

**California's Water Rights System:
Ready and Able to Meet the Challenges of the 21st Century**

**Testimony Presented to the Senate Natural Resources and Water Committee
"Overview of California Water Rights Laws"
March 10, 2009**

Good morning. My name is David Aladjem and I am a partner at the law firm of Downey Brand LLP here in Sacramento. I practice in the area of water law and water rights and my practice involves all aspects of the acquisition, management and transfer of water rights in California, including the conjunctive use of surface water and groundwater. I am presently the national Chair of the American Bar Association's Water Resources Committee. Although I represent clients throughout California, the comments I offer to you this morning are purely my own personal views.

1. *Summary of Testimony*

I would like to thank the Committee for the opportunity to appear before you this morning to discuss whether changes to California's water rights system are needed in order to respond, either in the short-term or in the long-term, to the ongoing drought and California's water crisis. The simple answer to this question is "no."

- California's water rights system is the foundation of a water delivery system that allows water to be moved from Northern California to urban centers in the Bay Area and Southern California and that allows California agriculture to be the envy of the world. This water delivery system has created one of the most prosperous economies in the history of the world.
- California's water rights system has sufficient flexibility – as demonstrated in the 1991 Drought Water Bank, the Yuba Accord and other water transfers – to meet the needs of the environment, urban areas, and farmers.
- Solving California's water problems will require billions of dollars of new infrastructure, financed through bonds, that will provide water to farms, the environment and cities. A secure and stable water rights system is essential for bond financing.
- Implementation of proposals to "reallocate" water rights through application of the public trust doctrine or the Constitutional requirement of reasonable use would violate well-established principles of California law as well as federal and state constitutional protections against the taking of private property without just compensation. There is little doubt that efforts to "reallocate" water rights would trigger decades of litigation.

- Efforts to “reallocate” water rights would also divert attention from the real question in front of us: how do we build a water system that will be adequate to meet the challenges of climate change and a growing population in the 21st century – a water system that protects the environment, promotes water conservation, maximizes use of recycled water, and utilizes new storage and conveyance across the Delta?
- Reforms to the water rights system – particularly in the area of one-year water transfers – are needed. Such reforms, if enacted into law, would likely improve water supplies for much of California.

California – as all of you know – faces a serious water crisis because we have not made serious investments in infrastructure in more than a generation. Finding solutions to this water crisis will be difficult under the best of circumstances. It makes no sense to make the task of finding solutions even harder by undermining California’s water right system. Trying to solve California’s water crisis without a secure system of water rights will be like a car with four flat tires: it may look good in the showroom but it won’t go anywhere.

2. *Proposals that Would Interfere with Efforts to Solve California’s Water Crisis*

a. *Proposal 1: Reallocate Water Rights Under the Public Trust Doctrine*

A number of commentators have suggested that the solution to California’s water crisis can be found in using the public trust doctrine to reallocate water away from consumptive uses (typically agricultural uses but potentially also urban uses) and dedicate that water to serve the needs of public trust resources. Such proposals would be contrary to California law and, if adopted, would lead to significant legal battles.

First, the California courts have clearly indicated that, if a consumptive use of water harms fish and wildlife, a court may balance the needs of public trust resources against the needs for the consumptive uses of water. That balancing cannot be undertaken at a statewide level, because the balance must include the specific public trust values at stake; the need of the diverter for the water in question; the cost of alternative sources of water, not only in dollars but also in terms of energy and impacts on other water bodies; and the reasonable investment-backed expectations of the water users.¹ Indeed, the only cases where a court has reallocated water based on the public trust doctrine have all involved specific diversions by specific water users.

Second, and more important, proposals to reallocate water from agriculture to public trust resources assume that there is some type of causal connection between agricultural diversions and the decline of public trust resources and that the proportional reallocation of water being diverted by agriculture would “cure” the harm to public trust resources.² At least in the case of

¹ See *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 448 (1983).

² *El Dorado Irrigation District v. State Water Resources Control Board*, 142 Cal.App.4th 937, 969 (2006) (State Water Resources Control Board could impose restrictions on El Dorado’s diversions to the extent that those diversions harm the public trust).

agricultural diversions upstream of the Delta, there is little – if any – scientific evidence to suggest that either of these conditions are true. Even assuming the required factual conditions, however, the reductions in diversions must comply with the water right priority system – the central principle of California water law.³ In other words, the most junior water right holders would be prevented from diverting until there was sufficient water to meet the needs of the environment. There can be no wholesale reallocation of water from agriculture to the environment based, for instance, on the face value of all agricultural water rights.

The call to reallocate water under the public trust doctrine – in reality – reflects a fundamental dissatisfaction with the California Supreme Court’s determination in the Mono Lake case that the public interest is served both by consumptive uses of water and by the protection of the environment. That decision – and the subsequent decision in the *State Water Resources Control Board Cases* – reflect common sense; there is no need to revisit those decisions.

b. *Proposal 2: Reallocate Water Rights Under the Reasonable and Beneficial Use Doctrine*

i. *Delta Vision Strategic Plan*

The Delta Vision Strategic Plan suggests (at page 95) that the SWRCB should “use its authority to determine reasonable use of water over the coming decades to evolve away from the generally accepted practices of diverting surface water for irrigated agriculture.” As noted in the appendix, there is no legal basis for a wholesale determination that the use of water for agricultural purposes is somehow “unreasonable.” Embarking on such a course would either require the monumental task of conducting individual, fact-specific inquiries into each agricultural operation in California or would run directly contrary to existing law.

ii. *California’s Water: An LAO Primer*

The Legislative Analyst’s Office (“LAO”) has also proposed to use the reasonable and beneficial use doctrine to reallocate water rights. In *California’s Water: An LAO Primer*, the LAO states (at page 68) that it is “in the interest of the state to undertake a concerted effort to realign the water rights system to better reflect modern needs and circumstances.” By “realigning water conservation and efficiency efforts with water rights, overuse of water simply to maintain a water right could be reduced and that water would be available for other purposes within the region or state.”

Although the LAO’s proposal sounds like it makes sense, it is a solution in search of a problem. Having worked with agricultural water districts for my entire career, there is little, if any, inefficiency in the application of water to crops in the Sacramento Valley. Growers have every economic incentive to optimize the delivery of water to crops in order to maximize economic returns. Water that is not used either returns to the river system or recharges the groundwater aquifer. In the urban sector, water districts in Southern California with which I am

³ *Id.* at 961.

familiar have made extensive (and expensive) efforts to improve water use efficiency, recognizing that individual families and businesses have the final say on water use. In both the urban and agricultural sectors, standard operating practices are continually evolving to make the best use of scarce water supplies. Modifying the standard for "reasonable use" will not create any new water for California or otherwise ameliorate our water supply crisis.

Indeed, defining what constitutes a "reasonable use" of water by legislation is likely an impossible task. For instance, any such definition in the urban sector would – almost by necessity – be dependent on land-use patterns, hydrology, the percentage of commercial/industrial customers, and family structures. Similarly, in the agricultural sector, any definition of reasonableness would depend on soil type, climate, crop mix/rotation, and consumer demands. Because these factors vary tremendously from region to region and over time in both the urban and agricultural sectors, it is my view that any definition would not represent a substantial improvement over the general requirement of reasonableness that is already in the Constitution and would represent a monumental waste of time and effort.

c. *Proposal 3: Move from a Prior Appropriation System to a Proportional Diversion System*

The final proposal that has been made in recent months is that California move towards a system that would give water users a proportionate share of the flow of a stream or river, rather than an absolute diversion amount. This proposal – again – has some intrinsic appeal in that it would seem to avoid the continual fights over priority that are inherent in a prior appropriation system.

The difficulty with this proposal, however, is that it has already been tried in California – and it failed miserably. Proportional diversion of water is the essence of the riparian rights system, which California adopted at statehood as part of its heritage of English common law. Almost immediately, however, the gold miners created the prior appropriation system because the riparian system provided little certainty for investments in water infrastructure. To my knowledge, in the 150 years since the creation of the prior appropriation system, there has not been a serious effort to move back to a riparian system. The lack of such an effort indicates that such a move would be a bad idea.

Moreover, it is noteworthy that many states in the Eastern United States, which have more abundant water resources than California, have now adopted forms of "regulated riparianism" that incorporate priorities of use and other elements of the prior appropriation system because of increasing shortages of water. Thus, any move to adopt proportional diversions would be exactly the wrong way for California to attempt to meet its ongoing water crisis.

3. *Proposed Changes to California Law*

California's water right system, as described in the appendix, seeks to balance certainty of water rights with the flexibility to adapt to new circumstances. The chief way that the system adapts to change is through water transfers. Based on my experience with a number of water

transfers from the Sacramento Valley to both the San Joaquin Valley and Southern California, there are several changes to existing laws that would facilitate water transfers.

The present water transfer system offers numerous opportunities for other water users, resource agencies or environmental groups to block a transfer. Given the very great need for water in areas south of the Delta, three changes in existing law are warranted. First, the CEQA exemption for one-year transfers of post-1914 water rights should be extended to one-year transfers of pre-1914 water rights. Second, if a one-year transfer is conditioned on the Bureau of Reclamation and/or the Department of Water Resources meeting all water quality and flow standards in the Delta, a water user in the Delta should not be able to object to the proposed one-year transfer on the ground that the transfer interferes with a vested water right. Third, again if a one-year transfer is conditioned on the Bureau of Reclamation and/or the Department of Water Resources meeting all water quality and flow standards in the Delta, no person may object to the transfer based on an unreasonable impact to the environment.

Thank you very much for the opportunity to present this testimony. I would be pleased to take any questions that you may have.

Appendix: California's Water Rights System

Although California's water right system can be confusing and complicated, there are four policies that organize the field. Taken together, these policies define a water rights system that creates secure property rights to water, thereby encouraging investment in water infrastructure, with the flexibility to adapt to changing circumstances and protection for non-economic values like the environment and local communities. This system has the required certainty and flexibility to allow California to meet the challenges of drought and climate change, *if we allow the system to function*.

a. Policy 1: Put Water to Use

The central policy underlying California's water right system is to put the State's water resources to use for the maximum benefit of the people of California. This policy is expressed in article X, section 2 of the California Constitution, which some call the "reasonable use doctrine," but which actually states that the "general welfare requires that the water resources of the State be put to beneficial use *to the fullest extent of which they are capable* and that the waste or unreasonable use or unreasonable method of use be prevented." (Emphasis added). The voters of California approved this language at the November 1928 election to ensure that water could be stored during the wintertime and then used productively rather than flowing wastefully to the ocean.

The courts have interpreted article X, section 2 as requiring that all uses be beneficial (i.e., that there be some public benefit from the class of uses) and that the quantity of water used be reasonable.⁴ The courts have not required that water be devoted to its most economically or environmentally valuable use; indeed, the only court to pose the latter question refused to decide it.⁵ Instead, the courts have opted for a case-by-case determination of reasonableness in the context of statewide considerations of transcendent importance, such as harnessing water resources to serve the public welfare.⁶ As the California Supreme Court has explained: "[w]hen the supply is limited[, the] public interest requires that there be the greatest number of beneficial uses which the supply can yield."⁷

b. Policy 2: Encourage the Investments Needed to Put Water to Use

The second key policy that flows through California water law is the need to encourage large investments in the infrastructure needed to put water to use. Most Californians live in places where the local water sources are insufficient to meet water demands. The San Francisco Bay Area, Los Angeles, Orange County and San Diego have all spent billions of dollars to construct massive water delivery system that will store water during wet seasons and then move water from Northern California to areas with deficient supplies. Consequently, California has,

⁴ *Joslin v. Marin Municipal Water District*, 67 Cal.2d 132, 143 (1967)

⁵ *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 447 n.28 (1983).

⁶ *Joslin*, 67 Cal.2d at 140-41.

⁷ *Peabody v. Vallejo*, 2 Cal.2d 351, 368 (1935).

since its earliest days, granted those who place water to reasonable and beneficial uses vested property rights to the water they have diverted. It is well-established that a right to divert water is a right to real property.⁸ Because water rights are vested property rights, they cannot be taken by the State without due process and just compensation.⁹

California allocates most of its water resources by means of the prior appropriation system (“first in time is first in right”), which, in 2000, the California Supreme Court called “the *central* principle in California water law.”¹⁰ The priority system is a simple way to ensure that those who are willing to invest large amounts of capital in water infrastructure will actually be able to use the water that they’ve developed. Before one can acquire a right to water, there must be unappropriated water (i.e., water in excess to the needs of all other water users) available for appropriation at the time that when it would be diverted. The amount of an appropriative right is calculated based on the maximum diversion that may be made, even if the typical appropriation may be much smaller. In essence, most appropriative rights are larger than the average amount of water available at the relevant time and place. By authorizing a higher diversion, an appropriative right allows the water user to divert high flows when they are available. It is obviously impossible to divert water that is not physically available. The priority system allows water users to quantify the maximum amount of water that may be available to them and rely on that quantity in designing their facilities and planning the financing necessary to build those facilities. By contrast, the water right system that historically has been used in Eastern states – the “riparian system” – does not provide all water users any quantified right and instead requires them to share the available supply with potentially year-to-year variations in their water rights. The riparian rights system provides much less security for investments because each additional user effectively takes water away from all other users and reduces water users’ ability to create their own supplies by building storage facilities. This system has historically worked in the Eastern states but is now beginning to collapse due to the increased stress on water resources resulting from climate change.

c. *Policy 3: Provide Flexibility in the Exercise of Water Rights*

California law recognizes that circumstances will constantly change and that the legal regime governing water resources also needs to adapt to these changes. California allows water users to change the places where they use water, the purpose for which the water is used, and the point where water is diverted. Taken together, these elements allow the transfer of water from an agricultural use in Imperial County to a municipal use in downtown San Diego. This flexibility in the exercise of water rights also allows for the proposed transfers of water from the Sacramento Valley to the rest of California as part of this year’s Drought Water Bank and past Drought Water Banks. The flexibility of the water rights system also allowed for the development of the Environmental Water Account and the environmental transfers that have taken place under the umbrella of the Yuba Accord.

⁸ *Locke v. Yorba Irrigation Co.*, 35 Cal.2d 205, 211 (1950) (“water rights are a species of real property.”); see Wells Hutchins, *The California Law of Water Rights* 121-22 (1956) (collecting cases).

