

CLIMATE

Rights to California's most important resource are built on injustice. New legislation seeks to change that

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The steel drum gate spillway at the Hetch Hetchy Reservoir is seen in February. San Francisco holds pre-1914 rights on the Tuolumne River, which set the stage for construction of the reservoir.

Carlos Avila Gonzalez/The Chronicle

Who gets California's water, and how much, is a high-stakes affair, and it's based on a system of water rights born long ago, when the West was wild — and often unfair.

The first-come, first-served pecking order established during European settlement gave the new and dominant landowners first dibs on pumping rivers and creeks. The beneficiaries, which include the likes of San Francisco and its pristine supplies in Yosemite, continue to enjoy tremendous advantage, consuming water with little constraint while others sometimes go without.

Amid growing water shortages and focus on equity, the system has begun drawing increased scrutiny. Last week, the state Legislature weighed in with the unusual step of advancing measures that would help regulators rein in the most privileged and profligate water users.

"The Legislature is finally considering water rights in California," said Gary Mulcahy, government liaison at the Winnemem Wintu Tribe, a Native American group in the state's far north that, like other tribes, didn't get water rights for ancestral lands. "How water is allocated in California has got to change, for the benefit of Californians not for the benefit of a few."

The three bills before lawmakers, each of which passed in its house of origin last week, do not mark a major undoing of the state's water hierarchy. However, they're enough of an adjustment that they're drawing pushback from cities and agricultural communities concerned about losing their standing, and most fundamentally their water, in the face of greater regulation.

Critics of the bills say that tinkering with a system that's been around so long, even if it's imperfect, will create uncertainty with water supplies and could destabilize everything from housing development to farming to manufacturing. Billions have been invested in capturing and moving water in California based on existing rights.

"We're a cornerstone of the Bay Area economy," said Steve Ritchie, assistant general manager of the water enterprise for the San Francisco Public Utilities Commission. "We constantly are having to plan not just for this year and 10 years from now but for 50 years out. Once we get users in our system, we can't just cut them off one day and say, 'Sorry, we're out of water.'"

California's most senior water right holders gained their status by making claims on rivers and creeks before 1914, when the state didn't regulate draws. San Francisco holds pre-1914 rights on the Tuolumne River, which set the stage for construction of the city's invaluable Hetch Hetchy Reservoir in Yosemite National Park years later.

Questions have long lingered about what jurisdiction the state has over senior water rights. During the drought of 2012-2016, the State Water Resources Control Board tried to limit, or "curtail," the draws of pre-1914 rights holders amid widespread water shortages. The action, however, was challenged in court, only to undergo years of litigation that ended last September when an Appellate District Court ruled against the state.

Assembly Bill 1337, one of the three pieces of advancing legislation, would reaffirm the State Water Board's ability to curtail the most senior water rights holders. It was introduced by Assemblywoman Buffy Wicks, D-Oakland.

"Legislative proposals like this that shore up the board's authority and embolden the board to be more aggressive go some distance," said Stephanie Safdi, clinical supervising attorney and lecturer at Stanford Law School.

Safdi was among those who supported the state in its legal fight with water users, filing an amicus brief last year on behalf of a handful of tribes and an environmental justice group. The filing described the water rights system as "discriminatory" and "racist" because of those who were — and weren't — able to get historical water rights and for perpetuating these injustices today.

Critics of AB 1337 fear the proposal would lead to new and unwarranted curtailments by the State Water Board.

A second piece of legislation, AB 460, would streamline the State Water Board's ability to crack down on water rights holders who illegally take water and boost fines to as much as \$10,000 a day. It was authored by Assemblymember Rebecca Bauer-Kahan, D-Orinda.

The bill follows a highly publicized incident last year along the Shasta River where farmers and ranchers flouted state curtailment orders. The group calculated that going without water was more costly than paying the penalties.

Because state law affords time for water users to request a hearing and time before cease-and-desist orders become final, the water board didn't act quickly enough to stop the draws. The pumping was blamed for reducing river flows and killing salmon.

Opponents of the legislation say one egregious incident shouldn't lead to throwing out due process.

"None of us condone diverting water illegally," said Brian Poulsen, general counsel at the El Dorado Irrigation District, a water agency serving about 125,000 people east of Sacramento. "We just think the bill goes way beyond."

A third bill, SB 389, would give the State Water Board greater authority to investigate the authenticity of senior water rights and strip the rights of those deemed illegitimate.

The legislation, authored by Ben Allen, D-Santa Monica, flips the burden of proof from the state to the water rights holder, which concerns critics. Water rights dating to 1914 and earlier can be tough to document, and some fear the State Water Board may be overzealous in its demands for evidence.

While SB389 is advancing to the state Assembly, the other two water bills are headed to the Senate. If the legislation passes in these chambers, they proceed to Gov. Gavin Newsom for final approval.

Stockton-based Restore the Delta, an advocacy that has been fighting for more equitable water allocation in California for years, supports the trio of bills, calling them a first step to making bigger changes to the water rights system.

"They're an excellent start in terms of gaining accountability of these legacy water right holders," said Tim Stroshane, the organization's policy analyst.

Cannon Michael, an influential grower and president and CEO of Bowles Farming Company agrees that some improvements to water rights policy are necessary, just not as many.

“I think the State Board needs to have more power,” Michael said. But “as soon as you start saying you’re going to take something away or blow up a system, that’s when you start putting people in their corners.”

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