

An aerial view of the Sacramento-San Joaquin River Delta, showing a complex network of waterways and agricultural fields. The image is overlaid with a teal graphic consisting of a vertical bar on the left and a large, stylized 'C' shape that curves around the text. The text 'Duel Over the Delta' is written in a large, white, sans-serif font, with 'the' in a smaller size between 'Over' and 'Delta'.

# Duel Over the Delta

BY GLEN MARTIN

An aerial view of the Sacramento—San Joaquin River Delta, shot with infrared photography

PHOTO BY HERB LINGL



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ANTE J. NOME LLINI GREW UP IN THE SACRAMENTO–SAN JOAQUIN RIVER DELTA, THAT VAST COMPLEX OF SLOUGHS, CANALS, TULE MARSHES, and croplands west of Stockton that harkens to the Golden State’s simpler, less populated, past. Though it has suffered profound ecological damage from development and water diversions, the delta still supports critical fisheries and abundant wildlife, as it did in Nomellini’s youth. Whenever he got time off from working at the family’s construction business

and farm, he fished the sloughs for striped bass and hunted ducks and geese that the big winter storms brought down from Canada. The delta was, simply, his place; it defined him.

Nomellini still pots a duck or two when presented with the opportunity. But as manager and co-counsel of the Central Delta Water Agency in Stockton, he spends most of his time these days representing the delta’s interests in courts and at the state capitol. “I’m basically a ditchdigger, but I ended up doing legal work,” he says.

It’s been a while, however, since Nomellini picked up a pick or shovel. Impeccably dressed, with long silver hair swept back from a broad forehead, he projects an aura of genteel prosperity. As Nomellini tracks legislation and decisions by the State Water Resources Control Board, his goals are simple: “In the delta,” he says, “agriculture is all about water quality and levees. You have to have uncontaminated fresh water, and you need sound levees. So everything I do works toward that end.”

Driving along the tops of the levees, Nomellini points out marinas, cafés, bars, duck clubs, standing crops, fallow fields, and fishing spots. “Those are small family farms, averaging two to four hundred acres,” he says. “They represent people who make a living from the land, people who are

devoted to their farms, to their communities, to a very real way of life.” He reveals an encyclopedic knowledge of the land and water, noting there are about 750,000 acres of cropland in the delta—all of it reclaimed from the vast marshlands that once comprised the confluence of the Sacramento and San Joaquin rivers. Tomatoes, corn, potatoes, and walnuts are among the crops that grow in the rich soil.

About 100 miles to the south is another farming region, just west of Fresno, known in state agricultural circles simply as “the west side.” It is as arid and dry as the delta is lush; the only

## Will a November ballot measure end California’s water wars—or just shift the battle to a new front?

*Glen Martin is a Santa Rosa–based environmental writer.*

duck that comes through here is on its way to someplace else. Yet like the delta, the west side of the San Joaquin Valley is a great agricultural engine, generating hundreds of millions of dollars in produce and cotton annually.

The two farming regions share something else—their water. Both depend on Sacramento River flows that collect in the delta. Delta farmers and Bay Area water districts pump supplies directly from the myriad waterways that wend through the region. And west-side farmers and the cities of Southern California take water by the acre-foot (about 326,000 gallons) from canals fed by huge state and federal pumps located near Tracy.

If Nomellini represents the delta's interests, Thomas W. Birmingham is the face of the west side. Spare in physique

he says, citing efforts in 2003 and 2004 to integrate the operations of the state and federal water projects to benefit San Joaquin Valley farmers. "Our failure on that was a huge disappointment."

Birmingham and Nomellini have been at odds over the state's water allocation for two decades, and each claims a cadre of politicians and economists who support their views. In a very real sense, their rivalry personifies the state's water wars, which have been carried out for the most part in federal courtrooms.

But in November 2009 the state Legislature enacted, and the governor signed, a package of four bills and an \$11.14 billion bond measure that shifted the field of battle. If voters approve the bond next November, the bills promise

to restore and maintain the delta while simultaneously sending needed water south. Follow-up federal legislation would smooth the way for water transfers within California, maintaining both the delta's farm economy and its environmental health.

