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How California Local Governments Became Both Water Suppliers and Planners

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ARTICLE

HOW CALIFORNIA LOCAL GOVERNMENTS BECAME BOTH WATER SUPPLIERS AND PLANNERS

A. DAN TARLOCK*

I. INTRODUCTION: THE DEVOLUTION OF WATER SUPPLY PLANNING RESPONSIBILITY IN AN ERA OF STRESSED SUPPLIES

The paradox of California is that growth is concentrated in arid southern California but most of the state's water supply, with the exception of the Colorado and Owens Rivers, originates in the north. This has meant that the state has had to bring massive amounts of water to the south to support the state's celebrated continued population growth in order to compensate for California's "bad hydrology."¹ From 1940 to 2007, California's population increased from 6,950,000 to 37,786,000,² and that growth has stressed the state's capacity to meet the demand for water.³ Predicting the future is impossible, but the most conservative working assumption (at least before the deep current recession) is that the state's climate and landscape will continue to hold and attract people.

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¹ John Briscoe, *Water Security: Why It Matters and What To Do About It*, 4 *INNOVATIONS* 3 (2009).

² CAL. DEP'T OF FIN., DEMOGRAPHIC RESEARCH UNIT, TABLE B-1, *available at* www.dof.ca.gov/HTML/FS_DATA/STAT-ABS/documents/B1.pdf.

³ After a survey of the historic drought record and the likely impacts of climate change, the National Research Council concluded that "[a] future of increasing population growth and urban water demands in a hydroclimatic setting of limited--and likely decreasing--water supplies presents a sobering prospect for elected officials and water managers." NATIONAL RESEARCH COUNCIL, *COLORADO RIVER BASIN WATER MANAGEMENT: ADJUSTING TO HYDROCLIMATIC VARIABILITY* 153 (2009).

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The 2009 Update to the California Water Plan displays three growth scenarios out to 2050. The Blueprint Projection holds the state's population at a more or less constant level, but the Current Trends and Expansive Growth scenarios project a population that ranges from 50,000,000 to 70,000,000.⁴

Until the last two decades, California was able to overcome bad hydrology through science, technology, and money.⁵ State and federal water planners and public officials proceeded on the assumption that climate and water supply imbalances should never be a constraint on agricultural and urban growth. This assumption rested on the belief that it was possible to supply the Central Valley and Southern California by capturing, storing and delivering the Sierra Nevada and Trinity Alps snowpack to supplement other supplies and thus meet all of the state's present and future needs. This assumption no longer holds, and California can no longer afford to base its water policy on the assumption that there are no hydroclimatic limits to supplying all human and nonhuman claims. The 2009 California Water Plan Update states the new reality clearly:

California is facing one of the most significant water crises in its history—one that is hitting hard because it has so many aspects. Growing population and reduced water supplies are exacerbating the effects of a multi-year drought. Climate change is reducing our snowpack storage and increasing floods. Court decisions and new regulations have resulted in the reduction of Delta water deliveries by 20 to 30 percent. Key fish species continue to decline. In some areas of the state our ecosystems and quality of underground and surface waters are unhealthy. The current global financial crisis will make it even more difficult to invest in solutions.⁶

⁴ CAL. DEP'T OF WATER RES., CALIFORNIA WATER PLAN UPDATE 2009: INTEGRATED WATER MANAGEMENT (Jan. 2009), *available at* www.waterplan.water.ca.gov/cwpu2009/index.cfm.

⁵ The federal and state water suppliers typically engaged in "urban water supply over-planning" to ensure that growing cities had adequate future supplies. Pia Maria Grimes, *Urbanization and Water Supply in the Northern San Joaquin Valley 100 (2001)* (Masters Thesis in Civil and Environmental Engineering, University of California, Davis), *available at* cee.engr.ucdavis.edu/faculty/lund/students/PiaGrimesMSThesis.pdf. The 1989-1990 drought "forced a rethinking of the entire question of water allocation, and of equal importance, the relationship of water to growth and conservation . . . [although] how deeply conservation awareness penetrated the collective consciousness of California during drought years remains a matter of debate." KEVIN STARR, *COAST OF DREAMS: CALIFORNIA ON THE EDGE, 1990-2003* 505-06 (2004).

⁶ CAL. DEP'T OF WATER RES., *supra* note 4, Vol. 1, at 4-29. The news continues to get worse. In late 2009, University of California at Davis researchers reported that a study of Sierra Nevada cave minerals showed evidence of past mega-droughts, one lasting almost a century and

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In short, California and the West generally must learn to live with a relatively fixed or decreasing water budget.

There are three primary reasons for this new reality. The first is the end of the Reclamation or “Big Dam” era. The era ended the late 1960s as a result of the environmental movement, the fiscal pressures faced by the federal government, and congressional loss of interest in promoting regional development in the South and West through subsidized water development. However, it took the western states two more decades to appreciate that they would have to live with the legacy infrastructure, and that water to meet new demands was likely to come more from the reallocation of existing agricultural supplies than from traditional forms of supply augmentation. In short, agriculture is the reservoir for new urban and environmental supplies.

The second reason is that new carry-over storage facilities will be harder to construct because of environmental constraints. Much of the environmental movement’s initial fury was directed against large dams, and many dams were subsequently stopped. The broader consequence of the movement’s antipathy to dams is the rejection of the very idea of hydrologic modification in the name of optimization. Although the federal government quickly ceased dam building in the late 1960s, the two major water agencies, the U.S. Army Corps of Engineers and the Bureau of Reclamation (BuRec), were left in place to manage their legacy projects. Instead of fundamental reform, Congress simply imposed ad hoc environmental protection mandates, such as the Endangered Species Act,⁷ over older, pre-environmental era regulatory structures that subordinated any notion of environmental protection to development.⁸

Environmentalism has taught us to appreciate rivers as integral parts of a landscape, as natural systems that can provide valuable ecosystem services along with the historic benefits, and as parts of our wilderness heritage.⁹ The Endangered Species Act and other environmental laws have allowed the selective implementation of this alternative vision of a river. Starting in the 1960s more water has been allocated to *in situ* uses

one-half, connected to rapid warming. Mark Grossi, UC Davis Researchers Find Evidence of Past Mega-Droughts, THE SACRAMENTO BEE, Nov. 24, 2009.

