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U.S. DIST. COURT
EASTERN DIST. CALIF.
SACRAMENTO

UNITED STATES DISTRICT COURT

BY

DEPUTY

EASTERN DISTRICT OF CALIFORNIA

SAN LUIS & DELTA-MENDOTA WATER)
AUTHORITY; WESTLANDS WATER)
DISTRICT,)

Plaintiffs,)

PIKEY IRRIGATION DISTRICT, et)
al.,)

Plaintiffs-in-)
Intervention)

v.)

UNITED STATES OF AMERICA, et)
al.,)

Defendants.)

SAVE THE SAN FRANCISCO BAY)
ASSOCIATION, et al.,)

Plaintiffs,)

v.)

UNITED STATES DEPARTMENT OF THE)
INTERIOR, et al.,)

Defendants.)

CIV F 97-6140 OWW DLB
SUPPLEMENTAL MEMORANDUM
DECISION AND ORDER RE:
SUMMARY JUDGMENT MOTION ON
OFFSET/RESET

An evidentiary hearing was held on January 8 and 16, 2002 to
resolve the remaining issue raised in the parties' cross-motions
for summary judgment covering the accounting for the U.S.

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1 Department of Interior's annual dedication and management of
2 Central Valley Project ("CVP") yield under Central Valley Project
3 Improvement Act ("CVPIA") Section 3406(b)(2).

4
5 I. PROCEDURAL AND FACTUAL BACKGROUND

6 This case involves the federal government's administration
7 of the Central Valley Project ("CVP") and the implementation of
8 Section 3406(b)(2)² of the Central Valley Project Improvement Act
9

10 ¹CVPIA § 3406(b)(2) states:

11 The Secretary, immediately upon the enactment of this
12 title, shall operate the Central Valley Project to meet
13 all obligations under State and Federal law, including
14 but not limited to the Federal Endangered Species Act,
15 16 U.S.C. 1531, et seq., and all decisions of the
16 California State Water Resources Control Board
17 establishing conditions on applicable licenses and
18 permits for the project. The Secretary, in
19 consultation with other State and Federal agencies,
20 Indian tribes, and affected interests, is further
21 authorized and directed to:

22 (2) upon enactment of this title dedicate and manage
23 annually eight hundred thousand acre-feet of Central
24 Valley Project yield for the primary purpose of
25 implementing the fish, wildlife, and habitat
26 restoration purposes and measures authorized by this
27 title; to assist the State of California in its efforts
28 to protect the waters of the San Francisco
Bay/Sacramento-San Joaquin Delta Estuary; and to help
to meet such obligations as may be legally imposed upon
the Central Valley Project under State or Federal law
following the date of enactment of this title,
including but not limited to additional obligations
under the Federal Endangered Species Act. For the
purpose of this section, the term "Central Valley
Project yield" means the delivery capability of the

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1 ("CVPIA"). The water district plaintiffs and the environmental
2 plaintiffs contend that the federal government by its Final
3 Decision on Implementation of Section 3406(b)(2) of the CVPIA,
4 issued October 5, 1999, pursuant to an earlier order in this
5 case, has implemented the CVPIA in such a way as to allegedly
6 misinterpret and misapply the definition of "CVP yield," causing
7 an incorrect amount of CVP water to be diverted from the water
8 districts and the environment. Earlier hearings have decided all
9 but one issue presented by the parties' complaints.

10 On May 4, 2001, the federal defendants moved for summary
11 judgment against the environmental plaintiffs and water district

12
13 Central Valley Project during the 1928-1934 drought
14 period after fishery, water quality, and other flow and
15 operational requirements imposed by terms and
16 conditions existing in licenses, permits, and other
17 agreements pertaining to the Central Valley Project
18 under applicable State or Federal law existing at the
19 time of enactment of this title have been met. (A)
20 Such quantity of water shall be in addition to the
21 quantities needed to implement paragraph 3406(d)(1) of
22 this title and in addition to all water allocated
23 pursuant to paragraph (23) of this subsection for
24 release to the Trinity River for the purposes of
25 fishery restoration, propagation, and maintenance; and
26 shall be supplemented by all water that comes under the
27 Secretary's control pursuant to subsections 3406(b)(3),
28 3408(h)-(i), and through other measures consistent with
subparagraph 3406(b)(1)(B) of this title.

