Notes

THE DELTA WATER RIGHTS DECISION

As water resources become increasingly scarce, allocations must be made between competing demands for environmental and consumptive uses. In the Delta Decision the California Water Resources Control Board was called upon to make such an allocation. This Note evaluates that decision by analyzing applicable case law and statutory policy prescriptions. The author argues that, while the Delta Decision appears to contravene certain precedent applicable to the federal Central Valley Project, there are overriding policy considerations which ought to compel compliance by the appropriate federal, as well as state, agencies.

The Sacramento-San Joaquin Delta\(^1\) lies at the hub of California's mammoth statewide water development projects, the State Water Project (SWP), and the federal Central Valley Project (CVP). Located at the confluence of the Sacramento and San Joaquin Rivers, the Delta is the confluencing point for the Central Valley rivers whose waters pass through the Delta on their way to the Suisun and San Francisco Bays and thence to the Pacific Ocean. The Delta is the last location where "surplus" Northern California water,\(^2\) stored in upstream SWP and CVP storage facilities, can be diverted and transported to water-deficient portions of the State.\(^3\) As these statewide projects now operate, waters stored behind project dams in the winter are released in the summer to flow into and across the Delta, mixing with other flows on their way to the Pacific Ocean, to be pumped into aqueducts leading south to the Central Valley and Los Angeles.\(^4\)

Because the Delta's waterways are central to State water development, maintenance of the quality of the Delta's waters is essential. The major problem faced in this regard is intrusion of saline waters from the Pacific Ocean.

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1. The boundaries of the Delta are officially delineated at CAL. WATER CODE § 12220 (West 1971). See Figure 1 at 734 infra.
2. Water resources planning in California has been formulated in terms of the "surplus" of water in Northern California and the "deficiency" of water in Southern California. Consequently, the problem of water planning in California is to capture and store the Northern California water and transport it to water-deficient areas of the State. See Gill, Gray, & Seckler, The California Water Plan and Its Critics: A Brief Review, in CALIFORNIA WATER: A STUDY IN RESOURCE MANAGEMENT 5 (D. Seckler ed. 1971).
3. CAL. DEP'T OF WATER RES., STATE RES. AGENCY, BULL. NO. 76, DELTA WATER FACILITIES 10 (1960) [hereinafter cited as BULL. NO. 76].
4. For a description of the nature and operation of the SWP and CVP, see 1 H. ROGERS & A. NICHOLS, WATER FOR CALIFORNIA: PLANNING LAW & PRACTICE FINANCE §§ 26-89 (1967) [hereinafter cited as ROGERS & NICHOLS].
As is explained subsequently, the intrusion of the saline waters of the Pacific occurs when outflows from the Delta are insufficient to repel incoming ocean tides. In addition to threatening the water supplies diverted to Central and Southern California, salt water intrusion can adversely affect every water user within the Delta, as well as its recreational, fish, and wildlife resources. While the problem is not a new one, continued construction of

5. See text accompanying notes 24-28 infra.
6. See generally BULL. No. 76, supra note 3, at app. D (Salinity Incursion
upstream storage reservoirs to retain water for upstream consumptive uses and increased exportation of water out of the Delta to southern portions of the State threaten to reduce future Delta outflows, thereby intensifying the problems of salinity intrusion. To deal with this problem and to attempt to define at least a temporary solution, the California Water Resources Control Board conducted extensive hearings during 1969 and 1970, and in 1971 issued the landmark Delta Water Rights Decision.8

The Delta Decision ushered in a new era in the administration of water rights, particularly in relation to the Board's treatment of the "public interest" in allocating the State's water resources. In its promulgation of the State the Delta Standards,9 designed to protect not only the quantity of water in the Delta but also the quality of water required in the public interest to protect beneficial uses in the Delta, the Board held that water previously scheduled for delivery to water-deficient portions of the Central Valley and Southern California would be retained in the Delta to augment Delta outflows repelling salinity intrusion from the Pacific Ocean.10 To implement these standards, the Board imposed strict controls on the use of waters flowing into the Delta,11 established fixed water quality standards to protect beneficial uses within the Delta (including domestic, irrigation, municipal, indu-

and Water Resources (April 1962)); F. TARP, ECOLOGICAL EFFECTS OF FEDERAL-STATE WATER PLANNING ON THE DELTA FISHERIES (Report to the Contra Costa County Bd. of Supervisors 1967).

Municipal, industrial, and agricultural water users in many cases must abandon their water supplies in the lower regions of the Delta and seek other more expensive water sources during the summer low-flow period. Birds migrating in the Pacific Flyway are also affected. As salt water intrudes into Suisun Marsh, salt-tolerant plants, such as pickleweed and salt grass, replace the natural fresh-water vegetation. Since the salt-tolerant plants are a less desirable source of food, the carrying capacity of this important feeding area is diminished. FED. WATER POLLUTION ADMINISTRATION, U.S. DEP'T OF THE INTERIOR, SAN JOAQUIN MASTER DRAIN: EFFECTS ON WATER QUALITY OF SAN FRANCISCO BAY AND DELTA 15 (1967) [hereinafter cited as FWPCA REPORT].

7. The first recorded reference to salinity intrusion into the Delta was reported by Commander Ringgold of the U.S. Navy in 1841. "During August of that year, Commander Ringgold encamped near the present site of Antioch and reported the river water as being brackish and unfit to drink." CAL. DEP'T OF WATER RES., STATE RES. AGENCY, THE DELTA AND THE STATE WATER PROJECT: MEMORANDUM REPORT 11 (1969) [hereinafter cited as MEMORANDUM REPORT]. For a chronology of events regarding salinity control in the Delta, see Cal. Water Rights Bd. Decision D 990, separate opinion by W. Rowe, dissenting in part, at 4-8 (Feb. 9, 1961).


9. Id. at 37.

10. Id. at 43-45. It has been estimated that if the Secretary of the Interior decides to abide by the requirements of the Delta Decision, the water available for the CVP to fulfill its delivery contracts would be reduced by 1.1 to 2.2 million acre-feet per year, depending upon whether or not the State proceeds with the Peripheral Canal. The effect on the SWP is estimated to be a reduction by some 1.7 million acre-feet per year of water available for project deliveries. Cal. Water Res. Ass'n Newsletter, Nov. 5, 1971, at 2, col. 1.

11. Delta Decision, supra note 8, at 40.
trial, recreational, and fish and wildlife purposes), and declared that the public interest required that these uses be protected, regardless of the nature or extent of vested water rights. The Board further required releases of water stored in statewide water projects (both the CVP and SWP) into the Delta, as necessary, to maintain these standards.

Following a discussion of the historical and legal context in which the Board made the Delta Decision, this Note will explore the issue which now surrounds the decision—has the Board the power to enforce it?

I

THE ROLE OF THE DELTA IN THE CALIFORNIA WATER DEVELOPMENT SYSTEM

A. The Delta and Salinity Intrusion

The California topography is dominated by two mountain chains, the Sierra Nevada in the east and the Coastal Ranges in the west. The chains converge at Mount Shasta in the north and are joined by the Tehachapi Mountains in the south to enclose the great Central Valley. Four hundred fifty miles in length and between 30 and 60 miles wide, the Central Valley is made up of three parts: the Sacramento Valley, drained by the Sacramento River; the San Joaquin Valley, drained by the San Joaquin River; and the Delta, the region where the two rivers join, turn westward, and eventually empty into the Pacific Ocean.

The Delta covers a total area of approximately 738,000 acres, interlaced with more than 700 miles of waterways. In its natural state the Delta was a vast low-lying marshland, replenished each year by winter floods. Early settlers in the area recognized the agricultural potential of the area and reclamation efforts began as early as 1852. By 1930 reclamation had changed the Delta into a series of sunken islands, with high levees to protect against flooding, and pumps to protect against seepage. Since that time, the Delta has become an increasingly valuable recreational, agricultural, industrial, and fishery resource—a "man-made ecosystem."

