

# CALIFORNIA **water II**

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Before you rely on the information in this book, be sure you are aware that some changes in the statutes or case law may have gone into effect since the date of publication. The book, moreover, provides general information about the law. Readers should consult their own attorneys before relying on the representations found herein.

# CALIFORNIA



# Water II

**2007**  
SECOND EDITION

**Arthur L. Littleworth and Eric L. Garner**

2007<sup>SECOND</sup>  
EDITION

# CALIFORNIA water II

**Arthur L. Littleworth and Eric L. Garner**

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## **NOTICE**

This book is designed to assist you in understanding water use and planning law. It is necessarily general in nature and does not discuss all exceptions and variations to general rules. Also, it may not reflect the latest changes in the law. It is not intended as legal advice and should not be relied on to address legal problems. You should always consult an attorney for advice regarding your specific factual situation.

*This book is dedicated to the many far-sighted leaders who, over the last century, constructed systems to supply water to all parts of the state—not only to meet the needs of their own time, but also to serve future generations. From their efforts, we have all greatly benefited.*





## Chapters at a Glance

1	<b>Brief Overview of California's Water Supply</b> . . . . .	page 1
2	<b>Capsule View of Water Rights Law</b> . . . . .	page 31
3	<b>Surface Water Rights</b> . . . . .	page 37
4	<b>Groundwater</b> . . . . .	page 69
5	<b>Allocating Water in California: Consumptive vs. Instream Uses and the Doctrine of Reasonable Use</b> . . . . .	page 89
6	<b>Threatened and Endangered Species</b> . . . . .	page 131
7	<b>Equitable Apportionment and the Doctrine of Physical Solution.</b> . . . . .	page 171
8	<b>State Water Resources Control Board: Its Role in Water Rights and Water Quality Regulation</b> . . . . .	page 187
9	<b>Interaction of Federal Law and State Water Law</b> . . . . .	page 229
10	<b>Conservation, Planning, Recycling and Desalination</b> . . . . .	page 255
11	<b>Water Transfers.</b> . . . . .	page 287
12	<b>Law of the Colorado River</b> . . . . .	page 313
13	<b>Reflections.</b> . . . . .	page 341

# Contents

Preface . . . . .	xix
Introduction . . . . .	xxiii

## chapter 1

### Brief Overview of California’s Water Supply / 1

<b>Introduction</b> . . . . .	1
<b>California Water Supply</b> . . . . .	1
Groundwater . . . . .	2
Colorado River. . . . .	3
Global Warming . . . . .	3
DWR’s Technical Memorandum on Global Warming	
<b>California’s Water Use</b> . . . . .	5
<b>Agricultural Use</b> . . . . .	8
<b>Urban Use</b> . . . . .	8
<b>Environmental Use</b> . . . . .	9
<b>San Francisco Bay Area.</b> . . . . .	9
City of San Francisco . . . . .	9
Hetch Hetchy Project . . . . .	11
<b>East Bay Municipal Utility District</b> . . . . .	12
Mokelumne River Supply . . . . .	12
Central Valley Project Contract. . . . .	12
Freeport Project. . . . .	13
<b>Los Angeles and Southern California Areas</b> . . . . .	14
City of Los Angeles . . . . .	14
Arrival of William Mulholland . . . . .	15
Owens River Project . . . . .	15
<b>Metropolitan Water District</b> . . . . .	16
MWD’s Members . . . . .	17
Colorado River Aqueduct . . . . .	18
State Water Project . . . . .	18

<b>Colorado Desert Area</b> . . . . .	19
Imperial Irrigation District. . . . .	19
Coachella Valley Water District. . . . .	19
<b>Central Valley Project</b> . . . . .	20
Growth of Agriculture . . . . .	21
CVP History . . . . .	21
CVP Development. . . . .	22
Operating Scheme . . . . .	23
<b>State Water Project</b> . . . . .	24
SWP Predecessor— The “Feather River Project” . . . . .	25
Burns-Porter Act . . . . .	25
Contractors Pay All Costs . . . . .	27
SWP Operations . . . . .	27
Peripheral Canal . . . . .	28
<b>Need for Storage</b> . . . . .	29

## chapter 2

### A Capsule View of Water Rights Law / 31

<b>Introduction</b> . . . . .	31
Property Based Rights . . . . .	31
Water Rights Apart from Land Ownership . . . . .	31
Reasonable Use Doctrine . . . . .	32
Statutory Regulation. . . . .	32
Developing New Water Supplies . . . . .	33
Environmental Demands for Water . . . . .	33
Adapting Water Law to Changing Needs . . . . .	33

## Contents

### chapter 3

#### **Surface Water Rights / 37**

Introduction . . . . .	37
Water Rights Are Real Property . . . . .	37
Reasonable Use of All Water in California . . . . .	38
Types of Water Rights . . . . .	38
Development of Riparian Rights in California . . . . .	39
Early History of Riparian Rights. . . . .	39
<i>Lux v. Haggin</i> . . . . .	40
Constitutional Amendment of 1928 . . . . .	40
Nature and Extent of Riparian Right . . . . .	42
Waters to Which Riparian Rights Attach . . . . .	42
Storage . . . . .	42
Diversion Point . . . . .	43
Lands to Which Riparian Rights Attach . . . . .	43
Riparian Right Holders . . . . .	44
Acquisition and Loss of Riparian Rights . . . . .	44
Acquisition . . . . .	44
Loss/Severance of Right— Conveyance of Right. . . . .	45
Loss of Contiguity to Water . . . . .	45
Condemnation . . . . .	45
Prescription . . . . .	45
Abandonment/Nonuse. . . . .	46
Loss of Priority . . . . .	46
Priority/Interrelationship with Other Rights . . . . .	47
Rights Between Riparians— Correlative Rights . . . . .	47
Rights Between Riparians and Appropriators . . . . .	47

