Summary of Significant Litigation 1998–2005

By DWR, Office of Chief Counsel

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By California Department of Water Resources, Office of the Chief Counsel

I. Disputes over Water Resources of Statewide Significance

A. Delta

1. Calfed Litigation: The Calfed Record of Decision issued on August 28, 2000, was challenged by environmental groups and agricultural interests in both state and federal courts. See *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (Third Appellate District Court of Appeal, Consolidated Case Nos. C044267 and C044577); Don Laub. v. Davis, (Fresno Superior Court No. 00CG1167), and Regional Council of Rural Counties v. State of California (Sacramento Superior Court No. 00CS01131)*. Three complaints filed in state courts were coordinated at the Superior Court level in Sacramento. Plaintiffs claim the CALFED Programmatic EIS/EIR violates CEQA and RCRC also alleges that the ROD is illegal under several water law theories. The state defendants won on all issues at the trial level and the two cases are pending on appeal.

Plaintiffs in the federal lawsuit allege violation of NEPA and the federal Administrative Procedures Act. The district court dismissed an earlier version of the complaint as premature in August 2001. The Court of Appeal reversed that decision in September 2003. *Laub v. United States Department of the Interior, 342 F.3d 1080 (2003)* and remanded the case for trial. The hearing in federal district court is scheduled for September 6, 2005.

2. Challenge to D-1641 Water Rights Decision: *Coordinated Special Proceedings, State Water Resources Control Board Cases (3rd Dist. Court of Appeals Case No. C044714).* Eleven different lawsuits were filed and coordinated in this action challenging SWRCB Water Rights Decision 1641 which implemented certain water quality objectives in the May 1995 Water Quality Control Plan. The case addressed several questions, including 1) whether D-1641 complied with CEQA; 2) whether the changes in D-1641 injured certain Delta water users; and 3) whether D-1641 was consistent with area of origin laws. The Superior Court decision largely upheld D-1641, finding that it properly decided all CEQA, area of origin, joint point of diversion, reasonable use, due process, and salmon protection issues. The court found two errors in D-1641: (1) it improperly limited the place of use for Westlands Water District, and (2) it improperly implemented the San Joaquin River flow objectives under the San Joaquin River Agreement. The case is pending on appeal.

Excluded from that appeal is one of the most difficult issues to resolve in the D-1641 Water Rights Decision: Which water users had responsibility to meet the water quality criteria? The Board's consideration of this issue was postponed to Phase 8 of the proceedings. As an alternative to litigating this issue, the Bureau, DWR and numerous Sacramento Valley and export water interests entered into negotiations resulting in an agreement to collaborate in the development and implementation of a variety of project and actions to help meet flow-related water quality objectives, meet local water needs, and improve water supplies throughout the state. See documents posted at www.svwmp.water.ca.gov.

3. Environmental Water Account: *California Farm Bureau Federation v. Mike Chrisman (Sacramento Superior Court No. 04CS00490).* The Farm Bureau filed this CEQA action challenging the adoption of the Final EIS/EIR covering operation of the Environmental Water Account (EWA) through 2007, the end of the first stage of implementation of the CalFed Program. The Farm Bureau alleges the EIS/EIR does not adequately address "agricultural resources" when analyzing impacts, alternatives,

mitigation, and other issues regarding operations of the EWA. The hearing date is scheduled for October 7, 2005.

4. Term 91: *El Dorado Irrigation District v. State Water Resources Control Board (Third District Court of Appeal, No. C046211).* Two lawsuits were filed challenging State Water Resources Control Board Decision 2001-22, which approved an application by El Dorado Irrigation District to divert water for urban purposes. El Dorado Irrigation District and El Dorado County Water Agency challenged the imposition of Term 91, which protects SWP stored water, as part of the decision. Another lawsuit was filed by an environmental group, League to Save Sierra Lakes alleging CEQA violations. The court issued its final decision in December 2003 finding that Term 91 was improperly applied to El Dorado Irrigation District. The State Board appealed the decision and the case is pending on appeal.

5. Delta Smelt: On February 15, 2005, a coalition of environmental groups sued the Bureau and FWS challenging a Biological Opinion issued at the request of the Bureau to review the impact of the Long-Term Central Valley Project Operations Criteria and Plan (OCAP) on the Delta Smelt. Natural Resources Defense Council v. Norton (N.D. Cal.2005).

6. Delta Wetlands: A private initiative to develop two Delta islands into water storage facilities was challenged in Central Delta Water Agency v. State Water Resources Control Board, 124 Cal.App.4th 245 (3rd Dist. 2004). The proposal stated that once built, purchasers of the stored water would be identified, and that likely purchasers would be users within the CVP or SWP service areas. The court held that the SWRCB water right permit issued to Delta Wetlands was invalid. The Court held that the State Constitution and Water Code require the SWRCB to determine the actual intended beneficial use of the impounded water before issuing a permit, and that a general statement of potential beneficial use with limiting conditions is insufficient. In addition, the court ruled invalid the Board's purported delegation of authority to its Executive Officer. The California Supreme Court denied review on March 16, 2004.

7. Prospect Island: Plans for the Prospect Island Ecosystem Restoration Project were abandoned after Reclamation District 501 and others filed a lawsuit alleging failure to comply with CEQA/NEPA. The plaintiffs alleged that permanent flooding of Prospect Island could cause water to seep onto neighboring Ryer Island and prevent agricultural use of their land. See Reclamation District 501 v. U.S. Army Corps of Engineers (E.D. Cal. No. S-99-1740 FCD GGH 1999).

