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Will a pending water rights bill on Gov. Newsom's desk be a game changer in California water? It depends

By JESSE VAD, SJV Water, September 17, 2023

A water rights bill that made it through the Legislature this year is, arguably, a much weakened version of its original form, but the fact that it addresses senior rights at all is a significant step, according to experts.

Senate Bill 389, which clarifies the state Water Resources Control Board's ability to investigate senior water rights, passed both the Assembly and Senate as of Sept. 12.

The bill, authored by Sen. Ben Allen, D-Santa Monica, originally faced an onslaught of opposition from the agriculture industry, with about 200 agencies and organizations that came out against the bill.

But after lawmakers worked with the opposition and committed to a significant reworking of the bill, SB 389 sailed through both houses and is expected to become law.

Senior water rights, or pre-1914 water rights, were claimed before 1914 when the state began regulating water ownership and use. Senior rights are seen as the golden water rights and are subject to far less regulation by the state.

SB 389 clarifies the Water Board's ability to investigate senior water rights, which clears the path for the state to be able to declare a trespass if it finds something is wrong with a right and could ultimately lead to the board curtailing or changing the water right.

Making the sausage

Originally, the bill was much more aggressive.

Three main sections of the bill were eliminated or modified, easing concern among the ag industry.

The bill originally had a provision that allowed the Water Board to investigate a water rights claim and determine whether the claim had been forfeited, said Alex Biering, senior policy advocate for the California Farm Bureau Federation, one of the organizations that originally opposed the bill.

“That felt threatening,” said Biering. “So they removed that piece out.”

The original bill also added a new section to the California Water Code giving the board new investigative powers as opposed to clarifying the ones it already has, said Biering.

That section was nixed too.

“We said, ‘OK, let’s instead just use the existing sections, the Water Code, that gives them the ability to investigate a water right and explain more thoroughly what that means,’” said Biering. “Instead of adding a whole new section, it was clarifying and confirming what was already there.”

The last change was shifting the burden of proof onto the Water Board, said Biering. In the original version, the board could send a letter about a claimed right and the receiving agency then needed to comply, she said.

In the updated version of the bill, the Water Board must request information from the water right holder, provide a written explanation as to why the board is investigating the right and provide any evidence that supports the board’s request, Biering said.

“We wanted it to be a slightly higher bar just so that this couldn’t be done capriciously,” said Biering.

Up for interpretation

The bill will become law as long as the governor doesn't veto it. Biering said she'd be surprised if it was vetoed, considering the opposition has largely approved the current version.

There is still concern among some about the current version of the bill, though.

"From a lot of people's standpoints, it's not really good enough," said Dean Ruiz, attorney for the South Delta Water Agency and other districts and landowners. "It's probably going to end up having to be further clarified one way or the other. But it does change things."

Despite the weakening of the bill, legal experts agree it is still a significant piece of legislation that could have sweeping implications for senior water rights holders. But the true impacts will depend on how the Water Board interprets its authority if the bill becomes law, according to water attorneys.

"If they abuse that authority, that's going to be bad, because there's going to be a lot of water rights holders that are going to have to go through the drill of accounting for their water rights," said Tom Berlinger, partner at Duane Morris law firm. Pearce represents the city of Bakersfield, which owns pre-1914 rights to a large chunk of the Kern River.

Proving a water right isn't as simple as it sounds, according to Pearce. It's not like showing your driver's license, said Berlinger. It can take months, cost a lot of money and disrupt normal operations significantly.

Others don't see it as ominous.

The significance of the bill will depend on how it's used, said Dan Raytis, attorney at Belden Blaine Raytis LLP.

“If there’s an area where there’s a particular problem with people overusing water, then I could see how it could be an important tool,” Raytis said. “If it’s a solution in search of a problem, then it’s just going to lead to endless litigation.”

Still, Raytis said the bill is probably not as earth-shattering as many are making it out to seem.

“I don’t think it’s as dramatic as people are making it sound,” said Raytis. “How dramatic the impact of this supposed change is really depends on how it’s invoked in the future.”

Seeking control

The Water Board has been pursuing greater control over pre-1914 rights since the 2012-2016 drought when it issued a curtailment order limiting the amount of water that could be taken from several state rivers. Water agencies with pre-1914 rights sued and won.

In September 2022, the Sixth District Court of Appeal upheld that decision but noted the Water Board still had other means to address water scarcity, including the authority to determine whether a pre-1914 right is valid or the right holder is exceeding its take.

It was widely believed the Sixth District’s opinion would lead to legislative action.

Despite the legal challenges, Water Board Chairman Joaquin Esquivel was clear that the board intended to continue pursuing water rights.

At the May 2022 Water Association of Kern County water summit, Esquivel said: “We know we have to change the system. Water rights can be there as a tool to be able to manage supplies through not just a drought but when there is water again.”

He repeatedly stated that the state needed to “track the drops” to understand how much water truly is available in watersheds, who has rights to that water and exactly how much those rights holders can claim.

Editor's note: Tom Berlinger, a partner with the Duane Morris law firm, spoke with SJV Water about a water rights bill. An incorrect attorney was named in the original story.

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