Revolution (and Counter-Revolution) in Western Water Law: Reclaiming the Public Character of Water Resources

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REVOLUTION (AND COUNTER-REVOLUTION) IN WESTERN WATER LAW: RECLAIMING THE PUBLIC CHARACTER OF WATER RESOURCES

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I. INTRODUCTION

Constitutions and statutes in the American West have long stated that water is the property of the public or of the state. Nonetheless, until recent decades, most of the law on water allocation in the region has involved private utilization of the resource. Courts routinely have ignored or distorted provisions on the public nature of water. Even in our time, the Colorado Supreme Court has concluded that state constitutional language declaring the water of every natural stream to be "the property of the public"* simply . . . establishes the right of appropriation in

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1. See ALASKA CONST. art. VIII, § 13 (all waters "reserved to the people for common use"); COLO. CONST. art. XVI, § 5 (water of every natural stream "the property of the public"); IDAHO CONST. art. XV, § 1; MONT. CONST. art. IX, § 3(3) (surface, underground, flood and atmospheric water vested in "the state for the use of its people"); NEB. CONST. art. XV, § 5 (use of the water of every natural stream "dedicated to the people"); N.M. CONST. art. XVI, § 2 (unappropriated water of natural streams declared to "belong to the public"); Wyo. CONST. art. VIII, § 1 (water of all natural streams, springs, lakes or other collections of still water "the property of the state"); ARIZ. REV. STAT. ANN. § 45-141A (West 1966) (waters "belong to the public"); CAL. WATER CODE § 102 (West 1971) (water "the property of the people"); IDAHO CODE § 42-101 (1993) (waters flowing in their natural channels are "the property of the state"); KAN. STAT. ANN. § 82a-702 (1989) (all water "dedicated to the use of the people"); NEV. REV. STAT. ANN. § 533.025 (Michie 1995) (water "belongs to the public"); N.D. CENT. CODE § 61-01-01 (1995) (all waters "belong to the public"); OR. REV. STAT. § 537.110 (1988) (all water "belongs to the public"); S.D. CODIFIED LAWS § 46-1-3 (Michie 1987) (all water "the property of the public"); TEX. WATER CODE ANN. § 11.021 (West 1988) (water of every flowing river or natural stream "the property of the state"); UTAH CODE ANN. § 73-1-1 (1989) (all waters "the property of the public"); WASH. REV. CODE ANN. § 90.03.010 (West 1992) (subject to existing rights, all waters "belong to the public").

2. COLO. CONST. art. XVI, § 5. The Colorado constitution adds that
this state." 3

Instead of accepting water as public property and working out the implications of that concept for the private use rights in water which have been recognized from the time of non-Indian settlement in the area, 4 courts have put practically all their emphasis on the private use rights. The dominant type of water right in the West has been the "appropriative" right, which permits — indeed, in most instances, requires — the holder of the right to divert water from the source and put it to beneficial use. 5 Mining, irrigation, and municipal water supply have been typical beneficial uses. The instream benefits of water, until recently, have been largely ignored.

Massive diversion of water from natural sources, often combined with the draining of wetlands, has led to the widespread loss of natural values throughout the West. In California's San Joaquin Valley, for example, water diversion and land reclamation have led to the obliteration of Tulare Lake, once an aquatic area of hundreds of thousands of acres. 6 Later on in California, on the eastern side of the Sierra Nevada mountain range, a water project built and operated by the City of Los Angeles caused the drying up of Owens Lake, previously an important

water in natural streams "is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." Id.

3. People v. Emmert, 597 P.2d 1025, 1028 (Colo. 1979) (upholding a criminal trespass conviction of persons who floated across a privately owned ranch on the Colorado River and whose feet occasionally touched the bed of the river).


6. In early California, Tulare Lake was larger than Lake Tahoe and home to "an abundance of fish and vast quantities of turtles that ended up in rich soups and stews." NORRIS HUNDLEY, JR., THE GREAT THIRST: CALIFORNIANS AND WATER, 1770s - 1990s, at 5 (1992). Tulare Lake once had a surface area of about 200,000 acres; after the flood of 1862, however, it spread to 486,400 acres. See STEPHEN JOHNSON ET AL., THE GREAT CENTRAL VALLEY: CALIFORNIA'S HEARTLAND 157 (1993). Buena Vista, Kern and Goose Lakes, to the south of Tulare Lake, have also disappeared in the path of agricultural development. See id.
habitat for waterfowl. Just a few years ago, again in the San Joaquin Valley, the disposal of contaminated agricultural drainage in a wildlife refuge led to an environmental debacle at Kesterson.

