

Date of Hearing: May 2, 2023

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Rebecca Bauer-Kahan, Chair

AB 676 (Bennett) – As Amended March 13, 2023

SUBJECT: Water: general state policy

SUMMARY: Clarifies uses that constitute “domestic purposes” in relation to the implementation of state policy and that the principle of reasonable use and public trust doctrine are the foundation for state water management policy. Specifically, **this bill:**

- 1) Provides that domestic purposes include, but are not limited to, water use for the following:
 - a) Sustenance of human beings and household conveniences;
 - b) Care of household livestock and animals;
 - c) Care of household gardens; and
 - d) Deliveries of water by community water systems, other public, municipal, and industrial water agencies, and water corporations regulated by the Public Utilities Commission.
- 2) Provides that all water rights remain subject to the reasonable use doctrine, the public trust doctrine as provided in *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, and subsequent California court decisions.
- 3) Re-states that the principle of reasonable use and the public trust doctrine provide the foundation for state water management policy.

EXISTING LAW:

- 1) Provides that the general welfare requires that water resources of the state be put to beneficial use to the fullest extent possible and that the waste or unreasonable use of water be prevented (Article X § 2, California Constitution).
- 2) Declares that it is the established policy of this state that the use of water for domestic purposes is the highest use of water and that the next highest is for irrigation (Water Code § 106).
- 3) Declares the established policy of the state to be that every human being has the right to safe, clean, affordable, and accessible water adequate for their basic needs (Water Code § 106.3).
- 4) Provides that the principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta (Water Code § 85023).

FISCAL EFFECT: None. This bill is keyed non-fiscal.

COMMENTS:

- 1) **Purpose of this bill.** According to the author, the extreme droughts of the last decade have demonstrated that climate change has arrived and that California's future hydrology will be different. These conditions have strained water management and led to unprecedented actions such as the December 2021 initial zero percent allocation for the State Water Project (SWP) and accompanying announcement that SWP would only deliver water to meet human health and safety needs. Given actions such as this, the author observes that "climate change may make the Domestic Use Preference more central to the difficult decisions when water runs short" and asserts that "legislative clarification is urgently needed before drought conditions force water managers to enforce the Domestic Use Preference, without clear guidance." That author maintains that by clarifying California's long-standing statutory Domestic Use Preference for water, this bill better prepares California for future water management challenges.

The author acknowledges that some may question the need for additional definition of "domestic purposes" in statute, but argues that, given that the state is much different than a century ago when the Domestic Use Preference was first put in statute and that climate change is forcing difficult decisions in water management, statutory clarity will help Californians exercise the Domestic Use Preference: "in the years ahead, water project operators and water agency managers may need to make difficult decisions among water demands. They need clarity in the law to make those decisions, which may come quickly, without advice from lawyers explaining a century of case law on the Domestic Use Preference."

- 2) **Background.** The Legislature recognized the Domestic Use Preference in statute more than a century ago, when it established a statutory structure for administrative issuance of rights to use the water owned by the people of California in the Water Commission Act of 1913: "the application for a permit by municipalities for said municipalities or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of whether they are first in time."

California created this administrative structure in the period when western states were establishing administrative water rights systems in order to attract federal funding for the Bureau of Reclamation to construct water projects. The 1902 Reclamation Act preferred irrigation use for its water projects, but gave deference to state water rights laws. In response, twelve of the seventeen western states enacted a range of statutes that generally preferred domestic use over irrigation use. Similarly, federal regulations for shortages on the Colorado River allow the Bureau of Reclamation to exclude municipal and industrial water contractors from procedures to reduce Colorado River deliveries (43 Code of Federal Regulations § 417.1).

Domestic Use Preference history. The Domestic Use Preference has deep roots in the Common Law, dating back before California was a state. California's first constitution, in 1850, adopted the Common Law, which included riparian water rights that gave landowners along a stream a right to use water. Riparian rights require "reasonable" use. Courts addressed what was reasonable, dividing uses between "natural" and "artificial" uses. In an

1842 opinion in *Evans v. Merriweather*,¹ an Illinois court described the preferred natural use in domestic use terms: “To quench thirst, and for household purposes, water is absolutely indispensable. In civilized life, water for cattle is also necessary. These wants must be supplied, or both man and beast will perish.”

Judicial development of Domestic Use Preference. Since California codified the Domestic Use Preference in 1913, courts have addressed it in individual cases, further defining “domestic use.” Courts have recognized domestic use to include human needs (drinking water, bathing, cooking and “household conveniences”), household livestock and animals (not commercial livestock operations), and household gardens. Some cases also have recognized the needs of municipalities as falling within domestic use.

