

SEQUOIA & KINGS CANYON NATIONAL PARKS
California Drought Assessment
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Updated December 2014

This assessment was originally issued in March 2014 by email to the Park. At that time, the State Water Resources Control Board (Board) projected that junior water rights would be curtailed due to lack of water. How the Board would administer the curtailments was, at that point, a matter of speculation; this assessment, then, reflected that uncertainty. Since then, there have been significant developments in the State of California relative to the drought, including calls for curtailment and the enactment of groundwater management legislation. This finalized assessment provides brief updates that reflect these significant developments. The updated portions are in italics.

Drought Notice

In January 2014, the Governor of California issued a Proclamation of a State of Emergency due to extreme drought. In turn, the Board issued a Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions to all water right holders in the state. An assessment of water rights held by Sequoia & Kings Canyon National Parks (Park) was performed in order to characterize the risk to Park water uses posed by potential curtailment of water uses in the Kings River and Kaweah River watersheds.

Curtailment of a water right, either partial or total, referred to here as a “call”, is an order by the Board to stop diverting water until further notice. The administration of a call—i.e., the order in which uses are curtailed—is based on the priority of rights within a watershed. Because California recognizes both riparian and appropriative rights, priority of rights within a watershed must be understood in order to assess the risk of having a water right called for curtailment.

In general, riparian rights¹ and pre-1914 rights² are the most senior in a watershed, followed by statutory appropriative rights (aka post-1914 rights).³ Statutory appropriative rights are prioritized based on the date water is first put to beneficial use by a given right. Federal reserved rights are subject to administration within the state priority system. Accordingly, federal reserved rights will be subject to calls based on the date of the reservation that created the reserved rights. Federal reserved rights held by the Park are discussed below.

¹ Riparian rights are based on land ownership. If a water source is located on or abuts a parcel of land, the owner of that land has the right to reasonable use of that water. There are no procedural requirements—e.g., applications, permits—required to use water pursuant to a riparian right.

² Pre-1914 rights are beneficial uses of water established prior to the enactment of the state Water Code in 1914.

³ In 1914, the state enacted the Water Code which set forth the exclusive means by which an appropriation of water could be made. After 1914, an appropriative right could be obtained only by complying with the procedures set forth in the Water Code.

It is not entirely clear how the administration of calls will proceed, but the following likely can be expected.⁴

- Calls will not occur statewide; rather, calls will be applied based on the severity of the drought in a given watershed. A call may be initiated by the Board, or by a request by water right holders in a given watershed.
- In addition to the severity of drought in a watershed, calls will reflect the degree to which a watershed is appropriated. If the watershed is fully appropriated⁵, it is likely more susceptible to a call.
- Calls will likely be applied in succession in the following order: (1) junior statutory appropriators; (2) senior statutory appropriators⁶; (3) pre-1914 rights⁷, and (4) riparian rights. At the time of this writing, calls appear to be limited to surface water diversions only.
- Calls will reflect some fashion of adaptive management.
 - Calls may be applied in succession according to the above order depending on the effect of the previous call. For example, if the initial call on the watershed allows remaining diverters to meet their needs, no additional call will be applied. Additional calls on a watershed can be expected if previous calls do not allow senior right holders to meet their needs or the drought conditions worsen.
 - Calls may be removed in the event of significant precipitation in the subject watershed.

At the time of this writing [March 2014], the focus of potential calls is on the San Francisco Bay Delta, and therefore the Sacramento and San Joaquin rivers. The Kaweah River terminates in Lake Kaweah. Though much of the lake's water is conveyed below for irrigation, it does not reach the San Joaquin River. Given this, a call on the San Joaquin River would not affect water rights in the Kaweah watershed. However, should conditions warrant, a call placed specifically on the Kaweah watershed could affect park rights in that watershed.

The Kings River, below Pine Flat Reservoir, enters the Central Valley and divides into multiple channels for irrigation. Portions of the river may then enter the San Joaquin River. Calls on the

⁴ Regarding curtailments, the Board's focus has been on the San Francisco Bay Delta and its tributaries. Much of this assessment is based on the Board's approach in the two main watersheds—the Sacramento and San Joaquin rivers—supplying the Bay Delta. Phone Conversation, Eric Lord-WRB, Christine Rico-Delta Water Master Office (Feb. 11, 2014); Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions, State Water Resources Control Board (Jan. 17, 2014); Fact Sheet, Water Right Holders Likely to Face Curtailment in 2014, State Water Resources Control Board (updated Jan. 31, 2014).

⁵ Both the Kings and Kaweah rivers have been declared fully appropriated. In re Declaration of Fully Appropriated Stream Systems in California, Order WR 98-08, State Water Resources Control Board (1998).

⁶ The initial call or calls will affect statutory appropriations first, with the initial call affecting more-junior appropriators. How the Board will determine which priority dates to be called is uncertain. For example, will the first call affect all rights junior to 1965 or junior to 1920? Most likely it will vary based on the severity of the drought in a given watershed, and the nature of the water rights in that watershed.

⁷ In general, riparian rights and pre-1914 rights will be presumed to be senior to all statutory appropriative rights, and consequently, such rights will be the last to be called out. Under the most extreme circumstances, the priority of a riparian right may be challenged based on the date the riparian right was first put to use. It is difficult to imagine such a dire situation, so the likelihood of this occurring is remote.

San Joaquin River could affect water rights on the Kings River. Similar to the Kaweah River, a call placed specifically on the Kings River could affect park rights in that watershed.

Update: December 2014

In March 2014, when this Assessment was first issued, there was much uncertainty as to how calls for curtailment would be applied in a given watershed. The Board did issue a number of calls on watersheds around the state, and it turns out that the expected administration of calls set forth above was fairly accurate.

