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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

<p>NATURAL RESOURCES DEFENSE COUNCIL, <i>et al.</i>,</p> <p>Plaintiffs,</p> <p>v.</p> <p>DIRK KEMPTHORNE, Secretary, U.S. Department of the Interior, <i>et al.</i>,</p> <p>Defendants.</p>
<p>SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, <i>et al.</i>,</p> <p>Defendant-Intervenors.</p>
<p>ANDERSON-COTTONWOOD IRRIGATION DISTRICT, <i>et al.</i>,</p> <p>Joined Parties.</p>

1:05-CV-1207 OWW SMS
ORDER RE MOTION FOR
RECONSIDERATION RE PROJECT
WATER (DOC. 854).

Before the Court for decision is Federal Defendants' Motion for clarification, or in the alternative, for reconsideration of previous decisions in this case interpreting the application of certain shortage provisions in the Sacramento River Settlement Contracts ("SRS Contracts") to the term "Project Water,"¹ as that

¹ The original SRS Contracts define "Base Supply" and "Project Water" in Article 1:

(d) "base supply" shall mean the quantity of water established in Articles 3 and 5 which the United States agrees may be diverted by the Contractor from [the] Sacramento River each month during the period April through October of each year without payment to the United States

1 term is used in the SRS Contracts. Doc. 855, filed June 17,
2 2009. Reclamation District No. 188, *et al.*, and Glenn-Colusa
3 Irrigation District, *et al.*, oppose clarification and/or
4 reconsideration. Doc. 859. The parties agreed to submit this
5 motion for decision without oral argument.

6 Federal Defendants' motion is appropriate, as the parties
7 recognize that the clarifying memorandum decision of June 3 2009,
8 Doc. 851 at 3 n.1, incorrectly quotes language from an SRS
9 Contract and attributes it to a DMC Contract, and inadvertently
10 failed to consider SRS Renewal Contract Article 3(i). A motion
11 for reconsideration brought under Federal Rule of Civil Procedure
12 60(b)(1) permits a court to correct its own inadvertence,
13 mistakes of fact, or mistakes of law. *Kingvision Pay-Per-View*
14 *Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999); *see*
15 *also San Luis & Delta-Mendota Water Auth. v. U.S. Dept. of*
16 *Interior*, --- F. Supp. 2d ---, 2009 WL 1362652, *9 (E.D. Cal.,
17 May 14, 2009).

18 The April 27, 2009 Supplemental Memorandum Decision Re Cross
19 Motions for Summary Judgment Addressing Applicability of *National*

20
21 for such quantities diverted.

22 (e) "Project water" shall mean all water diverted or scheduled to be
23 diverted each month during the period April through October of each year
24 by the Contractor from [the] Sacramento River which is in excess of the
25 base supply. The United States recognizes the right of the Contractor
26 to make arrangements for acquisition of water from projects of others
than the United States for delivery through the Sacramento River and
tributaries subject to agreement between the Contractor and the United
States as to identification of such water which water when so identified
shall not be deemed Project water under this contract.

27 *E.g.*, SC 04452-53 (Original Anderson-Cottonwood Irrig'n Dist. ("ACID")
Settlement Contract). The definitions remained materially the same in the
28 renewal contracts. *See, e.g.*, SAR 000049, 000052 (ACID Renewal Contract at
Article 1(a), (m).)

1 *Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct.
2 2518 (2008), to Plaintiffs' Request for Rescission of the
3 Sacramento River Settlement Contracts ("April 27, 2009
4 Decision"), addressed the question of whether the Original SRS
5 Contracts significantly constrained the Bureau's discretion to
6 modify diversions by the SRS Contractors under the Renewal
7 Contracts. Doc. 834. Under *Home Builders* and other cases
8 discussed in the April 27, 2009 Decision at pages 28-37, the
9 consultation requirements set forth in ESA § 7 do not apply if
10 the agency's discretion is "substantially constrained by a
11 federal statutory command, international treaty, or prior
12 contract, permit, or management decision." Doc. 834 at 37
13 (emphasis added). The April 27, 2009 Decision focused on the
14 language of Original SRS Contract Article 9(a), which provides:

15 During the term of this contract and any renewal
16 thereof it shall constitute full agreement as between
17 the United States and the Contractor as to the
18 quantities of water and the allocation thereof between
19 base supply and Project water which may be diverted by
20 the Contractor from the Sacramento River for beneficial
21 use on the land shown on Exhibit B which said
22 diversion, use, and allocation shall not be disturbed
23 so long as the Contractor shall fulfill all of its
24 obligations hereunder, and the Contractor shall not
25 claim any right against the United States in conflict
26 with the provisions hereof.

