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Summary of Water Rights in California

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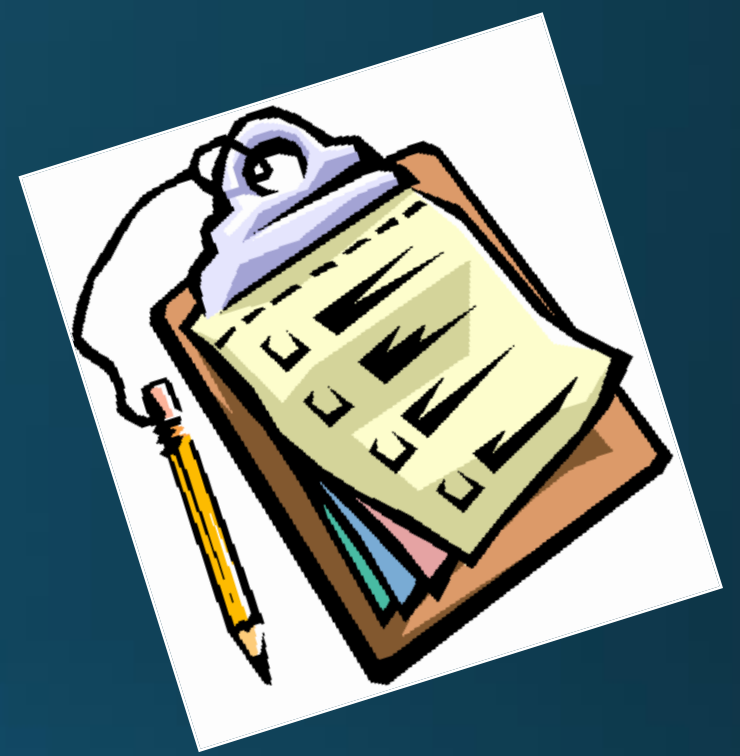
Agenda

Surface Water Rights

1. Riparian
2. Appropriative
3. Shortage

Groundwater Rights

1. Percolating Groundwater vs. Subsurface Flow
2. Groundwater Rights Generally
3. Types of Groundwater Rights
 - i. Pueblo
 - ii. Overlying
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4. Shortages and Groundwater Rights
5. Nonuse and Groundwater Rights
6. SGMA Generally
7. SGMA and Water Rights
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Water Rights Generally

- Water rights are not a possessory ownership right
- A right to use water is more like an option – exercisable only while supplies last
- Water rights holders have the right to “take and use water,” but they do not own the water and cannot waste it (*Central and West Basin Replenishment Dist. v. Southern Cal. Water Co.* (2003) 109 Cal.App.4th 891, 906)



Surface Water Rights in California

- Pueblo Rights
 - Based on succession of Spanish settlement
- Riparian Rights
 - Based on land ownership
- Appropriative Rights
 - Based on water use

Riparian Rights

Requirements:

- Contiguous to a natural watercourse
- Smallest parcel in single chain of title
- Water must be used within watershed
- No application or permitting

Benefits:

- No quantification of right (only limit is that use must be reasonable and beneficial)
- No forfeiture from non-use
- Runs with land

Restrictions:

- Only authorize diversion of natural flow
- No storing riparian water for later use
- No diversion of imported, foreign, or return flows
- Limited to riparian parcel – cannot use on other parcels or transfer rights off the riparian land

Pre-1914 Rights

Requirements:

- Intent to Divert Water prior to 1914
- Actual Use
- Diligent in putting water to beneficial use

Benefits:

- May transfer water without permission from SWB (cannot injure legal water users)
- May store water
- May change characteristics without permission
- Senior to post-1914 rights

Restrictions:

- Defined quantity
- Defined season of use, place of use, and point of diversion
- Forfeiture after 5 consecutive years of non-use
- Claim unless adjudicated

Post-1914 Rights

Requirements:

- Complete application with State Water Resources Control Board
- Water must be available for appropriation (Water Code 1260 and 1275)
- Diligently put water to beneficial use

Benefits:

- Defined attributes of water right recognized by SWB
- May store water
- May change transfer or sell water

Restrictions:

- Defined quantity
- Defined season of use, place of use, and point of diversion
- Forfeiture after 5 consecutive years of non-use
- Must receive permission from SWB before any attributes are changed

