceably accepted by those affected thereby without controversy, without objection, and without resorting to litigation. However, attention to realities should convince any reasonable mind that any such anticipation is utopian and not reasonably possible of fulfillment."[5]

Riparian Rights

Such hopes were utopian not only because of human frailties such as greed. Utopian hopes for the Central Valley Project to provide ample water supplies to CVP contractors were likely to founder on conflicts between riparian and appropriative doctrines coexisting in an arid region, feared Holsinger.

In California, tensions between riparian and appropriative right holders often erupted into litigation, going back to the early days of statehood. Riparian rights entail the right to use water as a result of owning property adjacent to a natural stream or lake. They give the owner a right to reasonable, beneficial use of water on that property.[6] Riparian doctrine was brought to California when the new state in 1850 adopted English common law for its own legal system.

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Riparian rights establish a clear connection of waters flowing in a stream to the land adjacent where the riparian owner may use the water. In effect, they respect and codify an ecological—as well as economic—relationship between human use of both water and land.

Of course riparian rights may also benefit capitalist production and reproduction (e.g., home life, domestic use). But these rights are still correlative among all riparian owners along a stream; each owner has a share of stream flows, and each must ensure flows of adequate quantity and quality to avoid injury to downstream riparians. Riparian right holders participate in a hydraulic commons.

> The more appropriators on a stream, the more competition in dry years, and the less reliable are the more junior rights to water supply obtained through the state's appropriative permit process—including those of the CVP and SWP.

Historically, riparian rights were also associated with land monopoly.[7] The largest whipping boy of early California land monopoly was Miller and Lux, the great cattle baronage of central California and the San Joaquin Valley.[8] Miller and Lux was a major cattle and beef marketing corporation whose empire reached from southern Oregon and northern Nevada to San Francisco and the northern San Joaquin Valley.[9] Miller and Lux did much to shape California's water law and jurisprudence. Its hydro-legacy was achieved largely through court case precedents—including establishment of riparian priorities over those of appropriators—but the corporation also thoroughly remade much of central California's land and waterscapes to benefit its beef production and water sales.[10]

"Riparianism pressed to the limits of its logic," the U.S. Supreme Court wrote in *Gerlach v. United States* case in June 1950, "enabled one to play dog-in-the-manger...[in which one] could enforce by injunction his bare technical right to have the natural flow of the stream, even if he was getting no substantial benefit from it."[11]

In 1928 California voters amended their state constitution to ensure the criterion of reasonable beneficial use would govern all water uses (including riparians) in perpetuity, making "dog-in-the-manger" games with water impossible today.[12] Yet reasonable use also makes water supplies less reliable and more subject to litigation and political conflict. After all, what's reasonable?

Appropriation's Elusive Surplus

In California, the appropriative doctrine is laid atop the riparian doctrine's allocations in the state's watersheds. Land owners along streams typically have riparian rights. To the

extent their rights do not require all the flows of a river or stream, then, California's hydro-legal minds reason, there is therefore a surplus.

"All waters in excess of the reasonable and beneficial needs of lawful users, including riparians, are considered unappropriated waters and are available for beneficial use," write water lawyers Arthur Littleworth and Eric Garner. Exercise of this logic was pivotal to building California's numerous water projects, including the CVP and SWP.[13]

Appropriative rights were invented by Gold Rush miners staking claims for mines on public lands where they could claim no riparian rights (since the U.S. Government owned the land they mined). Appropriative rights involve the right to divert and use a specific quantity of water for reasonable, beneficial use in a specific location. Littleworth and Garner note that these rights involve a "first-in-time, first-in-right" principle. The first individual on a stream to divert and use water beneficially and reasonably has an appropriative right superior to all those who come after to that stream.[14] Only appropriators have their rights quantified. Since 1914, appropriators apply to the State for permits to appropriate water.[15]

Appropriative rights sunder ecological relationships of water to land. They make it possible to mobilize water beyond mere watershed or place, to liberate water from constraints of native gravity by economic and technological means, and to incorporate it into circuits of modern capitalist production and urban life. The actual place of use of the water may in California be hundreds of miles from their origin in the stream as with the CVP and SWP.

