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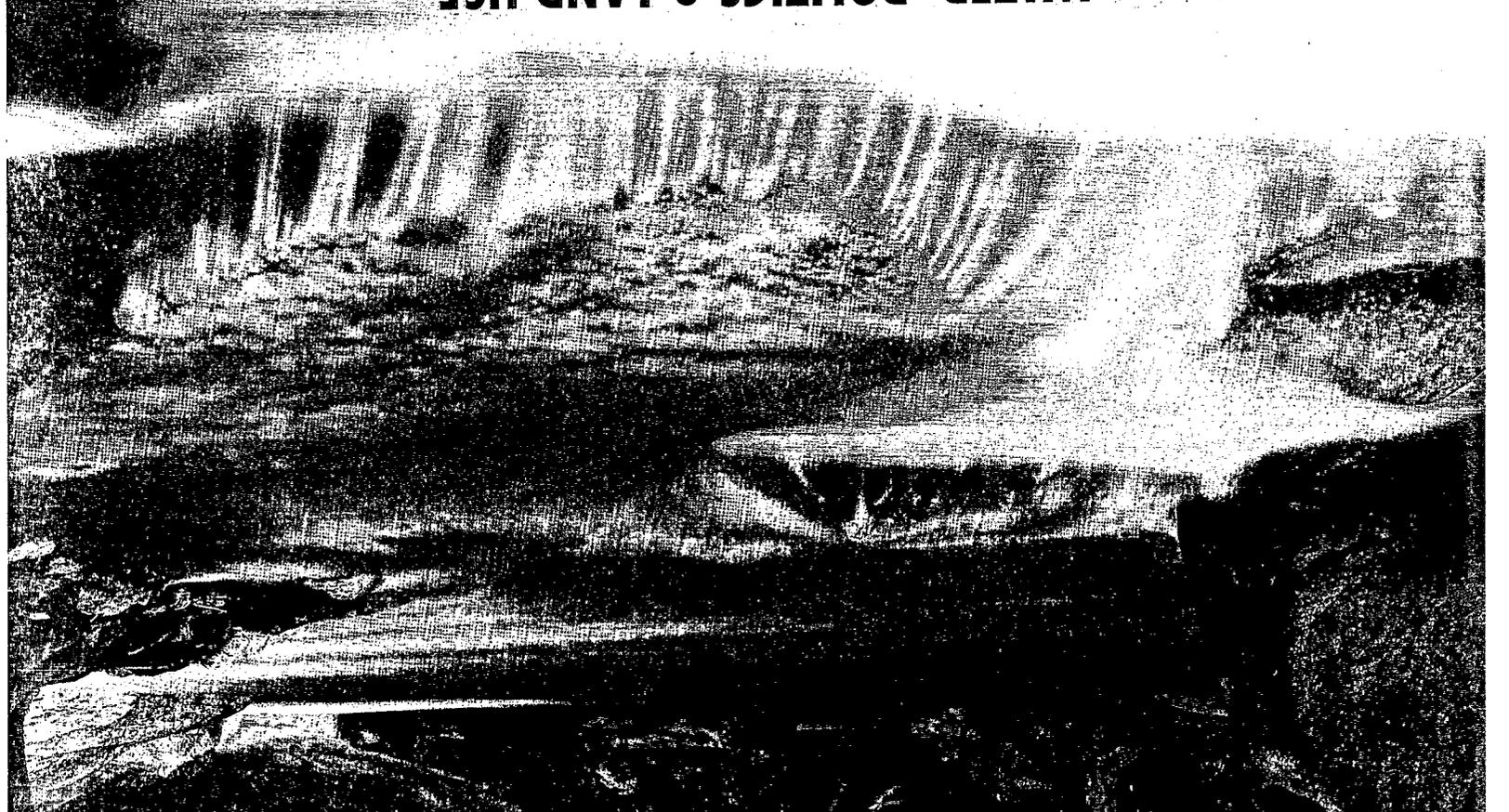
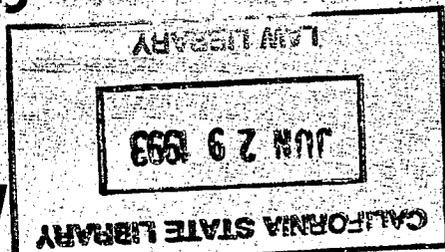


