

The Delta Water Wars: Westlands Water  
Daniel Bednarski

Benjamin Franklin once said the only two things certain in life are death and taxes. A third should now be added to that list: the fight over water in the arid American West. This is very true in California where wars over water have been ongoing since the state's founding.

California as we know it today was built largely on this fantasy: that arid farms and cities in the south could indefinitely satisfy the thirst of its agricultural fields and growing population by importing water from the north.<sup>1</sup> It is that fantasy which fuels today's disputes over water. "Recent events have revealed the truth: California is reaching the limit of its water supplies, and the economy and the environment are suffering for it."<sup>2</sup> As a result, California will collectively need to readjust who gets water and for what purpose. This paper addresses the precarious nature of one water district, Westlands Water District (Westlands), and a few of the ways its water supply is threatened by the changing times. In truth, Westlands is a proxy for any other water user.

### **I. Delta**

Some of the most recent, hard fought battles in the water wars have been over Sacramento-San Joaquin Delta (Delta) water. Oh, and what a prize it is! The Delta is the largest estuary on the West Coast of the Americas, draining 40 percent of California.<sup>3</sup> It serves as a conduit for the transfer of water by the statewide water projects, the Central Valley Project (CVP) and State Water Project (SWP) used in the distribution of the majority of water consumed in California.<sup>4</sup> Two-thirds of Californians get at

---

1 Matt Weiser, *The Delta debate: Resurrecting the canal*, SACRAMENTO BEE, Dec. 14, 2008, available at <http://www.sacbee.com/1268/story/1459470.html> (last visited Dec. 16, 2008).

2 *Id.*

3 *Id.*

4 *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d 82, 97 (1986).

least some of their water from the Delta.<sup>5</sup> It also irrigates nearly 3 million acres of farmland.<sup>6</sup> Westlands gets its water almost entirely from the Delta, through the CVP.<sup>7</sup> Metaphorically, the Delta now also serves as a conduit for the never ending water wars that have occurred in California since statehood.

Both the CVP and the SWP (the projects) divert water from the rivers that flow into the Delta and store the water in reservoirs.<sup>8</sup> The projects periodically release this water into the rivers that flow into the Delta.<sup>9</sup> Pumps situated at the southern edge of the Delta eventually lift most of the water into canals for transport south to the farmers in the San Joaquin Valley and cities in Southern California.<sup>10</sup> Water that is neither stored nor exported by the projects passes through the Delta where it is used by local farmers, industries and municipalities.<sup>11</sup> The excess flows out into San Francisco Bay and into Pacific Ocean.<sup>12</sup>

“California's critical water problem is not a lack of water but uneven distribution of water resources.”<sup>13</sup> “The state is endowed with flowing rivers, countless lakes and streams and abundant winter rains and snowfall.”<sup>14</sup> “But while over 70 percent of the stream flow lies north of Sacramento, nearly 80 percent of the demand for water supplies originates in the southern regions of the state.”<sup>15</sup> “And because of the semiarid climate, rainfall is at a seasonal low during the summer and fall when the demand for water is greatest; conversely, rainfall and runoff from the northern snowpacks occur in late winter and early spring when user demand is lower.”<sup>16</sup> The California water projects were ultimately

---

5 United States v. State Water Res. Control Bd., 182 Cal.App.3d 82, 97 (1986).

6 Matt Weiser, *Some in California could see water supply cut in half*, SACRAMENTO BEE, Dec. 16, 2008, available at <http://www.sacbee.com/1268/story/1476390.html> (last visited Dec. 16, 2008).

7 Westlands augments its CVP supply with groundwater pumping. Westlands Water Supply, <http://www.westlandswater.org/wtrsupply/ws9.htm> (last visited Dec. 16, 2008).

8 United States v. State Water Res. Control Bd., 182 Cal.App.3d 82 (1986).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* This, of course, is an over simplification of reality. There are users within the Delta who have higher priorities than the projects and are entitled to receive water from the Delta before the projects.

13 *Id.*

14 United States v. State Water Res. Control Bd., 182 Cal.App.3d 82 (1986).

15 *Id.*

16 *Id.*

conceived and formed largely to remedy such seasonal and geographic maldistribution, while also providing relief from devastating floods and droughts.<sup>17</sup> The large volume of water exported from the Delta does have negative impacts on the Delta ecosystem and on other areas within the state, as discussed below.

A rising tide of court cases over Delta water has been slowly increasing for a generation and is right now likely at its greatest point, thus far. The earliest in this wave of cases dealt with salinity level control in the Delta and the authority of the California State Water Resources Control Board (SWRCB) to alter and modify the appropriative license for the CVP, operated by the United States Bureau of Reclamation (Bureau), a unit of the United States federal government.<sup>18</sup> The United States Supreme Court said that, yes, the SWRCB did have such authority through section 8 of the Reclamation Act.<sup>19</sup>

Next, a wave of complaints that alleged takings under the Fifth Amendment were filed against the United States government because contractual water deliveries were decreased by CVP and SWP.<sup>20</sup> Beginning in 1993, water was reallocated away from consumptive users to comply with legal obligations to dedicate water to environmental purposes causing a 'permanent regulatory drought' for those water users.<sup>21</sup> For example, water service contractors in the San Luis division of the CVP have received less than 70 percent of their contract allotments on average although California has had wet or above normal precipitation 10 of those years.<sup>22</sup>

---

17 United States v. State Water Res. Control Bd., 182 Cal.App.3d 82 (1986).

18 California v. United States, 438 U.S. 645 (1978).

19 United States v. State Water Res. Control Bd., 182 Cal.App.3d 82 (1986) (citing California v. United States, 438 U.S. 645) (“When authorized for federal financing, the CVP was made expressly subject to the reclamation laws. Section 8 of the federal Reclamation Act of 1902 ... has been interpreted by our highest court to require the Bureau, in its operation of the CVP, to abide by state law with respect to the acquisition of water rights.”).

