WHY AND HOW TO AVOID PREJUDGMENT OF FUTURE WATER RIGHTS ISSUES IN THE PRESENT WATER QUALITY RULEMAKING

Submitted By

AREA I REPRESENTATIVES AND OTHER FARMERS

To The

STATE WATER RESOURCES CONTROL BOARD

In Connection With The

DECEMBER 1994

DRAFT WATER QUALITY CONTROL PLAN

SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY

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Introduction

This statement is made by Edwin R. O'Neill, Francis A. Orff, and Y. Stephen Pilibos, court-appointed representatives of Area I, and other landowners and water users in Area I, in connection with the pending consideration by the State Water Resources Control Board (the "Board") of the December 1994 Draft Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (the "Draft Plan").

Area I, the original area of Westlands Water District (the "District"), consists of nearly 400,000 acres of prime farmland. Its principal source of irrigation water is the San Luis Unit ("Unit") of the Central Valley Project ("CVP") operated by the Bureau of Reclamation (the "Bureau"). Area I farmers have purchased and applied to their lands 900,000 acre feet of such water since the late 1960s under water rights permits issued by the Board.

This statement follows up upon the letter of our counsel, Smiland & Khachigian, dated February 22, 1995 (Exhibit 9 hereto), the oral comments of Christopher G. Foster, Esq. of that firm at the Board's February 23, 1995 hearing, and subsequent conversations between Mr. Foster and Board staff.

The essence of our concern is that by adopting the objectives set forth in the Draft Plan, especially those relating to flow and CVP operations, the Board will be both acting in excess of its jurisdiction under the Porter-Cologne Water Quality Contract Act (the "PCA") and jeopardizing its future jurisdiction under the Water Commission Act (the "WCA"). While purporting merely to

establish water quality objectives under the PCA, the Draft Plan includes flow requirements that could effectively modify and abridge water rights in permits issued by the Board under the WCA. The Bureau's actions to achieve these objectives, prior to any water rights adjudications by the Board, could effectively abolish the Board's authority to determine the allocation of state-created water rights, and violate its duties to enforce permits and prevent diversions.

In Section I of this statement we suggest protective language to be inserted in any final version of the Draft Plan and in any adopting resolutions to make clear, among other things, that the Board (a) is only acting within the scope of its water quality regulatory jurisdiction, (b) is not foreclosing subsequent rulings within the scope of its water rights adjudicatory jurisdiction, and (c) is now taking vigorous action to enforce existing permits to appropriate water, and to prevent the unlawful diversion of such water, as required by law.

In Section II we describe Area I's existing water rights under statute, contract, permit, and judgment. In Section III we describe the regulatory schemes recently invoked by the Bureau to take or impair such rights. In Section IV we analyze the Board's authority and duties under the PCA, as well as the Board's duties under the water rights provisions of the WCA, with reference to the impact of the Draft Plan on Area I. And in Section VII we discuss certain policy implications of the current process.

I. REQUEST FOR PROTECTIVE LANGUAGE

In our counsel's letter of February 22, 1995 we said (at page 2) the following:

> "We would welcome the opportunity to discuss with the Board techniques for insuring that Area I's rights are not effectively modified or amended pending a formal water right decision. One such technique would be for the Board to require the Bureau to operate the CVP under the Draft Plan in a manner that gives full deference to Area I's existing rights."

That letter further stated (at page 12) the following:

> "It is the hope of the Area I parties that they can work with the Board and its staff and other interested parties in the coming weeks and months with a view to Board action with respect to the Draft Plan which protects Area I rights from direct or indirect impairment by the federal government."

The same point was made by Mr. Foster on our behalf at the February 23, 1995 public hearing. Board Chair Caffrey seemed to acknowledge the existence of, if not present the solution to, the problem facing Area I, when he responded:

> "Mr. Foster, thank you very much. I don't quite know how to answer your concern. . . .
>
> "I don't have an answer in terms of how this proposed plan may or may not affect [Area I's allocation]."

The basic purpose of this document is to suggest such an answer and to ask the Board to implement it.

After subsequent discussion with staff and independent analysis, the Area I representatives and farmers submitting this statement respectfully request that the Board insert in any final version of the Draft Plan and in any adoption resolutions protective language substantially similar to the following:

"NEITHER THE ADOPTION NOR THE IMPLEMENTATION OF THIS WATER QUALITY CONTROL PLAN SHALL BE DEEMED DIRECTLY OR INDIRECTLY TO ADJUDICATE OR DETERMINE THE EXISTENCE, NATURE, OR EXTENT OF ANY WATER RIGHTS, ANY MODIFICATIONS OR AMENDMENTS THERETO, THE OWNERS OR BENEFICIARIES THEREOF, ANY DUTIES OF THE U.S. BUREAU OF RECLAMATION AND ANY WATER OR IRRIGATION DISTRICT TO PROTECT OR PRESERVE SUCH WATER RIGHTS, ANY DUTIES OF ANY OTHER INVOLVED FEDERAL OR STATE AGENCY IN CONNECTION THEREWITH, OR THE RELATIVE RIGHTS, DUTIES, OR PRIORITIES AMONG ANY WATER RIGHTS CLAIMANTS AND ANY OTHER BENEFICIAL USERS OF THE WATER IN QUESTION. ANY SUCH ADJUDICATIONS OR DETERMINATIONS SHALL BE MADE AT A LATER TIME OR TIMES BY THE BOARD IN APPROPRIATE WATER RIGHTS ADJUDICATIONS OR BY A COURT OR COURTS OF COMPETENT JURISDICTION. ANY CLAIM OR DEFENSE IN SUCH LATER ACTION THAT THIS PLAN EFFECTS SUCH AN ADJUDICATION OR DETERMINATION MAY BE CHALLENGED AT THAT TIME AND IN THAT PROCEEDING ON THE GROUND THAT ANY SUCH ADJUDICATION OR DETERMINATION THEREON WAS INVALID, UNAUTHORIZED, UNREASONABLE, OR OTHERWISE UNLAWFUL."

We also ask the Board to take vigorous action under Section 1825 of the WCA to protect and defend Area I's rights.

II. AREA I RIGHTS

At the February 23, 1995 public hearing Board Member Del Piero quizzed Mr. Foster about the existence, nature, and extent of Area I's rights. Among other things, he said: "I didn't understand

Area I had any rights." Similar questions have since been raised by the staff.

In fact, Area I has irrigated for three decades pursuant to strong water rights created, and currently in effect, under statute, contract, permit, and judgment. In this section, we set out an overview of Area I's water rights.

Until recently the impairment of these water rights was unthinkable. In Barcellos I the Court took judicial notice that diversions of the type effected here create "economic catastrophe." Barcellos & Wolfsen, Inc. v. Westlands Water District, 491 F. Supp. 263, 265 (E.D. Cal. 1980). Furthermore, the Ninth Circuit has noted: "The old policies deposit a moraine of contracts, conveyances, expectations and investments. Lives, families, businesses, and towns are built on the basis of the old policies." Madera Irrigation District v. Hancock, 985 F.2d 1397, 1400 (9th Cir. 1993) cert. denied 114 S. Ct. 59 (1993). The U.S. Supreme Court's famous opinion in Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 299-300 (1958) concluded: ". . . [I]t seems farfetched to foresee the Federal Government 'turning its back upon a people who had been benefitted by [the CVP]' [quoting the first Senator Gore] and allowing their lands to revert to desert. The prospect is too improbable to figure in our decision." But what was once thought to be too improbable to consider has actually been happening in Area I in the last three years. At stake in this proceeding is whether the Board will allow -- indeed, perhaps enable -- the Bureau to turn its back on Area I, after all.

A. FEDERAL RECLAMATION STATUTES

In our December 20, 1994 memorandum of points and authorities (Exhibit 8 hereto) in support of our pending motion for judgment in the case of Westlands Water District v. U.S.A., we set out in detail (at pages 9-34) six rights, and the Bureau's correlative duties, with respect to irrigation water under federal reclamation water. In our February 22, 1995 letter to the Board we briefly summarized (at pages 3-4) those rights and duties.

Under federal reclamation statutes, the Bureau owes duties to Area I farmers (1) not to impair Area I's state water rights, (2) to use the water for irrigation, (3) to use it in the Unit's service area, (4) to sell it for the purpose of repaying the costs of the project, (5) not to impair Area I's judgment rights, and (6) to treat Area I equally with all CVP contractors.[1]

B. FEDERAL RECLAMATION CONTRACTS

Our February 22, 1995 letter briefly describes some of the key terms of Area I's 1963 water service contract with the Bureau (Exhibit 3 hereto). The 1963 contract was validated in a state court suit. At all times, Area I farmers have fully performed thereunder.[2]

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[1] Certain of the landowners submitting this statement have instituted litigation against the Bureau challenging its failure to construct and operate drainage facilities serving Area I. Sumner Peck Ranch, Inc. v. Bureau of Reclamation, 823 F. Supp. 715 (E.D. Cal. 1993). The district court has recently held that federal reclamation statutes establish such a mandatory duty.

[2] In Barcellos III the district court rendered certain advisory opinions about the Bureau's contractual duties under the 1963 contract. Barcellos & Wolfsen, Inc. v. Westlands Water

(continued...)

In 1965 the Bureau executed a repayment contract relating to construction of water distribution and drainage facilities within Area I (Exhibit 5 here). The farmers have also performed this contract.

In the late 1960s and early 1970s Area I landowners executed recordable contracts with the Bureau agreeing to sell their excess lands at their "dry" value (Exhibit 4 hereto). All such excess lands have been sold and the buyers thereof now hold such lands under severe resale restrictions, as required under those contracts.

For three decades, except in drought years and as discussed below, Area I farmers purchased, and the Bureau sold, 900,000 acre feet of irrigation water. Service charges and repayments borne by Area I farmers represent a major portion of CVP revenues and cost recovery. Area I lands have been broken up, pursuant to federal acreage limitation policy.

C. STATE APPROPRIATION PERMITS

At the February 23, 1995 hearing Board Member Del Piero asked Mr. Foster the following question: "But . . . the Bureau actually holds the permits, the farmers do not? In fact, Area I farmers own the rights.

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[2](...continued)
District, 849 F. Supp. 717 (E.D. Cal. 1993). The propriety of rendering such opinions, and their correctness, are currently under appellate review in the Ninth Circuit. O'Neill v. U.S.A., No. 93-17154.

Our February 22, 1995 letter briefly summarized (at page 5) the rights we possess under the permits issued by the Board (Exhibits 1 and 2 hereto).

The permits provide for the "perpetual right" to use the water in question. The purpose of use is identified as "irrigation." The place of use is Area I, as each right is expressly made "appurtenant" to Area I lands.

Our water rights under the permits were perfected when we first applied the water upon our lands. This occurred in the late 1960s and early 1970s.

The permits describe the Bureau as the "trustee" of the right to use the water recognized thereunder. The District, too, is a "trustee" with respect to such water. Ivanhoe Irrigation District v. All Parties, 47 Cal. 2d 597, 624 (1957) reversed on other grounds Ivanhoe, 357 U.S. 275. The Bureau and the District have also been described as "intermediary agent[s]," as well as co-trustees, as to the water in question. Murphy v. Kerr, 296 F. 536, 545 (D.N.M. 1923).

The permits expressly provide that we and our fellow Area I water users and project beneficiaries are the "true owners" of the water rights covered thereby. This is in accord with well-established state and federal law. Ickes v. Fox, 81 L. Ed. 525, 531 (1937); Nebraska v. Wyoming, 89 L. Ed. 1815, 1829-30 (1944); Nevada v. U.S., 77 L. Ed. 2d 509, 522 (1983).

The Board, as issuer of the permits, also bears a special responsibility to protect Area I landowners' rights thereunder. As stated in Section 1825 of the WCA, for example, the Board should

". . . take vigorous action to enforce the terms and conditions of existing permits and licenses to appropriate water and to prevent the unlawful diversion of water." (Emphasis added.) In particular, the Board should not permit -- let alone participate in -- any breach of trust by the Bureau or the District under the two permits. It must take vigorous action to prevent any such breach.

D. 1986 STIPULATED JUDGMENT

The 1986 stipulated judgment in the Barcellos case (Exhibit 6 hereto) is described generally in the February 22, 1995 letter to the Board from our counsel (at pages 5-6). It enforced certain of the above rights against the Bureau and the District.[3]

Paragraph 22.1 of the 1986 stipulated judgment provides, in relevant part, as follows: ". . . Area representatives are hereby authorized to represent the two major areas of the District, Area I and Area II, for the purposes of enforcement of [the litigation provisions of] this Judgment . . . and Area concurrence under Paragraph[] 4.3 . . . above." Paragraph 22.2 provides that the representatives of Area I shall include Edwin O'Neill, Frank Orff, and Y. Stephen Pilibos. Paragraph 4.3 provides, in relevant part, as follows: "The District shall not enter into any contract which would modify the rights and obligations under the 1963 Contract

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[3] The history of the litigation and terms of the judgment are discussed in greater detail in Barcellos II and several secondary sources. Barcellos & Wolfsen, Inc. v. Westlands Water District, 899 F.2d 814, 817-19 (9th Cir. 1990); B. Wilson, "Westlands Water District And Its Federal Water: A Case Study Of Water District Politics," 7 Stan. Envtl. L.J. 187 (1988); R. Wahl, Markets For Federal Water: Subsidies, Property Rights, And The Bureau Of Reclamation (1989) at 107-24.

prior to 2008, except with the concurrence of Area I . . . provided, that such concurrence may be obtained only by lack of objection [after 30 days' notice] by Area I representatives . . . ."

III. RECENT INVOLUNTARY REALLOCATIONS

For three decades Area I farmers have, except as discussed above, purchased from the Bureau and applied to their lands 900,000 acre feet of CVP irrigation water. However, in the past three water years the Bureau has refused to sell to Area I farmers their full entitlement. In water year 1993-1994, a wet year, the Bureau effected a 50% "involuntary reallocation" of Area I's water. Last year the reduction was 65%. This year -- one of the wettest on record -- 25% of Area I's water is being diverted to the Delta for the benefit of sport and commercial fishers, duck hunters, and their environmental allies. What defenses does the Bureau offer to justify these involuntary reallocations of water protected by firm water rights?

At the February 23, 1995 public hearing Board Member Del Piero asked Mr. Foster for clarification of the ground or grounds upon which the Bureau has based its actions. He asked whether the Bureau should not be "approached . . . for an affirmative answer one way or the other that the reason for the reduction is based on that or some other activities?" Board Chair Caffrey similarly said: "It seems to me . . . that some clarification from the Bureau might be in the offing for you as to how they get to their 75 percent allocation for your clients." Area I representatives are

seeking such clarification from the Bureau and will report their findings to the Board. What we know now is this:

First, the Bureau is secretive and vague about the ground or grounds upon which it relies. As shown below, we believed that this is because each claimed ground is, when analyzed separately, completely lacking in merit.

Second, the Bureau constantly shifts and vacillates among purported grounds. In each of the three years in question the alleged bases for the involuntary reallocations from Area I has been different. Indeed, the grounds have even shifted within a given year.

Third, the consistent theme behind each and every one of the Bureau's alleged excuses has in essence been: "The Devil made me do it." Sometimes the Bureau points the finger of blame at Congress. At other times it points to one of its fellow agencies of the federal government. Now the Bureau appears bent on attempting to shift responsibility to the Board.

A. WILDLIFE REFUGES UNDER CVPIA

One body the Bureau has pointed the finger of blame at is Congress. It has claimed that certain involuntary reallocations of Area I water were mandated by Section 3406(d)(1) of the CVP Improvement Act ("CVPIA"). But for numerous reasons Congress did not direct the Bureau make those particular reallocations from Area I. Instead, the Bureau desires to effect them to implement its new policy preferences.

For instance, Congress has made clear in Section 3406(d)(1) that the Bureau, in implementing the initial increment of any refuge diversion, "shall endeavor to diversify sources of supply in order to minimize possible adverse effects on [CVP] contractors." The Bureau has not so diversified the sources of supply to minimize impacts on Area I. Instead, it has obviously concentrated the source of the refuge supply in the Unit and, by so doing, maximized the harm to Area I.

Furthermore, Section 3406(d)(1) provides, as follows: "The quantities of water required to supplement the quantities provided . . . shall be acquired . . . in cumulating increments of not less than ten percent per annum through voluntary measures . . . which do not require involuntary reallocations of project yield." But the Bureau has relied upon such "involuntary reallocations."

B. DEDICATION OF 800,000 ACRE FEET UNDER CVPIA

The Bureau has also claimed that Congress commanded it to effect involuntary reallocations of Area I's water under Section 3406(b) of the CVPIA. But for various reasons that claim, too, is empty.

For example, CVPIA Section 3406(b)(2) directs the government to "dedicate" 800,000 acre feet of CVP yield for certain purposes. Such dedication of CVP yield does not include expropriating major portions of Area I's water. The language of the statute is elucidated by relevant legislative history. Senator Bradley, a chief sponsor of the CVPIA, described "several ways that

that 800,000 acre-feet could easily be obtained" by "improving the supply side by a total of way over 800,000 acre-feet," including the "conservation" of water elsewhere and the "purchase" of water from others. 138 Cong. Rec. S17315 (daily ed. Oct. 7, 1992). None of eight specific forms of dedication envisioned by Senator Bradley involved a bald grab of any area's water.

As a second example, Section 3406(b)(2) also directs the government to "manage" the 800,000 acre feet for certain rather ill-defined purposes. Neither salmon nor smelt protection is specifically mentioned as such a purpose. The section does state that the dedicated water shall be managed, among other things, to assist the Board in its efforts to "protect the waters" of the Delta. But, in our view, this does not embrace the regulation of Delta flow or Bureau operation of the CVP.

C. SALMON PROTECTION UNDER ESA

The Bureau has also claimed that certain actions taken by the National Marine Fisheries Service ("NMFS") under Section 7 of the Endangered Species Act ("ESA") compelled it to take Area I's water. This purported excuse is also lacking in merit for various reasons, including the following two.

The Bureau claims that its general duty to avoid jeopardy to salmon mandates that it involuntarily reallocate Area I's water. But federal reclamation statutes trump ESA, not the other way around, as the Bureau contends. In Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257, 262 n. 5 (9th Cir. 1984), cert. denied 470 U.S. 1083 (1985) the Ninth Circuit said: "[W]e

need not reach the question whether, given competing mandatory statutory directives, the Secretary would be required to use the project's water entirely for conservation purposes under ESA . . . ." But the leading case which has considered the effect of ESA in connection with conflicting statutory mandates, Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d 109 (D.C. Cir. 1989), 962 F.2d 27, 34 (D.C. Cir. 1992) ruled that ESA yields to a mandate in an agency's organic act, as follows:

> "The Trust reads section 7 essentially to oblige the Commission to do whatever it takes to protect the threatened and endangered species that inhabit the Platte River basin; any limitations on FERC's authority contained in the FPA are implicitly superseded by this general command. . . . We think the Trust's interpretation of the ESA is far-fetched. As the Commission explained, the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act."

Furthermore, under Sweet Home Chapter v. Babbitt, 17 F.2d 1463 (D.C. Cir. 1994), ESA does not prohibit the continued sale and delivery of irrigation water to Area I as a "taking" of salmon. Instead, the concept of taking, in the context of operating a federal reclamation project pursuant statutory mandates, is narrowly interpreted, as it is under similar statutes. U.S. v. Hayashi, 5 F.3d 1278 (9th Cir. 1993) (Marine Mammal Protection Act); Citizens Interested In Bull Run, Inc. v. Edrington, 781 F. Supp. 1502 (D. Or. 1992) (Migratory Bird Treaty Act); Seattle Audubon Society v. Evans, 952 F.2d 297 (9th Cir. 1991) (same).

D. SMELT PROTECTION UNDER ESA

The Bureau also has claimed that it is duty-bound under the general provisions of ESA to effect involuntary reallocations of Area I's water to avoid jeopardy to or the taking of smelt.

But, for the reasons stated in the Platte River Whooping Crane case, ESA's general jeopardy provision does not apply and is superseded where specific reclamation statutes mandate the sale and delivery of irrigation water.

And, as in Sweet Home, the operation of the CVP in order to carry out its basic purpose of delivering irrigation water is not an ESA taking.[4]

E. WATER QUALITY UNDER CWA

The Environmental Protection Agency ("EPA") suggests in its January proposed rules, 50 Fed. Reg. 810, 813, that "it is refraining from proposing direct revisions to the flow criteria," but, instead, has certain "habitat conditions" for which the Board may exercise its "full discretion over allocation of water" in order to achieve. The EPA further states that the water quality criteria which it sets should be implemented by the Board "by making . . . revisions to . . . water rights . . . ." Id. at 821.

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[4] In Barcellos III the district court abstained from deciding these CVPIA and ESA issues, and the propriety of such abstention is currently under review in the Ninth Circuit. These issues are among those raised by our pending motion in Westlands. In Sumner Peck Ranch, as in the above actions, the government asserted as affirmative defenses to its mandatory statutory duty to provide drainage would-be countervailing environmental mandates under ESA, CVPIA, PCA, and the Clean Water Act ("CWA"). In trial late last year, the district court held that there was no scientific or legal justification for such defenses.

However, the CWA clearly provides that water rights may not be so abrogated. Section 101(g) thereof, 33 U.S.C. 1251(g), provides:

> "It is the . . . policy of Congress that nothing in this chapter [33 U.S.C. sections 1251-1377] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."

The Draft Plan is allegedly being prepared, and made subject to adoption pursuant to Section 13170 of the PCA which authorizes the Board to "adopt water quality control plans . . . for waters for which water quality standards are required by the Federal [CWA]." The Draft Plan, by attempting to comply with, or otherwise substitute objectives equivalent to, EPA criteria, may not indirectly abrogate "rights to quantities of water."

IV. PROPOSED NEW JUSTIFICATIONS

Uncertain about the viability of the purported excuses upon which it has attempted to rely so far, the Bureau seek out other agencies to blame for the involuntary reallocations it itches to make. In particular, it leads the current effort to induce the Board to create two new purported grounds therefor, the water quality regulation currently proposed in the Draft Plan under the PCA, and possible future water rights adjudications under the WCA.

A. WATER QUALITY REGULATION UNDER PCA

(1) No Authority Over Flow Or Operations

The Draft Plan claims (at 7) that the Board may rely on its authority under the PCA to regulate flow and CVP operations in a water quality control plan. The Draft Plan argues that "the rate and quantity of flow, the direction of flow, and the operations of

the water projects, including their export pumping," fall within the definition of water quality set forth in Water Code § 13050(g), and thus are capable of regulation.

However, Section 13050(g) defines the "quality of water" to mean the "chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use." The Draft Plan cites no authority which validates the Board's crabbed interpretation of this definition to include flow and operational restraints as "water quality."

The February 22, 1995 comments of the Joint California Water Users (the "Joint Users") correctly point out (at 3) that the Board took an opposite position in its 1991 proceedings. Additionally, the Joint Users cite (at 4) appropriate authorities which show that "[w]ater flow and project operational parameters generally are not considered to be 'physical characteristics' of water and therefore cannot be considered attributes for which water quality objectives are appropriate." The Area I parties join the Joint Users' comments to the extent that they show that the PCA does not provide authority to the Board to set flow and operational objectives in a water quality control plan.

The Draft Plan suggests (at 7-8) that it may rely upon its statutory authority under the WCA concerning the adjudication and determination of water rights in order to include flow and operational mandates in a water quality control plan.

First, the Draft Plan argues (at 7) that because Water Code Section 174 combined the "water rights and . . . water quality functions of state government" into a single governmental

agency, the Board is authorized to consider both in the same proceeding. We disagree. The only case to consider such a combined procedure to date considered it "unwise." U.S. v. State Water Resources Control Board, 183 Cal. App. 3d 82, 119 (1986).

Second, the Draft Plan claims (at 8) that Sections 1242.5, 1243.5, 1257, and 1258 of the WCA, relating to the adjudication of appropriative rights, support the Board's inclusion of flow and operational provisions in a water quality plan. The Area I parties agree with the Joint Users statement (at 4, fn. 3) that these sections in fact "reflect the clear distinction the legislature has established and maintained between [water right and water quality]functions" and do not support any claimed authority to include flow and operation mandates in a water quality control plan otherwise governed by the PCA. Section 1242.5 relates to a situation where the Board "may approve appropriation." Section 1243.5 concerns the Board's "determining the amount of water available for appropriation." Sections 1257 and 1258 are only applicable when the Board is "acting upon applications to appropriate water." These sections are simply inapplicable to the Board's adoption of a water quality control plan pursuant to the PCA.[5]

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[5] The EPA recognized in its January 6, 1994 proposed rules, 59 Fed. Reg. 810, 821, that only after the Board follows state procedures relating to modification of water rights permits, may it possibly regulate flows and project operations. The EPA said: "Under the CWA, the states have a primary role in developing measures implementing water quality criteria. EPA expects that the State Board would implement these salinity criteria by making appropriate revisions to operational requirements included in water rights permits issued by the State Board. Consistent with the mandates of section 101(g) of the CWA, the State Board has full

(continued...)

Instead of suggesting that the Board's combined authorities allow it to reduce water allocations under permits when it legislates water quality objectives, the Board should be taking "vigorous action" to protect rights to water under Section 1825 of the CWA.

The Joint Users' February 22, 1995 comments state (at 5) that, notwithstanding their contention that the Draft Plan, as a water quality control plan, may not set flow and operational objectives, the plan name may be changed to "Coordinated Esturine Protection Plan," and the Board may rely on "multiple legal authorities," including statutes regarding the adjudication of appropriation water rights (Water Code Sections 1251, 1253, 1256, 1257 and 1258), in determining the flow and project operations for the Delta. There exists no statutory authority for such a plan.

Additionally, and, in any event, because the Draft Plan would set flow and diversion mandates, it would effectively adjudicate, and result in the impairment of, water rights without any of the due process and other procedure protections contained in the WCA and regulations. Water Code §§ 1250 et seq.; 1394; 1410 et seq.; 23 Cal. Admin. Code § 648 et seq. Any such adjudication and resulting impairment would violate Section 764 of the Board's regulations, which provides:

> "The board may hold a hearing to obtain evidence necessary to allow it to adopt or amend a water quality control plan pursuant to Water Code Section 13170 in combination with a hearing regarding a specific water

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[5](...continued)
discretion in determining the source of water flows necessary to meet these criteria." As discussed below, water rights may not be impaired in order to promote nonvested beneficial interests.

> right application or petition for a change, or in connection with a hearing regarding an exercise of the board's reserved jurisdiction. Whenever the board decides to hold a combined hearing and to make only one record for the combined proceeding, the board's hearing shall meet all of the requirements of Part 2 (commencing with Section 1200) of Division 2 of the Water Code." 23 Cal. Admin. Code § 764.

The present proceeding does not meet the requirements of Part 2 of Division 2 of the Water Code. (See e.g., January 3, 1995 Notice of Public Hearing (at 2) which recites that the hearing will be conducted in accordance with the procedural requirements of "Division 7," not Division 2, of the Water Code.)

In conclusion, the Draft Plan cannot contain flow or operational restrictions which affect the quantity of water capable of being delivered to the Area I parties. The inclusion of such restrictions, either as water quality objectives or otherwise, is not authorized under the PCA.

(2) Other Defects In Current Proceedings

In addition to the foregoing, any prejudgment by way of the Draft Plan of future water rights issues -- whether such be inadvertent or advertent -- will be unlawful under various other grounds, including the following:

(a) No Authority To Alter Water Rights

Our February 22, 1995 letter discusses (at page 10) the Board's duty under CPA to consider "economic" factors in making water quality regulations which are "reasonable." Under these and similar provisions a new, general water quality objective cannot be

used by the Bureau or any other agency to override or impair existing, specific water rights.

(b) Administrative Procedure Act

Our February 22, 1995 letter described (at pages 10-11) the defects in the Board's current proceedings under the Administrative Procedure Act.

(c) California Environmental Quality Act

Our February 16, 1993 letter (Exhibit 7 hereto) describes (at pages 2-3) the Board's duties under the California Environmental Quality Act. So, too, does our February 22, 1995 letter (at page 11).

(d) Federal Preemption

Our February 16, 1993 letter (at pages 7-9) and our February 22, 1995 letter (at pages 6-7) describe how federal reclamation law and the Supremacy Clause of the U.S. Constitution mandate that the Board protect Area I's federal water rights.

B. WATER RIGHTS ADJUDICATION UNDER WCA

In a December 21, 1994 letter from the Bureau's Regional Director, Roger Patterson, to NMFS and FWS, the Bureau stated: "It is our intent to immediately modify, upon your concurrence, coordinated operations of the Central Valley Project and State Water Project to conform to California Urban Water Agency/Agricultural Water Users (CUWA/Ag) proposal as modified by

the Principals." Mr. Patterson echoed the Bureau's intention in his comments at the public hearing before the Board on February 23, 1995. Mr. Patterson also stated that the Bureau would shortly be filing a petition to modify the permits for operation of the CVP, including our permits. On February 15, 1995 the Bureau announced for the upcoming wet year 100% allocations of CVP water for agricultural contractors north of the Delta, Friant Division contractors, and Exchange contractors, but only 75% for San Luis Unit contractors, including Area I. It is clear that the Bureau has, and will continue to, use the flow and operation objectives proposed in the Draft Plan as a justification for implementing the Bureau's new policy preferences. The Draft Plan's "back door" use to unilaterally modify the permits, and the concomitant abridgement of Area I's right to receive irrigation water thereunder, would directly contradict both the procedural and statutory requirements of state and federal law.

(1) Change of Purpose Or Place Of Use

No holder of appropriative water rights under California law may change the place of use or purpose of use of such water without the permission of the Board. Water Code § 1701. It is within the Board's discretion to refuse an application to change the place of use or purpose of use of appropriated water. Id. at § 1705. Indeed, before permission to make such a change is granted the Board shall find that the change will "not operate to the injury of any legal user of the water involved." Id. at § 1702. Where the requested change of purpose or place of use is for

preserving or enhancing fish resources the Board may approve such a change only if it "[w]ill not unreasonably affect any legal user of water."

Federal law echoes state law. As described above, federal reclamation law has always upheld state appropriation rights. The CVPIA carries this out. Section 3406(b) of the CVPIA provides that the Bureau "shall operate the [CVP] to meet all obligations under State . . . law," including "all decisions of the [Board] establishing conditions on applicable licenses and permits." Furthermore, Section 3411(a) of the CVPIA prohibits the Bureau from unilaterally modifying water rights permits in order to comply with the Act's directives:

> "Notwithstanding any other provision of this title, the Secretary shall, prior to the reallocation of water from any purpose of use or place of use specified within applicable Central Valley project water rights permits and licenses to a purpose of use or place of use not specified within said permits or licenses, obtain a modification in those permits and licenses, in a manner consistent with the provisions of applicable State law, to allow such change in purpose of use or place of use."

Thus, under both state and federal law, the current purpose of use (irrigation) and the current place of use (Area I) are sacrosanct. The Board may not directly or indirectly change them in this proceeding. Indeed, under Section 1825 of the WCA, it must take "vigorous action" to protect the current purpose and place of use.

(2) Reserved Jurisdiction

We discussed the Board's reserved jurisdiction in our February 16, 1993 letter (at pages 10-12).

Area I's permits were issued by the Board in 1961. Pursuant to Section 1394 of the WCA, the Board reserves continuing jurisdiction (but only until the date of the license) for the purpose of "coordinating" the permit with other CVP permits. It also reserves such jurisdiction for the purpose of "salinity control" of the Delta. The Board's reserved jurisdiction "shall be exercised only after notice to the parties and a hearing." In exercising its reserved jurisdiction under Section 1394 the Board must engage in a "balancing" process. U.S. v. State Board, 182 Cal. App. 3d at 126, 142. Standards so adopted by the Board must be "reasonable" and serve the "public interest." Id. In particular, Section 1256 of the WCA "requires consideration of the public benefits" derived from the CVP. Id. at 141. The Board must balance the "uses of the export recipients" in determining the public interest. Id. at 142. Finally, "necessary findings reflecting balancing of interest" in making that determination are required. Id.

The water quality regulation and water rights adjudications under review in U.S. v. State Board did not, as a matter of fact, authorize or mandate the Bureau to effect involuntary reallocations of Area I's water. Accordingly, its teachings should be seen as dicta. But the court seems to have noted that any water rights changes relating to operational restrictions would be suspect, as follows:

> ". . . [T]he Board recognized that while a higher level was necessary to ensure protection of other species (e.g., . . . salmon), such level of protection would require the 'virtual shutting down of the project export pumps,' contrary to the broader public interest." Id. at 148.

Thus, it is highly doubtful that in subsequent water rights adjudications the Board will be able to exercise any reserved jurisdiction so as to impair Area I's existing water right.

(3) Other Issues

(a) Article X, Section 2

Our February 16, 1993 letter discusses (at page 12) our rights in future water rights adjudications under Article X, Section 2 of the California Constitution.

(b) Public Trust

Our February 16, 1993 letter discusses (at pages 9-10) our rights under the public trust doctrine. So, too, does our December 20, 1994 memorandum of points and authorities (at page 24, note 2).

(c) Impairment Of Contract

Our February 16, 1993 letter discusses (at pages 3-5) our rights under the contract clauses of the California and U.S. Constitutions.

(d) Constitutional Property Rights

Our February 16, 1993 letter discusses (at pages 5-6) our property rights under the due process and takings clauses of the state and federal constitutions.

(e) Separation Of Powers

Our February 16, 1993 letter discusses (at pages 6-7) our judgment rights under the separation of powers doctrine.

Again, as in each case above, the Board cannot impair Area I's water rights in future water rights adjudications, nor can it allow the de facto anticipatory impairment thereof in the current water quality proceeding.

V. POLICY IMPLICATIONS

A. CAMPAIGN TO DESTROY WATER RIGHTS

Our February 16, 1993 letter to the Board analyzes (at pages 12-16) certain legal developments claimed to adversely impact water rights. Our February 22, 1995 letter traces (at pages 7-10) certain scholarship behind those developments.

B. NEED TO PROTECT WATER RIGHTS

The basic policies of the law still support the protection of water rights. The right to use water may be acquired by appropriation. Water Code § 102. Irrigation is the next highest use after domestic purposes. Id. at §§ 106, 1254. The Board shall require certainty in the definition of property rights. Id. at § 109. A permit gives the right to take and use water to the extent and for the purpose therein. Id. at §§ 1381, 1445. And to repeat: the Board shall take "vigorous action" to enforce the terms and conditions of existing permits and to prevent unlawful diversion. Id. at § 1825.

A recent book by a leading natural resource economist shows why the Board must protect water rights. Terry L. Anderson, Water Crisis: Ending The Policy Drought (1983). Professor Anderson demonstrates that ". . . property rights must be well-defined, enforced, and transferable." Id. at 18. He argues:

> "The belief that the doctrine of appropriation contains a great deal of potential for market failure appears to be unfounded. . . . [A] system of well-established and transferable property rights generally promotes efficient water allocation. The allocation problems in many Western states are not the fault of the doctrine of appropriation as much as they are the fault of restrictions placed on water markets. Administrative agencies and courts continually interfere with what constitutes a water right and, hence, with the definition and enforcement of those rights. . . ." Id. at 70.

Professor Anderson further writes:

> "In general, market failure refers to situations where property rights are not well-defined, enforced, or transferable. Since the task of defining and enforcing property rights is largely governmental, it is odd that an insufficient property rights structure is referred to as market failure. It is more appropriate to refer to situations where property rights are not well specified as cases of governmental or institutional failure." (Emphasis in original.) Id. at 80.

A second important work collects articles by leading scholars about the importance of protecting water rights. Terry L. Anderson, ed., Water Rights: Scarce Resource Allocation, Bureaucracy, And The Environment (1983). In his foreword, Professor Jack Hirshleifer explains:

> ". . . [W]ater rights should be well-defined, exclusive, secure, and transferable if the market is to function effectively in redirecting the resource to its most valuable uses. . . . [T]he solution to be feared is subjecting all uses to the whim of a supervisory agency rather than to the even-handed enforcement of carefully defined property rights. When commissions or courts license only temporary uses, with tenure contingent upon 'good behavior' according to some ill-defined notion such as serving the public good, the result is a grossly

inefficient allocation of water resources. . . ." Id. at xix-xx.

In his chapter entitled "Instream Water Use: Public And Private Alternatives," Professor James Huffman states that

> ". . . Instream water uses can be privately supplied if private rights in water are clearly defined, enforced, and transferable through appropriate institutional changes." Id. at 274.

Professor Huffman argues:

> ". . . [T]he designated public officials are in no position to make such allocational decisions with respect to the objective of allocational efficiency. . . . [T]he decisionmakers have very little information about the relative values of the water for the competing uses. . . . [T]he hard truth of the matter is that the delegation of any issue such as water use to a state agency will result in a decision based upon distributional rather than allocational considerations. . . . [P]ublic officials will decide on the basis of who benefits from water use rather than on which water uses will produce the most net benefits. . . .
>
> ". . . The fact that a stream is a good habitat for trout in no way is determinative of whether the stream should be maintained as trout habitat. That issue can only be resolved in the context of the possible alternative uses of the water in the particular streams at a particular time." Id. at 268-69.

These ideas have been explicated in an important recent work. Terry L. Anderson, Donald R. Lease, Free Market Environmentalism (1991). Professors Anderson and Leal conclude:

> "In order to reap the advantages of the market, policy makers must find ways to define property rights in water, enforce them, and make them transferable -- and then guard against doctrines that erode these principles. The prior appropriation doctrine supports these principles, but the public trust doctrine is eroding them. By limiting the application of the public trust doctrine, by extending the application of the prior appropriation doctrine to instream flows, . . . and by reducing the impediments to exchange, policy makers could vastly improve the nation's water allocation system. The development of coalitions that could bring about the necessary institutional reforms would be enhanced by the realization that efficient water markets could reduce not

only environmental degradation but also . . . the role of government. Id. at 118.

Conclusion

Area I representatives and other farmers respectfully request that (a) any adoption of the Draft Plan embrace the protective language set out in Section I of this statement and (b) the Board take vigorous action to protect and preserve Area I's water rights in connection therewith and thereafter.

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INTRODUCTION

This decision concerns nine applications by the United States through its Bureau of Reclamation, Region 2, Sacramento, (hereinafter sometimes referred to as the Bureau) for permits to appropriate water from the Sacramento River and Sacramento-San Joaquin Delta (hereinafter referred to as the Delta) in furtherance of the Central Valley Project (hereinafter referred to as the Project). A map of the Central Valley (Sacramento-San Joaquin Valley) Basin depicting the drainage system and the various features referred to in the decision is appended as Plate 1. A map of the Delta with its maze of channels and waterways and the numerous intensely farmed islands is appended as Plate 2.

California is traversed lengthwise by two approximately parallel ranges of mountains - the Sierra Nevada on the east and the coast range on the west - which converge at Mount Shasta on the north and are joined by the Tehachapi Mountains on the south to enclose the Central Valley Basin. The valley floor, comprising nearly one-third of the basin area is a gently sloping practically unbroken alluvial plain 400 miles long and averaging 45 miles in width. Sacramento River drains the northern portion of the basin and San Joaquin River the southern portion. These two streams flow toward each other, join in the Delta and find a common outlet to the Pacific Ocean through San Francisco Bay.

Most engineering studies consider the western limit of the Delta as corresponding with the boundary of the agricultural lands, or western-most part of Sherman Island now under irrigation. This generally accepted concept does not agree with the definition of the Delta as adopted by the Legislature in 1959 and contained in Water Code Section 12220 which

describes the Delta as extending to a point approximately two miles west of the City of Pittsburg. However, for convenience, the discussion portion of this decision will refer to the Delta as defined in the engineering studies.

The San Joaquin Valley, that portion of the Central Valley which lies south of the Delta, contains rich lands and enjoys a climate which permits the production of a great variety of irrigated crops. Development in some areas is limited, however, because of the lack of an adequate water supply for irrigation.

The Sacramento Valley, that portion of the Central Valley which lies north of the Delta, also contains fertile lands which produce a variety of irrigated crops, including many thousands of acres of rice. Unlike the San Joaquin Valley, the Sacramento Valley enjoys an abundant water supply, although during the late summer months in most years there is insufficient water to meet irrigation requirements without the benefit of seasonal storage.

For many years it had been the ambition of those people concerned with water development in the State to construct a project capable of exporting surplus water from the Sacramento Valley into the San Joaquin Valley and, at the same time, provide a supplemental supply for those water users in the Sacramento Valley dependent upon the natural stream flow. A plan to accomplish this was formulated by State engineers and later adopted by the Legislature in 1933 as the Central Valley Project Act. In 1927 and 1938 pursuant to Chapter 286, Statutes of 1927 (now codified as Division 6, Part 2 of the Water Code), the State made applications to appropriate water for the Project.

When it became apparent that the State was unable to finance the necessary construction works, the United States, with the urging of the

State, directed the Bureau to undertake construction and operation of the Project. Later, eight of the nine applications involved in this decision (Application 10588 was filed by the United States) were assigned to and completed by the United States. After notice of these applications was published, 73 protests based on 20 separate grounds were received.

Hearing before the State Water Rights Board (hereinafter referred to as the Board) for the purpose of receiving evidence commenced on September 15, 1959. The hearing was conducted by Board Members Ralph J. McGill (Acting Chairman) and W. P. Rowe, assisted by Bert Buzzini of the legal staff and Donald E. Kienlen of the engineering staff.

After 20 days of hearing, on November 4, 1959, the United States requested a recess for the purpose of allowing time to negotiate with the State Department of Water Resources (hereinafter referred to as Department) and those parties claiming rights to the use of water from the Sacramento River and Delta. None of the parties objected to the continuance and many joined in the request made by the United States. The hearing was scheduled to resume on January 5, 1960, at which time the parties requested a further continuance for negotiations. Pursuant to this request the Board granted a continuance until April 19, 1960, and directed the parties to report their progress to the Board every 30 days. Except for an agreement between the United States and the Department providing for an apportionment of water between the Federal Central Valley Project and the State Feather River and Delta Diversion Project (DWR 77*), the negotiations failed and the hearing resumed upon the expiration of that continuance.

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*Exhibit 77 of Department of Water Resources

The hearing concluded on August 24, 1960, after requiring a total of 75 days. It was reopened on November 1, 1960, and February 2, 1961, to allow presentation of certain motions by the parties. Those appearing at this hearing and their representatives are as follows:

Party	Representative
Anderson-Cottonwood Irrigation District Glenn-Colusa Irrigation District Jacinto Irrigation District Provident Irrigation District	P. J. Minasian, Attorney
California Water Service Company	Carl F. Mau, Vice President
Central California Irrigation District	Senator James A. Cobey, Attorney
Central Valley Regional Pollution Control Board Modesto Irrigation District	Clifford E. Plummer, Engineer
Chowchilla Water District	Denslow Green, Attorney
Columbia Canal Company Firebaugh Canal Company San Luis Canal Company	J. E. Woolley, Attorney
Contra Costa County Water Agency Contra Costa County Water District, et al Solano, County of	Frederick Bold, Jr., Attorney
Delano-Earlimart Irrigation District Rag Gulch Water District	Erling Kloster, Attorney
Delta Water Users Association	John A. Wilson, Attorney
Feather Water District	Arthur W. Coats, Jr., Attorney
Friant Water Users Association	James F. Sorenson, Engineer
Jongeneel, Albert	Malcolm O'Connell, Attorney
Kaweah Delta Water Conservation District Lower Tule Irrigation District Pixley Irrigation District Tulare Irrigation District	Kenneth Kuney, Attorney

Party	Representative
Kern, County of	William A. Carver, Deputy County Counsel
Kings River Conservation District	Henry Karrer, Engineer
Landowners Association of Reclamation District 108, Inc.	Robert H. Fouke, Attorney
Madera Irrigation District	Adolph Moskovitz, Attorney
Metropolitan Water District of Southern California	Charles C. Cooper, Jr., General Counsel
Merced, County of	Arthur Ferrari, Supervisor District 1
Merced Irrigation District	Kenneth R. McSwain, Chief Engineer and Manager
Newhall Land and Farming Company Tisdale Irrigation and Drainage Company	Donald H. Ford, Attorney
Reclamation Districts 756 and 802 Ritchie, Grace S. Western California Canners, Inc.	Tom H. Louttit, Attorney
Sacramento River and Delta Water Association, et al	Martin McDonough, Attorney George Basye, Attorney
San Joaquin County Flood Control and Water Conservation District	William F. Haywood, Assistant County Counsel
Shasta, County of Northern California County Supervisors' Association	Arnold S. Rummelsburg, Director Shasta County Department of Water Resources
Sproule, Marie	Albert Monaco, Attorney
Stanislaus, County of	Oliver Deatsch, County Surveyor and Engineer
State of California Department of Fish and Game	James M. Sanderson, Deputy Attorney General
State of California Department of Water Resources	Russell Kletzing, Attorney
Sutton, Louis	Louis N. Desmond, Attorney
Tehama, County of	Joseph E. Patten, Engineer

Party	Representative
Tulare, County of	Robert E. Moock, Attorney
Union Properties, Inc.	Walter Gleason, Attorney
United States of America Bureau of Reclamation	Thomas J. Clark, Assistant Regional Solicitor
Westlands Water District	Kenneth G. Avery, Attorney

None of the parties appearing at the hearing objected to permits being granted to the United States for water to be appropriated for the Project. However, many urged that the Board impose certain permit terms and conditions for the protection of the water supply of those parties who might be adversely affected by the operation of the Project and those parties receiving a water supply therefrom.

SUBSTANCE OF THE APPLICATIONS

For convenience the material contained in the amended applications has been summarized and is presented in Table 1 (page 11).

Application 5625, filed on July 30, 1927, by the Department of Finance, State of California, and assigned to the United States on September 3, 1938, as amended, is for a permit to appropriate 11,000 cubic feet per second (cfs) by direct diversion year-round, and 3,190,000 acre-feet per annum (afa) by storage to be collected between October 1 of each year and July 1 of the succeeding year from the Sacramento River for power purposes. Point of diversion is at Shasta Dam located within the NE¼ of SE¼ of Section 15, T33N, R5W*. Place of use is at Shasta Power Plant located within the NE¼ of SW¼ of Section 15, T33N, R5W.

Application 5626, filed on July 30, 1927, by the Department of Finance, State of California, and assigned to the United States on September 3, 1938, as amended, is for a permit to appropriate 8,000 cfs by direct diversion, year-round, and 3,190,000 afa by storage to be collected between October 1 of each year and July 1 of the succeeding year from the Sacramento River for irrigation, incidental domestic, stockwatering, navigation and recreational purposes. The application also indicates that it may be necessary to provide up to 6,000 cfs of direct diversion and/or storage releases to flow into Suisun Bay in order to provide water of suitable quality for the Delta-Mendota and Contra Costa Canals (hereinafter referred to as "carriage water"). The point of direct diversion and diversion to storage is at Shasta Dam. Points of rediversion are shown at top of page 12.

*All references to township and range are from Mount Diablo Base and Meridian (MDB&M).

TABLE 1

SUMMARY OF DATA IN APPLICATIONS 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588

Applications(1)	Purpose	Direct Diversion Rate cfs	Storage Quantity afa	Points of Diversion	Places of Use
5625	Power	11,000	3,190,000	Shasta Dam	Shasta Power Plant
5626	Irrigation, navigation, incidental domestic, stockwatering and recreational (2)	8,000	3,190,000	Shasta Dam	Gross area of 3,455,000 acres in Delta and Sacramento-San Joaquin Valley; net area of 1,200,000 acres to be irrigated in any one year
9363	Municipal and industrial	1,000	310,000	Along Sacramento River from Shasta Dam to Delta and channels of Delta(3)	Within gross area of 3,455,000 acres described under Application 5626
9364	Irrigation, flood control, navigation, incidental domestic, stockwatering and recreational (2)	9,000	3,000,000	Same as Application 9363 with the exclusion of the Vallejo Pumping Plant	Same as Application 5626
9365	Power	7,000	3,310,000	Shasta Dam	Shasta Power Plant
9366	Irrigation and domestic	200(4)	none	Rock Slough at intake of Contra Costa Canal	Gross area of 102,000 acres within Contra Costa County. Net area of 20,000 acres to be irrigated in any one year
9367	Municipal and industrial	250(4)	none	Same as Application 9366	Within gross area of 102,000 acres described under Application 9366
9368	Irrigation and domestic	4,000	none	Old River at intake canal to Tracy Pumping Plant	Gross area of 988,000 acres within San Joaquin Valley. A net area of 320,000 acres to be irrigated in any one year
10588	Power and incidental domestic	13,800	none	Keswick Dam	Keswick Power Plant

1. Applications 5625 and 5626 filed July 30, 1927, 9363 through 9368 filed August 2, 1938 and 10588 filed January 5, 1943.

2. The application also indicates that it may be necessary to provide up to 6000 cfs of direct diversion and/or storage releases to flow into Suisun Bay in order to provide water of suitable quality for the Delta-Mendota and Contra Costa Canals.

3. Points of diversion and/or rediversion included but not limited to the following: Keswick Dam; Tehama (Corning) Canal and Tehama-Colusa Canal (Corning Pumping Plant); Chico Canal Intake; Delta Cross Channel Intake; Delta-Mendota Canal (Tracy Pumping Plant); Contra Costa Canal Intake; and Vallejo Pumping Plant on Maine Prairie Slough.

4. The total combined diversions under Applications 9366 and 9367 are not to exceed 350 cubic feet per second.

Keswick Dam	Within NW¼ of SW¼ of Section 21, T32N, R5W
Tehama (Corning) Canal Tehama-Colusa Canal (Corning Pumping Plant)	Within NE¼ of NE¼ of Section 33, T27N, R3W
Chico Canal	Within SE¼ of NW¼ of Section 1, T23N, R2W
Delta Cross Channel	Within Swamp Land Survey 763, T5N, R4E
Delta-Mendota Canal (Old River Intake)	Within NE¼ of SW¼ of Section 29, T1S, R4E
Contra Costa Canal (Rock Slough Intake)	Within SE¼ of NE¼ of Section 33, T2N, R3E

The place of use consists of a gross area of 3,455,000 acres lying along the floor of the Sacramento-San Joaquin Valley and Delta within which a maximum area of 1,200,000 acres may be irrigated in any one year.

Application 9363, filed on August 2, 1938, by the Department of Finance, State of California, and assigned to the United States on March 26, 1952, as amended, is for a permit to appropriate 1,000 cfs by direct diversion, year-round, and 310,000 afa by storage to be collected between October 1 of each year and July 1 of the succeeding year from the Sacramento River for municipal and industrial purposes. Points of direct diversion are at Shasta Dam and locations (not specified) along the Sacramento River from Shasta Dam to the Delta and on channels of the Delta including but not limited to the points of rediversion described in Application 5626. An additional point of direct diversion and/or rediversion is the Vallejo Pumping Plant located on Maine Prairie Slough within NW¼ of NW¼ of Section 10, T5N, R2E. Other points of rediversion of stored water released from Shasta Reservoir are described as being located along the Sacramento River from Shasta Dam to the Delta and on channels of the Delta including but not

limited to those named in Application 5626. The place of use is within the gross service area described in Application 5626.

Application 9364, filed on August 2, 1938, by the Department of Finance, State of California, and assigned to the United States on September 3, 1938, as amended, is for a permit to appropriate 9,000 cfs by direct diversion, year-round, and 3,000,000 afa by storage to be collected between October 1 of each year and July 1 of the succeeding year from the Sacramento River for irrigation, flood control, navigation, incidental domestic, stockwatering and recreational purposes. The application also indicates that it may be necessary to provide up to 6,000 cfs of direct diversion and/or storage releases to flow into Suisun Bay in order to provide "carriage water". Points of direct diversion and/or rediversion are the same as those referred to under Application 9363 with the exclusion of the Vallejo Pumping Plant. The place of use is the same as that described in Application 5626.

Application 9365, filed on August 2, 1938, by the Department of Finance, State of California, and assigned to the United States on September 3, 1938, as amended, is for a permit to appropriate 7,000 cfs by direct diversion, year-round, and 3,310,000 afa by storage to be collected between October 1 of each year and July 1 of the succeeding year from the Sacramento River for power purposes. The point of diversion is at Shasta Dam. The place of use is at Shasta Power Plant.

Application 9366, filed on August 2, 1938, by the Department of Finance, State of California, and assigned to the United States on March 26, 1952, as amended, is for a permit to appropriate 200 cfs, year-round, by direct diversion from Rock Slough for irrigation and domestic purposes. The total combined diversions under this application and

Application 9367 are not to exceed 350 cfs. The point of diversion is on Rock Slough at the intake of the Contra Costa Canal. The place of use consists of a gross area of 102,000 acres lying principally within the Contra Costa County Water District and wholly within the County of Contra Costa. Of this, a maximum of 20,000 acres may be irrigated in any one year.

Application 9367, filed on August 2, 1938, by the Department of Finance, State of California, and assigned to the United States on March 26, 1952, as amended, is for a permit to appropriate 250 cfs year-round, by direct diversion from Rock Slough for municipal and industrial purposes. The total combined diversions under this application and Applications 9366 are not to exceed 350 cfs. The point of diversion is on Rock Slough at the intake leading to the Contra Costa Canal. The place of use is the same as that described in Application 9366.

