

COMMENTS

The Bay-Delta Water Quality Control Plan at Vernalis: A Part of the Solution to California's Water Wars?

INTRODUCTION

On May 22, 1995, the California State Water Resources Control Board adopted a Water Quality Control Plan that set forth fresh water flow standards required at certain points within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary.¹This comment addresses the flow standard adopted at Vernalis, located on the San Joaquin River. In addition, the Water Quality Control Plan allows the State Water Project and Central Valley Project to export one hundred percent of the Vernalis flow requirement. This comment will reveal that the adoption of the flow standard at Vernalis, and the allowance of one hundred percent of the flow standard to be exported by the State Water Project and Central Valley Project, both of which are junior water right holders on the San Joaquin River, may be considered a taking of water or storage facilities from senior water right holders in violation of California law and the United States Constitution.

I. BACKGROUND OF BAY-DELTA WATERWAYS AND AGREEMENTS

The San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta) is the largest estuary on the west coast of North America.² The San Francisco Bay includes the San Francisco and

¹ STATE WATER RESOURCES CONTROL BOARD, WATER QUALITY CONTROL PLAN, 95-1WR (May 1995). [Hereinafter WATER QUALITY CONTROL PLAN].

² BAY-DELTA ADVISORY COUNCIL, BAY DELTA ADVISORY COUNCIL INFORMATION

San Pablo Bays, the Carquinez Straits, Suisun Bay and the Sacramento River below the confluence of the Sacramento and San Joaquin Rivers.³ The Sacramento-San Joaquin Delta includes the land and waterways bounded by Sacramento to the north, Tracy to the south, Stockton to the East and Pittsburg to the west.⁴ The Sacramento-San Joaquin Delta and the Suisun Marsh are located where California's two major river systems, the Sacramento and San Joaquin Rivers, converge to flow westward to meet incoming seawater tides flowing through the San Francisco Bay. The Bay-Delta encompasses 738,000 acres and hundreds of miles of waterways.⁵

The Bay-Delta is an integral part of California's water system because its watershed provides drinking water for two-thirds of California's population.⁶ Additionally, the Bay-Delta watershed supplies water to major agricultural areas. The Bay-Delta watershed provides irrigation for two hundred crops, including forty-five percent of the nation's fruit and vegetable production.⁷ The Bay-Delta also provides support for 120 species of fish as well as various commercial fisheries and recreational areas.⁸

Two major water distribution systems release stored water into, and then divert from, the Bay-Delta watershed. The Central Valley Project (CVP), which is operated by the United States Bureau of Reclamation, was completed in 1947 with Shasta Dam as its main feature. The CVP was constructed to store and regulate waters of the Sacramento River and then divert those waters through the Bay-Delta via the Delta Cross Channel to the Tracy Pumping Plant and thereafter via the Delta-Mendota Canal to major agricultural areas. Friant Dam, an additional feature of the CVP impacting the Delta, diverts one hundred percent of the upper San Joaquin River via the Friant, Kern and Madera canals to other important agricultural regions. The water diverted by Friant Dam

BOOKLET (1995), at I-1.

³ *Id.*

⁴ *Id.*

⁵ CALIFORNIA DEP'T OF WATER RESOURCES, SACRAMENTO DELTA SAN JOAQUIN ATLAS 1 (1993).

⁶ STATE WATER RESOURCES CONTROL BOARD, NOTICE OF PUBLIC WORKSHOP, DEVELOPMENT OF A WATER RIGHT DECISION TO IMPLEMENT REQUIREMENTS FOR THE SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY (July 27, 1995).

⁷ John H. Cushman, Jr., *U.S. and California Reach Pact to Regulate Flow of Fresh Water*, N.Y. TIMES, Dec. 16, 1994, at A1, A2.

⁸ *Id.*

would otherwise drain into the Bay-Delta.⁹

The State Water Project (SWP) is operated by the State of California Department of Water Resources. In 1967, Oroville Dam the main feature of the SWP, was constructed to store and regulate waters of the Feather River.¹⁰ Feather River water is released from Oroville Dam and lifted into the California Aqueduct for storage in San Luis Reservoir and subsequently transported south through the San Joaquin Valley and eventually lifted over the Tehachapi Mountains for delivery and use throughout Southern California.¹¹ (The CVP and SWP shall be referred to collectively as the "Export Projects").

A. *The Framework Agreement*

On December 9, 1992, California Governor Pete Wilson created the California Water Policy Council (Council). The Council is comprised of representatives from eight California State departments and agencies. The Council's chief responsibility is to implement the State's long term water policy. In the summer of 1994, the Council, the United States Environmental Protection Agency (USEPA), the United States Bureau of Reclamation (USBR), the National Marine Fisheries Service and the United States Fish and Wildlife Service executed the Framework Agreement.¹² The purpose of the Framework Agreement was to increase coordination and communication with respect to environmental protection and water supply dependability in the Bay-Delta.¹³

B. *The Bay-Delta Accord*

After extensive hearings in December of 1992, the State Water Resources Control Board (SWRCB) issued a draft water quality control plan known as Draft Water Decision 1630 (Draft D-1630).¹⁴ On April 1, 1993, Governor Pete Wilson intervened and ordered the SWRCB to rescind Draft D-1630 and to terminate the water rights proceedings that led to the proposed decision.¹⁵ Re-

⁹ See generally *California v. United States*, 438 U.S. 645 (1978).

