

CALIFORNIA RUSHES IN



KEEPING WATER INSTREAM FOR FISHERIES WITHOUT FEDERAL LAW

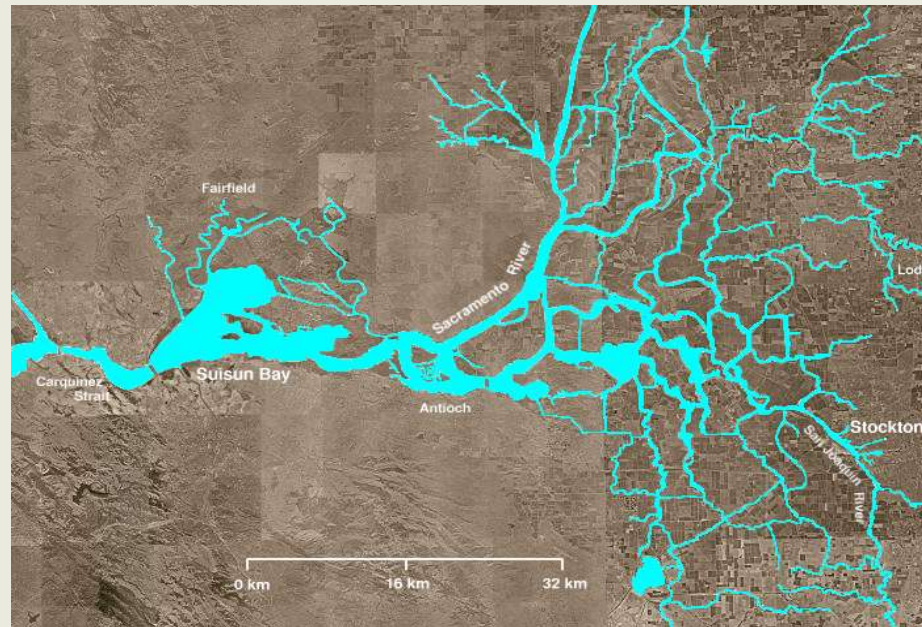
PAUL STANTON KIBEL

**PROFESSOR, GOLDEN GATE UNIVERSITY SCHOOL OF LAW
OF COUNSEL, WATER AND POWER LAW GROUP**

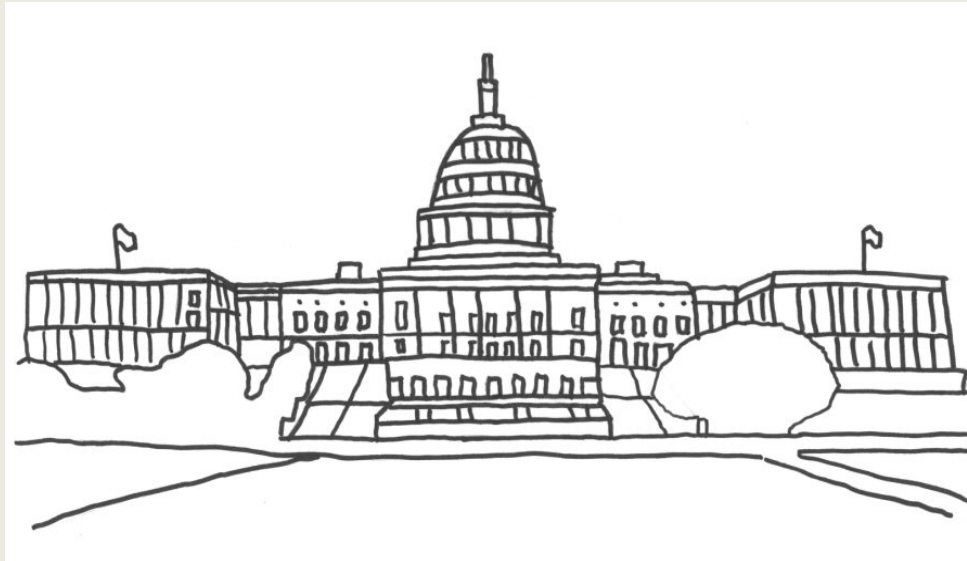
WAYS INSTREAM FLOW AFFECTS CALIFORNIA FISHERIES



