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## Introduction

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*California State Water Resources Control Board*

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## Introduction

William R. Attwater\*

It has been six years since the last *Pacific Law Journal* Symposium on California Water Law.<sup>1</sup> Since that time, a major drought has come and gone, the Federal Central Valley Project is marching to a new drummer,<sup>2</sup> "Club Fed"<sup>3</sup> has moved in to fill a vacuum in Delta regulation, the courts are continuing to forge water policy, and the legislature remains on the sidelines. Although water diversion and use in California has long been subject to the state constitutional prohibition on wasteful and unreasonable use, the State Water Resources Control Board's role in enforcing the constitutional requirements was clarified by two decisions of the Court of Appeal concerning the Imperial Irrigation District (IID). In *Imperial Irrigation District v. State Water Resources Control Board (IID-I)*,<sup>4</sup> the court upheld the authority of the State Water Resources Control Board (State Water Board) to adjudicate whether a water user's practices comply with the reasonableness standard of Article X, section 2 of the California Constitution.<sup>5</sup> The provisions of the State Water Board's order requiring the IID to take specified actions to come into compliance with the constitutional standard of reasonable use were upheld in *Imperial Irrigation District v. State Water Resources Control Board (IID-II)*.<sup>6</sup> The

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\* Chief Counsel, State Water Resources Control Board. The views expressed in this commentary are those of the author, and do not necessarily reflect the views of the State Water Resources Control Board, its individual members, or the State of California.

1. *Symposium: Revisiting California Water Law*, 19 PAC. L.J. 957, 957-1434 (1988).

2. See Central Valley Project Improvement Act, Pub. L. No. 102-575 § 3406, 106 Stat. 4600 (1992); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993) (affirming the right of the United States to allocate water from the San Luis reservoir as it sees fit, even when the allocation deprives San Luis Unit contractors of water.; *National Resources Defense Council v. Patterson* (E.D. Cal. S-88-1658 LKK) (reaffirming the application of California Fish and Game Code § 5937 to the operation of Friant Dam).

3. The term "Club Fed" refers to the apparent Policy of the federal agencies dealing with the Delta to speak with one voice. The federal agencies are the United States Bureau of Reclamation, United States Fish and Wildlife Service, National Marine Fisheries and Environmental Protection Agency. "FED" stands for Federal Ecosystem Directorate.

4. 186 Cal. App. 3d 1160, 231 Cal. Rptr. 283 (1986).

5. *Imperial Irrigation Dist. v. State Water Resources Control Bd. (IID-I)*, 186 Cal. App. 3d 1160, 1171, 231 Cal. Rptr. 283, 290 (1986); see CAL. CONST. art. X, § 2.

6. 225 Cal. App. 3d 548, 275 Cal. Rptr. 250 (1990).

court's decision emphasized that "it is time to recognize that [water] law is in flux and that its evolution has passed beyond traditional concepts of vested and immutable rights" and that "California is engaged in a process of governmental redefinition of water rights."<sup>7</sup> In addressing the role of the State Water Board, the court stated that the Board's obligations in the field of water use adjudication are "broad, plenary and all encompassing."<sup>8</sup>

In the field of regulation of hydroelectric projects, the State did not fare as well. In *California v. Federal Energy Regulatory Commission (Rock Creek)*,<sup>9</sup> the United States Supreme Court held that California could not use its water right authority to require the operator of a hydroelectric project licensed by the Federal Energy Regulatory Commission (FERC) to maintain flows for the benefit of instream beneficial uses in excess of the flows required by the FERC license for the project.<sup>10</sup> In *Sayles Hydro Association v. Maughan*,<sup>11</sup> the Ninth Circuit Court of Appeals interpreted *Rock Creek* to hold that the Federal Power Act "occupies the entire field," preempting the state from applying its environmental requirements to a FERC licensee, even where those requirements do not conflict with the FERC licensing decision.<sup>12</sup>

The saga of Mono Lake and its environs continues to be written by the courts and a soon-to-be released decision by the State Water Board. In *California Trout v. State Water Resources Control Board*,<sup>13</sup> the court held that the enforcement of Fish and Game Code section 5937, which requires that fish be kept in good condition downstream of a dam,<sup>14</sup> is an ongoing responsibility of the State Water Board and, therefore, the Board has a legal duty to condition the diversion license of the City of Los Angeles to comply with section 5937.<sup>15</sup> When the State Water Board tarried, the court of appeal poked the Board with a sharp stick in *California Trout v. Superior Court*.<sup>16</sup> The Board's decision on remand is expected to set instream flow requirements to comply with section 5937 as well as to set

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7. *Imperial Irrigation Dist. v. State Water Resources Control Bd. (IID-II)*, 225 Cal. App. 3d 548, 572, 275 Cal. Rptr. 250, 267 (1990).

