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When Equity is Unfair—Upholding Long-Standing Principles of California Water Law in *City of Barstow v. Mojave Water Agency*

by

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When Equity Is Unfair—Upholding Long-Standing Principles of California Water Law in *City of Barstow v. Mojave Water Agency*

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Excessive reliance on equitable apportionment . . . leads to more uncertainty in water rights. Water users can never be certain of the rules or the outcome until a case is tried in court. The doctrine does not easily lend itself to needed predictability.[1]

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* J.D., University of the Pacific, McGeorge School of Law, conferred May, 2001; B.A., University of California, Santa Barbara, 1997. This Casenote is dedicated to my family who have provided me with enduring support and guidance throughout my academic career. I am indebted to my friend and Faculty Advisor, Professor George Gould, for his thoughtful insights which significantly contributed to this Casenote; and I thank Anne J. Schneider for her encouragement and for sharing her invaluable time and expertise to review this Casenote.

1. ARTHUR L. LITTLEWORTH & ERIC L. GARNER, CALIFORNIA WATER 176 (1995).

I. INTRODUCTION

In *City of Barstow v. Mojave Water Agency*,[2] several cities and hundreds of farmers battled for "liquid gold" in the critically overdrafted Mojave River Basin.[3] Efforts to resolve the conflict came to a standstill in 1993, when a small group of alfalfa and dairy farmers refused to stipulate to a "physical solution"[4] because the judgment would have failed to take into account the farmers' paramount water rights.[5] Litigation ensued. The trial court imposed the proposed "physical solution" on the nonstipulating parties on the basis that it was consistent with the equitable apportionment doctrine and the constitutional requirement of reasonable use.[6] The court of appeal reversed the trial court's decision, excluded the farmers from the stipulated judgment, and ordered a determination of the farmers' water rights.[7] Ultimately, the parties to the stipulated judgment appealed to the State's highest court, which had not reviewed a major groundwater dispute in over twenty-five years. The California Supreme Court sided with the farmers and upheld the court of appeal's decision.[8]

Persuaded by well over a century of traditional water law, the California Supreme Court in *Mojave* unanimously held that an equitable apportionment of

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2. 23 Cal. 4th 1224, 5 P.3d 853, 99 Cal. Rptr. 2d 294 (2000).

3. *See id.* at 1233-36, 5 P.3d at 858-60, 99 Cal. Rptr. 2d at 299-301 (describing the Mojave River Basin water shortage and the parties involved in the suit).

4. The *Mojave* courts consistently referred to the proposed solution as a "physical solution" even though water rights were completely overlooked in calculating the pumping rate for each user. Because this is an imprecise use of the term as explained in Part II.C.2, the term physical solution, when referring to the solution proposed by the trial court, is highlighted with quotation marks in the text ("physical solution").

5. *Mojave*, 23 Cal. 4th at 1233, 5 P.3d at 858, 99 Cal. Rptr. 2d at 299.

6. *Infra* text accompanying notes 156-57.

7. *Infra* text accompanying notes 161-65.

8. *Infra* Part IV.C.

water that completely ignores vested water rights is contrary to the law in California.[9] This Casenote examines the soundness of the *Mojave* decision.

Part II of this Casenote serves three purposes. First, it provides an overview of California water law.[10] Second, it examines the origins of the constitutional mandate of reasonable use and the significant role the doctrine has played in altering water right priorities.[11] Third, it discusses the typical characteristics of physical solutions, emphasizing the California courts' recent tendency to expand the concept past its established meaning.[12]

Part III discusses the mutual prescription doctrine established in *City of Pasadena v. City of Alhambra*,[13] and subsequent case law which has limited the application of mutual prescription in groundwater adjudications.[14] This section next explores the *City of San Fernando v. City of Los Angeles*[15] decision and the interstate equitable apportionment doctrine referenced in that decision.[16]

Part IV reviews the *Mojave* litigation, first by explaining the lower courts' decisions.[17] This section then lays out the arguments developed and advanced by the parties to the supreme court and discusses the rationale behind the ruling.[18]

Part V provides a critique of the supreme court's holding and analysis. First, it argues that the supreme court inappropriately equated the term "equitable apportionment" with the mutual prescription doctrine, thus failing to appropriately define what "equitable apportionment" means.[19] Second, it notes that the supreme court may have left the door open for courts to apply some form of equitable apportionment in the future, provided existing water rights are not "wholly" ignored.[20] Third, it posits that the supreme court missed an opportunity to discuss the appropriate factors a court should consider before determining that an existing use is unreasonable.[21]

Generally, this Casenote attempts to bring attention to the fundamental principles of water law that were at stake in the *Mojave* decision. Many observers saw the controversy as involving senior agricultural users who were matched against the growing cities in competition for the valuable resource.[22] While this was the

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9. *Mojave*, 23 Cal. 4th at 1250, 5 P.3d at 869, 99 Cal. Rptr. 2d at 312.
10. *Infra* Part II.A-B.
11. *Infra* Part II.C.1.
12. *Infra* Part II.C.2.
13. 33 Cal. 2d 908, 207 P.2d 17 (1949).
14. *Infra* Part III.
15. 14 Cal. 3d 199, 537 P.2d 1250, 123 Cal. Rptr. 1 (1975).
16. *Infra* Part III.
17. *Infra* Part IV.B.
18. *Infra* Part IV.C.
19. *Infra* Part V.A.
20. *Infra* Part V.B.
21. *Infra* Part V.C.
22. David Kravets, *Agreement on Limiting Water Use Takes Blow; Court Says Farmers Have Priority Rights*, SAN DIEGO UNION & TRIB., Aug. 22, 2000, at A3, *available in* 2000 WL 13981784.

scenario before the supreme court, the *Mojave* decision will have a lasting impact on even the smallest of users and the largest of cities whose reliance on water is based on the seniority of a vested water right. In conclusion, this Casenote applauds the *Mojave* decision for affirming that water rights are still at the core of the law governing existing and future use of water in California.

II. THE BASIC TENETS OF CALIFORNIA WATER LAW

A. *The Dual System of Surface Water Rights*

California recognizes both the riparian doctrine and the appropriative doctrine of surface water rights.[23] These two doctrines coexist and are applied concurrently, although in many instances applying them together leads to conflict rather than harmony.[24] This section briefly discusses the concepts embodied in both doctrines.

An owner of land contiguous to a natural watercourse has a riparian right.[25] Riparian rights are correlative—each riparian rightholder is permitted to put the water to use on that parcel of land provided the use is reasonable and beneficial and does not harm other riparian users.[26] During times when water demand exceeds the natural flow of the watercourse, each riparian rightholder is required to decrease his water usage proportionately in relation to his needs.[27] The riparian right is not contingent upon the use of water; rather, the right is based on the ownership of land.[28] Thus, an owner's failure to make use of the water does not adversely affect the right unless an upstream trespasser gains prescriptive rights.[29] Riparian rights are generally superior in right to appropriative rights.[30]

By way of comparison to the riparian right, the appropriative right is not based on the ownership of land contiguous to a watercourse.[31] In fact, the diversion of water via an appropriative right is often for use a great distance from the source of supply.[32] Conflict among appropriators is resolved by the simple notion of "first in time, first in right."[33] An appropriator who puts water to a reasonable, beneficial use

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23. WELLS A. HUTCHINS, WATER RIGHTS IN THE NINETEEN WESTERN STATES 40 (1956).

24. *See id.* at 178 (noting that the co-existence of the appropriation and riparian doctrines has led to a substantial amount of litigation).

25. LITTLEWORTH & GARNER, *supra* note 1, at 29.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 29, 36.

30. *Id.* at 37. The paramount status enjoyed by the riparian user, however, has changed dramatically over time with the adoption of the 1928 amendment to the California Constitution. *Infra* Part II.C.1.

31. LITTLEWORTH & GARNER, *supra* note 1, at 40.

32. *Id.*

33. Irwin v. Philips, 5 Cal. 140, 147 (1855) ("[A]nd as these two [appropriative] rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority upon the maxim of equity, qui prior est in tempore potior est injure.").

earlier in time than other appropriators is entitled to a priority of right free from the others' interference.[34] A variation of this general rule may apply if an appropriative right was established by following the Civil Code procedures in place from 1872 to 1914.[35] This practice required persons to put others on notice of an appropriation, and if the diversion works were diligently completed and the water put to reasonable use, the priority date would "relate back" to the date of notice.[36] Under the Civil Code procedures, therefore, the date of notice rather than the time of diversion controls priority of right between appropriators.

