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CHAPTER THREE

Types of Water and Water Rights in California

This chapter will discuss the different types of water recognized by law in California and highlight a variety of water rights. There are two types of water with regard to the law: groundwater and surface water. Although there are many different types of water rights, the most common of these rights include riparian, pre-1914 appropriative, post-1914 appropriative, and prescriptive rights. In this chapter we also discuss some additional, less common types of water rights. For additional background on each of these types of water rights, please refer to Appendix A.

To begin, California water law governs both groundwater and surface water resources, but the law treats the two types of water differently.

GROUNDWATER AND SURFACE WATER

Groundwater is governed primarily by common law rather than written law and is not as simple a concept as one might anticipate. Water flowing in a subterranean stream is in fact treated as surface water in California,¹ whereas percolating groundwater is not treated under the surface water rights system.²



This latter type of groundwater is available for reasonable and beneficial use on lands that overlie the groundwater basin. Further, groundwater is considered a local supply and there is little state regulation of its use,³ and consequently a state water right permit is not required for use of this water.



SWRCB REGULATIONS VS. JURISDICTION

The California courts have developed a statewide groundwater law, but it is limited to defining the nature and extent of groundwater rights. The SWRCB can only “regulate” the rights by subjecting water users to the public trust and reasonable use doctrines (see below), though this is not pervasive.

The use of surface water, on the other hand, is subject to state laws and regulations that control its development and use. The SWRCB administers these laws and regulations and oversees and administers various water rights and uses. We will focus our discussion on the rights that are under the jurisdiction of the SWRCB and ultimately describe the procedures required to transfer them.

Beneficial Use

In general, California water legislation requires that water granted to all rights holders be used for beneficial purposes. As mentioned earlier, “beneficial use” can refer to agricultural, mining, urban, industrial, or environmental uses. Over the years, the beneficial status of each of these uses has undergone evaluation to ensure that the state’s scarce and valuable resource serves the highest needs. As a result, some of these uses have been deemed beneficial statutorily, such as for agricultural and urban needs, but also for the environmental preservation of certain designated wild and scenic rivers.⁴

With regard to the amount of water that is granted in a right, the measure of a right in California is equivalent to the amount of water that is diverted and put to beneficial use, which includes losses during conveyance. In some other western states, the measure of a water right is defined by the quantity of water consumptively used by the water right holder.

Reasonable Use

A water right holder is entitled to a “reasonable” amount of water, which not only considers the purpose for which the water is being used but also the relative consumption of the water with regard to other water users in the system. The courts also have allowed a water appropriator in the past to waste a cer-

tain amount of water if it did not significantly exceed the waste that was the “custom of the locality.”⁵ Reasonable use and waste now, however, are based on many factors, including local customs, the amount of water used and wasted by other users in the water system, the right holder’s efficiency of water use, the type of water use (such as agricultural), the availability of alternative sources, the right holder’s ability to conserve, as well as the effects of water use on the environment.⁶

If a right holder conserves some of the water resources granted to him, he could transfer the conserved water to other users in a manner that is consistent with California law.⁷ (See Chapter 8, “Determining the Quantity of Water Available for Transfer.”)

WATER RIGHTS

California has a dual system of water rights that recognizes both riparian and appropriative rights. As mentioned above, there are four main types of water rights that pertain to surface water: riparian rights, pre-1914 and post-1914 appropriative rights, and prescriptive rights.

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Briefly, riparian rights are rights to the “reasonable and beneficial use”⁸ of water on land that is adjacent to a watercourse. Riparian rights do not fall under the jurisdiction of the SWRCB, and the use of riparian water generally is not quantified or documented in other ways. As a result, riparian rights are not good candidates for transfer for environmental purposes.

Pre-1914 appropriative rights refer to rights appropriated by individuals and organizations before the legislature enacted the Water Commission Act of 1913—which established a framework for appropriating water—whereas post-1914 appropriative rights refer to rights appropriated by individuals and organizations after this Act was passed. These rights are treated differently by the SWRCB.

Pre-1914 appropriative rights fall outside the jurisdiction of the SWRCB, while post-1914 appropriative rights fall within the SWRCB’s purview of regulation. Appropriative rights rely upon a “first in time, first in right” rule and contemplate the diversion of water for use on lands that are separated from a watercourse. As these rights are the primary rights available for environmental transfers, this *Water Acquisition Handbook* will focus on them.



Below we offer a detailed description of riparian, appropriative, and prescriptive rights, as well as some other less common water rights. Again, for a more detailed description of each, please refer to Appendix A.

Riparian Rights

A riparian right is the right to use the water from a river, stream, or lake on land that is adjacent to the body of water. Thus, riparian rights attach to land and can be lost if the property's connection to the stream is severed through parcel division.

