

Appendix B - Memorandum Office of the Solicitor, Pacific Southwest Region, October 21, 2005

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ATTORNEY-CLIENT COMMUNICATION - ATTORNEY-CLIENT PRIVILEGED
United States Department of the Interior

OFFICE OF THE SOLICITOR

Pacific Southwest Region

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Sacramento, California 95825-1890

October 21, 2005

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BUREAU OF RECLAMATION
Lahontan Basin Area Office

IN REPLY
REFER TO:

To: Project Manager, Stillwater National Wildlife Refuge
Senior Realty Specialist, Stillwater National Wildlife Refuge

From: Regional Solicitor, Pacific Southwest Region

Subject: Use of Newlands Project Facilities to Deliver Non-project Water to
Lahontan Valley Wetlands

This memorandum responds to your inquiry regarding the above captioned subject.
Specifically, your questions were

1. Does Section 206(a)(3) of Public Law 101-618 authorize the use of Newlands Project facilities to deliver non-project water to Lahontan Valley wetlands?
2. If so, is a contract under the Warren Act (43 U.S.C. 523-525) required to deliver non-project water through the Newlands Project to the Lahontan Valley wetlands?

First, we examine your question regarding the use of Newlands Project (Project) facilities for the delivery of non-project water to the Lahontan Valley wetlands (Wetlands). Your inquiry raises the issue of whether P.L. 101-618 authorizes the Secretary to acquire non-project water and water rights for use on the Wetlands. We conclude that it does. We also conclude that the Secretary has the authority to use Project facilities to deliver acquired non-project water to the Wetlands. Second, we examine your question of whether a Warren Act contract is required for any proposed transfer of non-project water to the Wetlands. We conclude that the Warren Act does not apply to deliveries by the Secretary of non-project water to the Wetlands. However, all transfers and deliveries of non-project water to the Wetlands must comply with P.L. 101-618 section 209(b), and must satisfy the trust obligations of the Secretary to the Pyramid Lake Paiute and the Fallon Paiute Shoshone Tribes.

1 - Truckee-Carson-Pyramid Lake Water Rights Settlement Act

Among the purposes of Title II of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Settlement Act), P. L. 101-618, 104 Stat. 3294, Nov. 16, 1990, Congress authorized the acquisition of water rights for fish and wildlife, and sought to "protect

OPTIONAL FORM 99 (7-00)

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significant wetlands from further degradation and enhance the habitat of many species of wildlife which depend on those wetlands." § 202(c), (g). Section 206 of the Settlement Act designates approximately 77,520 acres of federal land as the Stillwater National Wildlife Refuge (SNWR) for the Service to manage under the National Wildlife Refuge System Administration Act, as amended, 16 U.S.C. 668dd et seq., as part of the National Wildlife Refuge System (NWRS). §§ 206(b)(1), (2), (3).¹ It also creates a willing seller program for the acquisition of water and water rights to sustain 25,000 acres of primary wetlands on a long-term basis, and allows the Secretary to use federal water facilities to deliver that water to the Wetlands.²

Subsection 206(a) states, in part,

(1) The Secretary is authorized and directed, in conjunction with the State of Nevada and such other parties as may provide water and water rights for the purposes of this section, to acquire by purchase or other means water and water rights, with or without the lands to which such rights are appurtenant, and to transfer, hold, and exercise such water and water rights and related interests to sustain, on a long-term average, approximately 25,000 acres of primary wetland habitat within the Lahontan Valley wetlands in accordance with the following provisions of this subsection.

§ 206(a)(1).³ Subsection 206(a) further provides, in relevant part, that

(2) Acquisition of water rights and related interests pursuant to this subsection shall be subject to the following conditions:

- (A) water right purchases shall be only from willing sellers, but the Secretary may target purchases in areas deemed by the Secretary to be most beneficial to such a purchase program;
- (B) water rights acquired by the Secretary shall be managed by the Secretary after consultation with the State of Nevada and affected interests...; and

¹ The Refuge was originally part of the Stillwater Wildlife Refuge and Management Area (SWMA), which was established by the 1948 Tripartite Agreement between the State of Nevada (State), Truckee-Carson Irrigation District (TCID), and the Service. At that time, the entire area was public land under the jurisdiction of the Bureau of Reclamation (Reclamation) for Project purposes. See Final Environmental Impact Statement, Water Rights Acquisition for Lahontan Valley Wetlands, at 1-14, Sept. 1996 (WRAP EIS). Subsection 206(b) of the Settlement Act effectively transferred jurisdiction over approximately 77,520 acres of that land, and all interests associated with it, to the Service to manage as a part of the NWRS.

² The Wetlands include lands associated with the SNWR, SWMA, Fallon Paiute-Shoshone Indian Reservation, and Carson Lake and Pasture. § 203(e).

