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Humanities Core

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I Know Why the Dammed River Sings

Man's relationship with the natural world is reflected in the constant fluctuation between laws that protect the natural world and laws that interfere with its natural existence. Although these opposing perceptions of the relationship between mankind and nature transcend both time and place, they are clearly depicted in a set of complex laws that determine the purpose of the San Joaquin River in California's Central Valley. These laws have generated different perceptions that contest the purpose and treatment of the river, and these differences can best be seen in the conflict that arose surrounding the construction of Friant Dam, which was constructed to control the San Joaquin River under the Friant Division of the Central Valley Project (CVP) that was developed by the Bureau of Reclamation in 1933.¹ The construction of Friant Dam permanently altered the flow of the San Joaquin River through the development of dams, reservoirs and canals. This resulted in the lawsuit *Rank v. Krug*, where Everett G. Rank sued the Secretary of the Interior, Julius Krug, because the water rights of riparian landowners like Rank were being threatened by the construction and subsequent operation of Friant Dam.² This sixteen-year-long legal battle focused on deciding who has the ultimate authority to decide the river's watercourse. The case resulted in the Supreme Court deciding in favor

¹ Rank v. Krug Collection. Special Collections Research Center, Henry Madden Library, California State University, Fresno, accessed May 22, 2013.

² Rank v. Krug Collection.

of the Federal government and its right to eminent domain, thus destroying the San Joaquin's natural flow and irreparably altering man's relationship with the river.³

California is a state whose complex need for water is reflected in its complex laws regarding water rights. In April 1850, California became a state and adopted English common law, which established riparian water rights.⁴ According to California law, these

are rights that an owner of land contiguous to a natural stream possesses to divert the naturally-available supply directly to use, without artificial storage, for reasonable, beneficial purposes on that riparian land. The right arises by virtue of ownership of the riparian land....⁵

The riparian doctrine didn't initially raise any problems, but as the population grew larger, more demands were placed on rivers like the San Joaquin, thus putting riparian rights in jeopardy. In 1855, appropriative rights were established. Under California law, "appropriative water rights exist in situations where surface water is transported away from its naturally occurring location and used on lands that are not adjoining the source water body."⁶ Prior to 1914, no formal license was needed to employ appropriative rights, but after 1914 a license was required. To obtain a permit and appropriative water rights, an application must be submitted in which the applicant had to show there was enough water available from the natural watercourse and demonstrate how the use of diversion would be beneficial.⁷ These requirements made the process of receiving an appropriative extensive and difficult. Therefore, landowners could also earn prescriptive

³ *ibid.*

⁴ The State of California adopted English Common Law, which was based on the wet climate of England and dramatically different than the dry arid West.

⁵ Bartkiewicz, P., Kronick, S., Shanahan, R., "A Summary of the California Law of Surface Water and Groundwater Rights," Bartkiewicz, Kronick & Shanahan Corporation (2006): 1, accessed May 30, 2013, <http://www.co.sutter.ca.us/pdf/pw/wr/gmp/WaterRightsSummary.pdf>.

⁶ U.S. Fish and Wildlife Service, "Summary of California Water Rights": 3, accessed June 1, 2013, <http://www.fws.gov/cno/fisheries/docs/Section1SummaryofCAWaterRights.pdf>.

⁷ The State Water Resources Control Board (SWRCB) grant applicants their appropriative rights.

rights, which were less formal. California law describes prescriptive rights as “water rights [that] are created by five years’ open and notorious use of water under a claim of right.... As in the case of appropriative rights, a prescriptive water right can be established for use on any land, and water can be diverted directly to use or stored for later use.”⁸ This series of water rights in California was established by the early twentieth century, and it wasn’t long before non-riparian landowners began clamoring for access to the waters of the San Joaquin River.