No calls were issued in the Kaweah or Kings rivers watersheds, but calls were issued for post-1914 rights in the Sacramento/San Joaquin (including the Merced River watershed), Russian, Scott, and Eel watersheds. In the Kaweah and Kings rivers watersheds, the Board's projected curtailments of pre-1914 rights and projected flow inadequacies to support even riparian rights did not materialize, due largely to intermittent storm events that maintained adequate stream flow to support pre-1914 and riparian rights. Consequently, the calls for curtailment did not progress beyond post-1914 water rights. In the fall, the Board issued temporary suspensions of curtailments due to the end of irrigation season and storm events, and at the time of this update the suspension of curtailments remained in place. Ultimately, the Park's water rights were not affected by the Board's calls.

Water Right Background

Statutory Appropriative (aka post-1914) Rights

With enactment of the Water Code in 1914, the statutory procedures in the Code set forth the exclusive means by which a water right could be obtained. Upon licensing of a post-1914 right, a priority date is issued which reflects the relative priority of that right within a given watershed. The more senior the right, the more superior the right, and the less likely that right is to be curtailed in the event a call is placed on the watershed. Such rights are generally junior to, or inferior to, riparian rights.

Riparian Rights

California recognizes riparian rights as well as appropriative rights. Pursuant to the riparian doctrine, the owner of land that contains or abuts a water source (stream, spring, lake) has the right to reasonable use of water from that source. There are no procedural requirements for such a right, e.g., application process. Riparian rights are “correlative”—this means that among riparian right holders on the same source, shortages and surpluses are shared equally. As stated, riparian rights are generally senior in priority to state appropriative rights.⁸

⁸ It should be noted that riparian rights, though normally viewed as correlative, also hold a temporal priority. The likelihood of such a priority becoming operative is very remote and would arise only under the most extreme drought circumstances; however, it is worth noting. Pursuant to federal and state court rulings, in California a riparian right attaches to reserved federal land when such land is first withdrawn from the public domain and reserved for a federal purpose, e.g., a national park. In theory, such riparian rights would be considered junior to

State law distinguishes riparian uses into *natural* uses and *artificial* uses. Natural uses are domestic uses including drinking, cooking, washing, and small amounts of livestock. All other riparian uses are artificial. Natural uses are given preference over artificial uses. Natural uses that are commercialized, i.e., serving paying guests, do not necessarily lose their preference as natural uses, but an excessive degree of commercialization⁹ to the prejudice of downstream riparian users may affect the preference.

The California Supreme Court has recognized that the federal government holds riparian rights as owner of reserved federal lands.¹⁰ Thus the Park, as a landowner, holds riparian rights to reasonable use of water within or abutting the reserved federal lands. The Park's uses of water—e.g., visitor center, staff housing, campground, firefighting—can be considered reasonable uses of water consistent with riparian rights.¹¹

Overlying Rights (Groundwater)

In California, there are two lines of distinction regarding groundwater use; the lines are (1) land ownership, and (2) the source of the groundwater. Regarding the first distinction, an owner of land has the right to reasonable use of groundwater beneath the land. This is referred to as an overlying right. There are no procedural requirements for such use and the Board generally does not have jurisdiction over such use. In contrast, a statutory groundwater right is not based on land ownership, but is based on procedural requirements, e.g., application to the Board. One need not own land to obtain such a right, but one does need legal access to the land upon which the well will be located.

The other line of distinction regards the source of the water. In California, groundwater is divided into two categories—"percolating" groundwater, and "subterranean streams flowing through known and definite channels." Groundwater is legally presumed to be percolating; the Board has no jurisdiction over such water and no permit is needed to use such water. In contrast, "subterranean streams...", sometimes referred to as stream underflow, are within Board jurisdiction and a permit is needed to use such water.

state law-based appropriative rights established prior to the reservation of federal land causing riparian rights to attach to the reserved federal land. Moreover, in the case of unexercised riparian rights held by the federal government, the Board may determine that the future riparian right of the US shall have a lower priority than uses authorized by the Board prior to *exercise* of the riparian right by the US. This indicates that the priority date of a riparian right will likely be a function of when it was first exercised, rather than when it attached; and that the United States must apply to the Board whenever it proposes to exercise a riparian right. *In re Water of Hallett Creek Stream System*, 749 P.2d 324 (Cal. 1988), cert denied sub nom *California v. United States*, 488 U.S. 824 (1988). Again, this aspect of riparian rights would come into play only under extreme circumstances.

⁹ Excessive commercialization of domestic uses might include swimming pools, ornamental pools, or boating. *Prather v. Hoberg*, 150 P.2d 405 (Cal. 1944).

¹⁰ *In re Water of Hallett Creek Stream System*, 749 P.2d 324 (Cal. 1988), cert denied sub nom *California v. United States*, 488 U.S. 824 (1988).

¹¹ Though there are some constraints, riparian rights afford the holder flexibility in terms of the amount of use, the purpose of use, timing of use, and location of use. In the event of questions regarding riparian uses, the Water Rights Branch is available for assistance.

The Park uses groundwater to meet some of its consumptive needs. As a landowner, the Park holds overlying rights to such water.¹² The water is legally presumed to be percolating; consequently, the Park needs no permit from the Board¹³ to use such water. The Park should be aware, however, that this legal presumption can be overcome by evidence that a given well is drawing from stream sub-flow.¹⁴ In such a situation, a well would then need to file an application for a water right, and would be subject to the Board's jurisdiction.

Update: December 2014

In 2014, the State Legislature enacted two bills regulating the State's groundwater for the first time.¹⁵ The Sustainable Groundwater Management Act established a State policy to manage groundwater on a sustainable basis. Existing surface or groundwater rights are not affected by the act, and the Board's authority is not expanded. The act requires the establishment of local groundwater sustainability agencies, and such agencies are required to implement groundwater sustainability plans for high and medium priority basins by 2020. The State will become involved in the process only if the local agency fails to establish a sustainability plan.

