

# The Water Rights Process

## STATE WATER RESOURCES CONTROL BOARD

A water right is a legal entitlement authorizing water to be diverted from a specified source and put to beneficial, nonwasteful use. Water rights are property rights, but their holders do not own the water itself – they possess the right to use it. Some water rights require a permit or license from the State Water Resources Control Board, whose objective is to ensure that the state's waters are put to the best possible use and that the public interest is served.

In making decisions, the Board must keep three goals in mind:

- Developing water resources in an orderly manner.
- Preventing waste and unreasonable use of water.
- Protecting the environment.

The State Board's duties are not limited to permits and licenses. It may be called upon to adjudicate water for entire systems or to act as a "referee" or fact-finder in court cases involving water rights.

### Water Right Law

Water right law in California and the rest of the West is different from the laws governing water use in the eastern United States.

Seasonal, geographic, and quantitative differences in precipitation caused California's system to develop into a unique blend of two kinds of rights; riparian and appropriative. Other types of rights exist in California as well, among them reserved rights (water set aside by the federal government when it reserves land from the public domain for specific purposes) and Pueblo rights (a municipal right based on Spanish and Mexican law).

In 1849, thousands of fortune seekers flocked to California following the discovery of gold. Water development in the United States proceeded on a scale never seen before as the "forty-niners" built extensive networks of flumes and waterways to work their claims. The water carried in these systems often had to be transported far from the original river or stream. The self-governing maverick miners applied the same "finders-keepers" rule to water as they did to their mining claims – it belongs to the first miner to assert ownership.

To stake their water claims, the miners developed a system of "posting notice" which signaled the appropriative right system. It allowed others to divert available water from the same river or stream, but their rights existed within a hierarchy of priorities. The "first in time, first in right" principle became an important feature of modern water rights law.

In 1850, California entered the Union as the 31<sup>st</sup> state. With statehood, California adopted the English common law; such law also included riparian doctrine. One of the first actions taken by its lawmakers was to adopt the common law of riparian rights.

Riparian rights usually come with owning a parcel of land that is adjacent to a source of water. A riparian right entitles the landowner to use a correlative share of the water flowing past their property. Riparian rights do not require permits, licenses, or government approval. They apply only to the water which would naturally flow in the stream. Riparian rights do not entitle a water user to divert water to storage in a reservoir for use in the dry season or to use water on land outside of the watershed. Riparian rights remain with the property when it changes hands, although parcels severed from the adjacent water source generally lose their right to the water.

One year later, the Legislature recognized the appropriative right system. The number of appropriative rights continued to increase as agriculture and population centers increased and ownership of land was transferred into private hands.

Until the early 1900s, appropriators – most of them miners and non-riparian farmers – had simply taken control of and used what water they wanted. Sometimes a notice was filed with the county recorder, but no formal permission was required from any administrative or judicial body.

The conflicting nature of California's dual water right system prompted numerous legal disputes. Unlike appropriative users, riparian right holders were not required to put water to reasonable and beneficial use. The clash of rights eventually resulted in a constitutional amendment (Article X, Section 2 of the California Constitution) that requires all use of water is "reasonable and beneficial." These "beneficial uses" have included municipal and industrial uses, irrigation, hydroelectric generation, and livestock watering. More recently, the concept has been broadened to include recreational use, fish and wildlife protection, and enhancement and aesthetic enjoyment.

The Water Commission Act of 1914 established today's permit process. The Act created the agency that evolved into the State Board and granted it the authority to administer permits and licenses for California's surface water. The Act was the predecessor to the current California Water Code provisions governing appropriations.

The hierarchy of priorities developed by the "forty-niners" governs these post-1914 appropriative rights. In times of shortage, the most recent ("junior") right holder must be the first to discontinue use; each right's priority dates to the time the permit application was filed with the State Board. Although pre- and post-1914 appropriative rights are similar, post-1914 rights are subject to a greater degree of scrutiny and regulation by the State Board.

Riparian rights generally have a higher priority than appropriative rights. The priorities of riparian right holders normally carry equal weight; during a drought all share the shortage.

## Groundwater Rights

In most areas of California, landowners may extract percolating groundwater and put it to beneficial use without approval from the State Board or a court. California does not have a permit process for regulation of groundwater use. In several basins, groundwater use is regulated in accordance with court decrees adjudicating the groundwater rights within basins.

The California Supreme Court decided in the 1903 case *Katz v. Walkinshaw* that the "reasonable use" provision that governs other types of water rights also applies to groundwater. Prior to this, the English system of unregulated groundwater pumping had dominated but proved to be inappropriate to California's semi-arid climate. The Katz decision established the concept of overlying rights, in which the rights of others with land overlying the aquifer must be taken into account. Later court decisions established that groundwater may be appropriated for use outside the basin, although appropriators' rights are subordinate to those with overlying rights.

## The Permit Process

Permittees range from water districts and electric utilities to farmers and ranchers. Permits are not required for riparian right holders, groundwater users, users of purchased water or those who use water from springs or standing pools lacking natural outlets. Unauthorized appropriation of water is against the law and can result in court action and fines.

Water right permits spell out the amounts, conditions, and construction timetables for the proposed water project. Before the State Board issues a permit, it must take into account all prior rights and the availability of water in the basin. The State Board considers the flows needed to preserve instream uses such as recreation and fish and wildlife habitat. The State Board's Division of Water Rights maintains records of water appropriation and use statewide.

To obtain a permit, the applicant must follow these steps:

**Filing an Application.** The process is initiated when the person or agency wanting to divert water files a permit application. This application specifically describes the proposed project's

source, place of use, purpose, point(s) of diversion, and quantity to be diverted, and time during the year when water will be diverted.

