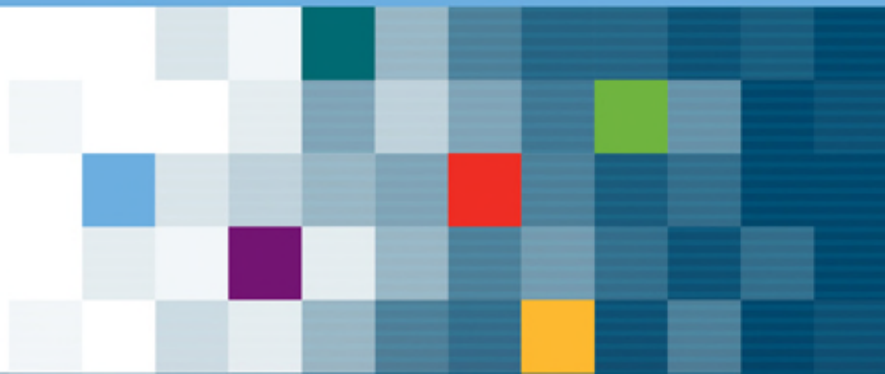


Understanding Riparian and Water Rights

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Ownership and Use of Submerged Lands

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ATTORNEYS

Ownership of Land Beneath/Abutting Waterways

- Equal Footing Doctrine
- Ownership of submerged lands in Kentucky
- Effect of changes in watercourse
- Watercourse property rights



Photo from www.garradcounty.ky.gov



Equal Footing Doctrine

- Title to streambeds of navigable waters passed to state upon entry into Union
- Test is “Navigability for Title Test”
 - Compare to other tests:
 - Federal Power Act
 - Admiralty Jurisdiction
 - Clean Water Act
- Stream must be navigable on the date the state entered the Union



Navigability for Title Test

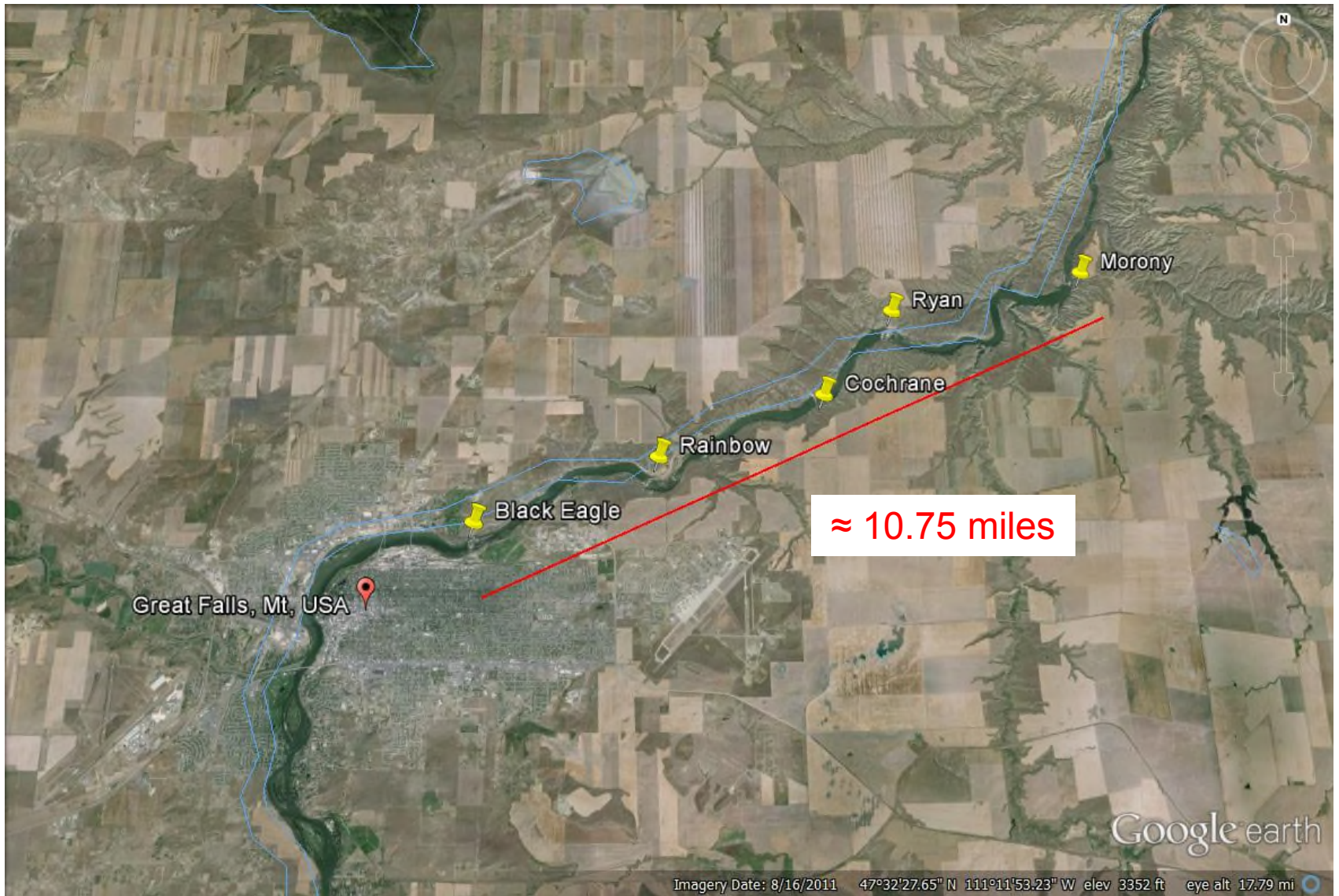
- The Daniel Ball, 10 Wall. 557, 563 (1871)
 - *Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.*



