

CALIFORNIA'S AREA OF ORIGIN LAWS

A Report to the State Water Resources Control Board
and
the Delta Stewardship Council

by

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INTRODUCTION

California's Area of Origin Laws have long been in the background of the State's major water issues. They were enacted 50-80 years ago, are written very generally, and have not been subject to a lot of interpretation by the courts. However, they remain a potential linchpin to resolving many of California's most vexing water disputes. For that reason alone, the Area of Origin Laws are worthy of attention. It is the purpose of this report to: provide a brief description of the Area of Origin Laws, to discuss recent court cases that have discussed them, and to summarize the major principles embodied in the laws.

THE AREA OF ORIGIN LAWS

The Area of Origin Laws are a set of legislature enactments that collectively seek to reassure users of water in the geographic area where such water originate that their water supply needs will be protected from impacts of exporting water out of the area of origin. There are five Area of Origin Laws, three of which are most significant. The three major laws are¹:

- 1) The County of Origin Law (1931). Codified at Water Code Sections 10500-10506.
- 2) The Watershed Protection Statute (1933). Codified at Water Code Sections 11460 – 11465.
- 3) The Delta Protection Act (1959) Codified at Water Code Sections 12200-12205.

¹ The two other Area of Origin Laws are:

- 1) The Protected Area Legislation (1984) Codified at Water Codes Sections 1215-1222. Since these laws only apply their protection to appropriative water rights issued after 1985, they are of limited importance.
- 2) The San Joaquin River Protection Act (1961) Codified at Water Code Sections 12230-12233. These laws specify that prior water rights in the San Joaquin River watershed will be protected.

It should also be noted that the Sacramento-San Joaquin Delta Reform Act of 2009 references the Area of Origin Laws. Specifically, Water Code Section 85031 provides that the Act shall not have any effect on the Area of Origin Laws. It also states that Area of Origin Law protections do not extend to areas south of the Delta that may be served by new conveyance facilities.

WHY THE AREA OF ORIGIN LAWS WERE ENACTED

They were enacted during the formative years of the major water projects to alleviate fears of Northern California interests that local water supplies would be depleted. Fears of an Owens Valley type water grab were fresh in the minds of many. The laws were passed to reassure Northern California water interests at key stages of the planning for the major north-south water projects. The dates of the laws are critical to understanding why they were enacted.

The County of Origin Law of 1931, was enacted in response to the passage in 1927 of laws which authorized the state to file applications to use unappropriated water as part general water resources developments. These projects were being planned to export major amounts of water from areas of water abundance to areas of water need. Areas of abundance included Northern California, and the Sierra Nevada mountains. Areas of need included the San Joaquin Valley and Southern California. In addition to addressing water shortages, the statewide water projects were designed to address severe water quality issues stemming from tidal salinity in the Delta.

The Watershed Protection Statute was enacted in 1933 as part of the Central Valley Project Act. This act authorized the Central Valley Project (CVP), the major multi-purpose, multi-basin water plan that was developed in the 1920s. Like the County of Origin Laws, the Watershed Protection Statute was passed to reassure upstream users that their rights to future water needs would be protected.

The third major Area of Origin law, the Delta Protection Act of 1959, was tied to the passage of legislation that authorized the second major north-south water project, the State Water Project (SWP). The Delta Protection Act provided assurances, in this case to Delta water interests, that an adequate water supply in the Delta would be maintained.

THE AREA OF ORIGIN LAWS INTENT

The common purpose of the laws is to reserve to areas of origin an undefined (inchoate) preferential right to future water needs. While the method of protection varies, each of the three major Area of Origin Laws seek to ensure that areas in which water originates shall have an adequate water supply for present and future needs. Where water may be needed for future needs of the Area of Origin, the laws are not intended to preclude export to other areas during the period before those needs arise. Instead, the needs of the Area of Origin take priority if and when they arise.

The 1931 County of Origin Law was tied to “state filings” which reserved major portions of unappropriated water for development of major statewide water projects. The purpose of the County of Origin Law was to ensure that such filings, as either used by the state or if released by the state to others, would not deprive the county of origin of such water which is necessary for the development of the county.

