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as long as the other state offered reciprocal rights to Oregon. (Oregon Compiled Laws, Ann. sec. 116-428 (1940), based upon General Laws of Oregon 1911, ch. 224, sec. 1, p. 404, as amended by General Laws of Oregon 1923, ch. 250, p. 350). Since then, Oregon law has been modified to require express legislative permission for any future appropriation or condemnation of water in Oregon for diversion or use outside the boundaries of Oregon (Oregon Laws 1951, ch. 593, p. 1053, effective May 12, 1951, codified as Oregon Rev. Stats. secs. 537.810-537.860).

On January 18, 1951, the United States filed plans and maps in support of this 1951 notice which specifically described works to serve Butte Valley. No authorization for these works has as yet been made, however. The deadline under the statute is January 25, 1955. If no authorization occurs prior to that date, the appropriation will, of course, fail.

Even though the United States may not acquire the right to appropriate water from the Klamath River for the development of Butte Valley by proceeding under Oregon appropriation procedures, Klamath River water may still be made available for this development as part of an appropriation of the waters of the Klamath River between the States of California and Oregon. This may be accomplished either in an interstate compact, such as the one which the California Klamath River Commission has been created to negotiate, or in a decree of the United States Supreme Court in an action between the states for equitable apportionment. Any appropriative rights in Klamath River water which may be acquired in these states under their respective laws prior to any apportionment between them of the waters of that river would have to be accommodated to such apportionment, whether contained in a compact or in a Supreme Court decree (*Hinderlider* v. *LaPlata Co.* (1938), 304 U.S. 92, 106). And the fact that the United States has or has not acquired rights from one of the states to appropriate water from the river for use in a federal reclamation project will not affect the right of the states to an equitable apportionment of the river's flow between them (*Nebraska* v. *Wyoming* (1945), 325 U.S. 589, 629; *Nebraska* v. *Wyoming* (1935), 295 U.S. 40, 43).

Opinion No. 53-298—January 5, 1955

SUBJECT: WATER RIGHTS—Constitutionality of Water Code sections protecting water rights of counties and watersheds of origin; rights of persons in such counties or watersheds, when water becomes necessary for development, to reclaim water appropriated in the interim for use in other areas; application of the county and watershed priorities to the United States in connection with the Central Valley Project; and the right of the State Engineer to include conditions and limitations in permits, all discussed.

Requested by: SENATOR, 5th DISTRICT.

Opinion by: EDMUND G. BROWN, Attorney General.
Wallace Howland, Assistant and Adolphus Moskovitz, Deputy.

The Honorable Edwin J. Regan, Senator from the Fifth Senatorial District, has asked for our complete analysis of the scope and effect of Water Code sections 10505, 11460 and 11463, including particularly our opinion on the following questions:

1) Are these code sections constitutional under article XIV, section 3, of the California Constitution?

2) Under these code sections, would water appropriated for use in areas outside the county where the water originates, or the watershed where the water originates and areas immediately adjacent thereto, be made available later for use in such local areas, if the water became necessary for their development at some time in the future?

3) Are Water Code sections 11460 and 11463 applicable to the United States in the construction and operation of the Central Valley Project?

4) Can the State Engineer, in the proper exercise of his power to condition appropriations of water in the public interest under Water Code section 1253, effectuate the protection contemplated by Water Code sections 11460 and 11463?

The conclusions may be summarized as follows:

1) Water Code sections 10505, 11460 and 11463, properly construed and applied, do not violate article XIV, section 3, of the California Constitution.

2) In the circumstances specified in the statute, Water Code sections 10505 and 11460 would require that water which had been put to use in the operation of the Central Valley Project in areas outside the county of origin, or the watershed of origin and areas immediately adjacent thereto, be withdrawn from such outside areas and made available for use in the specified areas of origin.

3) Water Code sections 11460 and 11463 are applicable to the United States in its operation of the Central Valley Project insofar as the law of California is concerned, but compliance therewith is dependent upon the fact that the United States has affirmatively elected to comply with state law in this respect.

4) The State Engineer is empowered to insert conditions in appropriation permits issued on applications assigned by the Department of Finance under section 10504 which are consistent and coextensive with conditions stipulated by the Department of Finance under sections 10504 and 10505. Further, the State Engineer is empowered to insert in permits issued to any state or federal agency engaged in the construction or operation of the Central Valley Project, as conditions of such permits, the limitations upon the powers of such agencies set forth in Water Code sections 11460 and 11463; however, such limitations are imposed upon such agencies by virtue of the statute, regardless of their inclusion or omission from any such permit granted and issued by the State Engineer.

ANALYSIS

I. *General Discussion of Water Code Sections 10505, 11460 and 11463.*

Water Code section 10505 is commonly referred to as the "county of origin" statute. Water Code sections 11460 and 11463 are the principal operative provisions of what is commonly known as the "watershed protection" statute. These

two statutes were enacted at different times and appear in different parts of the Water Code.[1] However, they have a common purpose, i.e., to reserve for the areas where water originates some sort of right to such water for future needs which is preferential or paramount to the right of outside areas, even though the outside areas may be the areas of greatest need or the areas where the water is first put to use as the result of operations of the Central Valley Project.

None of these sections have been involved in litigation to date. Consequently, they have not been interpreted or construed by any court. While the general legislative intent seems clear, legal minds may differ as to the effect of the statutory enactments when applied to a specific set of facts. Inasmuch as we have been requested to give a "complete analysis of the scope and effect" of these provisions, we have endeavored to depict them in actual operation. However, it must be recognized that contrary arguments may be made to contravene some of the views expressed herein and that the conclusions reached may be considered only as reflecting our best judgment as to the effect of statutes the phraseology of which is not beyond dispute.

The breadth of the inquiry here made makes it desirable to preface our analysis with a few general observations. The development of a co-ordinated state-wide water plan and the embodiment of its initial phases in the Central Valley Project has not been without controversy. Fundamentally the controversy is an economic one, arising from the fact that water has always been in short supply throughout the history of the State. Our water law had its inception in the law of property. The very term "water right" implies a permanent, vested property right to be owned and enjoyed by one owner to the exclusion of all others. Some of the bitterest and most protracted litigation has been over the conflicting interests in water.

Beginning in the 1920's, however, increased engineering knowledge and technological development gave promise of transforming an economy of water scarcity to one of sufficiency for all. Initially the problem was one of capturing and distributing the surplus waters of the North to the arid but fertile regions of the San Joaquin Valley. More recently another factor has been added arising from the extremely rapid growth in population of the southern part of the State. In any event, it was conceived as early as the mid-1920's that the capturing, storing, distributing and putting the waters of the State to beneficial use, in their aggregate quantity, was a task so enormous that it was beyond the capability of privately financed enterprise and must, therefore, necessarily devolve upon the public agencies of the State for its financing and execution. This injection of the State into the ownership and operation of large project works obviously required changes in existing water law. Distribution of the aggregate water resources of the State by a public agency acting in the public interest could not, and cannot be effected wholly within the framework of a water law whose "first in time" and "appropriation to beneficial use" concepts are adequate and equitable in the settle-

[1]All references to section, part and division are to the Water Code, unless otherwise indicated. Italics appearing in quotations have been added.

ment of controversies between the limited interests of plaintiff and defendant in private litigation.

Legislatively, the die was cast in 1927 with the enactment of the Feigenbaum Act, chapter 286 of the Statutes of 1927. The act is discussed in more detail later herein. Suffice it here to say that its effect was:

(a) to authorize the State itself to file on any and all of the unappropriated waters of the State which might be needed in the execution of a general or co-ordinated plan for the development and use of the water resources of the State as a whole;

(b) to subordinate to such State filings any further assertion of private rights to such unappropriated water; and

(c) to limit State action in releasing the priority of its filings or the assignment thereof to instances where such action would result in water development not in conflict with the general or co-ordinated plan.

This enactment was made on the recommendation of a joint Senate-Assembly interim committee that:

"... the State of California should at once take the necessary steps, either through its property officials or by legislation, to file on, or withdraw from filing by private parties, the water rights to be utilized and required for the consummation of the co-ordinated plan." (i.e., the plan for the development of the water resources of California then being formulated by the State Engineer.) (Sen. Jour. 47th Sess., 1927, p. 446.)

Prior to 1927 the law for many years had contained a provision substantially as now codified in section 102, viz:

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

Taken literally, this section would apply to *all* water in the State, including that already privately owned at the time of its enactment. However, as the Supreme Court has pointed out, "It should not require discussion or authority to demonstrate that the state cannot in this manner take private property for public use" (*San Bernardino* v. *Riverside* (1921), 186 Cal. 7, 29-30). Consequently, the statute has been restricted in its application to exclude water rights which vested prior to its passage. Thus, it applies only to unappropriated water (*Palmer etc.* v. *Railroad Commission* (1914), 167 Cal. 163, 175).

The effect of the 1927 legislation was to withdraw the then unappropriated waters of the State filed on by the Department of Finance from any further appropriation by private parties. And, if any further implementation of prior law was needed, the 1927 act established a procedure whereby, within the concepts applicable to privately owned water rights, the State in its role as trustee for the people could fairly be said to perfect its own "right" to water needed for the general or co-ordinated plan to the exclusion of all other persons or parties.

II. *The Origins of the "County of Origin" Preference.*

In the interpretation and evaluation of present preferences to counties of origin, it is important to bear in mind the scope and size of the co-ordinated water plan envisaged at the time of its passage. Southern California was then directing its efforts almost exclusively towards the procurement of Colorado River water and distribution of the waters of northern California was conceived of only in terms of the San Joaquin Valley.

