

# Water—Know Your Rights

Protecting your vineyard and winery water supplies begins with understanding your current groundwater, surface water and contractual water rights.

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**W**ATER IS AS ESSENTIAL to a vineyard as sunlight, good soil and just the right temperature. From grape to bottle, wineries depend on a sustainable supply of water. Water will become ever more scarce in California, considering the continued growth in population, constraints in supply due to climate change, and regulatory constraints related to water quality and the **Endangered Species Act**. It's essential for those in the wine business to understand their water rights to protect their water supply. This primer on water rights in California will get you started.

You'll find some aspects of California water rights parallel those in other western states, including a dual system of recognizing surface water rights for riparian land owners and for non-riparian water users. Some aspects of California's system of water rights are unique to the state, however, such as the state permit system controlling rights to surface water acquired after 1914 and the continued recognition of surface water rights freely appropriated prior to 1914. Other western states manage surface water rights exclusively under a permitting system.

The initial question is whether your water supply is groundwater or a surface supply. Different rights apply to the two although "subterranean streams" are treated like surface water.

## GROUNDWATER RIGHTS

Groundwater rights generally fall into two categories, appropriative or overlying. If your property overlies a groundwater basin, you have the right to reasonable beneficial use of a reasonable share of the water in that groundwater basin for use on your overlying land. Of course, overlying rights are correlative between all overlying users in a water basin. That means all users must reasonably share the available

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water among themselves. Overlying rights are superior to the second type of groundwater rights—appropriative rights.

Where groundwater is used on land that does not overlie that groundwater basin, the right to use of such water is termed an appropriative right. With appropriative rights, “first in time is first in right”—meaning the party who first uses a certain amount of groundwater acquires the right to continue such use indefinitely as long as the water continues to be put to reasonable

and beneficial use. Note that if your water supply is from a municipality, they usually only have appropriative groundwater rights.

A basin is said to be in overdraft when more water is being withdrawn than the basin is naturally able to replenish. Because of this unsustainable situation, use of groundwater in an overdrafted basin is more complicated. An overlying user can no longer automatically acquire rights to groundwater

water use, e.g., county or water district groundwater management plans. These plans generally have been adopted in areas of California that are more dependent on groundwater. In other western states, the use of groundwater is regulated on a state level.

## SURFACE WATER RIGHTS

Surface water rights in California can be divided into three types: riparian, appropriative and contractual. A riparian right is the right to use water from a natural watercourse adjacent to one's property. A landowner has the right to divert a reasonable amount of water for use on his or her property contiguous to the watercourse and within the watershed. Riparian rights are also correlative; all users of riparian water must share the available water.

An appropriative surface water right is the right to divert and use a specific quantity of water in a specific location. A water user is not required to own land adjacent to the source of water to acquire an appropriative right, but the appropriator must have legal access to the water source. Prior to 1914, a party could acquire an appropriative right simply by being the first to appropriate the water and put it to reasonable, beneficial use. The saying, “first in time, first in right,” also applies to such rights. The first party to appropriate

water has a superior right to later appropriators. A “pre-1914” right is an indefinite right to use of a specified amount of water as long as the use is continuous, reasonable and beneficial. The only hitch with pre-1914 water rights is that the holder of the right may be called on to demonstrate the nature, extent and continuity of the right.

In 1914, California started to regulate the appropriation of surface water. The **State Water Resources Control Board**, or **State Water Board**, was put in charge of a permit system to allocate all of California’s unappropriated waters. This permit system is now the exclusive means to obtain new appropriative rights. To obtain a permit, you must file an application specifying the type of use (e.g., agricultural, industrial, municipal), place of use of water, the point of diversion from the flow of water, the method of diversion, details on storage of the water diverted and any points of rediversion. If a permit is issued, over a specified period the permittee will be required to prove actual beneficial use of the water for the water right to vest. You’ll then be issued a license. Even if your vineyard does not have a license directly, your water purveyor may have surface water rights by way of a State Water Board license. Thus, some of the recent constraints on licenses, discussed below, can end up affecting you.

### CONTRACTUAL WATER RIGHTS

The third type of surface water rights is contractual. The State of California, through the **State Water Project**, and the federal government, through the **Central Valley Project**, manage water in many parts of California and sell this water to public and private parties. There are also a few local projects, such as the **Hetch Hetchy Project** supplying water to the Bay Area. If you acquire your water from a water district or other public entity, your water supply could be tied to one of these projects.

