

A GUIDE TO
CALIFORNIA
WATER
RIGHTS
FOR SMALL
WATER USERS





INTRODUCTION

This brochure is intended as an introductory guide to California water right law for smaller water users that meet their own water needs without relying on a larger entity to deliver water to them.

Typically, these will be rural residents or farmers who divert water from wells, springs, or streams located on or near their property. While these types of small-scale water use are common in California, the legal rights and obligations surrounding them can be rather complex, largely because California recognizes a number of different types of water rights. The type of water right needed to allow a given water use depends on several factors including the source from which the water is taken, how the water is to be used, and where it is to be used. Adding to this complexity, some types of water rights are regulated by the State Water Resources Control Board (the “Water Board”), while others

are not. In some cases, a water user may already have the necessary water right and not realize it. In other cases, the user may be able to modify the proposed water use to fit within an existing right, or else obtain a new water right from the Water Board.

The following discussion of California water law is organized around helping small water users answer a basic practical question:

Do I have a water right covering my existing or proposed water use, and if not, do I need to obtain one from the Water Board?

While this brochure is intended to provide a helpful approach to that question, it is not intended as legal advice. Water users are encouraged to seek the advice of a qualified attorney. They may also consult with Water Board staff by calling (916) 341-5300.

AN OVERVIEW OF CALIFORNIA WATER LAW

The requirements for diverting and using water vary depending upon several facts, including the user’s location, the source of the water, the method by which the user pumps or diverts water, and the method by which water is used. This brochure walks through the types of water rights that exist and discusses which types of diversion and use may need to be established through the Water Board.

Groundwater

As the name implies, groundwater is water that is located beneath the ground surface. It is perhaps the most common source of water supply for small water users. The type of water right needed to extract and use groundwater in a given situation depends upon the category of the groundwater source.

The two legally-recognized categories of groundwater are:

- **Percolating groundwater.** Most groundwater is of this type, which is defined as all groundwater not flowing in “subterranean streams” (see below). Landowners generally may extract percolating groundwater beneath their property without a permit or approval from the state. However, this right is subject to the same rights held by other landowners overlying the same aquifer, and any disputes over the amount to which each is entitled must be resolved in state court. In some Southern California counties, the state requires certain larger-scale extractors of percolating groundwater to report the amount of their extraction. In addition, with adoption of the Sustainable Groundwater Management Act in 2014, local agencies have established requirements for sustainable management of percolating groundwater in certain areas. Landowners should contact



their county government to get more information about local requirements for extracting percolating groundwater.

■ **Subterranean streams.**

This is a subset of groundwater that is treated for legal purposes as surface water, even though it is below the surface of the ground. Courts have defined subterranean streams as groundwater flowing in underground channels with relatively impermeable beds and banks whose course can be determined. Groundwater flowing in subterranean streams is considered “surface water” by the state, and is subject to the same requirements as if the water was located above the ground surface. Those requirements are discussed in the following sections of this brochure.

In practice, it is often unclear whether a given well is extracting from percolating groundwater or a subterranean stream. Making this determination with any certainty can require site-specific data and the opinion of qualified experts. In practice, landowners should be aware that the closer a given well is to a surface stream, and the more influence it has on surface streamflow, the more likely it is to be determined to draw from a subterranean stream and thus be subject to surface water permitting requirements. That said, the Water Board will presume groundwater to be percolating groundwater until sufficient evidence is developed to show that it is, in fact, a subterranean stream.



Surface water

Surface water includes all water above the surface of the ground, plus water flowing below the surface in subterranean streams (see above). Most surface water flows in some kind of watercourse, which is a natural channel (or under certain conditions, an artificial channel) which conveys natural flows of water such as a river, stream, or even a ditch. (For more detail on the definition of “watercourse,” see the Fact Sheet linked under “Resources,” on page 14.) Diverting water from a watercourse requires some kind of water right (usually a riparian or an appropriative right, as discussed below). However, there are several types of surface water not found in watercourses, which can be taken without a water right.

Types of surface water that can be used without a water right

There are some types of surface water that are not within watercourses and may generally be taken and used without approval from the Water Board.

