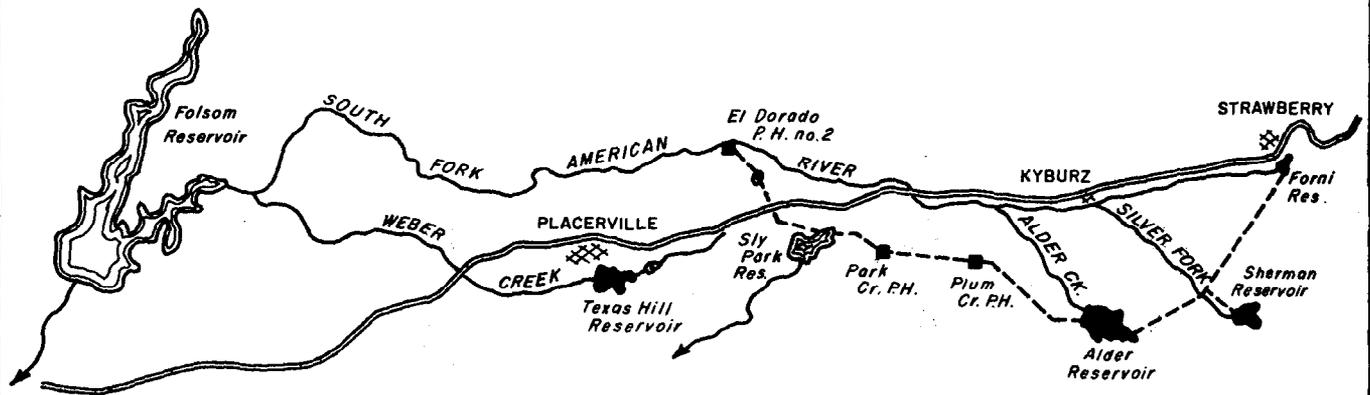


# SOUTH FORK AMERICAN RIVER PROJECT WATER RIGHTS DECISION

**Order: 83-1**  
**Amending and Affirming Decision 1587**  
**and Denying Petitions for Reconsideration**



February 1983



**STATE WATER RESOURCES CONTROL BOARD**

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STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 26375	)	
and 26376 to Appropriate Water From	)	
The South Fork of the American	)	
River and Its Tributaries	)	Order: 83-1
Petition for Assignment and Release	)	
From Priority of State-Held Applications	)	
5645, et al.	)	Source: South Fork
	)	American River
EL DORADO IRRIGATION DISTRICT AND	)	
EL DORADO COUNTY WATER AGENCY	)	
Applicant	)	County: El Dorado
	)	County
CALIFORNIA DEPARTMENT OF BOATING AND	)	
WATERWAYS, AMERICAN RIVER	)	
RECREATION ASSOCIATION, INC., et al	)	
Protestants	)	

ORDER AMENDING AND AFFIRMING DECISION 1587  
AND DENYING PETITIONS FOR RECONSIDERATION

BY THE BOARD:

El Dorado Irrigation District and El Dorado County Water Agency (El Dorado or applicant) having filed Applications 26375 and 26376 and having petitioned for assignment and release from priority of state-held applications; numerous protests having been filed; 25 days of public hearing having been held by the State Water Resources Control Board (Board); El Dorado, protestants and interested parties having appeared and presented evidence; closing briefs having been submitted; the evidence and closing briefs having been received

and duly considered; the Board having adopted Decision 1587 on November 18, 1982 approving water right permits for the South Fork American River (SOFAR) project; petitions for reconsideration of that decision having been filed by the Northern Sierra Summer Home Association, American River Canyon Association, and United States Bureau of Reclamation; the petitions having been duly considered, the Board finds as follows:

1.0 Grounds for Reconsideration

The Board may order reconsideration on all or a part of a decision adopted by the Board upon petition by affected persons (Water Code Section 1357). The Board's regulations provide that reconsideration may be sought for any of the following causes:

1. A procedural irregularity which has prevented the petitioner from receiving a fair hearing;
2. The decision is not supported by substantial evidence;
3. There is relevant evidence available which, in the exercise of reasonable diligence, could not be produced at the hearing; or
4. An error in law.

(23 Cal, Adm. Code 737.1).

2.0 Substance of the Petitions

2.1 Northern Sierra Summer Home Association (Home Association)

The petitioner alleges that agreements between the applicant (El Dorado) and the California Department of Fish and Game dated January 27, 1981, California Department of Boating and Waterways dated March 16, 1982, and

American River Recreation Association, Inc. dated March 2, 1982 were arrived at in closed sessions. Those sessions foreclosed participation by the Board, other protestants, interested parties, or the public sector.

