environs

Volume 2, Number 2
January 1978

ENVIRONS, a non-partisan environmental law/resources newsletter published by the Students of King Hall School of Law, and edited by the Environmental Law Society, University of California, Davis.
The views expressed herein are those of the authors and do not reflect the position of the University of California School of Law or of the Environmental Law Society.
Submission of Comments, Letters to the Editor and Articles is encouraged. We reserve the right to edit and/or print these materials.

the peripheral canal: moment of decision

Since its construction was first recommended by the Department of Water Resources in 1965, the Peripheral Canal has been the subject of a raging controversy. Politicians, environmental organizations, and water users have altered and reversed positions, formed and dissolved uneasy coalitions. Gradually, the forces supporting the construction of the Canal have gathered momentum. Currently, the legislation which includes the Peripheral Canal as its key component is in the final stages of consideration by the State Legislature.

This article will examine some of the key elements involved in the controversy. With that background, the proposed programs contained in S.B. 346 (Senator Ayala, Feb. 18, 1977) will be reviewed. Finally, the future of the bill and the Peripheral Canal itself will be discussed.

The Central Valley Project (CVP) was originally authorized by the State of California in 1933 (Stats. 1933 c. 1042, see Cal. Water Code sec. 11000 *et seq.*) and taken over by the U.S. Bureau of Reclamation two years later because California was unable to fund the project. It was a huge scheme to develop the water resources of Northern California and make them available to the dry agricultural lands of the southern Central Valley and Southern California. Construction began in 1937 and the first unit of the CVP was completed in 1940. With the completion of the Delta-Mendota Canal in 1951, large-scale export of water from the Sacramento-San Joaquin Delta began in earnest.

In the subsequent 26 years, the scale of water export has grown tremendously. Part of this growth is due to the addition of the State Water Project (SWP) in 1959 (Burns-Porter Act, Cal. Water Code, Sec. 12930 *et seq.*). However, the physical conduit used to transport water has not changed. Water is impounded in the various CVP-SWP reservoirs north of the Delta and is released to flow down the Sacramento River. It flows into the northern reaches of the Delta and is pumped out at the Clifton Court Forebay in the South Delta. The water is then exported via the Delta-Mendota Canal (CVP) and California Aqueduct (SWP) to its agricultural destinations. In essence, the CVP and SWP are presently using the natural channels of the Delta as their cross-Delta canal.

Current exports from the Delta total approximately 5 million acre-feet per year (MAF/yr.). The result of this large-scale pumping has been to reverse the natural flow of water within parts of the Delta. (See chart.) The reverse flows and reduced outflow from the Delta have caused a number of problems, among which are disruption of the Delta fish populations and habitat, intrusion of salt water into the Delta environment, and reduced water quality in the Delta.

continued to page 8

case notes

In **Big Rock Mesas Property Owners Assoc. v Board of Supervisors of Co. of L.A.,** 73 Cal. App. 3d 218, 139 Cal. Rptr. 445 (1977), a property owners association filed a petition for a writ of mandate and an application for injunction to set aside approval of a tentative tract map for a proposed residential subdivision in the Santa Monica Mountains. The petitioners alleged:

(1) The proposed 15% access street was steeper than that allowed by county ordinance (which prohibited grades steeper than 10% unless there is evidence that a lower grade is impossible).

(2) The EIR filed in connection with the proposed development was inadequate.

The trial court denied the petition.

Affirming, the Court of Appeal held the approval of the access road was proper because there was evidence presented to the planning commission which supported its apparent finding that a lower grade was impossible. A specific finding was not required. The court upheld approval of the EIR because it detailed the mitigating measures and alternatives to the entire project.

The court construed Los Angeles County Ordinance No. 4478, Sec. 55 to mean that the exception applicable to short stretches of grades more than 6% did not pertain to grades exceeding 10%.

Interpreting the EIR Guidelines, which require an EIR to discuss alternatives, the court found the requirements applicable only to the project as a whole and not the various facets thereof. The court did not elaborate on the significance of this distinction.

Finally, the court refused to review the adequacy of the EIR. The standard for the sufficiency of the EIR is that which is reasonably feasible. It need only provide decisionmakers with information which describes the anticipated environmental consequences of a project and enables them to make an intelligent decision. The fact that the tentative tract map had been before the county since July, 1972 may have influenced this decision.

City of Carmel-By-The-Sea v Board of Supervisors, 71, Cal. App. 3d 84, 139 Cal. Rptr. 214 (1977). The city and other plaintiffs sought a writ of mandate directing the Board and the county zoning administrator to withdraw a use permit granted for a motel development. An EIR had found three significant adverse impacts:

(1) utilities, i.e. water and sewage

(2) traffic

(3) population, i.e. displacement of sixteen families residing in an old apartment building to be removed for the project.

The trial court upheld the permit.

The Court of Appeal reversed, holding that there was nothing in the administrative record from which an evaluation and resolution of environmental problems could even be implied. The court held that the zoning administrator's decision to issue the use permit was not sufficiently supported by written or transcribed oral findings.

The court noted that the zoning administrator, as the administrative official having final authority over the project, had the duty to review the EIR and to state in writing reasons supporting his action if his decision to approve a project allows "substantial adverse environmental consequences" to occur. In particular, the court found wanting any discussion of economic or social values of the project which might override the adverse effects disclosed by the EIR. The absence of such evaluation made the issuance of the permit invalid as a matter of law under CEQA.

Lake County Energy Council v County of Lake & Magma Energy Inc., 170 Cal. App. 3d. 851, 139 Cal. Rptr. 176 (1977). The County Energy Council sought to set aside the Board of Supervisors' certification of an environmental impact report and issuance of a permit to Magma Energy, Inc. (Magma) for exploratory geothermal drilling. The Council contended that an EIR prepared in connection with an application for exploratory drilling must assess the effects of commercial development in the event that geothermal resources are discovered. The Court of Appeal disagreed, ruling the Board did not abuse its discretion in certifying the EIR since Magma could not prepare a truly meaningful report on the impact of commercial production until the wells are drilled, and the geothermal potential is assessed. It noted that approval of the exploratory wells did not commit the Board to approval of general commercial development.

The Court concluded that the county's approval of exploratory drilling would in no way hinder future intelligent decisionmaking with respect to the environmental impact of geothermal development in the area.

City of Coronado v California Coastal Zone Conservation Commission, 69 Cal. App. 3d 570, 138 Cal. Rptr. 241 (1977). An application by the State Department of Parks and Recreation to convert a beachfront parking lot into a camping area, a project opposed by the City of Coronado, was denied by the Regional Coastal Commission. On appeal to the State Coastal Commission, the permit was granted nine days after the expiration of the Commission's 60-day time limit to act on the appeal. The City alleged that the Coastal Commission's failure to act within 60 days violated the act. Additionally, the City contended that the California Environmental Quality Act was violated by issuance of the permit without first obtaining an environmental impact report.