- Reduced instream flow resulting in seawater intrusion/high salinity
- Reduced instream flow resulting in increased water temperatures
- Reduced instream flow resulting in slack water conditions



FEDERAL LAW AFFECTING INSTREAM FLOW



- Clean Water Act
- Endangered Species Act
- *Winters* tribal instream water rights
- National Environmental Policy Act
- Federal Power Act

Clean Water Act §303 – EPA Review of State Water Quality Standards



- under §303 states have authority to propose “beneficial uses” for waterways and propose “water quality standards” subject to EPA review and approval
- designated “beneficial uses” for Sacramento River, San Joaquin River and Bay Delta include fish spawning, rearing and migration
- in 2014 letter to U.S. Bureau of Reclamation, EPA pressed for CVP compliance with §303 salinity water quality standards for fisheries
- in 2016 NRDC filed lawsuit alleging violation of §303 due to water temperature and salinity impacts of reduced releases from Shasta Dam on Sacramento River
- in 2016 California’s State Water Board proposed base flows for tributaries to San Joaquin River to maintain cold water for salmon as part of update to Bay Delta Water Quality Plan

Endangered Species Act §7 – Biological Opinions for Salmon and Smelt



- U.S. Bureau of Reclamation operates Central Valley Project (CVP) and the CA Department of Water Resources operates State Water Project (SWP)
- 2008 U.S. Fish & Wildlife Service delta smelt Biological Opinion for joint operations plan for CVP and SWP
- 2009 National Marine Fisheries Service salmon Biological Opinion for joint operations plan for CVP and SWP
- 2008/2009 Biological Opinions contained “jeopardy determinations” and included flow conditions to maintain salinity (for delta smelt) and water temperature (for salmon)
- in 2014 Ninth Circuit Court of Appeals upheld flow/salinity conditions in 2008 delta smelt Biological Opinion (*San Luis v. Jewell*, 747 F.3d 581)



Winters Tribal Instream Rights – Flows to Maintain Salmon

- Trinity River is tributary to the Klamath River, and Lewiston and Trinity Dams on Trinity River are part of federal Central Valley Project (CVP)
- in past years slack water conditions on lower Klamath River led to outbreak of Ich parasite that decimated salmon runs
- in 1908 *Winters* case U.S. Supreme Court held tribes have federal water rights to fulfill purposes of reservation
- in 1995 Ninth Circuit Court of Appeals recognized Hoopa tribe's *Winters* rights to instream water for salmon on lower Klamath River (*Parravano*, 70 F.3d 539)
- to address Hoopa tribe's *Winters* rights, in 2015 the U.S. Bureau of Reclamation released draft of *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (and proposed enhanced releases from Lewiston and Trinity Dams)



NEPA – Evaluation of Increased Flow Alternatives in EISs



- National Environmental Policy Act (NEPA) requires environmental impact statements (EISs) prepared by federal agencies to evaluate alternatives to avoid significant adverse impacts
- California Water Fix is proposed project to move main point of diversion for federal CVP (and SWP) to north delta and to construct two underground tunnels to transport water from new diversion point to farms/cities south of delta
- once new north delta point of diversion and new tunnels are operational, California Water Fix proposes to increase CVP/SWP diversions thereby reducing instream flow
- fishery and environmental groups have challenged the U.S. Bureau of Reclamation's draft NEPA EIS for the California Water Fix for failure to evaluate an alternative to increase flow/reduce diversions to avoid adverse impacts on salmon and delta smelt



Federal Power Act §10 – Protecting Fisheries When Dams Are Relicensed



- under the Federal Power Act non-federal dams on navigable rivers are relicensed by the Federal Energy Regulatory Commission (FERC)
- FERC relicensing proceeding now underway for Don Pedro Dam on the Tuolumne River (tributary to the San Joaquin River)
- Federal Power Act §10 requires that FERC license must adequately protect and mitigate damages to fish spawning grounds and habitat affected by operation of the dam
- under Federal Power Act §10, FERC must include as license conditions fish protection measures (e.g. downstream releases) recommended by U.S. Fish & Wildlife Service or National Marine Fisheries Service



FEDERAL WATER LAW RUSHES OUT?