Application 9368, filed on August 2, 1938, by the Department of Finance, State of California, and assigned to the United States on March 26, 1952, as amended, is for a permit to appropriate 4,000 cfs, year-round, by direct diversion from Old River for irrigation and domestic purposes. The point of diversion is on Old River at the intake canal leading to Tracy Pumping Plant. The place of use consists of a gross area of 988,000 acres lying along the central and western portion of the San Joaquin Valley. Of this, a maximum of 320,000 acres may be irrigated in any one year.

Application 10588, filed on January 5, 1943, by the United States, is for a permit to appropriate 13,800 cfs, year-round, from Sacramento River for power and incidental domestic purposes. The point of diversion is at Keswick Dam. The place of use is at Keswick Power Plant within the NW¼ of SW¼ of Section 21, T32N, R5W.

PLAN OF THE UNITED STATES FOR USE OF SACRAMENTO RIVER AND DELTA WATER

The water sought to be appropriated under the subject applications is only for part of an overall project. The Bureau envisions the Central Valley Project as an expanding project to meet the demands for water supplies. As water requirements increase, new units will be added to provide a dependable supply (RT 11389*). To operate the Project the Bureau has either constructed or intends to construct certain physical works. These facilities and the proposed plan of operation described by Gleason Renoud and James J. O'Brien, engineers of the Bureau, are outlined in the following paragraphs.

Shasta Dam, the key unit of the project, is located on the Sacramento River about 14 miles upstream from the City of Redding and creates a reservoir capable of impounding 4,493,000 acre-feet of water. At the lowest reservoir level from which power may be developed there will be 502,000 acre-feet of water in storage although the river outlets will allow all but a small portion of the reservoir to be drained. The power plant at Shasta Dam is capable of using a maximum of 13,275 cfs. Keswick Dam is located about nine miles downstream from Shasta Dam and creates an afterbay reservoir of 23,800 acre-feet. The power plant at Keswick Dam is capable of using a maximum of 15,500 cfs (USBR 45**).

Between Keswick Dam and the Delta, the Bureau intends to divert water from the Sacramento River at various points as hereinafter described. Immediately east of Redding is the location of the proposed intake of the Bella Vista conduit, which will convey 93 cfs into the Cow Creek area (USBR 194). About

*Page 11389 of reporter's transcript of hearing
** United States Bureau of Reclamation Exhibit 45

two miles below the City of Red Bluff is the site of the Corning Pumping Plant, a common diversion point for the Corning and Tehama-Colusa Canals (RT 395). The pumping plant will have a capacity of about 2200 cfs. Water delivered through the Corning and Tehama-Colusa Canals will supply lands along the west side of the Sacramento Valley for approximately its entire length. At a point about 31 miles downstream from the City of Red Bluff is the site of the diversion plant for the Chico Canal which is to have a diversion capacity of 310 cfs. Water diverted through this canal is to be used on the east side of the Sacramento Valley in the vicinity of the City of Chico. Although not authorized at the present time, the Bureau has planned a canal to serve the Yolo-Zamora area located west of the Community of Knights Landing. The intake of the Yolo-Zamora Canal is to be located approximately 12 miles upstream from Knights Landing and is to have a capacity of 165 cfs (USBR 194).

Approximately 20 miles downstream from the City of Sacramento and immediately north of the City of Walnut Grove on the Sacramento River is the intake of the Delta Cross Channel which has a capacity of 7600 cfs. This channel facilitates the transfer of water from the northern or Sacramento portion of the Delta to the southern or San Joaquin portion of the Delta.

In the southern portion of the Delta are located the headworks of two export canals; namely, the Contra Costa and Delta-Mendota. Water diverted into the Contra Costa Canal is pumped from an extension of Rock Slough near the City of Oakley. This 48-mile canal has a capacity of 350 cfs and supplies water to agricultural lands and industrial areas of northern Contra Costa County (USBR 37 and 45). Tracy Pumping Plant, which diverts water into the 113-mile Delta-Mendota Canal, is located on a cut channel extending to Old River about 10 miles northwest of the City of Tracy.

The Delta-Mendota Canal has a capacity at its head of 4600 cfs and delivers water to lands along the western side of the San Joaquin Valley and to the San Joaquin River at Mendota Pool west of the City of Fresno (USBR. 45 and Staff 8*).

In addition to the features described above, other divisions and units which were planned by the State have been authorized for construction by the Bureau as parts of the Project, including the American River Division and the Trinity River Division. The American River Division consists of Folsom Dam and Reservoir on the American River about 20 miles east of the City of Sacramento and the Natomas Afterbay Reservoir created by Nimbus Dam located on the river seven miles downstream from Folsom Dam. Water from this division, in addition to supplying demands in the American River Service Area, supplements releases from Shasta Reservoir to provide the required inflow to the Delta (RT 367-371). The Trinity River Division which is under construction consists of Trinity Reservoir on the Trinity River approximately 19 miles generally west of Shasta Dam and an afterbay reservoir formed by Lewiston Dam six miles downstream. Trinity River water is to be imported into the Sacramento Valley to supplement the water supplies developed by the other Divisions of the Project. To accomplish this, Trinity River water will be diverted at Lewiston Dam through a tunnel into a reservoir to be formed by constructing Whiskeytown Dam located on Clear Creek, a tributary of the Sacramento River, at a point approximately five miles west of Keswick Dam. At this point Trinity River water will be commingled with Clear Creek water and rediverted through a tunnel into Keswick Reservoir (RT 396-400).

*State Water Rights Board Staff Exhibit 8

The largest demands for Project water are from the southern end of the Central Valley, while the largest water supply is in the north. The Delta is the hub of the Project. Diversions of water at Friant Dam on the San Joaquin River, another unit of the Project located about 18 miles north of the City of Fresno, into the Madera and Friant-Kern Canals for use along the east side of the San Joaquin Valley are possible by providing a substitute supply at Mendota Pool. This exchange is described in "Amended Contract for Exchange Of Waters" (USBR 82), which provides for 855,000 afa to be diverted to Mendota Pool through the Delta-Mendota Canal. This quantity may be reduced in critical dry years in accordance with provisions set forth in the Contract. An exchange of an additional quantity of water, estimated by the Bureau to be about 50,000 afa, is provided for in Schedule 2 of the "Contract for Purchase of Miller and Lux Water Rights" (USBR 164A and Staff 10, p. 567). To be able to export sufficient quantities of water to Mendota Pool, it is necessary to supplement the uncontrolled inflow to the Delta with stored water (RT 1717-20). Similarly, the requirements of the Sacramento Valley must be met. The conservation of water to satisfy these demands requires that the multi-purpose reservoirs of the Project -- Shasta on the Sacramento River, Folsom on the American River, Trinity on the Trinity River and Whiskeytown on Clear Creek -- be integrated in their operation and coordinated with the unregulated downstream inflow (RT Vol. 18, p. 2373). It is on this basis that the United States intends to provide adequate water supplies.

In addition to providing water for irrigation, domestic, municipal and industrial uses, the Project will provide many other benefits. Shasta Reservoir has greatly reduced the flood hazard along the Sacramento River. It has also provided a great recreational benefit. Most of the water

released at Shasta Dam passes through both Shasta and Keswick Power Plants to provide an economical source of electricity. Control of the Sacramento River at Shasta Dam provides for the conservation of fish life and enhancement of salmon and other fisheries. It provides adequate river regulation for navigation. Last, but not least, it provides control against encroachment of saline water into the Delta.

PENDING PETITIONS

The place of use of the water to be appropriated by the United States as described in these applications (other than for power) covers only a portion of the total service area of the Project. Applications filed for other units of the Project cover the remainder of the service area, although there is duplication in part. Because much of the water from the Trinity, Sacramento and American Rivers will be commingled prior to its actual use and, in order to allow greater flexibility in Project operations, the Bureau desires to amend the description of the place of use in the various applications so that water from each of the sources may be used anywhere within the Project service area to the extent it is physically possible and feasible. The desired consolidation and enlargement of places of use would also extend the service area to new lands surrounding the various reservoirs and to additional acreage in the Central Valley and in Alameda, Contra Costa and Solano Counties.

Before such amendments may be made the law requires that permission first be secured from the Board (Water Code Sections 1701 through 1705). When State filings are involved, the amendments must be approved by the California Water Commission before their submission to the Board (Water Code Section 10504.5).

The California Water Commission approved the proposed amendments including additional points of diversion and rediversion. Thereafter, petitions for the desired changes were filed with the Board. However, the Board has taken no action on these petitions because a proceeding to set aside the Commission's approval has been filed in the Superior Court of Sacramento County (No. 126921) and has not yet been determined.

On November 1, 1960, Tulare Irrigation District and others orally moved the Board to set for hearing the aforesaid petitions for permission to change place of use and points of diversion (RT 12461). This motion was taken under submission and it is hereby denied. The intent, if not the letter, of the law would be subverted were the Board to attempt to assume jurisdiction of the petitions before validity of the Commission's approval is determined by the Court.

The Board by its order of December 20, 1960, did, after public hearing, allow changes in points of rediversion and in place of use by the United States pursuant to Permits 11968, 11969, 11971 and 11973 (Applications 15374, 15375, 16767 and 17374) on the Trinity River and Permit 12364 (Application 17376) on Clear Creek so that wherever it is physically possible, water from the Trinity River Division of the Project may be placed on any lands within the service area of the Project. Since these permits were not subject to the jurisdiction of the California Water Commission, the changes did not require approval of the Commission before their submission to the Board.

POWER TO CONDITION PERMITS

Counsel for the Bureau relies heavily upon the Ivanhoe case (Ivanhoe Irrigation District v. McCracken, 357 U. S. 275) in contending that this Board is without power to impose any condition in permits to be issued to the United States upon approval of its applications. While paying lip service to the mandate of Section 8 of the Reclamation Act of 1902 (43 U. S. C. A. 383*) that the Secretary of the Interior shall proceed in conformity with state water laws in carrying out the provisions of federal reclamation law, it is nevertheless urged that the Board has no discretion to do other than to issue unconditional permits exactly as applied for because, so it is said, it has been shown that unappropriated water is available, and the water is necessary to the Project. Only the Secretary has the authority to determine how the water will be used and which citizens of the State within the total Project service area will receive Project benefits, it is argued.

The Ivanhoe decision declared that acquisition of water rights must not be confused with operation of federal projects and that the latter is within the exclusive jurisdiction of the United States. In evaluating the impact of this statement upon the power of the Board to condition permits in these proceedings, it must be borne in mind that the Court was

*"§ 383. Vested rights and State laws unaffected by chapter. Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. June 17, 1902, c. 1093, § 8, 32 Stat. 390."

addressing itself to one issue -- the relation between Section 8 and Section 5 (the excess lands provision) of the 1902 Act. It found there was no conflict because Section 8 deals with water rights and Section 5 concerns project operation. The decisions states:

> "Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5."

The Court's opinion had previously declared that "the question of title to or vested rights in unappropriated water" was not necessary to its decision. Provisions of California law regarding the procedures for initiating new rights to unappropriated water were not properly before the Court under its view of the case and were not considered by it. Here, acquisition of water rights is not only involved, it is the focal point of these proceedings. It follows that Section 8 is the governing statute so far as federal law is concerned and that the Court's reasoning in the Ivanhoe case is readily distinguishable. To predict what the Court's appraisal of the Board's authority to condition permits issued to the United States Bureau of Reclamation would be if the issue were squarely before the Court, upon the basis of judicial pronouncements which related to an entirely different issue, would be most unfair and unwise.

The Ivanhoe decision declared that federal control of project operations is supreme and exclusive because the subject matter is federal property. The Court assumed that the United States either had title to the water involved or would secure title. Actually, the United States has not yet fully complied with state procedures for acquiring title to Project water; otherwise it would not be before the Board in this proceeding. The Ivanhoe decision expressly reaffirmed that because of Section 8 the United States must comply with state law in acquiring water rights required for

reclamation projects. Acting under this direction, the United States has perfected its applications to appropriate water and is now asking this Board to approve them and to issue permits in accordance with the procedures prescribed by the California Water Code. This the Board will do.

Some of the statements in the Ivanhoe decision are difficult to reconcile. The Court said that state law must be followed in acquiring water rights but also said that the United States must acquire the necessary water rights which it does not already own by "paying just compensation therefor, either through condemnation or, if already taken, through action of the owners in the courts." These statements appear to be contradictory because rights to unappropriated water cannot be acquired by purchase or condemnation if state law is to be followed. Section 102 of the California Water Code declares:

> "102. All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."

Section 1225 of the Water Code provides:

> "1225. No right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division."

Section 1225 is found in Division 2 of the Water Code which contains the application, permit and license procedure for acquiring rights to appropriate water. This procedure, then, is by virtue of Section 1225, the only means for acquiring rights to the use of unappropriated water under California law.

A possible clue to the true intent and meaning of the Court's declaration concerning the condemnation of water rights is disclosed by its citation in connection with said declaration of the Gerlach case (U. S. v. Gerlach Livestock Co., 339 U. S. 725), which case held that Congress by

authorizing the Central Valley Project as a reclamation project did not intend to take privately vested water rights needed for the Project, without payment of compensation to the owners thereof, citing Section 8 of the 1902 Act. Apparently, the Court in the Ivanhoe case had such rights in mind.

The demand of the Bureau for unconditional permits is irreconcilable with the provisions of Section 8 of the Reclamation Act of 1902 that federal reclamation law is not intended to interfere with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation...and the Secretary of the Interior, in carrying out the provisions of this act shall proceed in conformity with such laws... ." There is no such thing as an unconditional water right under the law of California, or of any other western state for that matter. For example, Sections 1253, 1257, 1381, 1382, 1390 and 1391 of the Water Code provide:

> "1253. The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated."
>
> "1257. In acting upon applications to appropriate water, the State Water Rights Board shall consider the relative benefit to be derived from all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation of fish and wildlife, recreational, mining and power purposes, and may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated."
>
> "1381. The issuance of a permit gives the right to take and use water only to the extent and for the purpose allowed in the permit."
>
> "1382. All permits shall be under the terms and conditions of this division."
>
> "1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division, but no longer."

"1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed."

Sections 1395 through 1397 of the Water Code require permits to specify the time within which actual construction work upon any project shall begin, the time for completion of such construction work, and the time within which water shall be completely applied to beneficial use.

Other sections could be cited, but these are sufficient to demonstrate that all permits and all rights acquired thereunder are subject to conditions. In addition, permits issued pursuant to applications filed by the State, such as these, are required by state law to contain terms conditioning them upon compliance with Water Code Section 10504.5(a) which requires the assignee of a state-filed application to secure the approval of the California Water Commission before making any substantial change in the project in furtherance of which the assignment was made.

The decision of the California Supreme Court in the Ivanhoe case on remand from the United States Supreme Court (Ivanhoe Irrigation District v. All Parties and Persons, 53 Cal. 2d 692) declared the higher court's decision to mean that the title of the United States to project water was or could be made "unlimited". However, there is no judicial fiat that the United States is entitled to unlimited permits from the State. The resulting enigma is one which can only be explained by further court decision. In the meantime, this Board will endeavor to discharge those duties and responsibilities which have been delegated to it by the Legislature. To that end, it will carefully consider all applications for permits to appropriate the State's fast dwindling unused water resources, whether by individuals, corporate entities or by federal or local agencies, and will

issue permits only under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.

In view of the foregoing, the demand by the Bureau that unconditional permits be issued is contrary to law and must be rejected. Permits upon the conditions which are either required or authorized by state law are the most that the United States is entitled to receive in these proceedings. For additional water rights, if more are needed, it must look to other means, such as condemnation of privately vested rights. The evidence before the Board, however, indicates there is no need for additional water rights and that the Project can be operated as authorized by Congress and as presently planned by the Bureau within the framework of the permits to be issued and subject to the conditions therein imposed.

SEASONS OF DIVERSION AND WATER TO BE ALLOWED

Water Supply

It is accepted engineering practice when forecasting the availability of water to base the forecast on historic stream flows on the assumption that past conditions will be repeated in the future. Water supply records are available for this purpose at various points in the Sacramento River stream system. Table 2 (page 29) showing the flow of the Sacramento River at Shasta Dam and Table 3 (page 30) showing the inflow from the Sacramento River to the Delta have been prepared from these water supply records. The latter table does not reflect the total flow into the Delta since many streams, sloughs and drains contribute water to the area, but it does afford information of the magnitude of the available supply particularly during the summer months when it is the major source of inflow. The values in both tables have been adjusted to eliminate the effect of Shasta Reservoir operation which commenced in December 1943.

All of the studies considering water rights presented at the hearing assume a repetition of the hydrologic conditions experienced in the 31-year period, 1924 through 1954. The driest period of record, April 1928 through March 1935, occurred during the 31-year period (RT Vol. 18, p. 2374). The evidence from which Tables 2 and 3 were prepared indicates that hydrologic conditions vary considerably from year to year.

Seasons of Diversion to be allowed

In an effort to reach an agreement on existing water rights along the Sacramento River and in the Delta, the Bureau, the Department and the Sacramento River and Delta Water Association (hereinafter referred to as the Association) entered into a cooperative study program. For the purposes of

TABLE 2

FLOWS OF SACRAMENTO RIVER
AT SHASTA DAM FOR PERIOD
OCTOBER 1921 THROUGH SEPTEMBER 1954
In thousands

Month	Maximum		Minimum		Average	
	ac-ft	cfs	ac-ft	cfs	ac-ft	cfs
January	1677	27.27	179	2.91	565	9.19
February	1675	29.12	220	3.96	715	12.76
March	1886	30.67	228	3.71	720	11.71
April	1301	21.86	208	3.50	691	11.61
May.	984	16.00	182	2.96	473	7.69
June	538	9.04	167	2.81	307	5.16
July	319	5.19	161	2.62	224	3.64
August	264	4.29	153	2.49	199	3.24
September	241	4.05	149	2.50	190	3.19
October	529	8.60	161	2.62	222	3.61
November	720	12.10	165	2.77	297	4.99
December	1323	21.52	177	2.88	472	7.68

NOTE: All quantities in acre-feet were taken from Table 3, USBR 100.

The maximum and minimum water-year (October 1 - September 30) runoffs were 9,548,000 and 2,479,000 acre-feet which occurred in 1937-38 and 1923-24, respectively. On a continuous flow basis these quantities equal 13,190 and 3,410 cubic feet per second.

The average water year runoff was 5,075,000 acre-feet which is equal to a continuous flow of 7,000 cubic feet per second.

TABLE 3

FLOWS OF SACRAMENTO RIVER
BELOW MOUTH OF AMERICAN RIVER
INTO SACRAMENTO-SAN JOAQUIN DELTA FOR PERIOD
OCTOBER 1921 THROUGH SEPTEMBER 1954
In thousands

Month	Maximum		Minimum		Average	
	ac-ft	cfs	ac-ft	cfs	ac-ft	cfs
January	6612	107.53	547	8.90	2252	36.62
February	7724	139.08	724	13.04	3049	54.43
March	8864	144.16	509	8.28	2948	47.94
April	6042	101.54	490	8.23	2832	47.59
May	4936	80.28	224	3.64	1955	31.79
June	2613	43.91	79	1.33	940	15.80
July	840	13.66	10	0.16	251	4.08
August	330	5.37	30	0.49	152	2.47
September	467	7.85	161	2.71	299	5.02
October	824	13.40	234	3.81	423	6.88
November	3560	59.83	264	4.44	780	13.11
December	5799	94.31	413	6.72	1619	26.33

NOTE: All quantities in acre-feet were taken from Table 12, USBR 100.

The maximum and minimum water-year (October 1 - September 30) runoffs were 39,796,000 and 4,909,000 acre-feet which occured in 1937-38 and 1923-24, respectively. On a continuous flow basis these quantities equal 54,970 and 6,760 cubic feet per second.

The average water-year runoff was 17,500,000 acre-feet which is equal to a continuous flow of 24,160 cubic feet per second.

these studies the engineers for each agency agreed upon certain assumptions with respect to hydrologic conditions and water rights. The final report acknowledged these assumptions, particularly with respect to water rights, may differ considerably from the rights as may be determined by a court of law. The results of these studies are presented in "Report on 1956 Cooperative Study Program" (USBR 107).

Using the results of these cooperative studies as a basis, the Bureau and the Association presented separate studies as an equitable basis for determining the yields of existing rights along the Sacramento River and in the Delta. Study C-2BR was presented by the Bureau and Study C-650D was submitted by the Association (USBR 110 through 144 ; SRDWA 22* through 57). Both studies indicate that there is no water available at Shasta Dam for direct diversion for consumptive uses under the subject applications in August and only small amounts available for less than a quarter of the period of the study for July (USBR 130 and SRDWA 32). Therefore, the months of July and August should not be included within the direct diversion season at Shasta Dam. Likewise, both studies indicate that water is available for diversion into storage at Shasta Dam from November through May and small amounts of water are available in some years during the months of June and October. Water is not available for diversion into storage during the month of September if direct diversion requirements are to be satisfied first. The studies were made upon that assumption (USBR 131 and SRDWA 33).

With respect to the availability of water along the Sacramento River from Shasta Dam to the Delta and in the channels of the Delta,

*Sacramento River and Delta Water Association Exhibit 22

Study C-2BR indicates that no water is available during August and only infrequently available during July. Study C-650D indicates that September is also a month of questionable supply (USBR 139 and SRDWA 39). However, the Bureau presented evidence that because of return flows from applied Project water, there will be unappropriated water available in various reaches of the River below Keswick Dam and in the Delta year-round (USBR 164 and 164A and RT 11388). This evidence is corroborated by testimony submitted by the Department (RT 10928-30). There is no doubt that Project water applied to lands which drain into channels tributary to the Delta will provide additional return flows, but the quantities cannot be predicted with any degree of accuracy (RT 10972-75). Return flows from applied Project water will enter the Sacramento River at various points below Keswick Dam (USBR 164A). It appears proper, therefore, to allow a year-round direct diversion season at points below Shasta Dam as requested by the Bureau. Any necessary reduction in the season can be made at the time of licensing when the project is fully developed and the extent of return flow can be more accurately determined.

Project Requirements

The Bureau has requested that permits be granted for the full amounts of the applications. These amounts as previously stated are set forth in tabular form together with other pertinent data in Table 1 (page 11).

The power requirements are described in Applications 5625, 9365 and 10588. These applications request a total of 18,000 cfs to be appropriated by direct diversion at Shasta Dam and 13,800 cfs to be appropriated by direct diversion at Keswick Dam. The Board finds that the maximum amount to be granted for direct diversion at Shasta Dam for use in

generation of power should be 13,275 cfs, the greatest discharge obtainable through the Shasta Power Plant at maximum reservoir elevation. Although the greatest discharge obtainable through the Keswick Power Plant is 15,500 cfs, the maximum rate which may be granted in the permit must be limited to 13,800 cfs, the amount requested in Application 10588 which is the only application for power at Keswick (USBR 45 and Staff 2).

For beneficial uses other than power development the Bureau seeks to appropriate water by direct diversion at the maximum total rate of 22,350 cfs and a total quantity of 6,500,000 acre-feet per annum by storage.

Water requirements of the Project and availability of water covering a hydrologic study period extending from October 1921 through September 1954 are included in USBR Exhibit 164 entitled, "Central Valley Project Study - Shasta Reservoir Operation", dated August 3, 1959. This study also summarizes the same information for the 7-year critical dry period from April 1928 through March 1935 (RT Vol. 18, p. 2374).

USBR 164 is based upon the Project meeting seven principal requirements as summarized in Table 4 (page 34). These include (1) providing a supplemental supply to meet the requirements of areas diverting directly from the Sacramento River, and from the bypasses and drainage channels paralleling the River (Colusa Trough, Back Borrow Pit, Knights Landing Ridge Cut, Yolo By-pass, Lower Butte Creek and Butte Slough, Sutter By-pass and Sacramento Slough) under local rights; (2) requirements for Sacramento Canals Unit (Corning, Tehama-Colusa and Chico Canals), Cow Creek Unit and Yolo-Zamora Unit; (3) providing a supplemental supply to meet the requirements of the Delta lowlands and Delta uplands; (4) "carriage water", estimated at 1500 cfs for the purpose of the study, to repel salinity incursion in channels of the Delta in order to provide water of the quality

TABLE 4

ULTIMATE ANNUAL PROJECT REQUIREMENTS

Requirement (1)	Quantity ac-ft	Maximum Diversion Rate cfs
Irrigation		
Sacramento River, Delta and Bypasses (Firming local rights)	2,500,000 (2)	11,200 (3)
Sacramento Valley Canals	665,000	2,370
Cow Creek Unit	35,000	118
Yolo-Zamora Unit	40,000	146
Contra Costa Canal		(4)
Delta-Mendota Canal		4,600
Exchange Contract	1,070,000	
Other Contracts	647,000	
Portion of San Luis Service Area (Westlands)	512,000 (5)	
Additional Irrigation	735,000	2,390
Sub-total	6,204,000	20,824
Carriage Water	1,083,000	1,500
Municipal and Industrial		
Contra Costa Canal	195,000 (4)	350 (4)
Additional M & I	540,000	1,000
Sub-total	735,000	1,350
GRAND TOTAL	8,022,000	23,674

(1) Data from USBR 164B unless otherwise specified.
(2) RT 3371.
(3) Calculated by Board from USBR 122A, 123 and 124.
(4) Pending ultimate development of 195,000 acre-feet for municipal and industrial purposes through the Contra Costa Canal, water will be delivered through this Canal at a maximum rate of 200 cfs for irrigation purposes. However, at no time will the use of water for irrigation, municipal and industrial demands exceed 195,000 acre-feet diverted at the maximum rate of 350 cfs.
(5) RT 11241.

specified in the contracts for water deliveries to the Delta-Mendota and Contra Costa Canals; (5) requirements to be served through the Delta-Mendota Canal including the Amended Exchange Contract, estimate of requirements for rights described in Schedule 2 of the Purchase Contract, canal and operating losses, present contractual obligations and contemplated future deliveries limited to 4600 cfs, the capacity of the canal; (6) Contra Costa Canal diversion requirements limited by its capacity of 350 cfs; and (7) additional irrigation, municipal and industrial requirements from the Delta to be served through facilities not yet authorized or through non-project facilities. To these requirements may be added the potential direct diversion requirements of that portion of the San Luis Service Area (Westlands) which lies within the service area of these applications, limited to the presently unused capacity of the Delta-Mendota Canal. The maximum quantity which could thus be diverted to the Westlands area in any one year is 512,000 acre-feet (RT 11241).

In critical dry years a deficiency of 50 per cent was assumed on the irrigation requirements during the period April through October, except for the Delta lowlands and the requirements for the Amended Exchange Contract under the Delta-Mendota Canal. Deficiencies for this latter use were taken in accordance with the criteria contained in the Contract.

Water Required to Supplement Existing Rights

Regarding requirements (1) and (3) above, the Bureau proposed that Project water will be made available for diversion by and through the private facilities of water users to the extent necessary to assure the users a dependable supply over and above that which would have been available under local rights in dry years in the absence of the Project. These local

rights include riparian, appropriative and other rights to use water in the Sacramento Valley and Delta. The quantity of water required for this purpose is generally referred to as that quantity required to supplement local rights along the Sacramento River and in the Delta and may be determined from USBR Exhibits 122A, 123 and 124.

According to these exhibits, a maximum yield of water to local rights in a year of hydrologic conditions similar to 1924 would be 1,962,000 acre-feet. The assumed local rights along the Sacramento River between Shasta Dam and the Delta would have been, according to those exhibits, 4,325,000 acre-feet. This indicates a deficiency of 2,363,000 acre-feet which might be provided from the Project to supplement local rights. To this may be added the water required to supplement local rights along the bypass and drainage channels which were not included in the study summarized by USBR Exhibits 122A, 123 and 124. Study C-650D also considers yields to assumed local rights along the Sacramento River and in the Delta. However, the demand pattern utilized in Study C-650D does not allow its use in considering the maximum annual quantity required to supplement local rights. The quantity required to supplement local rights may also be derived from DWR 80 which analyzes USBR 164. According to DWR 80 the yield of local rights along the Sacramento River and bypasses and in the Delta for a hydrologic year similar to 1923-1924 is 2,159,000 acre-feet. USBR 164 indicates that the total requirement for these rights is 4,508,000 acre-feet or a deficiency of 2,349,000 acre-feet during a similar year. This approximates the 2,500,000 acre-feet testified to by the Bureau as necessary to supplement these rights (RT 3355).

Direct Diversion and/or
Rediversion Requirements

Ultimate annual irrigation requirements for lands to be served from the Project are: (1) 2,969,000 afa to be diverted at the maximum rate of 7,234 cfs for Project canals; (2) 2,500,000 afa to be diverted at the maximum rate of about 11,200 cfs for supplementing local rights; and (3) 735,000 afa to be diverted at the maximum rate of 2,390 cfs for additional irrigation requirements within the proposed service area, to be diverted either through additional Project facilities or privately-owned facilities for new developments. These requirements total 6,204,000 afa to be diverted at the maximum rate of 20,824 cfs. This rate includes not only direct diversion but also rediversion of stored water. The relative portion of each cannot be determined from the record. In July, when the maximum rate of diversion would occur, the greatest portion would be the rediversion of stored water.

The ultimate municipal and industrial requirements for the Project include 195,000 afa for the Contra Costa Canal to be diverted at a rate not to exceed a maximum of 350 cfs under ultimate conditions. Other municipal and industrial uses within the Project service area will require 540,000 afa to be diverted at rates not to exceed a maximum of 1000 cfs. This quantity of water will be used to meet the expanding municipal and industrial requirements such as those within Contra Costa County, as indicated by Exhibits 59 and 63 of the Contra Costa County Water Agency. Like irrigation requirements, the municipal and industrial requirements will be met by direct diversions and rediversions of stored water, but the exact amount of each cannot be determined at this time. The record indicates that the total quantity required for consumptive uses is 6,939,000 afa at a maximum diversion rate of 22,174 cfs.

The Contra Costa Canal requires special consideration due to the probable change in the character of use of water delivered by this canal. Applications 9366 and 9367, respectively, propose the appropriation of 200 cfs for irrigation purposes and 250 cfs for municipal and industrial purposes. However, the maximum rate at which water can be diverted under both applications is 350 cfs, the capacity of the canal. The evidence indicates that with the future expansion of municipal and industrial development in this service area the canal will deliver more water to these needs. This will be met by a reduction in agricultural use. However, the Board may not permit diversion rates greater than those named in the applications. When it becomes necessary to divert water for municipal and industrial purposes at a rate in excess of 250 cfs the United States may petition the Board to effect a change in character of use under Application 9366.

Storage Requirements

The maximum annual quantity of water which could be placed in storage in any one season would occur with a repetition of the hydrologic conditions similar to the years of 1923-1924 and 1924-1925. USBR 164 indicates that at the end of September for a year similar to 1923-1924 the reservoir would have contained only 500,000 acre-feet which is about the minimum power pool. Although the reservoir would have 3,993,000 acre-feet of storage space available, runoff which would occur during a year similar to 1924-1925 would have been sufficient to collect only 3,066,000 acre-feet of water into storage. This latter figure is confirmed by DWR Exhibit 76 and USBR Exhibit 130F.

A hydrologic year similar to 1924-1925 would produce the greatest combined appropriation of water by direct diversion and storage of 6,155,000

acre-feet although it does not include the greatest quantity which could be diverted without storage (USBR 164 and DWR 80). However, because of a possible change in hydrologic conditions in the future, it is not impossible for the greatest quantity appropriated by direct diversion (3,451,000 acre-feet - DWR 80) and the greatest quantity appropriated by storage (3,066,000 acre-feet - USBR 164), which would total 6,517,000 acre-feet, to occur during the same year.

Amounts to be Granted

The maximum quantity which could be diverted to storage during any one year, as previously stated, is 3,066,000 acre-feet. However, it is proper to grant a quantity equal to the gross capacity of the reservoir (4,493,000 acre-feet) to provide for the possibility that at some future time it may be necessary to completely drain the reservoir and refill it. This storage quantity together with water to be appropriated by direct diversion from the Sacramento River and Delta under permits issued pursuant to these applications and water from the Trinity River and the American River divisions will be adequate to meet all the Project requirements described in Table 4, including a maximum of 546,000 acre-feet of water to be released during periods of low stream flow to maintain water quality required by the contracts for water deliveries to the Delta-Mendota and Contra Costa Canals (based on a 1500 cfs outflow, USBR 253A). Based upon USBR 164 the Board finds that each application should be approved for the quantities requested with the total quantity to be used in any one year limited to 6,500,000 acre-feet of which not more than 3,450,000 acre-feet shall be by direct diversion and further limited to the extent that the combined rate of direct diversion and rediversion of stored water shall not exceed 22,200 cubic feet per

second. The quantity of water which may be diverted to storage shall not exceed 4,493,000 acre-feet per annum.

In fixing the rates of direct diversion to be allowed, the Board is inclined to greater liberality than usual because of the magnitude of the Project and the complexities involved in determining at this time the direct diversion as distinguished from rediversions of stored water. However, notwithstanding these considerations, we would require greater particularity in proof of direct diversion requirements were we not assured that no prejudice to others will result from failure of applicant to produce such proof. This assurance is provided by conditions which will be imposed in the permits subjecting exports of water from the Delta to use within the Sacramento River Basin and Delta so that there can be no interference with future development of these areas. Furthermore, the agreement of May 16, 1960 (DWR 77) between the United States and the California Department of Water Resources apportioning to each a share of the water in the Delta in the event the total available supply is not sufficient to satisfy the annual diversion requirements of both agencies, removes any possibility that appropriations by the United States would deprive the State of an equitable share in times of shortage.

However, in view of the Bureau's challenge of the Board's authority to impose conditions in the permits, the Board will reserve the right to re-examine and reduce the quantities which it authorizes the United States to appropriate by these permits in the event conditions protecting future uses in the Sacramento River Basin and Delta should be modified or set aside upon judicial review.

NAVIGATION AND FLOOD CONTROL

Included among the purposes for which water is sought to be appropriated pursuant to Application 9364 are navigation and flood control. With respect to Application 5626, navigation is included as a purpose of use. In this decision it is important, therefore, to distinguish on the one hand between the power of the United States pursuant to the commerce clause of the Federal Constitution to protect the navigability of the Sacramento River and to provide flood control and, on the other hand, acquisition by the United States of water rights in the stream flow pursuant to State procedures as required by the Reclamation Act of 1902.

Storage of water or regulation of flow for navigation and flood control purposes is a continuing paramount power of the United States conferred on it by the commerce clause of the United States Constitution. For this Board to grant a permit to use water for such purposes pursuant to these applications would be improper. Under applicable case law such a permit term would add nothing to the constitutional power of Federal authority and, to the extent such permit term were to purport to limit such power, it would be clearly invalid as an invasion of Federal power. We have previously so held in Decision D 935 (San Joaquin River applications of the United States and others) with respect to flood control and the same is now held with respect to navigation. Accordingly, Applications 5626 and 9364, insofar as they relate to the appropriation of water for navigation and flood control purposes, will be denied for lack of jurisdiction.

FLOW REQUIREMENTS FOR FISH CONSERVATION

The California Department of Fish and Game has presented evidence that certain minimum flows are required below Keswick Reservoir in order to maintain the fisheries which exist in the Sacramento River (F&G 2*). These minimum requirements have been adopted and formalized in a "Memorandum of Agreement for the Protection and Preservation of Fish and Wildlife Resources of the Sacramento River as Affected by the Operation of Shasta and Keswick Dams and Their Related Works and Various Diversions Proposed Under Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588 of the United States" executed on April 5, 1960, by both the United States and the California Department of Fish and Game (F&G 7). The minimum flows set forth in the agreement to be bypassed or released into the natural channel of the Sacramento River at Keswick Dam are as follows:

January 1 through February 28	-	2600 cfs
March 1 through August 31	-	2300 cfs
September 1 through November 30	-	3900 cfs
December 1 through December 31	-	2600 cfs

The agreement provides that these flows may be reduced in critical dry years in accordance with the schedule set forth in the agreement. The use of water for the preservation and enhancement of fish and wilflife resources is a beneficial use of water (Water Code Section 1243). The Board finds that the use of water as provided by the terms of the agreement is beneficial and in the public interest. Therefore, permits issued pursuant to these applications will be subject to said agreement.

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*Department of Fish and Game Exhibit 2

SALINITY INCURSION INTO THE DELTA

The Nature of the Problem

The Delta covers about 700 square miles of rich fertile lands between the City of Sacramento on the north, the City of Tracy on the south, the City of Stockton on the east and the City of Pittsburg on the west. It contains over 50 reclaimed islands (DWR 70A) interlaced by about 550 miles of open channels (DWR 5, p. 18). Water levels in these channels, all at or near sea level, are hydraulically connected and aggregate an open water area of about 38,000 acres (60 square miles). Moving from east to west, Suisun Bay, Carquinez Straits, San Pablo Bay and San Francisco Bay form connecting links between the Delta channels and the Pacific Ocean. Most of the Delta islands are below sea level and individual levee systems prevent their inundation.

Early settlers and residents in the area were familiar with the natural phenomenon of saline water invading the upper bay and the channels of the lower Delta during most years (DWR 5, p. 15). Because these channels furnished the only readily accessible water supply, salinity incursion was then a vexing problem and is now one of the most important issues before the Board.

The waters of the lower portion of the Delta are a combination of salt water from the ocean which enters through the Golden Gate and fresh water from the Central Valley and local runoff. The salinity of the water resulting from this combination is extremely variable, both geographically and during different periods of the year, as well as from year to year.

The variation in salinity is the result of the relative magnitude of the opposing forces of tidal action and stream flow. Seasonal

variations of salinity are characterized by the advance of saline water in the Delta channels starting in the late spring and continuing through the summer and fall months, which are the periods of low stream flow, and the retreat of saline water as it is replaced by fresh water from flood flows during the winter and spring months.

For the purposes of this discussion salinity is measured by the chloride ion concentration which is expressed as parts of chloride ions per million parts of water (hereinafter referred to as ppm). The exact limit of chloride ion concentration that may be allowed in irrigation water varies with crop, soil and drainage conditions and the frequency of use. In the Delta, water containing less than 1000 ppm is safe for irrigation use under average conditions. Water containing between 1000 and 2000 ppm may be used with caution, while that containing in excess of 2000 ppm is considered unsafe (RT Vol. 18, p. 2340).

The maximum chloride ion concentration acceptable for domestic use by the California Water Service Company is 100 ppm (RT 9649). The allowable limits of chloride ion concentration for industrial purposes vary in relation to the particular use of the water. For surface condensers in a steam power plant ocean water (about 18,500 ppm) may be acceptable (RT 9472), while water used for cooling canned food products must not have a concentration exceeding 200 ppm and preferably not more than 150 ppm (RT 9995).

The extent of salinity incursion into the Delta before and after the operation of Shasta Reservoir is shown on plates contained in reports of Sacramento-San Joaquin Water Supervision for the years 1924 through 1957 (Staff 6 and 6A). These plates show the limit of maximum seasonal encroachment of water containing 1000 ppm for the years 1920 through 1957.

Prior to the commencement of operation of Shasta Reservoir, salinity conditions in the Delta varied greatly from year to year. In dry years such as 1924, 1931 and 1934, water containing in excess of 1000 ppm intruded into practically all channels of the Delta. Only in 1938, the year of the largest runoff, did water in excess of 1000 ppm remain below Antioch for the entire year. For the period 1920 through 1943 the median of maximum incursion of water of this quality approximated a line through the northern part of Decker Island, the mouth of False River and a point on Dutch Slough about two miles west of the community of Bethel Island.

As previously stated, incursion of saline water into the upper part of Suisun Bay and the lower Delta has occurred during all known history of the area. A contributing cause for the deterioration of water quality around Sherman, Twitchell and Brannan Islands was the enlargement and straightening of the Sacramento River channel from Collinsville to above Rio Vista by the Army Corps of Engineers during the years 1917 to 1920 (SRDWA 65, p. 11).

Efforts and Planning to Solve the Salinity Problem

Efforts to meet the problems occasioned by the intrusion of saline water into the Delta varied greatly. California and Hawaiian Sugar Refining Corporation from 1908 to 1929 sent water barges upstream from Crockett in search of usable quality water (DWR 5, p. 48), while the City of Antioch brought an unsuccessful suit in 1920 to enjoin upstream diversions which contributed to lessening of the hydraulic barrier. Similarly, in 1923, the Holland Land Company and other landowners, who claimed riparian rights, sought injunctive court action (SRDWA 77B). However, the latter suit was not brought to trial and was voluntarily dismissed in 1944

after Shasta Reservoir went into operation (SRDWA 77D).

In a report published in 1920 the former State Water Commission favored the development of storage on the main streams and their tributaries above the Delta and the releases of this stored water at the proper time as a suitable method of controlling salinity incursion (CCCWA 2A*).

In response to a request by the 1925 State Legislature for a comprehensive plan for development of water resources, the State Engineer prepared a "Summary Report on the Water Resources of California and A Coordinated Plan for Their Development" 1927 (Bulletin No. 12, Department of Public Works, USBR 12). This report recommended construction of flood storage dams operated for power generation in order to provide revenue. Although observing that the water from the tailraces of power plants would be ample for navigation, irrigation and salt water control for a long time, the State Engineer concluded that a salt water barrier undoubtedly would ultimately be required. The recommended site for a large dam on the Sacramento River was at Kennett (USBR 12, p. 30, and Staff 9, p. 175).

Further studies of the plan were undertaken by a Joint Legislative Committee on Water Problems resulting in a report submitted on January 18, 1929, to the Legislature. The final conclusions reached in that report were that Shasta (then called Kennett) Dam be constructed with a view to conservation and most beneficial use of the surplus water of the Sacramento River along lines favorably affecting flood control, salinity control, navigation and irrigation. At the same time, construction of a salt water barrier at or near Army Point near the City of Benicia was described as necessary to completely carry out the coordinated plan for the development of the water resources of California (CCCWA 9). A supplemental

*Contra Costa County Water Agency Exhibit 2A.

report on April 9, 1929, by the same Joint Legislative Committee on Water Problems reaffirmed the conclusions that Shasta Dam be constructed for the principal purposes of relieving the salinity problem in the Delta and the furnishing of water to the San Joaquin Valley by means of dams, pumping plants, aqueducts and levees. The report said that Shasta Dam should be operated in the interest of navigation, flood control, furnishing water to the San Joaquin Valley, fresh water to the Delta and "as near as possible to industrial plants located along Carquinez Strait." It was said that such construction and operation of the dam would tend to solve the critical water problems in the big basin of northern California and the bay section as far as Antioch. Export to the San Joaquin Valley was considered after providing and guaranteeing an outflow at Antioch of not less than 5000 cfs (Staff 9, p. 233 and CCCWA 10).

In 1931, Bulletin No. 25 of the Department of Public Works was published as an operating study of the State Water Plan under assumed water conditions in the period 1918 to 1929. Prepared by the State Engineer, it included a summary of major features of the Central Valley Project and recommended an outflow from the Delta into Suisun Bay of not less than 3300 cfs at Antioch (DWR 3). This coordinated plan was later approved and adopted by the Legislature in 1941 (Stats. 1941, p. 2943; Water Code Section 10000).

The Army Corps of Engineers in 1931 reported to the 71st Congress concerning its studies of the Sacramento River recommending construction of Shasta Reservoir for the combined purposes of navigation, flood control, power development, irrigation and salinity control. A final report of the Corps of Engineers to Congress in 1933 affirmed salinity control as one of

the benefits to be derived from increased flows from Shasta Reservoir by providing a minimum discharge of 3300 cfs at Antioch (Staff 9, p. 514).

Salinity Control a Purpose of the Central Valley Project

The 1933 State Legislature authorized the Central Valley Project, making salinity control in the Sacramento-San Joaquin Delta one of the primary purposes of Shasta Dam (Stats. 1933, Ch. 1042). This provision is now found in Water Code Section 11207(c).

At the request of the House Committee on Rivers and Harbors of the 73rd Congress, the Chief of Army Engineers prepared a review report in which he approved the plan previously outlined in the report of the Corps of Army Engineers and concluded that providing for a minimum discharge of 3300 cfs at Antioch for salinity control in the Delta would eliminate the necessity of constructing locks in a physical barrier at the mouth of the river. This plan was accepted as the Rivers and Harbors Committee House Document No. 35, 73rd Congress (Staff 9, p. 544), and was later adopted and authorized by Congress in Section 1 of the River and Harbor Act of August 30, 1935 (49 Stats. 1028, 1038). This same plan was later incorporated in the River and Harbor Act of August 26, 1937 (50 Stats. 844, 850) when Congress adopted and reauthorized the Central Valley Project for construction by the Secretary of the Interior.

It follows from the foregoing that salinity control in the Delta is one of the purposes of the federally authorized Central Valley Project. This has been recognized by the United States Supreme Court in both U. S. v. Gerlach Livestock Co., 339 U. S. 725, and Ivanhoe Irrigation District v. McCracken, 357 U. S. 275.

Salinity Control a Purpose of the State Applications and of Their Assignment

As a step in obtaining the necessary water rights for the Project, the Secretary of the Interior on behalf of the United States requested the State of California to assign to it the applications to appropriate water of the Sacramento River and the Delta which had been filed by the State in 1927 and 1938. The assignment of Applications 5625, 5626, 9364 and 9365 followed on September 3, 1938. Of these, 5626 and 9364 covered diversion and storage at Shasta Reservoir and included "saline control" as one of the purposes for which the water was to be used. Under its terms, the assignment was made in consideration of the general benefits to accrue to the State of California from construction of the Project by the United States pursuant to Congressional authorization of August 26, 1937. On March 26, 1952, the State of California assigned to the United States Applications 9363, 9366, 9367 and 9368 "for the purposes of Central Valley Project as contemplated and provided by the State of California" (DWR 56). The State plan specifies salinity control as one of the purposes of Shasta Dam (Water Code Section 11207).

Thus it is clear that protection of the Delta from salinity incursion constituted a material part of the consideration for which the State of California assigned to the United States the applications which it had filed to provide adequate water for the Project. This protection was intended to accomplish two purposes: first, to provide the agricultural lands in the Delta with water of a quality suitable for irrigation; and second, to provide a reasonably accessible source of supply to meet the industrial and agricultural requirements along the south shore of Suisun Bay in Contra Costa County (DWR 3, p. 117, and 5, p. 221).

Present Plan of the Bureau to Control Salinity

In contrast to the federal plan contained in Document No. 35 as well as to the State plans dating from the early 1930's, the Bureau, as operator of the Project, now contends that its only obligation is to provide to its contract customers water of suitable quality at the intakes of the Delta-Mendota and Contra Costa Canals (RT 843). To accomplish this, the Bureau must prevent water containing in excess of 1000 ppm from encroaching beyond the limits of maximum incursion experienced in 1954 which approximated a line extending through the northern part of Decker Island, the mouth of False River and a point on Dutch Slough approximately two miles west of the community of Bethel Island (RT 1885). By coincidence, this approximates the pre-Shasta median of salinity incursion for the period 1920-1943, previously described.

Since the beginning of operation of Shasta Reservoir, water in excess of 1000 ppm has encroached beyond the pre-Shasta median line in only 1944, 1947 and 1959. Because 1944 was the first year of reservoir operations, it probably was not representative of actual operating conditions. The incursion in 1947 was described by a Bureau engineer as unintentional (CCCWA 37A) and the incursion in 1959 was caused by the adverse effect of an operational experiment (RT 2354).

Prevention of such encroachment requires a minimum inflow of fresh water to the Delta of approximately 1500 cfs in addition to the inflow required to meet consumptive uses in the Delta and that quantity required for export from the Delta (RT 2047). When the natural stream flow is insufficient to provide this minimum inflow, releases of Project water from storage are needed. According to evidence presented by the Bureau this would require on the average of 359,900 acre-feet of stored water

annually, and a maximum of 546,000 acre-feet in a very dry year (USBR 253A). According to evidence presented by Sacramento River and Delta Water Association, these quantities would be 192,260 and 403,430 acre-feet, respectively (SRDWA 45B).

Project operations as proposed by the Bureau would result in approximately 95% of the Delta obtaining water of adequate quality for irrigation (RT 1794) and would provide the Delta with greater protection than it enjoyed in dry years prior to the operation of the Project; but in wet years, salinity conditions in the western portion of the Delta - the remaining 5% below the aforementioned median line - would be inferior. This is because the spring runoff, which, in the absence of the Project, served to repel salinity incursion, would be modified to the extent of storage in Project reservoirs. The result would be that salinity would begin to encroach into the Delta at an earlier date each year than would have occurred in the absence of the Project (CWSC 10* and RT 9714-16). However, this situation generally has not occurred (RT 9822) and an analysis of the evidence indicates it will not occur for several years until use of Project water has been more fully developed. Furthermore, with the completion of the Trinity River Division of the Project, there will be substantial surpluses of water available for several years which could be used for salinity control purposes until additional diversion facilities are built and additional conduits are constructed to convey the water to the San Joaquin Valley (RT 11542). An average of 992,000 acre-feet per annum will be imported into the Sacramento Valley from the Trinity River (USBR 164).

California Water Service Company Exhibit 10

Proposals by Local Interests for Salinity Control

The western portion of the Delta comprises two distinct areas: one, the islands which are agricultural, and the other, those lands along the northern shore of Contra Costa County which support both an agricultural and industrial economy. With respect to the latter area, the Contra Costa County Water Agency in its Exhibit 59 sets forth the present and potential water requirements. The present needs are being met by water supplies delivered through the Contra Costa Canal, by diversions directly from Delta channels, by conservation of local runoff and by pumping from underground sources (CCCWA 58A). In order to meet future requirements, however, the Agency contends that the Project would have to be operated in such a manner as to provide quality standards at the City of Antioch and Mallard Slough intake of the California Water Service Company which the Agency describes as "necessary and practical". The quality standards sought by the Agency would provide that during the 150 consecutive days following the annual winter runoff season, water containing in excess of 250 ppm should not be allowed to advance upstream from the Mallard Slough intake of the California Water Service Company two miles west of the City of Pittsburg and that the average chloride ion concentration above Mallard Slough should not be allowed to exceed 150 ppm during this 150-day period; that water in excess of 350 ppm should never be permitted above Antioch. The Agency further contends that the operating conditions of the Project proposed by it should be maintained until such time as an alternate water supply is provided (CCCWA 85). This degree of water quality would require on the average 1,024,000 more acre-feet of stored water annually than would be required to prevent encroachment of salinity in the upper 95% of the Delta as contemplated by the Bureau (CCCWA 95 and USBR 253A).

The California Water Service Company holds Permit 3167 issued on Application 5941, filed in 1928. This permit authorizes a diversion of 50 cfs at the Mallard Slough intake and diversion to off-channel storage of 22,000 acre-feet per annum at a maximum rate of 120 cfs for domestic and industrial use (CWSC 2A). The Company takes the position that in the operation of the Project as proposed by the Bureau to provide quality water at the intake of the Contra Costa Canal, it must guarantee that the public's requirements for domestic water will be supplied on the basis of present maximum demands and estimated future demands. The Company estimates that Contra Costa Canal will reach its ability to meet maximum peak demands in about 1965, which will then make it necessary to enlarge facilities or supplement those now existing (CWSC 2). The Company would prefer, however, that the Board require the Bureau to maintain a satisfactory quality of water at the Company's intake on Mallard Slough so that the Company could continue to perfect its diversion right under Permit 3167. The Board is also urged to condition the permits of the United States so that the Company's 1928 priority is made superior to those presently under consideration (RT 9649).

The permits herein will be issued subject to vested rights and to that extent the Company's rights will be protected, however, no valid justification exists for upsetting the priority of the applications filed by the State in 1927 and now held by the United States pursuant to assignment. For reasons hereinafter discussed, enlarging the existing Contra Costa Canal or supplementing it with additional facilities may prove to be a more desirable and economical method of meeting future demands for domestic water than that proposed by the California Water Service Company.

The Association, the San Joaquin County Flood Control and Water Conservation District and others urge that the Board impose a condition in any permits granted to the United States to require that adequate outflows from the Delta into Suisun Bay be maintained at all times to prevent water in excess of 1000 ppm from encroaching beyond a point 0.6 mile west of Antioch. According to the Bureau's study, this would require on the average approximately 476,000 more acre-feet of stored water annually than would be required to maintain suitable quality for all but the western 5% of the Delta (USBR 253A and 253C). A comparable average annual figure according to the Association's study is 301,000 acre-feet (SRDWA 45B and 45D). In addition, the Association asks that the United States conduct studies in cooperation with the State of California to determine if it is possible to provide a substitute water supply to water users in and around the Delta in lieu of the water supply which would be available as a result of the above expressed condition.

The evidence shows that to protect the agricultural lands of the western Delta islands, it would be sufficient if water containing in excess of 1000 ppm were prevented from encroaching beyond the western end of Sherman Island. This would require an outflow of about 2650 cfs (RT 6629). Irrigation on Sherman Island could be continued with outflows of either 1800 cfs or 1500 cfs, but if these outflows were to continue for a long period of time it would be necessary to revise the Island's water distribution system. With an outflow of 1800 cfs a capital investment of $150,000 would be required. The capital expenditure with a 1500 cfs outflow would be at least $450,000. In addition to the capital expenditure,

the annual operation and maintenance costs would increase $15,000 and $45,000 respectively (SRDWA 86). No evidence was presented of the cost, if any, to maintain irrigation on Jersey Island with these outflows.

