

## ISSUE BRIEF

# California Water Rights System and Opportunities to Adapt for the Future

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### Overview

Water rights are part of our state's history and integral to our future. Water rights holders rely on the predictability of their water rights for planning. If regulations are put in place that grant the State Water Resources Control Board (State Water Board) broad and unprecedented powers to reduce diversions, then the value of a water right, including its volumetric reliability, will become wildly unreliable and make it impossible for water rights holders to meaningfully plan.

CMUA's members' water rights fall into a variety of categories, which are outlined in more detail below. Given this context, CMUA has significant concerns with the approaches in this year's proposed legislation. We recognize there are opportunities to ensure the system addresses bad actors and the state has the resources and data it needs to administer California's water rights system. We hope to actively engage on this issue and find solutions that can work for all.

### California Water Rights System

In California, a water right does not connote ownership. However, it is a very important right to use water. Under section 102 of the California Water Code, those who hold water rights have the right to beneficially use water, but the state is said to "own" the water. State ownership is regulatory in nature and not proprietary.

Water rights can be divided into two legal categories — rights acquired through land ownership (riparian/overlying) and rights acquired through use (appropriative). Water rights are further distinguished as either surface water rights or groundwater rights.

#### Surface Water Rights

Surface water rights are either riparian or appropriative. **Riparian rights** are tied to land ownership being adjacent to a waterway. Ownership of the land establishes the right, and a permit is not needed. There is no fixed quantity tied to riparian rights but there must be "reasonable use" and the water must be used on the overlying land and in the riparian watershed. Riparian rights are limited to the natural flow of a waterway. Riparian holders cannot store water. Additionally, for riparian rights, everyone

in a waterway holds equal rights in common, and the distribution of available natural flow is based on what is reasonable and equitable.

**Appropriative rights**, on the other hand, are based on beneficial use and priority, a concept called "first in time, first in right," with senior water users receiving the first right to available flows in times of water shortage. These rights are for a fixed quantity, use can potentially be diverted out of the watershed, and storage under this right may be allowed. Appropriative rights holders that acquired these rights prior to 1914 do not need a permit from the State Water Board. These non-permitted appropriative rights are pre-1914 rights. The Water Commission Act of 1913 established a permit system issued by the State Water Board. These permitted appropriative rights are post-1914 rights.

The date the right was acquired is the date of priority for appropriative rights holders. When there is not enough water to meet all permits, the oldest rights are satisfied first before any water can be taken by the younger rights. This is unlike riparian rights, where the available natural flow is always shared equally. As between riparians and appropriators, riparian rights are senior, and in times of shortage are satisfied before any water can be taken by the oldest appropriative right.

As an example, a riparian holder is typically senior to an appropriative holder that acquired their right in 1913, regardless of the date the riparian right was established. But the appropriative holder in this example is senior to other appropriative holders that acquired rights later.

In summary, for surface water rights in California, the date of acquisition matters as does the type of water right. Also, it is important to note that riparian rights can never be lost due to lack of use, while appropriative rights can be lost in some circumstances for lack of use.

#### Groundwater Rights

Groundwater rights to subsurface streams in California are issued through a permitting system established in California Water Code section 1200. These rights are to subsurface streams flowing through a known and definite channel.

Alternatively, the right to use percolating groundwater found in aquifers is determined through overlying, appropriative, overdraft, and prescriptive rights. Land-based rights to groundwater are overlying rights that are analogous to riparian — you do not need a permit and must use the groundwater on the overlying land.

Appropriative groundwater rights can be used outside of the basin. There is a priority system akin to that of appropriative rights to surface water, but permits are not required. These groundwater appropriative rights can be lost to forfeiture or prescription if not used.

Prescriptive rights to percolating groundwater is a physical solution that courts have the authority to do based on the California Constitution. California courts have said that we need to be efficient with our water and came up with a doctrine that says a court can limit the nature, scope, and extent of dormant overlying rights.

Historically, groundwater rights were managed by local agencies and county ordinances. Court adjudications to apportion groundwater rights between claimants would occasionally occur to ensure the safe yield of the aquifer and to prevent overdraft. Groundwater management in California is now governed by the 2014 Sustainable Groundwater Management Act (SGMA). The adjudicative process still exists in conjunction with SGMA.

### **Governing Principles for all Water Rights**

All water rights in California are subject to certain governing principles. The California Constitution Article X, Section 2 establishes a reasonableness standard – water shall be put to beneficial use to the fullest extent of which is capable and waters in the state may not be used wastefully or unreasonably. Whether any given use is reasonable is a fact-driven inquiry that may evolve over time.

