ENVIRONS
ENVIRONMENTAL LAW & POLICY JOURNAL
UNIVERSITY OF CALIFORNIA, DAVIS
SCHOOL OF LAW

VOLUME 35 FALL 2011 NUMBER 1

Protecting the Source: The Impact of California's Area of Origins Protections on Federal Exports of Water from Northern California to Southern California

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I. INTRODUCTION

California exists today as we know it due in part to the development of massive water storage and transport projects that carry water from the wet northern part of the state to arid Central and Southern California. California's dynamic economy, famous agricultural production, and booming population growth over the past eighty years are inextricably tied to water transportation and distribution around the state. However, tension between exporters and importers of California water also engendered conflict, strife, and ecological devastation. To mitigate these tensions, the California Legislature developed a body of water law that attempts to regulate the north to south transfer of California water in a manner that protects the water rights of residents in the areas from which water is exported. These laws include the so-called "area of origin" protections. Area of origin laws prioritize the water rights of people residing in areas where California water originates. This allows people residing in wet areas to exercise their water rights before the water can be exported by either of California's major water transport projects, the federal Central Valley Project ("CVP") or the state-run State Water Project ("SWP"). Since sufficient water generally existed to supply the needs of area of origin residents and the rest of the state, these area of origin protections have been dormant since their creation in 1933. As California's growing population puts increasing pressure on the state's water supplies[1], these protections will assuredly be invoked with increasing frequency to resolve conflicts between residents of areas of origin and out of area water users battling for access to the same water.

On February 11, 2010, the Tehama-Colusa Canal Authority ("TCCA") filed a lawsuit against the United States Bureau of Reclamation ("Reclamation") alleging that Reclamation's exportation of CVP water violated California's area of origin protections.[2] TCCA, an association of area of origin water users with CVP water contracts, alleges that area of origin protections require Reclamation provide TCCA members with their full allotment of CVP contract water before exporting the water out of the area. Reclamation argues that it has discretion when allocating project water and that TCCA can only assert area of origin priority by filing for and perfecting an appropriative water right with the State Water Resources Control Board ("SWRCB").[3] This case has important

[1] California's population grew from 5,677,251 people in 1930 to 37,253,956 million people in 2010. California's population is expected to surpass 46,000,000 people by 2030. Negative Population Growth, State Population Facts, http://www.npg.org/california.html (last visited Nov. 8, 2011).

[2] Complaint For Declaratory and Injunctive Relief, Tehama-Colusa Canal Auth. v. U.S. Dep't. Of Interior, No. 1:10-cv-0712 OWW DLB (E.D. Cal. Feb. 11, 2010) [hereinafter *Complaint*].

[3] In California, a party establishes an appropriative water right by filing for and obtaining a water right permit from the State Water Resources Control Board ("SWRCB"). This right is formally consummated or "perfected" when the applicant completes the necessary works for the

ramifications for the development, scope, and implementation of area of origin statutes and will likely affect future CVP water allocations and impact millions of Californians.

This article will review the development of water transport and area of origin protections in California. It will discuss how area of origin laws affects the north to south transfer of water by California's massive federal water project known as the Central Valley Project ("CVP"). Section I discusses the unequal distribution of water resources in California and how developments in California agriculture spurred the creation of the CVP. Section II examines the history, infrastructure and current operations of the CVP. The section concludes with an analysis of the CVP's impact on California agriculture and the economy in general. Section III examines the legislative roots of the area of origin protections, summarizes the relevant statutes and examines the development of these statutes through subsequent case law. Section IV assesses whether California's area of origin protections, as developed in the cases discussed in the previous section, guarantee CVP contractors located within an area of origin priority to stored CVP water over out of area contractors as claimed by the plaintiffs in *Tehama-Colusa Canal Authority v. United States Department of the Interior*.[4]

II. WATER AND THE DEVELOPMENT OF CALIFORNIA AGRICULTURE

Water transport in California developed to address natural disparities between northern and southern water resources. Generally speaking, Northern California has abundant water resources but less suitable land for farming, whereas Central and Southern California lack water but have plentiful sunshine and mild temperatures that are ideal for agriculture.[5] Highly variable levels of precipitation in California, with Northern California receiving the bulk of the annual rain and snow and the central and southern areas of the state receiving significantly less creates this disparity in water resources. Certain areas of Northern California, for example, often receive over one hundred inches of precipitation a year, whereas sixty-five percent of the state receives less than twenty inches a year.[6]

Rainfall in California is seasonal with the vast majority of rain and snow

water use, puts the allocated water to full and beneficial use and meets all other terms and conditions of the SWRCB permit. At this point the appropriative right is perfected and the SWRCB officially licenses the water users appropriative right to the allocated water. *California Water Rights Fact Sheet*, NATIONAL SCIENCE AND TECHNOLOGY CENTER, Aug. 15, 2001, http://www.blm.gov/nstc/WaterLaws/pdf/California.pdf.

[4] *Complaint*, *supra* note 2, at 4-7.

[5] Where Does California's Water Come From?, http://aquafornia.com/where-does-californias-water-come-from (Aug. 13, 2008).

[6] *Id*.

falling in the wet winter months and little precipitation occurring in the hot summer months. This means that much of the fresh water naturally available in California during the summer occurs as runoff from the previous winter's snow and rain. To compound the unequal levels of precipitation between Northern and Southern California, seventy percent of California runoff occurs north of Sacramento. This leaves little naturally occurring water in Central and Southern California during the dry season, where seventy-five percent of California's urban and agricultural water needs occur today.[7] The natural disparity in water supplies between the northern and southern parts of the state was evident to early settlers in the Central Valley who required additional water to fully avail themselves of the area's otherwise optimal agricultural conditions.

Water transport from the wet, but sparsely populated, northern areas of the state to the south was initially contemplated as a means of providing irrigation and municipal water to early settlers of California's Central Valley. Water was crucial because the settlers of the Central Valley were engaged in large-scale agriculture to provide food and fiber for the influx of people moving to California after the discovery of gold in 1848.[8] The first post-gold rush settlers in the Central Valley engaged primarily in cattle, and later sheep ranching, to provide meat for the state's exploding population.[9] Over time, Central Valley settlers saw their water needs increase as agriculture gradually supplanted ranching as a result of California's population growth, increased cost of land and a disastrous drought in 1863-1864 that destroyed much of California's cattle stock.[10] Early Central Valley agriculture primarily consisted of rain-fed farming of wheat and barley that did not require significant irrigation water.[11] Between 1890 and 1930, however, agriculture in the Central Valley experienced a major transformation as a complex interaction of factors would "forever shift California agriculture from extensive-dryland agriculture to intensive-irrigated agriculture."[12]

The development of irrigation, influxes of cheap agricultural labor and improved abilities to transport California produce to distant markets all contributed to a rapid shift from extensive dryland farming to intensive irrigated

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[7] *Id*.

[8] LAWRENCE J. JELINEK, HARVEST EMPIRE: A HISTORY OF CALIFORNIA AGRICULTURE 29 (Heinle & Heinle Pub. 1982) (1982).

[9] WARREN E. JOHNSTON & ALEX F. MCCALLA, WHITHER CALIFORNIA AGRICULTURE: UP, DOWN, OR OUT?: SOME THOUGHTS ABOUT THE FUTURE 3-4 (Gianni Foundation 2004), *available at* http://giannini.ucop.edu/pdfs/giannini04-1b.pdf.

[10] Project Details – Central Valley Project, http://www.usbr.gov/projects/Project.jsp?proj_Name= Central+Valley+Project (last visited Nov. 9, 2011).

[11] JOHNSTON & MCCALLA, *supra* note 9 at 4.

[12] JOHNSTON & MCCALLA, *supra* note 9 at 4.

farming.[13] Due to low average annual rainfall occurring primarily during a five month period from December through April, farmers in the southern part of the valley often faced water shortages in the summer and autumn when water is most needed to irrigate crops.[14] Farmers resorted to pumping water from wells to meet their irrigation needs but, as irrigated agriculture expanded, water pumped from the ground greatly exceeded the groundwater basin's natural recharge from rainfall and stream flows.[15] The water supply problem was exacerbated by California's rapid population growth during this time, which increased municipal water demands for cities in the state.[16]

The combination of the state's rapid population growth, increase in irrigated agriculture and the Central Valley's semi-arid climate and seasonal rainfall led to a growing realization amongst settlers that there was insufficient water for their needs. Furthermore, population centers relying on water from the Sacramento-San Joaquin Delta suffered from water shortages during the dry summer and fall months when the inflowing water was low.[17] In order to sustain the Central Valley's agriculture-based economy and to supply water for California's growing cities, it became clear that water needed to be regulated, transported, and distributed from California's wet areas to its dry areas.

III. THE CENTRAL VALLEY PROJECT ("CVP")

A. Creation of the CVP

Development of California's water resources to better supply farmers and municipalities in the State's dry areas became a major concern of both the state and federal government when California attained statehood in 1850. California's first legislature immediately enacted various water laws and gave the State Surveyor General responsibility for water "development" necessary to sustain the State's rapidly growing population.[18] In 1873, the federal government conducted a study of the Sacramento and San Joaquin Rivers, which included plans for a system of canals that would deliver water from the

[13] JOHNSTON & MCCALLA, *supra* note 9, at 5 ("The share of intensive crops in the value of total output climbed from less than four percent in 1879 to over twenty percent in 1889. By 1909 the intensive share reached nearly one-half, and by 1929, it was almost four-fifths of the total").

[14] Annual rainfall averages five inches a year in the southern Central Valley and thirty inches a year in the northern Central Valley. Project Details – Central Valley Project, *supra* note 10.

