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The Development of Water Rights in California

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Introduction

This report deals with the development of water rights in California as the story relates to the Santa Clara Valley Water Conservation District's early days. Many of the topics are located outside Santa Clara County, but they are included here because of their impact on the county. The report begins with a brief discussion of the District itself. It then goes on to the definitions of the two principles of water rights: riparian and appropriative. Such definitions are necessary in understanding the material on the ensuing pages. Next on the agenda is a brief description of the Water Conservation Act of 1931. This act, which is still in effect, is discussed because its story begins with events in 1848 - the Treaty of Guadalupe Hidalgo and the California Gold Rush - and goes through nearly a century of events that deal with water rights. Beginning with the gold rush and the Treaty of Guadalupe Hidalgo, the story goes on to the origin of the appropriative rights principle in the form of miners' customs and related legal cases and legislation. One such case was *Lux v. Haggin* of 1886, a California case. Next comes the *Herminghaus v. Southern California Edison Company* Case of 1926, also a California case, in which the plaintiffs used the riparian principle on their behalf. The 1928 Amendment, a California constitutional amendment, is discussed after the *Herminghaus* Case because of a reaction to the decision in the case. Then comes the opposition to the amendments to the Water Conservation (Jones) Act of 1929. In conclusion, there is a discussion of the election of 1931, in which the entire state of California voted upon the amendments and the Santa Clara Valley Water Conservation District voted upon a bond measure with which it was faced, and its aftermath, which comprised bond measures that faced the District in 1934 and 1936.

The Santa Clara Valley Water District

On November 22, 1926, the Santa Clara Valley Water Conservation Association was formed by a group of farmers with the express purpose of combating the problem of a water shortage that was then facing the Santa Clara Valley. This was the first countywide unified effort in Santa Clara County that was aimed at such a goal. The Association needed land on which to construct and operate its projects, but the Southern Pacific Railroad refused to lease any to the Association unless the latter incorporated.¹ The Association incorporated on December 1, 1926, and leased some land from the railroad.

The Association was to meet success in 1929. State Senator Herbert C. Jones of Santa Clara County sponsored the Water Conservation (Jones) Act of 1929, which outlined the procedures for the formation and operation of any water conservation district in California. All California voters were eligible to vote on this and Jones's bill was approved in the November 5, 1929, election.

Also, on the same ballot in the northern part of the Santa Clara Valley was a measure that was sponsored by the Association for the formation of a water conservation district in that area. This measure depended upon the passage of the Jones Act. Only about thirteen percent² of the eligible voters of the proposed district actually voted, and the bill was approved by a margin of nearly nine to one.³ Thus, the Santa Clara Valley Water Conservation District was formed.

The District, whose job entailed water conservation, eventually included most of Santa Clara County. The original district extended from Adobe or San Antonio Creek in Palo Alto on the north to the town of Coyote on the south, and between the eastern and western foothills. An

amendment to the Jones Act in 1931 allowed water conservation districts to acquire additional territory. In 1953, some 4,000 acres of land in the eastern foothills, known as the Evergreen Area, were included in the District.⁴ In 1954, the 14,000 acres of the Central Santa Clara Valley Water Conservation District, which extended from Coyote to the southern limits of Morgan Hill, were formally annexed to the District.⁵ As a result, the middle of Middle Avenue in San Martin began to border the Santa Clara Valley Water Conservation District and the South Santa Clara Valley Water Conservation District.

In 1968, the District merged with the Santa Clara County Flood Control and Water District, the new agency using the countywide agency's name. This new agency retained this name until January 1, 1974, when its new name of Santa Clara Valley Water District became effective.

The Santa Clara County Flood Control and Water District had been founded on July 10, 1951, as the Santa Clara County Flood Control and Water Conservation District, with its job being flood control. The Flood Control District dropped the word "conservation" from its name in 1964 to avoid confusion with the Santa Clara Valley Water Conservation District. Before suburbs came along, Valley residents didn't worry about floods because they provided good soil for orchards. With suburbs, people began to worry about flood damage to their homes. The Flood Control District didn't really get going until the Christmas Flood of 1955, which did extensive damage.

Water Rights and the Santa Clara Valley Water District

The Santa Clara Valley Water Conservation District faced some problems concerning water rights in Santa Clara County in its early days, but none were monumental. There were some lawsuits against the District in this regard.

