



Assembly
California Legislature

ASSEMBLY COMMITTEE ON
WATER, PARKS AND WILDLIFE

LOIS WOLK
CHAIR

MEMBERS
BILL MAZE, Vice Chair
JOEL ANDERSON
TOM BERRYHILL
ANNA CABALLERO
CHARLES CALDERON
JARED HUFFMAN
DOUG LA MALFA
TED LIEU
GENE MULLIN
PEDRO NAVA
NICOLE PARRA
MARY SALAS

CHIEF CONSULTANT
G. DIANE COLBORN
PRINCIPAL CONSULTANT
ALF W. BRANDT
STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0119
(916) 319-2096
FAX (916) 319-2196

November 5, 2007

Phil Isenberg, Chair
Delta Vision Blue Ribbon Task Force
1416 9th Street, 13th Floor
Sacramento, California 95814

Subject: Department of Water Resources Authority to Construct a Peripheral Canal

Dear Mr. Isenberg:

After some of the discussion at your recent Task Force meeting regarding the Department of Water Resources' (Department) legal authority to build the Peripheral Canal, I instructed my staff to inquire whether the Attorney General had ever issued an opinion on that question. The Attorney General's office responded with the attached document, regarding authority to construct a through-Delta water conveyance as proposed by Governor Deukmejian in 1983. The opinion appears to call into question the Department's position that it has legal authority to build a Peripheral Canal.

The attached advice letter suggests that the Department lacks the legal authority to build an isolated water conveyance facility that does not rely on existing Delta channels. The so-called "Duke's Ditch" proposal included a new canal in the North Delta to convey water from the Sacramento River to the Mokelumne River system and then improvements to existing channels in the South Delta to convey water to the State Water Project (SWP) export pumps. While the advice does not directly address authorization for a peripheral canal, its conclusion as to authority for this through-Delta facility is instructive. A few points deserve emphasis:

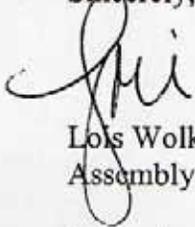
- The Burns-Porter Act (Act) authorized the following Delta facilities: "master levees, control structures, channel improvements and appurtenant facilities." The Act did not expressly authorize a new North Delta conveyance facility.
- DWR may nevertheless build a new North Delta canal as part of a river enlargement program in the Delta that relies on existing channels. The Act specifies "transfer of water across [not around] the Delta" as the purpose of the Delta facility.
- The Legislature and the voters approved the Act based on pre-vote documents and testimony from the Department (1957-60) that "repeatedly affirmed the Department's intention to build a Delta transfer facility that would use existing Delta channels as the means for water conveyance."



Given this advice letter and the statewide significance of the Delta, the Legislature should play an integral role in determining "whether" and "how" such a Delta facility is authorized and constructed.

The progress of the Delta Vision Blue Ribbon Task Force has been impressive, and the drafts of your Delta vision have been thought-provoking. I look forward to seeing your final Delta Vision at the end of the month, and working with the Task Force to take the next steps in 2008. Please let me know if I can provide any assistance to furthering your work.

Sincerely,



Lois Wolk, Chair
Assembly Water, Parks and Wildlife Committee

LW/awb

Attachment

cc: Delta Vision Blue Ribbon Task Force
Assembly Special Committee on Water
Assembly Committee on Water, Parks & Wildlife
Senate Committee on Natural Resources & Water
Edmund G. Brown, Jr., Attorney General
Mike Chrisman, Secretary for Resources
Linda S. Adams, Secretary for Environmental Protection
Lester Snow, Director, Department of Water Resources
John McCamman, Interim Director, Department of Fish and Game
Linda Fiack, Executive Director, Delta Protection Commission
Delta Vision Stakeholders and Coordination Group



455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5546
Facsimile: (415) 703-5480
E-Mail: Cliff.Lee@doj.ca.gov

