CHRONOLOGY OF MAJOR LITIGATION INVOLVING THE CENTRAL VALLEY PROJECT AND THE STATE WATER PROJECT

I. Central Valley Project

1950 *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950)

Riparians on San Joaquin River downstream of Friant Dam sued for damages for impairment of their rights to periodic inundation of their "uncontrolled grasslands." Under reclamation law, the United States had to recognize prior vested rights and compensate for their impairment.

1958 *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958)

Congress did not intend that Section 8 of the Reclamation Act, which generally makes state water law applicable to reclamation projects, would make the 160-acre limitation in Section 5 inapplicable to the CVP. If needed for a project, Reclamation could acquire water rights by the payment of compensation, either through condemnation, or if already taken, through actions by the owners in the courts.

1960 *Ivanhoe Irrig. Dist. v. All Parties*, 53 Cal.2d 692 (1960)

State law conferred legal capacity upon irrigation districts to enter into contracts with federal government for CVP water. Districts could execute the contracts even though they contained the 160-acre limitation under federal law.

1963 *Dugan v. Rank*, 372 U.S. 609 (1963)

Parties claiming water rights along the San Joaquin River downstream of Friant Dam sued the United States and Bureau of Reclamation officials, seeking to enjoin storage or diversion of water at the dam. The Court held that the courts had no jurisdiction over the United States because it had not consented to suit and the McCarran Amendment did not apply. If the United States did partially take valid water rights, the claimants' remedy was a suit against the U.S. for monetary damages in the Court

of Claims under the Tucker Act.

1963 *City of Fresno v. State of California,* 372 U.S. 627

Fresno intervened in *Dugan v. Rank,* seeking a declaration of superior rights to the San Joaquin River and its claim was barred by sovereign immunity. The United States may exercise the power of eminent domain to acquire water rights. Fresno had no preferential right to contract for CVP project water. The Secretary could follow Congress' express preference for irrigation use over domestic use.

1973 *Environmental Defense v. Armstrong*, 487 F.2d 814 (9th Cir. 1973)

Environmental impact statement for New Melones Dam project was adequate.

1976 *National Land for the People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976).

Court issued an injunction prohibiting DOI from approving excess land sales pursuant to recordable contracts until DOI promulgated rules under the Administrative Procedures Act.

1977 *Trinity County v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977)

During the 1976-77 California drought, Trinity County sued Reclamation to prevent it from reducing flows in the Trinity River to levels below those the County alleged were necessary for fish. The Court held that in the context of the demands placed on the entire CVP by the drought emergency, the decision to reduce flows to a previously agreed minimum for the duration of the drought was not arbitrary or capricious.

1978 *California v. United States*, 438 U.S. 645 (1978)

Federal Reclamation Act permits the State Water Resources Control Board to impose conditions on the "control, appropriation, use or

distribution of water" by a Federal project (New Melones Reservoir) so long as the conditions are not inconsistent with explicit Congressional directives.

1981 *California v. Sierra Club,* 451 U.S. 287 (1981).

Sierra Club alleged that the CVP and SWP diversions from the Delta degraded the quality of Delta water and violated Section 10 of the Rivers and Harbors Act of 1899. The Court held that there was no Congressional intent to provide a private remedy under the provisions of the Rivers and Harbors Act, so private parties could not bring an action to challenge the construction and operation of water diversion facilities that are part of the CVP or SWP.

1982 *United States v. State Water Resources Control Board,* 694 F. 2d 1171 (9th Cir. 1982).

Conditions placed by State Water Resources Control Board in permits for New Melones Reservoir were upheld as not inconsistent with Congressional directives.

1982 *United States v. State of California,* 529 F.Supp. 303 (E.D. Cal. 1982)

United States brought federal court action challenging the State Board's Delta Water Quality Control Plan and Decision 1485, three years after suing on the same grounds in state court. The federal court dismissed the action. The United States had failed to demonstrate the inability of the state court to grant any necessary relief. Moreover, the action by the United States was barred by the statute of limitations under state law, made applicable by Section 8 of the Reclamation Act.

1982 *Morici Corp. v. United States*, 681 F.2d 645 (9th Cir. 1982)

Governmental immunity barred action against United States under the Federal Tort Claims Act for crop damage caused by seepage. Even if, at the time of the alleged negligence, the project was being operated for a purpose other than flood control, the operation that caused the damage was not "wholly unrelated" to a congressionally authorized flood control project. (But see *Central Green Co. v. U.S.*, below.)

