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**THE TAKING OF WATER THROUGH
THE GUISE OF THE PUBLIC TRUST DOCTRINE
AND THE REASONABLE USE DOCTRINE:
A TAKING IS A TAKING**

by

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TABLE OF CONTENTS

	<u>Page</u>
A. The Delta – Existing and Proposed Actions	1
B. Basic Water Rights Concepts.....	3
C. Area-of-Origin Statutes.....	4
D. Groundwater	5
E. Public Trust.....	6
F. Delta Vision	6
G. The Attorney General’s Letters	9
H. The Reasonable Use Doctrine.....	9
I. Reallocation Through the Public Trust Doctrine	10
J. The <i>Casitas</i> Case.....	11
K. Practical Ramifications	12

This short paper discusses various potential takings associated with existing and proposed actions for the Sacramento-San Joaquin River Delta (Delta). It does so from the perspective of those with stable senior water rights north of the Delta on the Sacramento River and its tributaries. In this regard, the paper is limited to the subset of water related takings issues and does not directly address other significant takings issues that may also be raised by these same Delta related actions, although some of those issues are mentioned.

At the onset, it should also be noted that because of the limited nature of this paper its focus is upon a number of potentially damaging aspects of existing and proposed actions associated with the Delta, ignoring the positive. The reality is, however, that much of what is proposed is good, innovative and much needed. Nonetheless, in very critical areas, including those dealt with here, flaws in approach may undermine the effective implementation of the majority of the positive actions that have been suggested.

A. The Delta — Existing and Proposed Actions

The Delta is obviously the focal point of a great deal of attention. Two independent but related concerns have caused this attention. First, despite the construction of two significant water supply projects, the federal Central Valley Project (CVP) and the State Water Project (SWP), which were intended to convey water from Northern California to areas below the Delta, conveyance facilities through or around the Delta have, at best, never been sufficient to accomplish this goal. Second, as a result of inadequate means to convey water through the Delta (apparently combined with other factors) the ecosystem of the Delta has been driven into crisis.

This conveyance problem was recognized from the start. While the need for better conveyance was not then primarily focused on environmental protection, it was known that unless addressed, continued conveyance of water through the Delta would cause any number of problems and that levee failure and salinity intrusion would threaten the SWP and CVP's water supply reliability.

The obvious solution to this problem was a peripheral canal to convey water from the Sacramento River (from a point of diversion, in Sacramento County, at about Freeport) around the Delta to the SWP and CVP export pumps. Among other things, the operation of this facility would allow the Delta to function, more or less, the way it would under normal or natural circumstances. A peripheral canal has, to date, not been constructed. In 1982, the voters resoundingly defeated bonding authority to pay for the construction of a canal. Rather than addressing the legitimate concerns of the voters (including the size of the proposed canal and lack of specificity on how it was to be operated) the enormity of the defeat caused the water community and politicians to avoid discussing a peripheral canal until fairly recently.

At about the same time that financing of the peripheral canal was defeated, the State of California and the United States designated five North Coast rivers as wild and scenic rivers and, as a consequence, the water supply development of those rivers was prohibited by both the state and federal versions of wild and scenic rivers legislation. This ensured that the SWP would never be able to meet its contractual commitments since those rivers were to be an integral part of the SWP water supply. These actions also limited North-of-Delta available storage to the then

existing CVP and SWP reservoirs. Habitat concerns upstream of the Delta further limited available supplies as water was released (or not stored) in order to address fishery and habitat concerns associated with these facilities. Subsequently, it has been politically impossible to provide additional supply through new storage, either through enlargement of existing facilities, such as Shasta Reservoir, or through the construction of new off-stream storage facilities, such as the proposed Sites Reservoir in Colusa County.

Thus, from a water supply perspective, nothing has been done since the early 1980s to really address the conveyance (and water supply) limitations that have been identified, almost from the inception of the CVP and SWP. During this same time population in California has dramatically increased and the reliance on each drop of developed water has become more intense.