Severe environmental degradation from the impact of water projects and related activity has not been limited to California. A series of multi-purpose dams on the Colorado River System has led to degradation of the Colorado River delta, once home to lagoons which supported many wildlife species, including jaguar. Extensive development of the Columbia River and its tributaries, particularly for hydropower, has brought about listings under the Endangered Species Act. Similar consequences exist regarding the Truckee River in Nevada, the Sevier River in Utah, and many other lakes and rivers throughout the West.


11. See Lawrence J. MacDonnell, Managing Reclamation Facilities for Ecosystem Benefits, 67 U. COLO. L. REV. 197, 205-06 (1996). The Truckee River terminates at Pyramid Lake. MacDonnell notes that Lake Winnemucca, which once served as "a kind of overflow catchment from Pyramid Lake" and which once contained over three million acre-feet of water, has dried up completely as a result of water development. Id. at 205. Stampede Dam, a federal reclamation facility in the area, is operated for species preservation. Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985).


13. See generally Natural Resources Law Ctr., Restoring the
II. THE BEGINNINGS OF CHANGE

Blatant disregard for the environmental consequences of the exercise of water rights was possible in the last century, and indeed in this century through World War II. But eventually, public attitudes began to change. For example, in 1913 John Muir had lost his celebrated battle to prevent federal authorization of a water project for San Francisco in Yosemite National Park, while in the 1950s David Brower won his fight to stop Echo Park Dam, which would have affected the Dinosaur National Monument.

As public attitudes began to shift, changes in legal doctrine regarding water resources also began to occur. The California legislature, for example, imposed water bypass requirements on dam owners for the protection of downstream fish populations, and


14. See People v. Gold Run Ditch & Mining Co., 66 Cal. 138 (1884), which enjoined the deposit of hydraulic mining debris in California's rivers, is sometimes cited as a nineteenth century "environmental" case. See, e.g., Marilyn Ziebarth, California's First Environmental Battle, CAL. LAW., Aug. 1984, at 56. Although undoubtedly that decision brought environmental benefits, it was handed down to relieve farmers and cities from the adverse impacts of the hydraulic mining debris clogging river channels and causing floods. Protecting the integrity of rivers for their natural values was not an issue. See generally ROBERT L. KELLEY, GOLD VS. GRAIN: THE HYDRAULIC MINING CONTROVERSY IN CALIFORNIA'S SACRAMENTO VALLEY (1959) (recounting the California farmers' long struggle to halt the damage done by hydraulic mining operations in the Sierra Nevada mountains).

15. See HUNDLEY, supra note 6, at 169-83.

16. See id. at 307. At the time David Brower was the Executive Director of the Sierra Club. To Brower's later regret, in obtaining deletion of the Echo Park project, the Sierra Club acquiesced in a dam on the Colorado River at Glen Canyon. See id.; see also JOHN MCPHEE, ENCOUNTERS WITH THE ARCHDRUID 163 (1990).

17. See CAL. FISH & GAME CODE §§ 5937 (expanding upon earlier provisions), 5946 (linking bypass requirements to water rights granted in one part of the state) (West 1984); see also California Trout, Inc. v. State Water Resources Control Bd., 255 Cal. Rptr. 184, 189, 192-93 (Ct. App. 1989) (noting that the code was amended and strengthened in
it also provided that use of water for fish and wildlife is beneficial. In the years that followed, other enactments by western states provided that appropriative water rights could, in some circumstances, be obtained without the necessity of the traditional diversion or impoundment.

None of these changes, however, has made much difference for the operation of the dams and other water project facilities already constructed. These continue to have a myriad of detrimental environmental consequences. Many block access to upstream spawning areas for anadromous fish, alter and sometimes even eliminate downstream flows, modify temperature regimes and otherwise damage environmental values. Most of these consequences of water projects were initially ignored in the rush to "put water to work." To declare fish protection a beneficial use or to permit a necessarily junior appropriation for instream flow purposes has done nothing to alter the adverse consequences of the thousands of dams already constructed and in operation. To change these projects, more powerful tools have been and will be needed, as well as a political environment that permits those tools to be employed effectively.

