

# 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

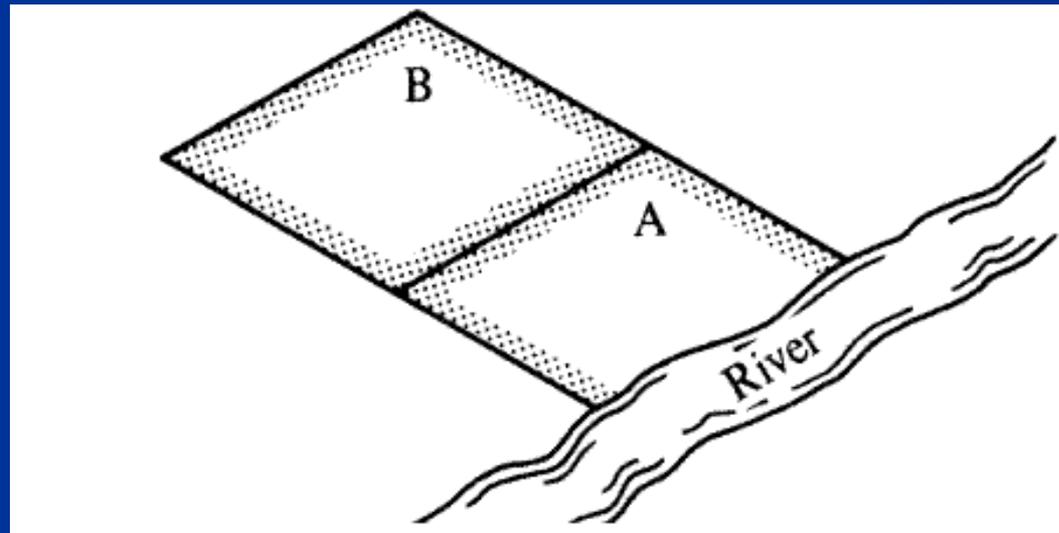
- Rights acquired through **LAND OWNERSHIP**
- Rights acquired through **ACTIONS (USE)**

# 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

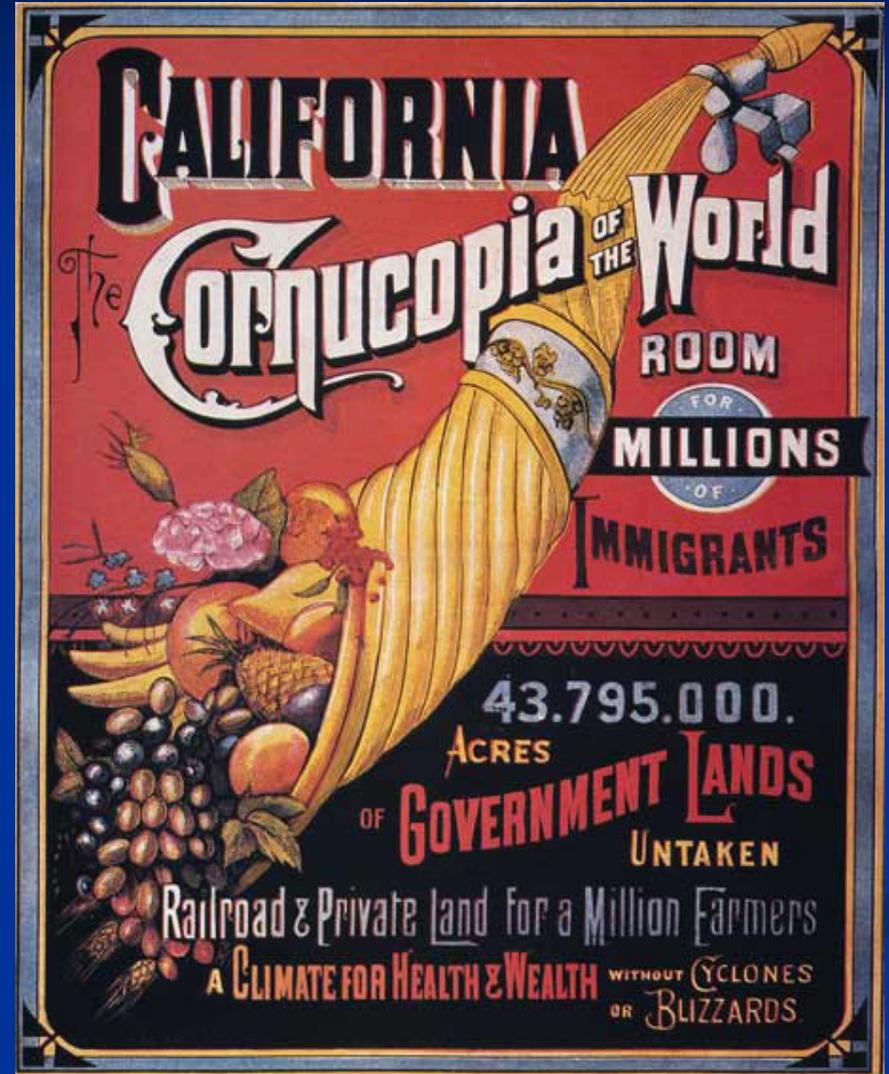
- Land based: Not lost for non-use
- Limited to use on riparian property in watershed
- Limited to **NATURAL FLOW** of watercourse
- **NO STORAGE** (over 30 days)
- Equitable sharing of shortages: **CORRELATIVE**

