

California Water Rights and the Public Trust Doctrine

General:

- The State of California owns all of the water in the state (California Constitution, California Water Code (CWC)).
- In California, rights are usufructuary and pertain to the use of the water, not actual ownership of it (California Constitution, CWC).
- The State Water Resources Control Board is the state agency in charge of administering and allocating water rights.

Appropriative Rights (Doctrine of Prior Appropriation)

- Entitlement is based on actual use of the water and developed from the miners in the 1850's using water on the public domain.
- Appropriative rights may be sold or transferred.
- Rights of appropriators who divert first are senior to subsequent (junior) appropriators.
- Must apply to the State Water Resources Control Board for a permit.
- Approval is based on availability of water, "reasonable and beneficial use" clause (CA Constitution: Article 10, § 2), possession of the water, and priority in appropriation.
- Title can be lost through nonuse.
- Codified in CWC §1450.
- See *Irwin v. Phillips* (1855)

Riparian Rights

- Entitlement stems from the ownership of property abutting a natural watercourse.
- Riparian rights are a facet of English Common Law^[1] which the U.S. adopted following the revolution.
- Entitlement established under the riparian doctrine must only be for use on the riparian parcel.
- Rights are subject to "reasonable and beneficial use" clause.
- Rights are senior to appropriators and correlative with respect to other riparians.
- Title cannot be lost through nonuse.
- See *Hudson v. Dailey* (1909) [re subdivisions of riparian parcel], *Gin S. Chow v. Santa Barbara* (1933) [applied "reasonable and beneficial use" to riparians], *Harris v. Harrison* (1892) [rights are correlative among riparians]

Dual Rights (The California Doctrine)

- Refers to the blending of Appropriative and Riparian Rights
- See *Lux v. Haggin* (1886) [riparian as senior], *Herminghaus v. Southern Edison Co.* (1926) [riparians as subject to "reasonable and beneficial use"]

Pueblo Rights

- Under Spanish and Mexican law, some missions attained status as a municipality to use adjacent sources of water.
- These rights are paramount to all other rights.
- This system only affects a few towns in southern California.

Federal Reserved Rights

- When the United States reserved public domain land for national parks and forests, it implicitly reserved water to support these areas.
- These rights are senior to all state claims
- See *Winters v. United States* (1908), *Arizona v. California* (1963), *United States v. New Mexico* (1978)

Prescriptive Rights (Doctrine of Mutual Prescription or Equitable Apportionment)

- Allows for junior rights holders to immunize themselves from senior rights holders. This is important because in times of water shortage, junior rights holders typically have to give up a larger share of the water.

^[1] Common Law is the precedent set by prior court decisions or case law; the idea of *stare decisis* or "let the decision stand." It was very important in deciding court cases when there was no substantial codified law, as in the U.S. following the revolution.

- Applies the real property common law theory of adverse possession to water.
- Generally means that if you are a junior user and have been openly and notoriously using water adverse to a senior rights holder for a few years, then you have priority equal to him.
- See *City of Pasadena v. City of Alhambra* (1949) [eliminated priorities among appropriators], *City of Los Angeles v. City of San Fernando* (1975) [limited these "prescriptive" rights against public agencies]

Groundwater: Overlying Rights and Appropriative Rights

- Landowners have overlying rights to use groundwater beneath their parcel.
- These rights are correlative with respect to other overlying users for use on overlying land.
- Use on overlying land is paramount to use on non-overlying lands.
- Subject to "reasonable and beneficial use" clause.
- No permit is required and the state has no program for managing groundwater, with exception of adjudicated basins. These adjudicated basins use the courts to resolve disputes and appoint a water master to apportion water. (AB3030 is the only state legislation allowing the formation of groundwater management districts).
- See *Katz v. Walkinshaw* (1903) [applied "reasonable and beneficial use" to groundwater], *California Water Service Co. v. Edward Sidebotham and Sons, Inc.* (1964) [overlying use as paramount]

Public Trust Doctrine (PTD)

- The PTD holds that certain resources are above private ownership and reside in the Trust of government for the benefit of the People. It is the duty of government to administer these resources to the highest public interest.
- Originally, the PTD only applied to the protection of fishing, navigation, and commerce on waterways.
- Oldest "environmental" law with roots in the Institutes of Justinian Book 2, Div. 1 (535 A.D.)
- 1. *By the law of nature these things are common to mankind--the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings which are not, like the sea, subject only to the law of nations.*
- 2. *All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.*
- Adopted by English Common Law
- Upon Signing Declaration of Independence the U.S. adopted English Common Law where consistent with the Constitution of the U.S.
- Found generally in the "Commerce Clause" of the U.S. Constitution Article 1, Sect. 8; and Title 33 US Code
- Interpreted in Supreme Court Decision *Illinois Central Railroad v. State of Illinois* of 1886 (146 U.S. 387)
- Quoted in the case is Chief Justice Taney from *Martin v. Waddell*, "*When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.*"
- The PTD has since expanded in scope to include recreational and environmental benefits, in addition to commerce and fishing.
- The PTD has been expanded in applicability to not only navigable waters, but in some cases to all state-owned lands, fish, and wildlife.
- In California the PTD has taken various forms:
- California Constitution Article 10, § 2, "reasonable and beneficial use" and § 4 regarding navigation
- California Endangered Species Act, California Fish & Game Code, California Water Code
- The PTD also stands alone as a common law principle
- Seminal case was *National Audubon Society v. Superior Court Alpine County* (LA Department of Water and Power, SWRCB, real parties). Suit was brought to limit diversions of streams tributary to Mono Lake. Supreme Court overturned decision in favor of Audubon Society, forcing the SWRCB to amend water rights permits to LA Department of Water and Power. Other cases have cited the Fish & Game Code as grounds to increase flows in streams to protect fish and wildlife (Big Bear Lake and Putah Creek Cases, SWRCB decision WR 95-4).

Further Reading on Water Resources and the Public Trust Doctrine:

1. California Environmental Resources Evaluation System. <http://www.ceres.ca.gov/>
2. Department of Water Resources. [The California Water Plan 160-98.](http://rubicon.water.ca.gov/b160index.html)
<http://rubicon.water.ca.gov/b160index.html>
3. Department of Water Resources. <http://www.dwr.water.ca.gov/>

4. Hundley, Norris. The Great Thirst: Californians and Water, 1770's-1990's. University of California Press: Berkeley, 1992.
5. Lazarus , Richard J. "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine," 71 Iowa 609, 1986.
6. Sax , Joseph L. "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. L.R. 473 1970.
7. State Water Resources Control Board. <http://www.swrcb.ca.gov/>
8. Water Education Foundation. Layperson's Guide to Water Rights Law. <http://www.water-ed.org/>