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Water Rights and Recycled Water: The Change Petition Process

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INTRODUCTION

Introduction

- By 2020 California's population is expected to reach nearly 41 million
- Sacramento-San Joaquin Delta, which serves as conveyance point for state water systems, provides water for nearly 22 million people in Southern California and 3 million acres of agricultural lands; near ecological collapse

Introduction

- Completing Interests for Water
 - Southern California populations
 - Central Valley agriculture
 - Agricultural heritage of Sacramento and San Joaquin River Valleys and Delta
 - Environmental/Ecosystem/Species of Sacramento and San Joaquin River Valleys and Delta
- California's "Water Wars" continue

Introduction

- Recycled Water as Solution
 - Dedicated, Reliable, and Efficient Supply/Source of Water
 - Consistent with State Policies Mandating Reasonable Beneficial Use of Water
 - More Available with Recent Stringent Regulatory Treatment Standards

Introduction

- But Recycled Water “Ownership” Can Conflict with State Water Rights Laws
- Interpretation of State Water Law Principles
 - No Injury Rule
 - Seepage/Return Flows vs Foreign/Imported Water
- More Appropriately Classified as Developed Water

Introduction

- State Legislative and Regulatory Policies Encouraging and Mandating the Use of Recycled Water
- Basics of California Water Rights Law
- The Water Rights Change Petition Process
- Recycled Water and the Wastewater Change Petition Process



STATE POLICIES SUPPORTING RECYCLED WATER

State Law and Policies

- California Constitution, art. X, § 2
 - Requires all water be put to beneficial use; prohibits unreasonable use, unreasonable method of use, and waste of water
 - Codified at Water Code section 100
- Water Code section 275
 - State Water Board authority to enforce prohibition against waste and unreasonable use

State Law and Policies

- Water Code section 461:
 - “It is hereby declared that the primary interest of the people of the state in the conservation of all available water resources requires the maximum reuse of reclaimed water in the satisfaction of requirements for beneficial uses of water.”

State Law and Policies

- Water Recycling Law (1969)
 - The Legislature finds and declares that a substantial portion of the future water requirements of this state may be economically met by beneficial use of recycled water.
 - The Legislature further finds and declares that the utilization of recycled water by local communities for domestic, agricultural, industrial, recreational, and fish and wildlife purposes will contribute to the peace, health, safety and welfare of the people of the state. [Wat. Code § 13511.]

State Law and Policies

- Water Recycling Law (1969) [continued]
 - It is the intention of the Legislature that the state undertake all possible steps to encourage development of water recycling facilities so that recycled water may be made available to help meet the growing water requirements of the state. [Wat. Code § 13512.]

State Law and Policies

- Water Recycling Act of 1991
 - “There is a need for a reliable source of water for uses not related to the supply of potable water to protect investments in agriculture, greenbelts, and recreation and to replenish groundwater basins, and protect and enhance fisheries, wildlife habitat, and riparian areas.”
 - “The use of recycled water is a cost-effective, reliable method of helping to meet California’s water supply needs.”
 - “The development of the infrastructure to distribute recycled water will provide jobs and enhance the economy of the state.”

Water Code § 13576(c), (f), (g).

State Law and Policies

- SB 918 (2010)
 - Direct and Indirect Potable Reuse
 - Water Code § 13560 et seq.
- Water Recycling in Landscaping Act (2000)
 - Government Code § 65601 et seq.

State Law and Policies

- State Water Board “Policy for Water Quality Control for Recycled Water”
 - Establishes as one of the State’s goals the “[i]ncrease[d]...use of recycled water over 2002 levels by at least one million acre-feet per year by 2020 and by at least two million acre-feet per year by 2030”
 - Explains that the purpose of the policy is “to increase the use of recycled water from municipal wastewater sources...in a manner that meets state and federal water quality laws.”
 - Originally adopted in 2009; amended in 2013

