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# Water Rights as Property in *Tulare v. United States*

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**Water Rights as Property in *Tulare v. United States*\***

David B. Anderson\*\*

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\* *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001).

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*The law of watercourses is a law of streams as natural resources. The water running therein unrestrained is the property of no one, but a portion of it taken out of the stream and confined in the possession of an individual becomes the taker’s private property, belonging to him while under his possession and control; and the law of watercourses is a development of the rules under which one may thus take of the water and make it his own.*<sup>1</sup>

Samuel Wiel was the foremost commentator on California and western water law in the first part of the twentieth century. His treatise on western states’ water rights, which is liberally consulted in this article, remains unequaled in its exposition of the nature and development of property in water. The brief description Wiel provides of the “law of watercourses,” quoted above, simply and accurately distills the essential nature of the water right as the right to take water from a watercourse and water rights law as “the rules under which one may thus take of the water [from a natural stream] and make it his own.”<sup>2</sup> Ninety years later, however, these simple propositions do not appear to be either broadly or well understood. The recent United States Court of Federal Claims decision in *Tulare Lake Basin Water Storage District v. United States* (“*Tulare*”) provides a particularly clear and instructive example. The purpose of this article is to take the opportunity of the *Tulare* case to renew an understanding of these basic propositions and, in so doing, to explain how and why the decision in *Tulare* departed so widely from them.

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1. SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES 1-2 (1911).

2. *Id.* at 2. The focus of Wiel’s description, like that of this article, is on diversions where water is removed from the watercourse and thereafter applied to some useful purpose like irrigation or municipal water supply—the vast majority of diversions. It applies as well, however, to appropriations where the flow of water is controlled but the water itself is never removed from the watercourse (such as appropriations to storage) and the possession of water is not the immediate result. *See infra* notes 61, 74, 80, and 150.

## I. INTRODUCTION

In the American federal system of government, the creation and definition of property rights are traditionally functions of state law.<sup>3</sup> Thus, when actions by the federal government are challenged under the Fifth Amendment to the United States Constitution as a taking of property for public use for which just compensation must be paid, federal courts are regularly required to first interpret the laws of the individual states to determine the property rights that are claimed to have been taken.<sup>4</sup>

As a rule, this task should not pose any special challenge for the federal courts because property law principles are largely traditional, uniform, and well-known. When, on the other hand, a case involves an unconventional or obscure form of state property, the task can present considerable challenges. An example is the 2001 United States Court of Federal Claims decision in *Tulare*, an action in inverse condemnation in which the unconventional property involved was water rights under California law.<sup>5</sup>

As a species of property, California water rights are indeed both unconventional and obscure. The interpretational challenge they present is compounded by the complex physical and institutional context in which they operate, of which the California Supreme Court wrote: “The scope and technical complexity of issues concerning water resources management are unequaled by virtually any other type of activity presented to the courts.”<sup>6</sup>

But beyond their complexity and unconventionality, one factor in particular contributes to the obscurity of California water rights *as property*: the ambiguity that resides in the terms by which water rights are defined and in which they are almost always discussed—*water* and *use*. The ambiguous usage of these terms is common and usually innocuous; but in *Tulare*, it played a significant role in how the case was decided.

In *Tulare*, the plaintiffs did not, themselves, hold title to the water rights they claimed were infringed. Rather, they claimed to hold rights derived through their water service contracts with the actual water right permit holder, the California

3. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *United States v. Powelson*, 319 U.S. 266, 279 (1943); *Rank v. Krug*, 90 F. Supp. 773, 786 (1950).

4. U.S. CONST. amend. V. In addition, courts must apply the background principles of state law that may further define the compensable expectations of property owners. *Lucas*, 505 U.S. at 1029. See generally ROBERT MELTZ, DWIGHT H. MERRIAM, & RICHARD M. FRANK, *THE TAKINGS ISSUE* (1999).

5. 49 Fed. Cl. 313 (2001). *Tulare*, sometimes referred to as “*Tulare I*,” decided the issue of takings liability. The case had a second damages phase in which the court determined the compensation owed for the taking. This phase of the case is reported as *Tulare Lake Basin Water Storage District v. United States* and is often referred to as “*Tulare II*.” 59 Fed. Cl. 246 (2003), *modified on reh’g*, 61 Fed. Cl. 624 (2004).

6. *Envtl. Def. Fund v. E. Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 344 (1977), *vacated*, 439 U.S. 811 (1978). Some states, like Colorado, have established a system of specialized “water courts.” WELLS A. HUTCHINS, *2 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 452-54, 502 (1971). In California, state courts may enlist the technical expertise of the State Water Resources Control Board through the court reference procedures available under California Water Code sections 2000-2001 (West 1971 & Supp. 2007).

Department of Water Resources (DWR). Implicit in this claim was the idea that the water right consists of two, separate parts: a right to divert water from a natural watercourse—a part that DWR itself continued to hold title to and to exercise; and a right to make beneficial use of the water to be diverted by DWR, a part of DWR's water right that the plaintiffs claimed had been transferred to them.

But that idea is mistaken. The notion that a water right includes, as an entitlement of the right itself, not only the right to divert water from a stream but the *further right* to put the water taken from the stream to beneficial use is a confusion that arises from the ambiguity that is created by the fact that those most basic terms, *water* and *use*, each have different meanings with different applications in California water law. In most contexts, the distinction between their different meanings is unimportant and, thus, also is the failure to carefully observe it. But under the facts in *Tulare*, the distinction was of key importance and the failure to recognize it caused the court to fundamentally misapprehend the nature of the water right as property under California law.<sup>7</sup>

#### A. *The Tulare Case*

##### 1. *The Takings Claim and the Court's Holding*

*Tulare* was a suit in inverse condemnation brought in the United States Court of Federal Claims by two California water agencies, the Tulare Lake Basin Water Storage District (“Tulare”) and the Kern County Water Agency (“Kern”), and by three entities that receive water from them: two public entities, Lost Hills Water District and Wheeler Ridge-Maricopa Water Storage District; and a private entity, Hansen Ranches. Kern and Tulare are large public districts organized under California law that provide water for agricultural use in California's San Joaquin Valley. In the early 1960s, the two districts entered into long-term water service contracts with the DWR for water to be developed and delivered by the State Water Project (SWP). DWR holds the water rights necessary for the management and operation of the SWP.

The suit complained that federal regulation under the Endangered Species Act (ESA) in the years 1992-1994 had restricted SWP diversions from the Sacramento-San Joaquin Delta to protect the federally listed Delta smelt and winter run salmon and thereby reduced SWP water deliveries to Kern and

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7. Ironically, it is the very unimportance of the distinction in most contexts that has allowed the ambiguity to become embedded in habits of language, making it all the more difficult to recognize in those rarer contexts where the distinction is important. It seems, however, that those latter contexts may be becoming less rare. Besides *Tulare*, there are two very recent cases in which the unexamined ambiguity in *water* and *use* has had a material effect on the disposition of important issues before the court. One case is from Utah, *Strawberry Water Users Association v. United States*, 133 P.3d 410 (2006); another is from California, *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674 (2006). These cases are briefly discussed below. See *infra* note 113.

Tulare.<sup>8</sup> The plaintiffs claimed that the loss of this water constituted a Fifth Amendment taking of property for which they were entitled to just compensation.

Addressing the merits of the taking claims on cross-motions for summary judgment, the court agreed with the plaintiffs, finding that, by virtue of their SWP contracts, the plaintiffs had held “water-use rights” in the quantities of water lost to them because of the ESA restrictions on SWP operations. The court found that these “water-use rights” were property derived from DWR’s water rights, and their loss on account of ESA regulation entitled the plaintiffs to compensation.

DWR’s water rights and its operation of the SWP played a central role in *Tulare*. Just as the property basis for the takings claims of all the plaintiffs was DWR’s water rights for the SWP linked by the water supply contracts between the two principal plaintiffs and DWR for the supply of water from the SWP, so the essential fact common to all their claims was the curtailment of SWP diversions that occurred as a result of federal regulation under the ESA.

## 2. *The Department of Water Resources and the State Water Project*

### a. *Background*

The State Water Project is the largest state-constructed water project in the nation and one of the largest water projects in the world.<sup>9</sup> It is owned and operated by the California Department of Water Resources, a state agency that has contracts with twenty-nine public agencies to supply water for urban and agricultural uses in the San Francisco Bay Area, the Central Coast, Southern California, and the Sacramento and San Joaquin Valleys. DWR planned, designed, and built the SWP’s pumps, dams, canals and other water and power facilities, which DWR now owns, operates, and maintains.<sup>10</sup> Among the many

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8. The diversion restrictions resulted both from direct limitations on pumping and also from other regulatory requirements, such as Delta outflow requirements, that resulted in less water available for export. *Tulare*, 49 Fed. Cl. at 316.

9. The Project consists of 28 dams and reservoirs, 26 pumping and generating plants, and some 660 miles of aqueducts. Its chief facilities are the Oroville Dam and Reservoir on the Feather River, the Harvey O. Banks Pumping Plant in the southern Sacramento-San Joaquin Delta (“Delta”), and the California Aqueduct, stretching 400 miles from the Delta, south through the San Joaquin Valley and the gigantic lifts over the Tehachapi Mountains, to terminal reservoirs in Southern California. The SWP provides an important supplemental water supply for hundreds of thousands of acres in agricultural production in California’s Central Valley and for the municipal and industrial needs of two-thirds of the population of the state, some twenty-three million people. DEPARTMENT OF WATER RESOURCES, BULLETIN 132-02: OPERATION OF THE STATE WATER PROJECT at xxix, 3 (2004) [hereinafter BULLETIN 132-03]. Bulletin 132 is a series of reports published periodically by DWR that updates information on the SWP.

In 2001, the SWP was recognized by the American Society of Civil Engineers as a “Civil Engineering Monument of the Millennium,” at that time one of only twenty American engineering achievements ever so honored, sharing an exclusive company with the Golden Gate Bridge as California’s only two recipients of the award. *SWP Civil Engineering: Monument of the Millennium*, DWR PEOPLE, Summer 2001 at 12.

10. See CAL. WATER CODE §§ 120, 123. Construction and financing of the SWP through state general

engineering, administrative, governmental, financial, and legal responsibilities it has as owner and operator of the SWP, DWR has obtained and holds and defends in its name the water rights necessary for the operation of the SWP, including water rights to divert water from the Feather River and from the Sacramento-San Joaquin River Delta.<sup>11</sup> Under these rights, the SWP stores water, primarily in Oroville Reservoir on the Feather River, which is a tributary to the Sacramento River, and then diverts both Oroville storage releases and unregulated flows<sup>12</sup> downstream at its Banks Pumping Plant in the Sacramento-San Joaquin River Delta.<sup>13</sup>

In the early 1960s, with the major SWP facilities under construction, DWR entered into long term water supply contracts with public water agencies for water to be developed and delivered by the SWP. The central provisions of all of these contracts, including Kern's and Tulare's, are the same.<sup>14</sup> DWR made its first SWP deliveries to Kern and Tulare in 1968, pumping water from the southern Delta and transporting it via the California Aqueduct to aqueduct turnouts within the Kern and Tulare service areas.

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obligation bonds were approved in 1960 after a statewide referendum ratified the 1959 Burns-Porter Act, which incorporated by reference the various organic authorities of the earlier 1933 State Central Valley Project Act. DEPARTMENT OF WATER RESOURCES, BULLETIN 160-93: THE CALIFORNIA WATER PLAN UPDATE (1994); State Water Project Milestones, <http://www.publicaffairs.water.ca.gov/swp/milestones.cfm> (last visited Apr. 10, 2007) (on file with the *McGeorge Law Review*). The 1933 Act was the original state water development plan. Because of depression-era financing difficulties, the Central Valley Project (CVP) ended up being constructed and operated as a federal project by the United States Bureau of Reclamation. MARY MONTGOMERY & MARION CLAWSEN, HISTORY OF LEGISLATION AND POLICY FORMATION OF THE CENTRAL VALLEY PROJECT (1946). The powers and authority of the Water Project Authority created by the 1933 Act were among those conferred upon DWR when it was created in 1956. See 1957 Cal. Stat. ch. 1932, § 261, at 3406.

11. See *In re* Implementation of Water Quality Objectives for the Central Valley Project, S.W.R.C.B. No. 1641 (Dec. 29, 1999) [hereinafter "SWRCB 1999 DECISION"]; see also BULLETIN 132-03, *supra* note 9.

12. "Unregulated flow" refers to all flow other than SWP (and CVP) storage releases (i.e., natural flow, abandoned return flow from upstream use, and abandoned non-SWP/CVP reservoir releases), which are all legally subject to appropriation. See BULLETIN 132-03, *supra* note 9; *In re* Water Right Permits in the Sacramento-San Joaquin Delta Watershed, S.W.R.C.B. No. 1594 (Nov. 17, 1983).

13. BULLETIN 132-03, *supra* note 9. Stored water is released from Oroville Reservoir and flows downstream to the Sacramento-San Joaquin Delta where the SWP export facilities are located. On the way, it supplies SWP contractors and water rights settlement contractors along the Feather River and in the Delta. In the Delta, DWR diverts both the storage releases as well as any unregulated flow that is available and for which it has capacity and demand either at the Banks Pumping Plant in the southern Delta or at the intake to the SWP's North Bay Aqueduct in the northern Delta. Most of the water the SWP diverts from the Delta is taken at the Banks Pumping Plant and is sent either to San Francisco Bay area contractors via the South Bay Aqueduct or to contractors in the San Joaquin Valley, the Central Coast region, and Southern California via the 400-mile California Aqueduct.

14. The SWP contracts were drafted in accordance with "Contracting Principles for Water Service Contracts Under the California Water Resources Development System" announced by Governor Edmund G. "Pat" Brown on January 20, 1960, reviewed by the Legislature, and published by DWR in June of 1960. DEPARTMENT OF WATER RESOURCES, BULLETIN 141: THE CALIFORNIA STATE WATER PROJECT WATER SUPPLY CONTRACTS (1995) [hereinafter BULLETIN 141]. The first SWP water supply contract was entered into with the Metropolitan Water District of Southern California (MWD) on November 4, 1960, and it was approved in a mandamus proceeding in *Metropolitan Water District of Southern California v. Marquardt*, 59 Cal. 2d 159 (1963). After four more contracts were executed on the MWD model, the Director of DWR adopted a set of "Standard Provisions" to be incorporated into the subsequent contracts (including Kern's and Tulare's), consisting of the first forty-four contract articles. See *supra* BULLETIN 141.

b. *ESA Regulation of the State Water Project*

Over the years, the activities of the SWP—and in particular its Delta operations—have been regulated primarily by the State Water Resources Control Board (“Board”).<sup>15</sup> The Board is the state agency that administers the state’s appropriative water rights system and from which DWR acquired its water right permits for the SWP.<sup>16</sup> In the early 1990s, DWR’s diversions from the Delta also came under regulation by two federal agencies, the National Marine Fisheries Service (NMFS—now known as “NOAA Fisheries”) and the United States Fish and Wildlife Service (USFWS), to protect two species of fish listed under the ESA.<sup>17</sup> The ESA restrictions at times caused a decrease in SWP water deliveries, including deliveries to plaintiffs Kern and Tulare, from the level of deliveries that would have been made in the absence of the ESA regulation.<sup>18</sup>

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15. See SWRCB 1999 DECISION, *supra* note 11.

16. The Board is responsible not only for issuing water right permits and thereby creating the initial property in water, but also for exercising a broad public interest regulatory authority over its water right permittees. CAL. WATER CODE §§ 1250-1259 (West 1971 & Supp. 2007); see also *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82 (1986); *Temescal Water Co. v. Dep’t of Pub. Works*, 44 Cal. 2d 90 (1955); David B. Anderson, *Recent Developments in Delta Decision Making*, in WATER LAW: TRENDS, POLICIES, AND PRACTICE, AMERICAN BAR ASSOCIATION SECTION OF NATURAL RESOURCES, ENERGY, AND ENVIRONMENTAL LAW 285 (1995).

17. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 315-16 (2001). The two species were the delta smelt and the winter run of Central Valley chinook salmon. *Id.*

The Federal Endangered Species Act (ESA) is codified beginning at 16 U.S.C.A. § 1531. The ESA’s chief regulatory vehicle when a federal action is involved is the “biological opinion,” issued pursuant to a “Section 7 consultation” (section 7 of the ESA is codified at 16 U.S.C.A. § 1536) between the federal action agency and either the NMFS in the Department of Commerce (as in the case of the anadromous winter run Chinook salmon) or the USFWS in the Department of Interior (as in the case of the Delta smelt). If the biological opinion finds that the federal agency action would cause jeopardy to the species, it must set forth any “reasonable and prudent alternatives” to the proposed project that would avoid jeopardy. 16 U.S.C.A. § 1536. The reasonable and prudent alternatives operate effectively as regulatory terms and conditions on the proposed action.

The federal action subject to regulation in the background of the *Tulare* case was the operation of the federal CVP during 1992 to 1994, which included the coordinated Delta operations of the SWP. The CVP, operated by the United States Bureau of Reclamation (USBR), also stores water upstream on the Sacramento system and, like the SWP, diverts substantial amounts of water from the Delta. The USBR also owns and operates the Delta Cross Channel facility, which can direct flow from the Sacramento River into the central Delta to avoid water quality degradation from the lower estuary. The reasonable and prudent alternatives the ESA specified for CVP and SWP operations in the Delta included direct limitations on project diversions and limitations on use of the Delta Cross Channel, which indirectly decreased the ability of the projects to divert water.