¹⁰ CAL. WATER CODE § 11260 (West 1992 & Supp. 1995).

¹¹ 1 ROGER & NICHOLS, *Water for California* (1967) at 42-62.

¹² BAY-DELTA ADVISORY COUNCIL, *supra* note 2.

¹³ BAY-DELTA ADVISORY COUNCIL, *supra* note 2.

¹⁴ STATE WATER RESOURCES CONTROL BOARD, WATER RIGHT DECISION 1630: SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY 85 (Dec. 1992) (Draft).

¹⁵ Letter from Pete Wilson, Governor, State of California, to John Caffrey,

sponding to Governor Wilson's intervention and the subsequent failure of the SWRCB to issue water quality standards for the Delta, the USEPA initiated hearings to establish federal standards for the Bay/Delta estuary under the Federal Clean Water Act.¹⁶

In an effort to prevent federal control of the estuary and to reach a compromise on the standards, various California interests began investigating an agreement for a new set of standards. On December 15, 1994, the Principles for Agreement on Bay-Delta (Bay-Delta Accord) was executed by federal and state officials.¹⁷ Governor Wilson attended the signing of the Bay-Delta Accord and declared, "Peace has broken out amid the water wars. We're lacking only Yasser Arafat and Yitzhak Rabin."¹⁸ Environmental Protection Agency Administrator Carol Browner stated, "I believe we have reached a consensus that is important for families, farmers and fish."¹⁹ The purpose of the Bay-Delta accord was to recommend draft water quality control standards for the Bay-Delta. The draft water quality control standards were intended to provide fresh water from the Sacramento and San Joaquin rivers to protect the majority of California's drinking water and habitat.

The water quality standards were quantified in terms of "flows" which will be required at different areas within the Bay-Delta at certain times of the year. Under the Bay-Delta Accord, the SWRCB was given authority to finalize the standards set forth in the Bay-Delta Accord.²⁰ The SWRCB will soon be initiating water right proceedings to assign responsibility among water right holders in the respective watershed to provide the flows, together with other measures in the watershed that may be necessary, to implement the standards.²¹ Environmental scoping workshops have already begun.²²

Acting Chair of the SWRCB, reprinted in 3 CALIFORNIA WATER LAW & POLICY REPORTER 152 (1993).

¹⁶ 33 U.S.C.S. §§ 1251-1387 (Law. Co-op. 1986 & Supp. 1995), is known both as the Federal Water Pollution Control Act and the Clean Water Act. *See also* 40 C.F.R. § 131.22 (1992).

¹⁷ PRINCIPLES FOR AGREEMENT ON BAY-DELTA STANDARDS BETWEEN THE STATE OF CALIFORNIA AND THE FEDERAL GOVERNMENT (Dec. 15, 1994).

¹⁸ Elliot Diringer, *Peace Has Broken Out In Water Wars, Wilson Says*, S.F. CHRON., Dec. 16, 1994, at A-1.

¹⁹ *Id.*

²⁰ PRINCIPLES FOR AGREEMENT ON BAY-DELTA STANDARDS BETWEEN THE STATE OF CALIFORNIA AND THE FEDERAL GOVERNMENT, *supra* note 17 at Attachment B.

²¹ *Id.*

²² PRINCIPLES FOR AGREEMENT ON BAY-DELTA STANDARDS BETWEEN THE STATE OF

A portion of the Bay-Delta Accord provided flow standards for the San Joaquin River at Vernalis, a point on the River just north of the confluence of the Stanislaus marking the point at which the San Joaquin enters the Delta. The justification for the Vernalis flow requirement was to provide flows for the Delta smelt in accordance with the USBR biological opinion for the Delta smelt.²³

The Delta smelt is a small resident fish normally found throughout the Delta but generally in its Northern reaches and Suisun Bay.²⁴ The Delta smelt was listed as a threatened species under the federal Endangered Species Act²⁵ in March 1993. Later that year, the State of California listed the Delta smelt as threatened under its own Endangered Species Act.²⁶ Historically, the Delta smelt became ensnared and trapped in the Export Projects' pumps, or fell prey to predator species which congregated near the pump. The Delta smelt were then unable to reach their rearing habitat, which in turn caused a decline in their population. The USBR justification for the flow requirement is to provide a river flow transport to allow the Delta smelt to reach a suitable rearing habitat downstream away from the Export Projects' pumps.²⁷

C. The Water Quality Control Plan

On May 22, 1995, the SWRCB adopted its Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin

CALIFORNIA AND THE FEDERAL GOVERNMENT, *supra* note 17 at Attachment B.

²³ *Id.* at Attachment A.

