

clerk
L2622
J

California Senate Interim Committee
On Water Projects

(Senator Stephen P. Teale, Chairman)

OPINION OF ATTORNEY WALTER M. GLEASON
REGARDING VARIOUS LEGAL ASPECTS OF
BURNS-PORTER ACT (SB 1106)
(PROPOSITION ONE)

(In response to a request of Chairman Teale
by letter dated October 4, 1960)

WALTER M. GLEASON,
533 Montgomery Street,
San Francisco 4, California.

Dated: October 28, 1960.

WATER RESOURCES
CENTER ARCHIVES

011

UNIVERSITY OF CALIFORNIA

Subject Index

	Pages
Letter of Senator Stephen P. Teale to Walter M. Gleason, Esq. (dated October 4, 1960) (requesting opinion)	(foreword)
Letter of Walter M. Gleason, Esq., to Senator Stephen P. Teale (dated October 28, 1960) (transmitting opinion)	(foreword)

OPINION

QUESTION NO. 1. DOES SB 1106 FULLY PROTECT NORTHERN CALIFORNIA'S VESTED WATER RIGHTS?	1-13
I. OPINION	1
II. SUPPORTING ANALYSIS AND ARGUMENT	1-13
1. Nature and importance of these "vested water rights"....	2
2. The "open-ended" nature of these water rights.....	2
3. The controlling criterion of "beneficial use".....	4
4. A "junior appropriator" can, in the absence of any binding adjudication of the quantitative extent of the senior water rights, freely litigate the quantitative scope of such prior "vested" rights	5
Lindsay-Strathmore Irrigation District Litigation with the Kaweath Delta "vested water rights" (Tulare County)	6
City of Fresno and Kings River	7
5. Relevancy of foregoing legal considerations to Brown Water Plan (SB 1106)	9
Does SB 1106 contain any provisions or restrictions to prevent such an attack by the South on these Northern "vested" rights?	9
6. Paragraph 12931 of SB 1106 (i.e., the so-called exclusionary clause)	12
Prior opinions and memoranda	13
QUESTION NO. 2. CAN THESE VESTED WATER RIGHTS BE IMPAIRED OR SERIOUSLY INVOLVED UNDER THE WATER PLAN ENVISAGED BY SB 1106?.....	14-25
I. OPINION	14
II. SUPPORTING ANALYSIS AND ARGUMENT	14-25
1. The New Central Valley "Water Picture"	14
a. The South's direct interest in establishing and preserving as much "surplus" water in the "Delta Pool" as possible	15
b. Determination of "surplus"	16
The completely unprecedented role of the State.....	19

	Pages
c. The Brown Water Plan provides absolutely no effective "controls" of any kind to so regulate or control this Delta "export pumping" that it will not invade or affect vested water rights of the Delta and the rest of the Central Valley	20
d. There is a grave doubt as to whether any dependable and sizeable "surplus" of water exists in the Central Valley	21
e. California's frequent "dry cycles"	23
f. Fair Play, Justice, etc.	24
QUESTION NO. 3. DOES THIS WATER PLAN ADEQUATELY SERVE AND PROTECT THE SO-CALLED "AREA OF ORIGIN RESERVATIONS" OF NORTHERN CALIFORNIA (i.e., "COUNTY OF ORIGIN" AND "WATERSHED OF ORIGIN" PROTECTION) ?	26-38
I. OPINION	26
II. SUPPORTING ANALYSIS AND ARGUMENT	26-38
1. Nature of these "preferential rights"	26
a. County of Origin Statute (Sections 10500-10505 of Water Code)	26
b. "Watershed of Origin" Provisions (Sections 11460 to 11463 of Water Code)	27
2. Vital Importance to the North of these "Reservations"	27
3. Deficiencies in SB 1106 on this phase	27
a. These "reservations" should have been made a permanent feature of this new Water Plan	28
Justice and propriety of this request for permanent preservation and protection of these reservations....	29
b. The Brown Water Plan (SB 1106) will place both the South and the State in a position directly antagonistic to these important "preferential water rights" of the North. This will lead to future serious involvement and possible impairment thereof (as well as much trouble and confusion for the North)	31
c. The various existing ambiguities and uncertainties in this "area of origin protection" should have been corrected and eliminated as a part of this new water legislation. This was not done	32
County of Origin Statute	33
Watershed Protection Statute	34
General vs. Specific Reservations	35
4. The impossibility of subsequently "correcting" these deficiencies by future legislation	38

	Pages
QUESTION NO. 4. DOES SB 1106 AFFORD PROPER PROTECTION FOR THE SACRAMENTO-SAN JOAQUIN DELTA (SALINITY CONTROL, LEVEE PROTECTION, ETC.)?	39-48
I. OPINION	39
II. SUPPORTING ANALYSIS AND ARGUMENT	39-48
Summary statement	39
The Sacramento-San Joaquin Delta	40
1. SB 1106 neither requires nor provides for any mandatory effective solution of the already critical "salinity problem." In fact, the Brown Water Plan will substantially aggravate this problem, with possible huge losses to the Delta landowners and water users	41
Central Valley Project	42
The Brown Water Plan	43
2. SB 1106 fails to legally protect, in any way, the vested water rights of the Delta. Moreover, it actually exposes such rights to a very real danger of infringement and impairment	44
3. The Brown Water Plan (as now formulated) will seriously and adversely imperil the intricate levee systems so vital to the Delta. SB 1106 contains no legal protection against this	44
A physical solution	46
Senate Bill No. 1327	48
QUESTION NO. 5. COULD SB 1106 BRING ABOUT THE "LEGAL FRANKENSTEIN" FEARED BY THE ENGLE COMMITTEE	49-57
I. OPINION	49
II. SUPPORTING ANALYSIS AND ARGUMENT	49-57
The Engle Committee's appraisal of the "litigation potential" in the Central Valley	49
Conflict between Federal Government (CVP) and State (FRP)	50
The utter "water-right" complexity in the Central Valley which the Brown Water Plan will bring about	51
The nature of this probable litigation	53
Litigation by the water right owners in the Central Valley to protect their vested rights against excessive "export" pumping from the Delta	53
Litigation by the State to protect the "surplus" water in the Delta Pool	55
Third alternative	56

	Pages
QUESTION NO. 6. DOES SB 1106 CONTAIN ADEQUATE LEGAL SAFEGUARDS TO PROTECT THE TAXPAYERS OF THIS STATE AGAINST THE POSSIBILITY OF DEFICITS IN CONNECTION WITH THIS PROPOSED MULTI-BILLION DOLLAR BOND ISSUE?	58-63
I. OPINION	58
II. SUPPORTING ANALYSIS AND ARGUMENT.....	58-63
1. Absence of any legal safeguards to prevent expenditures of bond proceeds fund before sufficient "water contracts" are first consummated	60
2. Absence of any requirement of a proper determination of "surplus" before physical facilities are built	61
3. Absence of any adequate provisions in SB 1106 to ensure that these vital water contracts will contain all necessary protective provisions (e.g., price formulas, etc.).....	62
QUESTION NO. 7. WILL THE GOVERNOR AND HIS EXECUTIVE OFFICIALS HAVE THE AUTHORITY AND POWER (IF SB 1106 IS APPROVED) TO FIX AND DETERMINE, IN THEIR SOLE DISCRETION, THE TERMS AND CONDITIONS OF THE "WATER CONTRACTS" WHICH WILL BE THE SOLE SOURCE OF REVENUES (OTHER THAN THE GENERAL FUNDS OF THE STATE) TO PAY OFF THIS HUGE BOND ISSUE? WILL THE LEGISLATURE HAVE ANY VOICE IN SUCH MATTERS?.....	64-67
I. OPINION	64
II. SUPPORTING ANALYSIS AND OPINION	64-67
1. Pertinent provisions of SB 1106	64
2. Pending litigation	65
3. Our interpretation of these "contract provisions" of SB 1106	65
"Policy statements" of the administration	66
CONCLUSION	68

Members
Senator Edwin J. Regan
Vice Chairman
Heaverville, California
Senator Randolph Collier
Tureka, California
Senator Hugh P. Donnelly
Turlock, California
Senator Luther E. Gibson
Vallejo, California
Senator Richard J. Dolwig
Redwood City, California

California Legislature
SENATE INTERIM COMMITTEE
on
PROPOSED WATER PROJECTS
(Senate Resolution No. 180)

Senator Stephen P. Teale
Chairman
Box E
West Point, California
or
State Capitol
Sacramento, California

Members
Senator Harold T. Johnson
Roseville, California
Senator George Miller, Jr.
Martinez, California
Senator Alan Short
Stockton, California
Senator Ed. C. Johnson
Marysville, California
Senator Nelson S. Dilworth
Hemet, California

4 October 1960

Mr. Walter M. Gleason
Attorney at Law
333 Montgomery Street
San Francisco, California

Dear Mr. Gleason:

The People of California will soon be called upon to vote upon the Burns-Porter Act (Senate Bill 1106) (Proposition One on the November ballot). Unfortunately, there seems to be a rather widespread lack of understanding on the part of many people as to the real significance of this very important proposed Bond Act, especially its legal aspects and implications.

As you are aware, our Committee has been working diligently in an effort to study these various phases and to acquaint the People of California with them. However, we find ourselves seriously handicapped in having varied, and to some extent, conflicting legal analysis from various water lawyers as to the various legal facets of this proposed multi-billion dollar Bond Act and the Water Plan which it will finance.

Having in mind your long and distinguished record in the field of water law and water litigation, and also your past invaluable service to legislators in their effort to protect the interests of all California in connection with California's water planning, I desire to now take advantage of your kind offer some time ago to furnish our Committee with an analysis of the legal aspects of SB 1106, which is now Proposition One.

We would particularly like to have your views with respect to the following salient points which have given various members of our Committee serious concern, to wit:

1. DOES SB 1106 FULLY PROTECT NORTHERN CALIFORNIA'S VESTED WATER RIGHTS?
2. CAN THESE VESTED WATER RIGHTS BE IMPAIRED OR SERIOUSLY INVOLVED UNDER THE WATER PLAN ENVISAGED BY SB 1106 ?
3. DOES THIS WATER PLAN ADEQUATELY PRESERVE AND PROTECT THE SO-CALLED "AREA OF ORIGIN" RESERVATIONS OF NORTHERN CALIFORNIA (i. e. , "COUNTY OF ORIGIN" AND "WATERSHED OF ORIGIN") PROTECTION?
4. DOES S, B, 1106 AFFORD PROPER PROTECTION FOR THE SACRAMENTO - SAN JOAQUIN DELTA (SALINITY CONTROL, LEVEE PROTECTION, ETC.) ?
5. COULD SB 1106 BRING ABOUT THE "LEGAL FRANKENSTEIN" FEARED AND PREDICTED BY THE ENGLE COMMITTEE ?
6. DOES SB 1106 CONTAIN ADEQUATE LEGAL SAFEGUARDS TO PROTECT THE TAXPAYERS OF THIS STATE AGAINST THE POSSIBILITY OF DEFICITS IN CONNECTION WITH THIS PROPOSED MULTI-BILLION DOLLAR BOND ISSUE ?
7. WILL THE GOVERNOR AND HIS EXECUTIVE OFFICIALS HAVE THE AUTHORITY AND POWER (IF SB 1106 IS APPROVED) TO FIX AND DETERMINE, IN THEIR SOLE DISCRETION, THE TERMS AND CONDITIONS OF THE "WATER CONTRACTS" WHICH WILL BE THE SOLE SOURCE OF REVENUES (OTHER THAN THE GENERAL FUNDS OF THE STATE) TO PAY OFF THIS HUGE BOND ISSUE ? WILL THE LEGISLATURE HAVE ANY VOICE IN SUCH MATTERS ?

We would appreciate it if you will try to express your views on these several legal points in language which will be readily understandable to laymen. We fully appreciate that some of these phases are highly technical in nature but hope that you can cover them in as nontechnical a manner as possible.

I might add that we will desire to submit your opinion on these phases to other legal experts for their appraisal and comments. If you have any objection to such procedure please so advise us.

With kindest personal regards,

/s/ STEPHEN P. TEALE

Senator Stephen P. Teale

never been fixed or determined by any comprehensive adjudication. * For historical and other reasons it has generally been unnecessary, up to now, to adjudicate in any comprehensive way the quantitative extent of this vast maze of vested water rights. The "rate of flow" * * schedules governing these water rights have adequately served their purpose in Northern California. *** However, this new water planning

* The monograph submitted by Henry Holsinger, Esq., in his testimony before the Engle Congressional Committee in 1951 (entitled "Necessity for Comprehensive Adjudication of Water Rights on the Sacramento and San Joaquin Rivers in aid of the Central Valley Project") contains an excellent explanation (by this outstanding water expert) of this "un-adjudicated characteristic" of these Central Valley water rights. His testimony is contained in the voluminous report published by the Engle Committee (in 1956) (House Document No. 416 - Volume 1, pp. 765-784). This official publication will be cited herein by the designation "Engle _____".

Mr. Holsinger (long time chief attorney for the Division of Water Resources and, subsequently, Chairman of the State Water Rights Board) summed up this absence of any comprehensive adjudication in the Central Valley as follows:

"In substantial degree existing rights to the use of water on the San Joaquin River has been litigated but not in such manner that each might be enforced against the other. On the Sacramento and in the delta, however, comparatively few rights have been litigated at all, and only a small proportion of these rights on both rivers are of record anywhere." (Engle 772)

** For the benefit of persons not acquainted with "water measurement terminology" there are two distinct "dimensions" to a water right. The first is rate of flow. This means the rate at which a given diversion flows (ordinarily expressed in terms of "cubic feet per second"). Such a "rate of flow" does not denote any quantity of water (any more than "miles per hour" in automotive travel gives any indication of the distance traveled). To get quantity (in water measurement) another "dimension" must be known which is the length of time such flow has persisted. For example, a rate of flow of one cubic foot per second (1 cfs) past a given point for 24 hours will produce a total quantity of water of approximately 1.98 acre feet (commonly and roughly expressed as approximately two acre feet). An acre foot of water is the amount of water necessary to cover one acre a foot in depth.

*** The phrase "Northern California" as used in this "Opinion" is intended to include all of California north of the Tehachapi Mountains; and principally the great Central Valley and its adjacent watersheds.

completely changes this situation. If the Brown Water Plan (SB 1106) * is put into effect, a comprehensive determination of the quantitative scope of all these water rights will become necessary because of the peculiar nature of this plan and the failure of this legislation to adequately "insulate" these vested water rights against involvement under this water plan.

3. The Controlling Criterion
of "Beneficial Use".

All water rights in California are controlled and limited by the yardstick of "beneficial use". In other words, this criterion pervades all California water rights. It is embedded in our California Constitution (Art. XIV, Section 3) which makes it mandatory that the "water resources of the State be put to beneficial use to the fullest extent of which they are capable" and forbids "unreasonable use" and any "unreasonable method of use" of water.

This means, in so far as our Northern California irrigation water rights are concerned (which comprise the great bulk of the North's water rights), that they are limited to the amount of water reasonably needed, from time to time (i. e., month to month and year to year) for the proper irrigation of the lands in question (with reasonable allowances for conveyance losses).