The Public Trust Doctrine provides that certain natural resources – the air, the sea, and consequently the shores of the sea – could not be individually owned, but were held in trust by the government for the benefit of all. As states joined the union, they acquired the lands underlying the navigable rivers and tidal waters. The title to navigable and tidal resources is impressed with public trust obligation to balance all beneficial uses of water while considering public trust values including navigation, commerce, fishing, environment, recreation, and science. The state has the responsibility to preserve public trust resources from destruction or injury.

Additionally, there is a beneficial use evaluation that applies to State Water Board actions. When the State Water Board takes action that may impact water rights and the beneficial uses to which they are put, the Water Code requires there to be a balancing of these beneficial uses, with domestic uses being declared as the “highest priority.”

Lastly, California adopted the Human Right to Water policy in 2012 (Water Code Section 106.3). Per the policy, the State recognizes that “every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.” The human right to water extends to all Californians, including disadvantaged individuals and groups, and communities in rural and urban areas.

### **Why are Water Rights Important to California?**

The laws surrounding water rights help provide certainty that water users, including those that supply water to urban and rural communities, will have water available in the future. Without this certainty, all water users cannot effectively plan, invest, or make the determination that water will be available for a given beneficial use such as a new affordable housing project. Beneficial uses of water are vital to everyone who lives, works, and does business in the State and include domestic, irrigation, municipal and industrial, hydroelectric power, recreational use, and protection and enhancement of fish and wildlife. Each of these uses of water provides benefits to Californians for a multitude of reasons. Without the established water rights system, water may be unavailable for one or more of these uses. This established system also has integrated protections for diverse populations. Altering the California water rights system may have unintended consequences for these populations.

Water rights are a vital part of California’s success and livelihood. In municipal and industrial settings, reliable water rights certainty allows communities to grow, develop, and thrive. Specifically, housing development projects need to have a dedicated water source identified before the project can even begin. Advancing the state’s clean energy goals is partly reliant on water availability to contribute hydroelectric power to the grid. Maintaining the state’s thriving agricultural industry relies on water availability to grow crops for consumption or export, and to employ California’s workers. In fact, the core of California’s economic viability is largely dependent on the certainty and reliability that the water rights system provides.

Water managers and users also have a strong interest in the protection of non-human uses of water. Water agencies have invested billions in infrastructure, and infrastructure removal, to protect and enhance water-dependent ecosystems, fish, and wildlife. These investments are only possible when water rights are protected and certain.

It is also important to note that California's existing water rights system fully accommodates the balancing of human and non-human uses of water. The existing processes include important protections for water rights holders to ensure that human interest in water is fully and equitably considered before water resources may be reallocated to the environment. Water rights are important for these, and many other, reasons, and should be maintained.

### Existing State Water Board Authority to Regulate

The State Water Board has many tools in its toolbox to ensure water users are complying with the various water rights laws.

First, the State Water Board has broad administrative enforcement mechanisms under Water Code Sections 1052 and 1831 to address unauthorized diversion. The State Water Board can refer an action for injunctive relief to the Attorney General for unauthorized diversions. The Board has authority under Water Code Sections 1052 and 1825 to investigate the legality of water use, to determine whether a diversion is authorized, and to issue cease and desist orders and fines when warranted.

Second, Section 1058.5 grants the State Water Board authority to adopt emergency regulations in drought years to implement the water rights priority system and to prevent unauthorized diversion of water.

Third, all water rights holders who divert water, under any basis of right, are required to measure the water they divert and report that information to the State Water Board, and the State Water Board may issue fines for diverters who fail to timely file such reports.

Fourth, Section 1051 of the Water Code authorizes the State Water Board to investigate stream systems, and Sections 2500-2900 authorize the State Water Board to determine all rights to water of a stream system.

### 2023 Bills Are Problematic for the Water Community

Several bills have been introduced this year that would have significant impacts on the California

water rights system that would permanently harm California's water supply reliability. These bills, collectively and individually, pose significant concerns to water suppliers that hold water rights or who receive water from other water rights holders. These problematic bills are:

[AB 460 \(Bauer-Kahan\)](#) State Water Resources Control Board: interim relief

[AB 676 \(Bennett\)](#) Water: general state policy

[AB 1337 \(Wicks\)](#) State Water Resources Control Board: water shortage enforcement

[SB 389 \(Allen\)](#) State Water Resources Control Board: determination of water right

Each bill seeks to dramatically expand the State Water Board's administrative authority in a manner that conflicts with the established water rights system California water users rely and depend on.

