WATER REGULATION IN THE WESTERN STATES: CALIFORNIA'S 2023 LEGISLATIVE PROPOSAL HIGHLIGHTS

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An ongoing, historic drought in California has compelled California state legislators to rethink the state's long-standing treatment of water rights. While the record snowpack of 2023 helped to significantly increase the amount of water in the state's major reservoirs, the changing climate leaves California susceptible to future long and extreme droughts. Due to these realities, the California legislature has proposed numerous bills this session that address water rights. Senate Bill (SB) 389, Assembly Bill (AB) 779, AB 1337, AB 460, and AB 1205 were proposed during the 2023 legislative session to increase the regulatory power of the California State Water Resources Control Board (the State Board). Although each bill was weakened over the course of the legislative session and only one became law, they reflect a desire to address the current water rights system in place.

California has a unique and paradoxical approach to surface water rights; both appropriative and riparian rights are recognized, but only some are subject to regulation.[1] Riparian rights entitle a landowner to a correlative share of water from a stream physically adjacent to the land. In California, riparian rights may be exercised by a landowner without a permit, license, or government approval. On the other hand, an appropriative right, or “first in time, first in right,” is based on physical control and beneficial use of water rather than land ownership. Most Californian appropriative rights require a permit from the State Board,[2] and those rights are subject to regulation and curtailment in times of drought. However, appropriative rights perfected before 1914 are not subject to any permitting requirements or regulatory oversight because these rights were established before California adopted an official water code. This counterintuitive, and sometimes contradictory, system of surface water rights has come under greater scrutiny in recent years as California continues to struggle with increasing water shortages that, while alleviated for the near future, remain a reality for the long term as the state contends with climate change.

The state agency with the main responsibility for regulatory oversight of California water rights is the State Board. Formed in 1914, the State Board is responsible for regulating appropriative water rights perfected after 1914 through permits and licenses. While the State Board does not have the authority to regulate riparian and pre-1914 appropriative rights, it does have the authority to prevent “unreasonable and wasteful uses of water” regardless of the sources of the water right. This includes the authority to adopt emergency regulations to curtail water diversion under any water right in times of drought. For example, the State Board has exercised this authority in the past to limit riparian withdrawals to protect spawning salmon habitat,[3] but the State Board's authority to manage riparian and pre-1914 appropriative rights for the purpose of water conservation is otherwise extremely limited.

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During this legislative session, there have been multiple proposals to expand the scope of the State Board's power and authority. The summaries below discuss these proposals.

WATER REGULATION PROPOSALS IN THE 2023 LEGISLATIVE SESSION

Each of SB 389, AB 779, AB 1337, AB 460, and AB 1205 address water rights in California.

SB 389:[4] SB 389 is intended to provide the State Board with the ability 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. SB 389 authorizes the State Board to issue an information order in furtherance of an investigation to a claimed water right holder, diverter, or user to provide certain information related to a diversion and use of water. The bill provides that a diversion or use of water ascertained to be unauthorized (e.g., due to a water right claim not being defensible) may be enforced as a trespass. This bill was passed by the California State Legislature and was signed into law by Governor Gavin Newsom (D-CA)on 8 October 2023.

AB 779:[5] AB 779 is intended to: (1) require parties to groundwater adjudications to send all pleading and briefing materials to the groundwater sustainability agency (GSA) in their basin, with the GSA required to publicly publish the materials online, (2) require the court to refer groundwater adjudications to the State Board, (3) prevent over-pumping during adjudication proceedings, and (4) require courts to certify that they have considered the useand "accessibility of water for small farmers and disadvantaged communities" when entering a judgment. This bill was passed by the California State Legislature and signed into law by Governor Newsom on 13 October 2023.

AB 1337:[6] AB 1337, as originally drafted, would empower the State 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. This would have been a significant change in the current authority of the State Board. The bill was in committee in the California State Senate, but the committee hearing was cancelled at the request of the author stopping this bill from moving forward this session.

AB 460:[7] AB 460 would have granted the State Board the authority to issue an interim relief order to enforce the reasonable use doctrine, the public trust doctrine, water quality objectives, and other provisions of law. In addition, the bill provided an amount not to exceed the sum of US$10,000 in civil penalties for each day in which a violation occurs and US$2,500 for each acre-foot of water diverted in violation of the interim relief order. The author of this bill also requested the California State Senate committee hearing be cancelled.

AB 1205:[8] AB 1205, as originally proposed, would declare "the sale, transfer, or lease of water rights from our agricultural lands by investment funds as a wasteful or unreasonable use of water." This bill was met with criticism that this would limit the use of private capital to develop reliable water supplies. The California State Senate amended this bill to require the State Board to conduct a study on the existence of speculation or profiteering by an investment fund in the sale, transfer, or lease of an interest in any water right previously put to beneficial use on agricultural lands before 1 January 2027. This bill was passed from the appropriations committee on 1 September and was ordered to a third reading on 5 September. However, this bill is currently dormant and was ordered to the inactive file at the request of Senator Melissa Hurtado.
Both AB 1337 and AB 460 were approved by the California State Assembly. However, as the 2023 legislative session ended before either bill could be fully considered by the State Senate, both bills now become "two-year bills" and will be revisited by the Senate in the 2024 legislative session.

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CONCLUSION

Water shortages are becoming common place across California as diminishing snowpack, low rainfall, and increased intensity of droughts has caused water withdrawals to deplete state reserves. The state has adopted measures to improve supply reliability, such as the Water Supply Strategy and Sustainable Groundwater Management Act. However, as demonstrated by the proposed bills in this year's legislative session, many believe more action is required to secure water availability for future use. We suspect that over the next few years there will be many proposals to alter the current water rights system. The firm continues to monitor water issues and can help clients navigate the impact of any changes in law.

FOOTNOTES

[1] *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 173 Cal. Rptr. 3d 200 (2014), as modified on denial of reh'g (July 11, 2014).

[2] California also has other types of water rights, including groundwater rights, reserved rights (the federal government sets aside water when it reserves land for the public domain), and pueblo rights (a municipal right based on Spanish and Mexican law).

[3] The Water Commission Act of 1914 created the agency that later evolved into the State Board.

[4] State Water Resources Control Board: investigation of water right, SB 389, CA 2023–2024 (sponsored by State Senator Ben Allen (D-SD 24)).

[5] An act to amend Sections 840 and 850 of, and to add Section 831.5 to, the Code of Civil Procedure, and to amend Section 10737.4 of, and to add Sections 10737.3 and 10737.9 to, the Water Code, relating to groundwater, AB 779, CA 2023–2024 (sponsored by Assemblymember Lori Wilson (D-AD 11)).

[6] State Water Resources Control Board: water diversion curtailment, AB 1337, CA 2023–2024 (sponsored by Assemblymember Buffy Wicks (D-AD 14)).

[7] State Water Resources Control Board: water rights and usage: interim relief: procedures, AB 460, CA 2023–2024 (sponsored by Assemblymember Rebecca Bauer-Kahan (D-AD 16)).

[8] Water rights: sale, transfer, or lease: agricultural lands, AB 1250, CA 2023-2024 (sponsored by Assemblymember Bauer-Kahan (D-AD 16)).

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