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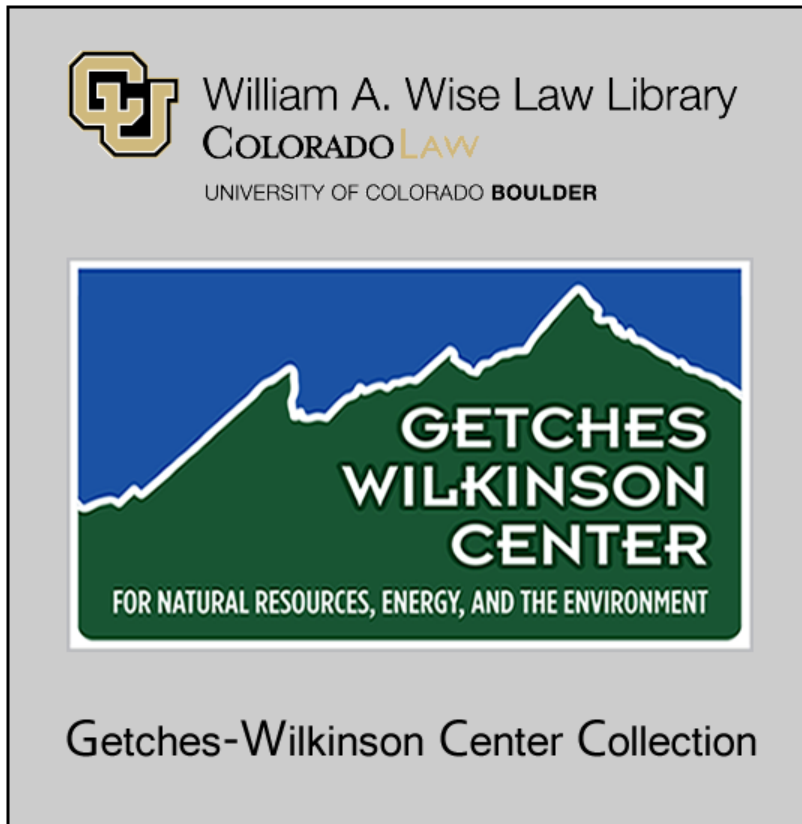
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Integrating Water Quality Objectives with
Traditional Water Rights in California:
the Sacramento-San Joaquin Delta Case

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Superior Court of California
Sacramento

Water as a Public Resource: Emerging Rights and Obligations

Natural Resources Law Center
University of Colorado School of Law
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I. Background of California Surface Water Rights Law

- A. The appropriation doctrine was adopted in California in Irwin v. Phillips (1855) 5 Cal. 140. (See also Cal. Stats. 1872, c. 424)
- B. The riparian doctrine also exists in the State (Lux v. Haggin (1884) 69 Cal. 255). Hence the "California Doctrine" of dual water rights.
- C. All water rights in the state are subject to the provisions of the 1928 Constitutional amendment (Article X, Section 2) which provides, in part, that "the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof....The right to water or to the use or flow of water...is and shall be limited to such water as shall be reasonably required for the beneficial use to be served..." (Peabody v. City of Vallejo (1935) 2 Cal. 2d 351).
- D. The organizational structure for administration of water rights has developed over the years.
 1. Riparian rights are outside the administrative structure unless there is a stream adjudication when both exercised and unexercised rights are included in the decree (In re the Waters of Long Valley Stream System (1979) 25 Cal. 3d 339).
 2. The first appropriative rights permit system was adopted in 1914. (Cal. Stats. 1913, c. 586) Until 1956 the system was administered by a single administrative official, the State Engineer, as is common in western states. In 1956, to separate the regulatory from the developmental responsibilities of the state, an independent three member, full-time Water Rights Board was created. (Cal. Stats. 1956 (First Ex. Sess.) c. 52) Later changes are discussed below.

II. Background of California's Water Quality law.

- A. As in most states the State Health Department had initial responsibility for water pollution, now water

quality.

- B. In 1949, the Legislature created an independent State Water Pollution Control Board consisting of appointed members and directors of several State agencies. The State was divided into nine hydrologic regions and a part-time board with appointed members was established for each region. (Cal. Stat. 1949, c. 1549) (See California Water Pollution Problem, 3 Stan. L. Rev. 649 (1951))
- C. Major changes in the law were made in 1969 with enactment of the Porter-Cologne Act (Cal. Stat. 1969, c. 482, c. 800. Now Water Code Sections 13000 et. seq.). (See Robie, Water Pollution: an Affirmative Response by the California Legislature, 1 Pac. L. J. 2 (1970) California was the first state to be delegated administration of the federal Clean Water Act. The Porter-Cologne Act now includes provisions necessary to implement the federal law.