October 31, 2007

Alf Brandt, General Counsel
Assembly Water, Parks and Wildlife Committee
1020 "N" Street, Room 160
Sacramento, CA 95814

RE: 1984 Advice Letter Regarding Delta Facilities Authorization

Dear Mr. Brandt:

In response to your email request of October 26, 2007, I am enclosing a copy of the June 21, 1984 informal advice letter that Attorney General John K. Van de Kamp authorized for release regarding the question of the State's authority to construct the Delta Facility feature of the State Water Resources Development System without additional legislation. Attorney General Van de Kamp authorized the release of this advice letter in response to an April 26, 1984 request for advice from Senator Ruben S. Ayala, Chairman of the Senate Committee on Agriculture and Water Resources.

Please note that this informal advice letter was issued over twenty-three years ago. The Attorney General's Office has not considered the issues raised in the letter since its release in 1984. In the event Attorney General Brown is requested to provide advice on any issue addressed in this letter, or any related issue, this office may revisit or reconsider any issue of fact or law addressed in the 1984 letter.

Sincerely,


CLIFFORD T. LEE
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

CTL:

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE



1515 K STREET, SUITE 511
SACRAMENTO 95814
(916) 445-9555

June 21, 1984

The Honorable Ruben S. Ayala
Chairman, Senate Committee on Agriculture
and Water Resources
Room 2090, State Capitol
Sacramento, California 95814

Dear Sir:

This letter is in response to your April 26, 1984 letter requesting our advice on the following question:

"Does the Executive Branch of the Government have the authority to construct the Delta Facility feature of the State Water Resources Development System without additional legislation?"

We have concluded that the Executive Branch of State Government, through the Department of Water Resources, has the authority to construct a Delta Facility as part of the State Water Resources Development System under existing law. However, the construction and operation of such a facility would require the Department of Water Resources to comply with the California Environmental Quality Act, any terms and conditions, including conditions for the protection of public trust values, imposed upon the Department by the State Water Resources Control Board under California water right law, and any other applicable requirements of law.

ANALYSIS

Existing law clearly authorizes the Department of Water Resources ("Department") to construct some form of water facilities in the Sacramento-San Joaquin Delta (Water Code § 12934(d)(3)). The more difficult question is whether any specific Delta facility comes within the authorizing language. For purposes of this analysis we will assume that the Delta facilities in question are the facilities for the North and South Delta described in Senate Bill 1369 (Sen. Bill No. 1369 (1983-84 Reg. Sess.) § 1).

Senate Bill 1369 would require the Department to construct certain Delta transfer facilities in the North and South Delta. The Department would construct the North Delta facilities in two stages. The first stage would consist of

the widening and deepening of the South Fork of the Mokelumne River. The second stage would consist of a new, man-made channel that would connect the Sacramento River with the Mokelumne River system. The purpose of the North Delta facilities would be to increase the efficiency of transferring water across the North Delta. The bill would further require the construction of certain South Delta facilities for the purpose of allowing the State Water Resources Development System (commonly known as the "State Water Project") to export greater quantities of water from the South Delta without eroding Delta channels and levees. These facilities would include enlargement of channels around Victoria Island and the enlargement of the existing Clifton Court Forebay.

At issue is whether the Department is authorized under existing law to construct the above facilities as additional components of the State Water Project.

I. The Burns-Porter Act

The California Water Resources Development Bond Act (commonly known as the "Burns-Porter Act") authorized the financing and construction of the State Water Project. The Act, approved by the electorate on November 8, 1960, allowed the State to issue \$1.75 billion of general obligation bonds to assist in financing the construction of certain specified water facilities (Water Code § 12934).^{1/} Water Code section 12938 states that:

^{1/} Public Resources Code section 6217(b) annually appropriates \$25,000,000 from tidelands oil and gas revenue to the California Water Fund. Under the Burns-Porter Act, these monies plus any surplus revenue from the sale of project water and power are also available for the construction of specified water facilities (Water Code § 12938). Revenue bonds authorized under the State Central Valley Project Act may also provide a revenue source for the State Water Project. (Warne v. Harkness (1963) 60 Cal.2d 579, 588.) To the extent that the Burns-Porter Act authorizes the construction of a Delta transfer facility, the Department may use these revenue sources to finance the construction of such a facility.

