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# Water Rights Taxation Institute of Contemporary Law

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## Water Rights Taxation

The water situation in many California counties, such as periodic scarcity and court-imposed restrictions, emphasizes the significance of taxing water rights. The pros and cons of such taxation may be arguable, but it appears that any relief from the operation of the tax laws in this field can be afforded only by amending the California constitution. However, the following discussion will attempt to set out the present law in this area and how it is applied.

Questions which frequently confront governing agencies in water rights taxation cases include: the type of water right subject to taxation; taxability of rights owned or controlled by mutual water companies; claims of double taxation because of taxation of parcels on which water is used; the extent of the authority of the local board of equalization; determining market value of a water right by capitalizing the cost of water from an alternate source of supply; and the validity of the so-called "basin to basin" theory of assessment.

### TAXABILITY

The California constitution provides that all property within the state is subject to ad valorem taxation for support of local government.<sup>1</sup> This constitutional provision further requires that all property be assessed "in proportion to its value."<sup>2</sup> Thus all kinds of property, wherever situated in the state, are subject to taxation.<sup>3</sup> Based upon this constitutional provision, the legislature has defined "value" to mean "the amount at which property would be taken in payment of a just debt from a solvent debtor."<sup>4</sup>

In *Spring Valley Water Co. v. Alameda*,<sup>5</sup> the court was confronted with the question of the taxability of riparian water rights where such water was diverted from the riparian land for use on other land. The court's decision was that the tax or assessment on the right to divert riparian water was unlawful because the description on the assessment roll was too vague to permit distinction from riparian rights owned by reason of ownership of land abutting the stream.<sup>6</sup> The court also doubted the taxability of a riparian right even when separated from the land.<sup>7</sup>

It appears that the water company involved in the case delivered water to the city of San Francisco and that Alameda County continued to levy taxes upon its water rights on behalf of the county and also on behalf of special districts lying within the watershed. The point of diversion of the stream in question lay in the county but outside any of the districts.

In 1927 the company again took the matter to court.<sup>8</sup> It is worth noting that

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<sup>1</sup> CAL. CONST. art. XIII, § 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> See CAL. REV. & TAX. CODE § 103. There are certain exemptions provided in the constitution which are not material to this study.

<sup>4</sup> CAL. REV. & TAX. CODE § 110.

<sup>5</sup> 24 Cal.App. 273, 141 Pac. 38 (1914).

<sup>6</sup> *Id.* at 282, 141 Pac. at 39.

<sup>7</sup> *Id.* at 281, 141 Pac. at 39.

<sup>8</sup> *Spring Valley Water Co. v. Alameda*, 88 Cal.App. 157, 263 Pac. 318 (1927).

the only taxes the company sought to recover were those paid to the districts, and the only question on appeal was whether any taxable right was situated in any of the districts. The court concluded that when by grant a riparian water right is separated from the land and conveyed to another, such right constitutes an individual and separate property right.<sup>9</sup> The court held that the situs of this right was the point of diversion, and since this situs was not located in any of the special districts, no taxable property right was present therein to tax.<sup>10</sup> Although this case has been relied upon by those arguing double taxation through the use of the water by shareholders of a mutual water company, a careful reading will indicate that the holding of the court does not support such a double taxation theory.

Repeating, we hold that the situs of the right here involved is at the *place of its enjoyment, namely, at the point of diversion*. Conceding, as claimed by appellant, that a right may be taxed even if not enjoyed, nevertheless when the right and the actual user thereof combine, the necessity of speculating upon the situs of an unenjoyed right does not arise. *The use locates the right*.<sup>11</sup>

In 1936 another dispute arose between Alameda County and San Francisco interests. The city purchased the water rights of the Spring Valley Water Company and claimed a tax exemption for such rights as city-owned property. The California Supreme Court found that the right to divert riparian water was a taxable right and that the constitutional exemption of publicly owned property did not apply, because the voters amended the constitution in 1914 to permit taxation of property owned by a public entity if such property is located outside the entity's boundaries.<sup>12</sup> Here, the point of diversion was outside the city boundaries, and thus the right was taxable.

In *Waterford Irr. Dist. v. Stanislaus County*<sup>13</sup> the question arose whether an appropriative right to divert water from a stream was taxable. It was asserted that the cases above all dealt with riparian rights which traditionally have been considered real property, whereas a taking by appropriation should not be considered as property. The court, however, did not agree, and concluded that such a right constitutes land as defined in the California constitution.<sup>14</sup> It was also urged that use of the water by landowners increased the value of their land and thus the assessment thereon; that also taxing the district's right constituted double taxation. The court did not agree.

