# Contents

# Abbreviations and Acronyms Used in This Article

| | |
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| APA | Administrative Procedure Act |
| BDCP | Bay Delta Conservation Plan |
| CEQA | California Environmental Quality Act |
| CESA | California Endangered Species Act |
| CLWA | Castaic Lake Water Agency |
| CVP | Central Valley Project |
| CVPIA | Central Valley Project Improvement Act |
| CVWD | Coachella Valley Water District |
| Delta | Sacramento-San Joaquin Delta |
| DFG | California Department of Fish and Game |
| DMC | Delta Mendota Canal |
| DWR | California Department of Water Resources |
| EC | electrical conductivity |
| EPA | US Environmental Protection Agency |
| ESA | Endangered Species Act |
| EWA | Environmental Water Account |
| IID | Imperial Irrigation District |
| KCWA | Kern County Water Agency |
| MRGO | Mississippi River Gulf Outlet |
| MWD | Metropolitan Water District of Southern California |
| NEPA | National Environmental Policy Act |
| NMFS | National Marine Fisheries Service |
| NPDES | National Pollutant Discharge Elimination System |
| OCAP | Operations Criteria and Plan |
| (P)EIS/EIR | (Programmatic) Environmental Impact Statement/Environmental Impact Report |
| QSA | Quantification Settlement Agreement |
| RPA | Reasonable and Prudent Alternative |
| SDCWA | San Diego County Water Authority |
| SRS | Sacramento River Settlement |
| State Water Board | State Water Resources Control Board |
| SWP | State Water Project |
| TROA | Truckee River Operating Agreement |
| USACE | US Army Corps of Engineers |
| USBR | US Bureau of Reclamation |
| USFWS | US Fish and Wildlife Service |
| WSA | water supply assessment |
| YCWA | Yuba County Water Agency |

# Summary of Significant Litigation 2005-2009

By California Department of Water Resources, Office of the Chief Counsel

## I. Disputes over Water Resources of Statewide Significance

### A. Sacramento-San Joaquin River Delta

**1. CALFED Litigation.** The CALFED Programmatic Environmental Impact Statement/Environmental Impact Report was challenged by environmental groups and agricultural interests. The issues included whether the PEIS/R was required to include a reduced-export alternative, whether the analysis of future sources of water was adequate, and whether analysis of the Environmental Water Account (EWA) was adequate. Two cases were coordinated before the California Supreme Court. [*Laub v. Davis,* No. S138974, and *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings,* No. S138975.] The court issued its ruling in June 2008, concluding that the CALFED final PEIS/R complied with California Environmental Quality Act (CEQA). [*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143.] The court held that omitting a "reduced export" alternative from consideration in the EIR did not violate CEQA because reducing exports was not compatible with ensuring water supply reliability, one of the CALFED program's four primary objectives (along with ecosystem quality, water quality, and levee system integrity). The court noted that the rule of reason "requires the EIR to set forth only those alternatives necessary to permit a reasoned choice and to examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project." [Id. at 1163.] The court stated: "…an EIR need not study in detail an alternative that is infeasible or that the lead agency has reasonably determined cannot achieve the project's underlying fundamental purpose." [Id. at 1165.] CALFED made an informed judgment that reduced exports would defeat the programs' purpose of concurrently resolving conflicting demands for water supply reliability, ecological quality, water quality, and levee system integrity.

The court also noted that the environmental baseline is measured by existing conditions, and included the State Water Project (SWP) and the Central Valley Project (CVP). Water exports had been occurring for decades before the CALFED program so "those problems would continue to exist even if there were no CALFED program, and thus under CEQA they are part of the baseline conditions rather than a program-generated environmental impact that determine the required range of program alternatives." Also, the court held that failing to identify and conduct in-depth EIRs on particular water supply sources did not violate CEQA because "first-tier" program EIRs do not require the same level of specificity required of "second-tier" site-specific project EIRs. The court concluded that "at the first-tier program stage, the environmental effects of obtaining water from potential sources may be analyzed in general terms, without the level of detail appropriate for second-tier, site-specific review. The court held that although the CALFED PEIS/R does not identify specific future water sources with certainty, the PEIS/R does evaluate in general terms the potential environmental effects of supplying water from potential sources, and this was sufficient. Finally, the level of specificity about the EWA in the PEIS/R was adequate for a first-tier programmatic EIR. Additional details in the subsequent "Action Framework" report properly belonged in a second-tier CEQA document.

**2. Challenge to D-1641 Water Rights Decision.** [*Coordinated Special Proceedings, State Water Resources Control Board Cases* (3rd Dist. Court of Appeal Case No. C044714).] Eleven different lawsuits were filed and coordinated in this action challenging State Water Resources Control Board (State Water Board) Water Rights Decision 1641 which implemented certain water quality objectives in the May 1995 Water Quality Control Plan. The case addressed several questions,including (1) whether D-1641 complied with CEQA, (2) whether the changes in D-1641 injured certain Sacramento-San Joaquin River Delta (Delta) water users, and (3) whether D-1641 was consistent with area of origin laws. The 2003 superior court decision largely upheld D-1641, finding that it properly decided all CEQA, area of origin, joint point of diversion, reasonable use, due process, and salmon protection issues. The court found two errors in D-1641: (1) It improperly limited the place of use for Westlands Water District; (2) It improperly implemented the San Joaquin River flow objectives under the San Joaquin River Agreement. The court of appeal issued its decision on February 9, 2006, largely upholding D-1641 and the trial court's decision. The court found that the State Water Board had complied with CEQA, that D-1641 did not injure Delta water users, and that it was consistent with area of origin law. The decision affirmed the trial court's ruling that the State Water Board improperly implemented the flow objectives on the San Joaquin River. The California Supreme Court denied all Petitions for Review.

**3. Environmental Water Account (EWA)**. [*California Farm Bureau Federation v. Mike Chrisman* (Sacramento Superior Court No. 04CS00490).] The Farm Bureau filed this CEQA action challenging the adoption of the Final EIS/EIR covering operation of the EWA through 2007, the end of the first stage of implementation of the CALFED Program. The Farm Bureau alleged the EIS/EIR does not adequately address "agricultural resources" when analyzing impacts, alternatives, mitigation, and other issues regarding operations of the EWA. In August 2005, the parties reached a settlement of this matter, and a request for dismissal with prejudice was filed. The settlement agreement allows federal and State agencies to cooperate with scientists and stakeholders to seek funding and to seek to obtain the best science available to promote Delta fish health and solve problems associate with fish declines. The parties agreed on certain steps to facilitate the participation of the Farm Bureau and others in the process for formulating and analyzing the longer term EWA. In late 2008, the US Bureau of Reclamation (USBR) and the Department of Water Resources (DWR), lead agencies for the long-term EIS/EIR, decided to suspend work on the longer term EWA program.

**4. Term 91.** Two lawsuits were filed challenging State Water Board Decision 2001-22, which approved an application by El Dorado Irrigation District to divert water for urban purposes. El Dorado Irrigation District and El Dorado County Water Agency challenged the imposition of Term 91, which protects SWP stored water, as part of the State Water Board decision. Another lawsuit was filed by an environmental group, League to Save Sierra Lakes, alleging CEQA violations. In September 2006, the Third District Court of Appeal upheld the decision of the trial court finding that the State Water Board abused its discretion in imposing Term No. 91 on El Dorado's permit. [*El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4$^{th}$ 937.] By imposing Term No. 91 on El Dorado, the State Water Board allowed those with rights junior to El Dorado to divert water when El Dorado could not, and this result was contrary to the rule of priority. The court found, however, that Term No. 91 was, in general, an appropriate condition to protect SWP stored water but it was not appropriate in this particular instance.

**5. Delta Smelt.** On February 15, 2005, a number of environmental groups sued the USBR and the US Fish and Wildlife Service (USFWS) challenging the 2005 USFWS Biological Opinion on Delta Smelt

issued to the USBR review for operations of the CVP and SWP as described in the Long-Term Central Valley Project Operations Criteria and Plan (OCAP). [*Natural Resources Defense Council v. Norton* (N.D. Cal. 2005.] In May 2007, the federal district court held that the USFWS biological opinion was arbitrary, capricious, and contrary to the federal Endangered Species Act (ESA) and invalid, but the court did not vacate the opinion. Prior to this decision, USFWS and USBR had reinitiated consultation on delta smelt to prepare a new biological opinion for the CVP and SWP operations. After several days of hearings, on December 14, 2007, the court issued an interim remedy order with new operational constraints on the SWP and CVP pending completion of a new biological opinion.