III. FIRST SHOTS IN THE REVOLUTION

California has been the leader in the current revolution in western water law, with the first significant battle being fought over the water resources of the Mono Basin. This small basin

1953 in response to the drying up of the Owens River Gorge).
20. In 1945, in a speech to a California Water Conference, Governor Earl Warren aptly stated the water ethic of earlier years as follows: "In my opinion we should not relax until California has adopted and put into operation a statewide program that will put every drop of water to work." Quoted in Joel W. Hedgpeth, The Passing of the Salmon, in California's Salmon and Steelhead: The Struggle to Restore an Imperiled Resource 52, 59 (Alan Lufkin ed., 1991).
lies to the north of the Owens Valley, due east of Yosemite National Park, just at the western edge of the arid Great Basin. Its principal feature is the highly saline Mono Lake, but the legal battle has been about the fresh water in several creeks tributary to the lake. Most of the water in those creeks is derived from the normally ample snowpack in the Sierra Nevada mountains to the west.

Earlier in this century, the City of Los Angeles, to augment its municipal water supply so as to allow for future growth, secured water rights for virtually the entire flow of four of the five major creeks in the Mono Basin. These are appropriative rights recognized by licenses issued by California's State Water Resources Control Board (SWRCB). They allow the city to divert water from the basin and to export it to Los Angeles via the Owens River and the Los Angeles Aqueduct.

Although in the 1930s some feared Los Angeles' Mono Basin project would dry up Mono Lake entirely, just as Owens Lake had been dried up to the south, the environmental consequences of water export from the Mono Basin have been somewhat less dramatic. The resultant water level decline, however, has led to loss of waterfowl habitat, increased salinity levels that have threatened invertebrates serving as a food source for several bird species, predator access to nesting areas and some toxic dust storms fed by material from the newly exposed lake shore.

22. The Great Basin is an enormous region of desert mountain ranges and valleys. It includes the western half of Utah, most of Nevada, and portions of Arizona, California, Idaho and Oregon. See THE COLUMBIA ENCYCLOPEDIA 1127 (Barbara A. Chernow & George A. Vallasi eds., 5th ed. 1993).

23. For a comprehensive report on conditions in the Sierra Nevada, see SIERRA NEVADA ECOSYSTEM PROJECT SCIENCE TEAM AND SPECIAL CONSULTANTS, CENTERS FOR WATER AND WILDLAND RESOURCES AT UNIVERSITY OF CALIFORNIA, DAVIS, STATUS OF THE SIERRA NEVADA — FINAL REPORT TO CONGRESS (1996).

24. See HART, supra note 21, at 42.

25. See KAHRL, supra note 7, at 35-36.

26. See CALIFORNIA ST. WATER RESOURCES CONTROL BD., DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE REVIEW OF THE MONO BASIN WATER RIGHTS OF THE CITY OF LOS ANGELES (1993) (three volumes, with twenty-eight supporting reports) [hereinafter CAL. WATER BD. (1993)]. See also
Additionaly, dried up creeks have brought not only significant changes in riparian conditions, but also the loss of celebrated fisheries of non-native trout.27

In former times, these detrimental environmental consequences would have been accepted as the price of progress, but not so for the Mono Basin. Scientific studies, first in the 1960s,28 and more visibly in the 1970s and 1980s,29 documented the ongoing threats to both wildlife and human health. Activists prevailed upon a major law firm to take up their cause — one that, in the late 1970s, seemed virtually impossible to win given what seemed the rock-solid water rights position of Los Angeles. After all, the city, with the full support of both the state and federal governments, had perfected property rights to a large part of the fresh water resources of the Mono Basin and was putting that water to reasonable beneficial use as required by the norms of the appropriative doctrine and California's anti-waste constitutional provisions.30 Those constitutional provisions had, in fact, been provoked by the desire to minimize the "loss" of fresh waters into saline waters such as those of Mono Lake,31 just the sort of loss the city's water project seemed to be reducing.

Despite the odds against a successful challenge to the Mono Basin water diversions, within a dozen years of initiating litigation the environmental challengers had obtained some prelimi-

27. See id.
nary judicial relief. By 1994, the SWRCB had issued an order greatly limiting exports and providing for both waterfowl habitat and stream restoration. Many developments seem to have influenced this result: a sense that California's water rights law was outdated and needed reform, the fact that the activist Mono Lake Committee centered much of its work in Los Angeles, the existence of reasonable means for the city to deal with the prospective loss of Mono Basin supplies, and the city's consistent intransigence on the issue and its increasing isolation within the California community of water development agencies. But one key element in bringing about substantial reoperation of the Mono Basin facilities clearly was doctrinal innovation and evolution in the California courts regarding water law.