The Court of Appeal stayed the permit, ruling that Section 27423 of the Coastal Zone Conservation Act unambiguously states that the regional commission's orders become final if the State Commission fails to act within the 60-day time period. Consequently, the Court held that the State Commission lacked jurisdiction to grant the permit. The Court also noted that the EIR requirements of CEQA apply to the permit-granting functions of the Coastal Commission. The Coastal Commission is not specifically exempt from those requirements, and recent amendments to CEQA emphasize the legislature's intent that environmentally-oriented agencies comply with CEQA by filing an abbreviated version of an EIR.

Mike Boli and Bruce S. Klafter

tri-county water conservation

The 1977 drought has focused attention not only on California water law but also on methods available to municipal and private water suppliers to reduce residential water consumption. The tri-county water suppliers have relied on publicity about the water crisis, consumer education on household conservation techniques, water watch patrols, and, in some instances, water-waste ordinances. Each supplier has a slightly different legal framework in which to work depending on its status as municipal, county, or private water supplier. Officials report considerable success with their low-key approach to encouraging water conservation.

The American Waterworks Association in the Sacramento area has carried out much of the publicity and consumer education which have occurred over the past summer. The approximately 25 water suppliers in the organization observed an overall reduction of some 20% as compared with water use in 1976. This means consumers have used about 12 billion gallons less water in the first eight months of 1977 than in the first eight months of 1976.

The City of Sacramento passed a water-waste ordinance effective March 31, 1977. This ordinance prohibits gutter flooding and washing of sidewalks, driveways, and cement structures. The ordinance provides for warnings, fines, and finally water shut-off for persistent violation. Fines of $10, $50, and $100 for the second, third, and fourth offense, respectively, may be imposed.

Sacramento also initiated a water-waste patrol to take action on water-waste complaints and issue citations. The patrol members were required to take a mini police course which included self defense, but the people of Sacramento have been very cooperative in working to conserve water. The City of Sacramento reported decreased water use of 25% for June, 14% for July, and 9% for August as compared with water use in the same period of 1976. This decreased conservation may be due partly to the novelty of the problem wearing off and to less publicity now being generated about the drought as compared with last spring.

Sacramento, like much of the Central Valley, does not meter residential use of water. The Sacramento City Charter prohibits the city from ever requiring residential water meters. There had been speculation that an amendment to the City Charter might be placed on the recent city ballot but no such amendment was included. According to Bill Hetland of the Division of Water and Sewers, the cost of installation and the resulting water savings probably would not justify residential metering. Hetland suggests that if the drought continues for another year mandatory rather than voluntary reduction of all nonessential water use might be considered.

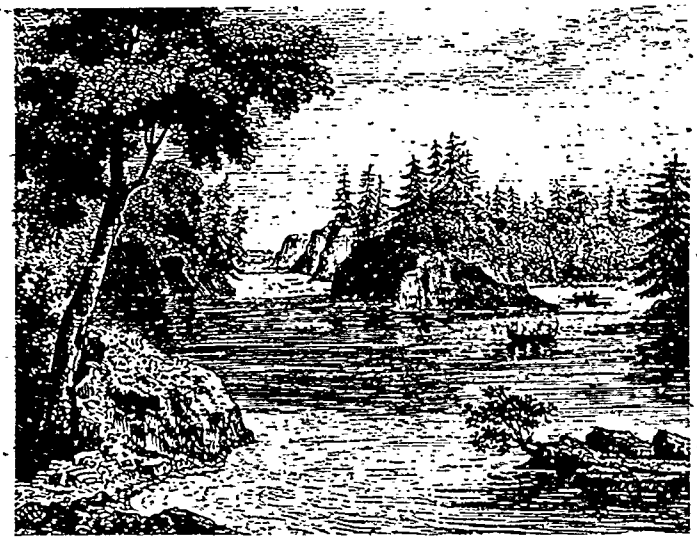
Sacramento County supplies water to only some 300 residences. The county contributed $8,000 to the Sacramento Area Waterworks Association for their publicity and education campaign.

Other Sacramento-area water suppliers used similar techniques to increase residential conservation of water. These suppliers include the Arcade Water District, the Arvin Water Company, and the Fruitridge Vista Water Company.

The Arcade Water District passed a drought ordinance in addition to the water-waste ordinance already in effect. This new ordinance calls for a $30 reconnection fee if water is turned off for water waste. Arcade has also participated in the Sacramento Area Waterworks Association's publicity and education campaign.

The Arvin Water Company has a water-waste ruling in effect which calls for fines from $10 to $100 and then water disconnection, with a reconnection fee, for water waste.

The Fruitridge Vista Water Company has depended on publicity, the Sacramento Area Waterworks Association's campaign, and a water-waste patrol. Warnings are first given for waste water and then water is cut off.



Woodland and Davis, which depend on ground water, have not had serious water problems. Neither has Fairfield, which receives its water from Lake Berryessa.

Woodland has relied on publicity, free water-saving devices available to the public, and a police officer who will stop by to discuss water-waste complaints with alleged water wasters.

The City of Davis adopted a three-stage program to cope with the drought. The first stage is voluntary conservation of water outside the home. This includes alternate-day watering of yards. This first stage also includes publicity papers, bulletins, and brochures. The second stage is mandatory conservation, while the third stage is to lower the pressure in the water system to force decreased water consumption. If the rainfall is not at all near normal by February, 1978, the Davis City Council will probably begin mandatory water conservation.

Fairfield has encouraged water conservation without sacrifice and has urged water-saving techniques such as use of water displacement containers and decreasing unnecessary running water. Fairfield has not used its total entitlement from Lake Berryessa this year.

Karen Ehler

legislation:

1977 legislative summary

Environmentalists were on the defensive during the 1977 legislative session. The allegedly poor economic climate and the continuing drought generated substantial challenges to the environmental gains of the early 1970's. Business and energy interests attempted to weaken environmental standards to enable growth to continue while environmentalists fought to maintain the status quo.

More important than the legislation that was signed into law are the measures that will still be pending when the Legislature convenes in January. Several of the most significant environmental bills were neither defeated nor passed and were held over to the next session.

Two major environmental measures that were signed into law modified the California Environmental Quality Act (CEQA) - the "Dow Chemical" bill and the Liquified Natural Gas Terminal Act of 1977. The other significant legislation of the session included a ban on the sale of fluorocarbons, tax exemptions for solar energy and the development of a protection plan for Suisun Marsh.

