

# environs

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# THE PERIPHERAL CANAL

## hydrological hydra

To the earliest Californians, conservation of water—the lifeblood of all earth's children—was a sacred trust. Western water law, however, developed from the frontier ethic that whoever claimed something first owned it. Thus, in the California of 1981, water is treated and exploited as a commodity—a liquid gold.

Water is not scarce in California. Annual average run-off far exceeds present and estimated future requirements. Unfortunately, run-off occurs in winter and spring, when our needs are minimal. Additionally, 70% of the total streamflow occurs north of Sacramento, while 80% of the consumptive requirements lie farther to the south. California's extensive agricultural industry, which has rerouted large amounts of surface water from marshlands to provide water for irrigation, is currently producing deserts. Continuing irrigation and the universal use of chemical fertilizers also salifies the soil. Groundwater overdraft increases each year. While supply and demand rarely coincide naturally, we compete to own rather than sensibly allot water resources, and the law has failed to recognize adequately or enforce protection of the public interest. Technology has tended towards expansion to consume and destroy rather than preserve and nurture.

The Central Valley Project (CVP) of California began in 1933 to implement the state water plan. The Project and plan were designed to rectify the state's natural water/need ratio imbalance. Because the state could not sell bonds to fund the Project during the Depression, the CVP was federally administered and financed beginning in 1937. Its declared purpose then was to provide for (1) river regulation, navigation and flood control; (2) irrigation and domestic uses; and (3), power. (Rivers and Harbors Act in 1937, as reprinted in Delta Water Facilities, Bulletin 76, July 1978, published by the California Department of Water Resources.)

The State Water Project (SWP) and the state water plan developed symbiotically after WW II. First, water from the north would have to be transported south. Next, something had to be done about the middle, where the naturally complicated hydrological network of the Delta and bays alternately flushes San Francisco Bay clean or siphons seawater inward. The Delta is the leak in the dyke of the state's freshwater system. A cross-channel transport facility has been on the boards since 1951 to solve this problem.

(See CANAL, page 8)

## LETTER FROM THE EDITOR

MICHAEL ENDICOTT

Well this issue will be the last for the school year. Though we will close for the summer, the environmental law field is blooming with controversy. A brief summer forecast indicates that we will have much to write about in the fall.

Secretary of Interior Watt has gone ahead with oil leases off Santa Maria, but apparently he will withhold the more controversial northern areas for later action. These increased oil leases make legislation concerning toxic substances and hazards necessary.

The fate of northern California's waters will be increasingly discussed. The Peripheral Canal has turned into an extremely hot political potato to be left to the resolution of the voters in June 1982. The introduction of several "unacceptable alternative" bills has shifted the

focus of the debates. Will rejection of the S.B. 200 referendum, which contains some environmental safeguards, mean the eventual passage of a canal bill with fewer or no safeguards? It is likely to be several years before the Wild and Scenic Rivers designation, that Andrus issued just prior to leaving office, will be a concluded matter.

The courts are seemingly playing a greater role in environmental management and planning, and the problems they must cope with are getting more complex. We hope you have enjoyed reading the articles we have published this year. We have endeavored to present the arguments on both sides of the issues without being too biased.

Your continued support is greatly appreciated and we hope that you will contribute again next year with suggestions, articles, and \$\$\$\$\$\$\$\$. A donation form can be found in the back of this issue (tell a friend!). Thank you to all who made this year's publication possible.

## NEW STATUS □ for □ MOBILE HOMES

On September 26, 1980, Governor Brown signed into law Senate Bill 1960 which will allow mobile homes in areas zoned for single-family dwellings. The new law, which will take effect on July 1, 1981, is intended to offer Californians an additional opportunity to own affordable housing without sacrificing the advantages of the traditional single-family residential neighborhood. S.B. 1960 precludes cities and counties (including charter cities, counties, or city and counties) from prohibiting the installation of mobile homes on permanent foundation systems on lots zoned for single-family residences. Previously, local governments were able to prohibit mobile homes in areas zoned for single-family dwellings.

S.B. 1960 only applies to mobile homes certified under the National Mobile Home Construction and Safety Standards Act of 1974 thereby excluding mobile

homes constructed and/or purchased before October 1976.

Although communities may not exclude mobile homes from areas zoned for single-family residences, local governments may determine certain lots within the zone to be compatible for mobile home use. The purpose of this provision is to give local governments certain discretionary authority in implementing the new law.

S.B. 1960 further provides that a city or county may subject mobile homes (and the lots on which they are placed) to the same development standards that would apply to a conventional single-family dwelling on the same lot (e.g. building setback standards, side and rear yard requirements, architectural requirements and other restrictions). Architectural requirements, however, are limited to the mobile homes' overhang, roofing material, and siding material. Furthermore, a local government may not subject the mobile home to any development standards which will have the effect of precluding it from being installed as a permanent residence.

