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July 2, 2008

John J. Kirlin, Executive Director
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RE: Area of Origin Provisions in California Water Law

Dear Mr. Kirlin:

The Delta Vision Blue Ribbon Task Force has asked for an analysis of the Water Code provisions which protect the areas in which water originates. There are a number of different statutes, which are collectively referred to as "Area of Origin" laws. They include the County of Origin protection, Water Code section 10500; the Watershed Protection Act, Water Code sections 11460 et seq.; the Delta Protection Act, Water Code sections 12201-12204 and the similar San Joaquin River protection provisions, Water Code sections 12230 et seq.; and the protected area provisions of Water Code sections 1215-1222. The purpose of the County of Origin and Watershed Protection laws is "to reserve for the areas where water originates some sort of right to such water for future needs which is preferential or paramount to the right of outside areas. . . ." (25 Ops.Cal.Atty.Gen. 8, 10 (1955)).¹ These statutes apply in different ways and to different entities. They are described below.

¹ This Opinion was issued by Attorney General (and later Governor) Edmund G. Brown, and was largely written by Adolphus Moskovitz. It contains extremely useful history and background on the County of Origin and Watershed of Origin statutes, as well as an analysis of those laws. For many years, in the absence of significant case law interpreting those statutes, the Attorney General's Opinion was the primary authority cited when area of origin protections were discussed. Another interpretation of the area of origin laws is the law review article by then-Director of Department of Water Resources and now-Justice of the Third District Court of Appeal Ronald Robie, and then-Assistant Chief Counsel of DWR, Russell Kletzing, entitled *Area of Origin Statutes—The California Experience*, 15 Idaho Law Review 419 (1979).

John J. Kirlin, Executive Director
July 2, 2008
Page 2

A. County of Origin Protection

The “county of origin” provision is found in Water Code section 10505, which provides: “No priority under this part shall be released nor assignment made of any application that will, in the judgment of the board, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county.” This section applies in those cases where the Department of Water Resources, or its predecessor, has filed applications for water under section 10500, which provides that the department may make applications for water that in its judgment “is or may be required in the development and completion of the whole or any part of a general or coordinated plan looking toward the development, utilization or conservation of the water resources of the state.” The applications are referred to as “state filings.” They typically have early priority dates--the first were filed in 1927--and are exempt from the ordinary requirement of diligence. All but seven of the initial filings were on major streams, for large quantities of water, to allow for the development of large projects transporting water to distant places of use. The remaining seven were for smaller quantities of water, for smaller projects located close to the source of the water. (28 Ops.Cal.Atty.Gen 307, 308.) They have been transferred to the State Water Resources Control Board to hold and administer.

The County in which the water “originates” would seem to be the county in which the water falls in the form of precipitation. (25 Ops.Cal.Atty.Gen. *supra*, at p. 17.) An “assignment” is “a transfer of ownership of all or part of the inchoate right initiated by the State Filing. The assignment or partial assignment carries with it the priority of the State Filing.” (SWRCB, *Information Pertaining to “State Filings”* (June, 1976) at p. 3.) A “release from priority” is described as “a waiver by the State of the priority of the inchoate right initiated by the State Filing. The release from priority is made specifically in favor of an application that will serve a purpose not in conflict with the general or coordinated plan. An application favored by a release from priority does not acquire the priority of the State Filing and bears only the priority as of the date of filing with respect to applications filed by other persons. The legal effect of a release from priority is to prevent the State or subsequent holder of the State filing from objecting to the application in favor of which the release was made.” (*Id.*, at pp. 3-4.)