In the text of 51 American Jurisprudence, at page 337, supported by numerous authorities, it is said that "before invalid double taxation may be said to exist, both taxes must have been imposed in the same year, for the same purpose, upon property owned by the same person, and by the same taxing authority." . . . The right here taxed, that is, the appropriative water right, is alleged to have been purchased by the appellant district from its previous owner and we think that, within the meaning of the constitutional exception,

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<sup>9</sup> *Id.* at 167, 263 Pac. at 323.

<sup>10</sup> *Id.* at 168, 263 Pac. at 323.

<sup>11</sup> *Id.* at 169, 263 Pac. at 323. Emphasis supplied.

<sup>12</sup> *San Francisco v. Alameda*, 5 Cal.2d 243, 245, 54 P.2d 462, 464 (1936).

<sup>13</sup> 102 Cal.App.2d 839, 228 P.2d 341 (1951).

<sup>14</sup> *Id.* at 847, 228 P.2d at 346.

it is owned by that district. Taxes levied upon it therefore are not taxes upon the property of the landowners within the district, and consequently the tax fails to meet the test of double taxation, not being a tax upon property owned by the same person.<sup>15</sup>

In the following year, 1952, the Alpaugh Irrigation District challenged Kern County's tax on the district's right to pump subsurface water and divert it for district use. The district contended that it did not own a separate taxable water right, for it owned the land of origin and was merely exercising its overlying water rights. Again the court disagreed, holding that insofar as the district pumped and diverted water in excess of the need of the overlying land it had both an appropriative and a prescriptive right.<sup>16</sup> These rights are land and thus taxable.<sup>17</sup>

A comparatively recent case, *North Kern Water Storage District v. Kern*,<sup>18</sup> involved taxation of a district right to divert water from the Kern River to non-riparian land. Relying on the 1927 *Spring Valley* case,<sup>19</sup> the district contended that the situs of its water right was within district boundaries and therefore exempt, because its right to use the water was limited to lands within the district. Justice Coughlin, speaking for a unanimous court, held that the situs was the point of diversion and that it was the same regardless of the type of water right involved.<sup>20</sup>

At this juncture the distinction must be noted between water rights and the water subject to use by an exercise of such rights. . . . [T]he place where the water may be used does not necessarily establish the situs of the rights which enable the owner to use that water at that place. . . . The paramount right conferred by the agreement in this case is the right to divert water from the river. For tax purposes the situs of this right should be located at the place where it is exercised, i.e., at the point of diversion.<sup>21</sup>

In this case the plaintiff had acquired its rights from certain land companies whose rights in turn were not restricted as to use. However, when the rights were transferred to the plaintiff, the companies restricted the use of the water by the district to the lands within its boundaries. This limitation, the court held, did not affect the nature of the rights, only their extent.<sup>22</sup> Thus, "as the transfer to plaintiff did not change the nature of these rights their situs was not changed."<sup>23</sup>

The court also made another very important distinction.

[T]he fact that the companies had the right to use water which the plaintiff did not use had no effect on the right of plaintiff to use that water. *The right to use and actual use are two different things.* . . . Failure to exercise that right did not affect the status thereof as "matters" or "things" capable of

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<sup>15</sup> *Id.* at 848, 228 P.2d at 347.

<sup>16</sup> *Alpaugh Irrigation District v. County of Kern*, 113 Cal.App.2d 286, 293, 248 P.2d 117, 120 (1952).

<sup>17</sup> *Ibid.*

<sup>18</sup> 179 Cal.App.2d 268, 3 Cal.Rptr. 636 (1960).

<sup>19</sup> *Spring Valley Water Co. v. Alameda*, 88 Cal.App. 157, 263 Pac. 318 (1927).

<sup>20</sup> *North Kern Water Storage District v. Kern*, 179 Cal.App.2d 268, 278, 3 Cal.Rptr. 636, 643 (1960).

<sup>21</sup> *Id.* at 276, 277, 3 Cal.Rptr. at 642.

<sup>22</sup> *Id.* at 277, 3 Cal.Rptr. at 642, 643.

