

# **2023 WATER POLICY ACADEMY**

## **An Introduction to California Water Rights**

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# FREE LAND

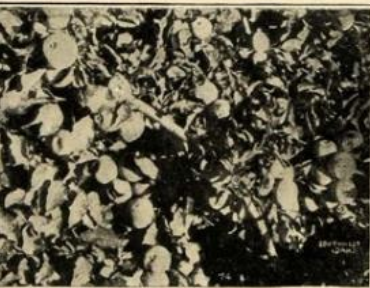
To be had from the Government Under the  
**DESERT LAND ACT**

igation means:

AIN { While the sun shines  
When you want it  
Where you want it  
In quantity to suit



Grain Field, Mountain Home, Idaho



Jonathan Apples, Mountain Home, Idaho

## A PERPETUAL WATER RIGHT

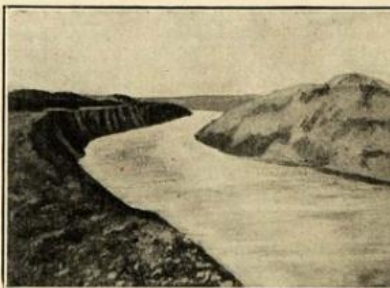
at a reasonable price  
and on easy terms,  
where the soil will pro-  
duce anything grown  
in the temperate zone

For complete information write  
to the Commercial Club  
or the

Great Western Beet Sugar Co.  
Mountain Home, Idaho

or to

The Virtue-Yerkes Co.  
303-4-5-6 Boston Block  
Seattle, Wash.



Large Irrigation Canal, Mountain Home, Idaho

# Water Law Is State Law

*Cal. Ore. Power Co. v. Beaver*

*Portland Cement (USSC 1935)*

- “Long-standing deference to state law”
- **States choose water rights system**

# Tribal & Federal Water Rights

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## **Tribal & Federal *Winters* “Reserved Rights”**

- Tribal or federal reservation of land from “public domain”
- **Implicit water to fulfill primary purpose of reservation**
- Tribal: Permanent homeland (California)
- Priority: **Date reserved from public domain (often senior)**
- Not lost for non-use
- Includes groundwater

**Tribal indigenous rights** – uses prior to reservation

- Priority: **“Time immemorial”**

# CALIFORNIA WATER INSTITUTIONAL FRAMEWORK

# State Water Resources Control Board

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- Cal EPA
- 5-member appointed board
- Full time, 4-year terms
- Represent range of expertise
  - Civil engineer, professional engineer, water quality expert, attorney member, public member
- **Division of Water Rights**
- **Office of Administrative Hearings**

## SWRCB – Division of Water Rights

- **Water right applications, permits/licenses**
  - Changes & transfers
  - Underground storage of surface water
- **Water quality**
- **“Comprehensive planning and allocation of the state’s waters”** - drought management, conservation
- **“Wield the power of the state”** - enforcement

## Courts

- **Appeal from SWRCB decisions**
- **Concurrent jurisdiction with SWRCB over:**
  - Reasonable use and public trust doctrine
  - Unauthorized diversion – rights not requiring permits
  - System-wide water rights adjudications

# Projects

Federal - CVP

State - SWP

Local

The Bay-Delta Watershed and Major Water Projects





# LOCAL WATER SUPPLIERS

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## City Water Department

- Land use agency with police power

## Special District

- Specific public services within defined service area

## Mutual Water Company

- Private company that serves only shareholders
- California Corporations Code

## Investor-Owned Utility

- Private company providing public services
- California Public Utilities Code



# CALIFORNIA WATER RIGHTS

# Dual Property Interests

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Water Code § 102: All water within the State is the property of the people of the State, but **the right to the use of water** may be acquired ... in the manner provided by law



# USUFRUCTUARY

## Full owner v. usufruct

- Usus = use of (right to use)
- Fructus = fruits (right to profit)

Property right but

Subject to power of full owner

State “ownership” is regulatory

- Power to protect public interest

# TYPES OF WATER RIGHTS

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## QUESTION 1 – Physical

- Surface water
- Groundwater

## QUESTION 2 – Legal

- Ownership of land adjacent to (next to) water
- Beneficial use

# SURFACE WATER



# RIPARIAN RIGHTS

# LEGAL ORIGINS

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1848 gold discovered in CA

People came west

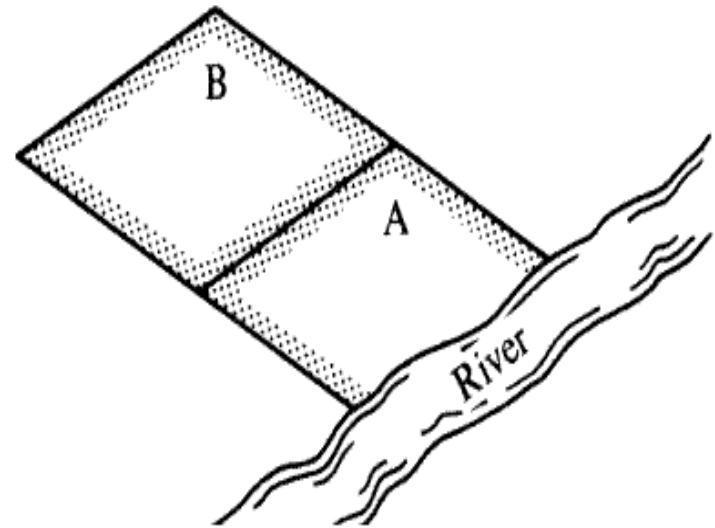
1850 California entered the Union

Adopted English common law

English water rights were **RIPARIAN**

# Ownership of land adjacent to water

- Perpetual right to amount reasonably needed on riparian land
- Deed establishes right: **NO PERMIT NEEDED**





# Riparian Rights

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**NO FIXED QUANTITY:** Reasonable Use

Example: Riparian uses 500 AFY to grow Crop A. Can she switch to Crop B, which requires 600 AFY?