8. *Id.* at 560, 275 Cal. Rptr. at 259.

9. 495 U.S. 490 (1990).

10. *California v. Federal Energy Regulatory Comm'n (Rock Creek)*, 495 U.S. 490, 506-07 (1990).

11. 985 F.2d 451 (9th Cir. 1993).

12. *Sayles Hydro Assoc. v. Maughan*, 985 F.2d 451, 455-56 (9th Cir. 1993).

13. 207 Cal. App. 3d 585, 225 Cal. Rptr. 184 (1989).

14. CAL. FISH & GAME CODE § 5937 (West 1984).

15. *California Trout v. State Water Resources Control Bd.*, 207 Cal. App. 3d 585, 225 Cal. Rptr. 184 (1989).

16. 218 Cal. App. 3d 187, 226 Cal. Rptr. 788 (1990).

a minimum water level in Mono Lake for protection of public trust values in accordance with *National Audubon v. Superior Court*.<sup>17</sup> In the meantime, a series of preliminary injunctions from the Superior Court in El Dorado County have had the effect of curtailing Los Angeles water exports from the Mono Basin since the fall of 1989.

Those interested in the "takings issues" read with interest *Lucas v. South Carolina Coastal Council*.<sup>18</sup> Post "Lucas" analysis still is fertile ground for commentators.<sup>19</sup> The aforementioned cases and other events provide the basis for the Articles in this Symposium.

Professor Gregory S. Weber's Article is entitled "The Role of Environmental Law in the California Water Allocation and Use System: An Overview."<sup>20</sup> This is an Article to be read and reread. Professor Weber weaves the tapestry of the role of California environmental law and its impact on the allocation of water rights. Professor Weber reinforces the fact that the winds of change are upon us and, like the winds from the west in California, they are irreversible and unchangeable.

The Article focuses on the historical water law of California and laws relating to fish protection, environmental review requirements, Endangered Species Act protection, water quality protection and, finally, wilderness protection. The author points out what was first mentioned in this Introduction; "California water allocation has become increasingly federalized." The reasons are many and are clearly explained.

There are many in this state who are still in a state of denial; denial that there will be no more major water projects; denial that the era of water and crop subsidies are coming to an end; and denial that you can pump groundwater forever. Professor Weber chronicles the changes in California water law heralded by *Preston v. Herminghaus*<sup>21</sup> and *National Audubon Society v. Superior Court*,<sup>22</sup> federal and state legislation and the duties of the State Water Resources Control Board regarding protection of the public trust resources and in preventing waste and unreasonable use. The Article is a blueprint for application of the California Environmental Quality Act (CEQA) and other environmental laws for the protection of the

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17. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

18. 112 S.Ct. 2886 (1992).

19. Joseph L. Sax, *Rights that "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 LOYOLA L.A. L. REV. 943 (1993).

20. Gregory S. Weber, *The Role of Environmental Law in California Water Allocation and Use System: An Overview*, 25 PAC. L.J. 907 (1994).

21. 211 Cal. 1, 292 P. 953 (1930).

22. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

fishery. The fact is, however, that laws are often easy to make and difficult to enforce. Enforcement may pit long-term water users with a substantial economic investment against those attempting to arrest the decline of a fishery resource.

The section on the federal Endangered Species Act notes that the “impact on water appropriators and diversions is substantial and that such impact is not priority related.” This is a truism that is not lost on diverters from the Sacramento River and the Delta. The section on water quality legislation is also most helpful. All too often the water law practitioner is unaware of the far-reaching impacts of the Federal Clean Water Act both as to discharger permits, water quality standards, and the impact of water quality certification under section 401.

Professor Weber also puts forth his view of the Delta morass. Good luck, Professor. This Delta business is indeed tricky business. From one on the inside, all is not what it seems.

Andrew Sawyer, Assistant Chief Counsel for the State Water Board, provides a detailed analysis of the interaction between the state and FERC, the impacts on the state of the United States Supreme Court’s decision in the *Rock Creek* case and how the state can still deal effectively with hydro projects pursuant to the state’s authority to issue certifications under section 401 of the federal Clean Water Act.<sup>23</sup> The portion dealing with section 401 is especially important because this section, while being in effect since 1972, has been little used until recently in water right matters.

Eric L. Garner, Michelle Ouelette and Richard L. Sharff, Jr. tackle the shame of California water law in “Institutional Reforms in California Groundwater Law.”<sup>24</sup> Beginning with a display of the problems of over-pumping and groundwater pollution from toxic chemicals and other dischargers, the Article strikes at the heart of the issue, namely that “the time is long past for comprehensive groundwater regulation in California.” The Article states that the legislature has not granted the State Water Board the authority to regulate groundwater because groundwater is presumed to be percolating water. Not so! The legislature has not done so because the farm lobby and legislators representing agricultural interests have historically opposed most regulation of groundwater.

