

# WATER 101: WATER RIGHTS

Water Education Foundation  
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The lifeblood  
of the state



# WATER RIGHTS

## PHYSICAL CATEGORIES

- Surface Water
- Groundwater

## LEGAL CATEGORIES

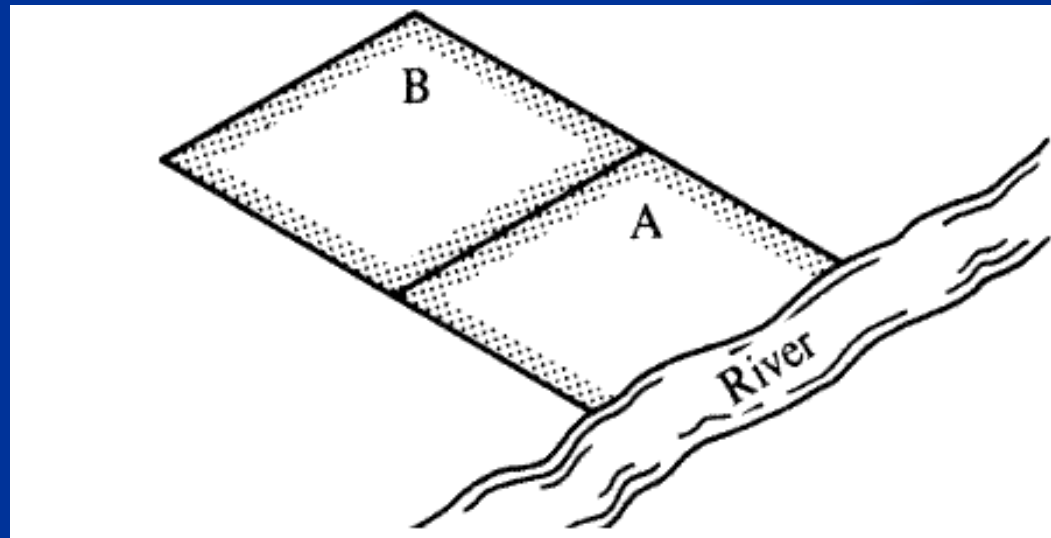
- Rights acquired through **LAND OWNERSHIP**
- Rights acquired through **ACTIONS (USE)**

# SURFACE WATER



# RIPARIAN RIGHTS

- Land ownership **ADJACENT** to watercourse
- Deed establishes right: **NO PERMIT NEEDED**
- No fixed quantity: **REASONABLE**



# RIPARIAN RIGHTS

**NO FIXED QUANTITY:** Reasonable Use

Example: Riparian uses 500 AFY to grow Crop A. Can she switch to Crop B, which requires 600 AFY?

Answer: Yes, without any additional water rights, as long as water is reasonably used, and not wasted.

# RIPARIAN RIGHTS

- Land based: Not lost for non-use
- Limited to use on riparian property in watershed
- Limited to **NATURAL FLOW** of watercourse
- **NO STORAGE** (over 30 days)
- Equitable sharing of shortages: **CORRELATIVE**

