

SOUTH DELTA WATER AGENCY

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August 7, 2014

Via email: bevoy@waterboards.ca.gov
Ms. Barbara Evoy, Deputy Director
Division of Water Rights
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: DWR and USBR Letter of July 23, 2014

Dear Ms. Evoy:

The South Delta Water Agency submits the following comments regarding the July 23, 2014 letter from the California Department of Water Resources and the Bureau of Reclamation to you, the Deputy Director, Division of Water Rights, State Water Resources Control Board.

The DWR/USBR letter is difficult to interpret given the pervasive inconsistencies contained therein. Rather than filing a complaint based upon alleged illegal diversions by in-Delta diverters, DWR and USBR ask the SWRCB Board to seek information irrelevant to their disjointed claim of such illegal diversion. Why would the projects want to know the facts supporting in-Delta riparian and pre-1914 claims if parties with such rights cannot legally divert the water anyway? Why would DWR and USBR seek additional information about the amount of in-Delta diversions if no diversions whatsoever are legal?

Clearly, the projects have decided that rather than file a complaint with the SWRCB about the alleged illegal diversions in the Delta and rather than seek relief for such alleged illegal acts through the courts, they would rather the SWRCB send out hundreds of Orders seeking information already well known. Since there is no logic or benefit to the DWR/USBR request, one must assume their intent is simply to harass Delta diverters and hope that many of them fail to meet the 5-day deadline for responding to orders under the emergency regulations. SDWA hopes the SWRCB does not decide to assist the projects in such harassment.

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The request for information regarding water rights seems to ignore the past 10 years. At the behest of the (then) San Joaquin River Association and the export contractors, the SWRCB spent the past few years investigating **ALL** of the claimed water rights in the southern Delta. That investigation resulted in four Cease and Desist hearings; one of which resulted in a finding of a pre-1914 right for the lands within a 6000 acre irrigation company service area, one which found the diverter had preserved his ability to get water from the riparian channels at the time of severance, and two for which the SWRCB has not rendered a decision. Certain upstream tributary agencies and exporters have pursued the two SWRCB decisions in court and initiated another action against a fifth diverter.

The SWRCB Division of Water Rights staff have spent thousands of hours investigating virtually all other southern Delta diverters over the past few years, including the efforts of the Delta Watermaster; a position created for the sole purpose of investigating **ONLY** southern Delta diverters. Contrary to the inflammatory and libelous claims of the tributary agencies and the export contractors (still repeatedly voiced at various SWRCB meetings) the Watermaster has produced summary reports which were presented to the Board. In short, the Watermaster concluded that it in fact appears that most all of the claimed rights were supported by the evidence requested and presented. Now that the Board has spent (likely) millions of dollars on this fools' errand, DWR and the Bureau suddenly arrive and ask for the exact same thing. This time however, rather than local diverters having months or even years they will have 5 business days to prove up their water rights. No sane person could suggest this.

It is important to note that the issue of claimed riparian and pre-1914 water rights can only be decided via an adjudicatory process. There is no process if a regulator suddenly demands that "proof" be provided in five days.

DWR and USBR also ask for information about the amounts of water diverted by in-Delta users. Again, it is as if the projects have been on vacation for the past few years. All diverters have been required to file Reports (licenses) and Statements (riparian/pre-1914) since 2009; statements over which contractor attorneys have been poring late at night. The southern and central Delta, we believe have the highest compliance percentage of any region in the State. In-Delta diversions as we have repeated often, do not give a meaningful number of water loss/consumption in the Delta. Seepage and the resulting drainage can exceed the amounts of water diverted, and crop use is not limited to the amount diverted. In light of this, most local diverters have been using calculations based on UC Davis evapo-transpiration numbers and estimating additional diversions above and beyond calculated evapo-transpiration. Seeking to order hundreds of diverters to do now (in 5 days) what they must do anyway by next July 1 Ms. Barbara Evoy

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would seem a bit onerous. This is especially true in light of the fact that DWR and USBR make daily calculations about in-Delta losses as part of their operations. Requesting this information be provided now would provide no new, or further insight into the exact amounts “used” in the Delta. Again, it appears that harassment is the only reasonable explanation for this request.

During these past few years, SDWA and CDWA have proposed and are continuing to work on a proposal to get even better information on such consumptive use. Working with the Watermater, we have suggested the use of new satellite technology which could better estimate crop use, perhaps even on a near real time basis. Those efforts continue, but are not yet available. For purposes of operating the system, the current modeling of in-Delta consumptive use is probably the best. If the projects want to hone the numbers they themselves produce, perhaps they should analyze the numerous monitoring systems of Delta outflow and make sure their export pumping numbers (reported) are accurate.

The Board and staff should also take note that DWR/USBR have operated their projects from the beginning to account/provide for any in-Delta “loss.” Each time the Delta is in “balance” stored water is being released to meet water quality standards because calculated “natural” or “unimpaired” flow is insufficient. At any time this happens, stored water is being mixed with natural flow, intruded ocean water and the water already in the Delta pool. Thus the not-quite-complained of in-Delta diversions going on now, are only by degree different from the hundreds of months in the past 40 years when the Delta was in balance. Oddly, the projects never complained before (and actually do not complain now) about in-Delta users affecting storage releases, perhaps because they must accept the fact they must do this.