This problem as to how much water a given area of land can beneficially use is not a simple one. To the contrary, it is a complex one. "Water duty" (which is an expression used to denote "beneficial use") varies from parcel to parcel. Soil conditions and many other technical facets of climatology and hydrology (e. g., ground water depths) must be considered. **

* SB 1106 has no precedent in our prior California water planning. It is a completely new piece of legislation, formulated entirely by the Brown Administration. Therefore, I will (for sake of identification) refer to the water project therein authorized (State Water Resources Development System) as the "Brown Water Plan."

** The complexity of "water duty litigation" can be illustrated by one such case (beginning in the late 20's) in which the writer was counsel for the defendants. Although it was only a localized controversy, its actual trial required in excess of two years.

One of the corollaries of this basic legal doctrine of "beneficial use" is that no matter how long (i. e., for how many years or decades) a given diversion of water has taken place and irrespective of how continuously this amount of water has been used on the land involved, the water right in question is restricted (under said controlling yardstick) to the actual amount of water which some court may determine (in a "water duty adjudication") to be necessary properly to irrigate such land. *

4. A "junior appropriator" can, in the absence of any binding adjudication of the quantitative extent of the senior water rights, freely litigate the quantitative scope of such prior "vested" rights.

Did P. 500 discuss in his review of CA water law?

One of the necessary consequences of the aforementioned controlling criterion of beneficial use is that any person who desires to acquire the right to use allegedly "surplus" water in a given stream or water basin can (unless prevented by a prior adjudication binding upon him) throw into question the quantitative extent of any and all "vested water rights" on said stream (no matter how long established). In short, a covetous "water exporter" (a proposed junior appropriator) can thus litigate any and all "senior" rights by simply resorting to the expedient of questioning the water duty of the senior diversion rights.

I should also mention, in order to indicate that this is a "hard reality" (as distinguished from a purely theoretical aspect) in California water right administration that our water history is replete

* One of the many enunciations by the California Supreme Court of this settled legal principle is:

"In so far as the diversion exceeds the amount reasonably necessary for beneficial purposes, it is contrary to the policy of the law and is a taking without right and confers no title no matter for how long continued." (citing authorities) (Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 C 2d 489, 45 P 2d 972) The Court also stated therein: "In determining what is a reasonable quantity for beneficial uses, it is the policy of the State to require within reasonable limits the highest and greatest duty from the waters of the State."

with just such episodes. * I will cite but two thereof.

The first is the famous:

Lindsay-Strathmore Irrigation District
Litigation with the Kaweah Delta
"vested water rights" (Tulare County)

This involved the Kaweah River and the "vested" water rights of the Kaweah Delta in Tulare and Kings Counties, California. Over a period of many decades the water right owners (irrigation districts, mutual water companies, riparianists, etc.) along said Kaweah stream system settled their respective water rights by a multitude of local adjudications and agreements. The end result was a complex river schedule to govern the diversions from the two main branches of the Kaweah River (Kaweah and St. Johns). These scheduled water diversions covered all of the normal flows of the river. Naturally, these water right owners felt that at long last they had finally and completely settled their water rights. However, in 1916 along came Lindsay-Strathmore Irrigation District, a large irrigation district situated to the south of (and outside) the Kaweah Delta. It was desperate for water. Its supply of "residual" underground water was fast nearing exhaustion due to inordinate pumping brought on by extensive and excessive planting of citrus and other groves during the preceding decade of prosperity. The District was faced with either eliminating much of this planted acreage or of obtaining an "outside" source of water. It therefore "invaded" the Kaweah Delta and established a series of large pumping plants in the heart of this Delta. It then proceeded to pump and "export" large quantities of water to the South (i. e., to the District). Litigation ensued. It went to the California Supreme Court twice. **

* If the writer has learned anything from his several decades of exposure to California water right problems and practices it is that there is a fundamental difference between a purely theoretical approach to such matters and a realistic and pragmatic understanding of the "hard realities" of such water problems and practices. I might add that it is my impression that far too much of the current water planning at Sacramento (including some of the legal phases) has been by theoreticians rather than by pragmatic realists schooled by adequate experience with the "hard realities" of irrigation practices and problems.

Incidentally, Mr. Holsinger reviewed many of the "hard realities" of California water practices (from a legal viewpoint) in his aforementioned testimony before the Engle Committee.

**A glance at the voluminous decision of the Supreme Court on the second appeal (Tulare Irr. Dist. v. Lindsay-Strathmore Irrigation District, 3 C 2d 489, 45 P 2d 972) will indicate the complicated nature of this lawsuit. The main case also generated a number of collateral disputes and lawsuits (in some of which the writer participated as counsel for Kaweah Delta interests in the late 20's and early 30's.)

It lasted for about fifteen years and its cost (fees of attorneys, engineers, court costs, etc.) ran into millions of dollars. The defense of Lindsay-Strathmore consisted principally of a resort to the aforementioned relatively simple device of questioning the "water duty" of the Kaweah Delta water right owners and users. Lindsay claimed, for example, that these Delta farmers were using far too much water to irrigate their alfalfa and other crops, and that under an "optimum" method of irrigation (expounded at length over a period of many months of trial by various engineering and irrigation experts)* the actual amount of water reasonably needed by the Delta was far less than the amount claimed and diverted pursuant to the Kaweah River schedules. This litigation finally was settled after both sides were pretty much exhausted. The irony and tragedy of the whole affair was that the expenditure of these millions of dollars did not produce a single drop of "new" water.

A second and more recent example of this involves the:

City of Fresno and Kings River

The Kings River rises in the Sierra Nevada Mountains in Fresno County and flows through the County of Fresno into Kings County where it terminates in Tulare Lake. In a part of its course, it is quite near the City of Fresno. As is well known, a vast and highly developed agricultural area (orchards, vineyards, extensive cotton acreages, etc.) depends (almost entirely) for its irrigation upon the waters of Kings River. Many irrigation districts, mutual water companies, and other irrigation units own water rights in this stream. The writer represents some of these Kings River water right owners.

During a period of about seventy years these water right owners, by a long series of adjudications and agreements, finally settled their respective water rights and priorities. ** The end result was a complicated

* One of the principal features of such "water duty" litigation is the widely disparate and conflicting testimony of the opposing able hydraulic engineers and other irrigation experts concerning this subject of how much water is needed properly to irrigate the area of land in question. An examination of the lengthy testimony of these experts in any of these cases will confirm this. I mention this aspect not to reflect on the good faith of these eminent experts but simply to further point up one of the many facets of the complexity of such litigation.

** Our engineers estimate that upwards of eighty millions of dollars have been invested by these various irrigation units in developing their water rights and diversion systems.

river compact specifically setting forth these various and interrelated rights and priorities. All of the flows of the river (high and low) are thus scheduled and apportioned among and between these units. These river schedules occupy many printed pages in the current issue of this controlling water right compact. A few years ago a large dam (Pine Flat) was built in the upper reaches of Kings River to provide storage and a regulated river flow. This project was promoted over a period of years by these irrigation units with a considerable expenditure of time and money. All of the available irrigation storage space in Pine Flat Reservoir has been contracted for and allotted to these units. However, the final contract covering this aspect (as distinguished from the interim contract) has not been finally signed by the Federal government (Dept. of the Interior) at Washington.

Now, to turn to the City of Fresno. This city has been expanding in every direction and it is predicted by responsible authorities that during the next few decades it will experience another almost phenomenal growth. Consequently it needs an additional and dependable water supply (mainly for domestic use). However, instead of planning and building its own mountain project (such as San Francisco's Hetch Hetchy, or the Mokelumne project of EBMUD) the City of Fresno is now casting covetous eyes upon the waters of Kings River. Among other things, it has petitioned the Federal government to allocate to it a large block of storage space in the Pine Flat project notwithstanding that all thereof has been allocated to the irrigation interests who own or control these waters of Kings River. Furthermore, to obtain water to fill any such storage space which it hopes to thus secure, Fresno is now asserting that there is a "surplus" of water in Kings River and that, under its domestic priority, it is entitled to this "surplus". This means that unless Fresno abandons this attack on the water rights of the Kings River irrigationists, a lengthy and costly legal proceeding will ensue, the chief feature of which will probably be an extended examination into the subject of the proper "water duty" of the lands in the Kings River service areas. This comes as a dismal surprise, of course, to the farmers along Kings River who thought (up until this attack by the City of Fresno) that they had finally and at long last settled their water rights (after decades of litigation, etc.).

Incidentally, is it any exaggeration to apply the phrase "hard realities" to this earlier Lindsay-Strathmore episode or to this current Kings River problem?

5. Relevancy of foregoing legal considerations to Brown Water Plan (SB 1106).

This phase may be summed up very simply. Under the Brown Water Plan the South will acquire a completely novel and unprecedented "contract water right" out of the Central Valley water resources (i. e., at the Delta). In the absence of any safeguards, once the South acquires this "water right" it will be in an excellent position to question and litigate all of the vested water rights in the Central Valley (and its adjacent watersheds most of which are tributary in one way or another to the Delta). I will deal more fully with this phase in a subsequent section of this memorandum. At this juncture, I wish to answer the question:

Does SB 1106 contain any provisions or restrictions to prevent such an attack by the South on these Northern "vested" rights?

The clear and indisputable answer is that it does not. This is one of the basic defects in this illy-conceived legislation. I might also mention, in this connection, that some of us strongly urged Governor Brown to include in SB 1106 appropriate provisions so that the South could not thus question and litigate these "vested water rights" of the North. In short, we sought proper provisions to fully "insulate" these vital rights against such unfair attacks. For example, several of us met with the Governor at an evening conference on February 25, 1959, and endeavored to emphasize the importance (to the North) of thus "insulating" these water rights. This was followed the next day by a lengthy letter from me to the Governor in which various phases (necessary for the protection of the North) were explained at length, including such topics as:

1. Necessity for the "insulation" and full protection of Northern water rights.
2. Adequate protection for Northern "Areas of Origin".
3. Protection of the Delta.

As to the first point (i. e., the "insulation" of Northern water rights) this letter stated:

"This phase is of vital importance to us. It is fully reviewed in earlier memoranda prepared by the writer for the California Water Development Council and other organizations (with which you may already be familiar...) (giving dates thereof, etc.)

} Feb 26, 1959
letter by Gleason

In any event, I will do no more herein than to sketchily review this phase and then repeat our suggestions made the other evening.

"If the CWP is authorized without full and adequate protection for Northern vested water rights these rights can be seriously affected and jeopardized by this water plan. Why? Because practically all of these rights are "open-ended". What does this mean? It means, among other things, that the quantitative extent of these rights has never been fixed or settled. Historically, and because of the flow regimens of our Northern streams and other practical considerations, it has not been necessary that these rights be quantitatively determined. The writer cited last evening, as one example of this, our complex water right schedule (Water Right Indenture, etc.) on Kings River. Not one of these many important water rights has ever been quantitatively determined or fixed.

"Presently, none of these valuable rights is subject to any question or attack by Southern California water interests. Why? Because geography and topography preclude this. In other words, the South might as well be in Mexico, from the standpoint of any present ability it may have to concern itself with, or attack these rights (or litigate the quantitative scope thereof).

"With the advent of the California Water Plan, however, this whole picture changes. From a water right standpoint, the effect will be the same as if Southern California were to be physically moved up to and placed next to the Delta. Unless proper safeguards are incorporated in the fundamental CWP legislation, the South will then be in a perfect position to question and litigate (in Lindsay-Strathmore type litigation) the quantitative extent of all these vested Northern water rights. We then would have the "Legal Frankenstein" which the Engle Committee worried so much about.

"Legal Frankenstein"

"It should be remembered, in this connection, that the South would enjoy various preponderant advantages in such litigation. One of these would be that to the South a given quantity of water would be many times more valuable than to the Central Valley farmer. Therefore, the South could spend much more 'to win the water' than the farmer could. In other words, this water to the farmers is worth X dollars (per acre foot). To the South it will be worth at least 10-X, and probably a great deal more. All the South would have to do (in such Lindsay-Strathmore type 'water duty' litigation) would be to spend 2-X (or more) and they would end up with most of the water. In short, the farmers could not sustain the expense of such a 'Legal Frankenstein.'"

Again, under date of May 1, 1959, the writer sent a lengthy memorandum to the Governor urging the inclusion (in SB 1106) of five different elements of protection for the North (including adequate protection for Northern "vested" water rights). The Governor's personal reply (dated May 8, 1959) stated, among other things, that:

How to
View
This
correspondence
?

"I think it is vital to California that we move ahead in this water program, and I agree with you in all five fundamentals in every particular.* We may disagree as to how we reach them, but not in objective.

"I would direct your attention to the fact that at this time we are only drawing the 'physical works'. We are not drawing conclusions or allotting water. When we come to that, which will be after the bond issue is passed, then you and I can sit down and discuss some of the other things mentioned in your letter."

Unfortunately (and in connection with the last suggestion of the Governor) there are two serious roadblocks in the way of any "post-election patching up" of SB 1106. The first is that if the People approve SB 1106 in its present form, it will be legally impossible (in the opinion of the writer as well as many other lawyers) for the Legislature to subsequently amend it in any substantial way. Secondly, the Governor and his water staff are now engaged in somewhat frenetic efforts to consummate a vital "water contract" with The Metropolitan Water District of Southern California (i. e., even before the People approve SB 1106.)** If this is consummated, it would likewise be impossible (in our opinion) to correct (by subsequent legislation) some of these basic defects in SB 1106. This phase is also dealt with in a subsequent portion of this Opinion.

In any event, we were unsuccessful in our efforts to have these protective provisions incorporated in SB 1106.***

* All emphasis in this Opinion, either by underlining or otherwise, is mine, unless otherwise noted.

** A contract with an initial term of seventy-five years, and renewable at the option of Metropolitan.

*** It is my personal opinion (from a rather close observation of the processing of this legislation through the Legislature; with its many drafts and counter-drafts) that the omission of these necessary and salutary protective provisions was not at all accidental. I might add that it is an "open secret" that various of the South's water lawyers and other experts closely collaborated with the Administration in the drafting and processing of this legislation.

This brings me to its so-called "exclusionary clause", viz:

6. Paragraph 12931 of SB 1106

This paragraph contains a provision that nothing contained in SB 1106 shall

"affect or be construed as affecting vested water rights"

The administration spokesmen have been pointing with pride to this simple statement as being "full protection" for our Northern vested water rights. This contention is, in my humble opinion, specious. In fact, it is little short of fatuous.

There are several reasons why this is so:

The first one is that this provision will not in any manner whatsoever prevent or preclude the South (or any other Delta water "exportee") from questioning, by litigation and otherwise, the quantitative extent of these Northern vested water rights. As shown above, these "junior appropriators" (once they are placed in a position, under SB 1106, to receive water out of the so-called Delta Pool) will have, because of the aforementioned principles of water law, the unfettered power to do exactly that (acting through the State). Nothing in SB 1106 precludes or prevents them from doing so.

In other words, the mere statement in SB 1106 that "nothing herein" shall affect "vested water rights" does not at all meet the issue or cure the evil. The South will not derive its right or power to thus "raid" Northern water rights by virtue of anything expressed in SB 1106. Rather, it will acquire that opportunity and power by virtue of being placed in an excellent position (physical and legal) to do so by this Brown Water Plan (SB 1106).

