

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 18721,
18722, 18723, 21636 and 21637 by
UNITED STATES BUREAU OF RECLAMATION,

Applicant,

M. B. and W. E. HOLTHOUSE, et al,

Protestants,

and

In the Matter of the Request of
UNITED STATES BUREAU OF RECLAMATION
for Release from Priority of Applica-
tion 7936 in Favor of Applications
18723 and 21636 and of Application
7937 in Favor of Applications 18721,
18722 and 21637.

DECISION AMENDING AND AFFIRMING,
AS AMENDED, DECISION 1356

Petition for reconsideration of this decision was filed, pursu-
and to Water Code Section 1357, by Contra Costa County Water
District (CCCWD) on March 6, 1970. The District petitioned
the Board to reconsider paragraph 7 on page 7, and paragraph 19
on page 16, of Decision 1356 which accord a prior right, until
December 31, 1975, to the counties of Placer, Sacramento and
San Joaquin to contract for project water before it is committed,
except on a temporary basis, to more remote areas.

Board Action on Petition and Submission of Briefs

The Board, on April 2, 1970, granted the petition
for reconsideration and allowed CCCWD 30 days within
which to file an opening brief in support of its position, in-
cluding an offer of proof covering the specific evidence in the

Delta water right hearing (hearing on "Application 5625 and 38 Other Applications to Appropriate from the Sacramento-San Joaquin Delta Water Supply") which it wished the Board to consider. Following receipt of the opening brief, other parties were allowed 30 days to file reply briefs. An opening brief was submitted by the petitioner and reply briefs were received from the United States, County of Sacramento and Sacramento River and Delta Water Association, East Bay Municipal Utility District, Central Valley East Side Project Association and Friant Water Users Association, San Joaquin County Flood Control and Water Conservation District and Metropolitan Water District of Southern California. A closing brief was filed by petitioner.

CCCWD did not suggest that Condition 19 be eliminated, but instead asked that the area defined in the condition be enlarged to include CCCWD. It appearing to the Board that, if CCCWD's position is correct, a viable alternative solution would be to eliminate the condition from the decision, the parties were invited to submit written comments on that proposal. Comments were received from the parties in opposition to elimination of the condition except CCCWD, which responded by stating that it had no further comments to submit.

Discussion of the Issues

CCCWD contends that Condition 19 is invalid because it violates the watershed protection provisions of the Central Valley Project Act (Water Code Secs. 11460-11463 and 11428). CCCWD reasons that the law accords a preferential right to the entire

watershed of the American River and adjacent areas which can be conveniently supplied with water therefrom, whereas the condition limits such right to only a portion of that area. CCCWD further contends that the provision is invalid because the preference under the law is timeless and the condition purports to impose a time limit without statutory sanction.

Condition 19 in Decision 1356 was not an effort by the Board to define the area which is entitled to protection under Water Code Section 11460. As indicated in paragraph 7 on page 7 of the decision, the condition was based on a similar term in Decision D 893 and was responsive to a request by the counties of Placer, Sacramento and San Joaquin as modified by agreement of other interested parties -- the Bureau, Sacramento River and Delta Water Association, Central Valley East Side Project Association and East Bay Municipal Utility District.

Reference to Decision D 893 shows that the similar condition in permits issued to the Bureau for the Folsom project was also not an attempt to interpret or apply Section 11460 of the Water Code although the decision refers to that section and notes that the condition would be consistent with it. The condition reflected a determination by the State Water Rights Board, based upon the evidence in that proceeding, that giving to the three counties a preferential right to contract with the United States within a limited period of time for sufficient water to meet their future requirements was in the public interest and was an exercise of the Board's authority under Water Code Sections 1253, 1255 and 1257 (see page 52 of Decision D 893).

The facts upon which the Board's determination was based were these: In the hearing leading up to Decision D 893, several entities within the three counties had pending applications to appropriate water from Folsom Reservoir, each seeking permits in its own name. Some of the applications had earlier priorities than the applications of the United States. However, the project works were owned and operated by the Federal Government, and, obviously, permits to those agencies would have been meaningless in view of the patent necessity of contracting for a supply of water from the federal facilities. The service areas which those applicants desired to supply could be supplied equally well by contract with the Federal Government rather than pursuant to independent permits. Permits were therefore issued to the United States to appropriate sufficient American River water to supply those who were then seeking permits and who were naturally dependent on that source, and availability of water to such applicants was to be assured, for a reasonable period, by the terms imposed in the United States' permits. The applications of others more remote from the river, such as Hollister Irrigation District and City of San Jose, were denied in their entirety. The Board stated that they "must, if necessary, seek water from other sources" (page 54).

In neither of the hearings which preceded adoption of Decision D 893 and Decision 1356 did representatives of areas outside the specified counties object to the conditions in question. The petition of CCCWD for reconsideration of Decision 1356 was the first such objection.