⁹ *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 101 (1986).

¹⁰ *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1243 (2000).

California law also allows – indeed encourages – the resolution of disputes by what is called a “physical solution.” Under the physical solution doctrine, a junior water user can install facilities that allow a senior water user to make more efficient use of its water rights, with the junior water user benefiting by being able to divert the saved water (assuming that there are no water users with intervening priority rights). The physical solution doctrine allows for changes in the exercise of water rights in a way that fully preserves the rights of the senior water user but that allows the junior to benefit from improvements in technology. The “physical solution” doctrine originated in a 1936 California Supreme Court decision in which the Court required that a flexible solution be developed to allow East Bay Municipal Utility District (“EBMUD”) to divert, store and transport Mokelumne River water for use in the East Bay, even though the City of Lodi had senior water rights.¹¹ Without this decision, EBMUD would have had a much more difficult time providing the water that has allowed the East Bay to flourish.

Similarly, the proposed Sites Reservoir could be a good example of a physical solution. A significant practical problem for California’s water supplies is that it currently is not possible to recapture water that is released from Shasta Reservoir’s cold-water pool to support fish in the upper Sacramento River. No facility exists to store that water for later use once it has served the fishery-protection purpose for which it is released from Shasta. Sites Reservoir, if constructed, would allow water to be released from Shasta to provide cold-water habitat for fish and then be rediverted and stored above the Delta. Water eventually released from Sites could: (1) provide water that could be diverted from the Delta for use in southern California or the San Joaquin Valley; (2) improve Delta water quality conditions; or (3) be exchanged with senior water right holders in the Sacramento Valley in order to allow them to reduce their diversions from the Sacramento River during fishery-migration periods.

There are, of course, limits on both water transfers and the physical solution doctrine. The most important limitation on these changes in the exercise of water rights is that the changes cannot injure other water users, including environmental uses. For instance, a senior water user cannot change its point of diversion and place of use in such a way as to deprive a junior water user of water that it had been relying upon as part of its supply.¹² Similarly, as noted above, a junior water user cannot enter into a physical solution with a senior water user if the effect of the physical solution would be to take water away from an intervening water user. Put simply, changes in water use cannot create negative externalities.

d. *Policy 4: Limit Water Rights to Preserve the Public Interest*

The final policy that runs throughout California water law is the need for limits on the prior appropriation system in order to secure other important social goals. Three major limitations are evident: limits to protect areas of origin, limits to protect the environment, and limits to protect the public interest by ensuring water is put to reasonable and beneficial use.

¹¹ *City of Lodi v. East Bay Municipal Utility Dist*, 7 Cal.2d 316 (1936).

¹² The statutes governing water transfers provide the environment with protection similar to the “no injury” rule.

i. *Area of Origin Protections*

For the areas where the vast majority of California's water originates – the Sierra foothills and the Central Valley – the great cautionary tale of California water law and politics is Los Angeles' diversions of water from the Owens Valley. The Owens Valley's communities suffered greatly as a result of those diversions; areas upstream of the Delta have been and will continue to be vigilant to ensure that Delta exports do not have similar effects. Accordingly, in authorizing the Central Valley Project and State Water Project, the Legislature adopted a series of statutes that are collectively known as the "area of origin" statutes. Although the details of these statutes vary, the thrust of these statutes is to preserve to areas of origin the right to local sources of water. Exports from these areas are limited to water that is surplus to the needs of the areas of origin, as those needs may develop over time. In this way, residents of these areas would not be forced to suffer from water shortages while they see local water supplies exported to other areas of California.¹³ It is important to note that the needs of areas of origin include the needs of the environment and are limited to the natural flow of rivers and streams; in these ways, the area of origin statutes seek to balance preserving the natural endowments of areas of origin with encouraging the development of export water projects that provide statewide benefits.¹⁴

ii. *The Public Trust Doctrine*

A second limitation on the prior appropriation system is the public trust doctrine, which is designed to limit any damage that consumptive uses of water may have on fish and wildlife. If a specific use of water is creating conditions that injure or harm public trust resources, the SWRCB may require the water user to take actions to correct the harm, provided that the causal connection is demonstrated and that the adverse effects on the water user are proportional to the adverse impacts on public trust resources.¹⁵

In *National Audubon Society v. Superior Court* (the Mono Lake case), the California Supreme Court considered whether the appropriative rights system would take precedence over the public trust doctrine or whether the public trust doctrine would take precedence over the appropriative rights system.¹⁶ The Supreme Court rejected both of these options, instead directing that there be a balance that takes "the public trust into account in the planning and allocation of water resources, and . . . protect[s] public trust uses whenever feasible" while recognizing that making efficient use of California's water resources "requires diverting water from in-stream uses" and that such diversions "may unavoidably harm" public trust resources.¹⁷ Significantly, the Supreme Court noted: "The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values . . . Now that the economy

¹³ *State Water Resources Control Board Cases*, 136 Cal.App.4th 674, 760 (2006).

¹⁴ *Phelps v. State Water Resources Control Board*, 157 Cal.App.4th 89, 107-108 (2007).

¹⁵ See, e.g., *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 437 (1983) (the public trust doctrine protects navigable waters from harm caused by the diversion of nonnavigable tributaries)

¹⁶ *Id.* at 445.

¹⁷ *Id.* at 446.

and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that *they harm public trust uses*.¹⁸

Many environmental groups have focused attention on the Supreme Court's use of the phrase "whenever feasible" to argue that public trust values must be pursued over the consumptive uses of water. Recently, the Court of Appeal, Third Appellate District, considered this view and squarely rejected it in favor of a broad "public interest" determination that considers municipal, industrial and agricultural uses of water as well as the environment.¹⁹ In making that determination, the water rights priority system must be preserved to the extent that it does not lead to a violation of the public trust standards.²⁰ Put simply, the most junior users of water are required to curtail their diversions in order to satisfy the water quality standards adopted by the SWRCB to serve public trust needs. It would be improper, therefore, as suggested by some, to force all water users to reduce diversions out of a generalized notion of "fairness." A similar notion of "equitable apportionment" was recently rejected by a unanimous California Supreme Court in the context of a court adjudication of groundwater rights.²¹

iii. *Reasonable and Beneficial Use*

The last limitation on the prior appropriation system is the reasonable and beneficial use requirement contained in article X, section 2 of the California Constitution. It is important to understand how the courts have applied article X, section 2. The courts have applied that constitutional provision to limit water uses where they have either resulted in significant amounts of water be lost to unproductive use or have injured environmental resources.²²

No court has ever interpreted article X, section 2, to authorize the state to reallocate water based on changes in the state's view of what are the most favored uses of water. Such reallocation, if attempted, would run contrary to the reasonable investment-backed expectations associated with the state's issuance of appropriative water rights, on which local governments and private entities have invested billions of dollars to satisfy the water demands of their communities, businesses and homesteads. In its 2000 decision under article X, section 2, the California Supreme Court specifically held that that constitutional provision did not allow the courts to ignore water-right priorities in developing a solution to a public problem, which was a

¹⁸ *Id.* (emphasis added).

¹⁹ *State Water Resources Control Board Cases*, 136 Cal.App.4th at 778.

²⁰ *El Dorado Irrigation District v. State Water Resources Control Board*, 142 Cal.App.4th 937, 966 (2006) (quoting *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1243 (2000)).

²¹ *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1250-1251 (2000).

²² *E.g., Joslin v. Marin Municipal Water District*, 67 Cal.2d 132, 140-141 (1967) (riparian does not have right to unaltered flow of stream for the purpose of depositing sand and gravel on riparian's property); *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal.2d 489, 568 (1935) (water used to kill gophers, squirrels, etc., held not devoted to beneficial use so as to confer rights as against a subsequent appropriator); *Peabody v. City of Vallejo*, 2 Cal.2d at 369 (riparian does not have right to overflow his land for the purpose of removing saline content of soil).

overdrafted groundwater basin in that case.²³ As noted above, whether or not a use of water is reasonable is a fact-specific inquiry that is conducted on a case-by-case basis.²⁴ There is no legal support for the claim that it is possible to make determinations of reasonable and beneficial use on a wholesale basis. Also, as noted above, there is no legal basis to transform the requirement that water uses be “reasonable” into a requirement that water uses be the “most valuable.” In implementing the reasonable and beneficial use requirement, like the public trust doctrine, every effort must be made to preserve and enforce the priority system to the extent that the priority system doesn’t lead to the unreasonable use of water.²⁵

e. *Summary*

California’s water right system combines sufficient certainty to encourage investments in very expensive infrastructure with the flexibility needed to adapt to new challenges, such as climate change. Two recent examples illustrate the key attributes of the current system.

In 1991, California faced the fifth year of drought. Governor Pete Wilson called upon water districts in Northern California to take the then-extraordinary step of fallowing crops and making water available for delivery to hard-pressed areas in the San Joaquin Valley and Southern California. Because the Legislature had previously made it clear that water transfers could not be the basis to challenge water rights, in a matter of weeks many Northern California farmers changed their cropping decisions and made more than 800,000 af (almost enough water to fill Folsom Reservoir) available for export to other portions of California.

Recently, water users from across the State have combined – as the Public Water Coalition of California – to develop a consensus proposal to address the major water challenges facing California (copy attached). The proposal calls for tremendous investments in the infrastructure needed to provide water to the environment, to farmers and to cities. One of the foundational elements of the proposal is the California water rights system. If adopted and implemented, the proposal offers the way for California to meet its water challenges without significant litigation. (For a more thorough discussion of the water right issues discussed above, please see the legal memoranda attached to this testimony.)

²³ *City of Barstow*, 23 Cal.4th at 1247-1248.

²⁴ *Joslin*, 67 Cal.2d at 140-41 (1967)

²⁵ *El Dorado*, 142 Cal.App.4th at 966.

ATTACHMENT 1

2/18/2008

Position of The Public Water Coalition of California

A united effort by public water agencies, utilities and leaders from the Bay Area, Northern and Southern California committed to solving our state's water problems

Common Pursuit of Delta Solutions

I. Introduction and Core Principles for Advancing Delta Solutions

The Public Water Coalition of California was initiated by major public water suppliers who share a common view on the core elements of a solution to Delta issues. It is joined by others who share a desire to see effective progress in resolving water supply and associated Delta management issues. This Coalition includes the largest water management regions of California, whose public water agencies serve the vast majority of the State's population and most of its irrigated lands. Regions represented are: (a) the Sacramento Valley, as represented by the Northern California Water Association, the Tehama Colusa Canal Authority agencies, and municipal and industrial suppliers in the greater Sacramento region; (b) the east side of the San Joaquin Valley, as represented by the San Joaquin River Group Authority and the Friant Water Authority; and (c) Contractors of the Central Valley Project and the State Water Project, which supply water to portions of the Bay Area, the west side of, and the southern San Joaquin Valley, as well as the Central Coast and Southern California, as shown on Figure 1. We support actions to achieve coequal goals of a sustainable ecosystem and improved water supply reliability. We believe the state's prosperity and quality of life are dependent upon clean, affordable, reliable and sufficient water supplies. To maintain this prosperity while accommodating inevitable population growth, California must invest both within the Delta and in regional self-sufficiency. For the Delta, new conveyance, habitat expansion and diversification, strategic flood management, and actions to address water quality degradation and other stressors impacting the system are needed. Investments in water conservation, surface and groundwater storage, recycling and desalination are essential throughout California. Solutions must be integrated and managed adaptively. Above all, we recommend the state begin immediately to implement the physical improvements for water supply and ecosystem function within the Delta described here. While the full outcome of these actions cannot be known with certainty, it is clear that the cost and risk to California of further delay is unacceptable.

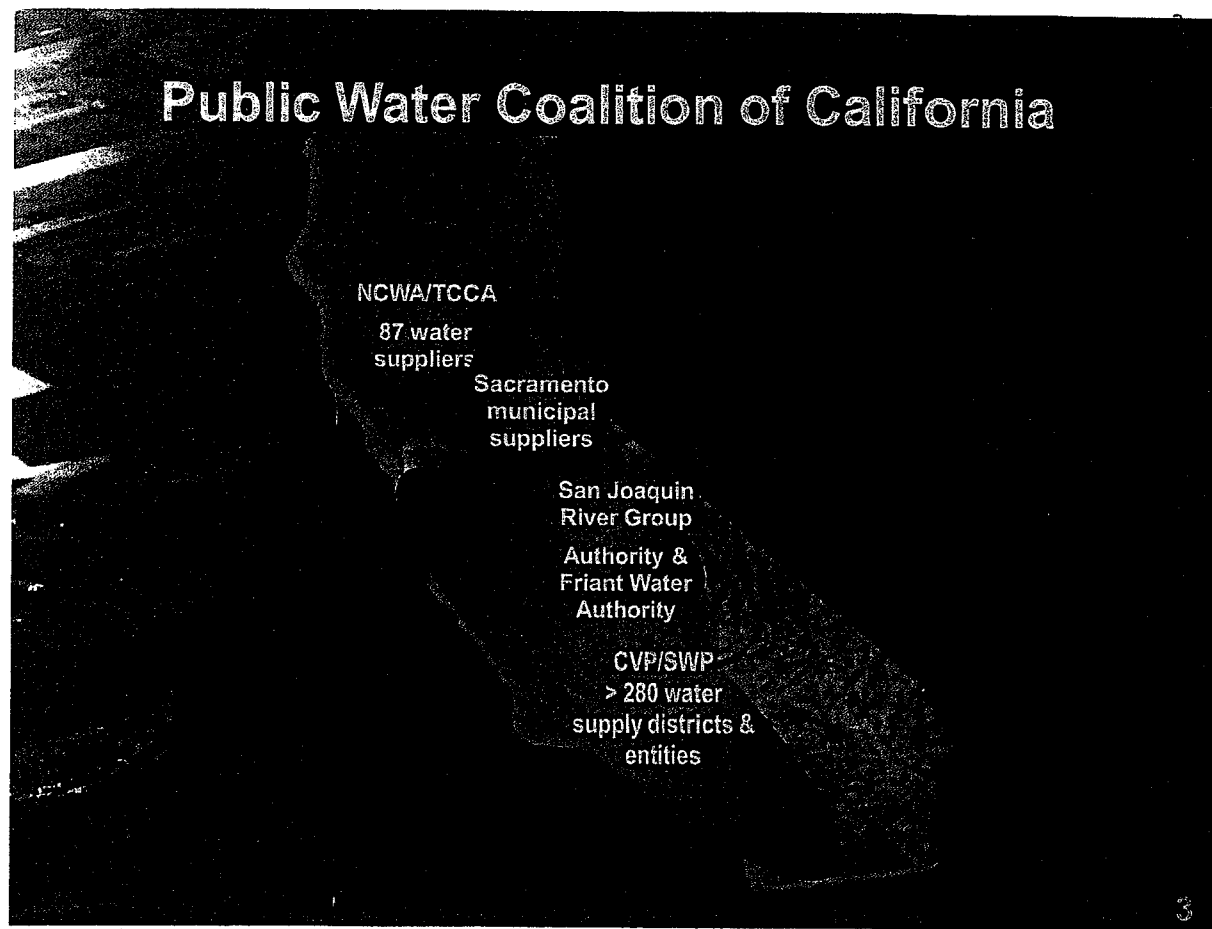


Figure 1

Changes in water infrastructure, flood protection and ecosystem restoration within the Delta can and should be implemented in the context of maintaining the unique character of this region. As plans for new conveyance, ecosystem restoration and flood management improvements progress, it is essential that in-Delta interests be addressed and local officials engaged. All changes also must consider adaptation to climate change, rising sea levels, and unstable landforms to move toward a more sustainable future. Attempts to doggedly maintain the Delta landforms of today are not physically feasible, financially realistic or environmentally sound.