20 See O'Neill v. United States, 50 F.3d 677 (9th Cir. 1995); Tulare Lake Basin Water Storage Dist. v. U.S., 49 Fed.Cl. 313 (2003); Westlands Water Dist. v. United States, 337 F.3d 1092 (9th Cir. 1995).

21 Brian E. Gray, *Dividing the Waters: The California Experience*, 14 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 1297 (2008).

22 UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, REGION 8, FORMAL ENDANGERED SPECIES ACT CONSULTATION ON THE PROPOSED COORDINATED OPERATIONS OF THE CENTRAL VALLEY PROJECT (CVP) AND STATE WATER PROJECT (SWP) (2008) (hereinafter FWS 12/15 BiOp), available at [http://www.fws.gov/sacramento/es/documents/SWP-CVP\\_OPs\\_BO\\_12-15\\_final\\_OCR.pdf](http://www.fws.gov/sacramento/es/documents/SWP-CVP_OPs_BO_12-15_final_OCR.pdf) (last visited Dec. 16, 2008); Brian E. Gray, *Dividing the Waters: The California Experience*, 14 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 1297 (2008).

Two things happened in 1993 to reduce water deliveries. First, biological opinions were published with regard to the Sacramento River Winter-Run Chinook Salmon and the Delta Smelt. Both are listed as threatened species under the Federal Endangered Species Act (FESA)<sup>23</sup> The biological opinions published by the National Marine Fisheries Service (NMFS) and Fish and Wildlife Service (FWS), respectively, placed a variety of constraints on the operation of the Central Valley Project and the State Water Project, such as limits on pumping, that were intended to ensure the survival of both species.<sup>24</sup> Second, the Central Valley Project Improvement Act (CVPIA) took affect. It required the CVP to “dedicate 800,000 acre feet annually (about twenty percent of project yield) to fish and wildlife, habitat restoration, water quality, and other environmental uses.”<sup>25</sup> Other water contractors also sued the CVP over its choice to control salinity through releases from New Mellones dam instead of taking other available measures.<sup>26</sup>

The latest wave of suits have asked courts to mandate various government agencies to protect species listed under FESA.<sup>27</sup> The environmental and fisherman interest groups who sued feel that the agencies tasked with protecting the delta smelt and winter-run chinook salmon allow the projects to take, as defined by FESA, far too many fish in their Delta pumping operations. Those groups also feel the agencies have turned their heads and ignored the many factors eroding the Delta ecosystem that affect the survival chances for the protected fish.

## **II. Westlands**

The Westlands Water District (Westlands) is the largest CVP contractor for Delta water,<sup>28</sup> contracting for over 900,000 acre-feet of water annually.<sup>29</sup> Its contract with the CVP is its primary

23 Brian E. Gray, *supra* note 21.

24 *Id.*

25 *Id.* at 1301.

26 Stockton East Water Dist. v. United States, 75 Fed.Cl 321 (2007).

27 See Natural Res. Def. Council v. Kempthorne, 506 F.Supp.2d 322 (E.D. Cal. 2007) (requesting judicial protection of the Delta smelt) and its companion case Pacific Coast Federation of Fisherman's Associations v. Gutierrez, 2008 WL 2851568 (E.D. Cal 2008) (requesting judicial protection for the winter-run chinook).

28 Westlands Water Dist. v. United States, 337 F.3d 1092 (9th Cir. 2003).

29 O'Neill v. U.S., 50 F.3d 677 (9th Cir. 1995).

water source.<sup>30</sup> If that water source dries up, so too will Westlands. That might help explain why Westlands seems to be a party or intervenor in most lawsuits over Delta water, in addition to several of its own looking to require water delivery or restitution for lack of delivery.<sup>31</sup>

Persistent water shortages due to both dry weather and reallocation from consumptive to environmental purposes have been felt most acutely by Westlands and other water users on the west side of the San Joaquin Valley who receive water from the San Luis Unit of the Central Valley Project.<sup>32</sup> Farmers who receive water from the San Luis Unit received the full contract allotments in all but one year between 1962 and 1992.<sup>33</sup> That year, 1977, was the worst drought year in California's recorded history.<sup>34</sup> However, since 1993 Westlands has received less than 70 percent of its contract allotments on average although California has had wet or above normal precipitation. This paper addresses the precarious nature of the remainder of its water supply as threatened by the changing times. First, a little about drainage problems affecting Westlands.

#### A. Drainage Problems

Much of the San Joaquin Valley sits on a shallow clay layer that obstructs vertical movement of irrigation water.<sup>35</sup> Instead of draining away, the water table rises to within a few feet of the surface and into the root zone.<sup>36</sup> This condition is worst throughout most of Westlands. These drainage problems are a serious danger to those lands for agriculture.

“Soils on the western side of the valley [including much of Westlands] are derived from the

---

30 Westlands augments its CVP supply with groundwater pumping and water transfers. Westlands Water Supply, <http://www.westlandswater.org/wtrsupply/ws9.htm> (last visited Dec. 16, 2008).

31 *Natural Res. Def. Council v. Kempthorne*, 506 F.Supp.2d 322 (E.D. Cal 2007) (regarding the Delta smelt); *Pacific Coast Fed'n of Fisherman's Assoc v. Gutierrez*, 2008 WL 2851568 (E.D. Cal 2008) (regarding winter-run chinook); *Westlands Water Dist. v. United States*, 337 F.3d 1092 (9th Cir. 2003) (requesting court to order water deliveries); *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995) (requesting court to order water deliveries).

