
State Water Resources Control Board

To: Michael Patrick George, Delta Watermaster

From: Micah Green, Water Rights Analyst

Re: Issues Related to Overlap between Pre-1914 and Riparian Water Right Claims in the Delta

Date: December 15, 2017

Pursuant to your request, I have researched an issue raised in the course of my review of responses to the Division of Water Rights' 2015 Information Order submitted by water right claimants within the Legal Delta.

I. Question Presented

Under California water law and within the Legal Delta, are there any circumstances under which riparian and appropriative rights can “overlap” becoming indistinguishable or inseparable such that either or both may be lawfully exercised at the election of the holder?

II. Short Answer

It is possible to perfect both riparian and appropriative water rights for beneficial use on the same parcel. However, riparian and appropriative rights are distinct property interests that must be separately established. There is no California precedent recognizing “overlapping” or “intertwined” water rights, and water laws against hoarding and non-use operate to preclude the duplicative exercise of water rights.

III. Factual and Legal Background

On February 4, 2015, the State Water Resources Control Board (the “Board”), Division of Water Rights issued an Order for Additional Information (“Information Order”) to 445 different parties claiming riparian and pre-1914 appropriative rights in the Delta and the Sacramento and San Joaquin River watersheds.¹ The claimants subject to the Information Order represent 90 percent, by volume, of

¹ State Water Resources Control Board Order WR 2015-0002-DWR at p. 1, available at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/2015sacsjinfoorder.pdf (hereinafter “Information Order”).

reported water use by water right claimants in the Delta, and 90 percent, by volume, of the remaining reported diversions from the Sacramento and San Joaquin River watersheds.²

The Information Order, issued pursuant to drought emergency authority, called for these claimants to submit “all documentation” supporting the basis for their claimed rights, and requested a “separate” accounting of water diverted under each claimed right.³ To support riparian claims, the Information Order sought “the property patent date and patent map.”⁴ For pre-1914 appropriative claims, the Information Order sought “a copy of notice filed with the county, copy of property deed, and all other information...pertaining to initial diversion and continued beneficial use of water.”⁵ The deadline for submitting this information was March 6, 2015.⁶

In the Delta, a unique history of land acquisition and use dating back to California’s statehood serves as the backdrop for many claimed water rights. Most of the lands in the Delta were passed from federal ownership to the State of California by the Swamp and Overflowed Lands Act of 1850.⁷ In turn, California offered land patents to individuals and associations willing to develop these inundated areas into cultivatable farmland.⁸ Upon payment, purchasers were issued a receipt known as a Certificate of Purchase, which counted as “*prima facie* evidence of legal title.”⁹ With a Certificate of Purchase in hand, individuals and associations formed for the purpose of reclamation could legally occupy and cultivate the lands described in their Certificates of Purchase. However, until the State of California issued a patent signed by the Governor, purchasers did not hold actual legal title to such lands. Prior to acquiring title via patent, many of these early purchasers diverted water from the streams and rivers running through or adjacent to the subject lands for agricultural and domestic use. Rights to this water were based on the “possessory rights” acquired by settlers as “occupants on the public lands.”¹⁰ Upon the issuance of a patent, these settlers acquired fully vested riparian rights with priority dates that were

² *Ibid.*

³ *Id.* at p. 2; see also Cal. Code Regs., tit. 23, § 879, subd. (c).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ 43 U.S.C. § 982.

⁸ See generally Cal. Statutes, Ch. 151 (1855); Cal. Statutes, Ch. 235 (1858); Cal. Statutes, Ch. 314 (1859); Cal. Statutes, Ch. 352 (1861); Cal. Statutes, Ch. 356 (1861); Cal. Statutes, Ch. 397 (1863); Cal. Statutes, Ch. 415 (1868); Cal. Statutes, Ch. 573 (1870); Cal. Statutes, Ch. 425 (1872); Cal. Statutes, Ch. 157 (1891); Cal. Statutes, Ch. 444 (1909).

⁹ Cal. Statutes, Ch. 397, § 17 (1863).

¹⁰ *Lux v. Haggin* (1886) 69 Cal. 255, 376-379; see also *Crandall v. Woods* (1857) 8 Cal. 136, 143 (under the law of riparian rights, one without title who “locates upon and appropriates public lands belonging to the United States” has a right to irrigate the lands through which the water naturally flows).

deemed to “relate back” to the date of settlement, under either a Certificate of Purchase¹¹ or an equitable claim of title based on settlement.¹²

In light of this factual and legal history, many of the materials submitted in response to the Information Order are accompanied by the assertion that certain riparian and pre-1914 appropriative rights in the Delta are “overlapping” and in some cases cannot be legally separated absent adjudication.¹³ In turn, many in-Delta water users subject to the Information Order claim both riparian and pre-1914 rights, but maintain that it is impossible to determine the amount of water diverted under each individual claimed right. Moreover, when certain pre-1914 appropriative rights were threatened with curtailment during the drought in 2015, some Delta diverters claiming dual rights asserted that they would continue to divert at the same rate under their riparian rights if their appropriative rights were curtailed.¹⁴

IV. Discussion

A. Riparian and appropriative rights are separate and distinct property interests. California courts have established fact-specific requirements that must be met in order to separately perfect each type of right.

