competing factors of economic survival and duty of care.[30] For in essence, it must determine whether "the game is worth the candle."[31]

IX

WATER LAW

A. Reasonable Use

Joslin v. Marin Municipal Water District.[1] Radically departing from established water law principles, which had permitted appropriation only where an excess of water existed over the needs of riparians, the court placed the judiciary in the position of redistributing water rights on the basis of its own determination of the relative social desirability of competing uses.

The plaintiffs, owners of land riparian to a creek, brought an action in inverse condemnation[2] for damages occasioned by the defendant municipal water district's construction of a dam across the creek at a point upstream from their land. The plaintiffs had been engaged in a rock and gravel business since 1955,[3] and the dam prevented the normal water flow from carrying rock and gravel down to their land. As a result, the value of the land was allegedly diminished by 250,000 dollars, and the value of gravel and rock lost prior to the time of the complaint was set at 25,000 dollars.

The supreme court, reversing a unanimous appellate court decision,[4] affirmed the trial court's grant of a summary judgment to the defendant. It held that the use to which the plaintiffs put the water was, as a matter of law, "an unreasonable use" under article XIV, section 3 of the California constitution,[5] and that denial of such use did not, therefore, infringe a compensable property right.[6]

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30. See note 15 *supra* for a federal court's handling of the situation where the plaintiff was hit by another vehicle as he crossed to make a purchase from the street vendor.

31. PROSSER, *supra* note 6, § 31, at 151. For a consideration of the factors involved see Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

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1. 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).

2. "'Inverse condemnation' is the name generally ascribed to the remedy which a property owner is permitted to prosecute to obtain the just compensation which the Constitution assures him when his property, without prior payment therefor, has been taken or damaged for public use. Its basis is found in section 14 of article I of the California Constitution . . . ." Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 730 (1967).

3. A lower water user generally cannot gain prescriptive rights against an upper owner. In the usual situation the lower user's actions will not be sufficiently adverse, open, and hostile. Pabst v. Finmand, 190 Cal. 124, 211 P. 11 (1922); Annot., 53 A.L.R. 201 (1928).

4. 247 A.C.A. 423, 55 Cal. Rptr. 737 (1966).

5. 67 Cal. 2d at 141, 429 P.2d at 895, 60 Cal. Rptr. at 383.

6. *Id.* at 145, 429 P.2d at 897, 60 Cal. Rptr. at 385.

Prior to 1928, a riparian owner was able to enjoin an upstream appropriation, at least where he was using the water to benefit his land,[7] and, under another line of cases, even where he was not making any beneficial use of the water.[8] In 1928, article XIV, section 3 was added to the California constitution. It "preserve[d] to the riparian owner all the water to which he may be entitled for beneficial use by reasonable methods of use, but require[d] that the unwarranted and needless waste of water should be prevented."[9]

The amendment was proposed in response to *Herminghaus v. Southern California Edison Company*,[10] which held that, as against an appropriator, a riparian owner owed no duty of reasonableness in his use of water. In that case, the riparian demanded the full flow of the stream so that in its natural course a small fraction would overflow the banks and benefit his land, while the rest ran to the sea. The appropriator unsuccessfully contended that the riparian should be required to use other means readily available by which he could receive the same benefit without the excessive waste of water.

The 1928 amendment, an exercise of the state's police power,[11] limited riparian rights to "such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."[12] In *Joslin*, the plaintiffs focused on the words "reasonably required for the beneficial use to be served;"[13] however, the court chose the subsequent language—"unreasonable use"—as the limit of rights in water.[14] This interpretation raises two questions: First, how is a use determined to be unreasonable; second, should an "unreasonable use" be uncompensated?

The court correctly noted that the constitutional amendment intended to apply to disputes between upstream appropriators and downstream riparians the same standard which applied to other water contests prior to the 1928 amendment.[15] However, in every case cited

7. Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 86, 252 P. 607, 609 (1926).

8. Lux v. Higgins, 69 Cal. 255, 390-92, 10 P. 674, 753-54 (1886).

9. Brief of the State of California, *et al.*, as Amici Curiae at 20, United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), quoting the language the argument presented to the voters on the proposed constitutional amendment.

10. 200 Cal. 81, 252 P. 607 (1926).

11. Gin S. Chow v. Santa Barbara, 217 Cal. 673, 701, 22 P.2d 5, 16 (1933).

12. CALIFORNIA CONST., art. XIV, § 3.

13. Appellants' Petition for a Rehearing at 5, 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377.

14. *See* 67 Cal. 2d at 140-41, 429 P.2d at 894-95, 60 Cal. Rptr. at 382-83.

15. *Id.* at 137-38 & n.6, 429 P.2d at 893 & n.6, 60 Cal. Rptr. at 381 & n.6.

to illustrate the application of that standard, the rule of reasonableness involved an equitable adjustment to meet the respective needs of the contestants' lands.[16] These cases did not involve the subordination of claims of one riparian to those of another, but rather the most equitable accommodation of the claims of all. The determination of reasonableness was based upon a comparison of each person's beneficial needs.

