

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE
COUNCIL, *et al.*,

Plaintiffs,

v.

DIRK KEMPTHORNE, Secretary, U.S.
Department of the Interior, *et*
al.,

Defendants.

1:05-CV-01207 OWW SMS

SUPPLEMENTAL MEMORANDUM
DECISION RE CROSS MOTIONS
FOR SUMMARY JUDGMENT
ADDRESSING APPLICABILITY OF
NATIONAL ASSOCIATION OF HOME
BUILDERS V. DEFENDERS OF
WILDLIFE, 127 S. CT. 2518
(2007), TO PLAINTIFFS'
REQUEST FOR RESCISSION OF
THE SACRAMENTO RIVER
SETTLEMENT CONTRACTS.

SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY, *et al.*,

Defendant-Intervenors.

ANDERSON-COTTONWOOD IRRIGATION
DISTRICT, *et al.*,

Joined Parties.

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1 I. INTRODUCTION

2 The November 19, 2008, Memorandum Decision Re: Cross Motions
3 for Summary Judgment Re Contract Rescission ("Memorandum
4 Decision"), called for further briefing addressing the
5 applicability of the recent Supreme Court case, *National*
6 *Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct.
7 2518 (2008), to Plaintiffs' request for rescission of a number of
8 Sacramento River Settlement Contracts ("SRS Contracts"):

9 To resolve the applicability of *Home Builders* ... it is
10 necessary for the Federal Defendants and/or the
11 Settlement Contractors to present evidence on the
12 nature and extent of their claimed senior water rights.
13 If, *arguendo*, this evidence establishes that the
14 Settlement Contractors hold senior rights to a certain
15 volume of water, it is appropriate to determine as a
16 matter of law that the Bureau lacks any discretion
17 under *Home Builders* over that volume of SRS Contract
18 water.

19 Memorandum Decision, Doc. 761, at 70:8-16 (emphasis added).

20 A December 3, 2008 scheduling conference confirmed that
21 these proceedings do not involve an actual adjudication of the
22 water rights of any parties in this case. See Reporters'
23 Transcript, Dec. 3, 2008, Doc. 764, at 7-8, 18, 28.

24 A January 14, 2009 Supplemental Scheduling Conference Order
25 defined the remaining issues.

26 By January 30, 2009, the Sacramento River Settlement
27 Contractor parties shall file further admissible
28 evidence and supporting pleadings regarding the nature
and extent of the Settlement Contractors' water rights
in order to resolve the applicability of the Supreme
Court's decision in [*Home Builders*], 127 S. Ct. 2518
(2007), and to further narrow the issues in this case.

See Doc. 769 at 2.

On January 28, 2009, Plaintiffs filed a motion for
certification of interlocutory appeal or, in the alternative, for

1 reconsideration of the district court's November 19, 2008
2 memorandum decision. Doc. 770. This motion was denied without
3 prejudice as premature on the ground that the November 19, 2008
4 decision was not completed nor final. Doc. 811, filed Feb. 12,
5 2009.

6 On January 30, 2008, two groups of Sacramento River
7 Settlement Contractors ("SRS Contractors"), Glenn Colusa
8 Irrigation District ("GCID"), et al., and Reclamation District
9 No. 108 ("RD 108"), et al., filed separate memoranda addressing
10 the district court's request. Docs. 772 & 773. GCID also filed
11 the declaration of Marc Van Camp along with voluminous supporting
12 documentation. See Docs. 775-810. Federal Defendants and
13 Plaintiffs responded. Doc. 815, filed Feb. 27, 2009; Doc. 820,
14 corrected version, filed Mar. 2, 2009. Oral argument was heard
15 on March 13, 2009, after which the matter was submitted for
16 decision. Doc. 826. On March 24, 2009, Federal Defendants
17 sought to file a supplemental brief to address the application of
18 *Home Builders* to this case. Doc. 827. The same day, Plaintiffs
19 opposed the request, objecting that supplemental briefing would
20 further delay a decision in this case: "Plaintiffs are anxious
21 to obtain a ruling on this matter, as the Bureau's implementation
22 of the Sacramento River Settlement Contracts is likely to have a
23 significant effect on threatened and endangered fish and their
24 critical habitat this year." Doc. 828. at 2.

25 This Memorandum Decision incorporates the November 19, 2008
26 Memorandum Decision, except that: (a) where inconsistent, this
27 Decision shall control, and (b) Part VI.D.1. of the November 19,
28 2008 Decision is superceded by this Memorandum Decision.

1 II. FACTUAL BACKGROUND

2 Earlier decisions in this case set forth extensive
3 background describing the coordinated operations of the Central
4 Valley Project ("CVP") and State Water Project ("SWP"). See,
5 e.g., Doc. 363, filed May 25, 2007; Doc. 761. As some of the
6 disputed water rights predate the Projects themselves, a review
7 of the Projects' history and the legal relationship between the
8 SRS Contractors and Interior is necessary.

9
10 A. General History of The CVP and Relevant State Law
11 Doctrines.

12 The California Court of Appeal, Third Appellate District,
13 performed a comprehensive review of the relevant history in *El*
14 *Dorado Irrigation Dist. v. State Water Resources Control Board*,
15 142 Cal. App. 4th 937 (2006):

16 The History Of Comprehensive Water Planning In
17 California

18 ***

19 As former Presiding Justice John T. Racanelli explained
20 in *United States v. State Water Resources Control Bd.*
21 (1986) 182 Cal.App.3d 82, 98: "California's critical
22 water problem is not a lack of water but uneven
distribution of water resources. The state is endowed
with flowing rivers, countless lakes and streams and
abundant winter rains and snowfall. But while over 70
percent of the stream flow lies north of Sacramento,
nearly 80 percent of the demand for water supplies
originates in the southern regions of the state."

23 Efforts to solve this problem date back more than
24 100 years. In the early 1870's, President Ulysses
Grant appointed a commission under the leadership
25 of Colonel B.S. Alexander (Alexander Commission)
to study California's "irrigation problem."
26 (Cooper, *Aqueduct Empire*, [1968], p. 42.) The
Alexander Commission "was the first to point out
27 ... that the Central Valley's most bountiful water
supplies lay in the Sacramento River region, in
contrast to potential shortages in the valley of
28 the San Joaquin." (*Id.* at pp. 42-43.) The

1 Commission "made several proposals for basin-wide
2 storage and distribution of water." (*Id.* at p.
3 42.)

4 The work of the Alexander Commission was followed in
5 the late 1870's by the work of William Hammond Hall,
6 the first State Engineer, who was appointed to
7 investigate, among other things, "the problems of
8 irrigation" in California. (Stats. 1878, ch. 429, § 3,
9 p. 634; Cooper, *Aqueduct Empire*, supra, at p. 43.) Hall
10 "took his assignment seriously and spoke out for
11 coordinated region-wide water development. But in that
12 respect he was a generation ahead of his time.... In a
13 time of rampant self-interest Hall's farsighted vision
14 of systematic development went largely unrecognized."
15 (Cooper, supra, at pp. 43-44.)

16 Forty years later, in 1919, Colonel Robert Bradford
17 Marshall, chief hydrographer of the United States
18 Geological Survey, followed in Hall's footsteps when he
19 "proposed to the governor of California a series of
20 storage reservoirs and canals in the Central Valley."
21 (Cooper, *Aqueduct Empire*, supra, at p. 50; see also
22 Rogers and Nichols, *Water for California* (1967) § 27,
23 p. 46.) "[I]n the hortatory language of a crusader,
24 [Colonel Marshall] sketched, summarized and espoused
25 for California the inevitable water logistics which
26 seventy years of cumulative geographic and hydrologic
27 evidence demanded: redistribution of water from north
28 to south; an integrated system of statewide waterworks;
the Central Valley Project in all its splendid promise;
the east and west side canals flanking that valley;
tunnels and pumps conveying to southern California a
share of the state's endowment." (Cooper, supra, at pp.
50-51.)

19 In 1921, the California Legislature took up the search
20 for a solution to California's water problem when it
21 directed the state engineering department "to determine
22 a comprehensive plan for the accomplishment of the
23 maximum conservation, control, storage, distribution
24 and application of all the waters of the state, and to
25 estimate the cost of constructing dams, canals,
26 reservoirs or other works necessary in carrying out
27 this plan." (Stats. 1921, ch. 889, § 4, p. 1686.)
28 Development of this comprehensive water plan for
California continued over the next decade, with
periodic reports to the Legislature. (See Rogers and
Nichols, *Water for California*, supra, § 27, p. 46;
Ivanhoe Irr. Dist. v. All Parties (1957) 47 Cal.2d 597,
614, revd. 357 U.S. 275.)

19 In 1927, while the water plan was still being
20 developed, a joint Senate-Assembly committee recognized
21 the need "to file on, or withdraw from filing by
22

1 private parties, the water rights to be utilized and
2 required for the consummation of the co-ordinated
3 plan.' " (25 Ops.Cal.Atty.Gen. 8, 11 (1955).)
4 Accordingly, the Legislature passed the Feigenbaum Act
5 (Stats.1927, ch. 286, pp. 508-510), which was later
6 codified as Water Code section 10500 et seq.[] (See 25
7 Ops.Cal.Atty.Gen., *supra*, at p. 11.) The Feigenbaum Act
8 directed the Department of Finance "to make and file an
9 application or applications for any water or the use
10 thereof which in the judgment of the state department
11 of finance is or may be required in the development and
12 completion of the whole or any part of a general or
13 coordinated plan looking towards the development,
14 utilization or conservation of the water resources of
15 the state." (Stats.1927, ch. 286, § 1, pp. 508-509; see
16 § 10500.) The act further provided that the priority of
17 any such application would be the effective date of the
18 act, which was July 29, 1927.[] (Stats.1927, ch. 286, §
19 1.) "The effect of the [Feigenbaum Act] was to withdraw
20 the then unappropriated waters of the State filed on by
21 the Department of Finance from any further
22 appropriation by private parties." (25
23 Ops.Cal.Atty.Gen., *supra*, at p. 11.) The Feigenbaum Act
24 also gave the Department of Finance the "power, in its
25 discretion, to release from priority or to assign any
26 portion of or all of any of the appropriations that may
27 be filed under the provisions of this act when such
28 release or assignment is for the purpose of development
not in conflict with such general or coordinated plan."
(Stats.1927, ch. 286, § 1, p. 509; see § 10504 ["The
board may release from priority or assign any portion
of any application filed under this part when the
release or assignment is for the purpose of development
not in conflict with such general or coordinated plan
or with water quality objectives established pursuant
to law"].)

"It was under th[e] authorization [of the Feigenbaum
Act] that the Director of Finance, beginning in 1927,
filed some 37 applications on behalf of the state on
streams within the central valley area" (*Ivanhoe
Irr. Dist. v. All Parties*, *supra*, 47 Cal.2d at p. 614.)
One of those state-filed applications, application No.
5645, was filed on July 30, 1927. That application
sought a permit to appropriate for irrigation and
domestic use various amounts of water from various
points in El Dorado County on tributaries to the
American and Cosumnes Rivers, including-as relevant
here-the South Fork of the American River.

The History Of The Area Of Origin Protections

In 1931, the Division of Water Resources submitted a
comprehensive series of reports on the State Water Plan
to the Legislature. (25 Ops.Cal.Atty.Gen., *supra*, at p.

1 13.) That same year, "the Legislature was called upon
2 to amend the Feigenbaum Act of 1927 by extending the
3 date to which State filings would be exempted from
4 requirements of diligence." (*Id.* at p. 14.) The bill
5 introduced to make this amendment "was [itself] amended
6 before final passage to provide a further restriction
7 on the authority of the Department of Finance to
8 release from priority or to assign any of the State's
9 filings." (*Ibid.*) Specifically, the Legislature amended
10 the Feigenbaum Act to provide that "no such priority
11 shall be released, or assignment made of any such
12 appropriation that will, in the judgment of the state
13 department of finance, deprive the county in which such
14 appropriated water originates, of any such water
15 necessary for the development of such county."
16 (Stats.1931, ch. 720, § 1, p. 1515.) This amendment was
17 the culmination of several attempts since 1925 "to
18 protect the counties of origin against exportation of
19 water which might be needed by them in their own future
20 development." (25 Ops.Cal.Atty.Gen., *supra*, at p. 12.)

21 Two years later, in 1933, "[a]s the result of the
22 prolonged studies and planning by the state, the
23 Legislature ... enacted a statute designating the
24 Sacramento-San Joaquin coordinated project as the
25 Central Valley Project" (the CVP). (*Ivanhoe Irr. Dist.*
26 *v. All Parties*, *supra*, 47 Cal.2d at p. 614.) Part of
27 the Central Valley Project Act of 1933 was a provision
28 that later became section 11460, which provides: "In
the construction and operation by the department 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 department 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." FN5 (Stats.1933, ch. 1042, § 11, pp.
2650-2651.)

FN5. Although on its face this provision applies
only to the Department, section 11128 makes the
statute applicable to the Bureau as well. "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." (§ 11128.)

1 The CVP

2 "Construction of the CVP began in 1937. It is now one
3 of the world's most extensive water transport
4 systems.... Shasta Dam on the upper Sacramento River is
5 the focal point of the CVP. Shasta Dam was completed in
6 1945 but began storing water and generating electric
7 power in 1944. The waters of the Sacramento River which
8 flow past the Shasta Dam are augmented by additional
9 water supplies brought through a tunnel from the
Trinity River and from reservoirs formed by Folsom and
Nimbus Dams on the American River. About 30 miles south
of Sacramento, the Delta Cross Channel regulates the
passage of Sacramento River water through the Delta to
the Tracy Pumping Plant." [United States v. State
Water Resources Control Board, supra, 182 Cal.App.3d at
p.99.]

10 ***

11 The appropriative water rights necessary for operation
12 of the CVP included rights acquired by assignment of
13 various state-filed applications. Indeed, as of 1957,
14 "[t]he greater portion of water to which the United
15 States ha[d] acquired rights [wa]s by assignments from
16 the state's Director of Finance. [Citation.] Four
17 assignments of applications for the appropriation of
unappropriated water of the Sacramento River, totaling
35,000 second-foot diversion and 12,690,000 acre-foot
annual storage, were made on September 3, 1938...."
(Ivanhoe Irr. Dist. v. All Parties, supra, 47 Cal.2d at
p. 618.)

18 142 Cal. App. 4th at 945-949 (parallel citations and footnotes
19 omitted).

20 B. The Bureau's Initiation of Permit Applications for the
21 CVP Before the State Board.

22 The Bureau of Reclamation ("Bureau" or "Reclamation") took
23 over operation of the CVP on behalf of the United States in the
24 late 1930s. See SC 03663¹; see also State Water Board Decision
25

26
27 ¹ All "SC" references are to the corresponding bates
28 stamped documents submitted as exhibits to the Van Camp
Declaration, Doc. 781-806.

1 990 at 5-6.² In 1938, the State of California assigned to the
2 United States a number of pending water rights applications
3 related to the mainstem Sacramento River. SC 03663. In 1952,
4 another application for direct diversion from Delta channels was
5 assigned to the United States. SC 03664. The United States
6 applied to the State Water Rights Board (the "Board" -- a
7 predecessor to the State Water Resources Control Board ("SWRCB"))³
8 for permits to operate the CVP with water from the assigned water
9 rights, along with a 1943 water rights application for power and
10 incidental domestic purposes at Keswick Power Plant. D-990 at 6,
11 10-14.

12 One of the central purposes of the state water rights
13 application/permitting process is to determine whether there is
14 sufficient water available to satisfy both senior rights-holders
15 and the applicant's requested appropriation. California Water
16 Code ("CWC") § 1375 ("As prerequisite to the issuance of a permit
17 to appropriate water ... [t]here must be unappropriated water
18 available to supply the applicant"); 23 Cal. Admin. Code § 731(a)
19 ("A person who claims an existing right to the use of water shall
20 be granted a permit or license to appropriate no more water than
21

22 ² Available at
23 <http://www.waterrights.ca.gov/hearings/decisions/WRD990.PDF> (last
24 visited, April 6, 2009).

25 ³ The Water Rights Board was created by the California
26 Legislature in 1956 to administer water rights. See *SWRCB Cases*,
27 136 Cal. App. 4th 674, 695 n.9 (2006) (citing Cal. Stats. 1957,
28 1st Ex. Sess. 1956, ch. 52, §7, pp. 425-27). In 1967, the
Legislature consolidated the Water Rights Board with the State
Water Quality Control Board to create the State Water Resources
Control Board. *Id.* at 695 (citing Cal. Stats. 1967, ch. 284).

1 is needed over that which is available under the existing right
2 to meet the beneficial use requirements of the project.”).⁴ The
3 SWRCB disclaims authority to directly adjudicate or otherwise
4 resolve disputes over the validity, nature, or extent of pre-1914
5 water rights. See SWRCB, *Information Pertaining to Water Rights*
6 *in California - 1990* at p.8.⁵ Instead, the parties may file suit
7 in a court of competent jurisdiction to determine the extent and
8 nature of such water rights. The court may, in turn, refer the
9 matter to the Board, as referee, for investigation. See CWC
10 §§ 2000, 2001. Alternatively, “one or more claimants to water of
11 any stream system” may request “the determination of the rights
12 of the various claimants to the water of that stream system.”
13 CWC § 2525. If “the facts and conditions are such that the
14 public interest and necessity will be served by a determination
15 of the water rights involved,” the Board may “enter an order
16 granting the petition and make proper arrangements to proceed
17 with the determination.” *Id.*

18
19 C. The 1956 Cooperative Studies and Related Analyses.