(B) Such quantity of water shall be managed
pursuant to conditions specified by the United States
Fish and Wildlife Service after consultation with the
Bureau of Reclamation and the California Department of
Water Resources and in cooperation with the California
Department of Fish and Game.

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1 plaintiffs on all claims. Doc. 423. On May 7, 2001, the water
2 district plaintiffs moved for partial summary judgment on
3 grounds, *inter alia*, that to the extent Interior uses "reset" and
4 "offset" to avoid counting yield dedicated and managed pursuant
5 to (b)(2), it is acting contrary to law. Doc. 426.

6 The cross motions for summary judgment on all other issues
7 were decided on October 19, 2001. The "Memorandum Decision and
8 Order Re: Cross Motions for Summary Judgment" found the
9 offset/reset issue could not be decided without taking evidence.
10 An evidentiary hearing was ordered "to address the sole, discrete
11 issue whether under the reset and offset methods, Interior
12 releases more than 800 TAF CVF yield." The evidentiary hearing
13 was held on January 8 and 16, 2002.

14 15 II. LEGAL STANDARDS

16 A. SUMMARY JUDGMENT

17 Summary judgment is warranted only "if the pleadings,
18 depositions, answers to interrogatories, and admissions on file,
19 together with the affidavits, if any, show that there is no
20 genuine issue as to any material fact." Fed. R. Civ. P. 56(c);
21 *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). The
22 evidence must be viewed in the light most favorable to the
23 nonmoving party. *Indiana Lumbermens Mut. Ins. Co. v. West Oregon*
24 *Wood Products, Inc.*, 268 F.3d 639, 644 (9th Cir. 2001), amended
25 by 2001 WL 1490998 (9th Cir. 2001).

26 The moving party bears the initial burden of demonstrating
27 the absence of a genuine issue of fact. *Devereaux v. Abbey*, 263
28 F.3d 1070, 1076 (9th Cir. 2001). If the moving party fails to

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1 meet this burden, "the nonmoving party has no obligation to
2 produce anything, even if the nonmoving party would have the
3 ultimate burden of persuasion at trial." *Nissan Fire & Marine*
4 *Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th
5 Cir. 2000). However, if the nonmoving party has the burden of
6 proof at trial, the moving party must only show "that there is an
7 absence of evidence to support the nonmoving party's case."
8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

9 Once the moving party has met its burden of proof, the non-
10 moving party must produce evidence on which a reasonable trier of
11 fact could find in its favor viewing the record as a whole in
12 light of the evidentiary burden the law places on that party.
13 *Trifan Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.
14 1995). The nonmoving party cannot simply rest on its allegations
15 without any significant probative evidence tending to support the
16 complaint. *Devereaux*, 263 F.3d at 1076.

17 [The plain language of Rule 56(c) mandates the entry
18 of summary judgment, after adequate time for discovery
19 and upon motion, against a party who fails to make a
20 showing sufficient to establish the existence of an
21 element essential to the party's case, and on which
22 that party will bear the burden of proof at trial. In
such a situation, there can be "no genuine issue as to
any material fact," since a complete failure of proof
concerning an essential element of the nonmoving
party's case necessarily renders all other facts
immaterial.

23 *Celotex Corp.*, 477 U.S. at 322-23.

24 25 B. REVIEW OF ADMINISTRATIVE AGENCY ACTION

26 Under the Administrative Procedures Act ("APA"), federal
27 courts can only review whether agency decisions are "arbitrary,
28 capricious, an abuse of discretion, or otherwise not in

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1 accordance with law." 5 U.S.C. § 706(2)(A) (2001).

2 A decision is arbitrary and capricious if the agency
3 "has relied on factors which Congress has not intended
4 it to consider, entirely failed to consider an
5 important aspect of the problem, offered an explanation
6 for its decision that runs counter to the evidence
7 before the agency, or is so implausible that it could
8 not be ascribed to a difference in view or the product
9 of agency expertise."