12. Id. at 28-34.
13. Id. at 36-37. By declaring that such protection should be afforded whether or not the water was beneficially used pursuant to vested rights, the Board found it unnecessary to arrive at permit terms for salinity control limited to protection of vested rights and dispensed with the need for a definition of such rights, a judicial function which the Board felt it had no jurisdiction to undertake. Id.
14. Id. at 42-43.
15. BULL. No. 76, supra note 3, at 8.
16. Delta Decision, supra note 8, at 5.
17. Id. at 4.
18. Id.
19. Id. at 5 (emphasis in original).

The estimated total recreational use of the Delta waters in 1965 was 17.9 million participation-days. FWPCA REPORT, supra note 6, at 32-33. See also BULL. No. 76, supra note 3, app C (Recreation (Aug. 1962)). Agricultural diversions from the Delta channels average 3.6 million acre-feet an-
The major problem threatening the use of Delta waters by the statewide water development projects is intrusion of the saline waters of the Pacific Ocean. Saline intrusion becomes a problem during the summer and early fall months when the level of fresh water outflow from the Delta is insufficient to repel ocean waters moved upstream by oceanic tidal action through the San Francisco and Suisun Bays and into the Delta water system. The level of the outflow during any given season is the difference between the total level of inflow water supply and the total water utilization or export. The Delta produces potatoes, celery, corn, milo, grain, hay, and most of the nation's canned asparagus. Industrial uses of Delta water include cooling, rinsing, and processing systems in the production of steel, paper products, fibreboard, and chemicals. The Delta's value as a fishery resource is enhanced by the presence of over 188 species of fish in the San Francisco Bay-Delta complex. Among these are three particularly important anadromous species: the striped bass, the King Salmon, and the American shad. Because of their anadromous characteristics, these species are particularly vulnerable to degraded water quality. The Delta Protection Act, CAL. WATER CODE §§ 12200-05 (West 1971) provides: The legislature hereby finds that the water problems of the Sacramento-San Joaquin Delta are unique within the state; the Sacramento and San Joaquin Rivers join at the . . . Delta to discharge their fresh water flows into Suisun, San Pablo and San Francisco Bays and thence into the Pacific Ocean; the merging of the fresh water with saline bay waters and drainage waters and the withdrawal of fresh water for beneficial uses creates an acute problem of salinity intrusion into the vast network of channels and sloughs of the Delta; 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 areas to the south and west of the . . . Delta, via the Delta; water surplus to the needs of the areas in which it originated is gathered in the Delta and thereby provides a common source of fresh water supply for water-deficient areas. The reason that salinity intrusion creates such an acute problem is because the effects of the waves of the Pacific are felt far into the Delta. This is the result of the very low gradients of both the Sacramento and San Joaquin Rivers in their lower reaches. In the 61 miles from Sacramento to the Suisun Bay, the Sacramento River falls at the average rate of 0.07 foot per mile, while the San Joaquin River, from the mouth of the Stockton Channel to the Suisun Bay, falls at an average rate of 0.02 foot per mile. As a consequence, under the low flows which occur in dry summers, tidal fluctuations can extend on the Sacramento River as far upstream as the mouth of the Feather River and on the San Joaquin to a point a few miles south of Mossdale, about 20 miles south of Stockton. The operations of the CVP and SWP in transferring surplus waters from the Sacramento River Basin across the Delta complicate the hydraulic picture by affecting movements of water within the complex of interconnected channels within the Delta itself. For example, the export of surplus waters at the Tracy Pumping Plant of the CVP and the Delta Pumping Plant of the SWP in the southern portion of the Delta cause a net upstream movement of water in certain channels to the pumps.
level of inflow is affected primarily by the flow level of the Sacramento and San Joaquin Rivers and their tributaries, the level of upstream consumption, the level of upstream storage operations, exports to non-Delta municipalities, and the quantity of stored water releases made by the CVP and SWP.22

As the level of water diverted for upstream development increases,23 thereby reducing the amount of Delta inflow, and more water is continually desired for export,24 it is clear that the level of outflow from the Delta to the Pacific Ocean to repel saline intrusions will continually decrease. At some point a maximum acceptable level of intrusion must be established by balancing the environmental and consumptive needs of the Delta with the needs of statewide water consumers.

B. The Statewide Water Projects


The people of California, indifferent to the bountiful gifts that Nature has given them, sit idly by waiting for rain, indefinitely postponing irrigation, and allowing every year millions and millions of dollars in water to pour unused into the sea, when there are hungry thousands in this and in other countries pleading for food and when San Francisco and the Bay Cities, the metropolitan district of California, are begging for water . . . . My solution of the whole problem is to turn the Sacramento River into the San Joaquin Valley, a feat which is now shown to be practicable as an engineering enterprise that is possible of execution within ten years and that would justify a cost, if necessary, of $750,000,000, be safe for the investor, present no legal obstructions, and provide for the present as well as the prospective land owner the most attractive proposition ever offered in the State. Remember, however, that the plan is a big, Statewide plan and also remember that success, as California measures success, is assured only when the enterprise is planned and carried out in its entirety.26

The Marshall Plan was followed by the passage of the Feigenbaum Act27 in 1927 authorizing the State to reserve such unappropriated water as might be necessary for the development of the State's water resources. Pursuant

22. BULL. No. 76, supra note 3, app. D, at 69-86 (Salinity Intrusion and Water Resources (Apr. 1962)).
23. It may be noted that, while the present upstream use accounts for reduction of natural inflow to the Delta by almost 25 percent, upstream development during the next 60 years will deplete the flow by an additional 20 percent. By that date about 22 percent of the natural water supply reaching the Delta will be exported to areas of deficiency by local, state and federal projects. BULL. No. 76, supra note 3, at 13 (preliminary ed.).
24. In 1966 the level of export from the Delta approximated 1,465,000 acre-feet. It is expected to increase to over 10,000,000 acre-feet by the year 2020. FWPCA REPORT, supra note 6, at 15.
25. R. MARSHALL, IRRIGATION OF 12 MILLION ACRES IN THE VALLEY OF CALIFORNIA (1919). Prior to this time water supply projects were conceived and consummated solely through local efforts. For a general history of water use and supply, see S. HARDING, WATER IN CALIFORNIA (1960).
to this legislation the State made 27 filings in 1927\textsuperscript{28} for what was in essence the implementation of the Marshall Plan, the Central Valley Project.\textsuperscript{29}

During the years which followed, however, the State found itself unable to finance the project and turned to the federal government for help in the construction of the project under federal reclamation laws.\textsuperscript{30} The federal government responded and with the Rivers and Harbors Acts of 1935\textsuperscript{31} and 1937,\textsuperscript{32} and the Central Valley Project became a federal reclamation project designed "first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power."\textsuperscript{33}

To allow the United States to obtain necessary water rights for the project, the State of California assigned to the Secretary of the Interior its appropriation applications originally filed in 1927;\textsuperscript{34} and in 1937 construction of the initial unit of the project, the Contra Costa Canal, began. The principal structure of the project, the Shasta Dam, located at the head of the Sacramento River, was completed in 1944. The period between 1946 and 1951 saw the completion of the Delta Cross Channel (constructed to transport surplus water from the Sacramento River across the Delta), the Delta-Mendota Canal (conveying water from the Delta southward into the Central Valley), and the Tracy Pumping Plant (constructed to elevate the surplus Sacra-