<sup>23</sup> *Id.* at 278, 3 Cal.Rptr. at 643.

ownership for the purpose of taxation within the meaning of the constitution.<sup>24</sup>

The distinction between the right held by a mutual water company and the actual use by the shareholders is illustrated in *Glendale v. Crescenta Mutual Water Co.*<sup>25</sup> In this case a city ordinance levied an excise tax of five cents per 100 cubic feet of water purchased from any water distributing agency for use within the city. The incidence of the tax was upon the use of water purchased for that purpose and every user was declared liable for the same.<sup>26</sup> The mutual water company (or other water delivering agency) was required to collect the tax and pay it to the city. The city's charges to its own customers were large enough to cover a similar amount.

Respondent's counsel assert that the water belongs to the shareholders, that they pay nothing for it when delivered, that the only charge paid is for production and distribution and hence there is no purchase or sale. . . . [I]n the case of shareholders who own and pool water rights their mutual water company becomes merely their agent in producing and delivering to them their own water. But that is not true of water which is owned by the mutual company and delivered by it to its shareholders even though their stock is appurtenant to their respective lands. . . . It does not appear that any of the shareholders own any water rights or that they ever had any which they could have conveyed to the company. . . . All the evidence supports the finding that defendant is the owner of the water furnished to its shareholders; hence their payment of the cost of production and delivery is the rendition of consideration for the acquisition of property belonging to another—a purchase and sale. It follows that there was no error in the holding that the defendant and its shareholders are subject to the excise levied by [the] ordinance.<sup>27</sup>

It thus appears that a mutual water company is a "person" which is distinct from its shareholders. Any right owned by it is not a right owned by the shareholders individually.<sup>28</sup> Further, no relief from taxation of water rights can be afforded a mutual water company unless it shows through competent evidence that it does not own the water right,<sup>29</sup> and such a state of facts would not make the assessment or tax invalid as to the actual owner of the right. For example, assume that each of a group of land owners owned an appurtenant, appropriative right to divert water from the Santa Ana River to irrigate non-riparian land. Assume also that each conveyed his right to a water company by a contract providing that he continued to own the right and that the company was merely a distributing agent for the group. These owners have placed the company in a position of control. These water rights are assessable to the company. If, however, the actual owners notify the assessor of their respective interests, they should be taxed rather than the company. If such step is taken, and the assessor does not show a separate assessment for the appurtenant water right, it will be deemed assessed as a part of the assessment of the land to which it is appurtenant.

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<sup>24</sup> *Id.* at 279, 3 Cal.Rptr. at 644.

<sup>25</sup> 135 Cal.App.2d 784, 288 P.2d 105 (1955).

<sup>26</sup> *Id.* at 802, 288 P.2d at 117.

<sup>27</sup> *Id.* at 801, 802, 288 P.2d at 116, 117.

<sup>28</sup> See Consolidated Peoples Ditch Co. v. Foothill Ditch Co., 205 Cal. 54, 63, 269 Pac. 915, 920 (1928), stressing this point and indicating the court's consideration of the varying types of ownership.

<sup>29</sup> See, e.g., *Glendale v. Crescenta Mutual Water Co.*, 135 Cal.App.2d 784, 288 P.2d 105 (1955).

If, however, the water right is owned by the company, and the shareholders' only right is to a right to a certain amount of the company's water, the company is the proper taxpayer. This is true whether the share or right against the company is or is not appurtenant to the land upon which the water is used.

Where the owner of a water right retains title thereto under certain circumstances,<sup>30</sup> the question may arise as to whether it is appurtenant to his land. If so, it is deemed taxed with the land, unless the assessor makes separate assessments.<sup>31</sup> His water right remains real property while any share of stock issued by the mutual water company as evidence of such right is merely personal property.<sup>32</sup> It should be kept in mind, however, that a share of water stock is not presumed to be appurtenant to any land.

Whether such appurtenance exists is a question of fact, to be determined upon extrinsic evidence, and the burden of establishing such fact is upon him who claims a right to the appurtenance. Shares of stock, as such are not presumptively appurtenant to land, and if the plaintiff would claim that the shares of stock in question represent water-rights or privileges which are appurtenant . . . it was incumbent upon it to introduce evidence of such fact.<sup>33</sup>

The question of appurtenance becomes important in this tax problem only if the shareholder actually owns the right to divert the water and claims he has been taxed more than once. If he owns no right to divert water, his share in a mutual company, even though it may be appurtenant, is a share only in the assets of the corporation and does not affect the taxability of the water right owned by the company as one of its assets.