Because the negotiations were so conducted, the petitioner alleges that relevant evidence was not produced at the hearing and that the foregoing parties were excluded from an essential area of the proceedings which led to the adoption of Decision 1587. The petitioner requests deletion of condition (permit term) 3.35 from the order to issue a permit. That condition states:

Reference is hereby made to the agreements between the permittee and (1) the California Department of Fish and Game, dated January 27, 1981; (2) the California Department of Boating and Waterways, dated March 16, 1982; and (3) The American River Recreation Association, dated March 2, 1982, and by this reference the provisions of said agreements are hereby incorporated herein as though fully set forth. Said provisions, insofar as they are not inconsistent with permit terms or conditions specified in other paragraphs of this permit, are incorporated as permit terms or conditions and shall be enforced as such, except that those provisions of said agreement which require binding arbitration of differences between the parties shall not bind the Board in interpreting or enforcing, in the public interest, the terms or conditions of this permit. The Board shall maintain continuing authority to change or add terms or conditions necessary to resolve, in the public interest, issues arising from alleged conflicts among the provisions of said agreements.

## 2.2 American River Canyon Association (ARCA)

The American River Canyon Association, representing cabin owners near the proposed Forni Dam diversion site, has petitioned for reconsideration of the SOFAR decision, "...because the decision is not supported by substantial evidence."

ARCA states that its testimony and briefs discuss loss of cabin sites through inundation, impacts associated with placement and usage of construction and maintenance roads, alterations of bridges and traffic patterns, and potential structural damage that could occur from blasting. Because Decision

1587 only addresses the issue of monetary compensation to cabin owners for loss of their summer homes, ARCA claims that the decision is incomplete and not supported by all the evidence.

The petitioner requests that the Board incorporate enforceable permit terms to mitigate perceived negative impacts on ARCA members. Terms suggested by ARCA in its petition are:

1. "Construction of the Forni diversion portion of the project shall not proceed until a mutually satisfactory Memorandum of Understanding has been negotiated among El Dorado, ARCA and the U.S. Forest Service.
2. All mitigation measures relating to ARCA's concerns, as outlined in the final Environmental Impact Report and articulated in oral testimony, shall be complied with during construction and maintenance of the project."
3. Incorporation of proposed permit terms 1-5 specified in ARCA's closing brief dated September 15, 1982.

#### 2.3 United States Bureau of Reclamation (Bureau)

The Bureau's opposition to El Dorado's project is based on its contention that the project, if approved, would impair the rights to appropriate water held by the Bureau at Folsom and Nimbus reservoirs near Folsom, California. Such impairment, it is claimed, would be caused by reduction in the amount of water reaching the reservoirs due to system losses and consumptive uses occasioned by the proposed project. Further reduction of flow, it is alleged, could be caused by El Dorado's use of South Fork American River water in another watershed.

In its petition for reconsideration, the Bureau contends (1) that the conclusions reached by the Board in Decision 1587 regarding the rights of the Bureau are not supported by the evidence and (2) that the Board erred, legally, in assigning the state-held applications to the applicant. Regarding

the latter contention, the Bureau further contends that the assignment of state-held applications is contrary to established procedure and that the Board should be estopped from assigning the applications. The Bureau further contends that it is inappropriate to assign state-held applications for a project different from state-held applications if the assignment would result in any injury to a prior right. The Bureau makes additional contentions, including the contention that the county and watershed of origin statutes cannot be made applicable to congressionally authorized projects of the United States.

The Bureau's petition for reconsideration requests the Board to modify Decision 1587 to grant "...only those water rights and release of priorities which are consistent with and which do not violate rights held by the United States."

### 3.0 Discussion

#### 3.1 Northern Sierra Summer Home Association

As stated earlier, the basis of the Home Association's petition is the allegation that certain agreements were developed in private and resulted in evidence being withheld during the hearing. The agreements in question as well as negotiations leading to development of the agreements were discussed during the hearing as noted in the following sections.

### 3.1.1 Fish and Game Agreement

The Fish and Game Agreement was introduced on April 13, 1982, the twelfth day of hearing, as the California Department of Fish and Game (Fish and Game) Exhibit C (T, XII, 56, 6). Direct testimony relating to contents of the agreement and negotiations leading to the agreement was presented. Cross-examination continued into the next day of hearing, on April 14, 1982. Approximately 71 pages of transcript were devoted to direct testimony and 121 pages to cross examination. The Fish and Game witness was cross-examined by eight people. That group included protestants, the applicant, Board staff and Board members.

### 3.1.2 Boating and Waterways Agreement

The Boating and Waterways Agreement was introduced during the fifteenth day of hearing, on May 13, 1982 (T, XV, 65, 11). This agreement was identified as the California Department of Boating and Waterways Exhibit 23. Contents of the agreement and negotiations leading to the agreement were both discussed. The rationale used to establish the agreed-upon flow regimes was explored during the cross-examination period.

The direct testimony occupied fourteen pages of transcript and cross-examination and redirect an additional 34 pages. Cross examination was conducted by seven individuals.

### 3.1.3 American River Recreation Association Agreement

The American River Recreation Association (ARRA) presented its agreement (identified as ARRA Exhibit 1) on May 26, 1982, the sixteenth day of hearing (T, XVI, 61, 199). Presentation of the agreement covered 61 pages of transcript. Subsequent cross examination by nine individuals required an additional 42 pages. Questions raised during that cross examination ranged from a detailed examination of differing provisions of the agreement to the "hows and whys" of establishing the flow release quantities and schedules to meet non-motorized recreational boating needs.