20 On July 7, 1952, Reclamation, the State of California, and
21 the Sacramento Valley Water Users Committee entered into a
22 “Memorandum of Understanding Relating to a General Approach to
23

24 ⁴ After the passage of the California Water Commission
25 Act in 1914, any appropriation of water must comply with the
26 provisions of Division 2, Part 2 of the California Water Code.

27 ⁵ Available at
28 http://www.waterrights.ca.gov/Forms/app_geninfo.pdf (last
visited, April 6, 2009).

1 Negotiations for Settlement of Water Diversions from the
2 Sacramento River and Sacramento-San Joaquin Delta with the
3 Objective of Avoiding Litigation." SC 03629-32 ("1952 MOU").

4 The signatories agreed that:

5 The Federal Government acting through the Bureau of
6 Reclamation is applying for certain permits to
7 appropriate un-appropriated water from the Sacramento
8 River, in aid of the Central Valley Project. The water
9 users along the Sacramento River, hereinafter referred
10 to as "the water users", who are for the purposes
11 hereof acting through the Sacramento Valley Water Users
12 Committee, have protested the applications of the
13 Federal Government for such permits and seek various
14 conditions and limitations. The State Engineer, before
15 whom the applications are pending, encourages
16 satisfactory agreements between applications and
17 protestants providing for withdrawal of protests.

18 The Federal Government has also indicated that an
19 authoritative determination of the validity and extent
20 of rights to the use of water of the Sacramento River
21 is necessary, and the parties hereto are in accord that
22 this determination should be made by agreement, if
23 possible, rather than by litigation.

24 The water users and the Federal Government are
25 accordingly undertaking to negotiate an adjustment of
26 the various matters just referred to without litigation
27 and with a minimum of formal proceedings, for their
28 mutual benefit. Such adjustment would eliminate the
delay, expense and uncertainty attendant upon complex
and difficult lawsuits, with a view of apportioning the
water of the Sacramento River in an equitable manner so
that the Central Valley Project can function in the
manner intended without injury to the water users. The
state of California will participate and assist in
these negotiations through its State Engineer and its
Attorney General.

29 [The] general approach [suggested by this memorandum]
30 shall not in any way prejudice any water rights claimed
31 by any of the parties...

32 SC 03629-30 (emphasis added).

33 The unambiguous intent of the MOU is to reach, by agreement
34 and compromise, "an authoritative determination of the validity
35

1 and extent of rights to the use of water of the Sacramento
2 River," as between Sacramento River water users and the United
3 States. To do this, the parties "entered into a cooperative
4 study program" in an "effort to reach an agreement on existing
5 water rights along the Sacramento River and in the Delta." D-990
6 at 28. The results of the 1956 studies were published in the
7 "Report on 1956 Cooperative Study Program," which reaffirmed that
8 the studies were intended to "produce information that would be
9 used to further negotiations aimed at reaching an agreement on
10 water rights along the Sacramento River and in the Delta." SC
11 00065. The Report explained that the assumptions utilized in the
12 studies were "solely for the purpose of evaluating the effects of
13 [those] assumptions upon water right yields, deficiencies, and
14 supplemental water requirements, and no implications as to the
15 legal status of such assumed rights are intended." SC 00066
16 (emphasis added).

17 Using the results of the cooperative study program, the
18 parties presented separate studies to the Board to support an
19 "equitable basis for determining the yields of existing rights
20 along the Sacramento River and in the Delta." D-990 at 31
21 (emphasis added). Study C-2BR was prepared by Reclamation and
22 Study C-650D was submitted by the Sacramento River and Delta
23 Water Association. *Id.* A description of the C-650 Study
24 published by the California Department of Water Resources ("DWR")
25 in 1959 reiterates that the purpose of the then-ongoing
26 negotiations between Sacramento River water users and the Bureau
27 is "to find a basis for agreement upon the respective water
28 rights of these parties and upon a suitable arrangement for the

1 water users to obtain a supplemental water supply from the
2 Central Valley Project.” SC 03451 (emphasis added).

3
4 D. Van Camp’s Summary of the Evidence Underlying the 1956
5 Cooperative Study Program and Related Investigations.

6 GCID submits the declaration of Marc Van Camp, a registered
7 civil engineer with extensive experience in the fields of
8 hydrology, hydraulics, irrigation, drainage, groundwater, water
9 supply, water rights, and related subjects. Doc. 775. His
10 declaration summarizes and explains voluminous technical
11 information pertaining to the SRS Contractors’ relevant
12 underlying water rights. *Id.* Much of Van Camp’s information is
13 from the 1956 Cooperative Studies, C-2BR, and C-650. *Id.* at ¶9.

14 Van Camp presents a series of tables to summarize the nature
15 and extent of the senior water rights held by each of the SRS
16 Contractors. Exhibits C-1 through C-28 summarize those senior
17 rights considered and used to arrive at the original contract
18 quantities. *Id.* at ¶11. Exhibits D-1 through D-28 are plots for
19 each of the SRS Contractors, showing the monthly contract
20 quantities ultimately provided for within each of the original
21 SRS Contracts, together with the water rights data from C-1
22 through C-28. *Id.* at ¶12. Exhibit E depicts the combined
23 monthly water rights quantities and the combined monthly contract
24 quantities of 27 of the 28 challenged SRS Contracts,
25 distinguishing between the various types of underlying and
26 contractual water rights involved. *Id.* at ¶13.⁶

27 ⁶ The City of Redding is treated separately, because the
28 City diverts water year-round for municipal, industrial, and

1 According to Van Camp's uncontradicted review of the
2 information contained in these Studies, the underlying water
3 rights held by the SRS Contractors included pre-1914
4 appropriative water rights, post-1914 appropriative rights,
5 riparian rights, and a small volume of "other" types of water
6 rights. Most of the underlying water rights included only a
7 maximum rate of diversion and a season of diversion. None of the
8 underlying water rights included any monthly diversion limits,
9 other than the maximum rate of diversion.⁷

10 Van Camp opined that in all but six cases, the monthly
11 contract quantities eventually agreed to in the original set of
12 SRS Contracts were less than the "documented" underlying water
13 rights.⁸ *Id.* at ¶41. The sum of the monthly contract quantities
14 that exceed the face value of the underlying water rights
15 accounts for approximately one percent of the total contract
16 quantity for the 28 contractors at issue in this case. *Id.* Van
17 Camp opines that some of these exceedences are attributable to
18 small differences in assumptions used to estimate monthly demand,
19 _____
20 domestic purposes. *Id.*

21 ⁷ It is undisputed that Reclamation's operation of the
22 CVP depended on placing limits on the SRS Contractors' monthly
diversions.

23 ⁸ Van Camp opined, specifically, that "in all but six
24 cases, the monthly contract quantities agreed to are less than
25 what was authorized for diversion under the documented water
26 rights that were considered and used to arrive at the contract
27 quantities provided for within the original SRS Contracts." Van
28 Camp Decl. at ¶41. The phrase "authorized for diversion under
the documented water rights" is, at least in part, an improper
legal conclusion and is disregarded, as the Board, Bureau, and
SRS Contractors did not reach such an agreement.

1 rounding, and the failure to identify all "other" water rights
2 concerned. *Id.* at ¶56. Van Camp explains that other exceptions,
3 such as the fact that Anderson Cottonwood Irrigation District's
4 ("ACID") pre-1914 claim is less than the monthly contract
5 quantities provided for in their contract, was the result of
6 Reclamation and ACID's consideration of "unusually high
7 conveyance losses, porous soils, and projected crop patters
8 within ACID...." *Id.* at ¶50.

9

10 E. D-990.

11 In response to the United States' applications, the Board
12 held more than 75 days of hearings over the course of more than a
13 year. D-990 at 6-7. The Board first rejected the United States'
14 position that it should be issued an unconditional permit to
15 appropriate water for the operation of the CVP, reasoning:

16 [This] demand ... is irreconcilable with the provisions
17 of Section 8 of the Reclamation Act of 1902 that
18 federal reclamation law is not intended to interfere
19 with state laws "relating to the control,
20 appropriation, use, or distribution of water used in
21 irrigation ... and the Secretary of the Interior, in
22 carrying out the provisions of this act shall proceed
23 in conformity with such laws" There is no such
24 thing as an unconditional water right under the law of
25 California, or of any other western state for that
26 matter.

27 *Id.* at 25.

28 D-990 recognized that "[t]he final report acknowledged [that
the] assumptions [made in the studies], particularly with respect
to water rights, may differ considerably from the rights as may
be determined by a court of law." *Id.* at 31.

The Board also examined the data to determine the maximum
quantity that the Bureau should be permitted to divert to storage

1 during any given year:

2 In fixing the rates of direct diversion to be allowed,
3 the Board is inclined to greater liberality than usual
4 because of the magnitude of the Project and the
5 complexities involved in determining at this time the
6 direct diversion as distinguished from rediversions of
7 stored water. However, notwithstanding these
8 considerations, we would require greater particularity
9 in proof of direct diversion requirements were we not
assured that no prejudice to others will result from
failure of applicant to produce such proof. This
assurance is provided by conditions which will be
imposed in the permits subjecting exports of water from
the Delta to use within the Sacramento River Basin and
Delta so that there can be no interference with future
development of these areas.

10 *Id.* at 40.

11 The Board concluded:

12 [T]he public interest requires that water originating
13 in the Sacramento Valley Basin be made available for
14 use within the Basin and the Sacramento-San Joaquin
Delta before it is exported to more distant areas, and
the permits granted herein will so provide.

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

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

Users within the watershed who do not presently hold
appropriative rights but who wish to initiate such

1 rights by application to this Board should also be
2 afforded preference. Accordingly the permits granted
3 for use outside the watershed shall be subject to
rights initiated by applications for use within the
watershed.

4 *Id.* at 72-73.

5 The Board directly encouraged the United States to reach a
6 settlement agreement with the Sacramento River water users who
7 held "existing rights" in the Sacramento River:

8 Throughout these proceedings, the Bureau's
9 representatives have consistently affirmed their policy
10 to recognize and protect all water rights on the
11 Sacramento River and in the Delta existing under State
12 law at the times these applications were filed,
13 including riparian, appropriative and others.
14 Unfortunately, these rights have never been
comprehensively defined. It is imperative, therefore,
15 that the holders of existing rights and the United
16 States reach agreement concerning these rights and the
17 supplemental water required to provide the holders with
18 a firm and adequate water supply, if a lengthy and
19 extremely costly adjudication of the waters of the
20 Sacramento River and its tributaries is to be avoided.

21 *Id.* at 75 (emphasis added).

22 The Board found:

23 [U]nappropriated water exists in the Sacramento river
24 and in the Delta at times and in sufficient amounts to
25 justify approval of [the] Applications.... [T]he uses
26 proposed are beneficial; that such waters in general,
27 but with certain exceptions and subject to certain
28 conditions, may be taken and used as proposed without
interference with the exercise of prior rights; and
that the applications should be approved and permits
issued pursuant thereto, subject to the usual terms and
conditions and subject to those additional terms and
conditions indicated in ... this decision for the
protection of prior rights and in the public interest.
The Board finds that as so conditioned the developments
proposed in these applications will best develop,
conserve and utilize in the public interest the water
sought to be appropriated.

29 *Id.* at 79. The position of the United States is unequivocal: to
30 "recognize and protect" existing Sacramento River water rights
31 already held by SRS users at the time (1952) the Bureau's

1 applications were filed. The parties did so by agreement.

2 On February 9, 1961, the board granted the Bureau's
3 applications, subject to, among others, the following relevant
4 conditions:

5 20. The quantity of water which may be diverted under
6 permits issued pursuant to Applications 5625, 5626,
7 9364 and 9365 shall remain subject to depletion of
8 stream flow above Shasta Dam by the exercise of lawful
9 rights to the use of water for the purpose of
10 development of the counties in which such water
11 originates, whether such rights have been heretofore or
12 may be hereafter initiated or acquired; such depletion
13 shall not exceed in the aggregate 4,500,000 acre-feet
14 of water in any consecutive 10-year period and not to
15 exceed a maximum depletion in any one year in excess of
16 700,000 acre-feet.

17 21. In conformity with Water Code Section 10505,
18 permits issued pursuant to Applications 9363, 9366,
19 9367 and 9368 shall be subject to any and all rights of
20 any county in which the water sought to be appropriated
21 originates to the extent that any such water may be
22 necessary for the development of such county.

23 22. Direct diversion and storage of water under
24 permits issued pursuant to Applications 5626, 9363,
25 9364, 9366, 9367 and 9368 for use beyond the
26 Sacramento-San Joaquin Delta or outside the watershed
27 of Sacramento River Basin shall be subject to rights
28 initiated by applications for use within said watershed
and Delta regardless of the date of filing said
applications.

29 23. The export of stored water under permits issued
30 pursuant to Applications 5626, 9363 and 9364 outside
31 the watershed of Sacramento River Basin or beyond the
32 Sacramento-San Joaquin Delta shall be subject to the
33 reasonable beneficial use of said stored water within
34 said watershed and Delta, both present and prospective,
35 provided, however, that agreements for the use of said
36 stored water are entered into with the United States
37 prior to March 1, 1964, by parties currently diverting
38 water from Sacramento River and/or Sacramento-San
39 Joaquin Delta and prior to March 1, 1971, by parties
40 not currently using water from Sacramento River and/or
41 Sacramento-San Joaquin Delta.

42 *Id.* at 84-86. The parties place particular emphasis on Condition
43 23.

1 F. 1951 House Interior and Insular Affairs Committee
2 Report.

3 Congress also urged the Bureau to reach an agreement with
4 the SRS Contractors. In 1951, the House Interior and Insular
5 Affairs Committee issued a report recognizing the growing
6 possibility of conflict between existing Sacramento River water
7 users and the nascent CVP, urging the Bureau to avoid litigation.
8 See Engle, *CVP Documents*, Part I, S. Res. 1, 84th Cong. (2d
9 Sess.), H.R. Res. 416 at 675-783 (1956). In this report,
10 Congress expressed its concern about the possibility that the CVP
11 could become involved in "[a] monstrous lawsuit ... that would
12 embroil the [CVP] in litigation for decades." *Id.* at 681.

13 On the one hand, the Committee nowhere conceded that the
14 CVP's rights were subordinate to any other existing rights on the
15 Sacramento River. The Report provides that, should the matter be
16 taken to court, the Department of Justice "would undoubtedly
17 represent the interest of the Federal Government and assert every
18 possible claim to the water...." *Id.* However, the Report
19 simultaneously acknowledged that any dispute over the relative
20 priority of the Bureau's water rights would be a heated one, as
21 the Bureau promised "that no water which is needed in the
22 Sacramento Valley will be sent out of it." *Id.* at 678.
23 Moreover, "instead of firm water rights necessary for the
24 operation of the [CVP] the Bureau ... had in effect merely 'four
25 pieces of paper' which the State of California ... in effect said
26 the Bureau should 'take to court' to find out if it has any water
27 rights." *Id.* at 682.
28

1 G. Negotiation of the SRS Contracts.

2 The proposed contracts were developed and forwarded to
3 interested Sacramento River water users in 1962. A February 15,
4 1963 Memorandum Report on Sacramento River Water Diversions,
5 developed by a specially appointed panel, made recommendations to
6 the Secretary of the Interior on the negotiations. The Report
7 recommended, among other things, that "the water studies C-2BR
8 and C-650-B, which were the principal bases for derivation of
9 schedule A quantities applicable to diverters above the city of
10 Sacramento, continue to be the principal bases for determining
11 each diverter's entitlement to the so-called base supply of
12 Sacramento River water...." SC 03685. However, the possibility
13 was left open that "adjustments [could] be made in individual
14 cases where there is specific and convincing justification for
15 departure." *Id.*

16
17 H. The SRS Contracts.

18 The United States reached agreement with the Settlement
19 Contractors and executed most of the original SRS Contracts in
20 1964. SAR 004147.⁹ The SRS Contracts fixed the specific volume
21 of water and place of use for each SRS Contractor for 40 years
22 and during any renewals of those contracts, all subject to the
23 condition subsequent that if a general stream adjudication or
24 other proceeding to judicially and/or administratively determine
25 Sacramento River System water rights eventuates, the parties are

26 _____
27 ⁹ All "SAR" References are to the Supplemental
28 Administrative Record submitted by the Bureau of Reclamation in
this case.

1 no longer bound by the contract settlements, and all parties are
2 then free to assert the full extent of their claimed SRS water
3 rights. SC 04447-05760.

4

5 I. Decision 1641.

6 In Decision 1641 ("D-1641"), issued December 1999 and
7 revised March 2000¹⁰, the SWRCB modified the United States'
8 permits to operate the CVP to implement flow objectives for the
9 Sacramento San-Joaquin Bay-Delta Estuary, in response to
10 petitions to change points of diversion of the CVP and SWP in the
11 Southern Delta, and to address a petition to change places and
12 purposes of use for the CVP. Among other things, D-1641 amended
13 the United States' permits to operate the CVP to include the
14 following conditions concerning endangered species:

15 This permit does not authorize any act which results in
16 the taking of a threatened or endangered species or any
17 act which is now prohibited, or becomes prohibited in
18 the future, under either the California Endangered
19 Species Act (Fish and Game Code sections 2050 to 2097)
20 or the Federal Endangered Species Act (16 U.S.C.A
21 sections 1531 to 1544). If a "take" will result from
22 any act authorized under this water right, the
23 permittee/licensee shall obtain authorization for an
24 incidental take prior to construction or operation of
25 the project. Permittee/Licensee shall be responsible
26 for meeting all requirements of the applicable
27 Endangered Species Act for the project authorized under
28 this permit/license.

D-1641 at 148. This does not diminish the SRS Contractors'
rights.