8. The State Water Resources Control Board's imposition of Term 91 in water rights permits was challenged in El Dorado Irrigation District v. State Water Resources Control Board and is pending at the Third District Court of Appeal, No. C046211 (Sacramento County Superior Court, Case No. 01CS01319

B. Central Valley Project

1. Trinity River: In 2004, decades of dispute and litigation over the Central Valley Project's Trinity River Division was culminated. The Trinity River Division was authorized in 1955 with the directive that the government take those measures necessary to protect the fishery and wildlife resources of the Trinity River Basin. In 1984, 20 years after full operations began, the Trinity River Basin Fish and Wildlife Management Act directed the Secretary to implement a basinwide fish and wildlife management program in order to achieve the long-term goal of restoring fish and wildlife populations in the Trinity River Basin to a level approximating that which existed immediately before the start of the construction of the Trinity River division. The 1992 Central Valley Project Improvement Act confirmed this

Congressional commitment. The Trinity River Flow Evaluation Study, completed in 1999, was a comprehensive strategy to rehabilitate the Trinity River and recreate an environment resembling the natural pre-TRD habitat. The TRFES recommended a permanent increase of flows depending on the water-year class, ranging from 368,900 AF/year in "Critically Dry" years to 815,200 AF/year in "Extremely Wet" years. Non-flow measures were also recommended. A final EIS/EIR was issued in 2000.

The EIS/EIR was challenged by Westlands Water District and other CVP contractors. In July, 2004, the Ninth Circuit Court of Appeal reversed in part the district court's orders declaring the EIS/EIR and related orders invalid. The Ninth Circuit held that the EIS did consider a reasonable range of alternatives; that no supplemental EIS was required to discuss the NMFS's BioOp requiring mitigation of impacts to Sacramento River temperatures and the effect of the California energy crisis; that the reasonable and prudent measure involving the mitigation of X2 movement in the Delta was invalid as a major change to the proposed action and accordingly set aside. The court stated:

> The number and length of the studies on the Trinity River, including the EIS, are staggering, and bear evidence of the years of thorough scrutiny given by the federal agencies to the question of how best to rehabilitate the Trinity River fishery without unduly compromising the interests of others who have claim on Trinity River water. We acknowledge, as the district court highlighted, concerns that the federal agencies actively subverted the NEPA process, but our review of the EIS shows that the public had adequate opportunity to demand full discussion of issues of concern. Twenty years have passed since Congress passed the first major Act calling for restoration of the Trinity River and rehabilitation of its fish populations, and almost another decade has elapsed since Congress set a minimum flow level for the River to force rehabilitative action. Flow increases to the River have been under study by the Department of the Interior since 1981. Restoration of the Trinity River fishery, and the ESA-listed species that inhabit it are unlawfully long overdue…Nothing remains to prevent the full implementation of the ROD, including its complete flow plan for the Trinity River.
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> *Westlands Water District et al. vs. United States Department of the Interior*, 374 F.3d 853, 878 (9th Cir. 2004).

2. San Joaquin Drain: Longstanding disputes over the Bureau of Reclamation's obligation to provide drainage services for lands in the San Luis Unit of the CVP were resolved by the Ninth Circuit in *Firebaugh Canal Co. v. United States Department of the Interior, 203 F.3d 568 (9th Cir. 2000).* The Court held that the San Luis Act required the Bureau to construct an interceptor drain and that this duty was not implicitly repealed by subsequently-enacted laws. In response, the Bureau initiated the environmental review process and in February 2004, reached an agreement with Westlands Water District regarding expanding the scope of review to include land retirement alternatives, as well as the drainage disposal alternatives. The draft EIS is scheduled to be available in the summer of 2005.

3. 1993 Allocation Dispute: Irrigators within Westlands Water District brought suit against the Bureau for allocation reductions caused by the listing of several fish species as endangered in the Delta. The Ninth Circuit found that individual water users were not qualified to assert that the United States waived sovereign immunity because they were not intended third-party beneficiaries under the contract

between the United States and the District. *Orff v. United States Department of the Interior, 358 F.3d 1137, cert. granted, 125 S.Ct. 309 (2004).* The Supreme Court heard oral arguments in February 2005.

4. 1994 Allocation Dispute: Westlands Water District and the San Benito Water District contended that the Bureau miscalculated the allocation during the 1994 water year. The districts contended that the Bureau erred by giving the Exchange Contractors priority based on their contract which exchanged a CVP water supply for their pre-existing water rights. In *Westlands Water District v. United States Department of Interior, 337 F.3d 1092 (9th Cir. 2003),* the Ninth Circuit held that substitute water delivered to the Exchange Contractors is not "available water," because such water is a vested priority obligation the Bureau must satisfy without including it in CVP available supply, and that accordingly, "The Westlands and San Benito contracts do not require that the Exchange contractors receive a pro-rata allocation along with the Districts; to the contrary, the contracts respect the Exchange Contractors' priority to CVP water." *Id.* at 1104.

