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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TEHAMA-COLUSA CANAL AUTHORITY,)
)
Plaintiff,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
THE INTERIOR; KENNETH LEE)
SALAZAR, in his official)
capacity as Secretary of the)
Interior; UNITED STATES BUREAU)
OF RECLAMATION; MICHAEL L.)
CONNOR, in his official)
capacity as the Commissioner)
of Reclamation, and DONALD R.)
GLASER, in his official)
capacity as Regional Director)
of the Bureau of Reclamation)
for the Mid-Pacific Region,)
)
Defendants,)
)
SAN LUIS & DELTA-MENDOTA)
WATER AUTHORITY,)
)
Defendant-Intervenor,)
)
WESTLANDS WATER DISTRICT,)
)
Defendant-Intervenor.)
)

1:10-cv-0712 OWW DLB
MEMORANDUM DECISION ON CROSS
MOTIONS FOR SUMMARY JUDGMENT
(DOCS 52, 60, 62) AND MOTION
TO STRIKE (DOC. 77)

I. INTRODUCTION.

This lawsuit is brought by an association of Federal Water
Contractors for federal water from the Sacramento River Division

1 of the Central Valley Project ("CVP") north of the San Joaquin-
2 Sacramento Delta against the United States Department of the
3 Interior ("Interior"), its Secretary, the Bureau of Reclamation
4 ("Bureau"), and its Regional Director of the Mid-Pacific Region,
5 and by Defendant-Intervenors, San Luis & Delta-Mendota Water
6 Authority and Westlands Water District, Federal Contractors, who
7 use CVP water on lands south of the Sacramento-San Joaquin Delta,
8 and seeks to establish superior water rights under CVP water
9 service contracts in the Sacramento Valley, which would limit and
10 exclude export of CVP water south of the Delta, until after
11 Plaintiff and its Members first receive 100% of their allocated
12 CVP contractual water supply.

13 The Plaintiff, Tehama Colusa Canal Authority ("TCCA"), a
14 Joint Powers Authority organized under the laws of the State of
15 California, is comprised of 16 water agency members on whose
16 behalf the case is brought. Cal. Gov't Code § 6500, *et seq.*
17 Plaintiff filed this suit on February 11, 2010, seeking
18 injunctive and declaratory relief against implementation of the
19 shortage provisions of Federal water service contracts under the
20 Federal Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702 to
21 706. Specifically, §§ 706(1) and 706(2).

22 II. PROCEDURAL BACKGROUND

23 After TCCA filed its complaint February 11, 2010, Defendant-
24 Intervenors, San Luis & Delta-Mendota Water Authority and
25 Westlands Water District were granted leave to intervene on April
26 16, 2010. Doc. 23; Doc. 34. The case was reassigned to this
27 Court on April 23, 2010. Doc. 30. Federal Defendants filed the
28 Administrative Record on July 16, 2010, and filed a Supplemental

1 Administrative Record on October 14, 2010. Doc. 39; Doc. 43. On
2 December 1, 2010 Plaintiff filed a motion for summary judgment.
3 Doc. 52. Federal Defendants and Defendant-Interveners filed
4 cross-motions for summary judgment on July 1, 2010. Doc. 60, 62,
5 respectively.¹

6 III. JURISDICTION

7 Jurisdiction exists under 28 U.S.C. § 1331, as this case
8 arises under the laws of the United States, specifically, § 8 of
9 the United States Reclamation Act of 1902. Reclamation Act of
10 1902, ch. 1093, § 8, 32 Stat. 390 (codified at 43 U.S.C. § 383
11 (2006)). Section 8 is part of Federal Reclamation law that
12 governs the Bureau's operation of the CVP Act, authorizing the
13 construction, repair, and preservation of certain public works on
14 rivers and harbors, Pub. L. No. 75-392, § 2, 50 Stat. 844, 850
15 (1937), as amended and supplemented, August 4, 1939 (53 Stat.
16 1187), July 2, 1956 (70 Stat. 483), June 21, 1963 (77 Stat. 68),
17 October 12, 1982 (96 Stat. 1263), as amended and supplemented
18 October 27, 1986 (100 Stat. 3050), and Title XXXIV of the Act of
19 October 30, 1992 (106 Stat. 4706) (Central Valley Project
20 Improvement Act ("CVPIA")) collectively referred to as
21 "Reclamation Law;" (authorizing the Central Valley Project); *S.*
22 *Delta Water Agency v. United States*, 767 F.2d
23 531, 536 (9th Cir. 1985).

24
25
26 ¹ Defendant-Interveners also move to strike Plaintiffs'
27 Reply to Defendant-Interveners' Opposition to Plaintiff's
28 Statement of Undisputed Facts ("Plaintiff's SUF Reply"). Doc.
77. Plaintiff's SUF Reply was not considered. Plaintiff's Motion
to Strike is moot.

1 Jurisdiction is also invoked under the APA. Section 702 of
2 the APA waives the sovereign immunity of the United States, its
3 agencies, and its individual officers acting in their official
4 capacity. *U.S. v. Park Place Associates, Ltd.*, 563 F.3d 907,
5 929, n.15 (9th Cir. 2009) (APA waives sovereign immunity but does
6 not confer federal jurisdiction). APA Section 704 authorizes
7 review of "final agency action for which there is no other
8 adequate remedy in a court." Because neither Federal Reclamation
9 law nor California Water Code ("CWC") § 11460 ("Section 11460")
10 grants a right of judicial review, the APA provides the
11 appropriate standard of decision. *S. Delta Water Agency*, 767
12 F.2d at 536-541 (holding that a claim that the Bureau's operation
13 of the CVP violated Section 11460 was reviewable under the APA.)

14 Plaintiff's declaratory and injunctive relief claims arise
15 under 28 U.S.C. § 1361, 43 U.S.C. § 383, 28 U.S.C. § 2201
16 (declaratory relief) and Fed. R. Civ. Proc. 65 (injunctive
17 relief).

18 Plaintiff claims 16 of its public agency members that supply
19 water to agricultural or municipal and industrial water users or
20 to both, received water from the CVP through the CVP's Tehama-
21 Colusa and/or Corning Canals pursuant to a "Long-Term Renewal
22 Contract Providing for Project Water Service From the Sacramento
23 River Division" between each member and the Bureau. TCCA, in
24 turn, has a separate contract with the Bureau under which TCCA
25 operates and maintains the Tehama-Colusa and Corning Canals and
26 their related facilities on behalf of its members. All
27 Defendants' water service contracts are entered into and
28 performed under Reclamation law.

1 Plaintiff and its Members' first claim is based on the
2 Bureau allegedly:

3 a) Reducing Plaintiff's water allocations under their water
4 service contracts in times of "water shortage" disregarding area
5 of origin protections and alleged priority right of Plaintiff's
6 provided by CWC §§ 11460, 11463 and 11128; Reclamation Law; Fifth
7 Amendment due process; and state law water rights under
8 *California v. United States*, 438 U.S. 645 (1978);

9 b) Improperly declaring conditions of shortage as to
10 Plaintiff while exporting CVP water outside the Sacramento River
11 watershed and reducing Plaintiff's full contractual water
12 allocations;

13 c) Arbitrarily allocating pro rata water allocations and/or
14 shortages among all CVP water service contractors without
15 applying area of origin protections and Plaintiff's "priority
16 rights" to CVP water;

17 d) Violating the terms of Reclamation's State-issued
18 permits to operate the CVP by ignoring area of origin protection;
19 and

20 e) Announcing conditions of water shortage, issuing a
21 statement of legal authority to allocate CVP supply without
22 compliance with area of origin protections, thereby issuing
23 unlawfully restricted licenses to CVP supply, imposing an order
24 or sanctions on Plaintiff as to its supply, and denying relief to
25 Plaintiff.

26 The second claim is for injunctive relief under Fed. R. Civ.
27 P. 65.

28 The third claim is for declaratory judgment under 28 U.S.C.

1 § 2201.

2 The fourth claim seeks attorney's fees pursuant to 5 U.S.C.
3 §§ 504(a)(1) and 504(b)(1)(C) and the Equal Access to Justice
4 Act, 28 U.S.C. §§ 2412(b) and (d).

5

6 A. 5 U.S.C. § 706(2).

7 Plaintiff asserts its claims are for violation of 5 U.S.C.
8 § 706(2) for alleged agency actions that are arbitrary,
9 capricious, unlawful, and in excess of statutory authority.

10 Defendants concede that review is available under Section
11 706(2), but is limited to claims arising within the six year
12 statute of limitations under the APA. *Hells Canyon Preservation*
13 *Council v. U.S. Forest Service*, 593 F.3d 923, 930 (9th Cir.
14 2010).

15

16 B. 5 U.S.C. § 706(1).

17 TCCA further asserts that jurisdiction is proper under 5
18 U.S.C. § 706(1). Section 706(1) applies to compel agency action
19 unlawfully withheld or unreasonably delayed. Pursuant to Section
20 11460, Plaintiff seeks to preclude the export of CVP project
21 water necessary to preserve sufficient supply to meet TCCA
22 Members' and the area of origin's present and future needs to the
23 extent of their full contractual supplies. Judicial intervention
24 under § 706(1) to compel action only applies to discrete agency
25 action the agency is required to take. *Norton v. S. Utah*
26 *Wilderness Alliance*, 542 U.S. 55, 64 (2004). A required
27 "ministerial or nondiscretionary act on which an agency can be
28 ordered "to take action upon a matter, without directing how it

1 shall act." *Ctr. for Biological Diversity v. Veneman*, 394 F.3d
2 1108, 1112 (9th Cir. 2005). Plaintiff suggests that water
3 deliveries under the water service contracts is only ministerial.
4 The Bureau's annual water allocations under the CVP water service
5 contracts are not ministerial, but rather entail uniquely
6 discretionary action that requires it to interpret CVP contracts
7 and balance all competing interests under operational
8 constraints, to comply with other statutory requirements,
9 including but not limited to, decisions of the SWRCB, the CVPIA,
10 Reclamation law and the ESA. *Westlands Water Dist. v. U.S.*, 153
11 F. Supp. 2d 1133, 1144 (2001) ("*Westlands 2001*") ("[the Bureau]
12 has contractual authority and administrative discretion over how
13 it provides water service among the CVP's water and power-users,
14 and how it picks its priorities among them.")

15 Plaintiff invokes *Natural Resources Defense Council v.*
16 *Patterson*, 333 F. Supp. 2d 906 (E.D. Cal. 2004) as authority for
17 section 706(1)'s application because Section 11460's "plain
18 meaning, legislative history, and construction by the state
19 court" all confirm Plaintiff's interpretation. *Patterson* is
20 distinguishable as Cal. Water Code § 5937, at issue in that case,
21 expressly required the Bureau to comply with its mandate to
22 release water from Friant Dam. *Id.* at 916. Here, Congress
23 leaves "to Interior the use of its considerable experience and
24 expertise to implement CVP water supply allocations." *Central*
25 *Valley Water Agency v. United States*, 327 F. Supp. 2d 1180, 1206
26 (E.D. Cal. 2004), *San Luis & Delta-Mendota Water Authority v.*
27 *U.S. Dept. of Int.*, 637 F. Supp. 2d 777, 805 (E.D. Cal. 2008)
28 (Bureau's accounting [is] a complex process within the agency's

1 discretion).

2 Section 11460 does not provide a mandatory duty or
3 ministerial discretion. Although § 11460 instructs that areas of
4 origin are not to be "denied" of the "prior right" to "the water
5 reasonably required to adequately supply the beneficial needs of
6 the watershed," it does not specifically identify what action the
7 Bureau is required to take to protect such "prior right."

8 Section 11460 does not address whether: 1) the "prior right" is
9 protectable by a requirement that limits the Bureau's ability to
10 divert water for export as the SWRCB has continuously interpreted
11 the statute, or 2) whether the Bureau must provide CVP
12 contractors within an area of origin a preference to CVP water at
13 the expense of other CVP contractors. Without a mandatory duty
14 or ministerial action, the Court is limited to the inquiry
15 whether the Bureau has made a discretionary decision, not to
16 second guess whether the agency should have made a different
17 decision. *Coos County Board of Commissioners v. Kempthorne*, 531
18 F.3d 792, 883 (9th Cir. 2008). The Bureau makes discretionary
19 allocation determinations in performing all its CVP water service
20 contracts. Plaintiff is not entitled to relief under § 706(1).

21 Relief by way of writ of mandate is equally unavailable
22 under 28 U.S.C. § 1361 because that extraordinary remedy lies
23 only to compel the performance of a clear nondiscretionary duty.
24 *Pittston Cost Group v. Sebben*, 48 U.S. 105, 121 (1988).

25

26 IV. HISTORICAL BACKGROUND.

27 A. CREATION OF THE CVP.

28 California's two largest rivers, the Sacramento and the San

1 Joaquin, meet to form the Sacramento-San Joaquin Delta ("Delta")
2 south of the City of Sacramento. Their combined waters, if not
3 diverted, flow through the Delta, Suisun Bay, and San Francisco
4 Bay, to the Pacific Ocean. This region, commonly known as the
5 Bay-Delta, is the hub of California's two largest water
6 distribution systems, the CVP, operated by the Bureau, and the
7 State Water Project ("SWP"), operated by the California
8 Department of Water Resources ("DWR"). *In re Bay Delta*
9 *Programmatic Env. Impact Report Coordinated Proceedings*, 43 Cal.
10 4th 1143, 1151 (2008). Plaintiff makes no claims against the DWR
11 or its operation of the SWP. The CVP and SWP are operated in a
12 coordinated manner under the Coordinated Operating Agreement,
13 Administrative Record ("AR") at 5046, *et seq.*, and State Water
14 Resources Control Board ("SWRCB") Decision 1641(d), AR at 4106.

15 The California Legislature originally conceived the CVP "to
16 conserve and put to maximum beneficial use the waters of the
17 Central Valley of California." *S. Delta Water Agency*, 767 F.2d
18 at 533-34. Maximizing the use of the Central Valley's water
19 would be achieved by constructing an irrigation project capable
20 of moving water from where water was plentiful in the north part
21 of California above the Sacramento Valley, to the San Joaquin
22 Valley, south of the Delta, which had abundant land but a
23 shortage of water. *United States v. Gerlach Live Stock Co.*, 339
24 U.S. 725, 728 (1950); *see also*, California State Engineer
25 Bulletin 12 at 22, Supplemental Administrative Record ("SAR") at
26 3136.

27 The first step in development of the Projects was the
28 California legislature's enactment of the Central Valley Project

1 Act of 1933, ch. 1042, 1933 Cal. Stat. 2643 (1933), which
2 authorized construction of Kennett Dam and Reservoir (now Shasta
3 Dam and Shasta Lake) on the Sacramento River, to pump water from
4 the lower Sacramento River to the lower San Joaquin River, and
5 Friant Dam on the San Joaquin River, with canals to carry water
6 to the southern San Joaquin Valley. The Act also included the
7 area of origin statutes, codified as CWC sections 11460-11463 and
8 intended to protect water use within areas of origin. CWC
9 §§ 11460 and 11463 were made applicable to the Bureau in 1951.
10 See CWC § 11128.²

11 The State of California was unable to finance the Project
12 alone and sought participation by the United States to do so.
13 Federal authorization for the CVP was enacted under the
14 provisions of the Emergency Relief Appropriation Act of 1935, ch.
15 48, 49 Stat. 115, § 4. Congress re-authorized the CVP pursuant
16 to the Rivers & Harbors Act of August 26, 1937, ch. 832, 50 Stat.
17 844, 850 and the Act of October 17, 1940, 54 Stat. 1198 (1940)
18 ("Rivers & Harbors Act"). As initially authorized, the CVP did
19 not include any facilities intended to provide water to the
20 Sacramento Valley. Congress did not authorize any facilities for
21 the CVP until 1950. See An Act to Authorize Sacramento Valley
22 Irrigation Canals, Central Valley Project, California, Pub. L.
23 No. 81-839, 64 Stat. 1036, § 2 (1950) ("1950 Act"), AR at 9136-
24 38.

26 ² Section 11463 addresses water exchanges and is not
27 implicated here. The CWC also includes an area of origin statute
28 designed to protect counties, CWC § 10505, not directly at issue
in this case.

1 It is undisputed that the federal Legislative history for
2 the 1950 Act describes it as: "a desirable step to implement the
3 intent of the legislation of the State of California which
4 preserves the water supply that will be required to meet present
5 and future beneficial needs in the various watersheds of origin."
6 S. Rep. No. 81-2447 at 638-39 (1950), AR at 9131-32. Congress
7 effectuated the California Legislature's intent by bringing
8 subsidized irrigation water to a valley that was then primarily
9 devoted to dry-farming to "create a much more intensified and
10 diversified farming economy." *Id.* at 636, AR at 9133. The 1950
11 Act specifically addressed how the canals of the CVP, that served
12 Plaintiff's members, would be operated. The 1950 Act did not
13 direct that the canals be operated to provide area of origin
14 contractors with a priority over other contractors, rather
15 Congress required that the canals be "coordinated and integrated"
16 with the operation of "the existing features of the Central
17 Valley Project in such manner as will effectuate the fullest and
18 most economic utilization of the land and water resources of the
19 Central Valley of California for the widest public benefit." 1950
20 Act, § 4 (emphasis added). This irreconcilable conflict between
21 Plaintiff's position that areas of origin have statutory priority
22 and the Congressional enactment that provided the existing
23 features of the CVP were to be coordinated and integrated to
24 effectuate the fullest and most economic use of the lands and
25 water resources of the Central Valley of California for the
26 widest possible public benefit is the crux of this dispute.