On September 1, 2009, the district court issued its final order on cross motions for summary judgment that had been filed by the parties in challenging the 2005 USFWS biological opinion. The court held that the environmental plaintiffs lacked standing to challenge USBR's approval of certain water contracts, referred to as the Delta Mendota Canal (DMC) Contracts. As to a second set of contracts, referred to as the Sacramento River Settlement (SRS) Contracts, the district court held that the consultation requirements of the ESA do not apply to the USBR's renewal of these contracts because the agency lacks sufficient discretion under these contracts to reduce water deliveries for the benefit of the delta smelt. However, the court also held that the USBR could reduce deliveries under these contracts "to meet legal obligations." Although the federal defendants/appellants are still evaluating their position in this appeal, one issue would be the scope of USBR's discretion under the SRS contracts.

On December 15, 2008, in compliance with the court order finding the 2005 biological opinion invalid, the USFWS issued a new biological opinion finding that the CVP and SWP operations jeopardized the continued existence of the delta smelt. The 2008 biological opinion included a Reasonable and Prudent Alternative (RPA) to prevent jeopardy and that proposed different operational restrictions than those described DWR for the SWP and by the USBR for the CVP. In 2009, the USBR conditionally accepted the RPA, and both the CVP and SWP are operating under that RPA.

In early 2009, State and federal water contractors filed six lawsuits against USFWS and USBR challenging the issuance of the USFWS 2008 biological opinion for delta smelt, claiming the RPA illegally restricts the amount of water that the SWP and CVP can divert from the the Delta. These lawsuits have been consolidated and are referred to as the Delta Smelt Consolidated Cases (United States District Court, Eastern District of California, Case No. 1:09-CV-00892, 1:09 CV-00407, 1:09-AT-00261 & 1:09 AT-00174). In late 2009, in response to claims by the defendants and a ruling of the court that DWR could not participate in the litigation as a real-party-in-interest, DWR intervened in the case as a plaintiff. In November 2009, Judge Wanger issued a decision in the case based on a challenge that USFWS did not comply with the National Environmental Policy Act (NEPA). The court ruled that USBR must first conduct an environmental review under NEPA before implementing a biological opinion that called for significant water reductions. The court concluded that USBR's provisional acceptance and implementation of the biological opinion and its RPA constitute major federal action triggering NEPA because they represent a significant change to the operation status quo. The RPA requires actions that commit CVP and SWP water to protect delta smelt and its habitat and will result in reduced water deliveries by several hundred thousand acre-feet. The court concluded that the appropriate focus for purposes of NEPA evaluation is "project operations," thus USBR and not USFWS is the appropriate lead agency. The water contractors filed a preliminary injunction motion to prevent implementation of the RPA actions during early 2010. The court scheduled a hearing to determine if an injunction should be issued and if any interim remedy is needed pending a new biological opinion or subsequent court order. In

addition, in response to summary judgment motions, the court scheduled several days of hearing for late April 2010 to address claims challenging the underlying science and compliance of the biological opinion with the ESA.

**6. Salmon.** On August 9, 2005, a coalition of environmental groups sued USBR and the National Marine Fisheries Service (NMFS) challenging the 2004 NMFS biological opinion on listed salmon issued to USBR for operations of the CVP and the SWP as described in the Long-Term Central Valley Project OCAP. [*Pacific Coast Federation of Fishermen's Association v. Gutierrez* (E.D. Cal. 2005).] On April 16, 2008, the federal district court found the 2004 biological opinion was invalid, but did not vacate the biological opinion, and ordered NMFS to prepare a new opinion. On June 4, 2009, NMFS issued a new biological opinion. Subsequently, in 2009, State and federal water contractors filed six separate lawsuits against NMFS and USBR challenging the issuance and adoption of the new opinion, alleging that the federal defendants failed to comply with NEPA, the ESA, and that Administrative Procedure Act (APA) in preparing and approving the opinion. The cases were consolidated in September 2009 (Consolidated Salmon Cases, Eastern District of California). In January 2010, in response to claims by the defendants and a ruling of the court that DWR could not participate in the litigation as a real-party-in-interest, DWR agreed to intervene in the case as a plaintiff. A hearing on the NEPA issue is scheduled for February 10, 2010, and a scheduling conference has been set for March 1, 2010.

**7. Levee Repair Funding.** In October,2009, the Fay Island Reclamation District sued the California Department of Fish and Game (DFG) along with DWR alleging that their funding for approved levee repairs is being unlawfully withheld by DFG. [*Fay Island Reclamation District 2113 v. California Department of Fish and Game, et al.* (San Joaquin County Superior Court, Case No. 38-2009-0022860-CU-BC-STK).]

**8. Bay Delta Conservation Plan and Alternate Conveyance.** In October 2009, two lawsuits were filed in Sacramento County Superior Court by Delta water agencies, farmers, and Reclamation District 999 challenging DWR's compliance under CEQA and its approval of the in-water geotechnical borings within the Delta. The purpose of the drilling, as stated in DWR's Notice of Determination, is to provide "geological information necessary for proposed intake structures and tunnels for proposed alignments in the water conveyance facilities associated with preparation of the EIR/EIS for the Bay Delta Conservation Plan (BDCP)." The lawsuits contend that the mitigated negative declaration and initial study for the in-water drilling violate the requirements of the CEQA. The briefing of the case will begin in 2010. [*Central Delta Water Agency, et al. v. California Department of Water Resources* (Case No. 34-2009-80000354*); Reclamation District 999 v. California Department of Water Resources* (Case No. 34-2009-80000343).]

In early 2009, the same Delta water agencies challenged DWR's filing of a notice of exemption under CEQA for geotechnical drilling on land needed for collection of information for use in preparing the BDCP EIR/EIS. This case is scheduled for hearing in 2010.

## B. Central Valley Project

**1. 1993 Allocation Dispute.** Irrigators within Westlands Water District brought suit against USBR for allocation reductions caused by the listing of several fish species as endangered in the Delta. The Ninth Circuit found that individual water users were not qualified to assert that the United States waived sovereign immunity because they were not intended third-party beneficiaries under the contract between the United States and the Westlands Water District. [*Orff v. United States Department of the Interior*, 358

F.3d 1137, cert. granted, 125 S.Ct. 309 (2004).] On June 23, 2005, the US Supreme Court upheld the Ninth Circuit, finding that in enacting the Reclamation Reform Act, 43 USC §390uu, Congress did not waive sovereign immunity or consent to the Westland Water District's suit. [*Orff v. U.S.*, 545 U.S. 596 (2005). ]

**2. Compensation for water diverted for environmental purposes.** Stockton East Water District and San Joaquin Water Conservation District brought action against USBR asserting breach of contract and takings claims based on USBR's alleged failure to provide the districts with specified quantities of water from the New Melones Unit as required by their contracts. The US Court of Appeals for the federal circuit held that USBR breached its contracts during several years where USBR failed to provide contract-specified quantities of water. [*Stockton East Water District v. United States*, 583 F.3d 1344 (Fed. Cir. 2009).] The court concluded that implementation of the Central Valley Project Improvement Act (CVPIA), which required diversion of water for fish, wildlife, and habitat restoration needs, did not excuse USBR. The court stated that USBR did not have inherent authority to reallocate water based on changes in law and policy. Law and policy changes are not "beyond the control of the United States" within the meaning of the contracts. The court concluded that USBR's failure to deliver water could be excused under the contracts if it could prove that drought conditions were the root cause. The court found that USBR was not liable for water shortages in two of the years at issue where there was adequate proof of drought. However, the water districts could pursue takings claims for those two years. For the remaining years, the court remanded to the claims court to determine the amount of damages owed to the water districts.