10 *O'Keefe's, Inc. v. U.S. Consumer Prod. Safety Comm'n*, 92 F.3d
11 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v.*
12 *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Put
13 another way, "if the agency examines the relevant facts and
14 reaches a conclusion that is rationally supported by the facts
15 then its decision is not arbitrary, even if the decision is a
16 'stupid' one" *United States ex rel. Sequoia Orange Co. v.*
17 *Sunland Packing House Co.*, 912 F. Supp. 1325, 1341 (S.D. Cal.
18 1995). Review under the arbitrary and capricious standard is
19 narrow; the reviewing court "may not substitute its judgment for
20 that of the agency." *United States v. Snoring Relief Labs Inc.*,
21 210 F.3d 1081, 1085 (9th Cir. 2000).

22 Absent clear congressional intent to the contrary, *Chevron,*
23 *U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.
24 837 (1984) requires courts to defer to "reasonable agency
25 interpretations of ambiguous statutory language." *Friends of the*
26 *Cowlitz v. Fed. Energy Regulatory Comm'n*, 253 F.3d 1161, 1166
27 (9th Cir. 2001). "Chevron deference is predicated on the
28 assumption that a statute's ambiguity constitutes an 'implicit
delegation' to the agency to interpret the statute."
Lujan-Armendariz v. I.N.S., 222 F.3d 728, 749 (9th Cir. 2000).

Review of an administrative agency's interpretation of a

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1 statute that it administers, consists of two steps. *Chevron*, 467
2 U.S. at 842-43. Under *Chevron's* first step, "traditional tools
3 of statutory construction" are employed to determine whether
4 Congress has expressed its intent unambiguously on the question
5 before the court. *Id.* at 843 n.9. "If the intent of Congress is
6 clear, that is the end of the matter, for the court, as well as
7 the agency, must give effect to the unambiguously expressed
8 intent of Congress." *Id.* at 842-43. If instead, however,
9 Congress left a gap that the administrative agency should fill,
10 step two of *Chevron* is employed, which "uphold[s] the
11 administrative regulation unless it is 'arbitrary, capricious, or
12 manifestly contrary to the statute.'" *Defenders of Wildlife v.*
13 *Browner*, 191 F.3d 1159, 1162 (9th Cir. 1999) (quoting *Chevron*,
14 467 U.S. at 844). *Chevron* deference does not require a court to
15 "conclude that the agency construction was the only one it
16 permissibly could have adopted . . . or even the reading the
17 court would have reached." *Chevron*, 467 U.S. at 843 n.11.

19 III. DISCUSSION

20 The water district plaintiffs argue that Interior
21 undercounts the amount of water it annually manages and dedicates
22 for (b) (2) purposes by using the offset and reset methods in its
23 accounting for (b) (2) water. Doc. 452. The government and the
24 environmental plaintiffs argue that offset and reset do not
25 result in the dedication of more than 800,000 AF of water for
26 (b) (2) purposes, but instead offset and reset take into account
27 and give "credit" for the positive effects that the use of water
28 for (b) (2) purposes has on CVP yield and is within the lawful

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1 exercise of Interior's administrative discretion.

2 Section 3406(b)(2) requires Interior to "dedicate and manage

3 annually eight hundred thousand acre-feet of Central Valley

4 Project yield" for environmental purposes. "CVP yield" is

5 defined by Section 3406(b)(2) as "the delivery capability of the

6 Central Valley Project during the 1928-1934 drought period after

7 fishery, water quality, and other flow and operational

8 requirements imposed by terms and conditions existing in

9 licenses, permits, and other agreements pertaining to the Central

10 Valley Project under applicable State or Federal law existing at

11 the time of enactment of this title have been met." The March

12 13, 2000 decision in this case, held that "CVP yield" is a

13 "finite quantity of CVP water measured in acre feet." Doc. 320

14 at 8:13. Interior has calculated and quantified CVP yield at

15 5,826,000 AF. Gov. Ex. 3, Final Decision, p. 3. The Decision

16 interpreted Congress' intent in defining CVP yield to provide a

17 "reliable supply of 'CVP yield'" from which to annually

18 appropriate 800,000 AF of CVP water. Id. at 32:7-9. The 800,000

19 AF of CVP yield is to be dedicated and managed for (b)(2)

20 purposes, each year, without regard to hydrologic conditions nor

21 is it affected by annual actions to dedicate and manage the

22 800,000 AF.