Of greatest significance was judicial approval of the point made by environmentalists that the public trust doctrine, a notion that sovereign property rights to navigable waters and the land beneath them should be exercised to protect public access and enjoyment, has a role to play with regard to water rights. California courts long ago had acknowledged the relevance of the public trust doctrine regarding fill placed in navigable waters in a way which destroys or severely limits public access to those waters. In litigation challenging Mono Basin water diversions,

32. See Hart, supra note 21, at 130-31.
35. See Hart, supra note 21, at 99-100.
37. See Hart, supra note 21, at 164. Indeed, within the city the Department of Water and Power, operator of the Mono Basin facilities, over time lost support from members of the city council and the mayor. See id., at 120, 173-74.
38. The earliest judicial acknowledgement of the public trust doctrine in California came with regard to fill placed in San Francisco Bay. See Eldridge v. Cowell, 4 Cal. 80 (1854); see also Craig Labadie, Note, Increased Public Trust Protection for California's Tidelands — City of Berkeley v.
environmentalists made the point that destruction of a lake by diversion of its inflow was similar to destruction of the same lake by filling it in. Logically, they argued, award of a public trust doctrine remedy in the latter case should require award of the same remedy in the former case.39

Although logic supported the environmentalists' point, history did not. In California no court had ever limited the exercise of a water right in the name of the public trust doctrine,40 and in the Mono Basin litigation, the state's Attorney General argued strenuously that any public trust doctrine had been absorbed by the overriding constitutional policy that the waste of water must be avoided.41 But the California Supreme Court rejected that viewpoint,42 concluding that an accommodation must be reached between appropriative water rights benefitting diverters and the public trust doctrine benefitting the general public in its use of water in place. In 1983 the court ruled that "whenever feasible" the exercise of appropriative water rights is subject to limitation to protect public trust values such as preservation.43

IV. SUBSTANTIAL PROJECT REOPERATION: THE MONO BASIN

The doctrinal innovation of the 1983 Mono Basin ruling eventually led to important modifications of project operation. In 1985, challengers of the hegemony of Los Angeles in the basin opened a second front: persons interested in flows in the tributary

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39. This point had earlier been made in Ralph W. Johnson, Public Trust Protection for Stream Flows and Lake Levels, 14 U.C. DAVIS L. REV. 233, 257-58 (1980).

40. Outside of California, the decision most on point was United Plainsmen Ass'n v. North Dakota Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976). United Plainsmen did not, however, involve a perfected water right.

41. See Roderick E. Walston, The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy, 22 SANTA CLARA L. REV. 63 (1982). Walston, who argued the Mono Basin case on behalf of the State Water Resources Control Board, maintained the public trust doctrine is "substantively neutral." Id. at 93.


43. Id. at 728.
ries for their significance in maintaining fish life—as opposed to their value in contributing to a lake level and quality deemed necessary for bird life in the basin—invoked certain provisions of the California Fish and Game Code, which require dam operators to release sufficient water to keep downstream fish in "good" condition.\textsuperscript{44} Although those provisions can be regarded as a partial codification of the public trust doctrine developed by the judiciary,\textsuperscript{45} they apply as written with no need for "accommodation" of the prior appropriation doctrine.\textsuperscript{46} The interim relief they allowed meant that for the first time since Los Angeles began its Mono Basin water project it had to operate with a direct constraint on the exercise of its water rights.

For many years lawyers for the environmental plaintiffs in the Mono Basin litigation had fought to remain in the courts—particularly, the federal courts\textsuperscript{47}—and conversely to keep the dispute away from the SWRCB. In 1989, however, a judicial stay was issued to allow the SWRCB to examine both the lake level and the creek flow components of the case.\textsuperscript{48} The SWRCB spent several years preparing a massive Environmental Impact Report on the situation pursuant to the California Environmental Quality Act.\textsuperscript{49} Thereafter, it conducted a lengthy evidentiary hearing prior to announcement of its order on September 28, 1994.

