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Water Law - A Postscript to the Mutual Prescription Doctrine - City of Los Angeles v. City of San Fernando

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CASE NOTES

WATER LAW—A Postscript to the Mutual Prescription Doctrine—City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 537 P.2d 1250, 123 Cal. Rptr. 1 (1975).*

Plaintiff city of Los Angeles operates an extensive water acquisition system within California for its distribution area located within the Upper Los Angeles River Area or, to be acronymic, the ULARA. Waters imported from the Owens Valley and Mono Basin constitute the exclusive source of water for most of the distribution area. However, for some portions of the plaintiff's distribution area, reliance is made upon the groundwater found in the ULARA. Comprising the ULARA Basin are four subareas: San Fernando (constituting 91% of the total area), Sylmar, Verdugo and Eagle Rock.[1] The defendants, the cities of Burbank, Glendale and San Fernando, as well as the Crescenta Valley County Water District and several private defendants,[2] have also used in varying degrees the waters underlying the ULARA for their water needs.[3]

To protect its rights to the disputed ULARA groundwater from prescription, the plaintiff brought suit asking that the court:

1) quiet plaintiff's title in such water;

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1. Plaintiff extracted groundwater from the San Fernando and Sylmar subareas. City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 537 P.2d 1250, 1259, 123 Cal. Rptr. 1 (1975). Although the city of Los Angeles did not extract water from the Verdugo subarea, it did claim that it was a tributary to the Los Angeles River and thus its waters were included within plaintiff's pueblo right. *Id.* at 1269. Eagle Rock subarea water was not included in the court's determination as no specific issue was raised with regard to it. *Id.* at 1259.
2. *Id.* at 1259. Numerous defendants were named but eliminated before trial. For the purpose of this case note, the approximately 16 nongovernmental parties are simply referred to as private parties. *See* at 1259 n.1 for a complete list of private defendants.
3. *Id.* at 1260. Defendant city of San Fernando at the commencement of the suit was entirely dependent upon the Sylmar subarea for its municipal water needs. However, during the approximately 20 years of litigation, San Fernando has since supplemented its water supply with water from the Municipal Water District or MWD. Defendant city of Burbank and the Crescenta Valley County Water District supplement their MWD water with extractions from the San Fernando and Verdugo subareas respectively. City of Glendale extracts water from both the Verdugo and San Fernando subareas as well as purchasing MWD water.

2) declare, on the basis of its *pueblo right*[4] recognized in *City of Los Angeles v. City of Glendale*,[5] plaintiff's prior right to all native water underlying the ULARA inclusive of the San Fernando, Sylmar and Verdugo subareas;

3) recognize plaintiff's prior right to all water recharging the ULARA subareas attributable to return flow from the imported water supplied to plaintiff's customers;[6] and

4) enjoin the defendant's extraction of any groundwater to which the plaintiff had a prior right except in subordination to that right.[7]

The trial court ruled that the plaintiff's pueblo right was unsubstantiated historically and, consequently, did not accord plaintiff any prior right to the waters underlying the ULARA. Additionally, it found that the four subareas of the ULARA were hydrologically independent. Most importantly, the court found that five years prior to the initiation of the suit an overdraft[8] had occurred in the subareas in

4. A pueblo right has been defined as "the paramount right of an American city as successor of a Spanish or Mexican pueblo (primitive village or town) to the use of water naturally occurring within the old pueblo limits for the use of the city and its inhabitants." HUTCHINS, 2 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 145 (1974). *For* a more adequate examination of the character of the right in California, *see* discussion at 147-59. *For* an older but respected treatment, *see* KINNEY, IRRIGATION AND WATER 2590-93 (1912).

5. 23 Cal. 2d 68, 142 P.2d 289, 292 (1943).

6. *Id.* at 294-295. The California Supreme Court recognized the plaintiff city's rights to all such water which had been delivered to agricultural customers. By the commencement of the *Los Angeles* suit, this agricultural clientele had largely been displaced by urban expansion. City of Los Angeles v. City of San Fernando, *supra* note 1, at 1262.

