

California drought puts spotlight on water theft¹

By Matt Weiser

mweiser@sacbee.com

Published: Sunday, Mar. 23, 2014

It's amazingly easy to steal water from a California stream. Even in this epic drought, the state has no way of monitoring exactly who is tapping into its freshwater supplies and how much they take. And those who do get caught taking water they have no right to often are allowed to keep taking it for years just by promising to obtain a permit.

Nearly 30,000 entities in the state hold valid water diversion permits, including individual property owners, farmers and water utilities. Some have meters or gauges to measure their diversions, but the state has no ability of its own to monitor those gauges in real-time. People and entities with water rights are required to regularly report their water use to the state, but many don't, and the state has no way of knowing if their accounts – self-reported – are truthful.

In average water years, many of these issues don't matter much. But the weaknesses are expected to complicate matters this year as the state struggles to stretch limited water supplies during the worst drought in 40 years. This spring, it is likely the State Water Resources Control Board will order some water rights holders to divert less water to ensure enough flow for cities and wildlife, something that has not been done since the drought of 1976-77. The state's ability to enforce such curtailment orders will be sorely tested.

Water board officials acknowledge the weaknesses, and say they will do their best within existing legal constraints to police the system.

"We know for sure, unless we get another 40 days and nights of rain, that there are going to have to be curtailments," said Andy Sawyer, assistant chief counsel at the water board, the state agency charged with regulating California's complicated system of water rights. "The basic idea is to live within our available water supply ... so we don't have people stealing from each other.

"And frankly, under existing conditions, for a lot of people it's just cheaper to violate and pay the penalty than it is to comply."

A basic principal of California water is that all the fresh water in the state's lakes and streams belongs to the public at large. It's possible to get a state permit to use that water for a domestic or commercial purpose. But the permit usually comes with limits on the amount of water that may be diverted.

Water permits or rights are held by all kinds of Californians: the rural homeowner who wants to fill a pond from an adjacent creek; the city that needs to tap a river to serve a growing population; the farmer who diverts water to grow wine grapes. But they generally fall into two classes.

¹ - Source: <http://www.sacbee.com/2014/03/23/6259597/california-drought-puts-spotlight.html>

Any permit issued after 1914 is considered a “junior” water right and comes with stricter limits on how much water may be diverted and when. Violate those terms, and you’re stealing from somebody else: a city or farm downstream, or the fish and other creatures that need water to survive. These are the first class of water permits to face curtailments in a drought.

The “senior” class of water rights are known as “riparian” and “pre-1914”. They generally include more supply and fewer diversion limits, if any. The state has no legal authority to impose fees on these diverters, and its ability to inspect their diversions is limited. But even these senior diverters are banned from “waste or unreasonable use” of water, and they could face curtailments this year due to the severity of the drought.

Having a water right means you don’t have to buy water from somebody else. Instead, the water is free and you control access. Junior water rights usually include a nominal annual fee paid to the state, but otherwise the same easy access applies. This differs from homeowners or water contractors who pay a monthly fee that varies according to how much water they consume – and who, if they don’t pay, see their water cut off.

Take the American River as an example. The city of Sacramento holds pre-1914 water rights in the American River, with few strings attached. Yet in recent years it has begun to adopt conservation rules because environmental groups contend that heavy water consumption by residents could be prosecuted as “waste” under state law, potentially jeopardizing the city’s water rights. Even in this drought year, no one has told the city to reduce its diversions, but it has tightened conservation rules as a gesture of cooperation with its neighbor cities.

The city of Roseville, on the other hand, has no water rights in the American River. But it buys American River water from the U.S. Bureau of Reclamation, which has a post-1914 right to water that it stores in Folsom Reservoir. If Reclamation doesn’t have enough water to fulfill its contract, it can cut back Roseville’s supply, which it intends to do this year.

Put all this together in a state of 38 million people and there isn’t much water left to hand out. In a drought year like this one, all those water rights get stretched even thinner, and the temptation to cheat grows.

‘Slaps on the wrist’

Water theft can take many forms. An illegal marijuana grower might lay pipe in a mountain stream to irrigate his illicit crop. A farmer with a valid water permit might take more than his permit allows to expand his crop or protect it from drought. A homeowner may decide to build a pond for swimming and divert the closest creek to fill it without getting a permit from the state.