²⁴ BUREAU OF RECLAMATION, U.S. DEP'T OF INTERIOR, DRAFT JEOPARDY BIOLOGICAL OPINION AND CONFERENCE OPINION ON EFFECTS OF LONG-TERM OPERATION OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT ON THE THREATENED DELTA SMELT, PROPOSED THREATENED SACRAMENTO SPLITTAIL AND PROPOSED DELTA SMELT CRITICAL HABITAT 16-17 (Nov. 29, 1994).

²⁵ 16 U.S.C.S. § 1531.

²⁶ STATE WATER RESOURCES CONTROL BOARD, ENVIRONMENTAL REPORT APPENDIX 1, TO WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY, 95-1WR, at III-19 (May 1995). *See generally* CAL. FISH & GAME § 2050 (West 1984 & Supp. 1995).

²⁷ BUREAU OF RECLAMATION, U.S. DEP'T OF INTERIOR, DRAFT JEOPARDY BIOLOGICAL OPINION AND CONFERENCE OPINION ON EFFECTS OF LONG-TERM OPERATION OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT ON THE THREATENED DELTA SMELT, PROPOSED THREATENED SACRAMENTO SPLITTAIL AND PROPOSED DELTA SMELT CRITICAL HABITAT at 41-42, (Nov. 29, 1994).

Delta Estuary.²⁸ The Water Quality Control Plan incorporates the rest of the principles developed by the Bay-Delta Accord.

II. THE VERNALIS ISSUE

The Water Quality Control Plan sets forth a flow standard on the San Joaquin River at Airport Way, Vernalis, to provide attraction and transport flows and to establish improved habitat for various life stages of aquatic organisms including the Delta smelt and the chinook salmon smolts.²⁹ At the same time, the Water Quality Control Plan allows the Export Projects to pump 100% of the prescribed flow standard from Vernalis for export.³⁰ The purpose of the export flow standard is to limit entrainment and salvage losses of outmigrating salmon smolts from the San Joaquin River.³¹

The San Joaquin Tributaries Association (SJTA) consists of the Modesto Irrigation District (MOID), Turlock Irrigation District (TID), Merced Irrigation District (MID), Oakdale Irrigation District (OID) and South San Joaquin Irrigation District (SSJID).³² The members of the SJTA are water right holders and project operators on the Tuolumne, Stanislaus and Merced Rivers. These three rivers are the main tributaries to the lower San Joaquin River.

All members of SJTA possess storage and senior water rights upstream of Vernalis on the San Joaquin River.³³ While SJTA members provide irrigation water to members of their respective districts, they were not invited to participate in discussions nor were they signatories to the Bay-Delta Accord.³⁴

²⁸ WATER QUALITY CONTROL PLAN, *supra* note 1.

²⁹ WATER QUALITY CONTROL PLAN, *supra* note 1 at Table 3.

³⁰ *Id.*

³¹ STATE WATER RESOURCES CONTROL BOARD, ENVIRONMENTAL REPORT APPENDIX 1 TO WATER QUALITY CONTROL PLAN, *supra* note 26 at VIII-28.

³² SAN JOAQUIN TRIBUTARIES ASS'N, *Statement at a Public Hearing of the State Water Resources Control Board* (Apr. 18, 1995). (transcript available at the State Water Resources Control Board).

³³ Deed executed January 18, 1922 by Exchequer Mining & Power Company in favor of Merced Irrigation District, Document Number 2553 recorded in Volume 26 at page 188 in the Office of the County Recorder of the County of Mariposa.

³⁴ PRINCIPLES FOR AGREEMENT ON BAY-DELTA STANDARDS BETWEEN THE STATE OF CALIFORNIA AND THE FEDERAL GOVERNMENT, *supra* note 17.

The Bay-Delta Accord and the Water Quality Control Plan were intended to mark a temporary end to the bitter war over California's most coveted resource and to protect the environment. However, SWRCB's adoption of the flow requirements at Vernalis may be one example of the Water Quality Control Plan serving to preempt the California water rights process. The Water Quality Control Plan could be considered a taking of water from SJTA members with senior water rights in possible violation of California law. First, the Water Quality Control Plan established a flow requirement at Vernalis. Then, the Water Quality Control Plan allowed for 100% of the flow requirement at Vernalis to be exported by the Export Projects, both of whom are junior water right holders along the San Joaquin River.

III. THE CALIFORNIA WATER RIGHTS SYSTEM: A BRIEF OVERVIEW

A water right is the right to *use* the water. The property right in water is usufructuary in that it does not consist of the water itself, but rather the right to use the water. Therefore, case law does not speak of the ownership of water, but only of the right to its use.³⁵

California's system of water rights is based upon a dual system comprised of riparian and appropriative water rights and is subject to constitutional and public trust doctrine limitations.³⁶ The law of water rights in California involves a hierarchy of priorities. Riparian rights, as a class, have priority which must be satisfied before any appropriative rights are exercised. As among appropriators, the "first in time, first in right" priority prevails.

