Water Rights and Water Management

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Water is a Unique Resource Because it is Shared and Transient
Tragedy of the Commons
Too Many Cows = Sad Cows
Solution: Internalize All Costs on Each User
Are Water Rights Property?
Public v. Private

- Right to Use = **PROPERTY RIGHT** Subject to **SUBSTANTIAL** Regulatory Regime

- Duality of **Public Control** Combined With **Private Rights to Use**

- State’s Right is **Not** Proprietary, But Rather Regulatory

- Debate Over Where to Draw the Line? Regulatory Takings, etc.
Complex and Countervailing Objectives

- Reasonable Public Interests v. Private Interests
- Consumptive Demands v. Instream Water Demands
- Appropriate Degree of Legal Certainty and Adaptable Management
Beneficial and Reasonable Use Limitation

Virtually All States Apply Some Form of Beneficial and Reasonable Use Limitation
What is Unreasonable/Non-Beneficial?

- Speculation? Non-Use = Unreasonable?

- Reasonable Efficiency or Optimal Use? (Alfalfa, Golf Courses, Artificial Lakes in the Desert?)

- Harm to Environmental and Other Public Interest Considerations?
Examples of Unreasonable Methods of Use and Non-Beneficial Purposes of Use

- Use of Full Flow of Stream to Maintain Accretion (Sediment Buildup) to Downstream Riparian Land
- Flooding of Fields to Kill Gophers
Three Approaches to Water Law: the Old, the New, and the Ugly

• Riparianism (The Old)
• Prior Appropriation (The New)
• Hybrid (The Ugly): Riparianism and Prior Appropriation
Riparianism
Origins in English Common Law

• Riparian Right - the Right to Divert Water from a Water Body Adjoining Land for Use on Adjoining Land

• Incident of the Rights to the Land (i.e., Part of the “Bundle” of Rights)
Riparian Rights (Overlying Rights)

- Appurtenant to Land; Right to Use Water from Adjoining Water Body
- Traditionally Must be on Riparian Land (Exceptions Apply)
- Reasonable Use
- Rights May be Correlative (i.e., Riparians Share the Supply)
- Right May be Inchoate (i.e., Dormant) - Not Dependent on Historical Use
Criticism of Riparian Rights - The Need for Certainty

- Unrecorded, Unknown Quantity – Can Preempt Vested, Long-Standing Uses
- Uncertainty Deters Long-Term Planning and Investments
- Dormant Rights Impair Administration of Water Rights Because of Uncertainty
- Not Well Suited for Water-Scarce Environments
Prior Appropriation

- Developed in Western Mining Camps Because Riparianism Was Not Well-Suited for Miners (Miners Were Largely Trespassers on Public Lands)

- Perfection of Right Through Posting Notice at Place of Diversion and Commencing Diversion

- Water Disputes Rapidly Escalate
Appropriative Rights

- May Apply to Use Off of Riparian Tract
- Defined by Historical Quantity of Use
- Land Ownership is Irrelevant
- Priority Based Upon First-In-Time, First-in-Right
- May be Forfeited (i.e., Lost) by Non-Use
- May Require State Permit
Riparianism v. Prior Appropriation in CA

- Conflict Between Miners (Appropriators) and Landowners Who Possessed Land Under Mexican Land Grants (Riparians)

- California Supreme Court Addresses the Conflict in Lux v. Haggin (1886)
And the Winner Is ... We Choose Both!!

- Court Reasons that California’s Adoption of the English Common Law Included Adoption of the Riparian Doctrine

- However, Court also Acknowledges Prior Appropriation, but Renders Appropriative Rights “Junior” in Priority to Riparian Rights
California Water Law

- Riparian Rights are First Priority Rights
- Appropriative Rights are Second Priority Rights
- Surface Water Regulated by the State
- Percolating Groundwater Regulated by Local/Judicial Management, if Regulated
• Eastern US – Riparianism (Reasonable Use/Permitting)

• Western US – Largely Prior Appropriation/Permitting (With Notable Exceptions – E.g. CA)
What About Groundwater?

Similar but Separate Law Applies
What is “Groundwater”? 

• **What’s the Issue?** The Demarcating Line Between “Independent” Groundwater and Groundwater That is Surface Water “Dependent” (Feeds or is Fed by Surface Watercourse)

• **Other Terms** - Percolating Groundwater vs. Subterranean Stream; Surface Water Underflow; Groundwater Flowing within Relatively Impermeable Beds and Banks (Known and Defined Channel)

• **What is at Stake?** Who Regulates? Can I Get a Permit? Can I Be Sued or Sue? Other Legal Implications
Difficult Issue Because it Pits Countervailing Interests Against One Another

- Want Certainty to Support Planning and Investment in Water Resources

- Want “Rational” System that Appreciates the Hydrologic Connection Between Surface Water and Groundwater
Percolating Groundwater v. Subterranean Stream

- Percolating Groundwater: Vagrant, Wandering Drops Moving By Gravity in Any and Every Direction Along the Path of Least Resistance
- Subterranean Stream ("Groundwater Flowing in Known and Definite Channel")
  - Subsurface Channel Present;
  - Channel Possess Relatively Impermeable Beds and Banks
  - Course of Channel Capable of Being Known with Reasonable Inference; and
  - Groundwater is Flowing in the Channel
Overlying **Groundwater** Rights: Similar to Riparian Rights