27 B. OPERATION OF THE CVP

28 The CVP operates under a Coordinated Operating Agreement

1 between the Bureau and the DWR as an integrated unit. *Westlands*
2 *2001*, 153 F. Supp. 2d at 1170-71. The modern CVP encompasses
3 more than twenty (20) reservoirs and five hundred (500) miles of
4 major canals, it continues to be generally operated as an
5 integrated unit. *Id.* Contractors receiving water from the CVP
6 do not apply for appropriative water rights from the SWRCB, as is
7 required to perfect a water right from a California water source.
8 Instead, they obtain CVP water – developed or appropriated
9 through Bureau facilities – by contracting solely with the
10 Bureau. 43 U.S.C. § 511 (authorizing Interior to contract with
11 irrigation entities, not individual water users, for the
12 delivery of Bureau Project water). It is undisputed that the
13 Plaintiff nor any of its Members has ever applied for, nor has
14 the SWRCB ever issued to them, appropriative water rights
15 permits.

16
17 C. ALLOCATION OF CVP WATER.

18 The Bureau normally allocates CVP water between its
19 divisions on a pro rata basis; except when 1) operational
20 constraints or 2) contract provisions dictate priority
21 allocation. M&I Water Shortage Policy at 1, SAR at 853
22 (providing general policy and operational constraints); *Del*
23 *Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d
24 1234, 1243 (E.D. Cal. 2003), *aff'd O'Neill v. United States*, 50
25 F.3d 677 (9th Cir. 1995) (recognizing contract-based priority of
26 Exchange Contractors to CVP water.) In dry water years, all CVP
27 contractors have received less than their full contractual
28 entitlements of water. The drought's impact on water supplies,

1 reservoir storage levels, and water allocation within the CVP has
2 not been uniform. Operational limitations at the Delta
3 facilities mean that allocation shortages are not solely a
4 reflection of water supply conditions and contractors south-of-
5 Delta usually bear an increased burden of the shortages.

6 The two dry water years at issue in this case are 2008 and
7 2009. In 2008, TCCA and other north-of-Delta water service
8 contractors received 100% of their allocation, while south-of-
9 the-Delta contractors received only 50%. AR at 2244.

10 In 2009, a drought year that caused the Governor of California to
11 declare a State of Emergency; AR at 1862, north-of-Delta received
12 40% of their contractual quantity, while south-of-Delta
13 contractors subject to operational constraints received only 10%.
14 AR at 1862.

15
16 D. STATE LAW AREA OF ORIGIN STATUTES.

17 The area of origin statutes, CWC §§ 11460-11465 ("area of
18 origin statutes"), were enacted to alleviate the concern that
19 construction of the CVP would leave inadequate water supplies for
20 local uses. *United States v. State Water Resources Control Bd.*,
21 182 Cal. App. 3d 82, 138 (1986). Reclamation's appropriation of
22 water for the CVP is subject to those statutes. *Natural Res.*
23 *Des. Council v. Kempthorne*, 621 F. Supp. 2d 954, 993 (E.D. Cal.
24 2009) *clarified on other grounds*, 2009 WL 2424569 (Aug. 6, 2009).
25 However, Area of Origin statutes do not dictate the allocation by
26 the Bureau of CVP water. Area of Origin statutes help determine
27 the quantity of water available to the Bureau for allocation, not
28 how the water is allocated by the Bureau's Contracting Officer.

1 1. THE CALIFORNIA ATTORNEY GENERAL ANALYZES THE AREA OF
2 ORIGIN STATUTES.

3 In 1955, a California Attorney General Opinion performed an
4 analysis of the scope and Effect of area of origin statutes. 25
5 Ops. Cal. Att'y Gen. 8 (1955) ("AG Op."), AR at 9498. The AG
6 Op. found Section 11460 was intended to protect area of origin
7 water users by creating an "inchoate" priority to a water right.
8 AG Op. at 20; AR at 9509. To protect the statutory right,
9 inhabitants of any area of origin "must comply with the general
10 water law of the state . . . to apply for and perfect a water
11 right" AG Op. at 20-21; AR at 9509-10.

12 The Attorney General opined that Area of Origin provisions
13 were constitutional and California had the authority to
14 incorporate their protections into conditions on the permits
15 issued to the Bureau for the CVP. AG Op. at 28-29, 32; AR at
16 9517-18, 9521.

17 2. THE BUREAU'S PERMITS FOR CVP WATER SUPPLY ARE
18 CONDITIONED TO PROTECT APPROPRIATION OF WATER WITHIN
19 THE AREA OF ORIGIN.

20 In 1961, the SWRCB approved the United States' application
21 to appropriate Sacramento River water for the CVP by Decision 990
22 ("D-990"). AR at 5463. D-990 recognized one of the CVP's
23 principal functions is to export water from the Sacramento River
24 watershed into the San Joaquin Valley. D-990 at 65, AR at 5528.
25 D-990 also spoke to the SWRCB's interpretation of the area of
26 origin statutes:

27 The public interest requires that water originating in the
28 Sacramento Valley Basin be made available for use within the
Basin and the Sacramento-San Joaquin Delta before it is
exported to more distant areas, and the permits granted

1 herein will so provide.

2 D-990 at 72-73; AR at 5535-36.

3 This protection was implemented by the condition Term 22
4 imposed on the Bureau's water rights permits. Term 22 made the
5 Bureau's water permits "subject to rights initiated by
6 applications for use within said watershed and Delta regardless
7 of the date of filing said applications." D-990 at 73, 85; AR at
8 5536, 5548 (emphasis added). Term 22 protects *appropriators* of
9 water with permits within the area of origin, not CVP
10 contractors.

11 The Bureau's permits also include a condition, Term 23, that
12 addresses the use of Project water by water users within an area
13 of origin. Term 23 does not require CVP water to be allocated
14 for the benefit of areas of origin. Rather, it granted then-
15 current water users within the Sacramento River watershed a three
16 year period to request water service contracts from the Bureau
17 which would be preferred over requests from users outside the
18 watershed. It also included a ten year preference in obtaining a
19 water service contract to those within a watershed area then
20 using water. D-990 at 73, 85-86; AR at 5536, 5548-49. SWRCB
21 decision D-1641 states that the "basis for Term 23 may have been
22 protection of the public interest, but it was not compelled by
23 the area of origin statutes." D-1641 at 100; AR at 4217.

24 In 1978 the SWRCB modified the Bureau's CVP permits to
25 require the Bureau to meet water quality standards in the Delta
26 and Suisun Marsh. D-1485 at 10; AR at 5188. This required the
27 CVP to either release water from storage or to curtail diversions
28 so that outflow from the Delta would be sufficient to prevent sea

1 water from intruding into the Delta and to enhance water quality
2 by decreased salinity. D-1594 at 1-3, SAR at 1377-79; *United*
3 *States v. SWRCB*, 182 Cal. App. 3d at 125. The California Court
4 of Appeal affirmed D-1485 recognizing the SWRCB's authority to
5 modify the Bureau's water right permits, but criticized the SWRCB
6 for actions it took to meet water quality standards solely by
7 restricting the CVP and the SWP while imposing no obligations on
8 other water rights holders.

9 To protect water availability, in 1965 the SWRCB added Term
10 80 to new water rights permits which reserved the SWRCB's
11 jurisdiction over the permit. In 1984, the Board responded to
12 the Court of Appeals' criticism with D-1594, which addressed how
13 to determine water availability for over 500 water rights permit
14 holders in the Delta watershed that were issued with Term 80. See
15 D-1594 at 2; SAR at 1378. The implementation means was Term 91,
16 which has been applied to those and all subsequent water permits
17 within the watershed. *El Dorado Irr. Dist. v. State Water Res.*
18 *Control Bd.*, 142 Cal. App. 4th 937, 951 (2006).

19 The SWRCB adopted Term 91 "to protect persons claiming
20 paramount rights to divert water from the Delta and the water
21 quality upon which such rights depend and to protect fish and
22 wildlife." *Id.* at 953. Term 91 imposes on new appropriators
23 shared responsibility to meet Delta water quality standards. D-
24 1594 at 9, SAR at 1372. "Term 91 prohibits permittees from
25 diverting water when stored Project water is being released to
26 meet Delta water quality standards or other in-basin demands."
27 D-1594 at 8, SAR at 01385; *El Dorado*, 142 Cal. App. 4th at 950.
28 This Term 91 prohibition is to ensure sufficient outflow of water

1 from the Delta to keep sea water from intruding into the Delta
2 and increasing salinity, which degrades water quality. Adequate
3 water quality increases availability of water throughout the
4 Delta watershed. D-1594 at 2, SAR at 1378. Term 91 uses the
5 affected area of origin provisions, because Term 91 assumes that
6 the CVP's and SWP's export water rights are junior to all other
7 water rights in the watersheds of origin. *Phelps v. State Water*
8 *Res. Control Bd.*, 157 Cal. App. 4th 89, 107 (2007), D-1594 at 40,
9 SAR at 01417 (an underlying assumption of Term 91 methodology is
10 to prefer in-basin permittees over CVP and SWP exports.)

11 3. APPLICATION OF THE AREA OF ORIGIN STATUTES BY SWRCB AND
12 REJECTION OF TCAA CLAIM FOR PREFERENCE TO CVP WATER.

13 Plaintiff contends that since the Bureau first obtained
14 water rights through the SWRCB permit process, 50 years ago,
15 § 11460 has been applied to protect the ability of potential in-
16 basin water users to obtain a natural flow water right by
17 appropriation. The terms of the Bureau's water rights permits,
18 and those of hundreds of other water rights holders, in effect
19 treat the CVP's right to export water out of the area of origin
20 as junior to all water rights, even future water rights, within
21 an area of origin.

22 Based on this premise, two TCCA member agencies, Glyde and
23 Orland-Artois Water Districts, filed a complaint with the SWRCB
24 in 1991 claiming preferential access to CVP water supply under
25 the area of origin statutes, which was rejected by the SWRCB's
26 decision that the TCCA members had no preferential access to CVP
27 water supply under the area of origin statutes. The SWRCB
28 explained: Sections 11460-11463 "allow [] water users within the

1 watershed of origin to appropriate water under a priority senior
2 to rights of the Bureau" AR at 4952 (May 24, 1991 Letter
3 from SWRCB). The SWRCB interpreted § 11460 in that response:

4 The statutes and permit terms protecting the areas of
5 origin do not guarantee that the water supply needs of
6 the entire area of origin, or any particular water
7 users within the area of origin, will be met. Rather,
8 the area-of-origin protections protect water users
9 within the area of origin against previous
10 appropriations for export. They are a guarantee that,
11 up to the amount of the exports, the Board will not
12 reject a new application in the area of origin on the
13 basis that no water is available for appropriation.

14 The area-of-origin provisions provide only priority;
15 export projects approved subject to the area-of-origin
16 requirements do not have rights senior to water
17 projects approved by the Board subsequently for the
18 area of origin. The right to obtain a priority does
19 not accord other rights such as a right to obtain water
20 at the price it would cost under a contract from an
21 exporter.

22 AR at 4956.

23 The SWRCB restated its interpretation during the 1990's.
24 Order 95-6 confirmed that the correct way to obtain area of
25 origin protections is to "file a water right application and
26 receive a permit with seniority over the rights of the DWR or the
27 USBR to export water from the area." SAR at 1256-57; *see also*
28 SWRCB Order 98-09 (1998), SAR at 1037. Plaintiff and its Members
hold no such water rights permits. The SWRCB again addressed
area of origin statutes in D-1641, issued December 29, 1999. AR
at 4428. The SWRCB rejected TCCA's arguments "that the CVP is
required under Water Code §§ 11460, *et seq.* to supply water to
meet the needs of users in the Sacramento Valley." D-1641 at 99,
101-102. The Board responded to petitions for reconsideration of
D-1641, by removing its findings regarding area of origin law at
pp. 101-102 of the original D-1641. AR at 4438. On

1 reconsideration, the Board explained: "TCCA has been advised in
2 the past that the appropriate way to obtain additional service
3 water supplies under the Watershed Protection Act is to file
4 applications to appropriate the additional water." AR at 4217.
5 The revised D-1641 confirmed: "[T]he USBR is subject to Water
6 Code sections 11460 and 11463, which are part of the area of
7 origin laws, and if it violates those sections, the SWRCB has
8 authority to require compliance." AR at 4211. The SWRCB has
9 never found that the Bureau violated the Watershed Protection
10 Act.

11
12 E. THE DISPUTED CVP WATER SERVICE CONTRACTS.

13 CVP water is only available under water service contracts
14 with the United States through Interior and the Bureau.
15 *Westlands 2001*, 153 F. Supp. 2d at 1144 (*citing*, 42 U.S.C.
16 § 511). Reclamation has contracted with water districts from the
17 CVP's nine divisions, including the Sacramento, San Luis, San
18 Felipe, and Delta Divisions to provide CVP water service.
19 Plaintiff's 16 members are located within the Sacramento
20 Division, north of the Delta. SAR at 129; 706. Defendant
21 Intervenors San Luis & Delta-Mendota Water Authority and
22 Westlands Water District are located south of the Delta, within
23 the CVP's San Luis, San Felipe and Delta Divisions. *Westlands*
24 *2001*, 153 F. Supp. 2d at 142. In CVP Federal water service
25 contracting, there are at least three categories of contracts.
26 The first are "Exchange Contracts" which give express contractual
27 priority to CVP water service to designated "Exchange
28 Contractors" on the basis of their pre-existing pre-1914 riparian

1 and appropriative rights to the San Joaquin River. *Westlands*
2 *Water Dist. v. United States*, 337 F.3d 1092, 1096 (9th Cir. 2003)
3 ("*Westlands 2003*"). The Exchange Contractors "traded" their pre-
4 existing water rights to the Bureau, which obtained water permits
5 from the SWRCB based on these exchanged water rights, for which
6 the Bureau in turn granted priority access to CVP water supply to
7 the Exchange Contractors in federal water service contracts.
8 This enabled the Bureau to provide water for a proposed CVP
9 expansion in other areas of the San Joaquin Valley. *Westlands*
10 *2003*, 337 F.3d at 1096-97 (citing, *Westlands Water Dist. v. U.S.*,
11 864 F. Supp. 1536, 1539 (E.D. Cal. 1994).

12 The second category of CVP contracts are Settlement
13 Contracts including the Sacramento River Settlement ("SRS")
14 Contracts, which grant a contractual priority to CVP water supply
15 through limitations on shortage provisions.³ *Kempthorne*, 2008 WL
16 5054115 at *23 (E.D. Cal. 2008) (not reported). The SRS
17 Contracts' priority arises from: "[T]he CVP's water rights are
18 subject to the Settlement Contractors' [pre-existing water
19 rights]" which include riparian, appropriative, and other water
20 rights recognized by the State Board. *Id.* at *23.

21 The third category of contracts are held by CVP contractors,
22 north-of-Delta, in-Delta, and south-of-Delta. All of these third
23

24 ³ Glen-Colusa Irrigation District, a TCCA Member, holds a
25 Sacramento River Settlement Contract. As a result, Glen-Colusa's
26 renewal contract has different shortage terms from other TCCA
27 Member contracts. Glen-Colusa receives lesser shortage
28 reductions based on the difference in its contract's shortage
AR at 3717-60.

1 category CVP contractors, which include TCCA and its Members,
2 (except Glen-Colusa), SLDMA and Westlands, held no pre-existing
3 water rights to offer as consideration for CVP water service and
4 have no priority access rights to CVP water supply or deliveries
5 in times of shortage; no guarantee of 100% contract water
6 deliveries; and no recognition they include pre-existing water
7 rights. The Bureau allocates reduced CVP water supplies during
8 Shortages to the third category of CVP water service contractors
9 on a CVP-wide basis in accordance with the terms of all these
10 contracting Districts' water service contracts.

11 1. TCCA MEMBERS' RIGHT TO CVP WATER UNDER THEIR LONG-TERM
12 CVP WATER SERVICE CONTRACTS.

