

Water Rights

No Overhaul Needed; Partnerships Help Manage Complex System

Water rights in California are an interesting amalgamation of different property right concepts. While perhaps not intuitive, this system is nonetheless the basis upon which all water infrastructure is founded. Despite recent criticism of the water rights doctrine, the current system is valuable, and a complete overhaul is both unnecessary and would be disruptive to every water user in the state. Instead, the focus should be on how water rights could be improved and how to achieve that improvement in a practical, meaningful and fair way.

WHAT ARE WATER RIGHTS?

Water rights are a notoriously complex area of law and policy, but in essence they are property rights that are associated with the ability to use a certain amount of water at a certain period of time. A water right does not convey ownership over individual molecules of water.

Surface water rights are based primarily on a priority appropriative system: the first person to divert water from a waterway for a beneficial use obtains the right to use a certain amount of water. Often referred to as “first in time, first in right,” this means that a right claimed earlier in time takes priority over a more recent — or junior — right. The highest priority rights are referred to as “pre-1914,” because they were claimed before the State Water Resources Control Board was formed in 1914, and thus are less regulated by the State Water Board. Landowners who have property adjacent to or encompassing a stream may have riparian rights, which also are considered a high priority right.

Relative priorities become most critical in times of water shortage: when there is insufficient flow to satisfy all claims on

a waterway. In those circumstances, more senior rights typically will be satisfied, and the most junior rights will be reduced or curtailed. Priorities also affect how large water infrastructure projects work. For instance, California and the United States had to enter into contracts with very senior water rights holders in order to obtain the ability to construct and operate the State Water Project and Central Valley Project.

Groundwater rights are tied to property ownership of the overlying land. Landowners have a right to access the common benefit of groundwater, but use cannot harm neighboring landowners.

DEDICATION OF WATER RIGHTS HOLDERS TO SOLUTIONS

The last three years of drought have stressed the existing water system to its limits, and water users have risen to the challenge of finding solutions that work for a broad swath of the state. For example, in 2022 the Russian River Voluntary Water Sharing Agreement was created, borne out of an acknowledgment by the State Water Board and local stakeholders that drought impacts in the Russian River watershed in Sonoma County would be severe.

The agreement was the result of lengthy negotiations, where water rights holders of all priority levels would enter into a sophisticated agreement that allows senior water rights holders to forgo a percentage of water per year so that juniors can receive some amount of water rather than being completely curtailed. In essence, the program created a water allocation and communication system among water rights holders and water users within the agreement.

The program ran for about six months in 2022 before operations of the upstream hydroelectric dam cut flows to the area to a very low level. The Russian River program nevertheless stands as an example of creative solutions that can be achieved even in severe drought conditions. Water agencies involved in the development of the agreement intend to take lessons learned from 2022 and continually improve the program in the future. The success of the program is tied directly to the collaboration and trust that was built between all stakeholders and with the state.



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POSSIBLE IMPROVEMENTS IN SYSTEM WITHOUT DISRUPTION

The regulation of water rights has worked to date, but more recently, and especially during the drought, the existing administration of rights may have proven to be too cumbersome to respond quickly to changing circumstances. The system therefore should be stabilized and modernized at the margins to achieve efficiency.

A wholesale overhaul of the water rights system is not only unnecessary but also disruptive to a state that relies on a complex network of water conveyances to ensure that Californians have access to water. An overhaul would upend decades of property rights and would undo contracts and conveyance agreements under which water is moved from one area of the state to another, which could strand expensive assets, and would instigate expensive and lengthy litigation. It

also inevitably would pit every water user in the state against each other.

As seen in the Russian River example, state and local partnerships can be helpful to achieving better water management without touching the underlying water rights system. Local stakeholders have the benefit of deep knowledge of their watersheds and also would be tasked with any program implementation, but the state provides important resources with data and support. Additionally, the State Water Board could focus on enforcement of the existing system in order to protect existing rights and reduce illegal diversions.

CALCHAMBER POSITION

With something as fundamental as the system through which all Californians receive their water, policymakers must make strategic improvements that make the system more nimble, efficient and predictable, and avoid disruptions.



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