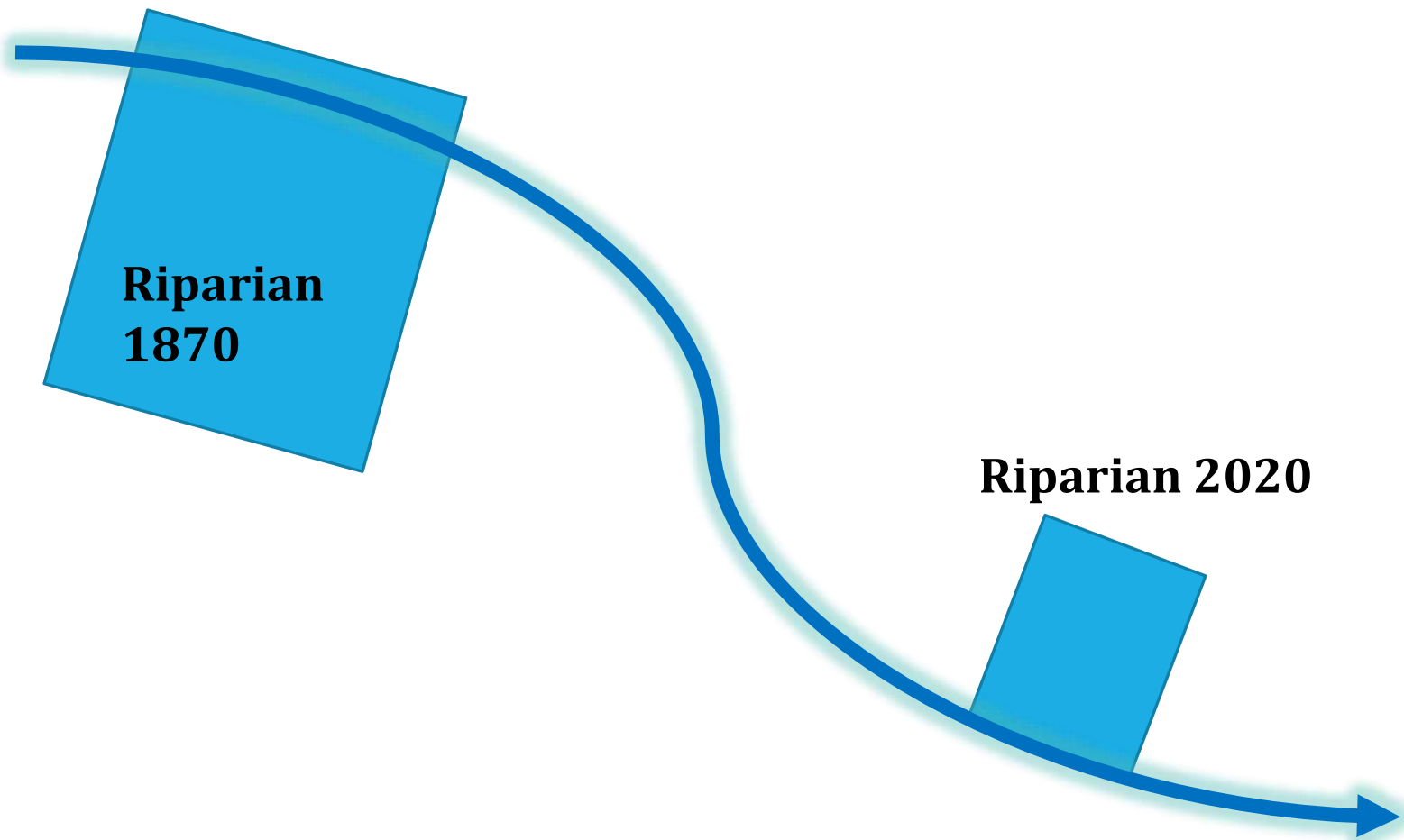
Answer: Yes, without any additional water rights, as long as water is reasonably used, and not wasted.

# Riparian Rights - Elements

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- Natural flow – no storage over 30 days
- Limited to riparian property and source watershed
- Shortage allocation is **correlative** based on reasonable use

# Correlative Allocation = Legally Equal Amounts based on what is **reasonable**



# Reasonable Use

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- No fixed quantity - **reasonable use**
- Multi-factor “reasonable use balancing”
  - Economic, social, environmental, justice, investment, practical solutions (“physical solution”)
  - Value of current use, opportunity cost of water, potential for efficiency, etc.