24

25

26

27 ¹⁰ Available at:
28 "<http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf>"
(last visited April 9, 2009).

1 J. CVPIA.

2 Effective October 31, 1992, Congress enacted the Central
3 Valley Project Improvement Act ("CVPIA"), Pub. L. No. 102-575,
4 106 Stat. 4600 (1992), mandating changes in management of the
5 CVP. Among other provisions, § 3406(b) provides that:

6 The Secretary, immediately upon the enactment of this
7 title, shall operate the Central Valley Project to meet
8 all obligations under State and Federal law, including
9 but not limited to the Federal Endangered Species Act,
10 16 U.S.C. § 1531, et seq., and all decisions of the
11 California State Water Resources Control Board
12 establishing conditions on applicable licenses and
13 permits for the project.

14 This provision does not elevate or subordinate any of the
15 specified laws or decisions of the SWRCB over any other. With
16 respect to the renewal of contracts, § 3404(c) provides:

17 Renewal of Existing Long-Term Contracts --
18 Notwithstanding the provisions of the Act of July 2,
19 1956 (70 Stat. 483), the Secretary shall, upon request,
20 renew any existing long-term repayment or water service
21 contract for the delivery of water from the Central
22 Valley Project for a period of twenty-five years and
23 may renew such contracts for successive periods of up
24 to 25 years each.

25 ***

26 (2) Upon renewal of any long-term repayment or
27 water service contract providing for the delivery
28 of water from the Central Valley Project, the
Secretary shall incorporate all requirements
imposed by existing law, including provisions of
this title, within such renewed contracts. The
Secretary shall also administer all existing, new,
and renewed contracts in conformance with the
requirements and goals of this title.

29 //

30 //

31 //

32 //

33 //

1 III. ANALYSIS

2 A. Threshold Issues.

3 1. Federal Defendants' Argument that Summary Judgment
4 Should be Granted on Other Grounds Raised in Their
5 Summary Judgment Briefs.

6 Federal Defendants argue that they are entitled to summary
7 judgment for all of the reasons set forth in their original
8 summary judgment motion, Doc. 679. The November 19, 2008
9 Memorandum decision rejected these other grounds upon which
10 Federal Defendants sought summary judgment, finding them without
11 merit. See Doc. 761. There is no basis to reconsider those
12 decisions.

13 2. Proceedings Not Intended to Adjudicate Any Party's
14 Water Rights.

15 Federal defendants renew their concern that this proceeding
16 cannot adjudicate the extent of the SRS Contractors' historical
17 water rights. Such an adjudication is beyond the court's
18 jurisdiction over these proceedings. The sole focus of this
19 proceeding is the applicability of *Home Builders* to the facts and
20 circumstances of the existing record.

21 3. Preliminary Nature of Previous Discussions
22 Regarding Home Builders.

23 To the extent any party has interpreted the discussion in
24 Part VI.D.1. of the November 19, 2008 Memorandum Decision to be a
25 final decision, it was not so intended, as explained in the
26 response to Plaintiffs' request for certification of an
27 interlocutory appeal of the *Home Builders* portion of that
28 decision. See Doc. 811, filed February 12, 2009.

1 4. The ESA and CVPIA Apply to the SRS Contractors.

2 The November 19, 2008 Memorandum Decision found:

3 The CVPIA specifically exempts all Settlement Contracts
4 from the various new requirements imposed by that law. Representative Fazio noted that such special treatment
5 is appropriate "given the seniority of their water
6 rights." 138 Cong. Rec. H 11,493, 11,515-516 (Oct. 5,
7 1992). "These contractors have a prior right to the
8 water they receive. They were entitled to this water
9 before the project was constructed." *Id.*

10 Doc. 761 at 64. This statement needs clarification. While
11 certain sections of the CVPIA apply only to "water service and
12 repayment" contractors, e.g. § 3404(c) (requiring renewal of all
13 "existing long-term repayment or water service contract[s]" for
14 periods of up to 25 years), other provisions explicitly include
15 "water rights settlement contracts," as distinguished from "water
16 service or repayment contracts," e.g., § 3405 (permitting "all
17 individuals ... who receive Central Valley Project water under
18 water service or repayment contracts, water rights settlement
19 contracts, or exchange contracts" to transfer water, subject to
20 certain conditions, "to any other California water user or water
21 agency").

22 The November 19, 2008 Decision also found that any truly
23 "senior" rights held by the SRS Contractors "are beyond the reach
24 of the ESA." This statement is overbroad. Even if, under *Home*
25 *Builders*, section 7(a)(2) does not apply to the Bureau's water
26 allocation actions and the SRS Contractors' diversion of their
27 "senior" rights, it is undisputed that other sections of the ESA
28 may apply, including section 9, 16 U.S.C. § 1539, which prohibits

1 the "take"¹¹ of an endangered species by any person without a
2 permit. See *United States v. Glenn-Colusa Irr. Dist.*, 788 F.
3 Supp. 1126 (E.D. Cal. 1992).

4
5 5. Evidentiary Matters.

6 A number of evidentiary issues are pending. First,
7 Plaintiffs filed a motion to strike portions of the Van Camp
8 declaration. Doc. 821, filed March 2, 2009. GCID opposed the
9 motion to strike. Doc. 823, filed Mar. 6, 2009. During the
10 March 13, 2009 hearing on the *Home Builders* issue, the court
11 overruled all of Plaintiffs' objections to the Van Camp
12 declaration, except that Mr. Van Camp's use of the term "senior"
13 in connection with this analysis of water rights is an
14 inadmissible legal conclusion. Any legal conclusions advanced by
15 the Van Camp declaration are inadmissible as irrelevant.

16 Second, the SRS Contractors object to portions of
17 Plaintiffs' Request for Judicial Notice. Doc. 825, filed March
18 9, 2009. These objections are resolved in a concurrently-filed
19 memorandum decision, incorporated by this reference.

20 The SRS Contractors request the court take judicial notice
21 of a number of documents, the existence of which are judicially
22 noticeable as publically-filed documents in court proceedings.
23 Doc. 774. A large number of these documents relate to the 1956
24 Cooperative Study Program and related investigations and the
25 underlying water rights considered in those investigations. See

26
27 ¹¹ The ESA defines "take" to mean: "to harass, harm,
28 pursue, hunt, shoot, wound, kill, trap, capture, or collect, or
to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

1 *id.* In their *Home Builders* brief, Plaintiffs object to the "vast
2 majority" of this evidence as "beyond the scope of these
3 proceedings." Doc. 820-2 at 25. Specifically, Plaintiffs argue
4 that this evidence fails to document the kind of "finite,
5 enforceable water rights," evidence of which the district court
6 called for at the start of these proceedings. *Id.* Plaintiffs
7 objection goes to the weight, not the admissibility of this
8 evidence. Plaintiffs' objection is OVERRULED; the SRS
9 Contractors' Request for Judicial Notice is GRANTED. The
10 documents are admissible only for the limited purpose of
11 ascertaining whether the SRS Contractors hold definite and
12 certain senior water rights.

13
14 B. Does Section 7 of the ESA Apply to the Bureau's
15 Implementation and/or Execution of the SRS Contracts?

16 1. Legal Framework.

17 Section 7(a)(2) of the Endangered Species Act ("ESA"), which
18 requires federal agencies to consult with one of the federal
19 wildlife agencies to determine whether their actions will affect
20 threatened or endangered species or their habitat, only applies
21 to those agency actions "in which there is discretionary federal
22 involvement or control." *Home Builders*, 127 S. Ct. at 2534. As
23 a general rule, the Bureau retains considerable discretion to
24 "choos[e] what specific actions to take in order to implement"
25 the general goals of Reclamation Law. *Nat'l Wildlife Fed'n v.*
26 *Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008)
27 ("*NWF II*"). The parties dispute whether and to what extent the
28 Bureau's discretion over the delivery of water to and contracting

1 with the SRS Contractors has been constrained either by law or
2 contract.

3 *Home Builders*, 127 S. Ct. at 2524, addressed the transfer of
4 permitting authority under the Clean Water Act's ("CWA") National
5 Pollution Discharge Elimination System ("NPDES") from the
6 Environmental Protection Agency ("EPA") to the State of Arizona
7 pursuant to CWA § 402(b). Under section 402(b), the EPA "shall
8 approve" a State's request to assume the permitting program
9 "unless [it] determines that adequate authority does not exist"
10 to ensure that nine specific criteria set forth in the statute
11 are satisfied. If the criteria are met, the transfer must be
12 approved. *Id.* at 2525.

13 At the same time, § 7 of the ESA requires federal agencies
14 to consult with either FWS or NMFS to "insure that any action
15 authorized, funded, or carried out by such agency ... is not
16 likely to jeopardize" endangered or threatened species or their
17 habitats. *Id.* (quoting ESA §7). *Home Builders* recognized that
18 "[a]lthough a later enacted statute (such as the ESA) can
19 sometimes operate to amend or even repeal an earlier statutory
20 provision (such as the CWA), repeals by implication are not
21 favored and will not be presumed unless the intention of the
22 legislature to repeal is clear and manifest." *Id.* at 2532. The
23 Supreme Court reasoned that requiring the EPA to comply with ESA
24 § 7 when approving a transfer application "would effectively
25 repeal § 402(b)'s statutory mandate by engrafting a tenth
26 criterion onto the CWA." *Id.*

27 Section 402(b) of the CWA commands that the EPA "shall"
28 issue a permit whenever all nine exclusive statutory
prerequisites are met. Thus, § 402(b) does not just set

1 forth *minimum* requirements for the transfer of
2 permitting authority; it affirmatively mandates that
3 the transfer "shall" be approved if the specified
4 criteria are met. The provision operates as a ceiling
as well as a floor. By adding an additional criterion,
the Ninth Circuit's construction of § 7(a)(2) raises
that floor and alters § 402(b)'s statutory command.

5 *Id.* at 2532-33 (emphasis in original).

6 *Home Builders* approved a joint NMFS/FWS regulation that
7 provided: "Section 7 and the requirements of this part apply to
8 all actions in which there is discretionary Federal involvement
9 or control." 50 C.F.R. § 402.03.

10 Pursuant to this regulation, § 7(a)(2) would not be
11 read as impliedly repealing nondiscretionary statutory
12 mandates, even when they might result in some agency
13 action. Rather, the ESA's requirements would come into
14 play only when an action results from the exercise of
agency discretion. This interpretation harmonizes the
statutes by giving effect to the ESA's no-jeopardy
mandate whenever an agency has discretion to do so, but
not when the agency is forbidden from considering such
extrastatutory factors.

15 ***

16 We conclude that this interpretation is reasonable in
17 light of the statute's text and the overall statutory
18 scheme, and that it is therefore entitled to deference
19 under *Chevron*. Section 7(a)(2) requires that an agency
"insure" that the actions it authorizes, funds, or
20 carries out are not likely to jeopardize listed species
or their habitats. To "insure" something-as the court
21 below recognized-means "[t]o make certain, to secure,
to guarantee (some thing, event, etc.).'" 420 F.3d, at
22 963 (quoting 7 Oxford English Dictionary 1059 (2d
ed.1989)). The regulation's focus on "discretionary"
23 actions accords with the commonsense conclusion that,
when an agency is *required* to do something by statute,
it simply lacks the power to "insure" that such action
will not jeopardize endangered species.

24 *Id.* at 2533-35 (emphasis in original).

25 *Home Builders* reasoned that "[a]gency discretion presumes
26 that an agency can exercise 'judgment' in connection with a
27 particular action," *id.* at 2535, and that while the EPA might
28

1 exercise "some judgment" in determining whether to approve a
2 transfer application under CWA § 402(b), "the statute clearly
3 does not grant it the discretion to add another entirely separate
4 prerequisite to [the listed criteria,]" *id.* at 2537.¹²

5
6 ¹² In discussing why its reasoning was supported by its
7 decision in *Department of Transportation v. Public Citizen*, 541
8 U.S. 752 (2004), *Home Builders* mentioned *California v. United*
9 *States*, 438 U.S. 645 (1978). *Public Citizen* concerned safety
10 regulations promulgated by the Federal Motor Carrier Safety
11 Administration ("FMCSA") that had the effect of triggering a
12 Presidential directive allowing Mexican trucks to ply their trade
13 on United States roads:

14 [In *Public Citizen*,] [t]he Court held that the National
15 Environmental Policy Act (NEPA) did not require the
16 agency to assess the environmental effects of allowing
17 the trucks entry because "the legally relevant cause of
18 the entry of the Mexican trucks is *not* FMCSA's action,
19 but instead the actions of the President in lifting the
20 moratorium and those of Congress in granting the
21 President this authority while simultaneously limiting
22 FMCSA's discretion." *Id.*, at 769, 124 S.Ct. 2204
23 (emphasis in original). The Court concluded that "where
24 an agency has no ability to prevent a certain effect
25 due to its limited statutory authority over the
26 relevant actions, the agency cannot be considered a
27 legally relevant 'cause' of the effect." *Id.*, at 770,
28 124 S.Ct. 2204.

21 We do not suggest that *Public Citizen* controls the
22 outcome here; § 7(a)(2), unlike NEPA, imposes a
23 substantive (and not just a procedural) statutory
24 requirement, and these cases involve agency action more
25 directly related to environmental concerns than the
26 FMCSA's truck safety regulations. But the basic
27 principle announced in *Public Citizen*-that an agency
28 cannot be considered the legal "cause" of an action
that it has no statutory discretion not to
take-supports the reasonableness of the FWS's
interpretation of § 7(a)(2) as reaching only
discretionary agency actions. See also *California v.*
United States, 438 U.S. 645, 668, n. 21 (1978) (holding

1 Where a statute articulates broad goals or leaves sufficient
2 room for an agency to maneuver, the consultation requirements
3 apply. A recent example is *Home Builders'* application to the
4 operation of Federal Columbia River Power System ("FCRPS") dams
5 and related facilities in *NWF II*, 524 F.3d at 928. *NWF II* held
6 the federal statutes authorizing operation of the FCRPS merely
7 set forth "broad goals" for the agency to follow when operating
8 the System, leaving the agency "considerable" discretion to
9 balance its mandates with the requirements of the ESA. *Id.* at
10 928-929. Similarly, *Natural Resources Defense Council v.*
11 *Houston*, 146 F.3d 1118 (9th Cir. 1998), a pre-*Home Builders* case,
12 examined a statute that directed Reclamation to give contracting
13 districts "a first right...to a stated share or quantity of the
14 project's available water supply...." (quoting 43 U.S.C. §
15 485h-1(4)). Although Congress directed Reclamation to give the
16 CVP Friant Unit water service contractors the first right to
17 water, the statute qualified that obligation by indicating that
18 only "available" water must be provided, leaving it to
19 Reclamation to determine whether water needed for ESA purposes

21 that a statutory requirement that federal operating
22 agencies conform to state water usage rules applied
23 only to the extent that it was not "inconsistent with
 other congressional directives".

24 *Id.* at 2535 (italics in original, underlining added). By this
25 reference, the Supreme Court suggests there are parallels between
26 Section 8 of the Reclamation Act, 43 U.S.C. §§ 372, 383, and the
27 ESA, insofar as neither statute overrides "other congressional
28 directives." *Home Builders* does not directly address whether and
to what extent the ESA takes priority over the state laws made
applicable to the Bureau as a result of Section 8 of the
Reclamation Act.

1 was "[un]available" for delivery. *Id.* at 1126.

2 In contrast, where a prior agreement or enforceable permit
3 or license fails to retain for the federal agency the right to
4 take action on behalf of a now-listed species, consultation
5 requirements may not apply. In *Sierra Club v. Babbitt*, 65 F.3d
6 1502 (9th Cir. 1995), another pre-*Home Builders* case, a federal
7 agency entered into a reciprocal right-of-way agreement with a
8 landowner prior to passage of the ESA. Under the agreement, the
9 agency only reserved the right to object to projects built in the
10 right-of-way in limited circumstances. *Id.* at 1505-06. Because
11 the agency did not retain discretion to "implement measures that
12 inure to the benefit of ... protected species," it was not
13 required to reinitiate consultation when the spotted owl was
14 listed. *Id.* at 1509.¹³ An analogous result was reached in
15 *Environmental Protection Information Center v. Simpson Timber*
16 *Co.*, 255 F.3d 1073, 1079-82 (9th Cir. 2001) ("*EPIC*"), where the
17 Fish and Wildlife Service ("*FWS*") was not required to reinitiate
18 consultation when two species found on affected land were listed
19 as threatened after *FWS* issued an incidental take permit to the
20 landowner. Although *FWS* retained some discretion over activities
21 pursuant to the take permit, it did not "retain discretionary
22 control to make new requirements to protect species that
23 subsequently might be listed as endangered or threatened." *Id.*

24
25 ¹³ *Sierra Club* cited the water service contracts at issue
26 in *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir. 1995),
27 as examples of contractual agreements to which the procedural
28 requirements of section 7(a)(2) do apply because under those
contracts the United States must determine each year the quantity
of water to supply. 65 F.3d at 1508.

1 at 1081.

2 An unambiguous limitation on agency discretion in the
3 context of contract renewal exists under the Federal Power Act
4 ("FPA"), which authorizes the Federal Energy Regulatory
5 Commission ("FERC") to issue long term licenses to operators of
6 hydro-electric projects for periods not to exceed fifty years.
7 16 U.S.C. §§ 797, 799. When any such licenses come up for
8 renewal, the applicant must begin a lengthy and complex
9 relicensing process. 18 C.F.R. § 16.6. If FERC does not issue a
10 new license before the expiration of the existing license, FERC
11 is required to issue annual licenses "to the then licensee under
12 the terms and conditions of the original license until ... a new
13 license is issued," 16 U.S.C. § 808(a)(1) (emphasis added), a
14 clear example of mandatory, albeit temporary, renewal on terms
15 and conditions of an original license.