Curbing the Deterioration of
our Urban Environment

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A Changing Landscape

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WATER, POLITICS & LAND USE

A Changing Landscape

In California, nature put water in the north, but climate and jobs lured people south. The need to bring water to population centers and the phenomenal expansion of irrigated agriculture in California resulted in giant water delivery systems running hundreds of miles from the Sacramento Delta south and the Colorado River north. The water created wealth for its recipients, enabled large cities to grow in arid areas, and brought thousands of acres of desert under production. The geographic tenuousness of water availability is illustrated by the fact that Southern California imports almost 70 percent of its water supply; San Diego's water is 90-percent imported. The Central Valley farmlands, especially on the west side of the valley, depend to a great extent on water from the Sacramento Delta.



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Water transfers of this magnitude are not without their costs. Environmentalists charge that rivers are depleted, water quality is degraded, and wildlife is disappearing. Population increases of 600,000 new residents a year in a state of 30 million mean that more water must be found for urban areas. In the past five years, 900,000 acres of farmland have been lost to developers, according to the State Department of Agriculture.

In a state where land use depends on water availability, the lack of a unified water policy and the internecine battles over water allocation are literally changing the shape of our urban and rural landscape. Notwithstanding the big water systems, California's water supply has not kept pace with the state's growth. Six years of drought have depleted stored supplies in reservoirs and groundwater basins, but even in years of normal rainfall, there is not enough developed water for all uses. With water development at a stalemate, environmentalists, cities, and farms are competing with each other for a limited supply. See Weatherford, *California's Water Future: Owning-Up to Long Term Water Scarcity*, 1 CEB Land Use Forum 275 (Summer 1992).

The federal, state, and local aqueducts that move millions of gallons of water from Northern California rivers and the Colorado River to coastal cities and Central Valley farms are the focal points of the competition. Critics allege that these systems have caused enormous environmental damage to California's rivers and wildlife, and that despite the needs of a growing population, some of the water currently put to human use should be returned to the source streams and estuaries. Urban areas urge that irrigated agriculture does not merit its preferred status as the largest user of water from the federal and state water projects, and that some of that water should be transferred from farms to cities. A lack of administrative or legislative direction from the state has left the regulation of our water supply to the courts and the competing interests. Meanwhile, changing concepts of water rights have upset long-held water supply allocations.

These and other issues are addressed in the articles that follow. First, we explore voluntary water transfers as a means of reallocating scarce supplies. Given the complexity of water marketing issues and the controversy that surrounds

them, it would be impossible to present all the diverse views on this topic in one issue, but we do offer a sampling. Norman Hill, an attorney with the Department of Water Resources, provides an introduction to the topic, explaining the legal framework and pointing out some of the legal and political controversies surrounding water marketing (p 319). We present two views on the environmental issues involved in water transfers. Richard Roos-Collins, an attorney for the Natural Heritage Institute, points out the environmental benefits of carefully regulated water transfers (p 323), while Gary Bobker of the Bay Institute cautions that transfers regulated primarily by a free market system could privatize water rights and shortchange the environment (p 325). Two views of water transfers from the agricultural perspective are presented by Robert D. Clark, Manager of the Glenn-Colusa Irrigation District (p 328), and Paul M. Bartkiewicz, a Sacramento water rights attorney in private practice (p 331). While Bartkiewicz explores in detail the actual experience of the Yuba County Water Agency in participating in water transfers, Clark points out the vastly different impacts on agricultural communities of transfers of surplus or underutilized water and transfers of water currently used for agricultural production to remote urban communities. Finally, Carl Boronkay, General Manager of the Metropolitan Water District of Southern California (Metropolitan), and Timothy Quinn, Director of the State Water Project and Conservation Division of Metropolitan, discuss the importance of water transfers from agricultural use to urban uses as a method of supplementing urban supplies (p 334).

Next, we present two very different opinions on the role that water agencies should play in growth management. The issue is discussed by a former manager of the East Bay Municipal Utility District, Jerome Gilbert (p 338), and a current member of the board of directors of that district, Andrew Cohen (p 341).

