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WATER LAW - GROUNDWATER - Land Use and Rights in Groundwater.
Alameda County Water District v. Niles Sand and Gravel Co., 37 Cal.
App. 3d 924, 112 Cal. Rptr. 846 (Ct. App. 1974), cert. denied, U.S. 95
S. Ct. 128 (1974).*

Plaintiff Niles Sand and Gravel Co., Inc. operates commercial sand and
gravel pits in the Niles Basin in Alameda County, California. Since 1935,
the defendant Alameda County Water District has been engaged in a
continuous program of groundwater replenishment within the Niles Basin.
The water district accomplishes this recharge by collecting water in
sufficient quantity on the surface so that the water will percolate beneath
the surface into the basin. The purposes for this recharge program are two
fold: first, to provide storage of fresh water for future consumption, and
second, to prevent salt water intrusion into the basin from nearby
San Francisco Bay.

The surface elevation at Niles Sand and Gravel Company’s pits is 60
feet, and the natural elevation of the water table is 20 feet above sea level.
At the time of the trial some of Niles’ pits had been dug to 120-125 feet
below the surface elevation, 80-85 feet below the water table. Naturally,
the mining operation expected to encounter and did encounter water. To
deal with this water, the Niles Company installed pumping facilities and,
at the time of the trial, was emptying water from the gravel pits into
Alameda Creek which then flows into San Francisco Bay at the rate of
five million gallons per day—enough fresh water to meet the daily needs
of a city of 30,000. Thus the trial court was faced with the situation of
one party putting water into the ground and the other party taking it out as
fast as he could.

The Niles Company and its lessor, Inland Aggregates, Inc., commenced
an action against the water district for inverse condemnation damages
based on the taking or damaging of their property for a public use. The
“taking” alleged by the Niles Company was the flooding of the company’s
gravel pits. In a separate action, the water district sought an
injunction against the mining operation for the waste of water, in which
the gravel pit operators counterclaimed.

*This case note was partially financed by the Water Resources Research
Institute of the University of Wyoming.
again seeking damages by way of inverse condemnation. The actions were consolidated and the trial court ruled in favor of the water district. The California Court of Appeal, First District, affirming the judgment of the trial court, held that the mining company's use of the water was burdened by a public servitude, and that the sand and gravel company could not be granted an inverse condemnation award because there was no taking of property or in the alternative, held that the water district's absolute control of waters within the basin was a proper exercise of the state's police power.

This note will focus on disputes between overlying landowners and others with an interest in groundwater, where the landowner's use of his land interferes with another's interests in the groundwater.1 These disputes have frequently arisen as a result of a mining operation removing water from its mines to the detriment of other nearby landowners who wished to make use of that water.

TRADITIONAL APPROACHES TO INTERFERENCE WITH GROUNDWATER

Alameda County Water District v. Niles Sand and Gravel Co.2 is the most recent of a long line of cases concerning the problem of an overlying landowner using his lands in such a way as to damage another's interests in groundwater. These adjudications, commencing with the early English decision of Acton v. Blundell,3 have been based upon the groundwater doctrine prevailing in the jurisdiction of that controversy. Therefore, a brief explanation of the several groundwater doctrines will be presented along with a review of the manner in which jurisdictions adhering to each doctrine apply those groundwater rules to disputes between the user of the overlying land and those whose interests in the subsurface water have been injured by a landowner's use of his land. There

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1. For the purposes of water rights, groundwater has been defined as, "All water in the ground that is free to move by gravity, is capable of being extracted from the ground, and susceptible of practicable legal control." Hutchings, Trends in the Statutory Law of Ground Water in the Western States, 34 Texas L. Rev. 157 (1955).
3. 152 Eng. Rep. 1223 (Ex. 1843). Here the defendant, in removing water from his mines, dried up the plaintiff's wells.
are four groundwater doctrines in use in the West: (1) the common law rule of absolute ownership, (2) prior appropriation, (3) reasonable use, and (4) the California doctrine of correlative rights. Though the doctrine of prior appropriation is followed in a majority of jurisdictions, all of these doctrines play a significant role in the relationship between the overlying landowner and the owner of the rights to the subsurface water.

