

# THE COUNTY OF ORIGIN DOCTRINE: INSUFFICIENT AS A LEGAL WATER RIGHT IN CALIFORNIA

## INTRODUCTION

Approximately fifty years ago, California passed two statutes to provide protected status for the geographical area where surface water originates. These laws favored the claims of rural areas over the demands of larger, more populated areas elsewhere in the state. Although these statutes have not previously been invoked in state conflicts over water appropriation, they are now coming to the forefront as rural areas, recreational enterprises, and environmental groups look for new ways to retain water from large irrigators and the large unquenchable urban areas of the state. An examination of the statutes' principles, collectively known as the Area of Origin Doctrine, results in the conclusion that these statutes may be ineffective as a defense against other, more established doctrines in California water law.

### I. ORIGIN OF THE DOCTRINE

In 1943, the California Legislature passed two Area of Origin laws to be incorporated into the State Water Code. The first, California Water Code section 10505, is known as the County of Origin statute.

“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.”<sup>1</sup>

The second is the Watershed of Origin statute, California Water Code section 11460, which has a wider breadth since it is not restricted by political boundaries, but encompasses the entirety of the land served by a river. It also designates protection not only to the

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<sup>1</sup> CAL. WATER CODE § 10505 (Deering 1999). Added to the code in 1943.

area in a communal sense, but to the inhabitants and property owners individually.

In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently 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.<sup>2</sup>

These statutes provide that the State Water Resources Control Board, which is legally empowered with granting the appropriation of water, shall consider the needs for development of the county where the water originates prior to those of other applicants. The statutes thus seek to apply the doctrine to provide sweeping protection for the county in all instances of appropriation.<sup>3</sup>

Another section in the Water Code applies the law directly to restricting the exchange of waters, which is a vital element in the irrigation goals of the Central Valley Project (CVP).<sup>4</sup> Later, in 1951, the Attorney General issued an opinion that the statutes applied to both state and federal government projects within the CVP.<sup>5</sup>

In 1943, the lawmakers set out to reassure a water-conscious public, whose fears had been heightened by the CVP, the largest reclamation project ever attempted by the federal government, carried out under the 1902 Reclamation Act.<sup>6</sup> The valley population, made up primarily of small rural counties, had reason to be wary, having witnessed the lengthy and violent exchange between the water czar of Los Angeles, William Mulholland, and the farmers and ranchers of the Owens Val-

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<sup>2</sup> CAL. WATER CODE § 11460 (Deering 1999). Under Article 3, Limitation of Powers. Added to code in 1943.

<sup>3</sup> CAL. WATER CODE § 10505.5 (Deering 1999) (stating in part that "Every application . . . , and any permit . . . , and any license . . . , 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.")

<sup>4</sup> CAL. WATER CODE § 11463 (Deering 1999) (stating in part that "[N]o exchange of the water of any . . . area for the water of any other . . . may be made . . . unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied . . . ")

<sup>5</sup> CAL. WATER CODE § 11128 (Deering 2001) (stating in part that "The limitation prescribed in Section 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 . . . ")

<sup>6</sup> Internet interview with Christopher Campbell, Water Law attorney, Baker, Manock & Jensen. Fresno, California (August 19, 2001).

ley. The residents of the Owens Valley, whose vital water sources were coveted by Mulholland for the expansion of Los Angeles, were never able to generate enough support to challenge the incursion in their water rights, even when the United States Senate became involved in 1906. The city proponents were successful in obtaining the support of President Roosevelt, which resulted in the passage of legislation authorizing the 1913 Los Angeles Aqueduct.<sup>7</sup>

The demise of the Owens Valley continued throughout the next two decades, both economically and ecologically, and the controversy found its way to a 1927 state Senate Hearing in Sacramento in 1927.<sup>8</sup> When the chief counsel for the City of Los Angeles stated that “regardless of what had happened in the Owens Valley, Los Angeles would enter any other part of the state, *including the San Joaquin Valley*, if it needed the water,” the Central Valley Residents became alarmed.<sup>9</sup> Although the Senate hearing resulted in a resolution criticizing the City of Los Angeles, the confrontation escalated. When the City declared that no reparations would be made (as it had promised earlier), the result was two months of violence. The ranchers blew up parts of the aqueduct and the City sent guards with Tommy guns and sawed-off shotguns to protect it.<sup>10</sup> Fearing repercussions for the violence, Mulholland tried economic means to subdue the ranchers, and found a way to discredit the only bank in the area. This resulted in the forfeiture of many of the ranchers’ mortgages.<sup>11</sup> This dealt the Owens Valley an economic blow from which it could not recover.<sup>12</sup> Mulholland ultimately prevailed and obtained the water resources he wanted, but the California State Senate sent an investigative committee to the Owens Valley in 1931.<sup>13</sup> The recommendations from the committee contributed to legislation requiring planned development for water throughout the state, with the Department of Finance as the mediator in case of conflict. This power of mediation now resides in the State Department of Water Resources.<sup>14</sup> The adoption of the Area of Origin statutes also resulted in part from these recommendations as protection

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<sup>7</sup> William L. Kahri, *The Politics of California Water: Owens Valley and the Los Angeles Aqueduct, 1900–1927*, 6 Hastings W.-N.W.J. Env. L. & Pol’y 255, 255 (2000).

<sup>8</sup> *Id.* at 263.

<sup>9</sup> *Id.*, emphasis added.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 264.

<sup>12</sup> *Id.*

<sup>13</sup> Kahri, *supra* note 7, at 267.

<sup>14</sup> *Id.* note 66 at 267. Chapter 720, Statutes of 1931 (Senate Bill 141-Crittenden).

for local watersheds.<sup>15</sup>

Whether the rural residents of California felt completely protected by the Area of Origin statutes is unknown. However, they withdrew their opposition to the diversion of Sacramento River water, which was vital to the federal government's plan for development of the Central Valley, and supported the planned canal system.<sup>16</sup> The fast-growing population of Southern California, however, began to speculate that the Area of Origin Doctrine would be a threat to their continued water rights, since water sources were mainly in the northern part of the State.<sup>17</sup>

In 1955, the California Attorney General issued two opinions regarding the Area of Origin Doctrine, declaring the code sections constitutional and declaring they applied to the proposed State Water Project, a California project for flood control and water distribution.<sup>18</sup> These opinions escalated the controversy over the distribution of water throughout the state. The state legislature responded by passing the 1959 Burns-Porter Act, which authorized an issuance of \$1,750,000,000 in general obligation bonds for the construction of reservoirs and canals. It was passed with the assurance of adequate water in California, both for the areas where water originated and for those areas which needed imported water. It was then necessary to create an adequate water delivery system.<sup>19</sup>

Although the bond passed with only a slight margin in 1960, the State Water Resources Control Board, joined with the huge undertaking of the federal reclamation projects, created a Mars-like web of water canals traversing the state. This infrastructure is supported by complex water exchange contracts and promises, that have, over the years, been successful in maintaining the delicate balance of water allocation which sustains California. Because of this balance, the Area of Origin laws exist in California basically unchallenged.

