

EDMUND G. BROWN JR.  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



1300 I Street  
P. O. Box 944255  
Sacramento, CA 94244-2550  
Telephone: 916/ 322-5647  
Fax: 916/ 327-2319  
E-Mail Address: Virginia.cahill@doj.ca.gov

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John J. Kirlin, Executive Director  
Delta Vision  
Resources Agency  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814

Re: Reallocation of Water under Specified Conditions

Dear Mr. Kirlin,

The Delta Vision Blue Ribbon Task Force, in connection with its preparation of a Strategic Plan, has asked for advice on the following question:

**Question Presented:** What legal tools are available to the State of California to reduce and/or reallocate water among users in instances of (a) over allocation, (b) needs for ecosystem protection and (c) emergencies (e.g., drought or interruption in supplies because of seismic or flood events)?

**Short Answer:** (a) In cases of over allocation, the analysis begins with water rights priorities. However, all water rights are held subject to article X, section 2 of the California Constitution, which requires that the use of water must be reasonable and for a beneficial purpose. This constitutional provision provides a mechanism for reducing unreasonable or wasteful uses. The State Water Resources Control Board (SWRCB)'s adoption and implementation of water quality standards may also effectively result in reallocation of water. Other tools for the reallocation of water include voluntary purchases/transfers, and purchase or condemnation of water rights. Reductions in some existing uses may result from more vigorous enforcement actions against those who are diverting without a valid right, or in non-compliance with the terms of their license or permit. Those tools are discussed in our earlier letter on flexibility in the California Water Rights System, dated September 18, 2007. In addition, the area of origin laws may result in reallocation of water as needs in the areas of origin increase. These laws are discussed in a separate paper we are preparing for the task force.

(b) The primary tool for achieving ecosystem protection is the public trust doctrine, which imposes on the State the *obligation* to exercise continuing supervision over the use of water, and the ability to reconsider past allocation decisions in light of current ecosystem

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needs. The public trust in fish and wildlife, the doctrine of nuisance, and the unreasonable use doctrine of article X, section 2 also provide mechanisms for the state to protect ecosystems. Purchases and condemnation are also available as means of acquiring water for ecosystem protection. Some cases consider uses that unreasonably harm the state's ecosystem resources to be unreasonable uses under article X, section 2.

(c) In cases of emergency, including water shortages, sections of the Water Code and the Government Code provide a preference for certain uses, usually domestic or health and safety-related uses.

Because this letter is lengthy, we have provided a table of contents following the conclusion; a table of authorities is also attached at the end of the letter.

## DISCUSSION

All the water of the state of California belongs to the people of the state. (Wat. Code, § 102.) However, rights for the use of water may be obtained in accordance with the law. (*Ibid.*) California operates under a dual or hybrid system of water law, encompassing both the riparian doctrine and the appropriation doctrine. (Hutchins, *The California Law of Water Rights* (1956) at p. 40.) The riparian doctrine confers upon the owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land. (*Ibid.*) The appropriation doctrine is based on beneficial use and does not require that the place of use be contiguous to the watercourse. (*Ibid.*) “Both riparian and appropriative rights are usufructuary only and confer no right of private ownership in the water course. [Citation.]” (*People v. Shirokow* (1980) 26 Cal.3d 301, 307. See also *Schaezlein v. Cabaniss* (1902) 135 Cal. 466, 470-71 [running waters of the state are public property and state may properly condition a private individual's use of such property, the title to which remained in the public]; *Kidd v. Laird* (1860) 15 Cal. 162, 180 [“[a] right may be acquired to [water] use . . . but this right carries with it no specific property in the water itself”].)

Under California's dual system of water rights, problems of over-allocation are handled, in the first instance, by following the priority system. For appropriators, the rule is “first in time, first in right.” (Hutchins, *supra*, at p. 130; *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 961.) This means that in times of shortage, junior appropriators are cut off, so that seniors may enjoy their full entitlement. Riparians have correlative rights, and share shortfalls among themselves. (Hutchins, *supra*, at pp. 218-221.) The question is whether tools are available to the state to reallocate water in cases of over allocation, without strictly following the priority system.

The California Supreme Court has recently reiterated that water right priority “has long been the central principle in California water law.” (*City of Barstow v. Mojave Water Agency* (23 Cal.4th 1224, 1243.) Courts will typically begin a water rights inquiry by examining the priorities of the parties. (*Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 450.) However, the priority system is not absolute, and the SWRCB has the power to

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act contrary to the rule of priority in appropriate circumstances. (*El Dorado Irrigation District v. State Water Resources Control Board, supra*, 142 Cal.App.4th at p. 965.) “Sometimes, a competing principle or interest may justify the Board’s taking action inconsistent with a strict application of the rule of priority.” (*Ibid.*) Two of the principles that permit the State, in the proper case, to override strict priority are the reasonable, beneficial use requirements of article X, section 2 of the California Constitution and the public trust doctrine. (*Id.* at pp. 965-66.)<sup>1</sup> Both of these principles derive from the state’s interest in its water resources. (See Wat. Code, §§ 104 and 105 [people of the state have a paramount interest in the use of all the water of the state].)

**I. Article X, Section 2 of the California Constitution Permits the State To Enforce the Requirement that All Uses of Water in the State Be Reasonable and Beneficial.**

The California Constitution, article X, section 2 requires the water resources of the state to be put to beneficial use to the fullest extent of which they are capable.<sup>2</sup> It requires all

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<sup>1</sup> In *El Dorado Irrigation District v. SWRCB, supra*, the court noted that there are other policies that may also justify a deviation from the strict application of water rights priorities, such as Water Code section 106, which declares that it is the policy of the state that use of water for domestic purposes is the highest use of water. (*Id.* at 966.) Water Code section 106.5 provides some protection to municipalities.

