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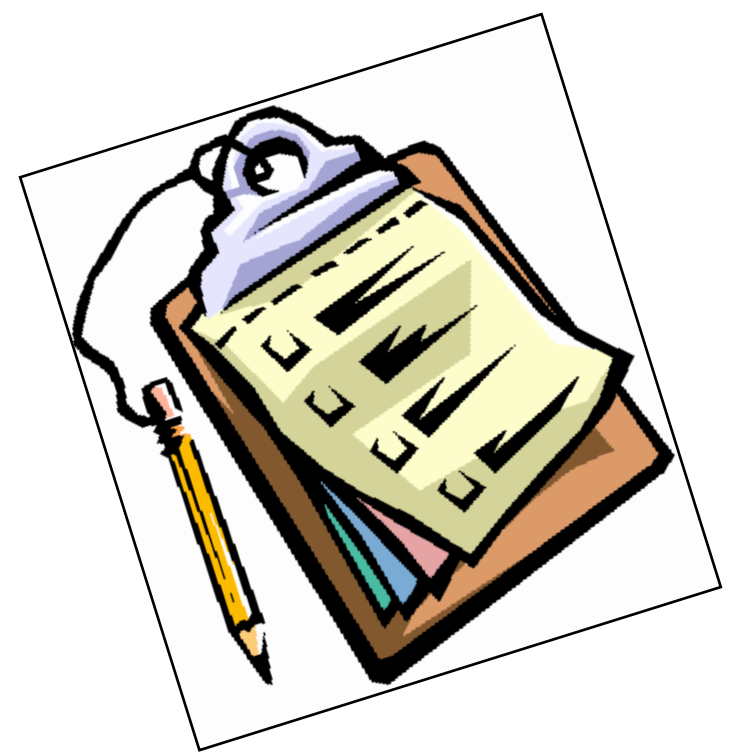
Attorneys at Law

Groundwater Rights Summary and Allocations Challenges for Market Development

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AGENDA

1. Background/SGMA
2. Summary of Groundwater Rights
3. Allocations – challenge of dividing the pie



Surface Water vs. Groundwater Systems

- 1914 Water Commission developed surface water permitting system
- NO such similar system for groundwater
- Most of the rules about groundwater are established through case law
 - Some rules not yet established, nature of cases



Sustainable Groundwater Management Act

- Significantly different than surface water system: No permitting authority
- Focus on sustainability and local management
 - Does not require a system of permitting or allocation
 - However, in order to manage (develop solutions), GSAs quickly understand the need to identify the problem (what they are managing)
- NO Change to Water Rights
 - GSA has authority to limit extractions
- County authority over groundwater wells
 - No consistency determination



Summary of Groundwater Rights

Four types of groundwater Rights

- Pueblo
- Overlying
- Appropriative
- Prescriptive

Pueblo Rights

- A pueblo right is the right of a local city or local government, as a successor of a Spanish or Mexican municipality, to use water naturally occurring for municipal use (*Lux v. Haggin* (1884) 69 Cal. 255, 328 – 330).
- A pueblo right is the right of the highest priority in the use of native groundwater (*Los Angeles v. San Fernando* (1975) 14 Cal.3d 199, 245 – 55)
- A pueblo right does not attach to foreign water imported from outside the watershed stored within the boundaries of the historic pueblo (*San Fernando*, at 253.)



Overlying Rights

- Ownership of land overlying percolating groundwater provides the landowner with an overlying groundwater right
(*Pasadena v. Alhambra* (1949) 33 Cal.2d 908, 925)



Key Distinction: Groundwater is used on underlying land from where it is pumped

- An overlying water right is not quantified, but allows the water right holder to divert as much water as is reasonable to support beneficial uses on the overlying land (*Katz v. Walkinshaw* (1902) 141 Cal. 116)

Overlying Rights – Non-Municipal

- Municipal or public extractions cannot be supported by overlying rights (*San Bernardino v. Riverside* (1921) 186 Cal. 7, at 24 -29.)
- This is so regardless of whether the municipality's boundaries and residents it delivers water to overly the basin it extracts from

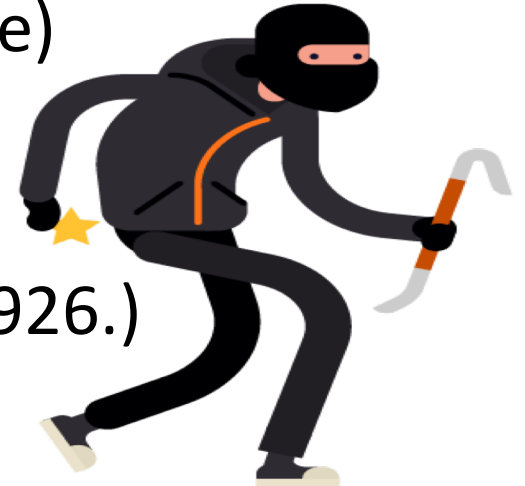


Appropriative Rights

- Do not derive from the land ownership but comes from the actual taking or “appropriation” of water (*Pasadena*, at 925.)
- May export groundwater and are not limited to use on lands within a specific area (like overlying rights holders) (*Peabody v. Vallejo* (1935) 2 Cal. 2d 351, 368 – 69.)
- Municipal appropriation, regardless of whether the water is served to customers overlying the basin from which the water is extracted (*San Bernardino*, at 10 – 11)
- The quantity of an appropriative right is based on the amount of appropriative water extracted and put to beneficial use