PPL Montana, LLC v. Montana (the Dam(n) Case)

- Suit brought by parents (in 2003) seeking rent for hydropower projects on the Missouri, Madison and Clark Fork Rivers
- State of Montana intervened claiming that the rivers were navigable for title purposes
- Montana state courts found for the state
- Reversed by the US Supreme Court
 - 132 S.Ct. 1215 (2012)





PLL Montana Ruling

- Navigability for title purposes can be evaluated on a segment – by – segment basis
 - Great Falls Reach not navigable
 - Lewis and Clark
- Modern uses for commerce do not meet the navigability for title test
 - State relied on recreational/guided fishing excursions on the Madison River



Streambed Ownership In Kentucky



Photo from geology.com



Streambed Ownership in Kentucky

- Owners of land abutting streams in KY own submerged lands to the “thread” of the stream
 - Exception is Ohio River (KRS 56.220)
 - Kentucky patented submerged lands to individual land owners
- *Kentucky Lumber Co. v. Green*, 87 Ky. 257, 258 (1888):
 - *The grant of land, as bounded by the Cumberland river, or lying upon the side of it, passes the title to the bed of the river to the middle of the stream, unless the terms of the grant clearly limit the grantee’s right of property to the margin of the river*

Changes in Watercourse

- Accretion/Erosion
 - Gradual changes (add/subtraction) of land
 - Property boundaries change with the water body
- Avulsion
 - Sudden change in watercourse
 - Property boundaries do not change
- Reliction
 - Dry land formed by withdrawal of water from shores of river, lake or sea
 - Boundaries shift with change in channel or shore



Limits on Riparian Owner's Rights

- Entitled to natural flow of waters, unimpaired in quality, except by "reasonable" use of others
- Where the water is navigable, abutting property owner subject to the "navigation servitude"
 - Navigation in its strictest sense
 - Also recreational uses (boating, swimming, fishing)
- No right to anchor indefinitely off a riparian owner's property



Rights in the Use of Water

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Whiskey's for Drinking, Water's for Fighting About

- Mark Twain (attributed)