These include:

Rainwater

Rainwater may be captured before it reaches a watercourse – for example by collecting runoff from rooftops – without a water right. This is an increasingly popular source of water for small, rural landowners.

Sheetflow

Some reservoirs are constructed in areas where they do not receive any water from a watercourse. These reservoirs may be filled by collection of diffused surface water usually originating from rain events, also known as sheetflow. In situations where sheetflow fills a reservoir, and the reservoir does not receive any water from a watercourse, then a water right is not needed. These types of reservoirs can be difficult to construct and require careful documentation and planning.

Water users should be cautious when concluding that a reservoir receives only sheetflow and not water from a watercourse. Even small, unnamed seasonal creeks and streams that might have surface flow only a few days a year or less are considered watercourses, and therefore any water collected from them requires a water right. Water users are encouraged to consult with Water Board staff or an experienced professional (see resources listed on page 14).

Fully contained springs

Springs are another common water source for landowners. If a spring does not flow off the landowners’ property under natural conditions at any time of the year, then the owner may use it without a water right. Landowners should be cautious in applying this rule, as “true” springs that are fully isolated from other waterbodies are rare in many parts of the state.

Surface waters requiring a water right

Surface water flowing in a watercourse (i.e., a river, stream, non-contained spring, or certain ditches), cannot be taken without some type of water right. Two of the most common types of water right – riparian and pre-1914 appropriative rights – do not require approval from the Water Board and are discussed first below. A third type – post-1914 appropriative rights – does require Water Board approval.

Riparian water rights

Water users who divert water from a watercourse should start by considering whether they can do so under a claim of **riparian water right**. Riparian rights generally come with the ownership of property that touches some type of watercourse. The owner of a parcel adjoining a watercourse has the right to use a reasonable amount of the natural flow of that watercourse for beneficial use within the parcel. In general, two basic rules apply to riparian rights: (1) water must be used

within parcels that are riparian to the watercourse (i.e., that touch it), and (2) water cannot be stored during a wet time for use during a drier time.

In general, the Water Board does not have control over the amount or timing of water diverted or used under riparian rights. However, anyone who diverts water under a claim of riparian right should be aware of two important requirements:

- **Reporting.** All riparian claimants are required to report their diversion and use of water each year to the Water Board by filing a Statement of Diversion and Use (see discussion below).
- **Reasonable use.** The Water Board may issue rules defining what is considered “reasonable use” of water under riparian rights, and riparian claimants must be sure to comply with any such rules.

Appropriative water rights

In some cases, small water users will find that a riparian right does not provide a sufficient legal basis for their existing or proposed water use. Most commonly, this is because they want to do either or both of two things:

- Use water on a parcel that is **not adjacent to the watercourse** from which the water is diverted, or
- Store water, which is defined as diverting it during a wet time of year and holding it for later use during a drier time.

To do either of these things, they must establish an **appropriative water right**. Appropriative water rights come in two types, depending on the date they were first established.

Pre-1914 appropriative rights

In cases where water has been diverted and used for a long time, the user should consider whether it is possible to claim a **pre-1914 appropriative water right**. To establish such a right, the user must be able to show that water was put to beneficial use prior to December 19, 1914 (the effective date of the law establishing the Water Board), and has been used without substantial interruption since that time. The water does not necessarily have to be used for the same purpose, or at the same location, throughout that time. Periods of non-use lasting 5 years or more may defeat the claim of right, but in some circumstances will not.

An advantage of pre-1914 rights is that the right holder does not need to obtain approval from the Water Board to exercise them, or to change the point of diversion or place or purpose of use. But in a sense, this can also be a disadvantage, because the right holder does not get the certainty that comes with a Board-issued permit or license. A claim of pre-1914 water right can be challenged by other water users in court, and if that happens the right holder may be required to prove water has been continuously used since 1914, plus other elements such as the amount and season of the use.

For this reason, anyone considering claiming a pre-1914 appropriative right is encouraged to contact a qualified attorney to assess the strength of their claim.

Finally, as in the case of riparian rights, all persons claiming pre-1914 water rights must report their diversion and use to the Water Board annually by filing a Statement of Diversion and Use (see below), and are subject to the requirement of reasonable use (see below).