Finally, the appropriate degree of protection for fish and wildlife resources in any water allocation is debated by two attorneys, Harold Thomas, an attorney with the Department of Fish and Game (p 345), and Stuart Somach, a Sacramento attorney who represents both developer and public agency clients (p 348).

The remainder of this article explores the evolution of water rights and use in California that has led us to the issues described above.

HISTORIC WATER RIGHTS SYSTEMS

A brief description of the historical water rights system in California should help in understanding the nature of the disputes about changing water uses and their effect on land use decisions. The fact that there are several kinds of water rights, most of which are not quantified and which often overlap or conflict, has injected tremendous uncertainty into planning and investment decisions.

A water right is a right of *use*, not of ownership of the water in its natural state. *Irwin v Phillips* (1855) 5 C 140. The right of use, though intangible, is a real property right. Thus, the law of water rights defines who may use water, and under what circumstances.

California water law is a plural system, derived from English common law, mining customs, and Spanish and Mexican precedents. The first water rights to be recognized by the courts, called *appropriative* rights, are an outgrowth of mining customs. Based on "first in time is first in right," the first person to divert water and put it to beneficial use has a superior claim to that amount of water over subsequent users. *Irwin v Phillips, supra*. The right is gained by diversion and use, and lost by nonuse. Although the doctrine of "prior appropriation" as it is called originated in the mining camps, subsequent court decisions have recognized it throughout the state. *Senior v Anderson* (1896) 115 C 496, 47 P 454.

Appropriative rights can be measured, are transferable, and can be used on land far from their source. The place and purpose of use and place of diversion may be changed as long as others are not injured. *Ramelli v Irish* (1892) 96 C 214, 31 P 41.

In 1913, the legislature adopted the Water Commission Act (Stats 1913, ch 506), which was ratified by popular vote in 1914, and forms the basis of our Water Code. An administrative agency, now called the State Water Resources Control Board (SWRCB), was created and a permit system for acquisition of water rights was established. That system is now the sole means of acquiring an appropriative water right to surface water. Wat C §1225. Pre-1914 appropriative rights are

still valid, but are not subject to the jurisdiction of the SWRCB.

Appropriation is only one way to acquire rights to surface waters. Riparian rights are also recognized water rights. This is the right of the owner of land abutting a watercourse to use the natural flow of the water for beneficial purposes on his or her land. The right is limited to the quantity reasonably necessary for use on the riparian land. Unlike an appropriative right, however, a riparian right is not transferable, is neither gained by use nor lost by disuse, is not quantified, and is not subject to the jurisdiction of the SWRCB. Unlike most other western states, California retained riparian rights as a form of private real property, together with the prior-appropriation system. The so-called "dual" system combining the two was crafted by an early California Supreme Court decision, *Lux v Haggin* (1886) 69 C 255, 4 P 919.

As an additional complication to any understanding of water rights, the Cities of Los Angeles and San Diego have pueblo rights that are paramount to all other rights, and that expand to accommodate the needs of the municipalities and their inhabitants within the original pueblo area. *Feliz v Los Angeles* (1881) 58 C 73; *San Diego v Cuyamaca Water Co.* (1930) 209 C 105, 287 P 475. Also, prescription—the acquisition of a water right by adverse possession—has been recognized as a means of acquiring a water right, although some doubt exists about its continuing validity as applied to surface water after the enactment of Wat C §1225, which prospectively made compliance with Water Code provisions the sole method of acquiring appropriative rights in California. *People v Shirokow* (1980) 26 C3d 301, 162 CR 30.

To make matters even more confusing, groundwater rights are subject to another doctrine: reasonable use and correlative rights, as enunciated by the California Supreme Court in 1903. *Katz v Walkinshaw* (1903) 141 C 116, 70 P 663. Owners of land overlying a groundwater basin are each entitled to a "fair and just proportion" of the available supply for use on overlying lands, as an incident of ownership of the land. The rights are not quantified, but are correlative with the reasonable needs of others overlying the same basin. Any surplus beyond the needs of the overlying owners can be appropriated for other than overlying

uses, on a first-in-time, first-in-right basis, but the overlying right is paramount. If the surplus ceases, the appropriative use must cease. Groundwater use is essentially unregulated by statute, and is not subject to SWRCB jurisdiction, or to any discretionary permit system. Some courts and water districts have made efforts to regulate groundwater, but statewide, only 11 groundwater management districts have been formed. Another eight basins (most of them in Southern California) have been adjudicated, the rights quantified, and a watermaster appointed to administer the provisions of the court judgment. The vast majority of groundwater basins in California are unregulated, and many are severely overdrafted as a result of uncontrolled pumping.