Until 1914, when the Water Commission Act[37] became effective, a person could acquire an appropriative right by complying with the Civil Code procedures or by diverting water reasonably.[38] Today, in order to establish an appropriative right a person must submit an application to the State Water Resources Control Board (SWRCB).[39] A whole host of requirements must be satisfied before a permit will issue, including a finding that there is unappropriated water available and that the purpose for which the water will be used is beneficial.[40] Although an application must be filed with the SWRCB to establish a valid appropriation, pre-1914 rights—appropriations acquired pursuant to the Civil Code or by the basic practice of diverting water—are still recognized.[41]

B. Groundwater Rights

1. Characteristics of Groundwater

The legal principles that govern groundwater right priorities vary depending on the hydrological classification of the water.[42] Water production from a subterranean stream flowing through a known and defined channel or from the underflow of a stream is treated like surface water and is allocated under the principles described

34. *See id.* (stating that if water is "already diverted . . . for as high, and a legitimate purpose as the one [the appropriator] seeks to accomplish, [the other appropriator] has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of [the appropriator's] own selection").

35. 1872 Cal. Stat. ch. 88, sec. 1, at 88 (enacting CAL. CIVIL CODE §§ 1410-1422).

36. *Id.* (enacting CAL. CIVIL CODE § 1418).

37. 1913 Cal. Stat. ch. 586, sec. 12, at 1018.

38. LITTLEWORTH & GARNER, *supra* note 1, at 42.

39. *Id.* at 43. The SWRCB is responsible for administering appropriative uses in accordance with the procedures in the California Water Code, and is the primary regulatory agency for water resources in California. CAL. WATER CODE § 174 (West 1971).

40. *Id.* § 1201 (West 1971).

41. LITTLEWORTH & GARNER, *supra* note 1, at 42.

42. *Id.* at 48; *see id.* at 48 (noting that groundwater is governed by different rules depending upon whether it is classified as: "(1) the underflow of a surface stream; (2) a definite underground stream; (3) [or] percolating waters").

in Section A.[43] However, the permit system does not apply to "percolating water."[44] The legal presumption is that all groundwater is percolating and outside of the jurisdiction of the State permit system.[45]

2. *Rights to Percolating Groundwater*

In 1903, in the revolutionary case of *Katz v. Walkinshaw*,[46] the California Supreme Court renounced the English common law notion that a landowner maintains an absolute or unconditional right to the use of water beneath his land.[47] Instead, the supreme court articulated what is now known as the "California doctrine of correlative rights."[48] Under this doctrine, each person having ownership of land overlying a groundwater supply—which ownership is called an overlying right[49]—has the common usage right to the reasonable use of water provided the water is put to beneficial use on the land.[50] In times of shortage, each overlying owner is entitled to a "fair and just proportion."[51] Similar to the riparian right, persons having overlying rights share the right to use the water without consideration of who exercised their right first.[52] Additionally, overlying rights are not subject to loss by nonuse; the right is considered a property interest acquired by land ownership.[53]

As previously noted, a permit is not required to legally pump groundwater.[54] This is true whether the use is "overlying" or the use is for nonoverlying use, which is also referred to as appropriative use of groundwater.[55] The distinction between

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43. CAL. WATER CODE §§ 1200, 2500 (West 1971 & Supp. 2000).

44. *Id.* Percolating waters are defined as "[t]hose which pass through the ground beneath the surface of the earth without any definite channel, and do not form a part of the body or flow, surface or subterranean, of any watercourse." BLACK'S LAW DICTIONARY 1591 (6th ed. 1990).

45. LITTLEWORTH & GARNER, *supra* note 1, at 49. The effect that various state laws and ordinances may have on groundwater pumping are beyond the scope of this Casenote.

46. 141 Cal. 116, 74 P. 766 (1903).

47. *Id.* at 122-34, 74 P. at 767-72.

48. HUTCHINS, *supra* note 23, at 423.

49. *See* California Water Serv. Co. v. Edward Sidebotham & Son, 224 Cal. App. 2d 715, 725, 37 Cal. Rptr. 1, 6 (1964) ("An overlying right, analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto.").

50. *Katz*, 141 Cal. at 134, 74 P. at 771-72; HUTCHINS, *supra* note 23, at 431.

51. *Katz*, 141 Cal. at 136, 74 P. at 772; HUTCHINS, *supra* note 23, at 431.

52. LITTLEWORTH & GARNER, *supra* note 1, at 50.

53. Burr v. Maclay Rancho Water Co., 160 Cal. 268, 281, 116 P. 715, 722 (1911).

54. LITTLEWORTH & GARNER, *supra* note 1, at 50. Those drawing percolating groundwater, however, may be subject to local ordinances that may require users to obtain a permit to construct a well or before pumping from a basin for export to another county. *Id.* at 249.

55. *Katz*, 141 Cal. at 135-36, 74 P. at 772. The relationship between an appropriator and an overlying user was summarized as follows:

> In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such landowners: those who have used the water on their land before the attempt to appropriate, and those who have not previously used it, but who claim

overlying use and non-overlying use, however, is crucial in situations of overdraft—the rights of owners of land overlying a basin are paramount to any right to use the water on non-overlying land.[56]

C. *The First Wholesale Limitation on Water Rights: The 1928 California Constitutional Amendment*

In reaction to the California Supreme Court's decision in *Herminghaus v. Southern California Edison Co.*,[57] an amendment was added in 1928 to the California Constitution that required all water use to be beneficial and reasonable.[58] At issue in *Herminghaus* was the riparian water use practice of using the annual overflow of the San Joaquin river to saturate their land in order to produce grass.[59] An upstream appropriator sought to construct dams and reservoirs along the river, thereby altering the annual peak flows of the river and interfering with the riparian's use.[60] The appropriator argued that the riparian's reliance on the full flow of the San Joaquin river to benefit the riparian land was an unreasonable and wasteful practice.[61] The court held, however, that the reasonable use doctrine was only applicable in disputes between riparians; therefore, despite a riparian's unreasonable use, a riparian right was to be upheld against an appropriative right.[62]

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the right afterwards to do so. Under the decision in this case the rights of the first class of landowners are paramount to that of one who takes the water to distant land; but the landowner's right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus. *Id.*, 116 P. at 722.

56. *Id.*, 116 P. at 722. *See generally* LITTLEWORTH & GARNER, *supra* note 1, at 247-48 (discussing the legal principles governing the relationship between overlying users and appropriators).

57. 200 Cal. 81, 252 P. 607 (1926).

58. HUTCHINS, *supra* note 23, at 13; CAL. CONST. art. X, § 2 originally enacted as CAL. CONST. art. XIV, § 3 (amended 1974)). The provisions of Article X, section 2 read completely as follows:

> It is hereby declared that because of the conditions prevailing in this State 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, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited 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. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

59. *Herminghaus*, 200 Cal. at 93, 252 P. at 612.

60. *Id.* at 86-87, 252 P. at 609.

61. *Id.* at 103-07, 252 P. at 616-18.

62. *Id.* at 100-02, 252 P. at 615-16.

After the California Supreme Court handed down the *Herminghaus* decision, the Legislature drew up a proposal which the voters adopted that made the reasonable use doctrine applicable to water disputes between appropriators and riparians.[63] In addition, the amendment prohibits the waste and unreasonable use of water by any user, including those with overlying rights.[64] Article X, section 2 of the California Constitution reads in pertinent part as follows:

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited 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.[65]

Water experts have argued over the intent behind the amendment—whether it sought to change the substance of the reasonable use limitation which was in existence for over half a century before the amendment's enactment, or whether the provision was simply a constitutional recognition of well-established and recognized principles in California water law that were now to apply to conflicts between appropriators and riparians.[66] For instance, in a review that traces the amendment's progressive application, two scholars have asserted that the "scope [of the amendment] is often misstated. . . . [T]he amendment incorporated the [reasonableness] doctrine, as it had been historically interpreted by the courts, into the Constitution, and extended it to competition between riparians and appropriators."[67] Although this is a plausible accounting for the purpose of the amendment, the California courts in recent years have used Article X, section 2 as the driving force to redefine the historical nature of proprietary rights to water.[68]

1. Whittling Away Proprietary Rights to Water

One California Supreme Court case in particular has construed the constitutional amendment in such a way that creates some uncertainty as to the substance of a

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63. HUTCHINS, *supra* note 23, at 12-13.

64. Peabody v. City of Vallejo, 2 Cal. 2d 351, 367, 40 P.2d 486, 491 (1935); CAL. WATER CODE §§ 100, 275 (West 1971); CAL. CODE REGS. tit. 23, § 780(a) (1999).

