STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2012-0002-EXEC

In the Matter of the Petitions for Reconsideration of the

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

Regarding the September 30, 2011, Order Approving Temporary Transfer and Change in the Matter of Permit Nos. 11885, 11886, and 11887 of the

United States Bureau of Reclamation,

Temporary Transfer of Water and Change Pursuant to Water Code Sections 1707 and 1725.

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR[1]

1.0 INTRODUCTION

The San Luis & Delta-Mendota Water Authority (Petitioner) petitioned the State Water Resources Control Board (State Water Board) for reconsideration of a September 30, 2011, order approving a temporary transfer and change petition under Water Code sections 1725 and 1707 for the Bureau of Reclamation (Reclamation) under water right permit numbers 11885, 11886 and 11887, hereinafter "Order." Petitioner's members have water contracts with Reclamation to use Central Valley Project (CVP) water. Petitioner alleges that the Order constitutes an unreasonable effect on legal users of water, in contravention of Water Code section 1727. While not alleging that Reclamation's actions violate their contracts as written, Petitioner asserts that the San Joaquin River Restoration Settlement Act, Pub. L. No. 111-11, (Mar. 30, 2009), §§ 10001 et seq., 123 Stat. 991, 1349 (2009) (Settlement Act) guarantees that the Settlement Act would have no impact on their receipt of water, and that their contract therefore now includes the amount of water which would have been available absent the Settlement Act. Petitioner additionally alleges that the Order improperly shifted the burden of proof for the "no injury" rule to the Petitioner. The State Water Board finds that the Settlement

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[1] State Water Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of petitions for reconsideration falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, or set aside or modify the decision or order.

Act does not operate to enlarge Petitioner's members' contractual rights to give them greater protection than already existed, and that, because the changes to Reclamation's rights do not violate the contracts, they cannot unreasonably harm Petitioner's members. Additionally, the State Water Board finds Petitioner's burden of proof argument lacks merit. Therefore, the State Water Board denies the petition for reconsideration.

2.0 GROUNDS FOR RECONSIDERATION

Any interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds:

(a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

(b) [t]he decision or order is not supported by substantial evidence;

(c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

(d) [e]rror in law.

(Cal. Code Regs., tit. 23, § 768.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)[2]

This order addresses the principal issues raised by Petitioner. To the extent that this order does not address all of the issues raised by Petitioner, the State Water Board finds that either these issues are insubstantial or that Petitioner has failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. (§§ 768-769, 1077.)

[2] Water Code section 1122 directs the State Water Board to act on a petition for reconsideration within 90 days from the date on which the Board adopts the decision or order. If the state Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; *see also California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-48, 1150-51; State Water Board Order WQ 98-05-UST at pp. 3-4.)

3.0 BACKGROUND

Reclamation holds water right Permit Nos. 11885, 11886, and 11887 for the operation of the Friant Division of the CVP. In each of the past three years, Reclamation has filed petitions with the State Water Board's Division of Water Rights (Division) for the temporary transfer and change of these water rights pursuant to Water Code sections 1725 and 1707.[3] Through its change petitions, Reclamation has sought to change temporarily its Friant Dam operations for a one-year period in accordance with provisions of the 2006 Stipulation of Settlement entered in *NRDC v. Rodgers* (E.D. Cal, Sept. 13, 2006, No. CIV. S-88-1658-LKK/GGH) (Settlement) and the ensuing Settlement Act, and as part of the San Joaquin River Restoration Program (SJRRP).

NRDC v. Rogers, No. CIV. S-88-1158-LKK/GGH was a lawsuit filed in 1988 by a number of environmental groups against federal agencies and holders of CVP water contracts, challenging the renewal of water contracts under environmental statutes, including the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA) and Fish and Game Code section 5937. The Settlement Act authorizes and directs the Secretary of the Interior to implement the settlement reached in that case. (Pub. L. No. 111-11, §§ 10002, 10004(a).) The Settlement has a Restoration Goal, to "restore and maintain fish populations in 'good condition' in the main stem of the San Joaquin River below Friant Dam ..." and a Water Management Goal, to "reduce or avoid adverse water supply impacts to all of the Friant Division" long-term contractors that may result from the Interim Flows and Restoration Flows." (Settlement, ¶ 2.)

