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WATER LAW AND ECONOMIC TRANSFERS OF WATER: A REPLY

M. MASON GAFFNEY
University of Missouri

THIS is a reply to Dean Frank Trelease's comment[1] on a case study of western water law as applied to the Kaweah River, California.[2]

That case study finds diseconomies in water allocation, and lays much of the blame to water law. Dean Trelease finds this "very disturbing," which reaction I, in turn, find a little puzzling, since he is himself no mean gadfly on the subject. Probably the answer is that there is a real issue between us: he leaning to the view that the appropriative doctrine is essentially sound, needing some repairs about the fringes; I to the view that many diseconomies are inherent in the core concept of prior appropriation. Such issues are hard to join cleanly, however, and all subtleties hard to pinpoint among the Dean's conjectures and divagations. One must admire the errantry with which he charges onto unfamiliar ground, but I find myself hard to recognize in some of the dragons he smites there, a crew of such mixed ancestry that I believe the greatest contribution I might make to this discussion would be to line them up for individual inspection.

The Dean's thesis, as I read it, proceeds as follows:

1. Gaffney blames appropriative law for initiating and perpetuating the misallocation of water on the Kaweah;
2. But California law is quite clear that water rights are transferable;
3. The real barriers to transfer in this case are probably:
   a. present uses yield spillover benefits not accounted for by Gaffney,
   b. present licensees are irrationally attached to their water rights and do not accept a legal and economic opportunity to sell;
4. The law represents the value judgments of the people.

Let me comment on those points in order.

1. On the relative merits of appropriative law

As a champion of appropriative law, Dean Trelease has reacted selectively to different passages in my Kaweah study. The study allots blame

[1] Trelease, Frank, "Water Law and Economic Transfers of Water," 43 *JFE* (5): 1147-52 (*Proceedings* Issue, Dec., 1961).

[2] Gaffney, Mason, "Diseconomies Inherent in Western Water Laws: a California Case Study," *Economic Analysis of Multiple Use*, Report No. 9 in the series *Water and Range Resources and Economic Development of the West*, Proceedings, Western Agricultural Economics Research Council, Range and Water Section, Tucson, Ariz., January 23-24, 1961, pp. 55-82.

impartially among the riparian, appropriative, and correlative doctrines, save to note that the Kaweah Delta has "more than the usual quota of riparian lands." In California's system of scrambled water law it is hardly possible to know just which doctrine is blocking what worthwhile project. If I had to choose I would share the Dean's partiality for the appropriative over the riparian system, just as I would rather be shot than hanged. But I would prefer a wider choice.

The Dean overstates my case a bit when he tells us that Gaffney tells us that transferable appropriative claims could not operate in a fashion to maximize benefits from water use. What Gaffney tries to tell us is that in California appropriative licenses are so hedged about with conditions and complexities as to be non-transferable in practice. Dean Trelease speaks of what they might be; I of what they are. I do not question that society could create definite and alienable claims on water. I wish it would.

But the Dean is correct if he intuits that I believe such negotiable instruments would little resemble what today we call a license to appropriate water. The present system is less one of licensing than of license. It encourages landholders to range as far as they can to claim more water than they use, and use more water than they need, sooner than they need it. I doubt that it can simply evolve into an economical system. The necessary changes would eliminate most of what is characteristically "appropriative." Dean Trelease offers no comment on the several points I raise in this vein.[3]

The Dean has confused issues further by shifting between the transferability of appropriative licenses and that of shares in mutual water companies. From his second paragraph one would gather he was concerned about the former issue, but his later discussion concerns the latter, a related yet distinct matter which my Kaweah study treats separately.

Now it may be well established in some jurisdictions, as Dean Trelease alleges, that an appropriator can only sell what he has been using consumptively, but there is no such general limitation on transferring water company shares in the southern San Joaquin Valley. Some shares have been restricted by the companies themselves within fixed perimeters, but others have rambled over the lea and far away, wagging their externalities behind them. There has been wailing and gnashing of teeth, but lamentation has not enjoined the transfers.

What really has blocked many other and more desirable transfers, however, is the law, which interdicts a change in point of diversion. In *Consolidated People's Ditch Company* v. *Foothill Ditch Company*[4] the court did not enjoin the transfer of water as such. Lindsay-Strathmore

[3] *Op. cit.*, pp. 64; 69-70; 72-74; 78.
[4] 205 California 54, 269 Pac. 915 (1928), at 64, 65, *et passim*.

could take the water corresponding to the shares it had bought, said the court, provided it did not do so in the direct and economical way, but let the water fall 200 feet and more to the diversion points that were good enough for Grandpa, and pumped it back uphill.