Riparian rights are based on ownership of land that is adjacent to a river or lake. The riparian doctrine confers upon the owner of the land the right to divert water flowing by his land for use on his land.³⁷ Under California law, water may be used under a riparian right only on land that is within the watershed from which the water originates.³⁸

³⁵ *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 100-101 (1986) (*Racanelli*). This case is known as the *Racanelli* decision after its author, Presiding Justice Racanelli, First District Court of Appeal.

³⁶ See generally CAL. CONST., art. X, § 2 (1928, amended 1976) and *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (1983).

³⁷ *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 100-101 (1986).

³⁸ *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 329 (1907).

Appropriative water rights in California, although originally developed through custom and usage, are now governed primarily by statute.³⁹ The SWRCB, as the principal regulatory agency with jurisdiction over California's water resources, directly regulates all appropriations of surface water commenced *after* December 19, 1914, through its power to grant permits and licenses.⁴⁰ All appropriations commenced *before* December 19, 1914 are collectively referred to as "pre-1914 rights," over which the SWRCB does not have direct regulatory jurisdiction.⁴¹ The SWRCB grants an appropriative right, if water is available and free from claims of others with earlier appropriations, for special beneficial purposes. The right is initiated either by actual use, as is the situation with pre-1914 rights, or by application for a permit or license. The right may be conveyed, and it may cease to exist if it is not used.

The most important element in the appropriative rights system is the doctrine of priority.⁴² The historic rule of "first in time, first in right"⁴³ requires that a senior appropriator have first priority right on all available water claimed by him, with subsequent junior appropriators being able to make appropriative decisions based on knowledge of their chance to obtain an adequate supply of water. The right to the use of water in California is predicated upon the reasonable and beneficial use of water.⁴⁴ The hierarchy of rights described may be subject to modification based on Article X, Section 2, of the California Constitution and the public trust doctrine.

Article X, Section 2, of the California Constitution was enacted in 1928.⁴⁵ In 1976, the Constitution was amended establishing the

³⁹ CAL. WATER CODE § 100 (West 1971 & Supp. 1995).

⁴⁰ CAL. WATER CODE § 1201(b) (West 1971 & Supp. 1995).

⁴¹ CAL. WATER CODE § 1202(b) (West 1971 & Supp. 1995).

⁴² 1 W. HUTCHINGS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 396-400 (1971).

⁴³ *Irwin v. Phillips*, 5 Cal. 140, 147 (1855).

⁴⁴ CAL. CONST., art. X, § 2 (1928, amended 1976).

⁴⁵ CAL. CONST., art. X, § 2 (1928, amended 1976) provides,

It is hereby declared that because of conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from

right to the use of water for reasonable and beneficial uses. The reasonable and beneficial use rule is enjoined upon *all* users of water including riparians and pre-1914 rightholders, but it is not exclusively defined either by statute or judicial decision. The rule depends on the facts and circumstances of each particular case.

In 1983, the California Supreme Court decided *National Audubon Society v. Superior Court*,⁴⁶ and for the first time applied the public trust doctrine to the appropriative rights doctrine. The public trust doctrine embodies the idea of a public trust, under which the sovereign owns all of its navigable waterways and the lands lying beneath them as trustee of the public trust for the benefit of the people.⁴⁷ The court in *National Audubon* held that the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.⁴⁸

The “reasonable and beneficial” use rule for a water right acts to provide an additional element of certainty in the system. It not only guarantees the continued ability to use water, provided the use is reasonable and beneficial, but also allows the junior appropriator to limit a senior appropriator’s use if that use is wasteful.

any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream of water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however that nothing herein contained shall be construed as depriving any riparian owner of reasonable use of water of the stream to which the owner’s land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled.

⁴⁶ Nat’l Audubon Soc’y v. Superior Court, 33 Cal.3d 419 (1983), known as the *Mono Lake* decision.

⁴⁷ *Id.* at 435.

⁴⁸ *Id.* at 446.

IV. THE SWRCB MAY HAVE THE AUTHORITY TO ALTER FIRST IN TIME, FIRST IN RIGHT PRIORITIES

The SWRCB states it has legal authority under the provisions of California Water Code section 1394⁴⁹ to re-open water permits and licenses. This *includes* pre-1914 and riparian rights in order to obtain water from the Bay-Delta system users, such as the SJTA, to meet the Vernalis flow standards established under the Water Quality Control Plan.⁵⁰

SWRCB's belief that it may ignore the historic rule of "first in time, first in right" may originate, in part, from language in *United States v. State Water Resources Control Board*.⁵¹ In that case, the court of appeal reviewed SWRCB's action in establishing Bay-Delta water quality control standards in its Decision 1485.⁵² The court found authorization for the SWRCB to disregard the historic rule of "first in time, first in right." The court stated:

⁴⁹ CAL. WATER CODE § 1394 (West 1971 and Supp. 1995) states:

(a) The board may reserve jurisdiction, in whole or in part, to amend, revise, supplement, or delete terms and conditions in a permit under either of the following circumstances:

(1) If the board finds that sufficient information is not available to finally determine the terms and conditions which will reasonably protect vested rights without resulting in waste of water or which will best develop, conserve, and utilize in the public interest the water sought to be appropriated, and that a period of actual operation or time for completion of studies will be necessary in order to secure the required information.