16 *Platte River Whooping Crane Critical Habitat Maintenance*
17 *Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989) ("*Platte I*"), and a
18 subsequent decision in the same case, 962 F.2d 27 (D.C. Cir.
19 1992) ("*Platte II*"), concerned the issuance of annual FERC
20 licences to two licensees. An environmental organization sued,
21 arguing that FERC had an obligation to consider inserting
22 conditions in the annual licenses that would benefit the Whooping
23 Crane. *Id.* at 110-11. The D.C. Circuit upheld FERC's
24 interpretation of the FPA as empowering FERC "to amend an annual
25 license, for example by adding conditions for the protection of
26 fish and wildlife, only if the existing license contains such
27 reservation of authority or the licensee agrees to such
28 additional conditions." *Id.* One of the disputed licenses

1 included such a reservation of authority; the other did not. *Id.*
2 at 112. Despite the reservation of authority in one of the
3 licenses, FERC refused to consider inserting conditions for the
4 protection fo the Whooping Crane into either license. See *id.* at
5 114. FERC abused its discretion by "refusing even to explore the
6 need for protective conditions." *Platte II*, 962 F.2d at 30
7 (citing *Platte I*, 876 F.2d at 119). The D.C. Circuit "suggested
8 that [FERC] could seek [the] cooperation [of the licensee whose
9 original license did not contain a reservation of rights] in
10 implementing any conditions deemed necessary," but agreed that
11 FERC only possessed authority to impose conditions unilaterally
12 on the licensee whose original license contained a reservation of
13 the authority to do so. *Id.* But see *Turtle Island Restoration*
14 *Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th
15 Cir. 2003) (where wildlife agency issues permits under a statute
16 designed to promote compliance with international conservation
17 treaties, the agency retains "substantial discretion to condition
18 permits to inure to the benefit of listed species").

19 An agency's discretion may also be constrained by
20 previously-concluded management decisions subject to the
21 consultation process. In a recent (post-*Home Builders*),
22 unpublished decision, an Arizona district court examined water
23 releases for power generation on the Colorado River. *Grand*
24 *Canyon Trust v. United States Bureau of Reclamation*, 2008 U.S.
25 Dist. LEXIS 83853 (D. Ariz. Sept. 26, 2008). An environmental
26 organization claimed that Reclamation's practice of allowing non-
27 seasonal fluctuating releases of water into the Colorado River to
28 generate electricity jeopardized the continued existence and

1 habitat of an endangered fish. After close examination of the
2 system's operational history, the district court concluded that
3 the release practices had been approved by a series of decisions
4 in 1996 and 1997, which followed full, lawful consultation
5 processes. The plaintiff's contention that Reclamation should be
6 required to complete consultation every year when it prepares its
7 Annual Operating Plan ("AOP") for a number of reservoirs on the
8 Colorado was rejected. The court held the agency's action was
9 "legally foreordained" by the 1996 and 1997 decisions, and that
10 Reclamation lacked discretion to modify the regime to benefit the
11 species. *Id.* at *47 (citing *Defenders of Wildlife v. United*
12 *States EPA*, 420 F.3d 946, 967 (9th Cir. 2005)); *but see Pacific*
13 *Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (where an
14 agency's management planning document specifically provides that
15 every "plan, permit, contract, or any other document pertaining
16 to the use of the [resource]" must be consistent with the
17 management plan, the management plan constitutes "continuing
18 agency action" because the agency retains discretion to
19 constantly control forest management projects).

20 *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 57
21 (D.D.C. 2003), concerned Reclamation's management of the lower
22 Colorado River and the agency's decision that it was not required
23 to pursue formal consultation as to the impacts of Colorado River
24 operations on a species that resided in the Colorado River Delta,
25 located across the border in Mexico. The environmental
26 plaintiffs argued that the consultation requirement should apply
27 because Reclamation retained "some discretionary ability" to
28 "handle river regulation, improvement of navigation, and flood

1 control" in a manner that could result in indirect releases of
2 excess water to Mexico. *Id.* at 68. The court held that any such
3 discretion was significantly constrained as to how much water
4 would be released to Mexico, because "a Supreme Court injunction,
5 an international treaty, federal statutes, and contracts between
6 the government and water users ... account for every acre foot of
7 lower Colorado River water." *Id.* at 69. Because the agency's
8 discretion was constrained in this manner, the court held that
9 Section 7 did not "extend[] to operations affecting ... species
10 ... downstream from river flows over which Reclamation has no
11 discretionary control." *Id.* at 62.

12 To trigger *Home Builders'* application, an agency's
13 discretion must be substantially constrained by a federal
14 statutory command, international treaty, or prior contract,
15 permit, or management decision. The cases demand a careful
16 examination of the authority claimed to constrain the agency's
17 discretion.

18 Here, the SRS Contractors and the Federal Defendants argue
19 that the Bureau's discretion to withhold deliveries for species
20 protection under the SRS Contracts and/or to negotiate new terms
21 for renewed contracts is substantially constrained: (1) because
22 the original SRS Contracts themselves, executed in the mid-1960s,
23 require the SRS Contracts be renewed on the same or substantially
24 similar terms; and/or (2) by D-990, made applicable to the Bureau
25 by Section 8 of the Reclamation Act of 1902.

26 //

27 //

28 //

1 2. Do the SRS Contracts Significantly Constrain the
2 Bureau's Discretion to Modify Deliveries Under the
3 SRS Contracts?

4 Under certain circumstances, a prior agreement, permit, or
5 management decision that predates the listing of a species may
6 constrain a federal agency's ability to take action on behalf of
7 that listed species, absolving the agency from the requirement of
8 consultation. See *Sierra Club*, 65 F.3d at 1509 (federal agency's
9 reciprocal right-of-way agreement with a landowner that predated
10 passage of the ESA and only reserved the right to object to
11 projects built in the right-of-way in limited circumstances did
12 not retain for the agency discretion to "implement measures that
13 inure to the benefit of ... protected species"); see also *EPIC*,
14 255 F.3d at 1081 (agency not required to reinitiate consultation
15 when two species found on affected land were listed as threatened
16 after FWS issued an incidental take permit to the landowner
17 because permit did not "retain discretionary control to make new
18 requirements to protect species that subsequently might be listed
19 as endangered or threatened"); *Defenders of Wildlife*, 257 F.
20 Supp. 2d at 62, 69 (Reclamation's discretion to affect operations
21 downstream of the Mexican border to benefit species significantly
22 constrained by "a Supreme Court injunction, an international
23 treaty, federal statutes, and contracts between the government
24 and water users that account for every acre foot of lower
25 Colorado River water") (emphasis added); *Grand Canyon Trust*, 2008
26 U.S. Dist. LEXIS 83853 at *47 (series of management decisions in
27 1996 and 1997, which followed full, lawful consultation
28 processes, "legally foreordained" Reclamation's discretion to
modify the regime to benefit the species on an annual basis).

1 Here, the original SRS Contracts, executed before the
2 passage of the ESA and the listing of the Delta smelt, constitute
3 binding, renewable forty year contracts for the diversion,
4 allocation, and place of use of water. This case does not
5 challenge the right of the Bureau to take action on behalf of the
6 now-listed species during the term of those original contracts,
7 all of which have expired. Rather, Plaintiffs' allege: (1) that
8 the Bureau's ongoing performance under the renewed contracts
9 violates its duty to protect the species against jeopardy and
10 adverse critical habitat modification; and (2) that the Bureau
11 violated the ESA by executing renewal contracts without
12 performing adequate consultation under ESA § 7(a)(2). Doc. 575
13 at ¶85; Doc. 761 at 33. With respect to the first allegation,
14 the November 19, 2008 Decision concluded that "[t]he present
15 motions do not adequately address whether the Bureau's ongoing
16 performance under the SRS Contracts currently violates the
17 substantive requirements of section 7, which require the Bureau
18 to guard against jeopardy and/or adverse critical habitat
19 modification. As there is no motion before the court for summary
20 adjudication on this claim, no ruling is required." Doc. 761 at
21 92. Nevertheless, the parties focus on a number of SRS Contract
22 provisions that arguably address whether the Bureau retains
23 discretion to modify deliveries under the existing contracts.

24
25 a. Article 3(g)(3).

26 Article 3(g)(3) of the original SRS Contracts provides:

27 The United States does not guarantee the quality of
28 water to be diverted by the Contractor and assumes no
responsibility for and neither it nor its officers,

1 agents, or employees shall have any liability for or on
2 account of ... [a]ny damage whether direct or indirect
3 arising out of or in any manner caused by a shortage of
4 water whether such shortage be on account of errors in
5 operation, drought, or unavoidable causes.

6 *E.g.* SC 04459-60 (original ACID Settlement Contract). Similarly,
7 Article 3(h) (4) of the renewal SRS Contracts provides:

8 The United States assumes no responsibility for and
9 neither it nor its officers, agents, or employees shall
10 have any liability for or on account of ... [a]ny
11 damage whether direct or indirect arising out of or in
12 any manner caused by a shortage of water whether such
13 shortage be on account of errors in operation, drought,
14 or unavoidable causes.

15 *E.g.* SAR 002707 (GCID renewal Settlement Contract).

16 In *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995),
17 the Ninth Circuit interpreted a nearly identical shortage
18 provision in a 1963 long-term water service contract between the
19 Bureau and Westlands Water District, which released the Bureau
20 from liability for damages "arising from a shortage on account of
21 errors in operation, drought, or any other causes." *Id.* at 682
22 n.2. The Ninth Circuit concluded that the "contract's liability
23 limitation is unambiguous" and that "an unavailability of water
24 resulting from the mandates of valid legislation constitutes a
25 shortage by reason of 'any other causes.'" *Id.* at 684. This
26 absolved Interior from any liability in connection with a failure
27 to deliver water to the contractors in any given water year.

28 GCID argues that, in the context of the SRS Contracts, this
language simply absolves Reclamation of liability if water is
unavailable due to hydrological conditions or legal or regulatory
mandates. Doc. 773 at 24. GCID maintains that nothing in the
SRS Contracts affords Reclamation discretion to reduce the amount
of water that can be diverted by the SRS Contractors. *Id.*

1 Although the *O'Neill* contracts use the arguably narrower
2 "unavoidable causes" language, rather than the "any other causes"
3 language in the SRS Contracts, the more critical distinction
4 involves the express reservation of discretion to reduce
5 deliveries in the *O'Neill* contracts:

6 In any year in which there may occur a shortage from
7 any cause, the United States reserves the right to
8 apportion the available water supply among the District
9 and others entitled under the then existing contracts
 to receive water from the San Luis Unit in accordance
 with conclusive determinations of the Contracting
 Officer

10 *O'Neill*, 50 F.3d at 683 n.2. No such supply reduction language
11 is present in the SRS Contracts. In this regard, the SRS
12 Contracts are distinguishable from the *O'Neill* contracts as the
13 SRS Contracts do not grant the Bureau the right to apportion
14 differently in shortage years, except as specifically mandated by
15 the Shasta Critical Year Shortage Provision.

16
17 b. The Shasta Critical Year Shortage Provision.

18 The November 19, 2008 Memorandum Decision addressed the
19 contention that the Shasta Year Shortage Provision arguably
20 exemplified a mechanism by which the Bureau exercises discretion
21 over the quantity of water diverted by the SRS Contractors. Doc.
22 761 at 70. Article 5 of the original SRS Contracts provides:

23 CRITICAL YEAR REDUCTION

24 5. In a critical year the Contractor's base supply
25 and Project water during the period April through
26 October of the year in which the principal portion of
 the critical year occurs and each monthly quantity of
 said period shall be reduced by twenty-five percent
 (25%).

27 SC 04461 (original ACID Settlement Contract). "Critical year" is
28

1 precisely defined in Article 1(h) as:

2 any year in which either of the following eventualities
3 exists:

4 (1) The forecasted full natural inflow to Shasta
5 Lake for the current water year, as such forecast
6 is made by the United States on or before February
7 15 and reviewed as frequently thereafter as
8 conditions and information warrant, is equal to or
9 less than three million two hundred thousand
10 (3,200,000) acre-feet; or

11 (2) The total accumulated actual deficiencies
12 below four million (4,000,000) acre-feet in the
13 immediately prior water year or series of
14 successive prior water years each of which had
15 inflows of less than four million (4,000,000)
16 acre-feet, together with the forecasted deficiency
17 for the current water year, exceed eight hundred
18 thousand (800,000) acre-feet.

19 For the purpose of determining a critical year the
20 computed inflow to Shasta Lake under present upstream
21 development above Shasta Lake shall be used as the full
22 natural inflow to Shasta Lake. In the event that major
23 construction completed above Shasta Lake after
24 September 1, 1963, materially alters the present
25 regimen of the stream systems contributing to Shasta
26 Lake, the computed inflow to Shasta Lake used to define
27 a critical year will be adjusted to eliminate the
28 effect of such material alterations. After
consultation with the State, the Weather Bureau, and
other recognized forecasting agencies, the Contracting
Officer will select the forecast to be used and will
make the details of it available to the Contractor.
The same forecasts used by the United States for the
operation of the Project shall be used to make the
forecasts hereunder.

21 SC 04453-54 (original ACID Settlement Contract). The relevant
22 language in the renewal contracts is not changed in any material
23 sense. Compare SC 04461 with SAR 002708.¹⁴

25 ¹⁴ GCID's renewal contract provides at Article 5(a):

26 In a Critical Year, the Contractor's Base Supply and Project
27 Water agreed to be diverted during the period April through
28 October of the Year in which the principal portion of the
Critical Year occurs and, each monthly quantity of said

1 Contrary to the November 19, 2008 Memorandum Decision's
2 preliminary finding, the SRS Contractors correctly point out that
3 the Shortage Provision affords the Bureau no "discretion"
4 whatsoever. When a set of natural conditions that are defined as
5 a "Critical Year" are present, Article 5 provides that the
6 contractor's base supply and project water "shall" be reduced by
7 25 percent. The Bureau has no discretion to decline to make that
8 reduction, to adjust the amount of the reduction, or to determine
9 when the reduction must take place. The mandatory Shasta
10 Critical Year Provision does not, by its terms, provide the
11 Bureau discretion to modify deliveries under the existing
12 contracts.

13 Plaintiffs identify no other language reserving to the
14 Bureau the right to reduce SRS Contractors' contractual
15 diversions. The SRS Contracts represent a settlement of a
16 dispute over the contracting parties' respective water rights and
17 Article 9(a) expresses that it is the mutual intent of the
18 parties not to disturb the quantities of water allocated
19 thereunder, so long as the Contractor fulfills all of its
20 obligations under the contract:

21 During the term of this contract and any renewal
22 thereof it shall constitute full agreement as between
23 the United States and the Contractor as to the
24 quantities of water and the allocation thereof between
25 base supply and Project water which may be diverted by
26 the Contractor from the Sacramento River for beneficial
27 use on the land shown on Exhibit B which said
28 diversion, use, and allocation shall not be disturbed
so long as the Contractor shall fulfill all of its

27 period shall be reduced by 25 percent.

28 SAR 002708.

1 obligations hereunder, and the Contractor shall not
2 claim any right against the United States in conflict
with the provisions hereof.

3 SC 04465 (emphasis added). Given the express language of Article
4 9(a), and the absence of any language reserving for the Bureau
5 the right to alter the quantities of water that may be diverted
6 by the SRS Contractors pursuant to their contracts, the Bureau
7 lacks discretion to reduce diversions under the existing
8 contracts for the benefit of listed species. Under *Home*
9 *Builders*, section 7(a)(2) does not apply to the Bureau's
10 implementation of the SRS contracts. These are historically
11 protected, vested Senior Water rights that take priority over the
12 United States' SRS water rights and the water allocation
13 operations of the CVP.

14 The remaining dispute centers on what binding effect the
15 expired contracts and Water Rights decisions have on the Bureau's
16 ability to renegotiate the contracts to reduce or impair
17 contractual or Board-authorized water rights held by the SRS
18 Contractors for the benefit of the smelt. If the Bureau retains
19 significant discretion in negotiating renewals, section 7(a)(2)
20 consultation requirements may apply to the contract renewal
21 process.

22
23 3. Do the Original SRS Contracts Significantly
24 Constrain the Bureau's Discretion to Negotiate
Upon Renewal for New or Modified Terms for the
25 Benefit of the Smelt?

26 Federal Defendants assert that a distinction exists between
27 the Bureau's discretion to reduce diversions under the original
28 SRS Contracts and its discretion to modify the contract terms

1 during the renewal process. The Bureau argues that it retains
2 "broad" discretion to negotiate the terms of the SRS Contracts.¹⁵
3 Doc. 827-2, at 10. The SRS Contractors maintain that the
4 original Article 9(a) requires the Bureau to execute renewal
5 contracts for the quantity of water specified in the original
6 contracts.

7
8 a. Basic Principles of Federal Contract
9 Interpretation.

10 When interpreting a contract entered into pursuant to
11 federal law and to which the United States is a party,
12 interpretation is controlled by federal common law. *Klamath*
13 *Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210
14 (9th Cir. 1999). For guidance, courts look to general principles
15 concerning the interpretation of contracts. *Id.*

16 A written contract must be read as a whole and every
17 part interpreted with reference to the whole, with
18 preference given to reasonable interpretations.
19 Contract terms are to be given their ordinary meaning,
20 and when the terms of a contract are clear, the intent
21 of the parties must be ascertained from the contract
22 itself. Whenever possible, the plain language of the
23 contract should be considered first.

