



MIKE DUNBAR

State water board shouldn't be judge, jury, executioner

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The largest circulation newspaper in western America decided to take Adam Gray to task last week. In a 715-word editorial, the Los Angeles Times denigrated Assembly Bill 313, which Gray authored.

When the Merced Assemblyman asked to respond, the Times told him to put it in a letter to the editor – 150 words max. (Gray declined, but you can read his original response [here](#).)

Hardly seems fair. But it might explain why the Times editorial writers go to such lengths to defend the State Water Resources Control Board. Fairness isn't especially important to either of them.

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Worried that the water board has the first, last and only say on water disputes, Gray's AB313 would require an impartial judge with specific water expertise to rule on cases involving the board.

Instead of “asking themselves if they agree with themselves,” said Gray, a neutral expert would weigh in first. The board could still overturn the decision, but its reasoning would

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have to hold up in court.

That's how most states handle disputes – and how they were handled in California before 1969 when the Porter-Cologne Water Quality Control Act consolidated two separate state boards into the State Water Resources Control Board, run by five governor-appointed directors.

From that point, water board staff wrote the rules, investigated violations, filed complaints, ruled on those complaints and set the penalties. If a farmer or city or water district didn't like the staff decision, they could appeal – to the five state water board directors.

Guess what? In some 2,500 actions since the board was established, the state water board never lost a case. Go figure.

Yes, farmers and others can take their cases to court. But that means challenging the full weight of a state agency, with its legal and research staffs. Challenging the water board – no matter how justly – is extremely costly. Hence, it seldom happens.

In 2015, the Byron Bethany Irrigation District, which stretches from Contra Costa County to the edge of Stanislaus, decided to do just that after the water board ordered it to stop pumping during the drought. Some of BBID's water rights were established prior to 1914, the golden year for California's most ironclad water rights. Modesto, Turlock, Oakdale and Merced irrigation districts all have similar "pre-14" rights.

When BBID ignored the board's order, water board staff wrote up the violation, its administrators heard the case and the board of directors confirmed the violation, levying a fine of \$1.5 million to \$5 million.

"This little agency, with a \$4 million budget, was looking at a potential \$5 million fine and millions in legal fees to defend itself," said a water expert who requested anonymity. "The water board picked on a small guy so they could set a precedent."

Why did the expert ask for anonymity? Because the expert occasionally has business before the board, and fears its regulators and administrators might hold a grudge. When a single agency causes so much anxiety, then no one – farmers, irrigation districts, cities or counties – can be certain they're getting a fair shake.

Byron Bethany had to go court to get a fair hearing, and it won. That victory gives weight to Gray's contention a neutral arbiter is needed.

The Times used a baseball metaphor in attacking Gray, saying the "state needs an umpire," to enforce laws against "illegal diversions" and protect the "rights of the public and others."

Amen. We just don't think the umpire should be wearing the same uniform as the pitcher.

The Los Angeles Times is a great newspaper and its editorial page has a mighty voice. But it rarely mentions our region unless writing about water, and usually the Times gets it wrong. It has long insisted more water must be sent down our rivers into the Delta and out to the ocean to protect salmon – assuming the water ever gets past the pumps that send it south to LA.

Last year, the Times even wrote an editorial giving salmon credit for our state's rich soils, abundant wildlife and tasty wines.

Yes, salmon need more water than they've been getting from our irrigation districts – and the districts know it. But how much and when that water is released is far from settled science. Despite the state's insistence otherwise, the latest research shows salmon do best in moderate flows, not floods. And we've seen that some increased environmental flows have done more harm than good. With diligent stream restoration, salmon can increase tenfold as they've done on the Stanislaus in the past decade.

Soon, the state will release instream flow requirements for our rivers – likely demanding doubling flows on the Tuolumne and Merced. If the Times notices, it will undoubtedly applaud such a plan – facts, science and fairness be damned.

There's not much chance Gray's AB313 will pass; those benefiting from the status quo are too powerful. But that doesn't mean the water board should have the final say on all questions of water use and flows. We've seen where that leads, and it isn't always fair.

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