1983 *Westlands Water District v. United States*, 700 F.2d 561 (9th Cir. 1983)

Environmental Defense Fund's application to intervene in Westlands' suit for determination of its contractual water rights was denied. EDF had no protectable right to participate in a suit involving contracts to which it was not a party.

1985 *South Delta Water Agency v. United States*, 767 F.2d 531 (9th Cir. 1985).

South Delta alleged that the CVP and SWP were being operated in a way that violated South Delta's water rights. The Court of Appeal held that the District Court had jurisdiction over this water rights suit against federal government because the waiver of sovereign immunity in the Administrative Procedures Act applied.

1985 SWRCB Water Quality Order No. WQ 85-1.

SWRCB issued a clean-up and abatement order to Reclamation requiring the closure of Kesterson Reservoir and appropriate actions to mitigate the nuisance conditions caused by its operations.

1986 *United States v. State Water Resources Control Board* (182 Cal. App.3d 82 (1986) ("Racanelli Decision").

This was a coordinated proceeding on multiple petitions challenging the State Water Resources Control Board's Delta water quality plan and Water Rights Decision 1485. The court held that the modification of the water rights permits for the CVP and SWP in order to implement the Board's water quality objectives was a proper exercise of the Board's authority, but the Board erred in setting water quality standards to protect existing water rights rather than all beneficial uses. Moreover, rather than use "without project" standards to protect the quality of Delta waters only from degradation by the projects, the Board should have attempted to protect against water quality degradation by all users, including upstream diverters or polluters. The court concluded that combining the water quality and water rights functions in a single proceeding was unwise.

1990 *Peterson v. United States Dept. of Interior*, 899 F.2d 799 (9th Cir. 1990).

Water Districts brought suit against the "hammer clause" in the Reclamation Reform Act of 1982. Court held that neither the due process clause nor the takings clause prevented Congress from limiting the amount of subsidized water the Districts can deliver to leased lands.

1992 *United States v. Glenn-Colusa Irr. Dist. 788 F. Supp. 1126* (E.D. Cal. 1992).

National Marine Fisheries Service brought suit against Glenn-Colusa Irrigation District to enjoin the taking of winter-run chinook salmon at the District's pumps on the Sacramento River. The Injunction was issued.

1993 *Madera Irr. Dist. v. Hancock*, 985 F.2d 1397 (9th Cir. 1993).

Provisions in proposed renewal contracts (setting future price of water at a level that would recoup past O&M deficiencies, providing for modification if necessary as a result of NEPA and ESA compliance) did not violate District's 5th Amendment rights.

1993 *Barcellos and Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814 (9th Cir.1990).

Landowners holding excess land who entered into recordable contracts to sell it, did not have a contractual right to receive subsidized water for more than 10 years.

1993 *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F.Supp. 715 (E.D. Cal. 1993).

Property owners sued Westlands Water District and Bureau of Reclamation because drainage and irrigation practices flooded their lands. In 2002, there was a settlement, in which the United States and Westlands bought and retired approximately 33,000 acres of drainage-impaired land.

1994 *Westlands Water Dist. v. NRDC*, 43 F.3d 457 (9th Cir. 1994)

Federal agencies were not required to comply with NEPA before implementing certain provisions of the Central Valley Project Improvement Act (providing 800,000 acre feet of water for fish and wildlife and providing water for wetlands) because the statute did not allow time to comply with NEPA. These sections were to take effect "upon enactment."

1995 *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995)

Following passage of Central Valley Project Improvement Act, landowner challenged Reclamation's reductions in water deliveries. Court held that federal government could reduce the amount of water required under a water service agreement, because Article 11(a) of the agreement absolves the United States from liability for its failure to deliver the full contractual amount where there is a shortage caused by a statutory mandate.

1995 *California Trout v. Schaefer*, 58 F.3d 469 (9th Cir. 1995)

CVP contractor Stockton East Water District applied to the Army Corps of Engineers for a permit to discharge fill into a wetland at the site where it was constructing a rediversion structure to take water from the Stanislaus River. The Court held that the Army Corps of Engineers' jurisdiction did not extend beyond the rediversion structure, and thus it properly looked only at the environmental impacts resulting from the application before it. Impacts on fisheries in the Stanislaus River had been considered in an EIS prepared by the Bureau of Reclamation.

1996 *Westlands Water Dist. v. United States*, 100 F.3d 94 (9th Cir. 1996).

District Court should have permitted Westlands and San Benito Water District to dismiss their own suit against United States, in which they claimed that Reclamation violated their contract rights.

