LEGAL STRUCTURE

George A. Gould
Professor of Law
McGeorge School of Law
University of the Pacific

Gregory S. Weber
Assistant Professor of Law
McGeorge School of Law
University of the Pacific

PART I
HISTORICAL DEVELOPMENT

I. INTRODUCTION

A. Purpose of Water Law
   1. Resource allocation
   2. Dynamic process

B. Period Covered - 1850 to 1960 (approximately)
   1. Characterized by property rights
   2. Dominant interest groups
      a. Irrigation organizations
      b. Cities
      c. Federal and state governments

II. DOCTRINES

A. Riparian Doctrine
   1. Origins
      a. English common law
   2. Fundamental Principles
      a. Water rights are an incident of land ownership
         (1) Limits use to riparian lands
         (2) Rights are not created or lost by use or nonuse
      b. "Equality" among riparians
         (1) Date of exercise is not controlling
         (2) Each riparian is entitled to a "reasonable" share of resource
   3. Doctrine of Abundance
      a. Rights are imprecisely defined
      b. Rights are relative

B. Appropriation Doctrine
   1. Origin
      a. Mining camps of California - see *Irwin v. Phillips*, 5 Cal. 140 (1855)

(1) Recognized by California courts and legislature

2. Fundamental Principles
   a. Beneficial use
      (1) Right is created by use and may be lost by nonuse
      (2) Use not limited to specific lands
      (3) Right is measured by beneficial use
   b. Priority
      (1) "First in time is first in right"
      (2) Senior appropriator may exhaust the resource to exclusion of juniors
3. Doctrine of Scarcity
   a. Rights are well defined
   b. Rights are absolute (priority)

C. California Doctrine
1. Origin
   a. *Lux v Haggin*, 69 Cal. 255, 10 P. 674 (1886)
2. Fundamental Principles
   a. Recognizes both riparian and appropriative rights
   b. Riparian rights given primacy
3. Operative Rules
   a. Patent to riparian lands carries with it riparian rights
   b. Riparian rights are subject only to appropriations existing at date of patent
      (1) Effectively, in dispute with appropriative rights, date of patent is priority date for riparian water rights
   c. Riparian prevails over subsequent appropriator even when use is "unreasonable"
4. Elevation of Appropriative Rights
   a. Prescription
   b. "Source of title" rule for riparian lands
   c. 1928 constitutional amendment, Cal. Const., Art. X, § 2
      (1) Riparian use must be "reasonable" to prevail over appropriator
   d. Subordination of unexercised rights, *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d. 339 (1979)
      (1) In statutory adjudication of rights, unexercised riparian rights <u>may</u> be subordinated to present and future appropriations
5. Extent of riparian and appropriative rights
   a. Approximately 50% of annual water use is based on appropriative rights versus 10% based on riparian rights. See FINAL REPORT, GOVERNORS

COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW 11 (1978).

(1) Remainder of annual water use is based on groundwater and other types of surface water rights, such as pueblo rights.

D. Pueblo Rights
   1. Cities of Los Angeles and San Diego succeeded to rights based on status of "pueblos" under Spanish and Mexican Law. See *Feliz v. Los Angeles*, 58 Cal. 73 (1881) and *San Diego v. Cuyamaca Water Co.*, 209 Cal. 105 (1930)
   2. These cites have a paramount right to use surface and underground water sources that run through the pueblo.

E. Property Rights
   1. Both riparian and appropriation doctrines are systems of property rights.
   2. California courts have repeatedly recognized that water rights are property and are protected by the state and federal constitution. See, e.g., *Lux v. Haggin*, 69 Cal.255, 374-75 (1886); *Thayer v. California Development Co.*, 164 Cal. 117, 125 ((1912).

F. Transfer of Water Rights
   1. Definition
      a. Change in place or purpose of use
   2. Appropriative Rights
      a. Transferable. See *Maeris v. Bicknell*, 7 Cal. 261 (1857); *Kidd V. Laird*, 15 Cal. 161 (1860)
      b. No injury rule - Change cannot cause injury to other water rights.
         (1) Primarily protects junior water rights
         (2) Uncertainties associated with determination of injury are an impediment to water rights transfers
         (3) Exceptions
            (a) Imported water
      c. Procedure
         (1) Transfer of post-1914 water rights requires approval of Water Resources Control Board
         (2) Transfer of pre-1914 rights does not require Board approval, but is subject to no injury rule
   3. Riparian Rights
      a. Riparian rights must be used on riparian lands and cannot be transferred to other lands
         (1) Cal. Water Code § 1707, added in 1991, allows riparian rights to be transferred

to protect instream values

b. Change in the nature of use is permitted
   (1) In theory, a new riparian use can displace an existing riparian use without compensation

G. Area of Origin Protection
   1. California has adopted several statutes which are intended to provide protection to areas from which water is exported.
      a. These statutes are intended to assure areas of origin that water needed to meet requirements for future growth and development will be available.
         (1) In some cases the statutes purport to prohibit exports which would deprive areas of origin of water needed for future growth and in some cases the statutes would allow areas of origin to recall exported water when needed.
      b. Specific provisions
         (1) County of origin protection, Cal. Water Code § 10505 (West 1971)
            (a) Prohibit assignment of state water rights filings if water required for future development of a county of origin
         (2) Watershed protection, Cal. Water Code § 11460 (West 1971)
            (a) Provides preferential treatment to users in watershed of origin and areas "immediately adjacent thereto."
         (3) Delta protection, Cal. Water Code § 12204 (West 1971)
            (a) Prohibits diversion of water from Sacramento-San Joaquin Delta of water to which users in Delta are entitled.
         (4) Protected areas, Cal. Water Code §§ 1215-1222 (West Supp. 1991) (enacted in 1984)
            (a) Provides preferential treatment to users in designated river systems
            (b) § 1220 restrict groundwater exports from the same general geographic region
         (5) Provisions (1) and (2), above, only apply to export of water pursuant to rights originally filed by the state; provisions (3) and (4) apply to all exports.
      c. The extent and nature of protection provided by these statutes is unclear.