Surface Water Shortage

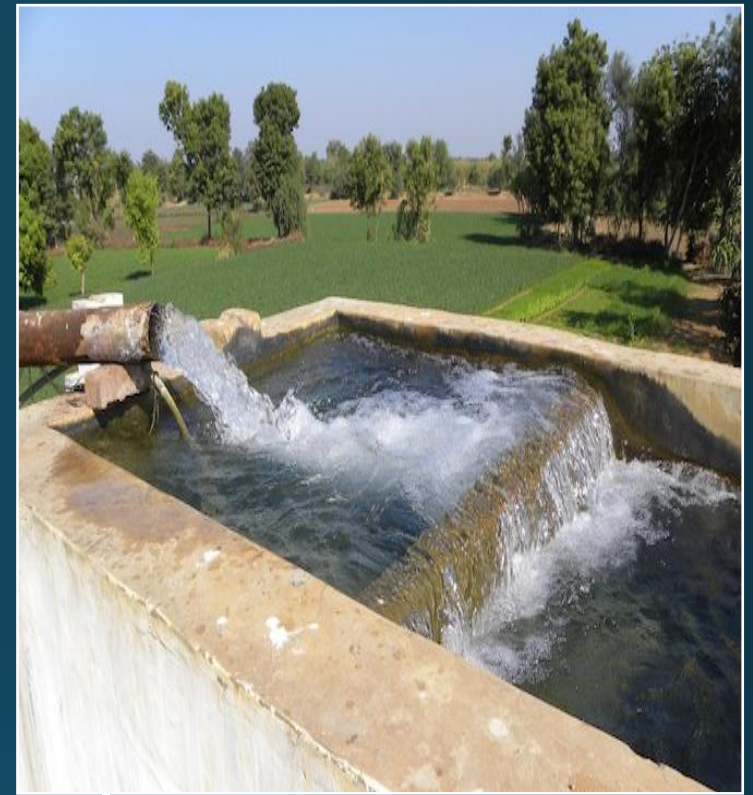
- When there is not sufficient supply to meet demand, shortage is allocated by category
- Pueblo water right holders are senior to riparians
- Riparians are senior to appropriators – all riparian demand is met before providing any appropriative supply
- Shortage among riparians is correlative (pro-rata reduction)
- Shortage among appropriators is by date of priority

Percolating Groundwater vs. Subsurface Flow

- “Groundwater” –is defined as:
 - “[W]ater beneath the surface of the earth within the zone below the water table in which the soil is completely saturated with water, but does not include water that flows in known and definite channels.” (Water Code, § 10721 (g).)
- Subsurface flows includes water that flows below the surface of the ground in known and definite channels. (Water Code, § 10721 (g).)
- Generally subsurface flows are treated as surface water and percolating flows are treated as groundwater – two different systems.

Groundwater Rights

- Four types of groundwater rights :
 1. Pueblo;
 2. Overlying;
 3. Appropriative; and
 4. Prescriptive
- Groundwater rights allow the extraction of common supply; recharge from applied surface water, imported water, and stored surface water are NOT included.
- Limited to reasonable use



Pueblo Rights

- A pueblo right is the right of a local city or local government, as a successor of a Spanish or Mexican municipality, to use water naturally occurring for municipal use (*Lux v. Haggin* (1884) 69 Cal. 255, 328 – 330).
- A pueblo right is the right of the highest priority in the use of native groundwater (*Los Angeles v. San Fernando* (1975) 14 Cal.3d 199, 245 – 55)
- A pueblo right does not attach to foreign water imported from outside the watershed stored within the boundaries of the historic pueblo (*San Fernando*, at 253.)



Overlying Rights

- Ownership of land overlying percolating groundwater provides the landowner with an overlying groundwater right (*Pasadena v. Alhambra* (1949) 33 Cal.2d 908, 925)



Key Distinction: Groundwater is used on underlying land from where it is pumped

- An overlying water right is not quantified, but allows the water right holder to divert as much water as is reasonable to support beneficial uses on the overlying land (*Katz v. Walkinshaw* (1902) 141 Cal. 116)

Overlying Rights – Non-Municipal

- Municipal or public extractions cannot be supported by overlying rights (*San Bernardino v. Riverside* (1921) 186 Cal. 7, at 24 -29.)
- This is so regardless of whether the municipality's boundaries and residents it delivers water to overly the basin it extracts from



Appropriative Rights

- Do not derive from the land ownership but comes from the actual taking or “appropriation” of water (*Pasadena*, at 925.)
- May export groundwater and are not limited to use on lands within a specific area (like overlying rights holders) (*Peabody v. Vallejo* (1935) 2 Cal. 2d 351, 368 – 69.)
- Municipal appropriation, regardless of whether the water is served to customers overlying the basin from which the water is extracted (*San Bernardino*, at 10 – 11)
- The quantity of an appropriative right is based on the amount of appropriative water extracted and put to beneficial use

Prescriptive Rights

- Develops when an appropriator takes water that is not surplus and the extraction is:
 1. Actual, open, and notorious;
 2. Hostile and adverse to the true owner;
 3. Under a claim of right; and
 4. Continues uninterrupted for 5 years (*Pasadena*, at 926.)
- Both overlying and appropriative rights are subject to prescription

Prescriptive Rights – Not During Surplus

- The “adverse” requirement ((2.) on the previous slide) can only be met when a basin is in overdraft (*City of Sana Maria v. Adam* (2012) 211 Cal.App.4th 266,293)
- Importantly, private pumpers cannot obtain prescriptive rights against public entities (*San Fernando*, at 214.)
- Appropriative and overlying water right holders may protect themselves from prescription by engaging in “self-help” (i.e., continuing to extract water during a period of overdraft) (*Pasadena*, at 926.)

