

The Hodge approach is the best solution to California's water disputes

Overview

California water law has significantly evolved since the state first constitutionalized the doctrine of riparian rights in 1928. Although the article X, section 2 principle of reasonable and beneficial use remains the backbone of California water law, the law has shifted away from priority rights and toward prioritizing efficiently exploiting water sources to their “fullest extent.” Priority rights are still an important factor courts consider in dispute resolution, but courts now increasingly recognize how the limited availability of California water sources forces the law to match the volume of a water right to its reasonable and beneficial use. The Hodge approach, which embraces situation-specific physical solutions to effectively allocate water rights, is the best general approach to resolving water law disputes because it embodies the evolution of California water law and provides flexibility in unique contexts.^[1]

Analysis

California water law is evolving toward a focus on efficiency and flexibility

Although California's basic structure of water rights has not much changed since statehood in 1850, the judicial view of those rights underwent major changes caused by three primary motivators: conservation imperatives to match water sources to their intended uses, a new constitutional principle for resolving conflicts, and changes in California's water supply.

California water law began with an emphasis on riparian rights, which gave property owners who live next to a body of water the right to use that water.^[2] Next, the state established appropriative rights, commonly known as “first in time, first in right,” which grant rights to the first person to claim a source of water; appropriative rights

are based on the beneficial use of a water source rather than land ownership.^[3] Consequently, unlike other states California operates under a dual system that recognizes both riparian and appropriative rights.^[4] This legal structure created conflicts between the distinct rights holders, which for a time were settled on a priority-based system: courts viewed riparian rights as senior to appropriative rights and looked to when a right was established, not the specific use.^[5] That all changed in 1935.

In 1935, California water law abandoned the priority system of rights when the California Supreme Court interpreted the California constitution to require a sorting of rights before outright denial of junior rightsholders.^[6] Instead of focusing solely on priority, the court evaluated the reasonable needs of rights holders and how they contribute to beneficial use before precluding other water uses. This included determining the quantity of water diverted by a rightsholder and whether that amount is reasonably necessary for the stated beneficial use.^[7] The new doctrine required courts to match the volume of a right to its intended use and aimed to reduce wasteful use.^[8]

The second major catalyst was a new perspective on California constitution article X, section 2. Although the article itself was included in the 1849 California constitution, judicial interpretations of it began to shift after *Tulare*.^[9] Article X, section 2 initially aimed to resolve conflicting demands by riparian landowners for entire stream flows, imperatives to store and move water, and the issue of wasteful uses. It did so by subjecting water rights to a standard of reasonable and beneficial use. The constitutional provision further bolstered the state's focus on efficient use of water resources when it underwent a revolution on the same scale and during the same time as *Tulare*, leading courts to reevaluate the concept of reasonable and beneficial use with a greater focus on efficient and sustainable use.^[10]

This shift was important given the third impetus: the physical changes to California's water supply over time. The amount and availability of water resources, variety of uses, and types of users have evolved since California first sketched its water law

doctrine. Climate change and the resulting drought have drastically impacted the availability of water sources. These altered conditions forced a new perspective on the reasonable and beneficial use concept. Courts now view the state's water sources as limited in quality and quantity — which underlines the significance of exploiting a water source to its fullest extent, avoiding wasteful use, and making decisions that are sustainable over the long-term.^[11]

These themes are all present in the Hodge approach, which incorporates an emphasis on efficiently allocating water to as many users as the water source can sustain and makes determining the priority between rightsholders for reasonable and beneficial uses a secondary consideration.^[12] Hodge drew inspiration from the court in *Tulare* when he crafted his approach to efficiently allocating water sources. Because it unites these three evolutionary trends in California water law, the Hodge approach best fits into and furthers the law's current direction.

The Hodge approach

The Hodge approach is named for Judge Hodge's opinion in *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*.^[13] The Hodge decision provides a useful and important framework for resolving water rights disputes: it balances competing uses and allocates water rights such that each party can fulfill its reasonable and beneficial uses, while still accounting for the water source's long-term sustainability. Judge Hodge's physical solution exemplifies the type of practical, forward-thinking resolution that California's water law has evolved to emphasize, thus making it the right approach for courts to use when resolving future disputes.