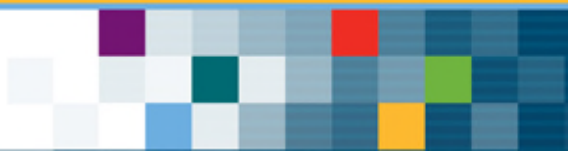
Water Use

- Water Rights Generally
 - Prior Appropriation (out west)
 - Riparianism (here)
- Regulated Riparianism
- Current Developments



Water Right Regimes

- Prior appropriation
 - First in time, first in right
 - Use it or lose it
 - Do not have to be adjacent to watercourse
 - Generally west of the 100th meridian
- Riparianism
 - No unreasonable harm to downstream users
 - Generally east of the 100th meridian



Prior Appropriation

- Provided incentives and security to miners and farmers in frontier era (miner's inch)
- User obtained right by:
 - Putting the water to beneficial use
 - Recording the amount, date and location of use with County Clerk
- Date of first use is "priority date"
- Water can be used miles away from source



Nature of Prior Appropriation Right



Photo from www.water.ca.gov

- Right grants authority to use water limited to:
 - Amount
 - Purpose
 - Place of use
 - Priority date
- Right of senior appropriator trumps all uses by juniors
- Subject to forfeiture if not used

Modern Prior Appropriation

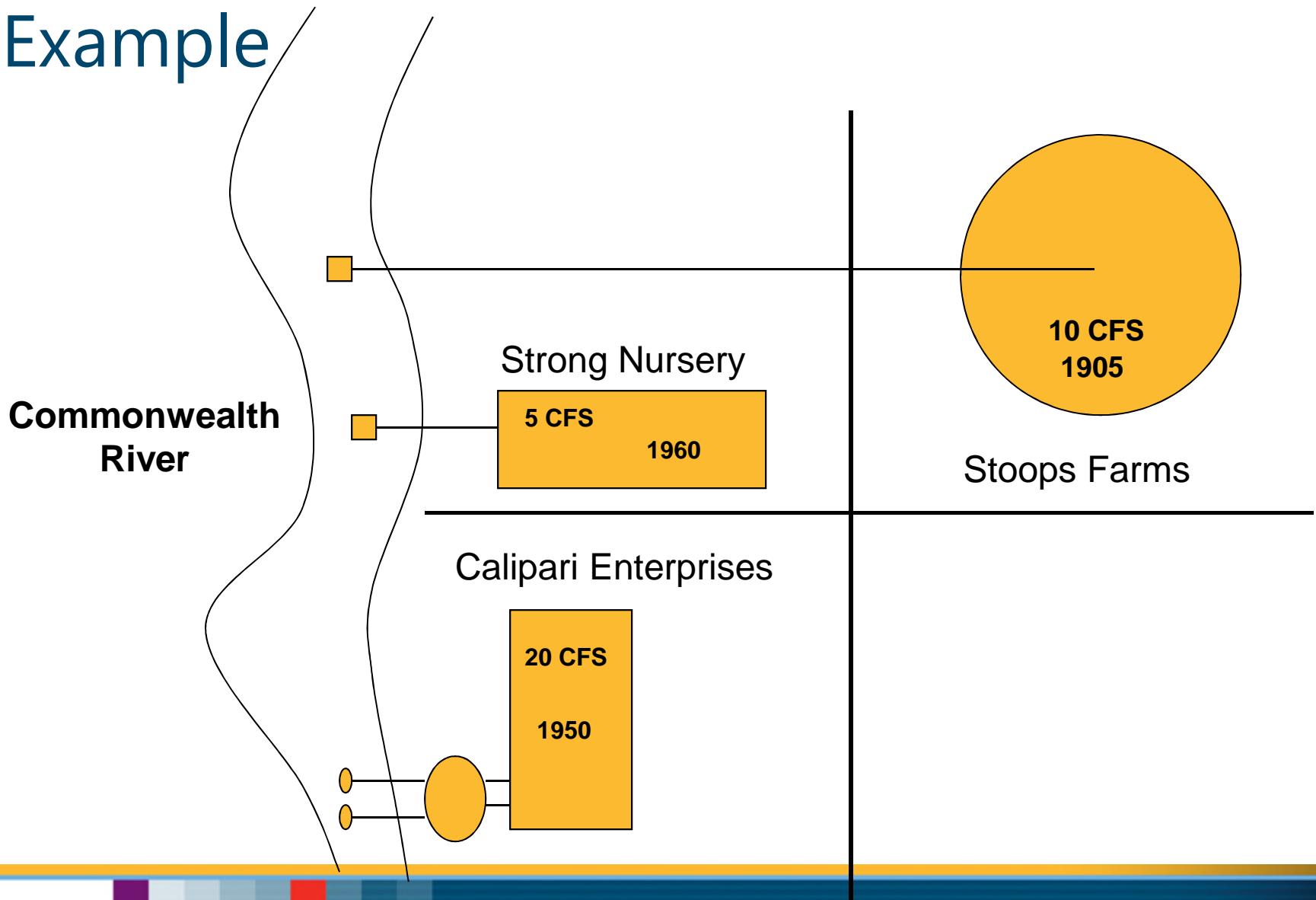
- Regulatory agencies replace clerk's offices
- Permits/Certificates
- In-Stream Rights
 - Endangered Species
 - Tribal UAF Rights
- Adjudications