(2) If the application or applications being acted upon to represent only part of a coordinated project, other applications for the project being pending, and the board finds that the coordinated project requires coordinated terms and conditions which cannot reasonably be decided upon until a decision is reached on the other pending application.

⁵⁰ STATE WATER RESOURCES CONTROL BOARD, *supra* note 6 at 2.

⁵¹ *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82 (1986).

⁵² In 1976 the SWRCB convened a hearing to formulate a water quality control plan for the Bay/Delta and to determine whether the water-use permits held by USBR and the DWR should be amended to implement the plan. In 1978 the SWRCB adopted the Water Quality Control Water Quality Plan and the Water Right Decision 1485 (D-1485). The SWRCB modified the permits held by the USBR and the DWR in D-1485 to compel the Export Projects to follow the water quality objectives in the 1978 Water Quality Plan. The USBR and DWR then petitioned for writ of mandamus.

Moreover the power of the Board to set permit terms and conditions . . . includes the power to consider the *relative* benefit to be derived. If the Board is authorized to weigh the values of competing beneficial uses, then logically it should also be authorized to alter the historic rule of "first in time, first in right" by imposing permit conditions which give a higher priority to a more preferred beneficial use even though later in time.⁵³

The court relied on Water Code sections 1253, 1254 and 1257,⁵⁴ which apply to SWRCB's authority to act on *applications* for the appropriations of *unappropriated* water.⁵⁵ Where two applications are pending, the determination of who should be granted the right shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water⁵⁶ with consideration being given to the relative benefit to be derived from all uses of the water.⁵⁷ The court, therefore, appears to have incorrectly applied statutes regulating applications for water permits to a situation involving water right permits that had already been granted. In the D-1485 process, the SWRCB was not dealing with applications for appropriations of water, but rather was concerned with water right permits that had *previously* been granted by the SWRCB.⁵⁸

Additionally, the court relied upon *East Bay Municipal Utility District v. Department of Public Works of the State of California*.⁵⁹ This case was a proceeding in *mandamus* to compel the State Water Commission (Commission), SWRCB's predecessor, to strike a

⁵³ *United States v. State Water Resources Control Board*, 182 Cal. App. 3d. 82 (1986).

⁵⁴ *Id.*

⁵⁵ CAL. WATER CODE § 1253 (West 1971 & Supp. 1995) states: "The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated."

CAL. WATER CODE § 1254 (West 1971 & Supp. 1995) states: "In acting upon applications to appropriate water the board shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water."

CAL. WATER CODE § 1257 (West 1971 & Supp. 1995) states: "[a]nd consideration of the relative benefit to be derived from . . . all . . . uses of the water concerned."

⁵⁶ CAL. WATER CODE §§ 106, 1254 (West 1971 & Supp. 1995).

⁵⁷ CAL. WATER CODE § 1257 (West 1971 & Supp. 1995).

⁵⁸ *United States v. State Water Resources Control Board*, 182 Cal. App.3d 82, 107 (1986).

⁵⁹ *East Bay Mun. Util. Dist. v. Dep't of Public Works of the State of California*, 35 P.2d 1027 (1934), discussed at 182 Cal. App. 3d 82, 132-133 (1986).

condition on a permit it had previously issued. The court was dealing with Section 15 of the Water Commission Act.⁶⁰ The issue in *East Bay*⁶¹ was whether the condition imposed by the Commission was an improper exercise of a judicial function by a regulatory agency, and the court held that the imposition was a legislative rather than judicial function.

The *East Bay* decision does *not* stand for the proposition that the SWRCB is authorized to impose a condition modifying the priority of a water right permit at any time after acting upon the application for that permit. Rather, the *East Bay* decision stands for the proposition that the SWRCB can reject an application based upon relevant facts in consideration of a greater benefit arising from a *competing* application.

The alteration of the first-in-time first-in-right, as suggested by the court in *United States v. State Water Resources Control Board*⁶² has the potential to inject uncertainty into the water allocation system and undermine the economic and social stability that has been created by, and is now dependent on, that system. For example, MID, alone has approximately forty million dollars in outstanding bonds. Monies received to pay the debt on these bonds originates from and is dependent upon current water routes.⁶³

Additionally, *United States v. State Water Resources Control Board*⁶⁴ can be distinguished on its facts from the issue of water rights involved at Vernalis. The water rights of the members of the SJTA

⁶⁰ CAL. WATER COMMISSION ACT, § 15 states:

The State Water Commission shall allow, under the provisions of this act, the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. It is hereby declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water and the next highest use is for irrigation. In acting upon applications to appropriate water, the commission shall be guided by the above declaration of policy. The commission shall reject an application when its judgment the proposed appropriation would not best conserve the public interest.

⁶¹ *East Bay Mun. Util. Dist. v. Dep't of Public Works*, 1 Cal.2d 476 (1934) discussed at 182 Cal. App. 3d 82, 132-133 (1986).

⁶² *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82 (1986).