Appropriative Water Rights . . . . .	48
Development of the Appropriative Right in California. . . . .	49
Appropriative Rights Prior to 1872 . . . . .	49
Court Recognition of Miners' Customs . . . . .	50
Appropriative Rights from 1872 to 1914 . . . . .	50
Water Commission Act (1913). . . . .	51
Current Appropriation Requirements . . . . .	52
Nature and Extent of Right— Water to Which the Right Attaches . . . . .	53
Land on Which the Water Can Be Used . . . . .	53
Who May appropriate . . . . .	53
Priority/Interrelationship with Other Appropriators . . . . .	54
Rights Among Appropriators . . . . .	54
Limitations on Appropriative Rights . . . . .	55
Due Diligence . . . . .	55
Loss/Severance of Rights . . . . .	55
Condemnation . . . . .	55
Prescription . . . . .	55
Abandonment . . . . .	56
Forfeiture for Nonuse . . . . .	56
Prescriptive Surface Water Rights . . . . .	57
Introduction . . . . .	57
Extent of Right . . . . .	57
Waters Subject to Prescription . . . . .	58
Acquisition of Right . . . . .	58
Reasonable and Beneficial Use . . . . .	58
Open and Notorious Use . . . . .	59
Adverse and Hostile Use . . . . .	59
Continuous and Uninterrupted Use . . . . .	60
Under Claim of Right . . . . .	60
Limitations on the Right . . . . .	60

## Contents

<b>Water Rights Remedies</b> . . . . .	61	<b>Statutory Recordation as</b>	
Introduction . . . . .	61	<b>Prescription Prerequisite</b> . . . . .	78
Declaratory Relief . . . . .	61	<b>Mutual Prescription.</b> . . . . .	79
Injunction . . . . .	61	<i>Los Angeles v. San Fernando</i> . . . . .	80
Parties Entitled to Relief . . . . .	62	<i>City of Barstow v.</i>	
<b>Adjudication</b>		<i>Mojave Water Agency</i> . . . . .	80
<b>of Water Rights</b> . . . . .	63	<b>Groundwater</b>	
Statutory Adjudication Procedure . . . . .	63	<b>Storage Capacity</b> . . . . .	81
Reference Procedure . . . . .	63	Unanswered Questions. . . . .	82
<b>Area of Origin</b>		Storage Capacity Is Not	
<b>Protections</b> . . . . .	64	Proportionate to Pumping Rights. . . . .	82
County of Origin Act . . . . .	64	<b>Groundwater Water</b>	
Watershed Protection Act. . . . .	65	<b>Rights Remedies</b> . . . . .	82
Delta Protection Act . . . . .	66	Adjudication Alternatives . . . . .	83
“Protected Area” Statutes. . . . .	66	Statutory Adjudication Procedure . . . . .	83
		Reference Procedure. . . . .	83
		Declaratory Relief . . . . .	84
		Stipulated Decrees . . . . .	84
chapter 4		<b>Water Districts</b> . . . . .	85
<b>Groundwater / 69</b>		<b>Groundwater</b>	
Introduction . . . . .	69	<b>Management Plans</b> . . . . .	86
Groundwater Resources. . . . .	69	<b>Groundwater Pollution</b> . . . . .	87
Regulation of		<b>Groundwater</b>	
Groundwater Pumping . . . . .	70	<b>Recovery and Storage.</b> . . . . .	88
What Is “Groundwater”?			
Sax Report. . . . .	72		
Springs . . . . .	73	chapter 5	
Groundwater Rights . . . . .	73	<b>Allocating Water in California:</b>	
Overlying Rights . . . . .	74	<b>Consumptive vs. Instream</b>	
Common Law Heritage. . . . .	74	<b>Uses and the Doctrine</b>	
<i>Katz v. Walkinshaw</i> . . . . .	74	<b>of Reasonable Use / 89</b>	
Municipal Rights		Introduction . . . . .	89
to Groundwater . . . . .	75	Reallocation of Water . . . . .	89
Appropriative Rights		Public Trust Doctrine . . . . .	90
to Groundwater . . . . .	75	Public Trust Doctrine	
Export of Groundwater. . . . .	76	in the United States . . . . .	90
Priorities Among		First Public Trust Case . . . . .	91
Groundwater Appropriators . . . . .	76	<i>Illinois Central Case</i> . . . . .	93
Prescriptive Rights. . . . .	77		