32 Brian E. Gray, *supra* note 21.

33 *Id.*

34 *Id.*

35 CALIFORNIA DEPARTMENT OF WATER RESOURCES, SAN JOAQUIN VALLEY DRAINAGE MONITORING PROGRAM 2002 (2007) (hereinafter SJV Drainage Monitoring), available at <http://www.dpla2.water.ca.gov/publications/drainage/02DMReprt.pdf> (last visited Dec. 16, 2008).

36 SJV Drainage Monitoring, *supra* note 35.

marine sediments that make up the Coast Range<sup>37</sup> and often contain elevated levels of salts and other elements found in sea water such as arsenic, boron, and selenium.<sup>38</sup> As this land is irrigated, the elements are dissolved into the the groundwater.<sup>39</sup> In addition, even the high-quality water provided by the state and federal water projects contain salts and trace elements.<sup>40</sup> Unless that water is removed, crops growing in these naturally salty soils with a high water table eventually die.<sup>41</sup> A large amount of Westlands suffers from such waterlogged, salty soils or rising water tables.<sup>42</sup>

Selenium is a naturally-occurring element found in soils and that is accumulated in drainage water when selenium-enriched salts are leached from the soil into the shallow groundwater, as occurs in the western parts of the valley with hard pan clay underneath.<sup>43</sup> Like other metals, selenium can impair the growth of crops and is hazardous to human and animal life when present in high concentrations.<sup>44</sup> The highest selenium concentrations is clearly linked throughout the valley with Coast Range sediment.<sup>45</sup> As a result, selenium is most likely found in effluent from areas on the western side of the San Joaquin Valley, such as Westlands, where the soil is made sediment from the Coast Range.<sup>46</sup>

### B. San Luis Drain

When Congress authorized the construction of the San Luis Unit “as an integral part of the Central Valley project,” to furnish water for irrigation in Merced, Fresno and Kings Counties (including Westlands) it expressly conditioned the construction of the San Luis Unit on the Bureau providing drainage facilities.<sup>47</sup> The Bureau's original plan was to construct a master drain (the San Luis Drain) to

---

37 *Id.*

38 G.S. Jorgensen et al., *Agroforestry Systems for On-Farm Drain Water Management* (1993), available at <http://cati.csufresno.edu/cit/rese/93/930102/index.html> (last visited Dec. 16, 2008).

39 *Id.*

40 The projects, in total, deliver approximately 1,600,000 tons of salt per year, as well as associated trace elements (boron, selenium, others). *Id.*

41 SJV Drainage Monitoring, *supra* note 35.

42 Jorgensen, *supra* note 38; SJV Drainage Monitoring, *supra* note 35.

43 SJV Drainage Monitoring, *supra* note 35.

44 *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000).

45 SJV Drainage Monitoring, *supra* note 35.

46 SJV Drainage Monitoring, *supra* note 35.

47 *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000).

collect the water and route it out of the valley and into the Delta<sup>48</sup> Only an 87 mile long section within Westlands was completed. It was through that section that, between 1975 and 1985, agricultural lands discharged approximately 7,300 acre-feet annually of collected subsurface agricultural drainage into Kesterson Reservoir. Originally, Kesterson was designed as a regulating reservoir for the drain en route to its planned terminus in the Delta<sup>49</sup> and to provide a wetland habitat.<sup>50</sup> However, it became the temporary terminus of the unfinished drain.<sup>51</sup>

In 1982, studies reported high selenium levels in fish taken from Kesterson Reservoir.<sup>52</sup> And in 1983, studies determined that the bioaccumulation of selenium was causing deformities and mortality<sup>53</sup> in embryos of waterfowl nesting at the reservoir.<sup>54</sup> San Luis Drain and Kesterson Reservoir were closed in June 1986; however, irrigation water deliveries to Westlands and other west side agricultural lands have continued.<sup>55</sup>

The Bureau remains obligated to complete the San Luis Drain, in which case, the effluent from Westlands will drain into the San Joaquin River and out to the Delta.<sup>56</sup> In partial compliance with its drainage obligations, the Bureau completed the Grasslands Bypass Channel in 1996 using a portion of the San Luis Drain to drain a neighboring water district, Grasslands, of agricultural water contaminated with Selenium.<sup>57</sup> It eventually discharges into the San Joaquin River. FWS and other agencies are currently monitoring the water quality and environmental effects of the bypass.<sup>58</sup> In the meantime,

---

48 SJV Drainage Monitoring, *supra* note 35.

49 Firebaugh Canal Co. v. United States, 203 F.3d 568 (9th Cir. 2000).

50 SJV Drainage Monitoring, *supra* note 35.

51 Firebaugh Canal Co. v. United States, 203 F.3d 568 (9th Cir. 2000).

52 SJV Drainage Monitoring, *supra* note 35.

53 Firebaugh Canal Co. v. United States, 203 F.3d 568 (9th Cir. 2000).

54 SJV Drainage Monitoring, *supra* note 35.

55 *Id.*

56 Firebaugh Canal Co. v. United States, 203 F.3d 568 (9th Cir. 2000); If ever completed, I would expect another set of lawsuits over clean water and other environmental protection laws.

57 UNITED STATES GEOLOGICAL SURVEY, WESTERN FISHERIES RESEARCH CENTER, *Ecological Assessment of Seleniferous Agricultural Drainwater on Fish Inhabiting the Grassland Water District and Adjacent Reaches of the San Joaquin River*, available at <http://wfrc.usgs.gov/research/contaminants/STSaiki4.htm> (last visited Dec. 16, 2008).

