

WESTERN WATER LAW

& POLICY REPORTER

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Publisher's Note:

Twice each year, in March and September, the Contributing Editors of *Western Water Law & Policy Reporter* all tackle the same subject, from their state's perspective, in our "Topical" issues. This time, we chose to investigate the role of water conservation and reuse. Drought conditions threaten many Western states this year, while other states deal with an arid environment as the norm. Regardless of these differences, all Western states are facing more stress on current supplies due to increasing populations and development, and/or regulatory requirements to leave more water instream for environmental purposes.

We hope you find the analysis of other state's programs interesting, and find ideas that might prove useful for your state.

As always, we welcome your comments and suggestions. Contact:

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Western Water Law and Policy Reporter is published monthly for \$410.50 a year by Argent Communications Group; P.O. Box 1425; Foresthill, CA 95631; (530)367-3844. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

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Subscription Rate: 1 year (12 issues) \$410.50. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1425; Foresthill, CA 95631; (530) 367-3844 or 1-800-419-2741.

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enforcement authority. It has developed two major recharge sites at which it captures and stores treated municipal effluent. And, it continues to develop additional groundwater supplies within and outside its corporate limits. As the drought plaguing Arizona—and the entire Southwest—continues, Payson’s water supplies will come under increasing pressure. However, the town has proven that its

forward-looking approach to regulating water use by its residents, recapturing and reusing effluent previously lost from its system, and exploring for additional supplies on the National Forest, represents a sound, long-term solution to its water needs. The town represents a model for additional rural Arizona municipalities facing similar growth pressures and trying to address proactively the water demands associated with new development. (TW)

CALIFORNIA: MEETING WATER NEEDS IN THE FACE OF DIMINISHED SUPPLY—THE ROLE OF WATER CONSERVATION AND REUSE

It is no secret that California’s rapidly expanding population is outpacing the state’s water supply. There is increasing reliance on a relatively static supply of surface and groundwater resources, and, for many reasons, the pace of developing new water supply projects has not kept up with an increasing demand. In recent years, California’s state and local governments have begun looking to conservation and reuse as a means towards satisfying this unmet water supply demand. The need to support conservation and reuse is widely recognized, yet regulatory and public perception obstacles have hindered a faster implementation of these crucial projects.

California’s Need to Explore Further Conservation and Reuse

The need to explore further conservation and reuse stems directly from California’s unmet demand for water. California’s water supply supports a vast agricultural economy, as well as the country’s most populous municipal and industrial users (M&I). Roughly 80 percent of the state’s water serves agricultural uses and the remaining 20 percent serves M&I uses. Although California’s agricultural water use remains at, or below, historic levels, there is increasing demand to satisfy the M&I needs created by California’s increasing population.

Population increase is not the only stress on California’s water supply. Demand is further increased by state and federal regulations relating to surface water quality and environmental protection. For instance, in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay Delta), water quality standards promulgated under the federal Clean Water Act and California’s Porter-Cologne Water Quality

Act are intended primarily to maintain proper salinity and other constituent levels for the benefit of aquatic species listed under the federal and state Endangered Species Acts. The Bay Delta is the confluence of Northern California’s two major river systems and serves as a conduit for the water pumping projects that deliver water to the Central Valley and Southern California. The impacts of increased salinity and direct fish kills from this pumping led to regulatory restrictions on the amount of water that may be pumped from the delta. Water users in the Central Valley and Southern California are increasingly turning to conservation and reuse as a means to make up for decreased delta deliveries.

Surface water flow requirements for endangered species reduce the amount of water available for human consumption on almost every major river in California. Operation of the state and federal reservoir projects must comply with mandatory releases to maintain instream fishery flows. These competing uses further decrease California’s water supply available for delivery to agricultural and M&I users.

Finally, California is grappling with the federal mandate to reduce Colorado River deliveries to 4.4 million acre-feet annually by 2015. California failed to meet the December 31, 2002, deadline within which to adopt a viable solution and, therefore, lost favorable water entitlements to any surplus waters from the Colorado River. Efforts at meeting this supply reduction have focused on a potential long-term water transfer from the Imperial Irrigation District to San Diego County Water Agency. Short-term solutions have focused on transfers from Sacramento Valley water contractors and reliance on existing storage in local reservoirs.

Regulation of Water Conservation and Reuse in California

Recognizing the water shortage in the state, the California Legislature has passed legislation to encourage water conservation and reuse. The California Constitution requires that all water be put to reasonable and beneficial use, thereby prohibiting the waste of water. (Cal. Const., art. X, § 2.) In an effort to encourage water conservation, the legislature has determined that cessation of use of water rights as a result of either conservation efforts or use of recycled water constitutes reasonable and beneficial use of the water. (Wat. Code, §§ 1010, 1011; *see also*, Wat. Code, §§ 1011.5, 1012.) Thus, the legislature specifically allows water rights holders to maintain their water rights even where those rights are not actually used in favor of conservation or reuse. Similarly, cessation of use of rights to groundwater for purposes of recharging the groundwater basin, or where the water is replaced by alternative supplies, constitutes reasonable and beneficial use of the water. (Wat. Code, §§ 1005.1, 1005.2.)

The legislature has also provided encouragement to local agencies and private enterprise to implement water conservation and reuse projects by establishing a state program to finance or assist in financing water conservation and reuse projects. (Wat. Code, § 11950 *et seq.*) Water projects identified as being eligible for state financing include projects for municipal and industrial advanced waste water treatment to permit the reuse of the water, projects for the improvement of water supply and delivery systems, and projects for the improvement of on-farm irrigation systems.