#### ASSESSMENT

For a fuller understanding of the question, it is necessary to consider also the principles governing the assessor and the board of supervisors in taxation of property.

When the assessor finds a diversionary water right which is owned or controlled by a mutual water company, he correctly places the water right on the assessment roll and the tax based on the assessment is properly directed to such corporation.

Revenue and Taxation Code section 610 provides that land once described on the roll need not be described a second time and any person claiming and desiring to be assessed for it may have his name inserted with that of the assessee. A subsequent section provides that when a person is assessed in a representative capacity, the assessment shall be entered separately from his individual assessment.<sup>34</sup> Furthermore, "a mistake in the name of the owner or supposed owner of real estate does not render invalid any assessment or any tax sale."<sup>35</sup>

<sup>30</sup> *Stratton v. Railroad Comm'n*, 186 Cal. 119, 198 Pac. 1051 (1921); *Frazee v. Railroad Comm'n*, 185 Cal. 690, 201 Pac. 921 (1921); *Hildreth v. Montecito Water Co.*, 139 Cal. 22, 72 Pac. 395 (1903).

<sup>31</sup> *Frederick v. Dickey*, 91 Cal. 358, 361, 27 Pac. 742, 743 (1891).

<sup>32</sup> *Locke v. Yorba Irrigation Co.*, 35 Cal.2d 205, 217 P.2d 425 (1950).

<sup>33</sup> *Bank of Visalia v. Smith*, 146 Cal. 398, 400-01, 81 Pac. 542, 543 (1905).

<sup>34</sup> CAL. REV. & TAX. CODE § 612.

<sup>35</sup> CAL. REV. & TAX. CODE § 613.

It seems clear, therefore, that if the assessor does not have full information as to the ownership of property rights, he has done his duty when he ascertains the person in control of such property and may conclude that the person in control is the owner.<sup>36</sup> The burden is upon the person in control to notify the assessor of any different situation. It is also the burden of any person claiming to be an owner to notify the assessor of his right. This would be particularly applicable in cases in which the so-called water company is merely a distributing company of water produced from rights owned by the shareholders.

*Tilden v. Orange County*<sup>37</sup> illustrates the problem. This case involved a lease of property to several persons. The lease was silent as to payment of taxes. Thus, under the law, the lessor was obligated to pay them.<sup>38</sup> However, the assessor made his assessment showing the lessees as the taxpayers. The lessees paid the tax under protest and sued to recover. In reviewing the judgment, the district court of appeal held the assessment to be proper. True, the court said, the lessor is obligated to pay the taxes on the property, but this is an obligation as between him and his lessees. Such contractual duty is not binding on the assessor, and he may name those in control of the property.<sup>39</sup>

The assessor, having found persons occupying and in possession of the property, was authorized to assess it in the names of such persons. *He is not required to pass upon the condition of the title to the interests involved for the purposes of taxation and assessment.*<sup>40</sup>

It becomes apparent, therefore, that regardless of the contractual rights between shareholders and a mutual water company, if the assessor finds the company in possession and control of a water right, he may assume, in the absence of information otherwise, that the company is the owner of the right. Where the water company is merely a distributing agent, the real parties in interest may bring the matter to the attention of the assessor through competent evidence of ownership.<sup>41</sup> This step would not vitiate the tax, but it would correct the record as to ownership. Such a shareholder may then state, "Now that I am shown as the owner of my water right, I wish the assessment canceled because this right is appurtenant to my land and must be deemed taxed as a part of that land." Assuming that the particular right is sufficiently described on the roll as assessed separately from such land, the shareholder has no right to cancellation of the assessment. Appurtenant, riparian or overlying rights are deemed taxed as a part of the land where there is no such separation of rights on the assessment roll.

The shareholder who has no water rights, per se, but whose share is representative of a right to a certain amount of the water produced by the company in the exercise of its water rights is not in a legal position to claim any adjustment on the assessment of the company's right or any change in the ownership shown

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<sup>36</sup> 46 CAL. JUR. 2d *Taxation* §§ 166, 169 (Supp. 1963).

<sup>37</sup> 89 Cal.App.2d 586, 201 P.2d 86 (1949).

<sup>38</sup> *Id.* at 587, 201 P.2d at 87.

<sup>39</sup> *Id.* at 588, 201 P.2d at 88.

