

WATER 101: WATER RIGHTS

Water Education Foundation
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Professor Jennifer Harder
McGeorge School of Law
jharder@pacific.edu

“Thousands
have lived
without love,
not one without
water.”

-H. Auden



THE NATURE OF PROPERTY RIGHTS IN WATER

PROPERTY RIGHTS IN WATER

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

REAL PROPERTY RIGHT

Full owner: direct & exclusive authority

Usufruct: unites property interests of **usus** & **fructus**

- **USUS = USE OF**
- **FRUCTUARY = FRUITS**



USUFRUCTUARY

USUS: Right to use or enjoy a thing possessed

FRUCTUS: Right to derive profit from thing possessed: e.g., by selling crops & taxing for entry

No right of exclusivity against full owner



PROPERTY RIGHTS IN WATER

USUFRUCT IS:

- **Taxable**
- Conveyable by **deed** or property instrument
- Subject to **condemnation**
- Damages for inverse condemnation (**takings**)
- Subject to **adverse possession**
- Interests protected by **judicial process**
- Controversies settled via **quiet title suit**

PROPERTY RIGHTS IN WATER

- State ownership is regulatory
 - Reflective of **POLICE POWER**
 - Not proprietary
- Authority to confer private right of use
- Must also protect public interest

WATER RIGHTS

WATER RIGHTS

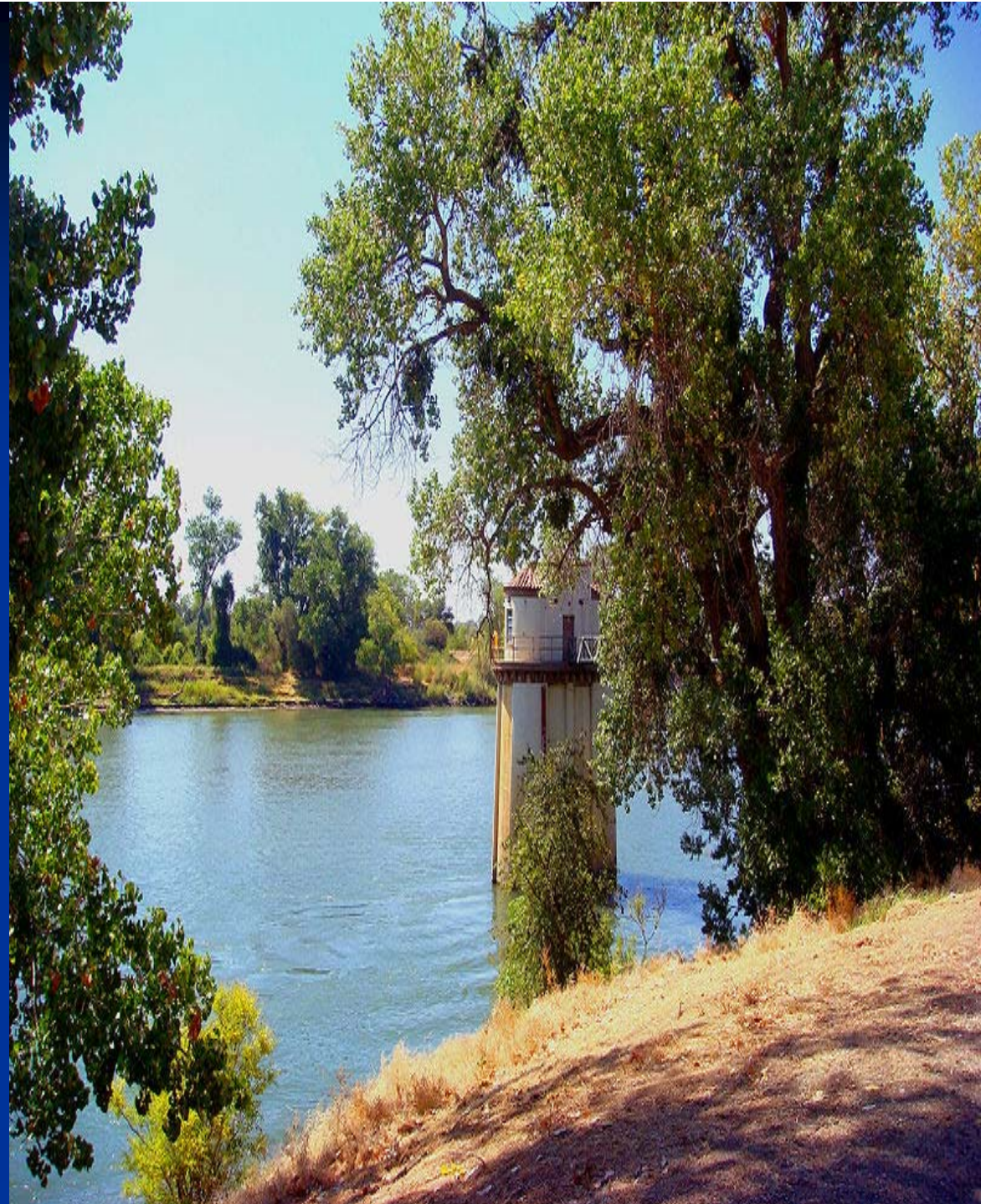
PHYSICAL CATEGORIES

- Surface Water
- Groundwater

LEGAL CATEGORIES

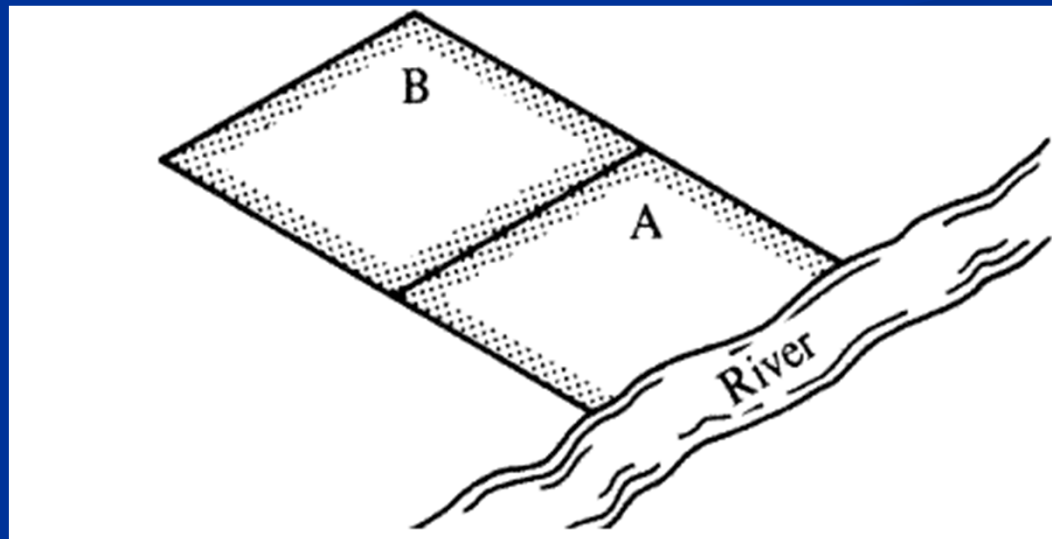
- Rights acquired through **LAND OWNERSHIP**
- Rights acquired through **ACTIONS (USE)**

SURFACE WATER



RIPARIAN RIGHTS

- Land ownership **ADJACENT** to watercourse
- Deed establishes right: **NO PERMIT NEEDED**
- No fixed quantity: **REASONABLE**



RIPARIAN RIGHTS

NO FIXED QUANTITY: Reasonable Use

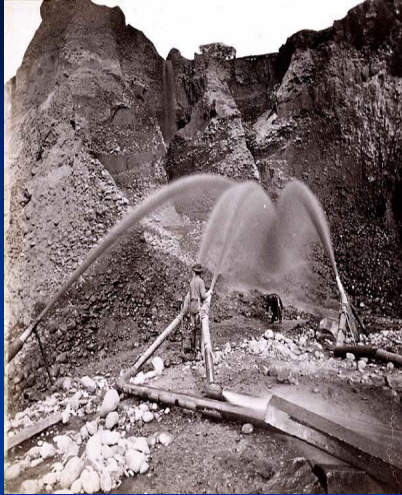
Example: Riparian uses 500 AFY to grow Crop A. Can she switch to Crop B, which requires 600 AFY?