23 Interior's accounting methodology to measure the annual

24 amount of CVP yield dedicated to (b)(2) purposes, uses three

25 metrics to determine where in the CVP and at what time water is

26 used. Metric 1 measures the amount of CVP reservoir storage

27 upstream in acre feet of water during the period October 1 to

28 January 31. Metric 2 measures the change, in acre feet of water,

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1 in releases from storage from upstream reservoirs in the period
2 February 1 through September 30. Metric 3 measures the
3 reduction, in acre feet of water, in exports from the Delta to
4 south of Delta contractors and uses resulting from (b) (2)
5 actions. Department of the Interior Decision on Implementation
6 of Section 3406(b) (2) of the CVPIA, Oct. 5, 1999 at 4-7.

7
8 A. RESET

9 "Reset" applies to Metric 1, which measures changes in CVP
10 upstream reservoir storage (Shasta, Trinity, Folsom, and New
11 Melones) from October 1 to January 31. During this period,
12 Interior releases water from the upstream reservoirs for (b) (2)
13 purposes. Metric 1 measures the cumulative net change in storage
14 in the upstream reservoirs at January 31 with the (b) (2) actions
15 and the cumulative net change in storage that would result from
16 simulated CVP operations over the same period without (b) (2)
17 actions. The net use of water is charged against the 800,000 AF
18 dedicated to (b) (2) purposes for that water year. Under reset,
19 if precipitation after October 1 refills the reservoirs, Interior
20 "credits" the (b) (2) account by the amount refilled. The net
21 effect is that the total annual charge for (b) (2) CVP water use
22 in acre feet is reduced by the amount "reset." The water
23 district plaintiffs argue that reset violates Section 3406(b) (2)
24 by allowing water dedicated and managed for (b) (2) purposes to
25 total more than 800,000 AF in that water year and Interior takes
26 CVP water for (b) (2) purposes without charging it against the
27 800,000 AF cap.

28 Water released under Metric 1 "dedicated" for (b) (2)

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1 purposes at the time it is released is beneficially used for
 2 (b) (2) purposes and is no longer in storage available for other
 3 uses. The government and the environmental plaintiffs argue that
 4 if water had not been released for (b) (2) purposes, the water
 5 used to "reset" would be released downstream for flood control.
 6 Congress capped and specified the exact quantity of CVP yield,
 7 800,000 AF, Interior is to annually use for (b) (2) purposes. The
 8 fortuity that precipitation prior to January 31 may restore much
 9 of the water released for (b) (2) purposes earlier in the water
 10 year to CVP reservoirs does not change the fact that CVP water
 11 has been "dedicated" and "managed" for (b) (2) purposes. CVP
 12 yield is a finite amount of water; acts of God, such as increased
 13 precipitation in a given year, do not change the annual amount of
 14 available CVP yield. No legal authority suggests that Interior
 15 may elect not to account for CVP yield actually dedicated and
 16 managed for (b) (2) purposes.

17 Section 3406 reflects a compromise reached by Congress to
 18 allocate a failsafe minimum annual supply of CVP water, an
 19 increasingly scarce resource, for environmental purposes by
 20 taking it from alternative uses. The statute mandates that
 21 800,000 AF of CVP yield, no more and no less, is to be annually
 22 dedicated to and managed for (b) (2) purposes. Reset, as
 23 implemented, actually results in more than 800,000 AF being
 24 dedicated to (b) (2) purposes in any water year that precipitation
 25 in the October to January period refills CVP reservoirs and
 26 credited prior (b) (2) use totals in the aggregate with all other

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1 (b) (2) uses during the year more than 800,000 AF.² Under the
2 reset methodology, the (b) (2) account is charged for use of
3 800,000 AF of CVP yield in dry years, although Interior actually
4 uses more in refill years. In dry years the amount of CVP water
5 available to the water districts for contractual use, after
6 (b) (2) water is dedicated, is reduced under contract provisions
7 and Bureau of Reclamation CVP water management practices. In any

8
9 ²In water year 1999-2000, 111,000 AF was credited to the
10 (b) (2) account by the reset accounting methodology. In his cross
11 examination, the government's expert, Chester Bowling, stated
12 that reset results in additional water being dedicated and
13 managed for (b) (2) purposes:

14 Q. Mr. Bowling, was the entire quantity of water
15 depicted by the blue shaded area, 117,000 acre feet,
16 dedicated to fishery actions prescribed by the United
17 States Fish & Wildlife Service?

