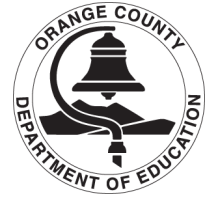




# Who Can Use the Water? Classroom Activity



## SYNOPSIS

Students will discuss water rights that lead to amending the state constitution

## OBJECTIVES

Students will:

- learn three key point about California's water rights.
- learn about several precedent-setting California water laws

## MATERIALS

- Student Books
- Group Discussion Worksheet
- *What Really Happened in the Case of Herminghaus v. Southern California Edison*

## LESSON PLAN - DAY 1 (15 minutes of class time)

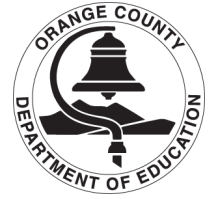
1. Briefly introduce the topic of rights in general, such as civil rights and the right to free speech.
2. Introduce the complexity of the issues of rights by using example that will be relevant to the students. The *Think About This Situation* section in the Student Book presents such a dilemma. You might want to describe the conflict in your own words, or you may want to make up a different rights-related conflict. The purpose is to provide an initial reference point and to stimulate thinking, not to resolve the problem, so limit the discussion.
3. Briefly introduce the topics of water rights, the importance of laws, and the governmental process for changing laws. (See the *Introduction to Water Rights* in the Student Book).

**Discussion Suggestions:** Discuss with the class some of the issues introduced in this section. For example, as a free person, what do you not have a right to do? Who has the right to the natural resources of this country? Could someone own the ocean or the water in the ocean? Under what circumstances might we not have a right to use water from the ocean, such as if we damage it, alter it, or pollute it?

**Homework:** Have your students read the student book, stopping at the beginning of the activity.



# Who Can Use the Water? Classroom Activity (cont.)



## LESSON PLAN - DAY 2

1. Summarize and briefly discuss the homework reading.
2. Begin the Water Rights Activity by having your students read aloud the activity's *Introduction* and *The Problem* from the Student Book.
3. Divide the class into groups of approximately four people each. Select one person from each group to be the recorder and another to be the spokesperson.
4. Allow the group ample time (20-25 minutes) to come to a decision and record that decision on the Group Discussion Worksheet.
5. Have the spokesperson for each group relate the decision of the group. Record these decisions for the class to see.
6. Discuss the differences in the groups decisions.
7. Have each group read aloud *What Really Happened in the Case of Herminghaus v. Southern California Edison*.

## LESSON PLAN - DAY 3

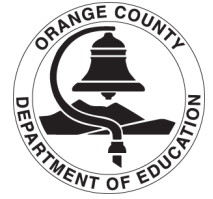
1. Summarize the discussions and decisions from the previous day.
2. Discuss how the court's ruling in *Herminghaus v. Southern California Edison* led to amending of the California Constitution. Emphasizing the relationship between the judicial and legislative branches.
3. Ask the group if they want to change their decisions from the previous day. If yes, ask them to explain why.
4. Discuss the issue of rights with the class.
5. Administer the unit test.
6. For more detailed study of the topic, assign activity extensions as you see fit.

### Discussion Suggestions:

- Discuss the meaning of the government's constitutional responsibility to protect the public welfare.
- Relate your discussion to other rights-related issues, such as civil rights, the right to privacy and free speech.
- Review the concepts of riparian rights, appropriate rights, and reasonable and beneficial use.



# Who Can Use the Water? Classroom Activity (cont.)



## EXTENSIONS

1. How has California's water laws evolved since the constitutional amendment in 1928?
2. California's water laws require that water be put to a reasonable and beneficial use.  
California also has a Wild and Scenic Rivers Act which requires that some rivers be allowed to flow to the ocean without being put to any commercial use whatsoever. Some people may consider these two laws to be a conflict with each other. The lawmakers and courts, however, do not. How can the idea of keeping a river wild and scenic be considered a reasonable and beneficial use?
3. The water law of two states is not based on English common law. Hawaii's laws have been handed down from the ancient Hawaiian kingdoms and Louisiana's laws are based on the Napoleonic Code. How do Louisiana's and Hawaii's rights differ from those states that are based on common law?
4. Have your students contact their local legislator, council person, or water agency official about water and water rights issues affecting their community.
5. Have your students contact their local water agency for available information on water related bills and legislation.
6. Have your students research current events involving rights in general and water rights.



# Who Can Use the Water? Teacher Background Information



## Water Rights in California

Before becoming a state in 1850, California did not have a formal body of state laws. Instead, its laws were based on English common law, a body of largely unwritten laws derived from hundreds of years of custom and precedent in England. The legal systems of 48 of the 50 United States, including California, are based on this body of laws. (Exceptions are Louisiana and Hawaii.) Even today, if a conflict is not addressed in the written laws of California, the legal system would fall back on common law. The common law system of water rights dates back to the 1500's, and is based on a principle know as riparian rights.