24 *Id.* (internal citations omitted). Courts must, if possible,
25 interpret contracts "so as to avoid internal conflict." *Trident*
26 *Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 566 (9th Cir.

27 ¹⁵ Despite arguing that the Bureau retains considerable
28 discretion during the renewal process, Doc. 827-2 at 10-12,
Federal Defendants assert that *Home Builders* bars application of
ESA § 7 to the renewal process because, under D-990, "Reclamation
lacks the discretion to use water being put to 'reasonable and
beneficial use' by the SRS Contractors for the benefit of the
Delta smelt," *id.* at 2.

1 1988). "The interpretation of a contract is a mixed question of
2 law and fact." *Tyler v. Cuomo*, 236 F.3d 1124, 1134 (9th Cir.
3 2000) (internal citation and quotation omitted).

4 A contract's language is ambiguous if "reasonable people
5 could find its terms susceptible to more than one
6 interpretation." *Id.* "The fact that the parties dispute a
7 contract's meaning does not establish that the contract is
8 ambiguous." *Id.* "[T]he determination whether contract language
9 is ambiguous is a question of law." *Tyler*, 236 F.3d at 1134
10 (internal citation and quotation omitted).

11 "Under the parole evidence rule, a court looks to, and
12 enforces, the plain language of a contract and does not look to
13 extrinsic evidence to interpret the terms of an unambiguous
14 written instrument." *United States v. Nunez*, 223 F.3d 956, 958
15 (9th Cir. 2000) (internal citation and quotation omitted).

16 However, the Uniform Commercial Code ("U.C.C.") is another source
17 of federal common law to aid contract interpretation where the
18 federal government is a party, permitting the use of extrinsic
19 evidence "in a manner that substantially narrows the traditional
20 application of the parole evidence rule." *O'Neill*, 50 F.3d at
21 684. For example, pursuant to U.C.C. § 2-202(a), evidence of
22 prior dealings, usage, and performance is also relevant in
23 determining whether the contract is ambiguous. See U.C.C. §
24 2-202(a). Only if a contractual term is ambiguous, may extrinsic
25 evidence (other than evidence of prior dealings, usage, and
26 performance) be utilized to interpret the parties' intent in
27 light of "earlier negotiations, later conduct, related
28 agreements, and industry-wide custom." *Pace v. Honolulu Disposal*

1 *Serv., Inc.*, 227 F.3d 1150, 1158 (9th Cir. 2000).

2
3 b. Application to Relevant SRS Contract
4 Language.

5 (1) Article 9.

6 Article 9(a) provides in pertinent part:

7 During the term of this contract and any renewal
8 thereof it shall constitute full agreement as between
9 the United States and the Contractor as to the
10 quantities of water and the allocation thereof between
11 base supply and Project water which may be diverted by
12 the Contractor from the Sacramento River for beneficial
13 use on the land shown on Exhibit B which said
14 diversion, use, and allocation shall not be disturbed
15 so long as the Contractor shall fulfill all of its
16 obligations hereunder, and the Contractor shall not
17 claim any right against the United States in conflict
18 with the provisions hereof.

19 SC 04465 (emphasis added). Each contract sets forth a schedule
20 of monthly diversions in Exhibit A and the place of use on lands
21 identified in Exhibit B. For each month in which diversions are
22 authorized, the volume is divided into Base Supply and Project
23 Water Supply. See, e.g., SC 04486.¹⁶

24 On its face, there is at least one reasonable way to
25 interpret Article 9(a): as a declaration that the original
26 contracts and any "renewal[s] thereof" must be for the same
27 quantity of water "and allocation thereof between base supply and
28 Project water" set forth in the original contracts.

Articles 9(b) and (c) provide the only exception to Article
9(a). Article 9(b) introduces a condition subsequent that the
contract quantities may change if any party or others undertake a

27 ¹⁶ Some Contractors are allocated no Project Water. See
28 *Van Camp. Decl.*, Ex. D-23 (Sacramento River Ranch) & Ex. D-27
(Windswept Land & Livestock Company).

1 general stream adjudication. In that event, the existing
2 contractual water rights continue until the Contractor elects to
3 either accept the adjudication and amend the contract
4 accordingly, or terminate the contract:

5 Nothing herein contained is intended to or does limit
6 rights of the Contractor against others than the United
7 States or of the United States against any person other
8 than the Contractor: Provided, however, That in the
9 event the Contractor, the United States, or any other
10 person shall become a party to a general adjudication
11 of rights to the use of water of the Sacramento River
12 system, this contract shall not jeopardize the rights
13 or position of either party hereto or of any other
14 person and the rights of all such persons in respect to
15 the use of such water shall be determined in such
16 proceedings the same as if this contract had not been
17 entered into, and if final judgment in any such general
18 adjudication shall determine that the rights of the
19 parties hereto are different from the rights as assumed
20 herein, the Contracting Officer shall submit to the
21 Contractor an amendment to give effect to such judgment
22 and the contract shall be deemed to have been amended
23 accordingly unless within sixty (60) days after
24 submission of such amendment to the Contractor the
25 Contractor elects to terminate the contract or within
26 the same period of time the parties agree upon mutually
27 satisfactory amendments to give effect to such
28 judgment.

17 SC 04465-66. Article 9(c) explains that, if the contract
18 terminates because the parties are unable to agree upon
19 amendments to give affect to the judgment resulting from a
20 general stream adjudication, the parties shall no longer be bound
21 by the contract quantities and return to the pre-contract
22 conditions:

23 In the event this contract terminates, the rights of
24 the parties to thereafter divert and use water shall
25 exist as if this contract had not been entered into;
26 and the fact that as a compromise settlement of a
27 controversy as to the respective rights of the parties
28 to divert and use water and the yield of such rights
during the term hereof, this contract places a limit on
the total supply to be diverted annually by the
Contractor during the contract term and segregates it
into base supply and Project water, shall not

1 jeopardize the rights or position of either party with
2 respect to its water rights or the yield thereof at all
3 times after the contract terminates. It is further
4 agreed that the Contractor at all times will first use
5 water to the use of which it is entitled by virtue of
6 its own water rights, and neither the provisions of
7 this contract, action taken thereunder, nor payments
8 made thereunder to the United States by the Contractor
9 shall be construed as an admission that any part of the
10 water used by the Contractor during the term of this
11 contract was in fact water to which it would not have
12 been entitled under water rights owned by it nor shall
13 receipt of payments thereunder by the United States
14 from the Contractor be construed as an admission that
15 any part of the water used by the Contractor during the
16 term of this contract was in fact water to which it
17 would have been entitled under water rights owned by
18 it.

10 SC 04466-67. Articles 9(a) and 9(b) describe a "condition
11 subsequent" or an "event that terminates a duty,"¹⁷ whereby the
12 entire contractual relationship may be terminated if a general
13 stream adjudication occurs and the parties fail to amend the
14 contract consistent with such a judgment.

15 //

17 ¹⁷ The Restatement (Second) of Contracts prefers the label
18 "event that terminates a duty" over "condition subsequent," as
19 such an occurrence is "subject to the rules on discharge,"
20 covered by Restatement (Second) § 230, and not the rules on
21 conditions covered by § 224. See § 224, comment e. Section 230
22 provides:

21 (1) Except as stated in Subsection (2), if under the
22 terms of the contract the occurrence of an event is to
23 terminate an obligor's duty of immediate performance or
24 one to pay damages for breach, that duty is discharged
25 if the event occurs.

26 (2) The obligor's duty is not discharged if occurrence
27 of the event (a) is the result of a breach by the
28 obligor of his duty of good faith and fair dealing, or
29 (b) could not have been prevented because of
30 impracticability and continuance of the duty does not
31 subject the obligor to a materially increased burden.

1 (2) Article 2.

2 Federal Defendants and Plaintiffs argue that the SRS
3 Contractors' interpretation of Article 9(a) cannot be reconciled
4 with Article 2, which provides:

5 TERM OF CONTRACT

6 For purposes of payment this contract shall be
7 effective as of April 1, 1964, and remain in effect
8 until and including March 31, 2004: Provided, That
9 *under terms and conditions agreeable to the parties*
10 *hereto, renewals may be made for successive periods not*
11 *to exceed forty (40) years each.* The terms and
12 conditions of each renewal shall be agreed upon not
13 later than one (1) year prior to the expiration of the
14 then existing contract: Provided further, That upon
15 written request by the Contractor of the Secretary made
16 not later than one (1) year prior to the expiration of
17 this contract, whenever, account being taken of the
18 amount then credited to the costs of construction of
19 water supply works, the remaining amount of
20 construction costs of water supply works which is
21 properly assignable for ultimate return by the
22 Contractor as established by the Secretary of the
23 interior pursuant to (3) of Section 1 of Public Law 643
24 (70 Stat. 483), probably can be repaid to the United
25 States within the term of a contract under subsection
26 (d), Section 9 of the 1939 Reclamation Project Act (53
27 Stat. 1187), this contract may be converted to a
28 contract under said subsection (d) upon terms and
conditions agreeable to the United States and the
Contractor. Notwithstanding any provisions of this
contract, the Contractor reserves and shall have all
rights and benefits under Public Law 643.

20 SC 04455 (underlining in original, italics provided). This
21 provision calls generally for renewal contracts to be executed
22 "under terms and conditions agreeable to the parties." Given
23 that this provision begins with the phrase "[f]or purposes of
24 payment"; largely discusses costs of construction and repayment;
25 and does not mention contract quantity, it arguably has no
26 bearing on the reasonableness of the SRS Contractors'
27 interpretation of Article 9. Yet, the heading "TERM OF CONTRACT"
28 suggests general applicability to the entire contract, rather

1 than just issues of payment.

2 Plaintiffs and Federal Defendants argue that Article 2's
3 general provision that "under terms and conditions agreeable to
4 the parties ... renewals may be made for successive periods not
5 to exceed forty (40) years each," allows for renewals may be made
6 on "any" terms and conditions the Bureau is able to negotiate.
7 However, this general language is followed by the more specific
8 requirement of Article 9(a) that any renewals contain the same
9 terms with respect to water quantity, allocation between Base
10 Supply and Project Water, and place of use as provided in the
11 original SRS Contracts.

12 It is a generally accepted principle of contract
13 interpretation that "specific terms and exact terms are given
14 greater weight than general language." Rest. (Second) of
15 Contracts § 203 (1981); see also *Info. Sciences Corp. v. United*
16 *States*, 80 Fed. Cl. 759, 792 (2008) (citing *Hills Materials Co. v.*
17 *Rice*, 982 F.2d 514, 517 (1992) ("Where specific and general terms
18 in a contract are in conflict, those which relate to a particular
19 matter control over the more general language.")).¹⁸ To the
20 extent Article 2 and Article 9(a) are in conflict, Article 9(a)
21 controls with respect to water quantity upon renewal.

24 ¹⁸ In California, "under well established principles of
25 contract interpretation, when a general and a particular
26 provision are inconsistent, the particular and specific provision
27 is paramount to the general provision." *Prouty v. Gores Tech.*
28 *Group*, 121 Cal. App. 4th 1225, 1235 (2004); see also Cal. Civ.
Code § 3534 ("particular expressions [in a contract] qualify
those which are general").

1 (3) Alternative interpretations of Article
2 9(a).

3 Plaintiffs and Federal Defendants suggest that Article 9(a)
4 may alternatively be read as a partial integration clause, by
5 arguing that, at least as to the quantity of water, the contract
6 constitutes the "full agreement" between the parties. Under this
7 interpretation, the quantity portion of the agreement is not to
8 be interpreted in light of any "claims in conflict with the
9 provisions" of the contract. See *Ayala Rios v. Rios Hernandez*,
10 189 F.R.D. 38, 41 (D. P.R. 1999) ("When an agreement states that
11 it constitutes the full agreement between the parties, there is
12 little room for considering outside evidence.").

13 However, this interpretation effectively reads the "and any
14 renewals" out of Article 9(a). There would be no need for the
15 original contracts to explicitly apply an integration clause to
16 any subsequent renewal contract, when the subsequent contract
17 could include an integration clause to evidence the parties'
18 mutual agreement that the renewed contract is integrated.

19 The interpretation advanced by the SRS Contractors gives
20 meaning to the phrase "any renewal thereof." There is no reason
21 to mention renewal unless the language is intended to prescribe
22 the volume of water to be provided under a renewal contract. "An
23 interpretation which gives a reasonable, lawful and effective
24 meaning to all the terms is preferred to an interpretation which
25 leaves a part unreasonable, unlawful, or of no effect."

26 Restatement (Second) of Contracts § 203 (1981) (emphasis added);
27 see also *Pac. Gas & Elec. Co. v. United States*, 536 F.3d 1282,
28 1288 (Fed. Cir. 2008) (contract interpretation should avoid any

1 meaning that "renders some part of the contract inoperative");
2 *United States v. Franco-Lopez*, 312 F.2d 984, 991 (9th Cir. 2002)
3 (applying Restatement (Second) of Contracts § 203 to construe
4 plea agreement to give some effect to all promises).

5 The meaning of Article 9(a) is clear, not ambiguous. It
6 requires any renewals of the SRS Contracts to be for the same
7 quantity of water, the same allocation between Base Supply and
8 Project Water, and the same place of use as set forth in the
9 original contracts.

10
11 c. The Unmistakability Doctrine.

12 Plaintiffs argue that the original SRS Contracts do not
13 include an unmistakable surrender of sovereign power and are
14 therefore subject to subsequent legislation by the sovereign.
15 Doc. 820-2 *Bowen v. Public Agencies Opposed to Social Security*
16 *Entrapment*, 477 U.S. 41, 52 (1986), *O'Neill*, 50 F.3d at 686, and
17 *Peterson v. United States Department of the Interior*, 899 F.2d
18 799 (9th Cir. 1990), cited by Plaintiffs, apply the so-called
19 "unmistakability doctrine," which provides the government with a
20 defense against contract claims where existing terms of a
21 contract to which the United States is a party conflict with
22 subsequently enacted federal legislation. See *DBSI/TRI IV Ltd.*
23 *P'ship, v. United States*, 465 F.3d 1031, 1040 (9th Cir. 2006).
24 The doctrine allows the United States to enter into contracts
25 that "bind future Congresses, but only if those contracts contain
26 an unmistakable promise." *Kimberly Assoc. v. United States*, 261
27 F.3d 864, 869 (9th Cir. 2001).

28 The Supreme Court's *United States v. Winstar Corp.*, 518 U.S.

1 839 (1996), decision has engendered continuing debate over
2 application of the unmistakability doctrine. See generally
3 *Westlands Water Dist. v. United States*, 134 F. Supp. 2d 1111,
4 1145-54 (E.D. Cal. 2001). The unmistakability doctrine does not
5 apply when the government is acting as a private contracting
6 party, *Kimberly*, 261 F.3d at 869 (citing *Winstar*, 518 U.S at
7 895), or where the legislative act targets particular contract
8 rights, e.g., *Westlands*, 134 F. Supp. 2d at 1145-54 (where
9 legislation particularly targets water users with contrary
10 contract rights, the legislation is not a "sovereign act" for
11 purposes of the unmistakability doctrine).

12 [The] unmistakability doctrine analysis requires
13 examination of two questions: (1) in what capacity was
14 the United States acting when it breached its
15 contractual obligations[] and (2) if the United States
16 acted in its sovereign capacity, did the contract waive
17 sovereign rights in unmistakable terms?

18 *Kimberly*, 261 F.3d at 869.

19 It appears established that ESA constitutes a sovereign act
20 for purposes of the unmistakability doctrine. See *Klamath*
21 *Irrig'n Dist. v. United States*, 75 Fed. Cl. 677, 685 (2007) (post-
22 *Winstar* decision); *Madera Irrigation District v. Hancock*, 985
23 F.2d 1397 (9th Cir. 1993) ("MID") (pre-*Winstar* decision).

24 Plaintiffs argue that Article 9(a) contains no unmistakable
25 surrender of sovereign authority and therefore cannot reasonably
26 be interpreted as the SRS Contractors suggest, because such an
27 interpretation would preclude the application and effect of
28 subsequent legislation (the ESA). This is an offensive
application of the unmistakability doctrine, which normally
operates as a defense to a breach of contract action brought

1 against the United States, *Far West Fed. Bank, S.B. v. Office of*
2 *Thrift Supervision-Director*, 119 F.3d 1358, 1365 n.3 (9th Cir.
3 1997).¹⁹ The interpretation sought is to apply the ESA to over-
4 write the SRS Contracts' agreed quantity, allocation of contract
5 water, and place of use on renewal. There is authority to
6 support the use of the unmistakability doctrine as an
7 interpretive tool. *Winstar*, 518 U.S. at 879, explains "that a
8 contract with a sovereign government will not be read to include
9 an unstated term exempting the other contracting party from the
10 application of a subsequent sovereign act (including an Act of
11 Congress), nor will an ambiguous term of a grant or contract be
12 construed as a conveyance or surrender of sovereign power."
13 However, Article 9(a) is not ambiguous. It explicitly precludes
14 the government from renewing SRS contracts to provide different
15 volume terms. Article 9(a) of the original contracts has
16 contractually binding effect and unmistakably binds future
17 Congresses on this subject matter, subject to the condition
18 subsequent of stream adjudication. Cal. Civ. Code § 1438 ("A
19 condition subsequent is one referring to a future event, upon the
20 happening of which the obligation [to perform] becomes no longer
21 binding upon the other party...."); 13 Williston on Contracts
22 (4th ed. 2008) § 38.9 (same).