Water diversion and use in California is governed by a “dual system” of property interests, which recognizes both riparian and appropriative water rights.¹⁵

¹¹ *Haight v. Costanich* (1920) 184 Cal. 426, 430.

¹² *Pabst v. Finmand* (1922) 190 Cal. 124, 130-131 (the “date of first lawful entry” controls. There are at least two types of “lawful entry:” entry under a Certificate of Purchase, and entry under an equitable claim of title. If a land acquirer received a Certificate of Purchase from the U.S. Land Office, the date of entry relates back to at least the date of entry under the Certificate (see *Haight v. Costanich* (1920) 184 Cal. 426, 430). If land had been settled before filing for a Certificate of Purchase, the settlers would have an equitable claim of title against all parties other than the United States, and the date of entry under the equitable claim controls (see *Pabst v. Finmand*, (1922) 184 Cal. 426, 430; see also *Crandall v. Woods* (1857) 8 Cal. 136, 143).

¹³ See, e.g., Dante Nomellini Jr., *Explanatory Attachment* at p. 2, available at:

http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_b.pdf;

John Herrick, *Explanatory Attachment* at p. 2, available at:

http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_c.pdf;

Central Delta Water Agency, *Public Comment Letter Re: February 17, 2015, Informational Item 4*, available at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/informational_order/cdwafeb2015.pdf;

Jennifer Spaletta, *Response to 2015 Drought Information Order Re Pre-1914 Rights* at p. 1-2, available at:

http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_e.pdf.

¹⁴ See Testimony of Brian Coats, Byron-Bethany Irrigation District Administrative Civil Liability Hearing/West Side Irrigation District Cease and Desist Order Hearing at p. 16, available at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/exhibits/pt/wr9.pdf.

¹⁵ *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 961 (hereinafter “*El Dorado*”).

Riparian Rights

Riparian rights support the diversion of water flowing in a natural watercourse for beneficial use on contiguous lands.¹⁶ The foundational principle of the riparian doctrine is that water rights may be obtained and exercised as an incident of property ownership.¹⁷ If water naturally flows past or through a parcel of privately owned land, such a parcel is known as “riparian” or “contiguous” land.¹⁸ The amount of water available under a riparian right is non-quantifiable, because riparian landowners may divert and reasonably use as much of the natural flow in the adjacent watercourse as necessary to meet the beneficial uses of the riparian parcel.¹⁹ Riparian rights are correlative with the rights of other riparians on the watercourse,²⁰ but the limit of the right is the amount of water that can be put to reasonable and beneficial use on the riparian parcel.²¹ Moreover, only the smallest parcel maintaining contiguity to a natural watercourse retains riparian diversion and use rights.²² This rule eliminates riparian rights from formerly riparian parcels when riparian land is subdivided and sold as smaller parcels, unless there is sufficient evidence of the contemporaneous intent to preserve riparian rights for use on any newly non-contiguous lands.²³ If evidence of such intent is not sufficient, riparian rights to divert and use water on all non-contiguous parcels terminate by operation of law.²⁴

Based on these principles, a riparian water right contains at least the following two elements: (1) ownership of land; and (2) a riparian connection between the subject land and a natural watercourse, either physically or through preservation. Moreover, lawful exercise of a riparian right is subject to five general limitations. First, water diverted under a riparian right must be put to reasonable and beneficial use.²⁵ Second, riparian rights generally attach to natural watercourses and the waters flowing naturally therein, with some limited exceptions.²⁶ Third, the place of use for a riparian right is limited to the

¹⁶ *People v. Shirokow* (1980) 26 Cal.3d 301, 307 (hereinafter “*Shirokow*”).

¹⁷ *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 101.

¹⁸ *Ibid.*

¹⁹ *Pabst v. Finmand* (1922) 190 Cal. 124, 129.

²⁰ *Southern California Inv. Co. v. Wilshire* (1904) 144 Cal. 68, 70.

²¹ *Prather v. Hoberg* (1944) 24 Cal.2d 549, 560; see also *Pabst v. Finmand* (1922) 190 Cal. 124, 129.

²² *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 529.

²³ *Hudson v. Dailey* (1909) 156 Cal. 617, 624-625.

²⁴ *Ibid.*

²⁵ Cal. Const. Art. X, § 2.

²⁶ *Chowchilla Farms Inc. v. Martin* (1933) 219 Cal. 1, 19-26 (note that a channel not created by natural forces can be deemed legally “natural” and give rise to riparian rights if the circumstances indicate that the channel has effectively become part of the natural watershed over time. Factors that point toward a natural channel include the length of time that the channel has been in use and the degree to which the flow in the channel is controlled by natural or artificial forces).

riparian parcel, unless the right was preserved for use on non-riparian land when it was severed from the residual riparian parcel.²⁷ Even if the right has been preserved for use on a non-riparian parcel, water diverted under a riparian right cannot be used on a parcel outside of the watershed from which it was originally diverted.²⁸ Fourth, water diverted under a riparian right cannot be transferred (sold or otherwise conveyed to a third party) separately from the riparian property.²⁹ Fifth, water diverted under a riparian right cannot be held in storage for use at a later time.³⁰

Appropriative Rights

Unlike riparian rights, appropriative rights are not established by the settlement or ownership of riparian real property.³¹ Instead, appropriative rights arise from and are limited to the actual diversion of a quantifiable amount of water for a beneficial use at a designated location.³² As a general principle, “[t]he appropriation doctrine...applies to ‘any taking of water for other than riparian or overlying uses.’”³³

