

April 25, 2014

Mr. Tom Howard  
Executive Director  
State Water Resources Control Board  
Post Office Box 100  
Sacramento, California 95812-0100

VIA E-MAIL  
Tom.howard@waterboards.ca.gov

Re: CVP/SWP Temporary Urgency Change – Response to San Luis & Delta-Mendota Water Authority Opposition to American River Operations Plan

Dear Mr. Howard:

As the State Water Resources Control Board is aware, this year's severe drought conditions seriously impacted Folsom Reservoir, the reservoir adjacent to our communities that is our primary water supply. The reservoir reached what will hopefully be its low point on February 6, 2014, when there was 162,617 acre-feet of water in storage. That amount was approximately 16% of the reservoir's capacity, with a water level of 357 feet above mean sea level. That was only about 25 feet above the level at which our only water-supply intake in the reservoir would be dry. At that point, the approximately 500,000 people we serve could have their water supplies severely limited. At this level, their water supplies could be restricted to a level that provides only enough water for basic indoor water needs. Based on this experience, in our March 10, 2014 letter to you, we requested that the SWRCB add to the CVP/SWP temporary urgency order a term requiring Reclamation to prepare a Folsom Reservoir operations plan to address the need for more water-supply certainty moving into the 2014-2015 water year. Given the very dry conditions over the last three years, there are no guarantees that next winter will be any wetter than this past winter. As a result, there are no guarantees that the condition of Folsom Reservoir will be better next year than this year. As explained in more detail below, the need for a Folsom Reservoir operations plan that protects our communities' public health and safety is growing ever more pressing because Reclamation currently is planning to enter next water year with the reservoir 80,000 to 90,000 acre-feet lower than it entered this water year.

*A Folsom Reservoir Operations Plan Is Urgently Necessary Because Reclamation Plans To Start Next Water Year With Even Less Water In Storage Than It Did This Water Year*

Our request for a Folsom Reservoir operations plan that will protect our 500,000 residents' health and safety has only grown more urgent since we sent our March 10 letter. In the draft operations plan that Reclamation shared with the American River Group last week (copy enclosed), Reclamation projects drawing Folsom Reservoir down to an end-of-September

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carryover level of 273,000 acre-feet in a dry 90%-exceedance scenario and 287,000 acre-feet in a normal 50%-exceedance scenario. These are dangerously low storage levels that present a serious risk to our residents' health and safety. For perspective, the reservoir held 361,108 acre-feet in storage on September 30, 2013. In other words, Reclamation's planned operation of the reservoir apparently will drain Folsom Reservoir approximately 80,000 to 90,000 acre-feet lower than the level at which the reservoir began the current water year. Under Reclamation's latest operations plan and if Reclamation had entered this past winter with Folsom Reservoir holding 80,000 to 90,000 acre-feet less than it did, there would have been a distinct possibility that our agencies' water-supply intake could have been dry as early as February or March 2014. If precipitation in late 2014 were to mirror precipitation in late 2013 and early 2014, our water supplies could be at risk as early as February 2015, with water surface elevations dropping below our water-supply intake.

Moreover, it appears that the Real-Time Drought Operations Team (RTDOT) created by the SWRCB's urgency order is not appropriately considering the need to protect our communities' public health and safety. On April 21, 2014, Reclamation implemented a pulse flow, apparently at the request of the "fish agencies," increasing releases to the lower American River from 500 cfs on April 21 to 1,500 cfs later that day with a ramp-down to 800 cfs by the end of the day on April 25. As far as our agencies are aware, the RTDOT's members did not consult with any interested stakeholders concerning either the pulse flow or the apparent plan to maintain American River releases at 800 cfs indefinitely. With Reclamation's operational plan indicating that our communities' water supplies may be put at serious risk given the Folsom Reservoir storage level at which Reclamation plans to enter next water year, the RTDOT's apparent willingness to increase releases from the reservoir without any discussion with our agencies or any other American River stakeholders is extremely troubling. It is particularly troubling because, through the Water Forum, our agencies and many other stakeholders have engaged extensively with Reclamation, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service concerning American River flows and conditions earlier in this drought year. Such consultations are critically important where the RTDOT's members are managing the water supplies that we deliver to meet our communities' basic human needs.

*San Luis & Delta-Mendota's Arguments Conflict With Public Policy And Are Legally Incorrect*

Notwithstanding the pressing need for a Folsom Reservoir operations plan to protect our communities' public health and safety, in a March 26, 2014 letter, the San Luis & Delta-Mendota Water Authority (SLDMWA) opposed our request for an operations plan for the reservoir. In short, SLDMWA argued that our agencies, as CVP contractors, have no priority to any supply from Folsom Reservoir, whether under the area of origin laws, the water-right terms that the SWRCB's predecessor agency applied to Reclamation's Folsom water-right permits to protect this region or any other source. The implication of SLDMWA's argument is that the SWRCB should take no steps to ensure that the 500,000 people we serve who rely on the reservoir as a local water source will have an adequate water supply if next winter were to be dry.