⁷ 16 U.S.C. §§ 1531-1599 (Westlaw 2010).

⁸ See Robin Kundis Craig, Climate Change, Regulatory Fragmentation, and Water Triage, 79 U. COLO. L. REV. 825 (2008).

⁹ See generally DAVID LEWIS FELDMAN, WATER POLICY FOR SUSTAINABLE DEVELOPMENT 53-56 (2007).

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to maintain minimum flows¹⁰ and existing dams subject to environmental operating conditions, and we have now moved to river restoration experiments. Climate change may trigger a second dam building era as demand continues to exceed supply and fears of reduced supplies mount, but any new storage facilities that may be built in the future are likely to be smaller and smarter than the large state and federal subsidized multiple-purpose projects constructed in the last century.¹¹

The third development is global climate change. A cascade of climate change studies continue to predict that arid and semiarid areas such as the American West face the risk of permanently decreased water budgets as precipitation declines and temperatures increase.¹² Depending on the temperature rise projection, the scenarios range upward (and the confidence in them becomes ever more speculative) from the desertification of much of the West, to abandoned coastal cities, to a largely uninhabitable planet.¹³ Given its bad hydrology and vulnerable climate and landscape, California has had to be the leader in

¹⁰ In the San Joaquin Valley, 48% of the total use, some 5.6 acre feet, is devoted to instream flows, although much of these flows are in the headwaters, and the water is available for downstream consumptive use. CAL. DEP'T OF WATER RES., CALIFORNIA WATER PLAN UPDATE 2005, Vol. 3, at 7-13, available at www.waterplan.water.ca.gov/docs/cwpu2005/vol3/v3ch07.pdf.

¹¹ Increased runoff capture is on the climate change agenda, and this includes the revival of building new carry-over storage. In May of 2007, Governor Arnold Schwarzenegger tried to jump-start a new dam building era by calling for the construction of two new hydroelectric dams to help meet the state's ambitious greenhouse-gas emission targets. Bonner Cohen, *Global Warming Creates Need for New Dams: Schwarzenegger*, ENVIRONMENT & CLIMATE NEWS, May 1, 2007, available at www.heartland.org/policybot/results/20949/Global_Warming_Creates_Need_for_New_Dams_Schwarzenegger.html.

¹² E.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE AND WATER (IPCC Technical Paper VI, 2008), available at www.ipcc.ch/pdf/technical-papers/climate-change-water-en.pdf (summarizing the studies that predict a decline in irrigated acreage and withdrawals in the United States due to higher temperatures). A 2010 National Research Council Report, CLIMATE STABILIZATION TARGETS: EMISSIONS, CONCENTRATIONS, AND IMPACTS OVER DECADES TO MILLENNIA (2010), concludes that each 1°C temperature rise in the southwest will reduce rain by 5-10%. Other important studies for the West include NATIONAL RESEARCH COUNCIL, *supra* note 3; NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS (2001), available at www.gcrio.org/OnLnDoc/pdf/ClimateChangeScience.pdf; BARRY NELSON ET AL., NATURAL RESOURCES DEFENSE COUNCIL, IN HOT WATER: WATER MANAGEMENT STRATEGIES TO WEATHER THE EFFECTS OF GLOBAL WARMING (July 2007), available at www.nrdc.org/globalWarming/hotwater/hotwater.pdf; and STEPHEN SAUNDERS, CHARLES MONTGOMERY & TOM EASLEY, THE ROCKY MOUNTAIN CLIMATE ORGANIZATION AND NATURAL RESOURCES DEFENSE COUNCIL, HOTTER AND DRIER: THE WEST'S CHANGED CLIMATE (March 2008), available at www.nrdc.org/globalWarming/west/west.pdf.

¹³ Alok Jha, *Copenhagen Climate Submit: Five Possible Scenarios for Our Future Climate*, THE GUARDIAN, Dec. 18, 2009, available at www.guardian.co.uk/environment/2009/dec/18/copenhagen-five-climate-scenarios.

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incorporating climate change scenarios into state water planning.¹⁴ But this is only the first step. Climate change adaptation will require cooperation and coordination among all levels of government and water suppliers and users.

One reflection of this coordination is the growing linkage between water supply and land use planning. The law is moving from the classic public utility model of water supply duties, which dominated local water supply planning, to the integration of land and water planning and regulation.¹⁵ Large urban water suppliers have always played an active role in ensuring that the necessary storage and delivery projects were financed and constructed. However, they did this on the assumption that they could either develop sufficient supplies or that the state or federal government would build the carry-over storage to provide the necessary supplemental water. Water supply planning and land use planning were therefore able to operate on separate tracks.¹⁶ Today, this historic disconnect is no longer sustainable for the reasons articulated above.

To correct this disconnect, the California Legislature has evolved new responsibilities for assuring a realistic, secure, long-term, and drought-proof supply to local governments and developers. These laws, as interpreted by the courts through the lens of the California Environmental Quality Act (CEQA),¹⁷ require risk-based water supply planning by local governments before new growth can be approved.¹⁸ California and the West's cities are unlikely to stop growing, as we still accept growth as inevitable;¹⁹ the linkage adds a new dimension to the long-running debates about the limits aridity imposes on growth.²⁰ As a leading student of water and growth wrote, "[i]n taking the first step and thinking more deliberately about water demands of growth, assured-supply laws represent an important step toward living sustainably in this

¹⁴ CAL. DEP'T OF WATER RES., MANAGING AN UNCERTAIN FUTURE: CLIMATE CHANGE ADAPTATION STRATEGIES FOR CALIFORNIA'S WATER, VOL. 4 (Oct. 22, 2008) *available at* www.water.ca.gov/climatechange/docs/ClimateChangeWhitePaper.pdf.

¹⁵ Professor J.B. Ruhl includes this linkage among the top ten new legal developments that the incorporation of climate change adaptation into environmental law will produce. J.B. Ruhl, Climate Change Adaptation and the Structural Transformation of Environmental Law, 40 ENVTL. L. 363 (2010).

¹⁶ See A. Dan Tarlock & Lora A. Lucero, Connecting Land, Water, and Growth, 34 URB. LAW. 971 (2002), for an analysis of the reasons for and consequences of this separation.

¹⁷ CAL. PUB. RES. CODE §§ 21000-21006 (Westlaw 2010).