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  \item S. Harding, \textit{supra} note 25, at 47; Cal. Water Rights Bd. Decision D 990, at 5 (Feb. 9, 1961) [hereinafter cited as Decision D 990].
  \item The CVP at this time was envisaged to be a multi-purpose water project designed to (1) improve navigation, aid in flood control, and increase summer irrigation supplies in the Sacramento Valley; (2) provide flows adequate to prevent the intrusion of salt water through tidal action into the Delta and furnish a supply of fresh water for irrigation in the Delta and areas around Suisun Bay; (3) provide for the extension of the water supply into the industrial area on the south shore of Suisun Bay by means of a canal; (4) provide a system for transferring water up the channel of the San Joaquin River to a point near Mendota to provide an additional source of water to the upper San Joaquin valley when necessity required; and (5) provide water for developed areas having a deficient supply throughout the Central Valley by the storage of waters of the San Joaquin River. \textit{Cal. Res. Comm'\textcircled{N}}, \textit{Report to the Governor on State Water Plan 23-24} (1932).
  \item Rivers and Harbors Act of 1937, ch. 832, 50 Stat. 844:
  \item Id. at 850. Notably the project functions of salinity repulsion, fish protection, and recreation were not mentioned. It was concluded that salinity repulsion could be classified as a "supplemental irrigation" function, and fish protection and recreation as miscellaneous purposes, except insofar as fish protection would be achieved by maintenance of stream flow during the spawning season it could be considered under river regulation. H.R. Doc. No. 146, 80th Cong., 1st Sess. 7 (1947).
  \item Under its terms, the assignment was made in consideration of the general benefits to accrue to the State of California from construction of the project by the United States pursuant to the congressional authorization of 1937. Decision D 990, \textit{supra} note 28, at 49.
\end{itemize}
mento River waters out of the Delta and into the Delta-Mendota Canal). More recently an American River Division, the Trinity River Division, and the San Louis Unit have been added. The total reservoir capacity of the principal dams in the project amount to 8.5 million acre-feet of water. By 1965 the project was already transferring 1.7 million acre-feet of water through the Delta channels.

With the CVP under federal control, State interest again turned to the development of its own facilities. Investigations during the 1920's had shown that the construction of facilities on the Feather River at Oroville could be of value. These facilities were not included in the CVP because it was found that water storage at other proposed CVP dams would be more economical. The State interest in an Oroville facility continued, however, and in 1951 the State Water Resources Board published its plan for the Feather River Project. Subsequent reports showed the feasibility of the project, and in 1957 the California Legislature made the first appropriations for the construction of a dam at Oroville, as the first part of the State Water Project. Two years later the California Water Plan was adopted, and with the passage of the Burns-Porter Act in 1959, the State was fully committed to the development of its own statewide water resources development system.

36. Rogers & Nichols, supra note 4, at 61.
37. Memorandum Report, supra note 7, at 15.
40. Established by the State Water Resources Law of 1945, ch. 1514, [1945] Cal. Stat. 2827, this board was given the responsibility of investigating the water resources of the State. It was one of the predecessors of the present Water Resources Control Board.
46. Paralleling the State's increased involvement in developing a statewide net-
The principal features of the State Water Project are: the Oroville Dam, a multi-purpose dam on the Feather River; the North Bay Aqueduct, trans-
work of canals, dams, and aqueducts has been a rising apprehension in those areas of water supply over the amount of water to be diverted. The concern was first raised by the town of Antioch in the western portion of the Delta. At two points above Antioch, water from the Sacramento River flows through sloughs into the San Joaquin River. The resulting flow is in most years sufficient to repulse saltwater from incoming tides below Antioch's point of diversion. In 1919 and 1920 rainfall was down and salinity incursion reached farther upstream to the point at which Antioch diverted. Antioch sought an injunction against upstream diverters ordering the maintenance of a flow of 3,500 cubic feet of water per second to maintain the purity of the water diverted. Antioch v. Williams Irrigation Dist., 183 Cal. 451, 205 P. 668 (1922).

The claim was one of first impression and the supreme court held that to allow a fresh water appropriator such as Antioch to stop upstream diversions so as to maintain sufficient river flow to hold back tidal waters would be unreasonable, unjust, and detrimental to the public interest. Id. at 465, 205 P. at 694.

Were Antioch decided in light of present conditions in the Delta, the outcome might well be different. The case was decided under hydrological and social conditions far different from those now prevailing. The present uses of the municipalities in this portion of the Delta are many times in quantity the one-second-foot the town of Antioch sought to protect. Furthermore, environmental degradation was not an issue in that case. The Water Resources Control Board suggested in the recent Delta Decision that in view of recent environmental protection legislation, present policy might well compel a different decision than that reached in 1922. Delta Decision, supra note 8, at 14.

Subsequent to the decision in Antioch, the Legislature took steps to protect certain areas from the effects of water exportation from those areas. As part of the Feigenbaum Act, a provision was added to the effect that no releases or assignments of water applications could be made which would deprive the county in which the appropriated water originates of water necessary for the development of the county. Ch. 720, § 1, [1931] Cal. Stat. 1514 (codified as amended at Cal. Water Code § 10505 (West 1971)). Later the Legislature passed the Watershed Protection Act, ch. 370, [1943] Cal. Stat. 1896 (codified at Cal. Water Code §§ 11460-63 (West 1971)), granting protection from State appropriation to watersheds of origin rather than to a political entity such as the county.

The effect of these “areas-of-origin” protections was to require that when water which has been appropriated for use in an outside area becomes necessary for the beneficial use of these protected areas, that water shall be withdrawn from the use of the outside areas in favor of the areas of origin. 25 Op. Cal. Att'y Gen. 9-10 (1955). While these statutes do not create in any individual a vested water right, a priority is established in favor of the inhabitants and owners in the area of origin. Id. at 20-25.

In 1959 the Legislature reaffirmed the protection of these areas by declaring that it was the established policy of this State that in the development and completion of any general or co-ordinated plan prepared and published by the Department of Water Resources . . . all uses, including needs of the area in which the water originated, of water shall be given consideration.

Whenever the Legislature authorizes the construction . . . of any project which will develop water for use outside the watershed in which it originates, the Legislature shall at the same time consider the authorization and the construction or acquisition of such other works as may be necessary to develop water to satisfy such of the reasonable ultimate requirements of such watershed as may be needed at the time the export project is authorized or as will be needed within a reasonable time thereafter.

porting water from the Delta to north San Francisco Bay counties; the South Bay Aqueduct, transporting water from the California Aqueduct to south San Francisco Bay counties; the San Louis Division, facilities jointly used with the CVP to provide water for much of the Central Valley; and the California Aqueduct, extending 444 miles along the west side of the Central Valley, through the Tehachapi Mountains and into metropolitan Los Angeles. Project deliveries began in 1962. By 1970, some 405,000 acre-feet of water were being delivered to project facilities. Upon full project development, the SWP is expected to supply 4,230,000 acre-feet annually to a total of 31 water service areas.

II

THE STATE WATER RESOURCES CONTROL BOARD: PROTECTOR OF THE PUBLIC INTEREST

The creation of the State Water Resources Control Board in 1967, combining the functions of the State Water Rights Board and the State Water Quality Control Board, was formal legislative recognition that considerations of water quantity and quality are in many instances intimately related. The Board is charged with formulating and adopting State policy for water quality control, including principles and guidelines for long-range resource planning, and water quality objectives for the planning and operation of water resource development projects and for water quality control activities. The general powers granted the Board include authority to investigate

47. For a complete report on the current status of the SWP, see CAL. DEPT OF WATER RES., STATE RES. AGENCY, BULL. NO. 132-71, THE CALIFORNIA STATE WATER PROJECT IN 1971 (1971).
48. Id. at xi.
50. Ch. 284, § 1, [1967] Cal. Stat. 1441. In some respects the merger was not complete. The staff is still divided into water quality and water rights divisions. CAL. WATER CODE § 186 (West 1971). And primary responsibility for enforcement of water quality regulations affecting waste discharges has been given to the Regional Water Quality Control Boards, with the State Water Resources Control Board retaining only appellate jurisdiction. CAL. WATER CODE §§ 13320-21 (West 1971). See generally, Robie, Some Reflections on Environmental Considerations In Water Rights Administration, 2 ECOLOGY L.Q. 695 (1972); Comment, Water Quality Control in California: Citizen Participation in the Administrative Process, 1 ECOLOGY L.Q. 400 (1971).
52. CAL. WATER CODE §§ 13140-42 (West 1971). In addition, the Board recommends needed water quality research programs [id. § 13161]; administers statewide programs of research into technological aspects of water quality control [id. § 13162]; coordinates water-quality-related investigations conducted by other state agencies [id. § 13163]; supervises the establishment of procedures by which water quality control plans are formulated and administered by the Regional Water Quality Boards [id. § 13164]; has appellate jurisdiction over actions of Regional Boards [id. § 13320]; and adopts regulations governing the use of chemicals in cleaning up oil spills [id. § 13169]. For a discussion of the Board's role under the Porter-Cologne Act, see Comment, supra note 50.
streams, stream systems, lakes, and other bodies of water, to take testimony in regard to the rights to water or the use of water, to act as referee when appointed by a court in a suit for the determination of water rights, and upon petition by a water right claimant to determine all rights to the water of a stream system. The Board is the State water pollution control agency for all purposes stated in the Federal Water Pollution Control Act and any other federal act in the area of water resources control. As the successor to all powers exercised by its predecessors, the Board has jurisdiction to act within the provisions of "any . . . laws . . . under which the functions of water pollution and quality control are exercised."