(1) Although some of these provisions have been the subject of opinions of the California Attorney General (see, e.g., 25 Op. Cal. Att'y Gen. 8 (1955) and have been peripherally involved in several federal cases, the statutes have never been addressed by California appellate courts

III. GOVERNMENT ADMINISTRATION AND REGULATION

A. Ministerial Regulation

1. Civil Code of 1872 (Civil Code §§ 1410-1422)
   a. Provided a procedure for initiating an appropriation by posting a notice at point of diversion and filing a copy of the notice with county recorder.
   b. The California Supreme Court held that compliance with these provisions was not mandatory and that a right could also be initiated by actual appropriation and application to beneficial use. *Wells v. Mantes*, 99 Cal. 583 (1893).
2. Water Commission Act of 1914 (Stats. 1913, ch. 568)
   a. The act created a state agency, the Water Commission (now the Water Resources Control Board), to supervise the appropriation of water.
   b. A permit from the Commission was required for the appropriation of water.
      (1) In 1923 language was added explicitly stating that a permit was the exclusive method for obtaining an appropriative right. Stats 1923, ch. 87, p. 162, codified at Cal. Water Code §1225 (West Supp. 1991)
         i) See also, *People v. Shirkow*, 26 Cal.3d 301 (1980), holding that an appropriative right cannot be created by prescription.
      (2) The function of the Water Commission was entirely ministerial; the permit had to be issued if unappropriated water was available.
      (3) The permit procedures provide for interested parties to protest before the permit is issued, allow the Board to specify terms and conditions, set standards for diligent construction of facilities and application of water to beneficial use, and provide for the issuance of a license evidencing

perfection of the water right.

c. The act also provided a statutory procedure for the adjudication of all rights on a stream.

d. The act also provided the Board with authority to bring actions for trespass against illegal diversions, and to take action to prevent waste and unreasonable use of water.

B. Substantive Regulation

1. Public interest regulation

a. Beginning in 1917, a series of legislative enactments now codified at Cal. Water Code §§ 1253 and 1255 (West 1971) were adopted giving the Water Resources Control Board the authority to consider the "public interest" in issuing permits for the appropriation of water.

(1) Although the term "public interest" is not defined, a variety of statutory provisions provide guidance as to its application

(a) Water Code § 1254 provides that domestic use is the highest use and irrigation is the next highest use of water

(b) Water Code § 1256 provides that the Board shall give consideration to the state water plan.

(c) Water Code § 1257 provides that the Board shall consider the relative benefit of all beneficial uses of water including uses for fish and wildlife and recreation.

(d) Water Code § 1257.5 directs the Board to consider streamflow requirements for fish and wildlife purposes

(e) Water Code § 1258 directs the Board to consider water quality control plans.

(f) Water code § 1243 directs the Board to take into account water for recreation and preservation of fish and wildlife.

IV. GROUNDWATER

A. Reasonable Use and Correlative Rights

1. The basic provisions of California groundwater law are found in the 1903 case of *Katz v. Walkinshaw*, 141 Cal. 116 (1903)

a. The English rule of absolute ownership was rejected on grounds that provided no protection to water users and, thus, discouraged development.
b. The court instead adopted a rule of reasonable use and correlative rights.

2. Operative principles
   a. As between appropriators (those not using groundwater on overlying lands) the court adopted a rule of priority.
   b. As between overlying users the court adopted a rule of correlative rights, giving each landowner a "fair and just proportion" of the available supply.
   c. As between an appropriator and an overlying user, the overlying user has a paramount right. See also, *Los Angeles v. San Fernando*, 14 Cal.3d. 199, 293 (1976).
3. The *Katz* rules essentially subject groundwater to the California doctrine.
4. Unlike surface water, groundwater is not subject to statewide governmental regulation.
   a. Several general statutes authorize the creation of districts with some powers to manage groundwater, including groundwater replenishment districts, Cal. Water Code §§ 60000-60449, water conservation districts, Cal. Water Code §§ 74000-76501, and metropolitan water districts, Cal. Water Code §§ 71000-73001.
   b. In addition, an extensive body of legislation authorizes groundwater regulation by special groundwater management districts, see, e.g., Orange County Water District Act, Cal. Water Code-Appendix ch 40 (West) and Monterey County Resources Agency Act, *id.* at ch. 52.

B. Mutual Prescription
1. *Pasadena v. Alhambra*, 33 Cal.2d 908 (1949) held that where an overdraft situation had existed for more than five years (the prescriptive period in California), appropriative and overlying users had acquired mutually prescriptive rights against each other.
   a. The effect of the rule was to produce a prorata reduction of pumping by all users so as to balance withdrawals with safe yield.
2. *Los Angeles v. San Fernando*, 14 Cal.3d 199 (1975), largely emasculated mutual prescription.
   a. The court held that cities were not subject to mutual prescription.
   b. The court clarified the definition of

"overdraft" and made it much more difficult to show that a user has the notice of overdraft necessary to start the prescriptive period running.

V. STATE-FEDERAL RELATIONS

A. State Jurisdiction over Water Resources

1. The conceptual basis for state jurisdiction over water resources in the western U.S. has been unclear because the western states were carved out of lands owned by the U.S.
2. In 1935, the United States Supreme Court adopted the "severance doctrine" in *California-Oregon Power Co. V. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).
   a. With the Desert Land Act of 1877, if not earlier, the U.S. severed the water from the land so that a federal land patent carried with it no water rights.
   b. All non-navigable waters became subject to the plenary control of the states, thus giving each state the power to develop its own water law.

