

# California Law Review

Volume XVII

MARCH, 1929

Number 3

## The Recent Attorneys' Conference on Water Legislation

THE November issue of CALIFORNIA LAW REVIEW refers to sessions of a Joint Committee of the California Senate and Assembly upon water resources. In the course of its work this legislative committee called upon several attorneys for an expression upon legal factors. These attorneys met by themselves for five months, at the end of which they filed a report to the committee of the legislature.

This report was more or less a compromise between papers which the attorneys had exchanged among themselves. One of these individual papers having recently appeared as an article in this REVIEW, a relation of some of the divergences among the attorneys has become a subject of interest.<sup>1</sup>

### I. THE COMPENSATION ISSUE

1. *An issue was early manifest over making compensation.* The Joint Committee of the two houses<sup>2</sup> met at the State Building in San Francisco on June 5, 1928. There were six attorneys present (at subsequent meetings increased to ten).<sup>3</sup> The chairman of the legislative committee presented, as the premise to be developed, that when public improvements damage private landowners the damage must be compensated.

The works concerned nowadays are the public utility developments,

<sup>1</sup> The article in the November REVIEW is an interesting paper that was read by Mr. Edward F. Treadwell in this advisory committee of attorneys, differing from the views of some of the other attorneys and differing also in some respects from the views to which the attorneys came in their report.

<sup>2</sup> Joint Legislative Committee: Assemblyman B. S. Crittenden, chairman; Assemblyman E. G. Adams, Assemblyman Frank W. Mixer, Assemblyman Van Bernard, Senator Edward A. Mueller, Senator H. C. Nelson, Senator William R. Sharkey, and Senator Ralph E. Swing.

<sup>3</sup> Legal Advisory Committee: Henry E. Monroe, (president of the San Francisco Bar Association), chairman; Fred G. Athearn, San Francisco; Louis C. Bartlett, San Francisco; William B. Bosley, San Francisco; Spencer Burroughs, Division of Water Rights of the Department of Public Works, Sacramento; A. L. Cowell, Stockton; Homer J. Hankins, San Francisco; S. B. Robinson, Los Angeles; Edward F. Treadwell, San Francisco, and Samuel C. Wiel, San Francisco.

The attorneys' report is contained in the Report of the Joint Legislative Committee on Water Problems, January 18, 1929, obtainable from the Department of Public Works, Sacramento.

— giant reservoirs particularly for water power, city supply, and irrigation districts. They have created a new situation. Formerly it was private controversy. An individual desiring to divert a stream to another course for his personal mining, irrigation, household or other use could not force others to relinquish their rights to him upon being compensated for any damage. He was not a public use and damage did not matter. Now, however, the works giving concern are public improvements. Their right to disturb conditions as they please, against private objection, stands forth at the outset by their public nature.

In this new situation payment of the damage, if any, liberates public use to make any disturbance it may desire, consequently the following were the topics which the chairman of the legislative committee commended to the attorneys for attention, namely: What may be considered as damage? What benefits may be offset from it? and What should be the assessment machinery?

The attorneys present, speaking in turn, accepted this point of view until shortly before the meeting closed.

At that point the author of the paper in the November issue interposed the objection that the legislative committeemen should not determine the line of thought; that the attorneys should sit separately and decide the line of thought for themselves.

The legislative committee acceded to this request, and about a week later the attorneys met alone.

2. *A declaration in favor of compensation was reached by the attorneys.* The writer of the November article presented to the attorneys at their first meeting a schedule in which "Proposed remedies — Nostrums patented and otherwise" were divided into eight topics. The last one of these, only, was the compensation remedy of eminent domain. A seven to one "lay out" against compensation was thus introduced.

To keep the aim from being diverted from the compensation solution which had been opened at the meeting with the legislative committee, the present writer ventured to renew the tender of topics which the chairman of the legislative committee had noted as the subject in hand. After several indecisive meetings the present writer introduced a resolution to the effect that the decisions of our courts compel recognition of compensation for damage; that the only permissible problem remaining therefrom must be one of assessment rules and machinery. The issue between compensating and suppressing compensation was thus kept to the front.

The attorneys came to make a definite choice upon the final printing of a report at the end of October. Therein the conclusion was expressed as follows:

"In this report we have assumed that any proposed legislation concerning the conservation and use of water would recognize, frankly and fairly, all existing rights to water or its use. These rights include: first, the rights of owners of riparian lands and lands containing percolating waters or other underground sources of water supply, and, second, rights based on appropriation, diversion or use of water by others than riparian owners or owners of so-called overlying lands. If any proposed appropriation, diversion or use of water, to be authorized by or under authority of the law of the state, should violate or prejudicially affect such existing rights, then the owners of such rights should be awarded just compensation for any damage which they may suffer."

