

Water Rights 101: An Overview of California Water Law with an Emphasis on Instream Flow Projects



Water Rights

- Background on water law and water rights in CA
- Discussion of specific legal provisions that often apply to permitting of instream flow projects



Water Rights in CA

- Riparian Water Rights
- Appropriative Water Rights

(plus groundwater)



Riparian Water Rights

Basic principle:

All owners of property adjacent to a stream have the right to reasonable use of water from the stream

(or lake)

- Comes from English common law
- Prevailing system in wetter states (eastern US)



Riparian Water Rights

Features:

- Exist through **ownership of land** abutting stream
- Can be put to any **reasonable, beneficial use** on **riparian property**
- All riparian right holders have **co-equal** priority
- Usually have **priority** over appropriative rights



Riparian Water Rights

Limits:

- Limited to use **on riparian land** within watershed (can't transfer)
- Right to **natural streamflow only** (not imported or stored water)
- Can't **store** water for use later in the year (30-day rule)



Riparian Water Rights

Can be lost by:

- Splitting a parcel to **separate land from the stream** (unless rights reserved)
- Signing them away by **contract** (e.g., Delta)
- Can lose priority in a **stream adjudication** (rare)
- But generally **not by failing to use them**



Appropriative Water Rights

Basic principle:

You get the right to use water by **putting it to beneficial use**, regardless of location

- Prevailing rule in more arid states (western US)
- Developed by CA miners/ Mormon settlers



Appropriative Water Rights

- Priority: **first in time, first in right**
- Use must be **reasonable** and **beneficial**
- Limited to **amount** historically used
- **Use it or lose it**: can lose the right due to non-use (more than 5 years)
- Can **store** water if your right says so
- Can **transfer** to another user and/or place, if won't harm other users



Appropriative Water Rights

- Pre-1914: Provide notice & put water to use.
 - Established by court system
- Post-1914: Apply to Water Board for permit



Limitations on Both Riparian and Appropriative Rights

- Water itself **belongs to the state**; the holder has only the right to **use** it
- Use must be a **beneficial use**
- Use must be **reasonable**
- Subject to the **public trust doctrine**



Beneficial Uses

- Domestic
- Irrigation
- Stock watering
- Municipal
- Industrial/ commercial
- Hydropower
- Fish and wildlife
- Frost protection
- Heat control
- More



Reasonable Use

- Depends on circumstances – what is reasonable at one time/place may not be at others
- Classic example: ditch loss
- Water Board can define by rule (e.g., frost protection rule)
- Broad source of WB authority



Public Trust Doctrine

- Rooted in state ownership of water
- Protects streamflow needed to support public uses of navigation/ fishing/ environment
- Water Board: continuing jurisdiction over all water rights to protect public trust
- Legislature: statutes such as § 5937 (dams)



Priority

Who gets water first?

- (1) Riparian rights (co-equal)
- (2) Appropriative rights (in order of seniority)