Dean Trelease is again intuiting aright when he wonders if the cross-hauling I deplore was not largely necessitated to avoid changing points of diversion. But whether that in turn reflects any overriding legal solicitude for spillover benefits is doubtful. The law has permitted all manner of changes in place of use, provided only all ditches stem from the fixed ancient diversion points. Thus water has to reach its destinations in the same roundabout manner that the law has to reach some of its conclusions. Points of diversion are treated as precedents.

2. California law on the transferability of appropriative rights

"How," asks the Dean, "can law which specifically states that changes can be made operate to block changes?" That is an odd question for a jurist to raise, when every reasonably skeptical layman observes that the pious protestations of one law are often subverted by others. Need one mention more than the 15th Amendment?

I will not repeat here the relevant passages of my Kaweah study. They are available to whosoever wishes to consult that work.[5] But I would take the occasion to add one more point, which overlaps some of the others as well.

California law and practice have long let municipalities (a term which includes irrigation districts) reserve future waters, exempt from the general requirement of due diligence, in anticipation of alleged greater needs. Many of these needs have never materialized, and probably never will—witness San Francisco, and the Modesto, Turlock, and Merced Irrigation Districts, among others. But the law does not provide for their selling their claims on surplus reserved waters. To sell something you must own it, and to own a perfected appropriative claim on water you must have put water to beneficial use. Meantime, which may literally be a century or more, the claimant can hardly convey that which is his only upon a condition he has not met.[6] He can, however, and does prevent anyone else's using it.

Obviously the waters most eligible for sale are those that are surplus to their claimants, yet they are the ones most likely to be trapped in this legal limbo. The reserver can release them only by abandonment and forfeiture, which nets him nothing but a sense of philanthropy toward rival municipalities.

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[5] Gaffney, *Op. cit.*, pp. 70-74 *et passim.*

[6] Cf. Hirshleifer, Jack, Dehaven, James and Milliman, Jerome, *Water Supply* (Chicago: Univ. of Chicago Press, 1960) p. 240, n. 50.

In practice many appropriators other than municipalities have also been allowed more water than they can use. Let me cite Dean Trelease to this point: "Early irrigation decrees were often for atrociously large quantities of water, and many of these are still in effect."[7] The Dean also advises us, I think correctly, that forfeiture is "almost impossible of enforcement."[8] So long as these overendowed appropriators lie low and keep still they are unlikely to be bothered. Let them try to sell their surplus, however, and the paternal public feels cheated. The appropriator was given the resource to husband and use, not to sell prodigally for money as Pinocchio sold his school books. The chance that the reserver could convey title that would hold against the swarm of claimants who would then claim priority is dim.

3a. Spillover effects and the transferability of appropriative rights

Dean Trelease's major point seems to be that the economics of spillover effects are what block transfers of appropriative rights and water company shares in the Kaweah area. He is content to "wonder" rather than commit himself, but if he has a thesis surely it is that.

First, a bit of local hydrology. Spillover effects in the Kaweah area do not consist largely of the return flows the Dean posits. As my study indicates, ground water gradients slope away from the main channels. The spillovers that help other irrigators (and have created severe drainage problems in some areas) are: (a) deep percolation under irrigated fields; (b) conveyance losses which seep underground; and (c) channel seepage above the diversion point. Of these, the law appears to protect only (c) channel seepage, probably on the uneconomic principle that it is more "natural." The law does not protect upstream juniors against increases in channel seepage which result from heavy pumping of wells. The upstream junior must then let more water pass his weir to maintain required flows for downstream seniors.

Second, there are spillover gains as well as losses. The Dean accentuates the losses but overlooks any gains, a failing all too common in his profession (and mine), and calculated to block all but extraordinarily advantageous transfers. He has no comment for my allegation that in the instant case spillover benefits would exceed spillover losses, because of greater reuse of water when applied at higher elevations. And is it not generally to be expected that spillover benefits in areas of shortage would exceed those in areas of surplus? Over-irrigation in the lower Kaweah has in fact created serious drainage problems.

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[7] Trelease, Frank, "A Model State Water Code for River Basin Development," 22 *Law and Contemporary Problems* 301 (1957), p. 305.

[8] Trelease, Frank, "Trends in the Law of Prior Appropriation," *Proceedings, Water Law Conferences*, Univ. of Texas, (1954), p. 215.

Third, there has been no transfer of an appropriative right in the Kaweah system for decades. The fact speaks volumes.

Fourth, appropriative law does not provide that injured parties shall be compensated when diversion points are moved; rather, it provides that parties shall not be injured.[9] The injured party has not just a damage claim, but a veto worth what the traffic will bear. This puts the water-buyer in the position of a right-of-way agent unarmed with eminent domain. Dean Trelease has elsewhere remarked this weakness in the riparian law: ". . . the value of the water right may be the price of buying the riparian's forebearance to enjoin the use, a price which may well be what it is worth to the non-riparian to continue his development.[10] . . . the certainty desired by the prospective water user can rarely be obtained from a single seller."[11] Do these words not apply as well to the power of appropriators (and others with vested interest in channel seepage) to enjoin moving points of diversion?