<sup>2</sup> Article X, section 2 provides as follows:

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 to which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. 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. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner’s land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is

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use of water in the state to be reasonable and beneficial. Waste of water, unreasonable use, unreasonable methods of use of water, and unreasonable methods of diversion are prohibited. The purpose of this constitutional amendment “was to ensure that the state’s water resources would be ‘available for the constantly increasing needs of all of its people’.” (*Central and West Basin Water Dist.* (2003) 109 Cal.App.4th 891, 904, quoting *Meridian, Ltd. v. City and County of San Francisco, supra*, 13 Cal.2d at p. 449.)

**A. Article X, Section 2 Is a Limitation on All Water Rights.**

Article X, section 2 is “an overriding constitutional limitation” that is “superimposed on [the] basic principles defining water rights.” (*United States v. State Water Resources Control Board* (sometimes referred to as “Racanelli Decision”) (1986) 182 Cal.App.3d 82, 105.) The constitutional rule of reasonable use applies to all types of water rights, whether riparian or appropriative rights to surface water, or overlying or appropriative rights to percolating groundwater. (*Id.* at p. 106; *Peabody v. Vallejo* (1935) 2 Cal. 2d 351, 383; *Tulare Irr. Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 524-26.) The SWRCB or the courts, which have concurrent jurisdiction (*Environmental Defense Fund v. East Bay Municipal District* (1980) 26 Cal.3d 183, 200), may limit a water rights holder who is wasting water, using water unreasonably, or using an unreasonable method of use or an unreasonable method of diversion. (*People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 753; *Imperial Irrigation District v. State Water Resources Control Board* (1990) 225 Cal.App.3d 548, 557-561.)

“No one can have a protectable interest in the unreasonable use of water.” (*City of Barstow v. Mojave Water Agency, supra*, 23 Cal.4th at p. 1242.) The California Courts have repeatedly held that, because there is no property right in an unreasonable use of water, a water user can never obtain a vested right to use water in a manner inconsistent with article X, section 2. (*Joslin, supra*, 67 Cal.2d at p. 145; *Joerger v. Pacific Gas & Elec. Co.* (1929) 207 Cal. 8, 22; *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 703; *Peabody v. City of Vallejo, supra*, 2 Cal.2d at p. 369; *In re Waters of Long Valley Creek Stream System* (1979), 25 Cal.3d 339, 348, n.3 [all holding that there can be no vested property right in an unreasonable use of water].) While every effort must be made to respect the rule of priority, where that rule clashes with the rule against unreasonable use of water, the latter must prevail. (*El Dorado Irrigation District, supra*, 142 Cal.App.4th 937, 966.)

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lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

Similar provisions are contained in Water Code § 100.

## **B. What Is a Reasonable Use of Water Is a Question of Fact.**

What is a reasonable use of water is a question of fact to be decided in each case. (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140.) What is reasonable at one time may be unreasonable at another time; what is a reasonable use in times of plenty may not be a reasonable use at times of scarcity and great need. “What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.” (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, *supra*, 3 Cal.2d at p. 567.)<sup>3</sup>

## **C. The Role of the Legislature.**

Article X, section 2 is self-executing. However, it specifically authorizes the Legislature to enact laws in furtherance of its policies. “This authorization discloses that the framers of article X, section 2 recognized that the promotion of its salutary policies would require granting the Legislature broad flexibility in determining the appropriate means for protecting scarce state water resources.” (*In re Waters of Long Valley Creek Stream System*, *supra*, 25 Cal.3d 339, 351-52.)

The Legislature has exercised the powers granted to it by the constitutional provision. For example, the Legislature has determined that it is the policy of the state to leave wild and scenic rivers in their free-flowing condition and that such use of the water is the “highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution.” (Pub. Resources Code, § 5093.50.) The Legislature has also enacted Fish and Game Code section 5937, discussed later, that requires dam owners to release water to keep fish below the dam in good condition, and section 5946, which requires the SWRCB to insert compliance with section 5937 in water rights permits and licenses in Inyo and Mono Counties. In *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, the court considered this law to be not only a specific expression of the public trust, but also a legislative determination that such use was reasonable. “We find no preclusion in article X, section 2 of legislative power to make rules concerning what uses of water are reasonable, at least so long as those rules are not themselves unreasonable. We cannot say that section 5946 is unreasonable in requiring a minimal in-stream flow for preservation of fish in the areas it affects.” (*Id.* at pp. 622-625.) Where various policy views are held concerning the reasonableness of a use of water, the view enacted by the Legislature is entitled to deference by the courts. (*Id.* at pp. 624-25.)

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<sup>3</sup> It is apparently still an open question whether unreasonable use under article X, section 2 refers only to wasteful use of water, or applies comparatively to prohibit any use which is less than the optimum allocation of water. (*California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 622; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447, fn. 28.)

**D. The Role of the State Water Resources Control Board (“SWRCB” or “Board.”)**

**1. In General**

The Legislature has also enacted Water Code section 275, which provides that the Department of Water Resources (DWR) and the State Water Resources Control Board “shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.” This statute gives the SWRCB considerable authority to determine whether a particular use of water or method of use or method of diversion is unreasonable.

**2. When Granting Permits**

The SWRCB considers reasonable and beneficial use when it first grants water right permits. It has the authority to condition water rights licenses and permits to assure that the water is used reasonably. Water Code section 1253 authorizes “the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in [the Board’s] judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.” In developing terms and conditions, the SWRCB considers the relative benefit to be derived from all beneficial uses of the water, including preservation and enhancement of fish and wildlife and all uses protected in a relevant water quality control plan. (Wat. Code, §§ 1253, 1257.)

**3. Regarding Pre-1914 Rights**

The SWRCB has used its power under Water Code section 275 to reduce existing wasteful water uses, even where those uses were made under pre-1914 appropriative rights. The SWRCB does not grant permits for pre-1914 appropriative rights, but Water Code section 275 gives it the authority to take all necessary actions to prevent waste or unreasonable use by holders of such rights. In *Imperial Irrigation District v. State Water Resources Control Board*, *supra*, 225 Cal.App.3d 548, the court held that the SWRCB had the jurisdiction to determine that certain irrigation practices in the Imperial Irrigation District were unreasonable. IID’s vested rights extended only to the reasonable use of water. It had no right to water that was wasted. The court noted that it is time to recognize that water law “is in flux and that its evolution has passed beyond traditional concepts of vested and immutable rights.” (*Id.* at p. 573.)

