

# 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)**

**THE NATURE OF  
PROPERTY RIGHTS  
IN WATER**

# PROPERTY RIGHTS IN WATER

**WATER CODE 102:** All water within the State is the property of the people of the State, but **the right to the use of water** may be acquired ... in the manner provided by law

# PROPERTY RIGHTS IN WATER

- State ownership is regulatory
  - Reflective of **POLICE POWER**
  - Not proprietary
- Authority to confer private right of use
- Must also protect public interest

-People v. Davis (Ca.3d 2016)



# USUFRUCTUARY

## REAL PROPERTY RIGHT

**Full owner:** Direct, immediate & exclusive authority

**Usufruct:** unites property interests of **usus** & **fructus**

- **USUS = USE OF**
- **FRUCTUARY = FRUITS**



# USUFRUCTUARY

**USUS:** Right to use or enjoy a thing possessed

**FRUCTUS:** Right to derive profit from thing possessed: e.g., by selling crops & taxing for entry

**No right of exclusivity against full owner**





# PROPERTY RIGHTS IN WATER

## USUFRUCT IS:

- **Taxable**
- Conveyable by **deed** or property instrument
- Subject to **condemnation**
  - Damages for inverse condemnation (**takings**)
- Subject to **adverse possession**
- Interests protected by **judicial process**
  - Controversies settled via **quiet title suit**

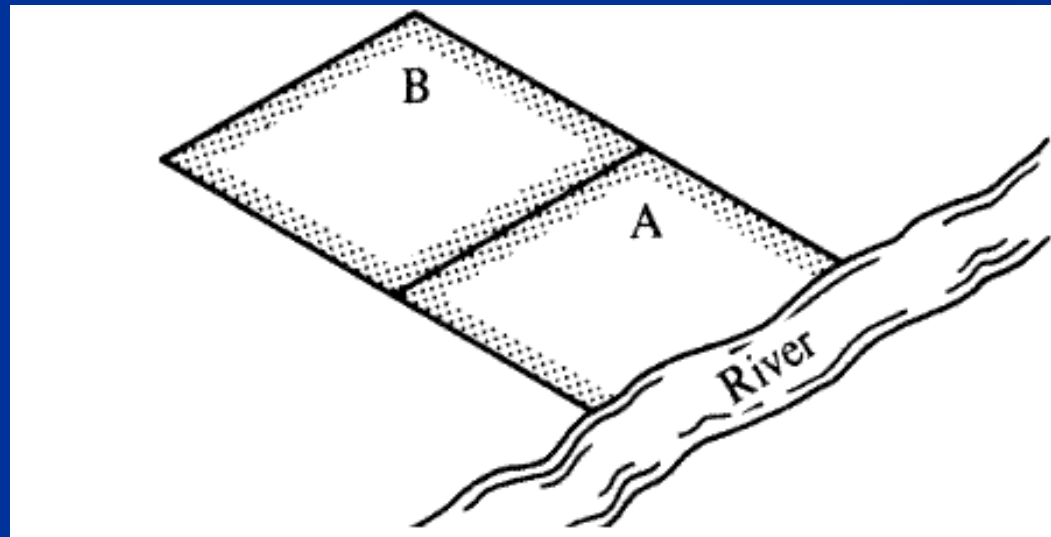
# WATER RIGHTS

# 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**



## Miners and farmers

Not riparian

Most land was **public land**

Riparian rights based in land ownership

Individuals didn't own public land



Riparian rights **uncertain**

No fixed quantity

Had to be used **on riparian land**

No storage

# CALIFORNIA WATER

## **APPROPRATIVE RIGHTS** beneficial use

- Custom: **First in time, first in right**
- Fixed quantity
- Use wherever & allowed **storage**
- Approved by Cal Supreme Court in 1855
- **NO SWRCB PERMIT**

