

March 28, 2008

Ms. Victoria Whitney
Division of Water Rights
Att. Mr. Charles A. Rich
State Water Resources Control Board
P.O. Box 2000
Sacramento, Ca 95812-2000

Dear Mr. Rich:

I read with interest the Bureau of Reclamation's (Bureau) and Department of Water Resources (DWR) responses to my complaint. I have tried not to repeat the Bureau or DWR's statement except to bring or add clarity for the reader. My main contention is that federally subsidized water is being used to irrigate lands and this practice generates drainage from which contains selenium and other toxic elements that are degrading many beneficial uses of the waters of the lower San Joaquin River and Delta. This continued irrigation and resultant drainage is a nuisance and waste and unreasonable use of the people's water under California law.

The gist of the Bureau's comments is that the State Board denied my past complaint request for review because my issues were being handled through other venues. The bureau contends my concerns can be handled in the Bay – Delta process and through the water rights allocation process. This review did not happen to my knowledge. I was not provided a copy of any report of findings. The Bureau pleads that it is operating the Central Valley Project (CVP) in a manner that is sensitive to fishery issues as stipulated in Judge Wanger's orders. It should be remembered that the Bureau only began even minimal efforts to protect the Delta's fishery resources *after* Judge Wanger issued his order. The American River situation will be discussed later.

I believe that the State Board has the responsibility to act affirmatively under its public trust duties and can modify the water rights allocation associated with the delivery of water for irrigating selenium laden soils because of the drainage impacts to beneficial uses caused by the selenium-laden drainage and runoff. According to the California Supreme Court's ruling in Mono Lake *Audubon* case, if the State Board acts to protect the public trust resources, uses and ecological values, there would not be a taking issue. One of the reasons the Bureau does not want an open review of the selenium drainage and wastewater issues is that the water used to irrigate the lands of the San Luis Unit can be traced to the Trinity, Sacramento and American Rivers. Presently there are is only SWRCB -Decision 893 and associated flows to be by the Bureau to the American River from Folsom Dam and Reservoir. This flow regimen is only partially protective of Chinook salmon and steelhead and does not have a temperature component. Another reason is that the impacts of the selenium drainage are harming or rendering near useless other beneficial uses in the lower San Joaquin River.

Response to DWR comments. Pg.1, par.2 and 3: The DWR reply appears to be representing the State Water Project and other exporters of Delta water, rather than its other responsibilities as contained in its Mission statement --- To manage the water resources --- to benefit the people and to protect, restore and enhance the natural and human environments. There is a conflict of interest between these two responsibilities. On the selenium drainage issue, DWR is judge and jury. It is the fox guarding the chicken house.

DWR admits that there are water quality problems in the San Joaquin Valley caused by irrigating vast acreages on the west side of the San Joaquin Valley. To date, SWRCB actions have been woefully inadequate to correct the problem. It is clear from research that continued irrigation and the resulting drainage contaminated with several trace elements (selenium, boron, molybdenum, etc.) and containing many, many tons of a variety of salts, is degrading soil and groundwater and ultimately ending up in the San Joaquin River, either through direct dumping in drainage ditches or through groundwater seepage. While the application of water may seem innocent by itself and could be considered a beneficial use, the irrigation of selenium laden soils with federally subsidized water that eventually leads to degrading or destroying beneficial uses, including fish and wildlife and their support ecosystems, ground and surface waters. This is a clear violation of DWR and the State Board's public trust duties.

My response to DWR comments pg.2, par. 2, 3 & 4. The State Board's Water Quality Control Plan Report -1998 revision describes beneficial uses. Maintaining beneficial uses is critical to water quality management. The Report lists at least 21 beneficial uses for which water quality is managed. The longer that water quality can be maintained, the longer a water body can be used for beneficial uses, the more effective the conservation / management measures and the more the water supply is stretched. The list of beneficial uses does not include all uses that one might some say are reasonable. The report states that disposal of wastewater, including agricultural waste waters, is not a beneficial use of water because it can not continue without being detrimental to beneficial uses, associated resources and ecological values. In other words, dilution is not the solution to pollution.