**4. Regarding Riparian Rights**

The SWRCB’s power under Water Code Section 275 also extends to riparian rights. In *People ex rel State Water Resources Control Board v. Forni*, *supra*, 54 Cal.App.3d 743, SWRCB brought suit to challenge as unreasonable the direct diversion of water for frost

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protection of vineyards. The Board alleged that such use/method of diversion was unreasonable inasmuch as the instantaneous diversions by many riparian vineyard owners depleted the Napa River, leaving insufficient water for some users. The SWRCB asserted that the vineyard owners could construct small storage reservoirs (which would require appropriative permits) and use water from the reservoirs for frost protection or acquire water from other sources. The court held that the Board's complaint stated sufficient facts to state a cause of action for injunctive and/or declaratory relief, and that the Board had statutory authority to bring the action under Water Code section 275. In response to the vineyard owners' claims of interference with their riparian rights, the court stated that "the overriding constitutional consideration is to put the water resources of the state to a reasonable use and make them available for the constantly increasing needs of all the people." Riparian owners may be required to "endure some inconvenience or to incur reasonable expenses" to accomplish this end. (*Id.* at pp. 751-752.)

## 5. In Statutory Adjudications

Article X, section 2 also permits the SWRCB to adjust priorities when adjudicating a stream system under Water Code section 2500 et seq. In *In re Waters of Long Valley Creek Stream System*, *supra*, 25 Cal.3d 339, the California Supreme Court relied on article X, section 2 in determining that the Board could decide that an unexercised riparian claim loses its priority with respect to currently-exercised rights (whether riparian or appropriative), and that the Board could also determine that the future riparian right would have a lower priority than any rights exercised before the riparian attempted to exercise the right. Although riparian rights are not usually lost by non-use, the court reasoned that the uncertainty resulting from an unexercised riparian right interfered with the more efficient and beneficial uses called for by article X, section 2. "In other words, while we interpret the Water Code as not authorizing the Board to extinguish altogether a future riparian right, the Board may make determinations as to the *scope, nature and priority of the right* that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its scarce water resources." (*Id.* at p. 358-59, emphasis added.) The court reached a similar conclusion with regard to federal riparian rights in *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 471.

### E. Courts Have Concurrent Jurisdiction.

In *Environmental Defense Fund v. East Bay Municipal District*, *supra*, 26 Cal.3d at p. 200, the court held that the courts have concurrent jurisdiction with the SWRCB over claims of unreasonable use under article X, section 2. In that case, Plaintiffs alleged that diversion of American River water at the Folsom South Canal for the single use in EBMUD's service area was an unreasonable method of diversion, because if the water were first allowed to flow down the Lower American River and then diverted from the Sacramento River or Delta, it would serve two uses—protection of instream uses in the American River and also consumptive uses by EBMUD's customers—thus maximizing the

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use of water. The California Supreme Court held that the claim could proceed in the trial court.<sup>4</sup>

**F. Some Current Uses May Be Determined To Be Unreasonable in the Future.**

Because the determination of whether an existing use is unreasonable is fact-specific, it is difficult to predict which uses the Board or the courts may find to be unreasonable. It is possible that some presently-exercised uses of water may be unreasonable now, or may become unreasonable in the future. In *Joslin*, the court stated that the inquiry into reasonable use cannot be “resolved in vacuo isolated from statewide considerations of transcendent importance.” (*Joslin, supra*, 67 Cal.2d 132, 140.) Paramount among the statewide considerations, the court saw “*the ever increasing need for the conservation of water in this state*, an inescapable reality of life quite apart from its express recognition in the 1928 amendment.” (*Ibid.*, emphasis added.) “When the supply is limited, the public interest requires that there be the greatest number of beneficial uses which the supply can yield.” (*Peabody v. Vallejo, supra*, 2 Cal.2d 351, 368.)

The cases suggest that where more water than necessary is being used for a particular purpose, and reasonable, feasible conservation measures exist, the existing (over)use may be unreasonable. As noted above, in the 1980s, the SWRCB found some of the Imperial Irrigation District’s irrigation practices to be unreasonable and wasteful, and directed Imperial to adopt water conservation measures. (*Imperial Irrigation District v. State Water Resources Control Board, supra*, 225 Cal.App.3d 548.) Similarly, in *Erickson v. Queen Valley Ranch Company* (1971) 22 Cal.App.3d 578, the court held that diverting water through an unlined canal through sandy desert soil, which resulted in loss of 5/6 of the flow en route to its use, was an unreasonable method of diversion, notwithstanding that it was the historical practice and similar to the custom of the locality. The appellate court urged the lower court to develop a solution that would roughly protect priorities while avoiding unreasonable use. (See also, *City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316 [physical solution to be developed to protect senior water rights holders while avoiding waste].)

At some point in the future, the Legislature, the SWRCB or the courts may declare that water use not in compliance with defined urban or agricultural water use efficiency

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<sup>4</sup> Plaintiffs later amended their complaint to add a public trust doctrine cause of action. Following a trial, Judge Hodge, the trial judge, issued a judgment containing a physical solution that acknowledged both EBMUD’s need for high quality water, and the need to protect trust resources in the Lower American River. EBMUD could divert water into the Folsom South Canal at Nimbus Dam, but only when certain instream flows (the “Hodge flows”) were present in the Lower American River. EBMUD and Sacramento County are currently constructing a project to divert water from the Sacramento River.

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measures/best management practices is unreasonable.<sup>5</sup> The Legislature has enacted the Urban Water Management Planning Act, Water Code sections 10610 et seq., which declares that the conservation and efficient use of urban water supplies are a matter of statewide concern and stresses the need for urban water management to achieve the efficient use of water. (Wat. Code, §§ 10610.2 (a) (2), 10610.4.) The Legislature may, in the future, make findings regarding reasonableness in other contexts as well.