The decision by Dow Chemical Company to abandon plans for a $500 million petrochemical plant in Solano County spurred numerous legislative attempts to modify CEQA. (See *ENVIRONS*, Spring 1977.) It was contended that CEQA contributed to a reportedly unfavorable business climate through its lengthy permit requirements and its failure to balance environmental and economic considerations. Speaker Leo McCarthy (D-San Francisco) authored the bill (AB 884, c. 1200) that became law.

The legislation streamlined the approval process for any project in the state requiring an Environmental Impact Report (EIR) by designating the public agency having the principal responsibility for carrying out or approving the permit process as the lead agency. The lead agency must approve or disapprove an application within one year from the date that it is considered to be complete. Environmentally conscious legislators agreed to this measure as an acceptable compromise to some of the more restrictive proposals. AB 884 does provide for a necessary modification of the approval process but it fails to solve the larger problem that underlies it - how to balance economic against environmental interests.

Several bills are still pending, including Senator John Holmdahl's (D-Alameda) SB 351 permitting public agencies to make findings that economic, social and other benefits outweigh the environmental consequences of a project. Also alive for the 1978 session is SB 211 by Senator Paul Carpenter (D-Orange) which would require that any person attempting to attack, review or void an allegedly environmentally-damaging project on CEQA grounds post a bond for at least 10% of the project's estimated cost.

The Liquified Natural Gas Terminal Act of 1977 (SB 1081, c. 855) also attacked the CEQA regulatory process and was opposed by environmental groups throughout the state. The legislation granted the Public Utilities Commission (PUC) the exclusive power to issue a permit for an on-shore LNG terminal after hearing, but not necessarily relying upon, the recommendations of the California Coastal Commission. The LNG project would be exempt from CEQA. The distance and population-density requirements of the Act make Point Conception virtually the only available site. In approving the measure, the Legislature found that an adequate supply of natural gas is essential to California's economy and to the health and welfare of its residents. To avoid serious shortages in the 1980's a LNG terminal is currently needed to permit sufficient supplies of natural gas to be imported from Alaska and Indonesia. To expedite the development of such a terminal, the bill's authors contended it is necessary to vest the power to issue a single permit authorizing the location, construction and operation of the terminal exclusively in one agency.

Environmentalist legislators responded strongly with Assemblyman Tom Bates' (D-Alameda) suggestion that the bill be renamed the "Utility Giveaway Act of 1977." In objecting to the legislation, Friends of the Earth contended that the need for natural gas has never been independently assessed. It claimed the permit process is effectively truncated by vesting all final authority with the PUC, without requiring it to heed a forecast that the State Energy Resources Conservation and Development Commission is required to prepare. Only onshore sites may be considered under the Act, even when an offshore terminal might be more desirable. Finally the wind and wave conditions off Point Conception are so severe that the Act's opponents contend ships would be precluded from berthing there over 20% of the year.

Perhaps the greatest environmental victory of the session was the enactment of the Suisun Marsh Preservation Act (AB 1717, c. 1155). The act requires Solano County and the cities and special districts in or near the 85,000-acre Suisun Marsh to jointly prepare a Suisun Marsh Protection Program. The program must be certified by the San Francisco Bay Area Conservation and Development Commission before going into effect on January 1, 1981. The protection program will be implemented at the local level.

The Act provides full protection for over 400 species of wildlife that inhabit the Marsh, which is a resting and feeding ground for over 10% of the birds using the Pacific Flyway.

The measures that were not approved during the 1977 session provide a good indication of the controversies that will face the Legislature in 1978. The narrow defeat of Governor Brown's water project bill, which would have allowed the construction of the Peripheral Canal, was a source of conflict both within and without the environmental movement. SB 346 (Ayala, D-Los Angeles) will be pending next session and heated debate will certainly continue.

Also held over was the Prime Agricultural Lands Preservation Act (AB 1900, Calvo, D-San Mateo) which would limit further urbanization of prime agricultural land. The Agricultural Resources Council, created by the Act, would be required to adopt and provide advisory guidelines for each county and city to assist them in the preparation of a local agricultural resources program identifying prime agricultural lands. These lands would be deemed enforceably restricted within the meanings of the California Constitution.

continued to page 9

roseville's water sale

Last summer's continuing drought conditions required the California State Water Resources Control Board (SWRCB) to curtail the use of water from Dry Creek because of a substantial decrease in its normal flow. The decline in flow was the result of sharply reduced irrigation flow and seepage into Dry Creek. The essential tenet of appropriative water rights law is "first in time, first in right," theoretically providing a systematic means of allocating water based on the date of each application. Consequently, the SWRCB directed low-priority holders of appropriative right licenses to cease diversion and use of Dry Creek in July 1977.

Seeking alternative sources of surface water, four private farmers, holding low-priority licenses in Placer County, negotiated a contract with the City of Roseville to buy treated sewage, suitable for crop irrigation at a nominal price. This water "sale" would, in effect, deprive downstream appropriators in Sacramento County, who hold high-priority licenses legally entitling them to Dry Creek water. If this water contract is executed the decline in Dry Creek's flow would have an adverse impact on downstream users' crops and orchards, and on a commercially valuable salmon fishery.

In an unusual action, SWRCB sought a temporary restraining order against the City of Roseville and the four farmers. The Board contended that the water sale constituted a clearly unlawful use of water.

Under California water law, Roseville is considered an "importer" because it obtains water from Folsom Dam, a source outside its own watershed, and discharges water into Dry Creek. California case law has established that an importer of outside or "foreign" water has priority of use over downstream appropriators if that water is released within the importer's land or boundaries. However, Roseville discharges its effluent into Dry Creek at a point wholly outside the city boundaries. Therefore, SWRCB contends that Roseville has "abandoned" this water and that it is subject to continued use by downstream users with high-priority appropriative licenses. Based on this analysis, Roseville's water contract with the four Placer County farmers seeks to grant them rights to use water which the city does not possess. SWRCB's primary claim against Roseville and the four farmers is that this water sale is illegal.

Ordinarily SWRCB does not initiate litigation; however, the board believes that by allowing the Roseville contract to stand, a dangerous precedent would be established. High priority appropriators could no longer maintain their assumed right to available water because in times of shortages it could be sold to other users. SWRCB maintains that this would seriously threaten the integrity and enforceability of any water

continued to page 9

bicycle commuters unite

A unique organization has been formed in Sacramento by people who want to ride to work on a bicycle.

The Capitol Bicycle Commuters Association (CBCA), organized last May, hopes to encourage and facilitate cycle commuting, particularly in the downtown area. According to Kurt Findeisen of the Sacramento City Planning Department, charter members are concerned that this form of commuting has not been given the serious support it deserves. The community, he says, tends to think of commuting problems and their solutions in terms of automobiles and busses. CBCA hopes to broaden this focus.