Fifth, Dean Trelease wonders if the Kaweah litigants had competent legal advice. Legal competency is a hard quality to define, but it is an objective fact that the litigants in *Tulare Irrigation District* v. *Lindsay-Strathmore Irrigation District* spent between one and two million dollars on legal counsel. Lindsay-Strathmore alone had already spent $671,611 by 1927[12] and the case dragged on to 1935. The Supreme Court decision of that year[13] left the major issues unresolved and the case might still be at bar had not the litigants gone bankrupt. A large share of the debts were incurred to pay counsel; about as much money was spent on litigation as on construction. If those sacrifices were not enough to buy competent legal advice one may fairly ask to how many citizens that commodity is available?

Finally, a word about the general problem of handling spillover effects. It would be hard to find a public or private decision or transaction without effects on others than the principal parties. In fields other than water, the law wisely refrains from requiring the active parties to come to terms with all the discommoded passive ones, else transactions would cease and society would stagnate. A commodity is not merchantable if not cut clean from the cloying entourage of indirect interests.

It would still be desirable to devise means to compensate losers from the gains of winners. It is monstrously impractical to do so in each in-

[9] California Water Code, Ch. 10, Para. 1706.
[10] "A Model State Water Code," p. 307.
[11] *Ibid.*, p. 309.
[12] Adams, Frank, *Irrigation Districts in California*, State of California, Department of Public Works, Division of Engineering and Irrigation, Bulletin No. 21 (Sacramento: State Printing Office, 1929), p. 249.
[13] *Tulare Irrigation District* v. *Lindsay-Strathmore Irrigation District*, 3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935).

dividual transaction. A workable alternative lies in the tax mechanism. Many indirect gains and losses accrue to individuals in their capacity as landholders. Let the fisc therefore rely heavily on *ad valorem* land taxes, keep assessments punctiliously current, and the winners automatically compensate the losers. Progress in this direction would seem to hold forth greater promise than litigating *ad infinitum* the external costs and gains of every transaction.

3b. On the heirloom attitude toward water rights

Dean Trelease opines that "reluctance to sell water rights is not a legal factor." Gaffney relates it indirectly to law but the reasoning is "subliminal." That may depend in part on the reader's threshold of perception to the thinking of another discipline. It is common cause for tears and laughter among economists that the public will acquiesce happily in the most outrageous giveways of public property and valuable monopolies to sell liquor, broadcast on Channel x, or drive taxis, until one beneficiary is found selling his privilege for money—then it becomes immoral profiteering.[14] Is it implausible then to suggest that a privileged class tends to develop modes of behavior and expression calculated to minimize this risk? Is it subliminal to relate that to the precarious legal instrument via which public property is given away?

Tell me not that the risk is past that society may reassert its collective ownership. Were that so, it would not be necessary for every other issue of *Western Water News* to headline "Water Rights in Jeopardy," nor for so many writers on water to volunteer disclaimers of belief in taking without compensation. The ladies do protest too much, methinks. These phenomena in fact betray the deep anxiety felt by licensees over the status of their privileges.

For this anxiety and uncertainty the law must bear its full measure of responsibility. Rather than resolving doubts by clearcut leadership, it stands poised, like Talleyrand, prepared to dodge the tumbrels of either party. Rather than designate water as "public" or "private" the law makes it both, or either. Dean Trelease's statement is characteristic:

> . . . the appropriator, with the permission of the State, receives a privilege of using the property of the State; a privilege that may be no less property but certainly property of a conditional and permissive kind. The State through a system of administrative machinery sees to it that its property is used wisely and well.[15]

[14] Dean Trelease has commented elsewhere on the punitive public reaction to such trafficking. He attributes the restrictive legislation of some states to the desire "to prevent abuses that arose from the transfer of some old water rights."—"A Model State Water Code," p. 315.

[15] Trelease, Frank, "Trends in the Law of Prior Appropriation," Proceedings, Water Law Conferences, Univ. of Texas (1954), p. 220.

Perhaps now it is my perception that is dull, but to me that verges on doubletalk. If the state is the owner, then the licensees, in the bold Mosaic phrase, are "sojourners and strangers with us,"[16] and it only breeds confusion to tell them their licenses are "no less property" and indulge their conceit that they have more than precarious tenancies.

If the state is to remain the owner of water, let it do so in the clean and unambiguous way enunciated by Oregon Chief Justice McBride: "... it does not seem to me that it [water use] ever arose in this country above the dignity of a mere privilege, over which the legislature had complete control."[17] Or, if we prefer to pass title to appropriators, let them pay a market price and get a real title, fully alienable and fully taxable as private property. The present precarious status only guarantees continued conflict, confusion, and litigation.