III. The Sacramento-San Joaquin Delta

- A. The Delta is formed by the confluence of the Sacramento and San Joaquin Rivers. The estuary empties into the San Francisco Bay (See Figure 1).
 - 1. The Delta includes 700 miles of waterways.
 - 2. Located in the South Delta are two major export pumping plants (Tracy Pumping Plant - U.S. Bureau of Reclamation's Central Valley Project and H.O. Banks Delta Pumping Plant - California State Water Project).
 - a. Salinity levels in the estuary are affected by the amount of outflow of fresh water through it.
 - b. Natural conditions prior to any water projects included high flows in winter and reduced flows in summer and fall when salinity intruded.
 - c. There is substantial agricultural activity in the Delta.
 - d. The Delta supports a high level of recreation and has major resident and anadromous fisheries (eg. salmon and steelhead).

- e. Upstream storage projects gradually decreased outflows. Oakland and East Bay Cities and the City of San Francisco developed upstream storage early in the twentieth century.
- f. The Central Valley Project (CVP) has storage upstream and exports at the Delta. (See Figure 1 for location of Tracy Pumping Plant)
- g. The State Water Project (SWP) also has storage upstream and exports. (See Figure 1 for location of the H.O. Banks Delta Pumping Plant)
- h. The CVP and SWP can operate to reduce salinity intrusion by 1) stopping or reducing diversions to storage; 2) stopping or reducing pumping; or 3) releasing water from storage (termed "stored water" as discussed below).

B. Water Rights Impacts in the Delta

- 1. Both the major water projects received appropriative water rights from the State prior to creation of the State Water Resources Control Board in 1967 (CVP: Decision 990; SWP: Decisions 1275, 1291 are principal ones).
 - a. The CVP and SWP each have several different priorities.
 - b. The CVP historically did not consider itself bound by State water rights decisions, but in California v. U.S. (1978) 438 U.S. 635, the U.S. Supreme Court held that the CVP was bound by state water right conditions unless they were inconsistent with congressional directives.
 - c. In each of the Projects' decisions jurisdiction was "reserved," including the purpose of coordinating the operations of the two projects.
 - d. The first major decision in furtherance of the reserved jurisdiction was Decision 1379 (1971) and it attempted to carry out water quality standards by water rights conditions. In this decision, the projects

were required to release "stored water" to meet water quality requirements in the Delta and adjacent Suisun Marsh. Judicial review of this decision was not complete when it was superceded by Decision 1485.

C. Beneficial uses of the Delta are many and varied.

1. Municipal and Industrial uses are met from Delta diversions, including the CVP Contra Costa Canal.
2. The adjacent Suisun Marsh is a major part of the Pacific Flyway and there are substantial resident and anadromous fisheries in the Delta.
3. There are substantial agricultural uses of water in the Delta. Many of these users claim riparian rights.

D. Water quality standards in the Delta are primarily described in terms of quality at specific points. Salinity is of importance to all uses - municipal, agricultural, and fishery. Water quality standards were established under State and Federal water quality laws beginning in 1965.

IV. Organizational Unification of Water Quality and Water Rights.

- A. During the 1960's public debate on the Delta increased as proposals were made to increase exports from the Delta (For example, the "Peripheral Canal" would have greatly expanded SWP Delta diversion capacity).
- B. In 1966 the Assembly Water Committee released a report, "A Proposed Water Resources Control Board For California," to provide a more efficient and unified administration of water quality and water rights. The report said the Water Rights Board "found itself unable" to protect water quality as part of water rights.
- C. With minor changes, the Legislature in 1967 unanimously created the new five member, full time Board, combining the functions of the Water Rights Board and the Water Quality Control Board, which were abolished. (Cal. Stat. 1969, c. 284) In the west, this remains the only state program with the same decisionmaker responsible for both water quality and

water rights.

- D. The law creating the Board added specific provisions coordinating water quality and rights. "The Stated purpose of this merger was to ensure that 'consideration of water pollution and water quality' would become an integral part of the appropriative right process." (Sec. 174.) United States v. State Water Resources Control Board (1986) 182 Cal. App. 3d 82, 125.