¹⁸ CAL. GOV'T CODE § 66473 (Westlaw 2010).

¹⁹ See A. Dan Tarlock, A Brief Examination of the History of Persistent Debate About Limits to Western Growth, 10 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 155 (2004).

²⁰ See *id.*

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spectacular—and fundamentally dry—western landscape.”²¹ At a minimum, linkage will make continued growth accommodation more difficult and expensive than it has been in the past. For example, in early 2008, a water district in Riverside County decided that it could not guarantee the supply for two new large commercial and retail developments.²²

No new law, no matter how radical, comes from the sky. California’s linkage laws are a product of the convergence of three developments that began in the now mythic 1960s as the state had to come to grips with the impact of exponential suburban growth on the landscapes that make California so unique and special. The developments are: (1) the exit of the federal government from subsidizing regional development and the decreasing inability of the state to finance large-scale public works projects; (2) the rise of the environmental movement; and (3) the legal success of growth management land use regulations in suburban northern California. The need for climate change adaptation, which may force cities to adapt through aggressive water conservation and denser, public transit oriented urban development,²³ reinforces these developments.

This introductory Article traces the evolution of California’s linkage laws from the time that cities operated under the public utility model, which viewed local governments as unconstrained suppliers, to the first linkage law, enacted in 1995. The following excellent Articles in this symposium carry the story forward and illustrate that in the Post-Reclamation, Global Climate Change Era, local governments in California and throughout the country are now active rather than passive participants in water supply planning and regulation and climate change mitigation and adaptation.

II. THE PUBLIC UTILITY MODEL AND WESTERN WATER LAW SUPPORT UNLIMITED URBAN GROWTH

For most of the twentieth century, California’s cities and special districts saw themselves as subject to a firm duty to supply the water

²¹ Sarah Bates, *Watering the West*, SCIENCE PROGRESS (June 17, 2008) (emphasis added), www.scienceprogress.org/2008/06/watering-the-west/.

²² Jennifer Bowles & Dan Lee, Water Troubles Put Inland Developments in Limbo, THE PRESS-ENTERPRISE, Jan. 24, 2008.

²³ E.g., John R. Nolon, The Land Use Stabilization Wedge: Shifting Ground To Mitigate Climate Change, 34 WM. & MARY ENVTL. L. & POL’Y REV. 1 (2009), available at 204.12.38.203/archives/34/nolon.pdf.

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necessary to support the glorious influx of people into the state.²⁴ Municipal water suppliers are generally either public utilities or municipalities regulated by state law or subject to the historic service duties that courts impose on monopolies. Because they are natural monopolies, public utilities have a duty to serve all customers within their service area who can afford to pay the water tariff.²⁵ Service must be provided to residents even if the cost of service exceeds the expected revenue provided that the system could absorb the cost. The Constitution guarantees public utilities only a reasonable rate of return on the system as a whole.²⁶ A leading California case extended a water provider's duty to serve to include a duty to acquire the necessary supplies to meet projected demand.²⁷

Growing cities must plan ahead to secure the necessary rights to meet projected future demands, and often they must hold water rights for long periods of time before wet water is delivered to new residents. In theory, the acquisition of water rights for future supplies is inconsistent with the agrarian-based beneficial use doctrine. Water is to be put to use within a relatively short period of time after a right is claimed and is to be continuously applied to a productive and non-wasteful use.²⁸ The continuous-use requirement is based on an anti-speculative, anti-monopoly policy embedded in the law. The tension between the need to create firm water rights and the need to make water widely available to the farmers of a largely empty West was reconciled by the beneficial use doctrine, which prevents a user from hoarding water that should be open to other users. Since prior appropriation was initially rooted in the vision of western settlement through small farms, there has always been a strong anti-monopoly rhetoric in the law.²⁹

²⁴ The positive impact on the welfare of the state and its citizens from endless growth is one of the themes of the historian Kevin Starr's grand survey of California history. *E.g.*, KEVIN STARR, *INVENTING THE DREAM: CALIFORNIA THROUGH THE PROGRESSIVE ERA* (1985); KEVIN STARR, *MATERIAL DREAMS: SOUTHERN CALIFORNIA THROUGH THE 1920S* (1990); KEVIN STARR, *GOLDEN DREAMS: CALIFORNIA IN AN AGE OF ABUNDANCE: 1950-1963* (2009).

²⁵ The history of the doctrine is traced in CHARLES M. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS* 21-33 (1986).

²⁶ *Mkt. St. Ry. Co. v. R.R. Comm'n*, 324 U.S. 548, 557, 569 (1945).

²⁷ *Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318, 325 (1915) (holding that municipal water supplier had duty "to keep in view the prospective and probable increase in population of the municipality and the necessarily increasing demand for a water supply which would be consequent therefrom . . . [and] to take reasonable measures to have under its control a sufficient supply of water . . . to meet the reasonable demands for water by the growing community").

²⁸ *See Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 225 Cal. App. 3d 548 (Ct. App. 1990).

²⁹ *See* David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of*

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To support and encourage urban growth in an under-populated region in the early twentieth century, western water law incorporated the public utility model into the doctrine of prior appropriation and exempted cities from any possible anti-speculative control limitations. Courts announced a progressive-growth doctrine. Initially created to allow irrigators to claim rights to acreage not yet in production,³⁰ the doctrine was soon extended to allow cities to perfect and hold water rights for long periods of time based on the expected need for the water.³¹ Cities enjoy an even larger exemption from the anti-speculation principle under the growing-cities doctrine, which—like the progressive-growth doctrine—allows a city to perfect a water right to the amount of water that it will need to meet reasonably anticipated future growth or to meet the anticipated future capacity of its system.³²

Apart from the “super-urban preference,”³³ the federal government took the sting out of any possibility that the law of prior appropriation would limit urban growth. During the first two decades of the twentieth century, conservationists developed a vision of water management as efficient, integrated river basin development that fully harnessed rivers and, if possible, allowed no drop of water to reach the sea.³⁴ In the Great Depression, this vision was implemented to put people to work, and California was the primary beneficiary of federal dam building

Property Rights, 32 *ECOLOGY L.Q.* 3, 65-66 (2005).

³⁰ *E.g.*, *St. Onge v. Blakely*, 76 Mont. 1 (1926); *State ex rel. State Eng’r v. Crider*, 78 N.M. 312 (1967).