1997 *County of San Joaquin v. State Water Resources Control Board*, 54 Cal.App.4th 1144 (1997).

County of San Joaquin brought action against State Water Resources

Control Board and U.S. Bureau of Reclamation challenging Reclamation's allocation of water impounded at New Melones Reservoir. The action was dismissed because the United States had not waived its sovereign immunity, and it was an indispensable party.

1998 *Natural Resources Defense Council v. Houston,* 146 F.3d 1118 (9th Cir. 1998).

Reclamation violated the ESA by renewing Friant Division contracts prior to completing required ESA consultation. The District Court's decision to rescind the contracts was upheld. NRDC's claim under California Fish and Game Code section 5937 (made applicable by section 8 of the Reclamation Act) was ripe.

1999 *Central Green Co. v. United States,* 531 U.S. 425 (1999).

Landowner alleged damage due to subsurface flooding from Madera Canal, part of the Friant Division of the CVP. Although U.S. is not generally liable for damages from flood waters, it is necessary to look at the particular waters that caused the damage and the purpose for which they were released, and not just the flood control purpose of the overall project, to determine whether they are flood waters. The case was remanded so the proper test could be applied.

2000 *Firebaugh Canal Co. et al., v. United States,* 203 F.3d 568 (9th Cir. 2000)

San Luis Act requires U.S. Bureau of Reclamation to provide drainage service to the San Luis Unit, but it need not be in the form of the San Luis Drain.

2001 *State of California v. United States,* 271 F.3d 1377 (Fed. Cir. 2001)

The State of California and the United States, through DOI, entered a contract to share the cost of operation and maintenance of the joint-use facilities of the San Luis project. When California sought reimbursement for the federal share of claims paid by California to compensate property owners for flood damages resulting from the joint-use canal's effect on local streams, the United States claimed immunity from liability under the Flood Control Act. The Court held that California stated a breach of contract claim

and that the United States had waived immunity under the Tucker Act, which was not impliedly repealed. The case was remanded to the Court of Claims to determine the amount due to California.

2002 *Central Delta Water Agency v. United States*, 306 F.3d 938 (9th Cir. 2002)

District Court erred in granting U.S. summary judgment on claims regarding the Reclamation's operation of New Melones Reservoir as farmers and agencies had standing and neither res judicata nor collateral estoppel applied.

2003 *Westlands Water District v. United States*, 337 F.3d 1092 (9th Cir. 2003)

Reclamation's water service contracts did not prevent Reclamation from allocating water to the exchange contractors as senior water rights holders before allocating water to contractors under water service contracts in times of shortage.

2003 *Laub v. U.S. Department of the Interior* (9th Circuit, 2003)

District Court's dismissal of Laub/Farm Bureau action challenging CALFED EIS/R under NEPA was reversed, since farmers adequately alleged potential harm to their interests. This case is now back in District Court, on hold awaiting decision by California Supreme Court in state CALFED case.

2004 *Bay Inst. of San Francisco v. United States* (9th Cir., unpublished, 87 Fed. Appx. 637, January 23, 2004).

Decision addresses accounting for 800,000 acre-feet of water under section 3406 (b)(2) of the CVPIA. Among the holdings: Interior may not use offset/reset matrices in accounting for the 800,000 acre-feet. Interior did have discretion to refrain from crediting the amount of Project yield actually used for any (b)(2) purpose against the 800,000 acre feet of project yield, so that it could meet the "primary purpose" of "fish, wildlife, and habitat restoration purposes."

2004 *Westlands Water District v. U.S. Department of Interior*, 376 F. 3d 853 (9th Cir. 2004).

Trinity River EIS satisfied NEPA requirements.

2004 *Natural Resources Defense Council v. Patterson*, 333 F.Supp.2d 906 (E.D.Cal. 2004).

Bureau of Reclamation has violated California Fish and Game Code section 5937 as applied to it by section 8 of the Reclamation Act by failing to release sufficient water from Friant Dam to keep the fish below the dam in good condition.

Prior to a trial on the required flows, the parties reached a settlement, which is dependent on legislation currently pending in Congress.

2005 *Orff v. United States*, 545 U.S. 596 (2005)

Farmers and Farm entities in Westlands Water District contended that U.S. breached the contract between Westlands and Reclamation, alleging that they were third party beneficiaries of the contract. Supreme Court held that suit was barred by the United States' sovereign immunity.

2005 *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9th Cir. 2005).