As water becomes property treated as a set of investment-backed expectations for future income and profit, big public water projects face the collision of property rights with ecological reality in times of drought.

"When the amount of water available is insufficient to meet the needs of all appropriators, traditional case law holds that junior appropriators can be prevented from exercising their rights until the water rights of senior appropriators are satisfied," write Littleworth and Garner. "However, this rule seems impractical today, since the cities and water districts providing urban water supplies generally hold appropriative rights. Because it is generally unrealistic to terminate such uses completely, courts can be seen to be moving way from a strict application of the first-in-time doctrine in order to protect established uses."[16]

The pecking order of appropriative priorities seems arbitrary to some when droughts occur—especially when any of today's water users get pecked. Littleworth, for one, looks forward to a time in California when a doctrine of "equitable apportionment" would supplant water right priorities, replacing them with a commons of appropriative rights holders.

Yet appropriative rights have also been able instruments of land monopolists like James Ben Ali Haggin, Miller and Lux's cattle rival of the 19th Century in Kern County. The contemporary Kern County Land Company descends from Haggin's empire. Clearly, routes to land baronage in California run through either type of water right. Strategies to address unequal political and economic power in living watersheds through equitable apportionment, however, are not the strong suit of this as-yet emerging doctrine.[17]

Courtesy of California Department of Water Resources.

Grant Line Canal in the San Joaquin River Delta looking west. Delta water quality is a lightning rod for conflict over water supply reliability in California's major water projects.

Through wet years, riparian and appropriative doctrines co-exist, though uneasily. Right holders know that next year could bring dry conditions and conflict. The more appropriators on a stream, the more competition for water in dry years, and the less reliable are the more junior rights to water supply obtained through the state's appropriative permit process—including those of the CVP and SWP.[18]

When the state and federal governments planned the big water projects, they knew they would have to appropriate waters then believed to be surplus in the state's major watersheds. Henry Holsinger, in his lawyerly way, doubted a surplus in the Sacramento Valley could be truly known: "If assumptions are made [about the definition of water rights on the Sacramento], someone must take the risk of the accuracy thereof...but in the final analysis, they consist wholely [*sic*] and entirely in assumptions.

"Any and all investigations [into quantifying water rights] are evidentiary merely," and without any legal force, he wrote in 1942.[19] Could we ask Henry Holsinger today, he might offer numbers pulled from the air as of similar legal heft in the CVP's position on the Sacramento, and of the SWP on the Feather River.

Miller and Lux and Monopoly

In early 1939, the Bureau of Reclamation acquired from notorious land monopolist Miller and Lux all the non-riparian water rights—and agreed to store and replace (but not own) riparian water rights—to the San Joaquin River.

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Miller and Lux's rights on the San Joaquin River comprised nearly the entire flow of that river and were jealously held by several company subsidiaries.[20] Water covered by the Bureau's acquisition would be impounded by a new dam constructed by the Bureau at Friant where the river arrives at the edge of the San Joaquin Valley floor. Water at Friant Dam would then be diverted via canals north to Madera and south to Kern and Tulare county farmers on the east side of the Valley. River channel flows would all but cease below Friant.[21]

This action would cut off water to the subsidiaries' San Joaquin riparian swamp and grasslands. The solution was for the Bureau to provide Miller and Lux's riparian lands with replacement water stored at Shasta Dam north of Redding, released into the Sacramento River for eventual diversion in the Delta via the Delta Cross Channel and exported from the Delta by pumps installed at Tracy for lift into the Delta-Mendota Canal (DMC). The DMC would snake its way through the San Joaquin Valley to irrigate lands of the "Exchange Contractors" (as Miller & Lux's descendant companies are known today).

> With the State Water Project, the State of California became a water developer as well as a water regulator, what Manteca farmer and south Delta water official Alex Hildebrand refers to as "the predatory nature of government."

