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

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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

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