3. *This conforms to the rulings of the Supreme Court, to the great benefit of peace and of practical operation.* The much-vexed water-division questions that have disturbed the subject turn, under the principle of making compensation, into the following simple terms of estimating damage money.<sup>4</sup>

The Supreme Court of this State has sanctioned that the damage award to a riparian in water cases "might be nominal," and I do not believe there is error in saying that this has unbroken support in the common law. Like a string of automobiles on a highway or the succession of lands crossed by a highway, the successive lands by which the flow passes to the sea are a mixed lot, as variable in value as a basket full of articles some of which are gold and some brass, with all grades between. Many highway right-of-way awards are nominal; so also the value of many riparian rights may be nominal.

A procession of automobiles is not all junk, however, nor does a highway always pass through indifferent properties; nor in fact does a stream. In the valleys, especially, many claims for substantial damage will rightfully follow. It is readily disclosed by *the difference in the market value of the land before and after the disturbance.*

Under this judicially-approved rule, landowners who are damaged by reservoirs at upper levels have their damages measured by the same rules of money computation as those who are damaged by railroad rights-of-way or by levees; in fact, all other public improvements. Witnesses come who are qualified to know what land is worth and say this land is worth \$10 an acre; after what the public utility has done it is worth \$8 an acre, the utility should pay him \$2 an acre; that is the measure of damages which the law applies now and which is the measure to be followed in any plan as well. Questions of waste, extravagance, reasonableness, police power and the like merge in this very sensible money test of a proper money award.

---

<sup>4</sup> For authorities upon the damage elements see (1928) 16 CALIFORNIA L. REV. 178.

By thus turning those familiar vexed questions into questions of their money equivalents, — questions of nominal damages, measure of damages and offset of benefits,<sup>5</sup> — we are fully enabled to assume that riparians are entitled to intact flow, as the Supreme Court says they are, without detriment to proper computation of the compensation.

## II. THE CONDITIONED-PERMIT PLAN

4. *An adaptation of existing machinery was suggested to put the foregoing into effect.* In furtherance of this, the conditioned-permit plan was laid before the attorneys by the present writer.

We have a State Water Administration (known as the Division of Water Rights and retaining also the name of Water Commission) that issues permits to disturb conditions, but up to now it issues them without cognizance of compensation. The Water Commission Act requires that notice be given of applications for permit to appropriate water and anyone may appear and protest, and hearings of the protests have been routine in the office for several years.

Reconciliation of public projects with the courts is obtainable by adding a supplement to this "protest" action, making provision that when the hearing discloses to the administrative office that there is damage, the administrative office should make an estimate of the amount according to the rules of computation established by the courts, and express in its permit that the permit is condition upon payment thereof, leaving judicial recourse with jury trial if the estimate is not accepted.

The permit-issuance and the compensation would thereby come together in the administrative routine, ending the source of conflict with the courts because of the neglect of compensation in the administrative office. Reports of experience under such provisions indicate that if the administrative creates confidence in its good faith the right to a jury is infrequently invoked, uncontested claims are expedited, and much friction is relieved. The bulk of appraisals are accepted as uncontested clerical tasks.

---

<sup>5</sup> The right to enact offset of benefits is generally sustained where, as in water cases, nothing physical belonging to the landowner is taken — (whether riparian or other, no one owns more than the strictly intangible right of flow and not the physical water). Diversion is only a collateral damaging of his land, and "where property is merely injured, and no part actually taken, as in the case of a railroad or other public improvement constructed in the street, it is the general rule, even in those jurisdictions in which the constitution forbids the consideration of benefits where land is taken, that benefits may be set off from the damage, or may be considered in estimating the amount thereof". 20 C. J. 819-820. See also *Hicks v. Drew* (1897) 117 Cal. 305, 314-315, 49 Pac. 189; 2 NICHOLS, *EMINENT DOMAIN* (2d ed. 1917) p. 788; 10 CAL. JUR. 348, § 62; CAL. CODE CIV. PROC. § 1248 (4).

5. *The following draft of the conditioned-permit plan was tendered by the present writer in a special report to the legislative committee:*

*Section 1. Permits by State Water Commission to be conditioned upon paying for damage done, subject to judicial recourse.*

(a) When passing upon an application for a permit to appropriate water where the application is for public use, the State Water Commission shall investigate and report upon the amount of damage likely to be caused thereby to anyone with whose rights said appropriation will conflict, and shall express in said permit, if granted, that the permit is conditioned upon payment of said amount. Said investigation and report shall be conducted and made in the manner governing said State Water Commission in dealing with protests against the approval of an application for permit to appropriate water.