**Acceptance of Application.** The State Board notifies the applicant within 30 days whether the application is incomplete or accepted. Acceptance establishes priority as the date of filing.

**Environmental Review.** The California Environmental Quality Act (CEQA) requires the State Board to consider the environmental effects of a project before a permit is issued. Large projects that could endanger or degrade natural habitat or water quality usually require preparation of an Environmental Impact Report (EIR). The State Board examines the proposed project's potential environmental impacts and determines whether mitigation measures will be needed.

**Public Notice.** The State Board publishes a notice of the applicant's intent and invites comment. Copies of any protests are given to the applicant who is required to respond.

**Protest Resolution.** The State Board takes actions to resolve any protests that have been filed. If both parties can agree, the protest is resolved. If it is not resolved for small projects, the issue may be resolved through a field investigation and subsequent decision from the State Board's Division of Water Rights. For large projects, a formal hearing is held before one or more members of the State Board. The State Board's decision is based upon the record produced at the hearing.

**Permit Issuance.** Two initial State Board findings are required before a permit can be issued: (1) that unappropriated water is available to supply the applicant; and (2) that the applicant's appropriation is in the public interest, a concept that is the overriding concern in all State Board decisions. The permit is then issued if the State Board determines that the proposed use of water best meets these criteria. If it determines otherwise, conditions may be imposed to ensure the criteria are met or the application may be denied. In most cases, the applicant is required to begin project construction within two years of permit issuance.

Other conditions are placed on the permit, such as when water use is to be completed. The permittee may petition for an extension. Unlike riparian rights, appropriative rights are quantified as the maximum amount that would ultimately be needed by the proposed project (or "beneficial use[s]"), for as long as the project is deemed reasonable and diligently pursued. Any change in purpose, place of use, or point of diversion requires State Board approval. The proposed change cannot initiate a new right or injure any other legal user of water.

**Licensing.** When the project is completed, the terms of the permit have been met and the largest volume of water is put to beneficial use, the State Board confirms the terms and conditions and issues a license to the appropriator. This license is the final confirmation of the water right and remains effective as long as its conditions are fulfilled and beneficial use continues.

The State Board has the authority to enforce the conditions of the permit and license and is empowered to revoke either in case the conditions are not met. Other, less severe action may be taken or the State Board may issue a cease and desist order to ensure that the terms are complied with promptly.

## Additional Duties

The State Board has other major water right responsibilities besides administering the permit and licensing system. These duties include statutory adjudication and court reference. Statutory adjudication is the comprehensive determination of all water rights in a stream system. This occurs if a claimant petitions the State Board for adjudication and the State Board finds the action necessary and in the public interest. The California Supreme Court has held that claimants or petitioners can include water users and those seeking recognition of public trust values on a streamwide basis.

After granting the petition, the State Board investigates the matter and issues a report, which includes a draft Order of Determination. The draft Order of Determination contains the State Board's recommendations about the limits of each right claimed by water users on the stream system. A hearing is held on objections to the draft report, after which the State Board adopts a final Order of Determination and files it with the appropriate Superior Court. Exceptions to the final order are heard in a court hearing, after which the court may determine their merits. The final step is a court decree that determines all water rights within the disputed system.

The State Board may be called upon to act as a “referee” in water right lawsuits, either recommending a decision on the case or answering questions of physical fact. State Board staff carefully study the matter, then issue a draft report when the interested parties may file objections; a hearing on these objections is authorized but is not legally required. The State Board’s report becomes evidence, but the court is also required to hear any other evidence offered in rebuttal.

## Public Trust

As increasing emphasis is placed on protecting instream uses – fish, wildlife, recreation and scenic enjoyment – surface water allocations are administered under ever-tightening restrictions, posing new challenges and giving new direction to the State Board’s water right activities.

Under the public trust doctrine, certain resources are held to be the property of all citizens and subject to continuing supervision by the State. Originally, the public trust was limited to commerce, navigation and fisheries, but over the years the courts have broadened the definition to include recreational and ecological values.

In the *National Audubon Society v. Superior Court* case, the California Supreme Court held that California water right law is an integration of public trust and appropriative right systems, and that all appropriations may be subject to review if “changing circumstances” warrant their reconsideration. The courts have concurrent jurisdiction in this area. At the same time, the Supreme Court held that public trust values are subject to the reasonable and beneficial use provisions of the California Constitution.

The difficulty comes in balancing the potential value of a proposed or existing water diversion with the impact it may have on the public trust. After carefully weighing the issues, the State Board arrives at its determination. The courts have concurrent jurisdiction to review existing diversions based on their impacts on public trust uses. Allocating the limited resource fairly and impartially among many competing users represents one of the State Board’s greatest challenges.

## Complaints

The State Board is responsible for investigating possible illegal, wasteful or unreasonable uses of water, in response to a complaint or on the State Board’s initiative. If the State Board’s investigation determines that a misuse of water is occurring, the State Board generally notifies the person and allows a reasonable period of time to terminate the misuse. The State Board may hold a hearing to determine if a misuse of water has occurred or is occurring. Water users who do not terminate a misuse of water are subject to various administrative enforcement measures including fines and revocation of a permit or license. In some cases, the State Board may seek relief in the courts.

## Water Transfers

Transfers of water from one water user to another have been used increasingly as a way of meeting statewide water demands, particularly in drought years. Transfers of post-1914 water rights are initiated by petition to the State Board. If the State Board finds the proposed transfer will not injure any other legal user of water and will not unreasonably affect fish, wildlife or other instream users, then the transfer is approved. If the State Board cannot make the required findings within 60 days, a hearing is held before State Board action on the proposed transfer. Short-term transfers are defined as one year or less and are exempt from the environmental review process. A similar review and approval process applies to long-term transfers in excess of one year, although the environmental review process is a key factor in review of these transfers.

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