58 *Id.*

Westlands continues to manage its drainage issues locally within the district and per farm under threat of running afoul of clean water rules. Most recently, the California Regional Water Quality Control Board, Central Valley Region sent a letter to Westlands on October 22, 2008, giving it 90 days to submit a report of waste discharge with a “plan and time schedule by sub areas ... to address both waste collection and disposal issues.”

### **III. Water Rights and Priority**

“California operates under a dual or hybrid system of water rights which recognizes both doctrines of riparian rights and appropriation rights.”<sup>59</sup> Under the riparian doctrine, “the owner of land has the right to divert the water flowing by his land for use upon his land, without regard to the extent of such use or priority in time.”<sup>60</sup> “[R]iparians on a stream system are vested with a common ownership such that in times of water shortage all riparians must reduce their usage proportionately.”<sup>61</sup> To accommodate gold mining, the doctrine of appropriation was incorporated into California water law.<sup>62</sup> “The appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses,” regardless of whether that person owns land contiguous to the watercourse.<sup>63</sup> In addition, all appropriative rights are subordinate to riparians or earlier appropriators.<sup>64</sup> In times of shortage riparians are entitled to fulfill their needs before appropriators are entitled to any use of the water.<sup>65</sup> “And, as between appropriators, the rule of priority is 'first in time, first in right.'”<sup>66</sup> Beginning in 1914, a statutory scheme has provided the exclusive method of acquiring appropriation rights through the SWRCB.<sup>67</sup> Riparian rights, however, continue to

---

59 United States v. State Water Res. Control Bd., 182 Cal.App.3d 82 (1986) (citing People v. Shirokow, 26 Cal.3d 301, 307 (1980)).

60 *Id.* (citing Miller & Lux v. Enterprise Canal & Land Co., 169 Cal. 415 (1915)).

61 *Id.*

62 *Id.* (citing Irwin v. Phillips, 5 Cal. 140 (1855)).

63 *Id.*

64 *Id.*

65 United States v. State Water Res. Control Bd., 182 Cal.App.3d 82 (1986) (citing Meridian, Ltd. v. San Francisco 13 Cal.2d 424, 445-447 (1939)).

66 *Id.* (citing Irwin v. Phillips, 5 Cal. 140, 147 (1855)).

67 *Id.* (citing People v. Shirokow, 26 Cal.3d 301, 308 (1980)).

be acquired through ownership of land contiguous to the watercourse.<sup>68</sup>

The CVP has an appropriative right acquired after 1914. Its water rights have dates that vary, based on the date of its license to appropriate from the SWRCB. It is junior to all riparians and senior appropriators. In the same vein, CVP contractors have different priorities based on the contract type: exchange contract, water service contract, and wildlife refuge contract.<sup>69</sup> Westlands is a water service contractor.<sup>70</sup>

The exchange contractors hold both pre-1914 riparian and appropriative water rights, having exchanged their senior rights to San Joaquin River water with CVP for a substitute water supply from the Delta.<sup>71</sup> In return, the Bureau guaranteed the exchange contractors a firm water supply<sup>72</sup> of 840,000 acre-feet per year, with a maximum reduction to 650,000 acre-feet annually under the Shasta critical year.<sup>73</sup> As such, exchange contractors have highest priority for CVP water. In addition, the exchange contractors maintain a claim on their underlying water rights that are senior to the CVP's water rights. Should the CVP ever renege on the exchange contracts the exchange contractors would rely upon those earlier water rights to divert water they are entitled to.

Conversely, water service contractors such as Westlands did not have water rights to 'exchange'<sup>74</sup> and receive their water allotment through contracts with the Bureau.<sup>75</sup> Water service contractors are entitled to a pro-rata share of CVP water available for water service contractors from the San Luis Unit.<sup>76</sup>

Wildlife refuge contractors provide water supplies to specific managed lands for wildlife

---

68 *Id.*

69 FWS 12/15 BiOp, *supra* note 22.

70 Westlands Water Dist. v. United States, 337 F.3d 1092 (9th Cir. 2003).

71 *Id.* (using a neighboring water district to Westlands, Firebaugh Canal Company, as an example of an exchange contractor).

72 *Id.*

73 FWS 12/15 BiOp, *supra* note 22.

74 Westlands Water Dist. v. United States, 337 F.3d 1092 (9th Cir. 2003).

75 FWS 12/15 BiOp, *supra* note 22.

76 Westlands Water Dist. v. United States, 337 F.3d 1092 (9th Cir. 2003).

purposes and the CVP contract water supply can be reduced under critically dry conditions up to 25 percent.<sup>77</sup>

In most years sufficient water supplies are not available to meet all water demands. Moreover, water deliveries are limited in some dry or critically dry years because there is insufficient storage in CVP reservoirs north of the Delta to meet all contractor and in-stream fishery objectives.<sup>78</sup> As a result, CVP deliveries are now generally under 100% for water service contractors. In severe droughts, it is possible that Westlands and other water service contractors will get little to no water because they are lowest on the totem pole in the way of water priorities.<sup>79</sup>

Westlands has been fighting for years to protect water deliveries from CVP so it can receive 100% of the amount it contracted for. As recently as 2003, it was in court attempting to get restitution from a decrease in water deliveries in 1993 and 1994 due to CVPIA and the FESA listings of the delta smelt and chinook salmon.<sup>80</sup> Its argument is that its contractual rights came in time before FESA or CVPIA so it has higher priority for water than those laws. Westlands lost those cases. The courts established that Westlands, as a water service contractor, has very little recourse when the CVP curtails water deliveries for *any* reason. The contract between CVP and Westlands contains a clause, Article 11(a), that precludes government liability for “any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes.”<sup>81</sup> Courts have found that clause to be unambiguous and clear on its face<sup>82</sup> and the priorities established by the various contracts to be valid.