B. Federal Powers and Programs

1. At one time it appeared that all water law was state law. See *Kansas v. Colorado*, 206 U.S. 46 (1907).
2. It has been clear for some time that the federal government has the power to preempt state water law in the exercise of enumerated powers under the U.S. Constitution.
   a. Powers relied on as the basis for federal activities affecting water include the commerce clause (including the navigation power), the property clause, the war power, the treaty power , and the general welfare clause.
   b. Because of the broad interpretation given federal powers in the twentieth century there is little that federal government cannot do regarding water if it chooses.
   c. With two notable exception, federal reserved rights and the navigation servitude, the federal government must usually pay compensation when its activities "take" state created property rights in water.
   d. Federal activities affecting water include uses of water by federal agencies, construction and operation of federal projects, and the regulation and licensing of

activities which affect water.

C. Federal-State Conflicts
   1. Despite its broad powers to preempt state water laws, the federal government has generally deferred to state water laws.
      a. The essential question in a federal-state conflict involving water law is whether Congress intended to preempted state law, not whether Congress has the power to do so.
   2. Reclamation projects and federal Hydro-power licensing - two areas of conflict
      a. Both the Federal Power Act, which provides for federal licensing of hydro-power projects, (16 U.S.C. § 791 *et seq*) and the Reclamation Act of 1902 (43 U.S.C. §371 *et seq*) contain provisions which seem to preserve the primacy of state water law and policy.
      b. In *First Iowa Hydro-electric Cooperative v. Federal Power Commission*, 326 U.S. 152 (1956) and a series of decisions in the 1950s and early 1960s involving the Central Valley Project, the Supreme Court emasculated these provisions, relegating the role of state water law to the determination of private property rights which must be compensated if taken.

D. Federal Reserved Rights
   1. *Winters v. United States*, 207 U.S. 564 (1908), held that the United States reserves water from appropriation under state law when it creates an Indian reservation.
      a. The priority date of the reserved right is the date the reservation was created.
      b. The reserved water right need not be exercised.
   2. In *Arizona v. California*, 373 U.S. 546 (1963) the doctrine was extended to other types of federal reservations, such as National Forests and Parks.

VI. CONCLUSION

A. By 1960, California had a fairly mature system of property rights for the allocation of water.
   1. The focus of water allocation was on diversion and use of water for consumptive purposes.
   2. Government regulation was concerned primarily with making this system operate more efficiently.

PART II
CONTEMPORARY DEVELOPMENT

I. FOCUS: INCREASED REGULATION OF PRIVATE PROPERTY INTERESTS

A. Beginning in the late 1960s, and continuing through the present, California courts have allowed public entities and public interest groups to use the reasonable use provisions of California Constitution Art. X, § 2, the public trust doctrine and certain Fish and Game Code statutes to force water rights holders to reexamine and modify their uses in order to accommodate perceived social needs, particularly for increased instream flows.

B. In addition to direct water law doctrinal development, the state has broadened its regulatory powers over the acquisition and exercise of water rights through environmental review, water quality and endangered species legislation.

C. In one area -- transferability of water rights -- the legislature, with the encouragement of some urban and environmental interest groups, has recently begun to expand or at least clarify some aspects of private property interests in California water rights.

II. REASONABLE USE DOCTRINE EXPANDED

A. Standing to Assert

1. State Agencies
   a. The State Water Resources Control Board has standing to sue to enforce the reasonable use provisions of Article X, § 2 (*People v. Forni*, 54 Cal.App.3d 743, 753 (1976); see also *Imperial Irrigation District v. State Water Resources Control Board*, 225 Cal.App.3d 548 (1990) ("I.I.D. II."), petition for cert. filed June 11, 1991) (U.S. No.91-30).)
   b. The Department of Water Resources shares with the State Board the power to investigate charges of alleged waste or other misuse of water either during the permit process or independently of it. (Cal. Water Code § 275 (West 1971); 23 Cal. Code Regs. §§ 4000-4007 (1979).)
2. Other entities
   a. Public interest organizations may sue to enjoin unreasonable uses of water. (*Environmental Defense Fund, Inc. v. East Bay*

Municipal Utility District, 26 Cal.3d 183 (1980).)

B. Scope of State Board Jurisdiction

1. The State Board's jurisdiction to prevent waste and unreasonable water use under Art. X, § 2, extends over:
   a. pre-1914 appropriative rights (I.I.D. II, supra; *United States of America v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986) ("Delta Water Cases," also known as "the Racanelli decision" after the justice who wrote it));
   b. post-1914 appropriative rights (Delta Water Cases, supra, at pp. 129-130);
   c. riparian rights (People ex rel. *State Water Resources Control Board v. Forni*, 54 Cal.App.3d 743 (1976).)
2. Under its jurisdiction, the State Board has the power to order water users to construct improvements to conserve water. (I.I.D. II, supra (pre-1914 appropriative rights); Forni, supra (riparian rights).)
3. The State Board's powers under Art. X, § 2, to consider various state policies authorize it, in theory, to add new permit or use restrictions at any time to any water rights holder, or to adjust priorities among competing water rights holder. (Delta Water Cases, supra, 182 Cal.App.3d at pp. 129-130.)

C. Determination of Reasonable Use

1. It remains undecided whether unreasonable use refers only to the inordinate and wasteful use of water or may include some water use that is merely less than optimal. (See *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 447 n.28 (1983).)
2. Determination of reasonable use under Art. X, § 2, proceeds case by case, although particular uses may be unreasonable as a matter of law. (*Joslin v. Marin Municipal Water District*, 67 Cal. 2d 132 (1967) (use of streamflow for gravel deposition held unreasonable as a matter of law).)
3. Policy Concerns Paramount:
   a. The case by case determination, however, occurs against the policy background created by "statewide considerations of transcendent importance." (Id.)

b. Principal consideration is "the ever-increasing need for the conservation of water ...." (Id.)