The lack of an adequate means to convey water past the Delta clearly caused degradation to the Delta ecosystem. This environmental degradation was exacerbated by other factors. Degraded water quality, invasive species, drought years, poor ocean harvest methodologies and conditions, upstream habitat concerns (from temperature to lack of screened diversions) all took their toll on the Delta and, from an environmental perspective, the Delta was “in crisis.” This, in turn, due to the application of the Endangered Species Act (ESA) and other environmental regulations, created a water crisis for those who rely upon the export of water across the Delta.

Dealing with this twin crisis occupied the better part of the last three decades. During this time we have seen the so-called Accord and Framework Agreements on the Delta, the rise, and fall, of CALFED, any number of failed and enacted pieces of legislation, the sale of billions of dollars in water bonds, State Water Resources Control Board (SWRCB) water quality control plans and associated water rights decisions dealing with the Delta, and countless rounds of litigation. All of this has been to no avail. At best, the State has been managing the crisis but not solving the underlying problems.

Recently two new efforts have been embarked upon. One, the Bay Delta Conservation Plan (BDCP), is an effort to obtain ESA permitting for the SWP and CVP’s Delta facilities and their operations through an HCP/and NCCP for the Delta, modeled loosely on the Multi-Species Conservation Plan for the lower Colorado River. The second is the Governor’s Delta Blue Ribbon Task Force. This later effort resulted in a “Delta Vision” and a “Strategic Plan” for the Delta Vision’s implementation. Both of these efforts seek to facilitate a resolution of the Delta water conveyance problems through some version of a peripheral canal and perhaps also an improved through-Delta conveyance mechanism. Both of these efforts either support or at least do not oppose the development of additional supplies through new storage upstream of the Delta. Both of these efforts also address the extensive Delta restoration activities that will need to take place to address years of abuse. (Keep in mind, the SWP went on line in 1968 and it and the CVP, which has been in operation for decades prior to the SWP, have been operating continuously since then.)

The Delta Vision as well as the Bay Delta Conservation Plan each pose potential significant takings issues, real or perceived:

- First, because of a lack of development of new water supply to meet Delta restoration efforts, developed water currently allocated for beneficial consumptive uses will need to be reallocated to these Delta environmental uses.
- Second, many of the restoration activities will require the flooding of lands that have or are currently utilized for agriculture or other purposes.
- Third, land use limitations have been suggested which may usurp private real property right prerogatives of Delta landowners.
- Fourth, in addition, the social and economic ramifications of the conversion of otherwise private lands and water rights to public use will affect, among other things, revenue generation, both directly and indirectly, that otherwise had been relied upon by local communities.

The purpose here is not to deal with all of these issues but rather to address the Delta Vision and limit that focus to those issues that deal with water rights, focusing on the taking issues that are implicated.

B. Basic Water Rights Concepts¹

The right one gains to water is considered and treated as a right to real property. It is a usufruct – a right to use – as opposed to the type of ownership one has to land. The ownership to the corpus of water itself is retained by the state, although the United States, at least in the Western part of the United States, apparently also claims ownership interest in the corpus of water. The means of allocating water has been delegated to the states. In California, the state allocates water through the doctrine of prior appropriation, which is a system of relative rights to the use of water with those who first obtained a right to water senior in right to those who come after –“first in time, first in right.”

The system was developed out of early mining experiences and attempted to create an element of legal certainty into the inherently uncertain physical situation that exists in the arid and semi-arid West. The doctrinal idea was that those with the most senior water rights could be certain that in all but the driest of years water would be available for their declared uses, with the most junior knowing that, in shortages, they would be cut off first. This allowed businesses and other water dependant endeavors, including the development of communities, to be based upon the relative certainty of water supply availability.