Many of the beneficial uses and ecological values are protected under the Public Trust Doctrine. The public trust cannot be diluted by treating it as merely just another beneficial use under the California Constitution, Article X, Section 2, co-equal with irrigation, power production and municipal water supply. The Public Trust is multi-faceted Doctrine that occupies an exalted position in any judicial or administrative determination of water allocation (Hodge Decision—1990, Moskowitz - 1994.) A use of water can be considered unreasonable and a nuisance because it can pollute, or because it offends our sense of aesthetics or natural beauty, or because it interferes with the right of the public to enjoy a natural resource of state or national significance, or because it threatens in a harmful way to upset the ecological balance of nature, or because to allow an unreasonable use confers a valuable privilege which is inconsistent with protecting the public trust. (See *Gold Run* and *Elk River Mill and Lumber Co.* court ruling on this subject.

The protection and management of water quality is a conservation measure because it stretches the supply for other beneficial uses. The longer that a water supply

is maintained to support aquatic resources and ecological values and is kept safe for drinking, the greater the multiple use of this water as both a resource and a commodity. The focus of my complaint is on impacts from irrigating saline, seleniferous soils of the San Joaquin Valley on selected beneficial uses of water and ecological values protected by the Public Trust Doctrine. People are aware of nature and what an environment / ecosystem requires to support viable and sustainable populations of fish and wildlife as well as people. The Public is becoming aware of how California's water resources are being mismanaged, and at what environmental and economic cost. In the San Joaquin Valley people are realizing that that every kilowatt-hour needed to operate the CVP and SWP Delta export pumps leads back to a gas well, or a river blocking hydroelectric dam. For a comprehensive understanding of the greater selenium drainage issue see Presser and Luoma – 2006. Forecasting Selenium Discharges to the San Francisco Bay-Delta Estuary: Ecological Effects of a Proposed San Luis Drain Extension. USGS Professional Paper 1646. This report contains a vast distillation of data from many professional scientists in several agencies and research firms that, I believe would lead a reasonable, unbiased person to conclude that selenium contaminated drainage is a major ecological issue in the San Joaquin Valley.

My response to DWR comments pg.2 par.4. The discussed IFDM zero-liquid discharge is not fully protective of water quality. The IFDM zero-liquid discharge is only partially effective because a large percentage of the selenium drainage and wastewater ends up in the San Joaquin River via shallow groundwater accretions. The evaporation basins are attracting migratory birds. Selenium accumulates in food chain organisms. Birds feed on such organisms. The selenium concentrations found in eggs will result in high incidence of embryonic deformities in maturing young if the eggs hatch. Impacts to fish and wildlife species are detailed in U.S. Fish and Wildlife Service, Fish and Wildlife Coordination Act Report – San Luis Drainage Re-Evaluation Project – March 2006.

The selenium in biota of the San Joaquin River, south Delta and adjacent wetlands originates on upslope seleniferous lands of the San Luis Unit. The irrigation water from these marginal farmlands in the western San Joaquin Valley comes from water pumped from the Delta, and stored at federal dams on the Trinity, Sacramento and American Rivers. The operation of such reservoirs has had serious impact on the sustainability of the Chinook salmon and steelhead of those rivers. On the American River there are no hard flow regimen/standards for releases to the lower American River that are fully protective of Chinook salmon and steelhead set in water rights for the Bureau's operation at Folsom/Nimbus facilities.

My Response to DWR comments pg. 3, paragraphs 2, 3 & 4. The *Racanelli* decision (*United States v. State Water Resources Control Board*, 227 Cal Rptr. 161, at 195 –1986) ordered the State Board to set water quality standards to protect all beneficial uses. In essence what *Racanelli* told the State Board was “Set water quality standards and then let the agencies do everything necessary to meet them. And if they complain that they can't meet the standards by modifying their water rights and changes in operation, they should explain why in detail.” *Racanelli's* global view of the Central Valley – Delta watershed would include pre-1914 right holders as well as post-1914 water right holders and diverters (depletions), uses of water, and who is discharging

what materials to the surface and ground waters of the Great Central Valley. The *Racanelli* decision (227 Cal Rpt 161, at 200 –1986) also stated the State Board has a mandate under state and federal law to set water quality standards to protect fish and wildlife.

