

## Who Gets the Water in California's Great Central Valley?

by Brennan Cain

### Introduction

This article will summarize the panel "Who Gets The Water?" from the Ninth Annual Environmental Law Conference at the University of California, Davis, King Hall School of Law on February 25, 1995. Roger Patterson, William Chisum, and Daniel Silverman were the three panelists. The objective of the panel was to present a balanced discussion of the claims on water from the perspective of the agricultural community and the environmental community. The panel was assembled with the hope of increasing awareness of the importance of communication and cooperation to help solve the water controversies polarizing the Central Valley.

### Roger Patterson

Roger Patterson, the opening speaker, provided the audience with the history of water issues in the West and introduced the Central Valley Project (CVP) and Central Valley Project Improvement Act (CVPIA). As Regional Director of the United States Bureau of Reclamation (BOR) for the Mid-Pacific Region, Mr. Patterson currently oversees management of the BOR's water projects in most of California, Nevada, and a portion of Oregon. He began implementing the CVPIA after it was signed into law by President Bush on October 30, 1992. This Act was passed to rectify some of the shortcomings of the Central Valley Project of 1937. The goal behind CVP was to put "every drop of water in a river...to work" producing power, irrigating crops, or supplying cities.<sup>1</sup> The result was the removal of water from the Sacramento and San Joaquin Rivers into canals and dams. The water was then transferred to the farms and cities in the Central Valley. CVPIA was designed to reallocate some of this water to other needs, such as salmon and smelt.

Mr. Patterson presented the history of the Bureau of Reclamation, a federal agency in the United States Department of Interior since 1902. He described the BOR as a large federal utility and remarked that the BOR is the largest water provider in the United States. Though headquartered in Washington, D.C., the BOR operates only in the seventeen western states, and within those states functions within the context of state law and state water rights.<sup>2</sup>

Generally, these states follow the Prior Appropriation Doctrine for the allocation of water: whoever first uses the water has first claim on the water up to full reasonable, beneficial use for as long as they have a need.<sup>3</sup> In most western states, the agricultural community holds the oldest extant claims on most of the water. A second type of water right is called Riparianism. Under this system, owners of riparian lands (those adjacent to rivers, lakes, and streams) have entitlements to the use of a reasonable amount of the water flowing past their lands. California is presently using a hybrid of the two water allocation systems.<sup>4</sup>

As farming practices became more intensive, more water was channeled from the rivers to irrigate crops. More water-dependent crops were planted and marginal land was put into production. Cities developed and needed water as well. More water was taken from the rivers, providing the towns and crops with an adequate water supply. "Unfortunately," Mr. Patterson

said, "the environment took it in the shorts." In more recent years, the environmental community has been fighting against the shortage of water in the streams and rivers. Insufficient water levels have been the genesis for Endangered Species Act (ESA) claims for fish, such as the Delta smelt.

The CVPIA was the result of years of controversy, negotiation, and fighting between different interest groups. The agricultural community is dissatisfied with the result because there are now regulatory statutes which are reducing the amount of water its farms receive. The environmental community is more pleased with the result because under the provisions of the CVPIA, one million acre feet of water are allotted to environmental needs each year. Finally, the urban community is split over the result because some communities have greater access to water while other communities have less access.

The CVPIA includes two methods of transferring water from farmers to environmental and urban needs. The first method involves reallocation or condemnation. Some farmers have challenged this method, claiming the government must first adhere to the procedural requirements of the National Environmental Policy Act before reallocating their water supplies. Mr. Patterson said that the government has fared well against these lawsuits.

The second method of transferring water under the CVPIA is allowing farmers to sell water on the open market. Mr. Patterson said this was the first time he has seen Congress allow farmers to transfer their federal water rights to the highest bidder. The highest bidder has turned out to be the Metropolitan Water District of Los Angeles (MWD) which sparked additional controversy. MWD supplies water for Southern California urban communities. Many people in the Central Valley do not want "their" water to go to Southern California.

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With the recent Congressional elections, the farmers gained support in the Senate and the House of Representatives. Mr. Patterson feels that although the agricultural interests want to modify some of the legislation, they do not want to do great damage to the cooperation embodied in the December 1994 Bay-Delta Agreement. The Bay-Delta Agreement came into existence after seventeen years of discussion and debate between various interest groups. It was signed by government, urban, agricultural, and environmental interests and is seen by many as a win-win situation for the various concerns. There was a spirit of cooperation and communication between the various interests that Mr. Patterson hopes will persevere.

Mr. Patterson said that the answer to the "who gets the water question" was simple: it was whoever has the most political muscle.

## William Chisum

The second panelist was William Chisum, an Associate at Kronick, Moskovitz, Tiedemann, and Girard. Mr. Chisum attended law school at the University of California, Davis, and graduated Order of the Coif in 1989. He then served as a law clerk for the Honorable Lloyd George, at the United States District Court, for the District of Nevada. After completing his clerkship, Mr. Chisum joined the Sacramento law firm of Kronick, Moskovitz, Tiedemann, and Girard where he primarily represents Westlands Water District (Westlands), the largest water district in the Central Valley.

