

Department of Water Resources
Michael L. Peterson, Director



LA17

Including service to the Cities of
Elk Grove and Rancho Cordova

March 12, 2015

Via Electronic Mail to: trust@usbr.gov

Mr. Tim Rust
Bureau of Reclamation
Resources Management Division
2800 Cottage Way
Sacramento, CA 95825

Re: Draft Environmental Impact Statement for Central Valley Project Municipal and Industrial Water Shortage Policy

Dear Mr. Rust:

The Sacramento County Water Agency (SCWA) holds Contracts No. 6-07-20-W1372 and No. 14-06-200-5198B-IR1 with the Bureau Reclamation (Reclamation). SCWA's Contracts entitles it to receive up to 52,000 acre-feet per year for municipal and industrial uses throughout the Contracts Use Area in central Sacramento County. SCWA is acutely interested in Reclamation's proposed Central Valley Project Municipal and Industrial Water Shortage Policy (2010 WSP) because SCWA believes a formal policy will provide SCWA with the clarity it needs for long-term water supply planning purposes. To ensure a clear and defensible policy, SCWA encourages Reclamation to clarify the following points in its Draft Environmental Impact Statement (DEIS), and to address them in its final EIS.

A. Historical Use

1. DEIS May Miscalculate M&I Water Delivery Obligations in Shortage Years.

The DEIS is unclear as to how Reclamation will treat the use of non-CVP supplies in calculating historical use under the proposed alternatives. Without clarity as to how Reclamation will adjust historical use based on use of non-CVP supplies, it is not clear how such adjustments would affect deliveries to M&I contractors.

~~Under Alternative 1, 4, and 5, M&I water service contractor reductions would be based on historical use. Historical use is determined by calculating the average quantity of CVP water put to beneficial use during the last three years of water deliveries that were unconstrained by the availability of CVP water. The DEIS states that historical use would be adjusted for non-CVP water use according to the factors described in Chapter 2.3.2, Historical Use. (DEIS at p. 2-13.) The DEIS, at Chapter 2.3.2, states that the contractor must show "the extent to which use of the non-CVP water actually reduced the contractor's use of CVP water in other years. A contractor must show that the non-CVP water used in other years reduced the use of CVP water in these years." (DEIS at p. 2-7.) Assuming "other years" refers to years~~

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other than the last three unconstrained years, the DEIS is internally inconsistent. In Chapter 2.6, the DEIS states that “adjustments for use of non-CVP water supplies would be based on the documentation showing the extent to which use of the non-CVP water actually reduced the contractor’s use of CVP water in the unconstrained historical years.” (DEIS at p. 2-13.) Thus, it is not clear whether a contractor must show that use of non-CVP water in years other than unconstrained years reduced CVP water use in those same years or whether use in unconstrained years reduced CVP water use in the same unconstrained years.

Further complicating matters is the fact that a third alternative may exist. The reference to “other years” may mean that a contractor must show how use of non-CVP water in one year establishes a CVP water “credit” for use in another year. (See 2010 WSP, at p. 2-5 [“The contractor must fully document use of non-CVP water to clearly show how much that water use actually reduced the contractor’s use of CVP water in other years”].) In fact, the 2005 Environmental Assessment (EA) provides an example calculation showing a crediting process.

The M&I Contractor Suggested Water Shortage Plan (WSP), evaluated as Alternative 5 in the DEIS, addresses this issue with a specific amendment. The M&I Contractors suggested language that would require a contractor to document use of non-CVP water to show how much non-CVP water use actually reduced the contractor’s use of CVP water in each historical unconstrained year. (M&I Contractor’s Suggested WSP at Ch. 2.1.2, Ch. 3.2.) The DEIS, however, does not accurately state the M&I Contractors suggested approach to adjusting historical use based on non-CVP water use. The DEIS simply states that adjustments to historical use will be calculated using the same factors described in Chapter 2.3.2, Historical Use. (DEIS at p. 2-18.) As noted above, the term “other years,” as used in Chapter 2.3.2, appears to refer to years other than the unconstrained years.

SCWA requests that Reclamation clarify these various inconsistencies regarding adjustments to historical use so that the DEIS clearly reflects Reclamation’s CVP delivery obligations in shortage years.

2. Lack of Clarity Has Unintended Consequences.

Without clearly articulating how Reclamation will treat the use of non-CVP supplies in calculating historical use under the proposed alternatives, M&I Contractors may continue to be penalized for using non-CVP supplies, and may be driven to use CVP supplies to build a record of historical use. Contractors are penalized for diversifying their water supplies because they cannot count on receiving credit for such supplies under the 2010 WSP. Further, driving contractors to use CVP supplies first is counterproductive to the M&I policy. The 2010 WSP specifically states that the provision allowing adjustments to historical use is “intended to encourage contractors to use non-CVP water first and rely on CVP water as a supplemental supply.” To the extent that the DEIS drives contractors to use CVP supplies to build historical use, one of the key purposes of the adjustment provision is thwarted.

3. Showing An Actual Reduction in CVP Water Use.

The DEIS is unclear as to the showing required to prove that non-CVP water use actually reduced CVP water use, and may be inconsistent with the interpretation of Reclamation staff. In 2014, following the procedures in the 2001 Water Shortage Policy (2001 WSP), which are similar to those in the 2010 WSP with respect to adjustments to historical use, SCWA requested adjustments to historical use based on non-CVP water use. Reclamation staff told SCWA that, in order to get credit for non-CVP water use, the contractor must first schedule CVP water then proceed to use non-CVP water in

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lieu of scheduled CVP water. Neither the 2001 WSP, the 2010 WSP, nor the DEIS say as much. Further, the 2010 WSP and DEIS use the same language as the 2001 WSP regarding the necessary showing. Thus, M&I Contractors remain concerned that without clearly articulating the showing required for an adjustment in historical use, M&I contractors will continue to be penalized for using non-CVP supplies. Further, if the DEIS is inconsistent with Reclamation's interpretation of this provision, the DEIS may miscalculate Reclamation's CVP delivery obligations in shortage years.