27 SC 04465. This "unambiguous language ... requires SRS Contract
28 renewals to be for the same volume of water, allocation between
Base Supply and Project Water, and place of use on specifically
designated land as the [O]riginal Contracts." Doc. 843 at 61.
By this language, the Original SRS Contracts did "substantially
limit[] the Bureau's discretion to modify the renewal contracts

1 in ways that would benefit the smelt," rendering section 7
2 consultation unnecessary for the renewal process under *Home*
3 *Builders*. *Id.*

4 The April 27, 2009 Decision rejected Federal Defendants' and
5 Defendant-Intervenors' arguments that certain shortage provisions
6 included in the Original and/or Renewal SRS Contracts evidenced
7 that the United States retained discretion to modify diversions
8 by the SRS Contractors. The Original SRS Contracts contain a
9 liability waiver in Article 3(g) (3):

10 The United States does not guarantee the quality of
11 water to be diverted by the Contractor and assumes no
12 responsibility for and neither it nor its officers,
agents, or employees shall have any liability for or on
account of the following:

13 ***

14 (3) Any damage whether direct or indirect arising
15 out of or in any manner caused by a shortage of
16 water whether such shortage be on account of
errors in operation, drought, or unavoidable
causes.

17 SC 4459-60 (Original ACID Contract). Substantially similar
18 language is found at Article 3(h) (4) of the renewal SRS
19 Contracts. *See, e.g.,* SAR 000057-000058.

20 The April 24, 2009 Decision distinguished the operation of
21 this liability waiver from the similar language found to operate
22 as a *force majeure* shortage provision in *O'Neill v. United*
23 *States*, 50 F.3d 677 (9th Cir. 1995):

24 In *O'Neill* [], the Ninth Circuit interpreted a nearly
25 identical shortage provision in a 1963 long-term water
26 service contract between the Bureau and Westlands Water
27 District, which released the Bureau from liability for
28 damages "arising from a shortage on account of errors
in operation, drought, or any other causes." *Id.* at 682

1 n.2. The Ninth Circuit concluded that the "contract's
2 liability limitation is unambiguous" and that "an
3 unavailability of water resulting from the mandates of
4 valid legislation constitutes a shortage by reason of
5 'any other causes.'" *Id.* at 684. This absolved Interior
6 from any liability in connection with a failure to
7 deliver water to the contractors in any given water
8 year.

9 GCID argues that, in the context of the SRS Contracts,
10 this language simply absolves Reclamation of liability
11 if water is unavailable due to hydrological conditions
12 or legal or regulatory mandates. Doc. 773 at 24. GCID
13 maintains that nothing in the SRS Contracts affords
14 Reclamation discretion to reduce the amount of water
15 that can be diverted by the SRS Contractors. *Id.*
16 Although the *O'Neill* contracts use the arguably
17 narrower "unavoidable causes" language, rather than the
18 "any other causes" language in the SRS Contracts, the
19 more critical distinction involves the express
20 reservation of discretion to reduce deliveries in the
21 *O'Neill* contracts:

22 In any year in which there may occur a shortage
23 from any cause, the United States reserves the
24 right to apportion the available water supply
25 among the District and others entitled under the
26 then existing contracts to receive water from the
27 San Luis Unit in accordance with the conclusive
28 determinations of the Contracting Officer....

29 *O'Neill*, 50 F.3d at 683 n.2. No such supply reduction
30 language is present in the SRS Contracts. In this
31 regard, the SRS Contracts are distinguishable from the
32 *O'Neill* contracts as the SRS Contracts do not grant the
33 Bureau the right to apportion differently in shortage
34 years, except as specifically mandated by the Shasta
35 Critical Year Shortage Provision.

36 Doc. 834 40-41. Because the language in Original Article 3(g) (3)
37 and Renewal Article 3(h) (4) lacked language specifically
38 reserving to the United States the right to affirmatively reduce
39 diversions by the SRS Contractors for any, as opposed to
40 unavoidable, causes, neither Original Article 3(g) (3) nor Renewal
41 Article 3(h) (4) introduce a degree of discretion into the
42 contracts sufficient to overcome the clear command in Article

1 9(a) that the SRS Contracts be renewed for the same quantity of
2 water and "allocation thereof between base supply and Project
3 water" negotiated in the Original SRS Contracts.