In general, the Restoration Goal is to be accomplished through structural improvements, implementation of "Interim Flows" and "Restoration Flows" determined by an agreed-upon hydrograph in the river channel below Friant Dam, and eventually salmonid reintroduction. (See Settlement, ¶¶ 9-15, pp. 7:9 – 20:7.) The Water Management Goal is generally to be accomplished by redirecting, recapturing, reusing, exchanging or transferring the Interim and Restoration Flows and by establishing a Recovered Water Account to reduce or avoid impacts on Friant Division contractors who made water available for Interim or Restoration Flows. (See *Id.*, ¶ 16, pp. 20:8 – 22:21.)

[3] Water Code section 1707 authorizes the use of the temporary transfer provisions of Water Code section 1725 et seq. for a change for the purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.

The interim flow program began on October 1, 2009, after the Deputy Director for Water Rights approved Reclamation's change petitions for Water Year (WY) 2010 in State Water Board Order WR 2009-0058-DWR. It continued for WY 2011 pursuant to State Water Board Order WR 2010-0029-DWR.

On July 28, 2011, Reclamation petitioned to implement the interim flow program for WY 2012. Reclamation sought approval to amend Permits 11885, 11886 and 11887 to (1) add points of rediversion, (2) add the San Joaquin River channel between designated reaches to the place of use, and (3) add preservation and enhancement of fish and wildlife resources as an authorized purpose of use in specific reaches. A number of interested persons, including Petitioner, commented on the petitions. On September 30, 2011, the Deputy Director for Water Rights issued the Order approving the petitions.

4.0 DISCUSSION

A temporary change and transfer in a water right under Water Code section 1725 is permissible only if, inter alia, it will "not injure any legal user of the water." (Wat. Code, § 1725.) An interim flow dedication under Water Code section 1707 must, inter alia, "not unreasonably affect any legal user of water." (*Id.*, § 1707, subd. (b)(2).) This "no injury" rule embodies a narrow concept of "injury," defined as the invasion of another's water right. (*State Water Resources Control Board Cases* (2006) 135 Cal.App.4th 674, 803.) A water user who uses water under a contract with a water right holder qualifies as a "legal user of water" for purposes of the no injury rule. A showing that a contractor will receive less water than prior to the change is insufficient to show a cognizable injury for the purposes of the "no injury" rule, however. (*Id.* at p. 805.) The contractor "must show that it has a *right* under its contract ... to the greater amount of water" and that the proposed change "will interfere with that right." (*Ibid.* [italics in original].)

Petitioner has not made any showing that, independent of the effect of the Settlement Act, they have rights under their contracts to any more water than they are receiving. Therefore, in order for Petitioner's members to have suffered, or have the potential to suffer, cognizable harm under the theory presented, the Settlement Act must have amended their contractual rights to receive water.

4.1 There is No Cognizable Injury to Petitioner's Members' Contractual Rights

Because the Settlement Act does not grant Petitioner's members greater, or more certain rights than under their pre-Settlement Act contracts, there is no cognizable injury to Petitioner's members as legal users of water.

4.1.1 Petitioner's Argument

In protesting Reclamation's WY 2012 petitions to implement the interim flow program, Petitioner argued that the petition would cause a cognizable injury to legal users of water, because its members would have reduced access to what it characterized as "flood flows" in most years. Petitioner further argues that its members have protectable interests in the greater delivery of these flood flows, not because the terms of their contracts as written grant such an interest, but because the Settlement Act and the contracts together guarantee it.