Similar County of Origin laws are being passed in other states throughout the West as municipalities become more possessive about

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<sup>15</sup> *Id.* at 267.

<sup>16</sup> Campbell, *supra* note 6.

<sup>17</sup> Ronald B. Robbie & Russell R. Kletzing, *Area of Origin Statutes: The California Experience*, 15 Idaho L. Rev. 419, 426-43 (1979). Reprinted in Joseph L. Sax, et al., *Legal Control of Water Resources*, 203, (2000).

<sup>18</sup> 25 Op. Cal. Att'y Gen. 8 (1955); 25 Op. Cal. Att'y Gen 32 (1955).

<sup>19</sup> Robbie & Kletzing, *supra*, at 425-431. The Act was also called the California Resources Development Bond Act, codified in the CALIFORNIA WATER CODE §§ 12930-12944.

their local resources.<sup>20</sup> Eastern states are also contemplating incorporating basin of origin laws to protect local resources from water transfer. The Regulated Riparian Model Water Code contains such a provision.<sup>21</sup>

Modern critics of existing water management theories agree that the Area of Origin Doctrine invokes questions regarding public policy.<sup>22</sup> Probably for this reason, it has not been a guide in the development of water use in California. It has not been used to date as a legal challenge nor has it been applied as a successful defense in a challenge of water allocation.<sup>23</sup>

Further critical analysis of the relative vitality of the Area of Origin Doctrine makes it clear that, despite the veneration for the doctrine in State Water Resources Control Board decisions and various local contractual documents, it is only a supporting theory. If directly challenged, the doctrine will be unable to protect the rights of those for which it was enacted. An examination of the competing legal theories of water rights in California supports this premise, as does an assessment of the basic nature of the laws as they relate to the Area of Origin Doctrine.

## II. EVOLUTION OF CALIFORNIA WATER RIGHTS: DOCTRINAL COEXISTENCE

Water law and policy in California now follow what is considered a hybrid doctrine.<sup>24</sup> Instead of a linear evolution in legal rights to water and water use, the courts have expanded their recognition of a variety of rights. The result is that no clear legal superiority of any specifically-acknowledged rights has emerged. Thus, there is no clear expectation of a court's decision in any legal conflict. An overview of the development of water rights in California explains this expansion.

In the western United States, water is not as plentifully nor as naturally distributed as in the saturated East. The need for transported

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<sup>20</sup> JOSEPH L. SAX, ET AL., *LEGAL CONTROL OF WATER RESOURCES*, 198. Oregon Rev. State § 537.801 et seq; Neb. Rev. State § 46-289; Wy Stat. § 41-2-121 (a)(ii)(9E)(VIII).

<sup>21</sup> *Id.* at 81. Regulated Riparian Model Water Code, water law committee Water Resources Planning & Management Division of the American Society of Civil Engineers (1997)

<sup>22</sup> *Id.* at 198, quoting A. Dan Tarlock, *New Water Transfer Restriction: The West Returns to Riparianism*, 27 *Water Resources Res.*, 987 (1991).

<sup>23</sup> *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 139 (1986).

<sup>24</sup> *Id.* at 101.

water has been essential to the economic development of California, and so the diversion from traditional riparian rights followed the needs of the economy over time. The riparian doctrine was modified historically to serve first the mining economy, and later for irrigated agriculture and the growing population. Subsequently, the courts began to recognize rights under the theories of appropriation, prescription and beneficial use.

### A. Riparian Rights

Most surface water rights in this country are patterned after those of England, where a riparian owner was entitled to the water flowing by or through his property.<sup>25</sup> Irrigation was usually unnecessary due to the adequate rainfall and plentiful water sources. Large townships or cities established themselves by large rivers or lakes.

In the New World, inhabitants modified the English structure depending upon the availability of water and the type of industry which utilized it. On the east coast, where water conditions are similar to those of England, the agrarian use of land in small parcels continued, and the riparian rights to the river remained the same. It was not until the population growth and industrial development of the Twentieth Century increased the need for water that the concept of reasonable use began to compete with riparian rights in the eastern states.<sup>26</sup>

In the West, where conditions are arid, the amount of land needed to create a profitable enterprise was greater.<sup>27</sup> As the economic needs varied, conflicts over water rights emerged. The resolution process was complicated, especially since, at the beginning of statehood, the majority of the land was still public. An appropriative right may have been established by use prior to the ownership which gave the owner riparian rights.<sup>28</sup> In the longest California Supreme Court decision ever written, the Court in 1886 reaffirmed California's reliance on English common law in *Lux v. Haggin*, and legally supported and recognized riparian rights as superior to appropriative rights.<sup>29</sup> However, it is important to note that the courts still allowed riparian rights to be overcome by public use, including irrigation water for "farming

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<sup>25</sup> SAX, *supra* note 20, at 30.

<sup>26</sup> *Id.* at 39.

<sup>27</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>28</sup> *Id.*

<sup>29</sup> *Lux v. Haggin*, 69 Cal. 255, 263 (1886).

neighborhoods.”<sup>30</sup>

### B. Appropriative Rights

Lack of water served to repel settlers from much of Nevada and California, but did not deter those seeking to make a fortune from mining. Needing water for the mechanics of mining, and with no landowner to impede them, the miners simply appropriated the water they needed from a nearby stream or river.<sup>31</sup> They followed the same rule in respecting water rights that they did in land rights: “first in time, first in right.”<sup>32</sup> Conflict resolution became even more difficult as courts sought to recognize both riparian and appropriative rights. Prior appropriation became as important legally as riparian rights in settling disputes, creating a right in priority to the one who appropriated first.<sup>33</sup>

### C. Beneficial Use

In California, as the population grew, and the transient mining population moved into settlements and farms, the scarcity of water created a further change in water rights. Anti-riparian organizations began to emerge after the *Lux* and 1926 *Herminghaus* decisions.<sup>34</sup> The court in *Herminghaus* found that a riparian owner had priority rights to the surface water of the San Joaquin River over the plans of Southern California Edison to build a hydroelectric plant.<sup>35</sup> In 1920, the court in *Waterford Irrigation District v. Turlock Irrigation District* held that “it is against the policy of the state to permit any waste by an appropriator of the waters . . . every person owning a water right must use it for a beneficial purpose.”<sup>36</sup> The application of the beneficial use doctrine and the sentiment after the *Herminghaus* decision accounted for the easy approval of the California Constitutional Amendment of 1928.<sup>37</sup> This amendment applied the Doctrine of Beneficial Use to all

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<sup>30</sup> *Id.*, at 264.