Almost without exception, the reports and documents relating to the general or co-ordinated plan speak of taking only the "surplus" or "excess" waters of the Sacramento River to areas of deficient supply in the San Joaquin Valley. In a 1925 report to the Legislature, the Department of Public Works stated:

> "Further, while the 1921-23 studies demonstrated that there is more than enough water in the Sacramento Valley for its own use, they also show that the surplus of easily developed water is not so great but that its residents would be gravely concerned that the cost of their own water development might not be increased by exportations. * * * In fact, the whole discussion of the diversion of surplus waters from the Sacramento River into the San Joaquin Valley, must be predicated from the institution of a coordinated development in both valleys that gives full protection against present or future loss to the owners of vested rights and to present users of water as well as to those *potential* users whose lands lie tributary to streams from which exportations of water are proposed." (Bull. No. 9, Div. of Engineering and Irrigation, Dept. of Public Works (1925) p. 18.)

Commencing with the 1925 session of the Legislature, a series of bills was introduced to protect the counties of origin against exportation of water which might be needed by them in their own future development. Obviously any such legislation would be a departure from existing water law which required actual reduction to beneficial use as a prerequisite to the establishment of a water right by appropriation. Little wonder, then, that the proponents of such legislation ran into difficulty in drafting an acceptable formula whereby uncertain future rights might be presently acquired. The problem is, in fact, still with us today.

The 1925 Legislature passed Assembly Bill 607 which would have reserved for use in the county of origin fifteen percent of all water appropriated for export. The measure was pocket vetoed by the Governor, presumably in the light of a letter to him from the Director of Public Works and State Engineer dated May 13, 1925, in which it was stated:

> "This Department is in sympathy with the object proposed to be obtained by the language of A.B. 607, but the procedure is so involved and the outcome so questionable, that we doubt the propriety of the measure becoming a law."

Another proposal, Assembly Bill 1079, provided that all diversions outside a watershed of origin would be subject to a reservation of all water necessary to

supply uses within the watershed. It was reported without recommendation by the committee and no further action was taken.

At the beginning of the 1927 session the Legislature received a report from the Department of Public Works concerning the coordinated plan. It contained several statements to the effect that only "surplus" waters would be exported from one area to another. Under the heading of recommendations it was stated that:

> "The new supplies for the deficient areas would be taken from regions of surplus after providing for their complete development." (Bull. No. 12, Div. of Engrg. & Irrig., Dept. of Public Works (1927) p. 48; see also pp. 26, 36).

As already stated, the 1927 Legislature passed the Feigenbaum Act permitting the State to assert a priority, as against subsequent private appropriators, to such of the then unappropriated waters of the State as might be needed for the general or co-ordinated plan. It also passed another so-called "fifteen percent" bill, similar to Assembly Bill 607 of the 1925 session, only to have it again pocket vetoed by the Governor.

The 1929 session of the Legislature had before it a report of a Joint Committee of the Senate and Assembly Dealing with the Water Problems of the State. With regard to the protection of the interests of the counties of origin, this report stated:

> "In supplying areas of deficiency of water from areas of surplus only such water as is not needed to serve vested or other property rights, or necessary for supplying the uses and purposes hereinbefore mentioned should be considered and *no water should be diverted from the area of origin which is now or which may ever be required for any beneficial use within such area of origin.*" (Report of Joint Committee, January 18, 1929, p. 19.)

In a supplemental report, the joint committee recommended the following policy:

> "4. It shall be the policy of the state to extend to the areas of surplus water, from which, under the coordination policy or the development thereof, areas of deficient water may obtain a supply, definite and valid assurance that such areas of surplus from which water is or may be taken shall have a right to ample water for their *ultimate needs*, superior and prior to that of the areas of deficiency to make use of such surplus * * *." (Supplemental Report of Joint Committee, April 9, 1929, p. 5.)

During the 1929 session, the Assembly passed another "fifteen percent" bill (A.B. 1150) which died in the Senate committee to which it was referred.

The 1931 Legislature received from the Division of Water Resources a "Report to the Legislature of 1931 on State Water Plan." This report again emphasized that the State plan contemplated only the transfer from one area to another of water which was surplus. It stated:

> "Under this plan, the basins favored with water in excess of their needs would be furnished a regulated supply in accordance with the requirements of their ultimate development. Waters in excess of their needs would be conveyed to areas of deficiency * * *." (Bull. No. 25, Div. of Water Resources, Dept. of Public Works, January 1, 1931, p. 35.)

Another and more detailed report issued the same year reiterated that:

> "* * * There is and will be a deficiency of supplies" (in the San Joaquin River basin). "In the Sacramento River Basin, on the other hand, the water supply if adequately regulated and conserved, is larger than will be required for ultimate development of that basin * * *." (Bull. No. 26, Div. of Water Resources, Dept. of Public Works, 1931, p. 30; see also p. 45.)

On March 31, 1931 the Legislature received the "Report of the Joint Committee of the Senate and Assembly Dealing with the Water Problems of the State." Therein (p. 29) the Committee repeated its previous recommendation that no water should be diverted from the area of origin "which is now or which may ever be required for any beneficial use within such area of origin."

At the Regular Session of the 1931 Legislature, A.B. 540 proposed a new formula for the protection of the future interests of the areas of origin. It was opposed because of its vague phraseology, and its doubtful efficacy, but not because of its intent to protect the rights of areas of origin. (See letter from State Engineer to Secretary, Irrigation Districts Association of California, March 21, 1931). The bill died in committee.

However, another solution to the problem was found more acceptable. In 1931, the Legislature was called upon to amend the Feigenbaum Act of 1927 by extending the date to which State filings would be exempted from requirements of diligence. S.B. 141 was introduced for this purpose and in its original form was limited to that object. However, it was amended before final passage to provide a further restriction on the authority of the Department of Finance to release from priority or to assign any of the State's filings. In assaying the importance of this amendment, it should be noted that by this time the State had already filed some 25 applications on many of the major streams flowing into the Central Valley. As thus amended and passed, S.B. 141 (Calif. Stats. 1931, Ch. 720, p. 1514) provided that:

> "* * * no such priority shall be released, or assignment made of any such appropriation that will, in the judgment of the state department of finance, deprive the county in which such appropriated water originates, of any such water necessary for the development of such county."

This proviso is now codified as Section 10505 of the Water Code. In the light of its legislative background the following conclusions may be drawn:

(1) The engineering plans developed by the State were predicated upon the reservation to "areas of origin" of water sufficient to meet their ultimate needs, and upon findings that there was a sufficient "surplus" over and above such ultimate requirements to make feasible the transportation of such surplus to areas of deficient water supply, and, specifically, to the San Joaquin Valley.

(2) The Joint Committee of the Legislature repeatedly advocated a policy for enactment into law with such clarity that it is reiterated here:

> "4. It shall be the policy of the state to extend to the areas of surplus water * * * definite and valid assurance that such areas of surplus from which water is or may be taken shall have a right to ample water for their ultimate needs, superior and prior to that of the areas of deficiency to make use of such surplus."

(3) In the three sessions of the Legislature prior to 1931, attempts had been made to enact a law which would protect the future interests of areas of origin.

(4) In 1927, in order to make possible a co-ordinated development of the water resources of several major watersheds by public agencies of the State, the State was authorized to and promptly initiated action to perfect its own "right" to the then unappropriated waters needed for such purpose.

(5) With the "water rights" to the unappropriated waters filed upon by the State itself, and all persons declared subject to the priority of the State's filings, it was conceived that the desired protection for the future interests of the counties of origin could be obtained by placing restrictions upon the authority of State officials to alienate or dispose of the priorities thus vested in the State. This, then, must be taken to be the intent and effect of what is now section 10505 of the Water Code.

(6) Difficulties with the granting of a preference to vague and undefined "mountain regions" (A.B. 540, 1931 Session) were eliminated by granting the preference, in effect, to the "counties of origin," a term readily definable for the purposes of the Feigenbaum Act with sufficient exactitude to satisfy constitutional requirements.

III. *Analysis of Section 10505.*

In order that section 10505 may properly be viewed in its context, the entire text of Part 2 of Division 6 of the Water Code, excepting section 10506 which is not relevant to this discussion, is here set forth:

> 10500. "The Department of Finance shall make and file applications for any water which in its judgment is or may be required in the development and completion of the whole or any part of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State.
>
> "Any application filed pursuant to this part shall be made and filed pursuant to Part 2 of Division 2 of this code and the rules and regulations of the State Engineer relating to the appropriation of water insofar as applicable thereto.
>
> "Applications filed pursuant to this part shall have priority, as of the date of filing, over any application made and filed subsequent thereto. Until October 1, 1955, or such later date as may be prescribed by further legislative enactment, the statutory requirements of said Part 2 of Divi-

sion 2 relating to diligence shall not apply to applications filed under this part, except as otherwise provided in Section 10504."

10504. "The Department of Finance may release from priority or assign any portion of any appropriation filed by it under this part when the release or assignment is for the purpose of development not in conflict with such general or coordinated plan. The assignee of any such application, whether heretofore or hereafter assigned, is subject to all the requirements of diligence as provided in Part 2 of Division 2 of this code. 'Assignee' as used herein includes, but is not limited to, state agencies, commissions and departments, and the United States of America or any of its departments or agencies."

10505. "No priority under this part shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originates of any such water necessary for the development of the county."

Section 10505 is limited in its application to water filed on by the Department of Finance under section 10500. However, section 10500 continues to authorize the filing of applications on unappropriated water which, in the judgment of the Department of Finance, "is or *may be* required" for "the whole or any part of *a* general or coordinated plan." In the light of the background and the date of enactment of this section, it is not confined in its application to any particular "plan," as, for example, the specific "State Water Plan" defined in section 10000 and adopted and approved by section 10002. Neither is it limited to the water requirements of any particular project, such as the Central Valley Project which is the subject matter of Part 3 of Division 6 of the Water Code.

The applications filed to date under section 10500 number more than forty. They may well cover substantially all of the water not previously appropriated or otherwise vested in private ownership within the watersheds involved.