There are two principles of water rights: riparian and appropriative. Struggles involving these principles arose because people wished to have an undisturbed flow of streams past their lands. This refers to the fact that they tried to prevent anybody from building dams because the latter would disturb this flow. This argument is weak because a dam is an appropriation, and appropriations don't affect riparian rights. Following are detailed discussions of the principles of water rights. After these definitions, this paper discusses related events of the years between 1848 and 1936. The legalities of water rights have affected the District. Events outside the county are discussed because they directly affected the status of water rights and, in turn, the District.

Riparian Rights

The word "riparian" has the Latin root that simply means "on the banks of." Riparian rights go with the land and are not sold. One who obtains a title to land that borders a natural, not a man-made, water course automatically gains such rights. The riparian owner doesn't have to do anything else in order to retain these rights. However, he may lose them only to another riparian owner if he doesn't take a violator to court or, in some other way, stop him within five years. It is extremely rare that a riparian owner would allow the five years to pass without doing anything about the violation. These rights only relate to unimported water. If

a farmer or some other person owns such land and the water is generally upstream from him, he may pump a reasonable quantity of that water out of the stream, as long as it is there, for his own use. However, he may only use it on his own land and not pump it to adjacent lands, another county, etc. A riparian owner may not pump water out of a stream to the detriment of the rights of riparian owners who are downstream from him, meaning that he must still make a beneficial use of that water. The riparian water rights principle comes from English common law. Summing up, this doctrine favors landowners along the banks of the streams and makes no provision for diversion of water to be consumed in the process of irrigation. Irrigation involves the appropriative water rights principle. Sometimes, riparian rights aren't affected by appropriative rights at all. For example, a dam would not interfere with riparian rights because it is an appropriation.

Originally, the riparian right was defined as use for one's gardening, cows, etc. Today, it is defined as a commercial use of the water.

If one owns land that is adjacent to the stream channel and sells the portion of it that is immediately adjacent to the channel, he may retain riparian rights to the water in the channel by maintaining in his deed his riparian right to that water. This may be done even though the owner's land now doesn't border a stream because it had been part of a larger parcel of land that bordered that stream. If this is not done, this is another way in which the owner could lose his riparian rights. Thus, riparian means riparian in some point in history.

Appropriative Rights

Appropriative rights are those rights that are obtained by applying to the state for a permit to take water that would ordinarily waste to

the ocean and store it for later use. Before 1914, when the appropriative owner began to be required to apply to the State of California for these rights, he obtained water merely by taking it. This mere taking of water was the method of securing prescriptive water rights. One secured such rights by making an adverse use of water for five years. If the owner of the water didn't take such a violator to court within the five years or, in some other way, stop him during that time, he would lose his right to do so. The violator could be an appropriator or another riparian owner. Like the appropriative right, this prescriptive right was never any better than the time one received it. By prescription, one gained water rights the moment that he began to take the water. By appropriation, one gains them the day that he applies for a permit. An appropriator may use the water while it is there.

The procedure that applicants of unappropriated water must follow is set up by the Water Rights Division of the State Water Resources Control Board. Under its former name, the State Water Rights Board, the Division did the same thing that it does today. The applicant, whether an individual or an agency, can file with this Division to appropriate a certain number of acre feet of water⁶ upon the particular lands for which he applies. This body makes an assessment of the availability of water and makes sure that there is no infringement upon others' rights. If it feels that there is an abundant supply of water, it can issue a permit to the applicant. The applicant thus may capture so many acre feet of water per year. That water can be stored in reservoirs or can be used directly upon the lands described in the application. If faulty, the application is returned to the applicant, who must refile. Usually, however, the Division will allow the applicant to keep his filing date and amend his application so that it would be in proper form. The applicant must keep

records in order to prove to the State that he is making beneficial use of and is using the water for which he had applied. The applicant may not waste the water after having appropriated it. If he hasn't proved up on the permit application on the amount of water for which he applied, the Division usually suggests that the applicant request that a license be issued for the lesser amount attained. The Division also suggests that a new application be filed for the difference. If an applicant applies for 10,000 acre feet of water and can only prove up to utilizing 5,000 acre feet, the license subsequently will be issued for 5,000 acre feet and that is all to which he is entitled. However, if he applies for 10,000 acre feet and utilizes 20,000 acre feet, he may be taking somebody else's water. If the additional water doesn't belong to anybody, it is unappropriated. When someone takes unappropriated water during a wet year, nobody complains. People complain about this during a dry year. If the applicant does take more than his share, he may reapply for the additional 10,000 acre feet for a total of 20,000 acre feet. If he proves up on the 20,000 acre feet, and if nobody makes any objections, the Division will issue the license sometime in the future. Sometimes, it takes quite a while to prove up on an application. The application comes first, then it is followed by a permit, which, in turn, is followed by a license. Once an applicant has a license, he must still prove that he is utilizing the water in the best possible manner.