D. No Damages For Takings

1. If a court determines a use of water to be unreasonable under Art. X, § 2, no damages for a taking of private property are available under California law. (Joslin, supra, 67 Cal.2d at pp. 143-144; compare *United State v. Gerlach Livestock Co.*, 339 U.S. 725 (1950) (interpreting California law to authorize damages for taking of unreasonable use).)
2. Similarly, the assertion of State Board jurisdiction under Article X, § 2, does not "take" a water right holder's property without just compensation. (I.I.D. II, supra.)

III. PUBLIC TRUST DOCTRINE EXTENDED

A. Origins

1. The doctrine traces its roots to several sources, including Roman law and the English sovereign's control over navigable waterways subject to tidal influences.
   a. In the United States, the doctrine received its biggest impetus in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) (under public trust doctrine, Illinois legislature had power to revoke grant of tidal and submerged lands along Chicago water front).)
2. Prior to 1983, the California courts developed and applied the doctrine to cases involving state ownership or grants of tidal and submerged lands. (See, e.g., *City of Berkeley v. Superior Court*, 26 Cal.3d 515 (1980), *City of Long Beach v. Mansell*, 3 Cal.3d 462 (1970).)

B. Original Focus--Navigability

1. Under the doctrine, the state's navigable waters, their underlying lands, and the accompanying shore zone, are subject to a public trust. (*National Audubon Society v. National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983).)
   a. The doctrine arises as an incident of the state's sovereignty, not its proprietary ownership of state waters. (See National Audubon Society, supra, 33 Cal.3d at p. 445.)

2. Navigability is normally met by use by oar or motor-propelled small pleasure craft. (People ex.rel *Baker v. Mack*, 19 Cal.App.3d 1040, 1050 (1971).)
   a. Private ownership of land under navigable waters will not bar a finding of navigability. (*Bohn v. Albertson*, 107 Cal.App.2d 738, 746 (1951).)
3. The doctrine applies also to nonnavigable tributaries of navigable watercourses, to the extent that diversions from the tributaries affect the water in navigable streams. (National Audubon Society, supra, 33 Cal.3d at p. 437.)
4. The zone of protection extends up to the ordinary high water mark (OHWM) of a navigable lake. (*State v. Superior Court* (Lyon), 29 Cal.3d 210, 231 (1981).)
   a. The protected zone extends to the OHWM of a navigable lake whose level has been artificially raised by an outlet dam. (*State v. Superior Court* (Fogerty), 29 Cal.3d 240 (1981).)
   b. In such a case, OHWM determined by the five consecutive years of highest water since the dam's operations begun. (*Fogerty v. State*, 187 Cal.App.3d 224 (1986).)
5. The doctrine has not yet been fully extended directly to nonnavigable tributaries of navigable bodies of water (see National Audubon Society, supra, 33 Cal.3d at p. 437 n.19) nor to wholly artificial bodies of water. (But see Fogerty, supra, 29 Cal.3d at pp.248-249, citing *State v. Sorenson*, 271 N.W. 234, 238-239 (Iowa 1937) (Under Iowa law, land underlying wholly artificial lake created by river impoundment subject to public trust).)

C. Scope

1. The state, as trustee, has an affirmative fiduciary duty to take the public trust into account in the planning and allocation of water resources and to protect public trust uses wherever feasible. (National Audubon Society, supra, 33 Cal.3d at pp. 446-447.) Trust protected uses include navigation, fishing, commerce, aesthetics and recreation.
   a. The doctrine places a burden on the affected waterways akin to an easement held by the state in trust for the public. (See *Marks v. Whitney*, 6 Cal.3d 25 (1971).) Unlike a prescriptive easement, however, public trust rights are not limited to actual prior public

uses of the burdened waterways. (See *Fogerty v. State*, 187 Cal.App.3d 224, 237 n. 9 & accompanying text (1986).)

2. As currently developed, the doctrine does not expressly mandate any particular outcome of a balancing among trust protected uses nor between trust protected and non-trust protected uses. Moreover, as a protected trust value, "commerce" in theory allows the state great latitude in balancing among competing water uses. (See, e.g., *Colberg, Inc. v. State*, 67 Cal.2d 408 (1967) (since state had power to prefer one public trust use, i.e., commerce, over another, i.e., navigation, highway bridge over river could block boat traffic below); see also *Gray v. Reclamation Dist. No. 1500*, 174 Cal. 622 (1917) (state has power to destroy navigability of some waters for the benefit of other waters).)

D. Jurisdiction and Standing

1. Ultimate power over the public trust resides in the state legislature, subject to judicial review.
2. Several state agencies, including the State Board, the State Lands Comm'n, and, to a lesser extent, the Department of Water Resources and the Department of Fish & Game, share practical supervisory authority over public trust matters.
3. While the State Board has the power to investigate public trust complaints, the courts share concurrent original jurisdiction. (National Audubon Society, supra, 33 Cal.3d at p. 451.)
4. Any member of the public has standing to raise trust issues. (*Marks v. Whitney*, 6 Cal.3d 251, 261-262 (1971).)

E. Severance

1. In the tidelands and submerged lands context, the state can only transfer trust bound property to private parties free of the trust if the legislature unequivocally frees the property from the trust and the purpose of the conveyance is to promote trust purposes such as navigation and commerce. (See, e.g., *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 523, 528 (1980).)
2. In the water rights context, the State Board may only approve appropriations that foreseeable harm trust protected uses if it has considered the effect of the harm and preserved, so far as consistent with the public interest, the uses

protected by the trust. (National Audubon Society, supra, 33 Cal.3d at pp. 446-447.)

