Superior Court of California
County of Kern
Bakersfield Department 11

Date: **06/09/2021** **BCV-19-100523**

KINGS RIVER WATER ASSOCIATION ET AL VS TULARE LAKE RECLAMATION DISTRICT NO. 761 ET AL

Courtroom Staff

Honorable: David R. Lampe **Clerk:** Veronica D. Lancaster

NATURE OF PROCEEDINGS: RULING ON BIFURCATED COURT TRIAL; HERETOFORE SUBMITTED ON MAY 28, 2021

The court hereby issues its final decision in the bifurcated matter. The court's ruling is attached.

Copy of minutes of ruling mailed to all parties as stated on the attached certificate of mailing and courtesy copy sent via email.

Kings River Water Association, et al. v. Tulare Lake Reclamation District No. 761, et al.

Decision

The following analysis is not intended as a Statement of Decision by the court. A Statement of Decision is not necessary or appropriate at this stage of the proceeding. A trial court is only required to issue a Statement of Decision on the trial of a "question of fact." (Code Civ. Proc., § 632.) As more fully explained below, the court is not adjudicating any question of disputed or controverted fact. The evidence put before the court is not in conflict. Although the parties have objected to the admissibility of certain evidence, and the parties certainly argue as to the weight to be given evidence, there is no dispute as to the authenticity or veracity of the evidence. The issue before the court is solely one of law—contract interpretation. Further the case is bifurcated, and no judgment is yet appropriate until the case is finally tried to the court or to a jury. Nevertheless, the court intends a "final" ruling and decision on the bifurcated issues now before the court, in order to provide meaningful structure and guidance to further proceedings. Of course, the court reserves the right to modify or adjust its decision pending judgment.

1. Introduction and Background

Plaintiffs Kings River Water Association ("KRWA"), Tulare Lake Basin Water Storage District ("Tulare Lake Basin"), Tulare Lake Canal Company ("Tulare Lake Canal"), and Southeast Lake Water Company ("Southeast Lake") filed suit against Defendants Tulare Lake Reclamation District No. 761 ("Dist. No. 761") and Sandridge Partners, L.P. for (1) declaratory relief, (2) breach of contract, and (3) intentional interference with contract. Plaintiffs allege the second and third causes of action against Sandridge only.

Plaintiffs brought suit on October 15, 2018 in Kings County. On February 13, 2019, the parties stipulated to transfer the action to Kern County, after which the case transferred in on February 25, 2019.

In the Complaint, Plaintiffs allege Defendants Dist. No. 761 and Sandridge are receiving water from the Kings River as beneficiaries of, and participants in, controlling agreements of KRWA, and that the Defendants are unlawfully transferring that water outside of the geographic area permitted by the agreements. Plaintiffs contend that this impermissible use threatens the balance of water rights, and threatens the Licenses for Diversion and Use of Water issued by the Water Quality Control Board Division of Water Rights, which permit KRWA to take of water from the Kings River for its members.

Plaintiff alleges that KRWA was formed in 1927 and operates under agreements among its member units. Those member units organized and empowered KRWA to protect and preserve their several and respective water rights in and to the waters of the Kings River, and to administer those water rights in accordance with certain agreements, including an Administrative Agreement" and a "Water Right Indenture," both dated May 3, 1927, entered into and adopted by KRWA's member units (both of these documents are referred to as the "1927 Agreement"). The KRWA member units deliver Kings River Water to their respective users. Dist. No. 761 is a member unit. Sandridge, a water user, receives water from various member units, including Dist. No. 761.

The 1927 Agreement was amended by an "Agreement Supplementing and Amending Water Right Indenture Dated May 3, 1927 and Supplementing and Amending Administrative Agreement Dated May 3, 1927 Relating to Kings River Water Association" dated June 1, 1949 (the "1949 Amendment").

The 1927 Agreement and the 1949 Amendment were subsequently amended by an "Agreement Supplementing and Amending Water Right Indenture Dated May 3, 1927, And Administrative Agreement Dated May 3, 1927, Each as Amended and Supplemented June 1, 1949, Relating to the Kings River Water Association," dated September 10, 1963 (the "1963 Amendment").

The 1963 Amendment expanded the member units to reflect and include successors in interest, and the parties both assert it became necessary after the 1954 construction of Pine Flat Dam.

By verbatim reiteration, these documents are contained in what the parties describe as the "Blue Book."

B. Second Amended Cross-Complaint[1]

In response to the Complaint, Dist. No. 761 and Sandridge filed a Cross-Complaint on April 4, 2019. On January 22, 2021, they filed a Second Amended Cross-Complaint ("FACC") against the Plaintiffs and Steve Haugen in his capacity as the KRWA Water Master, alleging the following causes of action:

(1) Declaratory relief (vs. All.);
(2) Breach of contract – wrongful refusal to deliver water (Dist. No. 761 vs. KRWA and Haugen only);
(3) Breach of the covenant of good faith (Dist. No. 761 vs. KRWA and Haugen only); and
(4) Breach of fiduciary duty (vs. KRWA and Haugen only).

Dist. No. 761 and Sandridge allege the 1949 Amendment, amending the 1927 Agreement, did not include Sandridge or any of its predecessors or any other water user that owned rights to the water of the Kings River in addition to water received pursuant to license as a party, instead only including member units as parties thereto. (SACC, ¶ 20.)

In the SACC, Dist. No. 761 and Sandridge contend and allege that the terms of the 1963 Amendment—specifically, ¶¶ 8, and 17-19—"purport to restrict the manner by which Member Units may convey, transfer or assign interests in water rights but said provisions do not purport to restrict the manner in which water users within a Member Unit can utilize water which they are entitled to receive nor do such provisions apply to waters to which landowners, other than signatory Member Units, have legal or equitable ownership, or obligate Member Units to dictate the manner in which their constituent water uses use the water so long as it is put to a beneficial use." (SACC, ¶ 33.)

Further, "for many decades the Kings River has been used by water users to deliver and disburse water into storage facilities and to irrigate crops in areas outside of the Service Area specified in the 1963 Agreement," the boundaries of which are disputed and uncertain, and that Plaintiff and the member units have been fully aware of this practice. (SACC, ¶¶ 34-35.)

[1] The Second Amended Cross-Complaint sets forth all member units of KRWA. (SACC, ¶ 10, pages 3:23-7:10.)

2. Scope of Bifurcated Proceedings Before the Court

The parties have entered into a stipulation, and the court has issued an order based upon the stipulation, that the matter before the court at this time is solely one of contract interpretation by the court. The actual terms of the stipulation are:

> "The issue of contract interpretation outlined in the KRWA Complaint and the Second Amended Cross-Complaint shall be bifurcated from the rest of the case and tried first by the Court, sitting without a jury."

Distilling the contract interpretation issues "outlined" in the pleadings summarized above, the court is essentially asked to interpret the meaning of the following terms of contract:

Paragraph 8 of the 1949 Amendment:

> That it is agreed by and among the parties hereto that none of the waters, or rights to the waters of the Kings River, now or hereafter owned or possessed by any of the parties hereto shall be sold, assigned, or transferred for use or transported outside of the watershed or service area of Kings River.

Paragraph 17 of the 1963 Amendment:

> That no party hereto shall rent, lease, lend, hypothecate, convey, transfer or assign in any way, any interest in any water or water right to which said party at any time shall of may be entitled, for use or possible use outside of the Kings River Service Area.

The issue before the court is narrow. The court is engaged solely in contract interpretation. The court is not at this time determining who is bound by the contracts in question.

Further, the court is also *not* adjudicating water rights to the waters of the Kings River. Water is a very special area of "property" law in California. The court has searched for a single legal resource and precedent that effectively summarizes California water law, in order to make clear what the court is *not* deciding at this time. The court has found a well stated reference in the appellate opinion in *Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal. App. 5th 1176:

> California's water belongs to the people of this state, but the right to use surface water may be acquired, either pursuant to the doctrine of riparian rights or by appropriation. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 100–101, 227 Cal.Rptr. 161 (*United States*).) The riparian doctrine, a legacy of the English common law, "confers upon the owner of land the right to divert the water flowing by his land for use upon his land, without regard to the extent of such use or priority in time." (*Id.* at p. 101, 227 Cal.Rptr. 161.) When water is scarce, "all riparians must reduce their usage proportionately." (*Ibid.*) The appropriation doctrine is a legacy of the California Gold Rush. It "confers upon one who actually diverts and uses water the right to do so" for beneficial uses. (*Ibid.*) An appropriator's rights are subordinate to riparian rights, and to those of all earlier appropriators. (*Id.* at pp. 101–102, 227 Cal.Rptr. 161.) This is the "rule of priority" that determines allocations in times of shortage. (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 961, 48 Cal.Rptr.3d 468

(*El Dorado*).) It means that an appropriator—especially one who is comparatively junior—may not be able to take any of the water to which it would otherwise be entitled.

Before 1914, one who sought to acquire water rights by appropriation had simply to divert and use that water to perfect a claim. Since 1914, a statutory scheme has required would-be appropriators to apply to the Board first for a permit. In reviewing permit applications, the Board examines existing riparian and appropriative rights and determines whether surplus water is available. (*United States, supra*, 182 Cal.App.3d at p. 102, 227 Cal.Rptr. 161.) If the Board issues a permit, the permit holder can take the water subject to the terms of the permit (and subject to the rights of riparian users and senior appropriators), and a license will then issue confirming appropriative rights. (*Ibid.*)

Similar principles govern rights to water in an underground basin. First priority goes to the landowner whose property overlies the groundwater. These "overlying rights" are analogous to riparian rights in that they are based on ownership of adjoining land, and they confer priority. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240, 99 Cal.Rptr.2d 294, 5 P.3d 853 (*Barstow*).) Surplus groundwater also may be taken by an appropriator, and priority among "appropriative rights" holders generally follows the familiar principle that "the one first in time is the first in right." (*Id.* at p. 1241, 99 Cal.Rptr.2d 294, 5 P.3d 853.) With groundwater there is an exception, however, that gives rise to a third category of rights. Under certain circumstances, an appropriator may gain "prescriptive rights" by using groundwater to which it is not legally entitled in a manner that is " 'actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right.' " (*Ibid.*) The permit and licensing requirements that apply to certain in-stream water rights do not apply to groundwater. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 933–934, 207 P.2d 17.)

Whatever their derivation, "once rights to use water are acquired, they become vested property rights." (*United States, supra*, 182 Cal.App.3d at p. 101, 227 Cal.Rptr. 161.) These property rights are not absolute, however.

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Superimposed on the dual system for defining water rights are two limiting principles. First is the rule of reasonableness: "the overriding constitutional limitation that the water be used as reasonably required for the beneficial use to be served." (*United States, supra*, 182 Cal.App.3d at p. 105, 227 Cal.Rptr. 161.) Second is the public trust doctrine. Both apply to limit all water rights, regardless of their legal basis. (*Barstow, supra*, 23 Cal.4th at pp. 1241–1242, 99 Cal.Rptr.2d 294, 5 P.3d 853.)

The rule of reasonableness was added to the California Constitution by amendment in 1928. (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1479, 173 Cal.Rptr.3d 200 (*Light*).) The amended Constitution declares: "The right to water or to the use or flow of water in or from any natural stream or water course in this State is ... limited to such water as shall be reasonably required for the beneficial use to be

served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." (Cal. Const., art. X, § 2.) "Beneficial use" and "reasonable use" are two separate requirements, both of which must be met. (*Joslin, supra*, 67 Cal.2d at p. 143, 60 Cal.Rptr. 377, 429 P.2d 889.)