18. The court found that Kern and Tulare’s 1992 to 1994 SWP water deliveries (which DWR Bulletin 132-95 shows to have been an aggregate of 2.542 million acre-feet of water) were 297 thousand acre-feet of water less than they would have been in the absence of the ESA regulation of DWR’s Delta diversions. See *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 317 (2001); DEPARTMENT OF WATER RESOURCES, BULLETIN 132-95: THE CALIFORNIA STATE WATER PROJECT WATER SUPPLY CONTRACTS 261, tbl. B-5B (1995) [hereinafter BULLETIN 132-95].

At the time, regulation in the Bay-Delta estuary under the ESA and state law (in particular, the SWRCB’s mammoth Bay-Delta planning and regulatory effort, begun in 1987) raised the issue of what restrictions on the Delta operations of the SWP and CVP were reasonable and adequately supported by the evidence. The complex relationships among estuarine biology, Delta hydrodynamics, water project operations, and the impact of non-project factors was not well understood, and an important controversy existed as to what type and degree of regulation of the operations of the



### 3. The “Water-Use Right”

The *Tulare* court found that the ESA regulations that constrained SWP operations and resulted in a decrease in SWP deliveries constituted a taking of the plaintiffs’ rights to use water they would otherwise have received from the SWP under their contracts with DWR. The court referred to these rights as the plaintiffs’ “water-use rights” and declared them to be derived from DWR’s water rights.<sup>19</sup> The court specifically found that, in depriving the plaintiffs of all use of the specific quantity of water not delivered, the impact of the federal restrictions amounted to an “exclusive occupation” and a “physical taking” of the plaintiffs’ water-use rights to that water and thus constituted a *per se* taking of their property.<sup>20</sup> The court rejected the government’s argument that the facts at most merited analysis as a “regulatory taking.”<sup>21</sup>

The court also rejected the United States’ primary argument that the plaintiffs had no property rights, that their water supply contracts with DWR gave them nothing more than non-compensable contractual expectations whose frustration due to lawful ESA regulation fell under the rule in *Omnia Commercial Co. v. United States*.<sup>22</sup> Instead, the court found that the plaintiffs themselves held property rights under California law. Its view was that the plaintiffs’ “water-use rights” are property rights that devolve from the state by permit and then by contract to end users of water: “[W]hile under California law the title to water always remains with the state, the right to the water’s use is transferred first by permit, and then by contract to end-users such as the plaintiffs.”<sup>23</sup>

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SWP and CVP was warranted by the evidence that did exist. See *Anderson*, *supra* note 16, at 286-90. The sufficiency of the factual basis for the regulation was therefore an important issue, ultimately one with constitutional implications of its own (due process), but a far different issue than the constitutional issue in *Tulare* (takings). If a regulatory effort is questionable because of the uncertain state of the evidence supporting it, the remedy is in mandamus to set aside the regulation, not in damages for condemnation. MELTZ, ET AL., *supra* note 4, at 473-81.

19. *Tulare*, 49 Fed. Cl. at 318. “Water-use right” is a term unknown in California law.

20. *Id.* at 319-20.

21. *Id.* Where the alleged taking is found to be a “physical taking,” i.e., the physical occupation or invasion of property, liability is automatic. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 438 U.S. 419 (1978). Where the alleged taking involves a regulation unduly restricting the use of property, a balancing must be done that considers the character of the government regulation and the impact on the property owners’ reasonable, investment-backed expectations and opportunity for use. See *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124-25 (1978). All property is otherwise held subject to noncompensable regulation under the state’s police power. *Peabody v. Vallejo*, 2 Cal. 2d 251 (1935); *Gray v. Reclamation Dist.* 1600, 174 Cal. 622 (1917); see also *infra* note 51.

22. 261 U.S. 502 (1923). In *Omnia*, the Supreme Court held that frustration of a mere contractual expectancy by lawful government action did not constitute a Fifth Amendment taking. In that case, the United States requisitioned a certain steel producer’s entire output of steel, to the detriment of a party who had a contract with that producer for a supply of steel. In finding no taking of the contractor’s rights, the Supreme Court reasoned that the contract did not pass title from the producer to the contractor in the undelivered steel, so the contractor was not deprived of any property rights by the federal requisition. The court in *Tulare* distinguished *Omnia* by finding that the plaintiffs’ contracts constituted not just a contractual expectancy to be supplied water to which they had no title, but the actual conferral of property interests in specific quantities of water. See *Tulare*, 49 Fed. Cl. at 317.

23. *Tulare*, 49 Fed. Cl. at 318 (citations omitted). One can observe in this brief but important statement by the court explaining the origin and devolution of “water-use rights” the difficulty it encountered in making its way through the complexities of California water law and institutions. There is virtually no part of this key statement that is correct:

Although this passage refers to transfer by contract as the general mechanism by which “water-use rights” are acquired, the court did not identify any provision for transfer, grant, or conveyance of water rights in the plaintiffs’ water service contracts with DWR. Nor, in finding that the plaintiffs’ rights were “derivative of the permit issued to DWR,”<sup>24</sup> did the court’s opinion address the point that DWR had no permits and no water rights when the contracts were executed in 1963—the water right permits for the SWP having not been granted to DWR until 1967.<sup>25</sup>

1. “*end-users such as plaintiffs*”: None of the public agency plaintiffs, who represented most of the alleged losses, were “end-users” of water; rather, they were themselves water purveyors like DWR.

2. “*transferred . . . by contract to end-users*”: The rights that most end users of water in California have to the water they receive are not contract rights at all, but rather common law and statutory rights of service from local districts and public utilities, including rights to public service. See HAROLD E. ROGERS & ALAN H. NICHOLS, 1 WATER FOR CALIFORNIA 433-51 (1967).

3. “*title always remains with the state*”: As to water in watercourses, the idea that the state or the people hold a proprietary title to running water, as implied in Water Code section 102 (cited by the court), was expressly and pointedly rejected by the California Supreme Court ninety years ago in *Palmer v. Railroad Commission*, 167 Cal. 163 (1914), a rejection thoroughly and insightfully reviewed and reaffirmed by the court of appeal in the recent case of *California v. Superior Court of Riverside County*, 78 Cal. App. 4th 1019 (2000). *Tulare* cited neither case.

As to water removed from its natural source and reduced to possession, the proposition is equally untenable. First, the state cannot “retain” a title it never had in the first place. Second, while proprietary title can and does exist in water that has been diverted and reduced to possession, it is difficult to conceive of either the nature or the effect of the title the state might be thought to retain to water in the rightful possession of others: for example, in a bottled beverage on a store shelf, in a stalk of celery, or in drawn bath water—not to speak of the sixty-seven percent of the average human body that is water. There is no instance that comes to mind in which the state has asserted title to water against the otherwise rightful possession of another. To the contrary, in *Riverside*, the court said, “[t]he State’s ‘ownership’ under Water Code section 102 confers *no* power of possession or use upon it.” *Id.* at 1028. Public “ownership” that does not preclude or limit the assertion of private ownership and that includes neither a present nor a future right of possession or use is frankly a word with no substantive meaning.

4. “*right is transferred . . . by permit*”: The SWRCB does not “transfer” or purport to transfer water rights to its permittees when it grants a permit or license (any more than the Department of Motor Vehicles, for example, transfers its right to drive when it issues a driver’s license), but rather it *creates and confers* them by governmental fiat in approving applications to appropriate under Division 2 of the Water Code. See CAL. WATER CODE §§ 1200-1851 (West 1971 & Supp. 2007) (detailing the administrative process for applying for and obtaining appropriative water right permits and licenses). In addition, Water Code section 1050 specifically states: “the board . . . shall be regarded as performing a *governmental* function in carrying out the provisions of this division [Division 2].” CAL. WATER CODE § 1050 (emphasis added).

5. “*transferred by contract to . . . plaintiffs*”: DWR did not receive its water rights from the SWRCB until 1967, *several years after* it entered into the water supply contracts with plaintiffs Kern and Tulare. See *infra* text accompanying notes 24 and 25.

24. *Tulare*, 49 Fed. Cl. at 318 n.6.

25. See Contract Between the State of California Department of Water Resources and Kern County Water Agency, For a Supply of Water, Nov. 15, 1963, published in BULLETIN 141, *supra* note 14 [hereinafter Kern Contract]; Contract Between the State of California Department of Water Resources and Tulare Lake Basin Water Storage, District For a Supply of Water, Dec. 20, 1963, published in BULLETIN 141, *supra* note 14 [hereinafter Tulare Contract]; and In re Application 5629, S.W.R.C.B. No. 1275 (May 31, 1967).

Water rights are mentioned in the water supply contracts only in the brief reference in Article 16(b) to DWR’s obligation to exercise good-faith efforts to obtain water rights for the yet-to-be-constructed project.

In fact, in holding the contracts with DWR to have effected a *transfer* of right to the plaintiffs (i.e., a transfer of the so-called “water-use right”), the court did not cite or discuss *any* provision of the SWP water supply contracts, but instead looked to the state’s substantive law of water rights. Although the court did not elaborate much on the matter, its reasoning seems clearly enough to have been that, if DWR’s water rights—once they acquired them—include not only the right to divert water but also the right to make beneficial use of the water it diverts (the unarticulated major premise in the court’s reasoning), and, if it is those in the SWP contractors’ service areas who beneficially use the water DWR diverts rather than DWR itself, then the effect of the water supply contracts was to transfer to the plaintiffs DWR’s water right to make beneficial use of the diverted water.<sup>26</sup>

## B. *The Property Issue Raised by the Court’s Decision on Liability*

### 1. *The Substantive Issue*

However the court may have understood the transfer of interest in DWR’s rights to the plaintiffs to have occurred did not change the threshold property issue in the case: What rights did *DWR* actually hold under *its* water rights? For the plaintiffs to have been transferred any property rights by DWR, or to

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“The State shall make all reasonable efforts to perfect and protect water rights necessary for [the State Water Resources Development System, defined in Article 1(b)] and for the satisfaction of water supply commitments under this contract.” BULLETIN 141, *supra* note 14. Article 6(c) refers in similar fashion to DWR’s obligation to exercise good faith efforts to complete the facilities necessary for the SWP to store, divert, and transport water for timely delivery. *Id.* at 21.

In fact, the Burns-Porter Act and the “Governor’s Contracting Principles” indicate no more than an intent to create a simple contractual relationship between DWR and the local agencies for the supply of state-developed water through state-owned and state-operated facilities on an unsubsidized basis—that is, on an equitable contract pricing basis designed to fairly recover all construction costs and operation and maintenance costs of the Project allocated to its water supply function in accordance with express state policy and with sound business practices.

26. Because of the very ambiguities under discussion in this article, it is important to be clear that the court was speaking of *the use of diverted water*—beneficial use—as the specific entitlement transferred to, held by, and taken from the plaintiffs. The court called that entitlement the “water-use right,” the right held by the plaintiffs as “end-users of water,” i.e., those who actually put water to beneficial use. *Tulare*, 49 Fed. Cl. at 317.

But, the court also made an odd reference at two points in the opinion to plaintiffs’ right to “*withdraw* or use water” and to “plaintiffs’ right to *divert* water.” *Id.* at 315, 324 (emphasis added). These anomalous references to diversion are puzzling, no less so because the court expressly distinguished DWR’s right to appropriate (i.e., divert) from the plaintiffs’ right to use water: “We further acknowledge that *plaintiffs possess rights not as direct appropriators of water* but as parties to a contract with an entity—DWR—entitled to appropriate water.” *Id.* at 318 n.6 (emphasis added); *see infra* note 28. The two passing references to diversion are never elaborated upon in the decision or relied on by the court. Moreover, they are completely at odds with the scheme of the water service contracts, under which DWR stores, diverts, and conveys water to the SWP contractors, and with the practical reality that it is *DWR*, not the plaintiffs, that owns and operates the SWP diversion facilities in the Delta necessary to exercise the right of diversion.

otherwise claim rights through DWR, DWR had to have first held those rights itself. One cannot transfer a right one does not have.<sup>27</sup>

Although the court did not explain the nature of the property rights held by DWR any more than it explained how the plaintiffs actually acquired interests in that property, the court was clear in its view that DWR's water rights were the source and basis of the plaintiffs' "water-use rights."<sup>28</sup> The purpose of this article is to examine this proposition in detail. Specifically, the question this article will explore—and answer—is: Does the California water right—specifically, the appropriative water right held by DWR—include the right to the post-diversion beneficial use of water, the so-called "water-use right" that the court found the plaintiffs to have held by virtue of their contractual relationship with DWR?

This question has obvious significance for the *Tulare* decision. The proposition it explores is at the heart of the court's determination of liability. If the water rights held by DWR did not include that right, then no contract made by DWR with the plaintiffs could have conveyed such a right. In that case, not only would the court's reason for finding a taking per se disappear, but also its proffered basis for distinguishing *Omnia* and for finding a taking at all.<sup>29</sup>

## 2. *The Interpretational Issue*

Although water rights are an unusual form of property, the truth is they are not that unusual. In fact, they are very similar in nature to other familiar and well understood common law property rights, namely, easements, profits à prendre, and hunting and fishing rights. Moreover, they are virtually identical in nature to oil and gas rights, a common and much-examined instance of the profit à prendre in California.<sup>30</sup> The major impediment to understanding the nature of water rights as property is, rather, the ambiguity that exists in the very terms by which they

27. It is a fundamental precept of the law that one cannot convey a title superior to the title one holds. It is expressed in the common law maxim, *nemo plus juris transferre potest quam ipse habet*, or, more simply, *nemo dat quod non habet*: you can't give what you don't have. BLACK'S LAW DICTIONARY 1736 (8th ed. 2004).

28. The court stated:

We accept that plaintiffs' contract rights are derivative of the permit issued to DWR . . . . We further acknowledge that plaintiffs possess rights not as direct appropriators of water but as parties to a contract with an entity—DWR—entitled to appropriate water. Those observations, however, do not change our conclusion that plaintiffs' right to the *use* of water is a compensable contractual right . . . .

*Tulare*, 49 Fed. Cl. at 318 n.6. Whether, in the end, the plaintiffs' asserted rights are to be understood as contractual rights, as property rights conveyed to them by DWR, or as property rights transferred to them by operation of law, the source of their rights was DWR's water rights; and the validity of their asserted rights necessarily turned on DWR's originally holding a property right to make beneficial use of water.

29. If the contract had not caused a property title to pass, then, under *Omnia*, the federal action would have constituted nothing more than the uncompensable frustration of a contractual expectancy—and not a taking. *See supra* note 22.

30. These basic similarities are examined later in Part III.

are defined, *water* and *use*,<sup>31</sup> and the habits of language in which that ambiguity has over time become entrenched.<sup>32</sup>

The two essential aspects of all property are (1) the thing or resource that is the subject matter of the property and (2) the ability or activity that the right entitles or protects with respect to that thing or resource.<sup>33</sup> For water rights, these two essential aspects of property are often expressed in phrases such as “the right to use water,” which employ those very, ambiguous terms: the subject matter, *water*, and the ability or entitlement, *use*. Thus, in looking at the doctrinal characteristics of water rights as property, particular attention must be paid to the ambiguity in those key terms and to the influence the ambiguity had upon the court’s interpretation of California water rights law.

## II. WATER RIGHTS: PROPERTY IN “WATER”

The title of this Part, “Water Rights: Property in ‘Water,’” is ambiguous—and deliberately so. It uses and highlights the word “water” to draw attention at the very outset to the fact that “water,” as commonly used in reference to water rights—and even within the term “water right” itself—is ambiguous. The fact is, there are many different forms of water and different kinds of rights in them; and in some forms, there are no rights at all.

For example, there is the rainwater that collects in puddles in one’s yard or on one’s fields, which the law calls “diffused surface water.”<sup>34</sup> There is water that has escaped from a watercourse and is roaming destructively over the land, which the law calls “vagrant flood waters.”<sup>35</sup> There is the water flowing in a ditch or a pipe, conducting it to a field, a factory, or a house, which may be either realty or personalty.<sup>36</sup> There is spring water that arises and remains on one’s land. There is water held in a water tower or cistern, or standing in furrows in an irrigated field. There is the glass of water, drawn and waiting to be drunk. *None*

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31. These are also the terms used in the expression “water-use right.”

32. A closely-related habit that has without doubt helped not only to perpetuate this ambiguity but actually to shield it from useful insight is the frequent recourse of legal writers to describing water rights as “usufructs” or as being “usufructuary.” “Usufruct” is a term imported from the European and ancient Roman civil law. In continental Europe, it became an important and well-developed construct of its property law, different from common law property traditions rooted in the later medieval institution of estates in land. But, as a solitary, transplanted term, shorn of its defining civil law context and having none in the common law, its chief contribution to the English and American law of water rights seems to be (1) that it sounds like and refers in some manner to “use” (“use”—*ufruct*), (2) that it has an erudite, vaguely Latin, and thus authoritative ring to it, and (3), that it ends rather than prompts or informs thoughtful analysis. The usufruct is discussed more thoroughly below.

33. “Property under the law consists of specific rights in relation to particular things. The things themselves are not property in the legal sense; they are merely the objects [subject matters] of property.” Theodore E. Lauer, *The Riparian Right as Property*, in *WATER RESOURCES AND THE LAW* 152 (1958).

34. *Mogle v. Moore*, 16 Cal. 2d 1, 8-9 (1940).

35. *Id.* at 9.