As necessary physical and operational modifications are made to better manage the co-equal goals of water supply reliability and ecosystem health, the following principles must guide the effort:

- Delta solutions, including ecosystem restoration and storage and conveyance, must be implemented in compliance with California's water rights system and area of origin statutes, and must not create regulatory or ecosystem restoration burdens unrelated to the source of impacts.
- California's water endowment, combined with new infrastructure and management tools, can meet the State's long-term environmental, water supply and water supply reliability needs, including in the areas of origin as they develop. There remain times in almost all years where there is water in the system in excess of ecosystem needs and legal flow obligations. There is no need to consider a major overhaul of our long-standing water rights structure, but there is a need to better enforce it.
- The "reasonable use" requirement of the California Constitution's Article X, section two, and the "public trust" doctrine are fundamental parts of California's water law, and Coalition members operate in compliance with both. Under those authorities, water supplies should be subject to regulatory reallocations only where the reallocation: 1) addresses the targeted water use's environmental impacts; and 2) is proportional to those impacts. Beyond this authority, if the state must acquire water necessary to meet additional ecosystem needs, it should do so through market transactions, which will limit undesirable economic impacts.
- Water supply management, flood control, and ecosystem changes in the Delta must be designed and implemented in the context of a future vision for the Delta that accounts for sea-level rise and hydrology changes due to climate change, unstable landforms and a strategic levee investment strategy that can adapt to an uncertain future.
- Key structural investments in the Delta to restore export project water supplies to levels experienced before recent regulatory restrictions and improve ecosystem functions should be expedited. Action cannot wait for yet another lengthy planning process.
- A focused planning effort that directly involves local land use jurisdictions that would define future land use geography and flood protection investments in the Delta and address local impacts of ecosystem restoration and conveyance projects is necessary to accomplish ecosystem restoration goals consistently with maintaining and promoting the concept of the Delta as a place.
- To promote innovative water supply, reuse, recycling and conservation projects statewide, unwarranted, duplicative and contradictory regulatory and legal impediments must be removed.
- Fees or charges on water use will only be supported where they will benefit the fee payer, for example by increasing water supplies or reliability, or

improving water quality. Those who pay must have an appropriate degree of participation in the decisions pertaining to the use of those funds. Such fees would be expected to vary to reflect impacts and benefits in specific regions.

- Each diverter has an obligation to mitigate environmental effects of their individual diversions but that requires analysis of those effects and proportionality of the obligation relative to those effects. Any mitigation or corresponding regulatory action should proportionately relate to the impacts caused by the diverter activities.
- Public funding should support actions of general statewide environmental benefit.

Our recommendations constitute a comprehensive and integrated package of measures to increase water supply reliability and promote healthy Delta ecosystem. Although various aspects of the solution will move forward at different rates, a commitment must be made to implementing the complete solution. Another piecemeal approach to solutions for the Delta will result in continued decline of the ecosystem, further uncertainty for water supply, and expenditure of state and local money with no assurance of achieving sustainable results.

II. Water Supply and Reliability

a. Regional Diversity and Self-Sufficiency

The concept of regional self-sufficiency is embraced through the State's Integrated Regional Water Management Plans (IRWMP's) initiative. Coalition members have participated in IRWMP's or related efforts to identify ways to optimize available water supplies, develop new local supplies, manage demands in a more comprehensive manner, and coordinate with other IRWMP regions. The existence of these IRWMP's presents an opportunity for DWR to coordinate its statewide analysis on analyses prepared locally in order to maximize the benefits of DWR plans and projects.

Recommended actions to address regional diversity and needs are the following:

1. DWR should promote development of IRWMP's to comprehensively cover the Delta watershed and in areas where exported water is used.
2. DWR should encourage coordination between IRWM regions and coordinate its own actions, through updates of the California Water Plan to better assist IRWMP participants.

b. Value of Conveyance for Ecosystem and Supply Reliability

Improvements to the Delta ecosystem and water supply reliability require creation of a system that reduces the inherent conflict between water supply and ecosystem health that have been placed in nearly constant conflict by the current method of moving previously stored water across the Delta. A dual-conveyance approach -- improving the existing channel through the Delta and constructing a new conveyance channel around the Delta -- is required. Past efforts to address the ecosystem and water reliability needs while maintaining a solely through-delta conveyance system have failed and, if further pursued, are likely to continue to fail.

Current conveyance places these co-equal values in direct conflict because there is little flexibility in managing diversions to accommodate both needs; and its operation often alters natural flow patterns in the Delta necessary for more normal ecosystem function. The current system is also unacceptably vulnerable to seismic and flood risks. Additionally as a result of the current pace of sea level rise, in a few decades the current conveyance system will succumb to salinity intrusion. Adding a conveyance facility around the Delta addresses all of these problems and will provide better quality water for millions of Californians. Modeling analyses have shown that important in-Delta water quality objectives can be achieved under prudent operations of a new conveyance facility. The more choices in when and how to move water, the greater ability California will have to meet the flow needs of the Delta ecosystem, to achieve water supply reliability and adapt to any unforeseen changes and needs. Flexible conveyance is essential to better manage water and ecosystem needs. Ultimately, only real-world adaptive management and rigorous monitoring combined with improved infrastructure will provide the answers to achieve ecosystem and water supply recovery and reliability.

Delta Vision says "Over time, flow standards should be set through adaptive management processes rather than just permitting requirements."

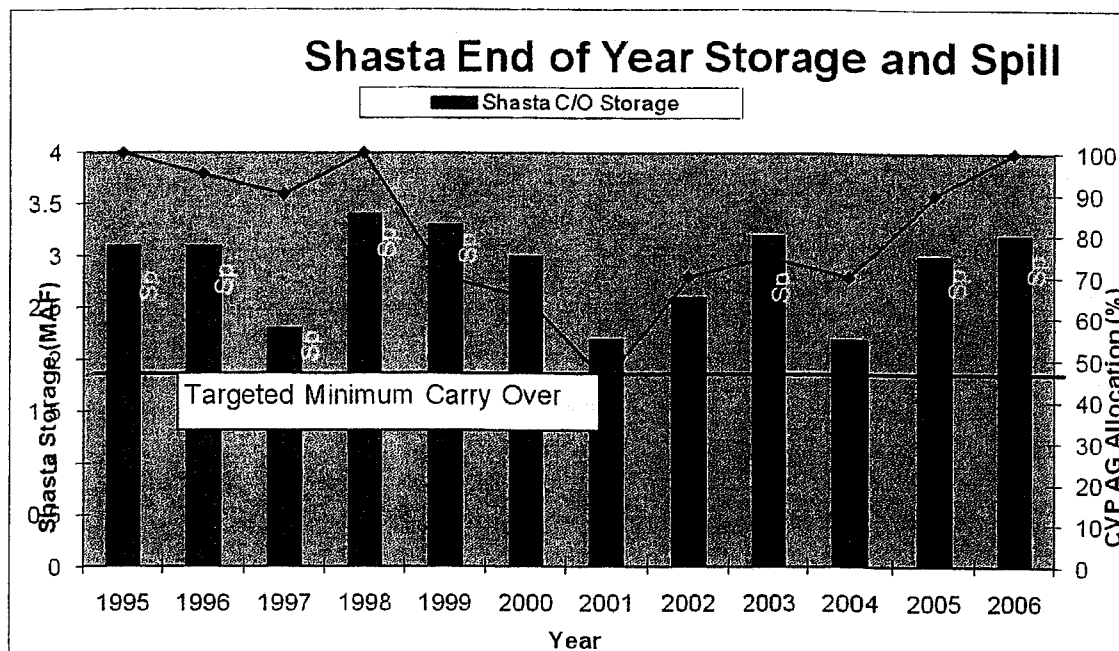
Recommended actions to address conveyance are:

1. The Bay Delta Conservation Plan (BDCP), the Delta Habitat Conservation and Conveyance Plan and related environmental documentation efforts must proceed rapidly to decisions and implementation.

2. The SWRCB must modify Delta water quality objectives to incorporate the addition of new conveyance facilities, to introduce increased salinity variability for ecosystem restoration actions, to recognize the ability to move water when more benign to the environment and to provide additional ecosystem protection only when the water-supply coequal goal can be maintained. These new objectives should incorporate and rely on real-time management flexibility.

c. Value of Storage

Due to recent court actions restricting Delta pumping, significant investments in storage and regional self sufficiency have been devalued. For example, over 6 million acre-feet of currently available surface and groundwater storage capacity upstream and downstream of the Delta has been rendered nearly useless or had operational flexibility seriously impaired. Storage south of San Luis Reservoir can no longer be filled in wet years and upstream storage releases cannot be sufficiently matched to pumping capability. Much of this storage has been developed in the last ten years. Even before these recent regulatory restrictions, in the period of 1995-2006, Shasta Reservoir operations required water that otherwise could have been used productively to be spilled in two-thirds of these years to provide for winter flood storage. Yet, in this same period, agricultural service contractors dependent on Shasta storage endured water shortages in three out of every four years (see figure below). This situation is primarily due to the inability to move water across the Delta to storage reservoirs or serve demands south of the Delta. New storage could have local water supply and regional ecosystem benefits immediately. The full statewide value of new storage will be realized when a Delta conveyance solution is implemented.



While new conveyance will restore benefits from existing storage, in the longer term, new storage is necessary. Climate change induced loss of snowpack will significantly reduce the capacity of nature's largest "reservoir." In addition there are serious flood

Delta Vision says:

"Improved storage and conveyance capacity offer increased opportunity for reliable water supply while improving ecosystem function."

control and public safety implications from more precipitation falling as rain rather than snow. New investments in surface and groundwater storage also will enable better management of flows for the environment by making more water available in drier years. Coupled with more sophisticated management of existing reservoirs, new storage will improve supply sufficiency and reliability for water users and will provide better environmental management. If we are to have the flexibility to

move water through and around the Delta at appropriate times, there must be places for the water to be stored until it is needed. This applies both to upstream locations from which water could be released to the Delta and to locations downstream of export diversions from which users could access it directly.

Actions to address storage are:

1. Complete CalFed surface storage studies, incorporating analysis with and without a conveyance fix, should be completed as quickly as possible.
2. Define benefits from alternative operations of new storage facilities to assess beneficiaries' willingness to pay for improvements.
3. Complete environmental documentation and acquire construction authorizations for the projects identified to be pursued.
4. Secure public funding to support the costs of creating general benefits including flood control, recreation, and environmental improvements associated with those storage projects serving statewide interests.
5. The state should continue to financially support locally controlled groundwater storage improving regional self-sufficiency and providing benefits statewide.

d. Water Conservation

Water conservation is a key component in integrated regional water management strategies and in achieving water supply reliability across the state. An ethic of efficient use of water is a tenet shared statewide. While great strides have been made in many regions, additional efforts in many areas are also necessary and appropriate. The impacts and benefits of conservation efforts will vary by region. In some areas at some times, conservation may make "new" water available for consumptive use or environmental enhancement. In other areas, conservation benefits will accrue to water supply reliability and efficiency in that basin. In areas where unconserved water returns to river systems, benefits in terms of "new" water may be limited. Because of regional differences and variable outcomes of conservation actions, prescriptive, "one size fits all" approaches to water conservation can create unintended consequences and negatively affect integrated regional water management objectives. Such approaches penalize areas where water conservation has been successful and could impede multiple uses of the same water.

The following principles for implementing additional water conservation programs must be followed:

- 1) Conservation programs and objectives must be tailored to regional needs, recognize varied benefits and outcomes and distinguish between on-farm or individual user efficiency vs. basin-wide efficiency

- 2) Enhanced conservation must support regional self-sufficiency and not interfere with other legitimate water management objectives;
- 3) Beneficiaries pay principles apply – those that seek the benefits of the actions should pay the costs.
- 4) Conservation programs should rely on creating incentives for actions by benefiting those who act. Programs that look simply to confiscate the benefits of conservation actions for purposes other than improving local supply self-sufficiency should not be pursued.
- 5) State investment in conservation should focus on producing water which is voluntarily transferrable to other uses or contributes to regional self-sufficiency.
- 6) Consistent with Water Code section 1011 and existing water contracts, state water policy should recognize that conservation benefits accrue first to the conserving water user.¹

Delta Vision says: *"The per capita rates of consumption and the economic uses of water differ greatly by geographic area, and therefore the conservation and efficiency investments that make economic and social sense vary regionally as well."*

Urban Water Conservation

Existing law requires all urban water agencies of significant size who must file Urban Water Management plans to review conservation BMPs and implement those found to be cost effective against other alternatives for provision of new water supply/reduction of shortages.

Recommendations for Urban Water Conservation:

- 1) Current efforts to update the Best Management Practices for Urban Water Conservation should be pursued.
- 2) DWR should identify water providers that could upgrade and improve their water conservation actions through thorough review of Urban Water Management Plans consistent with current law, and provide technical assistance to those areas who request it.