**3. Vernalis Standard.** South Delta farmers and water agencies challenged USBR's New Melones Interim Operations Plan developed under the CVPIA. The lower court found, *inter alia*, that USBR's decision to release water under the plan was not arbitrary and capricious, and that plaintiffs lacked proof of actual injury. [*Central Valley Water Agency v. United States*, 327 F.Supp.2d 1180 (E.D. Cal. 2004).] Plaintiffs appealed, arguing that plan's model showed that USBR would violate the standard 10 percent of the time. The Ninth Circuit rejected the argument, holding that although USBR has no discretion to violate the Vernalis Salinity Standard, the CVPIA leaves to the agency's discretion the decision of how to comply with the standards. [*Central Valley Water Agency v. United States*, 452 F.3d 1021 (9th Cir. 2006).] The court noted that USBR had consistently met the standard for over a decade by deviating from the plan as necessary in order to meet the standard. The court reasoned that the model is based on hypothetical conditions, whereas actual hydrological conditions will change during operation of the project.

## C. State Water Project

**1. California Endangered Species Act (CESA).**

a. In October 2006, Watershed Enforcers filed a challenge against DWR's authority under the California Endangered Species Act (CESA) for the incidental take of state-listed endangered species—delta smelt and winter and spring-run salmon—that unavoidably occurs through the operation of the SWP. Alameda County Superior Court Judge Roesch issued a statement of decision on March 22, 2007, granting a 60-day stay for DWR to obtain take authorization from DFG. [*Watershed Enforcers v DWR* (2007) (Alameda County Superior Court, Case No. RG06292124).] DWR and the SWP contractors appealed the decision, which stayed the order of the lower court. In addition, the appellate court granted the parties' request to stay the appellate proceedings to allow time for the federal Biological Opinions on these species to be issued. The federal biological opinion

for delta smelt was completed in December 2008, and the biological opinion for salmonids was completed in June 2009. Based on these federal biological opinions, DWR requested from DFG that the opinions be determined consistent with CESA. In 2009, DFG issued consistency determinations for delta smelt and salmon, which provides DWR take authorization as required by the trial court. DWR dismissed its appeal and is waiting for other appellate matters to resolve so that it can request a dismissal of the trial court order based on DWR's satisfaction of the order. Kern County Water Agency (KCWA) has continued its appeal, challenging DFG's authority to require DWR to obtain incidental take permits under CESA. [*Watershed Enforcers v. California Department of Water Resources, et al.* (1st Appellate District, Case Nos. A117715 and A117750).]

b. Longfin 2084 Regulation. In February 2008, the California Fish and Game Commission voted to make longfin smelt a candidate for endangered species status under the CESA. Candidacy provides protection to longfin smelt comparable to the protection it would receive as an endangered or threatened species under CESA. At the same meeting, the commission adopted emergency regulations, authorizing DWR's incidental take of longfin smelt during SWP operations (and USBR take during CVP operations) during the candidacy period. The commission readopted, with modifications, the emergency regulations in August 2008, and again for a final time in November 2008. In December 2008, three separate lawsuits were filed in the Superior Court of Los Angeles against the commission by the State Water Contractors, federal water contractors, and KCWA. [*State Water Contractors v. Fish and Game Commission*, Case No. BS118166, *San Luis & Delta-Mendota Water Authority et al. v. California Department of Fish & Game, et al.*, Case No. BS 118164, and *Kern County Water Agency v. California Department of Fish & Game, et al*., Case No. BS 118165.] The consolidated cases challenge the commission's adoption of emergency regulations for the take of longfin smelt, naming the commission, DFG and Office of Administrative Law as defendants, and naming DWR as a real-party-in-interest. In February 2009, the Los Angeles Superior Court denied the motion of the parties for a preliminary injunction in the consolidated Longfin smelt regulation cases. The emergency regulations expired shortly thereafter.

c. Longfin 2081 Take Permit (*SWC v. DFG*). In early 2009, in anticipation of the State listing of longfin smelt, DWR submitted an application to DFG for an incidental take permit under CESA section 2081 for longfin smelt related to SWP operations. In February 2009, DFG issued to DWR an incidental take permit for take of longfin smelt. In March 2009, the State Water Contractors filed a combined petition for writ of mandate and complaint for declaratory and injunctive relief challenging the incidental take permit. [*State Water Contractors v. Department of Fish and Game* (Case No. 34-2009-80000203, Sacramento County Superior Court).] The case names DWR as a real-party–in-interest. The contractors claim that the take permit has the potential of substantially reducing the ability of the SWP to regulate the ongoing and long-term provision of water. The case has been stayed until November 2010 pending completion of the federal litigation challenging the biological opinions for delta smelt and salmon.

d. CESA Consistency Determinations for salmon and delta smelt. In the summer of 2009, DFG issued determinations to DWR that the federal 2008 USFWS biological opinion for delta smelt and the 2009 NMFS biological opinion for salmon were consistent with CESA, satisfying DWR obligations to comply with CESA section 2080.1. Subsequent to issuing the Consistency Determinations, State Water Contractors filed lawsuits against DFG and DWR claiming the determinations were not in compliance with CESA. [*Kern County Water Agency v. California Department of Fish and Game*

(Case No. S-1500-CV-268133, Kern County Superior Court) and *State Water Contractors, Inc v. California Department of Fish and Game* (Case No. S-1500-CV-268074 and Case No. S-1500-CV-268497, Kern County Superior Court).]

**2. Water Right Permits.** On May 3, 2005, the State Water Board's Enforcement Division notified DWR and USBR of the division's intent to issue a cease and desist order because it claimed DWR and USBR threatened to violate the condition of their water right permits implementing a 0.7 electrical conductivity (EC) in the southern Delta during April through August. On February 15, 2006, the State Water Board issued a cease and desist order requiring DWR and USBR to take corrective actions by 2009 to obviate the threat of violation of water quality standards by constructing permanent gates in the southern Delta channels, or take equivalent measures. Pending construction of the permanent gates, the cease and desist order also required DWR and USBR to report if they exceed or threaten to exceed the 0.7 EC water quality requirement and report on reasons for an exceedance. On June 15, 2006, the USBR and the State and federal water contractors filed in Sacramento Superior Court separate actions against the State Water Board challenging the cease and desist order. USBR also filed a complaint against the State Water Board challenging the cease and desist order in federal district court.

In October 2006, DWR and the State Water Board agreed to toll DWR's right to sue until March 7, 2007, to allow time for settlement of the issues. In December 2006, the State Water Board, USBR, and water contractors agreed to a stipulation to dismiss the actions and to toll the right to file another action before December 31, 2008. The negotiations with the State Water Board staff, DWR, and other parties to settle the litigation resulted in a letter from the State Water Board executive director that clarified that the cease and desist order is to be interpreted consistent with the Decision 1641 conditions on DWR and USBR water rights. In 2007, the State Water Board began workshops to review the southern Delta agricultural water quality objectives which are the subject of the cease and desist order and the litigation. The commencement of this review is consistent with the executive director's letter to DWR regarding these objectives. In June 2009, the State Water Board held a hearing regarding modification of the schedule in the cease and desist order that required DWR and USBR to obviate the threat of noncompliance by July 2009. The State Water Board issued an order in January 2010 which provides for extending the schedule pending completion of the State Water Board proceedings that are reviewing the salinity objectives and their implementation.