(b) Until said report of the State Water Commission has been made, the claim to make a disturbance of established water conditions for public use, and the claim for damages, shall not be entertainable in any court, except when for any reason a fair investigation by and report from said State Water Commission could not be had; and in all proceedings had in court said report of the State Water Commission shall be *prima facie* evidence of the amount of damage.

(c) If the party claiming to make said disturbance of established water conditions for public use, or any party claiming damages, does not accept said report, judicial proceedings may be instituted in court as provided by law in reference to eminent domain, and said report of the State Water Commission shall be *prima facie* evidence of the amount of compensation in such proceeding in court.

*Section 2. Rules to be followed by the State Water Commission in measuring damages.*

(a) The State Water Commission shall assume that conflict with rights exists where the public use will permanently disturb established water conditions at levels below it, or will require established water conditions to remain permanently undisturbed at levels above it; and shall assume that the term established water conditions includes natural water conditions, artificial water conditions as between parties who are not connected with creating them, and artificial water conditions as against the creator thereof when he has bound himself to the continuance thereof by grant, estoppel, dedication, lapse of time or otherwise,

(b) When the conflict is with the water right that inheres in land as riparian to a stream or as overlying percolating water, or that has been made appurtenant to land by prior appropriation, grant, prescription or other means, the measure of damage is the loss in value of the benefit which said established water condition contributes to said land, and not in any degree the value of water for use independently of said land. In the absence of such benefit the State Water Commission shall express in its permit that there is nominal damage only, and shall designate the amount as one (\$1.00) dollar.

(c) The loss in value of said benefit is determined by the depreciation, if any, which said conflict with rights as above defined causes to the mar-

ket value of said land, being the difference between the market value of said land with enjoyment of said established water conditions undisturbed and the market value of said land after said disturbance.

(d) The party claiming damages has the burden of proving the amount of said depreciation. The quality and uses of said land in its established state maintained by said established water conditions when undisturbed, also the improvements maintained upon said land, also the improvements maintainable thereon and having a reasonable prospect of being put into operation by said landowner within a reasonable time, may be shown as factors influencing the market value of said land before said disturbance, but anything that is remote, speculative, imaginary, uncertain or conjectural is not considered. In estimating the market value of said land after said disturbance, it is presumed that the conditions at the protestant's land will be disturbed by at least the same extent as the diversion or other alteration of flow at the disturber's works, unless the disturber convincingly proves that the flow would have changed without his intervention, and to what extent it would have so changed.

(e) The public use may prove, in mitigation, any special benefit to said land which may accrue from the work.

(f) When the conflict is with a water right obtained by a prior appropriation that is independent of particular land, the Water Commission is to estimate the damage by the depreciation of value of the use to which such prior appropriation is devoted or to which there is a reasonable prospect that it would be transferred, such depreciation of value being determined by good judgment based upon all pertinent facts, or as otherwise provided by law.

(g) Compensation is not due to a landowner riparian to a surface stream for disturbance of the stream to a reasonable degree by another landowner's use of land riparian to the same stream or overlying underground percolation supplying or supplied by the stream; nor is compensation due to a landowner overlying percolating water for disturbance of the percolation to a reasonable degree by another landowner's use of land overlying the same body of percolating water or riparian to a surface stream supplying or supplied by the percolation; nor is compensation due to an appropriator (being anyone not in either of said classes) for disturbance of a stream or of percolating water to a reasonable degree by another appropriator.

*Section 3. Injunction to insure prepayment.* Disturbance of established water conditions for public use is enjoined until compensation has been made to and been accepted by the party seeking injunction, or has been paid into court for him when its amount has been ascertained in court, except that injunction may be denied in the following cases:

(a) Where triviality of any damage to the party seeking injunction is so self-evident that there is no reasonable possibility that any compensation could be awarded.

(b) Where the party seeking an injunction has conducted himself in a manner amounting to waiver of injunction, or amounting to laches, estoppel, or acquiescence.

(c) Where, under the general rules governing injunctions or concerning eminent domain, an injunction may be denied upon giving security.

(d) Where the general rules governing injunctions confer a discretion upon the court to deny or stay an injunction upon any other ground.

(e) Denial of injunction upon any ground is without prejudice to recovery of compensation; but compensation is not assessed in the injunction suit except where issue of the amount thereof is raised, and determination of the amount by the Water Commission and jury are waived by the parties.