All of these kinds of rights can and do co-exist in the same watershed. Without a central agency to record and administer the water rights in the various stream systems, settling disputes has been left to the courts. The unpredictability of such outcomes thwarts both planning efforts and wise investment decisions.

MODERN CONCEPTS OF REASONABLE USE AND PUBLIC TRUST

The current fundamental principle of water law in California is found in Cal Const art X, §2, which states:

The right to water or to the 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. . . . This section shall be self-executing, and the Legislature may also enact laws in furtherance of the policy in this section contained.

For almost 100 years, California water law encouraged development and use by protecting the private property interest in water. State regulation of any kind was minimal. With increasing competition for water and changing social values, the constitutional provision quoted above, which was added in 1928 as article XIV, §3, has been interpreted by courts and the SWRCB to limit uses perceived as "unreasonable," and to reallocate water for more beneficial purposes. In the process, the status of water rights as private property has become subordinated to a policy

of treating the actual utilization of such rights as a privilege. Those familiar with the process through which property rights in land have been subjected to increasing regulatory control will see many similarities.

As cities grew and reached out for water, their water needs often conflicted with paramount riparian rights on nearby streams. The cities required dams to store water for year-round use, which deprived riparians of their right to the entire natural flow. In case after case, rather than protecting the riparian right and thus requiring cities to acquire the right by condemnation, the California Supreme Court held that some exercises of the riparian right were "unreasonable," given the cities' needs and the relative benefits derived from urban uses of water. See, e.g., *Gin S. Chow v Santa Barbara* (1933) 217 C 673, 22 P2d 5 (claim to occasional flooding of islands in the Santa Ynez River); *Peabody v Vallejo* (1935) 2 C2d 351, 40 P2d 486 (use of spring floods to leach salts from land bordering Suisun Bay); *Joslin v Marin Mun. Water Dist.* (1967) 67 C2d 132, 60 CR 377 (gravel company receiving sand and gravel washed to its property by river). Because the uses were held to be "unreasonable," they were not protected by the California or U.S. Constitutions (and therefore not compensable) when weighed against the pressing needs of the cities or water agencies involved.

Now a firmly established principle of water law, the doctrine of reasonable use can be applied to all water rights. It has been used to compel conservation (*Imperial Irrig. Dist. v State Water Resources Control Bd.* (1990) 225 CA3d 548, 275 CR 250), and is one justification for reweighing the water rights of all water right holders in the Delta, regardless of how senior or junior the right may be (*U.S. v State Water Resources Control Board* (1986) 182 CA3d 82, 227 CR 161). Just as in land use law, when a regulation "goes too far" it will become a compensable taking, but no case has yet held that applying the reasonable use provisions of the California Constitution constitutes a deprivation of property in violation of the fifth amendment.

Yet another environmental protection exists in the application of the public trust doctrine to water. In 1983, this doctrine was extended to navigable waters and their non-navigable tributaries in a case

involving historic diversions from streams feeding Mono Lake by the City of Los Angeles. *National Audubon Soc'y v Superior Court* (1983) 33 C3d 419, 189 CR 346. "Public trust" means that the state, as trustee for the people, has a duty to take public trust interests in navigation, recreation, fish and wildlife, and aesthetics into account in the allocation of water resources, and to balance public trust uses against the public interest to be served by an out-of-stream appropriation. As circumstances change, the SWRCB may "re-balance" public trust uses even in "vested" water rights.