The 1933 Watershed Protection Statute was part of the CVP Act. Its purpose was to ensure that the operation of the CVP could not deprive areas where water originated of water reasonably required to adequately supply the beneficial needs of the watershed area.

The 1959 Delta Protection Act was tied to the second major statewide water project. Its purpose was twofold: to ensure maintenance of an adequate water supply for the present future water supply needs of the Delta and to provide protection to the Delta from the effects of tidal salinity.

THE PROTECTIONS PROVIDED BY THE AREA OF ORIGIN LAWS

- 1) The 1931 County of Origin Law: Water reserved by state filings may not be used outside the county of origin which is necessary for the development of the county. Specifically the state was prohibited from assigning “filings” where such impacts would occur.
- 2) The 1933 Watershed Protection Statute: The CVP shall not be operated to deprive the area wherein water originates and adjacent areas of water reasonably required to adequately supply the beneficial water needs of the area.
- 3) The 1959 Delta Protection Act: The CVP and State Water Project (SWP) shall be operated to provide salinity control and adequate water supply for areas of water in the Delta. No person should divert water from Delta channels to which Delta water users are entitled. In addition to protecting the Delta, the law provides that project exports are also subject to the prior needs of upstream areas of origin and that Delta obligations are not meant to restrain upstream development.

ACTIONS PROSCRIBED BY AREA OF ORIGIN LAWS

- (a) The 1931 County of Origin Law: State filings and their associated priority shall not be assigned or released if such actions would deprive the county of water origin of water necessary for the development of the county. Permits and licenses issued pursuant to state filings shall not authorize the use of any water outside the county of origin which is necessary for the development of the county.
- (b) The 1933 Watershed Protection Statute: The CVP may not be operated in a way to deprive areas of water origin of all water reasonably required to adequately supply the beneficial needs of the area.
- (c) The 1959 Delta Protection Act: The SWP must provide for Delta salinity control and an adequate water supply (or substitute) for Delta water needs. No person may divert Delta water to which Delta users are entitled.

It is important to note that these laws effectively establish a reversal of priorities as between the priority dates of CVP and SWP water rights and any later filed applications for use of water within the protected areas. This reversal of priority applies to the diversion of natural and abandoned flows for export use by the CVP and SWP, not to releases of water previously diverted to seasonal or long-term storage and later released. Accordingly, the laws provide users in area of origin with assurance that their water rights to natural flows would be protected over those for export users. Inbasin water right holders are entitled to priority access to natural flows over export users regardless of the standard "first in time, first in right" water rights priority system. There are limits on the protection afforded by the Area of Origin Laws. The laws do not allow use of CVP or SWP stored water without compensation since stored water is not considered natural flow. Inbasin users may negotiate with the federal or State government to receive CVP or SWP water with compensation.

AGAINST WHOM CAN THE AREA OF ORIGIN CASES BE ENFORCED

The 1931 County of Origin Law can be enforced against the state as “owner” of the state filings and against other persons who have been assigned state filings.

The 1933 Watershed Protection Statute was originally intended to apply to the State as the envisioned operator of the CVP. However the federal government ultimately built and now operates the CVP. Water Code Section 11128 makes it clear that the Act applies to the federal government.

The 1959 Delta Protection Act’s protections apply to both the State (as operator of the SWP) and the federal government (as the operator of the CVP). Additionally, no person may divert water from the Delta to which users of the Delta are entitled.

COURT DECISIONS INTERPRETING THE AREA OF ORIGIN LAWS²

There have only been a handful of court decisions interpreting the Area of Origin Laws. There have been four appellate court decisions since 2006. Three of the cases were in State Courts and one was in Federal Court.

(a) The State Water Resources Control Board Cases (2006). 136 Cal. App. 4th 674.

This lengthy opinion by Justice Ronald Robie involved appeals from the adoption by the State Water Resources Control Board (State Water Board) of Decision 1641 (D-1641). D-1641 was a water rights decision issued to the Projects. It contains numerous conditions to implement the Board's Bay Delta Water Quality Control Plan. The opinion includes a discussion of the Area of Origin Laws.