A riparian right allows the landowner to take as much water as can be reasonably and beneficially used on the riparian property. Riparian owners must, however, share with other riparian owners along the same water body, and they cannot waste water or unreasonably affect public trust resources.

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Riparian rights extend only to water that naturally occurs in the lake or stream, and storage of water for later use is not allowed. Riparian water can, however, be stored and re-regulated as long as this occurs within 30 days. In other words, riparian rights do not extend to water that is "foreign" in time or place, such as water that has been introduced by storage and release upstream, or to water that has been imported from another watershed or water body.

Riparian right holders are not required to obtain a permit from the SWRCB, but most are required to file a Statement of Water Diversion and Use⁹ so that the state can document the use of the water. There is no penalty, however, for not filing this statement and as a result few riparian right holders actually do so.

Riparian rights have priority over appropriative rights.¹⁰ An owner cannot lose a riparian right through non-use and cannot ordinarily transfer the right to another user. Under Water Code section 1707, a riparian user can request that the SWRCB approve a change in use dedicating the right to an instream use; however, there is very little potential for protection of riparian water, and thus this type of transfer is not advised.



Pre- and Post-1914 Appropriative Rights

Appropriative water rights can be applied to both riparian and non-riparian lands, provided that the riparian rights on a given stream are satisfied. Appropriative water may be stored for later use, or held for diversion and beneficial use. So-called "foreign" water may also be stored or diverted under an appropriative right.

Although riparian right holders in a region share equally in an available, naturally occurring water source that is adjacent to their land, appropriative rights are governed by the fundamental maxim of the "first in time, first in right" rule.¹¹ The first person to use the water (the "senior appropriator") acquires the right to its future use against later users (the "junior appropriators"). Additionally, whether an appropriative right was initiated before or after 1914 affects the priority and legal history of the right, and thus the regulation of the right. Before 1914, one could acquire a water right simply by posting an "intent of ownership" and then taking water from the source, or one could exercise control over the water and apply it to a reasonable and beneficial use. This was known as a "common law appropriation." In 1872, the California legislature recognized the doctrine of prior appropriation and provided for a second method of appropriating water, under which an individual could record a Notice of Appropriation in the county where the diversion was located.¹² This method is called a "Code Appropriation," which refers to provisions in the Civil Code that predated the Water Commission Act of 1913.

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There has never been a requirement to obtain permission from any governmental authority to exercise pre-1914 appropriative water rights. However, pre-1914 right holders, like riparian right holders, are now required to file a Statement of Water Diversion and Use with the SWRCB,¹³ and they may not waste water or unreasonably affect public trust resources. Furthermore, unlike riparian right holders, an appropriative right holder can lose pre-1914 appropriative rights through non-use or abandonment.¹⁴

Holders of pre-1914 appropriative rights may change the purpose of use, place of use, or points of diversion without the approval of the SWRCB. Such changes may not be made, however, if they would cause injury to another legal user of water.¹⁵ The injured water user's recourse, however, would not be through the SWRCB, but through a court action, since, as stated earlier, the SWRCB does not have jurisdiction over pre-1914 rights.¹⁶

In 1914, California's water laws changed to provide for state administration of appropriative water rights by the SWRCB. The new laws established an administrative process for issuing water rights permits and licenses and for requesting changes to already issued permits and licenses. These changes can include altering the place and purpose of use or the point of diversion, as long as they do not injure other legal users of water.

Today, a water user can obtain appropriative rights only by applying to the SWRCB for a permit, stating the intended beneficial use of the water, and publishing a notice to downstream water users informing them of the proposal for appropriating water. If other users object and the applicant and objectors cannot independently resolve the issue, then the SWRCB holds a hearing.¹⁷ (If the amount of water being appropriated is under 200 acre-feet of storage or a 3 cubic feet per second (cfs) diversion, then the SWRCB will conduct a field investigation and issue a decision without a hearing.¹⁸) If the SWRCB approves the application, it issues a water rights permit, which sets forth the conditions under which the water may be appropriated. The applicant must then put the water to beneficial use as prescribed in the permit, and the beneficial use is confirmed with a license granted by the SWRCB.¹⁹

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The priority of post-1914 rights is based on the date the application is accepted by the SWRCB. As with pre-1914 rights, a right holder can lose a post-1914 water right through non-use, except when the non-use is due to the right holder conserving water, using recycled water instead of the rights water, or participating in a larger water use program.²⁰



Prescriptive Rights

To obtain water rights through prescription, the water user must prove the elements of adverse possession of land, namely, that her diversion and application of water were “actual, open and notorious, hostile and adverse to the actual owner, continuous and uninterrupted for the statutory period of five years, and under a claim of right.”²¹

