

January 28, 2011

**Via E-mail:**

DELTA PLANS COPING@DELTA COUNCIL.CA.GOV

Ms. Terry Macaulay  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

Re: **NORTH DELTA WATER AGENCY COMMENTS ON NOTICE OF  
PREPARATION FOR DRAFT ENVIRONMENTAL IMPACT REPORT FOR  
THE DELTA PLAN**

Dear Ms. Macaulay:

This firm is counsel to the North Delta Water Agency ("NDWA"). On behalf of NDWA we respectfully submit these comments on the Notice of Preparation (NOP) dated December 10, 2010 for the Draft Environmental Impact Report for the Delta Plan, as issued by the Delta Stewardship Council.

By way of background, NDWA was formed by a special act of the Legislature in 1973. (North Delta Water Agency Act, Chapter 283, Statutes of 1973). Its boundaries encompass approximately 277,000 acres including substantially all of that portion of the Sacramento-San Joaquin Delta, as defined in Water Code Section 12220, that is situated within Sacramento, Yolo and Solano Counties. Also included within NDWA's boundaries are certain lands in northeastern San Joaquin County comprising New Hope Tract, Canal Ranch and Staten Island.

Beginning approximately 160 years ago, farmers within the area now comprising NDWA began reclaiming lands from flooding, appropriating water to beneficial use and establishing vibrant agricultural communities. The Bureau of Reclamation (Bureau) began constructing the Central Valley Project (CVP) in the late 1930s, damming the major tributaries on the Sacramento River and holding back substantial quantities of the Delta water supply. As it did with landowners along the Sacramento River, the United States conducted extensive studies and negotiations to ensure a sufficient supply for water right holders in the northern Delta. Discussions with Delta landowners were protracted, however, due to the complex issues of both water quantity and quality, and the issues only intensified with the construction of the State Water Project by the California Department of Water Resources (DWR).

Against this backdrop, NDWA was formed to represent northern Delta interests in negotiating a contract with both the Bureau and DWR in order to mitigate the water rights impacts of the Projects. From 1974 to 1979, North Delta, the Bureau and DWR determined the outflow necessary to meet water quality standards for irrigated agriculture and reviewed the paramount water rights of landowners within North Delta's boundaries. The agencies also evaluated the Delta channels' historical function as natural seasonal storage. Before the Projects began withholding much of the Sacramento River system's high winter flows, the Delta channels stored sufficient fresh water to sustain water quality in the northern Delta throughout and often beyond the irrigation season. Since the Projects commenced, however, the Delta functions more like a flowing stream and, as a result, relatively minor decreases in outflow can have a serious impact on northern Delta water quality.

In 1981, DWR and NDWA executed a Contract for the Assurance of a Dependable Water Supply of Suitable Quality (1981 Contract), a copy of which is enclosed. The crux of the 1981 Contract is a guarantee by the State of California that, on an ongoing basis, it will ensure that suitable water will be available in the northern Delta for agriculture and other beneficial uses. The 1981 Contract requires DWR to operate the State Water Project to meet specified water quality criteria while providing enough water to satisfy all reasonable and beneficial uses of water within NDWA's boundaries. (1981 Contract, Art. 2.) In return, North Delta makes an annual payment to DWR. (*Id.* Art. 10). The 1981 Contract remains in full force and effect.<sup>1</sup>

Although the two signatories are public agencies, the 1981 Contract also extends to individual landowners who, under the terms of the 1981 Contract, have executed subcontracts guaranteeing that their lands will receive all the benefits and protections of the 1981 Contract. (*Id.* Art. 18) Many of these subcontracts have been signed and recorded, enabling the subcontractors to enforce the terms of the 1981 Contract.

The 1981 Contract contains provisions that expressly protect NDWA and its landowners from harm caused by changes in State Water Project (SWP) water conveyance infrastructure. For example, Article 6 of the 1981 Contract provides:

The State shall not convey SWP water so as to cause a decrease or increase in the natural flow, or reversal of the natural flow direction, or to cause the water surface elevation in Delta channels to be altered, to the detriment of Delta channels or

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<sup>1</sup> In connection with the hearings that preceded the State Water Resources Control Board's adoption of Water Right Decision 1641, DWR and NDWA entered into a memorandum of understanding dated May 26, 1998 (MOU), which provides that DWR is responsible for any obligation imposed on NDWA to provide water to meet Bay-Delta flow objectives, so long as the 1981 Contract remains in effect. In Decision 1641, the State Water Board made the following findings and determinations: "Based on the agreement, the SWRCB finds that the DWR will provide the backstop for any water assigned to the parties within the NDWA as specified in the MOU. This decision assigns responsibility for any obligations of the NDWA to the DWR consistent with the MOU." (Decision 1641 at 66). The latter findings and determinations were upheld by the trial and appellate courts that subsequently reviewed Decision 1641.

water users within the Agency. If lands, levees, embankments, or revetments adjacent to Delta channels within the Agency incur seepage or erosion damage or if diversion facilities must be modified as a result of altered water surface elevations as a result of the conveyance of water from the SWP to lands outside the Agency after the date of this contract, the State shall repair or alleviate the damage, shall improve the channels as necessary, and shall be responsible for all diversion facility modifications required.

(Emphasis added.) NDWA will take all steps necessary to ensure that the protections embodied in the 1981 Contract are adhered to in connection with the Delta Plan or any related processes, proceedings or activities undertaken by the State of California or the federal government.

