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DROUGHT

California water law must change — quickly

By Richard M. Frank



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Dean Peck, ditch tender for San Luis Canal Co., twists open a gate along the Arroyo Canal to release water to a farmer in the Central Valley.

California's worst-ever drought, now entering its fourth year, demonstrates with dramatic force the many deficiencies of the legal system by which the state allocates shrinking water supplies among 39 million Californians. If we are to survive the drought with the state's economy and environment intact, we need to reform California water rights laws — and soon.

The fundamental problem is that California's water rights system was created over a century ago, when the population of the entire state was less than 3 million residents, and relatively stable water supplies were more than adequate to support the agrarian economy of the state at that time. California law created — and still relies on — a “first in time, first in right” system, under which those who secured their water rights first obtained priority over later, “junior,” water claimants.

In an era of relatively few people and limited statewide water demand, California's water rights system worked reasonably well. Now, 100 years later, with the same legal rules intact, California's population growing steadily, and state water supplies shrinking due to the effects of climate change, that system has become antiquated, dysfunctional and unresponsive to 21st century conditions.

Some of the most glaring deficiencies of California water rights law are that it arbitrarily creates “winners” and “losers” among similarly situated water users, based solely on when they obtained their permits from state regulators; that inequality hampers regulators' ability to allocate shortages fairly among those users; the water allocation system doesn't encourage — much less require — water conservation; the system discourages free water markets and commonsense transfers from lower to higher priority water uses; and water rights for environmental purposes aren't directly obtainable or recognized by the system.

So how do we fix and modernize California water laws? Here are some suggestions:

Recognize that water is a public resource. Many California water users — particularly those in the agricultural sector — view water as their private property — like a house or a bank account. Not so. California law expressly states that “[a]ll water within the State is the property of the people,” although private parties can obtain a right to use that public resource. This key, oft-ignored principle needs to be the cornerstone of California's water permitting system.

Improve requirements for monitoring and reporting water diversions by water users. Remarkably, many of the state's largest water users aren't currently required to disclose the amount of their water diversions and extractions; those that in theory are required to report them often refuse to do so. That's irrational. As one of California's senior water officials has aptly observed, “You can't manage what you don't measure.”

Create fixed terms for California water rights permits. Many California water rights date back a century or more — some to the mid-19th century, when California became a state. But those historic rights may have little bearing on current private or public needs. Many other states and nations impose fixed terms — 5, 10 or 20 years

— to water rights granted to private water users, thus allowing water regulators the ability to adjust water allocations to changing conditions and needs. California should do the same.

Make water transfers easier and quicker. Again, water law in many other jurisdictions facilitates and encourages water transfers — allowing, in times of scarcity, the water market to work by shifting water from lower to higher priority uses. While many California water users

agree in concept that water transfers make sense, the state's water rights system doesn't encourage — and in some instances actively discourages — such transfers. That needs to change.

Give the environment a seat at the water allocation table. State water law doesn't permit water rights to be allocated for environmental uses. This has at least two adverse consequences: 1) It is environmental values that routinely are sacrificed first in times of water scarcity; 2) This deficiency compels conservationists to rely on blunter environmental laws — such as the Endangered Species Act — to provide water for environmental uses. Allowing water rights to be directly allocated for environmental purposes would help solve both problems.

Increase water rights enforcement. California's widely respected, nonpartisan Little Hoover Commission has reported that state resources devoted to enforcement of state water rights laws are fewer than those California allocated for the same purpose in the 1960s, when California's population was half what it is now. As Abraham Lincoln once observed, without enforcement, laws are nothing more than good ideas. California needs to increase dramatically its water rights enforcement resources if the reforms proposed above are to be successful.

Fundamental reform of California's antiquated and outdated water rights laws doubtless will be both difficult and controversial. But California's disastrous drought compels nothing less. State political leaders have demonstrated, in the contexts of climate change and renewable energy, that they can rise above partisanship to create legal systems adequate to meet unprecedented environmental challenges. It's time they showed the same political courage and foresight by bringing California's antiquated water rights system into the drought-stricken 21st century.

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