### 3.1.4 Home Association Hearing Involvement

The Home Association petitioned the Board during the course of the hearing to be allowed to participate as an interested party. That matter was taken up during the eleventh hearing day, April 6, 1982 (T, XI, 123, 3-125, 22). The Hearing Officer admitted the Home Association as an interested party on that date.

As such, the Home Association was permitted to make a formal presentation on the last day of hearing. All files, exhibits and written testimony were available for its review prior to that presentation. Admission of the Home Association predated presentation of the three agreements previously noted. Except for presentation of the Boating and Waterways agreement on May 13, 1982, the Home Association representative, Mr. Clifford Boggess, was present.

3.1.5 Board Policy on Examining Agreements

During the course of the hearing, parties to the proceeding raised questions about the Board's procedures. One of the questions dealt with the appropriateness of the Board examining agreements between the applicant and various protestants (T, XVI, 22, 4-24, 12).

The Hearing Officer responded to that question during the May 26, 1982 hearing. She stated there are at least four reasons the Board examines agreements during a hearing. Two of the reasons are responsive to the concerns of the Home Association. The Hearing Officer stated:

"Water Code Sections 1253 and 1255 direct the Board to allow the appropriation of water only under such conditions as in its judgement best conserve, develop and utilize in the public interest the water sought to be appropriated.

Although the Board encourages an applicant and protestant to resolve their differences voluntarily, the Board must judge whether agreements resolving protests propose conditions that are in the public interest. It is not necessarily true that every agreement between an applicant and a protestant fully protects the public interest.

\* \* \* \*

In this proceeding the applicant has not reached an agreement with all the protestants. Some protestants do not view some or all of these agreements as adequately addressing their concerns.

Accordingly, the Board must understand the agreements in order to determine to what extent they do not address the concerns of protestants who are not parties to the agreements." (T, XVI, 23, 1-23 & 23, 17-23, 24).

The Home Association representative was present when these statements were made.

### 3.1.6 Conclusions

Although the Home Association believes that it was inappropriate for the applicant and some protestants to privately negotiate mitigation agreements, it has failed to point out any irregularity by the Board in considering the agreements. Most fundamentally the Home Association complaint appears to be that there is relevant evidence regarding negotiations that could have been heard. As previously indicated the Home Association had ample opportunity to be informed concerning the nature of the mitigation agreements and to present evidence concerning the agreements. Further, the petitioner failed to state that such evidence could not have been produced "in the exercise of reasonable diligence" (23 Cal. Adm. Code 737.1(c)) or to ask for an opportunity to present additional evidence. Rather, the petitioner adopts the position that it was inappropriate for the Board to adopt Condition 3.35 because additional evidence might have been available. We conclude that the Home Association's petition has failed to show error by the Board and that it should be denied.

### 3.2 American River Canyon Association

ARCA contends the decision is not supported by substantial evidence. However, new evidence is not identified nor is the Board's attention directed to evidence introduced during the hearing that was not considered in the decision. ARCA merely asks the Board to reconsider whether it made a correct decision with regard to the concerns of the cabin owners represented by ARCA.

Three "permit terms" have been suggested by ARCA. Inclusion of any or all of these terms in El Dorado's water right permits would alleviate its concerns. The second term is multi-faceted. Each is discussed in the following sections.

### 3.2.1 Memorandum of Understanding (MOU)

This proposed "permit term" is not defined by ARCA as to what subjects are to be mutually agreed to nor the standards by which a mutually agreeable solution to any perceived problems are to be measured. Should the MOU be envisioned as an approval mechanism to be utilized by ARCA in approving road locations, cabin relocation sites, etc., then the Board would turn project approval over to a private entity.

### 3.2.2 Mitigation Measures

ARCA's second term (related to concerns outlined in the final Environmental Impact Report and in its oral testimony) addresses mitigation measures it wants added to the El Dorado permit. ACRA's petition does not identify the mitigation measures in the Final Environmental Impact Report that it would have the Board adopt as permit conditions. Similarly, hearing testimony regarding mitigation measures was vague.

In its oral testimony, ARCA identified the following perceived impacts and suggested mitigation measures to cope with them:

- a. Inundation of several summer homes (T, XXII, 154, 17-154, 20).

Mitigation measures suggested are to identify by January 1, 1983 which cabins will be affected (inundated). El Dorado must then agree to provide an equivalent summer home, including all utilities, at an agreed-upon location and ensure that the new home be taxed at the same rate as the old. Furthermore, El Dorado is to make provisions to protect cabins in the "fringe area." That area is defined as the area between the elevation of the Forni dam (5560) and the maximum flood flow level or crest elevation (5578.5) (T, XXII, 155, 3-156, 8 and 157, 22-158, 10).

- b. Potential degradation or destruction associated with blasting and other construction activities (T, XXII, 154, 17-154, 20). ACRA suggests that the applicant compensate cabin owners for structural damage caused by construction or maintenance activities for a period of two years after Forni dam is constructed (T, XXII, 156, 22-156, 25 and 158, 18-158, 23).
- c. Noise and dust impacts (T, XXII, 154, 17-154, 20). ARCA asks that El Dorado provide a legal description of maintenance and access routes and further asks that those routes be agreed upon by ARCA prior to construction (T, XXII, 158, 11-158, 17).
- d. Aesthetic losses (T, XII, 154, 17-154, 20). These losses or impacts were not defined by ARCA nor were mitigation measures suggested.