<sup>40</sup> *Id.* at 588-89, 201 P.2d at 88. Emphasis supplied.

<sup>41</sup> CAL. REV. & TAX. CODE §§ 610-13.

on the roll. Such rights are properly assessed to the company. This situation follows whether or not the shareholder's share of stock is appurtenant to his land.

### EQUALIZATION

The board of supervisors acting as a local board of equalization has limited authority. It may perform only those functions permitted by the Revenue and Taxation Code. Equalization of assessments on the local roll is within its power.<sup>42</sup> And it may direct the assessor to assess property which has escaped assessment, to change amount, number, quantity or description of property on the assessment roll, and to enter new assessments where any assessment is so incomplete as to render collection doubtful.<sup>43</sup> The board may not raise or lower the entire local roll<sup>44</sup> and may not make any reduction of an assessment unless an application for such action has been filed with the board.<sup>45</sup>

Additionally, the board of equalization has no jurisdiction to cancel an assessment for a previous year even though it may have resulted in an unlawful tax.<sup>46</sup> The proper procedure in such cases would be filing application for cancellation or refund, or payment under protest and a suit to recover taxes.<sup>47</sup>

In *Flying Tiger Line v. Los Angeles*<sup>48</sup> it was pointed out that in making assessments "the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment so far as amount is concerned constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question."<sup>49</sup> The determination of the board on such matters will not be overturned normally unless it appears that there has been an arbitrary and wilful imposition of unequal burdens upon certain of the taxpayers "or unless there is something equivalent to fraud in the action of the board."<sup>50</sup> However, it is important also to note that "the lack of due process distinguishing the procedural phase of these equalization matters as submitted to the board furnishes an equally appropriate basis for the court's intervention in protection of the plaintiff's constitutional rights."<sup>51</sup>

Thus, in comparing and equalizing assessed values, the board's decision of fact is final. Where the board passes on a question of law, the courts are not bound and may determine such legal questions anew. Where the questions are mixed fact and law, there are no clear-cut guides, and the taxpayer must apply to the board for "equalization" so as not to run the risk of failing to exhaust his administrative remedy.<sup>52</sup>

The lack of certainty as to the full extent of the board's authority is demon-

<sup>42</sup> CAL. REV. & TAX. CODE § 1605.

<sup>43</sup> CAL. REV. & TAX. CODE §§ 1610-11.

<sup>44</sup> CAL. REV. & TAX. CODE § 1606.

<sup>45</sup> CAL. REV. & TAX. CODE § 1607.

<sup>46</sup> *Stafford v. Riverside County*, 155 Cal.App.2d 474, 478, 318 P.2d 172, 174, 175 (1952).

<sup>47</sup> CAL. REV. & TAX. CODE §§ 5096, 5137-39.

<sup>48</sup> 51 Cal.2d 314, 333 P.2d 323 (1958).

<sup>49</sup> *Id.* at 320, 333 P.2d at 327.

<sup>50</sup> *Id.* at 321, 333 P.2d at 327.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Bank v. Los Angeles*, 35 Cal.2d 319, 217 P.2d 946 (1950); *Sims v. Los Angeles*, 35 Cal.2d 303, 217 P.2d 936 (1950); *Columbia Savings Bank v. Los Angeles*, 137 Cal. 467, 70 Pac. 308 (1902).

strated by several recent decisions of the supreme court. In *De Luz Homes, Inc. v. San Diego*,<sup>53</sup> for example, the court established a formula for assessing possessory interests in tax-exempt property. The interesting point, however, is that after stating the formula, the court remanded the case to the local boards of equalization for determination of the facts and ultimate assessments under the formula.<sup>54</sup> This action indicated a recognition of a rather broad authority of such a board over assessment matters.

In 1958, however, there appears to have been some change in the thinking of the majority of the court on the question of remand. In the *Flying Tiger* case, decided subsequent to *De Luz*, the court refused to remand the case after determining the legal question of pro rata taxation of an aircraft used in interstate commerce and refunded the entire tax paid under protest.<sup>55</sup> Justice Traynor, dissenting, strongly urged the court to remand the matter to the local board as had been done in the earlier case, since it was agreed there was some taxable interest located in the county.

One may conclude, then, that while the board has limited powers, it may consider the formula used by the assessor in assessing water rights to determine whether such rights are being assessed equally with other kinds of real property interests located within the county. Specifically, the board may consider the application of any formula and the various factors involved.