**3. East Branch Extension.** DWR's Division of Engineering prepared an EIR for the East Branch Extension Phase II project to install approximately 6 miles of new large diameter pipeline, a new pump station, reservoir, and enlargement of the existing Crafton Hills Pump Station. The Final EIR was certified and the project approved on March 6, 2009. In April 2009, two nonprofit organizations, Cherry Valley Environmental Planning Group and Cherry Valley Pass Acres and Neighbors, filed a petition for writ of mandate challenging the EIR on various grounds, including the EIR's analysis of climate change impacts. DWR certified the administrative record in December 2009. Soon after preparing the administrative record, a settlement was reached wherein the plaintiffs agreed to dismiss their case with prejudice, and DWR agreed to pay the costs of preparing the record. [*Cherry Valley Environmental Group and Cherry Valley Pass Acres and Neighbors v. California Department of Water Resources* (Riverside County Superior Court Case No. RIC 523024). ]

**4. Hydropower.** TheSWP's role in electrical generation and consumption placed it in the middle of a tumultuous period of energy crisis in California. Although DWR's role as purchaser for a portion of the

State's energy needs was separate from its role as operator of the SWP and therefore is not a subject of this report, there were several key judicial decisions on the role of the SWP in the energy field.

a. On April 25, 2005, in *Alameda County Flood Control & Water Conservation District, Zone 7 et al. v. State of California Department of Water Resources*, 14 of the 29 State Water Contractors sued DWR alleging that the method it used to allocate costs and revenues of its Hyatt and Thermalito powerplants at Oroville violated the terms of the long-term water supply contracts. [Sacramento County Superior Court, Case No. 05ASO1775.] Plaintiffs' complaint included claims for injunctive and declaratory relief and attorney fees. Specifically, they wanted to have all "benefit" derived from the sale or other disposal of Hyatt-Thermalito power credited against the "Delta Water Charge," which is a component of the contractors' water bill. They alleged that currently DWR credits the Delta Water Charge with only a portion of that benefit. The 14 plaintiffs would benefit from a shift of additional credit to the Delta Water Charge from the "transportation variable" (power) charge. The contractors south of the Tehachapi Mountains would have to pay more to transport water if the lawsuit succeeded. Metropolitan Water District (MWD) and entities representing 12 of the other southern contractors successfully moved to intervene in the case as defendants. Plaintiffs also sought to impose a constructive trust on revenues they believe were improperly allocated and sought to recover allegedly excess credits to the transportation variable from the southern interveners.

After a hearing on October 13, 2006, the court granted DWR's motion to bifurcate the case into two separate phases, i.e., liability and damages. The trial on the liability phase started on November 5, 2008, and concluded on December 12, 2008. The parties filed post-trial briefs several months after the end of the trial. On October 30, 2009, the court entered an interlocutory judgment in favor of DWR and the intervenors. The judgment upholds DWR's discretion in interpreting the water supply contracts, specifically DWR's allocation of revenues from Hyatt power generation. On October 30, 2009, the court entered an interlocutory judgment in favor of DWR and the intervenors. The plaintiffs subsequently claimed that the interlocutory judgment does not dispose of all the claims in the complaint. In 2010, DWR and the intervenors will be filing a motion for judgment on the pleadings to argue that the court's interlocutory judgment disposes of all of the claims in the complaint and that there is no need for Phase II, which was going to be the damages portion of the lawsuit if DWR did not prevail on contract interpretation. The hearing on the motion for judgment on the pleadings is scheduled for March 26, 2010.

b. In 2008, DWR completed a settlement agreement and EIR for its application to Federal Energy Regulatory Commission (FERC) for relicensing of Oroville Dam. Subsequent to the approval of the EIR, Butte County and Plumas County filed a lawsuit claiming the EIR, findings, and mitigation and monitoring plan, are not in accordance with requirements of CEQA, and requesting that the court vacate the approval. The administrative record has been filed with the court and briefing of issues will begin in 2010. [*Butte Co. v DWR*, Yolo County Superior Court 2009.] A case management conference has been set for February 25, 2010, and a trial date has been set for February 7, 2011.

**5. The Monterey Amendment Litigation.** The 1995 amendment to the State Water Contracts resolved longstanding disputes between the urban and the agricultural State Water Contractors over allocation of available supply during times of shortages as well as other financial and water management issues. The EIR on the Monterey Agreement (so called because of the site of the negotiations) was successfully challenged and the Third District Court of Appeal ruled that the EIR was inadequate due to: (1) the

designation of the Central Coast Water Agency as lead agency, rather than DWR, and (2) the EIR's failure to adequately address potential impacts that might flow from the removal of Article 18(b) from the long-term water supply contracts. [*Planning & Conservation League v. Department of Water Resources*, 83 Cal.App 4th 892 (3rd Dist. 2000).]

A settlement agreement was signed by all plaintiffs, DWR, and all State Water Contractors in spring 2003. The settlement provides for a number of actions to be taken, including the preparation of a new EIR on the Monterey Amendment and the establishment of an EIR committee composed of representatives of the plaintiffs and contractors to advise DWR in its preparation of the EIR. In addition, DWR and the contractors agreed to use the term "Table A amount" in lieu of the term "entitlement" and changed the State Water Contracts to reflect the new term. A water supply reliability report is issued biennially to provide more accurate information on the reliability of the available supply of water from the SWP, and a watershed protection program was initiated in Plumas County.

DWR completed a draft EIR in fall 2007 and circulated it for public review. The comment period ended in January 2008. The final EIR is expected to be certified and approved in early 2010. DWR has continued to operate under the Monterey Amendment as set forth in the settlement agreement.

### D. Colorado River

By the early 1990s, Arizona and Nevada neared use of their full apportionments from the Colorado River, setting the stage for California's local water agencies to negotiate how they would allocate the water they relied on from the specified quantity of Colorado River water available to California. These negotiations culminated in execution of the Quantification Settlement Agreement (QSA) in October 2003. To enable the QSA local agencies to reach agreement on how to reduce their existing use of Colorado River water and use the amount available to California, the QSA implementing legislation provided that California State take responsibility for specified QSA environmental mitigation obligations relating to the Salton Sea and for Salton Sea ecosystem restoration. The Secretary for Natural Resources, through DFG, is leading a consortium of State and federal agencies to develop and implement fish and wildlife conservation measures in the Salton Sea and lower Colorado River ecosystems.

Related legislation required the All American Canal to be lined to prevent water leakage, which, after protracted litigation, was completed in April 2009. The Ninth Circuit Court of Appeals had disposed of the All American Canal case by remand and dismissal to the Nevada District Court on jurisdictional grounds and because midway through the appeal process Congress enacted the Tax Relief and Health Care Act of 2006 (Pub. Law No. 109-432, 120 Stat. 2922), which exempted the project from environmental review, mooting those claims, and mandated that the canal be completed "without delay." [*Consejo de Desarrollo Economico de Mexicali, A.C. v. U.S.*, 482 F.3d 1157 (9th Cir. 2007).]

DWR is to carry out specified water transfers that provide revenues for the Salton Sea restoration fund. Related State activities include issuance of State Water Board water rights orders for the QSA water transfers; DFG incidental take permits for special status species affected by the QSA water transfers, and financial arrangements for water conservation measures within Imperial Irrigation District (IID).

In October 2009, the California legislature passed a bond measure which, if approved by the voters in the November 2010 election, will provide funding for ecosystem and watershed protection and restoration projects in several watersheds, including the Salton Sea and Colorado River watersheds. Under the bill,

funds would be available for "Period 1" activities identified in the May 2007 report issued by Natural Resources Agency, titled "Salton Sea Ecosystem Restoration Program Preferred Alternative Report and Funding Plan."

The following cases were brought challenging various aspects of the actions taken on the Colorado River in the QSA and related documents. The cases have been coordinated in the Sacramento County Superior Court (Quantification Settlement Agreement (QSA) Cases, Judicial Council Coordination Proceeding No. 4353).

*Imperial Irrigation District v. All Persons, Imperial County Superior Court*, Case No. ECU 01649: This case is a contract validation action brought by IID under Section 860 of the Code of Civil Procedure to validate 13 of the 35 QSA agreements. The primary agreement, the QSA Joint Powers Agreement (QSA JPA), involves a water transfer of approximately 200,000 acre-feet per year between IID, Coachella Valley Water District, and San Diego County Water Authority (SDCWA).

*County of Imperial v. Imperial Irrigation District, Imperial County Superior Court*, Case No. ECU 01650: This petition for writ of mandate has been brought by Imperial County challenging the "water transfer project" between IID and SDCWA. The petition alleges that the IID/SDCWA water transfer violates unspecified provisions of the California Water Code and CEQA.

*County of Imperial v. Metropolitan Water District, et al., Imperial County Superior Court*, Case No. ECU 01656: This action has been brought by Imperial County challenging the "QSA project." The action is pled as a petition for writ of mandate and names MWD, IID, Coachella Valley Water District (CVWD), and SDCWA as respondents. Imperial County contends that these local agencies have failed to comply with unspecified provisions of the Water Code and the CEQA in adopting the QSA project.