"It's not perfect, but it is a very good step forward," Birmingham says of the legislative deal. "It is a clear articulation of a policy that balances the needs of delta restoration with a reliable water supply."

Supporters of the package hail it as the best hope for breaking a 30-year impasse over equitable distribution of the state's water supply. But skeptics say any sense of a mutual win for competing interests is illusory. "Many water allocations are political in nature and based on overly optimistic forecasts," says Thomas McShane, whose research team at Arizona State University's Global Institute of Sustainability monitors overseas development projects. "It's easier for politicians to tell water users what they want to hear than to limit water use."

Exploiting any natural resource, McShane contends, entails environmental impacts that often have deeply negative consequences. The question becomes whether the benefits are worth the ecological costs. For the people of California, that analysis ultimately could mean sacrificing the delta's ecosystem for the benefit of west-side growers and urban dwellers far to the south.

"If [the west-side growers'] water goes *around* the delta rather than through it, forget about water quality in the estuary. They won't give a damn."

—DANTE J. NOMELLINI



and imperious in manner, Birmingham is general manager and general counsel of the Westlands Water District. Formerly a shareholder at Sacramento's Kronick, Moskovitz, Tiedemann & Girard, Birmingham quit in 2000 to join his longtime client. He is known as a fierce advocate for the district's 600 farms, which sprawl across 600,000 acres of Fresno and Kings counties. Even his foes acknowledge that he combines a mastery of water law with a street fighter's instincts.

Birmingham grew up in the small Siskiyou County town of Yreka, near the banks of the Klamath River. He characterizes his early years as idyllic: "Basically, I spent them hunting and fishing," he says. Because he still enjoys fly-fishing and upland bird and big game hunting, he is irritated when opponents characterize him as an agribusiness true believer who knows little and cares less about the natural world.

Like Nomellini's, most of Birmingham's work is policy oriented, not administrative: "I'm in Sacramento and Washington a lot of the time," he says with a trace of fatigue. "That's where the policies are made." He's also proud of helping resolve a dispute early on over water distribution within the Westlands district.

On matters beyond his immediate control, however, Birmingham confesses to deep frustration. "Over the years, we've pursued a number of strategies that would've helped [irrigators] that ultimately weren't implemented,"

**T**HE DETAILS OF THE GOLDEN STATE'S HUNDRED-year water war are so convoluted, they tend to freeze the frontal lobe of anyone who reviews them. The driving elements of the conflict, however, are easy to comprehend:

■ California is semi-arid, and its developed water resources are essentially fixed. Historically, two-thirds of the 30 million acre-feet that flows annually from

the watersheds of the Central Valley—the main source of water for most California residents—originates in the northern third of the state.

■ Most of the state's demand for water occurs in the southern two-thirds of the state. Cities in Southern California as well as vast agricultural tracts in the western San Joaquin Valley require water from the delta, delivered via the canals of the State Water Project (SWP) and the federal Central Valley Project (CVP). Currently 6 million to 8 million acre-feet of water is exported from the delta annually by these two projects.

■ The delta's ecology depends on having a sufficient flow of fresh water. Proper allocation also is critical to the delta's agricultural productivity, the fishing industry, and to urban water systems at its periphery. With current diversions, roughly 20 million acre-feet of water flows into the delta each year, of which only about 13 million acre-feet flows out to the San Francisco Bay. Environmentalists say an additional 1.5 million acre-feet of outflow is needed to sustain the fisheries.

In conjunction with San Francisco Bay, the delta constitutes the largest estuary on the West Coast of the continental United States. Though ecologically degraded, the delta still supports more than 750 native plant and animal species; millions of wintering waterfowl; and salmon, striped bass, and sturgeon fisheries. It is also a recreational mecca, drawing boating enthusiasts, anglers, hunters, and sightseers from across the state.

The delta, in short, isn't anything like the west side, says Nomellini. The only significant vegetation in the Westlands district, he points out, is vast plantings of vegetables, melons, pistachios, and almonds—all irrigated with delta water. Where the water doesn't flow, the land supports only tumbleweeds and kangaroo rats.