36. *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 725-30 (1908).

of these is the “water”—the “property”<sup>37</sup>—to which a water right attaches. One may drain, dike, levee, apply, irrigate, circulate, discharge, flush, or drink this water and not be exercising, or in need of, a water right.<sup>38</sup>

The water of “water rights” is, specifically, *running water*. Water rights are property rights in *natural watercourses*, not in the water they contain or in the water taken from them.<sup>39</sup> This point, the distinction between water *as a substance* and *the watercourse* as the phenomenon of flowing water,<sup>40</sup> is essential to understanding the nature of the water right as property and to the analysis of the decision in the *Tulare* case.<sup>41</sup>

## A. The Origins of Property in Running Water

### 1. The Physical Character of Running Water

Water rights do not, as a species of property, fall within our normal sense and everyday understanding about property in land and chattels.<sup>42</sup> The reason is obvious, and it inheres in the very nature of water as it exists *in nature*. Unlike land and structures, water in natural watercourses<sup>43</sup> is neither static nor well-defined.<sup>44</sup> It moves and it changes. “One cannot step into the same stream twice” is the famous maxim from antiquity,<sup>45</sup> and it succinctly conveys the central problem for recognizing property in running water. “Running water at one

37. See *infra* note 56 and accompanying text (discussing the different meanings of the word “property”).

38. See ROGERS & NICHOLS, *supra* note 23, 186-89.

39. The passage from Wiel quoted at the beginning of this article provides the key perspective: “The law of watercourses is a law of *streams as natural resources*.” See WIEL, *supra* note 1, at 1 (emphasis added). Regarding lakes and percolating groundwater basins, which are also natural water resources subject to water rights, see *infra* note 55.

40. With phrases such as “running water” or “flowing water,” there is a tendency at times to think of *water* as the “thing” and *running* or *flowing* as merely an unfixed attribute or transient state of that thing whose presence or absence does not change its essential nature. While that may be true in other contexts, it is not true for property in watercourses, because the fact that water is running and not static goes to its essential nature as the subject matter of property. As the subject matter of property, the phenomenon of running water is itself the “thing” as if the expression were *runningwater*.

41. The shorthand use of “water” to refer to running water is a common economy of speech. It is used as such throughout the California Water Code. See, e.g., CAL. WATER CODE § 1202. (West 1971) (using “water” in a context in which “running water” is clearly meant). The shorthand is harmless so long as it is not used in a context where it is important to distinguish between running water and other forms of water.

42. 2 RESTATEMENT (SECOND) OF TORTS § 182 (1977) (“Because the physical nature of water differs from that of land and disputes concerning water often take a different form from those involving land, the general rules of real property law may not be suitable for direct application to water cases.”).

43. The California Water Code refers to natural watercourses as water flowing in natural channels. CAL. WATER CODE § 1201.

44. ANNE J. SCHNEIDER, INSTREAM USES OF WATER IN CALIFORNIA, Staff Paper No. 6, in GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW 7 (1978).

45. “You could not step twice into the same rivers, for other waters are ever flowing on to you.” JOHN BARTLETT, FAMILIAR QUOTATIONS 62 (Justin Kaplan ed., 16th ed. 1992) (attributing the phrase to Greek philosopher Heraclitus).

instance is at one place in the river, then it is gone and some other water has succeeded it, without anyone having been able to tag it as his own; a thing in continual motion and ceaseless change, incapable of possession or ownership in that condition.”<sup>46</sup>

As a subject of property, flowing water ill-fits property’s foundational concept of *possession* and defies the very order and predictability that it is property’s purpose to provide.<sup>47</sup> “Watercourses are not at all similar to other objects of property, which consist of substance which remains, for virtually all purposes, constant. . . . The inherent instability of flowing water has made it difficult to predicate a firm system of legal rights.”<sup>48</sup>

In short, running water has a unique physical character and, over time, the unique physical character of running water has dictated its unique legal character as a subject matter of property.<sup>49</sup>

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46. Samuel C. Wiel, *Origin and Comparative Development of the Law of Watercourses in the Common Law and Civil Law*, 6 CAL. L. REV. 245, 254 (1918).

47. *Possession* is the foundational concept of common law property. *Ownership*—of “things” as opposed to the ownership of “interests”—is not substantively well-defined in the common law, but is probably best defined as the “right to possession.” By contrast, and relevant to the discussion of usufructs, *infra*, “ownership” is the cornerstone of property in the civil law of continental Europe and is well-defined therein. See OLIN L. BROWDER JR., ET AL., BASIC PROPERTY LAW 73, 77-78 (3d ed. 1975); 1 RESTATEMENT OF PROP., §§ 10, 19-26 (1936). Possession requires control of a subject matter such as to yield the ability to use and enjoy it and to exclude others from it. See *id.* at 73; OLIVER WENDELL HOLMES, THE COMMON LAW 170-72, 193 (1963). That degree of control is impossible for naturally flowing waters.

The key feature of flowing water that makes possession so problematic is, of course, that it *flows*; that, from a fixed point of reference (whether the point of diversion or the place of use), its substance is constantly changing. But besides that, the flow of water itself can also vary, from year to year, from season to season, and even from day to day. In addition to their visible surface flow, watercourses may have unseen subsurface flow as well and can be interconnected with groundwater that may increase or decrease stream flow. Seepage and evaporation may deplete their flow, and precipitation and runoff may augment it—at different times and at different places along their length.

48. Lauer, *supra* note 33, at 160.

49. Fish and other animals in the wild (*ferae naturae*) are not susceptible of physical possession, either. Because of that physical insusceptibility, they too are incapable of legal possession and, hence, ownership. In his lecture on “Possession” in *The Common Law*, Justice Holmes used the example of wildlife in a rhetorical illustration of the necessary connection of physical facts to legal principles:

Every right is a consequence attached by the law to one or more facts which the law defines . . . .

When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights . . . . The word ‘possession’ denotes such a group of facts . . . .

To gain possession, then, a man must stand in a certain physical relation to the object . . . there must be a certain degree of power over the object. If there were only one other man in the world, and he were safe under lock and key in jail, the person having the key would not possess the swallows that flew over the prison.

HOLMES, *supra* note 47, at 170-71, 181, 193; see also *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (Holmes, J.). Holmes might as easily have said that the jailor would not possess the water flowing in the stream next to the prison either. Case law applies the same descriptive phrases interchangeably to running water and to animals in the wild to underscore the central fact that these resources are incapable of possession and ownership. Thus, running water has been called a “mineral *ferae naturae*.” *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 204 (1900); *California v. Superior Court*, 78 Cal. App. 4th 1019, 1032 (2000); *Ex Parte Elam*, 6 Cal. App. 233, 236 (1907). The right to capture wild animals (fish) has been called “usufructuary,” a term specifically used to denote the nonpossessory character of water rights. See, e.g., *Alegretti & Co. v. County of Imperial*, 138 Cal. App. 4th

## 2. *The Negative Community of Interest in Running Water: Property in No One*

The idea of property in running water has always been an elusive one, beginning with Roman law and continuing on into the civil law of continental Europe and the common law of England. Roman law did not distinguish among the many forms of fresh water in nature: clouds, rain, diffused surface water, stream flow, river underflow, percolating groundwater, vapor, lakes, flood water, seepage, etc. Because of the fugitive and fluctuating character of water in its natural state, Roman law denied the existence of property in water altogether—including running water—and held the use of rivers and lakes to be the common right of everyone, like the sea and the air.<sup>50</sup>

Wiel embraced the description favored by the civil law commentator Pothier of this common right as a “negative community of interest”: running water belonged to no one; everyone who had access to the resource had a right to take from it. Unlike property ownership, whose distinctive features are possession, control, and the right to exclude others, the implicit feature of the public right to running water, being incapable of possession or ownership, was the right not to be obstructed from using it.<sup>51</sup> It was, rather, more like the public right the law recognizes today to use a public street or highway or to use a navigable waterway, vindicable not by an individual claiming under private right but by the public prosecutor complaining under the law of public nuisance.<sup>52</sup> The “negative community of interest,” as its name implies, was the very antithesis of property.<sup>53</sup>

1261, 1271 (2006); *Wisconsin v. Matthews*, 635 N.W.2d 601, 603 (Wisc. 2003).

50. WIEL, *supra* note 1, at 748-49, 955-57; *cf. Lux v. Haggin*, 69 Cal. 255, 315 (1886).

51. “This civil-law principle that running water is in the ‘negative community’ passed into the common law. It was taken up by the mediaeval English law-writers.” WIEL, *supra* note 1, at 4. The United States Supreme Court in *Geer v. Connecticut*, 161 U.S. 519, 524-25 (1896), quoted Pothier at length on his characterization of the “negative community” in regard to animals *ferae naturae* and four years later referred to the “negative community” in *Ohio Oil v. Indiana*, 177 U.S. 190, 208-09 (1900), in reference to oil and gas.

The “civil law” refers to the Roman law set down in the sixth century under the Emperor Justinian in the *Corpus Juris Civilis*, adapted throughout Europe during the Middle Ages, and forming the basis of much of modern law on the European and South American continents. The civil law was codified under Napoleon I and is known as the Civil Code or the Code Napoléon, and its adoption followed Napoleon’s conquests into the other countries of Western Europe and their colonies. BROWDER ET AL., *supra* note 47; WILL DURANT & ARIEL DURANT, *THE AGE OF NAPOLEON* 180-82, 219-24, 590. (1975); Max Radin, *Fundamental Concepts of Roman Law-I*, 12 CAL. L. REV. 393, 395-96 (1923-1924).

52. See CAL. CIV. CODE §§ 3479, 3480 (West 1997).

53. Wiel provides a quote from Robert Callis, a common law commentator from the seventeenth century, that conveys the pervasive sense of the time of the intuitive impossibility of ownership of running water:

But that there should be a property fixed in running waters, I cannot be drawn to that opinion. . . . [I]t should be strange the law of property should be fixed upon such uncertainties as to be altered into *meum, tuum, suum*, before these words can be spoken, and to be changed in every twinkling of an eye, and to be more uncertain in the proprietor than a chameleon on his colours.

WIEL, *supra*, note 1, at 5-6 (quoting ROBERT CALLIS, UPON THE STATUTE OF SEWERS 78 (1622)) (noting that “sewers” at that time meant small streams). Wiel finds this view echoed by Blackstone and by the English cases



Wiel began his seminal treatise on water rights by noting that there are two categories of fresh water in its natural state: one in which there is simply too little physical definition to support systematic exploitation or a practical system of property, like clouds, rain, diffuse surface waters, and vagrant flood waters; and one in which water, albeit in flux, is nonetheless sufficiently physically confined to support a limited institution of property. In this latter group are streams (confined by beds and banks), lakes (confined by a shoreline), and percolating groundwater (confined by the geomorphology of the aquifer).<sup>54</sup> Streams and lakes are categorized together under the heading of “watercourse.”<sup>55</sup>

It is this latter category that contains the naturally occurring forms of water that are, today, the “res” of the water right, the “thing” to which the limited right of property attaches.<sup>56</sup> To emphasize the point made at the beginning of this section, the res, or subject matter, of the water right as property is *not* water as a substance,<sup>57</sup> it is *the watercourse*: water in its natural, moving state—*aqua profluens* in the Latin of the common law—*running water*. As it pertains to surface water, water rights law is the law of watercourses.

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from the early 1800s and in *Mason v. Hill*, 5 Barn. & Adol. 1 (1833): “No one has any property in the water itself except in the particular portion which he might have abstracted from the stream and of which he had the possession, and during the time of such possession only.” *Id.* at 7.

54. WIEL, *supra* note 1, 1-4. Weil chose to include percolating groundwater in the class of “indefinite” waters, reflecting perhaps what was at the time a less certain understanding of the behavior of water under the ground.

55. In California water rights law, “watercourse” includes all forms of surface waters interconnected with streams, including springs, lakes, and ponds. *Duckworth v. Watsonville Light & Power Co.*, 150 Cal. 520, 528 (1907); *Guitierrez v. Wege*, 145 Cal. 730, 734 (1905). For economy, percolating groundwater—the other natural form of water in which water rights are recognized—is not included in the discussion here and does not need to be. It is sufficient to note that the general, nonpossessory, non-ownership characteristics of property in watercourses have also come to apply to percolating groundwater as well. Moreover, the riparian and appropriative right doctrines for surface water have been given analogous applications in overlying and non-overlying groundwater rights. *See Katz v. Walkinshaw*, 141 Cal. 116 (1902).

56. The Restatement of Property defines “property” in the manner set forth by Professor Hohfeld in 1913, as a set of correlative legal relationships among people (right/duty, privilege/no right, power/liability, immunity/inability) with respect to a certain subject matter or thing. RESTATEMENT (FIRST) OF PROP. 3-9 (1936); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). In other popular conventions, “property” is used to mean the subject matter or thing itself (as in, “that car is my property”). This article recognizes the preference for the Restatement form; but, for emphasis, it will speak of the “res” or thing to which a property right “attaches,” meaning the subject matter of the property right. The purpose in this is to focus on and emphasize what the proper subject matter of the water right is—and is not—given the persistent, ambiguous use of the term “water” and the significant confusion that ambiguous use creates.

57. *See WATER AND WATER RIGHTS: A TREATISE ON THE LAW OF WATERS AND ALLIED PROBLEMS 67* (Robert Clark ed. 1967). “This nature of the *property right in flowing water* as only a right of use—a simple usufruct—while it passed along became an established facet of the riparian doctrine.” *Id.* (emphasis added). Division 2 of the Water Code contains the provisions for the state’s administrative conferral of appropriative water right permits and licenses. Section 1001 provides: “Nothing in this division shall be construed as giving or confirming any right, title, or interest to or in the corpus of any water.” CAL. WATER CODE § 1001 (West 1971). This section makes the point explicitly that “water” is not the subject matter of the water right.

### 3. Recognition of Water Rights and Property in Running Water

Wiel described how the common law ultimately came to recognize positive rights in running water, not as a community of interest but as individual, albeit correlative, rights in a common pool resource, a property inuring to those who had access to it. What had previously been characterized as *res nullius* or *res communes*, to denote a resource altogether incapable of property right, came to be characterized as *res publicae* and *publici juris*, signaling the inherent public character and residual public interest in the resource that accompanied the recognition of a limited private property right in it.<sup>58</sup>

The following is Wiel's own survey of the nineteenth century English courts' early recognition of the water right, and it gives both the substance and the flavor of what he called the law's evolved "attitude toward running water":

The beginning of the last century saw a re-examination into the nature of rights in running water. In 1805, in *Bealy v. Shaw*, Lord Ellenborough laid down the right, but without discussing the foundation of it. In 1823, however, in *Wright v. Howard*, it was said of a stream, "there is no property in the water." In 1824, in *Williams v. Moreland*, appear the

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58. WIEL, *supra*, note 1, at 4-13. The most forceful expression of this residual public character is the "public trust," which employs property terms like "trust," "easement," and "servitude" to describe the dimension and importance of that public character. See Schneider, *supra*, note 44, at 10.

Property, being as Jeremy Bentham asserted, a creature of the law and impossible without it, does not exist in a vacuum but in a legal and socio-political context that inherently defines and limits it. See Lauer, *supra* note 33, at 151 (quoting JEREMY BENTHAM, *THEORY OF LEGISLATION* (1871)). That defining context—as particularly illustrated not only in the public trust cases (e.g., *National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983)), but also in the cases discussing the scope of traditional police power regulation of water diversions and use (e.g., *Peabody v. Vallejo*, 2 Cal. 2d 351 (1935) and *Joslin v. Marin Municipal Utility District*, 67 Cal. 2d 132 (1967))—is especially important for a resource as vital to biological existence, as significant to society's social and economic needs, and as multifarious and interdependent in its uses and benefits as water running in rivers and streams. In a famous passage, Justice Holmes referred to this legal and socio-political context as a "neighborhood of principles of policy" and recognized the special public character of flowing water that may be subject to private rights:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded . . . . The limits set to property by other public interests present themselves as a branch of what is called the police power of the state.

. . . .

. . . [F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purposes of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. . . . Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what would otherwise be private rights of property, or that, apart from statute, those rights do not go to the height of what the defendant seeks to do, the result is the same. . . . The private right to appropriate is subject not only to the private rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

*Hudson Water Co. v. McCarter*, 209 U.S. 349, 356-57 (1908).

expressions, “Flowing water is originally *publici juris*,” and “running water is not in its nature private property.” In 1831, in *Liggins v. Inge*, “Water flowing in a stream, it is well settled by the law of England, is *publici juris*.” In *Mason v. Hill*, decided in 1833, Lord Denman elaborately considered the attitude of the law toward running water, with the intention “to discuss, and so far as we are able, to settle the principle upon which rights of this nature depend,” and this case has been generally accepted as accomplishing this result, settling the common law of watercourses in its present form. Lord Denman quotes at length from the civil law, and says concerning it: “No one had any property in the water itself except in that particular portion which he might have abstracted from the stream and of which he had the possession, and during the time of such possession only,” and says that the expressions of Blackstone and the common-law cases just quoted calling running water “*publici juris*,” simply adopted into the common law this principle that the water itself was not the subject of private ownership. This was followed very explicitly in the succeeding English cases. In one it was said: “Flowing water, as well as light and air, are in one sense ‘*publici juris*.’ They are a boon from Providence to all and differ in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some.” In another: “The water which they claim a right to take [from a spring] is not the produce of the plaintiff’s close; it is not his property; it is not the subject of property. Blackstone, following other elementary writers, classes water with the elements of the light and air.” And in the classical case of *Embrey v. Owen*, this finds what may be called its crystallized expression in the English reports. In this case Baron Parke (who had also taken part in the judgment in *Mason v. Hill*) said: “Flowing water is *publici juris*, not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only: that all may reasonably use it who have a right of access to it; that *none can have any property in the water itself*, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of possession only.” As late as the 1906 Appeal Cases the Chancellor said that running water is “*publici juris*,” and a claim to ownership of the *corpus* of the water of a stream was said by another of the lords to be “opposed to elementary ideas about the water of a river,” and “repugnant to the general law of rivers.”<sup>59</sup>

What Wiel found the court in *Embrey v. Owen* “crystallizing” in the phrase, “all may reasonably use it who have a right of access to it,” was the emergent

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59. WIEL, *supra* note 1, at 7-8 (citations omitted).

riparian doctrine and one of the earliest judicial articulations of what is now called the “water right,” the unique, limited property in running water recognized in America today.<sup>60</sup> In its emphasis on *access*, it reflected a truth central to all water rights: that the singular property recognized in natural sources of water is not at all in the nature of a traditional, possessory estate in the physical resource. It is not a question of *title* to the flowing water itself—an idea in fact strenuously rejected in the cases and comments Wiel cites and quotes and in all cases since then—but rather of *opportunity* to create a title in the substance of the water by taking it from its natural source and reducing it to possession.<sup>61</sup> As the riparian doctrine flourished in the English and American common law, the middle of the nineteenth century saw the appearance in American jurisprudence of the second expression of this unique property in running water in the doctrine of prior appropriation. For prior appropriation, the opportunity to create title in water through possession was provided not by access, as in the case of riparian ownership, but by appropriation itself.