# Reasonable Use

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- Ancient concept – reflects social value of water
- What is reasonable changes with time and circumstances
- One use can be unreasonable because water is needed for another use with higher social value
- High on fairness and flexibility; low on predictability and efficiency

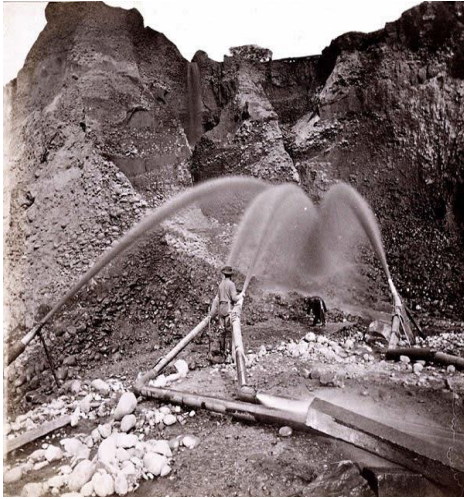


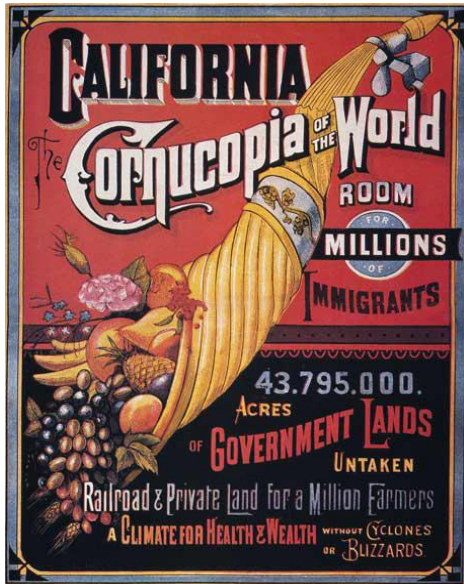
Photo courtesy of USGS

## Miners (1848) and later farmers

No riparian rights

Most land was **public land**

No private land ownership



Wikimedia Commons

Riparian rights **uncertain**

No fixed quantity

Only on riparian land

**No storage in reservoirs**

# PRIOR APPROPRIATION

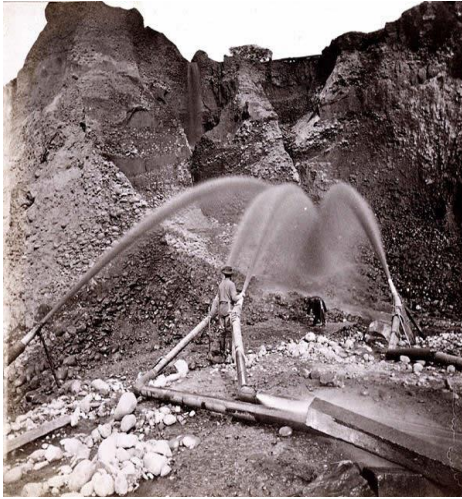
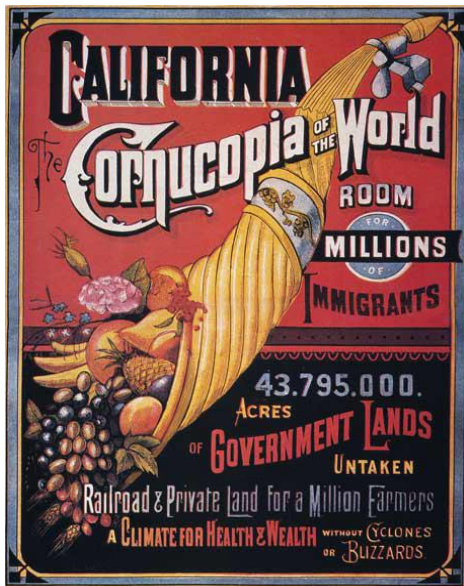


Photo courtesy of USGS

**Miners (1848) and later farmers**  
**No riparian rights**

**Most land was public land**  
**No private land ownership**



**Riparian rights uncertain**  
**No fixed quantity (reasonableness)**  
**Only on riparian land**  
**Only in riparian watershed**  
**No storage in reservoirs**



# COMMON LAW APPROPRIATIVE RIGHTS

# Appropriative Rights



Public Domain: Wikimedia  
Commons

## Irwin v. Phillips, 1855

- Beneficial use
- Priority: *first in time, first in right*
  - Senior - 1911
  - Junior - 1950
- Use anywhere
- Store in reservoirs
- *Use it or lose it*