**WILL THE NEW CONGRESS AND NEW PRESIDENT
REDUCE THE ROLE FEDERAL AGENCIES AND
FEDERAL LAWS PLAY IN KEEPING WATER
INSTREAM FOR CALIFORNIA FISHERIES?**

CALIFORNIA LAW/AUTHORITY AFFECTING INSTREAM FLOW



- California's Porter Cologne Water Quality Act
- California Public Trust Law
- California Reasonable Use Law
- §5937 of California Fish & Game Code
- Water Quality Certification Authority of California's Water Board

California's Porter Cologne Water Quality Act – Advancing if Clean Water Act §303 Recedes



- what if the U.S. Environmental Protection Agency stops pressing California to update and enforce its water quality standards for fisheries pursuant to Clean Water Act §303, or what if federal legislation is passed exempting/limiting application of Clean Water Act §303 to the Bay Delta watershed or CVP operations?
- California's 1969 Porter Cologne Water Quality Act predates the federal Clean Water Act and provides California's Water Board with independent authority to establish and enforce water quality standards to protect designated beneficial uses such as fish spawning, rearing and migration (such as base flows for San Joaquin River tributaries)



California Public Trust Law – Advancing if Endangered Species §7 Recedes



- what if new ESA §7 salmon and delta smelt Biological Opinions are issued by new President's administration that reach "no jeopardy" determinations, or what if federal legislation is enacted by new Congress that exempts/limits application of ESA §7 to CVP and SWP operations?
- in 1983 *National Audubon* case, California Supreme Court held that the public trust requires the State of California to fully protect instream public trust resources (such as fisheries) whenever feasible
- 2014 California case affirmed that public trust law applies to diversions that harm salmon in navigable waters (*Environmental Law Foundation, Case No. 34-2010-80000538, Sacramento County Superior Court*)



California Reasonable Use Law – Advancing if *Winters* Tribal Instream Water Rights Recede

- what if the new President orders the U.S. Bureau of Reclamation to discontinue work with Hoopa tribe on the salmon plan for the lower Klamath River, or otherwise decides not to increase releases from Trinity and Lewiston Dams to give effect to the Hoopa's *Winters* rights?
- California Constitution Article XI and California Water Code §100 prohibit unreasonable diversion of water
- in 2014 California Court of Appeal affirmed that the California State Water Board may rely on its reasonable use authority to implement regulatory program to ensure diversions in Russian River watershed do not reduce instream flow so as to imperil salmon (*Light*, 226 Cal.App.4th 1463)



§5937 of the California Fish and Game Code – Advancing if NEPA Recedes



- what if new President does not require U.S. Bureau of Reclamation to revise draft NEPA EIS for California Water Fix to consider increased flow alternative, or what if federal legislation is enacted by new Congress exempting California Water Fix from NEPA?
- §5937 of the California Fish & Game Code requires operators of dams in California to release sufficient water downstream to maintain fisheries in “good condition”
- in 2004 federal district court held §5937 applies to dams in California operated by U.S. Bureau of Reclamation such as Friant Dam on San Joaquin River and Shasta Dam on Sacramento River (*NRDC v. Patterson*, 333 F.Supp.2d 906)



California Water Quality Certification Authority – Advancing if Federal Power Act §10 Recedes

- what if under new President the U.S. Fish & Wildlife Service and National Marine Fisheries Service do not propose dam licensing terms to Federal Energy Regulatory Commission (FERC) to ensure downstream releases for fisheries?
- Clean Water Act §401 provides states are responsible for certifying that projects approved by federal agencies do not violate state water quality standards
- water quality certification by California State Water Board required for FERC's relicensing of Don Pedro Dam on the Tuolumne River (tributary to the San Joaquin River)
- state water quality certification may include FERC relicensing terms to maintain instream flow for fisheries (*Washington Dep't of Ecology, 511 U.S. 700*)



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