

VIA EMAIL

August 6, 2014

Ms. Barbara L. Evoy
Deputy Director
State Water Resources Control Board
Post Office Box 2000
Sacramento, CA 95814

Re: July 23, 2014 Letter from DWR and USBR

Dear Barbara:

This letter is submitted on behalf of Banta-Carbona Irrigation District, The West Side Irrigation District, Patterson Irrigation District and West Stanislaus Irrigation District in response to the July 23, 2014 letter to you from the California Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR).

DWR and USBR request that the State Water Resources Control Board Division of Water Rights (Board) order south and central Delta diverters claiming riparian and pre-1914 water right to provide the Board with information pursuant to Title 23 CCR section 879(c). The Board certainly has the authority to do so, and the districts have no objection.

The letter continues, however, to provide a purported legal background and other information that the districts assert is misleading at best. We wish to use this opportunity to clarify and correct the unsupported assertions made in the letter.

Diversions by riparian and pre-1914 water rights holders in the south and central Delta contribute to additional loss of stored water due to depletion and further complicate water management in this extremely dry year. Where water quality standards are controlling Water Project operations, any diversion of stored water by these diverters results in additional releases of stored water or reduction in Project deliveries, and requires a trade-off in the protection of beneficial uses.

This is simply not true. Water always remains in the delta channels and is available for diversion. As simply stated: "Since the bottom of the Delta channels is below sea level and the Delta is open to the Pacific Ocean, there is never a shortage of water in the Delta". *The Sacramento-San Joaquin Delta A Summary of Facts* 1976 Association of State Water Project

Agencies at p. 5-4. The State Board has recognized the unique circumstance of the Delta channels:

These delta channels form a network of waterways through which the water flows sometimes one way and sometimes another, depending upon the respective stages of the various main tributaries – Sacramento, San Joaquin and Mokelumne Rivers – and the influence of tides. It is difficult if not impossible to estimate the influence of a diversion at any one point in these delta channels upon the available water supply at other points the influence of a diversion from one of the tributary streams upon the available water supply at any particular point in the delta. The fact is that the delta channels form a vast reservoir through which the drainage from Sacramento and San Joaquin Rivers pours to form a barrier in the upper end of San Francisco Bay, Suisun Bay and the lower delta against the salt water which would otherwise enter through Golden Gate and San Francisco Bay. D100 at p. 11

Therefore, the diversion of water by in-delta diverters is not dependent upon stored water releases from the projects. Water is available both from stored water releases and from natural tidal flow that flows from the ocean and bay into the Delta twice a day, regardless of hydrology. In the Delta, a typical summer tidal cycle can bring 330,000 cubic feet per second flowing into the Delta from the ocean and bay daily¹. The average tidal flow at Chipps Island is 170,000 cfs, while the average summer outflow into the Delta from upstream tributaries is a mere 6,000 cfs, less than 4% of the water provided from the Pacific Ocean and San Francisco Bay into the Delta.

The unique circumstances surrounding the Delta were recognized by the Department of Water Resources in a 1969 report entitled *The Delta and The State Water Project* in which DWR noted:

in the Delta, the question of quantity is of little concern, since the Delta is never short of water. If flow from the tributary streams were insufficient to meet Delta use water from the Pacific Ocean would flow through the San Francisco Bay system and fill the Delta channels. At pp. 35-36.

The southern Delta diversion requirement identified for August in D-1641 (page 32) is 1,334 cfs. Without project releases of stored water that 1,334 cfs would be met with water in the Delta channels. In-Delta diverters do not divert more water because the projects are releasing stored water into the delta. Project stored water releases do not increase that demand, they simply move through the Delta channels as authorized by the California Water Code.

...the State Water Board has found that southern Delta riparian right holders have no right, in any year, to natural flow from the Sacramento River. D-1641, pg. 31-33,

¹ *Sacramento San Joaquin Delta Atlas* 1993 Department of Water Resources, p. 21.

SWRCB Order WR 89-9, pg. 22-23. These rights of south Delta riparian water users only extend to their correlative share of natural flow in the San Joaquin River. Id. Therefore the southern Delta riparian and appropriative rights holders have no right to natural or abandoned flows from the Sacramento River.

These are very misleading and inaccurate statements. In fact, the Board has not made such an evidentiary finding that southern Delta riparian right holders have no right, in any year, to natural flow from the Sacramento River. In Order WR 89-8 while the Board opines that riparian rights in the southern Delta would not extend to the Sacramento River, it then states that in order to:

. . . decide whether Protestants' members had a senior claim to water from the Sacramento River, the Board would be willing to consider evidence offered to prove that some of Protestants' members have rights to water from the Sacramento River. Relevant evidence would include, among other items, evidence that specific members have land adjacent to the Sacramento or its tributaries or that Sacramento River water flows south of the San Joaquin River under natural conditions.

Such an evidentiary hearing has never been held.