¹ Water Code section 1011 states, in relevant part: "(a) When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of the appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use."

- 3) Demonstration of compliance with the water code relative to implementation of BMPs should remain a prerequisite for grant funding eligibility, consistent with water code section 10631.5

Agricultural Water Conservation

In agriculture, improvements in water use efficiency do not always produce benefits to the conserving entity, but may result in benefits to other water users in the same basin. For most farming operations upstream of the Delta, diversions are made from surface water or groundwater to provide for irrigation demands. In most years, water not used by crops generally returns to groundwater basins or surface water streams for other use. Throughout California, enhancing the capability to more closely match applied water volume with crop requirements can result in real water savings; however, it could also decrease how much water is recharged to groundwater basins, some of which are overdrafted and may reduce return flows used by others.

Delta Vision says:

"Conservation and efficiency by themselves will not resolve California's water issues."

Over the past decade, increased delivery costs and less reliable water supplies have led to adoption of aggressive on-farm strategies to achieve more efficient water use, but we recognize in some areas more can still be done.

We recognize that improved water use efficiency within the agricultural sector will play an important and integral role in overall state water management. The California Water Plan (CWP) currently uses scenario planning and analysis to understand the implications of water policy, but more rigorous analysis is needed. That Plan projects total agricultural water use will decrease in the future under all scenarios as a result of reduced irrigated acreage and crop shifts.

Recommended actions to address agricultural water conservation are:

1. Complete the CWP update and determine water conservation targets for individual basins that reflect how water is reused, and how water use recharges groundwater, in each basin.
2. The state utilizing technical support from the CSU and UC systems and working with the agricultural community should develop a strategy that supports local efforts to implement agricultural water conservation.

3. DWR should target promotion and utilization of Efficient Water Management Practices for agriculture in areas found in the actions above that could benefit from advanced conservation efforts.

e. Real Time Operations/Monitoring/Reporting

Delta Vision says: *"that Californians aggressively apply and enforce existing water rights laws, may be the most far reaching recommendation made by the Task Force."*

Much of California's surface water diversions are measured in real-time but that information is underutilized. There remain unmeasured and unreported diversions and a paper system is used for diversion reports to the SWRCB, which is of little value in real-time management of the system. Real-time measurement and reporting systems would allow for transparent sharing of information, better policing of permit terms and opportunities to better manage California's water. Before efforts

are undertaken to modify flow requirements for environmental purposes, the State needs to do a more thorough job of assuring all water diversions are legal and exercised appropriately.

Recommendations to improve water operations are:

1. Initiate a pilot program to install real-time telemetered monitoring devices on permitted and licensed surface water diversions from streams tributary to and within the Delta that are currently not being monitored by CVO, OCO, or CDEC that divert more than a de minimis amount (approximately 5cfs).
2. Develop a software program that automatically compares real-time telemetered data for permitted and licensed diversions against permit and license requirements. Have the system set alarms for field review by SWRCB water rights enforcement staff, in conjunction with quality control of data, assuring pursuit of enforcement actions only where exceedences are verified.

Funding for local infrastructure costs for the above is considered a cost of doing business and would be provided by the individual diverters. The state should ultimately see operational cost savings with this innovation.

f. The Water Rights System and Delta Management

The hallmark of California water rights is flexibility. Gold Rush miners invented the appropriative water right to allow them to move water from streams to distant areas where the water would be more useful to them. Consistent with this heritage, California water rights have allowed the state to prosper by supplying the legal foundation for moving water from areas adjacent to streams to areas where it is needed, either locally or elsewhere. Based on these rights, communities throughout California have invested billions of dollars in reliance on their water rights or water-supply contracts issued under others' water rights. Moreover, Delta watershed communities have relied on area of origin laws that provide that they shall not be deprived by the operation of the SWP and CVP of the prior right to develop future water supplies reasonably required to adequately supply beneficial uses in those areas. This Coalition therefore believes that such communities' water rights, and the related area-of-origin laws, must be respected as part of any Delta solution.

With a resource as variable as water, some flexibility in rights is by design. Appropriative water rights account for this flexibility because their holders can modify them as long as other legal users of water are not injured. This basic rule has supported a robust and growing water transfer market. If water is reallocated to ecosystem enhancement, reallocations must occur through voluntary transfers to the maximum extent possible in order to respect the massive investments communities have made based on their water rights. Involuntary and uncompensated reallocation of water supplies to ecosystem enhancement, where the reallocation is intended to address ecosystem impacts not caused by the water users, or is not proportional to the impacts caused by those users, conflicts with the water rights system and the investments that have been made based on that system. Such a reallocation would not only reduce the value of the targeted water user's investments, but would introduce significant uncertainty into the security of all water rights, which could seriously constrain water transfers.

This Coalition recommends that any Delta solution recognize the following to properly maintain and account for water rights:

1. Any Delta solution must avoid involuntary and uncompensated reallocations of water from legal users of water that are not justified by the need to mitigate for impacts caused by those individual users;
2. Area of origin laws must apply to water delivered through any new Delta conveyance.
4. The SWRCB should remain the administrative forum in which to consider Delta water quality and flow requirements, because it can

transparently consider evidence, resolve scientific disputes and consider reasonable use issues under Article X section two of the California Constitution.

g. In - Delta Diversions

The SWRCB Strategic Plan for the Bay-Delta properly emphasizes the need for the Division of Water Rights to focus its enforcement activities on illegal diversions of water from the Bay-Delta. Simply halting illegal diversions within the Delta could potentially "free-up" as much as 500,000 acre-feet of water, or enough to supply 1.5 million California families. Since 1961 the SWRCB has recognized the need to determine water available for appropriation from the Delta. In the 1970's the Legislature recognized this need and set up the North Delta Water Agency (NDWA), Central Delta Water Agency (CDWA) and South Delta Water Agency (SDWA) to obtain water supply contracts from the Projects. To date, only the NDWA has negotiated a contract for water supply from the SWP.

Actions Recommended to Address in - Delta Diversions:

1. The SWRCB should commence hearings to establish a diversion schedule for in-Delta riparians and appropriators within the CDWA and SDWA based upon hydrology and water legally available for diversion in the Delta in the Bay-Delta Basin Plan in order to protect other beneficial users of water and the environment.
2. The SWRCB should immediately seek to identify and halt all illegal diversions.

h. Water Transfers:

In the last 25 years, as it has become clear that the opportunities to create new water supplies by building substantially more facilities may be limited, Californians have developed an increasingly sophisticated and voluntary water transfer market to meet short-term and long-term demands. California law has evolved to support such efforts by recognizing that the certainty of water rights is a precondition to effective transfers. In Water Code section 109, subdivision (a), the Legislature found and declared that:

"The growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the

definition of property rights to the use of water and transferability of such rights.”

This statute recognizes that no one will transfer water if there is a risk that a transfer will endanger the underlying water right. With legal assurance against such a risk, California water users have developed many techniques to make water available to transfer voluntarily to other water users. Water Code section 1011 authorizes the transfer of water made available through conservation projects. Water Code section 1011.5 authorizes the transfer of surface water made available through the conjunctive use of groundwater. Intra- and inter-regional water transfers have occurred consistently since 1991. Such transfers are made possible by the underlying flexibility of appropriative water rights.

While transfers have occurred, they are hindered by overly cumbersome regulatory requirements and are subject to repeated litigation. Many recurring transfers have shown that they can be an efficient, flexible and timely means of providing needed water supplies in times of shortage without injuring other beneficial uses of water. Due to extensive and repetitive regulatory requirements, however, water transfers are becoming more expensive and more difficult to implement, which is a trend that will impair the State's ability to match supply and demand through efficient use of water delivery infrastructure.

Recommended Actions Necessary to Promote Water Transfers:

1. Enact changes to the Water Code to expand the number of water transfers which can be considered ministerial to include those where the seller's and buyer's existing permit requirements, and water quality objectives, are maintained and where it can be conclusively determined that such transfers do not infringe upon the water rights of other users (constitute “real” water).
2. Combine place of use designation for the SWP and CVP for the San Joaquin Valley.

i. Rural Community Water Systems

Many rural communities and especially those in the San Joaquin Valley, face serious drinking water quality problems and have limited resources to address those concerns. Integrated regional water management planning by agencies in these regions should expand their scope to incorporate discussions of and solutions to these concerns, and

provide access to planning and implementation grant funding to address water quality needs.

III. Ecosystem Restoration

After nearly thirty years of focus on water project operations and flow as the ecosystem management tools of choice and little or no attention to the myriad of other ecosystem stressors, a new, comprehensive and science-based approach to Delta ecosystem restoration is necessary if water supply and ecosystem needs are to coexist. This means reducing the impacts of all important stressors on the system, habitat creation and restoration, and active invasive and non-native species reduction. Proposed changes to flow requirements and project operations must be assessed in conjunction with all available tools. In short, proposed Delta solutions must address all causes of the Delta's problems. Environmental problems cannot be fixed without scientifically identifying their causes or simply focusing on one effect. Finally, the realities of climate change, with regard to both sea-level rise/salinity variation and an altered hydrograph, must be better assessed and incorporated into this comprehensive approach.

There has been improvement in dedicated Delta science in recent years. That trend must be accelerated and incorporated into future regulatory actions. This is especially necessary within the resource agencies, where a more robust, adaptive and multi-faceted approach must also be promoted. While there will always remain uncertainties when it comes to predicting and trying to understand the natural world, the track record of the last decade has been poor – despite tremendous sacrifices of both water and financial resources by water users and Californians generally through bond outlays. We must increase our scientific capabilities and our willingness to boldly experiment to pursue improvements.

Major habitat restoration will be a cornerstone to rebuilding ecosystem processes and function that will promote natives over invasive species. It will be critical that this is done systematically. Restoring a complex, interconnected and functional mix of habitat types needs to be approached strategically. This can be done with farming activities that restore Delta landforms (tule-farming) rather than degrade them. While the primary interest of ecosystem investments is increasing the environmental health of the Delta estuary, the relationship to and integration with flood management is essential. The direct and indirect economic, physical and social impacts of habitat recreation will have to be addressed in ways to minimize those effects and provide mitigation where appropriate.

Sufficient quality, timing and quantity of flows in the estuary are part of a successfully functioning ecosystem. However, it cannot be presumed in the absence of thorough scientific review that new flow modifications in the system are necessary or that equivalent means to achieve the same ends are not available that would better maintain water supply reliability. The SWRCB is the administrative forum for determining flow needs for the Delta estuary through a process that is based on scientific evidence and balancing of the beneficial uses in the public interest of the water flowing through the Delta. Discussions within the Bay-Delta Conservation Plan (BDCP) should and must inform this SWRCB process. Conveyance changes will allow for better management tools to apply to ecosystem and water supply needs and the SWRCB can adapt water quality objectives, accordingly.

Increased efforts will be needed to work out strategies for the transition period before the time when new conveyance infrastructure is operational and ecosystem improvements have materialized. We must be careful to ensure that difficulties in the near term do not derail implementation of proposed operational and regulatory changes, or other program investments as we progress toward what is expected to be a much improved and resilient situation in the longer-term. Moreover, it will be imperative that investments in water supply reliability not be held in abeyance as somehow secondary to or dependent upon habitat and ecosystem enhancements. It is time to move forward on all fronts immediately. As a practical matter, funding for ecosystem improvements will not materialize under conditions of economic distress caused by ongoing or increased constrictions on water supply.

Adaptive management will be critical to success, to maintaining the credibility of the program, ensuring economic efficiency and the best chance for positive outcomes from the ecosystem program. The BDCP effort is developing an adaptive management program that should be looked to as a model. Real-time monitoring will be crucial for this.

Recommendations for ecosystem restoration actions:

1. Develop a "Mark-Select" fishery program for Salmon to help recover central valley winter and spring runs, coastal and Klamath runs, and the ocean fishery.
2. Implement active in-Delta predator control. The State's striped bass doubling policy and all other actions supporting predatory fisheries should be repealed. Active efforts to eradicate non-native predator species and structures that harbor these species must begin.
3. Reduce toxics entering Delta waters where those contaminants are adversely affecting the ecosystem.

4. Eliminate illegal in-Delta diversions by enforcing existing water-right laws.
5. Require screening of unscreened Delta diversions with public funding as appropriate.
6. Create a large-scale mix of interconnected native habitat types, restored from current uses, incorporating land- building farming activities where viable in light of sea level rise.
7. Address the direct and indirect economic, physical and social impacts of restoration projects.

IV. Delta as a Place

The Delta is ever-evolving and cannot be maintained in its current form when realities of sea level rise, seismic risk and the limits of financial resources are logically considered. River deltas in nature are transitory features. California's management of the Delta has ignored this reality. Sea-level rise and seismic risk, combined with unsustainable agricultural practices on islands with

Delta Vision says: *"The state cannot and should not attempt to create an unsustainable 'fortress Delta.'"*

peat soils only speed the inevitable transformation of Delta landforms. The Delta Vision Blue Ribbon Task force has recognized this and our future management of the Delta must as well. Planning for the future form of Delta geography must come to grips with a changing physical reality. State officials should more effectively engage with local land use agencies to develop cooperative plans to provide for emergency preparedness, habitat restoration, flood protection and accommodation of water transfer infrastructure.

Recommended Actions to Plan for the Delta's future geography:

1. State and local land use planning jurisdictions should engage in a planning effort to integrate ecosystem restoration habitat needs, flood management and other infrastructure into local county and Delta Protection Commission plans, while accommodating Delta export conveyance decisions that will be made at a state level.
2. Local government representatives should be involved in decisions implementing Delta ecosystem restoration projects to help address potential adverse local impacts.

V. Governance

With appropriate task delegation, targeted increases in staffing and proper resource allocation, current authorities within existing state and federal agencies are sufficient to implement the core elements of a Delta solution.

A new Delta Conservancy could add value to the effort and is widely supported, provided its focus is directed on implementing ecosystem restoration projects. Separation of DWR's State Water Project operations from its planning, local assistance, flood management, dam safety and other such functions is worthy of serious investigation with broad input to encourage a closer connection between the public water agencies that pay for the SWP and the policy and operational decisions that govern it. The ultimate consolidation of the Central Valley Project and State Water Project should be part of this discussion.