⁶³ Interview with Kenneth M. Robbins, Attorney for Merced Irrigation District, in Merced, California (Feb. 6, 1996).

⁶⁴ *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82 (1986).

do not involve applications before the SWRCB, whether pending or approved and issued. The water rights of the members of the SJTA are mostly pre-1914 rights, which are senior to the Export Projects rights and not subject to SWRCB jurisdiction. There does not appear to be any provisions of law that allow the SWRCB to reprioritize water rights once they have been granted. With the exception of *East Bay*,⁶⁵ no case law suggests this theory either. Accordingly, it is therefore questionable whether the SWRCB has authority to alter the first-in-time, first-in-right priority system.

V. THE SWRCB MAY HAVE THE AUTHORITY UNDER ARTICLE X, SECTION 2, OF THE CALIFORNIA CONSTITUTION TO ABANDON THE PRIORITY SYSTEM OF WATER RIGHTS

The SWRCB states it has legal authority under the provisions of Water Code sections 100⁶⁶ and 275⁶⁷ to enforce Article X, Section 2 of the California Constitution⁶⁸ to implement provisions of the Water Quality Control Plan including the Vernalis flow requirement.⁶⁹ Article X, Section 2 of the California Constitution directs beneficial use of water be maximized and that water be conserved, diverted and used under the rule of reasonableness.⁷⁰

⁶⁵ *East Bay Mun. Util. Dist. v. Dep't of Public Works*, 1 Cal.2d 476 (1934).

⁶⁶ CAL. WATER CODE § 100 (West 1971 & Supp. 1995) states:

It is hereby declared that because of conditions prevailing in the state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and the conservation of water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method or diversion of water.

⁶⁷ CAL. WATER CODE § 275 (West 1971 & Supp. 1995) states: "The department and the board shall take all appropriate proceedings or actions before executive, legislative or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."

⁶⁸ CAL. CONST., art. X, § 2 (1928, amended 1976).

⁶⁹ WATER QUALITY CONTROL PLAN, *supra* note 1 at 7.

⁷⁰ CAL. CONST., art. X, § 2 (1928, amended 1976).

Under *United States v. State Water Resources Control Board*,⁷¹ the court ruled that the SWRCB's authority to ensure compliance with water quality laws is based in part on its powers under the reasonable use doctrine.⁷² The court set the standard for determination of what constitutes "reasonable use." The court stated:

Determination of reasonable use depends upon the totality of the circumstances presented: The scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts. What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes What is reasonable use depends on the circumstances of each case⁷³

The SWRCB states that the Vernalis flow requirement is necessary for fish and wildlife beneficial uses.⁷⁴ According to the Water Quality Control Plan, the purpose of the Vernalis flow is to improve survival of salmon smolts emigrating down the San Joaquin River and to improve habitat conditions in the central and southern Delta for numerous aquatic species, including the Delta smelt, Sacramento splittail and striped bass.⁷⁵ The higher flows are assigned to improve salinity conditions for spawning in the central and southern Delta and provide transport flows out of the Delta.⁷⁶ Water Code section 1243 states that the use of water for the preservation and enhancement of fish and wildlife resources is a beneficial use of water.⁷⁷

⁷¹ *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82 (1986).

⁷² *Id.* at 130.

⁷³ *Id.* at 129-130.

⁷⁴ WATER QUALITY CONTROL PLAN, *supra* note 1 at Table 3.

⁷⁵ WATER QUALITY CONTROL PLAN, *supra* note 1 at Table 3.

⁷⁶ *Id.*

⁷⁷ CAL. WATER CODE § 1243 (West 1971 & Supp. 1995) states:

The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources.

VI. THE SWRCB MAY HAVE THE AUTHORITY TO INVOKE THE PUBLIC TRUST DOCTRINE TO ABANDON THE PRIORITY SYSTEM OF WATER RIGHTS

The SWRCB states it has legal authority under the public trust doctrine as articulated in *National Audubon Society v. Superior Court*⁷⁸ to carry out the provisions of the Water Quality Control Plan, including the Vernalis flow requirement. In that case, the Division of Water Resources granted a permit to the City of Los Angeles to divert water from Mono Lake. As a result of the diversions, the level of Mono Lake dropped substantially, islands became peninsulas subjecting nesting grounds to predators, and the overall beauty and ecological value of Mono Lake were diminished.⁷⁹ The plaintiffs filed suit to enjoin City of Los Angeles diversions on the theory that Mono Lake was protected by the public trust.⁸⁰ The court stated that the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams.⁸¹ The court held that the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.⁸² The SWRCB may be able to invoke the public trust doctrine under the guise of protecting the Bay-Delta from decline.

The SJTA possess pre-1914 water rights that are not subject to the jurisdiction of the SWRCB.⁸³ The *National Audubon* decision did not hold that the SWRCB could retroactively apply the public trust doctrine to riparian and pre-1914 appropriators. The court stated:

Plaintiffs, for example, argue that the public trust is antecedent to and thus limits *all* appropriative water rights, an argument which implies that most appropriative water rights in California were acquired and are presently being used unlawfully. Defendant DWP, on the other hand, argues that the public trust doctrine as to stream waters has been "subsumed" into the appropriative water rights system and, absorbed by that body of law, quietly disappeared; according to DWP, the recipient of a board license enjoys a vested right in perpetuity to take water without concern for the consequences of

⁷⁸ Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983).