The two extreme rules are the English or common law rule of absolute ownership and the doctrine of prior appropriation. The common law rule focuses on the ownership of the overlying land. It is based on the maxim *cujus est solum, ejus est usque ad inferos* or "to whomever the soil belongs, he also owns to the sky, and to the depths." Under this rule, followed by Texas and some eastern states, the overlying landowner may dig or drill and apply everything found below to his own pleasure with very little limitation on that right.

At the other extreme is the doctrine of prior appropriation. Here the focus of the law is on the rights in the water rather than the rights in the ownership of the soil. This doctrine, followed by the largest number of western states, applies the law of surface waters to groundwater. The groundwaters of the state belong to the public and may be appropriated for a beneficial use. Once appropriated, the water belongs to the appropriator subject to its continued beneficial use with the courts preventing any interference with the appropriator's prior right.

The remaining two doctrines are merely judicial modifications of the common law rule of absolute ownership. The so called American rule, or rule of reasonable use, was first

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pronounced by the New Hampshire Supreme Judicial Court in Bassett v. Salisbury Manufacturing Co.\textsuperscript{10} and is followed in the West by Arizona and Oklahoma.\textsuperscript{11} This rule recognizes the overlying landowner's right to extract subsurface water from his land, but limits his right to such quantity as might be necessary for a useful purpose.\textsuperscript{12} This limitation is analogous to the beneficial use limitation of the appropriation doctrine.

It was the rule of correlative rights which the court purported to apply in Alameda County Water District v. Niles Sand and Gravel Co.\textsuperscript{13} This rule, first applied as to overlying landowners in Katz v. Walkinshaw,\textsuperscript{14} is that the waters in a basin belong to all the overlying landowners in common and each landowner may use only his reasonable share when there is insufficient water to meet the entire demand.\textsuperscript{15} The rule recognizes a property right of the overlying landowner in the waters, but this right is subject to the dual limitations of reasonable use and correlation of the landowner's right with the rights of other overlying landowners. The correlative rights doctrine, then, attempts to reach a middle ground, recognizing the interests of the overlying landowner in the water beneath his land along with the interests of others in that water.

Disputes arising because of a landowner's interference with water below his land are generally governed by the doctrine of groundwater use followed in that jurisdiction. In those states applying the common law or English rule, the overlying owner may use the water and interfere with its free flow with impunity.\textsuperscript{16} This unlimited right to the water flowing beneath his land arises from the view that in these jurisdictions sub-surface water is considered to be part of the land.

\textsuperscript{10} 43 N.H. 569 (1862).
\textsuperscript{11} Clark & Martz, supra note 7, at 330.
\textsuperscript{12} Hutchins, supra note 1, at 162.
\textsuperscript{13} 37 Cal. App. 3d 924, 112 Cal. Rptr. 846 (Ct. App. 1974).
\textsuperscript{14} 141 Cal. 116, 74 P. 766 (1903).
\textsuperscript{15} Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17, 29 (1949).
\textsuperscript{16} Pixley v. Clark, 35 N.Y. 520, 527 (1866). The court here analogized the law governing an overlying landowner's use of groundwater to the use of his land.
and follows from the right to do with one's own property as one wishes.\(^{17}\)

Under the rule of reasonable use, jurisdictions in the water-rich east have held that mining operations may interfere with the flow of waters beneath their land. This has been considered a legitimate or reasonable use of that land.\(^{18}\) The concept that mining interference with underground waters is reasonable has apparently been approved in one western jurisdiction following this rule of reasonable use, though merely in dicta.\(^{19}\)

As previously stated, the doctrine of prior appropriation focuses on, and protects, the rights of the owner of the water rights. Courts in considering interference with underground water by a user of the overlying land, such as a mining operation, will first ascertain which is the senior appropriative right, and protect that right from all interference.\(^{20}\) In those states following the prior appropriation doctrine for groundwaters, all groundwater belongs to the state.\(^{21}\) Once a right to water is obtained from the state, it is a vested property right in the appropriator subject to continued beneficial use, with the definition of beneficial use determined by the courts of that state.\(^{22}\)