In 1855, the California Supreme Court recognized that the right to divert water could be acquired based on actual diversion and use; in so doing, the Court adopted a legal framework prioritizing appropriative rights based on the sequence in which they were acquired.³⁴ Based on that 1855 recognition of the prior appropriation doctrine in California, diverters could acquire rights to water by actually diverting water and putting such water to beneficial use.³⁵ Until 1872, there was no statutory or administrative process for providing notice of such a claim to other parties; however, posting a notice at the point of diversion was a commonly accepted method for doing so.³⁶

²⁷ *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 753, 772 (hereinafter *Pleasant Valley*, citing *Holmes v. Nay* (1921) 186 Cal. 231, 235 and stating that “a riparian right may be exercised only on the owner’s riparian land,” then applying the rule that contemporaneous evidence of intent is required to preserve riparian rights for non-contiguous land).

²⁸ *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 528-529.

²⁹ *Spring Valley Water Co. v. County of Alameda* (1927) 88 Cal.App. 157, 168.

³⁰ *Shirokow*, *supra*, 26 Cal.3d 301, 307.

³¹ *Pleasant Valley*, *supra*, 61 Cal.App.4th 742, 753.

³² *Arizona v. California* (1931) 283 U.S. 423, 459; *Crane v. Stevinson* (1936) 5 Cal.2d 387, 398 (hereinafter “*Crane*”); *El Dorado*, *supra*, 142 Cal.App.4th 937, 961.

³³ *Shirokow*, *supra*, 26 Cal.3d 301, 307 (quoting *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925); see also Cal. Water Code, § 1201 (codifying this principle).

³⁴ *Irwin v. Phillips* (1855) 5 Cal. 140, 147.

³⁵ *Ibid.*

³⁶ Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* at p. 293-294.

In 1872, the California legislature enacted standard procedures for making and recording appropriative claims.³⁷ Under the 1872 statutory scheme, an appropriative claim could be asserted by posting a notice at the point of intended diversion stating the amount of water to be diverted and listing the intended purpose and place of use.³⁸ Claimants taking advantage of the new scheme were required to record this notice with the Recorder's Office for the county in which the point of diversion was located.³⁹ Because participation in the 1872 framework was voluntary, registration with the county is not an essential element to establish an appropriative right. However, compliance with the registration protocol is a persuasive piece of evidence of the underlying water right; compliance also offered claimants a date of priority relating back to the first steps taken toward initial diversion of water.⁴⁰

The legislature enacted the Water Commission Act of 1913, which became effective, following referendum validation, on December 19, 1914.⁴¹ This act created the Water Commission, the predecessor to the Board, and established that the exclusive procedure for acquiring appropriative water rights in California would thenceforth be through an administrative process before the Water Commission.⁴² To appropriate water that is surplus to the water required to serve the beneficial uses of riparians and earlier appropriators, prospective diverters apply for a permit from the Water Commission (or its successor, the Board).⁴³ Application for such a permit requires (1) notice of intent to divert water (providing an opportunity for protest) and (2) a timetable for development of the physical facilities necessary to divert, convey, and apply the subject water to a beneficial use.⁴⁴ After the Water Commission (now the Board) determines that granting the permit would not injure another legal user of water and the permittee has put the water to beneficial use, the Water Commission issues a license confirming the water right.⁴⁵

The relevant statutes and case law identify five elements that must be met in order to perfect a pre-1914 appropriative water right. First, an appropriation must be properly noticed.⁴⁶ Notice may be

³⁷ Civil Code of 1872, §§ 1410-1422, available at: http://digitalcommons.csumb.edu/cgi/viewcontent.cgi?article=1000&context=hornbeck_usa_3_h.

³⁸ Civil Code of 1872, § 1415.

³⁹ *Ibid.*

⁴⁰ Civil Code of 1872, § 1418.

⁴¹ Stats. 2013, ch 586.

⁴² Cal. Water Code, § 1225.

⁴³ Cal. Water Code, §§ 1250 et seq.

⁴⁴ Cal. Water Code, §§ 1250 et seq.; Cal. Water Code §§ 1375 et seq.

⁴⁵ Cal. Water Code, §§ 1600 et seq.

⁴⁶ *Haight v. Costanich* (1920) 184 Cal. 426, 431-433.

formal, such as a notice recorded with the county or posted at the point of diversion,⁴⁷ or informal, through an outward manifestation of intent to divert water by constructing a channel or diversion structure at the point of diversion.⁴⁸ Second, the claim must be based on an actual diversion, as opposed to a prospective or purely speculative one.⁴⁹ Third, the claimant must have actually diverted and used water prior to 1914, because appropriations beginning after 1914 must be approved by the Water Commission (or its successor, the Board).⁵⁰ Fourth, the water diverted must be applied to a beneficial purpose.⁵¹ Fifth, the claimant must establish a specific amount of water actually diverted.⁵² Supported by sufficient evidence, these five elements establish a *prima facie* pre-1914 appropriative water right.

B. Riparian and appropriative rights may be perfected for use on the same parcel of land. However, appropriative rights may only be perfected by demonstrating the essential elements of appropriation.