4 However, this ruling did not consider all of the relevant
5 contract language. The Renewal SRS Contracts, at Article 3(i),
6 also include the following, entirely new, shortage provision,
7 applicable to "Project Water":
8

9 In addition to the provisions of subdivision (h) of
10 Article 3 of this Contract, if there is a shortage of
11 Project Water because of actions taken by the
12 Contracting Officer to meet legal obligations then,
13 except as provided in subdivision (a) of Article 30 of
14 this Contract, no liability shall accrue against the
15 United States or any of its officers, agents or
16 employees for any damage, direct or indirect, arising
17 therefrom.

18 See, e.g., SAR 000058 (ACID Renewal Contract). Unlike Original
19 Article 3(g) (3) and Renewal Article 3(h) (4), Renewal Article 3(i)
20 specifically gives the Contracting Officer the right to take
21 affirmative action to reduce Project Water "to meet legal
22 obligations." This absolving language is only distinguished from
23 that found in the *O'Neill*² and DMC Contracts³ by its limitation to

24 ² Article 11 of the *O'Neill* contracts, which absolves the United States from
25 liability for water shortages arising from operational errors, drought, or any
26 other causes, provides:

27 UNITED STATES NOT LIABLE FOR WATER SHORTAGE

28 (a) There may occur at times during any year a shortage in the quantity
of water available for furnishing to the District through and by means
of the Project, but in no event shall any liability accrue against the
United States or any of its officers, agents, or employees for any
damage, direct or indirect, arising from a shortage on account of errors
in operation, drought, or any other causes. In any year in which there
may occur a shortage from any cause, the United States reserves the
right to apportion the available water supply among the District and

1
2 others entitled under the then existing contracts to receive water from
3 the San Luis Unit in accordance with conclusive determinations of the
4 Contracting Officer as follows:

5 (i) A determination shall be made of the total quantity of water
6 agreed to be accepted during the respective year under all
7 contracts then in force for the delivery of Central Valley Project
8 water by the United States from the San Luis Unit, the quantity so
9 determined being hereinafter referred to as the contractual
10 commitments;

11 (ii) A determination shall be made of the total quantity of water
12 from the Central Valley Project which is available for meeting the
13 contractual commitments, the quantity so determined being
14 hereinafter referred to as the available supply;

15 (iii) The total quantity of water agreed to be accepted by the
16 District during the respective year, under Article 3 hereof, shall
17 be divided by the contractual commitments, the quotient thus
18 obtained being hereinafter referred to as the District's
19 contractual entitlement; and

20 (iv) The available supply shall be multiplied by the District's
21 contractual entitlement and the result shall be the quantity of
22 water required to be delivered by the United States to the
23 District for the respective year, but in no event shall such
24 amount exceed the total quantity of water agreed to be accepted by
25 the District pursuant to Article 3 hereof.

26 Insofar as determined by the Contracting Officer to be practicable, the
27 United States will, in the event a shortage appears probable, notify the
28 District of such determinations in advance of the irrigation season.

(b) In the event that in any year there is delivered to the District by
reason of any shortage or apportionment as provided in subdivision (a)
of this article or any discontinuance or reduction of service as set
forth in subdivision (d) of Article 9 hereof, less than the quantity of
water which the District otherwise would be entitled to receive, there
shall be made an adjustment on account of the amounts paid to the United
States by the District for water for said year in a manner similar to
that provided for in Article 7. To the extent of such deficiency, such
adjustment shall constitute the sole remedy of the District or anyone
having or claiming to have by, through, or under the District the right
to the use of any of the water supply provided for herein.

(c) The United States assumes no responsibility with respect to and does
not warrant the quality of the water to be furnished pursuant to this
contract....

O'Neill, 50 F.3d at 683 n.2.

³ The DMC Contracts' shortage provisions, which have also been interpreted to
have *force majeure* effect, are at Article 12(b)-(c):

(b) If there is a Condition of Shortage because of error in physical
operations of the Project, drought, other physical causes beyond the
control of the Contracting Officer or actions taken by the Contracting

1 only satisfying legal obligations. The *O'Neill* and DMC Contracts

2
3 Officer to meet legal obligations then, except as provided in
4 subdivision (a) of Article 18 of this Contract, no liability shall
accrue against the United States or any of its officers, agents, or
employees for any damage, direct or indirect, arising therefrom.

