Water Rights Law

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Spanish Water Law in California

Three main influences on California water law

- Communal ownership by pueblos is similar to collective ownership of water by Californians

- Ownership of river water flowing through a pueblo is similar to the riparian water right

- Requirement that water be used for a beneficial purpose is the foundation of California water law
California Constitution

From Article X, section 5, added in 1928

“The use of all water now appropriated, or that may be hereafter appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law.”
California Constitution

Article X, section 2:

“It is hereby declared that because of the conditions prevailing in this State, the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.”
Spanish Pueblo Water Right

California water law, § 101:

“Right of city as successor to Pueblo – A city, deriving its origin from a pueblo, has right to the waters of a river flowing through the pueblo for municipal purposes superior to the rights of upper riparian owners and the latter cannot assert their subordinate riparian rights in the waters so as to defeat the right of the city to condemn their lands in order to accomplish subjection of said waters to the pueblo needs and uses of the city.”
California Constitution

Explanation of ownership and right to use from Deering’s annotated Water California Code, volume 2, p. 16:

“Water rights in California, whether riparian or appropriative, or prescriptive, are usufructuary, and consist not so much of the fluid itself as the advantage of using it.”

“Usufrunct – the legal right of using and enjoying the fruits or profits of something belonging to another.” Mirriam-Webster Dictionary.
Prior Appropriation Water Right

- Under the old mining tradition from the Gold Rush, miners could divert water they needed from rivers just by posting signs with dates and building ditches.
- They could only take as much water as they actually needed for mining, no hoarding allowed.
- Whoever diverted water first had a superior right to it.
- This was not a law, merely a custom built on mutual need and reciprocity.
- In 1851 it became the law of prior appropriation in California.
- State law of prior appropriation works largely the same way, based on the idea of “first in time, first in right” to water diverted from a river.
- Since 1914 California has required all diverters under this law to file claims with the State Water Resources Board.
Prior Appropriation Water Right

- The timing of a water claim is everything under the prior appropriation law.
- The claim is basically a private property right to use water, not to own water.
- The person who files the earliest claim for water has a right to all of the water legally claimed.
- This claim must be entirely fulfilled before anybody with junior rights in time gets any water at all, regardless of the damage to the junior claimant.
- This water law is crucial for claiming the right to use water in the west because it does not specifically tie water to a piece of land.
- The land using the water can be any distance from the river source.
Prior Appropriation Water Right

- Water cannot be stored for future use under this right, it must be used for some practical purpose or the right is lost.

- Examples of “beneficial use” from Deering’s commentary on California Water Law, §1240, p. 189:
  - Farming
  - Watering of cattle
  - Resort operation
  - Municipal storage to reduce pumping of groundwater
Riparian Water Right

Kinds of riparian lands from Deering’s California Water Code, commentary to §101, pg. 49:

“The right to use water upon adjoining land applies as well to the water of a lake, pond, slough, or any natural body of water, by whatever name it may be called, as to a running stream.”
Riparian Water Right

- Riparian water rights are firmly tied to the property
- Not only must riparian land border or straddle a river, the land must drain into the river as well
- This means water used on the land will drain back to the river from which it was taken
- If this land is subdivided so that a piece no longer borders the river, that piece loses its riparian water right
Riparian Water Right

- Owner of land bordering or straddling a river can take all of the water he or she wants.

- There is no beneficial use requirement here.

- Riparian rights are “correlative” in that all riparian on the same river share the water, taking just their “correlative share” of the entire river.
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*States According to their Legal Approach to Surface Water Rights*
Source: Joseph W. Della Penna, found in *Aqua Shock*, page 111
Discussing Water Rights, A Western Pastime
Reconciling appropriative and riparian water right claims

- All things being equal, riparian claims to water are superior to appropriative claims.
- But this is only true if the riparian claim is older in time than the appropriative claim.
- In a conflict, if the appropriative claim is older than the riparian claim, the appropriator can take all assigned water for beneficial use and the riparian gets everything else.
- If the riparian claim is older, the riparian user can take everything and the appropriator gets nothing.
- Multiple riparians still must share the river with other riparian users regardless of time.
California Water Law

- Riparian claims need not be actually filed with the State Water Board.
- Even appropriative claims made before 1914 do not always need to have claims filed with the Board, but where grandfathered in (assumed to be true) when the licensing process started in 1914.
- Water claims today require significant documentation to file a claim, including an environmental impact statement under the California Environmental Quality Act (CEQA).
- Public entities can condemn private water rights.
California Water Law

- California water code §106.5:
  “It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses.”

- California water code §1460:
  “The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of whether it is first in time.”
Million Acre-Feet of Water Rights

Source: LAO's California Water Primer, page 30

- U.S. Bureau of Reclamation
- Imperial Irrigation District
- Pacific Gas and Electric
- Department of Water Resources
- Southern California Edison
California’s Water is Highly Over Allocated

From Granthem and Viers 2014
The Public Trust Doctrine

• When first created and admitted to the United States, a majority of the states, including California, used the English Common Law, which included the English public trust law.
• Also, when California was admitted to the union in 1850, the law passed by Congress authorizing it included the language “[A]ll navigable waters within the State shall be common highways and forever free, as well as to the inhabitants of such State as to citizens of the United States, without any tax, import or duty thereof.”
• Perhaps it is because these elements of public trust doctrine were incorporated in state law with so much other law that the doctrine was largely forgotten about until Mono Lake.
The Public Trust Doctrine

- In 1892 the U.S. Supreme Court held in *Illinois Central Railroad Company vs. Illinois* that the public trust doctrine had to be recognized.

- The state could not just transfer ownership of common resources into the private hands of a company.

- Illinois, the Court said, had a duty to keep all navigable waterways in good condition so the public might enjoy them.

- Never really clear as what counts as a “navigable waterway” or what responsibilities the state actually has to keep waterways in good condition.
The Public Trust at Mono Lake

- The decisive event was the California Supreme Court’s 1983 decision *National Audubon Society vs. Superior Court of Alpine County*
- The court ruled that the public trust doctrine does apply to all navigable waterways in California and *all of their tributary rivers*
- Without viable tributaries, the main waterway could not be navigable, and it would not be possible for the state to maintain the ecological health of the waterway
- The State Water Resources Control Board is obligated to act to preserve the integrity of all navigable waterways, which is more important than respecting the prior appropriative rights of the LA Department of Water and Power
Regulation of Groundwater?

- The hydrological cycle is almost entirely absent from California’s water law – no recognition of the connection between groundwater and surface water
- Private ownership of groundwater is determined by the notion of “overlying use”
- If you own property overlying groundwater in an aquifer, you can pump as much of it as you want
- A property owner cannot intentionally pump so much that an “overdraft” occurs because that means water under neighboring properties is being taken
- Thus groundwater rights are “correlative” in that every landowner over the same aquifer has the same responsibility not to overdraft (at least not overdraft more than can be naturally “recharged” in a year)
- Other western states have started developing policies of “conjunctive use” where surface water and groundwater are managed together, but not California
Winters Rights for Native Americans

- As a consequence of Winters v. United States (1908), Native American nations can claim water rights for their reservations dating to the time the reservation was created and recognized (often in the 19th Century).
- The claim might extend to all water that the nation could potentially use (“practicable irrigable acres”, but has never been tested in court.
- Some Navajo claim that the Winters decision gives the entire flow of the Colorado River to them.
- Other federal lands may also have similar reserved water rights, but it is legally murky and rarely used.