Towns on the west side tend to be small, widely separated, and impoverished. The 20th Congressional District, encompassing most of the area, is the poorest in the nation. "The west side is all about a small cabal of influential people who bought land in the desert back in the 1950s and 1960s, then demanded water deliveries from the feds," says Nomellini. "And they got it—at the expense of delta farmers, the fisheries, and the cities."

Not surprisingly, that kind of talk grates on people who actually farm on the west side. They freely admit they are not senior water-rights holders, and are in line behind the farms and cities that secured water rights before 1914—the year California established a permit system for appropriating water. According to Nomellini, the west side is vulnerable, having received no water from the federal project until the 1940s.

But the application and enforcement of state water rights have proved as fluid as the resource itself. The lack



In California, water is pumped south with the help of state and federal canal systems.

of consistency—or even coherence—in adjudicating water rights is the basis for the conflict over what constitutes an equitable distribution policy. Though west-side farmers say they aren't averse to making sacrifices, they feel they've already done enough.

"Since 1992, we've had our basic allotments of federal water cut to an annual average of 60 percent," says Joe Del Bosque, who grows cantaloupes, asparagus, cherries, and almonds on about 2,600 acres on the west side. He owns 950 acres and leases the rest.

Last year the cuts were worse than ever, Del Bosque says. He got only 521 acre-feet, or 10 percent of his allotted water. He was able to buy more water from other Central Valley water districts, but that's expensive: Water from the CVP costs Del Bosque \$110 an acre-foot. He had to pay \$350 to \$475 an acre-foot for the extra water.

Del Bosque says west-side farmers want a healthy delta, and he insists they've been working in good faith toward that end. Still, he says, he and his peers must survive, and that takes water. "I just invested several hundred thousand dollars in a drip system for 300 acres of canning tomatoes I planned to grow this year," he says. "I ended up not planting because we didn't get the water. That money is lost for this year. It's almost impossible to keep farming in this situation—it's hard to even understand what's going on."

For Nomellini, the issue is maintaining the "common pool" of water in the delta: fresh water of sufficient quantity

and purity to maintain fisheries in the estuary and its sustaining rivers, to support delta agriculture, and to supply municipal water users. He and his allies invoke a state Supreme Court ruling from a pivotal Mono Lake case to argue that under California water law, public trust doctrine is equal to appropriative rights and reasonable use (*Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419 (1983)). In other words, Nomellini says, west-side irrigators and Southern California cities can't run roughshod over the delta simply because they need its water.

Birmingham—who worked on the Mono Lake case while at Kronick Moskovitz as outside counsel to the Los Angeles Department of Water and Power—parses the

growers and Southland cities. “That’s because they draw their water from the delta’s common pool. But if their water goes around the delta rather than through it, forget about water quality in the estuary. They won’t give a damn.”

Plans for a peripheral canal seemed dead in the water after voters defeated a statewide initiative to build it in 1982. But last year Gov. Arnold Schwarzenegger called for a “conveyance system”—a canal, tunnel, or pipe—around the delta as part of the legislative package. He quickly signed the four policy bills that emerged, which were hailed by some as a breakthrough after decades of water litigation.

Those bills, sponsored by Senate President Pro Tem Darrell Steinberg (D-Sacramento), rank equally the goals of restoring the delta ecosystem and creating a reliable state water supply. They stipulate a 20 percent reduction in per capita urban water use by December 2020, and require irrigation districts to measure water deliveries and set pricing structures by July 2012. Municipalities and water districts that don't meet these goals won't be subject to fines, but they will be ineligible for state water loans and grants. Additionally, the package provides the State Water Resources Control Board with 25 enforcement

positions to investigate illegal water diversions and creates a program to evaluate and monitor groundwater in state aquifers.

A separate \$11.14 billion bond measure, sponsored by state Sen. Dave Cogdill (R-Modesto), contains enough goodies to overcome the anticipated objections of competing constituencies. For instance, \$3 billion for water storage projects goes to strategic legislative districts, including the Sites Reservoir in Colusa County and Temperance Flat Reservoir in Fresno County; \$2.25 billion funds ecosystem restoration projects in the delta; and \$1.8 billion covers two dozen various conservation and watershed projects, including the removal of four dams on the Klamath River that have devastated local salmon runs.

