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Water Infrastructure Finance in California: Who Should Pay to Keep the Tap Running?

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Water Infrastructure Finance in California: Who Should Pay to Keep the Tap Running?*

Alf Brandt**

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I. INTRODUCTION

For thousands of years, water management and infrastructure has played a pivotal role in the development of civilization.¹ In his book *Water: The Epic Struggle for Civilization*, Steven Solomon traces the connection between water and civilization, dating back 5,000 years, beginning with early civilizations in Egypt and continuing on through those in Rome, China, and Britain.² Each civilization emerged and thrived as it overcame its water challenge. Water and its infrastructure formed the critical link to the society's success.³

* After the author completed this article in July 2014, Governor Brown and legislative leaders negotiated a water bond that won overwhelming voter approval in the November general election. The final water bond reflected and resolved many of the water policy and finance debates discussed in this article.

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1. STEVEN SOLOMON, *WATER: THE EPIC STRUGGLE FOR WEALTH, POWER, AND CIVILIZATION* 2 (2010).

2. *Id.*

3. *Id.*

California's history offers a great example of water's centrality to a successful civilization.⁴ At its formative moment—the 1849 Gold Rush—the first conflicts and the first laws arose out of use of water.⁵ Miners, who needed water to get access to Sierra Nevada gold, developed the “first in time, first in right” principle that became the law of appropriation.⁶ The California Supreme Court recognized this miners' law in 1855 in *Irwin v. Phillips*.⁷ California went on to finance and develop the most sophisticated water storage and conveyance infrastructure anywhere in the world.⁸ Engineers overcame California's greatest hydrological challenge—2/3 of the water supply in the northern third of the state and 2/3 of the water demand in the southern third.⁹ It built huge reservoirs in the north and canals to take water hundreds of miles south.¹⁰

In 2014, California's central question is not whether to improve its water infrastructure.¹¹ That infrastructure continues to age and deteriorate. Much of that infrastructure was built at mid-20th Century, so some water infrastructure has aged past its design life.¹² Climate change adds to the necessity to improve California's water infrastructure and adapt to changing conditions, especially the loss of the Sierra Nevada snowpack.¹³ The central question is how to pay for improving California's water infrastructure—at the federal, state, and local level.¹⁴

Water finance questions implicate a wide range of policy issues and law.¹⁵ Understanding these issues requires knowledge of the state's history of water finance.¹⁶ Creating the most sophisticated water system required funding from all possible sources—private, federal, state, and local.¹⁷ California's success in water relied on drawing from all those sources as the system developed into the 1970s.¹⁸ Then, the state's voters began passing tax limitation initiatives such as

4. See, e.g., *Irwin v. Phillips*, 5 Cal. 140, 147 (1855); NORRIS HUNDLEY, JR., *THE GREAT THIRST: CALIFORNIANS AND WATER A HISTORY* (2001).

5. See *Irwin*, 5 Cal. at 146–47.

6. *Id.*

7. *Id.*

8. AB 2686, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

9. See HUNDLEY, *supra* note 4, at 123–291.

10. *Id.* at 128.

11. See LEAGUE OF CALIFORNIA CITIES, *INNOVATIVE WATER AND WASTEWATER INFRASTRUCTURE FINANCING 1* (2014), available at <http://www.cacities.org/Resources-Documents/Policy-Advocacy-Section/Federal-Issues/2014-Federal-Letters/Innovative-Water-Infrastructure-Financing.aspx> (last visited Aug. 4, 2014) (on file with the *McGeorge Law Review*).

12. *Id.*

13. *Id.*

14. See HUNDLEY, *supra* note 4.

15. ELLEN HANAK ET AL., *PAYING FOR WATER IN CALIFORNIA 9* (Public Policy Institute of California 2014), available at <http://www.ppic.org/content/pubs/report/R314EHR.pdf> (on file with the *McGeorge Law Review*).

16. *Id.*

17. *Id.*

18. *Id.* at 11.

Proposition 13 in 1978, Proposition 218 in 1996, and Proposition 26 in 2010.¹⁹ The provisions in the California Constitution limit state and local agencies' abilities to impose fees.²⁰ Proposition 218, however, treats water and sewer fees differently.²¹ This history creates a substantial part of the water finance milieu in which water planners and builders operate today.²²

Today, financing the next generation of water infrastructure requires policymakers, at all levels of government, to resolve a host of issues. Government finance law provides one set of issues.²³ California's water and environmental policies provide another set.²⁴ The state has used financing to encourage water users—on farms and in cities—to act consistent with water conservation, integrated regional water management, or water recycling policies.²⁵ Finally, voter preferences form the final link to success in financing water infrastructure.²⁶ Voters may have an opportunity to approve—or reject—water infrastructure.²⁷ An election may affect the physical project, the water rates, or the taxes used to pay for the project. In any case, the law of water and public finance shape the questions put before voters, and therefore the direction of development of California's water infrastructure.

II. HISTORY OF WATER INFRASTRUCTURE FINANCE

The challenge of financing California water infrastructure emerged in the earliest years of statehood, as demands for water for mining and agriculture grew.²⁸ In the early years, funding came primarily from private sources.²⁹ These sources included the corporations that invested in hydraulic mining after the intrepid 49ers retreated from gold panning in the 1850s, until state and federal courts deemed hydraulic mining a nuisance and stopped it, in 1884.³⁰ In addition to the usual corporate structures, California law created structures to encourage development of communal water facilities.³¹ California law authorized “mutual

19. *Id.* at 9.

20. *Id.*

21. CAL. CONST. art. XIIIID.

22. HANAK ET AL., *supra* note 15.

23. *Id.* at 9–10.

24. *Id.*

25. *Id.*

26. *See* AB 1331, 2013 Leg., Reg. Sess. (Cal. 2014).

27. *Id.*

28. *See* HUNDLEY, *supra* note 4, at 11.

29. HANAK ET AL., *supra* note 15, at 11.

30. *See* *People v. Gold Run Ditch Co.*, 66 Cal. 138, 154 (1884); *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (D. Cal. 1884).

31. CAL. CORP. CODE §§ 14300–14312 (West 2006).

water companies,” which were commonly formed by farmers joining together to finance and build a water facility, such as a reservoir or a ditch.³²

The 19th century also saw the development of public water agencies.³³ In 1861, the Legislature created a Board of Swampland Commissioners to design a flood control program for a part of the Central Valley.³⁴ In 1887, the Wright Act authorized the creation of irrigation districts.³⁵ To provide for financing and development of water infrastructure, these districts enjoyed the authority to issue bonds, levy taxes, and condemn property.³⁶ Over the years, California law authorized a plethora of special districts for water infrastructure.³⁷ In urban areas, cities and counties had authority to finance and develop water infrastructure for their citizens.³⁸ At the turn of the century, California’s major cities began developing their own water infrastructure. Los Angeles developed its water supply from the eastern side of the Sierra Nevada, in Owens Valley.³⁹ San Francisco gained federal authority to draw water from its Hetch Hetchy system in Yosemite National Park.⁴⁰

The State Government first got involved in water infrastructure in 1933 when the Legislature approved the first State Water Plan, which used revenue bonds to finance the storage of water in Northern California for use in the San Joaquin Valley.⁴¹ When the State could not finance the plan during the depression, the United States Bureau of Reclamation (Reclamation),⁴² which is an agency of the Department of the Interior, stepped in to finance and build the Central Valley Project (CVP).⁴³ The Legislature again engaged in financing of water infrastructure, when it approved the State Water Project and placed a \$1.75 billion general obligation (GO) bond on the 1960 ballot, at the urging of then-Governor Pat Brown.⁴⁴ The Burns-Porter Act placed a GO bond on the ballot, but

32. *Id.* §§ 14300 et seq. See *Hildreth v. Montecito Creek Water Co.*, 139 Cal. 22, 29 (1903); *Erwin v. Gage Canal Co.*, 226 Cal. App. 2d 189, 192–93 (4th Dist. 1964).