B. Technical Issues

The DEIS overestimates the quantity of non-CVP water available to SCWA (both Contracts), and does not include the City of Folsom's quantity of non-CVP water (Contract No. 6-07-20-W1372). The place of use for SCWA's CVP supply is Zone 40 (both Contracts) and portions of the City of Folsom (Contract No. 6-07-20-W1372 only), so the only non-CVP supplies that should be considered in the DEIS are those that are available in Zone 40 and the City of Folsom depending on Contract. For 2010, it appears that the DEIS included 6,000 acre-feet of groundwater pumping to serve areas outside of Zone 40. The actual non-CVP supply quantities available in 2010 for Zone 40 were: Normal Year: 35,000 acre-feet; Dry Year: 36,232 acre-feet; Critical Year: 39,930 acre-feet. For 2030, the DEIS included 11,198 acre-feet of water supplies to serve areas outside of Zone 40. The actual non-CVP supply quantities available in 2030 for Zone 40 are: Normal Year: 59,300 acre-feet; Dry Year: 54,000 acre-feet; Critical Year: 81,300 acre-feet. SCWA requests that Reclamation correct these figures for Zone 40. The City of Folsom's figures will be forth coming under a separate comment letter from the City.

SCWA appreciates the opportunity to comment on the DEIS and looks forward to these issues being addressed by Reclamation in the final EIS.

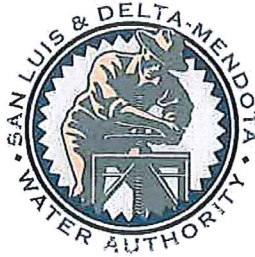
Sincerely,



Michael L. Peterson, P.E.

Director of Water Resources

Cc: Aaron Ferguson, SS&D
Sarah Britton, County Counsel
Marcus Yasutake, City of Folsom
Kerry Schmitz, SCWA
Mike Huot, SCWA
Dave Underwood, SCWA



LA18

March 13, 2015

Tim Rust, Program Manager
Resources Management Division
United States Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825
trust@usbr.gov

RE: M&I Water Shortage Policy Draft Environmental Impact Statement

Dear Mr. Rust:

The San Luis & Delta-Mendota Water Authority¹ ("Water Authority") appreciates the opportunity to provide the following comments on the November 2014, Central Valley Project ("CVP") Municipal and Industrial Water Shortage Policy ("Policy") Draft Environmental Impact Statement ("Draft EIS"). The Water Authority submits these comments, not to challenge the legal adequacy of the Draft EIS or to recommend the United States Bureau of Reclamation ("Reclamation") adopt a particular alternative. The Water Authority provides comment on two aspects of the Draft EIS: (1) the Purpose and Need Statement, and (2) environmental parameters, specifically the location of X2 and flow in Old and Middle River.

Purpose and Need Statement

The Draft EIS provides that the purpose of the proposed policy "is to provide detailed, clear, and objective guidelines for the allocation of available CVP water

¹ The Water Authority was formed in 1992 as a joint powers authority. The Water Authority's member agencies collectively hold contracts with Reclamation for the delivery of approximately 3.3 million acre-feet of CVP water. CVP water provided to the Water Authority's member agencies supports approximately 1.2 million acres of agricultural land, as well as more than 100,000 acres of managed wetlands, private and public, in California's Central Valley. The Water Authority's member agencies also use CVP water to serve more than 1 million people in the Silicon Valley and the Central Valley.

342 SIXTH STREET

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supplies to CVP water service contractors during water shortage conditions.” (Draft EIS, ES-5.) This purpose statement is not limited to allocation of CVP water to municipal and industrial water users and is not constrained to allocation after satisfying non-consumptive uses of CVP water (fish and wildlife). As a result of the broad purpose statement, important factors that guide the allocation of CVP water are absent from consideration in the Draft EIS. They include: (1) the manner in which Reclamation exercise its discretion when operating the CVP to meet regulatory requirements, and (2) limitations on water available to American River Division contractors.

1

Discretionary Decisions on Operation of the CVP

Since at least 1992, the United States has been making policy decisions that impact the allocation of CVP water. Those decisions are discussed briefly in the Draft EIS. On page 1-13 of the Draft EIS, it provides:

Increasing constraints have been placed on CVP operations by legislative requirements including implementation of the [Central Valley Project Improvement Act (“CVPIA”)] and the requirement under Section 3406(b)(2) for 800,000 AF of water for fish and wildlife purposes, Endangered Species Act requirements including BOs covering protections of the winter-run chinook salmon and the delta smelt, and the SWRCB’s Decision D-1641, partially implementing the Sacramento-San Joaquin Bay-Delta WQCP. These constraints have removed some of the capability and operational flexibility required to actually deliver the water to CVP contractors especially in dry years and sequential dry years. Water allocations south of the Delta have been most affected by changes in operations due to the CVPIA and the BOs. It is the combination of these factors which define the limits of water allocation.

2

(Draft EIS, p. 1-13 (emphasis added).) These statements are correct but do not reflect that the disproportionate impact to users of CVP water located south of the Delta is due to discretion the United States exercises. They do not reflect the fact that the United States thus has alternatives to meeting the requirements of the CVPIA, Endangered Species Act, and Decision 1641. As examples, there have been many times when the United States could have either dedicated additional CVP water for flow upstream of the Delta, pursuant to CVPIA section 3406(b)(2), or released more water from upstream reservoirs to meeting outflow requirements imposed under Decision 1641, instead of limiting pumping at the C.W. “Bill” Jones Pumping Plant. If either of those alternatives were taken, more water would be available for allocation south of the Delta.

As such, if the Draft EIS is intended to provide “detailed, clear, and objective guidelines for the allocation of available CVP water supplies to CVP water service contractors”, as reflected

in the purpose statement, the Draft EIS should more meaningfully consider, as part of the Policy, the discretionary decisions made by Reclamation when operating the CVP to meeting legal requirements.

2

Limitations on Water Available to American River Division Contractors

The Draft EIS does not reflect an important limitation on allocation of water to American River Division contractors. “Available CVP water supplies” for all American River Division contractors, including East Bay Municipal Utilities District, is limited to the quantity of water available from Folsom Reservoir. (See attached letter from Acting Regional Director Kirk C. Rodgers to Interested Parties, dated July 20, 2001.) Accordingly, the Draft EIS should recognize this limitation and that allocation of water to the American River Division may differ from CVP contractors in other divisions due to those other divisions have water available from different or more diverse sources.

3

It is important to note that, although limited to water from Folsom, the American River Division contractors are not entitled to either a priority to water available from Folsom or Reclamation re-operating Folsom Reservoir for the benefit of their non-CVP water rights. For many years, certain American River Division contractors have asserted they have a priority under their water service contracts to CVP water based on area of origin protections, (Water Code 11128, 11460), and a condition of State Water Resources Control Board Decision 893. Those American River Division contractors have also asserted Reclamation must re-operate the CVP for their benefit based on the terms of contracts regarding American River Division contractors’ non-CVP water rights. Throughout the period those assertions have been made, the United States has properly and repeatedly rejected them.