V. Delta Water Right Decision 1485 (1978)

- A. The Board held a single hearing to adopt both water quality and water rights orders. The result was Water Right Decision 1485 and a Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh. (This met the requirements of the federal Clean Water Act.) The water right permittees were required to meet the water quality standards in the Plan.

B. Key elements of the Decision

1. Water quality in the Delta should be no worse than those levels which would have existed had the state and federal projects not been constructed ("pre-project" conditions). This was an important provision for the water projects since they did not want to improve water quality beyond that for which they were responsible. To some extent this limited the water quality standards applicable to everyone by tying them to the water project operations.
2. The standards varied by water year, eg. "wet," "below normal." This allowed for all users, in-Delta and export, to share shortages and surpluses. This was compared to natural conditions.
3. In some areas, such as the South Delta, the Board did not set standards but urged the exporters to negotiate agreements with users.
4. As to striped bass, a major fishery, the Board adopted a "bass index" as a quantitative means of measuring the impacts of adherence to standards on the abundance of bass. Unfortunately, water conditions and the bass index did not correlate as expected. It is now back to the drawing boards for the biologists.

VI. Resolution of Major Legal Issues - United States v. State Water Resources Control Board (1986) 182 Cal. App. 3d. 82 (Review denied by California Supreme Court).
(Citations to pages alone are to this decision).

A. Although many decisions of the Board had been litigated, this was the first appellate decision on the major issues of water quality and water rights.

B. General issues.

1. The rule of "reasonable use" is the cardinal principle of California's water law. (Page 105)
2. The water right function is quasi-judicial and the water quality function is quasi-legislative and the two decisions are subject to different standards of judicial review. Each function has "distinct attributes". (Page 112)
 - a. As to water quality, "great deference must be given to the board's determination." (Page 112)
 - b. As to water rights, "deferential latitude should be accorded to the Board's judgment" (Page 113)
3. In the final analysis the "touchstone for the Board's actions is the 'public interest'." (Page 114)

C. Establishment of Water Quality Standards

1. In its holding the Court of Appeal (First District, Division 1, Racanelli, PJ) basically concluded that since the Board was concerned with the water projects' obligations, it took too restrictive a view of water quality.
 - a. The Board must provide reasonable protection of beneficial uses not just those uses covered by water rights. Thus, the court rejected the "pre-project conditions" basis for the water quality standards. (Page 116-118)
 - b. The Board must consider the upstream diverters (eg. Oakland, San Francisco) in setting water quality standards. Since

"pre-project" only included CVP and SWP the standards did not protect the Delta against these upstream diverters. (Page 118-119)

- (1) This raises a major problem. Can the pre-1914 water right of San Francisco and the right of Oakland (East Bay Municipal Utility District) be reopened to comply with water quality standards?
- (2) While the Court did not suggest any means, it is logical that old water rights could be reopened to comply with water quality standards by use of the "public trust doctrine" as set forth in National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419) Also, all permits are subject to the continuing authority of the Board to prevent unreasonable use. People ex rel. State Water Resources Control Board v. Forni (1976) 54 Cal. App 3d 743.
- (3) As to pre-1914 rights not subject to permit, a lawsuit might be necessary. Also the Board can consider operation without compliance with water quality standards to be an unreasonable use of water. (Page 129) Under Water Code Section 275 the Board can directly enforce a determination of unreasonable use. Imperial Irrigation District v. SWRCB (1986) 186 Cal. App 3d 1160.
- (4) The Court commented that combining water quality and water rights in a single proceeding "was unwise." (Page 120) and noted that the Legislature had not mandated a single proceeding. This was an appropriate observation. The court did not cite Water Code Section 1258 which provides that "In acting upon applications to appropriate water, the board shall consider water quality objectives which have been established..., and may subject such appropriations to such terms and conditions as it finds are necessary to carry out such

objectives."

- (5) Some felt that the Board would have to determine upstream rights before acting to adopt a comprehensive water quality plan. The Court suggested the Board need only make a "reasonable estimate" of water uses, an analysis done regularly in determining unappropriated water. (Page 119)
- (6) This will continue to be a concern to water project developers who fear standards will be set too high in a single water quality proceeding.
- (7) The Court noted as well that the pre-project approach did not take into account polluters discharging into the Delta. (Page 118)

D. Enforcement of Water Quality Standards

1. The Court said the enforcement authority was not clear but that the "principal enforcement mechanism available to the board is its regulation of water rights to control diversions which cause degradation of water quality." (Page 125).
 - a. In making this comment the Court noted that the only injunctive relief, for example, is against unauthorized dischargers of pollutants. Thus, in California, the water rights function is an important element of water quality enforcement.
 - b. Under EPA v. State Water Resources Control Board (1976) 426 U.S. 200, federal agencies must comply with State water quality requirements.
2. As to the SWP and CVP the Board can use pre-project standards to enforce water quality standards against the projects. But the Board should implement water quality standards against others, not just the CVP and SWP. (Page 126)
 - a. When the Board has reserved jurisdiction it can use this to implement water quality.