How common is this kind of water theft? No one can be sure, because the state has no way to measure and monitor total flows and diversions in every stream, nor enough water cops to inspect even the diversions it knows about. But anecdotal reports suggest it is common.

“I’ll go investigate one of them, and just walk the streambed and you can find a dozen illegal stream diversions in just one little small watercourse,” said Jerry Karnow, president of the California Fish and Game Wardens Association. “A lot of them don’t

even become a statistic, because you just can't investigate all of them. It's too overwhelming."

The State Water Resources Control Board has about 22 employees assigned to investigate suspected illegal diversions statewide. Wildlife officers, such as Karnow, often conduct their own investigations and refer illegal diversions to the water board for enforcement.

Since 2005, the water board has imposed fines or other corrective measures on property owners just 30 times for illegally diverting water or taking more than their share, according to a Sacramento Bee review of the agency's enforcement actions. It has dozens more cases pending, but these can take years to work their way through the board's complex enforcement process.

Like most western states, California adheres to a "first in time, first in right" principle of water rights. This means whoever first claimed water in a stream has a superior right to use that water. The state retains authority over senior water rights holders to punish "waste and unreasonable use" of water, and to curtail their diversions during extreme drought years, but it has rarely done so.

"Part of the culture of the board is that they're not going to take away someone's water unless the evidence is pretty conclusive," said Chris Shutes, a water consultant who works with the California Sportfishing Protection Alliance and other groups to monitor illegal diversions. "They don't have people with that kind of enforcement mentality. Most of the fines are slaps on the wrist."

The water board's enforcement staff responds to complaints and also looks for discrepancies in the required usage reports submitted by diverters. Because of its limited staff, it is unable to conduct extensive field inspections. But it does inspect individual watersheds, one at a time, to search for violations when possible, said John O'Hagan, manager of the water board's enforcement staff. Although enforcement is temporarily heightened in that watershed, dealing with suspected violations they find is still a long process.

"We have the enforcement resources we are allocated by legislation, and we are using that to the best of our ability," O'Hagan said. "If we're doing compliance inspections, it could take a year to finish up certain watersheds. If we're having followup enforcement activities, it could take a lot longer to finish those up."

When it does go after illegal diverters, the water board usually offers them a chance to settle their cases for fees well below the legal maximum. This avoids tying up staff in a long and complicated hearing process.

Under state regulations, the board is unable in most cases to simply impose a fine and then set about collecting it, like a traffic court. Instead, the state is required to issue a cease-and-desist order, and then document that the order has been violated. Only then can it assess a penalty. Each of these steps requires that the property owner be served notice by the state, as with a court summons. If that notice cannot be delivered, the enforcement process comes to a halt.

If the state also is alleging that the property owner wasted water or used it unreasonably – separate violations of law – this adds an additional step and another noticing requirement.

“All up and down the line, there are deficiencies,” said Craig Wilson, who serves as the Delta watermaster, a water board position created by 2009 legislation to oversee water management in the imperiled Sacramento-San Joaquin Delta. “It’s really cumbersome, and people that are recalcitrant can really delay things.”

At any point, the accused diverter can request a hearing, which amounts to a quasi-judicial proceeding with formal rules of evidence and procedure. It can take years for a case to reach the hearing stage, because this often involves lawyers researching water-rights records held by the board in paper files. Meanwhile, the disputed diversion is normally allowed to continue until the case is resolved.

One example is the story of a suspected illegal pond along Pettyjohn Road in Tehama County, west of Red Bluff. Water board officials discovered the pond in April 2006, according to agency records. It held about 64 acre-feet of water, enough to serve 120 average California homes for a year.

The pond was created by an earthen dam on an unnamed tributary of the south fork of Cottonwood Creek, itself a tributary of the Sacramento River. Property owner Brian Lowell told state officials the pond was built for recreational purposes, according to water board records. The board found no evidence that the required state permits were obtained for either the water diversion or the dam.

When the water board settled the case in 2009, according to the records, Lowell faced potential fines of \$31,440. Instead, he was allowed to pay \$13,500 in three installments, on the condition that he obtain a permit and pay an annual fee of \$1,665. In the meantime, he was allowed to continue diverting from the stream, the records state.

In 2010, Lowell sold the property. The new owner, Larry Thatcher, agreed to be bound by the same settlement. He told *The Bee* that before he can obtain a water permit, he has to reduce the height of the dam to 50 feet or less to comply with state law. He hired a contractor for that job, who is waiting for grading season to begin in Tehama County before starting work.

