



Phil Schemmeister

CHAPTER TWO

What Is Environmental Water?

Environmental water is water that has been transferred from some other traditional use, such as agriculture, to improve an environmental condition, such as instream flows to support a fishery.

The California Water Code historically has allowed for a range of “beneficial uses” of water, including agriculture, mining, urban development and sustenance, and industrial uses. However, putting water to beneficial use also has relied on physical diversion or “control” of the water. Leaving water instream does not represent “control” over the water, which has resulted in putting environmental uses (i.e., instream uses) at a disadvantage or in a subordinate position. Further, in the past, instream uses were ineligible for legal protection against the claims of appropriative users¹ because of the difficulty in exercising “control” over water designated for environmental use as opposed to water designated for consumptive use (for example, agricultural or industrial use). In fact, the courts unequivocally rejected efforts by conservation groups to dedicate water specifically for instream environmental uses due to an inability to control the water. In 1979, for example, in *California Trout*

vs. SWRCB (State Water Resources Control Board), the California Supreme Court rejected California Trout's attempt to dedicate water to improve instream flows in a particular watercourse.² The Court stated:

On appeal, the board contends that water may not be appropriated within the meaning of the Water Code without the exercise of some form of physical control or possession of the water such as a diversion from the stream channel or regulation of the water within the channel. This was its specific reason for rejecting the application. The board also contends it need not, and actually cannot, accept an application by a 'private party' such as plaintiff where such application seeks to appropriate water for the exclusive 'public use' of protecting fish and wildlife.³

Nearly 20 years later, the California legislature responded to this limitation in the Code by enacting section 1707 (see Chapter 1, "Introduction," and Chapter 4, "Types of Water Transfers"), which enables a water right holder to dedicate all or a portion of his right to an instream use, without the burden of the requirement to show "control" of the water through physical diversion. An instream use includes "the purposes of preserving or enhancing wetland habitat, fish and wildlife resources, or recreation in, or on, the water."⁴

As a result of this change in the Water Code, we can now see signs of a developing water market in which entities are attempting to acquire water rights strictly for the purpose of dedicating the water to augment instream flows or otherwise enhance wildlife habitat. State and federal agencies currently play the largest role in this developing market. The U.S. Bureau of Reclamation (BOR) and the U.S. Fish and Wildlife Service (FWS) are the biggest players that have leased and purchased water under the auspices of several government programs designed to restore habitat for Chinook salmon and other anadromous fish and for wildlife, namely ducks and waterfowl. Individuals, nonprofit organizations, and even for-profit companies are also beginning to show an interest in environmental water projects.

As a result, the real development of a market-based system that supports the conversion of appropriative water rights (discussed in Chapter 3, "Types of Water and Water Rights in California") to instream rights may soon be on the horizon. This approach could greatly contribute to the protection of fish and wildlife resources in California.

1. Gregory A. Thomas, *Conserving Aquatic Biodiversity: A Critical Comparison of Legal Tools for Augmenting Streamflows in California*, 15 STAN. L. REV. 3 (Jan. 1996).
2. *California Trout v. State Water Resources Control Board*, 90 Cal.App. 3d 816, 821 (1979). California Trout is an advocacy group that works to protect and restore fisheries in California.
3. *Id.* at 819. See also California Fish and Game Code sections 1300 et seq. (Deering 2003), which establish the process by which the California Department of Fish and Game can acquire water rights for environmental uses.
4. CAL. WATER CODE § 1707 (Deering 2003).

