

**2023 California Water Law Symposium  
Indigenous Peoples and Species Panel  
Outline of Remarks**

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- I. What are state water rights?**
  - a. California’s hybrid water rights regime
    - i. Riparian rights: Property owners entitled use natural flow of water on riparian land touching a waterway; adheres to parcel.  
*Lux v. Haggin* (1886) 69 Cal. 255; Cal. Water Code § 101.
    - ii. Appropriative rights: “First in time, first in right” rule.  
*Irwin v. Phillips* (1855) 5 Cal. 140.
  - b. Water Commission Act grandfathers in pre-1914 rights.
  - c. Important limitations: usufructuary, public trust, reasonable and beneficial use (Cal. Constitution Art. X, § 2).
  
- II. How are inequities embedded in water rights?**
  - a. State-sponsored program of genocide and dispossession of Indigenous Peoples.
    - i. Legal landmarks include:
      - 1. 1850 Act for Government and Protection of Indians
      - 2. 1851 California Land Act
      - 3. 1852 Senate refusal to ratify 18 treaties with California Tribes
    - ii. State water rights enable and embody dispossession of Tribes.
    - iii. Consequences for federal reserved rights.
  - b. Exclusion of communities of color from water rights.
    - i. 1913 Alien Land Law
    - ii. De jure segregation: racially restrictive covenants, redlining.
  
- IV. Inequities Today: Case Study of California’s Bay-Delta.**
  - a. What is the Bay-Delta?  
(San Francisco Bay/Sacramento-San Joaquin Delta Estuary)
  - b. Large-scale diversions driven by state water rights claims.
  - c. An ecosystem in crisis:
    - i. Freshwater flows reduced by half or more relative to unimpaired conditions (outflows by as much as 80% in dry conditions).
    - ii. Changes to salinity, temperature, dissolved oxygen, and other water quality parameters, as well as habitat loss and physical changes.
  - d. Translates into collapse of native fish species, loss of riparian resources; proliferation of harmful algal blooms (HABs).

- e. For Indigenous communities: threatens cultural survival, religious and cultural practices, access to sacred sites, food sovereignty, health, economics, and more.

**V. Water quality regulation: peril.**

- a. Water quality standards established under Clean Water Act and California's Porter-Cologne Act. *See, e.g.*, 33 U.S.C. 1313; 40 C.F.R. Part 131 (40 C.F.R. § 131.1 et seq.); Cal. Water Code §§ 13160, 13241.
  - i. Triennial review requirements. 33 U.S.C. § 1313(c)(1); Cal. Water Code § 13240.
- b. The Bay-Delta Plan: a mess everyone/no one can agree on?
  - i. 2008: State Water Board announces two-phase update of 2006 Bay-Delta Plan.
  - ii. 2009: State Water Board initiates review process for updating Phase I water quality standards for lower San Joaquin River and south Delta salinity.
  - iii. 2010: State Water Board releases report identifying significant increases in unimpaired flows necessary to protect public trust resources.
  - iv. 2017: Board releases Scientific Basis Report with recommendations for Phase II update to 1995 water quality standards for Sacramento River, Delta, and associated tributaries.
  - v. 2018: State Water Board issues Phase I amendments.
  - vi. 2022: Board issues Notice of Preparation for a regulation to implement Phase I objectives.
  - vii. 2023: State Water Board issues draft scientific basis report supplement in support of proposed Voluntary Agreements for the Phase II update.

**VI. Water quality regulation: promise.**

- a. Complete and implement Bay-Delta Plan update to provide for instream flows necessary to restore ecosystem and native fisheries, protect rights and interests of tribes.
- b. Process must be driven by Tribes and impacted Delta communities and incorporate tribal ecological knowledge and local experiences with waterways.
- c. Codify and protect Tribal Beneficial Uses.
- d. Ensure that water quality standards account for and protect tribal reserved rights.
  - i. *See* U.S. EPA proposed rule revising Clean Water Act water quality standards regulation to protect Tribal Reserved Rights (Nov. 2022), available at <https://www.epa.gov/wqs-tech/revising-federal-water-quality-standards-regulations-protect-tribal-reserved-rights>.
- e. Implementation will require meaningful curtailment of state water rights.

## Select Sources:

Shingle Springs Band of Miwok Indians et al., Title VI Complaint and Petition for Rulemaking for Promulgation of Bay-Delta Water Quality Standards, Submitted to U.S. Env't'l Protection Agency (Dec. 12, 2016), available at <https://www.restorethedelta.org/wp-content/uploads/2022-12-16-Bay-Delta-Complaint-and-Petition.pdf>.

Winnemem Wintu Tribe et al., Amicus Curiae Brief in Support of State Water Resources Control Board, California Water Curtailment Cases, Case Nos. H047270 & H047927 (Sixth Appellate Dist. Ct. of App. Mar. 14, 2022), available at <https://www.restorethedelta.org/wp-content/uploads/2022-03-10-Application-and-Proposed-Amicus-Brief-Rcvd-Stamped.pdf>.

Advisory Council on Cal. Indian Policy, *Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416* (Sept. 1997), available at <https://tribalaffairs.ca.gov/resources/>.

Benjamin Madley, *An American Genocide: The United States and the Californian Indian Catastrophe, 1846-1873* (2017).

Kate Poole, *California's Wildly Inequitable Water Rights System* (Oct. 11, 2021), <https://www.nrdc.org/experts/kate-poole/californias-wildly-inequitable-water-rights-system>.