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

“What is a reasonable amount varies with the circumstances of each particular case and also varies from year to year, for the amount which might be reasonable in a season of plenty might be manifestly unreasonable in a season of drought.”

RIPARIAN RIGHTS

- Land based: Not lost for non-use
- Limited to use on riparian property in watershed
- Limited to **NATURAL FLOW** of watercourse
- **NO STORAGE** (over 30 days)
- Equitable sharing of shortages: **CORRELATIVE**



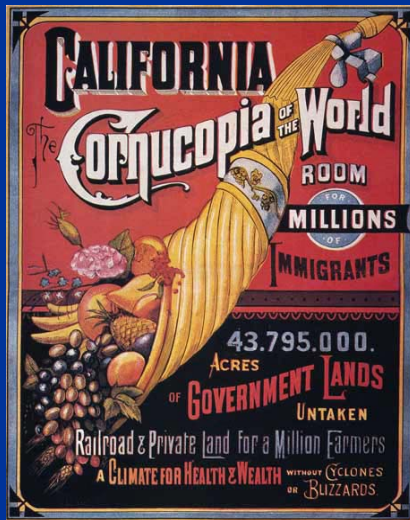
Miners and farmers

Not riparian

Most land was **public land**

Riparian rights based in land ownership

Individuals didn't own public land



Riparian rights **uncertain**

No fixed quantity

Had to be used **on riparian land**

No storage

Photo courtesy of USGS

Wikimedia Commons

APPROPRATIVE RIGHTS: beneficial use

- Custom: **First in time, first in right**
- Fixed quantity
- Use wherever & allowed **storage**
- **No SWRCB permit**

WATER COMMISSION ACT (1913)