## II. The SWRCB's Adoption and Implementation of Water Quality Standards May Also Result in Reallocation of Water.

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.). In the *Racanelli* case, the court addressed challenges to the SWRCB's Decision 1485, a combined water quality and water rights decision regarding the Delta. The court discussed the Board's obligations under the Porter-Cologne Act:

In its *water quality* role of setting the level of water quality protection, the Board's task is not to protect water rights, but to protect 'beneficial uses.' The Board is obligated to adopt a water quality control plan consistent with the overall statewide interest in water quality (§ 13240) which will ensure 'the reasonable protection of *beneficial uses*.' (§13241, italics added). Its legislated mission is to protect the 'quality of all the waters of the state . . . for use and enjoyment by the people of the state.' (§ 13000, 1st par., italics added.)

(*United States v. State Water Resources Control Board* ("Racanelli"), *supra*, 182 Cal.App.3d at p.116.)

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<sup>5</sup> Since at least 1987, the SWRCB has inserted in new permits, and in existing permits as a condition for granting extensions of time, a condition subjecting the permit to the Board's continuing authority to prevent unreasonable use. The permit term states that the board may exercise specific requirements, and may require the permittee (after notice and opportunity for hearing) to implement a water conservation plan, which may include but will not be necessarily limited to: "(1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing maintaining, and operating efficient water measuring devices . . ." (23 Cal. Code Regs., § 780, subd. (a.) Under Water Code section 275, the Board could require such measures if it determined they were necessary to prevent unreasonable use, even if there were no such condition in the permit.

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The Court held that the Board had erred in Decision 1485 by setting water quality standards at the levels that would have been present had the Central Valley Project (CVP) and the State Water Project (SWP) not been constructed. It should have set the water quality standards to protect beneficial uses, even if that meant that other users would also have to contribute. “[W]e believe the Board cannot ignore other actions which could be taken to achieve Delta water quality, such as remedial actions to curtail excess diversions and pollution by other water users.” (*Id.* at p. 120.)<sup>6</sup>

The court upheld the SWRCB’s imposition of water quality responsibilities jointly on the CVP and the SWP notwithstanding the fact that they had different water rights priorities. The court stated that the Board’s power to set permit terms includes the power to consider the “relative benefit to be derived.” (Wat. Code § 1257.) It opined that “logically [the Board] should also be authorized to alter the historic rule of ‘first in time, first in right’ by imposing permit conditions which give a higher priority to a more preferred beneficial use even though later in time.” (*Racanelli, supra*, at p. 132)

The Water Board’s authority to revise the permits for the CVP and SWP was also grounded in its power to prevent unreasonable use or unreasonable methods of diversion of water under article X, section 2. In the *Racanelli* Decision, *supra*, 182 Cal.App.3d 82, the court held that the constitutional provision authorized the SWRCB to modify permit terms to prevent unreasonable use. In Decision 1485, the Board had determined that changed

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<sup>6</sup> More recently, in *El Dorado Irrigation District v. SWRCB, supra*, 142 Cal.App.4th 937, the court reiterated that the SWRCB has a legitimate interest in having upstream diverters other than the CVP and SWP contribute their share toward achieving water quality standards. It noted that the Board had the power to convene a proceeding that would encompass El Dorado and junior appropriators in order to determine their obligations to contribute to Delta water quality. It suggested that the Board’s Bay-Delta water rights hearings could have been such a proceeding. (*Id.* at pp. 969-70.)

The *El Dorado* court also grappled with the role of priority in determining responsibility for meeting water quality objectives:

“This is not to say that in seeking to ensure water quality objectives are met, the Board must strictly adhere to priorities and impose the obligation to meet those objectives on junior appropriators before imposing *any* of that obligation on senior appropriators. The Board undoubtedly has the power to allocate the burden of meeting water quality objectives based on more than priorities alone. At the same time, however, the Board cannot disregard priorities without substantial justification.”

(*El Dorado Irrigation Dist., supra*, at p. 967, fn. 21.)

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circumstances revealed new information about the adverse effects of the CVP and SWP (Projects) and that such information necessitated revisions to water quality standards. The court concluded that the Board had made an implicit finding that the Projects' methods of use had become unreasonable because of their deleterious effects upon water quality. The court determined that this was essentially a policy judgment that the Board was qualified to make in view of its special knowledge and expertise. (*Id.* at pp. 129-30.)

The court upheld D-1485's elimination of a water quality standard for salinity at Antioch for the benefit of local companies making salt-sensitive uses of water, because meeting that standard would require a wasteful release of 25 acre-feet of water from upstream dams for each acre-foot diverted at Antioch. The Board's obligation is to provide "reasonable" protection for beneficial uses. (*Racanelli*, at pp. 143-44.)

Also in the *Racanelli* Decision, the court rejected the federal contractors' argument that the Board's actions in imposing increased water quality standards on the projects impaired the contractors' contract rights. The court noted that the CVP's appropriations are, by definition, conditional, subject to continuing jurisdiction, the provisions of article X, section 2, and the priorities of senior rights holders. Thus, the contractors could not have had any reasonable expectation that the contractual amounts of water would always be delivered. (*Id.* at pp. 145-48.)