5. CVPIA a. Accounting for the 800,000 acre-feet: Litigation over the Bureau's methodology for accounting for the 800,000 acre feet to be dedicated to fish, wildlife and habitat restoration under the CVPIA was finally resolved in *Bay Institute of San Francisco v. United States,* 87 Fed. Appx.637 (9th Cir. 2004). The Ninth Circuit affirmed the district court's holding that (1) Section 3406(b)(2) does not require Interior to calculate the cost of water actions taken pursuant to 3406(b)(2) against a hypothetical model of Project operations during the 1928-1934 drought period; (2) that Interior may not exclude from its calculation of Project yield water flows implemented in connection with Auburn Dam; (3) that Interior may not use offset/reset matrices in accounting for the use of water; and (4) that the CVPIA does not prohibit Interior from reusing water initially released for (b)(2) purposes. The Ninth Circuit held that the district court erred in concluding that Interior lacks discretion to refrain from crediting the amount of Project yield actually used for any (b)(2) purpose against the designated 800,000 acre feet of Project yield. The Court stated that "To hold otherwise would defeat the primary purpose for which the 800,000 acre feet were designated."

b. Vernalis Standard: South Delta farmers and water agencies brought an action against the Bureau challenging the New Melones Interim Operations Plan developed under the CVPIA. The Court found, *inter alia,* that the Bureau's decision to release water under the Plan was not arbitrary and capricious, and that plaintiffs lacked proof of actual injury. *Central Valley Water Agency v. United States, 327 F.Supp.2d 1180 (E.D. Cal. 2004).* An earlier challenge to State Water Resources Control Board Order No. 95-6 approving changes to the Bureau's allocation of water from New Melones was dismissed for failure to join the Bureau, an indispensable party. The Bureau refused to waive sovereign immunity. *County of San Joaquin v. State Water Resources Control Board, 54 Cal.App.4th 1144 (1997).*

6. Contract Renewals a. Friant: In *Natural Resources Defense Council v. Houston, 146 F.3d 1118 (9th Cir. 1998), cert. denied, Lower Tule River Irr. Dist. v. Natural Resources Defense Council, 526 U.S. 1111 (1999),* the court affirmed the rescission of renewal contracts in the CVP Friant Unit where the contracts had been entered into without complying with the Endangered Species Act. Once rescinded, the contract renewals were held to be subject to NEPA under the CVPIA. On remand, the district court held that Fish & Game Code Section 5937 applies to the Bureau's operation of the Friant Dam. *Natural Resources Defense Council v. Patterson, 333 F.Supp.2d 906 (E.D. Cal. 2004).* The court held that (1) the Court possessed jurisdiction over the claim; (2) Section 5937 required the Bureau to allow "sufficient water to pass over, around or through the dam to keep in good condition any fish that may be planted or

exist below the dam"; and that the Bureau had not released sufficient water from the dam to reestablish and maintain historic fisheries.

b. Delta-Mendota Canal: Contractors receiving water from the Delta-Mendota Canal were unsuccessful in seeking an injunction requiring the Bureau to recognize and grant the district water contract delivery priority over other CVP contractors. The court held that until the Bureau makes a final agency decision on the water district's priority, the action is not ripe for review. *Del Puerto Water District v. U.S. Bureau of Reclamation, 271 F.Supp.2d 1224 (E.D. Cal. 2003).*

c. After the Natural Resources Defense Council submitted a letter critical of the proposed terms for CVP contract renewals, Westlands Water District sued the NRDC for a declaratory judgment that certain terms in the proposed contract were lawful. The court dismissed the complaint with prejudice on the grounds that it was not ripe for adjudication and barred by the doctrine that protects citizen petitions to the government. *Westlands Water District v. Natural Resources Defense Council, 276 F.Supp.2d 1046 (E.D. Ca. 2003).*

C. State Water Project

1. The Monterey Amendment Litigation: The 1995 amendment to the State Water Contracts resolved longstanding disputes between the urban and agricultural State Water contractors over allocation of available supply during times of shortages as well as other financial and water management issues. The Monterey Amendment (so called because of the site of the negotiations) was challenged by the Planning & Conservation League, Plumas County, and the Citizens Planning Association of Santa Barbara County. The action challenged the Environmental Impact Report, which was prepared by Central Coast Water Authority as the lead CEQA agency, and the validity of the contract amendment, particularly the transfer of Kern Water Bank lands to Kern County Water Agency. After the Superior Court ruled in favor of the Department, and the Supreme Court also ruled in the contractors' favor on a procedural ground relating to the timeliness of the appeal of a motion to quash, *Planning & Conservation League v. Department of Water Resources, 17 Cal.4th 264 (1998),* the Third District Court of Appeal ruled that the EIR was inadequate (1) due to the designation of the Central Coast Water Agency as lead agency, rather than the Department, and (2) the EIR's failure to adequately address potential impacts that might flow from the removal of Article 18(b) from the long-term water supply contracts. *Planning & Conservation League v. Department of Water Resources, 83 Cal.App 4th 892 (3rd Dist. 2000).* Article 18(b) provided that the Department could reduce the minimum project yield if conditions warranted. The Court noted "the commonsense notion that land use decisions are appropriately predicated in some large part on assumptions about the available water supply." The case was remanded to Superior Court for consideration of plaintiffs' request for an injunctive order under Public Resources Code Section 21168.9. The parties stipulated to a stay of litigation while settlement negotiations proceeded. A settlement in principle was announced in July, 2002, and a formal settlement agreement was signed by all plaintiffs, the Department, and all State water contractors in the spring of 2003. The settlement provides for a number of actions to be taken, including the preparation of a new EIR on the Monterey Amendment. In addition, the Department and the contractors agreed to use the term "Table A amount" in lieu of entitlement and changed the state water contracts to reflect the new term. A Water Supply Reliability Report is issued biennially to provide more accurate information on the reliability of the available supply of water from the State Water Project, and a watershed protection program was initiated in Plumas County.

