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Report RL34554

*California Water Law and Related Legal Authority Affecting
the Sacramento-San Joaquin Delta*

Cynthia Brougher, American Law Division

July 1, 2008

Abstract. This report provides a summary of California's dual system of water rights, which includes riparian and prior appropriation doctrines, and regulation of those rights by the state. In particular, the report discusses considerations used in the process of regulating water usage, including the public trust doctrine, the rule of beneficial use, and the no injury rule. The report discusses the California water projects, the projects' rights, and access to water by other users. Significant court decisions and relevant statutes that affect the Delta are explained as well.

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CRS Report for Congress

California Water Law and Related Legal Authority Affecting the Sacramento-San Joaquin Delta

July 1, 2008

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Prepared for Members and
Committees of Congress

California Water Law and Related Legal Authority Affecting the Sacramento-San Joaquin Delta

Summary

The Sacramento-San Joaquin River Delta (the Delta) is formed by the confluence of the north-flowing San Joaquin River, the south-flowing Sacramento River, and the San Francisco Bay, to which the delta of the two rivers is linked. The 1,153-square-mile estuary is the hub of California's extensive water supply system. The Delta provides water to more than 25 million people and habitat for various species, including the threatened delta smelt and endangered chinook salmon. As such, the Delta has endured decades of competing water demands. During this time, the Delta ecosystem has experienced environmental degradation, increasing regional water demands, and a decrease in reliable water supplies for urban, agricultural, and natural areas.

The numerous stakeholders associated with the Delta include agricultural, urban, industrial, environmental, and recreational interests. In order to provide water to the various users, two major water projects were created: the federal Central Valley Project and the State Water Project. Concerns have been raised about the effectiveness of the regulation of these projects and the Delta waters generally both to meet the needs of water users and to avoid environmental impacts to water quality and species. Specifically, in late 2007, a federal judge ordered a reduction in the amount of water pumped out of the Delta to preserve the habitat of endangered fish in the Delta, meaning less water for areas that depend on the water projects for their water supply. In June 2008, Governor Schwarznegger declared a state of drought for the entire state of California. These events pose significant impacts on California's water supply. As a matter of oversight of the impacts of water flow and water management in the Delta, the House Natural Resources Committee held a subcommittee hearing on the effect conditions in the Delta have on the endangered species there.

This report provides a summary of California's dual system of water rights, which includes riparian and prior appropriation doctrines, and regulation of those rights by the state. In particular, the report discusses considerations used in the process of regulating water usage, including the public trust doctrine, the rule of beneficial use, and the no injury rule. The report discusses the California water projects, the projects' rights, and access to water by other users. Significant court decisions and relevant statutes that affect the Delta are explained as well.

Contents

Introduction	1
California Water Rights	2
Acquiring Water Rights	2
Priority of Water Rights	2
Modification of Water Rights and the No Injury Rule	2
Rule of Reasonable Use and the Public Trust Doctrine	3
The Water Projects and Water Rights	3
Settlement Contracts	4
Exchange Contracts	4
Contractual Rights to Water	4
Regulation of Water Rights and Water Quality in the Delta	5
Water Rights Regulation	5
Water Quality Oversight	6
Litigation of Water Rights and Management in the Delta	7
The <i>Racanelli</i> Decision	7
The <i>State Water Resources Control Board Cases</i>	8
Selected Litigation Regarding Flow Reductions in the Delta	9
Congressional Authority to Act and Current Interest	10

California Water Law and Related Legal Authority Affecting the Sacramento-San Joaquin Delta

Introduction

The Sacramento-San Joaquin River Delta (the Delta) is formed by the confluence of the north-flowing San Joaquin River, the south-flowing Sacramento River, and the San Francisco Bay, to which the delta of the two rivers is linked. The 1,153-square-mile estuary is the hub of California's extensive water supply system.¹ The Delta provides water to more than 25 million people and habitat for various species, including the endangered delta smelt. As such, the Delta has endured decades of competing water demands. During this time, the Delta ecosystem has experienced environmental degradation, increasing regional water demands, and a decrease in reliable water supplies for urban, agricultural, and natural areas. Numerous categories of stakeholders have an interest in water flowing through the Delta, including agricultural, urban, industrial, environmental, and recreational interests. In 2007, a federal court ordered flow restrictions on the Delta water projects to prevent the negative effect water diversions were having on species in the Delta ecosystem.² This decision requires federal and state entities to reduce pumping water in two large water projects and therefore has had significant effects on the water supply of California.