# 1848-49 Gold Rush

# Cornucopia of the World

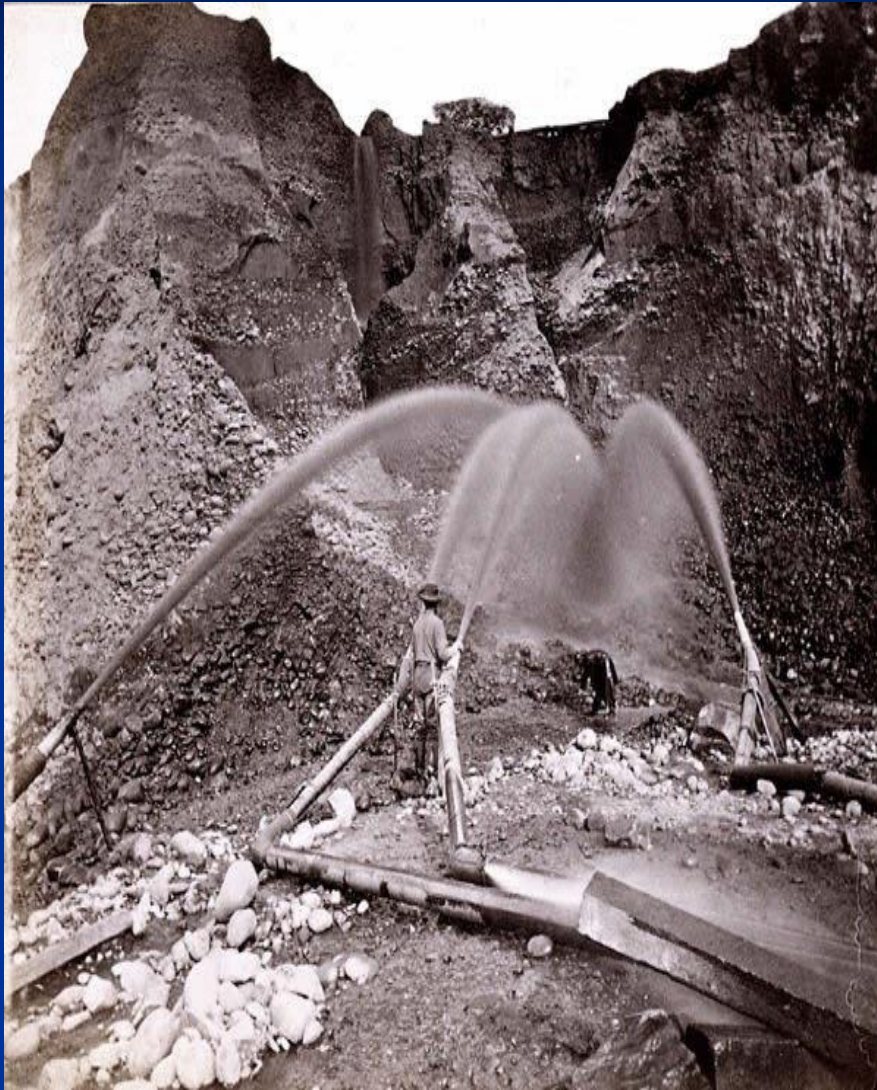
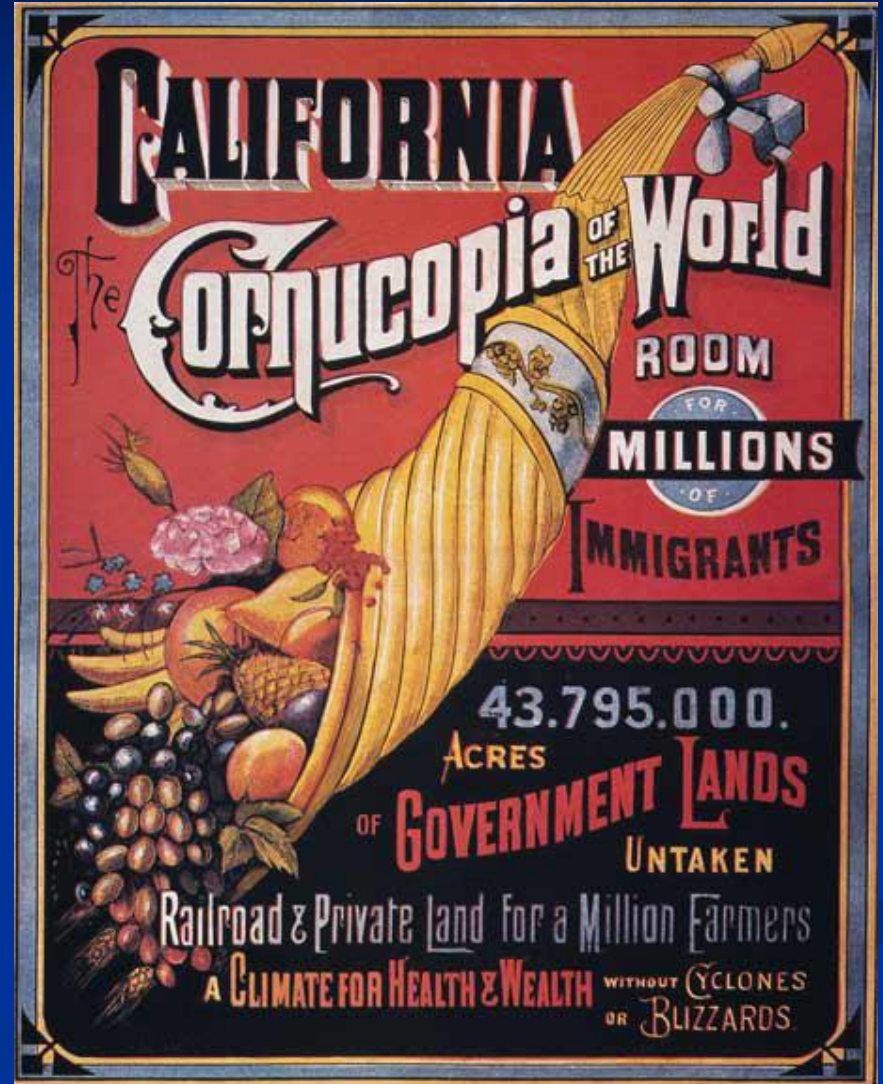