[15] *Id*.

[16] California State Water Project – History, http://www.water.ca.gov/swp/history.cfm (last visited Nov. 9, 2011).

[17] Project Details – Central Valley Project, *supra* note 10; *see* California State Water Project – History, *supra* note 16.

[18] ERIC A. STENE, THE CENTRAL VALLEY PROJECT 3 (U.S. Department of Interior - Bureau of Reclamation), *available at* http://www.usbr.gov/history/ProjectHistories/CVP%20OVERVIEW.pdf.

Sacramento River to the San Joaquin Valley. In 1878, the state government performed its first broad study of California water issues.[19] For the next forty plus years various parties conducted studies and made proposals for large-scale water transport and storage projects. Little progress occurred until the state legislature authorized and funded the creation of a comprehensive water plan in 1921.[20]

After receiving and studying fourteen detailed reports on all of California's water issues over the course of nine years, State Engineer Edward Hyatt finally completed a "State Water Plan" for north-to-south water transfer in California in 1931.[21] Spurred by a series of droughts in the 1920s that underscored the need for increased water in the San Joaquin Valley, the California Legislature passed the Central Valley Project Act in 1933. This Act authorized the funding and construction of the water transport infrastructure detailed in the 1931 State Water Plan.[22] Due to the Great Depression, California could not fund the project and the federal government assumed control of the project in 1935 when Congress authorized funding and construction of the CVP.[23] The Bureau of Reclamation officially took over operation of the CVP and began construction in October of 1937 on what would become California's first major water storage and transport system.[24] Major construction on CVP infrastructure continued for the next thirty plus years and by the 1970s the CVP was one of the largest water storage and transport systems in the world.[25] The CVP is now one of two massive water storage and conveyance systems functioning in California.[26]

B. The CVP Today

The CVP extends from the Cascade Range in the north to the semi-arid but fertile plains along the Kern River in the south.[27] The CVP consists of twenty dams and reservoirs, eleven power plants, and 500 miles of major canals.[28] It manages over nine million acre-feet of water and annually delivers over seven million acre-feet of water for agricultural, urban, and wildlife use to over 250

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19 *Id*.

20 *Id*.

21 California State Water Project – History, *supra* note 16.

22 Ivanhoe Irrigation Dist. v. All Parties and Persons, 306 P.2d 824, 834 (Cal. 1957).

23 Project Details – Central Valley Project, *supra* note 10.

24 *Id*.

25 State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d 189, 204 (Cal. Ct. App. 2006).

26 The state of California owns and operates another water conveyance system known as the State Water Project ("SWP") that was developed in the second half of the twentieth century. Although the CVP and SWP have similar functions and overlap operationally to a certain degree, they are two distinct systems. California State Water Project Overview, http://www.water.ca.gov/swp/ (last visited Nov. 09, 2011).

27 State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 203-04.

28 Project Details – Central Valley Project, *supra* note 10.

long-term water contractors.[29] The five million acre-feet of water the CVP annually delivers to farms irrigates roughly three million acres, or approximately one-third of the agricultural land in California.[30] The CVP also supplies water to many urban areas in Northern and Central California, including Redding, Sacramento, most of Santa Clara County, Stockton, and Fresno.[31] In addition to water storage and regulation, the CVP produces hydroelectric power, promotes flood control, and provides opportunities for fishing, boating and other water related recreation.[32]

CVP facilities include reservoirs on the Sacramento, Trinity, American, Stanislaus, and San Joaquin Rivers.[33] The CVP's north-to-south conveyance of water begins with the formation of Shasta Lake and Trinity Lake by a pair of dams in the mountains north of the Sacramento Valley.[34] Water from these lakes is then released into the Sacramento River, which flows to the Sacramento-San Joaquin Delta at controlled rates. Before the water reaches the San Francisco Bay it is intercepted and transported to the Delta-Mendota Canal, which conveys water southwards towards the San Joaquin Valley. This water enters the San Luis Reservoir and the San Joaquin River at Mendota Pool before eventually reaching irrigation canals in the San Joaquin Valley. Friant Dam captures water on the San Joaquin River upstream of the Mendota Pool and diverts this water southwards to the Tulare Lake area of the San Joaquin Valley. New Melones Lake stores water from the Stanislaus River, a major tributary to the San Joaquin River, for use during dry periods.

Today the CVP operates pursuant to water right permits and licenses issued to the Bureau of Reclamation by the SWRCB to appropriate water in accordance with California's appropriative water rights system.[35] The SWRCB allows the CVP to "store water during wet periods, divert water that is surplus to the Delta, and re-divert [CVP] water that has been stored in upstream reservoirs."[36] Although the CVP is a federal project operated by Reclamation, federal law provides that "Reclamation obtain water rights for its projects and administer its projects pursuant to State law relating to the control, appropriation, use, or distribution of water used in irrigation, unless the State law is inconsistent with

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[29] *Id*.; *see* State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 203-04.

[30] Project Details – Central Valley Project, *supra* note 10.

[31] State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 204.

[32] Project Details – Central Valley Project, *supra* note 10.

[33] *Id*.

[34] *Id*.

[35] BUREAU OF RECLAMATION, BIOLOGICAL ASSESSMENT ON THE CONTINUED LONG-TERM OPERATIONS OF THE CENTRAL VALLEY PROJECT AND THE STATE WATER PROJECT 1-1 (U.S. Bureau of Reclamation 2008), *available at* http://www.usbr.gov/mp/cvo/OCAP/sep08_docs/OCAP_BA_001_ Aug08.pdf.

[36] *Id*.

clear Congressional directives."[37]

After the CVP's water storage and transport systems became operational and Reclamation obtained water permits from the SWRCB, Reclamation began entering into contacts with water districts, irrigation districts, and others for CVP water.[38] The CVP now provides water to roughly 250 long-term contractors. Reclamation is contractually bound to deliver water to its contractors according to the terms of their contracts and most contracts have a term of forty years.[39]

C. Impacts of the CVP

The CVP had a tremendous impact on California. First and foremost, the CVP's water storage and transport plays a critical role in California agriculture. California agriculture is a $37 billion industry that generates approximately $100 billion in related economic activity[40] and employs roughly 1.1 million people.[41] California farms produce more than half of the nation's fruits, nuts, and vegetables and they generate twelve percent of the United States total agricultural revenue.[42] The CVP delivers essential water to more than a third of California's farms and was essential in transforming the San Joaquin Valley from a semi-arid desert into one of the world's most productive agricultural zones.[43] Due to irrigation water provided in large part by the CVP, the San Joaquin Valley now accounts for sixty percent of California's $38 billion annual agricultural sales.[44]

The CVP provides municipal water for over one million households and generates hydroelectricity for over two million Californians.[45] The CVP also provides more than 800,000 acre-feet of water annually for fish and wildlife protection and 410,000 acre-feet to state and federal wildlife refuges and

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[37] *Id*. at 1-6.

[38] *Id*. at 1-7.

[39] *Id*.

[40] CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, AGRICULTURAL STATISTICS 2010 CROP YEAR 1-2 (California Department of Food and Agriculture 2010), *available at* http://www.nass.usda.gov/Statistics_by_State/California/Publications/California_Ag_Statistics/2010cas-ovw.pdf.

[41] California Farm Water Coalition, Myths and Facts about CVP Water Contracts – Information, http://www.cfwc.com/Information/myths-and-facts-about-cvp-water-contracts.html (last visited Nov. 9, 2011).

[42] CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, CALIFORNIA AGRICULTURAL RESOURCE DIRECTORY 2006 26 (California Department of Food and Agriculture 2006), *available at* http://www.cdfa.ca.gov/Statistics/PDFs/ResourceDirectory_2006.pdf.

[43] *Id*.

[44] Edward Thompson, Jr., *American Farmland Trust: Reinventing Agricultural Conservation in California – Focus on Farmland*, CALIFORNIA PARTNERSHIP FOR THE SAN JOAQUIN VALLEY, Nov. 10, 2010, http://www.sjvpartnership.org/announcement.php?ann_id=516.

[45] Project Details – Central Valley Project, *supra* note 10.

wetlands.[46] In addition to delivering water and generating power, the CVP provides important flood protection that facilitated the growth of cities along the rivers in the Central Valley, which previously flooded each spring.[47] Finally, CVP releases of freshwater reserves help combat salt water intrusion in the Sacramento-San Joaquin Delta.[48]

Despite transforming California agriculture and playing a key role in the state's powerful economy, the CVP also had devastating environmental consequences. CVP infrastructure severely reduced the salmon populations in four major rivers by blocking historic salmon runs.[49] The CVP also destroyed many natural river environments.[50] Intensive irrigated farming facilitated by the CVP creates contaminated runoff that pollutes rivers and groundwater.[51] CVP reservoirs submerged many archeological sites and ninety percent of the land belonging to one northern California Native American tribe.[52] Congress attempted to address some of these problems when it passed the Central Valley Project Improvement Act in 1992 that mandated changes in the management of the CVP for the protection, restoration, and enhancement of fish and wildlife.[53]

IV. AREA OF ORIGIN PROTECTIONS

A. California's Area of Origin Statutes

The California Legislature has created a variety of Water Code provisions to protect the area of origin water rights of Californians living in the state's wet areas. These area of origin rules include the Watershed Protection Act, Water Code sections 11460 through 11463; the County of Origin protection, Water Code section 10500; the Delta Protection Act, Water Code sections 12201 through 12204; and the protected area provisions, Water Code sections 1215 through 1222. Generally speaking, these statutes mandate that large-scale water transport systems, like the CVP, not deprive an area where water originates of the prior right to all water reasonably required to adequately meet the beneficial needs of the area and its inhabitants.