The reference to D 1641 as reaching such a conclusion is disingenuous as best. While the Board did make such an unsupported finding in original D 1641, it was expressly removed by ORDER WR 2000-02 wherein the Board stated:

These parties also challenge a statement on page 33 of D-1641 that Order WR 89-8 finds that southern Delta riparian right holders have no claim to the waters of the Sacramento River. Since this statement appears in a part of D-1641 that addresses change petitions filed by appropriators on the San Joaquin River, it is unnecessary to the determination therein that the change petitions are approved. Therefore, the last sentence in the third paragraph on page 33, which reads, "SWRCB Order WR 89-8 concludes that southern Delta riparian right holders have no right to water from the Sacramento River." is deleted.

Some south and central Delta water users appeared to also be seeking to expand California Water Law by asserting rights to water from the "Delta Pool." The "Delta Pool" concept is that by virtue of the geography in the Delta water from many sources, including the Sacramento River, San Joaquin River, and the Pacific Ocean mix and become a new source of appropriable water. The State Water Board explicitly rejected the idea that water users in the south and central Delta have right to divert under a "delta pool" concept. (See Order WR 2001-0005, pg. 37; Order 2004-0004, pg. 15.)

Again, the statements mislead and misunderstand the assertions being made by Delta interests. In Order WR 2004-004 the Board does not address the Delta Pool concept at all; rather, on the referenced page 15 the Board addressed an implied physical solution. In Order WR 2001-0005 the Board concluded that all of the waters in the Delta do not form a single lake for purposes of attachment of riparian rights. That conclusion does not address the question facing the Board in this instance.

Here the districts ask the State Board to consider the tremendous volumes of natural tidal inflow into the Delta whenever the State Board evaluates whether there is a sufficient amount of flow for a diverter located within the influence of that tidal inflow to support its diversion needs (whether it is based upon a riparian, pre-1914 or post-1914 water right). Unlike upstream diverters, diverters within the tidal zone of the Delta are uniquely situated in that, unlike upstream diverters who are dependent solely upon the natural tributary flow, Delta diverters have the natural advantage of having access to the additional sources of natural flow that provide quantities of water in excess of the demand within the Delta channels.

During the recent State Water Board proceedings, south Delta diverters claimed a right to divert ocean water. See Order WR- 2011-0005, pg. 37; June 30, 2014, letter submitted by South Delta Water Agency to the State Water Board. However, in California, a riparian or appropriative right cannot be established or defined by availability and diversion of ocean water.

DWR and USBR do not provide any support for their claim that riparian rights cannot be obtained in ocean water. In fact, courts in California and throughout the United States have consistently decided to the contrary. However, this is not the primary issue regarding legal use of Delta channels. Rather, the issue of critical importance is the commingling of upstream stored water with the natural tidal flow within the Delta. This commingling, while lawful, cannot deprive senior water diverters within the delta of their ability to lawfully access that tidal flow pursuant to their rights:

There may be some difficulty in [water commingling] cases like the present, in determining with exactness the quantity of water which parties are entitled to divert. . . . The Courts do not, however, refuse the consideration of such subjects, because of the complicated and embarrassing character of the question to which they give rise. If exact justice cannot be obtained, an approximation to it must be sought, care being taken that no injury is done to the innocent party. The burden of proof rests with the party causing the mixture. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled. *Butte Canal & Ditch Co. v. Vaughn* (1858) 11 Cal.143, 152-53.

While the projects may use the Delta channels to convey stored project water, that action cannot adversely impact the senior Delta water right holders. Water Code section 7075. Clearly with over 300,000 cfs of tidal flow replenishing the Delta daily, the several thousand cfs of stored project releases moving through the Delta daily pale in comparison, and are not necessary to allow senior Delta water right holders to divert. The project operators have not provided any evidence that any Delta senior water right holders are (1) diverting stored water, or (2) that there is insufficient natural flow from Delta tidal sources to supply all in-Delta demand.

Delta water right holders can also not be prohibited from diverting water from the Delta because stored water releases are improving water quality. We return to *Butte Canal &*

Ditch Co. v. Vaughn, supra. The projects can certainly use the Delta channels for conveying water, but doing so they cannot adversely impact the senior Delta water right holders. See also Water Code section 7075.

If Delta water diverters are prohibited from diverting because of the assertions by DWR and USBR that they are diverting stored or transfer water, then they are being injured. Recent data collection has confirmed that the Delta was predominately a freshwater marsh for the past 2,500 years, and that the Delta has become far more saline in the past 100 years because of human activity. See enclosed *Historical Freshwater & Salinity Conditions Report Highlights* December 2009 Contra Costa Water District. The historical reports identified in the Contra Costa report chronicle unprecedented salinity intrusion, starting around 1917, due to upstream water use, and concludes: "Since 1920, reservoir operations and diversion of fresh water significantly increased salinity in the estuary".