Comprehensive Definition

Holsinger saw the CVP as vulnerable to legal challenge on at least two key fronts: the Sacramento River, and the San Joaquin River (in particular from the Exchange Contractors). He "clearly perceived that the stability of the water rights acquired by the United States for the purposes of the San Joaquin division [of the CVP] is largely dependent upon the rights available to the United States for exercise for project purposes of the Sacramento River..."[22] The United States acquired the senior-most rights on the San Joaquin River from the Miller & Lux subsidiaries, but its rights on the Sacramento River were "of inferior priority."[23]

To Holsinger, as soon as "the CVP fails to discharge that commitment" of providing Sacramento River water through the Delta Mendota Canal to the northern San Joaquin Valley (as would occur during droughts), the Bureau must release back to the Exchange Contractors along the San Joaquin River water stored at Friant for Madera, Tulare, and Kern counties since the Exchange Contractors retain their riparian rights on the San Joaquin.[24]

Holsinger expressed deep concern about the legal threats to the CVP's low priority (appropriative) rights to surplus Sacramento River water as well. "On the Sacramento diversion, there are some 300 intervening users between the point of storage [at Shasta Dam] and the point of diversion [in the Delta and again at Tracy] and along the Sacramento River and in the vicinity of the Delta. Whether...adequate amounts of water will be available at the point of diversion on the Sacramento River, is largely dependent upon the will of the existing users on the approximately 300 mile intervening course between the point of diversion and the point of storage" who could challenge CVP operations for failing in any way to provide Sacramento River users with flows sufficient to fulfill their water rights.[25]

Only a "comprehensive definition" of all water rights up and down the Sacramento Valley would make CVP deliveries truly reliable and protect existing water rights holders at the same time, wrote Holsinger. If the CVP went ahead, he observed, San Joaquin Valley agricultural development would expand on the promise of replacement Sacramento River irrigation water. Without legal certainties in place, "to withdraw that water would cause harm in the San Joaquin Valley and place the United States in a disastrous predicament."

Constitutional issues are at stake in promises made by these big projects to deliver water for agricultural and urban development. They involve both reasonable water use and just compensation for property taken by the government. To export water from one watershed to another creates future expectations based on today's investments. To withdraw or reallocate water breaks promises, most solemnly made. Yet to justify the appropriations—continuously and perpetually—the uses to which water is put must always and forever be reasonable. And what is considered "reasonable" can change, a stance in water policy that is also reasonable to assume.

While Holsinger focused his memorandum to Barrows on riparian right holders along the Sacramento, he likely had in mind "area of origins" reservations set aside in state law in the early 1930s as well.[26] These laws reserve water in source areas (for example, rural counties with ample water resources) for their future needs to prevent "Owens Valley" scenarios from recurring. They place a theoretical limit on how much and for how long the CVP and SWP—and even other major water projects—will be able to take water and move it far from its origins.

The point of this is not that comprehensive definition or quantification of water rights should have occurred or should now occur. Rather, Holsinger foresaw that huge capital investments made for the CVP could be derailed or undermined by a water right holder insisting on a quantity that would legally impair the CVP's contractual delivery commitments, and usher in perhaps a balkanizing spiral of litigation, undermining the very investment California and the U.S. government made to increase the state's water supply reliability. His analysis highlights the potential for compensable property takings by the government should water be withdrawn.

In March 1943, Bureau Commissioner John Page declined to include proposed Problems 25 and 26 in the CVP studies in a terse message to the new WPA director Edward Hyatt, despite Barrows' and Edmonston's earlier recommendations.[27]

Water Rights and Predatory Government

In the 1950s, water lawyer Walter Gleason, whose career in California water law began in the early 1920s and would last nearly seven decades, saw dangers of unchecked appropriative rights for the Central Valley and the areas of origins.

Gleason saw unquantified riparian rights as exceptionally vulnerable to ostensibly junior appropriative right holders moving in for what news media colorfully refer to as a "water grab." Appropriators moving into a watershed challenge riparians on the grounds that their water usage may be unreasonable, or that an unreasonable amount may be diverted. Protracted litigation then ensued in which an existing user's "water duty" had to be established and his or her water right effectively quantified.

Gleason believed that the new State Water Project (SWP) would create opportunities for litigious water grabs on an unprecedented scale aimed at the north.. Southern California's cities would seek northern California's "surplus waters" (which Gleason considered everything above the Tehachapis) in litigious invasion for water, with assistance from the state of California.