*Protect Our Water and Environmental Rights (POWER), et al. v. Imperial Irrigation District*, Imperial County Superior Court, Case No. ECU 01653: This action has been brought by an association composed of "residents and property owners within Imperial County and elsewhere in Southern California." This action is pled as a petition for writ of mandate and challenges the adequacy of the EIR prepared by IID for the water conservation and transfer project and the habitat conservation plan under CEQA. The petition names IID as a respondent and names SDCWA, MWD, and CVWD as real-parties-in-interest.

*Morgan, et al. v. Imperial Irrigation District, et al., Imperial County Superior Court*, Case No. ECU 01646: This action has been brought by owners or holders of land within IID's service area and by certain residents of Imperial County. This action is pled as a petition for writ of mandate and only names IID as the respondent. The petitioners contend that IID's October 2003 addendum to the district's EIR concerning the water conservation and transfer project fails to comply with CEQA and that CEQA requires IID to prepare a supplemental EIR.

*Morgan, et al. v. Imperial Irrigation District, Imperial County Superior Court*, Case No. ECU 01643: This action has been brought by some, but not all, of the plaintiffs who brought the previously noted Morgan CEQA action. The plaintiffs have pled this case as a reverse validation action under Section 863 of to Code of Civil Procedure. The complaint alleges a wide-ranging set of claims, including allegations that IID has failed to meet its trust obligations to district landholders, that IID assessments

pursuant to the QSA violate Article XIIID of the California Constitution (Proposition 218), that the QSA fails to comply with CEQA, that the QSA violates the Fifth Amendment prohibition against the taking of property, and that the QSA constitutes an unlawful conversion of the plaintiffs' property.

*Morgan and Emanuelli v. Imperial Irrigation District, Imperial County Superior Court*, Case No. ECU 91658: This case is almost identical to the CEQA action filed in *Morgan, et al. v. Imperial Irrigation District*, Imperial County Superior Court, Case No. ECU 01646, but names SDCWA, CVWD, MWD, and the State of California as real-parties-in-interest.

The coordinated cases went to trial in November 2009 on two primary issues: (1) whether the QSA JPA is valid; and (2) whether the State violated the State constitutional debt limitation provision. In December 2009, the court invalidated the QSA JPA and a dozen other related agreements based on the State's unconditional contractual agreement to pay for environmental mitigation costs related to the Colorado River water transfer between IID and SDWA as unconstitutional. Several parties intend to appeal the decision, which could postpone any final resolution for several years.

## II. Selected Disputes over Water Resources of Primarily Regional or Local Significance

### A. Santa Maria Basin adjudication

The water users in the Santa Maria Basin in the Central Coast area have been engaged in litigation to adjudicate rights to groundwater. [See *Santa Maria Valley Water Conservation District v. City of Santa Maria* (Santa Clara Superior Court No. 1-97-CV-770214).] On January 25, 2008, the court issued a final judgment and order which incorporated and approved a June 2005 stipulation that had been signed by a majority of the active parties in the case. The stipulation provides a comprehensive management structure for the basin. The court awarded the City of Santa Maria and Golden State Water Company prescriptive rights to groundwater against the non-stipulating parties and found that the city and Golden State have the right to use the groundwater basin for temporary storage and subsequent recapture of return flows generated from their importation of SWP water, to the extent that such water adds to the supply of water in the aquifer and if there is storage space for such return flows.

### B. Yuba River

In July 2003, the State Water Board adopted D-1644 addressing instream flows and water rights for the portion of the Yuba River from New Bullards Bar Reservoir to the confluence of the Yuba River with the Feather River in Marysville. Yuba County Water Agency (YCWA), several Yuba water districts, and an environmental group filed lawsuits against the State Water Board claiming the decision was inadequate. [*YCWA v State Water Board*, Yuba County Superior Court Case No. 03-0000591, filed July 31, 2003.] In 2007, YCWA, DWR, USBR, State and federal water agencies, and water users within YCWA entered into settlement agreements, known as the Yuba Accord. The Yuba Accord provided additional instream flows in the Yuba River to benefit fish while also allowing for transfer of water to SWP and CVP water users. YCWA petitioned the State Water Board to adopt the settlement as part of a revised Decision 1644, which allowed dismissal of the litigation.

### C. Los Osos Groundwater

The Los Osos Community Services District filed a lawsuit seeking determination of rights to the Los Osos Groundwater Basin. [San Luis Obispo Superior Court, Case No. GIN 040126, filed 2004.] In 2007, the parties reached an interim stipulated agreement, and the court entered an interim stipulated judgment in August 2008. The interim stipulated judgment established a process for developing and implementing a best management practice that will serve as a physical solution for the management of basin water resources, resolving all issues raised in the complaint.

### D. Castaic Lake Water Agency

California Water Impact Network and the Planning and Conservation League challenged the new EIR certified by Castaic Lake Water Agency (CLWA) for the permanent transfer of 41,000 acre-feet SWP Table A Amount to CLWA from KCWA member unit Wheeler Ridge-Maricopa Water District. The cases were originally filed in Ventura County but were later transferred to Los Angeles County. The original EIR certified by CLWA for this transaction was successfully challenged in *Friends of the Santa Clara River v. CLWA* on the grounds that it tiered off the decertified Monterey Agreement EIR. On May 22, 2007, the superior court ruled in favor of Castaic and the respondents in all but one aspect. [*Planning and Conservation League et al. v. Castaic Lake Water Agency* (Los Angeles Superior Court No. BS098724).] The court found that Castaic could be the lead agency and did not have to wait for DWR to complete the Monterey Plus EIR to proceed. However, the court found that the 2004 EIR had one defect - it failed to show the analytic route as to how and why various allocations of SWP water are relevant and would occur. The court required Castaic to set aside its approval of the EIR and to comply with CEQA either through a new EIR or other environmental documentation including an addendum. An appeal was filed, and on December 17, 2009, the Second District Court of Appeals issued a decision which ruled against the plaintiffs on all the issues and upheld the adequacy of the EIR.[*Planning and Conservation League et al. v. Castaic Lake Water Agency* (2nd Appellate District No. B200673).]

### E. Friant Dam/San Joaquin River

In 1988, the Natural Resources Defense Council on behalf of The Bay Institute and the other members of an environmental coalition filed suit challenging the Friant water users' long-term contract renewals and to compel flow releases from Friant to restore fish, including salmon, to good condition. [*Natural Resources Defense Counsel v. Houston*, 146 F.3d 1118 (9th Cir. 1998).] In 1999, the litigation was stayed so that the parties could reach a settlement. In September 2006, a settlement was reached. The settlement provided for (1) restoration and maintenance of fish populations in good condition in the main stem of the San Joaquin River below Friant Dam to the confluence of the Merced River, including naturally reproducing and self-sustaining populations of salmon and other fish; and (2) reduction or avoidance of adverse water supply impacts to all of the Friant Division long-term contractors that may result from the interim flows and restoration flows. The implementation of the settlement involved advancing the legislation to appropriate funding for the settlement and technical work associated with such a large-scale restoration and reconnecting the residents of the San Joaquin Valley to a living river. On March 30, 2009, President Obama signed legislation authorizing and funding the San Joaquin River Restoration settlement. The first flows were released from Friant Dam on October 1, 2009.

### F. Antelope Valley Groundwater Basin

The Antelope Valley groundwater adjudication has been ongoing for a decade. Several lawsuits have been consolidated in Los Angeles County Superior Court (*Antelope Valley Groundwater Cases,* No. JCCP 4408). The litigation stems from lawsuits filed by two farming companies in 1999 and 2001 against Antelope Valley water districts and government agencies. The companies sought priority rights to groundwater beneath their farmland. Since then, hundreds of stakeholders have entered the litigation. In the case's first phase, Judge Komar ruled in November 2006 that the Antelope Valley Groundwater Basin will serve as the geographic boundary in the case, rather than the entire watershed. In the second phase, the court was tasked with deciding whether the valley consists of a single groundwater basin or several distinct subbasins. Judge Komar ruled in January 2009 that the underground aquifer in the Antelope Valley is hydrologically connected, enabling the water to travel from one location to another. A case management conference is scheduled for January 8, 2010.