It will be noted that section 10504 authorizes assignment of State applications without limitation as to the identity of the assignee. From this it seems obvious that the Legislature contemplated that assignments would be made to two different classes of assignees, viz:

(a) To the agency or agencies to be eventually authorized to effectuate the general or coordinated plan by constructing and operating project works. Such assignments would, of course, be for the purpose of development not in conflict with the plan, and could be made by the Department of Finance as a routine matter.

(b) To private persons, corporations, municipalities, districts and others, but only in the event that the development and use of the water proposed by the assignee was found to be not in conflict with the general or coordinated plan.

When section 10505 was enacted in 1931, the general or coordinated plan had not yet evolved to the point where it had legislative sanction. There was still no agency of the State authorized to do anything towards effectuating the plan

still in its formulative stage. Section 10505 is cast in such language as to make its provisions applicable to *all* assignments made by the Department of Finance, regardless of the identity of the assignee. "*No* priority shall be released nor assignment made. . . ." which, in the judgment of the Department of Finance, would deprive the county of origin of water needed in its future development. Both the legislative intent and the effect of this provision seem clear: that the priority granted to counties of origin should be applicable to *all* water covered by State filings under section 10500, regardless of whether such filings are assigned to an agency of the State to effectuate the general or coordinated plan, or to some other assignee for development not in conflict with such plan.

Section 10505 has one feature in common with all legislation which confers discretionary authority upon a State agency or official—the protection which it offers is not absolute. Under section 10505, a preferential right is preserved for the counties of origin from the assignment or release of priority of State filings only to the extent that the Department of Finance may have reserved such a right.

Whether an assignment or release shall be made is left to "the judgment of the Department of Finance." The department is not required to hold a hearing before making its judgment. Thus, the section is satisfied if, before making an assignment or release, the department determines in good faith on the basis of information then available to it that the water covered by the application is not necessary for the development of the county of origin, or that the conditions inserted in the assignment or release will adequately preserve for those in the county a preferential right to use the water when they need it.[2] A mere error in judgment by the department in making its determination would not invalidate its action. The action of an administrative body involving the exercise of discretion may be successfully challenged in the courts only if it is arbitrary, capricious, or entirely lacking in evidentiary support. *Tulare Water Co.* v. *State Water Commission* (1921), 187 Cal. 533, 538, 202 Pac. 874, 877; *Mann* v. *Tracy* (1921), 185 Cal. 272, 274, 196 Pac. 484, 485; *Brock* v. *Superior Court* (1952), 109 Cal. App. 2d 594, 605, 241 P. 2d 283, 290; *Roussey* v. *City of Burlingame* (1950), 100 Cal. App. 2d 321, 326, 223 P. 2d 517, 520.

Sectioin 10505 requires that "the county in which the appropriated water originates" be protected from deprivation of any such water necessary for the development of the county. The common sense meaning of the word "originates" in this context would seem to be "falls in the form of precipitation." The protection afforded by the section to each county relates only to the water which falls as precipitation within that county's boundaries. But the need to be considered is that of the entire county, regardless of whether the place of need is in a different watershed from the place where the water originates. That is, each county is to be regarded as a unit, and all water originating therein which is covered by

[2] A more detailed discussion of the functions and responsibilities of the Department of Finance in making assignments under sections 10504 and 10505 is found in Opinion 54-159 (25 Ops. Cal. Atty. Gen. 32).

Department of Finance applications is, to the extent that such water may be needed anywhere therein, subject to the protection of the statute. Hence, the place of use of the water is the sole standard by which the preference is established, and the extent of the preference is limited to the aggregate amount of water which falls in the form of precipitation upon the county in question.

A person desiring water for use in a county of origin for development not in conflict with the general or coordinated plan must first apply to the Department of Finance for an unconditional assignment of so much of the State's application filed under section 10500 as may be necessary to satisfy his needs. Such action is necessary since any application which such person might otherwise initiate and file would be subject to the priority of the State's application.

It is the function of the Department of Finance to determine whether such an application for an unconditional assignment satisfies the conditions laid down in sections 10504 and 10505. The granting of such an unconditional assignment establishes the preferential or priority status of the application so assigned as against an earlier assignee of the department who has been exporting water out of the county of preference subject to a reservation in his assignment which protects the county of origin preference.

Upon the granting by the Department of Finance of such an unconditional assignment, the application so assigned must then be pursued to permit before the State Engineer under sections 1200-1800. Determination of all of the questions involved in the processing of an application to permit are still for the State Engineer in the exercise of his normal functions concerning the granting of appropriative permits.

IV. *Analysis of Sections 11460 and 11463.*

Sections 11460 through 11463 are codifications of section 11 of the Central Valley Project Act of 1933 (chapter 1042 of the Statutes of 1933). They provide as follows:

> 11460. "In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."
>
> 11461. "In no other way than by purchase or otherwise as provided in this part shall water rights of a watershed, area, or the inhabitants be impaired or curtailed by the authority, but the provisions of this article shall be strictly limited to the acts and proceedings of the authority, as such, and shall not apply to any persons or State agencies."
>
> 11462. "The provisions of this article shall not be so construed as to create any new property rights other than against the authority as provided in this part or to require the authority to furnish to any person

without adequate compensation therefor any water made available by the construction of any works by the authority."

11463. "In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange."

At the outset, it should be noted that these provisions apply only to any project described in part 3 of division 6.

By section 11460 the Water Project Authority is prohibited from depriving certain described areas directly or indirectly of the prior right to certain water. Some comment seems desirable concerning the descriptions of the areas of preference. The areas to be protected are (1) "a watershed or area wherein water originates," and (2) "an area immediately adjacent thereto which can conveniently be supplied with water therefrom."

In the first category, the term "watershed" must be taken as synonymous with the term "area wherein water originates." Otherwise, the latter term would be completely indefinite. It is obvious that an "area wherein water originates," without further qualification, could be as large or as small as one desired to make it. For example, the entire State of California is an area wherein water originates. On the other hand, a "watershed" is capable of fairly accurate delineation. It is defined as "The whole region or area contributing to the supply of a river or lake; drainage area; catchment area or basin" (Webster's New International Dictionary, 2d ed., unabridged, 1941, p. 2886). A reasonable and practicable construction of a statute which avoids fatal uncertainty is, of course, to be preferred (*Drummey* v. *State Board of Funeral Directors* (1939), 13 Cal. 2d 75, 80, 87 P. 2d 848, 851). Thus, the first type of area to receive protection is a watershed, i.e., the region or area which contributes to the supply of the stream in question.

The second category of areas described extends the protection of the statute beyond the confines of the particular watershed to any immediately adjacent area which can conveniently be served with water from that watershed. The word "adjacent" means "lying near or close at hand" (Funk & Wagnall's New Standard Dictionary). "Objects are adjacent when they lie close to each other, but not necessarily in actual contact" (Webster's New International Dictionary, 2d ed. unabridged, 1941, p. 32). But the word "immediately" qualifying the word "adjacent" indicates that the area must adjoin the watershed.

The extent of the area immediately adjacent to the watershed which is subject to protection is ascertainable from the remainder of the description. It is that adjoining territory which "can conveniently be supplied with water" from the watershed. The requirement of convenience in supplying the water implies the necessity that there be no difficult problems in effecting such supply and that

delivery be clearly feasible, from both a financial and an engineering point of view.

Although the question is not entirely free from doubt, in our opinion this description is stated with sufficient certainty of language and exactitude to constitute a valid enactment.

A civil statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning or the fact that it is susceptible of different interpretations will not render it nugatory (*Clark* v. *City of Pasadena* (1951), 102 Cal. App. 2d 198, 227 P. 2d 306). Proof of what is "convenient" is no more difficult than what is "reasonable" and falls within the category of "problems which in their nature are not subject to precise definition, but which tribunals exercising judicial functions must determine" (*Gin S. Chow* v. *City of Santa Barbara* (1933), 217 Cal. 673, 706). However, if litigation and the need for judicial construction is to be minimized, in all candor it must be stated that the certainty of this description leaves something to be desired.

The quantity of water as to which the prior right for use in the described areas is to be preserved is—

> "* * * all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

The words "the water" means the water which originates, i.e., falls as precipitation in the particular watershed. This is borne out by reference to the original enactment from which section 11460 is derived, which contains the more precise words, "said water" (Calif. Stats. 1933, ch. 1042, sec. 11, p. 2650). How much water is reasonably required to supply the beneficial needs of the watershed, the adjacent area and the inhabitants and property owners therein is a question of fact depending upon the circumstances in a particular case at any given time.

The scheme of things intended by sections 11460-11463 seems clear:

1) Section 11460 has the effect of reserving to the entire body of inhabitants and property owners in watersheds of origin a priority as against the Water Project Authority in establishing their own water rights in the usual manner as their needs increase from time to time up to the maximum of either their ultimate needs or the yield of the particular watershed.

2) The establishment of this priority does not create or vest in any individual person a presently definable "water right" in the conventional sense of the term. This is the unmistakable meaning of the limitation in section 11462:

> "The provisions of this article shall not be so construed as to create any new property rights other than against the authority. . . ."

This means simply what it says: No inhabitant of a watershed of origin[8] becomes possessed of any presently vested title or right to any specific quantity of water

[8]For brevity, as used herein, the word "inhabitants" includes also the "property owners" specified in section 11460. Similarly, the term "watershed of origin" is used to denote all of the preferred areas described in section 11460.

as a result of this statute. As the need of such an inhabitant develops he must comply with the general water law of the state, both substantively and procedurally, to apply for and perfect a water right for water which he then needs and can then put to beneficial use (Secs. 1200-1800). However, when he makes such an application, as a member of the class of persons protected by the statute, his application is not to be gainsaid, denied or limited by reason of any activity on the part of the Water Project Authority. Specifically, this means that if, prior to the development of the applicant's increased needs, the authority had been exporting from the watershed in question water required to supply the applicant's increased needs, such use by the authority would not justify denial of the application. Assuming the application to be otherwise meritorious, the State Engineer would grant a permit in the usual form, and the authority would thereafter be compelled to honor the water right thus created and vested.