Licenses to appropriate water have distinctive qualities other than precariousness, and I would not impute the heirloom quality exclusively to that. One may find the above reasoning subliminal and still observe that the heirloom attitude attaches not to water as such but to water rights, the legal instrument the law has forged for claiming the use of water. Put water in a bottle or metered pipe, and people buy and sell it with a good deal less sentiment than they attach to their houses or golf club memberships. But once create a legal obstacle course which obstructs transfers, and you begin to endow water rights with the essential heirloom quality, which is irreplaceability. Thenceforward the process is cumulative: because water is hard to replace people cling to surplus water, which makes water harder to replace, and so on.

To find attitudes resembling the heirloom attitude toward appropriative licenses one need rather look to similar legal instruments. The obvious parallel is with land titles, especially in areas and ages where these are closely held, lightly taxed and encumbered with barriers to transfer. Water rights are on their way to becoming the paralyzing *mortmain* of the modern west.

4. On the lawyers' responsibility for the law

There was no need for Dean Trelease to defend his profession for it was not under attack except as the shoe might fit. Particular laws, yes, but not law. But so long as he raises the subject I do not believe that the legal profession, which has a unique authority over law, can ask absolution from a unique responsibility for it.

It is true that lawyers have no monopoly on either power or folly, and the will of the majority is often illadvised. But this "will of the majority"

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[16] Leviticus 25:23.

[17] *In re Hood River*, 114 Oregon 112, 227 Pac. 1065 (1924) at 190-91.

is a shapeless humor that filters through several layers of lawyers before crystallizing into effective law. Legislators are mostly lawyers; they use legal counsel to draft bills before they pass, and Attorneys General to explain them afterwards. They have a weakness for leaving key decisions for their colleagues on the bench, and much of water law is purely judge-made.

It is fitting that we should endow a lawgiving caste with some special powers. Without leadership "the people" is a headless monster. It is also fitting that lawgivers harken to the will of the public, but what public? The Dean's "quite a few irrigators" are a minute and biassed interest group. One of the best reasons for giving lawyers so much discretion is the protection they can afford us against the clamor of privilege groups that so often sways legislatures. When lawyers think they hear the will of the majority in these strident and demanding voices they are on the verge of forfeiting one of the important functions that warrants their prerogatives.

To summarize my differences with Dean Trelease and those to whom he lends support, their economizing instincts are good, but they are too easily satisfied. If a driblet trickles in an economical direction through the baffles of water law, that is enough to show forth the law's goodness. If responses lag for decades behind the stimuli of demand, the important thing is that movement is in the right direction.

I maintain on the other hand the system is not good enough. At first blush that seems to be a difference of degree only, but it evolves into a difference of kind. Had we but world enough and time, we might patiently finance generations of legal talent tracing down formulae to reconcile economics and law. But when the law frustrates an optimal adjustment of resources to meet demands, time's winged chariot drawing near at 5 or 10 percent per annum spurs us on to entertain less attractive alternatives. Economic pressures build up until one of these poorer choices is taken, irreversibly, at great cost, to the permanent preclusion of the optimal adjustment. These poorer choices are often ponderous interregional transfers, so slow in gestation and so overwhelming in volume as to pose serious problems of developmental instability. But on that, the upshot of my thesis, Dean Trelease offers no comment.

I agree with Dean Trelease that Americans have bumbled many things and America is great, but I question if the one caused the other. It is not bumbles and fumbles, but recoveries that make a nation great. The unbumbling of our water law is not likely if the good-enough-for-Grandpa school prevails.

WATER LAW AND ECONOMIC TRANSFERS OF WATER: A REJOINDER

FRANK J. TRELEASE
University of Wyoming

THIS discussion seems to be generating more heat than light. I make this rejoinder[1] in the hope of clarifying some issues, pointing out some areas of agreement as well as disagreement between us and finding some common ground from which fruitful results can be obtained.

First, I will accept Professor Gaffney's statement of the real issue: That I lean toward the view that the appropriative doctrine is essentially sound, needing some repairs about the fringes; he to the view that many diseconomies are inherent in the core concept of prior appropriation. Secondly, that the situation he describes exists on the Kaweah I do not doubt. That from this one can conclude that prior appropriation law is all bad I doubt very much. That legal factors, along with historical, physical and tempermental factors have hindered transfers of water rights in that area seems to be true, but that this can be generalized over the west I doubt.

Joining Gaffney squarely on the core issue seems to be difficult, because he has chased me into the mists where my errantry and divagations took me, and there smote one or two dragons himself. Therefore I will accept his somewhat rough delineation of my argument, and will reply to his points as he made them.