33. Reclamation District Act, ch. 352, 1861 Cal. Stat. 355; Wright Act, 1887 Cal. Stat. 29.

34. Reclamation District Act, ch. 352, 1861 Cal. Stat. 355; CAL. WATER CODE §§ 50000–50013 (West 2014).

35. Wright Act, 1887 Cal. Stat. 29; WATER § 801 (West 2014).

36. *Id.*

37. HANAK ET AL., *supra* note 15, at 9.

38. *Id.*

39. See HUNDLEY, *supra* note 4, at 11.

40. Raker Act, Pub. L. No. 41, 63rd Congress, 38 Stats, at L. 242, 242–245 (1913).

41. Central Valley Project Act, WATER §§ 11100–11160 (West 1992).

42. Congress created the Bureau of Reclamation to provide federal financing and construction of water projects to “reclaim” dry lands for human use in the West, in the Reclamation Act of June 17, 1902, Pub. L. 57-161, 32 Stat. 388 (1902).

43. See U.S. Dep’t of the Interior: Bureau of Reclamation, *Central Valley Project*, RECLAMATION (Mar. 15, 2013), http://www.usbr.gov/projects/Project.jsp?proj_Name=Central+Valley+Project.

44. *Warne v. Harkness*, 60 Cal. 2d 579, 583–86 (1963).

required the water agencies that received the water to pay the bond off through contract.⁴⁵

The federal government has also contributed significantly to developing California's water infrastructure aside from the CVP.⁴⁶ In 1893, Congress created the California Debris Commission to address the hydraulic mining debris that had filled Central Valley rivers and increased the risk of flooding.⁴⁷ The Commission's recommendations led to the Legislature's 1911 creation of the Sacramento River Flood Control Plan and Congress' adoption of the plan in 1917.⁴⁸ The United States Army Corps of Engineers, therefore, has worked in concert with state agencies and contributed significant funding in the last century to implementing the plan and improving the flood control facilities in the Central Valley.⁴⁹ In 2006, voters approved two bonds that included \$4.89 billion in state funding for flood protection programs and facilities.⁵⁰

Reclamation made one of the most significant investments in California water infrastructure when it built—and continues to operate—the CVP.⁵¹ Since 1902, Reclamation has played a critical role in financing water infrastructure, primarily for agriculture, throughout the West.⁵² In California, Reclamation remains the largest single holder of water rights, at 7 million acre-feet.⁵³ Reclamation's finance structure includes substantial federal investment and management of water infrastructure construction. Water contractors⁵⁴ repay these investments over several decades through repayment contracts for purchasing the water, and generally with no interest charged.⁵⁵ CVP contractors, however, continue to repay the costs for CVP construction, which started in 1937, and completed in 1979.⁵⁶

45. Burns-Porter Act CAL. WATER CODE §§ 12930–12937 (West 2009). The Burns-Porter Act was approved by voters in 1960. *Id.*

46. See California Debris Commission, ch. 183, 27 Stat. 507, 95–96 (1893).

47. *Id.*

48. WATER § 12645(a) (West 2014).

49. *Id.*

50. *Strategic Growth Plan: Bond Accountability*, CAL. NATURAL RESOURCES AGENCY, <http://bond.accountability.resources.ca.gov/p1E.aspx> (last visited Aug. 12, 2014) (on file with the *McGeorge Law Review*).

51. Emergency Relief Appropriation Act of 1935, ch. 48, 49 Stat. 115, 115 (1935); Rivers and Harbors Act of 1937, ch. 832, 50 Stat. 844, 850 (1937)

52. U.S. Dep't of the Interior, Bureau of Reclamation, *The Bureau of Reclamation: A Very Brief History*, USBR.GOV, <http://www.usbr.gov/history/borhist.html> (last visited July 14, 2014) (on file with the *McGeorge Law Review*).

53. *Id.*

54. "Water contractors" are the public agencies that contract with the Department of Water Resources or the federal Bureau of Reclamation, to operate California's large water projects that transfer water from the Sacramento River watershed across the Sacramento-San Joaquin Delta for south-of-Delta urban and agricultural water use. *Id.*

55. *Id.*

56. *Id.*

III. LOCAL WATER SUPPLIER INVESTMENTS IN CALIFORNIA WATER INFRASTRUCTURE

Despite the substantial federal and state investments in water infrastructure in the last century, local water suppliers and wastewater agencies provide the majority of funds for water infrastructure in California.⁵⁷ According to a recent report by the Public Policy Institute of California (PPIC), local agencies provide 85% of the annual funding for water infrastructure.⁵⁸ While water debates in Congress and the State Legislature often receive the most statewide attention, local water suppliers continue to build and operate the vast majority of California's water infrastructure, delivering water to homes and farms across the state.⁵⁹ According to PPIC, local agencies perform "reasonably well—providing safe, reliable levels of service and preparing for future needs."⁶⁰

A. Public Water Agencies: The Challenge of Constitutional Limitations

Public water agencies continue to own and operate most of California's water infrastructure.⁶¹ The Association of California Water Agencies claims that its "nearly 440 public agency members collectively are responsible for 90% of the water delivered to cities, farms and businesses in California."⁶² These agencies, which include special districts as well as general governments like cities, have legal authority to raise revenues from a wide variety of sources, including property taxes, water rates, charges (*e.g.* standby charges), and fees (*e.g.* hookup fees).⁶³ Proposition 13 (1978) substantially limited local agency authority to collect property taxes, with its 1% cap on total property taxes from all agencies.⁶⁴ As a result, water agencies focused their revenue raising efforts on water rates and fees.⁶⁵

Proposition 218 (1996). California voters passed Prop 218 to limit the authority of special districts, including water agencies, to levy taxes and charge fees by imposing requirements for public approval of special taxes and fees.⁶⁶ Specifically, Prop 218 requires two-thirds voter approval for special taxes and

57. HANAK ET AL., *supra* note 15, at 12.

58. *Id.*

59. *Id.*

60. *Id.* at 2.

61. Ass'n of Cal. Water Agencies, *About ACWA*, ACWA, <http://www.acwa.com/content/about-acwa> (last visited Aug. 23, 2014) (on file with the *McGeorge Law Review*).

62. *Id.*

63. HANAK ET AL., *supra* note 15, at 15–16.

64. *Id.* at 19. In essence, Proposition 13 limited property taxes, to a total of 1% of assessed valuation, with some exceptions, and restricted increases in assessed valuation until a property is sold. CAL. CONST., art. XIII A § 2.

65. HANAK ET AL., *supra* note 15, at 19.

66. CAL. CONST., art. XIII C–D. Article XIII C addresses "voter approval for local tax levies" while Article XIII D addresses "assessment and property-related fee reform."

majority voter approval for property-related fee assessments.⁶⁷ However, Article XIID provides an exemption to voter-approval requirements for fee increases “for sewer, water, and [trash] collection.”⁶⁸ These fees proceed through a simpler majority-protest process.⁶⁹ The agency is required to give written notice of the fee increase to property owners and hold a hearing.⁷⁰ The agency may increase the fee unless a majority of property owners file a protest to the fee.⁷¹ Rather than having the people vote on every potential rate increase, this process makes increasing water rates much simpler.

The California Supreme Court examined how Prop 218 applied to water charges in 2004 and 2006.⁷² The Court recognized that Prop 218 does not apply to new water connection fees,⁷³ but water rates were “property-related fees” that required compliance with Article XIID⁷⁴ of the Constitution—the majority-protest process.⁷⁵

Prop 218 also includes substantive limitations on water rates.⁷⁶ First, Article XIID prohibits water rates charged to a property owner from exceeding the proportional cost of the service attributable to the parcel.⁷⁷ The agency therefore must structure the rate carefully to capture all—but not more than—the costs attributable to the property.⁷⁸ Second, the water agency may use the revenues only on water service and may not collect more than the costs of water service.⁷⁹ Cities, for example, may not use excess water service revenues on other governmental services.⁸⁰ Third, the rate may not include the costs for services available to the general public.⁸¹ Cities may not use water service revenues to cover the costs of watering city parks, for example.⁸²

While the water rate process is simpler, Prop 218 nevertheless discourages water agencies from increasing rates too often by making each increase a careful, deliberative decision.⁸³ As PPIC observes, public retail water agencies will have to explain more carefully and clearly the relationship between their water rate structures and the cost of providing water service to their customers, link new

67. CAL. CONST. art. XIID § (3)(2).

68. CAL. CONST. art. XIID § 6(c).

69. CAL. CONST. art. XIID § 4(c)–(e).

70. CAL. CONST. art. XIID § 4(d)–(e).

71. CAL. CONST., art. XIID

72. *Richmond v. Shasta Cmty. Serv. Dist.*, 32 Cal. 4th 409 (2004).