Both public trust and reasonable use doctrines operate to reallocate water use from prior appropriative uses to purposes considered more socially beneficial or environmentally desirable. Because the original rights holder is not considered to have been deprived of property if a portion (or all) of the right is lost because its use is no longer "reasonable" under current circumstances, or is found to be subject to a public trust need, the holder is not entitled to compensation for the loss. With time, limits to these doctrines must be articulated, and water rights will eventually again achieve a degree of stability and predictability. But for the present there is little certainty in any water right.

THE STRUGGLE TO CONTROL THE WATER SUPPLY

Major Water Distribution Systems

Although water rights originally developed as a form of private real property right, federal, state, and local distribution projects have created contract rights in large public water systems. The largest of these, the federally operated Central Valley Project (CVP), moves about 7.5 million acre-feet (MAF) of water in a normal year to agricultural and municipal uses in the Central Valley. Many critics believe the CVP's purposes and subsidies are no longer appropriate, and that its 50-year operation has caused serious environmental damage that must be repaired. Among those critics is Congressman George Miller (D-Martinez), who has been a moving force behind Central Valley reform legislation. At this writing, his legislation (originally HR 5099, now incorporated into HR 429 as Title 34) is moving through Congress. If passed, it will reauthorize the CVP for fish and wildlife purposes as well as for irrigation

and municipal uses, shorten the length of contracts from 40 to 20 years, and authorize water transfers for beneficial uses within and outside of the Central Valley. Meanwhile, in an effort to remove the CVP from federal control, Governor Pete Wilson has begun negotiations to transfer the project to the state. The ultimate outcome of the struggle for CVP water is unknown, but it is safe to predict that one result will be a transfer, voluntary or otherwise, of some water now used for irrigation to urban and environmental uses. What this will do to agriculture, and to rural communities dependent on it, is a subject of much dispute. See *Water Transfers*, p 319.

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The state owns and operates the State Water Project (SWP), which was built in the 1960s. Designed to move 4.2 MAF of water a year from the Feather River in Northern California to the Central Valley and urban Southern California, its build-out has been stalled by politics since 1972. Today it is capable of delivering only half of its designed capacity. Even so, environmentalists want a portion of its developed water to be returned to the environment. Urban water agencies are interested in acquiring some of its water from the agricultural districts that now receive SWP water.

Two other distribution systems bring water to Southern California. Both are the subject of reallocations of water from one user group to another. In 1928, the Boulder Canyon Project Act (43 USC §§617-617) authorized the Hoover Dam and the All American Canal on the Colorado River. The Colorado provided 4.4 MAF of water for distribution among seven California entities, 3.5 MAF of which is contracted to agricultural districts along the river. The remainder is conveyed through the Colorado River Aqueduct to the Metropolitan Water District of Southern California. Water from the Colorado River, now mostly used by irrigated agriculture, has been eyed by Metropolitan as a potential source of additional water for that agency. The irrigation districts' rights are senior to Metropolitan's, however, and the districts have been reluctant to sell or transfer any of their water for urban use. A very real possibility that the water right could be lost to urban uses anyway was presented when the SWRCB found that the Imperial Irrigation District's use of water was wasteful and unreasonable under Cal Const art X, §2, because the district had no reservoirs, failed to line its canals, and its return flows caused the Salton Sea to flood adjacent lands. *Imperial Irrig. Dist. v State Water Resources Control Bd.* (1986) 186 CA3d 1160, 231 CR 283. The decision was an incentive for Imperial to agree to transfer a portion of its water to Metropolitan in return for Metropolitan's facilitating conservation within the District.

Emboldened by the success of this transfer, Metropolitan has entered into an experimental two-year land fallowing program in the Palos Verde Irrigation District involving 21,000 acres of land in the Palo Verde Valley. If water savings prove to be successful, longer-term contracts are likely. Thus, even though the agricultural districts hold superior rights to the water, Metropolitan has been able to purchase a portion of their supply through voluntary water transfers, aided by the courts' implicit threat to find the agricultural districts' irrigation practices unreasonable. See Boronkay & Quinn, *Water Transfers: An Urban Perspective*, p 334.