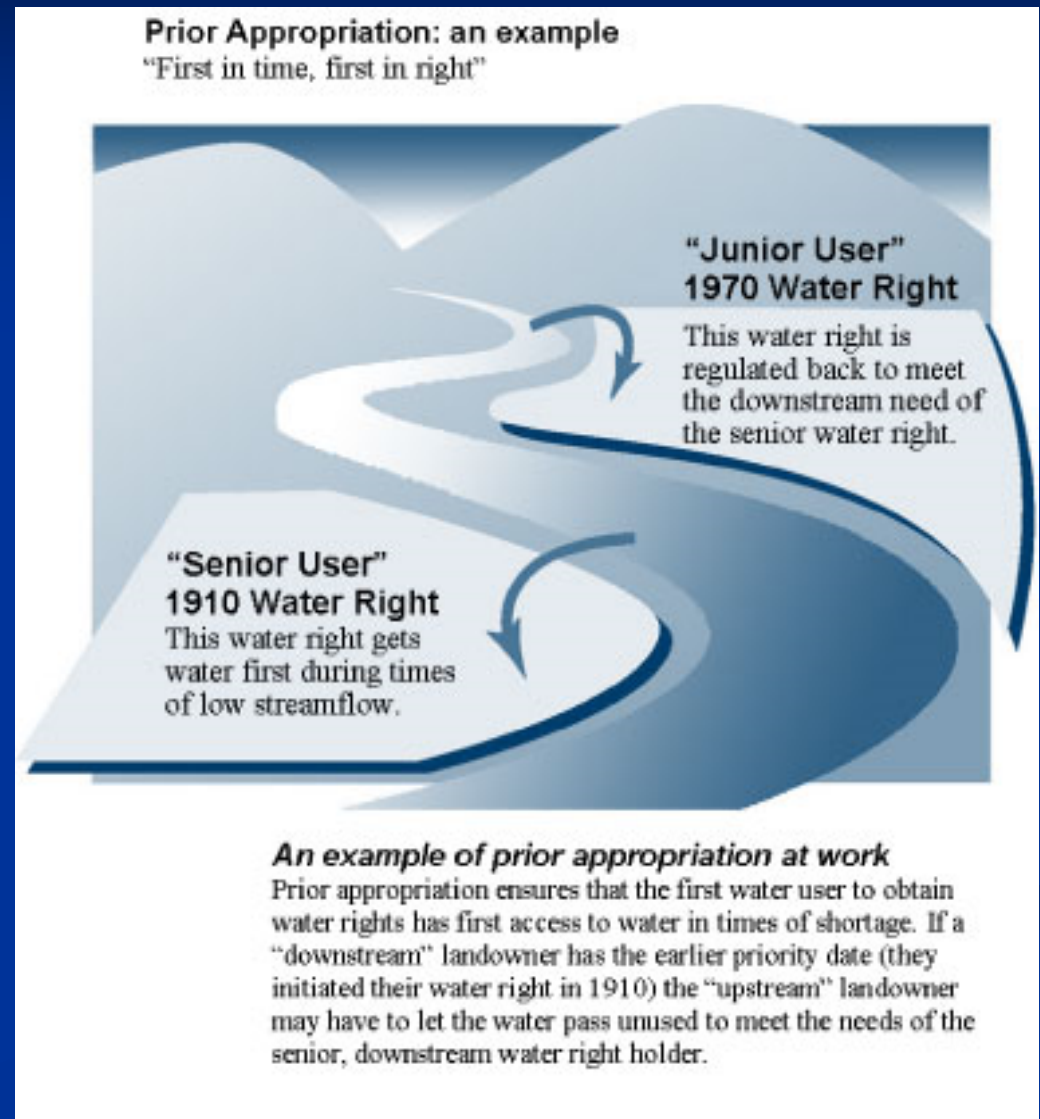
- State Water Resources Control Board
- **Post 1914 Right** – need permit

PRIORITY

First in time
First in right

■ SENIOR

■ JUNIOR



LUX V. HAGGIN (1886)



