Rewater

A look at California's water issues, from lakes to the ocean coast.

a Redefine blog

NEWSLETTER

Keep in touch with renewable energy and more environmental issues by signing up for our newsletter.

Subscribe to our mailing list

email address

Farmers at Roberts-Union Farm Center, outside Stockton, CA, pore over water use forms in February 2015. | Photo: Emily Green/KCET

BAY AND DELTA

Whose Water Is it, Anyway? California Water Rights, Explained

by Emily Green | April 7, 2015 11:45 AM

BAY DELTA PROJECT

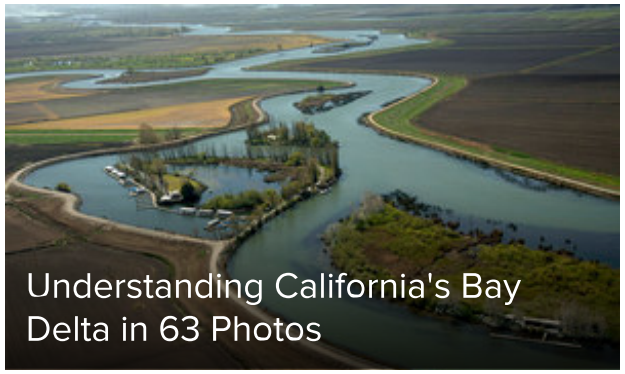
An explanatory series focusing on one of the most complex issues facing California: water sharing. And at its core is the Sacramento-San Joaquin Bay Delta. Stay with kcet.org/baydelta for all the project's stories.

"I have a headache," muttered the man beating a path out of the Roberts-Union Farm Center on a foggy Friday morning in late February. As he jumped into his black Sierra pick-up and peeled down Howard Road toward Stockton, the meeting room he fled remained packed. Inside, the mood was tax-day-bad. Groups of farmers huddled on banquet chairs as they pored over state water-use forms. A March filing deadline loomed. The farmers were being asked to produce proof of property rights dating back to the 19th century. The reason? If their properties adjoin natural rivers or streams in the Sacramento-San Joaquin Bay Delta, an estuary draining half of the state of California's fresh water streams and rivers, they enjoy some of the oldest, and therefore the most generous, water rights in a big dry state.

But what they were asked by the state didn't stop at producing proof of water rights. Regulators have also started requiring something that the farmers argue is impossible: Measuring how much water they use and estimating future use.

To those of us who live in homes in which our every shower and shave amount to clicks on a meter, this may sound absurd. However, for farms on reclaimed wetlands, where the

RELATED ARTICLES



fields are below sea level and irrigation has traditionally been gravity-fed through a network of ditches and streams, metering water is far from standard practice. Indignation at the idea runs so hot, you might as well ask the men and women in the Roberts-Union Farm Center to meter how much air they breathe.

"My dad and grandfather farmed in the 1930s on Union Avenue," said Paul Marchini. "We grow wine grapes, asparagus, wheat, corn, alfalfa. We have 400 acres. This form is basically mandated by the Department of Water Resources. They want to find out how much water I'm diverting. It's really difficult to determine. There's no way I can do that. We've never had to go in and determine how much we had. With riparian rights you can take as much as you have. It's all framed to determine how much so they can reduce, or completely eliminate, our usage in coming years. I firmly believe it's all political, spurred on by users in the Southern part of the state so they can get water that is rightfully ours."

Measure that.

STORY CONTINUES BELOW

Of this every farmer in the meeting hall was sure: Any attempt to regulate them is part of an on-going water grab. That grab began with construction of the first great water export project in the 1930s serving the Central Valley. It reached its greediest pinnacle in the 1960s with construction of the State Water Project serving Southern California. Above all, they believe that access to as much Delta water as they want, when they want it, is their birthright.

Is this true? Could this roomful of farmers squinting suspiciously at forms possibly be immune to calls from state water planners? Can they really be exempt from conservation requirements while 19 million Southern Californians at the other end of the Delta supply line watch their lawns come under scrutiny and face possible water rationing?

CONTACT US

Send us a tip, a press release, clarification, or just say hi.

CONTACT US →

Whose water is it, anyway?

The last question has a short answer. Fresh water in the 31st state belongs to the people of California. However, the longer answer, the one that explains who has rights to the people's water, in what order, for what, in what quantity, and under what terms, does favor this gathering of pioneer stock Californians. What worries them is a question of inviolability. As the paperwork they so vividly resent indicates, those rules are far from fixed. Rather, they are part of a rapidly evolving body of legislation and judicial opinion. If past is prologue, nothing is going to push that canon harder in the coming years as drought.