(Page 128)

- b. Independent of its reserved powers the Board is authorized to modify permit terms to prevent waste or unreasonable use or methods of diversion. (Page 129) This power of the Board should be broadly interpreted said the Court. (Page 130)
3. On the key issue of stored water the Court upheld the Boards authority to curtail project activities through reduced storage and export and termed it "eminently reasonable and proper to maintain the required level of water quality in the Delta." (Page 130) Although the Board did not specify it, the Court said this is based on the projects' impact becoming unreasonable due to the water quality impact. This is a dramatic extension of the concept of "reasonable use."
4. The Court said that the Board's decision to hold the SWP and CVP equally responsible for water quality (and the stored water releases) was reasonable, even if this modified priorities and did not put the full burden on the junior appropriator. The Board has the authority to alter the "historic rule of 'first in time, first in right'," the Court held. (Page 132)
 - a. Subsequent to the Court's decision, the U.S.B.R and the State executed a "Coordinated Operating Agreement" which, among other things, allocated the responsibility between the projects for meeting stored water releases.
 - b. In ruling on this issue the Court specifically found that the Board's conditions are "not facially inconsistent with Congressional directives." (Page 136)
 - (1) This apparently ends a decades old argument by the U.S.B.R. that the CVP does not have to provide salinity control.
 - (2) The "November 24, 1986 Coordinated Operating Agreement" provides that the CVP will comply with Decision 1485 and subsequent decisions of the Board although the U.S.B.R. reserves the right to challenge subsequent

decisions in court. The agreement also constitutes a water rights settlement and resolves priorities between the SWP and CVP and provides for the sharing of natural flows and release requirements. The agreement was authorized by PL 99-546

5. Contractors of both the SWP and CVP argued that the increased restrictions on the project operations impaired their contracts.

a. The Court rejected this and found as a matter of law that no substantial impairment appears as to the CVP. (Page 147)

b. Even if, arguendo, it was substantial, the Court found it a valid exercise of the police power. (Page 148)

E. Enforcement of Water Quality Standards for Non-Consumptive Uses

1. New standards with higher protection for fish and wildlife were established.

a. These standards were upheld on the basis of the "public trust doctrine" as provided in National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419. This requires a duty of continuing supervision over the taking and use of appropriated water. The State is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. (Page 150)

b. A second authority was the reserved jurisdiction discussed above.

c. But, the Court said, "the principles set out under National Audubon confirm the Board's power and duty to reopen the permits to protect fish and wildlife 'whenever feasible,' even without a reservation of jurisdiction." (Page 152)

2. The basis for establishment of fish and wildlife standards was the Clean Water Act and the Porter-Cologne Act.

VII. Conclusion

California has integrated the consideration of water quality and water rights in a unique manner. First, the same administrative agency considers both issues.

Second, there is a clear mandate to carry out water quality standards in the administration of water rights, including the modification of existing rights, whether jurisdiction has been reserved or not.

By broadly interpreting the "reasonable use" requirements of the Constitution (Art. X, Sec. 2, Water Code Sec. 275) the state Water Resources Control Board's authority to enforce water quality standards, especially for fish and wildlife uses, has been greatly enhanced. The primary reliance on "reasonable use," as well as the public trust doctrine of National Audubon, represents use of a traditional basis for upholding the far-reaching authority added by the Legislature in 1967 and is probably the most significant aspect of the decision. This reliance on the well established constitutional provision places the Board's authority beyond modification by the Legislature and should enable all water rights holders to be required to share in meeting standards, regardless of the priorities of those rights.

The Sacramento-San Joaquin Delta and the operations of two major water projects - the CVP and SWP - provide a dramatic example of the integration of water quality and water rights and the broad authority of the Board to enforce water quality standards through water rights.

The SWP and CVP water rights represent 55 per cent of Delta water supplies and 43 per cent are held by permittees not yet obligated to protect the Delta. It remains to be seen whether the Board will use its authority to assure these users meet their responsibilities. It may be the task of Delta users to bring actions to assure that all users meet constitutional requirements.

FIGURE 1