No specific mitigation is offered ARCA in the final Environment Impact Report. The mitigation measures which are identified are for general construction impacts on land, water and air resources. Much of this mitigation deals with methods of construction to prevent erosion and degradation of water quality (Staff, 14, pp. W-7-23 to W-7-72). El Dorado, in approving the project adopted those mitigation measures. Further, compliance with water quality mitigation is assured by waste discharge requirements adopted by the California Water Quality Control Board, Central Valley Region — Order Number 82-005 (El Dorado, 91).

The terms presented by ARCA in its oral testimony were addressed, in part, during the hearing and to a great extent in the subsequent decision. Identification of which cabins will be affected has already been accomplished through testimony at the hearing and presentation of El Dorado Exhibit 93. Just compensation for inundated cabins is guaranteed under eminent domain law. Availability of alternate lot locations and the willingness of the U.S. Forest Service to make these lots available has already been demonstrated (El Dorado, 94) through correspondence and in the El Dorado-U.S. Forest Service agreement.

Mitigation of noise and dust impact has already been dealt with by El Dorado when it approved the project. Laws requiring compensation for damage from construction related impacts now exist; El Dorado, in its testimony, expressed a willingness to make just compensation for damage if such damage was found to be construction induced (T, XXV, 56, 11-56, 20). Location of access roads will have to be agreed to by the U.S. Forest Service.

Aesthetic losses have not been defined nor mitigation measures identified. Given these circumstances the Board could only guess at what the petitions would have the Board do.

### 3.2.3 Terms In Closing Brief

Five suggested terms addressing mitigation measures are contained in ARCA's closing brief. The first four of these are the same as those expressed in ARCA's oral testimony. The fifth, mentioned only in the closing brief, is:

"Any unresolved dispute between affected cabin owners and the Applicant must be resolved through binding arbitration." (ARCA, closing brief, p. 2)

This issue was addressed under Topic 3.2.1 (supra).

### 3.2.4 Conclusions

To summarize, the petitioner has failed to show that the Board's decision is not supported by the evidence. The gist of the petition is that ACRA requested the Board adopt conditions that were not included in Decision 1587. We have not adopted the requested conditions for the reasons stated in Decision 1587 and in this Order. In accordance with the foregoing discussion, we conclude that the petition for reconsideration should be denied.

### 3.3 United States Bureau of Reclamation

As stated previously, the Bureau contends that Decision 1587 is not supported, in part, by the evidence and that in assigning state-held applications the Board legally erred.

#### 3.3.1 The County and Watershed of Origin Statutes are Applicable to the Folsom Project

The Bureau renews the arguments made in its Statement in Support of Protest and Responsive Brief that the county and watershed of origin statutes cannot be made applicable to the Central Valley Project (Statement in Support of Petition for Reconsideration, 12). Similarly, we affirm our response to this issue as set forth in Decision 1587 (pages 45 through 50). The very recent decision by the Ninth Circuit Court of Appeals, in the New Melones case, (United States v. State of California, slip opinion, Dec. 20, 1982) directly supports our conclusions in Decision 1587 that the Folsom project is subject to California's county and watershed of origin statutes.

When authorizing New Melones Congress stated:

"Before initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within the basin and the diversion shall at all times be subordinate to the quantities so determined." (Flood Control Act of 1962, Third provision).

The assignment of state-held applications to the Bureau for New Melones subordinated the use of the water developed at New Melones to the needs of the counties wherein the water originated (Decision 1422, conditions 4 and 25).

When considering whether the Board's conditions upon New Melones giving preference to the counties of origin conflicted with congressional directives, the Ninth Circuit held that the conditions "...far from working against congressional purposes, lead to results anticipated, and apparently encouraged, by Congress" and that the conditions must be upheld. U.S. v. California supra.

Similarly, when authorizing the Folsom Project Congress stated:

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future use."

As in the case of New Melones authorizing statute, the conditions imposed upon the Folsom Project respecting the county and watershed of origin lead to results anticipated and encouraged by Congress.

### 3.3.2 Partial Assignment Of State-held Applications

#### To El Dorado Was Appropriate

The Bureau makes several arguments why the assignment of state-held applications 5645 and 7938 to El Dorado is inappropriate. In general these arguments are based on an incomplete consideration of California water law.

Fundamental to the arguments made by the Bureau is the assumption that the Bureau would have a better claim to the use of water under its Folsom Project water rights if the priority of state-held applications 5645 and 7938 were released from priority to El Dorado as opposed to being assigned to El Dorado. This assumption is incorrect.

It is well established in California law that water right applications first in time are first in right (Water Code Sections 1450 and 1451). The numbers given applications correspond to their filing dates so that applications earlier in time have lower numbers than applications filed later in time.