In December 2014, the California Division of Water Resources prioritized groundwater basins around the state. Based on the Division of Water Resources' determination, the basins underlying the Park are considered to be of very low priority.¹⁶ Consequently, the act should have no effect on the Park's use of groundwater for some time.

Federal Reserved Rights

Water rights are generally a matter of state law; however, federal reserved rights are an exception. Based on United States Supreme Court rulings, federal reserved rights are created

¹² Though the California Supreme Court held that the United States holds riparian rights to surface water as a landowner, the case did not address whether the United States holds overlying rights to groundwater as landowner. *In re Water of Hallett Creek Stream System*, 749 P.2d 324 (Cal. 1988), cert denied sub nom *California v. United States*, 488 U.S. 824 (1988). However, the reasoning behind the California Supreme Court's ruling applies equally to overlying rights. 1-15 California Water Law and Policy § 15.16 [citations omitted].

¹³ It should be noted that though no permit from the Board is required to use the water, a so-called "water right", a permit to drill and complete the well will be required from the appropriate county. Such does not constitute a "water right".

¹⁴ Such a scenario is unlikely. However, if a Park well is located near a surface stream, there is incentive for a downstream surface water right holder to seek to have the Park well come under Board jurisdiction. This could be accomplished by providing evidence that the well is drawing water from stream sub-flow. The Park would then need to file an application with the Board for a water right; that right would be very junior in the watershed and would be subject to future calls like any other junior surface right.

¹⁵ For a summary of the bills enacted, go to: <http://leginfo.ca.gov/faces/billStatusClient.xhtml> (SB 1168), and: <http://leginfo.ca.gov/faces/billNavClient.xhtml> (AB 1739).

¹⁶ In June 2014, CASGEM (California Statewide Groundwater Elevation Monitoring) prepared a groundwater basin prioritization map for purposes of prioritizing basins in need of additional groundwater monitoring. In December 2014, pursuant to the new groundwater legislation the Department of Water Resources determined that this map would be the initial prioritization of groundwater basins. Based on this map, the groundwater basins beneath the Park are considered to be of very low priority. Consequently, the appropriate county or counties abutting the Park are not required to establish a groundwater sustainability agency or develop a groundwater sustainability plan for the foreseeable future.

when land is reserved from the public domain¹⁷ or acquired¹⁸ for a specific federal purpose, such as a national forest or national park. The reservation of land also reserves sufficient water to meet the purposes of the reservation of land. The priority dates of a federal reserved right are based on the dates that lands were reserved from the public domain for a specific purpose, either national forest or national park. Federal reserved rights doctrine is based largely on rights to surface water; the applicability of the doctrine to groundwater is unsettled, but the trend is toward recognition of federal reserved rights to groundwater.¹⁹

The federal reserved rights in use by the Park are located in areas with different land reservation histories; consequently, the priority dates of the federal reserved rights differ. Tables 1 and 2 set forth the estimated priority dates for federal reserved rights; the priority dates reflect the following land reservation history in the Park.

Sequoia National Park was created in 1890 by reservation of public land²⁰; this reservation did not include the Mineral King Valley or Kings River canyon. In 1893, the Sierra Forest Reserve was created²¹; the Mineral King Valley and Kings Canyon were included in this reservation. In 1910, the southern portion of the Sierra Forest Reserve, including the Mineral King Valley, was separated from the Sierra Forest Reserve and proclaimed the Kern Forest. In 1915, the Kern Forest was abolished and designated as the Sequoia Forest Reserve. In 1926, the Mineral King Valley was reserved as part of the Sequoia National Game Refuge.²² The lands within the refuge continued to be part of the Sequoia National Forest.²³ In 1965, the Cedar Grove area, containing the South Fork Kings River canyon area, was reserved from national forest into Kings Canyon National Park.²⁴ In 1978, the Sequoia National Game Refuge was abolished and the land, including the Mineral King Valley, was transferred to the National Park Service (NPS) and incorporated into Sequoia National Park.²⁵

Though the contours (amount, purposes, priority, etc.) of a federal reserved right can be conclusively determined only through a court proceeding, it can be reasonably concluded for purposes of this assessment that SEKI holds federal reserved rights for both national forest and national park purposes. The quantity of water so reserved is that quantity sufficient to support the purposes for which the national forest and national park were reserved.

¹⁷ *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963).

¹⁸ *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

¹⁹ See, for example, *Park Center Water Dist. v. United States*, 781 P.2d 90, 95 n.13 (Colo. 1989) (assuming without deciding that reserved rights may include groundwater); *United States v. Washington*, 375 F. Supp.2d 1050, 1058 (W.D. Wash. 2005) (tribal federal reserved rights determined to extend to groundwater).

²⁰ An act to set apart a certain tract of land in the State of California as a public park, P.L. 51-926, Ch. 926, 26 Stat. 478 (1890). The purpose of the reservation was to dedicate the land “as a public park, or pleasure ground, for the benefit and enjoyment of the people.”

²¹ Proclamation 348 (Feb. 14, 1893).

²² An act to revise the boundary of the Sequoia National Park, California, P.L. 69-465, Ch. 744, § 6, 44 Stat. 818 (1926) (amended 1948; repealed 1978).

²³ *Id.*

²⁴ An Act to add certain lands to the Kings Canyon National Park in the State of California, and for other purposes, 79 Stat. 446 (Aug. 6, 1965).

²⁵ National Parks and Recreation Act of 1978, P.L. 95-625, § 314, 92 Stat. 3479 (1978).

There are precedents for recognition of federal reserved rights in support of national forest and national park administrative purposes. The precedents include the California State Water Resources Control Board²⁶, agreements²⁷ in Montana and Wyoming, and water court rulings in Colorado²⁸.

