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THE ORANGE COUNTY MODEL FOR CALIFORNIA WATER LAW AND POLICY

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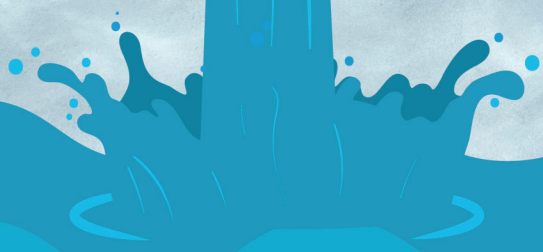
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## WATER POLICY



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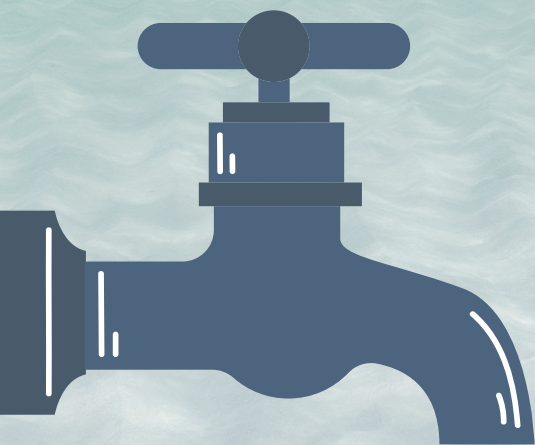
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# THE ORANGE COUNTY MODEL FOR CALIFORNIA WATER LAW AND POLICY

by PETER L. REICH



Perhaps the best-known, even iconic, California water case is *Lux v. Haggin*, the 1886 state supreme court decision arising in the Central Valley and holding that riparian (riverbank) landowners have superior rights to those of non-riparian prior appropriators, regardless of which use was more productive.<sup>1</sup> *Lux* has been placed “at the core of California water Law,”<sup>2</sup> and its too-rigid elevation of private property over public interest has spawned years of litigation.<sup>3</sup> Although in the twentieth century, water in the state gradually became seen as a communal rather than a divisible asset, the influence of *Lux*’s emphasis on private rights has continued to hinder that process.<sup>4</sup> Yet there is a strikingly

different, Southern California dimension to this story: Three years before *Lux*, a case from the Orange County area, *Anaheim Water Company v. Semi-Tropic Water Company*, buttressed riparianism while also pointing the way towards more equitable water allocation.<sup>5</sup>

This view was echoed in other decisions and in the broadly influential Orange County Water District (OCWD) groundwater management system.

Orange County’s geographic and climatic context played a role in the dispute between the two water

companies and in subsequent litigation. Most of the county is a semi-arid coastal plain, with most rainfall occurring in the low-water-use winter season and less than 20% coming in the spring and the summer growing season, when more water is necessary.<sup>6</sup> The major river in the region, the Santa Ana, rises inland in the mountains of San Bernardino and Riverside counties before descending into Orange County, and its surface flow is highly unpredictable.<sup>7</sup> However, rain and river variability is offset by an underground basin underlying approximately 40% of the county, which catches rainfall and surface flow, thus allowing water supply storage for year-round distribution.<sup>8</sup> Certainly, this rough balance between surface and underground water sources has not prevented conflict between users. But it has facilitated cooperation when far-sighted judges and water district managers have chosen to make the best use of it.

The dispute between Semi-Tropic and Anaheim began in the 1870s when the former, a riparian successor-in-interest to the Mexican-period land grant of Bernardo Yorba, was drawing water upstream from a ditch supplying the latter, a German immigrant colony which claimed an easement also originating from the Yorba *rancho*.<sup>9</sup> Plaintiff’s witnesses testified that until 1877, when Anaheim sued Semi-Tropic and some of the Yorba heirs, the local ditches were full, and the colony also obtained underground water from wells.<sup>10</sup> Semi-Tropic claimed that it had always taken half of the river’s flow.<sup>11</sup> Anaheim initiated the lawsuit after Semi-Tropic and the Yorbas responded



to the drought of 1877 by diverting more water than usual, which stunted the colony's trees, vines, and crops.<sup>12</sup> The trial court ruled for Anaheim, ordering that it was entitled to a "ditch flowing full at all times and seasons of the year to its upmost capacity."<sup>13</sup>

The California Supreme Court reversed, holding in *Anaheim Water Company v. Semi-Tropic Water Company* that Anaheim did not have the right to have its ditch always filled.<sup>14</sup> As a riparian proprietor, Semi-Tropic did not need to object to an appropriator's use in order to preserve its priority, even when there was an abundant water supply.<sup>15</sup> However, the court went on to suggest that "in view of the value of the water in dispute and the large interests at stake [it is] advisable for the parties . . . to divide the water on an equitable basis, and devote the money that may otherwise be expended in litigation in the proper development and judicious use of it."<sup>16</sup> Following this advice, the two water companies cooperated effectively from that point on, splitting the Santa Ana River's flow equally at Bedrock Crossing.<sup>17</sup>