4

- The claimed priority under the area of origin protections is contrary to the plain words of the Water Code, a point reflected in *Tehama-Colusa Canal Authority v. U.S. Dept. of Interior*, 721 F.3d 1086 (9th Cir. 2013), *cert. denied*, 13-836, 2014 WL 138371 (U.S. Mar. 24, 2014) and Attorney General Opinion No. 53-298, dated January 5, 1955.
- The condition from Decision 893, cited by American River Division contractors, does not provide American River Division contractors with a priority. The terms of the water service contracts they hold with Reclamation govern. This reading of Decision 893 is recognized in the cover letter the State Water Resources Control Board used when transmitting Decision 893 and is consistent with *Tehama-Colusa Canal Authority v. U.S. Dept. of Interior*, 721 F.3d 1086 (9th Cir. 2013), *cert. denied*, 13-836, 2014 WL 138371 (U.S. Mar. 24, 2014).

- And, although certain American River Division contractors hold contracts with Reclamation concerning non-CVP water rights, the contracts do not require Reclamation treat the American River Division contractors in a manner that harms other CVP contractors. Contracts previously identified by American River Division contractors include a commitment by Reclamation to convey non-CVP water through Folsom Reservoir. That commitment, however, does not require re-operation of Folsom Reservoir for the benefit of the American River Division contractors. In the contracts, Reclamation agreed to use “reasonable efforts” to ensure access to the non-CVP water. And, even that commitment is tempered, as Reclamation will use reasonable efforts provided they are consistent with overall operation of the CVP.²

4

Misplaced Reliance on Environmental Parameters

The Draft EIS conducts its aquatic resources impact assessment by relying, in part, on calculations and comparisons of various parameters derived from the CalSim II and Delta Simulation models. The Draft EIS suggests that changes in these parameters can be used as indicators of effects to aquatic resources, such as fish. For instance, the Draft EIS uses calculated changes in the computed position of the Delta salinity gradient known as “X2” to assess potential impacts to aquatic resources. (See Draft EIS p. 10-30.) Another parameter the Draft EIS relies on is the extent of flow alteration in the Old and Middle River portions of the Delta (“OMR”). The use of the calculated difference in X2 and OMR flows as biological metrics should be done with caution. Data and studies that consider the impact of changes in X2 or OMR flow have a high degree of scientific uncertainty and do not establish a mechanistic relationship to fish populations.

5

Regarding X2, for instance, there is still much uncertainty regarding the observed biological responses of fish and other biota to X2. The reported X2 relationships with Delta biota are simple correlations. And, as with such statistically derived relationships, biological responses to X2 do not necessarily reflect direct causal relationships. In fact, in very few cases has anyone developed a mechanistic understanding of the relationship. One exception is the splittail whose population increases when river flows inundate floodplains and expand spawning and rearing habitat; a phenomenon that is significantly correlated with X2 position, but not driven by X2 position in and of itself. Thus, simply using a comparison of calculated X2 positions is an imprecise way to assess impacts to aquatic resources.

² See, e.g., Contract No. 14-06-200-5515A, Art. 3(d) (providing “[t]he United States shall make all reasonable efforts, consistent with the overall operation of the Project, to maintain sufficient flows and level of water from the Folsom Reservoir and in the Canal to furnish water to the City at the delivery points...”); Contract No. 14-06-200-4816A, Art. 3(f) (providing “[t]he United States shall make all reasonable efforts, consistent with the over-all operation of the Project, to maintain sufficient flows and levels of water in the Canal to furnish water to the Company at the full designed capacity of the turnout established as the delivery point...”).

Similarly, there are large uncertainties with the reported relationships between changes in OMR flows and effects on different fish species. There are numerous factors that influence entrainment and survival in the southern Delta including the influence of tides and instantaneous velocities, swimming ability, the location of the fish in the water column, turbidity, and previous distribution of the fish, to name a few. Simply evaluating OMR flows in isolation will provide little insight into potential impacts to fish due to changes in OMR flows. For all of these reasons, if Reclamation continues to use these parameters to assess impacts to aquatic resources, Reclamation must revise the Draft EIS to reflect the limitations/uncertainties of the science.

Thank you in advance for your consideration of the Authority's comments.



Dan Nelson
Executive Director
San Luis & Delta-Mendota Water Authority

Attachments

- Cover Letter for State Water Resources Control Board Decision 893
- Tehama-Colusa Canal Authority v. U.S. Dept. of Interior, 721 F.3d 1086 (9th Cir. 2013), cert. denied, 13-836, 2014 WL 138371 (U.S. Mar. 24, 2014)
- Attorney General Opinion No. 53-298, Jan. 5, 1955
- July 20, 2001 Letter from Acting Regional Director Kirk C. Rodgers to Interested Parties
- Contract No. 14-06-200-5515A
- Contract No. 14-06-200-4816A

ATTACHMENTS

Cover Letter for State Water Resources Control Board Decision 893

May 1958

STATE OF CALIFORNIA
State Water Rights Board

1401 21ST STREET
P. O. BOX 1892
SACRAMENTO 7, CALIFORNIA

Henry Holsinger, Chairman
W. P. Rowe, Member
Ralph J. McGill, Member

L. K. Hill
Executive Officer

March 21, 1958

Decision on Major Applications to Appropriate
Water from American River System

To: Applicants, Protestants,
and Other Interested Parties

Attached is a copy of Decision D 893 of the State Water Rights Board adopted on March 18, 1958, in connection with the subject applications.

The Board found that unappropriated water normally exists in the American River system except during the months of August, September and October, and ordered that permits be issued to the City of Sacramento, Georgetown Divide Public Utility District and the United States Bureau of Reclamation subject to certain terms and conditions set forth on pages 61 through 74 of the decision.

Applications by all other agencies were denied upon the basis that said agencies either lacked right of access to Folsom and Nimbus Reservoirs of the United States from which they sought to appropriate, were not in position to proceed within a reasonable time with construction work and in applying the water to beneficial use, or that approval of the applications would not be in the public interest.