13 TCCA Members executed their original CVP water service
14 contracts in the 1960's and 1970's. See AR at 2781, 2992, 3543
15 (1960's); AR at 2890, 2920, 3434 (1970's). All original TCCA
16 contracts contained "shortage" provisions which permitted the
17 Bureau to apportion and reduce the available water supply in
18 years of shortage. See, e.g., Dunnigan Water Service District
19 Contract (Feb. 5, 1963) ("Dunnigan Renewal Contract"), Request
20 for Judicial Notice ("RJN"), Ex. 3 at 17. Before the original
21 TCCA CVP contracts expired in 1995, the Bureau delivered less
22 than 100% of contract amounts to TCCA Members in five shortage
23 water years, 1977, 1990, 1991, 1992, and 1994. SAR at 3177. In
24 those years, other third category contractors received similarly
25 reduced amounts of water, including Westlands. SAR at 3177.

26 In 1992, Congress enacted the Central Valley Project
27 Improvement Act ("CVPIA"), Pub. L. No. 102-575, 106 Stat. 4706
28 (1992), which reallocated priorities for use of CVP water. Among

1 other things, the CVPIA precluded the Secretary from entering
2 into new CVP contracts for delivery of CVP water for any purpose
3 other than fish and wildlife until certain environmental
4 requirements were met and directed that 800,000 acre-feet of
5 "Project yield" would be immediately dedicated to the
6 implementation of the fish, wildlife and habitat restoration
7 purposes established by the Act. CVPIA at §§ 3404(a),
8 3406(b) (2). The passage of the CVPIA came just as many CVP
9 contracts were about to expire. The process of developing new
10 CVP water contracts began.

11
12 2. INTERIM CONTRACTS.

13 In 1995, TCCA Members entered into "interim" renewal
14 contracts awaiting review and assessment of long-term renewal
15 contracts. SAR at 382. Interim renewal contracts commenced
16 execution in 1995 and were subsequently renewed for periods up to
17 two years until 2005. SAR at 382. The TCCA interim contracts
18 included water shortage provisions prescribed by Article 12,
19 authorizing the Bureau to determine conditions of shortage and to
20 apportion the reduced available water supply among CVP
21 contractors. See Dunnigan Renewal Contract at 24-25. TCCA
22 Members' interim contracts did not provide for preferential water
23 allocations based on area of origin. SAR at 1065-66. During the
24 interim TCCA contracts, the Bureau reduced available water supply
25 among all CVP water service contracts in four shortage years,
26 1995, 1997, 1999, and 2001. Through 2005 TCCA CVP water service
27 contracts always included a shortage provision.

1 3. NEGOTIATION OF CURRENTLY OPERATIVE TCCA RENEWAL
2 CONTRACTS: THE BUREAU'S INTERPRETATION AND PERFORMANCE.

3 TCCA was afforded an opportunity to comment and discuss the
4 renewal of long-term contract provisions with the Bureau. SAR at
5 518. The Bureau and TCCA Members extensively discussed the
6 applicability of area of origin laws to the CVP contracts and the
7 Bureau's authority to reduce water deliveries to CVP contractors
8 in times of shortage.

9 The Bureau asserted the non-applicability of Section 11460
10 to allocation and delivery of CVP water under CVP contracts. In
11 1994 the Bureau issued a November 2, Area of Origin Issue Paper,
12 SAR at 1317, which stated the Bureau's position that Section
13 11460 is "directed toward obtaining prior water rights, not
14 obtaining deliveries of water under the Project's rights." In
15 1996 another Bureau draft report addressed applicability of area
16 of origin statutes to the CVP, confirming that area of origin
17 statutes in California water law "do not guarantee that the water
18 supply needs of an entire area of origin, will or can be met."

19 SAR at 1154:

20 Under these statutes, water rights applicants within
21 the area of origin are essentially guaranteed that new
22 water right applications filed for the development of
23 water within the area of origin, will not be rejected
24 by the [Board] on the basis that no water is available
25 for appropriation by virtue of a senior water right to
26 export the water from the water shed. While the area
27 of origin statutes may result in future reductions in
28 the quantities of CVP water that can be delivered to
CVP export customers, the area of origin provisions do
not become part of a contract for the delivery of
water; they are part of the water rights on which the
contract is based and subject that right to
appropriations by users within the area of origin.

27 The Bureau found: "Area of origin statutes . . . do not
28 establish any priority to the allocation of CVP contract water or

1 CVP water used for implementation of the [CVPIA]." SAR at 1156.
2 Many contractors responded to the draft report. See, e.g., SAR
3 at 1105-11; 1125-32, 1133, 1134-37, 1138-40, 1150-53. TCCA then
4 acknowledged that "the Bureau's conclusions come as no surprise,
5 as this is a restatement of positions they [sic] have articulated
6 on numerous occasions in the past." SAR at 1141. In 2000,
7 Reclamation again stated: "Area of origin/county of origin
8 statutes do not give any CVP user a priority over any other CVP
9 user regarding water service provided by CVP contracts . . . this
10 is also the position of the State Water Resources Control Board .
11 . . ." SAR at 977.

12 The Bureau consistently rejected requests that an area of
13 origin provision be included in north-of-Delta CVP contracts.
14 SAR at 1317; 1308; 3238. TCCA proposed draft contract language
15 precluding water reductions to TCCA Members "unless and until
16 reductions have also been imposed in irrigation users receiving
17 water from the integrated CVP water supply who are outside the
18 Sacramento River watershed." SAR at 3238. TCCA contractors
19 requested area of origin transfer provisions and increased CVP
20 contract water allocations based on alleged area of origin
21 protections. SAR at 1004-7 (request for area of origin transfer
22 provisions); SAR at 1021-24 (request for water quantity
23 increase); SAR at 1000-1 (same); SAR at 831 (same). Both interim
24 TCCA contracts included a similar area of origin transfer
25 provision, SAR at 1308, as did the TCCA Renewal Contracts. AR at
26 307-71. The Bureau did not adopt contract terms to increase
27 contract quantities or afford protection against shortages. AR
28 at 3056 (same contract amounts in interim and renewal contracts).

1 4. TCCA ACCEPTS LONG-TERM RENEWAL CONTRACTS WITHOUT
2 PRIORITY ALLOCATION TERMS: THE SHORTAGE PROVISIONS.

3 All TCCA Members executed long-term CVP water service
4 contracts in 2005 ("TCCA Renewal Contracts"). All TCCA renewal
5 contracts contain identical shortage provisions, including
6 Dunnigan Water District, AR at 3043-97; Colusa County Water
7 District, AR at 3539-93; Corning Water District, AR at 2777-2834;
8 Cortina Water District, AR at 2917-30; Colusa County Water
9 District, AR at 3539-93; Corning Water District AR at 2777-2834;
10 Cortina Water District AR at 2917-30; Davis Water District AR at
11 3150-3201; 4M Water District, AR at 2887-2901; Glyde Water
12 District, AR at 3430-82; Holthouse Water District, AR at 2960-73;
13 Canawha Water District, AR at 3098-3149; Kirkwood Water District,
14 AR at 2673-2723; LaGrande Water District, AR at 3377-3429; Orland
15 Artois Water District, AR at 3322-76; Proberta Water District, AR
16 at 2835-86; Thomes Creek Water District, AR at 2724-76; Westside
17 & Westside Water District, AR at 3202-52.

18 All TCCA Renewal Contracts contain an Article 12 shortage
19 provision substantively identical to the shortage provision in
20 the prior long term contracts under which the Bureau declared
21 conditions of shortage and then allocated less than full
22 contractual amounts to TCCA and its Members under interim TCCA
23 contracts. See Dunnigan Renewal Contract at 24-25. The TCCA
24 long term renewal contracts memorialize the agreement of "the
25 United States and [each] contractor . . . to enter into the
26 contract pursuant to Federal Reclamation law on the terms and
27 conditions set forth below." AR at 3208. These purposes
28 include: operation of the CVP "for diversion, storage, carriage,

1 distribution and beneficial use, for flood control, irrigation,
2 municipal, domestic, industrial, fish and wildlife mitigation,
3 protection and restoration, generation and distribution of
4 electric energy, salinity control, navigation and other
5 beneficial uses."

6 The TCCA Renewal Contract's Article 12 shortage provision
7 authorize the Bureau to determine shortages and apportion waters
8 in times of shortage:

9 12(a): in its operation of the Project, the Contracting
10 Officer will use all reasonable means to guard against
11 a Condition of Shortage in the quantity of water to be
12 made available to the Contractor pursuant to this
13 contract. In the event the Contracting Officer
determines that a Condition of Shortage appears
probable, the Contracting Officer will notify the
Contractor of said determination as soon as
practicable.

14 12(b): if there is a Condition of Shortage because of
15 errors in physical operations of the Project, drought,
16 or other physical causes beyond the control of the
17 Contracting Officer or actions taken by the Contracting
18 Officer to meet legal obligations then, except as
provided in subdivision (a) of Article 18 of this
Contract, no liability shall accrue against the United
States or any of its officers, agents, or employees,
for any damage, direct or indirect, arising therefrom.

19 12(c): In any year in which there may occur a shortage
20 for any of the reasons specified in subdivision (b)
21 above, the Contracting Officer shall apportion the
22 available Project Water supply among the Contractor and
23 others entitled, under existing contracts and future
contracts . . . and renewals thereof, to receive
Project Water consistent with the contractual
obligations of the United States.

24 12(d): Project Water furnished under this Contract will
25 be allocated in accordance with the then-existing
26 Project M&I Water Shortage Policy. Such Policy shall
27 be amended, modified, or superseded only through a
28 public notice and comment procedure.

See, e.g., AR at 3073-74. Article 12 authorizes the Bureau to
apportion available CVP supply among all CVP water service

1 contractors during conditions of shortage, without regard to
2 whether those water service contractors are within or outside an
3 area of origin, as it has for the over-sixty year history of the
4 CVP and almost forty years of active dispute with TCCA over area
5 of origin alleged priority in CVP federal water service
6 contracts.

7
8 5. TCCA MEMBERS' VALIDATION OF ALL RENEWAL CONTRACTS IN
9 STATE COURT.

10 Article 38 of the TCCA Renewal Contracts provides that TCCA
11 Members obtain a State Court judgment validating each member
12 contract. AR at 3090 ("The Contractor shall furnish the United
13 States a certified copy of the Final Decree, the validation
14 proceedings, and all pertinent supporting records of the Court
15 approving and confirming this Contract, and decreeing and
16 adjudging it to be lawful, valid, and binding on the
17 Contractor."). This validation process, undertaken by each TCCA
18 member confirmed and validated under state law each renewal
19 contract, establishing the valid execution and enforceability of
20 every provision of the TCCA Renewal Contracts by judgment of the
21 State Superior Court. SAR at 23-31; 34-42; 43-45; 46-59; 60-64.

22
23 6. EXECUTION BY PERFORMANCE AND CONDUCT UNDER THE TCCA
RENEWAL CONTRACTS.

24 Following execution and validation of the TCCA Renewal
25 Contracts, the Bureau continued to make water deliveries and
26 performed by reducing Plaintiffs' water allocations in water
27 years when shortages were declared, as it had previously done
28 under the original and interim TCCA contracts. Under Article 12,

1 the Bureau declared conditions of shortage in 2007, 2008, and
2 2009. SAR at 317-80. The Bureau delivered less than full
3 contract amounts to all CVP water service contractors, including
4 TCCA members in 2008 and 2009. AR at 1591 (the cause of
5 reduction was "the ongoing absence of precipitation in Northern
6 California"). In correspondence that followed execution of the
7 TCCA Renewal Contracts, the Bureau affirmed its interpretation
8 that area of origin laws did not conflict with the terms of
9 Article 12 of the Renewal Contracts and the reduced apportionment
10 of CVP water so authorized. AR at 1602-3; 1589. TCCA admitted
11 that the Bureau had "consistently maintained more than a decade
12 that CVP contractors in the Sacramento River watershed are
13 entitled to no priority to CVP water supplies under Section
14 11460." AR at 1596.

15
16 V. STANDARDS OF DECISION.

17 A motion for summary judgment must be granted when "there
18 is no genuine issue as to any material fact and . . . the moving
19 party is entitled to judgment as a matter of law." Fed. R. Civ.
20 P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48
21 (1986). See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)
22 (summary judgment motion should be granted "so long as whatever
23 is before the district court" shows that the standard set by Rule
24 56(c) is satisfied.

25 For purposes of summary judgment, a fact is "material," when
26 it could affect the outcome of the suit. *Anderson*, 477 U.S. at
27 248. A dispute about a material fact is "genuine" when the
28 evidence is such that a reasonable jury could return a verdict

1 for the party opposing the motion. *Id.* at 248. The moving party
2 must show that it is entitled to summary judgment because, under
3 the governing law, there can be but one reasonable determination
4 of the relevant cause of action or issue. *Id.* at 250; *Margolis*
5 *v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). In ruling on a
6 motion for summary judgment, the court draws all inferences in
7 favor of the non-moving party, makes no credibility
8 determinations, and does not weigh the evidence. *Anderson*, 477
9 U.S. at 249-250. If the matter can be decided as a matter of
10 law, because there are no genuine factual issues, there is no
11 need for a trial and summary judgment is proper. *Id.* at 250-251.

12 In an APA case, the Court may not resolve factual questions
13 but determines "whether or not, as a matter of law, the evidence
14 in the Administrative Record permitted the agency to make the
15 decision it did." *Consolidated Delta Smelt Cases*, 760 F. Supp.
16 2d 855, 868 (E.D. Cal. 2010) (quoting *Sierra Club v. Mainella*,
17 459 F. Supp. 2d 76, 90 (D.D.C. 2006).) In administrative review
18 cases, the Court determines "whether the Agency action is
19 supported by the Administrative Record and otherwise consistent
20 with the APA standard of review." *Id.* at 90.

21 22 VI. LAW AND ANALYSIS.

23 A. STATUTE OF LIMITATIONS.

24 Plaintiff's counsel conceded at oral argument that APA
25 claims are subject to a six year statute of limitations and any
26 claims prior to February 11, 2004 are time-barred. *Hells Canyon*
27 *Preservation Council*, 593 F.3d at 930. Water shortages have been
28 declared under CVP water service contracts in 10 of the last 33

1 years. Summary judgment is GRANTED as to any claims arising
2 before February 11, 2004. Only the water shortages declared in
3 2008 and 2009 remain in dispute.

4
5 B. CVP STATUTES AND SECTION 11460 DO NOT CONTAIN OR SUPPORT THE
6 PRIORITY ALLOCATION RIGHT TO CVP WATER THAT TCCA ADVANCES.

7 TCCA contends that Congress, the State of California, and
8 Reclamation "all intended the CVP to provide for the water needs
9 of the Sacramento Valley with a priority over exports." The non-
10 Federal Defendants rejoin that TCCA's reliance on engineering
11 documents, reports, statements by State officials, and state
12 laws, need not be referenced based on unambiguous federal
13 statutory language and do not bear on Congress' intent in passing
14 Federal laws that authorize the CVP and are inconsistent with
15 state law.

16 TCCA argues:

17 1. Water service and deliveries to TCCA members must be
18 given priority over other CVP divisions and water service
19 contractors to provide 100% contract allocations to TCCA members
20 before south-of-Delta CVP contractors receive water service; and

21 2. Its proposed allocation aligns with the 1950 Act's
22 directive to "effectuate the fullest and most economic
23 utilization of the land and water resources of the Central Valley
24 of California for the widest possible public benefit." 1950 Act,
25 § 4.

26 The Federal-Defendants argue that TCCA's construction of
27 Section 11460 conflicts with the congressional directive in the
28 legislation authorizing the CVP canals, emphasizing the total

1 lack of any language in the Reclamation Acts, or CVPIA,
2 recognizing or granting such origin priority to TCCA. To the
3 contrary, Congressional enactments have repeated the federal
4 legislative intent that the CVP created was for multiple public
5 benefits throughout the Central Valley and that Interior's
6 mandate was to integrate and coordinate the Sacramento River
7 Division into the entire CVP to achieve the legislative purpose
8 of "the widest possible public benefit."

9 As a matter of ascertaining legislative intent, a court
10 looks first to the words of the statute. *United States v.*
11 *Monsanto*, 491 U.S. 600, 610 (1989) ("Congress' intent is 'best
12 determined by [looking to] the statutory language that it chooses
13 . . .'"). Where the plain language of a statute clearly
14 expresses Congress' intent, there is no need to resort to
15 legislative history. *Abraham & Sons Enterprises v. Equilon*
16 *Enterprises ORC*, 292 F.3d 958, 963 (9th Cir. 2002).

17
18 1. STATUTORY INTERPRETATION OF THE CVP STATUTES.

19 a. Plain Language.

20 The language of the original enactment for the CVP in 1935
21 grants no area of origin priority or intended preference to store
22 and provide water with priority for users in the Sacramento
23 Valley. Emergency Relief Appropriations Act of 1935, 49 Stat.
24 115 (1935). Congress' express language manifests its intent that
25 the CVP be used to satisfy multiple purposes to achieve the
26 broadest public benefit for the entire Central Valley. The
27 Rivers & Harbors Act of 1937 stated the original purposes for
28 creating the CVP:

1 Improving navigation, regulating the flow of the San
2 Joaquin River and the Sacramento River, controlling floods,
3 providing for storage and for the delivery of the stored
4 waters thereof, for the reclamation of arid and semi-arid
5 lands and lands of Indian reservations, and other beneficial
6 uses and for the generation and sale of electric energy . . .