Following the *Racanelli* decision, the SWRCB engaged in a multi-year effort that resulted in the adoption of a new Water Quality Control Plan for the Bay-Delta in 1995. The plan established water quality objectives, including flow standards, for the protection of fish, in addition to standards to protect other beneficial uses. The Board then commenced a water rights proceeding to determine the responsibilities of water rights holders to contribute to meeting the water quality standards of the plan. That proceeding culminated in Decision 1641. Several parties challenged the Board's decision. In *State Water Resources Control Board Cases* (2007) 136 Cal.App.4th 674, the Court of Appeal largely upheld the Board's decision, and its broad discretion to adjudicate water rights (*id.* at pp. 724-734), but determined that the Board erred by failing to implement certain flow and salinity objectives in the Plan

### **III. The Public Trust Doctrine Imposes on the State an Obligation of Continuing Supervision Over the Diversion and Use of Water. In the Planning and Allocation of Water Resources, the State Is To Protect Public Trust Uses Whenever Feasible.**

#### **A. The Public Trust Doctrine—General Principles**

The public trust doctrine is another principle that may lead to the reallocation of water. The California Supreme Court explained the public trust doctrine and its application to the California water rights system in *National Audubon Society v. Superior Court*, *supra*, 33 Cal.3d 419. The public trust doctrine embodies the principle that the state as sovereign

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owns “all of its navigable waterways and the lands lying beneath them ‘as trustee of a public trust for the benefit of the people.’” (*Id.* at p. 434 quoting *Colberg, Inc. v. State of California ex rel Dept. Pub. Works* (1967) 67 Cal.2d 408, 416.) Traditional public trust uses included navigation, commerce and fishing. California law has expanded the traditional public trust uses to include such uses as hunting, fishing, bathing, swimming, boating, and general recreational purposes, as well as to preserve trust lands and waters in their natural state, “so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259-60.)

As early as 1884, the courts observed that “the rights of the people in the navigable rivers of the State are paramount and controlling. The state holds the absolute right to all navigable waters and the soils under them . . . .” The state holds the soil as trustee of a public trust for the benefit of the people, and it cannot grant the rights of the people to the use of the navigable waters flowing over the soil. (*People v. Gold Run Ditch and Mining Co.* (1884) 66 Cal. 138, 151.) The state’s power to control and regulate its waters within the terms of the trust is absolute except as limited by the power of the federal government over navigable waters. (*Colberg, Inc. v California Dept. of Public Works, supra*, 67 Cal.2d at p. 416.)

No party may acquire a vested right to appropriate water in a manner harmful to the resources protected by the public trust. (*National Audubon, supra*, at pp. 425-426, 437, 440, 445, 447, 452.) “Like the rule against unreasonable use, when the public trust doctrine clashes with the rule of priority, the rule of priority must yield.” (*El Dorado Irrigation District, supra*, 142 Cal.App.4th 937, 966.)

As a matter of practical necessity, the State, acting through the SWRCB, may have to approve some appropriations even though they may harm trust uses. (*National Audubon, supra*, at p. 446.) However, the state has an affirmative duty to take the trust into account when it allocates water, and to protect public trust uses whenever feasible. (*Id.* at p. 446. See also, *id.* at p. 426 [“before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests”].) Once the SWRCB has granted a permit or license, the public trust imposes a “duty of continuing supervision” over the use of the water, and the SWRCB may reconsider past water rights allocations. (*Id.* at p. 447.) “In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.”(*Ibid.*)

Thus, when present uses of water are harmful to ecosystems protected by the public trust, the SWRCB may reconsider current allocations of water, and has the obligation to protect trust uses whenever feasible. (*National Audubon, supra*, at p. 446.) The California Supreme Court agreed with prior authorities that assumed that trust uses “relate to uses and

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activities in the vicinity of the lake, stream or tidal reach at issue [citations deleted].” (*Id.* at p. 440.) Thus the “interests protected by the public trust are nonconsumptive, in-stream uses, including navigation, fishing, recreation, ecology and aesthetics.” (*Racanelli, supra*, at p. 150, fn.41.) The public trust is “an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” (*National Audubon*, at p. 441.) As in the case of the reasonable use doctrine, the SWRCB and the courts have concurrent jurisdiction to enforce the public trust doctrine. (*Id.* at p. 451.)

The public trust doctrine empowers the SWRCB or the courts to modify or limit existing water rights in order to protect fish and wildlife and other ecosystem elements in the Delta and its tributaries.<sup>7</sup> (*United States v. State Water Resources Control Board* (“*Racanelli*”), *supra*, 182 Cal.App.3d 82.) In a challenge to SWRCB’s Decision 1485, the Bureau of Reclamation asserted that the Board did not identify the source of its authority to impose new conditions on existing appropriative permits to protect fish and wildlife. The court held that such authority resided in the public trust doctrine and the issue was controlled by *National Audubon*:

In that case, the Supreme Court clarified the scope of the ‘public trust doctrine’ and held that the state as trustee of the public trust retains supervisory control over the state’s waters such that no party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust.... This landmark decision . . . firmly establishes that the state . . . has continuing jurisdiction over appropriation permits and is free to reexamine a previous allocation decision.

(*Racanelli, supra*, at pp. 149-150.) The Court concluded: “In the new light of *National Audubon*, the Board unquestionably possessed legal authority under the public trust doctrine to exercise supervision over appropriators in order to protect fish and wildlife. That important role was not conditioned on a recital of authority. It *exists* as a matter of law itself.” (*Id.* at p. 150, emphasis in original.) The recent *State Water Resources Control Board Cases, supra*, 136 Cal.App.4th at p. 806, fn. 54 reaffirmed that the rights of appropriators are always subject to the public trust doctrine.

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<sup>7</sup> The same standard permit term that subjects water rights permits to the SWRCB’s authority to prevent unreasonable use of water (see footnote 5, *supra*) also provides that all rights and privileges under the permit and any license granted thereon are subject to the continuing authority of the Board to protect public trust uses. (23 Cal. Code Regs., § 780, subd. (a.)

## **B. Public Trust in Fish and Wildlife**

In addition to the traditional public trust doctrine that exists in the context of navigation and tidelands, the courts have held that the state owns the fish in its streams, and indeed all wildlife, in trust for the public. (*California Trout v. State Water Resources Control Board* (“*Cal. Trout I*”) (1989) 207 Cal.App.3d 585, 629-30 and cases cited therein.) The state’s ownership of fish even in non-navigable streams is “a species of property” held by the people. (*Id.* at p. 630.) Over 100 years ago, the California Supreme Court held in *People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 399 that the state as sovereign holds “the right and power to protect and preserve such property for the common use and benefit.” This branch of the public trust doctrine has been applied to protect fisheries in many cases. (*People v. Glenn Colusa Irrig. Dist* (1932) 127 Cal. App. 30; *People v. K.Hovden Co.* (1932) 215 Cal. 54, 56; *People v. Monterey Fish Products Co* (1925) 195 Cal. 548, 563-64; and *People v. Stafford Packing Company* (1924) 193 Cal. 719, 725-26. See also discussion of nuisance, below.) Trust principles have been applied to protect fish and wildlife habitat. (*State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 245.) Water rights are subject to the state’s sovereign power to protect its fish and wildlife. (*People v. Murrison* (2002) 101 Cal.App.4th 349, 361.)