The State's Plan for Solution of the Salinity Problem

The complexity of the water supply problem in the western Delta, together with the need for a supply of adequate quality without the necessity for committing large quantities of water to flow into Suisun Bay to serve as a hydraulic barrier, has been the subject of study by the State of California (DWR 10). The salinity control barrier investigations conducted by the Department and its predecessors have resulted in plans for the Delta Water Project (DWR 70 and 70-1).

The purposes of this State plan are to conserve water by reducing the quantity required for salinity control; to distribute quality water throughout the Delta and to diverters adjacent thereto; and to provide a higher degree of flood protection to the Delta (RT 5141). Wayne MacRostie, a witness for the Department, estimated that with the physical facilities of the Delta Water Project, it will be necessary to maintain an outflow in the order of only 1,000 cfs to allow quality water to be transported across the Delta (RT 5143-44).

The State plan includes facilities to serve irrigation water to the western islands and to deliver adequate municipal and industrial water to the north shore of Contra Costa County and a portion of Solano County north of the Sacramento River. The physical features of the latter facility are as yet undetermined but are being studied by the Department pursuant to Chapter 1765, Statutes of 1959 (RT 5148). With respect to replacement of irrigation water for the western Delta through facilities

planned by the State, water would be provided to all lands downstream with a maximum intrusion of water containing 500 ppm. The mean concentration of chlorides at such locations would be about 250 ppm (RT 5170).

The costs of the features of the Delta Water Project, including the irrigation water replacement facilities and limited industrial and municipal water replacement facilities, would be about $83 million based on 1958 prices (RT 5177).

Disposition of the Salinity Problem

The evidence has clearly established that salinity incursion is a subject of continuing economic concern to a small but nevetheless important and highly developed area comprising the western portion of the Delta and the northern portion of Contra Costa County. One possible solution to incursion would be to provide a hydraulic barrier of fresh water to be maintained in the vicinity of the City of Antioch. Various parties in this proceeding have proposed conditions which they urge be imposed upon the United States to provide this barrier. However, it has been conclusively determined on the basis of functional and economic feasibility studies by the Department that the best means of conserving water otherwise needed for salinity repulsion is the Delta Water Project (RT 5126). Provided the western portion of the Delta will be supplied by an alternate method and thereby conserve water to be beneficially used in the future through the State water facilities or the Central Valley Project, the Board concludes that it would be unreasonable to dedicate for salinity repulsion purposes the large quantities of water that would be required to flow out to the sea.

The Board is particularly persuaded to this view in the light of Article XIV, Section 3, of the State Constitution:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare ..."

In resolving the issue of salinity repulsion, the Board does not intend that the United States is to be relieved of its share of responsibility in this matter. The obligation of the United States is spelled out by the circumstances under which the Project was authorized and in the terms of the assignments of these applications which were originally filed by the State for this purpose.

Likewise, the Board is mindful of the State's obligation as set forth in Chapter 1 of Part 4.5 of the Water Code, with particular reference to Section 12202 which provides:

"Among the functions to be provided by the State Water Resources Development System, in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta ..."

The Board is also cognizant of the responsibility of the water users, present and future, in the Delta and in the northern portion of Contra Costa County to assume their share of the costs of the Federal and/or State project, commensurate with the benefits received, over and above those they would have enjoyed in the absence of a project.

Until the Delta Water Project as contemplated by the State becomes effective, continued maintenance of a hydraulic barrier is imperative. Until use of water from the Federal project develops more fully, surplus water will be available (particularly with the import of Trinity River

water) for the maintenance of such a barrier. Therefore, there is no impending emergency requiring imposition of specific permit terms relative to salinity control at this time. Rather, the Board will reserve jurisdiction for a reasonable period, not to exceed about three years subject to further extension, for the purpose of allowing the United States, the State of California, and the water users in the Delta, an opportunity to work out their problems by mutual agreement. During this period the Board will require the United States to report semi-annually the status of such negotiations, if any, and will welcome similar reports from any interested agency or individual. The permits can then be conformed to reflect the terms of any such agreement; or, failing to reach agreement, the Board will, after due notice and opportunity for interested parties to be heard, make such further order as may be necessary and proper relating to salinity control in the Delta.

In taking the action outlined in the preceding paragraph the Board recognizes that in this proceeding it has no jurisdiction over the Department or the water users to require their participation in such negotiations. An additional problem exists in the case of the latter group due to a lack of representation of all of the parties now being benefited or to be benefited. The Board also recognizes that reservation of jurisdiction does not solve the problem and without participation in good faith by all parties such action by the Board is of little consequence. The Board does not believe that reservation of jurisdiction and postponement of the day of final decision will cause the problem to disappear or diminish. Neither does it believe that the problem can be legislated out of existence nor solved by the mere weight of further investigations and studies, of which there have been many in the past, some of which have been recited in

this decision. The time has arrived for the parties to meet at the conference table, recognizing that all have a responsibility and an urgent interest in an early solution. As ably expressed by Harvey O. Banks, former Director of the Department of Water Resources and recognized as an eminent authority on the Delta problems: "I believe that the final solution to the allocation of costs and the responsibility for payment should be a three-way responsibility between the local water users there, the United States and the State" (RT 11558). "...it is imperative that these negotiations be started promptly and prosecuted vigorously" (RT 11600). William O'Connell, consulting engineer for Contra Costa County Water Agency stated in response to a question by engineer Kienlen of the Board's staff regarding the willingness of the people, industry and municipalities in Contra Costa County to pay for benefits derived through operation of the project: "I cannot answer in toto for the industry and people in Contra Costa County. The Contra Costa County Water Agency is willing and has made such a recommendation and received acceptance of their recommendation in principle by representative members of the community and the industrial complex" (RT 10282-83).

As stated above, jurisdiction of the Board over some of the parties to this proceeding is limited. Within a short time, however, the Department will be before this Board as an applicant for permits covering its proposed Feather River and Delta Diversion Project. The Department will then be faced with the salinity problem as the United States is at this time. The precedent of the May 16, 1960, agreement between the Department and the United States previously referred to, is believed adequate to warrant the participation of the Department at this time in similar negotiations regarding the extent of the State's responsibility for

releases of water for salinity control purposes, if and when the State is granted permits for its Feather River and Delta Diversion Project. Until this problem is solved a cloud will remain over the State project as to its ability to meet commitments under water service contracts.

We recognize that not all the Delta and the Contra Costa County water users were represented at the hearing and any agreement should properly include all beneficiaries. Although many interested parties in this area were very ably represented at the hearing through the Association, Contra Costa County Water Agency, and others, to effect overall representation, particularly for taxing purposes, some type of comprehensive water district or other legal entity might be required. If so, no impediment to its organization is indicated in the record.

As the Board views the record, the parties concerned apparently believe that no directive has yet been given or real incentive provided for them to aggressively approach the problem. Counsel for Contra Costa County Water Agency stated at the hearing: "...I know of no letter, no telephone call, (or) oral conversation in which any demand whatsoever has been made upon us to pay except at this hearing before this board.... There has been no negotiation or serious discussion ...of this subject with any responsible people" (RT 10286-87). We believe a real incentive for a negotiated settlement already exists. Mr. Banks cited the alternative as "...many years of litigation and many millions of dollars spent to make that determination." Mr. Banks was referring to a court determination of the water rights in the western portion of the Delta which may otherwise be required (RT 11566). Counsel for the Agency stated: "But apart from some massive litigation, we are convinced that the only protection that we can get is from the permit conditions imposed upon permits of the Bureau by

this Board" (RT 10288). Imposition of such permit conditions, however, is no absolute assurance against "massive litigation".

In summary, under Project operation large areas of the San Joaquin Valley are served directly from the Delta through the Delta-Mendota Canal. Absence of a Delta water supply for this Canal would largely preclude the irrigation of lands now being served from the Madera and Friant-Kern Canals. In a very real sense the economy of much of the San Joaquin Valley is contingent upon an adequate water supply in the Delta. Further, large exports from the Delta are to be made under the State Water Resources Development System authorized by the 1959 Legislature and endorsed by the people of the State in the bond election of November 1960. These exports will serve water-deficient areas from the Delta to the Mexican border. The people of the entire State have a transcending interest in the ultimate success of this plan as well as that of the Central Valley Project. The success of both will turn upon the acquisition of clearly defined rights to divert the necessary water from the Delta. Indefinite postponement of the determination of mutual responsibility and the clarification of the relationship between local interests and the two great Federal and State projects which are, or will be, dependent upon a Delta water supply, is adverse to the interests of the entire State.

The Board finds that in view of changing circumstances anticipated for the future, sufficient information is not yet available to determine with finality suitable terms and conditions which will protect the Delta from salinity incursion without unreasonable waste of water and thereby best develop, conserve and utilize in the public interest the water sought to be appropriated. The Board finds that in the absence of an agreement between the United States, the State of California and the Delta water

users a further period of actual operation of the Project will be necessary, coordinated with the State's Delta Water Project when constructed, in order to obtain the required information.

The Board will reserve jurisdiction to conform the permits to such agreement as may be reached, or to further order of the Board. If an agreement is not reached by March 1, 1964, or within such additional time as may be determined appropriate, the Board will, after due notice and opportunity for interested parties to be heard, make such further order as may be necessary and proper. Any final action which the Board may take in the absence of a negotiated settlement of the salinity control problem will be determined upon the premise that responsibility lies not with the United States alone but with the State of California and the Delta users as well.

COORDINATION OF FEDERAL-STATE PROJECTS

As previously pointed out, early studies by the State Engineer established the need for coordinated development of the water resources of the State. One of the devices to assure coordination, as provided by law, was the filing by the State of applications to appropriate water from the Sacramento River and streams tributary thereto as well as from the Delta, some of which are the applications under consideration in this proceeding. Many others are still retained by the State and are awaiting assignment (DWR 56). Still other applications have been filed by the Bureau for other units of the Project and are not yet acted upon.

The State plan for coordinated development includes the control of water in the Delta and its diversion for use to the south through an aqueduct conveyance system. In furtherance of this plan the Department has requested assignment of some applications for use in connection with the Feather River and Delta diversion units of the State Water Resources Development System. This system includes the Central Valley Project, the California Water Plan and the State Water Facilities as defined in Section 12934(d) of the Water Code (Water Code Section 12931). The physical relationship arising by reason of the joint use of the Delta requires coordinated operation of both federal and state projects.

Upon the urging of the Board the United States and the Department entered into an agreement on May 16, 1960, for the coordinated operation of the Central Valley Project and the State Feather River and Delta Diversion Projects (DWR77). This document, a significant milestone in federal-state relations with respect to water in California (RT 11539), provides, in part, for future "exchange of any and all plans, criteria,

and other operational information relative to the operation of their (federal and state) projects". The parties further covenant to "establish by agreement mutually acceptable operational criteria and plans including water service that will produce the maximum accomplishment of the Federal Central Valley and the State Feather River and Delta Diversion Projects" (DWR 77, p. 9).

The Board finds that the several units of the Central Valley Project, as well as other units of the State Water Resources Development System, are a coordinated project which require coordinated terms and conditions in permits for appropriations of project water (DWR 77). The Board further finds that the terms and conditions necessary to effect coordination cannot reasonably be determined until decision is reached on other State and Federal applications yet to be considered for permit. Therefore, reservation of jurisdiction to finally determine such terms and conditions is necessary. The period of time required to obtain the needed information is impossible to ascertain at this time. Jurisdiction will be reserved for the purposes stated for as long as may be necessary but not to exceed time of issuance of licenses.

WATERSHED PROTECTION

One of the principal functions of the Central Valley Project is the exportation of surplus water out of the catchment area of the Sacramento Valley into the San Joaquin Valley. This essential feature of the Project adopted by the early State planners has been followed by Federal project builders. As desirable as exportation may be, lands within the Sacramento Valley should not incur deficiencies in supply while water is transported past them to distant lands. Protection of users within the watershed against the possibility of suffering such deficiencies is a policy expression of law applied to the Central Valley Project in Water Code Sections 11460 through 11463.

It is contended by a number of parties in these proceedings that the provisions of the Watershed Protection Law are vague and uncertain and therefore unenforceable. Furthermore, counsel for the Bureau contends that this law does not apply to the United States. Similar contentions were advanced by the parties in the matter of applications by the United States to appropriate water of the San Joaquin River. In Decision D 935, the Board declared as follows:

> ". . . we are not here compelled to struggle with these problems of constitutional law and statutory construction. Such matters can only be finally determined by a court of competent jurisdiction. The limitations imposed by the watershed protection law are not dependent upon administrative action but exist by force of the statute itself. Action by the Board can have no effect upon them.
>
> "Without regard to the extent the statute may give rise to valid and enforceable obligations on the part of the United States, the Board is bound to look to all relevant legislative expressions of policy and to consider them as guides in exercising its discretion to condition permits in the public interest in the light of all the facts presently before the Board."

The foregoing statement applies equally to the present situation and is adopted as a part of this decision.

A number of parties in these proceedings argue that the Sacramento-San Joaquin Valley is in fact one watershed and that the Watershed Protection Law is, therefore, inapplicable. The evidence does not support such a conclusion. A brief review of the history of the Central Valley Project will serve to resolve any doubt on this issue.

Events Preceding the Adoption of the Watershed Protection Law

The earliest official state recognition of a plan for exportation of water from the Sacramento drainage basin to the San Joaquin Valley appeared in Department of Public Works Bulletin No. 4, "Water Resources of California - A Report to the Legislature of 1923". The report recommended a dam across Carquinez Straits for diversion of "excess waters" to the San Joaquin Valley. The investigation by the State Engineer which resulted in Bulletin No. 4 had been authorized by the 1921 State Legislature which directed formulation of a comprehensive plan for accomplishment of the maximum conservation, control, storage, distribution and application of all waters of the State (Staff 9, p. 150).

In 1925, another report, Department of Public Works Bulletin No. 9, "Supplemental Report on Water Resources of California - A Report to the Legislature of 1925" recommended importation of Sacramento River water to the San Joaquin Valley with an added feature of a major storage reservoir on the Sacramento River. This was followed by a further report on the comprehensive plan published in 1927 as Bulletin No. 12, "Summary Report on the Water Resources of California and a Coordinated Plan for their Development" by the State Engineer (DWR 1). Primary attention was

directed to the needs of the San Joaquin Valley with the Sacramento and upper Trinity drainage basins described as "the most accessible region of surplus". It was stated in the report that, "Here is ample water, taken with the San Joaquin Valley streams, for the full development of both valleys." The report continued, "The new supply for the San Joaquin Valley would be derived from the water used to maintain navigation in the channel of the Sacramento River. After serving its useful purpose in the Sacramento Valley, this water would be diverted at the mouth of the river into the San Joaquin." (Staff 9, p. 178)

The economic and legal problems implicit in carrying out the transfer of water from one drainage basin to another while at the same time protecting the watershed of origin from deficiencies prompted the State Legislature of 1927 to call for appointment of a Joint Legislative Committee to study the problems and recommend some method of procedure.

In 1929 the Joint Legislative Committee made its report suggesting that the State adopt a policy with respect to coordination of all uses for water and "The coordination of water supplies between the time and place of origin and time and place of use, and by means of transportation of water in excess of the needs of watersheds of origin from such watersheds to areas of deficient water supply to correct unequal geographic distribution." Continuing, the Committee urged a policy expression of law which would give "Definite and valid assurance that such areas of surplus from which water is or may be taken shall have a right to ample water for their ultimate needs, superior and prior to that of the area of deficiency to make use of such surplus. In the event of impounding water by storage, such areas or watersheds from which water is taken shall be entitled to use their prior water rights accorded hereunder, upon payment or agreement to

pay such consideration for waters used therefrom as may be reasonable and proper under all the circumstances and conditions relating thereto, making due allowance for the initial prior right of such areas to such surplus water." (Staff 9, pp. 230-231)

The "State Water Plan", Bulletin No. 25 (DWR 3), submitted in 1931 pursuant to legislative request of 1929, presented a comprehensive plan which included the diversion of water only from the Delta for exportation to the San Joaquin Valley. This was recommended because it would interfere least with "present rights and interests", and because it allowed utilizing the waters derived from the entire catchment area after they had flowed past all upstream users and after all upstream requirements had been met.

Applicable Statutes

The first successful legislative action to provide a protective policy with respect to a catchment area was in 1931 when the Department of Finance was prohibited from releasing from priority or assigning applications filed by the State pursuant to Statutes of 1927, Ch. 286, p. 508, § 1 (now Water Code Section 10500), for the appropriation of water when, in the judgment of the Department of Finance, such assignment or release would deprive the county in which such water originates of any water necessary for the development of the county (Stats. 1931, Ch. 720, p. 1514, § 1, now Water Code Section 10505).

In 1933, the Legislature authorized construction of a system of works designated as the Central Valley Project and creation of the Water Project Authority (Stats. 1933, Ch. 1042). The latter State agency was empowered to construct and operate any of the several units of the Project

as provided in the statute. The units authorized included a storage dam at or near Kennett, a Contra Costa County conduit, a Delta cross-channel, and Delta diversion, together with a conveyance system southward to the mouth of Fresno Slough which enters the San Joaquin River at Mendota Pool. By way of limiting the power of the Water Project Authority the statute provided that in the construction and operation by the Authority of any project authorized under provisions of the Central Valley Project Act, "no watershed or area wherein water originates, or any area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall be deprived by the authority directly or indirectly of the prior right to all of said water reasonably required to adequately supply the beneficial needs of said watershed, area or any of the inhabitants or property owners therein."

The act further provided that the impairment or curtailment of watershed rights by the Authority could be accomplished in no other way than by purchase and that the act was not to be construed as creating any new property rights other than as against the Water Project Authority nor to require the furnishing of project water to any person unless the water was purchased. With respect to exchanging water of one watershed for that of another, the act provided that the requirements of the watershed wherein the exchange is made must be satisfied first and at all times to the extent such requirements would have been met were the exchange not made.

In 1943, the Legislature included the Central Valley Project Act in the Water Code as Division 6, Part 3, and incorporated the language of the watershed protection statute into Sections 11460 through 11463.

Bureau Policy Statements

On February 17, 1945, Acting Regional Director R. S. Calland of the Bureau of Reclamation stated in a letter to the Joint Committee on Rivers and Flood Control of the California State Legislature that it was the view of the Bureau that the intent of Water Code Section 11460 is "that no water shall be diverted from any watershed which is or will be needed for beneficial uses within that watershed." The letter continued: "The Bureau of Reclamation, in its studies for water resources development in the Central Valley, consistently has given full recognition to the policy expressed in this statute by the Legislature and the people. The Bureau has attempted to estimate in these studies, and will continue to do so in future studies, what the present and future needs of each watershed will be. The Bureau will not divert from any watershed any water which is needed to satisfy the existing or potential needs within that watershed...." (Staff 9, p. 798, SRDWA 19).

On May 17, 1948, Assistant Secretary of the Interior William E. Warne wrote a letter to Congressman Clarence Lea on the subject of Federal policy with respect to export of surplus water from the Sacramento Valley drainage basin to the San Joaquin Valley, stating: "As you know, the Sacramento Valley water rights are protected by (1) Reclamation law which recognizes State water law and rights thereunder; (2) the State's counties of origin act, which is recognized by the Bureau in principle; and (3) the fact that Bureau filings on water are subject to State approval." (Staff 9, p. 799 and SRDWA 19).

On October 12, 1948, Secretary of the Interior Krug, in a public speech at Oroville, stated: "Let me state, clearly and finally, the

Interior Department is fully and completely committed to the policy that no water which is needed in the Sacramento Valley will be sent out of it." He added: "There is no intent on the part of the Bureau of Reclamation ever to divert from the Sacramento Valley a single acre-foot of water which might be used in the valley now or later." (Staff 9, p. 799 & SRDWA 19).

On November 15, 1949, Regional Director Richard L. Boke reaffirmed these main policy statements and summarized them in a letter to Congressman Clair Engle, stating, "We believe the foregoing is a summary of the main policy statements by Government officials on the subject of importation of Sacramento Valley water to the San Joaquin Valley." (Staff 9, p. 799 & SRDWA 19).

Watershed Protection Law
Applicable to United States

In spite of these reported clear-cut and unequivocal statements by persons occupying governmental positions of the highest authority respecting such matters at the time they were made, the Bureau has since qualified these long-held principles and now frankly proclaims its present intent: "To the extent that it can do so compatibly with project functions, the United States will satisfy watershed and area of origin needs and uses." (RT 1716).

In 1951, the Legislature added Section 11128 to the Water Code making the limitations prescribed in Sections 11460 to 11463 expressly applicable to "any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof".

In 1955, the State Attorney General published Opinion 53-298 in which he concluded that Water Code Sections 10505, 11460 and 11463 are

constitutional and that the latter two sections are applicable to the United States as the operator of the Central Valley Project in view of Water Code Section 11128 and Section 8 of the 1902 Federal Reclamation Act. Section 8 is interpreted as an affirmative election by Congress to comply with certain aspects of State law. It directs the Secretary of the Interior to proceed in conformity with state laws relating to the appropriation of water used in irrigation.

The Attorney General's opinion directs attention to the policy statements made in 1948 and 1949 by responsible Federal officials as consistent with the purpose of the legislative enactment of Water Code Sections 11460 and 11463. Referring to the enactment of Section 11128, the Attorney General said, "it removes any doubt but that, so far as State law is concerned, these sections do declare the law of the State for purposes of federal compliance therewith pursuant to Section 8 of the Reclamation Act".

Permit Conditions to Provide Watershed Protection

The Board concludes, therefore, that in the historical approach adopted by the project planners the Sacramento watershed was regarded as separate from that of the San Joaquin and that only water surplus to the needs of users in the Sacramento watershed would be considered as available for export to the San Joaquin. The Board views the legislative expression of protective policy as applicable in accordance with this historical concept of the distinction between the respective watersheds.

It is concluded that the public interest requires that water originating in the Sacramento Valley Basin be made available for use within

the Basin and the Sacramento-San Joaquin Delta before it is exported to more distant areas, and the permits granted herein will so provide.

However, the Board will limit the period of time in which such preference may be exercised. This limitation is necessary in order to best conserve in the public interest the water to be appropriated. The Board considers that, in view of the length of time the Project has been in operation, a period of approximately three years is a reasonable time in which the users within the watershed who are currently using water from Sacramento River or the Delta may have a preferred right to Project water. Accordingly, the permits will provide that until March 1, 1964, requests for water service contracts from such users within the Sacramento Valley and Delta shall be preferred over requests from users outside the watershed.

The Board concurs with Counsel for the Association that a period of approximately ten years is a reasonable length of time in which users within the watershed who are not presently diverting water from the Sacramento River or Delta may consummate contracts for Project water (SRDWA 79). Accordingly, the permits will provide that until March 1, 1971, requests for water service contracts from such users shall be preferred over requests from users outside the watershed.

Users within the watershed who do not presently hold appropriative rights but who wish to initiate such rights by application to this Board should also be afforded preference. Accordingly, the permits granted for use outside the watershed shall be subject to rights initiated by applications for use within the watershed.

All applications considered here, except Application 10588, were originally filed by the Department of Finance pursuant to Water Code Section

10500. The assignment of Applications 5625, 5626, 9364 and 9365, dated September 3, 1938, contains the following condition (DWR 56):

> "...subject to depletion of the stream flow above Shasta (formerly Kennett) Dam by the exercise of lawful rights to the use of water for the purpose of development of the counties in which such water originates, whether such rights have been heretofore or may be hereafter initiated or acquired, such depletion not to exceed in the aggregate four million five hundred thousand (4,500,000) acre-feet of water in any consecutive ten-year period, and not to exceed a maximum depletion in any one year in excess of seven hundred thousand (700,000) acre-feet."

On March 26, 1952, the Director of Finance executed two assignments, one concerning Applications 9363 and 9368 and the other concerning Applications 9366 and 9367. Both of these assignments contain the following condition (DWR 56):

> "...subject, however, in conformity with Section 10505 of the Water Code of the State of California, to any and all rights of any county in which the water sought to be appropriated originates to the extent that any such water may be necessary for the development of such county."

According to the Attorney General's Opinion No. 53-298, Section 10505 governs an exclusive function of the Department of Finance (now administered by the California Water Commission), but the State Engineer (whose functions in this regard are now performed by the State Water Rights Board) may incorporate all pertinent terms and reservations which were made as conditions of assignment into permits granted on the applications being considered. Therefore, permits issued pursuant to these applications will contain the terms set forth in the assignments of such applications.

PROTECTION OF EXISTING RIGHTS

Throughout these proceedings, the Bureau's representatives have consistently affirmed their policy to recognize and protect all water rights on the Sacramento River and in the Delta existing under State law at the time these applications were filed, including riparian, appropriative and others. Unfortunately, these rights have never been comprehensively defined. It is imperative, therefore, that the holders of existing rights and the United States reach agreement concerning these rights and the supplemental water required to provide the holders with a firm and adequate water supply, if a lengthy and extremely costly adjudication of the waters of the Sacramento River and its tributaries is to be avoided. Although not an issue at this hearing, reference to the two types of contracts for supplemental water that have been suggested is in order because the type of contract entered into between the holders of existing rights and the United States will have a direct bearing on the requirements necessary to protect existing rights.

One type of contract for supplemental water would provide for the water users to pay for the exact quantity of stored water diverted each year. This would require the maintenance of a large number of measuring devices and compilation of extensive records to determine the yield to each water user under his own right and the quantity of stored water diverted. Many of the measuring devices and records could be eliminated if the parties entered into the other type of contract for supplemental water similar to those proposed by the Bureau and the Sacramento River and Delta Water Users Association (USBR 96 and 97). This type of contract would require the water user to pay for the average annual quantity of stored

water that he would require during a repetition of hydrologic conditions similar to those during the period 1924 through 1954.

To assure that vested rights are protected under actual operating conditions of the Project and at the same time to assure that the water sought to be appropriated will be developed, conserved and utilized in the public interest, it will be necessary from time to time to establish measuring devices and reporting procedures. The Board finds that sufficient information is not now available with respect to these requirements to finally determine the terms and conditions which will reasonably protect such vested rights and at the same time best serve the public interest. Therefore, permits will provide that upon the request of the Board, permittee shall make such measurements and maintain and furnish to the Board such records and information as may be necessary to determine compliance with the terms and conditions of this order, including the recognition of vested rights and for the further purpose of determining the quantities of water placed to beneficial use under the permits both by direct diversion and storage.

RIGHTS SHALL BE APPURTENANT TO THE LAND

This Board has taken cognizance in previous decisions of resolutions adopted by the Legislature in 1952 expressing the desirability of including terms and conditions in permits issued to the United States for irrigation water to be used in federal reclamation projects (Stats. 1953, Vol. 1, pp. 272, 405).

Among such conditions recommended by the Legislature were those providing in substance that rights under the permits are to be held by the United States in trust for the water users and that rights acquired thereunder shall be permanent and appurtenant to the lands irrigated.

In Decision D 935, the Board discussed these conditions at some length, concluding that by force of applicable state and federal law, the United States holds all water rights acquired for project purposes in trust for the project beneficiaries who by use of the water on the land will become the true owners of the perpetual right to continue such use subject only to continued beneficial use and to observance of any and all contractual commitments to the United States. Upon the premise of this "trust theory" the permits issued to the United States were conditioned so as to express the "permanent and appurtenant" concept.

In further support of its view, this Board invited attention to the Congressional Act of July 2, 1956, Chapter 492, Section 4, 70 Stats. 484, now codified as Section 485h - 4, U. S. C. A., Title 43, which reaffirmed Section 8 of the Reclamation Act of 1902 containing the proviso reading as follows:

> "That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

The views thus expressed in Decision D 935 are reaffirmed, and the permits to be issued pursuant to those applications which include irrigation as a purpose of use will provide in substance that rights to be acquired thereunder will be appurtenant to the land on which the water shall be applied and that such rights shall continue in perpetuity.

CONCLUSION

The evidence indicates and the Board finds that unappropriated water exists in the Sacramento River and in the Delta at times and in sufficient amounts to justify the approval of Applications 5625, 9366, 9367, 9368 and 10588 and also to warrant the approval in part of Applications 5626, 9363, 9364 and 9365; that the uses proposed are beneficial; that such waters in general, but with certain exceptions and subject to certain conditions, may be taken and used as proposed without interference with the exercise of prior rights; and that the applications should be approved and permits issued pursuant thereto, subject to the usual terms and conditions and subject to those additional terms and conditions indicated in the preceding portion of this decision for the protection of prior rights and in the public interest. The Board finds that as so conditioned the developments proposed in these applications will best develop, conserve and utilize in the public interest the water sought to be appropriated.

ORDER

Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588 of the United States for permits to appropriate unappropriated water having been filed with the predecessors of the State Water Rights Board, protests against the approval thereof having been submitted, jurisdiction of the administration of water rights, including the subject applications, having been subsequently transferred to the Board, a public hearing having been held by the Board and said Board having considered all of the evidence received at the hearing and now being fully informed in the premises:

IT IS HEREBY ORDERED that Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588 be, and the same are, approved and that permits be issued to the applicant subject to vested rights and to the following additional terms and conditions:

1. The quantity of water to be appropriated from Sacramento River for power purposes at Shasta Power Plant under permit issued pursuant to Application 5625 shall not exceed 11,000 cubic feet per second by direct diversion and 3,190,000 acre-feet per annum by storage.

2. The quantity of water to be appropriated from Sacramento River for power purposes at Shasta Power Plant under permit issued pursuant to Application 9365 shall not exceed 2,275 cubic feet per second by direct diversion and 1,303,000 acre-feet per annum by storage.

3. The quantity of water to be appropriated from Sacramento River for power purposes at Keswick Power Plant and for incidental domestic purposes under permit issued pursuant to Application 10588 shall not exceed 13,800 cubic feet per second.

4. The quantity of water to be appropriated from Sacramento River for irrigation, incidental domestic, stockwatering and recreational purposes under permit issued pursuant to Application 5626 shall not exceed 8,000 cubic feet per second by direct diversion and 3,190,000 acre-feet per annum by storage; provided, however, that the amount of water appropriated by direct diversion shall be limited to such quantity as would be available for appropriation at Shasta Dam.

5. The quantity of water to be appropriated from Sacramento River and channels of Sacramento-San Joaquin Delta for municipal and industrial purposes under permit issued pursuant to Application 9363 shall not exceed 1,000 cubic feet per second by direct diversion and 310,000 acre-feet per annum by storage.

6. The quantity of water to be appropriated from Sacramento River and channels of Sacramento-San Joaquin Delta for irrigation, incidental domestic, stockwatering and recreational purposes under permit issued pursuant to Application 9364 shall not exceed 9,000 cubic feet per second by direct diversion and 1,303,000 acre-feet per annum by storage.

7. The quantity of water to be appropriated from Rock Slough for irrigation and domestic purposes under permit issued pursuant to Application 9366 shall not exceed 200 cubic feet per second; provided, however, that the total quantity of water to be appropriated under permits issued pursuant to Applications 9366 and 9367 shall not exceed 350 cubic feet per second.

8. The quantity of water to be appropriated from Rock Slough for municipal and industrial purposes under permit issued pursuant to Application 9367 shall not exceed 250 cubic feet per second; provided,

however, that the total quantity of water to be appropriated under permits issued pursuant to Applications 9366 and 9367 shall not exceed 350 cubic feet per second.

9. The quantity of water to be appropriated from Old River for irrigation and domestic purposes under permit issued pursuant to Application 9368 shall not exceed 4,000 cubic feet per second.

10. The total quantity of water to be appropriated by direct diversion and by storage under permits issued pursuant to Applications 5626, 9363, 9364, 9366, 9367 and 9368 shall not exceed 6,500,000 acre-feet per annum of which not in excess of 3,450,000 acre-feet per annum shall be by direct diversion. The maximum combined rates of direct diversion and rediversion of stored water shall not exceed 22,200 cubic feet per second.

11. The total quantity of water to be appropriated by storage for power and other beneficial uses under permits issued pursuant to Applications 5625, 5626, 9363, 9364 and 9365 shall not exceed 4,493,000 acre-feet per annum.

12. The collection of water to storage under permits issued pursuant to Applications 5625 and 9365 shall be limited to the period extending from about October 1 of each year to about June 30 of the succeeding year. Direct diversion under permits issued pursuant to Applications 5625, 9365 and 10588 shall be allowed year-round.

13. The season of diversion under permits issued pursuant to Applications 5626, 9363, 9364, 9366, 9367 and 9368 where applicable shall be as follows:

(a) About October 1 of each year to about June 30 of the succeeding year for collection of water to storage.

(b) About September 1 of each year to about June 30 of the succeeding year for direct diversion from Sacramento River at Shasta Dam.

(c) Year-round for direct diversion from Sacramento River downstream from Shasta Dam and at points within the Sacramento-San Joaquin Delta.

14. No direct diversion or rediversion of stored water for beneficial use under permits issued pursuant to Applications 5626, 9363, 9364, 9366, 9367 and 9368, other than through the conduits or canals hereinafter named in this paragraph, shall be made until a description of the location of each point of diversion and statement of the quantity of water to be diverted is filed with the State Water Rights Board:

(a) Bella Vista Conduit

(b) Corning Canal

(c) Tehama-Colusa Canal

(d) Chico Canal

(e) Yolo-Zamora Conduit

(f) Contra Costa Canal

(g) Delta Mendota Canal

15. The quantities of water which may be appropriated as set forth in Paragraphs 1 through 11 of this Order may in license be reduced if investigation warrants, or those quantities set forth in Paragraphs 4 through 11 may be reduced at any time prior to license if the reservations contained in Paragraphs 22 and 23 of this Order are modified or set aside upon judicial review; and all rights and privileges under the permits, including method of diversion, method of use and quantity of water

diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use and unreasonable method of diversion of said water.

16. Construction work shall be completed on or before December 1, 1985.

17. Complete application of the water to the proposed use shall be made on or before December 1, 1990.

18. Progress reports shall be filed promptly by permittee on forms to be provided annually by the State Water Rights Board until license is issued.

19. Permits issued pursuant to Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367 and 9368 are subject to compliance with Water Code Section 10504.5(a).

20. The quantity of water which may be diverted under permits issued pursuant to Applications 5625, 5626, 9364 and 9365 shall remain subject to depletion of stream flow above Shasta Dam by the exercise of lawful rights to the use of water for the purpose of development of the counties in which such water originates, whether such rights have been heretofore or may be hereafter initiated or acquired; such depletion shall not exceed in the aggregate 4,500,000 acre-feet of water in any consecutive 10-year period and not to exceed a maximum depletion in any one year in excess of 700,000 acre-feet.

21. In conformity with Water Code Section 10505, permits issued pursuant to Applications 9363, 9366, 9367 and 9368 shall be subject to any and all rights of any county in which the water sought to be appropriated

originates to the extent that any such water may be necessary for the development of such county.

22. Direct diversion and storage of water under permits issued pursuant to Applications 5626, 9363, 9364, 9366, 9367 and 9368 for use beyond the Sacramento-San Joaquin Delta* or outside the watershed of Sacramento River Basin** shall be subject to rights initiated by applications for use within said watershed and Delta regardless of the date of filing said applications.

23. The export of stored water under permits issued pursuant to Applications 5626, 9363 and 9364 outside the watershed of Sacramento River Basin or beyond the Sacramento-San Joaquin Delta shall be subject to the reasonable beneficial use of said stored water within said watershed and Delta, both present and prospective, provided, however, that agreements for the use of said stored water are entered into with the United States prior to March 1, 1964, by parties currently diverting water from Sacramento River and/or Sacramento-San Joaquin Delta and prior to March 1, 1971, by

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*For the purpose of this Order the Sacramento-San Joaquin Delta shall be that area defined in Water Code Section 12220.

**For the purpose of this Order the Sacramento River Basin shall be that portion of the State encompassed by a line beginning at the Sacramento-San Joaquin Delta at Collinsville thence northeasterly to the crest of the Montezuma Hills; thence northwesterly through the crest of the Vaca Mountains; thence northerly along the crest of Putah, Cache, Stony, Thomes, and Cottonwood Creek Basins and along the crest of the Trinity Mountains to Mt. Eddy; thence easterly through Mt. Shasta and along the northern boundary of the Pit River Basin to the crest of the Warner Mountains; thence southerly and westerly along the boundary of the Pit River Basin to Red Cinder Cone Peak; thence easterly along the northern boundary of the Feather River Basin to the crest of the Sierra-Nevada; thence southerly along the crest of the Sierra-Nevada to the southern boundary of the American River Basin; thence westerly along the southern boundary of the American River Basin to the eastern boundary of said Delta; thence northerly, westerly and southerly along the boundary of the Delta to the point of beginning.

parties not currently using water from Sacramento River and/or Sacramento-San Joaquin Delta.

24. Permittee shall bypass or release into the natural channel of the Sacramento River at Keswick Dam for the purpose of maintaining fish life such flows as are provided for in "Memorandum of Agreement for the Protection and Preservation of Fish and Wildlife Resources of the Sacramento River as Affected by the Operation of Shasta and Keswick Dams and their Related Works and Various Diversions Proposed Under Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588 of the United States" between the United States and the California Department of Fish and Game, dated April 5, 1960, filed of record as Fish and Game Exhibit 7 at the hearing of said applications.

25. The State Water Rights Board reserves continuing jurisdiction over permits issued pursuant to Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588 until March 1, 1964, or such additional time as may be prescribed by the Board, for the purpose of formulating terms and conditions relative to salinity control in the Sacramento-San Joaquin Delta. Permittee shall on or before January 1, 1962, and each six months thereafter submit to the Board a written report as to the progress of negotiations relative to agreement between permittee and the State of California and/or the permittee and water users in the Delta and in Northern Contra Costa County.

26. The Board reserves continuing jurisdiction over permits issued pursuant to Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588 for an indefinite period not to extend beyond the date of issuance of licenses for the purpose of coordinating terms and conditions

of the permits with terms and conditions which have been or which may be included in permits issued pursuant to other applications of the United States in furtherance of the Central Valley Project and applications of the State of California in furtherance of the State Water Resources Development System.

27. Upon the request of the Board permittee shall make such measurements and maintain and furnish to the Board such records and information as may be necessary to determine compliance with the terms and conditions of this order, including the recognition of vested rights and for the further purpose of determining the quantities of water placed to beneficial use under the permits, both by direct diversion and storage.

28. Permits issued pursuant to Applications 5626, 9363, 9364, 9366, 9367 and 9368 shall be subject to "Agreement Between the United States of America and the Department of Water Resources of the State of California for the Coordinated Operation of the Federal Central Valley Project and the State Feather River and Delta Diversion Projects" dated May 16, 1960, filed of record as Department of Water Resources Exhibit 77 at the hearing of said applications.

29. Subject to the existence of long-term water delivery contracts between the United States and public agencies and subject to compliance with the provisions of said contracts by said public agencies, the permits issued on Applications 5626, 9364, 9366 and 9368 shall be further conditioned as follows:

(a) The right to the beneficial use of water for irrigation purposes, except where water is distributed to the general public by a private agency in charge of a public use, shall be appurtenant

to the land on which said water shall be applied, subject to continued beneficial use and the right to change the point of diversion, place of use and purpose of use as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California and further subject to the right to dispose of a temporary surplus.

(b) The right to the beneficial use of water for irrigation purposes shall, consistent with other terms of the permit, continue in perpetuity.

IT IS FURTHER ORDERED that

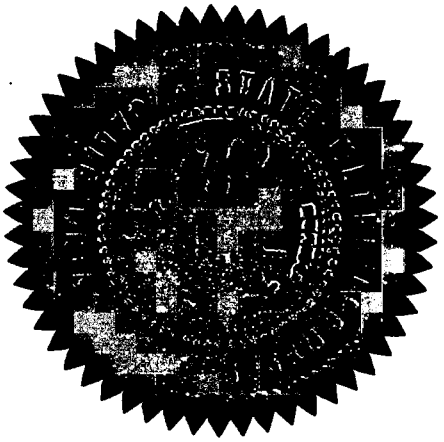
(a) Insofar as the amount of water to be appropriated by storage under Application 9364 exceeds 1,303,000 acre-feet per annum the same is hereby denied.

(b) Insofar as the amount of water to be appropriated by storage under Application 9365 exceeds 1,303,000 acre-feet per annum the same is hereby denied.

(c) Insofar as the amount of water to be appropriated by direct diversion under Application 9365 exceeds 2,275 cubic feet per second the same is hereby denied.

(d) Insofar as Applications 5626 and 9364 are for use of water for navigation and flood control purposes the same are hereby denied.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at Sacramento, California, on the 9th day of February, 1961.



Kent Silverthorne

Kent Silverthorne, Chairman

Ralph J. McGill

Ralph J. McGill, Member

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Board Member W. P. Rowe is filing a separate opinion concurring in part with, and dissenting in part from, the foregoing decision.

STATE OF CALIFORNIA

STATE WATER RIGHTS BOARD

In the Matter of Application 15764,	
UNITED STATES OF AMERICA, BUREAU OF RECLAMATION, Applicant	Decision D 1020
UNION PROPERTIES, INC., ET AL Protestants	Source: Old River

Adopted June 30, 1961

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INTRODUCTION

Application 15764 of the United States through its Bureau of Reclamation, Region 2, Sacramento, (hereinafter sometimes referred to as the Bureau), is for a permit to appropriate water from Old River, a channel of the Sacramento-San Joaquin Delta, (hereinafter referred to as the Delta) in furtherance of the San Luis Unit of the Federal Central Valley Project.

The Central Valley Project is being constructed in stages to meet the water requirements of various areas as the needs develop. The initial features of the project include Shasta and Keswick Dams on the Sacramento River, Delta Cross Channel, Contra Costa Canal; Delta-Mendota Canal, Friant Dam on the San Joaquin River and Madera and Friant-Kern Canals. The American River Division with Folsom and Nimbus Dams on the American River including the Sly Park Unit, and the Trinity River Division with Trinity and Lewiston Dams on the Trinity River and Whiskeytown Dam on Clear Creek have been added to the initial features.

The next large area where there is critical and immediate need for supplemental water, that could be supplied by the Central Valley Project, is located on the west side of the San Joaquin Valley in western Merced, Fresno and Kings Counties (RT 57-59). These lands, which are to be irrigated by the San Luis Unit, lie between elevations of about 200 and 500 feet above sea level on a broad gently sloping alluvial plain extending eastward from the Coast Range. The area forms a strip about 65 miles long and 13 miles wide, totaling about 500,000 acres. The climate is semi-arid and the only surface water supply is from minor creeks which are

dry in the summer months when water is needed for irrigation. Accordingly, present irrigation relies entirely on ground water which, for many years, has been heavily overdrawn (RT 59-61 and USBR 56*).

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* An asterisk following an exhibit number indicates an exhibit received into evidence by reference from the record of the hearing on Applications 5625 et al of the United States (Decision D 990).

SUBSTANCE OF THE APPLICATION AND PENDING PETITIONS

Application 15764, filed on March 8, 1954, by the Westlands Water District, and assigned to the United States on October 17, 1960, is for a permit to appropriate 1500 cubic feet per second (cfs) by direct diversion to be diverted between February 1 and November 30 of each year and 1,000,000 acre-feet per annum by offstream storage to be collected at the maximum rate of 4200 cfs between October 1 of each year and April 30 of the succeeding year from Old River for irrigation, incidental domestic and stockwatering purposes. The point of diversion is on Old River at the intake canal leading to Tracy Pumping Plant within the NE¼ of SW¼ of Section 29, T1S, R4E*. Offstream storage is to be effected by San Luis Dam located within the SW¼ of SE¼ of projected Section 15, T10S, R8E. The place of use consists of a gross area of 399,924 acres lying within the Westlands Water District. Of this, a maximum of 340,000 acres may be irrigated in any one year.

The United States, on December 8, 1960, filed petitions to amend Application 15764 to include municipal, industrial and recreation as additional purposes of use and additional points of rediversion as follows:

San Luis Canal and Reservoir Intake	Within T9S, R8E at Station 3014+20 on the Delta-Mendota Canal

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* All references to township and range are to Mount Diablo Base and Meridian (MDB&M).

Pacheco Pass Conduit Intake	Within projected Section 14, T10S, R7E
San Luis Canal Intake (from reservoir)	Within the SW¼ of NW¼ of Section 23, T10S, R8E
Mendota Dam (non-Project feature)	Within the SE¼ of SE¼ of Section 19, T13S, R15E
Temple Slough (Arroyo Canal) Intake (non-Project feature)	Within the SE¼ of SW¼ of Section 12, T11S, R13E
Pleasant Valley Canal	Within the NE¼ of NE¼ of Section 33, T18S, R16E

At the same time the United States also filed a petition to amend the application by enlarging the place of use to include a gross area of 1,398,000 acres of which a maximum of 910,000 acres will be irrigated in any one year.

HEARING

Other Applications Included

After notice of Application 15764 was published, 42 protests were received. After due notice to the applicants and protestants, a public hearing was held before the Board on April 11, 12, 13, and 20, 1961, at Sacramento, California. Applications 13573 and 13574 of Alameda County Water District, Application 13892 of Santa Clara Valley Water Conservation District, Application 15756 of Kings River Conservation District, Application 16342 of the City of San Diego and Applications 16433 and 16434 of Alameda County Flood Control and Water Conservation District were all set for hearing at the same time as Application 15764. At the commencement of the hearing, motions were made to postpone hearing on the latter applications, with all of the applicants except the City of San Diego agreeing to subordinate to Application 15764 and thereby waiving priority with respect to Application 15764 (RT 222-223). The motions to postpone have been granted except that of the City of San Diego; which has been denied. Application 16342 of the City of San Diego has been denied for reasons set forth in the Board's Decision D 1019, dated June 30, 1961.

Stipulation Between Bureau of Reclamation and Certain Protestants

The Bureau, Contra Costa County Water Agency, Delta Water Users Association, Sacramento River and Delta Water Association, California Department of Fish and Game, Alameda County Water District, and San Joaquin County Flood Control and Water Conservation District have

entered into a stipulation which provides substantially as follows:

1. That the Board defer action on the direct diversion portion of Application 15764 until such time as petitions for consolidating the service area under Applications 5626, 9363, 9364, 9366, 9367 and 9368 are considered, or after further hearing as may be directed by the Board.

2. That the month of October be deleted from the season of collection of water to storage thereby limiting the season of collection to storage from November 1 of each year through April 30 of the succeeding year.

3. That any permit issued pursuant to Application 15764 be limited so that the rate of diversion, when added to all other diversions from the Delta, through the Delta-Mendota Canal by the Bureau will not exceed a total of 4600 cfs.

4. That the Board defer hearing on the petition to change the place of use under Application 15764, insofar as it seeks to include lands within Alameda, Santa Cruz and San Benito Counties.

5. That the Board receive into evidence by reference the record of the hearing on Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588 of the United States giving the same weight to objections and arguments as though they were made in this proceeding.

Disposition of the Issues Raised by the Stipulation

It is appropriate at this time to dispose of the requests of the parties expressed in the stipulation.

(1) The parties immediately involved herein have entered into a stipulation requesting the Board to defer action on a portion of the application. An important factor in determining the propriety of deferment is whether or not any party would be affected. Consideration has been given to the possible adverse effects of deferment upon other applicants and water users located within the Delta and the Board is of the opinion that none will occur at the present time. Moreover, if a situation should arise in the future which would require disposition of this portion of the application, the Board will consider it at that time. Therefore, the request of the parties to defer hearing on the direct diversion feature of Application 15764 is granted.

(2) The voluntary reduction of the season for diversion to storage by the applicant in accordance with the stipulation is accepted by the Board and the permit will reflect this change.

(3) The capacity of the Delta-Mendota Canal is 4600 cfs and physically incapable of diversion in excess of that amount. In accordance with the parties' stipulation, however, such a limitation will be imposed in the permit issued pursuant to Application 15764.

(4) The request of the parties to defer action on the petition to change the place of use to include lands within Alameda, Santa Cruz and San Benito Counties is granted for the same reason outlined in Paragraph (1) above.

(5) The Board, at the hearing on April 31, 1961, admitted the entire record of hearing on Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588 (RT 241-45).

PLAN OF THE UNITED STATES FOR USE OF WATER

Public Law 488, 86th Congress 2nd Session, 74 Stat. 156, enacted June 30, 1960, authorizes the Secretary of the Interior to construct the San Luis Unit of the Central Valley Project either as a Federal facility or as a joint use facility in cooperation with the State of California (USBR 4). The use of water to be appropriated under any permit issued pursuant to Application 15764 will be the same in either case (RT 64). However, it is convenient to consider the project first as it would be constructed solely as a Federal project to serve only the San Luis service area, and secondly, as it would be constructed to provide for joint use facilities as a Federal-State project.

Federal Project

The Tracy Pumping Plant, which diverts water into the 113-mile Delta-Mendota Canal, is located on a cut channel extending to Old River about ten miles northwest of the City of Tracy. The Delta-Mendota Canal has a capacity at its head of 4600 cfs and delivers water to lands along the western side of the San Joaquin Valley and to the San Joaquin River at Mendota Pool west of the City of Fresno (USBR 45*). The water delivered to Mendota Pool permits water in the San Joaquin River to be diverted upstream at Friant Dam for use along the eastern side of the San Joaquin Valley. The full capacity of the Tracy Pumping Plant and the Delta-Mendota Canal is used only during the peak of the irrigation season during the summer months to satisfy these requirements. The Canal transports relatively little water in the winter and early spring months,

while during the same months large quantities of water waste to the sea through the Delta (RT 62-63).

The plan is to utilize this available capacity of the Delta-Mendota Canal to transport surplus water from the Delta to the San Luis service area. Because surplus water and the available canal capacities both occur during the non-irrigation season when the consumptive use demands are low, it will be necessary to provide offstream storage near the San Luis service area to impound the water which cannot be directly placed to beneficial use. Sixty-seven miles from the Tracy Pumping Plant, the Delta-Mendota Canal passes within two and one-half miles of the San Luis Reservoir site. At this point water conveyed in the Delta-Mendota Canal will be rediverted by the San Luis pumps. Whenever possible, water will be diverted directly into the San Luis Canal for immediate use. The remaining water will be diverted into the San Luis Reservoir for storage (RT 62-63). During the summer months when the capacity of the Delta-Mendota Canal is not adequate to supply the demands along that canal and also the demands within the San Luis service area, water stored in the San Luis Reservoir will be released into the San Luis Canal to serve the San Luis service area. The required storage capacity can be provided by constructing a 1,000,000-acre-foot reservoir (USBR 6).

The 104-mile San Luis Canal, as part of the strictly Federal project, will extend the entire length of the San Luis service area to its terminus about three miles northwest of Kettleman City. The capacity of the canal at its head will be 6800 cfs and its terminal capacity will be 700 cfs. A secondary canal, 20 miles in length and having a capacity of 600 cfs, will be constructed to serve the Pleasant Valley area located east of the City of Coalinga (USBR 6).

San Luis Reservoir also may be utilized to store water which probably would be lost by spilling at Shasta or Folsom Reservoirs. Later this water will be released into the Delta-Mendota Canal to satisfy demands normally made by releases from Shasta and Folsom Reservoirs (USBR 56*).

Federal-State Joint Use Project

San Luis Dam may be constructed as a joint Federal-State project to be used by the Bureau for the San Luis Unit and by the State for the Feather River and Delta Diversion Projects. Under joint operation the capacity will be enlarged to 2,000,000 acre-feet (USBR 6A) and water will be delivered from the Delta into a 40,700 acre-foot forebay reservoir through the Delta-Mendota Canal as well as a parallel canal to be constructed by the State. From the forebay water may be pumped into the San Luis Reservoir for storage. At a later date, water stored in San Luis Reservoir will be released back into the forebay before being transported to the place of use. It is anticipated that these releases will be utilized to generate electric power (RT 64-65).

Water from the forebay reservoir may be released either into the San Luis Canal or into the Delta-Mendota Canal. As a Federal-State joint use facility the San Luis Canal will have an intake capacity of 13,100 cfs and a terminal capacity of 7,750 cfs (USBR 6A). At the southern end of the San Luis service area this canal will cease to be a joint use facility but it will continue south as a feature of the State aqueduct system (RT 65).

DISCUSSION OF THE ISSUES

The record developed at the hearing on Application 15764 is essentially the same as that developed for the Board's Decision D 990 on Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588, and therefore most of the issues raised are identical. Those issues which have a bearing on Application 15764 are as follows:

1. Power of the Board to Condition Permits.
2. Salinity Incursion into the Delta.
3. Coordination of Federal and State Projects.
4. Watershed Protection.
5. Protection of Existing Rights.
6. Rights Appurtenant to the Land.

The Board adopts the sections of Decision D 990 disposing of these issues as a basis for the conclusions reached herein.

Need for Water Under Application 15764

The portion of Application 15764 under consideration in this decision is for a permit to appropriate water to meet requirements for lands which for the most part were not included in Decision D 990. Therefore, it is necessary to consider these requirements and to determine if there are sufficient quantities of surplus water available during the requested diversion season.