Post-1914 appropriative rights

Water users who are unable to claim a riparian or pre-1914 appropriative right to cover all aspects of their water use will need to obtain a post-1914 appropriative water right from the Water Board.

The state has established two methods for acquiring new post-1914 appropriative water rights: registrations and applications.

Registrations

For certain types of relatively small-scale water use, by far the easiest way to obtain an appropriative right is through a water right registration. Registrations provide water users a means of obtaining a water right to divert enough water to meet their needs without incurring the time and expense required to obtain a full appropriative license (see below).



There are four types of registrations:

- **Small Domestic Use Registrations** allow the holder to obtain the right to directly divert up to 4,500 gallons per day, and to store up to 10 acre-feet per year. The registration is primarily used for domestic use in a home or similar establishment but may also include certain related uses, such as non-commercial irrigation of up to a half-acre of lawn, landscaping, and garden.
- **Livestock Stockpond Use Registrations** can provide the right to directly divert up to 4,500 gallons per day, and to store up to 10 acre-feet per year, to provide water for commercial livestock.
- **Small Irrigation Use Registrations** can provide the right to store up to 20 acre-feet per year for irrigation, frost protection, and heat control of cultivated crops. Currently, this type of registration is only available in certain portions of Marin, Napa, Sonoma, Mendocino, and Humboldt counties. This type of registration cannot be used to irrigate commercial cannabis.



■ **Cannabis Small Irrigation Use Registrations** allow the holder to obtain the right to store up to 6.6 acre-feet per year for irrigation, frost protection, and heat control of commercially cultivated cannabis, and are subject to the Water Board's Cannabis Cultivation Policy (see page 10).

Registrations are obtained by completing a registration form and paying a filing fee to the Water Board. All non-cannabis registrations are reviewed by the California Department of Fish and Wildlife (CDFW), which may place site-specific conditions on them to protect fish and wildlife. In addition, all registrations will contain standard conditions issued by the Water Board, including the requirements to report annual use and pay fees. Once approved, registrations remain in effect for a term of five years, which is subject to renewal.

Permits/ Licenses

The second way to obtain an appropriative water right from the Water Board is by filing an **application** to appropriate water. If approved, this will result in an appropriative water right **permit**, and ultimately, a license. While a license is arguably the most secure and permanent form of post-1914 appropriative water right, it is also the most difficult to obtain in terms of time and expense. Before filing an application, water users should carefully consider whether any of the pathways discussed above – e.g., registrations, riparian rights, rainwater collection, etc. – can be used to enable their planned water use, or whether they can modify their plans to fit within those pathways.

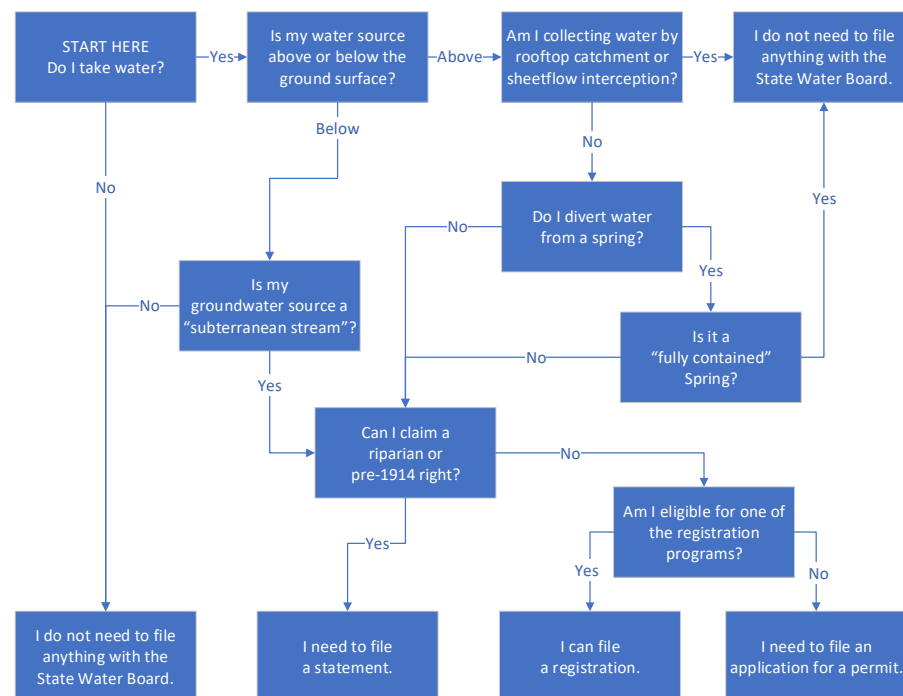
A water right application must be accompanied by supporting information, including a technical document known as a **water supply report** demonstrating that sufficient water remains available to supply the new right after considering the needs of existing water right holders and the environment. The process of considering an application requires the Water Board to conduct an extensive review and also allows other parties to protest the issuance of a permit. In order to issue a permit, the Water Board must ensure that any protests are resolved, there is water available to supply the permit, effects to **public trust resources** (see below) are considered, the requirements of the