## III. Disputes over Interstate Water Resources

### A. Klamath River Basin

Intractable disputes over water shortages and endangered species in the Klamath River Basin gave rise to litigation in a variety of settings. Ranchers filed a $1 billion claim with the federal court of claims (*United States Court of Federal Claims, No. 01-591 L)*. In March 2007, the court of claims held that a federal irrigation district did not break any contracts with Klamath Basin farmers when it shut off irrigation so there would be enough water for threatened and endangered fish. The irrigation districts appealed. However, in July 2008, the US Court of Appeals for the Federal Circuit, finding that the questions on appeal were more appropriately state law questions, certified three state law questions to Oregon's highest court. The Oregon Supreme Court was to decide whether Klamath water users have any property rights under Oregon law. After a 16-year legal battle, the Oregon Supreme Court held that the federal government must compensate two regional water authorities for water diverted to preserve the environment. [Oregon Supreme Court Case No. S056275.]

In *Trout Unlimited v. Lohn (National Marine Fisheries Service)* (2009) 559 F.3d 946), the US Court of Appeals (Ninth Circuit) needed to determine whether the NMFS may distinguish between natural- and hatchery-spawned salmon and steelhead when determining the level of protection the fish should be afforded under the ESA. The court stated that it deferred to the informed exercise of agency discretion, especially where that discretion is exercised in an area where the agency has special "technical expertise." The court was convinced that the Hatchery Listing Policy's method of assessing the status of an entire endangered species unit and NMFS's corresponding downlisting of the Upper Columbia River steelhead were decisions based upon the best scientific available. Moreover, the Hatchery Listing Policy complies with the express purpose of the ESA to preserve "the ecosystems upon which endangered and threatened species depend." [*Trout Unlimited*, id.]

In October 2009, a coalition of Tribes, conservationists, and commercial fishing groups filed suit opposing a plan by DFG to issue incidental take permits for agricultural practices that kill listed salmon or destroy habitat in the Shasta and Scott rivers, two of the Klamath's salmon spawning tributaries. California currently issues individual incidental take permits to allow farmers and ranchers to continue lawful use of these rivers while threatened salmon are present, as long as their activities do not jeopardize fish survival and efforts are made to mitigate harm. But in the Scott and Shasta rivers, the agency is planning a blanket waiver for all farming activities—without first determining whether any activities are

harmful to salmon or even illegal. The program may be replicated by DFG in watersheds throughout the state. [*Klamath Riverkeeper, et. al. v. California Department of Fish and Game*, San Francisco Superior Court.]

For over two years, the Klamath negotiation group, representing 28 federal, state, Tribal, county, and irrigation entities, conservation and fishing organizations, and PacifiCorp, has been working to develop a comprehensive solution for the Klamath Basin. Although an agreement has not been finalized as of September 2009, the parties have been able to reach a tentative agreement consisting of two parts. The first of the two parts deals with water, power subsidies for irrigators, commercial farming on the National Wildlife Refuges, regulatory assurances, fish reintroduction and restoration issues. The second part is focused on removal of the lower four PacifiCorp dams.

More specifically, the draft hydroelectric settlement lays out the process for additional studies, environmental review, and a decision by the Secretary of the Interior regarding whether removal of the lower four dams on the Klamath River that are owned by PacifiCorp will (1) advance restoration of the Salmonid fisheries of the Klamath Basin and (2) is in the public interest, which includes consideration of potential impacts on affected local communities and Tribes. The hydroelectric settlement also includes provisions for the interim operation of the dams and the process to transfer, decommission, and remove the dams.

Key provisions of the Klamath Basin Restoration Agreement include a program to rebuild fish populations sufficient for sustainable Tribal, recreational, and commercial fisheries; reliable water allocation to sustain the needs of the agricultural community and national wildlife refuges in the basin; a program to stabilize power costs in the area; and a compensation program for counties that may be impacted by the removal of the identified hydroelectric facilities. Implementing the agreement as it is currently outlined is expected to cost approximately $400 million in new funding over 10 years.

### B. Truckee River

Negotiations to settle disputes and litigation in accordance with the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990 (P.L. 101-618) have continued, leading to the development of a Truckee River Operating Agreement (TROA), which was signed on September 6, 2008. The Final EIR/EIS for the TROA was certified on September 6, 2008.

The primary purpose of the TROA is to implement section 205(a) of P.L. 101-618, which directs the Secretary of the Interior to negotiate an agreement with California and the State of Nevada to increase the operation al flexibility and efficiency of certain reservoirs in the Lake Tahoe and Truckee River basins. The TROA, once effective, will provide additional storage opportunities in existing reservoirs for future urban demands during periods of drought in the Truckee Meadows and enhance spawning flows in the lower Truckee River for the benefit of Pyramid Lake fishes (specifically, federally endangered cui-ui and threatened Lahontan cutthroat trout). In addition, the TROA will satisfy existing Orr Ditch and Truckee River Electric Decree water rights, increase recreational opportunities at federal reservoirs, improve streamflows and fish habitat throughout the Truckee River Basin, and improve water quality in the Truckee River. The TROA would also trigger certain other provisions of P.L. 101-618, including the California-Nevada Interstate Allocation (section 204 of P.L. 101-618) of waters of the Lake Tahoe and Truckee River basins and the confirmation of the Alpine Degree as port of the interstate allocation for the Carson River Basin.

Although the TROA has been signed, it will not become effective until several conditions have been satisfied. Importantly, all litigation challenging the TROA must be resolved before the TROA can be implemented. Several parties, including the Truckee-Carson Irrigation District, have challenged the promulgation of the TROA as a federal regulation under the Administrative Procedures Act (see 73 Fed. Reg. 74031 (December 5, 2008)) and the TROA EIR/EIS under the NEPA. In addition, the same parties have protested the water rights change petitions needed to implement the TROA and the motion to modify the Orr Ditch Decree to include the TROA. Given the current litigation and protests, the TROA will likely not become effective for several more years.

## IV. Flood Management

### A. Jones Tract Flood

A levee breach occurred on the west levee of the Upper Jones Tract in the southern region of the Delta in San Joaquin County at approximately 8 a.m. on June 3, 2004, causing flooding of the Upper and Lower Jones Tract islands. Within an hour of being notified of the levee breach, the State-Federal Flood Operations Center had been activated and implemented the “Delta Levee Failure Incident” response protocol. On June 6, 2004, DWR established a command post at the site of the unified command and on June 8, 2004, took over control of the incident. Both the breach closure and protection of the interior levee slopes were completed on June 30, 2004. In January 2005, the first in a series of three cases was filed seeking damages for the Jones Tract flood. *Vanni v. Rindge Land Reclamation District #2039* (CV025820) is a consolidation of three cases filed in the Superior Court of California, San Joaquin County: (1) *BNSF Railway Co. v. Upper Jones Reclamation District #2039 et al*. (CV028072) filed January 1, 2005; (2) *Armando P. Vanni et al. v. Rindge Land Reclamation District #2039* (CV025820) filed February 25, 2005; and (3) *New Market Underwriters Insurance Co. v. Rindge Land Reclamation District #2039* (CV026726) filed June 13, 2005. The cases allege, among other things, damages based on inverse condemnation. Discovery in these consolidated cases is ongoing.

### B. Delta Channels

Cortopassi Partners and Reclamation District 2086 filed suit against the State in San Joaquin County Superior Court in February 2008, alleging that the State failed to maintain the water-carrying capacity of Delta channels. [*Cortopassi Partners v. California Department of Water Resources et. al* (Case No. CV034843).] The complaint asserts that from the late 1800s through the mid-1900s, the State adopted a series of legislative and administrative actions to reclaim Delta lands by dredging sediments from Delta channels and using them to strengthen adjacent levees in order to reduce the flood risk of spring runoff and to protect productive farmland. The suit argues that the Legislature charged the Central Valley Flood Protection Board, DWR, and the State Lands Commission with the duty and jurisdiction to protect and maintain the Delta for the public benefit, particularly in mitigating flood risks.