Several programs have been suggested. First, long-range planners should be encouraged to develop major bicycle routes which make cycling fast and safe. The City-County Bikeway Master Plan recognizes both recreational and commuting needs. Both will be met when work is completed on the ten-mile bike path from Rio Linda to downtown Sacramento.

Commuters are concerned, however, with recommendations such as those in the proposed 1990 Central City Plan which fail to recognize the value of cycle commuting. CBCA points out the the Plan does little more than recommend on-street bike lanes, frequently along streets which offer no more protection than that provided by stop signs. Findeisen suggests a variety of additional measures can be implemented to attract cyclists at relatively little cost to the community. These might include partial street closures, bicycle routing along streets with traffic signals rather than stop signs, and bike lanes or paths with some physical separation from automobile traffic.

Cycle commuters are convinced that community expenditures for those purposes are justified. Bicycles obviously create less noise, less air pollution, and fewer parking problems than do busses and automobiles, all major concerns addressed in the Central City Plan.

CBCA members also hope to identify and solve problems as they arise in outlying areas. Future hazards to cyclists may consist of broken glass along a bike route, insufficiently paved crossing over railroad tracks, or cracked pavement on the street.

CalTrans employees, who were instrumental in forming CBCA, suggested the development of shower and locker facilities for commuter cyclists. CalTrans has agreed to build such facilities for state employees in the basement of its Eleventh and N Street building in the next few months. CBCA members have also recommended an increase in the number of bicycle racks in downtown locations.

The Association will serve as an information source. One bicycle maintenance clinic has been held, and others are proposed. Additionally, Findeisen says, CBCA eventually may provide maps of bike routes to interested persons.

The CBCA membership believes that Sacramento is an ideal community for cycle commuting. The terrain is relatively flat, the downtown area is compact, and the weather is conducive to outdoor activities most of the year. It will require increased community support from officials as well as concerned citizens, however, if cycle commuting is to be a viable alternative to auto and bus transportation.

Dee Hartzog

Sale of Water Rights

The severity of the recent drought focused public concern on the use and conservation of state water supplies. In response to this concern massive campaigns were conducted to educate both public and private sectors in conservation methods. Ironically, while the public strained to conserve, sectors of the agricultural community were encouraged to waste. This problem is of considerable magnitude since a major portion of the states waters are held by agricultural users under the appropriative water rights scheme. Under this system an appropriator may lose his right if he fails to use it over a continuous three year period. As a result of the drought many farmers found that it was not economically feasible to plant and thus were unable to use their total appropriative allotments. The farmers thus faced a dilemma: should they follow statewide conservation efforts and not use their water and brave the threat of forfeiture or waste water in order to secure their rights. One alternative chosen by some appropriators was to sell or lease their appropriative rights. However this course of conduct also raises the question of forfeiture since it is unsettled whether use by a lessee or buyer would toll the three year forfeiture statute of limitations.

This article will be the first of a series which discusses problems related to the lease or sale of appropriative water rights. This article will focus on the consequences of the sale of a post-1914 appropriative right under the forfeiture provisions of the California water code. To facilitate an understanding of the forfeiture issue it is necessary to outline the statutory scheme of the appropriative rights system.

History

The California legislature first recognized the prior appropriation doctrine through the enactment of Civil Code sections 1414-1422 in 1872. These provisions grew out of frequent disputes over the competing claims of miners who based their rights to surface waters on a "first in time first in right" principle. The civil code sections provided legitimacy to this practice through a notice and claim filing procedure. Under the statutory method, the claimant was required to post notice at the intended point of diversion, file a copy of the notice with the county clerk, and initiate use of the claimed right within 60 days.

During the 19th century water in the state was also claimed by riparian users. Despite the protests of appropriative right holders, the California Supreme court in 1886 held that riparian rights were valid and co-existed with appropriative rights. **Lux** v. **Haggin** 69 Cal. 255 (1886)

Due to a fear of monopolization of state water resources by riparian users and civil code claimants, the Legislature created the California Conservation Commission in 1911 to investigate and revise the water code. As a result of its investigation, the Commission recommended a simpler and more uniform appropriation method. The Commissions revision was adopted in the form of the Water Commission Act by voter referendum in 1914.

The Water Commission Act of 1914 and later amendments gave the Commission a discretionary power to issue permits in a manner which best protected the public interest. By constitutional amendment in 1928, a gloss was added to the appropriation permit requirements which mandated that "reasonable and beneficial use" of water be made in the interests of conservation. Districts supervised by watermasters were created to oversee use of appropriative rights. The Water Commission act also provided an adjudicatory system in which the Commission was empowered to investigate and settle claims subject to judicial review.

The Current Statutory

Today the State Water Resources appropriation system. The salient featu include: 1) permit application process (1260, and 1450), 2) notice to the public 1324), 3) issuance of a permit (Cal. W issuance of a license (Cal. Water Code s Admin Code section 764.12).

Permit Appli

Persons desiring to use surface or sub are required to apply for a permit fr Riparian users, appropriators whose righ and municipalitites with pueblo rights (use of water naturally occuring within application requirements. The permit source of the water supply, type of use and the time necessary to initiate use. guidelines established by the Californi Code section 21000 et seq). The appro date of the application. The Board appropriation.

Notice To

After an application is filed the pu section 1300). The notice includes all i and advises the public that it may prote date of the notice.

Protests may be filed by any memb application is not in the public intere consequences, or is contrary to law (C upon receiving notice of protest will culminating in a final determination by 183). This procedure is subject to judi

›ropriation Scheme

ıtrol Board administers the prior
›f the present appropriation process
Vater Code sections 1200, 1225, 1202,
Water Code section 1300, 1317 and
Code sections 1700 et seq), and 4)
n 1600, 1605-1610, 1625-26, 1675, Cal.

›n Process

nean waters in identifiable channels
he State Water Resources Board.
: based on pre-1914 statutory claims,
s of successors to Spanish pueblo to
blo limits) are exempt from permit
cation requires information on the
purpose, where it is to be diverted,
applications must comply with the
'ironmental Quality Act (Pub. Res.
or's priority is established as of the
mines what water is available for

: Public

nust be notified (Cal. Water Code
mation contained in the application
application within 40-60 days of the

the public on the grounds that the
vould have adverse environmental
ater Code section 1330). The Board
duct an investigation and hearing
full board (Cal. Water Code section
eview. (Cal. Water Code 1360).