### **NDWA COMMENTS ON NOP**

1. Any Delta Plan must include guarantees that lands within NDWA will continue to receive both the quantity and quality of water guaranteed under the 1981 Contract and under other applicable law, including but not limited to the Delta Protection Act, Cal. Water Code §§ 12201-12204 and the area of origin laws, Cal. Water Code §§ 11460-11465. Accordingly, the EIR must: (A) include a comprehensive description of the 1981 Contract including but not limited to its water quality requirements and the Article 6 protections quoted above; and (B) identify the 1981 Contract as a significant legal constraint on the discretion of the State to implement any project.
2. Consistent with Comment 1 above, the EIR must assume, as the “baseline” condition, that the terms and conditions of the 1981 Contract, including but not limited to its water quality requirements, will remain in full force and effect.
3. The NOP appropriately acknowledges that, in the 2009 Delta Reform Act that created the Council, the Legislature emphasized, as state policy, the enhancement of regional self-reliance around the state. The northern Delta comprises one of the few regions of the state that is self-reliant in its water supplies. In developing the alternatives in the Delta Plan EIR, the Council accordingly must analyze any environmental impacts that would occur with the implementation of any measure that would reduce this region’s ability to rely on its own water sources to meet its demands. These impacts would include indirect impacts that would result from the direct social and economic impacts. Those indirect impacts would include:
  - Inducement of growth in other regions of the state and the associated increased demand for sensitive habitats, increased traffic congestion, increased air pollution and increased greenhouse gas emissions in those regions;

- Increased groundwater pumping, which could lead to overdrafts in basins that are currently in balance due to the use of surface water;
- Reduced groundwater recharge from the application of surface water;
- Reduced habitat for waterfowl and birds along the Pacific Flyway;
- Reduced habitat for giant garter snakes;
- Limiting North Delta diversions of water to Agency lands due to imposition of water quality, species protection and outflow requirements in the Delta Plan; and
- Reduced recreational opportunities for residents and non-residents of the northern Delta region.

An analysis of the Delta Plan's effect on the northern Delta region's ability to rely on its own water supplies also is necessary to ensure that the Delta Plan does not propose measures whose implementation would violate California's area-of-origin or Delta protection laws. (See Water Code §§ 1215-1222, 10505, 10505.5, 11128, 11460-11463, 12200-12220.)

4. The NOP contains a number of specific proposals that could have the above-referenced impacts if applied in the northern Delta region, as well as other impacts. All of these impacts are discussed in more detail below.

- The NOP proposes that the Delta Plan include statewide agricultural and urban water conservation requirements that would be more stringent than those enacted by the Legislature in 2009's SBX7 7. (NOP, pp. 17-18.) As an initial matter, NDWA believes that including such measures in the Delta Plan would contravene the Legislature's intent in enacting the Delta Reform Act as part of a double-joined package with SBX7 7. SBX7 7's provisions were negotiated in extreme detail among the interested parties and, to the extent SBX7 7 delegates authority to develop further conservation measures to administrative agencies, it delegates that authority to agencies other than the Delta Stewardship Council. In this context, the Delta Reform Act's spare reference to the Council's having authority to "promote statewide water conservation" cannot be taken as enabling the Council to adopt and impose new or additional conservation measures on water users within the northern Delta.

- To the extent that the Council nonetheless decides to include heightened conservation standards in any Delta Plan alternative analyzed in the Council's EIR, that EIR must analyze whether an alternative that incorporates the application of any such heightened conservation measures in the northern Delta would be consistent with the California Environmental Quality Act (CEQA), given that such an alternative would require northern Delta water users to reduce their water uses to support a Delta Plan whose coequal goals would include

enhancing water supplies diverted from the Delta (see Cal. Code Regs., tit. 14, § 15126.6(a) (EIR alternatives must be “potentially feasible”), 15364 (“feasible” considers “legal” factors)).

5. The NOP indicates that possible components of the Delta Plan include “modifications to SWP and CVP operations and facilities to become compliant with” the reasonable and prudent alternatives (RPAs) in the U.S. Fish and Wildlife Service’s 2008 biological opinion for Delta smelt and the National Marine Fisheries Service’s (NMFS) 2009 biological opinion for, among other species, Chinook salmon and steelhead. (NOP, pp. 18-20.) As an initial matter, the NOP’s description of this possible Delta Plan component is too vague to allow for meaningful comment, given that it fails to define what portions of the lengthy RPAs the Delta Stewardship Council proposes to adopt. To the extent that the Delta Plan proposes to include those RPAs’ Delta flow standards or NMFS’s proposal to introduce salmonid species above the Central Valley’s rim reservoirs, the Delta Plan EIR must analyze what impacts implementation of those standards and proposals would have on DWR’s ability to meet the requirements of the 1981 Contract.

6. The NOP indicates that the Delta Plan EIR may consider “ecosystem-related flow recommendations prepared by the State Water Resources Control Board and Department of Fish and Game.” (NOP, p. 20.) If the Delta Plan EIR considers implementation of those recommendations, then the EIR must consider what impacts implementation of those standards and proposals would have on DWR’s ability to meet the requirements of the 1981 Contract.

7. Similar to the NOP’s proposal to implement undefined parts of the 2008 and 2009 biological opinions’ RPAs, the NOP’s proposal to incorporate, into the Delta Plan, “[m]odification of operations of upstream reservoirs or expansions of bypasses” is inconsistent with CEQA because it is too vague to describe the proposed project alternative. (See NOP, p. 22.) Again, if the Delta Plan EIR considers implementation of those recommendations, then the EIR must consider what impacts implementation of those standards and proposals would have on DWR’s ability to meet the requirements of the 1981 Contract.