Although the applications of Placer and El Dorado Counties were denied the Board has ordered certain terms and conditions be inserted in the permits to be issued to the City of Sacramento and the United States so that future upstream development in those counties will not be hampered by the projects of the City and the Federal Government. Also, the Board has ordered that conditions be inserted in permits of the United States which will preclude the contracting for water service on a permanent basis outside of the counties of Placer, Sacramento and San Joaquin until the water users within those counties have had a reasonable opportunity, 10 years, to obtain a water supply from the United States at Folsom and Nimbus Reservoirs.

Very truly yours,

L. K. Hill
L. K. Hill
Executive Officer

Encl.

Tehama-Colusa Canal Authority v. U.S. Dept. of Interior

721 F.3d 1086
United States Court of Appeals,
Ninth Circuit.

TEHAMA–COLUSA CANAL AUTHORITY,
Plaintiff–Appellant,
v.

UNITED STATES DEPARTMENT OF THE
INTERIOR; Kenneth Lee Salazar, in his official
capacity as Secretary of the Interior; United States
Bureau of Reclamation; Michael L. Connor, in his
official capacity as the Commissioner of
Reclamation; Donald R. Glaser, in his official
capacity as Regional Director of the Bureau of
Reclamation for the Mid–Pacific Region,
Defendants–Appellees,
San Luis & Delta Mendota Water Authority;
Westlands Water District,
Intervenor–Defendants–Appellees.

No. 11–17199. | Argued and Submitted Dec. 5, 2012.
| Filed July 1, 2013.

Synopsis

Background: Association of water contractors which obtained federal water from Sacramento River Division of Central Valley Project (CVP) brought action against Department of Interior, its Secretary, Bureau of Reclamation and related parties, seeking to establish superior water rights under CVP water service contracts in Sacramento Valley. The United States District Court for the Eastern District of California, Oliver W. Wanger, Senior Judge, 819 F.Supp.2d 956, granted summary judgment in favor of defendants, holding that all claims arising before February 11, 2004 were time-barred, and that association was not entitled to priority water allocation under the CVP contracts. Association appealed.

Holdings: The Court of Appeals, Rawlinson, Circuit Judge, held that:

[1] area of origin statutes did not bestow priority water rights upon association;

[2] association and its members were not entitled to the full complement of water contracted for, and could have to endure pro rata reduction in times of shortage; and

[3] association and its members were foreclosed from challenging any provision of the renewal contracts.

Affirmed.

West Headnotes (7)

[1] **Federal Courts**

↔ Government contracts

When the United States is a party to an agreement entered into pursuant to federal law, that law governs interpretation of the contract.

[2] **Contracts**

↔ Language of contract

Contracts

↔ Language of Instrument

When contract terms are clear, the parties' intent must be ascertained from the contract, and the contract terms connote their ordinary meaning.

[3] **Administrative Law and Procedure**

↔ Nature and Form of Remedy

When there is no provision for judicial review in legislation, court reviews challenged agency action pursuant to the Administrative Procedure Act (APA). 5 U.S.C.A. § 706.

[4] **Water Law**

↔ Contracts between federal government and local districts or associations

Area of origin statutes did not compel the Bureau of Reclamation to prioritize allocation of

federally appropriated water to members of association of water contractors which obtained federal water from Sacramento River Division of Central Valley Project (CVP); because association and its members held no water permits issued by California's State Water Resources Control Board that would establish priority under area of origin statutes, the Bureau's continued rejection of priority provisions in the water service contracts flouted no applicable law.

§ 870.

[7]

Water Law

◆ Distribution of project waters

Water users cannot assert any superior right to stored water under area of origin principles; rather, water rights to previously diverted and stored water are governed by water permits and water contracts.

[5]

Water Law

◆ Contracts between federal government and local districts or associations

Association of water contractors, which obtained federal water from Sacramento River Division of Central Valley Project (CVP), and its members were not entitled to the full complement of water contracted for, and could have to endure pro rata reduction in times of shortage, along with other Central Valley Project (CVP) contractors; renewal contracts entered into by association and its members expressly and explicitly provided that in times of shortage, the Bureau of Reclamation could divert water to other contractors to meet the Bureau's overall goal to provide water to the maximum number of users for the greatest potential benefit.

[6]

Water Law

◆ Contracts between federal government and local districts or associations

Because association of water contractors, which obtained federal water from Sacramento River Division of Central Valley Project (CVP), and its members were parties to the validation action and because the validation action resolved the validity of the renewal contract provisions, they were foreclosed from challenging any provision of the renewal contracts. West's Ann.Cal.C.C.P.

Attorneys and Law Firms

***1087** Steven P. Saxton (argued), Downey Brand LLP, Sacramento, CA; Ellen Lee Trescott (argued), Adams Broadwell Joseph & Cardozo, Sacramento, CA; J. Mark Atlas, Willows, CA, for Plaintiff-Appellant.

Ignacia S. Moreno, Assistant Attorney General, Vivian H.W. Wang (argued), David W. Gehlert, Charles R. Shockey, and E. Ann Peterson, Assistant United States Attorneys, United States Department of Justice, Environment & Natural Resources Division; Amy Aufdemberge and Shelly Randel, Of Counsel, United States Department of the Interior, Office of the Solicitor, Washington, D.C., for Defendants-Appellees.

Daniel J. O'Hanlon (argued), Hanspeter Walter, and Rebecca R. Akroyd, Kronick, Moskovitz, Tiedemann & Girard, Sacramento, CA, for Intervenor Defendant-Appellees San Luis & Delta-Mendota Water Authority and Westlands Water District.

H. Craig Manson, General Counsel, Westlands Water District, Fresno, CA, for Intervenor Defendant-Appellee Westlands Water District.

***1088** Jennifer L. Spaletta, Jeanne M. Zolezzi, and Natalie M. Weber, Herum Crabtree, Stockton, CA, for Amici Curiae Stockton East Water District and Solano County Water Agency.

Alan B. Lilly and Katrina C. Gonzales, Bartkiewicz, Kronick & Shanahan, Sacramento, CA, for Amicus Curiae Northern California Water Association.

Robert E. Donlan and Elizabeth P. Ewens, Ellison, Schneider & Harris L.L.P., Sacramento, CA, for Amici Curiae Alameda County Water District, Castaic Lake Water Agency, Coachella Valley Water District, Kern County Water Agency, Metropolitan Water District of Southern California, Mojave Water Agency and Palmdale Water District.

Kamala D. Harris, Attorney General of California, Kathleen A. Kenealy, Senior Assistant Deputy Attorney General, Robert W. Byrne, Supervising Deputy Attorney General, William Jenkins, Deputy Attorney General, San Francisco, CA, for Amici Curiae California Water Resources Control Board and Department of Water Resources.