Area of origin protections are rooted in the development of California's two

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[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] NRDC: Restoring the San Joaquin River, http://www.nrdc.org/water/conservation /sanjoaquin.asp (last visited Nov. 9, 2011).

[50] *Id*.

[51] *Id*.

[52] Winnemem-Wintu Tribal Issues: Raising Shasta Dam, http://www.centerforwateradvocacy.org/topics/view/24436/ (last visited Nov. 9, 2011).

[53] Bureau of Reclamation CVPIA Homepage, http://www.usbr.gov/mp/cvpia/index.html (last visited Nov. 9, 2011).

major water projects, the CVP and the SWP. In 1927 California passed the Feigenbaum Act authorizing the State to obtain the rights to unappropriated water, which might later be needed for a comprehensive state water project.[54] The Feigenbaum Act made previously unappropriated water no longer available for appropriation by private parties.[55] In response to the concerns of residents in areas from which the projects would potentially transfer water, the legislature amended the Feigenbaum Act in 1931. These amendments addressed residents' concerns by providing a number of protections for those counties from which water was being drawn.[56]

The most important step in the evolution of area of origin protections occurred with the passage of the Central Valley Project Act of 1933. This Act authorized the funding and construction of the CVP. During the Central Valley Act's legislative process, area of origin residents insisted the Act contain provisions guaranteeing they have first access to water originating in their area. Residents argued that excess water should only be exported to drier areas of the state once area of origin residents received their water.[57] The legislature addressed these concerns in several key provisions of the Act, now codified as California Water Code sections 11460-11463. These provisions, known as the "Watershed Protection Act" ostensibly gave inhabitants of the watersheds of origin priority over out of area users.[58] The relevant sections provide as follows:

> Section 11460
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> In the construction and operation by the [Department of Water Resources] of any project under the provisions of this part, a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.[59]
>
> Section 11462
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> The provisions of this article shall not be so construed as to create any new

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[54] CAL WATER CODE §§ 10500-10507 (West 1971 & West Supp. 1988).

[55] 25 Op. Cal. Att'y Gen. 8, 11 (1955).

[56] *Id*.

[57] Richard L. Wood, *Area-Of-Origin Rights: A Promise Kept?*, 14 CAL. WATER L. POL'Y REP., 291, 292 (2004).

[58] What is a Watershed?, http://geoggeol.mansfield.edu/what-can-i-study/watershed-management/what-is-a-watershed/ (last visited Nov. 9, 2011). Although the relevant California Water Code sections do not explicitly define "watershed," the Environmental Protection Agency defines watersheds as the areas of land where all the water that is under it or drains off of it goes to the place. The boundary of a watershed is determined topographically by ridges, or high elevation points.

[59] CAL. WATER CODE § 11460 (West 2011).

> property rights other than against the department as provided in this part or to require the department to furnish to any person without adequate compensation therefore any water made available by the construction of any works by the department.[60]
>
> Section 11463
>
> In the construction and operation by the department of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the department unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange.[61]

Section 11463 explicitly applies these protections to the original 1933 state-run CVP.[62] It protects area of origin residents by mandating that inhabitants of a watershed where water originates not be deprived of the prior right to all of their reasonable water needs by the "construction and operation of . . . any project" of the Department of Water Resources.[63] These state watershed protections now apply to the federally operated CVP pursuant to federal law requiring that Reclamation projects comply with state water law.[64] Therefore, the CVP "must comply with the watershed statute and related Water Code sections (such as section 11128, which explicitly requires the Bureau, as operator of the CVP, to comply with the watershed statute)."[65]

The language of the Watershed Protection Act appears to give watersheds of origin a "paramount and preferential right to the use in the future" of CVP water originating in watersheds of origin.[66] The Act does not qualify the rights of watershed of origin water users; the right is only limited by the amount of water that can be beneficially used within the watershed. This provides people living in an area where water originates (the Sacramento Valley, for example) priority to all the water originating in their watershed that they can beneficially use over

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[60] CAL. WATER CODE § 11462 (West 2011).

[61] CAL. WATER CODE § 11463 (West 2011).

[62] Recall that the original CVP was a state entity until the federal government took control in 1935. *See* Section III, Part A of this article for discussion of CVP from state to federal control.

[63] Wood, *supra* note 57, at 292; *see* CAL. WATER CODE § 11128 (West 2011) ("The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof…").

[64] 43 U.S.C. § 383 (2006); California v. United States, 438 U.S. 645, 678 (1978).

[65] Wood, *supra* note 57, at 292; *see* CAL. WATER CODE § 11128 (West 2011).

[66] Memorandum from Kevin O'Brien on Area of Origin Protections 3, *available at* http://www.norcalwater.org/water-rights/area-of-origin-summary/.

any and all parties living outside the watershed.

The Delta Protection Act of 1959 marked the next step in the development of area of origin protections.[67] This act required the coordination of CVP and SWP operations to maintain water quality standards. The Delta Protection Act incorporates by reference both the county of origin and watershed protection statutes. It provides that no person, corporation or government agency[68] can divert water from the channels of the Sacramento-San Joaquin Delta to which local users of Delta water are entitled.[69]

The final development of area of origin protections occurred in 1984 with the passage of the "protected areas" statutes. These statutes mandate that water exporters shall not deprive designated protected areas of the prior right to all the water reasonably required to adequately supply the beneficial needs of the protected area.[70] The numerous protections enacted since 1927 indicates the California Legislature's commitment to protecting area of origin residents' access to local water prior to the exportation of that water to drier areas of the state.

B. Interpretation of the Watershed of Origin Protections

Despite their potential to significantly impact the allocation of water in California, the area of origins statutes have rarely been invoked in California water disputes since they became law in 1933. As a result, courts have had limited opportunities to interpret the scope and application of these statutes. For many years a 1955 Attorney General's Opinion stating that parties could assert area of origin protections by applying for and receiving an appropriative right to the water in question was considered the primary authority on the topic.[71] The SWRCB interpreted this to mean that area of origin CVP contractors had no priority over out of area CVP contractors and that area of origin contractors could only invoke protections by obtaining a new water right.[72]

In 2006 and 2007 the California appellate courts made several rulings interpreting the area of origin statutes. In *State Water Resources Control Board Cases* ("*SWRCB Cases*"), the California Court of Appeal stated that area of

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[67] Bay-Delta: An Introduction, http://baydelta.wordpress.com/2009/09/20/bay-delta-an-introduction/ (Sept. 20, 2009).

[68] This includes public and government agencies at the state and federal level. *See* CAL. WATER CODE §§ 1201, 1203 (West 2011).

[69] CAL. WATER CODE §§ 1201, 1203 (West 2011).

[70] CAL. WATER CODE § 1215.5 (West 2011).

[71] David R.E. Aladjem & Jennifer L. Harder, *The Robie Decision and the Future of California Water Law*, CAL. WATER L. & POL'Y REP 223, 226-27 (2006).

[72] State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 255-56 (stating "not give any priority to an inhabitant of an area of origin who already has (or seeks) a contract with the Bureau (or the Department) for water from the area of origin").

origin protections *do* apply to area of origin CVP contractors.[73] In the next two years, however, the California Court of Appeal held in *El Dorado Irrigation District v. State Water Resources Control Board* and *Phelps v. State Water Resources Control Board* that area of origin protections only apply to natural or abandoned flows and not to previously stored water. The 1955 Attorney General's Opinion and subsequent judicial interpretations of the California's area of origin protections are relevant to the analysis of *Tehama-Colusa Canal Authority v. United States Department of the Interior.*

1. 1955 Attorney General's Opinion

The 1955 Attorney General's Opinion stated that inhabitants of an area of origin have an inchoate right to the water originating in that area. However, the right only took effect if an area of origin resident applied to the SWRCB for a water right and put the water to reasonable and beneficial use.[74] As area of origin inhabitants developed needs for water they could apply for and perfect a right to the amount of water needed. Upon obtaining a valid water right, the inhabitants would have priority over the prior water rights of any out of area users. Although the language of the watershed protection statute itself does not demand a formal application to appropriate water, the Attorney General's 1955 Opinion suggests otherwise.[75] It states that watershed of origin protections can only be asserted by an inhabitant of the watershed through a formal application to appropriate water within the watershed.[76]

The SWRCB interpreted the Attorney General's discussion to mean that the area of origin statutes do not give area of origin inhabitants who contract for CVP water any priority over out of area CVP contractors.[77] According to the SWRCB, to invoke area of origin protection, qualifying inhabitants must apply for and obtain their own water rights even if they had an existing contract to CVP water. This view was opposed by many who believed that area of origin protections applied either by applying for an appropriative right or by contracting with one of the projects.[78]

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[73] *Id*.

[74] 25 Op. Cal. Att'y Gen. 8 (1955).

[75] *Id*.; CAL. WATER CODE § 11460 (West 2011) (stating the "beneficial needs of the watershed, area, or any of the inhabitants or property owners therein." No mention is made of applying for a new water right).

[76] 25 Op. Cal. Att'y Gen. 8 (1955).

[77] State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 255-56 ("not give any priority to an inhabitant of an area of origin who already has (or seeks) a contract with the Bureau (or the Department) for water from the area of origin").

[78] Ronald Robie & Russel B. Kletzing, *Area of Origin Statutes: The California Experience*, 15 IDAHO L. REV. 419, 436-38 (1979).