## Contents

<p><b>Public Trust Doctrine in California</b> . . . . . 94</p> <p style="padding-left: 20px;"><i>Eldridge v. Cowell</i> (1854) 4 Cal. 80 . . . . . 94</p> <p style="padding-left: 20px;">Early Guidelines. . . . . 95</p> <p style="padding-left: 20px;">The Balancing Concept . . . . . 96</p> <p style="padding-left: 20px;">Types of Waters and Uses to Which the Public Trust Doctrine Applies . . . . . 97</p> <p style="padding-left: 20px;">End of Hydraulic Mining . . . . . 97</p> <p style="padding-left: 20px;">Expansion of Public Trust Values . . . . . 98</p> <p style="padding-left: 20px;">Stored Water. . . . . 99</p> <p><b>National Audubon Society v. Superior Court</b> . . . . . 101</p> <p style="padding-left: 20px;">Public Trust Doctrine Applied to Tributary Streams to Mono Lake . . . . . 101</p> <p style="padding-left: 20px;">City of Los Angeles Water Rights Permits . . . . . 101</p> <p style="padding-left: 20px;">Accommodation of Public Trust and Water Rights . . . . . 102</p> <p style="padding-left: 20px;">Continuing Supervision of Water Rights . . . . . 104</p> <p style="padding-left: 20px;">After <i>Audubon</i>. . . . . 104</p> <p><b>Law of Reasonable Use</b>. . . . . 105</p> <p style="padding-left: 20px;"><i>Herminghaus</i> and Article X, Section 2. . . . . 105</p> <p><b>1928 Constitutional Amendment</b> . . . . . 106</p> <p style="padding-left: 20px;"><i>Gin Chow</i>. . . . . 107</p> <p style="padding-left: 20px;"><i>Lodi</i> . . . . . 108</p> <p style="padding-left: 20px;"><i>Peabody</i> . . . . . 109</p> <p style="padding-left: 20px;"><i>Tulare</i> . . . . . 109</p> <p><b>Article X, Section 2, in the Modern Day</b> . . . . . 111</p> <p style="padding-left: 20px;"><i>Joslin</i> . . . . . 111</p> <p style="padding-left: 20px;"><i>Forni</i>. . . . . 111</p> <p style="padding-left: 20px;"><i>Long Valley Creek</i>. . . . . 112</p> <p style="padding-left: 20px;">Water Use in the Imperial Irrigation District . . . . . 112</p>	<p><b>Reasonable Use of Colorado River Water Within the Imperial Irrigation District</b> . . . . . 114</p> <p style="padding-left: 20px;">SWRCB Decision . . . . . 114</p> <p><b>Salton Sea—Waste or Beneficial Use?</b> . . . . . 115</p> <p><b>State Board Revised Order WRO 2002-0013</b>. . . . . 116</p> <p style="padding-left: 20px;">Mitigation . . . . . 116</p> <p><b>Federal Beneficial Use Law</b> . . . . . 117</p> <p style="padding-left: 20px;">Secretary of the Interior’s Intervention . . . . . 117</p> <p style="padding-left: 20px;">The Secretary’s Findings. . . . . 118</p> <p style="padding-left: 20px;">Remaining Questions . . . . . 118</p> <p><b>Fish and Game Code Sections 5937 and 5946</b> . . . . . 119</p> <p style="padding-left: 20px;">Challenge to City of Los Angeles’ Licenses . . . . . 119</p> <p style="padding-left: 20px;">Early Attorney General’s Opinion . . . . . 120</p> <p style="padding-left: 20px;">The Recreated Fishery. . . . . 120</p> <p style="padding-left: 20px;">Section 5937 Imposed on Los Angeles’ Licenses. . . . . 121</p> <p><b>State Board’s Mono Lake Decision</b> . . . . . 122</p> <p><b>Recent Litigation Involving Fish and Game Code Section 5937</b> . . . . . 122</p> <p style="padding-left: 20px;">Section 5937 as an Expression of the Public Trust Doctrine . . . . . 124</p> <p><b>Consumptive and Instream Uses in the Litigation Context: A Case Study of <i>EDF v. EBMUD</i></b> . . . . . 125</p> <p style="padding-left: 20px;">Summary of Case . . . . . 125</p> <p style="padding-left: 20px;">Background. . . . . 126</p> <p style="padding-left: 20px;">State Board Findings . . . . . 127</p> <p style="padding-left: 20px;">The Trial Court’s Opinion . . . . . 128</p> <p style="padding-left: 20px;">Priority for Public Trust Resources Rejected . . . . . 128</p> <p style="padding-left: 20px;">The Physical Solution . . . . . 129</p> <p style="padding-left: 20px;">Post-Trial Fish Studies . . . . . 130</p>
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# Contents

## chapter 6

### Threatened and Endangered Species / 131

Introduction . . . . .	131
<b>Overview of the Federal Endangered Species Act</b> . . . . .	132
Background. . . . .	132
<b>The Listing Process</b> . . . . .	132
Authority. . . . .	132
Relationship to NEPA . . . . .	133
<b>Defining Threatened and Endangered Species</b> . . . . .	133
Listing Depends Solely on Best Scientific Evidence. . . . .	134
When the Listing Evidence Is Not Sound . . . . .	134
<b>Designating Critical Habitat</b> . . . . .	135
Relationship to NEPA . . . . .	136
Economic Impacts . . . . .	137
Rejection of the “Incremental Approach” to Economic Impacts . . . . .	137
Excluding Habitat . . . . .	138
<b>Procedure for Listing a Species and Designating Critical Habitat</b> . . . . .	138
Any “Interested Person” May Petition for Action . . . . .	138
Status Review Panels	
Publication of Secretary’s Action . . . . .	139
Discussion of Data Used . . . . .	139
<b>Emergency Listing Procedures.</b> . . . .	140
<b>Recovery Plans</b> . . . . .	141
<b>Consultation Provisions</b> . . . . .	142

<b>Consultation Process</b> . . . . .	143
Biological Assessment. . . . .	143
Biological Opinions. . . . .	144
Definition of “Jeopardy”. . . . .	144
Judicial Review . . . . .	145
Reasonable and Prudent Alternatives . . . . .	145
No Irreversible or Irretrievable Commitment of Resources . . . . .	146
<b>Conference Provisions</b> . . . . .	146
<b>Consultation Exemption Process</b> . . . . .	147
The “God Squad” . . . . .	147
<b>Taking Provisions</b> . . . . .	148
Prohibitions Against Take . . . . .	148
Sweet Home—Broadening “Harm” . . . . .	149
How Much Harm? . . . . .	150
<b>Incidental Take</b> . . . . .	151
Habitat Conservation Plans . . . . .	151
No Surprises Rule . . . . .	153
<b>Enforcement and Citizen Suits</b> . . . . .	154
<i>Bennett v. Spear</i> (1997) 520 U.S. 154 . . . . .	155
<b>California Endangered Species Act</b> . . . . .	156
General . . . . .	156
Listing . . . . .	157
<b>Taking Under California’s ESA</b> . . . . .	159
Natural Community Conservation Planning Act. . . . .	159
<b>Incidental Take Under the CESA.</b> . . . .	160
<b>Consultation</b> . . . . .	161