F. Relationship with Water Rights

1. In National Audubon Society, supra, the California Supreme Court judicially superimposed the public trust doctrine upon the California system of appropriative water rights.
2. Holders of valid appropriative water rights licenses have no vested rights that bar reconsideration of the diversion's propriety under the trust doctrine. (National Audubon Society, supra, at p. 447.)
3. The doctrine allows the State Board to reconsider even those water allocations that have already undergone public trust review. (Id.)

G. Open Questions

1. To date, no test exists for determining the appropriate circumstances for a reevaluation under the trust doctrine.
   a. Alternatives might include changed circumstances or periodic review.
2. While National Audubon Society did not address the doctrine's application to rights other than fully licensed appropriative rights, the Delta Water Cases, supra, suggest that the doctrine, in combination with the police power under Cal. Const. Art. X, § 2, authorizes the state to reconsider and reprioritize any water right.
3. National Audubon Society does not determine which water rights holders among several along a watercourse must bear any flow restrictions necessary after a public trust reevaluation.
   a. Alternatives include equitable apportionment among all water rights holders, prioritization upon order of perfection of rights, or limitation to the holder whose use triggered the reevaluation.
4. National Audubon Society does not address whether a reprioritization or other curtailment of a water right would constitute a compensable taking of private property under either the California or the United States Constitutions.
   a. Trust dictated removal of shoreline improvements may require compensation. (Fogerty, supra, 29 Cal.3d at p. 249.)
   b. National Audubon Society strongly intimates that the extension of the trust to uses long thought free of it does not constitute a

taking. (National Audubon Society, supra, 33 Cal.3d at p. 440.)

c. To date, no United States Supreme Court decision has squarely addressed the limits of a state's police power or public trust power to adjust private interests in water without compensation.

IV. FISH & GAME CODE ACTIONS

A. Introduction

1. In addition to actions under both Art. X, § 2, and the public trust doctrine that have sought to increase water available for instream uses at the expense of uses under water rights, the past decade has seen a marked increase in public and private actions to enforce various provisions of the Fish & Game Code.
2. Unlike actions based on the public trust doctrine, less room exists under some of these Fish & Game Code provisions for courts to balance among competing water uses. In effect, the statutes represent a legislative determination that certain fishery uses must receive sufficient water.

B. Three sets of Statutes apply

1. Dam Operations Provisions: Fish & Game Code §§ 5900 et seq.
   a. Fish & Game Code § 5937 requires the owner of any dam to allow sufficient water at all times to pass through a fishway, or int he absence of a fishway, to allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.
   b. § 5946 requires the State Board, in issuing permits and licenses to appropriate water in District 4 1/2 after September 9, 1953, to impose terms commanding full compliance with Fish & Game Code § 5937. Similarly, the section requires the Department of Water Resources to condition dam approval in that District upon adequate provisions for compliance.
      (1) District 4 1/2 includes Mono Lake and its tributaries.
2. Anti-Discharge provisions: Fish & Game Code § 5650(f) prohibits the release into any California waters of any substance or material deleterious to fish, plant life, or bird life.

a. In addition to this specific Fish & Game Code provisions, criminal prosecutions for water quality violations resulting from discharges have also included counts under the public nuisance provisions of Penal Code § 372.

3. Stream Bed Alteration agreements: Fish & Game Code § 1601 prohibits the alteration of any streambed without the prior approval of the Department of Fish & Game.

C. Application to Mono Lake Basin

1. In *California Trout v. Superior Court*, 207 Cal.App.3d 585 (1989) ("Cal. Trout I"), the California Court of Appeal, Third District, ordered the State Board to modify the licenses held by the City of Los Angeles to appropriate water from the Mono Lake basin. The court ordered the State Board to follow Fish & Game Code § 5946 and insert license terms requiring the City to comply with § 5937.
   a. The court rejected the City's claim that § 5946 did not apply to licensees whose permits had been issued before the statute's effective date.
   b. The court also rejected the City's claims that the statute improperly gave fishery uses of water a priority over domestic uses.
   c. Finally, the court rejected the City's statute of limitations defense by finding that the State Board, in its failure to insert the license terms, continued to violate the law.
2. In *California Trout v. Superior Court*, 218 Cal.App.3d 187 (1990) ("Cal. Trout II"), the Third District ordered the Superior Court to set interim flow releases for the four Mono Lake tributaries covered by the city's licenses.
   a. The court rejected the State Board's request to delay compliance with § 5946 until after the State Board completed a comprehensive review of the Mono Lake basin area.

D. Other Recent Actions

1. In addition to the actions in the Mono Basin, illustrative recent actions under some or all of the Fish & Game Code provisions have been filed on Putah Creek, in Solano County (Monticello Dam); Russian River, Sonoma County (Healdsburg Dam [summer flashboard dam]); Walker River, Mono County (Bridgeport Dam); Mokelumne River, San Joaquin County (Camanche reservoir); Owens River, Mono

County (Owens Gorge facilities); and the San Joaquin River (Friant Dam).

a. In Natural Resources Defense Council v. Patterson, 791 F. Supp. 1425 (E.D. Cal. 1992), the federal district court ruled that the Bureau of Reclamation is subject to Fish and Game Code § 5937 in the operation of Friant Dam.

2. Criminal Liability attaches: several of the actions, notably those on the Mokelumne and Walker Rivers, have involved criminal prosecutions under Fish & Game Code §§ 5650 & 5937.

3. The well-publicized results of these actions will surely spawn further litigation by groups interested in restoring instream flows for fisheries below reservoirs.