The SWRCB's Mono Basin water rights decision,\textsuperscript{50} which no party chose to appeal to the courts,\textsuperscript{51} substantially changed the licenses pursuant to which Los Angeles diverts water in the basin. Practically no diversion is permitted until the lake returns to a specified elevation; thereafter, diversions are expected to average

\textsuperscript{44} CAL. FISH & GAME CODE §§ 5937, 5946 (West 1984).
\textsuperscript{46} Id. at 206-08.
\textsuperscript{47} See HART, supra note 21, at 103, 131; see also National Audubon Soc'y v. Department of Water, 869 F.2d 1196 (9th Cir. 1988) (rejecting federal common law nuisance theory asserted by National Audubon Society regarding interstate air pollution).
\textsuperscript{48} See HART, supra note 21, at 131.
\textsuperscript{49} See id. at 136-38; CAL. WATER BD. (1993), supra note 26.
\textsuperscript{50} CAL. WATER BD. (1994), supra note 33.
\textsuperscript{51} See HART, supra note 21, at 173-75.
well below half of those which occurred before the litigation.\textsuperscript{52} Furthermore, an affirmative obligation requires the city to prepare plans for the restoration of the creeks and waterfowl habitat areas, exercises which require more than the simple release of water into the creeks.\textsuperscript{53} All in all, the operation of the municipal water supply facilities has now been radically altered; restoration and maintenance of a desired ecosystem is now a precondition for the realization of any further water supply or power production benefits for the city.

V. PROJECT REOPERATION IN A MORE COMPLEX SETTING: THE DELTA PUMPS

In several ways the Mono Basin situation is quite simple. There is only one major diverter, the City of Los Angeles; the applicable law is mostly state law; and the amount of water at stake is — in the context of the massive water development characteristic of California — small.\textsuperscript{54} In contrast, the Bay-Delta water controversy is exceedingly complex. There are many major diverters from the Sacramento-San Joaquin Delta (the "Delta") and its tributary rivers;\textsuperscript{55} important federal laws, notably the Clean Water Act\textsuperscript{56} and the Endangered Species Act,\textsuperscript{57} interact with state law on riparian water rights, appropriative water rights, water quality, the public trust doctrine, and other matters;\textsuperscript{58} and a large part of the

\begin{itemize}
\item \textsuperscript{52} See id. at 171-73.
\item \textsuperscript{53} See id. at 171. Early in 1997, the State Water Resources Control Board opened hearings on the draft restoration plans submitted by Los Angeles.
\item \textsuperscript{54} See 1 DEP'T WATER RESOURCES, CALIFORNIA WATER PLAN UPDATE, 49 (1994) (California's estimated average annual runoff is about 71,000,000 acre-feet, of which in 1990 about 35% was developed for irrigated agriculture, urban and other uses); CAL. WATER BD. (1993), supra note 26, at 3A-14. Records maintained by Los Angeles indicate that from April 1940, the year water rights were granted, to March 1989 an average of 65,400 acre-feet of water was exported annually from the Mono Basin. See id.
\item \textsuperscript{55} See generally STATE OF CALIFORNIA, THE CALIFORNIA WATER ATLAS 104-06 (William L. Kahrl ed., 1979) [hereinafter CAL. WATER ATLAS].
\item \textsuperscript{56} 33 U.S.C. §§ 1251-1387 (1994).
\item \textsuperscript{57} 16 U.S.C. §§ 1531-1543 (1994).
\item \textsuperscript{58} See United States v. State Water Resources Control Bd., 227
state’s developed water supply passes through the Delta on its way to parts of the San Francisco Bay Area, the San Joaquin Valley and Southern California.  

A major water quality problem in the Delta is maintenance of an appropriate salinity balance. Salinity intrusion into the interior of the Delta — a much-altered landscape which has gone from tule marshes to numerous levee-protected islands used for farming — was an issue long before large federal and state water projects began pumping water from the southern end of the Delta for export, but the export pumps have greatly exacerbated the problem. Farmers and industries within the Delta, agricultural and urban users of the exported water, and important fish species all need either fresh water or an appropriately located low salinity zone to prosper, so control of the estuarine area where the salt and fresh waters meet is of critical significance to many interests.

Salinity standards for the Delta are set pursuant to state and federal water quality laws, but they are implemented through conditions placed on water rights pursuant to state law. An impasse of sorts occurred in recent years when the federal Environmental Protection Agency had disapproved portions of the state’s Delta salinity standards as inadequate to protect fish and wildlife and, pursuant to the Clean Water Act, was preparing its own salinity standards but lacked a ready means of implementing those standards. To further complicate the situation, listings under the federal Endangered Species Act had led to consultations and biological opinions which placed operational limits on the Delta pumps.