If it does lose out on more of its contracted water amount, it is a sure bet Westlands will be back

---

77 FWS 12/15 BiOp, supra note 22.

78 FWS 12/15 BiOp, supra note 22.

79 Global warming is expected to decrease the amount of water storage in the Sierra and Cascade snowpacks, thus decreasing the amount of water available to the CVP. Kayvon Sharghi, *California Crops at Risk Say Stanford Researchers*, Stanford News Service, Dec. 12, 2008, <http://news-service.stanford.edu/news/2009/january7/calbehot-010709.html> (last visited Dec. 16, 2008).

80 *Westlands Water Dist. v. United States*, 337 F.3d 1092 (9th Cir. 2003).

81 *Id.*

82 *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995) (holding that the contract at issue did not obligate the government to furnish to Westlands the full contractual amount of water when that water cannot be delivered consistently with the requirements of the Endangered Species Act and the Central Valley Project Improvement Act).

in court asking for judicial protection for *its* full water allotment or some form of compensation. Some of this fight over contractual water entitlements can be nipped in the bud and avoided by the CVP (or even SWP) not contracting with water service contractors for more than the water it has available. By giving water consumers paper contracts stating fixed quantities, the Bureau encourages investment in water-dependent infrastructure and foster a sense that full deliveries are a right. As far as the users are concerned, they have the paper to prove their entitlement to the water, even if those amounts exceed what nature and existing infrastructure can consistently and legally provide.<sup>83</sup> Consequently, regardless of what judges and scholars say about the inherent contingency of water rights, water service contractors may believe that the reductions are “deeply unfair, if not outright confiscations of property.”<sup>84</sup> That feeling has recently been backed up by the Idaho Supreme Court which held that a contract for water provides more than a contractual right: "Based upon the United States Supreme Court cases, the Reclamation Act, the Idaho Constitution, Idaho statutory and case law, it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right."<sup>85</sup> Such a ruling elsewhere in the arid West is likely to harden the resolve of water service contractors. However, California courts have not decided those contract rights have matured into anything more than contract rights. Furthermore, if the loss is due to unreasonable use, discussed below, its complaints are likely to be dismissed quickly because there is no property right in an unreasonable use and there no taking or damaging of property by the deprivation of such unreasonable use and, accordingly, the deprivation is not compensable.<sup>86</sup>

If the CVP were to deliver less water for any reason, it is very likely Westlands can do little other than watch water in the aquaducts flow by. It is at the whim of mother nature and the machinations of government, whichever is the cause for less water to be pumped from the Delta.

---

83 Dave Owen, *Law, Environmental Dynamism, Reliability: The Rise and Fall of CALFED*, 37 ENTL 1145 (2007).

84 *Id.*

85 *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600, 609 (Idaho 2007).

86 *Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132 (1967).

#### **IV. Unreasonable Use**

California has one of the most forceful and interventionist definitions of reasonable use in the western United States.<sup>87</sup> The California Constitution declares that it is the state's policy to achieve “maximum beneficial use of water and prevention of waste, unreasonable use and unreasonable method of use.”<sup>88</sup> That constitutional policy, the rule of reasonable use, applies “to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying land owner, or the percolating water right, or the appropriative right.”<sup>89</sup>

#### What is Reasonable Use?

The right to water, its use, or its flow, must be limited to reasonable beneficial uses.<sup>90</sup> What constitutes reasonable water use is a question of fact that needs to be determined according to the entire circumstances presented and varies as the current situation changes.<sup>91</sup> Moreover, the reasonableness of a particular use cannot be determined “in vacuo isolated from statewide considerations of transcendent importance.”<sup>92</sup> These statewide considerations are that “limited water resources be put only to those

---

87 Brian E. Gray, *supra* note 21.

88 *Erickson v. Queen Valley Ranch Co.*, 99 Cal.Rptr. 446, 450 (1971); *See also* Cal. Const. Art. 10, § 2 (“It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.”)

89 *Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132, 138 (1967). *See also* *Erickson v. Queen Valley Ranch Co.*, 99 Cal.Rptr. 446 (1971); *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339 (1979) (“[R]iparian rights are limited by the concept of reasonable and beneficial use. Moreover, they must not be exercised in a manner that is inconsistent with constitutional policy provisions that are to govern interpretations of water rights in California.”).

90 *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339 (1979).

91 *Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132 (1967); *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.*, 26 Cal.3d 183 (1980).

92 *Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132 (1967).

beneficial uses ‘to the fullest extent of which they are capable,’ that ‘waste or unreasonable use’ be prevented, and that conservation be exercised ‘in the interest of the people and for the public welfare.’<sup>93</sup>

The legislature is explicitly authorized to “enact laws in the furtherance of the policy in this section contained” to define what is reasonable or beneficial use.<sup>94</sup> The state legislature further delegated its authority to the SWRCB to protect the public interest, including protection of the environment, regulation of water quality, and prevention of waste, through issuance of appropriate permits and licenses and their later administration.<sup>95</sup> In turn, the SWRCB has adopted administrative regulations to prevent waste and unreasonable use.<sup>96</sup> Courts have also traditionally enforced proscriptions against unreasonable uses and unreasonable methods of water diversion.<sup>97</sup> As such, courts have found it unreasonable to flood fields for pest control<sup>98</sup> or to expose rocks and gravel.<sup>99</sup>

The regulation of competing uses of water rests in comparing reasonable, beneficial uses.<sup>100</sup> In addition, “the scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts.” I barely scratch the surface in this analysis and focus on the clear and obvious, bypassing a lot of subtleties in water use.