California has indicated a willingness to protect the interests of those other than the overlying landowner in groundwater. As demonstrated above, the California doctrine of correlative rights gives the overlying landowner an interest in his fair share of the waters beneath his land. Thus an overlying landowner engaged in a mining operation may interfere with only his reasonable share of the water, leaving for others their fair portion of the groundwater supply.\(^{23}\) In \textit{Eckel v.}

\(^{17}\) Id.

\(^{18}\) Syacmore Coal Co. v. Stanley, 292 Ky. 168, 166 S.W.2d 293, 294 (1942). Here the coal company's test bore interfered with the plaintiff's well.

\(^{19}\) Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694, 697 (1936). This was a dispute between a landowner and a city whose wells dried up the plaintiff's wells. The city was enjoined from exporting water off their land to the city.

\(^{20}\) Clark, supra note 4, § 446 at 472.


\(^{22}\) Id., 308 P.2d at 983.

Springfield Tunnel & Development Co., a mining company, which had invested nearly $900,000 in its mine, was enjoined from draining its mine unless it could supply the plaintiff, whose spring and creek dried up upon commencement of the draining of the mine, with a sufficient quantity of water to irrigate his lands. This remedy was ordered even though the court admitted that the mining operator derived greater benefit from his use that did the plaintiff.

The California Supreme Court was presented with a similar situation in O'Leary v. Herbert, where a mining company was enjoined from draining its mines to the detriment of other users of that water. California, therefore, protects the overlying landowner’s interests in subsurface water to the extent that his use is reasonable, i.e. not waste, and does not interfere with the rights of others to their share of that water. Each landowner is entitled to his share of the water and whoever is prior in time is immaterial. The application of this rule effectively prevents the total evacuation of water from mines if this interferes with others unless the mining interest purchases the rights to all the water in the basin.

THE PUBLIC SERVITUDE

In Alameda County Water District v. Niles Sand and Gravel Co., the mining operator was not using all the available groundwater supply to the detriment of the other overlying landowners though it was interfering with the rights of others. The Alameda County Water District was vested with very broad, but well defined statutory powers concerning the management of the Niles Basin. Based on an interpretation of these statutory powers and an application of the doctrine of correlative rights, the trial court concluded, and the appellate court affirmed, that the obligation of reasonable use from the correlative rights doctrine and the management of the

25. Id.
27. Id., 55 P.2d at 838.
28. CAL. WATER CODE § 30000 et seq. (West 1956). Special powers were given the Alameda County Water District by the state legislature in 1961. Ch. 1942, [1961] Cal. Stat. 4092. These powers relate to groundwater replenishment within the district.
water by a public agency imposes a "public servitude" on the landowners in the Niles Basin. The court defined "servitude" as, "[S]uch obligations when imposed by law, and limiting the use of lands lying in a particular geographical area, where an overriding public interest requires it." Rather than using the previously explained land use versus water rights concepts as developed under the California doctrine, the court stated that the Niles Company was subject to this public servitude.

It can fairly be said that the doctrine of correlative rights which limits each landowner's use of groundwater beneath his land to a reasonable use thereof, imposes a servitude upon that overlying landowner. "Servitude" has been defined in California as a right which subjects property to some service for the use of another's property. The application of the correlative rights principle and its limitations as to reasonable use as in O'Leary v. Herbert could be said to impose a servitude on the right of each subsurface water user in California, but, as will be discussed below, the declaration of a servitude in the Niles case may have heralded too expansive a doctrine.