The Bureau of Reclamation delivers Central Valley Project water to the west side of the San Joaquin Valley. This water can be traced back to the Delta, up the Sacramento River, to storage reservoirs on the American, Trinity and upper Sacramento Rivers. For example the Bureau's decisions for operating the Folsom / Nimbus facilities are dominated by meeting water contracts, which all too often take water at the expense of meeting temperature conditions later in the year that is protective of salmon and steelhead needs.

One aspect of *Racanelli's* global view would hold that all of the Central Valley's rim reservoirs should have hard flow regimen standards in place that are consistent with the purpose and intent of Fish and Game Code Section 5937, i.e. to keep "in good condition" all fish and aquatic life that utilize rivers or streams, downstream from a dam. On the American River there are no standards that are fully protective of the Chinook salmon and steelhead that are released from the Folsom / Nimbus Dam and Reservoir projects operated by the Bureau of Reclamation.

To protect Chinook salmon and steelhead utilizing the American River, a water temperature of 60 to 65 F Degrees along with adequate flows (2,000 to 2,500 cfs) will provide "good conditions" for Chinook salmon and steelhead during the over summering months. The temperature criteria are frequently exceeded for many days to several weeks a year. The cool water storage in Folsom Reservoir is depleted during the summer months by the large releases (4,000 to 4,500 cfs in 2007) made to provide water to western San Joaquin Valley contractors, including some in the San Luis Unit of the CVP. Such releases deplete the cool water pool and results in poor temperature conditions of the water released to the River during August, September, October, and in some year into November and early December. When adult Chinook salmon entering the American River on their spawning run, every effort must be undertaken to assure that environmental parameters are provided to keep the holding adults in good conditions.

Spawning flows of 2,200 to 2,500 CFS with temperature less then 60 F degrees preferably 58 F Degrees are need for spawning and the eggs incubation. Clearly those species that live for only 2 to 5 years, spawn 2,000 to 4,500 eggs and then die should be given a better chance to survive. From a public trust protection, poor or marginal conditions are not acceptable. The cause and effect to salmon and steelhead resources manifests itself in most years on the American River.

The Water Forum's Lower American River Flow Management Standard (FMS) is a best effort standard based on the water available and specific Bureau operations and contract needs. While the Water Forum's FMS would improve conditions over pre-CVPIA conditions, the FMS is not fully protective of Chinook salmon and steelhead that utilize the Lower American River. Protecting water quality by meeting temperature needs of Chinook salmon and steelhead during the summer and early fall months to provide "in good condition" is a key concern and purpose of Fish and Game Code Section 5937 as discussed in *Audubon*, *Racanelli* and *Cal Trout 1 and 2*.

Folsom / Nimbus Dam and Reservoir facilities must be required to meet the temperature criteria through changes in operations or added facilities. Agencies responsible for dam and reservoir operations must do everything necessary to make sure that Chinook salmon and steelhead are provided with the habitat and environmental conditions necessary for these fish to survive their downstream movement to and thru the Delta to San Francisco Bay to the Pacific Ocean.

Monitoring the flow regimen released from the Folsom/Nimbus facilities includes the volume of flow, the timing and duration of the flow and the temperature, the number of spawners that have successfully spawned, the number of eggs deposited in redds and the number of out migrants must an annual effort, with findings reported to the people for comment. The State, as trustee of our salmon and steelhead resources, has the implied power and authority to do or require everything necessary for the proper administration of this fish resource trust. The Public Trust also should protect the gene pool of our wild salmon and steelhead as well as other native fishes. See *City of Long Beach v Mansell* (476 Pac. 2d 423 –1970), *Marks v. Whitney* (6 Cal 3d 251) and *People v. California Fish* 166 Cal 576- 1913.)