Whether to grant a release or assignment is left to “the judgment of the board.” In some cases prior to 1969, the Board reserved a defined quantity of water for use in the local county. In such cases, section 10505 is satisfied, if, before making the release, the Board “determines in good faith on the basis of information then available to it that the water covered by the application is not necessary for the development of the county of origin, or that the conditions inserted in the assignment or release will adequately preserve for those in the county a preferential right to use the water when they need it. A mere error in judgment by the department in making its determination would not invalidate its action.” (25 Ops.Atty.Gen. 8, 17 (1955) [fn omitted]; see also 25 Ops.Atty.Gen. 32, 36 (1955).) Thus, once the Board granted the assignment of a state filing, even if subsequent events prove that the board’s judgment was incorrect, the resulting releases would be difficult to attack at this time based on newly-asserted needs of the county of origin. In permits issued after Water Code section 10505.5 was enacted

John J. Kirlin, Executive Director
July 2, 2008
Page 3

in 1969, the Board has included a permit term based on the general language of section 10505.5 (“shall not authorize the use of any water outside of the county of origin which is necessary for the development of the county”), making the permit subject to unquantified depletion for future upstream developments in the county of origin.

The State Board has assigned state filings or released priority in favor of reservoirs constructed by the Central Valley Project (CVP), such as Shasta Dam and Folsom Dam; by the State Water Project (SWP), for instance, Oroville; and by other entities, including projects by the El Dorado County Water Agency and Calaveras County. Although the original filings were intended to permit the construction of large reservoirs in furtherance of a comprehensive plan for the State’s water resources, in some cases the SWRCB has assigned pieces of state filings to local county interests, while finding that such assignments would not be inconsistent with a comprehensive plan for water resources.

Where a release or assignment is subject to upstream depletions in the county of origin, the perfection of water rights by inhabitants or entities in the county of origin will have the effect of reducing the amount of water available under the permit, often reducing supply to the CVP or SWP. However, because the conditions are in the assigned water rights permits, the permit holder is aware of those limitations and can take them into account in its planning. An additional consideration is that in those instances where a state filing is assigned to an entity other than the CVP or SWP, the resulting permit has the priority of the original state filing, often a 1927 priority, which may make it senior to some permits for the CVP and SWP. (See, *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 954 [El Dorado’s priority was senior to many, if not most, of CVP and SWP applications].)

When a permit resulting from the assignment of a state filing reserves a specific amount of water for the county of origin, that amount generally may not be reconsidered by the board to accommodate increases in a county’s needs beyond those anticipated at the time of the assignment. However, the board might reconsider the permits based on the public trust (if stream-related resources in the area merit trust protection), on the watershed protection statute *infra*, if the permits are held by the CVP or SWP, or on explicitly reserved jurisdiction. Such a reexamination would not be based on the county of origin statute itself, but may serve to protect the county’s needs under the guise of another doctrine.

B. Watershed of Origin Protection

Protection for a watershed of origin, and areas immediately adjacent to it which can be conveniently served with water from that watershed, is provided by the Central Valley Project Act, Water Code sections 11460-63. These sections operate as a limitation on the state or federal agency operating the Central Valley Project or the State Water Project. The sections provide as follows:

John J. Kirlin, Executive Director
July 2, 2008
Page 4

Section 11460:

In the construction and operation by the [Department of Water Resources] of any project under the provisions of this part, a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.

Section 11461:

In no other way than by purchase or otherwise as provided in this part shall water rights of a watershed, area, or the inhabitants be impaired or curtailed by the department, but the provisions of this article shall be strictly limited to the acts and proceedings of the department, as such, and shall not apply to any persons or state agencies.

Section 11462:

The provisions of this article shall not be so construed as to create any new property rights other than against the department as provided in this part or to require the department to furnish to any person without adequate compensation therefore any water made available by the construction of any works by the department.

Section 11463:

In the construction and operation by the department of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the department unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange.

As a matter of state law, the protections of Section 11460 and 11463 apply to the federal Central Valley Project, pursuant to Water Code section 11128, which provides:

The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are

John J. Kirlin, Executive Director
July 2, 2008
Page 5

consistent with and which may be constructed, maintained, and operated as part of the project and in furtherance of the single object contemplated by this part.