<sup>31</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>32</sup> SAX, *supra* note 20, at 284.

<sup>33</sup> *Antioch v. Williams Irrig. Dist.*, 188 Cal. 451, 459 (1922) (finding that the first user has rights in time over subsequent users not claiming ownership).

<sup>34</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>35</sup> *Herminghaus v. Southern California Edison*, 200 Cal. 81, 91 (1926).

<sup>36</sup> *Waterford Irrigation District v. Turlock Irrigation District et al.*, 50 Cal. App. 213, 221 (1920).

<sup>37</sup> SAX, *supra* note 20, at 304.

users of water.

The right to water or to use or flow of water in or from 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.<sup>38</sup>

Application of this doctrine changed water rights for all Californians. The riparian owner, as well as the primary appropriator, could no longer claim rights to all the water he wanted, but only to that which he could put to a beneficial use.<sup>39</sup>

The California courts then began the lengthy task of defining beneficial use. In the absence of a recognized formula to determine reasonableness of use in relation to amounts used, the courts allowed the trier of fact to determine beneficial use on an individual basis.<sup>40</sup> The highest priority of use is recognized in the California Water Code as domestic use; the next highest is irrigation.<sup>41</sup> Other beneficial uses are power, frost protection, municipal, mining, industrial, fish and wildlife preservation, aquaculture, recreational, water quality, stock watering, and heat control.<sup>42</sup> In addition, the Water Code identifies the storing of water underground and the release of water to control water quality as beneficial uses.<sup>43</sup>

Historically, conflicts between riparian, appropriative, and prescriptive rights were settled by allocating unappropriated waters. However, as time went on, less and less water was left unappropriated. Thus, the Doctrine of Beneficial Use and governmental powers of eminent domain rose in importance as determining factors in dispute resolution.

#### D. *The Public Good Doctrines*

Several doctrines have been upheld by the California courts over time to ensure water rights to large municipalities, or to the public in general. The earliest was the Pueblo Doctrine, which insured municipi-

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<sup>38</sup> Cal. Const. art. X § 2. Formerly Const. art. XIV, § 3, adopted November 6, 1928.

<sup>39</sup> *Id.* "Riparian rights in a stream or 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 . . ."

<sup>40</sup> *Prather v. Hobert*, 24 Cal. 2d 549, 561(1944).

<sup>41</sup> CAL. WATER CODE § 106 (Deering 1999).

<sup>42</sup> CAL. CODE OF REGULATION, tit. 23, §§ 659-660 (Deering 2001).

<sup>43</sup> CAL. WATER CODE § 1242, 1242.5 (Deering 1999).



palties a water source. Recently, these doctrines have been used to support environmental and aesthetic claims for rivers and water sources.<sup>44</sup>

### 1. The Pueblo Doctrine

When the United States acquired a vast amount of territory from Mexico in the Treaty of Guadalupe Hidalgo, the United States government recognized existing titles to property.<sup>45</sup> These existing titles gave the holder status as a Pueblo. The Court in *Lux* recognized the rights of these Mexican land grants as including riparian water rights.<sup>46</sup> The California courts consistently recognized these rights. In 1895, the court supported the right of the City of Los Angeles, based on its status as a Pueblo, to appropriate water for municipal use from the Los Angeles River.<sup>47</sup> This created the Pueblo Doctrine, which gave water rights to municipalities based on their status as a Pueblo in existence prior to California statehood.<sup>48</sup> Modernly, a 1975 California Supreme Court decision again upheld the pueblo rights of Los Angeles for water, and extended its rights to groundwater supplies.<sup>49</sup>

### 2. Public Use Doctrine

Public Use Doctrine is used when the water needs of the public are given priority over the owner of the water rights. The Public Use Doctrine was applied in *Collier v. Merced Irrigation District* on behalf of the Irrigation District as a public corporation. In *Collier*, the public's interest in erecting a dam affected the rights of a downstream riparian owner.<sup>50</sup> The court found that the needs of the public took priority. Although required to compensate the owner, the District was able to invoke the power of eminent domain over the owner.<sup>51</sup> The theory of the public's need for water superceding a private use was codified in Section 1 of Article XIV of the California Constitution, protecting the water for the use of the public. This section dedicates "all water appropriated now or in the future to public use, and in the control of the

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<sup>44</sup> *National Audubon Society v. Superior Court of Alpine County* 33 Cal. 3d 419, 441 (1983).

<sup>45</sup> *SAX*, *supra* note 20, at 309.

<sup>46</sup> *Lux v. Hagin*, 69 Cal. 255, 329 (1886).

<sup>47</sup> *Vernon Irrigation Company v. City of Los Angeles*, 106 Cal. 237, 251 (1895).

<sup>48</sup> *Id.*

<sup>49</sup> *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199, 251 (1975).

<sup>50</sup> *Collier v. Merced Irrigation District*, 213 Cal. 554, 558 (1931).

<sup>51</sup> *Id.* at 564.

State.”<sup>52</sup>

In 1956, the court in *Rank v. Krug* determined that public use could only be invoked at “the time at and before the suit was filed.”<sup>53</sup> Since that time, courts have consistently held that a public use claim to water can only be applied to what is actually taken and used, not to water which the municipality intends to take in the future.<sup>54</sup> In *Trussell v. City of San Diego*, the city was unable to apply the Public Use Doctrine in a riparian challenge against the City’s appropriation of water because there was no current public use.<sup>55</sup> In 1985, the court in *Wright v. Goleta Water District* reaffirmed the rule that a public use must have attached prior to the action for the doctrine to apply.<sup>56</sup>

### 3. Public Trust Doctrine

The concept of the government as a trustee charged with protecting the natural resources on behalf of the entire population of the state is emerging as another component in California water disputes.<sup>57</sup> Originally protecting the tidelands, the public trust doctrine has been relied upon in recent victories of environmental groups seeking to protect the waterways of California for natural habitats and recreational activities.<sup>58</sup> In *National Audubon Society*, the court challenged the traditional beneficial uses of domestic use and irrigation by stating that the *results* of usage must also be considered, referring to the environmental impact of water uses.<sup>59</sup> The court pointed out that emphasis on uses such as environmental may have overall benefit.<sup>60</sup> There is some feeling that the court’s decision to withhold the water in Mono Lake from the domestic needs of Los Angeles has been beneficial, creating the need to build and use water reclamation facilities and water conservation programs.<sup>61</sup> Local municipal governments and environmental groups are now considering employing the Public Trust Doctrine to challenge existing water uses throughout the state to protect regional environmental concerns. Trinity County is evaluating use of the doc-

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<sup>52</sup> Cal. Constitution, art. XIV, § 1.

