“Thousands have lived without love, not one without water.”

-H. Auden
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 & 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

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.
“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
APPROPRATIVE RIGHTS: beneficial use

- Custom: **First in time, first in right**
- Fixed quantity
- Use wherever & allowed **storage**
- No SWRCB permit

WATER COMMISSION ACT (1913)

- State Water Resources Control Board
- **Post 1914 Right** – need permit
PRIORITY

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
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 & Appropriative*
  *After 1914, SWRCB permit

PERCOLATING
Groundwater Law
- Overlying & Appropriative
  - No SWRCB permit
  - Overdraft: Prescriptive Rights

Illustrations: Walt Disney
SUBTERRANEAN STREAM FLOWING THROUGH KNOWN & DEFINITE CHANNEL

North Gualala Water Co. v. SWRCB (2006)

• Must be a subsurface channel
• 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
- **Overlying land ownership:** analogous to riparian
- Use on overlying land, no forfeiture
- **No permit**

Use-based: APPROPRIATIVE
- Use outside the basin or by public agency
- Priority system & “use it or lose it”
- **No permit**
“PERCOLATING” GROUNDWATER

LOCAL AGENCIES

COUNTY ORDINANCES

ADJUDICATION

• Overdraft & Safe Yield
• Prescriptive Rights
• Self-help
• Court Decree
• Watermaster
Sustainable Groundwater Management Act

- Local management with state backstop
  - Groundwater Sustainability Agencies
  - Groundwater Sustainability Plans
  - Sustainable Yield
  - If fail, SWRCB action
    - Still no permit
- 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
  • Adair/Baley 2019
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

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

• **EQUAL FOOTING:** CA acquired bed & banks of navigable waters & tidal waters at statehood

• Title to navigable and tidal resources impressed with “public trust” obligation

• Public trust values: navigation, commerce, fishing, environmental, recreation, scientific
National Audubon Society v. Superior Court

- Lake level drop
- 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

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?