2. State Water Resources Control Board Cases: The Robie Decision

In *State Water Resources Control Board Cases* ("*SWRCB Cases*"), the California Court of Appeal addressed whether area of origin inhabitants contracting for CVP water could invoke area of origin protections without applying for and receiving their own water rights permits. The *SWRCB Cases* involved a dispute over whether the SWRCB properly implemented the objectives in a water quality control plan. As part of the Court's reasoning, Justice Robie expressly rejected the SWRCB's interpretation of the 1955 Attorney General's Opinion that area of origin protections do not apply to CVP contracts.[79] Justice Robie held that

> to the extent section 11460 [area of origins statute] reserves an inchoate priority for the beneficial use of water within its area of origin, we see no reason why that priority cannot be asserted by someone who has (or seeks) a contract with the Bureau for the use of that water.[80]

According to Justice Robie, area of origin inhabitants are entitled to the full amount of water granted to them by their CVP contracts. Furthermore, the contractual allotment of water cannot be reduced "to supply water for uses outside the area of origin."[81] Justice Robie limited his ruling to protecting water contractually allotted to area of origin contractors. He specifically stated that his ruling "does not mean a user within the area of origin can compel the Bureau to deliver a greater quantity of water than the user is otherwise entitled under contract."[82] The Robie decision's general pronouncement that area of origin protections applied to CVP contracts marked a dramatic departure from the 1955 Attorney General's Opinion, but it was quickly refined in two subsequent decisions in 2006 and 2007.

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[79] Justice Robie's discussion of section 11460 was not essential to the holding of the *SWRCB Cases*, which turned on standing issues. Critics of Justice Robie's reasoning regarding the application of section 11460 to CVP contract water consider it to be non-binding dicta. Others argue that Justice Robie's ruling is controlling authority on the meaning of Water Code section 11460 because federal courts should follow a California appellate court's interpretation of a state statute applying to Reclamation's operation of the CVP when that interpretation points in the same direction as the language of the statute per Natural Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 918-19 (E.D. Cal. 2004). Proponents of the ruling also argue that Justice Robie's discussion of TCCA's relation to the CVP was necessary to determine standing and thus essential to the holding. *See* Plaintiff's Memorandum in Reply to Defendant and Defendant-Intervenors' Opposition to Plaintiff's Motion for Summary Judgment at 5, Tehama-Colusa Canal Auth. v. U.S. Dep't of the Interior, No 1:10-cv-00712-OWW-DBL, (E.D. Cal. Jan 28, 2011); Natural Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 918-19 (E.D. Cal. 2004).

[80] State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 255-56.

[81] *Id.* at 256.

[82] *Id*.

3. El Dorado Irrigation District v. State Water Resources Control Board

In *El Dorado Irrigation District v. State Water Resources Control Board*, the California Court of Appeal addressed the issue of whether non-CVP water permit holders could invoke area of origin protections to appropriate CVP water. The litigation involved a dispute over whether the SWRCB could require a senior appropriator within an area of origin (El Dorado) to stop diverting allocated water from the South Fork of the American River when the CVP was releasing stored water to meet water quality objectives.[83] El Dorado protested the SWRCB's insertion of Water Rights Term 91 ("Term 91") in its water permit. Term 91 prohibited water diversion by area of origin users when meeting water quality standards require the release of stored water by the CVP. The main issue relating to area of origin protections was whether El Dorado, which had its own water permit and was not contracting for CVP water, could assert a superior right to water that the CVP had properly stored in previous seasons.[84] The Court of Appeal held that El Dorado had the right to assert a priority under section 11460 over Reclamation to divert water originating in the watershed of the South Fork of the American River.[85] However, the Court found that such a priority does not extend to water the CVP had previously stored. For guidance the Court looked to section 11462, which provides that the area of origin statutes do "not require the department to furnish to any person without adequate compensation therefore any water made available by the construction of any works by the department."[86] The Court ruled that section 11462 reflects the Legislature's intent that users within an area of origin do *not* have the right to water stored by Reclamation without paying for it.[87] The Court concluded that while El Dorado may be entitled to assert a priority under section 11460 over CVP water, it does not have priority to stored CVP water. The Court stated that if "El Dorado wants water properly stored by the [CVP] it must pay for it."[88] The *El Dorado* holding limited the Robie decision's broad pronouncement that area of origin protections applied to CVP water. The California Court of Appeal dismissed any doubt as to whether area of origin protections gave priority to local non-CVP contractors to stored CVP contract water when it affirmed the *El Dorado* holding in *Phelps v. State Water Resources Control Board*.

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83 El Dorado Irrigation Dist. v. SWRCB, 48 Cal. Rptr. 3d 468, 472-73 (Cal. Ct. App. 2006).

84 *Id*. at 496-97.

85 *Id*.

86 *Id*. at 497.

87 *Id*. at 498-99.

88 *Id*.

4. Phelps v. State Water Resources Control Board

In *Phelps v. State Water Resources Control Board*, the California Court of Appeal again ruled that watershed of origin protections only apply to natural or abandoned flows and not to previously stored water.[89] The *Phelps* litigation arose out of a dispute over whether the SWRCB could impose civil penalties upon an area of origins water user for diverting water in violation of Term 91.[90] The plaintiffs argued that Term 91 deprived them of their right to use water from their own watershed violating section 11460. The Court of Appeal affirmed *El Dorado*, holding that section 11462 of the California Water Code indicates that area of origin users are not entitled by section 11460 to divert stored water belonging to the CVP.[91] In its ruling, the Court agreed with the SWRCB that CVP appropriation and storage of water during times of excess flow do not harm area of origin water rights holders.[92] The Court concurred with the SWRCB's contention that when previously stored CVP water is subsequently released from storage for exportation "it is already appropriated, and is not naturally present in the rivers."[93] Excess water appropriated when it is stored is "not subject to appropriation by others."[94] Therefore, at times when full delivery to area of origin water permit holders requires the CVP to release stored water to maintain legally mandated water quality standards, the in-area users are asserting a right to water that has already been appropriated. In other word, the CVP is being forced to release its appropriated water to meet needs of in-area users.

The 1955 Attorney General's Opinion, the Robie decision in the *SWRCB Cases*, *El Dorado Irrigation District v. State Water Resources Control Board* and *Phelps v. State Water Resources Control Board* constitute the body of law interpreting the area of origin statutes the Court will evaluate in deciding *Tehama-Colusa Canal Authority v. United States Department of the Interior*. The Court will evaluate the 1955 Attorney General's Opinion that area of origin protections can only be asserted by obtaining a new appropriative right. It will also consider whether the 2006 Robie decision authorizes area of origin protections to apply to CVP contract water and whether an area of origin contractor can assert priority to water over out of area contractors.[95] Finally, the

[89] Phelps v. SWRCB, 68 Cal. Rptr. 3d 350, 355 (Cal. Ct. App. 2007).

[90] *Id*. at 358-59.

[91] *Id*. at 366-67.

[92] *Id*. at 366.

[93] *Id*. (quoting WR Order 2004-0004 at 5).

[94] *Id*.

[95] State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 247. While the parties dispute whether Justice Robie's discussion of section 11460 is binding authority (see note 63), TCCA's argument that Justice Robie's decision should have at least persuasive effect because it directly addressed for the first time in a detailed manner the issue of the relation of section 11460 to CVP water is compelling. *See* Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motions for Summary Judgment at 6-7, Tehama-Colusa Canal Auth. V. U.S. Dep't of Interior, No.

court will have to consider the *El Dorado* and *Phelps* holdings to determine how these prior interpretations of area of origin protections relates to water the CVP has captured and stored in previous years. How the court reconciles these cases may determine its holding in the TCCA litigation.

V. TEHAMA-COLUSA CANAL AUTHORITY V. UNITED STATES DEPARTMENT OF THE INTERIOR

Against the backdrop of watershed of origin protections in relation to the CVP, the Tehama-Colusa Canal Authority ("TCCA"), an area of origin contractor, brought suit against Bureau of Reclamation ("Reclamation") on February 11, 2010.[96] In a case that has major implications on the future delivery and allocation of CVP water, TCCA argues that Reclamation violated California's area of origin rules by exporting CVP water in times of water shortage. TCCA alleges that Reclamation's failure to deliver TCCA's full allotment of contracted CVP water in dry years, while continuing to export water to out of area contractors, violates area of origin protections guaranteed by Water Code sections 11460, 11463, and 11128. It is important to note that Reclamation failed to deliver TCCA's full allotment of contracted CVP water in ten of the past thirty-three contract years.[97]

Reclamation responds that, while area of origin protections give in-area water users preference to obtain a natural flow water right, such protections do not provide area of origin contractors with a preferential right to the allocation of stored CVP water.[98] Reclamation further argues that "shortage" provisions in TCCA's CVP contracts allow Reclamation to deliver less than the contracted amount of water to TCCA members in times of shortage.[99] This paper focuses exclusively on the applicability of section 11460 to CVP water and does not address the parties' arguments regarding the shortage provisions in TCCA's CVP contracts. Specifically, this article addresses whether relevant case law, the legislative history of the area of origin statutes and practical issues surrounding water storage and transport indicate that area of origin CVP contractors like TCCA should have priority to CVP storage water over out of area CVP contractors.

1:10-cv-00712-OWW-DLB (E.D. Cal. Mar. 18, 2011).

[96] *Complaint*, *supra* note 2, at 4-10.

[97] *Complaint*, *supra* note 2, at 7.

[98] Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of the Federal Defendants' Motion for Summary Judgment at 2, Tehama-Colusa Canal Auth. v. U.S. Dep't of Interior, No. 1:10-cv-00712-OWW-DLB, No. 60-1. (E.D. Cal. Jan. 7, 2011) [hereinafter *Memorandum in Opposition*].

[99] *Id*. at 27.