“It’s in limbo right now,” Thatcher said. “I’m just trying to comply with a situation that came with the property.”

Meanwhile, eight years after the violations were discovered, the water diversion continues and the pond remains in place.

‘An appropriate balance’

Holders of water rights permits issued after 1914 are required to file annual reports with the water board documenting their diversions. Senior water rights holders are required to file similar reports every three years.

Not everyone complies: In the 2012-2013 fiscal year, about 29 percent of those who were required to file water use reports failed to do so. The board sent them warning notices and fined some who did not respond.

Even the reports that do get filed may not be very useful. Water use is entirely self-reported by the diverter. They may be using more or less than they are allowed, but there's often no way to know.

"We cannot verify whether something is accurately reported," O'Hagan said. "We have nothing to base it against."

When Wilson was appointed Delta watermaster, one of his first duties was to prepare a report analyzing weaknesses in the water rights enforcement process. His 2012 report recommended the process be streamlined to eliminate some steps and ease the noticing requirements. The result would be similar to rules the water board already follows in enforcing water pollution cases.

On March 1, Gov. Jerry Brown signed a new law that implements some of those recommendations during "critical drought" years like the present one.

The new law allows the board to order emergency curtailments on streams that risk running out of water. It also allows the board to skip some steps in the enforcement process, and jump straight to the cease-and-desist and penalty phases if the board believes a diverter is violating a curtailment order.

Finally, it doubles penalties for an illegal diversion to \$1,000 per day, and adds a \$2,500 per acre-foot penalty. Violating a cease-and-desist order gets even more painful, with penalties jumping from \$1,000 to \$10,000 per day.

These changes apply only during the present drought, not in other climatic conditions.

"History has not been kind to past efforts where you asked for too much," said Senate President Pro Tem Darrell Steinberg, D-Sacramento, the law's lead author. "I think it's an appropriate balance. It should give the water board some pretty good tools to deal with the drought situation."

It remains to be seen, however, if the board has adequate staff to enforce broad curtailment orders this year. Tom Howard, the water board's executive director, said some employees will be retrained to help existing enforcement staff. He also hopes to tap wildlife officers and DWR employees.

"Our estimates are that we'll be doing substantial curtailments in May, assuming a lack of substantial rainfall," Howard said. "If it doesn't start raining, it's going to be a very big deal."

Call The Bee's Matt Weiser at (916) 321-1264. Follow him on Twitter @matt_weiser.

WATCHING OVER WATER

Since 2005, the State Water Resources Control Board has punished people 30 times for illegally diverting California water or taking more than their share. Experts say such violations are far more common, but difficult to prosecute because of low manpower and a cumbersome enforcement process. Here are two examples of disputed diversions identified years ago that are still not resolved.

Tehama County diversion



Property owner:

Larry and Jill Thatcher

What it is: Allegedly illegal pond storing about 64 acre-feet of water, built in 1997. Pond is described as recreational.

Discovered: April 2006

How it was found: Unknown

Water source: Unnamed tributary of South Fork

Cottonwood Creek, a tributary of the Sacramento River, home to numerous endangered fish species. No evidence of a permit allowing diversions into the pond.

Potential penalty: \$31,440

Actual penalty in March 2009: \$13,500 plus \$1,665 annual fee

Status as of March 2014:

Settlement allows pond to remain and stream diversion to continue while property owner works to obtain a water diversion permit. Larry Thatcher says the permit is in "limbo" until dam is cut down to 50-foot height or less to meet state regulations.

Sonoma County diversion



Property owner:

Robert C. Mann

What it is: Allegedly illegal pond, about 13 acres in surface area with 65-foot-high earthen dam, storing about 183 acre-feet of water; built in 1950s to provide water for livestock.

Discovered: July 2011

How it was found: State

officials identified the pond after reviewing GIS data and satellite photos provided by a consultant doing a survey.

Water source: Unnamed creek tributary of Gualala River, where threatened steelhead are protected by law. No evidence of a permit allowing diversions into the pond.

Potential penalty: \$3.4 million

Proposed penalty: \$66,000

Status as of March 2014:

Pond and dam still in operation. Cease and desist order served on property owner in June 2012, then postponed when property owner requested a hearing to contest the penalty. No hearing date set.

Source: State Water Resources Control Board

USDA aerial images, 2011

Sharon Okada sokada@pacree.com