Sponsors of the bill included the California State Department of Housing and Community Development and the Western Manufacturing Housing Association. Opposing the measure were local organizations and lobby groups such as the League of California Cities and the California Chapter of the American Planning

(See MOBILE HOMES, page 7)

# PREEMPTION of state nuclear plant REGULATION

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## Two Cases Before the Ninth Circuit

The decision whether states can exercise regulatory authority over particular aspects of nuclear power plants will be handed down by the United States Court of Appeals for the Ninth Circuit in the very near future. Two federal district courts have struck down most provisions of the Warren-Alquist Energy Act (California Public Resources Code sections 25000 et seq.) that regulate nuclear plant siting. The district courts held that these laws conflict with or impede federal regulation of nuclear power as reserved by the federal Atomic Energy Act of 1954 as amended (AEA). The Ninth Circuit has consolidated these two cases on appeal.

This litigation is the first direct confrontation in the federal courts between a state, seeking to regulate nuclear plants, and electric utilities, contending that the AEA shields them from state scrutiny. The litigation is of considerable import not only for California, but for all states, because it may define the permissible limits of state regulation over nuclear power.

### District Court Cases

On October 2, 1978, Pacific Legal Foundation (PLF) and individual plaintiffs began the attack on California's nuclear laws by filing suit against the Cali-

fornia Energy Commission in the United States District Court for the Southern District of California. PLF asserted that California's three nuclear laws, the 1976 amendments to the Warren-Alquist Act, were pre-empted by the AEA. (See Cal.Pub.Res.Code sections 25524.1, 25524.2 and 25524.3.) The Energy Commission countered that the AEA pre-empted state regulation of nuclear power only in the area of radiation hazards. The Energy Commission reasoned that the state nuclear laws regulate reactor economics and reliability rather than radiation hazards; therefore, the laws do not conflict with federal regulation.

Charles Warren, author of California's nuclear laws, states that they are "designed to provide a pause in the development of nuclear power plants until certain stipulated problems which may 'clog' the nuclear fuel cycle are resolved." For example, without the nuclear laws, spent fuel storage facilities may be exceeded, resulting in the premature shutdown of nuclear plants.

The Energy Commission also challenged PLF's right to bring the case to court, arguing that plaintiffs met none of the requirements for "standing" or "ripeness". To have standing, plaintiffs must show that there is a case or controversy; that they have a personal stake in the outcome; and that there is a real or threatened injury for which the court can grant relief. Closely related, ripeness requires that the harm asserted has matured sufficiently to warrant judicial intervention.

The district court found that PLF had standing because one nuclear engineer had lost his job when San Diego Gas & Electric cancelled the Sundesert nuclear power project in 1978. The project was allegedly cancelled because of the constraints imposed by the nuclear laws.

On the merits, the district court held that section 25524.2 was pre-empted by the AEA. This section prohibits construction of nuclear power plants without state certification of a federally-approved high-level nuclear waste disposal program. (See "Nuclear Safeguard Laws: Pro and Con", *ENVIRONS*, vol. 4, no. 1.) The court further held that the challenges to sections 25524.1 and 25524.3 were moot. The technologies addressed in these two sections have been abandoned, at least temporarily, as being either too dangerous or uneconomical. (*Pacific Legal Foundation v. State Energy Resources and Development Commission*, 472 F.Supp. 191 [S.D. Cal. 1979].)

Also in 1978, Pacific Gas & Electric (PG&E) filed suit against the California Energy Commission in the U.S. District Court for the Eastern District of California. PG&E challenged the three nuclear laws at issue in the PLF case and fourteen other provisions of the Warren-Alquist Act related to nuclear power plant siting. These challenged sections link site selection criteria to population density, energy needs, availability of alternate sites and technology, and conformity to appli-

cable land use regulations. (See Cal.Pub.Res.Code sections 25500, 25502, 25503, 25504, 25511, 25512, 25514, 25516, 25517, 25519, 25520, 25523, 25528 and 25532.)

In response, the Energy Commission argued that the challenged sections were enacted to protect legitimate state interests to ensure Californians of reliable, economical and environmentally sound energy sources, and therefore were not pre-empted. Arguments were also raised on grounds of standing, ripeness and estoppel.

PG&E alleged standing on the basis that it had been forced to suspend its Stanislaus nuclear project because of the nuclear laws' certification requirements. The Energy Commission countered with evidence (including an affidavit from PG&E's president) that the challenged laws did not cause PG&E to suspend its project. Regarding ripeness, the Energy Commission argued that PG&E could not seek judicial action until the administrative process of carrying out the nuclear laws had been fully applied. Finally, the Energy Commission claimed that PG&E was estopped from challenging the laws because it had supported enactment of the same laws it was now attacking. The estoppel doctrine restricts a litigant from claiming the benefits of a statute and also challenging its validity.

The district court held for PG&E on all issues, striking all seventeen challenged sections of the Warren-Alquist Act. (See *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 489 F.Supp. 699 [E.D. Cal. 1980].)

### The Ninth Circuit

Both decisions were appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit has consolidated the two cases and significantly expedited the hearing and briefing schedule. Briefs of both parties were filed by August 1, 1980 and oral argument commenced on October 9, 1980.

