



# Who Can Use the Water?

## A Look at Water Rights and Water Law in California.

### The Issue of Rights

In a democracy of free people such as ours, the question of rights is fundamental. Does being free mean that we have a right to anything we want? Clearly we don't have the right to steal, murder, or drive recklessly, but not everything is that clear. Sometimes the issue of rights is a thorny one.

We come across the concept of rights frequently: civil rights, human rights, the right to privacy and freedom of the press. Less visible, but certainly important, is the right to use natural resources, such as water. Who would be entitled to water if there wasn't enough to go around? Who owns water? Should it matter how water is used, or even if it is used at all? Does government play a part in answering these questions, and if so, what is its role? In this activity, you will have a chance to think about some of these very difficult issues, and you will get a glimpse into how some of them have been (and continue to be) resolved.

### Think About This Situation

A new movie is opening in town; your favorite actor is in it, and you are eager to see it during the first weekend. On Saturday night, the theater is crowded, but you arrive early. You buy your ticket, and you are one of the first people to go in. You have your choice of seats, so you pick one in the middle about ten rows up. The theater fills quickly, but that doesn't matter to you because you have the best seat in the house.

Then a very tall person takes the seat in front of you and blocks your view. What's more disrupting is that the people sitting behind you never stop talking.

Since you bought your ticket, you certainly have the right to your seat. But did you also have a right to see and hear? What could you have done? Nothing? Leave? Ask the people to be quiet or slump down in the seat? Complain? Ask for your money back? But then you missed the movie. Ask the management to remove the problem people? But they paid for their tickets too, and they have as much right to be there as you do.

These questions address the issue of rights. In the case of water, who is entitled to use available water,

and under what circumstances might those rights change? Who should make decisions about water use? The people who use the water? The people who benefit from the water? If you buy land with a river running across it, do you have the right to any water in the river at all? Would it be okay for an upstream landowner to divert or pollute the water? These are the types of questions you will explore in this activity.

### Introduction to Water Rights

People need water for drinking, cooking, cleaning, agriculture and industry. Sometimes people live in areas with ample water supplies, and sometimes they settle in areas without enough water. Central and Southern California do not have enough local water to support their people and industries, so water must be brought from a distance. Because everyone needs water, the government plays a role in ensuring that the water supplies are divided and used fairly.

The government, or more specifically the judicial system, oversees water use and water rights through water laws, and the water laws we have today have their roots in English common law, legal concepts that are at least 500 years old. But while the fundamental concepts may be old, the laws themselves continue to be redefined as the needs of society change.

During the past several centuries, three principles have come to dictate the basis of water rights laws. Under English common law, whoever owned the land alongside a waterway, such as a river, had the right to the water. Those people were called riparians (riparian pertains to things alongside a river), and if they wanted, they could prevent other people from using the river's water for industry, drinking, or anything else. England is a very wet country and there was always enough water to go around.

In California, on the other hand, some parts of the state have ample water supplies while others, like Southern California, are extremely dry. Water in California is often needed in places where it does not naturally exist in large enough amounts. As a result, water rights have become a sticky issue here. In the mid-18th century, a person only needed to own the land besides a waterway to own the rights to that



# Who Can Use the Water? Case Study

water. In parts of the state without enough water, that simple riparian right deprived many people of the water they needed, particularly for commerce. As a result, the courts began to reinterpret the basic riparian right of English common law. In addition, in California at that time, no one actually owned most of the land; instead of belonging to a private owner, it belonged to the public (public domain), and that situation raised an interesting legal question: If no one owns the land alongside a waterway, who has rights to it? The courts ruled that the people who use the water should have the rights. Those people were called appropriators. The verb appropriate means to take, so appropriators are people who take the water and use it.

Upon making that ruling, the California courts basically said that two different groups both have rights to the water: riparians and appropriators. The question of who has the rights in any given situation has been the basis of many lawsuits and court rulings over the years.

In the mid-1920's, yet another factor became important in the water rights debate in California: how was water used. Simply stated, the question was, who has the right to use and make decisions about water, the water rights holder (the riparian or appropriator), or the person or group who puts that water to the best use? That question is the basis of the class discussion you will have in the following activity.

To summarize, California law has interpreted water rights on the basis of three fundamental principles:

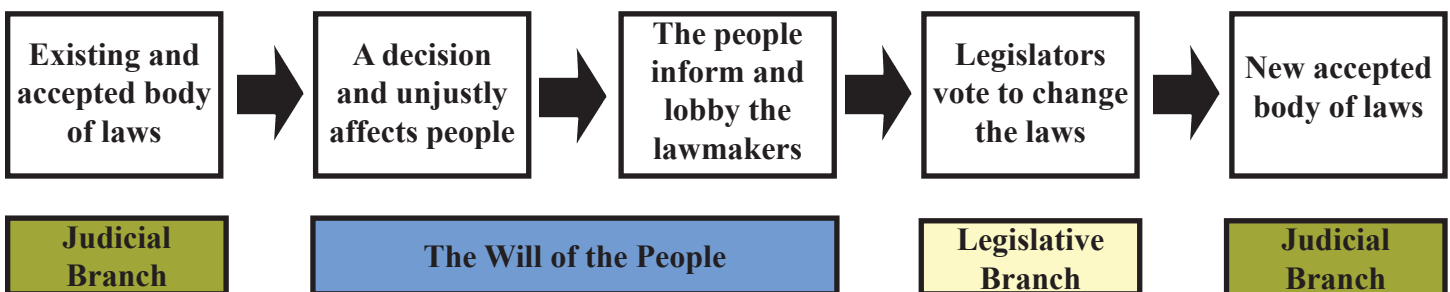
- **Riparian Use:** People who own land alongside water have the first right to use the water regardless of how that water is used.
- **Appropriative Use:** People who use water and started using it first have a right to the water regardless of how far away they are from the water's source.
- **Reasonable and Beneficial Use:** People who hold water put that water to a "reasonable and beneficial" use in order to retain their right to it.