## Contents

<b>Impacts of ESA on Water Supplies.</b> . . . . .	161
Pyramid Lake . . . . .	162
<i>Riverside Irrigation District v. Andrews</i> (10th Cir. 1985) 758 F. 2d 508 . . . . .	163
Glenn-Colusa . . . . .	163
Delta Smelt . . . . .	164
“No Jeopardy” Opinion on the Delta Smelt Is Overturned . . . . .	165
Plant and Wildlife Protection . . . . .	166
<b>Fifth Amendment</b>	
<b>“Taking” Under the ESA</b> . . . . .	167

<b>Trial Court Physical Solutions</b> . . . . .	182
Orange County Water District v. City of Chino <i>et al.</i> (1969) Orange County Superior Court No. 17628 . . . . .	182
<i>Chino Basin Municipal Water District v.</i> <i>City of Chino et al.</i> (1978) San Bernardino Superior Court No. 164327 . . . . .	184
<i>Western Municipal Water District</i> <i>of Riverside County, et al. v.</i> <i>East San Bernardino County</i> <i>Water District, et al. (n.d.)</i> Riverside Superior Court No. 78426. . . . .	185

### chapter 7

#### **Equitable Apportionment and the Doctrine of Physical Solution / 171**

<b>Introduction</b> . . . . .	171
<b>Equitable Apportionment</b> . . . . .	171
<b>Physical Solution Doctrine</b> . . . . .	172
Substantial “Enjoyment” of Prior Rights . . . . .	173
Duty to Consider Physical Solution . . . . .	173
Consent of Parties Not Required . . . . .	174
<b>California Physical Solution Cases</b> . . . . .	174
<i>Peabody v. City of Vallejo</i> (1935) 2 Cal. 2d 351 . . . . .	174
<i>Tulare Irrigation District v.</i> <i>Lindsay-Strathmore Irrigation District</i> (1935) 3 Cal. 2d 489 . . . . .	175
<i>City of Lodi v. East Bay Municipal</i> <i>Utility District</i> (1936) 7 Cal. 2d 316 . . . . .	176
<i>Hillside Water Co. v. City of Los Angeles</i> (1938) 10 Cal. 2d 677 . . . . .	178
<i>Rancho Santa Margarita v. Vail</i> (1938) 11 Cal. 2d 501 . . . . .	179
<i>Meridian Ltd. v. San Francisco</i> (1939) 13 Cal. 2d 424 . . . . .	180
<i>Allen v. California Water and</i> <i>Telephone Co.</i> (1946) 29 Cal. 2d 466 . . . . .	180
<i>City of Barstow v. Mojave Water</i> <i>Agency, et al.</i> (2000) 23 Cal. 4th 1224 . . . . .	181

### chapter 8

#### **State Water Resources Control Board: Its Role in Water Rights and Water Quality Regulation / 187**

<b>Introduction</b> . . . . .	187
<b>Appropriation of Water</b> . . . . .	188
Unappropriated Waters . . . . .	189
Processing an Application . . . . .	189
Court Review . . . . .	190
Statutory Beneficial Uses. . . . .	190
No Appropriation for Instream Use . . . . .	190
Fully Appropriated Streams . . . . .	190
<b>Evolution of the State Board’s Authority</b> . . . . .	191
<b>Exclusive vs. Concurrent Jurisdiction.</b> . . . . .	191
<i>Audubon</i> —Concurrent Jurisdiction . . . . .	193
Reference Procedure . . . . .	194
<b>Reasonable Use Considerations</b> . . . . .	194
State Board’s <i>Imperial</i> <i>Irrigation District</i> Decision . . . . .	194
<i>Imperial Irrigation District II</i> . . . . .	195
<b>Water Quality Control—</b>	
<b>California’s Role.</b> . . . . .	195
Regional Water Quality Plans . . . . .	196
Water Quality Objectives . . . . .	196
Balancing of Objectives . . . . .	197

## Contents

<b>Federal Role</b> . . . . .	197	<b>D-1641</b> <i>continued</i>	
Balancing Under State and Federal Procedures . . . . .	198	North Delta . . . . .	215
Federal Anti-degradation Policy . . . . .	198	Yolo and Solano Counties . . . . .	215
California Anti-degradation Policy . . . . .	199	Appeal of D-1641 . . . . .	216
<b>Regional Boards</b> . . . . .	199	Robie Decision • Delta Protection Act • “No Injury” Rule • Legal User of Water • Public Trust	
<b>NPDES Permits</b> . . . . .	200	<b>State and Federal Agreement on Bay-Delta Standards</b> . . . . .	218
<b>Total Maximum Daily Loads</b> . . . . .	201	Water Users Response . . . . .	218
Non-Point Sources . . . . .	202	<b>Bay-Delta Accord</b> . . . . .	219
<b>“Impaired” Water Bodies</b> . . . . .	203	No Further Water	
<b>Enforcement</b> . . . . .	204	Loss Due to ESA . . . . .	219
Review of Regional Board Action . . . . .	204	Additional Listings . . . . .	220
<b>Bay-Delta Hearing Process</b> . . . . .	205	<b>CALFED</b> . . . . .	220
<b>D-1275</b> . . . . .	207	CALFED’s Mission . . . . .	221
<b>D-1379</b> . . . . .	207	Phase I . . . . .	221
<b>D-1485</b> . . . . .	208	Phase II—EIR/EIS . . . . .	221
<b>Racanelli Decision</b> . . . . .	208	Phase III—Implementation . . . . .	222
Confirmation of State Board’s Authority . . . . .	209	<b>“Framework for Action”</b> . . . . .	222
Water Right		<b>California Bay-Delta Authority</b> . . . . .	222
Priorities Overridden . . . . .	209	CALFED Progress . . . . .	223
<b>Seemingly Never-Ending Bay-Delta Hearings, Beginning 1987</b> . . . . .	210	Public Policy Institute of California Report . . . . .	223
Phase I Hearings . . . . .	210	Delta Vision . . . . .	224
1990 Draft Salinity Plan— But Withdrawn . . . . .	210	<b>Delta Facilities Issue</b> . . . . .	224
Water Quality Only— No Water Rights . . . . .	211	Arguments for an Isolated Facility . . . . .	225
Can EPA Control		Opposition to an Isolated Facility . . . . .	226
Fresh Water Flows? . . . . .	212	CALFED’s Preferred Program . . . . .	226
EPA’s Own Draft Plan . . . . .	212	PPIC Proposals . . . . .	227
<b>D-1630</b> . . . . .	212	 chapter 9	
Withdrawal of D-1630 . . . . .	213	<b>Interaction of Federal Law and State Water Law / 229</b>	
<b>D-1641</b> . . . . .	214	Introduction . . . . .	229
Settlement Agreements . . . . .	214	Mining Act of 1866 . . . . .	230
San Joaquin River . . . . .	214	Desert Land Act of 1877 . . . . .	231
Mokelumne River . . . . .	215		