## **WATER COMMISSION ACT (1914)**

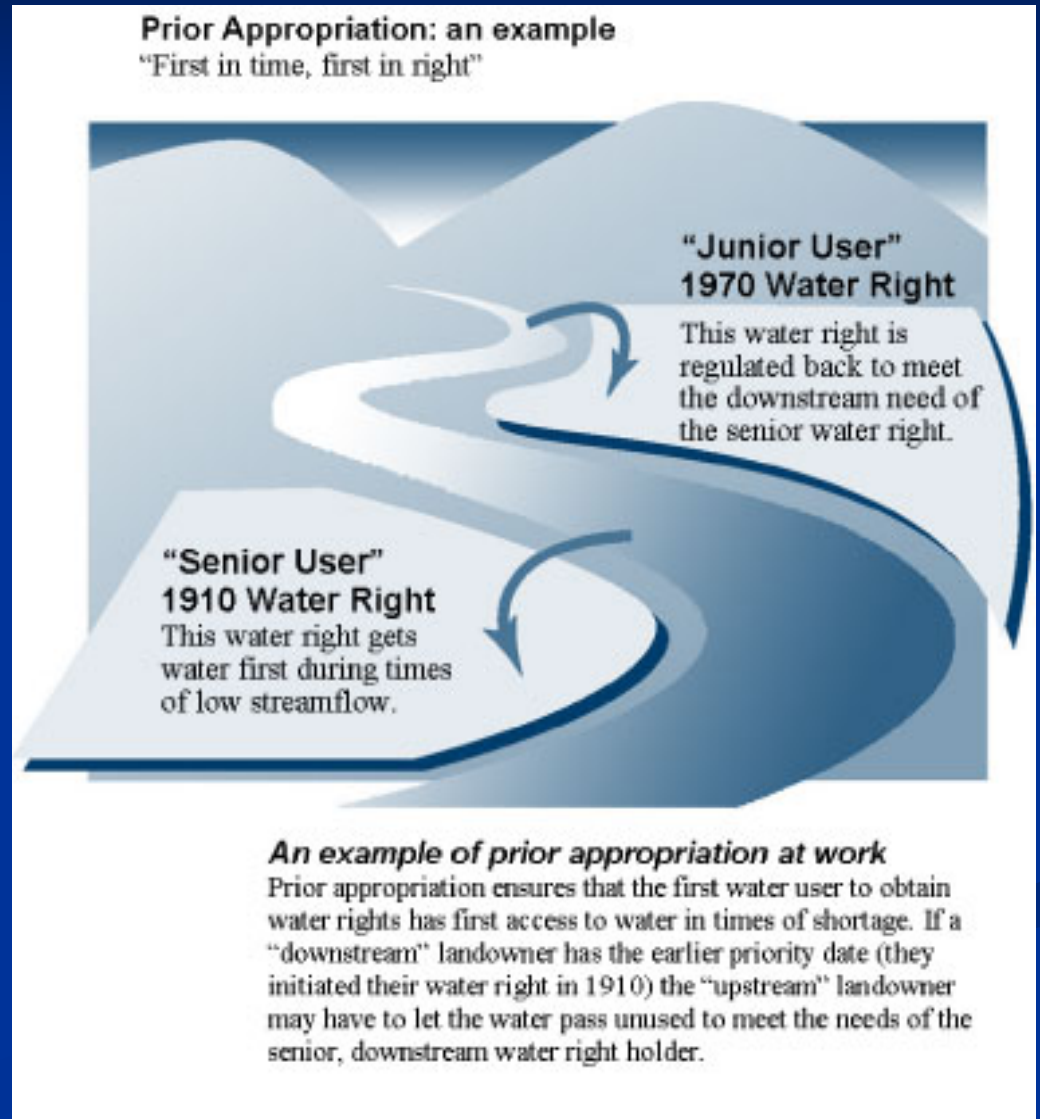
- State Water Resources Control Board
- **POST 1914 RIGHT – NEED PERMIT**