³¹ *E.g.*, *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 29-30 (Colo. 1996); *City & County of Denver v. N. Colo. Water Conservancy Dist.*, 130 Colo. 375 (1954); *City & County of Denver v. Sheriff*, 105 Colo. 193 (1939); *Reynolds v. City of Roswell*, 99 N.M. 84 (1982); *State, Dep’t. of Ecology v. Theodoratus*, 135 Wash. 2d 582, 614-17 (Wash. 1998) (Sanders, J. dissenting); *see Janis E. Carpenter, Water for Growing Communities: Refining Tradition in the Pacific Northwest*, 27 *ENVTL. L.* 127 (1997); Dennis J. Herman, Note, *Sometimes There’s Nothing Left To Give: The Justification for Denying Water Service to New Consumers To Control Growth*, 44 *STAN. L. REV.* 429 (1992). *See Malcolm Lindsey, Legal Problems in City Water Supply*, 22 *U. COLO. L. REV.* 356 (1950), for a discussion of the evolution of the adaptation of the Colorado law of municipal water rights to Eastern Slope growth.

³² *Theodoratus*, 135 Wash. 2d at 614-17 (Sanders, J. dissenting). For another example of judicial willingness to limit water rights to actual use, *see Reid Dev. Co. v. Parsipanny-Troy Hills Tp.*, 10 N.J. 229 (1952).

³³ *See 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?* 57 (Craig Anthony (Tony) Arnold ed., 2005).

³⁴ In Progressive Conservation Era, “water resources planning was expected to maximize hydrologic control, not maximize net benefits. The rational plan was one in which an integrated set of water projects would eliminate the ‘waste’ of water and control the vagaries of nature.” NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, U.S. ARMY CORPS OF ENGINEERS *WATER RESOURCES PLANNING: A NEW OPPORTUNITY FOR SERVICE* 38 (2004).

largesse.³⁵ The Central Valley Project, Hoover Dam, and later the State Water Project backstopped agricultural and urban water rights and allowed urban growth to accelerate along with the expansion of irrigated agriculture.³⁶ California's cities faced little risk of the application of the anti-speculation doctrine; prior appropriation allowed water to be moved long distances from the watershed of origin and facilitated the state's population growth. As the leading historian of California water, Norris Hundley Jr., has observed, "[t]he availability of Colorado River water beginning in the 1940s . . . obliterated any sense of restraint about Los Angeles' capacity to absorb ever more people and industries."³⁷

Cities did face a possible threat that arose from legislation designed to prevent another Owens Valley,³⁸ the dewatering of a remote, rural area. In 1931, before *Baker v. Carr* mandated one person, one vote, the "cow county"-dominated legislature passed an area-of-origin protection law that gave headwaters counties an absolute priority to make future claims of water and thus displace the claims of the areas of import.³⁹ However, the legislation took most of the possible risk out of the protection because the area of origin is the county where the rain or snow falls. Thus, the thinly populated mountain counties, not the more populated and growing foothill counties were the beneficiaries of the law, even though they had few claims to make.

III. THE END OF THE "BIG DAM" ERA IN CALIFORNIA AND WHAT IT MEANT FOR URBAN WATER SUPPLIERS

In California, the Big Dam era extended through the 1970s, but the powerful environmental reaction against it brought about consequences that fundamentally changed the politics of water in the state. The most relevant change for linkage laws is that the resulting scramble for new

³⁵ The water historian Donald Pisani has traced this development through the career of the legendary Commissioner of the Bureau of Reclamation, Floyd Dominy. During his tenure (1959-1969), he presided over the construction of major dams on the Colorado River and in California. The passage of the Central Arizona Project in 1968 marked the effective end of the Big-Dam Era, although the western states clung to the idea into the 1980s. Donald J. Pisani, *Waterhistory.org*, *Floyd E. Dominy*, www.waterhistory.org/histories/dominy/dominy.pdf (last visited July 28, 2010).

³⁶ NORRIS HUNDLEY, JR., *THE GREAT THIRST: CALIFORNIANS AND WATER, A HISTORY* 234-76 (rev. ed. 2001).

³⁷ *Id.* at 231.

³⁸ The story of Los Angeles' efforts to supplement its modest local supplies by bringing water from the eastern slope of the Sierra Nevada Mountains is well told in HUNDLEY, *supra* note 36, at 123-71.

³⁹ CAL. WATER CODE §§ 10505, 10505.5 (Westlaw 2010); see Gary D. Weatherford, *Legal Aspects of Interregional Water Disputes*, 15 *UCLA L. Rev.* 1299 (1968).

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supplies linked coastal urban areas to the watershed of origin and thrust suppliers into the new politics of environmentalism. Initially, the end of the Big Dam Era did not seem to be of great consequence for California. Not only did the state have the legacy of the Central Valley Project and Hoover Dam, but also the State Water Project and more federal largesse. The San Luis Reservoir was completed in 1967;⁴⁰ the Oroville Dam, which supplies the State Water Project, was completed in 1968;⁴¹ and the federal New Melones Dam was completed in 1979.⁴² However, the environmental movement's rapid rise to power quickly changed this, as it substituted an ethic of sustainable management and stewardship for the traditional view of nature as a treasure chest of valuable commodities to be rapidly exploited.⁴³ An immediate consequence of the rise of "fish power" was the protection of many major north-coast rivers in 1972.⁴⁴

In addition to the defeat of new dam proposals and the protection of wild and scenic rivers, it was no longer for cities to take the water and run, as the East Bay Municipal Utility District (EBMUD) learned when it tried to shore up its Mokelumne River supplies with American River water. In 1970 EBMUD contracted with BuRec for 150,000 acres of Central Valley Project water, which would be diverted from Nimbus Dam on the American River and conveyed through the Folsom South Canal. These plans were immediately challenged by various environmental groups, which argued that downstream fisheries and instream values would be adversely impacted.

In 1977, the California Supreme Court ruled that the State Water Resources Board should decide whether EBMUD had to seek an alternative source of supply—reclaimed sewage water—before taking its BuRec entitlement.⁴⁵ In 1990, a superior court ruled that EBMUD could take its entitlement but had to adhere to a physical solution that required minimum flow releases. The court further ruled that EBMUD could supply water only to customers within its service area. This litigation added a major new risk element to water-rights permits. Harold Raines, an EBMUD attorney who negotiated the Mokelumne River contract,

⁴⁰ HUNDLEY, *supra* note 36, at 320.