### B. Modern Water Rights

As Wiel declared in the passage introducing this article, water rights law—the law of watercourses—consists of the rules by which one may go to a watercourse and take of its waters. California recognizes two sets of rules that provide and govern that opportunity to interact with running water as a natural resource.

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60. In his very thorough and excellent article, Lauer describes the two essential physical requirements of the riparian right as the existence of a watercourse and a means of lawful access: “It is upon these two simple but fundamental elements that the often-times seemingly elaborate structure of the riparian right is founded.” Lauer, *supra* note 33, at 175. The right conferred upon the riparian owner by access, i.e., by the natural disposition of the land vis-à-vis the naturally flowing water, is called a right *ex jure naturae*—the right to avail oneself of the natural advantages of the location and circumstances of one’s land. *Wholey v. Caldwell*, 108 Cal. 95, 100-01 (1895).

61. This article, like the early commentaries on water rights just quoted, contrasts the nonpossessory water right to divert water from a watercourse, on the one hand, with the possession and ownership of the water thus diverted and reduced to possession, on the other. It should be understood, of course, that the exercise of the water right does not always result in the possession of the water diverted. This point was touched on earlier. Sometimes, diversion only involves or results in a “control” of running water that falls short of possession—as in the case of most appropriations to onstream storage. This clarification does not change or qualify the thesis of this article. The point of this article is not that beneficial use is always possessory—it plainly is not. It is, rather, that the water right, whose subject is flowing water, is never possessory. Thus, when diversion *does result* in the possession of water, as in the *Tulare* case (and as it ultimately does in virtually all diversions for irrigation and municipal and industrial purposes save hydroelectric generation), the rights in that water, to use it or dispose of it, are possessory rights and in no manner include, or are any part of, the nonpossessory water right that was exercised to take it from the watercourse. The right to use the watercourse and the right to use water taken from it are completely different and separate rights.

1. *Riparian Rights*

The route water rights originally took into American law, leading first to the humid, eastern United States,<sup>62</sup> came from the common law of England.<sup>63</sup> Over time, the strictly public or common character of rights in running water in England was eroded by the loss of public access to watercourses over the wastes and commons as a result of the Enclosure Movement, a legal, social, and economic movement in which portions of lands subject to common rights passed into purely private ownership and were fenced or otherwise enclosed, and that historically traced England's transition from a feudal to a mercantile and industrial society.<sup>64</sup> As time went on, only the owners of the enclosing private estates came to have access to watercourses; and the doctrine of "riparian rights" emerged as a positive rule of real property of the contiguous landed estates to allocate the advantage provided by access to running water that was shared exclusively by those private estates.<sup>65</sup>

The doctrine of riparian rights arose, then, not out of any deliberate notion that there was or should be property in watercourses, nor as a conscious policy regarding the allocation of water resources, but as an accident of enclosure—a social policy concerning land—and the inexorable operation of the law of trespass to land.<sup>66</sup> Today, the "riparian right" is the right recognized in the owner of land adjacent to or traversed by a watercourse (i.e., riparian land) to have the stream of water flow to his land and, while passing, to make use of the flowing water for reasonable purposes subject to the same, correlative rights of the other riparian owners on the stream.<sup>67</sup> It is a nonpossessory right that is part and parcel

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62. It ran from the Eastern seaboard to the Hundredth Meridian states of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas. It was also embraced by the Pacific coast states of California, Oregon and Washington. See DAVID B. ANDERSON, RIPARIAN WATER RIGHTS IN CALIFORNIA, Background Paper No. 4, in GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW 10-11 (1977).

63. Wiel argued that the riparian doctrine came into the American common law directly from continental law and was only later adopted by the English common law via the commentaries of the American jurists Kent and Story. See WIEL, *supra* note 1, at 245, 342. The more widely held view is that the American doctrine originated in the English common law. See WATER AND WATER RIGHTS, *supra* note 57, at 62.

64. Lauer, *supra* note 33, at 133, 184. The Enclosure Movement ran from the thirteenth to the nineteenth centuries, but the height of the movement was the period from 1709, when the first parliamentary enclosure act was passed, to 1869. The latter part of this period was highlighted by the General Enclosure Act of 1801, which facilitated the passage of the private bills by which enclosure was accomplished, and by the Enclosure Act of 1845, which established an Enclosure Commission to facilitate the factual investigations and findings that an individual enclosure bill required. 6 ENCYCLOPAEDIA BRITANNICA 121 (1957); RONALD WALTER HARRIS, A SHORT HISTORY OF 18TH CENTURY ENGLAND 23-25 (1963); CHRISTOPHER HILL, THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION 41-45, 282-83, 290-91 (1972).

65. Hence, the riparian right is an incident of land ownership, not as an easement or appurtenance but as "part and parcel of the soil," i.e., as an intrinsic aspect of ownership. *Lux v. Haggin*, 69 Cal. 255, 390-94 (1886); *St. Helena Water Co. v. Forbes*, 62 Cal. 182 (1882).

66. "The riparian's exclusive right to the use of water arises directly from the fact that nonriparians have no access to the stream without trespass upon riparian lands." Lauer, *supra* note 33, at 163 (quoting *Munninghoff v. Wisc. Conservation Comm'n*, 38 N.W.2d 712, 715 (1949)).

67. HUTCHINS, 2 WATER RIGHTS LAWS, *supra* note 6, at 183; see also *Fall River Valley Irrigation Dist.*

of the riparian estate, which arises because, as a practical matter, the land's natural, physical contiguity to the stream affords access to the flowing water.<sup>68</sup>

This last observation highlights the important point that, although the riparian right accrues to the possession of land, it is not, itself, a possessory property interest.<sup>69</sup> Rather, it is a nonpossessory right of use of the flowing water inhering in the possession of the riparian land that abuts it. As a nonpossessory right of use in the watercourse that benefits a possessory estate, the riparian right is thus very much like an easement appurtenant: a nonpossessory and non-exclusive right to the use of the contiguous watercourse, inuring to the possession of the "dominant"—as it were—riparian estate. The riparian right is a right of use in the naturally flowing water, not a property right in the substance of the water itself.<sup>70</sup>

## 2. Appropriative Rights

The other route the water right took into American jurisprudence was by way of the particular ethic and custom of water use observed by the miners in the foothill camps of the California gold rush, that "first in time is first in right," the same rule of prior appropriation that they observed for their mining claims.<sup>71</sup> The riparian doctrine found little or no application in the early West because the gold

v. Mt. Shasta Power Corp., 202 Cal. 56, 65 (1927); *Herminghaus v. S. Cal. Edison*, 200 Cal. 81, 93 (1926); *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237 (1895).

68. See Lucien Shaw, *The Development of the Law of Waters in the West*, 10 CAL. L. REV. 443, 447 (1921-1922); WIEL, *supra* note 1, at 758; *Ventura Land & Power Co. v. Meiners*, 136 Cal. 284, 290 (1902); see also Lauer, *supra* note 33, at 162-63 (1958).

The riparian right is not a possessory right arising from ownership of the underlying or overlying soil. WIEL, *supra* note 1, at 7-8. Ownership of the bed of the stream is immaterial to the existence of the riparian right. The riparian right depends only on ownership of the river bank, which provides contiguity and hence access. See 2 RESTATEMENT (SECOND) OF TORTS, *supra* note 42, at 195; WIEL, *supra* note 1, at 763-72. Furthermore:

The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully appropriated by one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good *jure naturae* as vertical.

JOHN M. GOULD, *LAW OF WATERS* 297 (quoting *Lyon v. Fishmongers' Co.*, (1876) 1 App. Cas. 662 (H.L.)); see also *id.* at 393, 448.

69. *Lux v. Haggin*, 69 Cal. 255, 390 (1886); *Gould v. Eaton*, 117 Cal. 539, 542 (1897). It is a nonpossessory interest such as one may acquire to enter the land of another to drill for and extract oil and gas, a particular kind of easement called a "profit à prendre." The close physical and doctrinal similarities between water rights and profits à prendre is significant. See *infra* note 127.

70. "The riparian owner does not own the water. He has the right only to enjoy the advantage of a reasonable use of the stream as it flows by his land . . ." WIEL, *supra* note 1, at 755 (quoting *Crawford v. Hathaway*, 67 Neb. 325 (1903)) (emphasis added). The riparian owner "has no property in the water itself; but a simple use of it, while it passes along." JOSEPH K. ANGELL, *A TREATISE ON THE LAW OF WATERCOURSES* 95 (1854) (quoting Justice Story in *Tyler v. Wilkinson*, 24 F. Cas. 472 (D. R.I. 1827)).

71. *Irwin v. Phillips*, 5 Cal. 140, 147 (1855).

fields and the lands abutting the rivers were not in private ownership but were, rather, lands of the United States.<sup>72</sup>

From California, the rule of “prior appropriation” spread throughout America’s arid West, “the Great American Desert,” where the vast majority of land lay in the public domain and access to water was therefore not a practical issue but scarcity was. In the West, the rule was (1) use conferred right and (2) priority of use conferred priority of right. Today, this right is the appropriative water right, or right of prior appropriation.<sup>73</sup>

As reflected in its name, the appropriative right is the right to “appropriate,” i.e., to “take,” water from a watercourse.<sup>74</sup> Although the circumstances for

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72. WELLS A. HUTCHINS, *THE CALIFORNIA LAW OF WATER RIGHTS* 41-43 (1956).

73. California law has historically recognized different ways by which appropriative rights may be acquired. Today, all appropriations must be made under the Water Code. *See* CAL. WATER CODE § 1225 (West 1971 & Supp. 2006); *People v. Shirokow*, 26 Cal. 3d 301 (1980).

74. “Diversion” is the term used for the physical act of appropriating water and the expression “diversion rights” is often used as a synonym for appropriative water rights. As noted above, this article is concerned with diversion that removes water from the watercourse and that thereby results in the possession of the substance of the water so removed. But, as also noted, there are diversions that do not result in the removal of water from the watercourse and in its immediate possession, as where a stream is dammed and its waters impounded: diversion to storage. To place the discussion of diversion in context and to avoid any misunderstanding or confusion in connection with this other type of diversion, a brief digression follows to discuss the different kinds of diversion.

Appropriative water rights law recognizes both “direct diversions” and “diversions to storage.” Direct diversion (and diversion to offstream storage) result in the abstraction and separation of water from the watercourse and its reduction to possession. The water thus diverted is completely separated from the watercourse and under the exclusive control of the diverter. This is the type of diversion involved in *Tulare*—DWR’s separation of water from its natural source in the Delta.

While diversion under an appropriative right requires some sort of physical interaction with the watercourse, *see California Trout, Incorporated v. State Water Resources Control Board*, 90 Cal. App. 3d 816, 819 (1979), not all diversions result in the factual or legal possession of the substance of the water diverted. One type of diversion to storage, which entails damming a watercourse and creating a lake—called “onstream storage”—does not usually involve separating the substance of the water from the watercourse, but rather simply retarding its flow. Diversion in this case does not, of itself, result in the possession of water. Water continues to enter the reservoir, mix with the impounded water, and exit the reservoir—just like the river inlets and outlets of natural lakes: “Thus, while water may be exclusively appropriated by being separated from the stream and confined in tanks, it does not cease to be aqua profluens merely by being impeded in its natural channel by a water-power dam on a navigable stream.” *WATER AND WATER RIGHTS*, *supra* note 57, at 67. However, at some point the degree of impedance may become so great and the degree of mixing so little that the impoundment may be deemed tantamount to possession. *See WIEL*, *supra* note 1, at 34.

Of course, this kind of nonpossessory “control” of the watercourse is a necessarily temporary state, because the impoundment is not for impoundment’s sake (unless it is for recreational lake uses, which are usually only incidental to other impoundment purposes). At some point, the impounded water must either be (1) reduced to possession by complete removal for the intended offstream use; (2) released back into the watercourse after its intended use (for power generation, for example); (3) released for redirection downstream; or (4) spilled (i.e., released and abandoned to the downstream watercourse for flood control or safety purposes or for public regulatory purposes like minimum downstream flows or temperature control).

Regardless of its circumstances or purpose, released water again becomes fully part of the downstream natural watercourse. Thus, even if in a particular case there is only such a minor degree of mixing and exchange with the watercourse that a possession of the impounded water may be deemed to exist, that possession is necessarily temporary and will ultimately give way either to the complete abstraction of the water for the intended offstream use or to the return of the water to the watercourse below the dam. As noted in the

acquiring an appropriative right and its secondary doctrinal characteristics (manner of acquisition, transfer, place of use, etc.) differ from those of the riparian right, the two rights share the same essential nature: the appropriative right is, like the riparian right, a nonpossessory right in the watercourse “to appropriate a certain portion of it”<sup>75</sup> and, where the diversion removes water from the stream, to reduce it to possession. Neither right presupposes nor confers any property in the water itself.<sup>76</sup> “Nothing is more firmly settled in the West than the rule that an appropriator can have no ownership in the water, as such, in the natural stream above the head of his canal or ditch, and that *his right is solely one to have the stream water flow to his ditch* so that it may be used.”<sup>77</sup>

### C. California Water Rights as Property in Running Water

California recognizes both appropriative and riparian rights in running water, but the former are by far the more significant surface water rights in California.<sup>78</sup> They are also the specific water rights held by DWR and at issue in *Tulare*.

Notwithstanding the separate routes they took into American and California law, and the fact that the respective conditions and circumstances of entitlement are different for each, the riparian and the appropriative rights doctrines today

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discussion above, property in the substance of the water itself continues only so long as possession of the water continues. Once water is turned back into the stream, whether by reservoir release or return flow, all property in it ceases.

The Water Code’s definition of “unappropriated water” includes “water which having been appropriated or used flows back into a stream, lake, or other body of water.” CAL. WATER CODE § 1202(d) (West 1971). Even where, as under (3), above, water is intentionally released from storage for the purpose of diverting it farther downstream (called “rediversion”), there is no right that attaches to the released water itself. The right to “redivert storage releases” (so to speak) is simply a right *in the watercourse*, for which a water right is required, to divert water downstream up to the released amount.

ESA regulation in *Tulare* involved only DWR’s diversions (and rediversions) of water *out of the Delta*—direct diversions and diversion to offstream storage south of the Delta; and plaintiffs’ alleged water-use rights pertained only to the use of water thus separated from its natural source (the Delta) and reduced to possession by DWR.

75. *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237, 256 (1895) (describing the nature of the riparian right). “The rights one can have in naturally *running water* are thus that of having it flow to him, and of using it and taking it into his possession, thereby making private property of a part of it, during the time he holds it in his possession.” WIEL, *supra* note 1 at 756. “All water flowing in any natural channel . . . is hereby declared to be public water of the State *and subject to appropriation* in accordance with the provisions of this code.” CAL. WATER CODE § 1201 (West 1971) (emphasis added).

76. *Kidd v. Laird*, 15 Cal. 161, 180 (1860). Unlike the riparian right, the appropriative right has no necessary connection with the possession of land. It is thus more akin in its nature to an easement in gross. It may in certain cases become appurtenant to the land to which water is diverted, and appurtenance may also be severed. *Wright v. Best*, 19 Cal. 2d 368, 382 (1942).

77. WIEL, *supra*, note 1, at 20 (emphasis added). Wiel then cites no fewer than twenty-eight California cases in support of this proposition. *Id.*

78. GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 11 (1978). The dual system of riparian and appropriative rights is in fact known as the “California Doctrine.” Other surface water rights recognized in California, including pueblo rights and prescriptive rights, are generally of only minor importance today.



share the same essential character and reflect the same central property tenets, which derive from their continental and common law origins and, ultimately, from the physical character of the resource itself. Those tenets are that the water right is a right in and to the use of running water; that running water is incapable of possession and ownership;<sup>79</sup> that there is no property in the water itself; and that water itself can only be possessed—and thereby become subject to the rights of possession and ownership—by being diverted from the stream and thereby reduced to possession.<sup>80</sup>

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79. *California v. Superior Court*, 78 Cal. App. 4th 1019, 1027 (2000).

80. *Parks Canal & Mining Co. v. Hoyt*, 57 Cal. 44, 46 (1880). As discussed in a previous note, possession and the right to possession are essential to the common law concept of ownership. *See supra* note 47. Conversely, ownership implies the ability to possess. Thus, statements averring the public or state “ownership” of water tend to obfuscate and confuse the essential, nonpossessory nature of property in running water and, in turn, the distinction between the nonpossessory water right and the possessory rights in water diverted from the watercourse.

In 1911, the California Legislature enacted what is now Water Code section 102, declaring that all running water in the state is the “property of the people”: “All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.” CAL. WATER CODE § 102 (West 1971). This section was explicated in *Palmer v. Railroad Commission*, 167 Cal. 163, 168 (1914), and a literal, proprietary reading of it emphatically rejected: “The true reason for the rule that there can be no property in the *corpus* of the water . . . in a stream is not that it is dedicated to the public, but because of the fact that so long as it continues to run there cannot be that possession of it which is essential to ownership.”