65. CAL. CONST. art. X, § 2.

66. Clifford W. Schulz & Gregory S. Weber, *Changing Judicial Attitudes Towards Property Rights In Water Resources: From Vested Rights To Utilitarian Reallocation*, 19 PAC. L.J. 1031, 1065-67 (1988).

67. *Id.* at 1064.

68. *Id.*; *see id.* at 1065-93 (providing a comprehensive review of the detrimental impact that Article X, section 2 has had on proprietary rights to water). For a viewpoint that embraces the courts' reliance on the amendment to reallocate water priorities in the face of modern developments, see Brian E. Gray, *"In Search of Bigfoot": The Common Law Origins of Article X, Section 2 of the California Constitution*, 17 HASTINGS CONST. L. Q. 225, 226-28 (1988).

vested water right.[69] In *Joslin v. Marin Municipal Water District*,[70] a riparian user relied on the flow of the Nicasio Creek to wash down sedimentary material to operate a sand and gravel business.[71] The Marin Municipal Water District, under an appropriative right, constructed a dam upstream which diminished the flow of the creek to a point where rock and gravel was not being deposited on the riparian's land.[72] As a result, Joslin suffered a monetary loss in land value of $250,000 and a $25,000 loss in rock and gravel.[73] In response to the alleged damages submitted by Joslin, the court held that the use of water to deposit rock and gravel was, as a matter of law, unreasonable pursuant to the constitutional amendment.[74] Accordingly, the court refused to require compensation for the loss, and held that the deprivation of an unreasonable use of water was not a compensable proprietary interest.[75]

In addressing the relationship between Joslin's use of water and unreasonableness, the court stated: "Is it 'reasonable' then, that the riches of our streams, which we are charged with conserving in the great public interest, are to be dissipated in the amassing of mere sand and gravel which for aught that appears subserves no public policy?"[76] The court further said: "[W]hat is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved in vacuo isolated from statewide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment."[77]

Joslin left the water community curious about the future of water law.[78] Whether *Joslin* simply condemned wasteful practices or was an affirmation that courts are to

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69. *Infra* notes 70-79 and accompanying text.

70. 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).

71. *Id.* at 134-35, 429 P.2d at 891, 60 Cal. Rptr. at 379.

72. *Id.*, 429 P.2d at 891, 60 Cal. Rptr. at 379.

73. *Id.* at 135, 429 P.2d at 891, 60 Cal. Rptr. at 379.

74. *Id.* at 140-42, 429 P.2d at 895-96, 60 Cal. Rptr. at 383-84.

75. *Id.* at 143-44, 429 P.2d at 897, 60 Cal. Rptr. at 385.

76. *Id.* at 140-41, 429 P.2d at 895, 60 Cal. Rptr. at 383. The court in *Joslin* could have concluded that Joslin's use of water was an invalid riparian use, thus avoiding the need for a constitutional analysis. *See* Peabody v. City of Vallejo, 2 Cal. 2d 351, 369, 40 P.2d 486, 492 (1935):

> The asserted right of a riparian owner, whose lands in a state of nature form a delta at about sea level, to have the full flood flow of the stream to overflow his lands for the purpose of depositing silt thereon, or by artificial check dams and levees to remove the saline content of the soil which in a state of nature are salt marsh lands, cannot be supported. So far as we are advised, this asserted right does not inhere in the riparian right at common law . . . .

See generally Schulz & Weber, *supra* note 66, at 1087 (noting *Peabody*'s holding and positing that the supreme court in *Joslin* unnecessarily engaged in a constitutional analysis). *But cf.* Los Angeles County Flood Control Dist. v. Abbot, 24 Cal. App. 2d 728, 732-35, 76 P.2d 188, 191-92 (1938) (specifically finding that the use of water for depositing rock and gravel on land was a valid riparian use, compensable in an eminent domain proceeding). Although this case was an appellate decision after the supreme court's decision in *Peabody*, the court made no mention or reference to *Peabody* in determining what constituted a riparian right.

77. *Joslin*, 67 Cal. 2d at 140, 429 P.2d at 894, 60 Cal. Rptr. at 382.

78. Gray, *supra* note 68, at 230.

entertain a balancing of social and economic interests when considering whether a use of water is reasonable remained unclear.[79]

Further support for the application of social and economic balancing of water allocation is found in other cases such as the 1990 case of *Imperial Irrigation District v. State Water Resources Control Board.*[80] In *Imperial Irrigation District* (IID) the court of appeal held that the water practices of IID that flooded a nearby farmer's property as a result of allowing large quantities of water to flow off of the fields, constituted an unreasonable use or waste of water.[81] In sweeping dicta, the court of appeals said:

> All things must end, even in the field of water law. It is time to recognize that this law is in flux and that its evolution has passed beyond traditional concepts of vested and immutable rights. . . . Professor Freyfogle explains that California is engaged in an evolving process of governmental redefinition of water rights. He concludes that 'California has regained for the public much of the power to prescribe water use practices, to limit waste, and to sanction water transfers.' He asserts that the concept that 'water use entitlements are clearly and permanently defined,' and are 'neutral [and] rule-driven,' is a pretense to be discarded. It is a fundamental truth, he writes, that 'everything is in the process of changing or becoming' in water law."[82]

The language in *Joslin* and *Imperial Irrigation District* appears to leave room for courts to deviate from the traditional principles of California water law. As competing demands for water increase, debates over whether courts should adopt a social and economic balancing test for water allocation will intensify. The question

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79. *Id.*; *see also* National Audubon Soc'y v. Superior Court of Alpine County, 33 Cal. 3d 419, 447 n.28, 658 P.2d 709, 729 n.28, 189 Cal. Rptr. 346, 365 n.28 (1983). Although the court's holding was based on the public trust doctrine, the court alluded to whether Article X, section 2 prohibited just waste or also "undesirable uses." *Id.*, 658 P.2d at 729 n.28, 189 Cal. Rptr. at 365 n.28. In addressing this question the court stated: "The dispute centers on the test of unreasonable use—does it refer only to inordinate and wasteful use of water, as in Peabody v. City of Vallejo, [2 Cal. 2d 351, 40 P.2d 486 (1935)], or to any use less than the optimum allocation of water" (citing Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967). *Id.*, 658 P.2d at 729 n.28, 189 Cal. Rptr. at 365 n.28.

80. 225 Cal. App. 3d 548, 275 Cal. Rptr. 250 (1990); *see also* United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 128-31, 227 Cal. Rptr. 161, 187-88 (1986) (authorizing the State Water Resources Control Board to modify appropriative uses on the basis that the appropriations were unreasonable because of their adverse affect on the Delta water quality). "The decision [regarding whether a use is unreasonable] is essentially a policy judgment requiring a balancing of the competing public interests . . ." *Id.* at 130, 227 Cal. Rptr. at 188. *United States v. State Water Resources Control Board* did not altogether advance the *Joslin* interpretation of the reasonable use provision, because the opinion dealt with appropriations in relation to water quality standards, not other uses.

81. *Imperial Irrigation District*, 225 Cal. App. 3d at 563, 275 Cal. Rptr. at 261.

82. *Id.* at 573, 275 Cal. Rptr. at 267.

remains under what specific circumstance, if at all, will the court adopt such a balancing test.

2. *Physical Solutions*

The objective behind a physical solution is to promote the "optimal utilization"[83] of a watercourse without disturbing the seniority of water right holders.[84] Although utilizing a physical solution to better allocate water occurred well before the 1928 amendment was enacted,[85] it has been an effective approach for carrying out the most reasonable and beneficial uses of water within the spirit of the constitutional mandate.[86] In fact, as a result of the amendment, courts are required to consider whether a physical solution can be achieved or is appropriate given the circumstances.[87] For instance, "a court . . . may . . . compel a senior right holder to accept a substituted source of water or a modification of his means of diversion, distribution or use of water at a junior right holder's expense in order to benefit the junior and to achieve better overall utilization of the resource."[88] Accordingly, a junior user may be permitted to line a canal in order to avoid waste and increase the junior's supply, so long as senior water rights are substantially preserved.[89] Some California courts, however, have implemented systems of water allocation under the physical solution concept which deviate substantially from its established understanding.

Since 1969, at least three trial courts have implemented "physical solutions" without specifically and separately recognizing water rights.[90] These systems for allocating water reach "far beyond physical or engineering changes to solve the overdraft problem"[91] and are enforceable only because the parties' stipulated to the judgment.[92] California courts are encouraged and required to consider physical solutions presented by the parties, or to craft a physical solution if the parties cannot.[93] Nonetheless, prudent steps should be taken to preserve the legal significance of the term: preventing the waste of water by actions paid for by junior

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83. Harrison C. Dunning, *The 'Physical Solution' in Western Water Law*, 57 U. COLO. L. REV. 445, 448 (1986).