⁴¹ *Id.* at 279-80.

⁴² *Id.* at 366-73.

⁴³ See JOHN PASSMORE, MAN'S RESPONSIBILITY FOR NATURE 28-40 (1974); Gilbert White, Reflections on Changing Perceptions of the Earth, 19 ANN. REV. ENERGY & ENV'T 1, 13 (1994).

⁴⁴ CAL. PUB. RES. CODE § 5093.54 (Westlaw 2010). The eel was protected under the federal Wild and Scenic Rivers Act, 12 U.S.C. § 1271 et seq., in 1981. See HUNDLEY, *supra* note 36, at 308-13, 360-78.

⁴⁵ *Env'tl. Def. Fund, Inc. v. E. Bay Mun. Util. Dist.*, 20 Cal. 3d 327 (1977), vacated, 439 U.S. 811 (1978), and remanded, 26 Cal. 3d 183 (1980).

nically summed up the changed political and legal environment. “In my day . . . when you got a permit it meant what it says: you got water. Since then, the environmental movement has forced—forced is the right word—but at least has encouraged the development of different ideas about water rights. . . . A permit now is just a hunting license for water.”⁴⁶ The 1983 Mono Lake decision⁴⁷ cemented the city-watershed linkage and led to the more radical idea of dam removal. The removal of O’Shaughnessy Dam, which supplies San Francisco, north of Yosemite National Park,⁴⁸ and even removal of the mighty Glen Canyon Dam on the Colorado,⁴⁹ have been seriously proposed.

IV. ENVIRONMENTALISM AND GROWTH MANAGEMENT: THE ORIGINS OF LINKAGE LAWS

A. PHASED GROWTH AND UTILITY SERVICE CONCURRENCY

As environmentalists were successfully opposing all new dams, more affluent cities in the path of growth began to ask themselves a new question that led directly to the current linkage between water supply and

⁴⁶ Interview by Germaine LaBerge with Howard Raines, EBMUD Attorney, East Bay Municipal Utility District, Water Rights on the Mokelumne River and Legal Issues at the East Bay Municipal Utility District, 1927-1966 (1995), available at ia331307.us.archive.org/3/items/watermokelumne00rainrich/watermokelumne00rainrich.pdf.

⁴⁷ Nat’l Audubon Soc’y v. Superior Court of Alpine County, 33 Cal. 3d 419 (1983).

⁴⁸ O’Shaughnessy Dam in the Hetch Hetchy Valley in Yosemite National Park supplies the city of San Francisco with water and power. The decision to build the dam was one of the great natural-resource fights of the Conservation Era and played a major role in splitting the movement into the utilitarian, multi-use and preservation wings and still resonates in California. See RICHARD WHITE, “IT’S YOUR MISFORTUNE AND NONE OF MY OWN”: A NEW HISTORY OF THE AMERICAN WEST 413 (1991). California environmentalists have long dreamed of restoring the valley to John Muir’s vision of it, as the “flow of nature.” MICHAEL COHEN, THE PATHLESS WAY: JOHN MUIR AND THE AMERICAN WILDERNESS 330 (1984). See SPRECK ROSEKRANS ET AL., ENVTL. DEF. FUND, PARADISE REGAINED: SOLUTIONS FOR RESTORING YOSEMITE HETCH HETCHY VALLEY (2004) for a comprehensive effort to simulate a removal debate. In 1987, President Reagan’s Secretary of the Interior, Donald Hodel, was the first high-ranking official to suggest removal. Environmentalists viewed the suggestion as a ploy to split green northern California. In 2007, the Bush II Administration proposed a \$7,000,000 removal feasibility study, but Senator Diane Feinstein, the former mayor of San Francisco and Hetch Hetchy defender, was not amused.

⁴⁹ Scott K. Miller, Undamming Glen Canyon: Lunacy, Rationality, or Prophecy? 19 STAN. ENVTL. L.J. 121 (2000), reviews proposals to take down Glen Canyon Dam. The issues raised by dam removal are beyond the subject of this Article. See THE HEINZ CENTER, DAM REMOVAL RESEARCH: STATUS AND PROSPECTS (H.J. William Graf ed., 2002); Symposium, A *Special Section on Dam Removal and River Restoration*, BIOSCIENCE, Vol. 52, No. 8, at 653-747 (2002), available at caliber.ucpress.net/toc/bisi/52/8.

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land use planning. The question, simply put, was: must we accept the market demand for new construction in our area in light of high and immediate infrastructure costs and the loss of open space? When gas prices were low, small and medium sized rural communities north of Marin County and in the Livermore Valley to the west experienced rapid growth as people traded longer commutes for lower-cost housing. Since the 1920s, California had led the way in the creation of an automobile-based, endlessly expanding suburban society.⁵⁰ During the post-World-War-II golden era of the state (1945-1968), the prevailing assumptions were that growth was inevitable and good, and that the state should and could build the education, transportation, and water infrastructure to serve this blessing.⁵¹ The planning choice was between minimal controls and efforts to accommodate the growth more rationally through regional planning and governance.⁵² The state opted for the initial efforts to pursue the second strategy.

Post-World-War-II California also illustrates that for every action, there is a reaction. As new suburbs expanded into farming areas near older urban areas, concern about the loss of “open space” emerged as a “hot” local and regional political issue.⁵³ By the 1960s, as the environmental movement was breaking, some local governments – generally smaller, affluent suburbs – decided that they did not need to accept the rate of growth as inevitable and did not need to accommodate all growth.⁵⁴ Although the national movement was primarily concerned with air and water, suburban local environmental movements had a strong growth control and management component. In response, these areas began to adopt aggressive growth management strategies.

As generally practiced today, growth management is little more than

⁵⁰ The rise of California’s automobile-obsessed culture and lifestyle is richly chronicled in STARR, *GOLDEN DREAMS: CALIFORNIA IN AN AGE OF ABUNDANCE: 1950-1963* (2009).

⁵¹ See *id.* for a portrait of the state in the time when California led the nation in building the public infrastructure to support what seemed like endless growth in the name of providing all its citizens the good life.