5 (c) In any Year in which there may occur a Condition of Shortage for
6 any of the reasons specified in subdivision (b) of this Article, and
subject to subdivision (d) of this Article, the Contracting Officer will
7 first allocate the available project Water consistent with the draft CVP
M&I Water Shortage Policy on the effective date of this Contract as
8 finally adopted after environmental review for determining the amount of
Project Water available for delivery to the Project Contractors.
9 Subject to the foregoing allocation, in any year in which there may
occur a Condition of Shortage, the Contracting Officer shall then
10 apportion Project Water among the Contractor and others entitled to
Project Water from Delta Division Facilities under long-term water
11 service or repayment contracts (or renewals thereof or binding
commitments therefore) in force on February 28, 2005, as follows:

12 (1) The Contracting officer shall make an initial and subsequent
determination as necessary of the total quantity of Project Water
13 estimated to be scheduled or actually scheduled under subdivision
(b) of Article 4 of this Contract and under all other long-term
14 water service or repayment contracts then in force for the
delivery of Project Water by the United States from Delta Division
15 Facilities during the relevant Year, the quantity so determined
being hereinafter referred to as the scheduled total;

16 (2) A determination shall be made of the total quantity of
Project Water that is available for meeting the scheduled total,
17 the quantity so determined being hereinafter referred to as the
available supply;

18 (3) The total quantity of Project Water estimated to be
scheduled or actually scheduled by the Contractor during the
19 relevant Year, under subdivision (b) of Article 4 hereof, shall be
divided by the scheduled total, the quotient thus obtained being
20 hereinafter referred to as the Contractor's proportionate share;
and

21 (4) The available supply shall be multiplied by the contractor's
22 proportionate share and the result shall be the quantity of
Project Water made available by the United States to the
23 Contractor for the relevant Year in accordance with the schedule
developed by the Contracting Officer under subdivision (c)(1) of
24 this Article 12, but in no event shall such amount exceed the
Contract total. In the event the Contracting Officer subsequently
25 determines that the Contracting Officer can increase or needs to
decrease the available supply for delivery from Delta Division
26 Facilities to long-term water service and repayment Contractors
during the relevant Year, such additions or reductions to the
27 available supply shall be apportioned consistent with
subparagraphs (1) through (4), inclusive.

28 See, e.g., SAR 001068-70 (Patterson Irrig'n Dist. Renewal Contract).

1 contain additional, specific language reserving to the United
2 States the power to allocate Project Water and describing the
3 procedures for allocating available Project Water, SRS Renewal
4 Contract Article 3(i) specifically and unmistakably reserves to
5 the United States the right to reduce Project Water diversions by
6 SRS Contractors. Article 3(i) also operates as a complete *force*
7 *majeure* provision with respect to Project Water.
8

9 Because supplies may only be reduced when necessary to meet
10 legal obligations, this does not create a level of discretion in
11 the Contracting Officer or the Bureau that satisfies the *Home*
12 *Builders* standard and does not change the overall conclusion of
13 the April 27, 2009 Decision. Legal obligations are defined by
14 law and must be performed without any exercise of discretion.
15 Even if Article 3(i) was the product of mutual negotiation, it
16 only affects the prior allocation scheme embodied in Original
17 Article 9(a), by reducing available Project Water required to
18 satisfy legal obligations, a nondiscretionary duty. This is not
19 a grant of discretion to the Bureau that triggers application of
20 ESA § 7 consultation requirements.
21

22 Article 3(i) of the SRS Renewal Contracts creates an
23 additional question: if 3(i) is interpreted to operate as a
24 total *force majeure* shortage provision with respect to Project
25 Water, does it conflict with the Shasta Critical Year Shortage
26 Provision, which leaves the Bureau no discretion but to reduce
27
28

1 Project Water and Base Supply by no more and no less than 25%
2 when defined critical shortage conditions exist?

3 CRITICAL YEAR REDUCTION

4 5. In a critical year the Contractor's base supply and
5 project water during the period April through October
6 of the year in which the principal portion of the
critical year occurs and each monthly quantity of said
period shall be reduced by twenty-five percent (25%).