Issuance of a Permit

Once the Board issues a permit the holder has a conditional right to appropriate water. The holder or permitee must act diligently to use the water in a beneficial manner. (Cal. Water Code section 1396) A permitee must seek Board approval for any change in place of diversion, use or purpose. (Cal. Water Code section 1700 et seq) The Board has the authority to issue permits subject to conditions such as the prohibition of unreasonable use or diversion to protect the public interest. (Cal. Water Code section 1394).

Issuance of a License

Once a permitee has put their water to a beneficial use they must notify the Board. (Cal. Water Code section 1600) The Board then conducts an investigation and issues a license upon determination that the permitee has complied with water code requirements. (Cal. Water Code sections 1605-1610) A license, like a permit, may be conditional. The license remains in effect so long as it is applied to useful and beneficial purposes. (Cal. Water Code section 1627) Licenses may be revoked for unreasonable use or failure to comply with the conditions of the license. (Cal. Admin. Code section 764.12, Cal. Water Code section 1675). Non-use over a continuous three year period subjects the license to forfeiture. (Cal. Water Code section 1241).

As of 1965, all persons diverting water in the state are required to file a statement of use and diversion with the Water Board. (Cal. Water Code section 5103) These statements require information relating to use, purpose, and source. The statements provide a source of centralized data on all water used in the state.

Consequence of a Sale of a Post-1914 Appropriative Right

As previously noted, one solution to the dilemma facing appropriative right holders in the agricultural community during the recent drought was to sell the portion of their allotments that they were not able to economically use. Many of these appropriators hold rights procured under the post-1914 statutory scheme under which a right may be forfeited for non-use over a three year period. The question that arises with regard to the sale of an appropriative right is whether the beneficial use of the right by the buyer-transferee is use by the seller-transferor, such that the three year forfeiture statute of limitation will be tolled.

The major element of the appropriative rights scheme is the reasonable and beneficial use requirement. This requirement is mandated by the state constitution (Cal. Cons. Art X Sec. 2), by statute (Cal. Water Code sections 1390 and 1627), and is confirmed by case law. **Tulare Irrigation District v. Lindsay Strathmore Irrigation District** 3 Cal. 2d 489 (1935), **Hufford v. Dye** 162 Cal. 147, 153 (1912). Once an appropriator ceases to use his right for a reasonable and beneficial purpose the right ceases. (Cal. Water Code section 1241). If the cessation continues for the required three year period the water reverts to the public.

The stringent beneficial use requirements have never been held to restrict the alienability of an appropriative right. The right is considered an estate in real property and is subject to conveyance. **Step v. Williams** 52 Cal. App. 237, 253 (1921), **Thayer v. Cal. Development Company** 164 Cal. 117, 125 (1912) The right has also been construed as separable and alienable from the land which it is appurtenant. Hutchins, **The California Law of Water Rights,** State of California, Sacramento 1956 at p. 125; citing **Wright** v. **Best** 19 Cal. 2d 368. The right is also divisible. **People's Ditch Co.** v. **Foothill Irrigation District,** 112 Cal. App. 273, 275 (1931).

The sale of an appropriative right separate from the land to which it is appurtenant will always involve a change in place of use and diversion and purpose. Such changes are permissible if they do not interfere with the rights of others and are approved by the Board. (Cal. Water Code sections 1700-1705, 23 Cal. Admin. Code section 738).

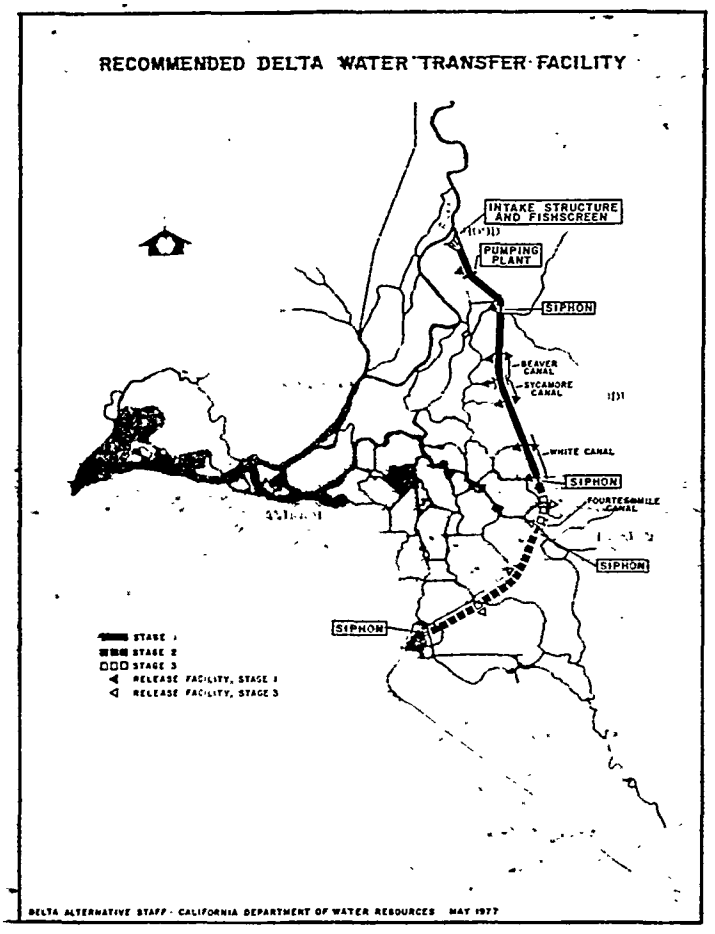
Therefore, subject to the reasonable and beneficial use requirement and board approval for change in place of use or diversion, an appropriative right can be conveyed apart from the land on which it is located. The question that still remains is when an appropriative right is sold, does beneficial use by the transferee prevent a reversion of the transferor's right to the public under water code section 1241.

continued to page 11

peripheral canal

continued from page 1

Much of the controversy surrounding the development of solutions to these problems stems from the complex nature of the estuarine environment. An estuary, the region of brackish water where a river approaches the sea and is affected by the tides, is one of the most productive of all ecological zones. Its productivity is the function of inter-related factors such as the fresh water - salt water interface, tidal fluctuations, periodic flooding, etc. As a result, estuarine environments have proven to be extremely sensitive to human intrusion. Altering one of the elements, such as limiting outflow, can sharply shift the ecological balance in the overall estuarine environment.



In 1966, the Department of Water Resources (DWR) adopted the Peripheral Canal as the Delta Water Conveyance Facility for both the CVP and the SWP. The Peripheral Canal would be a 42-mile earth channel extending from Hood to Clifton Court Forebay. (See map.) Additional facilities would include a pumping plant, floodgates, fish screens, siphons, bridges and water-release structures. It was chosen from a number of alternatives as most capable of meeting the water commitments of the CVP and SWP while still protecting the Delta environment. The DWR and others have been conducting studies from 1966 through the present to evaluate the impact of the Peripheral Canal on the Delta and to examine alternatives.