Photo courtesy of USGS



Wikimedia Commons



# APPROPRIATIVE RIGHTS

- **BENEFICIAL USE** (not land ownership)
- 5 Years Non-Use = Forfeit (**USE IT OR LOSE IT**)
- **FIXED QUANTITY**
- **STORAGE** allowed – belongs to appropriator
- Shortage: **PRIORITY**

# PRIORITY

First in time  
First in right

■ SENIOR

■ JUNIOR

**Prior Appropriation: an example**  
"First in time, first in right"

**"Junior User"**  
**1970 Water Right**  
This water right is regulated back to meet the downstream need of the senior water right.

**"Senior User"**  
**1910 Water Right**  
This water right gets water first during times of low streamflow.

***An example of prior appropriation at work***  
Prior appropriation ensures that the first water user to obtain water rights has first access to water in times of shortage. If a "downstream" landowner has the earlier priority date (they initiated their water right in 1910) the "upstream" landowner may have to let the water pass unused to meet the needs of the senior, downstream water right holder.

# APPROPRIATIVE RIGHTS

## ■ PRE-1914 RIGHTS

- Common law rights
- Divert and beneficially use water

## ■ POST-1914 RIGHTS

- Requires **water permit or license**
- Permit to License: Diligent “development” aka use

# LUX V. HAGGIN (1886)



## HYBRID SYSTEM

Riparian & Appropriative