Judge Hodge focused on finding a way to allow for multiple uses rather than outright prohibiting any one water right, so long as the uses were reasonable and beneficial. The decision centered on fitting reasonable and beneficial uses together to make space for the water source to be used to its fullest extent. Hodge believed it was important to determine if there was sufficient available water to satisfy the needs of all parties before cutting off any one rightsholder.^[14] If enough water existed to satisfy all claimed beneficial uses, then it should be allocated accordingly.

The Hodge analysis first looks to the minimum instream flow required to protect public trust values.^[15] All other beneficial uses must fit under that level. The key interests underlying each competing water use must be identified and shaped so the water source may be used to its fullest extent. Dividing a water source into multiple beneficial uses is difficult work. Hodge's answer was to create a baseline flow requirement, determine what water quantities were necessary to fulfill the parties' various beneficial uses, and allocate the volume of rights accordingly. This type of approach is necessary to ensure all reasonable and beneficial uses are fulfilled while recognizing the limited availability of water and importance of sustainable use. The results of that process form a physical solution.

Once controversial, it is now well-established that courts have authority to craft physical solutions — indeed, doing so may be required.^[16] Hodge's physical solution is an example of the modern detailed-and-specific court judgments that aim to resolve all claims to a water source. It placed strict limits on EBMUD's diversion volume, set an annual reservoir release volume, and required EBMUD to divert as much water as possible during the time when instream flows are least required for protection of environmental interests.^[17] And EBMUD could not divert water except to meet demands for customers within the EBMUD district.^[18] Hodge also anticipated that during certain "dry year" periods, modifying the flow regimes might be permitted to accommodate EBMUD.^[19]

Hodge-style physical solutions flow from the *Tulare* decision, which concluded that once priority users claim a need, courts should determine whether the proposed use is reasonable and beneficial — and if so, the water quantity necessary to satisfy that use.^[20] *Tulare* required a reasonable fit between a senior right and the use it served before a junior rightsholder could be cut off. The main concern in *Tulare* was determining the relationship between the volume of a right and the reasonable needs of the beneficial use that it serves. Hodge read this to mean that courts must fit the volume of a right to its beneficial use to ensure the water source is used most efficiently and sustainably, and that which water uses are reasonable depends on the changing circumstances.^[21]

Since *Tulare*, courts have assumed broad authority to evaluate the array of competing claims to a source, fit them all within the source's capacity under the umbrella concept of reasonable and beneficial use, and impose whatever conditions are needed to divide the source according to the court's balance of the competing interests. Such physical solutions are the best approach to use when allocating water rights between competing interests: they strike the right balance between satisfying multiple uses for a water source while also recognizing the need for long-term sustainability.

Yet the Hodge decision was not an inflection point that divides modern and ancient doctrines; it marked the progress of ongoing trends. Courts must still value priority rights, but the focus has shifted to a comprehensive allocation that uses water sources to their "fullest extent."^[22] In Hodge's analysis, priority rights are a factor, not the first-and-dispositive status they enjoyed in days past. Following more-recent developments in environmental regulations since the 1970s, other modern factors (climate effects, storage-and-transport, and environmental uses) now receive equivalent weight.^[23]

The Hodge approach anticipates takings claims. The law recognizes property rights in the use of water, and property law protects priority rights against being wholly disregarded, and the Takings Clause requires governments to compensate owners of water rights when regulations amount to a taking.^[24] But "there is no property right in an unreasonable use [of water]."^[25] Incorporating practical reality into a right's definition (as Hodge does) causes the priority rights to become secondary in the analysis.

Hodge's framework accounts for the increased emphasis on reasonable and beneficial use, environmental concerns, and sustainability, all while acknowledging traditional priority and property rights. This is why the Hodge approach best fits the evolution of water law and is best-suited to California's need for an adaptive system of water rights.