Mr. Chisum said that Westlands and many of the other water districts in the Central Valley have entitlements to the water through contracts with the BOR. Some of these districts have water rights that go back for more than a century. For example, the water districts along the San Joaquin River agreed to allow the BOR to use "their" water while building the CVP, in return for water from the completed CVP. This type of contract is called an Exchange Contract. One of these contracts is for an annual allotment of 840,000 acre feet of water (one acre foot equals 325,850 gallons of water). If the BOR cannot supply the farmers with the entire allotment of water, the farmers are entitled to water from Friant Dam.

A second group of water districts, the Friant Contractors, entered into contracts with the BOR in the 1950s to use water provided by the agency from Millerton Lake behind Friant Dam. There are two types of water defined in these contracts. Class One water is an allocation of 800,000 acre feet of water, which the agricultural community is likely to get each year. Class Two water, yielding potentially up to 1.4 million acre feet, is less dependable. Between 1987-1994 the farmers received 60%-100% of their Class One water. No Class Two water was received during most of this period.

Westlands Water District is entitled to 900,000 acre feet of water each year through contracts with the BOR. This water comes through the Delta via the Sacramento River from Shasta Dam. Westlands also receives 250,000 acre feet of water annually from a stipulated court judgment in the 1980s.<sup>5</sup> However, the area needs 1.5 million acre feet of water to meet the demands of the crops. Thus, even in the best of years, there is insufficient water for this district. The drought in the early 1990s was a major factor in Westlands Water District only receiving 50% (1990), 25% (1991), 25% (1992), 50% (1993), and 35% (1994), of the contracted water supply. Another factor for the low water deliveries has been the regulatory requirements imposed by the CVPIA. The Endangered Species Act has reserved water for Chinook salmon and Delta smelt to the detriment of the farming community.

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Mr. Chisum said that when the amount of water received by the farmers in the Central Valley is decreased, there is a detrimental economic impact. For example, Mr. Chisum remarked that for every 400 acre feet of water lost, 100 acres of land is taken out of production. Additionally, for each 80 acres taken out of production, one farmworker loses a job. Thus, when the

farming community receives only half of the water for which they have contracted, there is a

large economic impact on the community. Another economic concern for the community is the reticence of farmers to invest in upgrading and buying new machines due to the uncertain water supply. Since farmers are not willing to invest in new equipment, there is the problem of mechanical breakdowns. Moreover, dust and erosion problems emerge when farmland is taken out of production.

Reduced crop yield is another economic impact the farmers suffer if they do not receive the allotments of water promised them. Also, there is subsidence of ground level due to the lack of irrigation water percolating into the ground or the pumping of increased amounts of groundwater. The groundwater is saltier, and has higher levels of metals and contaminants than the cleaner, snow runoff and rain water for which the water districts have contracted from the BOR. The groundwater used needs to be blended with less salty water to protect the crops from salt which can kill them or reduce their yields. Additionally, pumping groundwater from the aquifers increases energy costs, which in turn reduces profits.

Mr. Chisum concluded by saying the overall goal is to figure out the right balance for all of the demands on the water. When water is taken away from the farming community, there are damages which need to be considered. The agricultural, environmental, and urban communities have different claims on the water through litigation and agreements. Mr. Chisum said that it will be interesting to see how it all settles out.

### **Daniel Silverman**

Daniel Silverman was the third and final panelist. Mr. Silverman has recently joined Share the Water, a water reform coalition of fishery, environmental, waterfowl, family farming and urban interests. From 1990 to 1992, he was a National Field Director for the US Public Interest Group. He then joined the Sierra Club's Northern California field staff where he campaigned to pass the California Desert Protection Act. During this time he also trained and organized volunteers for hearings on the CVPIA.

Focusing on the CVPIA, Mr. Silverman echoed the words of Roger Patterson, saying, "the old model doesn't work anymore." Mr. Silverman described the previous model as damming rivers, building canals, and planting more cotton (a water intensive crop requiring roughly 625 gallons of water per pound of cotton produced).<sup>6</sup> Mr Silverman said that under the CVP and the CVPIA, seven million acre feet of water are diverted from rivers and streams annually. The impact of this diversion is so great, the Delta sometimes flows in reverse.<sup>7</sup> In many of the rivers, the decline of the fish populations can be traced directly to the CVP. As salmon populations decreased, so did the number of commercial fishermen in the state. Between 1978-1992 there was an 80% decline in the California commercial salmon fishing industry.