<sup>53</sup> *Rank v. Krug*, 142 F. Supp 1, 134 (S.D. CA N.D. 1956).

<sup>54</sup> *Wright v. Goleta Water District*, 174 Cal. App. 3d 74, 78 (1985).

<sup>55</sup> *Trussell v. City of San Diego*, 172 Cal. App. 2d 593, 615 (1959).

<sup>56</sup> *Wright v. Goleta Water District*, *supra* at 78.

<sup>57</sup> *National Audubon Society v. Superior Court of Alpine County* 33 Cal. 3d 419, 441 (1983).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 448. *Emphasis added.*

<sup>60</sup> *Id.* at 434-35.

<sup>61</sup> *SAX*, *supra* note 20, at 554.

trine to challenge existing water appropriations of the Trinity River.<sup>62</sup>

### III. HISTORY OF THE AREA OF ORIGIN DOCTRINE IN LITIGATION

In the almost sixty years since its passage in California, the absence of formal challenges to the Area of Origin Doctrine appears to confirm the doctrine's position as a major theory of water allocation in California. In reality, the opposite is true. The two statutes which make up the Doctrine have led sheltered lives, remained, up until now, unchallenged within the state, and appear infrequently in state-federal conflicts. The Doctrine was described in 1986 by the California Court of Appeals in *United States v. State Water Control Board*, as "reserv[ing] to the Area of Origin an undefined preferential right to future water needs." This description seems justified by the fact that the Doctrine remains unused as a legal claim.<sup>63</sup> The statutes have not appeared in case law in the state, nor have they been used as a primary legal protection or challenge to water rights in any suit in the state.

The statutes have appeared in opinions by the California Attorney General. In 1955, the California Attorney General stated in an opinion that the statutes did not violate the reasonable and beneficial mandate of the California Constitution, Article X section 2 for all water use.<sup>64</sup> In the same year the Attorney General also determined that the statutes were applicable to water in the Central Valley Project.<sup>65</sup> The Attorney General also mentioned the Watershed of Origin statute in a 1957 opinion which determined the geographical boundaries of the Feather River Project.<sup>66</sup>

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<sup>62</sup> Telephone interview with Tom Stokley, Sr. Planner, County of Trinity (Sept. 20, 2001).

<sup>63</sup> *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 139 (1986).

<sup>64</sup> 25 Ops. Cal. Att'y Gen. 8, 25 (1955).

<sup>65</sup> *Id.* at. 9."In the circumstances specified in the statute, Water Code sections 10505 and 11460 would require that water which had been put to use in the operation of the Central Valley Project in areas outside the County of Origin, or the watershed of origin and areas immediately adjacent thereto, be withdrawn from such outside areas and made available for use in the specified areas of origin. 3) Water Code sections 11460 and 11463 are applicable to the United States in its operation of the Central Valley Projects insofar as the law of California is concerned but compliance therewith is dependent upon the fact that the United States has affirmatively elected to comply with state law in this respect."

<sup>66</sup> 29 Ops. Cal. Att'y Gen. 136, 135 (1957) (declaring Sutter and Yuba Counties as within the Sacramento River watershed in the Feather River Project).

### A. Federal Litigation

The statutes have been used, however, in Federal litigation. Since the origins of federal reclamation projects in California, a struggle against federal control of California's water resources has existed. The Area of Origin Doctrine gains validity by being used as California's weapon in this struggle.<sup>67</sup> As the most identifiable localized legislation with predetermination for water use, the Doctrine is a thread running through the two protracted legal battles involving the State of California and the federal government over the Reclamation water. Appearing as a supplemental defense in the ten years of litigation over the federal government's right to impound the water in Friant Dam, the Area of Origin Doctrine was used by plaintiffs to support their claims that the government had broken a promise to supply the area water from the Dam.<sup>68</sup>

Twenty miles northeast of Fresno, Friant Dam creates Millerton Lake from the build-up of the San Joaquin River. The lake is located in Fresno County, and the river is the dividing line between Fresno and Madera Counties. From Friant Dam, water is diverted using the Madera and Friant-Kern canals to the eastern side of the San Joaquin Valley. The canals supply irrigation water to farms in Tulare and Kern counties. The farmers on the western side of the San Joaquin Valley which were dependent on the downstream water from the San Joaquin River now receive their water from various northern rivers, through the Delta-Mendota Canal.<sup>69</sup> The area between Friant Dam and the input of the Delta-Mendota canal is approximately sixty miles, and is completely dependent upon release of water from the dam to maintain any viability of the river.<sup>70</sup>

Although the federal reclamation authorities had assured the riparian landowners that this sixty-mile stretch of land would receive water from the dam, the landowners received notice in 1947 that water would no longer be released.<sup>71</sup> In litigation against the reclamation district, the landowners joined with the City of Fresno and various irrigation districts to petition the court for a reasonable amount of water to be released for present and prospective uses.<sup>72</sup> Plaintiffs relied on the related case of *City of Fresno v. Edmonston*, where the City claimed

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<sup>67</sup> Rank v. Krug, 42 F. Supp. 1, 150 (1956).

<sup>68</sup> *Id.* at 48.

<sup>69</sup> *Id.* at 44.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 48.