Project Requirements

The San Luis service area, according to USBR 56*, will have a total annual water requirement of 1,666,000 acre-feet for irrigation,

domestic, municipal and industrial needs of the area. This requirement will be met from two sources - the Delta and the available ground water within the service area. The quantity of water that will be pumped from the available ground water is estimated as 540,000 acre-feet (USBR 56*). The annual quantity of supplemental water is estimated as 1,126,000 acre-feet. To this quantity must be added the canal losses of 125,000 acre-feet and the evaporation losses from San Luis Reservoir of 50,000 acre-feet per year, making the total average annual quantity required to be diverted from the Delta for the San Luis Unit about 1,300,000 acre-feet (USBR 56*). Of this quantity 470,000 acre-feet will be applied directly to the land; and the remaining 830,000 acre-feet will be stored in San Luis Reservoir for later release (RT 63). Included in the 830,000 acre-feet is that quantity which may be required for the portion of the Delta-Mendota Canal service area which can be served by water from the San Luis Reservoir. Releases of water from San Luis Reservoir for use within the Delta-Mendota Canal service area appeared to be advantageous in only two years of a 20-year operation study of the reservoir. This study indicated that the average annual release for the Delta-Mendota Canal service area would be 40,000 acre-feet (USBR 56*).

Other Permits of the United States to Supply Service Area

The United States holds permits to appropriate water from Trinity River, Clear Creek, Sacramento River, American River and the Delta for use within the San Luis service area. The service area described under the Trinity River and Clear Creek permits with the exception

of the San Luis Reservoir area and small areas along the western side of the San Joaquin Valley, include the entire service area under consideration in this decision. The service area under the American River, Sacramento River and Delta permits include all of the area to be served by the Delta-Mendota Canal and approximately one-third of the area to be served by the San Luis Canal. These permits allow direct diversions into the Delta-Mendota Canal year-round up to its capacity of 4600 cfs. They also permit water stored in Trinity, Lewiston, Whiskeytown, Shasta and Folsom Reservoirs to be rediverted into the Delta-Mendota Canal for use within their respective service areas. However, none of these permits allows water to be stored in San Luis Reservoir which is requested under that portion of Application 15764 considered in this decision.

Season of Diversion and Quantity of Water to be Granted

There is unappropriated water within the Delta during the winter and spring months. This is clearly established by USBR 21 which indicates large quantities of unappropriated water available in the Delta during the period November 1 through April 30 of every year. USBR 164*, "Central Valley Project Operation Study, Shasta Reservoir Operation", which presents conditions under full project development with a repetition of the hydrologic conditions for the period 1921-22 through 1953-54, also indicates that water would be available for diversion to San Luis Reservoir during each of these months for the period of study.

The record is clear that there is a need for supplemental water within the area to be served and that there is adequate water available

within the Delta during the requested season of diversion. Therefore, a permit will be granted for 1,000,000 acre-feet per annum to be collected in San Luis Reservoir at the maximum rate of 4200 cfs from about November 1 of each year to about April 30 of the succeeding year.

Disposition of Petitions

Those portions of the petitions to amend Application 15764 which are under consideration in this decision request (1) that the character of use be changed to include municipal, industrial and recreational uses; (2) that additional points of rediversion be allowed; and (3) that the place of use be extended to include the lands designated in Stanislaus, Merced, Fresno and Kings Counties.

The inclusion of municipal, industrial and recreational purposes will permit water to be supplied to communities within the service area not having access to any other supplemental water supply. The inclusion of the additional lands in Stanislaus, Merced, Fresno and Kings Counties will permit greater flexibility in the operation of the Central Valley Project by allowing the coordination of the storage facilities thereby making maximum use of the available supply. Because neither the quantity nor the season are to be changed, existing rights would not be adversely affected. Accordingly, the petitions will be approved.

The inclusion of these additional lands within the service area will require other points of rediversion for the water sought to be appropriated. However, some points described in the petitions merely constitute portions of the artificial distribution system and are not true

points of rediversion. The additional points of rediversion to be allowed under this permit are San Luis Dam, Mendota Dam and Temple Slough (Arroyo Canal) Intake.

Water Quality in the Lower San Joaquin River

The Delta Water Users' Association et al, and the San Joaquin County Flood Control and Water Conservation District presented testimony showing the deterioration of the quality of water in the San Joaquin River north of Mendota Pool since 1950 (DWUA 1). This is a result of a great many factors influenced by a highly developed irrigation economy in the San Joaquin Valley.

It is the position of the parties raising the issue that the development of the San Luis Unit will further degrade water quality in the San Joaquin River and in the Delta. It is contended that return flow from the San Luis service area will contain high concentrations of salts and if added to those already found in the San Joaquin River northward from Mendota Pool, will adversely affect the water quality for diverters along the stream and in the Delta (RT 277-78). At the same time, the parties point out that the construction of a master drainage system envisioned as one possible solution to the problem in Department of Water Resources Bulletin No. 89 will intercept all return flows for conveyance northward to San Francisco Bay, thereby reducing the flow of water in the lower San Joaquin River (RT 283-84).

The testimony discloses that a reduction in the quantity of water presently available in the lower San Joaquin River will result from the interception of drainage water north of Mendota Pool rather than the

interception of the drainage water from the San Luis Unit (RT 312-14). Therefore the contention that the construction of a master drainage system will reduce the quantity of water available in the lower San Joaquin River is clearly outside of the issues under consideration in connection with Application 15764.

Public Law 488, previously referred to, forbids commencement of construction of the San Luis Unit until the Secretary "has received satisfactory assurance from the State of California that it will make provision for a master drainage outlet and disposal channel for the San Joaquin Valley, as generally outlined in the California water plan, Bulletin Numbered 3, of the California Department of Water Resources, which will adequately serve, by connection therewith, the drainage system for the San Luis unit or has made provision for constructing the San Luis interceptor drain to the delta designed to meet the drainage requirements of the San Luis unit as generally outlined in the report of the Department of the Interior, entitled 'San Luis Unit, Central Valley Project', dated December 17, 1956".

Facilities for removal of drainage water from the San Joaquin Valley are included in the State Water Facilities as defined in Water Code Section 12934(d).

No specific term or condition is offered by the parties in this proceeding for inclusion in the permit to be issued by the Board which would bear directly upon the problem. The Board is convinced that Public Law 488 authorizing the construction of the San Luis Unit adequately protects the water of the lower San Joaquin River from further degradation of quality by return flows from the San Luis service area.

Therefore, no special term or condition relative to the disposition of drainage water from the San Luis service area will be included in this permit.

CONCLUSION

The evidence indicates and the Board finds that unappropriated water exists in Old River at times and in sufficient amounts to justify the approval of Application 15764 insofar as that application relates to appropriation by storage; that no lawful user of water will be injured by the approval in part of the petitions to change the character of use, place of use and to add points of rediversion; that the uses proposed are beneficial; and that the application should be approved in part and a permit be issued pursuant thereto, subject to the usual terms and conditions and subject to additional terms and conditions set forth in the following Order for the protection of prior rights and in the public interest. The Board finds that, so conditioned, the project proposed in this application will best develop, conserve and utilize in the public interest the water sought to be appropriated.

ORDER

Application 15764 of the United States for a permit to appropriate unappropriated water having been filed with the Division of Water Resources, predecessor to the State Water Rights Board, protests against the approval thereof having been submitted, jurisdiction of the administration of water rights, including the subject application, having been subsequently transferred to the Board, a public hearing having been held and evidence received by the Board and the Board having considered the same and now being fully informed in the premises:

IT IS HEREBY ORDERED:

(a) That portion of the petition to amend Application 15764 to enlarge the place of use to include additional lands within Stanislaus, Merced, Fresno and Kings Counties is hereby granted.

(b) That portion of the petition to amend Application 15764 by adding San Luis Dam, Mendota Dam and Temple Slough (Arroyo Canal) Intake as additional points of rediversion is hereby granted.

(c) That the petition to amend Application 15764 to include municipal, industrial and recreation uses is hereby granted.

(d) That action on Application 15764 insofar as it relates to appropriation of water by direct diversion, and on those portions of the petitions which propose to include lands within Alameda, Santa Cruz and San Benito Counties and the points of rediversion necessary to serve these lands is withheld pending further order of the Board.

IT IS FURTHER ORDERED that Application 15764, insofar as it relates to appropriation of water by storage, be and the same is approved,

and that a permit be issued to the applicant subject to vested rights and to the following limitations and conditions:

1. The quantity of water to be appropriated from Old River for irrigation, incidental domestic, stockwatering, municipal, industrial and recreation purposes shall be limited to the amount which can be beneficially used and shall not exceed 1,000,000 acre-feet per annum to be diverted from about November 1 of each year to about April 30 of the succeeding year. The maximum rate of diversion to offstream storage shall be 4200 cubic feet per second.

2. The maximum rate of diversion through the Delta-Mendota Canal under this permit, together with other rights of permittee, shall not exceed 4600 cubic feet per second.

3. The maximum quantity of water herein stated may be reduced in the license if investigation warrants, and all rights and privileges under the permit, including method of diversion, method of use and quantity of water diverted, are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use and unreasonable method of diversion of said water.

4. Construction work shall commence on or before December 1, 1965.

5. Construction work shall be completed on or before December 1, 1985.

6. Complete application of the water to the proposed use shall be made on or before December 1, 1990.

7. Progress reports shall be filed promptly by permittee on forms to be provided annually by the State Water Rights Board until license is issued.

8. This permit shall be subject to rights initiated by applications for use within the Sacramento-San Joaquin Delta* and the watershed of the Sacramento River Basin** regardless of the date of filing said applications.

9. The State Water Rights Board reserves continuing jurisdiction over this permit until March 1, 1964, or such additional time as may be prescribed by the Board, for the purpose of formulating terms and conditions relative to salinity control in the Sacramento-San Joaquin Delta. Permittee shall on or before January 1, 1962, and each six months thereafter submit to the Board a written report as to the

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* For the purpose of this Order the Sacramento-San Joaquin Delta shall be that area defined in Water Code Section 12220.

** For the purpose of this Order the Sacramento River Basin shall be that portion of the State encompassed by a line beginning at the Sacramento-San Joaquin Delta at Collinsville thence northeasterly to the crest of the Montezuma Hills; thence northwesterly through the crest of the Vaca Mountains; thence northerly along the crest of Putah, Cache, Stony, Thomes and Cottonwood Creek Basins and along the crest of the Trinity Mountains to Mt. Eddy; thence easterly through Mt. Shasta and along the northern boundary of the Pit River Basin to the crest of the Warner Mountains; thence southerly and westerly along the boundary of the Pit River Basin to Red Cinder Cone Peak; thence easterly along the northern boundary of the Feather River Basin to the crest of the Sierra-Nevada; thence southerly along the crest of the Sierra-Nevada to the southern boundary of the American River Basin; thence westerly along the southern boundary of the American River Basin to the eastern boundary of said Delta; thence northerly, westerly and southerly along the boundary of the Delta to the point of beginning.

progress of negotiations relative to agreement between the permittee and the State of California and/or the permittee and the water users in the Delta and in Northern Contra Costa County.

10. The Board reserves continuing jurisdiction over this permit for an indefinite period not to extend beyond the date of issuance of license for the purpose of coordinating terms and conditions of the permit with terms and conditions which have been or which may be included in permits issued pursuant to other applications of the United States in furtherance of the Central Valley Project and applications of the State of California in furtherance of the State Water Resources Development System.

11. Upon request of the Board, permittee shall make such measurements and maintain and furnish to the Board such records and information as may be necessary to determine compliance with the terms and conditions of this order including the recognition of vested rights and for the further purpose of determining the quantities of water placed to beneficial use under the permit.

12. This permit shall be subject to "Agreement between the United States of America and the Department of Water Resources of the State of California for the Coordinated Operation of the Federal Central Valley Project and the State Feather River and Delta Diversion Projects", dated May 16, 1960, filed of record as Bureau of Reclamation Exhibit 3.

13. Subject to the existence of long-term water delivery contracts between the United States and public agencies and subject to

compliance with the provisions of said contracts by said public agencies, this permit is further conditioned as follows:

(a) The right to the beneficial use of water for irrigation purposes, except where water is distributed to the general public by a private agency in charge of a public use, shall be appurtenant to the land on which said water shall be applied, subject to continued beneficial use and the right to change the point of diversion, place of use and the purpose of use as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California and further subject to the right to dispose of a temporary surplus.

(b) The right to the beneficial use of water for irrigation purposes shall, consistent with other terms of the permit, continue in perpetuity.

14. In accordance with Water Code Section 1393 permittee shall clear the site of the proposed reservoir of all structures, trees and vegetation which would interfere with the use of the reservoir for water storage and recreation purposes.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at Sacramento, California, on the 30th day of June, 1961.

Kent Silverthorne
Kent Silverthorne, Chairman

Ralph J. McGill
Ralph J. McGill, Member

W. A. Alexander
W. A. Alexander, Member

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

Contract No.
14-06-200-495
June 5, 1963

CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR WATER SERVICE

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

Contract No.
14-06-200-495-A

CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR WATER SERVICE

THIS CONTRACT, made this 5th day of June, 1963, in pursuance generally of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all collectively hereinafter referred to as the Federal reclamation laws, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, and the WESTLANDS WATER DISTRICT, hereinafter referred to as the District, a political subdivision of the State of California, duly organized, existing, and acting pursuant to the laws thereof, with its principal place of business in Fresno, California,

WITNESSETH, That:

EXPLANATORY RECITALS

WHEREAS, the United States is constructing and operating the Federal Central Valley Project for the purpose, among others, of furnishing water for irrigation, municipal, domestic, and other beneficial uses; and

WHEREAS, the United States is constructing the San Luis Unit of the Federal Central Valley Project which will be operated and used, in part, for the furnishing of water to the District pursuant to the terms of this contract; and

WHEREAS, the United States is providing an interceptor drain designed to meet the drainage requirements of the San Luis Unit of the Federal Central Valley Project; and

WHEREAS, investigations of the District lands and present water supply indicate that irrigated and irrigable lands within the boundaries of the District are at present in need of additional water for irrigation and certain areas have a potential need of water for irrigation, that ground water underlying the District is seriously depleted and in need of replenishment, and that an additional water supply to meet these present and potential needs can be made available by and through the works constructed and to be constructed by the United States; and

WHEREAS, the District desires to contract, pursuant to the Federal reclamation laws and the laws of the State of California, for the furnishing by the United States of a supplemental water supply from the Project and for drainage service by means of the interceptor drain for which the District will make payment to the United States upon the basis, at the rate, and pursuant to the conditions hereinafter set forth; and

WHEREAS, investigations of the streamflow in the Sacramento River, the Trinity River, the American River, the San Joaquin River, and their tributaries indicate that there will be available for furnishing to the District from the San Luis Unit an additional water supply for surface diversion and direct application for irrigation and directly or indirectly to replenish depleted ground waters underlying the District;

NOW, THEREFORE, in consideration of the mutual and dependent covenants herein contained, it is hereby mutually agreed by the parties hereto as follows:

DEFINITIONS

1. When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the term:

(a) "Secretary" or "Contracting Officer", shall mean the Secretary of the United States Department of the Interior or his duly authorized representative;

(b) "Project" shall mean the Federal Central Valley Project, California, of the Bureau of Reclamation;

(c) "San Luis Unit" shall mean the facilities constructed pursuant to the Act of June 3, 1960 (74 Stat. 156);

(d) "interceptor drain" shall mean the physical works constructed by the United States pursuant generally to the

Act of June 3, 1960 (74 Stat. 156), in order to meet the drainage requirements of the area served by the San Luis Unit which have been calculated to be one hundred and fifty thousand (150,000) acre-feet per year at a maximum rate of flow of two hundred and fifty (250) cubic feet per second. Such physical works shall not include those facilities necessary for the collection, conveyance, and discharge of drain water for disposal by the interceptor drain;

(e) "initial delivery date" shall mean the date announced by the Contracting Officer when water from the San Luis Unit first will be available for furnishing by the United States pursuant to this contract;

(f) "year" shall mean the period January 1 through December 31;

(g) "newly irrigated land" shall mean land that has not produced an irrigated crop during the five (5) years immediately previous to the initial delivery date;

(h) "agricultural use" shall mean use of water primarily in the commercial production of agricultural crops or livestock including domestic use incidental thereto on tracts of land operated in units of two (2) acres or more.

TERM OF CONTRACT

2. This contract shall be effective on the date first hereinabove written and shall remain in effect for a period of forty (40) years commencing with the year in which the earliest initial delivery date of the long-term contracts for water service from the San Luis Unit shall occur: Provided, That if within five (5) years commencing with the year in which the initial delivery date of this contract occurs the District has not constructed distribution facilities of adequate capacity to serve all of the irrigable lands of the District, this contract shall at the option of the Contracting Officer terminate on the last day of December in said 5th year, except that if such facilities are under construction at the end of said period the Contracting Officer may, at his option, extend said period from year to year to permit completion of said facilities: Provided further, That under terms and conditions mutually agreeable to the parties hereto, renewals of this contract for furnishing water for agricultural use may be made for successive periods not to exceed forty (40) years each. The terms and conditions of each renewal shall be agreed upon not later than one (1) year prior to the expiration of the then existing contract: And provided further, That upon written request by the District of the Secretary not later than one (1) year prior to the expiration of this contract, whenever, account being taken of the

amount then credited to the costs of construction of water supply works allocated to irrigation, the remaining amount of costs so allocated which is properly assignable for ultimate return by the District as established by the Secretary of the Interior pursuant to (3) of Section 1 of Public Law 643 (70 Stat. 483) probably can be repaid to the United States within the term of a contract under subsection (d), Section 9 of the 1939 Reclamation Project Act (53 Stat. 1187), this contract for the furnishing of water for agricultural use may be converted to a contract under said subsection (d) upon terms and conditions mutually agreeable to the United States and the District.

WATER TO BE FURNISHED TO DISTRICT--USE OF INTERCEPTOR DRAIN

3. (a) Each year for a period of five (5) years, commencing with the year in which the initial delivery date occurs, the United States shall furnish to the District and the District each such year shall accept and pay, as provided in Article 6 hereof, for water from the San Luis Unit in the quantities specified in the schedule or any revision thereof submitted by the District in accordance with subdivision (a) of Article 4 hereof for each such year: Provided, That the United States shall not be obligated to furnish more than one million eight thousand (1,008,000) acre-feet of water during any such year.

(b) Commencing with the 6th year and continuing through the 15th year the United States shall furnish to the District and the District shall accept and pay for, as provided in Article 6 hereof, four hundred thousand (400,000) acre-feet of water annually: Provided, That the District may at any time or times during the period described by this subdivision, by written notice furnished to the United States in advance, increase the quantity of water the United States shall furnish to the District and the District shall accept and pay for annually during said period, but in no event shall said annual quantity for the 6th year through the year 1979 exceed one million eight thousand (1,008,000) acre-feet and for the period commencing with the year 1980 and extending through the 15th year exceed seven hundred and eighty-three thousand (783,000) acre-feet plus such additional quantity as may be determined pursuant to subdivision (c) hereof. At any time during said period, the submission and approval of a schedule or any revision thereof pursuant to subdivision (a) of Article 4 hereof for water in excess of the quantity the District is required to accept and pay for during that year shall constitute such a written notice.

(c) The maximum of seven hundred and eighty-three thousand (783,000) acre-feet of water to be furnished to the District pursuant to subdivisions (b) and (d) hereof has been computed on the premise

that by eliminating overdraft a safe yield of two hundred and twenty-five thousand (225,000) acre-feet of water of usable quality will be available each year for pumping within the District from the deep underground beneath what is generally referred to as the Corcoran clay at an estimated average depth of three hundred (300) feet. Prior to January 1, 1980, the United States and the District by joint studies shall review the validity of this estimate based on conditions existing after the initial delivery date. In the event, as a result of such joint studies, the parties determine upon a safe yield in a quantity less than two hundred and twenty-five thousand (225,000) acre-feet, the quantity of water to be furnished annually to the District pursuant to subdivisions (b) and (d) hereof shall then be increased by the difference between said yield of two hundred and twenty-five thousand (225,000) acre-feet and the safe yield as determined by the joint studies; Provided, however, That such increase shall not exceed one hundred and seventeen thousand (117,000) acre-feet.

(d) Commencing the 16th year and each year thereafter during the remainder of the term of this contract, the United States shall furnish to the District for use on its eligible lands and the District shall accept and pay for, as provided in Article 6 hereof, seven hundred and eighty-three thousand (783,000) acre-feet of water plus such additional quantity as may be determined pursuant to subdivision (c) hereof. If in any year during such period the District

is unable to so use any part of such total quantity of water, the United States and the District by mutual agreement may reduce, by a quantity equal to that which the District was unable to so use, the quantity of water which the United States is obligated to furnish and the District is obligated to accept and pay for during the remainder of the term of this contract.

(e) If in any year after the Contracting Officer has approved a schedule or any revision thereof submitted by the District the United States is unable to furnish any portion of the water in the quantities and at the times requested in the schedule and the District does not elect to receive and does not receive such water at other times during such year, the District shall be entitled to an adjustment as provided in Article 7.

(f) The right to the beneficial use of water furnished to the District pursuant to the terms of this contract and any renewal hereof shall not be disturbed so long as the District shall fulfill all of its obligations under this contract and any such renewal.

(g) Drainage facilities of the District constructed in accordance with Article 13 hereof may be connected to the interceptor drain in such capacity and at such locations as may be mutually agreed upon between the District and the United States.

TIME FOR DELIVERY OF WATER

4. (a) Before January 1 of each year the District shall submit in writing to the Contracting Officer a schedule, subject to the provisions of Article 3 hereof and satisfactory in form and from an operational standpoint to the Contracting Officer, indicating the desired times and quantities for the delivery of all water pursuant to this contract during such year. The United States shall within the provisions hereof attempt to deliver said water in accordance with said schedule or any revision thereof satisfactory to the Contracting Officer in form and from an operational standpoint submitted by the District within a reasonable time before the desired change of time or quantity, or both, for delivery as nearly as may be feasible as conclusively determined by the Contracting Officer.

(b) If the District during any month is furnished a quantity of water in addition to that which it has requested for such month in its schedule and accepts such additional water, the District shall be deemed to have revised its schedule to call for such additional water during such month, and the United States shall be deemed to have accepted such revision as satisfactory. As soon thereafter as possible, the District shall submit a revised schedule to the United States for the remaining quantity to be delivered during that year.

(c) The District may at any time or times after the last day of September of any year request water to be furnished in excess of the quantity it is entitled to receive during any such year pursuant to Articles 3 and 8 hereof. Payment for the water so requested at the rate announced by the Contracting Officer pursuant to Article 6 hereof shall be made in advance of delivery of such water. The United States shall furnish such water in accordance with the schedule or any revision thereof submitted by the District and approved by the Contracting Officer to the extent such water is available and to the extent such furnishing will not interfere with maintenance of or result in detriment to the Project. The quantity of water furnished pursuant to this subdivision shall be deducted from the quantity of water the United States would otherwise be obligated to furnish and the District obligated to accept and pay for during the next succeeding year. The

amount paid by the District pursuant to this subdivision shall be deducted from the amount of the payment the District would otherwise be obligated to make during the next succeeding year.

USE OF WATER OUTSIDE THE DISTRICT

5. Water furnished to the District pursuant to this contract shall not be sold or otherwise disposed of for use outside the District without the written consent of the Contracting Officer.

RATE AND METHOD OF PAYMENT FOR WATER--DRAINAGE SERVICE

6. (a) Before December 15 of each year the Contracting Officer shall notify the District in writing of the rate of payment to be made by the District for water which the District is required to accept and pay for during the ensuing year pursuant to the provisions of Article 3 hereof. The rate so announced may not be in excess of Eight Dollars ($8) per acre-foot and shall include a drainage service component of not to exceed Fifty Cents ($0.50) for the interceptor drain and a water service component of not to exceed Seven Dollars and Fifty Cents ($7.50). The United States shall notify the District in writing when the interceptor drain becomes available for service. The drainage service component shall be included in the rate of payment beginning with the year following the date the District is notified that such service is available.

(b) The District shall make payments to the United States each year at the rate fixed as provided in subdivision (a) of this article for the quantity of water which the District is required to accept and pay for during such year pursuant to the provisions of Article 3 hereof. The District shall pay one-half (1/2) of the amount payable for said water to be furnished for the year before January 1 and shall pay the remainder of the amount payable for said water at the time the quantity of water furnished to the District equals the quantity for which payment has been made but in no event later than July 1 or such other later date or dates of the respective year as may be specified by the Contracting Officer in a written notice to the District. Water requested by the District in excess of the quantity it is required to accept and pay for that year shall be paid for in full at the time or times such requests are made.

(c) In the event the District is unable, fails, or refuses to accept delivery of the quantities of water available for delivery to and required to be accepted by it pursuant to this contract, or in the event the District in any year during the periods described in subdivisions (b) and (d) of Article 3 hereof fails to submit a schedule for delivery as provided in subdivision (a) of

Article 4 hereof, said inability, failure, or refusal shall not relieve the District of its obligation to pay for such water and the District agrees to make payment therefor in the same manner as if said water had been delivered to and accepted by it in accordance with this contract.

ADJUSTMENTS

7. The amount of any overpayment by the District by reason of the quantity of water actually available for the District during any year, as conclusively determined by the Contracting Officer, having been less than the quantity of such water which the District otherwise under the provisions of this contract would have been required to receive and pay for shall be applied first to any accrued indebtedness arising out of this contract then due and owing to the United States by the District and any amount of such overpayment then remaining shall, at the option of the District, be refunded to the District or credited upon amounts to become due to the United States from the District under the provisions hereof in the ensuing year.

NEED OF DISTRICT FOR MORE WATER THAN AGREED QUANTITY

8. In the event the District in any year requires a quantity of water in addition to the maximum total quantity required to be furnished by the United States and accepted and paid for by the District during such year pursuant to Article 3 hereof, the United States, upon receipt from the District of (1) a written notice requesting such additional water together with a schedule indicating the desired times and quantities for the delivery thereof and (2) payment as provided in Article 6 hereof, shall attempt to deliver such additional water to the District in accordance with said schedule to the extent that additional water is available for the District, as determined by the Contracting Officer. The amount of any overpayment by the District, by reason of the additional quantity of water furnished to the District pursuant to this article having been less than the additional quantity requested and paid for by the District, shall be applied as provided in Article 7 hereof: Provided, That the inability, failure, or refusal of the District to accept delivery of such additional quantities of water when it is available shall not entitle the District to any adjustment of payment for said water. The furnishing by the United States and acceptance by the District of such additional quantities of water shall neither entitle nor obligate the District to receive such quantities in subsequent years.

POINTS OF DELIVERY--MAINTENANCE OF FLOWS AND LEVELS--MEASUREMENT AND RESPONSIBILITY FOR DISTRIBUTION OF WATER

9. (a) The water to be furnished to the District pursuant to this contract will be delivered at such points on the San Luis Canal as may be mutually agreed upon in writing by the Contracting Officer and the District Provided however, That in the event the United States shall have reached the construction of the portion of the San Luis Unit which probably will embrace such points and the locations have not been so agreed upon, such points shall be established between mile 33 and mile 101 of the San Luis Canal at locations that in the conclusive determination of the Contracting Officer will best serve the needs of the District.

(b) All water delivered pursuant to this contract shall be measured by the United States at the points of delivery with equipment installed, operated, and maintained by the United States. Upon the request of the District, the accuracy of such measurements will be investigated by the Contracting Officer and any errors appearing therein adjusted.

(c) The United States shall not be responsible for the control, carriage, handling, use, disposal, or distribution of water which may be furnished at the delivery points established pursuant to subdivision (a) of this article, nor for claim of damage of any nature whatsoever, including but not limited to property damage, personal injury or death, arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such water beyond such delivery points: Provided, That the United States reserves the right to the use of all waste, seepage, and return-flow water derived from water furnished to the District hereunder and which escapes or is discharged beyond the District's boundaries and nothing herein shall be construed as an abandonment or a relinquishment by the United States of the right to use any such water, but this shall not be construed as claiming for the United States any right, as waste, seepage, or return flow, to water being used pursuant to this contract for surface irrigation or underground storage within the District's boundaries by the District or those claiming by, through, or under the District.

(d) The United States may temporarily discontinue or reduce the quantity of water to be furnished to the District or the service of the interceptor drain as herein provided for the purpose of such investigation, inspection, maintenance, repair, or replacement as may be reasonably necessary of any of the Project facilities used in the

furnishing of water to the District or any part thereof or to the interceptor drain, but so far as feasible the United States will give the District due notice in advance of such temporary discontinuance or reduction, except in case of emergency, in which case no notice need be given. In the event of any such discontinuance or reduction, the United States will upon the resumption of service approximate delivery of the quantity of water which would have been furnished to the District in the absence of such contingency.

LIMITATIONS ON DELIVERY OF WATER

10. Pursuant to the provisions of the Act of June 3, 1960 (74 Stat. 156), no water provided pursuant to this contract shall be delivered to any water user in the District for the production on newly irrigated lands of any basic agricultural commodity, as defined in the Agricultural Act of 1949, or any amendment thereof, if the total supply of such commodity, as estimated by the Secretary of Agriculture for the marketing year in which the bulk of the crop would normally be marketed will be in excess of the normal supply as defined in Section 301(b)(10) of the Agricultural Adjustment Act of 1938, as amended, unless the Secretary of Agriculture calls for an increase in production of such commodity in the interest of national security.

UNITED STATES NOT LIABLE FOR WATER SHORTAGE

11. (a) There may occur at times during any year a shortage in the quantity of water available for furnishing to the District through and by means of the Project, but in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes. In any year in which there may occur a shortage from any cause, the United States reserves the right to apportion the available water supply among the District and others entitled under the then existing contracts to receive water from the San Luis Unit in accordance with conclusive determinations of the Contracting Officer as follows:

(i) A determination shall be made of the total quantity of water agreed to be accepted during the respective year under all contracts then in force for the delivery of Central Valley Project water by the United States from the San Luis Unit, the quantity so determined being hereinafter referred to as the contractual commitments;

(ii) A determination shall be made of the total quantity of water from the Central Valley Project which is available for meeting the contractual commitments, the quantity so determined being hereinafter referred to as the available supply;

(iii) The total quantity of water agreed to be accepted by the District during the respective year, under Article 3 hereof, shall be divided by the contractual commitments, the quotient thus obtained being hereinafter referred to as the District's contractual entitlement; and

(iv) The available supply shall be multiplied by the District's contractual entitlement and the result shall be the quantity of water required to be delivered by the United States to the District for the respective year, but in no event shall such amount exceed the total quantity of water agreed to be accepted by the District pursuant to Article 3 hereof. Insofar as determined by the Contracting Officer to be practicable, the United States will, in the event a shortage appears probable, notify the District of such determinations in advance of the irrigation season.

(b) In the event that in any year there is delivered to the District by reason of any shortage or apportionment as provided in subdivision (a) of this article or any discontinuance or reduction of service as set forth in subdivision (d) of Article 9 hereof, less than the quantity of water which the District otherwise would be entitled to receive, there shall be made an adjustment on account of the amounts paid to the United States by the District for water for said year in

a manner similar to that provided for in Article 7. To the extent of such deficiency, such adjustment shall constitute the sole remedy of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein.

(c) The United States assumes no responsibility with respect to and does not warrant the quality of the water to be furnished pursuant to this contract: Provided, That the District shall not be obligated to accept and pay for any water which contains in excess of three hundred (300) parts by weight of chloride per one million (1,000,000) parts of water. To the extent that any adjustment is necessary because of the existence of chloride in the water available for furnishing to the District in excess of the quantity herein specified and because of previous payments by the District, such adjustment shall be made in a manner similar to that provided in Article 7 hereof. No adjustment shall be made hereunder in relation to any water actually furnished to and used by, through, or under the District for any purpose.

MUNICIPAL, INDUSTRIAL, AND DOMESTIC USE OF WATER FURNISHED TO DISTRICT

12. Water furnished in accordance with Article 3 of this contract is for agricultural use. Before water furnished under this contract may be delivered by the District for municipal, industrial, and domestic uses, the parties hereto shall agree upon the measurement of such water, the water service rates payable to the United States on account of the delivery for such purposes, and the time for payment therefor.

DRAINAGE STUDIES AND FACILITIES

13. To aid in determining the source and solution of future potential drainage problems the District shall, in a manner satisfactory to the Contracting Officer, initiate and maintain a program of ground-water observation in order to delineate shallow water table areas and shall furnish annually to the Contracting Officer, during the term of this contract and any renewal thereof, records and analyses of such observations as they relate to potential drainage problems. The District shall construct such drainage works as are necessary to protect the irrigability of lands within the District.

AGREED CHARGES A GENERAL OBLIGATION OF THE DISTRICT--TAXABLE LAND

14. The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District.

The lands which may be charged with any taxes or assessments under this contract are hereby designated and described as all the lands in the District.

ALL BENEFITS CONDITIONED UPON PAYMENT

15. Should any assessment or assessments required by the terms of this contract and levied by the District against any tract of land or water user in the District and necessary to meet the obligations of the District hereunder be judicially determined to be irregular or void, or should the District or its officers be enjoined or restrained from making or collecting any assessments upon such land or from such water user as provided for herein, then such tract shall have no right to any water furnished to the District pursuant to this contract, and no water made available by the United States pursuant hereto shall be furnished for the benefit of any such lands or water users, except upon the payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the

right to the use of water furnished to the District pursuant to this contract, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District, whether affecting the validity of District taxes or assessments or not, shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user.

LEVY OF TAXES AND ASSESSMENTS--FIXING OF RATES AND TOLLS

16. The District shall cause to be levied and collected all necessary taxes and assessments and shall use all of the authority and resources of the District to make in full all payments to be made pursuant to this contract on or before the date such payments become due and to meet its other obligations under this contract. The District may, either or both, require the payment of toll charges or levy assessments for such water supplied hereunder.

REFUSAL OF WATER IN CASE OF DEFAULT

17. No water shall be furnished to the District or by the District to or for the use of any lands or parties therein during any period in which the District may be in arrears in the advance

payment of charges accruing under this contract. No water shall be furnished to or by the District pursuant to this contract for lands or parties which are in arrears in the payment to the District of any assessments, rates, tolls, or rental charges of the District levied or established by the District and necessary for the purpose of raising revenues to meet the payment by the District to the United States of the District's obligation under this contract.

PENALTY UPON DELINQUENCY IN PAYMENT

18. Upon every charge or installment of money required to be paid by the District to the United States pursuant to this contract which shall remain unpaid after the same shall have become due and payable, there shall be imposed a penalty of one-half (1/2) of one (1) percent per month of the amount of such delinquent charge or installment from and after the date when the same becomes due until paid, and the District hereby agrees to pay said penalty: Provided, That no penalty shall be charged to or be paid by the District unless such delinquency continues for more than thirty (30) days.

DISTRICT TO KEEP BOOKS AND RECORDS AND REPORT CROP AND OTHER DATA

19. The District shall establish and maintain account and other books and records sufficient to enable it to furnish, insofar as the District is permitted to do so by the laws of the State of California, to the Bureau of Reclamation reports and statements to such an extent

and in such manner and form as may be prescribed by the United States as to information pertaining to (1) accounts and financial transactions of the District, insofar as such information pertains to this contract and operations thereunder, and (2) crops raised and agricultural and livestock products produced on the lands within the District, a report thereon to be furnished to the Contracting Officer annually before December 31.

INSPECTION OF BOOKS AND RECORDS

20. Subject to applicable Federal laws and regulations, the proper officers or agents of the District shall have full and free access at all reasonable times to the Project account books and official records of the Bureau of Reclamation, insofar as the same pertain to the matters and things provided for in this contract, with the right at any time during office hours to make copies thereof, and the proper representatives of the United States shall have similar rights with respect to the account books and records of the District.

CHANGES IN ORGANIZATION OF DISTRICT

21. While this contract is in effect no changes shall be made in the District either by inclusions which in the aggregate will total more than twelve thousand five hundred (12,500) acres of land or exclusions which in the aggregate will total more than twelve thousand five hundred (12,500) acres of land, by partial or total consolidation or merger with another district, by proceedings to dissolve, or otherwise, except upon the Contracting Officer's written assent thereto.

TRANSFER OF CARE, OPERATION, AND MAINTENANCE OF SAN LUIS UNIT

22. The United States may transfer the San Luis Unit or a portion thereof to the State of California for care, operation, and maintenance and such transfer shall not affect the rights or obligations of either party to this contract.

LAND NOT TO RECEIVE WATER FURNISHED TO DISTRICT BY UNITED STATES UNTIL OWNERS THEREOF EXECUTE CERTAIN CONTRACTS

23. (a) No water made available pursuant to this contract shall be furnished to any excess lands as defined in Article 25 hereof unless the owners thereof shall have executed valid recordable contracts in form prescribed by the United States, agreeing to the provisions of this article and Articles 24 and 25 of this contract, agreeing to the appraisal provided for in Article 24 hereof and that such appraisal shall be made on the basis of the actual bona fide

value of such lands at the date of the appraisal without reference to the construction of the Project, all as hereinafter provided, and agreeing to the sale of such excess lands under terms and conditions satisfactory to the Secretary and at prices not to exceed those fixed as hereinafter provided. No sale of any excess lands shall carry the right to receive water made available pursuant to this contract unless and until the purchase price involved in such sale is approved by the Contracting Officer and upon proof of fraudulent representation as to the true consideration involved in such sales the United States may instruct the District by written notice to refuse to furnish any water subject to this contract to the land involved in such fraudulent sales, and the District thereafter shall not furnish said water to such lands until such written notice is withdrawn.

(b) If Project water furnished to the District pursuant to this contract reaches the underground strata of excess land owned by a large landowner, as defined in subdivision (a) of Article 25 hereof, who has not executed a recordable contract and the large landowner pumps such Project water from the underground, the District will not be deemed to have furnished such water to said lands within the meaning of this contract if such water reached the underground strata of the aforesaid excess land as an unavoidable result of the furnishing of Project water by the District to nonexcess lands

or to excess lands with respect to which a recordable contract has been executed.

VALUATION AND SALE OF EXCESS LANDS

24. (a) The value of the excess irrigable lands within the District held in private ownership of large landowners as defined in the next succeeding article hereof, for the purposes of this contract, shall be appraised in a manner to be prescribed by the Secretary. At the option of a large landowner, however, the value of such land may be appraised, subject to the approval thereof by the Secretary, by three appraisers. One of said appraisers shall be designated by the Secretary and one shall be designated by the District and the two appraisers so appointed shall name the third. If the appraisers so designated by the Secretary and the District are unable to agree upon the appointment of the third, the Presiding Justice of the Fifth District Court of Appeal of the State of California shall be requested to designate the third appraiser.

(b) The following principles shall govern the appraisal:

(i) No value shall be given such lands on account of the existing or prospective possibility of securing water from the Project;

(ii) The value of improvements on the land at the time of said appraisal shall be included therein, but shall also be set forth separately in such appraisal.

(c) The excess land of any large landowner shall be reappraised at the instance of the United States or at the request of said landowner. The cost of the first two appraisals of each tract of excess land shall be paid by the United States. The cost of each appraisal thereafter shall be paid by the party requesting such appraisal.

(d) Any improvements made or placed on the appraised land after the appraisal hereinabove provided for prior to sale of the land by a large landowner shall be appraised in like manner.

(e) Excess irrigable lands sold by large landowners within the District shall not carry the right to receive water made available pursuant to this contract for such lands and the District agrees to refuse to furnish such water to lands so sold until, in addition to compliance with the other provisions hereof, a verified statement showing the sale price upon any such sale shall have been filed with the District and said sale price is not in excess of the appraised value fixed as provided herein.

(f) The District agrees to take all reasonable steps requested by the Contracting Officer to ascertain the occurrence and conditions of all sales of irrigable land of large landowners in the District made subsequent to the execution of this contract and to inform the United States concerning the same.

(g) A true copy of this contract, of each recordable contract executed pursuant to this article and Articles 23 and 25 hereof, and of each appraisal made pursuant thereto shall be furnished to the District by the United States and shall be maintained on file in the office of the District and like copies in such offices of the Bureau of Reclamation as may be designated by the Contracting Officer and shall be made available for examination during the usual office hours by all persons who may be interested therein.

EXCESS LANDS

25. (a) As used herein the term "excess land" means that part of the irrigable land within the District in excess of one hundred and sixty (160) acres held in the beneficial ownership of any single person; or in excess of three hundred and twenty (320) acres held in the beneficial ownership of husband and wife jointly, as tenants in common or by the entirety, or as community property; the term "large landowner" means an owner of excess lands and the term "nonexcess land" means all irrigable land within the District which is not excess land as defined herein.

(b) Each large landowner as a further condition precedent to the right to receive water made available pursuant to this contract for any of his excess land shall:

(i) Before any water is furnished by the District to his excess land, execute a valid recordable contract in form prescribed by the United States, agreeing to the provisions contained in this article and Articles 23 and 24 hereof and agreeing to dispose of his excess land in accordance therewith to persons who can take title thereto as nonexcess land as herein provided and at a price not to exceed the approved, appraised value of such excess land and within a period of ten (10) years after the date of the execution of said recordable contract and agreeing further that if said land is not so disposed of within said period of ten (10) years, the Secretary shall have the power to dispose of said land at the appraised value thereof fixed as provided herein or such lower price as may be approved by the owner of such land, subject to the same conditions on behalf of such large landowner; and the District agrees that it will refuse to furnish said water to any large landowner other than for his nonexcess land until such owner meets the conditions precedent herein stated;

(ii) Within thirty (30) days after the date of notice from the United States requesting such large landowner to designate his irrigable lands within the District which he desires to designate as nonexcess lands, file in the office of the District, in

duplicate, one copy thereof to be furnished by the District to the Bureau of Reclamation, his written designation and description of lands so selected to be nonexcess land and upon failure to do so the District shall make such designation and mail a notice thereof to such large landowner, and in the event the District fails to act within such period of time as the Contracting Officer considers reasonable, such designation will be made by the Contracting Officer, who will mail a notice thereof to the District and the large landowner. The large landowner shall become bound by any such action on the part of the District or the Contracting Officer and the District will furnish said water only to the land so designated to be nonexcess land. A large landowner may with the consent of the Contracting Officer designate land other than that previously designated as nonexcess land: Provided, That an equal acreage of the land previously designated as nonexcess shall, upon such new designation, become excess land thereafter subject to the provisions of this article and Articles 23 and 24 of this contract and shall be described in an amendment of such recordable contract as may have been executed by the large landowner in the same manner as if such land had been excess land at the time of the original designation.

AMENDMENT OF FEDERAL RECLAMATION LAWS

26. In the event that the Congress of the United States repeals the so-called excess-land provisions of the Federal reclamation laws, Articles 23, 24, and 25 of this contract will no longer be of any force or effect, and, in the event that the Congress amends the excess-land provisions or other provisions of the Federal reclamation laws, the United States agrees, at the option of the District, to negotiate amendments of appropriate articles of this contract, all consistently with the provisions of such repeal or amendment.

WATER ACQUIRED BY DISTRICT OTHER THAN FROM THE UNITED STATES

27. (a) The provisions of this contract shall not be applicable to or affect water or water rights now owned or hereafter acquired by the District or landowners within the District other than from the United States. Water furnished pursuant to the terms of this contract may be transported by means of the same distribution facilities as water now available or which may become available to the District or landowners within the District other than pursuant to the terms of this contract if the Contracting Officer determines that such mingling is necessary to avoid a duplication of facilities; and notwithstanding such mingling of

water, the provisions of this contract shall be applicable to the quantity of water furnished to the District pursuant to the terms hereof, and such mingling of water shall not in any manner subject to the provisions of this contract the quantity of water acquired by or available to the District or landowners within the District other than from the United States.

(b) With respect to the distribution works or portions thereof in which mingling is permitted as provided in subdivision (a) hereof, the District:

(i) Will be responsible for the operation and maintenance of separate outlets from the distribution system for nonexcess and excess lands as defined in Article 25 hereof. At the request of the Contracting Officer the District will be responsible for the installation, operation, and maintenance of water-measuring equipment at delivery points to excess lands and, further, will be responsible for the installation, operation, and maintenance of similar equipment for measuring the water available to the District or landowners within the District other than from the Project, and the Contracting Officer may check and inspect said equipment at any time;

(ii) Agrees that the quantity of water furnished to it by the United States during each 24-hour period will be delivered by the District only to eligible land through

the aforesaid outlets to eligible lands. The District shall be deemed to be in breach of this article and Articles 23, 24, and 25 of this contract if at any time there is furnished to all excess lands not covered by recordable contracts and served by the distribution works or portions thereof in which mingling is permitted, a quantity of water which is greater than that which the District or landowners within the District have introduced into said system from the supply available other than pursuant to this contract.

CONTINGENT UPON APPROPRIATIONS OR ALLOTMENT OF FUNDS

28. The expenditure of any money or the performance of any work by the United States hereunder which may require appropriations of money by the Congress or the allotment of funds shall be contingent upon such appropriations or allotment being made. The failure of the Congress so to appropriate funds or the absence of an allotment of funds shall not relieve the District from any obligations then accrued under this contract, and no liability shall accrue to the United States in case such funds are not appropriated or allotted.

OFFICIALS NOT TO BENEFIT

29. (a) No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract

or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

(b) No official of the District shall receive any benefit that may arise by reason of this contract other than as a landowner within the District and in the same manner as other landowners within the District.

NOTICES

30. Any notice or announcement which the provisions hereof contemplate shall be given to one of the parties hereto by the other shall be deemed to have been given if deposited in the United States Post Office on the part of the United States in a franked or postage-prepaid envelope addressed to the District at its office in Fresno, California, and on the part of the District in a postage-prepaid envelope addressed to the Bureau of Reclamation, United States Department of the Interior, Sacramento, California, or such other address as from time to time may be designated by the Contracting Officer in a written notice to the District: Provided however, That this article shall not preclude the effective service of any such notice or announcement by other means.

ASSIGNMENT--WAIVER--REMEDIES NOT EXCLUSIVE--
[illegible]

31. (a) The provisions of this contract shall apply to and bind the successors and assigns of the respective parties, but no assignment or transfer of this contract or any part thereof or interest therein shall be valid until and unless approved by the United States.

(b) Any waiver at any time by either party to this contract of its rights with respect to a default, or any other matter arising in connection with this contract, shall not be deemed to be a waiver with respect to any subsequent default or matter.

(c) Nothing contained in this contract shall be construed as in any manner abridging, limiting, or depriving the United States of any means of enforcing any remedy, either at law or in equity, for the breach of any provisions hereof which it would otherwise have.

(d) Where the terms of this contract provide for matters being done to the satisfaction of a representative of either party hereto, or for action to be based upon the opinion or conclusive determination of such a representative of either party hereto, such terms are not intended to be and shall never be construed as permitting such satisfaction, opinion, or determination of such a representative of either party to this contract to be arbitrary, capricious, or unreasonable; and the District, notwithstanding any other provisions of the contract, expressly reserves the right to relief from and appropriate adjustment for any such arbitrary, capricious, or unreasonable satisfaction, opinion, or determination.

ASSURANCE RELATING TO VALIDITY OF CONTRACT

32. (a) Promptly after the execution and delivery of this contract the District shall file and prosecute to a final decree, including any appeal therefrom to the highest court of the State of California, in a court of competent jurisdiction a special proceeding for the judicial examination, approval, and confirmation of the proceedings had for the organization of the District and the proceedings of the District Board of Directors and of the District leading up to and including the making of this contract and the validity of the provisions thereof; and this contract shall not be binding on the United States until said District organization, proceedings, and contract shall have been so confirmed by a court of competent jurisdiction or pending appellate action in any court if ground for appeal be laid: Provided, That nothing herein contained shall require the District to assume the responsibility of prosecuting judicial review beyond the highest court of the State of California.

(b) This contract shall be indivisible for purposes of validation and shall not be binding on the United States or the District unless validated in each and all of its terms and conditions as executed by the parties.

IN WITNESS WHEREOF, the parties hereto have executed this contract the day and year first above written.

THE UNITED STATES OF AMERICA

By _____
Regional Director, Region 2
Bureau of Reclamation

WESTLANDS WATER DISTRICT

By _____
President

(SEAL)--Affixed

Attest:

_____
Secretary

RESOLUTION NUMBER 121-62

WHEREAS, Westlands Water District and the Bureau of Reclamation, United States Department of the Interior, have been negotiating for the execution of a contract under the terms of which the United States would provide water service to this District from the San Luis Unit of the Central Valley Project; and

WHEREAS, the Bureau of Reclamation has submitted to Westlands Water District a draft of contract marked "R.O. Draft 12/7-1962" under the terms of which such service would be provided; and

WHEREAS, This District is in serious need of a supplemental water supply; and

WHEREAS, this District was formed in contemplation of the acquisition of a supplemental water supply from the San Luis Unit of the Central Valley Project; and

WHEREAS, said draft of contract marked "R.O. Draft 12/7-1962" is considered by this Board to be satisfactory and that it would be in the best interests of this District to execute said contract.

NOW, THEREFORE, BE IT RESOLVED, that the draft of proposed contract marked "R.O. Draft 12/7-1962" between the United States and Westlands Water District be, and it is, hereby approved.

BE IT FURTHER RESOLVED, that the Manager-Chief Counsel of this District be, and he is, hereby authorized and instructed to take the necessary steps to complete the statutory and other procedures required to be met prior to the execution of said contract; and

BE IT FURTHER RESOLVED, that, upon the approval by the Secretary of the Interior of said form of contract and after approval

by the California Districts Securities Commission and the voters of this District, the President and the Secretary of this District be, and they are, hereby authorized to execute said contract for and on behalf of Westlands Water District.

AYES: GIFFEN, DIEKER, BAKER, BENSON, van LOBEN SELS

NOES: NONE

ABSENT: ROBINSON, THOMAS

STATE OF CALIFORNIA)
) ss
COUNTY OF FRESNO)

STEWART P. SMITH does hereby certify that he is the duly appointed, qualified and acting Secretary of WESTLANDS WATER DISTRICT, a public district organized under the laws of the State of California with its offices at Fresno, California; that the foregoing Resolution Number 121-62 was duly and regularly adopted by the Board of Directors of WESTLANDS WATER DISTRICT at a meeting of s Board of Directors duly called and held on the 10th day of December, 1962 at the offices of said WESTLANDS WATER DISTRICT at which a quorum of said Directors was present and acting; and that said Resolution is still in full force and effect.

DATED: January 10, 1963.

STEWART P. SMITH
Secretary, Westlands Water District

(SEAL)

RESOLUTION No. 125-63

WHEREAS Westlands Water District has heretofore approved a proposed draft of contract marked R.O. Draft 12/7-1962, for water service to this District from the San Luis Unit of the Central Valley Project; and

WHEREAS, said form of contract was submitted to the Secretary of the Interior for approval on behalf of the United States; and

WHEREAS the President of the United States and the Secretary of the Interior have approved said draft of contract subject to certain amendments, which amendments are incorporated in a draft of said contract marked R.O.Draft 12/7-1962, Rev. W.O. 1-4-63, Rev. W.O. 1-21-63, and

WHEREAS, said draft of contract, as amended, is satisfactory to Westlands Water District; and

WHEREAS, said draft of contract, under the provisions of Section 35035 of the Water Code of California requires the approval of the California Districts Securities Commission prior to execution.

NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors of Westlands Water District do, and it does, hereby approve, for execution, the proposed contract between the United States of America and the Westlands Water District, which contract is marked R.O. Draft 12/7-1962, Rev. W.O. 1-4-63, Rev. W.O. 1-21-63.

BE IT FURTHER RESOLVED, that the California Districts Securities Commission be, and it is, hereby requested to approve said form of contract marked R.O. Draft 12/7-1962, Rev. W.O. 1-4-63, Rev. W.O. 1-21-63.

BE IT FURTHER RESOLVED, that Ralph M. Brody, Manager-Chief Counsel for this District be, and he is, hereby authorized and directed to petition said California Districts Securities Commission for such approval and to execute all necessary documents for and on behalf of Westlands Water District required for obtaining such approval of the California Districts Securities Commission.

AYES: GIFFEN, DIEMER, BAKER, BENSON, ROBINSON, THOMAS, van LOBEN SELS

NOES: NONE

ABSENT: NONE

STATE OF CALIFORNIA)
) ss
COUNTY OF FRESNO)

STEWART P. SMITH does hereby certify that he is the duly appointed, qualified and acting Secretary of WESTLANDS WATER DISTRICT, a public district organized under the laws of the State of California with its offices at Fresno, California; that the foregoing Resolution Number 125-63 was duly and regularly adopted by the Board of Directors of WESTLANDS WATER DISTRICT at a meeting of said Board of Directors duly called and held on the 11th day of February, 1963 at the offices of said WESTLANDS WATER DISTRICT at which a quorum of said Directors was present and acting; and that said Resolution is still in full force and effect.