73. *Id.* at 423.

74. *Id.* at 427.

75. *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 220 n.7 (2006).

76. HANAK ET AL., *supra* note 15, at 19.

77. CAL. CONST. art. XIID § 4.

78. HANAK ET AL., *supra* note 15, at 29.

79. CAL. CONST. art. XIID § 6(2)(b)(1)–(2).

80. HANAK ET AL., *supra* note 15, at 19.

81. *Id.*

82. *Id.* at app. A 17.

83. *Id.* at 19.

fees and rates to the projects and programs they are designed to fund, and justify any differential treatment between or among classes of customers based on differences in the cost of providing services to those classes.⁸⁴ They also need to make a greater effort to justify indirect costs of water infrastructure and service that may not directly benefit the individual property owner, but benefits all customers.⁸⁵

Proposition 26 (2010). Prop 26 redefined the term “tax” to ensure that neither the state nor local agencies could impose “fees” that were, in effect, taxes paying for general government services.⁸⁶ The act’s findings asserted that agencies “have disguised new taxes as ‘fees’ in order to extract even more revenue from California taxpayers without having to abide by . . . [the Prop 13 supermajority] constitutional voting requirements.”⁸⁷ Prop 26 prohibits “regulatory” fees, which may be adopted on a majority vote of the agency board or the Legislature, from exceeding the reasonable cost of the regulation or paying for general government services.⁸⁸ It also limits fees for mitigating current or prospective environmental harm, which overturns part of the California Supreme Court’s *Sinclair Paint* decision that allowed a fee for past harm from selling lead paint.⁸⁹

In effect, Prop 26 limits state and local discretion to impose fees to pay for water infrastructure.⁹⁰ By broadening the definition of “tax,” it imposes Prop 13’s supermajority vote requirements on fees that have been used to fund water infrastructure.⁹¹ After its passage, the Legislature considered bills in 2011 that would have created statewide water infrastructure investment programs, including the imposition of “public benefit” fees on water use to raise money for water infrastructure—SB 34 (Simitian) and SB 571 (Wolk).⁹² SB 34 proposed to use Prop 26’s exemption from the definition of taxes for fees for the use of state property,⁹³ because all water in California is owned by the people.⁹⁴ Individuals can only hold the right to its “reasonable and beneficial use.”⁹⁵ Neither bill passed

84. *Id.* at app. A 16–17.

85. *Id.*

86. See LEAGUE OF CALIFORNIA CITIES, INNOVATIVE WATER AND WASTEWATER INFRASTRUCTURE FINANCING 1 (2014), available at <http://www.cacities.org/Resources-Documents/Policy-Advocacy-Section/Federal-Issues/2014-Federal-Letters/Innovative-Water-Infrastructure-Financing.aspx> (on file with the *McGeorge Law Review*).

87. LEAGUE OF CALIFORNIA CITIES, PROPOSITION 26 IMPLEMENTATION GUIDE 15 (2011), available at <http://www.cacities.org/Prop26Guide> (on file with the *McGeorge Law Review*).

88. *Id.*

89. *Sinclair Paint Co. v. State Board of Equalization*, 15 Cal. 4th 866, 875 (1997).

90. HANAK ET AL., *supra* note 15, at 20.

91. *Id.*

92. SB 34 2009–2010 Leg., Reg. Sess. (Cal. 2010); SB 571, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

93. CAL. CONST., art. XIII A, § 3(b). “(4) A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property.” *Id.*

94. CAL. WATER CODE § 102 (West 2009).

95. *Id.* § 100.

beyond the house of origin. Because Prop 26 is not quite four years old, its ultimate effect remains unclear and depends on its interpretation and application by the courts. In the meantime, the use of fees to raise money for water infrastructure remains uncertain.

B. Investor-Owned Utilities: Public Utilities Commission Regulation

The other significant segment of water suppliers that invest in water infrastructure are the investor-owned public utilities regulated by the California Public Utilities Commission (CPUC).⁹⁶ These private water companies, represented by the California Water Association, provide water for municipal uses (e.g., residential, industrial) and account for approximately 20% of the urban water supply.⁹⁷

The CPUC closely regulates public utility investment in water infrastructure. In order to obtain a certificate of public convenience to serve customers in a specified area and obtain approval for a rate increase, the public utility must justify the necessity and sufficiency of its investments in providing adequate service to customers.⁹⁸ Public utilities remain subject to CPUC audit and investigation in order to ensure good service.⁹⁹ In return, state law protects the public utility's monopoly on water service in its area, and the CPUC authorizes water rates that ensure a rate of return for the utility's investors.¹⁰⁰ In some communities, the differential in water rates between public utility service areas and neighboring public agencies can lead to controversy as to water infrastructure costs.¹⁰¹

96. CAL. PUB. UTILITIES CODE §§ 201–216 (West 2004); PUB. UTIL. §§ 2701–2703 (West 2010).

97. *Water Information*, CAL. WATER ASS'N, <http://www.calwaterassn.com/water-information/> (last visited Aug. 12, 2014) (on file with the *McGeorge Law Review*); Cal. Pub. Utilities Comm'n, *Division of Water Audits*, CA.GOV <http://www.cpuc.ca.gov/PUC/water/> (last modified June 27, 2014) (on file with the *McGeorge Law Review*).

98. Cal. Pub. Utilities Comm'n, *Division of Water Audits*, CA.GOV (last modified June 27, 2014), <http://www.cpuc.ca.gov/PUC/water/>.

99. *Id.*

100. *See* PUB UTIL. § 201 (West 2004); *see also* PUB. UTIL. § 1501 (West 2004).

101. *See, e.g., Claremont Residents Want City To Buy Water Company*, CBS LOS ANGELES (Nov. 6, 2013), <http://losangeles.cbslocal.com/2013/11/06/claremont-residents-want-city-to-buy-water-company-accused-of-price-gouging/> (on file with the *McGeorge Law Review*); *see also City of Claremont—Water System Acquisition Information*, CITY OF CLAREMONT (June 10, 2014), <http://www.ci.claremont.ca.us/ps.topics.cfm?ID=1800> (on file with the *McGeorge Law Review*).

C. *Mutual Water Companies: Shareholder Investment Decisions*

With origins in the 19th century, non-profit mutual water companies¹⁰² continue to provide water service in some communities.¹⁰³ While many started as farmer cooperatives, others were started by developers who chose to create their own water service for their homebuyers, instead of obtaining a “will-serve letter” from the local public water agency.¹⁰⁴ The new California Mutual Water Company Association estimates that mutual water companies serve approximately 1.3 million Californians.¹⁰⁵ While some continue to serve their farmer-owners, many now operate “public water systems” providing drinking water to residential and business customers.¹⁰⁶ The landowner-shareholders pay all company costs to provide water service, and their voting power is based on the amount of water that they have a right to receive from the company.¹⁰⁷ In order to invest in water infrastructure, the company may impose an “assessment” on all shares to raise money.¹⁰⁸ State law allows these companies to serve only their shareholders, who own land served by the company, and certain other users, such as public schools.¹⁰⁹

Landowner-shareholders have exclusive control over the mutual water companies, which leaves little room for public oversight in the companies’ water infrastructure investment decisions. These companies are not subject to CPUC regulation or other public oversight as to their water rates or investments.¹¹⁰ (If they operate a public water system, however, the Department of Public Health oversees their drinking water quality.¹¹¹ The Board of Directors and the shareholders make all decisions.¹¹² Renters who receive their drinking water from such companies have no role in the company’s investment or service decisions.¹¹³

102. CAL. CORP. CODE §§ 14300–14318 (West 2006). A mutual water company is a type of non-profit California corporation created by landowners who merge their financial resources and water rights to build and manage water infrastructure. *See* *Erwin v. Gage Canal Co.*, 226 Cal. App. 2d 189, 192–93 (4th Dist. 1964).

103. *About Mutuals*, CAL. ASS’N OF MUT. WATER CO., <http://www.calmutuals.org/about-mutuals/> (last visited July 26, 2014) (on file with the *McGeorge Law Review*).

104. *History of Mutuals*, CAL. ASS’N OF MUT. WATER CO., <http://www.calmutuals.org/history-of-mutuals.html> (last visited July 26, 2014) (on file with the *McGeorge Law Review*).