Initially, the Ninth Circuit will review the lower courts' determinations of standing, ripeness and estoppel. If the Court reaches the merits, it will use the doctrine of pre-emption to determine whether and to what extent Congress has precluded state regulation of nuclear power. A federal statute pre-empts state authority where, pursuant to the supremacy clause of the U.S. Constitution, there is explicit federal pre-emptive language or implicit congressional intent to pre-empt state laws.

The two basic issues being considered by the Ninth Circuit are: first, whether Congress, through its enactment of the AEA, impliedly intended to pre-empt states' abilities to enact nuclear laws for purposes other than regulation of radiation hazards; and second, whether Congress intended to pre-empt virtually all state regulation of nuclear energy sources, including state authority to regulate the generation, sale and

transmission of nuclear power. Implicit in the determination of these two issues is resolution of whether or not the state will have the ability to prevent construction of proposed nuclear power plants.

The district court opinions and the appeal sparked significant interest among other states. Thirty states have submitted *amici* briefs to the Ninth Circuit supporting the Energy Commission's position. These states, along with California, generally argue that the district courts have struck down necessary and legitimate state regulations enacted for purposes not addressed by the AEA. The federal government primarily regulates radiation hazards related to nuclear plants. Thus, states conclude that the PLF and PG&E cases create a regulatory vacuum, allowing utilities to avoid basic state regulation regarding, for example, reactor economics, reliability, land use, and cooling-water consumption. In fact, Massachusetts argues that these two decisions "pose a substantial threat to the ability of the states to protect their legitimate interests, and constitute a challenge to the exercise of traditional police powers that is virtually without precedent."

Regardless of the outcome in the Ninth Circuit, the decision will assuredly be appealed to the United States Supreme Court.

### The U.S. Supreme Court

The ultimate resolution of these cases may depend upon which of its two divergent policies the U.S. Supreme Court will follow. On the one hand, in two recent decisions the Court demonstrated a pro-nuclear development attitude by upholding the Price-Anderson Act's limitations on liability for nuclear accidents (see *Duke Power Co. v. Carolina Environ. Study*, 438 U.S. 59 [1978]) and by confirming the Nuclear Regulatory Commission's administration of reactor licensing (see *Vermont Yankee v. NRDC*, 435 U.S. 519 [1978]). On the other hand, the Court has expressed a willingness to uphold states' rights to regulate where ramifications of federal actions might interfere with traditional aspects of state sovereignty in the labor relations field (see *National League of Cities v. Usery*, 426 U.S. 833 [1976]) and in the water rights area (see *California v. U.S.*, 438 U.S. 645 [1978]). In addition, there is state supportive presumption against pre-emption in cases where federal pre-emption is merely implied. State regulation of nuclear plants is an issue that would seem to divide the Court between the national interest in nuclear plant development and the states' rights to regulate for themselves.

### Impact of Affirming the District Court Decisions

If the district court decisions in the PLF and PG&E cases are affirmed by the Ninth Circuit or the U.S. Supreme Court, the outcome is still somewhat

# ■ Keeping the ■ FIVE ALIVE

On January 19th, 1,235 miles of northern California rivers became protected under the National Wild and Scenic Rivers Act. During his final hours in office, former Secretary of the Interior Cecil Andrus approved the addition of five California rivers. Andrus was acting upon a request made by California Governor Brown last July to protect the Eel, American, Klamath, Trinity and Smith rivers under the federal act. The inclusion of the rivers was applauded by federal and state conservation agencies, the rafting industry and environmentalist groups. The inclusion was denounced by timber interests, four county governments, water districts and southern California farmers.

## The Enabling Act

The National Wild and Scenic Rivers Act permits the Interior Secretary to act without congressional approval on an application made by a governor. Before the Secretary can consider including a river in the federal system, the river must have been designated wild and scenic by the state legislature. The five California rivers were so designated. The California statute permits the construction of water diversion projects that benefit local residents. Adding federal protection to the rivers would prohibit all dam and diversion projects. Before Andrus could act on Brown's proposal the Interior Department had to prepare an Environmental Impact Statement (EIS). In preparation of the report the U.S. Interior Department's Heritage Conservation and Recreation Service held a series of meetings at which public debate illuminated the conflicts over Brown's proposal.

## Support and Opposition Surfaces

Southern California water districts oppose the federal designation because they fear it will preclude the availability of water for the Peripheral Canal. Southern California agricultural interests also oppose the designation because further protection for the five rivers would mean "locking up" the possibility of drain-

ing more water from northern California for southern California farming. Proponents of including the five rivers not only concede but encourage the potential "locking up" effect. A major impetus to proponents was the fear that the state legislature intended to "gut" the California Wild and Scenic Rivers Act by removing protection from some rivers to encourage development.

California Resources Secretary Huey D. Johnson emphasized the need for water conservation. He compared damming the rivers to "burning our Mona Lisas to keep warm". Rafting industry representatives encouraged inclusion citing the importance of the rivers as scenic and recreational resources that millions of people visit each year.