18 A. Yes, the 117,000 acre feet was, yes.

19 Q. And by reducing the quantity of water counted
20 against the 800,000 acre feet under metric 1 from
21 117,000 acre feet to 6 acre feet --

22 A. 6,000

23 Q -- was Interior able to increase the quantity of CVP
24 water dedicated and managed under Section 3406(b) (2)
25 and accounted under metrics 2 and 3?

26 A. I would have to condition my answer to that, yes,
27 if you were comparing that to an accounting scenario
28 that did not allow refill or reset, yes.

Q. By reducing the quantity of water or yield under
metric 1 of the accounting decision from 117,000 acre
feet to 6,000 acre feet, Interior was able to increase
the quantity of CVP water or yield dedicated and
managed under Section 3406(b) (2) and accounted for
under metric 2 and 3?

A. Yes, in terms of your use of "yield," that, yes,
there was a reduction and it allowed more (b) (2) to be
dedicated to actions following January 31st.

Transcript at 47:8-48:13.

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1 year reset increases the amount of water dedicated for (b) (2)
2 purposes over the 800,000 AF cap, the amount of CVP water
3 available to plaintiff water districts and others is
4 correspondingly reduced. Interior abused its discretion to
5 create "reset" to increase the amount of discretionary water
6 available to Interior for CVP management.

7 Interior is contractually bound to provide specific amounts
8 of water to the water districts absent a water shortage.³ There
9 is no justification to increase the use of CVP "yield" for (b) (2)
10 purposes over 800,000 AF, when (b) (2) uses have not caused or
11 contributed to the increase in CVP yield. Instead, Interior is
12 arbitrarily preferring (b) (2) uses over all other water uses that
13 have claims to CVP yield. Reset does not "balance" the (b) (2)
14 account. Congress intended that exactly 800,000 AF of CVP yield
15 be dedicated and managed annually for (b) (2) purposes, regardless
16 of the hydrologic conditions in any given year.

17 Although, Interior is free to use its discretion to allocate
18 additional water after it has refilled CVP reservoirs, subject to
19 statutory and contractual priorities, it is not free to use
20 "reset" to "undedicate" and not account for (b) (2) use in a water
21 year, because the current year's overall CVP water delivery
22 capacity has been increased by the windfall of increased
23 precipitation. Interior's discretion does not include the
24 authority to disregard and not account for actual (b) (2) use.
25 The fact that "reset" is not specifically identified in the Final

26
27 ³Some water districts' water service contracts with Interior
28 have a provision calling for reduced deliveries during times of
shortage.

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1 Decision is further evidence that the concept is an ad hoc choice
2 by Interior to prefer one category of water use over another,
3 without basis in law.

4 As anecdotal evidence illustrating the arbitrariness of
5 reset, the water districts introduced in evidence, an e-mail
6 between senior Interior officials: "It now appears that the
7 decision is close at hand as to the quantity of offset and reset
8 for the next four years. David Hayes' [sic] has stated that each
9 will be 100,000 AF." Pls' Ex. 108. Plaintiffs contend that no
10 such estimate could honestly be made due to the total uncertainty
11 in annual hydrologic conditions affecting the CVP.

12 The government's expert, Chester Bowling, testified that
13 reset could have an effect on non-(b)(2) water uses.⁵ He admitted
14 that reset is not applied to any non-(b)(2) water uses. No other
15 CVP water use is credited when CVP reservoirs refill. Other than
16 to prefer one competing use for water over another, without legal
17 authority, the reset mechanism is a post hoc rationalization to
18 justify not charging actual (b)(2) use, in a water year, which
19 results in dedication and management of more than 800,000 AF of
20 CVP yield for (b)(2) purposes when reservoirs refill. The water
21 district plaintiffs' motion for summary judgment is GRANTED in
22 part, reset as formulated and applied is unlawful, arbitrary, and
23

24 ⁵ "David Hayes was a Deputy Secretary of Interior during the
25 Clinton administration.