Joslin appears to adopt a new concept of reasonableness,[17] whereby the social desirability of uses admittedly beneficial to the user's land are weighed. The court rhetorically asks, "Is it 'reasonable' . . . that the riches of our streams . . . are to be dissipated in the amassing of mere sand and gravel which . . . subserves *no* public policy?"[18] Formerly, a riparian could complain if a nonriparian appropriator caused actual loss or injury to his use of water under reasonable methods of use and diversion.[19] Under *Joslin*, one beneficial use may become unreasonable when it conflicts with a second more socially desirable beneficial use.[20]

16. See Pabst v. Finmand, 190 Cal. 124, 211 P. 11 (1922); Hudson v. Dailey, 156 Cal. 617, 105 P. 748 (1909); Burr v. MacLay Rancho Water Co., 154 Cal. 428, 98 P. 260 (1908); Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663 (1903); Natoma W. & M. Co. v. Hancock, 101 Cal. 42, 31 P. 112 (1894).

17. The following clearly demonstrates *Joslin*'s departure from prior law: "[T]heir use of the lake in its natural condition is reasonably beneficial to their land, and the littoral rights thereof may therefore not be appropriated, even for a higher or more beneficial use for public welfare, without just compensation therefor." Los Angeles v. Aitken, 10 Cal. App. 2d 460, 475, 52 P.2d 585, 592 (1935). *See* Comment, 22 CALIF. L. REV. 333, 338 (1933-34).

18. 67 Cal. 2d at 140-41, 429 P.2d at 895, 60 Cal. Rptr. at 383. It might be noted that "mere sand and gravel" probably contributed to the building of defendants' dam.

19. Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Waters*, 12 WYO. L.J. 1, 2 (1957).

20. The court's only support for its interpretation is the fact that the cases it cited and the constitution used the terms "reasonable beneficial use," "unreasonable use," and "reasonable and beneficial use." A closer analysis of the cases indicates that they are consistent with the plaintiffs' argument that a use which is of substantial benefit to the individual by means reasonable in light of the alternatives available to him is a "reasonable beneficial use." *See* Gin S. Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933) (use held unreasonable since no benefit to riparian land); Crum v. Mount Shasta Power Corp., 220 Cal. 295, 307, 30 P.2d 30, 36 (1934) (question whether any actual loss of benefit); Peabody v. City of Vallejo, 2 Cal. 2d 351, 372-76, 382-83, 40 P.2d 486, 494-95, 498-99 (1935) (held "unreasonable use *or* unreasonable method;" no showing of substantial injury by appropriation); Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 524-25, 45 P.2d 972, 986 (1935) (question on remand was *quantity* reasonably necessary for beneficial use and alternative *methods* to allow equitable distribution to contestants); City of Lodi v. East Bay Mun. Util. Dist., 7 Cal. 2d 316, 339-44, 60 P.2d 439, 449-52 (1936) (question of alternative, less wasteful *methods* of continuing beneficial use); Miller & Lux v. San Joaquin L. & P. Corp., 8 Cal. 2d 427, 435, 65 P.2d 1289, 1292 (1937) (use in question served no benefit); Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 555-62, 81 P.2d 533, 560-64 (1938) (reversed for physical solution by using all reasonable sources of supply to meet needs, *i.e.*, reasonable *method* of use of all waters available).

The background of the 1928 amendment indicates that the concern was to "provide . . .

The court might better have adopted plaintiffs' position,[21] which seems consistent with prior California decisions and the 1928 amendment.[22] This position would not allow nonbeneficial uses,[23] minimally beneficial uses,[24] or methods of use that are wasteful.[25] Nor does it tolerate uses which could be filled by alternative methods without substantial economic hardship to the riparian.[26] It would, however, protect the riparian who uses water, providing a substantial individual benefit to his land, through means and in such quantities as are reasonable when measured by his individual needs and the alternative methods and sources of water available to him. This seems to have been the intent of the 1928 amendment.

The consequence of a declaration of unreasonableness under *Joslin* is the loss, without compensation, of a preexisting right to the use[27] of water. Before *Joslin*, while one could not obtain absolute injunctive relief to continue a use involving little or no substantial benefit, or conducted by unreasonable methods,[28] one could retain amounts reasonably required for beneficial purposes[29] or, in appropriate cases, receive damages for loss of beneficial use.[30] It could then be said: "In no case has the Court denied both an injunction and

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that the riparian owner could continue to have the right to the benefit and enjoyment of the waters of the stream . . . insofar as he was able to put it to beneficial use . . . but that beyond that he could not insist that the water flow by and beyond his land whether he needed it or not." Ivanhoe Irr. Dist. v. All Parties, 47 Cal. 2d 597, 622, 306 P.2d 824, 838 (1957) (referring to the Water Commission Act of 1913, forerunner of the 1928 amendment). *See* similar statements of the 1928 amendment in Gin S. Chow v. Santa Barbara, 217 Cal. 673, 700, 22 P.2d 5, 15-16 (1933). *See also* the present CAL. WATER CODE § 1245 (West 1956), enacted in 1925, ch. 109, § 1, [1925] Cal. Stats. 251, reenacted in substantially the same form in 1955. Ch. 49, § 2, [1955] Cal. Stats. 491. This section indicates that the legislature has never viewed the 1928 amendment as entailing noncompensation for businesses destroyed by government acquisition.