## Lux v. Haggin, 1886

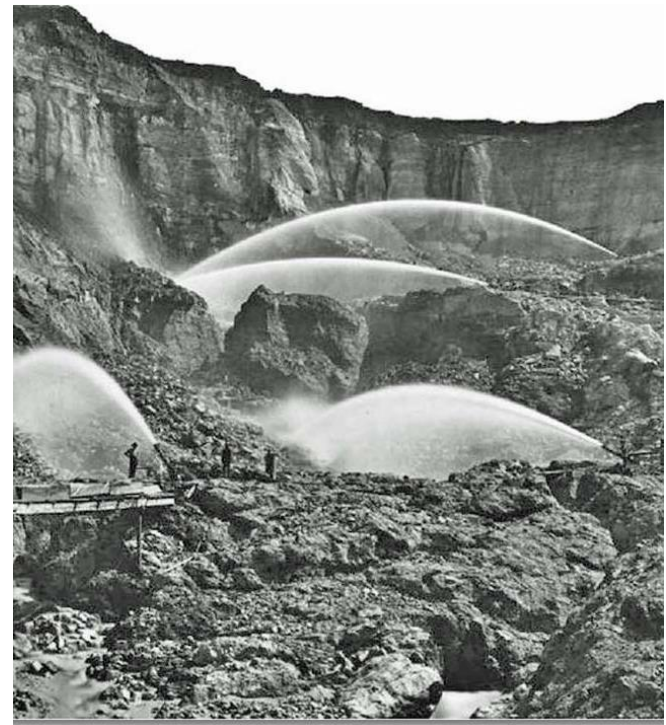
- Retained riparian rights

# Appropriative Rights = **Prior** Appropriation

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## Priority

- Project
- “Plan of development”
- First overt act = intent and notice
- **Progressive Development with Due Diligence**
- Priority date relates back to first overt act



# Common Law

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**INTENT:** First act toward appropriation - **Priority Date**

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**DIVERSION:** project is constructed with **Due Diligence**

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**BENEFICIAL USE:** diversion, use with **Due Diligence**

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Water right seniority “relates back” to **Priority Date**

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Right is amount beneficially used

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# Appropriative Rights = Prior Appropriation

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*Default – between users*

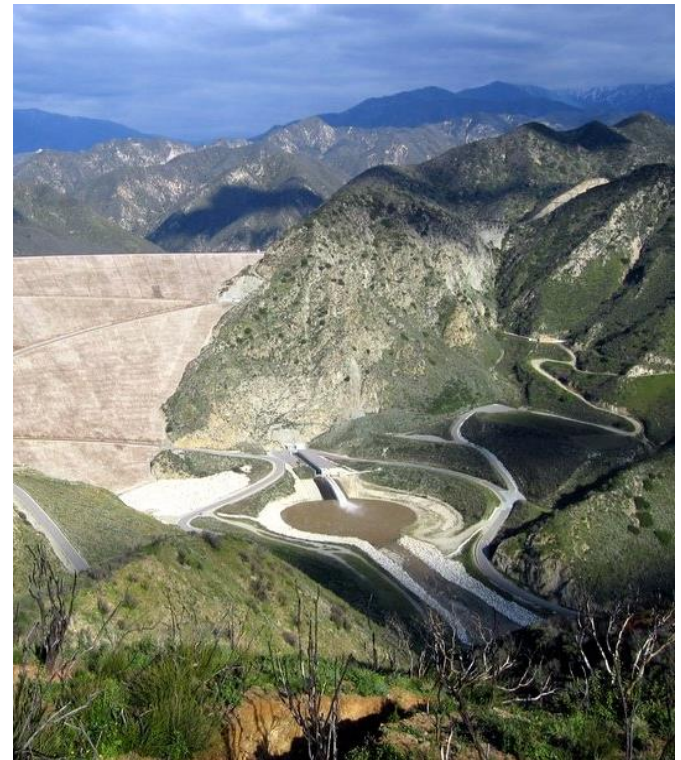
## Priority

- First in time, first in right
- Investment

*Policy – big picture*

## Maximum beneficial use

- Maximize social value of scarce water resource



PRIOR APPROPRIATION

POST-1914  
PERMIT SYSTEM



# Water Commission Act of 1913

State Water Resources Control Board

- **“Post-1914 right”** – permit needed
- Otherwise, same principles

Existing common law rights still valid

- **“Pre-1914 right”** - no permit
- **Riparian right** – no permit

California’s Progressive former governor, George Pardee  
Head of 1911 Conservation Commission

# Post-1914 Water Right Process

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**INTENT:** File application - **Priority Date**

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Water availability and public interest analysis

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Permit issued (inchoate right)

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**DIVERSION:** project constructed by date in permit - **Due Diligence**

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**BENEFICIAL USE:** diversion, use by date in permit - **Due Diligence**