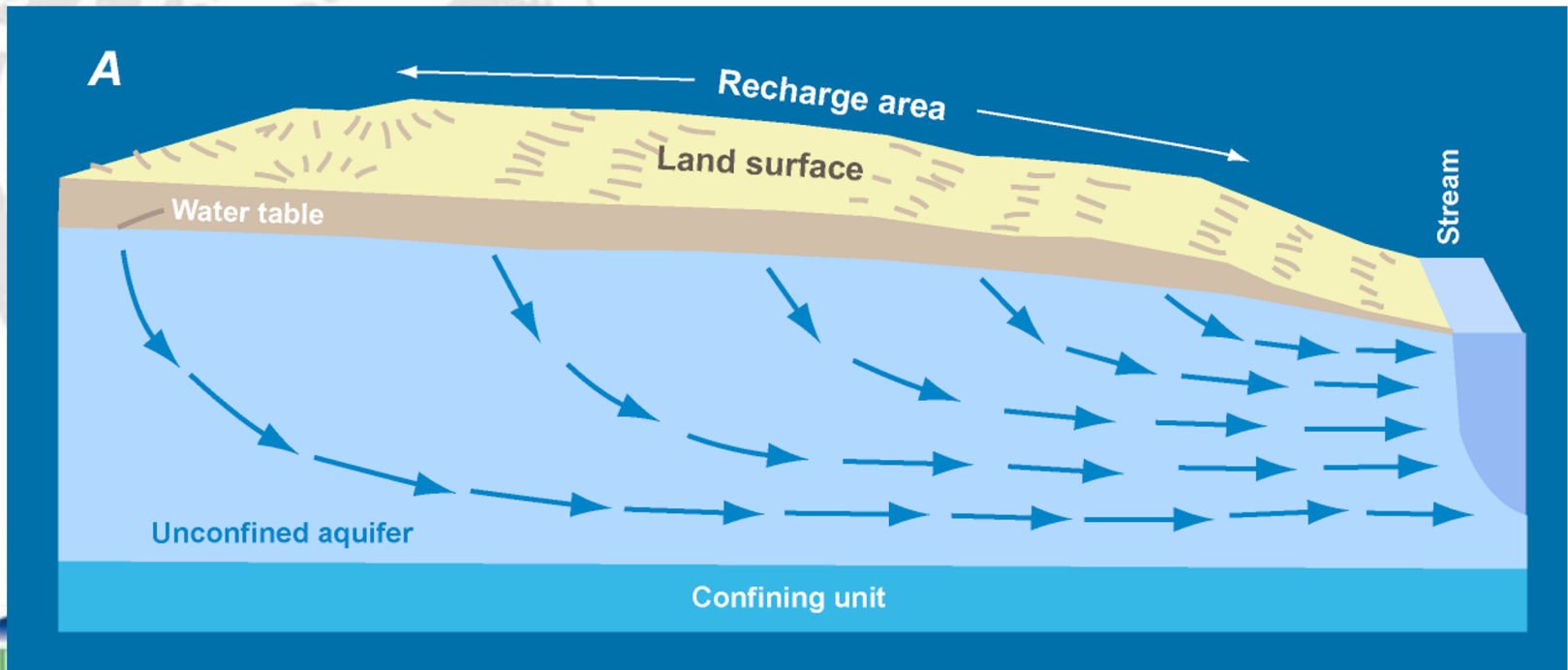
– But –

- Stored water (not available for diversion)
- Public trust doctrine (same)



Groundwater

- CA law presumes it's separate from surface water
- This is not true



Groundwater

“Percolating Groundwater”

- All groundwater not part of a subterranean stream
- Not regulated by the state
- Complex rules for use among neighbors



Groundwater

“Subterranean Streams”

- **Treated just like surface water**
- **Four-part test:**
 - subsurface channel
 - relatively impermeable
 - course/ location can be determined
 - has groundwater flowing in it
- **Often applies to alluvial aquifers**



§ 1707 Dedications

- Can petition the Water Board to dedicate water right to fish/wildlife, recreation, or wetlands, including ISF
- Can dedicate amount of actual, reasonable use – no “paper water”
- Protects against loss of right for non-use
- Must show no injury to other users
- Lengthy permitting process



CA Water Resources Control Board

(a.k.a. “State Water Board”)



Has Jurisdiction Over:

- Permitting & administration of **post-1914** water rights
- **Reasonable use** of **all** water rights, including pre-1914 and riparian
- Protection of the **public trust** with regard to **all** rights, incl. pre-1914 and riparian

Limited Jurisdiction Over:

- Groundwater (of the “percolating” variety)



Adjudications

- Essentially a giant lawsuit among all people claiming water rights in a watershed
- Purpose is to **quantify** all claims (particularly pre-14s and riparians) and establish priority
- Watermaster
- **Can** include instream flows for fish & wildlife, but usually not comprehensive
- Result is a **decree** declaring all rights & priorities



Enforcement

- Watermaster enforces in adjudicated basins
- Water Board can enforce post-14 rights
- Water Board can enact rules providing for enforcement of all rights (including instream flow) – emergency or permanent