³ The State acquires water for the Carson Lake and Pasture. Those lands are in the process of being transferred out of the jurisdiction of the U.S. and to the State. See § 206(e).

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- (C) prior to acquiring any water or water rights in the State of California for the Lahontan Valley wetlands, the Secretary shall first consult with the Governor of California and shall first prepare a record of decision on the basis of such consultations.

(3) the Secretary is authorized to:

- (A) use, modify, or extend, on a non-reimbursable basis, Federal water diversion, storage, and conveyance systems to deliver water to wetlands referenced in paragraph (a)(1) of this subsection, including the Fernley Wildlife Management Area;
- (B) reimburse non-Federal entities for reasonable and customary costs for operation and maintenance of the Newlands Project associated with the delivery of water in carrying out the provisions of this subsection; and
- (C) enter into renewable contracts for the payment of reasonable and customary costs for operation and maintenance of the Newlands Project associated with the delivery of water acquired by the Secretary to benefit the Lahontan Valley wetlands. The contracts shall be for a term not exceeding 40 years. Any such contract shall provide that upon the failure of the Secretary to pay such charges, the United States shall be liable for their payment and other costs provided for in applicable provisions of the contract, subject to the availability of appropriations.

§§ 206(a)(2)(A), (B), (C); 206(a) (3)(A), (B), (C) (Emphasis added).

A. – Does the Settlement Act authorize the Secretary to acquire non-project water and water rights for use on the Wetlands?

The language of the Settlement Act gives the Secretary the authority to acquire “water” and “water rights” to use for the preservation of the Wetlands. The statute, however, fails to define the term “water.” “Water” is ambiguous in this context because the statute implicates the operation of a federal reclamation project to achieve certain goals of the legislation. “Water,” therefore, can mean either “project water” or “non-project water,” or it can encompass both types. This ambiguity can be resolved by applying basic canons of statutory construction to discern the word’s meaning.⁴

⁴ The Service interprets the Settlement Act as giving the Secretary the authority to acquire both project and non-project water for the Wetlands. In its WRAP EIS, the Service discussed, as part of its preferred alternative, using non-project water from the Middle Carson Basin as a source of water for the Wetlands.

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"It is a fundamental canon that the words of a statute must be read in their context with a view to their place in the overall statutory scheme." FDA v. Brown Williamson Tobacco Corp., 529 U.S. 120, 133 (2001). Section 206(a) provides the authorization for the Secretary to "acquire by purchase or otherwise water and water rights...and to transfer, hold, and exercise such rights...to sustain, on a long-term average, approximately 25,000 acres of primary wetlands" in the Lahontan Valley. Subsection 206(a)(2)(C) provides that before the Secretary acquires water or water rights in California to use on the Wetlands, the Secretary must consult with the Governor and prepare a record of the decision based on those consultations. This shows that Congress authorized the Secretary to reach beyond the available water and water rights within the Project to acquire water for the Wetlands. This is so because no California lands are serviced by the Project.

Additionally, Congress distinguished between project and non-project water in the statute itself. In subsection 205(b)(1), Congress authorized the Secretary to allow storage of non-project water in the Lake Tahoe Dam, Truckee Storage, and Washoe Projects. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983). Since Congress used the phrase "non-project water" in one subsection, but did not use it in the subsection addressing acquisition of water and water rights for the Wetlands, the word "water" alone must therefore encompass both project and non-project water in this context. Examining the word "water" in these contexts, therefore, leads to the conclusion that its definition should encompass both project and non-project water and water rights.

B – Does the Settlement Act authorize the Secretary to use the Project facilities to deliver non-project water to the Wetlands?

Section 206(a)(3)(A) authorizes the Secretary to "use, modify, or extend, on a non-reimbursable basis, Federal water diversion, storage, and conveyance systems to deliver water" to the Wetlands. The language of this provision is plain. As concluded above, the Secretary can acquire both project and non-project water and water rights for the Wetlands. The Project is a "federal water diversion, storage, and conveyance system." It follows that section 206(a)(3)(A) allows the Secretary to use the Project to deliver non-project water acquired by her to the Wetlands to fulfill the Settlement Act's mandate. Next, we address the applicability of the Warren Act to these deliveries.

2 – The Warren Act and Section 305 of the Reclamation States Emergency Drought Act

In 1911, Congress enacted the Warren Act, 43 U.S.C. 523, which states in relevant part,

See WRAP EIS, at 2-28 to 2-35. Since the Service has yet to utilize non-project water as a source for the Wetlands, we thought a discussion of this issue was in order.

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[W]henever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems..., individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: *Provided, however,* That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects...

43 U.S.C. 523.⁵ The Warren Act, therefore, limits the use of excess capacity to non-project water used for irrigation purposes by those requesting the contract. WTR P04, at 3.