7 Rivers & Harbors Act of August 26, 1937, Pub. L. No. 75 392,
8 50 Stat. 844, 850 (1937).

9 None of the Federal laws authorizing the CVP include an
10 "area of origin" provision directing the Bureau to deliver 100%
11 of CVP water contract-allocations to Sacramento Valley users
12 before deliveries to other CVP contractors. Rather, Congress
13 intended the CVP to be used and operated for multiple purposes to
14 achieve broad public benefits for the entire Central Valley.
15 *Dugan v. Rank*, 372 U.S. 609, 612 (1963) (footnote omitted) (CVP
16 intended "to conserve and put to maximum beneficial use, the
17 waters of the Central Valley of California.").

18 TCCA contends that "Congress authorized the physical means
19 to meet the CVP's [area of origin] obligations" through the 1950
20 Act. TCCA refers to § 3 of the 1950 Act, which relates to
21 "locating and designing [of] the works authorized by § 2,"
22 concerning engineering and construction. TCCA asserts § 3
23 directed the Secretary of the Interior to give the State Engineer
24 Bulletins 13 and 26 "due consideration" in locating and designing
25 the Sacramento Canals Unit. According to Plaintiff, this
26 language demonstrates that Congress was well aware of the
27 Bulletins and of the Act's affect on "local interests." 1950 Act
28 at § 3. This section says nothing about an area of origin
 priority.

1 Defendants rejoin that § 4 of the 1950 Act ("Section 4")
2 expressly states as to the Tehama-Colusa Conduit Canal:

3 [T]he Secretary of the Interior is directed to cause
4 the operation of said work . . . to be coordinated and
5 integrated with the operation of . . . the existing
6 features of the Central Valley Project in such manner
7 as will effectuate the fullest and most economic
8 utilization of the land and water resources of the
9 Central Valley of California for the widest public
10 benefit.

11 TCCA contends that Section 4 is a "broad mandate" which does
12 not direct agencies to perform any specific nondiscretionary
13 actions. Under Section 4 of the 1950 Act, Congress gave two
14 instructions for the Unit's operation: (1) the canals are to be
15 operated to achieve the widest possible public benefit and (2)
16 that benefit would be realized by the fullest and most economic
17 utilization of the land and water resources of the Central
18 Valley, not just the Sacramento Valley.

19 The lack of any federal statutory language recognizing or
20 granting an area of origin priority in CVP water service
21 contracts defeats TCCA's self-serving, and wholly unsupported
22 contention that such a priority exists and is not inconsistent
23 with the CVP's purposes. See *Westlands Water District v.*
24 *Firebaugh Canal*, 10 F.3d 667, 671 (9th Cir. 1993). *Firebaugh*
25 *Canal* reviewed the district court's refusal to grant San Luis
26 (non-priority contractors) a CVP water priority under the
27 authorizing statute:

28 The strongest argument in favor of the Bureau is that the
Act nowhere mandates that the Reservoir first be used to
satisfy the needs of the San Luis Contractors before any
diversion to other contractors is allowed. Creating a
preference in favor of the San Luis Contractors and others
similarly situated, or providing that Reservoir water is for
their exclusive benefit, would have been a simple enough

1 drafting exercise for Congress. In effect, the San Luis
2 Contractors ask us to add an important substantive provision
3 to the Act. Such a provision cannot be found in the plain
4 language of the Act, and indeed would be inconsistent with
5 the mandate that the San Luis Unit be operated as an
6 integral part of the whole CVP.

7 *Id.* at 671.

8 b. Legislative History of the CVP Statutes.

9 Both sides claim support in the legislative history of the
10 1950 Act. TCCA asserts that select documents, including a letter
11 to then-Congress member Engle from the Assistant Secretary of the
12 Interior, represent "unequivocal policy statements" by
13 Reclamation that only excess water would be diverted outside of
14 the Sacramento Valley basin. AR 9735 ("I can assure you that the
15 Bureau will determine the amounts of water required in the
16 Sacramento Valley drainage basin to the best of its ability so
17 that only surplus waters would be exported to the San Joaquin . .
18 ."))).

19 Plaintiff's legal authority cited to support finding these
20 remarks "informative" demonstrate the opposite: "We are mindful
21 of the limited persuasive value of the remarks of an individual
22 legislator. Nevertheless, the unanimously expressed
23 understanding of the scope of [Federal legislation] assists our
24 analysis, particularly when that expressed understanding is in
25 complete harmony with the Congressional purpose and statutory
26 text." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1137 (9th Cir.
27 2009). No evidence has been submitted of later Congressional
28 history of any uniform understanding that any legislation
authorizing or implementing the CVP recognized a state area of
origin priority.

1 To the contrary, the same CVP Documents Plaintiff invokes
2 provide statements defeating the existence of any uniform
3 understanding. The House Special Subcommittee on Irrigation and
4 Reclamation, cited by TCCA, provides:

5 (a) That the statements of policy with respect to the
6 importation of surplus water from the Sacramento Valley
7 made by the State of California, the original sponsors
8 of the Project, and subsequently repeated in a similar
9 manner by Interior Department representatives, are
10 certainly confusing, if not misleading;

11 (b) Categorical statements about the reservation of
12 water for Sacramento Valley needs, such as the
13 assurance given by Secretary Krug in Oroville on
14 October 12, 1948, cannot be substantiated as a
15 practical matter in view of the increasing Sacramento
16 Valley uses

17 AR at 9162.

18 The Special Subcommittee further stated: "[T]he statements
19 by Federal officials in the reports appear to guarantee water for
20 the Sacramento valley. However, as Chairman Engle said at
21 Sacramento on October 28, 1951, ". . . these commitments must be
22 considered in the light of other commitments made then or since
23 that time." AR at 9176. Such "other commitments" are included
24 in the text of Federal CVP legislation including the 1950 Act and
25 the CVPIA. The language of those statutes controls over the
26 conflicting statements of individual Federal officials.

27 This case cannot be decided on the anecdotal evidence from
28 individual legislators or conflicting legislative history of the
1950 Act. Despite having knowledge of Reclamation's alleged
"unequivocal policy statements," Congress not only drafted the
1950 Act without any express provision, or even any language
inferentially providing any water rights preference for in-basin
users; the 1950 Act contains the exact opposite - a direction

1 that the Unit operate to achieve the widest possible benefit
2 across the entire Central Valley. The Rivers & Harbors Act nor
3 the 1950 Act do not create or recognize a priority for area of
4 origin CVP contractors.

5 2. STATUTORY INTERPRETATION OF SECTION 11460.

6 a. Plain Language.

7 Plaintiff contends that the plain language of Section 11460
8 is "clear from its use of the definite article, 'the' prior
9 right," as opposed to, *inter alia*, "a", "previously perfected,"
10 or "appropriative right." Defendant-Interveners rejoin that "the
11 word 'contract' does not appear Nor do words such as
12 'preference,' 'allocation,' or 'shortage.'" Defendant-
13 Interveners argue that while TCCA claims that its members are
14 entitled to CVP contracts that grant them preferential allocation
15 of CVP water during Conditions of Shortage, § 11460's plain terms
16 include no such entitlement. Defendant-Interveners further argue
17 that the area of origin statutes only allow for new property
18 rights against the *DWR*, not Reclamation. Federal Defendants join
19 Interveners, asserting that reading the area of origin statutes
20 together demonstrates that Section 11460 applies only to rights
21 previously perfected by way of application to the SWRCB. Section
22 11460 provides:

23 In the construction and operation by the Department of any
24 project and with the provisions of this part, a watershed or
25 area of origin wherein water originates, or any area
26 immediately adjacent thereto which can be conveniently
27 supplied with water therefrom, shall not be deprived by the
28 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.

1 Section 11462 provides: "[T]he provisions of this Article
2 shall not be so construed as to create any new property rights
3 other than against the department [of Water Resources] as
4 provided in this part"4

5 That the area of origin statues list only the DWR, and not
6 the Bureau is significant. Given section 11462's specific
7 limitation, Section 11460 cannot be construed to allow a CVP
8 contract to create any state-based water right against the
9 Bureau. See *El Dorado*, 142 Cal. App. 4th at 976 ("In other
10 words, although [a permittee] may be entitled to assert a priority
11 under Section 11460 over the Bureau and the [DWR] to the
12 diversion of water originating in the watershed of [origin], that
13 priority does not extend to water the projects have properly
14 diverted to storage at an earlier date.") (emphasis in
15 original).⁵ Section 11462 categorically precludes a finding that
16 Section 11460 confers a right in users in the area of origin to
17 insist on a preferential water contract to the Bureau's diverted
18 and stored water.⁶

19
20 ⁴ "Department" means Department of Water Resources. CWC §
21 22.

22 ⁵ There is a total lack of proof that the water TCCA asserts
23 Section 11460 priority over is not previously diverted and stored
24 CVP water or that any such water originated in a relevant area of
origin.

25 ⁶ It is undisputed that the Plaintiffs have never applied
26 for, and the SWRCB has never issued, appropriative or other water
27 rights permits to any of the Plaintiffs applicable to CVP water.
28 Under state law, Plaintiffs are required to obtain any water
right under Section 11460 by complying with SWRCB water project
permitting process.

1 b. Decades of Consistent Interpretation By the
2 California Attorney General, the SWRCB, and the
3 Bureau is That Section 11460 Governs Appropriation
4 Not Allocation of Water in the Area of Origin.

5 i. Attorney General Opinion.

6 Under California law, "in the absence of controlling
7 authority, an Attorney General opinion may be persuasive because
8 we presume the Legislature is aware of the opinion and would have
9 amended the statute if it disagreed." *Life Care Centers of*
10 *America v. Cal. Optima*, 133 Cal.App.4th 1169, 1178 (2005); *ARC*
11 *Students for Liberty Campaign v. Los Rios Community College*
12 732 F. Supp. 2d 1051, 1057 (2010) (citing *City of Irvine v. S.*
13 *Cal. Ass'n of Gov'ts*, 175 Cal. App. 4th 506, 521 (2009) ("Under
14 California law, the Attorney General's opinions are not binding,
15 yet are 'entitled to great weight and, in the absence of contrary
16 controlling authority, persuasive.'"))).

17 The 1955 AG Op. analyzed and addressed the application of
18 section 11460 and California's area of origin laws in detail.

19 The AG Op explains that the area of origin statutes do not
20 grant to the land or inhabitants in a watershed of origin a right
21 to use water stored by project facilities:

22 No inhabitant of a watershed of origin becomes possessed of
23 any presently vested title or right to any specific quantity
24 of water as a result of this statute. As the need of such
25 inhabitant develops he must comply with the general law of
26 the state, both substantively and procedurally, to apply for
27 and perfect a water right for water which he then needs and
28 can then be put to beneficial use (secs. 1200 to 1800).
 However, when he makes such an application, as a member of
 the class of persons protected by the statute, his
 application is not to be gainsaid, denied or limited by
 reason of any activity on part of the Water Project
 Authority. Specifically, this means that if, prior to the
 development of the applicant's increased needs, such use by
 the authority would not justify denial of the application.
 Assuming the application to be otherwise meritorious, the
 State Engineer would grant a permit in the usual form, and

1 the authority would thereafter be compelled to honor the
2 water right thus created and vested.

3 AG Op. at 20-21 (emphasis added.)

4 ii. The Bureau's Interpretation of Reclamation
5 Law.

6 "Unless unreasonable or clearly contrary to the statutory
7 language or purpose, the consistent construction of a statute by
8 an agency charged with responsibility for its implementation is
9 entitled to great deference." *Dix v. Superior Court*, 53 Cal. 3d
10 442, 460 (1991); *RTC Transp., Inc. v. Conagra Poultry Co.*, 971
11 F.2d 368, 370 (9th Cir. 1992) ("We accord substantial deference
12 to statutory interpretations by an agency charged with
13 administering a statute."); *Mesa Verde Const. Co. v. N. Cal.*
14 *Dist. Council of Laborers*, 861 F.2d 1124, n. 5 (1988) (citing
15 *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467
16 U.S. 837 (1984) ("[A] court may not substitute its own
17 construction of a statutory provision for a reasonable
18 interpretation made by the administrator of an agency.")).

19 The Bureau has consistently stated its position that Section
20 11460 does not create a priority allocation to TCCA Members or
21 any area or origin CVP water contractors. See e.g., SAR at 1317
22 (1994) ("[Section 11460 is] directed toward obtaining prior water
23 rights, not obtaining deliveries of water under the Project's
24 rights."); SAR at 1154 (1996) ("Area of origin statutes . . . do
25 not establish any priority to the allocation of CVP contract
26 water or CVP water used for implementation of the [CVPIA]"); SAR
27 at 977 (2000) ("Area of origin/county of origin statutes do not
28 give any CVP user a priority over any other CVP user regarding

1 water service provided by CVP contracts . . . this is also the
2 position of the State Water Resources Control Board.”).

3 The Bureau consistently rejected requests that an area of
4 origin provision be included in north-of-Delta CVP contracts.
5 SAR at 1317; 1308; 3238. TCCA proposed draft contract language
6 precluding water reductions to TCCA Members "unless and until
7 reductions have also been imposed in irrigation users receiving
8 water from the integrated CVP water supply who are outside the
9 Sacramento River watershed." AR at 2802. TCCA contractors
10 requested area of origin transfer provisions and increased CVP
11 contract water allocations based on alleged area of origin
12 protections. SAR at 1004-7 (request for area of origin transfer
13 provisions); SAR at 1021-24 (request for water quantity
14 increase); SAR at 1000-1 (same); SAR at 831 (same). The Bureau
15 did not adopt any contract terms to increase contract quantities
16 or afford Plaintiff's Members protection against shortages.⁷ AR
17 at 3056 (same contract amounts in interim and renewal contracts).

19
20 ⁷ As was recognized in *Westlands 2001*, Plaintiff's Members'
21 contracts "do not create special, preferential rights, in
22 derogation of the overall integrated management of the CVP.
23 Rather, they contain shortage provisions that abate the right []
24 to receive CPV water . . . in water-short years." *Westlands 2001*,
25 153 F. Supp. 2d at 1167. TCCA's Members are not like the
26 Exchange Contractors in *Westlands*. There, the senior priority
27 appropriator and riparian water rights of the Exchange
28 Contractors were both historically established and recognized by
the express language in the Exchange Contracts. *Id.*; *Del Puerto
Water Dist.*, 271 F.Supp.2d at 1243 (CVP contractor did not have
an unqualified right to the delivery of irrigation water).
Plaintiff's Members' contracts recognize § 11460 limits the
Bureau's diversion of natural flow water for export, not its
allocation of CVP water.

1 iii. The SWRCB Has Independently Interpreted
2 Section 11460 in the same manner as the AG
3 Op.

4 The SWRCB decisions are consistent with the AG Op. and the
5 Bureau's interpretation, and have never recognized the water
6 rights Plaintiff and its Members claim. The SWRCB has
7 historically and continuously interpreted § 11460 in the same
8 manner as the AG Op. See e.g., AR at 4952-56 (interpreting area
9 of origin sections to give priority for new appropriations
10 only)); Order 95-6 (same); SAR at 1256; Order 98-09 (same); SAR
11 at 1037(same); see also AR at 4956 (1991 Letter from SWRCB
12 rejecting two TCCA members' complaint seeking area of origin
based preference to CVP water.)

13 3. SECTION 11460's INTERPRETATION BY THE AG Op, SWRCB, AND
14 THE BUREAU ARE ALL CONSISTENT WITH THE PERMIT TERMS.

15 D-990, which approved the United States' application to
16 appropriate Sacramento River water for the CVP, was implemented
17 by the conditions Term 22 and 23. Term 22 made the Bureau's
18 water permits "subject to rights initiated by applications for
19 use within said watershed and Delta regardless of the date of
20 filing said applications." D-990 at 73, 85, AR at 5536, 5548
21 (emphasis added.) Term 22 protects appropriators of water with
22 permits within the area of origin, not CVP contractors.

23 Term 23 granted then-current water users within the
24 Sacramento River watershed a three year period (long-since
25 passed) to request water service contracts, which would be
26 preferred over requests from users outside the watershed. D-1641
27 at 100, AR at 4217. D-1614 expressly states "[the] basis for
28 Term 23 may have been protection of the public interest, but it

1 was not, compelled by the area of origin statutes." By the
2 language of D-1641, the SWRCB explicitly clarified that area of
3 origin statutes do not apply to CVP contracts.