Though the package of bills doesn't specifically authorize construction of a peripheral canal, it makes water “conveyance” likely. The bills grant the state's new Delta Stewardship Council authority to approve a tunnel or canal if the agency deems it consistent with a larger ecosystem restoration and water delivery plan scheduled for 2012.

Certainly, west-side irrigators consider the package an explicit endorsement of a canal. “The legislation was a compromise, but I think it does a good job of articulating the twin goals of ecosystem restoration and ensuring a reliable water supply,” Birmingham says. As a means of reaching both goals, he adds, the package “sets out a clear path

“If we want to sustain the state’s agricultural economy, we’re going to have to provide the water.”

—THOMAS W. BIRMINGHAM



court's ruling differently. “The state Supreme Court ultimately determined that public trust values did not have priority over appropriative rights,” he says. “Rather, it ruled that public trust resources need to be protected when feasible, that you have to balance the need to appropriate water with the duty to protect public trust resources. In some cases, it may be necessary to approve appropriation even if there is unavoidable harm to public trust resources because the benefits to the economy and society are paramount.”

**PUBLIC TRUST DOCTRINE NOTWITHSTANDING**, then, Birmingham makes clear that west-side irrigators will continue to pursue their interests aggressively and unapologetically. For decades, they have yearned for an engineering solution—construction of a peripheral canal—that would make water transport more effective and secure. Basically a shunt around the delta, a canal or tunnel could also avert violations of the U.S. Endangered Species Act that occur when protected delta smelt and young Chinook salmon are caught and destroyed in the big state and federal pumps at Tracy.

Delta farmers, fisheries advocates, and environmentalists generally oppose a peripheral canal for the very reason that making it easier to supply water to the south carries the potential for draining the delta. “Right now they care about delta water quality,” Nomellini says of the west-side

for the facilities and infrastructure necessary for a conveyance system. That's necessary for ensuring reliable water supplies for 'reasonable and beneficial uses.' Among the reasonable and beneficial uses specified in past [state water board] decisions is irrigation of land in the west side of the San Joaquin Valley."

It's long been conventional wisdom that anything that makes the Westlands Water District happy deeply distresses environmentalists. But the Legislature's rapid approval of the package—with its tantalizing array of incentives—took many activists by surprise, creating cracks in what was once a united front against west-side irrigators. Some groups—notably, the Natural Resources Defense Council (NRDC) and the Environmental Defense Fund (EDF)—supported the four policy bills because they require the state water board to use its authority over California's developed water to protect public trust resources—such as the delta's ecosys-

tem. The NRDC and the EDF also say they can live with the legislation's explicit equivalence of delta restoration and the efficient transfer of water south. Before the bills' passage, say supporters in the environmental community, no such equivalence was mandated. As a result, water exports trumped ecological restoration; the water flowed south, toward the money and power.

But other groups—including the California Sierra Club, the California Water Impact Network (C-WIN), and the statewide Friends of the River—have excoriated the legislation, vowing to defeat the bond measure and haul state water policy back to the courts.

Opponents note that the main beneficiary of the package—west-side agriculture—remains bedeviled by selenium-contaminated runoff produced when farmers flush their fields to remove salt accumulations. In the 1980s this tainted "tailwater" caused a debacle in the Kesterson

## ENDANGERED SPECIES ACT: STILL THE BIG GUN?

**D**espite its chronic shortage of fresh water, the Sacramento–San Joaquin River Delta has received significant protections and mandates for increased flows over the years, primarily because of the U.S. Endangered Species Act (16 U.S.C. §§ 1531–1544). Passed in 1973 during the Nixon administration, the ESA has been the big gun for lawyers seeking court action to preserve habitat for the delta's endemic wildlife and its general water quality. "When the ESA talks," says fisheries consultant Bill Kier of Humboldt County, "the bullshit walks."

