

BARTKIEWICZ, KRONICK & SHANAHAN

PAUL M. BARTKIEWICZ
STEPHEN A. KRONICK
RICHARD P. SHANAHAN
ALAN B. LILLY
RYAN S. BEZERRA
JOSHUA M. HOROWITZ
STEPHEN M. SIPPROTH

A PROFESSIONAL CORPORATION
1011 TWENTY-SECOND STREET
SACRAMENTO, CALIFORNIA 95816-4907
(916) 446-4254
FAX (916) 446-4018
EMAIL pmb@bkslawfirm.com

JAMES M. BOYD, JR., Of Counsel

December 12, 2008

The Honorable Mike Chrisman
Chair, Delta Vision Committee
650 Capitol Mall
Sacramento, California 95814

Re: Comments on the Delta Vision Strategic Plan; Legal Analysis of Proposals
for Regulatory Reallocations of Water to Delta Ecosystem Uses

Dear Secretary Chrisman:

We appreciate the opportunity to comment on the Delta Vision Committee's consideration of the Delta Vision Strategic Plan, which wisely recommends a comprehensive approach to addressing the crisis in the Delta (including proposing ecosystem restoration, new Delta conveyance infrastructure and development of new surface water and groundwater supplies). Unfortunately, the Strategic Plan also recommends a number of unnecessarily adversarial implementation strategies. The Delta Vision Strategic Plan has several proposals (discussed briefly below) that would require the reallocation through regulatory actions of water from existing Delta-watershed uses to Delta ecosystem uses. In response to a request from the Delta Vision Task Force, a Deputy Attorney General issued a July 9, 2008 memorandum that asserts that the state has authority to reallocate water from water users when needed for ecosystem protection under Article X, section 2, of the California Constitution, the public trust doctrine and nuisance law. We have enclosed our analysis that reviews this legal memorandum and concludes that the state does not have authority to reallocate water from existing uses to Delta ecosystem uses except where: (1) the proposed reallocation would mitigate for the targeted water use's environmental impacts; and (2) the mitigation requirement would be in proportion to these impacts. In addition, we respectfully submit that attempting to impose greater reallocations of water on Delta-watershed communities would be counterproductive because it would trigger disputes that would undermine any Delta solution.

The Delta Vision Strategic Plan's Proposes Uncompensated Reallocations of Water

The November 2007 Delta Vision Principles and the October 2008 Delta Vision Strategic Plan include many proposals, the implementation of which would require the reallocation of millions of acre-feet of water supplies from current uses, primarily through uncompensated regulatory actions.

Set forth below are some examples:

- “A revitalized Delta ecosystem will require reduced diversions -- or changes in patterns and timing of those diversions upstream, within the Delta, and exported from the Delta -- at critical times” (Recommendation 7 of Delta Vision Principles, November 2007)
- “Diversions from the Delta watershed -- upstream, within, and exported from the Delta -- are an issue of statewide importance and directly impact restoration of the Delta and the reliability of the state's water supply.” (Strategic Plan Goal 4 at page 32)
- “Request the State Board to use its authority to determine reasonable use of water over the coming decades to evolve away from the generally accepted practices of diverting surface water for irrigating agriculture.” (Action 4.1.3 at page 95)
- Recommendations to increase flows to the Delta from upstream water supplies, including:
 - adopting new SWRCB requirements by 2012 to increase spring Delta outflow (Action 3.4.3 at page 86)
 - adopting new SWRCB requirements by 2012 to increase fall Delta outflow (Action 3.4.4 at page 86)
 - increasing the frequency of upstream floodplain inundation and establishing new floodplains that would allow the Yolo bypass to flood at least 60 days continuously between January and April every other year, except during critical years (Action 3.1.1 at page 71)
 - having the Department of Fish and Game develop additional streamflow recommendations for high priority rivers and streams in the Delta watershed by 2012 and for all major rivers and streams by 2018 (Action 3.4.1 at page 85)
- “Achieving the flow targets of this strategy can be done through combinations of: *releasing more water from storage to improve flow conditions*, altering conveyance of water exports to the export pumps, or *reducing the amount of water diverted from the Delta ecosystem*. From an ecosystem perspective, flow targets are achieved far more effectively by reducing water diversions through the use of alternative supplies, conservation, increased efficiency, retiring marginal agricultural lands, recycling, desalination, conjunctive use of surface and groundwater supplies, *regulatory reallocations*, and market transactions.” (Emphasis added; Strategy 3.4 at page 85)
- Delta-solution financing principles should “create no expectation of public payment for any water required for ecosystem revitalization.” (Action 7.3.1 at page 134)
- Coordinate the authoritative oversight of the State Water Board and the Regional Boards to ensure compliance with the *reasonable use and public trust doctrine* [presumably, as interpreted by the Deputy Attorney General, as discussed below] and applicable water quality requirements by water diverters within, and exporting from, the Delta watershed. (Action 7.1.5 at pages 127-128)

Hon. Mike Chrisman

December 12, 2008

Page 3

Regulatory Reallocations Of Water Must Be Based On Causation And Proportionality Under California Law

Page 17 of the Deputy Attorney General's July 9, 2008 memorandum states its core conclusion:

[T]he harm done to public trust resources in the Delta [is] due to the incremental diversions of all who take water from the Delta or its tributaries, whether upstream, in the Delta, or for export from the Delta. [¶] It may be possible to allocate responsibility for addressing harm to public trust uses based on the proportionate amount of water diverted by each water user.

Although diversions upstream from the Delta, in-Delta and Delta-export diversions have very different *impacts* on Delta resources, the Deputy Attorney General's memorandum suggests that this fact is not relevant, and that the state may reallocate water from any water user in the Delta watershed based on its diversion's *size*. As our analysis states, we believe that California law supports only regulatory water reallocations that are based on determinations of causation and proportionality.