⁵² ELISA BARBOUR, *PUB. POLICY INST. OF CAL., METROPOLITAN GROWTH PLANNING IN CALIFORNIA, 1900-2000* (2002), is an excellent history of California’s efforts to promote institutions to accommodate growth.

⁵³ Much of the history of this movement can be traced in the pages of the magazine of the conservation organization California Tomorrow, which published *CRY CALIFORNIA* from 1965 to 1982.

⁵⁴ For a history of the anti-sprawl movement in Los Angeles, see MIKE DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE OF LOS ANGELES* (1990), excerpted as Mike Davis, *The New Urban Environmentalism*, in *GREEN VERSUS GOLD: SOURCES IN CALIFORNIA’S ENVIRONMENTAL HISTORY* 384 (Carolyn Merchant ed., 1998).

a sophisticated unlimited growth accommodation strategy.⁵⁵ Cities commonly accept growth levels as a given and seek to accommodate them by timing them and channeling development within urban growth boundaries and by using subdivision exactions to force new residents to pay directly for the costs of new public services. The law of growth management supports the long history of Americans' persistent market preference for low-density development.⁵⁶ However, growth management opened the door to alternative growth scenarios and to the linkage of land and water planning.

Environmentalists have long argued that the best way to channel and even limit growth is to tie utility service to land use objectives.⁵⁷ No water, no growth. However, many planners have been skeptical of this strategy.⁵⁸ Two legal constraints drive this skepticism. First, stopping growth can be challenged as a Fifth Amendment taking of property without due process of law. Stopping raw-land conversion is an unnatural regulatory act. Second, service denials are inconsistent with the public utility-law principle that a utility must serve all paying customers unless service extension will deny the utility its constitutionally guaranteed reasonable rate of return. In addition, California's most ambitious effort to use water service to drastically limit growth was a failure.⁵⁹ However, the mere idea of linking utility service with phased growth was first pioneered in the famous Ramapo, New York, ordinance.⁶⁰ The town, on the fringe of urban northern New Jersey, faced rapid growth; it adopted an ordinance that stretched the projected build-out of the town to eighteen years by basing development approvals on a

⁵⁵ GABOR ZOVANYI, GROWTH MANAGEMENT FOR A SUSTAINABLE FUTURE: ECOLOGICAL SUSTAINABILITY AS THE NEW GROWTH FOCUS FOR THE 21ST CENTURY 53 (1998).

⁵⁶ See KENNETH T. JACKSON, THE CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985).

⁵⁷ E.g., DAVID CARLE, DROWNING THE DREAM: CALIFORNIA'S WATER CHOICES IN THE MILLENNIUM (2000). Christine Klein, Water Transfers: The Case Against Transbasin Diversions in the Eastern States, 25 UCLA J. ENVTL. L. & POL'Y 249, 278 (2006-2007), argues that water transfers should not be used in the eastern United States because they promote unsustainable urban growth at the expense of third-party impacts in the watershed of origin.

⁵⁸ Lincoln L. Davies, Just a Big, "Hot Fuss"? Assessing the Value of Connecting Urban Sprawl, Land Use, and Water Rights Through Assured Supply Laws, 34 ECOLOGY L.Q. 1217, 1245-1246 (2007).

⁵⁹ Santa Barbara County contracted for State Water Project water, but voters initially refused to approve the bonds to finance a canal from the aqueduct to the county, but the droughts of the late 1980s resulted in a 1 to 991 vote to finance the hookup, which was completed in 1997. HUNDLEY, *supra* note 36, at 519-21.

⁶⁰ The system was upheld against an *ultra vires* challenge in *Golden v. Planning Bd. of Ramapo*, 30 N.Y. 2d 359 (1972).

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point system.⁶¹ The more infrastructure a developer provided, the more points it earned. The Ramapo approach came to California in the North Bay growth corridor and provided the legal and political precedents for the state's current assured water supply laws.

One of the first communities to time growth was Petaluma, the egg capital of California, which went from a bit of a joke to a rapidly growing exurban San Francisco Bay Area community in the 1960s. Rapid growth outpaced the ability of property tax revenues to support urban services and led to efforts to moderate it. To match growth to service capacity, Petaluma boldly capped new residential construction at 500 units per year and awarded development unit permits by an elaborate point system to encourage competition among developers for amenities. The plan survived an exclusionary zoning and Commerce Clause challenge,⁶² though it never was implemented as envisioned.⁶³ However, the Ninth Circuit's decision in that case legitimated a number of widely adopted concurrency programs that timed growth to service availability and opened the door to other planning techniques.⁶⁴ Some cities used moratoria to freeze development.⁶⁵ The apple-growing city of Sebastopol borrowed the British idea of ringing cities with greenbelts to confine growth and adopted an urban growth boundary in 1994.⁶⁶ The combination of the legality of Petaluma's plan and the courts' receptivity to truly temporary water-service moratoria⁶⁷ ultimately led to the erosion

⁶¹ The author of the ordinance tells the story of the rise and fall of the plan, in ROBERT A. FREILICH, *FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS* (1999).

⁶² *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

⁶³ ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH POLICIES, TECHNIQUES, AND IMPACTS* 55 (2004).

⁶⁴ See FREILICH, *supra* note 61.

⁶⁵ Livermore adopted a moratorium on growth by a referendum until adequate education, sewer and water services were available. The California Supreme Court upheld the ordinance against federal constitutional challenges in *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 610-11 (1976), although the court adopted a weak public-welfare limitation of municipal power.

⁶⁶ Greenbelt Alliance, *Greenbelt Alliance Origins: Drawing the Line on Sprawl*, NEWSWIRE, Vol. 2, Issue No. 10 (Oct. 2003), available at www.greenbelt.org/resources/newswire/2003october/history94to97.html.

⁶⁷ A growth moratorium is a long-established land use planning device to freeze development for a limited period of time to allow a city to formulate permanent land use plans for an area slated for development. The extra time is supposed to allow the city to secure water supplies, obtain financing, and construct the necessary infrastructure. Diane Albert, *Building Moratoria: Strategies and Tools for Governing Bodies*, WATER RESOURCES IMPACT, Vol. 7, No. 6, at 16 (Nov. 2005). Cities may impose moratoria on water service, *Swanson v. Marin Mun. Water Dist.*, 56 Cal. App. 3d 512, 520-21 (Ct. App. 1976); *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1457 (9th Cir. 1986), but this power is limited to denying service to customers until adequate facilities are available. See

of the public utility model, a crucial legal step for assured water supply laws.