Stating this differently, the use of the phrase "vested water rights" still leaves open the all-important question as to the quantitative extent of these vested water rights, a vital dimension which (as shown above) has never been fixed by any comprehensive adjudication which would in any manner be binding upon the South (or any other Delta "exportee"). In short, the South will be in the same position as was Lindsay-Strathmore which (in invading the Kaweath Delta) somewhat piously proclaimed, in effect, to the Kaweath Delta vested water right owners:

"Gentlemen of the Kaweath Delta, we do not intend to impair your vested water rights, but we most assuredly desire and intend to dispute and, if necessary, to litigate the quantitative extent thereof."

In conclusion, the foregoing are the principal considerations, factual and legal, on which is based my aforesaid answer to your first question.

Incidentally, in leaving this phase I desire to note that some of these aspects (i. e. , as to the "open-ended" nature of these Northern water rights, etc.) are more fully covered in other opinions and memoranda previously prepared by the writer, including the following:

Opinion dated February 8, 1957, to Mr. Bert Phillips,
President of California Water Rights Protective Association.

Opinion dated March 13, 1957, to California Water Rights
Protective Association (re ACA #38).

Opinion dated April 13, 1957, to Senator Edwin J. Regan.

Opinion dated December 31, 1959, to Mr. Gordon Garland,
Executive Director of California Water Development Council.
("The California Water Plan - The Two Divergent Roads
Ahead and their Litigation Potential").

---oOo---

QUESTION NO. 2. CAN THESE VESTED WATER RIGHTS BE IMPAIRED OR SERIOUSLY INVOLVED UNDER THE WATER PLAN ENVISAGED BY SB 1106 ?

I - OPINION: My answer is yes. My firm opinion is that this Brown Water Plan will not only expose these vested water rights to the danger of impairment but that it is inevitable, under the "hard realities" of the new hydrological situation which will be brought about by this Water Plan, that this involvement will occur.

II - SUPPORTING ANALYSIS AND ARGUMENT: The foregoing analysis in support of my answer to your Question No. 1 also applies herein. The essence of said discussion above is that because of the presently "open-ended" nature of these Northern "vested" rights, the South will be placed by this Water Plan in a perfect position to question and involve, by litigation and otherwise, these Northern "vested rights". However, and in order to demonstrate that this is not a fanciful and unrealistic appraisal of the new situation which will be brought about by this plan I will now touch upon some additional salient facts and considerations.

1. The New Central Valley "Water Picture"

Water-rightwise, the end result of this new Water Plan will be exactly the same as if all of Southern California were to be physically uprooted and set down at Tracy (i. e., next to Delta). In short, the length of the aqueduct between the Tracy Pumping Plants and Southern California is immaterial.

This end result will therefore mean that the South will, for all practical and legal purposes, be sitting next to the Delta with a right to receive water out of the Delta (through its "water contract" with the State). *

* As has been frequently pointed out by the writer (and many others) the name "Feather River Project" (which until recently was widely used in labelling this Water Plan) is a complete misnomer; and a deceptive and misleading one. This is and always has been a Delta Project. Under all this water planning the Feather River was to contribute but a relatively small fraction (approximately 1/4th) of the water to be exported from the Delta. (See Gleason letter of April 23, 1957 to Senator Edwin J. Regan). However, it is interesting to note, in this connection, another facet. Apparently, some of the State's own independent engineering consultants, (who are checking the feasibility of this Water Plan) have recently concluded that it is dubious as to whether even this "Feather River Phase" can be built (i. e., out of the funds to be provided by Proposition One).

A direct consequence of this new "hydrology" is that for the first time in history the South will become directly and legally interested in the water resources of the Central Valley and the water rights (existing and prospective) in connection therewith. Up to now the South has had, of course, no interest in or any ability to interfere with or involve any of these Northern rights. Why? Because geography and topography have taken care of this. In other words, Southern California might as well be in Mexico insofar as any present ability to take or interfere with any water or water rights in Northern California is concerned. For these reasons, it would seem that the South would be only too ready, in reciprocation of this very important privilege of thus being put into a position (by a State project) of receiving water from Northern California, to agree to any and all proper restrictions and provisions needed to prevent any involvement or impairment of these long standing "vested" water rights. Unfortunately, this has not proven so. The South has resisted (and I might add successfully resisted) all such efforts on our part to secure such protection.

The great practical importance and perilous nature to the North of this new "hydrological picture" can, I believe, be demonstrated by several "hard realities" implicit in this situation. The first is:

- a. The South's direct interest in establishing and preserving as much "surplus" water in the "Delta Pool" as possible.

Theoretically, the South (and the other Delta Pool "exportees") are only supposed to receive "surplus" waters in the so-called Delta Pool. What is "surplus"? How and when will it be determined? And by whom?

To properly determine what is "surplus" water one must first measure and determine "non-surplus". Over-simplifying the matter, the latter concept (i. e., "non-surplus") is the amount of water belonging to the vested water right owners. In short, these two things are correlatives. They are opposite sides of the same coin.*

* These "surplus" and "non-surplus" concepts are more fully treated in the writer's aforementioned "Letter Opinion" dated Feb. 8, 1957. As explained therein, this "water allocation" process can be likened to the slicing of a huge watermelon representing, in its totality, all of the capturable Northern California water (i. e., in the Central Valley and its adjacent watersheds). One slice thereof is the quantity which is now and will be needed (through the endless decades to come) to adequately service these presently existing vested water rights, including many "latent" riparian water rights. A second slice is the quantity which will be needed in the future for the "areas of origin". The third slice is the "surplus" available for export (i. e., to Delta "exportees").

b. Determination of "surplus"

Now, one naturally would assume and expect that before any "water export contracts" would be entered into between the State and the South for export of water from the Delta Pool, there would be a proper and comprehensive determination by appropriate legal procedure of the quantitative extent of any such "surplus" under this water planning. This would include, among other things, a proper determination of the quantitative needs and extent of this vast multitude of vested water rights in Northern California.

Incidentally, Mr. Holsinger emphasized (in his aforementioned testimony before the Engle Committee) the vital necessity for and importance of a comprehensive determination and adjudication of such vested rights before project construction or operation, viz:

"It has in fact long been widely recognized that full adjustment of water rights should precede not only project operation but also project construction". (Engle 776)

"In the absence of a comprehensive definition, interminable conflicts, disputes, and litigation will be necessarily ensue." (Engle 77-t)

"If this is not accomplished, the result will necessarily be uncertainty, doubt and conflict." (Engle 772)

This (and other) testimony of Mr. Holsinger was fully concurred in by then Governor Earl Warren and other State officials in their testimony before the Engle Committee. For example, Governor Warren testified:

"We have felt in State Government for many years that there should be a complete adjudication of the water rights on the Sacramento River, and we believed that it should be done before the Central Valley project was completed and in operation."

"As a matter of fact, on May 1, 1939, Walker R. Young, supervising engineer of the Bureau in Sacramento, recommended this adjudication of water rights of the two rivers. A copy of the letter also went to the then Commissioner of Reclamation, John C. Page. The letter said in part:

"I concur in the opinion of the State Engineer that a judicial determination of existing rights on the Sacramento and San Joaquin Rivers is necessary in order to operate the Central Valley project efficiently and successfully and such determination should be effected before the project is placed in operation." (Engle 710)

While the then Attorney General (Edmund G. Brown) apparently did not recommend such litigation, he did point out (in a memorandum submitted to the Engle Committee) the advantage of such proposed litigation:

"The advantage of such a suit appears to be that the judgment, when reached, would furnish an encyclopedic ranking of water rights in the Sacramento stream system according to quantity divertible and priority. Such ascertainment of rights would aid orderly administration of the Central Valley project and related projects. Whether such suit should extend to the ascertainment of water rights in the Sacramento-San Joaquin delta has not been made clear but such extension might be found logical. The ascertainment of rights in the delta to the flow of Sacramento River water would be complicated by the fact that some portion of the water enjoyed by the delta region is derived from the San Joaquin River as well as the Sacramento." (Engle 714)

The Brown Water Plan, however, makes no provision for any such comprehensive legal determination and adjudication of the existence and extent of surplus water. In other words, under this Water Plan no such prerequisite determinations of "surplus" and "non-surplus" will be made before project construction or operation. To the contrary, the Brown Administration proposes to proceed immediately with the consummation of "export water contracts" and the allocation thereby of huge amounts of water out of the Delta for export to the South. In fact, the Governor and his water advisers are now rather feverishly attempting to consummate such a contract with Metropolitan Water District.

No determination of surplus waters in Pap 1

Furthermore, not only has there not been any such requisite comprehensive judicial adjudication planned or provided for, but the truth is that there has not even been any accurate or proper administrative determination by the State (or any of its departments or officials) of the extent of the "surplus" water which is or will be available in the Central Valley for export. In fact, the Department of Water Resources does not even know the identity (let alone the quantitative scope) of many of these multiple thousands of vested water rights in the North. For example, in its recent publication: "Water Facts for Californians" (1958) this Department stressed one facet of this situation as follows:

"Since some water rights have existed from early mining days and some were acquired before the laws requiring the posting of notices and recordation of evidence of the rights were codified in 1872, and since riparian rights attach without any legal record being required, it is virtually impossible to determine the total water rights which exist without inventorying them by walking each stream in the State and noting all the diversions of stream flows which are in operation." (p. 7)

DWR quote

Mr. Holsinger's aforementioned testimony before the Engle Committee also confirms this absence of any accurate knowledge by the Department of many of these Northern "water rights," viz:

"Only a small proportion of these rights on both rivers are of record anywhere." (Engle 772)

The further truth is that the computations heretofore made by the State's water experts as to the probable extent of the "surplus" water which they hope will be available for export from the Delta Pool are, at best, rough estimates (i. e., little more than educated guesses). Furthermore, they are legally binding upon no one.

Incidentally, the Engle Committee had before it similar "estimates" by State officials (in connection with the planning of the Central Valley Project) and it was shocked to learn how erroneous they proved to be:

"Instead of an increased use of 300,000 acre-feet in the Sacramento Valley beyond that which existed when the project plan was first published the 'increased valley use' is 945,914 acre feet and the estimated amount of 'surplus water' for transfer to the San Joaquin Valley must be reduced accordingly.

"Such an error reduces the amount of available 'surplus water' by about 650,000 acre-feet if the Sacramento Valley uses are valid as was claimed by witnesses in the recent hearings at Sacramento. (Engle 690)

"Chairman Engle has received information indicating present uses are about 1,000,000 acre-feet greater than they were when project plans were made and the 300,000 acre-feet was originally allocated to meet probable increased uses in the Sacramento Valley." (Engle 694)

Now, what is the relevancy of all of this to the problem before us? It is that once the South enters into these "water export contracts" with the State the South:

- a. will become (and continue to be) directly and financially interested in the extent (from time to time through the decades to come) of the amount of "surplus" water in the Delta Pool; and

} relevancy
of the
"Legal
Frankenstein"
("unbreason
surplus")

- b. will take (or compel the State to take) all possible steps (including litigation) to preserve and increase the amount of "surplus" in the Delta Pool; and
- c. will inquire into and question the quantitative extent of every diversion right on the San Joaquin River System and the Sacramento River System (including all tributaries); and
- d. will insist upon continued deliveries out of the Delta Pool of these huge quantities of water thus allocated to the South under any "export water contracts" and
- e. will resist any attempt to reduce this "export pumping" out of the Delta.

When we add to the foregoing the indisputable consideration that the State will obligate itself (under the Brown Water Plan) to deliver these large quantities of water to the respective Delta Pool "exportees", the implications of this water plan become even more alarming to those of us who have spent years in the defense of Northern vested water rights, viz:

The completely unprecedented
role of the State

It is evident from the foregoing considerations that, water-rightwise, the State and the South will be "on the same side of the fence." They will be bedfellows. Their mutual interest, at all times through the endless decades to come, will be to build up "surplus" and to cut down "non-surplus." In fact, the very financial solvency of the State in future years may very well hinge upon the success of these efforts to thus secure enough water out of the Delta to fully service these vital water contracts which will be the only source (i. e., apart from general taxation) of the large sums which the State will have to pay, each year for many decades, to amortize the billions of dollars of bonded indebtedness which Proposition One proposes to create.

In brief, this new "water posture" of the State under the Brown Water Plan augurs no good for the Northern water right owners.

It should also be remembered, in all of this, that the State has already filed on practically all of the (surplus) water still remaining in Northern California. In short, it has thus put itself in a position (water-rightwise) directly adverse to and inconsistent with these vested water rights of Northern California (i. e., the "non-surplus").

It is interesting to note, in this connection, that Metropolitan inserted in its draft of proposed water contract (dated June 9, 1960) a paragraph (4-a) as follows:

"The State shall proceed with diligence in the acquisition and perfecting of water rights required for servicing all contracts, and shall protect with vigor the integrity of rights so obtained."
(p. 4/1)

This was slightly "toned down" in a subsequent draft submitted by the State (September 3, 1960) as follows:

"The State shall make all reasonable efforts to perfect and protect water rights necessary for the System and for the satisfaction of water supply commitments under this contract".
(Par. 16-b; page 16/1)

what does contract say in my copy?

Therefore, the complete mutuality of interest between the State and the South (in thus preserving, protecting and increasing these "export waters" in the Central Valley) is clear and indisputable.

Now, with this as a background we will next deal with another and to me one of the most ominous aspects of this novel water plan, viz:

- c. The Brown Water Plan provides absolutely no effective "controls" of any kind to so regulate or control this Delta "export pumping" that it will not invade or affect vested water rights of the Delta and the rest of the Central Valley.

Once these huge pumping plants start pumping water out of the Delta for export to the South, what will stop them? When and under what conditions will these pumping operations cease or be curtailed? Who will determine and control this? Under what criteria?

The Brown Water Plan is absolutely silent as to all of this'.

The answer to these several questions is, in my reasoned opinion, that these pumps will continue to operate unless and until they are stopped by litigation by the Valley farmers to protect their vested water rights.

The primary reason for this conclusion is that this Water Plan (SB 1106) contains absolutely no such "controls". *

* This "void" reminds one of the current international disarmament talks in which it is stressed that without effective controls agreements to disarm are meaningless.

Furthermore, in the absence of a comprehensive determination and a completely binding adjudication (i. e., binding upon the State and all other interested parties) there will be no effective and readily ascertainable demarcation (i. e., "boundary line") between "surplus" (on the one side) and "non-surplus" on the other. In the absence of such an obligatory definition of these two correlatives, there can be no effective (i. e., automatic) controls to delimit this "export" of water. When this "hard reality" is coupled with the indisputable fact that it will be directly to the mutual interest of both the State and the South to maintain this "export flow to the South" as continuously and on as large a scale as possible, the inevitability of direct and serious conflict between these vested water rights of the North and these "export allocations" is, I believe, patent.*

The serious import of all of this to Northern California is further indicated, I believe, when consideration is given to another "hard reality" of existing Central Valley hydrology:

- d. There is a grave doubt as to whether any dependable and sizeable "surplus" of water exists in the Central Valley. ✓

There are, of course, two major stream systems in the Central Valley, the San Joaquin River and the Sacramento.

It is indisputable that the San Joaquin River has no surplus. In fact, due to the huge inter-basin transfers of water under the Central Valley project, the San Joaquin River no longer exists (in large part) as a natural stream.** Under the CVP it is, in the main, an artificial stream supplied with supposedly "surplus" water from the Sacramento River (by the Delta-Mendota Canal, Mendota Pool, etc.).

* It should be stressed that the serious involvement and possible impairment of vested water rights which is being discussed in this Opinion will not be limited to the Delta Area or the other nearby "water areas". To the contrary, all vested water rights, including those in the various "water-rich sections" in the San Joaquin Valley (Merced River, Kings River, etc.) will be exposed to these same dangers.