It was undisputed at the trial that the water district owned the groundwater in the Niles Basin as "trustee" for all overlying surface owners within the basin. This trusteeship was found implicit in the powers given to the district in 1961. These special powers include the authority to "take any action necessary" to prevent interference with the water, to store water underground for "the common benefit of the district," to commence or intervene in actions begun to prevent interference with, diminution, pollution, or unlawful exportation of, any water in the district. These

30. Id.
32. 5 Cal. 2d 416, 55 P.2d 834, 839 (1936).
powers then, gave the water district the authority and responsibility to enforce this servitude.

Implicit in the court's reasoning is that it is not in the public interest to allow an individual corporation to pump out of a common supply five million gallons of water per day, permitting fresh water to be wasted into San Francisco Bay. It has long been held in California,\(^8\) as elsewhere,\(^9\) that waste of water is not a reasonable or beneficial use. Commentators have frequently urged that the public interest requires effective public management of groundwater basins.\(^10\) Basin management by a state agency is vital in California where water is a scarce commodity. The state's vast population is using more and more water each day, and California is in the midst of a long drought. Therefore, it is in the "public interest" to have governmental control over these basins to prevent waste of the waters. The California Supreme Court has said, "[P]ublic interest requires that there be the greatest number of beneficial uses which the supply can yield."\(^11\) Certainly such a public interest does not include pumping five million gallons of valuable fresh water per day into San Francisco Bay.

The "public servitude" as pronounced in Niles is quite similar to the state navigation servitude in California as announced in Colberg, Inc. v. State ex rel. Department of Public Works.\(^42\) The public purpose doctrine of the state navigation servitude announced in Colberg requires merely a public purpose for the state to invoke the servitude.\(^43\) This view of the navigation servitude also is based on the determination

\(^{38}\) O'Leary v. Herbert, 5 Cal. 2d 416, 55 P.2d 834, 838 (1936).
\(^{39}\) Eden Irrigation Co. v. District Court of Weber County, 61 Utah 103, 211 P. 957, 961 (1922). The Supreme Court of Utah upheld a statute prohibiting waste of water, saying no one can acquire a vested right to waste water.
\(^{41}\) Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17, 28 (1949).
\(^{42}\) 67 Cal. 2d 408, 433 P.2d 3, 62 Cal. Rptr. 401 (1967). The California Supreme Court denied a declaratory judgment for relief from the building of bridges which would severely limit the plaintiff's shipyard business.
that the state holds the navigable waterways and the lands beneath them as "trustee of a public trust for the benefit of the people." The state navigation servitude as interpreted by the California courts is much like the "public servitude" protected by the Alameda County Water District. The similarity between these servitudes is no coincidence for the court of appeal was well aware of the Colberg case when formulating its opinion.

It is submitted that the "public servitude" proclaimed by the court in Niles was not solely based on an application of the correlative rights doctrine and the powers of the water district. It is this author’s opinion that the court also considered the public interest and the needs of the state to manage the total water program. A public servitude was declared to indicate the judiciary's approval of centralized management of water use in California—especially groundwater. Thus the court developed a doctrine that is substantially similar in scope to the public purpose doctrine of the state navigation servitude in California.

DENIAL OF INVERSE CONDEMNATION

That the court denied the Niles Company its requested relief of inverse condemnation follows logically from the declaration of a public servitude on water rights in the Niles Basin. In refusing the Niles Company’s plea for inverse condemnation, the court of appeal based its decision on two alternative grounds. The first ground for the decision was that there was no taking or damaging of the mining company’s property. This was predicated on the conditional use permit issued by the City of Fremont to the mining operator which stated that the company "shall cooperate with the Alameda County Water District to the end that the water

pumped in connection with ... [their] ... operations shall not be wasted to San Francisco Bay nor shall ground water percolation capacity be diminished in quality or quantity."