According to the complaint, DWR must maintain channels "so as to prevent injury to other water users and/or injury to levees." Plaintiffs claim, however, that since the mid-1970s, the State agencies have manipulated Delta waterflows in a manner causing channels and sloughs to accumulate soil sediments, which has reduced their runoff-water carrying capacity and that the resulting accumulations of sediment has increased North Delta flood risk. The suit also challenges the State agencies’ use of $35 million of flood control bond funds approved by California voters as part of Proposition 13 in 2000 and designated for flood control in the North Delta in 2001. The plaintiffs seek an order directing DWR to dredge the

Mokelumne River and other adjacent channels and finding DWR (and other State agency-related defendants) negligent in their duty to mitigate Delta flood risks.

### C. Federal Flood Liability

In November 2009, the US District Court for the Eastern District of Louisiana issued its ruling in *In re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182. The case involved claims brought by flood victims arising from flooding caused by the Mississippi River Gulf Outlet (MRGO), a shipping channel. The plaintiffs alleged that the US Army Corps of Engineers (USACE) negligently operated and maintained the MRGO, leading to degradation of certain levees on the banks of the MRGO project. During Hurricane Katrina, the levees failed, resulting in damage to plaintiffs' property. The district court rejected USACE's claims of immunity under the Due Care Exception to the Federal Tort Claims Act and found USACE liable on the theory that USACE's negligent operation and maintenance of the MRGO shipping channel degraded the levees in question, ultimately causing their breach. Underlying this finding, the court held that the negligent handling of a non-flood project that causes degradation of a flood project is grounds for liability. Further, USACE cannot enjoy immunity from tort liability where it has ignored "simple engineering knowledge" in managing the shipping channel. The ruling is likely to be appealed to the Fifth Circuit. In the meantime, it is unclear what will be the ramifications for California and USACE operations.

## V. Other Legal Developments

### A. Constitutional Law

Significant developments in takings law on the national level over the last decade entered the California water arena with several claims filed against the US government. In *Tulare Lake Basin Water Storage District v. United States* (59 Fed. Cl. 246 (2003).), agricultural contractors receiving water from the SWP claimed that delivery reductions in the early 1990s made in order to improve Delta conditions for fish constituted a compensable taking of property in violation of the federal constitution. The claims court ruled in favor of the contractors, and the Department of Interior did not appeal the claims court's judgment. Although the case technically does not set a precedent for future cases, other parties have followed suit on similar theories.

In *Allegretti & Co. v. County of Imperial* (2006), 138 Cal.App.4$^{th}$ 1261, the court of appeal held that county-imposed restrictions on groundwater pumping did not constitute a taking. Allegretti had sought a permit to redrill an inoperable well on its property. The county approved the permit, but limited the draw of groundwater to 12,000 acre-feet per year from all production wells on the site. Prior to this, there were no restrictions on the use of water from the wells. Allegretti sued for inverse condemnation. The court held that the permit condition was not a physical taking because the county had not encroached upon Allegretti's property or diverted any water from beneath its property. The court criticized and declined to follow *Tulare Lake.* The court also noted that in *Tulare Lake* there were identifiable contractual rights, which were not present in the *Allegretti* case. The court also found that there was no regulatory taking because the county's action did not constitute a total deprivation of economically beneficial or productive use of the property nor did it severely impair the value of the property.

Casitas Municipal Water District (Casitas) brought suit against the United States, claiming that a biological opinion regarding the West Coast steelhead trout issued by NMFS, which required Casitas to

build a fish ladder and divert water to the ladder that would otherwise go into its reservoir, constituted a physical taking. A divided panel of the court of appeals for the federal circuit agreed with Casitas that the issue should be analyzed under the "physical takings" doctrine, rather than the "regulatory takings" doctrine. [*Casitas Municipal Water District v. United States,* 543 F.3d 1276 (2008).] The case involved the Ventura River Project, comprised of the Casitas Dam, Casitas Reservoir, Robles Diversion Dam, and the Robles-Casitas Canal. The project combines water of Coyote Creek and Ventura River in the Casitas Reservoir. In contrast to many such projects, Casitas, rather than USBR, holds the State water rights permit. The contract between Casitas and the United States provides that Casitas shall have a perpetual right to use all water that becomes available through the project. The court of appeals rejected Casitas breach of contract claim, holding that the biological opinion and the decision of USBR to adopt the opinion were sovereign acts. As such, it was impossible for the government to perform its contractual requirements. However, as to the takings claim, the court concluded that the government physically appropriated water that Casitas had a right to use. The fact that the government itself did not divert the water was of no import. USBR had directed Casitas to comply with the biological opinion by building the fish ladder and diverting the water for a public purpose, protection of the endangered fish. The court concluded that when the government diverted the water to the fish ladder, it took Casitas' water, stating that "the water, and Casitas' right to use that water, is forever gone."

## B. Water Rights

In the first published court opinion interpreting the statutory phrase "subterranean streams flowing through known and definite channels" in California Water Code section 1200, the First District Court of Appeal held that a water company must obtain an appropriative water right permit in order to pump groundwater from two production wells that were located approximately 200 feet from the Gualala River. [*North Gualala Water Company v. State Water Resources Control Board* (2006), 139 Cal.App.4$^{th}$ 1577.] The water company had argued that the groundwater was percolating water exempt from the State Water Board permitting process. The State Water Board had applied a four-part test, the "Garrapata test," that it established in 1999 to determine that it had jurisdiction. The test requires (a) a subsurface channel must be present; (2) the channel must have a relatively impermeable bed and banks; (3) the course of the channel must be capable of being determined by reasonable inference; and (4) groundwater must be flowing in the channel. The court, after concluding that State Water Board's interpretation of the statute was entitled to only limited deference, concluded that the four-part Garrapata test had been satisfied. The court rejected the water company's arguments that (1) the width of the channel must be narrowing rather than widening as the groundwater flows through it; (2) the bed and banks of a subterranean channel must be more than "relatively impermeable;" and (3) the groundwater flow direction must be parallel or at least flow in the same general direction of the channel at all times. Finally, the court rejected the trial court's suggestion that once the operation of the wells is shown to have an impact on surface flows, State Water Board's jurisdiction follows automatically. Although the case supports a more expansive view of State Water Board's jurisdiction over groundwater, the court did conclude that based on the history, text, and intent of the subterranean stream language in section 1200, State Water Board's jurisdiction over groundwater "was intended to be the exception rather than the rule when the legislature adopted the language at issue."

## C. Water Supply

In 2007, the California Supreme Court ruled that the water supply analysis in an EIR was inadequate because although it adequately informed decision-makers and the public of Sacramento County's plan for near-term provision of water to a proposed development project, it failed to do so as to the long-term

provision of water and hence failed to disclose the impacts of providing the necessary supplies in the long term. [*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.] The proposed project included 22,000 residential units, schools, parks, offices, and commercial uses. The court stated that while there is no definitive standard for how certain the availability of future water supplies must be to comply with CEQA, there are four principles to guide analysis:

1) Decision-makers must be presented with sufficient facts to evaluate the pros and cons of supplying the amount of water that the project will need;
2) An EIR must assume that all phases of the project will eventually be built and will need water, and it must analyze the impacts of providing water to the entire proposed project. Adequate analysis cannot be limited to the water supply for the first stage of a large project or the first few years. While tiering the environmental review is appropriate in some situations, the future water sources for a large land use project and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis;
3) The future water supplies identified and analyzed must bear a likelihood of actually proving available, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the availability of future water supplies; and
4) When it is impossible to confidently determine that the anticipated future water sources will be available, some discussion of possible replacement sources, and the impact of resorting to those alternative sources, is required.

The EIR at issue in the *Vineyard* case failed to comply with CEQA in a number of respects. Most notably, the long-term water supply for the entire project was too speculative because environmental documents showed that anticipated demand exceeded anticipated supply for the region, i.e., Sacramento County Water Agency Zone 40. The significance of *Vineyard* is that programmatic EIR's must provide reasonable (though not certain) assurances that water supply will be available for the entire project, including the larger area within which the project is located. It is not sufficient to take a piecemeal approach and approve phases of a project as water supplies are identified, with further development conditional upon subsequent identification of water supply sources.