Though this assessment focuses on the Park's consumptive uses of water, federal reserved rights also support instream values within the Parks. As is the case with consumptive uses, these instream values are based on the purposes for the creation of the parks or national forests as set forth in the respective enabling acts and the NPS Organic Act. Because a federal reserved right in support of instream values is non-diversionary, a call would not be operative on such a right.

Park Priorities

Surface Water

The water right records maintained by Water Rights Branch (WRB) and the Board were reviewed to determine what water rights of record are held by the Park. The Park's uses are limited to sources located within the Kings and Kaweah watersheds. The water right abstracts maintained by the Board for the Kaweah and Kings watersheds have no record of Park water uses, with two exceptions.²⁹ Absent any record filed with the Board indicating statutory appropriative rights, it reasonably can be concluded that Park uses of surface water are supported by riparian rights and federal reserved rights. It is also important to note that a water use can be supported by more than one type of right. The Park's surface water rights and uses are set forth in Table 1.

²⁶ The California State Water Resources Control Board has recognized a federal reserved right for the Forest Service for purposes of firefighting and industrial purposes. Findings and Order of Determination, In re Hallett Creek Stream System, California State Water Resources Control Board (1983); Decree No. 16291, Hallett Creek Adjudication (Superior Ct.-Lassen County, 1984).

²⁷ The Forest Service and the Montana Reserved Water Rights Compact Commission reached draft settlement recognizing reserved rights for fire-fighting and administrative needs and an instream flow right 4-37 Waters and Water Rights Section 37.03.

In a settlement in the Big Horn River adjudication, the federal government was allocated essentially the entire flow of the waters in Yellowstone National Park, mostly to "preserve the natural resources, natural curiosities and public enjoyment" of the park, but also for various administrative and visitor use purposes. The state agreed that the federal water right extended to both surface and groundwater and could not be precisely quantified. 4-37 Waters and Water Rights S 37.04.

²⁸ Federal reserved rights in support of administrative purposes have been recognized by water courts in Colorado. 4-37 Waters and Water Rights Section 37.03; Decree, In the Matter of the Application of the United States for Reserved Water Rights in Rocky Mountain National Park, Case No. W-8439-76, Dist. Ct., Water Div. No. 1, State of Colorado (1994); Final Decree, In the Matter of the Application of the United States for Reserved Water Rights in Rocky Mountain National Park, Civil Action No. 1768, Dist. Ct., Water Div. No. 5, State of Colorado (2000); Findings of Fact, Conclusions of Law and Decree, Concerning the Application for Water Rights of the United States of America (Reserved Water Rights for Mesa Verde National Park), Case No. W-1633-76, Water Div. No. 7, State of Colorado (1997)(Decree entered pursuant to agreement).

²⁹ The exceptions are Licenses 961 and 3006. License 961 authorizes use of water from an unnamed spring for domestic, recreational, and firefighting purposes. The right has a priority of 1927. This license authorized use of water for domestic, recreational, and firefighting purposes, but is now used in support of stock. License 3006 supplies water for communal domestic water use in the west Mineral King area. The license authorizes use of up to 1.4 acre-feet per year from an unnamed spring. The priority date is 1941.

Update: December 2014

In general, riparian rights are viewed as the most senior rights in a watershed. As such, they are least vulnerable to a call by the Board. The Park reasonably can continue to divert surface water pursuant to riparian rights. Such use would be vulnerable to a call only in the circumstance that the Board has already curtailed use pursuant to post-1914 and pre-1914 rights.

However, the Park's reliance on riparian rights in support of some consumptive uses comes with a caveat. If riparian rights have been dormant, i.e., not yet exercised, they may be re-prioritized to a very junior status by the Board. Such a re-prioritizing by the Board would usually only occur in the context of an adjudication of a watershed or after adjudication of a watershed. However, the Board may have the authority to re-prioritize unexercised riparian rights even in the absence of an adjudication. That is, the Board may have the authority on its own initiative to re-prioritize unexercised riparian rights to a very junior status. Under such a circumstance, a riparian right could be called out for curtailment as a very junior right. The available authorities are not entirely clear on this issue.³⁰

In the event the Park's exercise of its riparian rights is relatively recent—i.e., initiated or claimed in response to having an appropriative right called out for curtailment—the Board may have the authority to determine that such a new riparian right use is unreasonable and thus subject to re-prioritizing to very junior status. (It is important to note that discussion with the Board indicated that the Board is not seeking, at this time, to re-prioritize riparian rights.) In order to minimize this potential vulnerability, it is important for the Park to research its present consumptive uses that are supported by riparian rights, and determine the approximate date such use began. Such information could then be used to refute any assertion that the Park only recently started using riparian rights. WRB recommends that the Park consult with WRB regarding this research.

Though the Park's riparian rights are serving paying guests—i.e., are somewhat commercialized—they do not lose their status as riparian rights. This status can be maintained by ensuring that park uses are limited to basic domestic needs—e.g., drinking, cooking, washing. Given the expected administration of calls in the watershed, the Park's riparian rights would be the last rights affected by calls.

³⁰ The California Supreme Court has held that the Board may, in the context of an adjudication, re-prioritize unexercised riparian rights to a very junior status. *In re Waters of Long Valley Creek Stream System*, 599 P.2d 656 (Cal. 1979); *In re Water of Hallett Creek Stream System*, 749 P.2d 324 (Cal. 1988), cert denied sub nom *California v. United States*, 488 U.S. 824 (1988). Though the California Supreme Court has not addressed the issue directly, a recent Court of Appeals case suggests that the Board may have the authority to re-prioritize unexercised riparian rights as part of an enforcement action to prevent unreasonable or illegal uses of water. *Young v. State Water Resources Control Board*, 219 Cal. App. 4th 397 (2013). The trial court in *Hallett Creek* found that future use of water under unexercised riparian rights is unreasonable when supply is inadequate to satisfy all rights set forth in the decree. *In re Waters of Hallett Creek Stream System*, No. 16291, ¶ 18 (Sup. Ct. 1984).