Courtesy of California Department of Water Resource

Governor Edmund G. "Pat" Brown on the stump for the State Water Project in Santa Clara County.

"Water right-wise [*sic*]," Gleason wrote on the eve of the November 1960 election that saw John Kennedy elected President and the State Water Project bonds narrowly approved by California voters, "the end result of this new Water Plan will be exactly the same as if all of Southern California were to be physically uprooted and set down at Tracy (i.e., next to Delta). In short, the length of the aqueduct between the Tracy Pumping Plant [at the north end of the California Aqueduct] is immaterial since the South will...be sitting next to the Delta with a right to receive water out of the Delta (through its 'water contract' with the State).

"A direct consequence of this new 'hydrology'," he continued, "is that for the first time in history the South will become directly and legally interested in the water resources of the Central Valley and the water rights (existing and prospective) in connection therewith."[28] California's regions would be bound together as never before, and Gleason worried that technological prowess would outrun legal insight into the new system.

Prior to the State Water Project, Southern California "might as well be in Mexico insofar as any present ability to take on or interfere with any water or water rights in Northern California [*is*] concerned," Gleason wrote. But passage of the 1960 water bond would place the state of California in position to challenge water users for reasonableness on behalf of State water contractors (of which the Metropolitan Water District is the largest).

With southern California's insertion into the Central Valley watersheds of the Sacramento-San Joaquin River Delta, Gleason maintained that no vested rights in northern California (which he defined as waters north of the Tehachapis) are safe from predation by the state running interference for southern California.[29]

"In the absence of comprehensive adjudication," wrote Gleason, "there will be no effective and readily ascertainable demarcation (i.e., 'boundary line') between 'surplus' (on the one side) and 'non-surplus' on the other. In the absence of such an obligatory definition of these two correlatives, there can be no effective (i.e., automatic) controls to delimit this 'export' of water [from the North to the South]. When this 'hard reality' is coupled with the indisputable fact that it will be directly to the mutual interest of both the State and the South to maintain this 'export flow to the South' as continuously and on as large a scale as possible, the inevitability of direct and serious conflict between these vested water rights of the North and these 'export allocations' is, I believe, patent."[30]

With the State Water Project (SWP), the state of California became a water developer as well as a water regulator. The state and federal projects appropriated the two largest blocs of allegedly surplus waters in California.[31]

In its quest to bring reliability to California's future water supply, the state's conflict of interest would limit its capacity to protect Californians and their watersheds from what Manteca-area farmer and south Delta water official Alex Hildebrand refers to as "the predatory nature of government."[32]

The Quality of Delta Water

Water lawyers, like most of us, do not make good soothsayers. Not only do events conspire to drive history from its ruts, but human institutions also undergo radical shifts in social, economic, and even ecological priorities. The rise of environmentalism in the 1960s punctuated the prerogatives of appropriative water rights as a property institution.

Once the big projects were completed, neither a bare-knuckled southern California appropriative water grab of the

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kind envisioned by Walter Gleason, nor a paralyzing avalanche of Sacramento Valley riparian "dog-in-the-manger" litigation feared by Henry Holsinger occurred.

But by the 1970s, salinization of Delta freshwater channels—a common pool from which Delta riparian land owners draw their irrigation water—made clear that storage and diversions of the big projects exceeded the waters available from Central Valley watersheds. Flows left in Delta streams were too low to push back the tidal salt waters of San Francisco Bay, harming Delta farmers holding riparian water rights.

The struggle over Delta water quality began in the 1920s when rice growers began diverting irrigation water from the Sacramento River during dry years. But as historians W. Turrentine Jackson and Alan Paterson correctly observed in 1977, "thanks to the passage of the Federal Water Pollution Control Act of 1965 and a growing national interest in air and water pollution, the history of Delta water quality was just beginning."[33]

> The goal of water quality standards is to protect the use value of water, not water's exchange value as a property right, commodity, and income source.