Thus, upon a foundation already operating in practice, when the Water Commission has these people before it and has heard the evidence and arguments, it could be authorized to evaluate in money how much the damage, if any, is going to come to, and make its payment a condition of the permit. If the damage is going to be \$500 or \$1000 or whatever it is, the permit should carry the statement in it that such sum must be paid before effecting the disturbance. In that way a very small addition to the statute that we already have can make the compensation, which the Constitution requires, accompany the permit and realize the result that, *so long as the damage which is done to a man is paid*, private rights can put no limit upon what public development may do. It is said that about 90 per cent of such administrative awards are accepted, leaving only 10 per cent to be reassessed subsequently before a jury.

Now, from any point of view, if we get that 90 per cent of uncontested matter cleared off in a clerical way agreeably to both the public use and to compensation, we evidently have overcome 90 per cent of the difficulty at least.

### III. SOME COMMENTS WHICH THE CONDITIONED PLAN HAS EVOKED

6. *The conditioned-permit plan has elicited numerous expressions of general approval.* Such expressions as that of Mr. Albert E. Chandler, first president of the State Water Commission, that the plan would accomplish "inestimable benefit in developing our water resources"; of Professor McMurray that "the general scheme seems to be desirable," and the like expression of State Senator Ray Jones that it shows an effort "to deal fairly with all in the simplest way," are representative of numerous expressions favorable to the conditioned-permit plan.<sup>6</sup>

That every detail would stand as above drawn is not to be expected. Effectuating a general plan necessarily involves discussion of details.

---

<sup>6</sup> "It seems to me that, under existing conditions the method you propose is a reasonable one. If compensation has to be paid for riparian rights, it would be well indeed if the power to assess damages were vested in the State Water Commission; especially since you show that this addition to the powers of the Water Commission could be so readily made." Chas. D. Marx, professor of Engineering at Stanford University.

The proposal has had the benefit of detailed examination and approval by Mrs. Annette Adams, attorney, who assisted in its drafting. Some of the details which have interested others are as follows.

7. *Employment of administrative action in a judicial subject.* We face the fact that administrative action in water matters has obtained for fifteen years. It seems firmly seated, with no likelihood that it will be abolished. If we would rectify its inattention to compensation in issuing permits there is one thing of which we may feel sure. It will not be by abolishing the permit power.

It may be only by requiring attention to compensation in the power's exercise. The November writer's leaning toward employing only the courts in his article might have a commentary that any idea of excluding administrative action is now too late. We can rectify the administrative's defects; but to exclude entirely administrative participation no longer offers.

A valid summary concerning judicial versus administrative action, in this field at least, seems to me to be presented by: "I have never become reconciled to government by bureaus or commissions, especially where judicial functions are involved; and yet your report convinces me that the Water Commission is the logical tribunal to deal with these cases as they come up in the first instance, and I sincerely hope that your plan will be adopted."<sup>7</sup>

8. *Variations of the form of administrative organization.* Among those who accept administrative participation, a whole bundle of proposals spring up to reorganize the administrative office. Among the riders suggested in our attorneys' committee have been that the Water Commission is not the best tribunal; that any commission or tribunal which passes on rights should not be composed of engineers or persons other than lawyers; that the Water Commission be severed from its present status as the Division of Water Rights in the Department of Public Works and that its existence as a separate commission with broadened qualifications of its incumbents might be restored, particularly if it is to make reports upon compensation due by the State under a state-wide development project. On the other hand, this could be met by simply authorizing the present water administration, without changing it, to call to its aid special appraisors appointed by the Governor for impartial qualifications, to be independent of any department, in whatever number may be required to handle the press of work; which has in turn been opposed as inadvisable as compared to letting each litigant select his own experts on value.

---

<sup>7</sup> Mr. Ward Chapman, attorney, of Los Angeles.



I have not expressed a preference on these matters, for I think the occasion does not call for doing so. In my opinion, it is important to adhere, at the outset at least, to existing organizations and procedures, by merely inserting into the Water Commission Act an addition to existing machinery that would not alter anything on either side of where it is added. To do more in the beginning would encumber the reconciliation by riders, and overload it by separate enterprises whose consideration should be reserved to some other occasion.

There is one variant, however, whose rejection should, I think, be permanent. This is that imagination, pessimistically inclined, conjures up that if we are going to have a trial before the administrative office, another trial before a jury in the courts, and then an appeal to the appellate court and a final appeal to the Supreme Court, the public will become disgusted. A special "board-court" by constitutional amendment exercising administrative and judicial power in one is therefore suggested, whose findings should be made conclusive upon questions of fact, as in the case of the Railroad Commission and the Industrial Accident Commission, with review in the Supreme Court only, and on questions of law only; or even reviewable on questions of jurisdiction only; or even (in the Water and Power Act) without any review or recourse at all.