HYBRID SYSTEM

Riparian & Appropriative

Riparians usually senior as a class

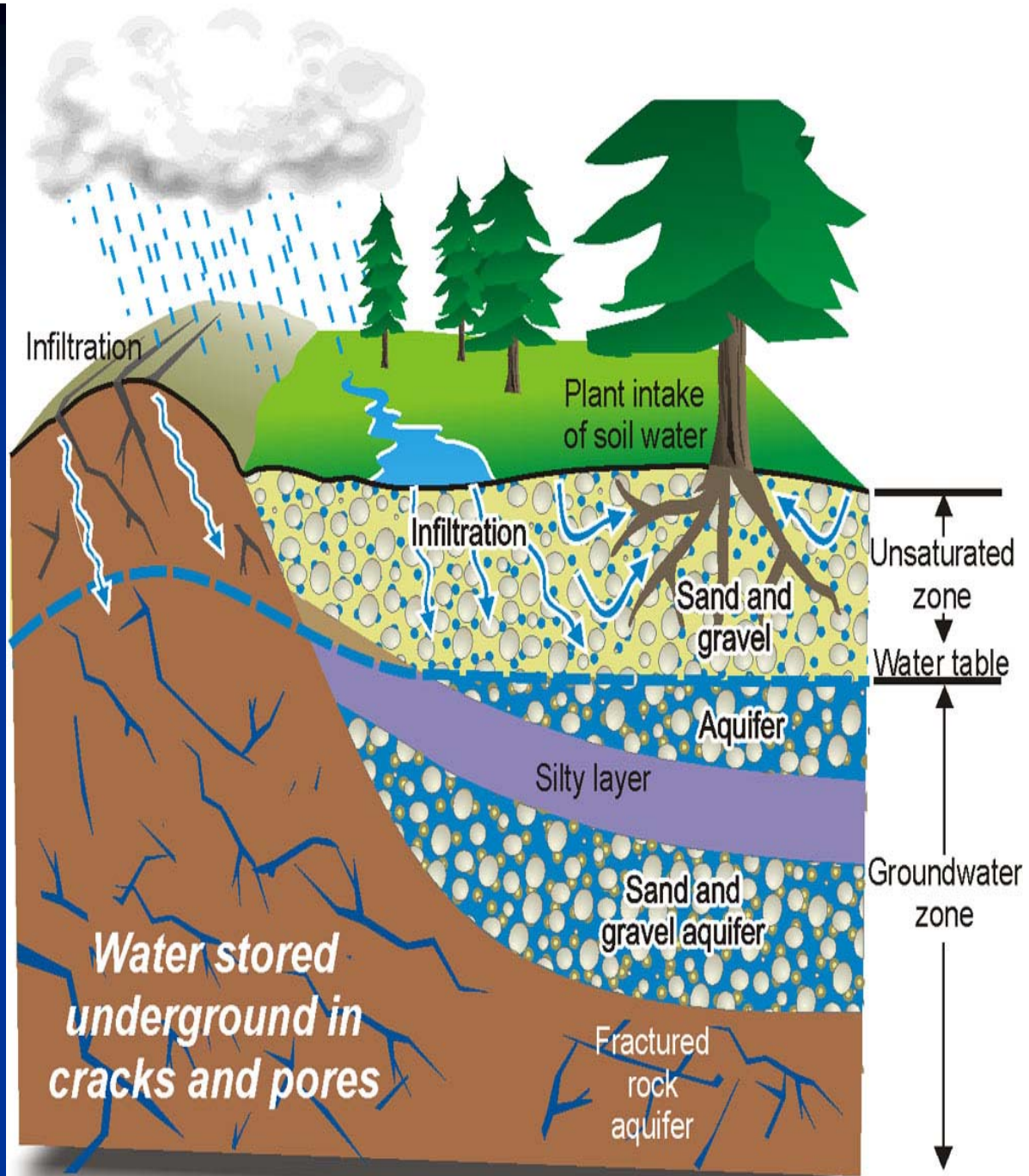
James Ben-Ali Haggin

Kern
River



Miller & Lux

GROUND WATER



GROUNDWATER

Water Code Section 1200 (permitting system)

Water refers only to **surface water** and to

“Subterranean streams flowing through a known and definite channel”

➡ NOT **“percolating groundwater”**

WATER UNDER THE GROUND



Illustrations: Walt Disney

SUBTERRANEAN STREAM

Surface Water Law

- Riparian & Appropriative*
- ***After 1914, SWRCB permit**

PERCOLATING

Groundwater Law

- Overlying & Appropriative
 - **No SWRCB permit**
- Overdraft: Prescriptive Rights

SUBTERRANEAN STREAM FLOWING THROUGH KNOWN & DEFINITE CHANNEL

North Gualala Water Co. v. SWRCB (2006)

- Must be a **subsurface channel**
- **Relatively impermeable** bed and banks
- Course determined by **reasonable inference**
- Groundwater **flowing in** channel (not across)

➡ No “Impact” Test

ALICE IN GROUNDWATER LAND



“[C]lassification disputes in this field quickly take on an Alice-in-Wonderland quality because the legal categories are drawn from antiquated case law and bear little or no relationship to hydrologic realities.”