Appeal from the United States District Court for the Eastern District of California, Oliver W. Wanger, Senior District Judge, Presiding. D.C. No. 1:10-cv-00712-OWW-DLB.

Before: STEPHEN S. TROTT and JOHNNIE B. RAWLINSON, Circuit Judges, and FREDERIC BLOCK, Senior District Judge.*

Opinion

OPINION

RAWLINSON, Circuit Judge:

The Tehama-Colusa Canal Authority (Canal Authority) appeals the district court's decision to grant summary judgment to the Department of Interior (Interior), Bureau of Reclamation (Bureau), San Luis & Delta-Mendota Water Authority (San Luis), and Westlands Water Authority (Westlands).

We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court's decision on the alternate basis that California Water Code § 11460 does not require the Bureau to provide Central Valley Project contractors priority water rights, because contracts between the Canal Authority and the Bureau contain provisions that specifically address allocation of water during shortage periods.

I. BACKGROUND

A. Procedural History¹

Canal Authority is a joint powers authority comprised of sixteen water agency members. Canal Authority initiated this action against Interior; the Secretary of Interior

(Secretary); the Bureau; the Bureau's regional director of the Mid-Pacific Region; and intervenors, San Luis and Westlands, to establish priority water rights under Central Valley Project (CVP) water service contracts in the Sacramento Valley. Specifically, Canal Authority requested a ruling limiting the export of water south of the Sacramento-San Joaquin Delta (Delta) until Canal Authority and its members received 100% of the water supply referenced in their CVP contracts. Canal Authority sought injunctive and declaratory relief.

Canal Authority maintained that the Bureau's water shortage allocations failed to adhere to area of origin protections as provided in *1089 California Water Code (CWC) §§ 11460, 11463, and 11128; Reclamation Law; the Fifth Amendment; and state law water rights articulated by the United States Supreme Court in *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978).

The defendants sought summary judgment on the bases that Canal Authority's Administrative Procedure Act claims were subject to the six-year statute of limitations, and that the Canal Authority's interpretation of § 11460 did not grant water allocation priority to the Canal Authority or its members. The district court granted summary judgment for the defendants, holding that all claims arising before February 11, 2004 were time-barred, and that Canal Authority was not entitled to priority water allocation under the CVP contracts. Canal Authority filed this timely appeal.

B. CVP Operations and Allocation of Water

The CVP operates under a Coordinated Operating Agreement between the Bureau and the California State Department of Water Resources (DWR) as an integrated unit. Contractors receiving water from the CVP do not apply for appropriative water rights from the State Water Resources Control Board (SWRCB), as would be required to perfect a water right from a California water source. Rather, water users contract directly with the Bureau for water allocations. Indeed, not one of the Canal Authority's members has ever applied for or received a water rights permit from the SWRCB.

The Bureau normally allocates CVP water on a pro rata basis, except when operational constraints or contract provisions dictate priority allocation. In dry water years, all CVP contractors have received less than their full contractual complement of water. When water shortages occur, contractors south of the Delta usually bear an increased burden of the shortages.

The two drought years at issue in this case are 2008 and 2009. In 2008, Canal Authority and other north-of-Delta water service contractors received 100% of their contractual water allocations from the Bureau. South-of-Delta contractors only received 50% of their allocations. In 2009, the Governor of California declared a state of emergency because of the drought. During that year, Canal Authority and other north-of-Delta contractors received 40% of their allocations, while south-of-Delta contractors received 10%.

C. State Law Area of Origin Statutes

The area of origin statutes, CWC §§ 11460–11465, were enacted to alleviate the concern that construction of the CVP would result in inadequate water supplies for local users. It is undisputed that the Bureau's appropriation of water for the CVP is subject to the area of origin statutes. However, an important distinction is that while the area of origin statutes help to determine the total quantity of water available to the Bureau for allocation, those statutes in no way control how the water is allocated by the Bureau once acquired.

D. The Bureau's Permits for CVP Water Supply

In 1961, the SWRCB approved the United States' application to appropriate Sacramento River water for the CVP. This approval, known as Decision 990 (D-990), recognized that one of the CVP's principal functions was to export water from the Sacramento River watershed into the San Joaquin Valley.

D-990 incorporated the SWRCB's interpretation of the area of origin statutes by acknowledging that the public interest required that water originating in the Sacramento *1090 Valley Basin be made available for use within the Basin and the Delta before it was exported to more distant areas. Protection of the articulated public interest was manifested by the condition set forth in Term 22,² which conditioned the Bureau's water rights permits. Term 22 established that the Bureau's water permits were "subject to rights initiated by applications for use within said watershed and Delta regardless of the date of filing said applications." Term 22 was designed to protect appropriators of water with permits, not contractors who obtained water through CVP contracts.

The condition reflected in Term 23³ addressed the use of CVP water by water users within an area of origin. Rather than requiring CVP water to be allocated for the benefit of areas of origin, Term 23 granted then-current water users a three-year window to request water service contracts

from the Bureau, which contracts would be preferred over requests from users outside the watershed. Also included in Term 23 was a ten-year preference for then-water users to obtain a water service contract.

In 1978, the SWRCB modified the Bureau's CVP permits to require the Bureau to meet water quality standards in the Delta and Suisun Marsh by either releasing water from storage or curtailing diversions, so that outflow from the Delta would be sufficient to prevent sea water from intruding into the Delta. The California Court of Appeal affirmed the SWRCB decision (Decision 1485), and recognized the SWRCB's authority to modify the Bureau's water right permits.

E. Application of the Area of Origin Statutes by SWRCB

Two Canal Authority member agencies filed a complaint with the SWRCB in 1991 claiming preferential access to CVP water supply under the area of origin statutes. The SWRCB rejected the claim, finding that Canal Authority members had no preferential access to CVP water supply under area of origin statutes. The SWRCB interpreted CWC § 11460 as protecting areas of origin, but with no guarantee that the water supply needs of the entire area of origin, or any particular water users within the area of origin, would be met. Rather, CWC § 11460 protected water users within the area of origin against export appropriations. In other words, CWC provided a guarantee that the SWRCB would not reject new applications in the area of origin due to unavailability of water for appropriation. Area of origin protection was secured by filing an application with the SWRCB and receiving a water rights permit⁴ with seniority vis à *1091 vis the state Department of Resources and the Federal Bureau of Reclamation as exporters.