The Board exercises direct regulatory control over water quality by virtue of its authority to issue permits for the appropriation of water. Any person seeking to appropriate water from a surface stream in California must file an application with the Board. Notice is then given of the application.

California recognizes two types of rights to the use of surface water, the riparian right and the appropriative right. The riparian right is based upon the ownership of land contiguous to the surface water flow. The riparian is entitled to use as much of that flow as is required for reasonable and beneficial uses on his land. A riparian is not required to apply or file for the right to use the water, nor is the right lost by disuse. See generally Rogers & Nichols, supra note 4, at 215-51. Presently the State has no inventory of the extent of these rights either as to the area of riparian land or the amount of water necessary to meet the reasonable needs of that land. Robis, supra note 50, at 696 n.5.

An appropriative right is the right to divert a given amount of water for beneficial uses. The right is based upon the principle of first in time, first in right. See 51 Cal. Jur. 2d Waters §§ 257 et seq. (1959). Presently, to obtain an appropriative right an application must be filed with the Board. CAL. WATER CODE § 1225 (West 1971). See generally Rogers & Nichols, supra note 4, at 253-324.

Early conflicts between riparians and appropriators led to the California Supreme Court decision of Herminghaus v. Southern California Edison, 200 Cal. 81, 252 P. 607 (1926). The court held that a riparian right-holder was entitled to the full flow of the stream without regard to reasonableness as against any appropriator. Following this decision the California Constitution was amended limiting all water rights to the water reasonably required for a beneficial purpose. CAL. CONST. art. XIV, § 3.

53. CAL. WATER CODE § 1051(a) (West 1971).
54. Id. § 1051(b).
55. Id. §§ 2000-76.
56. Id. §§ 2500-900.
58. CAL. WATER CODE § 13160 (West 1971).
59. Id. § 179.
60. Id. Under this section the Board must be cognizant of, among others, the provisions of the Watershed Protection Act, id. §§ 11460-64, the Porter-Cologne Water Quality Act, id. §§ 13000-951, the County of Origin Statute, id. §§ 10505-05.5, the Delta Protection Act, id. §§ 12200-20, the San Joaquin River Protection Act, id. §§ 12230-33, the Davis-Dolwig Act, id. §§ 11900-25, and the terms of the California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000 et seq. (West Supp. 1972), as amended by ch. 1154, [1972] Cal. Stat. — (to be codified at scattered sections of CAL. PUB. RES. CODE.), 1972 West's Cal. Legis. Service 2638.
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62. CAL. WATER CODE § 1225 (West 1971).
63. Id. §§ 1300-01, 1310-13.
and a public hearing is conducted by the Board. Any interested person may intervene to protest. If the application is approved, a permit is issued subject to appropriate terms and conditions. The permit is effective only so long as the water actually appropriated is used for a beneficial purpose. And the Board may reserve jurisdiction to amend or supplement permits granted:

(a) If the board finds that sufficient information is not available to finally determine the terms and conditions which will reasonably protect vested rights without resulting in waste of water or which will best develop, conserve, and utilize in the public interest the water sought to be appropriated, and that a period of actual operation will be necessary in order to secure the required information.

(b) If the application or applications being acted upon represent only part of a co-ordinated project, other applications for such project being pending, and the board finds that the co-ordinated project requires co-ordinated terms and conditions which cannot reasonably be decided upon until decision is reached on said other pending applications.

If the water has not been applied to the beneficial use as contemplated, the permit may be revoked.

In determining whether to grant or reject an application for an appropriation permit and in considering the nature of the terms and conditions which are to be placed in the permit if granted, the Board must act in the public interest. The California Water Code provides that the Board shall allow appropriation of water "under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated;" and the Board must reject applications which, in its judgment, it would not in the public interest to grant. In making these determinations, the Board is to consider the relative benefits to be derived from

(1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan, and (2) the reuse or reclamation of the water sought to be appropriated...
The predecessor to the current Board declared:

*The public interest is involved in varying degree but to some extent in every application to appropriate the unappropriated waters of the State. . . . [T]he public interest is a beacon light to guide this Board in arriving at each decision made by it.*

In evaluating the public interest in any particular situation, the Board exercises a broad discretion. Guidance in the exercise of this discretion comes from several sources. The Water Code provides that uses specifically protected in water control plans are to be considered and fish and wildlife resources are to be protected in connection with the construction of state resources are to be protected in connection with the construction of State water resources and may also approve appropriation of water for storage to be released later for protection or enhancement of the quality of other waters which are put to beneficial uses.

The Board must, of course, give effect to the overriding policy expressed in article XIV, section 3, of the California Constitution:

> The general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, 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 . . . is and shall be limited to such water as shall be reasonably required for the beneficial use to be served . . . .

The California Supreme Court considered this constitutional policy in *Joslin v. Marin Municipal Water District.* It determined that “[a]lthough . . . what is a reasonable use of water depends upon the circumstances of each case, such inquiry cannot be resolved in vacuo isolated from statewide considerations of transcendental importance.” The public interest is, therefore, an organic, changing concept, requiring that each fact situation be examined not in terms of precedent, but in light of the present status of public concerns and priorities.

With the recent enactment of the California Environmental Quality Act of 1970 the Legislature has determined that preservation and protection of the State's environment is a matter of the utmost public concern. As with other State agencies regulating activities of private individuals, corporations,
and public agencies which affect the environment, the Board must act "so that a major consideration is given to preventing environmental damage"\textsuperscript{83} and must "ensure that long range protection of the environment shall be the guiding criterion in public decisions . . . ."\textsuperscript{84} It is with this broadly defined mandate to act in the public interest in mind that any decision of the Board is to be evaluated.