105. *About Mutuals*, CAL. ASS’N OF MUT. WATER CO., <http://www.calmutuals.org/about-mutuals/> (last visited July 26, 2014) (on file with the *McGeorge Law Review*).

106. *Id.*; CORP. § 14303.

107. CORP. § 14310.

108. *Id.* § 14303.

109. *Id.* § 14301.

110. *See* CAL. PUB UTIL. CODE § 2701. This statute applies only to public utilities that serve “any person,” not mutual water companies who serve only their shareholders.

111. CAL. HEALTH & SAFETY CODE § 116270 (West 2012).

112. CORP. §§ 14300–14318.

113. *Id.* §§ 14300–14318.

Until this year, such customers had no access to company information or Board meetings.¹¹⁴

Assembly Bill 240 (Rendon) requires the companies to allow those who drink their water to attend board meetings and have access to five kinds of documents related to company operations and finances.¹¹⁵ This new statute arose out of problems with three mutual water companies serving the City of Maywood, where 2/3 of residents rent their homes and many complain about brown and smelly water. The mutual water companies, controlled by landowners, assert that they cannot afford to invest in improving their water infrastructure because the city's residents are poor and cannot afford to pay higher water rates.¹¹⁶ The companies have not proposed to assess their owners' shares to raise money for improved water infrastructure.¹¹⁷ By opening up the process and ensuring more transparency, AB 240 offers an example of how to improve local water supplier decisions on investment in water infrastructure.

IV. STATE GENERAL OBLIGATION BOND FOR WATER INFRASTRUCTURE IN 2014?

While the hundreds of local water suppliers make decisions about most investments in California water infrastructure, the State can play a significant role when it uses its financial capacity to sell general obligation (GO) bonds for water infrastructure investments. The 1960 voter decision on the State Water Project (SWP) involved a GO bond, albeit subject to repayment by the water users who received SWP water. Since 1996, voters have approved five GO bonds connected to water, totaling \$15.88 billion in water and related natural resource investments.¹¹⁸ In 2009, the Legislature placed a water bond for \$11.14 billion on the 2010 ballot, but the election was postponed twice based on concerns for weak voter support.¹¹⁹ This bond will appear on the November 2014 ballot unless the Legislature removes it or passes a replacement bond measure with a 2/3 vote.¹²⁰ Since February 2013, the Legislature has considered how to recast a water bond to replace the one currently on the ballot.¹²¹

114. *Id.* § 14305.

115. AB 240, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

116. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 240, at 7 (Apr. 29, 2013).

117. *Id.*

118. Cal. Proposition 204 (1996); Cal. Proposition 13 (2000); Cal. Proposition 50 (2002); Cal. Proposition 1E (2006); Cal. Proposition 84 (2006).

119. *See* SB 27, 2009–2010 Leg., Reg. Sess. (Cal. 2009); *see also* AB 1265, 2009–2010 Leg., Reg. Sess. (Cal. 2010); AB 1422, 2011–2012 Leg., Reg. Sess. (Cal. 2012).

120. CAL. CONST., art. XVI § 1.

121. *See, e.g., 2013 Informational/Oversight Hearings*, CAL. STATE SENATE, <http://sntr.senate.ca.gov/informationaloversighthearings> (last visited July 26, 2014) (on file with the *McGeorge Law Review*); *Funding Principles for Building a Water Bond*, LEGIS. ANALYST'S OFFICE (Feb. 26, 2013), <http://www.lao.ca.gov/Publications/Detail/2696> (on file with the *McGeorge Law Review*).

2014 / Who Should Pay to Keep the Tap Running

A. The Assembly Water Bond Process

To address 2009 water bond criticism and increase voter support, in May 2013 the California State Assembly began a new, transparent process for developing a water bond for the 2014 ballot.¹²² Assembly Speaker John Pérez appointed a Water Bond Working Group, chaired by the Water, Parks and Wildlife (WPW) Committee Chair Anthony Rendon (D-Lakewood).¹²³ This group, which included legislators representing Californians from the Mexican to the Oregon border, started its work by convening water discussions among legislators from each region.¹²⁴

Based on those legislator discussions, the Working Group established the *Proposed Principles for Developing a Water Bond (Principles)*,¹²⁵ which focused on accountability and priorities for water investments. Then, the Group developed a framework based on those principles.¹²⁶ To gain voter confidence, the *Principles* framework emphasized the importance of accountability for spending water bond funds.¹²⁷ The framework included five categories of funding—safe drinking water, protection of rivers and the coast, regional water reliability, Sacramento-San Joaquin Delta (Delta) sustainability, and water storage.¹²⁸ At first, the framework allocated \$1 billion for each category, but as testimony and evidence on the needs for investment in each category emerged, three categories increased to \$1.5 billion (protecting rivers, regional water, and storage), for a total of \$6.5 billion.¹²⁹ The framework became AB 1331 (Rendon), which was the Assembly’s vehicle for moving the water bond discussion forward.

Combining the Working Group and his WPW Committee, Rendon convened multiple public hearings, starting in the Capitol and then convening in communities across California, from Indio to Eureka.¹³⁰ This historic public

122. ASSEMBLY WATER, PARKS & WILDLIFE COMM., BACKGROUND: PRINCIPLES FOR DEVELOPING A WATER BOND 4 (July 2, 2013), available at <http://awpw.assembly.ca.gov/sites/awpw.assembly.ca.gov/files/Water%20Bond%20Principles%20-%20Background.pdf> (on file with the *McGeorge Law Review*) [hereinafter ASSEMBLY WATER, PARKS & WILDLIFE COMM.].

123. *Id.*

124. *Id.*

125. WATER BOND WORKING GROUP, PROPOSED PRINCIPLES FOR DEVELOPING A WATER BOND (July 2, 2013), available at <http://awpw.assembly.ca.gov/sites/awpw.assembly.ca.gov/files/Water%20Bond%20Principles%20-%20Proposed.pdf> (on file with the *McGeorge Law Review*).

126. WATER BOND WORKING GROUP, 2013 WATER BOND FRAMEWORK (2013), available at <http://awpw.assembly.ca.gov/sites/awpw.assembly.ca.gov/files/Water%20Bond%20Framework%20-%20208-14%20Public%20Draft.pdf> (on file with the *McGeorge Law Review*).

127. *Id.*

128. *Id.*

129. Compare WATER BOND WORKING GROUP, 2013 WATER BOND FRAMEWORK (2013), available at <http://awpw.assembly.ca.gov/sites/awpw.assembly.ca.gov/files/Water%20Bond%20Framework%20-%20208-14%20Public%20Draft.pdf> (on file with the *McGeorge Law Review*) with AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

130. See Press Release, Anthony Rendon, Cal. Assemb. Member, Statement on Passage of New State

hearing process attracted hundreds of Californians to talk about the state's most urgent needs for water investments.¹³¹ As the hearings proceeded into the spring of 2014, AB 1331 increased to \$8 billion and Senate Committees heard and moved the bill toward the Senate Floor.¹³² Disputes on various parts of AB 1331 developed, but the bill continued moving forward.¹³³

B. Water Bonds and Water Policy

The water bond debate in California reflects underlying debates about California water policy.¹³⁴ The structure of funding in a proposed water bond affects how California water policy objectives are achieved.¹³⁵ The water bond elements often arise out of a water debate or problem that the Legislature has sought to address in previous years.¹³⁶ This year's water bond proposals include the elements of the water policy debate since the last water bonds passed in 2006.¹³⁷ The five elements—safe drinking water, river and coastal protection, regional water reliability, the Delta, and water storage—have received substantial attention in both the Legislature and the public forum.¹³⁸ The specific provisions therefore reflect the Legislature's vision for water policy.¹³⁹ To the extent that the Governor participates in its development, the water bond may include his policies as well.¹⁴⁰

Water Bond (Aug. 13, 2014) [hereinafter Rendon State Assembly] (on file with the *McGeorge Law Review*).

131. *Id.*

132. AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

133. The 2014 Amendments to AB 1331 (Rendon) show the evolution of the bond discussion. The Assembly Water, Parks & Wildlife Committee's webpage provides information on its hearings. *Water Bond*, CAL. STATE ASSEMB., <http://awpw.assembly.ca.gov/waterbond> (last visited July 26, 2014) (on file with the *McGeorge Law Review*).

