

# Balancing Water Projects and Wildlife: New Authority for the California Water Resources Control Board

In *United States v. State Water Resources Control Board*,<sup>1</sup> the First Appellate District Court of California held that a state regulatory agency may modify the rights granted in water permits in order to protect fish and wildlife. This decision alters the existing blend of appropriative and riparian water rights in California by granting the State Water Resources Control Board (Water Board) the authority to amend existing water rights permits in order to enforce its decisions on water quality.

Pursuant to the court's holding, the present allocation of water rights will remain in place until the current permits expire in 1987. At that time, the Water Board will review the existing allocation of water rights and adjust them to meet the Board's water quality standards. During its review of federal and state water project permits, the Water Board will have wide discretion to balance competing beneficial uses—including protection of fish and wildlife.

## BACKGROUND OF PROJECT USE AND BOARD ACTION

In 1978, the Water Board issued the Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh, commonly referred to as Water Right Decision 1485.<sup>2</sup> This plan modified water permits for both the Central Valley Project, which provides water to the San Joaquin Valley, and the State Water Project by requiring their use to conform with water quality standards set for the Sacramento-San Joaquin Delta.<sup>3</sup>

Prior to the Board's issuance of Decision 1485, the projects ex-

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1. 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986) 27 Cal. Official Reports 1986, Sect. 8, Cumulative Subsequent History, at 166.

2. California State Water Resources Control Board Decision No. 1485 (1978).

3. 182 Cal. App. 3d at 107, 227 Cal. Rptr. at 172. The Central Valley Project is operated by the United States Bureau of Reclamation. The California Department of Water Resources operates the State Water Project. The court described the affected area as "a large lowland area with a labyrinth of natural channels in and around the confluence of the Sacramento and San Joaquin Rivers. The bounded area is roughly triangular, with Sacramento at the north, Vernalis at the south and Pittsburg at the west." *Id.*

ported enough water from the Sacramento River drainage area to significantly reduce the amount of fresh water in the Delta. This created saltwater intrusion problems, particularly during drought years. Absent a certain level of fresh water, sea water from San Francisco Bay invaded the area. Through Decision 1485 the Water Board sought to ensure a minimum of fresh water in the Delta mixture.<sup>4</sup> The Board's decision required the projects to take corrective measures by releasing water or reducing exports, in order to reduce salinity of Delta water to the level that would exist absent any project.<sup>5</sup>

#### ISSUES PRESENTED BY LITIGANTS

*State Water Resources Control Board* consolidated eight cases in the First District concerning Water Right Decision 1485. In addition to the Water Board, the Central Valley Project, and the State Water Project, the litigants included both riparian users in the Delta area and agencies that relied on the water exported from the Delta.<sup>6</sup> The projects and the export users generally contended that the Water Board did not have the authority to alter the rights of the permit holders. The Delta users, on the other hand, argued that the Board should have adopted more stringent water quality standards to protect the riparian uses of the Delta.<sup>7</sup>

#### BALANCING TEST FOR BENEFICIAL USES

The court decided that the Board should balance priorities when adjudging the competing claims between the projects and the export users on the one hand and the Delta users on the other hand.

The opinion held that, when deciding how to allocate water permits the Board no longer needed to rely on the hierarchy of beneficial uses employed in previous Board decisions. This approach allows a greater consideration of non-traditional categories of use. The court reasoned that "a . . . global perspective is essential to fulfill the Board's water quality planning obligations."<sup>8</sup>

This judicial expansion of the Water Board's power will benefit those concerned with the Delta environment. However, the ruling also creates gaps in the Board's enforcement power and presents procedural problems. The court admitted that the California Legis-

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4. *Id.* at 107-11, 227 Cal. Rptr. at 172-74.

5. *Id.* at 115-16, 148-49, 227 Cal. Rptr. at 177-78, 200.

6. *Id.* at 82, 227 Cal. Rptr. at 161.

7. *Id.* at 112, 227 Cal. Rptr. at 175.

8. *Id.* at 119, 227 Cal. Rptr. at 180.

lature had not provided the Water Board with enforcement powers as broad as the planning powers the court claimed for the Board.<sup>9</sup>

Although federal and state provisions require public agencies to comply with water quality standards, they do not provide the Water Board with the means to enforce those standards.<sup>10</sup> The court endeavored to correct this predicament by holding that the Board has the power to modify water rights permits to enforce water quality.<sup>11</sup> However, given the long period of fact-finding involved in modifying permits, protecting water quality by amending permits is, at best, a fairly slow and cumbersome method of enforcement.<sup>12</sup>

In addition, procedural problems created by the court's decision will further delay any improvement in water quality. While the First Appellate District has affirmed the Board's ability to set standards for both environmental control and water use, the Board still has to work out a process by which it can actually perform the balancing test required by the court. Unfortunately, neither the California Water Code nor the opinion here provides the Board with much guidance.

Adding to the difficulties is the fact that the language of the opinion does not indicate how much of the old structure of water rights should guide the Board's decisions concerning permits. Principally, the court has given little indication as to what the limits of the balancing test are, or when aggrieved parties should seek a hearing in court.

Granting the Water Board a "global perspective" is not necessarily the most efficacious method by which to combine water quality concerns with water rights. A better alternative might be the integration of rights approach used in *National Audubon Society v. Superior Court*.<sup>13</sup> In *National Audubon Society*, the California Supreme Court stated that the public trust doctrine should be integrated into the established hierarchy of beneficial water uses, and considered along with those uses when the Board allocates water

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9. The court stated: "Enforcement authority—in the form of clear and direct orders, injunctive relief and civil penalties—is provided only for unauthorized discharge of pollutants." (Citations omitted.) *Id.* at 125, 227 Cal. Rptr. at 184.