26 ⁵ "Well, if the storage recovers and there is a reset, it
27 means that the -- that there is water available, there is (b)(2)
28 actions that can be taken and later in the water year, and those
actions could amplify impacts to other Project purposes."

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1 capricious.

2

3 B. OFFSET

4 Offset has several different meanings, however the
5 definition here at issue is related to intrametric crediting in
6 Metrics 2 and 3. Metric 2 measures the change in releases from
7 storage in upstream reservoirs from February 1 to September 30.
8 Metric 3 measures the net reduction in Delta exports (to water
9 users) resulting from the use of CVP yield for (b) (2) purposes.
10 Offset is applied by Interior when a (b) (2) action has both a
11 positive and a negative effect on CVP yield. For instance,
12 offset can occur when reduced exports under Metric 3 result in
13 increased storage or a positive change in Metric 2. In that
14 case (b) (2) water dedication results in a reduction to CVP yield,
15 i.e., export reduction, and an increase in storage. Positive
16 effects within Metric 2 can only offset deductions within that
17 metric.

18 The government and the environmental plaintiffs argue that
19 offset simply "balances" the books and does not result in more
20 than 800,000 AF of CVP yield being dedicated and managed each
21 year for (b) (2) purposes. Defendants argue that because the
22 water has actually been used for a (b) (2) purpose, Interior
23 should account for it and recognize total actual (b) (2) use and
24 dedication of CVP yield.

25

26 "The positive effects on storage that result from decreased
27 exports occur because of Interior's management decisions within
28 the project and do not necessarily occur every time there is an
export reduction.

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1 Offset only occurs within metrics and only to the extent
2 that credits are applied for the "net" water use. At the end of
3 the water year the three metrics are added together to calculate
4 the total amount of CVP yield dedicated and managed for (b) (2)
5 purposes. Although, only intrametric offset is allowed, there is
6 a relationship between the Metrics 2 and 3. Mr. Bowling, the
7 government's expert, testified that "there can be debits in
8 metric 3 as a result of export curtailments that during balanced
9 conditions would result in a credit within the release metric."
10 Transcript at 114:21-23.

11 In effect offset results in earlier (b) (2) actions being
12 credited to the (b) (2) account or eliminated from (b) (2)
13 accounting by later actions. As in reset, this results in more
14 than 800,000 AF of CVP yield being dedicated and managed for
15 (b) (2) purposes each year. In water year 2000, Mr. Bowling
16 estimated that 129,000 AF of water was credited within Metric 2
17 as a result of offset. This water was not used for other CVP
18 purposes prior to the end of 2000. Transcript at 83:24-84:1.
19 Thus, although CVP yield was actually used for (b) (2) purposes,
20 and not made available for other CVP water users, it was not
21 accounted for under the (b) (2) account. Once water is used for
22 (b) (2) purposes it must be accounted for. Interior may not use
23 "offset" to "undedicate" and not account for as (b) (2) use, water
24 that has already been used for (b) (2) purposes in a water year.
25 CVP yield used for (b) (2) purposes such as export reduction
26 may result in increased storage, however, Interior cannot ignore
27 its statutory and contractual obligations when determining what
28 to do with this "excess" water. Congress directed that 800,000

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1 AF of CVP yield was to be annually dedicated and managed for
 2 (b)(2) purposes. Once water is used for a (b)(2) purpose it has
 3 been "dedicated and managed" for that purpose. In commenting on
 4 the California Department of Fish and Game's view that upstream
 5 storage releases that are diverted by the CVP to San Luis
 6 Reservoir should not be counted as (b)(2) water, Interior
 7 responded, "Because it has been used for (b)(2) purposes at one
 8 time, it is reasonable for such water to be counted as a (b)(2)
 9 use." Gov. Ex. 3, Attach. 3, "Response to Comments Regarding
 10 (b)(2) Implementation Decision, October 5, 1999," at p. 1.
 11 Interior's admission in this attachment to the Final Decision is
 12 entirely inconsistent with its use of offset, which does not
 13 count water actually used during the water year for (b)(2)
 14 purposes when a credit or offset is applied. In the Final
 15 Decision, Interior acknowledges that CVP yield is a fixed
 16 quantity of water that is not affected by subsequent use of
 17 water: "The annual accounting of yield dedicated and managed
 18 under (b)(2) does not affect the determination of the underlying
 19 yield of the Project because the statutory definition of yield
 20 incorporates specific, fixed conditions which are not affected by
 21 subsequent actions to use the dedicated water." Gov. Ex. 3, at
 22 2. Offset as implemented by Interior is inconsistent with this
 23 statement.