V. INTERRELATION OF WATER RIGHTS WITH OTHER REGULATORY DEVELOPMENTS

A. Environmental Review Legislation

1. CEQA

a. Applications for appropriative water rights permits are reviewed by the State Board under the California Environmental Quality Act (CEQA) and its implementing guidelines. (Public Resources Code §§ 21000-21176; CEQA Guidelines are at 14 Cal. Code Regs § 15000 et seq.; State Board regulations implementing CEQA are at 23 Cal. Code Regs. § 2700 et seq.)

b. Impact

(1) Most applications have received negative declarations under CEQA; thus, no full Environmental Impact Report (EIR) is generated.

(2) Nevertheless, at a minimum, compliance with CEQA adds additional procedural hurdles to the applicant for a water right, and additional opportunities for interested parties to challenge the lawfulness of a granted permit.

c. Ongoing Operations:

(1) In general, CEQA challenges to ongoing operations under water rights permits and licenses have been unsuccessful. Nevertheless, changed reservoir operating regimes initiated without an EIR have prompted CEQA challenges. (See, e.g., *Leach v. City of San Diego*, 220 Cal.App.3d 389 (1990) (no EIR needed for drafting of water between reservoirs);

compare *County of Inyo v. Yorty*, 32 Cal.App.3d 795 (1973) (increased groundwater pumping for export was CEQA project requiring EIR).)

2. NEPA
   a. Actions involving water rights held by or under contract with the United States have also raised environmental review issues under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. (See, e.g., *Natural Resources Defense Council v. Hancock*, (E.D. CA No. CIVS-88-1658 LKK (filed Dec. 21, 1988) (NEPA challenge to Central Valley Project contract renewals); *NRDC v. Duval*, 777 F.Supp. 1533 (E.D. Cal. 1991) (NEPA challenge to Reclamation Reform Act regulations upheld).)

B. Water Quality Legislation

1. In addition to the procedural requirements imposed on water rights applicants and holders by state and federal environmental review legislation, water quality legislation adds additional opportunities for state shaping--and reshaping--of uses permitted under water rights.
2. The Porter-Cologne Water Quality Control Act, Water Code § 13000 *et seq.*, was enacted in 1969. The regulatory program set up by the Act serves as the state certified water quality program under the federal Clean Water Act.
   a. The Act requires the State Board, through a series of Regional Boards, to promulgate water quality control plans to protect the beneficial uses of state water.
   b. Ultimately, the federal Environmental Protection Agency (EPA) retains power to approve the water quality standards set by the State Board. (Clean Water Act, § 303 (c), 33 U.S.C. § 1313 (c).) The
3. The impact of the state and federal legislation has been most pronounced in the State Board's ongoing hearings to revise the salinity and pollutant control plan for the San Francisco Bay-Sacramento/San Joaquin River Delta region. (See *Delta Water Cases, supra*.)
4. The relationship between the water quality planning and water rights systems remains unclear.
   a. In the *Delta Water Cases*, the court attempted to separate the two powers; it ordered the State Board to set water quality standards independently of the Board's ability to

implement or enforce the standards through its water rights authority.

(1) The court also told the State Board to consider the water quality impacts of *all* upstream diverters, regardless of priority of diversion right.

b. Ongoing litigation challenges the State Board's compliance with *Delta Water Cases (Golden Gate Audubon Society v. State Water Resources Control Board*, 1 Cal. Water L. & Pol. Rptr. 216 (August 1991) (Sacto. Super. Ct. No. 366984 [filed May 1, 1991]).) In particular, the case is addressing whether, in the Bay/Delta context, water quality plans must include water flow components.

c. The EPA's authority to set and enforce flow based water quality standards against California water rights holders has not been decided.

5. The relationship between the water quality planning, water quality certification, and water rights acquisition processes remains unclear.

a. Under the Clean Water Act, the State Board must certify that federally licensed projects meet state waste discharge requirements and comply with all "appropriate" requirements of state law. (*(Clean Water Act, §§ 401 (a) & (d), 33 U.S.C. §§ 1341 (a) & (d).*)

b. To the extent that water flows become part of a water quality control plan, or site specific flow rates are established as part of the waste discharge requirements, the § 401 certification process might give the State Board the ability to impose flow requirements upon federally licensed projects

(1) If the § 401 process gives the State Board independent federal authority to condition federal projects, the restrictions on state power to impose conditions upon the acquisition of water rights for federal projects (discussed *ante* and *post*) under the Federal Power Act and the Reclamation Act) might not apply.

c. Similarly, under the § 401 certification process, if "appropriate state law" includes CEQA, the State Board may attempt to add environmental harm mitigation requirements to a federally permitted project. (See *"Water*

Quality Certifications and Small Hydro Project Permitting," State Board (March 27, 1985).)

d. Some of these issues are the subject of recent Federal Energy Regulatory Commission (FERC) proposed regulations (56 FR 23108, 23153 & 23154) (petition for reconsideration filed by State of California).

C. Endangered Species Protection

1. Threatened and endangered species, and their habitats, are protected under both state and federal law. *(Calif. Fish & Game §§ 2050-2098; 16 U.S.C. §§ 1531-1544.)*

2. The listing of the Sacramento River winter run chinook salmon and the proposed listing of the Delta smelt may force water rights holders whose actions allegedly harm or threaten to harm the fish--notably the large federal and state water projects--to change their reservoir operations and pumping levels.

3. In United States v. Glenn-Colusa Irrigation District, 758 F.Supp. 1126 (E.D. Cal. 1992), the federal district court enjoined the Glenn-Colusa Irrigation District from pumping water from the Sacramento River during the winter-run chinook salmon's migration season of July 15 through November 30 each year because of the large number of salmon killed by the pumps. See also, Department of Fish and Game v. Anderson-Cottonwood Irrigation District, 8 Cal.App.4th 1554 (Ct. App. 1992), reaching a similar result under the California Endangered Species Act.