## The Activity - When a Law Becomes Ineffective or Unjust

California's water rights laws have changed during the past 150 years because the needs of the people have changed. When a law is on the books, it must be obeyed and followed. But when a law is unjust, it can be changed by the legislature.

The governmental system of changing laws works this way: First, the people who have been affected unjustly by the outdated law can inform and lobby their representatives. Once those lawmakers have been made aware of the problem, they can work to change the laws by introducing, debating and passing new legislation. When the law is changed, the original rulings of the court may also be changed. This is a process that has taken place during the past century and a half as California water laws have continually changed. In our society, the courts are

### The Governmental Process of Changing Laws





continually debating issues involving individuals and group rights. In the following activity, you will become part of the decision-making process, examining the court's decision in a landmark water rights case. In this particular case, the court's decision was so important that it forced the state's lawmakers to amend the California Constitution.

## Introduction

In this activity, you will examine a conflict that occurred in California in the mid-1920's when the economy of Southern California was in a state of change. Before that time, the economy was based primarily on agriculture, and in the '20's, it began to shift to an urban economy based primarily on manufacturing. As a result, the needs of the people shifted from things that benefited farmers to things that benefited industry and people in cities.

To complete this activity, you will have to think about the issues and put yourself in the shoes of the people in the conflict. The only special knowledge that you need is:

- Laws must be obeyed and followed by the courts, regardless of whether they are fair or unfair in a specific situation.
- A courtroom is not a place for compromise and negotiation; it is a place for making decisions, regardless of how difficult they might be. (The time for compromise and negotiation between parties is outside of court; once a case is adjudicated in court, it means that the parties were unable to find common ground, and there will be a winner and a loser.)
- When a law unjustly affects many people, the legislature has the option to change the law.

You will be divided into small groups for this activity. Your group will discuss the situation and arrive at a conclusion that upholds the law. If you uphold the law but feel that the decision is unfair, you will have to decide how to make it both legal and fair.

Your small group will discuss the situation and complete the group worksheet with your decision. Then you will present your decision to the class.

If the points of view in your class vary widely, you will not be alone. The points of view throughout

our country vary widely as well. In fact, our nation's system of Federalism exists so the 50 states can differ on issues. For example, laws which affect the nation as a whole, such as movement of hazardous waste materials across state lines, must be a federal law, while laws which affect people in a certain state, such as most water rights laws, are the responsibility of the state.

## The Problem

A farm family by the name of Herminghaus has been farming alongside a river for many years. They have never had to install an irrigation system of any kind because each spring when the snow in the mountains melts, the river floods and irrigates the land naturally.

A few miles upriver from the Herminghaus farm is an ideal site for a hydroelectric dam, and the local electric utility has bought hundreds of acres of land so they can build a dam and a reservoir for making electricity. The dam will hold water in the reservoir, and the utility company will release the water in a very controlled way, allowing it to flow across a generator which will turn and produce electricity. If the utility company builds the dam, the spring flood waters will flow into the reservoir instead of across the land. Water will continue to flow through the river all year, but because of the reservoir and dam, its water level will not rise and fall with seasonal changes. While the danger of flooding will be eliminated, so will the benefits of flooding: Herminghaus farm will no longer have a source of free irrigation water (see diagram on follow page).

Although the new dam will harm the Herminghaus' farm by eliminating their free irrigation water, it will be of great benefit to most of the community. The electricity will provide warmth and light to hundreds of new homes, and power to hundreds of businesses, which in turn will provide jobs to the people. In short, thousands of people will benefit from this new dam.

The Herminghaus family clearly has rights to the water. They own the land alongside the river, so they have the riparian rights, and they have been using the water for many

**Should the rights of a few override the needs of many?**

## Who Can Use the Water? Case Study



The Herminghaus farm relied on winter snowfall that collected in the mountains...



to cause spring flooding that irrigated their fields...



but a dam upstream would regulate flow year-round.

years. According to the law, they cannot be deprived of the use of the water that is rightly theirs.

The Herminghaus family and the electric utility company try to work out a compromise, but they fail. (The utility company even offers to pay for the new irrigation system for the farm.) Once they reach a deadlock, the Herminghaus family, knowing its rights, sues the electric utility company.

If the court rules in favor of the Herminghaus family, there will not be enough electricity for the new businesses to grow, and there will be fewer jobs. The region has been moving from a farm economy to an urban industrial economy, but without electricity, that movement will stop, and the economy will suffer a setback.

### Your Task

Discuss what you think the court should decide in this case; then have the group recorder complete the activity worksheet. When all the groups have recorded their answers, you will discuss your resolution with the whole class. After the various solutions and points of view have been discussed, you will have a chance to read what happened in the case of *Herminghaus v. Southern California Edison*, a landmark case in the evolution of water rights in California. Once you have read about the case, you will have a chance to reconsider your decision to see if you would like to change your resolution.