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What constitutes reasonable use is case-specific. "California courts have never defined ... what constitutes an unreasonable use of water, perhaps because the reasonableness of any particular use depends largely on the circumstances." (*Light, supra*, 226 Cal. App. 4th at p. 1479, 173 Cal.Rptr.3d 200.) Conformity with local custom is one factor to consider in determining whether a use of water is reasonable, but custom is not dispositive. (Water Code, § 100.5.) The inquiry is fact-specific, and the answer may change over time. "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need." (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567, 45 P.2d 972 (*Tulare*).) Because reasonableness is a question of fact, it generally is not resolvable on the pleadings. (*People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 754, 126 Cal.Rptr. 851 (*Forni*).) But courts have on some occasions determined that a given use of water is, as a matter of law, unreasonable. For example, for farmers to flood their fields during winter solely for the purpose of drowning gophers and squirrels is not a reasonable beneficial use. (*Tulare*, at p. 568, 45 P.2d 972.) So, too, is it unreasonable for a riparian landowner to rely on a creek to deliver in suspension continuing supplies of rock, sand, and gravel, when water from that stream could instead be diverted for municipal use. (*Joslin, supra*, 67 Cal.2d at pp. 134–135, 140–141, 60 Cal.Rptr. 377, 429 P.2d 889.)

Another important limitation on water rights in California derives from the public trust doctrine, an ancient legal principle that California courts have used to protect environmental values. (See *Natl. Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 425, 189 Cal.Rptr. 346, 658 P.2d 709 (*Natl. Audubon*).) The doctrine finds its origin in the Roman law principle that mankind shares ownership in the sea, the seashore, the air, and (most importantly for our purposes) running water. (*Id.* at pp. 433–434, 189 Cal.Rptr. 346, 658 P.2d 709; *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1175, fn. 5, 81 Cal.Rptr.3d 797.) The doctrine arrived in California via the English common law, and was often applied in cases involving public rights to navigation, commerce, and fishing in tideland areas, or on navigable lakes and streams. (*Natl. Audubon*, at pp. 434–435, 189 Cal.Rptr. 346, 658 P.2d 709.) But in 1983 our Supreme Court held that the doctrine also protects navigable waters, such as Mono Lake, "from harm caused by diversion of nonnavigable tributaries." (*Id.* at p. 437, 189 Cal.Rptr. 346, 658 P.2d 709.) The State of California as trustee has a broad "duty ... to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases." (*Id.* at p. 441, 189 Cal.Rptr. 346, 658 P.2d 709.) As a consequence, those "parties acquiring rights in trust property," such as water flowing in a stream, "generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust." (*Id.* at p. 437, 189 Cal.Rptr. 346, 658 P.2d 709.)

> But public trust interests, like other interests in water use in California, are not absolute. "As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, ... the state must bear in mind its duty as trustee ... to preserve, so far as consistent with the public interest, the uses protected by the trust." (*Natl. Audubon, supra*, 33 Cal.3d at p. 446, 189 Cal.Rptr. 346, 658 P.2d 709.) In short, "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use." (*Id.* at p. 443, 189 Cal.Rptr. 346, 658 P.2d 709.)

(*Id.* at 1183-1186.)

No one should conflate the issue of contract interpretation now before the court with the much broader issue of water rights, which would involve an adjudication by the court or a jury of significant, substantial, and likely disputed facts upon evidence not now before the court. Nevertheless, the abiding principles stated above do bear upon the court's interpretation of the contract language.

3. Relevant Rules of Contract Interpretation

The rules of contract interpretation to be applied by the court are well-established, "black letter" statutory and decisional law.

Civil Code section 1636 provides: "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (See 1 Witkin, Summary of Cal. Law (11th ed. 2020) Contracts, § 767, and cases therein cited.)

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code, § 1644.) "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense." (Civ. Code, § 1645.) "The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly." (Code Civ. Proc., § 1861.) (See 1 Witkin, Summary of Cal. Law (11th ed. 2020) Contracts, § 768.)

"A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code, § 1647.) "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret." (Code Civ. Proc., § 1860.) (See 1 Witkin, Summary of Cal. Law (11th ed. 2020) Contracts, § 771.)

"Acts of the parties, subsequent to the execution of the contract and before any controversy has arisen as to its effect, may be looked to in determining the meaning. The conduct of the parties may be, in effect, a practical construction thereof, for they are probably least likely to be mistaken as to the intent. 'This rule of practical construction is predicated on the common sense concept that "actions speak louder than words." Words are frequently but an imperfect medium to convey thought and intention.

When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent.' (Crestview Cemetery Assn. v. Dieden (1960) 54 C.2d 744, 754, 8 C.R. 427, 356 P.2d 171, 1*Cal. Proc.* (5th), *Attorneys,* § 193; see CACI, No. 318 [Interpretation—Construction by Conduct].)" (1 Witkin, Summary of Cal. Law (11th ed. 2020) Contracts, § 772.)

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643.) "An interpretation which gives effect is preferred to one which makes void." (Civ. Code, § 3541.) Rest.2d, Contracts § 203(a) states that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." (See 1 Witkin, Summary of Cal. Law (11th ed. 2020) Contracts, § 773.)

4. Role of Parol Evidence

Closely related to the rules of interpretation is the parol evidence rule.

First, the court generally does not admit evidence that would alter the plain meaning of an integrated written contract. However, the court may admit evidence of surrounding circumstances to determine the question of integration. The court may also admit evidence consistent with the terms of the agreement in order to explain it. These principles are well stated in the case of *Alling v. Universal Mfg. Corp.* (1992) 5 Cal. App. 4th 1412:

> The parol evidence rule generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, 92 Cal.Rptr. 704, 480 P.2d 320; *Imbach v. Schultz* (1962) 58 Cal.2d 858, 860, 27 Cal.Rptr. 160, 377 P.2d 272; *Blumenfeld v. R.H. Macy & Co.* (1979) 92 Cal.App.3d 38, 44, 154 Cal.Rptr. 652; 2 Witkin, Cal. Evidence (3d ed. 1986) Documentary Evidence, § 960, p. 908.) "An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." (Rest.2d Contracts, § 209, subd. (1).) In California, the rule is embodied in Code of Civil Procedure section 1856, which states that "[t]erms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." (Code Civ.Proc., § 1856, subd. (a).)
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> The parol evidence rule is not merely a rule of evidence concerned with the method of proving an agreement; it is a principle of substantive law. The rule derives from the concept of an integrated contract, and is based on the principle that when the parties to an agreement incorporate the complete and final terms of the agreement in a writing, such an "integration" in fact becomes the complete and final contract between the parties, which may not be contradicted by evidence of purportedly collateral agreements. "The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded; or, as it is sometimes said,

the written memorial supersedes these prior or contemporaneous negotiations. [Citations.]" (*Estate of Gaines* (1940) 15 Cal.2d 255, 264–265, 100 P.2d 1055; see also *BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 990, 209 Cal.Rptr. 50; *Buffalo Arms, Inc. v. Remler Co.* (1960) 179 Cal.App.2d 700, 709, 4 Cal.Rptr. 103.)

The determination of whether the agreement in question is an "integration"—that is, whether it was intended by the parties as a final, complete and exclusive statement of their agreement with respect to the terms included in the agreement—is a question of law to be determined by the court. (Code Civ.Proc., § 1856, subd. (d); *Mobil Oil Corp. v. Handley* (1978) 76 Cal.App.3d 956, 961, 143 Cal.Rptr. 321; *Brawthen v. H & R Block, Inc.* (1975) 52 Cal.App.3d 139, 145–146, 124 Cal.Rptr. 845.)

. . . .

Evidence of surrounding circumstances and prior negotiations *may* be admitted for the limited purpose of assisting the trial court in determining whether a document was intended to be the final agreement of the parties superseding all other transactions. (*Schwartz v. Shapiro* (1964) 229 Cal.App.2d 238, 251, 40 Cal.Rptr. 189; 2 Witkin, Cal. Evidence, *op. cit. supra,* §§ 970–971, pp. 916–918.) Moreover, even if the court determines that a particular written contract is integrated and was intended by the parties as the final expression of their agreement, the terms set forth therein "may be *explained or supplemented* by evidence of *consistent* additional terms *unless* the writing is intended also as a complete and *exclusive* statement of the terms of the agreement." (Code Civ.Proc., § 1856, subd. (b), emphasis added.) Thus, a prior or contemporaneous collateral oral agreement relating to the same subject matter may sometimes be admitted in evidence. However, this is true only where it is *not inconsistent* with the terms of the integration. (*Masterson v. Sine, supra,* 68 Cal.2d at pp. 227–230, 65 Cal.Rptr. 545, 436 P.2d 561; *Pollyanna Homes, Inc. v. Berney* (1961) 56 Cal.2d 676, 679, 16 Cal.Rptr. 345, 365 P.2d 401; *Simmons v. Cal. Institute of Technology* (1949) 34 Cal.2d 264, 274, 209 P.2d 581; *Skone v. Quanco Farms* (1968) 261 Cal.App.2d 237, 243, 68 Cal.Rptr. 26; 2 Witkin, Cal. Evidence, *op. cit. supra,* §§ 962, 990–994, pp. 910, 936–942.)

(*Alling v. Universal Mfg. Corp.* (1992) 5 Cal. App. 4th 1412, 1433–35.)

The court may also admit parol evidence to construe a written instrument when its language is ambiguous. The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is "reasonably susceptible." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.) The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. (*Blumenfeld v. R. H. Macy & Co.* (1979) 92 Cal.App.3d 38, 45.) (See *Winet v. Price* (1992) 4 Cal. App. 4th 1159, 1165.)

5. Evidentiary Issues

Consistent with the above principles, the court has received all of the testimonial and documentary evidence proffered by the parties. The parties have agreed that most of the evidence is likewise admissible, although they disagree as to the weight to be given it by the court. Some specific testimony and exhibits have been objected to on the basis of hearsay, relevance, foundation for relevance, improper opinion, and expert discovery objection under expert discovery rules. The court makes a separate specific ruling upon objections. Notwithstanding the objections, none of the parties asserts that the evidence is in conflict. In other words, no one attacks the credibility of the evidence proffered, simply its ultimate admissibility and weight. There being no evidence in conflict, the interpretation of the agreement is left to the court as a matter of law.

6. Judicial Notice

In applying the rules of contract interpretation set forth previously, the court needs to take judicial notice of certain matters supplied by the evidence proffered by the parties or otherwise. In construing the contracts made in 1927, 1949, and 1963, the court needs to resort to judicially noticed matter, especially in reference to the circumstances under which the contracts were made, and the matter to which they relate.

Some of the matters to be judicially noticed are evident from the evidence proffered by the parties. Otherwise, the court intends to take judicial notice on its own motion. The court may take judicial notice on its own volition. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal. App. 4th 743, 752, as modified on denial of reh'g (Apr. 16, 2013).) As to matters the court will judicially notice, the court intends to reflect those matters in this tentative ruling, so that the parties may address the court as to the propriety of taking judicial notice, the propriety of the source for notice, and the question of relevance. (See Evid. Code § 455(b).)

The court may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452(h).) Sources of reasonably indisputable accuracy include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. The sources of judicial notice would not be received in evidence (unless otherwise admitted from the proffer of evidence by the parties), but merely consulted by the court to determine whether or not to take judicial notice and the tenor of the matter to be noticed. (Law Rev. Com. Comment to Evid. Code, § 452; see *People v. Archerd* (1970) 3 Cal.3d 615, 638.) (See 1 Witkin, Cal. Evid. (5th ed. 2020) Judicial Notice, § 32.)

"In determining the propriety of taking judicial notice of a matter, or the tenor thereof" (Evid. Code, § 454), the court is free from nearly all of the restrictions of the rules of evidence. Under Evid. Code section 454(a): "(1) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party. (2) Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege." (See 1 Witkin, Cal. Evid. (5th ed. 2020) Judicial Notice, § 42.)