84. LITTLEWORTH & GARNER, *supra* note 1, at 176.

85. *See* Dunning, *supra* note 83, at 458-59 (explaining the circumstances that led a California court to adopt a physical solution in 1904).

86. LITTLEWORTH & GARNER, *supra* note 1, at 177.

87. City of Lodi v. East Bay Mun. Util. Dist., 7 Cal. 2d 316, 341, 60 P.2d 439, 450 (1936).

88. Dunning, *supra* note 83.

89. Peabody v. City of Vallejo, 2 Cal. 2d 351, 383, 40 P.2d 486, 499 (1935).

90. City of Barstow v. Mojave Water Agency, 64 Cal. App. 4th 737, 770, 75 Cal. Rptr. 2d 477, 499 (1998).

91. *Id.* at 765, 75 Cal. Rptr. 2d at 496.

92. *Supra* note 84.

93. California Water Serv. Co. v. Edward Sidebotham & Son, 22 Cal. App. 2d 715, 731-32, 37 Cal. Rptr. 1, 11 (1964).

users, with only incidental effects on the seniors.[94] Otherwise, adopting "physical solutions" that do not recognize water rights more appropriately reflect, but still inaccurately describe, a form of "equitable" allocation with no support in the law.

If a court adopts any form of equitable apportionment in which water rights are modified, it should recognize that physical solutions and equitable apportionments have vastly different purposes and are predicated on disparate principles in application. Such an acknowledgment would be advisable to limit confusion and, more importantly, to avoid the misapplication of a term with a productive history in California water law. Unfortunately, the *Mojave* court did not adequately make this distinction in its discussion of the "equitable apportionment" or "physical solution" at issue before it. As discussed in Part V.B., this simple, yet significant oversight, adds to the ambiguity of the California Supreme Court's opinion.

III. *CITY OF PASADENA V. CITY OF ALHAMBRA* AND THE "DEVICE" OF THE MUTUAL PRESCRIPTION DOCTRINE

In 1949, the California Supreme Court decided a landmark groundwater allocation dispute in *City of Pasadena v. City of Alhambra*.[95] In *Pasadena*, the Raymond Basin, which is situated in the San Gabriel Valley, was the principle source of supply.[96] The City of Pasadena and a water company were the lone parties refusing to stipulate to an agreement that allocated water among the users and remedied the overdraft.[97] In an effort to preserve the basin as a water source, the City of Pasadena brought suit to determine each party's respective groundwater rights and to enjoin the current uses that created the annual overdraft.[98] In 1939, the trial court referred the matter to the State Water Commission to conduct an investigation and produce a report on the condition of the basin.[99] The report revealed that, beginning in 1913, with the exception of a few years leading up to the litigation, the excessive pumping of the basin had exceeded the safe yield and created an annual overdraft of approximately six-thousand acre-feet.[100]

The supreme court posed the question: "[W]hich of the parties should bear the burden of curtailing the total production of the unit to the safe yield and what proportion, if any, of the pumping by each particular party should be restricted."[101] Prior to this decision, California groundwater law was prescribed by *Katz*

94. City of Lodi v. East Bay Mun. Util. Dist., 7 Cal. 2d 316, 341, 60 P.2d 439, 450 (1936).
95. 33 Cal. 2d 908, 207 P.2d 17 (1949).
96. *Pasadena*, 33 Cal. 2d at 921, 207 P.2d at 25.
97. *Id.* at 916, 207 P.2d at 23.
98. *Id.*, 207 P.2d at 22-23.
99. *Id.* at 917, 207 P.2d at 23-24.
100. *Id.* at 922, 207 P.2d at 26.
101. *Id.* at 924, 207 P.2d at 28. The real question was who would have to pay for the much more expensive imported water that had been made available to basin users.

principles;[102] therefore, the court could have enjoined the most junior appropriative users.[103] However, the supreme court affirmed with modification the trial court's position that each user of the basin had gained prescriptive rights against one another (mutual prescription), and that all the parties should be subject to a proportional reduction in allocation of pumping rights.[104]

All the parties to the action, including the City of Pasadena, stipulated that all water production from the basin was "taken openly, notoriously and under a claim of right, which claim of right was continuously and uninterruptedly asserted by it to be and was adverse to any and all claims of each and all of the other parties. . . ."[105] This helped facilitate the mutual prescription theory. Only two issues were left unresolved: (1) the period of wrongful use; and (2) the degree of intrusion.[106]

The supreme court found that any pumping occurring after the commencement of the overdraft in 1913-14 was wrongful and injurious to other rightful users' uses and that from that time forward courts could protect the rightful users through injunctive relief—but only until the statute of limitations expired.[107] The injury was characterized as a continual decline in the level of water, which in the long-term would make the basin insufficient for water rightholders.[108] The significant lowering of the water table served as notice of the overdraft.[109] Finding that all the elements of prescription had been met, the supreme court next determined the amount of water that should be allocated to the prescriptive users, because the adverse use continued throughout the five-year statutory period.[110]

In the Raymond Basin, the users pumped all the groundwater necessary to fulfill their needs, despite the adverse uses.[111] Thus, all uses interfered with one another because continued use would eventually lower the water table and deplete the supply.[112] This occurrence was characterized only as a "partial injury" because "[t]he owners were injured only with respect to their rights to continue to pump at some future date."[113] The supreme court, however, left open the issue of whether overlying right holders preserved part of their original rights through "self-help" or obtained new rights by means of prescription against others.[114] Ultimately, each party's use

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102. *Supra* notes 46-56 and accompanying text.
103. *Pasadena*, 33 Cal. 2d at 928, 207 P.2d at 29-30.
104. *Id.* at 937, 207 P.2d at 35.
105. *Id.* at 922, 207 P.2d at 26. These elements are required to establish any prescriptive right.
106. *Id.* at 930, 207 P.2d at 31.
107. *Id.* at 929-30, 207 P.2d at 30-31.
108. *Id.* at 929, 207 P.2d at 30.
109. *Id.* at 930, 207 P.2d at 31.
110. *Id.* at 931-32, 207 P.2d at 31-32.
111. *Id.* at 931, 207 P.2d at 31-32.
112. *Id.*, 207 P.2d at 32.
113. *Id.*, 207 P.2d at 32.
114. *Id.* at 931-32, 207 P.2d at 32.

was restricted proportionately, based on the highest continuous use during the five-year statutory period.[115]

Initially, the mutual prescription doctrine was praised as a sensible method of allocating water which would return a basin to its safe yield.[116] The practical effect of the *Pasadena* decision, however, was that it encouraged a "race to the pumphouse."[117] Cities relying on groundwater simply increased their pumping rates in case of a suspected overdraft.[118] By doing so, "cities could (1) increase their share of an adjusted safe yield prescriptively, (2) retain their share of an adjusted safe yield by increasing their extractions in proportion to other users or (3) at least minimize their loss of the adjusted safe yield by decreasing the proportion available to other users."[119] Several cases after the *Pasadena* decision, however, have considerably limited the viability of the mutual prescription doctrine.[120]

In *Tehachapi-Cummings County Water District v. Armstrong*,[121] the court of appeals determined that the application of the mutual prescription doctrine was not appropriate in groundwater basin adjudications that concerned only the rights of overlying users.[122] The court reasoned that without an appropriative use, "there is no paramount right which can be prescribed against," because all overlying users have a common right to the groundwater supply that is based on the "current reasonable and beneficial need for water."[123]

The largest modification of the mutual prescription doctrine occurred twenty-six years after *Pasadena*, when the California Supreme Court resolved a dispute in another overdrafted groundwater basin. In 1975, the California Supreme Court, in *City of Los Angeles v. City of San Fernando*,[124] rejected the application of mutual prescription as the appropriate remedy to resolve a dispute over the pumping of groundwater in the Upper Los Angeles River Area.[125] Los Angeles asserted that it had a superior right to pump the groundwater against other users of the basin and brought the litigation to enjoin the pumping by the cities of San Fernando, Glendale, and others, including private users.[126] Ultimately, the supreme court reversed and remanded the case to the trial court, rejected application of the mutual prescription

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115. *Id.* at 936-37, 207 P.2d at 35.

116. J. Nicholas Murdock, *Water Law—A Postscript to the Mutual Prescription Doctrine*—City of Los Angeles v. City of San Fernando, 11 LAND & WATER L. REV. 131, 138 (1976).