Petitioner reads the Settlement Act as extending protection to its members from any reductions in delivery of contract water vis-à-vis the deliveries that would have occurred without the changes Reclamation requested to implement interim flows. (Memorandum of Points and Authorities (MPA) p. 4 [citing §§ 10004(b), 10004(f), 10009, & 10011].) Petitioner relies specifically on four portions of the Settlement Act:

- § 10004(b): "Prior to implementation of decisions or agreements to construct, improve, operate, or maintain facilities that the Secretary determines are needed to implement the Settlement, the Secretary shall identify: (1) the impacts associated with such actions; and (2) the measures which shall be implemented to mitigate impacts on adjacent and downstream water users and landowners."
- § 10004(f): "Except as otherwise provided in this section, the implementation of the Settlement ... shall not result in the involuntary reduction in contract water allocations to the Central Valley Project Long-Term Contractors other than the Friant Division Contractors."
- § 10009: Petitioner does not cite specific subsections, but states that the section generally prohibits SJRRP costs from being re-diverted to third parties. (MPA, p. 4.) Subsection (a)(3) states: "Except as provided in the Settlement, to the extent that costs incurred solely to implement this Settlement would not otherwise have been incurred by any entity ... such costs shall not be borne by any such entity ... unless such are incurred on a voluntary basis."

- § 10011(c)(3)[4]: "the reintroduction [of salmonids] will not impose more than de minimus: water supply restrictions, additional storage releases, or bypass flows on unwilling third parties due to such reintroduction."

Citing *Central Arizona Water Conservation District v. United States*, 32 F.Supp.2d 1117, 1127 (1988), Petitioner argues that federal law controls interpretation of federal contracts and points to specific contract provisions that require compliance with federal law, concluding that therefore the Settlement Act prevents Reclamation's actions under the members' contracts. (MPA, p. 3.)

4.1.2 Analysis

Petitioner's argument that the Settlement Act increased its members' contractually protected interests under California water law by guaranteeing flows would not be reduced vis-à-vis what they would have been without the Settlement provisions relies on: (1) an interpretation of the water supply contracts to mean that subsequent changes in federal law amend them and (2) an interpretation of the Settlement Act to contain the guarantees Petitioner claims.[5]

4.1.2.1 Changes in Federal Law Do Not Automatically Increase Contract Delivery Amounts

Petitioners cite *Central Arizona Water Conservation District v. United States* (D.Ariz. 1988) 32 F.Supp.2d 1117, 1127 for the proposition that federal contracts are subject to federal law. This case and others establish that interpretation of federal contracts regarding federal property is subject to federal contract law, as opposed to state contract law. (See, e.g., *U.S. v. Seckinger* (1970) 397 U.S. 203, 209-210.) Despite Petitioner's implication, however, this does not mean that all federal laws amend all federal contracts. (See *O'Neill v. U.S.* (9th Cir. 1995) 50 F.3d 677 [interpreting federal contract provision as allowing certain subsequent federal laws to reduce deliveries: change in federal law alone did not do so].) To the contrary, there is a presumption that the law as it exists at the time of execution controls the contract's interpretation, and that subsequently-enacted statutes do not amend a contract absent an agreement by the parties at the time of contracting. (11 Williston on Contracts (Lord ed. 2011) Incorporation of Rules of Law into Contracts—Changes in law subsequent to execution of contract § 30:23; *Alvin Ltd. v. U.S. Postal Service* (Fed. Cir. 1987) 816 F.2d 1562, 1565; see *U.S. v. Seckinger, supra,* 397 U.S. at

[4] While Petitioners do not specify a subsection, this is clearly the subsection to which it refers.
[5] The State Water Board does not read the petition to include a claim that the Settlement Act of its own accord creates a protectable interest. Such claim would fail as the Act does not demonstrate a clear intent to create such a vested interest.

p. 208 [interpreting liability clause in post-1946 federal contract in light of Tort Claims Act, but offering different interpretations for same clause in contracts entered into before passage of the statute].) Furthermore, there is a strong presumption that an act of Congress is a legislative act expressing a policy decision, not a contractual act creating a binding right. (*National Railroad Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co.* (1985) 470 U.S. 451, 465-66.)