Riparians usually senior as a class

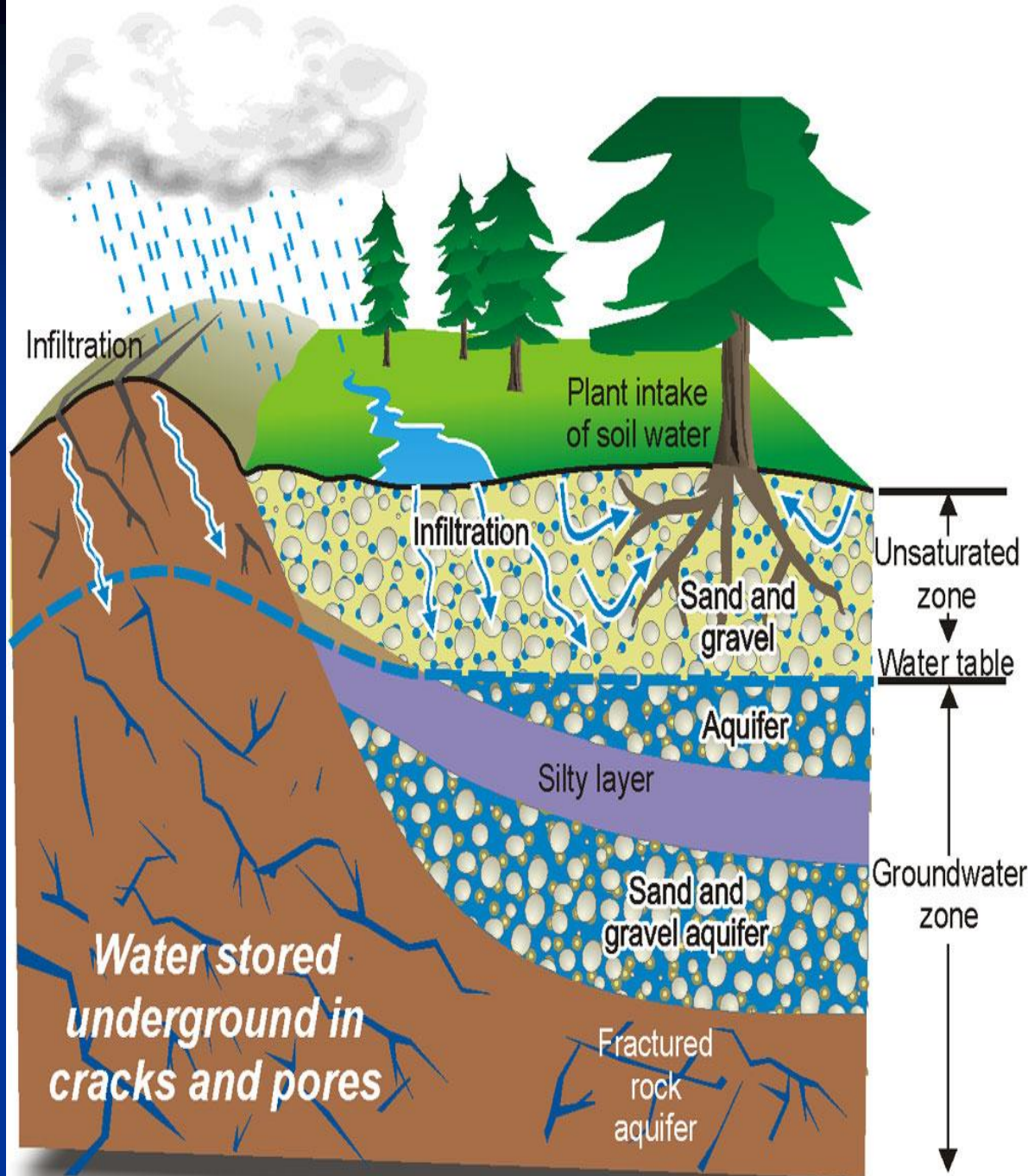
James Ben-Ali Haggin

Kern  
River



Miller & Lux

# GROUND WATER



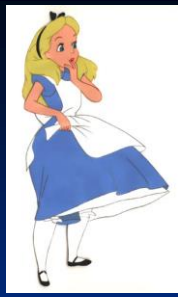
# GROUNDWATER

Water Code Section 1200 (permitting system):

Water refers only to **surface water** and to

**“Subterranean streams flowing through a known and definite channel”**

➡ NOT **“percolating groundwater”**



# WATER UNDER THE GROUND

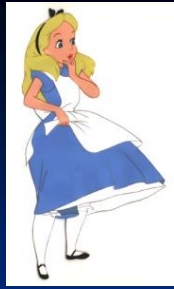
- **SUBTERRANEAN STREAM** = Surface Water Law
  - Riparian Right (overlying)
  - Appropriative Right\*
    - \* **After 1914, need SWRCB permit**
  
- **PERCOLATING** = Groundwater Law
  - Overlying Right
  - Appropriative Right
  - **No SWRCB permit**

# SUBTERRANEAN STREAM FLOWING THROUGH KNOWN & DEFINITE CHANNEL

## *North Gualala Water Co. v. SWRCB (2006)*

- Subsurface channel must be present
  - **Relatively impermeable** bed and banks
  - Course determined by **reasonable inference**
  - Groundwater **flowing in** channel (not across)
- 
- **No “Impact” Test**





## ALICE IN WONDERLAND

“[C]lassification disputes in this field quickly take on an Alice-in-Wonderland quality because the legal categories are drawn from antiquated case law and bear little or no relationship to hydrologic realities.”