Emerging from this period of study and review was S.B. 346. This bill is a complex piece of legislation which presents the Peripheral Canal as part of a larger plan to satisfy California's water needs. In addition to the Peripheral Canal, it authorizes construction of an off-stream storage site (Glenn Reservoir), a Suisun Marsh protection facility, the Mid-Valley Canal, the Cottonwood Creek Project, and the Los Banos Grandes Reservoir. It allocates money for investigation of groundwater storage and waste-water reclamation. It also establishes an agricultural water-conservation loan program in addition to other goals.

In terms of Delta production, the critical element is, of course, the Peripheral Canal. It is to be constructed to allow the charging of specified Delta channels with enough water to re-establish a net downstream flow pattern throughout the Delta. (See chart.) This would provide a method of controlling water quality in the Delta. It has also provoked a major controversy. S.B. 346 includes, as a prerequisite to the construction of the Peripheral Canal, a request that Congress pass legislation requiring the CVP to comply with the same water-quality standards as the SWP.

At present, the SWP, because it is operated by the State, must comply with the standards established by the State Water Resources Control Board. The Bureau of Reclamation, which operates the CVP, takes the position that it is not required to abide by State-imposed regulations. It is supported in this contention by *United States* v. *California*, 403 F.Supp. 874 (1975), which held that the Federal Government does not abdicate control over federal reclamation projects even though it is charged with cooperating with the State. The Bureau maintains that it need only comply with Federal standards embodied in the Federal Water Pollution Control Act, 33 U.S.C. sec. 1251 et seq., which it interprets as not requiring the CVP to release water for salinity control in the Delta. The DWR and the California State Attorny General take the opposite view.

The Bureau of Reclamation views water required for salinity control in the Delta as simply another water commitment of the CVP. Thus, when the SWP is required to make increased releases into the Delta (as determined by dry or wet years and seasonal fluctuations) the CVP is not under this constraint. It merely continues to release whatever percentage of its capacity is committed to the Delta.

Environmental groups are divided over the issue. The Sierra Club and the Planning and Conservation League take the view that because Sec. 11257 of S.B. 346 makes construction of the Canal contingent upon Congress passing legislation requiring the CVP to conform to SWRCB standards, water quality in the Delta is thereby protected. Other groups such as Friends of the Earth and the Environmental Defense Fund point to federal supremacy decisions such as *United States* v. *California, id.* and regard that protection as inadequate.

Environmental groups also disagree on S.B. 346's potential effect on the North Coast Rivers, such as the Smith, Van Duzen, Klamath, and Eel, which are either included or being studied for inclusion in the State Wild and Scenic Rivers System. Opponents of the bill contend that it is a "loaded gun" pointed at these rivers. They believe that the construction of the Glenn Reservoir

continued to page 10

literature review:

The October, 1977 issue of *Environment* gives a detailed discussion of the "National Energy Plan." The 103-page document was released on April 29, 1977 by the Executive Office of the President. It has received severe criticism with respect to both its detailed recommendations and its basic approach to the energy situation. The authors predict that the plan will keep oil imports essentially unchanged between 1976 and 1985, and allow a 25% increase in the use of coal and nuclear power.

"The Endangered Species Act," in the same issue of *Environment*, presents an overview of the legal and economic ramifications of the Endangered Species Act of 1973. The act has generated much controversy between federal and state governments regarding the distribution of authority to regulate wildlife.

Environmental Law, Vol. 7, No. 3, focuses on the issue of the frequent conflict between the objectives of individual liberty and environmental protection. "Individual Liberty and Environmental Regulations: Can We Protect People While Preserving the Environment?" concludes that environmental regulation is justified because it results in increased net benefits to society. Environmental regulation is closely tied to the economic problem of externalities - the incidental costs and benefits to society of the economic activity of an individual or firm. Environmental regulations seek to restrain activities that have external costs, or at least to see that costs are recognized and borne by those who derive the benefits accruing from environmentally hazardous activities.

Environmental injunctions are the topic of detailed consideration in "Interlocutory Injunctive Relief in Environmental Cases: A Primer for the Practitioner," *Ecology Law Quarterly*, Vol. 6, No. 3. Although the courts generally treat cases raising environmental issues in a similar manner to other actions, certain peculiarities arise from the unique nature of environmental cases.

In *Environmental Affairs*, Vol. VI, No. 1, the environmental challenge to water management is discussed in "Public Involvement in Natural Resource Development: A Review of Water Resource Planning." The article discusses the history of the water development agencies during the 1960's and outlines the continued problems of the 1970's. Particular emphasis is given to the need for increased public involvement in decision-making for federal water resource development.

Douglas Costle, President Carter's top environmental official, talks about his job in "A New Day at the E.P.A.?" in *National Wildlife*, August-September, 1977. Costle, the new administrator of the U.S. Environmental Protection Agency discusses the EPA's formidable agenda.

Diedre Bainbridge

roseville's water sale

continued from page 5

right entitlement it issues. Additionally, Roseville did not perform any preliminary analysis of the possible impacts of the water sale on the environment as required by the California Environmental Quality Act. Until an Environmental Impact Report is prepared, any detrimental effects of a decreased flow in Dry Creek remain uncertain. It is speculated that downstream users, riparian vegetation, and a salmon fishery will be all adversely affected to some degree. It is likely that Roseville and the Placer County farmers will not litigate this case since the City of Roseville is currently trying to negotiate a new agreement with the farmers. In the event that the parties decide to execute this contract, SWRCB will petition for an injunction to prevent its performance as scheduled in December 1977.

The Roseville water sale, a result of drought conditions, suggests the need for a reconsideration of California's appropriative system for the allocation of water resources. Under the present scheme, the first person to appropriate, no matter where he is located on the stream system or how great his need, always has the first priority to take available water. In times of shortage, losses fall entirely on the most recent appropriators. The failure to distribute the risk among all appropriators may lead to economically disastrous results for low priority appropriators.

Dick Tomoda

legislative summary

continued from page 4

Nuclear power will certainly be a focus of controversy in 1978. In response to the proposals of Proposition 15 several nuclear safety bills were enacted as compromises in June 1976. They required the Energy Commission to find that there is a viable means for disposing of high-level reactor wastes before allowing the construction of additional nuclear power plants. It is estimated that no viable means will be available before the mid-1980's, and that all new nuclear power plant construction will be effectively stalled until that time.

