

Item 6

Update on Water Law

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Issues

- California surface water right law
- Interface with water quality
 - Water quality/instream uses in water right decisions
 - Water quality laws affecting water rights
- Groundwater and water rights
 - Sustainable Groundwater Management Act

General Principles

- All water belongs to the people of the state.
- Water rights are a right to the use of water.
- Water use must be reasonable and beneficial.



Elements of a Water Right

- Holder of right
- Source of water
- Point of diversion
- Priority of right
- Amount of water – flow or volume
- Place of use
- Purpose of use
- Season of diversion
- Conditions from, e.g.
 - Permit/license
 - Adjudication
 - Other State Water Board or judicial determination

Elements of a Water Right

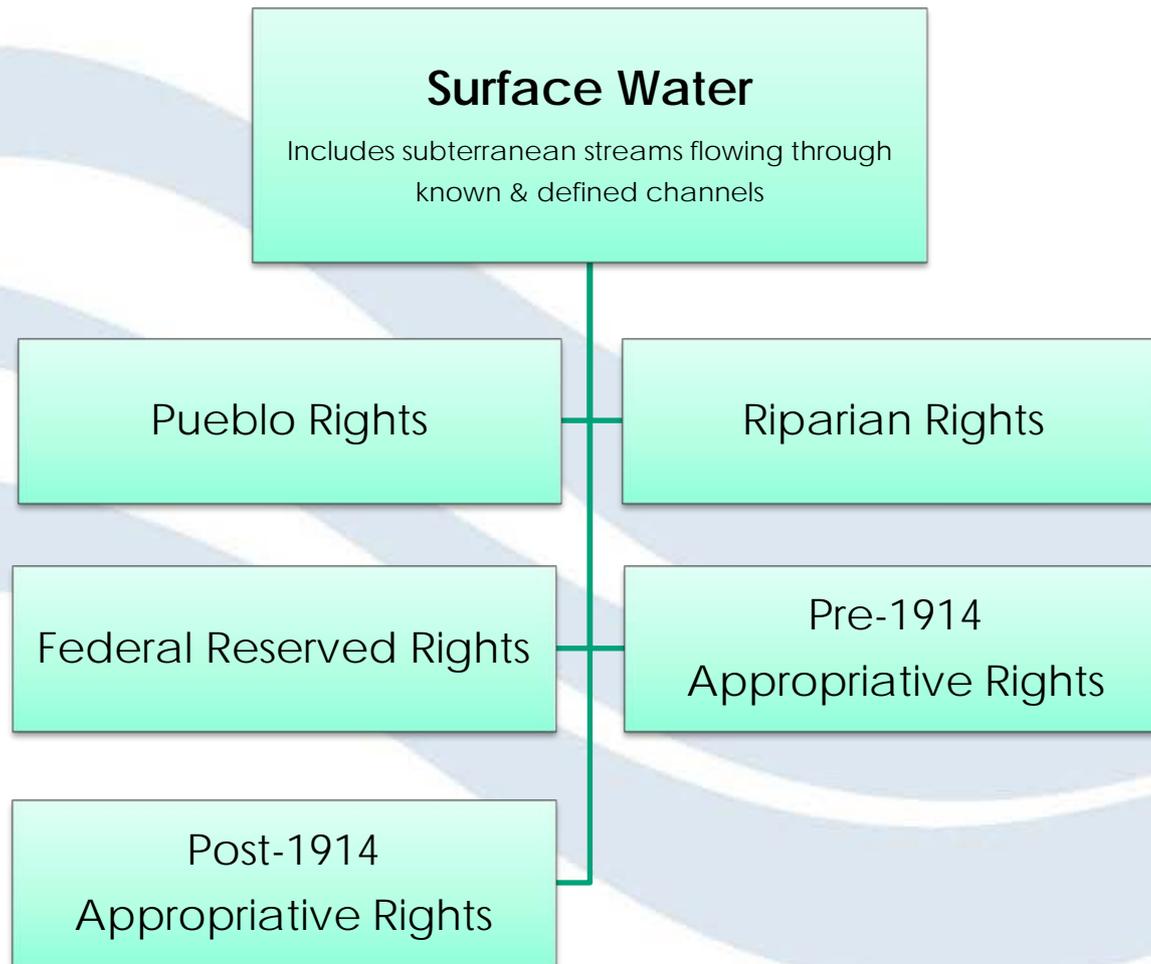
City, 1940, year-round



Pasture, 1910,
June 1 – Oct. 1



Water Rights





Appropriative Rights

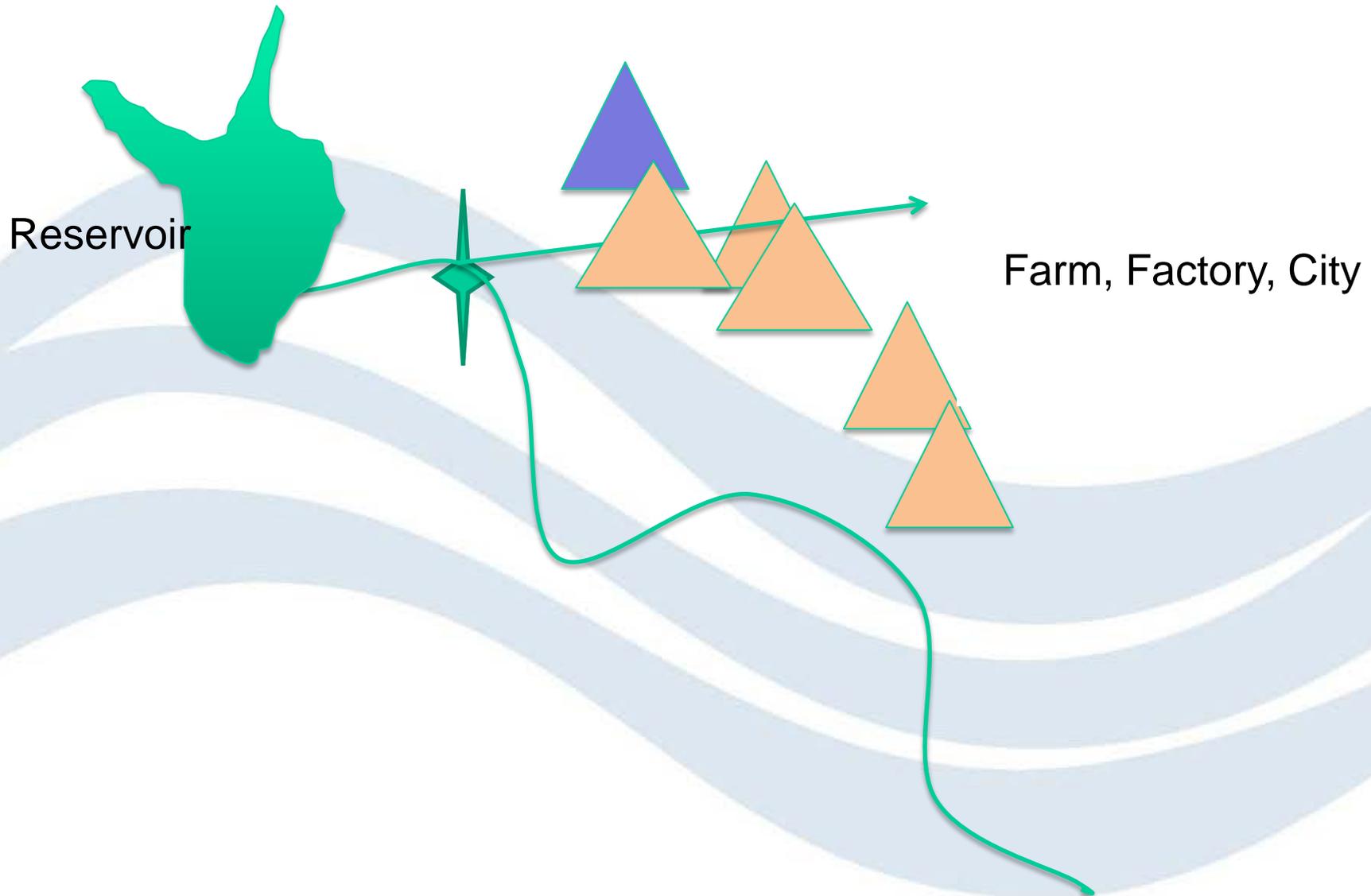
- Based on using water
- “First in time, first in right”
- After 1914, can only acquire by application to the State Water Board
- Priority date of water right:
 - Pre-1914: date of intention to divert and use water
 - Post-1914: generally, date of application