# PRIORITY

First in time  
First in right

■ SENIOR

■ JUNIOR



# LUX V. HAGGIN (1886)



## HYBRID SYSTEM

Riparian & Appropriative

Riparians usually senior as a class

James Ben-Ali Haggin

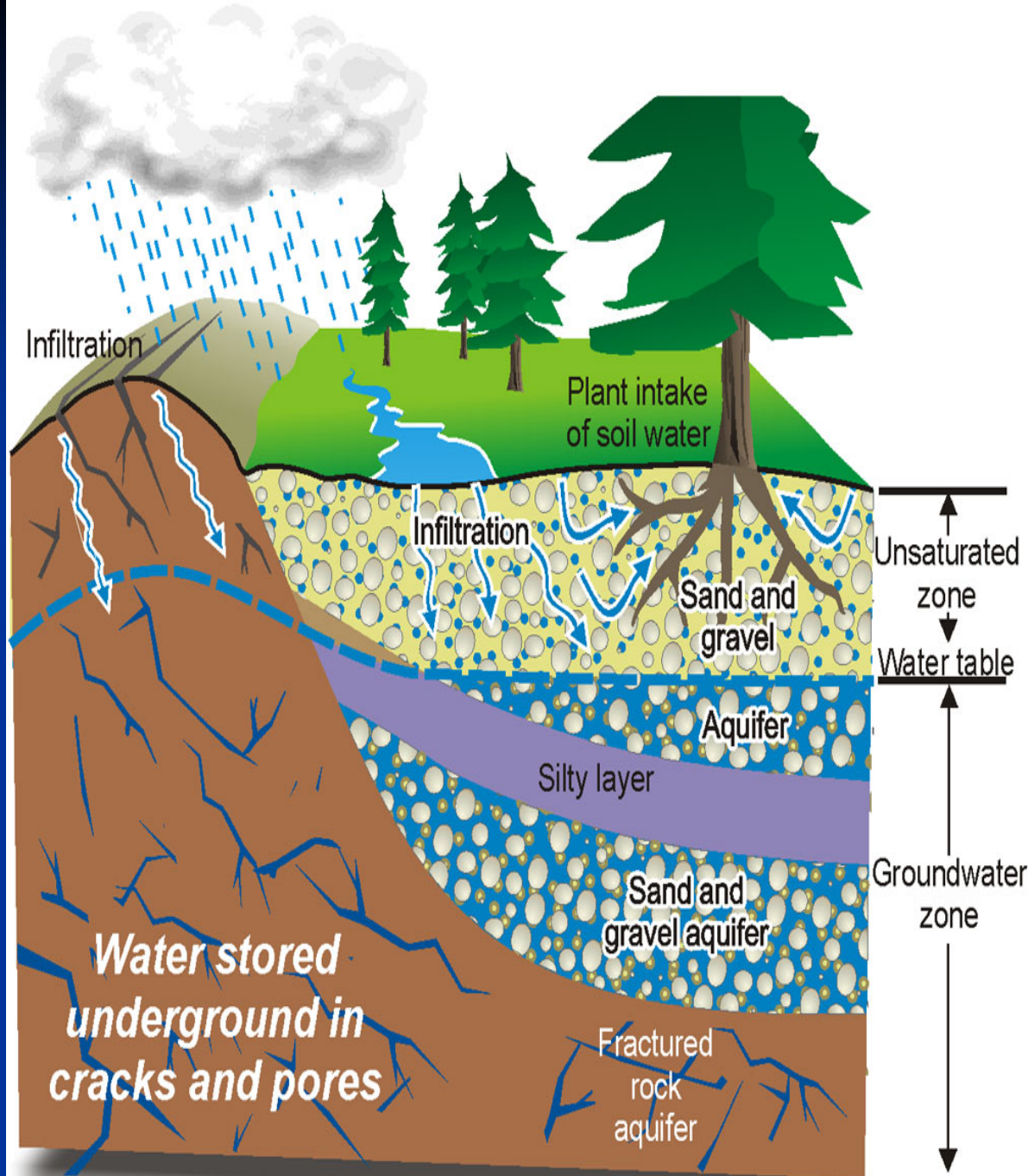
Kern  
River



Miller & Lux



# GROUND WATER



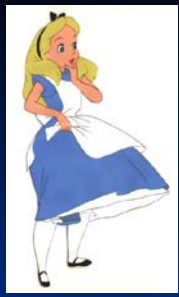
# GROUNDWATER

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”**



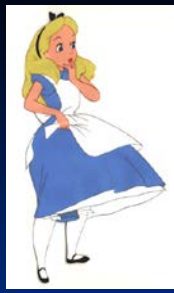
# WATER UNDER THE GROUND

- **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

# Sustainable Groundwater Management Act

- Local management with state backstop
  - Groundwater Sustainability Agencies
  - Groundwater Sustainability Plans
  - **Sustainable Yield**
  - If fail, SWRCB action
    - **Still no permit**
- SGMA does not “determine or alter” water rights

# TRIBAL WATER RIGHTS

- **Express treaty rights**
- **Implied *Winters* Rights: primary purpose**
  - Priority: date of reservation
  - Not lost for non-use
  - *Agua Caliente* 2017: *Winters* includes groundwater
- **Aboriginal rights: “time immemorial”**

# GOVERNING PRINCIPLES & GOVERNANCE



# HERMINGHAUS V. SO. CAL EDISON (1926)

Riparian relied on heavy spring flows to flood irrigate

SoCal Edison construct upstream hydropower reservoirs, reducing flow

Held: **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

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

# PUBLIC TRUST DOCTRINE

## DUTIES OF THE SOVEREIGN

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

# Public Trust Doctrine

Lake level dropping

Ecosystem impacts

LA: water right  
cannot be changed



# PUBLIC TRUST DOCTRINE

- Court: Both water rights & public trust matter
- 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

- **ELF v. SWRCB** (2016)

Scott River

Hydrologically-connected groundwater

# GOVERNANCE

# GOVERNANCE

## COURTS

- Jurisdiction over all water rights
- SWRCB Post-1914 permits & licenses
  - Challenges and appeals

# 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:
  - **Reasonable Use/Cal. Const., Art. X § 2**
    - *Light*
  - **Enforcement**
    - *Young & Millview*
  - **Public Trust Doctrine**
    - *ELF v. SWRCB*

# 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: SWRCB EVOLUTION

## DROUGHT MANAGEMENT

- Information orders
- Conservation requirements
- Curtailments
  - Litigation

## SUSTAINABLE GROUNDWATER MGT ACT



# 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?