134. Jeremy White, *Water Bond Leads Agenda as California Lawmakers Return for Final Month*, SACRAMENTO BEE (Aug. 4, 2014), <http://www.sacbee.com/2014/08/03/6602416/water-bond-leads-agenda-as-california.html> <http://www.sacbee.com/2014/08/03/6602416/water-bond-leads-agenda-as-california.html> (on file with the *McGeorge Law Review*).

135. *California Economic Summit 2013 Summit Report*, CAECONOMY.ORG (2013), http://sjvpartnership.org/wp-content/uploads/2013/04/SJV-Regional-Economic-Forum_State-Progress-Report.pdf (on file with the *McGeorge Law Review*).

136. *Id.*

137. Compare CAL. PUB. RES. CODE §§ 5096.800–5096.967 (West 2007) (codifying Prop. 1E as passed in 2006), and CAL. PUB. RES. CODE § 75050 (West 2007) (codifying part of Prop. 84 as passed in 2006), with AB 1331 (Rendon 2014) (proposing a repeal and amendment of CAL. WATER CODE §§ 79700–79813).

138. AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2014). While several water bond proposals are proceeding at the time of writing, this article will address AB 1331 (Rendon), the Assembly's primary water bond vehicle.

139. Rendon State Assembly, *supra* note 130.

140. Governor Brown did not participate in the bond discussions until June 23, 2014, when he gave the legislative leadership an outline for a \$6 billion water bond. Dan Bacher, *Senator Lois Wolk Reintroduces Revamped \$7.5 Billion Water Bond*, DAILYKOS.COM (July 7, 2014), <http://www.dailykos.com/story/2014/07/07/1312320-Senator-Lois-Wolk-reintroduces-revamped-7-5-billion-water-bond#> (on file with the *McGeorge Law Review*).

Safe Drinking Water. For several years, the Assembly has recognized and worked on addressing the problem of small communities that suffer from unsafe drinking water.¹⁴¹ Many of these communities can be found in the Central Valley and the Salinas Valley.¹⁴² In 2008, the Legislature passed SB 1 X2 (Perata), which required the State Water Resources Control Board (SWRCB) to study and develop pilot projects to help these communities in Tulare County and the Salinas Valley.¹⁴³ That legislation resulted in SWRCB recommendations on how to address nitrates in drinking water.¹⁴⁴ In 2013, the Governor signed bills addressing drinking water quality, many having originated in a bill package developed by the Assembly.¹⁴⁵ The Assembly's *Principles*, accordingly included a priority for safe drinking water projects, with an emphasis on the communities that suffer from poor drinking water quality.¹⁴⁶

Protecting Rivers and the Coast. Since the last drought in the 1990s, conflicts over water often have arisen out of declines in river ecosystems and fish populations, especially those fish listed pursuant to the Endangered Species Act (ESA).¹⁴⁷ Though the conflicts in the Delta have received the most public attention, conflicts over ESA-listed fish arise throughout the state, from the Santa Ana River to the Klamath River, and especially on coastal streams.¹⁴⁸ State funding to address these ecosystem declines and other watershed improvement needs has appeared in recent water bonds.¹⁴⁹ The Legislature has treated environmental needs in watersheds as a "statewide concern" deserving statewide funding from a water bond.¹⁵⁰ Past water bonds have allocated these funds to state conservancies, such as the Coastal Conservancy.¹⁵¹ AB 1331 proposed a different

141. See CAL. WATER CODE § 83002.5 (West 2004).

142. Sarah Rubin, *Reporting on Toxic Drinking Water in the Salinas Valley*, USCANNENBERG (Aug. 1, 2013), <http://www.reportingonhealth.org/2013/08/01/don%E2%80%99t-drink-water-reporting-toxic-drinking-water-salinas-valley> (on file with the *McGeorge Law Review*).

143. WATER § 83002.5.

144. STATE WATER RESOURCES CONTROL BD., RECOMMENDATIONS ADDRESSING NITRATE IN GROUNDWATER 48 (2013), available at http://www.waterboards.ca.gov/water_issues/programs/nitrate_project/docs/nitrate_rpt.pdf (on file with the *McGeorge Law Review*).

145. *Governor Brown Signs Water Legislation*, OFFICE OF THE GOVERNOR (Oct. 8, 2013), <http://www.gov.ca.gov/news.php?id=18258>; Press Release, Assembly member Alejo, *Governor Signs Clean Water for Californians Bill Package* (Oct. 8, 2013), <http://asmdc.org/members/a30/news-room/press-releases/governor-signs-clean-water-for-californians-bill-package> (on file with the *McGeorge Law Review*).

146. ASSEMBLY WATER, PARKS & WILDLIFE COMM., *supra* note 122, at 4.

147. See CALFED BAY-DELTA PROGRAM, PROGRAMMATIC RECORD OF DECISION 24 (Aug. 2000); see also U.S. DEP'T OF THE INTERIOR, RECORD OF DECISION: TRINITY RIVER MAINSTREAM FISHERY RESTORATION 1 (2000).

148. See U.S. DEP'T OF THE INTERIOR, RECORD OF DECISION: TRINITY RIVER MAINSTREAM FISHERY RESTORATION 1 (2000).

149. CAL. WATER CODE §§ 79570–79573 (West 2004); CAL. PUB. RES. CODE § 75050 (West 2007).

150. S. NATURAL RES. & WATER COMM., SETTING THE STATE FOR A 2014 WATER BOND: WHERE ARE WE AND WHERE DO WE NEED TO GO? 9–10 (Sept. 24, 2013), available at <http://sntr.senate.ca.gov/sites/sntr.senate.ca.gov/files/9-24%20Background%20%282%29.pdf> (on file with the *McGeorge Law Review*).

151. *Id.*

approach. It allocated protecting-rivers/coast funding to regions, but the Senate Committee on Natural Resources and Water rejected that approach, over the author's objections, and replaced that language with allocations to the conservancies.¹⁵²

Regional Water Supply Reliability. In 2002, a previous water bond initiative measure established funding for Integrated Regional Water Management (IRWM), to encourage agencies to collaborate in regional water infrastructure development.¹⁵³ Since then, this program has developed and expanded, and the 2006 Prop 84 included additional allocation of bond funding for IRWM.¹⁵⁴ AB 1331 retained the \$1 billion for IRWM that the 2009 water bond included, but added funding for specific categories independent of the IRWM.¹⁵⁵ The regional water reliability Chapter 7 includes \$500 million for water recycling, desalination, and groundwater cleanup, which are all connected to regional water strategies.¹⁵⁶ It also includes \$250 million each for water conservation and stormwater management projects¹⁵⁷ (Senate amendments limited the stormwater funding to stormwater capture projects for water supply purposes). Discussion has included proposals to separate groundwater cleanup and water recycling into their own chapters, independent of regional water reliability.¹⁵⁸

Sacramento-San Joaquin Delta. Delta funding receives the most attention in the water bond debate, given that the most intense and most funded opposition to the bond measures on the ballot are from the Delta.¹⁵⁹ Polling shows that voters only marginally support a new water bond, and voter awareness of negative messages on the water bond reduce support well below the levels required for the bond's passage.¹⁶⁰ The continuing Delta ecosystem crisis and climate change, however, calls for additional State bond funding for the Delta.¹⁶¹ AB 1331 includes three categories of Delta funding—levees, economic sustainability, and ecosystem restoration.¹⁶²

152. Compare AB 1331, 2013–2014 Leg., Reg. Sess., § 79734(b)–(c) (as amended Mar. 18, 2014) with AB 1331, 2013–2014 Leg., Reg. Sess., § 79734(b)–(c) (as amended Apr. 8, 2014).

153. WATER § 79501(d) (codifying Prop. 50 as passed in 2002 and declaring the need to “establish and facilitate integrated regional water management systems and procedures to meet increasing water demands due to significant population growth that is straining local infrastructure and water supplies”); WATER §§ 10530–10548 (codifying the Integrated Regional Water Management Plan).

154. Proposition 84 (Cal. 2006).

155. AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (as amended June 17, 2014).

156. *Id.*

157. *Id.*

158. *But see* AB 2686, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

159. White, *supra* note 134.

160. David Metz, *California Voter Attitudes on Water Policy in 2014*, FAIRBANK, MASLIN, MAULLIN, METZ & ASSOC., ppt. 10 (Apr. 25, 2014), available at http://www.labusinesscouncil.org/files/David_Metz_PPT.pdf.