In other words, if a resource is *incapable* of ownership, it is meaningless to declare that it is “owned by the people.” One might as easily (and idly) say that the air is “owned” by the people. *See Missouri v. Holland*, 252 U.S. 416, 434 (1920) (Holmes, J.) (“To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.”). In *Sporhase v. Nebraska*, 458 U.S. 941, 951 (1982), the Supreme Court declared “state ownership” of water to be a “legal fiction,” as it had three years previously in *Hughes v. Oklahoma*, 441 U.S. 322, 335-36 (1979), for the ownership of wild animals. A lucid exposition of the point was made by Professor Trelease. Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638, 652 (1957). His conclusion was that the assertion that the “people” (or the “state” or the “public”) *own* certain resources—when ownership intrinsically makes no sense, and the people or state therefore never actually exercise property-type rights or powers—serves as a statement that there is a strong public interest in the resource and it will readily be the subject of the state’s protection and stewardship in the interest of the people in the exercise of sovereign or governmental power. (*N.B.*: The character and scope of authority that this sovereign interest may assume, such as in the public trust—where proprietary terminology has been invoked to describe that character and scope of authority—is not relevant to the discussion in this article, which strictly concerns the nature of property rights in, not sovereign authority over, running water.)

This same view was echoed by B. Abbot Goldberg: “State ‘ownership’ of water rights concerns the political rights of a state to control, by its police power, the conduct of appropriators; it does not concern property rights in any ordinary sense.” B. Abbott Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1, 13 (1964). These views comport rather with the more accurate articulations of the state’s interest in water in California Water Code sections 104 and 105:

§ 104. It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use of controlled for public protection.

§ 105. It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State, and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit.

CAL. WATER CODE §§ 104, 105 (West 1971). Finally, Water Code section 102 was revisited and examined at

These tenets may be alternatively rephrased as four essential characteristics of the appropriative water right as property in “water”:

- (1) The water right is, specifically, a right to take water from a watercourse.<sup>81</sup>
- (2) The “property”—in the sense of the *res* or subject matter to which the water right attaches is not “water” but “running water,” i.e., the watercourse.
- (3) The water right is a nonpossessory right of property.
- (4) While the water right is a right of property in the watercourse, it confers no property, no ownership, and no right of possession in the substance of the water itself.

A fifth point may be added regarding water after it has been diverted:

- (5) Upon being diverted from a watercourse, water is no longer part of the watercourse. That water is then no longer the subject matter of the water right but is a substance factually and legally capable of possession and hence of possessory rights.<sup>82</sup>

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length by the Court of Appeal in *California v. Superior Court of Riverside County*, 78 Cal. App. 4th 1019 (2000). Many of the court’s observations are pertinent to the discussion here: “It is perhaps unfortunate that the word ‘property’ is sometimes used in the cases and statutes with no careful consideration of the nuances of its meaning. The same may be said of ‘own,’ ‘owner,’ and ‘ownership.’” *Id.* at 1027. “Read in context with provisions of statute and decisional law relating to water use, the Water Code provisions simply do not result in anything recognizable as ‘ownership’ as the term is commonly understood.” *Id.* at 1028.

Section 102 is an example of what the United States Supreme Court has called “a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource.” *Sporhase v. Nebraska*, 458 U.S. 941, 951 (1982). This power, of course, derives from the police power conferred by the United States Constitution . . . the State’s power under the Water Code is to control and regulate use; such a power is distinct from the concept of “ownership” used in the Civil Code and in common usage.

*Id.* at 1030. Therefore, to repeat what the California Supreme Court observed in *Palmer v. Railroad Commission* almost one hundred years ago, the reason private ownership of running water is impossible is not because it is owned by the public, but because the possession of running water essential to the concept of ownership is impossible. No one can own it. Rights in running water are, necessarily, nonpossessory rights. 167 Cal. at 168.

81. Or, to control water in a watercourse.

82. In *Palmer*, the court said:

One may have the right to take water from the stream, even the exclusive right to do so, but in that case he does not have the right to a specific particle of water until he has taken it from the stream and reduced it to possession. It then ceases to be part of the stream.

167 Cal. at 168.

Wiel summarized the essential property principles as follows:

§ 691. Systems of Water Law are but a Development of These Three First Principles:

- a. The running water of natural streams is, as a *corpus*, the property of no one.
- b. The substantial property right recognized by the law is the *usufruct* of the stream—the right to the flow and use of the natural resource.

D. *The Tulare Court's View*

The *Tulare* court's view of the plaintiffs' rights, however, focused on the plaintiffs' so-called "water-use rights," a term it adopted to describe rights to use water *after* diversion as *end users* of water—not the right to divert from the Delta but the right to use water for their particular agricultural purposes.<sup>83</sup> This view differs profoundly from the five points above.

The "water-use right," a right to use water *after* diversion, is something other than a right in or to use of the watercourse. Such a right implies a property *in the substance of the water itself*, which, if it exists, logically must attach to the water while running in the stream and follow it from the stream to the place of beneficial use.<sup>84</sup> A "water-use right" also implies a *possessory* nature to the water right: the use of water diverted from the stream and in the user's possession is, definitionally, the exercise of a possessory right. Such use entails the disposition of a discrete parcel of water that is completely under the user's control.<sup>85</sup> The *Tulare* court saw the water right, then, as far more than just the nonpossessory right to divert and saw the *res* of the water right as more than just the watercourse.<sup>86</sup>

The court's view of the water right as a right in the substance of the water rather than in the body of flowing water—a confusion over the property subject matter of the water right—evidences the mischief worked by the ambiguity in the term "water." At the same time, the court's focus on the plaintiffs' loss of the post-diversion *use* of water as the particular entitlement they held, especially in finding a *per se* taking, implicates the second ambiguity in water rights terminology—the ambiguity in the term "use."

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- c. Any specific portion of the water severed from the stream and reduced to possession is private property as a *corpus* (while so held in possession only).

WIEL, *supra* note 1, at 758.

83. *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed. Cl. 246, 318-19 (2001).

84. If the asserted right did not attach to water in the stream before diversion but only upon or after diversion, then there could not have been a taking of any such right by a regulation that prevented the diversion of the water from occurring. But if the assertion is that the right attaches to the water before diversion, it is contradicted by the legion of water law cases in California that uniformly acknowledge that there is no property in the corpus of the flowing water.

85. "So the particles of water that have passed into private control in a reservoir, ditch, or other waterworks or artificial structure that holds the water confined have been taken from their natural haunts, so to speak, and captured." WIEL, *supra* note 1, at 28. The substance of water diverted from the stream is both well-defined and under the physical control of the diverter. It thus meets the physical requirements of possession.

86. The Court of Federal Claims' treatment of the plaintiffs' loss of only a portion of the water otherwise available and deliverable under their contracts with DWR as a complete taking *of that portion of water* rather than as merely a diminution in the value or use of the whole right further evidences the court's view of the water right as a property or estate in the individual molecules of water. It also comports with takings law applicable to the physical invasion of possessory property interests. See MELTZ, ET AL., *supra* note 4, at 117-24.

## III. WATER RIGHTS: THE RIGHT TO "USE" WATER

Like the word "water" in the title to Part II of this article, the word "use" is highlighted in the title to this Part to emphasize the ambiguity that attaches to its meaning when the term is employed in phrases such as "the right to use water" or "use right." But, unlike *water*, the problematic ambiguity of *use* is not caused by its having more than one specific meaning. *Use* is a broad and adaptable term whose particular meaning is given by the thing being used. In water rights law, it is the uncertain meaning of *water* that makes the meaning of *use* uncertain in phrases such as "the right to use water."

Given that the subject matter of the water right is *running water*, one should expect the *use of running water* to be the activity entitled by the water right. But, one often finds water rights being referred to as the "right to divert *and use water*";<sup>87</sup> or, as the court in *Tulare* did, the "right to the *use of water*,"<sup>88</sup> implicitly connecting the water right not just with the use of running water (by diverting it), but with the later use of the water diverted—with what is generally called "beneficial use."

Setting aside for the moment whether such statements are correct (and they are not) it is nonetheless important to recognize why they are made. Linking diversion with the subsequent use of diverted water is a very natural, understandable, and usually innocuous thing to do. After all, the opportunity to use water beneficially is created by the act of diversion and often flows immediately from it; and the value in the subsequent use of water is the very motivation for diverting it in the first place. Furthermore, it is usually unimportant to distinguish between the right to divert water from a stream and the right to use the water diverted because the diverter-irrigator who turns water from the stream into his ditch is also at that moment the first possessor and the immediate owner of the water diverted.<sup>89</sup> As a practical matter, who is to care if the right to divert and the right to make possessory use of the diverted water are one right or two rights when the diverter and the possessor are the same person? Finally, combining the right of diversion with subsequent beneficial use offers a convenient and usually inconsequential shorthand that imparts the essential social

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87. "The appropriative right is the right to divert *and use* a specific quantity of water for reasonable beneficial use . . ." ARTHUR L. LITTLEWORTH & ERIC. L. GARNER, CALIFORNIA WATER 39 (1995) (emphasis added). This is perhaps the most frequently used expression in California water law that unconsciously and erroneously conflates the right to divert and the right to make beneficial use of diverted water: The phrasing is such that the right seems to entitle both diversion and subsequent use. A more accurate articulation is found in the same work regarding riparian rights: "The right to divert *for* reasonable beneficial use . . ." *Id.* at 29 (emphasis added). "Reasonable beneficial use" is clearly identified as the purpose or goal, rather than an entitlement, of the right (diversion *for* reasonable beneficial use). See *infra* note 97 for other examples.

88. *Tulare*, 49 Fed. Cl. at 318 n.6.

89. Diversion is both the act entitled by the water right and the act by which water is reduced to possession. Possession confers a title good against all but the true owner. Where there exists no title, first possession itself confers title: "The owner is allowed to exclude all, and is accountable to no one. The possessor is allowed to exclude all but one, and is accountable to no one but him." HOLMES, *supra* note 47, at 193.

and economic significance of the diversion right, which lies in how the diverted water is ultimately used.<sup>90</sup>

But in the Court of Federal Claims's decision in *Tulare*, ignoring the distinction between the right to divert water from a watercourse and the separate right to use diverted water and combining them under the single rubric of the "water right" was *not* inconsequential. In *Tulare*, the diverter and the beneficial users were not the same, they were different. The plaintiffs claimed rights to use diverted water derived from DWR's water rights but separate and apart from DWR's right to divert it. Thus, the distinction between the right of diversion and the right of subsequent use was very much in issue in this case and could not be harmlessly ignored.

#### A. Clarifying the "Use" that the Water Right Entitles

The first reason that the court's view of water rights as property departed so significantly from the five points above was the ambiguity in the term "water" and the confusion between *water* and *watercourses*. The second reason was the confusion, induced by that first ambiguity, in the term "use." One very telling indication of this latter confusion was the court's reference to the plaintiffs' "water-use rights" as *usufructuary* rights.

Water rights are often referred to as usufructuary rights—a term that literally denotes "use rights."<sup>91</sup> And, in the way that water rights have been considered to be "usufructs," they are indeed properly thought of as "use rights."<sup>92</sup> But, the critical question is whether the water right "use right" is the same thing as the Court of Federal Claims's "water-use right"? The answer is, no. They are completely different because they are rights to the use of different property subject matters—different kinds of water.

Like the term "water," "use" also has two distinctly different applications in water rights doctrine that are easily and often confused. The first "use," referred to as a usufruct, is the use of *running water*—the usufruct of the stream—and is

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90. The lack of precision in the use of language can indicate many things. But most often it simply means either that a more precise or discriminating meaning of a particular term or phrase is not important in the context in which it is used or that the context itself is sufficiently indicative of the intended meaning. Thus, if the context either does not require that "running water" be distinguished from other forms of water or clearly indicates which meaning of "water" is intended, then the shorthand term "water" is sufficient—even where "running water" is intended. This is the case of the Water Code itself. See *infra* note 103 and accompanying text. The benefit of this kind of shorthand is, as with any shorthand, simplification and ease of communication. The downside is the tendency to forget that it is a shorthand when a different context requires that "running water" be distinguished from other forms of water.

91. Usufruct combines *usus* and *fructus*, meaning respectively, "use" and "fruit." BLACK'S LAW DICTIONARY 693, 1580-81 (8th ed. 2004).

92. "This usufructuary right, or 'water-right,' is the substantial right with regard to flowing waters . . . [I]t is not an ownership in the water itself; it is merely a privilege to use the water, and hence purely *incorporeal*." WIEL, *supra* note 1, at 755.

synonymous with “diversion.”<sup>93</sup> The second “use,” often called “beneficial use,” is the use of *diverted water*—not of running water. They are completely different. One does not have a usufructuary interest (i.e., a use right) in water already in one’s possession,<sup>94</sup> and beneficially using water that has been diverted out of a stream is not the use of a watercourse. “Prior to the segregation of water from the general source, the proprietary right is *usufructuary* in character.”<sup>95</sup> After the segregation of water from its natural source, the proprietary right in the segregated water is *not* usufructuary; it is possessory.<sup>96</sup>

The 1872 California Civil Code, which codified much of the common law, contained the first statutory treatment of appropriative water rights. Sections 1410 and 1411 distinguished between the right to use flowing water and beneficial use:

Section 1410. The right to the use of *running water flowing in a river or stream, or down a cañon ravine*, may be acquired by appropriation.

Section 1411. The appropriation must be *for some useful or beneficial purpose*, and whether the appropriator or his successor in interest ceases *to use it for such purpose* the right ceases.<sup>97</sup>

93. Wiel quotes Blackstone on this point and adds: “To avoid misunderstanding, it must be well noted that this passage [from Blackstone’s Commentaries] distinguishes the *corpus* of water from the usufructuary right in the stream . . .” *Id.* at 757 (emphasis added).

94. As will be discussed below, the term “usufruct” is used in water rights doctrine in a manner entirely unrelated to its civil law origins—primarily to signify the nonpossessory, non-ownership nature of the water right. The idea that one holds a nonpossessory right of use in something one possesses such as diverted water—is a contradiction in terms. It is the same as holding an easement in one’s own land, a nonpossessory right to use the land one possesses. Because conveyances can cause the merging of interests in servient and dominant estates, the implicit illogic of holding an easement in one’s own land must be formally dealt with. Thus, California Civil Code section 805 explicitly prohibits the owner of a servient tenement from holding an easement in his own land and section 811 provides that, where the holder of an easement (the owner of a dominant tenement) later acquires title to the servient tenement, the nonpossessory easement is extinguished. See CAL. CIV. CODE §§ 805, 811 (West 1971).

95. WATER AND WATER RIGHTS, *supra* note 57, at 349 (emphasis added).

96. *Palmer v. R.R. Comm’n*, 167 Cal. 163, 167 (1914); see also HUTCHINS, THE CALIFORNIA LAW, *supra* note 72, at 36-40.

97. CAL. CIV. CODE §§ 1401-1411 (1872) (emphasis added). When the Civil Code was amended in 1911, it retained the section 1410 wording. 1911 Cal. Stat. ch. 407, at 821. When these provisions were later transferred from the Civil Code to the state’s new Water Code in 1943, the reference to “the use of running water flowing in rivers, etc.” was replaced with the shorthand expression “the use of water.” See CAL. WATER CODE § 102. Section 1411 became Water Code section 1240. The Code Commission Notes following Water Code section 102 state that “the deletion of the reference to running water is not intended to expand the definition of water subject to appropriation,” but to facilitate the writing of any possible future amendments. The unintended and unfortunate result was to remove a clear statutory statement that running water is the proper *res* of the water right as property and that the “use of water” conferred by the water right is the *use of running water*.

The phrase “useful or beneficial purposes,” rather than “beneficial use” fortuitously helps to avoid the confusion between use of the stream (diversion) and the use of diverted water. The 1914 Water Commission Act also used this helpful phrasing extensively, including in provisions that now appear in Water Code sections 1004, 2002, 1253, 1390, 1396, 1627, 1675, etc. However, “beneficial use” was the phrasing used in the 1928

Use of the watercourse—of running water—is the use entitled by the water right. Beneficial use of the appropriated water, on the other hand, the *purpose for which* an appropriation must be made, is the use of water enabled by the water right. To merge beneficial use with the water right itself is to confuse what the right *entitles* with what it merely *enables*.<sup>98</sup>

Thus, when the Court of Federal Claims invoked the plaintiffs' "usufructuary rights," it was attaching the usufruct to the wrong subject matter: diverted water. It was confusing the plaintiffs' so-called "water-use rights"—meaning rights to make beneficial use of *diverted water*—with usufructuary rights, which properly denote the rights to use (i.e., to divert) *running water*—water rights DWR alone held and exercised.

"Usufruct" is an unusual term to begin with, more unusual perhaps than is generally acknowledged. Because "usufruct" is used so often and so authoritatively in water rights law to convey a sense of "use-right" but never, it seems, with any explanation of what it actually means, the inquiry into how the term "use" is used and misused in California water rights law cannot avoid an examination of the use and meaning of "usufruct."

This examination reveals that the usufruct actually has only the most colloquial and superficial applicability to common law water rights doctrine. Nonetheless, understanding how and why the term has been used to describe water rights is helpful to highlight the key distinction between the *use* of the watercourse, which is *entitled* by the water right, and the *use* of water diverted from the watercourse (beneficial use), which is *enabled* by the water right. With this important distinction in mind, the discussion of "use" will then consider, in

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Amendment (Article 10, section 2) and it is now the exemplar for contemporary usage.