Contrary to the Delta Vision Blue Ribbon Task Force's recommendations, we do not support the creation of the California Delta Ecosystem and Water Council as proposed, or the development of the "CDEW" Plan. We support improved coordination of Delta solutions and related actions as described in this document.

Relative to land use affairs, any new and existing governance created or empowered to implement Delta solutions must include local representation, and engage and respect local land use planning authorities. These entities must also be engaged in discussions regarding conveyance solutions addressing statewide water needs.

Governance Recommendations:

1. The Delta Vision Committee should distill from the Delta Vision Strategic Plan, and the comments of Delta stakeholders, those actions that are necessary to improve the situation in the Delta as rapidly as possible and assign responsibility for implementing those actions to appropriate existing agencies. This is the only way to move forward on all fronts as rapidly as necessary.
2. The Delta Vision Committee should consider extending its existence to become the oversight entity for implementation of Delta Vision recommendations by line agencies, departments, and boards.
3. The federal administration should appoint a high-level representative that would coordinate relevant federal agency participation and actions affecting the coequal goals with the Committee.

4. New authority for the Committee to direct line agency action and modify budgets to support implementation of its recommendations should be considered. The existing CALFED Bay-Delta effort and staff can be redeployed to support the continued and formalized Delta Vision Committee.

ATTACHMENT 2



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December 15, 2008

HAND DELIVERED

Michael Chrisman
Secretary of Resources
Resources Agency
1416 9th Street, Suite 1311
Sacramento, CA 95814

Re: Delta Vision Committee – Water Rights

Dear Mr. Chrisman:

On July 9, 2008, the Attorney General provided an opinion letter advising the Delta Vision Blue Ribbon Task Force that the public trust doctrine may be used as a principal tool for reallocating water for ecosystem restoration purposes from existing water right holders, without regard to the priority of their various legal entitlements to water. (July 9, 2008 Letter to John J. Kirlin, Executive Director, Delta Vision, from Virginia A. Cahill, Deputy Attorney General, Re: Reallocation of Water under Specified Conditions.) The opinion letter of the Attorney General suggests that the responsibility for protecting public resources may be spread incrementally to all who divert water from the Delta or its tributaries, including upstream water users, and that this can occur without establishing that upstream water uses are, in fact, incompatible with the public trust values sought to be protected.

The Attorney General also advances the argument that article X, section 2 of the California Constitution can be used as an additional tool for reallocating water for ecosystem restoration purposes within the Delta. Article X, section 2 of the California Constitution requires that water be put to beneficial use to the fullest extent capable and that unreasonable use be prevented. This provision ensures that water is used efficiently and without waste. Contrary to the guidance given by the Attorney General, the constitutional requirement of beneficial use does not serve as a legal basis for reprioritizing one type of existing water use over another.

As discussed more fully herein, the Attorney General's reliance on the doctrines of public trust or reasonable use to massively reallocate water within California for the protection of the Delta is misplaced. Proceeding with proposals to reallocate water based upon the Attorney General's advice will destabilize California's system of water rights, and will thrust the State into decades of costly and counterproductive litigation. In turn, the State's economy will needlessly suffer, and the State will have done little, if anything, to further its goal of ecosystem restoration.

1. A Water Right Is a Property Right

California water law, developed over the past 158 years, is based upon the fundamental premise that one cannot take water from a stream without acquiring some type of water right. This well-developed area of law has, as one of its bedrock principles, a relative system of priorities. This system recognizes a senior right for those that first developed water resources for beneficial uses. Thus, those that have previously put water to beneficial use have the prior right, senior to those that came later, to continue to put water to beneficial use. While a water right is usufructuary in nature, once the right is perfected, i.e., put to beneficial use, the use of water becomes a vested real property right.

That perfected water rights are real property is confirmed by more than 150 years of California law. This recognition appears in numerous cases, in the California Constitution, and has been the position of the State in numerous adjudicative proceedings. In fact, the California Attorney General has argued, at least before the Appellate Courts of this State, that the right to water is classified as real property. (See *Fullerton v. State Water Resources Control Board* (1979) 90 Cal.App.3d 590, 598.) Thus, courts have continually affirmed that an appropriative water right is a real property interest incidental and appurtenant to land.

Any attempt to overturn this body of well-established law through reallocation schemes will, as noted above, result in protracted and costly litigation, including, among other things, numerous inverse condemnation actions for the unconstitutional taking of water rights.

2. Public Trust Doctrine

The California Supreme Court in *National Audubon Society v. Superior Court* (Los Angeles Dept. of Water & Power) (1983) 33 Cal.3d 419, 447 (*National Audubon*), defined the relationship between the public trust doctrine and California's system of water rights. We do not question California's affirmative duty to take public trust resources into account in the planning and allocation of water resources. Nor do we dispute the State's continuing supervisory authority over navigable waters for the protection of public trust values. We furthermore acknowledge that the scope of the public trust doctrine has evolved over time to encompass a broad range of ecological values. We fundamentally disagree, however, with the Attorney General's asserted "practical application of the public trust doctrine," and the Attorney General's assertion that the public trust doctrine authorizes a proportionate reallocation of all water diverted from the Delta or its tributaries for ecosystem restoration purposes.

In *National Audubon*, the California Supreme Court states that "[a]s a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses." (*Id.* at p. 446.) Realizing that California's economy and population centers have developed in reliance upon appropriations of water, the Supreme Court unmistakably contemplated that before water is allocated or, as in this case, reallocated, there must be a careful balancing and weighing

between the costs and the benefits associated with the continued use of water and the protection of public trust values.¹

The balancing and weighing of specific benefits and costs must be done on a case-by-case basis, and only where an individual's diversion of water can be traced to actual harm to the public trust resources. In *National Audubon*, the Court set forth a number of elements that enter into a public trust decision. In addition to considering the public trust values to be protected, the State was required to balance numerous other factors, including the City of Los Angeles's need for water, its reliance on past board decisions, and the cost in terms of money and the environmental impact of obtaining water elsewhere. (*National Audubon, supra*, 33 Cal.3d at p. 448.) Because the relevant components that must be considered may vary according to the individual circumstances of each situation, it is evident that the type of balancing directed by the Supreme Court cannot be achieved on a macro scale.

None of the cases cited by the Attorney General substantiates a decision to reallocate water over an entire watershed without first examining the unique circumstances associated with each individual diversion, and carefully weighing those against the particular public trust values to be protected. The Attorney General attempts by analogy to rely on *People v. Gold Run Ditch & Mining Co.* (1884) 66 Cal. 138 (*Gold Run*) to support the proposition that all who divert water from the Delta should be responsible for a proportionate share of the water required to protect public trust uses.

The Attorney General takes the California Supreme Court's holding in *Gold Run* entirely out of context, and misapplies it to the question of which water users may bear the burden of avoiding or reducing harm to public trust values. This case involved a public nuisance wherein each and every challenged mining operation, including the defendants', was considered to be wrongful and destructive of the public's right in the navigable rivers of the State. As the California Supreme Court stated:

[I]n an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined, jointly or severally. It is the nuisance itself, which, if destructive of public or private rights of property, may be enjoined. (*Gold Run, supra*, 66 Cal. at p. 149.)

Two-thirds of California's entire population are dependent upon diversions of water from the Delta. Diversions of water provide essential drinking water for California's cities and towns. California agriculture would be non-existent but for the ability to divert water critical to growing the food upon which this nation and the world depend. Industries throughout California rely on Delta diversions for manufacturing. Diversions of water from the Delta are the lifeblood of this State, not a nuisance to be enjoined. While there may be very unusual situations wherein an individual's

¹ Of course, even after an appropriate balancing, there would likely be significant issues associated with an unconstitutional taking that would need to be addressed.

diversion of water may be harmful of the public trust, it is beyond reason to conclude as a general proposition that all diversions from the Delta are wrongful, and therefore may be enjoined. Accordingly, the Attorney General's reading of *Gold Run* simply cannot be supported.²

While the Attorney General cannot cite a single case on point to support its proposals, there is case law which directly challenges those recommendations. The California Supreme Court recently rejected equitable apportionment of water as a physical solution to the overdraft of the Mojave River Groundwater Basin in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, specifically because it disregarded the priority of certain existing water right holders. Reiterating that water right priorities are fundamental to California's system of water law, the Court concluded that equitable solutions must preserve water right priorities to the fullest extent possible. (*Id.* at p. 1243.)

The solution's general purpose cannot simply ignore the priority rights of the parties asserting them. In ordering a physical solution, therefore, a court may neither change priorities among the water right holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine. (*Id.* at p. 1250, internal citations omitted.)

Contrary to the Attorney General's opinion, the State is compelled to ascertain whether there exists a solution that will avoid harm to the public trust resources while at the same time not adversely affect prior appropriators' vested property rights in water. Only if there is a direct conflict between prior rights to water and the public trust can the State apply the balancing test established by *National Audubon*. In addition, this balancing test must be assiduously undertaken before water can be reallocated for the benefit of public trust uses.

In *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937 (*El Dorado Irrigation Dist.*), the 3rd District Court of Appeals clearly articulated the fundamental principle of California water law that "priority of right is significant only when the natural or abandoned flows in a watercourse are insufficient to supply all demands being made on the watercourse at a particular time." (*Id.* at p. 962.) According to the Attorney General, it is the over-diversion of water that is causing the harm to public trust resources. California water law dictates that water right priorities be utilized to determine availability of water for competing uses, including use of water for the protection of public trust resources.

² Unable to find any case law justifying its theory that each Delta diverter should contribute proportionately to the ecosystem restoration, the Attorney General resorts to the State Water Resources Control Board's draft Decision 1630 as evidence of the acceptability of its proposal. However, as the Attorney General itself acknowledges, Decision 1630 was withdrawn and never adopted. Decision 1630 therefore is only demonstrative of an approach promoted by the State Water Resources Control Board staff, not the State Water Resources Control Board itself.

"[E]very effort must be made to preserve water right priorities to the extent those priorities do not lead to violation of the public trust doctrine." (*El Dorado Irrigation Dist.*, *supra*, 142 Cal.App.4th at p. 966.) Thus, rather than use the over-diversion of water in a strained attempt to justify the incremental reallocation of water for the benefit of public trust resources, the law requires just the opposite — that water right priorities be used in the first instance to address the over-diversion of water.

3. Unreasonable Use

In its analysis of article X, section 2 of the California Constitution, the Attorney General acknowledges that a determination of whether an existing use of water is reasonable requires a fact specific determination. Nevertheless, the Attorney General conjectures that California's doctrine of reasonable use may be used to prohibit uses of water that are less than optimum or desirable. Competing beneficial uses of water may affect the determination of what is "reasonable" over time. In order for an existing beneficial water user to lose its water rights, however, a finding must be made that the use is unreasonable, not simply that there is a more valued use for that water, in someone else's opinion. The doctrine of reasonable and beneficial use is not a legal basis for reprioritizing between various reasonable uses of water. A use must first be determined as being unreasonable before that use is reallocated to another.

Nor should the doctrine of reasonable and beneficial use be construed to inhibit the vesting of a quantifiable property right in water. The property right to water is defined, in part, by reasonable beneficial use. Like an easement in land, the property holder owns the land subject to the purpose of the easement, but the property owner still holds a vested interest in the subservient estate. Similarly, as long as a water right holder reasonably uses water for a beneficial purpose, the water right holder has a vested property right that cannot be reallocated simply because someone decides that there may be a higher valued use for the water.

After summarizing the case law on the reasonable and beneficial use, the Attorney General's opinion itself concedes that the doctrine has never been utilized in the manner it suggests as a basis for reprioritizing between existing uses of water. In spite of this admission, the Attorney General's opinion is currently being cited as authority for that very proposition, a proposition that is not substantiated by any of the cases cited within the Attorney General's opinion.

4. Conclusion

The purpose of the Attorney General's Opinion was ostensibly to identify tools to further the restoration goals for the Delta. The Attorney General, however, advances theories with little support in the law, and in doing so creates an unnecessary conflict with the lawful users of water. If implemented, the Attorney General's Opinion will undoubtedly result in

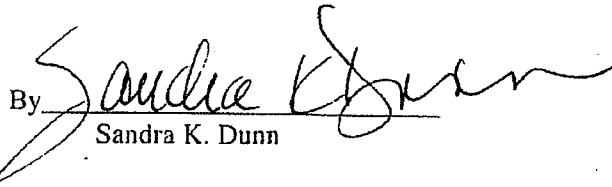
Michael Chrisman
Re: Delta Vision Committee — Water Rights
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costly complex litigation that will undermine the State's ability to achieve its overall objective.

California's system of water rights, based upon prior appropriation, was intended to inject an element of legal certainty into an inherently uncertain physical situation. Undercutting the concept of priority destabilizes California's system of laws. Thus, rather than ignoring California's water right law to achieve the State's restoration goals, the system of water rights should be fully recognized and utilized to facilitate a solution to the Delta.

Very truly yours,

SOMACH SIMMONS & DUNN

By 
Sandra K. Dunn

SKD:sb

cc: Linda Adams, Secretary for Environmental Protection
Dale Bonner, Secretary for Business, Transportation and Housing
Michael Peevey, President, California Public Utilities Commission
A.G. Kawamura, Secretary for Food and Agriculture
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JAMES M. BOYD, JR., Of Counsel

December 12, 2008

The Honorable Mike Chrisman
Chair, Delta Vision Committee
650 Capitol Mall
Sacramento, California 95814

Re: Comments on the Delta Vision Strategic Plan; Legal Analysis of Proposals
for Regulatory Reallocations of Water to Delta Ecosystem Uses

Dear Secretary Chrisman:

We appreciate the opportunity to comment on the Delta Vision Committee's consideration of the Delta Vision Strategic Plan, which wisely recommends a comprehensive approach to addressing the crisis in the Delta (including proposing ecosystem restoration, new Delta conveyance infrastructure and development of new surface water and groundwater supplies). Unfortunately, the Strategic Plan also recommends a number of unnecessarily adversarial implementation strategies. The Delta Vision Strategic Plan has several proposals (discussed briefly below) that would require the reallocation through regulatory actions of water from existing Delta-watershed uses to Delta ecosystem uses. In response to a request from the Delta Vision Task Force, a Deputy Attorney General issued a July 9, 2008 memorandum that asserts that the state has authority to reallocate water from water users when needed for ecosystem protection under Article X, section 2, of the California Constitution, the public trust doctrine and nuisance law. We have enclosed our analysis that reviews this legal memorandum and concludes that the state does not have authority to reallocate water from existing uses to Delta ecosystem uses except where: (1) the proposed reallocation would mitigate for the targeted water use's environmental impacts; and (2) the mitigation requirement would be in proportion to these impacts. In addition, we respectfully submit that attempting to impose greater reallocations of water on Delta-watershed communities would be counterproductive because it would trigger disputes that would undermine any Delta solution.

