WATER 101: WATER RIGHTS

Water Education Foundation
February 07, 2019

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The lifeblood of the state
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
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
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
WATER RIGHTS
WATER RIGHTS

PHYSICAL CATEGORIES

- Surface Water
- Groundwater

LEGAL CATEGORIES

- Rights acquired through LAND OWNERSHIP
- Rights acquired through ACTIONS (USE)
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.
“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.”
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

Graphic courtesy of Oregon Department of Water Resources
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
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: includes groundwater

- **Aboriginal rights: time immemorial**
GOVERNING PRINCIPLES & GOVERNANCE
REASONABLE USE
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
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 (2018)
  Scott River
  Hydrologically-connected groundwater
PUBLIC INTEREST
PUBLIC INTEREST

- California Water Code

- State governing principle
  - Allocation of water
  - Terms and conditions of permits and licenses
  - Changes to permits and licenses

- State must consider and value all interests: Environmental, economic, cultural, etc.
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 EVOLUTION

DROUGHT MANAGEMENT

- Information orders
- Conservation requirements
- Curtailments
  - Litigation

SUSTAINABLE GROUNDWATER MGT ACT
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?