I. The relative merits of appropriative law

I do not condone every sin committed in the name of prior appropriation. I do not approve every variant rule of law encompassed within that doctrine. I do not defend every maladjustment the law has permitted, every wrong decision, every result of maladministration. I do not defend California water law in general; I regard it to a large extent as a chamber of horrors, with its riparian rights, appropriative rights, correlative rights, and the hybrid monstrosities which have resulted from forced matings of these doctrines. Even in regard to appropriative law, I do not defend the prodigality of the California courts in allowing inflated claims to water nor deny that there is need to straighten out the bad situation that has resulted.

A major difficulty in coming to grips with Gaffney is that his position is essentially negative. He does not like prior appropriation but he offers us no clear cut alternative. Poking holes in, or even destroying, a system

[1] Heaven help us, in common law pleading there were once rebutters, surrejoinders and surrebutters.

is not enough; bad as prior appropriation is, what better can be offered? He has, in his main study, "not suggested, save by indirection, alternative policies." In his rebuttal, however, he hints at these: definite and alienable claims on water, that are negotiable instruments. He gives us a choice as to whether these should be mere privileges, over which the legislature (state? administrative agency?) has complete control, or else rights bought at a market price so as to get a real title, fully alienable and fully taxable as private property. He offers his study as proof that present policies are intolerable and posits the molding of new policies as one of the greatest challenges facing the economists' profession. With the latter I am heartily in accord, for the challenge faces the legal profession and the public as well, and as I have said we need all the help we can get from people like Gaffney and from studies like his. But his sketch of a substitute is too nebulous and incomplete for us to judge whether the flame he offers is hotter than the grease we presently sizzle in.

2. California law on the transferability of appropriative rights

First I am accused, under the previous heading, of confusing issues by failing to distinguish between the transferability of appropriative licenses and that of shares in mutual water companies. I think the confusion is caused by attempting to make the distinction. A change in point of diversion or place of use resulting from the sale and transfer of water company stock not appurtenant to land *is* a change in an appropriative right. To unravel the tangle of legal and factual variations in the structure, by-laws, and powers of mutual water companies is impossible here. Suffice it to say that while the company may be regarded for some external purposes as the owner or proprietor of the water right, the shareholder, variously, is either the "true owner of the appropriation" or is the equitable owner of a fixed or proportionate share of the company's water right, which the company holds in trust for him. When the shares are not inseverably appurtenant to particular land, a sale of stock by an owner with a low marginal revenue productivity to a person who can place a higher value on the water results in a change of the use in response to economic forces, and the ownership, legal or equitable, of the appropriation changes hands.[2] This is not to say that the company is entirely without rights in the matter, as the case Gaffney complains of indicates.[3] The company may restrict its service area within fixed perimeters and such a

[2] In one of the cases arising out of the Kaweah struggle, the purchase of stock in water companies by districts was said to be the equivalent of purchasing additional water rights. Lindsay-Strathmore Irrigation District v. Wutchumna Water Co. (Cal. App. 1931) 296 Pac. 933, 937.

[3] Consolidated Peoples Ditch Co. v. Foothill Ditch Co., 205 Cal. 54, 269 Pac. 915 (1928).

change may not operate in other ways to the disadvantage of the company or the rest of its shareholders.[4]

Secondly, I am not in error in attributing to California, and there applying to water company shares, the general rule that a change in water rights is permissible only if no injury is done to other water users. This limitation has been expressly held to apply to transfers of water company shares in the southern San Joaquin Valley.[5] For physical reasons, one of the most common types of injury, the loss of the benefit of return flows from the diversion, may not apply, but purchases of shares of mutual water companies have been treated by the California courts just like other transfers of appropriative rights, indeed held to be just such transfers. With specific reference to a change effected by a transfer of shares to a city, a California court has said: "It is true that such change in either the place or purpose of use may not be made to the detriment of others having superior rights."[6] The detriment alleged in that case was that a change from agricultural to municipal use would result in a diminution in downstream water supply available for recharge of aquifers, in other words, a loss of return flows.[7] If there has been only wailing and gnashing of teeth at such transfers within the Kaweah Delta it may be because the lamentors could not prove that they were hurt or abstained from going into court for some other reason. Actually, this adds fuel to Gaffney's fire, for it imposes legal limitations he thought did not exist on transfers. But I think that to the extent that economic transfers of water rights have been effectuated by transfers of water shares, appropriation law should be given the credit, rather than some unidentified law outside that framework.

