

# California Water Rights

**Maria E Milanes-Murcia and Samuel Sandoval-Solis**

## **I. Introduction**

California has a “dual system,” where both riparian and prior appropriation doctrines apply to water rights. Groundwater is regulated under specific doctrines that are analyzed in this article. Moreover, California’s system also includes in its regulation pueblo rights. It is important to understand that water rights in California are use rights, as water belongs to the state of California. A water right is defined as a property right that permits the use of water; however it does not mean ownership of water.<sup>1</sup>

The State Water Resources Control Board administers water rights and water quality together since 1967.<sup>2</sup> This joint authority allows the Water Board to provide comprehensive protection for California’s waters.<sup>3</sup> The Water Board ensures the highest reasonable quality for waters of the State, and allocates those waters to achieve the optimum balance of beneficial uses.<sup>4</sup> In order to address water rights law in this context, this article briefly reviews California water rights.

It provides the background of surface water rights law in California including appropriative rights, the constitutional requirement of reasonable use, riparian rights, pueblo rights, the public trust doctrine, and Indian water rights. It also provides the background of groundwater water rights law in California addressing underflow of surface streams and percolating waters. Finally the regulation for surface water and groundwater conjunctive use is studied in this article.

---

<sup>1</sup> California Code of Regulations, Title 23 available at: <http://www.calregs.com/>

<sup>2</sup> State Water Resources Control Board. Water Board’s Structure available at [http://www.swrcb.ca.gov/about\\_us/water\\_boards\\_structure/index.shtml](http://www.swrcb.ca.gov/about_us/water_boards_structure/index.shtml)

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## II. Background of Surface Water Rights Law in California

### A. Appropriative Rights

The doctrine of prior appropriation right originated in California; the rule *first in time, first in right* established that “the first appropriator has the prior right prevailed throughout the mining camps in the Sierra.”<sup>5</sup> Since mining times, prior appropriation was connected to a specific quantity of water, the characteristic that most distinguishes it from riparian rights.<sup>6</sup> “The person who first appropriates water and puts it to a reasonable and beneficial use has a right superior to later appropriators. In water-short years, junior appropriators with low priorities may be barred from exercising their rights in order to satisfy the rights of earlier, senior appropriators.”<sup>7</sup>

Appropriative rights were recognized in *Irwin v. Phillips* in 1855.<sup>8</sup> The common law doctrine was codified in 1877.<sup>9</sup> The “common law” elements of prior appropriation are intent, notice and diversion, and the basic element to acquire prior appropriation right is beneficial use.<sup>10</sup> Under the appropriation doctrine, the needs of the appropriator establish the limit of this right.<sup>11</sup> An appropriator “is only entitled to what he needs and when he needs it.”<sup>12</sup> The need of appropriation can also be established according to the capacity of the ditch and the original intention which established the future use.<sup>13</sup>

*The State Recognized Beneficial Uses:*

---

<sup>5</sup> HUTCHINS, Wells A. THE CALIFORNIA LAW OF WATER RIGHTS, 130 (State of California 1956) [hereinafter HUTCHINS 1956].

<sup>6</sup> HUTCHINS 1956 at 132.

<sup>7</sup> Governor’s Commission to Review California Water Rights Law, Appropriative Rights in California (Staff Paper No. 1, at 1-2) (May 1977). “This is true unless an appropriative right is prior to a riparian right or if in a statutory adjudication an unexercised riparian right has lost its priority with respect to all rights currently being exercised.” Ronald B. Robie. The Delta Decisions: The Quiet Revolution in California Water Rights. 19 Pac. L.J. 1111, July 1988 at Footnote 9. In re Waters of Long Valley Creek Stream Sys., 25 Cal. 3d at 358-59, 599 P. 2d at 668, 158 Cal. Rptr at 362 (1979).

<sup>8</sup> 5 Cal. 140 (1855).

<sup>9</sup> 1871-1872 Cal. Stat. ch. 424, secs, at 622.

<sup>10</sup> HUTCHINS 1956 at 130. See also GOULD, GEORGE A., GRANT, DOUGLAS L., WEBER, GREGORY S., CASES AND MATERIALS ON WATER LAW 199 (Seventh Edition, Thomson West, 2005) at 27 [hereinafter GOULD 2005].

<sup>11</sup> HUTCHINS at 134.

<sup>12</sup> *Hufford v. Dye*, (1912) 162 Cal. 147, 159, 121 Pac. 400.

<sup>13</sup> HUTCHINS at 134.