The Delta Vision Strategic Plan's Proposes Uncompensated Reallocations of Water

The November 2007 Delta Vision Principles and the October 2008 Delta Vision Strategic Plan include many proposals, the implementation of which would require the reallocation of millions of acre-feet of water supplies from current uses, primarily through uncompensated regulatory actions.

Hon. Mike Chrisman

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Set forth below are some examples:

- "A revitalized Delta ecosystem will require reduced diversions -- or changes in patterns and timing of those diversions upstream, within the Delta, and exported from the Delta -- at critical times" (Recommendation 7 of Delta Vision Principles, November 2007)
- "Diversions from the Delta watershed -- upstream, within, and exported from the Delta -- are an issue of statewide importance and directly impact restoration of the Delta and the reliability of the state's water supply." (Strategic Plan Goal 4 at page 32)
- "Request the State Board to use its authority to determine reasonable use of water over the coming decades to evolve away from the generally accepted practices of diverting surface water for irrigating agriculture." (Action 4.1.3 at page 95)
- Recommendations to increase flows to the Delta from upstream water supplies, including:
 - adopting new SWRCB requirements by 2012 to increase spring Delta outflow (Action 3.4.3 at page 86)
 - adopting new SWRCB requirements by 2012 to increase fall Delta outflow (Action 3.4.4 at page 86)
 - increasing the frequency of upstream floodplain inundation and establishing new floodplains that would allow the Yolo bypass to flood at least 60 days continuously between January and April every other year, except during critical years (Action 3.1.1 at page 71)
 - having the Department of Fish and Game develop additional streamflow recommendations for high priority rivers and streams in the Delta watershed by 2012 and for all major rivers and streams by 2018 (Action 3.4.1 at page 85)
- "Achieving the flow targets of this strategy can be done through combinations of: *releasing more water from storage to improve flow conditions*, altering conveyance of water exports to the export pumps, or *reducing the amount of water diverted from the Delta ecosystem*. From an ecosystem perspective, flow targets are achieved far more effectively by reducing water diversions through the use of alternative supplies, conservation, increased efficiency, retiring marginal agricultural lands, recycling, desalination, conjunctive use of surface and groundwater supplies, *regulatory reallocations*, and market transactions." (Emphasis added; Strategy 3.4 at page 85)
- Delta-solution financing principles should "create no expectation of public payment for any water required for ecosystem revitalization." (Action 7.3.1 at page 134)
- Coordinate the authoritative oversight of the State Water Board and the Regional Boards to ensure compliance with the *reasonable use and public trust doctrine* [presumably, as interpreted by the Deputy Attorney General, as discussed below] and applicable water quality requirements by water diverters within, and exporting from, the Delta watershed. (Action 7.1.5 at pages 127-128)

Regulatory Reallocations Of Water Must Be Based On Causation And Proportionality Under California Law

Page 17 of the Deputy Attorney General's July 9, 2008 memorandum states its core conclusion:

[T]he harm done to public trust resources in the Delta [is] due to the incremental diversions of all who take water from the Delta or its tributaries, whether upstream, in the Delta, or for export from the Delta. [¶] It may be possible to allocate responsibility for addressing harm to public trust uses based on the proportionate amount of water diverted by each water user.

Although diversions upstream from the Delta, in-Delta and Delta-export diversions have very different *impacts* on Delta resources, the Deputy Attorney General's memorandum suggests that this fact is not relevant, and that the state may reallocate water from any water user in the Delta watershed based on its diversion's *size*. As our analysis states, we believe that California law supports only regulatory water reallocations that are based on determinations of causation and proportionality.

No California court decision under the public trust or the California Constitution's Article X, section 2 -- the "reasonable use" provision -- has reallocated water from a water user: (1) to address environmental impacts caused by others; or (2) in an amount that exceeds the water user's own proportional impacts. For example, the *National Audubon* decision concerned direct impacts on Mono Lake resources caused by the City of Los Angeles' diversions. The importance of causation and proportionality is highlighted by two decisions that the Deputy Attorney General's memorandum did not discuss, in which the courts held that the public trust doctrine did *not* authorize reallocations of water to benefit public trust uses. (See *Golden Feather Community Ass'n. v. Thermalito Irr. Dist.* (1989) 209 Cal.App.3d 1276; and *Big Bear Municipal Water Dist. v. Bear Valley Mutual Water Co.* (1989) 207 Cal.App.3d 363.) Causation and proportionality also govern mitigation measures under the California Endangered Species Act. (Fish & Game Code Section 2052.1: such measures "shall be roughly proportional in extent to any impact on [the] species that is caused by" the project.)

Conclusion

Delta-watershed communities have invested billions of dollars in water facilities to maximize their self-sufficiency. We represent such communities in the Sacramento Valley and the Sacramento metropolitan area. California law does not support reallocating water from these communities for the Delta's ecosystem unless state regulatory agencies find, based on evidence and after hearings, that: (1) these communities' diversions have caused an environmental impact; and (2) the mitigation measure would be proportional to this impact. To avoid the severe conflicts that uncompensated regulatory reallocations of water would cause, we urge the Delta Vision Committee instead to emphasize and facilitate voluntary transfers of water and other collaborative processes. As they have throughout California's water history, Delta-watershed communities can assist the rest of the state in meeting the coequal goals of restoring the Delta ecosystem and providing reliable water supplies for California through these voluntary and collaborative arrangements.

Hon. Mike Chrisman
December 12, 2008
Page 4

Very truly yours,



Paul M. Bartkiewicz

PMB:af
7021/Delta Vision/1.121208pmb
Enclosure
cc (w/encl.):

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LEGAL ANALYSIS OF PROPOSED REALLOCATIONS OF WATER FROM UPSTREAM WATER USERS TO DELTA ENHANCEMENT

In a July 9, 2008 memorandum to the Delta Vision Task Force (the "Cahill Memorandum"), Virginia Cahill of the Attorney General's office concluded that state agencies may reallocate water among water uses pursuant to various legal authorities, including: (1) Article X, section 2, of the California Constitution; (2) the public trust doctrine; and (3) nuisance law. In particular, the Cahill Memorandum concluded (p. 17) that, pursuant to the public trust doctrine, the state could require water users to contribute water to Delta ecosystem improvement in proportion to their diversions' sizes because "the incremental diversions of all who take water from the Delta or its tributaries, whether upstream, in the Delta, or for export from the Delta" may contribute to the Delta's problems. The Cahill Memorandum thus apparently concluded that upstream water users in the Delta-watershed could be required to contribute water to address problems caused by in-Delta or Delta-export diversions.

The Cahill Memorandum, however, failed to synthesize the relevant judicial decisions' results to identify the rules that California courts would follow in evaluating potential reallocations of water. Under these decisions, the state does *not* have the authority to reallocate, involuntarily and without compensation, water users' supplies for ecosystem uses unless the relevant water uses have caused the relevant impacts and the reallocations are proportional to these impacts.

1. Standard Principles of Legal Interpretation Require That Cases' Results Be Integrated, Which The Cahill Memorandum Did Not Do

The Cahill Memorandum cited numerous judicial decisions and other decisions as authorities for its analysis, including 37 judicial decisions in its table of authorities. In particular, the Cahill Memorandum relied extensively on quotes from judicial decisions to support its points. (See Cahill Memorandum, p. 3 (quoting *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937 ("EID")), p. 5 (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 ("CalTrout I")), 6 (*Imperial Irr. Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548 ("IID")), p. 7 (*In re Waters of Long Valley Creek Stream* (1979) 25 Cal.3d 339), p. 8 (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132 ("Joslin")), p. 9 (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82 ("Racanelli") and pp. 11-13 (*Nat'l Audubon Society v. Superior Ct.* (1983) 33 Cal.3d 419 ("Nat'l Audubon")).) The Cahill Memorandum, however, did not compare the relevant decisions' results to determine what key factors have driven the courts' analyses and to extrapolate how these analyses might apply in future cases.

By omitting such a comparison, the Cahill Memorandum did not apply standard principles of legal analysis. The California courts have emphasized that the words courts use, and the statements that they make, cannot be understood outside the factual context of the dispute at issue. For example, in *General Dynamics Corp. v. Superior Ct.* (1994) 7 Cal.4th 1164, the California Supreme Court stated:

Mindful of the maxim that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used" (*Cohens v. Virginia* (1821) 19 U.S. (6 Wheat.) 264, 399), they seek in every case a just resolution, identifying those circumstances that lay claim to conscience, considered in light of *applicable* principles of law.

(*General Dynamics, supra*, 7 Cal.4th, at p. 1176 (emphasis in original); see also, e.g., *PLCM Group, Inc. v Drexler* (2000) 22 Cal.4th 1084, 1097; *Finegan v. County of Los Angeles* (2001) 91 Cal.App.4th 1, 9 ("[A]n opinion's authority is no broader than its factual setting and the parties cannot rely on a rule announced in a factually dissimilar case"); and *Fielding v. Superior Ct.* (1952) 111 Cal.App.2d 490, 496 ("It is not a question of taking isolated language out of a case . . . but of attempting to extract a principle that preceding courts have themselves extracted from the facts before them").)

In *Cohens*, Chief Justice John Marshall, for the United States Supreme Court, explained why it is important to focus on decisions' results, not just their words:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

(*Cohens, supra*, 19 U.S., at pp. 399-400.)

When one uses these rules to interpret the cases cited in the Cahill Memorandum, the resulting analysis shows that the courts have *never* decided that the state has the authority to require water users to reallocate their water supplies to address environmental impacts caused by others.

2. *Existing Decisions Show That The Public Trust Doctrine Only Authorizes The State To Reallocate Water Supplies Of Projects That Cause The Relevant Environmental Impacts And Only In Proportion To These Impacts*

Existing decisions under the public trust doctrine do not support the Cahill Memorandum's suggestion that, in order to improve the Delta's ecosystem, the state may reallocate water from any water user in the Delta watershed "due to the incremental diversions of all who take water from the Delta or its tributaries, whether upstream, in the Delta, or for export from the Delta." (Cahill Memorandum, p. 17.) Although the three types of diversions that the Cahill Memorandum mentioned – diversions upstream from the Delta, in-Delta diversions and Delta-export diversions – have dramatically different impacts on Delta resources, the Cahill Memorandum apparently concluded that the causes of the Delta's problems are not relevant to the analysis because it suggested that all of these diverters could be required to contribute to Delta solutions according to the relative size of their diversions.

The Cahill Memorandum's conclusion is incorrect for two reasons. First, the public trust doctrine does not support requiring a water user to mitigate impacts caused by other factors.¹ Second, reallocating water from a water user to ecosystem enhancement disproportionately to the relevant water use's impacts would not be consistent with applicable law, including Article X, section 2, of the California Constitution.

A. No Public Trust Decision Has Authorized Reallocating Water From A Water User To Ecosystem Restoration Where The Relevant Water Use Did Not Cause The Relevant Environmental Impact

A review of California decisions that have applied the public trust doctrine to reallocate water demonstrates that the courts have only approved such reallocations to address the impacts of the relevant water user's project. Specifically, the courts in California have approved such reallocations to protect public trust interests in only the following three factual situations:

- (1) Diversions by the City of Los Angeles from Mono Lake's tributaries that had lowered the lake's level and adversely impacted the fisheries in these tributaries (see *National Audubon*, *supra*, 33 Cal.3d, at pp. 424-425, 428-431; *Cal. Trout I*, *supra*, 207 Cal.App.3d, at pp. 593-598; and *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 194-195);
- (2) The Central Valley Project's (the "CVP") and the State Water Project's (the "SWP") diversions from the Delta that had affected the Delta's water quality (*Racanelli*, *supra*, 182 Cal.App.3d, at pp. 129-130, 149-151); and
- (3) The diversion of San Joaquin River flows by the CVP's Friant Dam that the court stated had significantly impacted the river's fishery (*Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 909-911, 924-925).

In addition, the Cahill Memorandum did not cite or discuss two Court of Appeal decisions in which the courts held that the public trust doctrine did *not* justify reallocating water

¹Fish and Game Code section 5937 "is a legislative expression of the public trust protecting fish as trust resources when found below dams. (*Cal Trout I*, *supra*, 207 Cal.App.3d, at p. 626.) This document's discussion of the public trust doctrine, therefore, applies to section 5937 as well.

to enhance public trust interests where: (a) the water user had created an asset, a reservoir, that had not historically been subject to the public trust (*Golden Feather Community Ass'n v. Thermalito Irr. Dist.* (1989) 209 Cal.App.3d 1276, 1285-1287); or (b) the trust interest had already been addressed in a prior judgment (*Big Bear Municipal Water Dist. v. Bear Valley Mutual Water Co.* (1989) 207 Cal.App.3d 363, 380-382). In *Golden Feather*, *supra*, the Court of Appeal held that the public trust doctrine did not require an irrigation district to retain water behind its dam to support fishing and recreation in its reservoir. (209 Cal.App.3d, at pp. 1285-1286.) In *Big Bear*, *supra*, the Court of Appeal held that the public trust doctrine did not support modifying a prior negotiated injunction to support recreational use of a lake because the prior injunction addressed this public trust value. (207 Cal.App.3d, at pp. 381-382.)²

If one analyzes all of these cases' results consistently with the rules of legal interpretation discussed above (pp. 1-3), the rules that emerge are: (a) where a water use has caused demonstrable damage to a public trust interest, the public trust doctrine can authorize actions to require the water user to address this damage; and (b) where a water use has not damaged a public trust interest, the public trust doctrine does not authorize such actions.