# 1848-49 Gold Rush

# Cornucopia of the World



Photo courtesy of USGS



Wikimedia Commons

# APPROPRIATIVE RIGHTS

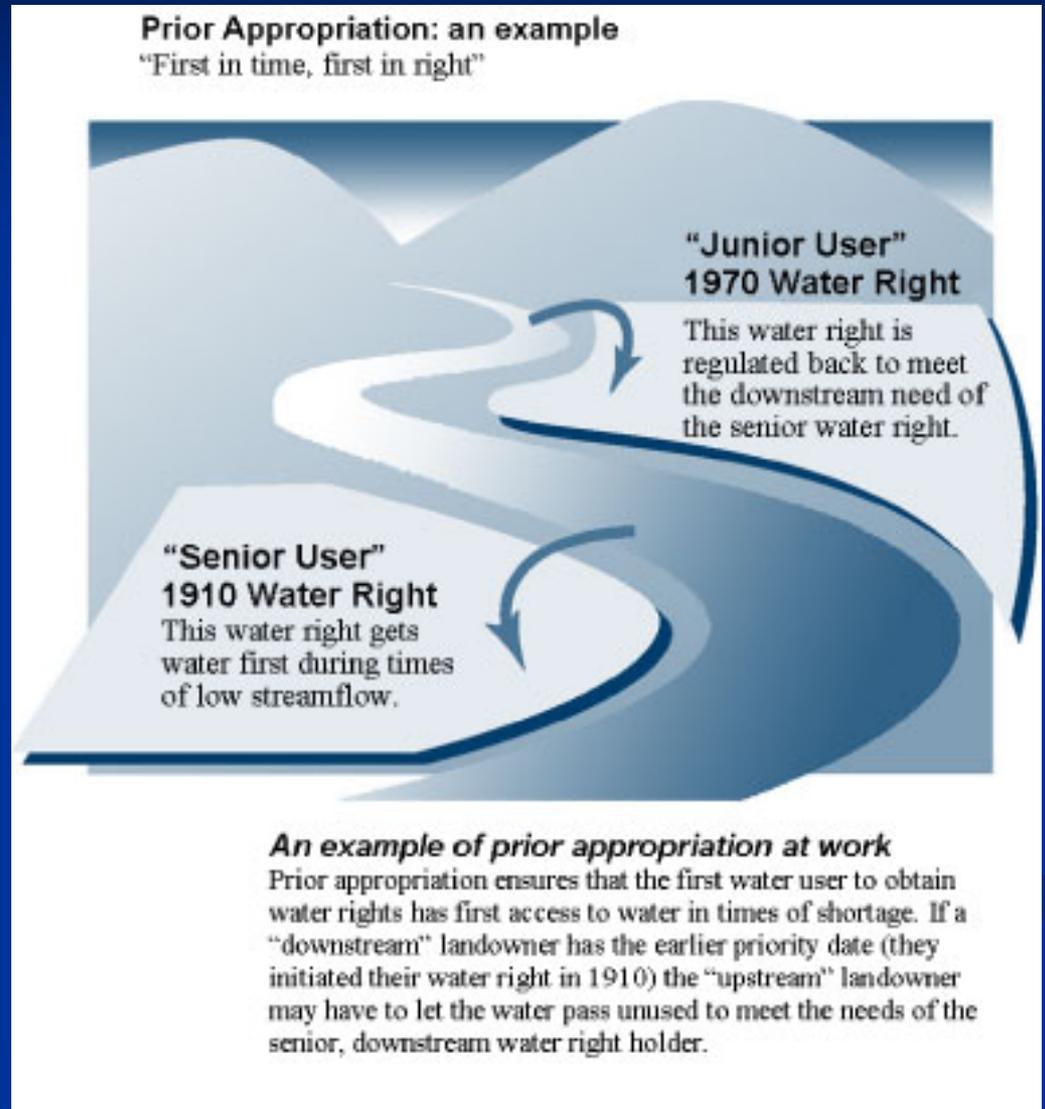
- **BENEFICIAL USE** (not land ownership)
- 5 Years Non-Use = Forfeit (**USE IT OR LOSE IT**)
- **FIXED QUANTITY**
- **STORAGE** allowed – belongs to appropriator
- Shortage: **PRIORITY**

