

- Is there sufficient groundwater and have there been any basin adjudications or any other limitations of use of quantity needed (including groundwater management plans)?
- Appropriative Rights
 - Has the basin been or is it being adjudicated and are there any prescriptive rights?
 - Is the water appropriate for the intended use?
 - Determine water suitability for use in the proposed area.
 - Determine if water can be transferred from one location of the project to another.
- Water Quality Issues
 - Is the chemical makeup appropriate for the intended use?
- Other Types of Water
 - Reclaimed Water
 - Consider if secondary treated or tertiary treated wastewater is appropriate for the intended use.
 - Desalinated Water
 - Treatment and use of a brackish groundwater or seawater.

C. 2006 Update

***Barnes v. Hussa* (2006) 136 Cal.App.4th 1358 (See Water Rights & Supply Exhibit 1)**

- This case concerned three properties considered "first priority" water rights users under a 1934 decree. A pipeline was installed across Hussa's property to bring water from the stream to the Streets property, which was not adjacent to the stream and diversion point. This pipeline, however, only carried 2.2 cubic feet per second (cfs), while the decree allotted 3.33 cfs to the property. Subsequently, Barnes (the owners of the Streets property) constructed a new pipeline to carry a portion of the first priority water to another parcel they owned nearby. Hussa complained, and claimed that they had a right to the unused first priority water

and subsequently filed a complaint against Barnes to enjoin him from using the diverted water. The trial court held for Barnes and the appellate court upheld the trial court's decision on three grounds: Hussa was not injured, the pipeline in question could only be used to divert water to the second property, and the predecessor's in interest to the Streets property had forfeited the right to use any more than the water than would fit through the pipeline.

- On the first issue, the court held that Hussa was not injured, because Hussa's water rights were not harmed by the change in diversion and the pipeline. Under California water law, first priority users have the right to change how the water is diverted to their property, as long as the diversion does not change the flow to the other properties. In this case, there is no evidence supporting Hussa's contention that the new diversion changed the flow of water to Hussa's property in any way.
- On the second issue, the court held that the new use of the pipeline to divert water to a different property did not violate the terms of the irrevocable license. The court equated the license to an easement and found that as long as the new use did not further burden Hussa's property, the new use was not a violation of the license.
- On the third issue, the court held that there was insufficient evidence to support Hussa's contention that the water had been forfeited. Although water rights can be forfeited if the water is not used for a period of five years, Hussa presented no evidence that showed a five year period in which excess water outside the pipe was not used.

El Dorado Irrigation Dist. v. SWRCB (2006) 142 Cal.App.4th 937 (See Water Rights & Supply Exhibit 2)

- The court invalidated a provision of a permit issued by SWRCB to the El Dorado Irrigation District ("EDID"), which limited EDID's first priority water rights in order to protect the water quality of the Sacramento-San Joaquin Delta downstream. Specifically, the provision required EDID to stop the diversion of water when water is released from the Central Valley Project and/or the State Water Project to meet water quality standards. According to SWRCB, this would protect the Project's stored water, and that water could then be sent to other regions of the state. EDID's water rights are senior to those of many projects downstream that were not prohibited from diverting water the projects released stored water. The court engaged in a balancing test to decide whether SWRCB's interest in protecting the stored water and the water quality of the Delta outweighed EDID's seniority rights to the water. The court found that since other projects downstream were not restricted, the provision would fail to achieve its objectives, and considering the outcome, the provision overly burdened EDID's

seniority rights. Therefore, the court upheld the trial court's ruling and invalidated the permit provision.