Riparian is a Latin word that pertains to things along the bank of a river. Simply defined, when water is based on riparian rights, it means that people who own land along the banks of a waterway have the right to use that water: because they own the land up to the water, they have a right to the water. In the early days of California, the riparian principles of common law were the only ideas upon which to base water right decisions.

That system worked fine in England because it is such a wet country. However, California is very different from England. While the mountains of Northern California have plenty of water, Southern California is semi-arid, getting enough water is a big issue.

## The Forty-Niners Put Common Law to its First Major Test

In the mid-19th century, the Forty-Niners were prospecting for gold in the hills of Central California. They needed lots of water for mining operations, but the gold, unfortunately, was not located near rivers. As a result, the miners had to build waterways, called flumes, across the mountains. These miners were not riparians because they didn't own the land near the water; instead they were appropriators. (To appropriate

means to take.) These miners took the water from where it was to where they could use it. Their rights to do that is called appropriative right.

In 1855, riparian rights and appropriative rights clashed in a courtroom for the first time in the case of *Irwin v. Phillips*. A group of miners later started mining alongside the river, and they wanted to stop the distant miners from using the water. They tried, but they couldn't. For the first time in California, the court ruled in favor of the appropriators instead of the riparians. Their logic was based on the fact that neither side owned the land and the appropriators had started using the land first. This decision established a very important principle in California water rights: First in time, first in right. That principle appeared to redefine the riparian principles of common law. If people had been using water, they were entitled to keep using it, regardless of where they were located.

## The Court Establishes a Hybrid System of Riparian and Appropriative Rights

But what would the court have decided if the people alongside the river, the riparians, owned the land? That is just what happened in 1886 in *Lux v. Haggins*. A man named Charles Lux, along with several partners, had claimed more than a million acres of land along the San Joaquin and Kern Rivers. They did very little with the land (because, allegedly, they were trying to control land values by controlling the progress of development), but they owned it. Another group, headed by a man named James Haggin, wanted to appropriate water from the river to irrigate their farm land. When Lux wouldn't let them, they sued.

In the longest decision ever written in California, the court ruled that the riparian rights of Lux were stronger than the appropriative rights of Haggin because Lux owned the land in question.

This decision brought the development of California agriculture to a virtual halt. The court had ruled against the farmers because of the law, not because the farmers claims were wrong or unfair. Although they had lost their lawsuit, the farmers still had another option: they could have the law changed, and they did just that! They informed the state legislature of their plight and the unfairness of the court's strict interpretation of the riparian rights. They lobbied legislators and informed them about the importance of agriculture to the state's economy. In only one year, they succeeded. In 1887, the legislature passed the Wright Irrigation Act, declaring that irrigation was a public use of water. It enabled regions to create irrigation districts which had to appropriate water for the purpose of irrigation. (Interestingly, the law still puts the rights of the riparians at a higher level than the rights of others: appropriators may only use water that remains after the riparians have used whatever water they need.)

### **The Issue of How Water is Used Leads to a Constitutional Amendment**

One of the shortcomings of the law was that no guidelines existed for how water should be used. That question came to a head in 1926 in the case of *Herminghaus v. Southern California Edison* (which provides the basis for this activity). By that time, California was full of irrigated farms. One farmer located along the San Joaquin River, a riparian, relied on heavy spring flows from melting snow to flood her land, effectively irrigating it without any effort or expense. Meanwhile, Southern California Edison proposed building a hydroelectric dam and power plant upstream. While the farmer would still have plenty of water year-round, the power plant's dam would eliminate the heavy spring flows, and the water would flow more regularly all year long.

In 1926, the court ruled in favor of the farmer because she was a riparian who had been using the water, and in so doing, the court stopped Southern California Edison from building their dam. But many of the state's citizens were furious. They believed that even riparians had an obligation to use water reasonably. While the idea of reasonable use would

always need to be interpreted, in this case it was pretty clear: the farmer who had won the lawsuit was an individual who could still continue farming by building an irrigation system instead of relying on the spring floods. Electricity from the hydroelectric plant, on the other hand, would benefit thousands of people. Her individual needs were less reasonable than the needs of the larger community.

California Law Review published an article in March 1928 about the pending water amendment. This article is available online: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3904&context=californialawreview>

In 1928, the state legislature successfully amended the California Constitution and formalized the reasonable use rule. Today, all water law is interpreted in the light of Article X Section II of the Constitution which reads that water must be put to a reasonable and beneficial use. Since that time, the law books have been filled with interpretations of reasonable and beneficial use.

Water law has become extremely complicated. To some, it is the most complicated area of all the California law. They base this assertion on the fact that more has been written about water and water rights than any other single legal issue in California. In addition, California law and the way it respects the rights of riparians in some situations, and appropriators in other situations, differs from the laws of virtually every other state.