21. Appellants' Petition for a Rehearing at 5, 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967); see text accompanying note 13 *supra*.

22. See discussion and cases cited in note 20 *supra*.

23. *E.g.*, Gin S. Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933).

24. *E.g.*, Tulare Irr. Dist. v. Linsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 567-68, 45 P.2d 972, 1007 (1935) (flooding to kill gophers).

25. *E.g.*, City of Lodi v. East Bay Mun. Util. Dist., 7 Cal. 2d 316, 60 P.2d 439 (1936).

26. *See* Peabody v. Vallejo, 2 Cal. 2d 351, 376-77, 40 P.2d 486, 495-96 (1935).

27. The property right in water is usufractuary—that is, it is a right in the use. 51 CAL. JUR. 2d *Waters* § 50 (1959).

28. *E.g.*, Gin S. Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933); *see* Peabody v. City of Vallejo, 2 Cal. 2d 351, 372-76, 382-83, 40 P.2d 486, 494-95, 498 (1935).

29. *E.g.*, Meridian, Ltd. v. San Francisco, 13 Cal. 2d 424, 90 P.2d 537 (1939).

30. Appropriate cases occur where the damage remedy is adequate in lieu of a physical solution, *see* Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677, 686, 76 P.2d 681, 686 (1938), or where a public use has intervened. *See id.* at 688, 76 P.2d at 687; Albaugh v. Mt. Shasta Power Corp., 9 Cal. 2d 751, 759, 73 P.2d 217, 222 (1937); Peabody v. City of Vallejo, 7 Cal. 2d 351, 377-79, 40 P.2d 486, 496-97 (1935).

In United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), the Supreme Court

compensation to a riparian on the ground that there was a wasteful or unreasonable use or method of use of water."[31] This is in keeping with the 1928 amendment's limited purpose of freeing water that was not put to a beneficial use, or could be put to greater beneficial use without substantial injury to the riparian.[32]

Joslin not only appears inconsistent with nearly 40 years of California water law and the intent of the 1928 amendment, but it threatens to reopen all previously settled water disputes. Throughout the state, each holder of water rights must now be uncertain whether his particular use—even if previously litigated and clearly beneficial to his land—is also consistent with the court's conception of the general welfare. Since this conception must change as the state evolves, so also must rights to water use change. Thus, the stability of water law has now been set aside in favor of a system in which uncertainty is the rule, and existing water rights are continually open to challenge on the highly subjective and theoretical ground that the uses involved are somehow inconsistent with the public interest.[33]

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assuming the *method* was unreasonable and therefore unenforceable by injunction, *id.* at 752, upheld damages measured by the difference between the value of the land with and without flooding rights. *See* 76 F. Supp. 87, 98, *aff'd*, 339 U.S. 725 (1950). *See also* W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 55 (1956).

31. Comment, 1 STAN. L. REV. 172, 175-77 (1948).

32. See note 9 and accompanying text *supra*.

33. The problems are illustrated by *Joslin*'s approach which leaves open the question of riparian rights in *future* reasonable beneficial uses by the riparian. The riparian right includes present and future rights. *See* 51 CAL. JUR. 2d *Water* §§ 175-76 (1959). *Joslin* dealt only with the present use.

In resolving water disputes between an appropriator and a riparian, a court should declare the paramount right of the riparian over the subsequent appropriator so that the riparian who is not presently putting the water to a reasonable beneficial use may later reassert his prior right without prescriptive rights running in favor of the later appropriator. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 525, 45 P.2d 972, 986 (1935); Peabody v. Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935). In condemnation, to avoid the possible consequences of such a later assertion of priority, for instance, removal of a dam, the court condemns present *and* future rights. *Tulare, supra* at 530, 533-34, 45 P.2d at 988, 990.

The court did not declare Joslin's priority as a riparian against the subsequent appropriator. As a consequence, prescriptive rights may be presently running in favor of the Marin Municipal Water District. Nor did the court condemn Joslin's future riparian rights, thus creating the possibility of their assertion within the statutory period. More importantly, in its disguised condemnation procedure, *Joslin* could not deelare such future rights unreasonable, for such rights are per se in the reasonable beneficial use of the water.