After the state reorganized its water quality control and water rights regulatory functions into the State Water Resources Control Board in 1967, the Board issued a series of decisions regulating new and old CVP permits and the newer SWP facilities. These decisions spawned legal battles, water quality control plans (as required by federal water pollution control regulations), and more legal battles. These battles reached their peak when the Board simultaneously adopted in 1978 a Delta water quality control plan and Decision 1478 that set stringent Delta water quality standards and assigned responsibility for meeting the standards—by adjustment of water rights—to the CVP and SWP.

Eight separate lawsuits before the California First District Appeals Court challenged the authority of the State Water Resources Control Board under the federal Clean Water Act and the state's Porter Cologne Water Control Act to enforce water quality standards by amending the appropriative water rights of the CVP and SWP. Presiding appellate judge John Racanelli authored a unanimous (3-0) decision handed down in June 1986.[34]

While upholding the Board's authority to adopt water quality control plans and use its water rights function to enforce standards in the plan, Judge Racanelli found that the Board erred in two ways. First, the Board assumed that stream flows required to meet water quality standards were necessary only to protect water rights in the Delta against impairment by the big projects. But Racanelli corrected the Board, saying that the Clean Water Act requires that "beneficial uses" are what need protection from water quality regulations, not water rights.

The Board's second error lay in assuming that only the state and federal projects were accountable for rectifying water quality problems in the Delta. As a result, "the Board erroneously based its water quality objectives upon the unjustified premise that upstream users retained unlimited access to upstream waters while the projects and Delta parties were entitled only to share the remaining water flows."[35]

Judge Racanelli echoed Holsinger and Gleason's observations that a comprehensive adjudication of Sacramento Valley water rights, however desirable, was not practical.[36]

But the genius of Racanelli's opinion lay in his insistence that "the trial court's basic premise—that water quality protection hinges on ownership of water rights—is faulty....[T]he Board's authority in setting water quality standards is not limited to the protection of water rights, but extends to the protection of all beneficial uses from degradation of water quality, even if the resulting water quality exceeds that provided by water rights," he wrote.[37]

In other words, the goal of water quality standards is to protect the use value of water, not water's exchange value as a property right, commodity, and income source.

State Board Horror

State and federal water contractors (those entities contracting for water service from the CVP and SWP in the San Joaquin Valley and in Southern California) argued also that the Board failed to protect the contractors' rights to use Delta water for a dependable water supply, claiming to do otherwise was a compensable property taking under Article 5 of the U.S. Constitution and an impairment of their contract rights.

Racanelli affirmed the trial court's opinion that no property taking had occurred because "the federal contractors have no water rights of their own but are subject to the limitations of the permits held by the CVP," which are appropriative water rights, subject to the Board's reserved jurisdiction, permit terms, and the state constitution's prohibitions on unreasonable water use.[38] Moreover, the contracts themselves limit both state and federal projects' liability for deliveries during droughts. "Logically," wrote Racanelli, "neither the project nor the contractors could have any reasonable expectation of certainty that the agreed quantity of water will be delivered."[39]

Judge Racanelli tacitly acknowledged what only environmentalists knew to be true at the time, that Central Valley rivers were over-appropriated by the CVP and SWP; water exports dreamed of in the 1957 California Water Plan could never be realized. The big projects starved important fisheries and Delta agriculture of fresh water to which both were entitled.

The Racanelli decision (sometimes called the Delta Water

Cases) ultimately became the intellectual prism through which appropriative, riparian, and instream water uses are now viewed, as well as the legal foundation on which the CalFED Bay-Delta Program edifice has been erected so, well, unreliably.

Part 2 to come: Bay-Delta Hearings, the 1995 WQCP, and the river agreements.

NOTES

1. Scott Slater, attorney with Hatch & Parent, Santa Barbara, from public comments at "Water Rights, Water Wrongs: Learning from the Past, Looking to the Future," conference sponsored by the San Francisco Estuary Institute, Oakland, CA, 2 November 1999.

2. My guiding light for this approach is economic historian Karl Polanyi, author of The Great Transformation: The Political and Economic Origins of Our Time*, Boston, MA: Beacon Press, 1944, 1957, p. 4.*

3. Holsinger would go on to become chief legal counsel of the California Division of Water Rights in the late 1940s and 1950s, a predecessor agency of the State Water Resources Control Board.