23
24 ¹⁹ The unmistakability doctrine "provides that contracts
25 limiting the government's future exercise of regulatory authority
26 must be expressed in unmistakable terms," while the sovereign
27 acts doctrine, "provides that government as contractor cannot be
28 held liable for the acts of government as regulator." *Far West*
Fed. Bank, S.B. v. Office of Thrift Supervision-Director, 119
F.3d 1358 (9th Cir. 1997). The caselaw does not clearly
delineate the relationship between these two doctrines. *Id.*

1 This case is distinguishable from *MID*, 985 F.2d 1397, which
2 applied the unmistakability doctrine to a dispute over water
3 contract renewals. *MID* sued for declaratory and injunctive
4 relief to prevent the United States from changing the terms of
5 its original forty year water contract when that contract came up
6 for renewal. Previous contracts, executed in 1939 and 1951,
7 recited that *MID* sold land and San Joaquin water rights to the
8 United States in exchange for a "permanent" annual supply of
9 270,000 acre-feet of water. *Id.* at 1399, 1401.²⁰ During the 1951
10 contract renewal, the United States sought to add new contract
11 terms, including a term making the contract subject to
12 modification by the United States arising from ESA consultation.
13 *Id.* at 1405. This ESA term reserved *MID*'s right to "challenge
14 the legality and validity of any such modifications made to the
15 contract..." *Id.*

16 The Ninth Circuit rejected the United States' argument that
17 *MID* had no renewal right under the 1951 contract, an

18
19 ²⁰ According to *MID*'s Petition for a Writ of Certiorari,
20 1993 WL 13076836, *16 (Apr. 28, 1993), the 1951 Contract
provided:

21 "... the District and the United States on May 24, 1939
22 executed a contract ... under the terms of which the
23 District ... became entitled to purchase from Friant Dam and
24 reservoir ... a permanent supplemental supply of Class I and
Class 2 water..."

25 "... the United States recognizes that the District in
26 contracting to transfer and surrender its properties and
27 rights hereinabove referred to relied upon its right to
28 purchase a permanent supplemental supply of water from
Friant Dam and Reservoir and the agreement that the United
States would construct the facilities described..."

1 interpretation that would have left the government "free to offer
2 renewal on any terms." *Id.* at 1401. This proposition could not
3 be reconciled with the terms of the 1939 and 1951 contracts
4 providing for (a) a "permanent" supply of water, and (b) renewal
5 at the expiration of the 40-year term of that contract. *Id.* at
6 1401.

7 However, the court held the United States could include in
8 the renewal contract a term permitting modifications arising from
9 ESA consultation, because that provision was qualified by
10 language permitting MID to challenge the legality and validity of
11 any such modifications. In analyzing the unmistakability
12 doctrine, the Court examined the renewal provision, which
13 provided:

14 The executory portions of the [original] contract ...
15 remain and shall remain in full force and effect, and
16 the parties, upon the expiration of [the original
17 contract] shall be entitled to all of the rights
conferred upon them by article 14 of the [original
contract] and shall be subject to all of the terms and
conditions of said article.

18 *Id.* at 1401-02. Section 14 of the original contract provided for
19 future purchases of water:

20 Whenever the United States shall be prepared to furnish
21 service for irrigation or other purposes from Friant
22 reservoir ..., the United States shall notify the
23 District in writing relative to the availability and
24 character of such service, and shall define the
25 classes and quantities of service then and thereafter
26 to be made available and the respective prices and
27 methods of payment therefor. The District shall have
28 six (6) months from the date of receipt of said notice
within which to contract for the purchase of water on
the basis of the classes and quantities of service so
offered to the District; provided, that, having due
regard for the District's procedure required or
expedient in negotiating for and securing approval of
such contract, the Secretary may grant such extensions
of time as he deems desirable. It is mutually
understood between the parties hereto that it is not

1 possible at this time to fix a price to be paid by the
2 District for said water, but the United States agrees
3 that the cost of said water to the District shall not
4 exceed charges made to others than the District for the
5 same class of water and service from the said Friant
6 Dam and Reservoir.

7 *Id.* (emphasis in original).

8 The Ninth Circuit found that this renewal provision "does
9 not say that all the terms in a renewal contract must be
10 identical to the expired contract," *id.* at 1406, and further
11 found:

12 Whether the environmental terms added into the renewal
13 threaten the proprietary rights preserved in Madera's
14 contract, a permanent right to a certain amount of
15 water at rates no higher than those charged to other
16 purchasers of the same class of water and service from
17 Friant Dam and Reservoir, depends on how the
18 environmental provisions are implemented. The
19 government has not "'surrendered in unmistakable
20 terms'" its power to impose any environmental laws on
21 the contractual relationship, so the required clause is
22 not necessarily violative of Madera's contractual
23 rights. *Bowen v. Public Agencies Opposed to Social
24 Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting
25 *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148
26 (1982)).

27 *Id.* at 1406 (parallel citations omitted). *MID* did not reach the
28 question of what "conditions" would be permissible, as the issue
was not before the court. *Id.*

Here, in contrast, the original contracts do state in
specific, unmistakable terms that the defined volume of
Sacramento River water dedicated to the SRS Contractors'
beneficial use in the original contracts must be preserved in
identical amounts upon renewal. *MID* is distinguishable.

This conclusion is not altered by the fact that the preamble
to each SRS Contract indicates that it was executed "in pursuance
generally of the act of June 17, 1902 (32 Stat. 388), and acts

1 amendatory or supplementary thereto....” SC 04450. One of those
2 “amendatory or supplementary” acts is the CVPIA, which, in
3 § 3406(b), requires the Bureau to immediately operate the CVP to
4 meet all obligations under state and federal law, including the
5 ESA.²¹ However, the general “acts amendatory or supplementary
6 thereto” language is subordinate to the specific language of
7 Article 9(a).

8
9 d. Scope of Article 9(a).

10 The original SRS Contracts completely surrender the United
11 States’ power to change the quantities and place of use of water
12 dedicated for beneficial use in the original SRS Contracts. This
13 does not resolve the issue whether and to what extent the Bureau
14 retains discretion to add non-conflicting conditions that protect
15 species of concern under the ESA. Plaintiffs suggest that, even
16 if contract quantities cannot be altered, the Bureau still
17 retains discretion to seek modifications to provisions related to
18 the timing of diversions and/or times of shortage. The November
19 19, 2008 Memorandum Decision recognizes the Bureau considered
20 alternatives to the Shasta Critical Year Shortage provision in
21

22 ²¹ See also *Rio Grande Silvery Minnow v. Keys*, 333 F.3d
23 1109, 1140-42 (10th Cir. 2003) (Seymour, J., concurring), vacated
24 on other grounds by 355 F.3d 1215 (2004) (rejecting dissent’s
25 argument that the unmistakability doctrine does not apply to
26 certain water delivery contracts because the government has no
27 discretion under the contracts themselves to change contract
28 terms, reasoning that this “stands the unmistakability doctrine
on its head,” and explaining that contracts “written under the
reclamation laws and all ‘acts amendatory and supplementary
thereto,’ envision applying subsequent legislation in their
interpretation”).

1 the Sacramento River Settlement Contract Final Environmental
2 Impact Statement ("SRSC FEIS"), prepared pursuant to the National
3 Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq.:

4 Additional contract terms the Bureau considered to be
5 "reasonable and feasible" included a proposed "payment
6 [to the SRS Contractors] in exchange for using
7 quantities of water below their contracted amounts,"
8 (SAR 4140), and a revised 25-year term instead of a
9 40-year contract term on the renewal contracts, (SAR
10 4140). These proposed terms could affect both the total
11 quantity and timing of the SRS Contractors' water
12 diversions, which in turn have the potential to affect
13 the survival and recovery of Delta smelt. (See, e.g.,
14 SAR at 3273 ("Delivery of this water to the points of
15 diversion for the Settlement Contractors has the
16 potential to affect listed fish species that inhabit
17 the Sacramento River and the Sacramento-San Joaquin
18 River Delta by influencing instream flows and water
19 quality conditions."))

20 Doc. 761 at 65-66. That the Bureau considered these alternative
21 contract provisions in the context of a NEPA review of the SRS
22 Contract renewals does not necessarily demonstrate that the
23 Bureau could exercise unilateral discretion to impose or
24 implement any of the alternatives spelled out in the FEIS.

25 Article 9(a) is broadly worded:

26 During the term of this contract and any renewal
27 thereof it shall constitute full agreement as between
28 the United States and the Contractor as to the
quantities of water and the allocation thereof between
base supply and Project water which may be diverted by
the Contractor from the Sacramento River for beneficial
use on the land shown on Exhibit B which said
diversion, use, and allocation shall not be disturbed
so long as the Contractor shall fulfill all of its
obligations hereunder, and the Contractor shall not
claim any right against the United States in conflict
with the provisions hereof.

SC 04465 (emphasis added). Issues related to place of use of
diversions are explicitly covered by Article 9(a), which
addresses not only the quantities of water, but the "allocation
thereof between base supply and Project water," for use on the

1 land shown on Exhibit B to each SRS Contract. Issues related to
2 shortage also come within Article 9(a)'s reach. The Shasta
3 Critical Year Shortage Provision, which is triggered by
4 hydrologic conditions, is part of the overall agreement with
5 respect to the quantity of water that may be delivered.
6 Notwithstanding the hypothetical alternative contract terms
7 suggested in the SRSC FEIS, the Bureau has no discretion to
8 unilaterally modify terms of the contracts with respect to timing
9 of diversions or cutbacks in times of shortage.

10 Neither Plaintiffs nor Federal Defendants point to other
11 types of contract modifications that arguably could enure to the
12 benefit of the smelt but which would fall outside the coverage of
13 Article 9(a).

14
15 e. Conclusion Regarding Article 9(a).

16 The unambiguous language of Article 9(a) requires SRS
17 Contract renewals to be for the same volume of water, allocation
18 between Base Supply and Project Water, and place of use on
19 specifically designated land as the original contracts. This
20 substantially limits the Bureau's discretion to modify the
21 renewal contracts in ways that would benefit the smelt.

22
23 f. Anderson Cottonwood Irrigation District &
24 Sutter Mutual Water Company Renewal Contracts
Water Reductions.

25 Plaintiffs and Federal Defendants point out that contract
26 volumes were in fact reduced on contract renewal for two SRS
27 Contractors: Anderson Cottonwood Irrigation District ("ACID")
28 and Sutter Mutual Water Company ("SMWC"). The parties vigorously

1 debate whether the reductions were the result of "mutual
2 agreement," the Bureau's own water needs assessments, or a
3 combination of the two. Regardless, because Article 9(a) is not
4 ambiguous, this is irrelevant extrinsic evidence. The contracts
5 in no way prevent mutual agreement by parties to the contracts
6 from waiving or modifying an existing contract term for their
7 mutual benefit, and subject to the requirement that contract
8 water be beneficially used.

9 Because the contractual language of 9(a) is not reasonably
10 susceptible to multiple interpretations, the parol evidence rule
11 bars admission of extrinsic evidence. Pursuant to U.C.C.
12 § 2-202(a), evidence of prior dealings, usage, and performance
13 may provide support for a finding of ambiguity. However, a
14 course of performance requires a "sequence of conduct" between
15 the parties to a particular transaction if the agreement
16 "involves repeated occasions for performance by a party." U.C.C.
17 § 1-303(a)(1). A "course of dealing" is similarly defined as "a
18 sequence of conduct concerning previous transactions between the
19 parties to a particular transaction that is fairly to be regarded
20 as establishing a common basis of understanding for interpreting
21 their expressions and other conduct." U.C.C. § 1-303(b). The
22 original SRS Contracts have only been renewed once. No evidence
23 of any course of performance on repeated occasions was submitted.
24 Evidence from the renewal process, including the reduced volumes
25 in the renewed ACID and SMWC contracts, does not constitute a
26 "course of dealing" or "course of performance."

27 A "usage of trade" is "any practice or method of dealing
28 having such regularity of observance in a place, vocation, or

1 trade as to justify an expectation that it will be observed with
2 respect to the transaction in question." U.C.C. § 1-303(c). No
3 argument has been made that any relevant "usage of trade"
4 evidence exists.

5
6 g. Impact of the CVPIA and D-1641 on SRS
Contract Renewal.

7 CVPIA § 3404(c) provides:

8 Renewal of Existing Long-Term Contracts --
9 Notwithstanding the provisions of the Act of July 2,
10 1956 (70 Stat. 483), the Secretary shall, upon request,
11 renew any existing long-term repayment or water service
12 contract for the delivery of water from the Central
Valley Project for a period of twenty-five years and
may renew such contracts for successive periods of up
to 25 years each.

13 The SRS Contractors argue that because this provision commands
14 the Bureau to renew all existing long-term water service
15 contracts, the Bureau must do so on the same terms as provided in
16 the original contracts. On its face, § 3404(c) does not address
17 the terms upon which long-term water service contracts must be
18 renewed. The CVPIA contains no language directing, nor does it
19 otherwise mandate that SRS Contracts be renewed on the same terms
20 as the original contracts. This obligation arises from the SRS
21 Contracts themselves, not the CVPIA.

22 CVPIA § 3404(c) (2) does specifically direct the Bureau to
23 modify the terms of renewal contracts to incorporate "all
24 requirements imposed by existing law":

25 Upon renewal of any long-term repayment or water
26 service contract providing for the delivery of water
27 from the Central Valley Project, the Secretary shall
28 incorporate all requirements imposed by existing law,
including provisions of this title, within such renewed
contracts.

1 Similarly, D-1641 included the following conditions concerning
2 endangered species in its amendment to the United States permit
3 to operate the CVP:

4 This permit does not authorize any act which results in
5 the taking of a threatened or endangered species or any
6 act which is now prohibited, or becomes prohibited in
7 the future, under either the California Endangered
8 Species Act (Fish and Game Code sections 2050 to 2097)
9 or the Federal Endangered Species Act (16 U.S.C.A
10 sections 1531 to 1544). If a "take" will result from
11 any act authorized under this water right, the
12 permittee/licensee shall obtain authorization for an
13 incidental take prior to construction or operation of
14 the project. Permittee/Licensee shall be responsible
15 for meeting all requirements of the applicable
16 Endangered Species Act for the project authorized under
17 this permit/license.

18 D-1641 at 148.

19 Arguably, CVPIA § 3404(c) (2) is a subsequent statutory
20 command to apply the ESA to the renewed SRS Contracts. However,
21 the original SRS Contracts, at Article 9(a), contain unmistakable
22 language precluding the sovereign from modifying terms related to
23 the volume, allocation, and place of use of diversions by the SRS
24 Contractors on renewal.

25 4. Effect of Reclamation Act Section 8 on the
26 Bureau's Discretion.

27 Alternatively, the SRS Contractors and Federal Defendants
28 maintain that the Bureau's discretion to modify the renewal
contracts for the benefit of the Delta smelt is constrained by D-
990, made applicable to the Bureau by Section 8 of the
Reclamation Act of 1902 ("Section 8"). Section 8 provides:

Nothing in this Act shall be construed as affecting or
intended to affect or to in any way interfere with the
laws of any State or Territory relating to the control,
appropriation, use, or distribution of water used in
irrigation, or any vested right acquired thereunder,

1 and the Secretary of the Interior, in carrying out the
2 provisions of this Act, shall proceed in conformity
3 with such laws, and nothing herein shall in any way
4 affect any right of any State or of the Federal
Government or of any landowner, appropriator, or user
of water in, to, or from any interstate stream or the
waters thereof.

5 43 U.S.C. § 383 (emphasis added). Section 8 commands Reclamation
6 to obey state law when securing the water rights necessary to
7 operate federal Reclamation Projects. See *California v. United*
8 *States*, 438 U.S. 645, 674-75 (1978).²² A state may impose
9 conditions upon the United States' appropriation of water, so
10 long as the condition "actually imposed" is not inconsistent with
11 other Congressional directives. See *id.* at 679; *United States v.*
12 *SWRCB*, 694 F.2d 1171 (9th Cir. 1982).²³

13 The Ninth Circuit on remand from the Supreme Court in
14 *California v. United States*, 438 U.S. 645, considered whether an
15 SWRCB-imposed condition upon the operation of New Melones Dam,
16 prohibiting appropriation of water for power generation, was void
17 as contrary to Congressional intent. *United States v. SWRCB*, 694
18 F.2d 1171 (9th Cir. 1982). The decision rejected California's

19
20 ²² The SRS Contracts were first executed before the
21 Supreme Court decided *United States v. California*. At that time,
22 Reclamation advanced a narrow interpretation of Section 8 that
23 did not permit California to place conditions on water rights
24 held by the United States, even to protect senior, state water
25 rights-holders and area-of-origin users. The Water Board
rejected the United States' position in D-990, but it was not
until 1978 that *United States v. California* recognized Section 8
to permit California to place conditions on Reclamation's water
rights.

26 ²³ The Board, in D-1641, also acknowledges that the
27 Bureau's duty to comply with state law only extends insofar as
28 there is no federal preemption. D-1641 at 125.