"[T]he department is authorized to construct any and all facilities for which funds are appropriated to it for expenditure pursuant to this chapter."

Section 12938 further states:

"All proceeds from the sale of the bonds herein authorized shall be deposited in the fund as provided in Section 16757 of the Government Code and shall be available for the purpose provided in Section 12935, but, except only as to accrued interest and any premiums received on any sale, or sales, of the bonds, shall not be available for transfer to the General Fund. All moneys deposited in the fund are hereby appropriated to the department for expenditure and allocation by the department without regard to fiscal years for the State Water Facilities as herein defined and, to the extent provided in this Section 12938, for additions to the State Water Resources Development System." (Emphasis added.)

The Burns-Porter Act specifically defines the term "State Water Facilities" in Section 12934. The term includes a dam and reservoir on the Feather River, an aqueduct system for delivery of water to specified counties, drainage facilities, and facilities needed for land and equipment acquisition and relocation purposes. In addition, Section 12934 includes a description of a Delta transfer facility. Section 12934(d)(3) provides for:

"Master levees, control structures, channel improvements, and appurtenant facilities in the Sacramento-San Joaquin Delta for water conservation, water supply in the Delta, transfer of water across the Delta, flood and salinity control and related functions." (Emphasis added.)

Thus, in order for the Senate Bill 1369 facilities to be part of the term "State Water Facilities" and thus authorized for construction under the Burns-Porter Act, the facilities must fall within the description of those facilities under Water Code section 12934(d).

The Burns-Porter Act expressly authorizes construction of certain portions of the Delta facilities proposed under Senate Bill 1369. Water Code section 12934(d)(3) includes Delta channel improvements as part of the authorized "State Water Facilities." Channel improvements generally are considered to be physical modifications of existing water courses (Department of Water Resources, The California Water Plan, Bulletin No. 3 (May 1957) pp. 186-87). The proposed enlargements of the South Fork of the Mokelumne River and the channels surrounding Victoria Island would constitute such physical modifications of existing water courses and would therefore be authorized under the Act. The existing Clifton Court Forebay, a reservoir in the South Delta from which the Project pumps water, is authorized as part of the aqueduct system under Section 12934(d)(2) of the Burns-Porter Act. Department enlargement of that forebay would therefore also be authorized under the Act.

However, the Burns-Porter Act does not expressly authorize the proposed North Delta channel connecting the Sacramento River with the Mokelumne River. This channel would be an isolated, man-made channel commencing at Hood on the Sacramento River and connecting with the Mokelumne River. Such an isolated facility is neither a master levee, control structure, nor channel improvement. (Department of Water Resources, Alternatives for Delta Transfer (November 1983) pp. 22-24, 30 and 53.) Thus Water Code section 12934(d)(3) would only authorize the proposed North Delta channel if the facility fell within the category of "appurtenant facilities."

The proposed North Delta channel may be considered an "appurtenant" facility under Water Code section 12934(d)(3) for at least two reasons. First, the Department has proposed building the North Delta Channel only in conjunction with a program of river enlargement in the Delta (Sen. Bill No. 1369 (1983-84 Reg. Sess.) § 1). The new channel would be physically connected and operationally integrated with the Department's river enlargement program. (Department of Water Resources, Alternatives for Delta Water Transfer (November 1983) pp. 22-23.) In contrast, the Department has considered a program of river enlargement, alone, as a separate Delta transfer alternative. (Id.) Thus the proposed North Delta channel may be considered "appurtenant" to the Department's river enlargement efforts. Second, the Department's purposes for constructing the North Delta channel are consistent with the purposes stated in Water