The Water Conservation Act of 1931

Senator Herbert C. Jones was at the helm in Sacramento and got the Water Conservation Act of 1929 amended so as to enlarge the Santa Clara Valley Water Conservation District's powers. The amended 1929 Act became known as the Water Conservation Act of 1931 when the voters approved it in the election of 1931. The amendments to the 1929 Act allowed the District to float bond issues; expand its area; obtain sewage or other waste water from cities then treat it and sell the effluent for any purpose that would be useful; and levy special assessments. The provision for power generation was removed before the act was submitted to the voters in the November 17, 1931, election after the Pacific Gas and Electric Company (P. G. & E.) protested that it should be removed.

Opposition to the Water Conservation Act of 1931

Prior to exploring the election of 1931, it is necessary to understand the development of water rights in California because the opposition to the Water Conservation Act of 1931 stemmed from this.

In February, 1848, the United States and Mexico ended the Mexican War of 1846-1848 by signing the Treaty of Guadalupe Hidalgo. The Mexican province of California was part of what the United States gained from Mexico as a result of this treaty. Unknown to anybody, just about a month earlier, in January, gold had been discovered on the American River in California. The immense good luck that the United States enjoys was shown by this bit of timing because that gold helped the North finance its American Civil War operations. Then, a great many miners came from Europe and the eastern United States, and trespassed on Federal land. All of the lands in the foothills of the Sierras where the miners were located belonged to the United States, which took this land from the Re-

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public of Mexico as a result of the treaty. The only body of law which the United States brought with her when she took California was the common law of England, which provided only one class of water rights: the riparian rights. Since the miners as trespassers found that the United States ran the banks of the streams, the streams themselves, and everything else in these lands, they had discovered that they had no water rights there and couldn't file on them or on anything else in the region as a result. Those people were merely squatters. Since one needs much water in order to mine gold, the miners needed a sure supply. These miners had to figure out a way of providing water rights for themselves without regards for riparian rights. So, they adopted the law governing miners' rights. Mining claims are begun by one filing a piece of paper and saying that he claims a certain piece of land. Then, he gets his tools and begins digging. If someone jumps the claim, he can be denied it because one's right to the claim dates from the time that one first makes the claim. This is the case only if the claimant proceeds with due diligence to develop the claim. The miners did this with water by filing pieces of paper and saying that they claimed certain amounts of water from certain streams for use on certain lands. They indicated the location of the land on which they would use the water, as well as the amount of desired water and the season during which the water was to be diverted. That was an appropriation. So, appropriative water rights came directly from the customs of miners.

In the latter half of the nineteenth century, two Federal cases involving these Federal lands and water rights arose. These and Federal legislation in Congress confirmed that appropriative rights could be established. The question before the court was whether these miners' customs, as they were called, could have the effect of law. The miners

currently had no riparian rights because the Federal government owned the land and one didn't have riparian rights unless he owned land that bordered a stream. The question was also raised whether, since there were such things as riparian rights, there were such things as appropriative rights, as well. The decision was in the affirmative. The *Lux v. Haggin* Case of 1886, a California state case, also said that there were both systems of water rights, and that riparian proprietors were entitled to a reasonable use of the waters of the stream for the purpose of irrigation.

Reasonable use in *Lux v. Haggin* referred only to riparians quarreling. At the time of this case, riparians had no obligation to be reasonable when they were confronted by appropriators. An appropriator took water for irrigating land that didn't border a stream.

Like the *Lux v. Haggin* Case, the *Herminghaus v. Southern California Edison Company* Case of 1926, another California case, involved the question of riparian rights. The former decided that there were both sets of water rights - riparian and appropriative - and the plaintiffs in the latter used the riparian principle on their behalf. The *Herminghaus* Case involved this situation. The *Herminghaus* people owned a large tract of land on the San Joaquin River. That tract of land had riparian rights and involved the use of the river's waters. In the 1920's, the Southern California Edison Company wished to build a dam upstream of this land. The *Herminghaus* people went to court and sought an injunction to prevent the building of that dam upon the allegation that they were entitled to the full flow of the river past their property and that the dam would obstruct this flow because any interruption of this flow was an interference with riparian rights. The court agreed with them and ruled against the building of that dam. The *Herminghaus* Case's rule was

applied to the entire natural flow of a stream, which was defined to include the annual flood flows as well as the usual low water flows. The riparian owner, as against the appropriator, was given a right to be unreasonable in his use of water. Thus, the riparian owner could use the full flow of the stream to irrigate a small portion of the riparian lands along the stream, thus wasting water. This narrow interpretation of "vested rights"⁷ stood athwart the full utilization of the state's water resources.