4. Henry Holsinger, "Necessity for Comprehensive Adjudication of Water Rights on the Sacramento and San Joaquin Rivers in Aid of the Central Valley Project," memorandum manuscript dated 10 December 1942, p. 2. Hereafter, Holsinger, "Necessity."

5. "Necessity," ibid.

6. Arthur Littleworth and Eric Garner, California Water, *Point Arena, CA: Solano Press Books, 1995, p. 29. Of riparian water rights they add, "A riparian right is not gained by use, nor generally lost by disuse, but is part and parcel of the land."* Ibid.

7. See M. Catherine Miller, Flooding the Courtroom: Law and Water in the Far West*, Lincoln, NE: University of Nebraska Press, 1993; and David Igler,* Industrial Cowboys: Miller and Lux and the Transformation of the Far West, 1850 to 1920*, Berkeley, CA: University of California Press, 2001.*

8. According to Igler, ibid.*, Miller and Lux ranches encompassed over half a million acres of land in four major areas of California: the Kern River delta northwest of Bakersfield (near rival Haggin's cattle ranches), lands along the San Joaquin River from Mendota almost to the Stanislaus County line, major holdings around Gilroy, and Lux's Buri Buri ranch at the north end of the San Francisco Peninsula.*

9. California Department of Public Works, Feasibility of Acquiring the Central Valley Project*, March 1952, pp. 57-60.*

10. For that history, see M. Catherine Miller, Flooding the Courtrooms, op. cit.*, note 8 above. Miller and Lux achieved this status through its vast ranches' fencing enclosures (contributing greatly to populist sentiment in early California), industrialization of cattle raising, racial segmentation of industrial labor markets, marshaling of capital to finance and construct a complex latticework of canals diverting the waters of the San Joaquin and Kern rivers onto its swamp and grasslands. See Igler,* op. cit.*, note 9 above.*

11. Gerlach et al v. United States*, June 1950, manuscript from Harry Barnes' files at the Water Resources Center Archive, University of California, Berkeley, Barnes file number 179-2, p. 17. Also cited as 76 F.Supp. 87.*

12. California Constitution, Article X, Section 2.

13. Littleworth and Garner, op. cit.*, note 6, p. 39. "Water that is diverted pursuant to an appropriative right may be used on or in connection with lands away from streams or outside a watershed, as well as on lands contiguous to streams. However, this use may be governed by other provisions such as area-of-origin limitations and the needs of fish and wildlife, which are now beneficial uses." Most hydro-legal thinkers in the 1940s and 1950s, however, had a blind spot for the needs of fish and wildlife, their implicit grasp of reasonable and beneficial uses not extending to all of God's creations, but only those most useful in capitalist production and urban development.*

14. Ibid*. Under prior appropriation, water in a stream is not treated like a commons, as it is under riparian doctrine.*

15. CVP and SWP water contractors, however, possess neither riparian nor appropriative rights; they possess contracts for water service from the big projects, both of which are the state's largest water appropriators.

16. Littleworth and Garner, op. cit.*, note 6, p. 39.*

17. Arthur Littleworth, "The Common Law of the Future," public remarks at "Water Rights, Water Wrongs," Oakland, CA, 2 November 1999. Equitable apportionment was dealt a severe blow by the California Supreme Court in City of Barstow v. Mojave Water Agency*, California Supreme Court, S071728. See also "Don't Tread on Mojave,"* SPILLWAY *v1n1, Fall 2000, pp. 2-3.*

18. The permit system has been in effect since 1914. Holders of rights that predate the permit system are referred to as "pre-1914" rights and have priority over rights holders with post-1914 appropriative permits.

19. Holsinger, "Necessity," op. cit.*, note 4, p. 16.*

20. Their modern-day descendants include the Columbia Canal Company, the Firebaugh Canal Company, San Luis Water District, and Gravelly Ford Canal Company.