3) The priority thus reserved to inhabitants of watersheds of origin by section 11460 may not in any way be defeated by any action or proceeding by the authority. In interpreting sections 11460-11463, it must be constantly borne in mind that the priority is a reservation granted to an entire class of citizens *in the aggregate*. The class is ascertainable at any given time with constitutional exactitude, but the individual inhabitants and property owners comprising it will change and vary over the years. No definable property right is created or presently vested in any particular individual. As to any particular individual the grant of the statute is wholly inchoate. Its potential maximum is the individual's ultimate need for water which can be beneficially used up to the capability of the watershed. It can only be defined momentarily, from time to time, as the needs of the individual develop and, by actually putting more water to beneficial use, he is able to establish a "water right" in himself in the usual form and manner. This is not to say that the grant of the statute is unconstitutional for vagueness, but it does mean that the reserved priority is not susceptible of being presently purchased, condemned or otherwise acquired by the authority.

Such being the case, the authority is precluded from any action which would have the effect of presently defeating or destroying the priority. Our view in this respect is predicated upon the following reasons:

a) Section 11460 is contained in article 4, under the heading "Limitation of Powers" of the authority. It expressly prohibits the authority from depriving the watershed of origin or its inhabitants "directly or indirectly of the *prior* right" to water needed in the future. The word "prior" as used in this section means paramount, preferred or superior. Section 11462 establishes beyond doubt that this priority in right exists *as against the authority*.

b) The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority by condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of section 11460 and make its enactment an idle gesture. We must reject such an interpretation. Hence, we conclude that

section 11460 not only creates the priority in inhabitants of a watershed of origin but constitutes a limitation on the legal powers of the authority granted by other provisions of the Water Code.

It must be borne in mind that section 11575 empowers the authority to acquire water rights and other property for the purpose of constructing, maintaining and operating the Central Valley Project "by gift, exchange, purchase or eminent domain proceedings." Section 11580 expressly confers upon the authority the power of condemnation when other means of acquisition fail.

Section 11461 provides in part that:

> "In no other way than by purchase or otherwise as provided in this part shall water rights of a watershed, area, or the inhabitants be impaired or curtailed by the authority * * *."

In the original statute from which these sections were derived, section 11461 immediately follows the provisions of section 11460 as the next sentence of the same paragraph (Calif. Stats. 1933, ch. 1042, sec. 11, p. 2650). Consequently, it must be taken in that context. We deem the intent and effect of section 11461 to be as follows:

a) It is a qualification on the scope of section 11460, in that it authorizes the curtailment and impairment of the "*water rights* of a watershed, area or its inhabitants," if that be the result of acquisition of such water rights by the authority by purchase, gift, exchange or condemnation.

b) It is a reaffirmation of the powers granted the authority under section 11575 to acquire "water rights," and indicates a legislative intent that these powers as applied to a watershed of origin are not wholly nullified by section 11460. We thus have a grant of the power of eminent domain by section 11575, a limitation on the power in section 11460, and a qualification of that limitation in section 11461. What can this mean? Needless to say every effort must be made to save the statute from ambiguity and to give it effect. In our view, the sections taken together mean that

> 1) The inchoate priority of inhabitants of watershed of origin granted by section 11460 may not presently be defeated or destroyed by acquisition or any other action on the part of the authority;
>
> 2) When the priority is asserted by such an inhabitant and with its aid he acquires and becomes vested with a water right in accordance with sections 1200-1800, such water right may be purchased or condemned by the authority if necessary for purposes of the project.

Any other interpretation would have either of the following results: On the one hand, if the priority be considered subject to immediate condemnation under sections 11461 and 11575, the result is a complete frustration of section 11460. On the other hand, if section 11460 be deemed to create a permanent "water right" which, even after it has been perfected and vested, may not be acquired or condemned by the authority when essential for project purposes, then section 11461 becomes meaningless and of no consequence. If either of these results was,

in fact, within the legislative contemplation, then it must be concluded that the sections referred to are mutually inconsistent and conflicting.

The question may well be asked whether, under our interpretation, the priority is of little real consequence since, although the priority may not be presently condemned or otherwise defeated by the authority, any vested water right which may eventuate from it can be condemned. We do not believe this necessarily follows. On the contrary, we believe that the statute effectuates the legislative intent and confers extremely valuable rights upon watersheds of origin. Its very effectiveness depends upon the distinction made between (a) the power of the authority to condemn a "water right" after it has come into being in accordance with the provisions of the law of appropriative rights and become vested in a particular individual, and (b) the total lack of power on the part of the authority to in any way defeat the operation of the preference in its inchoate form and prior to its ripening into an individually owned "water right." It was by this means that the Legislature was able to create and preserve the intended preference for the watershed of origin as a whole, without having to presently define and resolve the present property rights of countless individuals. It was by this means that the Legislature was able to achieve its objective with a minimum of confusion and with no substantial departure from well established water law, both procedural and substantive, concerning the assertion and protection of water rights as between individual citizens of the state. Finally, it preserves the effectiveness of the authority in carrying out its intended functions.

In resolving the questions presented, it is significant that sections 11460-11463 are cast in terms of a legislative directive to an agency of the State concerning the manner in which it is to deal with the unappropriated waters of the State withdrawn from private appropriation as the result of State applications made under section 10500. Our entire discussion here concerns the future right of inhabitants of a watershed of origin to satisfy their future needs. By definition, then, we are not concerned with water which was in private ownership prior to State filings under 10500. Water which has been put to use since the State applications were filed and which is covered by such applications is subject to the priority thereof; and water not yet presently in use but which will be needed at a later date has not yet been applied for; and it is with these two cases—i.e. unappropriated waters covered by the State's filings under section 10500—that we are concerned.

Section 11462 is important in two respects. It provides that:

> "The provision of this article (Secs. 11460-11465) shall not be so construed as to create any new property rights other than against the authority as provided in this part * * *."

It is this provision which effectively prevents any attempt to construe the priority granted in sections 11460 and 11463 as a "water right" in the conventional sense of the term which, if it existed, would be susceptible of individual ownership as against any and all persons and entities. Section 11462 further provides that the provisions of sections 11460-11465 shall not be construed:

"* * * to require the authority to furnish to any person without adequate compensation therefor any water made available by the construction of any works by the authority."

This provision has important financial results. It is obvious that certain of the project works are so situated in a watershed of origin that their storage and stream regulation capabilities augment the natural flow of the stream within the watershed of origin. It is most probable, and each case would present a question of fact for determination, that there are instances where the ultimate needs of the inhabitants of the watershed of origin can only be fully met by some degree of augmentation and regulation of the natural flow of the stream. Section 11460 assures such inhabitants of the prior right to water sufficient for their ultimate needs. However, this does not mean that they are entitled to water "made available by the construction of any works by the authority" without paying adequate compensation for the benefits actually received from the existence and operation of the project works. Having to pay for benefits received does not detract anything from the benefit or effect of the priority granted. It is simple equity to the taxpayers of the State as a whole. It is the purpose and effect of this provision of section 11462 to make it crystal clear that no person entitled to the priority reserved by section 11460 is thereby entitled to receive free of charge water which is made available by the construction of any project works by the authority. Charges appropriate to such cases may be fixed and established by the authority pursuant to section 11455.

There remains for consideration the effect of section 11463. Like section 11460, this section applies in the construction and operation by the authority of any project under the provisions of part 3 of division 6. It is a limitation on the power of the Water Project Authority to supply the needs of a watershed of origin from which water is being exported by means of the importation of water from another watershed. No such exchange may be made by the authority:

"* * * unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange."

In practical operation, this provision has the effect of making the priority granted to watersheds of origin by section 11460 effective as against both agreements and operational practices of the authority which result in the exchange of water between watersheds, as well as the outright exportation of water from the watershed of origin.

Section 11463 does not create any new or additional priority or preference. However, it prohibits the exportation of water under an exchange arrangement which would impair the fulfillment of the water requirements of the watershed from which such exportation is being made "to the extent that the requirements would have been met were the exchange not made." This qualification makes this section consistent with section 11460 since the preference granted by the latter section is limited to the amount of water which originates in the watershed in

question. In the event that a particular watershed cannot fulfill the needs of its inhabitants, the proviso in section 11463 quoted above would become effective to prevent any part of the requirements of such watershed from being filled by water being imported into that watershed under the exchange arrangement to replace water being exported. That such is the intent of the proviso is made doubly clear by the clause which immediately follows: "* * * and no right to the use of water shall be gained or lost by reason of any such exchange."

Subject to the foregoing, the "requirements" of the watershed protected by section 11463 are those which it may have at any time in the future. This is the meaning of the condition that "unless the water requirements of the watershed * * * are first and at all times met" no exchange may be made by the authority. In this connection, it will be noted that the prohibition is not merely against the execution of an exchange contract or any other form of specific agreement. Instead the prohibition is against a particular type of operating practice, i.e., the exchange of water from one watershed for that of another, regardless of whether the basis of such practice is a contract, agreement, or unilateral policy or practice.

The uncertainties which would otherwise arise by reason of this section are mitigated, from a practical viewpoint, by the overall power of the authority to purchase or condemn any and all "water rights" needed for operation of the project when and as such "water rights" come fully into being and are vested in a particular individual under the applicable general law.

V. *Constitutionality of Sections 10505, 11460-11463.*

As interpreted and construed herein, sections 10505 and 11460-11463 are in our opinion constitutional.