## Contents

<b>Reclamation Act of 1902</b> . . . . .	232	<b>Section 101(g)—</b>	
<b>Reversal Toward</b>		<b>The Wallop Amendment</b> . . . . .	248
<b>Federal Control</b> . . . . .	233	EPA’s View of the	
The 160-acre Limitation . . . . .	233	Wallop Amendment . . . . .	248
Area of Origin Protection . . . . .	234	Impact of the Wallop	
State Prior Appropriation Principles . . . . .	234	Amendment Not Fully Defined . . . . .	249
<b>California vs. United States</b> . . . . .	235	Corps of Engineers’	
State Law Prevails Unless		Authority . . . . .	250
Inconsistent with Clear		<b>What Constitutes “Wetlands”?</b> . . . . .	251
Congressional Directives . . . . .	236	<b>EPA’s Role in the</b>	
<b>Section 8 in the 1980s</b> . . . . .	237	<b>Bay-Delta Decision</b> . . . . .	252
Acquisition of Water		<i>PUD No. 1 v. Washington</i>	
Rights by Federal Agencies . . . . .	237	<i>Department of Ecology</i> . . . . .	252
<i>Racanelli</i> Decision . . . . .	237	<i>South Florida Water Mgmt. Dist.</i>	
<b>Federal Energy Regulatory</b>		<i>v. Miccosukee Tribe of Indians</i> . . . . .	253
<b>Commission and States Rights</b> . . . . .	238		
<i>First Iowa</i> —Federal Preemption . . . . .	239	chapter 10	
Rock Creek Challenge for		<b>Conservation, Planning,</b>	
State Minimum Flow Control . . . . .	239	<b>Recycling and Desalination / 255</b>	
<b>Federal Reserved Rights</b> . . . . .	240	<b>Introduction</b> . . . . .	255
<i>Winters</i> Doctrine . . . . .	241	<b>Water Conservation</b> . . . . .	256
<i>Winters</i> Extended		Per Capita Water Use . . . . .	256
to Non-Indian		Additional Conservation . . . . .	256
Federal Reservations . . . . .	241	<b>Legal Authority for</b>	
Adjudication of		<b>Conservation Programs</b> . . . . .	257
Indian Water Rights . . . . .	241	State Policies . . . . .	257
Pupfish Case . . . . .	241	<b>1992 Urban Water</b>	
Do <i>Winters</i> ’ Rights		<b>Conservation Memorandum</b>	
Extend to Groundwater? . . . . .	242	<b>of Understanding</b> . . . . .	258
Reserved Rights Curtailed . . . . .	243	<b>Agricultural Water</b>	
<b>Federal Riparian Water Rights</b> . . . . .	243	<b>Management Council</b> . . . . .	260
<b>Endangered Species Act</b> . . . . .	245	Agricultural Efficiency Defined . . . . .	260
<b>Water Quality Regulation</b> . . . . .	245	Agricultural	
Federal Clean Water Act . . . . .	245	Advisory Committee . . . . .	260
Salinity Control . . . . .	245	Can Agriculture	
Consideration of		Save More Water? . . . . .	261
Economic and Social Factors . . . . .	246	<b>Water Conservation</b>	
Is Water Released		<b>in Landscaping Act</b> . . . . .	261
from a Dam a Pollutant? . . . . .	247		