Selenium on the west side of the San Joaquin Valley has been known for a long time. It was identified there in the 1930s. DWR knew about the mineral-laced soils and the heavily mineralized runoff that was expected by irrigating western valley soils. DWR Bulletin No. 89, pgs 94–96, stated that drainage from the Panoche area is highly concentrated from a quality standpoint and would be unusable for beneficial purposes. It is not known if DWR tested for selenium at that time in the 1950s and 1960s. It is the irrigation of selenium-laced soils that results in runoff and drainage that is laced with selenium and other trace elements and salts that end up contaminating surface water habitats and biota and the groundwater. It is this use that is unreasonable. It is clear to water law writers that protecting fish and other aquatic life, wildlife, uses and environmental / ecological values must encompass water quality. Irrigation that causes pollution can be regulated under the theory that “beneficial use” means beneficial to the appropriator / user **and** not harmful to other beneficial uses or to the public. (Ralph Johnson – 1989, Water Pollution and the Public Trust Doctrine. In Environmental Law, Northwestern School of Law, Lewis and Clark College Vol.19, No 3 pg 484 to 514.)

My response regarding DWR comments on priorities pg. 3, par. 5. Presently the Bureau of Reclamation has more water under contract than it can supply. The Bureau establishes a priority as to who gets served water and how much for each water year. Common sense dictates that a use of water that results in a supply so contaminated by drainage (selenium or other heavily saline leachate) that it is polluted and unfit for reuse and selected beneficial uses should not make the “must irrigate list.” This view is particularly true when one looks at other beneficial uses of water that could be served without having selenium drainage impacts that accompany irrigating saline seleniferous soils. Water delivered for M&I purposes; with the wastewater disposed in septic tanks or regional treatment plants that meet acceptable water quality standards would still be delivered as a top priority.

DWR seems to be questioning the fact that water quality is protected under the doctrine of the Public Trust, but that this protection only applies if the impacts are severe and widespread. See Johnson – 1989. The facts are that the selenium impacts

are severe and widespread and have gone on for over 25 years. See again the report by Drs. Theresa Presser and Samuel Luoma – 2006. From all the evidence, one can conclude that waterborne selenium is the single best predictor of pollution, that it can and will continue to have an adverse affect on the aquatic ecosystem, associated fish and wildlife resources, uses and values (Saiki, et al-2001). The San Joaquin River contributed about 4.8 tons of selenium annually to the Delta at Vernalis between 1986–98 (SWQCB – CVR- 2000). **What is not known is the amount of selenium sequestered in the sediments and biota of the San Joaquin River and Delta and how much is being recycled into the water column and food chain and its synergistic effects when combined with agricultural chemicals.**

My response continues. In 1985 according to Mr. Ken Willis, the State Board and staff knew the extent of the selenium toxicity problem early on. As more research findings came in he was concerned that there could be a public health, let alone a hazard to fish and wildlife. He stated there was a campaign of misinformation put on by agribusiness interests. He went on to say that if parts of the San Joaquin Valley become unproductive, the people responsible are not the environmentalists, or the government. It would be agribusinesses themselves. The farmers and the State Board were hoping of a magic solution and a quick political fix with little sacrifice on the part of the farmers. See Fresno Bee Aug. 11, 1985.

I feel confident that a reasonable jury would conclude that a selenium contaminated ecosystem and food supply is, impacting and will continue to, impact selected fish and wildlife species / populations utilizing the San Joaquin River and adjacent wetlands, and that these negative impacts will continue without major changes in the allocation and uses Bureau water.

My response to DWR comments pg 4, par 2-5. The *Racanelli* decision (227 Cal Rpt 161, at 195 –1986) told the State Board to set water quality standards to protect all beneficial uses. In essence what *Racanelli* told the State Board was “Set water quality standards and then let the agencies do everything necessary to meet them. And if they complain that they can’t meet the standards by using their water rights and changes in operation, they should explain why in detail.” The Public Trust Doctrine may well require a balancing between beneficial uses and ecological values. However there is nothing that requires balancing a purpose or use that results in contaminating ecological values and is toxic to fish and wildlife species, degrades resources and activities protected by the doctrine of the Public Trust. This should be a no brainer. One doesn’t sacrifice the beneficial uses and resource renewability for a use that contaminate resources and ecological values because such uses can not be sustained on its own without impacting other beneficial uses downslope or downstream. See *Johnson* –1989.