Prior to 1914, there was no direct government involvement in the perfection of a water right. A right was perfected by actual use and the courts resolved disputes. Effective in 1914, California adopted a permit and licensing system to regulate the appropriation of water. This

¹ The intent here is not to argue basic concepts of water law, but to merely state them as a foundation for further discussion. In general, supporting authority can be found in the Water Code or in various treatises. The Attorney General, in a July 9, 2008 letter, discussed at length below, uses as authority for many basic water law concepts, Hutchins, *The California Law of Water Rights* (1956). This is a good source of authority for these basic concepts.

system is currently administered by the SWRCB. California recognized and continues to recognize appropriations of water that took place prior to 1914. These “Pre-1914” water rights are not directly regulated by the SWRCB and generally are the most senior water rights that exist.

California also adopted the riparian system of water rights. In general, riparian rights are more limited both in their use and scope than appropriate water rights, but, for the most part, they are senior in priority to appropriative rights.

As noted, what one has when one has a vested right in water is a right of use. Use defines and limits the right that is held. Uses are specific to quantities of water, seasons of diversion and use, means of diversion and storage, place and purposes of use, among other limitations.

In addition, and relevant to the current discussion, the use of water must be “beneficial.” (See Wat. Code, § 100.) The requirement of beneficial use has always been an element of the law.

In 1928, by constitutional amendment, the requirement that a use be both beneficial and “reasonable” was added as an element of the water right. (Cal. Const., art. X, § 2.) What was or is reasonable is not defined, but depends upon the facts and circumstances of a given situation.

By 1928, with the addition of the reasonable use requirement, the basic framework of California water law was firmly in place. One cannot obtain an appropriative right to water unless water was diverted away from the stream for a beneficial use. Consequently, no appropriative right to instream use can be obtained, although instream use is designated in the Water Code as a beneficial use of water. Water quality requirements, after the passage of the Clean Water Act in 1972 and its California implementing statutory provisions, acted as a limit on the full exercise of water rights, as have environmental laws such as the ESA. In general, the application of these laws, however, has focused on the effect of a specific use of water and has not reallocated water from one use to another.

C. Area-of-Origin Statutes²

The basic concept of exporting water from areas where it originated to areas of water scarcity is a foundational element of Western water law. In many respects the law of prior appropriation was developed to facilitate this movement of water. Nonetheless, experiences such as those associated with Los Angeles’ actions in Mono and Inyo counties resulted in a resistance (sometimes armed) to these types of export projects.

The SWP and CVP, of course, were planned to export much greater quantities of water than were contemplated in local export projects such as the Los Angeles example and those developed by San Francisco on the Tuolumne River or the East Bay Municipal Utility District on the Mokelumne River. Resistance to these proposals was intense and representatives of these

² The area-of-origin statutes include Water Code sections 10505, 10505.5, 11128, 11460-11463 and sections 12200-12220. This list is not all-inclusive.

potentially affected local communities dominated the Legislature at that time. Consequently, in order to facilitate authorization of these export projects, certain area-of-origin statutes were enacted. In essence, those statutes sought to preserve a priority in the right to water for existing and future needs within the areas of origin. Certain of these area-of-origin statutes focus on the Delta. While none of these statutes is clear with respect to their operation and all have been, are, or will be the subject of litigation, they do provide an interesting additional complication to the task of allocating water for Delta restoration efforts.

The question of how these area-of-origin statutes will be used or ignored is a significant one. The Attorney General's office has written a July 2, 2008 letter addressing these statutes and suggests that none of these statutes is absolute in its protections. Nonetheless, the letter does indicate that the Water Protection Act, Water Code sections 11460 et seq., has the greatest potential to reduce the supply presently exported to water uses south of the Delta.

As is discussed below, the Delta Vision has focused on a concept that attempts to level all water rights in order to spread the burden of providing water for Delta ecosystem restoration. It indicates that no part of the state should have a special status. Nonetheless, areas of origin have, as a matter of policy and statute, been provided a special status which would seem to create a policy preference to shift additional environmental burdens that can be met either through upstream water rights or the water rights of those south of the Delta away from those within the areas of origin.

D. Groundwater

In California, groundwater is generally not regulated through a statewide system of allocation. Common-law concepts govern the allocation of groundwater with some groundwater basins within California operating under management rules established through court adjudications or basin-specific legislation or through groundwater management plans or local ordinances. Moreover, a legal fiction exists that denies the physical connection between surface water and groundwater.

