

WATER RIGHTS

BY CAMERON SCOTT KIRK
BEYERS COSTIN

Secure your water rights by expanding your options

Recent events in the courts and Legislature compel local businesses and government agencies to re-examine water rights issues. On June 23, the United States Supreme Court ruled that the federal government was immune from suit by California farmers, though water rights secured through government contract were reduced by 50%. In the California Legislature, a Senate bill proposing significant changes to the Water Code, having passed to the Assembly on May 31, was sent to the Assembly Committee on Appropriations on June 28.

These events demonstrate that at national and state levels, traditional water rights law is changing, becoming less certain and subject to greater government regulation. Increasingly, the government will be pressured to further define both water rights and supplies. Accordingly, businesses of all types in the North Bay must evaluate their present and future water needs. To best secure their water supply, businesses should maximize the different water rights options available to them.

ORFF V. UNITED STATES

Farmers and farming entities in the Central Valley have been litigating water rights for years, attempting to define and secure their rights in the face of competing water demands. In *Orff v. United States*, the farmers contended that contracts entered into by the United States Bureau of Reclamation and the local water district secured for the farmers certain rights to water. In a limited decision, the United States Supreme Court held that the farmers could not sue the United States to compel the specified water deliveries, though only 50% of the water promised by contract was actually conveyed.

This decision has been interpreted in a variety of ways, but the unassailable conclusion is that the Central Valley farmers are unable to force the federal government to supply them with the agreed-upon water. While the decision does not state it specifically, the underlying premise is that government contracts may be unilaterally modified based on regulatory allocations of water among competing users. This must be considered a serious threat to water rights throughout the state.

INCREASING GOVERNMENT CONTROLS

While contractual water rights are threatened, population growth puts increasing pressure on the state Legislature to address water rights issues. Recently enacted legislation seeks to ensure adequate surface and groundwater supplies for continuing development. Enacted in 2002, SB 672 calls for the State Water Plan to emphasize local and regional solutions to meet community water needs.

In the same year, SB 221 was passed, requiring government permitting boards to determine that a 20-year water supply exists for new housing developments of 500 homes or more prior to issuance of a final subdivision map. Additionally, 2002 legislation also expands the requirements that public water suppliers prepare water supply assessments early in the land-use planning process.

This year legislation has been introduced in Sacramento that would affect significantly both urban and agricultural water users.

SB 820 mandates the following:

- 1) Water conservation must be considered in determining reasonable use.
- 2) Specific reporting requirements

must be met to document annual water use, including groundwater.

3) Consequences are imposed for failing to file required reports.

4) Additional requirements must be adhered to in the water resources planning processes.

This legislation contemplates both surface water and groundwater, and it seeks to establish a comprehensive system to regulate all the waters of the state. The legislation has been approved by the Senate and is now working its way through the Assembly. Given these events, the prudent business owner in the North Bay must consider carefully water supply needs and all legal options to meet those needs.

WATER SUPPLY OPTIONS

Riparian and appropriative water rights: California employs a unique system of water law, whereby riparian and appropriative rights are recognized, with riparian rights having priority. Riparian rights apply to property adjoining a water course, granting the property owner rights to use water from the natural river or stream.

Appropriative rights apply only to the reasonable use of water, allowing water users to divert the water for reasonable and beneficial use.

The rights pertaining to riparians are correlative. That is, each may use only his reasonable share when water is insufficient to meet the needs of all. The riparian user may not infringe on downstream users' rights. The riparian water right runs with the land and is not lost by lack of use.

As between appropriators, however, the one first in time is first in right, and a prior appropriator is entitled to all the water he needs, up to the amount taken previously, before a subsequent appropriator may take

any. A riparian user has priority over an appropriator. These principles, however, are qualified by the reasonable-use doctrine, which recently has become the defining doctrine in California water law.

Overlying landowner: Similar to the riparian right, the overlying landowner has the right to access the groundwater beneath his property. Historically, this right has not been regulated. As noted above, however, SB 820 proposes to change this practice.

Reasonable-use doctrine: The reasonable-use doctrine has become the overriding principle of California Water Law. The California Constitution limits water rights to reasonable and beneficial uses. Under this doctrine, establishing the rights of competing parties now requires the trial court to determine whether the parties, considering all the needs of those in the particular water field, are putting the waters to reasonable beneficial uses.

These factors include reasonable methods of use and reasonable methods of diversion. Such use depends, of course, on the circumstances of each particular case. Today, such an inquiry cannot be resolved without considering statewide considerations, including the ever-increasing need for the conservation of water. This has been specifically recognized by the courts in *Joslin v. Marin Municipal Water District* as "an inescapable reality of life," increasing the importance of the constitutional mandate.

The constitution thus dictates the basic principles defining water rights: No one can have a protectable interest in the unreasonable use of water, and holders of water rights must use water reasonably and beneficially. Crucial to an understanding of water rights is the fact that the amendment carefully preserves riparian and overlying rights, while abolishing "that aspect of the common law doctrine which entitled a riparian, as against an upstream appropriator, to enforce his right to the entire natural flow of a stream even if his use of the water was wasteful or unreasonable."

Water transfers: In the last two decades,

water transfers have become an important piece of California water law. Water transfers allow a water rights holder to sell rights to another. While transfers are gaining in popularity, problems exist. Most difficult is defining the seller's rights sufficient to provide security in the transfer agreement. The reluctance of some counties to allow water transfers out of the county has also proved to be an impediment for water transfers. Increasingly, water transferors must demonstrate that the transfer will not injure other legal users of water.

Nevertheless, water transfers are increasing. In 2001 and 2002, two large Northern California water districts/agencies arranged transfers by substituting groundwater sources for surface water diversions. The Department of Water Resources Water Bank has accepted numerous transfers from water right holders throughout the delta.

Water options: Water options are also gaining popularity in California. In an option agreement the purchaser makes an

option payment in the fall prior to the winter rain for the right to purchase a specific quantity of water in the spring if it is a dry year. By paying for the option, the buyer manages its supply risk by avoiding spring negotiations for a limited supply of water, where the competition for water may drive prices unreasonably high.

Reclaimed water: Reclaimed water is becoming crucial in meeting the needs of California. Water treatment plant owners are focusing on recycling this treated water, and water users are recognizing the increasing value of recycling. Water districts and agencies throughout the state provide incentives and programs for using treated water.

CONSIDER YOUR OPTIONS

Even as winter rains fill California's reservoirs, increasing water needs restrict water use. As competing water needs force the Legislature and the courts to reconsider water laws and rights, so must businesses reconsider their needs and their various water options.

ABOUT THE AUTHOR

Cameron Scott Kirk is a shareholder with Beyers Costin and specializes in all aspects of environmental law, representing property owners and businesses with environmental issues.

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BEYERS COSTIN
200 Fourth Street
Santa Rosa, CA 95402
707-547-2000
www.beyerscostin.com