7. The 1927 Agreement

Although the language of the 1927 Agreement is not directly the subject of judicial interpretation by the court in this proceeding, both the 1949 Amendment and the 1963 Amendment state that they are reaffirming the terms and provisions of the 1927 Agreement, except as amended and modified. Therefore, it is incumbent upon the court to have a general understanding of the circumstances preceding and surrounding the 1927 Agreement.[2]

The 1927 Administrative Agreement recitals state:

> WHEREAS, all the parties hereto are irrigation districts and corporations, and all of them except the Foothill Irrigation District are, and for a great many years last past have been, the owners of ditches leading out of Kings River, which River is a large natural water course having its sources in the Sierra Nevada Mountains in the Counties of Fresno and Tulare, State of California, and which runs thence in a general Westerly direction through the Counties of Fresno, Tulare and Kings in said State; and
>
> WHEREAS, all said Irrigation Districts and Corporations, except said Foothill Irrigation District are, and for a great many years last past have been engaged in the business of diverting and appropriating water from said Kings River by means of their respective ditches for the irrigation of lands and for other useful and beneficial purposes; and whereas, said Foothill Irrigation District desires, if it can lawfully do so, to become a diverter of water from said Kings River for use upon land lying within its boundaries;

The 1927 Water Rights Indenture states at Paragraph 16:

> That said Schedule so hereunto annexed has been and is hereby adopted, ratified, confirmed and approved; that the parties hereto are and shall be entitled to divert the waters naturally first flowing in said River, in accordance with said Schedule, and in the quantities and at the times in said Schedule specified; that the rights of the parties to this Indenture in and to the waters naturally first flowing in said Kings River, and their rights to divert and use the same up to but not in excess of the maximum quantity thereof distributed and to be distributed under said Schedule, are hereby firmly and finally fixed and settled; and that all agreements and judgments in conflict with this Indenture, or any of the provisions thereof, or in conflict with said Schedule, are, to the extent of the flows of waters distributed and to be distributed under said Schedule, but not as to any greater flows, hereby cancelled and annulled as between the parties hereto, and all actions pending between any of the parties hereto affecting said waters so distributed or to be distributed under said Schedule, or the flow thereof, are hereby dismissed as between the parties hereto upon the execution of this Indenture

To understand this agreement, the court needs to inform itself of "the natural water course" of the Kings River, the diversions of the Kings River by means of ditches for the "great many years last past" prior to the 1927 Agreement, and, in general, what "conflicts" were "settled" or "cancelled and annulled."

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[2] The 1927 Agreement collectively means the 1927 Administrative Agreement and the 1927 Water Right Indenture, Exhibits 1 and 2.

a. Historic Surface Hydrology and the Natural and Diverted Flow of the Kings River

In order for the court properly interpret the contracts in dispute, the court must understand the circumstances under which the agreements were made, including the situation of the subject of the instruments and of the parties to it, so that the court may be placed in the position of those whose language the court is to interpret. (Code Civ. Proc., § 1860.) In order to perform the task before it, the court believed it necessary to gain a basic understanding of the natural flow of the Kings River and its historic diversions. Toward that end, the court takes judicial notice of the following facts.[3]

Prior to European settlement, river-floodplain systems occupied large portions of the Sacramento, San Joaquin and Tulare Lake Basins. Seasonal inundations from the rivers created vast areas of tule marshes and wetlands that early surveyors mapped as overflow land. These marshes and wetlands covered approximately 1.4 million acres including more than half a million acres in the Sacramento-San Joaquin Delta and over 400,000 acres in the Tulare Lake Basin.

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[3] The parties presented some of these resources through evidence, exhibits and testimony. Much of this matter is contained in narrative description and also graphically displayed in maps as part of a decision of the State Water Control Board referred to in the evidence as Decision 1290 (Ex. 25). The court also searched to see if there was any other resource that the court could reference to aid judicial notice. The court found two such sources. First, the court located a document entitled Tulare Lake Basin Hydrology and Hydrography: A Summary of the Movement of Water and Aquatic Species, April 12, 2007, prepared for the U. S. Environmental Protection Agency, Document No. 909R07002 by ECORP Consulting, Inc. The document may be located at https://www.epa.gov/sites/production/files/2018-05/documents/tulare-fullreport.pdf . The document is not admitted. In and of itself it is irrelevant and inadmissible, containing much that has nothing to do with this case. The court only considered it for the matters distilled in the court's stated judicial notice and for no other purpose. The document was helpful for a general statement of hydrology not in dispute and for some very readable maps in its List of Tables which are entirely consistent with the maps proffered by the parties. Copies of those maps are attached to this ruling as Exhibits A, B, C, D, and E.

The court also reviewed a document available on the internet from the records of the plaintiff KRWA entitled "The Kings River Handbook." The document is located at http://kingsgroundwater.info/_documents/Kings_River_Handbook_2009.pdf . The court has some recollection that this document ("Handbook") or portions of it were submitted at an earlier stage of the proceedings, but the court cannot locate it in the record in the time available; it is not an exhibit to the current bifurcated trial proceedings. The version referenced by the court is the Fifth Edition 2009 and states that it was prepared by the Public Information Staff of KRCD and KRWA, J. Randall McFarland, KRCD and KRWA Public Relations Consultant, Cristel L. Tufenkjian, KRCD Manager of Community & Public Relations with special material provided by James Provost trial proceedings. McFarland was a witness in the trial called by plaintiff as an expert historian. Provost was mentioned as a source for information. Objection and motion to strike on the grounds of inadmissible hearsay was made to out of court statements adopted by McFarland from other sources including Provost. The court will separately rule on the objection and motion. The Handbook is obviously a public relations document. It is replete with hyperbole, frequently waxing poetic. It contains much irrelevant and inadmissible matter. Nevertheless, the court found the Handbook helpful with respect to the very narrow issues of water flow and historic information not reasonably subject to dispute. In particular, the court found one of the Handbook's maps to be helpful. That map is attached as Exhibit "F." The court has discounted any other matter stated in the Handbook and has not considered it. The Handbook itself is not admitted.

Historically, river runoff in the Tulare Lake Basin collected in terminal lakes on the basin floor. The interior drainage was created primarily by tectonic sinking and to a lesser extent by the damming effect of valley-crossing alluvial fans. The terminal lakes complex fluctuated in size from a few square miles during extended dry periods, to over 800 square miles in wet years.

Tulare Lake, by far the largest of the Basin's terminal lakes, received runoff from several rivers, including the Kings, Kaweah, Tule and Kern Rivers. Smaller east-side streams such as Deer and Poso Creeks and the White River likely reached the lake only in wet periods. Surface runoff from the Coast Range reaching the lake was rare, and usually occurred only after heavy winter rains. Tulare Lake was the largest freshwater lake west of the Mississippi River and the second largest freshwater lake in the United States based on surface area. Tulare Lake was estimated to encompass 790 square miles at its highest overflow level recorded in 1862 and 1868. The lake was very shallow and annual fluctuations could expose or submerge 100 square miles of land or more. The boundaries of Tulare Lake were ill defined and changeable due to the low gradients in the Basin.

Tulare Lake had no natural outlet when the lake level was low, but could flow northward into the San Joaquin River Basin during high waters.

The Kings River flowed southwesterly out of the foothills into numerous channels, and into a bottomlands area that is incised slightly below the surrounding land. It then coalesced into a single channel and flowed southwest. Most of the Kings River water flowed south toward Tulare Lake. Near Kingsburg, water began to flow out of the main stem [of?] Kings River into numerous sloughs that later facilitated the distribution of irrigation water. High flows distributed water into these sloughs over a large, marshy area that merged with Tulare Lake. The northernmost two of these sloughs, now called Cole and Murphy Sloughs, periodically carried water north into Fresno Slough and the San Joaquin River.

The Kings River originates naturally near the Sierra Nevada Crest above 13,000 feet, supplying waters to three upper branches of the river.

The Upper South Fork of the Kings River begins below Mather Pass and then descends through Paradise Valley, then turning west through the Kings Canyon. A number of tributary creeks contribute to this flow.

The Upper Middle Fork of the Kings River originates in Helen Lake (elevation 11,595 feet), immediately below Muir Pass. After flowing a few miles toward the east, the Middle Fork descends through the Tehipite Valley for 27 miles.

The Upper North Fork accumulates at 10,803 feet in Ambition Lake, and then flanks the LeConte Divide. It then descends reach Lake Wishon.

These branches coalesce into a central channel which is now the Pine Flat Reservoir (not in existence in 1927). This central branch passes through the Piedra Gauging Station ("Piedra") at the approximate point where the river exits the foothills of the Sierra. There is also a gauge observer's station and various devices for measuring and rating the water of the river. (See *People's Ditch Co. v. Foothill Irr. Dist.* (1931) 112 Cal. App. 273, 274.)

Midway between Piedra and the river's emergence onto the valley floor, Cobbles Weir is the first diversion structure. Water can be directed through Cobbles Gate into the "76 Channel" off the river's south bank. The channel conveys water four miles into the Alta Canal, a conveyance constructed in 1882-83.

Two miles downstream of Cobbles is the Gould Weir which pools water for diversion into the Gould Canal, which in turn supplies water to Enterprise Canal. The canals were completed in 1874. Gould Weir is located a mile upstream from the Friant-Kern Canal (which did not exist in 1927).

Next downstream is a structure known as Fresno Weir constructed in 1905. It pools water for diversion off the river's west bank into the Fresno Canal and the Consolidated Canal. The Consolidated Canal divides into two primary distribution channels, the Centerville and Kingsburg (C&K) and Fowler Switch canals. The C&K was built in 1878 and the Fowler Switch in 1882-83.

The Kings River then flows into a delta-like complex called the Centerville Bottoms containing many small channels, sloughs, and diversion points including Byrd's Ditch, built in 1858. The river then turns east for a few miles before bending south into the Reedley Narrows, which is a reach of the river constrained by bluffs. There are no points of diversion from above the Reedley Narrows to Highway 99. The river flows through the city of Reedley and passes from Fresno County into Tulare County.

The next significant diversion point of the river is at People's Weir. Under natural conditions, as described above, nearly all of the Kings River flows were discharged into old Tulare Lake. Early diversion provided the means to send water north. The transition between the former and present conditions begins at People's Weir. At People's Weir the river takes on fairly distinct northern and southern branches.

The original Kings River channel makes an abrupt turn toward the south a few hundred yards below People's Weir. This channel is known as Old River. From People's Weir north of the Old River the flow divides to the Cole Slough Weir on the north and then to the Dutch John Weir. These two flows then converge toward one another again with the Reynolds Weir to the north and the Last Chance Weir to the south. Water may flow from the Reynolds Weir back into the southerly channel through the Reynolds Cut.

The northerly flow from the Reynolds Weir moves in a westerly or northwesterly direction through the Murphy Slough Weir into a channel distinctly recognized as the North Fork. This North Fork passes through the James Weir on through the James Bypass to the Fresno Slough and the waters of the San Joaquin River.

The southerly flow of water from Last Chance Weir moves toward the Army Weir and Island Weir. The Army Weir did not exist in 1927. It was built in 1943- 1945 by the Army Corp of Engineers for flood control. Generally, the South Fork waters are controlled by what is now Army Weir through the south flowing Clark's Fork. The North Fork water is controlled by Island Weir, diverting water toward the Crescent Weir, which has the capacity to again divert water south if necessary in flood, but typically continues the flow north through Stinson Weir to join with the Murphy Slough waters into the North Fork flow.