Prescriptive Rights – SGMA

- Note: SGMA limits prescriptive rights under limited circumstances
- No groundwater extractions between January 1, 2015 and the date a GSA is adopted or an alternate plan is approved by DWR (whichever is sooner) may be used as evidence of, or to establish or defend against, any claim of prescription (Water Code, § 10720.5(a).)



What Happens to Each Right During...

Shortage?

Overdraft?

Nonuse?



Shortage

- Extractions are limited in order of priority of category
- All pueblo rights are served before any other extractions are allowed
- All overlying rights are served before appropriative
- Appropriative water rights are served after all pueblo and overlying rights are fully supplied

Shortage – Overlying Rights

- During times of shortage, overlying rights are senior to appropriative rights (*Pasadena*, at 926.)
- Amongst and between other overlying rights holders, each is apportioned their “proportionate fair share of the total amount available based upon reasonable needs” (*Pasadena*, at 926.)



Shortage – Overlying Rights – Correlative

- There is no formula for determining proportionate fair share (*Tehachapi-Cummings County Water District v. Armstrong* (1975) 49 Cal.App. 3d 992, 1001)
- To determine each users' proportionate fair share, courts evaluate the following factors:
 - Amount of water available
 - Extent of ownership in the basin
 - Nature of the projected use
 - Area sought to be irrigated
 - Character of the soil
 - Practicability of irrigation
 - Expense of irrigation compared to the projected profit

Shortage – Appropriative

- Appropriative rights are junior to overlying extractors and limited to the quantity of surplus water after all overlying uses are satisfied (*Pasadena*, at 926.)
- Amongst appropriators, the rule during shortage is “first in time, first in right” (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241)
- A prior appropriator is entitled to take all the water he has previously used before a subsequent appropriator may divert water (*Pasadena*, at 926.)



Shortage – Prescriptive

- During shortage, a prescriptive rights holder's response depends on what type of right they prescribed
- Meaning, if a prescriptive water right holder prescribed appropriative rights, then during shortage, they must adhere to the "first in time, first in right" principle
- Alternatively, if a prescriptive water right holder prescribed overlying rights, they must adhere to the "proportionate fair share" principle

Nonuse

Overlying

- Overlying water rights are not subject to forfeiture for nonuse (*Pasadena*, at 933.)
- But, overlying rights are subject to prescription and may be eroded or otherwise lost if prescribed (*Pasadena*, at 925 – 26.)

Appropriative

- Are subject to loss after 5 years of nonuse (*Mojave*, at 1241.)
- Can likewise be lost via prescription

Prescriptive

- Are subject to loss after 5 years of nonuse (*Santa Maria*, at 294.)

SGMA – What is it?

- SGMA requires groundwater management by locals, it is not an adjudication or required physical solution
- SGMA does not establish a groundwater permitting system
- SGMA's purpose is to achieve sustainable groundwater management, which SGMA defines as the avoidance of the following six “undesirable results”
 - Reduction in groundwater storage
 - Lowered groundwater elevations
 - Degraded water quality
 - Seawater intrusion
 - Land subsidence
 - Depletions of interconnected surface water

SGMA - Does it affect water rights?

- SGMA further asserts that “nothing” in this part, or any groundwater management plan adopted pursuant to this part determines or alters surface water rights, under common law or any provision of law that determines or grants surface water rights (Water Code, § 10720.5(b).)
- Finally, SGMA explicitly provides that “nothing” in this part shall be construed as authorizing a local agency to make a binding determination of the water rights of any person or entity, or to impose fees or regulatory requirements on activities outside the boundaries of the local agency (Water Code, § 10726.8(b).)

SGMA – Authority to Limit Extractions

- SGMA provides the State Water Board and GSAs with the authority to limit groundwater extractions under certain circumstances
 - GSAs are authorized to “control” groundwater extractions by “regulating, limiting, or suspending” extractions from individual groundwater wells or extractions from groundwater wells in the aggregate (Water Code, § 10726.4(a)(2).)
 - State Water Board imposed interim plans may include “restrictions on groundwater extraction” (Water Code, § 10735.8(c)(1).)

State Water Board Enforcement

- Three triggers for SWB enforcement:
 - No GSA by June 30, 2017
 - No GSP by 2020 or 2022 deadlines (or determination GSP is inadequate)
 - Failure to implement GSP
- Probationary notice
- Probationary hearing (90 days after hearing)
- Reporting requirements and fees triggered - this is by well owner!!
- 180 cure period after hearing
- SWB will develop interim plan

Questions?



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