Illinois Central Ry. v. State of Illinois – 146 U.S. 387- 1892), *Audubon*, *Racanelli and Cal Trout 1 and 2* have laid a great foundation for managing public trust resources, uses and ecological values. This collective foundation requires protecting the Public Trust and the stream flow regimens to meet the intent and purpose of Fish and Game code section 5937. The flow regimen requires at least 4 parameters be met to keep in good condition fish utilizing the river downstream of a dam: They are (1) timing, (2) the duration of flow, (3) the amount of those flows and (4) water quality. Water quality has

two components, chemical parameters and temperature. Water quality that results in fish in such poor condition that the state is forced to post public health advisories not to eat fish caught in portions of the lower San Joaquin River is not water quality in the public interest or that meets the purpose and intent of the Porter-Cologne Water Quality Act (Water Code 13000, et. Seq.) and the Federal Clean Water Act. 33 USCA s1251, et. seq.

Unavoidable harm is the impact remaining after all reasonable and feasible actions are taken to protect Public Trust values and the public interest of future generations. I do not know of any vote by the California Legislature or the U.S. Congress that openly allows the pollution or contamination of the State's waters, associated ecosystems, resources, uses and ecological values as being consistent with public trust protection, the public interest, the Porter-Cologne Water Quality Act (Water Code 13000, et. esq.) and the Federal Clean Water Act. 33 USCA. S 1251, et. seq.

My response continues. to DWR pg.5, par.1 –5. DWR suggests that conditional pollution waivers allow for controlling points of pollution and asks for more evidence supporting damages to fish and other aquatic life. There is ample evidence in state reports, some conducted under State Board contracts, that the goals of the Clean Water Act are not being met because fish and wildlife as well as their habitats, public use, and the swimmable and fishable waters are impacted by poor water quality in the lower San Joaquin River from the Mendota Pool downstream to the Delta. There are pesticides, selenium, a variety of salts, Boron, and something called “unknown toxicity” in lower San Joaquin River and tributary waters. One only has to look at selected State Board reports to verify such information. See 2000 California 305 (b) Report on Water Quality – State Board –2000, Presser and Luoma –2006, and Dubrovsky et al –1998).

In my opinion Conditional Waivers for or agricultural dischargers to discharge selenium tainted drainage to state waters above two to three parts per billion is unconscionable. This is especially so because selenium accumulates in the food chain and in the bodies of top predators. In addition once in the aquatic system selenium has the tendency to recycle and bioaccumulate in the food chain to become a problem to the health and survival of aquatic life.

The DWR's simplistic idea that the Bureau merely delivers water to wholesalers, who in turn provide the water to entities for many uses, is shallow thinking. The federally subsidized water is the big hook. Once dependent on such subsidy, the contractors and end users are hooked to this subsidized handout just as a junkie is hooked to his narcotic supplier either legal or illegal. Water from the CVP has long been recognized as a subsidy. Much of the land on the Westside of the San Joaquin Valley and the source of most of the selenium drainage / pollution would not be farmed were it not for public subsidies. The availability of CVP water encouraged western San Joaquin Valley growers to develop lands that could not be farmed for lack of water and to irrigate marginal lands that could not ordinarily be farmed at a profit (LeVeen-1986, Rennie – 1996).

Some of the farm operators that contract for and receive subsidized CVP water grow crops that receive direct price support payments with the largest farms getting the most subsidy payments. Subsidized water and crop subsidies inject a value into the land that it would not otherwise have.

Irrigating saline / seleniferous soils with their resultant drainage issues is a liability, not an agricultural, or fish and wildlife asset of the CVP - San Luis Unit. In 1978, the federal subsidy (public investment) was put at \$770 million, or a value of \$1,540 per acre for the San Luis Unit. This is the part farmers do not pay back. This is about a \$2.00 dollar cost to \$1.00 dollar benefit ratio. This does not include the annual subsidized cost of water and power used to pump water through the various pump lifts and canals. The annual water and power subsidy per acre of Westlands was estimated at \$217.00 per irrigated acre (see pages 38 & 39 – Special Task Force Report - San Luis Unit -USBR 1978).