The Los Angeles Aqueduct, completed in 1914, diverts the waters of the Owens River (in Inyo and Mono Counties) for use by Los Angeles. Under in-

tense environmental attack, Los Angeles's water-gathering activities in Mono County have been dramatically restricted by litigation stemming from *National Audubon Soc'y v Superior Court, supra*, that enjoins Los Angeles from diversions until Mono Lake reaches an agreed level, and by successful court actions enforcing Fish & G C §5937, which requires the operator of a dam to release sufficient water to maintain downstream fisheries in good condition (see, e.g., *California Trout, Inc. v State Water Resources Control Bd.* (1989) 207 CA3d 585, 255 CR 184; *California Trout, Inc. v State Water Resources Control Bd.* (1990) 218 CA3d 187, 266 CR 788). See Harold Thomas, *Instream Flows: The Need To Protect a Public Resource for Public Trust Users*, p 345. In Inyo County, 20 years of litigation over compliance with the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) have resulted in an historic groundwater management agreement between Inyo County and the Los Angeles Department of Water and Power. If it is approved by the court, the agreement will allow water exports to continue as long as they do not result in specified environmental damage. The net effect of both court battles will be to reduce the amount of water flowing to Los Angeles under its long-held vested water rights in order to meet environmental and public trust needs in the area of origin.

Recurring Issues of Federal Jurisdiction Over California Water

While state doctrines of public trust, reasonable use, Fish and Game Code sections, and CEQA compliance have been used to reallocate portions of long-held water rights from urban and agricultural uses to environmental and wildlife purposes, federal statutes, especially the Endangered Species Act of 1973 (16 USC §§1531-1544) and the Clean Water Act (33 USC §§1251-1387), signal the reentry of the federal government in water allocation decisions in California. Federal-state conflicts over control of water are not new, but many observers believed the basic issue of federal deference to state water law was settled in the case of *California v U.S.* (1978) 438 US 645, involving the New Melones Dam on the Stanislaus River. The U.S. Supreme Court held that §8 of the Reclamation Act of 1902 (43 USC §§371, 383) requires

the United States to comply with the conditions of water rights permits issued by the SWRCB in the acquisition, operation, and maintenance of a federal reclamation project unless the conditions are in direct conflict with clear congressional directives respecting the project. The principle of federal deference to state water law received a setback in a 1990 case involving a hydroelectric power plant permitted by the Federal Energy Regulatory Commission. *California v Federal Energy Regulatory Comm'n* (1990) 495 US 490. The U.S. Supreme Court, construing a section of the Federal Power Act, held that it showed a clear congressional directive preempting state law on

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the issue of instream flows. It remains to be seen whether this case signals a trend away from federal deference to state law in the operation of federal projects in California. (For further discussion of a recent federal district court case on this issue, see *Water*, p 378.)

Of more far-reaching import, however, has been the operation of the federal Endangered Species Act and the Clean Water Act. Under the former, once a species has been determined to be endangered, federal law prohibits taking, harming, or harassing the species. 16 USC §§1538(a)(1)(B), 1532(19). Because species protection primarily involves habitat

protection, the presence of endangered fish species in the Bay-Delta estuary, the water crossroads of the state, may require a shutdown or severe reduction in diversions of the major state and federal water projects that supply much of Central and Southern California. Environmentalists have been quick to see the benefits of the Endangered Species Act for the environment as a whole, and enthusiastically support the listing of the winter run salmon, the delta smelt, and even the brine shrimp in Mono Lake, as a means to protect and enhance instream flows. The federal EPA has intervened in the Bay-Delta hearings being conducted by the SWRCB, using its authority under the Clean Water Act to disapprove the water quality plan adopted by the Board, and has threatened to set its own standards to protect fish and wildlife in the Delta. Governor Wilson has directed the Board to adopt interim standards for the Bay-Delta estuary by the end of 1992, hoping to head off EPA action.

CONFLICTS FOR CALIFORNIA'S WATER

It has become clear that no new projects are likely to be built to divert more water out of the natural environment, and it seems probable that some of the water now being diverted will be returned to the streams for the benefit of fish and wildlife. Meanwhile, California's population grows rapidly. An alternative to new water diversions is the purchase or exchange of previously developed water from one user to another. The obvious source is irrigated agriculture. Cities can afford to pay farmers for their water, but environmentalists rely on application of the public trust doctrine, the Endangered Species Act, and the doctrine of reasonable use to wrest water away at its source. Water marketing and exchanges are occurring in all parts of the state, though the vast majority involve short-term sales of water rather than water rights. It is a trend supported, at least in theory, by the California Legislature, which has enacted a series of bills designed to facilitate water marketing as a solution to the state's water problem. See, e.g., Wat C §§109, 380-387, 475-483, 1010(b), 1011(b), 1244, 1735-1737, 1740, 1810-1814, 10008-10010. For a discussion of the benefits and problems of such transfers, see the series of articles beginning on p 319.