7. City of Los Angeles v. City of San Fernando, *supra* note 1, at 1258-59.

8. California has adopted a measure of overdraft based on hydrologic renewability rather than economic feasibility of extraction. The *Los Angeles* court found that an overdraft occurred when extractions depleted "surplus water" or water which "could be withdrawn without adverse effects on the basin's long term supply." *Id.* at 1307. Stated by formula, overdraft occurs when extractions exceed safe yield. Safe yield, in turn, was defined as "net ground water recharge, consisting of (A) recharge from (1) native precipitation and associated runoff, (2) return flow from delivered imported water, and (3) return flow from delivered ground water less (B) losses incurred through natural ground water depletions consisting of (1) subsurface outflow, (2) excessive evaporative losses in high ground water areas and through vegetation along streams, (3) ground water infiltration into sewers, and (4) rising water outflow, or water emerging from the ground and flowing . . . to the sea." *Id.* at 1308.

Although safe yield might be conceptualized so as to provide an analogue in the "mining" context, as applied here it is primarily a measure designed to maintain basin equilibrium confining extractions to an amount of water equal to that which replenishes the basin through recharge. *For* a discussion of the concept in the mining context, *see* Bagley, *Water Rights Law and Public Policies Relating to Ground Water "Mining" in the Southwestern States*, 4 J. LAW & ECON. 144, 166-67 (1961).

question. As a result of the overdraft, the court ruled that a prescriptive period had ensued in which each party had acquired prescriptive rights against all others taking water from the basin. Finally, the court apportioned the parties' pumping rights on a pro rata basis in accord with the procedure set forth in *City of Pasadena v. City of Alhambra.*[9]

Upon appeal, the California Supreme Court reversed the trial court's decision in several significant areas.[10] By (1) recognizing as applicable to groundwater the exemption of municipalities from prescription, (2) imposing a more stringent standard to establish notice of adverse use, and (3) adopting a new formula for allocation of groundwater in an overdrafted basin, the California court substantially qualified what was thought to be the "mutual prescription doctrine" established in the *Pasadena* case.

EFFECTIVE UTILIZATION OF BASIN GROUNDWATER

In assessing the significance of the *Los Angeles* decision, it is necessary to examine the impact of the mutual prescription doctrine within the overall context of basin utilization.

The groundwater of the United States represents one of its greatest resources.[11] Effective utilization of this resource, as with any resource, is an objective toward which the legal system must strive. Unfortunately, the goal of effective utilization by achieving "the maximum benefit in terms of water supply at minimum cost"[12] has been administratively elusive.[13] Indeed, the mutual prescription doctrine would not have been created had groundwater basins been effectively utilized and overdrafts prevented.

9. 33 Cal. 2d 908, 207 P.2d 17, 32-33 (1949).
10. A significant portion of the decision dealt with the pueblo right asserted by Los Angeles. The court upheld Los Angeles' right to native water in the San Fernando subbasin on that basis, but refused to extend the scope of that right beyond the San Fernando subbasin. In the interests of space, this note must content itself with an examination of the decision's effect on the "mutual prescription doctrine" or *Pasadena* rule.
11. Hutchins, *Ground Water Legislation,* 30 ROCKY MT. L. REV. 416, 437 (1958); Moses, *The Law of Ground Water—Does Modern Buried Treasure Create A New Breed of Pirates,* 11 ROCKY MT. MIN. L. INST. 277, 277-78 (1966).
12. Krieger and Banks, *Ground Water Basin Management,* 50 CAL. L. REV. 56 56-57 (1962).
13. Reis, *A Review and Revitalization: Concepts of Ground Water Production and Management—The California Experience,* 7 NATURAL RESOURCES J. 53, 82-86 (1967); Krieger and Banks, *supra* note 12, at 58.

Logically, it must be asked then why do overdrafts occur at all. To a certain extent, overdrafts are directly attributable to the hydrological complexities of the basin.[14] These complexities are most confounding in the determination of safe yields and the related prevention of overdrafts. Before safe yields can be accurately predicted, a rather complete catalogue of hydrological factors from absorption rates to groundwater lost to sewer infiltration must be available.[15] Ideally, the gathered data used to calculate such factors accurately reflects the conditions existing at the time of prediction. Yet, the time lag beween data acquisition and their interpretation for predictive purposes is crucial where the physical conditions causally related to these factors are rapidly changing. Ironically, the very social conditions, such as urbanization and industrialization, which place the greatest demands upon basin groundwater and thus necessitate the acquisition of "safe yield" data may also change the geography or physical surface conditions so drastically in the time after the data is taken as to render the resultant predictions unreliable.[16] Coupled with the high, if not prohibitive, cost of hydrological surveys,[17] the possibility of obsolescent data makes accurate safe yield predictions during increasing urban and industrial expansion extremely difficult.