8. The discussion of alternatives in the EIR must focus on alternatives that are potentially feasible in light of the requirements of the 1981 Contract. Inclusion of an alternative in the EIR that would result in a violation of the 1981 Contract’s water quality criteria, the Article 6 flow impact prohibitions, or other obligations would violate the requirements of CEQA. CEQA requires (CEQA Guidelines section 15126.6(b)) that an EIR must consider, as one alternative, a project that involves the improvement of through-Delta water conveyance capacity coupled with continued adherence to the water quality and other requirements of the 1981 Contract, with no so-called “isolated facility.”

9. To the extent that the proposed modifications to upstream bypasses would include the frequently discussed proposal to inundate the Yolo Bypass more frequently, the Delta Plan EIR must analyze:

- The risk of increased flooding, and the resulting flood management, social, economic and environmental damage, in the Sacramento and Bypass areas; and
- The impacts on Yolo and Solano Counties' agricultural economy and potential indirect environmental impacts on waterfowl habitat, giant garter snake habitat, seasonal sloughs, groundwater resources and other environmental resources outside of the Yolo Bypass that have developed in reliance on current levels of agricultural operations in Yolo and Solano Counties.

10. The NOP states that the Delta Plan will “[c]onsider a financing plan that could be based on fees and charges to fund implementation of the Delta Plan recommendations and Delta Stewardship Council activities . . . .” (NOP, p. 24.) To the extent that any such financing plan would involve fees on diversions within the northern Delta, the Delta Plan EIR must consider the Plan’s potential direct effect of reducing diversions for agricultural and municipal use in that area and the indirect effects associated with such reduced diversions previously discussed in this letter. In addition, if the Delta Plan’s proposed financing plan would involve any such diversion fees, then its EIR also would be required to analyze the cumulative impacts on northern Delta water users of those diversion fees and continuously increasing payments to DWR under the 1981 Contract. Those cumulative effects could include intensifying the growth-inducing impacts in the northern Delta region of increased cost burdens on agricultural lands.

11. Notwithstanding the NOP’s length, it gives little attention to one of the fundamental reasons why the Council was created, namely to coordinate the activities of other state agencies involved in issues related to the Delta. The Delta Vision Strategic Plan identified the problem that eventually led to the Council’s creation as follows:

The current governance of water and the Delta includes more than 200 federal, state and local government agencies! . . . All those who testified about Delta governance said a change had to be made . . . The Task Force . . . recommends a Governor-appointed, State Senate-confirmed public body representing a statewide perspective . . . .

(Delta Vision Strategic Plan, p. 7.)

12. To maximize its effectiveness, the Delta Plan should identify those instances where different state agencies are pursuing their policy goals in a way that may hamper implementation of the coequal goals by the state as a whole. A prime recent example of this sort of situation is the Delta Watermaster’s recent issuance of an agricultural efficiency white paper suggesting increased adversarial enforcement, while DWR is developing agricultural water management standards under SBX7 7 through cooperative processes. In such a circumstance, it becomes very difficult for stakeholders to determine whether voluntary discussions with a state agency have any particular value.

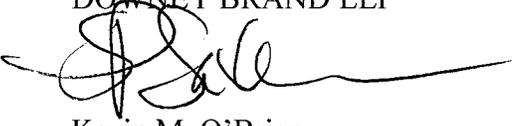
13. NDWA recommends hydrologic and hydraulic modeling as part of the DSC process. This modeling must assume, as the "baseline" condition, that the terms and conditions of the 1981 Contract, including but not limited to its water quality requirements, will remain in full force and effect. The Water Quality Control Plan objectives (D-1641) differ in certain key respects from the water quality requirements of the 1981 Contract, particularly the period from mid-August through March where the 1981 Contract requirements are more stringent from a water quality standpoint. Use of the wrong environmental baseline would skew the analysis of environmental impacts associated with the proposed project(s) and render the EIR vulnerable to attack. In addition, the hydrologic and hydraulic modeling undertaken as part of the DSC process should fully analyze all water quality impacts relating to the proposed creation of fishery habitat areas within the Yolo Bypass and Cache Slough areas.

14. The Delta Plan projects and alternatives could also result in changes in the water surface elevations, natural flows and flow directions within the NDWA, thus potentially resulting in violations of Article 6 of the 1981 Contract. All hydrologic and hydraulic modeling should include an analysis of the potential for seepage and erosion within the NDWA related to any isolated water conveyance facility and associated diversion facilities, proposed changes in water operations and new habitat measures. The EIR should address not only the potential impacts to water surface elevations, flows and flow direction, increased seepage and erosion resulting from various alternatives, but also the costs associated with these changes including but not limited to repairs, modifications, or replacement of existing diversion facilities and levees and added operating costs, as required under Article 6 of the 1981 Contract.

Thank you for the opportunity to submit these comments.