AB 460 would prescribe enforcement authority that is vastly different from current authority and sidesteps fundamental constitutional due process protections. There is already a process where the State Water Board can obtain short-term injunctive relief by referring matters to the Attorney General. The scope of actions this bill targets requires fact-finding and balancing — which is a role the state has long entrusted to courts as neutral adjudicators to accomplish.

AB 676 is likely to impact California's long-standing policy of prioritizing water for domestic use. California courts have applied the policy while defining the contours of individual water rights disputes. The bill may contradict the history of court interpretations and could add unnecessary confusion. It is unclear what benefit this bill will provide by statutorily adopting historic regulations, case law, and constitutional standards. Instead, AB 676 may open the door for uncertainty in an area of water law that is certain enough. There may be unintended impacts on the use of water for domestic and irrigation purposes which is concerning for the water community.

The impact of AB 1337 goes far beyond managing scarce supplies during drought and is a vast expansion of the State Water Board's authority over riparian and pre-1914 water right holders in all hydrologic conditions. The existing legal framework for emergency drought regulations is consistent with California water law and the law of priority. This bill would allow the State Water Board to do by regulation what it currently can only do by

adjudication, thus raising concerns with due process and fact-finding specific to each circumstance. There needs to remain a process for people that will be impacted by any decision to be involved by providing evidence and being heard by a neutral arbiter. AB 1337 eliminates this protection while providing stiff financial penalties for the violation of any regulation.

SB 389 also greatly expands the State Water Board's authority to impact all water rights in the State. This bill has two concerning pieces. First, this bill shifts the burden of proof of showing water rights are valid and are still being used onto the water rights holder by a preponderance of the evidence. Second, the forfeiture element of this bill differs from common law forfeiture. The authority envisioned in this bill would result in a severe diminishment of people's water rights and could impact a water agency's ability to plan for the future. Worse, this bill would push water users to use as much water as possible to reduce the risk of forfeiture, at a time when the State should instead be encouraging even greater water conservation.

These bills would cause unnecessary confusion and uncertainty for the water community and are not the right way to tackle concerns with the water rights system.

### **What Could Happen If the Bills are Passed?**

If any of these bills pass there will be lasting, irreversible impacts on the water rights system. Notable impacts include:

- Uncertainty of water availability to meet existing needs and planning for future needs;
- Inability for cities and counties to build new housing projects without a reliable and certain water supply;
- Loss of opportunity to divert water into storage;
- Uncertainty of water management;
- Billions of dollars of stranded costs invested by water suppliers on infrastructure to deliver water;
- Billions of dollars of new costs to acquire water from other sources that will be borne by customers;
- Elimination of constitutional due process guarantees for individuals and entities;
- Undue judicial burdens and clogging of the already clogged legal system to review unilateral State Water Board actions;

- Increased financial impacts to water suppliers that could lead to increased rates for customers;
- Significant negative impacts to groundwater basins as groundwater replaces uncertain surface water supplies;
- Increased risk that communities will be left without water;
- Negative impacts on the environment, and to fish and wildlife; and
- Potential to upend the California economy.

### **Areas for Improvement with the Current System**

As noted earlier, while we have concerns with the suite of 2023 legislative proposals, CMUA and its members recognize it is important to discuss targeted opportunities for improving aspects of the system.

CMUA encourages legislators to consider solutions or changes that address:

- Need for improved data on existing water supply and usage in California to better plan for the future.
- Need for better transparency for effective management of water supply.
- Need for improvements enabling the timely transfer of water from areas of surplus to areas of need in times of shortage.
- Need for sufficient authority to enforce against illegal diversions of water and to deter unlawful water uses or uses that contradict the reasonableness doctrine.
- Stiffer fines for unlawful diversions in all times, and punitive fines for unlawful diversions conducted during declared emergencies.
- Need to preserve reasonable due process afforded to water rights holders.

The current proposals that seek to overturn the water rights system are unsuitable, would result in protracted legal challenges, would exacerbate fisheries problems and groundwater overdraft, and would create unimaginable economic impacts and uncertainties throughout California. CMUA and its members are willing to work on solutions that benefit all water users in California while tackling the areas of concern highlighted in this issue brief.