117. City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 267, 537 P.2d 1250, 1299, 123 Cal. Rptr. 1, 50 (1975); Murdock, *supra* note 116, at 139.

118. Murdock, *supra* note 116, at 139.

119. *Id.*

120. *Infra* notes 121-31 and accompanying text.

121. 49 Cal. App. 3d 992, 122 Cal. Rptr. 918 (1975).

122. *Id.* at 1000-01, 122 Cal. Rptr. at 924-25.

123. *Id.* at 1001, 122 Cal. Rptr. at 924.

124. 14 Cal. 3d 199, 537 P.2d 1250, 123 Cal. Rptr. 1 (1975).

125. *See id.* at 292-93, 537 P.2d at 1318, 123 Cal. Rptr. at 69-70 (explaining the trial court's misapplication of the factors to be considered before prescription may be acquired).

126. *Id.* at 207, 537 P.2d at 1258, 123 Cal. Rptr. at 9.

remedy, and upheld the City of Los Angeles' pueblo right, finding that all of the defendants' water rights were subordinate to those asserted by Los Angeles.[127]

A very significant aspect of the opinion was that it rendered the mutual prescription doctrine an unlikely solution for future groundwater adjudications. The court first determined that Civil Code section 1007, which provides that "no possession by any person, firm or corporation no matter how long continued, of any . . . water right . . . owned by the state or any public entity, shall ever ripen into any title, interest or right," prohibits all pumpers—including government agencies—from acquiring prescriptive rights against city users and municipalities.[128] Second, the court reasoned that when a basin enjoys a surplus the prescriptive period is interrupted, thus making it a requirement that the basin be in a state of overdraft for each year of the five-year prescriptive period.[129] Third, the court modified the definition of overdraft to include pumping beyond the basin's safe yield and the use of any temporary surplus.[130] This concept of "operating safe yield" makes it much more difficult to satisfy the notice requirement for prescription. Lastly, the supreme court hinted in a footnote that prescriptive rights could not be acquired against an unexercised overlying right.[131]

In light of the limitations *San Fernando* placed on the application of the mutual prescription doctrine, several commentators have focused more narrowly on *San Fernando's* alleged approval of the equitable apportionment doctrine. The debate centers over the court's usage of a passage from a United States Supreme Court decision in an interstate water case and the accompanying reference to *Pasadena*. In referring to the mutual prescription doctrine, Justice Shenck said:

> [The mutual prescription remedy in *Pasadena*] does not necessarily result in the most equitable apportionment of water according to need. A true equitable apportionment would take into account many more factors. [FN61] . . . This does not mean that the Pasadena decision fell short of reaching a fair result on the facts there presented. . . . [T]he mutual prescription doctrine was not needed or applied in the present case for the purpose achieved in Pasadena—that of avoiding complete elimination of appropriative rights stemming from uses [in] recent years in favor of those based on earlier uses.[132]

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127. *Id.* at 292-96, 537 P.2d at 1318-20, 123 Cal. Rptr. at 69-71.

128. *Id.* at 273-76, 537 P.2d at 1304-07, 123 Cal. Rptr. at 55-57.

129. *Id.* at 284, 537 P.2d at 1312, 123 Cal. Rptr. at 63.

130. *Id.* at 280, 537 P.2d at 1309, 123 Cal. Rptr. at 60. Temporary surplus "is the amount of water that can be pumped from a basin to provide storage space for surface water that would be wasted during wet years if it could not be stored in the basin." ANNE J. SCHNEIDER, GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, STAFF PAPER NO. 2, GROUNDWATER RIGHTS IN CALIFORNIA 32 (1977).

131. *San Fernando*, 14 Cal. 3d at 293 n.100, 537 P.2d at 1318 n.100, 123 Cal. Rptr. at 69 n.100 ("Such prescriptive rights would not necessarily impair the private defendants' rights to ground water for new overlying uses for which the need had not yet not come into existence during the prescriptive period.").

132. *Id.* at 265-66, 537 P.2d at 1298-99, 123 Cal. Rptr. at 49-50.

With respect to what a "true" equitable remedy would entail, the California Supreme Court, in footnote 61, referred to the principles that the United States Supreme Court could apply to equitably apportion water among states as described in *Nebraska v. Wyoming*, 325 U.S. 589 (1945):

> [I]f an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.[133]

At least one scholar interpreted footnote 61 in *San Fernando* to be a justification for equitable considerations to be applied in intrastate water law disputes,[134] while another conjectured that the *San Fernando* decision would have the effect of a reversion to core principles of traditional water law.[135] Each of these arguments was forwarded and analyzed in the *Mojave* decision discussed below.

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133. *Id.* at 265, 537 P.2d at 1298, 123 Cal. Rptr. at 49.

134. Harris C. Dunning, *State Equitable Apportionment of Western Water Resources*, 66 NEB. L. REV. 76, 103 (1987).

135. SCHNEIDER, *supra* note 130, at 30.

IV. THE FIGHT FOR LIQUID GOLD: *CITY OF BARSTOW V. MOJAVE WATER AGENCY*

A. The Facts and Procedural History

The Mojave River Basin has been in a state of overdraft for a half-century.[136] The basin underlies several cities in the Barstow area and covers approximately 3600 square miles.[137] In recent years, the basin's primary source of replenishment, the Mojave River, has typically experienced low flows.[138] Consequently, the region's rapid urban development and large agricultural presence has stressed the basin and resulted in a severe water supply deficit.[139] In fact, by 1990, the annual supply of the Mojave River Basin could not meet the demands of the agricultural users alone.[140] The existing groundwater extractions and meager precipitation have led to an annual overdraft of approximately 72,200 acre-feet.[141] In order to succeed in returning the Mojave River Basin to its safe yield, a reduction of water extractions was necessary.[142] Leaving the current use unchallenged would have resulted in the Basin's exhaustion.[143]

In 1990, the City of Barstow and the Southern California Water Company filed a complaint that alleged that upstream users—including the City of Adelanto, the Jess Ranch Water Company, and the Cardozo farmers—were interfering with the Barstow water supply.[144] In addition to requesting that a 30,000 acre-feet average annual flow be set aside for the City of Barstow, the complaint asked for a writ of mandate to require the Mojave Water Agency (MWA) to import State Water Project water.[145]

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136. City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 1234, 5 P.3d 853, 858-59, 99 Cal. Rptr. 2d 294, 300 (2000); *see also* SCHNEIDER, *supra* note 130, at 26 (noting that the Mojave River Basin has been in overdraft since before 1951 and that early efforts to adjudicate the water rights among competing uses of the basin failed). The concept of overdraft refers to the condition of a groundwater basin when pumping exceeds the annual recharge over time. *Id.* at 99.

137. *Mojave*, 23 Cal. 4th at 1233, 5 P.3d at 858, 99 Cal. Rptr. 2d at 299.

138. *Id.* at 1234, 5 P.3d at 858, 99 Cal. Rptr. 2d at 299.

139. *Id.*, 5 P.3d at 858-59, 99 Cal. Rptr. 2d at 300.

140. Respondents' Opening Brief on the Merits at 1, City of Barstow v. Mojave Water Agency, 99 Cal. Rptr. 2d 294 (2000) (No. S071728).

141. Appellant Jess Ranch's Opening Brief at 3, City of Barstow v. Mojave Water Agency, 75 Cal. Rptr. 2d 477 (1998) (No. E017881).

142. *Mojave*, 23 Cal. 4th at 1234, 5 P.3d at 858-59, 99 Cal. Rptr. 2d at 300. "Safe yield" refers to 'the maximum quantity of water which can be withdrawn annually from a ground water supply under a given set of conditions without causing an undesirable result.' City of Los Angeles v. San Fernando, 14 Cal. 3d 199, 278, 537 P.2d 1250, 1308, 123 Cal. Rptr. 1, 59 (1975). "The phrase 'undesirable result' is understood to refer to a gradual lowering of the ground water levels resulting eventually in depletion of the supply." *Id.*, 537 P.2d at 1308, 123 Cal. Rptr. 2d at 59.

143. *Mojave*, 23 Cal. 4th at 1234, 5 P.3d at 858-59, 99 Cal. Rptr. 2d at 300.

144. *Id.*, 5 P.3d at 859, 99 Cal. Rptr. 2d at 300.

145. *Id.*, 5 P.3d at 859, 99 Cal. Rptr. 2d at 300.