The southerly flow from Clark's Fork continues in the South Fork to Empire Weir No. 1 and then to Empire Weir No. 2. Below Empire No. 2 Weir, the Kings River-South Fork Canal flows another ten miles

into the Tulare Lake bed's bottom as a South Fork extension. After a few miles, the canal is channeled directly south. There, it intersects the Tule River Canal, flowing from the east.

b. The Circumstances and Terms of the 1927 Agreement

The court takes judicial notice that from the inception of the development of diversions from the Kings River in 1850 through 1927, conflicting claims to the river waters were frequent and intense, leading to much litigation and even "self-help." The 1927 Agreement was executed by nineteen self-described "Irrigation Districts or corporations" that then currently and in the past were diverting water from the Kings River. The parties executing the 1927 Agreement may generally be described as the North River interests (with the exception of the Centerville Bottoms) and the North Fork interests. The South Fork interests did not participate at this time.

The 1927 Agreement followed some earlier and provisional agreed diversion schedules, and established a new agreed diversion schedule among the parties to be administered by a Water Master, based upon water levels to be gauged and measured at the USGS station at Piedra (see ¶ 17). The 1927 Agreement was written in two documents—an Administrative Agreement and a Water Rights Indenture ("Indenture").

The parties intended to settle any of their conflicting claims to water in accord with the adopted schedule. The Water Rights Indenture states at Paragraph 16:

> 16. That said Schedule so hereunto annexed has been and is hereby adopted, ratified, confirmed and approved; that the parties hereto are and shall be entitled to divert the waters naturally first flowing in said River, in accordance with said Schedule, and in the quantities and at the times in said Schedule specified; that the rights of the parties to this Indenture in and to the waters naturally first flowing in said Kings River, and their rights to divert and use the same up to but not in excess of the maximum quantity thereof distributed and to be distributed under said Schedule, are hereby firmly and finally fixed and settled; and that all agreements and judgments in conflict with this Indenture, or any of the provisions thereof, or in conflict with said Schedule, are, to the extent of the flows of waters distributed and to be distributed under said Schedule, but not as to any greater flows, hereby cancelled and annulled as between the parties hereto, and all actions pending between any of the parties hereto affecting said waters so distributed or to be distributed under said Schedule, or the flow thereof, are hereby dismissed as between the parties hereto upon the execution of this Indenture.

It is significant to this court that the parties styled their agreement as an "indenture." The use of the word "indenture" is somewhat archaic to modern ears. In ancient law it was a contract or deed written on a parchment or long paper that contained one original writing above and one duplicate verbatim original below. The two were then separated by a jagged cut, and each original given to the parties so that when the two were put together, it ensured authenticity. In a more modern context, familiar to legal drafters in 1927 but little used today except in connection with financial securities, an "indenture" simply describes a contract wherein the parties bind each other to mutual promises, benefits, and obligations as consideration, and are typically not conveying anything of value, tangible or intangible, for money, particularly where they are providing for representation in trust.

In the 1927 Agreement, the parties created the Kings River Water Association, and created the office of Water Master, with prescribed and proscribed principles of representation. Paragraph 2 of the Administrative Agreement states:

> 2. That said Association, acting by and through its Board of Directors, shall have and is hereby granted control and supervision over the waters of said Kings River and over the flow and diversion thereof, to the extent in said Schedule provided, and said Association acting by and through its said Board of Directors, shall cause the water which each of the parties hereto is so entitled to divert from said Kings River to be turned to it at the times, in the quantities and in the manner provided in said Schedule, and to protect and defend the said rights and interests respectively of all the parties hereto in and to the waters of said River, and in and to the diversion and use thereof under said Schedule; and
>
> That for said purposes said Association and its Board of Directors shall employ at the expense of the parties hereto, (such expense to be apportioned and paid as hereinafter provided), a Water Master to patrol said River and to turn into the ditch or canal of each of the parties hereto the quantity of water to which such party may be entitled under said Schedule, at the time and in the manner such party is entitled to have said water and to oversee the diversion of the waters of said River by the parties hereto, and to examine into all diversions of water from said River by natural and artificial persons not parties hereto, and do and perform such other acts as said Board may direct, and said Board of Directors shall otherwise carry out the purpose and intent of this Agreement, it being expressly understood and agreed that it shall be the duty of said Association and of its Board of Directors and of any person whom it may employ as a Water Master, to protect to the fullest extent the rights of all the parties hereto in the particulars aforesaid and to prevent the invasion of the respective rights of the parties hereto, and to prevent the diversion and appropriation by others not parties hereto of the waters of said River to which the parties hereto are respectively entitled under said Schedule, and to report promptly to each of the parties hereto any and all invasions of, and interferences with their said respective rights, and to take prompt and effective measures to protect said respective rights and prevent all invasions thereof.

Similarly, Paragraph 9 of the Administrative Agreement sets out the terms that govern the conduct of litigation by the KRWA, and the manner in which litigation would be authorized and how the costs of litigation will be borne and paid.

The parties to the 1927 Agreement did not intend an assignment or conveyance of water rights, but intended to only settle their respective diversion claims between themselves. Paragraph 19 of the Indenture states:

> 19. That except as to the rights of diversion between the parties hereto as in said Schedule "A" provided, no prior right of any of the parties to this Indenture in or to any of the waters of said River is intended to be or shall be or is by the terms of this Indenture, transferred, granted or conveyed to any other party to this Indenture, and that this Indenture does not and shall not vary, modify or limit the right or rights of any of the parties hereto to the flow or flows of the waters of said Kings River, or any part thereof, as

to any person, corporation or district not a party hereto; nor shall this Indenture in anyway affect the rights of the parties hereto to the water flows of said River in excess of the flows provided for by and to be distributed under said Schedule, it being expressly understood and agreed that the waters of said River first flowing therein shall be distributed as provided in said Schedule up to the maximum quantities in said Schedule mentioned and set forth; and that neither said Schedule nor this Indenture shall be construed as creating, granting or conferring any right or rights to the waters of said Kings River, but that this Indenture and the said Schedule are understood and intended by all parties hereto as a declaration between themselves of the present existing and respective rights of the parties hereto to the extent set forth in saidSchedule.

8. Interpretation of the 1963 Amendment

The court turns out of sequence in this ruling to the interpretation of the 1963 Amendment, leaving aside the 1949 Amendment for a moment. The 1963 Amendment is more easily interpreted and dealt with by the court. The 1963 Amendment states its reasons and its terms explicitly.

The recitals to the 1963 Amendment state that it is made to supplement and amend the 1927 Agreement and 1949 Amendment. The 1963 Amendment acknowledges that Kings River Water District is admitted to the KRWA with respect to an agreement regarding the "Centerville Bottoms Schedule." The recitals acknowledge that Circle "L" Farms is admitted as a member of KRWA. The 1963 Amendment recognizes certain successors in interest since 1927 and 1949.

The purpose of the 1963 Amendment was principally because the Pine Flat Dam had by then been constructed and the parties were participating in the "benefits of storage" under an interim contract between the United States and the Kings River Conservation District.[4] The Pine Flat Dam had altered the natural flow of the Kings River so that gaugings and measurements at the USGS Piedra Station would not at all times determine the true mean daily natural flow of the river. At the time of the 1963 Amendment, the Piedra measurement devices had been removed. The parties contemplated that the addition of other measuring stations might be necessary for the Water Master to determine the mean daily natural flow of the river.

The 1963 Amendment acknowledges that some of its parties were claiming that the storage of waters in the Pine Flat Reservoir had altered the river channel gains and losses so that it would be necessary to establish and employ a Storage Operations Pool. Disputes had arisen arising out of the channel gains and losses. The intent of the agreement was in part to settle disputes and to provide for the equitable administration of Kings River water under storage conditions.

The parties therefore agreed that the Natural Flow of Kings River (defined as "that quantity of the waters of Kings River which would arrive at the United States Geological Survey Station at or near Piedra in the absence of Pine Flat Project and all other artificial interference with or obstruction of the natural flow of said river upstream from said measuring station" (Definitions, subp. (f)), would continue to be divided and allocated among the parties in accord with the 1927 Agreement, the 1949 Amendment, including the Agreement Admitting Kings River Water District as a Member of

[4] The Kings River Conservation District was created in 1951 principally to serve as a public agency to deal with the United States on issues involving water storage in Pine Flat Reservoir.

Kings River Water Association and Agreement re Centerville Bottoms Schedule, except to the extent modified by the terms of the 1963 Amendment.

The parties agreed that each would have certain storage rights in the Pine Flat Reservoir pursuant to a Storage Allotment. "Storage Allotment" was defined as the total amount of storage space in Pine Flat Reservoir specified in and for which each party agreed to pay under the provisions of an Allocations Contract and that party's storage agreements with the United States (Definitions, subp. (b).)

The 1963 Amendment provided contract terms for the determination of the quantity of stored water for release. It provided terms for the proportionate share of gains or losses of water under storage. The amendment confirmed the use of the Piedra gauging station when available for determination of the mean daily natural water flow, and for measurement at upstream stations when the Piedra station was considered an inaccurate record.

The amendment also provided contractual terms for the distribution of floodwaters released from Pine Flat Reservoir.

The amendment also provided for administration of unstorable water below Pine Flat Dam and Piedra (¶ 13), terms related to the "Fresno Slough Agreement" (¶ 14), terms related to pending Water Right Applications of Tulare Lake Water Storage District then pending before the State Water Rights Board (¶ 15), and inclusion of Kings River Water District in pending water rights applications (¶ 16).

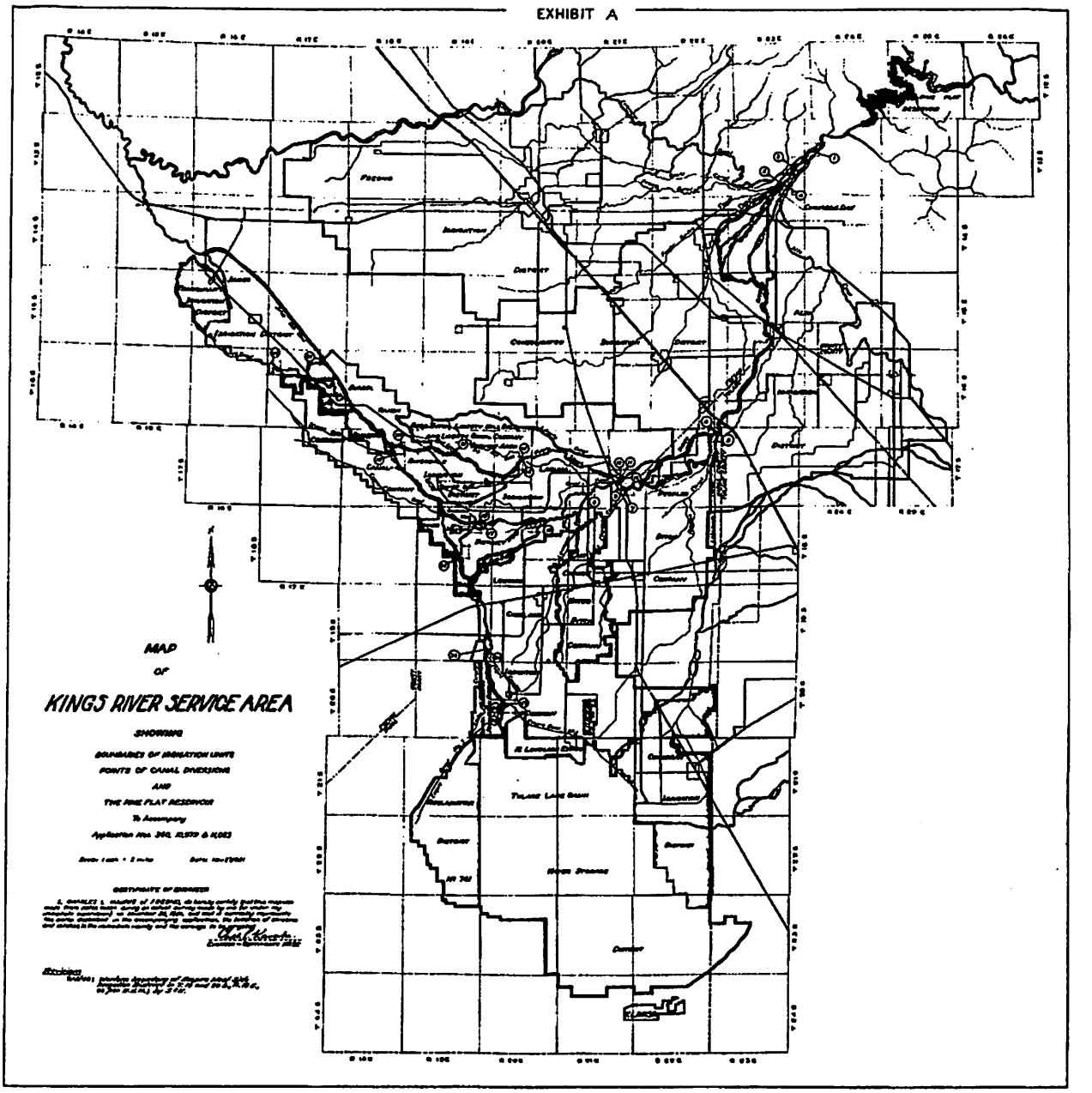
It is in this context that the court turns to the language in dispute, which requires court interpretation according to the pleadings and stipulation between the parties. To reiterate, the disputed language is contained in Paragraph 17 of the 1963 Amendment:

> "That no party hereto shall rent, lease, lend, hypothecate, convey, transfer or assign in any way, any interest in any water or water right to which said party at any time shall or may be entitled, for use or possible use outside of the Kings River Service Area."