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23. Andrew H. Sawyer, *Rock Creek Revisited: State Water Quality Certification of Hydroelectric Projects in California*, 25 PAC. L.J. 973 (1994); Clean Water Act § 401, 33 U.S.C. § 1341 (1988).

24. Eric L. Garner, Michelle Ouelette & Richard L. Sharff, Jr. *Institutional Reforms in California Water Law*, 25 PAC. L.J. 1021 (1994).

The Article's conclusion that the vacuum of state regulation has led to "judicial management" and an "inefficient" and "hopelessly archaic" system of management is right on point. Read the Article and weep. Other states are far ahead of California in groundwater management. Why? Because for most of this century when we had a groundwater problem, we threw more water at it. That time is now past. California needs to wake up. We are afflicted with severe overdrafts in many groundwater basins. We need to do something now and that something is not a continuation of court adjudications that easily last ten to twenty years. What will it take to get our Legislature interested in this issue?

In the Article entitled "Water Marketing in California Revisited: the Legacy of the 1987-92 Drought," Kevin M. O'Brien and Robert R. Gunning point out that the most recent drought has moved the subject of water transfers from mere discussion to action.<sup>25</sup> Such action, however, comes with a price and, according to the authors, the price has been a heavy involvement by both of the major project operators in the state, the Federal Bureau of Reclamation and the State Department of Water Resources. The authors contend that these two water giants have a built-in conflict of interest and in the future the impacts of these two operators should be lessened. The Article goes on to review recent legislation impacting water transfers and provides examples of unresolved issues that the authors believe will continue to hinder the development of water marketing; namely, quantifying water which can be transferred and the policies of the U.S. Bureau of Reclamation resulting from the recent enactment of the Central Valley Project Improvement Act.<sup>26</sup> All in all, this Article should be very helpful to both water attorneys and others interested in water marketing.

Stuart L. Somach's Article on "Who Owns Reclaimed Wastewater" is especially timely.<sup>27</sup> There is no doubt that with California's population growth and limited new water development, the use of reclaimed wastewater along with water transfers will become more important. Mr. Somach begins his Article with the proposition that the owner of a wastewater treatment facility holds the exclusive right to treated wastewater as against anyone who has supplied the water or any downstream water user. The Article then points out the issues behind this

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25. Kevin M. O'Brien & Robert R. Gunning, *Water Marketing in California Revisited: The Legacy of the 1987-92 Drought*, 25 PAC L.J. 1053 (1994).

26. Central Valley Improvement Act, Pub. L. No. 102-575 § 3406, 106 Stat. 4600 (1992).

27. Stuart L. Somach, *Who Owns Reclaimed Wastewater?*, 25 PAC L.J. 1087 (1994).

simple proposition relying heavily on the principles of common law. Issues explored in the Article include: the rights, if any, of those who supply water that ultimately ends up at a sewage treatment facility; rights, if any, of downstream riparians and appropriators, who may have historically relied upon a wastewater discharge; and, finally, the impacts of environmental laws. Although Mr. Somach's Article may appear to address a narrow area of the law, it is an important area. Increasing demands for water will entice more wastewater dischargers in the future to look for markets for their water.

Not mentioned in the Article, but also important are the increasing costs and complexities of treating and discharging treated wastewater to surface streams, such as the Sacramento River. This increase in cost will most certainly influence dischargers to dispose of treated wastewater in percolation and evaporation ponds or by some other land application. The wave of the future may be a wave of treated wastewater and what was once considered and even named a waste will become a salable commodity.

The Article by Sandra K. Dunn is entitled "Endangered Species Act Versus Water Resources Development: The California Experience."<sup>28</sup> A more accurate title would have been "Why Water Resources Development Has Triggered the Endangered Species Act." The Endangered Species Act has been used, of course, because species have been driven to the brink of extinction, not because there is some mindless drive to prevent water from being used for beneficial uses. Ms. Dunn lays out the relevant portions of the Endangered Species Act and gives examples of impacts on a small segment of water users. Attempting to classify long-term water uses as "legitimate uses" and, thus, implying that other uses are not as legitimate, demonstrates a one-sided bent in the Article. But the Article is there for you to read and agree or disagree with; that is for you to decide.

In closing, I should note that, several of the Articles are designed not only to advance one's knowledge of the law, but to sway its interpretation. As is often the case, those most eager to write an Article are often involved in a case or a cause. The law review is a desirable forum and is often cited and recited in briefs and speeches. Read the Articles contained herein with a critical eye. What often passes for an objective Article, is in reality a brief or argument in faint disguise.

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28. Sandra K. Dunn, *Endangered Species Act Versus Water Resources Development: The California Experience*, 25 PAC. L.J. 1107 (1994).