Thus, the protections provided by the State watershed of origin statutes apply to projects operated by the Bureau of Reclamation so long as they are not inconsistent with Congressional provisions authorizing the project. (See *California v. United States* (1978) 438 U.S. 645.) The acts authorizing Folsom and Auburn Dams specifically indicated a congressional intent to recognize the state area of origin protections. The American River Act of October 14, 1949, 63 Stat. 852, provides that the Secretary of the Interior “shall make recommendations for the use of water in accord with state water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.” Similar language is found in Public Law 89-161, 79 Stat. 615 (1965), authorizing the Auburn-Folsom South Unit.

The 1955 Attorney General’s Opinion states that “the quantity of water as to which the prior right for use in the described areas is to be preserved is—‘. . . all of the water reasonably required to adequately *supply the beneficial needs of the watershed area*, or any of the inhabitants or property owners therein.’ ” (25 Ops.Cal.Atty.Gen., *supra*, at p. 20, emphasis added.) The amount of water reasonably required to supply the beneficial needs of the watershed, the adjacent area and the inhabitants and property owners therein is a question of fact depending upon the circumstances in a particular case at any given time. (*Ibid.*)

Interpretation of Watershed of Origin Provisions.

Until recently, there was little case law interpreting these sections. In the absence of cases, the 1955 opinion of the California Attorney General, (25 Ops.Cal.Atty.Gen. 8), was considered the primary authority on the subject of area of origin laws. In this much-quoted opinion, at pages 20-21, the Attorney General set forth the following interpretation of the scheme intended by sections 11460 and 11463:

1) Section 11460 has the effect of reserving to the entire body of inhabitants and property owners in watersheds of origin a priority as against the Water Project Authority in establishing their own water rights in the usual manner as their needs increase from time to time up to the maximum of either their ultimate needs or the yield of the particular watershed.

2) The establishment of this priority does not create or vest in any individual person a presently definable ‘water right’ in the conventional sense of the term. . . . As the need of such an inhabitant develops he must comply with the general water law of the state both substantively and procedurally to apply for and perfect a water right for water which he then needs and can then put to beneficial use. (Secs. 1200–1800). However, when he makes such an application, as a member of the class of person protected by the statute, his application is not to be gainsaid, denied, or limited by reason of

John J. Kirlin, Executive Director
July 2, 2008
Page 6

any activity on the part of the Water Project Authority. *Specifically, this means that if prior to the development of the applicant's increased needs the authority had been exporting from the watershed in question water required to supply the applicant's increased needs, such use by the authority would not justify denial of the application.* Assuming the application to be otherwise meritorious, the state engineer would grant a permit in the usual form, and the authority would thereafter be compelled to honor the water right thus created and vested. (Emphasis added.)

3) . . . [I]t must be constantly borne in mind that the priority is a reservation granted to an entire class of citizens *in the aggregate*. The class is ascertainable at any given time with constitutional exactitude, but the individual inhabitants and property owners comprising it will change and vary over the years. No definable property right is created or presently vested in any particular individual. *As to any particular individual the grant of the statute is wholly inchoate.* . . . [The right is defined] as the needs of the individual develop and, by actually putting more water to beneficial use, he is able to establish a 'water right' in himself in the usual form and manner. (Emphasis added.)

As expressed in Paragraph (2) above, the Attorney General opined that the watershed of origin protection could be asserted by an inhabitant of the watershed in the context of an application to appropriate water within the watershed. However, the watershed protection statute does not itself demand a formal application to appropriate water, but purports to protect the prior right to all of the water reasonably required to adequately supply "the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein." While many agreed with the Attorney General's view that an inhabitant of a watershed of origin needed to file his/her own application to obtain the benefits of the statute, others believed that an inhabitant of the area could obtain the benefits of the statutory protection *either* by applying for a right, *or* by contracting with one of the Projects. (Robie and Kletzing, *supra*, 15 Idaho L.Rev. at pp. 436-438.)