A. Factual Background

TCCA is a coalition of numerous CVP water contractors operating within the Sacramento Valley watershed. Reclamation operates the CVP and establishes the CVP's yearly water supply allocations to its various water contractors. This includes deciding how and where to reduce water deliveries when there is insufficient water to meet the needs of all CVP contractors.[100] Tension between TCCA and Reclamation regarding the relationship of area of origin protections with CVP contract water has existed for decades. Beginning in the 1960s, TCCA members entered into their original contracts with Reclamation for CVP water.[101] By the mid-1980s, TCCA complained that Reclamation's proposal to expand the water service area of the CVP might compromise Reclamation's ability to meet TCCA's water contracts.[102] Reclamation assured TCCA that it intended to identify and supply the water needed by area of origin contract holders and that surplus water exported out of the Sacramento Valley "would be recallable" by area of origin users.[103]

By the 1990s, however, Reclamation changed its position and decided that area of origin protections do not apply to CVP contractors. In 1996, Reclamation informally concluded that area of origin protections only protect appropriators filing applications for new water rights with the SWRCB and "[t]o the extent that the facilities of the [CVP] are used to meet demands within the area of origin, no priority is imposed."[104] Concerned about how Reclamation's changed stance might affect CVP water allocations in times of shortage, area of origin CVP contractors pressed Reclamation to specifically reference area of origin protections in renewed CVP contracts to avoid future disputes in times of shortage.[105] Although Reclamation never officially addressed area of origin protections for CVP contractors in renewed contracts, TCCA executed long-term contracts with Reclamation for CVP water in 2005.[106]

In 2008 and 2009, Reclamation delivered sixty percent of allocated CVP water to TCCA members,[107] but continued to export water to the San Joaquin Valley.[108] TCCA subsequently demanded Reclamation make full delivery of

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[100] *Id*. at 7.

[101] Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motions for Summary Judgment at 6-7, Tehama-Colusa Canal Auth. v. U.S. Dep't of Interior, No. 1:10-cv-00712-OWW-DLB (E.D. Cal. Mar. 18, 2011) [hereinafter *Plaintiff's Motion for Summary Judgment*].

[102] *Id*.

[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] *Id*.

[107] *Id*.

[108] *Id*.

TCCA's CVP water. They argued that section 11460 as interpreted by the 2006 Robie decision requires that Reclamation deliver the full amount of TCCA's CVP water prior to exporting any water to out of area contractors.[109] Reclamation refused TCCA's demand. Reclamation, along with Intervenor San Luis & Delta Mendota Water Authority ("SLDMWA"), argued a shortage provision within TCCA contracts negated section 11460 and that section 11460 does not apply to CVP storage water.[110] In February of 2010, TCCA filed suit against Reclamation in federal court requesting injunctive relief requiring Reclamation deliver TCCA's full allotment of CVP water even in times of shortage.[111] TCCA also requests a declaratory judgment describing Reclamation's and TCCA's rights, responsibilities, and obligations relating to CVP allocations and area of origin protections.[112]

Since the area of origin statutes that TCCA cites have been infrequently invoked, this case has important implications for the future application and scope of area of origin protections as they apply to the CVP and SWP. Specifically, the holding will determine the extent of area of origin CVP contractors' priority over out of area contractors in annual CVP water allocations. Due to the state's reliance on CVP water, the holding in this case will affect millions of Californians who rely on CVP water. This case is also important because California's growing population will continue to strain the state's water supplies and cause further tension between area of origin residents and CVP contractors who rely on water exported from these wet areas. It is important that courts continue to develop and interpret the relationship between area of origin laws and the CVP to facilitate sensible water management and to help prevent future conflicts.

B. Legal Issues

There are two central issues in *Tehama-Colusa Canal Authority v. United States Department of the Interior*. The first is whether the terms of TCCA's contract for CVP water allow Reclamation to under deliver water in times of shortage. The second is whether California's area of origin protections give CVP area of origin contractors priority to CVP storage water over out of area CVP contractors. While the contract issue is critical to the outcome of the instant case, this article focuses exclusively on whether area of origin

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[109] *Supra* note 79 (Justice Robie stated in dicta that area-of-origin inhabitants are entitled to the full amount of water granted them by their CVP contracts and this contractual allotment of water cannot be reduced "to supply water for uses outside the area of origin). *See also Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 6-7, 12, (citing UMF 49; AR 2246-2248).

[110] *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 12.

[111] *Complaint*, *supra* note 2, at 11-12.

[112] *Id*.

protections should require Reclamation to deliver TCCA's full allotment of CVP water in dry years. The Court's ruling on this issue will likely have a significant impact on the scope and future application of area of origin protections to CVP water.

The Court should address three primary legal issues in resolving whether area of origin protections require Reclamation to give in-area CVP contractors, like TCCA, priority to stored CVP water. First, the Court must determine how prior case law addressing area of origin protections and CVP storage water applies to the facts of this case.[113] Second, the Court must evaluate whether the Legislature intended area of origin protections to apply to CVP water when it enacted those protections. Third, the Court must evaluate whether it is feasible for TCCA to avail itself of area of origin protections if those protections do *not* apply to CVP water.

1. Overview of Parties' Arguments

As an association of area of origin CVP water contractors, TCCA claims California's area of origin protections mandate that it receive one hundred percent of its allotted CVP water in times of water shortage. TCCA makes two main arguments in support of its claim. First, TCCA argues that Water Code section 11460 applies to CVP water and gives CVP contractors within areas of origin priority in receiving water over out of area contractors.[114] Second, TCCA refutes Reclamation's claim that the "shortage" provisions in TCCA's CVP contracts allow Reclamation to deliver less than the contracted amount of water to TCCA members in times of shortage.[115] As discussed above, this article focuses exclusively on the applicability of section 11460 to CVP water.

Reclamation responds that, while area of origin protections give in-area water users preference to obtain a natural flow water right, such protections do not create a preferential right to the allocation of stored CVP water to area of origin contractors.[116] Citing *El Dorado* and *Phelps*, Reclamation argues that section 11460 only applies to direct diversions of natural flow and does not apply to water diverted and stored by Reclamation.[117] Reclamation also contends that the Robie decision is not binding because its discussion of whether section 11460

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[113] *See* El Dorado Irrigation Dist. v. SWRCB, 48 Cal. Rptr. 3d at 496-97; *see also* Phelps v. SWRCB, 68 Cal. Rptr. 3d at 366-67; *see also* State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 256-57.

[114] *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 23.

[115] *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 28.

[116] *Memorandum in Opposition*, *supra* note 98, at 2.

[117] Defendant-Intervenors San Luis & Delta-Mendota Water Authority and Westlands Water District's Reply Memorandum in Support of Cross-Motion for Summary Judgment at 32, Tehama-Colusa Canal Auth. v. United States Dep't of Interior, No. 1:10-cv-00712-OWW-DLB, No. 75 (E.D. Cal. Feb. 18, 2011).

applies to CVP water was dicta and not essential to that case's holding.[118]

The critical issue is whether area of origin CVP contractors can assert priority over out of area contractors for stored CVP water or whether area of origin users can only assert their priority by applying for and obtaining a new water right from the SWRCB. Although similar issues have been discussed in cases such as *El Dorado* and *Phelps*, this dispute is different for two reasons. First, unlike in *El Dorado* and *Phelps*, the plaintiff in the instant case is a CVP contractor filing directly against Reclamation. Secondly, the plaintiff here asserts a preferential right to its allotted and paid-for CVP contract water based on area of origin protections.

2. Area of Origin Protections Case Law: CVP Contractor Priority to Stored Water

According to the Robie decision, area of origin CVP contractors can assert priority to CVP water over out of area contractors.[119] *El Dorado* and *Phelps*, however, indicate that area of origin water users cannot assert priority to CVP water stored in previous seasons.[120] The Court's reconciliation of these cases will be crucial to the Court's holding in this dispute.

Although disputed by Reclamation, Justice Robie's opinion appears to be the most cogent statement by a California appellate court as to whether area of origin protections apply to CVP water in general.[121] Justice Robie's statement "[t]o the extent section 11460 reserves an inchoate priority for the beneficial use of water within its area of origin, we see no reason why that priority cannot be asserted by someone who has (or seeks) a contract with [Reclamation] for the use of that water", clearly applies area of origin protections to CVP water.[122] TCCA contends that the Robie decision should be persuasive to the Court on the general applicability of area of origin protections to CVP contractors for three reasons. First, the decision is the most recent California appellate court ruling directly on the issue.[123] Second, it expressly refutes the 1955 Attorney

[118] *Memorandum in Opposition*, *supra* note 98, at 23.

[119] State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 256-57. While the parties dispute whether Justice Robie's discussion of section 11460 is binding authority (see note 80), TCCA's argument that Justice Robie's decision should have at least persuasive effect because it directly addressed for the first time in a detailed manner the issue of the relation of section 11460 to CVP water is compelling. *See Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 25.

[120] El Dorado Irrigation Dist. v. SWRCB, 48 Cal. Rptr. 3d at 498; Phelps v. SWRCB, 68 Cal. Rptr. 3d at 366-67.

[121] Natural Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 918-19 (E.D. Cal. 2004) (Where a California appellate court has interpreted a state statute that applies to Reclamation's operation of the CVP, and that interpretation points in the same direction as the plain language of the statute and its legislative history, it should be followed by federal courts).

[122] State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 256.