<sup>72</sup> *Id.* at 37.

rights to Friant Dam water for municipal use through the Area of Origin Doctrine.<sup>73</sup> After a detailed analysis of many theories, the District Court found in favor of Plaintiffs, and also held that the City of Fresno had a preferred right under the Area of Origin Doctrine.<sup>74</sup> The United States Supreme Court, however, upheld the Appellate Court's reversal, finding that the United States was able to take the water through its powers of eminent domain.<sup>75</sup>

The federal government's power of eminent domain continues to trump California's Area of Origin statutes. In the companion case, *Fresno v. California*, the lower court relied upon the County of Origin statute. The United States Supreme Court reversed the lower court, finding that the federal government's power of eminent domain took precedence over California's Area of Origin statute.<sup>76</sup>

California and the federal government clashed again in the series of cases from 1972 to 1982.<sup>77</sup> Here, the controversy centered on the ability of the State Water Resources Control Board to impose conditions on the federal government's application for reclamation water from the New Mellones Dam.<sup>78</sup> The state used the Area of Origin statutes to support the claim that the United States must abide by the decisions of the State concerning unappropriated water.<sup>79</sup> On certiorari, the United States Supreme Court declared that Section 8 of the 1902 Federal Reclamation Act gave states the power to impose a condition on application for water if such condition was "not inconsistent with clear congressional directives."<sup>80</sup> On remand, the District Court affirmed and required the federal government to abide by the Area of Origin laws.<sup>81</sup>

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<sup>73</sup> *Fresno v. Edmonston*, 31 F. Supp. 421, 429 (E.D. CA 1955).

<sup>74</sup> *Rank v. Krug*, 142 F. Supp. 1, at 184. (1956).

<sup>75</sup> *Dugan et al. v. Rank et al.*, 372 U.S. 609, 622 (1963).

<sup>76</sup> *Fresno v. California*, 372 U.S. 627, 630 (1963).

<sup>77</sup> *Environmental Defense Fund, Inc. et. al v. Armstrong*, 487 F.2d 814 (9th Cir. 1973); *United States v. California*, 403 F. Supp. 874 (E.D. CA 1975); *California et. al. v. United States*, 438 U.S. 645 (1978); *United States v. California*, 509 F. Supp. 867 (E.D. CA 1981); *United States v. California*, 694 F.2d 1171 (9th Cir. 1982).

<sup>78</sup> *United States v. California*, 403 F. Supp. 874, 888. (1975).

<sup>79</sup> *Id.* at 897.

<sup>80</sup> *California et al. v. United States*, 438 U.S. 645, 650 (1978). Section 8 Reclamation Act of 1902 "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the law of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . ."

<sup>81</sup> *United States v. California*, 509 F. Supp 867, 898 (9th Cir. 1981).

The California Attorney General's 1955 Opinion seems particularly prescient in light of the above conflicting positions of the United States Supreme Court in the Area of Origin Doctrine.

Water Code sections 11460 and 11463 are applicable to the United States in its operation of the Central Valley Projects insofar as the law of California is concerned, but compliance therewith is dependent upon the fact that the United States has affirmatively elected to comply with state law in this respect.<sup>82</sup>

The real issue in these cases is whether federal law preempts state law in this area. As Justice White pointed out in his dissent in *California v. United States*, the Supreme Court had previously found that County of Origin rights do not survive Congress' power of eminent domain.<sup>83</sup> Arguably, interpretation of the power of the Area of Origin Doctrine hinges on the Supreme Court's view of federal supremacy at any given time.<sup>84</sup> It also seems that the Doctrine itself will not be the deciding factor in a future state-federal conflict.<sup>85</sup>

### B. California Application

Within California, the Area of Origin Doctrine has never been a litigating principle between local jurisdictions. It does appear by reference in many water application decisions by the State Water Resources Control Board in the context of future rights.<sup>86</sup>

Now, however, as the state's water resources are under greater demands, the Doctrine may have finally emerged as a primary legal challenge to water use. In the Westlands Irrigation District's petition to the State Water Resources Control Board, Westlands claims that the Area of Origin statutes allows it to have a right to the allocated water from Friant Dam.<sup>87</sup> If the challenge is successful, the careful balance of California's water priorities could be upset.

### C. The Westlands' Use of the Doctrine

The Westlands Irrigation District (hereafter Westlands) is the largest agricultural district in the state of California, encompassing 604,000

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<sup>82</sup> 25 Ops. Cal. Att'y Gen. 8, 9 (1955).

<sup>83</sup> *California*, 438 U.S. at 691.

<sup>84</sup> *See id.* at 671.

<sup>85</sup> *See id.*

<sup>86</sup> State Water Resources Control Board, Decision 1635, 186 (October 2, 1996).

<sup>87</sup> Westlands Water District Application to Appropriate Water, No. 31153 to the California State Water Resources Control Board, Division of Water Rights, filed Aug. 4, 2000.

acres primarily within Fresno County.<sup>88</sup> The majority of the land is owned by large agribusiness and large-tract landowners.<sup>89</sup> For the last decade, Westlands has been dealing with claims that it has caused environmental destruction by its irrigation runoff, mainly to Kesterson Reservoir.<sup>90</sup> One-third of its area, or approximately 200,000 acres, is under consideration for permanent removal from farming activities due to the irrigation runoff of selenium and other salts and elements which make it unfit for agriculture.<sup>91</sup>

Westlands receives a combination of state and federal water through the federal portion of the state aqueduct to the Delta-Mendota Canal from Northern California.<sup>92</sup> Over the last few years, Westlands has seen a reduction of this water. Such reduction is mainly due to redirections of the water as a result of environmental legislation involving the northern rivers and the Delta/Bay area and the 1995 California Water Quality Control Plan.<sup>93</sup> In 2000, Westlands petitioned the State Water Resources Control Board for up to 750,000 acre-feet of water from the San Joaquin River.<sup>94</sup> The amount in their request was for over forty percent of the 1.7 million acre-feet average annual flow of the San Joaquin river, which is entirely appropriated. The State Water Resources Control Board currently has permits for 2.1 million acre-feet of the San Joaquin River.<sup>95</sup>

Since all of the requested water has been allocated, an outcry has ensued.<sup>96</sup> Much of the requested water is currently funneled down the east side of the San Joaquin Valley, and is the only water source for

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<sup>88</sup> Fresno Bee, Tuesday, Sept. 18, 2001.

<sup>89</sup> Nicholas Brozovic, Janis M. Carey, David L. Sunding, *How Big Are Farms In Westlands?*, Department of Agricultural and Resource Economics, University of California (July 2001).

<sup>90</sup> Lloyd Carter *USA Confidential, Penthouse*, 64, 143, (Jan. 1999).

<sup>91</sup> Ascribe Newswire (June 12, 2001).