III
THE IMPACT OF THE DELTA DECISION

A. The Prior Decisions

The Delta Decision was a reconsideration of terms and conditions imposed on appropriation permits granted to the CVP\textsuperscript{85} and the SWP\textsuperscript{86} by the Board and its predecessors during the previous fifteen years. The diversions of water from the Delta resulting from those decisions supplied over ten million acre-feet of water per year to State and federal service areas in the San Francisco Bay Area, the Central Valley and Southern California.\textsuperscript{87} The pattern in each of these previous decisions had been to find that the amount of water available for appropriation varied seasonally and to condition the permits accordingly.\textsuperscript{88} Protection of beneficial uses within the Delta was accomplished in two ways. First, restrictions were placed on the period of diversion, particularly during the late summer and early fall months when Delta outflows reach a minimum.\textsuperscript{89} Second, the Board reserved jurisdiction to conduct other hearings on the permit terms and conditions as more infor-

\textsuperscript{84} Id. § 21001(d).
\textsuperscript{85} Cal. Water Res. Control Bd. Decision D 1356 (Feb. 5, 1970), and Decision D 1308 (July 18, 1968); Cal. Water Rights Bd. Decision D 1250 (June 1, 1966), Decision D 1020 (June 30, 1961), Decision D 990 (Feb. 9, 1961), and Decision D 893 (March 18, 1958) [hereinafter cited as Decision D 893].
\textsuperscript{86} Cal. Water Rights Bd. Decision D 1291 (November 30, 1967), and Decision D 1275 (May 31, 1967) [hereinafter cited as Decision D 1275].
\textsuperscript{87} Delta Decision, supra note 8, at 1.
\textsuperscript{88} Cal. Water Rights Bd. Decision D 893, for example, concerned applications to appropriate water from the American River, a major tributary of the Sacramento River. A large number of protests were filed against the applications based on claims that there was insufficient flow to serve applicants' wants without interference with the exercise of downstream rights, that in view of present and future needs of riparian owners there was no unappropriated water available, that granting the application would lead to increased salinity intrusion, and that granting the applications would prohibit the full development of the American River Basin. The State Water Rights Board approved the applications. Since at that time 88.3 percent of the flow was unappropriated, the Board felt that apprehension on the part of users founded on the flow of the river was groundless. The decision recognized, however, that the unappropriated flow was present only from November to July or August of each season. Storage and diversion were, therefore, limited to that period by appropriate terms and conditions in the permits. Decision D 893, supra note 85, Terms 2, 3, 4, 5 & 18, at 69, 73.
\textsuperscript{89} E.g., Cal. Water Rights Bd. Decision D 1275, supra note 86, Terms 1-a through 1-f, 5 & 15, at 36-38, 40, and Decision D 893, supra note 85, Terms 2, 3, 4, 5 & 18, at 69, 73.
mation about the effects of the statewide water projects on the Delta became available.90

Of particular importance in these decisions was the consideration of federal-state relations in California water resource development in Decision D 990.91 At issue was the power of the State Water Rights Board92 to impose conditions of any sort on permits issued to the United States, through the Bureau of Reclamation, once the determination had been made that unappropriated water was available. The Bureau contended that compliance with state laws, which in this case resulted in the imposition of conditions on Bureau permits to appropriate water, would frustrate national policy by allowing a state to dictate to the federal government how it must operate a federal reclamation project. The Bureau argued that only the Secretary of the Interior had the authority to determine how federal project water would be used and which citizens of a state should benefit as a result.93

The Board held against the Bureau on two grounds. First, it felt that protection of the Delta was a material part of the consideration given by the United States to California in return for the assignment of applications to appropriate originally filed by the State.94 This protection was intended to be two-fold: to provide water of suitable quality for irrigation in the Delta and to provide a reasonably accessible source of supply to meet industrial and agricultural requirements in the lower portions of the Delta. Therefore, the responsibility for salinity control rested with the United States as well as the State and local water users.95 Any final action by the Board with respect to the Delta situation would be determined on this premise. In later decisions this meant that, if terms and conditions were placed in State permits

90. Term 24 of Cal. Water Rights Bd. Decision D 1275, supra note 86, for example, provides:
The board reserves continuing jurisdiction over these permits for the purpose of coordinating terms and conditions of the permits with terms and conditions which have been or which may be included in permits issued pursuant to applications of the United States in furtherance of the Central Valley Project or other applications of the State of California in furtherance of the State Water Project . . . .

Id. at 44.

91. Decision D 990, supra note 28. The applications filed were to appropriate water flowing down the Sacramento River and into the channels of the Delta itself.

92. The State Water Rights Board was a predecessor of the present State Water Resources Control Board.

93. In making this argument, the Bureau relied on the holding of Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958). For a discussion of that decision, see note 99 and the accompanying text infra.

94. Decision D 990, supra note 28, at 49. For a historical discussion, see H. Hansen, supra note 30.

95. Decision D 990, supra note 28, at 62. Because of this joint responsibility for dealing with the problems caused by salinity intrusion into the Delta, the Board has always felt that the most desirable solution to the problem was not by Board action, but by an agreement among the parties. This is what the parties have repeatedly been urged to do. See Decision D 1275, supra note 86, Terms 19, 22 & 24, at 42-44. It has been only because of the failure of the parties to conclude such an agreement that the Board has reserved jurisdiction. Decision D 990, supra note 28, at 61, 86.
which forced the State to cease diverting and storing water at a time when the CVP continued to divert and store under its permits, the decision granting those permits to the CVP could be reopened and the federal permits made to conform to those of the State.\(^96\)

The second basis for the decision was the Board's interpretation of section 8 of the Reclamation Act of 1902.\(^97\) The Board held that the language of section 8 forced federal compliance with state law in the acquisition of water rights, and under California law, all water right permits were conditional.\(^98\) Until there was an authoritative court ruling to the contrary,\(^99\) the Board was bound to continue its policy of conditioning all water right permits according to California law, and the permits of the Bureau to appropriate water for the CVP were no exception.

The decision and rationale of Decision D 990 have formed the basis for all subsequent decisions dealing with Bureau operation of the CVP and its effects on the Delta. In each case the Bureau has put into issue the State's ability to affect the operation of the federal project. In each decision the Board has cited Decision D 990 to hold against the Bureau and impose terms and conditions in the public interest calculated to protect the Delta by providing for salinity control. In each case, the Bureau, while not conceding the issue, has complied due to considerations of comity. There are indications, however, that because of the nature of the Delta Decision, this pattern of compliance may now be broken.\(^100\)

**B. The Delta Decision**

The maintenance and protection of the Delta is dependent on the interaction of natural river flows and the activities of three groups of water users: the water users upstream from the Delta along the Sacramento and San

\(^{96}\) See Decision D 1275, *supra* note 86, at 20.


\(^{98}\) Decision D 990, *supra* note 28, at 25.

\(^{99}\) The Board distinguished Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958), relied on by the Bureau, on the ground that the case specifically stated it was not concerned with questions of title to or vested rights in appropriated water. *See id.* at 290. Relying on this language and that of a subsequent decision by the California Supreme Court, Ivanhoe Irrigation Dist. v. All Parties and Persons, 53 Cal. 2d 692, 350 P.2d 69, 3 Cal. Rptr. 317 (1960), the Board felt that the issue of what terms and conditions could be placed upon water right permits acquired by the federal government was still an open question. Decision D 990, *supra* note 28, at 22-26. For a discussion of the significance of this reasoning in the context of this decision and the Delta Decision, see notes 101-09, 147-54 and accompanying text *infra.*

\(^{100}\) The Justice Department announced recently that the federal agencies involved will not obey the ruling made in the Delta Decision on the ground that the United States is not bound to obey state water pollution control laws. Oakland Tribune, Oct. 7, 1972, at 1, col. 6. In addition, two private suits are currently pending in the United States District Court. *Central Valley East Side Project Ass'n v. State Water Resources Control Bd.*, Civil No. S. 2582 (N.D. Cal., filed Sept. 29, 1972); Kern County Water Agency v. State Water Resources Control Bd., Civil No. S. 2583 (N.D. Cal., filed Sept. 29, 1972).
Joaquin Rivers and their tributaries, the water users within the Delta itself, and the State and federal water projects. The Board lacked jurisdiction over the first two of these groups. The water users within the Delta (in-Delta users) were entitled to water in the amount of their vested rights. Were they receiving water in excess of such rights, either in terms of quantity or quality, they could be required to pay for that excess, but payment would have to be made to project operators responsible for providing the excess. With respect to diverters from upstream Delta tributaries, many of which were metropolitan or agricultural systems whose diversions dated back for a century or longer, the Board felt that California law provided no method by which it could force such parties to share in the cost of protecting the Delta. While there might be possible legal remedies in court, measures requiring upstream diverters to share in the costs of Delta maintenance were deemed to be for the Legislature. If the Board were to protect the Delta, therefore, a method was needed whereby the third group, the statewide water projects, over whom the Board did have jurisdiction—by virtue of the power to place terms and conditions in appropriation permits and to reserve jurisdiction—could be required to compensate for depletions of stream flow attributable to its diversions, and for depletions caused by the other two groups.