DATED: June 5, 1963

STEWART P. SMITH
Secretary, Westlands Water District

RECORDED IN OFFICIAL RECORDS OF
FRESNO COUNTY, CALIFORNIA
at 10 min. past 4 p.m. 54458
Aug. 7, 1969
J. L. Brown, County Recorder Fee $10.00

R.(Dratt 2/20-1964
Rev. R.O. 5/19-1964
(Modified 1/19-1967 for
Westlands Water District)
172

Exhibit B
Page 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

Contract No.
14-06-200-4508A

AGREEMENT PERTAINING TO SALE OF EXCESS LANDS

THIS AGREEMENT, made this 12 day of June, 1969, under the provisions of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all collectively herein styled the Federal reclamation laws, between THE UNITED STATES OF AMERICA, herein styled "the United States", represented by the Secretary of the Interior or his duly authorized representative, and Edwin R. O'Neill and Kristan L. O'Neill, husband and wife, herein styled "the Landowner";

WITNESSETH THAT:

WHEREAS, pursuant to the Federal reclamation laws, the United States and the Westlands Water District have entered into a contract herein referred to as the District Contract, dated June 5, 1963, a copy of which is on file in the office of said District in the City of Fresno, County of Fresno, California, of which articles 23, 24, and 25 provide for the execution of certain contracts by owners of irrigable excess land within the District and the valuation and conditions

of sale of such land, and of article 23 which, among other things, provides in part as follows:

> No water made available pursuant to this contract shall be furnished to any excess lands as defined in article 25 hereof unless the owners thereof shall have executed valid recordable contracts in form prescribed by the United States, agreeing to the provisions of this article and Articles 24 and 25 of this contract, agreeing to the appraisal provided for in Article 24 hereof and that such appraisal shall be made on the basis of the actual bona fide value of such lands at the date of the appraisal without reference to the construction of the Project, all as hereinafter provided, and agreeing to the sale of such excess lands under terms and conditions satisfactory to the Secretary and at prices not to exceed those fixed as hereinafter provided.

WHEREAS, the Landowner is the owner of certain land situated in the County of Fresno, California, and within the territorial limits of and incorporated into and as a part of, the District; and

WHEREAS, the Landowner, pursuant to article 25 of the District Contract, has designated as nonexcess land a portion of the aforesaid land and has filed with the District a written description thereof;

NOW, THEREFORE, in consideration of the direct and indirect benefits to be derived under the terms of the District Contract, as implemented by this agreement, by all of the lands of the Landowner within the District, and as an inducement to the United States to make water and distribution facilities available to the District for the

excess land of the Landowner, the Landowner agrees and covenants for himself, his executors, administrators, heirs, successors, and assigns, all of which agreements and covenants are and each of them hereby is made a charge upon the excess land of the Landowner to run with the title to the said excess land, as follows:

1. Each term defined in the District Contract shall, when used herein, have the same meaning as that which it has when used in the District Contract.

2. The Landowner is the owner of excess land situated in Fresno County, California, and particularly described as follows:

PARCEL ONE: That portion of the north half (N 1/2) of Section Seven (7), Township Eighteen (18) South, Range Seventeen (17) East, Mount Diablo Base and Meridian, lying southeast of the southeasterly right of way line of the Fresno Coalinga Road, as said road is described in the deed to the County of Fresno recorded September 22, 1924 in Book 492 at Page 41, as Document No. 25290, Fresno County Official Records; BUT EXCEPTING THEREFROM that portion thereof lying within Butte Avenue, a deeded road, said Butte Avenue being described in the right of way deed to the County of Fresno recorded November 8, 1948 in Book 2689 at Page 102, as Document No. 52265, Fresno County Official Records; containing an area of 93 acres, more or less, after said exception.

PARCEL TWO: The southwest quarter (SW 1/4) of Section Eight (8), Township Eighteen (18) South, Range Seventeen (17) East, Mount Diablo Base and Meridian, BUT EXCEPTING THEREFROM that portion of the west half of the southwest quarter of the southwest quarter (W 1/2 SW 1/4 SW 1/4) of said Section Eight (8) lying North of the south 35 feet thereof; ALSO EXCEPTING THEREFROM that portion thereof lying within Butte Avenue, a deeded road, said Butte Avenue being described in the right of way deed to the County of Fresno recorded November 8, 1948 in Book 2689 at Page 102 as Document No. 52265, Fresno County Official Records; containing an area of 140 acres, more or less, after said exceptions.

PARCEL THREE: The southeast quarter (SE 1/4) of Section Eight (8),

(Continued on page 3a)

Township Eighteen (18) South, Range Seventeen (17) East, Mount Diablo Base and Meridian, containing an area of 160 acres, more or less.

PARCELS ONE, TWO and THREE containing a combined area of 393 acres, more or less.

(Continued on page 3b)

Each of said parcels being subject to existing rights of way in favor of the public or third parties for highways, roads, railroads; telegraph, telephone and electrical transmission lines and canals, laterals, ditches, flumes, siphons and pipelines on, over and across said premises.

Excepting and reserving as to each of said parcels all oil, gas and minerals and other hydrocarbon substances in and under said land, together with the right of ingress and egress thereto, as necessary or desirable, for the exploration, development and exploitation of all such reserved rights; Provided, that upon exercise of any of said rights of ingress and egress for exploration, development and exploitation the owner of said mineral rights shall fully indemnify the surface owner for any and all damages or losses resulting therefrom or caused thereby. This indemnification provision shall be binding upon the landowner herein, his executors, administrators, heirs, and assigns, and any conveyance of mineral rights by the landowner herein shall specifically contain such a provision for indemnification.

Continued on page 4

3. The appraised value of said excess land within the meaning of the District Contract and this contract shall be determined in a manner to be prescribed by the Secretary of the Interior. At the option of the Landowner, however, the said value may be determined, subject to the approval thereof by the Secretary, by three appraisers, one designated by the United States, one designated by the District, and the third designated by the first two, or upon their failure to agree by the presiding Justice of the Fifth District Court of Appeals of the State of California. Said excess land shall be appraised at its fair market value, but in the appraisal no value shall be given such land on account of the existing or prospective availability of water or service from the Central Valley Project. The value of the improvements on the land at the time of appraisal shall be included therein, but shall also be set forth separately in such appraisal.

4. The Landowner agrees that the land described in article 2 hereof shall be subject to the terms of this contract and the terms of articles 23, 24, and 25 of the District Contract and said articles are hereby made a part of this agreement by reference.

5. All rights of the Landowner to receive Project water for his excess land shall be subject to the provisions of the District Contract and this contract.

6. The Landowner agrees that if and when any or all of the land described in article 2 hereof is sold by or for him, it will be sold at prices not exceeding the appraised value thereof as fixed pursuant to the procedure set forth in article 3 or as said appraised value may be modified as hereinafter provided, plus the appraised value of the crops growing on said land at the date of sale. The value of crops growing on the land at the date of sale shall be included but shall be set forth separately in the appraisal.

7. If an appraisal has been made pursuant to article 3 prior to the sale of the land described in article 2 of this agreement, either the Landowner or the United States may require that said land or any part thereof be again appraised at any time prior to the sale thereof, and such appraisals shall be made as provided in article 3 hereof. The cost of the first two appraisals of each tract of excess land shall be paid by the United States. The cost of each appraisal thereafter shall be paid by the party requesting such appraisal. The value established by any new appraisal shall supersede the value established by the existing appraisal on the date of the receipt of a registered letter to the Landowner notifying him of said new appraisal.

8. None of the excess land described in article 2 hereof shall be entitled to receive water nor shall service be made available to such land pursuant to the District Contract, except while owned by the

Landowner, unless the same shall have been sold to a person who, as the owner of such land, is qualified as a nonexcess Landowner to receive Project water under the provisions of the Federal reclamation laws, the District Contract, and this agreement in full compliance with the provisions thereof.

9. When any of the excess land covered by this agreement shall have been transferred in accordance with the provisions hereof to a person who, as the owner of such land, qualifies as a nonexcess Landowner under the District Contract, the land so transferred shall thereupon be subject to and governed by the terms and provisions of said District Contract applicable to nonexcess lands.

10. The terms "sold" and "transferred", as used in articles 6, 8, and 9 of this agreement, include conveyance by way of bona fide gift, dividend, or otherwise, if the consideration, if any, received by the Landowner does not exceed the appraised value as determined pursuant to article 3 hereof or the reappraised value as determined pursuant to article 7 hereof.

11. The Landowner hereby irrevocably makes, constitutes, and appoints the Secretary of the Interior, United States Department of the Interior, his true and lawful attorney for him in his name, place, and stead, to sell and transfer at any time following the expiration of a period of ten years immediately following the date of execution

of this agreement, all of his then right, title, and interest in and to any or all of the excess land described in article 2 hereof, owned by the Landowner, beneficially or otherwise, by such instrument as may be agreed upon between the Secretary and any other parties: Provided, That such sale shall not be made at a price which is less than the appraised value as fixed pursuant to the procedure set forth in article 3 hereof, or such appraised value as amended pursuant to article 7 hereof: Provided further, That such sale of said excess land shall be only for cash or upon terms satisfactory to the Landowner. The Landowner gives and grants irrevocably unto his said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done to transfer title to said property, as fully to all intents and purposes as the Landowner might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that said attorney or his substitute shall lawfully do, or cause to be done, by virtue of these presents.

12. In the event that the Congress of the United States repeals the so-called excess-land provisions of the Federal reclamation laws, this agreement shall no longer be of any force or effect, and, in the event that the Congress amends the excess-land provisions or other provisions of the Federal reclamation laws, the United States agrees,

at the option of the Landowner, to negotiate amendments of the appropriate articles of this agreement, all consistently with the provisions of such repeal or amendment.

13. In the event that the District Contract shall not become effective, or, through no breach on the part of the District, should terminate prior to the expiration of the term thereof, then this agreement shall also terminate: Provided, That any recordable contract relating to the excess land described in article 2 hereof shall similarly provide that the power of attorney conferred upon the Secretary for the disposal of said land shall become effective ten years from the date of the execution of this recordable contract: Provided further, That the computation of the ten-year period prescribed in article 11 hereof shall not include any year or years in which water or service from the Project may not be available to the land involved through no fault of the District or the Landowner.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed the day and year first above written.

THE UNITED STATES OF AMERICA

By _____
Regional Director, Region 2
Bureau of Reclamation

LANDOWNER

Kristan L. O'Neill
Kristan L. O'Neill

LANDOWNER

Edwin R. O'Neill
Edwin R. O'Neill
Address P. O. Box 787
Fresno, California 93712

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF Fresno) ss.

On this 12 day of June, 19 69, before me, MICHAEL J. O'NEILL, personally appeared Edwin R. O'Neill and Kristan L. O'Neill the person whose name is last subscribed to the within instrument and acknowledged that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this acknowledgment above written.

Michael J. O'Neill
Notary Public in and for the County of Fresno, State of California

(SEAL)

MICHAEL J. O'NEILL
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
FRESNO COUNTY

MY COMMISSION EXPIRES APRIL 19, 1972

My commission expires _____

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

Contract No.
14-06-200-2020A
April 1, 1965

CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR THE CONSTRUCTION OF A WATER DISTRIBUTION AND DRAINAGE COLLECTOR SYSTEM

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EXHIBIT B

Table of Contents, cont'd. (Westlands Water District contract)

R.O. Draft 4/8-1964

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

Contract No
14-06-200-2020A

CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR THE CONSTRUCTION OF A WATER DISTRIBUTION AND DRAINAGE COLLECTOR SYSTEM

THIS CONTRACT, made this 1st day of April, 19 65, in pursuance generally of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all collectively hereinafter referred to as the Federal reclamation laws, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, and WESTLANDS WATER DISTRICT, hereinafter referred to as the District, a political subdivision of the State of California, duly organized, existing, and acting pursuant to the laws thereof, with its principal place of business in Fresno, California,

WITNESSETH, That:

EXPLANATORY RECITALS

WHEREAS, the United States is constructing and operating the Federal Central Valley Project for the purpose, among others, of furnishing water for irrigation, municipal, domestic, and other beneficial uses; and

WHEREAS, the United States will furnish Federal Central Valley Project water to the District pursuant to Contract No. 14-06-200-495-A, dated June 5, 1963, or as it may hereafter be amended, renewed, or extended; and

WHEREAS, the District, in order to utilize its ground-water supply and the water supply made available under the water service contract and such future contracts as may be made between the United States and the District, desires that a water distribution and drainage collector system be constructed for the District by the United States acting by and through the Bureau of Reclamation, United States Department of the Interior, pursuant to the Federal reclamation laws; and

WHEREAS, the District has constructed a portion of the water distribution facilities required for the operation of the distribution system; and

WHEREAS, it is desirable and in the interest of the United States and the District that the facilities constructed by the District for water distribution be acquired by the United States for integration with the distribution system; and

WHEREAS, the United States is willing to undertake the construction of the aforementioned water distribution and drainage collector system under the conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the mutual and dependent covenants herein contained, it is agreed as follows:

DEFINITIONS

1. When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the term:

(a) "Secretary" or "Contracting Officer" shall mean the Secretary of the United States Department of the Interior or his duly authorized representative;

(b) "Project" shall mean the Federal Central Valley Project, California, of the Bureau of Reclamation;

(c) "year" shall mean a calendar year;

(d) "distribution system" shall mean a water distribution and lateral system, primarily of closed pipe, including facilities for the integration of ground with surface water supplies, and a drainage collector system and related facilities to be constructed under the terms of this contract;

(e) "water service contract" shall mean the contract of June 5, 1963, No. 14-06-200-495-A, or as it may hereafter be amended, renewed, or extended, between the United States and the District providing for water service to the District from the San Luis Unit of the Central Valley Project.

CONSTRUCTION OF DISTRIBUTION SYSTEM AND LIMIT OF EXPENDITURES THEREFOR

2. (a) To the extent that funds may now or hereafter be available by appropriation and allocation for the purposes set forth herein, the United States will expend toward construction of a distribution system (generally as illustrated in Exhibit A) a sum not in excess of One Hundred Fifty-Seven Million Forty-Eight Thousand Dollars ($157,048,000).

or so much thereof as the Contracting Officer deems necessary for the completion of the distribution system. Said distribution system will not include the San Luis Canal or the San Luis Canal right-of-way except facilities and structures for handling water after delivery thereof to the District at the delivery points established pursuant to the water service contract. The United States and the District will exert their best efforts to expedite the completion of such features.

(b) The distribution system will be constructed so as to provide facilities for the delivery of water from the San Luis Canal to such units of a total of approximately 400,000 acres of irrigable land as mutually agreed upon by the District and the Contracting Officer prior to the award of the construction contract for the area to be served.

(c) Facilities to be constructed will be separated into construction groups. The general type and layout of the distribution system and the portions thereof to be included in each construction group shall be subject to review and approval by the District evidenced by a resolution of the District's Board of Directors prior to the commencement of construction of each such construction group of the distribution system. Construction group 1 shall include substantially all of the water distribution facilities, drainage collector facilities, and works for the integration of ground with surface water, all as initially required to serve the area substantially as delineated on Exhibit A.

Construction groups 2 and 3 shall include added portions of the distribution system on which subsequent construction is started no later than June 30, 1974, and June 30, 1979, respectively, except as provided in Article 4(b) hereof. Changes in capacity, specifications, locations, lengths and alignments, as may in the opinion of the Contracting Officer be expedient, economical, necessary, or advisable to the extent that such changes do not substantially change the basic character or service capability of the facilities theretofore approved by the District, may be made during the progress of the work after consultation with the District.

(d) The United States and the District shall cooperate closely in the preparation of the plans, designs, specifications, method of contracting, and review of abstracts of bids for construction of the distribution system and District representatives may at any time consult with the Contracting Officer or his designated representatives on such matters.

(e) Quarterly progress reports on design and construction, including costs thereof, in the form normally used by the United States will be furnished to the District. By reports and joint conferences, the District shall be kept informed of the progress on and costs of the facilities. The United States will furnish other related information in its possession as may be requested by the District.

The United States and the District will conduct cost auditing examinations and conferences as may be requested by the District.

DISTRICT FACILITIES TO BE ACQUIRED BY THE UNITED STATES

3. The United States shall acquire for the construction of the distribution system such water distribution pipeline facilities, including sublaterals constructed by the District as are usable as an integral part of the distribution system, which pipeline extends from a point approximately two (2) miles west of the easterly boundary of the District along Adams Avenue to the right-of-way of the San Luis Canal. The amount which the United States shall pay for such facilities, including rights-of-way, shall not exceed the lesser of (a) the cost which the United States would have incurred if it had constructed a line and sublaterals to serve the same area, or (b) the cost incurred by the District in the construction and operation and maintenance of said facilities less the amount attributable to such facilities received from the United States in payment of water transportation for preconsolidation purposes pursuant to Contract No. 14-06-200-316-A.

PAYMENT BY DISTRICT

4. (a) The District shall repay to the United States the actual cost of the distribution system constructed and acquired pursuant to Articles 2 and 3 hereof, but in no event shall the total cost incurred

by the United States for the distribution system exceed One Hundred Fifty-Seven Million Forty-Eight Thousand Dollars ($157,048,000).

(b) The construction cost of construction group 1 described in subdivision (c) of Article 2 shall be paid by the District in eighty (80) successive semiannual installments payable on January 1 and July 1 of each year beginning in the year following completion of said group to the point where all the laterals and sublaterals of such construction group and substantially all other facilities for such construction group can be put in service for the delivery of water, as announced in writing by the Contracting Officer pursuant to Article 24. Each of the first ten (10) payments shall be for one one-hundred and sixtieth (1/160th) of the construction cost of said group 1 and each of the remaining seventy (70) payments shall be for one-seventieth (1/70th) of the remainder of the cost. The construction cost of subsequent construction groups shall be paid in eighty (80) successive equal semiannual installments payable on January 1 and July 1 of each year. The first installment with respect to construction groups 2 and 3 shall become due and payable on January 1 of the year following completion of construction of the respective construction group to the point where all the laterals and sublaterals of such construction group and substantially all other facilities for such construction group can be put in service for the delivery of water, as announced in writing by the Contracting Officer pursuant to Article 24. If the actual cost of any

group shall not have been determined by the Contracting Officer when the first construction obligation installment for such group shall have become due hereunder, he shall announce the estimated construction cost. Such estimated construction cost shall govern the amount of the installments herein referred to until such time as the actual construction cost can be determined and a statement thereof furnished to the District. When notice of the actual construction cost has been given to the District, installments coming due thereafter from the District shall be adjusted to reflect any difference between the estimated cost and the actual cost of construction. If after June 30, 1979, it is determined that facilities to complete the distribution system, pursuant to Article 2 hereof, are required by the District in addition to the facilities in construction group 3, such additional facilities may with the consent of the District be constructed by the United States and their cost added to the unpaid balance of the cost of construction group 3. The remainder of payments to be made by the District for construction of group 3 shall be adjusted to cover the total cost of the additional facilities within the repayment period for that group.

(c) The Contracting Officer may at any time in his discretion, upon request of the District evidenced by a certified copy of a resolution of the Board of Directors of the District, provide

for dates upon which semiannual installments of the construction cost shall become due and payable other than and in lieu of those dates fixed for the payment of such semiannual installments as provided in subdivision (b) of this article.

(d) When the Contracting Officer notifies the District in writing that total expenditures have been made to the limit determined pursuant to subdivision (a) of this article or so much thereof as the Contracting Officer considers necessary and useful for the construction of the distribution system, the distribution system shall also be deemed to have been completed within the meaning of this contract.

ACQUISITION OF LANDS AND INTERESTS IN LANDS

5. The United States will invoke all legal and valid reservations of rights-of-way under acts of Congress, or otherwise reserved or held by it and available for the purposes of this contract. The United States reserves the right where rights-of-way are thus invoked to reimburse the owner of the servient lands for the value of the lands and the value of improvements which may be destroyed, and the District agrees that the United States may include such disbursement together with any others that may be authorized by the Congress in the cost of the distribution system to be repaid by the District. The District agrees to convey to the United States, on the request of the Contracting Officer, without cost, the unencumbered

fee simple title to any and all lands owned by it, or perpetual easements therein, required for right-of-way, construction, or other related purposes. Where rights-of-way are required for works herein agreed to be constructed by the United States and such rights-of-way are not reserved to the United States under acts of Congress or otherwise and the lands over which such rights-of-way are required are not then owned by the District, then the District upon request of the United States agrees that it will acquire such lands or perpetual easements therein, using in connection therewith such forms of contracts, deeds, and other necessary papers as may be required by the United States, and purchases shall be only at prices that are satisfactory to the Contracting Officer. Title may be taken directly in the name of the United States or by the District and then transferred to the United States and on procuring execution of the necessary contracts, deeds, and other papers they shall be transmitted by the District to the United States by whom payment will be made after title has been found satisfactory to the Contracting Officer. Expenses incurred by the District in connection with acquisition provided for herein, to the extent approved by the Contracting Officer, shall be paid to the District on the basis of quarterly statements submitted at the close of each quarter of the year and shall be chargeable as part of the construction costs.

OPERATION AND MAINTENANCE OF COMPLETED PORTIONS OF SYSTEM

6. Whenever, prior to the transfer of operation and maintenance of the distribution system, or any portion thereof, to the District as provided in Article 7 hereof, the Contracting Officer determines that any portion or portions of the system being constructed by the United States may be utilized for its intended purposes without interfering with the construction of the remainder of the distribution system, he will so notify the District in a written notice stating the period of availability and the estimated cost to the United States of supervising the operating and maintaining of such portion or portions of the system by the District during such period. If the District desires that such portion or portions of the system so be utilized, it shall give the Contracting Officer written notice thereof and shall make payment in advance to the United States of said estimated cost of said supervision of operation and maintenance. Thereupon the District will at its own expense operate and maintain said portion or portions of the system under supervision of the United States. The United States at any time may terminate the use of said portion or portions of the system if the Contracting Officer determines that such use is interfering or will interfere with the construction of the distribution system. The District shall contribute all labor and materials toward the operation and maintenance of the portion or portions of the system

being utilized. If the actual cost to the United States of operating and maintaining said portion or portions of the system exceeds the estimated cost paid in advance by the District, the District shall pay the difference upon receipt of a written notice thereof. If said actual cost is less than said estimated cost, the difference shall at the option of the District either be credited upon future payments due to the United States or be refunded to the District.

TRANSFER OF OPERATION AND MAINTENANCE TO DISTRICT--
UNITED STATES TO BE HELD HARMLESS

7. (a) Upon completion of construction of each construction group of the distribution system or such earlier date as may be agreed upon by the Contracting Officer and the District, the District shall accept the care, operation, and maintenance of such group or any part thereof described in a transfer notice to be furnished to the District by the Secretary. The District, without expense to the United States, shall care for, operate, and maintain such transferred works in full compliance with the terms of this contract and the water service contract, and in such manner that said transferred works shall remain in good and efficient condition. The District also agrees, upon the effective date of the transfer notice, to assume all obligations of the United States under any contract or contracts relating to the crossing of the distribution system facilities in, over, along, or across land or rights-of-way of public utilities, the State of California, or agencies thereof. The District will use all proper methods to secure the economical and beneficial use of the water delivered by means of the distribution system.

(b) At any time prior to full payment of the construction costs that the Contracting Officer determines that the District has not cared for, operated, maintained, or delivered water from transferred works in the manner as aforesaid, the United States may assume the control of the distribution system and appurtenant works and all equipment, materials, and supplies used, acquired for use, and useful in the operation of the distribution system, and shall operate and maintain such works, and the District hereby agrees to surrender possession of said works. The works so taken back for operation and maintenance by the United States may be retransferred to the District upon furnishing the District ninety (90) days' written notice of intention to retransfer. If any works are taken back by the United States at such time that funds for the operation and maintenance cannot be advanced in accordance with the procedure set forth in Article 8 hereof, the District hereby agrees, on the basis of statements of estimates to be submitted by the Contracting Officer, to advance sufficient funds to provide for the operation and maintenance of such works until such funds can be provided under the procedure set forth as aforesaid in Article 8 hereof.

(c) No substantial change in any of the transferred works shall be made by the District without first obtaining written consent of the Contracting Officer. The District shall make promptly any and all repairs to the transferred works which in the opinion of the Contracting Officer are deemed necessary for the proper care, operation, and maintenance of the same. If at any time in the opinion of the Contracting Officer any part of the transferred works shall from any cause be in a condition unfit for service, he may order that the water be turned out and shut off from that part of the distribution system until in his opinion such property is put in proper condition for service. In the event the District neglects or fails to make such repairs, the United States may cause the repairs to be made and may charge the cost thereof to the District, which charge the District shall pay in the manner provided in Article 9 hereof. The District shall provide for the collection of sufficient operation and maintenance or toll charges to pay all such bills to the United States within the time stated herein in addition to providing the necessary funds to meet the other obligations of the District.

(d) The Contracting Officer may from time to time cause an appropriate inspection of the transferred works and of the books and records of the District to be made to ascertain whether the requirements of this contract are being satisfactorily performed by the District. Such inspections may include physical inspection of all properties and audit of the books and records of the District. Any such inspection or audit shall, except in case of emergency, be made after written notice to the District and the actual expense thereof shall be paid by the District to the United States in the manner provided in Article 9 hereof.

(e) No liability shall accrue against the United States and its officers and employees because of damages arising out of or in any manner connected with the care, operation, and maintenance of the distribution system by the District. The District hereby releases the United States and agrees to hold it free and harmless and to indemnify it from all damage claims that may result from operation and maintenance of transferred works.

ESTIMATED COST OF OPERATION AND MAINTENANCE TO BE PAID IN ADVANCE

8. (a) During the time that the distribution system or any part thereof is being operated by the United States as provided in Article 7(b) hereof, the District will pay in advance to the United States not later than January 1, upon estimates therefor to be furnished by the United States on or before September 1 next preceding, the estimated cost of operation and maintenance for such year. The District in addition shall contribute such labor and materials toward the operation and maintenance of the distribution system or any portion thereof as may be requested by the Contracting Officer. The surplus of any amount so advanced by the District for operation and maintenance by the United States during any year shall be credited on future estimated cost of operation and maintenance by the United States.

(b) Whenever in the opinion of the Contracting Officer the amounts available from payments made by the District of the estimated annual operation and maintenance charges will be inadequate to operate and maintain the distribution system properly to the end of any year, he may give written notice to the District, hereinafter referred to as the supplemental operation and maintenance charge notice, stating

therein the amount of additional advance payment of funds required for such operation and maintenance, and the District shall pay the amount thereof on or before the dates specified in such supplemental operation and maintenance charge notice.

(c) Any amount of said operation and maintenance payments by the District for any year remaining unexpended and unobligated in the possession of the United States on the effective date of re-transfer of the distribution system, in whole or in part, to the District for care, operation, and maintenance, in accordance with Article 7(b) hereof, shall be refunded to the District.

(d) To the extent that the distribution system is operated and maintained by the United States, there shall be included as a part of the operation and maintenance costs such items for administration, supervision, inspection, replacement, and general expenses as properly are chargeable to such work in the opinion of the Contracting Officer.

DISTRICT TO PAY CERTAIN MISCELLANEOUS COSTS RELATING TO TRANSFERRED WORKS

9. In addition to the other payments to be made by the District, as provided by this contract, the District shall pay to the United States on or before April 1 of the year following that in which the same shall have been incurred and a statement thereof furnished by the United States, the following costs:

(i) Such items of cost incurred by the United States in connection with the distribution system for administration, supervision, and inspection during the time the distribution system is operated and maintained by the District and for the period covered by the statement; and

(ii) The cost of repairs to transferred works made by the United States as provided in Article 7 hereof.

COMPUTATION OF COSTS

10. The actual construction cost of the distribution system to be repaid to the United States by the District shall embrace all expenditures by the United States of whatsoever kind in connection with, growing out of, or resulting from work performed in connection with the distribution system, including but not limited to the cost of labor, material, equipment, engineering and legal work, superintendence, administration and overhead, rights-of-way, property, whether purchased from the District or others, and damage of all kinds, and shall include all sums expended by the Bureau of Reclamation in surveys and investigations in connection with the distribution system, both prior to and after the execution of this contract, and the expense of all soil investigations and other preliminary work. The determination of what costs are properly chargeable hereunder and the amount thereof shall be made conclusively by the Contracting Officer.

ACCUMULATION AND USE OF RESERVE FUND

11. (a) General. Commencing with the year following the year of completion of construction group 1 as provided in subdivision (c) of Article 2 hereof and continuing until all construction charge obligations to be paid to the United States under this contract are paid in full, the District shall accumulate and maintain a reserve fund, which will be available for use in the manner, for the purposes, and in the circumstances hereinafter set forth as follows:

(i) During such time as the distribution system constructed hereunder is operated and maintained by the United States in accordance with the provisions herein, the reserve fund shall be available for use by the United States for the purposes specified in this article;

(ii) At the option of the District, the reserve fund may be invested to the extent permitted by law, provided that such reserve fund may be made available within a reasonable time to meet the expenses for the purposes for which it was accumulated; and

(iii) From time to time, as requested by either party to this contract, the reserve fund provisions may be reconsidered and changed by mutual agreement of the parties.

(b) Reserve Fund. The reserve fund shall consist of annual deposits by the District of not less than Fifty Thousand Dollars ($50,000)

to a special account created by the District for the purpose. Such annual deposits shall continue until the amount in the reserve fund is not less than Two Hundred Fifty Thousand Dollars ($250,000). Whenever said reserve fund is reduced below Two Hundred Fifty Thousand Dollars ($250,000) by expenditures therefrom, it shall be restored to not less than the amount set forth above by the accumulation of annual deposits at a minimum rate of twenty percent (20%) of that amount. Expenditures shall be made from such fund only for meeting extraordinary costs of care, operation, maintenance, repair, and replacement of the distribution system including Project features operated and maintained by the District, and for care, operation, and maintenance during periods of special stress, such as may be caused by drought, hurricane, storms or other emergencies.

AGREED CHARGES A GENERAL OBLIGATION OF THE DISTRICT--TAXABLE LANDS--LEVY OF TAXES AND ASSESSMENTS--FIXING OF RATES AND TOLLS

12. (a) The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District. The lands which may be charged with any taxes or assessments under this contract are hereby designated and described as all the lands in the District.

(b) The District shall cause to be levied and collected all necessary taxes and assessments and will use all of the authority and

resources of the District to make in full all payments to be made pursuant to this contract on or before the date such payments become due and to meet its other obligations hereunder. The District may, either or both, require the payment of toll charges or levy assessments to meet its obligations hereunder.

ALL BENEFITS CONDITIONED UPON PAYMENT

13. Should any assessment or assessments levied by the District against any tract of land or water user in the District and required to meet the obligations of the District under this contract be judicially determined to be irregular or void, or should the District or its officers be enjoined or restrained from making or collecting any assessments upon such land or from such water user as provided for herein, then such tract or water user shall have no right to any of the benefits of this contract, and no use shall be made of the distribution system for the benefit of any such lands or water user, except upon the payment by the landowner of his assessment or a toll charge for the use of said distribution system, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water user involving service from said distribution system shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rates and

upon the terms and conditions provided for herein is a prerequisite to the right to service from said distribution system, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District, whether affecting the validity of District taxes or assessments or not, shall be held to authorize or permit any water user of the District to demand or receive service made available pursuant to this contract unless charges at the rates and upon the terms and conditions provided for herein have been paid by such water user.

REFUSAL OF SERVICE IN CASE OF DEFAULT

14. No service from the distribution system shall be furnished to the District or by the District to or for the use of any lands or parties therein during any period in which the District may be in arrears in the advance and other payments of operation and maintenance costs or for more than twelve (12) months in the payment of construction charges accruing under this contract. No water made available pursuant to the water service contract and no service from the distribution system shall be furnished to or by the District to any lands or parties which are in arrears in the payment to the District of any assessments, rates, tolls, or other charges levied or established by the District for the purpose of providing revenues to meet payments by the District to the United States pursuant to Articles 7 and 9 hereof

or are in arrears for more than twelve (12) months in similar payment to the District for the purpose of providing revenues to meet payment by the District to the United States pursuant to Article 4 hereof.

PENALTY FOR DELINQUENCY IN PAYMENT

15. The District shall pay a penalty on installments or charges which become delinquent computed at the rate of one-half of one percent per month of the amount of such delinquent installments or charges for each day from the date of such delinquency until paid: Provided, That no penalty shall be charged to the District unless such delinquency continues for more than thirty (30) days.

BOOKS, RECORDS, AND REPORTS

16. The District shall establish and maintain accounts and other books and records pertaining to its financial transactions, land use, crop production, water supply, water use, changes to the distribution system, and to such other matters as the Contracting Officer may require. Reports thereon shall be furnished to the United States in such form and on such date or dates as may be required by the Contracting Officer. Each party shall have the right, during office hours, to examine and make copies of the other party's books and official records relating to matters covered by this contract.

CHANGES IN ORGANIZATION OF DISTRICT

17. While this contract is in effect no change, except as provided for in the water service contract, shall be made in the District either by inclusion or exclusion of lands, by partial or total consolidation or merger with another district, by proceedings to dissolve, or otherwise, except upon the Contracting Officer's written assent thereto.

TITLE TO REMAIN IN THE UNITED STATES

18. Title to the distribution system constructed by the United States pursuant to this contract shall be and remain in the name of the United States until otherwise provided for by the Congress, notwithstanding the transfer hereafter of any of such works to the District for operation and maintenance.

TRANSFER OF CARE, OPERATION, AND MAINTENANCE OF SAN LUIS UNIT

19. The United States may transfer the San Luis Unit of the Central Valley Project or any portion thereof, other than distribution system, to the State of California for care, operation, and maintenance and such transfer shall not affect the rights or obligations of either party to this contract.

LAND INELIGIBLE TO RECEIVE WATER UNDER THE WATER SERVICE CONTRACT NOT TO RECEIVE WATER SERVICE THROUGH THE DISTRIBUTION SYSTEM

20. No water shall be delivered through the distribution system to any lands or persons not eligible under the terms of Articles 23, 24, and 25 of the water service contract to receive water made available pursuant to that contract.

CONTINGENT UPON APPROPRIATIONS OR ALLOTMENT FUNDS

21. The expenditure of any money or the performance of any work by the United States herein provided for which may require appropriations of money by the Congress or the allotment of funds shall be contingent upon such appropriations or allotment being made. The failure of the Congress so to appropriate funds or the absence of an allotment of funds shall not relieve the District from any obligations then accrued under this contract, and no liability shall accrue to the United States in case such funds are not appropriated or allotted.

RULES AND REGULATIONS

22. The Secretary reserves the right to make, after consultation with the District, such rules and regulations consistent with the provisions of this contract, the laws of the United States and the State of California, and to add to and modify them as may be deemed proper and necessary to carry out this contract, and to supply necessary details of its administration which are not covered by express provisions of this contract. The District agrees to observe such rules and regulations.

OFFICIALS NOT TO BENEFIT

23. (a) No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall

not be construed to extend to this contract if made with a corporation or company for its general benefit.

(b) No official of the District shall receive any benefit that may arise by reason of this contract other than as a landowner within the District and in the same manner as other landowners within the District.

NOTICES

24. Any notice or announcement which the provisions hereof contemplate shall be given to one of the parties hereto by the other shall be deemed to have been given if deposited in the United States Post Office on the part of the United States in a franked or postage-prepaid envelope addressed to the District at its office in Fresno, California, and on the part of the District in a postage-prepaid envelope addressed to the Bureau of Reclamation, United States Department of the Interior, Sacramento, California, or such other address as from time to time may be designated by the Contracting Officer in a written notice to the District: Provided, however, That this article shall not preclude the effective service of any such notice or announcement by other means.

ASSIGNMENT--WAIVERS--REMEDIES NOT EXCLUSIVE

25. (a) The provisions of this contract shall apply to and bind the successors and assigns of the respective parties, but no assignment

or transfer of this contract or any part thereof or interest therein shall be valid until and unless approved by the United States.

(b) Any waiver at any time by either party to this contract of its rights with respect to a default, or any other matter arising in connection with this contract, shall not be deemed to be a waiver with respect to any subsequent default or matter.

(c) Nothing contained in this contract shall be construed as in any manner abridging, limiting, or depriving the United States or the District of any means of enforcing any remedy, either at law or in equity, for the breach of any of the provisions hereof which it would otherwise have.

DETERMINATIONS

26. (a) Where the terms of this contract provide for action to be based upon the opinion or determination of either party to this contract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations.

(b) In the event the District questions any factual determination made by any representative of the Secretary as required in the administration of this contract, any findings as to the facts in dispute thereafter made by the Secretary shall be made only after consultation with the District's board of directors.

(c) Except as otherwise provided herein, the Secretary's decision on all questions of fact arising under this contract shall be conclusive and binding upon the parties hereto.

COVENANT AGAINST CONTINGENT FEES

27. The District warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona bide employees or bona fide establishe. commercial or selling agencies maintained by the District for the purpose of securing business. For breach or violation of this warranty the United States shall have the right to annul this contract without liability or in its discretion to add to the contract repayment obligation or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

ASSURANCE RELATING TO VALIDITY OF CONTRACT

28. Promptly after the execution and delivery of this contract, the District shall file and prosecute to a final decree, including any appeal therefrom to the highest court of the State of California, in a court of competent jurisdiction a special proceeding for the judicial examination, approval, and confirmation of the proceedings of the District Board of Directors and of the District leading up to and including the making of this contract and the validity of the provisions thereof, and this contract shall not be binding on the United States until said proceedings and contract shall have been so confirmed by a court of competent jurisdiction or pending appellate action in any court if ground for appeal be laid: Provided, That nothing herein contained shall require the District to assume the responsibility for prosecuting judicial review beyond the highest court of the State of California.

PERFORMANCE OF WORK WITH CONTRIBUTED FUNDS

29. (a) Pursuant to the Act of March 4, 1921 (41 Stat. 1367, 1404), the United States will perform with funds contributed by the District any construction or maintenance work on the distribution system not otherwise provided for by this contract, or any construction work covered by this contract but for which funds may not be available: Provided, That the undertaking of any such work and the plans therefor must be approved by the United States. When the undertaking of such work is approved, funds therefor shall be advanced by the District as may be directed by the Contracting Officer and there shall be submitted to the United States a certified copy of the resolution of the Board of Directors of the District describing the work to be done and authorizing its performance with contributed funds.

(b) After completion of any work so undertaken the District will be furnished with a statement of the cost thereof, and any unexpended balance of the funds will be refunded to the District or applied as otherwise directed by the District, and the amount by which the cost of such work exceeds the amount of the funds advanced by the District therefor shall be paid by the District to the United States as the Contracting Officer may direct.

EQUAL EMPLOYMENT OPPORTUNITY

30. (a) During the performance of this contract, the District, hereinafter in this article referred to as the contractor, agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited, to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color,

or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, as amended, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(5) The contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, as amended, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any

of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, as amended, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, as amended, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) Inclusion of the Equal Opportunity clause may be by reference to Section 301 of Executive Order 10925, dated March 6, 1961, as amended. Subcontracts below the second tier, other than subcontracts calling for construction work at the site of construction are exempt from inclusion of the clause.

IN WITNESS WHEREOF, the parties hereto have executed this contract the day and year first above written.

APPROVED AS TO LEGAL FORM AND SUFFICIENCY

[illegible]
Department of the Interior

THE UNITED STATES OF AMERICA

By R. J. Pulkowski
Regional Director, Region 2
Bureau of Reclamation

WESTLANDS WATER DISTRICT

By [illegible]
President

(SEAL)

Attest:

[illegible]
Secretary

Approved:

[illegible]
Secretary of the Interior

STATE OF CALIFORNIA)
) ss
COUNTY OF FRESNO)

STEWART P. SMITH, does hereby certify that he is the duly appointed, qualified and acting Secretary of WESTLANDS WATER DISTRICT, a public district organized under the laws of the State of California with its offices at Fresno, California; that the foregoing Resolution Number 150-64 was duly and regularly adopted by the Board of Directors of WESTLANDS WATER DISTRICT at a meeting of said Board of Directors duly called and held on the 13th day of April, 1964 at the offices of said WESTLANDS WATER DISTRICT, at which a quorum of said Directors was present and acting; and that said Resolution is still in full force and effect.

DATED: April 14, 1964

STEWART P. SMITH
Secretary, Westlands Water District

(SEAL)

WESTLANDS WATER DISTRICT

RESOLUTION NO. 150-64

WHEREAS, on June 5, 1963 this District entered into a contract with the United States of America for a water supply for the lands of Westlands Water District from the San Luis Unit of the Central Valley Project; and

WHEREAS, in order to utilize said water supply it will be necessary for the District to have a system constructed for the distribution of water to and drainage of water from the lands within the District; and

WHEREAS, it is contemplated that the extent of the drainage facilities, and possibly some water distribution facilities, required for the lands within the District will increase over a period of years and, therefore, it is desirable that provision for their ultimate construction be made at this time; and

WHEREAS, this District did on the 20th day of November, 1963 approve a form of repayment contract under the terms of which the United States would construct a water distribution and drainage system to serve the lands of the District; and

WHEREAS, since said approval by the District, certain changes have been made in said form of contract by the United States Bureau of Reclamation and a revised draft of contract marked Draft 4/8-1964 embodying such changes has been submitted to this District for approval; and

WHEREAS, the lands within the District are in great need of water and it is of extreme urgency that the water distribution facilities and the portion of the drainage works presently required be completed to the fullest extent possible at the time water is available from the San Luis Canal late in the year 1967 or early in the year 1968.

NOW, THEREFORE, BE IT RESOLVED, that the draft of contract entitled "Contract Between the United States and Westlands Water District Providing for the Construction of a Water Distribution and Drainage Collector System" and marked Draft 4/8-1964 be, and it is hereby, approved subject to such minor editorial changes, if any, as may be required in the judgment of the Manager-Chief Counsel of the District; and

BE IT FURTHER RESOLVED, that upon approval of said draft of contract by the Secretary of the Interior, the Manager-Chief Counsel of the District is authorized and directed to submit said form of contract to the California Districts Securities Commission for approval and to do any and all things required by law to be done to permit execution of said contract on behalf of this District; and

BE IT FURTHER RESOLVED, that upon completion of all steps required by law to be taken prior to the execution thereof, the President and Secretary of this District be, and they are hereby, authorized to execute said contract for and on behalf of Westlands Water District.

AYES: GIFFEN, BAKER, BENSON, DIENER, van LOBEN SELS

NOES: NONE

ABSENT: ROBINSON

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

*****

BARCELLOS AND WOLFSEN, INC., et al., Plaintiffs, v. WESTLANDS WATER DISTRICT, et al., Defendants.	No. CV 79-106-EDP JUDGMENT
WESTLANDS WATER DISTRICT, Counterclaimant and Cross-Claimant, v. BARCELLOS AND WOLFSEN, INC., et al., Counterclaim and Cross-Claim Defendants.	
BARCELLOS AND WOLFSEN, INC., et al., Counterclaimants and Cross-Claimants, v.	

UNITED STATES OF AMERICA, et al.,

Counterclaim and Cross-Claim Defendants.

FRANK ORFF, as representative of 1B Class,

Counterclaimant and Cross-Claimant,

v.

UNITED STATES OF AMERICA, et al.,

Counterclaim and Cross-Claim Defendant.

WESTLANDS WATER DISTRICT, et al.,

Plaintiffs-in-Consolidation.

v.

UNITED STATES OF AMERICA, et al.,

Defendants-in-Consolidation.

BARCELLOS & WOLFSEN, INC., et al.,

Plaintiffs,

v.

WESTLANDS WATER DISTRICT, et al.,

Defendants.

CONSOLIDATED

No. CV F-81-245-EDP

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Pursuant to the Stipulation for Compromise Settlement, effective as of Aug 21 1986, the Order, dated Oct 1, 1986, and the Order, dated DEC 30 1986

IT IS ADJUDGED, ORDERED, DECLARED AND DECREED as follows:

1. Definitions.

As used herein, the following words and phrases shall have the following meanings:

1.1. "1A Parties": Plaintiffs, the class representatives (in their individual and representative capacities) of the Area 1A Class, all landowners and water users in the Area 1A Class and their predecessors and successors, and each other party to the extent such party owns, or uses water on, land in Area 1A;

1.2. "1B Parties": The class representative (in his individual and representative capacities) of the Area 1B Class, all landowners and water users in the Area 1B Class and their predecessors and successors, and each other party to the extent such party owns, or uses water on, land in Area 1B;

1.3. "2A Parties": The class representatives (in their individual and representative capacities) of the Area 2A Class, all landowners and water users in the Area 2A Class and their predecessors and successors, and each other party to the extent such party owns, or uses water on, land in Area 2A;

1.4. "2B Parties": The class representatives (in their individual and representative capacities) of the Area 2B Class, all landowners and water users in the Area 2B Class and their

predecessors and successors, and each other party to the extent such party owns, or uses water on, land in Area 2B;

1.5. "1939 Act": The Reclamation Project Act of August 4, 1939, 53 Stat. 1187;

1.6. "1960 Act": The Act of June 3, 1960, 74 Stat. 156, authorizing the San Luis Unit of the Central Valley Project, as supplemented by the Act of June 15, 1977, 91 Stat. 225;

1.7. "1963 Contract": Contract number 14-06-200-495, dated June 5, 1963, entered into between the United States and the Original Westlands District, as supplemented by a memorandum dated February 15, 1979, both of which are attached hereto as Exhibit A;

1.8. "1965 Contract": Contract number 14-06-200-2020A, dated April 1, 1965, entered into between the United States and the Original Westlands District, attached hereto as Exhibit B;

1.9. "1982 Act": The Reclamation Reform Act of October 12, 1982, 96 Stat. 1261;

1.10. "Area 1A": The area of the Original Westlands District within the proposed initial service area of the San Luis Unit of the Central Valley Project, as depicted on Plate 1 in the report of the U.S. Bureau of Reclamation entitled "A Report on the Feasibility of Water Supply Development, San Luis Unit, Central Valley Project, California," dated May 1955, and transmitted to the Congress on December 17, 1956;

1.11. "Area 1B": The area of the Original Westlands District outside said proposed initial service area;

1.12. "Area 2A": The area of the Former Westplains District within said proposed initial service area;

1.13. "Area 2B": The area of the Former Westplains District outside said proposed initial service area;

1.14. "Area I": All the lands in the Original Westlands District;

1.15. "Area II": All the lands in the Former Westplains District;

1.16. "Bookkeeping Account Period": The period of time covering June 30 through December 31, 1978, all of the years 1979, 1982, 1983, 1984, 1985, 1986 and the year 1987 through the end of the month in which this Judgment is entered;

1.17. "Cost Effective": In connection with Drainage Service Facilities, has reasonable costs in relation to the quantity of subsurface agricultural drainage water transported, treated or disposed of thereby; and, in connection with Drainage Reduction Programs, has reasonable costs in relation to the quantity of subsurface agricultural drainage water reduced thereby;

1.18. "Costs of Construction": Costs of design, preparation of plans and specifications, acquisition of real and personal property, and actual construction, excluding administrative, indirect and overhead costs;

1.19. "Discretionary Provisions of 1982 Act": Sections 203-208 of the 1982 Act;

1.20. "District": The Westlands Water District;

1.21. "Drain": The work which is referred to as the "San Luis interceptor drain" in Section 1 of the 1960 Act and defined as the "interceptor drain" in Article 1(d) of the 1963 Contract and which between March 13, 1968, and February 4, 1975,

was partially constructed between Laguna Avenue in Fresno County and Kesterson Reservoir in Merced County;

1.22. "Drainage Plan": The plan described in Paragraph 6.1 of this Judgment;

1.23. "Drainage Reduction Program": Any facility or activity which reduces the amount of subsurface drainage water requiring drainage service in the District.

1.24. "Drainage Service Facility": The Drain or any significant drainage service facility constructed or acquired by either the United States or the District as partial or full alternatives to the Drain providing drainage service for lands in the District;

1.25. "Drainage Trust Fund": The trust fund established by Paragraph 7.1 of this Judgment;

1.26. "Existing Trust Fund": The trust fund established by the Stipulated Agreement, as amended, between the Federal Parties and the District, attached hereto as Exhibits C, D, E, F and G;

1.27. "Federal Parties": The United States Department of the Interior; the Bureau of Reclamation of the Department of the Interior; the Secretary of the Interior; the Assistant Secretary of the Interior for Water and Science; the Commissioner of Reclamation; and the Regional Director of the Bureau of Reclamation for the Mid-Pacific Region;

1.28. "Former Westplains District": The Westplains Water Storage District, as it existed immediately prior to June 29, 1965;

1.29. "Interim Contract": (a) Any temporary short-term water service contract between the District and the United States with respect to the period between June 30, 1978, and December 31, 1981, and (b) the Stipulated Agreement between the United States and the District, approved September 16, 1981, in Westlands Water District v. United States et al., U.S. Dist. Ct., E.D. Calif. No. CV-F-81-245-EDP, attached hereto as Exhibit C, and the amendments thereto approved on September 10, 1982, March 14, 1985, November 5, 1985, and February 11, 1986, attached hereto as Exhibits D, E, F and G;

1.30. "Internal Allocation Rule": Any water allocation regulation or policy adopted by the District;

1.31. "Internal Pricing Rule": Any water pricing regulation or policy adopted by the District;

1.32. "Merger Law": The Westlands Water District Merger Law, California Water Code sections 37800 through 37856;

1.33. "M&I Uses": Uses other than agricultural use;

1.34. "Original Westlands District": The Westlands Water District, as it existed immediately prior to June 29, 1965;

1.35. "Overpayment Refund Account": The special account established by Paragraph 8.4 of this Judgment;

1.36. "Statutory Interest": Simple interest at the rate or rates established pursuant to Section 12 of the Contract Disputes Act of 1978 (92 Stat. 2389, 41 U.S.C. §611).

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2. Termination of Stipulated Agreement and Duration of Judgment.

The Stipulated Agreement identified in Paragraph 1.29(b) above shall terminate at the end of the month in which this Judgment is entered. This Judgment shall govern the rights and duties of all parties for its term commencing the first day of the month following entry of this Judgment and terminating December 31, 2007, except as otherwise provided in Paragraph 13.3(c) below and Exhibit K of this Judgment.

3. Enforcement of Judgment.

A party may obtain relief from a violation of this Judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions. Either of these proceedings against the Federal parties shall, except as otherwise specifically limited by Paragraphs 6.1, 12.1.1, 12.1.2 and 12.3 of this Judgment, be for the sole purpose of seeking an order directing the Federal parties to perform in accordance with the express terms of this Judgment; provided, that any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of (a) Paragraph 5 below or (b) any contract or other right or obligation arising independently of this Judgment, notwithstanding that (i) it is required to be performed by this Judgment, (ii) its future creation is anticipated or encouraged by this Judgment, or (iii) it is otherwise a subject of this Judgment. A motion in these present actions to obtain relief from an alleged violation of

this Judgment may be filed only after 60 days prior written notice to all other parties that such a motion will be filed if another party or other parties fail or refuse to perform in the manner described in said notice. The parties entitled to file such a motion and to receive such prior written notice thereof in these present actions shall be limited to the Area representatives provided for in Paragraph 22 below (who shall represent the interests of the class members within the areas they represent), the United States, the District, and any landowners or water users who have heretofore appeared in these present actions on their own behalf. The parties shall not seek judicial enforcement of this Judgment in any other manner than described above. During the term of this Judgment, each party shall perform all acts it is obligated hereunder to perform. This Judgment shall not alter or impair, or deprive any party of, any existing legal rights or confer on any party any right except as expressly provided herein.

4. 1963 Contract.

4.1. Beginning the first day of the month after this Judgment is entered, the District and the United States shall perform the 1963 Contract; provided, that the District waives the right to make payment for water requested and delivered under Articles 4(c) or 8 of said contract at the rate provided in Article 6 thereof so long as the rate charged for said water does not exceed the applicable Central Valley Project water rate as of the date of delivery; provided further, that to facilitate and

implement the existing water conservation policies of the United States, (a) Article 1(f) of said contract shall be revised to state: "'year' shall mean the period commencing March 1 of each year through the last day of February of the following year"; (b) Article 6(b) of said contract shall be revised by substituting "March 1" for "January 1" and "September 1" for "July 1"; and (c) notwithstanding the provisions of Article 3(d) of said contract, the quantity of water the United States shall be obligated to furnish, and the District to pay for, pursuant to Article 3 of said contract during the period commencing March 1, 2007, and ending December 31, 2007, shall be 811,000 acre-feet. The 1963 Contract is a valid, enforceable and implementable contract entitling the District through the end of 2007 to water and other service by the United States as specified therein.

4.2. The District acknowledges that it entered into the 1963 Contract for the benefit of Areas 1A and 1B and the lands therein. The District will enforce the prior rights of said areas to the benefits of said contract and acknowledges that water users in Areas 2A and 2B may purchase water under the 1963 Contract not purchased by water users in Areas 1A and 1B as provided in this Judgment. To the extent that water under the 1963 Contract is purchased by a water user in Area 2A or Area 2B, the District shall collect from such water user and pay the United States for such water the water service rate set forth in Article 6(a) of the 1963 Contract, Paragraph 4.4 below or 4.5.4 below, whichever is applicable, plus a $0.50 per acre foot drainage service charge, until such water user becomes entitled to water service pursuant to the long-term contract described in

Paragraph 12.1.1 below, whereupon the contracting improvement district of the District shall collect from such water user and pay the United States for such water the applicable rates set forth in such long-term contract.

4.3. The District shall not enter into any contract which would modify the rights and obligations under the 1963 Contract prior to 2008, except with the concurrence of Area I as provided in Paragraph 22.5 below; provided, that such concurrence may be obtained only by lack of objection by Area I representatives and not by an advisory election under said paragraph.

4.4. The agricultural water service component of the rates to be paid to the United States for water delivered under Article 3 of the 1963 Contract to lands which become subject to the Discretionary Provisions of the 1982 Act shall be the higher of (a) $7.50 per acre foot or (b) the appropriate rate as of the date of delivery established pursuant to the 1982 Act.

4.5. Water deliveries under the 1963 Contract for M&I Uses shall be in accordance with Paragraph 4.5.1 through 4.5.4 below.