While the various Delta processes focus on surface water, they indirectly raise issues that may become relevant as actions associated with the Delta proceed. Groundwater use has been raised, in the first instance, as a means for export areas to deal with shortages that have and will continue to occur as a result of Delta related environmental and restoration actions. The use of available groundwater has also been raised as a means to explain why the potential reallocation of surface water from those areas north of the Delta will not adversely affect those with water rights in those areas. The argument is advanced, in this regard, that the combined use of remaining surface water with available groundwater will be sufficient to meet regional needs within those areas.

Proposals by the Delta Vision also suggest a much greater regulation of groundwater than has ever existed in the state and has linked this regulation to the Delta. Aside from the obvious resistance to this greater level of regulation, the concept itself raises significant takings questions. The exact nature of the property right one obtains to groundwater and the Delta Vision's proposal that that groundwater right be linked in some way to the use of surface water

raises significant questions. Those questions, while raised here, are not further discussed in this paper.

E. Public Trust

The public trust doctrine is an interesting concept. While most did not know it was a part of California law, it apparently is of ancient origin and has been a part of the law, at least since 1850, when California was admitted to the Union. It applies to various resources, including water.

With respect to the water resource, each right to the use of water granted by the state was and is conditioned upon the prior right in the public to preserve public trust values which include boating, fishing, recreation, swimming, habitat and species protection, scientific study and any number of other values important to the public. While the state can abrogate the trust in certain circumstances, the bar for doing so is set quite high. In application, the public trust can trump all other uses, but its application does involve a balancing and consideration of what is in the public interest. (See, generally, *National Audubon Society v. Superior Court* (1983) 33 Cal. 249.)

Presumably, public trust values could be less important than one consumptive use of water in a river system and more important than another use. In this context, a problem potentially arises if the use that trumps the trust has a lower priority in right than the use that does not. This interesting dilemma has not yet been dealt with by the courts, but is potentially implicated in the context of the various current Delta processes and will be discussed further below.

F. Delta Vision

The Blue Ribbon Task Force (Task Force) was formed pursuant to Executive Order S.-1 7-0 62 “to develop a durable vision for sustainable management of the Delta” with the goal of “maintaining the Delta over the long term to restore and maintain identified functions and values that are determined to be important to the environmental quality of the Delta and the economic and social well-being of the people of the state.” The initial result of that effort was a document entitled “The Delta Vision, Our Vision for the California Delta” dated November 2007 (Delta Vision).

The Delta Vision articulated twelve integrated and linked recommendations including the articulation of the co-equal goals of ecosystem protection and a reliable water supply for California.

The Delta Vision effort was followed by the Task Force’s adoption, in October 2008, of its “Delta Vision Strategic Plan.” The final version of the Strategic Plan itself was a result of a process that included five and one-half staff drafts. (At this time the actual final document has not yet been posted.) The Strategic Plan, among other things, will require the dedication of a great deal of water for in-Delta restoration activities, including water for the inundation of lands to be flooded and restored to wetland and tidal habitat, increased flows in the Yolo Bypass, the creation of areas of open water in the Delta and additional Delta outflow. While the exact

quantity of water involved has not been quantified it is clear that there is not sufficient unappropriated water available to accomplish this goal.

The net result is that in order to meet these Delta water needs, one way or another, water currently all allocated for other uses will need to be reallocated to these Delta environmental purposes³. Two means of doing this seem obvious. First, one could simply exercise the most basic concept of the prior appropriation doctrine where junior water right holders, including the SWP and CVP, simply reduce their diversions until the needed water is available for the Delta. In concept this might result in zero SWP and CVP diversions, and if this did not satisfy the Delta's need for water, the next junior appropriators would also need to cease diversions until the Delta's water needs were met.

The problem with proceeding in this manner is that it is directly in conflict with the co-equal goal of water supply reliability and, in this context, it would have a significant adverse impact to those export areas below the Delta, which constitute the vast majority of the people and economy of the state.