In 1991, the MWA responded with a cross-complaint against all water producers within the Mojave River Basin, with the exception of several insignificant users.[146] The amended cross-complaint proposed that the water available in the watershed was inadequate and requested that all water producers' rights within the watershed be determined.[147] A "litigation standstill" was ordered and the Mojave Basin Adjudication Committee was created to establish production rates of water users and to propose a remedy for all producers in the basin.[148]

In 1993, the Committee submitted to the trial court a "physical solution" which was adopted by the majority of the parties through a stipulated interlocutory order.[149] The "physical solution" was explained in pertinent part as follows:

> The judgment sets forth the 'free production allowance' of each subarea, as well as the 'base annual production' and the 'base annual production right' of each party. The free production allowance is the amount of water that may be produced from a subarea each year free of any replacement water obligation. A producer's base annual production is the maximum annual production that the producer produced for a five[-]year period 1986-1990. A producer's base annual production right is defined as the relative right of each producer to the free production allowance within a given subarea, as a percentage of the aggregate of all producers' base annual production in the *subarea. The base annual production right of each producer has been determined without priority for the type of use or type of water right.*[150]

In drafting the "physical solution," the Committee refused to take into consideration the priority of legal users of water on the basis that such consideration would lead to an unfair allocation of water.[151] In addition, the trial court "concluded that allocating water based on asserted legal priorities would be 'extremely difficult, if not impossible.'"[152]

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146. *Id.* at 1235, 5 P.3d at 859, 99 Cal. Rptr. 2d at 300.

147. *Id.*, 5 P.3d at 859, 99 Cal. Rptr. 2d at 300.

148. *Id.*, 5 P.3d at 859, 99 Cal. Rptr. 2d at 300.

149. *Id.* at 1236, 5 P.3d at 860, 99 Cal. Rptr. 2d at 300.

150. City of Barstow v. Mojave Water Agency, 64 Cal. App. 4th 737, 747, 75 Cal. Rptr. 2d 477, 484 (1998) (emphasis added), *aff'd* City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 5 P.3d 853, 99 Cal. Rptr. 2d 294 (2000). Any use in excess of the "free production allowance" requires a user to purchase replacement water. *Mojave*, 23 Cal. 4th at 1235, 5 P.3d at 859, 99 Cal. Rptr. 2d at 300.

151. *Mojave*, 23 Cal. 4th at 1235, 5 P.3d at 859, 99 Cal. Rptr. 2d at 301.

152. *Id.*, 5 P.3d at 859, 99 Cal. Rptr. 2d at 301.

A number of water users in the basin rejected the "physical solution."[153] In particular, the Cardozo farmers asserted that they were holders of vested water rights and demanded a trial for purposes of adjudicating their individual water rights.[154]

B. The Lower Courts

The trial court rejected the Cardozo farmers' argument that the "physical solution" was fatally flawed because it ignored established water rights.[155] The trial court instead found the "physical solution," which was determined without consideration for individual water rights, was fair to the non.-stipulating parties, on the premise that the solution was consistent with the doctrine of equitable apportionment set forth in *San Fernando*.[156] The court reasoned further that any pumping from a basin in overdraft was unreasonable and required "an equitable apportionment of all rights."[157]

The trial court espoused its view of the traditional priority system very early in the opinion by stating, "The strict adherence to a priority of right and a correlative right among water users of equal status[] creates uncertainty and potential economic consequences for those with a lower priority of use."[158] Faced with a complex situation, the trial court proceeded, in effect, to create equal rights for all pumpers in the basin, even for "latecomers to an already overdrafted system, [who] had not established any basis of right."[159] The trial court's decision to ignore priorities and

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153. *Id.* at 1236, 5 P.3d at 860, 99 Cal. Rptr. 2d at 301.

154. *Id.*, 5 P.3d at 860, 99 Cal. Rptr. 2d at 301. Another party to the litigation, Jess Ranch, challenged the method in which it was awarded a 'free production allowance.' *Id.*, 5 P.3d at 860, 99 Cal. Rptr. 2d at 301. For purposes of brevity, this Casenote does not address this issue.

155. City of Barstow v. City of Adelanto, No. 208568, slip op. at 10 (California Superior Court, Riverside County, Jan. 2, 1996) (unpublished statement of decision) (copy on file with the *McGeorge Law Review*), *rev'd sub. nom.* City of Barstow v. Mojave Water Agency, 64 Cal. App. 4th 737, 75 Cal. Rptr. 2d 477 (1998), *aff'g* City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 5 P.3d 853, 99 Cal. Rptr. 2d 294 (2000) [hereinafter *Mojave Trial Court*]; *see id.* ("Having determined that an overdraft exists and that the overdraft amounts to an unreasonable use of water, the court has the authority to draft and impose a physical solution which requires all users to share equitably in the cost and reduction of use, to safe yield."). The trial court's disposition was handed down in an unprecedented fashion. *See* LITTLEWORTH & GARNER, *supra* note 1, at 186-90, discussing three trial court cases involving "physical solutions" that did not take into account existing water rights. However, in each case, the parties involved stipulated to the terms of the physical solution without objection. *Mojave*, 64 Cal. App. 4th at 768-69, 75 Cal. Rptr. 2d at 498-99. Accordingly, the cases did not serve as precedential support for the trial court's conclusions. *Id.*, 75 Cal. Rptr. 2d at 498-99.

156. *Mojave Trial Court*, *supra* note 155, at 14.

157. *Id.* at 9.

158. *Id.* at 8.

159. Application for and Brief of Amici Curiae City and County of San Francisco, San Joaquin Tributaries Association, and the San Joaquin River Exchange Contractors Water Authority at 2, City of Barstow v. Mojave Water Agency, 5 P.3d 853 (2000) (No. S071728).

create equal rights was a far departure from the established understanding of a physical solution.[160]

The Court of Appeal entertained the City of Barstow, Mojave Water Agency, and Southern California Water Company's position in support of the trial court's decree at great length, but ultimately reversed the ruling in favor of the Cardozo appellants.[161] The court held that *San Fernando* and its progeny did not justify an equitable apportionment of water.[162] Therefore, "the trial court could not overlook well-settled principles of water law to establish its own system of groundwater allocation."[163] Significantly, the court said that the constitutional mandate requiring that all water be put to reasonable use does not support a finding that uses are unreasonable simply because a basin is in a state of overdraft.[164] Because the trial court had improperly ignored the value of the Cardozo appellants' water rights, those appellants were excluded from the judgment and granted injunctive relief to protect their overlying and riparian uses.[165] With respect to the other stipulating parties, the "physical solution" remained binding.[166]

C. *The Supreme Court*

The California Supreme Court granted the stipulating parties' request for review in order to address "whether the trial court could disregard legal water rights in order to apportion on an equitable basis water rights to all producers in an overdrafted groundwater basin."[167]

The supreme court unanimously held that neither *Pasadena* nor *San Fernando* was precedent for applying an equitable apportionment.[168] In addition, the court observed that while the constitutional mandate of reasonable use may require a court

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160. *Supra* Part II.C.2. Notwithstanding the legality of the physical solution adopted by the trial court, the basis on which it awarded allocation rights for each user—the average annual production over a five year period—seemingly would encourage a return to the "race to the pumphouse" mentality frowned upon after the *Pasadena* decision. *Supra* notes 117-20 and accompanying text.

161. City of Barstow v. Mojave Water Agency, 64 Cal. App. 4th at 782, 75 Cal. Rptr. 2d at 507-08.

162. *Id.* at 764-65, 75 Cal. Rptr. 2d at 496.

163. *Id.* at 749, 75 Cal. Rptr. 2d at 485.

164. *Id.* at 751, 75 Cal. Rptr. 2d at 486-87.

165. *Id.* at 783, 75 Cal. Rptr. 2d at 508.

166. *Id.* at 772, 75 Cal. Rptr. 2d at 501; *see id.*, 75 Cal. Rptr. 2d at 501 ("We see no reason why the parties cannot stipulate to a judgment incorporating the physical solution, nor do we see any reason why a stipulated judgment entered into by a large number of water producers in the Mojave Basin should be totally reversed when the rights of the Cardozo Appellants can be fully protected by appropriate trial court orders on remand.").

167. City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 1239-40, 5 P.3d 853, 862, 99 Cal. Rptr. 2d 294, 304 (2000). The parties failed to assert prescriptive rights before the trial court, thus making mutual prescription an implausible remedy for the supreme court to consider. *Id.* at 1241, 5 P.3d at 863, 99 Cal. Rptr. 2d at 305.