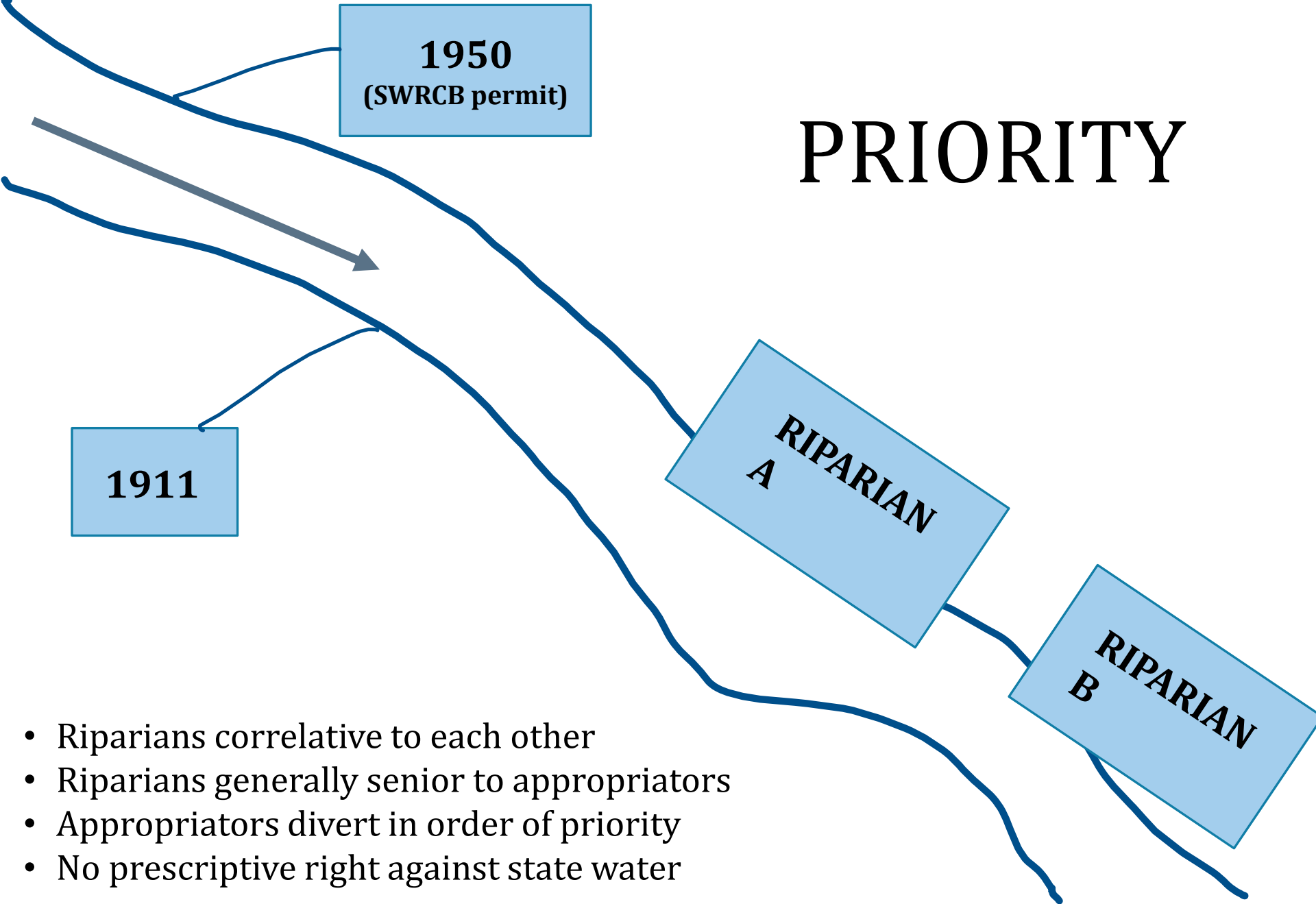
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License is issued for amount beneficially used