# “PERCOLATING” GROUNDWATER

- Land-Based: **OVERLYING Right**
  - **Overlying land ownership:** analogous to riparian
  - Use on overlying land, no forfeiture: **NO PERMIT**
  
- Use-based: **APPROPRIATIVE Right**
  - Use **outside the basin** or by **public agency**
  - Priority system & “use it or lose it”: **NO PERMIT**

# “PERCOLATING” GROUNDWATER

## ■ ADJUDICATION

- OVERDRAFT & SAFE YIELD

- PRESCRIPTIVE RIGHTS

- SELF HELP

- Court Decree

  - Watermaster: post decree management

## ■ LOCAL AGENCIES

## ■ COUNTY ORDINANCES

# “PERCOLATING” GROUNDWATER

## Sustainable Groundwater Management Act

- Local management with state backstop
  - Groundwater Sustainability Agencies
  - Groundwater Sustainability Plans
  - **Sustainable Yield**
  - If fail, SWRCB action

# TRIBAL WATER RIGHTS

- **Express treaty rights**
- **Implied *Winters* Rights: primary purpose**
  - Priority: date of reservation
  - Not lost for non-use
- **Aboriginal rights: “time immemorial”**

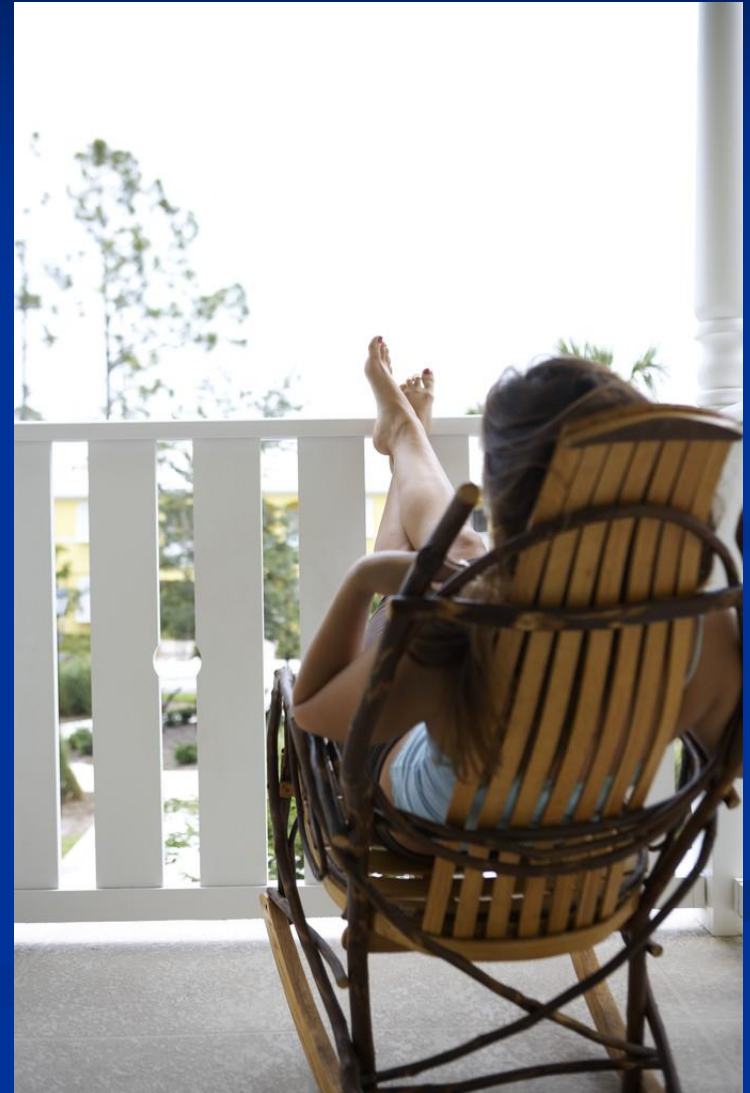
# GOVERNING PRINCIPLES

# HERMINGHAUS V. SO. CAL EDISON (1926)

Riparian relied on heavy spring flows to flood irrigate

So Cal Edison wanted to construct upstream hydropower reservoirs, reducing peak flows