Beneficial uses as recognized in California include the following<sup>14</sup>:

- Aquaculture - Raising fish or other aquatic organisms not for release to other waters.
- Domestic - Water used by homes, resorts, or campgrounds, including water for household animals, lawns, and shrubs.
- Fire Protection - Water to extinguish fires.
- Fish and Wildlife - Enhancement of fish and wildlife resources, including raising fish or other organisms for scientific study or release to other waters of the state.
- Frost Protection - Sprinkling to protect crops from frost damage.
- Heat Control - Sprinkling to protect crops from heat.
- Industrial Use - Water needs of commerce, trade, or industry.
- Irrigation - Agricultural water needs.
- Mining - Hydraulic, drilling, and concentrator table use.
- Municipal - City and town water supplies.
- Power - Generating hydroelectric and hydro-mechanical power.
- Recreation - Boating, swimming, and fishing.
- Stockwatering - Commercial livestock water needs.
- Water Quality Control - Protecting and improving waters which are put to beneficial use.

Since 1914 appropriation requires an application through the State Water Board. Prior to that date, a simply notice with the County Recorder was enough.<sup>15</sup> Today, when an individual is seeking water rights must file an application to appropriate water. The Board issues a “permit” authorizing the applicant to develop works, to take and use the amount of water for beneficial purposes. A license is issued upon the completion of the works and use of the water. At this time, the appropriator gains a priority as of the date of the application.<sup>16</sup>

#### B. The Constitutional Requirement of Reasonable Use

California water rights are subject to the “reasonable use” limitation of the state constitution.<sup>17</sup> This limitation applies to surface and groundwater as well as riparian and appropriative. In order to determine reasonable beneficial

---

<sup>14</sup>Water Code § 13050 (f). Western States Water Laws. California Water Rights Fact Sheet. Available at: <http://www.blm.gov/nstc/WaterLaws/california.html>

<sup>15</sup> Bureau of Land Management (BLM), *Western States Water Laws*. Available at: <http://www.blm.gov/nstc/WaterLaws/california.html>

<sup>16</sup> Craig, *California Water Law in Perspective*, West’s Annotated California Codes, Water, vol. 68, at LXV-CVIII (1971). See also Ronald B. Robie. *The Delta Decisions: The Quiet Revolution in California Water Rights*. 19 Pac. L.J. 1111, July 1988.

<sup>17</sup> U.S. v. SWRCB, 182 Cal. App.3d at 105, 227 Cal. Rptr. At 170-71.

use the facts of each case must be analyzed, considering different factors such as existing circumstances, water conservation and local regulations.<sup>18</sup> California Constitution Article X, Sec. 2 establishes:

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 waters 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. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

### C. Riparian Rights

The California Water Code states that “Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used.” California Water Code § 101. “The riparian doctrine confers upon the owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land.”<sup>19</sup> The extent of lands having riparian status is determined by three criteria: (1) whether the land is contiguous to or abuts the stream; (2) whether the parcel is the smallest parcel held under one title in the chain of title leading to the current owner; and (3) whether the parcel is within the watershed of the stream<sup>20</sup>.

It is a settled principle of California law that the riparian owner has a usufruct in the stream as it passes over his land.<sup>21</sup> The right consists not so much in the fluid itself as in its uses, including the benefits derived from its momentum or impetus. The riparian does not own the water of a stream; he owns a usufructuary right, the right of reasonable use of the water on his riparian land when he needs it.

---

<sup>18</sup> Ronald B. Robie. *The Delta Decisions: The Quiet Revolution in California Water Rights*. 19 Pac. L.J. 1111, July 1988

<sup>19</sup> *People v. Shirokow* (1980) 26 Cal.3d 301, 307, 162 Cal.Rptr. 30, 605 P.2d 859.

<sup>20</sup> *Phelps v. State Water Resources Control Bd.*, (2007) 68 Cal. Rptr. 3d 350 at 116.

<sup>21</sup> *San Francisco v. Alameda County*, (1936) 5 Cal. 2d 243, 246, 54.

Riparian rights as well as every other kind of water right, are limited by reason of a constitutional amendment of 1928 and its construction by the courts to reasonable beneficial use under reasonable methods of diversion and use.