As farmers began to migrate into the American West, they encountered long dry seasons and insufficient precipitation, which caused these agricultural communities to pressure the Federal government to establish water storage and irrigation projects.⁹ Thus, in 1907, a Reclamation Service was established under the U.S. Department of the Interior in order to find potential lands that could be “reclaimed” for farming through the controlled distribution and management of water, and thus began mankind’s attempt to control the waters of the West.¹⁰ In 1923, it became the Bureau of Reclamation; and ten years later, the California Central Valley Project Act was passed, authorizing the genesis of the Central Valley Project and its construction of dams and reservoirs for the San Joaquin River.¹¹ The passing of this act was initially met with celebration and public approval; however with the economic depression impairing the country, the State of

⁸ Bartkiewicz, P., Kronick, S., Shanahan, R., “A Summary of the California Law of Surface Water and Groundwater Rights,” Bartkiewicz, Kronick & Shanahan (2006): 4, accessed May 30, 2013, <http://www.co.sutter.ca.us/pdf/pw/wr/gmp/WaterRightsSummary.pdf>.

⁹ “The Bureau of Reclamation: A Very Brief History,” U.S. Department of the Interior/Bureau of Reclamation, accessed June 3, 2013, <http://www.usbr.gov/history/borhist.html>.

¹⁰ U.S Department of the Interior/Bureau of Reclamation, “The Bureau of Reclamation: A Very Brief History.”

¹¹ *ibid.*

California could not raise enough money through the sale of bonds to fund the project.¹² Therefore, the State of California asked the Federal Government to fund the project through The Rivers and Harbors Act, which was approved on August 30, 1935, authorizing the construction of the initial features of the Central Valley Project.¹³ Later that year, \$20 million was transferred the Emergency Relief Act to the Department of the Interior by order of President Franklin D. Roosevelt for the construction of Friant Dam and other “initial” features of the Central Valley Project.¹⁴ The project had three purposes: “dams and reservoirs should be used, first, for river regulation and improvement of navigation and flood control; second, for irrigation and domestic uses; and third, for power.”¹⁵ Although the Central Valley Project focused on protecting the land by avoiding floods through dams and reservoirs, the CVP also focused on using this reclaimed water to irrigate non-riparian land that didn’t have access to the San Joaquin River. Therefore, Friant Dam was created to channel the river water into two diversion canals: Madera Canal and Friant-Kern Canal.¹⁶ The Madera Canal would divert the water north, irrigating that land before flowing into the Chowchilla River, while the Friant-Kern Canal would take the water south into Kern County, irrigating the southern Central Valley before dumping into the Kern River near Bakersfield.¹⁷ Collectively, these two canals would divert more than 90% of the water from the San Joaquin River and leave more than 60 miles of the river dry every year, beginning at Gravelly Ford, 37 miles

¹²Eugene A. Rose, *The San Joaquin River: A River Betrayed* (Clovis: Quill Driver Books/Word Dancer Press, Inc., 2000), 100.

¹³Rank v. Krug Collection. Special Collections Research Center, Henry Madden Library, California State University, Fresno, accessed May 22, 2013.

¹⁴ Rank v. Krug Collection.

¹⁵ *ibid.*

¹⁶Eugene A. Rose, *The San Joaquin River: A River Betrayed* (Clovis: Quill Driver Books/Word Dancer Press, Inc., 2000), 109.

¹⁷ Rose, *The San Joaquin River*, 139.

downstream from Friant Dam.¹⁸ However these details were overlooked as the benefits of the project were being celebrated. In a document issued by the Mid-Pacific Bureau of Reclamation, the Central Valley Project's stated goals included not only supplying domestic and industrial water throughout the Central Valley, but also generating electric power, conserving fish and wildlife, creating opportunities for recreation, and enhancing water quality.¹⁹ On November 11, 1936, the *Fresno Bee* echoed enthusiasm for these great promises, saying "[a] new era of prosperity dawns for the San Joaquin Valley, for with the completion of the Central Valley Project the fondest dreams of man will be realized...."²⁰ At the time, it was believed these great engineering feats favorably defined man's relationship with nature.