Prescriptive Rights

- Develops when an appropriator steals the water right of someone who is not using their full right:
 1. Actual, open, and notorious; (you are not hiding use)
 2. Hostile and adverse to the true owner;
 3. Under a claim of right; and
 4. Continues uninterrupted for 5 years (*Pasadena*, at 926.)
- Both overlying and appropriative rights are subject to prescription



Prescriptive Rights – Not During Surplus

- The “adverse” requirement (#2 on the previous slide) can only be met when a basin is in overdraft (*City of Sana Maria v. Adam* (2012) 211 Cal.App.4th 266,293)
- Importantly, private pumpers cannot obtain prescriptive rights against public entities (*San Fernando*, at 214.)
- Appropriative and overlying water right holders may protect themselves from prescription by engaging in “self-help” (i.e., continuing to extract water during a period of overdraft) (*Pasadena*, at 926.)

Prescriptive Rights – SGMA

- Note: SGMA limits prescriptive rights under limited circumstances
- No groundwater extractions between January 1, 2015 and the date a GSA is adopted or an alternate plan is approved by DWR (whichever is sooner) may be used as evidence of, or to establish or defend against, any claim of prescription (Water Code, § 10720.5(a).)



Allocations – Groundwater Accounting

- How to apply different fact patterns to the groundwater rights rules we just reviewed
- Must consider the following (The Pie Problem/Challenge):
 - Groundwater/surface water
 - Importing water
 - Salvaging water
 - Priority
 - Prescription
 - Shortage



Identification of Groundwater (How big is the pie?)

- Native groundwater includes:
 - Seepage from natural channels
 - Recharge from precipitation
 - Subsurface flows from adjacent subbasins
 - Percolation from applied groundwater
- This does NOT include: (Why is the pie so small?)
 - Imported water (water brought from outside the subbasin)
 - Stored surface water (seepage from non-natural facilities, such as canals and reservoirs, recharged surface waters, overapplication of irrigation for purpose of storing)
 - Salvaged water (water saved from waste, improving efficiencies, water flowing out to ocean, treated water not otherwise usable)



Geography/Connectivity

(Who does the pie have to feed?)

- Sources must be hydrologically connected to be same pie
- SGMA has defined Bulletin 118 boundaries as connectivity
- If water moves between subbasins, the rules do not apply (water becomes native supply for another basin)
- If water moves between GSAs, the rules DO apply



Water Right Priority (Who gets first piece of pie?)

- Pueblo water right holders have priority over all others
- Overlying water rights have priority
- Appropriators are junior
- UNLESS prescription – which usually turns the rules upside down



PRIORITY

Managing Shortage

(There is not enough pie)

- Water right priority rules require reduction by category (pueblo, overlying, appropriative)
- Shortage within overlying rights is correlative
- Amongst and between other overlying rights holders, each is apportioned their “proportionate fair share of the total amount available based upon reasonable needs” (*Pasadena*, at 926.)
- Shortage within appropriative rights is first in time, first in right
- A prior appropriator is entitled to take all the water he has previously used before a subsequent appropriator may divert water (*Pasadena*, at 926.)



Prescription

(Did you just take my pie?)

- Prescription happens when:
 - MUST be during overdraft
 - Water use is actual, open and notorious
 - Hostile and adverse to owner
 - Uninterrupted use for 5 years
- Cannot prescribe against public agencies (one way street)



Dormant Overliers

(Do we save pie for people not at table?)

- Use is not a requirement to preserve an overlying water right
- Subordination of dormant overliers is allowed in certain circumstances (Antelope Valley)
- Adjudications have treated this class of water right holder differently (set aside, limited pools, deal ins)



In Lieu Pumping (I brought my own pie)

- If you are using surface water in lieu of groundwater, it is a beneficial use of groundwater
- Promotes conjunctive use programs
- Protects surface water users against prescription
- Remains to be seen whether in lieu users can rely on banked groundwater for future use
- SGMA requires disclosure and quantification of in lieu use



Reasonable and Beneficial Use

(Give that person a small piece, they never finish)

- The requirement to use water reasonably and beneficially limits on the application of priority and prescription
- Adjudications often develop a “physical solution” that takes into consideration fairness or equity
- Still must be based on priority



Overarching Policies

- Human Right to Water (Water Code 106.3)
- Water Code section 106
- Practical consideration of public health and safety
- Difficulty in application – what do these policies require?
 - Lessons from adjudications
 - Tools: Set asides, limited pools, categories of water user with base allocation
 - Must still consider rules and priority

Conclusions Regarding Markets

- No market will be able to comply with all the rules – due to rigidity
- Which rules likely have to be broken?
- Which rule breaking will invite challenge?
- Which rule breaking will be accepted or defensible?

QUESTIONS?