59. See CAL. WATER ATLAS, supra note 55, at 104.

60. See, e.g., Town of Antioch v. Williams Irrigation Dist., 205 P. 688 (Cal. 1922).

61. See CAL. WATER ATLAS, supra note 55, at 104.

62. See Rieke, supra note 58, at 343-44.


64. See Rieke, supra note 58, at 354-55.
At the eleventh hour — or, better, a stroke before midnight — federal and state negotiators late in 1994 reached an agreement on a three-year “truce” memorialized in joint state-federal Principles for Agreement. These provide, in effect, for integration of water quality and endangered species requirements and a coordinated state-federal approach to implementation of those requirements through restrictions on pumping in the southern Delta and other measures. Export limits are included, as are requirements that water be released from reservoirs to achieve water quality objectives. Although the project reoperation in this instance is less drastic than in the Mono Basin, the changes are significant. And they have led to a major current effort to study the Delta system with an eye to improvements in the environment, water supply reliability, water quality and system (e.g. levee) vulnerability.

VI. REOPERATION RESISTED: THE CVPIA

One of the federal government’s most substantial water projects in the West is the Central Valley Project (CVP) in California. Like most water projects of its time, it was built with evident disregard for its environmental impacts. The conse-

65. Id. at 348-49.
70. See Harrison C. Dunning, Confronting the Environmental Legacy of Irrigated Agriculture in the West: The Case of the Central Valley Project, 23 ENVTL. L. 943, 950 (1993).
quences for fish species have been particularly severe.\textsuperscript{71}

In 1992 Congress included in water project legislation\textsuperscript{72} a lengthy title known as the Central Valley Project Improvement Act (CVPIA).\textsuperscript{73} This act reauthorized the CVP with a new set of project purposes: for example, stating for the first time that fish and wildlife mitigation, protection, and restoration would have the same priority as irrigation.\textsuperscript{74} Keeping with this "new look" for the CVP, Congress, pursuant to the National Environmental Policy Act (NEPA),\textsuperscript{75} mandated the preparation of a Programmatic

\textsuperscript{71} Plans for Friant Dam originally included hydroelectric power generation, which would have served to maintain a regular flow of water downstream of the dam. However, that feature was deleted early in construction. See Rose, supra note 69, at 100. Subsequently state officials decided that no water releases would be required to maintain the downstream fishery. See id. at 102-104; see also 18 Op. Cal. Att’y Gen. 31 (1951). Aside from flood years, only small amounts of water are released from Friant Dam, enough to satisfy the rights of riparians between Friant Dam and Gravelly Ford (37 miles downstream). See Leland O. Graham, The Central Valley Project: Resource Development of a Natural Basin, 38 CAL. L. REV. 588, 598-99 (1950). With virtually no water in the San Joaquin River below Gravelly Ford in most years, and with no fish passage facilities at the dam, spring-run salmon which once summered in the headwaters above Friant Dam have become extinct. See George Warner, Remember the San Joaquin, in California’s Salmon and Steelhead - The Struggle to Restore an Imperiled Resource 61, 68 (Alan Lufkin ed., 1991).


\textsuperscript{73} Projects Act § 3401.

\textsuperscript{74} Projects Act § 3406(a). Although earlier the situation had been debatable, the Bureau of Reclamation, which administers the CVP, had taken the position that project water for fish and wildlife was authorized but subordinate to irrigation and other statutorily recognized purposes. Central Valley Project Improvement Act: Hearings on S.484 Before the Subcomm. on Water and Power of the Senate Comm. on Energy and Natural Resources, 102d Cong., 1st Sess. 426-27 (1991). Note that fish and wildlife “enhancement” is given a lower priority by CVPIA than “mitigation, protection and restoration,” one equivalent to power production. Projects Act § 3406(a)(2).