#### METHOD OF ASSESSMENT OF WATER RIGHTS

Determining the value of various types of property rights involves the development of methods or formulae to ascertain what the right would probably bring on the open market. In the *De Luz* case, the court developed a formula for assessing a private possessory interest in tax-exempt public property, basing the formula upon anticipated income "capitalized" for the term of the lease. In their computations the assessors were directed to consider any factors which might adversely affect the full realization of possible income.<sup>56</sup>

Some of the uncertainties involved may be "risk of partial or no receipt" of income, "hazards of the investment," and "accepted concepts of a 'fair return.'" <sup>57</sup> Another expression speaks of a "value factor that reflects interest, risk, and . . . a decline in income in later years."<sup>58</sup>

Where there is no income from the exercise of a property right, the assessor may look to comparable property and ascertain sales prices or replacement costs.<sup>59</sup>

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<sup>53</sup> 45 Cal.2d 546, 290 P.2d 544 (1955).

<sup>54</sup> *Id.* at 563, 564, 290 P.2d at 555.

<sup>55</sup> *Flying Tiger Line v. Los Angeles*, 51 Cal.2d 314, 322, 333 P.2d 323, 330 (1958). See also *Parr-Richmond v. Boyd*, 43 Cal.2d 157, 165, 272 P.2d 16, 22 (1954).

<sup>56</sup> *De Luz Homes, Inc. v. San Diego*, 45 Cal.2d 546, 564, 290 P.2d 544, 555, 556 (1955).

<sup>57</sup> *Id.* at 565, 290 P.2d at 556.

<sup>58</sup> *Id.* at 565, n.3, 290 P.2d at 556, n.3.

<sup>59</sup> *Id.* at 563, 290 P.2d at 555. See also *Kaiser Co. v. Reid*, 30 Cal.2d 610, 623, 184 P.2d 879, 887 (1947). In San Bernardino County, the assessor has used the method of "capitalizing" the cost of water from a substitute or alternate supply which seems to be a method to obtain the value of other property of like kind for comparison purposes. Currently, he uses the price received by the Metropolitan Water District for its lowest grade of water. This figure is multiplied times the average annual amount of water pumped by the taxpayer in recent years. Then various factors are deducted, including a discount of 8%, costs of production and delivery to the nearest market. Of the result,

Additional factors which could be considered would be availability of substitute supplies or likelihood that the right in question will continue to result in a water supply.<sup>60</sup>

#### BASIN TO BASIN THEORY

Under the so-called basin to basin theory, the assessor also applies a factor as a part of his method which takes into consideration whether water is taken from one sub-basin to be used on lands overlying another sub-basin. This theory is based on an engineer's report on taxability of water rights. The thought apparently is that unless water is taken out of such sub-basin it has no value, either because the nearest alternate or substitute supply is located within the same basin, or that water used in the basin constitutes something akin to overlying rights. For those pumping water out of a sub-basin the formula includes the value of a substitute supply at the place of application of the water to the land.

Implicit in this formula is the erroneous legal conclusion that the cost of water at the place of application of the water is the controlling factor. As noted above, however, the situs, that is, the location of the right, is the point of diversion, and the assessor's determination is the value of the property at that place, not some other place.<sup>61</sup> The same factors must be applied to all water rights at their situs. Any substitute supply must be determined in relation to its delivery at the situs within the county.

In *Orange County Water District v. Riverside*,<sup>62</sup> the court held that the Santa Ana River basin constitutes one water source. In the case of *Pasadena v. Alhambra*,<sup>63</sup> the contention was made that the defendant pumped from a different basin than the plaintiff and therefore should not be limited in the amount of water taken. The court refuted this argument by pointing to evidence in the record which indicated the probability of some connection between the basins, though small, and that there was a demonstrable lowering of water level in plaintiff's wells following pumpage by the defendant.<sup>64</sup>

In the *Spring Valley* case the county contended that the situs of the company's right extended upstream and throughout the watershed.<sup>65</sup> In the *Kern Water Storage* case the water district contended that the situs of its right continued past the point of diversion to the parcels receiving the water.<sup>66</sup> The courts rejected these theories and designated the situs of the right as the point at which the water is interrupted in its natural flow and directed to other locations.<sup>67</sup> In view of these precedents, it is doubtful whether the so-called basin to basin theory

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25% is taken as the assessed value for tax purposes. If applied uniformly, the formula would undoubtedly be upheld by the courts. A similar formula for assessment of water rights was upheld in *Alpaugh Irrigation District v. Kern*, 113 Cal.App.2d 286, 293, 248 P.2d 117, 120-21 (1952).