98. Because of this confusion, entitlement versus enablement is an important analytic perspective in the discussion of the water right as a property right. It distinguishes those interests and abilities that the right specifically confers from the advantages and opportunities that are merely made possible or facilitated by the exercise of those interests and abilities. A familiar, everyday example of the distinction between what a right entitles and what it only enables may be found in the large warehouse-type stores that require purchase of a "store membership." Store membership confers the right to use the store—to enter and make purchases. But membership alone, entitling a person to use *the store*, does not of itself entitle a person to use or possess an item of merchandise *in the store*. That use is merely *enabled* by store membership, specifically by purchasing and thus acquiring title to the item. It is, at that point, the member's *ownership of the item* that entitles its use—not his store membership.

While the distinction is important—particularly where the taking of a property entitlement is compensable but the "taking" of an expectancy or opportunity is not—it is also elementary, and further illustrations of what a right *entitles* (i.e., what it is a *right* to) as opposed to what it only *enables* (i.e., the opportunities its exercise creates) may be easily put forth:

- A trust to provide for the beneficiary's education *entitles* the beneficiary to use the proceeds for education. It *enables* the beneficiary to acquire an education; but it does not *entitle* the beneficiary to acquire an education.
- A driver's license *entitles* one to operate a motor vehicle upon the state's roadways. It *enables* the licensee to drive to San Francisco. But it does not entitle the licensee to drive to San Francisco; and if a lawful governmental act blocks highway access to San Francisco, the holder of a driver's license has not been deprived of any right, compensable or otherwise, conferred by his license.

turn, (1) the close and instructive similarity of the water right to the species of easement known as the *profit à prendre* and, in particular, to oil and gas rights; (2) the water right as a legal power whose exercise “links” the nonpossessory right to use the watercourse by diversion with the possessory right to make beneficial use of the diverted water (the so-called “water-use right”); and (3) the separate role of beneficial use in California water rights law not as an economic opportunity for the individual but as a condition and obligation imposed upon the water right for the benefit of society.

### 1. *The Water Right as a Usufruct*

In recognizing a unique and limited property right in *running water*, California courts have used an expression earlier common law jurists and commentators had taken from Roman law and the European civil law, declaring the private interest in running water to be “usufructuary” and the right to be not ownership but “a usufruct in the stream.”<sup>99</sup> California courts have often repeated that water rights are “usufructuary” or “usufructs.”

The usufruct was an important element of Roman law. Today, it is an essential construct in the civil law of continental Europe, which is followed in the United States only by the State of Louisiana.<sup>100</sup> It is not a fundamental property principle of the English or American common law, but the term has been employed on occasion in various American jurisdictions, for different but largely descriptive purposes.<sup>101</sup> That is how it has been employed in connection with water rights. Water rights are most often described as being usufructuary rather than formally denominated as “usufructs.” But for as often as some form of the term has been applied to water rights, no case has ever actually defined what a “usufruct” is or what “usufructuary” means.

In the civil law, a usufruct is the “right to the use, enjoyment, and avail of property belonging to another,” a personal right in property *that is owned by someone else*, usually for the life of the usufructuary right holder.<sup>102</sup> As a rule, the right applies to property that is not consumed by use and enjoins upon the

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99. *Pope v. Kinman*, 54 Cal. 3, 5 (1879).

100. Louisiana’s Civil Code was derived from the Civil Code of France (the Code Napoléon). VERNON VALENTINE PALMER, *THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION* 52-53 (2005).

101. WIEL, *supra* note 1, at 15-18 (referring to English and American commentators, including Blackstone, Story, and Kent). Although the term is not included in the California Civil Code, as a species of servitude or otherwise (see California Civil Code sections 801 and 802), the term has been used, for example, to describe the interest of a lessee of government land for purposes of property taxation. See *Douglas Aircraft v. Byram*, 57 Cal. App. 2d 311, 317 (1943); *Hammond Co. v. County of Los Angeles*, 104 Cal. App. 235, 240 (1930). More typical is its use in *Smith v. Cooley*, 65 Cal. 46, 47-48 (1884), where the court described a “mining right” as “usufructuary in its nature and character.” Today, a “mining right” would clearly be classified as a *profit à prendre*.

102. “Usufruct is a real right of limited duration on the property of another.” 28 AM. JUR. 2D *Estates* § 6; see also LA. CIV. CODE art. 535 (2006).



usufructuary<sup>103</sup> an obligation not to damage the property in derogation of the owner's title and right of subsequent use and enjoyment.<sup>104</sup> Moreover, the usufructuary right may be possessory<sup>105</sup> and, as to all but the "naked owner," exclusive and absolute.<sup>106</sup> "The usufructuary's right of enjoyment comprises two elements: the right to draw fruits and *the right to possess* and use things. After the usufructuary has taken possession, *his right to use the thing is, in principle, as extensive as that of the owner.*"<sup>107</sup>

While the "drawing of fruits" aspect of the usufruct comports with water rights being a right to divert (i.e., to draw the fruit of water from the stream), the "right to possess" aspect does not. The one essential feature of running water as the subject matter of property rights is that it is altogether incapable of possession. Thus, it is important to recognize that when the water right is declared to be "usufructuary" or a "mere usufruct," it means something quite different from the possessory and exclusive present interest in property that the civil law usufructuary can have.<sup>108</sup>

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103. "Usufructuary" is an adjective used to describe the right and as a noun to denote the holder of the usufruct.

104. It is quite similar in this way to the common law life tenant's obligation to the reversioner or remainder not to commit waste. In fact, the construct of the usufruct as a servitude or encumbrance on ownership largely accomplished for the civil law what the division of fee simple into lesser possessory estates (life tenancies) and interests (tenancies for a period of years) accomplished for the common law. BROWDER ET AL., *supra* note 47, at 57.

105. As to non-consumable "things," the Louisiana Civil Code states that "the usufructuary has the right to possess them and to derive the utility, profits, and advantages that they may provide." LA. CIV. CODE art. 539 (2006) (emphasis added). As to consumables, the usufructuary *owns* them. *Id.* art. 538 (emphasis added). Apart from its tenure limitations and its prohibition on waste, the usufruct—like the life tenancy—may include every substantial right of ownership, including possession, control, and the right to exclude others.

106. The civil law usufruct is predicated on there being an owner of the property, with an implicit focus on the present rights and conduct of the user vis-a-vis the future rights of the owner. *See id.* art. 535; *id.* bk. II, tit. III, Personal Servitudes: *Exposé des Motifs*, ch. 2, § 2 (1980).

107. *Id.* (emphasis added); *see also* OXFORD ENGLISH DICTIONARY 478 (2002) (defining "usufruct" as "the right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as it may be had without causing damage or prejudice to this") (emphasis added). The French Civil Code expressly states that the usufruct is the right to enjoy the property of another as the owner himself: "*L'usufruit est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance.*" C. CIV. art. 578 (France). It appears in fact that possession had pivotal significance in the development of the usufruct in the Roman law:

There was a further type of servitude the Romans called personal, i. e. [sic], in gross, that had no estate to depend upon and could be applied to realty as to personalty. The most characteristic form of it was the *usufructus* . . . . What gave it its particular value to Romans was that it enabled interests in the res itself to be created which the contracts of letting and hiring, of mandate, and the "real" contracts, were generally unable to effect. This was due to the fact that the usufruct conferred 'possession' and these contracts did not . . . .

Max Radin, *Fundamental Concepts of the Roman Law* XV, 13 CAL. L. REV. 207, 218 (1925).

108. The idea that one has a "mere" usufructuary right, or use right, *in a stream* makes sense: it means that the property right in the stream to divert water from it is limited and less than ownership, which implies the ability to exercise complete and exclusive dominion over what is owned. But the proposition that one has a "mere" right to use *the substance of the water* that has been taken from the stream and reduced to possession is simply fatuous. There is nothing "mere" about the right to make full, possessory, and exclusive use of property.

Obviously, the California water right is not, literally, a *usufruct* within the civil law's meaning of the term.<sup>109</sup> Nor is it literally usufructuary, if the meaning

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To say that one can *only use* the diverted water one possesses—i.e., one can *only* grow crops or generate electricity or manufacture goods or bathe in it or drink it—in other words, can *only* control it, apply it to use, and reap every last reward it can offer, to the exclusion of all others—but cannot *own* it—is like the old joke about the person who didn't want to be a millionaire but only wanted to live like one. The mistake lies in confusing nonpossessory “use rights” in the stream, which are inherently limited and non-exclusive and, at their fullest, fall short of ownership, with the exclusive “rights of use” of diverted water, which are simply the constituent “sticks” in the bundle of possessory property rights and which, together, *are* ownership.

Wiel notes the confusion of a Colorado appellate court on this very point, a confusion that is undoubtedly much more common than not:

Unfortunately, the distinction [between the usufruct of the stream and ownership of the corpus of the water in the stream] has not always been appreciated. For example, in an overruled Colorado case it was said: “The distinction attempted to be drawn between the right to use water and the title to it is purely mythical and imaginary, and the sooner it is dropped, and the two are treated as identical, the better, and less confusion will exist.” *Wyatt v. Larimer etc. Co.* (1892) 1 Colo. App. 480, 29 Pac. 913.

WIEL, *supra* note 1, at 20 n.2.

The Colorado court's frustration is understandable, if misplaced. If the *res* of the “right to use” were in fact the same as the *res* to which “title” attached, i.e., the substance of the water, then the distinction between the right to use water and title to it would indeed be mythical. But it is not the same. The Colorado court, just like the Court of Federal Claims, failed to recognize that there are actually two different *res* involved and that “water” refers to *two completely different things*: running water (in which there is but a right of use) and water reduced to possession (in which title exists).

Wiel quotes *Chesmore v. Richards*, 7 H.L. Cas. 349 (1859), on this same point in criticizing the application of the principle that ownership of the surface includes ownership of everything above and below (expressed in the common law maxim, *cujus est solum, ejus usque ad coelum et ad inferos*) to water flowing over private land as the source of the riparian right, saying it is “founded on a *mistake between the property in the water itself* [ownership] *and the right to have its continual flow* [the usufruct].” WIEL, *supra* note 1, at 767 (emphasis added).

In fact, the first California water case to invoke the usufruct (and the first California water case at all) similarly failed to make a clear distinction between the two *res*, between water (the substance) and running water, and hit upon an infelicitous but amazingly often-quoted turn of phrase: “The right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of *its* use.” *Eddy v. Simpson*, 3 Cal. 246, 249 (1852). The problem with this passage begins with the fact that the phrase, “the *right of property* . . . consists not so much of *the fluid itself*,” does not make literal sense. “Fluid” is not a “right”—of property or anything else. A fluid is a substance, a gas or liquid, which may be *property* in the sense of the subject matter of property interests (what this article calls the “*res*”), but not a *right* of property.

But much more important and relevant to the confusion attending use and usufructs, is that the antecedent of “its” (in “its use”) is “the fluid itself.” Thus, the phrase utterly fails to distinguish between the flow of water and the substance of the water. Considering only the substance of the water, the passage literally says: there is no ownership of *the fluid* but “only” a right to use *the fluid*. That is, *only* a right to use the molecules, the water *qua* water—which in turn sounds exactly like not owning a million dollars but “only” being able to spend it—very much a “mythical and imaginary distinction.” It was in fact this language from *Eddy v. Simpson* that the Court of Federal Claims quoted to support its view that the “plaintiffs’ sole entitlement is to the use of the water.” *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (2001).

The mischief created by the unfortunate phrasing in *Eddy*, however, also lies in its being taken out of context. Two sentences later, *Eddy* helps to correct the antecedent problem by expressly stating: “The right is not in the *corpus* of the water . . . .” That is, the water right is *not* in the fluid, *not* in water *qua* water. The right is, as it can only be, in the flowing water.

109. Tellingly, the French riparian right—the only private water right recognized in the French Civil Code—is not a usufruct either; nor is the Louisiana riparian right. They are, rather, like the American riparian right, a substantive right of use inhering in riparian proprietorship—not a personal servitude or encumbrance

of that term is to refer to the formal, civil law usufruct. “Usufructuary” can only have the looser, informal sense of “like a usufruct”—although in what way or to what degree the water right is “like a usufruct” is never expressly stated in the substantial body of California case law that has used the term.

Rather than having the formal, developed meaning it has in the civil law, the courts in California have used the expression usufruct/usufructuary less to convey what the water right is than to convey what it is not: that the water right is *not* a right of possession or ownership of water. One can “use the stream” as the water passes by—draw its fruits, as it were—but one cannot assert dominion over the flowing water or over the substance of the water itself. The use of the term is almost invariably accompanied by the statement that there is no property in or ownership of the substance of the water.<sup>110</sup>

In sum, the civil law usufruct is a non-ownership right in which possession is possible; whereas the water right “usufruct” is a non-ownership right *because* possession is *impossible*. The expression, juxtaposed with the absence of property in the substance of the flowing water itself, means the usufruct of the *flowing stream*: the nonpossessory right to use the running water, to draw the fruit of water from the watercourse, and *not* the right to later use the diverted water.<sup>111</sup>

This, however, is not how the *Tulare* court used the term. Identifying the plaintiffs as end-users of water holding “water-use rights,” the court stated: “[P]laintiffs’ sole entitlement is to the *use of the water*. . . . To the extent, then, that the federal government . . . ha[s] rendered the *usufructuary right to that water* valueless, they have thus effected a physical taking.”<sup>112</sup> There is no water right, however, and therefore no usufruct, in the *corpus* or molecules or specific parcel of flowing water. There is no “*that water*,” as in the court’s phrase “the usufructuary right to *that water*.”

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upon the ownership of another. See LA. CIV. CODE art. 656, 657 (2006); C. CIV. art. 644 (France); see also Wiel, *supra* note 46, at 253-61.

110. “A party hath only the usufruct; and not the absolute property of the soil.” 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 105 (1766). The usage is all but tautological, *usufruct* being used to denote the absence of ownership. It is a term with essentially no contextual reference in the common law, whose principal function, in being both singular and exotic, is to impart a sense of authority. Professor Trelease refers to an engaging discussion of this phenomenon in Alf Ross, *TU-TU*, 70 HARV. L. REV. 812 (1957). Trelease, *Government Ownership*, *supra* note 80, at 638.

111. Wiel observed:

[T]he *corpus* of the water in the stream itself, as a substance, is not the subject of property, and . . . one may have only the strictly usufructuary right to the flow and use of the *stream*. Were the principles to be, to any great extent, so applied as to regard cases as based upon property rights in running water as a substance, it would be a misapplication, for their true force lies in showing the opposite—that controversies must, as a rule, be decided with regard to the *flow and use of the natural water supply*, and not its *corpus*; for the *usufruct of the natural resource* (and not the water itself) is alone of practical importance.

WIEL, *supra* note 1, at 45 (“*corpus*” italicized in original, other italics added for emphasis).

112. *Tulare*, 49 Fed. Cl. at 319.

The Court of Federal Claims, focusing on the plaintiffs' loss of the irrigation use of the water expected to be provided under their contracts with DWR, applied the water rights terms "usufruct" and "use-right" to a different *res* than the *res* of the water right. The court did not apply them to flowing water but misapplied them to the substance of the water itself. Almost certainly it did so because it did not recognize the ambiguity in the term "use" that arises because there are two different manners of use integrally involved in California water law, each associated with a different physical form of water.<sup>113</sup>

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113. As noted at the beginning of this article, the failure to distinguish between the meanings of "use" and "water"—the use of flowing water and the beneficial use of diverted water—has had a material influence in other recent judicial decisions besides *Tulare*. One is the 2006 decision of the Utah Supreme Court in the Uintah Basin adjudication, involving the rights of United States Bureau of Reclamation (USBR) contractors under Utah law and under the terms of their federal contracts. In this case, the Utah court, quoting an earlier decision, stated:

*The right to the use of water, although a property right, is very different from the ownership of specific property which is subject to possession, control and use as the property owner sees fit. Such right does not involve the ownership of a specific body of water but is only a right to use a given amount of the transitory waters of a stream or water source for a specific time, place and purpose*  
 . . . .

*In re* Uintah Basin, 133 P.3d 410, 421 (Utah 2006) (quoting United States v. District Court (*Strawberry*), 121 Utah 1, 238 P.2d 1132, 1134 (1951) (emphasis added)). After this very accurate articulation of the distinction between water rights in flowing water and possessory ownership rights in a parcel of water, the court went on to conclude, however:

Accordingly, it is not sufficient to ask only who has title to water or in whose name a certificate of appropriation has been issued. The governing statute . . . affords the certificate of appropriation only the status of 'prima facie evidence of the [certificate] owner's right to the use of water.' Here it is undisputed that the right of use rests with Strawberry.

*Id.* (emphasis added).

After speaking of the right to *use* the "transitory waters of a stream," which is "very different from the ownership of a specific body of water," the court concluded that Strawberry, the beneficial user of the body of diverted water—not the United States, the diverter/user of the transitory waters of the stream—holds the "undisputed right of *use*" accorded by the water right. *Id.* Based on the passage first quoted, however, the "title" was the certificate of appropriation; the owner of this title was the USBR, and the *user of water under the title* (i.e., the *appropriator/diverter*) was the *USBR—not* Strawberry.

Another recent decision is that of the California Court of Appeal in the *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674 (2006), in which the court addressed the meaning of the term "legal user of water" in California Water Code section 1702. Section 1702, based on the common law "no injury" principle, provides protection for "any legal user of water" from injury caused by a proposed change in point of diversion or place or purpose of use by a statutory appropriator (i.e., a permittee or licensee). The court recognized that, under the common law, only diverters—the holders of water rights—were legal users of water and thus entitled to assert protection against harmful changes in the exercise of senior appropriations. The specific issue before the court was whether contractors, or other parties who do not hold water rights but who make beneficial use of the water diverted by others, are also legal users of water under section 1702. The court concluded they are. The court's analysis of the meaning of "legal user of water" in section 1702, based upon an asserted "plain meaning" of the phrase, would have been more robust had the court been clearly presented with the issue of the dual and often-conflated meanings of the terms that comprise the phrase. The three potentially harmful water right permit changes that are the subject of the rule are, specifically, ones in which changes *affect the regimen of flowing water*, through their effect on the relative location of diversions from the watercourse (changes in point of diversion), on timing of diversion from the watercourse (especially changes in purpose of use), and on return flow amounts and patterns (changes in place of use, but changes in the other two as well). In short, the effects that are of concern from these specific permit changes, and that could potentially cause injury and thus be of policy concern under the statute, are the changes in water availability in the stream to the users of the stream.