VI. NEW INTEREST IN WATER TRANSFERS

A. Policy Directives

1. In 1980, the Legislature clarified that water transfers should be facilitated and that they do not in themselves evince waste or unreasonable water use. *(Water Code §§ 109 & 1244 (West Supp. 1991).)*

2. In 1986, the Legislature reiterated that voluntary water transfers are in the public interest and should be supported by the State Board and the Department of Water Resources. *(Water Code §§ 109 (b), 475, 480-482, 10008-10009 (West Supp. 1991).)*

B. Transfers of Conserved and Surplus Water

1. In 1982, the Legislature authorized local and regional water agencies to transfer surplus water without losing rights to resume full future use of their entitlement. *(Water Code §§ 380-387 (West Supp. 1991).)*
   a. Surplus water includes water beyond local users' needs or whose use will be foregone during the transfer period.
2. Beginning in 1977, the Legislature determined that water rights holders who reduce fresh water usage because of water reclamation or conservation retain full rights to resume their historic water usage. *(Water Code §§ 1010-1012 (West Supp. 1991).)*
   a. The user who reclaims or conserves water retains the right to transfer the water not needed.

C. Short-term Transfers

1. In 1988, the Legislature streamlined the temporary transfer process. Temporary Changes are possible under *Water Code §§ 1725-1732 (West Supp. 1991)*.
   a. May only include water that would have been consumptively used.
   b. State Board must determine that transfer will not injure any other water user nor unreasonably affect instream beneficial uses.
   c. Temporary transfers are exempt from CEQA.
   d. Upon the expiration of the temporary change period, the water right automatically reverts to the original holder. Water Code § 1731 *(West Supp. 1991)*.)
2. Temporary Urgency Transfers are permitted under Water Code §§ 1425-1431 *West Supp. 1991.)*
3. Water may be leased for up to five years under Water Code §§ 1020-1030, *(West Supp. 1993)*, added in 1991. Apparent purposes of leasing statute are to expedite transfers of water by providing simpler procedures and by separating transfers from controversies regarding underlying water rights.
   a. The amount leased cannot exceed 25 percent of water which the lessor would have used in the absence of the lease. Assumption is that third-party effects will be minimized by this limitation.
   b. The lease must contain provisions to ensure that the lease will not injure other users or unreasonable affect fish, wildlife or other instream uses.

c. Compliance with procedures for temporary changes is not required.

d. If lessor or lessee is a water district, it appears that approval of the lease by the Water Resources Control Board is not required, although the Board must be notified and notice must be provided to users of water who may be affected and to Dept. of Fish and Game.

e. If lessee and lessor are private parties, lease must be approved by Water Resources Control Board, after notice and opportunity for a hearing.

f. Water Resources Control Board is directed to monitor leases and to initiate proceedings to enforce lease terms designed to protect other users and environment.

4. A public or private water supply agency or company may contract with state drought water bank or other users to transfer water made available by conservation measures or by the agreement of a regular customer to reduce water use below the customer's allocation. Water Code §§ 1745-1745.11 *(West Supp. 1993)*.

a. Surface water transferred under these sections cannot be replaced with groundwater unless there is a groundwater management plan in effect or unless the supplier from whose service area the water is transferred determines that the transfer will not create or contribute to overdraft of the aquifer.

D. Long-term Transfers

1. Long-term transfers, with automatic reversion of rights, are also permitted with State Board approval under Water Code §§ 1735-1737 *(West Supp. 1991)*.

E. Conjunctive Use

1. Water Code § 1011.5, *(West Supp. 1993)*, provides that a reduction in use of surface water by an appropriator because of the substitution of groundwater shall not result in a forfeiture of the appropriative right. The section also authorizes the appropriator to sell, lease, exchange or otherwise transfer the water replaced by groundwater.

a. Pumping from the basin from which the groundwater is obtained cannot exceed "the operating safe yield" of the basin.

b. Other conditions, including adoption of a local groundwater management program, are required if the groundwater is obtained from the Eastern San Joaquin County Basin.

F. Changes to Environmental and Recreational Uses

1. Water Code § 1707, *(West Supp. 1993)*, provides that a person having an "appropriative, riparian or other right" may petition the Water Resources Control Board to a change "for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.
   a. The Board may approve the change, "whether or not the proposed use involves a diversion of water," if there is no increase in consumption and no injury to other water users.

VII. RECENT GROUNDWATER DEVELOPMENTS

A. Legislation Providing for Groundwater Management

1. Water Code § 1220, enacted in 1984, prohibits the export of groundwater from "the combined Sacramento and Delta-Central Sierra Basins" unless pumping is in compliance with a groundwater management plan adopted by ordinance by the county board of supervisors.
   a. This provisions is part of legislation provides "area of origin" protection to northern California river systems.
   b. The section does not specify the elements of the groundwater management plan.
   c. This section contains a number of ambiguities and uncertainties.
2. A.B. 3030, Cal. Water Code §§ 10750-10755, adopted in 1992, allows local agencies which provide water service or which provides flood control, groundwater management, or groundwater replenishment to adopt a groundwater management plan if its service area includes a groundwater basin or a portion of such a basin that is not otherwise subject to groundwater management.
   a. This legislation applies only to groundwater basins that "are not critically overdrafted." Cal. Water Code § 10750.8(b).
   b. Although A.B. 3030 specifies certain components that the plan may include, Cal. Water Code § 10753.7, it does not specify mandatory elements.

c. A local agency can adopt rules and regulations to implement the plan but cannot adjudicate water rights or limit or suspend extractions unless it determines that "groundwater replenishment programs or other alternative sources of water supply have proved insufficient or infeasible to lessen the demand for groundwater." Cal. Water Code § 10753.8.