161. *About the Central Valley Project*, BUREAU OF RECLAMATION, http://www.usbr.gov/projects/Project.jsp?proj_Name=Central+Valley+Project (last updated Sept. 26, 2012) (on file with the *McGeorge Law Review*).

162. AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (as amended June 17, 2014).

The controversy over Delta funding for ecosystem restoration arises from the debate over the Bay-Delta Conservation Plan (BDCP), commonly called “the Governor’s Tunnels,” which would take water from the Sacramento River to the water export pumps in the South Delta.¹⁶³ The 2009 Delta Reform Act (Delta Act) requires the water exporters who benefit from BDCP to pay for construction and mitigation of environmental impacts from the Delta tunnels.¹⁶⁴ The Delta Act also requires BDCP to include ecosystem restoration beyond mitigation, sufficient to qualify BDCP as a “Natural Community Conservation Plan.”¹⁶⁵ Where to draw the line between ecosystem restoration and mitigation, as well as who pays for the ecosystem restoration have been the questions at the center of the Delta water bond funding debate.¹⁶⁶ Passage of a water bond—by 2/3 of the Legislature and a majority of voters—will require resolution of these Delta water bond funding issues.¹⁶⁷

Water Storage. Water bond funding for dams and reservoirs remained at the center of the 2009 water bond discussion.¹⁶⁸ Then-Governor Arnold Schwarzenegger threatened to veto all bills in 2009 if the Legislature failed to pass a water bond that included funding for dams.¹⁶⁹ Storage continues to play a central role in the 2014 water bond debate.¹⁷⁰ The 2014 storage issues include: (1) if the bond should “continuously appropriate[]” funding for water storage to the California Water Commission to decide which projects get funds, as the 2009 water bond provided; (2) bond language, as stated in the 2009 water bond, that would favor Central Valley surface storage reservoirs over groundwater and other regions that are not connected to the Delta; and (3) the total amount, which the 2009 water bond put at \$3 billion, out of \$11 billion then set for the 2014 ballot.

On a separate—but related—issue this year, the Governor has advocated for expanding groundwater planning, management and regulation.¹⁷¹ His 2014 California Water Action Plan includes a call for sustainable groundwater management.¹⁷² With a continuing drought, California’s Central Valley aquifers

163. John Kirlin, *Viewpoints: Bay Delta Conservation Plan is a 50-Year Gamble*, SACRAMENTO BEE, May 18, 2014, <http://www.sacbee.com/2014/05/18/6409422/viewpoints-bay-delta-conservation.html>.

164. CAL. WATER CODE § 85089 (West 2004).

165. *Id.* § 85320(b)(2)(A).

166. White, *supra* note 134.

167. *Id.*

168. Samantha Young, *New Dams Critical for Water Supply*, THE REPORTER, Aug. 19, 2009, http://www.thereporter.com/news/ci_13156869 (on file with the *McGeorge Law Review*).

169. *Id.*

170. See AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

171. Wayne Lusvardi, *Gov. Brown, Legislature Push Groundwater Regulation*, CALWATCHDOG (Mar. 14, 2014), <http://calwatchdog.com/2014/03/14/gov-brown-legislature-push-groundwater-regulation/> (on file with the *McGeorge Law Review*).

172. CAL. NATURAL RES. AGENCY ET AL., CALIFORNIA WATER ACTION PLAN 14 (2014), available at http://resources.ca.gov/california_water_action_plan/docs/Final_California_Water_Action_Plan.pdf (on file with the *McGeorge Law Review*).

have seen rapid depletion, leading many Valley leaders to call for better management of the region's groundwater.¹⁷³ The California Water Foundation, led by former Natural Resources Agency Secretary Lester Snow, issued a report to the Brown Administration in May 2014 that recognized the growing consensus on the need for groundwater management and groundwater management funding, including a 2014 water bond.¹⁷⁴ While AB 1331 includes funding for groundwater storage and cleanup, its May 8 version did not specifically include funding for development of groundwater management plans.¹⁷⁵ The bill did, however, require that proponents of projects related to groundwater demonstrate that a public agency has sufficient authority to manage the groundwater.¹⁷⁶ Given the Governor's actions to improve groundwater management statewide, funding for improving groundwater management and planning may appear in the final version of the bond that goes on the November 2014 ballot. This may depend on whether the Legislature passes a replacement for the \$11.14 billion water bond that was moved to the 2014 ballot in 2012.¹⁷⁷

C. Water Finance Policies Incorporated Into Water Bonds

As the Legislature has developed water bonds over the last twenty years, it has adopted certain policies or principles in deciding what belongs in a statewide water bond.¹⁷⁸ In some cases, these policies apply to other kinds of water financing tools, such as proposals for statewide water fees.¹⁷⁹ They originate in water policy discussions about the State's role in encouraging or discouraging actions by regional or local water agencies, which actually deliver water to customers. As water bond bills develop, they incorporate these policies into their language, either at introduction or as the policy committees review the bills.¹⁸⁰

The 2013 Assembly Water Bond Working Group adopted the *Principles* that reflected many of these policies.¹⁸¹ Its first principle focused on setting "critical

173. Lusvardi, *supra* note 171.

174. CAL. WATER FOUND., RECOMMENDATIONS FOR SUSTAINABLE GROUNDWATER MANAGEMENT: DEVELOPED THROUGH A STAKEHOLDER DIALOGUE 30–31 (2014), available at <http://www.californiawaterfoundation.org/uploads/1399077265-GroundwaterReport-52014%2800249329xA1C15%29.pdf> (on file with the *McGeorge Law Review*).

175. See AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

176. *Id.* (proposing an amendment of CAL. WATER CODE §§ 79723, 79748, 79768(b)).

177. Lusvardi, *supra* note 171.

178. STATE GOVERNANCE & FINANCE COMM. & SENATE NATURAL RESOURCES & WATER COMM., OVERVIEW OF CALIFORNIA'S DEBT CONDITION: PRIMING THE PUMP FOR A WATER BOND 9–11 (2013), available at <http://sntr.senate.ca.gov/sites/sntr.senate.ca.gov/files/Background-Final.pdf> [hereinafter CALIFORNIA'S DEBT CONDITION] (on file with the *McGeorge Law Review*).

179. See AB 34, 2010–2011 Leg., Reg. Sess. (Cal. 2011).

180. See generally ASSEMB. WATER BOND WORKING GROUP PROPOSED PRINCIPLES FOR DEVELOPING A WATER BOND 4 (2013), available at <http://awpw.assembly.ca.gov/sites/awpw.assembly.ca.gov/files/Water%20Bond%20Principles%20-%20Proposed.pdf> (on file with the *McGeorge Law Review*).

181. *Id.*

statewide water policy priorities” for water bond funding.¹⁸² Its second principle emphasized accountability to voters for how the State spends water bond money.¹⁸³ Its third and fourth principles emphasized respect for existing law and policy, how they relate to water rights and protection of the Delta.¹⁸⁴ The Working Group and the hearings that followed reflected a unique effort at transparency in developing a water bond, which is perhaps another developing policy for water finance.¹⁸⁵

Some of the most significant policies for State water infrastructure finance and water bonds include:

- *Statewide Interests.* The Senate Committee on Natural Resources and Water has framed this policy as “State Funds For State Responsibilities.”¹⁸⁶ The Committee explained that the State Government has accepted responsibility for certain activities related to water, such as protecting the public trust and public health, and setting statewide standards and rules of behavior for the local agencies that deliver water.¹⁸⁷ Because taxpayers throughout the state pay off the debt created by a water bond, the water bond funding should support statewide objectives.¹⁸⁸
- *Beneficiary Pays.* This principle is the converse of the statewide interest policy: those who receive water from infrastructure should pay the cost of that infrastructure. While this principle has long been advocated, the Legislature has found it difficult to implement. Project proponents often describe the public benefits broadly and private benefits narrowly. In addition, some disadvantaged communities cannot afford to pay for the infrastructure to provide clean and safe drinking water, so the State—stepping into its public health role—pays for this fundamental water infrastructure. AB 1331 encourages this principle, but it does not impose the principle as a requirement for funding from the water bond.¹⁸⁹ It also targets safe drinking water specifically for disadvantaged communities.¹⁹⁰
- *Polluter Pays.* Similar to the “beneficiary pays” principle, the state should not charge taxpayers statewide to fix a problem caused by an

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. CALIFORNIA’S DEBT CONDITION, *supra* note 178, at 9.