***North Gualala Water Co. v. SWRCB* (2006) 139 Cal.App.4th 1577 (See Water Rights & Supply Exhibit 3)**

- The court upheld SWRCB's determination that it has jurisdiction over North Gualala Water Company's ("Water Company") groundwater. In the process, the court endorsed SWRCB's four-part test to determine whether groundwater is a "subterranean stream flowing through known and definite channels," which would give SWRCB jurisdiction. The four-part test states that the groundwater must meet the following four elements in order to fall under SWRCB's jurisdiction:
 - (1) a subsurface channel is present
 - (2) the channel has a relatively impermeable bed and banks
 - (3) the course of the channel is known or capable of being determined by reasonable inference
 - (4) groundwater is flowing in the channel
- After examining each of the elements in detail, the court determined that all four elements were satisfied in this case, and therefore, the Water Company would have to apply for the required permits as directed by SWRCB.

***Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261 (See Water Rights & Supply Exhibit 4)**

- The court held that limiting the extraction of water to 12,000 acre-feet per year on a 2,400 acre parcel was not a taking. Allegretti obtained a conditional use permit from Imperial County allowing him to re-drill an inactive well. The permit was subject to the condition that Allegretti would not extract more than 12,000 acre-feet per year on the 2,400 acre property. Allegretti claimed this constituted a taking under the California Constitution. The district court disagreed. The court found that the County's actions failed to show an actual physical occupation or invasion of the land, namely the County did not appropriate or divert the groundwater. Additionally, the court found that the County's actions did not meet the three-prong analysis set forth in *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104. The condition did not unreasonably impair the value or use of the property or invade or appropriate any of Allegretti's property, and there was no interference with reasonable investment-backed expectations because the California Constitution already limits a landowner's use of water to the amount needed for the landowner's beneficial use. Thus, the court held that no taking had occurred.

O.W.L. Foundation v. City of Rohnert Park, Sonoma County Sup. Ct. Case No. 236309 (See Water Rights & Supply Exhibits 5 & 6)

- The court held that the City of Rohnert Park's water supply assessment ("WSA") was insufficient because it did not evaluate the entire water basin in which it was located. The WSA, which analyzed a residential and commercial project, focused on particular areas within the Santa Rosa basin, and from the WSA, the city found that there was an adequate water supply for the project. The O.W.L. Foundation sued the city on the grounds that the WSA violated Senate Bill 610 ("SB 610"). SB 610 amended the Water Code to require a showing that there is an adequate 20-year water supply for any project of more than 500 homes. The court agreed with the O.W.L. Foundation and held that the WSA must analyze all users of groundwater from the Santa Rosa basin in order to properly determine whether there will be a sufficient 20-year water supply.
- This decision has been appealed to the First Appellate District, and if it is upheld, there will be enormous repercussions for developers and for local government.

Turlock Irrigation District v. Zanker (2006) 140 Cal.App.4th 1047 (See Water Rights & Supply Exhibit 7)

- The court held that the "existing facilities" CEQA exemption applied when the water conservation measures were adopted for the Town of La Grange ("Town") by two water districts, including the Turlock Irrigation District. In the 1920s, the two irrigation districts in the water service area proposed to build a dam on the Tuolumne River. This dam would potentially interfere with the water rights of the Town. The irrigation districts were able to acquire the water rights to the La Grange ditch, which was an artificial channel that brought water to the town. However, the water rights granted to the irrigation districts were conditioned on the continued supply of water to satisfy the town's water rights needs. Since the water rights were acquired, the irrigation districts have faithfully supplied the necessary water to the Town. Recently, the irrigation districts adopted water conservation rules for the Town. The irrigation districts brought suit to receive a declaratory judgment that the water conservation rules were lawfully adopted and implemented. The trial court found in favor of the irrigation districts, and the Town appealed.
- The court first addressed the issue of whether the irrigation districts had the power to adopt water conservation rules that imposed restrictions on the town. The court held that the irrigation districts had acted properly. The second issue addressed was whether the failure of the irrigation districts to apply CEQA was lawful. The court found that the existing facilities exemption applied because the water facilities are not changing, only the amount of water given to consumers. The court was not persuaded by the Town's argument that the regulation affected

consumers and not the pre-existing facilities, and therefore, the exemption did not apply. The court also found that no unusual circumstances existed in this case to preclude the exemption. Thus, the court held that the water conservation rules were valid, and the irrigation districts could regulate the amount of water received by the Town as long as it continued to meet the Town's needs.