In the recent *State Water Resources Control Board Cases (SWRCB Cases)*, (2006) 136 Cal.App.4th 674, the Court of Appeal addressed the issue of whether a person or entity within the watershed of origin must apply for and receive its own water rights permit in order to take advantage of the protection granted by this section. Justice Robie, citing his own earlier law review article, writes: "To the extent Section 11460 reserves an inchoate priority for the beneficial use of water within its area of origin, we see no reason why that priority cannot be asserted by someone who has (or seeks) a contract with the Bureau for the use of that water." (*Id.* at p. 758.) The Department of Water Resources has indicated in the past that it would entertain requests for new State Water Project contracts from entities in the watershed of origin on the same terms as existing contracts. Recently, the Cities of Fairfield, Vacaville and Benecia entered into contracts with the Department, rather than seeking their own water rights based on watershed of origin benefits. In contrast, the City of Stockton sought and obtained its own right

John J. Kirlin, Executive Director
July 2, 2008
Page 7

and claimed watershed of origin protection and a special provision in Water Code Section 1485. Similarly, the Cities of Woodland and Davis have a pending application for water rights, and claim the benefits of the watershed of origin law.

In the *SWRCB Cases*, the court held that beneficial uses made by an entity in one part of a watershed do not have priority over beneficial uses in another part of the watershed. In that case, the court concluded that consumptive uses in one part of a watershed did not obtain priority over the use of water to maintain water quality to meet the beneficial needs of agriculture and fish and wildlife in another part of the same watershed. The court quoted the SWRCB: ““Section 11460 does not establish a preference for any particular type of use within the area of origin, such as irrigation or municipal use, over other uses within the area of origin, such as protection and enhancement of water quality.”” (*SWRCB Cases, supra*, 136 Cal.App.4th at p. 758.)

A watershed where water “originates” means the watershed where the water falls as precipitation. (25 Ops.Cal.Atty.Gen., *supra*, at p. 20.) An additional issue requiring interpretation is the meaning of the term “watershed.” Based on legislative intent and common sense, Robie and Kletzing concluded that the entire Sacramento River System is a single watershed, and the Delta is a part of that watershed, but the San Joaquin River system is considered a separate watershed. (Robie and Kletzing, *supra*, at pp. 433-434.)

The Watershed of Origin priority attaches only to natural or abandoned flows, not to previously-stored water. (*Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, 111.) Recognizing both the priority that permit or license holders in the watershed of origin (and adjacent areas) have over the Projects with respect to natural flows and also the Projects’ rights to water previously stored by them and then released to meet their own needs and obligations, the SWRCB has inserted “Water Rights Term 91” in almost all new water rights permits and licenses granted in the watersheds of origin since 1965. Term 91 prohibits diversion of water by the area of origin user when satisfaction of in-basin entitlements requires release of stored water by the CVP or the SWP. In other words, when the Projects are releasing previously-stored water to meet water quality requirements, Term 91 requires area of origin water rights holders to cease diversion. In *Phelps v. State Water Resources Control Board, supra*, 157 Cal.App.4th 89, the court upheld the inclusion of term 91 in water rights licenses held by certain Delta farmers. The Delta users alleged that Term 91 deprived them of their right to use water from the Delta, a watershed of origin. Moreover, they asserted that they were not required to pay the Projects for water in order to exercise their rights under the Watershed of Origin Act. (*Id.* at p. 106.) The court disagreed, and affirmed the SWRCB’s reading of the Watershed Protection Act:

Term 91 is based on the assumption that the water rights of the DWR and the USBR to appropriate uncontrolled flows for export from the southern Delta are junior to all other water rights in the watershed. The water stored upstream by the DWR and the USBR during periods of excess flow, however, is appropriated at times when its appropriation does not injure any other water

John J. Kirlin, Executive Director
July 2, 2008
Page 8

right holders. When this water is subsequently released from the reservoirs to flow downstream to the export facilities, it is already appropriated, and is not naturally present in the rivers. Water that is appropriated and is flowing in a channel under the control of its appropriator is not subject to appropriation by others.