⁷⁹ *Id.* at 711.

⁸⁰ *Id.* at 719.

⁸¹ *Id.* at 727.

⁸² *Id.* at 728.

⁸³ CAL. WATER CODE § 1202(b) (West 1971 & Supp. 1995).

the trust.⁸⁴

Here, the Court had an opportunity to apply the public trust doctrine retroactively to *all* appropriative rights by embracing Plaintiffs' argument in favor of retroactive application. In response to Plaintiffs' argument that the doctrine should be applied retroactively, and to Defendants' argument that the public trust doctrine has been "subsumed" into the appropriative water rights system, the court stated:

In our opinion, both the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust.⁸⁵

The Court's response indicates that it chose not to apply the public trust doctrine retroactively to *all* (including pre-1914) appropriative rights, but rather gave SWRCB authority to invoke the public trust doctrine in all post-1914 appropriative rights.⁸⁶

VII. THE WATER QUALITY CONTROL PLAN MAY HAVE VIOLATED AREA OF ORIGIN LAWS

In addition to the law of prior appropriation in California, there exists a body of law commonly referred to as "area-of-origin laws." These laws serve to provide a water right priority to those areas within California in which water originates. When the Export Projects' facilities were first authorized, a major issue was whether the Export Projects would export waters that were originally needed and intended for the use and development of areas in which the water originated. To respond to this issue, the Legislature enacted the "area-of-origin laws." These laws are numerous and include Water Code section 11460,⁸⁷ which prohibits the Cali-

⁸⁴ Nat'l Audubon Soc'y v. Superior Court, 659 P.2d 709, 727 (1983). Emphasis Added.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ CAL. WATER CODE § 11460 (West 1992 & Supp. 1995).

In the construction and operation by the department of any project under the provisions of this part a watershed area wherein water originates, or an area immediately adjacent thereto which can con-

ifornia Department of Water Resources (DWR) from depriving a watershed or area of origin of the "prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed area, or any of the inhabitants or property owners therein" and Water Code sections 10505 and 10505.5, which provide for the reservation of water for counties of origin through applications filed with the DWR to appropriate water to benefit local areas.⁸⁸ Water Code section 11128 provides that the United States, in the development of the CVP shall be bound by the provisions of Water Code sections 11460 and 11463.⁸⁹

Water Code section 12330 provides, ". . . the Legislature hereby finds and declares that a serious problem of water quality exists in the San Joaquin River and the junction of the San Joaquin River with the Middle River."⁹⁰ Water Code Section 12231

veniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.

⁸⁸ *Id.* § 10505: "No priority under this part shall be released nor assignment made of any application that will, in the judgment of the board, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county." Section 10505.5 states:

Every application heretofore or hereafter made and filed pursuant to § 10500, and held by the State Water Resources Control Board, shall be amended to provide, and any permit hereafter issued pursuant to such an application, and any license issued pursuant to such a permit, shall provide, that the application, permit or license shall not authorize the use of any water outside of the county of origin which is necessary for the development of the county.

⁸⁹ *Id.* § 11128:

The limitations prescribed in §§ 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part.

⁹⁰ *Id.* § 12230:

The legislature hereby finds and declares that a serious problem of water quality exists in the San Joaquin River between the junction of the San Joaquin River and the Merced River and the junction of the San Joaquin River with Middle River; that by virtue of the nature and causes of the problem and its effect upon water supplies in the Sacramento-San Joaquin Delta, it is a matter of statewide interest

declares that it is state policy that no "public or private agency or the State or the United States should divert water from the San Joaquin River and its tributaries to which users along the portion of the San Joaquin River described in Section 12230 are entitled."⁹¹ These statutes appear to grant certain priorities to areas of origin which must be honored before any water surplus from the areas of origin can be made available to other water users.

VIII. THE DE FACTO WATER RIGHTS GIVEN TO THE EXPORT PROJECTS MAY BE A VIOLATION OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

The de facto water right given to the Export Projects may be a violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment to the United States Constitution (the Takings Clause) provides that private property shall not be taken for public use without just compensation.⁹² The Takings Clause is impliedly contained in the Fourteenth Amendment Due Process Clause and thus applies to state governments.⁹³ Additionally, Article I, section 19 of the California Constitution provides that private property may not be taken or damaged without just compensation.⁹⁴

Valid appropriative rights are vested property rights.⁹⁵ Like other forms of private property, appropriative rights may be taken for public use under the laws governing the right of eminent domain. However, other than express conditions properly imposed by the SWRCB in the issuance of a license to appropriate water, there is no legislative or judicial authority in California for enforced advancement of the priority of an appropriation for one beneficial purpose over that of a prior appropriation for another beneficial purpose, either in time of water shortage or oth-

and is the responsibility of the State to determine an equitable and feasible solution to this problem.