The Honorable Ruben S. Ayala
June 21, 1984
Page 5

Code section 12934(d)(3) for a Delta facility. The section specifies "water conservation" and the "transfer of water across the Delta" as authorized purposes of a Delta facility under the Burns-Porter Act. The Department has stated that it intends to use the North Delta channel for precisely those purposes. (Statement, Plans for Delta Transfer, David N. Kennedy, Director, Department of Water Resources, Senate Committee on Agriculture and Water Resources, Sacramento, April 10, 1984.) As one appellate court has observed:

"It is a settled rule of statutory construction that statutes are to be given a reasonable and common sense construction (Ivens v. Simon) (1963) 212 Cal.App.2d 177, 181 [27 Cal.Rptr. 801]), in accordance with their apparent purpose and intention (County of Alameda v. Kuchel (1948) 32 Cal.2d 193, 199 [195 P.2d 17]), and one that is practical rather than technical. (Estate of Anderson (1960) 179 Cal.App.2d 535 [3 Cal.Rptr. 697].) The words must be read in context, keeping in mind the nature and obvious purpose of the statute (Johnstone v. Richardson (1951) 103 Cal.App.2d 41, 46 [229 P.2d 9]), and the statutory language applied must be given such interpretation as will promote rather than defeat the objective and policy of the law. (City of L.A. v. Pac. Tel. & Tel. Co. (1958) 164 Cal.App.2d 253, 256 [330 P.2d 888].)" (Fireman's Fund Ins. Co. v. Security Pacific Nat'l Bank (1978) 85 Cal.App.3d 797, 815.)

Thus the inclusion of the proposed North Delta channel within the definition of "appurtenant facilities" would appear to be appropriate given that the facility directly promotes the purposes outlined in Section 12934(d)(3) of the Burns-Porter Act.

Furthermore, the authorization of the proposed Delta transfer facilities under the Burns-Porter Act is supported by the fact that those facilities are consistent with the type of Delta facilities under consideration at the time the Legislature and the electorate adopted the Burns-Porter

The Honorable Ruben S. Ayala
June 21, 1984
Page 6

Act.2/ From 1957 to 1960, Department of Water Resources publications and legislative testimony by Water Resources Director Harvey O. Banks repeatedly affirmed the Department's intention to construct a Delta transfer facility that would use existing Delta channels as the means for water conveyance (Department of Water Resources, Bull. No. 60, Interim Report on the Salinity Control Barrier Investigation (March 1957) pp. 25-28; Department of Water Resources, Bull. No. 3, The California Water Plan (May 1957) pp. 185-86; Statement of Harvey O. Banks, Director, Department of Water Resources, Hearings Before the Sen. Interim Com. on Proposed Water Projects (January 22, 1958) pp. 139-41; Department of Water Resources, Bull. No. 76, Delta Water Facilities, Preliminary Edition (December 1960) pp. 32-35; 26 Assem. Interim Com. Rep. No. 2, The Delta Pool, A Report of the Assem. Interim Com. on Water (January 2, 1961) pp. 10-11.) As we have seen, the Delta facilities proposed under Senate Bill 1369 would rely heavily upon the existing Delta channel system as a means of water conveyance and would therefore be congruent with the intentions of the original project planners.

Finally, the California Supreme Court has generally granted the Department broad powers to manage the State Water Project under the Burns-Porter Act. In Metropolitan Water District v. Marquardt, the court held that Water Code section 12938 of the Burns-Porter Act did not unconstitutionally delegate legislative power to the Department. Section 12938 provides that:

"[T]he department is authorized to construct any and all facilities for which funds are appropriated to it for expenditure pursuant to this chapter."