Photo from www.usbr.gov



Example



Riparianism

- More abundant water resources
- System in Kentucky
- Property owner adjacent to watercourse is the riparian water right holder
- Historically controlled by common law



Nature of Riparian Rights

- A riparian owner is entitled to:
 - The natural flow of the water past its property
 - Subject to the reasonable use by others
- The riparian owner has:
 - The right to make any use of the water
 - So long as there is no substantial injury to downstream users
- Location on stream is more important than when use began



What is Unreasonable Use?

- Constructing reservoir upstream of grist mill
 - *Anderson v. Cincinnati Southern Railway*, 86 Ky. 44 (1887)
- Dumping untreated wastewater and industrial waste into stream
 - *Kraver v. Smith*, 164 Ky. 674 (1915)
- Discharging copperas water into stream
 - *Beaver Dam Coal Co. v. Daniel*, 227 Ky. 423 (1929)



Regulated Riparianism

- Many eastern states require water withdrawal permits
- In KY, users must apply for permits from KDOW
- Standard for issuance
 - Detrimental to public interest?
 - Detrimental to rights of other water users?
- Permits must set forth authorized quantity, time, place and rate of withdrawal
- Only grants limited right to use the water
 - No ownership interests

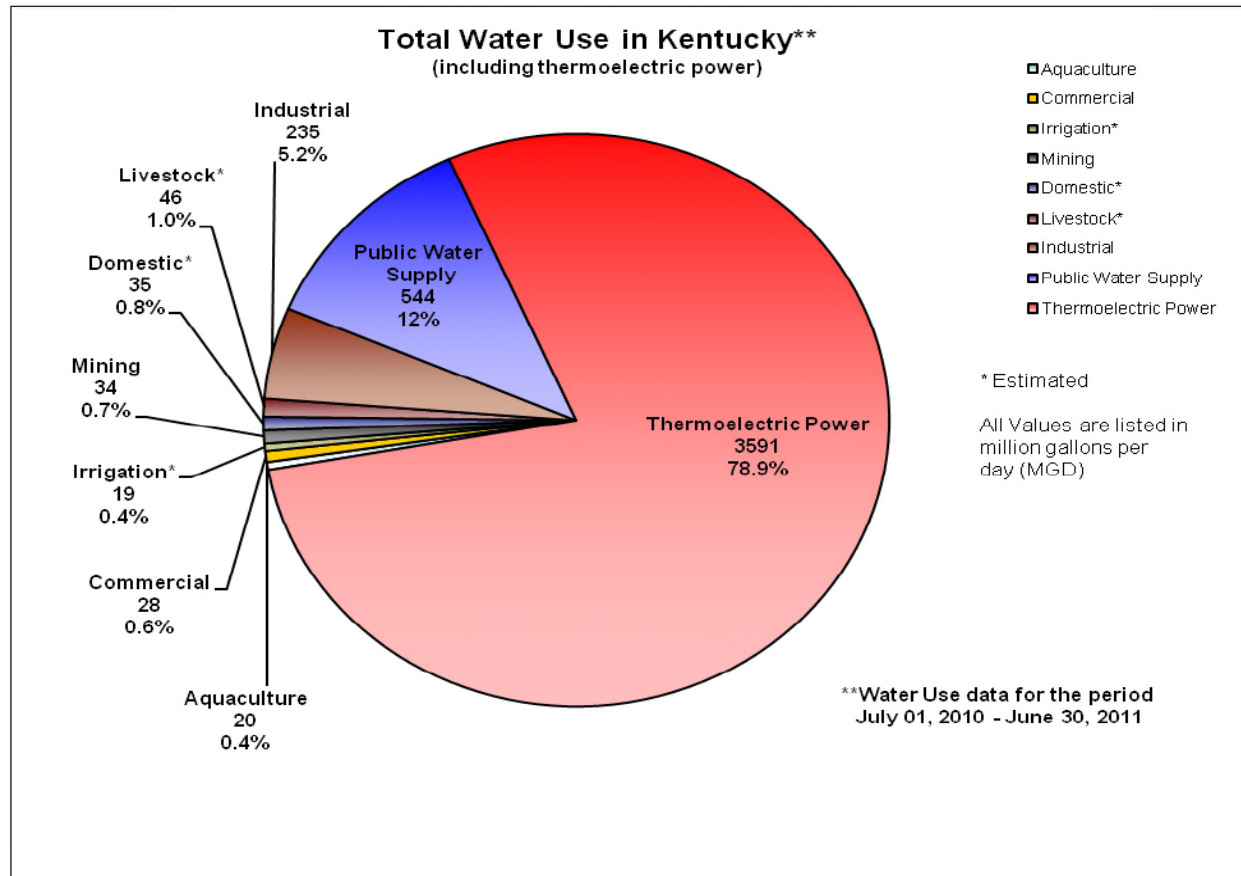


But...

- The following uses are exempt from permitting:
 - Withdrawals of less than 10,000 gpd (average)
 - Agricultural uses (including irrigation)
 - Domestic uses
 - Production of steam at power plants owned by companies whose rates are regulated by the PSC