Although the Central Valley Project's Friant Division was moving forward with the endorsement of the state and federal governments as well as the general public, different groups were noticing potential problems arising from the construction of Friant Dam and its diversion of river water. Even before any water was diverted from the dam, The California Department of Fish and Game attempted to stall the diversions because the decrease in the amount of water would put several fish species that inhabited the river in danger.²¹ However, the Attorney General Edmund G. Brown declared, "...the federal government was not required to preserve the fishery below the dam, because the primary purpose of the dam was not for fish but rather for irrigation."²² Once again, man's need to manipulate nature for its own convenience takes precedent over the needs of the natural

¹⁸ Rose, *The San Joaquin River*, 97.

¹⁹ Mid-Pacific Region Bureau of Reclamation, *Central Valley Project* (Project Data Book, 1984), 1.

²⁰ "Central Valleys (sic) Project," *Fresno Bee*, November 11, 1936.

²¹ Eugene A. Rose, *The San Joaquin River: A River Betrayed* (Clovis: Quill Driver Books/Word Dancer Press, Inc., 2000), 106.

²² Rose, *The San Joaquin River*, 106.

world, and The California Department of Fish and Game's attempts to impede the diversion of water were thwarted, ultimately, and eradicating the salmon runs when the San Joaquin River dried up downstream from Gravelly Ford.²³ In addition, local hunters expressed their concern, for "[t]he ritual migration up and down the corridor, [where] huge flights of ducks, geese, swans and coots would cloud the sky as they lifted off from the sloughs and ponds of the valley."²⁴ Hunters feared diversions from the San Joaquin River would force the birds to stop their migration along this corridor. Perhaps the most shocking criticism of Friant Dam was from a consulting engineer for the project, Professor George E. P. Smith from the University of Arizona, who testified:

...almost everything was wrong with Friant Dam... the dam was too small... its storage capacity at 520,000 acre feet was insufficient to accommodate the erratic flows of the San Joaquin River. Furthermore—and most damning—the dam had also been built at the wrong location. If it had been six miles upstream, it would have been able to provide sufficient carry-over storage for year, rather than a few months.²⁵

Although all of these criticisms were valid, the group that really challenged the authority of the Central Valley Project and its Friant Dam were the riparian landowners.

As the project continued to move forward, riparian landowners along the San Joaquin River expressed their concern for the diversion of the water of the San Joaquin River because diverting the water to land that was not adjacent to the river would leave the riparian land without sufficient water.²⁶ However, officials of the Central Valley Project were quoted in the Fresno Bee in January of 1945, saying "[o]wners of land adjacent to the San Joaquin River were assured and reassured by speakers... that their

²³ Rank v. Krug Collection, Special Collections Research Center, Henry Madden Library, California State University, Fresno, accessed May 22, 2013.

²⁴Eugene A. Rose, *The San Joaquin River: A River Betrayed* (Clovis: Quill Driver Books/Word Dancer Press, Inc., 2000), 113.

²⁵ Rose, *The San Joaquin River*, 105.

²⁶ *ibid.*

riparian water rights will be fully respected in carrying out the Central Valleys [sic] Project.”²⁷ Such official messages did little to calm the fears or anger of the riparian landowners, and in 1947 the epic sixteen-year-long legal battle between riparian landowner, Everett G. Rank and the Secretary of Interior, Julius Krug, began.²⁸ Attorney Claude Rowe represented Everett G. Rank, along with twelve other riparian landowners who joined the suit, alleging that the Bureau of Reclamation was illegally diverting water because they did not file for a state permit according to the laws governing appropriative water rights.²⁹ Later hundreds more riparian landowners and the City of Fresno joined the case. However, Julius Krug and his predecessors argued they had received permission from Congress through the California Central Valley Project Act to pursue building the obstructions on the San Joaquin River for purposes of diverting water to the arid lands throughout the Central Valley.³⁰

Official Superior Court documents show the plaintiffs “have continuously been engaged for more than sixty years last past and long before any of the dams, diversions, work and other structures... either begun, started or conceived of, in reasonably and beneficially using all of said waters of said San Joaquin River....”³¹ The plaintiff’s argument about the beneficial uses of the water continued for four pages, explaining the water they diverted directly from the San Joaquin River under their riparian rights was used for many reasons, most importantly, supplying water for cattle, poultry, and crops.³²

²⁷ “Riparian Owners Told State Will Respect Rights,” *Fresno Bee*, January 9, 1945.