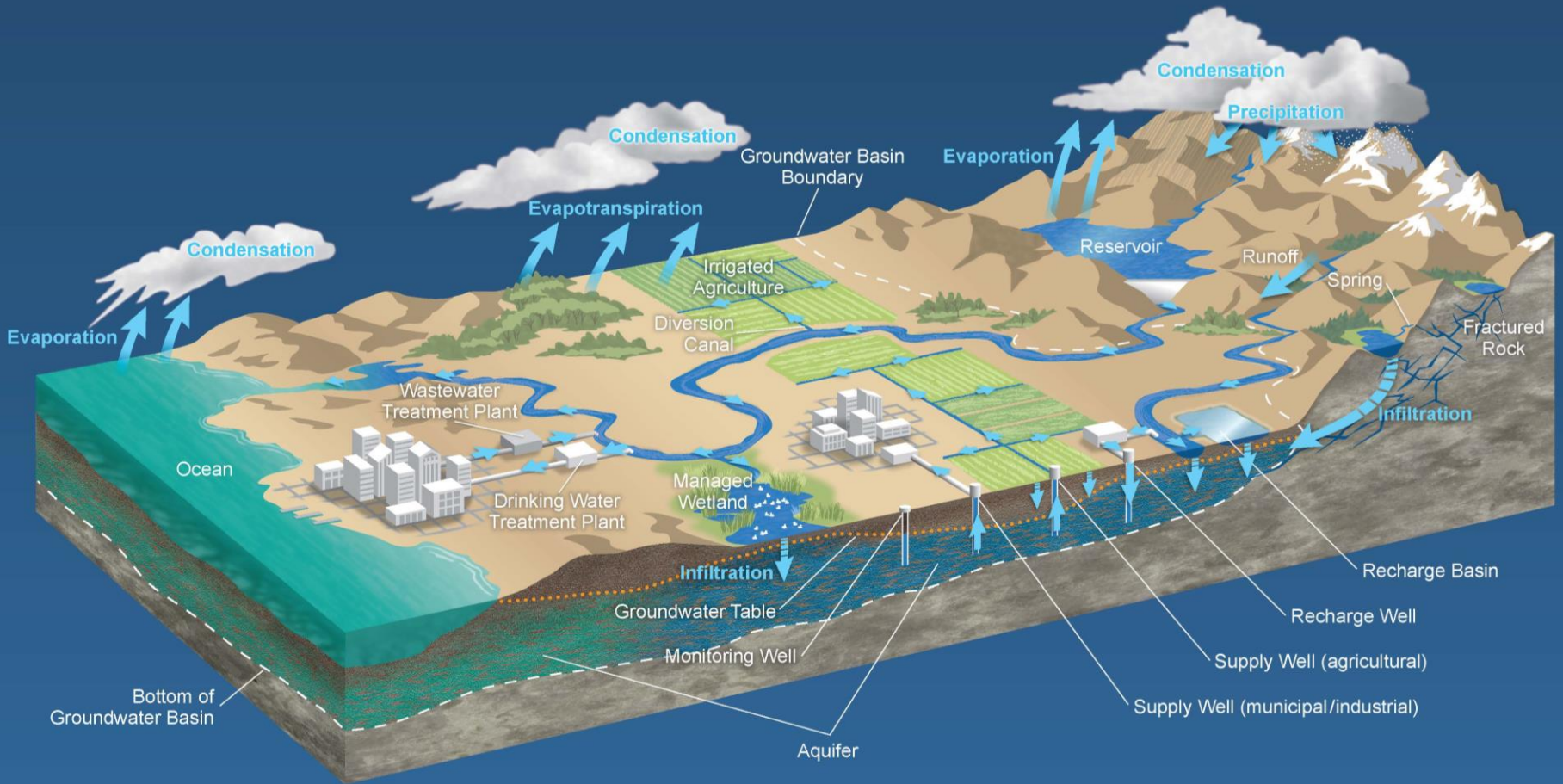


# INTEGRATING RIPARIAN & APPROPRIATIVE RIGHTS

# PRIORITY



- Riparians correlative to each other
- Riparians generally senior to appropriators
- Appropriators divert in order of priority
- No prescriptive right against state water



# Groundwater

# GROUNDWATER

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## WATER COMMISSION ACT

Permitting system does not extend to  
“**percolating groundwater**”

Permits only required for “subterranean streams flowing through known and definite channels” (relatively rare)

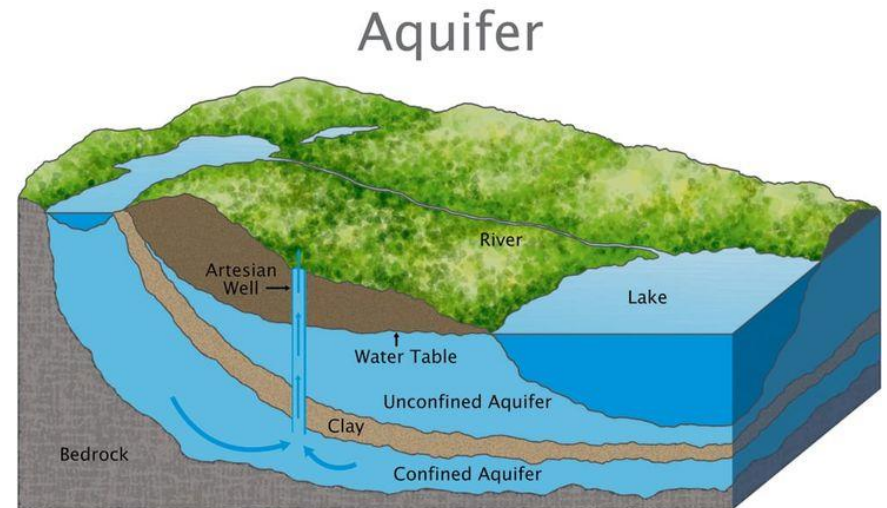
# GROUNDWATER

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Land-based  
**OVERLYING RIGHT**