The Hodge approach is consistent with water law's evolution

The Hodge decision aligns with the evolution of water law in three key ways. First, it emphasized unique solutions to fit the source; judicial recognition that each water source is unique permits efficient use of resources to their fullest extent.^[26] Next, the Hodge approach incorporated an emphasis on environmental uses alongside human uses, which is an important component of long-term sustainable use. Finally, Hodge focused more on the practicality of physical solutions than on parsing priority rights. Hodge's focus on physical solutions mirrors the reliance in recent water law decisions on physical solutions as the best method for allocating water sources to their fullest extent.^[27]

An analysis that aligns with the evolution of water law accounts for the reality of current and future resources in California. Over time, and as water uses further deplete available sources, allocating water rights efficiently will become more difficult. Consequently, courts have recognized the importance of connecting beneficial use to what a water source can sustain.^[28] This makes dispute resolution more about using a water resource to its fullest extent, and accommodating as many as the source can sustain, than cutting off lower-priority rightsholders solely based on their junior status.^[29] Just as the Hodge decision aligns with the trends, other recent decisions mirror Hodge's emphasis on fitting volume of a right to a beneficial use.^[30] All this shows the new direction water law is evolving as courts continue to trend toward focusing on valuing sustainability and prohibiting wasteful use.

Hodge's approach also aligns with the law's evolving emphasis on environmental concerns. Hodge underscored the significance of fitting environmental uses with human uses, particularly through establishing a minimum instream flow requirement. Hodge recognized that environmental uses were a growing concern that earlier decisions overlooked, recognizing that "many of the particular environmental and ecological consequences advanced in this case were not evident at the time of the congressional hearings which were occurring in the late 1940's," and "much of the most critical environmental damage became manifest only after the dam was constructed."^[31] Human uses are no longer the only competing sources of water law disputes; the scope of proper uses has expanded to include environmental concerns and uses. The Hodge decision was first to advance *Tulare*

by incorporating environmental uses alongside human uses when determining the correct volume of water to assign each right.

Hodge also recognized that water rights dispute resolution has recently developed a concentrated focus on crafting well-considered physical solutions to most efficiently use each water source, rather than only deciding which party has priority rights. Hodge correctly noted that the judicial role has evolved from a narrow role of deciding priorities between competing appropriators to the modern charge of comprehensive planning and allocation.^[32] That trend will only continue to grow, and the doctrinal analysis can only follow suit.

The Hodge approach best suits California's need for a flexible water law doctrine

The Hodge approach is a fitting answer to California's evolving water supply and climatic conditions. Physical solutions are best suited to changing environmental circumstances; Hodge's physical solution focused on sustainability and cumulative effects. This approach also accounts for possible changes in water flow and establishes a carve-out to modify annual allocations accordingly — a critical component when deciding cases in an often-drought-ridden state. That makes Judge Hodge's approach the best framework for resolving water law disputes: it aligns with the evolving law, it fits each beneficial use to the circumstances, and it incorporates environmental concerns and sustainability into its physical solutions. The Hodge approach gives California courts the flexibility needed to balance competing imperatives in water disputes.

Hodge permits judges to balance and accommodate all competing interests for a single water source; rather than employing a zero-sum frame, courts can use Hodge's framework to fit all the uses together by limiting each to a reasonable degree. Courts can thus accommodate interests "to the satisfaction of both Article X, section 2 and the public trust doctrine."^[33] Hodge rightly assumed that in the complex arena of water law, "it is reasonable to suppose a legislative intent to accommodate those conflicting interests, wherever such accommodation can reasonably be accomplished."^[34] The Hodge method is superior because it

emphasizes physical solutions, which are a “‘common sense approach’ to water rights litigation . . . having a long judicial history and based on equitable considerations designed to preclude harsh results in complex water appropriation matters.”^[35] The ultimate point of water resolutions is to provide for the fullest beneficial use of the water source under article X, section 2 while protecting public trust values. Doing so requires physical solutions because parties alone lack resources to craft allocation structures.^[36] Physical solutions are also flexible and may be adapted as issues evolve. A Hodge-style physical solution can best satisfy all party interests by allocating water use to its fullest extent and providing the flexibility needed in an ever-evolving subset of law.