The Park's federal reserved rights are more difficult to characterize in terms of vulnerability to a call. For sake of clarity, federal reserved rights will be divided into two categories—those for national forest purposes and those for national park purposes.³¹ Federal reserved rights for national forest purposes have a priority date of 1893. The priority dates of federal reserved rights for national park purposes vary depending upon when a given area was incorporated into the park. Federal reserved rights in Kings River canyon area have a priority date of 1965; those in the Mineral King Valley have a priority date of 1978; and all others have a date of 1890. The federal reserved rights for Kings Canyon National Park and those in the Mineral King Valley are very junior and thus more likely to be affected by an initial call in the watersheds. The remaining federal reserved rights are reflective of the original reservation of land into Sequoia National Park in 1890. Such a date is relatively senior in the Kaweah River watershed and would likely not be affected until a second or third successive call on that watershed.

Though SEKI's federal reserved rights have some vulnerability to a call, it should be remembered that the Park's uses are also supported by riparian rights, and so long as the park uses are “reasonable”, the park can continue to use water based on riparian rights. Moreover, the Board has not yet sought to apply the calls for curtailment to federal reserved rights.³²

The Park holds two statutory appropriative rights. License 961 holds a priority date of 1927, and License 3006 holds a priority date of 1941. These are both junior in the watersheds, and so are vulnerable to calls. Because the Park owns the land on which the water sources are located, the uses are also supported by riparian rights. Should these licenses be called for curtailment, the Park will most likely be able to continue to divert water pursuant to riparian and federal reserved rights.

Update: December 2014

The exercise of dormant riparian rights as a “fall-back” to curtailment of statutory appropriative rights comes with a caveat. This is discussed above at pages 7 – 8.

*The application of a call by a state agency on a federal reserved right pursuant to state law is a relatively untested aspect of the prior appropriation doctrine. NPS policy and the weight of existing authority suggest that a park voluntarily curtail use of water pursuant to a federal reserved right in the event of a call.*³³

Groundwater

The Park likely holds both overlying rights and federal reserved rights to the use of groundwater. The Park's overlying rights for groundwater use are not subject to Board jurisdiction. Therefore, a call issued by the Board will have no effect on water use

³¹ Exhibit 2 provides a brief summary of the Park's federal reserved rights, reflecting the land reservation history at the locations of water use.

³² Phone Conversation: Eric Lord-WRB, Barry Hill-Forest Service Regional Hydrologist (since retired)(Sept. 16, 2014). This issue arose in the context of calls for curtailment of rights within Lassen National Forest in June 2014.

³³ NPS Policy Manual § 4.6.2 (2006); *United States v. Denver*, 656 P.2d 1, 35 (Colo. 1982); *United States v. Bell*, 724 P.2d 631, 644 (Colo. 1986); *Federal Youth Center v. Dist. Ct.*, 575 P.2d 395, 400 (Colo. 1978).

pursuant to overlying rights. Though the Park's wells are legally presumed to be drawing "percolating" water not subject to Board jurisdiction, additional assessment of these wells is likely warranted to determine whether they are drawing from stream underflow.³⁴ If so, the vulnerability of these wells to calls will change. The Park's federal reserved rights to groundwater use³⁵ have priority dates based on the date a specific area was reserved into a national park or national forest. The Park's groundwater rights and uses are set forth in Table 2.

Administration of Calls for Curtailment

Estimating the effect of calls on Park uses has uncertainty, due largely to the Board's own uncertainty as to how calls will be applied and unique character of each watershed. The water rights abstracts for the Kings River and Kaweah River watersheds were reviewed, nevertheless, in an attempt to estimate how calls would likely be applied in these watersheds. The abstracts indicate that calls on these watersheds will differ in terms of their effects, though the ultimate effect on Park rights will be similar. In the Kaweah watershed, statutory appropriations—i.e., those to be called out first—constitute a very minor share of total diversions. Consequently, an initial call on these rights will not likely have a large effect on river flow. This suggests that subsequent calls are more likely. The largest diverter in the watershed, Wutchumna Water Company, claims 114,500 acre-feet per year based on a pre-1914 claim with a claimed priority date of 1877. Though this is a relatively senior priority—senior to the Park's federal reserved rights—it is junior to the Park's riparian right uses.

In contrast, the Kings River abstract indicates that a large quantity of water is diverted by third parties pursuant to statutory appropriative rights; the largest diverter is Kings River Water Association for irrigation purposes. A call or calls on statutory appropriative rights, then, would likely have the desired effect, thus reducing the likelihood of additional calls. Another substantial diverter, Fresno Irrigation Company, claims a pre-1914 right with a priority date of 1914. This use would be affected prior to the park's riparian rights and prior to the park's federal reserved right for national forest purposes. In summary, calls on the Kings River watershed would likely curtail very large diversions and thus have the desired effect before the Park's uses would be affected.

Exhibit 1 illustrates how a succession of calls might be applied to a watershed and how such calls might affect Park rights.

³⁴ As stated, groundwater is legally presumed to be "percolating" and so not subject to Board jurisdiction. The legal presumption may be overcome by a third party seeking to have the well within the Board's jurisdiction. If under Board jurisdiction, the wells would be subject to calls and would need to obtain permits from the Board. The presumption may be overcome by evidence that a well is drawing from stream underflow. In a drought situation, a downstream water user may seek to have the Board gain jurisdiction over the wells by providing such evidence.