The immediate origins of the modern link between land use and water planning can be found in Oregon's bold and widely studied centralization of land use planning and in the 1980 Arizona Ground Water Management Act. In 1973, Oregon adopted legislation that required that all local plans have common elements, mandated that local decisions be consistent with adopted plans, and created the Land Conservation and Development Commission to enforce the mandate.⁶⁸ The primary objective of the law was to force cities to adopt urban growth boundaries to preserve prime agricultural land as urban greenbelts. Water availability for urban growth in Oregon is not the problem that it is in California, yet most Oregon local governments have included water-availability assessments in their plans. However, the specificity and rate of enforcement varies widely,⁶⁹ and the courts and the Land Use Board of Appeal have been very deferential to local governments that have approved developments with uncertain supplies.⁷⁰ Nonetheless, Oregon's law helped establish the idea that communities have an affirmative obligation to provide adequate water to existing and new residents.

Arizona was the first state to require local governments to guarantee a secure long-term supply. It was forced to do so by the federal

San Mateo Coastal Landowners' Ass'n v. County of San Mateo, 38 Cal. App. 4th 523, 556-57 (Ct. App. 1995). If a moratorium is a *de facto* permanent freeze on development, the city may be held responsible for an unconstitutional taking of property. Lockary v. Kayfetz, 917 F.2d 1150, 1155-56 (9th Cir. 1992); see Dennis J. Herman, Note, Sometimes There's Nothing Left To Give: The Justification for Denying Water Service to New Consumers To Control Growth, 44 STAN. L. REV. 429, 443-46 (1992). Moratoria became constitutionally suspect in the 1980s when the U.S. Supreme Court began to apply Takings doctrines to constrain urban development. In 1987, the Supreme Court held in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987), that a landowner could recover damages for a temporary taking of property and suggested that courts must now distinguish between unconstitutional temporary takings and "normal delays" in obtaining development permissions. But in 2002, the Supreme Court returned to the view that reasonable time-limited moratoria are legitimate planning tools and thus constitutional. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), refused to apply a categorical rule to moratoria. Instead, the Court characterized the potential taking as regulatory rather than a physical taking, and applied a balancing test to uphold a 32-month moratorium as a proportional, reasonable, and good-faith response to threats to a community posed by development. Thus, the First English compensation rule only applies after a court has determined that the moratorium is not a Tahoe-Sierra. See Matthew G. St. Amand & Dwight H. Merriam, *Defensible Moratoria: The Law Before and After the Tahoe-Sierra Decision*, 43 NAT. RESOURCES J. 703 (2003).

⁶⁸ See Davies, *supra* note 58, at 1257-59.

⁶⁹ *Id.* at 1259.

⁷⁰ *E.g.*, Durig v. Washington County, 177 Or. App. 227, 243 (Or. Ct. App. 2001).

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government.⁷¹ The price for congressional funding of the Central Arizona Project, which brings water from the Colorado River to the center of the state, was that Arizona had to stop mining groundwater.⁷² To achieve this goal, the state forced cities to stop relying exclusively on groundwater. The 1980 Groundwater Management Act shifted direct responsibility to local governments to guarantee the availability of water for new developments.⁷³ It states that no development can be approved unless there will be “sufficient groundwater [or] surface water . . . continuously available to satisfy the water needs of the proposed use for at least one hundred years.”⁷⁴

B. SANTA ROSA AND THE FALL OF THE PUBLIC UTILITY MODEL

The duty to serve came under increasing criticism as cities aggressively began to control growth rates. The duty was out of step with the cases that allowed cities to control the rate and location of new development short of totally deflecting it to other communities in the region. Initially, these cases had no impact on the law. In the 1970s, two widely noted cases held that the duty to serve could not be subordinated to a land use plan because a city had to have “utility-based reasons” for refusing service.⁷⁵ California, however, followed its historic practice of adapting old rules to new conditions and breaking with long-established doctrines. The City of Santa Rosa and Sonoma County adopted a policy that prohibited leapfrog development to encourage compact growth. After the city refused to extend sewer service to a property outside the city limits but adjacent to its trunk line, the developer challenged the denial.⁷⁶

The court of appeal held that the duty to serve does not prohibit service denials consistent with an adopted anti-sprawl plan, because such

⁷¹ Desmond D. Connall Jr., *A History of the Arizona Groundwater Management Act*, 1982 ARIZ. ST. L.J. 313.

⁷² *Id.*

⁷³ ARIZ. REV. STAT. ANN. § 45-411 *et seq.* (Westlaw 2010).

⁷⁴ ARIZ. REV. STAT. ANN. § 45-576 (Westlaw 2010).

⁷⁵ *Robinson v. City of Boulder*, 190 Colo. 357 (1976); *Delmarva Enters., Inc. v. Mayor & Council of Dover*, 282 A.2d 601 (Del. 1971). Both cases involved service denials to property outside city limits. Boulder squarely raised the issue of whether a city could subordinate the duty to serve to consistency with an adopted joint city-county comprehensive plan, but the court sidestepped the issue by holding that the development complied with the county’s zoning ordinance, and the county, not the city, had the power to approve the development.

⁷⁶ *Dateline Builders, Inc. v. City of Santa Rosa*, 146 Cal. App. 3d 520 (Ct. App. 1983).

a plan is “a proper exercise of police power.”⁷⁷ The result was clearly grounded in the increasing reaction to suburban sprawl, as the opinion noted that “[u]nfortunately, the experience of many communities in this state has been that when planning is left to developers, the result is urban sprawl.”⁷⁸ Today, courts routinely hold that a city has the power to refuse service until an area is ready for development and to deny subdivision approvals for new subdivisions with water and sewer service that are inconsistent with a county’s land use plan.⁷⁹ However, in the unlikely event that California recognizes a human right to water,⁸⁰ courts might be forced to reevaluate Santa Rosa.