Reasonable use doctrine. This is the fundamental principle in California water law and it is enshrined in Article X, Section 2 of the California Constitution. This provision was amended into the Constitution in 1928 to clarify that “the right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served [...]” This amendment was made in response to the 1926 California Supreme Court ruling in *Herminghaus v. Southern California Edison* that found that a riparian user (Herminghaus) had no obligation to use water reasonably in relation to an appropriative right holder (Southern California Edison) so long as the use by the riparian was “beneficial.” “Beneficial use” refers broadly to uses that benefit society and includes domestic use, irrigation, power generation, municipal use, industrial, fish and wildlife preservation and enhancement, recreational, and water quality, among others.

California Code of Regulations (CCR) definition. California regulations define “domestic use” as follows (23 CCR § 660):

Domestic use means the use of water in homes, resorts, motels, organization camps, camp grounds, etc., including the incidental watering of domestic stock for family sustenance or enjoyment and the irrigation of not to exceed one-half acre in lawn, ornamental shrubbery, or gardens at any single establishments. The use of water at a camp ground or resort for human consumption, cooking or sanitary purposes is a domestic use.

Public trust doctrine. This is an important principle for California water law that reflects the notion that certain properties should not be privately held, but should be held by the government for the benefit of the public. The public trust has its origin in Roman law: “by the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea” (Institutes of Justinian 2.1.1). The public trust doctrine is established by a number of court decisions dating back to the early 19th Century and it has evolved over time to include environmental values. This bill references a landmark public trust case, *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, that “found that the public trust doctrine applied to the tributary streams of Mono Lake and prevented the Los Angeles Department of Water and Power (LADWP) from maintaining a vested right to divert these waters if the diversion would harm public trust values” (Littleworth and Garner,

¹ 4 Ill. (3 Scam.) 492 (1842).

2019). In effect, LADWP has had to reduce (but not halt) its diversions from the tributary rivers to Mono Lake to protect environmental values; this was accomplished through Water Right Decision 1631 issued by the State Water Board that remains in effect today.

- 3) **Suggested committee amendments.** While the current version of this bill is correct in stating that the reasonable use and public trust doctrines provide the foundation for state water policy, the inclusion of references to these doctrines in Water Code, Section 106, which pertains to long-standing policy on the domestic use preference, seems incongruous. To address this, the Committee may wish to request that the author strike these references from this bill by making the following changes to proposed Water Code, Section 106:

106. (a) It is hereby declared to be the established policy of this ~~State~~ state that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.

(b) Domestic purposes include, but are not limited to, water use for all of the following:

(1) Sustenance of human beings and household conveniences.

(2) Care of household livestock and animals.

(3) Care of household gardens.

(4) Deliveries of water by community water systems, other public, municipal, and industrial water agencies, and water corporations regulated by the Public Utilities Commission.

~~(c) (1) All water rights remain subject to the reasonable use doctrine, pursuant to Section 2 of Article X of the California Constitution, and the public trust doctrine, as provided in National Audubon Society v. Superior Court (1983) 33 Cal.3d 419 and subsequent California court decisions.~~

~~(2) Pursuant to Section 85023, the longstanding constitutional principle of reasonable use and the public trust doctrine provide the foundation for state water management policy.~~

- 4) **Arguments in opposition.** The Association of California Water Agencies (ACWA) and other agricultural trade associations oppose this bill arguing that it confuses a “foundational code section by inserting redundant references to existing laws that have nothing to do with establishing priority of use” and that it will likely lead to litigation. ACWA et al. take specific issue with the restatement of the reasonable use doctrine and public trust doctrine in this bill and assert that the language in this bill inaccurately states how both doctrines apply to water rights contending that this bill is “problematic in its inaccuracy and lack of clarity and is likely to do little more than cause confusion.” Finally, ACWA et al. note that the definition of “domestic purposes” in this bill is not consistent with how the California Code of Regulations (CCR) defines “domestic use.”

REGISTERED SUPPORT / OPPOSITION:

Support

None on file

Opposition

Agricultural Council of California
 Association of California Water Agencies
 Byron-Bethany Irrigation District
 California Chamber of Commerce

California Farm Bureau Federation
California Manufacturers & Technology Association
California Municipal Utilities Association
City of Corona
County of San Joaquin
County of Stanislaus
El Dorado Irrigation District
Imperial Irrigation District
Manteca Chamber of Commerce
Modesto Irrigation District
Oakdale Irrigation District
Palmdale Water District
Rowland Water District
San Francisco Public Utilities Commission
South San Joaquin Irrigation District
Turlock Irrigation District
United Water Conservation District
Valley Ag Water Coalition
Walnut Valley Water District
Western Growers Association

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