The most relevant contract section here is, as Petitioner points out, Article 3 subdivision (a): "During each Year, *consistent with* all applicable State water rights, permits and licenses; *Federal law* and subject to the provisions set forth in Articles 11 and 12 of this Contract, the Contracting Officer shall make available" 140,210 acre-feet of CVP water to the Contractor. (Long-term Renewal Contract Between the United States and Del Puerto Water District Providing for Project Water Service from the Delta Division, Delta Div. Contract No. 14-06-200-922-LTR1[6], p. 13.)

In this instance, the clause making water delivery "consistent with" state and federal law is best read as language of limitation, meaning Reclamation will offer water for delivery so long as that delivery will not violate state and federal laws. Thus interpreted, the clause limits Reclamation's liability if it fails to deliver water under the contract when doing so would violate federal law, rather than as incorporating all federal laws and state rights, permits and licenses into the contract as contract rights. This reading avoids a change in the contractor's rights with every federal policy change. (See *National Railroad Passenger Corp., supra,* 470 U.S. at pp. 465-66 [requiring clear expressed intent to overcome presumption that a Congressional act is legislation expressing federal policy, rather than an establishment of a fixed contractual right].) This accords with the language in the following clause, that deliveries are also subject to Articles 11 and 12 of the Contract. These articles also address limits in delivery obligations and contractor's rights: addressing temporary reductions in deliveries (Article 11, pp. 31-32), Reclamation's reserved authority over seepage and return flows outside the contractor's service area (Article 11, p. 32), and Reclamation's lack of liability for physical or legal constraints on the availability of water (Article 12, pp. 32-35). The subsequent subsections in Article 3 similarly support this interpretation, and describe constraints imposed by law and other circumstances. Subdivision (b) acknowledges that:

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[6] This document, hereinafter referred to as "Contract," is a contract for one of Petitioner's members, but Petitioner represents that the pertinent terms for other members are the same. (MPA, pp. 2-3, n. 1.)

> Because the capacity of the Project to deliver Project Water has been constrained in recent years and may be constrained in the future due to many factors including hydrologic conditions and implementation of Federal and State laws, the likelihood of the Contractor actually receiving the amount of Project Water set out in subdivision (a) of this Article in any given Year is uncertain... [and modeling shows] the Contract Total ... will not be available in many years.

(Contract, p. 14.)[7] Subdivision (c) limits the contractor to using the water in compliance with all applicable legal requirements. (Contract, p. 14.) Subdivision (d) binds the contractor to the beneficial use requirements, while subdivision (e) requires the contractor to comply with endangered species laws. (Contract, pp. 15-16.)

Furthermore, when the Contract intends for a future change in the law to potentially increase parties' contractual responsibilities, it has clear language concerning which changes in the law will be incorporated to affect those obligations. For example, Article 26 concerns the contractor's obligations in terms of water conservation planning and reporting, meeting conditions as described "federal law." (Contract, pp. 45-46.) Article 26, subdivision (d) concerns revisions to the water conservation plan every five years "to reflect the then current conservation and efficiency criteria for evaluating" such plans under federal law. (Contract, p. 46.) If subsequent changes in federal law automatically amend contractual obligations, there would have been no need for this provision to reference the "then current" requirements under federal law. Likewise Article 3, subdivision (e), which addresses the contractor's compliance with the ESA review for the contract renewal, expresses clearly that such compliance is for conditions as yet to be determined: "biological opinion(s) prepared as a result of a consultation regarding execution of this Contract" under ESA section 7. (*Id.* p. 15.) Because the Contract contains clear language incorporating specific, and as yet unknown, obligations to perform specific actions based on future law changes or new requirements based on federal law into the Contract, the State Water Board declines to interpret the more ambiguous statements regarding legal compliance as doing so.