AB 371 (Chapter 541, Statutes of 2006) Water recycling (See Water Rights & Supply Exhibit 8)

- This bill requires recycled water producers to notify the Departments of Transportation and General Services, if the producer proposes to provide recycled water for use for state landscape irrigation within ten years. This proposal must meet certain conditions and would require all pipe installed by those state agencies for landscape irrigation within the area identified by the proposal to meet prescribed requirements.

AB 1881 (Chapter 559, Statutes of 2006) Water Conservation (See Water Rights & Supply Exhibit 9)

- This bill amends the Davis-Sterling Common Interest Development Act by mandating that the architectural guidelines a common interest development shall not prohibit or have the effect of prohibiting the use of drought tolerant plants.
- The Water Conservation in Landscaping Act ("Act") requires the drafting of a model water efficient landscape ordinance that may be adopted by local agencies at their discretion or would be applicable to all local agencies that failed to adopt their own ordinance. This bill amends the Act by imposing new standards that any given ordinance must meet. Additionally, these provisions do not apply to chartered cities.
- This bill requires the Energy Commission, in consultation with the DWR, to adopt regulations identifying performance standards and labelling requirements for landscape irrigation equipment, including irrigation controllers, moisture sensors, emission devices, and valves to reduce the wasteful, uneconomic, inefficient, or unnecessary consumption of energy or water.
- Under this bill, water purveyors are required to install separate water meters to measure the volume of water used exclusively for landscape purposes in order to establish new water service on or after January 1, 2008.

SB 1347 (Chapter 309, Statutes of 2006) Water, solar evaporators (See Water Rights & Supply Exhibit 10)

- This bill changes the restrictions and requirements regarding solar evaporators. Specifically, it eliminates the restriction on regional water quality control boards that prohibits these boards from issuing a written notice of authority to operate a solar evaporator after January 1, 2008. Additionally, it changes the requirements placed upon the SWRCB when adopting regulations concerning solar evaporators.

SWRCB's Order Adopting Cease and Desist Order and Granting Petitions for Reconsideration – ORDER WR 2006-0006 (See Water Rights & Supply Exhibit 11)

- SWRCB determined that the Department of Water Resources and the United States Bureau of Reclamation were violating the permit conditions set forth for their State Water Project and Central Valley Project, respectively. Specifically, they failed to achieve the proper salinity levels for the Sacramento-San Joaquin Delta required by the permit. In order to ensure compliance, SWRCB laid out specific requirements and guidelines in its order.

Notice of Preparation of a Substitute Environmental Document (SED) and Notice of Public Scoping Meeting for the North Coast Instream Flow Policy – July 19, 2006 (See Water Rights & Supply Exhibit 12)

- The North Coast Instream Flow Policy will effectuate section 1259.4 of the Water Code, which requires the State Water Resources Control Board to adopt principles and guidelines for maintaining instream flows in coastal streams from the Mattole River to San Francisco and in coastal streams entering northern San Pablo Bay. SWRCB is currently proposing guidelines similar to the Draft Guidelines of the National Marine Fisheries Services and the California Department of Fish and Game for the maintenance of instream flows in mid-California Coastal Streams. The Draft Guidelines will most likely provide the following:
 - Limiting new water right permits to diversions during the winter period (December 15-March 31) when stream flows are generally high;
 - Maintaining minimum bypass flows and cumulative maximum rates of diversion to ensure that streams are adequately protected from new winter diversions;
 - Conserving the natural hydrograph and avoiding significant cumulative impacts by limiting maximum cumulative volume of water that can be diverted in a watershed;
 - Constructing storage ponds off-stream rather than on-stream; and
 - Providing fish screens and fish passage facilities where appropriate.