California Environmental Quality Act are met, and it is in the public interest to issue the permit. For these and other reasons, the process can be lengthy; after filing an application, an applicant may have to wait five or more years for a decision.

After a permit is issued and has been in effect for a period of time (typically several years), and the permittee has been in compliance with its terms, the Water Board inspects the project and

confirms the amount of water that has actually been put to beneficial use. This is sometimes less than the amount stated in the permit. The Water Board then issues a water right **license** for the amount beneficially used. A license is considered a final vested water right. The holder of a permit or license must comply with the conditions contained within the permit or license, and must submit annual reports and pay annual fees to the Water Board.

Flow chart for a simplified water rights compliance process





SPECIFIC ISSUES RELATED TO WATER RIGHTS

Storage

One of the most common reasons water users apply for appropriative water rights is that they want to **store** water and lack the right to do so – for example, because they currently divert under a riparian right. Storage is defined as collecting water in a tank or reservoir during a time of higher streamflow for use during a time of lower streamflow. It is important to be aware that many smaller tanks and reservoirs do not provide “storage” in the legal sense, but rather are considered to provide “regulation of flow” over shorter time periods so that water can be used at a higher rate than it is diverted from a watercourse. This is often the case when the storage facility is small enough to hold only a limited supply of water – typically a few weeks’ supply or less.

In regions of the state with a Mediterranean climate, small-scale storage offers multiple potential benefits. It can provide landowners with a more secure supply of water during the summer and fall dry season months. Storage can also enable users to reduce or eliminate their diversions from the stream during these months,

leaving more water instream for fish and wildlife. This practice, often called “storage and forbearance,” is becoming increasingly common in coastal areas, and is legally required in the case of water diverted for cannabis cultivation. In most cases, the easiest permitting pathway for obtaining a water right for small-scale storage projects will be via a **registration** (see above).

Cannabis

All water diversion and use for the cultivation of commercial cannabis – even if conducted under an existing water right – must comply with the rules contained in the Water Board’s **Cannabis Cultivation Policy**. These rules include a ban on diversion of water between April 1 and October 31 to protect dry season streamflow, as well as a limitation on winter diversions to times of high streamflow. The ban on summertime diversion effectively forces all commercial cannabis cultivators that rely on surface water to seasonally store water, which requires an appropriative water right. See: https://www.waterboards.ca.gov/water_issues/programs/cannabis/cannabis_policy.html.

Reporting

All holders of riparian and appropriative rights must **report** the amounts of water they divert and use each year to the Water Board. Holders of post-1914 appropriative rights – i.e., those issued by the Water Board – do this by filing annual reports as required by the terms of their license, permit, or registration. These reports are due by April 1 each year and are filed online at <http://www.waterboards.ca.gov/rms>.

Holders of pre-1914 and riparian rights must report their use by filing a **Statement of Diversion and Use** form online (https://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/). These forms are due by July 1 every year. Although many riparian and pre-1914 right holders are unaware of this reporting requirement, it is extremely important to comply with it for two reasons. First, water users can be fined \$1,000 for failure to file, plus \$500 per day after being notified by the Water Board. Second, reporting annual use protects holders of pre-1914 and riparian rights by ensuring the Water Board is aware of these rights, and will take them into account when issuing new water rights in the same stream system. This prevents the over-allocation of water.