³⁵ The applicability of the federal reserved right doctrine to groundwater is somewhat unsettled. The U.S. Supreme Court enjoined the pumping of groundwater by third parties in order to protect a federal reservation. *Cappaert v. United States*, 426 U.S. 696 (1978). The Arizona Supreme Court recognized a federal reservation of groundwater in support of federal purposes, *In re General Adjudication of the Gila River*, 989 P.2d 739 (Ariz. 1999), and a federal district in Nevada exempted a military reservation from complying with state requirements to pump groundwater, *Nevada ex rel. Shamberger v. United States*, 165 F. Supp. 600 (D. Nev. 1958), *aff'd* on other grounds, 279 F.2d 699 (9th Cir. 1960). However, the Wyoming Supreme Court denied the applicability of Indian reserved rights to groundwater. *In re General Adjudication of the Big Horn Sys.*, 753 P.2d 76 (Wyo. 1988).

Update: December 2014

Contrary to the Board's projections in April 2014, no calls were issued by the Board in the Kaweah or Kings watersheds. The Board did, however, issue calls in other watersheds in the state. From that experience, much can be learned about the Park's vulnerabilities to future calls. The Park's reliance on riparian, federal reserved, and overlying rights provides some degree of protection of Park water uses. Thus far, the Board seems reluctant to seek to curtail riparian or federal reserved rights. Nevertheless, given the volatility of the California climate and projected changes to that climate, efforts should be made to improve the reliability of the Park's water rights setting. This is set forth in the recommendations.

Recommendations

In order to minimize the effect of the Park's consumptive uses on the watershed and in the interest of good public relations, it is important to minimize the park's water use. This can be accomplished by minimizing the amount of water used, ensuring that no water is wasted, reusing water where possible, and making sure unused water is returned to the system. The Park has already identified several things that can be done in its response to enquiries by the Regional Office. By minimizing the Park's water use and maximizing the park's efficiency, the Park reduces the likelihood that either the Board or a downstream user will seek to curtail Park uses.

In addition to the items identified by SEKI in its response to the Regional Office, WRB also recommends the following:

- For those water uses supported by riparian rights, research the history of water use at those given facilities to determine when water use pursuant to a riparian right was initiated. Document that history and record Statements of Water Diversion and Use that reflect that history. Such Statements are required of all surface water uses, and can be used to document its continuing use of riparian rights and federal reserved rights in the event of call, conflict, or adjudication. Should the Park pursue this research, WRB requests that copies be provided to WRB to complete our dockets.
- Regarding License 961, now used in support of stock animals, we recommend that the Park consult with WRB about adding such a use to the license to legitimize that use under the license.
- Ensure that the Reports of Licensee for licenses 961 and 3006 are current and reflect current use.
- Prioritize Park water uses and prepare a contingency plan for curtailment of uses based on those priorities. Given the severity of the current drought, Park uses should be constrained to minimal domestic needs.
- Monitor any developments in adjacent county governments regarding the establishment of an agency tasked to regulate groundwater pursuant to the Sustainable Groundwater Management Act. Consult with WRB regarding the potential effects of any such activity.

TABLE 1: PARK SURFACE WATER USES AND RIGHTS

			FEDERAL RESERVED RIGHTS – SURFACE WATER	
LOCATION OF USE	STATUTORY APPROP- RIATIVE RIGHTS	RIPARIAN RIGHTS	National Forest Purposes	National Park Purposes
Ash Mountain	No	Yes	None	1890
Atwell Mill	No	Yes	1893	1978
Cabin Creek	No	Yes	None	1890
Cold Springs Water System	License 3006 (1941)	Yes	1893	1978
Copper Creek	No	Yes	1893	1965
Dorst	No	Yes	None	1890
Lodgepole	No	Yes	None	1890
Redwood Meadow	No	Yes	1893	1926
Sheep Creek	No	Yes	1893	1965
Silver City	No	Yes	1893	1978
South Fork	No	Yes	1893	1890
Unnamed Spring trib. to Mill Creek	License 961 (1927)	Yes	1893	1940
Wolverton	No	Yes	None	1890

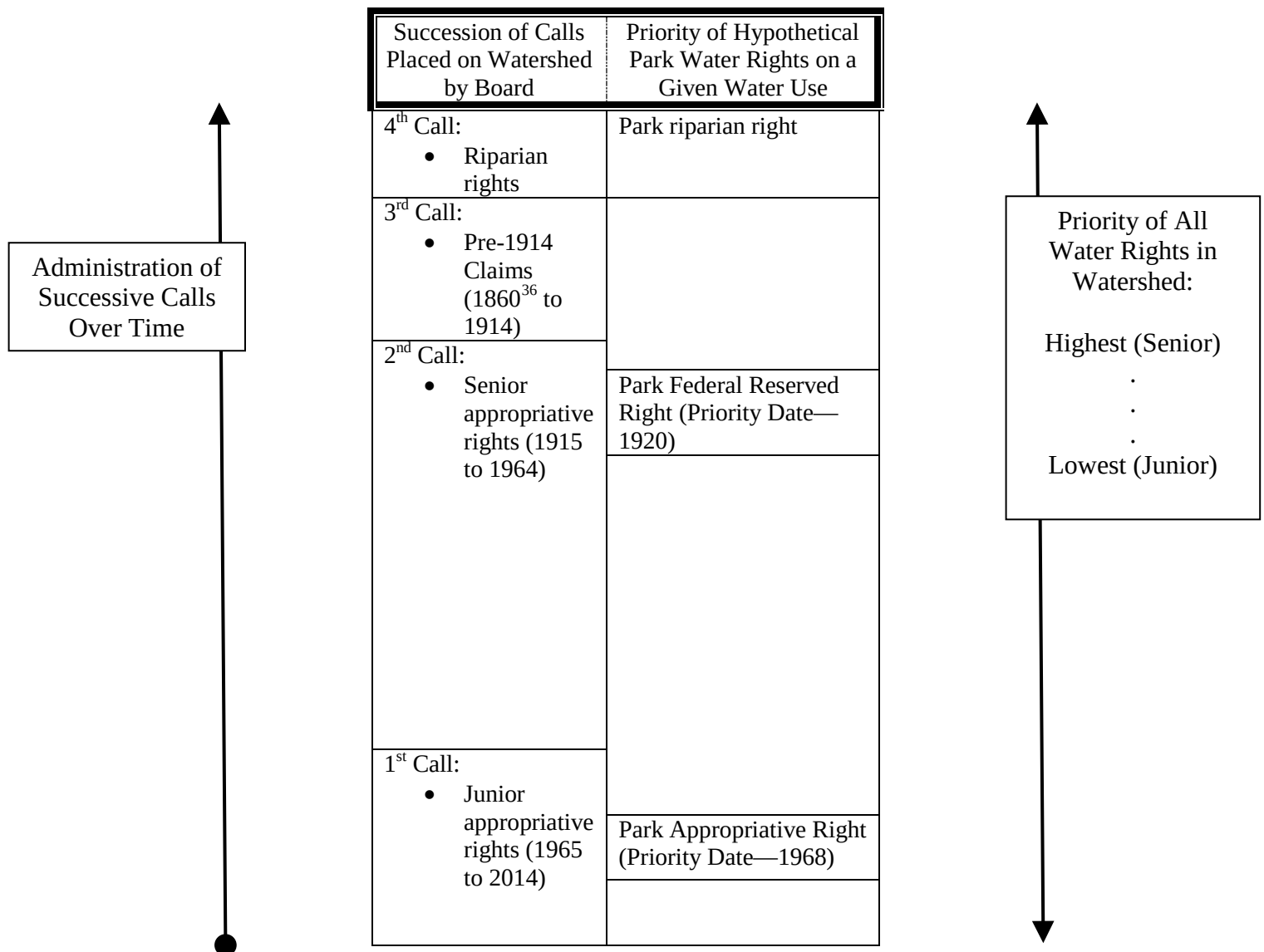
TABLE 2: PARK GROUNDWATER USES AND RIGHTS