The other Contract sections Petitioner cites similarly fail to demonstrate the contracting parties' intent that future federal laws enlarge the contractual rights described. Article 11, subdivision (a)'s requirement that Reclamation make "all reasonable efforts to optimize Project Water deliveries to the Contractor" is "subject to: (i) the authorized purposes and priorities of the

[7] While this subdivision has no operative effect on the "rights and obligations of the parties under any provision of this Contract," it is still useful in interpreting subdivision (a) as discussing limits to delivery.

Project and the requirements of Federal law." (Contract, p. 31.) "Subject to" is limiting language, and this clause indicates that federal law may limit the reasonable efforts Reclamation must make to optimize water deliveries. Article 16, subdivision (a) requires Reclamation to meet certain water quality requirements and those of other "existing federal laws," but specifically notes that Reclamation is not obligated to build water treatment facilities and that Reclamation makes no water quality guarantees to the contractor. (Contract, p. 35.) Again, this section appears to limit Reclamation's water quality obligations to the contractor, including clarification that, while it is not limiting itself from its obligations to meet any current water quality requirements beyond the one cited, Reclamation only binds itself to meet those under laws in existence at the time of contracting. Article 36 reserves contractor's rights to contest the application of federal laws and regulations to performance of Contract. (Contract, pp. 51-52.) Reserving a right to sue does not suggest that the parties have agreed that subsequent federal laws and regulations expand the parties' contractual obligations.

The State Water Board declines to interpret the contract as containing an open-ended agreement that any future changes in federal law expand the parties' contractual rights and obligations. Because so much of the Contract addresses legal changes that can constrain deliveries (and limits Reclamation's liability for such constraints); because the Contract clearly states when it intends to incorporate future federal laws and legal duties as potentially increasing the obligations of a party under the contract; and because of the dual presumptions that contracts are subject to laws in place at the time of execution and that acts of Congress do not create contractual obligations, Petitioner's argument has no merit.

4.1.2.2 The Settlement Agreement Does not Expand the Contract Rights

Even if Petitioner's interpretation of the Contract is correct, and the parties did agree that future changes in federal law could expand the water user's contractual rights, the Settlement Act would not serve to increase Reclamation's obligations beyond those set forth in the Contract.

Citing several provisions of the Settlement Act, Petitioner asserts that the Act constrains Reclamation from implementing the Interim Flows when doing so means that less water is available to Petitioner's members than would be available absent the Settlement. The Settlement Act does not impose such a rigid restriction, however. The Settlement Act indicates an intent to implement the Settlement (including the required flows) without impairing any Third Party's existing contractual rights, not an intent to perpetuate the status quo for water deliveries

at the cost of preventing implementation of Settlement releases even where those parties' contracts contain the flexibility to allow the releases.

Petitioners cite Settlement Act, section 10004(f), which states that the Settlement "shall not result in the involuntary reduction in contract water allocations to Central Valley Project long-term contractors," for the proposition that the Act protects its members from reductions in deliveries vis-à-vis the deliveries it would have gotten absent the Settlement. While such an interpretation might be reasonable reading the subsection in isolation, a statute must be interpreted as a whole, including reference to surrounding provisions, and to the object and policy of the statute. (*Kasten v. Saint-Gobain Performance Plastics Corp.* (2011) 131 S.Ct. 1325, 1330-31; *Khalid v. Holder* (5th Cir. 2011) 655 F.3d 363, 366-67.) The next part of the Act, section 10004(g), states: "Except as provided in the Settlement and this part, nothing in this part shall modify or amend the rights and obligations of the parties to any existing water service, repayment, purchase, or exchange contract." Read together, these subsections indicate that the "reduction in water contract allocations" referred to in section 10004(f) is a reduction below what the contractor is entitled to under the contract. This interpretation is also consistent with a concern expressed in other provisions of the Settlement Act that loss to property rights be allowed only where it is voluntary on the part of the property owner. (See §§ 10004(a)(3) [authorizing Secretary to obtain water rights, but only "from willing sellers and not through eminent domain"]; 10005(b)(1) [authorizing Secretary to purchase any needed property from "willing sellers"].)