Thirdly, Gaffney overstates his case when he says that the law interdicts a change of diversion and permits changes in place of use only when all ditches stem from the fixed ancient diversion points. I intuit that Gaffney knows that this is not really the law and that this is a shorthand expression for his belief that while the letter of the law permits such changes other ramifications take away what is given. For it is clear that changes in point of diversion have been made in California,[8] even from a stream to a related ground water basin,[9] or from one set of wells to another drawing from the same basin.[10] And, although local information

[4] Brighton Ditch Co. v. Englewood, 124 Colo. 366, 237 P. 2d 116 (1951).
[5] Lindsay-Strathmore Irrigation District v. Wutchumna Water Co. (No. 2) (Cal. App. 1931) 296 Pac. 942.
[6] Orange County Water District v. Riverside (Cal. App. 1959) 343 P. 2d 450, 484.
[7] See an earlier phase of the same case (Cal. App. 1959) 340 P. 2d 1036.
[8] Byers v. Colonial Irrigation Co., 134 Cal. 553, 66 Pac. 732 (1901).
[9] Barton v. Riverside Water Co., 155 Cal. 509, 101 Pac. 790 (1909).
[10] San Bernardino v. Riverside, 186 Cal. 7, 198 Pac. 784 (1921).

furnished to Gaffney did not indicate this,[11] a reported case records that in the neighboring Kings River Valley a 35 mile change in the point of diversion was allowed, upstream, in the direction of greater economic use.[12]

One of Dr. Gaffney's main complaints is that the law, by various means, will not permit the sale of surplus by districts which have over-estimated their needs and laid claims to waters they may never use, and by other appropriators with an excess over actual need. But in practice this effect may not work out too badly, if I may be permitted another supposition. If these excess waters are not diverted and consumed by their "owners" they are left in the streams and are available to and are used by junior appropriators. It is true that these juniors hold a precarious title, subject to defeasance if the dreams of the owner of the surplus ever come true. But if the surplus were to be sold to those who would divert and consume it, the juniors would be deprived of water they have used for years and can expect to use for years. This is a spillover I believe the law should prevent. Had I the fiat, my solution would be barsber than that Gaffney proposes. I would not propose that the situation be corrected by permitting these people to sell what they do not own, but by a re-use of the adjudication procedure, I would redetermine what is and can be used and cut titles back to this. An alternative technique might be that which has been sometimes, but seldom, used by water distribution officials: cutting down the amount of water delivered to an appropriator to the actual amount he can beneficially use.[13] These techniques would firm up the title of the junior appropriators using the water claimed but unused by the seniors, and free the remainder for new appropriations.

3a. Spillover effects

I quite agree that most public and private decisions or transactions have effects on others than the principal parties. I cannot agree that in fields other than water the law wisely refrains from considering spillover effects. On the contrary, a very large segment of law and a large proportion of the work of courts is devoted to the problems of seeing that those who cause losses pay for them, and that those who reap benefits from conduct or transactions pay the costs thereof. The law reacts selectively to spillovers. those with which it (and I) are most concerned in this context are those

[11] Gaffney, "Diseconomies Inherent in Western Water Laws; A California Case Study," Proceedings, Western Agricultural Economics Research Council, Tucson, Ariz., Jan. 23-24, 1961, p. 55, at note 49.

[12] Peoples Ditch Co. v. Foothill Irrigation District (Cal. App. 1931) 297 Pac. 71.

[13] Parshall v. Cowper, 22 Wyo. 335, 143 Pac. 302 (1914); cf. Quinn v. John Whitaker Ranch Co., 54 Wyo. 367, 92 P. 2d 568 (1939).

that would result in depriving a third person of water. The state gives a water right (license, privilege) to A, and another to B. A sells his to C, and B now finds he is short of water. A common case is that of the irrigator who sells his gross diversion so that downstream juniors are deprived of return flows. Caffney gives us other illustrations more applicable to the Kaweah Valley. A change in point of diversion that would lower the water in the stream and lessen the channel seepage or natural recharge to aquifers would deprive ground water users of water, or possibly of a more valuable asset, a shallow pumping lift. This I think should be accounted for, and so does the law,[14] and I am not at all sure that this is an "uneconomic principle." The law does not protect the quite similar conveyance losses from leaky ditches,[15] perhaps it should. Deep percolation under irrigated fields is a form of return flow and those who use it would, I believe, be protected.[16] Although California law does not protect upstream juniors against increases in channel seepage which result from heavy pumping of wells, I believe it should. Wyoming's underground water law, which I drafted, contains the only explicit statutory statement of this principle,[17] although it has been recognized by courts elsewhere.[18]

Neither the law nor I are entirely blind to spillover gains. One example of their recognition in the water field is in the Federal Power Act, which compels a hydroelectric power producer to pay for "headwater improvements," benefits received by the downstream power plant from the storage capacity of a new upstream plant.[19] In eminent domain, the law is slowly but surely accepting the principle of set-off of benefits received from an improvement against the award for the taking of property for the improvement.[20] To a large extent, however, the law ignores the claims of a volunteer who by his own property improvement benefits his neighbor. Yet parties negotiating a transaction do not usually ignore collateral benefits. Again, I can simply wonder whether the spillover benefits from a real-