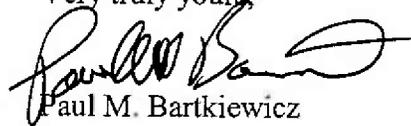
No California court decision under the public trust or the California Constitution's Article X, section 2 -- the "reasonable use" provision -- has reallocated water from a water user: (1) to address environmental impacts caused by others; or (2) in an amount that exceeds the water user's own proportional impacts. For example, the *National Audubon* decision concerned direct impacts on Mono Lake resources caused by the City of Los Angeles' diversions. The importance of causation and proportionality is highlighted by two decisions that the Deputy Attorney General's memorandum did not discuss, in which the courts held that the public trust doctrine did *not* authorize reallocations of water to benefit public trust uses. (See *Golden Feather Community Ass'n. v. Thermalito Irr. Dist.* (1989) 209 Cal.App.3d 1276; and *Big Bear Municipal Water Dist. v. Bear Valley Mutual Water Co.* (1989) 207 Cal.App.3d 363.) Causation and proportionality also govern mitigation measures under the California Endangered Species Act. (Fish & Game Code Section 2052.1: such measures "shall be roughly proportional in extent to any impact on [the] species that is caused by" the project.)

Conclusion

Delta-watershed communities have invested billions of dollars in water facilities to maximize their self-sufficiency. We represent such communities in the Sacramento Valley and the Sacramento metropolitan area. California law does not support reallocating water from these communities for the Delta's ecosystem unless state regulatory agencies find, based on evidence and after hearings, that: (1) these communities' diversions have caused an environmental impact; and (2) the mitigation measure would be proportional to this impact. To avoid the severe conflicts that uncompensated regulatory reallocations of water would cause, we urge the Delta Vision Committee instead to emphasize and facilitate voluntary transfers of water and other collaborative processes. As they have throughout California's water history, Delta-watershed communities can assist the rest of the state in meeting the coequal goals of restoring the Delta ecosystem and providing reliable water supplies for California through these voluntary and collaborative arrangements.

Hon. Mike Chrisman
December 12, 2008
Page 4

Very truly yours,



Paul M. Bartkiewicz

PMB:af

7021/Delta Vision/L121208pmb

Enclosure

cc (w/encl.):

Hon. Linda S. Adams
Hon. Dale E. Bonner
Hon. A.G. Kawamura
Hon. Michael R. Peevey

BARTKIEWICZ, KRONICK & SHANAHAN

PAUL M. BARTKIEWICZ
STEPHEN A. KRONICK
RICHARD P. SHANAHAN
ALAN B. LILLY
RYAN S. BEZERRA
JOSHUA M. HOROWITZ
STEPHEN M. SIPTROTH

A PROFESSIONAL CORPORATION
1011 TWENTY-SECOND STREET
SACRAMENTO, CALIFORNIA 95816-4907
(916) 446-4254
FAX (916) 446-4018
EMAIL pmb@bkslawfirm.com

JAMES M. BOYD, JR., Of Counsel

LEGAL ANALYSIS OF PROPOSED REALLOCATIONS OF WATER FROM UPSTREAM WATER USERS TO DELTA ENHANCEMENT

In a July 9, 2008 memorandum to the Delta Vision Task Force (the "Cahill Memorandum"), Virginia Cahill of the Attorney General's office concluded that state agencies may reallocate water among water uses pursuant to various legal authorities, including: (1) Article X, section 2, of the California Constitution; (2) the public trust doctrine; and (3) nuisance law. In particular, the Cahill Memorandum concluded (p. 17) that, pursuant to the public trust doctrine, the state could require water users to contribute water to Delta ecosystem improvement in proportion to their diversions' sizes because "the incremental diversions of all who take water from the Delta or its tributaries, whether upstream, in the Delta, or for export from the Delta" may contribute to the Delta's problems. The Cahill Memorandum thus apparently concluded that upstream water users in the Delta-watershed could be required to contribute water to address problems caused by in-Delta or Delta-export diversions.

The Cahill Memorandum, however, failed to synthesize the relevant judicial decisions' results to identify the rules that California courts would follow in evaluating potential reallocations of water. Under these decisions, the state does *not* have the authority to reallocate, involuntarily and without compensation, water users' supplies for ecosystem uses unless the relevant water uses have caused the relevant impacts and the reallocations are proportional to these impacts.

1. Standard Principles of Legal Interpretation Require That Cases' Results Be Integrated, Which The Cahill Memorandum Did Not Do

The Cahill Memorandum cited numerous judicial decisions and other decisions as authorities for its analysis, including 37 judicial decisions in its table of authorities. In particular, the Cahill Memorandum relied extensively on quotes from judicial decisions to support its points. (See Cahill Memorandum, p. 3 (quoting *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937 ("EID")), p. 5 (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 ("CalTrout I")), 6 (*Imperial Irr. Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548 ("IID")), p. 7 (*In re Waters of Long Valley Creek Stream* (1979) 25 Cal.3d 339), p. 8 (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132 ("Joslin")), p. 9 (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82 ("Racanelli") and pp. 11-13 (*Nat'l Audubon Society v. Superior Ct.* (1983) 33 Cal.3d 419 ("Nat'l Audubon").) The Cahill Memorandum, however, did not compare the relevant decisions' results to determine what key factors have driven the courts' analyses and to extrapolate how these analyses might apply in future cases.

By omitting such a comparison, the Cahill Memorandum did not apply standard principles of legal analysis. The California courts have emphasized that the words courts use, and the statements that they make, cannot be understood outside the factual context of the dispute at issue. For example, in *General Dynamics Corp. v. Superior Ct.* (1994) 7 Cal.4th 1164, the California Supreme Court stated:

Mindful of the maxim that “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used” (*Cohens v. Virginia* (1821) 19 U.S. (6 Wheat.) 264, 399), they seek in every case a just resolution, identifying those circumstances that lay claim to conscience, considered in light of *applicable* principles of law.