Regarding the San Joaquin River Protection Act, the court concluded that the protection accorded by the Act did not apply to any water projects that were already in the works by June 1961.

The opinion also described the Watershed Protection Statute. The court concluded that the Statute applies to both the state and federal Projects. The opinion discussed the issue of whether the Statute guarantees watershed protection to CVP contractors in the area of origin. The State Water Board had interpreted the Statute as to not give any priority to any area of origin inhabitant who seeks a water service contract for water from the area of origin. Instead, according to the State Water Board, the inhabitant must apply for and obtain its own appropriative water right. The court disagreed and stated that the State Water Board cannot reduce an area of origin user's contractual allotment of water in order to supply water for use outside the area of origin, absent some other legal basis for doing so that trumps the Statute. The Court rejected the contractors' argument that their rights under the Statute were violated, however, because the contractors were claiming priority over releases made to meet water quality standards within the area of origin, not over exports. The Court held that as between competing uses within the area of origin, the Statute grants no priority.

The Court also described the Delta Protection Act. It states in part:

As we read these rather vague statutes, the Delta Protection Act recognizes the importance of providing salinity control and an adequate water supply in the Delta to serve dual goals: (1) maintaining and expanding agriculture, industry, urban, and recreational development in the Delta; and (2) providing fresh water

² For many years, the only authoritative interpretation of the Area of Origin Laws was found in two Attorney General Opinions. The first, issued in 1955, interprets the 1933 Watershed Protection Statute (Opinion No. 53-298, Jan. 5, 1955). The second, written in 1956, interprets the 1931 County of Origin Law (Opinion No. 56-256, Dec. 4, 1956).

for export to areas of water deficiency. As between these two goals, however, the Delta Protection Act gives preference to the first. Thus, no one may divert water from the Delta that is necessary for salinity control or to provide an adequate water supply for users within the Delta. What the Delta Protection Act does *not* specify is: (1) what is an adequate supply of water for users within the Delta; and (2) what level of salinity control must be provided. (136 Cal. App. 4th at page 768).

It also stated:

As for the argument of the Central Delta parties that the Delta Protection Act gives Delta riparians and appropriators a right to water stored upstream by others, we disagree. Nothing in the Delta Protection Act purports to grant any kind of water right to any particular party. The Delta Protection Act does preclude the diversion of water from the Delta that is necessary for salinity control or to provide an adequate water supply for users within the Delta; however, it is for the Board to decide, in the exercise of its judgment, what level of salinity control should be provided and what is an adequate supply of water for users in the Delta. (Id. At pgs 771-772).

As will be seen below, some of the conclusions reached in this case, namely the rights of contractual users, were clarified by later decisions.

- (b) *El Dorado Irrigation District v. State Water Resources Control Board* (2006).
142 Cal. App. 4th 937.

This case, also authored by Justice Robie, involved the issue of whether it was correct to include a term (Term 91) in a senior appropriator's water right permit, which required curtailments of water diversions when stored water was being released from the Projects to meet water quality standards, when the term was not imposed in junior appropriators in the watershed.

The court's opinion includes a brief history of the Area of Origin Laws. After a brief discussion of the County of Origin Laws, the Court concluded that they did not apply to the matter in dispute.

Regarding the Watershed Projection Statute, the Court concluded that while the statutes may entitle water users to assert a priority over the Projects as to the diversions of water originating in the watershed under their own water right, that priority did not extend to water the projects have properly diverted to storage at an earlier date. If areas of origin inhabitants want water properly stored by the Projects, they must pay for it. This language appears to narrow the Court's earlier view, expressed in the State Water Resources Control Board Cases, that area of origin inhabitants may claim priority through contracts for CVP or SWP water.

(c) *Phelps v. State Water Resources Control Board* (2007). 157 Cal. App. 4th 89.

This case involved the validity of enforcement actions taken by the State Water Board for unauthorized diversion of water. At issue was whether the appropriators in question had violated the term (Term 91) in their water right prohibiting the diversion of stored water being released by the Projects to meet water quality standards. The plaintiffs argued that Term 91 deprived them of their right to use water from their own watershed, in violation of the Watershed Protection Statute and the Delta Protection Act. Consistent with the El Dorado Irrigation District case, the court concluded that the Watershed Protection Statute does not give appropriators priority to stored water.