* * *

Never play Scrabble with a water lawyer. Or, if you do, be wary of challenging "usufruct," a term commonly used to describe a citizen's right to use, but not own, the state's water. How we enjoy this right depends a hybridized priority system whose chafing points give rise to the Us v. Them worldview in the Roberts-Union Farm Center.

Two major strands of California water law have been rubbing each other the wrong way since statehood. As the promise of land and gold drew settlers into Alta California, the doctrine of "prior appropriation" arrived in the Sierra from the intermountain west. Under this system, which was favored by miners, the first person to claim stream flow for a "beneficial use," or in those days basically divert it from nature for human benefit, enjoyed first right. In times of shortage, the last to arrive to a watershed became the first to give up water. The creed was solidified in California case law in 1855: *Qui prior est in tempore, potior est in jure* (he who is prior in time is better in right).

However, just as the 49ers were damming streams and rigging them with flumes to move water to their mining camps, in 1850, downstream in Sacramento, California's first legislature voted a constitution that adopted English common law. Without explicitly decreeing it, this meant that a notionally English (some say Napoleonic) "riparian doctrine" became the rule of water law in California.

Under this, anyone owning land alongside a natural water body enjoyed the right to (beneficially) use it. In times of shortage, riparians would share the shortage equally. As the forbearers of the farmers in the Roberts-Union Farm Center began draining the Delta

and diking their tracts -- many at the meeting date their rights back to the 1870s -- riparian law applied even as dredges erased the very distinctions between rivers (eligible for riparian rights) and irrigation ditches (subject to appropriative ones).

With common law dictating one system, and the constitution validating another, it took only five years after statehood for riparians and appropriators to make it to the Supreme Court of California. The decision in the oft-cited 1855 case Irwin v. Phillips appears to favor prior appropriation. It doesn't. The litigants posing as "riparians" lost because they were squatters, not owners, of the public land they were flooding. "The squatting privilege, we submit, does not retroact, nor does it concede to the sojourner of a day the right to pull down all the mill dams up and down the creek," wrote Justice Solomon Heydenfeldt.

The next time prior appropriation and riparianism met in the Supreme Court of California, a new law had emboldened each of the rival litigants with an epic sense of entitlement. To resolve disputes among appropriators (never mind their issues with riparians), in 1872, the legislature passed a law requiring appropriators to register their diversions with a county recorder and make good on their announced diversions in a timely manner. Among appropriators, the "first in time" rule would apply.

The bigger upshot of an effort to get appropriators to behave themselves? Appropriation was legal. There it was, bang smack in the Civil Code. But while the legislature acknowledged appropriation in the rule books, it did not repeal riparianism, which remained bang, smack (and earlier) embedded in the state constitution.

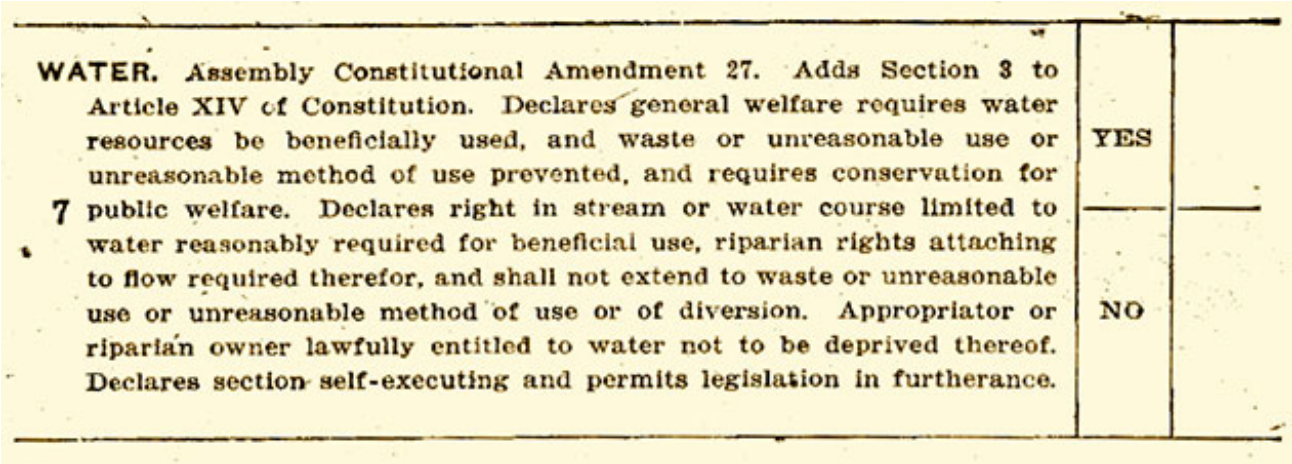
Within a decade, a four-way Charlie Foxtrot between riparians and appropriators over the contents of the Kern River was more than a new supreme court case. Lux v. Haggin was nothing short of an 1880s version of Dallas v. Dynasty. For the riparians were Central Valley cattle barons Charles Lux and Henry Miller. For the appropriators were mining magnate James Ben Ali Haggin and railroad boss William Carr.