4 Finally, SWRCB adopted Term 91 "to protect persons claiming
5 paramount rights to divert water from the Delta and the water
6 quality upon which such rights depend and to protect fish and
7 wildlife." *El Dorado*, 142 Cal. App. 4th at 953. Term 91 imposes
8 on new *appropriators* shared responsibility to meet Delta water
9 quality standards. D-1594 at 9, SAR Doc. 103. "Term 91
10 prohibits permittees from diverting water when stored Project
11 water is being released to meet Delta water quality standards or
12 other in-basin demands." D-1594 at 8, SAR at 1385; *El Dorado*,
13 142 Cal. App. 4th at 950. Term 91 does not grant an area of
14 origin priority to CVP contractors.

15
16 4. SUBSEQUENT LEGISLATIVE ACTS.

17 Defendants assert that subsequent CVP legislative
18 authorizations reenforce that Congress did not intend the area of
19 origin statutes to apply in the manner TCCA suggests. In 1955,
20 just after the AG Op. was published, the Bureau was authorized
21 "to construct, operate, and maintain, as an addition to and an
22 integral part of the Central Valley project, California, the
23 Trinity River division." Trinity River Division Act of August
24 12, 1955, Pub. L. No. 84-386, 69 Stat. 719 (1955). One purpose
25 of the Trinity River division is "to transport Trinity River
26 water to the Sacramento River." *Id.* Section 2 of the Act
27 provides that "the operation of the Trinity River division shall
28 be integrated and coordinated, from both a financial and an

1 operational standpoint, with the operation of other features of
2 the Central Valley project, as presently authorized and as may in
3 the future be authorized by Act of Congress, in such manner as
4 will effectuate the fullest, most beneficial, and most economic
5 utilization of the water resources hereby made available
6 [Provided] [t]hat not less than 50,000 acre-feet shall be
7 released annually from the Trinity Reservoir and made available
8 to Humboldt County and downstream water users." *Id.* at § 2
9 (emphasis added). The Trinity River furnishes substantial
10 volumes of CVP water that are stored for CVP use by conveyance
11 through the Sacramento River.

12 In 1962 Congress re-authorized the New Melones project on
13 the Stanislaus River. The New Melones project moves water from
14 the Stanislaus River basin to the San Joaquin River. The
15 authorizing statute directs that "before initiating any diversion
16 of water from the Stanislaus River Basin in connection with the
17 operation of the Central Valley Project, the Secretary of the
18 Interior shall determine the quantity of water required to
19 satisfy all existing and anticipated future needs within that
20 basin and the diversions shall at all times be subordinate to the
21 quantities so determined." Flood Control Act of 1962, Pub. L. No.
22 87-874, 73 Stat. 1180, 1191 (1962) (emphasis added).

23 These later enacted Trinity River and New Melones Acts,
24 demonstrate that Congress knew how to create a preference in the
25 allocation of CPV water for an area when it wanted to do so. The
26 Trinity River Division Act prioritizes 50,000 acre feet of CVP
27 water to Humboldt County. The New Melones Unit Act prioritizes
28 CVP water for the Stanislaus River Basin. Both these Acts employ

1 express language to grant such priorities to CVP water. The
2 timing of these subsequent Acts is significant because they were
3 enacted after the California State Legislature specifically
4 applied § 11460 to Reclamation by CWC § 11128 and after the AG
5 Op. was published. Had Congress believed a different approach
6 was warranted, it certainly could have enacted a different
7 statute. *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) (a
8 "longstanding administrative construction is entitled to great
9 weight, particularly when [] Congress has revisited the Act and
10 left the practice untouched."). Instead, recognizing the CVP
11 Acts did not include area of origin protection, Congress created
12 two express legislative priorities for use of CVP water with
13 particularized statutory language applicable to the Trinity River
14 Division and the New Melones Unit.

15
16 5. CALIFORNIA CASE LAW.

17 Plaintiffs and Defendants both claim support from California
18 case law. Defendants assert that, the more recent case law, *El*
19 *Dorado Irrigation Dist.*, 142 Cal. App. 4th 937 and *Phelps*, 157
20 Cal. App. 4th 89, confirm that Section 11460 does not create an
21 area of origin priority to CVP water. Plaintiffs rejoin that
22 dicta from *Water Resources Control Bd. Cases*, 136 Cal.App.4th 674
23 (2006) ("SWRCB Cases") states that there is "no reason why" CVP
24 contractors cannot have a Section 11460 area of origin right to
25 priority CVP water allocation.

26 a. The El Dorado and Phelps Decisions

27 The *El Dorado Irrigation District* case, in response to a
28 challenge that application of Term 91 to the district's water

1 deliveries violated their area of origin priority, held that
2 "Section 11462 contradicted the trial court's conclusion that
3 appropriators [with water permits] in an area of origin may
4 assert a priority to water from that area or that was properly
5 stored by another in an earlier season." 142 Cal. App. 4th at
6 976. The court concluded: "Although El Dorado may be entitled to
7 assert a priority under § 11460 over the Bureau and the
8 Department to the diversion of water originating in the watershed
9 of the South Fork of the American River, that priority does not
10 extend to water the Projects have properly diverted to storage at
11 an earlier date." *Id.* Although *El Dorado* is not on all fours
12 with this case, the decision demonstrates that California courts
13 have rejected the application of Section 11460 to the allocation
14 of stored CVP water; the same category water TCCA and its Members
15 use and to which they assert a Section 11460 priority.⁸

16 *Phelps*, addressed a challenge to a SWRCB civil liability
17 order assessing fines for water users' illegal diversion of water
18 during times when they were required to curtail diversions, while
19 the CVP and SWP were releasing stored water to meet water quality
20 standards. 157 Cal. App. 4th at 99. The Plaintiffs there
21 challenged the SWRCB's imposition of term 91 diversion
22 restrictions on the grounds that those restrictions deprived
23 Plaintiffs of their rights under the area of origin statutes
24

25
26 ⁸ It cannot be disputed that the CVP stores carryover water
27 from prior seasons to meet a number of statutory, regulatory, and
28 operating requirements. TCCA does not present any proof the
water TCCA asserts Section 11460 priority to is not previously
diverted and stored CVP water.

1 §§ 11460-11463. *Id.* As here, The *Phelps* plaintiffs sought to
2 divert previously stored water released by the CVP and SWP. The
3 *Phelps* decision affirmed the SWRCB's explanation for limiting
4 diversions of stored water:

5 The water stored upstream by DWR and the USBR during
6 periods of excess flow, however, is appropriated at
7 times when its appropriation does not injure any other
8 water rights holders. When this water is subsequently
9 released from the reservoirs to flow downstream to the
10 export facilities, it is already appropriated, and is
11 not naturally present in the rivers . . . Accordingly,
12 the stored water transported to the rivers to the
13 export pumps by the Projects, is not available for
14 others to appropriate.

15 *Id.* at 107.

16 *Phelps* confirmed: "[W]e affirmed this reading of the [area
17 of origin statutes] in *El Dorado, supra*, 142 Cal. App. 4th at p.
18 976" *Id.* As in *El Dorado*, *Phelps* held: "Based on the
19 foregoing authority, we conclude that the [area of origin
20 statutes] do[] not bar enforcement of Term 91 against
21 Plaintiffs;" affirming it was proper for the SWRCB to prohibit an
22 area of origin user from diverting water when the only available
23 water was stored upstream of the Delta CVP and SWP Project
24 supply. This California water jurisprudence defeats TCCA's
25 Section 11460 priority assertion by interpreting Section 11460 to
26 mean that once water has been properly appropriated to storage by
27 the Bureau, Section 11460 is inapplicable. TCCA relies on a
28 different California case, the SWRCB Cases, to justify TCCA and
its Members' CVP Renewal Contracts claims for preferential rights
to CVP water supply.

b. The SWRCB Cases Provide No Binding Or Persuasive
Precedent.

1 Plaintiff depends upon language from the *SWRCB Cases*
2 decision, that no violation of Section § 11460 occurred from use
3 of stored water in the New Melones Reservoir to meet Delta water
4 quality standards, because the Delta was within the area of
5 origin. 136 Cal. App. 4th at 758-60. Recognizing the
6 inapplicability of this ruling because of the express statutory
7 priority language for New Melones in-basin users, Plaintiff
8 seizes on the following dicta:

9 To the extent § 11460 reserves the inchoate priority
10 for the beneficial use of water within its area of
11 origin, we see no reason why that priority cannot be
12 asserted by someone who has [or seeks] a contract with
13 the Bureau for the use of that water. (See, *Robie &*
14 *Kletzing Area Area of Origin Statutes - the California*
15 *Experience* (1979) 15 Idaho L. Rev. 419, 436-438
16 (discussing right of area of origin users to contract
17 with Department for SWP water.) This does not mean a
18 user within the area of origin can compel the Bureau to
19 deliver a greater quality of water than the user is
20 otherwise entitled under the contracts. It simply
21 means the Bureau cannot reduce that user's contractual
22 allotment of water to supply water for uses outside the
23 area of origin, absent some other legal basis for doing
24 so that trumps § 11460.

25 136 Cal.App.4th at 758 (emphasis added).

26 There are at least three reasons why Plaintiff's reliance on
27 this dicta is misplaced.

28 First, the operation and effect of the Bureau's federal
water service CVP contracts was not an issue presented for nor
necessary to *SWRCB Cases'* decision. See *United States v.*
Westlands Water Dist., 134 F. Supp. 2d 1111, 1130 (E.D.Cal. 2001)
("Westlands") (citing *Trent v. Valley Elec. Ass'n, Inc.*, 195 F.3d
534, 537 (9th Cir. 1999) (interpreting prior panel's statement as

1 dicta and therefore not binding under the law of the case
2 doctrine)).⁹

3 Second, no comprehensive analysis or in-depth scrutiny was
4 applied to federal CVP water Renewal Contract rights under
5 Conditions of Shortage. The portion of the cited law review
6 article quoted in the *SWRCB Cases* decision was exclusively
7 confined to state SWP contracts, not federal CVP contracts, and
8 addressed obligations and actions of the DWR, not the Bureau. AR
9 at 5169-71.

10 The *SWRCB Cases* dicta offered a strong caveat regarding CVP
11 contracts: “[T]his does not mean a user within the area of origin
12 can compel the Bureau to deliver a greater quantity of water than
13 the user is otherwise entitled [to] under the contract.” *SWRCB*
14

15 ⁹ Notwithstanding that this language has nothing to do with
16 the holding, Plaintiff urges its acceptance, citing *United States*
17 *v. Johnson*, 256 F3d 895, 914 (9th Cir. 2001) (en banc) (“Where a
18 panel confronts an issue germane to eventual resolution of the
19 case, and resolves it after reasoned consideration in a published
20 opinion, that decision becomes the law of the circuit (i.e., it
21 is precedential) regardless of whether the decision was necessary
22 in some strict logical sense.”). That the Ninth Circuit has a
23 unique view of the force of dicta, does not apply to the
24 jurisprudential effect of state court dicta. Further, the *SWRCB*
25 *Cases*’ decision does not meet the *Johnson* standard. The decision
26 did not consider key elements required to make a determination
27 whether a federal CVP contractor can assert an area of origin
28 priority over the Bureau and other CVP contracts. The *SWRCB*
Cases court only poses the rhetorical question “why not?”. In a
decision subsequent to *Johnson*, *Cetacean Community v. Bush*, 386
F.3d 1169, 1173 (9th Cir. 2004), the Ninth Circuit clarified that
“rhetorical flourishes” are not precedential. See also *Camreta*
v. Greene, 131 S. Ct. 2020, 2045 (2011) (“Judicial observations
made in the course of explaining a case might give important
instruction and be relevant. . . But as dicta those remarks would
not establish law and would not qualify as binding precedent.”).

1 Cases, 136 Cal. App. 4th at 758. As the following discussion
2 explicates, the § 12 shortage provisions of Plaintiff's CVP
3 contracts gave no preference to Plaintiff or its Members in times
4 of shortage despite multiple requests for such priority. The
5 Bureau remains subject to its contractual duty to reduce the
6 remaining CVP water to be allocated ratably among all federal
7 water service contractors in accordance with the terms of their
8 CVP Renewal Contracts.

9 Third, Plaintiff's interpretation and proposed application
10 of § 11460 to CVP water service contracts would bring the state
11 law, § 11460, into direct conflict with two express federal
12 Reclamation law Congressional directives. *S. Delta Water Agency*,
13 767 F.2d at 537-41. Under Reclamation law, the Bureau must renew
14 CVP contracts on terms "mutually agreeable to the parties." 43
15 U.S.C. § 485h-1(1). The record of contract negotiations and the
16 express terms of Plaintiff's Renewal Contracts unequivocally
17 prove that the Bureau did not agree to include any term to grant
18 a priority allocation of CVP water to TCCA Members based on area
19 of origin priority. TCCA and its Members were not compelled to
20 sign contracts that were not mutually agreeable. The CVPIA
21 directed the Secretary of the Interior to "renew" existing CVP
22 water contracts. CVPIA § 3404(c). Plaintiff's interpretation of
23 § 11460 would grant them new, different and more favorable
24 contract terms that have never been included in Plaintiff's and
25 its Members' CVP contracts. Such an interpretation and action
26 bring § 11460 into conflict with federal law governing CVP
27 contracts.

28

1 TCCA's proposed interpretation of Section 11460 also
2 conflicts with § 4 of the 1950 Act's directive that the CVP be
3 "coordinated and integrated" for the widest possible benefit to
4 the entire Central Valley.

5 The *SWRCB Cases* provide no binding or persuasive precedent.
6 The decision is distinguishable, and is not controlling in a
7 federal court faced with different issues of fact and law.

8
9 6. Plaintiff's Interpretation of Section 11460 Conflicts
10 With The Congressional Directive of the 1950 Act.

11 In 1951, the California State Legislature expressly applied
12 § 11460 to the Bureau via CWC § 11128. Under Section 8 of the
13 1902 Reclamation Act, federal reclamation projects must be
14 operated in accordance with state water law, when not
15 inconsistent with congressional directives. *California*, 438 U.S.
16 at 674.¹⁰ "[T]he federal statute [is examined] as a whole to
17 determine . . . whether, in light of the federal statute's
18 purpose and intended effects, state law poses an obstacle to the
19 accomplishment of Congress's objectives."

20 TCCA contends that Section 11460 is consistent with the 1950
21 Act, citing *Trinity Country v. Andrus*, 438 F. Supp. 1368, 1386 n.
22 10 (E.D. Cal. 1977). Footnote 10 states:

24 ¹⁰ Here, the SWRCB's interpretation of Section 11460 is
25 directly aligned with the Bureau's, reflecting "the 'cooperative
26 federalism' which the [1902 Reclamation] Act embodie[s] in § 8.'" *California*, 438 U.S. at 648. It is TCCA and its Members'
27 interpretation of Section 11460 that brings the state law into
28 conflict with the Congressional purpose prescribed by Section 4
of the 1950 Act.

1 A few statutes authorizing the construction of CVP units
2 have specifically directed the Secretary to give priority to
3 the needs of the area of origin. 43 U.S.C. § 616eee
4 (Auburn-Folsom South Unit); River and Harbor Act of 1962,
5 Pub.L.No.87-874, § 203, 76 Stat. 1173, 1191 (New Melones
6 Project).

7 Congress knows how to and in the New Melones Unit Act
8 created an express priority for the Stanislaus River Basin. 76
9 Stat. at 1191. TCCA's interpretation of Section 11460 is
10 inconsistent with Congress' express mandate the Bureau operate
11 the CVP for the widest possible benefit. The allocation priority
12 here sought, unlike the New Melones Act, is not based on the 1950
13 Act or any other express provision of reclamation law.

14 The *Trinity County* case footnote also cites the Auburn Act-
15 Folsom, authorizing the Auburn-Folsom South unit of the CVP.
16 That Act includes a similar operational directive provision to
17 the 1950 Act, § 4. See Pub. L. No. 89-161, 79 Stat. 615-618, § 2
18 (1965) ("the operation of the Auburn-Folsom South unit, American
19 River division, shall be integrated and coordinated, from both a
20 financial and an operational standpoint, with the operation of
21 other features of the Central Valley project. . . in such a
22 manner as will effectuate the fullest, most beneficial, and most
23 economic utilization of the water resources.") *Trinity County*
24 found that Section 11460 is consistent with the Folsom-Auburn
25 Act. This finding, however, lends no support to the claim that
26 Plaintiff's interpretation of Section 11460 is consistent with
27 Congressional directives relating to the operation of the CVP.
28 TCCA ignores a critical aspect of point about *Trinity County*¹¹

¹¹ TCCA also cites *S. Delta Water Agency*, 767 F.2d at
536-539. The same analytical void applies. *S. Delta Water Agency*

1 that considered Section 11460 as it has historically been
2 applied, *not* as TCCA seeks to have the statute applied. No
3 federal court has ever held that any "area of origin" contractor
4 enjoys a "prior right" to previously stored and appropriated CVP
5 water. As it has been consistently administered, Section 11460
6 complies with congressional directives because the section has
7 never been applied to dictate how the Bureau *allocates* CVP water
8 under its water service contracts.