Very truly yours,

DOWNEY BRAND LLP

  
for Kevin M. O'Brien

KMO/se

1138866.2

cc: Melinda Terry

CONTRACT  
BETWEEN  
STATE OF CALIFORNIA  
DEPARTMENT OF WATER RESOURCES  
AND  
NORTH DELTA WATER AGENCY

FOR THE ASSURANCE  
OF A DEPENDABLE WATER SUPPLY OF SUITABLE QUALITY

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**CONTRACT BETWEEN THE STATE OF CALIFORNIA DEPARTMENT OF WATER RESOURCES  
AND THE NORTH DELTA WATER AGENCY  
FOR THE ASSURANCE OF A DEPENDABLE WATER SUPPLY OF SUITABLE QUALITY**

THIS CONTRACT, made this 28 day of Jan., 1981, between the STATE OF CALIFORNIA, acting by and through its DEPARTMENT OF WATER RESOURCES (State), and the NORTH DELTA WATER AGENCY (Agency), a political subdivision of the State of California, duly organized and existing pursuant to the laws thereof, with its principal place of business in Sacramento, California.

**RECITALS**

(a) The purpose of this contract is to assure that the State will maintain within the Agency a dependable water supply of adequate quantity and quality for agricultural uses and, consistent with the water quality standards of Attachment A, for municipal and industrial uses, that the State will recognize the right to the use of water for agricultural, municipal, and industrial uses within the Agency, and that the Agency will pay compensation for any reimbursable benefits allocated to water users within the Agency resulting from the Federal Central Valley Project and the State Water Project, and offset by any detriments caused thereby.

(b) The United States, acting through its Department of the Interior, has under construction and is operating the Federal Central Valley Project (FCVP).

(c) The State has under construction and is operating the State Water Project (SWP).

(d) The construction and operation of the FCVP and SWP at times have changed and will further change the regimen of rivers tributary to the Sacramento-San Joaquin Delta (Delta) and the regimen of the Delta channels from unregulated flow to regulated flow. This regulation at times improves the quality of water in the Delta and at times diminishes the quality from that which would exist in the absence of the FCVP and SWP. The regulation at times also alters the elevation of water in some Delta channels.

(e) Water problems within the Delta are unique within the State of California. As a result of the geographical location of the lands of the Delta and tidal influences, there is no physical shortage of water. Intrusion of saline ocean water and municipal, industrial and agricultural discharges and return flows, tend, however, to deteriorate the quality.

(f) The general welfare, as well as the rights and requirements of the water users in the Delta, require that there be maintained in the Delta an adequate supply of good quality water for agricultural, municipal and industrial uses.

(g) The law of the State of California requires protection of the areas within which water originates and the watersheds in which water is developed. The Delta is such an area and within such a watershed. Part 4.5 of Division 6 of the California Water Code affords a first priority to provision of salinity control and maintenance of an adequate water supply in the Delta for reasonable and beneficial uses of water and relegates to lesser priority all exports of water from the Delta to other areas for any purpose.

(h) The Agency asserts that water users within the Agency have the right to divert, are diverting, and will continue to divert, for reasonable beneficial use, water from the Delta that would have been available therein if the FCVP and SWP were not in existence, together with the right to enjoy or acquire such benefits to which the water users may be entitled as a result of the FCVP and SWP.

(i) Section 4.4 of the North Delta Water Agency Act, Chapter 283, Statutes of 1973, as amended, provides that the Agency has no authority or power to affect, bind, prejudice, impair, restrict, or limit vested water rights within the Agency.

(j) The State asserts that it has the right to divert, is diverting, and will continue to divert water from the Delta in connection with the operation of the SWP.

(k) Operation of SWP to provide the water quality and quantity described in this contract constitutes a reasonable and beneficial use of water.

(l) The Delta has an existing gradient or relationship in quality between the westerly portion most seriously affected by ocean salinity intrusion and the interior portions of the Delta where the effect of ocean salinity intrusion is diminished. The water quality criteria set forth in this contract establishes minimum water qualities at various monitoring locations. Although the water quality criteria at upstream locations is shown as equal in some periods of some years to the water quality at the downstream locations, a better quality will in fact exist at the upstream locations at almost all times. Similarly, a better water quality than that shown for any given monitoring location will also exist at interior points upstream from that location at almost all times.

(m) It is not the intention of the State to acquire by purchase or by proceeding in eminent domain or by any other manner the water rights of water users within the Agency, including rights acquired under this contract.

(n) The parties desire that the United States become an additional party to this contract.

**AGREEMENTS**

1. **Definitions.** When used herein, the term:

(a) "Agency" shall mean the North Delta Water Agency and shall include all of the lands within the boundaries at the time the contract is executed as described in Section 9.1 of the North Delta Water Agency Act, Chapter 283, Statutes of 1973, as amended.

(b) "Calendar year" shall mean the period January 1 through December 31.

(c) "Delta" shall mean the Sacramento-San Joaquin Delta as defined in Section 12220 of the California Water Code as of the date of the execution of the contract.

(d) "Electrical Conductivity" (EC) shall mean the electrical conductivity of a water sample measured in millimhos per centimeter per square centimeter corrected to a standard temperature of 25° Celsius determined in accordance with procedures set forth in the publication entitled "Standard Methods of Examination of Water and Waste Water", published jointly by the American Public Health Association, the American Water Works Association, and the Water Pollution Control Federation, 13th Edition, 1971, including such revisions thereof as may be made subsequent to the date of this contract which are approved in writing by the State and the Agency.

(e) "Federal Central Valley Project" (FCVP) shall mean the Central Valley Project of the United States.

(f) "Four-River Basin Index" shall mean the most current forecast of Sacramento Valley unimpaired runoff as presently published in the California Department of Water Resources Bulletin 120 for the sum of the flows of the following: Sacramento River above Bend Bridge near Red Bluff; Feather River, total inflow to Oroville Reservoir; Yuba River at Smartville; American River, total inflow to Folsom Reservoir. The May 1 forecast shall continue in effect until the February 1 forecast of the next succeeding year.