For delta environmental advocates, the most important ESA decision has been a 2007 ruling by U.S. District Court Judge Oliver Wanger to protect the delta smelt, a tiny, brackish-water fish that is listed under the act as a threatened species (*Natural Resources Def. Council v. Kempthorne*, 2007 WL 4462391 (E.D. Cal. 2007)). Thanks to Wanger's ruling, about 700,000 additional acre-feet of fresh-water was sent through the delta in 2009 alone.

New ESA cases significant to the delta ecosystem pop up regularly. Most recently, the Center for Biological Diversity filed two lawsuits under the act against the U.S. Fish and Wildlife Service. The first complaint challenged the agency's refusal to grant ESA protection to the longfin smelt, another scarce delta fish (*Council for Endangered Species Act Reliability v.*

*Salazar*, 09-02875 (E.D. Cal. filed Oct. 15, 2009)). The second demanded that Fish and Wildlife respond to an earlier request to change the delta smelt's listing from threatened to endangered (*Center for Biological Diversity v. Salazar*, 09-03154 (E.D. Cal. filed Nov. 13, 2009)). In December both cases were transferred to the Fresno division of the court and merged with the *Delta Smelt Consolidated Cases* (No. 09-407 (E.D. Cal.)) pending before Judge Wanger.

But Cynthia Koehler, the Environmental Defense Fund's legislative director for water issues in California, notes that the ESA may be in as much danger as the delta smelt. "We're not at all sure how long ESA protections will hold," she says. "The general legislation is under unrelenting attack, and the same can be said of the biological opinions [issued through the act] that provide specific protection to different species."

Koehler's concerns seem prescient, given Sen. Dianne Feinstein's recent move to seek National Academy of Sciences review of biological opinions controlling the transport of delta water. Feinstein made the request in September at the urging of Stewart Resnick, a billionaire and corporate farmer whose company controls the Kern Water Bank, a vast subterranean reservoir essential to agriculture in the San Joaquin Valley.

Resnick and Feinstein are friends—or at least, very friendly. Resnick has donated

tens of thousands of dollars to her election campaigns, and he threw a party for the Senator at his Beverly Hills estate. Feinstein has acknowledged forwarding to the Obama administration a letter Resnick wrote asking for the review, but she emphasized that his opinion was shared by a large group of farmers she had met with separately in Coalinga.

Regardless, Koehler thinks that Feinstein's request—subsequently approved by the Obama administration—to re-examine the entire delta environmental protection plan is a bad omen for continued reliance on the ESA. "At this point, the biological opinions are the only thing holding salmon protections together," she says, referring to limits imposed on the commercial fishing of threatened runs of coho salmon in the state's rivers. "That's a very, very thin reed. We need additional protections—and the new [state] legislative package is a big step in that direction."

Even so, the courts are likely to remain the final arbiter for allocating the state's water, and perhaps for saving both farms and fish in the delta. But fisheries consultant Kier is not eager for more litigation. "If the state water board fails to meet its public trust obligations for sufficient delta flows, they'll certainly be open to legal challenge," he says. "But it would be very discouraging, given that the fish don't have much time. Any victory we could claim would be a Pyrrhic one." —GM

National Wildlife Refuge, killing thousands of birds by selenium poisoning when the west side used its drainage water to charge the refuge's wetlands. Unless the drainage problems are addressed, environmental advocates say, farming in general should be limited in the region.

Tom Stokely, water policy coordinator for C-WIN and a long-time foe of west-side irrigators, says the ecosystem protections defined in the legislative package are lax.

"Under the legislation, the state water board is supposed to determine the volume of freshwater flows needed" to protect the bay and delta, Stokely says. "But it's going to do that in an 'informational proceeding'—not an evidentiary hearing. That means board members go into a room, hear statements and review letters, and then decide what they want to do. Plus, the board's decision won't necessarily be adopted into state water law—it can simply be a recommendation."

Peter Gleick, co-founder of the Pacific Institute in Oakland and one of the state's foremost water policy analysts, also has problems with the package—especially its conservation targets. "Municipalities are required to conserve water by 20 percent per capita, but there's no conservation required for agriculture," he notes. "We don't monitor or meter all water uses, so we still have no idea how much water is being used [overall]—legally or illegally. Nor do we know if there is going to be a peripheral canal, the amount of water it might transport, or where it would be built. And if a canal is built, this legislation doesn't guarantee that ecosystem mitigations will be enough to protect the delta."