#### D. Pueblo Rights

The origin of Pueblo Water Rights is “the paramount right of an American city as successor of a Spanish or Mexican pueblo to the use of water naturally occurring within the old pueblo limits for the use of the inhabitants of the city.”<sup>22</sup>

When Spain colonized California, it controlled civil pueblos or municipalities, religious missions and military towns. Spanish law stated that water was a common property for domestic use, irrigation, and other purposes.<sup>23</sup> The question of the “nature and extent of water rights” was addressed later under state law and general public law.<sup>24</sup>

The California constitutional amendment of 1928 established that “no one has the right to more water than is reasonably necessary for the beneficial use to be served in no way diminishes the rights of the city as successor to the pueblo.”<sup>25</sup> This allows the use of water to others and ensures enough water for the needs of a city.

#### E. Public Trust Doctrine

The public trust doctrine evolved because of “changing public perception of the values and uses of waterways.”<sup>26</sup> “Public trust easements [were] traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.”<sup>27</sup>

In 1983, the Supreme Court of California ruled that Mono Lake has “public trust values” that must be considered in any decisions about the lake’s water. Water diversions from Mono Lake were reconsidered in light of the Court’s decision, leading to the lake’s ongoing recovery. This Supreme Court decision is

---

<sup>22</sup> HUTCHINS 1956 at 256.

<sup>23</sup> HUTCHINS 1956 at 256.

<sup>24</sup> HUTCHINS 1956 at 257.

<sup>25</sup> HUTCHINS 1956 at 17.

<sup>26</sup> GOULD, 2005 at 534.

<sup>27</sup> GOULD, 2005 at 534 in the case National Audubon Society v. Superior Court 33 Cal. 3d 419.

considered one of the top ten environmental law cases of the 20th century, creating the public trust doctrine as a legal tool to protect natural resources in the United States.<sup>28</sup> “*The public trust...is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands....*”<sup>29</sup> “Water Board has articulated a vision of accommodation which gives it the fullest possible power to allocate surface water, places practical limits on the ability of other parties to invoke these powers, and acknowledges the necessity of permitting continued diversions of water.”<sup>30</sup> This ensures the protection of environmental values and controls the allocation of water according to the needs of each region and area. The doctrine has limited application to water rights in other states beside California.<sup>31</sup>

#### F. Indian Water Rights

The California Water Code establishes the protection of Indian Water Rights with the specific goal not to “imperil those rights or in some way breach the special obligation of the federal government to protect Indians.”<sup>32</sup>

### **III Background of Groundwater Water Rights Law in California**

For the purpose of determining rights of use, groundwater in California is classified as (1) definite underground streams and (2) percolating waters. “Groundwater means all water 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 which flows in known and definite channels.”<sup>33</sup> A subterranean watercourse has the same general characteristics as those of a watercourse on the surface. The evidence must show the existence of underground streams flowing in defined channels. “The rules of law which govern the use of similar streams flowing upon the surface of earth are applicable to them.”<sup>34</sup> Therefore, underground stream is subject to vested riparian and appropriative rights.

In addition, under Water Code § 1200 “[w]henver the terms stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such

---

<sup>28</sup> *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 435, 189 Cal.Rptr. 346, 658 P.2d 709

<sup>29</sup> *Id.*

<sup>30</sup> GOULD, 2005 at 544. *See in general*, Weber, Gregory S., *Articulating the Public Trust: Text, Near-Text, and Context*, 27 Ariz. St. L.J. 1155 (1995).

<sup>31</sup> GOULD, 2005 at 544.

<sup>32</sup> California Water Code § 31175

<sup>33</sup> Under California Water Code § 10752

<sup>34</sup> *Hanson v. McCue*, (1871) 42 Ca. 303, 308.

applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels.” These rights may be acquired by appropriation.

In addition, a definite underground stream is subject to the riparian rights of contiguous lands.<sup>35</sup> Riparian owners have a correlative right to take a proportional share of the water of the stream. The burden of proof is upon the plaintiff. The presumption is that the water is percolating if the movement of groundwater is not defined and known.

#### A. Underflow of surface streams

The underflow of surface streams is the subsurface portion of a watercourse. In this case, rights of use are governed by the law of watercourses. Therefore, those who hold rights to the surface flow of a watercourse have corresponding rights to the underflow. The law applicable such a case will be riparian doctrine and prior appropriation.

#### B. Percolating waters

In California percolating waters have been defined in the common law as “vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance.”<sup>36</sup> The definition includes “a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet’ or outlets.”<sup>37</sup>

It is essential to the nature of percolating waters that they do not form part of the body or flow, surface or subterranean, of any stream. They may either be rain waters which are slowly infiltrating through the soil, or they may be waters seeping through the banks or bed of a stream which have so far left the bed and the other waters as to have lost their character as part of the flow.<sup>38</sup>

---

<sup>35</sup> *Prather v. Hoberg*, (1944) Ca. 2d 549, 557-562.