2. Arroyo Pasajero: The Department sought cost-sharing for flood damages incurred by landowners in the operation of the San Luis Canal, which is jointly operated by the Department and the

Bureau of Reclamation. The Court of Claims approved the Department's claim of $2.5 million plus interest. (Court of Claims, No. 99-18C 1998).

3. Hydropower: The State Water Project's role in electrical generation and consumption placed it in the middle of a tumultuous period in California's history. Although the Department's role as purchaser for net short portion of the entire State's energy needs was separate from its role as operator of the State Water Project and therefore is not a subject of this report, there were several key judicial decisions on the role of the State Water Project in the energy field. In *Department of Water Resources v. Federal Energy Regulatory Commission, 341 F.3d 906 (9th Cir. 2003),* the court invalidated a FERC order granting authority to the Independent System Operation to control DWR's power outages. "The question we address is whether FERC adequately responded to DWR's position that the ISO should not control DWR outages in the same way that it controls the outages of private companies. FERC's orders subject DWR's generating units to the same outage control obligations that the ISO imposes on private companies selling power on the wholesale markets. These private companies, known as merchant generators, differ from a dedicated-purpose generator like DWR, a state agency whose primary mission is to store and deliver water throughout California. Creation of electrical power is essentially a by-product of DWR's storage and distribution of water." Id. at 910. FERC's petition for rehearing was denied. 361 F.3d 517 (9th Cir. 2004). On remand, FERC amended the order to exclude the SWP from ISO control for outages. The ISO has requested rehearing and the decision is pending. The Ninth Circuit is reviewing a dispute over grid-wide charges, specifically whether certain PG&E transmission facilities should be integrated into grid-wide charges to all ISO customers, including DWR. *California Department of Water Resources v. Federal Energy Regulatory Commission* (9th Cir. No. 04-76131, 2005). In addition, DWR intervened in *Sacramento Municipal Utility District v. Federal Energy Regulatory Commission, U.S. Court of Appeals, D.C. Cir. No. 04-1171,* to support SMUD's claim that it has renewal rights to its extra-high voltage contract with PG&E, which terminates in 2005. DWR contends its similar contract with PG&E also provides renewal rights.

The Department of Water Resources has been engaged in a lengthy relicensing process by which its license to operate Oroville Dam will be renewed. During this process, FERC grants annual renewals. In a case involving the Santa Ana River Hydroelectric Project, the Ninth Circuit held that annual renewal of hydropower licenses does not require state certification of compliance with the clean Water Act. *California Trout Inc. v. FERC, 313 F3d 1131 (9th Cir. 2002), cert. denied, 540 U.S. 818.*

D. Colorado River

By the early 1990s Arizona and Nevada neared use of their full apportionments from the Colorado River, setting the stage for negotiations among California's local agency users of Colorado River water that eventually culminated in execution of the Quantification Settlement Agreement in October 2003. To enable the QSA local agencies to reach agreement on how to reduce their use of Colorado River water, the QSA implementing legislation provided that the State take responsibility for specified QSA environmental mitigation obligations relating to the Salton Sea and for Salton Sea ecosystem restoration. The Secretary for Resources is to prepare an ecosystem restoration plan by the end of 2006. The Department of Fish and Game is to manage a restoration fund to be used for implementing fish and wildlife conservation measures in the Salton Sea and lower Colorado River ecosystems. The Department of Water Resources is to carry out specified water transfers that provide revenues for the restoration fund. Related State activities include issuance of State Water Resources Control Board water rights order for the QSA water transfers; Department of Fish and Game incidental take permits for special status species affected by the QSA water transfers, and financial arrangements for water conservation

measures within Imperial Irrigation District. The cases listed below were brought challenging various aspects of the actions taken on the Colorado River in the Quantification Settlement Agreement and related documents. The cases have been coordinated and transferred to Sacramento Superior Court.

Imperial Irrigation District v. All Persons, Imperial County Superior Court, Case No. ECU 01649: This case is a contract validation action brought by Imperial Irrigation District (IID) under Section 860 of the Code of Civil Procedure to validate 13 of the QSA agreements.

County of Imperial v. Imperial Irrigation District, Imperial County Superior Court, Case No. ECU 01650: This petition for writ of mandate has been brought by Imperial County challenging the "water transfer project" between IID and San Diego County Water Authority ("SDCWA"). The petition alleges that the IID/SDCWA water transfer violates unspecified provisions of the Water Code and the California Environmental Quality Act.

County of Imperial v. Metropolitan Water District, et al., Imperial County Superior Court, Case No. ECU 01656: This action has been brought by Imperial County challenging the "QSA project." The action is pled as a petition for writ of mandate and names Metropolitan Water District ("MWD"), IID, Coachella Valley Water District ("CVWD"), and SDCWA as respondents. Imperial County contends that these local agencies have failed to comply with unspecified provisions of the Water Code and the California Environmental Quality Act ("CEQA") in adopting the "QSA project."