(*General Dynamics, supra*, 7 Cal.4th, at p. 1176 (emphasis in original); see also, e.g., *PLCM Group, Inc. v Drexler* (2000) 22 Cal.4th 1084, 1097; *Finegan v. County of Los Angeles* (2001) 91 Cal.App.4th 1, 9 (“[A]n opinion’s authority is no broader than its factual setting and the parties cannot rely on a rule announced in a factually dissimilar case”); and *Fielding v. Superior Ct.* (1952) 111 Cal.App.2d 490, 496 (“It is not a question of taking isolated language out of a case . . . but of attempting to extract a principle that preceding courts have themselves extracted from the facts before them”).)

In *Cohens*, Chief Justice John Marshall, for the United States Supreme Court, explained why it is important to focus on decisions’ results, not just their words:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

(*Cohens, supra*, 19 U.S., at pp. 399-400.)

When one uses these rules to interpret the cases cited in the Cahill Memorandum, the resulting analysis shows that the courts have *never* decided that the state has the authority to require water users to reallocate their water supplies to address environmental impacts caused by others.

2. *Existing Decisions Show That The Public Trust Doctrine Only Authorizes The State To Reallocate Water Supplies Of Projects That Cause The Relevant Environmental Impacts And Only In Proportion To These Impacts*

Existing decisions under the public trust doctrine do not support the Cahill Memorandum's suggestion that, in order to improve the Delta's ecosystem, the state may reallocate water from any water user in the Delta watershed "due to the incremental diversions of all who take water from the Delta or its tributaries, whether upstream, in the Delta, or for export from the Delta." (Cahill Memorandum, p. 17.) Although the three types of diversions that the Cahill Memorandum mentioned – diversions upstream from the Delta, in-Delta diversions and Delta-export diversions – have dramatically different impacts on Delta resources, the Cahill Memorandum apparently concluded that the causes of the Delta's problems are not relevant to the analysis because it suggested that all of these diverters could be required to contribute to Delta solutions according to the relative size of their diversions.

The Cahill Memorandum's conclusion is incorrect for two reasons. First, the public trust doctrine does not support requiring a water user to mitigate impacts caused by other factors.¹ Second, reallocating water from a water user to ecosystem enhancement disproportionately to the relevant water use's impacts would not be consistent with applicable law, including Article X, section 2, of the California Constitution.

A. No Public Trust Decision Has Authorized Reallocating Water From A Water User To Ecosystem Restoration Where The Relevant Water Use Did Not Cause The Relevant Environmental Impact

A review of California decisions that have applied the public trust doctrine to reallocate water demonstrates that the courts have only approved such reallocations to address the impacts of the relevant water user's project. Specifically, the courts in California have approved such reallocations to protect public trust interests in only the following three factual situations:

- (1) Diversions by the City of Los Angeles from Mono Lake's tributaries that had lowered the lake's level and adversely impacted the fisheries in these tributaries (see *National Audubon*, *supra*, 33 Cal.3d, at pp. 424-425, 428-431; *Cal. Trout I*, *supra*, 207 Cal.App.3d, at pp. 593-598; and *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 194-195);
- (2) The Central Valley Project's (the "CVP") and the State Water Project's (the "SWP") diversions from the Delta that had affected the Delta's water quality (*Racanelli*, *supra*, 182 Cal.App.3d, at pp. 129-130, 149-151); and
- (3) The diversion of San Joaquin River flows by the CVP's Friant Dam that the court stated had significantly impacted the river's fishery (*Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 909-911, 924-925).

In addition, the Cahill Memorandum did not cite or discuss two Court of Appeal decisions in which the courts held that the public trust doctrine did *not* justify reallocating water

¹Fish and Game Code section 5937 "is a legislative expression of the public trust protecting fish as trust resources when found below dams. (*Cal Trout I*, *supra*, 207 Cal.App.3d, at p. 626.) This document's discussion of the public trust doctrine, therefore, applies to section 5937 as well.

to enhance public trust interests where: (a) the water user had created an asset, a reservoir, that had not historically been subject to the public trust (*Golden Feather Community Ass'n v. Thermalito Irr. Dist.* (1989) 209 Cal.App.3d 1276, 1285-1287); or (b) the trust interest had already been addressed in a prior judgment (*Big Bear Municipal Water Dist. v. Bear Valley Mutual Water Co.* (1989) 207 Cal.App.3d 363, 380-382). In *Golden Feather, supra*, the Court of Appeal held that the public trust doctrine did not require an irrigation district to retain water behind its dam to support fishing and recreation in its reservoir. (209 Cal.App.3d, at pp. 1285-1286.) In *Big Bear, supra*, the Court of Appeal held that the public trust doctrine did not support modifying a prior negotiated injunction to support recreational use of a lake because the prior injunction addressed this public trust value. (207 Cal.App.3d, at pp. 381-382.)²

If one analyzes all of these cases' results consistently with the rules of legal interpretation discussed above (pp. 1-3), the rules that emerge are: (a) where a water use has caused demonstrable damage to a public trust interest, the public trust doctrine can authorize actions to require the water user to address this damage; and (b) where a water use has not damaged a public trust interest, the public trust doctrine does not authorize such actions.