<sup>36</sup> *Los Angeles v. Hunter*, (1909) 156 Ca. 603, 608, 105.

<sup>37</sup> *Eckel v. Springfield Tunnel & Development Co.*, (1927) 87 Ca. App. 617, 622, 262.

<sup>38</sup> *Vineland Irr. Dist. V. Azusa Irrigating Co.* (1899) 126 Ca. 486, 494, 58.

This definition demonstrates the essential consideration that percolating water shall not constitute part of a definite underground stream.<sup>39</sup> In addition, it is interesting to keep in mind that “overlying pumpers are not under an affirmative duty to adjudicate their groundwater rights, because they retain them by pumping.”<sup>40</sup> An overlying owner can pump without adjudication of groundwater rights; however, the use of water must be done in a reasonable beneficial use of the water in connection with the owner’s overlying land. The right of each owner is equal and correlative to the rights of all other owners similarly situated.<sup>41</sup> This implies that “one must so use his own rights as not to infringe upon the rights of another.”<sup>42</sup>

#### **IV. Conjunctive use**

The Water Code expressly addresses conjunctive use and beneficial use. The California Water Code, sec. 1011.5 states:

The Legislature further declares that it is the policy of this state to encourage conjunctive use of surface water and groundwater

---

<sup>39</sup> Types of Groundwater Rights. This is a brief summary of groundwater rights in California “In California, water rights involve the right to use water, not the right to own water. While the Water Code implies the existence of groundwater rights, their doctrinal bases and characteristics are essentially the product of the decisions of the courts. There is no comprehensive law in California that determines the right to groundwater. If disputes arise, the courts decide priorities in individual cases considering types of water rights and judicial decisions that have set precedent.

**Overlying Rights** - All property owners above a common aquifer possess a mutual right to the reasonable and beneficial use of a groundwater resource on land overlying the aquifer from which the water is taken. Overlying rights are correlative (related to each other) and overlying users of a common water source must share the resource on a pro rata basis in times of shortage. A proper overlying use takes precedence over all non-overlying uses.

**Appropriative Rights** - Non-overlying uses and public uses, such as municipal uses, are called appropriative uses. Among groundwater appropriators the "first in time, first in right" priority system applies. Appropriative users are entitled to use the surplus water available after the overlying user's rights are satisfied.

**Prescriptive Rights** - Prescriptive rights are gained by trespass or unauthorized taking that can yield a title because it was allowed to continue longer than the five year statute of limitations. Prescriptive rights can only be obtained against private entities. Claim of a prescriptive water right to non-surplus water by an appropriator must be supported by many specific conditions which include a showing that the pumping was actual, open and notorious, hostile, adverse to the overlying user, continuous and uninterrupted for five years, and under a claim of right”.  
[http://www.emwd.org/water\\_service/where\\_water-gwater-rights.html](http://www.emwd.org/water_service/where_water-gwater-rights.html)

<sup>40</sup> *City of Barstow v. Mojave Water Agency*, 5 P.3d 853.

<sup>41</sup> *Katz v. Walkinshaw* (1903) 141 Cal. 116, 74 P. 766.

<sup>42</sup> Ca. Civ. Code, sec. 3514.



supplies and to make surface water available for other beneficial uses.

California Water Code, sec. 1242 also provides that:

The storing of water underground, including the diversion of streams and the flowing of water on lands necessary to the accomplishment of such storage, constitutes a beneficial use of water if the water so stored is thereafter applied to the beneficial purposes for which the appropriation for storage was made.”

This section specifically allows the possibility of storing surface water underground, which is considered a beneficial use. In addition, the right to store water for a later use under an appropriative right is implicit in the water law of California.<sup>43</sup> “The priority of an appropriation exercised by means of a reservoir in the bed of a ravine was sustained as against a later appropriation.”<sup>44</sup> This shows that water when put into beneficial use may be stored in a reservoir.

## **V. Conclusion**

California water law has changed from the days of the first settlers and miners that diverted water in accordance with local custom. Today, California water law establishes a system to allocate water among different users and economic sectors with different “public interest.” This concept public interest implies the analysis of the specific circumstances of each area such as large cities, farming communities, conservation, the needs of environmental uses and the sustainable development of new areas. California water law reflects historical experience as well as the current and future evolutions to cover the needs of the population.

---

<sup>43</sup> HUTCHINS 1956 at 150.

<sup>44</sup> HUTCHINS 1956 at 150. *Rupley v. Welch*, (1863) 23 Cal. 452, 454-457.