In *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 cal.App.4th 149, the court of appeal provided clarification of the *Vineyard* ruling. The opinion illustrates that absolute certainty about an anticipated water source is not required under *Vineyard*—as long as known uncertainties are disclosed and the EIR contains a thorough, well reasoned analysis of why the water source is likely to prove available. The case involved a challenge to the water services portion of the West Creek EIR, focusing on the EIR's analysis of the Kern-Castaic water transfer agreement. The EIR related to a large-scale residential and commercial development in the Santa Clarita Valley. The court evaluated the EIR against the four principles governing water supply analysis set forth in *Vineyard* and found that the EIR at issue satisfied these four principles. The court found an implicit difference between legal uncertainties and factual uncertainties that result because of "paper entitlements." The court held that replacement sources of future water supplies need not be subjected to *Vineyard* analysis. In an earlier case, *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, the court had determined that the discussion in an EIR for an unrelated project of the Kern-Castaic transfer was inadequate because it failed to discuss the legal uncertainty of the transfer created by the decertification of the transfer's original EIR. In contrast, here, the EIR disclosed the legal uncertainty of the transfer due to the Monterey Agreement litigation. However, the EIR concluded, as a practical matter an adverse

outcome in the Monterey litigation is unlikely to "unwind" the transfer agreement. The court found that this conclusion was supported by reasoned analysis.

In *California Water Impact Network v. Newhall County Water District*, 161 Cal.App.4th 1464, (2nd Dist. 2008), the Second District Court of Appeal held that a water supply assessment (WSA) is not subject to a direct judicial challenge. Instead, WSAs are properly reviewed as part of a CEQA review. The court rejected the argument that a WSA is a final determination of the water supplier concerning the sufficiency of the water supply for a proposed project, concluding that a WSA is a technical, information document and not a "final" determination subject to direct judicial review. The court also ruled that a potential claimant must exhaust its administrative remedies with the lead agency before filing suit. If the claimant's concerns are still not alleviated, the claimant may seek judicial review after the lead agency has certified the EIR and approved the development project.

In *O.W.L. Foundation et al. v. City of Rohnert Park et al.*, 168 Cal.App.4th (1st Dist. 2008), the court ruled that water suppliers have substantial discretion under SB 610 (Water Code Section 10910 et seq.) in determining how to measure groundwater sufficiency, noting that the Water Code does not specify a particular methodology for a sufficiency analysis. Water Code Section 10910 requires a public water system to prepare a WSA that analyzes whether water supplies are sufficient for certain proposed development projects. If the water supply for the proposed project includes groundwater, the water supplier must analyze whether groundwater supplies will be sufficient to meet the projected demand associated with the project. The court also ruled that Water Code Section 10910 does not require a basin-wide study of past and future pumping of all users. Rather, the city has broad discretion to make technical and practical determinations about the appropriate study area in evaluating a particular project for a WSA.

## D. Water Transfers

On June 18, 2008, the US Environmental Protection Agency (EPA) issued a final rule clarifying its longstanding position that water transfers are excluded from regulation under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program. EPA concluded that Congress did not intend to subject water transfers to the NPDES program and that there is no "addition" of a pollutant which would trigger the permit requirement for water transfers because the pollutants are already in the waters being transferred and are not being added. EPA further concluded that Congress intended to leave primary oversight of water transfers to state authorities in cooperation with federal authorities. A number of groups and some states have challenged the rule, and many of the cases have been consolidated in the Eleventh Circuit. These challenges were stayed pending the outcome of a case involving water transfers in the Florida Everglades. In the first ruling to examine the permitting requirement in light of the EPA rule, the Eleventh Circuit Court of Appeals afforded deference to EPA's interpretation and held that an NPDES permit is not required for water transfers. The plaintiffs have filed a motion for a rehearing en banc. [*Friends of the Everglades, et al. v. South Florida Water Management District, et al.* 530 F.3d 1210 (2009).] EPA indicated in October 2009 that it would reconsider the water transfer rule.

## E. Wetlands

In the consolidated cases, *Rapanos v. United States* and *Carabell v. United States*, 126 S. Ct. 2208 (2006), known as "*Rapanos*," the US Supreme Court addressed the jurisdiction of the federal Clean Water Act, which regulates wetlands. The Justices issued five separate opinions, with no opinion being the majority.

Two of the opinions, those of Justices Scalia and Kennedy, became the opinions that are the standard for an evaluation as to what type of wetland the Clean Water Act regulates. The Scalia analysis requires a wetland to have a surface connection to relatively permanent waters which themselves are connected to traditional navigable waters. Justice Kennedy asserts that wetlands are regulated by the Clean Water Act if the wetlands, either alone or with similar land in the area, significantly affect the chemical, physical, and biological integrity of navigable waters. This is known as the "significant nexus" standard. The standard assesses slow characteristics and functions of the tributary and all wetlands adjacent to the tributary to determine its chemical, physical, and biological effects on downstream traditional navigable waters, including the hydrologic and ecologic affects. The conditions which require the significant nexus evaluation are found quite often in California.

## F. California Environmental Quality Act (CEQA)

A challenge was brought by California Native Plant Society and a local citizens group against the City of Santa Cruz EIR for a public greenbelt master plan. [*California Native Plant Society et al. v. City of Santa Cruz* (2009) 177 Cal.App.4$^{th}$ 957, 99 Cal.Rptr. 3d 572.] The City of Santa Cruz had certified an EIR evaluating a city greenbelt master plan, which included a system of public trails. The proposed project included a multi-use trail that had a significant impact on the Santa Cruz Tarplant, a federal-listed threatened species and State-listed endangered species. The court held that the EIR adequately evaluated a reasonable range of alternatives, and that when making CEQA findings, the city properly rejected alternatives to the proposed project as infeasible based on policy considerations.

In its decision, the court of appeal clarified the rules on when and how a lead agency may find alternatives to be infeasible. The court stated that the feasibility of alternatives is considered twice in the CEQA process. When preparing an EIR, the lead agency assesses alternatives that are "potentially feasible." Later, when adopting CEQA findings, the lead agency makes its final determination on the feasibility of alternatives. It is entirely permissible, as in this case, to find that alternatives that avoid significant impacts are potentially feasible in the EIR, but ultimately infeasible when CEQA findings are made. If this were not the rule, then lead agencies could essentially be forced to adopt the environmentally superior alternative identified in the EIR, a result contrary to the long-established case law (see *Laurel Hills Homeowners Assn. v. City Council* (1978) 83 Cal.App.3d 515). Also, when making CEQA findings, a lead agency is entitled to reject as infeasible alternatives that are impractical or undesirable from a policy standpoint, or that fail to meet certain project objectives. In this case, the city rejected an alternative that would have reduced impacts on the Tarplant based on inconsistency with city policies to promote transportation alternatives and provide access to open space for persons with disabilities.

## G. Water Quality

In 2005, the USACE issued a permit under the federal Clean Water Act authorizing Coeur Alaska, Inc. to discharge wastewater from the Kensington Gold Mine in navigable waters in Alaska. Environmental groups claimed that this permit violated the Clean Water Act because the discharge from the mine did not comply with the EPA's pollution standards under the Act. Coeur Alaska, however, argued that USACE governed the discharge under a different section of the Clean Water Act, and that the issuance of the permit therefore did not violate the Act. [Coeur Alaska, Inc. Southeast Alaska Conservation Council, et al. 129 S.Ct. 2458 (2009).] The US Supreme Court held that USACE, rather than EPA, has authority to permit the discharge of a rock-and-water mixture called "slurry" from a mine froth flotation process to a nearby lake because §404(a) of the Clean Water Act empowers USACE to "issue permits . . . for the

discharge of . . . fill material," and the agencies' joint regulation defines "fill material" to include "slurry . . . or similar mining-related materials" having the "effect of . . . [c]hanging the bottom elevation" of water. Therefore, the slurry Coeur Alaska wishes to discharge into the lake falls within the USACE §404 permitting authority and not under §306(e) of the Clean Water Act.