[123] Plaintiff's Memorandum in Reply to Defendants' and Defendant-Intervenors' Opposition to

General's Opinion, which stated that section 11460 does not apply to area of origin contractors.[124] Lastly, it does not contravene the plain language of the statute.[125] Reclamation argues that the 1955 Attorney General's Opinion is the most persuasive authority. Additionally, Reclamation maintains that the Robie decision's discussion of section 11460 giving priority to area of origin CVP contractors is non-binding dicta and therefore not subject to full analysis and explanation.[126]

The Robie decision should be given persuasive weight over the 1955 Attorney General's Opinion for three reasons. First, the Robie decision is the most recent holding specifically addressing whether area of origin protections apply to CVP contract water. Second, Justice Robie has extensive experience and expertise in water law issues.[127] Lastly, Ninth Circuit case law states that relevant opinions not central to a judicial holding remain binding.[128]

As TCCA argues, the fact that the Robie decision specifically discusses the relationship between the area of origin statutes and CVP contractors makes it more relevant to the current dispute than the fifty-six year old Attorney General Opinion, which fails to discuss the CVP. The Court should give considerable weight to the Robie decision's finding that area of origin protections apply to CVP contractors, especially when considering how this statement explicitly contradicts the 1955 Attorney General's Opinion that obtaining and perfecting a new water right is the only way to exercise area of origin protections.

The Court should defer to the Robie decision due to Justice Robie's extensive experience in California water law issues, which is likely unparalleled in the judiciary.[129] Although Reclamation accurately points out a lack of "in depth" analysis supporting Justice Robie's opinion that section 11460 extends to CVP contractors, the Court should defer to Justice Robie's knowledge.[130] Justice

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Plaintiff's Motion for Summary Judgment, and in Opposition to Defendants' and Defendant-Intervenors' Motions for Summary Judgment at 5, Tehama-Colusa Canal Auth. v. U.S. Dep't of the Interior, No. 1:10-cv-0712-022-DLB. (E.D. Cal. Jan. 28, 2011) [hereinafter *Plaintiff's Memorandum in Reply*].

124 *Id.* at 6.

125 *See* CAL. WATER CODE § 11460 (West 2011).

126 *Memorandum in Opposition*, *supra* note 98, at 23-31.

127 Justice Robie has served as a water management staff person in the California Assembly, as a member of the SWRCB, and as Director of the Department of Water Resources. Aladjern & Harder, *supra* note 71, at 223.

128 United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) ("We hold . . . that where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense").

129 Aladjern & Harder, *supra* note 71, at 223.

130 Justice Robie supports his opinion that area of origin protections should extend to CVP contractors by stating nothing in section 11460 requires those seeking area of origin protections to obtain a new appropriative right and that giving area of origin protections to CVP contractors does not conflict with the clear language of the statute. Reclamation contends this analysis is not

Robie is well versed in exactly the issue at hand because he wrote a law review article in 1975 discussing the extent of area of origin protections.[131] Even if Justice Robie's analysis is terse, it is supported by previous scholarship and significant experience in California water law.

Finally, Ninth Circuit case law holds that opinions on issues not central, yet still germane, to a case are considered the law of the circuit.[132] Consequently, the Robie decision's discussion regarding applying section 14460 protections to area of origin CVP contractors is compelling law, even if it was not central to the *SWRCB Cases'* holding. TCCA effectively argues that Justice Robie's opinion was necessary to the Court's conclusion in the *SWRCB Cases*, and therefore was "germane" to the case.[133] It further argues that the Attorney General's Opinion is persuasive only in the absence of controlling authority.[134] Therefore, if Justice Robie's opinion is the "law of the circuit", the 1955 Attorney General's Opinion is neither governing nor a persuasive authority. Even if the Court does not find the Robie decision controlling, it should give significant consideration to the decision's extension of section 11460 protections to CVP contractors for the above reasons.

If Justice Robie's decision in the *SWRCB Cases* persuades the Court that area of origin protections apply to CVP contractors generally, the Court must then address whether these protections extend to CVP water diverted and stored in previous seasons. In *El Dorado* and *Phelps*, the courts held that section 11460 protections do *not* apply when in-area, non-CVP contractors seek to assert priority over CVP stored water.[135] Therefore, the Court will have to determine the relationship between the Robie decision's extension of area of origin protections to CVP water and the holdings of *El Dorado* and *Phelps* that these protections do not apply to stored water.

The most obvious distinction between *TCCA* and the *El Dorado* and *Phelps* cases is that the plaintiffs in each case had different relationships with the CVP. TCCA is an association of CVP contractors arguing that section 11460 guarantees them their full allotment of contracted CVP water. The plaintiffs in *El Dorado* and *Phelps* were area of origin water appropriators without CVP contracts who argued that the CVP and SWP must provide them water captured and stored by the CVP in a previous year free of charge. In both *El Dorado* and

sufficiently "in depth" or "explanatory" to justify Robie's conclusion. *See Memorandum in Opposition*, *supra* note 98, at 33-34.

131 Kletzig & Robie, *supra* note 78, at 436-38.

132 Aladjern & Harder, *supra* note 71, at 223; *see Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 25.

133 Aladjern & Harder, *supra* note 71, at 223; *see Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 25.

134 *Plaintiff's Memorandum in Reply*, *supra*, note 123, at 5-6.

135 El Dorado Irrigation Dist. v. SWRCB, 48 Cal. Rptr. 3d at 498; Phelps v. SWRCB, 68 Cal. Rptr. 3d at 366-67.

Phelps, the courts held that section 11460 does not require the CVP to provide stored water to fulfill the beneficial use needs of area of origin water users.[136] However, in those cases the courts did not directly address the issue of area of origin CVP contract holders' annual CVP water allotments. Therefore, TCCA is correct in arguing that the holdings in *El Dorado* and *Phelps* do not specifically address the issue of area of origin CVP contractors seeking full allotment of their contract water.

Just as *El Dorado* and *Phelps* do not specifically support Reclamation's claim that area of origin protections do not apply to CVP contractors, the Robie decision does not specifically address the exact issue in dispute in TCCA's litigation. None of these cases directly addresses whether area of origin protections gives priority to in area CVP contractors over out of area CVP contractors to CVP water *stored in a previous season*. The Robie decision states that section 11460 protections can "be asserted by someone who has (or seeks) a contract with the [CVP] for the use of that water" and that Reclamation "cannot reduce [an area of origin] user's contractual allotment of water to supply water for uses outside the area of origin."[137] This language clearly applies section 11460 protections to CVP water generally. It states that Reclamation must fulfill its contractual obligations to area of origin contractors prior to exporting CVP water outside the area of origin. However, it does not specifically address how area of origin protections affect CVP water stored from a previous season.

TCCA's brief fails to clarify how Justice Robie's opinion applies section 11460 protections to stored water. TCCA addresses the issue of stored water peripherally by discussing why Water Code section 11462 applies to CVP contractors generally.[138] TCCA only specifically addresses whether area of origin protections apply to stored CVP water when refuting Reclamation's claims that the *Phelps* and *El Dorado* holdings necessitate that area of origins protections do *not* apply to stored CVP water.[139] TCCA does an effective job of differentiating the facts alleged in its complaint from the factual situations in *Phelps* and *El Dorado*. Still, TCCA does not clearly state why section 11460 applies to CVP water stored in a previous season. Accordingly, Reclamation has a strong argument that even though *Phelps* and *El Dorado* do not specifically address CVP contractors, they are the holdings that most closely address the relationship between area of origin protections and stored CVP water. Consequently, it is likely these cases will play a role in the instant case.

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136 *Id*.

137 The relevant language within the Robie decision states "[t]o the extent section 11460 reserves an inchoate priority for the beneficial use of water within its area of origin, we see no reason why that priority cannot be asserted by someone who has (or seeks) a contract with the Bureau for the use of that water." State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 256.

138 *Plaintiff's Memorandum in Reply*, *supra* note 123 at 8-9.

139 *Id*. at 9-11.

The outcome of the instant case essentially hinges on whether the Court is more persuaded by the language in *Phelps* and *El Dorado* or the Robie decision. *Phelps* and *El Dorado*, while factually distinguishable from the current dispute, specifically state that stored CVP water is exempt from section 11460.[140] Alternatively, the Robie decision included statements that section 11460 applies to CVP water and area of origin CVP contractors have priority to project water.[141] The courts in *Phelps* and *El Dorado* state that section 11460 only applies to natural water flow and not stored water.[142] This language should be given significant weight because these are the only area of origin cases that directly address the storage issue. TCCA cannot completely rely on the Robie decision's general pronouncement that section 11460 applies to CVP water in this case for two reasons. First, *Phelps* and *El Dorado* explicitly state that section 11460 protections do not give area of origin water users the right to stored CVP water without compensation. Second, the Robie decision does not mention stored water. However, the Court cannot rely purely on *Phelps* and *El Dorado* because TCCA is a group of CVP contractors that paid for their water allotment. Since the Robie decision and *Phelps* and *El Dorado* conflict and do not specifically address the issue presented by the TCCA litigation, the TCCA court will likely look to legislative intent to decide whether to extend the Robie decision's protections to stored water.[143]

3. The Legislative History of the Area of Origin Protections Indicates Legislative Intent to Give Priority to Area of Origin Water Consumers

In addition to relevant case law, the Court will also assess TCCA's and Reclamation's contradictory arguments regarding whether Congress and the California Legislature intended for area of origin protections to give area of origin CVP contractors priority to stored CVP water over out of area CVP contractors. TCCA argues that area of origin protections are embedded in the federal and state legislation creating the CVP.[144] TCCA maintains that Reclamation's right to CVP water are conditioned on giving priority to area of origin users, including area of origin CVP contractors.[145] TCCA also argues that Reclamation expressly acknowledged its duty to give priority to areas of origin

[140] El Dorado Irrigation Dist. v. SWRCB, 48 Cal. Rptr. 3d at 498; Phelps v. SWRCB, 68 Cal. Rptr. 3d at 366-67.