In 1959, the state enacted the Delta Protection Act, which provided a specific law to govern Delta waters based on the unique problems posed by the Delta.³ The Delta Protection Act provides for protections against the two major problems — salinity control and adequate supply.⁴ These problems stem from an “uneven distribution of water resources.”⁵ Quantitatively, the areas in California in which demand for water is highest are also the areas in which the supply is lowest, causing shortages for users — largely south of the Delta. Qualitatively, the Delta is affected by saltwater intrusion, caused by the inflow of saline tidal waters and the diversion of fresh water that would normally counterbalance the inflow. The Delta and its ecosystem are also affected by contaminants from urban and agricultural runoff.

¹ General information about the Delta can be found at [<http://baydeltaoffice.water.ca.gov/>].

² *Natural Resources Defense Council v. Kempthorne*, No. 1:05-cv-01207-OWW-GSA (E.D. Cal. 2007). This decision is often referred to as the *Wanger* decision.

³ Cal. Water Code § 12200 et seq.

⁴ Cal. Water Code § 12202.

⁵ *United States v. State Water Resources Control Board (Racanelli)*, 182 Cal. App. 3d 82, 98 (Cal. Ct. App. 1986).

California Water Rights

Acquiring Water Rights. California law provides for several limits on the use of the state's waters. Because the waters of California are considered to be "the property of the people of the State," anyone wishing to use those waters must acquire a right to do so.⁶ California follows a dual system of water rights, recognizing both the riparian and prior appropriation doctrines.⁷ Under the riparian doctrine, a person who owns land that borders a watercourse has the right to make reasonable use of the water on that land. Under the prior appropriation doctrine, a person who diverts water from a watercourse (regardless of his location relative thereto) and makes reasonable and beneficial use of the water acquires a right to that use of the water. Before exercising the right to use the water, appropriative users must obtain permission from the state through a permit system run by the State Water Resources Control Board (the Board).

Priority of Water Rights. California law provides for a hierarchy of these rights for users sharing water that may not meet all users' needs.⁸ Because riparian users share the rights to the water with other riparians, no one riparian user's right is considered superior to another's riparian right. Therefore, riparian rights are reduced proportionally in times of shortage. With regard to appropriative rights, the person's right that was appropriated first is considered superior to later appropriators' rights to the water. Between the two types of rights, users with riparian rights generally have superior claims to those who have appropriative rights.⁹ That is, riparians generally may fill their needs before appropriators, and appropriators fill their needs according to the order in which they secured the right to the water.¹⁰

Modification of Water Rights and the No Injury Rule. Water rights may be modified under certain circumstances. If a right is acquired by appropriation, it is approved for a *specific place* and *purpose of use*, which can be changed only with the Board's permission.¹¹ Under what is known as the no injury rule, the Board

⁶ Cal. Water Code § 102. *See* National Audubon Society v. Superior Court, 33 Cal. 3d 419, 441 (Cal. 1983).

⁷ *See In re Determination of Rights to Water of Hallett Creek Stream System*, 44 Cal. 3d 448, 455 (Cal. 1988); National Audubon Society v. Superior Court, 33 Cal. 3d 419, 441 (Cal. 1983); *People v. Shirokow*, 26 Cal. 3d 301, 307 (Cal. 1980).

⁸ These rules are specific to California. Rules in other western states may differ.