1 argument that "only explicit federal statutory policies, such as
2 those the [Supreme] Court found decisive in *Ivanhoe Irrigation*
3 *District v. McCracken*, 357 U.S. 275 (1958) (160 acre limitation),
4 and *City of Fresno v. California*, 372 U.S. 627 (1963) (preference
5 for irrigation use over municipal use), are sufficient to preempt
6 the operation of inconsistent state law," and concluded:

7 We agree with the district court that California's
8 broad contentions must be rejected. We do not think
9 that section 8 of the 1902 Reclamation Act was intended
10 to require any later Congress to tolerate state laws
11 whose operation would otherwise be curtailed by the
12 Supremacy Clause, nor to require any particular form of
13 clear statement by a later Congress before inconsistent
14 state laws were overridden. See Sax, *Problems of*
15 *Federalism in Reclamation Law*, 37 U.Colo.L.Rev. 49,
16 66-68 (1964). Section 8 requires only that state law
17 will apply unless the contrary is intended by Congress;
18 as we stated in *United States v. Tulare Lake Canal Co.*,
19 677 F.2d 713, 717 (9th Cir. 1982), the Supreme Court
20 decision in *California v. United States* requires "that
21 the United States follow state water law absent a
22 pre-empting federal statute." The question before us,
23 therefore, is whether state law, otherwise applicable
24 by virtue of section 8, is displaced by subsequent
25 congressional action. The analysis undertaken by the
26 district court, consistent with settled preemption
27 principles, was therefore appropriate.

28 *Id* at 1176 (footnote and parallel citations omitted).²⁴

20 ²⁴ Federal Defendants' suggest that the key question is
21 whether the ESA and the Reclamation Act can be reconciled, and
22 assert that reconciliation can be accomplished simply by not
23 applying the ESA to "senior" water rights. The law is clear on
24 that question; the ESA is not a super-statute that automatically
25 trumps other federal laws. See e.g., *Home Builders*, 127 S. Ct.
26 2518. However, *United States v. SWRCB*, 694 F.2d 1171, holds
27 that, in applying state laws made applicable to federal agencies
28 by virtue of section 8 of the Reclamation Act, the question is
not whether the ESA trumps section 8. Rather, does the ESA
preempt the state laws that purportedly apply to the federal
agency action by operation of Section 8? The ESA has been found
to preempt conflicting state laws in other contexts, see *Strahan*
v. Coxe, 127 F.3d 155, 168 (1st Cir. 1997); *Nat'l Audubon Soc.*,

1 The Ninth Circuit looked to then-prevailing preemption
2 doctrines to guide its evaluation of whether state law was
3 displaced by a specific provision of the Flood Control Act of
4 1962 pertaining to the sale and delivery of power from the New
5 Melones dam and powerplant:

6 A state statute or regulation is preempted by a federal
7 rule "to the extent it conflicts with a federal
8 statute," *Maryland v. Louisiana*, 451 U.S. 725, 747
9 (1981), or where it "stands as an obstacle to the
10 accomplishment and execution of the full purposes and
11 objectives of Congress," *Perez v. Campbell*, 402 U.S.
12 637, 649 (1971), quoting *Hines v. Davidowitz*, 312 U.S.
13 52, 67 (1941); see also *Chicago & North Western*
14 *Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S.
15 311, 317 (1981).

16 In the case before us, therefore, a state limitation or
17 condition on the federal management or control of a
18 federally financed water project is valid unless it
19 clashes with express or clearly implied congressional
20 intent or works at cross-purposes with an important
21 federal interest served by the congressional scheme.
22 Similar formulations were found appropriate by the
23 Supreme Court of California in *Environmental Defense*
24 *Fund, Inc. v. East Bay Municipal Utility District*, 20
25 Cal.3d 327, 338 (1978), and by Professor Sax in his
26 article, *Problems of Federalism in Reclamation Law*, 37
27 U.Colo.L.Rev. 49, 68 (1964).

28 *Id.* at 1176-77 (parallel citations omitted).²⁵

29 *Inc. v. Davis*, 307 F.3d 835, 307 F.3d 835, 852-53 (9th Cir.
30 2002); *Swan View Coal., Inc., v. Turner*, 824 F.Supp. 923, 938 (D.
31 Mont. 1992); *United States v. Glenn Colusa Irr. Dist.*, 788 F.
32 Supp. 1126, 1134 (E.D. Cal. 1992). Whether the ESA preempts
33 state laws made applicable to the Bureau by section 8 of the
34 Reclamation Act has never been addressed.

35 ²⁵ The preemption standard has evolved since *United States*
36 *v. SWRCB* was decided:

37 Congress has the constitutional power to preempt state law,
38 Art. VI, cl. 2; [citation], and may do so either
39 expressly-through clear statutory language-or implicitly.
40 Defendants acknowledge that Congress has not expressly
41 preempted any of Whistler's claims, but argue that Section

1 The Ninth Circuit cautions against deciding a case on
2 preemption grounds where other resolutions might be possible.

3 We are mindful, in deciding whether later federal law
4 overrides inconsistent state law, that we may not seek
5 out conflicts between state and federal regulation
6 where none clearly exists. *Joseph E. Seagram & Sons v.*
7 *Hostetter*, 384 U.S. 35, 45 (1966). The Supreme Court
8 noted in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151
9 (1978), that "when a State's exercise of its police
10 power is challenged under the Supremacy Clause, 'we
11 start with the assumption that the historic police
12 powers of the states were not to be superseded by the
13 Federal Act unless that was the clear and manifest
14 purpose of Congress.'" *Id.* at 157, quoting *Rice v.*
15 *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This
16 admonition is particularly applicable in the
17 reclamation context. In this very litigation, the
18 Supreme Court has detailed the long history of
19 "purposeful and continued deference to state water law
20 by Congress." 438 U.S. at 648-70, 653. "If the term
21 'cooperative federalism' had been in vogue in 1902, the
22 Reclamation Act of that year would surely have
23 qualified as a leading example of it." *Id.* at 650.

24 *Id.* at 1176 (parallel citations omitted).

25 Here, the SRS Contractors argue that the Bureau's discretion

26 17A of the Securities Act implicitly preempts the claims.

27 There are two types of implied preemption: field preemption
28 and conflict preemption. Under field preemption, preemption
is implied when Congress "so thoroughly occupies a
legislative field," that it effectively leaves no room for
states to regulate conduct in that field. [citation] Under
conflict preemption, Congress's intent to preempt state law
is implied to the extent that federal law actually conflicts
with any state law. [citation] Conflict preemption analysis
examines the federal statute as a whole to determine whether
a party's compliance with both federal and state
requirements is impossible or whether, in light of the
federal statute's purpose and intended effects, state law
poses an obstacle to the accomplishment of Congress's
objectives. [citation]

29 *Whistler Investments, Inc. v. Depository Trust and Clearing*
30 *Corp.*, 539 F.3d 1159, 1164 (9th Cir. 2008).

1 is constrained by D-990, made applicable to the Bureau by Section
2 8's express language.

3
4 a. Relevant Background Principles of California
5 Water Law.

6 (1) California's Dual System of Water
7 Rights.

8 By express provision of Section 8, the Bureau's
9 appropriation of water occurs under California's "dual or hybrid
10 system of water rights[,] which recognizes both doctrines of
11 riparian rights and appropriation rights...." *United States v.*
12 *SWRCB*, 182 Cal. App. 3d 82, 101 (1986) (internal quotations
omitted).

13 The riparian doctrine confers upon the owner of land
14 the right to divert the water flowing by his land for
15 use upon his land, without regard to the extent of such
16 use or priority in time.... The appropriation doctrine
17 confers upon one who actually diverts and uses water
18 the right to do so provided that the water is used for
19 reasonable and beneficial uses and is surplus to that
20 used by riparians or earlier appropriators.
21 Appropriators need not own land contiguous to the
watercourse, but appropriation rights are subordinate
22 to riparian rights so that in times of shortage
23 riparians are entitled to fulfill their needs before
24 appropriators are entitled to any use of the water.
And, as between appropriators, the rule of priority is
"first in time, first in right." The senior
25 appropriator is entitled to fulfill his needs before a
26 junior appropriator is entitled to use any water.

27 *Id.* at 101-102. "[W]ater right priority has long been the
28 central principle in California water law." *City of Barstow v.*
Mojave Water Agency, 23 Cal. 4th 1224, 1243 (2000).

[T]he rule of priority applies only to the use of
natural or abandoned flows in a watercourse. No
riparian or appropriator has a right to use water that
was previously stored or imported by another upstream
and then released into the watercourse for use
downstream. (See §§ 1201 ["All water flowing in any
natural channel, excepting so far as it has been or is

1 being applied to useful and beneficial purposes upon,
2 or in so far as it is or may be reasonably needed for
3 useful and beneficial purposes upon lands riparian
4 thereto, or otherwise appropriated, is hereby declared
5 to be public water of the State and subject to
6 appropriation in accordance with the provisions of this
7 code"], 7075 ["Water which has been appropriated may be
8 turned into the channel of another stream, mingled with
9 its water, and then reclaimed"]....)

6 Furthermore, it is important to understand that
7 priority of right is significant only when the natural
8 or abandoned flows in a watercourse are insufficient to
9 supply all demands being made on the watercourse at a
10 particular time. Obviously, when flows are of
11 sufficient abundance that every water user can fulfill
12 his or her needs, the rule of priority does not matter.

10 As for the determination of an appropriator's priority
11 over other appropriators, for appropriations since 1914
12 an appropriator's priority is generally fixed by the
13 date of his or her application to appropriate the
14 water. (See § 1450; Hutchins, *The California Law of*
15 *Water Rights, supra*, at pp. 94-95, 97, 116.) Section
16 10500 specifically confirms this application-date
17 priority with respect to applications filed by the
18 state under the Feigenbaum Act. (§ 10500 ["Applications
19 filed pursuant to this part shall have priority, as of
20 the date of filing, over any application made and filed
21 subsequent thereto"].)

16 *El Dorado*, 142 Cal. App. 4th at 961-962.

18 (2) Area of Origin Protections.

19 The Bureau's appropriation of water in California for the
20 CVP is also subject to statutory provisions designed to protect
21 water users in the so-called "areas of origin" (i.e., those
22 wetter areas of California from which the Projects export water).
23 CWC § 11460 provides:

24 In the construction and operation by the department of
25 any project under the provisions of this part a
26 watershed or area wherein water originates, or an area
27 immediately adjacent thereto which can conveniently be
28 supplied with water therefrom, shall not be deprived by
the department directly or indirectly of the prior
right to all of the water reasonably required to
adequately supply the beneficial needs of the

1 watershed, area, or any of the inhabitants or property
2 owners therein.

3 CWC § 11128 provides that § 11460 applies to the Bureau in its
4 operation of the CVP, as well as to DWR in its operation of the
5 SWP.

6 (3) Reasonable & Beneficial Use/Prohibition
7 of Unreasonable Use.

8 In California, "Superimposed on those basic principles
9 defining water rights is [an] overriding constitutional
10 limitation that the water be used as reasonably required for the
11 beneficial use to be served." *United States v. SWRCB*, 182 Cal.
12 App. 3d 105 (citing Cal. Const., art. X, § 2²⁶). The "rule of
13

14 ²⁶ The amendment provides: "It is hereby declared that
15 because of the conditions prevailing in this State the general
16 welfare requires that the water resources of the State be put to
17 beneficial use to the fullest extent of which they are capable,
18 and that the waste or unreasonable use or unreasonable method of
19 use of water be prevented, and that the conservation of such
20 waters is to be exercised with a view to the reasonable and
21 beneficial use thereof in the interest of the people and for the
22 public welfare. The right to water or to the use or flow of water
23 in or from any natural stream or water course in this State is
24 and shall be limited to such water as shall be reasonably
25 required for the beneficial use to be served, and such right does
26 not and shall not extend to the waste or unreasonable use or
27 unreasonable method of use or unreasonable method of diversion of
28 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 the
owner's land is riparian under reasonable methods of diversion
and use, or as depriving any appropriator of water to which the
appropriator is lawfully entitled. This section shall be

1 reasonable use' is now the cardinal principle of California's
2 water law." *Id.* (citing CWC § 100).

3 The courts have construed this rule as a valid exercise
4 of the police power of the state to regulate the use
5 and enjoyment of water rights for the public benefit
6 Thus, no water rights are inviolable; all water
7 rights are subject to governmental regulation.

8 *Id.* at 106 (citations omitted).

9 The Reclamation Act incorporates the concept of reasonable
10 and beneficial use:

11 The right to the use of water acquired under the
12 provisions of this Act shall be appurtenant to the land
13 irrigated, and beneficial use shall be the basis, the
14 measure, and the limit of the right.

15 43 U.S.C. § 372 (emphasis added). The beneficial use inquiry is
16 "intended to be governed by state law" doctrines concerning
17 beneficial use. *United States v. Alpine Land & Reservoir Co.*,
18 697 F.2d 851, 854 (9th Cir. 1983). Moreover, if state law
19 dictates an outcome in a water rights dispute that is contrary to
20 the outcome suggested by a beneficial use inquiry, the beneficial
21 use approach prevails, as the beneficial use requirement in the
22 Reclamation Act constitutes a "'specific congressional directive'
23 which acts as a 'restraint upon [the Bureau].'" *Id.* at 855; see
24 also *United States v. Clifford Matley Family Trust*, 354 F.3d 1154
25 (9th Cir. 2004).

26 The Ninth Circuit defines "beneficial use" as the "general
27 rule that water is beneficially used (in an accepted use such as
28 irrigation) when it is usefully employed by the appropriator,"

self-executing, and the Legislature may also enact laws in the
furtherance of the policy in this section contained."

1 *Alpine*, 697 F.2d at 854, subject to two qualifications:

2 (1) "[T]he use cannot include any element of 'waste' which,
3 among other things, precludes unreasonable transmission loss
4 and use of cost-ineffective methods," *id.*;

5 (2) "[T]he use cannot be 'unreasonable' considering
6 alternative uses of the water," *id.*

7 The Board was required to make a finding beneficial use of
8 SRS Contract water in the designated areas of use. Moreover, the
9 Bureau made beneficial use findings in connection with execution
10 of the renewal contracts. Plaintiffs do not challenge these
11 beneficial use findings.

12
13 (4) Public Trust Doctrine.

14 "Another important principle that may compete with the rule
15 of priority is the public trust doctrine." *El Dorado*, 142 Cal.
16 App. 4th at 966.

17
18 That doctrine recognizes that "the sovereign owns 'all
19 of its navigable waterways and the lands lying beneath
20 them 'as trustee of a public trust for the benefit of
21 the people.'" (National Audubon Society v. Superior
22 Court (1983) 33 Cal.3d 419, 434.) Ecological values are
23 among those values protected by the public trust. (*Id.*
24 at p. 435.) "The state has an affirmative duty to take
25 the public trust into account in the planning and
26 allocation of water resources, and to protect public
27 trust uses whenever feasible." (*Id.* at p. 446.) Indeed,
28 this duty "prevents any party from acquiring a vested
right to appropriate water in a manner harmful to the
interests protected by the public trust." (*Id.* at p.
445.) Thus, like the rule against unreasonable use,
when the public trust doctrine clashes with the rule of
priority, the rule of priority must yield. Again,
however, every effort must be made to preserve water
right priorities to the extent those priorities do not
lead to violation of the public trust doctrine.

Id. The National Audubon court recognized that "[t]he courts and

1 the Water Board have concurrent jurisdiction" in public trust
2 cases. *Id.* Whether diversion of water by the SRS Contractors
3 pursuant to the SRS Contracts violates the public trust is not
4 before the court for adjudication in these cross-motions.

5
6 Neither the SRS Contractors nor the Federal Defendants argue
7 that any of these general principles of California water law
8 constrain the Bureau's discretion in the abstract. Rather, it is
9 argued that any such constraint on the Bureau arises as a result
10 of the application of these principles through D-990.

11
12 b. D-990.

13 When the United States applied for water permits to operate
14 the CVP, the process necessarily required a determination of
15 whether there was unappropriated water in the applicable
16 watershed. CWC § 1375 ("As prerequisite to the issuance of a
17 permit to appropriate water ... [t]here must be unappropriated
18 water available to supply the applicant...."). After more than
19 75 days of hearings over the course of more than a year, the
20 Board issued a conditional water permit to the United States, as
21 documented in D-990, which analyzed applicable considerations of
22 California's dual water rights system, the rules of priority, the
23 area of origin protections, and the concept of reasonable and
24 beneficial use.

25 The SRS Contractors and the Federal Defendants maintain that
26 D-990 constrains the Bureau's discretion in a number of ways.

1 c. D-990's Reliance on the 1956 Study & Its
2 Progeny Does Not Demonstrate the Exact Nature
3 and Extent of the SRS Contractors' Underlying
4 Water Rights.

5 D-990 relied upon the 1956 Cooperative Studies, C-2BR, and
6 C-650 ("the Studies") as bases for the finding that
7 unappropriated water remained available to support a permit for
8 the Bureau's proposed use. See, e.g., D-990 at 28-32. The SRS
9 Contractors assert that the underlying water rights relied upon
10 in the Studies "demonstrate the nature and extent" of their water
11 rights; and because, at least according to Van Camp's analysis,
12 the total volume of their underlying water rights relied upon in
13 the applicable historical studies exceeds the total volume of
14 water contracted for in the SRS Contracts, the Bureau possesses
15 no discretion under *Home Builders* to diminish the volume of
16 deliveries to the SRS Contractors without their prior consent.

17 There is no doubt that some volume of water rights possessed
18 by the SRS Contractors in the Sacramento River system are vested
19 and senior to the United States' water rights. The SRS
20 Contractors argue that the water rights identified in the Studies
21 reflect the true nature and extent of their senior rights, and
22 the Board relied upon those water rights in D-990. This is only
23 partially true.

24 The "Report on 1956 Cooperative Study Program" reiterated
25 that the studies were intended to "produce information that would
26 be used to further negotiations aimed at reaching an agreement on
27 water rights along the Sacramento River and in the Delta." SC
28 00065. It acknowledged that the assumptions utilized in the
studies were "solely for the purpose of evaluating the effects of

1 [those] assumptions upon water right yields, deficiencies, and
2 supplemental water requirements, and no implications as to the
3 legal status of such assumed rights are intended." SC 00066
4 (emphasis added). The supplemental studies (C-2BR and C-650)
5 were intended to support an "equitable basis for determining the
6 yields of existing rights along the Sacramento River and in the
7 Delta." D-990 at 31.