In addition to preventing development in the river, Wild and Scenic status also maintains the adjoining lands as wilderness. The federal act preserves an average of 100 acres per mile along both sides of the river. Timber interests opposed Brown's proposal claiming their industry is already over-burdened by environmental regulation. A spokesman for an organization of logging companies also blamed "bureaucratic-overlap" for the industry's problems. The local governments effected oppose expanding wilderness areas because of the shrinking tax base the timber industry says federal intervention will create.

David Pesonen, director of the California Department of Forestry, voiced the viewpoint of many environmentalists that "forest land in California serves a lot of other needs than simply growing timber." Pesonen also rebutted the timber industry's charge that recent environmental regulation is the culprit behind that industry's problems. He cited a 20 year old University of California study which predicted serious industry problems in the 1970's due to the timberland owners' lack of foresight and poor management practices.

## Recommendation and Reactions

After hearing both sides and researching the ecological and economic effects of the proposal, the Heritage Conservation and Recreation Service recommended all five rivers for federal Wild and Scenic status. Federal law required Andrus to wait 30 days before unilaterally making a decision. At the heart of the controversy lay the political reality that Carter's Secretary would be more likely to favor the proposal than would Reagan's Secretary. The 30 day period would end just prior to the end of Andrus' term in office. To prevent action under the Carter administration, opponents to inclusion followed two courses of action.

### ● Use of the Legislature

The first was to use legislative procedure that would prevent Andrus from acting unilaterally. Through a budget proposal rider, Senator James

McClure, R-Idaho, sought veto power over an Interior Secretary's wild river recommendations for the chairmen and ranking minority-party members of the appropriate House and Senate committees. The rider, amended by Senator Dale Bumpers, D-Ark., would have required a 60-day congressional review period during which Congress could bar the inclusion of a river recommended by the Interior Secretary. Congress did not pass the amended rider before the session ended. Both the amendment and the rider had drawn criticism from the governor and the press.

Part of the criticism centered on the partisanship of the proposal. The McClure rider would have given Senator McClure veto power because of his approaching position as chairman of the Senate Energy and Natural Resources Committee. The effect would have been to center veto power primarily in the hands of the Republicans. The Bumper amendment lessened the effect of partisanship but still involved a substantial alteration of a 12 year policy. It would have seriously undermined the power of the Interior Department to add rivers in special circumstances. Legislative intent would have been defeated by making the decision of adding rivers one for Congress alone.

#### ● Use of the Judiciary

The second course taken to prevent Andrus from acting was to resort to the judiciary. A series of suits was initiated by opponents including water districts, timber companies and county governments. The suits sought to restrain the Interior Department from acting, claiming the Department was moving too fast. The suits asked the court to enjoin Andrus from making a decision without further public input. Specifically, the suits charged that the EIS was biased and that a new period for comment should be permitted.

A district court in San Jose dismissed an action to enjoin Andrus from acting prior to the completion of an EIS. The court held that a determination as to whether the EIS study was sufficiently thorough would be premature until the EIS was completed.

After the EIS was released, suits were filed in San Jose and Portland. The Portland suit charged that the rivers were not ready for inclusion under state and federal laws since the state legislature had not approved a management plan. U.S. District Court Judge James M. Burns issued a temporary restraining order on January 16th. The order prevented Andrus from acting prior to a hearing on a motion for a permanent injunction. Burns' ruling took the decision out of Andrus' hands since his term would expire six days before that hearing. With the EIS's release, the San Jose court held that the issue was ripe for justiciability and issued a preliminary injunction. This action had the same potential effect as Burns' ruling.

On an appeal heard January 19th, the 9th Circuit reversed and remanded both cases with instructions to

dismiss because there had been no final agency action by the Interior Department. By acting on a procedural requirement, the courts had again bypassed addressing the issue of what constitutes adequate preparation time. However, by acting on the last day of the Carter administration's term, the court allowed Andrus to sign the order adding the five rivers.

#### Litigation Lies Ahead

In order to soften the impact on timber and mining operations, Andrus approved only 1,235 of the 4,006 miles requested by Governor Brown. Yet, opponents to including the Eel, American, Klamath, Trinity and Smith rivers under the National Wild and Scenic Rivers Act remain dissatisfied. They believe their cases were dismissed on technicalities and that the three months time spent preparing the EIS was insufficient. Thus, they are bringing new suits hoping for a resolution of the issues.

Northern California counties of Del Norte, Trinity, Humboldt and Siskiyou joined with lumber firms and others in a suit filed February 2nd to reverse the action by Andrus. A similar suit was filed in Portland by southern Oregon Counties and timber interests. The main issue seems to be whether inclusion of the rivers without completion of a state management plan violated federal law. The suits claim that the California Legislature needed to develop a separate management plan before the Interior Department could act. Since the federal act includes provisions for federal management, the debate will revolve around the necessity of a separate state plan. There is indication that some of the county supervisors have changed their position and no longer oppose the inclusion of the rivers. Whether the new suits will be as vigorously pressed is then questionable.