The record discloses that the calls for reassessment whose suppression is the object of such dictatorship are but 10 per cent of the cases in fact.<sup>8</sup> The pictured piling up of relitigation is therefore sadly exaggerated. The disgusted public would be the misinformed public only.

<sup>8</sup> As reported by 2 NICHOLS, *EMINENT DOMAIN* (2d ed. 1917) pp. 1057-1059: "The same policy which requires a preliminary award in the case of the taking of land for public highways equally impels a like procedure in the case of takings by public service corporations", and "it is customary to provide that the preliminary award shall be made by a commission appointed by the court, or by some existing board of public officers", etc. On pp. 1125-1126 he says: "For similar reasons in almost all of the states, especially in those in which a jury trial can be had if either party demands it, provision is made for a preliminary and informal determination of damages by some board or tribunal other than a court, and, as a practical matter, in the great majority of cases the award of such board is accepted, the owner being satisfied, or not caring to incur the expense of further litigation." Much the same experience is reported when applying the like practice, as above noted, to determining titles to water in kind. Speaking of one state, a government paper says: "One thousand and sixty-eight different rights to water have been defined and recorded by the administrative board during this period, affecting 106,686 acres of irrigated lands in 15 different streams, without a single appeal to the Supreme Court." U. S. Geological Survey, *WATER SUPPLY PAPER* No. 344, p. 134. The California Water Commission recently reported that of 1426 actions taken during the biennium upon application, permits and licenses, recourse has been taken to the Superior Court on only five different actions. (Part III, *BIENNIAL REPORT OF THE DIVISION OF WATER RIGHTS*, Nov. 1, 1926, p. 28.) "The lack of such appeals from the administrative officers in Wyoming and Oregon indicates that but a few appeals will be necessary". John H. Lewis (former State Engineer of Oregon) in *AMERICAN SOCIETY OF CIVIL ENGINEERS*, Paper No. 1256, p. 675.

This 10 per cent of cases, moreover, are the very ones which have a real grievance, that ought to be reheard and ought not to be suppressed. Very appropriately Mr. Monroe, president of the San Francisco Bar Association, said in addressing the legislative committee: "Now, the question was asked here whether some summary proceeding could not be devised. Well, if anyone thinks that a summary proceeding can be devised by which you could with great expedition determine these complicated questions, I want to say that it is an iridescent dream, it can't be done. The mere machinery of taking testimony, having a hearing, bringing the matter up and afterwards perhaps the right to go to the courts makes it utterly impossible that any summary proceeding could be devised." The trouble is that we are too summary already, whereby compensation gets too roughly treated as it is.

The trouble at present is too great administrative power, the authority to permit disturbance uncompensated. That being rejected by the courts, the objective to be attained by legislation is to rectify the cause of conflict by requiring the administrative office to recognize compensation in its routine. This is qualifying and not extending power. No benefit is likely from new or larger power, when the trouble rests in having more power than is sustainable already.

Although the example of the Railroad Commission is easily invoked, the fact is that in the present matter our State has rejected such "board-court" suggestions several times, particularly in 1901 where the proposal was known as the Works Bill, and in the 1927 legislature where it was the Jones Amendment which was again decisively defeated. We ought to continue to resist a gradual penetration of dictatorship into the departments of government.

To go on extending power, as a cure for an excess of power already outstanding which the courts will not pass, would therefore miscarry by moving in the reverse of the necessary direction. The need is simply to insert compensation at the point where cognizance of it most aptly arises in current machinery. That point arises very evidently where protests against application for permit to appropriate water are heard; and I respectfully suggest that constitutional amendments or other variations from this machinery extending power, creating new power, or adding new boards or officeholders are not appropriate.

9. *Recital of rules of measuring compensation.* It is to be understood that the rules enacted in section 2 would bind the reassessment in court so far only as the legislative rules were declaratory of the judicial decisions. In any difference the courts would follow themselves.<sup>9</sup>

---

<sup>9</sup> *Monongahela Navigation Co. v. United States* (1892) 148 U. S. 312, 13 Sup. Ct. 622; *Davis v. Newton Coal Co.* (1925) 267 U. S. 292, 301, 45 Sup. Ct. 305, 306; *Railway Steel Spring Co. v. Chicago etc. Co.* (1919) 261 Fed. 690, 693.