After consideration of all admitted evidence, and considering all evidence provisionally admitted for the purpose of determining ambiguity, the court finds that this language and term of agreement is not ambiguous. It means exactly what it says.

First of all, according to subpart (e) of the "Definitions" section of the amendment, the defined Kings River Service Area is "those areas in the State of California identified and delineated on the map attached to the 1963 Amendment as Exhibit A." This map appears originally to have been drafted under the supervision of Water Master Charles Kaupke in 1951, and supplemented in 1963. The court concludes the area intended as the Kings River Service Area is that area contained within the drawn black boundary of the map which states that it depicts the "Boundaries of Irrigation Units." This area is consistent with later maps used in KRWA applications to the State Board, and is virtually coextensive to the boundaries of the KRCD (per the testimony of Hartwig).

This Exhibit A is reproduced as follows:



Furthermore, the language of Paragraph 17 explicitly prohibits a transfer of an interest in water or water right if such a transfer would result in use outside of the defined Kings River Service Area. By its terms, this is not a prohibition on the physical transport of water. It is a prohibition against transfers of interests and rights. An unambiguous reading of paragraph 17 of the 1963 Amendment shows that such provision does not restrict the movement of water per se. This provision prohibits the hypothecation of interests in water or water rights for use outside of the Kings River Service Area.

This interpretation of the clear language of the 1963 Amendment is consistent with the overall purposes of the Amendment. The 1963 Amendment is clear that it is primarily concerned with the equitable distribution of stored and diverted waters among the parties. By this 1963 Amendment, the parties

were providing for "first claim" of waters among themselves so that if a party intended a transfer of their rights to someone outside the Service Area (presumably a stranger to the Agreement) it would, in effect, diminish the interests of the other participants, particularly since the focus of the 1963 Amendment involved storage rights in the Pine Flat Reservoir. This is evident from other provisions of the 1963 Amendment.

For instance, Paragraph 12 of the 1963 Amendment states:

> That any water of Kings River to which any party to this Agreement is entitled in accordance with Paragraph 2 hereof, which has been refused by the party entitled thereto, whether such water has been previously stored or not, shall be added to the mean daily natural flow of Kings River, computed and determined as herein provided, and when so added to such flow shall determine the amount of water <u>to be divided among all other parties</u> to this Agreement in accordance with Paragraph 2 hereof; and such water may either be directly diverted or stored by such other parties entitled thereto in accordance with Paragraph 2 hereof, except that no stored water so released for flood control purposes or any increase in scheduled entitlements caused thereby, shall be stored in Pine Flat Reservoir. (Emphasis added.)

Paragraph 18 of the 1963 Amendment states:

> That no party hereto shall rent, lease, lend, hypothecate, convey, transfer or assign in any way, any interest in any water or water right to which said party at any time shall or may be entitled, for use within the Kings River Service Area, except upon strict compliance with the following conditions:
>
> (a) That the transferor shall first notify all of the remaining parties hereto, in writing, of any such contemplated transfer, and shall allow such remaining parties hereto not less than fifteen (15) days thereafter in which to investigate such contemplated transfer, and in which to determine whether the same would result in any increase of river channel losses adversely affecting such remaining parties to this Agreement; and
>
> (b) That in the event any one or more of such remaining parties hereto shall determine that such contemplated transfer would result in any increase of river channel losses adversely affecting such remaining party or parties hereto, on being notified in writing of such determination by such remaining party or parties hereto so adversely affected, the transferor must at the time of such transfer, make arrangements for and provide all water required to fully compensate for all such losses; and
>
> (c) That in the further event the transferor and any remaining party hereto which has determined that such contemplated transfer would result in any increase of river channel losses adversely

affecting such remaining party hereto, shall fail to reach agreement regarding the character or extent of such increased river channel losses and the amount of water required to fully compensate for the same, on receipt of notice in writing from such remaining party hereto of such absence of agreement, the Kings River Water Master shall not administer the waters of Kings River in accordance with any such transfer unless and until the matters included in such absence of agreement have been resolved by negotiations by and between the transferor and such remaining party hereto, or by an appropriate order of a court of competent jurisdiction.

Paragraph 19 of the 1963 Amendment states:

That no party hereto shall rent, lease, lend, hypothecate, convey, transfer or assign in any way any interest in any portion of the storage space in Pine Flat Reservoir to which said party at any time shall or may be entitled, except upon strict compliance with the following conditions:

(a) That any such transfer must be made to another party or parties to this Agreement; provided, however, that if none of the remaining parties hereto shall exercise their opportunity to acquire such storage space as hereinafter specified, then and in that event such storage space may be transferred to some other person or entity, but only for the storage of water to be used within the Kings River Service Area; and

(b) That any such transfer must be made for a period of not less than three (3) years; and

(c) That the transferor shall first notify all of the remaining parties hereto, in writing, of any such contemplated transfer, and shall allow such remaining parties hereto not less than fifteen (15) days thereafter in which to investigate such contemplated transfer, and in which to determine whether the same would result in any increase of river channel losses adversely affecting such remaining parties to this Agreement; and

(d) That each of said remaining parties hereto shall be afforded an opportunity and shall be entitled, but shall not be obligated, to acquire its pro rata share of such storage space, in direct proportion to its percentage share of the total storage space in Pine Flat Reservoir, on the same basis that the transferor proposed to transfer the same to any other party or parties hereto; but said opportunity shall be deemed to be waived unless exercised within sixty (60) days after notification in writing of such contemplated transfer; and

(e) That in the event any one or more of such remaining parties hereto shall determine that such contemplated transfer would result in any increase of river channel losses adversely affecting such remaining

party or parties hereto, on being notified in writing of such determination by such remaining party or parties hereto so adversely affected, the transferor must at the time of such transfer, make arrangements for and provide all water required to fully compensate for all such losses; and

(f) That in the further event the transferor and any remaining party hereto which has determined that such contemplated transfer would result in any increase of river channel losses adversely affecting such remaining party hereto, shall fail to reach agreement regarding the character or extent of such river channel losses and the amount of water required to fully compensate for the same, on receipt of notice in writing from such remaining party hereto of such absence of agreement, the Kings River Water Master shall not administer the waters of Kings River in accordance with any such transfer unless and until the matters included in such absence of agreement have been resolved by negotiations by and between the transferor and such remaining party hereto, or by an appropriate order of a court of competent jurisdiction. (Emphasis added.)

All of these provisions support the court's interpretation that the language of Paragraph 17 of the 1963 Amendment is unambiguous, and only restricts hypothecation of interests or rights in water for use outside the defined Kern River Service Area, not physical transport of the water itself.

9. Interpretation of the 1949 Amendment

The court now turns to the 1949 Amendment. To reiterate, the language in dispute for the court's interpretation is in Paragraph 8:

> That it is agreed by and among the parties hereto that none of the waters, or rights to the waters of the Kings River, now or hereafter owned or possessed by any of the parties hereto shall be sold, assigned, or transferred for use or transported outside of the watershed or service area of Kings River.

The first question before the court is whether this language is ambiguous.

> Ambiguity is defined as "an unclear, indefinite, or equivocal word, expression, meaning, etc." (Random House Unabridged Dict. (2d ed. 1993) p. 64, col. 3.) A word or expression is said to be ambiguous when it is "open to having several possible meanings or interpretations." (*Ibid.*) Ambiguities in a written instrument are either patent (arising from the face of the writing) or latent (based on consideration of extrinsic evidence). (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360, 114 Cal.Rptr.2d 265.)

(*Rancho Pauma Mut. Water Co. v. Yuima Mun. Water Dist.* (2015) 239 Cal. App. 4th 109, 117; see also *Linton v. Cty. of Contra Costa* (2019) 31 Cal. App. 5th 628, 636, reh'g denied (Feb. 19, 2019), review denied (Apr. 10, 2019).)

The language in one part is not ambiguous. In context, this provision clearly states that the parties to the agreement, "by and among" them, agree that "none of rights to the waters" of the Kings River owned or possessed by any of them, then or in the future, could be "transferred for use" "outside" of a stated area. In this sense, the language is similar to the provision stated in Paragraph 17 of the 1963 Amendment discussed above. However, also read in context, the parties to the agreement, "by and among" them, agree that "none of the waters" of the Kings River owned or possessed by any of them, then or in the future, could be "transported outside" of a stated area. This language pertains specifically to the water as opposed to any rights thereto, and is the only language in any of the contracts under scrutiny to circumscribe the location where Kings River water can be transported. It unambiguously conveys that the water may not be physically transported beyond a described area.

The issue then boils down to interpretation of the contractual meaning of "outside the watershed or service area of the Kings River." The parties to the litigation offer two competing interpretations of this language.

Plaintiffs and Cross-Defendants argue that the term "service area" in the 1949 Amendment means the same thing as the defined term in the 1963 Amendment, that is, the "Kings River Service Area" delineated in the map attached to the 1963 Amendment as Exhibit "A," reproduced above. Plaintiffs and Cross-Defendants also argue that the term "watershed' as used in the 1949 amendment means only a well-defined area upstream of Piedra which constitutes the mountainous slopes which drain into and become the lower Kings River. The court would also describe this as the area of upstream mountainous drainage. The areal boundary intended by the 1949 Agreement as argued by Plaintiffs and Cross-Defendants is probably best graphically represented by the colored portions of the map admitted into evidence as Exhibit 24.