168. *Id.* at 1245-48, 5 P.3d at 866-68, 99 Cal. Rptr. 2d at 306-10.

to fashion a physical solution, it could not do so by failing to prioritize preexisting valid uses.[169]

1. Rejecting a Pure Equitable Apportionment

The supreme court first addressed whether the mutual prescription doctrine applied in *Pasadena* supported the trial court's application of the equitable apportionment doctrine in intrastate water disputes.[170] In *San Fernando*, the court opined that it specifically rejected any contention that the mutual prescription doctrine was a "beneficent instrument for conservation and equitable apportionment of water in ground basins which are subjected to extractions in excess of the replenishment supply."[171] The court further explained, with respect to *Pasadena*, that a 'true equitable apportionment would [have] take[n] into account many more factors.'[172] Affixed to this excerpt from the *San Fernando* opinion is footnote 61 which described the interstate equitable apportionment principles the United States Supreme Court had noted in *Nebraska v. Wyoming*, 325 U.S. 589 (1945).[173] Respondents asserted that the trial court appropriately relied on the language of footnote 61 to ignore vested water rights.[174]

First, the supreme court observed that even assuming the interstate equitable apportionment doctrine controlled, the priorities of the disputants would remain "the guiding principle" for allocating water.[175] Second, and most conclusively, the supreme court declared: "[T]o the extent footnote 61 in City of San Fernando could be understood to allow a court to completely disregard California landowners' water priorities, we disapprove it."[176] Finally, and to repudiate any suggestion that *San Fernando* itself stood for equitable apportionment, the supreme court noted that it remanded *San Fernando* with instructions to give a priority of right to overlying

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169. *Id.* at 1250, 5 P.3d at 869, 99 Cal. Rptr. 2d at 312.

170. *Id.* at 1243-44, 5 P.3d at 865, 99 Cal. Rptr. 2d at 307.

171. *Id.* at 1245, 5 P.3d at 866, 99 Cal. Rptr. 2d at 308.

172. *Id.*, 5 P.3d at 866, 99 Cal. Rptr. 2d at 308. Nowhere in the *Pasadena* opinion can one find a reference to the equitable apportionment doctrine. *Id.* at 1244, 5 P.3d at 865, 99 Cal. Rptr. 2d at 307.

173. *Id.* at 1245-46, 5 P.3d at 866, 99 Cal. Rptr. 2d at 308.

174. *Id.* at 1256, 5 P.3d at 867, 99 Cal. Rptr. 2d at 309.

175. *Id.* at 1246, 5 P.3d at 867, 99 Cal. Rptr. 2d at 309. "But any allocation between Wyoming and Nebraska, if it is to be fair and just, must reflect the priorities of appropriators in the two states." *Id.* at 1246 n.12, 5 P.3d at 867 n.12, 99 Cal. Rptr. 2d at 309 n.12.

176. *Id.* at 1248, 5 P.3d at 868, 99 Cal. Rptr. 2d at 310. The supreme court stated that:

> [O]ne could read footnote 61 in *City of San Fernando* to suggest that if prioritization of rights results in denying recent appropriative users the right to produce water, some type of equitable appropriation may be implemented in intrastate water matters. But the case is not precedent for wholly disregarding the priorities of existing water rights in favor of equitable apportionment in this state, where water allocation has been based on an initial consideration of owners' legal water rights.

Id. at 1247-48, 5 P.3d at 867-68, 99 Cal. Rptr. 2d at 310.

land owners and senior appropriators, subject only to those who gained prescriptive uses.[177]

2. *Disapproving the Trial Court's "Physical Solution"*

Observing that the respondents failed to present any authority for implementing a "physical solution" that disregarded priorities, the supreme court rejected the trial court's "physical solution" as to the Cardozos' water rights.[178] The supreme court considered that "water priority has long been the central principle in California water law."[179] Accordingly, "an equitable physical solution must preserve water right priorities to the extent those priorities do not lead to unreasonable use."[180] Justice Chin further expounded on this point:

> [A]lthough it is clear that a trial court may impose a physical solution to achieve a practical allocation of water to competing interests, the solution's general purpose cannot simply ignore the priority of rights of the parties asserting them. In ordering a physical solution, therefore, a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine.[181]

The supreme court agreed with the court of appeal that no compelling reason existed to reverse the entire stipulated judgment; the parties who agreed to the terms of the equitable "physical solution" were bound by it.[182]

V. A CRITIQUE OF THE MOJAVE DECISION

A. *What Is an Equitable Apportionment of Water?*

The central issue in the *Mojave* case was the determination of whether a trial court can "equitably" apportion water without regard for water priorities in an overdrafted basin.[183] Fundamental to this inquiry, therefore, is having an understanding of exactly what is meant by an equitable apportionment of water and whether the doctrine or any variation of the doctrine has ever been applied to groundwater rights in California. At least one statement by the supreme court illustrates that there is some confusion over the meaning and application of the term.

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177. *Id.* at 1247, 5 P.3d at 867, 99 Cal. Rptr. 2d at 309-10.
178. *Id.* at 1250-51, 5 P.3d at 869-70, 99 Cal. Rptr. 2d at 311-12.
179. *Id.* at 1243, 5 P.3d at 864, 99 Cal. Rptr. 2d at 306.
180. *Id.*, 5 P.3d at 864, 99 Cal. Rptr. 2d at 306.
181. *Id.* at 1250, 5 P.3d at 869, 99 Cal. Rptr. 2d at 312.
182. *Id.* at 1252, 5 P.3d at 870-71, 99 Cal. Rptr. 2d at 313.
183. *Id.* at 1239-40, 5 P.3d at 862, 99 Cal. Rptr. 2d at 304.

After definitively rejecting a *pure equitable apportionment*, the supreme court said, "Case law simply does not support applying an equitable apportionment to water use claims unless all claimants have correlative rights; for example, when parties establish mutual prescription."[184]

This statement is inconsistent with prior case law and the supreme court's disposition in *Mojave*. The equitable apportionment doctrine and the mutual prescription remedy rely on quite different principles in application, and do not forward the same objectives.[185] The mutual prescription doctrine is formalistic in nature, requiring the elements for establishing a prescriptive right.[186] For example, the supreme court ruled in *San Fernando* that Civil Code section 1007 prevents adverse users from gaining prescriptive rights against cities, no matter how "equitable" such a result may be.[187] In addition, the *San Fernando* opinion acknowledged that "the allocation of water in accordance with prescriptive rights mechanically based on the amounts beneficially used by each party for a continuous five-year period . . . does not necessarily result in the most equitable apportionment of water according to need."[188] Finally, the *Mojave* court clarified that, in applying mutual prescription, those with overlying rights "retain their rights [to nonsurplus water without judicial assistance] by using them."[189] Thus, the classification of a use as overlying is a factor even after the prescriptive period has begun and all the other requirements of mutual prescription have been met. The only way to reconcile the result in *Pasadena* with an equitable apportionment is to claim that the supreme court was searching for a "fair" result in the *Pasadena* case. Even then, however, one cannot ignore that the decision was based on legal, not equitable, standards.

In addition, implying that mutual prescription can apply when all users have overlying rights undermines the court of appeal's decision in *Tehachapi-Cummings*.[190] There, the court held prescription was unavailable in a groundwater adjudication involving only overlying users (those with correlative rights).[191]

The supreme court's statement may not be completely baffling, however. Perhaps the supreme court was simply saying that the outcome of a dispute between correlative users or competitors without superior rights is a form of equitable apportionment. In fact, the supreme court has embraced this concept in one case to describe allocation of water among riparians in a water-short creek. In *Joerger v. Mt. Shasta Power Corp.*,[192] the court said each competing riparian is entitled to "an

184. *Id.* at 1248, 5 P.3d at 868, 99 Cal. Rptr. 2d at 310.
185. *Infra* notes 186-89.
186. *See supra* note 105 and accompanying text (listing the prerequisites for obtaining a prescriptive right).
187. *Supra* note 128.
188. *Supra* note 132.
189. *Mojave*, 23 Cal. 4th at 1248, 5 P.3d at 868, 99 Cal. Rptr. 2d at 310.
190. *Supra* notes 121-23 and accompanying text.
191. *Supra* notes 121-23 and accompanying text.
192. 214 Cal. 630, 7 P.2d 706 (1932).

equitable division or apportionment."[193] Furthermore, one commentator echoes the *Katz's* principles in a recent discussion of the *Mojave* case: where correlative rights control the sharing of water, "no rules of seniority apply and equitable principles will dominate."[194] Finally, under the mutual prescription doctrine, one's pumping during the prescriptive period is determinative of allocation, not rules of priority.[195] Thus, the result in all of these situations is generally referred to as an equitable apportionment, according to the supreme court in these cases, because priorities are not relevant to the determination of pumping rights.