It is important to remember the disparity in our agencies' contracts with Reclamation and the contracts held by SLDMWA's members. All of our agencies' supplies under settlement

contracts with Reclamation, CVP water-service contracts and subcontracts under CVP water-service contracts total 123,200 acre-feet a year. Roseville and San Juan also hold contracts for supplies from Placer County Water Agency (PCWA) under PCWA's water rights that total 55,000 acre-feet a year. At 100% allocations under all of those contracts, our communities' demands from Folsom Reservoir total 178,200 acre-feet a year. All of those supplies – even those under PCWA contracts – are put at risk if there is a risk of Folsom Reservoir levels declining below our water-supply intake. In contrast, the CVP water-service contract for just one SLDMWA member, namely Westlands Water District, is 1,150,000 acre-feet per year. While CVP deliveries to SLDMWA's members of course have been constrained for some time, and are severely constrained this year, requiring Reclamation to adopt a plan to protect our agencies' relatively small – yet critical – water supplies would appear to have little impact on supplies for SLDMWA's members.

SLDMWA's argument in favor of subjecting our residents' primary water supply for drinking, cooking and bathing to significant risk entering next water year is contrary to public policy. (See, e.g., Water Code §§ 106 (“It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water . . . .”); 106.3(a) (“It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes”).) SLDMWA's arguments also contain numerous legal flaws:

1. SLDMWA ignores settlement contracts. As explained in our March 10 letter, Folsom and San Juan hold settlement contracts with Reclamation that reflect their pre-CVP – indeed, pre-1860 – water rights. Those contracts do not allow for dry-year reductions, whatever interpretation is applied to CVP water-service contracts. SLDMWA ignores the existence of the settlement contracts.
2. Congress's authorization of Folsom Reservoir contradicts SLDMWA's argument. Congress authorized the construction of Folsom Dam and Reservoir in 1949's Public Law 81-356 (copy enclosed). That act contains the following direction to the Secretary of the Interior:

Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized *the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.* (63 Stat. 853 (emphasis added, copy enclosed).)

As explained in our March 10 letter and below, the practical method by which this direction was implemented was Term 14 as adopted by the State Water Rights Board in Decision 893. While SLDMWA has benefitted from the consideration of the specific terms of congressional authorizations of other CVP units (see *Tehama-Colusa Canal Authority v. U.S. Dept. of Interior* (E.D.Cal. 2011) 819

F.Supp.2d 956, 976-978 (discussing act authorizing Tehama-Colusa Canal)), its argument here is contrary to Folsom Dam and Reservoir's authorizing act.

3. SLDMWA ignores binding legal authority concerning the effect of Folsom Reservoir's permit terms. In Decision 893, the State Water Rights Board made it crystal clear what the effect of the decision's Term 14 would be:

Permits are being issued to the United States to appropriate enough American River water *to adequately supply the applicants naturally dependent on that source* and availability of water to such applicants is reasonably assured by *the terms to be contained in the permits to be issued to the United States restricting exportation of water* under those permits insofar as exportation interferes with fulfillment of needs within Placer, Sacramento and San Joaquin Counties. *Other applicants in more remote areas must if necessary seek water from other sources.* (Decision 893, p. 54 (emphasis added).<sup>1</sup>)

In its landmark 2006 decision concerning D-1641, the Court of Appeal interpreted Term 14 adopted by Decision 893 (which SLDMWA identifies as Term 11) in response to arguments by SLDMWA's member Santa Clara Valley Water District. (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4<sup>th</sup> 674, 814.) The Court of Appeal interpreted the above discussion in Decision 893 and stated:

Understandably, Santa Clara does not claim that Santa Clara County is an area *naturally* dependent on water from the American River. Moreover, the language following "United States" refers to a permit condition that, as the decision states, was imposed to protect the "fulfillment of needs within Placer, Sacramento and San Joaquin Counties." Thus, the Water Rights Board was explaining that the availability of water to applicants within Placer, Sacramento, and San Joaquin Counties that were naturally dependent on the American River was "reasonably assured" by *the permit condition that restricted the export of water appropriated under the American River permits until the needs of those counties were fully met.* (*State Water Resources Code Board Cases*, 136 Cal.App.4<sup>th</sup>, at p. 814 (first emphasis in original, second emphasis added).)