⁹ While users acquire appropriative rights through a permit system, riparian users are required to file a statement with the Board that declares their right. With regard to later riparians, the California Supreme Court has noted that an appropriator may have a superior right to a riparian if the appropriator acquires his right before the riparian secures his right in the land. *See Lux v. Haggin*, 69 Cal. 255, 344-49 (Cal. 1844).

¹⁰ *See Meridian, Ltd. v. San Francisco*, 13 Cal. 2d 424, 445-47 (Cal. 1939).

¹¹ Cal. Water Code § 1701.

cannot approve changes to water permits unless “the change will not operate to the injury of any legal user of the water involved.”¹²

Rule of Reasonable Use and the Public Trust Doctrine. Under its constitutional and statutory rules, the state requires that water users, regardless of the manner by which they acquired their rights, are all limited to uses that are reasonable and for a beneficial purpose.¹³ Courts have upheld this limitation, known as the rule of reasonable use, as a valid exercise of the state’s police power to regulate water for public benefit.¹⁴ The California Supreme Court recognized the public trust doctrine as a further limitation on water rights. The court held that the state acts as a trustee for the people of the state with a duty to protect the waters, which are held in a public trust, from harmful diversions by water rights users.¹⁵

The Water Projects and Water Rights

Two major water projects transfer water throughout the state. The Central Valley Project (CVP) is a federal project run by the U.S. Bureau of Reclamation (Reclamation). The State Water Project (SWP) is run by the California Department of Water Resources (DWR). The projects “divert water from the rivers that flow into the Delta and store the water in reservoirs. Quantities of this stored water are periodically released into the Delta. Pumps situated at the southern edge of the Delta eventually lift the water into canals for transport south....”¹⁶

Both projects acquired appropriative rights, receiving several permits at various points between 1927 and 1967.¹⁷ Section 8 of the Reclamation Act of 1902¹⁸ requires Reclamation to comply with state law, including requiring Reclamation to acquire water rights for the CVP.¹⁹ If Reclamation found it necessary to take the water rights

¹² Cal. Water Code § 1702. *See also* Kidd v. Laird, 15 Cal. 161 (Cal. 1860); Hill v. Smith, 27 Cal. 476 (Cal. 1865).

¹³ Cal. Const. Art. X, § 2; Cal. Water Code § 100.

¹⁴ *See People ex rel. State Water Resources Control Board v. Forni*, 54 Cal. App. 3d 743, 753 (Cal. Ct. App. 1976); *Chow v. City of Santa Barbara*, 217 Cal. 673, 701-03 (Cal. 1933).

¹⁵ *National Audubon Society*, 33 Cal. 3d 419, 445-48 (Cal. 1983). The public trust doctrine continues to be invoked in the dispute over Delta water regulation. In March 2008, two environmental groups filed a petition with the Board alleging that the Board is violating the public trust doctrine and state and federal laws “by allowing clearly excessive export of ... water.” Press Release, California Water Impact Network, Public Trust, Unreasonable Use Complaint Filed With State Board (March 19, 2008).

¹⁶ *Racanelli*, 182 Cal. App. 3d at 97.

¹⁷ For a discussion of the projects’ permit process, see *Racanelli*, 182 Cal. App. 3d at 106.

¹⁸ 43 U.S.C. § 383.

¹⁹ The U.S. Supreme Court has held that Section 8 “requires the Secretary to comply with state law in the ‘control, appropriation, use or distribution of water’” by a federal project. *See California v. United States*, 438 U.S. 645, 674-75 (1978). This requirement to comply with state law applied so long as the conditions imposed by state law were “not inconsistent

(continued...)

of other users, those users would be entitled to just compensation.²⁰ In some cases, Reclamation found it necessary to enter into “settlement” or “exchange” contracts with water users who had rights pre-dating the CVP.