There are three uses I think relevant as comparisons to Westlands water use: 1) agricultural uses on land without drainage issues; 2) municipal uses for domestic or industrial uses; 3) protection of wildlife and habitat restoration.

By statute, irrigation is considered a beneficial use.<sup>101</sup> In the case of Westlands, the CVP

---

93 *In re* Waters of Long Valley Creek Stream System, 25 Cal.3d 339 (1979).

94 *Id.*

95 *Environmental Def. Fund, Inc. v. East Bay Mun. Util. Dist.*, 26 Cal.3d 183 (1980).

96 *Id.*

97 *Id.*

98 *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal.2d 489 (1935).

99 *Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132 (1967).

100 *Los Osos Valley Assoc. v. City of San Luis Obispo*, 30 Cal.App.4th 1670 (1994).

101 Cal. Water Code § 1257 (“In acting upon applications to appropriate water, the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan, and ...”)

knowingly delivers water to irrigate crops planted in salty soil with poor drainage. Unless that land is properly drained, the rootzone will become water logged and soil too saline for plants to grow and the land will become barren, at least for agricultural purposes. In addition, irrigation without proper drainage may damage nearby land as the subsurface water drains away naturally or through ditches, or the water table, looking for equilibrium, sees salts and trace elements move from areas of higher concentration to parts of the water table with lower concentration. In that regard, ground water contaminants such as selenium can pollute ground or surface water elsewhere in the San Joaquin Valley.<sup>102</sup> If selenium is able to concentrate high enough in an area, it will impair the growth of crops and be hazardous to human and animal life as it was in Kesterson Reservoir.<sup>103</sup> Its irrigation of salty soil with poor drainage operates as a strike against Westlands. In contrast, irrigating land without the drainage issues present in Westlands will not present the same hazards to the land irrigated, nearby land, crops, or animal life.<sup>104</sup>

There are a lot of subtleties to municipal water use because of the multitude of individual water users and the uses they make of the water they receive. Municipal users account for about 20% of consumptive water use in California and agriculture accounts for the other 80% of water consumed. The biggest argument Westlands may have against municipal users is that 60% of municipal water use is directed to landscaping<sup>105</sup> which provide little more than aesthetic pleasure in comparison to the Westlands farmers who grow the food that feeds city dwellers. Whether or not it is unreasonable would require the SWRCB to take a closer look at the purpose and use of the landscaping (whether

---

102 See letter from California Regional Water Quality Control Board, Central Valley Region to Westlands, October 22, 2008. (“Irrigation water when applied to leach salts from the root zone possesses a threat to ground water quality both in the immediate area of application and adjacent areas where groundwater migrates.”), available at <http://www.calsport.org/10-22-2008.pdf> (last visited Dec. 16, 2008).

103 Firebaugh Canal Co. v. United States, 203 F.3d 568 (9th Cir. 2000)

104 I prefer to limit this discussion to irrigation of land with salty soil and poor drainage so please ignore the use of pesticides and fertilizers for sake of this discussion. Whether irrigation of agricultural land that also uses pesticides and fertilizers is another argument and discussion entirely. Some pesticides, such as DDT, have been banned for their danger level; however, other pesticides are still widely used in agriculture.

105 Matt Weiser, *The Delta debate: Resurrecting the canal*, SACRAMENTO BEE, Dec. 14, 2008, available at <http://www.sacbee.com/1268/story/1459470.html> (last visited Dec. 16, 2008).

landscaping is a “beneficial use of water to the fullest extent to which the water user is capable”), the irrigation techniques (“that waste or unreasonable use be prevented”), and that the water cannot be used for better purposes in the public interest (“that conservation be exercised in the interest of the people and for the public welfare”).<sup>106</sup> It is unlikely the SWRCB will find all use of water for landscaping unreasonable; however if it did, it would save, at most, 12% of California water consumption. In which case, there could be other reasonable municipal uses for that water such as accommodating more population. Westlands could also argue that it is unreasonable for cities to not reclaim waste water as Orange County in Southern California does and that it would not be feasible for Westlands to reclaim water because it would require a costly desalination plant.<sup>107</sup>

California and the United States governments have laws that specifically protect wildlife and ecosystems. In addition to FESA, which is used to protect threatened or endangered species such as the delta smelt and winter-run chinook salmon, there is the California Endangered Species Act (CESA), California Environmental Quality Act (CEQA), U.S. Clean Water act, and more. California and the federal government have also passed laws that specifically identify the Delta as necessary to protect for wildlife and other purposes. For example, the Central Valley Project Improvement Act (CVPIA) stated as its express purpose: “to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and ... to address impacts of the Central Valley Project on fish, wildlife and associated habitats.”<sup>108</sup> Just as with municipal uses, the SWRCB will need to look at and balance the relative merits of the uses for water. With the number of laws and government resources put toward fish and

---

106 *In re* Waters of Long Valley Creek Stream System, 25 Cal.3d 339 (1979).

107 Bryan Walsh, *Sewage That's Clean Enough to Drink*, TIME, Dec. 16, 2008, available at <http://www.time.com/time/health/article/0,8599,1866469,00.html?iid=tsmodule> (last visited Dec. 16, 2008) (“The Orange County GRS takes in about 70 million gallons of wastewater a day, puts it through a multistep cleaning process, then discharges the treated water into Orange County's underground aquifers.”); *See also* Reuters, *California Near Impact Report on Monterey Desalination*, Dec. 15, 2008, <http://www.reuters.com/article/environmentNews/idUSTRE4BF0FP20081216> (“[A] draft environmental impact report will be issued soon for a proposed desalination plant on the Monterey Peninsula that is to open by end-2015 ... planned to supply 11,730 acre-feet of water per year for public use.... The \$250 million plant is still many permits and years away from operation ...”)