Yet, it might be thought that the knowledge that safe yield predictions were uncertain would result in a tendency toward underprediction, or underextraction, lessening the possibility of overdraft.

Counterbalancing this expected tendency is the opportunity cost associated with the underprediction or the loss of

14. Krieger and Banks, *supra* note 12, at 57; Moses, *supra* note 11, at 293-94.
15. These were only two of many factors considered by the *Los Angeles* court. City of Los Angeles v. City of San Fernando, *supra* note 1, at 1308. *See* Krieger and Banks, *supra* note 12, at 57, for a consideration of factors necessary for prediction of safe yield.
16. For example, the construction of concrete or asphalt roads and the concreting of channels adversely affect absorption and may result in a reduced recharge. If such activity occurs after the collection of the safe yield data, the predictions must be adjusted by approximation or augmented by better data. Krieger and Banks, *supra* note 12, at 57.
17. *Cf.* City of Los Angeles v. City of Pasadena, *supra* note 1, at 1269-70 concerning expenses of State Water Resources Control Board. Although the $493,264 included other costs, it would be assumed that the major portion was spent on the watermaster's collection of data and submission of reports to the court.

the net benefit which would have been gained had water unused because of underprediction been developed. Consequently, the proclivity to under- or overpredict is theoretically determined by a comparison of overdraft costs with opportunity costs. To the extent that external costs such as salt water intrusion, subsidence and compactification are not included in the overdraft costs, there will be an underevaluation of the overdraft costs and, concomitantly, a relative tendency toward overprediction and overdraft.[18]

Given the likelihood of basin overdraft, especially when a rapidly expanding economy demands more groundwater than the safe yield can supply, what administrative solutions[19] can best resolve the attendant competing economic needs for the basin groundwater? At this point, it is important to distinguish the legal basis for a pro rata pumping reduction of all basin users from its immediate administrative and economic effect. While the individual state's legal groundwater doctrine may determine whether such an administrative solution is imposed due to prescription,[20] an exercise of administrative discretion[21] or statutory necessity,[22] it is posited that a system which entails a pro rata solution to overdraft problems will undergo economic tendencies which vary remakably little regardless of the legal mechanism which allowed the overdraft to occur.[23] Examination of

18. *See* Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. LAW & ECON. 67 (1968); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). Though the above are concerned primarily with pollution, the conceptual framework presented by each is equally applicable to the context of groundwater and its transactional costs, both social and hydrological. The apparent inability of California utilizers to anticipate subsidence and salt water intrusion, not to mention costs associated with urban growth, perhaps, overstimulated by "cheap water," are all external costs of groundwater basin development.
19. The panorama of solutions to overdrafted basins is extensive. *Cf.* Clark, *Groundwater Management: Law and Local Response*, 6 ARIZ. L. REV. 178, 200-06 (1965).
20. City of Pasadena v. City of Alhambra, *supra* note 9, at 32-33.
21. *Cf.* WYO. STAT. § 41-132 (Supp. 1975). Although Wyoming is a prior appropriation state, a pro rata solution is still available.
22. *Cf.* SO. DAK. COMPILED LAWS 46-6-6.2 (1974). This statute would seem to adopt the pro rata reduction solution modified by priority being given to wells pumping for domestic use.
23. It must be noted that characteristics of each individual legal system may be capable of controlling the dysfunctional tendencies, namely, economic distortion with regard to ownership of water rights and the value thereof, created by use of a pro rata solution. For instance, a more cautious granting of permits for drilling or the election of the pro rata solution only when hydrological necessities dictate would (1) lessen the opportunity to extract water from other basins and (2) reduce the utility of drilling in a

the California experience in resolving its overdraft situations through proportional reduction in pumping by all parties[24] provides insight into the problems inherent in the pro rata solution.