The Legislature has ample authority to control the disposition of unappropriated water in the State. "These excess waters constitute the public waters of the state to be used, regulated and controlled by the state or under its direction." (*Meridian, Ltd.* v. *San Francisco* (1939), 13 Cal. 2d 424, 445, 90 P. 2d 537, 547.

The specific question has been asked whether, in reserving water for future use in areas of origin as provided in sections 10505, 11460 and 11463, the Legislature has exercised this authority in violation of article XIV, section 3 of the California Constitution which provides:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unrea-

sonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *provided, however,* that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

The immediate occasion for the passage of this amendment in 1928 was the widespread dissatisfaction with the judicial rule upholding the right of a riparian landowner to enjoin any use by appropriators of water from the stream to which his land is riparian which would reduce the natural flow of the stream past his land, even if enforcement of this right might result in a waste of water. (*Herminghaus* v. *Southern California Edison Co.* (1926), 200 Cal. 81, 252 Pac. 607; *Lux* v. *Haggin* (1886), 69 Cal. 255, 390, 10 Pac. 674, 753). The effect of the amendment is to deny a riparian landowner the remedy of injunction to prevent the use by others of water which he himself cannot use reasonably and beneficially. (*Peabody* v. *City of Vallejo* (1935), 2 Cal. 2d 351, 368, 40 P. 2d 486, 492).

The amendment does not forbid the maintenance of preferences for prospective uses, so long as the water is made available for interim use by others who have a present need for it. Thus, the preservation of a preferential right to the use in the future of water not presently needed, despite the present need and use of such water by others, was expressly held constitutional under article XIV, section 3, both in the case of riparian rights (*Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (1935), 3 Cal. 2d 489, 525, 45 P. 2d 972, 986, 1014); and in the case of pueblo rights (*City of Los Angeles* v. *City of Glendale* (1943), 23 Cal. 2d 68, 75, 142 P. 2d 289, 293).

There are other examples of paramount or preferential rights which may be exercised in the future so as to supersede rights already being exercised. The California Supreme Court has approved a condition, in a permit to appropriate water for power generating purposes, making the right subordinate to future domestic use of the water (*East Bay M. U. Dist.* v. *Department of Public Works* (1934), 1 Cal. 2d 476, 35 P. 2d 1027). This condition was inserted for the purpose of carrying out the legislative policy expressed in section 106. Sections 106.5, 1203, and 1460 to 1464, which grant a preference to applications for future municipal use, and section 10500, which gives a preference to the applications filed by the Department of Finance, are as yet untested in the courts.

Neither section 10505 nor sections 11460 and 11463 prohibit interim use by others of water which may be reserved in the manner provided and as interpreted herein. To be constitutional, the sections must be construed to permit such interim use, and that is how we construe them.

VI. *Reversion of Water to Areas of Preference When Needed.*

From what has already been said, it follows that the interim use of water reserved for counties of origin under section 10505, or for watersheds of origin under sections 11460 and 11463 is subject to termination whenever such water becomes necessary for development of such areas of preference and proper applications to appropriate the water for use therein are filed and granted. In such case there would be no right of reimbursement for the project works which had been used for the interim use of the water exported.

Until recently, however, this consideration has been academic in view of the fact that the Central Valley Project to date has been of such scope that all of the legislation considered herein is predicted upon a project conception and engineering data indicating that a surplus or excess of water exists over and above the ultimate needs of the counties and other areas of origin for which the reserved priorities have been granted (supra, II).

Today we have under consideration the addition of large units to the existing Central Valley Project. More important, perhaps, is the proposed expansion of the areas of deficiency to be served with project water to include territory lying south of the Tehachapis. The Division of Water Resources is engaged in an up-to-date survey of the needs of the areas of origin, and upon its findings much will depend.

As the next phase of the State's coordinated plan for water development evolves, it may be that the effect of the reserved priorities now granted will impair the financial feasibility of certain project works required to transport present surpluses the great distance to Southern California. Future sound water development may therefore make it desirable that the Legislature provide a definite, quantitative ceiling on the preferential rights of areas of origin to the future use of water. One basis of limitation might be the ultimate needs of a given watershed but not to exceed the flow of the stream in its natural state. The logic underlying this suggestion is that any increase over the natural flow of the stream is directly attributable to the storage and stream regulation resulting from project works financed by the people of the entire State and that inhabitants of the watershed of origin would in all fairness be entitled only to their pro rata share of any such augmentation of the natural flow.

VII. *Application of Sections 11460 and 11463 to the United States in the Construction and Operation of the Central Valley Project.*

The prohibitions contained in sections 11460-11463 are limited by their terms to the Water Project Authority. Therefore, these sections standing alone would not apply to the United States.

Purely of its own force, State law could not control the United States in its construction and operation of the Central Valley Project. The project was authorized by the Act of Congress of August 26, 1937 (50 U.S. Stat. 850) and is, therefore, free from State regulation except to the extent that Congress may have

affirmatively elected to comply with State law (*United States* v. *Gerlach Live Stock Co.* (1950), 339 U.S. 725, 739; *Mayo* v. *United States* (1943), 319 U.S. 441, 445, 448; *Kauffman* v. *Kauffman* (1949), 93 Cal. App. 2d 808, 811, 210 P. 2d 29, 32. The law thus firmly established is not altered by the adoption of the amendment to Article XIV, section 4, of the California Constitution at the 1954 general election.

However, an affirmative election by Congress to comply with certain aspects of State law is contained in section 8 of the Federal Reclamation Act of 1902 which provides that:

> ". . . Nothing in this Act shall be construed as affecting nor intended to affect or is in any way to interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . ." (32 U.S. Stat. 390, 43 U.S.C. sec. 383).

This provision was made applicable to the Central Valley Project by the federal statute which "reauthorized" the project (sec. 2, Act of August 26, 1937, 50 U.S. Stat. 850). In our opinion, sections 11460 and 11463 are so inseparably concerned with irrigation in their application to the Central Valley Project as to fall within the purview of section 8 of the Federal Reclamation Act, *supra.* The significant thing is that sections 11460 and 11463 state the law of California concerning the use and distribution of water involved in the construction and operation of the Central Valley Project. It is true that these sections are specifically addressed to the Water Project Authority and are stated in terms of limitations on its powers. However, this fact is predicated upon the further fact that, so far as State law is concerned, the Water Project Authority is the one and only agency of the State authorized to construct, maintain and operate the project. Consequently, from the viewpoint of the Secretary of the Interior, seeking to ascertain the law of California concerning the distribution and use of Central Valley Project water in order that he may obey the mandate of section 8 of the Reclamation Act that he "shall proceed in conformity with such laws," the law of California is to be found in sections 11460 and 11463. And, insofar as the United States appropriates water for the purposes of the project and seeks to avail itself of the priorities established by the State applications filed under section 10500, it is bound to comply with the county of origin preferences established as a condition of any assignment of such applications by virtue of section 10505.

It must be recognized, however, that the general election to conform to State law contained in section 8 of the Federal Reclamation Act is not controlling upon the United States to the extent that State law may be inconsistent with other and more specific provisions of federal law. That is, a specific federal provision, if it existed, would govern the general. However, no federal statute of which we are

aware prohibits or prevents federal compliance with the declaration of State law contained in sections 11460 and 11463.

This conclusion is apparently shared by the United States Department of the Interior. Over a period of years, federal officials have consistently taken the position that the United States is bound to observe the provisions of sections 11460 and 11463 in its operation of the project. A number of their official utterances are collected in a letter to Congressman Clair Engle from the Regional Director, United States Bureau of Reclamation, dated November 15, 1948 (printed in Cong. Rec. Feb. 21, 1949, 81st Cong., vol. 95, p. A-961). Likewise, the "Comprehensive Departmental Report on the Development of the Water and Related Resources of the Central Valley Basin," submitted to Congress by the Department of the Interior (Aug. 1949, Senate Doc. 113, 81st Cong., 1st Sess., pp. 39, 64-65, 104, 121-122, 125), makes numerous references to protection of counties and watersheds of origin. Conformity with State law in this regard was further assured in an official statement of federal policy set forth in the report to the Legislature by the Joint Committee on Rivers and Flood Control, entitled "proposed Klamath and Trinity River Diversions and Other Projects of the Central Valley" (May, 1945, pp. 49-51; printed in Sen. Jour. June 4, 1945, p. 3393).

In 1951 the Legislature added section 11128 to the Water Code, providing that:

> "The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part." (Calif. Stats. 1951, ch. 1325, p. 3216.)

It seems obvious that the intent of this section was to make it clear that the interpretation of federal officials was consistent with the purpose of the Legislature in 1933 in enacting sections 11460 and 11463. It removes any doubt but that, so far as State law is concerned, these sections do declare the law of the State for purposes of federal compliance therewith pursuant to section 8 of the Reclamation Act.

In concluding on this subject, it should be pointed out that nothing contained in State law restricts the power of the United States to acquire by exercise of its power of eminent domain either water rights already vested in individual ownership or the unappropriated waters of the State. The reason is that the same federal statute which reauthorized the Central Valley Project and made section 8 of the Federal Reclamation Act applicable thereto also expressly empowered the Secretary of the Interior to acquire all property, including water rights, necessary for the authorized purposes of the project by proceedings in eminent domain or otherwise (50 U.S. Stat. 850.).

VIII. *Power of State Engineer to Impose in Appropriation Permits Conditions to Effectuate the Protection Contemplated by Sections 10505, 11460 and 11463.*

Section 1253 provides:

> "The department [acting through the State Engineer, Sec. 1050.5] shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated."

We have been asked whether, in the proper exercise of his power under this section, the State Engineer may effectuate the protection of areas of origin provided for in sections 10505, 11460 and 11463.