## **C. Fish and Game Code Section 5937—A Legislative Expression of the Public Trust**

Related to the public trust doctrine is Fish and Game Code Section 5937, which requires the owner of a dam to release sufficient water to keep fish below the dam in good condition.<sup>8</sup> This statutory provision has been characterized as a “specific legislative rule concerning the public trust.” (*California Trout I, supra*, 207 Cal.App.3d at p.631.) In *Cal Trout I* and *California Trout v. Superior Court* (“*Cal Trout II*”) (1990) 218 Cal.App.3d 187, the court held that the SWRCB had a duty pursuant to section 5946 of the Fish and Game Code to insert a condition requiring compliance with Fish and Game Code Section 5937 in the City of Los Angeles’ water rights licenses for its diversion of water from four streams tributary to Mono Lake. The court concluded that the Legislature had resolved the competing claims for the use of water in favor of preservation of the fisheries. (*Cal Trout I*, at pp. 622-625; *Cal Trout II*, at p.195.) “Section 5946 fixe[d] the priority of the public trust in fisheries for the streams to which it applies.” (*Cal Trout II*, at p. 208.)

In *Cal Trout II*, the court determined that the SWRCB should have imposed interim stream flows while it decided upon permanent flows for the streams. When it failed to do so, the Court of Appeal ordered the Superior Court to establish appropriate interim flows. (*Cal Trout II*, at p. 211.) Ultimately the SWRCB determined the necessary stream flows, along with Mono Lake levels, in its Decision 1631. Implementation of Fish and Game Code Section 5937 resulted in increased flows in four streams tributary to Mono Lake, and a

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<sup>8</sup> We will address additional statutory provisions for the protection of wildlife, including the California Endangered Species Act, in a separate letter.

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resulting reduction in the amount of water received by the City of Los Angeles pursuant to its water rights.<sup>9</sup> Fish and Game Code sections 5937 and 5946, in combination with the public trust doctrine, thus resulted in a reduction of consumptive use in order to protect fish.

Section 5937 was also the basis of a challenge by the Natural Resources Defense Council to the Bureau of Reclamation's operation of Friant Dam on the San Joaquin River. NRDC alleged that Reclamation was not releasing sufficient water from the dam to keep fish below the dam in good condition. The federal Court agreed that Section 5937 had been violated. (*NRDC v. Patterson* (2004) 333 F.Supp.2d 906.) Before a trial on the amount of water required to comply with the law was held, the parties negotiated a flow regime and settled the case, although necessary Congressional approval has not yet been achieved. (See HR 4074 [Costa].) In any event, the case serves as precedent for reallocation of water in order to protect fish. Section 5937 has provided a basis for requiring additional releases of water for fish in other cases as well, including litigation involving releases from the Solano Diversion Dam to benefit fish in Putah Creek.

Section 5937 requires reallocation of water in those cases where it applies—dams releasing insufficient water for fish below the dam. Whether it has any application to the Delta, however, is not clear because the statute does not define “below” the dam. The Delta is “below”, that is, downstream of, the dams on its tributaries. Some might argue that if insufficient water is being released by dams upstream of the Delta to keep Delta fish in good condition, section 5937 might apply to require additional releases for the benefit of Delta fish. However, in *Cal. Trout I, supra*, 207 Cal.App.3d at p. 632 the court held that section 5946 was not germane to every existing dam along the course of waterways traversed by appropriated water after it has been diverted and thus did not apply to the Owens River below the downstream Long Valley Dam.

#### **D. Nuisance**

California nuisance law closely parallels the public trust doctrine and the doctrine of public ownership in fish. Nuisance includes interference with another's use and enjoyment of his property and the unlawful obstruction of the free passage of a navigable stream. (Civil Code, § 3479.) In *People v. Gold Run Ditch & Mining Co., supra*, 66 Cal. 138, 151-152, the court affirmed a judgment for a perpetual injunction against hydraulic mining, based on the concepts of public trust and nuisance. Hydraulic mining cast large amounts of debris into the navigable waters of the state “to the endangerment of habitation and cultivation of large tracts of country, upon which are cities, towns and villages, and to the impairment of the navigation of the Sacramento River.” (*Id.* at p. 146.) Holding that the state holds the title to all navigable waters and the soils under them as trustee of a public trust for the benefit of the people (*id.* at pp. 151-52), the court enjoined hydraulic mining,

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<sup>9</sup> Public funding was provided for some projects to assist Los Angeles in replacing the water it lost.

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which by interfering with navigation was interfering with the state's property. As the court explained:

As a navigable river, the Sacramento is a great public highway in which the people of the State have paramount and controlling rights. These rights consist chiefly of a right of property in the soil, and a right to the use of the water flowing over it, for the purposes of transportation and commercial intercourse. . . . An unauthorized invasion of the rights of the public to navigate the water flowing over the soil is a public nuisance. . . .

(*Id.* at p. 146.) Although hydraulic mining was based on a local custom, the practice had come to threaten the safety of the people and cause destruction to public and private rights, and thus the custom had become unreasonable and constituted a nuisance. (*Id.* at p. 151.) Moreover, the Court held that the miners had no vested right to continue their activity, despite its longstanding existence. (*Ibid.*) This case thus combines the concepts of public trust, unreasonable use, and nuisance.