Unhappy with the anticipated delay of its proposed Sundesert Nuclear Plant, San Diego Gas and Electric pushed for a measure to allow the Energy Commission to recommend that a facility for which a notice of intention had been filed with the Commission prior to January 1, 1977 should be exempt from the nuclear waste requirements. AB 1852 (McAlister, D-Alameda) which concerns only the Sundesert Project was signed by the Governor (C. 1144). The Sundesert controversy will provide the first real test of the nuclear safety bills, and will undoubtedly spark heated debate during the election year 1978.

The 1977 session was a holding period for environmentalists. The Suisun Marsh Preservation Act was the only real victory and the LNG Terminal Siting Act was the only major defeat. CEQA withstood the potentially devastating backlash from the Dow controversy and

continued to page 11

peripheral canal

continued from page 8

project in the Coast Range would be a stepping-stone to impounding these rivers and making an inter-basin transfer. Water from the rivers could be transported by tunnel and/or pipe from the North Coast drainages to the Glenn Reservoir and from there it would enter CVP control. S.B. 345, also introduced by Senator Ayala, which seeks to delete the North Coast rivers from the Wild and Scenic Rivers Act is seen as further proof of this intention. Proponents of the Canal argue that S.B. 346 has been amended to provide adequate protection for these rivers under Sec. 1. Here these rivers are reinstated under the Wild and Scenic River System, apparently counteracting the threatened loss of protection.

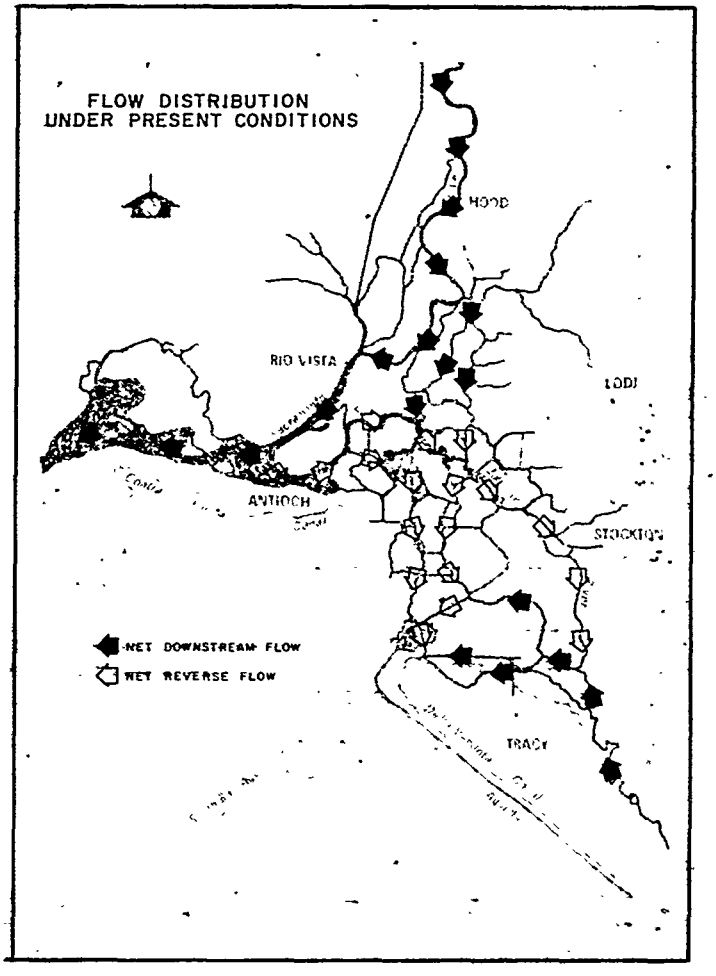
Proponents of S.B. 346 also point to the money allocated for the study and use of underground storage and waste-water reclamation as constructive features.These will become additional methods of supplying water to the service areas of CVP and SWP. In addition to section 12974 of the bill which appropriates funds for loans to encourage agricultural water conservation, this is seen as a method of reducing both groundwater overdraft (pumping in excess of natural recharge, currently equalling 1.5 MAF/yr.) and projected commitments of CVP and SWP water (7.7 MAF/yr. by 2000).

These arguments have special significance in light of the SWRCB mandate giving priority to protection of Delta water quality over water exports to meet SWP commitments. Currently, as noted, the CVP places its service-area commitments ahead of Delta water quality. It does not feel obligated to comply with State standards. S.B. 346 requires the Bureau to submit its CVP operations to the regulations of the SWRCB. Whether or not Congress will agree to submit the CVP to State control is purely speculative.

Even though S.B. 346 is close to passage, it may not yet have achieved its final form. The much-amended bill will undergo a second round of public hearings during November and December. The hearings will allow various water interests to suggest refinements to the bill. During the interim, the bill has been assigned to a conference committee. It should return to the Senate Floor by January or February.

If the bill is passed, then Congress is given until December 31, 1980 to pass the enabling legislation required by the bill before the authorization for the Peripheral Canal lapses. Congress is certain to conduct its own studies of the situation. The Federal Government views a bill such as this as a statement of intent and a request for action by the State of California. Before acting on the request, more questions will be posed from the CVP viewpoint. Among them is whether the Peripheral Canal is sufficient to supply California's water needs on a long-term basis. The Bureau of Reclamation is the agency which would be authorized to conduct further studies on these issues. It is clear that the controversy over the Peripheral Canal will not be ended by passage of S.B. 346.

The Bureau of Reclamation has contracts for water commitments with agricultural interests in the southern Central Valley. Those interests will not allow their water rights to be subjugated to Delta water-quality requirements without a struggle. Moreover, the controversy among environmentalists as to the most efficient method of protecting the Delta will not terminate with the passage of S.B. 346.



Without question, the current Delta water-export situation requires action. A solution with inherent flexibility is required. The needs of both water exporters and Delta water users must be taken into consideration. Adequate protection measures for the Delta environment which are acceptable to Federal authorities and State water users are needed. Whether or not the Peripheral Canal is the project which accomplishes these goals is the crux of this long-standing dispute. From the State Legistature's point of view, the moment for resolution of the controversy is nearly at hand.

Donald Segerstrom

legislative summary

continued from page 8

remained intact with streamlined approval procedures. Water development, nuclear power, and land use will be the primary foci of the Legislature when the 1978 session begins.

Environmentalists' ability to withstand further attacks depends on two major factors - the business climate and the drought. An unfavorable business climate and high unemployment will probably act to maintain the pressure to modify environmental standards. A continuation of the drought will solidify the strong push for possibly environmentally-damaging water projects.