** Its flows are impounded in its upper reaches by Friant Dam. Most of this water is sent southward to Tulare and Kern Counties by the Friant-Kern Canal. Some is sent to Madera County through the Madera Canal.

*Albert
now
thoroughly
complicated
by ESA, CWA,
Wild & Scenic
Rivers Act,
among other
constraints
to Lewis.*

Furthermore, even the present existence of any substantial "surplus" water in the Sacramento River is questionable. In fact, the Engle Committee (after its exhaustive 1951 investigation of this very subject of "surplus" in the Central Valley) was surprised to learn that this alleged "surplus" was rapidly disappearing, if not actually non-existent, even then (i. e., as far back as 1951). In its formal "findings" that Committee concluded (inter alia):

"Only one answer can be obtained from the foregoing testimony That one logical answer is: If diversions continue at the rate they were being made in 1951, and there is no reason to believe they will be reduced, then the developed waters of the Sacramento River are overcommitted and oversubscribed.

"The obvious result is that much less water is available for transfer to the San Joaquin Valley than was originally contemplated." (Engle 692)

"Findings - (a) That for all practical purposes, the developed water supplies of the Sacramento River are overcommitted and oversubscribed;

(b) Increased uses of water from the Sacramento River from the beginning of project construction in 1935 to the present are about three times the expected increase of 300,000 acre feet which was estimated by the State of California and Bureau of Reclamation officials in their original plans for operation of the Central Valley project;

(c) Testimony indicated diversions from the Sacramento River would have caused the river to be dry for about 40 miles in July 1951 if stored water had not been available from Shasta Reservoir for Sacramento Valley use, and a large part of this water is destined for the San Joaquin Valley under the proposed Central Valley project operation;

(d) Applications for use of American River water to be developed by Folsom Dam, an additional storage unit of the project now under construction, exceed by 'several times' the probable supply that can be made available through this source."* (Engle 679)

1951

* It is interesting to note that Congressman Poulson (now Mayor of Los Angeles) participated in the hearing and thereby learned of this "paucity" of "surplus" water in the North. He also concurred in these Findings. Yet this same gentleman is a very vocal advocate of the Brown Water Plan, the basic predicate of which is the aforementioned unwarranted assumption that a large amount of "surplus" water exists in the Central Valley.

Another interesting statistic pertinent on this "surplus" phase is the explicit statement in the "Preview of the California Water Plan" (published by the State in 1956) that there is only enough water in the Central Valley to take care of the needs of this Valley (i. e., present and future), viz:

"As regards the Central Valley Area, it is coincidental that with 48 per cent of the State's run-off this area should ultimately require almost exactly 48 per cent of the developed water supplies." (Preview, p. 6)

What more cogent confirmation could there be of the fact that there is no "surplus" water in the Central Valley available for permanent export over the Tehachapi Mountains to Southern California!

Furthermore, the dangerous nature (to the North) of this new "hydrological picture" which the Brown Water Plan will create becomes even more manifest when another "hard reality" of our California hydrology is noted, viz:

e. California's frequent
"dry cycles"

drought

An unfortunate characteristic of California hydrology is, of course, the very irregular regimen of the flows in our stream systems, particularly those draining into the Central Valley from the Sierra watersheds. These flows vary radically, not only from month to month but from year to year. This aspect is summed up in the aforementioned "Preview of the California Water Plan" as follows:

"In addition to the characteristic variation in its natural water supply within the year, California is subject to extended wet and dry periods. In the late 20's and early 30's we suffered a severe drought--one of a great many in the past--during which runoff in the streams throughout the State for a 10-year period averaged only a little more than 50 percent of the long-time mean. In this connection, while the state-wide runoff has averaged some 71,000,000 acre-feet per season, the actual seasonal flows have varied from as little as 18,000,000 acre-feet to more than 135,000,000 acre-feet."

"The normal monthly variations in occurrence of the water supplies of California, as well as the periodic droughts, create a most basic problem relative to the development and use of water...." (Preview, pp 7-8)

Now, when these dry cycles recur in the future (as they undoubtedly will) what will stop (or even slow down) these Tracy pumping plants? What will be the governing or effective legal controls in such a situation? The simple answer is that under the Brown Water Plan there are and will be no such effective controls. Which means (among other things) that (as Henry Holsinger so aptly expressed it):

"interminable conflicts, disputes, and litigation will necessarily ensue."

f. Fair Play, Justice, etc.

Some persons may endeavor to minimize or explain away this basic defect in the Brown Water Plan by contending, in effect, that we must presume that the State (in its aforementioned novel and unprecedented role as financier, owner, operator and "export right protector") will be fair, just and honorable, and will so operate these Tracy Pumps (and the other facilities of this project) as to preclude any such involvement or impairment of vested water rights.

Any such attempted answer to this legal criticism is, in my humble opinion, patently unsound and specious for several distinct reasons:

The first is that in the absence of any comprehensive adjudication of the legal extent of "surplus" and "non-surplus", the State would not have any effective "control criteria" to apply to this "export pumping", even if it wanted to be fair and just to the vested water right owners.

Secondly, the State's aforementioned direct and vital financial interest in the continuation of this "export pumping" would, of course, be a strong and perhaps preponderant motivation in any such decision by it. As stated above, the very financial stability of the State will directly depend upon such "water exports" and the net revenues produced therefrom. Furthermore, the State must act (under the Brown Water Plan) as the South's "water protagonist" to protect and preserve any allegedly "surplus" water in the Delta Pool.

In other words, any hope or expectation that the State (or its "export ally" - the South) would thus worry about these "open-ended" vested water rights of the North bespeaks, I believe, a naivete and altruism wholly inconsistent with and unconfirmed by the "hard realities" of California water practices. * To borrow an apposite

* Mono County is but one of the many illustrations in California history of the inanity of hoping for or depending upon any such altruism.

phrase from Mr. Holsinger:

"However, attention to realities should convince any reasonable person that any such anticipation is Utopian and not reasonably possible of fulfillment". (Engle 766)

And, in concluding this chapter, there is a very rough analogy which occurs to me which may point up for laymen unacquainted with the intricacies of water law or water rights, the essence of this new "water picture" which SB 1106 will bring into being (with the so-called Delta Pool as its central feature).

Mr. Pigmy and Mr. Giant find themselves stranded in the Mojave Desert on an arid day. There is but one bottle of water between them (in the possession of Mr. Pigmy). He has "vested" rights therein, which Mr. Giant readily agrees to recognize. Mr. Pigmy therefore generously consents to share this water with Mr. Giant. Each inserts his "sucking straw". Naturally, Mr. Giant's thirst is gargantuan. Likewise, his straw is king-size. The avid draughts begin. Unfortunately, however, for Mr. Pigmy, the quantitative extent of his "vested right" has not been pre-determined, nor agreed upon, nor marked on the bottle. Does it require a water lawyer to envisage the dire results for Mr. Pigmy? Or the resulting impairment of his "vested right"?

And, to carry this homely analogy a step further: Mr. Pigmy, aghast at this impairment, complains to a passing policeman for protection but finds, to his chagrin, that this chap is a close associate (both financial and otherwise) of Mr. Giant!*

--o0o--

* I trust that this Honorable Committee will pardon this digression into the Mojave Desert. Its sole justification is the "aridity" (if not "rigidity") of this "Opinion".

QUESTION NO. 3. DOES THIS WATER PLAN ADEQUATELY PRESERVE AND PROTECT THE SO-CALLED "AREA OF ORIGIN RESERVATIONS" OF NORTHERN CALIFORNIA (i. e., "COUNTY OF ORIGIN" AND "WATERSHED OF ORIGIN" PROTECTION)?

I - OPINION: SB 1106 does not properly preserve and protect these important "water reservations". To the contrary, the Brown Water Plan exposes them to a serious danger of severe diminishment, and to possible extinction.

II - SUPPORTING ANALYSIS AND ARGUMENT: Before reviewing the several salient legal reasons underlying my said conclusion, I will first briefly describe (for the benefit of any interested layman) the legal nature of these "preferential water rights" in favor of our Northern areas of origin" and their importance to Northern California.

1. Nature of these "preferential rights"


These important "preferential water reservations" are based on two distinct sets of statutory provisions. The first is the so-called:

a. County of Origin Statute
(Sections 10500-10505 of
Water Code)

These provisions of our law have the effect of reserving for every county all of the water originating in such county which will be needed at any time in the future for the development of any portion of such county (i. e., either by public or private agencies).

This "reservation" or "preferential right" of a county to recapture and use in the future its "surplus" water (i. e., over and above that needed for "vested" water rights in said county) is obviously one of great importance to all Northern California's counties. This affects all counties in the Central Valley, including those in the San Joaquin Valley. *

Incidentally, a more detailed explanation of this "County of Origin" phase is to be found in the writer's aforementioned Opinion of February 8, 1957 (to the CWPA).

* Certain water interests in Fresno County recently learned in a water right proceeding before the State Water Rights Board (Application Nos. 6733, etc.) of the vital importance to them of this "County of Origin" statute. 

b. "Watershed of Origin" Provisions
(Sections 11460 to 11463 of Water
Code)

This is the second (and an entirely distinct) phase of our "area of origin protection." In essence, this "watershed of origin statute" gives our Northern "watersheds" (and the "areas immediately adjacent thereto which can conveniently be supplied with water therefrom") a "preferential right" (for their future water needs) in and to the waters naturally occurring in such "watersheds".

It should be noted that these statutory provisions form a part of the legislation in the Water Code dealing with the Central Valley Project. The "County of Origin Statute" is not a part of the Central Valley Project legislation. The legal significance of this difference will be explained hereinafter.

*Context
of area of
origin laws*

2. Vital Importance to the North of these
"Reservations"

These "reservations" are obviously of crucial importance to the North. They constitute the prime (if not only) source of water which will be needed for the future expansion and development of Northern California during the endless decades to come. It is apparent, therefore, that this question as to whether the Brown Water Plan (SB 1106) adequately preserves and protects these "area of origin reservations" is a most important one to the North.

3. Deficiencies in SB 1106 on this phase

With the foregoing as a brief background, I will now explain why I firmly believe that SB 1106 fails to adequately protect and preserve these important "preferential water rights" of the North.

Summarily stated, my principal criticisms of SB 1106 from the standpoint of this "area of origin phase", are:

- a. This "area of origin protection" should have been made a permanent feature of the Brown Water Plan, but this was not done. It is now purely statutory and if the South gets control of the Legislature at any time in the future such protection can be entirely wiped out.

objective of the South which was to acquire a perpetual and irrevocable quantitative allocation out of these already "over-drawn" water resources of the Great Central Valley.

Governor Brown repeatedly promised throughout Northern California that these important "water reservations" would be fully preserved and protected under his water plan. * We therefore submitted various proposed legislative provisions to accomplish this. Among other things, we tried to have these "area of origin reservations" expressly recognized and incorporated in SB 1106 so that they would thereby become a permanent feature and condition of this legislation. These provisions would also have made it mandatory for the State to expressly incorporate these "reservations" in every "export water contract" and thus make all "export" of waters from the Delta strictly subordinate thereto.

Unfortunately, we failed to achieve these objectives. One of the reasons for our failure was, I believe, said close collaboration between the Governor's water advisers and legislative draftsmen and various legal and engineering experts of the South. I might add, however, that we at least managed to exact a promise from Mr. Harvey Banks (Director of the Department of Water Resources) that as long as he had anything to do with these "water contracts" (i.e., under SB 1106) he would insist that they contain appropriate provisions expressly recognizing these "area of origin reservations". He made this promise on various occasions. It is regrettable, however, that this is not the present "policy" of the Administration. The proposed contract with Metropolitan is completely silent on this important aspect.

Banks' promise
SW contracts silent

Justice and propriety of this request
for permanent preservation and protection of these reservations.

It may be argued by some that inasmuch as this "area of origin protection" is now only statutory (and thus "impermanent"), it should not be made a permanent feature of the Brown Water Plan. I believe, however, that the legal and moral justification for "permanence" can be demonstrated by several considerations.

The first is that (as pointed out in another portion of this Opinion) the South presently has no physical or legal ability to become interested in (or intermeddle with) the water resources in or water rights of the North.

* This "area of origin protection" was one of the five points covered in my letter to Governor Brown of May 1, 1959, with which he agreed in every particular in his letter to me of May 8, 1959 (p. 11, supra)

One result of this is that these "area of origin reservations" are not now in jeopardy. Under this present state of affairs, they are virtually permanent because there is no reason nor incentive for attacking (or repealing) them. As between the water right owners of the North (i. e., in different sections of the Central Valley) they have worked quite satisfactorily to date and will in all probability continue to do so.

This whole picture will radically change, however, if and when the South is permitted to become physically and legally interested in these Northern waters (under the Brown Water Plan). These "water reservations" will then constitute a constant "thorn in the side" of the South and it no doubt will (unless precluded by appropriate and continuing legal restrictions) make every effort to obviate or vitiate these "water reservations."^{*}

It would seem only fair and just that if the South is to be given this desired and important privilege of participating in these water resources in the North it should be willing (as a fair price for its "ticket of admission" to such participation) to readily agree that these "area of origin reservations" for the North should be made a permanent feature of any new State Water Plan. It might also be mentioned, in this connection, that Northern California (which has always stood ready to allow the South to participate in these Northern waters under a fair and sound water plan) will, in effect, guarantee (by its large percentage of the assessed values in the State) the huge general indebtedness which the State proposes to assume in order to thus make it possible for the South (for the first time in history) to be put in a position to thus become directly interested in, and gain benefits from these water resources in the North.

Unfortunately, however, despite much importuning by Northern representatives, the Brown Administration did not see fit to make this present statutory protection for these Northern areas of origin a basic and permanent feature of this new water plan. In short, SB 1106 does not contain this vital protection which our group of Central Valley water lawyers deemed so necessary.

but why?

As a matter of actual fact, there are no direct references whatsoever (in SB 1106) to the aforementioned statutory provisions which presently embody this "area of origin protection". Furthermore, the aforementioned

* The detailed monograph prepared by Mr. Samuel B. Morris, one of the South's leading water "experts" and spokesmen (and formerly General Manager and Chief Engineer of the L.A. Dept. of Water & Power) under date of September 19, 1956 and entitled "The Feather River Project and the California Water Plan" shows how clearly and carefully the South's experts have studied these "area of origin reservations" and various means of solving (from the South's viewpoint) the problems created thereby for the South.



"County of Origin Statute" is not even indirectly referred to in SB 1106. It is not mentioned or incorporated in this legislation either directly or indirectly.

There is, however, a most indirect and quite "left-handed" reference (in SB 1106) to the "Watershed Protection Act." This is to be found in paragraph 12931 of SB 1106 which provides (inter alia) that:

"any facilities heretofore or hereafter authorized as a part of the Central Valley Project or facilities which are acquired or constructed as a part of the State Water Resources Development System with funds made available hereunder shall be acquired, constructed, operated, and maintained pursuant to the provisions of the code governing the Central Valley Project, as said provisions may now or hereafter be amended."