The method adopted by the Board in the Delta Decision was to place a requirement on SWP and CVP operations for stored water releases. The Board thus went beyond terms and conditions imposed in previous decisions, which had required the statewide projects to refrain from interfering with the natural flows required to repel salinity intrusion and for fish and wildlife, and required that the projects provide reasonable quantities of water conserved by storage under the authority of their permits for these purposes. No longer will the water projects contribute to Delta protection by the mere placing of restrictions on their seasons of diversion; they will be required to contribute affirmatively by releasing water stored during the course of the year to create a specified Delta flow that otherwise would not exist. The result

101. Delta Decision, supra note 8, at 15.
102. Id.
103. Id. The Board did not indicate the cost of maintaining the Delta or what the share of the upstream diverters might be.
104. Id. The Board failed to indicate what possible legal remedies might exist.
105. Id.
106. Id. at 15-16.
107. Id.

The Board stated that the outflows necessary to sustain the quality required to meet the State Delta Standards [Delta Decision, supra note 8, at 53] constituted “prior demand on the supply which is not available to the state and federal projects.” Id. at 22. This conclusion appears to ignore the fact that without the projects, water to augment summer flows through the Delta would not have been available to begin with. For example, water released from storage at Shasta Reservoir has augmented natural runoff sufficiently to meet local uses and prevent saline water intrusion into the interior Delta. "Had there been no releases from storage in Shasta Lake, salt water would
is that the burden of protecting the Delta is placed upon the SWP and the CVP.¹⁰⁹

IV

CAN THE DECISION BE ENFORCED?

In Decision D 990 the Board expounded its present position that, under California law, all water right permits are conditional and that this limitation applies equally to state and federal appropriators.¹¹⁰ The standards for what conditions actually may or may not be imposed was found to be the “public interest.” Whether the particular conditions imposed by the Delta Decision requiring affirmative action on the part of water appropriators are within the public interest standard and the Board’s enforcement authority, requires a separate examination of the state and federal permits.

A. The State Water Project

In order to appropriate water for State Water Project operations the Department of Water Resources is required to file permit applications with the Board as does any other private appropriator.¹¹¹ In determining the amount of water available for project use and appropriation, the Board, as in all other applications, must consider the water required in the public interest for the protection of beneficial uses. There is no direct authority, however, for the proposition that the Board may require an appropriator, such as the SWP, to add water to create a stream flow which otherwise would not exist. The imposition of such terms on an appropriator appears justifiable only in view of the general State policy directing agencies such as the Board “to create and maintain conditions under which man and nature can exist in productive harmony” and requiring them “to develop . . . procedures necessary to protect environmental quality.”¹¹² This policy is supported by

have intruded well into the interior Delta in 7 of the 10 years from 1955 through 1964.” Memorandum Report, supra note 7, at 13.

¹⁰⁹. In addition, the Board reserved jurisdiction to formulate terms and conditions relative to the flows to be maintained in the Delta for the protection of fish and wildlife and relative to salinity control. Delta Decision, supra note 8, at 51.

The Board did not address itself to the issue of repayment of those portions of the costs resulting from the ordered releases related to enhancement of fish and wildlife resources. The Board expressed the hope that these costs would be provided for by the State Legislature and by Congress. Id. at 16.

¹¹⁰. See notes 91-99 and accompanying text supra.


Water Code declarations that the Board must act in the public interest and that beneficial uses of water include not only the preservation but also the enhancement of fish and wildlife resources.  

Board action designed to protect and maintain the Delta environment is clearly consistent with the defined public interest. The problem for the Board was that environmental damage in the Delta was attributable to upstream tributary diverters, in-Delta users, and the statewide water projects, and it lacked jurisdiction over the first two groups. In these circumstances the only way for the Board to prevent further environmental damage in the Delta was to “find” water to compensate for those depletions of Delta inflows over which it had no control.

The SWP and CVP dams on the water courses emptying into the Delta have, for the most part, storage capacity sufficient to exert control over flows through the Delta during the dry months of July, August, and September. The Board did have jurisdiction over the operators of these dams, the State Department of Water Resources and the Bureau of Reclamation. Hence, requiring releases from storage behind water project dams was the Board’s only practicable way of maintaining the Delta environment. While these requirements forced the individual projects to enhance conditions to the State which would exist in the absence of the projects, the net effect was only maintenance and protection of natural Delta conditions.

The imposition of such permit terms in the public interest is supported by analogy. The Federal Power Act, for example, contains a directive to the Federal Power Commission (FPC) to recognize beneficial uses of water, similar to those recognized by the Board, in granting permits licensing power projects. The FPC is authorized to give preference to those plans which best develop, conserve, and utilize in the public interest the water resources of the region, and the permits granted are so conditioned that they may be modified to secure the optimal comprehensive plan for beneficial uses. These considerations are bolstered by congressional declarations of a “national policy for the environment which provides for the enhancement


114. See text accompanying notes 101-07 supra. In this regard, it is important to note that the last appropriator takes the stream “as he finds it.” This stems from the nature of the “first in time, first in right” appropriative concept. See note 62 supra. The last appropriator must “pay the price” if he desires to use the water. The Board is not empowered to go back to prior appropriators (or riparians) and impose revised terms and conditions on their rights.

115. Since 1944, when the Shasta Dam of the CVP began operations, CVP releases to augment Delta outflows have been able to restrain salinity intrusion far below that which would otherwise have occurred. Bull. No. 76, supra note 3, at 8. See generally, J. Bains, R. Caves & J. Margolis, Northern California’s Water Industry: The Comparative Efficiency of Public Enterprise in Developing a Scarce Natural Resource 50-52 (1966).

116. See Delta Decision, supra note 8, at 5.


118. Id. § 803(a).
of environmental quality,"\textsuperscript{119} and the affirmation by the executive branch of the responsibility of the federal government to "provide leadership in protecting and enhancing the quality of the nation's environment."\textsuperscript{120}

These provisions were construed by the judiciary in \textit{State of California v. FPC}.\textsuperscript{121} In granting licenses for the proposed Don Pedro Dam on the Tuolomne River, the FPC had required stored water releases to resurrect diminishing salmon runs. The stored water would not have been available in the absence of the project.\textsuperscript{122} Two irrigation districts appealed the order on grounds that such terms would illegally impair their irrigation rights. The court upheld those provisions requiring stored water releases, stating:

In granting such a license the commission is required ... to consider all beneficial public uses including recreational uses. ... The issuance of a license can be justified only on the theory of a resulting benefit to the public.\textsuperscript{123}

These are requirements strikingly similar to those applicable to the Board in making the Delta Decision.\textsuperscript{124}

A further analogy to the Board's action may be found in a recent California Supreme Court case, \textit{Associated Home Builders v. City of Walnut Creek},\textsuperscript{125} upholding the constitutionality of provisions requiring subdividers to dedicate land for park and recreational purposes as a condition of approval of subdivision maps. Such provisions were challenged on grounds that they represented a violation of constitutional guarantees of equal protection and due process by depriving a subdivider of his property without just compensation. The constitutional violation was alleged to result from the requirement that a subdivider dedicate land or pay a fee for park and recreational purposes to provide for public facilities enjoyed by all citizens of the city and only incidentally by the subdivision residents, when all taxpayers should share the cost of the public facilities. Because the subdivider passed along all such costs to future residents, the net effect was that future residents of the subdivision would be required to pay for recreational facilities, the need for which stemmed from the community as a whole.\textsuperscript{126}

In upholding the challenged provisions, the court pointed out that undeveloped land in a community is a limited resource which is difficult to conserve in a period of increased population pressure. The development of the new subdivision in itself would have the counterproductive effect of consuming already scarce land while at the same time increasing the need for park and recreational land—subdivisions diminish supply and increase demand.\textsuperscript{127} In view of the responsibility of government entities to provide park and recreational land to accommodate human expansion and the policy

\begin{itemize}
  \item 121. 345 F.2d 917 (9th Cir. 1965).
  \item 122. 31 FPC 510, 515-518, 526 (1964).
  \item 123. 345 F.2d at 923.
  \item 124. CAL. WATER CODE §§ 1253, 1255, 1257 (West 1971).
  \item 125. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, 2 ERC 1491 (1971).
  \item 126. \textit{Id.} at 637, 484 P.2d at 610, 94 Cal. Rptr. at 634, 2 ERC at 1491.
  \item 127. \textit{Id.} at 638-42, 484 P.2d at 610-12, 94 Cal. Rptr. at 634-48, 2 ERC at 1492-95.
\end{itemize}
of the State to preserve and maintain open space lands, recognized in article 28 of the California Constitution, the court concluded that requiring such dedications could be justified on the basis of a general public need for recreational facilities. The court intimated that the dedication might be required even if the recreational facilities provided were not used for the specific benefit of the future residents of the subdivision, but were employed for use by the general public.