9 TCCA's construction of the statute would handcuff the
10 Bureau's discretionary allocation of Project water in its
11 administration of water service contracts and do so in a manner
12 violative of congressional intent. The 1950 Act does not create
13 an allocation priority for area of origin CVP contractors.
14 Instead, the Act directs that the CVP be "coordinated and
15 integrated" in a way that utilizes the "land and water resources"
16 of the Central Valley for "the widest possible benefit." 1950
17 Act, § 4. A piecemeal operation of the CVP that does not strive
18 for and achieve this highest use of both land and water resources
19 throughout the entire CVP, is inconsistent with Section 4. The
20 CVP is not intended to commit the water resources of one part of
21 the Central Valley to the detriment of another part of the
22 Central Valley.

23 C. CONCLUSION RE: STATUTES.

24 Congress has never created an allocation preference for CVP
25 water contractors in an area of origin. It is not the role of a
26

27
28 considered Section 11460 as it has historically been applied, *not*
as TCCA seeks to have the statute applied.

1 trial court to grant Plaintiff relief that Congress and its
2 delegee, the Bureau, have continuously refused to provide.
3 *Schweiker v. Chillicky*, 487 U.S. 412, 429 (1988) (courts should
4 defer to Congress' judgment because "Congress is the body charged
5 with making the inevitable compromises required in the design of
6 a massive and complex . . . program.") Plaintiff's demand under §
7 11460 is in material contravention to the express intent of
8 Congress, and would turn the world of federal CVP water
9 contracting on its head.

10 D. INTERPRETATION OF LONG-TERM CVP WATER SERVICE CONTRACTS.

11 TCCA's claim is premised on a showing that the Bureau had no
12 authority to allocate water as it did. Alternatively, TCCA
13 alleges the Bureau acted arbitrarily, capriciously, or contrary
14 to law in exercising its contracting authority and in performing
15 TCCA's water service contracts. Defendant Intervenors respond:

16 1.) The express terms of the TCCA Renewal Contracts
17 specifically authorized Reclamation to declare conditions of
18 shortage and to apportion CVP water in times of shortage.
19

20 2.) At the time Plaintiffs executed their TCCA Renewal
21 Contracts, TCCA Members understood exactly how Article 12 would
22 apply and had been applied to limit their CVP water deliveries in
23 times of declared shortage.

24 3.) The Bureau has statutory and contractual discretion to
25 apportion CVP water pro-rata to TCCA Members and all other non-
26 priority CVP water contractors during declared Conditions of
27 Shortage.
28

1 4.) The *post hoc* interpretation of the Contract terms by
2 TCCA is entitled to no weight, as it violates the Bureau's and
3 TCCA's express mutual understanding of the meaning of and their
4 agreement to the shortage provisions at the time they contracted
5 based on almost forty years of contracting history, and because
6 TCCA's interpretations are incorrect as a matter of law.

7
8 1. FEDERAL CONTRACT LAW.

9 Federal law governs the interpretation of a contract if the
10 United States is a party, especially federal reclamation
11 contracts. See *Mojave Valley Irrigation & Drainage Dist. v.*
12 *Norton*, 244 F.3d 1164, 1165 (9th Cir. 2001) (citing cases); see
13 also *Westlands*, 134 F. Supp. 2d at 1135 (applying federal law to
14 interpret Westlands' 1963 water-service contract) (citing *Klamath*
15 *Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210
16 (9th Cir. 1999) (citing *O'Neill*, 50 F.3d at 682)). For guidance,
17 federal courts also follow general principles of contract
18 interpretation. See *Westlands*, 134 F. Supp. 2d at 1135 (citing
19 *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir. 1983) (citing
20 *United States v. Seckinger*, 397 U.S. 203, 209-11 (1970))).

21 The plain language within the four corners of the contract
22 must first be examined to determine the mutual intent of the
23 contracting parties. See, e.g., *United States v. Clark*, 218 F.3d
24 1092, 1096 (9th Cir. 2000) ("Following traditional rules of
25 contract interpretation, we must examine the plain language of
26 the term in the context of the document as a whole.") (quoting
27 sources). In "cases of contracts, language is to be given, if
28 possible, its usual and ordinary meaning. The object is to find

1 out from the words used what the parties intended to do." *Fla.*
2 *Cent. R.R. Co. v. Schutte*, 103 U.S. (Mem.) 118, 140, 13 Otto 118,
3 26 L.Ed. 327 (1880). "A written contract must be read as a whole
4 and every part interpreted with reference to the whole, with
5 preference given to reasonable interpretations." *Klamath*, 204
6 F.3d at 1210. "[C]ourts should attempt to construe contracts to
7 avoid absurdity, and must reject interpretations which would make
8 the contract unusual, extraordinary, harsh, unjust, or
9 inequitable." *Blecher & Collins, P.C. v. N.W. Airlines, Inc.*,
10 858 F. Supp. 1442, 1459 (C.D. Cal. 1994) (citing sources).

11 "In fashioning federal rules, guidance is gained from
12 general principles for interpreting contracts." *Saavedra*, 700
13 F.2d at 498 (citing *United States v. Seckinger*, 397 U.S. 203,
14 209-11 (1970)).¹² The Uniform Commercial Code ("U.C.C.") is one
15 source of federal common law used to interpret any contract to
16 which the federal government is a party. See *O'Neill*, 50 F.3d at
17 684 (applying the U.C.C. to the disputed contracts). "[T]he
18 backdrop of the legislative scheme that authorized" a government
19 contract may also be examined to interpret that contract.
20 *Peterson v. U.S. Dept. of Interior*, 899 F.2d at 799, 807 (citing
21 *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 87-88
22 (1958)). Additional contract interpretation rules apply:
23

24 ¹² Sources of federal common law include: (1) the
25 Restatement of Contracts (2d); (2) the U.C.C.; (3) federal
26 caselaw; and (4) state law. *Westlands*, 134 F. Supp. 2d at 1134
27 (citing Robert E. Jones, Gerald E. Rosen, William E. Wegner, and
28 Jeffrey Scott, *Federal Civil Trials and Evidence* ¶ 8:4455 (2000)
(citing cases)).

1 (1) the four corners of the contract must be read as a
2 whole;

3 (2) preference is given to reasonable interpretations,
4 favoring those that avoid internal conflict;

5 (3) under the U.C.C., extrinsic evidence, including usage of
6 trade;¹³ course of dealing¹⁴; and course of performance¹⁵, is
7 admissible to determine whether the contract is ambiguous;

8 (4) if the contract is ambiguous, i.e., whether "reasonable
9 people could find its terms susceptible to more than one
10 interpretation," extrinsic evidence may be considered to
11 interpret the parties' intent in light of earlier
12 negotiations, later conduct, related agreements, and
13 industry-wide custom;

14 (5) whether a contract (or any term) is ambiguous is a
15 question of law.

16 See *Westlands*, 134 F. Supp. 2d at 1134-38 (quoting and citing
17 cases).

18 ¹³ Under U.C.C. § 1-205(2) usage of trade is:
19 any practice or method of dealing having such regularity
20 of observance in a place, vocation or trade as to
21 justify an expectation that it will be observed with
22 respect to the transaction in question. The existence
23 and scope of such a usage are to be proved as facts.

24 ¹⁴ Under U.C.C. § 1-205(1) a course of dealing is:
25 a sequence of previous conduct between the parties to a
26 particular transaction which is fairly to be regarded as
27 establishing a common basis of understanding for
28 interpreting their expressions and other conduct.

¹⁵ "Where the contract for sale involves repeated
occasions for performance by either party with
knowledge of the nature of the performance and
opportunity for objection to it by the other, any
course of performance accepted or acquiesced in without
objection shall be relevant to determine the meaning of
the agreement." U.C.C. § 2-208.

1 2. STANDARDS RE: THE BUREAU'S STATUTORY DISCRETION TO
2 APPORTION CVP WATER IN TIMES OF SHORTAGE.

3 The Bureau, "has contractual authority and administrative
4 discretion over how it provides water service among the CVP's
5 water and power-users, and how it picks its priorities among
6 them." *Westlands 2001*, 153 F. Supp. 2d at 1144. The Bureau is
7 expressly empowered to allocate CVP water under the shortage
8 provisions in its various CVP Contracts. *Westlands Water Dist.*
9 *v. Bureau of Reclamation*, 805 F. Supp. 1503, 1513 (E.D. Cal.
10 1992) ("*Westlands 1992*"). In *Westlands 1992*, the court found
11 the plain language of similar water shortage provisions:
12 "Vest[ed] conclusive authority to apportion the entire . . . Unit
13 water supply in the Contracting Officers of the Bureau." *Id.* at
14 1512. The Bureau "had the prerogative to exercise its allocation
15 powers granted under the water shortage provisions in the
16 relevant supply contracts." *Id.* at 1513; see also, *San Luis &*
17 *Delta-Mendota Water Authority v. U.S. Dept. of the Interior*, 637
18 F. Supp. 2d 777, 795 (E.D. Cal. 2008) (recognizing discretion of
19 Interior through the Bureau to allocate water under the CVPIA).

20 The same prerogative exists under Plaintiff's and its
21 Members' Renewal CVP Contracts. The Bureau has discretion to
22 declare Conditions of Shortage and to exercise its water
23 allocation powers accordingly. Plaintiff's contention that the
24 Bureau lacks discretion to allocate prorata CVP water supply by
25 reducing deliveries under Conditions of Shortage is contrary to
26 *Westlands 1992* and the express language of Plaintiff's CVP
27 Renewal Contract. TCCA correctly points out that Article 12(c)
28 does not specify that apportionment of limited Project Water

1 supply must be equal or pro-rata, however, that decision is
2 allocated to the Bureau's discretion to declare water shortages
3 and to allocate water accordingly during dry years. The Bureau
4 has the discretion to perform the Contracts in the manner it has
5 historically done and in accordance with the parties' long-
6 standing course of dealing and course of performance. *Westlands*
7 *1992*, 805 F. Supp. at 1513. The Bureau's "water allocation
8 decisions are entitled to judicial deference, [if] they are
9 neither unlawful nor unreasonable." *Id.*

10 3. TCCA MEMBER LONG-TERM CVP CONTRACTS: SHORTAGE TERMS.

11 Every TCCA renewal contract includes Article 12 empowering
12 the Bureau to declare conditions of shortage and to apportion
13 water in times of shortage. The shortage provision states:
14

15 (b) If there is a Condition of Shortage¹⁶ because of errors
16 in physical operations of the Project, drought, other
17 physical causes beyond the control of the Contracting
18 Officer or actions taken by the Contracting Officer to meet
19 legal obligations then, except as provided in subdivision
(a) of Article 18 of this Contract, no liability shall
accrue against the United States or any of its officers,
agents, or employees for any damage, direct or indirect,
arising therefrom.

20 (c) In any Year in which there may occur a shortage for any
21 of the reasons specified in subdivision (b) above, the
22 Contracting Officer shall apportion the available Project
23 Water supply among the Contractor and others entitled, under
24 existing contracts and future contracts (to the extent such
future contracts are permitted under subsections (a) and (b)
of Section 3404 of the CVPIA) and renewals thereof to
receive Project Water consistent with the contractual
obligations of the United States.

25
26 ¹⁶ Article 1(c) defines condition of shortage as: "A
27 condition respecting the Project during any Year such that the
28 Contracting Officer is unable to deliver sufficient water to meet
the Contract Total."

1 (d) Project Water furnished under this Contract will be
2 allocated in accordance with the then-existing Project M&I
3 Water Shortage Policy.

4 Renewal Contract, Article 16 (b), (c), (d).

5 The present CVP M&I Water Shortage Policy generally
6 allocates project water between divisions on a pro rata basis,
7 except when "specific operational constraints on Reclamation
8 require otherwise." SAR at 853, M&I Water Shortage Policy at 1.

9 a. Discretionary Interpretive Authority in Renewal
10 Contract Shortage Provisions.

11 TCCA Renewal Contract Article 12 grants the Bureau authority
12 to determine when Conditions of Shortage occur and to ratably
13 apportion CVP water during those times. AR at 3073-74. Article
14 12 defines "Condition of Shortage" as "a condition respecting the
15 Project during any Year such that the Contracting Officer is
16 unable to deliver sufficient water to meet the Contract Total."
17 SAR at 3049. Article 12(b) provides that a "Condition of
18 Shortage may occur "because of errors in physical operations of
19 the Project, drought, or other physical causes beyond the control
20 of the Contracting Officer or actions taken by the Contracting
21 Officer to meet legal obligations." AR at 3073. The Contracting
22 Officer must notify contractors when it determines that a
23 Condition of Shortage is probable, and no liability shall accrue
24 against the United States for any damage from a Condition of
25 Shortage. Renewal Contract, Article 12(a); 12(c). The language
26 of Article 12 grants the Bureau unqualified ability to determine
27 when a Condition of Shortage exists under any CVP water service
28 contract, absent language expressly limiting such discretion.

1 When the Bureau determines a Condition of Shortage exists,
2 Article 12(c) directs that "the Contracting Officer shall
3 apportion the available Project Water¹⁷ supply among the
4 Contractor and others entitled . . . to receive Project Water
5 consistent with the contractual obligations of the United
6 States." None of the statutes authorizing the Project provide
7 for area of origin priority nor does Plaintiff TCCA or its
8 Members - with the possible exception of Tehama-Colusa Canal
9 Company - hold priority water rights acquired pursuant to
10 California law.¹⁸ The contractually required apportionment by
11 the Contracting Officer, for the Bureau, calls for Project Water
12 supply to be allocated among the Contractor and other CVP
13 Contractors.

14 Further authority is granted to the Bureau during a declared
15 shortage to apportion water among all CVP Contractors, within and
16 outside the areas of origin under 12(d): "Project Water furnished
17 under [each Renewal Contract] will be allocated in accordance
18 with then-existing Project M&I Water Shortage Policy." AR at
19

22 ¹⁷ Contract Article 1(u) defines "Project Water" as "all
23 water that is developed, diverted, stored and delivered by the
24 Secretary in accordance with the statutes authorizing the Project
25 and in accordance with the terms and conditions of water rights
acquired pursuant to California law." SAR at 3052.

26 ¹⁸ The Plaintiffs' Contracts do not define the term
27 "apportion." Apportion is defined in common usage as "to divide
28 and assign in proportion." Webster's Third New Int'l Dictionary
105 (2002).

1 3074.¹⁹ The M&I Policy "define(s) water shortage terms and
2 conditions applicable to all CVP M&I contractors." SAR at 853
3 (emphasis added). The M&I Policy requires the Bureau to allocate
4 to non-priority contractors a reduction in 5% increments until
5 75% of their contractual supply is reached, then, "(W)hen
6 allocation of irrigation water has been reduced below 75% and
7 still further water supply reductions are necessary, both the M&I
8 irrigation allocations will be reduced by the same percentage
9 increment." SAR at 855-56. The M&I Policy makes no distinction
10 between north-of-Delta and south-of-Delta water contractors. Nor
11 does the M&I Policy distinguish between area of origin and non-
12 area of origin contractors. Article (d) operates to require the
13 Bureau to allocate CVP water supply among all CVP contractors in
14 times of Condition of Shortage.

15 b. The Renewal Contract's Shortage Provisions Are Not
16 a Limitation on the Bureau's Discretion to
17 Apportion Contract Water.

18 Plaintiff advances multiple arguments related to the Renewal
19 Contracts Condition of Shortage term: 1) a "Condition of
20 Shortage" cannot exist if water supply is provided to south-of-
21 Delta contractors; 2) other CVP water service contracts in other
22 CVP divisions do not create a "legal obligation" under Article
23 12(b); 3) the meaning of the term "others entitled" does not
24 apply to contractors holding non-area of origin CVP contracts;
25 and 4) Section 11460 is a legal obligation under Article 12(b) to

26 ¹⁹ The draft M&I Water Shortage Policy dated September 11,
27 2001, governed the Bureau's water allocation to Plaintiffs during
28 declared Conditions of Shortage in 2008 and 2009. SAR at 843-57.

1 deliver all contract water to TCCA's Members before exporting to
2 other non-area of origin CVP contractors.

3 Plaintiff's first argument is addressed in part by the
4 contract definition that a "Condition of Shortage" is
5 specifically defined as "a condition respecting the Project." AR
6 at 2841. "Project refers to the entire Central Valley Project
7 "owned by the United States and managed by the Department of the
8 Interior, Bureau of Reclamation." AR at 2843. When the Bureau
9 is unable to deliver sufficient CVP water to all CVP water
10 service contractors, after calculating their contract
11 requirements in the aggregate, a Condition of Shortage respecting
12 the Project exists. The Bureau has interpreted the shortage
13 provision to, in its discretion, require that "the remaining
14 supply has to be apportioned among all CVP Contractors pursuant
15 to Article 12(c), which could further reduce the amount of water
16 available to all CVP Contractors." AR at 1591. No other non-
17 priority CVP Contractors receive 100%, rather, all share in a
18 reduced allocation of the available CVP supply. This
19 interpretation is reasonable, fair and equitable, and is
20 consistent with Congress' directive that the Bureau operate the
21 CVP "in such manner as will effectuate the fullest and most
22 economic utilization of the land and water resources of the
23 Central Valley of California for the widest possible public
24 benefit." Federal Act of 1950, § 4.