## 2. *The Water Right as a “Use Right”*

Precisely speaking, then, a water right is *not* a right to use water. A water right is (1) a right (2) to use (3) *running* water. It is a right to use a watercourse, to avail oneself of its fruits by diversion, which thereafter provides (1) an opportunity (2) to use beneficially (3) the diverted water. The former is the use entitled by the water right, the latter, the use that is enabled by its exercise. Hutchins articulated the former right of use clearly: “The right one may acquire *with respect to water flowing in a stream* is a right to its use, which will be regarded and protected as property. This right is strictly usufructuary.”<sup>114</sup>

One *uses* a watercourse by diverting water from it.<sup>115</sup> Diversion is the use, and the detached substance of the water is the “fruit” that the running water yields: water reduced to possession by diversion and no longer physically part of the watercourse to which the water right attaches. The beneficial use of water, on the other hand—the second “use” with which water rights doctrine is concerned—is the use of diverted water: diverted water applied to personally profitable and socially productive ends.

## 3. *Diversion and the Resultant Rights of Possession and Ownership*

Obviously, the key point in the relationship between the property right to use running water and the use of water separated from the stream is the physical act of diversion, the act entitled by the water right. Before this point, the law recognizes no private right in the molecules of water flowing in the stream, molecules that are in their way *ferae naturae* and incapable of possession. Beyond the point of diversion, physical possession confers a true and complete property in the parcel of water severed from the watercourse.<sup>116</sup> Many different

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Interestingly, the ambiguity in the term “water” appears elsewhere in the opinion, but in a different context where it raises yet a third meaning of the word. In a passing comment, the court embraced the inclusion of “flow” as a characteristic or parameter of “water quality” because (quoting the SWRCB in its 1995 Water Quality Control Plan, which also considers “diversion” a water quality characteristic), “the rate and quantity of flow . . . are physical properties of *the water*” that can adversely impact beneficial uses. *Id.* at 710 (emphasis added). The policy focus and sense of “the *water*” in “water quality,” however, is the condition or character of the *substance of the water* in the watercourse, referred to as the “water column.” Water quality parameters of the water column are traditionally its chemistry, constituents, and physical character (principally temperature). Flow, on the other hand, its quantity, rate, velocity, direction, etc., are not characteristics of the water column but of the watercourse itself. The physical behavior of the watercourse, including flow, depth, stage, and other aspects of riverine hydrodynamics, are certainly of public and regulatory concern; but they are concerns that fall more naturally and fittingly within the policy and legislative frameworks of water rights, flood control, and navigation, and far less so within the sphere of water quality policy interests and concerns, such as “pollution,” “contamination,” and “degradation.”

114. HUTCHINS, *THE CALIFORNIA LAW*, *supra* note 72, at 37 (footnotes omitted) (emphasis added).

115. Thus, a water right holder “uses” a watercourse in precisely the same way that the holder of a profit à prendre “uses” a servient tenement: by taking material from it. *See infra* Part III.A.4.

116. Wiel describes the water right as a link, a “transition from nobody’s property to private property, by capture and severance from the stream . . . . The right may exist to have its [naturally flowing water] flow and

rights can potentially attach to water after it has been diverted from the stream, but only one kind of right operates at the interface of nature and human instrumentality and exists in “water” before it is diverted: the water right.

Diversion is not an end in itself any more than mining for gold or drilling for oil, but is a means to an end. The ultimate human and social object of diversion is the use of the captured molecules of water for their chemical, thermal, and hydraulic properties, i.e., for beneficial use. For all of the reasons that it is natural to link the water right to divert water from a watercourse with putting water to beneficial use, and for all of the times the two have been so readily merged together in phrases such as “the right to divert and use water,”<sup>117</sup> “the appropriative right is a right of beneficial use,”<sup>118</sup> or the “right to use water,” the fact that there is a complete legal disjuncture between the property right in the stream and the property right in the water diverted from the stream may seem counterintuitive. The mind that can clearly see that the fruit of an apple tree is an apple, and not apple pie, may yet have difficulty accepting that the fruit of the watercourse is water and not water beneficially used.<sup>119</sup> But the truth is, this kind of legal disjuncture is quite ordinary, and examples of it abound.

The common law offers many examples of rights very similar in nature to water rights in which one also finds an identical discontinuity between nonpossessory rights of use and the possessory interests that their exercise creates. The fact that the water right is (1) a right of use (2) in a resource that the right holder does not own, invites a natural and instructive comparison with easements—the most common and familiar of nonpossessory use rights—and, in particular, with that category of easements known as profits à prendre.

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use, and to take of it (called usufructuary). Any part taken is the private property of the possessor while in his possession.” WIEL, *supra*, note 1, at 755. The physical act of diversion, besides being the particular act entitled by the water right, also constitutes the exercise of a legal power that creates new legal rights. This aspect of diversion is discussed below.

117. Even Professor Trelease refers to “rights to abstract and use the water of streams.” FRANK J. TRELEASE, *WATER LAW* 10 (2d ed. 1974).

118. *Hufford v. Dye*, 162 Cal. 147 (1912).

119. Hutchins, for example, seemed to experience a similar intuitive discomfort in reporting *Nevada County & Sacramento Canal Co. v. Kidd*, 37 Cal. 282 (1869), which quite sensibly held that the water right and the physical works of diversion are different things, capable of different injuries, different causes of action, and different remedies, commenting: “Even though the water right and the ditch right are separate property rights, it is true that they are *closely related*, for under most circumstances the exercise of the water right depends upon the use of some method of diverting and conveying the water.” HUTCHINS, 2 *WATER RIGHTS LAWS*, *supra* note 6, at 164, 165 (emphasis added). Strictly speaking, the comment is neither true nor logical. Of course one may interfere with the exercise of a diversion right by interfering with the physical means of diversion as well as by interfering with the streamflow. But Hutchins’ conclusion that *the rights themselves* are therefore related does not follow. That the exercise of an incorporeal real property right to enter upon land and drill for oil is dependent upon having a right to the use of the necessary drilling equipment does not mean that the rights themselves, *qua* rights, are related. One may suppose the same kind of intuitive urge to “connect” the nonpossessory right to divert water from a watercourse with the possessory right to use the diverted water—even though they are, in reality, “separate property rights.”

#### 4. *The Water Right and the Profit à Prendre*

Like the water right, the affirmative easement is a nonpossessory right of use in a resource one does not own.<sup>120</sup> Much closer still to the water right is the subset of affirmative easements known as “profits à prendre.”

An affirmative easement is the nonpossessory right to use the land of another—that land being called the “servient tenement.”<sup>121</sup> The profit à prendre (also called simply a “profit”) is the species of easement in which the particular use entitled to be made of the servient tenement is the taking of something from it: minerals, oil and gas, forest products, or other material.<sup>122</sup>

##### a. *The Nonpossessory Use Right Is the Right to Take*

“À prendre,” like the verb “to appropriate,” means to take.<sup>123</sup> The land in which the right exists—the servient tenement—is to the profit what the watercourse is to the water right. Land is the subject matter of the right, and the nonpossessory right to use land one does not own by mining and taking minerals or cutting and taking timber from land under a profit is no different from the nonpossessory right to use a watercourse one does not own by diverting and taking water from the watercourse under a water right. The profit, then, is a ready example from the common law of (1) a nonpossessory (2) right of use (3) in a resource or subject matter one does not own, where (4) the “use” is the taking of something from the resource.<sup>124</sup>

##### b. *A Right in the Realty/Resource—Not in the Material to Be Taken*

The essential property aspects of water rights and profits track very closely. Figure 1 shows their virtual identity. The property of a mineral profit, for

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120. A negative easement, on the other hand, limits the owner’s use of the servient estate for the benefit of the dominant estate. WILLIAM E. BURBY, *REAL PROPERTY* 64 (3d ed. 1968). Today, “easement” refers almost universally to affirmative easements only; negative easements are now categorized as restrictive covenants. See 1 RESTATEMENT (THIRD) OF PROPERTY § 12, 14 (1998).

121. CAL. CIV. CODE § 803 (West 1997).

122. “A profit à prendre is an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another.” 1 RESTATEMENT (THIRD) OF PROPERTY, *supra* note 120, at 12; see also *Gerhard v. Stephens*, 68 Cal. 2d 864 (1968); *Westlake v. Silva*, 49 Cal. App. 2d 476 (1942); CAL. CIV. CODE § 801, 802 (items 2 fishing, 3 taking game, 5 taking water, wood, minerals, and other things, and easements in gross); BURBY, *supra* note 120, at 62. Although earlier cases distinguished the profit à prendre from easements, the California Civil Code classifies profits as a type of easement.

123. “À prendre” is a French adjectival construction meaning “to take.” *DICTIONNAIRE MODERNE FRANÇAIS-ANGLAIS/ANGLAIS-FRANÇAIS* 1, 563 (1960).

124. There is no material difference between riparian rights (or overlying groundwater rights) and oil and gas profits in California. For both, land ownership is necessary to provide access, and oil and gas in the ground, like groundwater, are not themselves susceptible of possession or ownership, even by the overlying owner: “Like water [gas and oil are] not the subject of property, except while in actual occupancy . . .” *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 207 (1900) (quoting *People’s Gas Co. v. Tyner*, 131 Ind. 277, 281 (1892)).

example, is the use right *in the land* where the minerals are located—not a right in the minerals themselves. Similarly, the property of the water right is the use right *in the watercourse* and not a property or estate in the *corpus* of the water itself. Case law provides some illustrative examples. In the Tennessee case of *Stanton v. Herbert*, the court distinguished between the grant of an exclusive right to sand and gravel (creating a possessory estate in the sand and gravel itself) from the grant of a non-exclusive right to take the material, which created a nonpossessory profit à prendre. The profit was not a right in the sand and gravel; it was a right *in the land it burdened* to take sand and gravel from the land.<sup>125</sup>

*c. New Title (Ownership) Created in the Material Taken*

The consequences of taking material are also the same for water rights and profits à prendre. Severance from the source creates a title in that which has been severed. In *Stanislaus Water Co. v. Bachman*,<sup>126</sup> the court compared water in nature to the natural occurrence of timber, minerals, rocks, oil, and clay and described the property transformation that occurs when these resources are severed from the earth and reduced to possession. Undisturbed, they are a part of the realty to which they are affixed. But severed, they become personalty, property separate and apart from the land or watercourse from which they were detached. The court found the same transformation to be true for water: “The business of collecting water in reservoirs and conducting it in pipes to houses of a city . . . is a process of severing the water from its connection with the earth and changing it into personal property.”<sup>127</sup> The court then quoted from the earlier case of *Heyneman v. Blake*: “Water when collected in reservoirs or pipes and thus separated from the original source of supply is personal property, and is as much the subject of sale—an article of commerce—as ordinary goods and merchandise.”<sup>128</sup>

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125. *Stanton v. T. L. Herbert & Sons*, 141 Tenn. 440 (1918); *see also Callahan v. Martin*, 3 Cal. 2d 110 (1935); *Western Oil & Refining Co. v. Venago Oil Corp.*, 218 Cal. 733, 738, 741 (1933).

126. 152 Cal. 716 (1908).

127. *Id.* at 726. The point in *Stanislaus* was not to say that all severed material is necessarily *personalty*, but to emphasize that a new, possessory property in the material is created when it is severed from the servient estate. The property could just as easily be realty as personalty, if, for example, the profit were appurtenant to a dominant estate or the water right appurtenant to a place of use. It just would not be real property *in the servient estate*. *See HUTCHINS, THE CALIFORNIA LAW, supra* note 72, at 38-39.

128. 19 Cal. 579, 594 (1862). The court in *Stanislaus*, however, found that the contract in question, which expressly declared itself to be a covenant running with the land, of perpetual duration, and inuring to the benefit of the contractor’s heirs and assigns was, not surprisingly, not simply a sales agreement but the conveyance of an undivided interest in the company’s ditch and the water flowing in it. *Stanislaus Water*, 152 Cal. at 728-29.



On this property transformation, Wiel observed: “[R]unning water . . . is the property of no one, but a portion of it taken out of the stream and confined in the possession of an individual becomes the taker’s private property, belonging to him while under his possession and control.”<sup>129</sup> As the court in *Bachman* observed, these are the same consequences that result from the taking and removing of material under a profit and reducing it to the possession of the taker. In the exercise of a profit to take sand, as in *Stanton*, excavation detaches the sand from the servient tenement and reduces it to the personal possession of the excavator. Upon excavation, the sand is no longer physically connected with or a legal part of the servient estate and is thus no longer subject to the profit either. The sand that is taken is *owned* as personal property of the possessor, and the possessor may use it or may sell it for use by someone else.<sup>130</sup>

d. *Oil and Gas*

The exploitation of oil and gas provides the most expansive body of law on profits à prendre in California. Moreover, oil and gas are even more closely comparable to running water than are other minerals or resources because they too are (1) moving, transient substances with no regard for surface property boundaries; (2) the object of multiple, concurrent rights; and (3) incapable of ownership, even by the overlying owner.<sup>131</sup> Where as to the right to take standing timber or minerals in place the profit and the water right are extremely similar, as the right to take oil and gas they are virtually identical.<sup>132</sup> The nonpossessory profit à prendre to take oil and gas is, like the nonpossessory water right to appropriate running water, the fullest property the law recognizes in these fugitive natural resources.<sup>133</sup>

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129. WIEL, *supra*, note 1, at 1-2.

130. See *Western Oil*, 218 Cal. at 741.

131. *Id.*; *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900). Other minerals—those that do not move—are considered to be owned by the surface owner, under the rule of “ownership in place.” As noted above, a grant of an exclusive right to minerals in place has thus been held to convey a possessory estate in the minerals themselves, whereas the grant of a non-exclusive mineral right conveys a profit à prendre to the grantee. See *Stanton v. T. L. Herbert & Sons*, 141 Tenn. 440 (1919); BURBY, *supra* note 120, at 62-63.

132. The only way in which they are different is the absence of ownership of the watercourse (i.e., of a servient estate), an inconsequential difference. See Fig. 1.

133. Thus, the owner of the servient tenement himself has no possessory interest in the “fugacious” oil and gas resources underlying his land, but only a non-exclusive right to drill and take them from beneath the surface. In this, the nature of the owner’s rights is no different from the nature of the rights of the assignees of royalties or of oil and gas lessees, which consist only of the right to enter the servient tenement and to explore for and extract oil and gas therefrom. *Gerhard v. Stevens*, 68 Cal. 2d 864 (1968); *Callahan v. Martin*, 3 Cal. 2d 110 (1935); *Western Oil*, 218 Cal. at 741; *PG&E v. Zuckerman*, 189 Cal. App. 3d 1113 (1987); *Lough v. Coal Oil*, 155 Cal. App. 2d 785 (1957).

As with other profits, the right to take oil and gas from the servient estate does not include any property in the unextracted substances. Only upon extracting the material and reducing it to possession in exercise of the profit do oil and gas become the property of the profit holder.<sup>134</sup> In *Western Oil*, the court stated:

It is settled law that the lessee under an oil and gas lease [i.e., the profit holder] acquires no title to the oil and gas in place as part of the realty, but only a right to enter upon the land, drill wells, and reduce the oil and gas to possession. When reduced to possession the oil and gas are personal property, and only then can absolute title vest.<sup>135</sup>

Similarly, the builder who may contract to purchase sand for use in construction from one who holds the right to mine sand from a quarry (but who has no title in the unmined sand)—no different from the refiner in *Richfield* with a contract to purchase the production of oil from an operating lessee—holds no “sand use-right” in the quarry or in the sand in place. Only upon the exercise of the profit à prendre, of the right “to take,” does his property in the sand itself arise and thereupon *entitle* what the profit only *enabled*: a universe of future actions, including the beneficial use of the substance taken or the transfer for use by someone else.

This is the same relationship the appropriative water right bears to the activities that it enables. Beneficial use is an opportunity enabled, not entitled, by the water right. The legal character of this particular enablement is discussed in the next Part.

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134. *Richfield Oil Co. v. Hercules Gasoline Co.*, 112 Cal. App. 431, 434 (1931).

135. *Western Oil*, 218 Cal. at 738; *see also Ohio Oil*, 177 U.S. at 208.

**Fig. 1**  
**Comparison of the Water Right and the Profit à Prendre**  
**as Rights of Property**

	<b>Water Right</b>	<b>Profit à Prendre</b>
<b>Character of Right</b>	A nonpossessory right of use	A nonpossessory right of use
<b>Use Entitled</b>	Taking water	Taking material, etc.
<b>Property Res</b>	The watercourse (Not owned by water right holder)	The servient estate (Not owned by profit holder)
<b>Not the Property Res</b>	The substance of the water to be taken	The material to be taken
<b>Physical Effect of Exercise</b>	Severance of water from the watercourse and reduction to possession of the water taken	Severance of material from the realty and reduction to possession of material taken
<b>Legal Effect of Exercise</b>	A new title (ownership) is created in the water taken	A new title (ownership) is created in the material taken
<b>Rights Under New Title</b>	Possessory use and disposition of water taken	Possessory use and disposition of material taken

### 5. *The Water Right as a Power*

The profit à prendre presents exactly the same proprietary disjuncture as the water right: a disjuncture between the nonpossessory right to take and the ownership of what is taken. Neither the water right nor the profit includes rights that extend beyond the use of the watercourse or beyond the use of the servient tenement.