Changes

For appropriative rights, there are limits on the right holder’s ability to change the amount, rate, timing, and manner in which water is diverted and used. Neither the amount of water diverted nor the amount of water put to beneficial use may be increased above the amount established when the right was created. Likewise, the rate of diversion may not be increased, and the season in which water is diverted may not be expanded.

The point of diversion, place of use, or purpose of use of an appropriative right may all be changed, provided the change will not injure the rights of any other legal user of water. For post-1914 rights, the right holder must seek approval for such changes by filing a Petition for Change with the Water Board, which notifies other water users and the public and resolves any protests. For pre-1914 rights, the holder may implement these changes without approval, and other users may challenge the changes in state court.



PRINCIPLES THAT APPLY TO ALL WATER USE

California law establishes several overarching principles that apply to all water used under any type of right – whether riparian, appropriative, groundwater, or some other type. These principles are rooted in Article X of the California Constitution, which provides that the ownership of water lies with the people of the state, and that water rights convey only the right to use water at certain times and places.

Beneficial use

Water cannot be used for just any purpose; rather, it must be for some legally recognized beneficial use. Some of the most common beneficial uses are:

- Irrigation
- Domestic
- Municipal
- Industrial
- Stockwatering

- Fire protection
- Frost protection
- Power generation
- Heat protection

Although this list is not exhaustive, there are some activities that have been expressly found not to be beneficial uses. For example, one court has held that diverting water in the winter to kill gophers is not a beneficial use.

Reasonable use

The amount of water diverted, and the manner of diversion, must be reasonable in light of the beneficial use to be achieved. For example, irrigators cannot apply water in excess of the reasonable demands of the crop being grown on the place of use. The Water Board has authority to make rules defining specific practices that do (and do not) constitute reasonable use. For example, in 2014 the Water Board issued a rule defining diversion of water from certain salmon-bearing streams for frost protection to be unreasonable unless it complies with approved management plans designed to prevent dewatering that harms endangered fish.

The public trust doctrine

The public trust doctrine is a longstanding principle of water law providing that all water rights are subject to a duty to leave sufficient flow instream to meet public trust uses, including fish and wildlife, navigation, and recreation. The legislature and state agencies can define and implement minimum flow standards to protect public trust uses in several ways, including:

- By inserting bypass flows and other terms into water right permits and Lake/ Streambed Alteration Agreements (see right).
- By enacting and enforcing statutes such as Fish and Game Code Sections 5937 (which requires dam owners to release sufficient water to keep fish in good condition) and 1602 (discussed at right).
- By implementing minimum streamflow requirements through ongoing regulatory processes such as water quality control plans, or regulations defining reasonable use.



Fish and Game Code Section 1602 (Lake/ Streambed Alteration Agreements)

In addition to a water right, many surface water diversions also require approval from CDFW under Fish and Game Code Section 1602, which provides that no one may “substantially divert . . . the natural flow of . . . any river, stream, or lake” without a Lake/ Streambed Alteration Agreement (LSAA) signed by CDFW.

Such an agreement often contains terms such as minimum bypass flows and season requirements to ensure a diversion will not unreasonably harm fish and wildlife. Whether a diversion is “substantial,” and therefore requires an LSAA, is a case-by case determination that should be made in consultation with CDFW. See: <https://www.wildlife.ca.gov/Conservation/LSA>.



ONLINE RESOURCES REGARDING CALIFORNIA WATER RIGHTS

General Information

The Water Board maintains a web page with general water rights information and resources here:

https://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.html

Attorneys and Consultants

The Water Board maintains a list of attorneys and consultants that have indicated they perform services in the area of California water law or water rights consulting. The Division of Water Rights does not recommend or endorse any particular firm or consultant.

