

# CALIFORNIA WATER RIGHTS AND PROCEDURES

Mr. Chairman and members: Your interest in water rights administration is appreciated, especially in view of its close relationship with your Board's responsibilities.

My comments have been prepared to cover the factors outlined by Mr. Hampson, including definitions of the types of rights and procedures for their administration in California including rights to groundwater.

I call to your attention that I cannot speak for the State Board<sup>1</sup> as to policy; therefore, my remarks are primarily based upon existing rules and past actions in this area along with factual considerations stemming from my own experience.

## Definition

A water right may be defined generally as an authorization by society, with specific conditions, allowing a reasonable and orderly beneficial use of its waters.

The specific conditions required so that the right may be exercised in an orderly manner and provide the necessary legal security are a description of the pertinent:

- a. Source of supply
- b. Location of the point of diversion
- c. Purpose of use
- d. Amount reasonably needed for that use
- e. Season of diversion
- f. Priority as against all other rights to the source

The right does not grant ownership of the water itself, but merely to its use.

A reasonable amount of impairment of the quantity and/or quality of the water used has customarily been recognized in California as part of a right for consumptive purposes.

## Dual Doctrine

A dual system of water rights exists in California today. Both the riparian doctrine and appropriation doctrine apply simultaneously. This has been the cause of considerable conflict over rights throughout the State in the past and enters into some questions which we face today.

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<sup>1</sup> Board as used herein refers to the State Water Resources Control Board and its early predecessors consisting of the State Water Commission from 1914 to the mid-twenties, the State Engineer to 1956 and the State Water Rights Board until 1967.

Riparian Right - The riparian right stems out of the common law, it is not defined by statute but by case law. California courts have declared that it attaches to the stream as it was accustomed by nature to flow, undiminished in quantity and unimpaired in quality, subject to a reasonable use thereof by other riparian owners.

A riparian land owner has a right to share in the use of water from a stream, lake or other natural source of water for use on his contiguous land. The right passes with the land. Its existence is not dependent upon use, and in the absence of prescription the right is not lost by nonuse. It may be extinguished by condemnation, grant or contract. It may not be transferred to another parcel of land and no priority over other riparian owners is obtained by reason of an earlier use. The use may be for any beneficial purpose, but must be reasonable in relation to the requirements for use under other rights, both riparian and non-riparian. Shortages are shared on the basis of the reasonable requirements of each owner.

The tract of land to which a riparian right attaches must be within the watershed of the source from which the water is diverted. It must also be the smallest tract retaining contact with the source in any single ownership in the chain of title leading to the present owner. Riparian rights do not generally apply to water flowing in artificial channels nor do they apply to foreign, as distinguished from natural, flows in natural watercourses. The riparian right of a parcel of land is lost when the land is severed from the stream by conveyance unless the right is reserved for the severed parcel.

Overlying Right - The overlying right is similar to the riparian right in all respects except that it applies to percolating groundwater and the land in which it vests is that overlying the groundwater basin.

Appropriative Right - An appropriative right is an exclusive right with a specific priority to a definite quantity of water for a stated beneficial use and is entitled to complete fulfillment before a junior right is entitled to any water. The concept of first in time, first in right, is the essence of the appropriative doctrine.

The right is created by use and is lost by nonuse. The extent of the right is determined by the extent of use. The appropriative right attaches to any unappropriated water present in the source of supply, regardless of the origin of the water. The point of diversion, place of use and character of use may be changed if others are not - injured thereby.

In California an appropriation of percolating groundwater, which includes all water in the ground not flowing in definite channels, can be obtained solely by taking the water and applying it to beneficial use. The right thus acquired applies only to the excess over quantities needed for prior rights, including those quantities needed for beneficial use on the overlying land. An appropriative

right to percolating groundwater is limited by reasonable use and by its priority in the same manner as appropriative rights to water of surface streams. As with appropriative rights acquired prior to 1914, loss of the right may result from a period of nonuse for five years.

Other Rights - Pueblo rights grant-the American city, successor of the old Spanish pueblo, a paramount right to meet the water needs within its boundaries as they expand from time to time up to the full amount of the supply.

Prescriptive rights are only developed by the acquisition of another appropriative or riparian water right through adverse use and therefore do not stem out of a separate right doctrine. Prescription, however, has been the primary catalyst which welds the conflicting riparian and appropriative doctrines in to a single usable system through adjudication.