Section 1253 is a codification of part of section 15 of the Water Commission Act (Calif. Stats. 1913, ch. 586, p. 1021) as amended in 1921 (Calif. Stats. 1921, ch. 329, p. 443). Sections 1254 and 1255 are codifications of the remainder of section 15 of the act. They provide as follows:

> 1254. "In acting upon applications to appropriate water the department shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water."
>
> 1255. "The department shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest."

The exercise of the authority to grant permits under section 15 of the Water Commission Act has been held to be an administrative, not a judicial, function. (*East Bay M. U. Dist.* v. *Department of Public Works* (1934), 1 Cal. 2d 476, 35 P. 2d 1027; *Tulare Water Co.* v. *State Water Commission,* supra; *Mojave River Irr. Dist.* v. *Superior Court* (1927), 202 Cal. 717, 721-722, 262 Pac. 724, 725). The delegation of discretion by the Legislature to administrative agencies and officers is permissible and is not an unconstitutional delegation of legislative power, if the delegating statute establishes "an ascertainable standard to guide the administrative body." (*State Board* v. *Thrift-D-Lux Cleaners* (1953), 40 Cal. 2d 436, 448, 254 P. 2d 29, 36.)

Section 1253 is a statute generally applicable to the granting of water appropriations. In conjunction with section 1255 it contemplates that the State Engineer act on permit applications in the light of what is, in his judgment, the public interest. In the delegation of legislative authority, the standard prescribed for the guidance of the agency or official in whom discretionary power is vested is inseparable from the particular agency or official in whom such trust is reposed. Conversely, where separate trusts are reposed in two agencies or officials, one may not presume to exercise the discretion vested in the other.

Section 10505 has a specific, as compared to a general, applicability to the appropriation of water. Strictly speaking, it is not concerned with the granting of permits to appropriate water at all. It deals solely with the terms and conditions upon which applications already filed by the Department of Finance on behalf

of the State itself shall be assigned or the priority thereof released to others. The determination of these terms and conditions the Legislature has specifically entrusted to the Department of Finance. The question is whether "in the judgment of the Department of Finance" the requested release or assignment will deprive the county of origin of water needed for its development. Only the Department of Finance can exercise such judgment.

In a letter dated September 21, 1939, to the Director of Finance, the Attorney General ruled that in view of section 10505 the Department of Finance must either (a) make a bona fide finding of fact that the assignment in question will not deprive the county of origin of water for future development or (b) include a reservation for adequate supplies of water for the future development of the county. In either case, the granting of an assignment by the Department of Finance is, in effect, a certification by the responsible head of that department that the purpose underlying section 10505 has been served and that the full measure of protection has been granted to the county of origin. When the assignee seeks to process the assigned application to permit before the State Engineer, the question of the need for and the extent of protection to the county of origin has already been determined by the one agency expressly authorized and directed by the Legislature to make this determination. Nothing in section 1253, or any other provision of applicable law, authorizes or even permits the State Engineer to re-evaluate and re-determine the issue already resolved by the Department of Finance. Needless to say, the State Enginer may, and probably should, incorporate into any permit issued, such provisions and reservations as may have been stipulated by the Department of Finance as a condition of assigning the application underlying the permit. However, this is quite a different thing from the exercise by the State Engineer of his own judgment concerning the need for protecting the county of origin; for the latter there is no warrant.

A different situation exists with respect to sections 11460 and 11463. These sections, unlike 10505, do not require the exercise of discretion by an administrative official in order to make them operative. Instead, they express a limitation on the power of the public agencies, state and federal, to which they are directed. The law of the State so established is a matter of which the State Engineer is bound to take cognizance in passing on applications for water permits.

Such action by the State Engineer may involve the issuing of permits to (1) an inhabitant of a watershed of origin, seeking to obtain additional water to meet his increased needs, or (2) an assignee of an application filed by the state under section 10500.

As to the first category, in passing upon the application of a person qualifying for the priority granted by section 11460, the State Engineer is to be guided by the provisions of sections 11460-11463 *in addition to* the other standards provided by law for his guidance in issuing water permits (secs. 1200-1800). That is to say that an application, otherwise meritorious, made by a person who qualifies for the preference granted by these sections, is not to be denied or modi-

fied or conditioned as the result of any agreement, policy or practice on the part of the public agency constructing or operating the Central Valley Project which would deprive the applicant of any water from the watershed in question to which he would otherwise be lawfully entitled. In these circumstances the action of the State Engineer would be limited to the granting of the permit in proper form, but such action on his part would be a necessary prerequisite to the judicial enforcement of the mandates of sections 11460-11463.

As to any assignee under section 10504 of an application filed by the State, reference has already been made to the exclusive functions of the Department of Finance with respect thereto pursuant to section 10505. As noted, the State Engineer may incorporate into his permit all pertinent terms and reservations which were made a condition of the assignment by the Department of Finance.

If the assignee is an agency of the State engaged in the construction or operation of the Central Valley Project it is firmly bound, as a matter of law, by the provisions of sections 11460-11463 taken in conjunction with section 11128. And if the assignee is an agency of the federal government similarly engaged, it also is bound to comply with sections 11460 and 11463, not by operation of California law alone, however, but as a result of the operation of section 8 of the Federal Reclamation Act considered in conjunction with the law of California (see discussion, *supra*, VII). Therefore, as to either state or federal agencies engaged in construction and operation of the Central Valley Project, the State Engineer may incorporate into his permit as conditions thereof the limitations on the powers of such assignees established by sections 11460 and 11463. However, it should be noted that the statute imposes the limitations in any event, regardless of their inclusion or omission from the permit.

Opinion No. 54-159—January 5, 1955

SUBJECT: WATER RIGHTS—Right of Department of Finance to make conditional assignments to Water Project Authority of applications heretofore filed to appropriate water from the Feather River, for use in connection with the Feather River Project, where such assignments are conditioned upon the reservation to the counties of origin of all water necessary for the development of such counties, discussed; effect of such assignments on requirements as to diligence also discussed.

Requested by: ASSEMBLYMAN, 2nd DISTRICT.

Opinion by: EDMUND G. BROWN, Attorney General.
Adolphus Moskovitz, Deputy.

The Honorable Pauline L. Davis, Member of the Assembly from the Second District, has asked our opinion on a series of questions arising out of a request by the Water Project Authority of the State of California that the Department of Finance assign to the authority for use in the proposed Feather River Project

Letter from Kirk C. Rodgers to Interested Parties

United States Department of the Interior

BUREAU OF RECLAMATION
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825-1898

IN REPLY
REFER TO:
MP-440
WTR-4.00

JUL 20 2001

To: Interested Parties (see attached list)

From: ACTING FOR Kirk C. Rodgers
Acting Regional Director

Subject: East Bay Municipal Utility District Amendatory Contract No. 14-06-200-5183A-1 - American River Division - Central Valley Project, California

This letter is being written as followup to our conversation earlier this week regarding the East Bay Municipal Utilities District (EBMUD) Amendatory Contract. It is Reclamation's position that the EBMUD contract is for American River water. The contract was negotiated as an American River contract, and the title of the contract itself states that it is a contract "providing for project water service from the American River Division." The water shortage provision in the EBMUD contract is based upon the hydrology of the American River and is the same provision contained in other American River contracts. The only water Reclamation's permits will allow to be diverted at Freeport is American River water. If Reclamation were to attempt to deliver Sacramento River water to EBMUD at the Freeport point of diversion, it would require California State Water Resources Control Board action and completion of appropriate environmental documentation.

If you have further questions or comments concerning this, please do not hesitate to contact me or John Davis, Regional Resources Manager, at (916) 978-5200 (TDD 978-5601).

RECEIVED
JUL 23 2001
STATE W...

Attached List for Dear Interested Parties' Letter

Mr. Thomas Birmingham
Manager-Attorney
Westlands Water District
PO Box 6056
Fresno, California 93703-6056

Mr. Walter J. Bishop
General Manager
Contra Costa Water District
P O Box H20
Concord, California 94524

Mr. Thomas N. Clark
Manager
Kern County Water Agency
PO Box 58
Bakersfield, California 93302-0058

Mr. Daniel G. Nelson
Manager-Secretary
San Luis and Delta-Mendota
Water Authority
PO Box 2157
Los Banos, California 93635

Mr. Tim Quinn
Metropolitan Water District of
Southern California
1121 L Street, Suite 900
Sacramento, California 95814

Mr. Dennis Diemer
State Water Contractors
455 Capitol Mall, Suite 220
Sacramento, California 95814

Mr. Terry Erlewine
State Water Contractors
455 Capitol Mall, Suite 220
Sacramento, California 95814

Mr. Jim Waldo
State Water Contractors
455 Capitol Mall, Suite 220
Sacramento, California 95814

Mr. Stanley M. Williams
Executive Officer
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, California 95118-3686

Contract No. I4-06-200-5515A

R.O. Draft 5/4-1971

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

Contract No.
14-06-200-5515A

CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE CITY OF FOLSOM FOR CONVEYANCE OF WATER RIGHTS WATER

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

Contract No.
14-06-200-5515A

CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE CITY OF FOLSOM FOR CONVEYANCE OF WATER RIGHTS WATER

THIS CONTRACT, made this 23rd day of June, 1971, in pursuance generally of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which are commonly known and referred to as the Federal reclamation laws, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, and the CITY OF FOLSOM, hereinafter referred to as the City, an incorporated city of the State of California, duly organized and existing pursuant to the laws thereof,

WITNESSETH, That:

EXPLANATORY RECITALS

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

Preamble
Explantory Recitals--

WHEREAS, the United States is constructing the Folsom South Canal as an integral part of the Central Valley Project and upon its completion there will be available from the Canal a water supply for agricultural and municipal, industrial, and domestic uses; and