[141] State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 256.

[142] El Dorado Irrigation Dist. v. SWRCB, 48 Cal. Rptr. 3d at 498; Phelps v. SWRCB, 68 Cal. Rptr. 3d at 366-67.

[143] While beyond the scope of this paper, it is clear that issues surrounding the TCCA-CVP contract will play a role in the court's decision. *See Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 21.

[144] *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 6.

[145] *Id*.

when it was authorized to operate the CVP.[146] Reclamation argues that construing section 11460 to give water-delivery priority to area of origin CVP contracts will handcuff Reclamation's allocation of CVP water and thereby conflict with Congressional intent that the CVP operate for the "widest public benefit."[147] Reclamation also argues that since Congress never explicitly mandated area of origin priority for CVP contractors in legislation related to CVP projects, Congress impliedly rejected such priorities.[148] Therefore, any interpretation of sections 11460 mandating that Reclamation give priority to area of origin CVP contractors conflicts with Congressional intent and is thus subject to federal preemption.

a. TCCA Legislative Intent Arguments

TCCA argues that giving area of origin CVP contractors priority to CVP water allocations is fundamental to the legislation creating the CVP. According to TCCA, the California Legislature included the area of origin protections within the 1933 Central Valley Project Act authorizing the CVP in order to ensure that area of origin residents had priority to all the water they needed.[149] TCCA claims that the language of the 1933 Act prohibiting the export of water "reasonably required to adequately supply the beneficial needs of the watershed" where water "originates," is a blanket provision guaranteeing area of origin users the "paramount and preferential right to the existing and future use of water within a watershed of origin."[150] TCCA reasons that the area of origin statute was expressly included in the legislation creating the CVP to specifically prevent the exact situation at dispute in this litigation.

TCCA also argues that Reclamation's control of the CVP is conditioned on area of origin protections. TCCA contends that the federal authorization of the CVP as a federal reclamation project in 1935, Congressional authorization of the Sacramento Canals Unit in 1950, and the State of California's grant of water right permits to Reclamation were all contingent on prioritizing water needs of the Sacramento Valley over exports.[151] TCCA points to specific language in both the 1950 Federal Act and the California Legislature's resolution supporting the Federal Act, which require that Reclamation give "due consideration" to prioritizing Sacramento water needs over exporters per area of origin protections.

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146 *Id*. at 6-7.

147 *Memorandum in Opposition*, *supra* note 98, at 19-22.

148 *Id*.

149 *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 6.

150 *Id*. (citing UMF 14; Central Valley Project Act of 1933 § 11, 1042 Cal. Stat. at 2650-651 [codified as amended at CAL. WATER CODE § 11460 (West 2010)]).

151 *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 7.

In addition to pointing to the intent of Congress and the California Legislature to protect area of origin users, TCCA claims that Reclamation expressly recognized and accepted area of origin priorities when it took control of the CVP.[152] During the development of the CVP, Reclamation made statements illustrating its policy that CVP storage water would be used first and foremost to satisfy area of origin needs and only the remainder would be exported. In 1948, the Assistant Secretary of the Interior wrote to Congress that "the excess water made available by Shasta Reservoir would go first to such Sacramento Valley lands" and that "[Reclamation] will determine the amounts of water required in the Sacramento Valley drainage basin to the best of its ability so that only surplus waters would be exported to the San Joaquin . . ."[153] In 1948, the Secretary of the Interior delivered his famous statement that

> the Interior Department is fully and completely committed to the policy that no water which is needed in the Sacramento Valley will be sent out of it . . . There is no intent on the part of the Bureau of Reclamation ever to divert from the Sacramento Valley a single acre-foot of water which might be used in the valley now or later.[154]

TCCA argues that these statements indicate, at a very fundamental level, Reclamation's intent to give priority to stored CVP water to area of origin users.

Finally, TCCA argues that the SWRCB's grant of water permits to Reclamation for CVP water was conditioned on compliance with area of origin protections.[155] When the SWRCB officially issued Reclamation its water rights permits to appropriate water from the Sacramento River for the CVP in 1961, the SWRCB expressly conditioned Reclamation's permits. The SWRCB indicated it would allow anyone in an area of origin (1) to file for and obtain an appropriative right with priority over Reclamation or (2) receive a "preferred right to Project water" by obtaining a CVP contract with Reclamation.[156] In the SWRCB decision granting the Reclamation permits, the SWRCB stated:

> The export of stored water under [Reclamation's Sacramento River water right permits] outside the watershed of the Sacramento River Basin . . . shall be subject to the reasonable beneficial use of said stored water within said watershed and Delta, both present and prospective . . .[157]

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[152] *Id*.

[153] *Id*. (citing UMF 19; AR 9735).

[154] *Id*. (citing UMF 20; AR 9735-9736).

[155] *Id*. at 9-10.

[156] *Id*. at 11-12.

[157] *Id*. (citing UMF 29; AR 5535-5536, 5548-5549).

b. Reclamation's Legislative Intent Arguments

Reclamation argues that Congress expressly directed Reclamation to operate the CVP for the widest possible public benefit and this mandate preempts applying section 11460 to prioritize water-delivery to CVP contractors in areas of origin.[158] To support its argument, Reclamation cites the Congressional legislation in 1950 ("1950 Act") authorizing the integration of the Sacramento Valley canals used by TCCA into the CVP. In this legislation, Congress stated that upon integration with the CVP, the canals are to be operated "in such a manner as will effectuate the fullest and most economic utilization of the land and water resources of the Central Valley of California for the *widest possible public benefit.*"[159] Reclamation maintains that TCCA's interpretation of section 11460 prioritizing water-delivery to area of origin contractors "concentrates the benefits of the Project on those water users within an area of origin."[160] Such an interpretation violates the Congressional intent to use CVP water for the widest possible benefit. The legislative history behind the 1950 Act indicates that Congress intended the authorization and construction of the canals to "implement the intent of the legislation of the State of California [section 11460] which preserves the water supply that will be required to meet present and future beneficial uses in the various water sheds of origin."[161] However, Reclamation argues that Congress merely intended that the canals effectuated section 11460's goals by physically increasing the amount of water put to beneficial use within watersheds of origin.[162]

Reclamation also argues Congress' failure to expressly provide water delivery priority to area of origin CVP contractors in CVP related legislation indicates Congress's intent that such priority should *not* be granted. According to Reclamation, Congress had the opportunity to create allocation preferences for area of origin project users in legislation such as the New Melones Act and Auburn-Folsom Act, but choose not to create such preferences.[163] Congress was arguably aware of California's area of origin provisions and declined to expressly provide allocation preferences to area of origin CVP contractors in relevant legislation. Accordingly, Reclamation claims that TCCA's interpretation of section 11460 to mandate such allocation preferences contradicts clear Congressional intent and cannot be sustained due to federal pre-emption.

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158 *Id*.

159 Pub. L. No. 81-839 § 4, 64 Stat 1036, 1037 (1950) (emphasis added).

160 *Memorandum in Opposition*, *supra* note 98, at 20.

161 *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 23 (citing S. Rep. No. 81-2447 pp. 638-39 (1950), at AR doc. 359 at 9131-32).

162 *Memorandum in Opposition*, *supra* note 98, at 21.

163 *Id*. at 22.

c. Analysis of Parties' Legislative Intent Arguments

The basis of TCCA's legislative intent argument asserts that the original purpose of the area of origin statute was to protect areas of origin from having needed water exported by the CVP. Accordingly, area of origin protections should be enforced to provide local water users access to all the available water they need. TCCA's arguments regarding legislative intent are compelling at a general level, but they do not truly address the specific issue of whether Congress and the California Legislature intended area of origin protections to require Reclamation to give area of origin CVP contractors priority to stored CVP water at the expense of out of area contractors. TCCA's assertion that the legislature intended to protect area of origin users can be countered by arguing that the legislature's intent is not frustrated by Reclamation's failure to give TCCA priority, because TCCA can exercise its area of origin protections by applying for and perfecting a new water right.

TCCA's strongest argument is that the SWRCB granted Reclamation's water permits with the condition that Reclamation gives area of origin contractors "preference" to stored water. The SWRCB interpreted the underlying premise of the CVP to be that "only water surplus to the needs of users in the Sacramento watershed would be considered as available for export to the San Joaquin."[164] After a thorough review of the legislative history, agency policies, etc., the SWRCB conditioned Reclamation's water permits through SWRCB Decision 990 ("D-990").[165] D-990 allows area of origin water users to either file for a new water right application with the SWRCB at any time that would have priority over Reclamation's water rights, or to receive a "preferred right" to CVP water by entering into a CVP water contract with Reclamation.[166] The context and specific language of D-990 mandating that area of origin water users have the right to obtain preferred water rights by entering into CVP contracts with Reclamation suggests that the SWRCB interprets section 11460 protections to apply to CVP contract water.[167] While this language is not crystal clear, it provides further specific and substantive grounds for arguing that section 11460 gives area of origin CVP contractors priority to CVP storage water. The specific language of the decision counters broad pronouncements regarding the legislature's intent to give area of origin users preference to water generally, especially when that preference could potentially be achieved through applying for a new appropriative right.

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[164] *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 10. (TCCA contends that the SWRCB held that only excess water was available for export by the CVP after reviewing the history of the State Water Plan and the 1933 State CVP Act and Reclamation's prior policy statements).

[165] *Id*.

[166] *Id*. at 11.

[167] *Id*. at 10.