Undeveloped water has received similar constitutional recognition as a limited resource in California. Like open space lands, water is a resource which is difficult to conserve in a period of increased population pressure. In water resource development, however, the developer, unlike the subdivider, seeks to acquire the right to use a resource which is the property of the people of the State. The State has directed the Board to represent the public interest in administering the use and development of this scarce resource, and to subject the rights of water users, like those of subdividers, to conditions necessitated by the public interest. In the Delta Decision, the Board concluded that the State policy favoring environmental maintenance and enhancement would best be served by ordering stored water releases. Such a requirement appears to be less a burden than that borne by the subdivider in dedicating land, since water permittees are not the owners of the water they are being required to release.

There is another factor to be considered. In the case of dedication of subdivision land, the ultimate cost of the dedication is passed along by the developer and falls upon the future residents of the subdivision. Costs imposed on the SWP as a result of conditions imposed by the Board to enhance fish and wildlife resources arise when water which would otherwise be available for sale, to provide reimbursement of all costs incurred by the State in the operation of the SWP, is no longer available for sale because of its release to augment Delta outflows. The price of the remaining water available for sale may not be adjusted upward to compensate for this loss. Costs incurred for the enhancement of fish and wildlife, as opposed to pres-

128. CAL. CONST. art. 28, § 1:
The people hereby declare that it is in the best interest of the state to main-tain, preserve, conserve and otherwise continue in existence open space lands . . . and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well being of the state and its citizens.

Cf. id. art. XIV, § 3.

129. 4 Cal. 3d at 638, n.6, 484 P.2d at 610 n.6, 94 Cal. Rptr. at 634 n.6, 2 ERC at 1493 n.6.

130. CAL. CONST. art. XIV, § 3.

131. CAL. WATER CODE § 102 (West 1971) provides: "All water within the State is property of the people of the State . . . ."

132. See text accompanying note 134 supra.

133. From the point of view of the SWP, it would be enhancing the environment by providing water flows which would not exist in its absence. See Delta Water Rights Decision, separate opinion by E. Dibble, supra note 108, at 2. Hence, while the net effect of the Board's decision may only be to preserve the environment, so far as the SWP is concerned, its water releases would be regarded as enhancing the State environment.
ervation, are nonreimbursable, and may not figure into price considerations for water sold to project water purchasers. Unlike subdivision dedication costs, the Legislature in this case has provided that the public as the beneficiaries must pay the costs.

B. The Central Valley Project

At issue in considering the terms and conditions placed in the federal permits is the ability of the State, acting through the Board, to impose permit restrictions on the United States, and the effectiveness of the terms and conditions imposed. The CVP is a federal undertaking, administered by the Bureau of Reclamation in accordance with the Reclamation Act of 1902. In general the Act outlines a comprehensive reclamation scheme: it provides for the examination and survey of lands, the construction and maintenance of irrigation works, and the storage, diversion, and development of water for the reclamation of arid and semi-arid lands. The Commissioner of Reclamation, under the supervision and direction of the Secretary of the Interior, is in charge of administration projects. The key provision relating to the interplay of federal and state rights in reclamation projects is section 8 of the Act:

Nothing in [the Reclamation Act] shall be construed as affecting or intending to affect or interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections shall proceed in conformity with such laws and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or waters thereof...

134. CAL. WATER CODE § 11912 (West 1971).
135. Id. at §§ 11900, 11913.
136. See generally ROGERS & NICHOLS, supra note 4, at 41-62. It was the understanding of Congress and California that the project would be run solely by the federal government. This was made clear during early hearings on appropriations for the project:

Congressman Buck: But the state, itself, as I understand it, has no authority whatsoever to enter into this picture. It is intended to be, in my opinion, and I think I speak for all of my colleagues in Congress, that it is intended to be a federal project, reimbursable under the reclamation law.

California State Engineer Hyatt: Absolutely. That is the position. There is no question about it at all.

137. 43 U.S.C. § 373(a) (1970) provides:
Under the supervision and direction of the Secretary of the Interior, the reclamation of arid lands under the Act of June 17, 1902, and Acts amendatory thereof... shall be administered by a Commissioner of Reclamation who shall be appointed by the President.
138. Id. §§ 371 et seq.
140. 43 U.S.C. § 373 (1970) provides:
The Secretary of the Interior is authorized to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of the [Act].
141. Id. § 383 (1970).
In the Delta Decision, the Bureau came before the Board as the project operator of the CVP with applications for permits to appropriate water, and the Board conditioned the permits as it was empowered to do under California law. The power granted under State law, however, was an abstract one. The real question is the effectiveness of the terms and conditions imposed by the Board in the face of the Bureau's authority to operate the project: can the Board force the Bureau to comply with its terms and conditions? At the heart of this issue is the meaning of section 8, which has been the subject of a series of cases involving the CVP.

In United States v. Gerlack Livestock Co. the Supreme Court held that section 8 required the federal government to give recognition to all water rights existing under state law. The laws of a state determine the rights and liabilities of landowners and appropriators by defining those rights which may "subsist" along with any federal right—hence the water rights taken by the federal government under its power of eminent domain. This means that the role of state law under section 8 is merely to define that which is compensable when the federal government acts by eminent domain.

In Ivanhoe Irrigation District v. McCracken the Court dealt with the relation between section 8 and section 5 of the Reclamation Act of 1902 and with the question of whether the validity of contracts for water was governed under federal or California law. The California Supreme Court had invalidated terms incorporating the 160-acre limitation of section 5 on grounds that section 8 of the Act controlled all other provisions of the Act and other reclamation statutes having to do with the control, appropriation, use, or distribution of water in the State. The United States Supreme Court unanimously reversed, holding that this was an erroneous construction of section 8. Congress had not intended section 8 to override the national policy of section 5: "We read nothing in section 8 that compels the U.S. to deliver water on terms imposed by the state."

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142. See Delta Decision, supra note 8, at 18-21; Decision D 990 supra note 28, at 22-27.
144. Id. at 742.
145. Id. at 734 n.7.
146. This was made clear in Fresno v. California, 372 U.S. 627 (1963). See text accompanying notes 160-61 infra.
148. Section 5 provides:
   No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefore are made.
150. 357 U.S. at 292.
While neither dealing with the question of title to or vested rights in unappropriated water,\textsuperscript{151} nor passing on the coverage of section 8 in the area of federal-state relations,\textsuperscript{152} the Court did discuss in general terms federal policy in the operation of a federal reclamation project. That the federal government has the power to impose reasonable conditions on the use of federal funds, federal property, and federal privileges was deemed to be "beyond challenge."\textsuperscript{153} A state could not compel the use of federal property on terms other than those prescribed by Congress. In the case of the CVP, Congress has delegated the authority for its operation to the Secretary of the Interior and the Bureau of Reclamation, and hence a state cannot compel the operation of the project on other than their terms.