Using the Cost of Living Calculator to update the 1977 subsidy value of \$1,540.00, to 2007 brings that value is about \$5,227.00 per acre. This value does not include damages to public trust resources (several races of Chinook salmon, Coho salmon and steelhead) uses and ecological values in the area of origin of the water supply such as the Trinity, Sacramento and American Rivers. The subsidy value does not include damages to trust interests of the Grasslands, degraded surface and groundwater supplies, cost of replacement water supplies or any clean-up costs allied with selenium damages, or the \$100 million to \$150 million drainage water study.

My response to DWR comments pg 6, par 5. DWR questions my assertions that the Bureau is a part of the problem. The Bureau is culpable and should be made to contribute to the solution. The Bureau carried the weapon (water) to the site of the crime and encouraged the farmers to irrigate their saline –seleniferous soils. The water district took control and delivered the water to the farmers who then irrigated their land containing selenium. The resultant selenium leachate and drainage impacted fish, other aquatic biota and wildlife as in migratory birds and other beneficial uses of local water supplies. The public nuisance of the selenium leachate / drainage is clear. – One does not gain a right through custom to discharge wastewater or other debris into state waters. See *Gold Run, Elk River and Truckee Lumber*.

My response to DWR comments pg. 6, par 1 thru 5. DWR apparently believes selenium is not associated with the decline of Delta's Pelagic Organism Decline. DWR believes that water diversions, invasive species, toxic elements, pesticides and low water inflows also contribute to the fishery decline. Even assuming there are other causes for the Delta's decline, this does not eliminate the indisputable fact that agricultural drainage is clearly exacerbating deteriorating conditions in the Delta fishery and thus constitutes an unreasonable use and method of use or water in violation of state law. Please Note, DWR presents no evidence that selenium is not found in the in San Joaquin River and South Delta water column and in the biota of these areas.

The selenium TMDL alone is not a good measure or indicator of biological safety because many organisms bioaccumulate selenium to many times the concentration found in the surrounding water. There is a small margin between what is a safe level of selenium and what is toxic. A slight increase of selenium in the surrounding environment can cause a disproportional increase of selenium in organisms, rapidly crossing the safe threshold from benign and beneficial nutrient to a deadly toxin. Research findings indicate a that a selenium concentration of 5 to 30 ppb in water could see a 500 to 800 times increase in plankton; in sediment 200 to 400 times; in benthic

invertebrates 800 to 2,000 times and in fish tissue (depending on species) 1,000 to 35,000 times higher than levels of selenium found in the surrounding water. The high concentrations of selenium in tissues of fish and wildlife are a result of its accumulation via the food chain. Because of its many forms selenium is able to bond with many substances, in water, sediment and biota and is magnified in tissues as one goes up the food chain. Many invertebrate-eating fish, birds and mammals can receive toxic quantities of selenium through their diet even though the selenium concentration in water is low. Many researchers have stated that waterborne selenium is the single and best predictor of pollution of an aquatic environment. (See Presser and Luoma – 2006.

Based on federal jurisdiction over navigation under the Commerce Clause of the United States Constitution, the United States can oust any conflicting ownership, interest or use from navigable waters without compensation (emphasis added - Morreale-1963). The growth of the no compensation rule largely parallels the federal navigation powers and a contemporary understanding of navigation, commerce and fishery and other interests protected by the public trust (See *Marks v. Whitney* 1971). Today, the no compensation rule extends to all state waters whether navigable or not, and whether or not they support a fishery, such as the tributaries to Mono Lake (*Audubon* -1983 and *Cal. Trout I*-1989). It seems most reasonable that this would apply to the San Joaquin River as a tributary to the Delta and San Francisco Bay.

The argument that an interference with the right of navigation (or other trust uses) can be halted can also be applied to water rights. Improper water allocation, point and non-point pollution, unreasonable diversion and unreasonable use of water, all of which can and frequently do impact public trust interests and the beneficial use of water, can be halted by government action on behalf of the public trust. According to Ralph W. Johnson - Professor of Law, University of Washington and prominent public trust scholar, -- no one, including irrigators with appropriative rights (or contracts) -- has a vested, constitutionally protected property right to pollute or otherwise degrade the quality of public waters. Pollution control can be accomplished either under the State's police power or the public trust doctrine without becoming derailed by the taking issue (Johnson 1989). Water right holders or users of water do not acquire a property right by their past history of water uses or its past customs of disposal. If a water use is found to be unreasonable, the water rights associated with that use were never allocated and there is no compensation (*Audubon*.)