(WR Order 2004-0004 at p. 5, quoted in *Phelps, supra*, at p. 107.) Thus the protection of the Watershed Protection Act is embodied in Term 91, which can be enforced against Delta water users.²

Financial Considerations

Section 11462 provides that the watershed protection provision shall not be construed “to require the authority to furnish to any person without adequate compensation therefore any water made available by the construction of any works by the authority.” The Attorney General’s opinion discusses this provision as follows:

This provision has important financial results. It is obvious that certain of the project works are so situated in a watershed of origin that their storage and stream regulation capabilities augment the natural flow of the stream within the watershed of origin. It is most probable, and each case would present a question of fact for determination, that there are instances where the ultimate needs of the inhabitants of the watershed of origin can only be fully met by some degree of augmentation and regulation of the natural flow of the stream. Section 11460 assures such inhabitants of the prior right to water sufficient to their ultimate needs. However, this does not mean that they are entitled to water ‘made available by the construction of any works by the authority’ without paying adequate compensation for the benefits actually received from the existence and operation of the project works. Having to pay for benefits received does not detract anything from the benefit or effect of the priority granted. It is simple

² In *El Dorado Irrigation Dist. v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, the Court held that the SWRCB improperly inserted Term 91 in permits granted to El Dorado County Water Agency. The decision was based on the fact that El Dorado had obtained assignment of a state filing with a priority date of 1927, and more junior water rights holders did not have the equivalent term. The court determined that this was a violation of the priority system. The decision does not cast doubt on the inclusion of Term 91 in watershed of origin water rights, so long as Term 91 is not imposed in a permit with an early priority date without including Term 91 in other permits with later priority dates. The court held that the SWRCB could convene a proceeding to determine the obligations of El Dorado and the junior water rights holders to contribute to meeting water quality standards in the Delta. (*Id.* at pp. 969-70.)

John J. Kirlin, Executive Director
July 2, 2008
Page 9

equity to the taxpayers of the state as a whole. It is the purpose and effect of this provision of section 11462 to make it crystal clear that no person entitled to the priority reserved by section 11460 is thereby entitled to receive free of charge water which is made available by the construction of any project works by the authority. Charges appropriate to such cases may be fixed and established by the authority pursuant to section 11455.

(25 Ops.Cal.Atty.Gen. 8, 24.)

This interpretation suggests the possibility that the cities, counties or districts in the watershed of origin could assert watershed of origin rights to contract for water, but would have to pay for the water released to create such flows. As noted above, recently, the Cities of Fairfield, Benecia and Vacaville entered into contracts with the Department, under which they will receive and pay for State Water Project water.

Limitation on Watershed of Origin Protection

The primary limitation in asserting watershed of origin protection is that section 11461 provides that "the provisions of this article shall be strictly limited to the acts and proceedings of the department, as such, and shall not apply to any persons or state agencies." As discussed above, sections 11460 and 11463 also operate as limitations on the Bureau of Reclamation. However, the statute has no application to other entities exporting water from an area of origin, such as the City of San Francisco or East Bay Municipal Utility District.

C. Delta Protection Act

The Delta Protection Act, enacted in 1959, begins with legislative findings on the need for special legislation, and then provides:

Section 12201:

The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area as set forth in Section 12220 . . . and to provide a common source of fresh water for export to areas of water deficiency is necessary to the peace, health, safety and welfare of the people of the State, except that delivery of such water shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive of this code.

Section 12202:

Among the functions to be provided by the State Water Resources Development System, in coordination with the activities of the United States

John J. Kirlin, Executive Director
July 2, 2008
Page 10

in providing salinity control for the Delta, through operation of the Federal Central Valley Project, shall be the provision of salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. If it is determined to be in the public interest to provide a substitute water supply to the users in said Delta in lieu of that which would be provided as a result of salinity control no added financial burden shall be placed upon said Delta water users solely by virtue of such substitution. Delivery of said substitute water supply shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code.

Section 12203:

It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled.

Section 12204:

In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of Sections 12202 and 12203 of this chapter.

