

Date of Hearing: July 11, 2023

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Rebecca Bauer-Kahan, Chair

SB 389 (Allen) – As Amended July 6, 2023

SENATE VOTE: 23-11

SUBJECT: State Water Resources Control Board: investigation of water right

SUMMARY: Authorizes the State Water Resources Control Board (State Water Board) to issue an information order to ascertain whether any claimed water right is valid, including pre-1914 appropriative or riparian rights. Specifically, **this bill:**

- 1) Provides that the State Water Board may investigate whether any claimed water right is valid under the laws of California, which includes riparian and pre-1914 rights.
- 2) Authorizes the State Water Board to issue an information order, executed by the Executive Director, to a water right holder or claimant, diverter, or water user requesting the following:
 - a) Information required to be reported in a statement of water diversion and use;
 - b) Information concerning the basis of the water right claimed;
 - c) Information related to the patent date claimed for place of use, in the case of a riparian right;
 - d) Information concerning the notice and date of the appropriation and the date of actual delivery of water to beneficial use; and
 - e) Information concerning the prior diversion and use.
- 3) Provides that the burden, including costs, of any information order issued (as described in #2, above), shall bear a reasonable relationship to the need for the requested information and the benefits to be obtained by the State Water Board in receiving the requested information. The State Water Board shall do the following when issuing an information order pursuant to this bill:
 - a) Provide the person to whom the request is directed with a written explanation regarding the need for the information; and
 - b) Identify the evidence that supports requiring the person to provide the requested information.
- 4) Provides that a diversion or use of water ascertained to be unauthorized may be enforced as a trespass.
- 5) Clarifies that nothing in this bill limits any authority held under any other provision of law.

EXISTING LAW:

- 1) Authorizes the State Water Board to investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water and ascertain whether or not water filed upon or attempted to be appropriated is appropriated under the laws of the state (Water Code § 1051).
- 2) Provides that the diversion or use of water other than as authorized is a trespass and a person committing trespass may be civilly liable, as specified (Water Code § 1052).
- 3) Requires that an appropriation of water must be for some useful or beneficial purpose, and when the appropriator or their successor in interest ceases to use it for such purposes the right ceases (Water Code § 1240).
- 4) Provides that if a person entitled to the use of water fails to beneficially use all or any part of the water claimed by them, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, that unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water (Water Code § 1241).
- 5) Authorizes the State Water Board to determine all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right upon petition by a claimant to water of the stream system requesting the determination of the rights of the various claimants to the water of that stream system (i.e., statutory adjudication). Requires the State Water Board to comply with specific notice, proceeding, and investigation processes and requires claimants to notify the State Water Board of their intention to file proof of claim and to submit proof of their respective claims (Water Code § 2500 *et seq.*).
- 6) Requires each person who diverts water to file a statement of their diversion and use ("statement of water use and diversion") with the State Water Board unless exempted, for example small domestic or small irrigation use registrations (Water Code § 5101).

FISCAL EFFECT: Unknown. This bill is keyed fiscal.

COMMENTS:

- 1) **Purpose of this bill.** This bill is intended to provide the State Water Board with more tools to determine whether senior water right claimants who assert riparian or pre-1914 appropriative rights have defensible ground for their diversion and use of water. According to the author, "In the face of climate change and the increasing prevalence of drought, it is critical that the State of California has thorough and up-to-date data for assessing water availability for all holders in a watershed. An accurate determination of water rights requires verification of a watershed's diversions or use, including those of senior water right holders not governed by the permitting system of the California Water Commission Act of 1913. To address critical gaps in authority, [this bill] provides information-gathering tools that allow the State Water Board to align a watershed's reported demand with the diversions and use authorized under California law, thus more accurately determining water availability for all beneficial uses."

