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## Conservation of What?: An Introduction to the Issue

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## CONSERVATION OF WHAT?: AN INTRODUCTION TO THE ISSUE

*PAUL STANTON KIBEL\* & ANTHONY A. AUSTIN\*\**

In the field of environmental and natural resources law and policy, there is often talk of “conservation.” When it comes to discussions about the linkage of land use development approvals and water supply entitlements to serve such development, however, the term “conservation” can be deployed in very different ways.

On the one hand, there are those persons that emphasize the need to conserve adequate freshwater for fisheries and water quality. For these persons, the core objective of the linkage between land use and water supply is to conserve instream flow and aquatic ecosystems by curtailing over-diversion and degradation. For these persons, proposals to secure additional water supplies for new land use development through measures (enhanced off-stream storage, conjunctive use of aquifers, lining of earthen canals) that do not jeopardize instream resources are acceptable solutions. The potential environmental impacts of the new land use development – scenic degradation, air pollution, terrestrial habitat loss – are not a primary concern.

On the other hand, there are those persons whose underlying concern is reducing new land use development and metropolitan sprawl, to avoid the above-mentioned scenic degradation, air pollution, terrestrial habitat loss. These persons may also seek to avoid degradation of instream resources through land use-water supply linkages, but their environmental concerns do not end there.

These contrasting notions of what is to be conserved through land use-water supply linkages have similarly played out in regard to conflicting interpretations of the emerging term “wet growth.” In its most

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## 2 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 4

basic form, the term “wet growth” suggests the need for actual or real water supply availability and entitlements for proposed development, as proposed to mere “paper” water. In his introduction to the Environmental Law Institute’s 2005 book *Wet Growth: Should Water Law Control Land Use?*, Professor Craig Anthony Arnold writes:

There is a need for a concept of “wet growth”: integration of concerns about water quality and the availability of water supply into the density, form, pattern and location of land development. This “wet growth” idea – that growth and land use should be sustainable with respect to aquatic ecosystems and water resources – may simply be an aspect of a broad smart growth agenda (or even broader sustainability agenda). . .<sup>1</sup>

This particular view was also noted by Professor Barton Thompson (in his chapter titled *Water Management and Land Use Planning: Is It Time for Closer Coordination?* (in the above-noted 2005 *Wet Growth* book)), who observed:

In practice, growth opponents have spearheaded many efforts to integrate water management and land use planning. Unable to block growth through more direct means, opponents have sought to use water scarcity<sup>2</sup> as a means to slow down or block new housing development.<sup>2</sup>

Although Professor Arnold and those identified by Professor Thompson may perceive of the concept of wet growth as a component of a larger anti-sprawl policy framework, there is evidence that others may not share this broader perspective. Others appear to view the concept of wet growth as merely requiring that additional secure water supplies be found, wherever and however they can, so that sprawl type development can continue. As Professor Lincoln Davies opined in a 2007 article titled *Just a Big Hot Fuss? Assessing the Value of Connecting Suburban Sprawl, Land Use and Water Rights Through Assured Supply Laws:*

Assured supply laws appear to prompt additional conservation, but it also appears that they do not yield the other environmental benefits their advocates often tout.

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<sup>1</sup> Craig Anthony Arnold, *Introduction: Integrating Water Controls and Land Use Controls: New Ideas and Old Obstacles*, in *WET GROWTH: SHOULD WATER LAW CONTROL LAND USE?* 23 (Craig Anthony Arnold ed., 2005).

<sup>2</sup> Barton Thompson, *Water Management and Land Use Planning: Is It Time for Closer Coordination?*, in *WET GROWTH: SHOULD WATER LAW CONTROL LAND USE?* 97.

2010]

## CONSERVATION OF WHAT?

3

Perhaps most important, it is clear that assured supply laws will not stop sprawl. By definition, of course, assured supply measures do not restrict sprawl per se. They do not tell developers where they can build, they impose no density limits, and they do not expressly require infill development in already urbanized areas. On the contrary, assured supply laws typically only restrict subdivision development to the extent that sufficient water supplies are not available. Thus, if water is available, the assured supply law does not purport to be a barrier to sprawl. Moreover, if water is not available in the immediate vicinity of a project, that does not mean it will be available elsewhere.

. . . .

Because assured water supply laws are unlikely to actually prevent sprawl, environmentalists' attempts to invoke these laws carry a real risk of frustrating their own objectives – backfiring through backlash. Employing a law in a way that will not work, for a purpose for which it was not intended, is exactly the concern that developers repeatedly express when assured supply laws are considered for enactment. . .<sup>3</sup>

Similarly, Professor Dan Tarlock, in his chapter titled *We Are All Water Lawyers Now: Water Law's Potential But Limited Impact on Urban Growth* (also from the above-noted 2005 *Wet Growth* book) has commented:

Today, there is much editorial and other talk about the need for cities and regions to recognize the natural limits of growth. This talk is not new. There is a long futile history of trying to adapt settlement to the perceived limits of reality, but the reality is that the era of reallocation will not deter the net amount of market-driven urban growth. The initial principal impacts of the post-Big Dam era are primarily to raise the cost of urban growth and to shift greater responsibility to cities and state to find the water necessary to support growth.<sup>4</sup>

The analysis set forth by Professors Davies and Tarlock raise points that merit closer scrutiny. Although Professor Davies may be correct that water supply assurance laws do not prohibit sprawl outright, might such laws nonetheless provide effective economic incentives for less water-

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<sup>3</sup> Lincoln L. Davies, *Just a Big Hot Fuss? Assessing the Value of Connecting Suburban Sprawl, Land Use and Water Rights Through Assured Supply Laws*, 34 *ECOLOGY LAW QUARTERLY* 1217, 1274, 1277 (2007).