"The SWRCB rejected [Canal Authority's] arguments that the CVP is required under [CWC] §§ 11460, et seq. to supply water to meet the needs of users in the Sacramento Valley...." *Tehama-Colusa Canal Auth. v. U.S. Dep't of Interior (Tehama)*, 819 F.Supp.2d 956, 970 (E.D.Cal.2011) (citation and internal quotation marks omitted). "On reconsideration, the Board explained: [Canal Authority] has been advised in the past that the appropriate way to obtain additional service water supplies under the Watershed Protection Act is to file applications to appropriate the additional water...." *Id.* (citation and internal quotation marks omitted).

F. The Disputed CVP Water Service Contracts

CVP water is available only through a water service contract between the water user and the Bureau. There are three categories of contracts for the provision of CVP federal water supply. The first category is comprised of "Exchange Contracts" that give express contractual priority to designated "Exchange Contractors" on the basis of their pre-1914 riparian and appropriative rights to the San Joaquin River. *Id.* at 970-71. These Exchange Contractors "traded" their preexisting water rights to the Bureau. *Id.* at 971. The Bureau obtained water permits from the SWRCB that were co-extensive with the exchanged water rights. The Bureau in turn entered into water service contracts with the Exchange Contractors for CVP federal water supply on a priority access basis.

The second category of CVP contracts encompasses "Settlement Contracts" that grant a contractual priority to CVP water supply through the inclusion of provisions limiting the extent of shortage amounts. These contracts typically arose from pre-existing water rights.

The third category contains contracts held by CVP contractors north-of-Delta, in-Delta, and south-of-Delta. This category of CVP contractors, which includes Canal Authority and most of its members, held no pre-existing water rights to offer as consideration, and therefore receives no priority access to CVP water supply.

1. Canal Authority Members' Right to CVP Water under Their Water Service Contracts

Canal Authority members executed their original CVP water service contracts in the 1960s and 1970s. All the original Canal Authority contracts contained shortage provisions that permitted the Bureau to apportion and reduce available water supply in years of shortage. Before these original contracts expired in 1995, the Bureau delivered less than 100% of contract amounts to Canal Authority members and Westlands in water shortage years 1977, 1990, 1991, 1992, and 1994.

In 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA), Pub.L. No. 102-575, 106 Stat. 4706 (1992), which reallocated priorities for use of CVP water. Among other things, the CVPIA precluded the Secretary from entering into new CVP contracts for delivery of CVP water for any purpose other than fish and wildlife until certain environmental requirements were met. The CVPIA also directed that 800,000 acre-feet of "project yield" be immediately dedicated to the implementation of fish, wildlife and habitat restoration purposes established by the Act. *Tehama*, 819 F.Supp.2d

at 972. The passage of the CVPIA occurred when many CVP contracts were just about to expire.

*1092 2. The CVP Interim Contracts

In 1995, Canal Authority members entered into "interim" renewal contracts pending review and assessment of long-term renewal contracts. *Id.* Interim renewal contracts commenced in 1995 and were subsequently renewed for periods of up to two years until 2005. These interim contracts included water shortage provisions authorizing the Bureau to determine conditions of shortage and apportion the reduced available water supply among CVP contractors. The interim contracts did not provide for preferential water allocations based on area of origin considerations. During the span of the interim contracts, the Bureau reduced available water supply among all CVP water service contractors in shortage years 1995, 1997, 1999, and 2001. The Canal Authority CVP water service contracts included a shortage provision through 2005.

3. The Bureau's Interpretation and Performance of Canal Authority's Current Contracts

In the process of discussing the renewal of long-term contract provisions, the Bureau and Canal Authority members debated at length the applicability of area of origin laws to the CVP contracts and the extent of the Bureau's authority to reduce water deliveries in times of shortage.

The Bureau took the position that CWC § 11460 did not apply to the allocation and delivery of CVP water under CVP contracts. As early as 1994, the Bureau issued an Area of Origin Issue Paper articulating the Bureau's position that § 11460 is "directed toward obtaining prior water rights, not obtaining deliveries of water under the Project's rights." *Id.* (citation omitted). In 1996, another Bureau draft report confirmed that area of origin statutes in California water law "do not guarantee that the water supply needs of an entire area of origin, will or can be met." *Id.* (citation omitted).

The Bureau explained that area of origin statutory provisions are not a part of the water delivery contract between the water user and the Bureau. Instead, the area of origin provisions are part of the water rights in the region. In sum: "[a]rea of origin statutes do not establish

any priority to the allocation of CVP contract water or ... CVP water used for implementation of the CVPIA....” *Id.* (citation and alterations omitted). In 2000, the Bureau reiterated: “Area of origin/county of origin statutes do not give any CVP user a priority over any other CVP user regarding water service provided by CVP contracts ... this is also the position of the State Water Resources Control Board.” *Id.* at 973 (citation and second alteration omitted). In keeping with its stated position, the Bureau consistently rejected requests that an area of origin provision be included in north-of-Delta CVP contracts. Canal Authority acknowledged that “the Bureau’s conclusions come as no surprise, as this is a restatement of positions they [sic] have articulated on numerous occasions in the past....” *Id.* (citation omitted).

4. Long-term Renewal Contracts with Shortage Provisions and No Priority Allocation Terms

All Canal Authority members executed long-term CVP water service contracts in 2005 (renewal contracts). Each renewal contract contains shortage provisions that are substantively identical to the shortage provision in the prior long-term contracts under which the Bureau declared conditions of shortage, and allocated less than full contractual amounts to Canal Authority and its members. The renewal contracts ensured operation of the CVP “for diversion, storage, carriage, distribution and beneficial use, for flood control, irrigation, municipal, domestic, industrial, fish *1093 and wildlife mitigation, protection and restoration, generation and distribution of electric energy, salinity control, navigation and other beneficial uses.” *Id.*

Article 12 of the renewal contracts authorized the Bureau to determine shortages and apportion waters in times of shortage without regard to area of origin. In the sixty-plus years of the CVP’s existence and the almost forty years of disputes with Canal Authority regarding area of origin priority, the CVP’s practice and position have remained constant.

5. Validation of Renewal Contracts in State Court

Article 38 of the renewal contracts provides that each Canal Authority member must obtain a state court judgment validating its water services contract with the Bureau. This validation process was completed by each Canal Authority member. The effect of the validation

process was to establish the enforceability of the renewal contracts under state law.