The history of the case also suggests that protection of contract rights to water was the protection the Settlement offered CVP contractors who were not parties to the Settlement. After confidential discussions with third-party contractors before entry of the Settlement, the settling parties added a provision indicating that the Settlement shall be developed and implemented so as to "not adversely impact the Secretary's ability to meet [existing] *contractual obligations.*" (Memorandum in Support of Joint Motion for Approval of Settlement and Entry of Judgment, pp. 4:15-20, 17:1-18:2 [emphasis added]; Settlement, ¶ 16(a)(3).) This section apparently is the basis for the third-party protections in Settlement Act section 10004 and indicates an intent to protect long-term contractors' contract rights, not impose additional rigidity into the contracts.

This interpretation is also consistent with the strong presumption that when Congress passes a law the act is legislation expressing a mutable policy decision, not a contract creating a binding

right. (*National Railroad Passenger Corp., supra,* 470 U.S. at pp. 465-66.) Thus, in order for an act of Congress to create a contractual right, binding the United States to act in a certain way and granting certain rights to a third party, there must be clear language or other clear indications that it intends to do so. (*Id.*) It follows that Congress must be equally clear in effectively amending an existing contract to increase the contractual entitlements by assuring that they will not decrease in the future, despite flexibility in the contract's language. Modifications to an existing contract "must satisfy all the criteria essential for a valid original contract." (17A Am.Jur.2d. (2004) Contracts § 507.) The Settlement Act does not contain any clear statement that it is enlarging or changing contract rights.

Neither do the other provisions Petitioner relies on to increase long-term contractors' rights. The requirement for the Secretary to identify potential impacts to third parties and any mitigation measures to be implemented before releasing Interim Flows does not give any contractor the right to more water than is available under his or her contract. (See § 10004(d).) A requirement to identify impacts and mitigation measures does not amount to a requirement that all adverse impacts be avoided, as opposed to mitigated to the extent otherwise required or determined to be appropriate, let alone create a contractual entitlement that those impacts be avoided. The provisions of Settlement Act section 10009, which detail specific amounts of money for certain parties (not including Petitioner) to pay for restoration activities, and include a statement that other entities not incur costs solely to implement the Settlement, also fails to grant third parties greater rights to water deliveries than expressed in the terms of their contracts. (*Id.,* esp. subd. (a)(3).) Section 10009 addresses implementation costs, not the impacts of implementation. Even if reduced water deliveries would constitute a "cost .. . incurred to implement" the Settlement, for the purposes of this section, it does not follow that such a "cost" includes water to which Petitioner's members are not contractually entitled. Finally, Petitioner cites Settlement Act section 10011 which, among other things, requires that the Secretary of Commerce issue an incidental take rule for any reintroduced Spring Run Chinook Salmon to provide that such reintroduction "will not impose more than de minimus water supply reductions, additional storage releases, or bypass flows on unwilling Third Parties."[8] This section also does not provide protection from reductions in water supply caused by circumstances other than restrictions that might otherwise be imposed under the Endangered Species Act. And like the other Sections cited by Petitioner, section 10011 does not create a contractual entitlement, as

opposed to imposing a statutory duty for which the remedy is an action in federal court to compel a federal officer to comply with that statutory duty. Nor does the text suggest that the contemplated water supplies be set at a level greater than the existing contracts require.