Environmentalists fear that Reagan's Secretary of the Interior, James Watt, will attempt to repeal Andrus' actions. Prior to the election, the Heritage Conservation and Recreation Department asked their counsel to determine whether a river added by the Interior Department could be removed by a new Secretary of that department. Their solicitors were unable to reach a definitive conclusion because such an act would be wholly unprecedented. The Wild and Scenic Rivers Act permits Congress to remove from protected status a river they had previously included. But as to the Secretary's power to do the same, the Act is mute. The infrequency of an Interior Secretary's adding rivers, the change in the federal government's environmental policy and the hesitancy of the district court to resolve the issues have combined to threaten the lives of these five wild and scenic rivers.



# Mobile Homes

(continued from page 2)

Association. These organizations opposed the measure primarily because it would further limit a community's ability to regulate development.

Opponents preferred the alternative approach in Assembly Bill 2698 which also would have allowed certain mobile homes in areas zoned for single-family dwellings. This bill, unlike S.B. 1960, would have permitted local governments to establish separate zones for mobile homes installed on foundation systems. In addition, the architectural requirements which a government could impose on a mobile home would not have been limited as under S.B. 1960. A.B. 2698 also would have allowed local governments to impose specified requirements and standards on mobile homes so long as the restrictions did not exceed those placed upon conventionally constructed homes.

A.B. 2698 was approved by the State Legislature but did not become law because of a clause contained in the bill which provided that it would not take effect if S.B. 1960 became law.

## Legal Issues

By allowing a community to designate lots for mobile home use in a single-family zone, does S.B. 1960 require a local government to "spot-zone"? Spot zoning is an invalid use of zoning power which occurs when a small area of land is classified in a manner which is inconsistent with surrounding zoning patterns. The purpose of spot zoning is to benefit a landowner by placing a higher zoning classification on his land so that it will be economically more valuable. The classification, however, does not benefit the community as it fails to advance the public health, safety, morals and general welfare.

S.B. 1960, however, does not authorize spot zoning. Designating certain lots as compatible for mobile home use will obviously benefit the owners of these lots since it will give them greater flexibility in developing their land. The mobile home designation, however, does not make a parcel inconsistent with surrounding zoning patterns. It does not intensify the use of land but merely allows it to be occupied by a single-family dwelling of either conventional or mobile home design. Moreover, the mobile home designation may provide a substantial benefit to the community by providing low and moderately priced alternatives to conventional housing.

By designating certain lots as compatible for mobile home use, will a city or county violate the equal protection clause of the U.S. Constitution by discriminating against an owner whose lot is not zoned for mobile homes? Equal protection is not denied when a community can demonstrate that the distinction

between lots is not arbitrary but based upon some difference between the lots which justifies their differential treatment. For example, a lot might not be designated for mobile home use because its shape might not permit a mobile home to be placed on it without violating the setback requirements of a city or county.

What effect will S.B. 1960 have on restrictive covenants which prohibit mobile homes on single-family lots? Covenants which prohibit uses normally allowed under a less restrictive zoning ordinance have been upheld by the California courts. For this reason, the state Legislative Counsel has indicated that covenants prohibiting mobile homes should not be affected by S.B. 1960 (including covenants entered into before and after the bill was approved).

## Implementation Problems

In addition to these legal questions, the new statute poses several implementation problems for cities and counties. One problem will be determining which lots are "compatible" for mobile home use since this term is not defined under the law. The Department of Housing and Community Development (HCD), the state agency responsible for administering S.B. 1960, has indicated that local governments may use their own judgment in determining compatibility, provided there is a rational basis for this determination. In the opinion of HCD, compatible lots for mobile home use should generally include those where mobile homes will meet existing zoning and subdivision requirements. Other factors which might be used for determining compatibility include architectural and historical considerations. For example, a lot in a historic preservation district might be incompatible for mobile home use since a mobile home at that location might conflict with the historic character of the area.

Public acceptance of the new law may ultimately decide whether it will be implemented as currently written. A recent hearing before the El Dorado County Board of Supervisors suggests that public acceptance of the law may be divided. At that hearing, an ordinance that would allow mobile homes in previously restricted single-family residential zones was considered. Public comment on the proposed ordinance was sharply divided. For this reason, the Board of Supervisors postponed a decision on the ordinance until county staff members could consider the comments made during the hearing. The response to this ordinance suggests that the general public reaction to S.B. 1960 may also be divided, which may make modifications in the new law necessary. Thus, public opposition to the law may bring about the "sudden need" to amend S.B. 1960 before it becomes effective on July 1, 1981.