### History

A brief history of water rights in California will assist in placing our present administration of them in proper perspective.

The Constitution adopted by California was silent in regard to water rights. However, at the first legislative session in 1849, it was enacted that the common law should constitute the rule of decision in cases not otherwise provided for. Riparian rights thereby came into existence.

Miners, who were already in California in large numbers, were appropriators, and large heads of water were conveyed many miles for working gold deposits in other watersheds. Soon the rules and customs of miners, when not in conflict with the Constitution, were recognized by the California Practice Act of 1851 as having the force of law. Thus, the doctrine of appropriation was also adopted.

Miners' appropriative rights developed by trespass on government land were also recognized by Congress in 1866, and in 1872 California first provided for the posting of notice of intent to appropriate and filing it with the County.

The Irrigation District Act of 1896 instigated much water development with a resultant increase in conflicts over water rights.

In 1906, the State Supreme Court rejected the rule of absolute ownership of underground waters and adopted in its stead the law of correlative rights. This doctrine is closely akin to the riparian doctrine, and under it overlying owners may assert paramount rights over appropriators of a common supply unless prescription takes place.

Until 1914, the courts were the only forum in which water rights matters could be administered. The high case load involving water rights led to

the passing of the Water Commission Act in 1914. This Act set up the machinery for assistance to the courts and administration of new rights. These statutes are administered by -the State Water Resources Control Board except for Watermaster service which has been under the Department of Water Resources since it was created in 1956.

### Procedures

Jurisdiction over the determination of all riparian and overlying rights, all appropriations begun prior to 1914, and prescriptive rights lies with the courts.

The Board has sole jurisdiction over the issuance of new appropriations initiated since the Water Commission Act of 1914.

Appropriation of Water - The appropriation laws administered by the Board provide a three-step procedure to perfect an appropriative water right. An application is filed, a permit obtained, and after the project is diligently completed, a license is issued. The general procedure is as follows:

An application to appropriate water describing the proposed project in considerable detail, including the requisite components already defined, is filed with the Board.

After review for completeness, it is accepted and a notice of completed application is issued by the Board and is posted or published by the applicant, opening a 40-day protest period for small projects or a 60-day protest period for large projects, (i.e., over 3 cfs or 200 AFA.)

If protests are received which cannot be adjusted between the parties, a hearing is held. At the discretion of the Board, a hearing may be held on an unprotested application. On small projects, if all parties agree, the matter may be decided on evidence obtained at an informal field investigation.

If an application is approved, a permit is issued. In many cases the permit carries special terms alerting the permittee to special obligations or requirements to protect prior rights. A reasonable time is allowed within which to begin construction of the diversion works, complete the construction and make full beneficial use of the water, which time may be extended upon request and a showing of good cause. Failure to comply with the completion schedule set by the Board may result in revocation of the permit. Annual progress -reports are required to be filed.

When construction and use of water are complete to the full extent contemplated, an engineer from the Board inspects the project and a license is issued confirming a right to such use of water, "both as to amount and season, as has been made under the terms of the permit. The

licensee must file reports on use of water every three years to document the continuing validity of the right.

This procedure is used to acquire a new right to surface water, subterranean streams flowing through known and definite channels and to supporting underflow of a surface stream. The procedure is also the same for the appropriation of surface water to be impressed into the underground for storage and later withdrawal and use. The application in this case, however, must be supplemented with information concerning the works to be utilized for groundwater recharge.

Where applicable, all permits now issued prohibit use of water until the permittee has first obtained the necessary waste permits from the Regional Board or a waiver thereof. There are about 1500 active permits and over 8500 active licenses presently being administered by the Board.

All such permits and licenses are subject to vested rights and therefore can only be exercised after all senior rights are satisfied.

#### Adjudication Assistance to the Courts

Adverse effects of overdraft have been the cause of much litigation in the early history of this State. The court system of pitting two antagonists, while successfully applied to constitutional questions, is not well adapted to the complexity of fact involved in a quiet-title action concerning water rights of up to several hundred claimants. This has resulted in the State adopting a statutory procedure whereby all the surface water rights on a stream system are determined through an administrative process with the Board compiling all the necessary facts as to water supply, and its use, and the claims thereon of all interested persons. Conflicting claims are heard and decided by the Board, which makes a determination describing all the rights to the common source of supply, including their relative right of precedence in the use of the supply. Exceptions to the administrative determination are heard before the Superior Court of the county where the stream system is located and the rights are finally decreed by that court.