4.5.1. Such water shall be quantified and identified in the schedule or any revision thereof submitted by the District in accordance with Article 4(a) of the 1963 Contract;

4.5.2. Such water shall be measured at canalside delivery points established pursuant to Article 9 of the 1963 Contract which are used exclusively to deliver water for M&I Uses, as determined by the United States, with equipment installed, operated and maintained by the United States. The District shall measure all water furnished by the District for

M&I Uses at other delivery points with equipment installed, operated and maintained by the District. Said equipment and its installation, service and use shall be approved by the United States. The United States shall have full access at all reasonable times to inspect said measuring equipment to determine the accuracy and conditions thereof and any errors in measurements disclosed by said inspections shall be adjusted. If said facilities are found to be defective or inadequate they shall be adjusted, repaired or replaced by the District. In the event the District neglects or fails to make such repairs or replacements within a reasonable time as may be necessary to satisfy the operating requirements of the United States, the United States may cause repairs or replacements to be made and the costs thereof charged to the District, which charge shall be paid to the United States before April 1 of the year following that in which the cost was incurred and a statement thereof furnished by the United States;

4.5.3. The Federal Parties shall submit a report to the District as to the quantity of water the United States measures and the District shall submit a report to the Federal Parties as to the quantity of water the District measures. Said reports shall be submitted on or before the 10th day of each month following the month in which the water is measured;

4.5.4. Such water shall be paid for in accordance with Article 6(b) of the 1963 Contract at the applicable Central Valley Project water rate as of the date of delivery.

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5. Provisional Water Service.

5.1. The provisions of Paragraphs 5.2 through 5.3 below are included in this Judgment in light of the facts recited in this Paragraph 5.1, as agreed to by the parties. Each year from 1964 through 1981, the Federal Parties have permitted the District to take various quantities of water from the Mendota Pool pursuant to annual contracts to supplement the water provided to the District under the 1963 Contract. Since 1965 when the Former Westplains District was merged into the Original Westlands District, the Federal Parties have recognized that a firm water supply from the San Luis Unit of 200,000 acre feet per year in addition to the water from the San Luis Unit provided for in the 1963 Contract and a firm water supply of 50,000 acre feet per year from the Mendota Pool, are necessary within the boundaries of the District as it was expanded by the merger. Such additional water supplies have consistently been allocated and provided to the District by the Federal Parties each year from 1972 through 1981, inclusive, pursuant to a series of annual contracts. Thereafter, such additional water supplies have been provided pursuant to the Stipulated Agreement, as amended, Exhibits C, D, E, F and G attached hereto. The District has claimed that, pursuant to the provisions of the memorandum from Kenneth Holum, Assistant Secretary of the Interior, Water and Power Development, to Stuart Udall, Secretary of the Interior, dated October 4, 1964, approved by Secretary Udall on October 7, 1964, and related activities, it is entitled as of right to both of these additional supplies of water, a claim which the United

States disputes herein. The parties have agreed to settle this claim by recognizing the claim for the purposes of this settlement only to the limited extent set forth in Paragraphs 5.2 through 5.3 below and subject to the provisions of Paragraph 14.1.1 below.

5.2. In addition to the quantity of water specified in Article 3 of the 1963 Contract, the District shall be entitled to provisional water service from the United States of 200,000 acre feet per year from the San Luis Unit and 50,000 acre feet per year from the Mendota Pool under the conditions specified in Paragraphs 5.2.1 through 5.2.4.7 below.

5.2.1. The District shall pay the United States for water delivered to lands which are not subject to the discretionary provisions of the 1982 Act the Central Valley Project water rates applicable to the District as of the date of delivery.

5.2.2. The District shall pay the United States for water delivered to lands which are subject to the Discretionary Provisions of the 1982 Act the higher of (a) the rates payable under Paragraph 5.2.1 above or (b) the appropriate rate established pursuant to the 1982 Act.

5.2.3. The District shall pay the United States for water delivered for M&I Uses at the applicable Central Valley Project water rates as of the date of delivery.

5.2.4. Provisional water service under this Paragraph 5 shall commence the first day of the month after this Judgment is entered and end February 28 next following the conclusion of the action entitled Contra Costa Water District v.

Donald Hodel, as Secretary of the Interior, U.S. Dist. Ct., N.D. Calif., Civil No. C-75-2508-SW, unless said action is concluded by a final dismissal with prejudice, in which event said provisional water service shall end two years after such dismissal. All other terms and conditions of such provisional water service shall be the same as under the "Contract between the United States and Westlands Water District for Temporary Water Service from San Luis Unit and Mendota Pool," R.O. Draft 4/10-1981, (hereinafter "Draft Contract") attached to the Stipulated Agreement identified in Paragraph 1.29(b) above (Exhibit C hereto), except as modified in Paragraphs 5 and 7 of the Stipulated Agreement and further modified in Paragraphs 5.2.4.1 through 5.2.4.7 below.

5.2.4.1. No change in the rates to be paid for water delivered for agricultural use or M&I Uses shall be effective for any year unless written notice of the estimated rate is given to the District on or before the preceding September 1 and written notice of the actual rate is given to the District on or before the preceding December 1.

5.2.4.2. The following is substituted for Article 6(c) of the Draft Contract:

> "By February 1 of each year, the District shall make any additional payment it is obligated to make for the year."

5.2.4.3. The following is substituted for Article 15 of the Draft Contract:

> "(a) The parties agree that the delivery of irrigation water or the use of Federal facilities

pursuant to this contract is subject to the acreage and ownership limitations and pricing provisions of reclamation law, as amended and supplemented, including but not limited to the 1982 Act.

"(b) The Contracting Officer shall have the right to make, after an opportunity has been offered to the Contractor for consultation, rules and regulations consistent with the provisions of this contract, the laws of the United States and the State of California, to add to or to modify them as may be deemed proper and necessary to carry out this contract, and to supply necessary details of its administrations which are not covered by express provisions of this contract. The Contractor shall observe such rules and regulations."

5.2.4.4. The following is substituted for Article 19 of the Draft Contract:

"Where the terms of this contract provide for action to be based upon the opinion or determination of either party to this contract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations. In the event that the Contractor questions any factual determination made by the Contracting Officer, the

findings as to the facts shall be made by the Secretary only after consultation with the Contractor and shall be conclusive upon the parties."

5.2.4.5. The following is substituted for Article 20 of the Draft Contract:

"The Contractor shall pay a late payment charge on installments or charges which are received after the due date. The late payment charge percentage rate calculated by the Department of the Treasury and published quarterly in the Federal Register shall be used; provided, that the late payment charge percentage rate shall not be less than 0.5 percent per month. The late payment charge percentage rate applied on an overdue payment shall remain in effect until payment is received. The late payment rate for a 30-day period shall be determined on the day immediately following the due date and shall be applied to the overdue payment for any portion of the 30-day period of delinquency. In the case of partial late payments, the amount received shall first be applied to the late charge on the overdue payment and then to the overdue payment."

5.2.4.6. Article 31 of the Draft Contract is deleted.

5.2.4.7. To facilitate and implement the existing policies of the United States, Article 1(d) of the Draft Contract shall be revised to state: "'Year' shall mean the period

commencing March 1 of each year through the last day of February of the following year."

5.3. The District acknowledges that all water to which the District is entitled pursuant to Paragraph 5.2 above shall be for the benefit of the 2A Parties and the 2B Parties and the lands in Area 2A and Area 2B.

6. Drainage Service Facilities.

6.1. The Federal Parties, in consultation and cooperation with the District, shall develop, adopt and submit to the District by December 31, 1991, a Drainage Plan for Drainage Service Facilities, which shall have at least the elements set forth in Paragraphs 6.1.1 and 6.1.2 below; provided, that the remedies available to a party for an alleged breach of this paragraph by the Federal Parties shall be strictly limited to (a) the release to the District of the money then deposited in the Drainage Trust Fund, plus accumulated interest, pursuant to Paragraphs 7.1.8 and 7.1.8.1, below, and (b) the revival of any claim against the United States of the right to drainage service or Drainage Service Facilities pursuant to and in accordance with the terms of Paragraph 14.1.2, below.

6.1.1. The Drainage Service Facilities included in the Drainage Plan shall (a) in the aggregate have sufficient capacity and capability to transport, treat as necessary, and dispose of, the annual quantity of subsurface agricultural drainage water from the District (not less than 60,000 acre feet and not more than 100,000 acre feet) required to be disposed of

by December 31, 2007, as projected in the Drainage Plan, (b) be Cost Effective and financially feasible, and (c) be capable of construction, acquisition and operation in compliance with all applicable law.

6.1.2. The Drainage Plan shall contain a schedule for the initiation and completion of each Drainage Service Facility by the United States. Adherence to the schedule will be contingent upon approvals within the Executive Branch and authorizations and appropriations by the Congress.

6.2. If the United States determines to construct or acquire Drainage Service Facilities prior to development of the Drainage Plan, the Federal Parties shall develop a plan for such facilities. Such plan shall be developed in consultation and cooperation with the District and shall have the same elements as the Drainage Plan except for the required acre-foot capacity of the facilities.

6.3. Drainage Service Facilities heretofore constructed by the United States are and, unless hereafter otherwise provided by statute, will be a work or works "connected with water supply and allocated to irrigation" and not any "irrigation water distribution work" as those terms are used in Section 9(e) of the 1939 Act. Section 9(d) of the 1939 Act does not prohibit the Federal Parties from presently providing water service or drainage service under the 1963 Contract. Agreement by the District to repay the Costs of Construction by the United States of Drainage Service Facilities under said Section 9(d) is not a condition precedent to the United States' or the Federal Parties' duty to perform any term of the 1963 Contract. A per acre foot

drainage service charge is a legal and valid method of repayment of the Costs of Construction by the United States of Drainage Service Facilities.

6.4. Because they are the drainage counterpart of the main conveyance facilities of the San Luis Unit, Drainage Service Facilities authorized by the 1960 Act are not a part of "distribution systems and drains" as that term is used in Section 8 of the 1960 Act.

7. Drainage Trust Fund.

7.1. To aid in funding costs of Drainage Service Facilities and to encourage and expedite United States' construction or acquisition thereof, beginning the first day of the month after this Judgment is entered, the District shall establish, maintain and use the Drainage Trust Fund exclusively for the purposes and in accordance with the terms and conditions specified in Paragraphs 7.1.1 through 7.1.9 below.

7.1.1. Beginning the second year after this Judgment is entered, the District shall levy $5 million per year by assessments on all lands within the District, and deposit the money collected into the Drainage Trust Fund. Said $5 million per year may be increased by the District with Area I and Area II concurrence as provided in Paragraph 22.5 below. To the extent necessary to meet the payment obligations from the Drainage Trust Fund under Paragraphs 7.1.4 and 7.1.7 below, the District shall borrow and deposit additional money therein. The District may terminate the collection and deposit of said $5 million per year

when the District Board of Directors finds and determines, based on reasonable projections of said payment obligations and of interest earned on the money in the Drainage Trust Fund, that there is sufficient money therein to meet said payment obligations.

7.1.2. Each year, the per acre average of said assessments levied by the District within (a) the territory encompassing Areas 1A and 1B and lands adjacent thereto annexed to the District after June 29, 1965, shall be 1.7 times the per acre average of said assessments within (b) the territory encompassing Areas 2A and 2B and lands adjacent thereto annexed to the District after June 29, 1965. However, within each of the territories described in (a) and (b) in the preceding sentence, the District shall apportion said assessments as authorized by law, including but not limited to Water Code Sections 36577 and 36578.

7.1.3. The District Treasurer shall be trustee of the Drainage Trust Fund and shall make the payments required under Paragraphs 7.1.4 and 7.1.7 below. The trustee shall invest the money in the Drainage Trust Fund to earn the highest possible rate of interest in prudent, legally authorized investments pursuant to California Government Code Sections 53600-53683. The interest earned on said investment shall become part of the Drainage Trust Fund.

7.1.4. For each Federal fiscal year (hereinafter "fiscal year") the trustee shall pay the United States from the Drainage Trust Fund, in accordance with the procedure and to the extent stated in Paragraph 7.1.5 below, a progress payment of 35 percent of the estimated Costs of Construction by the United

States during that fiscal year of Drainage Service Facilities. As to facilities constructed or acquired by the United States for drainage service which have capability to serve others in addition to capability as Drainage Service Facilities, the 35 percent progress payment to be paid from the Drainage Trust Fund shall be reduced to reflect the District's proportionate benefits from such facilities. The required progress payment to the United States from the Drainage Trust Fund for any fiscal year shall not exceed $500,000 per facility for design and preparation of plans and specifications and $15 million for total Costs of Construction of all facilities. The progress payments in the aggregate shall not exceed $100 million. Accumulated payments from the Drainage Trust Fund under Paragraph 7.1.7 below shall be credited toward meeting both the District's fiscal year and aggregate progress payment obligations.

7.1.5. By July 1 of each year, the Federal Parties shall advise the trustee of the estimated Costs of Construction to be incurred by the United States during each quarter of the upcoming fiscal year. The trustee shall pay the United States the required portion of said estimated quarterly cost on October 1, January 1, April 1, and July 1 of that fiscal year, to the extent that the Congress has appropriated federal funds sufficient to cover the remainder of such estimated costs. In the event the trustee does not make such payment when due, the Federal Parties shall have the right to withdraw the required amount of money from the Drainage Trust Fund on behalf of the United States. At the end of each quarter, if the actual Costs of Construction incurred by the United States during such quarter

were less than the estimated costs, there shall be an appropriate credit against the next quarterly progress payment obligation from the Drainage Trust Fund.

7.1.6. On October 1 and April 1 of each year, or at other times as agreed in writing by the Federal Parties and the trustee of the Drainage Trust Fund, the trustee shall provide a statement to the Federal Parties specifying the amount of money in the Drainage Trust Fund.

7.1.7. Upon the District's request, the Trustee shall pay the District from the Drainage Trust Fund:

(a) (i) the Costs of Construction, both before and after the date of this Judgment, of Cost Effective and financially feasible Drainage Service Facilities constructed or acquired by the District and the cost of Cost Effective and financially feasible Drainage Reduction Programs implemented by the District either before or after the effective date of this Judgment, or (ii) the amounts needed to repay District funds, or the principal of money borrowed by the District, used either before or after the effective date of this Judgment to pay any of the foregoing costs;

(b) a maximum of $5 million which may be used for any one or more of the following: (i) to pay the costs of studies and investigations of drainage problems and solutions, either before or after the effective date of this Judgment; (ii) to repay District funds or the principal of money borrowed by the District to pay the costs described in (i) immediately above; (iii) to pay the interest cost of money borrowed by the District, either before or after the

effective date of this Judgment, to pay the Costs of Construction (not exceeding a total of $30 million) of Drainage Service Facilities constituting "Alternative Means" under the agreement between the District and the U.S. Department of the Interior dated April 3, 1985 (a copy of which is attached hereto as Exhibit H); and

(c) the amounts needed to repay the principal of money borrowed and deposited into the Drainage Trust Fund by the District as required by Paragraph 7.1.1 above.

The District shall consult with the Federal Parties before incurring any Costs of Construction of Drainage Service Facilities or any costs of implementing Drainage Reduction Programs, or borrowing any money to pay such costs. Construction or acquisition by the District of Drainage Service Facilities or implementation by the District of Drainage Reduction Programs paid for with money from the Drainage Trust Fund shall reduce, by the amount of the design capacity of such facilities or by the design amount of drainage reduction resulting from such programs, the legal obligation of the United States to the District, if any, to construct or acquire Drainage Service Facilities or provide drainage service.

7.1.8. The money then deposited in the Drainage Trust Fund, including accumulated interest, shall be released to the District free of any obligation to the United States if and when any of the conditions specified in Paragraphs 7.1.8.1 through 7.1.8.8 below occurs.

7.1.8.1. The Federal parties do not develop, adopt, and submit to the District the Drainage Plan by December 31, 1991.

7.1.8.2. The Congress has not authorized the appropriation of funds for the construction or acquisition of at least one Drainage Service Facility described in the Drainage Plan by December 31, 1993.

7.1.8.3. The Federal Parties have not commenced actual construction or acquisition of at least one Drainage Service Facility described in the Drainage Plan by December 31, 1996.

7.1.8.4. After the authorization referred to in Paragraph 7.1.8.2, the Congress for any two consecutive fiscal years does not appropriate funds for construction or acquisition of Drainage Service Facilities.

7.1.8.5. After the Congress has appropriated funds for the construction or acquisition of Drainage Service Facilities, the Federal Parties do not diligently pursue construction or acquisition thereof.

7.1.8.6. The Federal Parties do not complete construction or acquisition of at least one Drainage Service Facility by the date provided in the Drainage Plan schedule.

7.1.8.7. The Federal Parties state that they will not develop or implement the Drainage Plan.

7.1.8.8. The Congress conditions future appropriations for Drainage Service Facilities on cost sharing arrangements different from those provided in Paragraph 7.1.4 above, and the District, after 30 days written notice to its

landowners and water users and opportunity for hearing, gives written notice to the Federal Parties that it desires release of the money as provided in Paragraph 7.1.8. Such notice to the Federal Parties shall be given within six months of the effective date of, and shall specify, the Act of Congress giving rise to the District's right to a release of such money.

7.1.9. Each of the conditions specified in Paragraphs 7.1.8.1 through 7.1.8.7 above may be waived or the time extended by written agreement between the Federal Parties and the District, with Area I and Area II concurrence as provided in Paragraph 22.5 below.

7.2. Upon release from the Drainage Trust Fund under Paragraph 7.1.8 above, the money not needed to discharge payment obligations previously incurred pursuant to Paragraph 7.1.7 above shall be paid by the District as a refund to the landowners whose assessment payments were the original source of the money in amounts proportionate to such assessments.

7.3. Except as provided in Paragraph 7.3.2 below, on request of the District, the United States shall reimburse the District for the progress payments which were previously made by the District to the United States from the Drainage Trust Fund pursuant to Paragraph 7.1.4 above, plus Statutory Interest from the date each progress payment was made to the date on which the money in the Drainage Trust Fund is released to the District, with respect to any uncompleted Drainage Service Facility for which progress payments have been made if (i) for two consecutive fiscal years the United States has not incurred any Costs of Construction with respect to such facility and (ii) at the time

of such request, the United States has not resumed and does not thereafter diligently continue to incur Costs of Construction of such facility. Such reimbursement shall be accomplished by credits against water service payments due from the District to the United States, commencing the first day of the month after the Drainage Trust Fund is released to the District, until the total progress payments made pursuant to Paragraph 7.1.4 above have been reimbursed, with Statutory Interest on the unreimbursed amount starting the first day of said month. Thereafter, the District shall be entitled to no further credit for said progress payments made pursuant to Paragraph 7.1.4 above.

7.3.1. Notwithstanding the credits provided for in Paragraph 7.3 above, (a) water users in the District shall pay the District for water service the same amounts of money as they would have been required to pay for water service in the absence of said credits, and (b) at the time payments for such water service would have otherwise been made to the United States, the District shall deposit an amount of money equal to said credits into a special Assessment Refund Account of the District, which the District shall invest to earn the highest possible rate of interest in prudent, legally authorized investments pursuant to California Government Code Sections 53600-53683. Said interest shall become a part of said Assessment Refund Account. The money deposited into the Assessment Refund Account plus the interest thereon shall be paid by the District periodically as soon as practicable as refunds to the landowners for the portion of their assessments not previously refunded from the released Drainage Trust Fund.

7.3.2. No reimbursement shall be made to the District pursuant to Paragraph 7.3 above of any progress payment previously made from the Drainage Trust Fund for any Drainage Service Facility if it is financially feasible for the District to complete construction and to operate and maintain such facility. In such event, the District shall have the right, but not the obligation, to complete the construction of, and to operate and maintain, such facility.

7.4. Unless and until one of the conditions specified in Paragraphs 7.1.8.1 through 7.1.8.8 above occurs, the parties shall not seek judicial relief based on any claim that the United States or the Federal Parties have any statutory, contractual or other obligation, or are violating any such obligation, to construct Drainage Service Facilities or to provide drainage service.

7.5. Beginning upon completion of construction or acquisition by the United States of any Drainage Service Facilities included in the Drainage Plan and continuing through December 31, 2007, the District shall pay the United States for drainage service, in addition to the $0.50 per acre foot drainage service charge under the 1963 Contract, a drainage service charge per acre foot of Central Valley Project water delivered to the District sufficient, when combined with the $0.50 per acre foot charge, to cover the District's share of the operation and maintenance costs of such Drainage Service Facilities. Such additional charge shall be adjusted by the Federal Parties annually in subsequent years after payment begins by the same percentage as the change in the annual operation and maintenance

costs of said Drainage Service Facilities; provided, that no increase in such charge shall be effective for any year unless written notice of the estimated increase is given by the Federal Parties to the District on or before September 1 of the previous year and written notice of the actual increase is given by the Federal Parties to the District on or before December 1 of the previous year. The United States shall credit the total drainage service charges collected, first, to payment of the District's share of the operation and maintenance cost of said Drainage Service Facilities and, second, to the District's share of the construction costs of said facilities.

7.6. During the duration of this Judgment, the District shall not pay a total of more than $100 million (exclusive of any interest other than the $5 million referred to in Paragraph 7.1.7(b) above) for Costs of Construction of Drainage Service Facilities and costs of implementing Drainage Reduction Programs by either or both the District and the United States. If, however, the United States and the District agree to an amount greater than $100 million and the Area I and Area II concurrences are obtained as provided in Paragraph 22.5, the District shall pay such additional amount.

7.7. Nothing in Paragraph 6 above or this Paragraph 7 shall be deemed to prevent the Congress from conditioning future appropriations for Drainage Service Facilities on cost sharing arrangements different from those provided in this Judgment.

8. Refunds to District for Net Overpayments and Deposits.

The parties agree that, as a result of overpayments and underpayments by the District to the United States for water service since June 30, 1978, and deposits by the District to the Existing Trust Fund since January 1, 1982, the District is entitled to the money referred to in Paragraphs 8.1 and 8.2 below.

8.1. The entire amount in the Existing Trust Fund at the end of the month in which this Judgment is entered, including principal and interest, (which was a total of $37,960,287.75 as of February 28, 1986) shall be released to the District from said trust at the end of said month. As soon thereafter as possible, the money shall be used, first, for payment of court costs and attorneys' fees and expenses as provided in Paragraph 19 below and, second, to refund water users in the District having net credits as provided in Paragraph 9 below.

8.2. As of the end of the month in which this Judgment is entered, the District shall be entitled to a refund from the United States of a sum which was $6,900,081.00 as of February 28, 1986, as shown in Exhibit I attached hereto, which amount includes Statutory Interest. Said refund amount shall be adjusted to reflect overpayments and underpayments and Statutory Interest thereon from March 1, 1986, to the end of the month in which this Judgment is entered.

8.3. The adjusted refund referred to in Paragraph 8.2 above shall be applied as a credit against payments due from the

District to the United States as provided in Paragraph 13.2 below.

8.4. Notwithstanding the credit provided for in Paragraph 8.3 above, (a) in the first year after this Judgment is entered, the District shall levy, and apportion within the District as authorized by law, and the landowners in the District shall pay to the District assessments in the total amount of said credit and (b) the District shall deposit the assessments so paid into a special Overpayment Refund Account of the District, which the District shall invest to earn the highest possible rate of interest in prudent, legally authorized investments pursuant to California Government Code Sections 53600-53683. Said interest shall become a part of the Overpayment Refund Account. The money in the Overpayment Refund Account shall be refunded or used as provided in Paragraphs 9.6.2 and 9.6.3 below.

9. Overpayment Credits and Underpayment Debits to Water Users.

9.1. The District shall establish a bookkeeping account for every District water user who purchased water from the District for use during the Bookkeeping Account Period.

9.2. Each water user's bookkeeping account shall show, as a credit, the amount of overpayments to the District and, as a debit, the amount of underpayments to the District for the various categories of water purchased by such water user for use during the Bookkeeping Account Period and the amount of Statutory Interest properly attributable thereto as determined by the

District. Exhibit J attached hereto shows the totals of all overpayments and underpayments to the District for the Bookkeeping Account Period for the various categories of water as of February 28, 1986. Said totals shall be adjusted to reflect overpayments and underpayments from March 1, 1986, through the end of the month in which this Judgment is entered. In allocating these adjusted totals and Statutory Interest thereon among the various water user's bookkeeping accounts, the District shall be guided by the principles set forth in Paragraphs 9.2.1 through 9.2.5 below.

9.2.1. All the water purchased by agricultural water users in Areas 1A and 1B has been "San Luis agricultural" ("SL AG") water. The remaining SL AG category water not purchased by agricultural water users in Areas 1A and 1B for use in each year has been purchased by agricultural water users in Areas 2A and 2B in proportion to the total amount of water purchased by each such water user for use in such year. However, as an exception to the first sentence of Paragraph 9.2.1 above, SL AG water is deemed to have become "San Luis Agricultural operation and maintenance" ("SL AG O&M") water to the extent the water was delivered for use to lands subject to the operation and maintenance water rate pursuant to Section 208 of the 1982 Act.

9.2.2. Agricultural water users in Areas 2A and 2B have purchased all the "Mendota Pool agricultural water" ("MP AG") each year in proportion to the total amount of water purchased by each such water user for use in such year.

9.2.3. The remainder of the total amount of water which has been purchased by each agricultural water user in Area

2A and 2B for use in each year has been "San Luis agricultural excess" ("SL AG EX") water.

9.2.4. All the water which has been purchased by agricultural water users in areas annexed to the District after June 29, 1965, has been SL AG EX water.

9.2.5. Municipal and industrial water users in the District have purchased and used only "San Luis Municipal and Industrial" ("SL M&I") water.

9.3. Each water user's bookkeeping account shall also show, as a debit, such water user's share of the total payment by the District of court costs and attorneys' fees and expenses as provided for in Paragraph 19 below. Each water user's share shall be the same proportion of said total payment as the total amount of water purchased by such water user from the District for use during the Bookkeeping Account Period is of the total amount of water purchased by all water users from the District for use during the Bookkeeping Account Period.

9.4. Each water user's bookkeeping account shall also show such water user's net credit or net debit, taking into account the credits and debits described in Paragraphs 9.2 and 9.3 above.

9.5. Each water user having a net debit in such water user's bookkeeping account shall be obligated to pay the District the amount thereof, together with Statutory Interest on the unpaid balance beginning the first day of the month after this Judgment is entered. The District shall take such action as it deems appropriate to collect the amount owed, including but not limited to adding such amount to such water user's water purchase

payment obligations. The amount collected shall be deposited into and become part of the Overpayment Refund Account established by Paragraph 8.4 above.

9.6. The net credits in the water users' bookkeeping accounts shall be refunded as provided in Paragraphs 9.6.1 through 9.6.3 below.

9.6.1. The total amount of money released to the District from the Existing Trust Fund under Paragraph 8.1 above, less the amount paid for court costs and attorneys' fees and expenses as provided in Paragraph 19 below, shall be apportioned among and paid to all the water users having net credits in proportion to their net credits.

9.6.2. When the required money has been deposited in the Overpayment Refund Account under Paragraphs 8.4 and 9.5 above, the money therein shall be apportioned among and paid by the District as soon as practicable to all the water users having net credits in proportion to their net credits. Upon such payments being completed, said net credits shall be deemed fully refunded.

9.6.3. If the District is unable to locate a particular water user to refund the net credit to which such water user is entitled, the amount due such water user shall be used as determined by the District.

10. Service Area - Area 1B and 2B Rights.

10.1. Area 1B, in addition to Area 1A, is within the authorized service area of the Central Valley Project, including

the San Luis Unit and Delta Mendota Canal, and is entitled to the same water supply and the same rights pertaining thereto as Area 1A.

10.2. Area 2B, in addition to Area 2A, is within the authorized service area of the Central Valley Project, including the San Luis Unit and Delta Mendota Canal, and is entitled to the same water supply and the same rights pertaining thereto as Area 2A.

10.3. Areas adjacent to Area 1B or Area 2B which in the past have been annexed to the District with the consent of the United States are within the authorized service area of the Central Valley Project, including the San Luis Unit and Delta Mendota Canal.

11. Improvement Districts and Future Contracts.

11.1. The District shall initiate proceedings to form an improvement district encompassing all of Area 2A and Area 2B plus lands annexed to the District after June 29, 1965, for the purpose, among other things, of contracting with the United States for water service to serve solely the lands therein. The District also may initiate proceedings to form one or more improvement districts encompassing all or certain portions of the same territory described in the preceding sentence for the purpose, among other things, of contracting with the United States for construction of water distribution facilities or collector drainage facilities to serve the lands therein.

11.2. The District shall, with Area I concurrence as provided in Paragraph 22.5 below, initiate proceedings in the future to form one or more improvement districts encompassing all or certain portions of Area 1A and Area 1B for the purpose, among other things, of contracting with the United States, if and when appropriate, for completion of a collector drainage and water distribution system to serve the lands therein.

11.3. For any improvement district of the District to be eligible to contract with the United States for any purpose referred to in Paragraphs 11.1 and 11.2 above, it must qualify as an "organization" under Section 2(g) of the 1939 Act, and to be eligible to contract with the United States for the purpose of construction of collector drainage or water distribution facilities, it must be of such size and configuration as the Secretary of the Interior reasonably determines constitutes a logical area for such purpose. Upon any improvement district of the District entering into a contract with the United States for any purpose referred to in Paragraph 11.1 and 11.2 above, the contracting improvement district, but not the portion of the District outside such contracting improvement district, shall, if required by Section 203 (a) of the 1982 Act, become subject to the discretionary provisions of the 1982 Act by virtue of entering into said contract.

11.4. Neither the District nor any improvement district of the District shall enter into any future contract with the United States as described in Section 203(a) of the 1982 Act (a) without approval of the voters of the District or improvement district thereof, as appropriate, by two-thirds of the votes

cast, and (b) until the latest date reasonably necessary, which, in the case of a future contract with the United States for completion of a collector drainage system to serve lands in Area 1A and Area 1B, shall be the latest date which would enable completion of such collector drainage system by the time Drainage Service Facilities are completed and ready to receive and dispose of drainage therefrom.

11.5. The entry into and performance of any water service contract between the United States and any improvement district of the District pursuant to this Judgment shall create no rights, preferences or priorities as to water service between lands in the Original Westlands District and lands in the Former Westplains District after the term of this Judgment.

12. Cooperation Between District and Federal Parties.

12.1.1. Reference is made to the recital of facts in Paragraph 5.1 above. Subject to all the requirements of this Judgment and the law, including the applicable provisions of the National Environmental Policy Act ("NEPA"), Federal reclamation law and the Administrative Procedure Act, including their requirements respecting agency decision-making, the Federal Parties shall, with the cooperation of the District, enter into a long-term contract under Section 9(e) of the 1939 Act on behalf of the United States with an improvement district of the District encompassing all of the territory described in Paragraph 11.1 above, for the firm annual delivery of the amounts of Central Valley Project water referred to in Paragraph 5 above at the

rates specified in that paragraph for a term expiring no sooner than December 31, 2007; provided, that in the event of an alleged breach of the provisions of this Paragraph 12.1.1 by the Federal Parties, the remedies available to a party shall be limited to: (1) the revival of any claim otherwise preserved pursuant to Paragraph 14.1.1, below, or (2) the bringing of a new action pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

12.1.2. Subject to all requirements of this Judgment and the law, including the applicable provisions of NEPA, Federal reclamation law and the Administrative Procedure Act, including their requirements respecting agency decision-making, and subject to any necessary congressional authorization, the availability of funds appropriated by the Congress, and the execution of an appropriate repayment or loan contract between the United States and the District or an improvement district of the District that is approved by the Secretary pursuant to Paragraph 11.3 above, the Federal Parties will make a good faith effort to construct water distribution and collector drainage facilities needed in the District in addition to those constructed under the 1965 Contract; provided, that the sole remedy available to a party for an alleged breach of this Paragraph 12.1.2 by the Federal Parties shall be limited to pursuing a claim as described in Paragraph 14.1.8 below.

12.2. With reference to the portion of the District encompassing Areas 2A and 2B plus lands annexed to the District after June 29, 1965, the provisions of Paragraph 12.3 below are included in this Judgment in light of the facts recited in

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Paragraphs 12.2.1 through 12.2.6 below, as agreed to by the parties.

12.2.1. In addition to any water obtained by contract pursuant to Paragraph 12.1.1 above, any water available to such portion of the District under Paragraphs 5 above and 17.3 below, and the limited available groundwater supply, such portion of the District needs an additional annual supplemental water supply of 100,000 acre feet or more in order to provide it a total water supply adequate to sustain the existing agricultural development.

12.2.2. That need for an additional annual supplemental water supply to Areas 2A and 2B has been acknowledged by the Federal Parties and the District since before the merger of Former Westplains District and Original Westlands District in 1965.

12.2.3. Such portion of the District currently has no water supplies available to it other than those described in Paragraph 12.2.1 above.

12.2.4. Such portion of the District is within the authorized service area of the Central Valley Project.

12.2.5. Additional water service can be provided to such portion of the District from the Central Valley Project through the existing main conveyance facilities of the Central Valley Project, to the extent such service does not interfere with the furnishing of Central Valley Project water to contract entities in the San Felipe Division, Central Valley Project.

12.2.6. Such portion of the District has the financial ability and is willing to pay the United States the

applicable rates for an additional annual supplemental water supply from the Central Valley Project.

12.3. At such time as additional Central Valley Project water becomes available for long-term contracting, the Federal Parties, subject to all requirements of law and the then-prevailing Bureau of Reclamation water marketing policy, shall make a good faith effort to provide for delivery of an additional annual supplemental water supply to an improvement district encompassing such portion of the District or, if no such improvement district then shall exist, to the District, under mutually agreeable contract terms and conditions; provided, that nothing in this Paragraph 12.3 shall be deemed to confer upon either such improvement district or the District any priority right to such additional water vis a vis any other potential or competing users of available Central Valley Project water; provided further, that in the event of an alleged breach of the provisions of this Paragraph 12.3 by the Federal Parties, the sole remedy available to a party shall be limited to the bringing of a new action pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

13. Repayment of Funds Expended Under P.L. 95-46

13.1. The provisions of Paragraphs 13.2 and 13.3 below are included in light of the facts recited in Paragraphs 13.1.1 through 13.1.5 below, as agreed to by the parties.

13.1.1. Public Law 95-46, enacted June 15, 1977, authorized to be appropriated and to be committed for expenditure

by the Secretary of the Interior the sum of $31,050,000 (hereinafter "P.L. 95-46 funds") for continuation of construction of distribution systems and drains on the San Luis Unit, Central Valley Project. But said statute prohibited the Secretary from expending any of those funds prior to obtaining a pledge of the Board of Directors of the District indicating its intent to repay costs associated with the construction authorized by said statute.

13.1.2. On May 13, 1977, in anticipation of the enactment of Public Law 95-46, the Board of Directors of the District adopted Resolution No. 549-77 wherein it pledged to take all steps necessary to insure repayment by the District of expenditures of funds by the United States on behalf of the District pursuant to said statute. On June 23, 1977, the District mailed a certified copy of that Resolution to the Federal Parties. That copy was received by the Federal Parties on June 27, 1977, and was immediately accepted by the Federal Parties as the pledge of the District Board of Directors described in said statute.

13.1.3. Thereafter, in 1978, the Congress commenced the appropriation and the Federal Parties commenced the expenditure within the District of P.L. 95-46 funds, and the District accepted the benefits thereof.

13.1.4. By virtue of the foregoing, the District became and still remains contractually obligated at law to repay to the United States all P.L. 95-46 funds, expended on the District's behalf, on such terms as are required by Section 9(d) of the 1939 Act and were, at that time, customarily used in

repayment contracts between the United States and water districts under said section.

13.1.5. To date, the Federal Parties have expended $22,027,371 of P.L. 95-46 funds to construct distribution and collector drainage facilities in the District and intend to expend the remaining $9,022,629 of said funds to construct additional distribution and collector drainage facilities within the District to the extent such funds are now or hereafter become available.

13.1.6. Exhibit K attached hereto and incorporated herein by reference includes the terms customarily used in repayment contracts between the United States and water districts under Section 9(d) of the 1939 Act at the time the contractual obligations referred to in Paragraph 13.1.4 arose.

13.2. The terms of the contractual obligations between the District and the United States with respect to the expenditure and repayment of P.L. 95-46 funds within the District are set forth in Exhibit K.

13.3. As set forth in Exhibit K:

(a) The adjusted refund to which the District is entitled under Paragraph 8.2 above is applied as a credit against the expenditure of P.L. 95-46 funds to date of $22,027,371, and the District's contractual obligation is thereby repaid to the extent of that credit.

(b) The remaining amount of P.L. 95-46 funds expended to date shall be repaid by the District in 28 equal semi-annual installments on January 1 and July 1 each year beginning July 1 of the year after this Judgment is entered.

(c) Upon completion of expenditure by the United States of the presently unexpended remainder of P.L. 95-46 funds, said remainder shall be repaid by the District to the United States in 40 equal semi-annual installments on January 1 and July 1 each year beginning July 1 of the year following such completion of expenditure.

14. Claims Preserved and Claims not Affected by Judgment.

14.1. Notwithstanding this Judgment and the parties' voluntary dismissal of all claims for relief pleaded in these present actions, the claims described in Paragraphs 14.1.1 and 14.1.2 below, and the right to judicial relief with respect thereto in other actions, are preserved, and the claims described in Paragraph 14.1.3 through 14.1.8 below are not affected by this Judgment.

14.1.1. Any claim of (a) a long-term right to the water service provided for in Paragraph 5 above at an agricultural water service rate of $7.50 per acre foot, and (b) if such a right is held not to exist, a right to recover the costs of operation and maintenance of the Pleasant Valley (Coalinga) Canal and Pumping Plant incurred by the District; provided, that such claims may be asserted only if the Federal Parties do not offer the District or an improvement district of the District encompassing Areas 2A and 2B a contract as described in Paragraph 12.1.1 above within a reasonable time prior to the expiration of the term of provisional water service provided for in Paragraph 5.2.4 above.

14.1.2. Any claim against the United States of the right to drainage service or Drainage Service Facilities, including but not limited to any claim by the District of the right to recover District costs of providing Drainage Service Facilities; provided, that the right to drainage service or Drainage Service Facilities which may be claimed against the United States during the term of this Judgment shall be limited to the removal and disposal of not to exceed 100,000 acre feet per year of subsurface agricultural drainage water from the District; provided further, that such claim may be asserted only upon the occurrence of one of the conditions specified in Paragraphs 7.1.8.1 through 7.1.8.8 above.

14.1.3. Any claim that the second sentence of Section 203(b) of the 1982 Act is invalid or inapplicable to lands within the District.

14.1.4. Any claim challenging the authority of the United States or the Federal Parties to sell excess lands under Federal reclamation law, including but not limited to the right to assert, subject to Paragraph 7.4 above, that provision for the Drain as set forth in the 1960 Act is a condition of the exercise of that authority.

14.1.5. Any claim that a contract referred to in Paragraph 11.2 above is not a contract as described in Section 203(a) of the 1982 Act.

14.1.6. Any claim of any landowner or water user against the United States arising out of or relating to Exhibit H which (a) sounds in tort, or (b) has been asserted in any other action pending on the date of execution of the Stipulation for

Compromise Settlement from which this Judgment arose, or (c) seeks declaratory relief about the interpretation of the terms of Exhibit H.

14.1.7. Any claim of any landowner or water user against the District arising out of or relating to Exhibit H, drainage service, or Drainage Service Facilities.

14.1.8. Any claim of a party against the United States of a legal right to have additional water distribution or collector drainage facilities constructed within the District in addition to those constructed pursuant to the 1965 Contract; provided, that such claim may be asserted only in the event that the Federal Parties fail to perform in accordance with the terms of Paragraph 12.1.2 above, and not otherwise.

14.2. The claims referred to in Paragraphs 14.1.1 through 14.1.8 above shall be subject to all available defenses, except that the running of time respecting the defense of statute of limitations and laches to the claims referred to in Paragraph 14.1.1 and 14.1.2 above shall be tolled between the date this Judgment is entered and the first date when such claim may be asserted.

15. Past Contracts, Water Allocation and Pricing.

All parties have voluntarily dismissed with prejudice all claims for relief pleaded in these actions arising out of any Interim Contract, Exhibit H, any Internal Allocation Rule or any Internal Pricing Rule, except that the District and the United States retain any claim for relief arising out of Exhibit

H. No party shall recover any damages or obtain any other judicial relief in any action against any other party based on such past actions, except as provided in Paragraphs 8 and 9 above and Exhibit H. Notwithstanding the foregoing, any landowner or water user may assert in any other action any claim for relief referred to in Paragraphs 14.1.6 and 14.1.7 above and seek any remedy provided by law with respect thereto.

16. Future Contracts - Rights Under Merger Law.

Subject to the provisions of this Judgment and during its term, neither the District nor any improvement district of the District shall enter into any future water service, repayment or other contract, or perform under such contract, so as to impair the rights to which the 1A and 1B Parties are entitled pursuant to the Merger Law.

17. Future Water Allocation and Pricing.

17.1. Subject to the provisions of this Judgment and during its term, neither the District nor any improvement district of the District shall adopt any future Internal Allocation Rule or Internal Pricing Rule, or enforce any such rule, so as to impair the rights to which the 1A Parties and 1B Parties are entitled pursuant to the Merger Law.

17.2. The 1A Parties and 1B Parties shall have the first and prior right to timely apply for and purchase from the District the entire quantity of water to which the District is

entitled under the 1963 Contract. Except as provided in the preceding sentence and in Paragraphs 17.3 and 17.5 below, by virtue of the Merger Law the District shall adopt no Internal Allocation Rule in the future which allocates to Area 1A and Area 1B less than such quantity of water.

17.3. Any water delivered to the District under the 1963 Contract not purchased by water users in Area 1A and Area 1B shall be allocated ratably among water users in Area 2A and Area 2B which timely apply for and purchase such water from the District.

17.4. Any water delivered to the District by the United States for use within the District in addition to water delivered under the 1963 Contract, including but not limited to water delivered under Paragraph 5 above and under the water delivery contracts referred to in Paragraphs 12.1.1 and 12.3 above, shall be allocated ratably among water users in Area 2A and Area 2B which timely apply for and purchase such water from the District.

17.5. In years of water shortage when water deliveries to Central Valley Project water contractors are reduced by the Federal Parties under their respective water service contracts, deliveries to and within the District of water purchased under Article 3 of the 1963 Contract to which the water users in Area 1A and Area 1B have prior rights shall be proportionally reduced along with deliveries to and within the District of the additional water from the Central Valley Project to which lands in the District are entitled.

17.6. Except as provided in Paragraph 7.3.1 above and Paragraph 18 below, the District shall not charge any water user more for water service or Drainage Service than the charges required to be paid to the United States for such service, plus any appropriate District charges to cover District costs reasonably necessary in making such service available within the District and in operating the District, including but not limited to compliance with this Judgment. Except as required by the 1982 Act and as provided in Paragraph 18 below, the District shall adopt no Internal Pricing Rule in the future which imposes a water service charge for the water allocated to Area 1A and Area 1B which is greater than the price of water which the District is obligated to pay under the 1963 Contract, plus the appropriate District charges referred to in the preceding sentence.

18. District Financing and Expenditures for Drainage Purposes.

18.1. Notwithstanding anything to the contrary in Paragraphs 7.6 and 17.6 above or elsewhere in this Judgment, the District may raise money to be expended for any drainage purpose either by assessments on land or by charges for service or by a combination of both assessments and charges, as authorized by law, subject, however, to the conditions and limitations set forth in Paragraphs 18.2 through 18.5 below.

18.2. In levying any such assessments, the District shall apportion them as authorized by law, including but not limited to Water Code Sections 36577 and 36578.

18.3. In fixing any such charges, the District shall, if appropriate, equitably vary the amounts in different localities of the District to correspond to the cost and value of the service involved as authorized by law, including but not limited to Water Code Section 35470.

18.4. Before deciding on a major expenditure for any drainage purpose, the District shall give all water users (and, if appropriate, all landowners) reasonable notice of, and opportunity to submit views to the District regarding, the proposed drainage purpose, the estimated amount of the expenditure, the proposed method of raising money to finance it, who will ultimately bear the cost, and any other relevant information. If, by reason of circumstances beyond the control of the District, there is insufficient time to give such notice and opportunity to all water users, the District shall give such notice and opportunity to the Area I and Area II representatives.

18.5. Area I and Area II concurrence, as provided in Paragraph 22.5 below, shall be required before the District may raise money or make appropriate expenditures for any drainage purpose, except that such concurrence is not required to raise money or make expenditures reasonably necessary (a) to comply with obligations arising from statutes and court and administrative judgments, orders and regulations, and from existing contracts, and (b) to make drainage service provided by the United States available within the District.

19. Payment of Court Costs and Attorneys' Fees and Expenses.

Except as set forth herein, each party shall bear his or its own court costs and attorneys' fees and expenses. The District shall pay the class representatives their court costs and reasonable attorneys' fees and expenses as approved by the District for the representation of their respective classes. The District shall also pay West Haven Farming Company its reasonable attorneys' fees and expenses as approved by the District for its assistance in achieving settlement of these actions, and shall also pay Kings County Development Company Shareholders Liquidating Trust, successor in interest to Kings County Development Company, Stephens Investments Inc. et al, Chevron U.S.A. and Southern Pacific Land Company, et al their respective reasonable attorneys' fees and expenses up to $25,000 each as approved by the District for the assistance each has provided in achieving settlement of these actions. Said payments shall be made by the District from the money released from the Existing Trust Fund under Paragraph 8.1 above before said money is used to refund water users for their net credits.

20. Fifty Cents Per Acre Foot Drainage Service Charges.

No party or water user shall be entitled to reimbursement of any $0.50 per acre foot drainage service charge paid in the past.

21. Pleasant Valley (Coalinga) Canal and Pumping Plant.

Neither the District nor any water user or landowner therein has any right against the United States or the Federal Parties to any refund of the costs of operation and maintenance of the Pleasant Valley (Coalinga) Canal and Pumping Plant which the District has assumed in the past. The District shall retain the responsibility for such operation and maintenance until the end of 2007, as long as the Federal Parties continue to deliver to the District the quantities of Central Valley Project water specified in Paragraph 5 above at the rates specified therein. The 1A Parties and 1B Parties shall have no relief against the District or against the 2A Parties and the 2B Parties with respect to the manner in which the District has heretofore charged its water users for said costs under any Internal Pricing Rule. The District shall adopt no Internal Pricing Rule in the future which passes on the District's share of such charges on any other than a uniform basis throughout the District.

22. Termination of Classes and Authorization of Area Representatives.

22.1. The Area 1A, 1B, 2A and 2B Classes are hereby terminated and the representatives heretofore certified as representatives thereof are hereby discharged. In lieu thereof, Area representatives are hereby authorized to represent the two major areas of the District, Area I and Area II, for purposes of enforcement of this Judgment under Paragraph 3 and Area concur-

rence under Paragraphs 4.3, 7.1.1, 7.1.9, 7.6, 11.2, and 18 above.

22.2. The representatives of Area I shall initially be Boston Ranch Company, Edwin O'Neill, Frank Orff, Y. Stephen Pilibos and Fabry Farms. The representatives of Area II shall initially be Vista Verde Farms, Inc., Price Giffen & Associates, Jim Lowe Inc., Woolf Farming Company of California, Inc., and Perez Ranches Inc.

22.3. Any representative of either such Area shall automatically lose status as such and shall no longer have any powers or duties as a representative of such Area hereunder upon the happening of either (a) the cessation of such representative's juridical existence, including the death or adjudication of incompetence of a natural person, or the dissolution of a corporation, or (b) the cessation of such representative's ownership and operation of land within the Area of which he is a representative. Upon the occurrence of such vacancy, the remaining representatives of the affected Area owning or operating at least a majority of the assessed value of all the lands within such Area which are owned or operated by all the remaining representatives of such Area shall select a successor representative willing to so serve. The name of the successor representative shall be certified to the District by the representatives who have selected the successor. The District shall maintain an up-to-date list of the names and addresses of all Area representatives and the assessed value of the lands owned or operated by each.

22.4. The Court retains jurisdiction to remove or replace one or more of the representatives of an Area for good cause on motion of a landowner or water user within such Area. Notice of such motion shall be served upon all the representatives of such Area and upon the District.

22.5. Concurrence of an Area with District action, as required in Paragraphs 4.3, 7.1.1, 7.1.9, 7.6, 11.2 and 18 above, shall be deemed to have been obtained as follows:

The District shall give every Area representative of each Area for which concurrence is required for a particular action written notice of such action by certified mail. If, within 30 days after such notice has been mailed, the District has not received written objection to such action from representatives owning or operating at least a majority of the assessed value of the land owned or operated within such Area by all the representatives thereof, concurrence of such Area shall be deemed to have been obtained. If, however, within said 30 days the District has received such written objection, concurrence shall be deemed not to have been obtained, except as follows with regard to the concurrence required under Paragraphs 7.1.1, 7.1.9, 7.6, 11.2 and 18 above but not under Paragraph 4.3 above: The District may call an advisory election within such Area pursuant to the California Water District Act and the California Elections Code on the question of concurrence. If a majority of the votes cast in such election are in favor of concurrence, concurrence shall be deemed to have been obtained.

23. Judgment and Stipulation for Compromise Settlement Not a Contract.

Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 Act.

24. No New United States Drainage Service Obligation.

Nothing in this Judgment or the Stipulation for Compromise Settlement shall be deemed to create any obligation of the United States to provide any drainage service to the District or to construct Drainage Service Facilities for the District, and any claim that the United States has a preexisting obligation with respect to drainage service or Drainage Service Facilities may be brought by the District in accord with Paragraph 14.1.2 and not otherwise.

25. Application of Certain Paragraphs.

The provisions of Paragraphs 11.4, 16, 17 and 22 are intended to, and shall, apply only among the District, the 1A Parties, the 1B Parties, the 2A Parties and the 2B Parties and are not intended to benefit the United States.

Dated: _____.

_____
United States District Judge

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JEROME T. STEWART
WILLIAM M. SMILAND
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VIA TELECOPIER AND FEDERAL EXPRESS

State Water Resources Control Board
901 P Street
Sacramento, California 95814

Re: Draft Water Right Decision 1630

Dear Board Members:

Introduction

This letter is written on behalf of Arvid D. Allen, Cameron Brooks, Theresa Buchanan, Rod Cardella, John Coelho, John Giacone, Bob Glassman, Jim Gramis, Richard Guenther, M. G. Noblat, Edwin R. O'Neill, Francis A. Orff, Carolyn G. Peck, Y. Stephen Pilibos, Joyce Rupe, Bill Schuh, and David Wakefield and certain of their family members and affiliated entities. Our clients own and operate substantial acreage of farmland in the west side of the San Joaquin Valley. We here provide their comments on draft Water Right Decision 1630.

Our clients' lands are in the San Luis Unit of the Central Valley Project and the original area ("Area I") of the Westlands Water District. They are served with federal irrigation water pursuant to a 1963 service contract (the "1963 Contract") and various repayment and recordable contracts implementing the 1963 Contract. The 1963 Contract has been enforced in a 1986 federal court judgment (the "1986 Judgment"). Barcellos & Wolfsen, Inc. v. Westlands Water District, 491 F. Supp. 263 (E.D. Cal. 1980) ("Barcellos I"); Barcellos & Wolfsen, Inc. v. Westlands Water District, 899 F.2d 814 (9th Cir. 1990) ("Barcellos II"). Our clients' water entitlement under the 1963 Contract and the 1986 Judgment will be substantially destroyed if the draft Decision is adopted and implemented. As the court in Barcellos I judicially noticed, cessation of federal water deliveries would create "economic catastrophe" in the western regions of Kings, Fresno, Madera and Merced Counties. 491 F. Supp. at 265.

Our clients strenuously object to the approval of the draft Decision. Their objection is based both upon law and policy, and relates both to environmental and economic factors. Our specific objections are set forth below.

1. CEQA Compliance

The draft Decision states that it is "categorically exempt" from the requirements of CEQA under 14 CCR §§ 15321(a), 15307, 15308, and 15301(i). This is not correct. Dunn-Edwards Corp. vs. Bay Area Air Quality Management District, 9 C.A.4th 644, 653-58 (1992) dispenses with such contention. In Dunn-Edwards an air quality management district contended that its adoption of regulations tightening emissions standards for volatile organic compounds from certain paints was categorically exempt from CEQA requirements pursuant to Sections 15307 and 15308. In rejecting this argument the court held:

> "Projects which are categorically exempt from CEQA are those projects which have been determined not to have a significant effect on the environment. (§ 21084.) Consequently, Guidelines section 15300.2, subdivision (c) states: "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Stated another way, a project is only exempt from CEQA "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (Guidelines, § 15061, subd. (b)(3).) Thus, . . . if the court perceives there was substantial evidence that the project might have an adverse impact, but the agency failed to secure preparation of an EIR, the agency's action must be set aside because the agency abused its discretion by failing to follow the law." Id. at 656.

To the same effect are Wildlife Alive v. Chickering, 18 C.3d 190, 206 (1977) (where there is a reasonable possibility that a project or activity may have a significant effect on the environment, an exemption is improper) and International Longshoremen's & Warehousemen's Union v. Board of Supervisors, 116 C.A.3d 265, 175-65 (1981).