(g) "State Water Project" (SWP) shall mean the State Water Resources Development System as defined in Section 12931 of the Water Code of the State of California.

(h) "SWRCB" shall mean the State Water Resources Control Board.

(i) "Water year" shall mean the period October 1 of any year

through September 30 of the following year.

## 2. Water Quality.

(a) (i) The State will operate the SWP to provide water qualities at least equal to the better of: (1) the standards adopted by the SWRCB as they may be established from time to time; or (2) the criteria established in this contract as identified on the graphs included as Attachment A.

(ii) The 14-day running average of the mean daily EC at the identified location shall not exceed the values determined from the Attachment A graphs using the Four-River Basin Index except for the period February through March of each year at the location in the Sacramento River at Emmaton for which the lower value of the 80 percent probability range shall be used.

(iii) The quality criteria described herein shall be met at all times except for a transition period beginning one week before and extending one week after the date of change in periods as shown on the graphs of Attachment A. During this transition period, the SWP will be operated to provide as uniform a transition as possible over the two-week period from one set of criteria to the next so as to arrive at the new criteria one week after the date of change in period as shown on the graphs of Attachment A.

(b) While not committed affirmatively to achieving a better water quality at interior points upstream from Emmaton than those set forth on Attachment A, the State agrees not to alter the Delta hydraulics in such manner as to cause a measurable adverse change in the ocean salinity gradient or relationship among the various monitoring locations shown on Attachment B and interior points upstream from those locations, with any particular flow past Emmaton.

(c) Whenever the recorded 14-day running average of mean daily EC of water in the Sacramento River at Sacramento exceeds 0.25 mmhos, the quality criteria indicated on the graphs of Attachment A may be adjusted by adding to the value taken therefrom the product of 1.5 times the amount that the recorded EC of the Sacramento River at Sacramento exceeds 0.25 mmhos.

3. **Monitoring.** The quality of water shall be measured by the State as needed to monitor performance pursuant to Article 2 hereof with equipment installed, operated, and maintained by the State, at locations indicated on "Attachment B". Records of such measurements shall at regular intervals be furnished to the Agency. All monitoring costs at North Fork Mokelumne River near Walnut Grove, Sacramento River at Walnut Grove, and Steamboat Slough at Sutter Slough incurred by the State solely for this contract shall be shared equally by the Agency and the State. All monitoring costs to be borne by the Agency for monitoring at the above locations are included in the payment under Article 10.

## 4. Emergency Provisions.

(a) If a structural emergency occurs such as a levee failure or a failure of an SWP facility, which results in the State's failure to meet the water quality criteria, the State shall not be in breach of this contract if it makes all reasonable efforts to operate SWP facilities so that the water quality criteria will be met again as soon as possible. For any period in which SWP failure results in failure of the State to meet the water quality criteria, the State shall waive payment under Article 10, prorated for that period, and the amount shall be deducted from the next payment due.

(b) (i) A drought emergency shall exist when all of the following occur:

(1) The Four-River Basin Index is less than an average of 9,000,000 acre feet in two consecutive years (which occurred in 1933-4 and 1976-7); and

(2) An SWRCB emergency regulation is in effect providing for the operation of the SWP to maintain water quality different from that provided in this contract; and

(3) The water supplied to meet annual entitlements of

SWP agricultural contractors in the San Joaquin Valley is being reduced by at least 50 percent of these agricultural entitlements (i) being the objective of the SWP to avoid agricultural deficiencies in excess of 25 percent) or the total of water supplied to meet annual entitlements of all SWP contractors is being reduced by at least 15 percent of all entitlements, whichever results in the greater reduction in acre feet delivered.

(ii) A drought emergency shall terminate if any of the conditions in (b) (i) of this Article ceases to exist or if the flow past Sacramento after October 1 exceeds 20,000 cubic feet per second each day for a period of 30 days.

(iii) Notwithstanding the provisions of Article 2 (a), when a drought emergency exists, the emergency water quality criteria of the SWRCB shall supersede the water quality requirements of this contract to the extent of any inconsistency; provided, however, that the State shall use all reasonable efforts to preserve Delta water quality, taking into consideration both the limited water supply available for that purpose and recognizing the priority established for Delta protection referred to in Recital (g).

(iv) When a drought emergency exists, and an overland supply is not available to an individual water user comparable in quality and quantity to the water which would have been available to the user under Attachment A, the State shall compensate the user for loss of net income for each acre either (A) planted to a more salt-tolerant crop in the current year, (B) not planted to any crop in the current year provided such determination not to plant was reasonable based on the drought emergency, or (C) which had a reduced yield due to the drought emergency, calculated on the basis of the user's average net income for any three of the prior five years for each such acre. A special contract claims procedure shall be established by the State to expedite and facilitate the payment of such compensation.

## 5. Overland Water Supply Facilities.

(a) Within the general objectives of protecting the western Delta areas against the destruction of agricultural productivity as a result of the increased salinity of waters in the Delta channels resulting in part from SWP operation, the State may provide diversion and overland facilities to supply and distribute water to Sherman Island as described in the report entitled "Overland Agricultural Water Facilities Sherman Island" dated January 1980. Final design and operating specifications shall be subject to approval of the Agency and Reclamation District No. 341. The Agency or its transferee will assume full ownership, operation, and maintenance responsibility for such facilities after successful operation as specified. After the facilities are constructed and operating, the water quality criteria for the Sacramento River at Emmaton shall apply at the intake of the facilities in Three Mile Slough.