Held that Reasonable Use does not apply between riparian & appropriator



## CAL CONST. ART. 10 § 2 (1928)

### ■ FULLEST EXTENT

CA water shall “be put to beneficial use to the fullest extent of which [it is] capable”

### ■ REASONABLE USE

Amount “reasonably required for beneficial use”

### ■ WASTE & UNREASONABLE USE

No right where water wasted or used unreasonably



“What is a reasonable amount varies with the circumstances of each particular case and also varies from year to year, for the amount which might be reasonable in a season of plenty might be manifestly unreasonable in a season of drought.”

# PUBLIC TRUST DOCTRINE

By the laws of nature

These things are common  
to mankind

The air, the sea, and  
consequently

The shores of the sea

--Institutes of Justinian

## Mono Lake, Eastern Sierra



# PUBLIC TRUST DOCTRINE

- CA acquired **bed & banks of navigable waters & tidal waters** @ statehood (**EQUAL FOOTING**)
- Title to navigable and tidal resources impressed with “public trust” obligation
- Public Trust values: Navigation, commerce, fishing, environmental, recreation, scientific

# Public Trust Doctrine

Lake level dropping

Ecosystem impacts

LA: water right  
cannot be changed



# PUBLIC TRUST DOCTRINE

- Court: Both water rights and public trust must be accommodated
- Public Trust Doctrine: state can & must protect trust values where **FEASIBLE**
  - **Feasibility:** environmental, economic, cultural, scientific, legal

# PUBLIC TRUST DOCTRINE

- **NATIONAL AUDUBON** (1983)  
Non-navigable tributaries
- **SCOTT RIVER** (ELF v. SWRCB) (2014)  
Percolating groundwater  
(Sacramento County superior court)  
County well permitting

# PUBLIC INTEREST

- **PUBLIC INTEREST:** California Water Code
- **SWRCB governing principle**
  - Allocation of water
  - Terms and conditions of permits and licenses
  - Changes to permits and licenses
- SWRCB must consider and value all interests:  
**Environmental, economic, cultural, etc.**

# GOVERNANCE



# GOVERNANCE

- **STATE WATER RESOURCES CONTROL BD**
  - Five members, appointed by governor
  - Staff: **Division of Water Rights**
  
- **WATER PERMITS & LICENSES**
  - Initially Limited Jurisdiction
  - Only **Surface Water & Subterranean Streams**
    - Only **post-1914 appropriations**
    - Not: pre-1914, riparian, or percolating GW

# GOVERNANCE: **SWRCB JURISDICTION**

- Not: pre-1914, riparian, or percolating GW
- Exceptions – currently evolving:
  - **Cal. Const., Article X section 2**
    - *Light v. SWRCB*, 2014
  - **Enforcement**
    - *Young v. SWRCB*
  - **Public Trust Doctrine**
    - *ELF v. SWRCB* (Scott River case)

# GOVERNANCE: **SWRCB EVOLUTION**

## **DROUGHT MANAGEMENT 2014-16**

- Information orders
- Conservation requirements
- **Curtailments**
  - Litigation

# GOVERNANCE

## COURTS

- Concurrent jurisdiction
- All water rights
- Post-1914 permits & licenses
  - Challenges and appeals

# GOVERNANCE

## LOCAL AGENCIES & WATER SUPPLIERS

- Cities and counties
  - Special districts
  - Investor-owned utilities (CPUC)
  - Mutual water companies
- 
- Water rights or water contracts
  - May own and operate local projects
  - Local rules and regulations

# GOVERNANCE

## ■ PROJECTS

- Federal (CVP)
- State (SWP)
- State water rights
- Supply contracts



QUESTIONS?