Examples of the Hodge approach in action

Two examples illustrate how water law has evolved in the Hodge direction and how the Hodge framework is useful for future decisions.

In *San Fernando Valley* the court rejected California’s standard structure of water rights because the court needed a physical solution adapted to the relevant basin’s unique characteristics.^[37] Every water law dispute is unique, as is every water resource, so solutions must conform to the varying circumstances. And each unique source is always changing, requiring courts to craft adjustable ongoing solutions. *San Fernando Valley* was decided before and perhaps predicted the Hodge decision, in its emphasis on the uniqueness of water sources and their disputes. That is a theme Hodge used to shape his own decision and advance the law further toward flexible, all-rights-accommodating physical solutions.

Another example is *Mojave*, where the court acknowledged how beneficial use drives water rights, but those rights are still bound by what the water source can sustain.^[38] The court did not ignore priority rights, but it protected them only to the extent that they did not lead to unreasonable use. This case illustrates how modern courts emphasize the sustainable water use that Hodge considered when crafting his own resolution. Hodge shaped his physical solution around water source sustainability and allocated water rights only to the volume necessary to fulfill each reasonable and beneficial use. The court in *Mojave* did the same.

Further underscoring the recent attention on sustainability, California passed the Sustainable Groundwater Management Act (SGMA) in 2014. SGMA created a state-wide framework for long-term conservation of groundwater resources.^[39] This emphasis on using water sustainably was novel; early water law gave little thought to how much groundwater was pumped from wells. SGMA arguably codifies the importance of sustainable water use that Hodge emphasized in his decision, and courts now have a statutory policy basis for using Hodge's framework to order sustainable water uses and allocate rights accordingly.

Water law's evolution is moving in the direction of prioritizing efficient use of resources and giving greater weight to environmental concerns — two key themes in the Hodge approach. The authorities and trends discussed above highlight the importance of allocating water rights only in quantities necessary to fulfill a rightsholder's reasonable and beneficial use, and otherwise protecting against unreasonable and unsustainable use of water sources.

Drawbacks to Hodge

There is one major criticism of the Hodge approach: it is very time- and resource-intensive (Hodge itself took 10 years of litigation to craft). Drawing out every dispute to that extent can delay solutions to the detriment of the source, the environment, and users. Although physical solutions make the Hodge approach more flexible, requiring a case-by-case analysis is harder than applying a bright-line rule.

The counterpoint is that, because it was the first of its kind, Hodge's time investment laid the groundwork for similar disputes. Courts using the same approach can save time by building on Hodge's skeleton structure (determining each party's interest, setting a minimum instream flow requirement first if necessary, and allocating water rights accordingly) and fit it to their unique circumstances.

And even if each water source requires a unique solution, general processes and guidelines can be drawn from Hodge that apply broadly. For example, courts could use similar strategies or factors for allotment, such as drawing on the same expert testimony concerning minimum instream flow, accepted methodologies for studying water quality, and cost analyses. Exploiting Hodge's investment, courts can benefit

from the original analysis for more efficient and fairer physical solutions. Even with the time investment the Hodge approach requires, it remains the best framework to use in water rights disputes because it provides an outline for allocating rights to multiple competing uses and incorporates the changing principles of water law.

Conclusion

The Hodge decision is the best approach to use when resolving water law disputes. It aligns with the direction water law is evolving by focusing more on using resources efficiently than settling priority rights and fitting human uses with environmental concerns. The Hodge approach best conforms to constitutional mandates because it seeks to maximize beneficial use for the greatest number of parties, it emphasizes physical solutions, and it and recognizes the growing need for sustainability of water resources. Given how water law has evolved and its apparent trend moving forward, Hodge's framework is the right approach to take when resolving water law disputes.