“PERCOLATING” GROUNDWATER

Land-Based: **OVERLYING**

- **Overlying land ownership:** analogous to riparian
- Use on overlying land, no forfeiture
- **No permit**

Use-based: **APPROPRIATIVE**

- Use **outside the basin** or by **public agency**
- Priority system & “use it or lose it”
- **No permit**

“PERCOLATING” GROUNDWATER

LOCAL AGENCIES

COUNTY ORDINANCES

ADJUDICATION

- Overdraft & Safe Yield
- **Prescriptive Rights**
- Self-help
- **Court Decree**
- Watermaster

Sustainable Groundwater Management Act

- Local management with state backstop
 - Groundwater Sustainability Agencies
 - Groundwater Sustainability Plans
 - **Sustainable Yield**
 - If fail, SWRCB action
 - **Still no permit**
- Does not “determine or alter” water rights

TRIBAL WATER RIGHTS

- **Express treaty rights**
- **Implied *Winters* Rights: primary purpose**
 - Priority: date of reservation
 - Not lost for non-use
 - Agua Caliente 2017: includes groundwater
- **Aboriginal rights: time immemorial**
 - Adair/Baley 2019

GOVERNING PRINCIPLES & GOVERNANCE

REASONABLE USE

HERMINGHAUS V. SO. CAL EDISON (1926)

Riparian relied on heavy spring flows to flood irrigate

SoCal Edison construct upstream hydropower reservoirs, reducing flow

Held: **Reasonable Use does not apply between riparian & appropriator**



CAL CONST. ART. 10 § 2 (1928)

FULLEST EXTENT

CA water shall “be put to beneficial use to the fullest extent of which [it is] capable”

REASONABLE USE

Amount “reasonably required for beneficial use”

WASTE & UNREASONABLE USE

No right where water wasted or used unreasonably

“What is a reasonable amount varies with the circumstances of each particular case and also varies from year to year, for the amount which might be reasonable in a season of plenty might be manifestly unreasonable in a season of drought.”

PUBLIC TRUST DOCTRINE

PUBLIC TRUST DOCTRINE

DUTIES OF THE SOVEREIGN

By the laws of nature

These things are common to mankind

The air, the sea, and consequently

The shores of the sea

..Institutes of Justinian

PUBLIC TRUST DOCTRINE

- **EQUAL FOOTING:** CA acquired **bed & banks of navigable waters & tidal waters** at statehood
- Title to navigable and tidal resources impressed with “public trust” obligation
- Public trust values: navigation, commerce, fishing, environmental, recreation, scientific

National Audubon Society v. Superior Court

- Lake level drop
- Ecosystem impacts
- LA: water right cannot be changed



Photo courtesy of visitusa.com

PUBLIC TRUST DOCTRINE

- Court: Both water rights & public trust matter
- Public Trust Doctrine: state can & must protect trust values where **FEASIBLE**
 - **Feasibility:** environmental, economic, cultural, scientific, legal

PUBLIC TRUST DOCTRINE

NATIONAL AUDUBON (1983)

Non-navigable tributaries

ELF v. SWRCB (2018)

Scott River

Hydrologically-connected groundwater

PUBLIC INTEREST

PUBLIC INTEREST

- California Water Code
- **State governing principle**
 - Allocation of water
 - Terms and conditions of permits and licenses
 - Changes to permits and licenses
- State must consider and value all interests:
Environmental, economic, cultural, etc.

GOVERNANCE

GOVERNANCE

COURTS

- Jurisdiction over all water rights
- SWRCB Post-1914 permits & licenses
 - Challenges and appeals

GOVERNANCE

STATE WATER RESOURCES CONTROL BD

- Five members, appointed by governor
- Staff: **Division of Water Rights**

WATER PERMITS & LICENSES

- Initially Limited Jurisdiction
- Only **Surface Water & Subterranean Streams**
 - Only **post-1914 appropriations**
 - Not: pre-1914, riparian, or percolating GW