Settlement Contracts. In 1964, in order to avoid legal problems that might arise if the CVP could not operate without interfering with other users’ water rights claims to the Sacramento River, Reclamation negotiated settlement contracts with users who held water rights predating the CVP (often referred to as Settlement Contractors). The settlement contracts provided an agreed upon allocation of water rights to the river. These contracts’ initial term was 40 years and the contracts are currently in the process of renewal.²¹

Exchange Contracts. Exchange contracts provide assurance that the needs of these users whose rights predated the CVP (often referred to as Exchange Contractors) would be satisfied. In entering these contracts, the Exchange Contractors sold their water rights on the San Joaquin River to the government, except for reserved water (water to which the Exchange Contractors held vested rights), and agreed not to exercise the reserved water rights in exchange for the government delivering specified amounts of substitute water.²² The terms of the contract are for “a conditional permanent substitution of water supply. The United States has a right to use the Exchange Contractors’ water rights ‘so long as, and only so long as, the United States does deliver ... substitute water in conformity with this contract.’”²³ To date, Reclamation has met this obligation by delivering CVP water. The water is pumped from the Delta and delivered south via the Delta-Mendota Canal.

Contractual Rights to Water. Reclamation, therefore, holds legal water rights to the water in the CVP and enters contracts with other users for water supply.²⁴ The water supplied to users under these contracts is determined by the terms of the contract, rather than the legal doctrines of water rights. These contracts incorporate the requirements of federal legislation and are made subject to federal

¹⁹ (...continued)

with clear congressional directives respecting the project.” *See id.* at 670-73; *see also* *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963). In the context of the CVP, a court has held that the permit conditions were consistent with the project purpose of river regulation. *Racanelli*, 182 Cal. App. 3d at 135. *See also* *United States v. State Water Resources Control Board*, 694 F.2d 1171 (9th Cir. 1982).

²⁰ *See Int’l Paper Co. v. United States*, 282 U.S. 399, 407 (1931); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 736-39 (1950).

²¹ For more information on Sacramento River Settlement Contract renewal, see [<http://www.usbr.gov/mp/cvpia/3404c/srsc/index.html>].

²² *See Westlands Water Dist. v. Patterson*, 337 F.3d 1092, 1096-97 (9th Cir. 2003).

²³ *Id.* at 1097.

²⁴ For a CVP-wide form of contract (CVP Contract) that Reclamation uses, see [http://www.usbr.gov/mp/cvpia/3404c/lt_contracts/cvpwide_final_form_contract_04-19-04.pdf].

Reclamation law.²⁵ Specifically, the contracts typically include provisions that address the possibility of water shortages that may affect users' access to water provided under their contract.²⁶ Generally, courts have allowed the government to reduce water allocations provided by contract if the reduction is made necessary by federal law, but the extent of liability depends on the terms of the specific contract used in each case.²⁷

Regulation of Water Rights and Water Quality in the Delta

The State Water Resources Control Board (the Board) is the state agency charged with water supply and water quality issues. It is authorized to regulate water rights permits and to regulate water pollution and quality control.²⁸

Water Rights Regulation. Although riparian rights are not a part of the state's permit system, the Board has the authority to regulate these rights to ensure beneficial use of the water through adjudications.²⁹ The Board has two duties when issuing appropriation permits: to determine the availability of surplus water, and to protect the public interest. A person who seeks to appropriate water must apply to the Board for a permit.³⁰ The Board's review of that application "must first determine whether surplus water is available, a decision requiring an examination of prior riparian and appropriative rights."³¹ Appropriation then may be made "for beneficial purposes of unappropriated water under such terms and conditions as in

²⁵ CVP Contract preamble.

²⁶ See CVP Contract art. 3(b) ("Because the capacity of the Central Valley Project to deliver Project Water has been constrained in recent years and may be constrained in the future due to many factors including hydrologic conditions and implementation of Federal and State laws, the likelihood of the Contractor actually receiving the amount of Project Water set out [in this contract] in any given Year is uncertain.").