Mr. Silverman claimed that the CVPIA was so desperately needed that it was supported by a cross section of the community including labor unions, business leaders, courts, urban water districts, newspapers, and Native Americans. Further, Mr. Silverman noted, it was the "environmental" President Bush who signed the bill. Though Share the Water and other environmental organizations were generally pleased by the passage of the CVPIA, they are concerned with the manner in which provisions have been implemented. Though the environmental community has been successful at the grassroots level in getting environmental safeguards into the CVPIA, Mr. Silverman said they have so far been ineffective at the

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implementation stage because of their inability to understand and use the administrative process. The interpretation of the laws has been skewed in favor of those with the most political clout: the agricultural community. For example, water allocated to meet in-stream fish and wildlife needs in the Delta is then diverted for farming needs downstream. Mr. Silverman felt that this

water should instead go through the Delta to the San Francisco Bay as was intended in the CVPIA. The through Delta flow provides a current for the salmon and smelt which spawn in the rivers, but live in the ocean.

Another concern of Share the Water is the United States Fish and Wildlife Service's failure to address one of the goals of the CVPIA, doubling the population of anadromous fish in the Central Valley. Though a major provision in the CVPIA, after two years, there still is no draft plan for the restoration of the anadromous fish population. Mr. Silverman said that there has been political pressure to delay this restoration plan. Additionally, on February 22, 1994, a Congressional appropriations committee attempted to cut funding for the San Joaquin River Comprehensive Plan. This plan was to research the possibility of reintroducing salmon and other anadromous fish into the upper San Joaquin River.

Mr. Silverman hailed the Bay-Delta Agreement on December 15, 1994 as the potential opening of a new era in communication and coordination between the different interest groups. All parties benefitted from the compromise, and there appeared to be lots of reason for optimism. Mr. Silverman then expressed his concern with the new Congress. The "extreme folks" in the agricultural community want to get rid of CVPIA, claimed Silverman. It has taken seventeen years for the parties to agree to sit at the table and cooperate. No one will benefit by a return to the water wars of the past. Mr. Silverman closed by saying that he hopes the agricultural community will continue to work closely with the environmental groups for mutually beneficial agreements.

## Conclusion

The panelists introduced the audience to the numerous problems caused by and concerns addressed by the Central Valley Project Improvement Act. Mr. Patterson presented the role of the Bureau of Reclamation as a conduit for transporting water from the areas where it is plentiful to areas where it is needed for the production of crops and maintenance of cities. He showed his candidness by saying that the recipient of the water in the Central Valley was whoever had the most political clout.

Mr. Chisum then explained how the agricultural community had acquired their claims to the water. He said that since the agricultural industry had some of the oldest legal claims on the water, it belonged to them. I am of the opinion that the water was first used by the wildlife of the Central Valley, including salmon, smelt, and waterfowl. The Native American tribes also had an early claim on the water. I realize that the farming industry has been a valuable part of the social and economic history of the Central Valley, but growing water intensive surplus crops in the salty, semi-arid Central Valley is a misallocation of resources, and consequently

inefficient. Crops more suitable to the habitat, such as eucalyptus and jojoba, are a better long-term approach to a water-conserving and economically sustainable agricultural economy in the Valley.

I hoped the third speaker, Daniel Silverman, would point out flaws in the implementation process of the CVPIA without insisting on its doom or the pervasive evil of the agricultural industry. I think Mr. Silverman filled this need well. He acknowledged gains made by the cooperative efforts of the agricultural and environmental communities, but expressed concern that the new Congress would abrogate this teamwork. Although he focused on salmon, Mr. Silverman's criticism of the implementation of the CVPIA covered the overall concerns of the environmental community.

I believe that both the agricultural and environmental communities have benefitted from working together in the past few years. Now is a critical time for them to alleviate some of the trenchant problems in implementing the CVPIA. To return to the previous animosity between the groups is not in the best interests of the Central Valley in the long term. The problems that exist now, such as selenium accumulation in evaporation ponds, will only get worse and require more costly remediation in later years.<sup>8</sup> The answer to "Who gets the water?" should not be "whoever has the most political clout," but "whoever has the most legitimate need."

*Brennan Cain is a 1L and co-chair of the Environmental Law Society at King Hall. He organized the panel discussion "Who Gets the Water?" at the 1995 Ninth Annual Environmental Law Conference at King Hall.*

## NOTES

1. 18 Ops. Cal. Atty Gen. 31, 33 (1951).
2. The 1902 Reclamation Act, Act of June 17, 1902, c. 1093, 32 Stat. 388 (as amended). The act originally applied to 16 western states to bring water to arid lands. Texas was added in 1906. For a more complete history of the reclamation movement, there are two interesting sources: DONALD WORSTER, RIVERS OF AMERICAN EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST (1985) and MARC REISNER, CADILLAC DESERT.
3. California Governor's Commission, Final Report 6-14, (1978).
4. *Id.*
5. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, CV79-106-EDP. (E.D. Cal. 1986).
6. Telephone Interview with Carolyn Marn, Biologist, National Biological Service (March 17, 1995).
7. Harrison C. Dunning, Confronting the Environmental Legacy of Irrigated Agriculture in the West: The Case of the Central Valley Project, 23 ENVTL. L. 943, 954 (1990).
8. For a quick summary, see Sports Illustrated, THE KILLING FIELDS, PP. 61-69. For a more in depth discussion, see TOM HARRIS, DEATH IN THE MARSH (1991).