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CHAPTER ONE

Introduction

For the first 120 years of California's history, few people considered the effects of dam construction or river diversion on the well-being of fish, birds, and other wildlife. Water rights allocations to support healthy ecosystems, and the species that depend on them, also were not considered. The pioneers in California's emerging water market did not recognize the validity of providing sustenance for these "public trust resources."

In the mid to late 1800s—during the period of hydraulic mining in the Sierra Nevada region—the state developed a "first in time, first in right" seniority system for water rights. The policy essentially granted usage rights to anyone who claimed the water first, without consideration for the environment and wildlife dependent on that resource. The policy lasted for many decades, and the number of parties competing for water rights increased over the years, including mining companies, farmers and ranchers, industrial organizations, and ultimately the populations of growing cities and towns. As a result, environmental scars are left on the landscape and waterscape from the Sierra Nevada to the San Francisco Bay.

In the early 20th century, water usage and the distribution of water rights in California became tied to the expansion of agriculture and the rapid growth of cities. In 1915, to sustain burgeoning Los Angeles—the population of

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which doubled in 12 months—officials acquired and exported water from the Owens Valley, nearly 230 miles away. During this period, other forces had a profound impact on California's landscape and waterscape. The U.S. Bureau of Reclamation (BOR) and the U.S. Army Corps of Engineers (COE), two rival federal agencies whose very existence depended on the construction of dams and related water facilities, were responsible for re-routing and altering bodies of water. These two agencies, along with the California Department of Water Resources (DWR), planned and implemented water projects that aimed to create fertile agricultural lands in arid parts of the state. But the projects were constructed without regard for their impact on fish and wildlife.

Before "public trust resources" were considered in California, governmental agencies distributed water rights to agriculture and cities, without regard for the impact on fish and wildlife.

In the 1970s, with fish and wildlife populations collapsing, legislators passed new laws that forced developers and water users to consider the potential impact of water projects and diversions on the environment. The Federal Endangered Species Act (ESA),[1] the California Endangered Species Act (CESA),[2] the National Environmental Policy Act (NEPA),[3] the California Environmental Quality Act (CEQA),[4] and other statutes established a framework for protecting valuable public trust resources such as fish and wildlife.

In 1983, the California Supreme Court issued its landmark *Mono Lake* decision, which said that the "state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect trust uses whenever feasible."[5] The Court's requirement that the survival of wildlife habitats be considered in the planning of any water allocation project was in direct contrast to the state's historical approach to water rights since the mid-1880s.

Then in 1991, the state amended the California Water Code by adding section 1707, which permitted the transfer and dedication of all or part of a water right specifically for environmental purposes. California water law does not provide for the *appropriation* of water for instream beneficial uses. Section 1707, however, does allow for a party to dedicate the availability of "environmental water on a short-term (one year or less), long-term (more than one year), or permanent basis, either through a limited transfer of water (changing the purpose and place of use of a specific amount of water from one location to another for a set period of time) or a purchase."[6] The statute states that the water can be used not only to increase instream flows for fish or to

improve the health of a river system but also to enhance, restore, or even create wetlands.

All of these legal changes were prompted by a growing awareness of the need to preserve natural habitats. This need persists today. However, despite the state and federal laws that have come into play during the last few decades, and the existence of the Public Trust Doctrine,[7] California's native species and habitats still are at risk. The majority of California's wetlands were drained long ago (for example, some 90 percent of wetlands in the San Francisco Bay have been lost to development and other uses), and nearly every major river has been dammed,[8] leaving instream flows a fraction of what they once were. The effect on the landscape and on a multitude of species has been dramatic and, in some cases, devastating.

Water transfers are becoming a more common tool for agricultural districts and urban water agencies striving to meet the water demands of their constituents. A market for these water transfers continues to develop and mature. For example, agricultural to urban transfers may become even more common in the southern part of the state, as population growth puts increased pressure on agricultural lands, and societal views about the way water is used change over time. The increased demand for water also drives up the price. Despite the growing need for water as a tool for environmental restoration, transfers of water from agricultural use to environmental use, the subject of this *Water Acquisition Handbook*, may become even more difficult, given these other pressures.

Although section 1707 of the Water Code allows for the dedication of water rights to address instream flows and other environmental needs, the statute has been severely underutilized.

Currently, state law and agencies support the voluntary transfer of water as a mechanism for addressing water problems, as long as the transfer does not adversely affect existing water uses and users.[9] Although section 1707 of the Water Code allows for the dedication of water rights to address instream flows and other environmental needs, the statute has been severely underutilized. In fact, the State Water Resources Control Board (SWRCB) has received only a few applications for long-term transfer and dedication of water rights under this section since it was passed in 1991.

The lack of environmental water acquisitions and dedications completed to date may be due in part to myriad bureaucratic requirements and legal and political issues that complicate the completion of these types of transfers. But

we hope that this handbook will help alter the current trend and enable conservation organizations to begin to take advantage of this opportunity.

Conservation organizations and public agencies have been very successful at acquiring land for preservation and restoration. Over the last few years the state's voters have allocated billions of dollars to acquire land, protect watersheds, improve water quality, allow for recreational opportunities close to residential communities, and save areas from inappropriate development. Though there has been no similar allocation of financial resources for water acquisition, the adoption of Water Code section 1707 creates an opportunity for the conservation purchase of the scarce and critical resource of water itself. The question remains whether the traditional players in California's conservation field will seize this opportunity.

The information presented here is intended to help readers understand the complicated issues and procedures associated with acquiring environmental water and to encourage them to pursue water transfers as a tool to help meet the state's important environmental needs so that we might one day restore health to our aquatic habitats in particular, and to the environment in general. For additional resources that may prove helpful in providing context on California water issues in general, and water transfers in particular, refer to Appendix E.

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1. 16 U.S.C. §§ 1531 et seq. (2003).
2. CAL. FISH & GAME CODE §§ 2050 et seq. (Deering 2003).
3. 42 U.S.C. §§ 4321 et seq. (2003).
4. CAL. PUB. RES. CODE §§ 21000 et seq. (Deering 2003).
5. *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 446 (1983).
6. CAL. WATER CODE § 1707 (Deering 2003).
7. The Public Trust Doctrine defines the state's responsibility to protect "navigable waters" and lands that are held in the public trust. Its general premise is that a state's natural resources are held in the public trust and even senior water rights holders do not have the right to destroy these resources.
8. There are three major undammed rivers remaining in California: the Scott River, the Shasta River, and the Cosumnes River.
9. *See, e.g.,* CAL. WATER CODE §§ 109, 475.