Prescriptive rights originated in the context of conflicts between competing riparian users—where one riparian right holder sought to obtain the right to more than her correlative share of water for five consecutive years by “open and notorious adverse use” of another riparian's right. Courts historically have rejected a water user's assertion of prescriptive rights against riparian rights. In this vein, the court has rejected attempted prescriptions, and in later cases required that the true owner show harm to obtain such an injunction. The law remains that one cannot acquire prescriptive rights in water that is surplus to the riparian right holder's current needs.²²

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For example, although courts have long recognized prescription as a viable method of acquiring water rights,²³ the fairly recent decision in *People v. Shirokow* casts doubt on a user's ability to claim prescriptive rights in the post-1914 appropriation permitting system.²⁴ The defendant in *Shirokow*, although living adjacent to a watercourse called Arnold Creek, could not assert riparian rights because he maintained a storage reservoir on his property, an activity that is strictly prohibited for riparian users. After twice being granted a conditioned permit by the SWRCB under Water Code section 1225 that was not to his satisfaction, he asserted prescriptive rights. The *Shirokow* decision held that unless a user holds riparian, pueblo, or pre-1914 appropriative rights, he needs a permit to divert or use water.²⁵ Shirokow's water use was deemed a trespass. By holding that all post-1914 appropriative rights require the SWRCB's approval, the court seriously questioned the ability to prescribe surface water under the post-1914 permitting system.



OTHER TYPES OF RIGHTS

As mentioned above, there are other, less common types of water rights in California that may be available for environmental transfers, but these water rights often are attached to land and are subject to specific limitations that don't make them ideal candidates for transfer. These include pueblo rights, tribal rights, federal reserved rights, and adjudicated rights. For more information on these rights, see Appendix A, "Summary of California Water Law."

Other types of water rights often are attached to land and are subject to specific limitations that don't make them ideal candidates for transfer.

With this background on surface water and groundwater, and a brief primer on the types of water rights in California, we are now prepared to move forward in describing the process of identifying a water right appropriate for acquisition and transfer, and the steps you will need to undertake to complete such a project.

1. California State Water Resources Control Board, Division of Water Rights, *A Guide to Water Transfers* (draft) 3-1 (1999) [hereinafter *A Guide to Water Transfers*], available at <http://www.waterrights.ca.gov/watertransfer/watertransfer.htm>.
2. *Id.*
3. *Id.*
4. See California Water Code section 106 (Deering 2003), which declares domestic use the highest use of water in the state, followed by irrigation. See also California Public Resource Code section 5093.50 (Deering 2003), which classifies certain California rivers as wild and scenic, and declares the preservation of these rivers the highest and most beneficial use of water.
5. *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 Cal. 2d 489, 547 (1935).
6. CAL. WATER CODE § 100.5.
7. *A Guide to Water Transfers*, supra note 1, at 6-6.
8. Because of a 1928 amendment to the California Constitution, all water in California must be put to beneficial and reasonable use. Article X, section 2 of the constitution provides, in part:

[t]he right to water or to the use or flow of water in or from any natural stream or water course in the 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.

9. CAL. WATER CODE § 5100.
10. The only exception to the seniority of a riparian right over an appropriative right is if the appropriative right predates the patent of the riparian land (obtained from the United States government).
11. *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 925 (1949).
12. CAL. CIVIL CODE §§ 1410-1422 (enacted 1872).
13. CAL. WATER CODE § 5100.
14. *Smith v. Hawkins*, 120 Cal. 86, 88 (1898); *Wood v. Etiwanda Water Co.*, 147 Cal. 228, 233-34 (1905).
15. CAL. WATER CODE § 1706.
16. The reasonable use and public trust doctrines apply to all methods of diversion and all types of water rights. See *In re Waters of Hallett Creek Stream System*, 44 Cal. 3d 448, 473 n.16 (1988); *Peabody v. Vallejo*, 2 Cal. 2d 351, 367, 372 (1935). Further, the SWRCB and the courts have concurrent original jurisdiction to apply the reasonable use and public trust doctrines. See *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 449-51 (1983); *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*, 26 Cal. 3d 183, 200 (1980).
17. CAL. WATER CODE §§ 1225 et seq.
18. *Id.* § 1605.
19. *A Guide to Water Transfers*, supra note 1, at 15.
20. CAL. WATER CODE § 1011.
21. *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 926-27 (1949).
22. *Id.*
23. *Crandall v. Woods*, 8 Cal. 136 (1857).
24. *People v. Shirokow*, 26 Cal. 3d 301 (1980).
25. *Id.*; CAL. WATER CODE § 1201.



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