THE LAW BEFORE *Los Angeles:* THE *Pasadena* RULE OF MUTUAL PRESCRIPTION

In 1949 the California Supreme Court enunciated the mutual prescription doctrine, creating what many believed to be the major legal impetus for overdevelopment of California groundwater basins.[25] In *Pasadena,* the court departed from the standard forwarded in *Katz v. Walkinshaw*[26] which would have required satisfaction of overlying users' needs first, with any other water apportioned to appropriators according to the date of their appropriations.[27]

Instead, the *Pasadena* court reasoned that since the safe yield had been exceeded for a number of years, each party who had extracted water from the basin had caused injury to every other party extracting groundwater. Since this injury had occurred for the short five year period prescribed in the California adverse possession statute,[28] the *Pasadena* court held that each junior user acquired a "prescriptive right" against all overlying users and those senior in appropriation to him.[29] The court refused to explain whether the

basin which may be close to overdrafting. However, a cautious approach may not be feasible to the extent that demands for utilization are high and externalities associated with overdrafting are not internalized. Indeed, one accompanying effect of the institution of a pro rata solution in Basin *X* may be increased demands for water in other basins, as the fear of losing capital expended in establishing a well may be reduced by the expectancy of a pro rata reduction in the future.

Even within basins where overdrafting occurs and denial of additional permits provides no remedy, there may be a decreased tendency to assert an overdraft by users due to the deterrent effect of the expense of ascertaining the overdraft condition and the decreased incentive of an adjusted pro rata share once the overdraft is established.

24. It is of course true that California has only employed this solution when a five year prescriptive period of overdraft has occurred. However, the *Los Angeles* court implied that such a solution could be utilized even if no prescriptive rights were acquired. City of Los Angeles v. City of San Fernando, *supra* note 1, at 1298.
25. Krieger and Banks, *supra* note 12, at 61-62; Reis, *supra* note 13, at 63-64. This was also the *Los Angeles* court's conclusion. City of Los Angeles v. City of San Fernando, *supra* note 1, at 1299-1300.
26. 141 Cal. 116, 74 P. 766 (1903).
27. *Id.* at 772.
28. CAL. CIV. CODE § 1007 (West 1954).
29. City of Pasadena v. City of Alhambra, *supra* note 9, at 32.

rights of overlying users and appropriators senior to a party claiming prescription were retained by self-help in continuing to extract water or replaced completely with prescriptive rights against all other parties.[30] A pro rata reduction in extraction of all users was ordered, with each ration being determined by a comparison of the amount pumped by each party to the total pumped during the five years of the overdraft. However, because of the unique manner in which the case developed,[31] the court did not specify whether prescriptive rights could be acquired against a municipal corporation invoking the protection of the broad exemptions found in the adverse possession statute, Section 1007 of the Civil Code.[32] Nor did the court examine what constituted notice of adverse use during the prescriptive period, except to say that a falling well level for twenty-nine consecutive years was sufficient.[33]

The question of the applicability of Section 1007 to the water rights of a municipal corporation seemed to have been

30. *Id.* at 32-33. This portion of the *Pasadena* case has created debate by the commentators. *For* the view that there never was a true "mutual prescription doctrine," *see* HUTCHINS, WATER RIGHTS IN THE NINETEEN WESTERN STATES, *supra* note 4, at 676-679. *See* Krieger and Banks, *supra* note 12, at 60-61, for the opposite view. It would seem the *Los Angeles* court adopted the former view. City of Los Angeles v. City of San Fernando, *supra* note 1, at 1319 n.101.

31. The appellant, California-Michigan Land and Water Company, was the only party which had not "entered into a stipulation for a judgment allocating the water and restricting total production to the safe yield." Consequently, none of the defendant cities were able to raise any defenses to prescription gained against their water rights. City of Pasadena v. Alhambra, *supra* note 9, at 23.

32. CAL. CIVIL CODE § 1007 (West 1954) provided that:

> Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, but no possession by any person, firm or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to or owned by any county, city and county, city, irrigation district, public or municipal corporation or any department or agency thereof, shall ever ripen into any title, interest or right against such county, city and county, city, public or municipal corporation, irrigation district, or any department or agency thereof or any agency created or authorized by the Constitution or any law of this State for the administration of any State school, college or university. The exemption of certain classes of governmental property is intended as a limitation and shall not be deemed to subject to the operation of this section any classes of governmental property which would not otherwise be subject thereto.

This section of the Code was amended in 1969 to include public utilities. City of Los Angeles v. City of San Fernando, *supra* note 1, at 1302 n.67.