The second obvious means to address the Delta's need for water would be to identify potential sellers of senior water rights and buy those senior water rights from them and then dedicate the purchased water (through Water Code section 1700 et seq. or by special legislation) to the Delta. This might be quite expensive, but if the Delta Vision is correct, protecting the Delta is well worth the expenditure.

The problem with proceeding in this matter is that there will be other costs associated with Delta protection and restoration and having to pay for water may well "break the bank," particularly in times such as these, of great economic uncertainty. Additionally, despite the long history of addressing water rights as vested real property rights, there is an aversion by some to thinking and addressing the right to use water in these terms. Instead, they prefer to believe water to be purely a public asset to be allocated and reallocated at the discretion of the state without the need for compensation. It is this latter view that permeates the Delta Vision's thinking.

In addressing the question of water for the Delta, the Delta Vision states the following:

The foundation for policy making about California water resources must be the long-standing constitutional principles of "reasonable use" and "public trust"; these principles are particularly important and applicable to the Delta. In the "reasonable use doctrine" ... California water officials and the courts may limit a water rights holder who is wasting water, using water unreasonably, or employing an unreasonable method of use or of diversion.

³ The Delta Vision includes numerous proscriptions for the more efficient use of water through conservation, reuse, conjunctive use of surface water and groundwater, desalination, and additional storage. All of these efforts are intended to reduce the quantity of water that will need to be reallocated to meet Delta needs.

State of California natural resource managers and legislators have an affirmative obligation under the public trust doctrine to act as trustees to oversee and manage those resources for the long-term benefit of the state and its citizens.

These principles have direct relevance to the Delta and the vision process. There are inevitable conflicts between protection of ecosystem and provision of water for California. Application of the twin constitutional principles of reasonable use and public trust is the best way to determine how these competing values will be addressed.... (Delta Vision at pp. 10-11.)

In laying the groundwork for addressing and dealing with the reallocation of water to Delta uses, as articulated in the Delta Vision, the Delta Vision also articulates a view that lays a significant portion of the blame for the Delta crisis on areas other than those that export water from the Delta. Another key recommendation of the Delta Vision is that a “revitalized Delta ecosystem will require reduced diversions - or changes in patterns and timing of those diversions upstream ... at critical times.” (Delta Vision at p. 12.) And then the Delta Vision makes the statement that “water diversions upstream threaten the Delta ecosystem.” (*Id.*)

Additionally, the mere articulation of the co-equal goals of water supply reliability and Delta ecosystem has the effect of leveling all water supply within the State of California and eliminates any distinction between those areas with sufficient supply and senior water rights, primarily in the areas of origin upstream from the Delta, from those water deficient areas in export areas of the state where junior water rights are held.

The latest version of the Delta Vision’s Strategic Plan contains a fairly watered down statement of its intent with respect to the application of the reasonable use and public trust doctrines, stating only that “the California Constitution’s reasonable use doctrine provides the foundation for needed policy making regarding water supply allocation.” (See Strategic Plan [Version 5.5, Red-line] at p. 1-22.) (A reference to the public trust doctrine can be found at footnote 28 of the same draft.) Earlier versions of the Strategic Plan are much more specific. For example, in the initial staff draft it was stated: “water required to support and revitalize the Delta will not be purchased but will be provided within the California systems of water rights and the constitutional principles of reasonable use and public trust.” (Delta Vision Strategic Plan, Preliminary Staff Draft at p. 23.) The Third Staff Draft of the Strategic Plan states:

An analysis of reasonable use and public trust cases by the California Office of the Attorney General concludes that “the State, acting through the Legislature, the SWRCB and other state agencies, and the courts, has substantial ability to reallocate water when necessary to prevent unreasonable use, achieve water quality, protect the public trust, avoid nuisance and respond to emergency situations.” Area of origin claims have a priority and may result in reallocation of water rights but do not provide an absolute claim on water uses, remaining subject to reasonable use and public trust. The reasonable use and public trust cases require “balancing” tests for policy making in which no single interest or principle automatically prevails. Overall, under these doctrines, the State of California is

able to make strong affirmative policy regarding use of water resources, and the courts are most likely to accept policy makers' decisions when based on best available science and robust policy processes. (Delta Vision Strategic Plan, Third Staff Draft at p. 7.)