These are the only provisions of SB 1106 to which the Administration can point as incorporating any of this "area of origin protection" in SB 1106. These provisions make it manifest, of course, that if the Central Valley Project Act is subsequently amended so as to eliminate this "watershed reservation" this "protection" in the CVP legislation will vanish and no longer apply to any part of the Brown Water Project (SWRDS). Incidentally, we strenuously but unsuccessfully fought the inclusion (by the Administration's representatives) in this legislation of this short but significant phrase:

"as hereafter amended"

This brings us to my second principal criticism:

- b. The Brown Water Plan (SB 1106) will place both the South and the State in a position directly antagonistic to these important "preferential water rights" of the North. This will lead to future serious involvement and possible impairment thereof (as well as much trouble and confusion for the North.)

As shown in a previous portion of this Opinion, the end result of the Brown Water Plan will be that the South will be "sitting next to the Delta." It will, in effect, be a gigantic and powerful "water octopus" sitting astride of the Delta Pool with its potent tentacles reaching into

water octopus image

every nook and cranny of our Northern stream systems, even to the upper-most reaches thereof. Among other things, this will mean that the South (and the State) will be directly interested in and affected by every future water application filed in the North (under these "area of origin preferences"). Why? Because to the extent that any such appropriations of water are hereafter allowed (i. e., in connection with the future growth and development of the North), to that very same extent the "surplus" available in the Delta for export to the South is thereby diminished. This is one of the problems covered at length by Mr. Samuel Morris in his aforementioned 1956 analysis of the so-called Feather River Project.

It should also be stressed, in this connection, that these "water reservations" for the North are not self-executing or automatic. To the contrary, as and when portions of this "reserved water" are needed in the future, the people (public agencies, etc.) seeking to make an appropriation and use thereof will have to file (and duly process) in the Department of Water Resources (in accordance with established procedure) specific applications covering the appropriation and use of this water. They also will have to secure any necessary "assignment" or "release" from the State.

All of these applications will, of course, be subject to protest. Many issues could be raised by a vigorous protestant (including the "fuzzy phases" of this present legislation - some of which are touched upon hereinafter).

I will leave it to your judgment as to whether the South (and its new "water ally" - the State) will sit silent in the face of such future attempts to thus diminish the available "surplus" in the Delta Pool.

Next is my third criticism, viz:

- c. The various existing ambiguities and uncertainties in this "area of origin protection" should have been corrected and eliminated as a part of this new water legislation. This was not done.

Time limitations will not allow any extended analysis herein of the many shortcomings of and uncertainties in this existing "area of origin protection". They are serious and should have been clarified in this new legislation. We tried to accomplish this but failed, due to the

complete lack of cooperation by the "water spokesmen" and draftsmen of the Administration. I will, however, touch upon but a few highlights in this connection.

"County of Origin Statute"

There could be an extended dispute as to whether this important statute applies at all to this Brown Water Plan (i. e., the State Water Resources Development System). The reason is that this is, of course, a State project. There is a school of thought that this "County of Origin Statute" (and particularly its vital Section 10505) would not apply to the State in its new role as owner and operator of the water project contemplated by SB 1106. In fact, a committee of "water experts" (including eminent lawyers) concluded, in 1956, that this "County of Origin Statute" did not apply to the State. This was a special subcommittee of the State-wide Water Resources Committee of the California State Chamber of Commerce. This subcommittee was appointed for the particular purpose of studying and reporting upon this "area of origin" phase in connection with the California Water Plan. The chairman was Burnham Enersen, Esq. Among its other members were such distinguished water lawyers as Chas. C. Cooper, Jr., Esq. (counsel for Metropolitan); Gilmore Tillman, Esq., (counsel for the Los Angeles Department of Water & Power); Wallace Howland, Esq., (Assistant Attorney General of the State of California); Martin McDonough, Esq., of Sacramento, Mark C. Nosler, Esq. (principal attorney for the California Department of Water Resources). In fact, the entire committee consisted of lawyers except for two ranchers (one of them being Mr. Bert Phillips) and two engineers (one being Mr. Samuel B. Morris). This subcommittee made its report on November 30, 1956. Among other things, it concluded that Section 10505 does not apply to the State as such. This conclusion is expressed as follows in its formal report:

*COS
might not
apply to the
State*

"Although the section is brief and is expressed in simple terms it has been the subject of much controversy and its meaning and effect have been much misunderstood. The principal and significant features of the section appear to be these:

"(a) The section does not by its terms restrict or otherwise affect the use by the State itself of water appropriated by the State pursuant to the Feigenbaum Act. Rather, it appears to be focussed upon the assignment of State applications to other parties, such as, for example, municipal corporations, districts, private parties or the United States

Government. Stated very broadly, the section applies primarily to non-state water resource development. (* (p. 6 of Report)

The writer disagrees with this conclusion of said subcommittee. It is quoted, however, to show that (even before SB 1106 was formulated) this "County of Origin Protection" was a subject of conflicting views.

Two other things should be noted in this connection.

The first is that the aforementioned conclusion was reached by said Subcommittee notwithstanding the fact that Section 10504 (as it existed in 1956) contained an "assignee definition" similar to that contained in the present statute.

The second is that this "County of Origin Statute" is not a part of the Central Valley legislation and therefore has not been included (either by reference or otherwise) in SB 1106.

Therefore, the applicability of this important phase of the "Area of Origin Protection" to the Brown Water Plan is thus left in a somewhat "clouded condition". To say the least, the matter is not beyond the possibility of dispute.

"Watershed Protection Statute"

There are various substantial uncertainties in connection with this phase of the "Area of Origin Protection". In fact, some of these were pointed out by then Attorney General Edmund G. Brown in a formal Opinion (No. 53/298, under date of February 5, 1955 - issued in response to a request from Senator Edwin J. Regan). This Opinion covered the subject of "Area of Origin Protection". After discussing various uncertainties in these statutes, the Attorney General concluded:

"However, if litigation and the need for judicial construction is to be minimized, in all candor it must be stated that the certainty of this description leaves something to be desired."

* In all fairness, it should be added that this formal report was not signed by various "Northern" members of the Subcommittee. It did, however, receive the support of Mr. Samuel Morris and other "Southerners".

I might add that the Governor and his staff were reminded by us (on more than one occasion during the processing of SB 1106 through the Legislature) of this "fuzzy condition" of these statutes; and the need for correction thereof in connection with his new Water Plan. *

Another phase of the present "fuzziness" of this "Area of Origin Protection" should also be touched upon, viz:

General vs. Specific Reservations

There are two schools of thought on the question as to whether these "water reservations" for the areas of origin must be general or specific. There is a vast and important difference between these two concepts. **

A specific reservation means that a definite quantity of water must be fixed and reserved for the future needs of the "area of origin" (i. e., "county", etc.). On the other hand, a "general reservation" would entitle the area in question to all the water it might need in future decades, without any quantitative limit being fixed at the time the reservation is made (i. e., in connection with a proposed "assignment" or "release" of a state filing). This basic difference was pointed out by the Division of Water Resources in its testimony before the California Water Project Authority on August 31, 1954. It stated:

* This was discussed in our meeting on the evening of February 25, 1959 and also adverted to in my letter to the Governor's secretary on February 26, 1959:

"The deficiencies of our present statutory protection for these "areas of origin" are well known to the Governor (as a result of the report of his Attorney General's Water Lawyers Committee, etc.). As epitomized the other evening, this situation is in a 'fuzzy' condition (to say the least).

"It has been generally agreed in the various prior discussions and debates by both Northern and Southern water spokesmen that these 'areas of origin' deserve full and adequate protection under the California Water Plan (when authorized).

"Therefore, there should be no great difficulty in working out in the Administration's 1959 CWP legislation a fair formula to cover this phase. We believe that this protection should be firmly embedded, as a basic policy, in such legislation."

** This subject is dealt with fully in my Memorandum Opinion of February 8, 1957, to the California Water Rights Protective Association.

"The principal advantage to the counties of origin to be gained by having a general reservation is that the general reservation would, in effect, reserve for those areas all the water that may ultimately be needed for reasonable beneficial use in the future. This general reservation would provide for various factors which are unknown at the present time while a specific reservation, being necessarily based on an estimate might provide for either too small or too great an amount. A specific reservation would limit the amount of water that would be available to the counties of origin under the State filings." (See "Answer to Question No. 4, Program For Financing and Constructing the Feather River Project". Appendix H, p. 117)

*general
vs. specific
reservation
of water*

The various water representatives of the South have been contending and urging for a number of years that these "reservations" should be specific, not general. In fact, the aforementioned "area of origin" subcommittee of the State Chamber of Commerce specifically recommended this in its report dated November 30, 1956. Speaking of the "reservations" to be made under the "County of Origin Statute" this report states:

"Assignments or releases containing such general reservations present the same difficulties as do the present provisions of Section 11460 to 11463 with respect to the operations of State water projects. They leave the rights of the county of origin undefined, and they leave the exported water subject to 'recapture' whenever needed locally. It is the recommendation of the subcommittee, therefore, that the agency which passes upon this question (i. e., the State Water Rights Board) should make a quantitative determination of the water which is to be reserved to the county of origin. The attached proposal contains provisions designed to accomplish this result." (p. 20)

recapture

The unfairness and impracticability of any such attempts to thus definitively forecast the future quantitative needs of these "areas of origin" (through the many decades to come) was well pointed out in our final report of Attorney General Brown's Water Lawyers Committee (dated January 3, 1957)(Assistant Attorney General Wallace Howland, Chairman). Speaking of the South's desire to thus (i. e., by specific reservations) put quantitative tags and limits upon Northern California's future water requirements, this report states:

"Hence, it is argued that the ultimate future needs of the areas of origin must be determined now, as a necessary mathematical step in placing a quantitative limit on the water reserved for use in such areas and that this, in turn, is a necessary step in the determination of the surplus available for export.

"On the other hand, from the viewpoint of the areas of origin it must be admitted that there is no crystal ball in which to foresee the future. What the future needs of the areas of origin will be, only time will tell. Present determinations of future needs can only be estimates of the minimum needs made in the light of present day knowledge. Moreover, the most "consistent thing" about California history of the past thirty years has been the extent to which the State has exceeded the best estimates of its rate of growth and the resulting need for expanding services of all types." (p. 15 of Report)*

Incidentally, ample evidence of this quite understandable inability (in public works), to foretell the future, abounds all around us. One good example is our many outmoded and inadequate highways (including some freeways) which were built but a relatively short time ago, presumably adequate to serve us for many decades, but already largely outmoded. And planned and built by able and conscientious engineering staffs!

It would seem evident from the foregoing that, for the proper protection of the North and in all fairness and justice, any and all uncertainties and "fuzzy phases" in connection with this important problem of "general v. specific" reservations for these "areas of origin" should have been definitely resolved and eliminated as a part of this new water planning. In brief, this legislation should have expressly provided for "general reservations" for these "areas of origin". However, despite our repeated efforts to accomplish this (and other proper protection for these areas), this was not done. The "water experts" of the Administration were deaf to such suggestions.

The foregoing comprise some of the reasons why the writer is of the firm opinion that SB 1106 falls far short of any adequate protection for these "area of origin reservations."

* The danger and impracticability of such specific reservations was also pointed out by me in my "Interim Report" as Chairman of the 1956 Water Lawyers Committee of the San Francisco Bar Association (dated December 28, 1956), viz: "In short, this proposed procedure would necessitate a high degree of 'crystal ball gazing' into the future in an effort to guess at many imponderables, a 'determination process' which appears to me to be quite dangerous and impracticable."

Before leaving this subject there is one other facet which I briefly wish to discuss, viz:

4. The Impossibility of Subsequently
"Correcting" these Deficiencies
by Future Legislation

Various Administration spokesmen are now attempting to allay the rather widespread fears arising as a result of the aforementioned and other shortcomings of SB 1106, by representing to the electorate that all such defects can and will be corrected by subsequent legislation. They are proclaiming, in effect, that: "It is better to have a water plan with problems and defects (which can and will be remedied later), than no water plan at all."

{ From a legal standpoint such "propaganda" is indefensible. The juridical truth is that if SB 1106 is approved by the People, it will be beyond the power of the Legislature to make any substantial changes in it (e. g., to implant therein, as a permanent feature of the Brown Water Plan, this important "area of origin protection"). As Hon. Dion Holm, Esq., stated, in his formal opinion to the City of San Francisco (No. 1426 - dated March 8, 1960) (re SB 1106), viz:

"My purpose in pointing out the foregoing to you is based on the fact that the Legislature will have no power to amend the act once it is approved by the people and no power to repeal it once general obligation bonds are sold."
(p. 5)

--o0o--

QUESTION NO. 4. DOES SB 1106 AFFORD
PROPER PROTECTION FOR THE SACRAMENTO-
SAN JOAQUIN DELTA (SALINITY CONTROL,
LEVEE PROTECTION, ETC.)?

I - OPINION: It is my firm opinion (based on a close personal knowledge of the Delta and its multiple and complex hydrological aspects) that SB 1106 does not, from a legal standpoint, properly protect the Delta. On the contrary, this Brown Water Plan (SB 1106) will seriously aggravate and intensify the already existing and critical legal and hydraulic problems of the Delta.

As a legal minimum, this legislation should have required, as a basic and indispensable legal condition precedent to any "export" of water out of the Delta, that which we call in water law a "physical solution" fully to ensure complete and effective protection for the Delta in connection with its complicated and perplexing hydrological difficulties. This has not been done (or even hinted at) in SB 1106.

II - SUPPORTING ANALYSIS AND ARGUMENT: It would take a rather large volume (e. g. exceeding the size of the excellent Engle Committee report of almost two thousand pages) to discuss in detail these many serious hydrological and legal problems of the Delta (all of which are relevant to your question). As this Honorable Committee knows, various and voluminous reports have been published over the years by the State and others with respect to these problems of the Delta (e. g., salinity control, etc.). Therefore, and because of time limitations, I will do no more herein than sketchily touch upon some of them with the hope of demonstrating (at least by generalities) the soundness of my foregoing appraisal of SB 1106 (insofar as it relates to the Delta).

Summarily stated, my reasoned conclusions as to the legal inadequacy of SB 1106 on this phase are:

1. It neither requires nor provides for any mandatory and effective "physical" solution of the already critical salinity problem. In fact, the Brown Water Plan will substantially aggravate this serious Delta difficulty with possible huge losses to the Delta landowners and water users.
2. It fails to legally protect, in any way, the vested water rights of the Delta. Moreover, it actually exposes such rights to a very real and imminent danger and probability of infringement and impairment.

3. The Brown Water Plan (as now formulated) could seriously and adversely affect the intricate levee systems so vital to the Delta.
4. It will bring about serious drainage problems.
5. It does not adequately preserve and protect, from a legal standpoint, the important recreational features of the Delta.

Before briefly dealing with these phases, I will set forth (for the benefit of those interested persons who are not familiar with the Delta) a few "highlights" as to its location and physical characteristics.

The Sacramento-San Joaquin Delta

This area comprises several hundred thousand acres of excellent and highly developed agricultural lands. It is reputed to be one of the prime and richest farming areas in the world. It lies at the confluence of the Sacramento and San Joaquin River; and is situated mainly in San Joaquin, Sacramento and Contra Costa counties.

At the western extremity of the Delta is located a very extensive industrial complex with many large factories and other industrial units, most of which are directly dependent upon the continued availability of fresh water of good quality from these nearby stream systems.

One of the principal hydraulic features of this Delta area is the myriad of natural river channels, sloughs and other watercourses which meander in a highly irregular pattern throughout this entire area. One consequence is that a large part of the Delta consists of many islands entirely surrounded by these water channels.