LOCATION OF USE	OVERLYING (GROUNDWATER) RIGHTS	FEDERAL RESERVED RIGHTS – GROUNDWATER	
		National Forest Purposes	National Park Purposes
Ash Mountain Water System	Yes	None	1890
Buckeye Campground Water System	Yes	None	1890
Grant Grove Water System	Yes	None	1890
Hospital Rock Water System	Yes	None	1890
Packers Dorm Water System	Yes	1893	1965
Pinewood Water System	Yes	None	1890
Potwisha Campground Water System	Yes	None	1890
Sheep Creek Water System	Yes	1893	1965
Wolverton Water System	Yes	None	1890

EXHIBIT 1: ADMINISTRATION OF CALLS TO HYPOTHETICAL PARK WATER RIGHTS IN A GIVEN WATERSHED

Assumptions:

- Park uses water from a given source at the same location based on a riparian right, a federal reserved right (priority 1920), and an appropriative right (priority 1968)
- State Water Resources Control Board applies calls in succession: (1) junior appropriative rights (1965-2014); (2) senior appropriative rights (1915 to 1964); (3) pre-1914 rights (1860 to 1914), (4) riparian rights.



³⁶ The 1860 priority date is somewhat arbitrary. It merely represents a date representative of the earliest pre-1914 rights. There are likely some pre-1914 rights established prior to 1860.

Outcome:

In this hypothetical, the Board issues a succession of four calls on the watershed. The 1st call curtails the Park's appropriative right with a date of 1968; however, the Park may continue to use water pursuant to a riparian right for that purpose. The federal reserved right, with a priority date of 1920, is senior to the 1st call and so is not affected by the 1st call. The 2nd call, however, curtails the federal reserved right because that right's priority date is within the priority range of the 2nd call. However, the Park can continue to use water from that source for that same purpose based on its riparian right until the potential 4th call. The 3rd call affects only pre-1914 rights, based on their claimed priority dates. In this hypothetical, the Park holds no pre-1914 rights and so is not affected by this 3rd call. The Park's riparian right does not have a priority date, and is senior to all appropriative rights in the watershed. Assuming the drought is extreme, there may be a 4th call. If so, such a call could affect the Park's uses based on riparian rights.

This begs the question: Of what value is a federal reserved right in tandem with the riparian right if the federal reserved right can be called out with no effect on the riparian right? It is true that a federal reserved right has a priority date based on the date of the federal reservation and that it can be called out. However, a federal reserved right and a riparian right can be used simultaneously for the same purpose at the same place. And the federal reserved right provides some flexibility over the riparian right in terms of place and type of use. In addition, a riparian right can be dedicated to instream use only by petitioning the Board and only after a period of consumptive use for another purpose, e.g. domestic or irrigation; in contrast, federal reserved rights can be used in support of instream values without such requirements. Lastly, continuing to claim a federal reserved right develops a record of such right with the Board, supporting recognition of such a right in the event of an adjudication, conflict, or call.

In the context of groundwater, state law presumes all groundwater to be "percolating"; the Board has no jurisdiction over percolating water. Consequently, a call would not be operative against a Park's groundwater use. Again, this begs the question: Of what value is a federal reserved right to groundwater in tandem with an overlying right if the federal reserved right can be called out with no effect on the overlying right? The answer parallels the above paragraph; a federal reserved right provides some flexibility in terms of location of use. In addition, though state law presumes that wells are drawing percolating water—water that is not subject to Board jurisdiction—if the Park wells were actually drawing water from stream subflow, and proof of this is provided by downstream right holders in the watershed, the Park wells could be required to obtain a statutory water right for the wells. The Board does have jurisdiction over such a right. Should such a water right be obtained, it would likely be very junior and thus subject to call. Alternatively, given that the watershed is considered to be fully appropriated, the likelihood of obtaining a water right for the wells seems remote. In such a case, the Park's federal reserved right could continue to support Park use. But it is important to remember that a federal reserved right may also be called out based on priority date.