As I previously wrote to Mr. Tom Howard, there is no doubt that D-1641 requires the projects to meet water quality standards regardless of in-Delta use. The entire D-1641 hearing was based on modeling that included years of drought and dry times where the amounts needed to meet the standards were a function of (among other things) in-Delta consumptive use. Neither DWR or USBR challenged D-1641 in court. Thus, any complaint now that the burdens of meeting the standards, including in-Delta consumptive use amounts is too little too late. CDWA has and will again present additional information which shows that the project obligations are not conditional and include this in-Delta amount. Lastly as to this issue, I again note that the notion that meeting water quality objectives to protect in-Delta agriculture cannot be conditioned on any supply calculation. If the projects need only meet the standards when such does not require stored water, then there are no standards. The obligations exist regardless of anyone’s belief regarding the amount of water that might be flowing in a stream.

As I previously wrote to Mr. Howard, the DWR/USBR reference to D-1641 is Ms. Barbara Evoy

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disingenuous. That section of the Decision was an analysis of whether or not changes in San Joaquin River flow would injure other legal users. The conclusion was that since the San Joaquin River didn't provide enough water to meet local needs, the changes resulting from VAMP could not adversely affect other legal users. Interestingly, this section was not based upon any information submitted or cross-examined during the hearing, but was the result of SWRCB staff requesting information from SDWA regarding estimated consumptive use. It is clear from a reading of pages 31-33 of D-1641 that the Decision makes no references to the Sacramento River and does not make any conclusions about whether or not southern Delta diverters are riparian to that or other Delta tributaries. More importantly, DWR and USBR fail to reference the language on page 35 where the SWRCB states: "[C]onsequently, the southern Delta agricultural uses should not be deprived of water of useable quality as a result of this decision." D-1641 specifically requires standards to be met while acknowledging that the San Joaquin River is sometime insufficient to provide all southern Delta needs.

The reference to WR 89-8 is also misplaced. Although that Order does make certain statements about the issue of who is riparian to the Sacramento River, on page 23 it clearly shows that such statements are conditional and anticipates that southern Delta diverters (or others) can seek a hearing, present evidence and show how Sacramento water do indeed reach their channels under natural conditions. SDWA has previously presented such evidence and asserts that any belief that Sacramento River water does not reach the southern Delta is unsupportable. One need only examine dry year records when San Joaquin River flows were less than channel depletions and see if the southern Delta channels were dry. They were not of course because the Delta is mixed twice daily by the tides and so the greater Sacramento River flow becomes part of the tide which moves into the southern Delta. SDWA welcomes having a hearing on this simple, technical issue.

The DWR/USBR letter makes another odd claim when it asserts without any citation that no riparian right can be associated with or supplied by ocean water. I'm sure this position would be surprising to the City of Antioch which enjoys various water rights in an area of the Bay-Delta that the projects have salted up by allowing ocean water to regularly intrude. Whether or not someone on the coast has a riparian right to divert from the ocean is irrelevant. The issue before us is whether or not an in-Delta riparian's right somehow diminishes or extinguished when inflow decreases. The projects' absurd view seems to suggest that Delta channels go dry why river flows get small. As is know by every DWR and USBR hydrologist, modeler and Delta division employee, when river flows decrease tidal action maintains the water levels in the Delta and thus maintains a supply of water. At the western most end of this Delta pool, the water may be near ocean quality, while at the eastern, northern and southern "ends" the water remains

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good quality. The oceans water mixes with, and dilutes in the Delta pool water and the supply is

always there even though it may slowly degrade. As we have stated before, if anyone has any legal citation that supports the notion that a slowly decreasing quality of water in a riparian supply adversely affects that riparian right, they should present it rather than making uninformed assertions. Like it or not, the Delta supply is always there whether or not the projects are releasing limited amounts of stored water; water which they were unable to siphon out of the system when the regulators were not looking.

This of course leads to the DWR/USBR letter's noticeable silence when it comes to the *Butte Canal* case and Water Code Section 7075. This case and statute appear to completely resolve the issue of continued in-Delta diversions during the time stored project water is in the system. The law clearly holds that the projects *can* use the Delta to transport their stored water and remove it as long as they do not diminish the ability of others who could have diverted in the absence of the stored water. Unless someone can show that diverters in the southern Delta can't divert at any time, the matter is at an end. As we presented for consideration on the proposed emergency regulations, southern Delta diverters not only can but did divert even in the worst drought on record.

The projects citations to *EL Dorado*, *Phelps*, and other cases are similarly off point and the referenced portions applying to different issues. I believe other local interests comments will adequately address and distinguish those cases.

As SDWA, CDWA and other local interests have suggested, the Board should conduct a hearing on any relevant issues, allow cross-examination and make findings. Such a process will finally resolve these, non-scientific, false assertions by the projects and the contractors and insure that efforts to harass in-Delta users are precluded. I encourage you decline to act upon the DWR/USBR letter, and instead notice a hearing on any of these issues about which you are unsure. For years we have heard the muffled cries that we have no water rights and we have no water. Perhaps we can resolve this without using emergency powers which severely limit a property right owner's ability to protect him/herself.

Please feel free to contact me if you have any questions.

Very truly yours,

JOHN HERRICK