[14] Haberman v. Sander, 166 Wash. 453, 7 P. 2d 563 (1932).
[15] Bower v. Big Horn Canal Association (Wyo. 1957) 307 P. 2d 593.
[16] *Supra*, n. 6.
[17] Wyo. Stat. 1957 Sec. 40-133: Where underground waters in different aquifers are so interconnected as to constitute in fact one source of supply, or where underground waters and the waters of surface streams are so interconnected as to constitute in fact one source of supply, priorities of rights to the use of all such interconnected waters shall be correlated and such single schedule of priorities shall relate to the whole common water supply. The state engineer may by order adopt any of the corrective controls specified in section 17 of this act.
[18] Templeton v. Pecos Valley Artesian Conservancy District (N.M. 1958) 332 P. 2d 465.
[19] 16 U.S.C. Sec. 803 (f).
[20] Nichols on Eminent Domain, 3rd Ed., Secs. 8.62 *et seq.*

location of Kaweah water would accrue to those who suffer the spillover damages.[21]

Nor am I blind to the veto power which an injured person has over a change in an appropriative right. The law almost universally states that if damage will occur to other appropriators, the change shall not be made. Utah is perhaps an exception: its statutes provide, rather indefinitely, that no change shall be made if it impairs any vested right without just compensation.[22] But this is weakened by a later provision that a change may be approved, though it would impair the vested right of others, upon condition that such conflicting rights be acquired.[23] The Alaska legislature currently has under consideration a water code prepared by me as consultant to the state which would go farther. It provides, "A change may be granted in part or subjected to conditions including the payment of damages to an injured person in order to avoid injury to private property or the public interest."[24]

There is another doctrine which could ameliorate the situation, but which to my regret I have never seen applied to one of these cases. This is the denial of an injunction and the relegating of a plaintiff to an action for damages upon a "balancing of the equities," actually, an overwhelming balance of benefits to the defendant as measured against minor disadvantages to the plaintiff. But further than this I do not believe the courts should go. Save in the most indirect of spillovers, we reserve powers of eminent domain to the state or to businesses fairly obviously affected with a public interest, and rightly hesitate to give our neighbors such power over our property.

Gaffney would take such cases out of the courts, and leave the adjustment of gains and losses resulting from a transfer to the tender mercies of the tax collector. Perhaps the people will approve this; I had thought that if there was one class of persons whose public image is worse than that of lawyers, it was the tax collectors, from the publicans to today's Internal Revenue Service.

3b. On the "heirloom attitude"

I have buttressed Gaffney on the existence of this attitude, but I still

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[21] If a smitten dragon may be permitted to snap back, the relevancy of the Lindsay-Strathmore Irrigation District spending two-thirds of a million or more on legal counsel in an attempt to establish water rights is not apparent. After that money was spent and the suit lost, the district attempted to buy water rights from more successful parties, but apparently failed to pay or offer the right amount to the right people, who promptly took them to court. My query related to the latter transaction.

[22] Utah Code Ann. 1953, Sec. 73-3-3, first paragraph.

[23] *Ibid.*, third paragraph.

[24] S.B. 356, Second Alaska Legislature, Second Session (1962), Sec. 232(d).

cannot agree that the emotional attachment to water rights stems primarily from the precariousness of the appropriator's title. Let me reiterate that I agree that an "owner" of surplus water has indeed a precarious title, none save that given by lax judges and administrators, so that he rightly fears that the courts may some day review their mistakes. But I cannot admit that the run-of-the-mill irrigator putting all of his water to a recognized beneficial use has a precarious title. The Supreme Court of the United States has said that an appropriative right exists in perpetuity.[25] State courts have protected vested rights in so many cases that the wall of precedent can never be breached without the payment of just compensation. That water titles are subject to possible recapture because the original transfer from the public domain was a giveaway of a public asset is nonsense. Land titles are not precarious because they are derived from homesteads. Cash payments to the state for water rights would not make the titles more "real."

Calling water "public" or "property of the state" does not detract from the property aspect of the appropriator's right to use that water. I may have fallen into the common parlance in explaining a concept to Texas lawyers. I doubt that my audience misunderstood me, though it may seem doubletalk to some. Elsewhere I have explained the fallacy of attempting to derive a system of water law from such declarations of public ownership.[26] When the state allows the water to be used, it makes no difference whether the word used is permit, privilege, license, right or grant, so long as the meaning is understood in terms of the property interest passed. However, such declarations have led to an attitude on the part of some people that does give rise to fears on the part of appropriators and causes them anxiety. This is the feeling that water is "different," that the state must keep water uses under constant review, that since today's best use of water may not be tomorrow's, the state must reserve the right to at any time reallocate the water to these now more beneficial uses. Compensation is not mentioned by these people, since they think in terms of revocable privilege and license. Gaffney's position on this matter is ambivalent. The western water user, hearing these proposals, rightly protests the introduction of a system that might leave him only dry land, with his investment lost and his going concern destroyed.