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- Kahrl, Wm. *Water and Power: The Conflict Over Los Angeles Water Supply in the Owens Valley*, University Press, 1982, Chapter 1
- The Pacific Law Journal (Journal of the Law School for the Pacific)*, 1988 volume 4, July 1988



### **What Really Happened: *Herminghaus v. Southern California Edison***

This case took place in 1926 in California. Because of riparian rights, Herminghaus held the rights to the water that flooded their farm. The court had no choice but to rule in the family's favor, blocking the utility's effort to build the dam. At this time, hundreds of families were moving from the farm to the city because the city offered much greater opportunities..

When the court ruled in favor of Herminghaus, the majority of the people grew extremely upset because they felt that by protecting the rights of a few people, the court penalized most. They did not feel that this was acceptable for a government designed to protect the public welfare, so the people, through their elected representatives, launched a successful effort to change the law.

In 1928, the California legislature added an amendment to the state constitution that changed the nature of water rights in California. In addition, to the riparian and appropriative rights that already existed, Article X Section II of the California Constitution now requires that water must be put to a reasonable and beneficial use. As a result, ownership or use alone is not enough. The test of the water rights since 1928 has been reasonable and beneficial use, and the courts have worked long and hard ever since trying to define exactly what that means.

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# Who Can Use the Water? Quiz



## Circle the best answer.

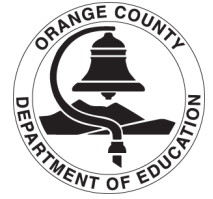
1. According to English common law, who had the first right to use water?
  - A. Whoever used the water first.
  - B. Whoever put the water to the most reasonable and beneficial use.
  - C. Whoever owned the land alongside a waterway.
  - D. The law was not explicit. Then answer was determined on a case-by-case basis.
2. Today's California water law is based on what principle(s) of water rights:
  - A. Riparian rights
  - B. Appropriative rights
  - C. Reasonable and beneficial use
  - D. All of the above
3. Even in a California landowner has a riparian right to water, that water must still sometimes be shared with others and it must be used carefully and reasonably.  
True  
False
4. As long as there is enough water to go around, there's never any conflict among people about water.  
True  
False

## Short Answer

5. Explain the difference between riparian and appropriative rights.
6. If people feel they have been treated unfairly as a result of a law, is there anything they can do to have that law changed? If so, what, and how can they go about doing it?
7. The Herminghaus case provided the basis for making fundamental changes in California water laws, including changing the state constitution. Explain how.



# Who Can Use the Water? Quiz Answer Key



## Circle the best answer.

1. According to English common law, who had the first right to use water?
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**True**  
False
4. As long as there is enough water to go around, there's never any conflict among people about water.

True  
**False**

## Short Answer

5. Explain the difference between riparian and appropriative rights.

Riparian rights, which came from English common law, give water rights to those who own land alongside a waterway. Appropriative rights give rights to those people who use water, regardless of their proximity to the waterway.
6. If people feel they have been treated unfairly as a result of a law, is there anything they can do to have that law changed? If so, what, and how can they go about doing it?

They can work with their representatives on new legislation and lobby to have that legislation passes.
7. The *Herminghaus* case provided the basis for making fundamental changes in California water laws, including changing the state constitution. Explain how.

As a result of *Herminghaus v. Southern California Edison*, the state's constitution was changed, requiring that all the water of the state be put to a reasonable and beneficial use.







# 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:

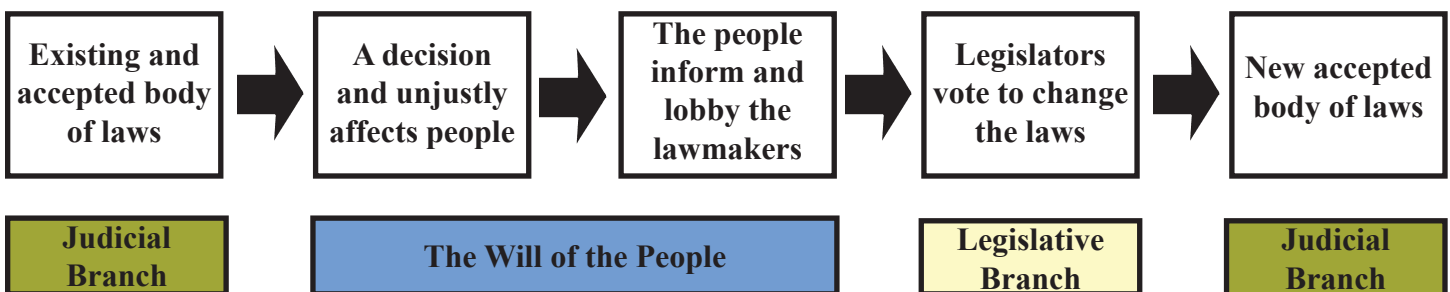
- **Riparian Use:** People who own land alongside water have the first right to use the water regardless of how that water is used.
- **Appropriative Use:** People who use water and started using it first have a right to the water regardless of how far away they are from the water's source.
- **Reasonable 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





# Who Can Use the Water? Case Study

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.