Although this explanation makes the supreme court's passage comprehensible, the plain use of the term "equitable apportionment" is left without independent legal significance and inconsistent with the interstate equitable apportionment doctrine established by the United States Supreme Court.[196]

B. Inadequate Direction: Is the Equitable Apportionment Doctrine Alive?

The *Mojave* opinion suggests that the California Supreme Court recognizes three fundamentally different equitable apportionment doctrines: (1) a *pure equitable apportionment*, in which legal water rights are entirely ignored;[197] (2) a *true equitable apportionment* which would consider, among a host of factors: priorities, the hydrology of the source, water use practices, and economic considerations;[198] and (3) an *equitable apportionment*, discussed above, which resolves competing demands among users when, pursuant to other principles, priority is not relevant.[199]

While the court clearly rejects a *pure equitable apportionment*, the statement that water rights cannot be "completely" disregarded implies that rights can be somewhat ignored—just not entirely ignored.[200] If the trial court had implemented a "physical solution" after an adjudication of the Cardozo's water rights, would the supreme court have rejected it? Does the answer turn on whether water rights were at least discussed or to what degree water rights were modified? In what situation would a *true equitable apportionment* be appropriate? Unfortunately, the supreme court made a vague statement without explaining its intent.

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193. *Id.* at 637, 7 P.2d at 708.

194. Joel S. Moskowitz, Commentary, *Physical Solution to Overdraft Must Consider Existing Water Rights*, CAL. ENVTL. L. REP., Oct. 2000, Issue No. 10, at 256.

195. *Supra* note 111-15 and accompanying text.

196. *See supra* note 133 and accompanying text (recognizing that in an interstate equitable apportionment priority is a major fact in allocating water).

197. The court of appeals referred to the "physical solution" as a "pure equitable apportionment" because it failed to take into account water rights. City of Barstow v. Mojave Water Agency, 64 Cal. App. 4th 737, 758, 75 Cal. Rptr. 2d 477, 492 (1998).

198. *See supra* note 133 and accompanying text (detailing the interstate equitable apportionment principles discussed in the *San Fernando* decision).

199. *Supra* notes 192-95 and accompanying text.

200. *Mojave*, 23 Cal. 4th at 1248, 5 P.3d at 868, 99 Cal. Rptr. 2d at 310.

The supreme court did say, in the context of the "physical solution" at issue, that water rights cannot be terminated or subordinated without first determining that the water is being used unreasonably.[201] A literal reading of this statement suggests that water rights cannot ever be modified on strictly equitable grounds, which makes the significance of qualifying the trial court's error as "completely" disregarding rights a moot point. Presumably any form of equitable apportionment that curtailed senior uses without considering those uses under the reasonable use requirement would be invalid. In other words, if uses are reasonable, any equitable modification of a senior water right is unsupportable.

Even assuming that future courts are restricted from altering water rights absent an unreasonableness determination, this restriction still begs the question of what is an unreasonable use of water. Could an equitable apportionment be achieved by simply labeling uses unreasonable? For instance, one water expert asserts that there is support in California law for making reasonableness determinations to protect "competitors on some egalitarian basis" and "to provide justice among large communities by means of equitable apportionment."[202]

Arguably, the door is open for the existence of an equitable apportionment doctrine in California water law as long as water rights are considered. After refuting a *pure equitable apportionment*, the supreme court itself did not dismiss the notion of a *true equitable apportionment* which the United States Supreme Court may consider in interstate disputes: "one could read footnote 61 in *City of San Fernando* to suggest that if prioritization of rights results in denying recent appropriative users the right to produce water, some type of equitable appropriation [that modifies senior water rights] may be implemented in intrastate water matters."[203] Still, the supreme court's opinion appears to be inherently contradictory. If one reads the opinion to require preservation of "water right priorities to the extent those priorities do not lead to unreasonable use,"[204] support for the application of a *true equitable apportionment* is lacking, or is at least at odds with part of the *Mojave* court's discussion. Thus, the current state of the law, with respect to the viability of an equitable apportionment doctrine, is unclear.

C. A Missed Opportunity: What Constitutes an Unreasonable Use?

The supreme court implicitly rejected the trial court's finding that all uses are unreasonable simply because a basin is in a state of overdraft.[205] Yet, the supreme court, in dicta, discussed the reaches of the reasonable use doctrine in footnote 13

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201. *Id.* at 1250, 5 P.3d at 869, 99 Cal. Rptr. 2d at 312.
202. Dunning, *supra* note 134, at 113.
203. *Mojave*, 23 Cal. 4th at 1247, 5 P.3d at 867, 99 Cal. Rptr. 2d at 310.
204. *Id.* at 1243, 5 P.3d at 864, 99 Cal. Rptr. 2d at 306.
205. *Supra* notes 178-81 and accompanying text.

concerning the future of overlying rights.[206] The supreme court said, "If Californians expect to harmonize water shortages with a fair allocation of future use, courts should have some discretion to limit the future groundwater use of an overlying owner who has exercised the water right, and reduce to a reasonable level the amount the overlying user takes from an overdrafted basin."[207]

The supreme court's policy pronouncement may well be an application of Article X, section 2 of the California Constitution, which prohibits the unreasonable or wasteful uses of water.[208] The supreme court did not consider, however, what factors may warrant the modification of a water right under the reasonable use doctrine. Instead, the supreme court simply held that "in ordering a physical solution," uses cannot be reduced without a determination that a use is unreasonable.[209] The problem is that the reasonable use doctrine may be pivotal in the next major debate over groundwater rights, and its boundaries are relatively ill-defined, making the scope of its application unpredictable. For example, if a basin is in overdraft, a court could determine that a much more stringent application of the reasonableness requirement would apply to all users, requiring drastic cutbacks by all pumpers. Did the court apply a broad reading of the *Joslin* rationale which advances an ad hoc determination for what uses of water are reasonable?[210] Conceivably, drastic pro rata reductions, ostensibly based on a super-reasonableness requirement, could be imposed to protect a basin—yet, priorities would not totally be ignored.

The question is clearly raised whether future courts can proceed in a consistent and responsible manner that does not make the rights of senior water users unstable. Clearly, the waste of water is unacceptable, but absent identifying negligent water use practices in the context of determining what is unreasonable, great deference should be afforded to those who have relied on vested water rights.

While the *Mojave* decision is most appropriately viewed as a preservation of existing law, the California Supreme Court, for better or worse, side-stepped an opportunity to address and perhaps confine the evolving application of the reasonable use provision in water conflicts.

VI. CONCLUSION

The California Supreme Court's rejection of a *pure equitable apportionment* doctrine was a relief from a practical standpoint to the water community that seeks

206. *Mojave*, 23 Cal. 4th at 1249 n.13, 5 P.3d at 869 n.13, 99 Cal. Rptr. 2d at 311 n.13.

207. *Id.*, 5 P.3d at 869 n.13, 99 Cal. Rptr. 2d at 311 n.13.

208. *Supra* note 65 and accompanying text.

209. *Supra* note 181 and accompanying text.

210. *See, e.g.*, GEORGE A. GOULD & DOUGLAS L. GRANT, CASES AND MATERIALS ON WATER LAW 317 (6th ed. 2000) ("Joslin seems to hold that a riparian use may become 'unreasonable' simply because socially or economically more valuable uses develop.").

certainty. Water law is already nebulous even to those knowledgeable and experienced in the field, and concerns about certainty are already prevalent because of several courts' expansive application of the reasonable use doctrine. The troubling aspect of the *Mojave* opinion, however, does not necessarily center around its holding, but rather, the supreme court's approach to the principles of water law that controlled the dispute. The supreme court, in parts of the opinion, used terms such as "physical solution" and "equitable apportionment" without carefully delineating the purposes behind and the concepts embodied in both approaches of allocating water. This has created confusion over the current state of the law.[211] Such a critical response to the supreme court's opinion, however, does not outweigh what appears to be an opinion that embraces traditional water law principles.

The *Mojave* decision established that water rights may not be "completely disregarded" under any system of allocation;[212] yet, the supreme court did not consider in any helpful detail to what extent and on what grounds legal priorities may be disregarded or modified in future groundwater adjudications. Perhaps another twenty-five years will pass before the supreme court takes on this question. In the interim, those with vested water rights can be confident only that their legal priorities cannot by "wholly" ignored.

211. *Supra* 197-202 and accompanying text.

212. *Supra* note 176 and accompanying text.