But in the 90 per cent of cases that would not go to court the legislature not only could provide the administrative office with the guide that it is to follow, but it would seem clearly that the legislature should provide such a guide. It is an accepted tenet that administrative action should not be left unguided, but should have rules legislatively prescribed where rule is practicable.

Professor McMurray comments, undoubtedly correctly, that "there would seem to me to be a grave question whether the legislature can define damages in a way which would really eliminate those matters which must be taken into consideration *by courts* in fixing values, though I do not say that your suggestions are not entirely in accordance with the common law. I merely raise the doubt whether it is desirable to state matters in the statute that ought to be taken into consideration *by courts* under the general rules of law. The statement can scarcely deprive *them* of the duty of really determining what the damages are". I am venturing to quote this to emphasize that the proposal is drawn to observe the distinction so well pointed out; that the rules of measurement in its section 2 are not addressed *to the courts*. They are drawn to guide the report of *the administrative office*.

Their virtue, if there be any, lies in the expectation that probably 90 per cent of damage awards if estimated by the administrative under the above-enumerated rules of measurement would not reach the courts. For those that would get there, however, the plan has no intention to prevent the courts from altering the administrative estimate with the full freedom that, as Professor McMurray well notes, is admittedly necessary.

10. *Manner of entering into court for reassessment.* The proposal's belief is that there will be ample benefit if something can be inserted adjusting 90 per cent of damage claims *without the court having to be invoked*. For the other 10 per cent to enter court the plan makes no change from present practice. The applicant, as now, would remain the moving party if it wishes to pursue the enterprise; signifying its intent would occur by filing its complaint; the filing would occur at its own choice of time. These are simply continued as they are.

It has been obviously noticed that none of these details of time and manner of resorting to court are specified; but it is not through oversight or neglect but because the existing eminent domain procedure is incorporated in whole, making repetition of its details uncalled for. The task of refashioning the court action is not, therefore, involved; thus escaping the pitfalls before those who, by demanding conditions, would limit the freedom and independence of the courts upon which constitutionality of the reassessment depends.

The only difference from the present, in the 10 per cent that would reach the court, would be the availability of an administrative report as *prima facie* evidence, in an eminent domain suit otherwise unchanged; just as the proposal aims to make no change in the definition of public use or in the relations between competing public uses. In fact, it proposes no change in any feature of the law of eminent domain beyond the addition of an administrative report inserted at a convenient place.

Another point in the same connection is that by preserving the existing practice in eminent domain for the court the distinctive feature of public use is preserved, whereby concern is given to *those only who claim to be damaged*. The November article elaborately contends that "a judicial proceeding *in rem* to determine all rights in a particular stream" is necessary before anyone's compensation can be fixed; but we are probably more justified in concluding that none has any interest in the money due to the other nor, therefore, in its ascertainment,<sup>10</sup> and as there is no community of interest in damages there is no occasion for venue in a single county or for a joint assessment. The Supreme Court ruled this when the contrary conception was presented,<sup>11</sup> and so the idea of refashioning eminent domain suits into a "universal census" of all water rights whether damaged or not can be fortunately left out.

I say fortunately because experience has shown that a universal water-right census takes many years, much labor and large expense; so much so that a substitute invoking administrative action instead of the courts in the first instance has been put on the statute books. Thereby statements of claim are filed in the administrative office and it makes a statewide, authoritative census of rights by prior appropriation. It files this list in the courts for final disposition. This universal procedure (whether it be "*in rem*" or otherwise) has existed for fifteen years without, however, lessening the burdensome task.<sup>12</sup>

---

<sup>10</sup> Foreman v. Boyle (1891) 88 Cal. 290, 26 Pac. 94.

<sup>11</sup> San Joaquin etc. Irr. Co. v. Stevinson (1912) 164 Cal. 221, 241-242, 128 Pac. 924.

<sup>12</sup> Sections 12 and 25 to 36 of the Water Commission Act, Cal. Stat. 1913, p. 1012 and amendments.

While writing this article, the following appears in the press concerning such a census proceeding in Nevada: "Water users on the Humboldt river at a meeting Saturday night, favored a suggestion that some means be taken to relieve Judge George A. Bartlett from his heavy duties on the bench in Reno to permit him to complete the decision in the Humboldt river adjudication suit. The suggestion was made that the judge be given a vacation of a year from the Washoe county bench so he could devote all his time to the adjudication matter. Judge Bartlett, however, does not see it that way, he said today. 'These people do not seem to realize that it required eighteen years to gather the evidence in this case, much of which had merely been submitted to the court in typewritten form and never was read in court', Judge Bartlett said. 'Why, there are more than fifty thousand pages of exhibits which have never been read in court. Also my court is probably the busiest court in the State. Even if the suggestion had any merit, it would require more than a year just to go through the testimony.'" Reno Evening Gazette, Feb. 5, 1929.