It is possible to perfect both riparian and appropriative water rights to support beneficial use on the same parcel.⁵³ However, a claimant must establish the essential elements of each type of right in order to independently support each claim. And, for each type of water right, the claimant must observe the specific limitations on the right claimed. For instance, as noted above, a riparian water right will not support storage or transfer of water to a non-riparian parcel, because water diverted pursuant to a riparian right is limited to direct application to beneficial use on the riparian land.⁵⁴ Similarly, a riparian right is limited to diversion and use of the natural flow of water in the watercourse, while an

⁴⁷ *Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879, 905 (hereinafter “*Millview*”) (citing Civil Code of 1872, § 1415).

⁴⁸ *Nevada County and Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 311-312; *Haight v. Costanich* (1920) 184 Cal. 426, 431-433.

⁴⁹ *McDonald v. Bear River and Auburn Water and Mining Co.* (1859) 13 Cal. 220, 232-233; *Haight v. Costanich* (1920) 184 Cal. 426, 431-433; *Turlock Irrigation District v. Zanker* (2006) 140 Cal.App.4th 1047, 1054.

⁵⁰ *Fall River Valley Irrigation District v. Mt. Shasta Power Corp.* (1927) 202 Cal. 56, 66 (citing the statutory provision that became Cal. Water Code, § 1225); *Temescal Water Company v. Department of Public Works* (1955) 44 Cal.2d 90, 95-97.

⁵¹ *McDonald v. Bear River and Auburn Water and Mining Co.* (1859) 13 Cal. 220, 232-233; *Nevada County and Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 311-312; *Crane, supra*, 5 Cal.2d 387, 398; *Haight v. Costanich* (1920) 184 Cal. 426, 431-433; *Arizona v. California* (1931) 283 U.S. 423, 459; *El Dorado, supra*, 142 Cal.App.4th 937, 961; *Millview, supra*, 229 Cal.App.4th 879, 905.

⁵² See, e.g., *Crane, supra*, 5 Cal.2d 387, 398; *Arizona v. California* (1931) 283 U.S. 423, 459; *Millview, supra*, 229 Cal.App.4th 879, 905 (this element alone precludes an assertion of “overlapping” and collectively “unquantifiable” water rights, because claimants must independently establish the amount diverted under the appropriative claim in order to affirmatively establish the priority of the appropriative right).

⁵³ *Rindge v. Crags Land Co.* (1922) 56 Cal.App. 247, 252 (hereinafter “*Rindge*”).

⁵⁴ *City of Lodi v. East Bay Municipal Utilities District* (1937) 7 Cal.2d 316; *Moore v. California Oregon Power Co.* (1943) 22 Cal.2d 725, 731; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925-926; but see Cal. Water Code, § 1707 (allowing dedication of water arising under riparian rights for instream beneficial uses).

appropriator is entitled to divert non-natural flows that have been abandoned.⁵⁵ Appropriative rights can also be perfected through applying water to riparian land if the water was diverted from a non-contiguous source and conveyed through a controlled system to the riparian parcel.⁵⁶ In summary, each claim must be supported by the essential elements of the right claimed, and must also observe the limitations attributable to the right claimed.

The decisions of the Board apply this principle to conclude that the exercise of each right remains distinguishable from the other, based on both the elements and the limitations that apply differently to each right. In 2011, the Board faced a claim of indistinguishable overlapping riparian and pre-1914 water rights *In the Matter of Draft Cease and Desist Order Against Unauthorized Diversions by Woods Irrigation Company*.⁵⁷ In that proceeding, the Board's Division of Water Rights issued a draft Cease and Desist Order ("CDO") that aimed to limit the amount of water that Woods could divert and distribute in its Delta water service area.⁵⁸ In response, Woods asserted "overlapping" pre-1914 and riparian rights that entitled it to divert more water than indicated in its service agreements.⁵⁹ In its Order adopting the CDO, the Board rejected the theory of overlapping rights, because to accept the theory "would mean assuming that water was diverted under an appropriative right on riparian lands, and that the riparian owners can then switch to diverting under riparian rights, and 'double-count' the water."⁶⁰ After reviewing the authorities cited by Woods in support of its overlapping rights theory,⁶¹ the Board concluded that "none of these authorities hold [sic] that a riparian right holder may use the available natural supply of water on riparian land for a riparian purpose, and then claim that the use was under an

⁵⁵ *Bloss v. Rahilly* (1940) 16 Cal.2d 70, 76 (as opposed to "natural flow," "foreign water" is water that did not originate in the watershed from which the claimant diverts water ("foreign in origin") or which has been diverted to storage from and later released to the watershed ("foreign in time"). (See *E. Clemens Horst Co. v. New Blue Point Mining Co.* (1918) 177 Cal. 631, 637-640.) "Abandoned" water is that which has been lawfully diverted and released by a diverter who intends to relinquish dominion and control over such water. (See *Utt v. Frey* (1895) 106 Cal. 392, 396-397.) Water that is appropriated or used and subsequently flows back into a stream is subject to appropriation. (Cal. Water Code, §§ 1201-1202.) The right to divert abandoned water only applies to water that has already been abandoned; it does not include a right to compel the continued abandonment of water in the future. (See *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450, 454; *Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 343, 348.)

⁵⁶ See, e.g., *Pleasant Valley*, *supra*, 61 Cal.App.4th 742.

⁵⁷ State Water Resources Control Board Order WR-2011-005; State Water Resources Control Board Order WR-2012-0012.