108 Pub.L. No. 102-575, 106 Stat. 4706

wildlife, it is difficult to imagine that legislative or judicial directions to use water for wildlife will be looked at as unreasonable.

### **V. Endangered Species Act**

Although it may be considered a long shot, environmental groups may use the Federal or California Endangered Species Acts to challenge water deliveries to Westlands and other water districts with salty soil and poor drainage if the effluent were to somehow affect survival of a protected species. Here, I will focus on the Federal Endangered Species Act (FESA) and Delta Smelt since that has been in the news and courts most recently.<sup>109</sup>

FESA was passed “to conserve endangered and threatened fish and wildlife species through federal action and in coordination with state programs.”<sup>110</sup> A species is identified as threatened or endangered by the Secretary of Commerce or the Secretary of the Interior.<sup>111</sup> FWS listed the Delta smelt as a threatened species in 1992<sup>112</sup> and is currently considering information to determine if the listing status of delta smelt should be upgraded from threatened to endangered.<sup>113</sup> It also requires “identification of a critical habitat for each species and adoption of regulations which will conserve and enhance the population of the species.”<sup>114</sup> FWS designated the Delta and surrounding waters as critical habitat for delta smelt.<sup>115</sup>

Once protected, “the Act prohibits any person from taking, possessing, selling, importing, exporting or transporting a protected species.”<sup>116</sup> The Endangered Species Act broadly defines “take” to

---

109 California Endangered Species Act (CESA) has similar protections and restrictions on taking protected species. *See* *Envtl Prot. and Info. Center v. California Dept. of Forestry and Fire*, 44 Cal.4th 459, 187 P.3d 888 (2008) (“Central to CESA is its prohibition on the taking of an endangered or threatened species. (Fish & G.Code, § 2080.) To “take” in this context means to catch, capture or kill.”). If I were to bring a claim into court, I would address both FESA and CESA.

110 *United States v. Glenn-Colusa Irrigation Dist.*, 788 F.Supp. 1126 (E.D. Cal. 1992).

111 *Id.*

112 *Natural Res. Def. Council v. Kempthorne*, 506 F.Supp.2d 322, 328 (E.D. Cal. 2007).

113 FWS 12/15 BiOp, *supra* note 22.

114 *United States v. Glenn-Colusa Irrigation Dist.*, 788 F.Supp. 1126 (E.D. Cal. 1992).

115 FWS 12/15 BiOp, *supra* note 22, at 190.

116 *United States v. Glenn-Colusa Irrigation Dist.*, 788 F.Supp. 1126 (E.D. Cal. 1992).

means “harass, harm, pursue, hunt, capture, shoot, wound, kill, trap, capture or collect or to attempt to engage in any such conduct.”<sup>117</sup> However, the Secretary responsible may permit taking of a protected species “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>118</sup> “The application for such an incidental take permit must contain a conservation plan that specifies: (i) the impact which will likely result from such taking; (ii) the steps the applicant will take to minimize and mitigate such impacts and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.”<sup>119</sup> In addition, FESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat....”<sup>120</sup>

To this end, when there is discretionary involvement or control over an action by a federal agency, the agency planning the action must consult with a consulting agency (FWS or NMFS).<sup>121</sup> This process, known as a “Section 7” consultation, results in consultation, investigation, and analysis.<sup>122</sup> The consulting agency evaluates the effects of the proposed action on the survival of species and any potential destruction or adverse modification of critical habitat in a biological opinion, 16 U.S.C. § 1536(b), based on “the best scientific and commercial data available,” *id.* § 1536(a)(2).<sup>123</sup> “Effects of the action” include both direct and indirect effects of an action “that will be added to the environmental

---

117 *Id.*

118 *Id.* (citing 16 U.S.C. § 1539(a)(1)(B)).

119 *Id.* at 1132.

120 *Nat. Wildlife Fed'n v. Nat. Marine Fisheries Serv.*, 524 F.3d 917(9th Cir. 2008).

121 *Id.* at 924; *See also* *Pac. Coast Fed'n of Fisherman's Assoc. v. Gutierrez*, 2008 WL 2851568 (E.D. Cal 2008) (“water service contracts for irrigation ... by ... south-of-Delta CVP contractors are, for the purposes of Home Builders, “discretionary” and are subject to the [F]ESA.”).

122 *Nat. Wildlife Fed'n v. Nat. Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008).

123 *Id.*

baseline.”<sup>124</sup> It then issues a biological opinion report.<sup>125</sup> If the consulting agency concludes that the other agency's action may jeopardize the survival of species protected by the FESA, or adversely modify a species' critical habitat, the action must be modified.<sup>126</sup> The consulting agency may recommend a “reasonable and prudent alternative” to the agency's proposed action. 16 U.S.C. § 1536(b)(3)(A).<sup>127</sup> In *NRDC v. Kempthorne*, the delta smelt case currently ongoing, the action taken by the Bureau was scheduling volume increases in the amount of water pumped by the CVP and SWP through a joint operating agreement from the Delta.<sup>128</sup> In compliance with FESA, the Bureau consulted with FWS with regard to the delta smelt.<sup>129</sup>