⁹¹ *Id.* § 12231:

It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the San Joaquin River and its tributaries to which the users along the portion of the San Joaquin River described in § 12330 are entitled.

⁹² U.S. CONST. amend. V.

⁹³ See generally *Chicago & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

⁹⁴ CAL. CONST., art. I, § 19.

⁹⁵ W. HUTCHINS, *THE CALIFORNIA LAW OF WATER RIGHTS* 173-74 (1956).

erwise, without making due compensation.⁹⁶

The granting of the de facto water right to the Export Projects, whose rights are junior to SJTA members, appears to be a taking of senior property water rights from SJTA members.

The SWRCB has not compensated any of the SJTA members for this taking and, accordingly, may have violated SJTA members' rights guaranteed by the United States and California Constitutions. This is because Section 1 of the Fourteenth Amendment to the United States Constitution provides that a person shall not be deprived of life, liberty, or property, without due process of law.⁹⁷

The SWRCB utilized the standards for Vernalis from the Bay-Delta Accord. The SJTA was not a signatory to the Bay-Delta Accord. The Bay-Delta Accord and the Water Quality Control Plan, by utilizing the standards for Vernalis without the consent of SJTA members, may be taking water arbitrarily without due process of law. Consequently, the Fourteenth Amendment rights of SJTA members may have also been violated. This is particularly true if the real property storage facilities of the SJTA are required to provide the mandated flows.

CONCLUSION

The SWRCB, by requiring a flow standard and then allowing one hundred percent of the flow standard to be exported by the Export Projects may be in violation of the first-in-time, first-in-right appropriation process as well as the area of origin laws. The Bay-Delta Accord and Water Quality Control Plan flow standard and export subsidy to the Export Projects established at Vernalis appear to be in violation of the California water rights process. At issue is whether the SWRCB has legal authority to alter the pre-1914 senior water rights under *United States v. State Water Resources Control Board*.⁹⁸ The SWRCB has not shown that it can invoke the constitutional limitation to justify the taking of water from senior water right holder SJTA members. Although the SWRCB has proper authority to deem the fish and wildlife resources a valid beneficial use of water under the California Constitution,⁹⁹ the at-

⁹⁶ *Id.*

⁹⁷ U.S. CONST. amend. XIV, § 1.

⁹⁸ *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82 (1986).

⁹⁹ See generally CAL. WATER CODE § 1243 (West 1971 & Supp. 1995) and CAL.

tempt by the SWRCB to bootstrap jurisdiction through this constitutional basis may be inappropriate unless the use, or method of use, by the SJTA is found to be uniquely wasteful or unreasonable. If the use or method of diversion is consistent with the practices of other water users with junior priorities, then the senior water right priorities should be recognized. The Water Quality Control Plan fails to indicate that any diversions by members of the SJTA are either wasteful or unreasonable. It is, therefore, questionable whether the SWRCB may use the constitutional basis to support the export subsidy to the Export Projects.

The SWRCB may not be able to invoke the public trust doctrine limitations to justify the taking of water from senior right holder SJTA members. Although the SWRCB has the right to impose public trust concerns on all *post*-1914 appropriations, it may lack jurisdiction to retroactively apply the public trust doctrine to riparians and pre-1914 appropriators. The SJTA senior water rights are pre-1914 water rights and do not appear to be subject to the jurisdiction of the SWRCB. Accordingly, it is questionable whether the SWRCB has authority to invoke the public trust doctrine against the SJTA pre-1914 senior water right holders.

The SWRCB, in the Water Quality Control Plan, appears to have granted a *de facto* water right to the Export Projects despite the area of origin laws. In making this prescription, it appears that the SWRCB failed to consider, let alone determine, whether the water thus diverted is necessary for the present uses or future development of the areas of origin. This *de facto* water right may be considered a violation of the area of origin laws.

The SWRCB states that it would, and shortly will, initiate a water rights proceeding following adoption of the Water Quality Control Plan to allocate responsibility for meeting the objectives among water rights holders in the Bay-Delta watershed.¹⁰⁰ However, the flow standards established at Vernalis and the export rights of the Export Projects are each a *basis* for the contribution allocation. The Vernalis flow requirement is set at a level that requires taking of water rights regardless of the outcome of the hearing.

The Bay/Delta Accord and the Water Quality Control Plan are not a solution to California's water wars. The Bay/Delta Accord and the Water Quality Control Plan can, however, be a founda-

CONST., art. X, § 2 (1928, amended 1976).

¹⁰⁰ WATER QUALITY CONTROL PLAN, *supra* note 1 at 27.

tion on which to build towards a long term solution. However, the SWRCB should amend its Water Quality Control Plan to remove the illegal subsidy to the Export Projects to enable dialog between the SWRCB and senior water right holders on the San Joaquin River, including the SJTA. Since, the Bay-Delta Accord was between the State of California and the federal government and exporters, a consensus of water right holders, in addition to the state and federal government, is necessary to reach a final long term solution to this problem.

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