The Cahill Memorandum cited another decision – *EID, supra*, 142 Cal.App.4th 937 – that did not involve a proposed reallocation of water from an established use, but did recognize the importance of project impacts in applying the public trust doctrine. In this case, the Court of Appeal held that the State Water Resources Control Board (“SWRCB”) could not apply Term 91 – which generally requires a Delta watershed diverter to stop diverting when the CVP and SWP are releasing stored water to meet Delta water quality standards – to a water right with a higher priority than the CVP’s and SWP’s rights where the SWRCB did not impose Term 91 on water rights with intervening priorities. (*Id.* at pp. 942-944.) The Court of Appeal held that the SWRCB could subordinate priorities in issuing water-right permits in some circumstances, but stated:

[T]o the extent El Dorado’s diversions of natural flow contribute to the degradation of water quality, the [SWRCB] has a legitimate interest in requiring El Dorado to reduce its diversions to contribute toward the maintenance and improvement of water quality in the Delta . . . [T]he subversion of a water right priority is justified only if enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust.

[¶]

[T]he [SWRCB] has a legitimate interest in requiring El Dorado to contribute toward the maintenance of Delta water quality objectives to the extent El

²The Cahill Memorandum cited a draft State Water Resources Control Board decision that the SWRCB never adopted to “demonstrate an approach that could be considered in the future” to reallocate water under the public trust doctrine without following water-right priorities. (Cahill Memorandum, p. 18 (citing draft Decision 1630).) The Cahill Memorandum, therefore, relied on a draft decision that the SWRCB never adopted, but did not cite two Court of Appeal decisions concerning the public trust doctrine that are binding legal authority.

Dorado's diversion of natural flow contributes to the degradation of water quality in the Delta.

(*Id.* at pp. 967, 969 (emphasis added).)

The *EID* decision, therefore, recognizes that the public trust doctrine does not authorize dispensing with a water right's priority – “the central principle in California water law” (*id.* at p. 961 (quoting *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 (“*Mojave*”)) – unless the water use has adversely impacted public trust interests.

The Cahill Memorandum cited footnote 21 in the *EID* decision as suggesting that the state need not respect water rights' priorities in attempting to reallocate water to benefit the Delta. (Cahill Memorandum, p. 10.) This footnote, however, is appended to the following discussion in the decision's text:

[T]he Board must attempt to preserve water right priorities to the extent those priorities do not lead to unreasonable use or violation of public trust values. In other words, in such circumstances the subversion of a water right priority is justified only if enforcing the priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust.

(142 Cal.App.4th, at p. 967 (emphasis added).)

Properly understood in this context, footnote 21 in the *EID* decision does not support the Cahill Memorandum's conclusion that water users can be required to contribute to a Delta solution in proportion to their diversions' sizes, but rather indicates that water-right priorities will not necessarily govern a situation where a particular water use adversely impacts public trust values. This interpretation of footnote 21 is consistent with the above fact-based analysis of existing public trust decisions concerning water resources.

This analysis also is consistent with the California Supreme Court's conclusions in public trust decisions contemporary with, and cited in, *National Audubon*. In *State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, and *State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, the Court held that the public trust doctrine applies to the portion of property located between the high and low levels of lakes. (*Lyon, supra*, 29 Cal.3d, at pp. 226-232; *Fogerty, supra*, 29 Cal.3d, at pp. 243-249.) In both cases, the owner of the lakeside property claimed that the application of the public trust to its property constituted a compensable taking of its property. The Court held that no taking occurred because the owners could use their properties “for any purposes which are not incompatible with the public trust.” (*Fogerty, supra*, 29 Cal.3d, at p. 249 (emphasis added); see also *Lyon, supra*, 29 Cal.3d, at p. 232.) The Court further stated:

Landowners who have previously constructed docks, piers and other structures in the shorezone [that is subject to the public trust] may continue to use these facilities unless the state determines . . . that their continued existence is inconsistent with the reasonable needs of the trust. In that event, both statute and

case law require that plaintiffs be compensated for the improvements they have constructed in the shorezone.

(*Fogerty, supra*, 29 Cal.3d, at p. 249 (emphasis added); see also *Nat'l Audubon, supra*, 33 Cal.3d, at p. 440 fn. 22 (citing this portion of *Fogerty*).)³

The “not incompatible” standard that *Fogerty* and *Lyon* stated as governing what improvements could be built in areas subject to the public trust is the flip-side of the impact standard derived above from cases in which the public trust doctrine has been applied to water rights. If a water use does not adversely impact trust resources, its diversions cannot be incompatible with the public trust.

The Cahill Memorandum included numerous general quotes from *National Audubon* concerning the state’s power and duty to protect public trust interests, but it does not cite the portions of this decision in which the California Supreme Court identified the facts that were crucial to its decision. While the Court’s statements must be respected even if not binding, because they do not relate to the facts before the Court (see, e.g., *United Steelworkers, supra*, 162 Cal.App.3d, at p. 835), in *National Audubon*, the Supreme Court expressly identified the case’s “salient fact:”

In the case before us, the salient fact is that no responsible body has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct.

[¶]

It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin. No vested rights bar such reconsideration. We recognize the substantial concerns voiced by Los Angeles . . . We hold only that they do not preclude a reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment.

In light of *National Audubon*’s “salient fact,” if this decision is interpreted consistently with the rules of legal interpretation discussed above (pp. 1-3), it shows only that the state may reallocate water away from consumptive use to ecosystem enhancement where the water use caused the relevant impact to trust interests, subject to consideration of the resulting impacts on established consumptive water uses. (*National Audubon, supra*, 33 Cal.3d, at pp. 446, 448.)

In particular, neither *National Audubon* nor any other California public trust decision supports the Cahill Memorandum’s conclusion that the state can require water users to devote water to Delta ecosystem restoration “due to the incremental diversions of all who take water from the Delta or its tributaries, whether upstream, in the Delta, or for export from the Delta.”

³Because this discussion in *Fogerty* and *Lyon* was necessary to address the landowners’ takings claims, it is binding legal authority. (See *United Steelworkers of America v. Bd. of Education* (1984) 162 Cal.App.3d 823, 833-835, *superseded by statute as stated in Cal. School Employees Ass’n v. Bonita Unified School Dist.* (2008) 163 Cal.App.4th 387, 401; and *Garfield Med. Center v. Belshé* (1998) 68 Cal.App.4th 798, 806.)