With respect to conservation specifically, the legislature has given local agencies power to enforce water conservation measures. (Wat. Code, § 373 *et seq.*; *see also*, Wat. Code, § 1009.) Any public entity that supplies water at retail or wholesale has the authority to adopt and enforce a water conservation program. (Wat. Code, § 375.) The public entity must hold a noticed public hearing and adopt an ordinance or resolution making appropriate findings of necessity for a conservation program. (Wat. Code, § 375.) The water conservation program may reduce the quantity of water used by persons in the service area for the purpose of conserving the water supplies of the public entity. The ordinance or resolution may require installation of water saving devices and may encourage water conservation through a rate structure.

Violation of a water conservation program is a misdemeanor punishable by imprisonment for not more than 30 days and/or a fine not exceeding \$1,000. (Wat. Code, § 377.) This law allows local agencies to enforce conservation programs as necessary based on local water supplies.

With regard to water reuse, the legislature has declared that there is a public interest in development of facilities to recycle waste water. (Wat. Code, § 13500 *et seq.*) To encourage recycled water use, the State Water Resources Control Board is authorized to provide loans for the development of water reclamation facilities. (Wat. Code, § 13515.) While recycled water use is encouraged, there are hurdles for a user to overcome. The Water Code requires the Department of Health Services to establish recycling criteria, or the levels of constituents of recycled water and means for assurance of reliability that will ensure protection of public health in the use of recycled water. (Wat. Code, §§ 13520, 13521.) Any person that uses or proposes to use recycled water must file a report with the State Water Resources Control Board and obtain approval through water reclamation requirements, in conformance with the recycling criteria. (Wat. Code, §§ 13522.5, 13523.) Thus, while water conservation and reuse are both encouraged in California, a person desiring to recycle water or use recycled water is subject to strict regulation by the State Water Resources Control Board and, potentially, the Department of Health Services.

The California Legislature recently amended pertinent sections of the Water Code and Health & Safety code in an effort to encourage service of recycled water by sanitation agencies. In the past, a sanitation agency was required to get permission to serve recycled water in a service area overlapping another public entity with primary water service authority. The amendments now only require that the sanitation agency consult with the overlapping entity prior to constructing water service facilities or serving water. This amendment creates a powerful incentive for sanitation agencies to treat and sell their recycled water as a means to boost the state's water supply.

Conservation and Reuse Solutions

There are significant ongoing conservation efforts in California. Recent funding from large bond measures provides grants and loans to agricultural and

urban conservation programs. Conservation programs include: subsidizing and requiring low-flow technologies for urban uses; farming irrigation techniques, from drip irrigation to canal lining; and water metering with tiered rates based on usage. Moreover, the aforementioned statutory law promotes and mandates conservation. Development of conservation programs and more sophisticated conservation technologies is being stimulated by this “carrot and stick” approach.

Water reuse is one of the hot topics in California water law. In recent years, many California cities have implemented recycling programs whereby wastewater treated to secondary or tertiary levels is being used for landscaping, golf course irrigation and other non-potable irrigation projects. Conflicts have arisen, however, with California water rights law. The problem stems from California’s requirement that changes in water uses must create “no injury” to existing legal users. This rule has been applied in different circumstances, but generally prohibits a change to an existing water use upon which a third party lawfully relies. This situation occurs most often when there is an attempt to redirect discharges from a wastewater treatment plant that have historically augmented river flows and been relied on by downstream diverters.

An example of this collision between California’s water reuse and water rights laws was the 2001 unsuccessful effort of the Victor Valley Wastewater Reclamation Authority (VWVRA) to change the place and purpose of use of its 1,680 acre feet annually of discharged treated wastewater. VWVRA petitioned California’s State Water Resources Control Board (SWRCB) to allow delivery of the treated wastewater to the City of Victorville, instead of discharging into the Mojave River. The city intended to use the wastewater for landscaping and golf course irrigation, in lieu of the high quality potable groundwater historically used.

In ruling, the SWRCB expressed its strong support of using reclaimed water for non-potable uses, but held that allowing VWVRA to change its water use

would “injure” third parties. These third parties included downstream users who previously perfected water rights to the treated discharge. The court noted that although VWVRA’s petition described its proposed project as reclaiming discharged water, this water had already, in effect, been reclaimed by downstream users.

Although disappointed by this ruling, VWVRA recently renewed its efforts to serve the city by using only wastewater reclaimed from a new prison project. VWVRA argued to the SWRCB that no third party injury would occur from this transfer, because it is only for the new discharge created by the prison. The SWRCB issued a draft decision supporting this interpretation of the law.

Reuse projects similar to the VWVRA proposal have been successful in several California cities. The City of Redlands recently made plans to construct a \$24.5 million wastewater treatment plant. The project was only possible based on the future revenues the plant will generate from sales of reclaimed water. Projects aiming to serve reclaimed water as drinking water have not fared as well, with voters in Orange County repeatedly rejecting such attempts.

Forecasting Developments in Conservation and Reuse

Predicting future developments in California water law is often difficult, but it is clear that the future portends an increased focus on both conservation and reuse of water as a means to make existing supplies match up with burgeoning demands. The coincidence of increasing municipal and industrial demands, greater legal requirements for instream surface flows, possible cutbacks in supply from the Colorado River, and unpredictable weather points to the inevitable conclusion that the California Legislature will continue to focus on greater efforts in this area. The future of California’s water supply will include significant conservation and reuse elements. (NAJ/KTC/CCS)