Because of this provision in the use permit and the water district's duty to prevent waste, the court concluded that the quarry owners had no property interest which had been taken or damaged.46

As an alternative theory, the court denied inverse condemnation because the district's actions were a proper exercise of the state's police powers.50 The court of appeal's rationale was that the California Constitution expressly prohibits waste or unreasonable use of water.51 This prohibition, the court claimed, was not a taking or damaging of property but rather regulation of the use and enjoyment of a property right and therefore, a legitimate exercise of the state's police power.52

It is conceded that the first basis for denying inverse condemnation is valid, that being based on the express agreement between the sand and gravel company and the City of Fremont. The second, or alternative basis for denying inverse condemnation, though, bears a more thorough examination. The California Constitution declares the state's interest in the reasonable and beneficial use of the waters of the state and the prevention of the waste of these waters.53 It has long been held under this constitutional provision that the prevention of an unreasonable use is a valid exercise of the police power of the state and thus not a compensable taking for a public use,54 but rather a limitation on the use of one's property.55 The considering of a state's regulation of

48. Id. at 927 n.3, 112 Cal. Rptr. at 848 n.3.
49. Id. at 935, 112 Cal. Rptr. at 854.
50. Id.
51. Cal. Const. art 14, § 3. "The right to water or to the use or flow of water ... does not extend to waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."
53. Cal. Const. art. 14; § 3.
54. Cal. Const. art 1, § 14. "Private property shall not be taken or damaged for public use without just compensation having first been made to ... the owner . . . ."
55. Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5, 18 (1933). The court in this action declared that requiring water to be put to a reasonable use was a legitimate exercise of the police power.
the use of its natural resources as a non-compensable exercise of the police power is not limited to California. The California courts, though, have carried this concept further than most.

The court, in according the alternative ground for denying compensation, presupposed that the company had a property right in the groundwater which was damaged. If the Niles Company was indeed injured by the water district, the courts in California have again extended the police power beyond the usual bounds. Traditionally, any "taking" or "damaging" of property for a public use is compensable, but the taking of one's use of his property, where that use is harming another is generally not compensable. Commentators have argued that state control of groundwater basins should be obtained by the use of eminent domain powers, and the property owners should receive compensation for public infringement of their water rights. Other courts also have rejected the California approach to this problem.

Because the court of appeal imposed a public servitude on water use in the Niles Basin, denial of inverse condemnation logically follows. The interests of the overlying landowners are servient to the interests of the water district, which embodies the public interest. Since the uses made of this subsurface water now become subject to a public agency's determination of what is reasonable, the court could apply previous decisions, such as Colberg or Joslin v. Marin Mun-

57. See Joslin v. Marin Municipal Water District, 67 Cal. 2d 132, 429 P.2d 889, 69 Cal. Rptr. 377 (1967), where the California Supreme Court denied inverse condemnation relief to the plaintiff whose business depended upon a stream carrying rocks, sand and gravel to his land. The defendant built a dam and thus prevented the stream from carrying any more material to the plaintiff's lands. See also Colberg, Inc. v. State ex rel. Department of Public Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).
60. Reis, supra note 46, at 85.
to deny any compensation to the users of groundwater.

It is submitted that the court of appeal reached the proper decision in this case because of the conditional use permit but that the court went too far in declaring a public servitude, and in its broad statements about the police power of the state. The latter holding makes the Niles case an imminent threat to all holders of water rights in groundwater basins in California. It is recognized that groundwater is a valuable and scarce commodity in California, as it is throughout the arid lands of the western United States, but this would seem to be no reason to make the broad pronouncements concerning the public servitude and the police power of the state which were made in the Niles case. There are alternatives available.

The need for planned, coordinated development and utilization of groundwater resources is widely recognized. But judicial response to this need should not deprive the owner of water rights in subsurface water of all interest in that water as was done in the Niles case. By imposing the public servitude, the court has vested in the water district absolute control over water use in the basin. This goes far beyond the statutory power given the district to protect rights in the water within the framework of the correlative rights doctrine. Potentially, in a subsequent decision, a court could use the broad pronouncements in the Niles case to deny compensation to a legitimate water right holder when a public agency takes his water.