25
26 Second, Plaintiff argues that other CVP water service
27 contracts in other CVP divisions do not create a "legal
28 obligation" under Article 12(b) that constitutes a Condition of

1 Shortage. There is no evidence the Bureau considered the
2 existence of additional CVP contracts as causing shortage, as it
3 cited drought as the justification for a declaring Condition of
4 Shortage in both 2008 and 2009. The existence of multiple CVP
5 contractors is not a shortage-causing condition.

6 Third, Plaintiff contends that the meaning of the term
7 "others entitled" under Article 12(c) does not to apply
8 contractors not in the area of origin. This view is discredited
9 by Article 12(c)'s language that those holding "existing and
10 future contracts" are entitled to CVP water without regard to
11 their geographic location. The apportionment of the available
12 Project water supply under Article 12(c) is to those "entitled
13 under existing contracts and future contracts . . . to receive
14 Project Water" No reference to geographic location is
15 provided for any contractor. Geographic location is not a
16 qualifying condition to full water service. TCCA ignores that
17 although the Renewal Contracts did not define the term "others
18 entitled," the Bureau, in its discretion, has historically and
19 consistently maintained that "others entitled" means all other
20 CVP Contractors. AR at 4590 (1990 letter from the Bureau to TCCA
21 Member Districts); AR at 4950 (1999 Bureau letter to CVP
22 Contractors); AR at 4904 (1994 Bureau letter to CVP Contractors);
23 SAR at 1154-56 (1996 Draft Paper on Applicability of Area of
24 Origin Statutes). The Bureau has without exception, allocated
25 water pursuant to similar language in the original and the
26 interim TCCA Contracts, pro-rata among contractors without
27 differentiating the amounts of reduction. TCCA has acknowledged
28

1 the Bureau's consistent pro rata allocations. SAR at 977; SAR at
2 865; AR at 1596 (A March 12, 2000 letter from TCCA stating
3 "Reclamation has asserted the same position [concerning area of
4 origin protection] . . . in the long-term water service contract
5 renewal negotiations completed in 2005").

6 Plaintiff cites *Westlands 2001* to support its final argument
7 that "'available' Project Water, subject to allocation to export
8 contractors under their own versions of Article 12(c), cannot
9 include water needed to serve the 'prior right' [under Section
10 11460] held by TCCA contractors." *Westlands 2001* is factually
11 distinguishable. In *Westlands 2001*, Exchange Contractors held
12 senior riparian and pre-1914 appropriative rights, recognized by
13 the SWRCB under prior permits and those senior rights were
14 expressly identified and reserved in the Exchange Contractors'
15 CVP water service contracts. In this case, Section 11460 creates
16 no water allocation priority for CVP contractors in the area of
17 origin and the TCCA Renewal Contracts have no express or implied
18 reservation of priority to CVP water based on area of origin
19 "right" to TCCA Members or any other legal priority of any kind
20 or nature. No court has ever held that any "area of origin"
21 contractor enjoys a "prior right" to CVP water that originates in
22 an area of origin.

23 The Bureau is, however, under a legal obligation to "use all
24 reasonable means to guard against a Condition of Shortage in the
25 quantity of water to be made available to the Contractor." AR at
26 3073, Renewal Contract, Article 12(a); AR at 2308. The Bureau is
27 under a legal mandate to optimize deliveries for all CVP
28

1 Contractors. AR at 3072, Article 11(a); AR at 2307. Each CVP
2 Water Service Contractor is entitled to a "stated share or
3 quantity of the Project's available water supply." 43 U.S.C.
4 § 485h-1(4). The Bureau has historically met this obligation in
5 operating the CVP by apportioning CVP water supplies to
6 Contractors in all Divisions of the CVP in times of shortage.

7 Plaintiff ignores and refuses to acknowledge that since the
8 inception of the CVP and through the manifestly significant
9 amendments to add non-water service priorities through the CVPIA,
10 the Bureau has never recognized it is under any legal obligation
11 to observe any area of origin "priority"; has never reduced CVP
12 water deliveries on the basis of any area of origin legal
13 obligations to Sacramento Valley CVP contractors; and has
14 continuously and consistently refused to accept such an
15 interpretation of Plaintiff's water service contracts; nor has it
16 recognized any area of origin priority which would conflict with
17 the federal CVP's legal purposes and mandate that the Bureau
18 operate the CVP in such manner to effectuate the fullest and most
19 economic utilization of the land and water resources of the
20 Central Valley of California for the widest possible public
21 benefit.²⁰ The Bureau's contractual interpretation and its
22 performance and Plaintiffs' performance under prior and existing
23 TCCA Renewal CVP Water Service Contracts comply with federal and
24 state law and are not arbitrary or capricious. *Central Arizona*
25 *Irrigation & Drainage Dist. v. Lujan*, 764 F. Supp. 582, 590 (D.

26
27 ²⁰ No CVP contract now includes and has never included any
28 contract provision that identifies a "legal obligation" under
§ 11460.

1 Az. 1991) (inclusion of term and Bureau water service contract
2 not capricious because the "administrative record is replete with
3 correspondence between all of the affected parties and the Bureau
4 of Reclamation").

5 Plaintiff's interpretation is contrary to and would
6 improperly restrain and limit the Bureau's contractual authority
7 and discretion to allocate the CVP water supply.

8 c. Article 18(a) in Not a Limitation on the Bureau's
9 Discretion to Apportion Contract Water.

10 Plaintiff contends that Article 18(a) limits the shortage
11 provisions to favor Plaintiff or its Members. However, Article
12 18(a) only reserves the right of the Bureau and the Contractor to
13 challenge in court any action TCCA either believes is "predicated
14 upon arbitrary, capricious, or unreasonable opinions or
15 determinations." This provision says nothing about water
16 allocation. Contract Article 12(c) specifically limits the
17 amount of CVP water any contractor is entitled to Contracting
18 Officer's exercise of discretion in allocating CVP water among
19 CVP contractors. AR at 1590. No language in the shortage
20 provisions or anywhere else in Plaintiff's or its Members'
21 contracts specify any entitlement to full contract deliveries
22 during a Condition of Shortage.²¹

23
24 ²¹ There is, however, proof in the Renewal Contracts that
25 Plaintiff and its Member knew how to reserve a disputed issue.
26 Article 7(n) is an express reservation regarding "Rates for M&I
27 Water" that was in dispute between the parties at the time of
28 contracting. Article 7(n) states in relevant part:

Contractor asserts that it is not legally obligated to repay
any Project deficits claimed by the United States to have

1 d. Article 3 and 1(u) Are Not a Limitation on the
2 Bureau's Discretion to Apportion Contract Water.

3 Plaintiff argues that Article 3 and 1(u) of its Members'
4 contracts incorporate state law, including § 11460. Articles 3
5 and 1(u) recognize that § 11460 applies to the Bureau through the
6 terms of the Bureau's water rights permits, limiting the Bureau's
7 ability to divert natural flow water for export rather than
8 mandating preferential allocation of CVP water. The National
9 Environmental Policy Act ("NEPA") review for these contracts was
10 based on that understanding. SAR at 130-3, Finding of No
11 Significant Impact at Findings 1, 3 & 4. Plaintiff again cites
12 the *SWRCB Cases* decision and D-990, which authorized the Bureau's
13 CVP water permits. Term 22 of the Bureau's permits effectuating
14 § 11460 does not direct the Bureau to recognize a priority in
15 area of origin contractors; rather, it affords protection to
16 state permitted appropriators of water within an area of origin,
17 not federal water contractors. D-990 at 73, 85, AR at 5536,
18 5548. Consistent with approximately forty years of contracting
19 with Plaintiff, § 11460 at most imposes limits on the Bureau's

20 accrued as of the date of the Contract. . . [T]he Contractor
21 does not waive any legal rights or remedies that it may have
22 with respect to such issues. Notwithstanding execution of
23 this Contract. . . the Contractor may challenge in the
24 appropriate administrative or judicial forums [regarding] []
the existence, computation, or imposition of any such
deficit. . .

25 AR at 2699.

26 No such express reservation exists as to Plaintiff's
27 interpretation of Section 11460, despite decades of dispute on
28 the issue.

1 ability to divert natural flow in the area for export use. It
2 does not require a preferential allocation to Plaintiff or its
3 Members of CVP water.

4 4. CONTRACT NEGOTIATION AND PERFORMANCE.

5 Plaintiff and its Members had express notice and knowledge
6 of the Bureau's historical and continuous interpretation of
7 Article 12 and the Bureau's actual past and intended performance
8 under its CVP Water Service Contracts. See *Kemmis v. McGoldrick*,
9 767 F.2d 594, 597 (9th Cir. 1985) (ambiguous contract provisions
10 are interpreted based on parties' intent at the time contracts
11 are executed). Plaintiff admits that "Reclamation has reduced
12 water deliveries under the Water Service Contracts north-of-
13 Delta, including deliveries to TCCA Members, in ten of the past
14 33 contract years, the period from 1976 through 2009."
15 (Complaint at 7:17-19). The course of dealing and performance
16 between Plaintiff and the Bureau proves the Bureau has always
17 reduced water deliveries to Plaintiff's Members and applied
18 Article 12's mandated CVP-wide apportionment reduction in years
19 when "Reclamation delivered some quantity of CVP water to south-
20 of-Delta contractors" under declared Conditions of Shortage. SAR
21 at 3177-80.

22
23 Uncontradicted substantial evidence of the history of the
24 CVP establishes that TCCA recognized, understood, and disputed
25 the Bureau's long standing consistent application of Article 12,
26 including the Bureau's expressed disavowal of any intent to
27 recognize, coupled with its actual non-recognition of area of
28 origin preference in TCCA and its Members, in the present renewal

1 and under prior CVP contracts. SAR at 977; 1154-56; 1308; 1317.
2 TCCA has on more than two occasions formally disputed the
3 Bureau's interpretation of the Article 12 shortage conditions and
4 has unsuccessfully sought to include area of origin priority in
5 their CVP Water Service Contracts, which the Bureau consistently
6 denied.

7
8 The historic practice of the Bureau during shortages has
9 been to, without exception, reduce CPV water deliveries to TCCA
10 and its Members to effect pro rata apportionment of CVP water to
11 all north-and south-of-Delta CVP Water Service Contractors.
12 TCCA's proffered interpretation of Article 12 is manifestly
13 different from the express understanding of the parties at the
14 time of contract formation that, pro-rata allocations and water
15 reductions were required of all contractors under Conditions of
16 Shortage. Plaintiff now asserts for the first time in any
17 federal judicial proceeding that contract Article 12 is illegal
18 because the shortage provisions of Article 12 are wholly
19 inconsistent with the requirement that the Bureau apply § 11460
20 to those Contracts. It is indisputable that when the latest
21 Renewal Contracts were executed, Plaintiff and its Members
22 possessed actual knowledge that a dispute over the area of origin
23 priority existed and that the Bureau had never acquiesced and did
24 not agree to Plaintiff's interpretation. The Bureau notified a
25 TCCA Member in 1990:

26 Reclamation has reviewed the appropriate statute and has
27 concluded that the Contract . . . between Reclamation and
28 your District satisfies any obligation Reclamation might
have under the California Water Code to provide water for
the 'area of origin.' The District has agreed to the terms

1 and conditions of that Contract. So, the imposition of
2 shortages on the District, in accordance with that Contract
3 as a result of drought conditions, does not give the
4 District the right to claim water in addition to the amount
5 provided for in that Contract. Users of CVP water are
6 sharing in the shortage of water from the CVP.

7 AR at 4590 (May 27, 1990 Letter from the Bureau to Orland-Artois
8 Water District) (emphasis added). In 1994 the Bureau issued a
9 November 2nd, Area of Origin Issue Paper, SAR at 1317, which
10 stated the Bureau's position that Section 11460 is "directed
11 toward obtaining prior water rights, not obtaining deliveries of
12 water under the Project's rights." In 1996 another Bureau draft
13 report addressed applicability of area of origin statutes to the
14 CVP, confirming that area of origin statutes in California water
15 law "do not guarantee that the water supply needs of an entire
16 area of origin, will or can be met." SAR at 1154:

17 Under these statutes, water rights applicants within
18 the area of origin are essentially guaranteed that new
19 water right applications filed for the development of
20 water within the area of origin, will not be rejected
21 by the [Board] on the basis that no water is available
22 for appropriation by virtue of a senior water right to
23 export the water from the water shed. While the area
24 of origin statutes may result in future reductions in
25 the quantities of CVP water that can be delivered to
26 CVP export customers, the area of origin provisions do
27 not become part of a contract for the delivery of
28 water; they are part of the water rights on which the
contract is based and subject that right to
appropriations by users within the area of origin.

29 The Bureau found: "Area of origin statutes . . . do not
30 establish any priority to the allocation of CVP contract water or
31 CVP water used for implementation of the [CVPIA]." SAR at 1156.
32 Many contractors responded to the draft report. See, e.g., SAR
33 at 1105-06; SAR at 1107-11; SAR at 1125-32; SAR at 1133; SAR at

1 1134-37; SAR at 1138-40; SAR at 1150-53. TCCA then acknowledged
2 that "[T]he Bureau's conclusions come as no surprise, as this is
3 a restatement of positions they [sic] have articulated on
4 numerous occasions in the past." SAR at 1141 (emphasis added).
5 In 2000, the Bureau again stated: "Area of origin/county of
6 origin statutes do not give any CVP user a priority over any
7 other CVP user regarding water service provided by CVP contracts
8 . . . this is also the position of the State Water Resources
9 Control Board" SAR at 977.

10 The Bureau consistently rejected requests that an area of
11 origin provision be included in north-of-Delta CVP contracts.
12 SAR at 1317; 1308, *see also*, SAR at 3238. TCCA proposed draft
13 contract language precluding water reductions to TCCA Members
14 "unless and until reductions have also been imposed in irrigation
15 users receiving water from the integrated CVP water supply who
16 are outside the Sacramento River watershed." TCCA contractors
17 requested area of origin transfer provisions and increased CVP
18 contract water allocations based on alleged area of origin
19 protections. SAR at 1004-7 (request for area of origin transfer
20 provisions); SAR at 1021-24 (request for water quantity
21 increase); SAR at 1000-1 (same); SAR at 831 (same). Both
22 proposed interim TCCA contracts included a similar area of origin
23 transfer provision SAR at 1308) as did the TCCA Renewal Contracts
24 AR at 307-71. The Bureau did not adopt contract terms to
25 increase contract quantities or afford protection against
26 shortages. AR at 3056 (same contract amounts in interim and
27 renewal contracts) Plaintiff and all TCCA Members signed their
28

1 CVP Renewal Contracts with full knowledge of the Bureau's
2 contracting position.

3 At the time the most recent long-term TCCA Renewal Contracts
4 were executed, shortages had been implemented in at least five
5 prior years and continued to be implemented in the same manner,
6 providing TCCA and its members express notice and actual
7 knowledge of the Bureau's consistent continuing performance of
8 the shortage conditions and pro-rata reduction of TCCA CVP water
9 deliveries during shortages without recognition of area of origin
10 priority. The Bureau is authorized under its state water permits
11 issued by the SWRCB to manage and deliver water under Federal CVP
12 water service contracts without recognizing the priority TCCA
13 seeks; has done so for almost the past 40 years; and TCCA has not
14 taken any judicial action to have its Federal water service
15 contract rights otherwise established.
16

17 5. CONCLUSION RE: INTERPRETATION OF THE CONTRACT RENEWAL
18 TERMS.

19 Fatal to plaintiffs' interpretation of its CVP contracts is
20 the total absence of any language granting an area of origin
21 preference, or that limits or abrogates the Article 12 allocation
22 mandate which binds the Bureau and its Contracting Officer. A
23 Court "cannot under the guise of construction, add words to a
24 contract, which would impermissibly re-write that contract."
25 *Westlands 2001*, 153 F. Supp. 2d at 1162. Plaintiff's water
26 service contract is devoid of any language that limits "available
27 Project Water" by the existence or operation of any area of
28 origin statute, nor does the language suggest that 'others

1 entitled' is limited solely to area of origin users." Contract
2 Article 12 contains no reference to "area of origin," Section
3 § 11640, or any preference or priority of any kind in favor of
4 Plaintiff.²² The Bureau has performed Plaintiff's water service
5 Contracts and other third category water service contractors'
6 contracts precisely in accordance with the plain language of
7 Article 12, in 2008 and 2009 and in prior years under similar
8 shortage provisions.