Protect Our Water and Environmental Rights (POWER), et al. v. Imperial Irrigation District, Imperial County Superior Court, Case No. ECU 01653: This action has been brought by an association composed of "residents and property owners within Imperial County and elsewhere in Southern California." This action is pled as a petition for writ of mandate and challenges the adequacy of the environmental impact report prepared by IID for the water conservation and transfer project and the habitat conservation plan under CEQA. The petition names IID as a respondent and names SDCWA, MWD, and CVWD as real parties in interest.

Morgan, et al. v. Imperial Irrigation District, et al., Imperial County Superior Court, Case No. ECU 01646: This action has been brought by owners or holders of land within IID's service area and by certain residents of Imperial County. This action is pled as a petition for writ of mandate and only names IID as the respondent. The petitioners contend that IID's October 2003 addendum to the district's environmental impact report concerning the water conservation and transfer project fails to comply with CEQA and that CEQA requires IID to prepare a supplemental EIR.

Morgan, et al. v. Imperial Irrigation District, Imperial County Superior Court, Case No. ECU 01643: This action has been brought by some, but not all, of the plaintiffs who brought the previously noted Morgan CEQA action. The plaintiffs have pled this case as a reverse validation action under Section 863 of to Code of Civil Procedure. The complaint alleges a wide-ranging set of claims, including allegations that IID has failed to meet its trust obligations to district landholders, that IID assessments pursuant to the QSA violate Article XIIID of the California Constitution (Proposition 218), that the QSA fails to comply with CEQA, that the QSA violates the Fifth Amendment prohibition against the taking of property, and that the QSA constitutes an unlawful conversion of the plaintiffs' property.

Morgan and Emanuelli v. Imperial Irrigation District, Imperial County Superior Court, Case No. ECU 91658: This case is almost identical to the CEQA action filed in Morgan, et al. v. Imperial Irrigation District, Imperial County Superior Court, Case No. ECU 01646, but names San Diego County Water Authority, Coachella Valley Water District, Metropolitan Water District of Southern California, and the State of California as real parties in interest.

II. Selected Disputes over Water Resources of Primarily Regional or Local Significance

A. Monterey County

In *Save Our Peninsula Committee v. Monterey County Board of Supervisors, 87 Cal.App.4th (6th Dist. 2001),* an environmental group challenged an EIR for a proposed residential development of ranch property located within the Carmel River Valley. The Court of Appeal held that: (1) EIR was inadequate in its discussion of baseline water use; (2) identification of parcel, for which applicants acquired pumping rights, late in review process warranted further discussion and opportunity for public response; and (3) the EIR was inadequate in its discussion of applicants' asserted riparian right.

B. Sonoma County:

Russian & Eel Rivers: Environmental organizations successfully challenged the EIR for a project to increase Sonoma County Water Agency's withdrawal of water from the Russian River. The Court of Appeal held that: (1) the EIR's cumulative impacts analysis was inadequate due to failure to consider whether proposed curtailments in diversions from the Eel River to the Russian River would significantly impact project; and (2) report's alternatives analysis was deficient. *See Friends of the Eel River v. Sonoma County Water Agency, 108 Cal.App.4th 859 (2003).*

C. MWDSC/San Diego

A dispute regarding Metropolitan Water District's interpretation of its authorizing statute's provisions on allocation of water during a time of shortage was addressed in *San Diego County Water Authority v. Metropolitan Water District of Southern California, 117 Cal.App.4th 13 (1st Dist. 2004)*. San Diego claimed that MWD's interpretation did not account for preferential rights San Diego claimed it earned by making substantial payments. The court rejected San Diego's arguments, stating that "The proper forum for San Diego's 'changed circumstances' argument is the Legislature, not here." *Id*. At 29.

D. Santa Maria Basin adjudication

The water users in the Santa Maria Basin in the Central Coast area have been engaged in litigation to adjudicate rights to groundwater. See *Santa Maria Valley Water Conservation District v. City of Santa Maria (Santa Clara Superior Court No. 1-97-CV-770214).*

E. Yolo County/Putah Creek

In March of 1996 Sacramento Superior Court ruled that additional instream flows were needed for Putah Creek downstream of the Solano Diversion Dam. The judgment was appealed by the Solano parties, but a settlement, the Putah Creek Accord, was negotiated in 2000 among the parties that resolved all disputes. The settlement still provides for increased flows to Putah Creek, but includes reduced flows when Lake Berryessa is low in storage and includes a process for addressing illegal surface water diverters in Putah Creek. A Lower Putah Creek Coordinating Committee was formed made up of Yolo and Solano representatives to address Putah Creek issues such as creek habitat enhancement projects. The Committee has hired a Streamkeeper.

F. Yuba River

The State Water Resources Control Board adopted D- 1644 addressing instream flows and water rights for the portion of the Yuba River from New Bullards Bar Reservoir to the confluence of the Yuba River with the Feather River in Marysville. Yuba County Water Agency filed an appeal.

G. Los Osos Groundwater

The Los Osos Community Services District filed a lawsuit seeking determination of rights to the Los Osos Groundwater Basin. *(San Luis Obispo Superior Court, 2004).*

H. Central and West Basin Groundwater

A dispute over how to allocate unused storage space of an adjudicated groundwater basin was addressed in *Central and West Basin Water Replenishment District v. Southern California Water Company, 109 Cal.App.4th 891 (2d Dist. 2003).* The court ruled that the replenishment district had priority to manage and store water in the basin over groundwater rights holders in the basin.