Appropriative Rights

- Quantity = amount put to reasonable beneficial use, within limits of permit or license
- Can be lost by non-use once established
- Must actually divert water out of the waterbody
- May be used for any reasonable beneficial use
- Apply to natural flow or other flow in stream
- Can only change if no injury, not make new right

Appropriative Rights



Appropriative Rights





Riparian Rights

- Based on:
 - ownership of land
 - that touches (“is riparian to”)
 - a natural waterbody
- Can attach to waterbodies that have come to be treated as natural
- Quantity – what reasonably needed for the use on the riparian parcel within the watershed
- Shared use with other riparians



Riparian Rights

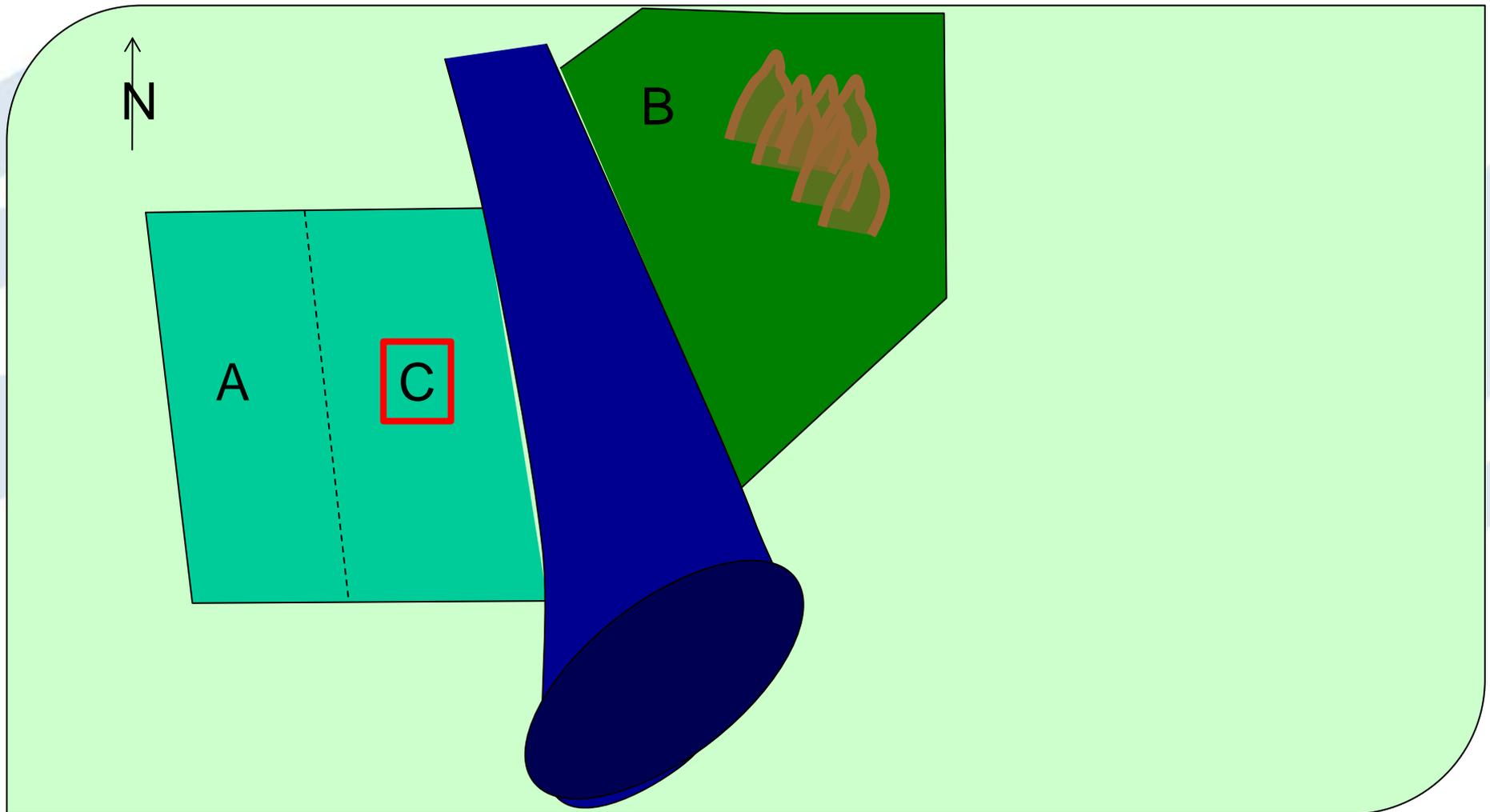
- Priority date vis-à-vis other rights: date the land withdrawn from the public domain
- Can stop or start use at any time – no loss of right for not exercising it
- Courts are split on whether it can be an instream use
- Usually applies to smallest parcel on chain of title that has retained connection to water