## Contents

<b>Mandatory Conservation Ordinances</b> . . . . .	262	<b>Water Recycling and Desalination</b> <i>continued</i>	
EBMUD Example. . . . .	263	Health Department Requirements . . . . .	278
<b>Restrictions on Water-Supply Hookups</b> . . . . .	263	Required Uses of Recycled Water . . . . .	279
City Control Over		OCWD “Water Factory 21” . . . . .	279
New Water Connections . . . . .	264	Direct Use of Recycled Water in Drinking Water Supplies. . . . .	280
<b>Water Meter Requirements.</b> . . . . .	265	Graywater . . . . .	280
<b>Application of CEQA.</b> . . . . .	266	Desalination . . . . .	281
<b>Planning for Future Water Needs</b> . . . . .	266	MWD’s Desalination Efforts . . . . .	281
Urban Water Management Planning Act . . . . .	266	Private Efforts . . . . .	282
<b>Water Supply for New Developments</b> . . . . .	268	Tampa Bay . . . . .	282
Water Supply Assessments and Verifications . . . . .	268	Santa Barbara and Desalination Costs . . . . .	283
Twenty-year Supply . . . . .	269	Enter the Coastal Commission . . . . .	284
Vineyard Decision . . . . .	270		
<b>Water Shortage Emergencies</b> . . . . .	271	chapter 11	
Water Code Section 350 . . . . .	271	<b>Water Transfers / 287</b>	
Special Municipal Water District and County Water District Authority . . . . .	272	<b>Introduction</b> . . . . .	287
Threat of Future Water Shortage . . . . .	272	<b>Water Transfer Policy</b> . . . . .	288
Duty to Augment Supply . . . . .	273	Role of DWR . . . . .	288
Claim of Inverse Condemnation . . . . .	274	Wheeling Charges . . . . .	289
<b>Exacting Water Rights as a Condition of Service.</b> . . . . .	275	<b>Statutory Framework for Transfers—Early Legislation</b> . . . . .	290
<b>Water Recycling and Desalination</b> . . . . .	275	<b>Surface Water Transfers Requiring Water Board Approval</b> . . . . .	291
Water Recycling—		Temporary Urgency Changes. . . . .	291
A Change in Terminology . . . . .	276	Temporary Changes . . . . .	292
Treatment Required . . . . .	276	Long-Term Transfers . . . . .	292
Amount of Recycled Water Use . . . . .	277	<b>Constraints on Transfers</b> . . . . .	292
Discharges to the Ocean . . . . .	277	Appropriative Rights . . . . .	292
		Riparian Rights . . . . .	293
		Groundwater . . . . .	293
		Groundwater Management Statutes and Ordinances . . . . .	294
		“Protected Areas” . . . . .	295

## Contents

<p><b>Transfers of Conserved and Surplus Water</b> . . . . . 296</p> <p style="padding-left: 20px;">Legal Standards . . . . . 296</p> <p style="padding-left: 20px;">Example—1988 MWD-IID Agreement . . . . . 298</p> <p style="padding-left: 20px;">Example—2002 MWD-Palo Verde . . . . . 299</p> <p style="padding-left: 20px;">Example—Emergency Drought Water Bank . . . . . 299</p> <p><b>State Water Project Transfers—The Monterey Agreement</b> . . . . . 302</p> <p><b>Transfers of Central Valley Project Water</b> . . . . . 303</p> <p style="padding-left: 20px;">Transfers Between CVP Contractors . . . . . 303</p> <p style="padding-left: 20px;">Transfers Outside the CVP Service Area . . . . . 304</p> <p><b>Conjunctive Use of Surface and Groundwater</b> . . . . . 305</p> <p style="padding-left: 20px;">Legal Authority . . . . . 305</p> <p style="padding-left: 20px;">Examples . . . . . 306</p> <p style="padding-left: 20px;">MWD Transfers . . . . . 307</p> <p><b>Economic and Social Impacts of Transfers</b> . . . . . 309</p> <p><b>Transfers for Environmental Purposes—Environmental Water Account</b> . . . . . 311</p> <p> chapter 12</p> <p><b>Law of the Colorado River / 313</b></p> <p style="padding-left: 20px;"><b>Introduction</b> . . . . . 313</p> <p style="padding-left: 40px;">Upper and Lower Basins . . . . . 313</p> <p style="padding-left: 20px;"><b>Colorado River Compact</b> . . . . . 314</p> <p style="padding-left: 40px;">Fear of Equitable Apportionment . . . . . 315</p> <p style="padding-left: 40px;">Terms of the Compact . . . . . 316</p> <p style="padding-left: 40px;">Basic Allocations . . . . . 316</p> <p style="padding-left: 40px;">Tributary Flows . . . . . 317</p>	<p><b>Federal Legislation Leading to the Boulder Canyon Project Act</b> . . . . . 318</p> <p><b>Boulder Canyon Project Act</b> . . . . . 319</p> <p style="padding-left: 20px;">California Limitation Act . . . . . 320</p> <p><b>Seven Party Agreement</b> . . . . . 320</p> <p><b>Continued Disputes with Arizona</b> . . . . . 323</p> <p><b><i>Arizona v. California</i></b> . . . . . 324</p> <p style="padding-left: 20px;">Neither the Law of Prior Appropriation Nor Equitable Apportionment Applicable . . . . . 325</p> <p style="padding-left: 20px;">Tributary Waters Excluded . . . . . 325</p> <p style="padding-left: 20px;">Congressional Apportionment Scheme . . . . . 325</p> <p style="padding-left: 20px;">Secretary of the Interior’s Power to Contract . . . . . 327</p> <p style="padding-left: 20px;">Native American Water Rights and Present Perfected Rights . . . . . 328</p> <p style="padding-left: 20px;">Present Perfected Rights . . . . . 328</p> <p><b>Mexico’s Water Rights</b> . . . . . 330</p> <p><b>Water Rights of the Imperial Irrigation District</b> . . . . . 330</p> <p><b>Colorado River Today</b> . . . . . 331</p> <p style="padding-left: 20px;">The Central Arizona Project . . . . . 331</p> <p style="padding-left: 20px;">Quantification Settlement Agreement Package . . . . . 332</p> <p style="padding-left: 20px;">IID—San Diego Transfer . . . . . 332</p> <p style="padding-left: 20px;">Objections to the Transfer . . . . . 333</p> <p style="padding-left: 20px;">Key Terms . . . . . 333</p> <p style="padding-left: 20px;">More Negotiations . . . . . 334</p> <p style="padding-left: 20px;">IID Sues . . . . . 334</p> <p style="padding-left: 20px;">Finally a Settlement . . . . . 334</p> <p><b>Is the Colorado River Over-allocated?</b> . . . . . 335</p> <p><b>Endangered Species</b> . . . . . 336</p> <p><b>Other Issues</b> . . . . . 337</p> <p><b>The 2006 Proposal for Modifying Operations of the River</b> . . . . . 338</p>
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# Contents