The cases of *Gold Run*, *Elk River Mill and Lumber*, and *Truckee Lumber* laid the foundation of public nuisance law in the realm of protecting public waters from degradation or misuse. In today's setting such a nuisance would violate the doctrine of Public Trust. The findings and thinking of the *Elk River* Court are clear: if western San Joaquin Valley irrigators / drainers cannot carry on their operations at a profit without putting their selenium-contaminated drainage and wastewater into ground and surface waters with all the associated negative impacts, and they cannot pay the clean-up costs, then they should not be allowed to misuse the water in such a fashion. These farmers / drainers then must find some other use for the land. If they refuse to find some other use for the land, then the water should be shut off and returned to the area of origin. There is no taking issue for a public trust use or for a use that is deemed unreasonable and a nuisance.

Summary

The *Racanelli* decision (227 Cal Rpt 161 –1986) ordered the State Board to set water quality standards to protect all beneficial uses. What, in essence, *Racanelli* told the State Board was “Set water quality standards and then let the agencies do everything necessary to meet them. And if they complain that they can’t meet the standards by using their water rights and changes in operation, they should explain why in detail.” *Racanelli*’s global view of the Central Valley – Delta watershed would include pre-1914 right holders as well as post 1914 water right holders and diverters (depletions), uses of water, and who is discharging what materials to the surface and ground water of the Great Central Valley.

Setting standards would force diverters and dischargers, as a priority, to meet those standards. Water quality could easily be traced back to reservoir releases from upstream reservoirs. Did the water quality and flow released from all Valley rim dams and reservoirs adequately protect and provide ecological conditions for salmon and steelhead in all streams tributary to and all the way to the Delta, including outflow needs. Enforcement of *Racanelli* will allow effective implementation of the Public Trust Doctrine to protect instream flows and ecological conditions. This could spur a genuine sensitivity to ecosystem protection. This, in turn, could force constraints on existing water right allocations and probably force prioritizing off stream uses of water as well as changes in reservoir operations.

A few questions that should be answered by the State Water Resources Control Board, regarding selenium contaminated drainage and wastewater:

1. With today's knowledge about the extent of selenium in soils of the west side of the San Joaquin Valley and with the long-term environmental impacts resulting from selenium contaminated drainage and wastewater on beneficial use of water and the public trust -- Is it good public policy and a good investment of public and private funds to irrigate saline - seleniferous soils?
2. Is it good public policy to dam Northern California Rivers to divert massive amounts of such waters to irrigate selenium containing soils, when the drainage and wastewater from this activity results in poisoning fish, birds, mammals, reptiles and other wildlife and renders their habitats toxic; killing the soil thru salinization as well as degrading or destroying beneficial uses of water?
3. Is it a reasonable and wise use of our limited water resources to continue to irrigate saline seleniferous soils to grow surplus crops in a near desert environment when other options are available?
4. Have we pushed the assimilative capacity of Central Valley rivers and Delta to the point that it is detrimental to sustainability of fish and other aquatic life, water dependent species, migratory birds, recreation and other beneficial uses.

These questions may have to be answered some day. But from my experience the answers are no to all the above.

The key to carrying out the State's public trust duties are its powers to regulate and its powers to protect the State's fundamental rights in trust properties, ecological values and public use of those properties. "The powers of the State as trustee are not expressed. They are commensurate with the duties of the trust. The State as trustee has the implied power to do everything necessary to the execution and proper administration of the trust". (*People v. California Fish Company*, 166 Cal. 576, 138 Pacific 79, 87, 88 (1913), *City of Long Beach v. Mansell*, 91 Cal 23., 476 P. 2d 423 at 437 (1970).

Thank for allowing me to comment and be a part of this process.

Sincerely,

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