If the rights held by the United States are insufficient then it must acquire those necessary to carry on the project,\ldots paying just compensation therefore, either through condemnation or, if already taken, through the action of the owners in the courts.\textsuperscript{154}

The policy surrounding the Bureau's operation of the CVP was further explained in \textit{Dugan v. Rank}\textsuperscript{155} and \textit{Fresno v. California}.\textsuperscript{156} In \textit{Dugan}, claimants of water rights below the Friant Dam of the CVP sought to enjoin the storage and diversion of water which had previously come downstream to their points of diversion and use. The Court denied the injunction and held that the only relief available to them was compensation for the value of any water rights taken. In the operation of the CVP, the Bureau can acquire whatever water is necessary for the operation of the project by physically seizing the water.\textsuperscript{157} Eminent domain proceedings are not required and in such a case, as \textit{Ivanhoe v. McCracken} suggested,\textsuperscript{158} the owners' relief is through their own action in the courts.\textsuperscript{159}

In \textit{Fresno v. California}, the plaintiff city sought, in addition to the injunctive relief sought by the plaintiffs in \textit{Dugan}, its statutory priority under California law to the use of the water. It claimed that section 8 required federal compliance with State county-of-origin and watershed protection laws and federal recognition of the State preference for domestic over irrigation uses.\textsuperscript{160} Because the Bureau, by virtue of the decision in \textit{Dugan}, could physically seize whatever water was necessary to the operation of the project, the Court held that section 8 could not mean that state law could prevent the United States from exercising the power of eminent domain to acquire the rights of others. Hence, state laws regarding water allocation preferences, such as the areas-of-origin laws, were held inapplicable to federal operations,

\begin{itemize}
\item \textsuperscript{151} \textit{Id.} at 290.
\item \textsuperscript{152} \textit{Id.} at 292.
\item \textsuperscript{153} \textit{Id.} at 295.
\item \textsuperscript{154} \textit{Id.} at 291.
\item \textsuperscript{155} 372 U.S. 609 (1963).
\item \textsuperscript{156} 372 U.S. 627 (1963).
\item \textsuperscript{157} 372 U.S. at 622.
\item \textsuperscript{158} 357 U.S. at 291.
\item \textsuperscript{159} 372 U.S. at 622, 625-26.
\item \textsuperscript{160} 372 U.S. at 628.
\end{itemize}
rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made.\textsuperscript{161}

In view of these cases, the effectiveness of the terms imposed in the Delta Decision requiring stored water releases appears questionable on two grounds. First, the terms may be considered as inconsistent on their face with federal operation of a federal project and, for that reason, invalid. The terms would require CVP dams to store water during the rainy season and release water during the dry season which follows. The effect would be to compel a federal project to deliver water on terms imposed by the State. As Ivanhoe v. McCracken made clear, the Bureau need not do so. Requiring the Bureau to make these releases would be to allow State water use preferences—in this instance favoring environmental enhancement of the Delta over water for Central Valley irrigation and Southern California consumption—to be controlling on the operation of the project. As Fresno v. California and Ivanhoe v. McCracken both point out, such preferences may not be imposed on the Bureau.\textsuperscript{162}

The Board has consistently avoided facing this argument. Fresno v. California and Ivanhoe v. McCracken are distinguished on the ground that they do not specifically involve the acquisition of water rights by the federal government from a state or the authority of a state to issue a conditional permit or license to a federal agency.\textsuperscript{163} This may be true, but there is an inescapable overlap between what the Board calls “acquisition of a water right,” which is subject to state law, and the “operation of a federal project,” which clearly is not. As soon as water rights are conditioned over time—e.g., the CVP may divert and store 500 acre-feet of water in November, but only 100 acre-feet in July—then the operation of the project is affected and the holdings of the Fresno v. California and Ivanhoe v. McCracken decisions may no longer be distinguished.

The second hurdle stems from the Bureau’s ability to seize physically any water necessary for the operation of the project. The effect of the terms

\textsuperscript{161} Id. at 630.
\textsuperscript{162} See also Arizona v. California, 373 U.S. 546 (1962). This case dealt with the development of the Colorado River. At issue was the question of how water appropriated to each state was to be distributed to users within the state. The Court held that section 8 of the Reclamation Act of 1902 did not mean that the Bureau was bound to follow state law in that allocation. The Court stated:

Where the Government . . . has . . . undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws.

It was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project’s operation, would want to make certain that the waters were effectively used . . . Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power . . . to direct, manage, and coordinate their operation.

\textit{Id.} at 587, 589-90.
\textsuperscript{163} Delta Decision, supra note 8, at 18. See notes 93-99 and accompanying text supra.
imposed by the Board is to limit the water right desired by the Bureau. If the Bureau chooses not to be so limited, by refusing to release the water as ordered, it can be considered to have "seized" it. The lesson of Fresno v. California and Dugan is that the Bureau's responsibility for such seized water is only the payment of compensation for the water rights damaged by the seizure. It need not give up the water. In this case, however, the water seized would be water stored during the wet winter months, previously unappropriated, now appropriated and stored by the Bureau for contemplated use as "stored water releases" to provide for enhancement of the Delta environment over and above the condition that would exist in the absence of the CVP. State law has not yet operated to define the water right which would be damaged. Hence the Bureau has no one to compensate.

This does not mean, however, that the imposition of terms and conditions on Bureau permits will be totally ineffective. While the Bureau may not be required to comply with such terms, the question remains whether they ought to comply, particularly in view of strong policy considerations favoring voluntary compliance. As Decision D 990 pointed out, salinity control in the Delta was one of the purposes of the CVP, and protection of the Delta from salinity incursion constituted a material part of the consideration for which the State of California assigned to the United States the applications which it had filed to provide adequate water for the project. This position was recognized judicially in Ivanhoe v. McCracken.

This prior commitment on the part of the CVP is bolstered by recent declarations of national policy relating to environmental quality responsibilities. The Federal Water Pollution Control Act declares that it is the "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution. . . ." This Act also directs the Bureau to consider possible inclusion of storage for regulation of streamflow for the purpose of water quality control in the survey and planning of any reservoir. The Environmental Quality Improvement Act of 1970 provides that "there is a national policy

164. Decision D 990, supra note 28, at 48-49.

165. The dissent in Decision D 990 traced the federal involvement with California water resource development as it related to the issue of salinity control and concluded that the Bureau had an unfulfilled obligation to provide the Delta with protection against the damage caused by salinity intrusion. Decision D 990, separate opinion by W. Rowe, supra note 7, at 3-62.

166. 357 U.S. at 281 (1958).


168. Id. § 101(b), formerly 33 U.S.C. § 1151(b) (1970). It should be noted that section 102(b)(2) of the amended Act provides:

The need for and the value of storage for regulation of streamflow (other than for water quality) including but not limited to navigation, salt water intrusion, recreation, esthetics, and fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal Agencies.

169. Id. § 102(b)(1).

for the environment which provides for the enhancement of environmental quality . . . [and] primary responsibility for implementing this policy rests with State and local governments." The National Environmental Policy Act of 1969 declares that it is "the continuing policy of the Federal Government in cooperation with State and local governments . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony . . . ." The particular terms imposed by the Delta Decision were promulgated in furtherance of these national policies. They were imposed by the state agency designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act. Under these conditions there are strong policy arguments in favor of federal compliance with the State's mandate.

CONCLUSION

Justice Holmes, more than forty years ago, described a river as "more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." The Delta Decision represents a major step in that rationing process. The State Water Resources Control Board, given the power it has to protect the public interest, but faced with a limited jurisdiction, has acted to protect the environmental quality of the Delta. But the process is not complete. While the State is bound to comply with the decision in its operation of the State Water Project, the Secretary of the Interior and the Bureau of Reclamation are not. Only with their cooperation can the Delta Decision be effective in maintaining and protecting the Delta.

J. Mark Waxman

171. Id. §§ 4371(b)(1)-(2).
173. Id. § 4331(a).
174. CAL. WATER CODE § 13160 (West 1971).