Riparian Rights

- Right only to natural flow
 - No seasonal storage
 - No right to “foreign waters”
- Adjudications can fix amounts, places of use, points of diversion, and subordinate unexercised riparian rights

Riparian Rights



Riparian Rights



Luis Dias Ribeiro
The Online Circle, marketingeasy.net

Authority to Protect Instream Flows/Water Quality

- Public trust doctrine
- Reasonable use doctrine
- Porter-Cologne Water Quality Control Act

Public Trust Doctrine

- Protects public trust uses of navigable water bodies
 - Navigation, commerce, fishing, recreation, and the preservation of fish and wildlife habitat
- Applies to diversions from non-navigable tributaries that affect navigable water bodies.

National Audubon Society v. Superior Court
(1983) 33 Cal.3d 419

Public Trust Doctrine

- The state has affirmative duty to take public trust into account and to protect public trust uses whenever feasible and in the public interest.
- The state has duty of continuing supervision, and may reevaluate water allocations based on current knowledge and current needs
- Harm to public trust resources should be avoided or mitigated if feasible.
- In some cases, the public interest served by water diversions may outweigh harm to public trust resources.

Reasonableness Doctrine

- Constitutional and statutory authority (California Constitution Article X, § 2; Water Code § § 100, 275).
- Prohibits waste, unreasonable use, unreasonable method of use and unreasonable method of diversion of water.
- Applies to all uses of all waters of the state and is a limitation on every water right and every method of diversion.

Reasonableness Doctrine

- Supreme Court has repeatedly emphasized that the doctrine is flexible, evolving with prevailing conditions in the state.
- *Joslin* – What is a reasonable use of water depends on the circumstances of each case, and such an inquiry cannot be resolved *in vacuo* isolated from state-wide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state.

Reasonableness Doctrine

- *Lindsay-Strathmore* – What may be a reasonable beneficial use where water is present in excess of all needs, may not be reasonable in times of scarcity, and what is reasonable at one time may not be reasonable at a later time.
- SWRCB and the courts have the authority to conduct proceedings to adjudicate issues regarding waste and unreasonable use.
- Legislature, and in some circumstances the SWRCB, can define classes of unreasonable use.

Reasonableness Doctrine

- Unreasonable use doctrine not likely to result in wholesale rearrangement of water rights priorities.
- Senior water rights holders can be cut back if their uses are actually unreasonable. That is, seniority won't protect unreasonable use.
- Proposed use or method of diversion may be unreasonable based on its impact to fish, wildlife, or other instream beneficial use.



Porter-Cologne Water Quality Control Act

- State and Regional Water Boards water quality control plans
- The plans include:
 - **Beneficial Use** designations for each water body
 - **Water Quality Objectives** to protect beneficial uses
 - **Implementation Programs** to achieve compliance with the objectives

Porter-Cologne Water Quality Control Act

- **Beneficial uses** may include:
 - domestic, municipal, agricultural and industrial supply
 - power generation
 - recreation
 - aesthetic enjoyment
 - navigation
 - preservation and enhancement of fish & wildlife

Porter-Cologne Water Quality Control Act

- Water quality objectives may include:
 - limits on constituents
 - temperature requirements
 - flow and water project operations

Porter-Cologne Water Quality Control Act

- Water quality objectives must ensure **reasonable** protection of beneficial uses
- Entails **consideration** of competing uses, economics
- Planning process is designed to create a broad framework for participation and consideration of broad societal interests
- Provides certainty that is generally lacking in water right decision-making

Porter-Cologne Water Quality Control Act

- State Water Board may develop state policy for water quality control
 - Include principles and guidelines for water quality control
 - May include water quality objectives

Porter-Cologne Water Quality Control Act

- Combined authority of the State Water Board in 1967 allows coordinated consideration of water quality and water rights issues
- Pre-dated the Porter-Cologne Act
 - “ Just as you would not separate water into its component parts of two parts hydrogen and one part oxygen and have a separate regulatory board for both, likewise separating the water rights and water quality functions made just as little sense”

Porter-Cologne Water Quality Control Act

- Water Code does not require water rights decisions to implement water quality control plans/policies
- But the Water Boards can commit the State Water Board to implement water right proceedings to implement the plan. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674; Wat. Code, § 13247.)