An assignment or partial assignment is a transfer of ownership of all or part of the right initiated by the state filing. The recipient of an assignment and the contemporaneous permit receives a right to develop water; the right has the priority of the application. A release from priority is a waiver of the priority of the state-held application in favor of an original application filed by the recipient of the waiver. The priority of an original application filed by the recipient of a release from priority is improved only as against the state-held application of which priority is released.

The Bureau has the right to use water under permitted Applications 13370, 13371, 13372 and 14662. State-held Applications 5645 and 7938 have an earlier priority, and an assignee of these applications has a right to use water from the American River superior to the Bureau's rights under permitted Applications 13370 et seq. El Dorado's original applications to develop water for the SOFAR Project (numbered 26375 and 26376) have a lower priority to the use of water from the American River than does the Bureau under permitted Applications 13370 et seq. The Bureau has apparently concluded that if the priority of state-held Applications 5645 and 7938 were released to El Dorado (as opposed to assigned),

then the normal order of priority among the applications would prevail. This conclusion is incorrect, as will be explained in the following paragraphs.

The Department of Water Resources' release of priority of applications 7938 and 7939 in favor of Applications 13370 et seq. subjected the release "to the prior rights of any county in which the waters sought...originates to use such water as may be necessary for the development of the county..." More explicitly, the permits issued by this Board for Applications 13370 et seq. provide that "[t]he amounts which may be diverted under rights acquired...under this permit are...subject to reduction by future appropriation of water for...use within the watershed tributary to Folsom Reservoir." The operative effect of both the reservation in the release from priority and the permit condition is to make Applications 13370 et seq. junior to all applications for the appropriation and use of water in the county or watershed in which the water originates irrespective of whether the applications were filed later or have a higher number than Applications 13370, et seq.

### 3.3.2.1 Assignment of State-held Applications To El Dorado Accords With Applicable Procedure

The Bureau contends that the Board has failed to act in accord with established procedure in granting partial assignment of state-held applications 5645 and 7938 to El Dorado. More specifically the Bureau contends that if a proposed project is different from the project reflected in a state-held application then the priority of the state-held application should be released rather than assigned to the project proponent.

In support of this contention the Bureau references two publications. The earliest publication is by the Department of Water Resources, dated January 1959 and is titled State Water Right Applications For Unappropriated Water, Assignments Thereof, Reservations For Counties of Origin, and Other Related Matters . The second publication is by the Board, dated June 1976 and is titled Information Pertaining To State Filings . Both publications generally indicate that an assignment of a state-held application is appropriate if the proposed project is substantially similar to the project described by the state-held application. Conversely, the Board should be petitioned for a release of the priority of a state-held application if the proposed project is substantially different from the project described in the state-held application.

The Water Code provisions governing state-held applications provide no standard for determining whether a state-held application should be assigned or released from priority (Division 6, Part 2, Section 10500, et seq.) and no regulations have been adopted by the Board respecting the subject (see generally 23 Cal. Adm. Code, Subchapter 2).

The January 1959 publication by the Department of Water Resources is only a generalized statement of circumstances when an assignment will be appropriate. For example, it is stated:

"In general, an assignment of a state application is executed when the agency plans to build a project essentially as proposed in the state applications." (page 43)

Further, this publication was put in its final form about six months before changes were made to the Water Code pertaining to state-held applications. It appears the guidance provided by the Board's publication, Information Pertaining to State Filings, merely carried forward the general statement in the Department's publication without taking sufficient note of subsequent changes in the law.

On July 20, 1959 an Act amending and adding new sections to Water Code, Division 6, Part 2, Section 10500, et seq. was filed with the Secretary of State. This Act added a new section to the Water Code which made clear that holders of state-held applications could alter projects that had initially been proposed for assignment or release of priority of state-held applications, provided such changes would not conflict with "the general or coordinated plan" for water development. As subsequently amended (for purposes of this discussion the amendments have no importance) this section now provides in pertinent part:

"10504.5

(b) The holder of applications that have been assigned, or in favor of which a release from priority has been made, shall submit any proposed amendments to such applications to the State Water Resources Control Board. The board shall approve such amendments only if it determines that the amendments will not conflict with the general or coordinated plan or with water quality objectives established pursuant to law. The board shall notify the holder of the application of its approval or disapproval."

The Bureau is aware of the effect of this enactment. Subsequent to the passage of the act, the Bureau has made requests to the Board (or its predecessors) to have state-held applications amended to conform to proposed projects and assigned to the Bureau. One such request was made on February 29, 1960 and sought to have state-held Applications 5626 et al. (for Lake Shasta) amended to include an enlarged place of use. Decision 990, adopted on February 9, 1961 dealt with that request (see pages 20 and 21). Although the Board deferred action on the request due to pending litigation alleging that the California Water Commission improperly approved such amendments, the discussion in the Decision is not unsympathetic to the Bureau's request. The suit was not dismissed until October 10, 1980 and the Board has not taken further action on the proposed amendments to Application 5626. (Sacramento River and Delta

Water Users Association v California Water Commission , Sacramento County Superior Court No. 126921). In making the request to amend state-held Applications 5626 et al., the Bureau did not consider its proposal to expand the place of use from 3,559,000 acres to an additional 6,197,000 acres to be a significant change in the state-held application (letter of Feb. 29, 1960, pages 5 and 7).