10. *Id.* See also CAL. WATER CODE § 13247 (West Supp. 1986) and 33 U.S.C. § 1323 (1985).

11. 182 Cal. App. 3d at 127-29, 227 Cal. Rptr. at 185-87.

12. The court's choice to postpone the modification of the permits until their renewal indicates the increased delay that is likely to result from the expansion of the Board's powers.

13. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983).

rights. However, *National Audubon Society* does not allow consideration of the public trust doctrine to completely supersede the established hierarchy of water uses. *State Water Resources Control Board* cited *National Audubon Society* for its holding on the existence of the public trust doctrine in water law; however, *State Water Resources Control Board's* discussion regarding beneficial uses does not correspond with the more traditional analysis of *National Audubon Society*.

As a result of the court imposed balancing test, the Water Board no longer issues water permits based on a narrow determination of the existence of available water for appropriation. The Board must now consider a broader set of criteria that may impact current permit holders. Relying on this state agency as the forum of first resort probably reduces to a minimum the delay in granting permits. However, adding to the Water Board's jurisdiction does not expedite or improve the permit approval process. Furthermore, while the current Board may exercise its greater authority to accommodate environmental concerns, different personnel on a future board may choose a global perspective favoring industrial or municipal uses.

#### FEDERAL CLAIMS OF THE U.S. BUREAU OF RECLAMATION

The Central Valley Project tried to convince the court that, as an arm of the United States Bureau of Reclamation, the court could not hold it to a higher quality standard than that set forth in contracts with its customers. However, the court rejected the assertion that the Water Board lacked the authority to regulate the Central Valley Project because the latter is run by a federal agency. The court's reasoning was logical: given that the Water Board has the authority to modify water permits to meet water quality standards, the federal authorities have an obligation to comply to the same extent as other permit holders.

The court's holding was not without precedent; claims of federal immunity had already been denied by prior federal decisions. In 1977, the United States Supreme Court, in a suit challenging the Board's power to attach conditions to water rights, held the United States Bureau of Reclamation subject to the regulation of state agencies.<sup>14</sup> Other federal case law has also held that both federal and state entities must comply with state water quality controls.<sup>15</sup>

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14. *California v. United States*, 438 U.S. 645 (1977).

15. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

## NONCONSUMPTIVE USES OF WATER

One of the concerns that encouraged the Water Board to alter water rights permits is the protection of wildlife.<sup>16</sup> However, since fish and wildlife do not go through the application process for a permit with articulated property demands, they present special problems of evaluation for the Board. Water rights permits imply a certain set of property rights. This implication tends to downplay uses of water not easily attributable to a single consumer or group of consumers.

A balancing test seems a fairly direct way to take noneconomic uses of water into account, but it remains unclear exactly what regulatory scheme provides an appropriate scale to weigh the relative values of uses. When balancing uses, water quality standards may prove difficult to establish. The court in *State Water Resources Control Board* offered no assistance in this regard; it merely held that the adequacy of the water quality standard set by the Water Board was beyond the scope of the appeal.<sup>17</sup>

Although the court in *National Audubon Society v. Superior Court*<sup>18</sup> stated that appropriate rights must give way to nonconsumptive uses protected by the public trust doctrine, it reached this conclusion by an analysis that differs somewhat from *State Water Resources Control Board*. The earlier opinion recognized that the Water Board's role includes protection of uses for the public trust, but also held that California water law is "an integration including both the public trust doctrine and the board-administered appropriative rights system."<sup>19</sup> This statement of the public trust doctrine, along with the state plan for appropriative rights, gives the affected parties some notion of what rights they do possess under their current permits and, consequently, a better chance to predict the outcome of the next round of Water Board hearings.

It is important to note that continuing judicial recognition of appropriative rights, as opposed to the balancing of beneficial uses, does not have to result in a lower priority for protection of fish and wildlife. When an application reaches the Water Board for a permit that will adversely affect the environment, it may modify or reject it to the extent that it would not be the best protection of the public trust.<sup>20</sup> The Board may also reject an appropriation permit where it

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16. CAL. WATER CODE § 13050(f) (West Supp. 1986).

17. 182 Cal. App. 3d at 151, 227 Cal. Rptr. at 202.

18. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

19. *Id.* at 426, 658 P.2d at 712, 189 Cal. Rptr. at 349.

20. *Id.* at 427, 658 P.2d at 713, 189 Cal. Rptr. at 350.

decides that water has already been put to a beneficial use.<sup>21</sup>

Modification of priorities in water use, while imperfect, preserves an administrative process with the advantage of predictability for its applicants. Allocating water based on "global perspectives," as developed in *State Water Resources Control Board*, leaves complete discretion with a particular Board's personnel.

#### RESULTS OF THE DECISION

Initially, the Water Board and environmentalists greeted the court's decision in *State Water Resources Control Board* with enthusiasm.<sup>22</sup> While this decision undoubtedly expands the power of the Water Board, the long-term results of this expansion remain unclear.

In the short run, the 1987 hearings will probably result in equal or greater controls on water quality being written into the renewed permits. However, the results of the 1987 hearings will not tell us whether the result of this case has permanently increased the Board's consideration of uses for the public benefit. Judicial redefinition of the role of the Water Board has given the Board so much discretion that water allocation criteria may change with each new appointment to the Board.

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21. *Id.* at n.5.

22. One of the attorneys for the Water Resources Control Board described the holding as "a very good decision from the [B]oard's jurisdictional standpoint," while Tomas Graff of the Environmental Defense Fund remarked that "it will be very beneficial for San Francisco Bay and the Delta." *Sacramento Bee*, May 30, 1986, at B5.

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