Acts which interfere with the state's property in its fishery resources have also been characterized as both statutory and common law public nuisances, on the ground that such acts interfere with the state's property interest in fish. (*People v. Truckee Lumber Co.*, *supra*, at p. 400.) In *Truckee Lumber*, the state Attorney General obtained an injunction on a nuisance theory prohibiting the lumber company from discharging pollutants into the waters of the Truckee River, where they harmed fish life and unlawfully interfered with the property rights of the people of the state. Other cases have similarly found that acts which kill fish that live in the state's waterways constitute a public nuisance. (*People v. Glenn Colusa Irr. Dist.*, *supra*, 127 Cal.App. 30, 34-35, 38 [enjoining unscreened diversion of irrigation water which result in death of fish]; *People v. Monterey Fish Products Co.*, *supra*, 195 Cal. 548, 563-66 [waste of fish at processing plant].)

#### **E. Practical Application of the Public Trust Doctrine**

If diversions in and upstream of the Delta are harming public trust resources in the Delta, the public trust doctrine may be applied to protect the ecosystem. The unresolved issue is how the doctrine can be applied to obtain the water necessary for such protection. There are at least two potential approaches available, and they might be used in combination. First, where over-diversion of water is causing harm to trust resources, it may be necessary to reduce those diversions (or increase releases), in other words, those contributing to a violation of the trust will contribute *water*. Second, it is possible that water users contributing to the harm to trust resources could be assessed a fee, to be used to purchase water or to restore habitat or to take other measures, such as installation of fish screens, where those actions would be effective to offset the harm they are doing to trust resources, in other words, they will contribute *money*.

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A further question is which water users bear the burden of reducing the impact on trust resources. Where identifiable water users are causing harm to trust resources, they may be called upon to take such actions as are necessary to avoid or reduce the harm. These actions might consist of limitations on diversions, increased releases from reservoirs, or such measures as installation of fish screens. The more difficult situation is where multiple diversions each contribute incrementally to the impact on fish and other trust resources. The question then becomes whether the reductions/releases and the fees can be imposed equally on all those contributing to the harm, or whether the priority system would require the burden to fall most heavily on junior water rights holders.

There is little or no case law directly on point, although the decision in one of California's earliest public trust cases, *People v. Gold Run Ditch & Mining Co.*, *supra*, 66 Cal. 138, 150 is instructive. The *Gold Run* decision addressed a situation where a nuisance which interfered with the state's public trust interests was caused by the cumulative effects of many contributors. Citing *Hillman v. Newington*, 57 Cal. 62, the court enunciated "the equitable principle that, in 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." The court adopted the following description from a Maryland case:

It is no answer to a complaint of nuisance, that a great many others are committing similar acts of nuisance. . . . The extent to which the appellee has contributed to the nuisance may be slight, and scarcely appreciable. Standing alone, it might well be that it would only very slightly, if at all, prove a source of annoyance. And so it might be, as to each of the other numerous persons contributing to the nuisance. Each standing along might amount to little or nothing. But it is when all are united together, and contribute to a common result, that they become important, as factors, in producing the mischief complained of. And it may only be after, from year to year, the number of contributors to the injury has greatly increased, that sufficient disturbance of rights has been caused to justify a complaint. . . . In that state of facts . . . each element of contributive injury is a part of one common whole; and to stop the mischief in the whole, each part in detail must be arrested and removed."

(*Gold Run*, at p. 150, quoting *Woodyear v. Schaeffer*, 57 Md. 9.) The sort of incremental harm to trust resources described in this paragraph could be analogized to the harm done to public trust resources in the Delta, 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. This case suggests that the responsibility of reducing the harm to public trust uses may be spread over all who contribute to the injury.

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. The justification would be that each diverter contributes incrementally to the harm and should contribute proportionally to the solution. This was the approach proposed in the SWRCB's draft

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Decision 1630. In that draft decision, the SWRCB would have imposed the obligation to redress harm to public trust uses on all water rights holders of a certain size whose diversions were cumulatively affecting the Delta. The Board included those who diverted water upstream, as well as those who diverted in or from the Delta. The Board rejected the argument by senior water rights holders that the Board could not modify their water rights without first cutting off the diversions of junior appropriators and found that following the order or seniority would not be feasible or reasonable in that case.<sup>10</sup> (Draft D-1630, at p. 103-04.) Draft Decision 1630 was withdrawn and not adopted by the Board, but it does demonstrate an approach that could be considered in the future.

A current bill, SB 27, proposes a fee of five dollars (\$5) per acre-foot “on water agencies that divert water upstream of the delta, that, under existing state or federal laws, are not otherwise required to pay mitigation fees for impacts on ecological functions of the delta that are caused by their diversions.” This bill is presently held in committee and is not expected to be enacted in the current legislative year.

#### **IV. In Certain Emergency Situations, the State May Reallocate Water to Promote Public Health and Safety.**

##### **A. Emergency Services Act**

Government Code section 8550, et seq. (“Emergency Services Act”) provides that the state has the responsibility to mitigate the effects of natural emergencies which result in conditions of disaster or in extreme peril to life, property and the resources of the state.

Three types of emergency exist, “state of war emergency”, “state of emergency” and “local emergency”. (Gov. Code, § 8558.) The last two types of emergency would pertain to conditions, such as, fire, earthquakes, flood, drought, and/or sabotage. “State of emergency” means proclaimed existence of conditions of disaster or extreme peril to the safety of persons and property within the state (*id.* subd. (b)) and “local emergency” is the same except within the territorial limits of a county, city and county, or city. (*Id.*)

The Governor may proclaim a state of emergency in an affected area when the circumstances described in section 8558 (b) exist and he is asked to do so by the authorized representatives of a city or county or he finds that local authority is inadequate to cope with the emergency. (Gov. Code, § 8625) The Governor’s written proclamation of emergency takes effect immediately upon issuance. (Gov. Code, § 8626.) The Governor may make, amend, and rescind orders and regulations. (Gov. Code, § 8567.) During a state of emergency, the Governor shall have complete authority over all state agencies and the right to exercise the police power vested in the state by the Constitution and laws of the State of

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<sup>10</sup> If it was determined that priority should be used to modify water rights, it is noteworthy that the SWRCB has already assembled lists of post-1914 water rights by priority group, for use in the water rights hearings leading to Decision 1641.