\textsuperscript{75} 42 U.S.C. §§ 4321-4327 (1994).
Environmental Impact Statement (PEIS) prior to the renewal of any existing long-term water supply contracts.\(^7^6\)

At the heart of the CVPIA, however, are directions for changes in key CVP facilities, which are prerequisites for new water supply contracts.\(^7^7\) Some of these directions relate to physical improvements of water project facilities;\(^7^8\) others involve the establishment of firm water supplies for wildlife areas in the Central Valley, as in for example, the Grassland Resources Conservation District.\(^7^9\)

Two CVPIA reoperation directions of central importance have not to date been implemented as Congress apparently intended. One was to dedicate a minimum of 800,000 acre-feet of CVP water for fish, wildlife, water quality and habitat restoration purposes under the management of the U.S. Fish and Wildlife Service;\(^8^0\) the other, to develop and implement a program to double anadromous fish population levels by the year 2002.\(^8^1\) Initially the

\(^7^6\). See Projects Act § 3404(c). Interim renewal contracts, subject to certain new requirements, are however permitted. \textit{Id.}

\(^7^7\). See id. § 3404(a). For what is arguably the CVP's most serious environmental impact, the complete drying up most years of the San Joaquin River below Gravelly Ford, the CVPIA, however, required only development of a plan. \textit{See id.} § 3406(c)(1). Even that has been cut short by Congressional commands denying funding for plan preparation. \textit{See} 141 CONG. REC. H10,949 (daily ed. Oct. 26, 1995) (Conference Report on H.R. 1905, Energy and Water Development Appropriation Act, 1996).

\(^7^8\). For example, to construct fish screens at unscreened diversions and to install a temperature control device at Shasta Dam. \textit{See} Projects Act § 3406(b)(6).

\(^7^9\). \textit{See} Projects Act § 3406(d). See also § 3406(b)(23) on firm in-stream flows for the Trinity River. These flows are designed to fulfill the federal government's trust duty to the Hoope Valley Tribe. \textit{See id.}

\(^8^0\). \textit{See} Projects Act § 3406(b)(2). The 800,000 acre-feet figure was a compromise — the chair of the Senate Committee on Energy and Natural Resources had originally proposed a dedication for environmental purposes of 1,500,000 acre-feet. \textit{See} Phillip A. Davis, \textit{Congress Seeks to Rechannel Flow of Water in the West}, 50 CONG. Q. WKLY. REP. 527, 532 (1992). Note that the 800,000 figure can be reduced by up to 25 percent in the event drought means reductions occur for agricultural deliveries of CVP water. \textit{See} Projects Act § 3406(b)(2)(C).

\(^8^1\). \textit{See} Projects Act § 3406(b)(1). The program requires "all reasonable efforts" toward the doubling goal. \textit{See id.}
environmental dedication was successfully challenged on NEPA grounds, but a federal district court's preliminary injunction of the dedication was vacated on appeal. More serious for project reoperation to ensure implementation of the dedication, however, are disputes over the meaning of the dedication language. Some of these go to whether there will be accounting procedures used to sort out how CVP yield is allocated, while others deal with the availability of dedicated water in dry years and whether any CVP water reallocated from contractors needs to be made up at a later date. There is also disagreement on whether water used to accomplish an upstream flow objective can be "recaptured" for out-of-stream use when it reaches the Delta — if so, an obvious incentive to find upstream environmental uses for the dedication is created. As of this writing, these disputes are unresolved and block progress toward achieving the environmental goals of the legislation.

The two centrally important CVPIA reoperation directions mentioned above are related, for one use of the environmental dedication water would be to help achieve the Act's anadromous fish doubling goal. Pursuant to the doubling mandate, in December 1995 the Fish and Wildlife Service released a draft Anadromous Fish Restoration Program ("AFRP") which identified over one hundred actions beneficial for anadromous fish which utilize Central Valley waterways. Some of these can be done at no water cost to CVP contractors, for example, restoration of spawning gravels in tributary streams. Others do carry a cost to CVP contractors, for example, reduction of water exports from the Delta when the anadromous fish are most at risk from such pumping. As of this writing, final decisions have not been made on implementation of the AFRP, but the inclination of the Bureau of Reclamation seems to be to favor non-water related measures and, for those which cost contractors water, to favor upstream measures (which allow "recapture") over Delta measures.

83. Westlands Water Dist. v. Natural Resources Defense Council, 43 F.3d 457 (9th Cir. 1994).
As noted above, California currently is the leader in the on-going revolution in western water law, with the dramatic reopera-

tion of Mono Basin water facilities belonging to the City of Los Angeles being the most dramatic single example of modification

of a water supply project to achieve environmental goals. The Bay-Delta and CVPIA examples discussed above are less clear-cut, but each holds promise of significant project reoperation for environ-

mental benefits. California is not alone, however, in these efforts. A recent detailed study of fifteen selected federal recla-

mation projects scattered throughout the west found substantial change occurring at a number of them, a result of “the in-

creased attention now paid to the in-place values of water for such things as fisheries.”