State Law and Policies

- State Water Board Resolution No. 77-1
 - “Policy With Respect to Water Reclamation in California”
 - Encourages the funding of water reclamation projects that make beneficial use of wastewater, replace or supplement the use of fresh water, and preserve, restore, or enhance instream beneficial uses (fish, wildlife, recreation)
 - Adopted 1977

State Law and Policies

- State Water Board Strategic Plan Update
 - Priority Issue 3: Promote Sustainable Local Water Supplies
 - “Achieving California’s recycled water potential will require greater public acceptance and confidence that the use of recycled water is safe for irrigation of edible crops and, with treatment, for drinking water.”
 - “[T]he Water Boards should address the economics and effective marketing of recycled water.
 - Adopted 2008; updated 2010



CALIFORNIA WATER RIGHTS LAW

Basics of California Water Rights

- California Recognizes Different Types of Water Rights
 - Riparian
 - Reasonable use on property adjacent to watercourse; natural flow only; no priority date
 - Appropriative
 - Removal from watercourse and put to beneficial use; specified amount based on reasonable use; priority date
 - Groundwater
 - Appurtenant right of landowner to extract from underlying basin

Basics of California Water Rights

- Commonalities
 - All Rights Usufructory
 - State holds title to water in Public Trust for citizens
 - Permittees/Licensees have only right to use
 - No ownership of molecules
 - All Rights Subject to Constitutional Prohibition on Waste and Unreasonable Use
 - All Water Rights Are Real Property Rights
 - Infringement subject to constitutional and statutory protections
 - Regulation for public health and safety; public trust considerations

Basics of California Water Rights

- Characteristics of Water Rights
 - Place of Use
 - Purpose of Use
 - Point of Diversion
 - Method of Diversion
 - (Season of Use)
 - (Standard License/Permit Terms)



THE WATER RIGHTS CHANGE PETITION PROCESS

Water Rights Change Petition Process

- Change Petitions Under the Water Code
 - Water Code § 1700 et seq.
 - Not applicable to all water rights; generally those subject to State Water Board regulatory jurisdiction
- No Petition Process at Common Law
 - Riparian, pre-1914 appropriative, overlying groundwater rights
 - But common law no-injury rule...

Water Rights Change Petition Process

- Petition Process Applies to Many Types of Changes
 - Characteristic of a water right – place of use, purposes of use, point of diversion, method of diversion
 - Dedication of water to fish, wildlife, habitat preservation or enhancement purposes
 - Temporary and permanent transfers of water and water rights
 - Temporary urgency changes
 - Changes in the use of wastewater or recycled water

Water Rights Change Petition Process

- Water Code Change Petition Process
 - Submission of petition to State Water Board
 - Notice provided by State Water Board
 - Protest by any interested person
 - Investigation by State Water Board
 - State Water Board approval after hearing on protest
 - State Water Board may approve without hearing if no protest

Water Rights Change Petition Process

- Approval by State Water Board
 - No injury to legal user of water
 - Resolution or dismissal of protests
 - Project modifications, additional environmental impact or wildlife analysis, etc.
 - Compliance with California Fish and Game Code
 - CESA, LSA Program, Section 5937
 - Compliance with CEQA

Water Rights Change Petition Process

- No Injury Rule
 - Originally a common law rule; now codified at Water Code section 1702:
 - “Before permission to make such a change is granted the petition shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of water involved.”

Water Rights Change Petition Process

- No Injury Rule – “Legal User of Water”
 - Must have a legal right to the water at issue
 - “Under...the “no injury” rule, only those “others” who had “rights” to the water involved could claim “injury,” and they could show “injury” only by showing an injurious effect on their “rights” to the water involved in the change.”
 - State Water Resources Control Board Cases (2006) 136 Cal. App. 4th 674, 740.

Water rights Change Petition Process

- No Injury Rule: Rights to “Leftovers”
 - Return Flow and seepage
 - Foreign and developed Water

Water Rights Change Petition Process

- No Injury Rule: Return Flows and Seepage
 - Return Flows and Seepage are waters which are diverted but left over from use and then return to the stream
 - Seepage is best thought of as a type of return flow associated with the storing of water
 - General Rule – once returned to their natural stream, return flows again become a part of the *natural flow* of that stream, and are available for diversion and use by downstream users
 - *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, 330.