Another physical feature is that much of the land in the Delta is considerably below the level of the adjacent water channels. Consequently, a vast and intricate system of earthen levees (with an aggregate length of many hundreds of miles) is used to prevent the inundation of these low-lying lands.

In some portions of the Delta (particularly in its westerly reaches) a serious and continuous problem of land subsidence exists, due to the nature and texture of the soils in such areas, etc.

All of these many disparate but interrelated hydraulic characteristics create for the Delta (as all competent experts concede) an extremely complex "hydrological picture", with numerous interlocking hydraulic and other physical facets, all in close and delicate physical balance. Naturally, this intricate hydrological situation makes the Delta's legal problems (water-right and otherwise) peculiarly difficult and complicated.

In the light of this short "physical background", I will now briefly discuss some of the legal criticisms of SB 1106 set forth above in summary fashion.

1. SB 1106 neither requires nor provides for any mandatory and effective solution of the already critical "salinity problem". In fact, the Brown Water Plan will substantially aggravate this problem, with possible huge losses to the Delta landowners and water users.

The critical nature of this "salinity problem" is, of course, well known. It suffices to state that, due to tidal and other hydraulic phenomena occurring in the San Francisco Bay (and its upper reaches - Suisin Bay, etc.) there is an ever present and extremely serious menace of "salt-water intrusion". In other words, the salt water from the bay (and ocean) thus moves upstream and (unless prevented from doing so) intrudes into these "fresh water channels" of the Delta, with consequent serious injury (if not complete ruin) of these Delta lands and the crops thereon.

From time immemorial, the outflow of "fresh water" (coming down the Sacramento and San Joaquin Rivers) has provided a natural barrier to repel this "salt water intrusion". However, during some periods of the past these river flows of "fresh water" down to and through the Delta have not been adequate. This has been particularly true in several past "dry cycles". The severity of this salinity problem, even in the "pre-project era" (i. e., before the advent of the Central Valley Project) can be illustrated by reference to the following official report:

"Gradually, as reclamation of the Delta and development of the use of water took place upstream, the amount of water available for natural salinity control decreased until in 1924, 1931, and other dry years, the encroachment of saline waters reached serious proportions.

During the late summers of those years irrigation in a large part of the Delta was made impossible by the degree of concentration of salinity in the waters of the channels. " (Report on 1956 Cooperative Study Program, Department of Water Resources, Vol. 1, p. 27)

Another official depiction of this hydrological problem is:

"The greater part of the water diverted for irrigation, from the Sacramento River above Knight's landing, is for rice culture. As a result of these diversions, combined with the natural lack of water following three consecutive years of very low precipitation, the amount of water reaching the city of Sacramento in the summer of 1920 fell to the minimum of 500 to 700 second-feet and in consequence salt water was able to work its way upstream in harmful quantities as far as Grand Island on the Sacramento River and Andrus Island on the San Joaquin and Mokelumne Rivers (see inclosure No. 12 and pp. 85-87 of the Report of Division of Water Rights, inclosure No. 17). The crops of the delta, valued at \$35,730,800 that year, were seriously endangered by the salinity of the river, and the land escaped permanent damage on a large scale only by reason of the heavy sustained rains of the following winter, which effectually flushed the salt out again." (Engle 165)

Central Valley Project
(CVP)

One of the primary objectives of this project was that of providing much better salinity control and protection for the Delta. This objective was supposed to be accomplished by the maintenance (by water "releases" from the upstream reservoirs of the CVP-Shasta Lake, etc.) of sufficient flows of "fresh water" to, through and from the Delta to effectively repel and control this ever threatening "salinity intrusion".

The voluminous official reports (both State and Federal) prepared in the planning of this CVP project make it manifest that this "salinity control" was one of the important phases of the Central Valley Project.

Surprisingly enough, however, the Federal government has in recent years (i. e., now that the CVP is operating and it appears that the amount of alleged "surplus water" in the Delta is far below the previous official estimates), been indicating that it disclaims any real responsibility (as operator of the CVP) for such salinity control (i. e., as a mandatory feature of the CVP). This is a situation which in my opinion can and probably will lead to extensive litigation (a subject treated in a subsequent section of this Memorandum).

I do wish to stress, however, in connection with this CVP project (which, of course, is already built and functioning) that it involves the storage and detention in its upstream reservoirs (on the Sacramento River, etc.) of large quantities of water which otherwise, in a state of nature, would normally flow down these streams and thereby serve to "repel salinity intrusion"; as well as to periodically "flush out" the saline consequences thereof in the lower reaches of the Delta. It is true that these "stored flows" are subsequently released from these reservoirs and then flow down stream. However, if the Federal government is successful in its aforementioned avowed purpose of not devoting these "delayed flows" primarily to "salinity control" and secondarily to "export" to the San Joaquin Valley, the gravity of the Delta's "salinity problems" (both physical and juridical) created or aggravated by the CVP is, I believe, patent.

The Brown Water Plan

One of the widely publicized purposes of the so-called Feather River Project (as officially proclaimed over a period of years) has been that of providing (among other things) full and effective "salinity control" for the Delta. It would be expected, therefore, that SB 1106 (i. e., this proposed permanent legislative implementation of the FRP) would contain clearcut and effective provisions making such full and effective "salinity control" a mandatory feature of this new water plan. More specifically, this legislation should have made effective "salinity control" a legal condition precedent to any export of water out of the Delta.

Has it done so? It patently has not. This phase will be dealt with further hereinbelow in connection with my discussion of the subject of a "physical solution". However, in leaving this "salinity phase" for a moment, I wish to stress that this Brown Water Plan will also involve (as does the CVP) the impounding and periodical detention, in various upstream reservoirs, of large portions of the flows of the Sacramento River, with a consequent substantial alteration of the regimen of seasonal flows of "fresh water" to and through the Delta; and a resultant aggravation of the Delta's "salt water intrusion" problem.

This brings me to the second criticism above, viz:

2. SB 1106 fails to legally protect, IN ANY WAY, the vested water rights of the Delta. Moreover, it actually exposes such rights to a very real danger and probability of infringement and impairment.

This subject has been covered in prior portions of this Opinion. It will also be dealt with in a subsequent "litigation section". It suffices to state at this juncture that, from a water-right standpoint, the serious involvement and possible impairment of water rights (which subjects are discussed in prior sections of this Memorandum) will be especially severe and critical for these Delta water right owners. They are, of course, in the immediate "zone of influence" of these huge pumping drafts of water out of the Delta (i. e., both under the existing CVP and the proposed Brown Water Project)

In view of the aforementioned entire absence in SB 1106 of any governing legal criteria or effective and mandatory legal controls to restrict this "export pumping" the inevitable result of this "legally uncontrolled water exportation" will, in my opinion, be acute "water-right problems" for these Delta water right owners.

My third criticism is:

3. The Brown Water Plan (as now formulated) will seriously and adversely imperil the intricate levee systems so vital to the Delta. SB 1106 contains no legal protection against this.

One of the hydrographic features of the Delta which operate in "delicate balance" is the aforementioned extensive system of earthen levees. (and the water diversion facilities incidental thereto)

The writer can testify as to this from long personal experience as a director of one of the large reclamation districts in the Delta. Although our district is supposed to have (according to our engineer) one of the (if not the) finest and strongest levee systems in the entire Delta, the writer and his co-directors have, during the past fifteen years, "sweated out" a number of critical flood crises. One of the physical features of most of these earthen levee systems is the relative shortness (or scarcity) of "freeboard" (i. e., the distance between the normal water

line and the top of said earthen levees). The hydraulic problems thereby created are quite serious. A couple of them might be noted in passing. The first is that, if, due to the proposed radical alterations in the hydrology of the Delta (under the Brown Water Plan) the water levels in these channels (i. e., thus "contained" by these levees) are held at a higher level in these channels for any substantial additional period (or periods) of the year, severe (if not disastrous) weakening of these earthen levees can and will occur. There is no legal protection against this in the Brown Water Plan.

Another of the important hydraulic features incident to this extensive system of levees is that the diversion facilities and devices (mainly pumps) used to extract and transport water from these channels (through or over these levees) for irrigation of the adjacent farmlands are, in the main, quite critically related to the existing water levels in these water channels. Here again, if any substantial and abnormal alterations in channel flows or channel characteristics occur, the results for these water diversions will be quite serious. There is, in SB 1106, no legal protection against this.

Now, the Brown Water Plan will presumably involve the construction of large new water channels (i. e., the so-called master "water channels", "wasteways" etc.) In short, as now theoretically and tentatively planned on paper, most (if not all) of these Delta levee systems will be radically altered.

In view of this huge proposed "plastic surgery" on the face of the Delta, one would naturally expect that this proposed permanent legislation (SB 1106) would spell out (in clear detail) specific legal requirements to adequately and fully protect these existing and critical levee systems (and the channel flows "corralled" thereby) against any substantial changes which would prove injurious to these reclamation districts, and their extensive acreages of rich farmlands which are so vitally and continuously dependent upon these protective levees.

However, SB 1106 completely fails to do this. ✓

The foregoing remarks also serve, I believe, to confirm the soundness of the other criticisms set forth above of this Brown Water Plan legislation (i. e., insofar as it relates to the Delta). I will therefore conclude this rather hurried discussion of some of the Delta's legal problems (under the Brown Water Plan) with a brief treatment of the subject of:

"A physical Solution"

Our "water jurisprudence" contains an important legal concept known as a "physical solution". Our modern California water practice is replete with such legal "solutions". In essence, they constitute a legally binding set of predetermined and instantly applicable "legal controls and criteria", which are utilized, among other things:

- a. to prevent any improper or excessive pumping of "export" water from a basin (such as the Delta).
- b. to prevent other improper or illegal hydrological activities (e. g. undue lowering of groundwater tables; inadequate or inordinate drainage of waste waters, etc.).
- c. to make mandatory any required "upstream" releases of stored water or stream flows in order to ensure adequate water supplies for lower diverters; to protect fish, etc.

If there ever was a legal and hydraulic situation requiring a rigid and detailed "physical solution" for the preservation and legal protection of vested water rights (as well as for the preservation of the other juridical aspects of the "water status quo") it is, (in my firm and studied opinion) this Delta situation, with its multiple hydrological and related legal problems. The principal feature of such a solution should be a carefully worked out set of definitive legal provisions (conditions, restrictions, etc.) to make certain (as far as physically and legally feasible) that, (by way of illustration):

1. No water will be "exported" out of the Delta at any time under the Brown Water Plan which is needed for irrigation or other uses by the vested water right owners.
2. No water will be "exported" out of the Delta (under said plan) which is needed, at any time, to fully and effectively control salinity.
3. Before any water is committed by contract for export out of the Delta (under SB 1106), the State must actually build and operate successfully in or near the Delta, for a sufficient number of years of trial operation, suitable physical works and facilities to fully accomplish the various solutions (i. e., salinity control, etc.) which the State's experts now hope they will be able to achieve under their present incomplete and largely theoretical "paper planning."

I stress, in the foregoing, the theoretical nature of the present planning of the State (in connection with these Delta problems) because although it may come as a surprise to many, the simple truth is that much (if not all) of this "water planning" for the Delta is still quite tentative, tenuous and incomplete. For example, one of the hoped for solutions to the salinity problem is a "bay barrier". Various schemes have been studied and rejected. One thereof (the so-called "Biomed Plan") is still under study. This is made clear by the aforementioned 1958 publication of the Department:

"One of the integral parts of The California Water Plan still under study is a proposed multi-purpose water barrier project for the Sacramento-San Joaquin River Delta known as the Biomed Plan." ("Water Facts for Californians", p. 11)

Now, what is the relevancy of all of this to the legal question before us? It can be epitomized, I believe, by a simple question:

What if all these now purely THEORETICAL "Delta schemes" prove to be unsound or inadequate?

In other words, the Brown Administration now proposes (as soon as Proposition One is approved) to immediately consummate obligatory and long-term "export water contracts" (i. e., for "export" of water out of the Delta), which contracts will impose onerous burdens on the State for many decades. These long-term and serious contractual obligations (for "export" of water, etc.) will be assumed long before the soundness and feasibility of these various theoretical schemes (now under study) (i. e., to solve the Delta's problems) are built and demonstrated by actual operation to be a success. If these proposed schemes are unsuccessful this "export project" will fail.

Furthermore, the bonds to be authorized by SB 1106 will be sold forthwith and the proceeds spent to construct (among other things) the enormously costly aqueduct to Southern California long before such a "physical solution" of the Delta's problems is first achieved and demonstrated to be feasible.

These and other equally cogent considerations which I have not time to review herein, demonstrate, I believe, the absolute necessity for incorporation in this legislation of a requirement of such a "physical solution" as a legal condition precedent to any of the other aforementioned steps in this water plan. The absence of any such a requirement in SB 1106 is, I believe, but another of the numerous deficiencies, from a legal standpoint, in this vital legislation.

One final point on this "Delta" phase:

Senate Bill No. 1327 (1959)
(Adding Part 4.5 to Division
6 of the Water Code)

Delta Protection Act

Some may assert that this particular legislation answers the aforementioned need (from both a legal and practical standpoint) of a physical solution. It is my reasoned judgment that any such argument is clearly unsound for various reasons:

One is that this statute neither contains nor makes mandatory any such a "physical solution". Rather, it amounts simply to:

- a. A legal delineation of the boundaries of the Delta (by metes and bounds); and
- b. Legislative findings as to the severity and uniqueness of the "water problems" of the Delta; its importance as a "hub" of the proposed State Water Resource Development System, etc.; and
- c. A generally stated set of legal principles (i. e., "juridical policies" to govern the operation of the Delta as this "hub" of the SWRDS; etc.)

These generalized provisions in SB 1327 (commendable as they are) do not even remotely constitute the requisite "physical solution" which the writer (and others) feel is an absolutely indispensable legislative and legal sine qua non if the Delta is to receive the full legal protection to which it is entitled (either under the Brown Water Plan or any other water plan involving the use of the Delta for "export" operations).

Another significant aspect of SB 1327 is that it is purely statutory. Therefore, unlike SB 1106, it has no assurance of permanence. In short, any and all of its provisions can be repealed at any future session of the Legislature. It is quite significant, I respectfully submit, that these excellent "policy statements" in SB 1327 were carefully omitted from SB 1106. Had they been included in the latter we at least would have had in this Brown Water Plan legislation a permanent (though generalized) juridical statement of the necessity of protecting the Delta, and solving its "unique" problems.

For all of the foregoing reasons, therefore, SB 1106 is, in my opinion, basically and legally deficient insofar as the Delta is concerned.

--o0o--

QUESTION NO. 5: COULD SB 1106 BRING
ABOUT THE "LEGAL FRANKENSTEIN"
FEARED BY THE ENGLE COMMITTEE?

I - OPINION: My firm opinion is that not only can SB 1106 (if adopted) bring about the almost interminable water litigation in the Central Valley which was so aptly described by the Engle Committee as a "Legal Frankenstein", but that (in all probability) it will have this result.

The absence of any comprehensive adjudication of the vested water rights of the Central Valley; the complete failure of SB 1106 to provide any effective legal controls to regulate this "export pumping"; and the extremely complex and confused hydrological situation in the Delta which the Brown Water Plan will bring about, constitute the principal considerations which impel me to this conclusion as to the probability of this scourge of litigation (i. e., if Proposition One is approved by the People).