(Cahill Memorandum, p. 17.) Diversions from the Delta watershed may decrease inflows into the Delta. By storing water and releasing it later, however, such diversions also may increase Delta inflows at some times. In contrast, Delta-export diversions can change internal Delta hydrodynamics by causing reverse flows within Delta channels and also can entrain some Delta fish species, for example. These latter effects are fundamentally different, and no public trust decision suggests that responsibility for addressing environmental effects can be redirected to water users who do not cause them.

B. *Any Reallocation Of Water From A Water User To Ecosystem Restoration Must Be Proportional To The Impacts Of The Water Users' Activities*

Since all of the cases in which the courts have approved reallocations of water to protect public trust resources have involved water uses that directly impacted these resources (see pp. 3-7 above), it has not been necessary for courts to formulate, or to review, public trust remedies implemented in more complex factual situations. Nonetheless, one important public trust case, the *Racanelli* decision, indicates that it would be appropriate to limit remedial reallocations of water to address only the relevant projects' impacts. (182 Cal.App.3d, at pp. 120: "[W]e think that the imposition of without project standards *upon the projects* represents one reasonable method of achieving water quality control in the Delta." At p. 126 (emphasis in original).) *Racanelli* rejected the concept that water quality standards should be set only to address these projects' impacts, but did say that, once such standards were properly established, project impacts could drive allocations of responsibility for implementing these standards. (*Id.* at pp. 115-120, 126.)

Two sources of law related to the public trust doctrine show that proportionality between a water use's impacts and any reallocations of water is required: (a) Article X, section 2, of the California Constitution; and (b) public nuisance cases.

1. *Reallocations Of Water Disproportionate To A Water User's Ecosystem Impacts Would Violate The Reasonable Use Doctrine*

Article X, section 2, of the California Constitution – the "reasonable use" provision – would require that any order reallocating water to protect public trust resources be proportional to the relevant water use's impacts on the affected resources. As *National Audubon* states, under Article X, section 2, of the California Constitution, "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use." (33 Cal.3d, at p. 443 (emphasis added).) As discussed below (pp. 8-9), many cases decided under Article X, section 2, have held that a water use is unreasonable where it requires large amounts of water that are disproportionate to the benefit of using the water.

Even before Article X, section 2, was enacted in 1928, the California Supreme Court held that the rule requiring reasonable use among appropriators barred a senior Delta appropriator from demanding that junior Sacramento Valley appropriators cease diverting water in order to prevent salt water from San Francisco Bay from reaching the senior's diversion, because

enormous amounts of water would have been needed to accomplish this result, and, therefore, lost to upstream beneficial use. (*Antioch v. Williams Irr. Dist.* (1922) 188 Cal. 451, 461, 464.) Similarly, after Article X, section 2's, 1928 enactment, the Supreme Court held that a senior appropriator could not require that large amounts of water be devoted to serving its relatively small use even though standard California water law provides that a junior appropriator has no right to divert until the senior appropriator's right has been satisfied. (See *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 336-340 ("*Lodi*").) Other cases have reached similar results. (*Racanelli, supra*, 182 Cal.App.3d, at pp. 143-144 (Antioch flow standards).)

To date, no court has applied these "reasonable use" cases to determine how much water should be reallocated from a consumptive use to ecosystem restoration, perhaps because there has been a direct relationship between water uses and their environmental impacts in all of the public trust cases that have been decided to date. (See pp. 3-7 above.) Applying the reasonable use principles stated in cases like *Antioch* and *Lodi* to potential reallocations of water for ecosystem restoration, however, shows that any such reallocations must be proportional to the impacts of the relevant water use.

Lodi presents the clearest authority on this point. In this case, the impact of the junior appropriator's water use on the senior appropriator's right was substantially less than 3,600 acre-feet per year, which was the total amount diverted by the senior. (*Lodi, supra*, 7 Cal.2d, at pp. 321, 336-337.) In order to alleviate any impact on the senior's right, the junior would have been required to forgo the use of 120,000 to 360,000 acre-feet annually, which the trial court found was necessary for recharge of the senior's wells. (*Id.* at pp. 336-337.) The California Supreme Court held that such a disproportionate burden on the junior violated Article X, section 2, and directed the trial court to develop a physical solution to satisfy the senior's needs by implementing measures that would impose a more proportionate burden on the junior. (*Id.* at pp. 343-346.) By identifying proportionality to project impacts as the rule to be implemented in determining what remedies a court should fashion to protect a senior water right, *Lodi* contradicts the Cahill Memorandum's conclusion that the benefit to the ecosystem alone, rather than the relationship between a targeted water use and the relevant environmental impacts, can support reallocations of water. As suggested by *Lodi*, Article X, section 2, requires that measures that are implemented under the public trust doctrine be proportional to the impact that the relevant water use has on public trust interests.

This interpretation of the interaction between the public trust doctrine and Article X, section 2, also is consistent with the California Endangered Species Act's ("CESA") limitation on the burdens that may be imposed to mitigation for project impacts on listed species. This act, specifically Fish and Game Code section 2052.1, states in relevant part:

The Legislature further finds and declares that if any provision of this chapter [CESA] requires a person to provide mitigation measures or alternatives to address a particular impact on a candidate species, threatened species, or endangered species, the measures or alternatives required shall be roughly proportional in extent to any impact on those species that is caused by that person . . . All required measures or alternatives shall be capable of successful

implementation. This section governs the full extent of mitigation measures or alternatives that may be imposed on a person pursuant to this chapter.

(Emphasis added.)

In order to be consistent with Article X, section 2, any SWRCB order that would reallocate water from an existing water use to environmental use must contain factual findings that show that the amount of the reallocation is proportional to the existing use's impacts on the environmental use.