Thus, while it may be uncertain exactly how all of this will play out as the recommendations will be dealt with as they are evaluated by the Governor and the Legislature, at a minimum, a more provocative interpretation of the reasonable use doctrine and the public trust doctrine than have traditionally been advanced is now in play. Moreover, third parties through court actions and the SWRCB all have an independent ability to press these issues.

G. The Attorney General's Letters

The Attorney General's office provided the Delta Vision with several opinion letters. A letter dated July 9, 2008 from the Attorney General's office addressed the subject of "Reallocation of Water under Specific Conditions" (Reallocation Letter). The Reallocation Letter articulated the question presented as "what legal tools are available to the State of California to reduce and/or reallocate water among users in instances of (a) over allocation, (b) needs for ecosystem protection and (c) or emergencies...." (Reallocation Letter at p. 1.) The Reallocation Letter concluded that any analysis of this question needs to start with water rights priorities, but then quickly added that means exist for the reallocation of water, including the use of the reasonable use doctrine and "the primary tool" of the public trust doctrine that would overrule the rule of priority. (*Id.*)

The basic concepts articulated within the Attorney General's Reallocation Letter, including the reasonable use doctrine and the public trust doctrine, clearly are part of the law and are without dispute. What is disputable, however, are the leaps in logic that are employed in order to justify ignoring the prior rights to water in the zeal to reallocate that water to environmental purposes without paying for it.

H. The Reasonable Use Doctrine

As noted, all water must be used reasonably. Indeed, the property right to water is defined by, among other things, reasonable beneficial use. If a use is not reasonable or beneficial then there can be no water right for that use. What is a reasonable use is fact-driven and may change over time. The purpose of the doctrine was clearly to avoid the waste of water. In its classic application the determination of reasonableness would be determined by looking at the use at issue. For example, the use of water for the flooding of pasture, instead of sprinkler or drip irrigation, may be an unreasonable use in some parts of the state, considering the topography, and losses and return flow patterns, but not in other parts of the state. The doctrine has not been used to compare uses as would occur if one were to determine that irrigation of, for example, tomatoes was an unreasonable use of water because it would be better to use that same water for export south of the Delta or for Delta outflow. The Reallocation Letter apparently agrees that there is no law to support this comparative approach to the reasonable use doctrine but, nonetheless, in a footnote, states that whether the doctrine would allow this kind of comparative application "is apparently still an open question." (Reallocation Letter at p. 5, fn 3.)

In this context, presumably the reallocation of water based upon the reasonable use doctrine, if it occurs, will not be accomplished through comparing one use with another but rather by focusing on an existing less favored class of uses and then eliminating those uses based upon “statewide considerations of transcendent importance.” (See Reallocation Letter at p. 8, quoting *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132, 145.)

I. Reallocation Through the Public Trust Doctrine

The Reallocation letter states “if diversions upstream of the Delta are harming public trust resources in the Delta, the public trust doctrine may be applied to protect the ecosystem. The unresolved issue is how the doctrine can be applied to obtain the water necessary for such protection.” In this context, the Reallocation Letter identifies two approaches. The first is when a diversion of water can be traced reasonably to an individual water user and it is that diversion which is causing harm to the public trust resources. In this case it is clear that the identified diversion will need to be modified in order to accommodate public trust uses. The second example, however, is more difficult to deal with. In this instance harm to public trust uses cannot be traced to one water right holder but, rather, it is the combined diversions within a system that are affecting public trust values. In this case with little, if any, authority the Reallocation Letter suggests that responsibility for reducing diversions can be spread over all of the diverters in a system, rather than allocation of the responsibility to meet public trust needs pursuant to priorities.