⁵⁸ State Water Resources Control Board Order WR-2011-005 at 5-6.

⁵⁹ *Id.* at p. 34-35.

⁶⁰ *Id.* at p. 35.

⁶¹ See *Rindge*, *supra*, 56 Cal.App.2d 247; *Porters Bar Dredging Co. v. Beaudry* (1911) 15 Cal.App. 751; *Pleasant Valley*, *supra*, 61 Cal.App.4th 742; State Water Resources Control Board Board Decision D-1282 (1967).

appropriative right which developed while its riparian rights lay dormant.”⁶² The Board recognized the possibility that appropriative rights may “wrap around” riparian rights, but also noted that the appropriative right is distinct in operation and “is not in addition to available riparian rights, such that the right holder can divert two times as much, or transfer the appropriative right while continuing to divert under the riparian one.”⁶³

After the Woods CDO was adopted, the parties reached a settlement that was subsequently approved by the Board.⁶⁴ The Order adopting the CDO, although superseded by the approved settlement of the case, nonetheless illustrates the Board’s position that riparian and appropriative rights are not intertwined so as to be indistinguishable under California water law. This position is consistent with the long-standing differentiation among the elements of and limitations on appropriative as compared to riparian water rights.⁶⁵

Also in 2011, the Millview County Water District asserted “overlap” of a riparian and a pre-1914 appropriative right to divert water from the same source for use on riparian land. In addressing this claimed “overlap,” the Board noted that the appropriative right might not have been perfected, because there was no evidence that water had been put to a “wrap around” use, within the meaning of that term as used in the *Woods* Order.⁶⁶ On review of the Superior Court’s grant of a writ of mandate, the Court of Appeal recognized that “a [Board] finding to this effect would have precluded any appropriation,” and agreed with the Board’s conclusion that the Water District “could not perfect the...claim as an appropriative water right without actually using the diverted water on non-contiguous land.”⁶⁷

Regardless of whether the place of use is a riparian parcel, an appropriative claimant must meet the essential elements for perfection of an appropriative right discussed above (in Section IV.A) to obtain a valid appropriative water right. To perfect a pre-1914 appropriative right, claimants must meet the

⁶² State Water Resources Control Board Order WR-2011-005 at p. 37.

⁶³ *Id.* at p. 35.

⁶⁴ See State Water Resources Control Board Order WR-2016-0006-Exec.

⁶⁵ *City of Lodi v. East Bay Municipal Utility District* (1937) 7 Cal.2d 316, 335; *Shirokow, supra*, 26 Cal.3d 301, 307; *El Dorado, supra*, 142 Cal.App.4th 937, 961; *Millview, supra*, 229 Cal.App.4th 879, 887.

⁶⁶ State Water Resources Control Board Order WR-2011-0016 at p. 24.

⁶⁷ *Millview, supra*, 229 Cal.App.4th 879 at 887, 905 (some might be tempted to describe the Court of Appeal’s finding as mere *dicta*, because the Court did not expressly rely on the lack of evidence of a “wrap around” use to decide the merits of the case. However, in making this finding, the Court was providing guidance for the proceeding on remand. Therefore, the Court of Appeal’s determination on this point has binding effect. (See *Garfield Medical Center v. Belshe* (1998) 68 Cal.App.4th 798, 806.).

elements of (1) notice, (2) actual diversion, (3) evidence of actual diversion and use of water prior to 1914, (4) beneficial use, and (5) a specific amount of water.⁶⁸

C. The constitution, statutes, court decisions, regulations, and policies of the State of California require beneficial use and preclude the duplicative exercise of water rights. There is no California authority supporting the concept of “overlapping” or “indistinguishable” riparian and appropriative water rights.

The assertion of “overlapping” water rights contained in many of the Information Order responses appears to be based on the premise that pre-patent water use on riparian land is appropriative in nature.⁶⁹ Assuming that appropriative rights were perfected through diversion and use on riparian land prior to the date of patent, these responses assert that “overlapping” riparian rights vested on top of pre-patent appropriative rights when title was transferred from public to private ownership.⁷⁰

The cases cited in support of this argument do not reference “overlapping” water rights. Both *Pleasant Valley Canal Co. v. Borrer* and *Rindge v. Crags Land Co.* recognize that riparian and appropriative water rights could be perfected through water use that began prior to acquisition of a patent and continued after the patent date.⁷¹ However, neither case holds that a pre-patent diversion of water for use on adjacent public land constitutes an appropriation. Instead, the court in *Pleasant Valley* held that the claimant’s acquisition of a riparian right did not deprive him of his pre-existing rights to appropriate water via a shared ditch from upriver land.⁷² Similarly, *Rindge* recognized that the right to appropriate water to physically separate riparian property would survive the acquisition of title and riparian rights in the downstream riparian property.⁷³ However, neither case holds that pre-patent water use was

⁶⁸ See *supra*, Part IV.A (many Information Order responses support pre-1914 appropriative claims by relying solely on the patent(s) and Certificate(s) of Purchase tied to a riparian parcel. (See, e.g., Response of Bettencourt Farming LLC supporting S016492, available at:

http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_i.pdf;

Response of Kurt and Sandra Kautz Family Trust supporting S016909, available at:

http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_k.pdf.) Such evidence, standing alone, falls short of meeting the essential elements of an appropriative right.)