²⁷ See *Stockton E. Water Dist. v. United States*, 76 Fed. Cl. 321, 358-59 (Fed. Cl. 2007) (Bureau not liable where reductions "occurred due to implementation of amendments to federal Reclamation law"); *O'Neill v. United States*, 50 F.3d 677, 682-83 (9th Cir. 1995) (contract provision relieving government of liability "for any damage ... arising from a shortage on account of errors in operation, drought, or any other causes" included protection for shortages caused by "the effects of subsequent Congressional mandates"). *But see Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (Fed. Cl. 2001) (holding that the federal government was liable when federal legislation forced reductions under state contract to which the federal government was not a party). Six years later, the same judge that wrote the *Tulare* decision repudiated the physical taking characterization, citing intervening caselaw and noting the absence of a physical diversion. See *Casitas Municipal Water Dist. v. United States*, 76 Fed. Cl. 100 (Fed. Cl. 2007). *Casitas* was argued on appeal to the Federal Circuit on May 7, 2008.

²⁸ Cal. Water Code § 179.

²⁹ See Cal. Water Code § 2501; see, e.g., *In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339 (Cal. 1979).

³⁰ See Cal. Water Code § 1375; *People v. Shirokow*, 26 Cal. 3d 301, 308 (Cal. 1980).

³¹ *Racanelli*, 182 Cal. App. 3d at 102-03 (citing *Temescal Water Co. v. Dept. Public Works*, 44 Cal. 2d 90 (Cal. 1955)). See also Cal. Water Code § 1375(d).

[the Board's] judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated."³² To determine whether an appropriation would be in the public interest, the Board must consider "any general or co-ordinated plan ... toward the control, protection, development, utilization, and conservation of the water resources of the State" and the relative benefit of "all beneficial uses of the water concerned."³³

Water Quality Oversight. The Board also has responsibility to regulate water quality. Under the federal Clean Water Act (CWA), the states must adhere to certain federal standards regarding water quality.³⁴ Although the federal law may not apply to salinity intrusion as a discharged pollutant, the law provides protections under water quality provisions.³⁵ Specifically, the CWA recognizes saltwater intrusion as a form of pollution meant to be regulated by the states under the planning process and water quality standards.³⁶ Each state is required to maintain a "continuing planning process" and once every three years each state pollution control agency must review its water quality standards, which are subject to EPA approval.³⁷ Water quality standards provide the framework for specific pollution control requirements that are contained in CWA permits for individual dischargers.

California's Porter-Cologne Water Quality Control Act³⁸ (Porter-Cologne Act) provides for a statewide program for water quality control to implement the federal CWA, as well as additional state requirements. Under the Porter Cologne Act, nine regional boards formulate and adopt water quality plans across the state, which are subject to the Board's approval.³⁹ The state Board sets the statewide policy for water quality control, and its authority to act in regard to the water control plan has been

³² Cal. Water Code § 1253; *see also* Cal. Water Code § 1255.

³³ Cal. Water Code §§ 1256-57. Section 1257 indicates that possible beneficial uses at least include "use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan." The Water Code explicitly provides that the Board must consider nonconsumptive uses such as the preservation of fish and wildlife and amounts necessary for protection of beneficial uses protected by water quality control plans. *See* Cal. Water Code §§ 1243, 1243.5. Among beneficial uses, § 1254 provides that domestic use is highest, then irrigation.

³⁴ For more information on the Clean Water Act and its requirements, see CRS Report RL30030, *The Clean Water Act: A Summary of the Law*, by Claudia Copeland.

³⁵ *See Racanelli*, 182 Cal. App. 3d at 108-09.

³⁶ *See id.* at 109 ("Thus, the federal act mandates certain planning responsibilities including formulation of water quality standards to provide salinity control. But the act contains no provision for either implementation of water quality standards or regulation of nonpoint pollution sources, matters of enforcement relegated to the states.").

³⁷ 33 U.S.C. §§ 1313(e)(1), (c)(1).

³⁸ Cal. Water Code § 13000 et seq.

³⁹ Cal. Water Code §§ 13240, 13245.

held to be very broad.⁴⁰ The plan must be the best reasonable option considering all present and future demands made on the waters and the values and benefits involved.⁴¹

Litigation of Water Rights and Management in the Delta

Over the decades since the construction of the water projects, there has been extensive litigation regarding water rights, Delta water management, and the regulation of permits and standards for water in the Delta. Some of the ensuing court decisions have affected the overall management of the Delta and are summarized in the following paragraphs.