Anyone who imagines that the bumper-sticker tenor of today's water disputes is somehow new should read about Lux v. Haggin in historian Donald Pisani's 1984 gem "From the Family Farm to Agribusiness: The Irrigation Crusade in California." Rabblerousing for appropriators, Haggin and Carr sponsored rallies as far south as Riverside. These decried riparianism as "repulsive, dangerous and ruinous to California." One speech warned Southlanders, "Let our courts in an evil hour give preference and sanction to this principle

[riparianism] and the spectacle of decadence in Los Angeles and San Bernardino counties inside of five years would be mournful, aye hideous, to contemplate."

In 1886, in a four-to-three decision, the Supreme Court of California ruled for the riparians.

It took forty years for riparians to win so big they lost. A 1926 decision in favor of a Madera and Fresno county riparian farmer named Amelia Herminghaus agreeing that her 18,000 acres in those two counties were legally entitled to very nearly the full flow of the San Joaquin River so incensed voters that, two years later, in 1928, Californians amended the constitution. Article 10, Section 2 was born. This required not only beneficial use but also "reasonable" use of the state's water.



	WATER. Assembly Constitutional Amendment 27. Adds Section 3 to Article XIV of Constitution. Declares general welfare requires water resources be beneficially used, and waste or unreasonable use or unreasonable method of use prevented, and requires conservation for public welfare. Declares right in stream or water course limited to water reasonably required for beneficial use, riparian rights attaching to flow required therefor, and shall not extend to waste or unreasonable use or unreasonable method of use or of diversion. Appropriator or riparian owner lawfully entitled to water not to be deprived thereof. Declares section self-executing and permits legislation in furtherance.	YES NO	
7			

Prop 7 on California's 1928 ballot. To read the argument in favor of this ballot measure, click here.

* * *

The re-plumbing with dams and aqueducts of the third largest state in the country was, by definition, the handiwork of appropriators, who, in spite of having junior water rights to riparians, proceeded after 1928 to behave as if the reasonable use rule was enacted purely to restrain riparians. Having reduced Owens Lake to a salt flat in less than 20 years, by 1930 the city of Los Angles was already raising money to extend its siphons roughly 100 miles north to the creeks feeding Mono Lake. San Francisco tapped the Tuolumne River, Southern California moved on the Colorado River, and the tributaries of the Sacramento-San Joaquin Delta were targeted by first the federal, and then the state government.

But, by the 1970s, like the riparians before them, appropriators won so big they lost.

Appropriators spread water across the state before being held accountable for destruction of the environment under the Public Trust Doctrine. View a larger version of this map by clicking here. | Image: Courtesy California Department of Water Resources

As snowmelt originating in a watershed bordering Oregon began making its way through the State Water Project to a reservoir on the border of the Mojave Desert in Riverside County, in 1970 a Harvard-educated law professor named Joseph Sax suggested in the Michigan Law Review that the courts had the power to protect the country's natural resources in the name of the public trust. The public trust doctrine, an idea dating back to Roman times, was awoken in the spirit of American law. Within 25 years, the city of Los Angeles had lost a tenth of its fresh water supply as the courts, then state regulators, held that its diversions from creeks feeding Mono Lake violated implicit public trust values safeguarding the environment.

Mono Lake public trust decisions between 1983 and 1994 in effect booted Los Angeles into the low-flow era. At the same time, federal Bureau of Reclamation was getting a far harder kick in the pants over impacts of its diversions of Delta water to San Joaquin Valley irrigators. When the Central Valley Project Improvement Act was signed by the President in October 1992, according to lawyer Michael George, it "turned 90 years of federal water policy on its head."

"The process [of exporting water from wet places to dry] was called 'reclamation,'" George said. "Dam the rivers and settle the West. You can look out and say, 'That works.' But the federal government said it no longer makes sense to subsidize that and diverted some water back to the environment. This created hierarchies of public trust, clean rivers, prevention of salt water intrusion, and protection of endangered species."