 - Production of steam at power plants owned by companies that require certificates of environmental compatibility by PSC
 - Underground water injection for oil/gas production
- These comprise the overwhelming majority of uses in the Commonwealth



Kentucky Water Use



Kentucky Division of Water, Annual Report, Fiscal Year 2011

Interstate Disputes

- Equitable Apportionment
 - Disputes between states over allocation of water
 - Original jurisdiction in US Supreme Court
 - Arizona v. California
- Moving East
 - South Carolina v. North Carolina



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A-C-F Dispute

- Apalachicola-Chattahoochee-Flint River System
 - Multi-district litigation in Tampa
- Lawsuits involve
 - FL, GA, AL
 - Municipalities
 - USACE
 - Federal power system customers
 - Environmental Groups



A-C-F Dispute

- Dispute centers around use of Lake Lanier
 - USACE recently entered into agreements for lake to supply water for Atlanta
- 2009 District Court Ruling
 - Act enabling Buford Dam does not authorize USACE's actions
 - Prior water allocation system to be reinstated in July
- 11th Circuit Reversed
- Congress involved now...



Map from Pfly

What's Next?

- Challenges of growth
 - Population concentrations in municipalities
 - Adequate water availability and infrastructure to serve?
 - Is there enough water where its needed?
- Conflicting uses
 - Power generation v. municipal v. agricultural
- Interstate disputes
 - Could the A-C-F dispute happen elsewhere?



Questions?

Thank You