4. On the lawyer's responsibility for the law

Gaffney's last point astounds me. I did not "defend [my] profession," nor advocate that the lawyer abdicate responsibility for the law. My pro-

[25] Arizona v. California, 283 U.S. 423 (1931).

[26] Trelease, "Government Ownership and Trusteeship of Water," 45 *Cal. L. Rev.* 638 (1957).

posed bill to reform Wyoming's water law so as to permit economic changes of appropriative rights did not fail because I supinely yielded to the strident voice of a minute interest group in the mistaken belief that I heard the will of the majority. I got soundly whipped. I have been whipped before yet come up fighting; my 1955 underground water law for Wyoming was defeated, but my 1957 version was enacted. I have recently re-entered the lists in Alaska, drafting a comprehensive water code at the request of state officials. Whether the legislature will accept it or reject it I do not know, but I did not renounce leadership when Fairbanks miners who feared curtailment of their activities turned a public hearing into an indignation meeting.

Conclusion

I would like to end this round by touching gloves with Gaffney, as collegiate boxers do at the end of a match. Neither of us has pulled any punches so far, though many a roundhouse swing has gone wild. Perhaps now we can take off the gloves. Neither Gaffney nor I like what he has seen on the Kaweah. Both of us find much to criticize in the law of prior appropriation. How far apart are we?

If California had had a different system of water law when the Kaweah Delta was virgin territory, perhaps so many diseconomies would not have arisen or have persisted so long. It is too late to make a fresh start. These diseconomies now may never be solved, because the alternative of imported water has for whatever reason proved more attractive.

I still believe that a team of lawyers, hydrologists and economists working for the districts, water companies and irrigators could have, if they had come up with enough facts, worked out a scheme for redistribution of water under the present law that would have placed the water where it was most needed by the most economic means. This would have included a scrupulous identification of costs and benefits and their recipients, and a demonstration that fears of unlikely losses were irrational, or an assurance that such losses were contingently recompensible at prices that included a profit. Perhaps there were too many people who disregarded the profit motive (the holdout for an unconscionable price, the "heirloom" holder, the bitter veteran of the "seventeen years war" who still nursed his animosity) for all this to be worked out voluntarily. But the law offered another solution. There is in existence in the area the Kaweah Delta Water Conservation District which, assuming it is organized under the general California Water Conservation Acts, has power to condemn, tax, and levy special assessments in such a way as to achieve a close correlation between costs and benefits. I surmise that much of this has been done in other areas of California. In speaking to a water law

expert on the poor economics of the riparian system, I was once told that I should realize that today riparian rights in California are worth only money, that the irrigator who formerly depended upon his riparian rights for water now receives his water from a district, and that his assessments are adjusted to credit the value of his riparian rights against his share of the costs of the district.[27] The same reasoning could work with appropriative rights, rights to ancient points of diversion and the like.

If these possibilities were too awkward, cumbersome, expensive or politically impossible because of local tempers and temperament to be accepted by the residents of the Kaweah Delta, Gaffney must show that his system will be a more attractive alternative to residents of similarly afflicted areas. For either a majority of the people of the area must accept this, or an outraged majority of Californians must impose it upon them for their own benefit, willy-nilly. The economist who would suggest a change has a responsibility to legislators and to the people as well as do the lawyers. It will not do to simply offer an alternative on a take-it-or-leave-it basis, as has been sometimes done, and curse the people as fools for not taking it. A new system must be sold to the people and to the legislators. I would like to see Gaffney come up with such a proposal; I think I might like it very much. If I might make a suggestion for it, I think it might be built upon and derived from present prior appropriation law. The modern law of prior appropriation, based on Elwood Mead's 1889 Wyoming water administration statute, was a far cry from the free prior appropriation that the pioneers knew. It was acceptable to the people because it retained old concepts, continued the old comforting phrases, while adding a mechanism that substantially changed practices and results.

If Gaffney's negotiable instrument will have enough permanence to enable a new user to build a going enterprise, if it will guarantee that the holder can draw its face value in water, against holders of instruments bearing a later date, or against loss when the holder of another instrument negotiates it, I would favor calling it an appropriation, with priority, changeable in place of use and point of diversion. New mechanisms for its issuance and transfer, and for assessments and compensations for spill-over benefits and costs, would have to be carefully drafted to avoid carrying forward all the old baggage of the old words. But such a compromise might carry the day, while a proposal to exactly the same thing, couched in terms of abolishing grandpa's good old appropriations and substituting something new and different, would be doomed to failure.

[27] B. Abbot Goldberg, Deputy Attorney General of California, c. May 15, 1957.