This decision so shocked California that a constitutional amendment was proposed and adopted in a statewide vote. This became known as the 1928 Amendment, which says that one's riparian right and, in fact, any right to the use of water is limited to reasonable use by reasonable method. It was declared that the general welfare required that the water resources of the state be put to the greatest possible beneficial use, with waste and unreasonable use or method of use being prevented, and that water conservation be exercised in the public interest. It was also decided that riparian and other rights would be limited to water courses to the part of the flow useful for reasonable and beneficial purpose, under reasonable methods of diversion. The unsettling split in the trend of California water law, whether toward the common law riparian doctrine or the Western States doctrine of appropriation, was thus decided in favor of a centrist position of limited riparian rights and correlative use. Thus, the ruling in the *Herminghaus Case* was reversed.

In general terms, what the 1928 Amendment does is to prevent waste. Since people in 1931 were still asserting the principles of the *Herminghaus Case*, they had a weak legal case because they had been intercepted by the 1928 Amendment, whether they knew it or not. The opponents of the

amendments to the Jones Act may have still liked the full natural flow past their land and felt that the water would come past their land unless the dam was built.

Like the Lux and Herminghaus cases, the opposition to the amendments of 1931 involved the riparian principle. The opponents disliked the building of dams because it would obstruct the flow of the stream and keep people from getting their full flow. Like the Herminghaus people, the opponents to the amendments felt that they should get the full flow. One of these amendments, the bond issue, would allow the District to float bond issues in order to obtain money with which to build dams.

The Farmers and Home Owners' Protective League campaigned against the proposed amendments. The core of the opposition was that the Herminghaus Case set a legal precedent that would block the impounding of flood waters as planned in the Tibbetts and Kieffer Report.⁸ However, this argument was worthless because of the 1928 Amendment. Such impounding would be allowed by the bond issue amendment. According to seventeen attorneys, the District had to acquire the riparian rights of the owners of lands along the stream, as they had vested property rights in the water, before it could impound and divert any of the water from the Coyote Creek to lands not bordering on the stream, since these property rights had been upheld in the Herminghaus Case and by several California decisions that had never been overturned. L. D. Bohnett seems to have been the only independent attorney to challenge this logic, standing almost alone in saying that the Herminghaus Decision didn't bar conservation of flood waters in the Santa Clara Valley. In this era when an increasing use of the appropriative doctrine under the concept of correlative and reasonable use was being compelled by the necessities of the scarcity of water, the Herminghaus Case was an extreme interpretation of the riparian

rights doctrine.

Taxpayers sometimes dislike bonds and this may have been the source of this opposition. The opponents needn't have worried about water rights because the proposal to store water behind a dam always and only is a subject of appropriative rights. Appropriation doesn't affect riparian rights. So, the opponents may have been misled since they were opposing the act on the basis of water rights.

The Election of 1931 and Its Aftermath

A statewide election was called for November 17, 1931, for the approval of the amendments to the 1929 Act. Also, a bond issue of six million dollars⁹ to carry out the Tibbetts and Kieffer Report was placed before the voters of the Santa Clara Valley Water Conservation District. The bond issue, which called for money for the District's first dams, was defeated by a margin of seven to one.¹⁰ However, the amendments were approved in the statewide vote. Whether positive or negative, the bond issue vote wouldn't have counted had the amendments been defeated, since one of them called for bond issues. Senator Jones faced possible political defeat for his role in the campaign by opponents of the bond issue.

When he was requested to analyze the tremendous defeat in view of subsequent victories that were just as great in the other direction, Mr. Jones attributed it to the Great Depression of the 1930's. People were reluctant to spend money in the days of the Depression.

C. H. Johnson of the Farmers and Home Owners' Protective League, who remained opposed to the bonds as late as January, 1932, noted the rising water levels, typical of that time of the year, and, in his optimism, spoke of the fertilizing value of ditch irrigation, as follows:

. . . the solution of the water problem is to take the muddy wa-

ter from the streams by ditches and pumping and distribute it over the land, particularly over the gravel strata. This fertilization and revitalizing of the land is worth thousands of dollars.¹¹

In his search for a positive view of the defeat of the bond issue, a defeat to which he had greatly contributed, Johnson was resurrecting a long since shattered belief. Besides being deluded about the fertilizing element of surface irrigation, he was misleading in his use of the rising well levels because it was natural for levels to rise in the winter. The significance was in the year by year trend.