Defendants and Cross-complainants argue for a different interpretation. Defendants and Cross-complainants propose that the area intended by the 1949 Amendment was a broader area. Defendants and Cross-complainants argue that, even if the "service area" in the 1949 Amendment was intended to encompass only the specific boundaries of the Irrigation Units that comprise the "Kings River Service Area" delineated in the map attached to the 1963 Amendment as Exhibit "A," (which they do not necessarily concede), the disjunctive use of the term "watershed" must be understood to encompass a broad area commonly understood as a "watershed" comprising also the lower reaches of the Kings River below Piedra, emerging out of the foothills, and also the river and its diversions as they flow onto the San Joaquin Valley floor, which includes the "service area," but extends to lands beyond the "service area." Defendants and Cross-complainants argue that the term "watershed" must be understood in its most general sense, and they offer common definitions and definitions provided by the USGS. Defendants and Cross-complainants argue (including from the testimony of their expert hydrologist Smith) that the "watershed" of Kings River includes the entire topographical drainage area that feeds into Kings River, including both the upper area as proposed by Plaintiffs and Cross-defendants, but also its lower segment, in its natural state, and includes the historic terminal lake area of the Tulare Lake. As the court has noted from judicial notice, this area would be relatively vast extending as far as to Kern County. Defendants and Cross-complainants argue that this is the common definition required to be used by the court under rules of interpretation, and is the area the contracting parties intended because their principle concern would have been the waters of the lower river, and not its upper reaches.

From one perspective, the contract language in dispute is susceptible to both of these interpretations. From this view, the language would be deemed ambiguous, and the court would consult the extrinsic

evidence in an effort to resolve the ambiguity. The extrinsic evidence consists of evidence of surrounding circumstances and course of conduct.

On the one hand, some extrinsic evidence supports the interpretation offered by Plaintiffs and Cross-Defendants that the area limitation of the 1949 Amendment was intended to mean the Kings River Service Area (as defined in 1963) and the upstream drainage above Piedra. Exhibit 23 is a "General Map of the Kings River Watershed and Irrigation Units" dated December 1929. This map depicts the area argued by Plaintiffs and Cross-Defendants. This area is also consistent with the area depicted in an October 1924 map and September 1945 map (Ex. 24). This interpretation tends to be supported by later descriptions, such as those expressed in the Committee of Engineers Minutes of April 16, 1959 (Ex, 39), as well as the maps accompanying Decision 1290 of January 18, 1967 (Exs. 25, 26, and 27) and maps and descriptions associated with later state water licenses (Ex. 12). This interpretation is also consistent with the administration by Water Masters Woodman and Haugen (who were not percipient witnesses to any matters in 1949).

On the other hand, the 1949 Amendment by its terms, and other extrinsic evidence, equally support an interpretation that the parties to the 1949 Amendment did not intend to define the area of water transport restriction only to the boundary of the upper drainage and the legal boundaries of the Irrigation Units.

The court takes judicial notice that 1949 Amendment brought the South Fork and Tulare Lake Bed Units into the KRWA and included those interests in a new diversion schedule. The 1949 Amendment was entered into in part out of a common interest in providing for the negotiation for and payment for the eventual construction of Pine Flat Dam. The 1949 Amendment resulted in the conclusion of some of the last then remaining lawsuits over Kings River water.

The court also takes judicial notice that the parties to the 1949 Amendment were sophisticated in agriculture and water use. They had very qualified engineers and lawyers available to them. Had they intended to exactly define the "service area" and "watershed" as urged by Plaintiffs and Cross-Defendants, they could have done so, both by exact description and by reference to or incorporation of the very maps in existence at the time that depict those very areas. (Eg., Exs. 19, 20, 21, 24.) The parties to the 1949 Amendment did not intend to restrict their use of the term "watershed" simply to upper drainage, because their concern was the use of the water as it flowed from the foothills below Piedra. There is no evidence of any concern over diversions upstream of that point because there was no practically arable land. Water use in the upper watershed was little diverted except for cattle operations which was a negligible diversion.[5]

There is also no evidence that these parties intended by the use of the term "service area" to restrict the then existing use or future development of the lands under cultivation or reasonably suitable for future cultivation by their constituent landowners. There is no evidence that the land ownership of the ultimate water users in 1949 was restricted to the legal boundaries of the Irrigation Units.

That the parties did not intend the narrow limitation argued by the Plaintiffs and Cross-defendants is evident from the terms of the 1949 Amendment itself. Paragraph 6 of the 1949 Amendment confirms

[5] Decision 1290 also describes the watershed area of Kings River as being both the area above Piedra and the flow of the river below Piedra. (See Ex. 25.)

the intent of the South Fork interests that their use of water would not be administered by the Water Master:

> 6. That the authority of the Water Master of Kings River provided for in said Administrative Agreement, as set forth therein, is recognized and confirmed hereby. It is understood and agreed that the duties and authority of said Water Master with respect to the control and direction of diversions from said Kings River shall terminate at the gauging station below Empire Weir No. 2 as to the water of said Kings River flowing downstream in the South Fork of Kings River.

Further, Paragraph 7 reiterates that none of the parties were actually relinquishing water rights, but were agreeing only to the diversion schedule. The parties were also confirming that the amendment was not intended to have any third party beneficiaries or modify any rights with respect to nonparties

> 7. That except as to the rights of diversion between and among the parties hereto as in said Amended Schedule provided, and as otherwise specifically provided herein and in said Indenture and Administrative Agreement, no right of any of the subscribing parties hereto in or to any of the waters of said River is intended to be, or shall be, or is, by the terms hereof, transferred, granted or conveyed to any other party to this agreement, and that this agreement does not and shall not vary, modify, limit, waive or abandon any right or rights of any of the parties hereto in or to the flow or flows of the waters of said Kings River, or any part thereof, as to any person, corporation or district, or anyone else, not a party hereto; it is further agreed that neither said Amended Schedule nor this agreement shall be construed as granting or conferring any right or rights in or to the waters of said Kings River, except as otherwise herein and in said Indenture and Administrative Agreement specifically provided, but that this agreement, the said Indenture and Administrative Agreement and the said Amended Schedule are understood and intended by all of the parties hereto as a declaration between and among themselves of the present existing and respective rights of the parties hereto to the extent therein set forth and as otherwise herein specifically agreed, and that neither this agreement nor any provision in it is made nor shall be construed to be, for the benefit of anyone whomsoever who is not expressly named herein as a party hereto.

Also, the maps of 1929 and 1945 (Ex. 24) depict "service areas" and water flows of Kings River outside the boundaries of the Irrigation Districts. The term "Kings River Area" as stated in the August 12, 1927 minutes of the KRWA Board make that reference only to distinguish between claims of San Joaquin River interests.

Turning to rules of interpretation requiring that the court adopt the common meaning of words unless a technical meaning is ascertainable from the evidence, the court finds that the words "service area" of Kings River as used in the 1949 Amendment means the "areas of land serviced by Kings River water" in the river's developed state, and that the word "watershed" of Kings River means the "area bounded peripherally by a divide, and draining ultimately to" Kings River in its natural state. (See Merriam Webster Dictionary definition of "watershed.")

The court finds that the use of the word "or" in the disputed language of the 1949 Amendment is a disjunctive connector used in the inclusive sense (i.e., A or B, or both). (*Dow v. Honey Lake Valley Res. Conservation Dist.*, No. C090304, 2021 WL 1711582, at *1 (Cal. Ct. App. Apr. 30, 2021).) Although the

use of the word "or" as a disjunctive is inclusive as used in this contract, this does nothing to resolve the uncertainty. The language provides that certain lands served by the developed Kings River might lie outside its natural watershed, and areas of its natural watershed might lie outside its developed service area. The parties to the 1949 Amendment meant both areas, including those areas where there was overlap.

Although the court finds that the terms used by the parties intended a broader area than argued for by Plaintiffs and Cross-Defendants, the court does not find that the parties intended the area advanced by Defendants and Cross-complainants, to include the pre-development historic terminal lake area of the Tulare Lake (as testified to by their expert hydrologist, primarily based upon USGS definition). This area would be vast, extending as far as to Kern County, and would include waters flowing not only from Kings River, but could include the watersheds of the Kaweah River, the Tule River, the Kern River, other tributaries, and even the San Joaquin River. The parties meant what they said that transport for use would be limited to that within the area of the Kings River, which *could* include Tulare Lake bed lands or some portion of them.

The court finds that neither interpretation offered by the parties is reasonable under the circumstances. The interpretation offered by plaintiff and Cross-defendants is too narrow, and the interpretation offered by Defendants and Cross-complainants is potentially too broad.

The court is mindful that, having reached a conclusion and finding as to what the parties intended by their language which is now in dispute, the court's conclusion and finding in no way resolves any uncertainty. There is a reason.

The court finds that the language in question is <u>not</u> ambiguous—it is <u>indefinite</u>. In this context, there is a difference. "Ambiguity" in contract results when the parties have a definite intent, but the language they use is uncertain, and is therefore susceptible to two or more reasonable interpretations. Language in a contract is "indefinite" when it exactly states the intent of the parties, but the parties do not, at the time of contracting, have in mind themselves a definite meaning.[6] They intend instead to establish a more definite understanding in the future. This is sometimes called an "agreement to agree."

On rare occasions, essential terms of an agreement are so indefinite that the court holds that no contract is formed. However, in many cases where the indefiniteness of the contract is an issue, the parties clearly intend a contract, and perform according to its terms, but leave some collateral term of agreement stated indefinitely for future resolution, particularly as to matters that address future contingencies that the parties cannot know exactly at the time they enter into the contract (because no one has a crystal ball).

This court finds that these are the circumstances here. The disputed "transported" "for use" limitation language of Paragraph 8 of the 1949 Agreement was not intended to limit any then extant use of water or any immediately foreseeable development of arable land owned by constituent water users at the time. The language was intended to express a general agreement of the parties that the parties to the agreement would not, in the future, transport Kings River water outside the sphere of Kings River interests generally. In 1949, the parties had a general concern that water not be transported to the

[6] Another way to look at the issue is that the ambiguity is unresolved by extrinsic evidence, or that the disputed language is not reasonably susceptible to the interpretation offered by either party, in which case the court must look to the remaining rules of construction. This alternative view is addressed later in this ruling.

benefit of those foreign to Kings River, but they could not then exactly predict what form the offense might take. The parties to the 1949 Agreement were not sure what exact form the forbidden foreign export of water would take, but they probably thought that "they would know it when they saw it."[7]

There was good reason for the parties' concerns, and there was also good reason to leave the matter stated indefinitely. The parties intended the revised Schedule set out in the 1949 Amendment to be a long term solution. Sometimes definite language has unintended consequences. By attempting to define the forbidden transport language more definitely, the parties could have then embroiled themselves in a collateral dispute that would have derailed the essential purpose of the agreement which was to reach terms on the Schedule to aid in bringing the parties together for their mutual general goal of providing for the Pine Flat Dam. The efforts of the parties might have been diverted from this essential purpose if they pursued negotiating over exact language so that it would not have the effect of curtailing one constituent landowner's uses over another. Further, any attempt to use exact language would have them attempting to predict the exact nature of future uses, so that no "loophole" language found its way into the contract thereby permitting uses that were not intended.

This does not mean that the parties to the 1949 Amendment did not intend a limit to the transport of Kings River water. They did. They would have been well aware that the transport of water on a vast scale was not only possible in the years to follow 1949, but was also likely. Their own efforts and the efforts of their predecessors had demonstrated that the waters of the Kings River could be bent to human will on a very large scale. They were also well familiar with the history of the Owens Valley water diversion by the City of Los Angeles. Also in the immediate timeframe of the 1949 Amendment was the proposal for the Central Valley Project and construction of the Friant-Kern Canal to take water from Friant Dam on the San Joaquin River all the way to southern Kern County, facilities which would cross the flow of the Kings River. The State Water Project and State Aqueduct were less well along in conception in 1949, but its prospect was on the horizon.[8] The parties to the 1949 Amendment had a common intent that Kings River water stay where it was for the benefit of Kings River water interests.