# PRIORITY

First in time  
First in right

■ SENIOR

■ JUNIOR



# 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)



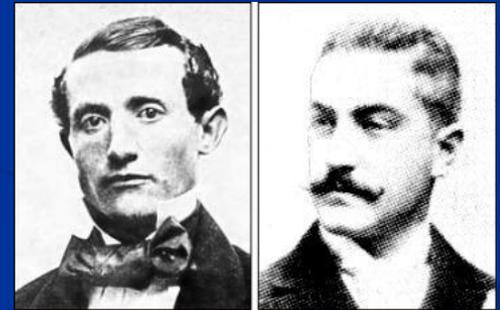
## HYBRID SYSTEM

Riparian & Appropriative

Riparians usually senior as a class

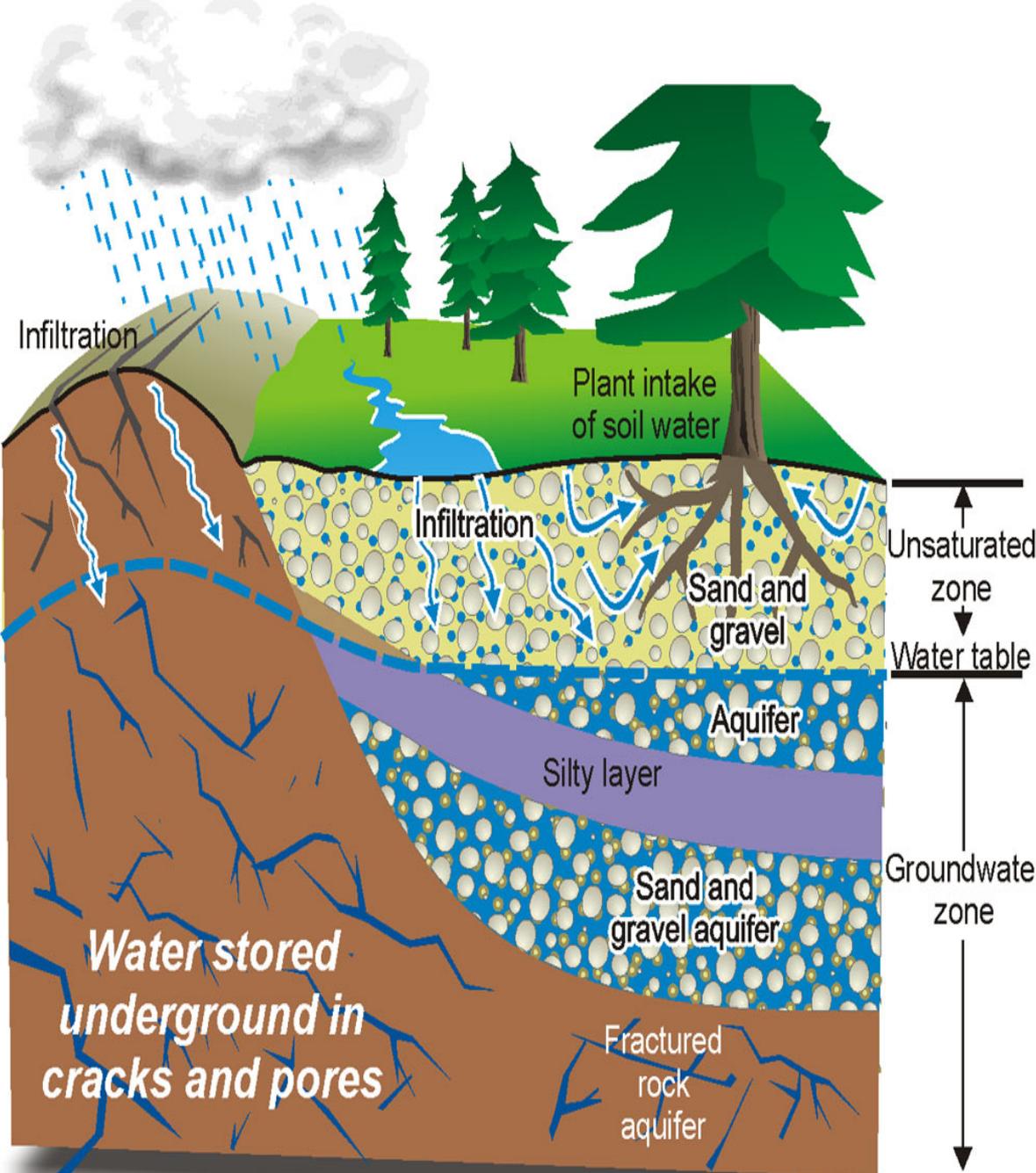
James Ben-Ali Haggin

Kern  
River



Miller & Lux

# GROUND WATER



Graphic: Prince Edward Island Dept. of Environment, Labour & Justice

# 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

## OVERDRAFT & SAFE YIELD

- ADJUDICATION

- **PRESCRIPTIVE RIGHTS**

- SELF HELP

- **COURT DECREE**

- WATERMASTER: post-decree management

# “PERCOLATING” GROUNDWATER

## GROUNDWATER MANAGEMENT

- Local agencies
- County ordinances
- **Sustainable Groundwater Management Act**

# “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”**

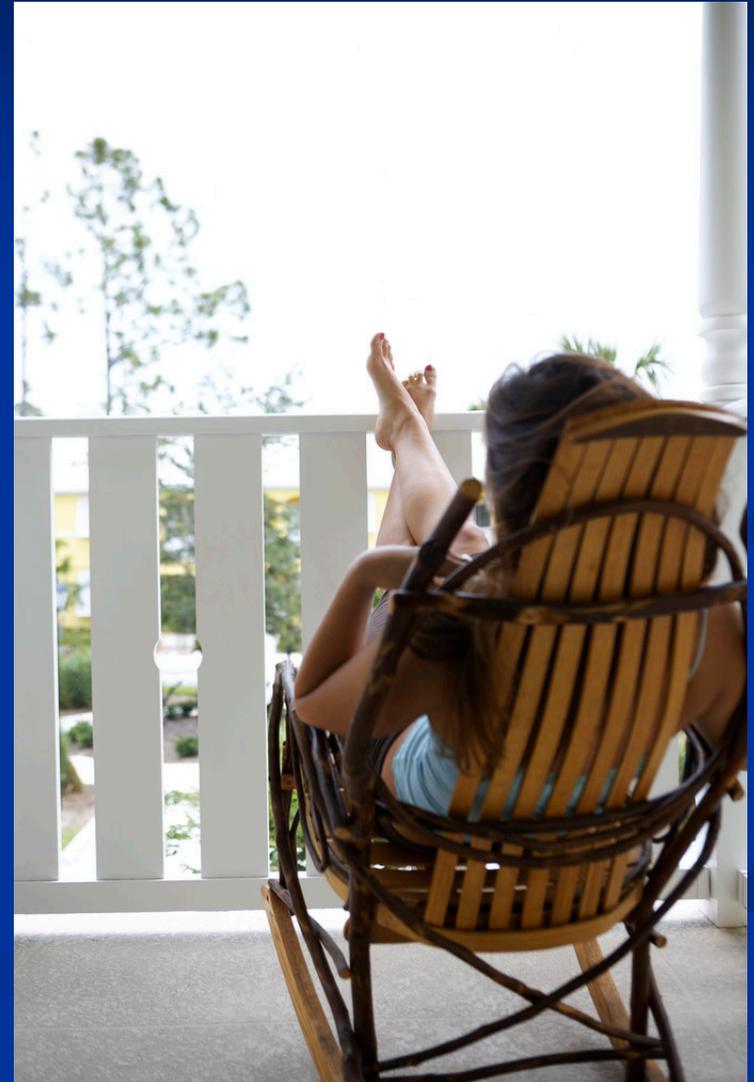
# GOVERNING PRINCIPLES

# 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

# Public Trust Doctrine

## Mono Lake

- Tributaries
- Lake level dropping
- Ecosystem impacts



# 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

## Los Angeles:

- Public trust applies only to navigable waters
- Water rights cannot be changed

## Court:

- Both water rights & public trust must be accommodated
- Public trust applies to non-navigable waters connected to navigable waters

# PUBLIC TRUST DOCTRINE

- **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) (2016)  
Percolating groundwater hydrologically  
connected to protected surface water

# 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 regulatory authority over all rights evolving:

- **Cal. Const., Article X section 2**

- Light v. SWRCB (2014)

- **Enforcement**

- Young v. SWRCB (2013)

- **Public Trust Doctrine**

- ELF v. SWRCB (Scott River case) (2016)

# GOVERNANCE

## 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?