## chapter 13

### Reflections / 341

Introduction . . . . .	341
Can the State Continue to Meet Water Demands? . . . . .	342
Need for Leadership . . . . .	342
Need to Look Ahead . . . . .	342
Need to Consider In-Stream Values; the Need to Build . . . . .	343
How Well Are We Now Doing? . . . . .	343
Endangered Species Act . . . . .	344
No Growth . . . . .	345

### Appendices

appendix A	
State Water Project Deliveries from 1962 through 2004 . . . . .	349
appendix B	
Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government . . . . .	353
appendix C	
Memorandum of Understanding Regarding Urban Water Conservation in California . . . . .	359
appendix D	
Regulations Governing Water Service to Customers of the East Bay Municipal Utility District . . . . .	367
appendix E	
Option and Purchase Agreement for Water Transfer . . . . .	375

### List of Figures

1-1 Water Project Facilities in California . . . . .	5
1-2 San Francisco’s Hetch Hetchy Water Supply System . . . . .	6
1-3 EBMUD’s Mokelumne River Aqueduct System . . . . .	11
1-4 Los Angeles Department of Water and Power System . . . . .	13
1-5 Metropolitan Water District of Southern California System . . . . .	16
1-6 Major State Water Project Facilities . . . . .	25
5-1 Wild and Scenic Rivers in California . . . . .	95
8-1 Delta Waterways . . . . .	206
11-1 Projects Authorized by MWD-IID Water Conservation Agreement . . . . .	299

### List of Tables

1-1 State Water Contracting Projects and Their Entitlements . . . . .	26
11-1 Main Types of Statutory Water Transfers. . . . .	298
11-2 Water Distribution for the 1991 Drought Water Bank in 1,000s of acre-feet . . . . .	300
11-3 Water Distribution for the 1992 Drought Water Bank in 1,000s of acre-feet . . . . .	301
12-1 Seven Party Agreement Priorities. . . . .	323

Table of Authorities . . . . .	383
Credits . . . . .	397
Index . . . . .	399
List of Acronyms . . . . .	428

## Preface

**T**he first edition of *California Water* was published more than ten years ago. At that time, I had some doubts about whether a book of this kind would be well received. I knew there was a real need for a practical book that dealt not only with basic water law, but also more generally with water issues, water development, and the relationship of water to the environment. Multi-volume treatises were then available as they are now, but there was nothing that was easily readable for the interested person. The visible need was not only for the lawyer, but for the engineer, the planner, the elected official, or the community leader who was interested in water, for those who were looking for a concise, yet still comprehensive, story of California water. Nonetheless, a book of this kind is hardly bedtime reading, and I was pleasantly surprised when the first printing sold out. And, later, even more heartened when people began to ask about when we were going to put out another edition.

More than a decade later is a good time for the new book. The historic Bay-Delta Accord of 1994 has now achieved legal recognition in State Board Decision 1641 which was essentially affirmed in Justice Robie's landmark opinion. However, the promise of implementation through the consensus approach of CALFED appears to be fading. The critical issues on the Colorado River, occasioned by disappearing surpluses and California's use of more than its basic 4.4 million acre-feet entitlement, occupied almost a decade of sometimes bitter politics, negotiations, and litigation. But a settlement of those issues is now in place among the major California water users, the Bureau of Reclamation, and other Colorado basin states. Water transfers, conservation, recycling, and conjunctive use of groundwater have begun to emerge as major sources of supply. The ESA and CEQA have come to overshadow traditional water

rights in the allocation of the state's water resources. Global warming is much in the news, but the impact on our water supplies is still uncertain. A recent 2007 report by the Public Policy Institute of California asserts that our decades-old policy of trying to maintain the entire Delta as a fresh water source is no longer viable, suggesting a return to more natural saline conditions, and resurrecting the peripheral canal. In 2000, the Supreme Court issued its most important decision on groundwater law\* since the 1975 opinion in *Los Angeles v. San Fernando*. The historic settlement in the Friant case restored flows in a reach of the San Joaquin River. And the legislature and the Supreme Court have now begun to tie the approval of future urban development to more secure water supplies. So while much of the history of California's water development and the basic principles of water law that were included in the original edition of *California Water* are still present in this book, much material has been added to recount more than ten years of significant change.

As noted in our first edition, we come to water issues from the perspective of a law firm that primarily represents public agencies which bear the heavy responsibility of providing reliable water supplies to a growing population and some of the most productive agriculture in the world. Still, we have tried to keep the book impartial, and to fairly represent the increasing importance of the environmental uses of water. The in-stream use of water and the consumptive uses of water frequently clash, and we have devoted significant portions of the book to this issue. At one point, it appeared that conflict might be on the wane as the Environmental Water Account and CALFED paid huge amounts of money into ecosystem restoration. However, recent dramatic declines of pelagic fisheries in the Delta, and diminishing support for the CALFED consensus approach, have led to renewed attacks on SWP and CVP Delta exports. Conflict, without a solution, is the condition as this book goes to press.