Decisional law recognizes that some enforceable provisions of a valid contract may be left indefinite for later determination, particularly when addressing future events in a long-term deal. In the case of *City of Los Angeles v. Superior Ct. of Los Angeles Cty.* (1959) 51 Cal. 2d 423, the California Supreme Court dealt with the agreement between the City of Los Angeles and the Brooklyn Dodgers for a stadium to be built in Chavez Ravine and to move the ball club to Los Angeles. In that agreement, the city agreed to convey to the ball club 185 acres, "more or less," of land then owned by it in Chavez Ravine and to use its best efforts to acquire at a reasonable cost and convey additional land to make a total of about 300 acres, reserving, among other things, an oil drilling site not to exceed five acres, the location of the site to be mutually agreed upon by the parties. Title to 40 acres of the 300, to be designated by the ball club, was to be retained by the city for 20 years to assure performance by the ball club of its obligations to provide and maintain certain recreational facilities during that period, after which title was to be conveyed to the club. Among other terms, the ball club agreed to construct on the Chavez Ravine property, at its expense, a modern baseball stadium seating at least 50,000 people. It would move to Los Angeles "the present Brooklyn National League franchise and ball team known as the 'Dodgers.'" Further, the club would convey to the city the land and improvements known as Wrigley Field (the one in Los Angeles),

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[7] Like Justice Stewart in *Jacobellis v. Ohio.*

[8] The court takes judicial notice of these matters of common historical knowledge. See, for instance, Madera Tribune, Vol. 17, No. 6, July 9, 1949 as to the opening of the Friant-Kern Canal, "Dust to Dust," by Martin Forstenzer, Los Angeles Times, April 10, 1992.

reserving the right to use of the field until the stadium was completed, conditioned upon payment of a rental to be mutually agreed upon. Recreational facilities costing not over $500,000 were to be constructed by the ball club on the 40-acre portion of the Chavez Ravine property, the facilities to be mutually agreed upon prior to conveyance of the property. The club was to maintain the recreational facilities on the 40-acre parcel at an annual cost. The city reserved all mineral rights in the Chavez Ravine property, and it acquired all mineral rights in Wrigley Field.

In addressing some of the indefinite terms of the agreement, the Supreme Court stated:

> The contract is claimed to be void because it contains promises to agree in the future. The general rule is that if an 'essential element' of a promise is reserved for the future agreement of both parties, the promise gives rise to no legal obligation until such future agreement is made. *Ablett v. Clauson*, 43 Cal.2d 280, 284–285, 272 P.2d 753. The enforceability of a contract containing a promise to agree depends upon the relative importance and the severability of the matter left to the future; it is a question of degree and may be settled by determining whether the indefinite promise is so essential to the bargain that inability to enforce that promise strictly according to its terms would make unfair the enforcement of the remainder of the agreement. See 1 Williston on Contracts (3rd ed. 1957) §§ 45, 48, pp. 152, 156–158. See also *Belcher v. Williams*, 151 Cal.App.2d 615, 620, 311 P.2d 861. Where the matters left for future agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced. *Wilson v. Wilson*, 96 Cal.App.2d 589, 593–595, 216 P.2d 104; see 1 Williston on Contracts (3rd ed. 1957) § 48, pp. 156–158.
>
> The contract leaves to the future agreement of the parties the location and size, within five acres, of the site to be used for oil drilling, the nature of the recreational facilities to be constructed and maintained for 20 years on the 40-acre parcel, and the rental to be paid to the city in the event the ball club exercises its right to use Wrigley Field prior to completion of the stadium. The reservation of an oil drilling site and the establishment and maintenance of the recreational facilities on the 40-acre parcel are, of course, important features of the contract, but, in our opinion, the uncertainty with respect to the exact location and size of the drilling site and the details with respect to the recreational facilities are matters which should not be treated as rendering the contract void. There is no indication that the city and the ball club are unable to come to an agreement as to them, and, if the parties cannot do so, the court may determine the matters within the test of reasonableness referred to above, in accordance with the general purposes of the contract. Similarly, the court could fix a reasonable rental for Wrigley Field, if this should ever become necessary.

(*City of Los Angeles v. Superior Ct. of Los Angeles Cty., supra* at 433.)[9]

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[9] "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.... The parties to an agreement may entirely fail to foresee the situation which later arises and gives rise to a dispute; they then have no expectations with respect to that situation, and a search for their meaning with respect to it is fruitless. Or they may have expectations but fail to manifest them, either because the expectation rests on an assumption which is unconscious or only partly conscious, or because the situation seems to be unimportant or unlikely, or <u>because discussion</u> of it might be unpleasant or <u>might produce delay or impasse</u>. (Emphasis added.)" Restatement (Second) of Contracts § 204 (1981).

Extrinsic evidence also supports the conclusion that the parties to the 1949 Amendment had no definite boundary but only a general prohibition in mind for the limitations of water use.

Reference to the 1945 map (Ex. 24) reveals that many tributaries depicted that are likely part of the watershed of the Kings River in its natural state are outside the boundaries of the Irrigation Units. It also appears that certain areas shown which depict developed diversions are also outside the boundaries of the Irrigation Units but undoubtedly part of the area served by Kings River water, such as the "area served by Liberty Canal, Liberty Willrade Canal, and Reed Canal," as well as certain depicted canal extensions of the Crescent Canal Company. Also, the boundaries of the Irrigation Districts may include areas that were not part of the natural watercourse of Kings River, such as the North Fork interests and the waters that ultimately flow to the Fresno Slough. Decision 1290 notes that not all of the area serviced by Kings River is within the boundaries of the KRWA Irrigation units. (Ex. 25.)

The indefinite nature of the language in question is also revealed by the controversy that arose in 1996-2000 over water use limitations under the terms of the Blue Book agreements.

KRWA Executive Committee minutes of July 16, 1996, document that the Committee discussed a proposed transfer of 10,000 acre feet of water from Fresno Irrigation District to People's Ditch Company, and that, in that process, Laguna Irrigation District complained that KRWA members were diverting water out of the Kings River Service Area. These minutes reflect that follow up investigation by the Water Master may "generate new procedures" to be discussed. (Ex. 63.)

KRWA Executive Committee minutes of September 17, 1996 reported a meeting of the "Transfer Committee" held on August 20, 1996 which discussed a draft of a policy to address water importation into the Kings River Service Area in exchange for water which might be used outside that area. (Ex. 64.)

Minutes of the Board of Directors of the Tulare Lake Basin Water Storage District of October 1, 1996 report that Laguna Irrigation District was raising the issue of water being used outside of the Kings River Service Area. The concern was raised about the "potential implications" on deliveries of entitlement water in the future. (Ex. 136.)

On October 2, 1996, Engineer R. L. Schafer wrote a letter addressed to KRWA, in which he expressed certain general propositions affecting the water use limitations imposed by the Blue Book agreements. He purported to write not on behalf of any unit, but as a water master of the Tule River. (Ex. 120.) The principle issue of concern addressed in this letter focused on the ultimate use of water transferred from storage under Paragraphs 18 and 19 of the 1963 Amendment.

An October 9, 1996 legal memorandum from "Chris" to "Dan" (likely attorney Dan Dooley) discusses many of the questions now being addressed by the court regarding the uncertainty over water use restrictions under the 1949 and 1963 Amendments. (Ex. 121.)

In October 1996, attorney Dooley wrote a letter on behalf of Crescent Ditch Company to Douglas Woodman as Water Master of KRWA, in which he assured that water to be received from a proposed transfer from Fresno irrigation District to Crescent and Stinson Ditch Companies would be used in the Kings River Service Area as defined in the Exhibit A map to the 1963 Amendment. (Exs. 122 and 123.) In providing this assurance, however, Dooley stated:

> In providing you and the Association this assurance, Crescent does not waive any rights or privileges it has acquired through its historic operation as a member unit of the Kings River Water Association. Crescent continues to maintain and assert the lands owned by its shareholders which historically have received water of the Kings River from the Crescent Ditch Company are within its historic Service Area and were intended to be included in the Service Area as described in the 1963 Agreement. To the extent that such lands of shareholders of the Crescent Ditch Company were not included on the exhibit to the 1963 Agreement, it represents a mistake which has been corrected by the historic operation of the Kings River Water Association and the Ditch Company.
>
> The assurance that the waters received from FID pursuant to the noted transfer, will be used within the Kings River Service Area as defined in the exhibit to the 1963 Agreement is made with the understanding that the Association will address and attempt to resolve the many questions arising out of the historic operation of the Association and its member units with respect to the defined Service Area. It is Crescent's understanding that Crescent and Stinson are not the only member units who may have historically conducted their internal operation in a manner which caused waters of the Kings River to be delivered to lands which are outside the area delineated on the exhibit to the 1963 Agreement. It is imperative that the Association devote time as soon as possible to address and resolve this matter.

In an October 18, 1996 memorandum to the KRWA Transfer Committee, attorney Gary Sawyer wrote that member units may be delivering water outside of the designated Kings River Service Area. He wrote that the magnitude of such use was unknown, and that an investigation was needed. However, he noted that it would be difficult to investigate because many member units would be reluctant to provide information if it would result in adverse consequences for their water users. He discussed the difficulties of an "amnesty" agreement or confidentiality agreement. He suggested that the Transfer Committee meet to establish a protocol for the Water Master investigation so that the Transfer Committee could formulate a proposed policy "as soon as possible." (Ex. 124.)

On November 1, 1996, attorney Sawyer wrote a letter (Ex. 125) to counsel for the member units in which he posed the issues as to whether the Blue Book Agreements prohibit transfers of water outside the Kings River Service area, and, if so, were there circumstances for a water user to receive water for use in an "excluded" area.

Minutes of the Board of Directors of the Tulare Lake Basin Water Storage District of November 5, 1996 report (from Attorney Nordstrum) that tensions among member units were escalating over whether entitlement water could be used outside of the Kings River Service Area, which had been occurring for decades. It was reported that a compromise was being discussed to "grandfather in" historically irrigated lands and then draw a new map which would clearly bar any use outside its boundaries. (Ex. 137.)

On November 12, 1996, engineer Schafer wrote a letter to the KRWA asserting that there was no use limitation on any use of water under pre-1914 water rights. He suggested that "further time, effort, and discussion of place of use" of pre-1914 water rights would lead to costly litigation and "external review." (Ex. 126.)

KRWA Executive Committee minutes of July 16, 1996, document that Attorney Sawyer reported that extensive research and analysis had commenced concerning the legal issues and contractual provisions affecting the potential use of Kings River water outside the Service Area delineated in the 1963 Amendment. Numerous legal theories were being evaluated and a detailed historical analysis was under way. The member unit attorneys all agreed that the issues were complex and that a number of different interpretations were possible. It was highly desirable to avoid litigation. (Ex. 138.)

On December 26, engineer Schafer wrote another letter in which he expressed that the language of limitation in the 1949 Amendment intended a broad definition of "watershed" and "service area." He also reiterated his position that there was no restriction in the Blue Book agreements for use of any pre-1914 water, noting that "no one has the right to take water for any purpose out of a watershed over an underground basin, if such taking will deprive of water any lands within the basin. The right to take water out of a watershed is always qualified by the limitation that no injury be thereby inflicted upon other water rights holders...." (Ex. 127.)

Minutes of the KRWA Transfer Committee meeting held February 12, 1997 (Ex. 139) reflect that a list of proposed procedures was reviewed for modifying the defined Kings River Service area, as follows

Presented at Transfer Committee Meeting, February 24, 1997

A. There should be a finite Kings River Service Area outside of which no Kings River water may be delivered and used unless it is i) Flood water delivered in accordance with the Flood Water Agreement or ii) Replacement water created in accordance with the KRWA Foreign Water Exchange Policy.

B. The revised Kings River Service Area should encompass all lands which are eligible to receive Kings River water in accordance with criteria to be established by the KRWA.

C. Each member of KRWA would be requested to submit the total eligible acres which it proposes to add to the Kings River Service Area (subject to proof).

D. The Kings River Intra-Association Agreement would be amended to incorporate provisions which limit the use of Kings River water to a Revised Kings River Service Area.