In 1992, Congress supplemented the Warren Act by passing Section 305 of the Reclamation States Emergency Drought Act of 1991 (Drought Act), P.L. 102-250, 106 Stat. 59, March 2, 1992.⁶ This provision authorized the Secretary to enter into contracts pursuant to the Warren Act, with "municipalities, public water districts and agencies, other Federal agencies, State agencies, and private entities," for the,

[I]mpounding, storage and carriage of non-project water for domestic, municipal, fish and wildlife, industrial and other beneficial purposes using any facilities associated with the Central Valley Project, Cachuma Project, and the Ventura Project, California, the Truckee Storage Project and the Washoe Project, California and Nevada.

43 U.S.C. 2245.⁷ Thus, the Warren Act as supplemented, authorizes the Secretary to enter into contracts with a variety of entities for the use of federal reclamation facilities to

⁵ Reclamation defines excess capacity as "diversion, storage, conveyance, or pumping capacity in the project facilities which is excess to that needed to achieve a Reclamation project's authorized purpose." Bureau of Reclamation Policy Manual, WTR P04, at 2, January 10, 2001 (WTR P04).

⁶ This section is codified at 43 U.S.C. 2245.

⁷ Congress previously authorized the Secretary to store non-project water in the Truckee and Washoe Projects for Settlement Act purposes, § 205(b)(1). Since Congress is presumed to legislate knowing existing law, we can only conclude that in section 305 of the Drought Act, it sought to authorize the Truckee and Washoe projects to store and carry non-project water for non-Settlement Act purposes. See Miles v. Apex Marine, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

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store and transport non-project water for irrigation purposes, and for non-irrigation purposes only in those facilities that Congress has specifically authorized.⁸

Does the Warren Act apply to the delivery of non-project water acquired by the Secretary for Wetlands use?

As stated above, section 206(a)(3)(A) of the Settlement Act authorizes the use of Project facilities to deliver non-project water acquired by the Secretary for the Wetlands. A question exists, however, as to whether the Warren Act applies to these deliveries. We conclude that the Warren Act does not apply to non-project water deliveries by the Secretary to the Wetlands.

Section 206(a)(3)(A) of the Settlement Act specifically authorizes the Secretary to utilize federal water diversion, storage, and conveyance systems to deliver water to the Wetlands. Congress also specifically provided that the Secretary pay "non-federal entities" that may operate the Project for the customary costs associated with the delivery of the acquired water. § 206(a)(3)(B).⁹ Furthermore, the Settlement Act provides the authorization to enter into contracts for the payment of these costs. § 206(a)(3)(C).

All water acquired by the Secretary for use on the Wetlands in accordance with State law and applicable Decrees can be delivered to the Wetlands through the Project without a Warren Act contract. To be practical, however, it is recommended that there be some type of contract for deliveries to the Wetlands between the Service, Reclamation, and TCID pursuant to subsection 206(a)(3)(c). Please note that if a contract is negotiated for the payment of reasonable costs associated with deliveries of water to the Wetlands, the United States is liable for those costs. *See id.* All transfers and deliveries of non-project water, however, are subject to Section 209(b) of the Settlement Act. Subsection 209(b) states that no provision of the Act can be implemented in a way that would 1) increase diversions of the Truckee River water to the Project over allowed by applicable operating criteria and procedures, or 2) conflict with applicable decrees.

To summarize, pursuant to the Settlement Act, the Secretary may acquire non-project water and water rights to sustain primary wetland habitat, which includes lands on the Refuge. She may also use the Project to deliver that water to the Wetlands to fulfill her mandate to sustain the Wetlands on a long-term basis. The Warren Act does not apply when the Secretary seeks to use the Project to deliver water that was acquired pursuant to the Settlement Act to the Wetlands.

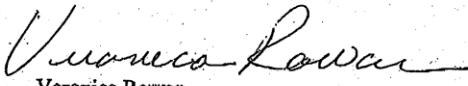
⁸ Congress seems to supplement the Warren Act on a case-by-case basis. Recently, Congress supplemented the Warren Act to authorize the Secretary to contract with certain entities to use the excess capacity in specific federal reclamation projects for a variety of purposes. P.L. 106-549, 114 Stat. 2743, Dec. 19, 2000; P.L. 106-467, 114 Stat. 2026, Nov. 9, 2000; P.L. 106-368, 114 Stat. 1416, Oct. 27, 2000. The projects authorized are Mancos Project, Colorado, the Solano Project, California, and the Weber Basin Project, Utah, respectively.

⁹ An early version of the bill named TCID as one non-federal entity operating "existing water transport facilities." S. 1554, 135 Cong. Rec. S10296, 10299, Aug. 4, 1989.

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If you have any questions please call Veronica Rowan at 916-978-5675.

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