On a personal note, I continue to believe that state efforts to create more storage are sadly lagging. The capture and storage of high flows, not needed for environmental uses, are vital to long-term reliable water supplies. Additional surface storage facilities become even more important as climate changes may substitute increased rainfall and fast runoff for the natural storage of water now achieved from mountain snow packs. Moreover, the increased use of groundwater basins to store water still requires the temporary use of surface storage facilities. Getting water underground is a slow process. High flows first have to be held somewhere before they can be percolated into groundwater basins. And storage

\* *City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224.

facilities take years, if not decades, to get finally built. Storage facilities constructed now can help to head off the potentially disastrous impacts of a long drought, but storage facilities that are only studied and talked about now, though perhaps to be built later, cannot provide quick relief from drought. Previous generations planned for growth and to protect the state against drought. That surplus capacity has now been essentially used up. Without the same kind of foresight, drought will simply pit cities, farmers, and the environment against each other for the use of the scarce resource. We should have learned from the electrical crisis how devastating a shortage in a basic utility service can be. Yet a shortage of electricity is far more easy to remedy than a shortage of water. Electricity can be manufactured and purchased from outside the state. Water has only one advantage over electricity. It can be stored. This advantage should not be squandered.

— Arthur L. Littleworth



## Introduction

**T**his is a book for everyone who may be interested in the state's water supply, and its development and use, as well as in the future of California. It is a book for local officials—in water districts, cities, and counties—for engineers and planners, for community leaders, for environmentalists and developers, for farmers, and indeed for lawyers and judges. The book contains broad coverage of water rights law\* and related environmental law. The history of the state's water use and perhaps the future allocation of our water supply cannot be fully understood apart from the basic concepts of water law.

**How to Use This Book.** This book is not designed to be read like a novel from beginning to end. The first two chapters should be useful to everyone, but the following chapters concentrate on specific subjects and can be read selectively as the need or interest arises. Chapter 12 on the Colorado River is a good example. It is complete in itself, tracing the history of the state's Colorado River rights from the 1924 Interstate Compact to the recent Metropolitan Water District—Imperial Irrigation District settlement. It is a chapter that should have broad appeal and usefulness. On the other hand, some chapters focus on discrete legal issues that may be of interest primarily to lawyers and judges. An example is chapter 6, which outlines the court cases that have applied the doctrine of “physical solution” to the resolution of water rights litigation.

**The State's Water Supply.** Chapter 1 begins with California's water supply—how much do we have, how it is used, how much goes to the environment and how much to farms and cities. This chapter describes

\* There is no attempt, however, to include the level of detail that can be found in several multi-volume treatises on water law.

the major water development projects that store water from winter rains and mountain snow-melt, and distribute that water for later use hundreds of miles away—San Francisco’s Hetch Hetchy project, East Bay Municipal Utility District’s Molelumne River aqueduct, Los Angeles’ Owen Valley system, MWD’s Colorado River aqueduct, the State Water Project, and the federal Central Valley Project. This is the major network of storage and delivery facilities that sustains California today.

**Water Law in a Nutshell.** Chapter 2 is a brave attempt to present a capsule view of water law, if that is possible. It is the briefest overview of the basic principles of California water law, and should be of value to every reader. That may be all the “water law” that some readers will want to know. Yet for others, this brief introduction may stimulate an interest going further into chapters 3 and 4. These chapters deal with the rights to surface waters and to groundwater. The development of water law—from the claims of miners in 1849 to our massive statewide water projects—is covered in these chapters in more detail. Groundwater, which supplies about one-third of our consumptive water demands, is discussed separately in chapter 4. Groundwater supplies are being overdrafted, *i.e.*, “mined” without replenishment, by between one and two million acre-feet a year. Chapter 4 addresses the efforts to regulate groundwater pumping and the use of underground storage capacity.

**Allocation of Water—Consumptive vs. Instream Demands.** The major issue in water law today centers on the question of how much of the state’s total water supply should be devoted to instream and environmental uses, and how much should be used to supply farms and cities. Collectively, chapters 5, 6, and 7 deal with this issue. More than one-half of California’s total water supply is now dedicated to environmental uses, and these three chapters discuss the changes in water law that have shifted the allocation of the state’s water resources from municipal and irrigation demands to instream uses. As part of that process, the nature of water rights as vested property rights, with reliable priorities, has been gradually eroded. The greatest impact has come from the Endangered Species Act, and this subject receives comprehensive coverage in chapter 6.

**State Water Board and Federal Law.** The role of the State Water Resources Control Board in both water rights and water quality matters is discussed in chapter 8. This chapter unravels the tangled mess of Bay-Delta decisions that began in 1988 and led finally to the 1994 Bay-Delta Accord, and to the CALFED process. Water quality regulation and the role of EPA and the federal government are also included.

**Conservation.** The state's considerable progress in water conservation, the use of recycled water, and in desalination are covered in chapter 10. Major strides have been made in these areas, and major opportunities still remain to enlarge our supplies and to use existing supplies more efficiently.

**Transfers.** Free-market transfers are shifting water from farms to cities. Since the 1980s, it has been the official policy of the state to encourage water transfers to help meet growing municipal needs. But only in recent years have we seen much activity. Chapter 11 outlines what is now occurring, the legal requirements to effect transfers, and the restraints on such transfers.

**Colorado River.** Chapter 12 is a comprehensive review of the "Law of the River," and an up-to-date account of the most recent developments, including the "QSA" Agreement among MWD, IID, San Diego and Coachella, the approval of the United States, and the "soft landing" that reduces California to its basic 4.4 million acre-feet entitlement.

**Reflections.** The last chapter has been added for a brief look at the history of water law and water development in California to see what lessons might be learned and where the state is going, and to suggest the direction perhaps the state should be moving towards.

*“The history of California is written on its waters.”*

— Justice Ronald B. Robie  
State Water Resources  
Control Board Cases (2006)  
136 Cal. App. 4th 674, 687

*“California and water. The two always have been, and always will be, inextricably linked. No resource is as vital to California’s urban centers, agriculture, industry, recreation, scenic beauty, and environmental preservation as its ‘liquid gold’. And no resource is as immersed in controversy.”*

— Introduction to “Liquid Gold,” a 1997 exhibit by the University of California, Water Resources Center Archives