- 2) **Background.** Some scholars have dubbed California’s legal framework for surface water rights the “California doctrine”¹ and it is unique among all other states in that it recognizes both riparian and appropriative rights. The coexistence of the two types of surface water rights dates to the very beginning of California’s statehood and was affirmed by the California Supreme Court in the 1886 landmark case *Lux v. Haggin* that recognized the legitimacy of both types of rights but determined “that riparian rights have priority over appropriative rights in most instances.”²

Riparian rights are attached to land that is contiguous to a river, stream, or other natural water course and permit a landowner to put the water to beneficial use on their land. Riparian rights derive from English common law which the California Legislature adopted in 1850.³ Appropriative rights, in contrast, are not tied to land ownership and do not require the holder to use the water on land adjacent to the body of water. Appropriative rights “arose in mining camps on public lands where no one could own the land and thus no one could get a riparian right.”⁴

The doctrine of prior appropriation (also known as “first in time, first in right”) applies to appropriative rights and is a seniority system that still applies today. Under prior appropriation, a junior water right holder (i.e., one that claimed a right at a date after a senior water right claimant) will have their right curtailed, or cut back, in times of shortage before the next claimant has their right curtailed. Like riparian rights, appropriative rights were recognized shortly after California became a state: first in the 1855 California Supreme Court case *Irwin v. Phillips* and later by an act of the Legislature in 1872.⁵

In 1913, the Legislature passed the Water Commission Act that established today’s framework for obtaining a permit and license for the appropriation of surface water resources. Under the Water Commission Act, the Water Commission (the predecessor to the State Water Board) had sole jurisdiction to issue a right to use unappropriated surface waters. The Act recognized that water rights obtained prior to its passage were still valid. This established another important distinction in appropriative surface water rights: those obtained before 1914 (“pre-1914 rights”) and those obtained thereafter. There is limited information regarding pre-1914 surface water rights, as rights holders did not obtain a permit or license from the State Water Board, and until recently, did not report volume of use to the State Water Board.⁶

Updating California Water Laws to Address Drought and Climate Change (February 2022). A group of legal scholars and individuals with decades of experience in California’s water sector released a series of recommendations to update California’s water rights laws in response to drought and climate change. The authors note that nearly 1 million Californians

¹ Donald Worster, *Rivers of Empire*, (New York: Oxford University Press, 1985), 107.

² Arthur Littleworth and Eric Garner, *California Water Law*, 3rd Edition, (Point Arena: Solano Press Books, 2019), 41.

³ *Ibid.*, 40.

⁴ *Ibid.*, 50.

⁵ *Ibid.*, 51.

⁶ Theodore Grantham and Joshua Viers, “100 years of California’s water rights system: patterns, trends and uncertainty,” *Environmental Research Letters*, 9 (2014): 3, <https://iopscience.iop.org/article/10.1088/1748-9326/9/8/084012>.

lack access to safe drinking water, domestic wells have been going dry at an unprecedented rate, and more than 100 freshwater-dependent species of plants and wildlife are listed as threatened or endangered under state and federal protection laws, including 18 native fish species that are “highly vulnerable to extinction.” The report asserts that “California’s current system of water laws is ill-equipped to respond to modern water shortages. California’s water laws need to be reassessed to address today’s challenges, safeguard the health, safety, and livelihoods of California’s 40 million residents, support its economy, and protect California’s imperiled ecosystems.” This bill is based on the report’s recommendation (#6) to provide the State Water Board with authority to verify the validity of pre-1914 appropriative and riparian water rights.

Regarding its recommendation #6, the *Updating California Water Laws* report states: “The State Board presently lacks the tools for promptly investigating and determining whether senior water right claims are inflated or represent the amounts that the claimants have the right to divert and use. Section 1051 of the Water Code grants the State Board the general authority to investigate stream systems but does not explicitly grant the power to verify the water rights of users claiming rights outside of the Water Commission Act [Water Code § 1051]. Sections 2500 through 2900 of the Water Code allow the State Board to ‘determine...all rights to water of a stream system whether based upon appropriation, riparian rights, or other basis of rights,’ proceedings commonly known as statutory adjudications [Water Code § 2501]. However, these sections do not allow the State Board to initiate an adjudication of rights to a stream system. Only claimants to water from the stream may initiate a statutory adjudication [Water Code § 2525]. Furthermore, the sections do not allow the State Board to determine the rights of individual diverters or a narrow set of diverters.”