The *Racanelli* Decision. In 1978, in the first exercise of its dual authority to regulate water supply and quality, the Board adopted a water quality control plan that established new standards for salinity control and protection of fish and wildlife in the Delta, pursuant to obligations under the CWA.⁴² In adopting the new plan, “the Board reconsidered existing water quality standards in light of current data concerning the effects on the Delta of the operations of the two water projects — the users with the greatest impact.”⁴³ The Board also issued Water Right Decision 1485, which modified permits held by Reclamation and the DWR for the water projects to implement the new standards. In 1986, a state appellate court upheld the modification of the water rights permits, but held that the water quality standards were insufficient in light of the scope of the Board’s duty to act in accordance with the Porter-Cologne Act.⁴⁴ The court also held that the Board “has the power and duty to provide water quality protection to the fish and wildlife that make up the delicate ecosystem within the Delta.”⁴⁵

The court emphasized that under the CWA the Board is charged by law with protecting beneficial uses of state waters, not protecting water rights.⁴⁶ The Board is obligated to establish standards that satisfy statewide interests and take account of the effects of all users.⁴⁷ The court noted that the Board must not disregard the effects of other users and instead must look at the impacts to the system

⁴⁰ See *Racanelli*, 182 Cal. App. 3d at 109-10; Cal. Water Code § 13000.

⁴¹ Cal. Water Code §§ 13000, 13241.

⁴² The CWA requires the states to implement water quality standards. See *Racanelli*, 182 Cal. App. 3d at 109. Through the Porter-Cologne Act, California implements these federal requirements and authorizes the Board to adopt water quality control plans. See Cal. Water Code § 13160.

⁴³ *Racanelli*, 182 Cal. App. 3d at 111.

⁴⁴ See *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82 (Cal. Ct. App. 1986). This opinion, known as the *Racanelli* decision, was upheld by the state Supreme Court.

⁴⁵ *Id.* at 98.

⁴⁶ *Id.* at 116.

⁴⁷ *Id.*

comprehensively, including “past, present, and probable future beneficial uses of water as well as water quality conditions that could reasonably be achieved through the coordinated control of *all* factors which affect water quality in the area.”⁴⁸ The Board’s actions created a standard that was enforceable only against the projects rather than against all users, which the court held was an improperly narrow exercise of its authority.⁴⁹ The court also noted that in addition to its authority to regulate the effect of consumptive uses of the water, the Board also has authority to regulate nonconsumptive instream uses, such as protection for fish and wildlife.⁵⁰

In order to implement the state’s water quality control plan, the Board must use its power to regulate “water rights to control diversions which cause degradation of water quality.”⁵¹ Although the court held that the Board failed to properly take action in response to the quality control plan by modifying only two of the users’ permits, it held that the Board has the authority to modify permits to meet its water quality standards.⁵² State law specifically authorizes the Board to reserve jurisdiction to modify the permits it issues, which the Board did in the case of the projects.⁵³ The Board is also authorized to modify permits “under its power to prevent waste or unreasonable use or methods of diversion of water.”⁵⁴ The court noted that “determination of reasonable use depends upon the totality of the circumstances presented” and “varies as the current situation changes.”⁵⁵ The court held that the balancing of the considerations regarding the use of water is “one the Board is uniquely qualified to make.”⁵⁶

The State Water Resources Control Board Cases. In 1995, the Board adopted a new water quality control plan that provided 17 beneficial uses in three categories (municipal and industrial, agricultural, and fish and wildlife) and permitted water flow to be regulated because of its impact on beneficial uses.⁵⁷ The implementation of this plan led to another series of lawsuits. After setting flow objectives in the plan, the Board implemented alternate flow objectives upon which interested parties agreed instead. A state court held that it was improper for the Board to implement provisions not included in some provision of the plan it

⁴⁸ *Id.* at 118 (emphasis in original) (internal quotations and citations omitted).