The Cahill Memorandum cited another decision – *EID*, *supra*, 142 Cal.App.4th 937 – that did not involve a proposed reallocation of water from an established use, but did recognize the importance of project impacts in applying the public trust doctrine. In this case, the Court of Appeal held that the State Water Resources Control Board ("SWRCB") could not apply Term 91 – which generally requires a Delta watershed diverter to stop diverting when the CVP and SWP are releasing stored water to meet Delta water quality standards – to a water right with a higher priority than the CVP's and SWP's rights where the SWRCB did not impose Term 91 on water rights with intervening priorities. (*Id.* at pp. 942-944.) The Court of Appeal held that the SWRCB could subordinate priorities in issuing water-right permits in some circumstances, but stated:

[T]o the extent El Dorado's diversions of natural flow contribute to the degradation of water quality, the [SWRCB] has a legitimate interest in requiring El Dorado to reduce its diversions to contribute toward the maintenance and improvement of water quality in the Delta . . . [T]he subversion of a water right priority is justified only if enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust.

[¶]

[T]he [SWRCB] has a legitimate interest in requiring El Dorado to contribute toward the maintenance of Delta water quality objectives to the extent El

²The Cahill Memorandum cited a draft State Water Resources Control Board decision that the SWRCB never adopted to "demonstrate an approach that could be considered in the future" to reallocate water under the public trust doctrine without following water-right priorities. (Cahill Memorandum, p. 18 (citing draft Decision 1630).) The Cahill Memorandum, therefore, relied on a draft decision that the SWRCB never adopted, but did not cite two Court of Appeal decisions concerning the public trust doctrine that are binding legal authority.

Dorado's diversion of natural flow contributes to the degradation of water quality in the Delta.

(*Id.* at pp. 967, 969 (emphasis added).)

The *EID* decision, therefore, recognizes that the public trust doctrine does not authorize dispensing with a water right's priority – “the central principle in California water law” (*id.* at p. 961 (quoting *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 (“*Mojave*”)) – unless the water use has adversely impacted public trust interests.

The Cahill Memorandum cited footnote 21 in the *EID* decision as suggesting that the state need not respect water rights' priorities in attempting to reallocate water to benefit the Delta. (Cahill Memorandum, p. 10.) This footnote, however, is appended to the following discussion in the decision's text:

[T]he Board must attempt to preserve water right priorities to the extent those priorities do not lead to unreasonable use or violation of public trust values. In other words, in such circumstances the subversion of a water right priority is justified only if enforcing the priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust.

(142 Cal.App.4th, at p. 967 (emphasis added).)

Properly understood in this context, footnote 21 in the *EID* decision does not support the Cahill Memorandum's conclusion that water users can be required to contribute to a Delta solution in proportion to their diversions' sizes, but rather indicates that water-right priorities will not necessarily govern a situation where a particular water use adversely impacts public trust values. This interpretation of footnote 21 is consistent with the above fact-based analysis of existing public trust decisions concerning water resources.

This analysis also is consistent with the California Supreme Court's conclusions in public trust decisions contemporary with, and cited in, *National Audubon*. In *State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, and *State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, the Court held that the public trust doctrine applies to the portion of property located between the high and low levels of lakes. (*Lyon, supra*, 29 Cal.3d, at pp. 226-232; *Fogerty, supra*, 29 Cal.3d, at pp. 243-249.) In both cases, the owner of the lakside property claimed that the application of the public trust to its property constituted a compensable taking of its property. The Court held that no taking occurred because the owners could use their properties “for any purposes which are not incompatible with the public trust.” (*Fogerty, supra*, 29 Cal.3d, at p. 249 (emphasis added); see also *Lyon, supra*, 29 Cal.3d, at p. 232.) The Court further stated:

Landowners who have previously constructed docks, piers and other structures in the shorezone [that is subject to the public trust] may continue to use these facilities unless the state determines . . . that their continued existence is inconsistent with the reasonable needs of the trust. In that event, both statute and

case law require that plaintiffs be compensated for the improvements they have constructed in the shorezone.

(*Fogerty, supra*, 29 Cal.3d, at p. 249 (emphasis added); see also *Nat'l Audubon, supra*, 33 Cal.3d, at p. 440 fn. 22 (citing this portion of *Fogerty*).)³

The "not incompatible" standard that *Fogerty* and *Lyon* stated as governing what improvements could be built in areas subject to the public trust is the flip-side of the impact standard derived above from cases in which the public trust doctrine has been applied to water rights. If a water use does not adversely impact trust resources, its diversions cannot be incompatible with the public trust.

The Cahill Memorandum included numerous general quotes from *National Audubon* concerning the state's power and duty to protect public trust interests, but it does not cite the portions of this decision in which the California Supreme Court identified the facts that were crucial to its decision. While the Court's statements must be respected even if not binding, because they do not relate to the facts before the Court (see, e.g., *United Steelworkers, supra*, 162 Cal.App.3d, at p. 835), in *National Audubon*, the Supreme Court expressly identified the case's "salient fact:"

In the case before us, the salient fact is that no responsible body has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct.

[¶]

It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin. No vested rights bar such reconsideration. We recognize the substantial concerns voiced by Los Angeles . . . We hold only that they do not preclude a reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment.

In light of *National Audubon*'s "salient fact," if this decision is interpreted consistently with the rules of legal interpretation discussed above (pp. 1-3), it shows only that the state may reallocate water away from consumptive use to ecosystem enhancement where the water use caused the relevant impact to trust interests, subject to consideration of the resulting impacts on established consumptive water uses. (*National Audubon, supra*, 33 Cal.3d, at pp. 446, 448.)

In particular, neither *National Audubon* nor any other California public trust decision supports the Cahill Memorandum's conclusion that the state can require water users to devote water to Delta ecosystem restoration "due to the incremental diversions of all who take water from the Delta or its tributaries, whether upstream, in the Delta, or for export from the Delta."

³Because this discussion in *Fogerty* and *Lyon* was necessary to address the landowners' takings claims, it is binding legal authority. (See *United Steelworkers of America v. Bd. of Education* (1984) 162 Cal.App.3d 823, 833-835, superseded by statute as stated in *Cal. School Employees Ass'n v. Bonita Unified School Dist.* (2008) 163 Cal.App.4th 387, 401; and *Garfield Med. Center v. Belshé* (1998) 68 Cal.App.4th 798, 806.)

(Cahill Memorandum, p. 17.) Diversions from the Delta watershed may decrease inflows into the Delta. By storing water and releasing it later, however, such diversions also may increase Delta inflows at some times. In contrast, Delta-export diversions can change internal Delta hydrodynamics by causing reverse flows within Delta channels and also can entrain some Delta fish species, for example. These latter effects are fundamentally different, and no public trust decision suggests that responsibility for addressing environmental effects can be redirected to water users who do not cause them.

B. *Any Reallocation Of Water From A Water User To Ecosystem Restoration Must Be Proportional To The Impacts Of The Water Users' Activities*

Since all of the cases in which the courts have approved reallocations of water to protect public trust resources have involved water uses that directly impacted these resources (see pp. 3-7 above), it has not been necessary for courts to formulate, or to review, public trust remedies implemented in more complex factual situations. Nonetheless, one important public trust case, the *Racanelli* decision, indicates that it would be appropriate to limit remedial reallocations of water to address only the relevant projects' impacts. (182 Cal.App.3d, at pp. 120: "[W]e think that the imposition of without project standards *upon the projects* represents one reasonable method of achieving water quality control in the Delta." At p. 126 (emphasis in original).) *Racanelli* rejected the concept that water quality standards should be set only to address these projects' impacts, but did say that, once such standards were properly established, project impacts could drive allocations of responsibility for implementing these standards. (*Id.* at pp. 115-120, 126.)

Two sources of law related to the public trust doctrine show that proportionality between a water use's impacts and any reallocations of water is required: (a) Article X, section 2, of the California Constitution; and (b) public nuisance cases.

I. *Reallocations Of Water Disproportionate To A Water User's Ecosystem Impacts Would Violate The Reasonable Use Doctrine*

Article X, section 2, of the California Constitution – the "reasonable use" provision – would require that any order reallocating water to protect public trust resources be proportional to the relevant water use's impacts on the affected resources. As *National Audubon* states, under Article X, section 2, of the California Constitution, "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use." (33 Cal.3d, at p. 443 (emphasis added).) As discussed below (pp. 8-9), many cases decided under Article X, section 2, have held that a water use is unreasonable where it requires large amounts of water that are disproportionate to the benefit of using the water.

Even before Article X, section 2, was enacted in 1928, the California Supreme Court held that the rule requiring reasonable use among appropriators barred a senior Delta appropriator from demanding that junior Sacramento Valley appropriators cease diverting water in order to prevent salt water from San Francisco Bay from reaching the senior's diversion, because

enormous amounts of water would have been needed to accomplish this result, and, therefore, lost to upstream beneficial use. (*Antioch v. Williams Irr. Dist.* (1922) 188 Cal. 451, 461, 464.) Similarly, after Article X, section 2's, 1928 enactment, the Supreme Court held that a senior appropriator could not require that large amounts of water be devoted to serving its relatively small use even though standard California water law provides that a junior appropriator has no right to divert until the senior appropriator's right has been satisfied. (See *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 336-340 ("*Lodi*").) Other cases have reached similar results. (*Racanelli, supra*, 182 Cal.App.3d, at pp. 143-144 (Antioch flow standards).)

To date, no court has applied these "reasonable use" cases to determine how much water should be reallocated from a consumptive use to ecosystem restoration, perhaps because there has been a direct relationship between water uses and their environmental impacts in all of the public trust cases that have been decided to date. (See pp. 3-7 above.) Applying the reasonable use principles stated in cases like *Antioch* and *Lodi* to potential reallocations of water for ecosystem restoration, however, shows that any such reallocations must be proportional to the impacts of the relevant water use.

Lodi presents the clearest authority on this point. In this case, the impact of the junior appropriator's water use on the senior appropriator's right was substantially less than 3,600 acre-feet per year, which was the total amount diverted by the senior. (*Lodi, supra*, 7 Cal.2d, at pp. 321, 336-337.) In order to alleviate any impact on the senior's right, the junior would have been required to forgo the use of 120,000 to 360,000 acre-feet annually, which the trial court found was necessary for recharge of the senior's wells. (*Id.* at pp. 336-337.) The California Supreme Court held that such a disproportionate burden on the junior violated Article X, section 2, and directed the trial court to develop a physical solution to satisfy the senior's needs by implementing measures that would impose a more proportionate burden on the junior. (*Id.* at pp. 343-346.) By identifying proportionality to project impacts as the rule to be implemented in determining what remedies a court should fashion to protect a senior water right, *Lodi* contradicts the Cahill Memorandum's conclusion that the benefit to the ecosystem alone, rather than the relationship between a targeted water use and the relevant environmental impacts, can support reallocations of water. As suggested by *Lodi*, Article X, section 2, requires that measures that are implemented under the public trust doctrine be proportional to the impact that the relevant water use has on public trust interests.

This interpretation of the interaction between the public trust doctrine and Article X, section 2, also is consistent with the California Endangered Species Act's ("CESA") limitation on the burdens that may be imposed to mitigation for project impacts on listed species. This act, specifically Fish and Game Code section 2052.1, states in relevant part:

The Legislature further finds and declares that if any provision of this chapter [CESA] requires a person to provide mitigation measures or alternatives to address a particular impact on a candidate species, threatened species, or endangered species, the measures or alternatives required shall be roughly proportional in extent to any impact on those species that is caused by that person . . . All required measures or alternatives shall be capable of successful

implementation. This section governs the full extent of mitigation measures or alternatives that may be imposed on a person pursuant to this chapter.

(Emphasis added.)

In order to be consistent with Article X, section 2, any SWRCB order that would reallocate water from an existing water use to environmental use must contain factual findings that show that the amount of the reallocation is proportional to the existing use's impacts on the environmental use.

2. *Public Nuisance Cases Show That Remedies Must Be Proportional To The Relevant Project Impacts*

As the California Supreme Court recognized in 1983 in *National Audubon*, when it first applied the public trust doctrine to water rights, this doctrine is similar to public nuisance law. (See *National Audubon*, *supra*, 33 Cal.3d, at pp. 435-436.) For example, *National Audubon* – and the Cahill Memorandum – rely on *People v. Gold Run Ditch and Mining Co.* (1884) 66 Cal. 138 (*National Audubon*, *supra*, 33 Cal.3d, at p. 436; Cahill Memorandum, pp. 15-17), and *Gold Run* in turn describes the relevant activities as nuisances. (*Gold Run*, *supra*, 66 Cal., at pp. 147-148, 150.)

Nuisance law would require a finding that a water user's activities have caused the relevant environmental impact before the water user's supplies could be reallocated to address this impact. Cases in which the courts have considered the breadth of injunctions imposed to address public nuisances further show that such injunctions must be narrowly tailored to the conditions created by the relevant activities. These cases show that any remedy formulated to address a water use's impacts under the public trust doctrine must be proportional to these impacts because: (a) this doctrine and public nuisance law are closely related, as recognized by *National Audubon* and the Cahill Memorandum; and (b) orders reallocating water to ecosystem enhancement effectively would be injunctions governing water users' operation of their facilities.

In *Anderson v. Souza* (1952) 38 Cal.2d 825, the California Supreme Court stated the general rule concerning the scope of injunctions to address nuisances as follows:

Injunctive process ought never to go beyond the necessities of the case and where a legitimate business is being conducted and in the conduct therefore a nuisance has been created and is being maintained, the relief granted should be directed and confined to the elimination of the nuisance, unless under the peculiar circumstances of the case the business, lawsuit in itself, cannot be conducted without creating a nuisance

(*Id.* at pp. 840-841.)

Consistent with this rule, in many cases, the California courts have either: (a) affirmed injunctions that were limited to addressing only the harm that a defendant's activities caused to the relevant property interest; or (b) reversed injunctions that imposed more of a burden on the

defendant. For example, in *Anderson, supra*, the California Supreme Court reversed an injunction that prohibited an airport's operation, holding that the more-appropriate injunction would have allowed for changes to the airport's operations that would have eliminated the nuisance it created for neighboring landowners. (38 Cal.2d, at pp. 844-845; see also *People v. Mason* (1981) 124 Cal.App.3d 348, 352-354 (an injunction requiring that a bar permit no noise to be audible off its premises was overbroad).) In *Guttinger v. Calaveras Cement Co.* (1951) 105 Cal.App.2d 382, the Court of Appeal affirmed an injunction that a trial court had imposed to require the plant to stop emitting more than 13 percent of the dust and other materials that would be emitted without control devices, the trial court having found that the emission of this 13 percent would not damage the neighboring land. (105 Cal.App.2d, at pp. 384-385, 390-391.)