33. City of Pasadena v. City of Alhambra, *supra* note 9, at 30-31.

answered in the intermediate appellate decision of *California Water Service Co. v. Sidebothan & Son, Inc.*[34] Arising under conditions very similar to *Pasadena*, *California Water Service* had one variation: the appellant was the municipality of Hawthorne interposing as a defense to the mutual prescription the bar of Section 1007. The appellate court dismissed the asserted defense on other grounds;[35] but in the court's dicta, it was clearly implied that water rights capable of divestment, namely appropriative rights, would not fall within the application of Section 1007.[36]

The *Pasadena* rule, amplified by *California Water Service*, established that the open and notorious extraction of water from a basin beyond one's appropriative or overlying right for a five year period of overdraft resulted in the acquisition of prescriptive rights against all other users of the groundwater, including municipal corporations. While the mutual prescription doctrine of *Pasadena* might have been doctrinally "repugnant to the concept of prescriptive rights,"[37] it did nevertheless provide a practical means of adjusting rights to basin water, thus stabilizing an overdrafted basin.

However, beyond statutory authorization existing in some states for a solution similar to that found in *Pasadena*, pro rata reduction of all users seems to have enjoyed little success outside of California.[38] On those occasions when the *Pasadena* rule was advocated, the rationale for its use was predicated upon the full utilization of the state's resources.[39] However, courts rejected the deviation from already established rules which a pro rata solution would have required. In that reliance upon established rules of adjudicating groundwater rights would reinforce existing rights, the court seemed to feel that the market would procure the best utilization of the water, as such rights could be purchased if a more useful development would result.

34. 224 Cal. App. 2d 715, 37 Cal. Rptr. 1 (Dist. Ct. App. 1964).
35. *Id.* at 9.
36. *Id.* at 7-8. Nor does it seem that a city could be an overlying user to any significant extent. City of San Bernardino v. City of Riverside, 186 Cal. 2d 7, 198 P. 784, 791-92 (1921).
37. HUTCHINS, *supra* note 4, at 679.
38. *Cf.* Baker v. Ore-Ida Foods, Inc. 75 Ida. 575, 513 P.2d 627 (1973).
39. *Id.* at 635-36.

LATENT CONSEQUENCES OF THE *Pasadena* RULE

As a result of *Pasadena*, California cities began to pump as much water as possible in basins other than the Raymond Basin. They had little to lose, since by increasing their extractions, cities could (1) increase their share of an adjusted safe yield[40] prescriptively, (2) retain their share of an adjusted safe yield by increasing their extractions in proportion to other users or (3) at least minimize their loss of the adjusted safe yield by decreasing the proportion available to other users.[41]

In advancing the *Pasadena* rule, the court had sought to encourage senior appropriators and overlying users to assert their right early in the prescriptive period, thus preventing overdraft of the basin.[42] To the extent that the court hoped for such a deterrent effect, it failed to assess the great infor-

40. Adjusted safe yield refers to the proportioned allowed extractions after prescriptive rights were determined by the court.

41. Assume a basin with a continuous safe yield of 100 acre-ft. The following four scenarios illustrate the respective strategies which *A* may follow (All units represent acre-feet.):

Party	Legal Right	Extractions During Prescriptive Period	Adjusted Right
Option 1: The Acquisitive Strategy			
A	33.33	100	50
B	33.33	50	25
C	33.33	50	25
Total	99.99*	200	100
Option 2: The No-Gain Strategy			
A	33.33	50	33.33
B	33.33	50	33.33
C	33.33	50	33.33
Total	99.99*	150	99.99*
Option 3: The Minimization of Loss Strategy			
A	33.33	40	28.5
B	33.33	50	35.7
C	33.33	50	35.7
Total	99.99*	140	99.9*
Option 4: The Status Quo Strategy			
A	33.33	33.33	25.0
B	33.33	50	37.5
C	33.33	50	37.5
Total	99.99*	133.33	100

*Deviation from 100 due to round-off.
Cf. Reis, *supra* note 13, at 64 n.33.