Water Rights Change Petition Process

- No Injury Rule: Foreign and Developed Water
 - Foreign water is water that is brought by artificial means into an area from a different watershed
 - Developed water is water that reaches a natural watercourse only after some human action or intervention
 - General Rule – parties who introduce foreign or developed water into a watercourse have primacy rights to that water
 - See, e.g., *E. Clemens Horst Co. New Blue Point Mining Co.* (1918) 177 Cal. 631, 634-640; *Churchill v. Rose* (1902) 136 Cal. 576, 578-579.

Water Rights Change Petition Process

- Right to Claim Injury to Proposed Change
 - Legal user of water based on riparian, appropriative, groundwater, and contractual claim of right – YES
 - Legal user of return flows and seepage – YES
 - Legal user of foreign or developed water – NO
- Distinction largely depends on whether the water at issue is natural flow of watercourse (rather than imported from foreign or artificial source)



RECYCLED WATER AND THE CHANGE PETITION PROCESS

Recycled Water: Change Process

- Water Code § § 1210-1212
- Establish treatment plant owner's exclusive right vs. suppliers' rights to reclaimed water, unless agreement to contrary
- Water Code § 1210: "The owner of a waste water treatment plant...shall hold the exclusive right to the treated waste water as against anyone who has supplied the water discharged into the waste water collection and treatment system..."

Recycled Water: Change Process

- Water Code § 1211 establishes a change petition process similar to the water rights change petition process for any “change in point of discharge, place of use or purpose of use” of recycled water
- Water Code § 1211 provides wastewater change petitions reviewed pursuant to Water Code § 1700 et seq. (water rights change petition process)
 - Note: Does incorporate consideration of environmental impacts

Recycled Water: Change Process

- Wastewater change petition process expressly incorporates the No Injury rule
- Water Code § 1210: “Nothing in this article shall affect the treatment plant owner’s obligations to any legal user of the discharged treated waste water.”

Recycled Water: Change Process

- Issue
 - Wastewater treatment plant owner has “exclusive right” to treated wastewater as against any person that supplied water discharged into the plant
 - But No Injury Rule applies
 - Which persons can claim a legal interest in the use of recycled water/wastewater discharged from a treatment plant for the purposes of claiming an injury due to a change or reduction in discharge?

Recycled Water: Change Process

- Competing Considerations – On One Hand
 - Recycled water is foreign per se or developed water
 - Treatment plants expend great effort and expense reclaiming wastewater to stringent treatment standards
 - Recycled water/wastewater should be treated as foreign or developed water, and treatment plants should have primacy rights to that water
 - Water Code § 1210 establishes that treated wastewater is “new water” available for appropriation and not subject to existing rights
 - Winner – Treatment Plant Owners

Recycled Water: Change Process

- Competing Considerations – On the Other Hand
 - Recycled water is derived from return flows
 - All waters entering treatment plants derived from some upstream natural flow
 - As return flows, recycled water/wastewater should be subject to claims of diversion by downstream right holders
 - Water Code § 1210 merely articulates prior law that “legal users” must have perfected a right to the discharged wastewater
 - Winner – Downstream Users

Recycled Water: Change Petition

- Implications for Treatment Plant Owners
 - If “exclusive right” or “new right,” then treatment plant owners have right to recycled water
 - Discharge can be reduced and recycled water can be diverted and sold to finance capital projects, conservation projects, operations and maintenance
 - Recycled water can be dedicated to fish and wildlife or habitat preservation or enhancement purposes as mitigation for the recycled water project or future projects/upgrades

Recycled Water: Change Petition

- Implications for Downstream Users
 - Historic reliance on wastewater discharge; discharge reductions and diversion of recycled water could result in less water availability
 - Strong case for asserting injury in wastewater change petition process
 - Less water to maintain water quality and temperature triggering regulations/permit conditions requiring water to be left in system



QUESTIONS?



Thank You!

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