It is recognized that the likelihood of the scenarios discussed here are remote. However, given California's susceptibility to drought, climate change, and generally increasing water demand, such scenarios are not out of the range of possibility. Consequently, seeking to record water use based at least in part on a federal reserved right is worthwhile if only as an abundance of caution.

EXHIBIT 2: SUMMARY OF ESTIMATED PRIORITIES OF PARK FEDERAL RESERVED RIGHTS

The park uses water in several different areas—e.g., King River canyon, Dorst, Mineral King Valley, etc. The areas have different reservation histories. Consequently, the priority dates of the federal reserved rights differ based on the location of the use. The following are summaries of the estimated priorities of the water rights currently being exercised in SEKI.

Surface Water Uses:

Sheep Creek:

- Creation of Sequoia National Forest: 1893.
- Creation of Kings Canyon National Park: 1965. The spur containing Cedar Grove to the east almost to Zumwalt Meadow had remained in the National Forest for some time, though NPS had managerial jurisdiction over it for much of that time.
- Conclusion: A federal reserved right for national forest purposes as of 1893; a federal reserved right for national park purposes as of 1965.

Copper Creek:

- Creation of Sequoia National Forest: 1893. It appears that Sequoia National Forest was part of the Sierra Forest Reserve, which was created in 1893. The southern parts of this reserve ultimately came to be Sequoia and Kings Canyon National Parks.
- Creation of Kings Canyon National Park: 1965. The spur containing Cedar Grove to the east almost to Zumwalt Meadow had remained in the National Forest for some time, though NPS had managerial jurisdiction over it for much of that time.
- Conclusion: A federal reserved right for national forest purposes as of 1893; a federal reserved right for national park purposes as of 1965.

Dorst :

- Creation of Sequoia National Park: 1890.
- Sierra Forest Reserve: The reservation creating the Sierra Forest Reserve was not effective as to lands already located within Sequoia National Park.
- Conclusion: The map provided by the park is not entirely clear as to whether the point of diversion was actually within Sequoia National Park's boundaries when it was initially created.
 - A federal reserved right exists for national park purposes with a priority date of 1890 (assuming the point of diversion is within the Sequoia National Park reservation in 1890). If the point of diversion is not within the Sequoia National Park 1890 boundary, a federal reserved right was created upon reservation of the Sierra Forest Reserve in 1893.

Cabin Creek:

- Creation of Sequoia National Park: 1890.
- Sierra Forest Reserve: The reservation creating the Sierra Forest Reserve was not effective as to lands already located within Sequoia National Park.

- Conclusion: Though this is close to the Dorst Creek point of diversion, it appears that the Cabin Creek area was located within the original boundaries of Sequoia National Park.
 - A federal reserved right exists for national park purposes with a priority date of 1890.

Lodgepole:

- Creation of Sequoia National Park: 1890.
- Sierra Forest Reserve: The reservation creating the Sierra Forest Reserve was not effective as to lands already located within Sequoia National Park.
- Conclusion: A federal reserved right exists for national park purposes with a priority date of 1890.

Wolverton Creek:

- Creation of Sequoia National Park: 1890.
- Sierra Forest Reserve: The reservation creating the Sierra Forest Reserve was not effective as to lands already located within Sequoia National Park.
- Conclusion: A federal reserved right exists for national park purposes with a priority date of 1890.

Ash Mountain:

- Creation of Sequoia National Park: 1890.
- Sierra Forest Reserve: The reservation creating the Sierra Forest Reserve was not effective as to lands already located within Sequoia National Park.
- Conclusion: A federal reserved right exists for national park purposes with a priority date of 1890. A federal reserved right also exists for national forest purposes with a priority date of 1893.

Atwell Mill:

- Reservation of land into Sequoia National Park: 1978.
- Creation of Sierra Forest Reserve: 1893.
- Conclusion: A federal reserved right exists for national park purposes with a priority date of 1978. A federal reserved right also exists for national forest purposes with a priority date of 1893.

Silver City (NPS Housing):

- Reservation of land into Sequoia National Park: 1978.
- Creation of Sierra Forest Reserve: 1893.
- Conclusion: A federal reserved right exists for national park purposes with a priority date of 1978. A federal reserved right also exists for national forest purposes with a priority date of 1893.

South Fork (Ranger Station):

- Creation of Sequoia National Park: 1890.
- Sierra Forest Reserve: The reservation creating the Sierra Forest Reserve was not effective as to lands already located within Sequoia National Park.

- Conclusion: A federal reserved right exists for national park purposes with a priority date of 1890. A federal reserved right also exists for national forest purposes with a priority date of 1893.

Redwood Meadow:

- Expansion of Sequoia National Park: 1926.
- Creation of Sierra Forest Reserve: 1893.
- Conclusion: A federal reserved right exists for national park purposes with a priority date of 1926. A federal reserved right also exists for national forest purposes with a priority date of 1893.

License 961:

This license authorizes diversion and use of water from an unnamed spring, which is tributary to Mill Creek and then to Kings River. The purpose of use was changed in 1950 to include domestic, recreation, and firefighting. It is now used in support of pack stock. The priority date is 1927.

License 3006:

This license authorizes diversion and use of water from an unnamed spring, tributary to East Fork Kaweah River. Water from the spring is used for domestic purposes through the Cold Springs Water System from June 1 to October 30. The priority date is 1941.

Groundwater Uses:

The Park uses groundwater in support of the following water systems: Ash Mountain, Potwisha Campground, Hospital Rock Water System, Buckeye Campground, Pinewood, Wolverton, Grant Grove, Sheep Creek, and Packers Dorm. These uses are legally presumed to be drawing percolating water. The Board has no jurisdiction over percolating groundwater; consequently, a call would have no effect on the Park's use of this groundwater.