If, therefore, the public utility had to await such census before it could build a reservoir it would be as fatal to public progress as the like wait of the landowner for his payment would mean private poverty.

By adhering to present eminent domain practice for the 10 per cent of awards that are reassessed in court the many pitfalls surrounding attempts to refashion the court procedure are left safely aside.

11. *What title would follow payment?* Senator Ralph E. Swing of San Bernardino (who has a good deal of experience in water law and is probably the legislature's foremost member thereon), at the meeting at which the attorneys discussed their report with the legislative committee raised the question: What title would payment upon a conditioned-permit give to the respective parties?

On the utility's side, what would the record show that the utility has acquired? As developed in the interesting discussion that ensued, it would seem that if the case has gone to a jury and it has made an award, payment according to its verdict is a final disposal; while if the parties accept an award without demanding a jury, there is a final disposal by voluntary acceptance, settlement, release, and discharge. Suppose, in illustration, that the administrative office finds that a man is entitled to \$500 damages, and he says, "Well, I ought to get \$600, but I am not going to carry it further, I will take \$500," and he settles for \$500. He accepts it, a release and receipt is given and put on record, the opposition to the disturbance is disposed of permanently, like a street opening proceeding where the fixing of damages is by a preliminary finding by referees, and the record shows the utility's right to proceed.

On the landowner's side, what will the record show for what the landowner has left, in case the utility makes less than a complete diversion? Say a thousand inches have been taken from the landowner; how can we avoid leaving his land-title so clouded that when he goes to sell his land the certificate of his title would have a condition inserted that would say the land was subject to the utility's right to divert that amount without showing how much water the landowner still had a right to have remain? The engineers may estimate that he will have five thousand inches left, enough for all his needs; or that his groundwater level will be lowered only ten feet; of course we know that cross-examination brings out that those things are beyond accurate estimate. The fact may develop far away from the estimate.

The landowner, it must follow, should be entitled to call real estate valuers to estimate the extent that the land's market value will be lessened by the uncertainty left by the engineering data. To an extent the

real estate valuer's opinion must also be a guess. It is a settled principle, however, that we always have to approximate when exact proof is not possible. That is what a jury is for — to weigh the probabilities, where there is no certainty. The award must compensate for the land value lost by the uncertainty.

The landowner having thus been compensated for the uncertainty of his residue, the uncertainty is one whose removal, it would seem, is no longer to be looked for.

#### IV. CONCLUSION

12. *Opposition to making compensation will account for most of what remains.* If damage claims (it is asked) could so easily be presented before a permit is granted, would not landowners who have heretofore made no claim flock in, every fellow with his little claim, with the result that the public use will be blocked?

So far as by "little claim" is meant claims for nuisance value without being damaged, the reason which kept them inactive heretofore will continue to keep them inactive. This is that they are not worth making. The knowledge that when there is no damage a jury could not award them any payment has resulted in the past acquiescence; and with an efficient administrative inspection added the futility of pressing nominal claims should be still better known.

The interesting part of the objection is, however, its generality, condemning not the empty claims alone. The November article, for example, refers as "sleeping dogs" to all damaged landowners and disparages any effort to help collection of compensation however severe the damage might be — an expression which the attorneys' committee noted and condemned as subject to the interpretation that its approval "would make it so difficult for a damaged party to get compensation that he would not get it."

Rather than fear of unsound claims, the balance is probably much the other way. "We know as a practical proposition," Mr. Monroe in addressing the legislative committee said, "that if a railroad wants to put a road through it does not have to condemn every piece of property over which it runs, *they send their right of way man out along the road* and he succeeds in making a settlement with nearly all of the people there, it is adjusted in a practical, amicable sort of way, and it is only here and there a man holds them up, and *exactly the same principle* would apply in your water right. In the majority of cases, if the State wanted to condemn water and carry through any particular scheme, if the agents of the State went out and met the people *in a fair, friendly sort of way* and said our engineers have gone over this and we estimate

you will be damaged so much, they will find in the majority of cases the people would accept it." The water utilities, however, are apt not to be thus friendly.

They are apt to be imbued with a predisposition not to pay; and the Water Commission or Division of Water Rights only states in issuing a permit that it is "subject to existing rights," much like the advertisements where a big display in the headline is made of one thing and then in very small fine print down at the bottom a contradiction of it appears that nobody notices; giving to the utility that is bent upon defeating all claims the appearance of being backed by an official permit. As a consequence the small owner who has been damaged five or six hundred dollars or under a thousand dollars, let us say, and feels he really has been damaged, feels also that the expense of fighting would equal the claim, and he lets his claim go by default because he is really beaten out of it when it is a justly payable one. Pretty surely many more cases have failed to be pressed that ought to have been pressed than the other way.