The Water Code authorizes assignments of state-held applications so long as the proposed project is not in conflict with a general or coordinated plan for the development of waters (Water Code Section 10504). To obtain assignment, an applicant need not propose the exact project described in the state filing. In Johnson Rancho County Water District v. State Water Rights Board, 235 C.A.2d 863; 45 Cal. Rptr. 589 (1965) the Court described the California Water Plan as follows:

"In contending that the Water Rights Board was legally powerless to award permits based upon a development which precluded construction of the Parks Bar Dam, petitioner misconstrues the plan and misconceives the Legislature's purpose in giving it statutory sanction. At a multitude of points throughout its 26-page introduction and 246 pages of text, Bulletin No. 3 evinces the general, tentative and flexible character of the plan. In its introductory section, a communication from a board of engineering consultants endorses the recommendation of the Director of Water Resources that there be more detailed study of component features of the plan to determine their need, engineering feasibility and financial feasibility and that the plan be subject to continuing review, modification and improvement in the light of changing conditions and additional information. The engineering consultants recommended that the Legislature receive the plan as a coordinated proposal for the progressive and comprehensive future development of the state's water resources, but that no specific project be authorized for construction without detailed investigation of engineering feasibility, economic justification and financial feasibility. (Bull. No. 3, p. XV.) It warned that the plan, as presented in Bulletin No. 3 includes 'projects of doubtful economic justification and works of unproven physical feasibility.' (Ibid., p. XV.) The department's introductory section states that

the magnitude of the investigation prevented economic and financial analyses. ( Ibid. , p. XXV.) It states that '...the Plan must be regarded as no more than a broad and flexible pattern into which future definite projects may be integrated in an orderly fashion.' (P. XXV.) The plan states that 'Further investigation may indicate alternative projects which are more feasible than those discussed herein....' ( Ibid. , p. 7.)"

The Department of Water Resources is authorized to file applications for water which in its judgement may be required to fulfill the state water plan or which may be required for the development of any general or coordinated plan for the development of water (Water Code Section 10500). In Johnson Rancho, supra, the court upheld the assignment of a state-held application for a project that, when constructed, would preclude construction of the project set forth in the state water plan.

Finally, in 1965 the legislature added Section 10504.01 the Water Code. Providing a new procedure for handing incomplete state-held applications this section states, in part:

"Each petition for assignment of all or a portion of an application filed pursuant to this part, which application has not been completed in accordance with law and the regulations of the board, shall include as a part thereof a proposed completed application consistent with the requested assignment, and describing petitioner's proposed project. As soon as practicable after the receipt of such petition the board shall issue a notice of the petition and proposed completed application. Further procedure with respect to each such petition shall be in accordance with Chapters 3 (commencing with Section 1300), 4 (commencing with Section 1330) and 5 (commencing with Section 1340), Part 2, Division 2 of this code relating to notice, protests, hearing, and action on applications for permits to appropriate water. The hearing shall be for the purpose of determining whether the application should be assigned pursuant to Sections 10504 and 10505 and whether the proposed completed application submitted by the petitioner should be approved in whole or in part. When the board's determination is favorable to the petitioner, it shall assign all or a portion of the application to the petitioner, accept and approve the assigned portion, and issue a permit as in other cases provided by law."

This procedure was followed by the Board when processing El Dorado's application. The section requires that an applicant file a proposed completed application describing the proposed project; it does not require that the application conform to the incomplete state-held application.

The Bureau also contends that it was inappropriate to assign state-held Application 7938 to El Dorado because that application was meant to be used in conjunction with Application 7939, to supply water to the floor of the Sacramento and San Joaquin Valleys and the Delta. When a state-held application providing for the use of water outside of the county or watershed of origin is subject to the superior right to use water by the county and watershed of origin then it follows, logically, that such applications can be assigned to projects proposing to serve the county and watershed of origin. The Board is directed to determine whether a proposed project will conflict with a general or coordinated plan for the development of water. This procedure was followed by the Board when processing El Dorado's application. The court's discussion of the state water plan in Johnson Rancho shows this is an entirely reasonable procedure. We conclude that assignment of state-held Applications 5645 and 7938 was in accord with applicable procedure.

3.3.2.2 State-Held Applications Having an Earlier Priority Date Than Applications For Existing Water Projects May Be Assigned Even Though an Existing Project May be Adversely Affected

The Bureau contends that state-held applications should not be assigned for projects different from those identified in the general or coordinated plan if such an assignment will injure holders of existing water rights. The

discussion under the previous heading has demonstrated that state-held applications may be assigned for projects which differ from those identified in the general or coordinated plan or in state-held applications. The discussion under this heading will show why the assignment of state-held applications for projects different from those in state-held applications should not disturb the normal order of priority accorded applications. The following heading will deal with the issue of whether the proposed changes will operate to the injury of any legal user of water.

Water Code Section 10500 describes the priority to be accorded state-held applications as follows:

"Applications filed pursuant to this part shall have priority, as of the date of filing, over any application made and filed subsequent thereto."