WHEREAS, the Natomas Water Company possessed certain rights in and to the waters flowing in the South Fork of the American River, recognized to be 32,000 acre-feet per year, said rights being based on a filing in the records of the County of El Dorado, State of California, in 1851, subsequent diversion and usage in whole or in part continuously since that time, and by application and devotion of said rights and said water to beneficial use; and

WHEREAS, a contract dated June 18, 1951, designated Contract No. DA-04-167-eng-330, was entered into between Natomas Water Company and the United States represented by the Corps of Engineers, hereinafter referred to as the Natomas Water Company contract, which provided certain facilities of Natomas Water Company for the diversion and conveyance of water from the South Fork of the American River be rearranged, relocated, or altered and that the United States deliver the Company's water; and

WHEREAS, Natomas Water Company conveyed its interest in said water rights and facilities under said Natomas Water Company contract to the Southern California Water Company; and

WHEREAS, inasmuch as said Natomas Water Company contract is still in full force and effect; and

WHEREAS, the Southern California Water Company conveyed, sold, or otherwise disposed of 11/16 of said 32,000 acre-feet of water rights water and all facilities to the City; and

WHEREAS, the City and Southern California Water Company are entitled to take delivery of the entire 32,000 acre-feet of water through said rearranged, relocated, and altered facilities, with the City obligated to deliver to the Southern California Water Company through the City's facilities 10,000 acre-feet thereof until such time as the Folsom South Canal is completed; and

WHEREAS, the City desires a second point of delivery to take a portion of its 22,000 acre-feet of water rights water from the Folsom South Canal; and

WHEREAS, said Folsom South Canal will have the capability, from a design and operating standpoint, to provide the City with 10,000 acre-feet of water per year at a rate not to exceed 20 cubic feet per second; and

WHEREAS, the full enjoyment of the rights of the City under this contract are consistent with the overall operation of the Central Valley Project; and

WHEREAS, as of the date hereof the United States sees no circumstances under which any inconsistency between the full exercise of the City's rights under this contract and the overall operation of the Central Valley Project will arise; and

WHEREAS, the United States is willing to transmit to the City through the Folsom South Canal water in a quantity not to exceed 10,000 acre-feet per year; and

WHEREAS, it is the intention of the parties that this contract expressly preserve and recognize the right of the City to 22,000 acre-feet of water rights water and to insure to the extent physically possible the availability to the City of such quantity of water;

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

DEFINITIONS

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

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

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

(c) "Canal" shall mean Folsom South Canal of the Project;

(d) "year" shall mean a calendar year; and

(e) "Valley Canal" shall mean the Canal running generally from the Willow Hill Reservoir to its terminus in Rancho Cordova, variously referred to in whole or in part as the Valley Ditch, the Alder Canal, or the American River Canal.

DELIVERY OF WATER

2. After the Contracting Officer notifies the City that water is available from the Canal, the United States shall deliver at the Canal and the City may accept in lieu of water furnished from the rearranged, relocated, and altered facilities 10,000 acre-feet per year at a rate not to exceed 20 cubic feet per second unless greater quantities or rates are approved by the Contracting Officer at least 6 months prior to such change. The quantity of water the City is entitled to take directly from Folsom Reservoir each year shall not exceed 22,000 acre-feet less the quantity taken from the Canal for that year.

Also refer to letter dated Sept 10, 1990

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

3. (a) Water will be delivered to the City pursuant to this contract:

(1) Directly from Folsom Reservoir at a point 100 feet southeasterly from the easterly right-of-way line of the Green Valley Road at Station 102+67.88 of the Natoma Canal Relocation, designated "Diversion Point 1", on Exhibit A attached hereto and made a part hereof under the following conditions:

a. Without expense to the United States, the City shall care for, operate, and maintain those certain conveyance facilities provided for under the Natomas Water Company contract which were conveyed, sold, or otherwise disposed of by Southern California Water Company to the City, also being known as Natoma Canal Relocation, from Stations 102+67.88 to 260+07.86, as shown on Exhibit A; and

b. All water delivered pursuant to this subsection (1) shall be measured by the United States with existing equipment installed, operated, and maintained by the United States; and

(2) From the Canal approximately at Station 120+00, designated "Diversion Point 2", as shown on Exhibit A:

a. The following facilities shall be constructed by the United States to be used jointly by the City and Southern California Water Company:

1. A turnout through the operating road to and including the pump well; and

2. Provision for future addition of moss screens;

b. The United States hereby grants permission to the City to enter upon, construct, operate, and maintain its proposed water system facilities in, on, across, and through that portion of the Canal right-of-way as shown on Exhibit B attached hereto and made a part hereof. The installation of facilities shall be in accordance with plans and specifications approved by the Contracting Officer. The United States retains right of ingress and egress at reasonable times to maintain, inspect, operate, and read the meters or for other purposes related to the delivery of water. The United States also hereby grants to the City right-of-way for ingress and egress to and from said parcel of

Article 3(a)(2)b.--

land in, on, over, and along said Canal right-of-way: Provided, That in exercising the rights of ingress and egress, the City shall not use any cleated equipment on any paved or oiled roads and shall confine its routes of travel to existing roads or lanes as specified by the Contracting Officer; and

c. All water delivered from the Canal shall be measured by the Contracting Officer at the point of delivery established pursuant to this subsection (2) and with equipment furnished, operated, and maintained by the United States: Provided, That said measuring equipment shall be installed by the City after submitting installation drawings to the Contracting Officer and obtaining his written approval thereto. All determinations relating to the measurement of such water shall be made by the Contracting Officer. Upon request of the City the accuracy of such measurements will be investigated by the Contracting Officer and any errors appearing therein adjusted.

(b) All other facilities necessary for the diversion and/or control of water delivered to the City shall be the responsibility of the City and all such facilities, wherever located, shall be and remain the property of the City, whatever their nature, personal, mixed, or real.

(c) The United States shall not be responsible for the control, carriage, handling, use, disposal, or distribution of water which may be furnished to the City beyond the delivery points established pursuant to this article, nor for claim of damage of any nature whatsoever, including but not limited to property damage, personal injury, or death arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such water beyond the points of diversion.

(d) The United States shall make all reasonable efforts, consistent with the overall operation of the Project, to maintain sufficient flows and levels of water from the Folsom Reservoir and in the Canal to furnish water to the City at the delivery points established pursuant to this article.

(e) The United States may temporarily discontinue or reduce the quantity of water to be furnished to the City as herein provided for the purposes of investigation, inspection, maintenance, repair, or replacement of any of the Project facilities or any part thereof necessary for the furnishing of water to the City, but so far as feasible, the United States will give the City due notice in advance of such temporary discontinuance or reduction, except in case of emergency, in which case no notice need be given: Provided, however, That the United States shall use its best efforts to avoid any

discontinuance or reduction in service for a period longer than 3 days. In the event of any such discontinuance or reduction, upon resumption of service and if requested by the City, the United States will attempt to deliver the quantity of water which would have been furnished hereunder in the absence of such contingency.

ASSIGNMENT LIMITED--SUCCESSORS AND ASSIGNS OBLIGATED

4. The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this contract or any part or interest therein shall be valid until approved by the Contracting Officer.

CONTINGENT ON APPROPRIATION OR ALLOTMENT OF FUNDS

5. The expenditure or advance of any money or the performance of any work by the United States hereunder which may require an appropriation of money by the Congress or the allotment of funds shall be contingent upon such appropriation or allotment being made. No liability shall accrue to the United States if funds are not so appropriated or allotted.

--Article 3(e)
Article 4
Article 5

EFFECTIVENESS OF CONTRACT

6. This contract shall become effective on the date hereinabove written and shall supersede the obligation of the United States to deliver water to the City under the Natomas Water Company contract.

QUALITY OF WATER

7. The operation and maintenance of Project facilities and the construction of new Project facilities for the provision of water under this contract shall be performed in such a manner as is practicable to maintain the quality of raw water to be furnished hereunder at the highest level reasonably attainable, as determined by the Contracting Officer. The United States is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water except to the extent such facilities are expressly referred to elsewhere in this contract as a part of the Project facilities to be constructed by the United States pursuant to Reclamation law or as otherwise required by law. Further, the United States does not warrant the quality of water to be furnished pursuant to this contract.

OFFICIALS NOT TO BENEFIT

8. (a) No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom. This restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

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

NOTICES

9. Any notice, demand, or request authorized or required by this contract shall be deemed to have been given when mailed, postage prepaid, or delivered to the Regional Director, Region 2, Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825, on behalf of the United States and to the City of Folsom, 50 Natoma Street, Folsom, California 95630, on behalf of the City. The designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

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

THE UNITED STATES OF AMERICA

By E F Sullivan
Acting Regional Director, Region 2
Bureau of Reclamation

CITY OF FOLSOM

(SEAL)

By _____
John E. Kipp, Jr.
Title Mayor

ATTEST:

Attie M. Davies (mrs)
Title City Clerk

RESOLUTION NO. 783

RELATIVE TO EXECUTION OF CONTRACT WITH THE UNITED STATES OF AMERICA REGARDING FOLSOM SOUTH CANAL

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FOLSOM:

That the City Council of the City of Folsom hereby approves of the terms and conditions of the document attached hereto, entitled "CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE CITY OF FOLSOM FOR CONVEYANCE OF WATER RIGHTS WATER," and hereby authorizes the Mayor and the City Clerk to execute said contract on behalf of the City of Folsom.

PASSED and ADOPTED this 7th day of June, 1971, by the following vote on roll call:

AYES: Councilmen Bullard, Goodell, Kipp, Relvas, Slater

NOES: Councilmen None

ABSENT: Councilmen None

s/s John E. Kipp, Jr.
MAYOR

ATTEST: s/s Artie M. Davies
CITY CLERK

I hereby certify that the foregoing Resolution was passed and adopted by the City Council at a regular meeting held on June 7, 1971.