8 D-990 accepted that the Studies' assumptions, "particularly
9 with respect to water rights, may differ considerably from the
10 rights as may be determined by a court of law." *Id.* D-990
11 recognizes the uncertain nature of using the Studies to
12 approximate the volume of unappropriated water remaining for the
13 Bureau's proposed uses. Neither the Studies nor D-990 purport to
14 finally and exactly delineate and quantify legally binding,
15 vested senior water rights of the SRS Contractors. Rather, they
16 facilitated informed consensual agreements among the SRS
17 Contractors and the Bureau that specifically defined forty year
18 water service entitlements, renewable as to the same quantities,
19 allocations, and places of use, to achieve the requisite
20 certainty absolutely essential to the long term operations of the
21 CVP.

22 In fixing the rates of direct diversion to be allowed,
23 the Board is inclined to greater liberality than usual
24 because of the magnitude of the Project and the
25 complexities involved in determining at this time the
26 direct diversion as distinguished from rediversions of
27 stored water. However, notwithstanding these
28 considerations, we would require greater particularity
in proof of direct diversion requirements were we not
assured that no prejudice to others will result from
failure of [the] applicant to produce such proof. This
assurance is provided by conditions which will be
imposed in the permits subjecting exports of water from
the Delta to use within the Sacramento River Basin and

1 Delta so that there can be no interference with future
2 development of these areas.

3 *Id.* at 40. In encouraging settlement between the parties, the
4 Board acknowledged that the pre-existing rights had never been
5 quantified:

6 Throughout these proceedings, the Bureau's
7 representatives have consistently affirmed their policy
8 to recognize and protect all water rights on the
9 Sacramento River and the Delta existing under State law
10 at the times these applications were filed, including
11 riparian, appropriative and others. Unfortunately,
12 these rights have never been comprehensively defined.
13 It is imperative, therefore, that the holders of
14 existing rights and the United States reach agreement
15 concerning those rights and the supplemental water
16 required to provide the holders with a firm and
17 adequate water supply, if a lengthy and extremely
18 costly adjudication of the waters of the Sacramento
19 River and its tributaries is to be avoided.

20 *Id.* at 75 (emphasis added).²⁷

21 The United States has consistently disputed the nature and
22 extent of the SRS Contractors' underlying water rights. This is
23 reflected in Article 9(b) of the SRS Contracts, which expressly
24 reserves the right of all parties to advance their respective
25 positions concerning the extent of their water rights in any
26 general Sacramento River adjudication:

27 (b) Nothing herein contained is intended to or does
28 limit rights of the Contractor against others than the
United States or of the United States against any
person other than the Contractor: Provided, however,
That in the event the Contractor, the United States, or
any other person shall become a party to a general
adjudication of rights to the use of water of the
Sacramento River system, this contract shall not

29 ²⁷ The Board disclaims authority to directly adjudicate or
30 otherwise resolve disputes over the validity, nature, or SWRCB,
31 Information Pertaining to Water Rights in California - 1990 at
32 p.8, see *supra* note 5. Accordingly, D-990 cannot be read as
33 definitively establishing the nature, extent, or quantity of any
34 of the pre-1914 water rights held by the SRS Contractors.

1 *jeopardize the rights or position of either party*
2 *hereto or of any other person and the rights of all*
3 *such persons in respect to the use of such water shall*
 be determined in such proceedings the same as if this
 contract had not been entered into....

4 SC 04465-66 (original ACID Contract) (underlining in original,
5 italics added). This means that upon the occurrence of the
6 condition subsequent, the mutual obligations under those
7 contracts are no longer binding. 13 Williston on Contracts,
8 § 38:9.

9 Congress also urged the Bureau to reach an agreement with
10 the SRS Contractors to avoid "[a] monstrous lawsuit ... that
11 would embroil the [CVP] in litigation for decades," see Engle,
12 CVP Documents, Part I, S. Res. 1, 84th Cong. (2d Sess.), H.R.
13 Res. 416 at 675-783 (1956), but noted that, should the matter be
14 taken to court, the Department of Justice "would undoubtedly
15 represent the interest of the Federal Government and assert every
16 possible claim to the water...." *Id.* at 681.

17 The record indicates that the Studies were intended to
18 facilitate a settlement to firmly quantify the SRS Contractors'
19 and Bureau's contractual water rights that would become the basis
20 for the issuance of water right permits to the Bureau and for the
21 long-term water service contracts and renewals that utilized
22 those firm quantities (subject to a mandatory 25% reduction in
23 drought conditions). The Board explicitly disclaimed that the
24 SRS Contractors' rights have never been "comprehensively
25 defined." The United States has never conceded and consistently
26 reserved the right to challenge the SRS Contractors'
27 representations as to the nature and extent of their "senior"
28 rights, except as set forth in the long term SRS Contracts and

1 their renewals. The essence of the settlement was to define
2 contract quantities so that there could be certainty in
3 allocation of water entitlements in the Sacramento River System.
4 That settlement, except for performance under the contracts, does
5 not permanently, legally define the nature and extent of the SRS
6 Contractors' senior water rights.²⁸

7
8 d. The Effect of Condition 23.²⁹

9 Whether and to what extent Condition 23 in D-990 constrains
10 Reclamation's discretion presents a more difficult question.
11 Condition 23 provides:

12 The export of stored water under permits issued
13 pursuant to Applications 5626, 9363 and 9364 outside
14 the watershed of Sacramento River Basin or beyond the
15 Sacramento-San Joaquin Delta shall be subject to the
reasonable beneficial use of said stored water within
said watershed and Delta, both present and prospective,
provided, however, that agreements for the use of said

16
17 ²⁸ Plaintiffs argue in the alternative that the water
18 rights records relied upon in the Studies and D-990 do not
19 accurately quantify the SRS Contractors water rights.
20 Specifically, Plaintiffs assert that D-990's ultimate conclusion
21 that 6.5 million acre feet of water per year ("MAFY") is
22 available to the United States as unappropriated water is
23 inconsistent with the fact that the SRS Contractors claim water
24 rights that exceed the entire natural flow of the Sacramento
25 River. Doc. 820-2 at 7, n. 6. The SRS Contractors responded
26 during oral argument that Plaintiffs' calculations fail to
27 consider the re-use by SRS Contractors and the Bureau of return
28 flows.

29 It appears undisputed that the other conditions
subordinate the United States' water rights to other uses that
are not relevant here. Condition 20 concerns diversions above
Shasta Dam, D-990 at 84; Condition 21 covers water appropriations
by counties, *id.* at 84-85; and Condition 22 governs the
retention of water permitting authority by the SWRCB, *id.* at 73,
85.

1 stored water are entered into with the United States
2 prior to March 1, 1964, by parties currently diverting
3 water from Sacramento River and/or Sacramento-San
4 Joaquin Delta and prior to March 1, 1971, by parties
5 not currently using water from Sacramento River and/or
6 Sacramento-San Joaquin Delta.

7 D-990 at 85-86.³⁰

8 In general, this provision conditions the United States'
9 export of water outside the watershed on the reasonable and
10 beneficial use of water within the watershed and Delta. It gives
11 in-basin users a period of time within which to enter into
12 contracts with the Bureau to attain priority water rights subject
13 to a Board-imposed time limit:

14 [T]he public interest requires that water originating
15 in the Sacramento Valley Basin be made available for
16 use within the Basin and the Sacramento-San Joaquin
17 Delta before it is exported to more distant areas, and
18 the permits granted herein will so provide.

19 However, the Board will limit the period of time in
20 which such preference may be exercised. This
21 limitation is necessary in order to best conserve in
22 the public interest the water to be appropriated.

23 ³⁰ Plaintiffs raise a serious question that is unaddressed
24 by any of the SRS Contractors' or Federal Defendants' briefs.
25 Condition 23, on its face, applies only to the "export" of water
26 "outside the watershed of the Sacramento River Basin or beyond
27 the Sacramento-San Joaquin Delta..." Could acts taken by the
28 Bureau for benefit of the smelt ever trigger this provision,
given that the smelt's entire critical habitat lies within the
confines of the Bay-Delta Estuary? See Doc. 820-2 (citing 58
Fed. Reg. 12,854 (Mar. 5, 1993)). It is difficult to understand
how actions taken by the Bureau to benefit the smelt could ever
be considered an "export" of water outside the Sacramento
watershed and Delta. However, given that the Bureau has never
attempted to restrict diversions by the SRS Contractors, reduce
SRS Contract quantities, or otherwise seek to modify the SRS
Contract terms upon renewal, it is unclear how this language
would apply to actions not yet proposed or implemented. As the
pending motion is resolved on alternative grounds, it is not
necessary to decide this issue.

1 *Id.* at 72-73.

2 RD 108 asserts that D-990 (presumably through Condition 23)
3 was intended to insure that the United States' "honor[ed] senior
4 water rights and the rights established under the area-of origin
5 laws." Doc. 772 at 2. D-990 does not explicitly impose such a
6 duty upon the Bureau. Rather, Condition 23 specifically subjects
7 the Bureau's export of water to the "reasonable and beneficial
8 use" of stored water as embodied by any contracts entered into
9 prior to specific deadlines. The Board balanced the goal of
10 protecting existing rights-holders and area of origin interests
11 against the broader public interest in beneficial use by
12 requiring existing rights-holders to memorialize their claimed
13 water rights in the written Settlement Contracts. Condition 23
14 requires compliance with the provisions of any contract entered
15 into by the deadlines, nothing more.³¹ Although D-990 adopts the
16 Studies as an appropriate basis for negotiating the quantity
17 terms of the Settlement Contracts, D-990 does not prescribe the
18 exact terms nor the quantities that should be included in any
19 final contract.

20 GCID suggests, alternatively, that Condition 23 incorporates
21 the SRS Contracts, making all of their terms binding upon the
22 Bureau as conditions of their water right. Doc. 773 at 18.

23
24 ³¹ GCID suggests that the United States' failure to enter
25 into the SRS Contracts or abide by existing SRS contracts would
26 nullify the United States' water rights. See Doc. 773 at 14-15.
27 Accepting this premise, *arguendo*, if the Bureau had not entered
28 into the SRS Contracts, there would have been no water rights in
the Bureau to approve. Any breach by the Bureau of the terms of
the SRS Contracts would give rise to relief for breach prescribed
by the contract itself under applicable federal and state law.

1 Condition 23 makes the United States' export of stored water
2 subject to the "reasonable and beneficial use of said stored
3 water within said watershed and Delta, both present and
4 prospective, provided, however, that agreements for the use of
5 said stored water are entered into with the United States" prior
6 to certain deadlines. Nothing in Condition 23 or any other part
7 of D-990 evidences an intent to condition the United States'
8 export of stored water upon compliance with the terms of the
9 "agreements" referenced in Condition 23. Rather, export of SRS
10 water is conditioned on reasonable and beneficial use of stored
11 water within the watershed and Delta. The contracts themselves
12 constrain the federal agency's exercise of its discretion in a
13 variety of ways.³²

14 The United States contends that it has "broad" authority to
15 negotiate the terms of the SRS contracts, but that this "does not
16 matter" for purposes of the *Home Builders* analysis, because
17 "Reclamation lacks the discretion to use water being put to
18 'reasonable beneficial use' by the SRS Contractors for the

20 ³² GCID suggests that "it is the policy of federal courts
21 to promote settlement before trial," citing *Exxon Valdez v. Exxon*
22 *Mobile Corp.*, 490 F.3d 1066, 1079 (9th Cir. 2007), and *Franklin*
23 *v. Kaypro Corp.*, 884 F.2d 1222, 1225 (9th Cir. 1989), and that
24 this general policy "drove the decision to employ the alternative
25 of entering into the SRS Contracts, as opposed to embarking upon
26 litigation." Doc. 773 at 17-18. GCID further argues that "once
27 the SRS Contracts were wisely entered into, the United States
28 became bound to the terms of those settlements as a condition of
their own water rights." *Id.* at 18. Although the United States'
discretion may be bound by any agreement it enters into, any
federal policy favoring settlement does not determine whether the
SRS Contracts do or do not significantly constrain the Bureau's
discretion.

1 benefit of the Delta smelt." Doc. 827-2 at 3. Although D-990
2 affirms that the reasonable and beneficial use of SRS Contract
3 water within the Sacramento River watershed and Delta is given
4 priority over the Bureau's export of water, D-990 requires any
5 users that exercise such preference to enter into contracts with
6 the United States. The United States rejoins it has the
7 discretion to negotiate the terms of the SRS contracts upon
8 renewal, which impliedly includes the power to use any water
9 subject to its discretion for the benefit of Delta smelt. This
10 position is not consistent with the United States' contentions
11 that it had no discretion to deliver any quantity of water less
12 than the SRS Contract amounts subject to the mandatory 25%
13 drought reduction price. The Bureau's arguments are
14 irreconcilably contradictory and are rejected.

15
16 e. D-990 Does Not Substantially Constrain the
17 Bureau's Discretion to Negotiate
Modifications to the Settlement Contracts.

18 Although D-990 conditions the Bureau's water rights permit
19 for the operation of the Shasta Division of the CVP upon
20 satisfaction of "vested rights," D-990 does not quantify those
21 rights in a manner that definitively precludes the Bureau from
22 exercising discretion. Condition 23 mandates that the Bureau's
23 export of stored water be subject to the reasonable and
24 beneficial use within the Sacramento River and Delta so long as
25 those uses were reduced to writing by dates certain. The parties
26 chose to agree on contract quantities that must remain fixed on
27 renewal unless a general stream adjudication occurs. It is the
28 contracts, not D-990, that constrain the Bureau's discretion in

1 this case.

2
3 f. Preemption Analysis Unnecessary.

4 D-990 does not constrain the Bureau's discretion to
5 negotiate modifications to the Settlement Contracts. In light of
6 the principle that findings of preemption should be avoided
7 whenever possible, see *United States v. SWRCB*, 694 F.2d at 1176,
8 it is not necessary to engage in a preemption analysis here.³³

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13 ³³ Plaintiffs' argue in the alternative that it is not
14 necessary to engage in the preemption analysis because, as a
15 result of both D-990 and Federal Reclamation law, the Bureau is
16 obligated to ensure that any water delivered pursuant to its
17 contracts is put to reasonable and beneficial use. Plaintiffs
18 assert that the reasonable and beneficial use standard
19 incorporates within it concepts that give the Bureau discretion
20 to protect wildlife and related environmental values. It is
21 undisputed that Federal Defendants must perform a reasonable and
22 beneficial use analysis as part of the contracting process.
23 Federal Defendants take the position that the reasonable and
24 beneficial use analysis the Bureau is required to undertake does
25 not extend to an evaluation of whether the contract quantities
26 should be reduced to protect fisheries resources under the
27 reasonable and beneficial use and/or public trust doctrines.
28 Doc. 815 at 18. Federal defendants argue that "Reclamation, as
operator of the CVP, is generally not the regulator here, but is
itself regulated by state water law." *Id.* There is authority to
support the proposition that a federal court must look to state
law when interpreting and applying the Reclamation Act's
reasonable and beneficial use requirement, see *United States v.*
Alpine Land & Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1983),
but neither side identifies authority that resolves whether the
Bureau is required to do so. As the need for a preemption
analysis is obviated by other findings, it is unnecessary to
resolve this issue.

1 IV. CONCLUSION

2 More than forty-five years ago, the United States and the
3 SRS Contractors accepted the directions of the Water Board and
4 the United States Congress to bring certainty to, and to enable
5 the long-term operation of, the CVP through their compromised
6 contractual recognition of senior Sacramento River System water
7 rights, rather than undergo a complex, years-long stream
8 adjudication. After a more than one-year study of the history
9 and extent of all parties' SRS water rights, the parties settled
10 on long-term water contracts to continue for a 40 year term and
11 renewals thereafter, for fixed, contractually defined quantities,
12 allocations, and places of use. This facilitated the continued
13 operation of the CVP.

14 Article 9(a) of the Contracts provides for the exact
15 definition of water rights achieved in the original SRS Contracts
16 to be preserved upon renewal. This substantially constrains the
17 Bureau's discretion to reduce diversions of Sacramento River
18 System water for the benefit of the Delta smelt or any other
19 reason, by fixing SRS Contractor quantities, allocations, and
20 places of use upon renewal. If the Bureau decides to terminate
21 or abandon these settled water rights, its discretion will be
22 restored at that time. Until then, under *Home Builders*, ESA
23 § 7(a)(2) does not apply to the SRS Contract renewal process.
24 The SRS Contracts contain the fail-safe of a condition
25 subsequent, permitting non-renewal of the SRS Contracts if a
26 general stream adjudication establishes that the full nature and
27 extent of the SRS Contractors' vested senior water rights differs
28 from the rights defined in the Contracts. This is not unfair,

1 unjust, or against the public interest, because without the SRS
2 Contractors' contribution of their senior water rights to the
3 CVP, the CVP Units served by the Sacramento River System could
4 not exist or effectively function.

5 Plaintiffs' motion for summary judgment as to the ESA
6 § 7(a)(2) claims against the SRS Contracts is DENIED; the SRS
7 Contractors' and Federal Defendants' cross-motions as to the SRS
8 Contracts are GRANTED.

9 Federal Defendants shall submit a form of order consistent
10 with this memorandum decision within five (5) days of electronic
11 service.

12
13 SO ORDERED

14 Dated: April 27, 2009

15 /s/ Oliver W. Wanger
16 Oliver W. Wanger
17 United States District Judge
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