²⁸ Rank v. Krug Collection, Special Collections Research Center, Henry Madden Library, California State University, Fresno, accessed May 22, 2013.

²⁹ Rank v. Krug Collection.

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

Under the riparian water laws, the plaintiffs are granted full access to the water of the San Joaquin River that is adjacent to their land if it is to be used directly for domestic or recreational use.³³ Also, not only were the plaintiffs' water rights being affected, the fish and wildlife populations were being affected as well as the landowners' rights to recreational activities along the San Joaquin River:

[A]ll of the waters of said San Joaquin River are and will be needed by plaintiffs for the purposes hereinabove and in this paragraph set forth and for replenishing, sustaining, feeding, supplying and supporting, and for seeping into, percolating and flowing into said undergrounds and percolating water, water stratas and said subterranean streams and said sub-irrigation of said lands...for and will be needed and necessary for the maintenance of said fish life, fishing, boating, camping, picknicking, general resort and recreational purposes.³⁴

The Bureau of Reclamation made their defense for two pages of the court documents, arguing they received permission through the California Central Valley Project Act to build Friant Dam, and that

no one can have any rights as against any action of the United States in building obstructions in the San Joaquin River, or the defendants in diverting *its entire flow* if Congress has declared that the appropriation for the building of such obstruction (dams) or diversionary works (canals) are for the improvement of navigation or flood control.³⁵

On April 13, 1950 the presiding judge of the Superior Court of the State of California, Person M. Hall issued a ten-page decision, claiming that the officials of the Bureau of Reclamation were illegally storing and diverting water from the San Joaquin River:

...none of the lands of said defendant... are riparian to nor have

³³ Bartkiewicz, P., Kronick, S., Shanahan, R., "A Summary of the California Law of Surface Water and Groundwater Rights," Bartkiewicz, Kronick & Shanahan Corporation (2006): 1, accessed May 30, 2013, <http://www.co.sutter.ca.us/pdf/pw/wr/gmp/WaterRightsSummary.pdf>.

³⁴ Rank v. Krug Collection, Special Collections Research Center, Henry Madden Library, California State University, Fresno, accessed May 22, 2013.

³⁵ Rank v. Krug Collection.

appropriative or prescriptive or other rights nor have the owners of said lands any riparian, appropriative or prescriptive or other rights nor any rights whatsoever in or to any of the waters of said San Joaquin River and which said lands of said defendant... lies entirely outside of and beyond the watershed of said San Joaquin River....³⁶

Thus, the Superior Court judge's claims countered the Bureau of Reclamation's argument of that they had permission from the Federal government because none of the land that was going to receive the diverted water had any right to it according to state water law. Therefore, the judge also filed an injunction to stop the diversions from the San Joaquin River, however the Bureau of Reclamation defied the injunction and appealed Judge Hall's ruling, certain they had received permission from the government to allow them to interfere with riparian water rights.³⁷ Their appeal was sent to the Ninth Circuit Court of Appeals to be reviewed in 1953.³⁸ A year later, the Ninth Circuit Court of Appeals issued a thirty-three paragraph document declining to review the case and claiming that it could not decide on a ruling for a case that involved suing the United States of America when the United States of America didn't give consent to be sued.³⁹ In addition, the Court concluded it could not review the case because the claims questioning the authority the Federal government gave to the Bureau of Reclamation are "the questions here [being] presented [and] are not sufficient to invoke the exercise of our power... the petitions are dismissed."⁴⁰

Nine years later, the case reached the Supreme Court under the name of *Dugan v.*

³⁶ *ibid.*

³⁷ "Dugan v. Rank, 372 U.S. 609 (1963)," Find Law for Legal Professionals, last modified 2013, accessed June 2, 2013, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=372&invol=609>.