42. City of Pasadena v. City of Alhambra, *supra* note 9, at 32-33.

mational costs associated with ascertaining the point at which overdrafting occurs.[43]

If a party seeking an injunction overcame the formidable cost threshold of obtaining data, it still faced frustration. Initially, the party might find that no overdraft existed. As an injunction could not be obtained for the taking of surplus water, the party's expenditures had netted nothing legally. Nor were the data of great value, for they were not necessarily reliable for future years, as conditions determining the basin's recharge capability might change. Consequently, the benefits of instituting an injunctive suit were minimal when compared with the costs. The less costly alternative quickly became obvious: the extraction of greater water so as to preserve the party's rights vis-a'-vis other users. While the *Pasadena* rule may have fulfilled the requirement of the California constitution by averting waste of groundwater,[44] it did so at considerable expense. The hydrologically ignorant holder of a water right had little recourse but to increase his extractions from the basin. The incentives to overdraft were great, but the deterrents to doing so were minimal, or non-existent. Thus, the *Pasadena* remedy, which stabilized water rights in the Raymond Basin,[45] had the unintended effect of creating economic distortion in other basins leading to serious overdevelopment of those resources.

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43. Reis, *supra* note 13, at 79. The magnitude of this cost was the subject of much remedial legislative action. *Id.* at 64-66; Krieger and Banks, *supra* note 12, at 64-69.

44. CAL. CONST. art. 14, §3. If one were to apply a concept of "waste" which recognized the loss through unneeded or induced consumption (Krieger and Banks, *supra* note 12, at 56), it is questionable whether the *Pasadena* decision actually averted waste. The economic distortion created when parties did not know their rights or their value, and, furthermore, could not expend the resources to determine the above, was conducive to overdrafting. This in turn probably created the marketing of "cheap water" with its resultant uneconomical 'induced' consumption. *Cf.* Reis, *supra* note 13, at 69 n.57.

45. It has also been suggested that *Pasadena* was intended to encourage, if not compel, parties to reach prejudgment agreement. Reis, *supra* note 13, at 53-55. By essentially ratifying the agreement of a majority of the parties below and requiring dissenters to comply with the agreement, the court was in an administrative sense forcing the decision "downward." Parties were required to reach some type of settlement for fear that withdrawal from negotiations might result in an entirely unpalatable resolution which the court might later make the recalcitrant party accept anyway.

Though this judicial intent might be said to have attained some success (*See* Krieger and Banks, *supra* note 12, at 74-76), it has also demonstrated its shortcomings. In terms of informational costs and time and money

EROSION OF THE MUTUAL PRESCRIPTION DOCTRINE: THE *Los Angeles* DECISION

In adjudicating the conflicting claims to water in the Sylmar subarea,[46] the *Los Angeles* court re-examined the mutual prescription doctrine. First, it recognized Section 1007 of the Civil Code as exempting from prescription any water right of a municipal corporation, whether appropriative, prescriptive or overlying.[47] It also held that the language of the provision would not allow one member of the protected class to acquire a prescriptive right against any other member of that class. Accordingly, Los Angeles' prior groundwater appropriations were protected from prescription attempted by either private users or municipalities.[48]

In a manner consistent with *Pasadena*, the court refined the definition of overdraft. In the *Pasadena* formula, overdraft was reached when extractions from the basin exceeded the safe yield. The court, agreeing with the plaintiff, felt the proper formula to be one which permitted a greater extraction than the safe yield, that is, extraction until the "available water storage capacity of the basin was sufficient to permit cycling of the safe yield throughout the twenty-nine year base period of wet and dry years without causing a waste of water in the wet years."[49] Extractions could exceed the normal safe yield if the effect of such extractions was to create additional storage which could be utilized in years of higher precipitation, thus resulting in conservation of groundwater.

This redefinition also illustrated the difficulty of ascertaining, without some hydrological data, when an overdraft occurred. This became extremely significant in establishing

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spent in adjudication, it is a costly venture susceptible to encouraging further pumping rather than adjudication of rights. It has also been questioned whether the agreements were inadequate with regard to impending storage problems. Reis, *supra* note 13, at 79-82.

46. Because the native waters of the San Fernando subarea were held to belong to Los Angeles under its pueblo right (City of Los Angeles v. City of San Fernando, *supra* note 1, at 1284-91) and no overdraft had occurred in the Verdugo subarea (*Id.* at 1287-88.) only the waters of the Sylmar subarea were in question with regard to prescriptive rights.
47. *Id.* at 1302-04.
48. *Id.* at 1304-07.
49. *Id.* at 1308.