I. Santa Margarita River

Longstanding disputes over the allocation and use of the Santa Margarita River were resolved in 2002. *Rancho Santa Margarita v. Vail (San Diego County Superior Court No. 42850) and United States v. Fallbrook Public Utility District (S.D. Cal. No 1247-SD-T).*

J. Mission Springs/Coachella Valley

A dispute among water agencies in the Coachella Valley arose over allocation of imported water, which is used to replenish groundwater which is the primary source of water in the area. *See Mission Springs Water Dist. v. Desert Water Agency (Riverside/Indio No. INC 038660).* The lawsuit was settled in 2004 with an agreement to work towards improving management of the groundwater recharge program, and develop a comprehensive plan for two sub-basins in the valley in order to address replenishment of groundwater in the Mission Springs area.

K. Castaic Lake Water Agency

Proposals for new developments in the Castaic Lake Water Agency in northern Los Angeles County generated a number of lawsuits, many focused on issues relating to the water supply available for such development. In *County of Ventura v. County of Los Angeles (Kern County Superior Court),* the EIR for the Newhall Ranch development was held to be inadequate due to its failure to address the reliability of the water supply for the project, as well as potential impacts on groundwater in Ventura County and impacts on biological resources. In *Friends of the Santa Clara River v. Castaic Lake Water Agency, 123 Cal.App.4th 1 (5th Dist. 2004),* the petitioners challenged the Castaic Lake Water Agency's 2000 Urban Water Management Plan. The appellate court agreed with the petitioners' claim that the Plan was not supported by substantial evidence due to its failure to adequately address the impacts of perchlorate contamination on the reliability of the groundwater supply. A Revised 2000 Urban Water Management Plan was subsequently adopted that addressed all of the concerns expressed by the appellate court in its decision. That Plan has not been challenged. In *California Water Network v. Castaic Lake Water Agency,* (Ventura County Superior Court No. CIV 215327), the petitioners challenged the adoption of a negative declaration concerning the approval of an agreement among CLWA, Semitropic Water Storage District, and the Department of Water Resources. The agreement provided for the storage of up to 24,000 acre feet of CLWA's annual SWP deliveries in Semitropic groundwater storage basin. The challenge was rejected by the Superior Court and an appeal is pending. A similar case was filed in Sacramento Superior Court, *Friends of the Santa Clara River v. Department of Water Resources (Sacramento Superior Court No. 03-CS-0028)* and has been stayed pending resolution of the Ventura County case. In another case involving Castaic Lake Water Agency, a challenge was brought to the 1999 EIR for the transfer of 41,000 acre feet of SWP Table A amount from Kern County Water Agency to Castaic Lake Water Agency (Los Angeles County Superior Court No. BS 056954). Although the EIR was determined to be adequate by

the trial court, the appellate court held that the EIR was inadequate due to its reliance on the subsequently-invalidated EIR for the Monterey Amendment in *Planning and Conservation League v. Department of Water Resources, 95 Cal.App.4th 1373 (3rd Dist. 2002), Friends of the Santa Clara River v. Castaic Lake Water Agency,* 95 Cal.App.4th 1373 (2nd Dist. 2002). The Los Angeles County Superior Court retained jurisdiction over the action until a new EIR was prepared in compliance with CEQA. In December 2004, Castaic Lake Water Agency certified a new EIR independent of the Monterey EIR, and filed it with the Los Angeles Superior Court. Thereafter, the petitioner dismissed its action. New actions challenging the EIR, however, have been filed in the Ventura County Superior Court by California Water Impact Network and by Planning and Conservation League (Ventura County Superior Court Nos. CIV 231606 & 231588).

L. Stanislaus County/Diablo Grande

Plans for a large new destination resort and residential community in southwest Stanislaus County brought forth objections from environmental groups. In 1996, the Superior Court held that the EIR for the Diablo Grande project was inadequate due to its failure to analyze potential impacts of the future water supply after the existing five-year supply became insufficient or unavailable. *Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal.App.4th 182 (5th Dis. 1996).* After the source for the permanent water supply was shifted from the original plan (SWP supply transferred from the Berrenda Mesa Water District in Kern County) to a local supply from Kern County's Pioneer Groundwater Project, the court held that the addendum to the EIR approved by the County was not adopted in compliance with procedures required by CEQA. *Protect Our Water v. County of Stanislaus, (5th Dist. No. F042089, unpublished opinion Dec. 8, 2003).* In federal court, the plaintiffs were successful in their argument that the Salado Creek is a tributary of the San Joaquin River, and as such, it is a navigable water of the United States, and that the defendants were required to comply with the Clean Water Act. *California Sportfishing Protection Alliance v. Diablo Grande, 209 F.Supp.2d 1059 (E.D. Cal. 2002).*