Thus, in addition to the County of Origin and Watershed of Origin protections, the water users in the Delta are entitled to the protections of the Delta Protection Act. The exact meaning and scope of those protections have been hotly contested for years, and recent cases have finally interpreted them.

In the *SWRCB* Cases, the Court characterized the Delta Protection Act's provisions as "these rather vague statutes." The Act recognizes the importance of salinity control and an adequate water supply in the Delta, but raises two questions: "(1) what is an adequate supply of water for users within the Delta; and (2) what level of salinity control must be provided." (163 Cal.App.4th at p. 768, citing *United States v. State Water Resources Control Board* ("*Racanelli*") (1986) 182 Cal.App.3d 82, 139.)

Parties such as the Central Delta Water Agency have long argued that the Delta Protection Act gives Delta riparians and appropriators a right to water stored upstream by the Projects, without cost. (*SWRCB Cases, supra*, 136 Cal.App.4th at p. 770.) The Court disagreed. "Nothing in the Delta Protection Act purports to grant any kind of water right to any particular party." (*Id.* at p. 771-72.) While the Delta Protection Act does prohibit diversion of water from the Delta needed to maintain salinity control and an adequate water supply for in-Delta users, "it is for the Board to decide, in the exercise of its judgment, what level of salinity control should be provided and what is an adequate supply of water for users in the Delta." (*Ibid.*)

John J. Kirlin, Executive Director
July 2, 2008
Page 11

In *Phelps v. State Water Resources Control Board*, *supra*, 157 Cal.App.4th 89, in-Delta water users challenged the imposition by the SWRCB of Term 91 in their permits. They alleged that the CVP and SWP have a statutory duty under section 12202 to provide salinity control and an adequate water supply in the Delta without compensation. The Court held that nothing in the Delta Protection Act gave the Delta water users a new water right or entitlement to water stored by the Projects without paying for it. (*Id.* at p. 109.) The Court quoted with approval the SWRCB's Water Rights Order 2004-0004, which stated: "If existing water rights are not adequate to supply the needs of in-delta water users, the Delta Protection Act does not ensure the Delta water users an adequate supply. The in-Delta water users can, however, make arrangements with [the] DWR and pay adequate compensation to the DWR for the water, pursuant to Water Code section 11462."

D. San Joaquin River Protections

Water Code section 12230 et seq. provides some protection for the San Joaquin River. The Legislature begins by declaring that there is a serious problem of water quality in the San Joaquin River between the Merced River and the junction of the San Joaquin River with Middle River in the Delta, and that this water quality problem has effects upon water supplies in the Delta. (*Ibid.*) Then, in language similar to that of the Delta Protection Act, the statute provides:

Section 12231:

It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the San Joaquin River and its tributaries to which the users along the portion of the San Joaquin River described in Section 12230 are entitled.

Section 12232:

The State Water Resources Control Board, the State Department of Water Resources, the California Water Commission, and any other agency of the state having jurisdiction, shall do nothing, in connection with their responsibilities, to cause further significant degradation of the quality of water in that portion of the San Joaquin River. . . .

Section 12233:

Nothing in this part shall be construed as affecting the quality of water diverted into the Sacramento-San Joaquin Delta from the Sacramento River, nor as affecting any vested right to the use of water, regardless of origin, or any water project for which an application to appropriate water was filed with the State Water Resources Control Board prior to June 17, 1961.

John J. Kirlin, Executive Director
July 2, 2008
Page 12

Section 12231 is similar to section 12203 of the Delta Protection Act. For this reason, courts might be likely to interpret them in a similar fashion. In the *SWRCB Cases, supra*, 136 Cal.App.4th at p. 746, the court considered section 12233, and affirmed that the San Joaquin River protections in the sections quoted above do not affect water rights that were vested, or projects for which an application to appropriate water was filed with the SWRCB, at the time sections 12230 et seq. went into effect in 1961, even if the water rights holder later files a petition to change some aspect of the right.