187. *Id.*

188. *Id.*

189. AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2013) (amending CAL. WATER CODE § 79709).

190. *Id.* (amending CAL. WATER CODE §§ 79720–79729).

identifiable party. Bonds have applied this principle in prohibitions on paying for mitigation or environmental compliance, or in requirements that recovery from polluters should be paid back to the State.¹⁹¹ As environmental regulation has developed, some compliance efforts have become water supply strategies, such as stormwater capture and management. For that reason, the May 8 version of AB 1331 included this narrower prohibition language: “[f]unds provided by this division shall not be expended to support or pay for penalties or correcting violations.”¹⁹²

The Senate Committee on Natural Resources and Water, in a February 2013 background paper,¹⁹³ identified several other policies that it recommended, including: (1) state funds for state responsibilities;¹⁹⁴ (2) subsidies should be avoided;¹⁹⁵ (3) “bonds should aid in implementation of policy,” not create policy;¹⁹⁶ and (4) “respect separation of powers.”¹⁹⁷ The Legislature is likely to incorporate these policies and others, such as the principles arising out of the Assembly Water Bond Working Group, into water bonds in the years ahead. A constant challenge in crafting a water bond is balancing statewide policies and principles with the need to address the most immediate needs for water infrastructure funding that will attract votes from legislators and voters.¹⁹⁸

D. The Most Difficult Water Bond Issues

The Legislature continued discussing a replacement water bond through the June 26 deadline for placing a new water bond on the November 2014 ballot.¹⁹⁹ Three days before the deadline, the Senate took up Senator Wolk’s \$10.5 billion

191. Cal. Proposition 84 (containing a prohibition on mitigation and groundwater cleanup provisions).

192. AB 1331, 2013–2014 Reg. Sess. (Cal. 2013) (amending CAL. WATER CODE § 79709).

193. CALIFORNIA’S DEBT CONDITION, *supra* note 178, at 1.

194. *Id.* at 9. As explained in this Background Paper, the State Government has responsibility for certain water and natural resource activities, such as protecting the public trust, public health and providing flood protection in the Central Valley. *Id.*

195. *Id.* at 10. When statewide bond funds are used for purposes that are not a state responsibility, “should be characterized as a subsidy.” *Id.* These non-state responsibilities should be paid with private or local government funding. *Id.*

196. *Id.* Bonds provide funding for implementing policy, but cannot be changed, without voter approval, even as conditions change and necessitate changes in policy.

197. *Id.* As explained in this Background Paper, in funding state programs, the Governor proposes a State Budget but the Legislature has responsibility to determine how best to spend state funding, including bond funds. Therefore, a bond that provides a continuous appropriation of funding to a particular program (*e.g.* storage) abdicates the Legislature’s responsibility to make annual decisions as to how to spend state funding. *Id.*

198. Memo from David Metz and Curtis Below of Fairbank, Maslin, Maullin, Metz, & Assoc. on Californians’ Perceptions of the Drought (June 16, 2014) (on file with the *McGeorge Law Review*).

199. See CAL. ELEC. CODE § 9040 (West 2003) (requiring that the Legislature place measures on the ballot at least 131 days before the election). For the November 4, 2014, election, that deadline was June 26, 2014. See *id.*

water bond, SB 848, on the Senate floor, but it failed to gain the two-thirds vote necessary to pass a bond measure on a 22–9 vote.²⁰⁰ The next day, the Governor gave legislative leaders an outline for a \$6 billion water bond.²⁰¹

Assembly Speaker Toni Atkins convened Assembly members, from both sides of the aisle, who had participated in the water bond debate.²⁰² Assembly Appropriations Committee cancelled several hearings on AB 2686 (Perea) and AB 2043 (Bigelow/Conway) scheduled during the final weeks before the summer break commenced on July 3rd because no agreement emerged.²⁰³ The Speaker focused on gaining bi-partisan support that could lead to a two-thirds vote on the Senate floor,²⁰⁴ and developed proposed amendments to AB 2686 for a bond at \$8.25 billion.²⁰⁵ The Appropriations Committee cancelled the July 2 hearing when the Republican leadership rejected the proposal.

The “sticking points” that prevented the necessary votes raised the same issues that both houses discussed vigorously the previous year—water storage and the Sacramento-San Joaquin River Delta:

- *Water Storage.* Historically, water users paid (or at least repaid) the costs to build California’s dams.²⁰⁶ The 2009 water bond proposed (for the first time) that taxpayers pay up to 50% of dam costs for “public benefits” related to the environment, flood protection, and recreation.²⁰⁷ It authorized and continuously appropriated \$3 billion to the California Water Commission for building surface or groundwater storage facilities. The 2009 water bond language skewed the storage funding toward Central Valley dams, with language requiring “measurable improvements to the Delta

200. See SB 848, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (showing that the bill failed on the senate floor).

201. Melanie Mason, *Governor Pushes for Scaled Down Water Bond*, CUWCC (June 26, 2014), <http://www.cuwcc.org/Home/gov-jerry-brown-pushes-for-scaled-down-6-billion-water-bond-582> at 1 (on file with the *McGeorge Law Review*).

202. *Water Bond Off Until Aug.*, BAY PLANNING COALITION (July 3, 2014), <http://bayplanningcoalition.org/2014/07/water-bond-off-until-august/>.

203. While the legal deadline was June 26, the Legislature could exempt a new water bond from that deadline. But several legislators asserted that the real deadline was before summer break, to pre-empt the Secretary of State from preparing a ballot pamphlet for the 2009 water bond then on the ballot. White, *supra* note 134.

204. The Senate had lost its 2/3 Democratic supermajority earlier in the year, when three Democratic Senators could no longer vote due to legal problems. Stephen Frank, *Corrupt State Senate Democrats Kill Super-Majority*, CAPOLITICALNEWS.COM (Mar. 3, 2014), <http://capoliticalnews.com/2014/03/03/corrupt-state-senate-democrats-kill-super-majority/> (on file with the *McGeorge Law Review*).

205. *On Topic: Assembly Speaker Toni Atkins Discusses Water Bond*, THE SACRAMENTO BEE, July 7, 2014, <http://www.sacbee.com/2014/07/07/6532998/on-topic-assembly-speaker-toni.html> (on file with the *McGeorge Law Review*).

206. HANAK ET AL., *supra* note 15, at 9.

207. See SENATE FLOOR, COMMITTEE ANALYSIS OF SB 2 X7, at 1 (Nov. 4, 2009).

ecosystem or to the tributaries to the Delta”²⁰⁸ and defining recreational use as a public benefit²⁰⁹ (groundwater aquifers provide little recreational benefit). Republicans insisted that storage funding had to remain at \$3 billion with the 2009 language intact.²¹⁰ Both SB 848 and AB 2686 included the 2009 language with little change.²¹¹ The Speaker’s proposed amendments to AB 2686, however, set the storage funding at \$2.75 billion.²¹²

- *The Delta.* Senator Wolk and advocates for the Delta had long opposed the 2009 water bond because it allowed funding for ecosystem restoration related to the BDCP. BDCP proposed to achieve the “Co-Equal Goals” of water supply reliability and Delta ecosystem restoration, as provided in the 2009 Delta Reform Act.²¹³ The Plan, which had become known as “the Governor’s Tunnels,” proposed to transfer water south from the Sacramento River to water export pumping facilities in the South Delta.²¹⁴ At the time of the bond discussions, the BDCP was out for public comment, pursuant to the California Environmental Quality Act. The three Democratic bond proposals—SB 848, AB 1331, and AB 2686—had studiously avoided any mention of BDCP. SB 848, however, consistently required that all Delta ecosystem restoration funding be allocated to the Delta Conservancy, whose eleven-member board included five representatives of the Delta Counties.²¹⁵ That provision led to opposition from the state and federal water contractors, and effectively, SB 848’s failed passage on June 23.²¹⁶

208. AB 2686, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (proposing to enact CAL. WATER CODE § 79762).

209. *Id.* (proposing to enact CAL. WATER CODE § 79763).