The only case law offered in the Reallocation Letter is a nuisance case, *People v. Gold Run Ditch and Mining Company* (1884) 66 Cal. 138. Aside from the fact that the case is not a public trust case, the case is also factually distinguishable from what is posed in the Delta⁴. Moreover, this type of analysis completely ignores the California Supreme Court’s adherence to water right priorities in *City Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224. There the California Supreme Court rejected an effort to ignore water rights priorities in favor of an “equitable apportionment” of water within a system.

The Reallocation Letter also, with absolutely no authority, states that “it is possible that water users contributing to the harm to trust resources could be assessed a fee, to be used to purchase water or to restore habitat or to take other measures ... where those actions would be effective to offset the harm that they are doing to trust resources, in other words they will contribute *money*.” (Reallocation Letter at p. 16, emphasis in original.) This gratuitous statement is apparently made in support of the Delta Vision proposal to assess fees against all the diversions of water in California. Apparently there is some thought that these diversion fees obtained from water users, including those who hold senior water rights, could be utilized to purchase the very water upon which the fees are being assessed.

⁴ A citation to SWRCB draft Decision D1630 for this proposition is also suspect since the Reallocation Letter admits that that draft decision was withdrawn and never adopted by the SWRCB.

J. The *Casitas* Case

In recent years there have been a number of taking cases involving the right to water that have been decided in the Court of Federal Claims. In *Casitas Municipal Water District v. United States*, 2007-5153, Decided September 25, 2008, the United States Court of Appeals for the Federal Circuit found a physical taking of water to the extent that the United States, in the enforcement of the ESA, required the physical use of water otherwise the property of the Casitas Municipal Water District for the purposes of ensuring that water flowed through fish ladders associated with facilities owned by the United States. In this context the Court of Appeals determined that the right to water, contractual or otherwise, constitutes property that, when taken, requires compensation under the Fifth Amendment.

The case, however (other than confirming the clear principle that the Fifth Amendment requires compensation for the taking of a right to water), for our purposes here has limited application. This case, as well as other cases previously dealt with by the Court of Federal Claims involves, among other things, contractual obligations as well as the application of the ESA.⁵ Although the fact that even under these circumstances a taking can occur is of significance.

Most relevant, perhaps, to the instant discussion, is the dissent. There, Judge Mayer stated: “Casitas does not own the water in question because all water sources within California belong to the public.... Whether Casitas even has a vested property interest in the use of water is a threshold issue determined under California law. California subjects appropriative water rights licenses to public trust and reasonable use doctrines, so Casitas has no property interest in the water, and therefore no takings claim.” (*Casitas* Slip Op. at pp. 1-2 of the Dissent.) The dissent proceeds to make the unsupportable statement that because a right to water is a usufructuary right it could never be physically invaded or occupied. (*Id.* at p. 3.)

In large part, this line of thinking is similar to that which was articulated in the Reallocation Letter. This is not surprising since the State of California in an amicus curiae brief filed in the *Casitas* case appears to have provided this kind of analysis which, while rejected by the majority, was apparently accepted by the dissent.

In its brief the Attorney General, on behalf of the SWRCB, makes several startling statements. Among them is a statement that in California water rights are not like real property rights and by their very nature are “limited and uncertain.” (See Amicus Curiae Brief of California State Water Resources Control Board in Support of the United States at pp. 5-6.) The brief also states that the use of water, once reasonable, may subsequently become unreasonable in light of changed factual and legal circumstances. (*Id.* at p. 9.) It further states that because there can be no property right in unreasonably using water there can never be a compensable taking if the water is needed for almost any environmental purpose.) (*Ibid.*) The logic here is that if the use of water has some kind of adverse environmental impact, it is per se unreasonable and therefore the right to that water simply does not exist.

⁵ See, e.g., *Tulare Lake Water Storage District v. United States* (2001) 49 Fed. Cl. 313; *Klamath Irrigation. Dist. v. United States* (2005) 67 Fed. Cl. 504.