⁶⁹ See, e.g., Jennifer Spaletta, *Response to 2015 Drought Information Order Re Pre-1914 Rights* at p. 1-2, available at: http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_e.pdf.

⁷⁰ *Ibid.* (citing *Rindge, supra*, 56 Cal.App. 247, 252; *Pleasant Valley, supra*, 61 Cal.App.4th 742, 774).

⁷¹ *Rindge, supra*, 56 Cal.App. 247, 252; *Pleasant Valley, supra*, 61 Cal.App.4th 742, 774.

⁷² *Pleasant Valley, supra*, 61 Cal.App.4th 742, 774.

⁷³ *Rindge, supra*, 56 Cal.App. 247, 252.

necessarily appropriative in nature, nor that “overlapping” rights were created upon the issuance of a patent.⁷⁴

Rather than creating an “overlapping” right, the vesting of a riparian right upon acquisition of title operates to change a conditional riparian right, based on land occupation, into an unconditional riparian right, based on land ownership.⁷⁵ As discussed above (in Section IV.B), appropriative rights can be acquired separately from riparian rights and applied to the same parcel.⁷⁶ However, there is no support in the law for a riparian right “overlapping” with a previously perfected appropriative right upon the issuance of a patent.

Water diverted in California must be “put to beneficial use to the fullest extent” possible.⁷⁷ This principle operates to prohibit diversion of more water than is reasonably necessary to meet the purposes for which water was diverted.⁷⁸ In *Senior v. Anderson*, the California Supreme Court applied the beneficial use limitation specifically to the exercise of appropriative rights on riparian land.⁷⁹ There, the claimant had appropriated water for use on riparian land prior to the acquisition of a patent; the quantity of the claimed appropriation exceeded the amount that could be put to beneficial use on the riparian parcel.⁸⁰ The Court held that, upon acquiring a patent, the claimant did not obtain a right to any additional quantity of water by virtue of the newly vested riparian right.⁸¹ This holding illustrates that the exercise of appropriative and riparian rights is limited to the amount needed for beneficial use on the land, even when both rights are asserted for use on the same parcel.

⁷⁴ Even assuming *arguendo* that pre-patent water use on a riparian parcel gave rise to an appropriative right, such rights may be subject to forfeiture for non-use. In a forfeiture action before the Board, diversions are attributed to the highest priority right held by the claimant. (See State Water Resources Control Board Order WR 2016-0001.) In the context of a claim of “overlapping” rights, the higher priority right is likely the riparian right, so long as natural flow is available, because the priority date of the riparian right relates back to the first possessory steps taken by the claimant’s predecessor. (See *Haight v. Costanich* (1920) 184 Cal. 426, 430; *Pabst v. Finmand* (1922) 190 Cal. 124, 130-131.) If all diversions to a riparian parcel are attributed to the riparian right, and there is no further evidence of appropriation, the appropriative right will have been un-exercised for a long period of time. In a forfeiture action, the party asserting forfeiture has the burden of identifying (1) five consecutive years of non-use and (2) the presence of a contemporaneous and conflicting claim to the un-used water. (Cal. Water Code, § 1241; *Millview*, *supra*, 229 Cal.App.4th 879, 891-905.)

⁷⁵ *Lux v. Haggin* (1886) 69 Cal. 255, 350-387.

⁷⁶ *Rindge*, *supra*, 56 Cal.App. 247, 252.

⁷⁷ Cal. Const. Art. X, § 2.

⁷⁸ *California Pastoral and Agricultural Co. v. Madera Canal and Irrigation Co.* (1914) 167 Cal. 78 (although this case predates by 14 years the adoption of Article X, section 2, the doctrine of reasonable and beneficial use is a common law principle that pre-dates the constitutional provision).

⁷⁹ *Senior v. Anderson* (1900) 130 Cal. 290.

⁸⁰ *Id.* at p. 296.

⁸¹ *Ibid.*

The limitation that beneficial use imposes on water rights is well-settled pursuant to Article X, section 2 of the California Constitution. As the Supreme Court explained in *California Pastoral and Agricultural Co. v. Madera Canal and Irrigation Co.*, “[t]he state has limited the right to appropriate waters of a stream to such waters as are reasonably necessary for the purpose for which the water is in fact appropriated.”⁸² Because of this principle, a diversion that exceeds the reasonably necessary amount “is contrary to the policy of our law and unauthorized...[such diversions] confer no right, no matter for how long continued.”⁸³

D. A riparian right for use of water on a parcel that does not maintain contiguity with a natural watercourse must be supported by evidence of intent to preserve the riparian right at the time of subdivision. As illustrated by recent cases in the Delta, severance without contemporaneous evidence of intent to preserve a riparian right precludes retention and exercise of the vestigial riparian claim.

Upon completion of the patent process, large swaths of riparian land in the Delta were subdivided and sold as individual parcels.⁸⁴ Many of these parcels did not maintain contiguity with a natural watercourse after subdivision and conveyance. Many Delta responses to the Information Order claim riparian rights but reference points of diversion and/or places of use on property that does not appear to be contiguous to a natural watercourse.⁸⁵

Of course, where riparian rights are terminated due to severance, owners of severed land could thereupon perfect an appropriative right to divert and use water on formerly riparian lands.⁸⁶ Such a right would need to be supported by evidence of appropriation in accordance with the law at the time of the appropriation. If such evidence indicates that the lawful appropriation occurred after severance

⁸² *California Pastoral and Agricultural Co. v. Madera Canal and Irrigation Co.* (1914) 167 Cal. 78, 85.

