

Frequently Asked Questions Associated with the Release of a Memorandum on the Theory of Overlap between Riparian and pre-1914 Water Rights (“Overlap Memo”)

What is the Overlap Memo?

The Overlap Memo is a memorandum prepared under supervision of the Delta Watermaster. The Overlap Memo describes current California water rights law as applied to the assertion that riparian and pre-1914 water right claims within the Delta can only be distinguished through adjudication of such claims, that is, through an adversarial process resulting in a final decision by a court. The Overlap Memo essentially rebuts that assertion.

What is the basis of the theory that riparian and pre-1914 water rights “overlap”?

Most of the Legal Delta was “reclaimed” pursuant to the Nineteenth Century Swamp and Overflowed Lands Act, which encouraged farmers to fill in wetlands to create arable crop land. Thus, much of the land in the Delta is adjacent to natural watercourses, and that adjacency is the basis for common law riparian water rights attaching to the land. Most of the reclamation in the Delta took place before the turn of the Twentieth Century. When the Water Commission Act became effective in 1914, appropriators who had lawfully diverted water and put it to beneficial use on non-riparian lands prior to the effective date were “grandfathered”, establishing what came to be known as pre-1914 water rights. Both riparian and pre-1914 water rights are outside the statutory administrative jurisdiction of the Water Board. However, the Water Board has authority to prevent waste and unreasonable use, to protect the public trust, to prevent unlawful diversions, and to protect legal users of water under the priority system—even when a challenged diversion is defended by a claim of riparian or pre-1914 water rights.

What prompted preparation of the Overlap Memo?

During staff review of the 2015 Informational Order, it became apparent that there is widespread confusion about distinguishing between riparian and pre-1914 water right claims. Among Informational Order respondents within the Delta, the vast majority claimed both pre-1914 and riparian water rights to support their diversions. In fact, many responses include the following boilerplate: “Until the Pre-1914 and Riparian rights are adjudicated they are overlapping rights that cannot be legally separated.”

The assertion that pre-1914 and riparian rights cannot be distinguished without an adversarial court proceeding leading to a final judgment creates legal and administrative uncertainty. For instance, the asserted impossibility of distinguishing without a court adjudication preserves for a diverter claiming both rights the opportunity to “pick and choose” between the rights according to circumstances. In response to challenges to the exercise of a pre-1914 claim, a diverter might cease diversion under that right, but divert the same water under the “overlapping” riparian claim thus confounding administration of the priority system in periods of shortage. As another example of the confusion caused by the claim of overlapping water rights, many in-Delta diverters “double count” actual use by reporting the same water use under both a riparian claim and a pre-1914 claim.¹ Finally, confusion about how to distinguish between water right claims impedes accurate predictions of actual water demand within the Delta.

In light of the confusion and the claim of inextricable overlap between riparian and pre-1914 claims, the Delta Watermaster commissioned legal analysis of the issue, which culminated in the Overlap Memo.

Does the Overlap memo articulate new policies and procedures?

No, the Overlap Memo describes current California water rights law as applied to the incidence of supposedly overlapping senior water right claims within the Delta. The Overlap Memorandum assists the Office of the Delta Watermaster as it carries out statutory (WC §85230) and delegated (Resolution 2015-0058) responsibility and authority. The Overlap Memo creates no new or independent regulatory authority; rather, it is an explanation of current law as extensively cited therein.

The Overlap Memo has no regulatory effect. However, the analysis and conclusions in the Overlap Memo could be challenged by Delta water rights advocates or other legal scholars. In fact, one of the reasons for releasing the Overlap Memo is to invite discussion with the Delta water bar aimed at resolving the apparent confusion. If the principles described in the Overlap Memo become the basis for an enforcement action, water right claimants subject to such enforcement will have due process recourse to challenge the application of the principles before the Water Board and the courts.

What are the legal principles explained in the Overlap Memo?

The Overlap Memo suggests that:

¹ The incidence of such duplicate reporting has diminished considerably since 2015, partly as a result of constituent outreach and education not only by the Office of the Delta Watermaster but also by the three Delta Water Agencies and the community of Delta water lawyers.

- the elements needed to establish a riparian water right are distinct from the elements needed to establish a pre-1914 water right;
- by concentrating on the elements required to establish each type of right, it is possible to distinguish between them based on careful analysis of the facts, circumstances, and characteristics of each claim;
- exercise of a riparian water right prior to 1914 alone does not give rise to a pre-1914 appropriative water right;
- water rights cannot be “stacked” such that the diversion of water under one right can be maintained while water available for diversion to the same beneficial use on the same parcel(s) under another right can be transferred to support another use at another location;
- the precise nature and extent of a water right can only be definitively determined through an adjudicatory proceeding subject to due process protections;
- careful review of the facts, circumstances, and historic use patterns surrounding water use in the Delta can help to identify information that supports a riparian or a pre-1914 water right; and
- careful review and analysis of the elements required to support a water right could lead to an allegation that a water right claim lacks foundation and that diversion under an unfounded claim constitutes an unlawful diversion triggering an enforcement action.

Why is the Overlap Memo limited to overlap of water right claims within the Delta?

The jurisdiction of the Delta Watermaster is limited to water diversion and use within the Legal Delta and Suisun Marsh. Aside from the limitation based on jurisdiction, however, there are characteristics of water use in the Delta that dictate limitations in the scope of the Overlap Memo. For example, there is no operable seasonal or inter-annual water storage in the Delta; water diverted and not consumed returns to the Delta channels in close proximity (both in space and time); the Delta exhibits far less consolidation of water rights (i.e., through creation of mutual water companies or irrigation districts) than in upland agricultural districts. The Overlap Memo makes no attempt to discern how its analysis might properly be applied outside the Delta.

Why is the Overlap Memo being released for public review?

The Delta Watermaster has chosen to post the Overlap Memo on this webpage in order to:

- subject the Overlap Memo to external scrutiny;
- promote reasoned discussion of the underlying principles and their potential application within the Delta;
- improve transparency of the Delta Watermaster’s understanding of current law (and consequent activities);

- guide water users in preparing and filing their annual reports of diversion and use; and
- allow water users (as well as their counsel and other associates and advisors) within the Delta to plan and proceed with a broader understanding of the legal principles related to claims of overlapping riparian and pre-1914 water rights.

If interest warrants, the Delta Watermaster may convene or participate in various forums for discussion of the Overlap Memo, the principles articulated therein, and its possible application in the Delta.

What if water right claimants dispute principles and legal conclusions enunciated in the Overlap Memo?

Contrary and/or complimentary legal research and argument related to the issues discussed in the Overlap Memo will be welcomed. In any instance in which the principles explicated in the Overlap Memo are applied in the course of an enforcement action, there will be a proceeding that affords appropriate due process.

Will the principles described in the Overlap Memo be subject to Water Board review and action?

As noted above, any enforcement action seeking to apply contested principles in the Overlap Memo will be subject to standard due process protections as appropriate to the proceeding. The Overlap Memo is not a pronouncement of the Water Board, and endorsement by the Water Board is not implied by its publication on the webpage of the Office of the Delta Watermaster.

(This Fact sheet was last updated on June 6, 2018)