Following execution and validation of the renewal contracts, the Bureau continued to make water deliveries and to reduce water allocations in years when shortages were declared, as it had done under the original and interim contracts. Invoking Article 12, the Bureau declared conditions of shortage in 2007, 2008, and 2009. The Bureau delivered less than full contract amounts to all CVP water service contractors, including Canal Authority members, in 2008 and 2009. This action followed.

II. STANDARDS OF REVIEW

We review *de novo* the district court’s grant of summary judgment and the district court’s interpretation and application of federal statutes. *See San Luis & Delta–Mendota Water Auth. v. United States*, 672 F.3d 676, 699 (9th Cir.2012).

^[1] Contract interpretation is a mixed question of law and fact that we also review *de novo*. *See Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1034 (9th Cir.2005). When the United States is a party to an agreement “entered into pursuant to federal law,” that law governs interpretation of the contract. *Id.* “[F]ederally-funded water reclamation products are by nature necessarily federal, and we have therefore consistently applied federal law to interpret reclamation contracts....” *Id.* (citation and internal quotation marks omitted).

^[2] “A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations....” *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir.2000), *as amended* (citation omitted). When the contract terms are clear, the parties’ intent must be ascertained from the contract, and the contract terms connote their ordinary meaning. *See id.*

^[3] When there is no provision for judicial review in legislation, as with the CVPIA, we review the challenged agency action pursuant to the APA. *See San Luis & Delta–Mendota Water Auth.*, 672 F.3d at 699. We will only set aside an agency’s action when that action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law....” *Id.* at 699–700 (citation omitted). When the agency has articulated a rational connection between the facts and the decision made, we will uphold the agency’s action. *See id.* at 700.

III. DISCUSSION

A. CWC § 11460 Does Not Compel the Bureau to Prioritize Allocation of Federally Appropriated Water to Canal Authority Members

^[4] The renewal contracts to which Canal Authority and its members mutually *1094 assented did not include area of origin language or priority distribution provisions. During negotiations, the Bureau steadfastly rebuffed efforts to include terms that would provide priority in shortage periods. When Canal Authority and its members signed the renewal contracts, there was absolutely no misunderstanding of the Bureau's position regarding area of origin protection, priority rights, or shortage protection. Indeed, Canal Authority acknowledged the Bureau's consistent and persistent negotiating stance that area of origin law did not afford Canal Authority and its members priority to CVP water supply. Considering the plain language and terms of the contracts, the Bureau did not act arbitrarily when it rejected Canal Authority's demand to prioritize federally appropriated water to Canal Authority and its members. *See San Luis & Delta-Mendota Water Auth.*, 672 F.3d at 700 (noting that agency action should be upheld when the agency articulates a rational connection between its decision and the facts).

Of course, as with any other contract, the Bureau could not flout the law in declining to include area of origin provisions in the renewal contracts. *See Peterson v. United States Dep't of Interior*, 899 F.2d 799, 812 (9th Cir.1990) (explaining that water district contracts must conform to governing law). Indeed, the renewal contracts contained provisions requiring adherence to state and federal law.

However, as discussed above, CWC § 11460 has not been interpreted so as to provide priority for Canal Authority and its members in the realm of federally protected water. *See Tehama*, 819 F.Supp.2d at 970. Because Canal Authority and its members hold no water permits issued by the SWCRB that would establish priority under CWC § 11460, the Bureau's continued rejection of priority provisions in the water service contracts flouted no applicable law.

B. Canal Authority's Water Service Contracts Temper Their Rights to a Full Complement of Contracted Water and any Claims to Priority Delivery of Water

In 1993, we held that the Bureau was not bound to first satisfy the needs of water district contractors when the

San Luis Act does not mandate it. *See Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 671 (9th Cir.1993). Nothing has changed.

^[5] The Bureau has adhered to its interpretation of the San Luis Act, up to and including the most recent 2005 renewal contracts. Article 12 of those contracts provides in no uncertain terms that Canal Authority and its members are not entitled to the full complement of water contracted for, and may have to endure pro rata reduction in times of shortage, along with other CVP contractors. Article 12 expressly and explicitly provides that in times of shortage, the Bureau may divert water to other contractors to meet the Bureau's overall goal to provide water to the maximum number of users for the greatest potential benefit. Article 12 forecloses any persuasive argument that Canal Authority and its members are entitled, during times of shortage, to receive the full complement of contracted water supply. *See id.* at 671.

We agree with the district court that Canal Authority's belated challenge to the shortage provisions in the renewal contracts is unavailing. Canal Authority's contention that no condition of shortage can exist under the renewal contracts to the extent water is shipped to south-of-Delta contractors is belied by the definition of condition of shortage in the renewal contracts themselves. The contracts define *1095 shortage in the context of "the Project." In turn, "the Project refers to the *entire* Central Valley Project," north and south of the Delta. *Tehama*, 819 F.Supp.2d at 991 (emphasis added). This clear contract language controls. *See Klamath Water Users Protective Ass'n*, 204 F.3d at 1210. Similarly, Canal Authority's continued reliance on the provisions of CWC § 11460 is unwarranted in view of the Bureau's and SWCRB's unvarying interpretations to the contrary. As the district court noted, there is a "total absence of any language [in the renewal contracts] granting an area of origin preference, or that limits or abrogates the Article 12 allocation mandate ..." *Tehama*, 819 F.Supp.2d at 995.

C. Canal Authority Is Foreclosed from Asserting Statutory Rights Under Area of Origin and Water Priority Theories

^[6] Once the renewal contracts were finalized among the parties, Canal Authority and its members invoked the provisions of California Code of Civil Procedure (Cal.CCP) § 870 to obtain judgments validating each of the renewal contracts under California law. *See Tehama*, 819 F.Supp.2d at 996. Each validation judgment ensured the enforceability and validity of the renewal contracts. Each validation judgment certified that *all* provisions of the renewal contract "are lawful, valid, enforceable, and

binding upon the respective parties thereto...."). *Id.* (citations omitted). Because the validation judgments became final in 2005, Canal Authority and its members are now foreclosed from challenging any provision of the renewal contracts. *See id.* at 996–97; *see also* Cal. CCP § 870⁵; *Embarcadero Mun. Improvement Dist. v. Cnty. of Santa Barbara*, 88 Cal.App.4th 781, 792, 107 Cal.Rptr.2d 6 (2001) (recognizing that challenges to validated contracts are precluded after expiration of the applicable statute of limitations for appeal).