II - SUPPORTING ANALYSIS AND ARGUMENT: Before briefly renewing my reasoning with respect to this phase, I desire to touch upon two preliminary aspects. The first is:

The Engle Committee's appraisal
of the "litigation potential" in the
Central Valley.

As indicated in a prior section of this Memorandum, this Engle Congressional Committee held extensive hearings (in 1951) in California, which were devoted almost entirely to this intricate "water right situation" in the Central Valley. One of the specific subjects receiving its attention was the aforementioned recommendation of Governor Earl Warren (and other state officials) that this very confused, unsettled and complex water right situation in the Central Valley should be completely clarified and definitively settled by a comprehensive adjudication of all of these inter-related water rights. The Engle Committee was aghast at the enormity of this proposed litigation, concluding, among other things:

"(b) The State of California and Bureau of Reclamation officials may create a 'legal Frankenstein' which would destroy all hope for State control of Central Valley water rights, especially if the adjudication is in the Federal Court with Department of Justice representation in behalf of the government ;

.....

(d) The cost of the proposed lawsuit would be enormous and the number of persons who would be involved is indefinite, having said to be 'astronomical' in number by one Federal witness;

(e) Further, it would embroil the Central Valley Project in litigation for decades. " (Engle 681)

Another aspect which caused this Engle Committee serious concern (and one which will make the Delta's problems under the Brown Water Plan even more severe, complex and difficult) is the basic legal conflict between the Federal Government (as operator of the CVP) and the State (as proposed operator of the FRP). * Both of these gigantic projects involve, of course, the pumping of huge quantities of "export water" from the Delta. The Committee also made a formal finding as to this:

"Findings - (a) The record clearly shows a conflict between the Bureau of Reclamation and the State of California over the water rights of the Feather River - the Bureau claiming those water rights under an assigned water-right application which is needed for the operation of the Central Valley project, and the State claiming the water is available for the State to construct and to operate the proposed billion and a quarter dollar Feather River Project;

(b) The proposal of the State engineer to utilize the Feather River water resources without proper coordination and consultation with the Bureau of Reclamation impinges on the assignment already made by the State engineer to the Federal Government which is necessary to operate the Central Valley Project." (Engle 684)

The Committee also concluded that: "This conflict is so basic to the operation of the project that it should be resolved as quickly as possible." (Engle 702)

It might also be mentioned that this basic conflict between the Federal government (CVP) and the State (FRP) over the waters of the Central Valley still persists. The recent State-Federal Agreement (May 16, 1960) for a "co-ordinated operation" of these projects (constructive though it may be) does not, in my opinion, eliminate this conflict nor obviate the severe effect these "competitive" "Delta Export Projects" will have upon the Delta, and aforementioned hydrological and

* This subject is dealt with in detail in the writer's Memorandum Opinion of December 31, 1958, to Mr. Gordon Garland, Executive Director of CWDC. (see pp 29 to 32)

legal problems. Rather, it underscores and emphasizes the magnitude of the hydrological impact of these huge pumping "drafts" out of the Delta; calling (as it does) for annual "diversion requirements" by the United States of up to 8,300,000 AF, and for the State of up to 5,260,000 AF.

It incidentally should also be noted, in this regard, that a vital and basic condition of this recent Federal-State agreement is that, for all practical purposes, it does not become effective until "after the construction of the major storage facilities of the Feather River and Delta Diversion Projects" (see par. 12, p. 6). When this is coupled with the fact that it now appears probable that the Oroville Dam (i. e., as a major reservoir) will not be built for many years to come, even this phase as to "starting point" of this recent "cooperative agreement" becomes considerably clouded.

The second consideration preliminary to my analysis of this "litigation potential" of the Brown Water Plan is:

The utter "water-right complexity" in the Central Valley which this plan will bring about.

This subject as to the complexity of the Central Valley "water-right situation" is reviewed at length in my aforementioned Memorandum Opinion of December 31, 1958 (to CWDC) I will, therefore, do no more herein than to give a summarization thereof (with cross references to my said earlier Memorandum).

The complexity of this Central Valley water-situation in the pre-project era (i. e., before the CVP), and the completely unsettled and unadjudicated status of this multitude of vested water rights, was excellently portrayed by Mr. Holsinger in his aforementioned testimony before the Engle Committee (Memo of 12/31/58, pp 16-19).

With the advent of the CVP this "water-right situation" became much more complicated (Memo, 12/31/58, pp 19-25). As Mr. Holsinger so succinctly summed up this CVP project (from a water-right standpoint):

"Never in the history of the State has there been an instance where a water conservation project was put in operation which involved such violent and extensive changes in the regimen of any stream". (Engle 765)

The Engle Committee also stressed the unprecedented nature of this mammoth project, viz:

"The integrated operation of the initial features of the Central Valley project commencing July 5, 1951, brings into being huge man-made transfers of water from one watershed to another. This huge transfer is unprecedented in our State..." (Engle 675)

The magnitude of this project is also aptly described in a recent opinion (1956) of the U. S. District Court (at Fresno) in Rank v. Krug, viz:

"As hereinbefore pointed out, the Central Valley Project of California is a colossal undertaking, or as stated by Justice Jackson - 'A big bundle of big projects'. The gigantic dams envisioned, some of which are built, the tremendous canals and diversions of waters of rivers, with the resulting change of diversion and of underground waters affects millions of acres of land, tens of thousands of farmers, and practically all, if not all, of the cities in the valley which secure their water mostly from wells." (142 F. Supp. 98)

The Brown Water Plan (SB 1106)

This enormous project (or series of projects), which has as its "hub" the so-called Delta Pool, with its pumping of huge quantities of water from the Delta, (i. e., in addition to the CVP "drafts") will obviously superimpose upon an already extremely complex water-right situation, tremendous additional hydrological changes and problems, some of which are indicated in earlier portions of this memorandum.

Truly, the hydrological and water-right situation which will then exist will be one of almost incredible complexity. It must be remembered, in all of this, that these huge amounts of so-called "project water" (i. e., the "surplus") will be completely commingled with "vested right" water (i. e., the "non-surplus"), both in transit along the Sacramento River and in the so-called Delta Pool. In other words, their individual identities will, of course, be completely lost. To again borrow a colorful phrase from Mr. Holsinger, none of these several sources of water thus to be commingled have "any distinctive coloring". (Engle 773)

{ One of the many adverse results of all of this complexity and this confusion, to the water right owners in the Central Valley (riparianists, etc.) (and especially to those in the Delta) will be that, unless a proper "physical solution" is worked out, they will never know or be able (as a practical matter) to quickly and inexpensively determine (i. e., without litigation) the extent to which their vested water rights are being invaded

from day to day by this mammoth man-made manipulation of water in the Central Valley. Stephen W. Downey, Esq., lucidly explained this phase in his statement submitted at the hearing before the Engle Committee. Speaking in behalf of Sacramento River water users and with respect to the five water right applications by the Bureau of Reclamation in connection with the CVP, he testified:

"My concern is to explain why every water user in this basin is affected by these applications...."

Such a massive appropriation of water naturally alarms the Sacramento River agriculturists. All normal ways for protecting a valuable water right and for acquiring a right to additional water as it is needed disappear. The river is controlled by a Federal agency through giant reservoirs and canals so that the individual water user cannot tell what has become of his water or how to get it back. There is little wonder that the Bureau's applications have created as much furor as they have." (Engle 787)

*enclosure
and
commodification
by the state*

The Nature of this Probable
Litigation

The litigation which I believe will occur if the Brown Water Plan is put into operation could happen in several different ways. One thereof would be:

Litigation by the water right owners
in the Central Valley to protect their
vested rights against excessive
"export" pumping from the Delta.

It is inevitable, in my opinion, that these Central Valley water right owners (and particularly those in the Delta) will find themselves in a most difficult situation (under this new "hydrological picture") as future dry cycles occur. The Delta is, of course, "at the end of the ditch", in the sense that it lies at the lower end of the Sacramento and San Joaquin Rivers. The heavy burden this physical situation imposes upon these "lower users" is well described by Mr. Holsinger:

"The uppermost user, it is axiomatic in water-right litigation, is in possession of the source of supply and by physical law necessarily the water will become available to the lower users only to the extent he who has control upstream allows it to flow past his point

of diversion. The old adage therefore applies that 'possession is nine points of the law.' This position therefore casts a heavy burden upon the lower users." (Engle 768)

Also:

"In the existing condition of human nature, it may be confidently predicted that those intervening users, finding an abnormal increment in the stream, will each for himself define and exercise their rights in their own favor with substantial elasticity." (Engle 773).

The end result will be, in my opinion, that these water right owners in the Delta will find themselves in a gigantic "hydraulic squeeze", resulting from this "upstream" diminution in the flows (i. e. from the North) and the huge CVP and FRP Delta "exports" (i. e., to the South.) In short, they will be "caught in the middle".

It should also be noted (in connection with this "water squeeze") that it now appears that SB 1106 will not finance the Oroville Reservoir and that this unit will be delayed for many years. In other words, the large amount of "conserved water" which this reservoir was supposed to conserve and feed into the Delta will not be available to alleviate this water squeeze in the Delta. Ironically, this was to be the "key unit" of the Brown Water Plan:

financed by revenue bonds.
actually, it was completed by ~1975?

"The key unit of the project is a dam to be constructed on the Feather River, almost five miles above the City of Oroville. This structure will be 730 feet high, which is 20 feet higher than Hoover Dam. Behind the dam will be a reservoir with a storage capacity of 3, 500, 000 acre-feet of water, and a shoreline of 167 miles". (Water Facts For Californians, 1958, p. 10)

In short, this future "water squeeze" would thus be further aggravated by this important change in "project plans".

The foregoing are some of the "hard realities" which could, and in my opinion will, cause (in future dry cycles) the "legal Frankenstein" depicted by the Engle Committee.

Incidentally, it should be noted that similar (but far less severe) "hydrological pressures" gave rise to "a flood" of water litigation in the Central Valley during the "dry cycle" of the 20's. This was described by the Engle Committee as follows:

"Throughout 1928, the Joint Legislative Water Problems Committee continued to study the Bulletin No. 12 plan in an increasingly serious situation of ground-water depletion that was intensified by a 2-year drought. The Joint Committee reported to the 1929 Legislature that ground-water levels from the Kings River south were falling to such an alarming extent that Federal farm loans had been discontinued. At the same time, the Joint Committee reported that irrigation, power, and domestic uses had drawn so heavily on summer flows of the Sacramento and San Joaquin Rivers that salt water intrusions were causing damage in the delta, and a vast number of legal controversies had been instituted between cities and others, power companies and other appropriators, and between delta interests and all irrigators or appropriators in the Sacramento and San Joaquin Valleys." (Engle 7)

I might add that in one of these many lawsuits of the 1920's (Town of Antioch v. Williams Irrigation District, etc., Superior Court of Alameda County, No. 62328) there were over six thousand defendants (including those named by fictitious designations.)

This early litigation also confirms one other salient aspect which I wish to emphasize: The Central Valley water right litigation which the writer believes will occur as a result of this Brown Water Plan will not be a "piecemeal" or "localized" affair. To the contrary, it will, of necessity, have to be a comprehensive adjudication involving all water rights and water resources in the Central Valley. A partial adjudication would have no more efficacy nor utility than "half a bridge".

1995
WQCP
resulting
from
Reconall

A second "litigation potential" is:

Litigation by the State to protect the "surplus" water in the Delta Pool.

Most of the considerations expressed above apply to this situation. Time will not permit herein any review of the many ramifications of this phase of the "litigation potential" of this proposed new water picture. It suffices to state that it too would necessarily result in the "monstrous lawsuit" described by the Engle Committee.

Third Alternative

Another "Legal Frankenstein" which could (and the one which I believe will) occur would be a suit by Delta water-right owners (and other Delta water interests) to secure and compel a "physical solution" of the type which I have briefly described above. Burdensome as it may be, this, in my reasoned judgment, is the only logical course for these water interests to follow (if SB 1106 becomes law). In this way, these Central Valley water right owners instead of awaiting and suffering the various adverse and grave consequences above described, would be able to accomplish a sound and legal solution of these many problems before this project is built or operated. Among its advantages, this legal action would, in my opinion, bring about the following salutary results (among various others):

didn't occur?

1. A legally enforceable set of effective controls to fully and adequately protect these "vested water rights" (at all times) in connection with any "export pumping" out of the Delta.
2. None of these proposed "Delta water exports" (under the Brown Water Plan) could legally occur unless and until satisfactory and adequate "physical works" (e. g. such as a bay barrier, etc.) are first built and operated successfully (for a trial period of years), so as to solve the aforementioned hydrological problems of the Delta.

Among other things, such litigation would directly dispute the existence of the alleged "surplus" water which is the indispensable predicate of the Brown Water Plan. It is my opinion that one result of this will be that no bonds authorized by SB 1106 will be saleable until this litigation is finally resolved.

←

Incidentally, I might add that the writer is already authorized by his clients to institute this type of litigation if Proposition One is passed. I hope it can be avoided. If not, it will ensue.

} hmmm what am I of this?

Please also let it be noted for the record that my clients have made every reasonable effort to avoid any such undesirable results by bringing about a sound water plan; one which (on the one hand) would fully "insulate" and protect these vital and indispensable water rights of the North, and, (on the other) would result in the South securing a perpetual and irreducible water right out of the North Coastal Basin, which, as the State's own water statistics show, is the only true source

and locale in Northern California of substantial amounts of "surplus" water. (see Memorandum of December 31, 1958). The aforementioned "Preview" states:

eg -
Trinity
Klamath
Smith
rivers

"The North Coastal Area with its large natural water supply, 41 per cent of the State's total" (i. e. 71,000,000 AF annual mean) "should ultimately require only about 4 per cent of the water consumptively used throughout California." (p. 6)

Incidentally, the "Statement of Policy" widely circulated in 1958 by the California Water Development Council (a client of the writer) (under the leadership of Gordon Garland, Executive Director) outlined the salient features of a sound water plan. This was submitted for the consideration of Governor Brown and various other interested parties (including the South). This "Statement of Policy" states (as its Point 16) as follows:

"THE ONLY AREA OF UNQUESTIONED SURPLUS IS THE NORTH COASTAL AREA. For this reason a new major water export project from this area should be committed and constructed concurrently with the Feather River Project"

And, in concluding this chapter as to the probability of a "legal Frankenstein", it should be stressed that this "litigation scourge" will also seriously militate against the South's best interests. Among other things, it will, in my opinion, "freeze" the South's (as well as the State's) water planning (at least in so far as "exports" from the Delta Pool are concerned) for a long time to come. This should be contrasted with the sound water plan which the CWDC advocated:

"PART TWO - THE NORTH COASTAL ROUTE"

"This is the solution which your Council has advocated for so long. It is a sound solution. It is a permanent solution. Its 'litigation potential' is practically nil.

"Furthermore, this solution will enable the South to acquire a perpetual right to a huge quantity of water, a right not at all dependent upon 'diligence,' and one which cannot be eroded away by future increased Northern water uses in the Central Valley. Moreover, this excellent and very desirable 'water right' can be assured to the South by a basic 'water compact', confirmed (if desired) by a constitutional amendment (see p. 9 infra)" (Memo, 12/31/58; p. 6)

//

QUESTION NO. 6. DOES SB 1106 CONTAIN
ADEQUATE LEGAL SAFEGUARDS TO PRO-
TECT THE TAXPAYERS OF THIS STATE
AGAINST THE POSSIBILITY OF DEFICITS
IN CONNECTION WITH THIS PROPOSED
MULTI-BILLION DOLLAR BOND ISSUE?