A true reconciliation pretty evidently must mean that application for damages should be free and open to everyone who feels himself aggrieved, since the presentation of claims and the allowance of them are different things.

13. *From beginning until nearing the end the attorneys remained suspended between making compensation and not making it.* As was illustrated by the November article, solicitude to assure compensation fraternized with assertious that enjoining disturbances until the compensation is collected is an "obstacle" that is "extravagant and wasteful." The November author would "first have *the legislature* provide the character of diversion works which would be reasonable," and he concurred in another paper stating that "both the legislature and the people are committed to the policy of encouraging appropriations of water *without making compensation.*" (The reader will readily recognize the plan which the Supreme Court disposed of in the *Herminghaus* case.) The November article is also much interested in anything lending color to denial of compensation, such as navigability of watercourses.<sup>13</sup>

---

<sup>13</sup> On the contrary, the law as found in the authorities declares:

"That riparian owners upon public navigable rivers have in addition to the rights common to the public certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank, *must be conceded.* These additional rights are not dependent upon title to the soil over which the river flows, *but are incident to ownership upon the banks.* Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state, both in quantity and quality". *United States v. Chandler-Dunbar etc. Co.* (1912) 229 U. S. 53, 33 Sup. Ct. 667. Italics added.

"And while Congress, in the exercise of this power, may adopt, in its judgment,

Thus the attorneys' committee remained for a long time suspended between noncompensation hopes and assurances that the measure of compensation, if payment of it has to be faced, is neither extravagant, wasteful nor an obstacle. "If it is decided," the November article says, "that the riparian owner has a certain right, and that it can only be taken from him by condemnation, it is obvious that the measure of his damages is the difference in the value of his land with the right and without it. This measure of damages has been time and again announced by the courts, and is in accordance with common sense, and I cannot see how it can in any way be improved upon."

Certainly this praise of the justice of awards, and the initial characterization of an "obstacle" that is extravagant and wasteful, are in conflict. The conflict kept the attorneys suspended between favoring compensation and opposing it for most of five months, without reaching the stage of examining the particulars of any plan. The deadlock over making compensation or not making it was only ended so far as the attorneys put the declaration for compensation into the conclusion of their report and required implications that any private right would be an "obstacle," "extravagant" or "wasteful" to be expunged as unjustifiably prejudging that an improper compensation would be required.

I venture, in closing, to repeat here what I said at the final session with the legislative committee as the reporter took it down, that in any plans for public improvements, particularly such extensive ones as the Kennett Dam or the Salt Water Barrier,

"you must contemplate some form of organization to carry out those plans and in that form of organization you necessarily will have to contemplate some department or some method or some way of making a clearing house for the damage claims that are going to arise. If you make no provision for taking care of or clearing up the damage claims you are simply allowing these claims to fester, so to speak, you are putting them into an antagonistic attitude and making them fight you, and making trouble for yourself and the courts."

---

any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States v. Chandler-Dunbar Co.*, *supra*, it may not arbitrarily destroy or impair the rights of riparian owners by legislation *which has no real or substantial relation to the control of navigation or appropriateness to that end.*" *United States v. River Rouge Improvement Co.* (1926) 269 U. S. 411, 419, 46 Sup. Ct. 144, 147. *Italics added.*

The California Supreme Court has said: "We see no occasion to discuss the question as to whether the river is navigable or not. In either event the result would be the same. The riparian owner on a non-tidal, navigable stream has all the rights of a riparian owner not inconsistent with the public easement." *Heilbron v. Fowler etc. Co.* (1888) 75 Cal. 426, 432, 17 Pac. 535.

Similarly 20 C. J. 662, n. 75; 45 C. J. 491, notes 42 to 50; *ibid.* p. 493, notes 60, 61; *ibid.* pp. 496-499. Compare upon state ownership of river water, *Palmer v. Railroad Com.* (1914) 167 Cal. 163, 138 Pac. 997.



In the SOUTHERN CALIFORNIA LAW REVIEW for April, 1929 (University of Southern California, Los Angeles) the present writer relates his endeavor to interest the attorneys' committee in the necessity of taking account of underground water in any law for surface water and vice versa, as inseparable aspects of the same thing.

*Samuel C. Wiel.*

SAN FRANCISCO.  
February 1, 1929.