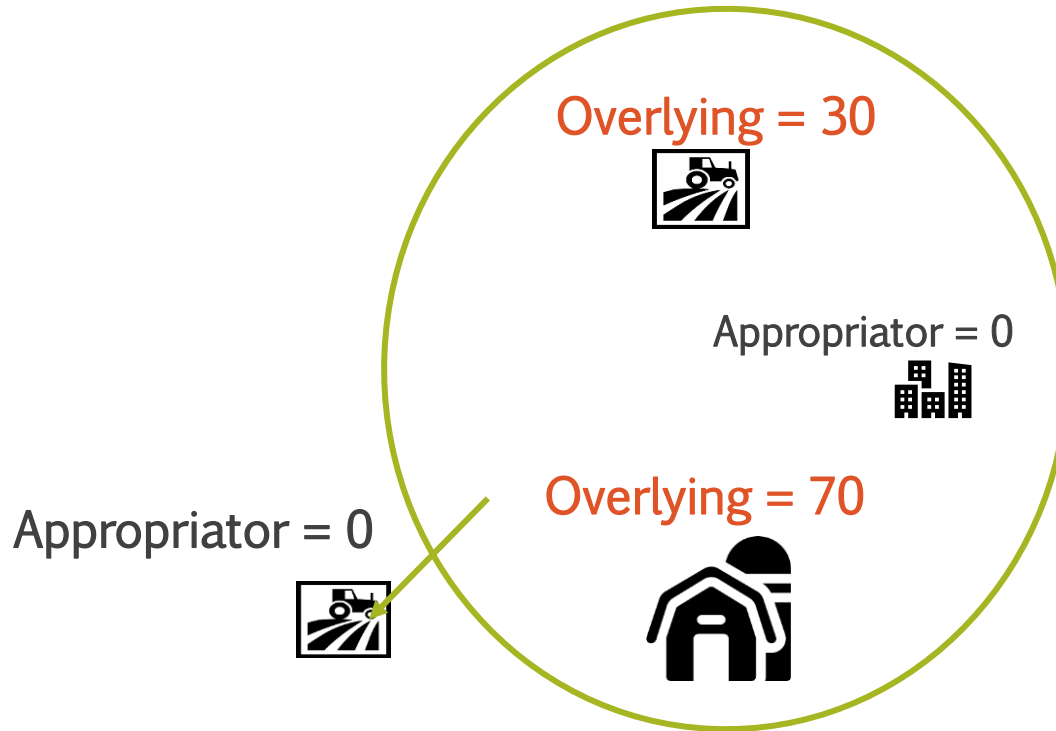
Use-based  
**APPROPRIATIVE  
RIGHT**

- Outside the basin
- Public agency



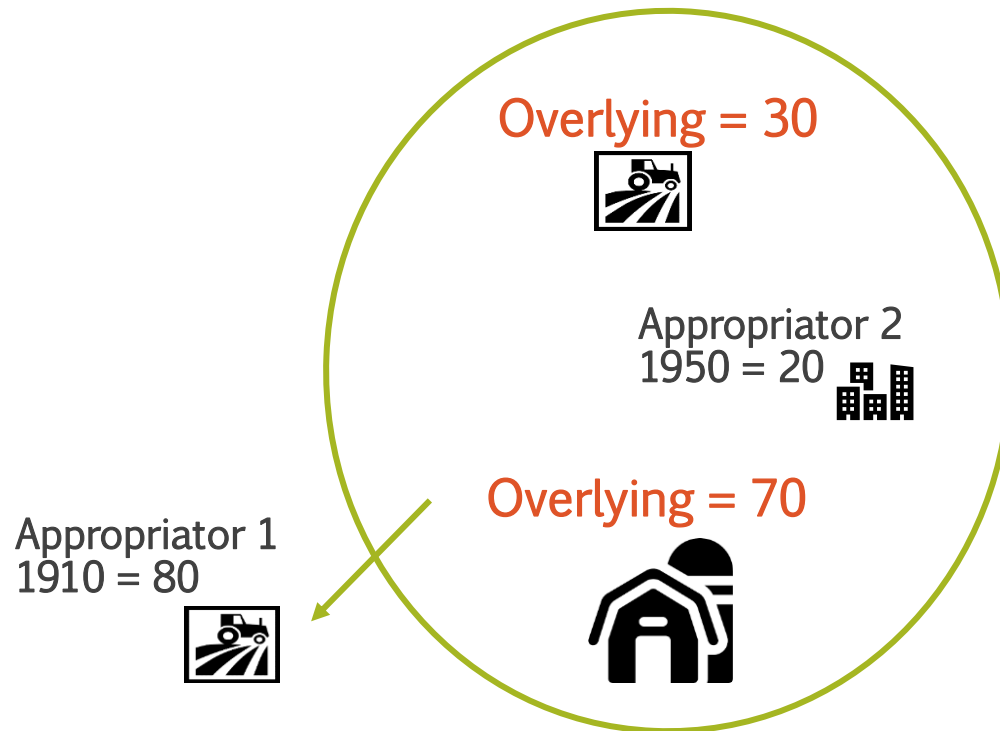
# Overlying & Appropriative Rights

Groundwater Basin = 100



# Overlying & Appropriative Rights

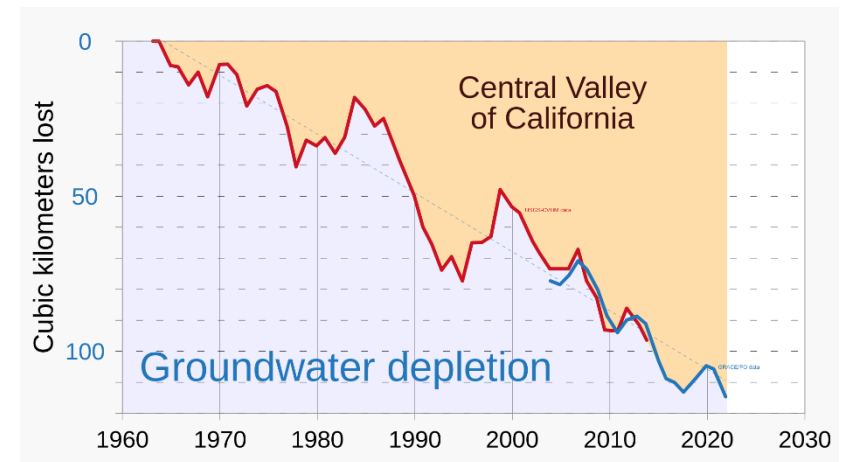
Groundwater Basin = 200



# OVERDRAFT

## LONG-TERM DECLINE

- Court adjudication to set pumping levels
- Groundwater rights change in overdraft
- **Prescriptive rights**
  - Continued pumping by appropriators
  - Overlying rights protected through “self-help”





# GROUNDWATER RIGHTS

Water Right	Acquisition	State Permit?	State Regulatory Authority?
Overlying Rights <b>Correlative</b>	<b>Ownership of land</b> overlying percolating groundwater	<b>No</b>	<b>Yes</b>
Common law appropriative rights <b>Priority</b>	Pumping or use without overlying rights (either use on non-overlying land or use by a public agency)	<b>No</b>	<b>Yes</b>
Prescriptive Rights	Continued pumping by appropriator in overdraft (overlying rights preserved through self-help)	<b>No</b>	<b>Yes</b>

# GROUNDWATER

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## Sustainable Groundwater Management Act