* * *

To refer to Michael George as a lawyer is an understatement. His proper title is Delta Watermaster. His job, created by the Sacramento-San Joaquin Delta Reform Act of 2009, is to administrate Delta water rights. In other words, anyone plotting to steal water from the group gathered in the Roberts-Union Farm Center would have to go through him.

As wild as the allegations of South Delta farmers such as Paul Marchini sound about the Southland being behind the reporting and estimate requirements, both watermaster George and a spokesman from the Metropolitan Water District of Southern California confirm that there is a kernel of truth to it. Last year Metropolitan did remonstrate to George's predecessor at the State Water Resources Control Board that "project water," that is to say water impounded in mountain reservoirs far upstream for export to Southern California, somehow disappeared from the system in between being released from behind dams and reaching State Water Project pumps in the Delta. Metropolitan asked for an audit. According to George, the complaint is being investigated.

However, the broader intent in holding Delta farmers accountable for how much water they use, George stressed, is so the state can plan how much water it needs any one season to meet requirements now divided between Delta residents, the environment, and exporters. "There are between 1,500 and 2,000 diversions in the Delta," George said. "One thing my office is responsible for doing is inventorying those diversions. The in-Delta users are accurate to talk about how difficult it is to measure those diversions. But it's not impossible. It's not prohibitively expensive. The question is: Should we do it?"

Rudy Mussi, Roberts Island farmer, stands in front of his alfalfa field to show how excess water that comes in one side of the plot drains out the other. | Photo: Emily Green/KCET

This is far from a silly question. There is an argument to be made (and last February after the Roberts-Union meeting, Delta farmer Rudy Mussi stood out in front of his alfalfa field across from Farm Center to make it), that flood irrigation isn't wasteful when unused water drains out of a field right back into the Delta.

Mussi and Marchini might be surprised by support from their supposed nemesis, Delta watermaster Michael George, the very one investigating Metropolitan claims, when it comes to an incipient notion that driving Delta farmers off the land might somehow save water. A well-managed asparagus field, George said, might just use less fresh water than a wetland whose salinity levels must be controlled with releases of fresh water from upstream reservoirs. Moreover, added George, undrained tracts could easily become freshwater traps.

The conviction of Paul Marchini, Rudy Mussi, and others who gathered at the Roberts-Union Farm Center that regulators are doing the bidding of Southern California is understandable. Direct descendants of the argonauts are being forced into a regulated tent with the very come-lately Southern Californians whose massive project pumps make Delta rivers flow backwards, and who, more than one person noted, have taken to buying Mexican asparagus.

Yet, read the case law that has dictated who gets what of the people's water, and the story is different. Within this tent of Delta water users, to be managed the next four years by Michael George, old riparian v. appropriator lines are somehow blurring. The men and women in the Roberts-Union Farm Center do have superior rights to those exercised by the Metropolitan Water District for 19 million Southern Californians. Delta riparians were first in the state's constitutionally recognized system of claiming water, and first in time in the appropriative one before the State Water Project began pumping Delta water over the Tehachapis. However, that doesn't mean they don't have to provide proof of their rights or meter how much they use.

Meanwhile, given the track record of both riparians and appropriators of winning so big they lost, more modern distinctions stressing the reasonableness of the way we use water and how dear we hold the public trust doctrine are emerging as the more important qualifiers.

And so, as Delta farmers such as Paul Marchini and Rudy Mussi are forced to submit to the indignity of filling out the people's paperwork to enjoy the right to use the people's water, and as Southern California steadily gives up its lawns, we may still resent each other, but we're gradually doing it differently as water law is asking us not what we were, but what we want to become.

Next up in the Bay Delta Project: how a series of government projects, each convened to "save" the Delta, arrived at the initiatives embodied in the Sacramento-San Joaquin Delta Reform Act of 2009.

← The Upside to Cutting Water to L.A. From Mono Lake

About the Author

Emily Green is a science writer based in Los Angeles County. Her work has appeared in the UK Independent, Guardian, New Statesman, New York Times, Los Angeles Times and High Country News. **MORE →**

Follow @chanceofraincom

ADD YOUR RESPONSE

REWATER | REWIRE | REWILD | REVISIT | REDUCE

NHK WORLD TV

KCET.org

Home
Shows
News
SoCal
Arts
Living
Video
Support

About
Education
Schedule
E-News
Donate

My Account
Privacy Policy
Terms of Use
Help/FAQ
Find KCET in Your Area

Press Room
Facility Rentals
Contact Us
Site Map

KCETLink Productions

Artbound
Artbound Presents
Studio A
Border Blaster
City Walk
Departures
Earth Focus
Fine Cut
SoCal Connected