2. *Public Nuisance Cases Show That Remedies Must Be Proportional To The Relevant Project Impacts*

As the California Supreme Court recognized in 1983 in *National Audubon*, when it first applied the public trust doctrine to water rights, this doctrine is similar to public nuisance law. (See *National Audubon*, *supra*, 33 Cal.3d, at pp. 435-436.) For example, *National Audubon* – and the Cahill Memorandum – rely on *People v. Gold Run Ditch and Mining Co.* (1884) 66 Cal. 138 (*National Audubon*, *supra*, 33 Cal.3d, at p. 436; Cahill Memorandum, pp. 15-17), and *Gold Run* in turn describes the relevant activities as nuisances. (*Gold Run*, *supra*, 66 Cal., at pp. 147-148, 150.)

Nuisance law would require a finding that a water user's activities have caused the relevant environmental impact before the water user's supplies could be reallocated to address this impact. Cases in which the courts have considered the breadth of injunctions imposed to address public nuisances further show that such injunctions must be narrowly tailored to the conditions created by the relevant activities. These cases show that any remedy formulated to address a water use's impacts under the public trust doctrine must be proportional to these impacts because: (a) this doctrine and public nuisance law are closely related, as recognized by *National Audubon* and the Cahill Memorandum; and (b) orders reallocating water to ecosystem enhancement effectively would be injunctions governing water users' operation of their facilities.

In *Anderson v. Souza* (1952) 38 Cal.2d 825, the California Supreme Court stated the general rule concerning the scope of injunctions to address nuisances as follows:

Injunctive process ought never to go beyond the necessities of the case and where a legitimate business is being conducted and in the conduct therefore a nuisance has been created and is being maintained, the relief granted should be directed and confined to the elimination of the nuisance, unless under the peculiar circumstances of the case the business, lawsuit in itself, cannot be conducted without creating a nuisance

(*Id.* at pp. 840-841.)

Consistent with this rule, in many cases, the California courts have either: (a) affirmed injunctions that were limited to addressing only the harm that a defendant's activities caused to the relevant property interest; or (b) reversed injunctions that imposed more of a burden on the

defendant. For example, in *Anderson, supra*, the California Supreme Court reversed an injunction that prohibited an airport's operation, holding that the more-appropriate injunction would have allowed for changes to the airport's operations that would have eliminated the nuisance it created for neighboring landowners. (38 Cal.2d, at pp. 844-845; see also *People v. Mason* (1981) 124 Cal.App.3d 348, 352-354 (an injunction requiring that a bar permit no noise to be audible off its premises was overbroad).) In *Guttinger v. Calaveras Cement Co.* (1951) 105 Cal.App.2d 382, the Court of Appeal affirmed an injunction that a trial court had imposed to require the plant to stop emitting more than 13 percent of the dust and other materials that would be emitted without control devices, the trial court having found that the emission of this 13 percent would not damage the neighboring land. (105 Cal.App.2d, at pp. 384-385, 390-391.)

The courts have reached similar results in cases involving California streams. In *Thompson v. Kraft Cheese Co.* (1930) 210 Cal. 171, the California Supreme Court modified an injunction against any discharge of certain substances to a creek that would wash into a neighboring property so that the revised injunction prohibited only such discharges that would cause "material pollution" of the creek's waters, cause "contamination" of its bed or banks or "give rise to noxious odors" preventing the plaintiff from using or enjoying its property. (210 Cal., at pp. 179-180.) In declaring the initial injunction overboard, the Supreme Court stated: "The vice of this provision is that it ignores the question of actual injury, and is framed so as to cover the slightest discharge, whether it causes any substantial pollution of the stream or not." (*Id.* at p. 176 (emphasis added).) An order reallocating from a water user an amount of water disproportionate to the ecosystem impacts of the water user's activities would share the same "vice" as the injunction that the Supreme Court rejected in *Thompson*, because such an order would ignore "the question of actual injury." Similar to *Thompson*, other California cases have rejected injunctions that required more mitigation by water users than was necessary to address their facilities' impacts. (See *City of Fresno v. Fresno Canal and Irr. Co.* (1893) 98 Cal. 179, 183-184 (an injunction requiring destruction of a ditch to prevent interference with streets was overbroad); and *Byers v. Colonial Irr. Co.* (1901) 134 Cal. 553, 555-556 (an injunction prohibiting operation of a dam was overbroad in a case to prevent interference with senior water rights).)

Because nuisance cases are closely related to the public trust doctrine, California cases that require that injunctions be tailored to address the actual nuisance that a defendant has created shows that orders reallocating water to address impacts to the public trust must, as well, be tailored so that such reallocations would be proportional to the impacts of the relevant water uses. These cases show that imposing greater reallocations on water users would not be supported by California law, and therefore would be illegal. In order to support any reallocation of water, the SWRCB would have to make factual findings to demonstrate that the targeted water user's activities caused ecosystem impacts that were proportional to the amount of water that the SWRCB was reallocating to environmental use.

3. *The California Constitution's Article X, Section 2's, Plain Text And The Decisions Under It Show That It Prohibits Just Unreasonable Uses, And Does Not Authorize The State To Choose Among Existing Uses And Reallocate Water To Those It Prefers*

Article X, section 2, states, in part:

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 . . . 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

Constitutional provisions should be interpreted according to their plain text to the extent possible. (See, e.g., *Delaney v. Superior Ct.* (1990) 50 Cal.3d 785, 798-799; and *Pacific Gas & Electric Co. v. City of Oakland* (2002) 103 Cal.App.4th 364, 367-368.) “[C]ourts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any . . . express provisions.” (*Delaney, supra*, 50 Cal.3d, at p. 799 (quoting prior Cal. Supreme Ct. decisions).) Nothing in Article X, section 2, indicates that the state has the power to reallocate water among water uses, as opposed to just limiting unreasonable uses. Consistent with Article X, section 2’s, plain text, California decisions under this provision have: (a) limited water users’ rights to devote water to unproductive uses; or (b) sought to maximize the availability of water for all uses without infringing water-right priorities.

