

## Upstream Users, Export Projects and the Delta: A Historical Summary

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One of the questions raised by the Delta Vision process and others is the extent to which upstream water users in the Sacramento and San Joaquin basins should share in the responsibility for meeting water supply and ecosystem requirements in the Delta with the federal and state projects exporting water from the Delta. This paper will briefly examine the history behind that issue.

California faced several challenging water problems in the 1920s, among them a severe shortage in the southern San Joaquin Valley and the movement of tidal salinity into the Delta. In 1920 the town of Antioch sought to enjoin dozens of upstream diverters from diminishing the outflow that could repel the salt water. When that suit failed, others were filed pitting Delta water users against hundreds of upstream agencies and individuals. It was in this context of inter-regional water crises that state engineers developed the multi-purpose, multi-basin plan that became the Central Valley Project.

The state's project was outlined in Division of Water Resources Bulletin No. 25 in 1930. The fundamental concept was described as follows: "Under this plan, the basins favored with water in excess of their needs would be furnished regulated supply in accordance with the requirements of their ultimate development. Waters in excess of those

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requirements would be conveyed to areas of deficiency.”<sup>2</sup> Under the plan, releases of water from Kennett (Shasta) reservoir would control Delta outflow and prevent salinity from invading the agricultural Delta, while a canal would provide fresh water to Contra Costa County. An important additional benefit of salinity control was elimination of the imminent threat of a protracted and damaging valley-wide water rights adjudication. Excess water would also be exported to the San Joaquin Valley where, through an exchange arrangement, it would alleviate the shortages plaguing Tulare and other counties.

Bulletin No. 25 described how the “ultimate water requirements” of each basin were calculated, and it was clearly intended that only water surplus to those requirements would be exported to other areas. Upstream interests, especially in the Sacramento Valley, worried that the state might declare as “excess” some of the water they would need for future development. After all, the example of Owens Valley was all too familiar. To assuage those concerns, legislation referred to as the County of Origin Act was adopted in 1931 granting a priority, against state applications only, to counties for the use of water originating within their boundaries. A 1931 joint legislative committee report made clear “no water should be diverted from the area of origin which is now or which may ever be required for any beneficial use within such area of origin.”<sup>3</sup> That more inclusive terminology became part of the Central Valley Project Act two years later:

In the construction and operation by the authority 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 authority 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. ...<sup>4</sup>

The Watershed of Origin law, also referred to as the Watershed Protection Act, gave specific meaning to how upstream requirements, and the “surplus” or “excess” water available for project export use, should be defined.

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<sup>2</sup> Division of Water Resources, Bulletin No. 25, Report to the Legislature of 1931 on State Water Plan (1930), p.35.

<sup>3</sup> Report of the Joint Committee of the Senate and Assembly Dealing with the Water Problems of the State, March 23, 1931, p. 29.

<sup>4</sup> This part of Section 11 of the Central Valley Project Act became Water Code Section 11460.

The Central Valley Project was transferred to the federal government, but in the 1950s California designed a new project on the same principle as the CVP; that is, the capture of surplus water for use in areas of deficiency, mostly in the San Joaquin Valley and southern California. By connecting populous and politically powerful southern California directly to the Delta and the north state's water, fears of a "water grab" were rekindled. The state, therefore, reaffirmed its commitment to the area of origin protections enacted in the 1930s by recognizing them in State Water Project water service contracts and in the 1959 Delta Protection Act. The part of the Delta Protection Act that became Section 12200 of the Water Code clearly and concisely summarizes the relationship between the new State Water Project on the one hand and upstream, and Delta, users on the other:

... the State Water Resources Development System has as one of its objectives the transfer of waters from water-surplus areas in the Sacramento Valley and the north coastal area to water-deficient areas to the south and west of the Sacramento-San Joaquin Delta via the Delta; water surplus to the needs of the areas in which it originates is gathered in the Delta and thereby provides a common source of fresh water supply for water-deficient areas.

The fundamental commitment to use only "water surplus to the needs of the areas in which it originates" was reinforced by Section 12201, which, with regard to exports, required that "delivery of such water shall be subject to the provisions of Section 10505 [County of Origin, 1931] and Sections 11460 to 11463, inclusive [Watershed of Origin, 1933], of this code." Taken together Sections 12201 and 12204 make project exports subject to the prior needs of both the Delta and upstream areas of origin.

In analyzing the meaning of the Delta Protection Act, the State Water Resources Control Board said in 1993:

... the Delta Protection Act applies to the effects of diversion and export of water from the Delta by the State Water Project and the Central Valley Project. It makes Delta protection subject to the two projects' satisfaction of the reasonable and beneficial uses of the areas of origin, under Water Code Sections 10505 and 11460-11463. Thus, the purpose of the Act is to protect the Delta from export effects, not to restrain upstream development.<sup>5</sup>

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<sup>5</sup> State Water Resources Control Board, Order WR 93-2, January 1, 1993, p. 12.

This statement underscores the fact that in exporting water from the Delta the projects are responsible for the effects of those exports on the Delta, and that the export function of the projects is subject to the needs of the areas of origin.

The Delta Protection Act also reaffirmed the commitment to salinity control that had been an integral part of the original Central Valley Project legislation. Water Code Section 12202 states that “Among the functions to be provided by the State Water Resources Development System, in coordination with the activities of the United States 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.” Section 12202 also provides that if it becomes necessary to provide a substitute water supply in lieu of maintaining in-channel salinity at acceptable levels, the substitution would be at “no added financial burden” to Delta water users and would be subject to the watershed of origin laws.

The relationship between upstream users and the export projects in regard to meeting Delta water requirements is shaped by the projects’ general responsibility for salinity control and by the area of origin protection that was a consistent and integral part of each project’s purpose and intent. That protection includes, in the terms of the 1933 law, a prohibition on taking “directly or indirectly” water that the areas of origin need for their own use, which means the projects must be responsible for mitigating all of their export-related impacts. For example, water released to offset the effects of reverse flows or entrainment caused by the projects’ pumps has to be provided by the projects, and not by non-project upstream users. In a system as complex as the Delta, the nuances of application of these and other laws may be endlessly debatable, but the underlying principles are not.