⁴⁹ *Id.* at 119-20.

⁵⁰ *Id.* at 148-49.

⁵¹ *Id.* at 125. The court noted that “Congress has expressly declared a policy of noninterference with state authority to allocate water quantities within its jurisdiction and has declined to supersede or abrogate water rights established by any State.” *Id.* (internal quotations omitted).

⁵² *Id.* at 127.

⁵³ *Id.* at 127-28 (citing Cal. Water Code § 1394).

⁵⁴ *Id.* at 129 (noting the state constitutional limit on reasonable use of water).

⁵⁵ *Id.* at 129-30 (internal quotations omitted).

⁵⁶ *Id.* at 130.

⁵⁷ *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 701 (Cal. Ct. App. 2006).

adopted.⁵⁸ In other words, if the Board believed the alternate objectives were appropriate, it needed to account for those objectives in the plan, which is the guiding authority of water quality control for the Delta.⁵⁹

Selected Litigation Regarding Flow Reductions in the Delta. Courts have allowed a reduction in the flows in some situations and mandated them in others (e.g., the 2007 *Wanger* decision). As discussed above, certain federal actions have led to decreased flows in the rivers of the Delta. For example, in the early 1990s, Endangered Species Act consultations regarding the newly threatened winter-run chinook salmon and delta smelt resulted in Reclamation pursuing alternative management of the CVP to avoid jeopardy to the species.⁶⁰ At the same time, Congress enacted the Central Valley Project Improvement Act which amended the project's authorization to include consideration of fish and wildlife preservation and allocated 800,000 acre-feet of water for fish and wildlife purposes (sometimes referred to as "b2 water").⁶¹ These events resulted in allocations being reduced by up to half in some years for some water contractors, which a federal court held was fair under the terms of the contract.⁶² Additionally, the question of how to account for the b2 water has been a recurring issue in litigation.⁶³

In other cases, courts have addressed reductions due to environmental conditions. One federal district court held that Reclamation did not act in an arbitrary and capricious manner when it reduced the amount of water released in response to a drought.⁶⁴ When Trinity County sued Reclamation in the late 1970s, it claimed that operation of the Trinity River Division of the CVP in response to drought conditions was in violation of federal Reclamation law, specifically that the reduced flows would not adequately preserve fish and wildlife.⁶⁵ Noting that the decision to reduce flows could be overturned only if it was found to be arbitrary and capricious, the court held that Reclamation appeared to consider the relevant factors and made a decision that seemed reasonable given the context of the situation.⁶⁶ Reclamation law required the Secretary of the Interior to adopt "'appropriate measures' for fish

⁵⁸ *Id.* at 690. The court construed the language of § 1258 to require the Board to comply with the plan, noting that although the language appears to be permissive, it is actually mandatory because a public duty is involved. *Id.* at 731-32.

⁵⁹ *See id.* at 719.

⁶⁰ *O'Neill*, 50 F.3d at 681.

⁶¹ *See* P.L. 102-575, tit. XXXIV, 106 Stat. 4600. Section 3406(b)(2) of the CVPIA provides the 800,000 acre-feet of water for fish and wildlife purposes, and thus is known as b2 water.

⁶² *O'Neill*, 50 F.3d at 681-84.

⁶³ *See, e.g.,* *San Luis & Delta-Mendota Water Auth. v. United States Dep't of Interior*, 236 F.R.D. 491 (E.D. Cal. 2006); *Bay Inst. of San Francisco v. United States*, 87 Fed. Appx. 637 (9th Cir. 2004) (unpublished); *Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457 (9th Cir. 1994).

⁶⁴ *County of Trinity v. Andrus*, 438 F.Supp. 1368 (E.D. Cal. 1977).

⁶⁵ *Id.* at 1371-74.