The thrust of the Settlement Act is to implement the Settlement by releasing flows into the San Joaquin River, and then reusing much of them in the Friant Division Service Area. The Act requires adherence to a specific hydrograph for Interim and Restoration flows. Petitioners assert that the release of these flows according to the hydrograph will result in their receiving less water than they would absent the flow releases in almost all water years. (Letter to Kathy Mrowka from Jon Rubin on September 11, 2011, pp. 1-2.) A statute must be interpreted so as to effectuate rather than frustrate the purposes of the law, and "should not be construed so as to render its provisions ineffective or contrary to a stated legislative objective." (*People v. Pieters* (1991) 52 Cal.3d 894, 901.) The State Water Board declines to interpret the third-party protection provisions as broadly guaranteeing contractors protection beyond that already in their contracts, where doing so would be counter to the core purposes of the Settlement Act.[9]

An interpretation that would interfere with the Settlement flows schedule simply because there may be flow reductions to third parties vis-a-vis delivery amounts absent interim flows would be particularly inappropriate because the Act specifies conditions in which the Secretary will not make releases as per the schedule for Interim Flows. (Settlement Act § 10004(h)(1)-(h)(3).) Generally, where Congress enumerates exceptions to a statutory rule, the statute will not be construed to include additional exceptions. (See *Hallstrom v. Tillamook County* (1989) 493 U.S. 20, 26-27 [declining to create additional exception to 60-day delay requirement in RCRA, particularly where Congress had already delineated certain exceptions].) These specific instances include *seepage* impacts to third parties. (Settlement Act, § 10004(h)(3).) If Congress had intended that the type of impact Petitioner's members would undergo to override implementation of one of the two main purposes of the Act itself, it would have said so.

[8] Because no Spring Run Chinook Salmon have as yet been introduced under the Settlement, this section of the Settlement Act does not yet apply.

[9] Additionally, under Settlement Act section 10006(a)(1), the federal agencies implementing the Settlement Act are required to do so in compliance with state law. Applicable requirements of state law include the requirement for flows sufficient to maintain fish in good condition below dams, as required by section 5937 of the Fish and Game Code. The Settlement is intended to implement this requirement, and the Settlement Act should be interpreted in a manner that does not unnecessarily interfere with doing so.

Neither the individual sections Petitioner relies on nor the fabric of the statute as a whole lead to the conclusion that the Settlement Act increased any contractual rights to third parties. To read the Settlement Act as eliminating operational flexibility that Reclamation has retained in its existing contracts by effectively binding it to deliver certain flows would create unnecessary discord among the various provisions of the legislation. The State Water Board declines to do so.

4.2 Petitioner's Arguments Regarding Burden of Proof

Petitioner argues that State Water Board has unlawfully shifted the burden of proof to Petitioner to demonstrate that Reclamation's changes in purpose of use and temporary transfer will not harm other legal users of water, rather than requiring Reclamation, as the permit-holder requesting the change, to demonstrate that it will not harm other legal users of water.

Water Code section 1727, subdivision (c) addresses the burden of proof for the "no injury" rule for a temporary transfer:

> The petitioner shall have the burden of establishing that a proposed temporary change would comply with paragraph[] (1) ... of subdivision (b) [articulating the no injury rule]. If the board determines that petitioner has established a prima facie case, the burden of proof shall shift to any party that has filed a comment ... to prove that the proposed temporary change would not comply with [the no injury rule].

Here, Reclamation submitted extensive evidence regarding the water supply impacts of its proposed temporary transfer on other water users. Contrary to Petitioner's assertions, none of the submissions showed any impact on cognizable rights, as the changes did not violate Reclamation's contractual obligations. Reclamation has established a prima facie case that its actions would comply with the "no injury" rule. Accordingly the burden of proof shifted to the Petitioner or any other party alleging that the temporary change would not comply with the "no injury" rule.

5.0 CONCLUSION

Because the changes made to Reclamation's water right permit numbers 11885, 11886 and 11887 do not impair Petitioner's members' contractual rights, Petitioner's members have suffered no cognizable harm for purposes of the "no injury" rule. Additionally, because Reclamation submitted sufficient information for the State Water Board to make a prima facie determination of no injury, the Deputy Director of Water Rights did not improperly shift the

burden of proof in reviewing and approving the changes. Therefore, the petition for reconsideration is denied.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied.

Dated: JAN 17 2012

Thomas Howard
Executive Director