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VII. COUNTER-REVOLUTION

Water supply is a critical component of both urban life and agri-

culture. Because municipal prosperity and success in irrigated

farming require reliable water supplies, changes in water supply

projects to enhance environmental quality will be contentious.

For fifteen years Los Angeles adamantly resisted environmental-

ists’ legal and political efforts to bring change in the Mono Ba-

sin,85 while water users dependent on exports from the Delta

have frequently used litigation and other means to resist any re-

ductions.86 Those adversely affected by the CVPIA have both

sued87 and sought to weaken the act by amendments.88

84. Lawrence J. MacDonnell, Managing Reclamation Facilities for Ecosystem Benefits, 67 U. COLO. L. REV. 197, 201 (1996). This article sum-

marizes much of the study, with attention given to reform of reclama-

tion projects on the Truckee and Carson Rivers of California and Ne-

vada, the Yakima River of Washington, and the Upper Colorado River

of Colorado. Results of the full study are provided in NAT. RESOURCES

L. CENTER., RESTORING THE WEST’S WATERS: OPPORTUNITIES FOR THE BU-

REAU OF RECLAMATION (1996).

85. See HART, supra note 21, passim.


87. See, e.g., Westlands Water Dist. v. Natural Resources Defense Council, 43 F.3d 457 (9th Cir. 1994).

Counter-revolution, however, is more than resistance to change. It is a proactive reaching out to seize the initiative: to destroy that which is threatening. The best example of a counter-revolution regarding contemporary reform of western water projects is found in Idaho.

As noted above, the doctrinal basis for the Mono Basin water project changes was the use of the public trust doctrine to limit the exercise of appropriative water rights. Shortly after the California Supreme Court decided that both the public trust doctrine and the appropriations doctrine are part of California water rights law,99 the Idaho Supreme Court in dicta endorsed that idea.90 No water rights were actually limited in Idaho, and indeed in the massive Snake River Basin Adjudication, environmental groups were denied standing to raise public trust claims.91 Nonetheless, in 1996 at the behest of irrigation organizations and others, a statute enacted in Idaho purported to overturn this case law by providing that the public trust doctrine “shall not apply” to the appropriation or use of water or to the granting, transfer, administration or adjudication of water rights.92

The Idaho public trust legislation is suspect on several theories: (1) that it is an improper give-away of public rights rooted in sovereignty; (2) that it violates federal constraints rooted in the constitutional equal footing doctrine; and (3) that it is inconsistent with the public use clause of the Idaho Constitution.93 If

91. Idaho Conservation League, Inc. v. State, 911 P.2d 748, 751 (Idaho 1995). The court reaffirmed, however, that in Idaho "proprietary rights to use water... are held subject to the public trust." Id. at 750.
92. IDAHO CODE §58-1203(2). The political background for this measure is provided at Michael C. Blumm et al., Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794, 24 ECOLOGY L.Q. 461 (1997).
93. IDAHO CONST. art. XV, §1. All three possible bases for the invalidity of Idaho's public trust statute are considered in detail in Blumm et al., supra note 92. For a defense of the statute, see Robert E. Bakes, Can The Legislature Change The Public Trust Doctrine? The Idaho Experience,
the legislation is valid, however, it not only cuts off one doctrinal basis for water project reform but also stands as a symbol of refusal — a rejection of the trend all over the West to modify dam operations to reduce the environmental impact from water development. Idaho has participated in that trend in the past, although only to a very limited extent. Yet at present Idaho is maintaining a counter-revolutionary stance on water project re-operation, manifesting at the state level the attitude toward environmental protection reflected at the federal level by the leadership of the 104th Congress.

VIII. CONCLUSION

From one point of view, to reoperate water projects to address the severe degradation often characteristic of those projects can be seen as consonant with the agenda of the modern environmental protection movement. Externalities are gradually being internalized, consistent with the widely accepted principle of polluter — here, diverter — pays. Alternatively, Western water projects can be viewed as reclaiming the notion that water is fundamentally a public resource, that there is a community interest in water which transcends the ambitions of individual users. As noted by the late Allen Broussard, author of the California Supreme Court’s Mono Basin decision, alongside the economic benefits of appropriative water rights there is a community stake in “the people’s common heritage of streams, lakes, marshlands...
and tidelands."98 That community interest is now gradually being reclaimed for a number of rivers, lakes and estuaries in the West.