Attorneys

https://www.waterboards.ca.gov/waterrights/board_info/docs/attorneylist.pdf

Consultants

https://www.waterboards.ca.gov/waterrights/board_info/docs/consultantslist.pdf

Fact Sheet on Water Courses and On- and Off-Stream Reservoirs

https://www.waterboards.ca.gov/publications_forms/publications/factsheets/docs/onstream_reservoir_factsheet.pdf

Program Web Pages for Prospective Water Right Holders

Statements of Water Diversion and Use

Each person or organization, with certain exceptions, that diverts and uses surface water or pumped groundwater from a known subterranean stream must file with the Water Board a Statement of Water Diversion and Use by July 1 of the year following the year when water was diverted.

https://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/

Applications for Permits

The Water Board manages a program to issue certain types of water rights for larger projects.

https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/

Registrations (Domestic, Stockpond, Irrigation)

The Water Board manages a program to issue certain types of water rights for domestic, stockwatering, and irrigation uses for small projects. Larger projects that need to apply for a water right must file an Application for a Permit.

https://www.waterboards.ca.gov/waterrights/water_issues/programs/registrations/

Registrations (Cannabis)

The Water Board manages a special program to issue water rights for commercial cannabis cultivation.

https://www.waterboards.ca.gov/water_issues/programs/cannabis/

Program Web Pages for Current Water Right Holders

Reporting

https://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/water_use.html

Measurement

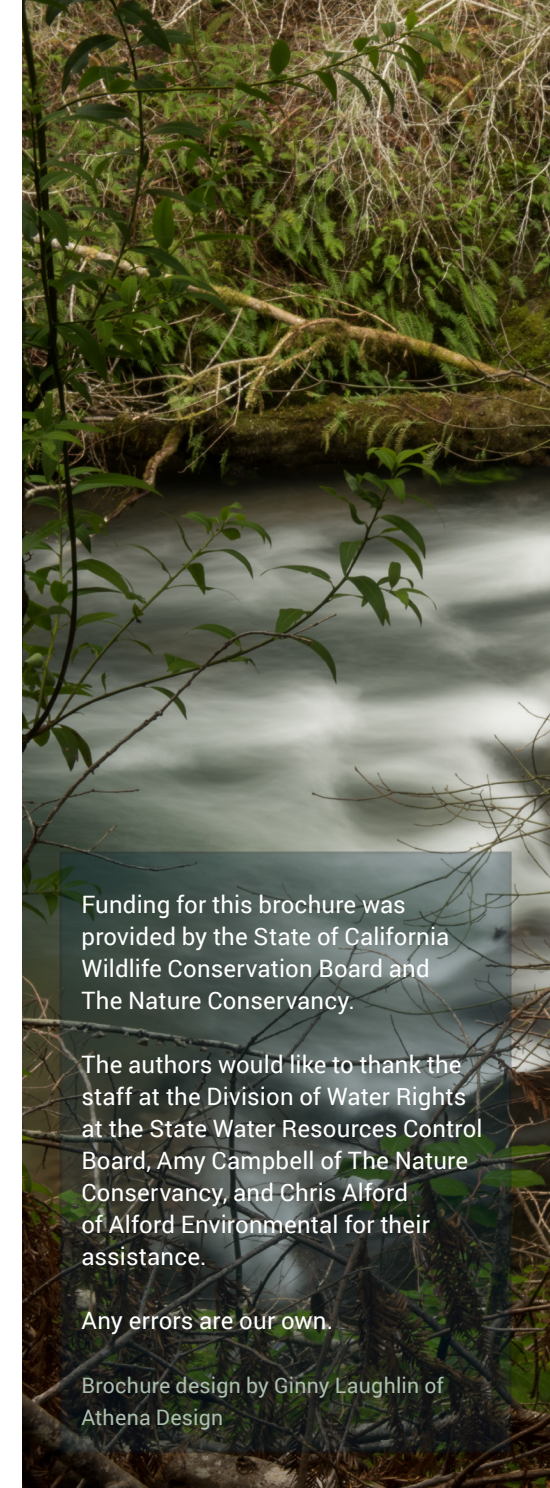
https://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/water_use.html

Fees

https://www.waterboards.ca.gov/resources/fees/water_rights/

Forms

https://www.waterboards.ca.gov/waterrights/publications_forms/forms/



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Any errors are our own.

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