the requirements for notice sufficient to declare a prescriptive right. Since the hydrological situations presented in *Pasadena* and other cases were of such a nature that the continued dropping of the basin level could not be interpreted except as an overdraft,[50] the court failed to develop criteria as to the requirement for notice of adversity. However, given the hydrological complexities found in the *Los Angeles* case, the court was forced to elucidate by differentiating notice of asserted adversity from "notice of adversity *in fact* caused by the actual commencement of overdraft."[51] The court did not specify what constituted notice of adversity in fact, but it would seem that at a minimum the circumstances establishing notice of "adversity in fact" are those in which the party against whom prescriptive rights are to be acquired can reasonably ascertain that the lowering of the basin level was an overdraft and not a reduction in temporary storage. It is obvious that the burden of proof of establishing notice of adversity under the *Los Angeles* rule will be much greater than that under *Pasadena*.[52]

Assuming the existence of proper notice of adversity in fact against a private defendant, a prescriptive right analogous to that dictated by *Pasadena* would not automatically follow. If the rights or later appropriators under the *Katz* rules would not be completely eliminated and the prior rightful use of a prescriptive party was "substantial" in proportion to that party's total extractions taken during the prescriptive period,[53] the court would administer what might be termed the "priority principle" variation of the rule. This variation would first determine the prescriptive rights acquired against private defendants. Water would then be

50. City of Pasadena v. City of Alhambra, *supra* note 9, at 31; California Water Service Co. v. Sidebotham & Son, Inc., *supra* note 34, at 4.

51. City of Los Angeles v. City of San Fernando, *supra* note 1, at 1311.

52. With regard to notice the appellate court which considered the *Los Angeles* case said:

> Defendant's claim of adversity was based on the fact that there was a shortage of water in the basin. The proof of that fact was so technically complicated, occupying the referee and the trial court here as extensively as it did, that knowledge of its existence could not be presumed.

City of Los Angeles v. City of San Fernando, 28 Cal. App. 3d 905, 105 Cal. Rptr. 77, 86 (Dist. Ct. App. 1972).

53. City of Los Angeles v. City of San Fernando, *supra* note 1, at 1299.

allocated to overlying users "less any amounts of such rights lost by prescription."[54] The remaining water would then be allocated by the court according to the priority principle: "the one first in time is the one first in right," regardless of whether the right is appropriative or prescriptive.[55]

IMPACT OF *Los Angeles:* HAS THE RACE ENDED?

By the *Los Angeles* decision, the court lessened the likelihood of overdevelopment of groundwater basins, and encouraged long-range water planning by cities. As cities and other public entities representing the class of groundwater appropriators will be recognized as statutorily protected from prescription, the need to insure their prior rights by "racing to the pump" will be eliminated. Due to the statutory exemption of cities and other public users, the total water to which one can acquire a prescriptive right has been substantially reduced, thus decreasing the utility of any attempt to acquire prescriptive rights. In addition, the court has placed a barrier to gaining prescription even against statutorily unprotected basin users due to the difficulty of showing notice of

54. *Id.* at 1319. The prescriptive right gained would be the lesser of "the amount of the prescriptive taking" or "enough water to make the ratio of the prescriptive right [acquired against the private party] to the remaining rights of the private [party] . . . as favorable to the former in time of subsequent shortage as it was throughout the prescriptive period . . . ." *Id.* at 1318-19. Presumably, the amount of the prescriptive taking is the average annual amount of water extracted beyond the safe yield during the prescriptive period. If the safe yield of the basin were to increase, the parties would share in that increment in the same proportion as the rights had been allocated originally. Yet, should any party's share in the increment exceed his prescriptive taking, his share would be restricted to the prescriptive taking. In this sense, *Los Angeles* follows the *Pasadena* policy.

The appropriate allocation of water when an existing overlying user has a greater use for the basin groundwater at a date subsequent to the prescriptive period is dependent upon his need for that use during the prescriptive period. Clearly, if it is an expansion of an "old" use, the overlying user can legally anticipate no further allocation. *Id.* at 1318 n.100. If the use is "new," an increased allocation would not be permitted if the "need" for such a use had existed during the prescriptive period. On the other hand, a new overlying use for which no need existed during the prescriptive period would probably take priority over any prescriptive rights gained. *Id.*

The effect of an enirely new overlying user's need for water upon the allocation of basin water after a prescriptive period was not examined in *Los Angeles.* The alternatives would seem to be allocation of water being predicated upon the nonexistence of the need during the prescriptive period or being permitted as no prescriptive rights could be obtained against a party not yet using the basin, whether the need for such a use existed or not.

55. *Id.* at 1319.

adversity which would comply with the requirement for notice set forth in *Los Angeles*.