(b) The State and the Agency may agree to the construction and operation of additional overland water supply facilities within the Agency, so long as each landowner served by the overland facilities receives a quality of water not less than that specified in Attachment A for the upstream location nearest to his original point of diversion. The design and operation of such facilities and the cost sharing thereof are subject to approval of any reclamation district which includes within its boundaries the area to be served. The ownership, operation, and maintenance of diversion works and overland facilities shall be the subject of a separate agreement between the Agency or its transferees and the State.

6. **Flow Impact.** The State shall not convey SWP water so as to cause a decrease or increase in the natural flow, or reversal of the natural flow direction, or to cause the water surface elevation in Delta channels to be altered, to the detriment of Delta channels or water users within the Agency. If lands, levees, embankments, or revetments adjacent to Delta channels within the Agency incur seepage or erosion damage or if diversion facilities must be modi-

ted as a result of altered water surface elevations as a result of the conveyance of water from the SWP to lands outside the Agency after the date of this contract, the State shall repair or alleviate the damage, shall improve the channels as necessary, and shall be responsible for all diversion facility modifications required.

#### 7. Place of Use of Water.

(a) Any subcontract entered into pursuant to Article 18 shall provide that water diverted under this contract for use within the Agency shall not be used or otherwise disposed of outside the boundaries of the Agency by the subcontractor.

(b) Any subcontract shall provide that all return flow water from water diverted within the Agency under this contract shall be returned to the Delta channels. Subject to the provisions of this contract concerning the quality and quantity of water to be made available to water users within the Agency, and to any reuse or recapture by water users within the Agency, the subcontractor relinquishes any right to such return flow, and as to any portion thereof which may be attributable to the SWP, the subcontractor recognizes that the State has not abandoned such water.

(c) If water is attempted to be used or otherwise disposed of outside the boundaries of the Agency so that the State's rights to return flow are interfered with, the State may seek appropriate administrative or judicial action against such use or disposal.

(d) This article shall not relieve any water user of the responsibility to meet discharge regulations legally imposed.

#### 8. Scope of Contract.

(a) During the term of this contract:

(i) This contract shall constitute the full and sole agreement between the State and the Agency as to (1) the quality of water which shall be in the Delta channels, and (2) the payment for the assurance given that water of such quality shall be in the Delta channels for reasonable and beneficial uses on lands within the Agency, and said diversions and uses shall not be disturbed or challenged by the State so long as this contract is in full force and effect.

(ii) The State recognizes the right of the water users of the Agency to divert from the Delta channels for reasonable and beneficial uses for agricultural, municipal and industrial purposes on lands within the Agency, and said diversions and uses shall not be disturbed or challenged by the State so long as this contract is in full force and effect, and the State shall furnish such water as may be required within the Agency to the extent not otherwise available under the water rights of water users.

(iii) The Agency shall not claim any right against the State in conflict with the provisions hereof so long as this contract remains in full force and effect.

(b) Nothing herein contained is intended to or does limit rights of the Agency against others than the State, or the State against any person other than the Agency and water users within the Agency.

(c) This contract shall not affect, bind, prejudice, impair, restrict, or limit vested water rights within the Agency.

(d) The Agency agrees to defend affirmatively as reasonable and beneficial the water qualities established in this contract. The State agrees to defend affirmatively as reasonable and beneficial the use of water required to provide and sustain the qualities established in this contract. The State agrees that such use should be examined only after determination by a court of competent jurisdiction that all uses of water exported from the Delta by the State and by the United States, for agricultural, municipal, and industrial purposes are reasonable and beneficial, and that irrigation practices, conservation efforts, and groundwater management within areas served by such exported water should be examined in particular.

(e) The Agency consents to the State's export of water from

the Delta so long as this contract remains in full force and effect and the State is in compliance herewith.

#### 9. Term of Contract.

(a) This contract shall continue in full force and effect until such time as it may be terminated by the written consent and agreement of the parties hereto, provided that 40 years after execution of this contract and every 40 years thereafter, there shall be a six-month period of adjustment during which any party to this contract can negotiate with the other parties to revise the contract as to the provisions set out in Article 10. If, during this period, agreement as to a requested revision cannot be achieved, the parties shall petition a court of competent jurisdiction to resolve the issue as to the appropriate payment to be made under Article 10. In revising Article 10, the court shall review water quality and supply conditions within the Agency under operation of the FCVP and SWP, and identify any reimbursable benefits allocated to water users within the Agency resulting from operation of the FCVP and SWP, offset by any detriments caused thereby. Until such time as any revision is final, including appeal from any ruling of the court, the contract shall remain in effect as without such revision.

(b) In the event this contract terminates, the parties' water rights to quality and quantity shall exist as if this contract had not been entered into.

#### 10. Amount and Method of Payment for Water.

(a) The Agency shall pay each year as consideration for the assurance that an adequate water supply and the specific water quality set forth in this contract will be maintained and monitored, the sum of one hundred seventy thousand dollars (\$170,000.00). The annual payments shall be made to the State one-half on or before January 1 and one-half on or before July 1 of each year commencing with January 1, 1982.