3. A.B. 2897, Cal. Water Code § 1745.10, adopted in 1992 prohibits the replacement of transferred surface water with groundwater unless it is consistent with groundwater management plan or, if no plan exists, if the replacement is approved by the water supplier after the supplier has determined that the transfer will not create or contribute to conditions of overdraft.

B. County Regulation of Groundwater

1. A number of counties have enacted groundwater regulation ordinances without express legislative authorization to do so.
   a. In general, the primary purpose of these ordinances is to regulate the "export" of groundwater and reserve groundwater for the future needs of the county.
   b. The power of counties to enact such ordinances without express legislation raises questions of preemption.

VIII. RECENT DEVELOPMENTS IN STATE-FEDERAL RELATIONS

A. Deference to State Water Rights Law under the Reclamation Act

1. Under § 8 of the Reclamation Act *(43 U.S.C. § 383)*, the United States Bureau of Reclamation (Bureau), in its operation of the Central Valley Project (CVP), must abide by state law regarding the acquisition of water rights. The State Board has the authority to impose terms and conditions upon the Bureau's water rights permits so long as such restrictions are not inconsistent with congressional directives. (*California v. United States*, 438 U.S. 645, 679 (1978).)
2. A State Board imposed term or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional

scheme. (*United States v. California*, 694 F.2d 1171, 1177 (9th Cir. 1982) ("New Melones II").

a. The determination of consistency presents a factual question. (*California v. United States*, supra, 438 U.S. at p. 679.)

b. State Board ordered Bureau compliance with water quality control plans and area of origin legislation does not conflict with congressional purposes in establishing the CVP. (New Melones II, supra, 694 F.2d at p. 1181.)

c. Watershed of origin protection also do not conflict with congressional CVP purposes. (*South Delta Water Agency v. United States*, 767 F.2d 531, 539 (9th Cir. 1985).)

d. State Board ordered Bureau compliance with salinity control plans is also not facially inconsistent with congressional directives. (Delta Water Cases, supra, 182 Cal.App.3d at p. 136 (permitting evidence on inconsistency at subsequent administrative proceedings).)

e. Recent claims under the public trust doctrine and Fish & Game Code § 5937 against the CVP in its operations of Friant Dam will undoubtedly raise preemption issues. (*NRDC v. Hancock*, supra.)

B. Continued Primacy of Federal law under the Federal Power Act

1. Rejecting analogies to Reclamation law and California v. United States, supra, the Supreme Court reaffirmed that the Federal Power Act (FPA) gives the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction to set minimum flow release requirements on a federally licensed hydroelectric power project. (*California v. FERC*, 110 S.Ct. 2024 (1990) ("Rock Creek").)

a. FPA § 27, preserving the states' legal authority over water rights, applies only to property rights, not to regulatory powers.

2. When issuing an appropriative rights permit to a FERC regulated hydropower project, the State Board may only consider the availability of water for appropriation; if unappropriated water is available, the State Board must issue a permit without conditions. (*Sayles Hydro Associates v. State Water Resources Control Board*, 1 Cal, Water L. & Pol. Rptr. 159 (E.D. Cal. Feb. 5, 1991).)

a. Neither the public trust doctrine nor the California Environmental Quality Act (CEQA) gives the State Board additional powers either

to review planned water uses or to impose conditions upon an appropriative permit issued to a FERC license hydropower project. (Id.)

3. Neither Rock Creek nor Sayles Hydro Associates involved Clean Water Act § 401 certifications.

C. Federal Land Ownership Includes State Riparian Rights

1. Like any other proprietor of land, the Federal government holds riparian rights on federal reserved land in California. (In re Water of Hallet Creek Stream System, 44 Cal.3d 448 (1988).)
2. The California Supreme Court refused to treat the federal government differently from any other proprietor of land in California.
   a. The court refused to hold that the federal government could not hold any riparian rights.
   b. The court also rejected the Court of Appeals' ruling that federal riparian rights were automatically defeasible; i.e., automatically subordinate to the rights of subsequent appropriators.
3. Also, like any other holder of unexercised riparian rights, however, in a statutory adjudication, unexercised federal riparian rights are subject to the principles of In re Waters of Long Valley Creek Stream System, supra.
   a. As such, during or after a statutory stream adjudication, the federal government may be compelled to apply to the State Board or the courts for permission to exercise its previously unexercised riparian rights.
   b. Moreover, while the State Board may not extinguish a future riparian right altogether, the Board may grant such unexercised federal rights a lower priority than any other use of water authorized before the federal government seeks to exercise its riparian rights on reserved land.
   c. Finally, the exercise of federal riparian rights remains subject to the reasonableness requirements of Cal. Const. Art. X, § 2.

D. Adjudication of Federal Water Rights

1. The McCarran Amendment, 43 U.S.C.A. § 666, waives the sovereign immunity of the United States in suits for the adjudication of rights to use the water of a river system or other source, thus permitting the joinder of the United States in state court for the purpose of determining its water rights.

2. In *United States v. Idaho*, ____U.S.____, No 92-190 (1993), the Supreme Court held that the McCarran Amendment forbids a state from assessing "filing fees" against the United States which are designed to offset the costs of the adjudication.
   a. Because of the enormous expense of suits of general adjudication, this holding may make it difficult to conduct such proceedings where the United States claims substantial water rights.
   b. It is not clear whether the prohibition on assessing costs to the United States applies to water rights acquired by the United States under section 8 of the Reclamation Act, 43 U.S.C.A. § 383.