V. EBMUD AND DOUGHERTY VALLEY: THE LINKAGE OF LAND USE AND WATER SUPPLY PLANNING

Service concurrency is an important step in promoting more efficient urban settlement patterns but it still assumes that there will be

⁷⁷ *Id.* at 532. The result has precedent in an early Kentucky case that faded in importance as cities developed sufficient revenue to support rapid growth. *Moore v. City Council of Harrodsburg*, 32 Ky. L. Rptr. 384 (1907) (“In the absence of fraud, corruption, or arbitrary action, the judgment of the city officials as to [extension of water service] is beyond judicial control.”).

⁷⁸ *Dateline Builders*, 146 Cal. App. 3d at 265, 266 (citing *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582 (1976)). The *Dateline Builders* court signed off with the “smack down” that “[b]uilders’ argument that only zoning may be used for planning sits poorly in its mouth as they never sought to rezone the property or meet any of the County’s other conditions.” *Id.* at 266.

⁷⁹ In *Serpa v. County of Washoe*, 111 Nev. 1081, 1083-85 (1995), the court held that Washoe County (Reno) can prohibit five-acre or less subdivisions “until a new water source is available,” and the county’s action did not impair state water rights, because the power to define rational growth “includes the ability of a county government to determine water availability for itself.” In *Schofield v. Spokane County*, 96 Wash. App. 581, 588-89 (Ct. App. 1999), it was held the county had the power to deny rezoning for riparian land, because no central sewer system existed to serve the proposed ranchettes. A state order to a financially strapped city to improve its antiquated sewage system was sufficient reason to terminate previously extraterritorial service in *City of Attalla v. Dean Sausage Co.*, 889 So.2d 559, 569 (Ala. Civ. App. 2003).

⁸⁰ In recent years, environmentalists have advocated the recognition of a human right to water, which would require cross-subsidization between wealthy and poor urban users. This issue arose in Soweto, Johannesburg, South Africa, when the city guaranteed all units a small amount of water and then required prepaid meters for additional amounts. Wealthy areas were served by the conventional post-use billing. South Africa’s constitution provides a right to water, but the Constitutional Court refused to apply it to this case. In 2009, the California Legislature passed AB 1242, which declared as the “established policy of the state that every human being has a right to clean, affordable, and accessible water for human consumption, cooking, and sanitary purposes, that is adequate for human health and well-being of the individual and family.” A.B. 1242, 2009-10 Reg. Sess. (Cal. 2009). Governor Schwarzenegger supported the premise but vetoed the bill because it would lead “to potentially costly and constant litigation.” See Press Release, Community Water Center, Governor’s Water Priorities All Wrong; He Fails To Recognize Basic Water Needs While Pushing Billions for Pet Water Projects (Oct. 13, 2009), available at www.communitywatercenter.org/files/press_release_1242_FINAL.pdf.

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sufficient water to meet a community's development needs at the location that the community chooses. A fight between EBMUD and Contra Costa County over the approval of a new development of 11,000 new homes near Dublin took the legacy of Petaluma, Santa Rosa and Livermore to the next level by questioning the wisdom of growth, not just delayed service, in water short areas.⁸¹ In 1990, environmental candidates captured four of the seven seats on EBMUD's board, and as a result, the District urged Contra Costa County to reject the proposed development because it lay outside its service area. Seeing the potential for new property-tax revenues, the County approved it and listed the District as the source of water in the project's Environmental Impact Report (EIR).

EBMUD refused to play the development game and refused to extend service to the area, which was outside the service area of any utility, claiming that it lacked sufficient supplies for its service area. To block the project, the District filed suit to declare that the county's EIR was inadequate. A superior court judge ruled that approving a project "without knowing whether water is, or will be, available to serve the project fails to achieve the fundamental purpose of the California Environmental Quality Act to inform the public and responsible officials of the environmental consequences of their decisions before they are made."⁸²

The action shifted from the Contra Costa County court to the state legislature because many in the Upper San Joaquin Valley were concerned about the continuing urban sprawl from the ever expanding Bay Area into one of the world's great agricultural districts. Fringe cities such as Tracy were bumping up against the limits of their available water supplies,⁸³ and the loss of prime agricultural land had long been an issue in the state.⁸⁴ A Fresno Democrat introduced S.B. 901, which formally linked water supply and land use planning. California passed the legislation in 1995, prohibiting approval of tentative subdivision maps, parcel maps, or development agreements for a subdivision of more than

⁸¹ This section is drawn from Ryan Waterman, *Addressing California's Uncertain Water Future by Coordinating Long-Term Land Use Planning: Is a Water Element in the General Plan a Next Step?*, 31 *ECOLOGY L.Q.* 117, 125-29 (2004).

⁸² *Id.* at 127. The Building Industry Association of Northern California contributed enough money to defeat the green candidates in 1994, and the Board settled the suit and committed itself to obtain American River water, a controversial effort that continues to the present.

⁸³ Grimes, *supra* note 5, at 106.

⁸⁴ HUNDLEY, *supra* note 36, at 521-25.

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WATER SUPPLIERS AND PLANNERS

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500 units unless there is a “sufficient water supply.”⁸⁵ The legislation also required cities and counties to prepare detailed “water supply assessment reports”⁸⁶ for various types of large development. The 1995 law was weak because the threshold was too high, and it did not require cities to deny approvals for covered projects without an adequate water supply. Thus, it was largely ignored. However, as the courts began to use CEQA to probe water supply projections,⁸⁷ local governments and developers soon realized that the law had exposed the “dirty little secret” of California water law: that if you develop land, water will follow as night follows day.⁸⁸ In response, the weaknesses of S.B. 901 were corrected in 2001 with the state’s much tougher “show me” laws, which opened a new chapter in California water history.⁸⁹

⁸⁵ CAL. GOV’T CODE § 66473.7 (Westlaw 2010).

⁸⁶ CAL. WATER CODE §§ 10910, 10911 (Westlaw 2010).

⁸⁷ The first major case was *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal. App. 4th 182 (Ct. App. 1996). See also *Santa Clarita Org. for Planning the Env’t v. County of L.A.*, 106 Cal. App. 4th 715 (Ct. App. 2003). The necessity for a full articulation of all the assumptions and risks in a water supply assurance was confirmed by the California Supreme Court in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412 (2007).

⁸⁸ HUNDLEY, *supra* note 36, at 524.

⁸⁹ ELLEN HANAK, PUB. POL’Y INST., WATER FOR GROWTH: CALIFORNIA’S NEW FRONTIER (2005), available at www.ppic.org/content/pubs/report/R_705EHR.pdf.