### RETAINING YOUR WATER RIGHTS

With groundwater or surface water rights, it’s generally use ’em or lose ’em. Water rights are considered abandoned if you have the intent to abandon the right and act to do so. By law in California, you also forfeit your rights

if you do not use them for a continuous period of five years.<sup>1</sup> This forfeiture does not happen automatically, however, and the State Water Board must provide you with notice of the potential forfeiture. You have a right to a hearing to present your side to the Board. Keep in mind that there are quite a few things you can do that are considered a beneficial use of water, without actually using it on your land. Storing water underground, keeping water instream for the preservation of fish and wildlife, or selling, leasing, exchanging or transferring your water are all considered beneficial uses.<sup>2</sup> Any beneficial use of your water will protect you from abandonment or forfeiture claims.

### WATER FOR THE FISH, WATER FOR THE FARMERS

Water supply is seasonal in California; many parts of the state are arid and rely on other areas of the state for their water supply. Because of these circumstances, there have always been competing uses for water in California. The water supply in certain areas of California will soon be fully allocated, meaning there will not be available water for new diversions. Also, recent State Water Board and court decisions have decreed that a certain amount of water must remain instream to maintain water quality and provide habitat for threatened aquatic species. All around, supply is tight and demand ever expanding.

In one contentious case, the **California Court of Appeal** has held that the State Water Board cannot favor one type of use of water over another.<sup>3</sup> Therefore, the State Water Board can weigh the competing interests and beneficial uses of water in the federal Central Valley Project, but farmers will not always have priority over other uses for Project water, such as maintaining instream flows. Vineyards served by water districts that receive water from the federal Central Valley Project or State Water Project are already impacted. If the State Water Project has to maintain greater instream flows, for instance, and a water district receives less water for its farmers than it is contractually entitled to, the district has no recourse.

With the passage of California Assembly Bill 2121 in 2004, the State Water Board has been in the process of

adopting a policy to maintain instream flows in the northern California coastal streams.<sup>4</sup> The current draft policy affects water rights applications to the State Water Board for appropriative surface water rights as well as existing water rights permits and licenses. This policy is expected to create significant restrictions on North Coast stream water use, including limiting diversions to December 15 through March 31, requirements to maintain minimum bypass flows and protection of the natural hydrograph of a stream (the natural variance in stream levels and rates of flow), and discontinuing permitting of existing or newly constructed onstream storage reservoirs. The policy in its current form will continue to severely hamper water diversions from the Northern California Coastal streams and will certainly hamper any new water applications.

### PLANNING WATER SUPPLY FOR AN EXPANSION OF OPERATIONS

Business is good, the time is right for expansion... but now you need more water. Acquiring additional water rights is the first order of business. You may also need to understand whether you have the necessary water supply for your expansion to be permitted by state or local authorities. Expansion of operations may require environmental review under the **California Environmental Quality Act** or CEQA.<sup>5</sup> If a project, such as a new vineyard or expanded winery, may have a significant impact on the environment, the project owner may have to conduct a formal environmental review of the project and prepare an environmental impact report under CEQA.

CEQA review includes an analysis of the impact of the project on water resources. The environmental impact report has to document the water supply for the project and also address the reasonably foreseeable impacts of supplying water to a project. For example, supplying water to a new project could contribute to groundwater basin overdraft or could divert water that is considered necessary for instream flow to protect fishery resources. If the report concludes that the project will have a significant impact on water resources or other environmental resources, the project

owner usually has to provide mitigation for these impacts. Securing and protecting an adequate water supply early on helps avoid such efforts.

### ACQUIRING WATER RIGHTS

Water rights can be transferred, sold or exchanged in California.<sup>6</sup> Such uses of your water rights are considered a “beneficial use,” protecting you from forfeiture. This also means that water rights can be acquired, without obtaining a new State Water Board permit for surface water. However, depending on the type of water right being transferred or exchanged, such transaction could require State Water Board approval. In addition, if the transaction results in a change in point of diversion, place of use or type of use, a petition to the State Water Board could be necessary.

In order to increase the amount of water diverted from a stream or to develop a new diversion, a water right application must be filed and pursued from the State Water Board. A CEQA analysis is required, and often a Streambed Alteration agreement with the California Department of Fish and Game is necessary. It is important to note that, as explained above, a riparian right is not subject to State Water Board permitting compliance in California although even riparian rights are subject to the Streambed Alteration rules implemented by the **Department of Fish and Game**.

### CONCLUSION

Understanding your current water rights is the first step in protecting those existing rights and planning for any increase in water use. California is somewhat unique in its recognition of various surface water rights and implementing a permitting scheme that only applies to certain types of water sources. Most western states have invoked a regulatory program that covers all water use. Knowing your rights is essential, no matter which state you are in. **wbm**