<sup>60</sup> In this regard the San Bernardino assessor considers the alternate source as available and that the water right taxed will continue to supply water in perpetuity.

<sup>61</sup> See text accompanying note 11 *supra*.

<sup>62</sup> 173 Cal.App.2d 137, 343, P.2d 450 (1959).

<sup>63</sup> 33 Cal.2d 908, 207 P.2d 17 (1949).

<sup>64</sup> *Id.* at 923-24, 207 P.2d at 27.

<sup>65</sup> *Spring Valley Water Co. v. Alameda*, 88 Cal.App. 157, 169, 263 Pac. 318, 323 (1927).

<sup>66</sup> *North Kern Water Storage District v. Kern*, 179 Cal.App.2d 268, 272, 3 Cal.Rptr. 636, 639 (1960).

<sup>67</sup> *Ibid.*

would withstand scrutiny by the courts. There is a distinct possibility that the court could find such a theory to be inherently discriminatory in its effect and thus invalid.

While errors of judgment will not render a tax void, where the method used results in different treatment of rights of the same type, the courts have not hesitated to order tax refunds, even though there was no intent to discriminate. In *Rancho S. M. v. San Diego*,<sup>68</sup> for instance, it was held that where the overall plan of assessment and equalization results in inequality of assessment on similar types of property, the tax based on such assessment is void. In *City of Los Angeles v. Inyo*<sup>69</sup> the facts showed a plan of separate assessment of water rights of each of the taxpayer's parcels which resulted in assessments for land and water two and three times as large as those for similar parcels without such separation of taxable interests. The tax was declared to be invalid.<sup>70</sup>

It is therefore submitted that where the basin to basin theory is being used, it should be abandoned, and any element of it deleted from the formula for assessing water rights.

#### CONCLUSION

By way of summarizing, then, the following conclusions should be noted.

*First:* A water right is a property right which is subject to taxation. If it is an overlying right or a right appurtenant to the land served, it is deemed taxed with the land unless the assessor shows such land and such water right separately on the assessment roll.

A right to divert water from its place of origin to serve other lands is a separate property right and may be taxed as such. It is not deemed included in the tax on the land of origin. This right may become appurtenant to the land of use, and, if so, would be deemed taxed with the land of use unless the land and water right are separately shown on the assessment roll.

*Second:* A water right owned or controlled by a mutual water company is taxable to the company. Increased assessment on the shareholder's land through use of water does not result in double taxation of rights owned or controlled by a mutual water company. The right to divert water to other lands is a property right which is distinct from the use of the water produced and is taxable whether the water is or is not used.

Double taxation of the same water right could result if the company does not own the water right but merely acts as agent for the actual owner of such rights. The owners must, however, make a timely request for correction on the assessment roll. Ownership of a water right, or appurtenancy to land is not presumed merely because of ownership of a share in a mutual water company. The assessor properly shows the company as owner until such time as competent proof is presented showing ownership to be in another.

*Third:* Jurisdiction of the local board of equalization is limited to determining

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<sup>68</sup> 126 Cal.App. 186, 201, 14 P.2d 588, 594 (1932).

<sup>69</sup> 167 Cal.App.2d 736, 335 P.2d 166 (1959).

<sup>70</sup> *Id.* at 739, 743, 335 P.2d at 168, 170.

value for equalization of assessment of property located within the county. The board may consider any formula for assessing property rights as it may affect equalization.

*Fourth:* The assessor may employ any method of determining property values so long as the resulting assessment bears a reasonable relationship to actual market value, and if the method has been uniformly and fairly applied. A method which is inherently discriminatory invalidates the tax, but errors of honest judgment will not so long as the aforementioned safeguards are observed.

*Fifth:* Determining value of a water right by "capitalizing" the cost of an alternate supply equivalent to the water produced in the exercise of the right is a valid method of assessment. Capitalizing the difference between cost of production from the right and cost of an equivalent amount of water supply is also a valid method. In any such capitalization formula, however, the same factors must be applied to each right at its situs, not at the place of application of the water to the land.

Finally, whatever basic formula is used, assuming it is otherwise valid, it should be applied uniformly and without reference to any element of the so-called "basin to basin" theory.

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