GOVERNANCE

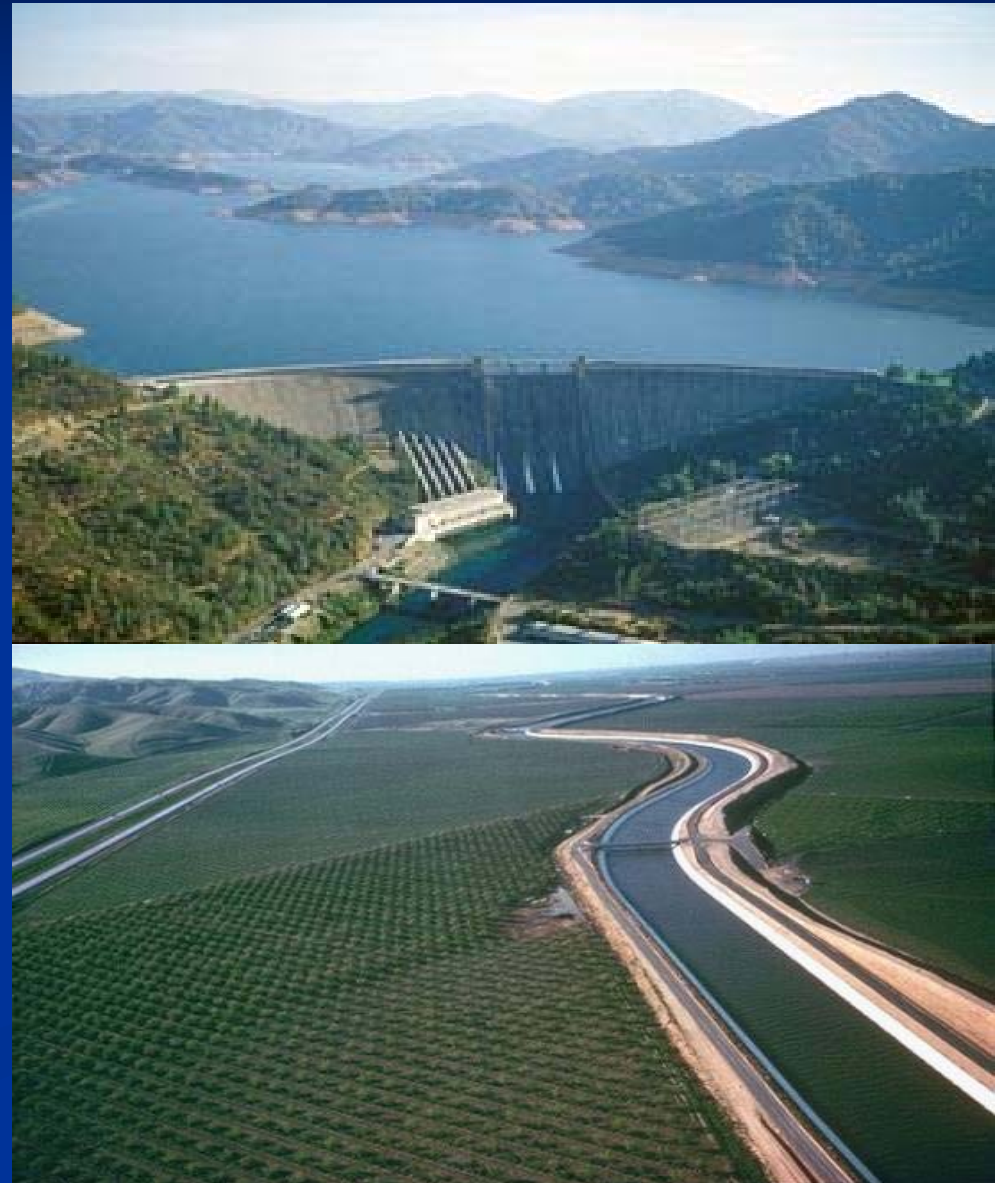
LOCAL AGENCIES & WATER SUPPLIERS

- Cities and counties
 - Special districts
 - Investor-owned utilities (CPUC)
 - Mutual water companies
-
- Water rights or water contracts
 - May own and operate local projects
 - Local rules and regulations

GOVERNANCE

PROJECTS

- Federal (CVP)
- State (SWP)
- State water rights
- Supply contracts



QUESTIONS?