E. Upon execution of such revisions to the Intra-Association Agreement, each member requesting expansion of the Kings River Service Area would provide evidence that each parcel (or block of land) proposed to be added to the Service Area is eligible in accordance with the criteria established for that purpose.

F. Upon receipt of all evidence, the Watermaster would cause to be drawn a Revised Kings River Service Area Map which when finally approved, would become the Revised Exhibit A to the Intra-Association Agreement.

G. Any unit may challenge the evidence submitted to a three member Appeal Board appointed by the Board of Directors. The Appeal Board may examine all evidence, take written or oral testimony and make such investigation as may be reasonable and necessary to arrive at a final ruling on the eligibility of the parcel or parcels in question. The decision of the Appeal Board shall be final and the Service Area Map shall be further revised as necessary to reflect the decision of the Appeal Board.

On April 16, 1997, Water Master Doug Woodman wrote a memorandum regarding the Water Master survey of "diversions" outside of the Kings River Service Area. The total number of acres reported was 57,460 acres. The court notes that this is an area constituting approximately 90 square miles. He also included in the memorandum some criteria proposed to incorporate lands where water was being received outside of the Kern River Service Area into the area by amendment to the agreements. (Ex. 128.)

An April 23, 1997 fax from Mike Nordstrum to John Howe states the apparent position of Reclamation District 761 that it was not restricted in the area in which it could deliver scheduled entitlement water for use, and that it would not be party to any agreement that imposed such a restriction. (Ex. 129.)

Minutes of the KRWA Transfer Committee meeting held February 12, 1997 (Ex. 141) reflect as follows:

In the lengthy discussion that followed, several diverse opinions were expressed, the range of which included the following:

> The Kings River Service Area boundary is delineated on a map attached as an exhibit to the 1963 Intra-Association Agreement and defines the place of use by all Kings River water except flood water.
>
> Pre 1914 Kings River water rights (which are the vast majority of Kings River water rights) presently are and always have been exempt from Service Area restrictions and can be taken anywhere.
>
> Transferred water is the only Kings River water that is required to stay within the Service Area. Entitlement water (scheduled) is not restricted as to place of use.

Litigation and/or arbitration were acknowledged as possible means to settle the Service Area issue if an acceptable internal KRWA solution cannot be achieved. However, concern was expressed that the nature of such litigation may not be controllable and that the outcome may not be what is expected or desired.

Minutes of the KRWA Transfer Committee meeting held September 18, 1997 (Ex. 142) reflect as follows:

> Stan Barnes commented that he believed the intent of the drafters of the 1963 Intra-Association Agreement was to prevent major exportation programs such as Owens Valley to Los Angeles, but not to limit service to the precise boundaries of the small scale map included with the 1963 Intra-Association Agreement. He noted that literally dozens of Kings River water exchanges over the years have been highly beneficial and have resulted in more water being used within the KRSA than would have otherwise occurred.

Minutes of the KRWA Transfer Committee meeting held January 15, 1998 (Ex. 142) reflect as follows:

> Mr Leake presented a summary of the issues involved in redefining the Kings River Service Area to include lands that historically have been served with Kings River water He stated that opinions among KRWA representatives regarding the inclusion of additional lands range from confining the diversion of all Kings River water to the area identified as the Kings River Service Area in Exhibit A of the 1963 Intra-Association Agreement to delivering Kings River water anywhere without restriction It was agreed that the position papers relative to the Service Area and replacement water policy be revised in accordance with the changes suggested and that the revised versions be forwarded to the subcommittee for direction in their deliberations

Evidence was also received of a fax dated March 18, 2000, apparently from attorney Sawyer, which was part of witness Nordstrum's file, which outlined the issues over water deliveries outside of the Kings River Service Area, including where the "line" should be drawn and how not to interfere with perceived rights but not significantly increase the delivery area. The issue was also outlined as to who would monitor any revised area for water use. (Ex. 132.)

Minutes of the KRWA Transfer Committee meeting held April 18, 2000 (Ex. 66) reflect that Laguna Irrigation District requested that all matters with respect to the water use question be placed on hold due to that district's dedication of resources related to a power agreement. The issue was deferred, and there is no evidence that it was ever addressed again until this litigation.

Thus, the parties had begun a process of attempting to agree upon the exact meaning of the 1949 Amendment water use limitations. This court finds that this is the exact process intended by the parties executing the 1949 Amendment with indefinite terms for future determination. Unfortunately, to date the parties have never come to an agreement.

As noted by the Supreme Court in *City of Los Angeles*, when the parties are unable to agree as to indefinite contract terms, the court will fix the terms under a "test of reasonableness." This is not a matter that the court can undertake under the current stipulation of the parties and based upon the current state of the evidence. All the court is able to state at this time is that the language in question is indefinite and subject to further adjudication.

Fortunately, the court is aided in future adjudication of the matter by the law. The "test of reasonableness" that would apply to contract interpretation relates to the rule that applies in consideration of water rights as addressed earlier in this ruling. The test of reasonableness would be similar in determining the limits of the contract as might generally apply in determining the right to use water between the parties under water law. As stated previously, the rule of reasonableness was added to the California Constitution by amendment in 1928 which declares: "The right to water or to the use or flow of water in or from any natural stream or water course in this State is ... limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." (Cal. Const., art. X, § 2.) What constitutes reasonable use is case-specific, and depends on many questions, which would need to be answered by the evidence. As previously noted: "California courts have never defined ... what constitutes an unreasonable use of water, perhaps because the reasonableness of any particular use depends largely on the circumstances." (*Light, supra*, 226 Cal. App. 4th at p. 1479, 173 Cal.Rptr.3d 200.) Conformity with local custom is one factor to consider in determining whether a use of water is reasonable, but custom is not dispositive. (Water Code, § 100.5.) The inquiry is fact-specific, and the answer may change over time. "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need." (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567.)

There are many questions that would need to be answered before the court could itself determine the limits of water use under the disputed contract language, some of which might have to be determined by a jury if requested. Some that come to mind for the court immediately are: (1) what is the exact nature of the alleged offending use or potential offending use? (2) What are the parties actually doing with the water, or what are they proposing to do? (3) Does the use or potential use harm any other signatory member unit of the KRWA? (4) What would be the disposition of water if the offending use were prohibited? (5) Are ultimate water users of the member units of the KRWA who are not signatories bound by the terms of the Blue Book Agreements, particularly with respect to pre-1914 water? (6) Are any other water users of the areas served by the Kings River harmed by the alleged offending use or alleged potential offending use? (7) How is all of the water being used by all member units and their constituent water users?

The court is not turning this case into a litigation of water rights (having already disclaimed that this litigation encompasses such issues as presently presented before the court). The court simply notes that the law as to the "test of reasonableness" that the court would need to apply to determine the matters before the court coincides with concepts of "reasonable use" under water law.

One issue of concern to the court that may or may not need to be addressed in future proceedings is the issue of groundwater. Both sides assert to the court that the issues in this litigation only involve surface water diversion, not groundwater. If the parties are not in dispute on this point, so be it.

Nevertheless, the court notes that if there is further adjudication of the contract provision that water is to be used only as reasonably within the "service area," or "watershed" of Kings River as defined by the court, groundwater questions may be unavoidable. The court notes that the USGS definition of "watershed" proffered by the Cross-complaints and Defendants states:

> The word watershed Is sometimes used Interchangeably with drainage basin or catchment. Ridges and hills that separate two watersheds are called the drainage divide The watershed consists of surface water-- lakes streams, reservoirs and wetlands-- and all the underlying groundwater. Larger watersheds contain many smaller watersheds.

(Ex. 145 (emphasis added).)

Groundwater availability was a matter likely well understood by the 1949 signatories. At that time, it was well known that the surface waters were insufficient to provide all of the water needs of farmers in the area, and that many had to rely on wells and would continue to need wells after the construction of Pine Flat Dam. The area was deemed "water deficient." (See Ex. 110 at p. 110-004.) Also, Decision 1290 recites:

> As the Kings River flows out on the floor of the San Joaquin Valley the river channel changes from gravel and sand to sand and finer detrital material. This sandy material is permeable and serves as a medium for transmission of river water to the groundwater basin underlying the delta of the Kings River.
>
> Approximately 30 miles from the Sierra foothills in a southwesterly direction the permeable soils of the Kings River delta are separated horizontally by an impervious stratum called the Corcoran clay. Water from the free groundwater table upstream or east of this clay formation can, and does seep underneath the clay and becomes confined, a situation which in the past has given rise to a supply of artesian water to the west. Percolating waters also are trapped and form an unconfined water table above the clay.
>
> The primary source of all ground water in the Kings River service area is the river and its distributaries including percolation from applied irrigation water direct rainfall and some imported water.

(Ex. 25, p. 15-16.)

The court also takes judicial notice that the Kings River area and all of the San Joaquin Valley are in a state of severe groundwater overdraft. The condition of groundwater in the state has led to statutory mandates for groundwater sustainability (the California Groundwater Sustainability Act). Any adjudication involving groundwater issues involves resort to the hydrology of underground aquifers and subaquifers—a vast undertaking.

The court will not here dwell further on groundwater questions, but notes only that it projects that this may become an area of concern in this litigation over contract interpretation and enforcement. As stated, the court accepts, if the parties agree, that groundwater is not at issue at all in this litigation.

10. Other Rules of Contract Interpretation

The decision of the court that defining the boundaries of the water use limitations of the 1949 Amendment requires resort to a "test of reasonableness" for further adjudication is consistent with the rules of contract interpretation, even if the court determined that the language is ambiguous.

In cases such as this one, where the court cannot determine the meaning of contract language after resort to all available extrinsic evidence—in other words, when the uncertainty remains, the court may resort to other rules of interpretation.

For instance, "[i]n cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." (Civ. Code, § 1654; See 1 Witkin, Summary of Cal. Law (11th ed. 2020) Contracts § 780.) Of course this rule is entirely inappropriate here, where the drafters were mutual, and where mutual promises were made.

However, another rule of construction states that, "'[a]s a general rule, all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.' (Alpha Beta Food Markets v. Retail Clerks, 45 Cal.2d 764, 771, 291 P.2d 433, 437.)" (*Swenson v. File* (1970) 3 Cal. 3d 389, 393.) Here, the parties are deemed to be aware of the general rule of water law regarding "reasonable and beneficial use" when they entered into the use limitations of Paragraph 8.

11. Conclusion

The court finds that the 1963 Amendment is unambiguous as herein stated.

The court also finds that the 1949 Amendment provides that the parties agreed that "none of the waters ... of the Kings River, now or hereafter owned or possessed by any of the parties hereto shall be ... transported outside" (that is for use only within) the "watershed" of Kings River (meaning the area bounded peripherally by a divide, and draining ultimately to Kings River in its natural state), or "service area" of the Kings River (meaning areas of land serviced by Kings River water in the river's developed state), as the court may determine within a test of reasonableness.

KINGS RIVER WATER ASSOCIATION ET AL VS TULARE LAKE RECLAMATION DISTRICT NO. 761 ET AL
BCV-19-100523

CERTIFICATE OF MAILING

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, and not a party to the within action, that I served the ***Minutes dated June 09, 2021*** attached hereto on all interested parties and any respective counsel of record in the within action by depositing true copies thereof, enclosed in a sealed envelope(s) with postage fully prepaid and placed for collection and mailing on this date, following standard Court practices, in the United States mail at Bakersfield California addressed as indicated on the attached mailing list.

Date of Mailing: June 09, 2021

Place of Mailing: Bakersfield, CA

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Tamarah Harber-Pickens
CLERK OF THE SUPERIOR COURT

Date: June 09, 2021

By: *Veronica Lancaster*
Veronica Lancaster, Deputy Clerk

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