This factual situation is also recognized by the State Water Project contractors:

Delta water uses have always relied on diversions from nearby Delta channels to meet most of their water needs. Before 1920, they were able to divert usable water in all but a few summer months of the driest years. But, as diversions from the Delta and diversions to the San Francisco Bay area from streams tributary to the Delta increased, the outflow remaining available to repulse salinity has decreased, particularly in late summer. Increasing diversions upstream from the Delta historically caused the salinity intrusion to become more frequent and to extend farther into the Delta. *The Sacramento-San Joaquin Delta A Summary of Facts* 1976 Association of State Water Project Agencies at p. 5-4.

The same projects that have diverted water from the Delta watershed cannot now complain that senior Delta water right holders are diverting water "freshened" by project releases. In 1933 when the State Legislature authorized the Central Valley Project, it made salinity control in the Sacramento-San Joaquin Delta one of the primary purposes of Shasta Dam (Stats. 1944, Ch. 1042). This provision is now found in Water Code Section 11207(c). In D 990, the State Water Board concluded:

. . . salinity control in the Delta is one of the purposes of the federally authorized Central Valley Project. This has been recognized by the United States Supreme Court in both *U.S. v. Gerlach Livestock Co.*, 339 U.S. 725, and *Ivanhoe Irrigation District v. McCracken* 357 U.S. 275.

In 2010 the Contra Costa Water District released a Technical Memorandum (WR10-001) entitled *Historical Fresh Water and Salinity Conditions in the Western Sacramento-San Joaquin Delta and Suisun Bay*, which noted:

Studies and salinity measurements confirm that despite salinity management efforts, Delta salinity is now at or above the highest salinity levels found in the past 2,500 to 4,000 years. Under equivalent hydrological conditions, the boundary between salt and fresh water is now 3 to 15 miles

farther into the Delta than it would have been without the increased diversions of fresh water that have taken place in the past 150 years.

Reservoir operations artificially manage salinity intrusion to conditions that are saltier than had been experienced prior to the early 1900's. While these managed conditions are certainly fresher than would occur in today's altered system if operated without any salinity management, they are still saltier than what the Delta experienced under similar hydrological conditions in the past. While the Delta is being managed to a somewhat acceptable saline condition to meet many beneficial uses, it is still managed at a more saline condition than would have occurred prior to the anthropogenic changes of the past 150 years.

For example, the 1928-1934 drought was one of the driest periods in the past 1,000 years (Meko et al., 2001a)², and occurred after tidal marshes within the Delta had been reclaimed and water diversions began removing substantial amounts of fresh water from the Bay-Delta system. Nonetheless, the Delta freshened during the winter in those drought years. This winter freshening of the Delta has not occurred during recent droughts. While salinity intrusion into the Delta was previously only seen in the driest years, significant salinity intrusion now occurs in nearly every year – exceptions are only found in the wettest conditions.

As was discussed recently at a State Board meeting on January 1, 2014, the maximum intrusion of saline water, as measured by the 1,000 ppm chloride ion level, occurred in September of 1931, when an estimated 74 percent of the Delta water supply was rendered unusable. This fact is important for two reasons (1) in this historical critically dry year the Delta water users had usable water through the irrigation season into September, and (2) water quality in the south delta was still under 1,000 ppm in September of 1931.

In fact, the State Board has recognized that operation of the state and federal water projects has adversely impacted the conditions of the Delta, and has imposed upon the State and Federal water projects the responsibility for meeting water quality requirements in the Delta for salinity. In D 1485 the State Water Board considered the water quality standards to be adopted for agricultural protection in the Delta, and concluded: “. . .water quality in the Delta should be at least as good as those levels which would have been available had the state and federal projects not been constructed, as limited by the constitutional mandate of reasonable use”. D 1485 at p. 10. The key conclusion reached by the State Water Board in D 1485 has not changed:

² Meko, D. M., M. D. Therrell, C. H. Baisan and M. K. Hughes. 2001b, Sacramento River Annual Flow Reconstruction. International Tree-Ring Data Bank. IGBP PAGES/World Data Center for Paleoclimatology Data Contribution Series #2001-081. NOAA/NGDC Paleoclimatology Program, Boulder CO, USA. See ftp://ftp.ncdc.noaa.gov/pub/data/paleo/treering/reconstructions/california/sacramento_flow.txt

Ms. Barbara Evoy
August 6, 20124
Page 7

The Delta and Marsh comprise a highly productive and immensely valuable ecosystem which must be managed and protected as a matter of statewide public interest. The effect of the Delta Plan and this decision is that water quality standards in the Delta must be satisfied prior to any export from the Delta to other areas for any purpose. These standards must be maintained as first priority operating criteria for any and all projects or parts thereof that may be constructed and operated under the permits considered in this decision.

When the State Water Board curtails diversions in the legal delta due to lack of flow, it ignores the conclusions of fact and law that it has made for decades, and that have long been recognized by all parties diverting water in and from the Delta.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeanne Zolezzi". The signature is written in a cursive, flowing style.

JEANNE M. ZOLEZZI
Attorney-at-Law

cc: State Water Resources Control Board Members
Mr. Thomas Howard