21. Completion and operation of Friant Dam would ultimately kill off the spring run chinook salmon of the San Joaquin River by the mid-1950s, despite meager efforts by committed fish and game biologists to save this variety of salmon. See George Warner, "Remember the San Joaquin," in Alan Lufkin, ed., California's Salmon and Steelhead: The Struggle to Restore an Imperiled Resource*, Berkeley, CA: University of California Press, 1991, pp. 61-69.*

22. Holsinger, "Necessity," op. cit.*, note 4, p. 5.*

23. Ibid.*, p. 5, 15.*

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24. California Department of Public Works, op. cit.*, note 9, Appendix G, pp. 221-239. See Article 12(a) of the Purchase Agreement and Article 7 of the Exchange Agreement between Miller and Lux, Inc., and the United States Bureau of Reclamation, July 1939. If replacement water the Bureau provided the Exchange Contractors via the Delta-Mendota Canal fell to less than 72 percent of what their entitlement, then the Exchange Agreement requires the Bureau to make up the deficiency (back up to 72 percent of the Purchase Agreement delivery schedule) by releasing water from Friant Dam for use by the Exchange Contractors. The Contractors protect this exchange right by having retained their riparian rights as allowed under the Purchase Agreement.*
25. Holsinger, "Necessity," op. cit.*, note 4, p. 8.*
26. California Water Code Section 10505 and Sections 11460-11463.
27. Letter of John C. Page, Commissioner of U.S. Bureau of Reclamation, to Edward S. Hyatt, Directory of the California Water Project Authority, 10 March 1943.
28. California Senate Interim Committee on Water Projects, Senator Stephen P. Teale, Chairman, Opinion of Attorney Walter M. Gleason Regarding Various Legal Aspects of Burns-Porter Act (SB 1106) (Proposition One)*, October 28, 1960, p. 15.*
29. From this perspective, the CalFED "Framework for Decision" proposal for a "water quality exchange" by the Metropolitan Water District of Southern California and the Friant Water Users Authority (on the San Joaquin River) both is hardly surprising, and takes on new meaning. More than merely pragmatic and practical, proposed CalFED water quality exchanges effectively reverse water right priorities without acts by the state Legislature or decisions by state courts or the State Water Resources Control Board. In that sense, CalFED's plans are beyond politics, beyond law. See CalFED Bay-Delta Program, "Framework for Action," June 9, 2000; and Tim Stroshane, "Reframing CalFED," SPILLWAY *v1n1, Fall 2000, p. 5.*
30. Gleason, op. cit.*, note 28, p. 21.*
31. State Water Resources Control Board, Final Environmental Impact Report for Implementation of the 1995 Bay/Delta Water Quality Control Plan*, Volume 1, November 1999, p. III-5, and Table III-5, p. III-24.*
32. Alex Hildebrand, personal communication, Manteca, California, 10 December 1999.
33. W. Turrentine Jackson and Alan Paterson, The Sacramento-San Joaquin River Delta: The Evolution and Implementation of Water Policy, An Historical Perspective*, California Water Resources Center, University of California, Davis, Contribution No. 163, June 1977, p. 102.*
34. The Racanelli decision, United States of America et al v. State Water Resources Control Board*, 182 Cal. App. 3d 82; 227 Cal.Rptr.161 (Cal.App.1 Dist. 1986), was appealed to the California Supreme Court, which refused to review the case on September 18, 1986, thereby letting the appellate court decision stand. The eight plaintiffs were: the Central Valley East Side Project Irrigation Association (a precursor to the Friant Water Users Authority), Kern County Water Agency, South Delta Water Agency, San Joaquin County Flood Control and Water Conservation District, the Contra Costa County Water Agency, the United States Bureau of Reclamation, and two Antioch-area private corporations, Fibreboard and Crown Zellerbach. All page citations are to 182 Cal.App.3d 82 and following pagination.*
35. Ibid.*, p. 118.*
36. Racanelli merely noted it would be "too cumbersome and impractical to accomplish the mandated periodic revisions of water quality control plans" since reallocating water rights is the only enforcement mechanism available to the Board for administering its water quality standards and protecting beneficial uses under the Clean Water Act. Ibid.*, 119.*
37. Ibid.*, p. 140, 141.*
38. See also Tim Stroshane, "A History of the Monterey Agreement: Glimpsing the Future," SPILLWAY *v1n2, Winter 2000, p. 4.*
39. Racanelli decision, op. cit.*, note 34, p. 147.*

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