Trinity River restoration programs do not fall within the mandatory contracting provisions of the Indian Self-Determination and Education Assistance Act. Reclamation was not required to enter mandatory contracts with the tribe under the ISDEAA.

2006 *State Water Resources Control Board Cases*, 136 Cal.App. 4th 674 (2006).

State Water Resources Control Board's Delta Water Rights Decision 1641 was generally upheld with respect to CVP and SWP water rights, with limited exceptions. The Board did err in adopting the San Joaquin River flows in the Vernalis Adaptive Management Plan, rather than allocating responsibility for the flow standards the Board had adopted in its 1995 Bay-Delta Water Quality Control Plan. (Many other issues, also.)

2006 *Central Delta Water Agency v. Bureau of Reclamation,* 452 F.3d 1021 (9th Cir. 2006).

Delta Water Agency failed to establish a genuine issue as to whether Reclamation would comply with state salinity standard in the immediate future.

2006 *Planning and Conservation League v. U.S. Bureau of Reclamation,* U.S. District Court for the Northern District of California, Case No. C 05-3527.

In February, 2006, a federal court enjoined construction of the Delta-Mendota Canal/California Aqueduct Intertie until an Environmental Impact Statement was prepared. Reclamation is now preparing the EIS.

2007 *Stockton East Water District v. United States,* 76 Fed. Cl. 321 (2007), amended by 76 Fed. Cl. 470.

Government did not breach contracts with Stockton East Water District by reducing water allocations from New Melones Reservoir, since contracts were subject to new legislation (CVPIA) requiring water releases for environmental purposes and there was no showing that government's allocation decisions were unreasonable.

2007 *NRDC v. Kempthorne,* U.S. District Court for the Eastern District of California, Case Number 1:05-cv-1207 OWW.

On August 31, 2007, U.S. District Judge Wanger remanded the 2005 OCAP delta smelt biological opinion to USFWS to prepare a new opinion, and issued an injunction against USBR and DWR prohibiting them from operating the CVP and SWP in a manner inconsistent with a suite of actions the judge identified. The judge gave the parties 50 days, until October 22, 2007, to review the official transcripts and prepare a draft final order.

2007 *Pacific Coast Federation of Fishermen's Associations v. Gutierrez,* U.S. District Court for the Eastern District of California, Case No. 1:06-CV-00245 OWW.

A hearing was held on October 3, 2007, in Judge Wanger's court on the merits of this case challenging the 2004 OCAP salmon and steelhead biological opinion issued by the National Marine Fisheries Service. The judge had ruled earlier in this case that, contrary to plaintiff's allegations, the OCAP was not a "final agency action" by USBR, and thus did not trigger the need to prepare an EIS under NEPA.

2007 *Laub v. Davis*, California Supreme Court Case No. S138974; *Regional Council of Rural Counties v. State of California*, Supreme Court Case No. S138975 (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*.)

These coordinated cases challenge the CALFED Programmatic EIS/EIR. They are currently pending, fully briefed, before the California Supreme Court. The issues include: whether the CALFED PEIS/R was required to include a reduced-export alternative; whether the analysis of future sources of water was adequate; and whether analysis of the Environmental Water Account was adequate.

II. State Water Project Litigation

1963 *Metropolitan Water District of Southern California v. Marquardt* 59 Cal.2d 159 (1963).

Court upheld validity of Metropolitan's State Water Project contract with the State of California acting through the Department of Water Resources, concluding, among other things, that the bond act for the State Water Project was constitutional.

1963 *Warne v. Harkness*, 60 Cal.2d 579 (1963)

Court held that Department of Water Resources had authority to issue Central Valley Project Act revenue bonds for construction of parts of the "Oroville Division." DWR's authority to issue CVP bonds was not terminated by passage of the Burns-Porter Act.

1981 *California v. Sierra Club*, 451 U.S. 287 (1981).

Sierra Club alleged that the CVP and SWP diversions from the Delta degraded the quality of Delta water and violated Section 10 of the Rivers and Harbors Act of 1899. The Court held that there was no Congressional intent to provide a private remedy under the provisions of the Rivers and Harbors Act, so private parties could not bring an action to challenge the construction and operation of water diversion facilities that are part of the CVP or SWP.

1983 *Goodwin v. County of Riverside*, 140 Cal.App.3d 900 (1983).

Property tax assessments by local water agency to help fund its payments on its water supply contract with DWR for State Water Project water were levied to pay an indebtedness approved by the state's voters prior to July 1, 1978, and thus came within an exception to the property tax limitations in Proposition 13. When voters approved Burns-Porter Act, they approved an indebtedness in the amount necessary for building, operating, maintaining, and replacing the project and intended that the costs would be made by payments from local agencies.