RESTRICTION OF WATER AVAILABILITY TO CONTROL GROWTH

While large water agencies, such as Metropolitan, are scouring the state for additional supplies, they have come under attack by the communities they serve for promoting growth by augmenting their supplies. Some argue that Metropolitan and other water agencies have a responsibility to control growth in their service area by making a decision not to increase their water supplies. Others contend that land use decisions may only be made by agencies granted the police power under Cal Const art XI, which includes only cities and counties. Land use decisions, including growth management, are an exercise of police power. Courts have upheld land use decisions aimed at growth management when the decisions are made by cities and counties. *Construction Indus. Ass'n v City of Petaluma* (9th Cir 1975) 522 F2d 897; *Associated Home Builders, Inc. v City of Livermore* (1976) 18 C3d 582, 135 CR 41. Accordingly, if the city has adopted a general plan or policy of regulating growth, courts have held that restricting access to the water or sewer utility can be an acceptable method of implementing the plan. *Dateline Builders, Inc. v Santa Rosa* (1983) 146 CA3d 520, 194 CR 258.

On the other hand, water districts, limited to the specific powers enumerated in their enabling statutes, are not authorized to exercise police powers over land uses.

A water district's authority to restrict service or impose a connection moratorium is arguably restricted to utility-related reasons, not to a desire on the part of the district to regulate growth. Early cases in California emphasized that public utilities and public agencies serving water needs had a duty to serve users within their jurisdiction without documentation, including those within the service area requesting new connections. See, e.g., *Lukrawka v Spring Valley Water Co.* (1915) 169 C 318, 146 P 640; *Glenbrook Dev. Co. v City of Brea* (1967) 253 CA2d 267, 61 CR 189; *City of Downey v Downey County Water Dist.* (1962) 202 CA2d 786, 21 CR 370. The duty was never absolute, however; it depended on the reasonableness of the demand, the necessity of pipeline extensions, and the impacts on existing users. See *Butte County Water Users Ass'n v Railway Comm'n* (1921) 185 C 218, 196 P 265; *Marr v Glendale* (1919) 40 CA 748, 181 P 671.

The 1976 case of *Swanson v Marin Mun. Water Dist.* (1976) 56 CA3d 512, 128 CR 485, marks a more recent judicial deference to a water district's responses to actual or threatened water shortages. In that case, a hookup moratorium established by the district based on a threatened water shortage was upheld by the courts because it was a legislative act declared to be in the furtherance of water conservation and to prevent future water shortages. The court left open the issue of whether the district had a duty to seek new water

sources and thus end the moratorium. Two 1991 cases reaffirmed judicial deference to the legislative discretion of water districts to establish water service moratoria that distinguish between current and potential classes of users. They also left to the district's judgment the determination of whether to seek new water sources. See *Building Indus. Ass'n v Marin Mun. Water Dist.* (1991) 235 CA3d 1641, 1 CR2d 625; *Marin Mun. Water Dist. v KG Land Cal. Corp.* (1991) 235 CA3d 1652, 1 CR2d 767. As the articles by Gilbert (p 338) and Cohen (p 341) demonstrate, however, a lively debate continues over the issue of a water district's duty, or lack thereof, to take growth control into account when approving new water supply acquisitions or new water service connections.

CONCLUSION

Water agencies, cities, developers, farmers, and environmentalists are struggling for secure, reliable water supplies in a climate of shifting concepts of water rights and conflict between state and federal agencies for control. The lack of a clearly articulated state water management or growth management policy leaves communities and water agencies without direction. In the absence of legislative or gubernatorial actions, a three-way process involving farmers, cities, and environmentalists seeking a policy consensus offers some hope of reaching a workable solution to California's water wars.

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