The 1931 bond issue program was resubmitted to the voters of the District in 1934, but a lot of things were left out of it. The bonds, which comprised a principal of two million dollars,¹² were approved by a margin of seven to one¹³ in the election, which was held on June 19, 1934. \$530,000 worth of the bonds bore a five percent interest rate, while the rest of the bonds, worth \$1,470,000, bore a $3\frac{1}{4}\%$ interest rate.¹⁴ Another bond issue for the construction of District projects, which comprised a principal of \$400,000,¹⁵ was approved on May 12, 1936, in another election.

Footnotes

1. "Water Conservation District Honors Founders Who Began Job in 1926," San Jose Mercury-News, 1 December 1946, p. 8.
2. Richard Garland Martin, "Water Conservation in Santa Clara Valley" (M.A. thesis, U.C. Berkeley, 1949), p. 43.
3. Water: Our Buried Treasure; The Story of Water Conservation in the Santa Clara Valley (pamphlet). A Cooperative Project of the Santa Clara County School Department and the Santa Clara Valley Water Conservation District. San Jose, California, 1960. Page 11.
4. Annual Report; Fiscal Year Ending June 30, 1960. San Jose, California: Santa Clara Valley Water Conservation District, 1960, p. 4.
5. Ibid.
6. An acre foot is the quantity of water that would cover one acre to a depth of one foot.
7. Riparian rights had become vested when California adopted the common law in 1850.
8. This report, which was prepared in 1921 by San Francisco engineers Fred H. Tibbetts and Stephen E. Kieffer, had made recommendations for water conservation in the Santa Clara Valley.
9. Stephen C. Smith, The Public District In Integrating Ground and Surface Water Management: A Case Study In Santa Clara County. Giannini Foundation Research Report No. 252. California Agricultural Experiment Station. Giannini Foundation of Agricultural Economics. Division of Agricultural Sciences, University of California, April, 1962, p. 195.
10. Martin "Water Conservation in Santa Clara Valley," p. 54.
11. Ibid., p. 57.
12. Santa Clara Valley Water Conservation District. Minutes. Vol. 2, p. 382.
13. Martin "Water Conservation in Santa Clara Valley," p. 59.
14. Santa Clara Valley Water Conservation District. Minutes. Vol. 2, p. 426.
15. Ibid., Vol. 3, p. 887.

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1. Annual Report; Fiscal Year Ending June 30, 1960. San Jose, California: Santa Clara Valley Water Conservation District, 1960.
2. Clarke, John H. (Jack). Santa Clara Valley Water District engineer. July 12, 1976.
3. "Formation of Valley Water Conservation District Is Approved By Huge Majority." San Jose Mercury-Herald, November 6, 1929, pp. 1; 10.
4. Henley, Albert T. Santa Clara Valley Water District attorney. August 2, 1976.
5. Martin, Richard Garland. "Water Conservation in Santa Clara Valley." M.A. thesis, U.C. Berkeley, 1949.
6. Melton, James R. Public Information Officer of the Santa Clara Valley Water District. July 24, 1979.
7. Melton, James R., ed. The Story of the Santa Clara Valley Water District (brochure). San Jose, California: Santa Clara Valley Water District, 1978.
8. Roll, J. Robert. Former chief engineer and former manager of Santa Clara Valley Water Conservation District. August 3, 1976.
9. Santa Clara Valley Water Conservation District. Minutes. Vol. 2, pp. 382; 426.
10. Santa Clara Valley Water Conservation District. Minutes. Vol. 3, p. 887.
11. Smith, Stephen C. The Public District In Integrating Ground and Surface Water Management: A Case Study In Santa Clara County. Giannini Foundation Research Report No. 252. California Agricultural Experiment Station. Giannini Foundation of Agricultural Economics. Division of Agricultural Sciences, University of California, April, 1962.
12. "Water Conservation District Honors Founders Who Began Job In 1926." San Jose Mercury-News, 1 December 1946, p. 8.
13. Water: Our Buried Treasure; The Story of Water Conservation in the Santa Clara Valley (pamphlet). A Cooperative Project of the Santa Clara County School Department and the Santa Clara Valley Water Conservation District. San Jose, California, 1960.