III. Disputes over Interstate Water Resources

A. Klamath

Intractable disputes over water shortages and endangered species in the Klamath River Basin gave rise to litigation in a variety of settings. A mass adjudication of basin-wide water rights is pending in Oregon state court. The Ninth Circuit held that the United States Government and the Klamath Indian Tribe can be compelled to comply with the statute governing the state adjudication. (*United States v. State of Oregon, 44 F.3d 758 (1994*). The United States Supreme Court held that ranchers and irrigation districts have standing to bring a civil action to enforce the Endangered Species Act, including a claim that the Secretary of the Interior failed to consider the economic impact of critical habitat designation. *Bennett vs. Spear, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed. 2d 281 (1997).* The ranchers' challenge to the 1992 Biological Opinion was found to have merit: the court held that the Biological Opinion failed to address the interrelatedness or interdependence of Gerber or Clear Lake to the Klamath Project as a whole, and that the reasonable and prudent alternatives issued with regard to those reservoirs were not rationally related to the purpose of avoiding jeopardy. *Bennett vs. Spear, 5 F.Supp.2d 882 (D. Oregon 1998).* Ranchers challenged the Bureau's 1997 plan of operations on a breach of contract theory; the Ninth Circuit held that the irrigators were not third-party beneficiaries to the contract between the Bureau and the dam operator (Pacificorp). *Klamath Water Users Protective Association v. Patterson, 204 F2d 1206 (2000).* Environmental groups challenged the Bureau's operations as violating the Endangered Species

Act by failing to formally consult with the National Marine Fisheries Service before implementing the annual operations plan. The District Court agreed and enjoined irrigation deliveries for the 2001 season. *Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation 138 F. Supp.2d 1228.* A separate attempt by the irrigators to enjoin the new 2001 operating plan was rejected. *Kandra v. United States, 145 F.Supp.2d 1192 (2001).* Ranchers have filed a $1 billion claim with the federal Court of Claims (No. 01-591 L). The Pacific Coast Federation of Fishermen's Associations was granted leave to intervene in that proceeding. (*United States Court of Federal Claims, No. 01-591 L, Order February 28, 2005)*. Finally, the dispute contributed to the development of the law on public records, when the United States Supreme Court ruled that the government must release copies of correspondence between certain Klamath Basin Tribes and the Department of the Interior. *Department of the Interior v. Klamath Water Users Protective Association* 532 U.S. 1 (2001).

B. Truckee River

Negotiations to settle disputes and litigation in accordance with the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990 (P.L. 101-618) have continued, leading to the development of a Truckee River Operating Agreement (TROA), which was released in October, 2003. A revised Draft EIR/EIS analyzing the draft TROA was released for public comment in August, 2004. The primary purpose of the TROA is to implement section 205(a) of P.L. 101-618, which directs the Secretary of Interior to negotiate an agreement with California and the State of Nevada to increase the operational flexibility and efficiency of certain reservoirs in the Lake Tahoe and Truckee River basins. The draft TROA would provide additional storage opportunities in existing reservoirs for future urban demands during periods of drought in the Truckee Meadows, and enhance spawning flows in the lower Truckee River for the benefit of Pyramid Lake fishes (specifically federally endangered cui-ui and threatened Lahontan cutthroat trout). In addition, the proposed TROA would satisfy existing *Orr Ditch* and *Truckee River General Electric Decree* water rights, increase recreational opportunities at Federal reservoirs, improve streamflows and fish habitat throughout the Truckee River basin, and improve water quality in the Truckee River. The draft TROA, if it becomes effective, would also trigger certain other provisions of P.L. 101-618, including the California-Nevada Interstate Allocation (section 204 of P.L. 101-618) of waters of the Lake Tahoe and Truckee River basins, and the confirmation of the *Alpine* Decree as part of the interstate allocation for the Carson River basin

C. Walker River Adjudication

A decree was entered in 1936 allocating most of the surface water rights to the Walker River and its tributaries in California and Nevada. Disputes arose in the 1990's over various aspects of the Decree, including the applicability of state law, water rights for federal and tribal lands, and the protection of the Lahontan Cutthroat Trout in Walker Lake. The litigation has been stayed while the parties engage in mediation to pursue a comprehensive settlement of the litigation claims and other outstanding issues in the Walker River Basin. *United States of America v. Walker River Irrigation District;* (D. C. Nev.) *In Equity Nos.* C-125-A, C-125-B, and C-125-C.

IV. Flood Management

In recent years public agencies have been confronted with judicial decisions that expanded previously-held concepts of liability for damages caused to private parties due to flood incidents. The line of cases, beginning with *Belair v. Riverside County Flood Control District, 47 Cal.3d 550 (1988),* set forth a standard of reasonableness for evaluating whether a public agency should be liable for damages

caused when its flood control facilities fail to protect land and property. In *Locklin v. City of Lafayette, 7 Cal.4th 327 (1994),* a set of factors was developed to judge whether a public agency's conduct was reasonable in the face of a claim for inverse condemnation. Subsequent cases applied the *Locklin* factors: *Bunch v. Coachella Valley Water District, 15 Cal.4th 432 (1997); Akins v. State, 61 Cal.App.4th 1 (3rd Dis. 1998); Odello Brothers v. County of Monterey, 63 Cal.App.4th 778 (6th Dis. 1998); Arreola v. County of Monterey, 99 Cal.App.4th 722 (2002); Paterno v. State, 113 Cal.App.4th 998 (3rd Dis. 2004).* See also *Kevin McMahan, et al, v. State of California and Reclamation District No. 784; Yuba County Superior; Case No. 061561* (flood damages from Feather River levee failure in January 1997, pending in Superior Court). The theory, as explained in *Paterno*, is that "a landowner should not bear a disproportionate share of the harm directly caused by failure of a flood control project due to an unreasonable plan." The Department of Water Resources responded by issuing a Flood Management White Paper. It states: "While flooding has always been an unfortunate fact of life in many parts of California, the need for adequate flood management is more critical now than ever before. California's Central Valley flood control system is deteriorating and, in some places, literally washing away. Furthermore, the Central Valley's growing population is pushing new housing developments and job centers into areas that are particularly vulnerable to flooding. Yet, in recent years, funding to maintain and upgrade the flood protection infrastructure has sharply declined. Compounding these challenges is a recent court ruling, *Paterno v. State of California*, that held the state liable for flood-related damages caused by a levee failure. Together, these factors have created a ticking time-bomb for flood management in California."