The purpose of state-held applications is to reserve water, through the application process, for water required for a general or coordinated plan for the development of water (Water Code Section 10004, et seq., and 10500, et seq.). Persons planning water development projects have actual or constructive notice of state-held applications and must plan for the effect of such applications or seek the assignment or release of the state-held applications in favor of the planned project.

The Bureau was well aware of the state-held applications on the South Fork of the American River. On February 27, 1958, the Bureau was assigned state-held Applications 5635, 5636 and 7940, and the priority of state-held Applications 7936, 7937, 7938 and 7939 was released in favor of Bureau Applications 13370, 13371, 13372 and 14662.<sup>1</sup> These

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<sup>1</sup> The Bureau cancelled state-held Applications 5635 and 5636 for the Folsom Project in 1961. These applications had an earlier priority than state-held Applications 5645 and 7938.

assignments and releases were also found not to be in conflict with a general or coordinated plan for the development of water. All assignments and releases, however, were made subject to "...the prior rights of any county in which the water sought to be appropriated originates to use such water as may be necessary for the development of the county..." The Bureau should have planned for a reduction in the water available to the Folsom Project for local needs inasmuch as Congress specifically instructed the Bureau to plan a project in accordance with state laws protecting local needs. We conclude, therefore, that the priority of state-held applications should be preserved, as against water projects subsequently applied for and built, even though such projects may be adversely affected.

### 3.3.2.3 Legal Users of Water Must Be Protected From Injury From Changes To State-Held Applications.

Before granting permission to change a water right application, the Board must find that the change will not operate to the injury of any legal user of the water involved (Water Code Section 1702). In Decision 1587 the Board stated:

"The proposed changes to the state-held applications will move points of diversion upstream on the South Fork American River. The applicant acknowledges that such changes could interfere with existing water rights and suggests that assignments be made subject to a condition to protect existing water rights..."

Based on the foregoing discussion, we conclude that subject to conditions to protect...lawful users of water, El Dorado's petition for assignment of state-held applications may be granted..."

The condition to protect legal users of water was omitted from the conditions in Decision 1587; this order will correct that omission.

Adoption of that condition, however, will not benefit the Bureau because the changes proposed by El Dorado will not more adversely affect the Bureau than the projects proposed in the state-held applications. The points of diversion for state-held applications 5645 and 7938 are all upstream from the Folsom Project. As noted in Decision 1587, the changes proposed do not increase the quantity of water to be diverted as specified in the state-held applications. El Dorado's project would move the points of diversion further upstream. Such changes in the points of diversion do not injure the Bureau. Further, the addition of eight hundred acres to the place of use within Section 35 and 36, T12N, R9E, and Section 31, T12N, R10E to eight hundred square mile place of use will not adversely affect the Bureau. Expansion of the place of use does not authorize El Dorado to divert or put more water to consumptive use and return flows remain in the South Fork American River tributary to the Folsom Project.

### 3.3.3 El Dorado Is Not Required to Reach an Agreement

#### With The Bureau Prior to Commencing Project Construction

In a related contention, the Bureau maintains that the Board should, consistent with Article 10, Section 2, of the California Constitution, require El Dorado to reach an agreement with the Bureau prior to commencing project construction (Statement in support of Petition For Reconsideration, p. 10). Our discussion of this subject is found in Decision 1587 at page 40. We stated that Pacific Gas and Electric Company (PG&E) could be compelled to enter into an agreement with El Dorado and not that El Dorado could be required to reach an agreement with PG&E. This meant that notwithstanding superior rights to the use of water, that PG&E could not deny El Dorado water necessary for its

project. The relationships between El Dorado and PG&E and between El Dorado and the Bureau are different. El Dorado seeks to use water to which PG&E has superior rights and to use PG&E facilities, El Dorado does not propose to use water to which the Bureau has a superior right nor to use Bureau facilities. We conclude that the constitutional issue raised by the Bureau is not applicable to the relationship between El Dorado and the Bureau.

### 3.3.4 Estoppel Is Not Applicable To Assignment of State-Held Applications

The Bureau contends the Board should be estopped from assigning state-held Applications 5645 and 7938 because the Bureau was not assigned these applications for the Folsom Project (Statement in Support of Petition for Reconsideration, p. 10). In support of this contention the Bureau references a portion of a memorandum written in 1951 by a staff engineer which states:

"[T]he United States has requested a partial assignment of State filings 5645, 7938 and 7939 which involve storage and diversion at the Coloma site on the South Fork of the American River. Construction at the Coloma site is prohibited at the present time under Section 10001.5 of the Water Code. An assignment of a portion of these applications to the United States, in order that they might be utilized at Folsom, might render inadequate water rights at the Coloma site for future development. It would appear, however, in view of the fact that the Bureau has its own applications for the project, that the objectives could be accomplished by executing a release of priority."

One party may seek to estop (enjoin) an action of another party:

"Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing to be true and to act upon such belief..."

(Witkin, Summary of California Law, v, 8, p. 5351.)