³⁸ "213 F. 2d 818," United States Court of Appeals Ninth Circuit, accessed June 1, 2013, <https://bulk.resource.org/courts.gov/c/F2/213/213.F2d.818.14243.14244.14284.html>.

³⁹ "Dugan v. Rank, 372 U.S. 609 (1963)," Find Law for Legal Professionals, last modified 2013, accessed June 2, 2013, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=372&invol=609>.

⁴⁰ "213 F.2D 818," United States Court of Appeals Ninth Circuit, accessed June 1, 2013, <https://bulk.resource.org/courts.gov/c/F2/213/213.F2d.818.14243.14244.14284.html>.

Rank. It was argued on January 7, 1963, and the decision, delivered by Tom C. Clark on April 15, 1963, had three main claims: the United States was incapable of being sued without consent; the United States gave the Bureau of Reclamation power to seize riparian rights through “physical seizure”; and the riparian landowners could only sue the Bureau of Reclamation for illegal activity if they had proof their land was losing value due to the diversions of water from the San Joaquin River.⁴¹ The first claim upheld the Ninth Circuit Court of Appeal’s ruling, while the second claim stated that Congress had granted the Bureau of Reclamation the right of physical seizure, “[s]ince the Government, through its officers here, had the power, under authorization of Congress, to seize the property of the respondents...[T]his power of seizure was constitutionally permissible....”⁴² Finally, the third claim addressed how the riparian landowners could only sue the Bureau of Reclamation if they had proof the diversion of water devalued their land. By denying the claims of the landowners who not only sought their own relief, but also relief for the river’s fish and wildlife, the Supreme Court gave the government the right to act, regardless of the effects their actions would have on the natural world.

Although Everett G. Rank’s efforts to stop the effects of Friant Dam ultimately failed, *Rank v. Krug* was a benchmark case that reflected the debate between allowing the natural world to exist as it is and interfering with it in favor of human convenience. The question of how to achieve a balanced distribution of water from the San Joaquin River that is adequate for agriculture, recreation, and sustained wildlife and fish habitats, continues to generate conflict. Since then, additional lawsuits surrounding the protection of fish and wildlife on the San Joaquin River have made their way through the judicial

⁴¹ “Dugan v. Rank, 372 U.S. 609 (1963),” Find Law for Legal Professionals, last modified 2013, accessed June 2, 2013, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=372&invol=609>.

⁴² Find Law for Legal Professionals, “Dugan v. Rank, 372 U.S. 609 (1963).”

system, and Congress has passed laws attempting to undo some of the earlier damage through acts such as the Central Valley Project Improvement Act passed in 1992 that enhanced the habitats of fish and wildlife in the Central Valley.⁴³ As Everett G. Rank and the other riparian landowners knew, a reciprocal relationship between mankind and the natural world is indispensable. It is a constant struggle to maintain this balance throughout the world. For example, this conflict was also demonstrated in “South Africa in World History” when the Dutch-East India Company built barriers around the cape in Southern Africa to separate that popular European pit stop from the indigenous populations.⁴⁴ Those barriers transformed the cape into the Cape of Good Hope, providing convenience for Europeans at the expense of the indigenous people and their historic connection to that land.⁴⁵ Achieving balance between the natural world and humans clearly requires compromises and sacrifices on both ends; humans need to express their capabilities through scientific and technological advances, but they must always be mindful that ultimately, destroying the natural world will destroy humans too.

⁴³ “The Central Valley Improvement Act,” U.S. Fish and Wildlife Service, last modified February 15, 2013, accessed June 4, 2013, <http://www.fws.gov/stockton/afrp/title34.cfm>.

⁴⁴ Iris Berger, “Ancestors: South Africa in World History,” in *The Human and its Others: Divinity, Society, Nature*, ed. David T. Pan (Boston: Person Learning Solutions, 2010), 305.

⁴⁵ Berger, “Ancestors,” 306-308.

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