This binding legal interpretation of the key permit term contradicts the entirety of SLDMWA's legal position. While we cited the Court of Appeal's decision in our March 10 letter, SLDMWA ignores it.

4. SLDMWA relies on non-binding dicta from a decision that warns against relying on non-binding dicta. SLDMWA's argument relies largely on the Ninth Circuit

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<sup>1</sup>As explained in our March 10 letter, Roseville and San Juan's predecessor Fair Oaks Irrigation District were among the "applicants naturally dependent" on the American River at the time of Decision 893.

Court of Appeals' decision in *Tehama-Colusa Canal Authority v. U.S. Dept. of Interior* (9<sup>th</sup> Cir. 2013) 721 F.3d 1086. The Ninth Circuit held that Water Code section 11460 did not give Tehama-Colusa Canal Authority's (TCCA) members a priority to CVP water-service contract supplies even though they were located in the CVP's area of origin and that those laws could have given TCCA's members priority if they were to file their own water-right applications. (721 F.3d, at p. 1097.)<sup>2</sup> In doing so, the Ninth Circuit stated that the Court of Appeal's *State Water Resources Control Board* decision was not controlling:

[A]s the district court noted, the decision in *SWRCB Cases* lacks persuasive power because: (1) CVP contracts were not at issue in that proceeding; (2) there was no comprehensive discussion of the CVP project; and (3) the proposed interpretation of [Water Code] § 11460 by [TCCA] and its members would nullify explicit provisions of the renewal contracts. (721 F.3d, at p. 1096.)<sup>3</sup>

While SLDMWA benefited from the Ninth Circuit's dismissal of certain statements in the Court of Appeal's *State Water Resources Control Board Cases* decision as involving questions not at issue in that decision and therefore non-binding dicta, SLDMWA relies on a discussion of Shasta Reservoir's water-right permit terms by the Ninth Circuit, even though those permit terms were not at issue before the Ninth Circuit because TCCA relied wholly on Water Code section 11460. Moreover, the *State Water Resources Control Board Cases*' holding concerning Term 14 is a binding interpretation of a California water-right permit terms by a California Court of Appeal.

SLDMWA's arguments in opposition to our agencies' request for a Folsom Reservoir operations plan have no merit.

### *Conclusion*

Given the ever more pressing need for a Folsom Reservoir operations plan that protects our communities' water supplies – as well as the water supplies for all of the other communities in the Sacramento region – and the apparent opposition to even that basic level of protection for our supplies, we plan to participate actively in the SWRCB's May 6 workshop concerning

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<sup>2</sup>As discussed in our March 10 letter and above, Roseville and San Juan's predecessor filed exactly the sort of water-right applications that would have had area-of-origin priority under the Ninth Circuit's logic and received the protection of Term 14 as a result.

<sup>3</sup>In contrast to the situation with the CVP water-service contracts of TCCA's members, Term 14 is incorporated into CVP water-service contracts because they define the key term "Project Water" as water that "is developed, diverted, stored, or delivered by the Secretary . . . in accordance with the terms and conditions of water rights acquired pursuant to California law." Under the Ninth Circuit's logic, because SLDMWA's members receive water under such water-service contracts, they are precluded from disputing the applicability and effect of Term 14. Of course, even leaving aside the definition of "Project Water," Reclamation of course must comply with the terms of its water-right permits.

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possible changes to the CVP/SWP temporary urgency order. Please do not hesitate to contact any of us if you have any questions.


Very truly yours,


CITY OF FOLSOM

CITY OF ROSEVILLE


SAN JUAN WATER DISTRICT

By:   
\_\_\_\_\_  
Marcus Yasutake  
Environmental and  
Water Resources Director

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Director,  
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Attorneys for the City of Folsom, the City of Roseville  
and San Juan Water District

Enclosures

8618/American River/L0425142rsb SWRCB Urgency

Cc (w/encl): Hon. Tom McClintock  
Hon. Ami Bera  
Hon. Ted Gaines  
Hon. Jim Nielsen  
Hon. Darrell Steinberg  
Hon. Lois Wolk  
Hon. Ken Cooley  
Hon. Beth Gaines  
Hon. Jim Frazier  
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Frances Spivy-Weber  
Tam Dudoc  
Steven Moore  
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Michael Buckman

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David Murillo

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Dan Nelson

# DRAFT April 2014

## 90%-Runoff Exceedance Outlook - WITH SALINITY BARRIERS

### Federal End of the Month Storage/Elevation (TAF/Feet)

		Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Folsom	436	512	522	447	359	303	273	259	247	248	261	318	440
	Elev.	418	419	410	397	388	382	380	377	377	380	390	409

### Monthly River Releases (cfs)

American	956	954	1920	1958	1474	935	806	863	837	800	800	800
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## 50%-Runoff Exceedance Outlook

		Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Folsom	436	531	569	520	440	345	287	308	347	407	506	601	666
	Elev.	420	425	419	409	395	385	389	395	404	417	429	436

### Monthly River Releases (cfs)

American	953	1220	1700	2062	2338	1712	892	850	850	850	3000	4000
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Persons engaging, etc., in strikes against or advocating overthrow of U. S. Government.