7 SC 04461 (original ACID Settlement Contract) (emphasis added).

8 "Critical year" is precisely defined in Article 1(h) as:

9
10 any year in which either of the following eventualities
11 exists:

12 (1) The forecasted full natural inflow to Shasta
13 Lake for the current water year, as such forecast
14 is made by the United States on or before February
15 15 and reviewed as frequently thereafter as
conditions and information warrant, is equal to or
less than three million two hundred thousand
(3,200,000) acre-feet; or

16 (2) The total accumulated actual deficiencies
17 below four million (4,000,000) acre-feet in the
18 immediately prior water year or series of
19 successive prior water years each of which had
inflows of less than four million (4,000,000)
acre-feet, together with the forecasted deficiency
for the current water year, exceed eight hundred
thousand (800,000) acre-feet.

20 For the purpose of determining a critical year the
21 computed inflow to Shasta Lake under present upstream
22 development above Shasta Lake shall be used as the full
23 natural inflow to Shasta Lake. In the event that major
24 construction completed above Shasta Lake after
25 September 1, 1963, materially alters the present
26 regimen of the stream systems contributing to Shasta
27 Lake, the computed inflow to Shasta Lake used to define
28 a critical year will be adjusted to eliminate the
effect of such material alterations. After
consultation with the State, the Weather Bureau, and
other recognized forecasting agencies, the Contracting
Officer will select the forecast to be used and will
make the details of it available to the Contractor.
The same forecasts used by the United States for the
operation of the Project shall be used to make the
forecasts hereunder.

1 SC 04453-54 (original ACID Settlement Contract).⁴ Pursuant to
2 the nondiscretionary Shasta Critical Year Shortage Provision,
3 Base Supply and Project Water "shall" be reduced by 25% if, and
4 only if, the objective hydrologic thresholds described in Article
5 1(h) are triggered.

7 The Shasta Critical Year Shortage Provision and Article 3(i)
8 can be harmonized to give effect to both provisions. The Shasta
9 Critical Year Shortage Provision reflects the historic natural
10 hydrology of the Sacramento River watershed and by a settlement
11 process reduced to writing a rough approximation of the effect
12 that critically dry hydrologic conditions had on the SRS
13 Contractors' underlying water rights.⁵ When hydrologic
14 conditions reduce available water supplies by a certain,
15 significant amount, diversions by the SRS Contractors mandatorily
16 must be reduced by 25%.

18 At the same time, by mutual agreement during the renewal
19 process, Article 3(i) was added to the SRS Renewal Contracts,
20 giving the United States the additional authority to reduce
21 Project Water supplies when required to meet legal obligations.
22 Article 3(i) operates to permit such reductions in all water year

24 ⁴ The relevant language in the renewal contracts is not changed in any
25 material sense. Compare *id.* to SAR 50-51, 58-59.

26 ⁵ As discussed in the April 27, 2009 Decision, the water studies C-2BR and
27 C-650-B, formed the principal bases for determining each SRS Contractors'
28 entitlement to base supply. See Doc. 834 at 22 (citing SC 03685). Those
studies revealed that, periodically, there were very dry years when the
natural flow of the Sacramento River was not adequate to meet all demands.
See Decl. of Marc Van Camp, Doc. 775 at ¶37.

1 types, so long as those reductions are taken to meet legal
2 obligations.

3 The role of the court is limited to interpretation of
4 contractual language. So long as all provisions of a contract
5 can be given reasonable and harmonious interpretations, the
6 intent behind the SRS Contractors' consent to the addition of
7 Renewal Article 3(i), which consent pre-dated the Supreme Court's
8 decision in *Home Builders*, is not relevant or admissible under
9 the parol evidence rule. See *Pace v. Honolulu Disposal Serv.,*
10 *Inc.*, 227 F.3d 1150, 1158 (9th Cir. 2000).

12 For the reasons set forth above, Federal Defendants' motion
13 for reconsideration is GRANTED. Article 3(i) in the SRS Renewal
14 Contracts operates as a *force majeure* shortage provision with
15 respect to Project Water only when Project Water must be used to
16 meet legal obligations. The April 24, 2009 Decision with respect
17 to the application of *Home Builders* is not changed by the grant
18 of reconsideration.

20 Federal Defendants shall submit a form of order consistent
21 with this and previous Memoranda Decisions within ten (10) days
22 following electronic service.

24 SO ORDERED

25 Dated: August 6, 2009

26 /s/ Oliver W. Wanger
27 Oliver W. Wanger
28 United States District Judge