It has previously been judicially determined that a reduction in water deliveries to the west side of the San Joaquin

Valley will have significant adverse environmental impacts. In County of Fresno v. Andrus, 8 Envtl. L. Rep. 20179 (E.D. Cal. 1978) revd on other grounds 622 F.2d 436 (9th Cir. 1980) the court considered proposed regulations which would have denied irrigation water to a substantial portion of the land in Area I and other federal service areas. The court made the following findings of fact with respect to the reduction of irrigation water: "[1] If defendants' proposed regulations are implemented, . . . much . . . currently irrigated farmland . . . may return to desert . . .; [2] If defendants' proposed regulations are implemented, serious and substantial overdrafts to the groundwater supply will result or be intensified . . . in Westlands Water District . . .; [3] If defendants' regulations are implemented, land use patterns and cropping patterns will be altered throughout the San Joaquin . . . Valley[]."

The Board did not prepare an EIR in the late 1970s in connection with D-1485. However, the draft Decision acknowledges that "[t]he ecological and water diversion situations in the estuary have changed rapidly in the past few years, and the changes have been accelerated by the ongoing drought." These changes necessitate the development of new comprehensive environmental documentation under the guidance of CEQA, even if the Board had complied with CEQA in the first instance. CEQA Section 21166 requires new environmental documentation at the second step of a two-step project where there has developed in the interim "[s]ubstantial changes" in the project or surrounding circumstances or "[n]ew information" not known at the first step. Such documentation is required at the latter time when "new significant environmental impacts not considered" previously have since developed. 14 CCR § 15162(a).

The Board may not adopt the draft Decision without first complying with CEQA and preparing an EIR. California's most important environmental statute may not be ignored.

2. Impairment Of Contract

The 1963 Contract expressly requires that the federal government "shall furnish" to Area I farmers 900,000 acre feet of irrigation water each year. It also expressly warrants that such water can be made, and will be "available" each year. However, the federal government has recently said that (a) it is following the draft Decision as an interim measure, and (b) it will cut off 75% of our clients' water in 1993-1994.

By drastically reducing the supply of CVP water to Area I, the draft Decision would, by virtue of the impairment of contract prohibitions in the state and federal Constitutions, unconstitutionally impair Area I's rights under the 1963 Contract. In Sonoma County Organization of Public Employees v. County of Sonoma, 23 C.3d 296, 309 (1979), the leading contracts clause case in California, the court held that the law invalidated there had effected a "severe" impairment of the plaintiffs' contract rights and that, therefore, the judicial scrutiny the law had to undergo was to be "elevated." The court relied in major part on Allied Structural Steel Company v. Spannaus, 438 U.S. 234 (1978) in which the U.S. Supreme Court had held that a state action unconstitutionally impaired previously created private contractual relationships in that it purported to impose new duties on one side for which the other side had not contracted. The court in Sonoma made the following statements regarding the holding in Allied:

> "The Court opined that . . . a severe impairment 'will push the inquiry to a careful examination of the nature and purpose of the state legislation.' The statute was invalidated on the grounds that it . . . worked severe and permanent change in those terms [and] the measure was not necessary to meet an important general societal problem . . . ." 23 C.3d at 307.

The impairment of the 1963 Contract and our clients' implementing contracts would be "severe" in the extreme. It could be expected to destroy up to 75% of Area I's water entitlement. In contrast, D-1485, upheld in U.S. v. State Water Resources Control Board, 182 C.A.3d 82 (1986) ("U.S. v. State Board"), has resulted in no known material impairment of such entitlement. U.S. v. State Board held that one factor to be considered is whether the holder of the contract right has been so regulated in the past that it has notice that the state might destroy such right in the future. But the state has never impaired our clients' federal contract rights before, nor have they received any such notice. U.S. v. State Board held that another factor is whether the right holder had reasonable expectations and relied thereon. Barcellos II found that even an inexplicit pricing provision of the 1963 Contract created "reasonable expectations." 899 F.2d at 825. And surely the explicit water availability and delivery warranties and promises in the 1963 Contract do too. The U.S. v. State Board court further noted that federal contracts provide protection for the government when water is not available. But the express warranty of availability in the 1963 Contract overrides such provision. Commercial Code §§ 2313, 2316(1); Fundin v. Chicago Pneumatic

Tool Co., 152 C.A.3d 951, 958 (1984); Sierra Diesel Injection Service v. Burroughs Corp., 890 F.2d 108, 113 (9th Cir. 1989).

As to whether the draft Decision is "necessary" to meet an "important" public problem, Sonoma County Organization holds that judicial review is "elevated," and Allied Structural Steel holds that it is "careful." (U.S. v. State Board cites both cases, but for other provisions.) The draft Decision fails to carry the Board's burden of so showing. Other alternatives exist which would permit this purpose to be fulfilled without impairing our clients' contract rights.

3. Fifth Amendment

U.S. v. State Board acknowledges that "once rights to use water are acquired, they become vested property rights," and "they cannot be . . . taken by governmental action without . . . just compensation." 182 C.A.3d at 101. Since the trial court in that case had rejected such claims because the districts had "no water rights of their own," and since on appeal they made had "no argument . . . concerning the nature of their water rights," the appellate court declined to address the taking issue. 182 C.A.3d at 145.

Our clients are the owners of water rights to beneficial use of the water which are property rights appurtenant to their lands. 43 U.S.C. §§ 372, 485h-1(4); Ickes v. Fox, 300 U.S. 82, 95 (1937); Nevada v. U.S., 463 U.S. 110, 121, 126 (1983). These rights are reflected, not only in the 1963 Contract, but also in the permit and license issued by the Board pursuant to D-1020 (1961).

A permit modification that divests permanent physical dominion of property is a taking regardless of whether the action achieves an important public benefit. Nollan v. California Coastal Commission, 483 U.S. 825, 831-32 (1987); Kaiser Aetna v. U.S., 444 U.S. 164, 180 (1979). Further, in the context of a regulatory restriction, merely serving the public interest does not avoid the compensation requirement of the Fifth Amendment. 483 U.S. at 841. "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' [citations]." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-19.

State action promoting environment values which results in a deprivation of property may constitute a taking for which compensation is required. National Audubon Society v. Superior Court, 33 C.3d 419, 440 (1983); City of Berkeley v. Superior Court, 26 C.3d 515, 532 (1980).

In Everett Plywood Corp. v. U.S., 651 F.2d 723 (Ct. Cl. 1981), a plywood manufacturer made a contract to purchase timber harvested from a national forest. Two years later, when the contract had only been performed in part, the government unilaterally terminated the contract, fearing environmental damage to soil and watershed. The court held that a takings claim was stated, saying:

> ". . . [T]he high cause of environmentalism . . . is a cause with numerous and devoted adherents, some of whom will not tolerate the balancing of environmental considerations against others perhaps equally high but of a different nature. Here the cause is deemed to override the normal obligations of a government contract, i.e., if the Secretary of Agriculture is acting on behalf of the environment he can make any contract of his Department null and void. The effort of the government which has stepped into the market place and made contracts binding on others, to void them as applied to itself on behalf of some high public policy, is an old phenomenon in the law. . . . There can therefore be no doubt that high reasons of public policy do not endow public officials with authority to repudiate contracts. . . ." 651 F.2d at 727-28.

Adoption of the draft Decision would take Area I's water. We estimate that Area I would be entitled to just compensation of $200 million.

4. Separation Of Powers

The draft Decision states that it "provides direction" for the use of water "required by recent federal legislation to be used for fish . . . protection." This apparently refers to Section 3406(b)(2) of the Central Valley Project Improvement Act (the "CVPIA") which directs the federal government to "dedicate" annually 800,000 acre feet of the CVP yield for such purposes.

Section 3408(k) of the CVPIA provides, however, that nothing therein shall "alter the terms of any final judicial decree confirming or determining water rights." The legislative

history makes clear that this provision was intended to protect the 1986 Judgment. 138 Cong. Rec. S17659, S17660 (Oct. 8, 1992).

An ambiguous statute will be interpreted to protect rights enforced in a judgment. Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 812, 816, 822 (D.C. Cir. 1974). If the Board were to improperly interpret the CVPIA so as to impair Area I's rights under the 1986 Judgment, the CVPIA, as so applied, would be unconstitutional under the separation of powers doctrine. Where private rights are at stake, a court's examination of state action altering a judgment is "searching." Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 854 (1986). A long line of cases involving governmental attempts to alter the outcome of government disputes establishes that later action may not impair rights established by an earlier judgment. United States v. Klein, 80 U.S. 128, 146 (1871); Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. 421, 431 (1856); Gordon v. United States, 117 U.S. 697, 701, 703 (1865); United States v. O'Grady's Executors, 89 U.S. 641, 647, 648 (1875); McCullough v. Virginia, 172 U.S. 102, 123, 124 (1898); Hodges v. Snyder, 261 U.S. 600, 603 (1923).

The 1986 Judgment ordered that the government "shall perform" the 1963 Contract. It "requires" the government to perform the 1963 Contract. Barcellos II, 899 F.2d at 826.

A federal court judgment is binding upon, and must be honored by, a quasi-judicial body of the state government. Martin v. Martin, 2 C.3d 752, 761-62 (1970); Gene R. Smith Corp. v. Terry's Tractor, Inc., 209 C.A.3d 951, 953-54 (1989).

Furthermore, a state court judgment, rendered December 5, 1963, decreed that the 1963 Contract was "valid," the judgment was "conclusive" against all persons, including the Board, "as to all matters which could have been adjudicated" in that action, and that each such person, including the Board, is "enjoined and restrained" from raising any issue as to which the judgment was conclusive.

Area I's judgment rights are unique, to the best of our knowledge. Accordingly, the draft Decision may not apply to Area I.

5. Federal Supremacy

State water law may control the operation of a federal reclamation project only where state law is not inconsistent with

Congressional directives. U.S. Const., Art. VI, § 2; 43 U.S.C. § 383; California v. U.S., 438 U.S. 645 (1978). A state limitation or condition on federal management or control of a reclamation project is invalid if it "clashes with express or clearly implied Congressional intent or works at cross-purposes with an important federal interest served by the Congressional scheme." U.S. v. California, 694 F.2d 1171, 1177 (9th Cir. 1982).

U.S. v. State Board acknowledges the existence of these federal constraints upon state power. 182 C.A.3d at 134-37. Yet it appears that the government and districts had not argued and, thus, the court did not address there two central requirements of federal reclamation law.

First, U.S. v. State Board stated that the Board had erred in failing to make factual findings on whether a repayment contract was required to cover the costs of releasing water for outflow to control salinity control. Id. at 143. It stated the reclamation law had not "expressly declared nonreimbursable" such costs by irrigators and suggested that the "burden of such costs" may fall upon irrigators. Because of the inadequate record, the court failed to address this matter in substance.

Farmers in Area I cannot bear any costs, including fish protection costs, unless they are permitted to buy the water in question and thereby pay to the government the water charges set out in the 1963 Contract. If Area I farmers do not bear those costs in that manner, someone must do so under some contract. Reclamation law mandates repayment of all project costs, including fish protection costs. 43 U.S.C. §§ 521, 485h(a), (c); Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257, 260 (9th Cir. 1984). The CVP authorizing legislation specifically provides that "the provisions of the reclamation law . . . shall govern the repayment of expenditures" and that the government "may enter into repayment contracts, and other necessary contracts" with state agencies and other private or public parties. 50 Stat. 844, 850 (1937). The act authorizing the San Luis Unit also states that no funds shall be appropriated for construction of Unit distribution systems and drains until after "a contract . . . calling for complete repayment" has been submitted.

Here, the draft Decision would divert massive quantities of water from Area I farmers, who would have paid the construction and operation costs associated therewith, to be used by those public and private interest groups concerned with fish protection. But those interest groups, including the industries and agencies who advocate such protection, would enjoy the beneficial use of that water without having incurred any repay-

ment obligation, that is, free of charge. This would unconstitutionally clash, and work at cross-purposes, with the financial scheme carefully laid out in federal reclamation law.

Second, U.S. v. State Board suggested that Congress deemed the objectives behind D-1485 to possess "a priority at least equal" to the transport of irrigation water to water-deficient farmlands. 182 C.A.3d at 136. But reclamation law provides exactly the opposite.

Federal reclamation law contains a strong and unmistakable preference and priority of irrigation use over all other uses. 43 U.S.C. §§ 521, 485h(c); Fresno v. California, 372 U.S. 627, 631-32 (1963); California, 438 U.S. at 671; U.S. v. Alpine Land & Reservoir, 697 F.2d 851, 858-60 (9th Cir. 1983); Arvin-Edison Water Storage District v. Hodel, 610 F. Supp. 1206, 1217 n. 37 (D.D.C. 1985); Nevada, 463 U.S. at 126; County of Trinity v. Andrus, 438 F. Supp. 1368, 1380 (E.D. Cal. 1977).

The legislation authorizing the Unit in which Area I is located provides that irrigation is the "principal" purpose of the Unit and that other purposes, such as providing fish benefits, are more "incidents" thereto. Cf., U.S. v. New Mexico, 438 U.S. 696, 714-15 (1978).

The draft Decision now before the Board would honor fish protection uses over irrigation uses. This would directly conflict with federal law. Accordingly, the draft Decision would be unconstitutional.

6. Public Trust Doctrine

The draft Decision claims authority under the public trust doctrine. The landmark case is Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) which held that the state could not sell waterfront property to private parties without first accommodating the public interest in access to waterways.

Recently the doctrine has been transformed. In the words of a leading legal scholar, the transformed doctrine "strays from its original function, that of limiting government power over public assets, and addresses a new function, that of expanding government power over private property," and is "simply another unfortunate effort to create instability in private rights." Richard A. Epstein, "The Public Trust Doctrine," Cato Journal, Vol. 7, No. 2 (Fall 1987).

In California the transformed public trust doctrine was applied in National Audubon Society, the case cited, in turn, in U.S. v. State Board, 182 C.A.3d at 148-52. The doctrine has since been limited. Golden Feather Community Assn. v. Thermalito Irrigation Dist., 209 C.A.3d 1276 (1989).

U.S. v. State Board quotes National Audubon for the proposition that the doctrine should be invoked "whenever feasible." Id. at 151, 152. These cases also state that in-stream uses should be preserved "so far as consistent with the public interest." Id. at 151. They merely impose a duty to "take the public trust into account." Id. The U.S. v. State Board court states that the doctrine shall be applied only if "necessary and reasonable." Id. The public trust doctrine is not used to upset reasonable expectations of property holders. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 482 (1988).

U.S. v. State Board upheld D-1485's level of protection of the striped bass. That level, however, has resulted in no cutoff of Area I's water. The issue before the Board in the draft Decision is whether the much higher level of protection for the winter run of the Sacramento River Chinook Salmon may be justified under the public trust doctrine. U.S. v. State Board expressly noted the distinction, as follows: ". . . [T]he Board recognized that while a higher level was necessary to ensure protection of other species (e.g., . . . salmon), such level of protection would require the 'virtual shutting down of the project export pumps,' contrary to the broader public interest."

U.S. v. State Board also held that "findings are required to show the underlying factual bases." id. at 150. The draft Decision contains no findings of fact supporting the reasonableness, the feasibility, the necessity, the public interest, or the reasonable expectations associated with cutting off Area I's water.

7. Reserved Jurisdiction

A permit or license granted by a state agency, which is relied upon, creates a vested right which may not be deprived under the due process clause. Halaco Engineering Co. v. South Central Coast Regional Commission, 42 C.3d 52, 72-73 (1986); City of West Hollywood v. Beverly Towers, Inc., 52 C.3d 1184, 1189-94 (1991).

A state agency may also be estopped to alter a permit or license under such conditions. Raley v. California Tahoe

Regional Planning Agency, 68 C.A.3d 965, 975 (1977); Security Environmental Systems, Inc. v. South Coast Air Quality Management District, 229 C.A.3d 110, 128 (1991).

Area I has operated in reliance upon the permit issued by the Board three decades ago. It acquired a vested right, which the Board is estopped to destroy.

The draft Decision relies upon (a) standard permit term 80, in effect since the mid-1960s, to ensure that water is diverted only when available, and (b) reservations of jurisdiction to revise permit terms concerning fish protection. D-1020 was issued in 1961 granting the permit relating to the Unit. It contains neither of the above reservations.

However, D-1020 contains two others. Pursuant to Water Code Sections 1394 and 13241, the Board reserved continuing jurisdiction (but only until the date of the license) for the purpose of "coordinating" the permit with other CVP permits. It also reserved such jurisdiction for the purpose of "salinity control" of the Delta.

D-1485 was issued in 1978. Term 1 thereof continued any reservations of jurisdiction relating to coordination of permits and salinity control, but did not create any for fish protection. Term 2 provided that the government "shall maintain . . . water quality conditions" in the Delta according to specified without-project standards by (a) reduction of direct diversion at the pumps, (b) release of natural flow or water in storage, (c) operation of the Delta Cross Channel gates, or (d) any combination thereof.

In reviewing D-1485 U.S. v. State Board stated that the Board engaged in a "balancing" process. 182 C.A.3d at 126, 142. It further sated that standards had to be "reasonable" and serve the "public interest." In particular, the court held that Water Code Section 1256 "requires consideration of the public benefits" derived from the CVP. Id. at 141. The court held that the Board must balance the "uses of the export recipients" in determining the public interest. Id. at 142. The court upheld D-1485 to the extent it protected fish. Id. at 150-51. It said that the bass-bass-protecting without project standards were proper, taking into account not only such needs, "but also the value of the projects." Id. at 151.

The draft Decision would be a radical departure from D-1485 upheld as reasonable upon balancing in U.S. v. State Board. It achieved without project standards of water quality and protected the striped bass, while allowing Area I to continue

to purchase 100% of its irrigation water. By contrast, the draft Decision would cut off up to 75% of Area I's water in an effort to protect salmon by achieving water quality far above without project levels. This would be unreasonable and, therefore, illegal.

U.S. v. State Board also held that "necessary findings reflecting the balancing of interests" in determining public interest are required. The draft Decision lacks the requisite findings. Accordingly, the reserved jurisdiction doctrine gives the Board no lawful basis for taking Area I's water.

8. Reasonable Use

The draft Decision also relies upon the reasonable use doctrine of Article X, Section 2 of the California Constitution.

U.S. v. State Board did not rely upon this doctrine in upholding the bass protection provisions of D-1485. 182 C.A.3d at 148-50.

Furthermore, the court held in another context that an "accommodation" must be reached concerning the major public interests at stake, including "transport of adequate supplies for needs southward." Id. at 130.

U.S. v. State Board holds that this is a "question of fact" and that findings are required. Id.

Here, the draft Decision fails to make adequate findings on (a) its economic impacts, (b) its environmental impacts, (c) alternative causes of salmon loss, and (d) alternative solutions to such problems.

9. Trend Of The Law

The current governmental assaults upon Area I's long-established water rights, including the draft Decision, raise fundamental questions about trends in the law generally, and in water law in particular. Before closing, please allow us to comment on the larger context. While it may first appear as a digression from the specific issues at hand, we think the Board must consider the broader implications of the issue it now faces.

What is happening to water law in California? While surprising, we think it particularly instructive to start the analysis by examining the influence of the once-obscure "critical legal studies" movement on the development of that law. Allan C. Hutchinson, a law professor at York University in Toronto, Canada, has recently written that the central thrust of that movement's attack on traditional jurisprudence is its program of "left" politics. Allan C. Hutchinson, Ed. Critical Legal Studies (1989) at 2. Other law professors who are associated with the movement describe it similarly. Mark Kelman, A Guide To Critical Legal Studies (1987) at 1, 2; Roberto Mangabeira Unger, The Critical Legal Studies Movement (1983) at 1, 4. Professor Hutchinson touts the movement's "major offensive on the whole edifice of modern jurisprudence" and, in particular, its assault upon "the crucial distinction between law and politics." Hutchinson at 2, 4. His colleagues echo the same themes. Kelman at 3-6; Unger at 1, 3-4.

Profession Hutchinson and a colleague have co-authored an article praising California water rights decisions in recent years for revealing "the fundamental truth that everything is in a process of changing or becoming." Allan C. Hutchinson, Patrick J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought," 36 Stan. L. Rev. 199, 217 n. 70 (1984).

Professor Hutchinson's article has recently been extolled by Eric T. Freyfogle, a law professor at the University of Illinois, in his analysis of California's recent water law jurisprudence. Eric T. Freyfogle, "Context and Accommodation in Modern Property Law," 41 Stan. L. Rev. 1529, 1545-47 (1989). Professor Freyfogle describes the critical legal studies perspective, as follows: "Entitlement issues . . . cannot be resolved neutrally and objectively, based either on formal reason or on the inherent nature of the property item itself, because they raise questions of power, value, and social policy that are inevitably political in nature." Id. at 1546. Professor Freyfogle argues that California's assertion of political control over the process of defining water rights "has regained for the public much of the power to prescribe water use practices" traditionally governed by the free market and the common law. Id. He praises the new development, as follows: "By discarding all pretense that water use entitlements are clearly and permanently defined, the story casts aside the notion of neutral, rule-driven adjudications." Id.

Professor Freyfogle's article lauds certain new California cases departing from the traditional property rights model. He seems comforted that after National Audubon water

rights which had been "secure" were suddenly "precarious." Id. at 1537. And he endorses the praise lavished by his cohorts on U.S. v. State Board for tempering strict priorities by "a sense of equitable sharing." Id. at 1537 n. 43.

The ideas of Professors Hutchinson and Freyfogle and their ilk are obviously no longer purely academic. Indeed, they have been expressly relied upon and incorporated in a recent intermediate appellate court decision in California. Imperial Irrigation District v. State Water Resources Control Board, 222 C.A.3d 548 (1990) upheld the Board's decision to restrict a water district's water loss from canal spill and tailwater, relying heavily on cases such as National Audubon and U.S. v. State Board. In its conclusion, the court swallowed the critical legal studies line advanced by Professors Hutchinson and Freyfogle, as follows:

> "All things must end, even in the field of water law. It is time to recognize that this law is in flux and that its evolution has passed beyond traditional concepts of vested and immutable rights. In his review . . ., Professor Freyfogle explains that California is engaged in an evolving process of governmental redefinition of water rights. He concludes that 'California has regained for the public much of the power to prescribe water use practices . . . .' He asserts that the concept that 'water use entitlements are clearly and permanently defined,' and are 'neutral [and] rule-drive,' is a pretense to be discarded. It is a fundamental truth, he writes, that 'everything is in the process of changing or becoming' in water law.
>
> "In affirming this specific instance of far-reaching change, imposed upon traditional uses by what some claim to be revolutionary exercise of adjudicatory power, we but recognize this evolutionary process, and urge reception and recognition of same upon those whose work in the practical administration of water distribution makes such change understandably difficult to accept." 222 C.A.3d at 573.

Water rights at the federal level have also been seen by some as recently undergoing erosion. E.g., Peterson v. U.S. Department of Interior, 899 F.2d 799 (9th Cir. 1990); Barcellos II, 899 F.2d at 814; Madera Irrigation District v. National Resources Defense Council, 93 Daily Journal D.A.R. 1533 (1993). But any change there has been much more modest and restrained than at the state level. For example, the Barcellos II court noted:

> "The fifth amendment prohibits the federal government from depriving a person of 'property without due process of law.' In Lynch v. United States, 292 U.S. 571, 579, . . . (1934), the Supreme Court held that '[r]ights against the United States arising out of a contract with it' are property rights protected from deprivation or impairment by the fifth amendments."

The dissent in Barcellos II said this about the 1963 Contract and the 1986 Judgment:

> "Here we are not dealing with some public right that Congress can change at will. We are dealing with a judgment arising out of very specific contracts, and the only public aspect is that the contracts were with the government. That aspect should make the contracts even less subject to the vicissitudes of legislation. See Perry v. United States, 294 U.S. 330 . . . (1935); Lynch v. United States, 292 U.S. 571 . . . (1934) . . . . There is no reason to find that the judgment ordering enforcement of the 1963 contract stands on shakier grounds. Rather, this case is more like Daylo, 501 F.2d 811 . . . . Specific and valuable rights are involved, and the judgment deserves enforcement." Id. at 831-32.

Madera Irrigation District also stated the same principle. 93 Daily Journal D.A.R. at 1535. It opined that ". . . the government cannot reserve to itself an unlimited right to escape its contractual obligations without rendering its promises illusory . . . ." Id. at 1537. And it analyzed the larger issue, as follows:

> "Congress can change federal policy, but it cannot write on a blank slate. The old policies deposit a moraine of contracts, conveyances, expectations and investments. Lives, families, businesses, and towns are built on the basis of the old policies. When Congress changes course, its flexibility is limited by those interests created under the old policies which enjoy legal protection. Fairness toward those who relied on continuation of past policies cuts toward protection. . . . Expectations reasonably based upon constitutionally protected property rights are protected against policy changes by the Fifth Amendment. Those based only on economic and political predictions, not property rights, are not protected. . . .

> ". . . [T]oo liberal an interpretation of the residual sovereign power of the government to override its contractual commitments would eviscerate the government's power to bind itself to contracts. In addition to the moral offensiveness of allowing the government to break its promises, too liberal a construction would have the paradoxical consequence of weakening the sovereign power to implement policy. If the government's commitments need not be honored, then it can induce responses to policies only by cash or coercion." Id. at 1534-35.

While most of the world is rapidly abandoning all forms of central planning, it is puzzling, as well as ironic, that California water law seems to be going in the opposite direction.

The matter now before the Board may prove to be a crucial test of whether California will retain the traditional property-based approach or embrace the discredited social engineering approach to water law. See Terry L. Anderson, Donald R. Leal Free Market Environmentalism (1991) at 104-14. We urge the Board to think extremely carefully about this crucial question.

Conclusion

For the above reasons, our clients in Area I contend that neither the public trust, reserved jurisdiction, nor reasonable use doctrine permits the Board to issue the draft Decision. In addition, such issuance would unlawfully violate CEQA, impair the 1963 Contract, take our clients' water rights, violate the 1986 Judgment and the separation of powers principle, and affront the supremacy of federal reclamation law. Finally, the Board should not promote the rise of the social engineering model and the fall of the free market regime in water law.

In addition, we endorse the views of various other commentators, including the District, showing that (a) the draft Decision may produce no environmental benefits, (b) any such benefits it may produce would be narrow in scope and limited in nature, (c) the draft Decision would certainly yield massive environmental damage, and (d) it would produce without any doubt devastating economic impacts. In short, the draft Decision is outside the zone of reason -- far outside. We cannot comprehend how this Administration could embrace such a radical change.

Accompanying this letter is an exhibit volume containing copies of (1) the 1963 Contract, (2) the 1986 Judgment, (3) our letter, dated March 30, 1992, to the government, and (4) our notice, dated November 18, 1992, under the 1986 Judgment. We request that the Board take official notice of these public documents.

Respectfully submitted,

William M. Smiland

WMS:k
cc: Governor Pete Wilson
Daniel Lundgren, Esq.
Mr. Douglas Wheeler
Mr. James M. Strock
Mr. David N. Kennedy
Mr. George P. Shultz

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WESTLANDS WATER DISTRICT, SAN BENITO COUNTY WATER DISTRICT, SAN LUIS WATER DISTRICT, AND PANOCHE WATER DISTRICT, Plaintiffs, v. UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR, BUREAU OF RECLAMATION; UNITED STATES OF AMERICA, DEPARTMENT OF COMMERCE, NATIONAL MARINE FISHERIES SERVICE; RONALD H. BROWN, SECRETARY OF COMMERCE; BRUCE BABBITT, SECRETARY OF INTERIOR, Defendants. FRANCIS A. ORFF, et al., Plaintiffs-In-Intervention. NATURAL RESOURCES DEFENSE COUNCIL, et al., Defendants-In-Intervention.	No. CV-F 93-5327 OWW/SSH AREA I MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO OPPOSITION OF GOVERNMENT AND DELTA INTERESTS TO MOTION FOR JUDGMENT Date: January 9, 1994 Time: 9:00 a.m. Ctrm.: 2

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FRIANT WATER USERS AUTHORITY, et al.,

Plaintiffs-In-Intervention.

KERN COUNTY WATER AGENCY,

Plaintiff-In-Intervention.

SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY,

Plaintiff-In-Intervention.

COUNTY OF FRESNO, a political subdivision of the State of California,

Plaintiff-In-Intervention.

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Introduction

As to the Area I claims that the government's involuntary reallocations of water violate six mandatory duties under federal reclamation statutes and state appropriation law, the government, with support of the Delta Interests, now claims for the first time that each such duty either (1) never actually existed, or (2) has been impliedly repealed. This revolutionary new stance attempts to evade or eviscerate at one fell swoop 92 years of Congressional lawmaking reflected in hundreds of pages of the federal code, as well as state water doctrine developed over a century and a half. But, as shown in detail below, each of the six mandatory duties retains its traditional vitality and, indeed, has recently been affirmed by Congress.

As to the government's alleged defense under Section 3406(b)(2) of the CVPIA, the government and the Delta Interests default. Neither makes any effort whatsoever to show that its dedication and management duties thereunder necessitated the massive involuntary reallocations of water at issue. The defendants offer the Court no reason to conclude that Section 3406(b)(2) was the real cause of those massive diversions.

As to the alleged defense under Section 7 of ESA, both defendants are totally silent about the dispositive authority and, instead, importune the Court with irrelevancies. Again, ESA is not the actual cause of the government's forced reallocations of water.

The extravagant indulgence by the executive branch in its new policy preference is, of course, not cost-free. The losses to the economy -- and to the law -- are staggering. In Barcellos I the Court took judicial notice that diversions of the type effected here

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create "economic catastrophe." Barcellos & Wolfsen, Inc. v. Westlands Water District, 491 F. Supp. 263, 265 (E.D. Cal. 1980). Furthermore, the Ninth Circuit has noted: "The old policies deposit a moraine of contracts, conveyances, expectations and investments. Lives, families, businesses, and towns are built on the basis of the old policies." Madera Irrigation District v. Hancock, 985 F.2d 1397, 1400 (9th Cir. 1993) cert. denied 114 S. Ct. 59 (1993). The U.S. Supreme Court's opinion in Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 299-300 (1958) concluded: ". . . [I]t seems farfetched to foresee the Federal Government 'turning its back upon a people who had been benefitted by [the CVP]' [quoting the first Senator Gore] and allowing their lands to revert to desert. The prospect is too improbable to figure in our decision." But what was once thought to be too improbable to consider has actually been happening in Area I in the last two years. At stake in this case is whether the government may turn its back, after all.

1. PRELIMINARY CONSIDERATIONS

(a) Recent Scholarship

The stunning assault the government has mounted on the farmers of Area I, and the novel defense thereof the defendants now stand upon, call for some perspective. This case brings down to earth a conflict being waged in the academic world.

Several well-known western historians have in the last decade mounted a determined critique on irrigators' water rights. A central focus of the attack has been on landowners' rights and correlative government duties under the federal reclamation program. A second target has been the state law doctrine of prior appropria-

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tion which underlies that program. Norris Hundley, Jr., The Great Thirst: Californians And Water, 1770s-1990s (1992); Donald J. Pisani, To Reclaim A Divided West: Water, Law, And Public Policy 1848-1902 (1992); Donald Worster, Rivers of Empire: Water, Aridity, And The Growth Of The American West (1985). Typical of the views of these historians are Professor Hundley's: "The entire body of water law itself has been -- and remains -- a major culprit because of flawed statutes and other principles out of step with the times." The Great Thirst at 385-86. ". . . [T]he overriding message [is] . . . abandon those attitudes and institutions that were born of an earlier era . . . Id. at 422. "Ultimately what seems clearly warranted is a coordinating agency authorized to take charge." (Emphasis in original.) Id. at 416.

This thesis has also been advanced by several professors of law. Professors Hutchinson and Monahan co-authored an article praising certain recent California water rights decisions for revealing "the fundamental truth that everything is in a process of changing or becoming." Allan C. Hutchinson, Patrick J. Monahan, "Law, Politics, And The Critical Legal Scholars: The Unfolding Drama Of American Legal Thought," 36 Stan. L. Rev. 199, 217 n. 70 (1984). This article was praised by Professor Freyfogle in his analysis of California's recent water law jurisprudence. Eric T. Freyfogle, "Context And Accommodation In Modern Property Law," 41 Stan. L. Rev. 1529, 1545-47 (1989). Professor Freyfogle describes the "critical legal studies" perspective, as follows: "Entitlement issues . . . cannot be resolved neutrally and objectively, based either on formal reason or on the inherent nature of the property item itself, because they raise questions of power, value, and social policy that

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are inevitably political in nature." Id. at 1546. He argues that the assertion of political control over the process of defining water rights "has regained for the public much of the power to prescribe water use practices" traditionally governed by the free market and the common law. Id. He praises the new development, as follows: "By discarding all pretense that water use entitlements are clearly and permanently defined, the story casts aside the notion of neutral, rule-driven adjudications." Id. Professor Freyfogle seems comforted that water rights which had once been "secure" are suddenly "precarious." Id. at 1537. And he endorses the tempering of strict priorities by "a sense of equitable sharing." Id. at 1537 n. 43.

Professor Freyfogle's views on water rights have been recently cited approvingly in a book about water rights and related issues. Charles F. Wilkinson, Crossing The Next Meridian: Land, Water, And The Future Of The West (1992) at 290. Professor Wilkinson offers vehement criticism of federal reclamation rights and state appropriation rights. Id. at 21-22, 219-92. The effects of these doctrines have become "unacceptable," he says. Id. at 298. Accordingly, "eliminating" and "abolishing" them is required. Id. at 297, 305. In their stead he posits processes of "planning" by the "community." Id. at 260.

Similar opinions are expressed in another recent law book. Lawrence J. MacDonnell, Sarah F. Bates, Eds., Natural Resources Policy And Law: Trends And Directions (1993). The editors write that a new understanding "calls for major changes in existing laws and institutions," including the elimination of reclamation and appropriation rights and their replacement by government planning

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and management. Id. at 9. One contributor, Professor Getches, assails the same two doctrines and concludes: "Now the time is right and the ideas are ripe for change." Id. at 146. Another contributor, Professor Lazarus, postulates a shift from the old paradigm of private property, contract, and the free market to a new paradigm involving the "deemphasis" of property where "government will dictate the substance of the necessary restrictions." Id. at 202, 213.

Similar themes are even more boldly advanced in a book published last year by four of the above mentioned law professors. Sarah F. Bates, David H. Getches, Lawrence J. MacDonnell, and Charles F. Wilkinson, Searching Out The Headwaters: Change And Rediscovery In Western Water Policy (1993). They mount a strong challenge to the wisdom of the water rights system underlying reclamation and appropriation law. Id. at 128-51. The professors advocate "breaking free" of those doctrines. Id. at 175. They urge "reshaping" traditional western water policy. Id. at 198, 202. The four would institute a new regime based on "what is 'right' instead of who has rights." Id. at 179.

Professor Gray, one of the co-counsel for the Delta Interests in this case, published a law review article earlier this year which incorporates many of these ideas. Brian E. Gray, "The Modern Era In California Water Law," 45 Hast. L.J. 249 (1994). He writes about "reallocations" of water, including "involuntary" or "government-mandated" reallocations of the type involved in this case. Id. at 249, 253, 261, 262, 263, 272, 306. He describes involuntary reallocations under CVPIA Section 3406(b)(2) and ESA Section 7 as "the most dramatic challenges to the existing alloca-

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tional scheme" and as "emblematic of the central themes of the modern era." Id. at 252, 260-61, 306. Professor Gray touts the importance of the "definition" of a water right in such a way as to allow the government to "alter" it. Id. at 262. The new type of water right he favors is "fragile," i.e., existing at government sufferance, and is "dynamic", i.e., subject to change by government. Id. at 262, 271.

A competing vision about western water policy has been offered by a group of influential market resource economists. Terry L. Anderson, Donald R. Leal, Free Market Environmentalism (1991) at 32-33, 55-56, 99-120; Terry L. Anderson, Ed., Water Rights: Scarce Resource Allocation, Bureaucracy, And The Environment (1983); Terry L. Anderson, Water Crisis: Ending The Policy Drought (1983). These economists are also critical of certain aspects of the reclamation program, including water development and marketing by the government, excess land regulation, interest subsidies, and environmental impacts. But they stoutly advocate well-defined and enforced water rights, including those created under federal reclamation law and state appropriation law, as a basis for voluntary reallocation in private water markets.

The property rights/free market model advocated by these economists is supported by leading legal scholars. Charles J. Meyers, Richard A. Posner, Market Transfers Of Water Rights: Toward An Improved Market In Water Resources (1971); Richard A. Epstein, "The Public Trust Doctrine," 7 Cato J. No. 2 (Fall 1987).

Professor Gray notes that to date government has chosen to exercise any authority to effect involuntary reallocations "sparingly." Id. at 307. As noted in a leading treatise edited by

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Beck, one scholar has opined that involuntary reallocation is "legally difficult." Robert E. Beck, ed., Waters And Water Rights (1991) ("Waters And Water Rights II") § 16.03(a) at 331 n. 464. Beck also states that "there is little enthusiasm for the idea" of involuntary reallocation. Id. § 16.04(a) at 370. That is, until now.

(b) Statutory Interpretation

In Radzanower v. Touche Ross & Co., 426 U.S. 148, 155, 157-58 (1976) and Rembold v. Pacific First Federal Savings Bank, 798 F.2d 1307, 1310-11 (9th Cir. 1986), both the U.S. Supreme Court and the Ninth Circuit, respectively, held that no implicit repeal existed based on facts similar to the case at bar. In Radzanower, the Court said:

> "[There are] two well-settled categories of repeals by implication -- (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . . ." 426 U.S. at 154 (quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936)).

In each of the two categories "the intention of the Legislature to repeal must be clear and manifest." Id. Repeals by implication "are not favored and will only be found when 'the new statute is clearly repugnant, in words or purpose, to the old statute . . .' ." In re Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991). It is insufficient to show that two statutes produce differing results when applied to the same factual situation. "Rather 'when two statutes are capable of co-existence, it is the duty of the courts

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. . . to regard each as effective.'" 426 U.S. at 155 (quoting Morton v. Mancari, 417 U.S 535, 551 (1974)). "'Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.'" 426 U.S. at 155 (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963).[1]

Additionally, as set forth in Radzanower, prior specific statutory language controls over later general language. The Radzanower court said:

> "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' Morton v. Mancari, 417 US 535, 550-551, 41 L Ed 2d 290, 94 S Ct 2474. 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.' T. The Sedgwick, Interpretation And Construction Of Statutory And Constitutional Law 98 (2d ed 1874)."

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[1] "Long-standing, important" components of the reclamation program are not likely to be repealed by implication. Morton v. Mancari, 417 U.S. 535, 550 (1974). See Hicks Body Co. v. Ward Body Works, 233 F.2d 481, 484 (8th Cir. 1956) ("the principle that the law does not favor repeal by implication is of special application in the case of an important public [policy] statute of long standing . . . ." See also Watt v. Alaska, 451 U.S. 250, 271 n. 13 (1981) ("it is almost inconceivable that Congress knowingly would have changed substantially a longstanding formula . . . without a word of comment.").

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In Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, (1958), the Supreme Court made it clear that under the reclamation laws, the government is obligated to ensure a sufficient supply of water to meet program requirements. The Court said: "If the rights held by the United States are insufficient, then it must acquire those necessary to carry on the project, United States v. Gerlach Live Stock Co., supra (339 U.S. at 739) . . . ." (Emphasis added.) 357 U.S. at 290-91. This overriding direction to obtain sufficient water to meet all reclamation program obligations -- which arises from the interaction of the six specific duties discussed below -- remains intact. Neither ESA nor CVPIA in any way repeals or amends it. Perhaps the government must sell and deliver a million truckloads of Perrier to Area I ... but the basic purpose of the reclamation program must be carried out.

2. RECLAMATION STATUTORY DUTIES

(a) Duty To Honor Beneficial Use Rights

Section 8 of the 1902 act establishes "the right to the use of water" and provides that "beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. Section 8 further provides, in relevant part, as follows:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State . . . relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . ." Id. at § 383.

Under California law the issuance of a permit to appropriate water gives the right to take and use such water. Cal. Water

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Code §§ 1381, 1455. Landowners within a district served with federal reclamation project water have the right to beneficial use. Ivanhoe Irrigation District v. All Parties, 47 C.2d 597, 627-29 (1957), rev'd on other grounds Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958). Section 8 refers to the state law of prior appropriation. Id. at 628. Such rights are vested and cannot be infringed or taken. U.S. v. State Water Resources Control Board, 182 C.A.3d 82, 101 (1986).

In 1956 Congress attempted to clarify users' rights. The 1956 legislation reenacted Section 8 of the 1902 act, in the modern context, including the landowner's right of beneficial use and the government's duty to proceed in conformity, and not to interfere, with state law relating to the appropriation and use of irrigation water. 43 U.S.C. § 485h-4. Another key provision of the 1956 act, Section 1(4), refers to the "right" to water "for beneficial use." Id. at 485h-1(4).

Ickes v. Fox, 300 U.S. 82, 81 L. ed 525, 530-31 (1937) described the farmers' statutory water rights under Section 8, as follows:

> "Respondents . . . had acquired a vested right to the perpetual use of the waters . . . . Under the Reclamation Act . . . as well as under the law of Washington, 'beneficial use' was 'the basis, the measure and the limit of the right.' . . .
>
> ". . . And in those states, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act, as well, part and parcel of the land upon which it is applied."

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Nebraska v. Wyoming, 325 U.S. 589, 89 L. Ed. 1815, 1829 (1944) described Section 8, as follows: "The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use."

After extensive quotation from Ickes and Nebraska, the Supreme Court in Nevada v. U.S., 463 U.S. 110, 77 L. Ed. 2d 509, 522 (1983) said this:

> "The law of Nevada, in common with most other Western States, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land. [Citation] . . . [T]he beneficial interest in the rights . . . resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. . . ."

In U.S. v. Alpine Land & Reservoir Co., 697 F.2d 851, 853 (9th Cir. 1983) the Ninth Circuit explained Section 8, as follows: "By the terms of the statute, beneficial use . . . is . . . the necessary rationale and source of the right. This determination by Congress is explained . . . by the historical significance of the beneficial use concept in western water law . . . ."

Clark states that ". . . it is regarded as settled that as against . . . an attempt [to reduce the amount of water users had been receiving], a project user has a vested property right which cannot be withdrawn at the will of the government." Robert E. Clark, ed., Waters And Water Rights (1967) ("Waters And Water Rights I") § 118.2. He further states: "Insofar as the users are entitled to continued service in accordance with past use, the water is undoubtedly theirs . . . ." Id. at § 117.3.

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Roos-Collins writes that a farmer's rights to project water are "defined partly . . . by the Reclamation Act and state law" and "have the character of property rights," and that "the Bureau cannot take back a project right." Richard Roos-Collins, "Voluntary Conveyance Of The Right To Receive A Water Supply From The United States Bureau Of Reclamation," 13 Ecol. L.Q. 773 (1987) ("Right To Receive A Water Supply") at 778 n. 17. He states: "A project right . . . guarantees continued delivery for the project life . . . ." Id. at 793. He further states that ". . . the actual irrigators . . . have guarantees of continued delivery of project supply." Id. at 821. Roos-Collins also writes, as follows:

> ". . . The sources of definition [include] the Reclamation Act [and] state law . . . . Federal law (including the Reclamation Act's few specific mandates as to water use . . . generally defines the obligations that the United States assumes and which . . . the irrigators can expect the United States to satisfy; state laws provide the substance . . ., unless these laws frustrate the purposes of the Reclamation Act, including the requirement that all project water be put to beneficial use. . . .
>
> ". . . [S]tatutory . . . provisions do specify, with reasonable clarity, what the . . . irrigators can expect from the United States . . . ." Id. at 822.

Roos-Collins further explains:

> ". . . Under the statutory and common law in western states, a right to use water to the exclusion of others is property . . .' as a result of section 8 of the Reclamation Act, a project right therefore is the 'property' of the . . . project irrigators. Under the common law of western states (generally adopted by statute), the right to use water . . . exists because of continuing beneficial use. Like a state-granted water right, a project right for permanent supply is property . . . ." Id. at 824-25.

Finally, Roos-Collins explicates the government's duty to irrigators under the above statues, as follows:

> ". . . [T]he actual irrigators hold the primary beneficial interest in the project's agricultural water supply. . . .

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"The 'primacy' of an irrigator's project right is a conclusory label that does not indicate the nature and the limits of the obligations owed by the Bureau and the irrigation district. The irrigator does have a right to continued water service . . .; neither the Bureau nor the district can unilaterally and arbitrarily deprive the irrigator of that service. . . ."

"The irrigator's project right is measured by the beneficial use of project water on the project land. . . ." Id. at 846, 848.

Citing Ickes and Nevada, Beck states:

"The landholder who . . . has applied [reclamation water] to an authorized and beneficial use has a 'vested right' that has been upheld against unilateral attempts by the government to alter the contract to terms more favorable to the United States. . . ." Waters And Water Rights II § 41.05 at 410.

As to "involuntary or administrative reallocation" of project water, Beck notes that "individual irrigators may have vested rights." Id. at § 16.03(a) at 331-32 n. 464.

The government's west-wide duty under Section 8, the 1956 reenactment thereof, and the judicial gloss thereon is reflected in CVP legislation. The 1937 authorizing act provides that the government may acquire "water rights" necessary for the purpose of the reclamation of arid and semiarid lands. 50 State. 844 at 850 (Aug. 26, 1937)

Section 3406(b) of the CVPIA provides that the government "shall operate the [CVP] to meet all obligations under State and Federal law." Section 3411(a) mandates that, prior to any reallocation, the government "shall . . . obtain a modification in [water rights] permits and licenses, in a manner consistent with the provisions of applicable State law." These CVPIA provisions affirm the government's duties to honor landowners' federal and state

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rights of beneficial use and to proceed in conformity to state water law.

The same rights and duties were specifically incorporated in the Unit. Section 1(a) of the Unit authorizing act of 1960 provides that construction of the Unit shall not be commenced until the government has secured "all rights to the use of water which are necessary to carry out the purposes of the unit." Pub. L. 86-488, 74 Stat. 156 (June 3, 1960).

SWRCB's D990 (Feb. 9,1961) provides that the "rights" thereunder were acquired and are to be held by the government "in trust for the water users" and "the project beneficiaries who by use of the water on the land will become the true owners of the perpetual right to continue such use."

The government attempts to distinguish Ickes. It argues (at 2) that the farmers there had "pre-federal project water rights." It asserts (at 3) that "Area I does not hold senior water rights that pre-date the CVP." The government cites no authority for the proposition that the government must only honor preproject rights. Neither Section 8, as originally enacted, nor the 1956 reenactment and clarification thereof makes any such distinction. Ivanhoe Irrigation District v. McCracken applies the basic reclamation principles to preproject and postproject water users alike. Indeed, the Supreme Court expressly noted that "irrigators in [Ivanhoe District] receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right." 2 L. Ed. 2d at 1322. Roos-Collins states that irrigators hold the right to beneficial use of project water ". . . even in the typical case where the irrigators, prior to the project construction and opera-

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tion, had no such state-granted water rights to the waterway from which the Bureau now diverts the project supply." Right To Receive A Water Supply at 846.

The government attempts (at 2-3) to distinguish Nevada and Alpine on the ground they "involve stream-wide adjudications" of Nevada rivers. The adjudication involved in those cases "confirmed" water rights secured for irrigators under Section 8 and the state law of appropriation. Nevada, 77 L. Ed. 2d at 519, 522. The rights here were also secured for Area I farmers under Section 8 and state appropriation law.

The government argues (at 3) that "it is the United States which holds the water rights permits issued by the [SWRCB], not Area I." It offers no authority in support of this proposition. In fact, the authority is to the contrary. As stated in Ickes:

> ". . . [T]he contention . . . that . . . ownership of the . . . water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law . . ., the water-rights became the property of the landowners. . . " 81 L. Ed. at 53.

In Nebraska, The Supreme Court said it this way:

> "The property right in the water right . . . is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. [Citations] . . . .
>
> "We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. . . . Pursuant to that procedure individual landowners have become the appropriators of the water rights." 89 L. Ed. at 1829-30.

Nevada holds: ". . . [T]he beneficial interest in the rights confirmed to the Government resided in the owners of the land within

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the Project to which these water rights became appurtenant upon the application of Project water to the land." 77 L. Ed. 2d at 522.

The Delta Interests argue (at 53) that Nevada and Alpine, as well as Ickes, "only require the United States to fulfill its contracts." For this proposition, the Delta Interests cite Beck. Waters And Water Rights II § 41.05 at 411 n. 214. Beck limits his point to the duty imposed on the government "by Ickes." But Ickes holds that Section 8 and the state law incorporated therein impose such duty independent of contract.

The Delta Interests argue (at 53) that Area I farmers, like the claimants in Fremont-Madison Irrigation District v. U.S., 763 F.2d 1084 (9th Cir. 1985), lack any rights under state appropriation or federal reclamation law. But there, unlike here, the dam collapsed "before any stored water was delivered" to the farmer for application to his land. Id. at 1085. Accordingly, the right of beneficial use had never come into being. Here, Area I farmers have applied irrigation water from the Unit to their lands for approximately 25 years.

The Delta Interests argue (at 50) that "this Court has already determined that Area I has no 'statutory' right to water," citing the opinion in this case denying their motion to dismiss. They argue (at 51) that Area I's motion is barred by collateral estoppel as ". . . it is based on a legal argument that was rejected by this Court in a prior proceeding . . .," citing 850 F. Supp. at 1400. The Court, in fact, noted that, "[a]s a general matter, dismissals without prejudice do not constitute a final decision," and that such a dismissal will be so considered only if "sufficiently firm." Id. at 1400-01. Within these guidelines, the Court

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held only that contract issues were finally decided in Barcellos III and gave rise to collateral estoppel, as follows:

> "Westlands and any other party to the contract at issue in Barcellos cannot relitigate that that contract provides an absolute vested contract right to water that cannot under any condition be altered by the Federal Defendants' reasonable actions, taken pursuant to valid, subsequent legislation. That issue was resolved against them and no further judicial action is required. The parties were fully heard, and the order supported by a reasoned decision. . .
>
> ". . . [T]he issue of whether the Westlands and related parties' water rights were absolutely unalterable under their contracts with the Bureau [is precluded]." Id.

As the Area I Representatives do not attempt to relitigate their contract claims here, collateral estoppel is not warranted under the dismissal opinion in this case.

Indeed, that opinion made clear that the reclamation statute claims asserted here were not precluded. It described many of such claims. Id. at 1397-98, 1401. It held: "Nor did the decisions finally determine the questions presented by . . . the Bureau's change of management philosophy for the CVP . . . ." Id. at 1400. It further held: "Taken as true, these allegations provide the defendants notice of claims their actions in allocating CVP water are . . . contrary to law. That issue was not determined in Barcellos and is not precluded." Id. at 1401. Accordingly, it is the Delta Interests who are precluded by the dismissal opinion.

The Delta Interests also attempt (at 51, 53) to reach beneath the dismissal opinion in this case to the opinions in Barcellos III. But the cited passages rejected the Area I contract claims. In the first opinion the Court addressed any rights Area I landowners possess "as a result of the 1963 contract." 849 F. Supp.

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at 724. It stated that Area I's contract rights "are limited by the shortage provision contained in Article 11." Id. at 725. At the second hearing the Court explained that, "arguendo" and "assumedly for lawful . . . purposes," the government can follow the legislative mandate it is under "without violating reclamation law." Rep. Trans. Aug. 30, 1993 at 18-19. In the supplemental opinion the Court made clear that it was ruling that Section 8 of the 1902 act does not "abrogate[] the shortage provision of the present contract." Id. at 732.

(b) Duty Not To Impair Irrigation

Federal reclamation statutes "restrict" the use of water to certain purposes. Jicarilla Apache Tribe v. U.S., 657 F.2d 1126, 1138, 1139 (10th Cir. 1981). "Originally the federal reclamation laws made provision only for water to be used in irrigation." Id. at 1138. In Nevada the government unsuccessfully attempted to compel a reallocation of project water from its historic irrigation use to a new fishery use. The Supreme Court said: ". . . [T]he Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights . . . ." 77 L. Ed. 2d at 519. The Court went on the say: ". . . [T]he Government is completely mistaken if it believes that the water rights confirmed . . . for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." Id. at 522. See also Alpine I, 697 F.2d at 853-54.

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Under Section 8 and the 1956 reenactment and clarification thereof, water rights shall be appurtenant "to the land irrigated." 43 U.S.C. §§ 372, 485h-4. The 1956 legislation provides that a water user "shall . . . have a first right" to water for use "on the irrigable lands . . . owned" by him. id. at § 485h-1(4). In short, federal water rights arise out of the use of water for irrigation, not for other purposes.

Section 8 and its 1956 iteration obligate the government to proceed in conformity with state laws relating to the use of irrigation water. No holder of appropriative water rights under California law may change the purpose of use of such water without the permission of the State Water Resources Control Board. Water Code § 1701. It is within the State Board's discretion to grant or refuse an application to change the purpose of use of appropriated water. However, before permission to make such a change is granted the State Board shall find that the change will not operate to the injury of any legal user of the water involved. Id. at §§ 1702, 1705. Where the requested change of purpose of use is for preserving or enhancing fish resources, in addition to finding that the change will not unreasonably affect any legal user of water, the State Board must determine if the proposed change is in the public interest. Id. at § 1707(b)(2).