Affidavit.

Penalty.

60 Stat. 810.

Payment of claims.

60 Stat. 843; 62 Stat. 1008.  
28 U. S. C., Supp. II, § 2672.  
*Ante*, pp. 82, 106.  
60 Stat. 903.  
Short title.

may suspend from time to time in whole or in part compliance with this section if he should deem such course to be in the public interest.

SEC. 3. No part of any appropriation contained in this Act, or of the funds made available for expenditure by any corporation included in this Act, shall be used to pay the salary or wages of any person who engages in a strike against the Government of the United States or who is a member of an organization of Government employees that asserts the right to strike against the Government of the United States, or who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: *Provided*, That for the purposes hereof an affidavit shall be considered prima facie evidence that the person making the affidavit has not contrary to the provisions of this section engaged in a strike against the Government of the United States, is not a member of an organization of Government employees that asserts the right to strike against the Government of the United States or that such person does not advocate, and is not a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: *Provided further*, That any person who engages in a strike against the Government of the United States or who is a member of an organization of Government employees that asserts the right to strike against the Government of the United States, or who advocates, the overthrow of the Government of the United States by force or violence and accepts employment the salary or wages for which are paid from any appropriation or fund contained in this Act shall be guilty of a felony and, upon conviction, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both: *Provided further*, That the above penalty clause shall be in addition to, and not in substitution for, any other provisions of existing law.

SEC. 4. The Governor of the Panama Canal and the Chief of Engineers, Department of the Army, are authorized to employ services as authorized by section 15 of the Act of August 2, 1946 (5 U. S. C. 55a), in amounts not exceeding \$6,000 for the Panama Canal and not exceeding \$150,000 for the Corps of Engineers, Department of the Army: *Provided*, That the rates for individuals shall not exceed \$100 per diem.

SEC. 5. Appropriations for civil functions of the Department of the Army may be used for the payment of claims under the Act of July 3, 1943, and section 403 of the Federal Tort Claims Act (28 U. S. C. 2672); examination of estimates of appropriations in the field; and for health programs as authorized by law (5 U. S. C. 150).

SEC. 6. This Act may be cited as the "Civil Functions Appropriation Act, 1950".

Approved October 13, 1949.

[CHAPTER 690]

AN ACT

October 14, 1949  
[H. R. 165]  
[Public Law 356]

To authorize the American River Basin development, California, for irrigation and reclamation, and for other purposes.

American River Basin development, Calif.

Folsom Dam and Reservoir.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Central Valley project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby reauthorized to include the American River development as hereinafter described, which development is declared to be for the same purposes as described and set forth in the Act of Congress of August 26, 1937 (50 Stat. 850).

SEC. 2. The American River development shall consist of: Folsom

Dam and Reservoir having a storage capacity of approximately one million acre-feet, to be constructed by the Corps of Engineers at such point below the confluence of the North Fork and the South Fork of the American River near the city of Folsom, California, as the Secretary of the Army and the Chief of Engineers after consultation with the Bureau of Reclamation and other appropriate State, Federal, and local agencies may find most advisable; and the following features for the development and use of water, to be constructed, operated, and maintained by the Secretary of the Interior through the Commissioner of Reclamation: A hydroelectric power plant with a generating capacity of approximately one hundred and twenty thousand kilowatts, and necessary hydroelectric afterbay power plants and necessary electric transmission lines to the nearest practical interconnection with the Central Valley project transmission system; a storage dam with a capacity of approximately forty thousand acre-feet to be located on Sly Park Creek, a tributary of the North Fork of Consumnas River, with necessary appurtenant works, including a diversion dam on Camp Creek, tunnel, conduit, and canals for the delivery of water to lands in El Dorado County, and incidental works appurtenant thereto. The Secretary of the Interior, through the Bureau of Reclamation, is hereby further authorized and directed to conduct the necessary investigations, surveys, and studies for the purpose of developing plans for disposing of the water and electric power which would be made available by the project, including studies of such supplemental works and equipment as may be required to maintain a firm supply of electric energy, and render reports thereon which would set forth the works required for such disposition, together with findings as to their engineering and financial feasibility, including a study of the water resources and requirements of the entire American River watershed and the areas serviceable therefrom, and particularly of a diversion canal at the highest feasible level extending southerly from Folsom Reservoir as will permit the maximum beneficial use of the water for irrigation of the lands lying under said canal in El Dorado and Sacramento Counties; a diversion canal at the highest feasible level for the purpose of securing the maximum beneficial use of the water in Placer County extending northerly from such reservoir to a point on the Bear River in the vicinity of Sheridan, California, and a conduit or conduits with necessary pumping plants and supplemental works extending from the most feasible diversion point on the Central Valley project, California, to serve lands and municipalities in Contra Costa, Alameda, Santa Clara, San Joaquin, and San Benito Counties.