Article X, section 2, was enacted specifically to apply the first rule to riparian rights after the California Supreme Court’s decision in *Herminghaus v. So. California Edison Co.* (1926) 200 Cal. 81, in which the Court had held that riparian landowners’ use of a stream’s natural flow was not required to be reasonable even though it conflicted with an appropriative use. (See *National Audubon, supra*, 33 Cal.3d, at pp. 442-443.) Most of the cases decided under Article X, section 2, have involved similar disputes where landowners sought to continue using very large amounts of water while receiving very little benefit from the use of the water:

- (a) Cases in which downstream landowners unsuccessfully sought to enjoin upstream storage of high flows for municipal use in order to continue receiving those high flows’ marginal benefits (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 694-695, 699-706; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 362-363, 375 (washing of silt onto, and salts out of, salt marsh property); *Joslin, supra*, 67 Cal.2d, at pp. 134-136, 140-141 (washing of sand and gravel onto property); and
- (b) *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567-568, in which the California Supreme Court held that using large amounts of water to kill gophers was not a reasonable use

The Courts of Appeal also have held that water users did not comply with Article X, section 2, where they caused significant amounts of water to be lost to unproductive use through

the maintenance of very inefficient conveyance systems. (*Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 585-586; *IID, supra*, 225 Cal.App.3d, at pp. 553, 570.)

Under Article X, section 2, the courts also have required senior water-right holders to change their operations to make water available for junior water users where the changes would not injure the seniors' end uses and would occur at the juniors' cost. (*Lodi, supra*, 7 Cal.2d, at pp. 343-344; and *Racanelli, supra*, 182 Cal.App.3d, at pp. 143-144.) "An equitable physical solution," however, "must preserve water right priorities to the extent those priorities do not lead to unreasonable use." (*Mojave, supra*, 23 Cal.4th, at pp.1243, 1249-1251 (overdraft in a groundwater basin does not justify imposition of a physical solution that ignores water-right priorities).)

Similar to the physical solution cases, the Court of Appeal has held that it could be an unreasonable method of diversion for riparian landowners to divert natural river flows where their cumulative instantaneous demands could dry up the river and deny some water users any water to protect their crops from frost. (*People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 747, 750-751.) The *Forni* decision held that, under Article X, section 2, the SWRCB potentially could require riparian landowners to build storage facilities to serve their frost-protection needs, but that the question of whether this solution was "the only feasible method of achieving the constitutional mandate of reasonableness [was] manifestly a question of fact." (*Id.* at p. 752.) *Forni*, therefore, did not reallocate water among water uses, but rather held that the state potentially could require holders of riparian rights to alter allegedly unreasonable methods of diversion under their rights.

Finally, in *Racanelli*, the Court of Appeal held that Article X, section 2, would authorize the SWRCB to modify the CVP's and SWP's Delta-export water rights to address the projects' "deleterious effects" on the Delta's resources:

[T]he Board determined that changed circumstances revealed in new information about the adverse effects of the projects upon the Delta necessitated revised water quality standards. Accordingly, the Board had the authority to modify the projects' permits to curtail their use of water on the ground that the projects' use and diversion of water had become unreasonable.

[¶]

We perceive no obstacle to the Board's determination that particular methods of use have become unreasonable by their deleterious effects on water quality.

(182 Cal.App.3d, at p. 130 (emphasis added).)

Reviewing these cases' results shows that courts have interpreted Article X, section 2, to allow the state and the courts to prevent unreasonable amounts of water from being devoted to particular uses, and to change unreasonable methods of diversions, in order to make more water available for more water users or to address a project's particular environmental impacts. None of these cases interpreted Article X, section 2, to allow the state to take the further step of

reallocating water to promote uses that it prefers to the detriment of well-established, but less favored, uses.

4. *Nuisance Law Requires That The State Prove That A Water User Has Contributed To The Relevant Environmental Damage In Order To Obtain Relief*

The Cahill Memorandum relied heavily on the California Supreme Court's decision in *Gold Run*, *supra*, 66 Cal. 138, in concluding that the state, under nuisance law, could require water users to contribute, according to their diversions' respective sizes, to programs to attempt to restore Delta resources. (Cahill Memorandum, pp. 15-17.) The Cahill Memorandum also stated that *Gold Run* relied on a previous California decision, *Hillman v. Newington* (1880) 57 Cal. 56. (Cahill Memorandum, p. 17.) These decisions, however, do not support the Cahill Memorandum's conclusion.

In *Gold Run*, the Supreme Court affirmed an injunction prohibiting the Gold Run mine from discharging hydraulic mining debris into the North Fork of the American River where this debris was filling the beds of the American and Sacramento Rivers, and even San Pablo and San Francisco Bays. (66 Cal., at pp. 143-145, 15-152.) The Court held that the injunction was proper against the Gold Run mine, even though many other mines also contributed to the filling of the rivers. (*Id.* at pp. 148-149.) There was no question, however, about whether the Gold Run mine contributed to the problem to be solved. In contrast, the Cahill Memorandum concluded that everyone who uses water from the Delta or its watershed can be required to contribute water in proportion to their diversions' size, even though these diversions could have vastly different effects on the Delta's environmental resources. This distinction demonstrates that *Gold Run* is consistent with the rule that proof of causation is necessary for nuisance liability, contrary to the conclusion of the Cahill Memorandum. Causation is one of the fundamental elements in proving a case to require someone to abate a public nuisance. (See *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 986-992 (citing Restatement Second of Torts).)