<sup>4</sup> A. Dan Tarlock, *We Are All Water Lawyers Now: Water Law's Potential But Limited Impact on Urban Growth Management*, in *WET GROWTH: SHOULD WATER LAW CONTROL LAND USE?* 69.

## 4 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 4

intensive urban infill development? Although Professor Tarlock may be correct that water supply assurance laws will not deter the amount of “market-driven” urban growth, by forcing developers and (and therefore home buyers) to internalize significant water supply costs upfront does this cost internalization itself affect the “market” for sprawl-type development? And to the extent that environmental stakeholders supported water supply assurance legislation for the express objective of reducing metropolitan sprawl then why is it inconsistent for such stakeholders to now use such water supply assurances laws to scale back proposed sprawl-type development?

Any attempt to answer these questions forces us again to clarify what in fact is the fundamental objective behind the idea of “wet growth” and to articulate more precisely what is intended to be “conserved” in the context of land use-water supply linkages. These are the points we take up in this special symposium edition of the Golden Gate University Environmental Law Journal – *Real Water: California’s Land Use-Water Law Turns Ten*. The focus of the *Real Water* symposium edition is on Senate Bills 221 and 610, California’s controversial and innovative “wet growth” legislation that went into effect in 2001.

In our lead article, Dan Tarlock, Professor of Law at Chicago-Kent College of Law, traces the development of California’s aptly named linkage laws from the classic public utility model of water supply duties to the passage of S.B. 901 in 1995. Tarlock explains how urban development in California evolved from early doctrines supporting unlimited growth and water supply, to the introduction of growth management strategies in select cities, and culminating in the passage of S.B. 901, a defining moment in the “linking” of land use and water supply planning.

Next, James Moose, Senior Partner at Remy, Thomas, Moose & Manley in Sacramento, examines the interdependency of land use and water supply planning through the lens of the California Environmental Quality Act (CEQA), particularly analyzing how the courts have dealt with water supply issues in land use environmental impact reports. The article recounts a series of appellate court cases that recently culminated in the 2007 California Supreme Court case, *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, and created a significant body of case law to complement California’s assured water supply laws.

Ellen Hanak, Director of Research and Senior Fellow at the Public Policy Institute of California (PPIC) in San Francisco, follows with a review of the relationship between the Urban Water Management Planning Act (UWMPA) and S.B. 221 and 610, which were designed to coordinate with the earlier UWMPA. Relying on first-hand surveys of

2010]

*CONSERVATION OF WHAT?*

5

land use authorities and water utilities, Hanak examines the effectiveness of California's effort to impose water supply planning safeguards on a highly decentralized planning system, proffering suggestions to address the weaknesses that still exist in this process.

In our fourth article, Barry Epstein, Partner and Chair of the Land Use, Environment, and Natural Resource Group at Fitzgerald, Abbott & Beardsley in Oakland, presents a case study of a proposed development in California that required greater scrutiny of the water rights entitlement to the proposed water supply. Epstein tells the story of the River Ranch Estates development in Madera County through the briefs of the parties to the lawsuit that arose after the county approved the project. The article highlights the issue of whether federal holding contracts can sufficiently establish water rights entitlement for purposes of a water supply assessment under S.B. 610.

Next, Kevin O'Brien, Partner at Downey Brand in Sacramento, explores the preparation of water supply assessments, as required under S.B. 610, in the context of subsurface water supplies. The article presents many issues that arise given that the level of scientific and legal certainty required under S.B. 610 often does not exist when dealing with subsurface water supplies. Ultimately, O'Brien suggests that, despite those issues, given the substantial discretion afforded to public water systems in determining the sufficiency of subsurface water supplies, these systems operators must effectively exercise such discretion to ensure that new developments occur with reliable water supplies.

Randele Kanouse, Special Assistant to the General Manager at the East Bay Municipal Utility District (EBMUD), and Douglas Wallace, Environmental Affairs Officer for EBMUD, follow with an analysis of one of the nation's first water-neutral residential projects that involved four developers and EBMUD and arose at the same time that S.B. 221 and 610 were being finalized. The article explains how the linking of water supply and land use planning played out in the Camino Tassajara development project between land developers and the Oakland-based public water agency. In discussing the future of California's water, Kanouse and Wallace conclude by highlighting the importance of early communication with developers at the plan reviewing stage in order to include the most water efficient measures.

In our final article, Lincoln Davies, Associate Professor of Law at the University of Utah, S.J. Quinney College of Law, analyzes five western states' assured supply laws in determining whether these types of laws actually advance sustainability. In coming to his determination, Davies first examines the costs and benefits of assured supply laws and how they function. He then deconstructs what sustainability means in

6 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 4

order to place these assured supply laws in the proper context before answering that pivotal question. Though he concludes that these laws do promote sustainability, it is often only in limited instances, focusing on one aspect of the larger sustainable development scheme.

With ten years of collective experience now under our belt, the time is ripe for an assessment of whether S.B. 221 and SB 610 have lived up to the hopes of those who supported the legislation and the fears of those who opposed it.