Gleick also maintains that the package hardly increases the state water board's authority. On the contrary, he says, last-minute dealings in the Legislature eliminated modest efforts to bolster the board's monitoring and enforcement of water law. "As it stands now," he says, "the legislation marginally increases water-rights [violation] penalties, but not enough to make a difference. The penalties are the same for illegally taking one acre-foot of water or a million acre-feet. It's like imposing the same prison term for shoplifting and armored car robbery."

Environmentalists who support the bills admit that the package includes pieces they do not endorse. Cynthia Koehler, EDF's legislative director for water issues in California, emphasizes that her group remains neutral on the bond measure but sees significant reform in the policy bills. "Even if the bond fails, the policy remains in place," she says.

More important, Koehler contends, is how the legislative package changes the rules of the game. "We've been saying all along the state water board has an obligation to exercise its public trust responsibilities for the delta and its fisheries," she says. "This legislation dictates direction in exercising that authority—specifically, by requiring the state board to recommend delta flows necessary

for ecosystem restoration."

True, the provision doesn't specify the volume of through-delta water—a point lambasted by C-WIN. But Koehler asks, "How can you know the amount of water you'll need until the state water board does the determination? I understand that there's always more you can get, but this package does far more than any past ecosystem restoration initiative. Basically, this is how we get things done—piece by piece, fighting hard for every section in every statute."

For Bill Kier, a fisheries consultant in Humboldt County known for his comprehension of the state's water development history, the controversy over the latest bills is all too familiar. "It's like that movie, *Groundhog Day*," Kier says. "It's the same stuff over and over. We know the basic through-delta water flows necessary to maintain salmonids and other native fish. We've known them since 1988, when the state water board submitted a draft plan for additional flows needed to maintain delta fisheries."

That draft plan, Kier says, called for a 13 percent increase in annual through-delta flows—roughly an additional 1.6 million acre-feet sent out the Golden Gate instead of siphoned off. But the plan was never implemented. "We have a pretty darn good idea of what the fish require," he says. "Every year we delay with another round of studies, every year we overtax the system and send more water south, we have fewer fish. We haven't had a salmon season for two years because the stocks are so low. The salmon can't afford to wait for another study."

Stokely agrees that commitment on paper isn't the same as implementation on the ground. Even if the current package is fully funded, he says, experience suggests that little, if any, additional water will go to fish and wildlife. He notes that plenty of aborted agreements mark the histories of both the SWP and the CVP.

"I've compiled a list of about 20 broken promises," Stokely says. "They range from the 1959 Delta Protection Act that was supposed to safeguard delta water rights, to a fish-doubling plan intended to guarantee an additional 800,000 acre-feet of through-delta flows annually. Not one of those promises was kept. The water kept going south, just as it's going south today."

For Stokely and his allies, the next step is forming an ad hoc group to fight the water bond measure. He thinks voters won't be easily seduced. "People know this state is drowning in red ink," he says. "[Treasurer] Bill Lockyer came out with a report last year that said California would have trouble servicing debt if it issued any new general obligation bonds—and he focused on the water bond measure as a classic example."

Fresno attorney Lloyd Carter, a former professor of water law at San Joaquin College of Law and board president of the California Save Our Streams Council, also

Continued on page 50

disparages the bond measure, calling it “a classic illustration of the axiom that you don’t want to watch sausage or law being made.” Carter contends that passing a bond “doesn’t solve anything—it just makes it easier for SWP and CVP beneficiaries to sell their water. Irrigation districts that get project water pay from \$50 to \$100 an acre-foot and can sell it for up to \$500 an acre-foot. Water is California’s new cash crop.”

Bond measure opponents also are resisting pending federal legislation, co-sponsored by Senators Dianne Feinstein and Barbara Boxer, that would simplify Central Valley water transfers. Promoted as a pragmatic response to California’s three-year drought, the Water Transfer Facilitation Act of 2009 (SB 1759) would ease the redistribution of 250,000 to 300,000 acre-feet annually among water districts in the Central Valley, generally from the east side to the west side. East-side farmers would be able to sell their allocated supply at a premium, while west-side farmers could maintain production. A companion measure (HR 3750) sponsored by Rep. Jim Costa (D-Fresno) has been introduced in the House.