⁸³ *Ibid.*; see also *Mt. Shasta Power Corp. v. McArthur* (1930) 109 Cal.App. 171, 191 (“An appropriator obtains title to the extent only of his use of the water for beneficial purposes.”).

⁸⁴ See, e.g., John Thompson, *Early Reclamation and Abandonment of the Central Sacramento-San Joaquin Delta* (2006) at p. 49-58, available at: http://ccrm.berkeley.edu/resin/pdfs_and_other_docs/background-lit/EarlyReclamationandAbandonmentofDelta.pdf (discussing large-scale reclamation and subdivision projects on Sherman and Twitchell Islands.).

⁸⁵ See, e.g., Response of Joy and Robert Augusto Trust supporting S016918, available at: http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_f.pdf; Response of Everett Luiz and Sons Dairy supporting S016530 and S016937, available at: http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_g.pdf; Response of Honker Lake Ranch supporting S016906, available at: http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_h.pdf.

⁸⁶ See Cal. Water Code, § 1201 (allowing for appropriative use of water on non-riparian lands.).

but prior to 1914, the appropriative right would not be subject to the Board's permitting authority.⁸⁷ Even if severance took place after 1914, a formerly riparian owner would still have the opportunity to petition for an appropriative right through the permit and licensing process administered by the Board and its predecessors dating back to the Water Commission Act of 1913.⁸⁸

In *Phelps v. State Water Resources Control Board*, the Court of Appeal recognized the evidentiary standard applicable to Delta claimants asserting dual rights.⁸⁹ There, the claimants conceded that their properties were non-contiguous to any natural watercourse, and the Court noted that "there was no language in the deeds to show they retained riparian rights in parcels that no longer abut natural watercourses."⁹⁰ However, in support of their riparian claims, the claimants argued that surface waters and groundwater were sufficiently connected to establish a riparian connection, and that their predecessors in interest intended to retain riparian rights when acquiring the non-contiguous parcels.⁹¹ The Court of Appeal affirmed the trial court's rejection of these arguments, concluding that the record supported invalidation of the riparian claims.⁹² Turning to the claimants' pre-1914 appropriative claims, the Court also affirmed the trial court's finding that the claimants "failed to establish actual appropriation of water for irrigation before 1914," in light of conflicting evidence about the extent of general irrigation practices in the area surrounding their properties.⁹³ In so holding, the Court essentially demonstrated that water right claims may be rejected where: (1) a claimant's parcel is not contiguous to any natural watercourse, (2) there is no evidence to support a finding of contemporaneous intent to preserve riparian rights for the severed parcel, and (3) there is no evidence to support a finding of actual appropriative use prior to 1914.⁹⁴

In *Modesto Irrigation District v. Tanaka*, the Sacramento Superior Court issued a decision that further illustrates the evidentiary challenges facing Delta claimants.⁹⁵ Tanaka, a landowner in the Delta, claimed

⁸⁷ *Temescal Water Company v. Department of Public Works* (1955) 44 Cal.2d 90, 95-97.

⁸⁸ *Ibid.*

⁸⁹ *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89 (hereinafter "*Phelps*").

⁹⁰ *Id.* at p. 116-117.

⁹¹ *Ibid.*

⁹² *Id.* at p. 117-118.

⁹³ *Id.* at p. 118-119.

⁹⁴ *Id.* at p. 116-119.

⁹⁵ *Modesto Irrigation District v. Tanaka* (May 26, 2016) Sacramento Sup. Ct., Case No. 34-2011-00112886, available at: http://www.waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/midv_tanaka_final160526.pdf (hereinafter "*Tanaka*").

both riparian and pre-1914 rights to divert water for irrigation.⁹⁶ Because Tanaka's property was not contiguous to a natural watercourse, the Court considered proffered evidence of contemporaneous intent to preserve a riparian right when the subject parcel was severed from the larger riparian parcel.⁹⁷ The claimant submitted evidence of language in the deed transferring interest in the property along with all "tenements, hereditaments and appurtenances thereunto belonging."⁹⁸ Finding this language to be "patently silent" as to riparian rights under existing case law,⁹⁹ the Superior Court held that the general language in the transfer documents was not sufficient evidence of intent to preserve riparian rights for Tanaka's non-contiguous parcel.¹⁰⁰ Next, in evaluating the alternative pre-1914 claim, the Court looked for evidence of actual appropriative use since prior to 1914.¹⁰¹ Because the claimant relied on general irrigation practices by her predecessors in interest, and because the evidence indicated that the diversion facilities serving the property had been constructed without a permit after 1914, the Court found no evidence to support either a pre-1914 water right or a permitted or licensed appropriation.¹⁰² It is important to note that the *Tanaka* decision is currently under appeal,¹⁰³ and the legal conclusions of the Superior Court are not precedential unless and until affirmed on appeal in a published opinion. However, *Tanaka* is illustrative of the burdens Delta claimants encounter in developing and presenting evidence in support of water right claims on non-contiguous parcels.