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California, in accordance with provisions of section 8567. (Gov. Code, § 8627.) The Governor may assign to a state agency any activity concerned with the mitigation of the effects of an emergency of a nature related to the existing powers and duties of such agency. (Gov. Code, § 8595.) All possible assistance from state agencies, including, personnel, equipment and facilities shall be given to the Governor and to the Director of Office of Emergency Services. (Gov. Code, § 8596.)

Although the Governor has not been granted express statutory authority to order mandatory water rationing, his powers pursuant to a declaration of a 'state of emergency' under Government Code section 8550 are broad enough to encompass ordering mandatory rationing. An extreme drought may qualify as a 'state of emergency' and the governor's power to mandate rationing in such circumstances is within the police power vested in the state. (60 Ops.Cal.Atty.Gen. 99.)

**B. Public Water Suppliers May Reallocate Water to Promote Public Health and Safety When Emergency Shortages Exist.**

The governing body of a distributor of a public water supply, whether publicly or privately owned and including a mutual water company has the statutory power to ration water in times of shortage. A "water shortage emergency condition" may be declared when a water supplier "finds and determines that the ordinary demands and requirements of water consumers cannot be satisfied without depleting the water supply of the distribution to the extent that there would be insufficient water for human consumption, sanitation and fire protection." (Wat. Code, § 350.)

Once the public water supplier has declared a water shortage emergency, it may adopt regulations and restrictions on the delivery of water and the consumption of water "as will in the sound discretion of such governing body conserve the water supply for the greatest public benefit with particular regard to domestic use, sanitation, and fire protection." (Wat. Code, § 353.) After setting aside the amount of water required for those purposes, the supplier "may establish priorities in the use of water for other purposes and provide for the allocation, distribution, and delivery of water for such other purposes, without discrimination between consumers using water for the same purpose or purposes." (Wat. Code, § 354.) The regulations remain in effect during the period of the emergency. (Wat. Code, § 355.) Where the regulations or restrictions on the delivery and use of water adopted conflict with any law establishing the rights of individual consumers to receive either specific or proportionate amounts of the water available to be distributed within the supplier's service area, "*the regulations and restrictions adopted pursuant to this chapter shall prevail over the provisions of such laws relating to water rights for the duration of the period of emergency,*" provided that if the supplier is subject to regulation by the Public Utilities Commission, the Commission must approve the regulations and restrictions. (Wat. Code, § 357, italics added.)

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County water districts have the power to restrict uses of water in cases of drought or other threatened or existing water shortage. (Wat. Code, § 31026.) The district may prohibit waste of district water “or the use of district water during such periods, for any purpose other than household uses or such other restricted uses as may be determined to be necessary by the district and may prohibit use of such water during such periods for specific uses which the district may from time to time find to be nonessential.” (*Ibid.*) Identical powers are conferred on municipal water districts pursuant to Water Code section 71640.

Urban water suppliers are required to prepare an urban water management plan that is to include a water shortage contingency analysis that will describe stages of action to be undertaken in response to water shortages, including up to a 50 percent reduction in water supply, and the measures to be taken at each stage. (Wat. Code, § 10632, subd. (a).)

The State Water Resources Control Board under Water Code section 1058.5 may adopt an emergency regulation “to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote wastewater reclamation, or to promote water conservation and is adopted in response to conditions in a critically dry year immediately preceded by two or more consecutive dry or critically dry years.” Emergency regulations are required to be approved by the Office of Administrative Law.

Water Code section 1810, subdivision (c) provides that any person or public agency that has a water service contract the owner of a conveyance facility may utilize the unused capacity of the facility in the event of an emergency. “Emergency” means a sudden occurrence such as a storm, flood, fire or an unexpected equipment outage impairing the ability of a person or public agency to make water deliveries. (Wat. Code, § 1811 (b).)

Water Code section 79520 provides for an appropriation of \$50,000 to protect state, local and regional drinking water systems from terrorist attacks or deliberate acts of destruction or degradation to prevent disruption of drinking water deliveries and to protect drinking water supplies from intentional contamination.

#### **V. Other tools for water reallocation exist.**

Another set of tools that are likely to result in some level of water reallocation in the coming years are the “area of origin” laws. We discuss them in a separate letter.

Public agencies retain the ability to purchase or condemn water or water rights for public use. They may also purchase or condemn land that has water rights.

In recent years, the most-used tool for changing the place or purpose of water use, thus reducing some uses and augmenting others, is water transfer. We will not address transfers here. Transfers were discussed in our letter of September 18, 2007. The best authority remains the SWRCB’s *A Guide to Water Transfers* (Draft, 1999) (available at

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[www.waterrights.ca.gov/watertransfer](http://www.waterrights.ca.gov/watertransfer)). It the policy of the state to encourage water transfers where beneficial to the place of origin and the place of use. (Wat. Code, §§ 109, 475.)

Finally, we note that in times of over-allocation, it is important to reduce unauthorized uses. As discussed in our prior letter, the SWRCB may bring enforcement actions for use of water without a valid water right (Wat. Code, § 1052; *People v. Shirikow*, *supra*, 26 Cal.3d 301) and it may revoke permits or licences where the holder is not in compliance with the terms therein (Wat. Code §§ 1611, 1675.) Water Code section 1825 provides: “It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of permits, licenses, certifications, and registrations to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water.”

### CONCLUSION

The state, acting through the Legislature, the SWRCB and other state agencies, and the courts, has considerable ability to reallocate water when necessary to prevent unreasonable use, achieve water quality, protect the public trust, avoid nuisance and respond to emergency situations.

Sincerely



VIRGINIA A. CAHILL  
Deputy Attorney General

For EDMUND G. BROWN JR.  
Attorney General

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cc: Matt Rodriquez (With attachments)

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