This example of pragmatic conflict resolution based on public policy was extended in *Stoner v. Zucker*, a 1906 case originating on the Santa Ana's upper reaches in Riverside County and affecting Orange County downstream.<sup>18</sup> In *Stoner*, a riparian owner gave oral permission, or a license, to an appropriator to convey water through an irrigation canal over the latter's land, but then claimed to have withdrawn his consent.<sup>19</sup> The California Supreme Court held that the licensee's expenditures and efforts maintaining the ditch made the license irrevocable "as long as the nature of [the license] calls for."<sup>20</sup> Thus the court recognized the public value of irrigation, and was willing to protect it even at the expense of riparian rights.

The limitations on riparianism in *Anaheim Water Company v. Semi-Tropic* and *Stoner*

*v. Zucker* did not mean that appropriators necessarily came out ahead. *Anaheim Water Company v. Fuller* involved another riparian owner on the Santa Ana who sued an upstream appropriator for diverting part of the river's flow, even though there was no evidence of actual damage.<sup>21</sup> The California Supreme Court took into account the "well-known aridity of the climate and high rate of cultivation" in ruling that even without current losses the water company could "enjoin an unlawful diversion, in order to

riparian, sued upper-basin parties in federal court to prevent spreading, based on the technique's threat to well replenishment.<sup>24</sup> A 1942 stipulated judgment settled the case, allowing some spreading under limited conditions.<sup>25</sup>

Not all conflicts over the river were settled so amicably. In 1951 the Orange County Water District filed a lawsuit against four upstream appropriators—the cities of Riverside, San Bernardino, Colton, and Redlands—to prevent interference with the downstream flow.<sup>26</sup> In *Orange County Water District v. City of Riverside*, the California Court of Appeal largely upheld a trial court judgment that limited the cities' prescriptive rights to an amount of water equal to that taken at the beginning of the five-year period before the suit, which in practice meant a substantial reduction.<sup>27</sup> This ruling diverged from earlier holdings in which riparians had automatic priority, and displayed the practical aspect of Orange County-related jurisprudence. Judicial allocation in the region continued with a 1969 stipulated judgment declaring rights in the Santa Ana River watershed, implemented by water-sharing agreements between lower- and upper-basin users that fixed the amount of downstream flow required.<sup>28</sup>

Within the confines of Orange County, water management has taken an administrative rather than a legal form. In the 1920s and 1930s, increased urbanization put high demands on local groundwater, and as aquifers diminished, saltwater intrusion from the ocean became a growing problem.<sup>29</sup> With local farmers' and cities' support, the Orange County Water District imposed a pump tax in 1953 to pay for replenishment from outside sources, and to disincentivize each landowner's withdrawals from the underlying subsurface.<sup>30</sup> In 1969, this approach was refined with the creation of a yearly "basin production percentage" (BPP), an estimate of the amount of water that could be pumped locally as opposed to being

## Orange County's model constitutes one region's successful pursuit of sustainability . . . .

protect and preserve his riparian right."<sup>22</sup> Again, the public policy favoring dependable water supply in an environment of potential shortage influenced the result.

Later in the twentieth century, litigation ensued between lower- and upper-Santa Ana River stakeholders over the latter's "spreading" of captured stormwater onto alluvial fans (the flat geologic feature at the mouths of canyons) to induce percolation to their subsurface, thus depriving the lower basin of its usual flow.<sup>23</sup> In 1932 the Irvine Company, a lower-basin

imported, and of how much costlier outside water should be subsidized for producers who needed it.<sup>31</sup> Water users exceeding the limit are charged and those not reaching it are credited, which encourages efficiency.<sup>32</sup> Compliance with this agreement has been high, with the main critique being that agricultural users are favored with lower rates.<sup>33</sup>

Orange County's pump tax and basin production percentage arrangement has effectively lowered groundwater depletion, and is an alternative to the "water rights" orientation which caused so much litigation in the past.<sup>34</sup> Significantly, the pump tax has served as a model for other California water districts including those in Alameda and Santa Clara counties, Stockton and East San Joaquin, and the Mojave Water Agency.<sup>35</sup>

In 1881, two years before *Anaheim Water Co. v. Semi-Tropic Water Company* and five years prior to *Lux v. Haggin*, future U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., argued that law should reflect "the felt necessities of the time" and "intuitions of public policy," suggesting that the legal system should incorporate a contextual concept of the public good, rather than impose abstract categories based on logic.<sup>36</sup> Over the last 140 years, the Orange County experience has implemented this philosophy through efficient and fair water distribution at judicial and administrative levels. Unlike the formalistic property rights orientation of *Lux*, pragmatic decisions beginning with *Anaheim Water Company* and the Orange County Water District's pump tax and BPP have promoted cooperation rather than conflict. Orange County's model constitutes one region's successful pursuit of sustainability, and reflects a broader consensus that water sharing is a crucial response to the increasing pressures of urbanization and climate change on water resources.<sup>37</sup>

## ENDNOTES

(1) 69 Cal. 255 (1886). Since it coordinated rights based on both doctrines, *Lux* is situated between the eastern U.S. approach allowing only riparian rights and the privileged status of prior appropriation in many western states. Joseph W. Dellapenna, *United States: The Allocation of Surface Waters*, The Evolution of the Law and Politics of Water 189, 192-98 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2009).