I - OPINION: Various important legal safeguards which should have been incorporated in this legislation for the proper protection of the State and its taxpayers are absent therefrom.

These proposed bonds are general obligation bonds and therefore will have to be paid by the California taxpayers if the net revenues from this Water Project are not sufficient to meet the more than four billion dollars (principal and interest) which must be paid by the State in large annual installments over a period of many decades to come. These are not "revenue bonds" (as some people seem to think). To the contrary, if the revenues from this water project are not adequate, the general taxpayer will have "to foot the bill". Therefore, every proper legal safeguard for the protection of the State and its taxpayers should have been included in SB 1106. This was not done.

II - SUPPORTING ANALYSIS AND ARGUMENT: It is not within the purview of this opinion to deal with the many fiscal problems which will arise in connection with the vague and loosely drawn provisions of SB 1106 dealing with this proposed bonded indebtedness.* We will, however, mention two "fiscal facets" as a preliminary to a brief discussion of some of the legal defects in SB 1106 from the standpoint of its lack of proper protection for the California taxpayers.

The first is that this huge proposed bond issue will have a very serious and adverse impact on the bonding capacity of the State for a long time to come. It will make it more difficult and costly to market many other types of bonds which California (and its many local districts - such as school districts, local improvement districts, etc. etc.) will have to sell during the coming decades in order to finance many needed local developments (schools, etc.).

* The legal aspects of many of these doubtful "fiscal phases" are reviewed in the "Interim Report" of Chas. T. Main, Inc. (July, 1960.)

The second "fiscal fact of life" is that with its already huge bonded and other indebtedness, California must be most careful in incurring further general indebtedness lest the State reach the point of serious financial involvement. As State Treasurer Bert Betts recently (in September 1960) warned (in discussing the already existing saturation of the national bond market with California Veterans bonds), the credit of the State is being dried up and impaired. He flatly stated that "we must look out for the credit of the State now before we go into bankruptcy". *

This same admonition was voiced in a recent issue (July 11, 1960) of Barron's (the national financial journal), in an article entitled "Strained Finances May Jeopardize California's Investment Status".

Now, in the light of these indisputable fiscal considerations (upon which all financial experts seem to be in accord) I will briefly outline a few of the basic legal shortcomings in SB 1196 from the standpoint of its failure to protect the State and its taxpayers against possible huge deficits under the Brown Water Plan.

* "California has to pay higher interest than the national average, largely because of the great volume of bonds we market. I've been East promoting our bonds four or five times since I took office and everywhere I go bond people ask 'when is your veterans program going to end?' Eventually we're going to fill every bond portfolio in the country with Cal-Vet bonds. We are going to reach the point one day where the State of California will not get a bid on a bond sale.

"We must look out for the credit of the State now, before we go into bankruptcy. . . . And I happen to be a veteran of the State of California." (S. F. Chronicle, Sept. 25, 1960)

The Governor apparently participated in this same "veterans conference" at Sacramento. He is reported as saying: "Vet bonds glut the market and force higher interest rates on other types of bonds."

1. Absence of any legal safeguards to prevent expenditures of the bond proceeds fund before sufficient "water contracts" are first consummated.

Under the Brown Water Plan the State officials can proceed (as soon as SB 1106 is approved by the People) to expend these hundreds of millions of dollars on the aqueducts and other facilities comprising the project (State Water Resources Development System) irrespective of whether or not PROPER "water contracts" with financially sound water districts have FIRST been consummated. This is, in my opinion, a basic legal defect. There should be in SB 1106 a clear prohibition against the expenditure of these huge sums (of borrowed money) unless and until the State has first carefully formulated and consummated proper "water contracts" of such a nature (e. g., with a sound price formula, etc.) that the reasonable amortization of this huge debt will be absolutely assured. This, in my humble opinion, is a minimal requisite protection for the general taxpayers. Without such a provision the general taxpayer is entirely at the mercy of these State officials. Any serious mistakes on their part in this respect could prove disastrous to the State.

Metropolitan Water District caught this fundamental defect in SB 1106. In its draft of proposed water contract (Draft of 6/9/60) (which it submitted to the Governor on June 9, 1960) Metropolitan inserted a paragraph (9-f) requiring that no bonds be sold nor funds expended under the Bond Act (SB 1106) for the construction of any aqueduct or other water facilities of the SWRDS (with certain minor exceptions):

"until the State shall have entered into contracts which will provide for repayment of at least 75% of the construction costs thereof, allocated to water supply for reimbursement by the contractors, with contractors having an adequate tax base or other evidence of ability to perform their respective contractual obligations." (p. 9/6)

While this commendable effort to thus "plug" this deficient legislation is cogent confirmation of its basic inadequacy, such "patching by contract" is, in my opinion, an inadequate and dangerous substitute for proper legislation. ✓

2. Absence of any requirement of a proper determination of "surplus" before physical facilities are built.

The indispensable keystone of the entire Brown Water Plan is these "water and power contracts". Why? Because they are the sole source of revenue to pay off this huge bonded indebtedness (apart from general tax revenues).

Now, these vital "water contracts" are in turn based on the assumption that there will be sufficient "surplus" water available in the Delta Pool through these many decades to come, to properly service these contracts.

But what legal assurance is there that this will be so? Absolutely none. To the contrary, the record (including the State's own data) plainly shows (as above indicated) that there is a grave doubt as whether or not this alleged "surplus" exists or will hereafter exist in the Delta; particularly if the Central Valley is to continue to expand and develop its natural resources (including its invaluable and indispensable water resources).*

However, and entirely apart from the question as to whether or not there is any serious doubt as to the existence of this necessary "surplus", one thing seems crystal-clear to me. It would seem to be simple prudence and plain common sense to determine, in a proper and legal way, the existence or non-existence of adequate "surplus water" before these hundreds of millions of dollars are spent on physical works. Empty reservoirs or aqueducts will not pay off this enormous bond issue.

Covering the same matter from a little different approach, what will happen if these physical works are built and then a "Legal Frankenstein" occurs (as above indicated) and such litigation results in a legal demonstration of the non-existence of an adequate amount of "surplus water" to properly service these "Delta export water contracts"? It does not require a water lawyer to foresee the critical financial situation in which the State would then find itself.

* It should never be forgotten that this future expansion and development is directly dependent upon proper protection of the North's "area of origin" water preferences and reservations. " (p. 26 supra)

Furthermore, it is no answer to this to assert that the State would then be forced to "switch horses" and turn to the North Coastal Basin for a water supply. One fallacy in any such argument is that it overlooks the fact that SB 1106 does not include the funds which will be needed for this admittedly costly North Coast development. In fact, there is now a serious doubt, (in view of the findings of the State's independent consultants), as to whether SB 1106 will provide sufficient funds to complete the Oroville Dam project (on the Feather River), which up until recently has been the widely heralded hydraulic keystone of the Brown Water Plan.

3. Absence of any adequate provisions in SB 1106 to ensure that these vital water contracts will contain all necessary protective provisions (e. g., price formulas, etc.)

Governor Brown and his staff have already attempted to construe SB 1106 as conferring upon them the full and unfettered discretion to determine what "terms and provisions" should be incorporated in these vital "water contracts" (which bear so directly on the State's future solvency). As stated above, pursuant to this interpretation, the Governor and his staff have recently been engaged in rather frantic attempts to consummate the aforementioned important water contract with Metropolitan Water District.

This interpretation of SB 1106 is, in our opinion, an unsound one. It is now the subject of litigation recently instituted by us in the Kings County Superior Court, which is briefly discussed in a subsequent section of this Opinion.

However, we will assume in this portion of our Opinion that SB 1106 can be so interpreted. Assuming this, it obviously is a legally defective statute from the viewpoint of proper protection for the taxpayer. Why? Because the very least this law should have done (on this phase) was to provide basic and controlling criteria (including proper "pricing formula") to make certain that these vital water contracts will always yield sufficient revenues to fully pay off this bonded indebtedness.

Time exigencies will not permit any further analysis of this phase herein but I do wish to point out, in leaving it, that your Honorable Committee and other legislative committees have heretofore spent a considerable amount of time studying this very aspect of "water contracts" and

their basic terms and conditions. One interim result of these studies is the "Report" issued by the Senate Fact Finding Committee (in March 1960) containing many excellent suggestions (e. g., price formulas, conditions of power sales, etc.) for study in connection with these vital "water contracts". The tragedy, however, is that these important protective provisions are no part of this Brown Water Plan legislation. Furthermore, if the Administration's interpretation of SB 1106 is correct, (i. e., that the Department has a full and unfettered power to decide what provisions should go into these "water contracts"), there will be no real opportunity to adopt, by appropriate legislation, any of these necessary safeguards and protective provisions so essential to the future welfare of California and its taxpayers.

--o0o--

QUESTION NO. 7. WILL THE GOVERNOR AND HIS EXECUTIVE OFFICIALS HAVE THE AUTHORITY AND POWER (IF SB 1106 IS APPROVED) TO FIX AND DETERMINE, IN THEIR SOLE DISCRETION, THE TERMS AND CONDITIONS OF THE "WATER CONTRACTS" WHICH WILL BE THE SOLE SOURCE OF REVENUES (OTHER THAN THE GENERAL FUNDS OF THE STATE) TO PAY OFF THIS HUGE BOND ISSUE? WILL THE LEGISLATURE HAVE ANY VOICE IN SUCH MATTERS?

I - OPINION: My opinion is that the Legislature and not the Executive Branch has the exclusive right and power (and responsibility) of fixing the basic criteria (i. e., the fundamental terms and conditions) of these vital "water contracts", to be executed pursuant to SB 1106.

II - SUPPORTING ANALYSIS AND ARGUMENT: This question goes to the very heart of the Brown Water Plan (SB 1106). Why is this true? Because unless all of the many important aspects of these vital water contracts are carefully and providently planned, the State can and will find itself in serious trouble. Your Honorable Committee is familiar, of course, as a result of your aforementioned detailed studies, with the many ramifications (both legal and fiscal) of this all-important "water contract phase". There is, therefore, no need to detail them herein.

Rather, I will merely summarize the salient aspects relevant to this question as to which branch of the State government has the power to formulate the basic terms and conditions of these "water contracts".

1. Pertinent Provisions of SB 1106

Paragraph 12937-(b)-(4) of the Act provides (in part) that:

"The department, subject to such terms and conditions as may be prescribed by the Legislature, shall enter into contracts for the sale, delivery or use of water or power, or for other services and facilities, made available by the State Water Resources Development System with public or private corporations, entities, or individuals."

2. Pending Litigation

This question as to what these provisions mean (in the sense of "contract power") is now being litigated in the case of "E. C. Salyer vs. Edmund G. Brown, Harvey O. Banks, Ralph M. Brody, et al." Action No. 14952 in the Superior Court of Kings County, California. A temporary restraining order was issued (and is now in force) enjoining the execution of the proposed contract with Metropolitan. The writer (and the legal firm of Rosson & Pearson of Hanford, California) represent the plaintiff. We have recently filed a brief in support of our position in that case (as outlined hereinafter). Therefore, instead of setting forth a detailed legal analysis herein, I will simply state our conclusions and will incorporate in the "Supplement" the relevant portions of our written argument in this Kings County case.

of Salyer & Bowell?

3. Our interpretation of these "contract provisions" of SB 1106.

Our conclusions, based on a careful study of these provisions (in the light of clearly established principles and "canons" of statutory construction) may be summarized as follows:

- First: No "water contracts" can be signed until SB 1106 first becomes a law (by approval of the People). This conclusion is based on elementary legal principles. These well settled principles of our jurisprudence clearly demonstrate, in our opinion, the illegality of the present efforts of Governor Brown and his staff to consummate the aforementioned vital water contract with Metropolitan.
- Second: If Proposition One is approved by the People, the power to formulate the basic terms and conditions of these "water contracts" is a legislative function which resides in the Legislature, and not in the Department of Water Resources.
- Third: If SB 1106 is to be construed as delegating this important legislative power to the Department, it is unconstitutional and void as an unlawful delegation of legislative power. It is further defective and vulnerable (constitutionally) because it is completely devoid of the requisite "controlling criteria" (i. e., "guidelines") to limit and control the discretion of the Executive officials.
- || ←

competent lawyers will concede, I believe, that such declarations do not and cannot change the controlling legislation (SB 1106). * In brief, such pronouncements have no legal efficacy whatsoever. They are binding upon no one. Legally speaking, they are worthless.

Furthermore, they are patently ephemeral. In other words, insofar as having any 'permanency' they might as well be "written on ice". In this connection, it is also interesting to observe that the authors of most of these "policy statements" are soon to leave the service of the State. Director Banks and Deputy Director Brody have already tendered their resignations to the Governor. Their successors obviously will not be bound by any of these many "policy pronouncements" heretofore made by these gentlemen.

Incidentally, these "personnel facts" (which are but another of the frequent reminders of the rather rapid turnover of administrative officials) constitute, I respectfully submit, cogent confirmation of the wisdom of our "founding fathers" in establishing a "government of laws" and not a "government of men". SB 1106 will be with us for a long while (if approved by the People) whereas these evanescent "policy statements" have no durability whatsoever. In brief, they are no adequate substitute for law.

--o0o--

* This was ably demonstrated to the San Francisco Board of Supervisors by Hon. Dion Holm (long-time City Attorney of San Francisco and an outstanding water lawyer). In his excellent formal "Opinion" (No. 1426) (under date of March 8, 1960) (re SB 1106) he clearly shows (by extensive citation of California authorities) the inefficacy and worthlessness (from a legal standpoint) of any such "ex post facto declarations" by the Governor (or others).

Incidentally, after reviewing a number of perplexing legal ambiguities in SB 1106, Mr. Holm concluded: "The courts would indeed be called upon to exercise extraordinary mental dexterity in construing the quoted language. Examples (1) to (4) above are not a complete listing of doubtful points in the bill."

CONCLUSION

Most legal experts who have studied SB 1106 believe that it is a badly drafted statute and that it is replete with material ambiguities which will breed much future litigation. *

In addition to these many ambiguities, SB 1106 contains basic legal defects which could endanger the future fiscal fate of all of California; as well as seriously involve and impair the presently "vested water rights" of Northern California; and also imperil the "area of origin reservations" which are the only substantial source of Northern California's additional water needs in the future.

One of the numerous adverse results of this defective legislation will be, in my sincere and firm opinion, a scourge of almost interminable water controversies; a litigation legacy which could plague California for decades to come.

Respectfully,



WALTER M. GLEASON

* Our 1960 Water Lawyers Committee of the San Francisco Bar Association (Dan Hadsell, Esq., Chairman) (of which the writer is a member) so concluded after an exhaustive analysis of SB 1106. The report of this Committee to the Board of Governors of the San Francisco Bar Association (under date of October 27, 1960) states:

"With one thing members of the Committee are very much impressed. It is that SB 1106 is a badly drafted statute. If enacted it is bound to be productive of litigation which will very much impede administrative progress in implementation of the Act but which will be necessary to clarify meanings or effect of language or to settle many legal problems. True it is that any important new statute will generally provoke litigation over its meanings and effects; but such legal challenges are generally reduced to a minimum by good drafting. That is not so with this measure. Litigation under this Act will likely be excessive."