<sup>92</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>93</sup> Karen Spinardi, *Bay-Delta Water Quality Control Plan at Vernalis: A part of other Solutions to California's Water Wars?*, 6 S.J.Agric. L. Rev. 95 (1996) (stating "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").

<sup>94</sup> Westlands Water District Application to Appropriate Water, No. 31153 to the California State Water Resources Control Board, Division of Water Rights, filed August 4, 2000.

<sup>95</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>96</sup> AScribe Newswire (June 12, 2001).

many smaller landowners and growers in Visalia and Kern Counties.<sup>97</sup> Many current water users protested the application, stating that the water reduction would force 260,000 acres of crops out of production, as well as severely impact the economy of small rural communities on the east side of the valley.<sup>98</sup> Many protesters claimed superior appropriate, contractual, and riparian water rights.<sup>99</sup> Others protested on various legal grounds stating that the doctrine did not apply to stored water rights, and that part of Westlands District was not in the watershed or County of Origin.<sup>100</sup> The Natural Resources Defense Council filed a protest to protect their recent victory enforcing the release of water from Friant Dam for environmental purposes.<sup>101</sup> Trinity County responded with an official protest to the State Water Resources Control Board claiming that any additional water allocated to the Westlands District would be in violation of the unreasonable use prohibition in the California Constitution, and that the drainage problems and irrigation methods of the District constitutes “wasteful and unreasonable use of water.”<sup>102</sup> Trinity County’s protest takes the position that beneficial use should take precedence over the Area of Origin statutes of the Water Code. In total, there were eighteen official protests to the Westlands application, each with a different challenge to their County of Origin claim.<sup>103</sup> Additionally, there were unofficial protests made by environmental groups interested in the San Joaquin River and Delta/

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<sup>97</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>98</sup> Friant Water Users Authority, Protest to State of California Water Resources Board Application 31135 SWCB. (June 12, 2001).

<sup>99</sup> Contra Costa Water District, City of Fresno, Central Green Co, South Delta Water Agency and Alexander Hildebrand, San Joaquin River Exchange co, et al. Protest to State of California Water Resources Board Application 31135 (June 12, 2001).

<sup>100</sup> Metropolitan Water District of Southern California, Protest to State of California Water Resources Board Application 31135 (June 12, 2001).

<sup>101</sup> National Resources Defense Council, Protest to State of California Water Resources Board Application 31135 (June 11, 2001).

<sup>102</sup> County of Trinity Supplemental Information, Protest to State of California Water Resources Board Application 31135 (June 11, 2001).

<sup>103</sup> California Department of Fish and Game, California Sportfishing Protection Alliance, California Department of Water Resources, Central Delta Water Agency, State Water Contractors, San Francisco Bay Association and Friends of the Trinity River, United States Bureau of Reclamation, and the Regional Council of Rural Counties: consisting of Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, El Dorado, Glenn, Inyo, Lake, Lassen, Madera, Mariposa, Merced, Modoc, Mono, Nevada, Placer, Plumas, San Benito, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Tuolumne, and Yuba. Protests to State of California Water Resources Board Application 31135 (June 11, 2001).



Bay areas.<sup>104</sup>

In actuality, many of the protesters have an interest in preserving the Doctrine, as it might be relied upon in the future to give protection to their own water needs.<sup>105</sup> Reluctance to confront the legitimacy of the Doctrine exists in northern rural areas, where it is an important and necessary part of California's water strategy.<sup>106</sup> There can be little doubt that the Area of Origin statute directly addresses many interests of Westlands. For instance, the statute includes the riparian landowners of the area who form part of the District, and section 11460 of the California Water Code, which applies to state and federal water projects, specifically protects the beneficial needs of "any of the inhabitants or property owners therein."<sup>107</sup>

This application of the Doctrine to the Westlands' challenge is prominent not just for the notoriety of being the first to test the Area of Origin Doctrine, but because it disrupts the delicate balance of water resources within the state. Any disruption to the existing allocation system is a threat that carries far-reaching repercussions, not just for the water-source communities, but for the entire state.<sup>108</sup> Additionally, any decision on the vitality of the Area of Origin statutes may have overreaching effects under California law, by redefining the priority of existing water rights.

#### IV. POSSIBLE CHALLENGES TO THE AREA OF ORIGIN DOCTRINE

The Area of Origin Doctrine holds a revered place in the California water system. It exemplifies local control over local resources, defending them from larger, richer, or more powerful takers. The court in *Rank v. Krug* defended the Area of Origin Doctrine, describing the statutes as:

. . . an expression of public policy . . . [and] the doctrine of protection of the watershed of origin has been consistently applied by the California Courts in the protection of riparian and overlying rights in recognition of

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<sup>104</sup> AScribe Newswire (June 12, 2001), (stating the environmental groups include: California Trout, Save San Francisco Bay, The Bay Institute, Pacific Coast Federation of Fishermen's Associations, and Trout Unlimited).

<sup>105</sup> Telephone Interview with Tom Stokley, Sr. Planner for Trinity County (Sept. 19, 2001).

<sup>106</sup> *Id.* Trinity County has a variety of litigation pending for transfer of water to recreational and environmental uses, which would affect 50,000 acre-feet of water now going to Westlands.

<sup>107</sup> CAL. WATER CODE § 11460 (Deering 2001).

<sup>108</sup> E-Mail interview with Christopher Campbell, water law attorney for Baker, Manock and Jensen, Fresno, California (Aug. 5, 2001).

the facts that the natural advantages of a surface or underground water supply was the principal reason for the settlement and development of the counties and watersheds where water originates.<sup>109</sup>

Although it may be part of public policy, it is possible that the County of Origin Doctrine can be successfully challenged by other doctrines which place benefits for the entire state over local concerns. In addition, many of the existing water rights recognized in California conflict with the intent of the Doctrine. An analysis of those conflicts is important in determining whether Westlands' claim can override existing contractual and appropriative claims to the water of the San Joaquin River.

#### A. Eminent Domain

The eminent domain powers of the federal government powerfully defeated the County of Origin assertion by the City of Fresno in *Fresno v. United States*.<sup>110</sup> Although the Doctrine seemed to have been respected in *California v. United States*, it was not the legal basis the Court relied upon in applying state law to resolve the dispute. The legal basis was, instead, section 8 of the Federal Reclamation Act.<sup>111</sup> The Court held that the intent of the state must not be inconsistent with congressional directives.<sup>112</sup> Therefore, courts are allowed to interpret congressional intent to defeat the laws. The Court notes that "subsequent legislation authorizing a specific project may by its terms signify congressional intent that the Secretary condemn or be permitted to appropriate the necessary water rights for the project in question."<sup>113</sup> This argument is promoted by the United States Department of the Interior (DOI) in its protest of the Westlands application. The DOI states that Westlands' attempt to invoke the Area of Origin statutes would prevent historical water appropriations to users, degrading the operation of Friant Dam and the intent of its construction.<sup>114</sup>

#### B. Beneficial Use

The California Water Code provides that "water for domestic purposes is the highest use of water and that the next highest use is for

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<sup>109</sup> Rank v. Krug, 142 F. Supp. 1, 150 (1956).