(b) The payment established in (a) above shall be subject to adjustment as of January 1, 1987, and every fifth year thereafter. The adjusted payment shall bear the same relation to the payment specified in (a) above that the mean of the State's latest projected Delta Water Rate for the five years beginning with the year of adjustment bears to \$10.00 per acre foot; provided that, no adjusted payment shall exceed the previous payment by more than 25 percent.

(c) The payments provided for in this article shall be deposited by the State in trust in the California Water Resources Development System Revenue Account in the California Water Resources Development Bond Fund. The trust shall continue for five years (or such longer period as the State may determine) but shall be terminated when the United States executes a contract as provided in Article 11 with the State and the Agency at which time the proportion of the trust fund that reflects the degree to which the operation of the FCVP has contributed to meeting the water quality standard under this contract as determined solely by the State shall be paid to the United States (with a pro rata share of interest). In the event that the United States has not entered into such a contract before the termination of the trust, the trust fund shall become the sole property of the State.

11. **Participation of the United States.** The Agency will exercise its best efforts to secure United States joinder and concurrence with the terms of this contract and the State will diligently attempt to obtain the joinder and concurrence of the United States with the terms of this contract and its participation as a party hereto. Such concurrence and participation by the United States in this contract shall include a recognition ratified by the Congress that the excess land provisions of Federal reclamation law shall not apply to this contract.

#### 12. Remedies.

(a) The Agency shall be entitled to obtain specific perfor-

mance of the provisions of this contract by a decree of the Superior Court in Sacramento County requiring the State to meet the standards set forth in this contract. If the water quality in Delta channels falls below that provided in this contract, then, at the request of the Agency, the State shall cease all diversions to storage in SWP reservoirs or release stored water from SWP reservoirs or cease all export by the SWP from Delta channels, or any combination of these, to the extent that such action will further State compliance with the water quality standards set forth in this contract, except that the State may continue to export from Delta channels to the extent required to meet water quality requirements in contracts with the Delta agencies specified in Section 11456 of the California Water Code.

(b) To the extent permitted by law, the State agrees to forego the use of eminent domain proceedings to acquire water rights of water users within the Agency or any rights acquired under this contract for water or water quality maintenance for the purpose of exporting such water from the Delta. This provision shall not be construed to prohibit the utilization of eminent domain proceedings for the purpose of acquiring land or any other rights necessary for the construction of water facilities.

(c) Except as provided in the water quality assurances in Article 2 and the provisions of Article 6 and Article 8, neither the State nor its officers, agents, or employees shall be liable for or on account of:

(i) The control, carriage, handling, use, disposal, or distribution of any water outside the facilities constructed, operated and maintained by the State.

(ii) Claims of damage of any nature whatsoever, including but not limited to property loss or damage, personal injury or death arising out of or connected with the control, carriage, handling, use, disposal or distribution of any water outside of the facilities constructed, operated and maintained by the State.

(d) The use by the Agency or the State of any remedy specified herein for the enforcement of this contract is not exclusive and shall not deprive either from using any other remedy provided by law.

**13. Comparable Treatment.** In the event that the State gives on the whole substantially more favorable treatment to any other Delta entity under similar circumstances than that accorded under this contract to the Agency, the State agrees to renegotiate this contract to provide comparable treatment to the Agency under this contract.

### GENERAL PROVISIONS

**14. Amendments.** This contract may be amended or terminated at any time by mutual agreement of the State and the Agency.

**15. Reservation With Respect to State Laws.** Nothing herein contained shall be construed as estopping or otherwise preventing the Agency, or any person, firm, association, corporation, or public body claiming by, through, or under the Agency, from contesting by litigation or other lawful means, the validity, constitutionality, construction or application of any law of the State of California.

**16. Opinions and Determinations.** Where the terms of this contract provide for action to be based upon the opinion, judgment, approval, review, or determination of either party hereto, such terms are not intended to be and shall never be construed as permitting such opinion, judgment, approval, review, or determination to be arbitrary, capricious, or unreasonable.

**17. Successors and Assigns Obligated.** This contract and all of its provisions shall apply to and bind the successors and assigns of the parties hereto.

**18. Assignment and Subcontract.** The Agency may enter into subcontracts with water users within the Agency boundaries in which the assurances and obligations provided in this contract as

to such water user or users are assigned to the area covered by the subcontract. The Agency shall remain primarily liable and shall make all payments required under this contract. No assignment or transfer of this contract, or any part hereof, rights hereunder, or interest herein by the Agency, other than a subcontract containing the same terms and conditions, shall be valid unless and until it is approved by the State and made subject to such reasonable terms and conditions as the State may impose. No assignment or transfer of this contract or any part hereof, rights hereunder, or interest herein by the State shall be valid except as such assignment or transfer is made pursuant to and in conformity with applicable law.

**19. Books, Records, Reports, and Inspections Thereof.** Subject to applicable State laws and regulations, the Agency shall have full and free access at all reasonable times to the SWP account books and official records of the State insofar as the same pertain to the matters and things provided for in this contract, with the right at any time during office hours to make copies thereof, and the proper representatives of the State shall have similar rights with respect to the account books and records of the Agency.

**20. Waiver of Rights.** Any waiver at any time by either party hereto of its rights with respect to a default, or any other matter arising in connection with this contract, shall not be deemed to be a waiver with respect to any other default or matter.