- Groundwater Sustainability Agencies
- Groundwater Sustainability Plans
- **Sustainable Yield – 2040 or 2042**
- Local management with state backstop
- Still no permit
  - Note: SGMA projects may involve recharging surface water that IS held under a permit

# GOVERNING PRINCIPLES

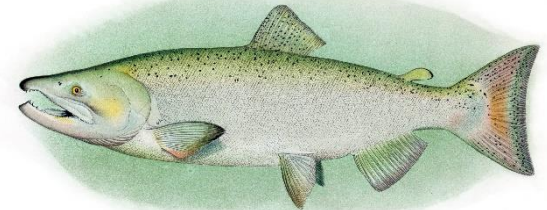
**1950**  
(SWRCB permit)

**Classic Priority Rules**  
Certainty, predictability  
Protect investment

**1911**

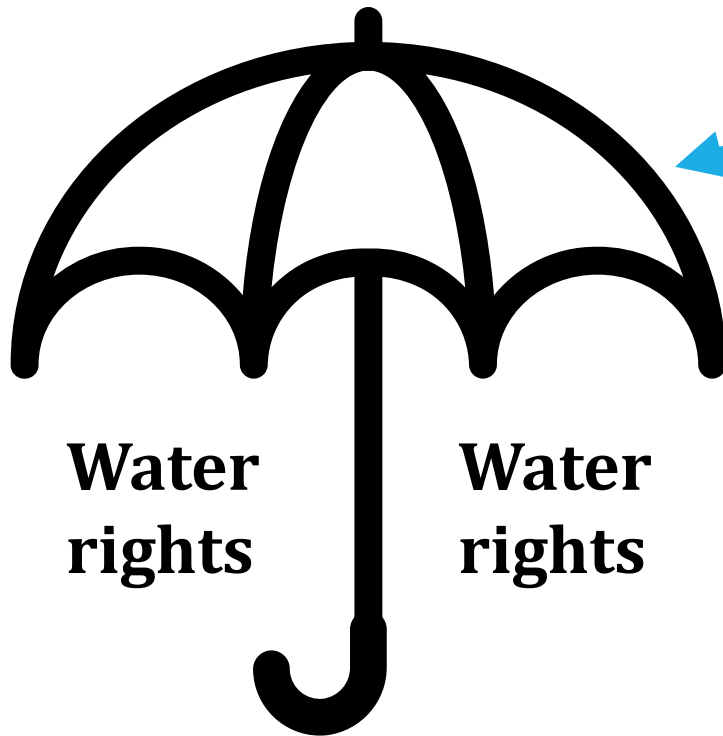
**RIPARIAN**

**What about  
other values?**



# Overarching Principles That Govern Water Allocation

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- Reasonable Use
- Public Trust Doctrine
- Public Interest



# CALIFORNIA CONSTITUTION

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 . . .** be prevented

# CALIFORNIA CONSTITUTION

## **Fundamental state water policy**

### **Maximum Beneficial Use**

- “Use” includes non-consumptive
- Maximize social value of scarce resource
- All water law principles reflect this core policy

### **Reasonable use – social value**

- Balance multiple factors (environmental, economic, cultural, etc.)
- If competition, use with lower value might be considered unreasonable

# CALIFORNIA CONSTITUTION

## **Fundamental state water policy**

Applies to ALL rights and uses in California

Legislature and State Water Board can declare uses unreasonable

Often: “reasonable if”

- Use of potable water where recycled is feasible
- Frost protection and fish flows in Russian River
- Sustainable Groundwater Management Act



# PUBLIC TRUST DOCTRINE

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Roman Law – commons

- “the air, the sea, and shores of the sea”
- **Navigable & tidal waters; beds and banks**
- Public uses: navigation, commerce, fishing

# PUBLIC TRUST DOCTRINE

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- **CA adds environmental, recreation, scenic**
- *National Audubon v. Superior Court Cal. Supreme Court (1983)*
  - State has authority and obligation to protect if **FEASIBLE**
  - Feasible – multi-factor balancing
  - *ELF v. SWRCB*: applies to groundwater if connected to surface water



Mono Lake, CA

# Whither priority?

- Priority is default, day-to-day rule
- Fundamental principles of reasonable use and public trust (and sovereign power) act as corrective to priority -- since the beginning

## State Water Resources Control Board

- “The function of the Board has steadily evolved from the narrow role of issuing permits and licenses for post-1914 water right holders to ‘comprehensive planning and allocation of waters.’”

# SURFACE WATER RIGHTS

Water Right	Acquisition	State Permit?	State Regulatory Authority?
Riparian Rights <b>Correlative</b>	<b>Ownership of land</b> adjacent to watercourse	No	<b>Yes</b>
Common law appropriative rights <b>Priority</b>	Intent before Dec. 19, 1914  <b>Beneficial use</b> within reasonable time	No	<b>Yes</b>
State-issued appropriative permit or license <b>Priority</b>	File application with SWRCB  <b>Beneficial use</b> by date in permit	Yes	<b>Yes</b>

# A Modern Water Rights System Protects Both Economy & Environment

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## Local Management and State Law

- Local management is often necessary & desirable
- Clear statewide authority facilitates wise local management

## State Water Board Drought “Curtailments”

- Implementing priority system (seniors/juniors)
- Curtailments are inherent in water rights

## Enforcement

- Necessary to protect all legitimate water rights and uses
- Updates to address modern challenges