- Overlying Rights to a Groundwater Aquifer Are Analogous to Riparian Rights to a Surface Water Body
- Same Legal Characteristics Apply to Both Forms of Right
Riparian/Overlying Rights

- Appurtenant to Land; Right to Use Water from Adjoining Surface Water Body/Underlying Aquifer
- Use Must be on Riparian/Overlying Land
- First Class Right (Senior to Appropriative Rights)
- Rights are Correlative (i.e., Equal Legal Footing) with Other Riparians/Overlying Owners; Conflicts Between Riparians/Overlying Land Owners Settled Pursuant to Reasonable Use Considerations
- Right May be Inchoate (i.e., Dormant), and Thus is Not Dependent on Historical Use; Only Limited in Quantity by Reasonable and Beneficial Use Criteria
Appropriative Rights to Groundwater

- Like Appropriative Rights to Surface Water
  - Defined by Historical Quantity of Use
  - Priority Based Upon First-In-Time, First-in-Right
  - Can Use Off of Overlying Land
Overdraft...

- The Rules Change . . . Maybe
- Adverse Basin Impacts (e.g., Seawater Intrusion/Subsidence)
- Ramp-Down
- Prescriptive Rights
What is Overdraft?

• Groundwater extractions in excess of safe yield

• Safe Yield is generally calculated as net inflows less subsurface and surface outflows.

• Safe yield defined as “the maximum quantity of water which can be withdrawn annually from a groundwater supply under a given set of conditions without causing an undesirable result.”

• “Undesirable results” – e.g., water quality degradation, seawater intrusion, land subsidence, or uneconomic use of groundwater
“Undesirable Results”

- Substantial Depletion of Supply
- Subsidence
- Seawater Intrusion
- Uneconomic Pump Lifts
- etc.
versus
Court of Appeal - North Gualala

“California’s surface water groundwater classifications “take on an Alice-in-Wonderland quality because the legal categories . . . are drawn from antiquated case law and bear little or no relationship to hydrological realities.”
What is the Effect of Overdraft on Groundwater Rights?

- Overlying Owners Entitled to **Enjoin** Appropriators (Junior Appropriators Reduced/Eliminated First)

- Adversity Commenced for Purposes of **Prescriptive Rights**

- Prescriptive Rights
  - Four Elements (Actual, Open and Notorious, Adverse, Exclusive and Continuous for Five Years)
Figure 6-3
Rights to Groundwater In a Basin That is Not in Overdraft

Surplus groundwater not needed for beneficial uses of overlying landowners can be extracted by appropriators on first-in-time, first-in-right basis.

Overlying land owners share coequally or correlatively for beneficial uses on overlying lands without regard to history or frequency of use.

Figure courtesy of DWR, 2003; modified in 2004.

Figure 6-4
Rights to Groundwater In an Overdrafted Basin

Appropriative rights extinguished; most junior rights extinguished first.

Overlying land owners’ correlative rights are apportioned if no surplus remains after all appropriative rights are extinguished.

Prescriptive rights may develop to allow the former appropriator to continue producing some groundwater if overlying land owners do not bring a lawsuit to diminish/extinguish appropriative extractions within five years of the commencement of overdraft. If prescriptive rights develop, the overlying land owners may be forced to reduce some production to accommodate extractions by prescriptive right holders.
Who Manages?

- State (State Water Resources Control Board)
- Courts, Adjudications, and Watermasters
- Local Public Agency (County or City)
- Special Water District
- Joint Powers Agency
- Groundwater Management Evolving – Often Starts with Reporting and Monitoring
AB 3030

- Allows local agencies to develop groundwater management plan
- Notice and protest opportunity
- Mandatory and permissive plan components
- Powers include (among others):
  - monitor water levels
  - wellhead and recharge protection
  - abandonment and well destruction program
  - mitigate contamination, seawater intrusion, and overdraft
  - assess production assessments
  - replenishment
- May be “usurped” by water right claims
Adjudication

- Declare How Much Total Withdrawals
- Declare and Define Individual Rights
- Establish Basin Management Rules and Regulations
- Establish Governance Structure
Post Adjudication

- Typically Well-Structured Rules
- Watermaster – Often Composed of Stakeholders Board
- Subject to Court’s Retained Jurisdiction
- Clearly Defined Water Rights
- Rights Typically Transferable
Adjudication Challenges

- Can be 100’s or even 1000’s of Parties
- Can take decades
- Can cost $$ millions
Regulatory Restrictions

- What Constitutes Reasonableness/Beneficial Use?
- In-Stream Flow Requirements
- Public Trust Doctrine
- Amendment of State-Issued Permit
- Groundwater regulation
Local Regulation of Groundwater: Permissible and “Too Far”

- Water rights are a form of “property right”
- Special districts (e.g., Soquel Creek Water District) may exercise powers in enabling legislation (e.g., CA Water Code § 31020 et. seq.)
- Greater powers over water served than groundwater use by others
- Cities and Counties may exercise broader “police powers”
- CA Supreme Court has held that management plan must respect water right priorities (Mojave Decision – 2000)
- Management programs that adhere to water right priorities will fare better against legal challenges