V. Other Legal Developments

A. Constitutional Law

Significant developments in takings law on the national level over the last decade recently entered the California water arena with several claims filed against the U.S. government. In *Tulare Lake Basin Water Storage District v. United States (Court of Claims No. 98-101),* agricultural contractors receiving water from the State Water Project claimed that delivery reductions in the early 1990's made in order to improve Delta conditions for fish constituted a compensable taking of property in violation of the federal constitution. The Claims Court ruled in their favor and the Department of Interior did not appeal the claims court's judgment. Although the case technically does not set a precedent for future cases, other parties have followed suit on similar theories. The Klamath River Basin irrigators have filed a claim which is pending at the Court of Claims, and the water users claiming water rights to water stored in New Melones Reservoir have also made a claim. In addition, Casitas Municipal Water District in Ventura County has filed a claim.

B. Water Rights Law

i. Surface Water

A pre-1914 water right holder is subject to the notification requirement under Fish & Game Code Section 1603. *People v. Murrison, 101 Cal.App. 4th 349 (3rd Dist. 2002)*

See discussion of Term 91 and *El Dorado Irrigation District v. State Water Resources Control Board* in Delta Section of this report.

ii. Groundwater

In D-1645 (2002) the State Water Resources Control Board addressed the test for determining whether or not groundwater is a "subterranean stream" and therefore subject to the permitting authority of the Board, rather than "percolating groundwater". Water users in the San Luis Rey River Pauma basin

brought their dispute to the Board. The Board cited the presumption that all groundwater is percolating groundwater, and the party attempting to show that the groundwater was a subterranean stream had the burden of proof. The Board found evidence on both sides equally persuasive, and accordingly found that the burden of persuasion had not been met, and the basin was presumed to be percolating groundwater outside the jurisdiction of the Board.

An attempt to resolve disputes over use of groundwater in the Mojave Water Agency service area through agreement was unsuccessful due to the objections of several overlying rights holders. The California Supreme Court affirmed the rights of overlying owners. See *City of Barstow v. Mojave Water Agency, 23 Cal.4th 1224 (2000).*

In *State of California v. Superior Court, 78 Cal.App.4th 1019 (2000),* the court addressed the meaning of Water Code Section 102's statement, that "all water within the State is the property of the people of the State." The code section came up in the context of a dispute over an insurance policy exclusion of liability for groundwater cleanup costs at the Stringfellow Acid Pits. The court stated that the State "owns" groundwater in a regulatory, supervisory sense but not in a possessory sense: "Water Code Section 102 thus expresses the preeminent right of the people of the State to make water policy and control water usage…the State's power is the power to control and regulate use." Id. at 1022.

Private water companies regulated by the Public Utilities Commission cannot be sued for damages arising out of consumption of contaminated groundwater if the utility complied with federal and state drinking water standards, but can be sued for damages arising out of a failure to comply with such standards. *Hartwell Corporation v. Superior Court, 27 Cal.4th 256 (2002).*

A challenge to a landfill in eastern San Bernardino County was upheld due to the failure to discuss the volume of the aquifer in the EIR/EIS, with the result that agencies could not evaluate the risk of contamination. See *Cadiz Land Co. v. Rail Cycle L.P., 83 Cal. App. 4th 74 (2000).* The court stated that groundwater in a desert area is a rare resource under Public Resources Code Section 15125(c).

The San Mateo Superior Court ruled that the county's decision to grant well-drilling permits is a discretionary decision subject to CEQA. *Committee to Save Lake Merced v. California Gold Club of San Francisco (San Mateo Superior Court No. 416311, 2001).*

C. Water Transfers & Wheeling

1. In *Metropolitan Water District of Southern California v. Imperial Irrigation District, 80 Cal. App.4th 1403 (2000),* MWD sought validation of its wheeling rates. MWD's inclusion of system-wide costs in a set, predetermined rate had been the source of some controversy. The Court of Appeal held that Water Code Section 1810 et seq. did not, as a matter of law, require that plaintiff recover reasonable capital, operation, and maintenance costs incurred only with respect to the particular facilities used in the transaction (point-to-point costs), rather than including system-wide costs in calculating its rate. The court further held that the law did not mandate that plaintiff determine its rates on a case-by-case basis as transactions are proposed, instead of using a flat rate, and that MWD's reservation of the right to interrupt service under certain conditions was valid.

2. In a challenge to a proposed water transfer from Oakdale Irrigation District, South San Joaquin Irrigation District, and Stockton East Water District to urban water users, the court held that a CEQA challenge could be brought by naming only some of the parties to the transfer agreement, if the named parties have an interest sufficient to protect the interests of those not joined. *Deltakeeper v. Oakdale Irrigation District, 94 Cal.App.4th 1092 (2001).*

3. See Delta Wetlands case (*Central Delta Water Agency v. State Water Resources Control Board, 124 Cal.App.4th 245 (3rd Dist. 2004)), discussed in the Delta Section of this report.*