Reclamation also makes general arguments that fail to truly address whether Congress intended for area of origin CVP contractors to have priority over out of area contractors. Reclamation relies heavily on the argument that giving area of origin contractor's priority to CVP water contravenes Congressional intent to utilize CVP water for the greatest benefit of California. Reclamation maintains that Congress impliedly contradicted applying section 11460 protections to CVP stored water when it passed the 1950 Act authorizing the Sacramento canals utilized by the CVP, because the 1950 Act stated that the project's CVP water should be used for the "widest public benefit."[168] This is not a compelling argument because the legislative record indicates that Congress acknowledged California's area of origin statutes when it authorized Reclamation's control over the CVP.[169] Additionally, Congress never passed any legislation clearly contradicting the application of section 11460 to stored CVP water. The 1950 Act's statement about using CVP water for the widest benefit also does not impliedly contravene TCCA's argument because it is certainly possible to honor area of origin protections by giving TCCA priority to its CVP water while managing the remaining water for the widest possible benefit.

Overall, TCCA's arguments that the legislature intended area of origin protections to apply to CVP contract water are more compelling than Reclamation's arguments to the contrary. Both parties make general arguments that do not truly address the specific issue of whether area of origin CVP contractors should have priority to CVP water over out of area contractors.[170] However, TCCA's general arguments are more aligned with the California Legislature's policy regarding the purpose of the area of origin protections. At their essence, the area of origin protections were designed and implemented to prevent people living in the areas from which water originates from losing access to water exported to more populous and politically powerful arid regions of the state.

4. The Futility Argument

TCCA argues that Reclamation must give priority to area of origin CVP contractors because this is the only practical way to effectuate section 11460 protections for area of origin contractors dependent upon CVP infrastructure to access area of origin water. According to TCCA, section 11460 gives area of origin contractors a right to contract for CVP water and Reclamation must

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168 Pub. L. No. 81-839 § 4, 64 Stat 1036, 1037 (1950).

169 *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 6 (citing UMF 14; State CVP Act, § 11, ch. 1042, 1933 Cal. Stat. at 2650-51 [codified as amended at CAL. WATER CODE § 11460 (West 2010)]).

170 With the possible exception of TCCA's discussion of SWRCB's decision to condition Reclamation's water rights with protections for area of origin users.

furnish all CVP water reasonably needed by area of origin contractors when the contractual CVP supply is the "only economically feasible source of water."[171] TCCA contends that Reclamation must provide the full contractual water allocations because trying to secure area of origin water rights through a new permit is not economically feasible. In order to acquire a new permit, TCCA would likely have to build new diversion facilities at great expense that are redundant to existing CVP facilities. Moreover, such facilities would "repeat the expenses TCCA contractors have already incurred through the Project repayment components of their contract payments."[172] TCCA also argues that the water sought is already covered by their CVP permits. Accordingly, TCCA would be applying for a permit to water it already has a contractual right to.[173]

Reclamation does not directly address TCCA's futility argument, but it does assert several policy arguments for why granting TCCA priority to its contract water has negative consequences for California water storage and transport necessary for the state's welfare. Reclamation contends that applying area of origin protections to CVP contractors would disrupt the integrated operation of the CVP because doing so would "destroy the careful, balanced approach to integrated project management."[174] Reclamation also argues that providing TCCA with priority to CVP contract water is contrary to how area of origin protections have traditionally been effectuated through the application for new water rights.[175] TCCA is no different than any other CVP contractor, therefore, TCCA's area of origin status does not justify changing how area of origin protections have been historically granted.[176]

TCCA's futility argument highlights the practicality of how to most efficiently execute area of origin protections to in-area CVP contractors, but overlooks the potential harmful impacts on out of area contractors. Because TCCA relies on CVP infrastructure for their CVP water, it seems unlikely they will be able to feasibly construct the diversion facilities necessary to avail itself of any water granted from a new permit. TCCA could likely invoke section 11460, as Reclamation suggests, obtaining a new appropriative right that has priority over Reclamation's rights. The right to this water, however, is useless if TCCA cannot effectively access it. Reclamation may argue that this is just a hard economic reality, but TCCA can counter that they helped pay for Reclamation's diversion facilities through the repayment provisions embedded

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171 *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 28 (citing Ronald Robie & Russel B. Kletzing, *Area of Origin Statutes: The California Experience*, 15 IDAHO L. REV. 419 (1979)).

172 *Id*.

173 *Id*.

174 *Memorandum in Opposition*, *supra* note 98, at 28.

175 *Id*. at 28-29.

176 *Id*.

in its CVP contract.[177] In fact, TCCA can, and does, argue that the reason they cannot afford to build their own diversion facilities is because they were "induced to become part of the CVP in part based on assurances of priority for access to an adequate water supply."[178] TCCA "thus encumbered themselves with the financial obligations that have flowed from that action such that they cannot now afford to develop water supplies and facilities separate from the CVP."[179] The Court may believe that granting priority to CVP storage water is the only viable way for TCCA to feasibly access reasonably required water as guaranteed by area of origin protections. Should the Court believe this, it should grant TCCA priority to its CVP contract water *provided* that such priority does not unreasonably injure out of area CVP contractors.

Reclamation correctly asserts that giving TCCA priority will disrupt CVP water allocations. However, Reclamation overstates the magnitude of this disruption because the water TCCA requests is small relative to the amount of water exported to contractors south of the Delta. TCCA's CVP contracts call for 318,700 acre-feet per year ("afy"), which is forty percent of the CVP water going to north of Delta contractors (and seventy-two percent of north of Delta CVP agricultural water).[180] TCCA's CVP water allocation is only thirteen percent of the thirty-three year average for water exported to CVP contractors south of the Delta of 2,380,000 afy.[181] The priority TCCA seeks will only impact water allocations in dry years where there is not enough water to meet all of Reclamation's contractual obligations. In an exceptionally dry year such as 2008, for example, when all CVP agricultural contractors only received forty percent of their project water, giving TCCA one hundred percent of its water would reduce the amount of water available to south of Delta contractors by another twenty percent.[182] This is a significant amount of water. Prioritizing contractors north of the Delta will surely harm south of Delta contractors who

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[177] *Plaintiff's Motion for Summary Judgment*, *supra* note 101, at 27-28.

[178] *Id*.

[179] *Id*.

[180] U.S. BUREAU OF RECLAMATION, CENTRAL VALLEY PROJECT ("CVP") WATER QUANTITIES W/ 2011 ALLOCATIONS, (2011), http://www.usbr.gov/mp/PA/water/chart/latest_CVP_Water_Quantities.pdf; Tehama-Colusa Canal Authority Area of Origin Claim: Frequently Asked Questions, http://www.tccanal.com/site_images/small_photo/78_~TCCA%20A%20of%20O%20FAQ.pdf (last visited Nov. 9, 2011).

[181] *Id*.

[182] Giving TCCA one hundred percent of its water in 2008 would mean that 190,800 acre-feet of water (sixty percent of TCCA's full allocation) would not be available for export. This constitutes twenty percent of the 952,000 acre feet (forty percent of south of Delta full CVP allocations) available for export in 2008 (where all CVP contractors received 40% of their full contract allocations). U.S. BUREAU OF RECLAMATION, RECLAMATION UPDATES THE CENTRAL VALLEY PROJECT WATER SUPPLY ALLOCATION HISTORICAL CVP ALLOCATIONS (2008), http://www.westlandswater.org/wwd/usbr/usbr20080602.pdf?title=June%202,%202008.

rely on CVP water in drought years.

Giving TCCA its full water allocations is not as likely to disrupt the delicate balance of the CVP as Reclamation alleges. All industries must adapt to change and Reclamation is certainly capable of re-calibrating the system to account for the moderate amounts of water TCCA seeks. Reclamation currently adjusts water deliveries annually depending on water supply. It will not be difficult to factor in a priority given to north of Delta contractors.

Giving priority to area of origin contractors will not overly disrupt the operations of the CVP. Nonetheless, the Court should consider the serious negative economic and social consequences of diminished water exports to the Central Valley in times of drought. Much of California's industry and population centers in arid locales depend on exported CVP water. Even small reductions in their annual allocations could seriously hurt contractors who are already stretching their scarce water resources to their limit. But this is exactly the difficult situation that the area of origin protections were designed to address: when insufficient water exists for all users, people in the areas from which that water originated should have priority.

VI. CONCLUSION

As California's area of origin protections emerge from dormancy, they will only achieve their intended purpose if the judiciary interprets them to only allow the export of surplus water from California's wet regions. California's federal and state water projects constitute such a large proportion of the water used in California today that area of origin protections must apply to the CVP and SWP storage water to truly effectuate the legislation's intent to keep the wet areas of the state wet. However, it is important to balance the needs of areas from where water originates with the needs of an arid state that has developed in reliance upon that water.

The ruling in *Tehama-Colusa Canal Authority v. United States Department of the Interior* will have major consequences for how California's area of origin protections are applied. The Court's ruling may also seriously impact how California's major water projects allocate water. A ruling against TCCA may validate the long standing fears of residents of the less populous wet regions of the state that their neighbors in drier areas can utilize the CVP and SWP to export water needed for the development of areas of origin. Conversely, a ruling for TCCA might lead to further litigation preventing the CVP and SWP from delivering water relied upon by millions of Californians living outside of the areas of origins. The area of origin protections are an important vehicle for protecting the water rights of area of origin residents. Still, this vehicle should not be so powerful that the protections have serious negative impacts on the lives of large numbers of other Californians in other areas. Ultimately, the area of origin protections have the ability to disrupt California's water transport and

supply system. The Legislature may need to modify these protections to facilitate the most effective and efficient management of the state's water for all Californians.