The court held that:

"The standards laid down by the Legislature for administrative action need not be minutely defined, and it is sufficient if they can be found by implication from the general purposes

^{2/} The Legislature sent the Burns-Porter Act to the Governor for signature on June 29, 1959. The Governor signed the measure on July 10. (Final Calendar of Legislative Business (1959) Reg. Sess. p. 435). On November 8, 1960, the electorate approved the Act.

of a statute and from the reasons which must have led to its adoption." (Metropolitan Water District v. Marquardt (1963) 59 Cal.2d 159, 176.)

The court then concluded that:

"[T]he conduct of an important public enterprise requires that broad power and discretion be granted to the administrative agency in charge of the project." (Marquardt, supra, at 177.)

In short, given the language of the Burns-Porter Act, the congruency of the proposed Delta facilities with the original Delta facilities, and the broad power generally granted to the Department to manage the Project, the Department would appear to have the necessary authority under the Act to construct the Delta facilities proposed in Senate Bill 1369.^{3/}

II. The State Central Valley Project Act

In addition to the Burns-Porter Act, the Department of Water Resources appears to have the authority to construct the proposed Delta transfer facilities under the State Central Valley Project Act ("State CVP Act") (Water Code §§ 11100 et seq.). The Legislature and the electorate adopted the State CVP Act in 1933 as an ambitious effort to develop a state financed, interbasin water development and transfer system. The State system failed due to the State's inability to finance the program through revenue bonds during the 1930's depression and, eventually, the federal government constructed a number of projects specified under the State Act. Twenty-seven years later, the electorate approved the Burns-Porter Act, thus authorizing the construction of new

^{3/} Although neither this office nor the Legislative Counsel has had a prior opportunity to render an opinion on the precise question raised here, in 1981 the Legislative Counsel opined that Water Code section 12934(d)(3) authorized the Department to construct the "Peripheral Canal" in the Sacramento-San Joaquin Delta, even if Senate Bill 200 (1979-80 Regular Session) had been rejected by the voters. (Ops. Cal. Legis. Counsel, No. 21267 (December 31, 1981) Water Resources Development, p. 9.)

water supply development to be financed by way of general obligation bonds (Water Code §§ 12930 et seq.). Rather than repealing the State CVP Act, the Burns-Porter Act expressly states that the two statutes are to be complimentary. Section 12931 of the Burns-Porter Act provides that:

"Any facilities heretofore or hereafter authorized as part of the Central Valley Project or facilities which are acquired or constructed as a part of the State Water Resources Development System with funds made available hereunder shall be acquired, constructed, operated, and maintained pursuant to the provisions of the code governing the Central Valley Project, as said provisions may now or hereafter be amended." (Water Code § 12931.)

The California Supreme Court has thus held that the Burns-Porter Act did not repeal the Department of Water Resources' authority to issue revenue bonds to finance facilities authorized under the State CVP Act (Warne v. Harkness (1963) 60 Cal.2d 579, 588-89).

The State CVP Act does not specifically authorize the Delta transfer facility. Nonetheless the Act has bearing on the Department's authority to build a Delta transfer facility because of the Act's general authorization language. Water Code section 11260 authorizes the Department to construct, operate and maintain, as units of the Project:

"The units set forth in publication of the State Water Resources Board entitled 'Report on Feasibility of Feather River Project and Sacramento-San Joaquin Delta Diversion Projects Proposed as Features of the California Water Plan,' dated May, 1951, as modified in the publication of the Division of Water Resources entitled 'Program for Financing and Constructing the Feather River Project as the Initial Unit of the California Water Plan.' dated February, 1955, and including the upstream features set forth in Chapter VI of the 1955 report, except the features on the south fork of the Feather River, and as further modified by the recommendations contained in Bulletin No. 78 of the Department

of Water Resources, entitled 'Preliminary Report on Investigation of Alternative Aqueduct Systems to Serve Southern California,' dated February, 1959, and subject to such further modifications thereof as the Department of Water Resources may adopt, and such units or portions thereof may be constructed by the department and maintained and operated by it to such extent and for such period as the department may determine, as units of the Central Valley Project separate and apart from any or all other units thereof." (Water Code § 11260) (emphasis added).