1986 *United States v. State Water Resources Control Board*, 182 Cal. App.3d 82 (1986) ("Racanelli Decision").

This was a coordinated proceeding on multiple petitions challenging the State Water Resources Control Board's Delta water quality plan and Water Rights Decision 1485. The court held that the modification of the water rights permits for the CVP and SWP in order to implement the Board's water quality objectives was a proper exercise of the Board's authority, but the Board erred in setting water quality standards to protect existing water rights rather than all beneficial uses. Moreover, rather than use "without project" standards to protect the quality of Delta waters only from degradation by the projects, the Board should have attempted to protect against water quality degradation by all users, including upstream diverters or polluters. The court concluded that combining the water quality and water rights functions in a single proceeding was unwise.

2000 *Planning and Conservation League v. Dep't of Water Resources*, 83 Cal.App.4th 892 (2000).

Department of Water Resources should have been lead agency under CEQA for environmental analysis of Monterey Amendments to State Water Project Contracts. Moreover, the EIR should have considered an alternative that would have implemented article 18 (b) of the contracts. Article 18 (b) provided that if the State Water Project were unable to deliver the originally-contemplated amounts, contractors' entitlements set forth in table A of the original contract would "be reduced proportionately by the State to the extent necessary so that the sum of the revised maximum annual entitlements of all contractors will then equal . . . reduced minimum project yield." DWR is preparing a new EIR on the Monterey Amendments.

2001 *Tulare Lake Basin Water Storage District v. United States*, 49 Fed.Cl. 313 (2001).

To avoid or lessen harm to threatened delta smelt and endangered winter-run chinook salmon, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service issued "reasonable and prudent alternatives" that restricted the time and manner in which water could be pumped from the Delta, thus reducing the water delivered to the CVP and SWP. The Court held that the federal agencies' actions constituted a "physical taking" and thus a "per se taking" of the

complaining State Water Project Contractors' property.

2006 *State Water Resources Control Board Cases*, 136 Cal.App. 4th 674 (2006).

State Water Resources Control Board's Delta Water Rights Decision 1641 was generally upheld with respect to CVP and SWP water rights, with limited exceptions. The Board did err in adopting the San Joaquin River flows in the Vernalis Adaptive Management Plan, rather than allocating responsibility for the flow standards the Board had adopted in its 1995 Bay-Delta Water Quality Control Plan.

2006 *El Dorado Irrigation District v. State Water Resources Control Board*, 142 Cal.App.4th 937 (2006).

SWRCB abused its discretion by including Term 91 (requiring curtailed diversions when stored water was being released by the projects for water quality purposes) in the water rights permits granted to the El Dorado Irrigation District, where the term had not been imposed on junior water rights holders in the Delta watershed. The rule of priority is one of the fundamental principles of California water law.

2007 *Casitas Municipal Water District v. United States*, 76 Fed.Cl. 100 (2007).

Not a SWP case, but the court disavowed the "per se taking" holding of the *Tulare Lake Basin* case above, and thus this case affects potential future takings claims by SWP contractors. Regulation of Delta pumps to protect fish will likely be analyzed under usual regulatory "takings"analysis using standards in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). (This case is on appeal.)

2007 *Watershed Enforcers v. California Department of Water Resources*, Alameda County Superior Court Case No. RG06292124.

Department of Water Resources has not obtained the necessary permit under the California Endangered Species Act for its operation of the State Water Project. The Court enjoined DWR from operating the Harvey

O. Banks Pumping Plant unless within 60 days it obtained from the Department of Fish and Game the necessary permit or other authorization to operate in compliance with the California Endangered Species Act. DWR has appealed the ruling, and the order is stayed during the appeal.

2007 *NRDC v. Kempthorne*, U.S. District Court for the Eastern District of California, Case Number 1:05-cv-1207 OWW.

On August 31, 2007, U.S. District Judge Wanger remanded the 2005 OCAP delta smelt biological opinion to USFWS to prepare a new opinion, and issued an injunction against USBR and DWR prohibiting them from operating the CVP and SWP in a manner inconsistent with a suite of actions the judge identified. The judge gave the parties 50 days, until October 22, 2007, to review the official transcripts and prepare a draft final order. DWR had intervened, and was a party in this case.

2007 *Laub v. Davis*, California Supreme Court Case No. S138974; *Regional Council of Rural Counties v. State of California*, Supreme Court Case No. S138975 (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*.)

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