<sup>110</sup> Fresno v. California, 372 U.S. 627, 630 (1963).

<sup>111</sup> California et al v. US, 438 U.S. 645, 676 (1978).

<sup>112</sup> *Id.* at 668.

<sup>113</sup> *Id.*

<sup>114</sup> United States Department of the Interior, Bureau of Reclamation, Protest to State of California Water Resources Board Application 31135 (June 7, 2001).

irrigation.”<sup>115</sup> The *Audubon* Court, however, tempers this priority by noting subsequent judicial decisions which interpret this policy to find “neither domestic and municipal uses nor in-stream uses can claim an absolute priority.”<sup>116</sup> For various water rights in the state to exist without prioritizing beneficial use, courts face the difficult task of balancing the “greatest good for the greatest number” against the protection of the minority.<sup>117</sup>

The Area of Origin Doctrine is also limited to beneficial use. The court in *Trinity v. Andres* discounts the Area of Origin Doctrine, requiring further proof of how the beneficial use of restoration of fish populations is necessary for the development of Trinity County.<sup>118</sup> Current legal scholars hint that water uses may be finding their way to the beneficial use list in order to make it easier for rural areas to defend the local access to water.<sup>119</sup>

In the historic priority of beneficial use, the domestic needs of a large metropolitan area could take precedent over the recreational needs of a smaller rural area. Under this doctrine, rural areas must prove that their needs are truly beneficial to compete with domestic and irrigation uses.

### C. Economics

The force of California’s irrigation and farming industry on the economy was so strong in the early days of statehood that it altered the centuries-old riparian theory of water rights.<sup>120</sup> Consideration of economic forces are still important in considering competing claims to water. The County of Trinity refers to economic factors in its official protest to the Westlands’ application, stating that Westlands’ use of water is unreasonable, on the basis that the majority of Westlands’ acreage is devoted to cotton production.<sup>121</sup> The irrigation techniques

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<sup>115</sup> CAL. WATER CODE, § 106 (Deering 1999).

<sup>116</sup> *National Audubon Society et al. v. Superior Court of Alpine County*, 33 Cal. 3d 419, 448 (1983).

<sup>117</sup> *Ivanhoe Irrigation District v. McCracken*, 47 Cal. 2d, 597, 658 (1957) (referring to the original intent of the federal reclamation projects).

<sup>118</sup> *County of Trinity v. Andres*, 438 F. Supp. 1368, 1386 (E.D. CA 1977).

<sup>119</sup> SAX, *supra* note 20, at 198 (naming instream flow appropriation, Indian water rights, public interest restriction, endangered species acts, aquatic ecosystem restoration, and public trust claims as “devices calculated to keep water at home”).

<sup>120</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>121</sup> *County of Trinity, Protest to State of California Water Resources Board Application 31135*, 3. (June 11, 2001).

utilized in the District have created a highly saline soil, unfit for most crops. Cotton is highly salt tolerant but many claim it is not an economically-effective crop.<sup>122</sup> Agricultural subsidies are routinely allocated to the cotton grower. In addition, 487,000 acre-feet of water is used annually for growing cotton in the Westlands District.<sup>123</sup> The annual domestic water needs of a family of five is one acre-foot. The amount of water used to support this unprofitable cotton enterprise is enough to supply the annual domestic water needs of almost 2.5 million people.<sup>124</sup>

The farmers in the Westlands Irrigation District farm on large tracts of land. Over 600,000 acres is owned by 318 farm networks (groups of farms in common ownership).<sup>125</sup> The economic benefits of cotton-growing are realized by a small group of farmers and supporting businesses in the area, while the costs of subsidies and irrigation run-off is borne by the government. California has currently spent over 50 million dollars to study the problem of toxic irrigation run-off from the Westlands' farmlands.<sup>126</sup> The economic cost to the state for the cotton enterprise may outweigh any Area of Origin claim.

#### D. Public Good Doctrines

Recent decisions, such as *Natural Resources Defense Council v. Houston*, in 1992, are willing to do for environmentalists that which they had been unable to do for riparian owners in the 1950's: ensure water flow to the San Joaquin south of Friant Dam.<sup>127</sup> The Public Good Doctrines can pose significant challenges to the Area of Origin Doctrine if they represent a benefit to the entire state. Utilizing the Public Good Doctrines, the court may find that the interest of the population as a whole is superior to an Area of Origin claim.

The Pueblo Doctrine has been upheld by the courts as a recognized right.<sup>128</sup> Although the original claim concerned water in their own watersheds, the three largest pueblos (Los Angeles, San Diego, and San

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<sup>122</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>123</sup> County of Trinity, *supra* note 120, at 3. 2,435,000 people.

<sup>124</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 21, 2001) (relying on California State Water Resources Control Board figures).

<sup>125</sup> Nicholas Brozovic, Carey and Sunding, *supra* note 88, at 1.

<sup>126</sup> CARTER, *supra* note 89, at 146.

<sup>127</sup> *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1133 (9th Cir. 1992).

<sup>128</sup> *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199, 251 (1975).

Francisco) now rely on imported water for their existence.<sup>129</sup> There has been no determination by the courts that the Pueblo Doctrine may take precedence over an Area of Origin Doctrine if there is a conflict.

The Public Use Doctrine is another challenge to the Area of Origin Doctrine. Under the Public Use Doctrine, the Area of Origin claim would fail if adhering to it would interfere with an *existing* public use. The City of Fresno is allocated 60,000 acre-feet per year of water from the San Joaquin River, and protests Westlands' claim on the basis of prior right.<sup>130</sup> Although the Area of Origin Doctrine was designed to protect *future* needs of the area, this may not be enough for the court to find it superior to an existing public use.<sup>131</sup>

Modernly, the Public Trust Doctrine was used to successfully block the exportation of water to an out-of-area appropriator.<sup>132</sup> In *National Audubon Society v. Superior Court of Alpine County*, the Court determined that the Public Trust Doctrine could enable the State to revoke any previously granted rights.<sup>133</sup> The Court determined that it was the "state's authority as a sovereign" which granted that authority.<sup>134</sup> Therefore, courts may consider a water right based on the Area of Origin Doctrine as a revocable right under the Public Trust Doctrine.