How does the State Water Board apply these authorities?

- Quasi-judicial proceedings:
 - Water right applications and petitions
 - Reopen existing rights
 - Statutory stream adjudications/court references
 - Water quality certification of FERC-licensed hydroelectric projects

How does the State Water Board apply these authorities?

- Quasi-legislative proceedings:
 - Regulations
 - Water quality control plans and policies

Bay-Delta Plan



Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary

December 13, 2006



Division of Water Rights
December 2006



REVISED Water Right Decision 1641

In the Matter of:

Implementation of Water Quality Objectives for the
San Francisco Bay/Sacramento-San Joaquin Delta Estuary;

A Petition to Change Points of Diversion of the
Central Valley Project and the State Water Project in the
Southern Delta; and

A Petition to Change Places of Use and Purposes of Use of the
Central Valley Project

December 29, 1999

Revised in Accordance with Order WR 2000-02

March 15, 2000

STATE WATER RESOURCES CONTROL BOARD
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

Sacramento-San Joaquin Delta Reform Act of 2009

- Required report by 2010 with prioritized schedule and cost estimate to complete instream flow studies:
 - For the Delta and high priority tributaries by 2012
 - For all major rivers and streams outside the Sacramento River watershed by 2018



California Water Action Plan

- State Water Board and Department of Fish & Wildlife to coordinate efforts to enhance flows in at least five streams that support critical habitat for anadromous fish
- Funded by Legislature as part of 2015 drought legislation

California Water Action Plan



Bay-Delta Plan Update

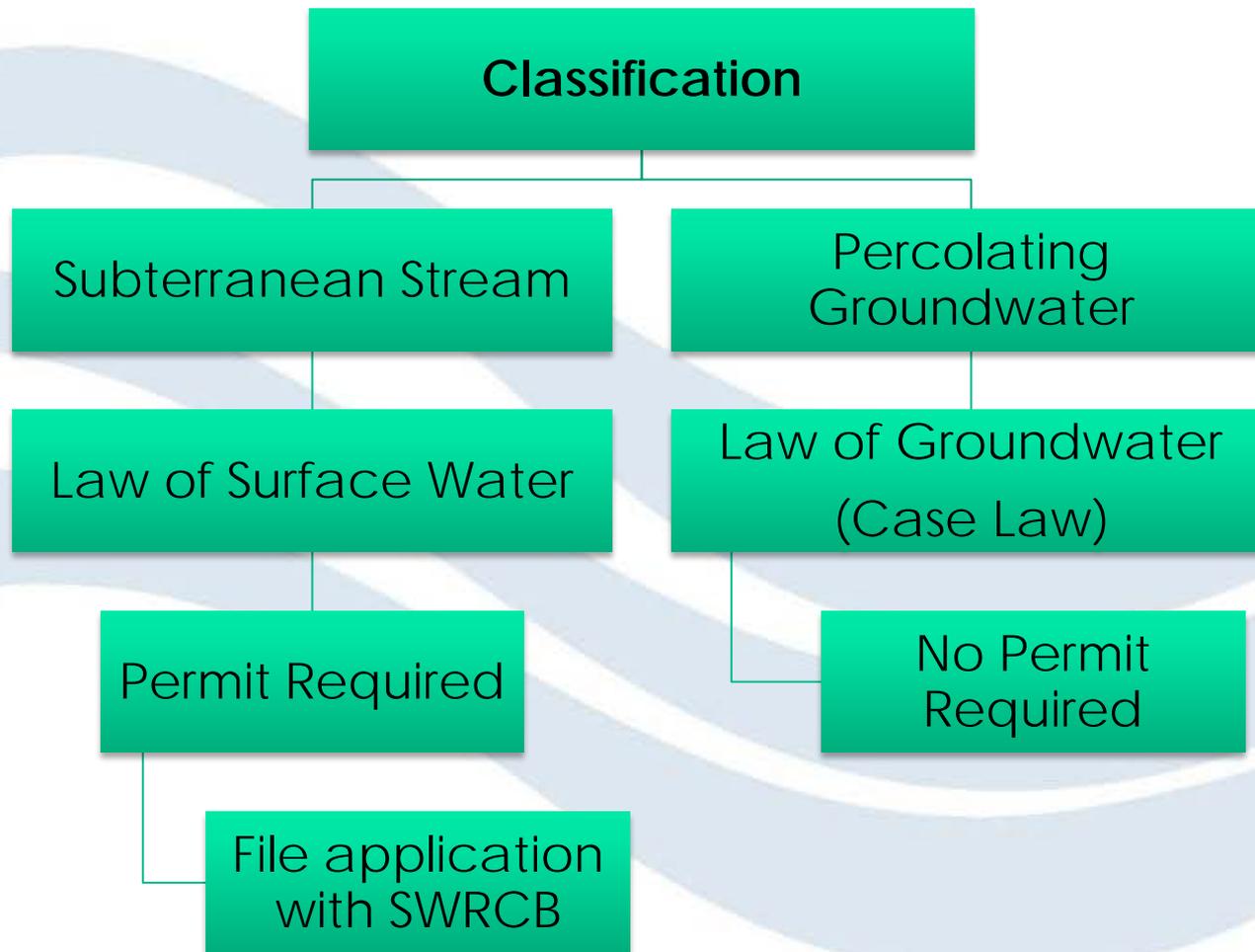
Phased approach:

- Phase 1 – San Joaquin River flows and Southern Delta salinity
- Phase 2 – other updates
- Phase 3 – implementation of Phases 1 & 2
- Phase 4 – developing and implementing flow objectives for priority tributaries

Groundwater Water Rights

- No statewide statutory scheme or permitting process
- Groundwater rights can be overlying (akin to riparian) or appropriative
- Only way to quantify or prioritize rights is through comprehensive court adjudication
- Legal fiction separates groundwater and surface
 - hydrology recognizes they are connected in many circumstances

Groundwater Appropriation Method



Sustainable Groundwater Management Act of 2014

- Requires local basin plans for high- and medium- priority basins
- Provides local management tools
- Allows state review and intervention
- Sets goals and deadlines
- Does not alter water rights



Establishing Groundwater Sustainability Agencies

- Local agency, or combination of agencies with coordination agreement
- Local agency election:
 - Listed agencies with groundwater management powers get first dibs, but can elect not to.
 - Counties are presumptively the agencies for “white spot” areas not within the area of another local agency that elects to manage, but the county may opt out

New Local Management Tools

- Aligns local groundwater agencies with basin boundaries
- Authorizes agencies to:
 - Register wells
 - Measure extractions
 - Require reports
 - Manage extractions
 - Assess Fees
- Local plans are exempt from CEQA



Key Dates for Local Agencies

Time	Action	Protects local water users from state intervention
6/30/2017	Form local agencies	<input checked="" type="checkbox"/>
1/31/2020	Adopt plans in critically overdrafted basins	<input checked="" type="checkbox"/>
1/31/2022	Adopt plans in all other basins	<input checked="" type="checkbox"/>
20-year implementation period	Successfully implement plans	<input checked="" type="checkbox"/>

What is Sustainable Groundwater Management?

- Managing groundwater during the 50-year planning horizon without causing:
 - Chronic lowering of groundwater levels
 - Reductions in storage
 - Seawater intrusion
 - Degradation of groundwater quality
 - Land subsidence
 - Surface water depletions



State Water Board SGMA Activities

- Pre-July 1, 2017
 - Consultation – DWR Regulation
 - Education
 - Familiarization
 - Familiarize State Water Board with basins
 - Familiarize locals with State Water Board authority
- Post-July 1, 2017
 - Backstop and intervention

State Water Board Intervention



State Water Board Intervention

Cause of Intervention	After
1. No local agency	2 ½ years
2. No plan	5 years (overdraft) 7 years (all other high/med)
3. Inadequate plan or inadequate implementation <u>plus</u> <ul style="list-style-type: none"> • Critically over-drafted 	5 years
4. Inadequate plan or inadequate implementation <u>plus</u> <ul style="list-style-type: none"> • long-term overdraft, <u>or</u> • significant depletions of surface waters 	7 years (long-term overdraft) 10 years (surface water)

Local agencies control their destiny



State Water Board Intervention

- Intervention Steps
 - Board designates basin as “probationary”
 - Cure period & possible mediation
 - Board develops an interim plan
 - Local agency adopts an adequate groundwater sustainability plan

Board controls the intervention process

Wrap Up

- Questions?
- Other topics?