What does inhere in both the water right and the profit à prendre, however, is a legal *power* whose exercise creates the new legal rights in what is taken, rights of ownership that go well beyond the watercourse and the servient tenement. That power explains and bridges, as it were, the proprietary discontinuity between the nonpossessory water right and profit on the one hand, and the possessory rights in the detached substances that arise by virtue of their exercise on the other. Because the power inheres in the nonpossessory right, the new rights of necessity flow to the exerciser of that right.

The Restatement of Property defines a “power” as “an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.”<sup>136</sup> In the case of water flowing in a natural channel, the power to create a property title in the substance of the water by taking and possessing it lies in the exercise of the water right itself. The new possessory right in the new *res* arises

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136. 1 RESTATEMENT OF PROPERTY 6 (1936).

by virtue of, and only by virtue of, (1) the *exercise* of the power implicit in and coincident with the exercise of the nonpossessory right of diversion (the water right) and (2) the resultant *fact* of capture and possession.<sup>137</sup> Until the power is exercised, that is, until water is diverted and possession factually occurs, the new *res*—and perforce any property in that *res*—simply do not exist.

From an entitlement/enablement perspective, the power is simply the legal mechanism for enabling those actions that require new or changed legal relationships. The exercise of the power that creates ownership of the substance taken enables all that the new ownership itself entitles (and may, in turn, further enable) with regard to that substance—including possessory rights of use.

Another traditional example of this kind of power is the power conferred by a hunting license: the license itself confers no property in wild game, but inherent in the right to hunt is the power to reduce a wild animal to possession and thereby create a new property in it. As has been discussed, a hunting license is also very similar to the water right in that wild animals, like flowing water, are a moving, unfixed part of nature (*ferae naturae*) and incapable as such of possession or ownership. The right to take in both instances, i.e., the water right and the hunting license, are rights with which the powers are coincident.<sup>138</sup>

Useful reference may also be made to the earlier example of the power a person has to acquire title to merchandise offered for sale in a store by paying the store its price.<sup>139</sup> In that particular example, shopping at the store first requires the acquisition of a store “membership.” Membership, then, confers both the *right* to use the store—to enter and make purchases in it—and the coincident *power* to acquire title to merchandise in the store through the act of purchase. But, like the profit à prendre, the hunting license, and the water right, store membership of itself confers no property and no “use-rights” in the merchandise sitting, untaken, on the store’s shelves. The member has no rights in that merchandise until he purchases it. Much less could the member transfer a property right in the unbought merchandise to a third party by entering into a contract to supply merchandise yet to be purchased from the store.

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137. An intent to exercise dominion (*animus domini*) is also a necessary ingredient for legal possession and for the new property title. See HOLMES, *supra* note 47; Radin, *supra* note 107, at 218-29.

138. Wiel discusses the English and American common law commentaries that compare the law of water rights to the law of wild animals. WIEL, *supra* note 1, at 755-57.

139. This power is not usually coincident with any legal right—it is merely the power of any member of the public to accept the offer of goods for sale by tendering the stated price. See ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS 129-30. (rev. ed. 1990).

6. “Water-Use Rights”: Property Rights in Water Taken from a Watercourse

DWR acquires rights of possession and ownership in the water it diverts from the Delta into its facilities upon exercise of the right of diversion—but *not until then*. These are the same right and title that DWR exercises as it conducts water through its aqueduct to its contractors, and the same property right it transfers to its contractors once they take possession of the water from DWR at their turnouts pursuant to their water supply contracts. It is the same property right the plaintiffs hold and exercise as they put the water to use or deliver it to others to use: not a water right in the stream, but ownership rights of the water they have come to possess, delivered pursuant to the water supply contract with DWR.

If one desired to coin a phrase, “water-use right,” to mean the property right to make beneficial use of water, it would be the same kind of right of use that inheres in the ownership of any thing, of any *res*—in the case at hand, in the ownership of the parcel of water to be used. Under no construction of contract or of transfer by operation of law could the plaintiffs’ ownership rights or the ownership rights through which they claimed have arisen before that water was diverted by DWR and reduced to possession. There existed no property at all in “that water.”

DWR’s water rights in the Delta, its property rights to divert water therefrom, were significantly affected by the ESA restrictions on diversion. But, while ESA regulation significantly affected the *Tulare* plaintiffs’ contractual expectations and resulted in a definite and quantifiable pecuniary loss to them, under the facts of the *Tulare* case, they could not have been deprived of “water-use rights” in water never diverted because a property was never created in that water. On the other hand, the property rights DWR acquired in the water it was able to divert (and thereafter transferred to the plaintiffs through delivery of possession of the diverted water) were, of necessity, not affected at all. Thus, property *in water*, the existence of which is wholly contingent upon diversion, upon the exercise of a power that creates that property, could not have been “occupied,” “invaded” or “destroyed” by regulatory actions that prevented diversion from occurring in the first place.<sup>140</sup>

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140. Although a taking per se must therefore be ruled out, this still leaves unaddressed whether the plaintiffs’ loss constituted a regulatory taking, a question the court had no reason to reach and did not in fact take up. It would seem, however, that once the plaintiffs’ assertion of a property right in the subject matter of the contract (i.e., the water-use right) is rejected, the basis for distinguishing *Omnia* disappears. Since the contract passed no property right or title, then, under the rule in *Omnia*, the plaintiffs would have nothing more than non-compensable contractual expectancies. See generally *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923). If the case had involved a regulatory takings analysis of the impairment of a water right or water rights, it should be clear that the issue should have been framed as a diminution in the value or usefulness of the whole nonpossessory diversion right rather than (as the decision framed it) as an occupation or destruction of a specific right in the individual molecules lost.

### B. Beneficial Use as a Legal Requirement

In addition to being the individual motive for diversion, as well as the activity that diversion enables the diverter to engage in, beneficial use plays several other very key, and in fact paramount, institutional roles in California water rights law. In these roles beneficial use is an overarching *obligation* and *condition* that the law imposes upon the water right, not to extend it but to limit it. In none of these roles is beneficial use itself an entitlement of the water right.

In California, the “beneficial use” of water diverted pursuant to an appropriative water right is *required* to originate and to perfect an appropriative water right.<sup>141</sup> It also defines the *measure or limit* of the perfected appropriative water right.<sup>142</sup> And its continuation is *required* to prevent loss of the right through forfeiture.<sup>143</sup> This second important role played by beneficial use in appropriative water rights doctrine is not as an entitlement of the water right, either, but rather a compulsion of public policy that conditions, limits, and burdens the right. As Civil Code section 1411, quoted above, states: “The appropriation *must be* for some beneficial purpose . . . .” The California Constitution says that “the general welfare *requires* that the water resources of the State be put to beneficial use to the fullest extent of which they are capable.”<sup>144</sup>

The principle of “beneficial use” in California and throughout the West is a legal condition and requirement placed upon appropriative water right holders to exercise their water rights and to apply the water thus made available to beneficial—i.e., to socially valuable—ends. As opposed to riparian rights, if one is to be allowed to have an appropriative water right, one must exercise it and put the diverted water to some valuable use, as a matter of public policy.<sup>145</sup>

The reason for this requirement was, and continues to be, simple: water in the West is scarce.<sup>146</sup> Putting water to use is not just a personal financial opportunity, it is a social imperative to sustain the economic life of its people. No one is allowed to monopolize under right a resource as precious as the natural source of

141. *Senior v. Anderson*, 130 Cal. 290, 296 (1900).

142. “A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division, but no longer.” CAL. WATER CODE § 1390 (West 1971); *Thayer v. Cal. Dev. Co.*, 164 Cal. 117 (1912).

143. *See, e.g.*, CAL. WATER CODE § 1241.

144. CAL. CONST. art. X, § 2 (emphasis added).

145. *Cf. In re Waters of Long Valley Creek Stream Sys.*, 25 Cal. 3d 339 (1979). Policy refinements have created exceptions to the strict “use it or lose it” rule for appropriative rights. As to the general proposition that riparian rights are not lost through non-use, the Supreme Court in *Long Valley* suggested that active riparian use might, under certain circumstances, be required to sustain the right—not by the beneficial use doctrine but by the constitutional requirement of reasonable use. *Id.* at 354-55, 355 n.10.

146. The most salient fact is that in the West, unlike the humid eastern states, it does not rain in the summer. Irrigation from watercourses (or groundwater basins) has always been a necessity. From the beginning of settlement, the climate forced reliance on the maximum exploitation of limited water resources in this region of the country.

water or to hoard it unused.<sup>147</sup> In California, beneficial use has always been required to create and to maintain an appropriative water right, first under the common law and then by statute. It became a constitutional requirement in 1928 when Article 14, section 3 (now Article 10, section 2) was adopted.

In *Lux v. Haggin*, the California Supreme Court described the creation of property through the exercise of the appropriative water right and described beneficial use as an obligation of the right: “The appropriator . . . by his appropriation makes the running water his own, subject only to the trust that he shall employ it for some useful purpose.”<sup>148</sup>

As has been discussed, beneficial use is often confused for the water right itself.<sup>149</sup> But it is quite distinct. It is a common law, statutory, and constitutional *condition* and *duty* that burdens and limits every appropriative water right in the state.

### C. Summary of “Use”

Whether viewed as a personal opportunity enabled by diversion or as a social or legal obligation and limitation imposed on the right of diversion, the actual end use of the water *is not itself a right conferred by the water right*. The “right” of the water right is the right to divert *from the watercourse*, and the “fruit” of the watercourse is the water it gives up to diversion. By contrast, beneficial use is, first, a possessory right in diverted water that is created by the exercise of the power implicit in the nonpossessory diversion right and, second, a statutory and constitutional condition and limitation on appropriative water rights.

Law and policy in California are indifferent as to who satisfies that condition, the water right holder or someone else. Thirty-five million individual Californians and thousands of businesses are, every day, end-users of water obtained through the exercise of someone else’s water rights. The plaintiffs—or, more accurately, the end users whom the plaintiffs ultimately served—needed no water right to fulfill the condition of beneficial use any more than do the millions of California urban and residential water users who receive water as a matter of their public right of service and who use it, beneficially, by turning on their taps and washing their hands.

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147. *Smith v. Hawkins*, 110 Cal. 122, 127 (1895).

148. 69 Cal. 255, 309 (1886).

149. Hutchins provides an example: “The right of usufruct of the appropriator is subject to a reasonable use and consumption of the water for beneficial purposes. Hence, the appropriative right is a right of beneficial use.” HUTCHINS, 2 WATER RIGHTS LAWS, *supra* note 6, at 72 (emphasis added). Under the best possible interpretation of this passage, “usufruct” in the first sentence refers to the usufruct of the stream, making that sentence correct. The second sentence, however, would be *non sequitur*. Placing a condition on a right does not make the condition itself a right. The first sentence put the matter precisely and correctly: the water right is subject to the requirements of reasonable and beneficial use. They are limits on the right, not positive entitlements of it.

#### IV. CONCLUSION

The conclusions of this article examining the matter of water rights as property, as that inquiry has been directed and focused by the decision in *Tulare v. United States* are: that the *property right* to put water diverted from a stream to beneficial use is not part of the appropriative water right or of any water right recognized in California; that DWR held and holds no such entitlement under its water rights; and that the plaintiffs could not therefore have held such entitlement, whether by transfer from DWR, by contract, or by operation of law.

Because the broad topic of water law concerns itself with both watercourses and water taken from watercourses, as well as with the use of each of these kinds of water, and regularly employs the shorthand “water” and “use” indifferently to refer to them, it is a subject matter naturally prone to ambiguity and confusion. If water rights doctrine is somewhat obscure to begin with, the stubborn and habitual ambiguities in the use of “water” and “use” have greatly increased that obscurity, as has the unquestioning acceptance and use of the term “usufruct.”

The appropriative water right is a nonpossessory property interest in a watercourse entitling the right holder to use the watercourse by diverting water from it. It is an interest very much in the nature of a profit à prendre or of the right to fish or hunt wild animals and is often described as a usufructuary right in the watercourse to distinguish it from a right of ownership. The water right includes no property in the water itself, either before or after diversion. There is no property of any kind in the substance of the water in a watercourse prior to diversion. Property in the substance of the water arises only upon its being diverted and reduced to possession, and then is a possessory title, not a nonpossessory right of use—i.e., not a water right.

The property rights in the substance of the water that the plaintiffs in *Tulare* at some point actually do acquire from DWR, which include the right to make beneficial use of water, are the constituent rights of ownership and do not even exist until DWR diverts from the Delta and thereby creates the original property in it. Moreover, the plaintiffs’ own property in the diverted water does not exist until the water is delivered to them at their canal turnouts, as provided in their service contracts with DWR, when they, themselves, take possession of it from DWR. Until then, their rights and their remedies regarding water service are purely contractual.

Lastly, beneficial use—the application of water to socially useful purposes—is not simply the opportunity enabled by the exercise of the water right. From a water rights perspective, it is a significant policy requirement and condition imposed by law that must be met to acquire and to keep an appropriative water right in California. But in neither case, as enablement or requirement, is beneficial use something that the appropriative water right itself entitles.

Therefore, at the time that ESA regulation limited DWR’s opportunity to divert under its water rights, the plaintiffs—DWR’s water supply contractors and those served by them—had no property rights in the water that was thereby lost



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to diversion, delivery, and use. Upon this analysis, the court in *Tulare* erred fundamentally in its characterization of the state-defined property at issue and in its decision on liability for taking that flowed from that flawed characterization.

APPENDIX

Summary of the Different Meanings of “Water” and “Use” in Water Rights Law and Some Suggestions Regarding Usage

I. “Water”

In water rights law, “water” is used in two ways:

–To mean “running water”: water flowing in a natural channel; a watercourse.

–To mean “diverted water”: the substance of the water diverted from a watercourse.<sup>150</sup>

A. Running Water

1. Running water is incapable of ownership. No one owns it.
2. Running water is not owned by the state, the public, or the people.
3. Running water is incapable of ownership because it is incapable of possession in its flowing state.

B. Water Diverted from a Watercourse

1. Water diverted from a watercourse is subject to both possession and ownership.
2. The substance of diverted water can be owned because, unlike running water, it is capable of physical possession.

II. “Use”

In water rights law, “use” is used in two ways, corresponding to the two different meanings of “water”:

–The use of running water (use of the watercourse).

–The use of diverted water.

A. Use of the Watercourse

1. Synonym for “use of the watercourse”: diversion.
2. The water right is the right to use a watercourse.
3. Synonym for water right: diversion right.
4. The right to make use of a watercourse is a nonpossessory right.
5. The right to make use of a watercourse is “usufructuary.”
6. Diversion, the exercise of the water right, is the means by which running water is reduced to possession and made capable of ownership.

B. Use of Diverted Water

1. The use of diverted water is the exercise of a possessory right inhering in the ownership/possession of the diverted water.
2. The use of diverted water is not “usufructuary”; it is a possessory right of ownership.

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150. Excluding diversion to storage where the water remains a functional part of the watercourse. The outline uses the term “diverted water,” just as the article has, to mean water diverted from a watercourse and reduced to possession.

3. The use of diverted water for beneficial purposes is both a benefit to the individual and a requirement of state law and policy
  - a. It is an opportunity enabled by the water right, but it is not an activity entitled by the water right.
  - b. Beneficial use is a common law, statutory, and constitutional requirement.
  - c. Beneficial use is a requirement that, in the first instance, limits and conditions the water right.

### III. Usage Suggestions

This article emphasizes the confusion in water rights terminology and understanding that has been the product of understandable but unfortunate habits of usage. The following are some of those habits and some specific suggestions for correcting them.

#### A. Eliminate from usage the following terms and phrases:

1. *Usufruct*.  
–Substitute: “the nonpossessory right to divert water flowing in a natural channel.”
2. *Water-use right*.
3. *The people/state own the water/running water* (or similar phrases).  
–Substitute: “the nonpossessory right to divert water is the fullest property right the law recognizes in running water”; adding, as appropriate, that “the state has a paramount sovereign interest, but not a proprietary title, in the use of its natural water resources.”
4. *The water right is a right to use water/to make beneficial use of water* (or similar phrases).  
–Substitute: “the water right is a right to divert from a watercourse.”

#### B. Avoid use of the following terms and phrases:

1. The quotation from *Eddy v. Simpson*, “the right consists not so much . . . .”
2. *The right to divert and make beneficial use of water* (or similar phrases).  
While this shorthand is not so completely objectionable as A.4, above, and is usually harmless, it gives an incorrect impression of what the water right is.  
–Substitute: “the right to divert water for beneficial purposes.”
3. *Corpus of the water*.

This phrase is not discussed in the text as a source of confusion, but it is implicit in the false distinction made in *Eddy v. Simpson* and otherwise stands out as having a potential for causing misunderstanding. In property law, the term “corpus” is most immediately suggestive of a *trust*, whose “corpus” is a single

property *res* in which there exists both the legal ownership of the trustee and the equitable right of the beneficiary to the use of the corpus (usually in the form of the trust's income stream). In water cases, however, when the absence of property in the "corpus" of the water is contrasted with the water right as a use right, it is not a matter of there being a single *res* divided into legal and equitable parts. It is a matter of there being *two* different *res*: (1) the substance of the water (the "corpus") in which there is *no property* before diversion; and (2) the watercourse in which only a right of use exists (but not an equitable right of use). Unlike a trust, the use right is not in the corpus of the water in a watercourse—"corpus" meaning the substance of the water—but in the watercourse itself. The only right in or to the use of the corpus of the water is the right of ownership *after* water has been diverted and reduced to possession. Thus, it would seem prudent to avoid the term "corpus of the water" with the term's confusing suggestion of trusts.

-Substitute: "the substance of the water."

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