E. Areas of Origin/Protected Areas

A final area of origin statute, enacted in 1984, applies to protect certain areas, but only against “water suppliers exporting or intending to export water for use outside a protected area pursuant to applications to appropriate surface water filed, or groundwater appropriations initiated, after January 1, 1985, that are not subject to Section 11460.” (Wat. Code, § 1215.) The protected areas include the Sacramento River System, the Mokelumne River System, the Calaveras River System, and the San Joaquin River System. The Delta is considered to be within each of those systems. (Other systems are also included, but are not tributary to the Delta.) Thus, the Delta and its tributaries are within the protected area.

The key provision is section 1216, which provides:

A protected area shall not be deprived directly or indirectly of the prior right to all the water reasonably required to adequately supply the beneficial needs of the protected area, or any of its inhabitants or property owners therein, by a water supplier exporting or intending to export water for use outside a protected area pursuant to applications to appropriate surface water filed, or groundwater appropriations initiated, after January 1, 1985, that are not subject to Section 11460.

This statute authorizes water users in a protected area to obtain their own water right, which would have priority over the rights of an exporter (initiated after January 1, 1985), and also to purchase, for adequate compensation, water made available by the construction of works by the exporter. (Wat. Code, § 1217, subd. (a).) It provides for negotiation between the local water users and the supplier (*id.*, § 1217, subd. (c), (d)), and mediation, if necessary (*id.*, § 1219).

Unlike the Watershed of Origin Act, this statute does not apply to the CVP and SWP. Because the Act only applies to suppliers obtaining water rights after 1985, it will have limited application, but it will apply when the conditions are met. For example, several parties claimed the benefit of this statute when the Delta Wetlands Project (flooding Delta islands for reservoirs) was pending before the SWRCB.

John J. Kirlin, Executive Director
July 2, 2008
Page 13

In addition to the provisions above, this statute provides limitations on pumping groundwater for export from protected areas. Section 1220 provides in part:

- (a) No groundwater shall be pumped for export from within the combined Sacramento and Delta-Central Sierra Basins . . . unless the pumping is in compliance with a groundwater management plan that is adopted by ordinance pursuant to subdivision (b) by the county board of supervisors, in full consultation with affected water districts, *and that is subsequently approved by a vote* in the counties or portions of counties that overlie the groundwater basin, except that water that has seeped into the underground from any reservoir, afterbay, or other facility of an export project may be returned to the water supply of the export project. (Emphasis added.)

We are unaware of any groundwater management plan adopted by a county board of supervisors and subsequently approved by the voters. It is thus an open question whether this section currently precludes all export of groundwater from the protected areas, because no such groundwater management plans presently exist.

The State Water Resources Control Board has found section 1220 inapplicable to groundwater substitution transfers, whereby a local user sells surface water to which he/she is entitled, and pumps groundwater in its place. Although the impact on the groundwater basin is arguably similar, the Board does not consider such transfers to be a pumping for export.

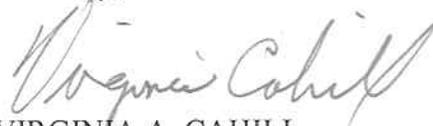
Conclusion

None of the area of origin protections offers absolute protection to inhabitants of an area of origin; each of them is subject to various limitations. Of all the statutes, the one with the greatest potential to reduce the supply presently enjoyed by export water users is the Watershed Protection Act, Water Code section 11460 et seq. This act permits entities in the Sacramento Valley and probably the watersheds of eastside tributaries to the Delta, such as the Mokelumne, the Cosumnes and the Calaveras, to perfect new water rights to natural flow in those areas which will have priority over the water rights of the CVP and SWP.

John J. Kirlin, Executive Director
July 2, 2008
Page 14

For a long time, the area of origin laws were untested. They have recently been interpreted in a number of cases. It remains to be seen whether the area of origin provisions will actually permit counties and areas of origin to recapture water long used by the CVP and SWP as their own needs increase.

Sincerely,



VIRGINIA A. CAHILL
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

cc: Matt Rodriguez