In the case of Westlands, parties challenging water deliveries to Westlands would sue the Secretary of the Interior because the Bureau and CVP is part of that department. They would claim that the delivery of water to Westlands is an agency action likely to jeopardize the continued existence of a protected species. The argument would ultimately depend on whether the “the best scientific and commercial data available” clearly shows that an endangered species is affected by the water delivery. For example, the latest biological opinion report about the delta smelt by the U.S. Fish and Wildlife Service (FWS), states that “[t]here are long-standing concerns related to methyl mercury and selenium levels in the [Delta] watershed.”<sup>130</sup> That is not likely enough on its own because it has no real detail or scientific proof of harm. The biological opinion continues: “[t]here is evidence that contaminants may inhibit phytoplankton growth rates at times.” Phytoplankton is a primary food source of delta smelt, young striped bass, and other organisms in the Delta ecosystem and, in general, supports the food web the delta smelt depends on.<sup>131</sup>

---

124 *Id.*

125 *Id.*

126 *Id.* at 925 (citing *Aluminum Co. of Am. v. Admin'r, Bonneville Power Admin.*, 175 F.3d 1156, 1159 (9th Cir. 1999)).

127 *Nat. Wildlife Fed'n v. Nat. Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008).

128 *Natural Res. Def. Council v. Kempthorne*, 506 F.Supp.2d 322 (E.D. Cal. 2007).

129 *Id.*

130 FWS 12/15 BiOp, *supra* note 22. The biological opinion also states that “contaminant loading and its ecosystem effects within the Delta are still not well understood.”

131 *Id.*

For the sake of argument, assume that scientific studies determines that sudden and dramatic losses of phytoplankton is the primary reason for Pelagic Organism Decline (POD), the sudden, overlapping declines of San Francisco and Delta Estuary pelagic fish that includes delta smelt. Also, assume that high concentrations of selenium, traceable to Westlands agricultural land, are found in the Delta and are considered a root cause of the decline in phytoplankton.<sup>132</sup>

Such a finding will invite lawsuits, particularly if seemingly met with government inaction. Groups most likely to sue<sup>133</sup> under FESA on behalf of the delta smelt are likely to use two tactics. First, they would file a complaint and request for immediate injunction against the projects alleging violations of FESA for indirectly taking by providing water to Westlands, and a writ of mandate, or similar complaint, to order the FWS to update its biological opinion relied upon by the projects. FESA broadly defines “take” to mean “harass, harm, pursue, hunt, capture, shoot, wound, kill, trap, capture or collect or to attempt to engage in any such conduct.”<sup>134</sup> Harm is further defined by the FWS to include significant habitat modification or degradation that results in death or injury to listed species by impairing behavioral patterns including breeding, feeding, or sheltering.<sup>135</sup> A reasonable argument could be made, under those circumstances, that water delivery to Westlands harms, and thus takes, delta smelt through degradation of habitat and impairment of feeding. Second, they would file a FESA complaint directly against Westlands and its farmers for violations of FESA by taking delta smelt through the harm they cause.<sup>136</sup>

Of course, there may be other reasons for a decline in phytoplankton and delta smelt as identified in the latest FWS biological opinion. For example, “[c]hannelization, conversion of Delta

---

132 This is just an assumption made for the sake of argument. I have no support for such an assertion. Selenium can be substituted here for any other contaminant, whether trace element, such as boron, or pesticides.

133 Groups representing environmental and fishing interests have so far been lead plaintiffs in FESA actions to protect the delta smelt. They are the most likely in future suits as well.

134 *United States v. Glenn-Colusa Irrigation Dist.*, 788 F.Supp. 1126 (E.D. Cal. 1992).

135 FWS 12/15 BiOp, *supra* note 22.

136 16 USCA § 1538(a)(1); This is in addition to complaints under other environmental protection laws.

islands to agriculture, and water operations have substantially changed the physical appearance, water salinity, water clarity, and hydrology of the Delta.<sup>137</sup> Delta smelt prefer more turbid waters and avoid clear water.<sup>138</sup> “Persistent confinement of the spawning population of delta smelt to the Sacramento River increases the likelihood that a substantial portion of the spawners will be affected by a catastrophic event or localized chronic threat such as pesticides used locally in the delta and surrounding areas.<sup>139</sup> In addition, invasive species may have play an active role.<sup>140</sup> A group called Coalition for a Sustainable Delta recently filed a lawsuit claiming that striped bass are the cause of the delta smelt decline.<sup>141</sup>

### **Conclusion**

California is reaching the limit of its water supplies and will collectively need to readjust who gets water and for what purpose. By exploring the precarious nature of water availability to the largest water customer of the largest federal reclamation project, Westlands Water District, I demonstrated just a few of the many ways access to water by a water user might be threatened by our changing times. In truth, Westlands is a proxy for any other water user, big or small.

In short, Westlands is likely to come out on the short end of the battle over Delta water. It has low priority and is subordinate to the established water rights of riparians, appropriators senior to the CVP, and exchange contractors. In times of shortage, which sound more likely to occur with global warming, it will share the lesser amounts of water available on a pro-rata basis with other water service contractors. Furthermore, there is a chance the SWRCB finds the irrigation of salty soil with poor drainage to be an unreasonable use. Westlands can force the Bureau to create a drainage solution but any plan to complete the San Luis drain is likely to run into obstacles. And, if the Bureau has too hard a

---

137 FWS 12/15 BiOp, *supra* note 22.

138 *Id.*

139 *Id.*

140 *Id.*

141 Coalition for a Sustainable Delta v. Carlson, 2008 WL 2774605 (E.D. Cal. 2008).

time building a drainage solution, it may back out of the contract through section 11(a) which spares it liability for decreasing water allocations. Regardless of whether the drain is ever built, environmental interest groups and government agencies tasked with protecting wildlife and keeping water clean will be watching for potential violations of laws such as FESA.