9
10 In the two disputed shortage years, 2008 and 2009, the
11 Contracting Officer declared a Condition of Shortage when it was
12 determined inadequate CVP water supplies existed to deliver full
13 contract allocations to all CVP contractors. AR at 2128-30. The
14 Bureau cited drought as the basis for the Conditions of Shortage
15 pursuant to Article 12(b). See AR at 2091 (referencing
16 "critically dry period"). The Bureau ratably reduced CVP water
17 deliveries among all CVP Water Service Contractors to honor the
18 terms and conditions of all CVP Water Service Contracts.

19 6. EFFECT OF TCCA RENEWAL CONTRACT VALIDATION.

20 After they executed their most recent Renewal Contracts,
21 TCCA and its Members invoked the procedures under Cal. Code Civ.
22 Proc. § 860 et seq., to obtain validation judgments that each of
23 their Renewal CVP Water Service Contracts is valid and
24 enforceable. Under validation precepts, a public agency is
25

26 ²² The "others entitled" language is included in CVP Water
27 Service Contracts throughout the divisions of the CVP although
28 modified to some extent on a division-by-division basis. AR at
2309.

1 authorized to "bring an action in the Superior Court of the
2 County in which the principal office of the public agency is
3 located to determine the validity of such matters," and the
4 "action shall be in the nature of a proceeding in rem." Such
5 validation proceedings under state law are the exclusive means by
6 which to challenge the validity of certain contracts and their
7 terms. Cal. Code Civ. Proc. § 869: "No contest . . . of anything
8 or matter under this chapter shall be made other than within the
9 time and manner herein specified." California law prescribes
10 that validation statutes are construed to uphold the purpose of
11 affording public agencies a prompt method for settling all
12 questions regarding the validity of their actions. *McLeod v.*
13 *Vista Unified Sch. Dist.*, 158 Cal. App. 4th 1156, 1166 (2008).

14 The validation proceedings were instituted in the Superior
15 Court of California for the County of Colusa and each TCCA Member
16 sought an "order, judgment and decree approving, confirming, and
17 declaring valid and binding upon the respective parties thereto,
18 each and all provisions of the Contracts" See, e.g., SAR
19 at 30. Each validation judgment provides: "The Contract has been
20 validly executed and each and all provisions thereof are lawful,
21 valid, enforceable and binding upon the respective parties
22 thereto." SAR at 26-31; 34-42; 43-45; 46-59; 60-64 (judgments
23 for other TCCA Renewal Contracts)). All Plaintiffs' validation
24 judgments became final in 2005. Under Cal. Code Civ. Proc.
25 § 870, each validation judgment is now:

26
27 forever binding and conclusive, as to all matters therein
28 adjudicated or which at the time could have adjudicated
 against the agency and against all other persons, and the

1 judgment shall permanently enjoin the institution by any
2 person of any action or proceeding raising issue as to which
3 the judgment is binding or inconclusive. All such validated
4 contracts pursuant to the respective validation judgments do
5 not include any area of origin priority to CVP water
6 deliveries therein, nor does any such contract address the
7 Bureau's ability to declare Conditions of Shortage and
8 apportion CVP water deliveries under the terms of each
9 Member's CVP Water Service Contract without regard to state
10 area of origin laws all of which are foreclosed by the
11 validated judgments.

12 The validation judgments are entitled to full faith and
13 credit in the United States Courts pursuant to 28 U.S.C. § 1738,
14 which provides:

15 The records and judicial proceedings of any court of any
16 such State. . . or copies thereof, shall be proved or
17 admitted in other courts within the United States . . . by
18 the attestation of the clerk and seal of the court annexed,
19 if a seal exists, together with a certificate of a judge of
20 the court that the said attestation is in proper form.

21 Such Acts, records and judicial proceedings or copies
22 thereof, so authenticated, shall have the same full faith
23 and credit in every court within the United States. . . as
24 they have by law or usage in the courts of such State. . .
25 from which they are taken.

26 The claim for preclusive effect of a validation § 870
27 judgment includes matters "which have been or which could have
28 been adjudicated in a validation action, such matters - including
constitutional challenges - must be raised within the statutory
limitations period (30 days from entry of judgment) in § 870 et
seq., or they are waived." *Friedland v. City of Long Beach*, 62
Cal. App. 4th 825, 846-847 (1998). Plaintiff TCCA and its
Members are categorically barred from raising any challenge to
the legality, validity, and enforceability of the TCCA Renewal
Contracts they signed and by which they agreed to be bound.

1 As mentioned above, the plain preclusive effect of the State
2 Court validation judgments are given effect under 28 U.S.C.
3 § 1738 because it is "settled that a federal court must give to a
4 state court judgment the same preclusive effect as would be given
5 that judgment under the law of the state in which the judgment
6 was granted." *Migra v. Warren City School Dist. Bd. of Educ.*,
7 465 U.S. 75, 81 (1984); see *Heath v. Clairry*, 708 F.2d 1376, 1379
8 (9th Cir. 1983) (relying on 28 U.S.C. § 1738) ("To determine
9 whether to give preclusive effect to a state court decision both
10 in terms of collateral estoppel and res judicata, you look to the
11 law of the state in question.") Plaintiff and its Members are
12 bound by their conduct in judicially validating every provision
13 of their Renewal Contracts which include the Article 12 shortage
14 provisions. These California judgments are afforded full faith
15 and credit and preclude any subsequent challenge to the validity
16 enforceability of all TCCA and its Members' Renewal Contracts.
17 These validated contacts are as a matter of law enforceable and
18 not illegal. Plaintiff and its Members sought validation knowing
19 of this dispute and are presumed to know the legal effect and
20 consequences of their choice. TCCA Members voluntarily validated
21 their CVP Renewal Contracts with full knowledge of the Bureau's
22 interpretation and performance of the Shortage provisions in
23 contravention of Plaintiff's and its Members' interpretation.

24 E. THE BAR OF EQUITABLE ESTOPPEL.

25 "Equitable estoppel precludes a party from claiming the
26 benefits of a contract while simultaneously attempting to avoid
27 the burdens that contract imposes." *Mundi v. Union Sec. Lic.*
28

1 *Ins.*, 555 F.3d 1042, 1045 (9th Cir. 2009). Equitable estoppel
2 also applies to alleged third party beneficiaries' rights under a
3 contract based on equity and fairness, which prevent a litigant
4 from "having it both ways" by claiming benefits, while denying
5 obligations contained in the contract for the convenience of the
6 parties seeking to avoid the effects of that parties' prior
7 conduct. *Omega Indus. Inc. v. Raffaele*, 894 F. Supp. 1425, 1433
8 (D. Nev. 1995) (equitable estoppel "stands for the basic precepts
9 of common honesty, clear fairness and good conscience").

10 A party seeking to invoke the doctrine of estoppel must
11 establish the following four elements: (1) the party to be
12 estopped knows the facts; (2) he or she intends that his or her
13 conduct will be acted on or must so act that the party invoking
14 estoppel has a right to believe it is so intended; (3) the party
15 invoking estoppel must be ignorant of the true facts; and (4) he
16 or she must detrimentally rely on the former's conduct. *Lehman*
17 *v. United States*, 154 F.3d 1010, 1016-1017 (9th Cir. 1998).
18

19 The first element of estoppel is established because TCCA
20 had full knowledge of all facts before they entered into the
21 disputed long term Renewal Contracts and the Bureau had always
22 disagreed and never recognized or granted an entitlement in TCCA
23 members to preferential CVP water allocations during shortages.
24 *Lehman*, 154 F.3d at 1016-1017. Plaintiff has consistently argued
25 and objected that it is not subject to ratable allocation when
26 Conditions of Shortage are declared based on its alleged area of
27 origin priority. Plaintiff previously complained to the SWRCB
28 that the Bureau's implementation of Plaintiff's and its Members'

1 Water Service Contracts violated California area of origin law
2 and the Bureau's state water rights permits by which it operates
3 the CVP. The SWRCB rejected Plaintiff's Complaint and found no
4 violation of state law, explaining that Plaintiff had to apply
5 for an appropriative water right to gain any priority protection
6 afforded by the area of origin laws. AR at 4952-56.

7
8 During negotiations for long term renewal of TCCA Water
9 Service Contracts, Plaintiff and its Members knew their renewed
10 contracts did not include and were not intended to include or
11 reserve any area of origin water service priority to CVP water
12 supplies based on the Bureau's consistent refusal to acknowledge
13 any such rights or priorities. To the contrary, several of
14 TCCA's Members had express knowledge, based on historical
15 reallocations, that the Bureau intended to and would perform the
16 Water Service Contracts by reducing pro rata deliveries to TCCA
17 Members, and other CVP contractors whenever water shortages
18 caused by drought conditions made it impossible for the Bureau to
19 deliver full contract water supplies to all CVP Water Service
20 Contractors, whether north-or south-of-Delta. Plaintiff and its
21 members knew of these burdens based on the Bureau's unwavering
22 interpretation of their Water Service Contracts for almost forty
23 years, and at the time they executed the current Renewal
24 Contracts, including all previous pre-TCCA Water Service
25 Contracts. SAR at 977; 1154-56; 1308; 1317.

26 The second element of estoppel, intentionally misleading the
27 other party to its detriment, is said to be established through
28 Plaintiff's Members' negotiation and execution of the Renewal

1 Contracts, while not disclosing they had no intent to accept
2 performance under the shortage provision in their contracts;
3 rather, their true intent was to sue the Bureau to reform and/or
4 avoid the Bureau's interpretation of Article 12 that reduced TCCA
5 CVP water allocations in times of shortage. Plaintiff argues
6 that TCCA needed to renew the CVP contracts to provide a basis
7 for suit against the Bureau. Defendants maintain that by having
8 the Renewal Contracts validated with the same shortage terms that
9 historically existed under the parties' prior performance and
10 course of dealing under such similar shortage terms, that
11 Plaintiff and its Members have acquiesced and cannot by their
12 performance upset the terms of their Renewal Contracts.

13
14 The third and fourth elements, whether the Bureau was
15 ignorant of the true facts and whether the Bureau detrimentally
16 relied on TCCA's objective manifestation of assent, are
17 undisputed. Plaintiff and its Members in no way disclosed that
18 despite their express manifestation of intent by signing the
19 contracts, without any reservation of rights, with full knowledge
20 of the history of performance, they would sue to overturn the
21 shortage provisions. Federal Defendants noted at the oral
22 hearing that an express reservation of rights was made in Article
23 7(n) of the contracts regarding "Rates for M&I Water," that are
24 in dispute between the parties at the time of contracting. The
25 provision states in relevant part:

26 Contractor asserts that it is not legally obligated to repay
27 any Project deficits claimed by the United States to have
28 accrued as of the date of the Contract. . . [T]he Contractor
does not waive any legal rights or remedies that it may have
with respect to such issues. Notwithstanding execution of

1 this Contract. . . the Contractor may challenge in the
2 appropriate administrative or judicial forums [regarding] []
3 the existence, computation, or imposition of any such
4 deficit. . .

5 AR at 2699.

6 Plaintiff and its Members knew how to reserve a disputed
7 issue in their Renewal Contracts, but did not do so for the area
8 of origin dispute. This intentional omission to disclose material
9 facts induced detrimental reliance by the Bureau resulting in
10 execution of the TCCA Renewal Contracts which provided the basis
11 for this lawsuit to avoid the binding effect of and the plain
12 meaning and historical execution by performance of the shortage
13 provisions. Defendants argue that TCCA's strategy of feigning
14 agreement to induce the Bureau to execute the Renewal Contracts
15 so it could then claim there was no agreement to the essential
16 terms governing shortage is behavior equity should not
17 countenance. *First National Bank of Portland v. Dudley*, 231 F.2d
18 396, 400-401 (9th Cir. 1956) (citing *Dickerson v. Colgrove*, 100
19 U.S. 578, 580 (1879)).

20 Plaintiff's revisionist lawsuit to reinvent the CVP water
21 world is founded on delay that has caused prejudice to the Bureau
22 and all other CVP Water Service Contractors who have relied upon
23 the Renewal Contracts' validity and enforceability. For decades,
24 Plaintiff and its Members could have filed a claim with the SWRCB
25 that the Bureau was allegedly violating its water permits from
26 the SWRCB by performing the TCCA contracts to reduce water
27 deliveries in times of CVP water shortage. They did not.
28 Plaintiffs could have filed a lawsuit to determine area of origin
rights long ago. They did not. Instead, they judicially

1 validated their latest long-term Renewal Contracts. The Bureau,
2 as contracting party, was entitled to rely upon Plaintiff and its
3 Members' acquiescence in the Bureau's categorically consistent
4 interpretation that federal CVP Water Service Contracts do not
5 and have never been performed to recognize any area of origin
6 priority in water allocations. The law demands there must be
7 certainty in contracting.

8 Such inequitable conduct estops Plaintiff and its Members
9 from seeking "a preliminary and permanent injunction prohibiting
10 . . . (export of CVP water supplies) whenever such supplies are
11 needed to meet the full contractual supplies for (TCCA)" and from
12 obtaining any "declaratory judgment providing that Defendants
13 must . . . implement the Water Service Contracts in accordance
14 with the area of origin protections" If the Bureau had
15 known the true facts that Plaintiff and its Members did not
16 intend to perform the Renewal Contracts as they had always been
17 performed, the Bureau could have gained Plaintiff's express
18 acquiescence and waiver, or elected not to execute new contracts.
19 Plaintiff and its Members' conduct requires they be equitably
20 estopped from obtaining the benefit of federal CVP water service
21 without accepting the burden of those that reduces their water
22 allocation during water shortages.

23
24 F. PLAINTIFF'S FUTILITY ARGUMENT IS WITHOUT MERIT.

25 Plaintiff claims it would be "futile" for its Members to
26 obtain their own water rights and build their own water
27 conveyance facilities, separate from their Bureau-contracted
28

1 water rights, which entitles them to use of CVP water conveyance
2 facilities. This ignores the law. Plaintiff and its Members
3 have been told that the only way to obtain water rights they seek
4 is to apply to the SWRCB for a permit. Plaintiff and its Members
5 seek to change the rules of the game after almost 40 years of
6 contracting for CVP water service, to judicially create new
7 contract terms granting preferential treatment to Plaintiff and
8 its Members to CVP water supply during Conditions of Shortage
9 that Congress, the Interior, the Bureau, SWRCB and TCCA's
10 contracts have never provided. Defendant Interveners correctly
11 argue the law requires Plaintiffs to apply to the SWRCB for water
12 rights permits.

13 VII. CONCLUSION.

14
15 As a matter of statutory interpretation, Plaintiff's post
16 hoc view of the water world is that the CVP was authorized by
17 Congress to first benefit them, and to operate to the exclusion
18 of all other CVP users, to protect the Sacramento Valley and its
19 water users. Although this may have been a purpose sought by a
20 local legislator, Congressman Engle, at the time the more
21 parochial state CVP became a federally authorized and funded
22 project. Congress unequivocally expressed its intent that it
23 created the CVP to benefit all the people of the Central Valley,
24 Federal Act of 1950, § 4 (compelling coordinated operation of CVP
25 "as will effectuate the fullest economic utilization of land and
26 water resources of the Central Valley of California for the
27 widest possible public benefit"). Notably absent from Congress'
28 stated purposes in the CVP legislation is any recognition that

1 the "widest possible public benefit" was subject to a prior right
2 that prefers the Sacramento Valley and its water users. The
3 ratable reduced allocation of CVP water among all non-priority
4 CVP water service contracts during Conditions of Shortage
5 achieves the widest possible public benefit intended by the CVP
6 authorizing legislation.

7
8 This lawsuit brings new meaning to the adage: "If you do not
9 at first succeed, try and try again." The reality of the state
10 area of origin priority statutes is that no express water rights
11 are created by the law. At most, TCCA has an inchoate water
12 right that must be perfected by application for and issuance by
13 the SWRCB of a water permit. After more than twenty years of
14 active dispute and having been told to do so by the Bureau, state
15 courts, the SWRCB, and the AG Op., Plaintiff and its Members have
16 chosen not to obtain such water rights. The Bureau owes them no
17 more CVP water than they have received. All their disputed water
18 service contracts provide for is pro-rata reductions which have
19 been consistently administered to give full effect to the
20 unambiguous contract terms requiring reductions for Shortages in
21 the discretion of the Bureau's contracting officer.

22 For all the reasons stated above, Judgment shall be entered
23 against Plaintiff and/or Plaintiff's Members as third party
24 beneficiaries, and in favor of Federal Defendants and Defendant
25 Interveners on all Plaintiff's claims for equitable, declaratory,
26 and injunctive relief pursuant to the APA, 5 U.S.C. §§ 702, 703,
27 706(1), 706(2); the Declaratory Judgment Act of 1934, 28 U.S.C.
28 §§ 2201-2202; and Fed. R. Civ. Pro. 65(d). Plaintiff's motions