Artie M. Davies
Artie M. Davies
City Clerk

Contract No. 14-06-200-4816A

R.O. Draft 3/9-1970

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

Contract No.
14-06-200-4816A

CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND SOUTHERN CALIFORNIA WATER COMPANY FOR CONVEYANCE OF WATER RIGHTS WATER

Table of Contents

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

Contract No.
14-06-200-4816A

CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND SOUTHERN CALIFORNIA WATER COMPANY FOR CONVEYANCE OF WATER RIGHTS WATER

THIS CONTRACT, made this 20th day of May, 1970, in pursuance generally of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which are commonly known and referred to as the Federal reclamation laws, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, and the SOUTHERN CALIFORNIA WATER COMPANY, hereinafter referred to as the Company, a corporation organized and existing under the laws of the State of California,

WITNESSETH, That:

EXPLANATORY RECITALS

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

WHEREAS, the United States is constructing the Folsom South Canal as an integral part of the Central Valley Project and upon its completion there will be available from the Canal a water supply for agricultural and municipal, industrial, and domestic uses; and

WHEREAS, the Natomas Water Company possessed certain rights in and to the waters flowing in the South Fork of the American River, recognized to be thirty-two thousand (32,000) acre-feet per year, said rights being based on a filing in the records of the County of El Dorado, State of California, in 1851, subsequent diversion and usage in whole or in part continuously since that time, and by application and davotion of said rights and said water to beneficial use; and

WHEREAS, a contract dated June 18, 1951, designated Contract No. DA-04-167-eng-330, was entered into between Natomas Water Company and the United States represented by the Corps of Engineers, which provided that certain facilities of Natomas Water Company for the diversion and conveyance of water from the South Fork of the American River be rearranged, relocated, or altered and that the United States deliver the Company's water; and

WHEREAS, Natomas Water Company conveyed its interest in said water rights and facilities under Contract No. DA-04-167-eng-330 to the Company; and

WHEREAS, inasmuch as said Natomas Water Company contract is still in full force and effect except as modified by this contract; and

WHEREAS, the Company has conveyed, sold, or otherwise disposed of eleven-sixteenths (11/16) of thirty-two thousand (32,000) acre-feet of water rights water to the City of Folsom; and

Carl Wendy Bell

WHEREAS, the Company is taking delivery of the remaining five-sixteenths (5/16) or ten thousand (10,000) acre-feet of water rights water from said rearranged, relocated, and altered facilities; and

WHEREAS, said Folsom South Canal will have the capability, from a design and operating standpoint, to provide the Company with ten thousand (10,000) acre-feet of water per year at a rate not to exceed twenty (20) cubic feet per second without the necessity for rationing, interruptions, or other outages; and

WHEREAS, the Company desires to take delivery of said ten thousand (10,000) acre-feet of water rights water from the Folsom South Canal; and

WHEREAS, the full enjoyment of the rights of the Company under this contract are consistent with the overall operation of the Central Valley Project; and

WHEREAS, as of the date hereof the United States sees no circumstances under which any inconsistency between the full exercise of the Company's rights under this contract and the overall operation of the Central Valley Project will arise; and

WHEREAS, the United States is willing to transmit to the Company through the Canal the ten thousand (10,000) acre-feet of water referred to; and

WHEREAS, it is the intention of the parties that this contract expressly preserve and recognize the right of the Company to ten thousand (10,000) acre-feet of water rights water and to insure to the extent

physically possible the availability to the Company of such quantity of water from the Folsom South Canal;

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

DEFINITIONS

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

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

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

(c) "Canal" shall mean Folsom South Canal of the Project;

(d) "year" shall mean a calendar year; and

(e) "Valley Canal" shall mean the Canal running generally from the Willow Hill Reservoir to its terminus in Rancho Cordova, variously referred to in whole or in part as the Valley Ditch, the Alder Canal, or the American River Canal.

DELIVERY OF WATER

2. The United States shall deliver and the Company shall accept a quantity of water not to exceed ten thousand (10,000) acre-feet per year at a rate not to exceed twenty (20) cubic feet per second.

Also referred to letter dated Aug. 15, 1956

POINT OF DELIVERY--MEASUREMENT AND RESPONSIBILITY FOR DISTRIBUTION OF WATER--MAINTENANCE OF FLOWS AND LEVELS--FACILITIES TO BE FURNISHED BY UNITED STATES AND COMPANY--TEMPORARY REDUCTIONS

3. (a) The water to be furnished to the Company pursuant to this contract will be delivered approximately at station 120 + 00, through a turnout structure to the property shown on the attached drawing marked Exhibit A and designated "Pumping Plant Area." This site is to be used by the Company for the purpose of installing its water works such as, for example, booster pumps and related electrical equipment including transformers and switchboards, required piping, valves, meters, screening devices and any other equipment needed to enable the Company to take ten thousand (10,000) acre-feet of water annually from the Folsom South Canal and to transfer it to the water system of the Company. Physical and legal provision for ingress and egress to the site for all purposes related to the Company's use will be provided by the United States from its operating road along the right bank of the Canal and then crossing the Equestrian Trail to the site.

(b) The following facilities shall be constructed by the United States to be used jointly by the Company with the City of Folsom:

(1) A turnout through the operating road to and including the pump well; and

(2) Provision for future addition of moss screens.

All other facilities necessary for the diversion and/or control of water delivered to the Company shall be the responsibility of the Company and all such facilities, wherever located, shall be and remain the property of the Company, whatever their nature, personal, mixed, or real.

(c) The United States hereby grants permission to the Company to enter upon, construct, operate, and maintain its proposed water system facilities in, on, across, and through that portion of the Canal right-of-way, as shown on Exhibit A. The installation of facilities shall be in accordance with plans and specifications approved by the Contracting Officer. The United States retains right of ingress and egress at reasonable times to maintain, inspect, operate, and read the meters or for other purposes related to the delivery of water. The United States also hereby grants to the Company rights-of-way for ingress and egress to and from said parcel of land in, on, over, and along said Canal right-of-way: Provided, That in exercising the rights of ingress and egress the Company shall not use any cleated equipment on any paved or oiled roads and shall confine its routes of travel to existing roads or lanes as specified by the Contracting Officer.

(d) All water delivered from the Canal shall be measured by the Contracting Officer at the point of delivery established pursuant to subdivision (a) of this article and with equipment furnished, operated, and maintained by the United States: Provided, That said measuring equipment shall be installed by the Company after submitting installation drawings to the Contracting Officer and obtaining his written approval thereto. All determinations relating to the measurement of such water shall be made by the Contracting Officer. Upon request of the Company the accuracy of such measurements will be investigated by the Contracting Officer and any errors appearing therein adjusted.

(e) The United States shall not be responsible for the control, carriage, handling, use, disposal, or distribution of water which may be furnished to the Company beyond the delivery point established pursuant to this article, nor for claim of damage of any nature whatsoever including but not limited to property damage, personal injury, or death arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such water beyond the point of diversion.

(f) The 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 pursuant to this article.

(g) The United States may temporarily discontinue or reduce the quantity of water to be furnished to the Company as herein provided for the purposes of investigation, inspection, maintenance, repair, or replacement of any of the Project facilities or any part thereof necessary for the furnishing of water to the Company. The delivery of water to the Company will be discontinued or reduced proportionately with other users of water from the Canal who are similarly situated. So far as feasible the United States will give the Company due notice in advance of such temporary discontinuance or

reduction, except in case of emergency, in which case no notice need be given: Provided, however, That the United States shall use its best efforts to avoid any discontinuance or reduction in service for a period longer than three (3) days. In the event of any such discontinuance or reduction, upon resumption of service and if requested of the Contracting Officer or such other person as he may designate in writing to receive such request by the Company, in writing, the United States will attempt to deliver the quantity of water which would have been furnished hereunder in the absence of such contingency.

ASSIGNMENT--SUCCESSORS AND ASSIGNS OBLIGATED

4. This contract shall inure to the benefit of and be binding upon successors and assigns of the parties hereto. Notice shall be given to the Contracting Officer of any assignment or transfer of this contract or any part or interest therein.

CONTINGENT ON APPROPRIATION OR ALLOTMENT OF FUNDS

5. The expenditure of any money or the performance of any work by the United States hereunder which may require appropriation of money by the Congress or the allotment of funds shall be contingent upon such appropriation or allotment being made. No liability shall accrue to the United States if funds are not so appropriated or allotted.

EFFECTIVENESS OF CONTRACT

6. This contract shall:

(a) Become effective when the Company begins taking water water at the delivery point provided hereunder; and

(b) Supersede the obligation of the United States to deliver water to the Company under the Natomas Water Company contract.

QUALITY OF WATER

7. The operation and maintenance of Project facilities and the construction of new Project facilities for the provision of water under this contract shall be performed in such a manner as is practicable to maintain the quality of raw water to be furnished hereunder. The United States is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water except to the extent such facilities are expressly referred to elsewhere in this contract as a part of the Project facilities to be constructed by the United States pursuant to Reclamation law or as otherwise required by law. Further, the United States does not warrant the quality of water to be furnished pursuant to this contract.

OFFICIALS NOT TO BENEFIT

8. (a) No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit to arise therefrom. This restiction shall not be construed to extend to this contract if made with a corporation for its general benefit.

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

NOTICES

9. (a) Any notice authorized or required to be given to the United States shall be deemed to have been given when mailed postage prepaid, or delivered to the Regional Director, Region 2, Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825. Any notice authorized or required to be given to the District shall be deemed to have been given when mailed in a postage prepaid or franked envelope, or delivered to the Southern California Water Company, 10667 Folsom Boulevard, Rancho Cordova, California 95670.

(b) The designation of the addressee or the address given above may be changed by notice given in the same manner as provided in this article for other notices.

(c) This article shall not preclude the effective service of any such notice or announcement by other means provided by law.