As indicated above, the court based the declaration of this servitude on the public purpose interpretation of the state navigation servitude. This development in the state naviga-

64. Hutchins, Ground Water Legislation, 30 ROCKY Mt. L. Rev. 416, 437 (1968); Clark, supra note 8.
tion servitude idea has been widely criticized. It has been said that this broad interpretation of the servitude hinders the development of property, placing the costs of public development on private parties. These same criticisms apply to the public servitude imposed in the Niles Basin. This court, it seems, failed to heed the warning of Professor Coase in his influential article on cost-benefit analysis to look beyond the immediate consequences of a decision. "[I]n choosing between social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others." As a result of Niles, extreme caution will develop among those users of groundwater within a groundwater basin over which a state regulatory agency has some control. Owners will be hesitant to invest further in the use of groundwater as there will be the ever present danger that, as greater and greater needs develop for their water, a court may find that their rights too are subject to a public servitude and take away their investment without compensation. The ultimate result of this doctrine is that the cost of public development and control of these valuable groundwater resources is borne solely by those who initially developed and used these resources rather than spread among those who (the public) will derive the benefit from the expanded public use of these resources. This approach will make it frightfully easy for a state agency, vested with moderate power and a "public purpose," to take control of the state's groundwaters and control and prohibit uses as it sees fit.

The potential dangers of this doctrine are not limited solely to California. This public servitude could be imposed with relative ease in almost any of the western states. The beneficial use doctrine of the appropriation states and the reasonable use limitations of the riparian states are highly

68. Comment, supra note 43, at 537.
susceptible to judicial interpretation. In addition, there is the concept of the public interest, which has given rise to some judicial utterances which are capable of being built upon. It would be a short step from such statements to the imposition of a public servitude on the appropriators of groundwater. It is submitted that this would be a significant threat to current uses of groundwater.

**Alternatives Available**

As previously stated, it is believed that the proper result was obtained in this case. What remains to be explored is whether any alternative means exist to reach the result of *Niles*. Before discussing any other alternatives, it should be reiterated that the first rationale of the court in *Niles*, that the conditional use agreement controlled the relationship between the parties, is a viable means of reaching the proper decision in this case. It is submitted that two other routes to achieve the desired result were available to the court. The first of these alternatives was for the court to focus on what the Niles Company did with the water. It would seem that the pumping of five million gallons of fresh water per day into San Francisco Bay is waste no matter how water-rich an area might be. Under any groundwater doctrine, except perhaps the English rule of absolute ownership, waste is prohibited. Waste is against the stated policy in the California Constitution. In addition, the court could find that this waste was harming others with property interests in the water. Thus, the mining company’s use of its water was reaching beyond its property lines and harming others. This factor may be made a basis for the taking of property without compensation. The court of appeal could have declared that this

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72. See Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764, 768 (1955) where the Arizona court said, “[W]here the public interest is significantly involved, the preferment of that interest over the property interest of the individual even to the extent of its destruction is a distinguishing characteristic of the police power.”

73. Eden Irrigation Co. v. District Court of Weber County, 61 Utah 103, 211 P. 957, 961 (1922).

74. CAL. CONST. art. 14, § 3.

waste of the water was not a reasonable use, thus the mining company had no property interest which was impaired.

The second approach that might have been used would be to apply the traditional analysis of the problem of land use interfering with water rights. Here the court would be able to apply the doctrine of Eckel v. Springfield Tunnel & Development Co.—that a water user may use only his reasonable share of the water of the basin. Though there would be some problem with this approach, especially in a large basin such as Niles, in determining the extent of an overlying owner’s reasonable share, these problems have been overcome before. In California under the correlative rights doctrine, the doctrine of the Eckel case would have to be used in conjunction with the reasonable use doctrine to deny the Niles Company any water rights. In the appropriation states competing uses would not create this problem. If the mining operator did not have the prior appropriation the courts could simply enforce the appropriation. If the operator held the prior permit, then it is reasonable to require the public agency to pay for the condemnation of that right, and the cost be borne by the public who will benefit from the increased water supply. In the Niles case, then, the court did not need to make such broad proclamations about a “public servitude” existing or the broad scope of the state’s police power.

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77. Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949). Here the dispute was turned over to the Division of Water Resources, Department of Public Works, State of California for determination of facts.