The Cahill Memorandum's conclusion that water-right priorities can be disregarded in allocating responsibility for Delta solutions also is inconsistent with the holding in *Hillman v. Newington*, *supra*, on which the portion of the *Gold Run* decision cited in the Cahill Memorandum relied. (See *Gold Run*, *supra*, 66 Cal., at p. 149 (cited in Cahill Memorandum, p. 17.) In *Hillman*, the Supreme Court held that upstream junior water users were jointly liable for ensuring that sufficient water was available to satisfy the rights of a downstream senior appropriator. As among the juniors, however, the Court stated: "If there is a surplus [of water above the senior's right], the defendants can settle the priority of right to it among themselves." (See *Hillman*, *supra*, 57 Cal., at p. 64.) *Hillman* – and thus *Gold Run* – does not, therefore, support the Cahill Memorandum's conclusion that the state may require water-right holders to contribute water to Delta solutions in proportion to their diversions' sizes.

5. *The SWRCB's Adoption Of Water Quality Standards Does Not Result In Reallocations Of Water Without Actions Under Water-Right's Law*

Under the heading, "The SWRCB's Adoption and Implementation of Water Quality Standards May Also Result in Reallocation of Water," the Cahill Memorandum stated:

The Board has authority to impose conditions on water rights to protect water quality. This authority is derived from the federal Clean Water Act and the Porter-Cologne Water Quality Control Act (Water Code, § 13000 et seq.)

(Cahill Memorandum, p. 9 (emphasis added).)

The Cahill Memorandum's discussion of water quality standards relied in part on the Court of Appeal's decision in *EID, supra*, 142 Cal.App.4th 937. (Cahill Memorandum, p. 10, fn. 6.) This decision, however, does not support the Cahill Memorandum's conclusion about water quality standards themselves resulting in reallocations of water. Specifically, in this decision, the Court of Appeal stated:

We do acknowledge that there may be circumstances in which El Dorado is authorized to continue diverting under the rule of priority, but if El Dorado does so there will be insufficient flow to meet Delta water quality objectives . . . El Dorado is under no obligation (absent some action by the Board) to bypass natural flow that is needed to meet Delta water quality objectives. Thus, there may be times when the natural flow is sufficient to allow El Dorado to divert and to meet the needs of downstream riparians and senior appropriators, but not sufficient to also satisfy Delta water quality objectives. In those circumstances, El Dorado's diversion of the natural flow available under the rule of priority will require the projects to release more stored water to satisfy the water quality objectives.

(*EID, supra*, 142 Cal.App.4th, at pp. 968-969 (italics in original, underlining added).)

Accordingly, the adoption of water-quality standards does not automatically result in a reallocation of water to implement the standards. Such a reallocation may occur only if it is authorized by some other legal authority.

6. *A State Order That Attempts To Reallocate A Federally-Licensed Hydroelectric Project's Supplies To Ecosystem Enhancement Would Be Preempted By Federal Law*

The Cahill Memorandum did not discuss the impact of the following two facts on its legal analysis: (a) many California water projects hold hydroelectric licenses issued under the Federal Power Act ("FPA"); and (b) the United States Supreme Court has held that that FPA preempts the SWRCB's authority to set streamflow requirements for such projects. In *California v. Federal Energy Regulatory Comm'n* (1990) 495 U.S. 490 ("*California v. FERC*"), the Court reaffirmed its 1946 decision in *First Iowa Hydro-Electric Cooperative v. FPC* (1946) 328 U.S.

152, and held that the SWRCB could not impose on a hydroelectric project streamflow requirements higher than those stated in the project's FPA license. In *Sayles Hydro Ass'n v. Maughan* (9th Cir. 1992) 985 F.2d 451, the federal Court of Appeals for the Ninth Circuit: (a) held that *California v. FERC* showed that the FPA occupies the field of regulation of hydroelectric projects; and (b) decided that the SWRCB could not require a hydroelectric project proponent to prepare studies concerning recreation, aesthetics, archaeology, sport fishing, cultural and economic issues in addition to the studies of these resources that were required by the Federal Energy Regulatory Commission. The Ninth Circuit stated:

In many states where water is scarce, a state property law regime enables users of streams and wells to obtain proprietary rights in a continuing quantity of water. By perfecting state water rights, users can enjoin other users who deprive them of their share of the flow . . . [¶] [T]he only authority states get over federal power projects relates to allocating proprietary rights in water.

(*Id.* at pp. 455.)

Any streamflow requirements that the state might attempt to impose on a federally-licensed hydroelectric project in order to enhance the Delta's resources, therefore, would be preempted under *California v. FERC* and *Sayles Hydro*.

A California Court of Appeal has held that these decisions do not mean that a hydroelectric-project owner is exempt from conducting a CEQA review where it proposes to change the project's purpose to include consumptive use. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 956-962.) According to the court, such a significant change in use involved a question of "proprietary rights" in California water that the FPA allows states to regulate. (*Id.* at p. 960.) The court characterized *California v. FERC* as having "involved a state effort to set minimum stream flow, a matter that did not involve proprietary water rights" (*Id.*) *County of Amador*, therefore, supports the conclusion that federal law would preempt state efforts to impose streamflow requirements on hydroelectric projects that would be different than the requirements stated in these projects' FPA licenses.

CONCLUSION

Before reallocating any water from existing diversions and uses under upstream water rights to restore the Delta's ecosystem, the SWRCB must hold an evidentiary hearing and make detailed findings on the relative impacts of upstream, in-Delta and Delta-export diversions on the Delta's fisheries and other elements of the Delta's ecosystem. Any such reallocation then must be based on these findings and tailored to reflect the different types and levels of impacts that these types of diversions have, as well as to reflect the relevant individual diversions' priorities. Any reallocations also must not alter any instream-flow requirements specified in hydroelectric licenses issued under the FPA.