Regarding the Delta Protection Act, the court concluded that the Act itself does not grant water rights to users of water in the Delta. Rather there must be adequate existing water rights to support water use in the Delta.

(d) *Tehama-Colusa Canal Authority vs. U.S. Department of the Interior, et al.* (9th Cir. 2013). Case No. 11-171 99.

This is the most recent case discussing Area of Origin Laws and was decided by the federal Ninth Circuit Court of Appeals.

The case involved whether CVP water service contractors in the North were entitled to priority deliveries of CVP water vis-a-vis contractors located outside the watershed.

The court discussed the Watershed Protection Statute at length. It stated that it is undisputed that the federal government's appropriation of water is subject to Area of Origin Laws. However, the Court went on to say that while the Area of Origin Laws help determine the amount of water available to Reclamation for allocation, the laws in no way controls how water is allocated by the federal government once acquired and stored. The latter is controlled by the language of the water service contracts. Here the plaintiffs had no water rights from the State Water Board independent of their CVP contractual rights.³

This case discussed the earlier state court decisions cited above. The Ninth Circuit concluded that those decisions are consistent with the idea that water service contractors cannot assert superior rights to stored water based solely on the Area of Origin Laws. Rather, such users would have to rely on existing water rights. Without independent water rights, the contracts control, including provisions that specifically addressed the allocation of water during shortage periods. Area of Origin protection must be secured either by existing water rights

³ The court noted that some water service contracts do provide priority water in Area of Origin water users based on settlement and exchange of senior water rights. See also the North Delta Agency Contract, which provides similar protections.

or by the filing of a water right permit application which would have seniority vis-a-vis the Projects as exporters.

Plaintiffs attempted to rely on the State Water Resources Control Board Cases to support their argument that Area of Origin statutes provide priority appropriative rights. However the court noted that El Dorado Irrigation District case, decided just a few months after State Water Resources Control Board Cases, clarified that the Act does not purport to limit in any way the Projects' authority to allocate water that was previously diverted and stored. Put simply, the court concluded area of origin protections do not apply where water use is based on a contract that expressly authorizes the very curtailments that were attempted to be avoided.

CONCLUSIONS

The following observations can be made regarding the Area of Origin Laws:

- 1) Their intent seems clear: to provide some measure of protection for Area of Origin water such that water will be available for future needs notwithstanding the development of export projects.
- 2) While the intent is clear, the language of the laws is very general.
- 3) There have been four recent court decisions that contain discussions of the Area of Origin Laws. All four cases considered and rejected area of origin claims.
- 4) The court case that most directly implicated the Area of Origin Laws, the Tehama Colusa case, was more of a contract interpretation case than a broad decision interpreting the laws.
- 5) A common theme of the cases is that the Laws unquestionably apply to the major state and federal water projects in the Delta watershed.
- 6) The cases also make it clear that the Laws do not independently create water rights for Area of Origin inhabitants. Rather, a water right must exist before the protection of the laws may be invoked.
- 7) Where there are no water rights in existence, the Area of Origin Laws provide a means for an Area of Origin inhabitant to acquire a water right that would have priority over the water rights of the export projects.
- 8) The Area of Origin Laws do not entitle valid water right holders to divert water that has been previously stored upstream and later released for downstream rediversion or instream beneficial use.
- 9) Area of Origin inhabitants have the right to purchase stored water from the projects, but the receipt of stored water is subject to the terms of the parties' contracts. Unless such contracts have special status by virtue of settlement or contract language, they are subject to curtailments based on water shortages the same as other contractors.
- 10) The intersection of the Area of Origin laws with Stored Water Bypass requirements is less than clear when considering the Legal Delta. As an estuary, the Delta will always have water even during very dry years. The Area of Origin Laws certainly provide protection to valid water right holders in the Legal Delta as to natural flow. Whether there is enough natural flow in the Delta to satisfy all valid water rights holders may be an open question. And, even where valid water rights exist, they are subject to the constitutional mandate that water must be used reasonably and efficiently.