**21. Assurance Relating to Validity of Contract.** This contract shall be effective after its execution by the Agency and the State. Promptly after the execution and delivery of this contract, the Agency shall file and prosecute to a final decree, including any appeal therefrom to the highest court of the State of California, in a court of competent jurisdiction a special proceeding for the judicial examination, approval, and confirmation of the proceedings of the Agency's Board of Directors and of the Agency leading up to and including the making of this contract and the validity of the provisions thereof as a binding and enforceable obligation upon the State and the Agency. If, in this proceeding or other proceeding before a court of competent jurisdiction, any portion of this contract should be determined to be constitutionally invalid, then the remaining portions of this contract shall remain in full force and effect unless modified by mutual consent of the parties.

**22. Notices.** All notices that are required either expressly or by implication to be given by one party to the other shall be deemed to have been given if delivered personally or if enclosed in a properly addressed, postage prepaid, envelope and deposited in a United States Post Office. Unless or until formally notified otherwise, the Agency shall address all notices to the State as follows:

Director, Department of Water Resources  
P.O. Box 388  
Sacramento, California 95802

and the State shall address all notices to the Agency as follows:

North Delta Water Agency  
921 1/2 11th St., Rm. 703  
Sacramento, California 95814

IN WITNESS WHEREOF, the parties hereto have executed this contract on the date first above written.

Approved as to legal form  
and sufficiency:

STATE OF CALIFORNIA

By /s/ P. A. TOWNER  
Chief Counsel  
Dept. of Water Resources

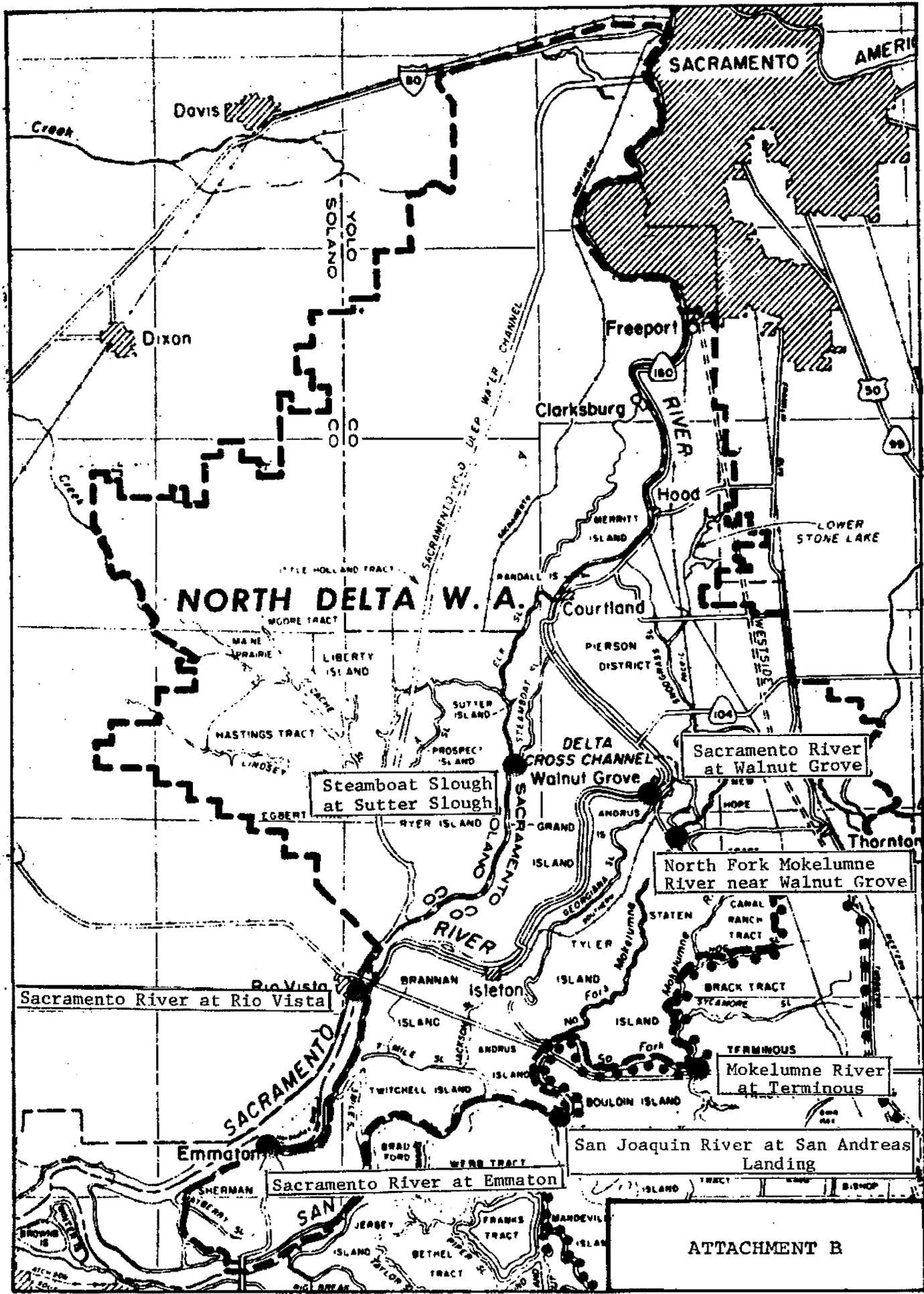
By /s/ RONALD B. ROBT  
Dept. of Water Resources

Approved as to legal form  
and sufficiency:

NORTH DELTA WATER  
AGENCY

By /s/ GEORGE BASYE  
General Counsel  
North Delta Water Agency

By /s/ W. R. DARSIE  
Chairman  
Board of Directors



ATTACHMENT B