One can hardly imagine concepts that will destabilize the water rights system in California more than the concepts offered by the Attorney General, both in its Reallocation Letter and in its legal briefing.

K. Practical Ramifications

There can be no question that the reallocation of water advocated within the Delta Vision implicates Fifth Amendment taking proscriptions. While one can argue about whether the nature of the takings is “regulatory” or “physical,” the prospect of a taking clearly arises in what is proposed by the Delta Vision and the Attorney General.

The twist in the takings analysis, of course, is that the cause of the “taking” will be a determination that a use violates the public trust or that it is unreasonable. Since reasonable use, in part, defines the water right there would, under the Delta Vision, be no taking. Similarly, since the water right was always subject to the public trust, displacing an existing use of water for its use to address public trust needs would also not be a taking.

While I am not at all certain that the reasonable use doctrine can be used in this fashion to circumvent the need to compensate a water right holder when water under the right is used to meet instream uses, and the Delta Vision analysis writes out the whole concept of public trust balancing that is associated with the public trust doctrine, I am not going to further address that specific situation here. For the sake of argument, I will accept the concept that if an individual use can be determined to have caused harm to the Delta then perhaps the reasonable use doctrine and the public trust doctrine can be used to avoid the constitutional requirement of compensation for a taking.

The significant question relevant to the Delta example, however, is the takings ramifications of reallocation when no individual use of water can be traced to the alleged harm, but it is the cumulative diversions of a great number of water right holders that have caused the alleged harm. For the most part, this is the Delta example.

The Reallocation Letters suggest, with the citation to little, if any, authority, that one can simply spread the burden to all those within the relevant river system. Thus, if you need water for the Delta you can take it equally from those with rights to use water north of the Delta and those who export water. In making this argument the Attorney General, and by extension Delta Vision, ignore the fact that, for the most part, the value of a water right is in its relative priority. Remember, first in time is first in right. By spreading the Delta water burden to all who divert water from the watershed it is not just water that is physically taken but also taken is the benefit of priority. When one adds to this the fact that areas north of the Delta also are the subject of area-of-origin protections, the Attorney General and Delta Vision reallocation concepts, if implemented, would, indeed, take a great deal.

Additionally, proceeding in this manner creates conflicts over the reallocation of water that need not exist. In recent years those north of the Delta and those within export areas have worked together to avoid the whole question of a taking and the litigation it will engender

through the development of water markets that allow water to be sold and either used within the export areas or dedicated to Delta uses. These markets combined with the development of additional water north of the Delta in facilities such as the proposed Sites Reservoir are better models for how to provide water for the Delta than the takings proposals advocated by Delta Vision and the Attorney General.

Finally, and most significantly, the Delta Vision proposals will destabilize the water rights system. As noted earlier, the prior appropriation doctrine was intended, in part, to inject an element of legal certainty into an inherently uncertain physical situation. Undercutting the concept of priority undercuts that system and destabilizes it. A destabilized water rights system can support very little and it certainly cannot support the socio-economic needs of the State of California.

In this regard, proceeding with proposals to reallocate water without compensation will also thrust the state into decades and decades of costly and counterproductive litigation. Moreover, that litigation will not just be takings litigation. It will include the adjudication of the entire Sacramento San Joaquin River systems, including the Delta. This is the very “legal Frankenstein” that Congress urged the Bureau of Reclamation, in its development of the CVP, to avoid when it told Reclamation that it needed to recognize prior water rights though the execution of Settlement Contracts with senior water right holders on the Sacramento River.⁶

All of this can and must be avoided. Now is not the time to chart new social policy by ignoring private property rights in water in order to address problems in the Delta. Instead, one should fully utilize the existing system of water rights, recognizing property rights, and allow that system along with the water markets engendered by that system to work as intended to address the scarcity of water and the need to reallocate it to meet Delta needs.

⁶ See, e.g., Engle, Central Valley project Documents, Part 1, 84th Congress, 2nd Session, House Document No. 416 (1956) at p. 679.