Legislation passed in 1920 also deals with protection of irrigation uses. It reads, in pertinent part, as follows:

> "The Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: Provided . . . That no water shall be furnished for uses aforesaid if the delivery of such water

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shall be detrimental to the water service for such irrigation project. . . ." (Emphasis in original.) 43 U.S.C. § 521

Clark writes:

> "[The 1920 act] not only prefers irrigation, but provides that . . . 'no water shall be furnished for the uses aforesaid if they delivery of such water shall be detrimental to the water service for such irrigation project.' . . . [T]he 1920 act is still applicable to nonproject users. Notably, its language states the preference in terms which suggest that, even when contracts have been made and uses exist under them, those uses must be subordinated to subsequently arising needs of the irrigation project. Waters And Water Rights I § 122.1 at 242-43.

Similarly, Roos-Collins asserts that under the 1920 act "the water supply for nonirrigation may be provided only if" its provision will not be detrimental to irrigation. Right To Receive A Water Supply at 795.

Another irrigation protection statute, Section 9(c) of the 1939 act, provides, in relevant part, as follows:

> "The Secretary is authorized to enter into contracts to furnish water for . . . miscellaneous purposes. . . . No contract relating to . . . miscellaneous purposes . . . shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." (Emphasis in original.) 43 U.S.C. § 485h(c).

In Fresno v. California, 372 U.S. 627, 10 L. Ed. 2d 28 (1963) Fresno sued to establish its entitlement to water at Friant Dam on the same terms as irrigators. The Supreme Court rejected Fresno's claim, citing Section 9(c) and saying: ". . . Fresno has no preferential rights to contract for project water, but may receive it only if, in the Secretary's judgment, irrigation will not be adversely affected." 10 L. Ed. 2d at 31. This passage in Fresno was quoted approvingly in California v. U.S., 438 U.S. 645, 57 L.

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Ed. 2d 1018, 1036 n. 24 (1978); see also Jicarilla, 657 F.2d at 1138.

The government attempts vainly (at 4) to distinguish the Fresno case. It notes that "there was no fisheries issue in that case." But Section 9(c) protects irrigation as against "power," "municipal," and all "miscellaneous" (including fishery) uses equally. All such purposes may be served, but only subject to the restriction that irrigation not be impaired.

The Delta Interests argue (at 55), as follows: ". . . [B]y its plain language section 521 merely authorizes the Secretary to enter into contracts under certain conditions. However, here, the Secretary has not entered into a contract to deliver water to the fish." But as shown in point 2(d) below, the government is bound to deliver the water in question for any fishery purposes pursuant to a cost-sharing contract. It cannot escape its duty to perform the 1920 act by violating that other duty. Similarly, the Delta Interests argue (at 54) that Section 9(c) "does not apply where, as here, . . . no water is being sold under a competing Reclamation contract." Again, the government cannot avoid one statutory duty by violating another.

The Delta Interests also argue (at 54) that Section 9(c) "does not apply where, as here, no new Reclamation project is involved." No authority is cited supporting this view, and nothing in the language of the statute so suggests. The 1920 act provision discussed above parallels Section 9(c) of the 1939 act and operates broadly "in connection with the operations under reclamation law."

The Delta Interests also claim (at 54) that Section 9(c) is "irrelevant" to Area I's claim, citing two cases. The first,

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City of Santa Clara v. Anderson, 572 F.2d 660 (9th Cir. 1978) construes portions of Section 9(c) not at issue here and is, itself, therefore, irrelevant. The second, Arizona Power Pooling Assn. v. Morton, 527 F.2d 721 (9th Cir. 1975), supports the Area I claim. It holds that the disposition of natural resources developed under reclamation law is "subject to the restrictions" of Section 9(c). 527 F.2d at 729. It states:

> ". . . [T]he Secretary [is] . . . subject only to considerations of overall project efficiency with respect to the ultimate goals of irrigation. The Secretary is thus given a very specific directive and a prohibition against making any contract . . . which would 'impair project efficiency'. Clearly he is not given total and absolute discretion . . . ." (Emphasis in original.) Id. at 727.

Section 1(a) of the 1960 act authorizing the Unit provides that the Unit may furnish water for fish benefits, but only as "incidents" to its "principal purpose of irrigation." The 1956 feasibility report, which is incorporated by reference in Section 1(a) of the 1960 act provides that, of the Unit supply, "about 98 percent will be for irrigation." Report To Regional Director at 13. In Jicarilla Apache Tribe, the most geographically specific statute set out irrigation as a "principal" use and fish as an "incidental" use. 657 F.2d at 1130. The court there held that fishery uses could not lawfully displace established irrigation uses.

D990 and D1020 (June 30, 1961) provide that the water is for "irrigation" purposes. They further provide for change in "purpose of use" as provided by state law.

Section 3406(b) of the CVPIA provides that the government "shall operate the [CVP] to meet all obligations under . . . Federal law." Such obligations include honoring federal water rights

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relating to irrigation under Section 8 and the 1956 reenactment and clarification legislation, avoiding detriment to irrigation under the 1920 legislation, and avoiding impairment of irrigation efficiency under Section 9(c) of the 1939 act. They also include, in addition to these west-wide duties, the Unit-wide duty in Section 1(a) of the 1960 act to carry out the principal purpose of the Unit.

Section 3406(b) of the CVPIA also provides that the government "shall operate the [CVP] to meet all obligations under State . . . law," including "all decisions of the [SWRCB] establishing conditions on applicable licenses and permits." Section 3411(a) provides, in relevant part, as follows:

> ". . . [T]he Secretary shall, prior to the reallocation of water from any purpose of use . . . specified within applicable [CVP] water rights permits and licenses to a purpose of use . . . not specified within said permits or licenses, obtain a modification in those permits and licenses, in a manner consistent with the provisions of applicable State law, to allow such change in purpose of use . . . ."

The government argues (at 3-4) that "Area I ignores the public trust doctrine under California law which vests the [SWRCB] with continuing jurisdiction over the holders of water rights permits and licenses to protect the resources of the State, in particular, fisheries." The government's implication that the SWRCB will apply the public trust doctrine in this situation and in a manner to vindicate its involuntary reallocations is not ripe for adjudication by this Court at this time. Even if it were ripe, it is by no means certain the SWRCB is inclined to apply the public trust doctrine as the government wishes. It has not necessarily acted in the past as the government predicted or hoped. Finally,

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there is substantial doubt that the SWRCB could so act even if it were inclined.[2]

The government argues (at 4) that nothing it has done conflicts with California v. U.S., 438 U.S. 1018 (1978), as "ESA and CVPIA are clear Congressional directives." As shown below ESA Section 7 is not a clear Congressional directive to involuntarily reallocate half or more of Area I's water. As also shown below neither is CVPIA Section 3406(b)(2). If the government refers to Section 3406(a) or 3402(f) of CVPIA, those are shown below in this point to provide no such clear Congressional directive. As shown above and below, state appropriation law, and the permits issued thereunder, establish that the water in question was appropriated

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[2] The landmark case involving the public trust doctrine is Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) which held that the state could not sell waterfront property to private parties without first accommodating the public interest in access to waterways. California appeared to have transformed the public trust doctrine in National Audubon Society v. Superior Court, 33 C.3d 419 (1983). U.S. v. State Board, quotes National Audubon for the proposition that the doctrine should be invoked "whenever feasible." 182 C.A.3d at 151, 152. These cases also state that in-stream uses should be preserved "so far as consistent with the public interest." Id. at 151. They merely impose a duty to "take the public trust into account." Id. The U.S. v. State Board court states that the doctrine shall be applied only if "necessary and reasonable." Id. U.S. v. State Board upheld D-1485's level of protection of the striped bass. That level, however, has resulted in no cutoff of Area I's water. The issue the Board would consider here includes whether the much higher level of protection for the salmon may be justified under the public trust doctrine. U.S. v. State Board expressly noted the distinction, as follows: ". . . [T]he Board recognized that while a higher level was necessary to ensure protection of other species (e.g., . . . salmon), such level of protection would require the 'virtual shutting down of the project export pumps,' contrary to the broader public interest." The public trust doctrine is not used to upset reasonable expectations of property holders. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 482 (1988). The once-expanded doctrine has more recently been limited. Golden Feather Community Assn. v. Thermalito Irrigation Dist., 209 C.A.3d 1276 (1989).

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for irrigation. The diversions conflict with such provisions of state law, contrary to Section 8 and California.

Section 3406(a)(2) of CVPIA amends the 1937 and 1954 legislation authorizing the CVP to read that the CVP dams and reservoirs shall be used, second, "for irrigation . . . and fish . . . mitigation, protection and restoration purposes" and, third, for "fish . . . enhancement." The Delta Interests argue (at 55) that this amendment to the 1937 and 1954 acts "has placed fish . . . restoration on an equal footing with irrigation in the CVP." But what does the amendment really mean? It is a well established rule of statutory construction that statutes are to be given prospective effect only except where the intent for the statute to be applied retroactively is express, or clearly, explicitly and unequivocally shown to be a necessary implication. Shwab v Doyle, 258 U.S. 529 (1922); Brewster v. Gage, 280 U.S. 327, 74 L. Ed. 457 (1929); Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994); First National Bank in Billings v. First Bank Stock Corp., 306 F.2d 937, 940 (9th Cir. 1962). Thus, Section 3406(a) applies to prospective beneficial uses of CVP water, not preexisting beneficial uses protected by state and federal water rights. That CVP facilities are now to be used for both irrigation and fish does not imply that old irrigation uses which are within the service area, protected by statutes, permits, and a judgment, and pay their way financially are in all respects on an "equal footing" with new fish uses which are not so protected, are outside the Unit, and do not pay their way. This general statute must be harmonized with the others, not deemed to impliedly repeal all specific statutes in existence.

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Section 3402(f) of the CVPIA provides that one of the purposes of that act is to achieve "a reasonable balance among competing demands" for water use. The government argues (at 3) that Section 3402(f) "modified" the reclamation statutes mandating that the government protect irrigation uses. But, again, this general and vague aspiration cannot possibly be said to extinguish Section 8, the 1920 act, Section 9(c), or the 1960 act and their explicit commands to protect irrigation uses.

(c) Duty To Use Water In Service Area

Section 8 of the 1902 act provides that the right to beneficial use of water shall be "appurtenant to the land irrigated." One of the chief sponsors of the 1902 act, Congressman Mondell, said the following during floor debate:

> ". . . The water having been beneficially applied and payments having been made under the provisions of the bill, the water right would become appurtenant to the land irrigated and inalienable therefrom. . . .
>
> "The settler or landowner who complies with all the conditions of the act secures a perpetual right to the use of a sufficient amount of water to irrigate his land, but this right lapses if he fails to put the water to beneficial use and only extends to the use of the water on and for the tract originally irrigated. . . ." 35 Cong. Rec. 6679 (1902).

He also reported that the character of the irrigator's right under the statute is defined to be that of "appurtenance or inseparability from the lands irrigated." Right To Receive A Water Supply at 853.

The appurtenancy rule of Section 8 has been relied upon to hold that areas outside the geographic boundaries of a project are generally not a part of the project and persons operating in those areas have no rights to project water thereunder. Hudspeth County

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Conservation & Recreation District No. 1 v. Robbins, 213 F.2d 425, 429-30 (5th Cir. 1954); Bean v. U.S., 163 F. Supp. 838, 844 (Ct. Cl. 1958).

Further, it is stated in Alpine I: ". . . Under section 8 of the 1902 Reclamation Act, . . . appropriated water must be applied to irrigation; it cannot be severed as a commodity for use on land to which it would not be appurtenant." 697 F.2d at 858. This rule has recently been confirmed by the Ninth Circuit. U.S. v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1492 (9th Cir. 1992).

Section 8, of course, was reenacted in 1956 to govern modern reclamation practice. 43 U.S.C. § 485h-4. At the same time Congress specifically provided that the water right shall be for use "on the irrigable lands within the boundaries of, or owned by" the beneficiary. Id. at § 485h-1(4).

Roos-Collins discusses Hudspeth and Bean in detail. Right To Receive A Water Supply at 810-11. He writes that the establishment of project boundaries defines those lands that ". . . may receive project rights and the guarantees of rights to continued water delivery." Id. at 807. He further concludes: "The establishment of project boundaries determines what kind of project right an irrigator holds . . . ." Id.

Beck cites Bean, among other authorities discussed below, as suggesting the existence of an "in project" preference. Waters And Water Rights II § 41.05 at 409-10.

The 1920 act authorizes nonirrigation supply from any "project irrigation system," but mandates that no such water shall be furnished for such uses if detrimental to the water service "for such irrigation project." 43 U.S.C. § 521. Beck also cites the

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1920 act as suggesting the existence of an "in project" preference., Waters And Water Rights II § 41.05 at 409-10.

Section 1(a) of the 1960 act provides that the government is authorized to construct and operate the Unit to furnish irrigation water to "approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California, hereinafter referred to as the Federal San Luis unit service area." Designation of the authorized service area was intended to protect the viability of the federal investment in Unit facilities. Sol. Op. M-36901 (Supp. I) (June 17, 1986).

Beck states that the government may alter authorized boundaries only ". . . within the general geographical area described by Congress." (Emphasis in original.) Waters And Water Rights II § 16.03(d) at 353.

As discussed above, state law limits rights as to place of use. D990 and D1020 provide that the rights here are "appurtenant" to the lands on which the water is applied and which are thereby irrigated. They provide for change in "place of use" as provided by law. As discussed above, Section 3411(a) of CVPIA requires a change in the place of use condition before any reallocation. That has not occurred.

The government appears to concede (at 5) that Section 3411 "limits the geographic area of use" of Unit water. It cites this Court's opinion of April 28, 1994, which so recognizes.

The Delta Interests argue (at 56-57) that Westlands v. Firebaugh Canal, 10 F.3d 667 (9th Cir. 1993) "explicitly held against" the Area I position. We disagree. It suggests that the

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1960 act only allows "occasional" diversions "in times of drought." Id. at 671, 672, 676.

(d) Duty To Recoup Costs From Water Users

Sections 4 and 5 of the 1902 act provide for the sale to irrigators of the right to use the water with a view to returning the government's construction costs. 43 U.S.C. §§ 392, 431, 461. In 1914 Congress also mandated that water users pay an operation and maintenance charge. Id. at § 492. In 1926 legislation was passed requiring contracts with water districts as the means for recouping construction and O&M costs. Id. at § 423e. The repayment and service contracting provisions were refined in 1939, 1956, and 1982. Id. at §§ 485h, 485h-1 et seq., 390aa et seq. As stated in Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257, 260 (9th Cir. 1984): "Reclamation projects funded by the federal government are generally intended to be reimbursed through the sale of project water. See e.g., 43 U.S.C. § 485h(a) (1982) (Secretary must submit findings on the amount of costs that will 'probably be repaid by water users' before construction expenditures for a given project may be made.)"

The government concedes (at 4-5) that ". . . Project costs allocated to . . . miscellaneous purposes are to be repaid by the water users." The users of the water in question, however, are no longer repaying such costs.

Further, the government concedes that any project costs for fish enhancement must be shared between the United States and nonfederal bodies under a cost-sharing agreement required by Sections 2(a) and 3 of the Federal Water Project Recreation Act of

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1965. 16 U.S.C. §§ 460l-13, 14. Under Section 3402(a) of the CVPIA, one of its purposes is "to . . . enhance fish" habitats.

Clark opines that "the only way fish and wildlife enhancement facilities can now be provided . . . is under the cost-sharing provisions" of the 1965 act. Waters And Water Rights I § 113.2 at 152. He further states that the government must "refrain from making adequate provision for wildlife in the absence of a cost-sharing agreement" thereunder. Id. at 152-53.

Roos-Collins writes that the 1965 act requires a plan including a provision for a fish and wildlife agency "to pay a specified share of the project costs of . . . environmental mitigation." Right To Receive A Water Supply at 818. Roos-Collins describes the government's duty, as follows:

> "A nonfederal party, whether a private group or a public agency, may contract for purchase or lease of a project right for conservation of fish and wildlife affected by project construction or operation. . . . Even though the nonfederal purchaser or lessee is, in effect, donating to the public benefits from the use of the project right, that party must assume the repayment obligation the irrigator had previously accepted." Id. at 117-18.

The 1937 CVP act mandates that reclamation law "shall govern the repayment." Section 3406(b) of CVPIA mandates that the government "shall operate the [CVP] to meet all obligations under . . . Federal law." In Section 3408(a) thereof Congress "directed" the government "to . . . enter into such agreements as may be necessary to implement the intent, purposes and provisions" thereof.

Section 8 of the 1960 act prohibits appropriations in the absence of a contract calling for complete "repayment" of distribution systems and drains.

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In short, the current give-away of half of the Area I water for the use and benefit of sport and commercial fishers and other fish interests violates the commands of the 1939 and 1965 acts, the CVP legislation, and the Unit legislation.

(e) Duty To Obey Judgment

The Ninth Circuit and the Supreme Court strictly enforce decrees, including consent decrees, adjudicating water rights. Nevada v. United States, 463 U.S. 110 (1983); U.S. v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1050 (9th Cir. 1993) cert. denied 114 S. Ct. 600 (1993); Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 626 F.2d 95, 98 (9th Cir. 1980).

Section 3408(k) of CVPIA is an express directive of Congress to honor such judgments. It was specifically intended to protect the 1986 judgment.

The government argues (at 7) that it would seem "odd" for Congress to exempt the Area I beneficiaries of the 1986 Judgment from CVPIA. But the government is not free to disregard Congressional mandates, even if it deems them odd.

The government argues (at 6) that the term "any final judicial decree confirming or determining water rights" is limited to "decrees following general stream adjudications." Neither the language nor history supports this crabbed construction. This argument is even more farfetched than the one rejected in Barcellos & Wolfsen, Inc. v. Westlands Water District, 491 F. Supp. 263, 266-67 (E.D. Cal. 1980).

The government seems to concede (at 7) that the statute covers a judgment enforcing ". . . water rights applied for through

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the [SWRCB] and recognized in a permit or license," but to imply that Area I landowners lack such water rights. As shown above, these permits and licenses, and these rights, exist.

The government argues (at 7) that the 1986 judgment simply ". . . involved resolution of a dispute over contract interpretation." The Delta Interests argue (at 57) that the 1986 Judgment "only reiterates" content contract duties. In fact, the 1986 judgment is broader than that. It also confirms and determines rights and duties under federal reclamation statutes. For example, Paragraph 10 of the 1986 Judgment confirms and determines which lands are "within the authorized service area" and, therefore, "entitled to the . . . water supply and the . . . rights pertaining thereto." The government's statutory duties to Area I were further enforced in Paragraph 12.1.2, which read, in relevant part, as follows: "Subject to all requirements of . . . the law, including the applicable provisions of . . . Federal reclamation law . . . the Federal Parties will make a good faith effort to construct water distribution . . . facilities needed in the District . . . ." Furthermore, Paragraph 6.4 determined that certain facilities were as part of the facilities covered by the higher, indeed appropriation ceiling, "not a part of" the facilities covered by the lower, nonindeed ceiling under Section 8 of the 1960 act. In addition, Paragraph 6.3 determines that added financial burdens could not be imposed, as follows: "Section 9(d) of the 1939 Act does not prohibit the Federal Parties from presently providing water service . . . ." The 1986 judgment also confirms water rights of Area II lands which were not covered by a repayment or service contract but had received and applied water. Paragraph 5.2 provides that Area II "shall be

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entitled to provision water service" of 250,000 acre feet for a certain period. Paragraph 12.1.1 provides that subject to federal reclamation law, Area II shall thereafter receive under a service contract the "firm annual delivery" of such amount. The Delta Interests note (at 57) that Barcellos II and Barcellos III decided contract issues underlying the 1986 judgment. But this motion asserts for the first time statutory claims directly enforced by the 1986 judgment apart from any contract.

(f) Duty To Treat Unit As Part of CVP

Clark writes: ". . . [I]n times of shortage, water in a project is distributed among the users by some principle of apportionment, rather than by a seniority scheme which totally cuts off the most junior users. . . . [A]pportionment . . . has been very widely adopted as the means to deal with shortages." Waters And Water Rights § 118.4 at 189. Clark says this about Section 1(4) of the 1956 act: "Perhaps . . . it is mandatory that in time of shortage water be apportioned by giving each user an equal fractional share of the supply . . . ." Id. at 189-90 n. 40. Roos-Collins cites Clark approvingly. Right to Receive A Water Supply at 844.

The 1937 CVP act sets out the purposes and governing law of the "entire" CVP. Section 1(a) of the 1960 act mandates that the Unit is to be operated as "an integral part" of the CVP.

The government argues (at 7) that this claim was "made," "rejected," and "lost" in the 1994 Westlands v. U.S. case. This argument is erroneous for four reasons. First, the Area I Representatives were not parties to that case and Area I was not repre-

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sented by any party representing solely its interests. Second, the ruling on a preliminary injunction is not preclusive. Third, the case only involved a dispute between several units of the CVP, not the government's duty as to the entire CVP. Fourth, the only claims asserted and addressed in that case were based in contract, not statute.

The Delta Interests assert generally (at 57) that "Westlands does not give Area I any right to receive water." But this wholly ignores the relevant aspects of Westlands, as discussed by Area I Representatives (at 8). The Ninth Circuit eschewed "preferential treatment" and construed the 1960 act "to serve the overall needs of the CVP." Indeed, the Delta Interests, themselves, quote Westlands in the preceding page of their brief (at 56) as acknowledging the 1960 act's ". . . mandate that the San Luis Unit be operated as an integral part of the whole CVP."

3. CVPIA SECTION 3406(b)(2) DEFENSE

Surprisingly, neither the government nor the Delta Interests make any effort to establish that Section 3406(b)(2) of CVPIA "made me do it." They offer the Court no claim, let alone support, for the notion that the government's general duties to "dedicate" and "manage" water thereunder mandates the specific involuntary reallocations involved here. Instead, they offer two procedural defenses.

(a) Collateral Estoppel

The Delta Interests suggest (at 58) that the Court has previously held that CVPIA Section 3406(b)(2) mandates the water

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cut-offs in question. The Court has not so held. In Barcellos the Court said that the government may be able to rebut Area I "by demonstrating that the shortage was caused by the Bureau's mandatory compliance with . . . the CVPIA." 849 F. Supp. at 724. But neither the government, nor the Delta Interests, have made or attempted to make, such a demonstration. The Court has never discussed what specific language of the CVPIA could possibly provide any such alleged mandate. Instead, the Court has made it very clear that it desired that these issues be resolved in this case, and not in the Barcellos judgment enforcement proceedings. 849 F. Supp. at 725 ("The proper forum to raise Movants' remaining issues is a separate suit . . . rather than a motion to enforce the 1986 Judgment."); 850 F. Supp at 1401 (Area I's claim that the government's failure to deliver water "is neither mandated nor permitted under the CVPIA . . . was not determined in Barcellos and is not precluded.").

(b) Burden Of Proof

The government states (at 9) that it has "raised appropriate affirmative defenses" in [its] Answer and that, therefore, it "need not address" its CVPIA defense.

Once Area I has met its burden as to its statutory claims, the burden of proving any affirmative defenses thereto is on the government. In Gianpaoli v. Califano, 628 F.2d 1190 (9th Cir. 1980), the plaintiff made her prima facie case against the government. The government's affirmative defense, as to which it bore the burden of proof, remained "stated but unproven." 628 F.2d at 1195. After a reasonable time elapsed, during which the government failed to carry its burden, the court finally foreclosed the defense and

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rendered judgment for the plaintiff. The judgment was affirmed by the Ninth Circuit. The Court held that the government could not compel the plaintiff either to "wait patiently" for the government to prove its defense or "assume the burden of proving" its nonexistence. Id. "At that stage of the proceeding the judge may treat the government as he would any other civil litigant . . . ." Id. at 1196. The Court concluded: "[Plaintiff's] prima facie case stood unrebutted, and, accordingly she was entitled to prevail as a matter of law." Id.

The government has had three opportunities, over a period of two water seasons, to show exactly whether and how Section 3406(b)(2) of CVPIA might excuse the government from performing its statutory duties to Area I. The government has elected not to essay such a showing.

The Delta Interests suggest (at 58) that Area I bears the burden of proof "on all issues," and, therefore, must prove the nonexistence of the would-be "command" in Section 3406(b)(2). However, the case cited by the Delta Interests, Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), does not support this proposition. Instead, it contradicts it. Quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (cited in Area I's moving papers at 11), the Lujan Court stated that a nonmoving party must lose where she "'has failed to make a sufficient showing on an essential element of her case . . . .'" 497 U.S. at 884. The Court said: "Celotex made clear that Rule 56 does not require the moving party to negate the elements of the nonmoving party's case . . . ." (Emphasis in original.) Id. at 885.

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4. ESA SECTION 7 DEFENSE

(a) Jeopardy

The government repeatedly states in both of its briefs that ESA creates certain mandates it must follow. The government, in its long brief, states (at 1) that it has "mandatory obligations" under Section 7(a)(2) of ESA. Similarly, the Delta Interests repeatedly assert (at 2, 7, 43, 44, and 58) the existence of an ESA Section 7(a)(2) "mandate."

The Area I parties concede that ESA Section 7 imposes certain obligations upon the government. However, the question here is whether any such ESA obligations repeal or override conflicting obligations imposed on the government by reclamation law to sell water to Area I.

The government's long brief cites (at 5, 51) TVA v. Hill, 437 U.S. 153 (1973) for the proposition that under Section 7, the government has a "non-discretionary duty . . . to avoid jeopardy." In its short brief, the government cites (at 8) TVA for the proposition that if a conflict with the government's "obligations under reclamation law and ESA arise, the ESA obligations control."

Similarly, the Delta Interests quote (at 5, 12, 13, 59) language of TVA, and argue (at 7) that ESA Section 7 creates an "affirmative duty that overrides other statutory [omissions] in the event of conflict," and (at 59) that therefore "ESA Section 7 overrides the government's reclamation law mandates.

However, neither the government nor the Delta Interests discuss the leading case which has considered the effect of ESA in connection with conflicting statutory mandates, Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d

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109 (D.C. Cir. 1989), 962 F.2d 27 (D.C. Cir. 1992) (discussed by Area I at 13-14). In the Platte River Whooping Crane case, the court distinguished TVA v. Hill, as follows:

> "The Trust reads section 7 essentially to oblige the Commission to do whatever it takes to protect the threatened and endangered species that inhabit the Platte River basin; any limitations on FERC's authority contained in the FPA are implicitly superseded by this general command. Petitioner relies on Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) (TVA), the famous 'snail darter' case in which the Supreme Court said that section 7's legislative history 'reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species.' Id. at 185, 98 S.Ct. at 2297. We think the Trust's interpretation of the ESA is far-fetched. As the Commission explained, the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act. See Order on Rehearing at 61,752-53. TVA, which did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA, is hardly authority to the contrary." Id. at 34.[3]

By ignoring Platte River Whooping Crane, the government and Delta Interests have missed a crucial aspect of this case.[4]

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[3] The TVA case did not deal with conflicting statutory mandates. The Tennessee Valley Authority Act granted discretionary authority to construct dams. 16 U.S.C. § 831(j). There was no statutory mandate to build. In Hill v. Tennessee Valley Authority, 419 F. Supp. 753, 759 (1976), the trial court noted that it was TVA's position that "the ultimate decision to proceed with [the Tellico dam] project rests with TVA . . . ."

[4] The Delta Interests cite (at 7) Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257, 261-62 (9th Cir. 1984), cert. denied 470 U.S. 1083 (1985). However, in Carson-Truckee, the Ninth Circuit held that the subject Washoe Project Act, "unlike other reclamation project authorizations, did not prohibit the Secretary from constructing the project until repayment contracts for the project had been entered into." Id. at 260. In light of this holding, the Court said: "[W]e need not reach the question whether, given competing mandatory statutory directives, the Secretary would be required to use the project's water entirely for conservation purposes under ESA . . . ." Id. at 262 n. 5. The other case cited (at 7) by the Delta Interests Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977), does not address at all conflicting statutory mandates.

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The Delta Interests cite (at 13) U.S. v. Glen-Colusa Irrigation District, 788 F. Supp. 1126, 1132 (E.D. Col. 1992), for the proposition that "[s]pecies extinction is to be avoided regardless of the expense and inconvenience to the public." The Delta Interests quote (at 58) Barcellos, 849 F. Supp. at 732 (which quotes Glen-Colusa), for the proposition that there is "no special privilege" to ignore ESA granted to water rights holders. Area I does not dispute these propositions. However, Area I does dispute the applicability of the Glen-Colusa case, which unlike the instant case, did not involve the government's failure to perform reclamation law mandates.

(b) Taking

Area I's moving papers argue (at 15) that under Sweet Home Chapter v. Babbitt, 17 F.2d 1463 (D.C. Cir. 1994), ESA Section 9 does not prohibit "habitat modification," and thus, cannot conflict with any of the reclamation mandates. Sweet Home also is cited (at 15) for the proposition that Section 9 of ESA can be easily reconciled with each reclamation mandate by the government exercising its incidental take discretion. See Sumner Peck Ranch v. Bureau of Reclamation, Findings Of Fact And Conclusions Of Law (December 16, 1994) ("The ESA does not excuse, make impossible, or impliedly repeal the government's drainage obligations under the San Luis Act. Section 9 of the ESA, 16 U.S.C. § 1538, can be reconciled by the Secretary exercising authorized discretion to permit any takings incidental to providing drainage. 16 U.S.C. § 1539(a)(1)(B)."

The government, in its long brief (at 3, 53) argues that Sweet Home is not good authority because it "involved only the

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Section 9 prohibition against unlawful taking, and not the Section 7 prohibition" allegedly involved in the instant case. The Delta Interests similarly declare (at 32) that issues relating to ESA Section 9 are "irrelevant." The government and Delta Interests apparently concede that Section 9 either is inapplicable to, or may be reconciled with, the government's reclamation obligations.[5]

Conclusion

For these reasons, Area I's motion for judgment should be granted.

Dated: December 20, 1994.

Respectfully submitted,

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[5] Both the government (at 52-56) and Delta Interests (at 32-35) argue that the Sweet Home decision should not be recognized, but, instead, that Palila v. Hawaii Department of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988) is controlling. Palila did not involve the federal government, and does not stand for the proposition that ESA defeats or cannot be reconciled with mandatory reclamation law. Instead, the meaning of "taking," in the context of operating a federal reclamation project pursuant statutory mandates, should be narrowly interpreted, as it is under Sweet Home for ESA, and as it is under the Marine Mammal Protection Act and the Migratory Bird Treaty Act. U.S. v. Hayashi, 5 F.3d 1278 (9th Cir. 1993) (Marine Mammal Protection Act); Citizens Interested In Bull Run, Inc. v. Edrington, 781 F. Supp. 1502 (D. Or. 1992) (Migratory Bird Treaty Act); Seattle Audubon Society v. Evans, 952 F.2d 297 (9th Cir. 1991) (same).

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February 22, 1995

HAND DELIVERY

State Water Resources Control Board
901 P Street
Sacramento, California 95814

Re: Draft Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, December 1994

Dear Board Members:

Introduction

This letter is written on behalf of the court-appointed representatives of and other irrigators in Area I, the original and largest area of Westlands Water District. We here provide their preliminary comments on the draft Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, December 1994 (the "Draft Plan"). Initially, we wish to commend the Board for its efforts in coordinating and creating a proposed agreement on Bay-Delta standards in conjunction with the federal government, urban and agricultural water users (although not our clients), and environmental interests.

However, there are certain issues of serious concern with the Draft Plan, particularly as it applies to or affects Area I. The Draft Plan states (at p. 1) that "[f]ull implementation of this plan by the SWRCB will occur through the adoption of a water right decision." The Draft Plan further states (at p. 24) "the SWRCB will initiate a water right proceeding following adoption of this water quality control plan . . . . The water right decision, which is anticipated before June 1988, will allocate responsibility for meeting objectives among water right holders in the Bay-Delta Estuary watershed and will establish terms and conditions in appropriate water right permits." Although the Bureau of Reclamation ("Bureau") should not operate the Central Valley Project ("CVP") in accordance with the Draft Plan until its adoption and the adoption of a water right decision, the Bureau is now employing the Draft Plan's restrictions.

In a December 21, 1994 letter from the Bureau's Regional Director to the National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS"), the Bureau stated: "It is our intent to immediately modify, upon your concurrence, coordinated operations of the Central Valley Project and State Water Project to conform to California Urban Water Agency/Agricultural Water Users (CUWA/Ag) proposal as modified by the Principles." On February 15, 1995 the Bureau announced for the upcoming wet year 100% allocations of CVP water for agricultural contractors north of the Delta, Friant division and exchange contractors, but only 75% for San Luis Unit contractors, including Area I. Prior to the adoption of the Draft Plan and an appropriate water right decision we object to any partial implementation of the Draft Plan if and to the extent that such implementation (1) requires the Bureau to take Area I's vested water rights, or (2) gives the Bureau of Reclamation discretion to take such rights.

U.S. v. State Water Resources Control Board, 182 Cal. App. 3d 82, 119 (1986) opines that combining the Board's water quality and water rights functions in a single proceeding is "unwise." It declined to suggest explicitly that the Board must first define or quantify all existing water rights, acknowledging that such an "omnibus assessment" would prove "cumbersome and impractical." Id. at 118-19. On the other hand, the court did not expressly suggest that an omnibus water quality plan should be adopted without examining its direct or indirect adverse effect on specific water rights. As reflected in the notice of public hearing (at p. 2) the Board has previously recognized that water quality regulation should not "preampt" water rights protection: "The 1991 Bay-Delta Plan did not amend the flow and operational objectives for protection of fisheries-related beneficial uses, because the SWRCB intended to address flow and operations in a subsequent water right decision." In our view, as it relates to Area I and other San Luis Unit farmers, the Draft Plan puts the cart before the horse.

Here, the Bureau and other involved federal government agencies are already "implementing" the not-yet-adopted Draft Plan in such a way as to claim it as the basis for the involuntary reallocation of 25% of the water to which our clients are entitled, even in this extremely wet year. It would not be unduly cumbersome or impractical for the Board to make a specific assessment at this time of the impact of the Draft Plan on such rights -- and to protect them against federal abridgement. We would welcome the opportunity to discuss with the Board techniques for insuring that Area I's rights are not effectively modified or amended pending a formal water right decision. One such technique would be for the Board to require the Bureau to

operate the CVP under the Draft Plan in a manner that gives full deference to Area I's existing rights.

Our clients' lands and those of other Area I farmers they represent are served with federal irrigation water pursuant to a 1963 service contract (the "1963 Contract") and various repayment and recordable contracts implementing the 1963 Contract. The 1963 Contract has been enforced in a 1986 federal court judgment (the "1986 Judgment"). Barcellos & Wolfsen, Inc. v. Westlands Water District, 491 F. Supp. 263 (E.D. Cal. 1980) ("Barcellos I"); Barcellos & Wolfsen, Inc. v. Westlands Water District, 899 F.2d 814 (9th Cir. 1990) ("Barcellos II"). In addition to these contractual and judicially decreed rights, our clients' rights to irrigation water from the CVP derive from the federal reclamation statutes and permits issued by the Board. Each source of our clients' rights is discussed more fully below. Copies of the 1963 Contract and the 1986 Judgment were filed by our clients under cover of the letter dated February 16, 1993 of Donnelly, Clark, Chase & Smiland relating to proposed D-1630, all of which are incorporated herein by reference.

1. Clients' Rights

(a) Federal Reclamation Statutes

A landholder who has applied irrigation water to beneficial use on his land has a statutory property right appurtenant thereto which cannot be unilaterally altered or taken away by the government. 43 U.S.C. §§ 372, 383, 485h-4, 485h-1(4); Pub. L. No. 86-488 § 1(a); Ickes v. Fox, 300 U.S. 82, 95 (1937); U.S. v. Alpine Land & Reservoir Co., 697 F.2d 851, 853-57 (9th Cir. 1983); Nevada v. U.S., 463 U.S. 110, 121, 126 (1983).

Reclamation statutes prefer irrigation over other purposes and restrict the government's authority to divert irrigation water for nonirrigation uses. 43 U.S.C. §§ 485h(c), 521; Pub. L. No. 674 § 7; California Water Code §§ 106, 1254; Pub. L. No. 86-488 § 1(a); California v. U.S., 438 U.S. 645, 671 (1978); Fresno v. California, 372 U.S. 631 (1963).

Reclamation statutes require the government to sell project water to beneficial users of the water under contract to reimburse their portion of the government's construction and operation and maintenance costs. 43 U.S.C. §§ 390b(b), 485h(a), 485h(c), 521; 16 U.S.C. § 460l-13; 50 Stat. 844, 850 § 2; Pub. L.

No. 674 § 6; Pub. L. No. 86-488 § 8; Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257, 260 (9th Cir. 1984).

Areas outside the geographic boundaries of a project are generally not a part of the project and persons operating in those areas have no rights to project water thereunder. Hudspeth County Conservation & Recreation District No. 1 v. Robbins, 213 F.2d 425, 431 n. 6 (5th Cir. 1954); Bean v. U.S., 163 F. Supp. 838, 844 (Ct. Cl. 1958). The Unit was constructed and is operated to furnish water to approximately five hundred thousand acres of land referred to as the Federal San Luis Unit "service area." Pub. L. No. 86-488 § 1(a). The Unit authorizing act allows only "occasional" diversions "in times of drought" outside the service area of the Unit. Westlands Water District v. Firebaugh Canal, 10 F.3d 667, 671, 672, 676 (9th Cir. 1993).

Section 3408(k) of the Central Valley Project Improvement Act ("CVPIA") provides that "nothing in [CVPIA] is intended to alter the terms of any final judicial decree confirming or determining water rights." The legislative history confirms that this was specifically intended to protect Area I's 1986 judgment. 138 Cong. Rec. S17659-60 (daily ed. Oct. 8, 1992). Accordingly, Area I farmers enjoy statutory immunity from involuntary reallocation.

Water rights under federal reclamation law are appurtenant to all project lands irrigated with project water and are measured by beneficial use. 43 U.S.C. § 372. The right is a first right to a stated share of the project's available water. Id. at § 485h-1. In carrying out reclamation statutes, the government shall not affect in any way the right of any water user or landowner within the project to such water. Id. at § 383. The 1937 act authorizing the CVP provides that the "entire" CVP is for the purpose, among others, of reclaiming arid lands by irrigation and that reclamation law shall govern its operation. 50 Stat. 844, 850 (Aug. 26, 1937). The 1954 reauthorization statute provides that the "entire" CVP is subject to the priorities under said statutes. Pub. L. No. 674 (Aug. 27, 1954). The Unit was authorized to be operated as "an integral part" of the CVP. Pub. L. No. 86-488 (June 3, 1960) at § 1(a). It creates no "preference" for Unit contractors over other CVP contractors. Westlands v. Firebaugh, 10 F.3d 667 at 671. Congress did not intend that Unit water is for the "exclusive benefit" of Unit contractors. Id. It is reasonable to construe the act "to serve the overall needs of the CVP." Id. If Congress had wanted "preferential treatment" with respect to the Unit it could have said so. Id. at 672.

(b) Permits

Our clients are the owners of rights to beneficial use of the water which are property rights appurtenant to their lands which arose 25 years ago upon original application and beneficial use. 43 U.S.C. §§ 372, 485h-1(4); Ickes v. Fox, 300 U.S. 82, 95 (1937); Nevada v. U.S., 463 U.S. 110, 121, 126 (1983). These rights are reflected in the permits and licenses issued by the Board.

A permit or license granted by a state agency, which is relied upon, creates a vested right which may not be deprived under the due process clause. Halaco Engineering Co. v. South Central Coast Regional Commission, 42 Cal. 3d 52, 72-73 (1986); City of West Hollywood v. Beverly Towers, Inc., 52 Cal. 3d 1184, 1189-94 (1991).

A state agency may also be estopped to alter a permit or license under such conditions. Raley v. California Tahoe Regional Planning Agency, 68 C.A.3d 965, 975 (1977); Security Environmental Systems, Inc. v. South Coast Air Quality Management District, 229 Cal. App. 3d 110, 128 (1991).

Our clients have operated in reliance upon the permit issued by the Board three decades ago. They acquired a vested right, which the Board is estopped to destroy.

(c) 1963 Contract

The 1963 Contract expressly requires that the federal government "shall furnish" to Area I farmers 900,000 acre feet of irrigation water each year. It also expressly recites that such water can be made, and will be "available" each year. Further, it states that "the right to the beneficial use of water . . . pursuant to the terms of this contract . . . shall not be disturbed."

(d) 1986 Judgment

The 1986 Judgment ordered that the government "shall perform" the 1963 Contract. It "requires" the government to perform the 1963 Contract. Barcellos II, 899 F.2d at 826. The 1986 Judgment also enforces certain of the statutory rights described above, including those relating to the sale of the water, and its use within the San Luis Unit.

Section 3408(k) of the CVPIA provides that nothing therein shall "alter the terms of any final judicial decree confirming or determining water rights." The legislative history makes clear that this provision was intended by Congress to protect the 1986 Judgment. 138 Cong. Rec. S17659, S17660 (Oct. 8, 1992).

A federal court judgment is binding upon, and must be honored by, an agency of the state government. Martin v. Martin, 2 Cal. 3d 752, 761-62 (1970); Gene R. Smith Corp. v. Terry's Tractor, Inc., 209 Cal. App. 3d 951, 953-54 (1989).

Furthermore, a state court judgment, rendered December 5, 1963, decreed that the 1963 Contract was "valid," the judgment was "conclusive" against all persons, including the Board, "as to all matters which could have been adjudicated" in that action, and that each such person, including the Board, is "enjoined and restrained" from raising any issue as to which the judgment was conclusive.

(e) Section 8 Of The 1902 Act

Under Section 8 of the Reclamation Act of 1902 and the 1956 reenactment and clarification thereof, water rights shall be appurtenant "to the land irrigated." 43 U.S.C. §§ 372, 485h-4. The 1956 legislation provides that a water user "shall . . . have a first right" to water for use "on the irrigable lands . . . owned" by him. Id. at § 485h-1(4). In short, federal water rights arise out of the use of water for irrigation, not for other purposes.

Section 8 and its 1956 iteration obligate the government to proceed in conformity with state laws relating to the use of irrigation water. No holder of appropriative water rights under California law may change the purpose of use of such water without the permission of the Board. Water Code § 1701. It is within the Board's discretion to grant or refuse an application to change the purpose of use of appropriated water. However, before permission to make such a change is granted the Board shall find that the change will not operate to the injury of any legal user of the water involved. Id. at §§ 1702, 1705. Where the requested change of purpose of use is for preserving or enhancing fish resources, in addition to finding that the change will not unreasonably affect any legal user of water, the Board must determine if the proposed change is in the public interest. Id. at § 1707(b)(2).

Here, as applied to Area I, vested rights under Board issued permits are being abrogated by the Bureau's operation of the CVP. We request that Board ensure the sanctity of such rights until they are amended through the procedure of a Board water right decision.

2. Recent Scholarship

What is at stake here? Perhaps some perspective is in order.

Several well-known western historians have in the last decade mounted a determined critique on irrigators' water rights. A central focus of the attack has been on landowners' rights and correlative government duties under the federal reclamation program. A second target has been the state law doctrine of prior appropriation which underlies that program, as well as this Board's water right program. Norris Hundley, Jr., The Great Thirst: Californians And Water, 1770s-1990s (1992); Donald J. Pisani, To Reclaim A Divided West: Water, Law, And Public Policy 1848-1902 (1992); Donald Worster, Rivers of Empire: Water, Aridity, And The Growth Of The American West (1985). Typical of the views of these historians are Professor Hundley's: "The entire body of water law itself has been -- and remains -- a major culprit because of flawed statutes and other principles out of step with the times." The Great Thirst at 385-86. ". . . [T]he overriding message [is] . . . abandon those attitudes and institutions that were born of an earlier era . . . Id. at 422. "Ultimately what seems clearly warranted is a coordinating agency authorized to take charge." (Emphasis in original.) Id. at 416.

This thesis has also been advanced by several professors of law. Professors Hutchinson and Monahan co-authored an article praising certain recent California water rights decisions for revealing "the fundamental truth that everything is in a process of changing or becoming." Allan C. Hutchinson, Patrick J. Monahan, "Law, Politics, And The Critical Legal Scholars: The Unfolding Drama Of American Legal Thought," 36 Stan. L. Rev. 199, 217 n. 70 (1984). This article was praised by Professor Freyfogle in his analysis of California's recent water law jurisprudence. Eric T. Freyfogle, "Context And Accommodation In Modern Property Law," 41 Stan. L. Rev. 1529, 1545-47 (1989). Professor Freyfogle describes the "critical legal studies" perspective, as follows: "Entitlement issues . . . cannot be resolved neutrally and objectively, based either on formal reason or on the inherent nature of the property item itself, because they raise questions of power, value, and social policy that are

inevitably political in nature." Id. at 1546. He argues that the assertion of political control over the process of defining water rights "has regained for the public much of the power to prescribe water use practices" traditionally governed by the free market and the common law. Id. He praises the new development, as follows: "By discarding all pretense that water use entitlements are clearly and permanently defined, the story casts aside the notion of neutral, rule-driven adjudications." Id. Professor Freyfogle seems comforted that water rights which had once been "secure" are suddenly "precarious." Id. at 1537. And he endorses the tempering of strict priorities by "a sense of equitable sharing." Id. at 1537 n. 43.

Professor Freyfogle's views on water rights have been recently cited approvingly in a book about water rights and related issues. Charles F. Wilkinson, Crossing The Next Meridian: Land, Water, And The Future Of The West (1992) at 290. Professor Wilkinson offers vehement criticism of federal reclamation rights and state appropriation rights. Id. at 21-22, 219-92. The effects of these doctrines have become "unacceptable," he says. Id. at 298. Accordingly, "eliminating" and "abolishing" them is required. Id. at 297, 305. In their stead he posits processes of "planning" by the "community." Id. at 260.

Similar opinions are expressed in another recent law book. Lawrence J. MacDonnell, Sarah F. Bates, eds., Natural Resources Policy And Law: Trends And Directions (1993). The editors write that a new understanding "calls for major changes in existing laws and institutions," including the elimination of reclamation and appropriation rights and their replacement by government planning and management. Id. at 9. One contributor, Professor Getches, assails the same two doctrines and concludes: "Now the time is right and the ideas are ripe for change." Id. at 146. Another contributor, Professor Lazarus, postulates a shift from the old paradigm of private property, contract, and the free market to a new paradigm involving the "deemphasis" of property where "government will dictate the substance of the necessary restrictions." Id. at 202, 213.

Similar themes are even more boldly advanced in a book published last year by four of the above mentioned law professors. Sarah F. Bates, David H. Getches, Lawrence J. MacDonnell, and Charles F. Wilkinson, Searching Out The Headwaters: Change And Rediscovery In Western Water Policy (1993). They mount a strong challenge to the wisdom of the water rights system underlying reclamation and appropriation law. Id. at 128-51. The professors advocate "breaking free" of those doctrines. Id. at 175. They urge "reshaping" traditional western water

policy. Id. at 198, 202. The four would institute a new regime based on "what is 'right' instead of who has rights." Id. at 179.

Professor Gray published a law review article last year which incorporates many of these ideas. Brian E. Gray, "The Modern Era In California Water Law," 45 Hast. L.J. 249 (1994). He writes about "reallocations" of water, including "involuntary" or "government-mandated" reallocations of the type now being undertaken by the Bureau under the Draft Plan. Id. at 249, 253, 261, 262, 263, 272, 306. He describes involuntary reallocations to protect fish and wildlife as "the most dramatic challenges to the existing allocational scheme" and as "emblematic of the central themes of the modern era." Id. at 252, 260-61, 306. Professor Gray touts the importance of the "definition" of a water right in such a way as to allow the government to "alter" it. Id. at 262. The new type of water right he favors is "fragile," i.e., existing at government sufferance, and is "dynamic", i.e., subject to change by government. Id. at 262, 271.

A competing vision about western water policy has been offered by a group of influential market resource economists. Terry L. Anderson, Donald R. Leal, Free Market Environmentalism (1991) at 32-33, 55-56, 99-120; Terry L. Anderson, ed., Water Rights: Scarce Resource Allocation, Bureaucracy, And The Environment (1983); Terry L. Anderson, Water Crisis: Ending The Policy Drought (1983). These economists are also critical of certain aspects of the reclamation program, including water development and marketing by the government, acreage limitations, interest subsidies, and environmental impacts. But they stoutly advocate well-defined and enforced water rights, including those created under federal reclamation law and state appropriation law, as a basis for voluntary reallocation in private water markets. They teach a principle of central importance: Without firm water rights, there can be no water marketing.

The property rights/free market model advocated by these economists is supported by leading legal scholars. Charles J. Meyers, Richard A. Posner, Market Transfers Of Water Rights: Toward An Improved Market In Water Resources (1971); Richard A. Epstein, "The Public Trust Doctrine," 7 Cato J. No. 2 (Fall 1987).

Professor Gray notes that to date government has chosen to exercise any authority to effect involuntary reallocations "sparingly." Id. at 307. As noted in a leading treatise, one scholar has opined that involuntary reallocation is "legally difficult." Robert E. Beck, ed., Waters And Water Rights (1991)

§ 16.03(a) at 331 n. 464. Beck also states that "there is little enthusiasm for the idea" of involuntary reallocation. Id. § 16.04(a) at 370. However, the implementation of the Draft Plan by the Bureau is now resulting in just such an involuntary reallocation of Area I's water.

3. Porter-Cologne Act

In enacting the Porter-Cologne Water Quality Control Act the Legislature found that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." Water Code § 13000. In adopting a water quality control plan the Board must take into account economic considerations. Id. at § 13241(d). The Draft Plan as applied to Area I does not sufficiently consider the economic impacts of the reduced irrigation deliveries that the Bureau is unilaterally imposing under the Draft Plan.

4. Administrative Procedure Act

Board exercises of quasi-legislative power are subject to compliance with the Administrative Procedure Act ("APA"). State Water Resources Control Board v. Office of Administrative Law, 12 Cal. App. 4th 697 (1993). Under the APA, the notice of proposed amendment of a regulation shall include various information relating thereto. Government Code § 11346.5(a)(2), (3), (7), (10). The Board must prepare and make available to the public an initial statement of reasons including a description of the "problem" addressed, the "purpose" of the amendment and the "rationale" about whey it is "necessary," studies relied upon, and "alternatives" that would lessen the impact on small business. Id. at § 11346.7(a). The initial statement must also include the reasons for mandating "specific technologies" and an analysis of whether alternatives would be "more effective" or "as effective and less burdensome." Id. at § 11346.14. The Board "shall assess the potential for adverse economic impact on California business . . ., avoiding the imposition of unnecessary or unreasonable regulations or . . . compliance requirements. Id. at § 11346.53(a)(1). Its acts "shall be based on adequate information concerning the need for, and consequences" thereof. Id. at § 11346.53(a)(1)(A). The Board shall approve any regulation in compliance with the APA. Id. at § 11347.5(a).

We have serious concerns that the procedure currently being followed by the Board for the adoption of the Draft Plan does not comport with these requirements of the APA, as applied to Area I.

5. California Environmental Quality Act

The Draft Environmental Report states (at VIII-62): "Reduced water deliveries in export areas as a result of implementation of the draft plan are expected to cause significant impacts." See also County of Fresno v. Andrus, 8 Envtl. L. Rep. 20179 where the court found that reductions in irrigation deliveries would cause the following significant adverse impacts: ". . . [S]erious and substantial overdrafts to the groundwater supply will result or be intensified in . . . Westlands Water District within Fresno and Kings Counties . . . . [L]and use patterns and cropping patterns will be altered throughout the San Joaquin, Coachella, and Imperial Valleys."

However, the Environmental Report goes on to state (at X-1) "[b]ecause implementation actions will not be fully formulated and established in this plan, the SWRCB cannot mitigate for the potential significant impacts of this plan through regulatory actions incorporated into the plan. Such regulatory actions must wait until the plan is implemented through a water right decision." This acknowledged deficiency in the environmental documentation again points out the wisdom of completing the water right decision before adopting any water quality control plan, at least one which the Bureau and other federal agencies can and will use to take away Area I's water rights.

6. Judicial Review

The above principles of law, as well as those discussed in the February 16, 1993 letter to the Board about D-1630, render highly problematic the Draft Plan, as it will apply to and affect Area I and the water rights of its farmers.

Where an agency is charged with regulating in violation of applicable law, judicial review is nondeferential. Ontario Community Foundation, Inc. v. State Board of Equalization, 35 Cal. 3d 811, 816-17 (1984); Henning v. Division of Occupational Safety & Health, 219 Cal. App. 3d 747, 757-58 (1990); California Assn. of Psychology Providers v. Rank, 51 Cal. 3d 1, 11-12

(1990); Dunn-Edwards Corp. v. Bay Area Air Quality Management District, 9 Cal. App. 4th 644, 655 (1992).

It is the hope of the Area I parties that they can work with the Board and its staff and other interested parties in the coming weeks and months with a view to Board action with respect to the Draft Plan which protects Area I water rights from direct or indirect impairment by the federal government.

Very truly yours,

Christopher G. Foster

CGF:k:mad