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Water Rights in Adjudicated and Unadjudicated Basins and Implications for Stormwater Capture and Storage

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PRESENTED BY

Eric Garner

Partner

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Summary

- Basic Water Rights
- Adjudications
- Rights to Store Water Underground
- Rights to Recapture Stormwater



“Ownership” of Water

- The State of California owns all the water in California (*Central and West Basin WRD v. SoCal Water and California v. Superior Court*)
- Water rights holders obtain a usufructuary (“use”) right



Reasonable Use

- All use of water in California must be reasonable (Article X, section 2)
- What is reasonable depends on the facts and circumstances of each situation and can vary over time and geographically (*Tulare v. Lindsay-Strathmore ID* and *Joslin v. Marin MWD*)



Reasonable Use

- Reasonable use can modify priority
- The doctrine of reasonable use has allowed water rights to adapt over time
- In California courts start with priority but often don't end with priority



Basic Groundwater Rights

- Overlying – right to pump water for use on overlying land
- Appropriative – right to pump water surplus to overlying needs for use within or outside the basin
- Municipal users are appropriators



Basic Groundwater Rights-Prescriptive

- Appropriator pumps adversely (basin in overdraft)
- Notice (actual-falling water levels subsidence or constructive – should have known)
- Five consecutive years



Adjudication Dynamic

- Groundwater law has been pump until a judge tells you not to – no permitting or regulation
- Unequal priority to groundwater between overlying and appropriative (municipal and agricultural uses)
- A serious problem such as overdraft, salt water intrusion or subsidence



Adjudicated Basins - General Pattern

- All users brought into litigation (sometimes prospective users as well)
- Technical committee of parties' experts seeks consensus on hydrology
- Court determines hydrology



Adjudicated Basins

- Faced with having to prove their water rights, many parties settle
- Trial of water rights of non-settling parties
- Court enters a judgment with a “physical solution”



Storage Rights

- Reasonable use of water is the prime consideration
- Storage space is a public resource (*Central and West Basin Replenishment Districts v. Southern California Water Company (2003)*)



Storage Rights

- Judgments vary on allocation of storage space
- Parties and non-parties that intervene can likely store if they do not interfere with production, storage or create nuisance issues
- Seeking to control unused storage space is likely unreasonable (at least without clear plan to put it to use)



Stormwater and Water Rights

- Stormwater
 - Temporary surface water runoff and drainage generated by immediately preceding storms
Water Code § 10561.5(b)



Stormwater and Water Rights

- Rainwater defined (Water Code § 10573(c):
 - “precipitation on any public or private parcel that has not entered an offsite storm drain system or channel, a flood control channel, or any other stream channel, and has not previously been put to beneficial use”



Stormwater and Water Rights

Classification Bookends

- Water flowing in a channel requires permit for appropriation (Water Code § 1201)
- No permit required for Rainwater collected from rooftops (Water Code § 10574)



Stormwater and Water Rights

- Diffused (unchannelized) surface water
 - By its nature, water that reaches ground as freshly fallen rain is unappropriated
 - Generally, no permit required to capture, store or use it



Stormwater and Water Rights

- Surface water
 - Stormwater that enters into a channel becomes surface water subject to appropriation. Diversion from channel requires permit
 - Note: Is it already appropriated?



Stormwater and NPDES Permits

- CWA specifically authorizes regulation of stormwater discharges
- Stormwater defined under CWA:
 - Stormwater runoff, snowmelt runoff, and surface runoff and drainage
- In practice: EPA and State treat just about anything coming out of MS4 as non-stormwater
 - Stormwater: What comes out of sky
 - Non-stormwater: Anything co-mingled enroute to a surface water must be controlled



Stormwater and NPDES Permits

- NPDES permit requirements for discharges from MS4s (municipal separate storm sewer systems)
 - Shall include a requirement to effectively prohibit non-stormwater discharges into storm sewers, and
 - Shall require controls to reduce discharge of pollutants into storm sewers to “maximum extent practicable”
 - Discharge of pollutants is regulated without regard to the source
 - BMPs and adaptive management practices are encouraged
 - BMPs: Proven practices to manage stormwater



Drivers of Stormwater Capture

- Physical Drivers
 - Population and economic growth
 - Drought and water shortages
- Legal Drivers
 - Designated beneficial uses of a waterbody
 - Water quality control
 - Water rights
- Financial Driver
 - Value of increased water yield may offset some costs of MS4 compliance projects (“new” water)



Proposed Stormwater Capture Legislation (AB 2594)

- A public entity that captures stormwater before the water reaches a natural channel shall be entitled to use the captured water



Arguments for AB 2594

- Clarifies that public agencies can capture and use stormwater
- Consistent with federal and state policy to prevent stormwater from entering streams for water quality reasons
- Creates a right in captured stormwater



Arguments Against AB 2594

- Not needed, covered by existing law
- Violates judgments that allocate “all water in watershed”
- Creates confusion



Water Rights and Stormwater - Issues

- Where is it? – in stream or not
- Does it flow to the ocean?
- Does it eventually percolate into a basin?
- What if diminishing downstream user and they claim damages?



Thank you for attending

Eric L. Garner, Esq.

Partner

Best Best & Krieger LLP

300 South Grand Avenue, 25th Floor

Los Angeles, CA 90071

Phone: (213) 787-2561

Email: eric.garner@bbklaw.com

www.bbklaw.com