The 1955 Report did include project facilities in the Delta designed to improve Delta water transfer efficiency. The report stated that:

"The Delta Cross Channel would convey water flowing down the Sacramento River to the westerly channels of the San Joaquin Delta, from which channels the water would flow to the intake channel to the project pumps.

The inlet of the Delta Cross Channel would be located near Isleton from which point a channel would be excavated from the Sacramento River to Georgiana Slough, which in turn would be enlarged to its confluence with the Mokelumne River. The water would then be conveyed through the channel of the Mokelumne River to the San Joaquin River. The Old River Channel of the San Joaquin River, and a tributary, would be dredged to provide ample capacity for conveying the water through it to the project intake headworks located at a point about three miles southeast of Bryon." (Department of Public Works, Division of Water Resources, Program for Financing and Constructing the Feather River Project (February 1955) p. 4).

Thus, in adopting Water Code section 11260, the Legislature envisioned Delta transfer facilities which would include an isolated North Delta Channel and the improvement of existing Delta channels. As we have seen, these facilities are

similar in kind to those facilities proposed under Senate Bill 1369.4/

The State CVP Act provides additional construction authority for the Department under Water Code Section 11290. The section states:

"The project includes such other units as may be from time to time added by the department to the units specifically enumerated. The department may add additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part." (Water Code § 11290) (emphasis added).5/

Pursuant to these two sections, the Department may add, by administrative action, to the projects specifically authorized under the State CVP Act (29 Ops.Cal.Atty.Gen. 161, 162 (1957)). Thus the State CVP Act would appear to provide separate authority for the Department to construct the Delta facilities proposed under Senate Bill 1369.

Moreover, the subsequent adoption of the Burns-Porter Act, with its specific designation of Delta facilities, does not

4/ The proposed Delta Cross Channel was apparently intended to be a new channel, separate and apart from the Federal Delta Cross Channel of the Federal Central Valley Project. The Federal Delta Cross Channel diverts Sacramento River water at Walnut Grove into Snodgrass Slough. The proposed State Delta Cross Channel would have diverted Sacramento River water farther South at Isleton into Georgiana Slough (See Water Project Authority, Report to the California State Legislature on the Feasibility of Construction By the State of Barriers in the San Francisco Bay System (March 1955) plate 13; See also W. Jackson and A. Paterson, The Sacramento-San Joaquin Delta, The Evolution and Implementation of Water Policy (June 1977) pp. 37-44).

5/ While this language is broad, the California Supreme Court has upheld very similar language in the Burns-Porter Act from challenges that such language represents an unconstitutional delegation of power to the Executive Branch (Metropolitan Water District v. Marquardt (1963) 59 Cal.2d 159, 176-77).

The Honorable Ruben S. Ayala
June 21, 1984
Page 11

prevent the Department from building the proposed Delta facilities under the State CVP Act. In Warne v. Harkness, the California Supreme Court considered this question in an analogous setting. (Warne v. Harkness (1963) 60 Cal.2d 579, 584-85). In Warne, the respondents were contesting the issuance of revenue bonds for the construction of power facilities at Oroville Dam. The court, however, held:

"We reject at the outset the contention of respondent that the Oroville dam, because it is among the facilities enumerated by the Burns-Porter Act as 'State Water Facilities,' is no longer authorized by the Central Valley Project Act. As we have seen, the Burns-Porter Act expressly continues, rather than precludes, the operation of the Central Valley Project Act, and nothing in the Burns-Porter Act shows that a facility authorized as part of the Central Valley Project is no longer to be so regarded merely because it is also enumerated as one of the 'State Water Facilities.'" (Warne v. Harkness, supra, 60 Cal.2d 579, 584-85.)

Thus, to the extent the Delta facilities in Senate Bill 1369 are already authorized under the Burns-Porter Act, the Act does not preclude their additional authorization under the older State CVP Act.

