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Adapting Water Laws To Increasing Demand And A Changing Climate

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California Groundwater



Uncertainty-Fundamental Issue

- Uncertainty – we know there will be changes but we don't know what they will be
- Clients (farmers, industry, cities, even the environment) – want certainty
- How can water law address tension between uncertainty and desire for certainty?



Traditional Water Law Regimes

- Property-Based – riparianism or overlying right to groundwater
- Use or Permit-Based – appropriation first in time, first in right
- Strict rules ill-suited to uncertainty and changing environmental conditions



California - Uncertainty

- Population has increased by 400% in 60 years
- Half of the population (nearly 20M people) live in arid Southern California
- Surface supplies variable and uncertain



Uncertainty in California

- Pumping groundwater is cheaper than importing water from another watershed
- During dry times groundwater is the only source of water



Uncertainty is Normal California

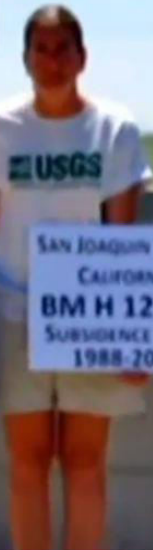
- Groundwater law has been pump without restriction – only a court can stop you (no permitting, no government regulation)
- Over extraction has been the logical outcome





SOURCE: USGS

1988



2004

2008

SAN JOAQUIN VALLEY
CALIFORNIA
BM H 1235 R
SUBSIDENCE 4.8 FT
1988-2013

H 1235

CALIFORNIA: A STATE OF SURVIVAL

A Sinking Feeling



California Drying

Cumulative water storage changes from NASA GRACE (2002-2014)



California Has Managed Groundwater

- Despite problems and lack of codified law a number of success stories in California Groundwater Management
- Governing the Commons – Elinor Ostrom (2009 Nobel Prize Winner in Economics)



Doctrine of Reasonable Use

- Start with Priority (until 1928 California was essentially an absolute Priority State)
- Priority right may be modified by the reasonable use doctrine
- No “material harm” to prior right



California – Physical Solution

- Management structure and process has been started in court but never completed by full litigation of water rights priorities
- Vast majority of parties have settled on a management system
- Why and How?



Keys to Managing Uncertainty

- Process, Process, Process (risk of not being in the room)
- Technical Process is essential before applying the law



Technical Issues

- Boundaries of Basin/Catchment/Watershed
- Identifying Stakeholders/Pumpers/Parties
- Determining Sustainable Supply (“Safe Yield”)
- Establish all these before allocation



Technical Issues

- Technical Committee - experts communicate directly and usually establish a fairly wide level of consensus
- Lawyers and Policy-Makers/Stakeholders not in the room until later



Law-Reasonable Use/Physical Solution

- Must start with priorities in current water rights regime (or regimes if transboundary)
- Can't simply tell current users entire regime will change immediately



Law-Reasonable Use/Physical Solution

- Goal is to maximize all parties' reasonable and beneficial uses
- Projects to create “new” water (transfer rights, decrease transmission loss, more efficient use, recycling, desalination, storm water capture, importation)
- Gradual curtailment of existing uses to safe yield (5-7 years)



Physical Solution

- Priorities are modified but not extinguished – some burden (monetary or production cutback) can be placed on senior rights
- Continuing Jurisdiction – monitor use, water levels, etc. ... changes made if warranted



Parallels – California/Developing Nations

- Unsustainable use and lack of regulation similar to many nations
- Lack of groundwater law
- Difference is rule of law



Parallels?

- Where to start?
- Can Reasonable Use apply elsewhere?
- Continuing Jurisdiction



Start With Process and Current Uses

- How we live is so different from how we ought to live that he who studies what ought to be done rather than what is done will learn the way to his downfall rather than his preservation – *Machiavelli, The Prince*



Parallels?

- International Conventions already have reasonable use (reasonable and equitable utilization)
- McIntyre – process norms in Pulp Mills case
- Eckstein – adaptive management



Volta Convention – Continuing Jurisdiction

- Creates procedural obligations
- Creates permanent consultation tools among the parties



Thank you for attending

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