The court's utilization of an alternative allocation formula to that found in *Pasadena* was also aimed at alleviating the overdevelopment of groundwater basins by substantially lessening the advantages to be obtained in seeking prescriptive rights. A party pumping after the overdraft has begun may receive nothing, as any prescriptive right gained might be later in time and thus judicially unrecognized.[56] Coupling

56. This is illustrated in the following example which contrasts the outcomes obtained under the *Pasadena* rule and *Los Angeles* "prior appropriation" variation. Assume a basin with a safe yield of 200 acre-feet and five users —*A*, *B*, *C*, *D* and *E*—all exempted from prescription save *A*, an overlying user. Hypothesize as well the following relationships:

Party	Acre-Feet Due Prior to Prescription	Total Acre-Feet Pumped During Prescription Period
A	25	25
B	50	50
C	25	50
D	50	75
E	50	100
Total	200	300

If *B*, *C*, *D* and *E*'s appropriative and prescriptive rights have priority in that order, based upon the preceding data, rights would be allocated as indicated:

	Solutions: Acre-Feet of Water Allocated Under:		
Party	*Pasadena* without Exemption	*Pasadena* with Exemption*	*Los Angeles**
A	16.7	5.0	16.7
B	33.3	50.0	50.0
		(0.0)	(0.0)
C	33.3	30.0	33.3
		(5.0)	(8.3)
D	50.0	57.5	50.0
		(5.0)	(0.0)
E	66.7	60.0	50.0
		(10.0)	(0.0)
Total	200.0	200.0	200.0

*Numbers in parentheses indicate amount of prescriptive right.

The procedure utilized in the "*Pasadena* without exemption" solution is of course the pro rata method utilized in the *Pasadena* case. The "with exemption" variation is computed by applying the pro rata solution only with regard to unexempted water which in this case is *A*'s 25 acre-feet. The portion of unexempted water allocated to each party is determined by a comparison of the amount of unexempted and prescriptively taken water to the total of such water pumped by all parties during the five years of the overdraft. If such a solution were used in this example, hardship would inequitably fall upon *A* contrary to the court's policy of allowing no one to be substantially deprived of a water right. At 1299.

The *Los Angeles* solution, on the other hand, preserves the amount of water which *A* would take under the "*Pasadena* without exemption" solution. The water lost prescriptively is simply the difference between *A*'s former right and the right determined under the "*Pasadena* with exemption"

the procedural difficulty of acquiring prescriptive rights with the limited amount of water to which prescriptive title may be gained, the *Los Angeles* decision has made the speculative acquisition of prescriptive rights less attractive than other possibilities, though it has not completely eliminated the possibility of an exempted party taking groundwater from an unprotected user without compensation. To the extent that the acquisition of prescripive rights is deterred by the *Los Angeles* decision, the resources of large producers and distributors should now be turned to development of secured sources of water, with the concomitant rewards for planning of water needs.

CONCLUSION

The California Supreme Court in its *Los Angeles* decision has moved a great distance from its earlier decision. The exemption of cities and the strengthening of the notice requirement may very well remove the legal impetus for overdevelopment of groundwater basins caused by *Pasadena.* California's experience justifies the warning of one influential commentator who noted that

> [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 directions may well lead to a worsening of others.[57]

As the demands for groundwater increase with development of other natural resources, states may feel the need to apply a pro rata solution to overdrafting. This need may be felt particularly when to do otherwise would result in an economic interest being left without sufficient water to continue in existence. The legal mechanism administering the groundwater is then asked to choose between competing interests. It may appear at that juncture that the disruption

solution. The extent of any party's possible prescriptive right is then determined by the difference between his total right under a "*Pasadena* without exemption" solution and his former right. The water lost by prescription is then allocated by the priority principle which in this case results in *E* gaining nothing by his pumping beyond safe yield.

57. Coase, *supra* note 18, at 44.

which might result from application of the established rule, be it appropriation or whatever, would simply be too harmful. To the extent that the legal system lessens the certainty of ownership of water rights or distorts the value of such rights by applying a pro rata solution, it may face more costly long-term disruption. Before applying a pro rata solution, states should ponder the postscript written by the *Los Angeles* decision to this "novel" application of equitable apportionment, and use that rule, such as prior appropriation, which best insures certainty of ownership and facilitates long-range planning of water utilization.

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