⁶⁶ *Id.* at 1381-82.

conservation” and the measures that had been adopted were appropriate in light of drought conditions, according to the court.⁶⁷ The statutory provision requiring consideration of measures for the preservation of wildlife could not be interpreted “in isolation from the management practices of the CVP as a whole.”⁶⁸

In 2007, the federal district court for the Eastern District of California addressed the issue of threatened species in the Delta by issuing an interim order that required specified water flows for management of the Delta’s resources to protect the delta smelt.⁶⁹ That order placed limits on the amount of water that could be pumped out of the Delta, and thus would affect water users downstream.⁷⁰

In times of water reductions, the Exchange Contractors are put in a unique situation. This is because their contracts differ from the general CVP contracts.⁷¹ As discussed above, because the Exchange Contractors had rights predating the CVP, their contracts provide a guarantee that they receive the entire share from Reclamation or that they could exercise their reserved rights to acquire that share. Therefore, it is possible that in times of shortage, though other users’ access to water is diminished, the Settlement and Exchange Contractors may still receive their entire share of water.⁷²

Congressional Authority to Act and Current Interest

Although water law is traditionally a matter left to the states, Congress has taken a role in the regulation of waters under its constitutional authority to regulate channels of interstate commerce. For instance, Reclamation law typically regulates water supplied via federal Reclamation projects. The Rivers and Harbors Act of 1937 that reauthorized the CVP typically regulates navigation and flood control. As discussed above, application of federal legislation has led to federal action in recent decades to protect environmental interests in the Delta. Congress may take a role in the current situation to redirect Reclamation’s authority in CVP operations or

⁶⁷ *Id.* at 1380.

⁶⁸ *Id.*

⁶⁹ *Natural Resources Defense Council v. Kempthorne*, No. 1:05-cv-1207 OWW GSA (E.D. Cal., December 14, 2007).

⁷⁰ *Id.* The order can be accessed online at [http://www.earthjustice.org/library/legal_docs/delta-smelt-final-remedy-order.pdf].

⁷¹ Some scholars have summarized the contract differences as follows: “The exchange contract differs from the standard CVP contracts in three respects. First, its term is perpetual. Second, in recognition of their preproject rights, the exchange contractors pay nothing for CVP water. ... Third, neither the acreage limitations of the Reclamation Act of 1902 nor the provisions of the RRA are applicable to these districts.” Brian E. Gray, Bruce C. Driver, & Richard W. Wahl, *Economic Incentives for Environmental Protection*, 21 ENVTL. L. 911, 970-71 (1991).

⁷² *See O’Neill*, 50 F.3d at 681; *Westlands*, 337 F.3d at 1097.

management. In May 2008, a House Natural Resources Committee subcommittee held a hearing on the management of salmon fisheries in the Delta.⁷³

Court decisions, agency actions, and other recent events, including the *Wanger* decision and the statewide drought declared in June 2008,⁷⁴ have brought heightened attention to the issues affecting water resources in California. These matters can be expected to remain of interest to Congress as new lawsuits arise over the management of the state's water resources and operations of the water projects. For instance, two environmental groups filed a petition before the Board in March 2008, alleging that the water projects' diversions continue to cause environmental problems, both for fish and for the water itself.⁷⁵ The groups claim that the Board has a duty to reduce pumping from the projects, including the CVP, because the excessive water exports from the Delta are in violation of the public trust doctrine required by state law.⁷⁶

⁷³ *Oversight Hearing Regarding Management of West Coast Salmon Fisheries*, Subcomm. On Fisheries, Wildlife and Oceans of the H. Comm. on Natural Resources, May 15, 2008.

⁷⁴ Citing below-average rainfall, low snowpack runoff, and significant court-ordered reductions in flows in the Delta, Governor Schwarzenegger declared a statewide drought in Executive Order S-06-08, *available at* [<http://gov.ca.gov/index.php?/press-release/9796/>].

⁷⁵ The complaint can be accessed at [http://lloydgcarter.com/files_lgc/PUMPSCASE_COMPLAINTCWINCSPAinpdf2031808.pdf].

⁷⁶ *Id.*