



Susan A. Sutton



February 2009

## *Water Battle Will Move to the Courts*

*By Susan A. Sutton*

Over two thirds of California's population is reliant on water from the Delta. The water provides not only drinking water but water to support our abundant agricultural economy that supplies food and fiber to our state and the world, not to mention our service and manufacturing industries. For over 158 years Californians have worked hard to establish sound stable water laws and to undermine the water rights priority laws will do little to advance the goals of the Delta Vision. The attempt to reallocate water rights would only lead to long standing legal conflicts, social upheaval, and undermine the very goal and vision of the Delta. The Battle will be in the courts if the current movement afoot to reallocate water rights gains momentum.

On July 9, 2008 Virginia Cahill, Deputy Attorney General, responding for Edmund G. Brown Jr., California State Attorney General, responded to John Kirlin, Executive Director for the Delta Vision question, "What legal tools are available to the State of California to reduce and/or relocate water among users in instances of (a) overall allocation, (b) needs for ecosystem protections and (c) emergencies...?"

The overall conclusion of the attorney general's office presented in the 21 page document was that "The state, acting through the Legislature, the State Water Resources Control Board (SWRCB) and other agencies, and the courts, has considerable ability to reallocate water when nec-

essary to prevent unreasonable use, achieve water quality, protect the public trust, avoid nuisance and respond to emergency situations."

The opinion in the Attorney Generals letter suggested that the responsibility of protecting environmental and other public resources should be spread to all who divert water including upstream, in Delta, and Delta exporters. The argument presented attempts to ascertain that the basis for the argument is founded in definitions of beneficial use and the public trust doctrine.

Two highly respected Sacramento water attorneys, Sandra Dunn of Somach, Simmons, and Dunn (SSD), and Paul Bartkiewicz of Bartkiewicz, Kronick and Shanahan (BKS), have submitted comments that present numerous arguments in opposition to the Attorney Generals position.

Some of these arguments are as follows:

- "...The constitutional requirement of beneficial use does not serve as a legal basis for reprioritizing one type of existing water use over another." SSD
- The court must consider the cost and benefits of water diversions on a case-by-case individual basis not on an area wide basis. In addition, the state must consider other factors, such as water needs, costs in terms of financial resources related to the case, and other environmental impacts. SSD

Water rights are property rights. Water right priorities are "fundamental to California's system of water law." "The State is compelled to ascertain whether there exists a solution that will avoid harm to the public trust resources while at the same time not adversely affect prior appropriators' vested property rights in water." SSD

The Attorney General referred to a draft SWRCB Decision 1630 as evidence to justify that each Delta diverter should contribute proportionally to restoration. The SWRCB draft was never adopted. This ploy was used because there was no case law to justify such an action. SSD

A water use is determined to be reasonable based on a "fact specific determination". "In order for an existing beneficial water user to lose its water rights,...a finding must be made that the use is unreasonable, not simply that there is more valued use for that water, in someone else's opinion." Water can not be reallocated due to a change in how the water is used or for a "high" valued use. SSD

"The doctrine of reasonable and benefi-

*SAS Strategies & Perspectives*

S.A. Sutton

P.O. Box 663

Maxwell, CA 95955

E-mail: [sjsutton@frontiernet.net](mailto:sjsutton@frontiernet.net)

cial use is not a legal basis for reprioritizing between various reasonable uses of water. A use must first be determined as being unreasonable before that use is reallocated to another.” SSD

- “California law supports only regulatory water reallocations that are based on determinations of causation and proportionality.” “No California court decision under the public trust or the California Constitution’s Article X, section 2 -- the

“reasonable use” provision -- has reallocated water from a water user: (1) to address environmental impacts caused by others; or (2) in an amount that exceeds the water user’s own proportional limits.” BKS

- “Before reallocating any water from existing diversions and uses under upstream water rights to restore the Delta’s ecosystem, the SWRCB must hold an evidentiary hearing and make detailed findings on the

relative impacts of upstream, in-Delta and Delta-export diversions on the Delta’s fishery and other elements of the Delta’s ecosystem.” BKS

The solution is simple. Support the current water laws and priority system and let the free market prevail.

**Special thanks to Sandra Dunn of Somach Simmons and Dunn, and Paul Bartkiewicz of Bartkiewicz Kronick and Shanahan.**

## *A Pocket Guide to Solving the California Water Crisis*

The following is a short list of key elements that should be incorporated into any state wide water plan. When talking water be sure to support these main concepts.

- Maintain current priority water rights laws and area of origin
- Build new storage contiguous with restoration
- Support the idea that each area in California must be water self-reliant
- Support conservation and restoration simultaneous with new water development
- Eliminate the striped bass program, a non-native predatory species.
- Screen all diversions.
- Support water transfers in the free market system

**Support Delta environmental solutions that are based on scientific fact, reasonableness, and are cost effective**

Reassess and reallocate environmental funding from non-essential out-of Delta projects to in-Delta projects

**Link conveyance with new storage, no conveyance without storage**

- Identify and halt illegal water diversions
- Maintain current levee and bypass systems
- Support captive brood stock programs by both public and private sectors

Support ground water and conjunctive use

**Don’t deprive one area at the expense of another**

Susan A Sutton

## *Eco Sense - Pervious Concrete, Environmentally Friendly Hardscapes*

*By Chris Pisano*

### Eco-Sense

In “Eco-Sense” we attempt to feature environmentally sensitive products or ideas that not only promote a healthy environment but work well with modern day life.

Pervious concrete is just such a product. Pervious concrete is a mixture of coarse aggregate, Portland cement, water and little to no sand. Typical pervious concrete is made up of tiny voids that trap water, and hold it until it slowly percolates into the substrate aggregate and soil.

This special concrete is made from carefully measured amounts of water and cementitious materials to create a paste that forms a thick coating around aggregate particles without washing off during mixing and placing. The result is a product that can pre-

vent storm water runoff and help in ground-water replenishment. Proponents of this new type of eco-friendly concrete contend that installation of this product can have important impacts on groundwater quality and the health of the environment. Because the product is so porous, it can pick up everything from oil and grease spills to deicing salts and chemical fertilizer. To date it has application in parking lots, driveways, sidewalks, and some limited use on streets. In some cases parking lots can double as water retention structures, reducing or eliminating the need for traditional storm water management systems such as retention ponds and sewer tie-ins. This has special significance in light of EPA storm water runoff regulations. It may have important application of its use in

controlling pollution.

Pervious concrete may be a practical alternative for subdivision streets, sidewalks, and golf cart paths. It may have unique applications to include driveways, walkways, pool decks, and patios. Long term it may be the ideal product for controlling water runoff, to protecting sensitive fish habitats and irrigating land. This product is exactly the type of product we need. It is environmentally friendly and community/business savvy. We all benefit when environment is coupled with engineering and business opportunity.

For more information go to <http://www.concreteresources.net> or give Chris Pisano a call at 916.716.3209 Chris is a partner in Precision Concrete Materials, LLC .