Many of the responses to the Information Order by in-Delta water users claiming dual rights appear to mirror the basis of dual claims that was asserted and rejected in *Woods*, *Phelps*, and *Tanaka*.¹⁰⁴ Because

⁹⁶ *Ibid.*

⁹⁷ *Id.* at p. 4-8.

⁹⁸ *Id.* at p. 6.

⁹⁹ See *Tanaka*, *supra*, at p. 7 (quoting *Murphy Slough Association v. Avila* (1972) 27 Cal.App.3d 649, 655). Note that, while *Murphy Slough* finds that general "tenements, hereditaments and appurtenances" deed language is "patently silent" as to riparian rights, it acknowledges that the circumstances surrounding a conveyance may demonstrate an intent to preserve riparian rights, even when the transfer documents are silent. The Court in *Tanaka* did not address this basis for proving intent, apparently because no such circumstances were persuasively advanced by the claimant.

¹⁰⁰ *Tanaka*, *supra*, at p. 8.

¹⁰¹ *Id.* at p. 14-15.

¹⁰² *Ibid.*

¹⁰³ See California Courts, Third Appellate District, Docket for Case No. C083430, available at: http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=2169957&doc_no=C083430 (stating notice of appeal lodged 11/15/2016.).

¹⁰⁴ See, e.g., Response of Joy and Robert Augusto Trust supporting S016918, available at: http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_f.pdf; Response of Everett Luiz and Sons Dairy supporting S016530 and S016937, available at: http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_g.pdf;

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these responses were required to be submitted under relatively short time constraints, many of the responses explicitly reserve the right to provide additional evidence to support their water right claims if their claims are legally challenged. Nonetheless, several of the responses relate to properties that appear to be non-contiguous to natural watercourses assert riparian claims, but submit no evidence demonstrating a contemporaneous intent to preserve riparian rights for non-contiguous parcels.¹⁰⁵ Moreover, like the claimants in *Phelps* and *Tanaka*, many responses rely on long-standing general irrigation practices to support pre-1914 claims instead of documenting specific appropriative use.¹⁰⁶

E. In times of severe drought, diversions under riparian rights in the Delta could be limited by the availability of natural flow in the Delta channels.

Riparian rights only authorize diversions of “natural flow.”¹⁰⁷ However, application of the “natural flow” rule is complicated by the unique physical circumstances in the Delta. First, the Delta is hydrologically connected to the salty water of San Francisco Bay, and beyond that, the Pacific Ocean. In addition, the State Water Project and the Central Valley Project (the “Projects”) store and release water that intermingles with water from other sources in natural watercourses throughout the Delta. Therefore, as you and I have observed in the course of recent investigations in the Delta, it is difficult for individual diverters to determine whether the water flowing past their properties is “natural flow” or previously stored water released by the Projects to serve a defined purpose.

(footnote continued from previous page)

Response of Honker Lake Ranch supporting S016906, available at:

http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_h.pdf; Response of Bettencourt Farming LLC supporting S016492, available at:

http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_i.pdf;

Response of Kurt and Sandra Kautz Family Trust supporting S016909, available at:

http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_k.pdf.

¹⁰⁵ See, e.g., Response of Joy and Robert Augusto Trust supporting S016918, available at:

http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_f.pdf;

Response of Everett Luiz and Sons Dairy supporting S016530 and S016937, available at:

http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_g.pdf;

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¹⁰⁶ See, e.g., Response of Bettencourt Farming LLC supporting S016492, available at:

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http://waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reports/attach_k.pdf.

¹⁰⁷ *Turner v. James Canal Co.* (1909) 155 Cal. 82, 91; *Chowchilla Farms Inc. v. Martin* (1933) 219 Cal. 1, 19; see also Cal. Water Code, § 1201.

Coupling this difficulty with the language of the Delta Protection Act and the Area of Origin statutes enacted in concert with the development and implementation of the Projects, in-Delta diverters have argued that they are entitled to divert water from the “Delta pool” for agricultural use, without regard to whether “natural flow” is intermingled with previously stored Project water and without regard to whether salty water would invade the “Delta pool” but for Project operations designed to repel salt intrusion.¹⁰⁸ In *State Water Resources Control Board Cases*, the Court of Appeal held that the Projects have the paramount right to reservoir releases of lawfully stored water, notwithstanding the protections provided by the Area of Origin statutes and the Delta Protection Act.¹⁰⁹ Therefore, the “natural flow” available to in-Delta riparians does not extend to any water stored and released by the Projects (water that is “foreign in time”), unless delivery of such water is specifically contracted from the paramount right holder.¹¹⁰

V. Conclusion

It is possible to hold both riparian and appropriative rights to use water on a single parcel of riparian land. However, riparian and appropriative rights are validated according to different legal requirements. The exercise of any surface water right in California is subject to the reasonable and beneficial use provisions of the California constitution. As a result, *bona fide* water right claims require evidence of both the elements of the claimed right and the observation of the limitations inherent in the nature of the claimed right.

¹⁰⁸ See, e.g., *State Water Resources Control Board Cases* (2006) 39 Cal.Rptr.3d 189, 239-244.

¹⁰⁹ *Id.* at p. 255-267.

¹¹⁰ *Ibid.*; see also *El Dorado*, *supra*, 142 Cal.App.4th 937 at 967, 976; *Phelps*, *supra*, 157 Cal.App.4th 89, 105-111.