Hydroelectric power plant.

Investigations, surveys, etc.

Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.

Recommendations of Secretary.

Said studies and the reports thereon shall be submitted to the proper State authorities under the procedure provided for in the Flood Control Act of 1944 (Public Law 534, Seventy-eighth Congress, second session).

Reports, etc., to States.  
58 Stat. 887.  
33 U. S. C. §§ 701a-1, 701c, 701f, 701j notes, 708, 709; Supp. II, § 701c note; 16 U. S. C., §§ 460d, 825s; 43 U. S. C., § 390.

Folsom Dam and Reservoir, upon completion of construction by the Corps of Engineers, to the extent where water from said reservoir is ready to be turned either into the power plant or conduits, shall be transferred to the Bureau of Reclamation for operation and maintenance under the supervision of the Secretary of the Interior together with the other features of the American River development herein

Transfer to Bureau of Reclamation.

43 U. S. C. § 372 et  
seq.; Supp. II, § 385a  
et seq.

58 Stat. 890.  
33 U. S. C. § 709.  
Consultation with  
local interests.

Coordination, etc.,  
of works.

Appropriation au-  
thorized.

authorized for construction by the Bureau of Reclamation, all in accordance with the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto). After the transfer as provided herein, the dam shall be operated for flood control in accordance with criteria established by the Secretary of the Army as provided for in section 7 of the Flood Control Act of 1944 (Public Law 534, Seventy-eighth Congress, second session).

SEC. 3. In locating and designing the works authorized for construction by section 2 of this Act the Secretary of the Army and the Chief of Engineers, the Secretary of the Interior and the Commissioner of Reclamation shall give due consideration to the report set forth in Bulletin Numbered 26 of the Division of Water Resources of the Department of Public Works of the State of California, and shall consult the local interests to be affected by the construction and operation of said works, through public hearings or in such other manner as in their discretion may be found best suited to a maximum expression of the views of such local interests.

SEC. 4. The Secretary of the Interior is directed to cause the operation of said works to be coordinated and integrated with the operation of existing and future features of the Central Valley project in such manner as will effectuate the fullest and most economic utilization of the land and water resources of the Central Valley project of California for the widest possible public benefit.

SEC. 5. There are hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as are necessary to carry out the purposes of this Act.

Approved October 14, 1949.

#### [CHAPTER 691]

#### AN ACT

October 14, 1949  
[H. R. 3191]  
[Public Law 357]

To amend the Act approved September 7, 1916 (ch. 458, 39 Stat. 742), entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", as amended, by extending coverage to civilian officers of the United States and by making benefits more realistic in terms of present wage rates, and for other purposes.

Federal Employees'  
Compensation Act  
Amendments of 1949.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Federal Employees' Compensation Act Amendments of 1949".

### TITLE I—SUBSTANTIVE AMENDMENTS

#### WAITING PERIOD MODIFIED

39 Stat. 743

39 Stat. 743.  
5 U. S. C. § 759.  
Post, p. 862.  
39 Stat. 743.

Use of leave.

Supra.

SEC. 101. (a) Section 2 of the Act approved September 7, 1916 (ch. 458, 39 Stat. 742) (hereafter in this Act referred to as the "Federal Employees' Compensation Act"), as amended (5 U. S. C., 1946 edition, sec. 752), is hereby amended to read as follows:

"SEC. 2. That with respect to the first three days of temporary disability the employee shall not be entitled to compensation except as provided in section 9, unless such disability exceeds twenty-one days in duration or is followed by permanent disability."

(b) Section 8 of such Act (5 U. S. C., 1946 edition, section 758), is amended to read as follows:

"SEC. 8. If at the time the disability begins the employee has annual or sick leave to his credit he may use such leave until it is exhausted, in which case his compensation for disability shall not begin, and the time periods specified in section 2 shall not begin to run, until the annual or sick leave has ceased."