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1. This approach was first applied by Judge Hodge in *Environ. Defense Fund v. East Bay Mun. Utility Dist.*, Alameda County Superior Court Case No. 425955, 1990 Cal. Super. LEXIS 7 (Jan. 2, 1990). ↑
2. Hanak et al. (2011) *Managing California's Water: From Conflict to Reconciliation*, Public Policy Institute of California, San Francisco. ↑
3. *Id.* ↑
4. *Id.* ↑
5. *Lux v. Haggin* (1886) 69 Cal. 255. ↑
6. *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 525. ↑

7. *Id.* ↑
8. *Id.* ↑
9. *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 383; *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132, 145-149. ↑
10. *People v. Forni* (1976) 54 Cal.App.3d 743, 752 (where the court ruled that, to carry out the California Constitution mandate that beneficial use of water be maximized and that waste and unreasonable use be prohibited, riparian owners can properly be required to incur some reasonable costs or experience some inconvenience in connection with the exercise of their riparian water rights); *see also In re Waters of Long Valley Creek System* (1979) 25 Cal.3d 339, 351. ↑
11. *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 129 (where the court confirmed SWRCB's authority under the public trust doctrine and the prohibition against waste or unreasonable diversion or use of water to reopen water rights to implement water quality objectives); *see also* Water Code section 85001 (which declares that the Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable). ↑
12. *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555, 565 (where the court ruled that forfeiture of a senior water right does not necessarily make unappropriated water unavailable, because junior appropriators may be able to make use of the forfeited water). ↑
13. *EDF v. EBMUD (Hodge)* 1990 Cal. Super. LEXIS 7. ↑
14. *EDF v. EBMUD (Hodge)* 1990 Cal. Super. LEXIS 7 at 37-38. ↑
15. *Id.* at 48. ↑
16. *City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 341. ↑
17. *EDF v. EBMUD (Hodge)* 1990 Cal. Super. LEXIS 7 at 172-174. ↑

18. *Id.* ↑
19. *Id.* ↑
20. *Tulare Irrigation Dist.*, 3 Cal.2d at 535. ↑
21. *EDF v. EBMUD (Hodge)* 1990 Cal. Super. LEXIS 7 at 172-174. ↑
22. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1249-51. ↑
23. **33 U.S.C §§ 1251 et seq.** (Clean Water Act); California Department of Water Resources, *Sustainable Groundwater Management Act (SGMA)* (Mar. 2022). ↑
24. Cal. Const., art. 1, § 19. ↑
25. Cal. Const., art. X, § 2; *Joslin v. Marin Municipal Water District*, (1967) 67 Cal.2d 132, 386. ↑
26. *Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th 992, 1050. ↑
27. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1249-1250; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 277. ↑
28. The California Court of Appeals has explained that “sometimes the use of water under a claim of prior right must yield to the need to preserve water quality...[and] contribute toward the maintenance...of water quality in the Delta.” *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 967. ↑
29. As recently as 2021, California courts have found that, “when crafting a physical solution for an overdrafted groundwater basin where a court must allocate a water supply that is insufficient to meet the reasonable needs of all who hold correlative rights, a court may employ equitable apportionment principles to allocate the available supply among competing claimants with equivalent priorities...as long as the physical solution does not ‘wholly disregard the priorities of existing water rights.’” *Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th at 1030 (citing *City of Barstow v.*

Mojave Water Agency, (2000) 23 Cal.4th 1224, 1247-1248). ↑

30. *Antelope Valley*, 62 Cal.App.5th at 1030. ↑

31. *EDF v. EBMUD (Hodge)* 1990 Cal. Super. LEXIS 7 at 57. ↑

32. *Id.* at 38. ↑

33. *EDF v. EBMUD (Hodge)* 1990 Cal. Super. LEXIS 7 at 41. ↑

34. *Id.* at 69. ↑

35. *Id.* at 154; *City of Lodi*, 7 Cal.2d at 341 (“since the adoption of the 1928 constitutional amendment, it is not only within the power but it is also the duty of the trial court to admit evidence relating to possible physical solutions, and if none is satisfactory to it, to suggest on its own motion such physical solution”). ↑

36. *Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 447. ↑

37. *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 289. ↑

38. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241. ↑

39. California Department of Water Resources, *Sustainable Groundwater Management Act (SGMA)* (Mar. 2022). ↑