The Board agrees with CCCWD that Condition 19 in its present form is subject to an interpretation which is inconsistent with the Watershed Protection Law and concludes that the condition is unnecessary and should be omitted from the decision.

Water Code Section 11460 provides:

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

Water Code Section 11128 makes these provisions applicable to the United States.

Whatever meaning this law has with respect to the area to be protected, the Board cannot impose limitations upon that area and, as previously stated, has not intended to do so. To simply modify Condition 19 by including CCCWD in the protected area would not cure the fault that CCCWD has called to our attention, for the decision would still contain an apparent limitation on the time of and area entitled to preferential water service. Other areas might subsequently assert similar claims. The only complete solution, without attempting to

delineate the entire area entitled to watershed protection, is to delete the condition from the decision. Contrary to the contention of some parties, deletion of the condition is within the scope of the petition for reconsideration and the order granting the petition because it is directly responsive to the issue which the Board undertook to reconsider. The Board is not limited to the precise action that a petition for reconsideration of a decision requests.

Deletion of Condition 19 will not prejudice any of the parties in any real sense. The Bureau states that it will honor the two agreements referred to in the condition whether or not the condition is retained. The counties referred to in the condition are clearly within the area entitled to the benefits of the Watershed Protection Law and, if necessary, can assert their rights independently of any terms in the Bureau's permits. Furthermore, the federal law which authorized the Auburn Project includes the three counties as beneficiaries of the project which are to receive water from project facilities (P.L. 89-161). Placer County has already contracted for as much water as it will need in the foreseeable future and the Bureau has been negotiating contracts with those public agencies in the other counties which have expressed a desire for project water. The agencies have had a period of 12 years since Decision D 893 was adopted within which to contract with the Bureau for water.

The Board's action is not to be construed in any sense as a "repudiation" of the agreements that have been executed

with the United States nor is it to be construed as giving preference to more remote areas to contract for water from the subject project.

Deletion of Condition 19 from the decision will render unnecessary augmentation of the record as requested by CCCWD.

IT IS HEREBY ORDERED that Decision 1356 be, and it is hereby, amended by deleting the last sentence of paragraph 7 on page 8 and deleting paragraph 19 on page 16 and by renumbering the subsequent paragraphs in sequence beginning with paragraph 19.

Adopted as the order of the State Water Resources Control Board at a meeting duly called and held in Sacramento, California.

Dated: December 17, 1970

Kerry W. Mulligan, Chairman

E. F. Dibble, Vice Chairman

Norman B. Hume, Member

Ronald B. Robie, Member

W. W. Adams, Member

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4-2-70

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ORDER GRANTING PETITION FOR RECONSIDERATION

On February 5, 1970, the Board adopted Decision 1356 approving in part applications of the United States Bureau of Reclamation in connection with the Auburn Dam-Folsom South Canal Unit of the Federal Central Valley Project, and releasing the priority of certain state applications in favor of those of the bureau.

The Contra Costa County Water District (hereinafter referred to as the "district"), an interested party, filed a petition on March 6, 1970, for reconsideration of the decision. The portions of the decision on which the petitioner seeks reconsideration are paragraphs 7 on page 7, and 19 on page 16, which accord a prior right, until December 31, 1975, to the counties of Placer, Sacramento, and San Joaquin to contract for project water before it is committed, except on a temporary basis.

to more remote areas. The district contends that lands within its boundaries and certain lands immediately adjacent thereto are entitled by law to a prior right to contract for project water and that Decision 1356 fails to recognize this priority. It also asks that the evidence received at the hearing on "Application 5625 and 38 Other Applications to Appropriate from the Sacramento-San Joaquin Delta Water Supply", the Delta water rights hearing, be incorporated by reference in the record of this proceeding insofar as the evidence introduced by the district in the quoted case relates to the subject of the priority of the district and adjacent territory.

The issue raised by the petition was not considered by the Board in its decision in this matter and is of sufficient substance that the district and other parties should be given an opportunity to present their respective positions.

IT IS HEREBY ORDERED that the petition of Contra Costa County Water District for reconsideration of Decision 1356 be, and it is, granted. The district is allowed 30 days within which to file an opening brief in support of its position, including an offer of proof covering the specific evidence in the Delta water rights hearing which it wishes the Board to consider. Other parties may file reply briefs within 30 days thereafter. Further instructions will be issued if oral arguments or a further hearing become necessary. The Board will determine at a later time whether any evidence received at the Delta water rights hearing should be incorporated by reference in the record of this proceeding.

Adopted as the order of the State Water Resources
Control Board at a meeting duly called and held at Sacramento,
California.

Dated: April 2, 1970

KERRY W. MULLIGAN
Kerry W. Mulligan, Chairman

E. F. DIBBLE
E. F. Dibble, Vice Chairman

NORMAN B. HUME
Norman B. Hume, Member

RONALD B. ROBIE
Ronald B. Robie, Member

W. W. ADAMS
W. W. Adams, Member