(2) M. Catherine Miller, *Flooding the Courtrooms: Law and Water in the Far West* 176 (1993).

(3) Eric T. Freyfogle, *Lux v. Haggin and the Common Law Burdens of Modern Water Law*,

57 Colo. L. Rev. 485 (1986).

(4) *Id.* at 524-25.

(5) 64 Cal. 185 (1883). At that point the region was still part of Los Angeles County; Orange County would shortly be incorporated as a separate entity in 1889.

(6) Louis F. Weschler, *Water Resources Management: The Orange County Experience* 4 (1968).

(7) *Id.*

(8) *Id.*

(9) Terry E. Stephenson, Don Bernardo Yorba 84-85 (1941).

(10) Transcript on Appeal, *Anaheim Water Company v. Semi-Tropic Water Company*, UCI Orange County Regional History Collection, Testimony of Henry Knapke, 104; Testimony of Benjamin Dreyfus, 117.

(11) *Id.*, Testimony of J.F. Isbell, 209.

(12) *Id.*, Testimony of A. Langenberger, 120.

(13) *Id.*, W.T. McNealy, Judge, Decree, April 7, 1882, 68-69.

(14) 64 Cal. at 194-97.

(15) *Id.* at 196.

(16) *Id.* at 197.

(17) M.B. Scott, *Development of Water Facilities in the Santa Ana River Basin, California, 1810-1968* 215 (1976).

(18) 148 Cal. 516 (1906). Water diversions in the upper Santa Ana River Valley decrease the flow arriving in the lower valley. Paul Bailey, *Water Supply of Orange County* 8 (1946).

(19) 148 Cal. at 518.

(20) *Id.* at 521.

(21) 150 Cal. 327 (1907).

(22) *Id.* at 336.

(23) Scott, *supra* note 17, at 223.

(24) *Id.* at 224.

(25) *Id.* at 225-26.

(26) 173 Cal. App. 2d 137 (1959).

(27) *Id.* See William Blomquist, *Dividing The Waters: Governing Groundwater In Southern California* 255-57 (1992).

(28) See Agreement Between Orange County Water District and City of Riverside Concerning Water Rights, July 24, 2006, [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/santa\\_ana\\_river/exhibits/all\\_applicants/app\\_joint2\\_6.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/santa_ana_river/exhibits/all_applicants/app_joint2_6.pdf). The judgment also linked water rights to quality, so if dissolved solids in the upper river increase, Orange County receives more water. Gary Pitzer, *A Tale of Two Rivers: The Russian and the Santa Ana*, *Western Water*, May-June 2009, at 12.

(29) Weschler, *supra* note 6, at 13.

(30) *Id.* at 16-20; Edgar E. Pankey, *Water—Pay Your Dues!*, Proceedings of the Conference of Orange County History 1988 21 (Robert

A. Slayton & Leland L. Estes eds., 1989). *Katz v. Walkinshaw* established the legal principle that surface landowners have a "correlative" use right to groundwater based on the proportion their land occupies over an underlying common pool. 141 Cal. 116 (1903).

(31) Orange County Water District, *History of the Orange County Water District* 32-33 (2023), [https://www.ocwd.com/wp-content/uploads/OCWD-History-Book\\_June-2023.pdf](https://www.ocwd.com/wp-content/uploads/OCWD-History-Book_June-2023.pdf).

(32) Paula K. Smith, *Coercion and Groundwater Management: Three Case Studies and a "Market" Approach*, 16 *Env'tl. L.* 797, 833-34 (1986).

(33) *Id.* at 839; Blomquist, *supra* note 27, at 269.

(34) Smith, *supra* note 32, at 839. The OCWD also sets an operating range with an upper limit to extraction to prevent saltwater intrusion. Takahiro Endo, *Pump Tax, Basin Equity Assessment and Sustainability in Groundwater Management: Orange County Water District Experience*, *The Water-Energy-Food Nexus: Human-Environmental Security in the Asia-Pacific Ring of Fire* 157, 171 (Aiko Endo & Tomohiro Oh eds., 2018).

(35) Weschler, *supra* note 6, at 3.

(36) Oliver Wendell Holmes, Jr., *The Common Law* 5 (Mark DeWolfe Howe ed., Little, Brown 1963) (1881).

(37) See Endo, *supra* note 34, at 171 (contrasting the OC pump tax with the Los Angeles-area Raymond Basin's division and allocation of tradable pumping limits).

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