The courts have reached similar results in cases involving California streams. In *Thompson v. Kraft Cheese Co.* (1930) 210 Cal. 171, the California Supreme Court modified an injunction against any discharge of certain substances to a creek that would wash into a neighboring property so that the revised injunction prohibited only such discharges that would cause "material pollution" of the creek's waters, cause "contamination" of its bed or banks or "give rise to noxious odors" preventing the plaintiff from using or enjoying its property. (210 Cal., at pp. 179-180.) In declaring the initial injunction overboard, the Supreme Court stated: "The vice of this provision is that it ignores the question of actual injury, and is framed so as to cover the slightest discharge, whether it causes any substantial pollution of the stream or not." (*Id.* at p. 176 (emphasis added).) An order reallocating from a water user an amount of water disproportionate to the ecosystem impacts of the water user's activities would share the same "vice" as the injunction that the Supreme Court rejected in *Thompson*, because such an order would ignore "the question of actual injury." Similar to *Thompson*, other California cases have rejected injunctions that required more mitigation by water users than was necessary to address their facilities' impacts. (See *City of Fresno v. Fresno Canal and Irr. Co.* (1893) 98 Cal. 179, 183-184 (an injunction requiring destruction of a ditch to prevent interference with streets was overbroad); and *Byers v. Colonial Irr. Co.* (1901) 134 Cal. 553, 555-556 (an injunction prohibiting operation of a dam was overbroad in a case to prevent interference with senior water rights).)

Because nuisance cases are closely related to the public trust doctrine, California cases that require that injunctions be tailored to address the actual nuisance that a defendant has created shows that orders reallocating water to address impacts to the public trust must, as well, be tailored so that such reallocations would be proportional to the impacts of the relevant water uses. These cases show that imposing greater reallocations on water users would not be supported by California law, and therefore would be illegal. In order to support any reallocation of water, the SWRCB would have to make factual findings to demonstrate that the targeted water user's activities caused ecosystem impacts that were proportional to the amount of water that the SWRCB was reallocating to environmental use.

3. *The California Constitution's Article X, Section 2's, Plain Text And The Decisions Under It Show That It Prohibits Just Unreasonable Uses, And Does Not Authorize The State To Choose Among Existing Uses And Reallocate Water To Those It Prefers*

Article X, section 2, states, in part:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented . . . The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water

Constitutional provisions should be interpreted according to their plain text to the extent possible. (See, e.g., *Delaney v. Superior Ct.* (1990) 50 Cal.3d 785, 798-799; and *Pacific Gas & Electric Co. v. City of Oakland* (2002) 103 Cal.App.4th 364, 367-368.) "[C]ourts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any . . . express provisions." (*Delaney, supra*, 50 Cal.3d, at p. 799 (quoting prior Cal. Supreme Ct. decisions).) Nothing in Article X, section 2, indicates that the state has the power to reallocate water among water uses, as opposed to just limiting unreasonable uses. Consistent with Article X, section 2's, plain text, California decisions under this provision have: (a) limited water users' rights to devote water to unproductive uses; or (b) sought to maximize the availability of water for all uses without infringing water-right priorities.

Article X, section 2, was enacted specifically to apply the first rule to riparian rights after the California Supreme Court's decision in *Herminghaus v. So. California Edison Co.* (1926) 200 Cal. 81, in which the Court had held that riparian landowners' use of a stream's natural flow was not required to be reasonable even though it conflicted with an appropriative use. (See *National Audubon, supra*, 33 Cal.3d, at pp. 442-443.) Most of the cases decided under Article X, section 2, have involved similar disputes where landowners sought to continue using very large amounts of water while receiving very little benefit from the use of the water:

- (a) Cases in which downstream landowners unsuccessfully sought to enjoin upstream storage of high flows for municipal use in order to continue receiving those high flows' marginal benefits (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 694-695, 699-706; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 362-363, 375 (washing of silt onto, and salts out of, salt marsh property); *Joslin, supra*, 67 Cal.2d, at pp. 134-136, 140-141 (washing of sand and gravel onto property); and
- (b) *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567-568, in which the California Supreme Court held that using large amounts of water to kill gophers was not a reasonable use

The Courts of Appeal also have held that water users did not comply with Article X, section 2, where they caused significant amounts of water to be lost to unproductive use through

the maintenance of very inefficient conveyance systems. (*Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 585-586; *IID, supra*, 225 Cal.App.3d, at pp. 553, 570.)

Under Article X, section 2, the courts also have required senior water-right holders to change their operations to make water available for junior water users where the changes would not injure the seniors' end uses and would occur at the juniors' cost. (*Lodi, supra*, 7 Cal.2d, at pp. 343-344; and *Racanelli, supra*, 182 Cal.App.3d, at pp. 143-144.) "An equitable physical solution," however, "must preserve water right priorities to the extent those priorities do not lead to unreasonable use." (*Mojave, supra*, 23 Cal.4th, at pp. 1243, 1249-1251 (overdraft in a groundwater basin does not justify imposition of a physical solution that ignores water-right priorities).)

Similar to the physical solution cases, the Court of Appeal has held that it could be an unreasonable method of diversion for riparian landowners to divert natural river flows where their cumulative instantaneous demands could dry up the river and deny some water users any water to protect their crops from frost. (*People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 747, 750-751.) The *Forni* decision held that, under Article X, section 2, the SWRCB potentially could require riparian landowners to build storage facilities to serve their frost-protection needs, but that the question of whether this solution was "the only feasible method of achieving the constitutional mandate of reasonableness [was] manifestly a question of fact." (*Id.* at p. 752.) *Forni*, therefore, did not reallocate water among water uses, but rather held that the state potentially could require holders of riparian rights to alter allegedly unreasonable methods of diversion under their rights.

Finally, in *Racanelli*, the Court of Appeal held that Article X, section 2, would authorize the SWRCB to modify the CVP's and SWP's Delta-export water rights to address the projects' "deleterious effects" on the Delta's resources:

[T]he Board determined that changed circumstances revealed in new information about the adverse effects of the projects upon the Delta necessitated revised water quality standards. Accordingly, the Board had the authority to modify the projects' permits to curtail their use of water on the ground that the projects' use and diversion of water had become unreasonable.

[¶]

We perceive no obstacle to the Board's determination that particular methods of use have become unreasonable by their deleterious effects on water quality.

(182 Cal.App.3d, at p. 130 (emphasis added).)

Reviewing these cases' results shows that courts have interpreted Article X, section 2, to allow the state and the courts to prevent unreasonable amounts of water from being devoted to particular uses, and to change unreasonable methods of diversions, in order to make more water available for more water users or to address a project's particular environmental impacts. None of these cases interpreted Article X, section 2, to allow the state to take the further step of

reallocating water to promote uses that it prefers to the detriment of well-established, but less favored, uses.

4. *Nuisance Law Requires That The State Prove That A Water User Has Contributed To The Relevant Environmental Damage In Order To Obtain Relief*

The Cahill Memorandum relied heavily on the California Supreme Court's decision in *Gold Run*, *supra*, 66 Cal. 138, in concluding that the state, under nuisance law, could require water users to contribute, according to their diversions' respective sizes, to programs to attempt to restore Delta resources. (Cahill Memorandum, pp. 15-17.) The Cahill Memorandum also stated that *Gold Run* relied on a previous California decision, *Hillman v. Newington* (1880) 57 Cal. 56. (Cahill Memorandum, p. 17.) These decisions, however, do not support the Cahill Memorandum's conclusion.

In *Gold Run*, the Supreme Court affirmed an injunction prohibiting the Gold Run mine from discharging hydraulic mining debris into the North Fork of the American River where this debris was filling the beds of the American and Sacramento Rivers, and even San Pablo and San Francisco Bays. (66 Cal., at pp. 143-145, 15-152.) The Court held that the injunction was proper against the Gold Run mine, even though many other mines also contributed to the filling of the rivers. (*Id.* at pp. 148-149.) There was no question, however, about whether the Gold Run mine contributed to the problem to be solved. In contrast, the Cahill Memorandum concluded that everyone who uses water from the Delta or its watershed can be required to contribute water in proportion to their diversions' size, even though these diversions could have vastly different effects on the Delta's environmental resources. This distinction demonstrates that *Gold Run* is consistent with the rule that proof of causation is necessary for nuisance liability, contrary to the conclusion of the Cahill Memorandum. Causation is one of the fundamental elements in proving a case to require someone to abate a public nuisance. (See *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 986-992 (citing Restatement Second of Torts).)

The Cahill Memorandum's conclusion that water-right priorities can be disregarded in allocating responsibility for Delta solutions also is inconsistent with the holding in *Hillman v. Newington*, *supra*, on which the portion of the *Gold Run* decision cited in the Cahill Memorandum relied. (See *Gold Run*, *supra*, 66 Cal., at p. 149 (cited in Cahill Memorandum, p. 17.) In *Hillman*, the Supreme Court held that upstream junior water users were jointly liable for ensuring that sufficient water was available to satisfy the rights of a downstream senior appropriator. As among the juniors, however, the Court stated: "If there is a surplus [of water above the senior's right], the defendants can settle the priority of right to it among themselves." (See *Hillman*, *supra*, 57 Cal., at p. 64.) *Hillman* – and thus *Gold Run* – does not, therefore, support the Cahill Memorandum's conclusion that the state may require water-right holders to contribute water to Delta solutions in proportion to their diversions' sizes.

5. *The SWRCB's Adoption Of Water Quality Standards Does Not Result In Reallocations Of Water Without Actions Under Water-Right's Law*

Under the heading, "The SWRCB's Adoption and Implementation of Water Quality Standards May Also Result in Reallocation of Water," the Cahill Memorandum stated:

The Board has authority to impose conditions on water rights to protect water quality. This authority is derived from the federal Clean Water Act and the Porter-Cologne Water Quality Control Act (Water Code, § 13000 et seq.)

(Cahill Memorandum, p. 9 (emphasis added).)

The Cahill Memorandum's discussion of water quality standards relied in part on the Court of Appeal's decision in *EID, supra*, 142 Cal.App.4th 937. (Cahill Memorandum, p. 10, fn. 6.) This decision, however, does not support the Cahill Memorandum's conclusion about water quality standards themselves resulting in reallocations of water. Specifically, in this decision, the Court of Appeal stated:

We do acknowledge that there may be circumstances in which El Dorado is authorized to continue diverting under the rule of priority, but if El Dorado does so there will be insufficient flow to meet Delta water quality objectives . . . El Dorado is under no obligation (absent some action by the Board) to bypass natural flow that is needed to meet Delta water quality objectives. Thus, there may be times when the natural flow is sufficient to allow El Dorado to divert *and* to meet the needs of downstream riparians and senior appropriators, but not sufficient to also satisfy Delta water quality objectives. In those circumstances, El Dorado's diversion of the natural flow available under the rule of priority will require the projects to release more stored water to satisfy the water quality objectives.

(*EID, supra*, 142 Cal.App.4th, at pp. 968-969 (italics in original, underlining added).)

Accordingly, the adoption of water-quality standards does not automatically result in a reallocation of water to implement the standards. Such a reallocation may occur only if it is authorized by some other legal authority.

6. *A State Order That Attempts To Reallocate A Federally-Licensed Hydroelectric Project's Supplies To Ecosystem Enhancement Would Be Preempted By Federal Law*

The Cahill Memorandum did not discuss the impact of the following two facts on its legal analysis: (a) many California water projects hold hydroelectric licenses issued under the Federal Power Act ("FPA"); and (b) the United States Supreme Court has held that that FPA preempts the SWRCB's authority to set streamflow requirements for such projects. In *California v. Federal Energy Regulatory Comm'n* (1990) 495 U.S. 490 ("*California v. FERC*"), the Court reaffirmed its 1946 decision in *First Iowa Hydro-Electric Cooperative v. FPC* (1946) 328 U.S.

152, and held that the SWRCB could not impose on a hydroelectric project streamflow requirements higher than those stated in the project's FPA license. In *Sayles Hydro Ass'n v. Maughan* (9th Cir. 1992) 985 F.2d 451, the federal Court of Appeals for the Ninth Circuit: (a) held that *California v. FERC* showed that the FPA occupies the field of regulation of hydroelectric projects; and (b) decided that the SWRCB could not require a hydroelectric project proponent to prepare studies concerning recreation, aesthetics, archaeology, sport fishing, cultural and economic issues in addition to the studies of these resources that were required by the Federal Energy Regulatory Commission. The Ninth Circuit stated:

In many states where water is scarce, a state property law regime enables users of streams and wells to obtain proprietary rights in a continuing quantity of water. By perfecting state water rights, users can enjoin other users who deprive them of their share of the flow . . . [¶] [T]he only authority states get over federal power projects relates to allocating proprietary rights in water.

(*Id.* at pp. 455.)

Any streamflow requirements that the state might attempt to impose on a federally-licensed hydroelectric project in order to enhance the Delta's resources, therefore, would be preempted under *California v. FERC* and *Sayles Hydro*.

A California Court of Appeal has held that these decisions do not mean that a hydroelectric-project owner is exempt from conducting a CEQA review where it proposes to change the project's purpose to include consumptive use. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 956-962.) According to the court, such a significant change in use involved a question of "proprietary rights" in California water that the FPA allows states to regulate. (*Id.* at p. 960.) The court characterized *California v. FERC* as having "involved a state effort to set minimum stream flow, a matter that did not involve proprietary water rights" (*Id.*) *County of Amador*, therefore, supports the conclusion that federal law would preempt state efforts to impose streamflow requirements on hydroelectric projects that would be different than the requirements stated in these projects' FPA licenses.

CONCLUSION

Before reallocating any water from existing diversions and uses under upstream water rights to restore the Delta's ecosystem, the SWRCB must hold an evidentiary hearing and make detailed findings on the relative impacts of upstream, in-Delta and Delta-export diversions on the Delta's fisheries and other elements of the Delta's ecosystem. Any such reallocation then must be based on these findings and tailored to reflect the different types and levels of impacts that these types of diversions have, as well as to reflect the relevant individual diversions' priorities. Any reallocations also must not alter any instream-flow requirements specified in hydroelectric licenses issued under the FPA.