Ed Prendergast,
Chris Elms,
Joel Diringer,
Suzi Harmatz,
and Bruce Waggoner

sale of water rights

continued from page 7

The only California case dealing directly with this issue is *Perry v. Calkins* 159 Cal. 175, 181, 182 (1911). The case involved a riparian landowner who leased a right to use his water except for two days and two nights each week. The riparian owner's right was challenged and the California Supreme Court sustained the ripirian user's claim. In an alternative holding, the court noted that if the lessor had claimed a right by prescription under the appropriation doctrine, the use of the lessees could be used as evidence of continuous adverse use.

In *Stevinson Water Districts et al v. Roduner et al,* 36 Cal 2d 264, 270 (1950), the California Supreme Court sanctioned the sale of water by a water district. The court said that the sale could be made to "any willing purchaser. for beneficial purposes." The case was decided under irrigation district law but lends support to the notion of alienabilty of water rights subject to the beneficial purpose and use requirement.

Conclusion

The relevent case law seems to support the sale of an appropriative right as a viable alternative to forfeiture. However the cases provide meager precedent to defend the conveyances of farmers who sold their appropriative rights during the recent drought. An examination of the viability of these transactions should focus on notions of equity and fairness to right holders as well as protection and conservation of the state's water resources. Analogies to adverse possession as suggested by the court in *Perry v. Calkins* may clarify the logic of beneficial use by the transferee by "taking" to use by the transferor and thus avoiding forfeiture. The failure to sanction the sale of appropriative rights would encourage appropriative users to waste water in times of drought or situations in which it is not feasible to make productive use of their entire allotments. Vindication of the appropriative users' authority to sell their rights without the threat of forfeiture will encourage beneficial use and thus accomplish the stated goal of putting the state's waters to the "highest and best use."

Christy Bliss and Sam Imperati

our MONEYTREE

is part of an extinct species... in spite of our environmental efforts...so we turn to you, our readers, with this plea for support...

PLEASE SUBSCRIBE TO ENVIRONS AND ASSIST OUR CONTINUING EFFORT FOR SUSTENANCE

Please fill out the form below and mail to:

Environmental Law Society
UC Davis School of Law
Davis, California 95616

Please make checks payable to: ELS/Environs

NAME: _____

ADDRESS: _____

_____

_____

AMOUNT ENCLOSED:

☐ $ 5.00 — Bread & Water
☐ $10.00 — Soup & Sandwiches
☐ $15.00 — Three meals a day
☐ $25.00 — Gourmet Delight
☐ _____ — Friend of Environs
(any amount appreciated)

Any subscription donation given will insure your receipt of all issues of Environs published this year.

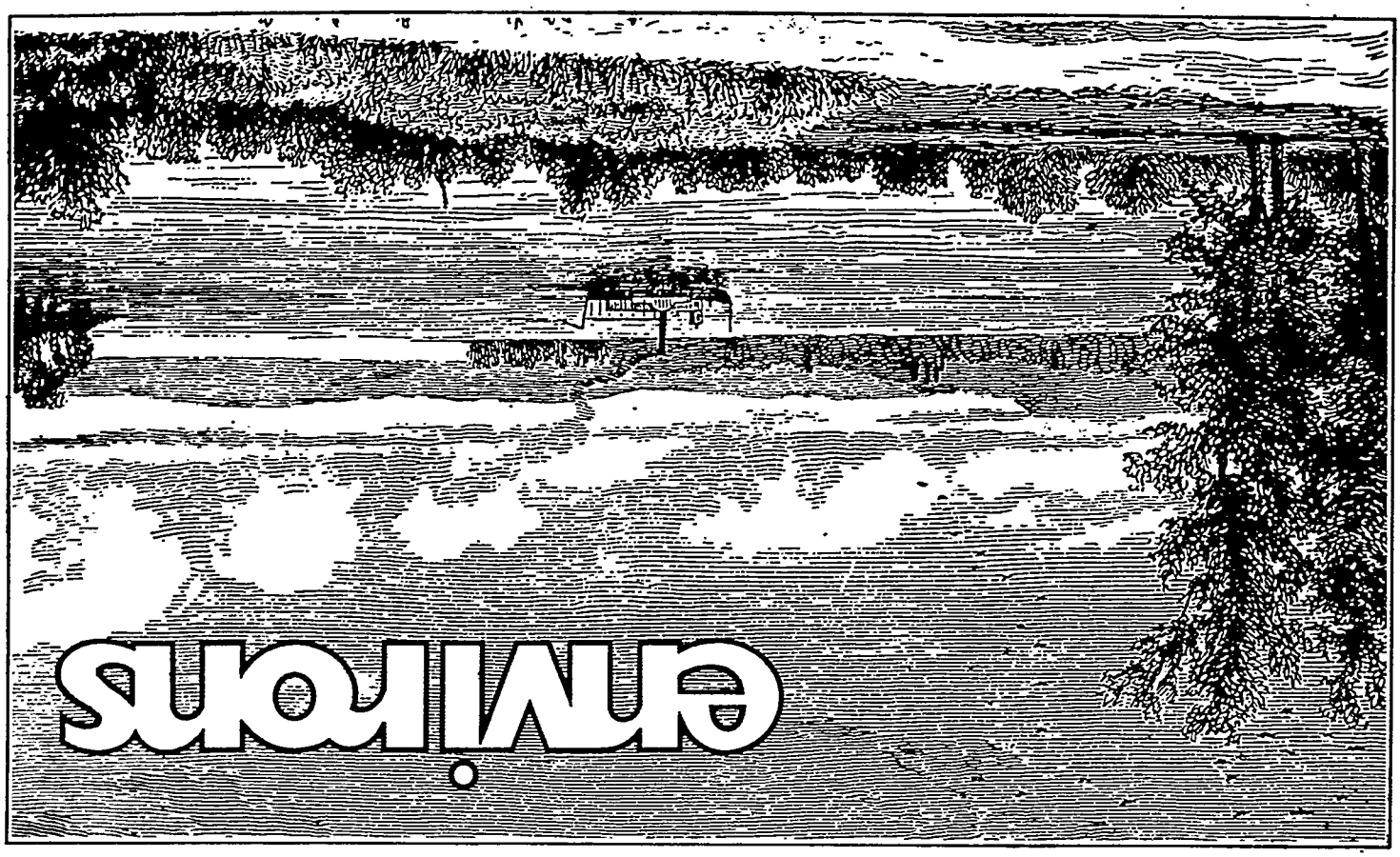
Is there some one/organization that might benefit from receiving Environs? Please send us their name/address too.

NAME: _____

ADDRESS: _____

_____

_____



inside:

Environs
Environmental Law Society
King Hall
University of California
Davis, California 95616

NONPROFIT ORG.
BULK RATE
PAID
U.S. POSTAGE
Davis, Calif.
Permit No. 3