The Board can also be appointed referee in matters already before the court. The reference can be made to determine all or any of the issues and facts involved and can also be made in relation to a determination of rights to groundwater in contrast to the existing statutory procedure just described, which with one special exception is limited to surface waters. After investigation, the referee makes its determination in writing and files its report with the court, subsequent to announcing it to the parties in the form of a draft. After hearing any exceptions, the report of the referee is accepted as *prima facie* evidence of the facts it contains.

During the 60 years since the Water Commission Act, the State has participated in over 60 major adjudications involving almost 5000 water rights, including 16 comprehensive stream system adjudications under the statutory procedure, and over 50 court references. Total cost of a comprehensive adjudication, including the State's expenses, court expense, and all legal and technical fees, has been estimated at between one to two percent of the capital worth of rights to groundwater, whereas surface water determinations under the statutory procedure cost from about one-half percent to one percent of the worth of the right. The State's expense varies from almost all of this in the case of a statutory adjudication of surface waters to approximately one-third or less for groundwater determinations. All of the State's direct expense is reimbursed by the water users.

Recently the Legislature revised the statutory adjudication statutes to include consideration of the interconnected ground water in the Scott River adjudication now [1975] underway in Siskiyou County. Also Chapter 2.5 of Division 2 of the Water Code was added in 1969 to help implement the Porter-Cologne objectives. These statutes permit the Board, under certain circumstances, to file an action in the Superior Court to restrict pumping or impose a physical solution as may be necessary in order to prevent irreparable injury to the quality of the groundwater in a basin. In the event the rights have already been determined, or such a determination is pending, the Board's action is limited solely to intervention in such cases in accomplishing its objective.

Before it can proceed on either route, the Board must hold a public hearing on the necessity for the legal action and even if it finds that such necessity exists it may only proceed to undertake a suit if action in the matter is not taken by local agencies.

The Board has given no formal consideration of any basin under these provisions nor has it adopted rules to implement them.

### Physical Considerations

California law recognizes that a physical solution of the water problem is desirable and is in fact necessary for a lasting and efficient determination. The law therefore requires, in addition to the other factual determinations noted below, that all rights, whether stemming from riparian or appropriative doctrine, be defined under a common priority system. The relative priority of such right with respect to all other interrelated rights so established makes distribution of the supply feasible. Prescription is the primary catalyst to accomplish this.

The comprehensive water right determination must be general enough to survive the variations in yield and still be specific enough to enable an intelligent and orderly use of the varying common supply. It must in essence be a description of the owner's share in the safe yield of the supply.

As has been noted, there is inherent in the exercise of a right for consumptive purposes, a reasonable degree of impairment to the water supply including a reasonable diminution of quantity and degradation of quality. The impairment will vary greatly depending on the purpose of use of the water. Under any given set of conditions of water supply development there is a finite limit in the ability, of a water supply system to meet the aggregate use requirements imposed upon it. This limit has been termed the safe yield. Exceeding the safe yield of the water supply system results in a permanently diminished or degraded supply, conditions which are contradictory to an orderly continued use of the perennial supply. A successful system of water rights administration must therefore take cognizance of the safe yield concept and operate within its limits. Due consideration must be given to the fact that the safe yield may vary with development of the supply and variation of conditions used to define it, including integration into regional development. Exceptions to this conclusion of course exist where renewal of the supply is minimal and a consensus has been reached that to mine the supply on a nonrenewable basis is permissible.

Except where the duty of water has been specified by statute, the general policy has been to recognize the existing, locally accepted custom and practice in the use of water, unless it is obviously wasteful. This policy has been applied in defining "reasonableness" in evaluation of the duty of water, water losses, and quality degradation, and has been successful, judging from the very few instances where factual issues have been carried into court in the determination of thousands of water rights.

Information concerning the use of water by the claimant for the past 5 to 10 years is of prime importance in evaluating the magnitude and validity of his right. The longer period is deemed necessary in order to evaluate the mutual prescription right of a groundwater pumper after overdraft under the Raymond Basin theory. Five years of record is desirable where prescription is claimed on a surface water right.

Therefore, in addition to priority the following three factual areas require consideration in order to provide sufficient record for a comprehensive adjudication:

- a. A definition of the common supply.
- b. Past and present-use of water by all claimants. This is, in many instances, the controlling information as to existence and magnitude of the right, particularly where adverse use is involved.
- c. Safe yield of the supply.