# Peripheral Canal

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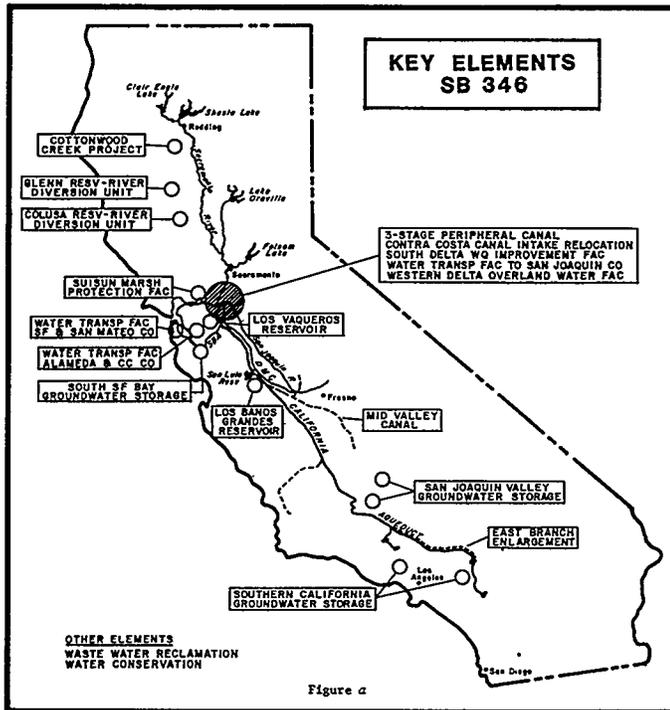


Figure 2

system. A cross-channel transport facility has been on the boards since 1951 to solve this problem.

California Senate Bill SB 200 proposes to lock into place the final pieces of a \$7.2 billion dollar jigsaw puzzle. The most controversial piece of that puzzle is the proposed 43-mile, \$515 million dollar earthen ditch called the Peripheral Canal. The Canal has caused a split between north and south, physically and politically.

## Journey to the Center

The Delta is the heart of the state waterworks. It is a completely engineered environment encompassing 1,100 square miles interlaced with 700 miles of waterways. Controlled releases from northern reservoirs flow into the Delta and are then diverted to consumers in the south. This water supplies nearly 90 public agencies that represent two-thirds of the state's population. When tidal-influenced sea water replaces the fresh water normally entering the Delta from northern rivers, water delivered farther south becomes increasingly brackish due to salinity intrusion.

Several cities border the Delta, but few people inhabit the approximately fifty reclaimed islands devoted almost exclusively to farming. However, anadromous (migratory) fish populations important to the fishing industry, especially striped bass and salmon, depend upon Delta waters for their survival. Bass use the Delta as a spawning area, and salmon pass through it on their way to spawn in upstream rivers. Major hazards to fish life include: blockage of spawning areas, reduction of stream flows, higher water temperatures,

variable direction of flows (causing fish to lose theirs), fungus growths and diseases resulting from contact with fish screens designed to avoid their being drafted to the export dumps, and suction into power turbines. Similar factors had already caused substantial losses at least 25 years ago.

The Delta is also a part of the Great Pacific Flyway, a stopping place for some 30% of the migratory waterfowl of the northern continent. The marshlands were once an avian paradise. Today birds must resort to oases artificially maintained by the Department of Fish and Game. Although both federal and state legislative acts propose to maintain the Delta environment, it is both physically and politically overstressed.

Proposition 8, a state referendum for Delta wildlife conservation, passed in November 1980 as a measure partnered with SB 200 to promote the environmental quality of the Delta. Only two of the four agencies involved, the Department of Water Resources [DWR] and the Department of Fish and Game, have been able to agree on standards or propose any solid plan to regulate standards. Therefore, the prospects for implementing Proposition 8 are unclear at this time.

The federal government had, before President Reagan was elected, expressed interest in sharing responsibility to protect the Delta. Since the President is determined to dismantle the yoke of Federalism, it is now uncertain what role the federal government will play in the future of the Delta.

## The Contracts

The picture is further complicated by long-term contracts that commit the CVP and SWP to provide water into the future. These contracts may require delivery of more than twice the current annual yield by the year 2000. Because the contracts guarantee delivery of fresh water, the above-mentioned problem of brackish water could expose the state to liability in billion dollar sums. This places two of the primary objectives of the current project—to protect the environment and economy of the Delta and to protect the financial integrity of the CVP and SWP—in conflict.

Two classes of water are sold by the SWP. "Entitlement water" is that supply allocated by consumers who contracted to buy water in the 1960's. The remainder is "surplus water", which sells for one-seventh the price of entitlement water. There has always been surplus water in the past. For example, in 1975, the Kern County Water Agency—largest agricultural water agency in California—obtained half of its water at \$3.50 per acre-foot (435 gallons), one-seventh of the entitlement price of \$21.00.

The Delta Environmental Advisory Committee (DEAC) was formed in 1973 by members of the Salmon and Steelhead Advisory Board, the Sierra Club, the Audubon Society, and the California Wildlife Federation, among others. The group submitted a

disheartening report upon completion of a four year study that underscored three areas where hard questions still remained to be answered:

First, can adequate screens be developed to prevent further significant losses of fish populations? The Peripheral Canal would add four siphoning pumps from north of Lodi to Clifton Court Forebay.

Second, will there be adequate freshwater flows to protect the Delta, Suisun Marsh, and bay environmental conditions? Will reduced flows be adequate to guide fish on course?

