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
- **FRUCUTUARY** = 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**
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
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
“[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

Photo courtesy of visitusa.com
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/Cali. 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?