#### E. Prior Appropriation

The Westlands' claim implies that the Area of Origin claim is superior to a prior appropriator.<sup>135</sup> The language of the statute seems to support this, claiming that the Area of Origin has "prior right to all the water reasonably required."<sup>136</sup> The court does not utilize the theory of prior appropriation when groundwater is shared and needs to be restricted, nor in times of drought.<sup>137</sup>

Many of the protesters of the Westlands' application claim prior appropriation rights are superior to that of Westlands. In reality, the appropriators are only contractors, as the Bureau of Reclamation has the

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<sup>129</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>130</sup> City of Fresno, Attachment to Protest to State of California Water Resources Board Application 31135 (June 11, 2001).

<sup>131</sup> CAL. WATER CODE §11460.

<sup>132</sup> *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 427 (1983).

<sup>133</sup> *Id.* at 440.

<sup>134</sup> *Id.* at 425.

<sup>135</sup> Westlands Application, *supra* note 93, at 1.

<sup>136</sup> CAL. WATER CODE § 11460 (Deering 1999).

<sup>137</sup> *Pasadena v. Alhambra*, 33 Cal. 2d 908, 933 (1949).

sole permit to divert the water at Friant Dam.<sup>138</sup>

Until now, reclamation contracts have only been challenged at the point of renewal.<sup>139</sup> The Westlands Irrigation District contract expires in 2007.<sup>140</sup> The varying dates of the contracts may make other water districts and municipalities who had contracted with the Reclamation District earlier than the Westlands District prior appropriators. Since these contracts are federal in nature, the court may feel that any decision voiding them would be contrary to the intent of congress, which is not allowed under the ruling by the Court in *California v. United States*.<sup>141</sup>

### F. Stored Water

The Metropolitan Water District of Southern California protest to the Westland's application states that the Area of Origin Doctrine does not apply to stored water.<sup>142</sup> There was a specific reference to the water in Friant Dam, prior to the release into the San Joaquin river or a canal. However, there is no such qualifying language excluding stored water in either of the two statutes.<sup>143</sup> The timing and intent of the laws were in reference to the reclamation projects, which include dams and other storage facilities. California Water Code section 11463 directly applies to "construction and operation by the department of any project" which includes the storage of water.<sup>144</sup>

### G. The United States Supreme Court's Definitions

One of the greatest challenges to Westlands' Area of Origin claim is the existing United States Supreme Court's definition of core terms of the watershed of origin statute as part of the Area of Origin Doctrine. In *Fresno v. California*, the Supreme Court states that the City of Fresno should not be granted preference under the County of Origin Doctrine.

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<sup>138</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>139</sup> See *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1124 (1998).

<sup>140</sup> Lloyd Carter, Water Law Professor, Lecture at San Joaquin College of Law (Sept. 13, 2001).

<sup>141</sup> *California et al. v. US*, 438 U.S. 645, 650 (1978).

<sup>142</sup> Metropolitan Water District of Southern California, Protest to State of California Water Resources Board Application 31135 (June 12, 2001).

<sup>143</sup> CAL. WATER CODE §§ 10505, 105056.2, 11460, 11463 (Deering 2001).

<sup>144</sup> CAL. WATER CODE § 11463 (Deering 2001).

The area of service from Friant Dam would include Kern and Tulare Counties as well as Fresno and Madera. The preference under the Acts is not limited to that area closest to the stream, but extends beyond the watershed and to areas adjacent thereto which can 'conveniently be supplied with water therefrom,' which from the map would seem to include the Friant-Kern as well as the Madera Canal areas.<sup>145</sup>

From this definition, it appears that the area of service that "can conveniently be supplied with water" includes the area supplied by *improvements* on the watershed, since Kern and Tulare were only "conveniently" supplied with water from the San Joaquin river after the construction of Friant Dam and the canal system.<sup>146</sup> The Supreme Court's definition also impacts the State Water Resources Control Board's protest that the Westlands District is too remote from the San Joaquin River to be considered the Area of Origin.<sup>147</sup> If the improvements create a greater watershed area, the already-nebulous boundaries of the watershed of origin are blurred even further, weakening any legal force the Doctrine may carry.<sup>148</sup>

#### V. CONCLUSION

In light of the mixed-doctrine approach to water resource claims held by the California judicial and legislative system, the courts have failed to develop a set of basic rules for resolving conflicts.

The Area of Origin Doctrine was developed to protect local interests in primarily rural watershed areas. In the fifty-eight years since the passage of the two statutes which codify the Doctrine, they have done little to protect the residents of these areas. Future attempts to preserve water for local areas may find that the Area of Origin Doctrine is ineffective as the long-term effects of environmental planning and the tremendous population concentrated in some metropolitan areas make it difficult to rank one geographical area a higher priority over another.<sup>149</sup> Just as the profitable economic development of the state has influenced the direction of California water law to date, the overall state economy, rather than regional interests, may influence future water rights decisions.

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<sup>145</sup> *City of Fresno v. California*, 372 U.S. 627, 630 (1963).

<sup>146</sup> *Rank v. Krug*, 42 F. Supp. 1, 45 (1956).

<sup>147</sup> State of California Water Resources Board, State Water Resources Control Board Protest to Application 31135 (June 12, 2001).

<sup>148</sup> *City of Fresno*, 372 U.S. at 630.

<sup>149</sup> SAX, *supra* note 20, at 206.

The invocation of the County of Origin Doctrine gives the Court an opportunity to protect rural communities from larger, more expansive neighbors. However, it also gives the Court and legislators an opportunity to re-examine the applications of the constitutional directive of highest beneficial usage, and create a template for future decisions. The large political questions of both directions, and the forces supporting them, have kept the California Water Laws in the current state of "mixed-theory." It may be that the resolution of the Westlands' challenge, or further challenges utilizing the Doctrine, will mandate the direction of California water priorities. The court needs to be cautious in application of the County of Origin Doctrine, because setting a precedent in this area would allow the re-examination and possible challenges to the existing water allocations which allow water to be transported out of the local watershed. This would not only consume the courts' resources, but weaken the balance of water distribution upon which California depends. The Doctrine may need to stay an unused and unsupported legal theory to allow the continued growth of the State.

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