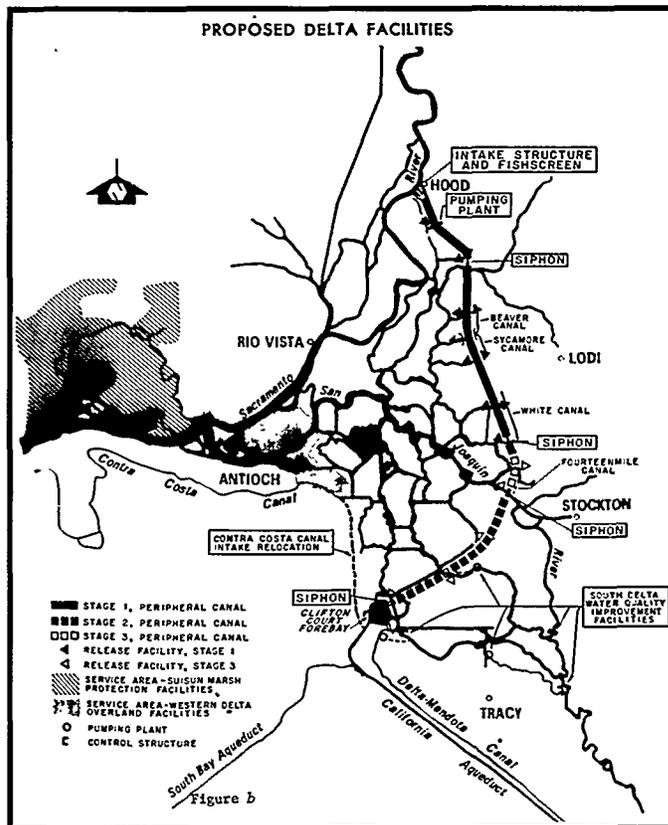
Third, can we develop institutional guarantees to insure that the Canal will be properly designed and operated? After stating that 'Proper design and operation' has turned out to be a much greater hurdle than expected—one that none of the governmental agencies has been able to leap, the DEAC queried whether the Canal can be used "to protect and where possible enhance rather than damage the environment of the Bay, the Suisun Marsh, the Delta, and the North Coast rivers."

**Pros...**

Given that 90% of the California water plan is a present, working reality, it seems unreasonable to hesitate at this point. The system was designed to have a cross-channel waterway. What use is a puzzle with pieces missing? A makeshift solution for the missing pieces would always be just a cardboard cutout, patchwork filler. The rest of the waterworks seem as permanent as the Roman aqueducts. The need is urgent; although projected estimated needs have not materialized, demand will almost surely increase beyond current capacity within fifteen years. Provisions for increased demand are already specified in the contracts previously mentioned.

Early this year, Pete Wilson, mayor of San Diego vowed in a speech before the legislature that the people of southern California would refuse to be "left to rot in the desert." Larry Kapiloff, a San Diego Democrat, recently introduced several alternative bills, claiming that if northern California turns down the Canal, southern California will possibly vote to dam San Francisco Bay for L.A.'s thirsty citizens. Even Governor Brown has been reported to have said that opposition to SB 200 is "just plain crazy."

At first, agribusiness pushed for the Canal. Since passage of Proposition 8 however, some farming interests have backed off, recognizing that it would be an expensive proposition to be honest about preserving the Delta. This is because agribusiness calculates that at some point a bill to guarantee water for agricultural purposes will pass without the notorious expenses of environmental protection, and without compromise on their side. This thesis rests on three grounds: 1) Los Angeles taxpayers are frustrated by the enormous sums they pay for northern water; 2) they are afraid that



because Arizona is decreasing Los Angeles' allotments from the Colorado River, they may be left bone-dry; and 3) the Kern County Water Agency continues to support the Canal.

**And Cons**

SB 200 is a package deal including, in addition to the Canal itself: diversion units at the Glenn or Colusa Rivers, additional reservoirs, canals, four pumping stations, and at least two dams. Is SB 200 necessary? Would the Canal use increased water flows to propel California forward in the agricultural marketplace? Can we make the Delta function as a chambered nautilus that sucks and expels water within discreet divisions? If our understanding of the host's life-mechanisms is incomplete, will the Peripheral Canal, with its multiple pumping stations, rear itself as a hydrological hydra?

There has been no water policy reform, no provisions for groundwater management, and insufficient emphasis on conservation and protection for the Delta and North Coast rivers. The canal is described as plumbing for northern rivers. Northern voters are not merely concerned about the environmental integrity of the Delta, but also about the quality of life in the San Francisco Bay area. It galls them to think that while people in Mendocino were saving thousands of gallons in the last drought by not flushing their toilets, people in the same situation in Beverly Hills were watering their lawns. Nevertheless, the North/South battle is something of an illusion.

According to Michael Storper, a lobbyist for Friends of the Earth:

We have a massive water industry, supported by public funds, promoting a certain kind of agricultural development, with an army of lawyers and lobbyists, coming up with very sophisticated ways to...bilk the public.