The cases cited by Canal Authority to support its argument that its challenge to Article 12 is alive and well involved agreements or contracts that were not initially valid. *See Fontana Redev. Agency v. Torres*, 153 Cal.App.4th 902, 913, 62 Cal.Rptr.3d 875 (2007) (“[T]he courts cannot validate ongoing illegality....”) (citation omitted); *see also Embarcadero Mun. Improvement Dist.*, 88 Cal.App.4th at 792, 107 Cal.Rptr.2d 6 (describing challenge to expenditure not authorized by the validated agreement); *Redev. Agency of Fresno, Inc. v. Herrold*, 86 Cal.App.3d 1024, 1029–30, 150 Cal.Rptr. 621 (1978) (same). In contrast, the contract provisions at issue in this case are and were at all times valid. Canal Authority and its members voluntarily consented to the validated contracts, and with full knowledge of the Bureau’s interpretation and implementation of the area of origin statutes and the shortage provisions. Canal Authority and its members had a full and fair opportunity to challenge any contract provision during *1096 the validation proceeding, including whether any contract provision ran afoul of California law. Once the contracts were validated, the state court determination became binding upon any subsequent action involving the same parties and the same issue, determination of which was necessary for final resolution of the initial action. *See Cent. Ariz. Irrigation & Drainage Dist. v. Lujan*, 764 F.Supp. 582, 594–95 (D.Ariz.1991). Because Canal Authority and its members were parties to the validation action and because the validation action resolved the validity of the renewal contract provisions, they are now foreclosed from seeking to circuitously undo the contract provisions to which they previously acceded. *See id.*

Canal Authority and its members rely on *SWRCB Cases*, 136 Cal.App.4th 674, 39 Cal.Rptr.3d 189 (2006), to support their argument that area of origin statutes provide priority water appropriation rights. Canal Authority quotes the following language from Justice Robie’s opinion:

To the extent section 11460 reserves an inchoate priority for the beneficial use of water within its

area of origin, we see no reason why that priority cannot be asserted by someone who has (or seeks) a contract with the Bureau for the use of that water. (*See Robie & Kletzing, Area of Origin Statutes—the California Experience* (1979) 15 Idaho L.Rev. 419, 436–438 [discussing right of area of origin users to contract with Department for SWP water].) This does not mean a user within the area of origin can compel the Bureau to deliver a greater quantity of water than the user is otherwise entitled [to] under the contract. It simply means the Bureau cannot reduce that user’s contractual allotment of water to supply water for uses outside the area of origin, absent some other legal basis for doing so that trumps section 11460.

Id. at 758, 39 Cal.Rptr.3d 189 (brackets in the original).

^[7] We agree with the district court that Canal Authority’s reliance on the quoted language is misplaced. *See Tehama*, 819 F.Supp.2d at 984. The rationale espoused in *SWRCB Cases* was tempered by the reasoning in *El Dorado Irrigation District v. SWRCB*, 142 Cal.App.4th 937, 48 Cal.Rptr.3d 468 (2006). Only a few months after penning the *SWRCB Cases* decision, Justice Robie opined in *El Dorado Irrigation District* that, although a plaintiff may generally be entitled to assert priority rights, the plaintiff had no such rights regarding water that was previously diverted and properly stored for future use. *See id.* at 976, 48 Cal.Rptr.3d 468; *see also Tehama*, 819 F.Supp.2d at 983. Justice Robie clarified that § 11460 does not purport to limit in any way the Bureau’s authority to allocate water that was previously diverted and stored in accordance with approved CVP procedures. *See El Dorado Irrigation District*, 142 Cal.App.4th at 974–75, 48 Cal.Rptr.3d 468. Water users simply cannot assert any superior right to that stored water under area of origin principles. Rather, water rights to previously diverted and stored water are governed by water permits and water contracts. *See id.* at 975–76, 48 Cal.Rptr.3d 468. In any event, as the district court noted, the decision in *SWRCB Cases* lacks persuasive power because: (1) CVP contracts were not at issue in that proceeding; (2) there was no comprehensive discussion of the CVP project; and (3) the proposed interpretation of § 11460 by Canal Authority and its members would nullify explicit provisions of the renewal contracts. *See Tehama*, 819

F.Supp.2d at 984–85. The Bureau clearly and consistently articulated the rationale for its stated position regarding allocation of CVP water during shortage periods. Its subsequent allocation of water during *1097 shortage periods in accordance with its stated position was not an abuse of discretion, unreasonable, or contrary to applicable law. *See San Luis & Delta–Mendota Water Auth.*, 672 F.3d at 699–700 (setting standard of review).

IV. CONCLUSION

The district court properly determined that CWC § 11460 does not bestow priority water rights upon Canal Authority and its members. The renewal contracts entered into by the Canal Authority and its members included terms and provisions outlining the procedures to be followed in allocating water resources during shortage periods. The Canal Authority and its members assented to

these terms and provisions in the renewal contracts, and brought actions in state court to validate the renewal contracts pursuant to California law. The Bureau's exercise of discretion when apportioning water during shortage years in accordance with these renewal contracts was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *see also San Luis & Delta–Mendota Water Auth.*, 672 F.3d at 715 (upholding Bureau's discretionary decision against a similar challenge).

AFFIRMED.

Parallel Citations

13 Cal. Daily Op. Serv. 6960, 2013 Daily Journal D.A.R. 8615

Footnotes

- * The Honorable Frederic Block, Senior United States District Judge for the Eastern District of New York, sitting by designation.
- ¹ The facts are derived largely from the district court's thorough opinion. *See Tehama–Colusa Canal Auth. v. U.S. Dep't of Interior*, 819 F.Supp.2d 956 (E.D.Cal.2011).
- ² Term 22 provides in pertinent part:
Direct diversion and storage of water under permits issued ... 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.
(Emphasis added and footnote references omitted).
- ³ Term 23 provides in pertinent part:
The export of stored water under permits issued pursuant to [a]pplications 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 parties not currently using water from Sacramento River and/or Sacramento–San Joaquin Delta.
- ⁴ Neither Canal Authority nor its members hold such permits.
- ⁵ CCP § 870 provides in pertinent part:
(a) The judgment, if no appeal is taken, or if taken and the judgment is affirmed, shall, notwithstanding any other provision of law ..., thereupon become and thereafter be forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other persons, and the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive.
(b) Notwithstanding any other provision of law ..., no appeal shall be allowed from any judgment entered pursuant to this chapter unless a notice of appeal is filed within 30 days after the notice of entry of the judgment, or, within 30 days after the entry of the judgment if there is no answering party...

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