210. Michael Doyle, *Drought be Dammed, Calif. Lawmakers Look to Storing Water*, MCCLATCHY DC (Feb. 27, 2014), <http://www.mcclatchydc.com/2014/02/27/219641/drought-be-dammed-calif-lawmakers.html> (on file with the *McGeorge Law Review*).

211. *But see* Assemb. B. 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (explaining that \$2.5 billion will be available for water storage expenses).

212. *See On Topic: Assembly Speaker Toni Atkins Discusses Water Bond*, THE SACRAMENTO BEE, July 7, 2014, <http://www.sacbee.com/2014/07/07/6532998/on-topic-assembly-speaker-toni.html> (on file with the *McGeorge Law Review*).

213. CAL. WATER CODE § 85350 (West 2014).

214. *Id.*

215. SB 848, 2013–2014 Leg., Reg. Sess. (Cal. 2014). AB 1331 also allocated ecosystem restoration funding to the Delta Conservancy based on amendments imposed by the Senate Natural Resources and Water Committee over the author’s objection, as amended April 8, 2014. AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

216. Letter from coalition to members of the California State Senate, *LEGISLATIVE ALERT SB 848 (Wolk): 2014 Water Bond as Proposed to be Amended Oppose Unless Amended 1–2* (May 30, 2014), available at <http://restoredhodelta.org/wp-content/uploads/2014/06/MWD-et-al-SB-848-opp-5-30-14.pdf> (on file with the *McGeorge Law Review*).

The conflicts over a new water bond reflect the underlying conflicts over how California manages and pays for its management of water resources. The biggest issues—storage and the Delta—go to the heart of the questions that California water leaders now ponder. With climate change reducing snowpack—the state’s biggest reservoir—and increasing drought, how will California store and share its water among agriculture, cities and the environment? The Delta remains the heart of the California water system, as well as the most valuable estuary ecosystem on the west coast of North or South America. How will California manage this environmental jewel for its many competing uses? The list of water bond issues continues, on groundwater cleanup, water recycling, watersheds, and others. Those issues similarly reflect conflicts over water management.

Perhaps the one issue that receives broad bi-partisan, legislative support is safe drinking water. Drinking water quality draws the support of voters as well. In years like 2014, when newspapers reported that seventeen small communities were threatened with running out of water completely within sixty days,²¹⁷ safe drinking water became a critical issue for legislators and voters alike. The chapters on safe drinking water were substantially similar among the Democratic water bond bills.²¹⁸ Polling shows that voters will support a bond to pay for safe drinking water for all Californians.²¹⁹ As legislators continue to encounter conflict, safe drinking water may be the one segment that survives the conflict, whether in 2014 or in a subsequent year if voters reject the water bond proposal on the November ballot.

The question for future water bond debates will be how California resolves its water conflicts. Will the state make the decision to alter how it conveys water across the Delta to the San Francisco Bay Area, San Joaquin Valley, and Southern California? Will it build big new dams or will it better manage its biggest groundwater aquifer in the Central Valley? Will it cleanup its contaminated groundwater, especially in Southern California? Will the state achieve its goal of using 3 million acre-feet of recycled water by 2030? How will California implement the “Human Right to Water,” adopted in 2012, to ensure that “every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes”?²²⁰

217. Paul Rogers, *California Drought: 17 Communities Could Run Out of Water Within 60 to 120 Days, State Says*, SAN JOSE MERCURY NEWS, Jan. 28, 2014, http://www.mercurynews.com/science/ci_25013388/california-drought-17-communities-could-run-out-water (on file with the *McGeorge Law Review*).

218. Compare SB 848, 2013–2014 Leg., Reg. Sess. (Cal. 2014); with AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2013); and AB 2686, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

219. See David Metz, *California Voter Attitudes on Water Policy in 2014*, FAIRBANK, MASLIN, MAULLIN, METZ & ASSOC., ppt. 12 (Apr. 25, 2014), available at http://www.labusinesscouncil.org/files/David_Metz_PPT.pdf.

220. CAL. WATER CODE § 106.3 (West 2012) (enacting what is known as the “Human Right to Water” as proposed in AB 685 in 2012).

Ultimately, voters will decide. They will judge whether water policymakers have resolved their conflicts in a way that taxpayers are willing to support by approving a water bond and paying taxes to repay the bond debt.²²¹ A recent *Los Angeles Times* poll showed that, despite public awareness of the serious drought, a majority of respondents would not support “large-scale public spending to boost water supplies.”²²² The challenge for any water bond measure on the statewide ballot will be convincing voters not only that there is a need for new water infrastructure, but that the proposed solutions are worth the cost.²²³ That is the challenge that legislators face in 2014 and beyond.

V. CONCLUSION

Conflicts and compromise over water shaped California from its inception with the 49ers.²²⁴ Since then the state—and its water—developed into the bread basket for the world. Some of the world’s great cities have been created, even where there was not enough water to support such world-class cities. Each generation has passed laws to resolve water conflicts and build a water system for future generations.²²⁵ Our predecessors built a statewide water system admired the world over—a great accomplishment for the 20th century. California’s 21st century challenge will be restoring its world leadership in water by providing safe and clean water for its people and economy.”

The greatest part of that challenge is figuring out how to pay for the necessary water infrastructure.²²⁶ The next generation of water infrastructure will demand substantial financial investment.²²⁷ With its water infrastructure aging and climate change leading to more intense droughts, California cannot afford to ignore its deficiencies in water infrastructure. Just as water built the robust California economy, failing water infrastructure can destroy it. Investment is the key to California’s future.

Making sufficient investments in water will take support from all Californians.²²⁸ We have established a water finance system, rooted in the California Constitution, which ensures that California voters play important roles in state and local water investment decisions.²²⁹ The State needs voter approval of

221. Bettina Boxall, *Poll Finds Little Support for Drought Spending Despite Broad Awareness*, L.A. TIMES, June 6, 2014, <http://www.latimes.com/science/la-me-poll-drought-20140606-story.html> (on file with the *McGeorge Law Review*).

222. *Id.*

223. *Id.*

224. *See Irwin v. Phillips*, 5 Cal. 140, 145 (1857).

225. HUNDLEY, *supra* note 4, at 67–115.

226. *See ASSEMBLY WATER, PARKS, & WILDLIFE COMM.*, *supra* note 122, at 4.

227. *Id.* at 2.

228. *See Boxall*, *supra* note 221.

229. CAL. CONST. art. XIII § 3; CAL. CONST. art. XVI § 1.

water bonds²³⁰ and local agencies need property owner acceptance of increased water rates. Convincing voters of the urgent need for water investments is, therefore, critical to California's water future. Unfortunately, convincing voters to open their wallets and support water bonds often takes a crisis.²³¹

In the last decade, a flood crisis led to voter support for flood control bonds. In 2005, Hurricane Katrina brought public attention to flood risks throughout the nation, and California's state capital suddenly became the American city most at risk of flooding.²³² That same year, the State Legislature approved a \$500 million payment to settle a claim from a prior flood.²³³ Californians began learning about flood risks in the Central Valley and the deterioration of the federal-state flood control system. The next year, Californians approved billions of dollars of GO bonds to fix levees and improve Central Valley flood protection.²³⁴

Convincing voters to support state and local investments in water supply infrastructure may take another crisis. This year's serious drought may be the start of that crisis, but voters need to see a connection between the crisis and their own lives. Reduced snowpack or wilting crops hundreds of miles away may not be enough to make the crisis real for voters. The crisis needs to affect voters in the coastal cities, where most of them live. Successful investment in California's water future may need to start with a crisis at the tap. When voters see first-hand that California's water system needs improvement, they may be more likely to support the substantial financing it would require to accomplish that improvement. Ironically, the future of California's civilization may depend on the apparent failure of its water system. Then the state can once again be successful in investing in the water system for the 21st century.

230. See AB 1331, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

231. Rogers, *supra* note 217.

232. *High Water Marks, Life Jackets, and Other Innovations as California Leads in Flood Preparedness*, THE WATER AWAY (Nov. 14, 2013), <http://thewateraway.wordpress.com/2013/11/14/high-water-marks-life-jackets-and-other-innovations-as-california-leads-in-flood-preparedness/> (on file with the *McGeorge Law Review*).

233. *Paterno v. State*, 113 Cal. App. 4th 998, 1034 (4th Dist. 2003).

234. Cal. Proposition 1E (2006).