Storper contends that agriculture has expanded onto lands poorer and poorer in terms of soil quality, thereby continuing to draw down the water table. "And every time they have a new crisis, they come back to us for a new water project." This turns out to be an easy solution, if temporary, for two reasons: 1) use of groundwater continues to be private business, and agriculture has botched it, while 2) water obtained under contract with governmental agencies is not only absurdly cheap for farmers, but payment may also be postponed for 150 years. Agriculture uses 85% of the state's total developed water supplies.

Meanwhile, California's population growth has slowed in the 1970's. The California League of Women Voters, which opposed SB 200 before and still opposes it, reports that "[T]he tremendous built-in demand for water [hasn't] materialized and population projections [has] nose-dived." Further, the costs of dams and 'plumbing' have skyrocketed since the Bond Act to finance this portion of the SWP passed in 1960.

### The Law

To anyone at all familiar with elementary hydrological principles it must seem astounding that the law should divide water into surface water and ground water and treat each independently; the first thing a hydrologist always tells a lawyer is that ground water and surface water are 'a single resource.' Joseph L. Sax, Water Law, Cases and Commentary, Pruett Press, Boulder (1965).

California water law developed from the notion that, "First in time is first in right." The law classically distinguishes between surface water and ground water for two reasons. The first has to do with ancient property laws which guaranteed that the vertical measure of one's property extended to heaven and to hell. Thus, California water law creates an individual right to percolating water beneath the surface, for without water any land is finally worthless.

Joseph Sax, a professor of water law at the University of Michigan and a renowned expert in his field, has postulated that outdated theories of water law have had two consistent results. First, groundwater

reservoirs are always exploited to deplete supply to crisis proportions. Second, there is "a persistent but not illegal interference" with the supply of prior appropriators.

### Conclusion

U.S. Geological Surveys report that between 1985 and 2015, groundwater will probably provide 50% of the nation's water supply, as compared with 20% in 1963. In California, there are at least five major underground aquifers with ample capacity to store whatever water the Valley may require, yet there is no regulation of agricultural groundwater use. There are studies. Not only is the groundwater table diminishing annually, but subsurface storage areas are also being routinely and perhaps permanently poisoned by toxic chemical wastes, industrial fertilizers, and increased salinity caused by excessive irrigation.

Whether or not SB 200 is finally approved, critical water issues have yet to be explored. We need to integrate surface and groundwater rights legally in a way that accords with physical reality.

There are additional considerations. Two-thirds of our potential water supply evaporates or is lost through seepage. Only the Delta-Mendota Canal and the California Aqueduct are lined. Lining canals in the Imperial and Coachella Valleys would save thousands of acre-feet of water. These canals are privately owned. Another problem is that there are 4,000 agencies administering water needs in this state!

The grim conclusion of at least one hydrolics expert at the University of California at Davis is that only utter catastrophe will resolve the conflicts to compel progressive thinking about water. That opinion is echoed in the following warning:

It is more likely that human welfare in the United States will be impaired through degradation of water quality or through inept management than from a physical scarcity of water. Gilbert F. White, Strategies of American Water Management, The Univ. of Mich. Press, Ann Arbor (1969).

The fact remains that we are sharply divided, physically and politically, now more than ever.



# State Nuclear Plant Regulation

(continued from page 4)

uncertain. Should the Court void all seventeen challenged sections, then the California Public Utilities Commission's (CPUC) authority over utility finance and reactor economics would come into question. The CPUC stated in its *amicus* brief to the Ninth Circuit:

Under the [district courts'] ruling, the Nuclear Regulatory Commission construction and operation of nuclear power plants... [N]o government agency on the federal or state level will be able to determine the all-important question of whether a proposed nuclear plant is cost-effective and reliable in comparison to other alternative technologies.

The breadth and specificity of the Court's decision may or may not resolve this problem.

Some legal commentators claim that, irrespective of the issues before the Ninth Circuit, Congress has given states the authority to regulate nuclear plants through the Federal Water Pollution Control Act and the Clean Air Act. (See, for example, Meek, *State Radiation Protection Measures: The Impotence of Pre-emption*, 10 *Env'tl L.* 1 [1980].) This author feels that Congress should clarify state authority to regulate nuclear power; until such clarification, states still have jurisdiction pursuant to traditional public utility commission authority. Also, states can indirectly "regulate" nuclear power by reducing the need and incentive for further reactor construction. (See, Woychik, *State Opportunities to Regulate Nuclear Power and Provide Alternative Energy Supplies: Part I*, 15 *U.S.F. L.Rev.*... [1981].)

The scope of the decision will play a significant role in determining the impact on states' abilities to regulate nuclear power.

### Conclusion

The primary question must be confronted: what say will the states have in further development of nuclear power? Harvard Law Professor Lawrence Tribe states, "Congress has clearly indicated its intent to provide states with a nuclear option, not a nuclear mandate." (Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Pre-empted?*, 7 *Ecology L.Q.* 679 [1979].) Yet, even if this statement were adopted as a truism, does it necessarily follow that the states have the right to negate future expanded utilization of nuclear power? The federal courts or Congress must provide states with clear answers to the nuclear development issues.

Eric Woychik



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