However, it would appear that the converse would also be true. If a Delta facility (for example the proposed North Delta Channel) was not authorized under the Burns-Porter Act but was authorized under the State CVP Act, then the facility would continue to be authorized under the older State CVP Act. Such continuing authorization would remain effective as long as the facilities authorized under the State CVP Act are not in conflict with the facilities authorized under the Burns-Porter Act (see generally Warne v. Harkness, supra, 60 Cal.2d at 587-88). As we have shown, all the Delta facilities in Senate Bill 1369 are either expressly authorized under the Burns-Porter Act, or are integral parts of facilities that are authorized. Therefore, any Delta facility in Senate Bill 1369 which might not be authorized under the Burns-Porter Act would appear to be authorized under the general provisions of the State CVP Act.

III. Construction and Operational Constraints

The legal determination that existing law authorizes the Department of Water Resources to construct the proposed Delta transfer facilities does not grant the Department the power to proceed without constraints. As you know, the California Environmental Quality Act ("CEQA") requires all state agencies to prepare an Environmental Impact Report ("EIR") on any project that they propose which may have a significant effect on the environment (Pub. Resources Code, § 21100). In addition, a public agency must mitigate or avoid any significant environmental effects of its project where feasible. (Pub. Resources Code, § 21002.1(b)). Thus CEQA will require the Department to prepare an EIR on the proposed Delta transfer facilities and to adopt feasible measures to mitigate any environmental damage caused by the facilities.^{6/}

Moreover, the State Water Project diverts and stores water subject to water right permits issued by the State Water Resources Control Board ("Board"). The Board issues permits where unappropriated water remains in the stream system and where the proposed project would promote the public interest (Water Code § 1253). In determining the public interest the Board must consider fish and wildlife, recreation, and water quality values (Water Code §§ 1243, 1243.5, 1257, and 1258). In addition, State Water Project operations are subject to specific restrictions under the County of Origin Statute, the Watershed Protection Statute, and the Delta Protection Act for the purpose of protecting the Delta and other areas of origin. Lastly, the Project, like all users of water,

^{6/} The scope of the EIR required of the Department remains an unresolved legal question. The State Water Project is an integrated water storage and conveyance project involving numerous dams, aqueducts, pumping plants and other facilities. To the extent that the operation of the proposed Delta transfer facilities would significantly change the operation of the entire State Water Project then the changes themselves might constitute a project under CEQA. In such a case, the Department's obligations under CEQA might require a comprehensive EIR covering the operation of the entire State Water Project. (See County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 204).

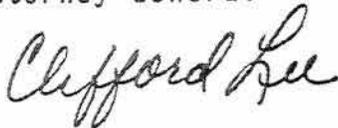
The Honorable Ruben S. Ayala
June 21, 1984
Page 13

must comply with the constitutional prohibition against the waste and unreasonable use of water (Cal. Const., art 10, § 2). The Board has specifically reserved jurisdiction to reconsider the Project's permits if necessary to protect fish and wildlife and to provide for salinity control in the Delta under the above authority. (State Water Resources Control Board Water Right Decision 1485 (August 1978) p. 21). In addition, the California Supreme Court, in National Audubon Society v. Superior Court, has required the Board to consider public trust values in administering the State's water rights system. (National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 446). Public trust values include the protection of navigation, commerce, fishery, and general ecological values. (National Audubon Society v. Superior Court, supra, 33 Cal.3d at 434-35).

In summary, the Department's construction and operation of the proposed Delta transfer facilities will be contingent upon the Project's compliance with an array of statutory, constitutional, and common law requirements designed to protect Delta interests and environmental values. These requirements will clearly affect the timing and nature of the Department's actions. Thus the mere determination that existing law authorizes the construction of the proposed Delta transfer facilities would not allow the unconditional development of those facilities by the Department. The Department must still comply with existing water right and environmental requirements.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General



CLIFFORD T. LEE
Deputy Attorney General

CTL:lld

Attachment