- 3) **Recent amendments.** The most recent amendments removed what would have been a new authority for the State Water Board to “determine” the validity of water rights. Instead, the bill expands the State Water Board’s existing authority to investigate and “ascertain” whether water has a valid claim or appropriative water right for its use. This change has the effect of slightly expanding the State Water Board’s existing authority to ascertain water availability, by allowing investigation of claims of riparian as well as appropriative rights. It deletes this bill’s previous language on allowing legal determinations of water rights, shifting to a lesser authority to ascertain, factually, whether the water itself has a legal claim on it.

Established Burden of Proof. The recent amendments also delete a provision that would have *statutorily* imposed the burden of proof on the water right claimant. Due to these amendments, courts will instead rely on common law if any disputes arise from State Water Board investigations into a given party’s basis of right pursuant to this bill. Presumably, courts will apply the long-standing legal principle that the water right claimant “has the burden of proving every element of the right that he claims. The burden is upon him ‘to establish by sufficient evidence the fact of appropriation by him to beneficial use upon his land.’” W.A. Hutchins, *The California Law of Water Rights*, p. 282 (1956), quoting *Crane v. Stevenson*, 5 Cal 2d 387, 398 (1936).

- 4) **Arguments in support.** The Planning and Conservation League (PCL) is the sponsor of this bill and argues that this bill gives the State Water Board an important tool to verify water rights and ensure that water is used judiciously in an era of increasing scarcity. PCL points out that “neither holders of riparian rights nor pre-1914 appropriative rights require a permit

or license from the Water Board.... Because the Water Board does not issue permits or licenses for riparian and pre-1914 appropriative rights, the extent and scope of these rights are poorly understood.” PCL cites one study that suggests holders of these senior water rights account for the diversion of at least 2.3 million AF of water from the Sacramento-San Joaquin Delta watershed. PCL maintains that this bill addresses this gap in the State Water Board’s authority and will allow it “to better manage the system for the benefit of all users, and the ecology of California’s many beautiful streams.”

- 5) **Arguments in opposition.** The Committee has received several letters of opposition to the previous version of this bill. These letters specifically mention the forfeiture and burden of proof provisions that the recent amendments have removed. It is not clear if these parties still have concerns with this bill.
- 6) **Oppose unless amended.** The Contra Costa Water District has taken an “oppose unless amended” position on this bill noting “significant concerns about language in the bill that places the burden of proof solely on the water rights holder.” Recent amendments may have addressed this concern.
- 7) **Related legislation.** AB 1337 (Wicks) of the current legislative session authorizes the State Water Board to issue a curtailment order for any diversion, regardless of basis of right, when water is not available under the diverter’s priority of right. AB 1337 is pending in the Senate Natural Resources and Water Committee.

AB 460 (Bauer-Kahan) of the current legislative session grants the State Water board authority to issue an interim relief order to enforce the reasonable use doctrine, water rights, water quality standards, and other provisions of law. AB 460 is pending in the Senate Natural Resources and Water Committee.

SB 1205 (Allen), Chapter 369, Statutes of 2022, requires the State Water Board to adopt regulations that specify methodology for, and incorporate consideration of climate change effects into, water availability analyses required for the issuance and administration of water right permits.

REGISTERED SUPPORT / OPPOSITION:

Support

Planning and Conservation League (sponsor)
 California Climate Reality Coalition
 California Coastkeeper Alliance
 California Environmental Voters
 California Outdoors
 California Sportfishing Protection Alliance
 California Water Research
 Clean Water Action
 Climate Action California
 Climate Reality Project, Los Angeles Chapter
 Climate Reality Project, San Fernando Valley Chapter
 Coast Action Group
 Defenders of Wildlife

Friends of The River
Mono Lake Committee
Natural Heritage Institute
Northern California Council, Fly Fishers International
Pacific Coast Federation of Fishermen's Associations
Restore the Delta
Sacramento River Council
San Francisco Baykeeper
Sierra Club California
Trout Unlimited
Tuolumne River Trust
Union of Concerned Scientists
Water Foundation
Wholly H2o

Oppose Unless Amended

Contra Costa Water District

Opposition

California Cattlemen's Association
City of Corona
City of Foster City
City of Mountain View
County of Fresno
County of San Joaquin
County of Solano
County of Stanislaus
County of Tulare
Modesto Irrigation District
Mountain Counties Water Resources Association

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