The Obama administration supports the federal bills, and they are formally endorsed by the EDF and the Nature Conservancy. According to Laura Wilkinson, a spokeswoman for Feinstein,

the legislation “has received positive feedback from several prominent environmental groups”—including California Audubon and the NRDC. But because the legislation would waive certain environmental restrictions, delta advocates see it as the camel’s nose under the tent—which ultimately could lead to less water flowing out the Golden Gate and more going south.

They predict a stalemate on water policy, and a return to endless litigation. (See “Endangered Species Act: Still the Big Gun?” on page 25.) “Over the past 30 years, the only real option for delta supporters has been the courts,” Carter says. “We have plenty of laws—the California Water Code is 10 volumes, and mandates compliance with state water board policy stipulating that water quality can’t be degraded anywhere in the state. But it’s all a joke. The state water board and the regional boards won’t enforce the code. Their staffs are utterly demoralized. Their decisions are based on political science, not science.”

State water board spokeswoman Judie Panneton counters that the agency, in just the past year, has undertaken a number of significant water-quality enforcement cases on behalf of the regional water boards. “Those enforcement cases have generated millions of dollars in penalties. It’s law that drives the decisions.”

For Nomellini, the questions at hand involve the limits of a natural resource as much as the law. He says he has no problem with exporting water from the delta to the west side, as long as it is “surplus” water. “But we only have a surplus during very wet years,” he says. “Otherwise, there’s not enough water to meet the needs of the estuary and its fisheries, the delta communities, and the [Bay Area] cities, let alone the western San Joaquin.”

For Birmingham, however, the dispute is about the highest and best use of available water supplies. Considering the contribution of San Joaquin Valley farmers to the state’s economy, he insists, west-side irrigation meets that standard. “I’m not aware of any human activity that doesn’t involve some environmental impact,” he says. “But environmental impacts don’t necessarily negate public benefits. We need to minimize the impacts, but we also need to factor in human needs. If we want to sustain the state’s agricultural economy, we’re going to have to provide the water.”

The chance of a compromise between the two lawyers’ views seems remote. But the prospect of continuing the legal stalemate over water policy might itself generate movement toward resolution—and finally making the hard choices about California’s water allocation rather than postponing them. ☪

## ADVERTISER INDEX

PAGE ADVERTISER	PAGE ADVERTISER	PAGE ADVERTISER	PAGE ADVERTISER
4 Abacus Data Systems www.abacuslaw.com/cal	45 Feldman, Phillip www.CASStateBarDefense.com	45 Margolis & Margolis 1-323-953-8996	15 SpeakWrite www.SpeakWrite.com/CABJ
48 Barkley Court Reporters www.barkley.com	47 Gerry, Kevin 1-310-275-1620	12 Marsh Affinity www.proliability.com/lawyer	3 Tabs 3 Billing & PracticeMaster www.tabs3.com/12bestcl
19 CEB www.ceb.com	3 Government Liaison www.TRADEMARKINFO.com	46 Monroe Insurance www.monroe-insurance.com	C4 Thomson Reuters www.westlawlitigator.com
47 Century Law Group www.CalStateBarDefense.com	17 Justia www.justia.com	14 Omni Hotel 1-213-617-3300	3 Triay, Charles www.triaylaw.com
9 CompuLaw www.compulaw.com	10 Katten Muchin www.CalStateBarDefense.com	C4 Dechert www.dechert.com	52 University of La Verne www.go2lavernelaw.com/alan
44 Daniels-Head www.danielshead.com	27 Lawyers Mutual www.LMIC.com	49 Pansky Markle Ham, LLP www.panskymarkle.com	45 Wine, Michael www.ethicslawyer.net
13 Essential Publishers www.essentialpublishers.com	C2 LexisNexis www.LexisNexis.com	49 Professional Resource 1-760-322-1589	