As previously stated the action releasing the priority of state-held Application 5645 and 7938 was taken on February 27, 1958. Additionally, this action preceded additions to the Water Code in 1959 and 1969 which changed the

law for assigning or releasing from priority state-held applications (See discussion, pages 15 and 17, supra). We find no statement or conduct that could have led the Bureau to believe that the legislature would never change the rules under which assignments might be granted.

Regarding the aforementioned staff memorandum, the February 27, 1958 Release From Priority which released state-held application 7938, does not explain why the applications were released from priority rather than assigned. The staff engineer's reasoning is certainly not adopted. Further, no express or implied representation is made, in the Release, that state-held Applications 5645 and 7938 would never be used for a project different from the Coloma Project, and it is not at all clear that the engineer would have recommended against assigning the applications in question if the Bureau had lacked the water necessary for the Folsom Project under other applications. Nor is it clear that the engineer would never recommend that state-held Applications 5645 and 7938 be assigned for a project different from the Coloma Project. We are unable to find any factual basis that supports the contention that the Board should be estopped from assigning state-held Applications 5645 and 7938.

3.3.5 The SOFAR Project Will Not Use Water On An Average Annual Basis For Which the Bureau Has Permits Irrespective of the Relative Order Of Priorities To The Use Of Water Or The County And Watershed Of Origin Reservations.

In Decision 1587 we found that it appeared there was an amount of water in excess of 60,000 acre-feet available for appropriation in the South Fork American River, on an average annual basis. We noted, further, that the Bureau's own testimony indicated that inflow to the Folsom Reservoir would be

reduced by only about 33,000 acre-feet annually (pages 52 and 53). This means that on an average annual basis, the Bureau would continue to receive all the water for which it holds permits.

The forgoing estimate, by the Bureau, of reduced inflow to the Folsom Project made no allowance for special conditions 80 and 91 included in permits for applications to appropriate water that may affect the availability and quality of water in the Delta. In Term 80, the Board reserves jurisdiction to change the season of diversion to conform to the results of a comprehensive analysis of the availability of water in the Sacramento River Basin, and Term 91 provides, in part, that no diversion is authorized when the Bureau must release water from storage for Delta Beneficial uses. Mr. Meyer, of the Bureau, testified that such conditions "would take care of a lot of our objection" to the SOFAR Project (T, XXI, 51, 2-51, 22). These conditions were adopted by the Board (see Decision 1587, p. 92, conditions 3.6 and 3.7). Having reviewed these facts, it is clear the Bureau's Folsom Reservoir will not sustain any real reduction to inflows for which it holds permitted rights as a result of our approval of the SOFAR project. It further appears that, absent any injury to Folsom Reservoir, the Bureau is not justified in pursuing a legal attack on the county and watershed of origin principle. This is particularly true, when the attack could result in the frustration of the SOFAR Project which the Bureau concedes is in the public interest (T, XXI, 51, 2-51, 10).

#### 4.0 Conclusions

The Board concludes that:

- a. The Northern Sierra Summer Home Association Petition for Reconsideration fails to raise substantial issues related to the

causes for reconsideration in that the agreements negotiated between the applicant and various protestants were adequately examined both in content and background during the course of the hearing.

- b. The American River Canyon Association Petition for Reconsideration fails to raise substantial issues related to the causes for reconsideration. No evidence was alleged that was not considered in developing Decision 1587.
- c. The U.S. Bureau of Reclamation Petition for Reconsideration fails to raise substantial issues related to the causes for reconsideration. No evidence was alleged that was not considered in developing Decision 1587.
- d. A condition should be adopted as a permit term for each state-held application assigned to El Dorado which subject the permit to all appropriative rights filed before May 21, 1980 for the diversion of water from the South Fork American River Watershed for use within El Dorado County above of the points of diversion identified in the state-held application.

ORDER

NOW, THEREFORE, IT IS ORDERED, that:

- a. The Northern Sierra Summer Home Association Petition for Reconsideration of Decision 1587 is denied.
- b. The American River Canyon Association Petition for Reconsideration of Decision 1587 is denied.

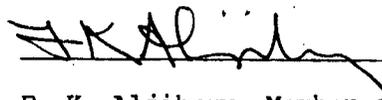
- c. The U.S. Bureau of Reclamation Petition for Reconsideration of Decision 1587 is denied.
- d. The following condition shall be included as a permit term for each state-held application assigned to El Dorado:

This permit is subject to all appropriate rights filed before May 21, 1980 for the diversion of water from the South Fork American River Watershed for use within El Dorado County above (township, range and section number of the points of diversion identified in the state-held application).

Dated: February 17, 1983



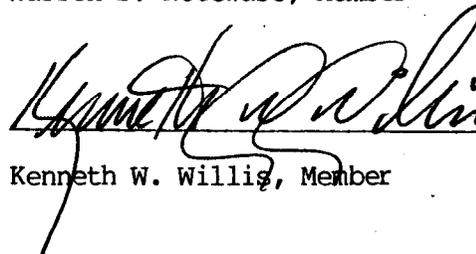
Carol A. Onorato, Chairwoman



F. K. Aljibury, Member



Warren D. Noteware, Member



Kenneth W. Willis, Member