24 The government and the environmental plaintiffs have pointed
 25 to no legal authority that authorizes Interior to create
 26 accounting concepts of "reset" and "offset," that ignores and do
 27 not account for the actual use of CVP yield for (b)(2) purposes
 28 in violation of Congress' direction that exactly 800,000 AF of

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209 472-7996

T-503 P.018/021 F-254

p.18

1 CVP yield are to be dedicated and managed annually for (b) (2)
 2 purposes. Offset allowed Interior to dedicate more than 800,000
 3 AF of CVP yield to (b) (2) purposes in water year 2000. Interior
 4 has the discretion to use "excess" water as it sees fit, however
 5 it must first comply with its statutory and contractual
 6 obligations. Interior's use of "offset" is arbitrary and
 7 capricious. The water district plaintiffs' summary judgment
 8 motion is GRANTED, in part, as to "offset."

9
 10 IV. CONCLUSION

11 "Reset" unlawfully disregards net annual use of CVP yield
 12 for (b) (2) purposes and has actually resulted in the dedication
 13 and use of more than 800,000 AF of CVP yield for (b) (2) purposes
 14 in the 1999-2000 water year. Acts of God and windfalls do not
 15 justify favoring one use of water over another and depriving
 16 contractually entitled parties, where there is no statutory
 17 directive to do so. The water district plaintiffs' summary
 18 judgment motion is GRANTED, in part, as to reset. That
 19 mechanism shall not be used.

20 "Offset" allows more than 800,000 AF of CVP yield to be
 21 dedicated and managed annually for (b) (2) purposes. The concept
 22 of "net benefit" is not expressed in the CVFIA. Every use of CVP
 23 yield for (b) (2) purposes in any water year must be accounted for
 24 and not reversed or ignored. The water district plaintiffs'
 25 summary judgment motion is GRANTED, in part, as to offset, as it
 26 has been implemented in water year 1999-2000. Federal
 27 defendants' cross motion for summary judgment is DENIED as to
 28 offset.

08-02 08:39am From

T-582 P.019/021 F-254

Feb 07 02 03:04p

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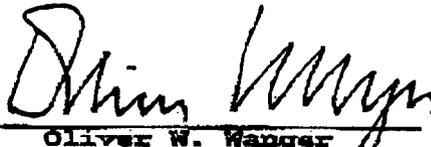
208 472-7986

p.19

1 With the completion of this decision, all summary judgment
 2 motions have been fully decided. The parties shall immediately
 3 schedule a conference with the court to facilitate the entry of
 4 judgment so the parties can proceed with their appeals.

5
6 SO ORDERED.

7
8 DATED: 2-5-02

9
10 
 11 Oliver W. Wanger
 12 UNITED STATES DISTRICT JUDGE

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08-02 08:38am From-

T-263 P.020/021 F-254

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jh

United States District Court
for the
Eastern District of California
February 6, 2002

* * CERTIFICATE OF SERVICE * *

1:97-cv-06140

San Luis & Delta

v.

USA

the undersigned, hereby certify that I am an employee in the Office of
the Clerk, U.S. District Court, Eastern District of California.

that on February 6, 2002, I SERVED a true and correct copy(ies) of
the attached, by placing said copy(ies) in a postage paid envelope
addressed to the person(s) hereinafter listed, by depositing said
envelope in the U.S. Mail, by placing said copy(ies) into an inter-office
delivery receptacle located in the Clerk's office, or, pursuant to prior
authorization by counsel, via facsimile.

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T-563 P.021/021 F-254
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