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May 13, 2014

VIA U.S. MAIL AND E-MAIL

Water Resources Control Board
c/o Michael Buckman
P.O. Box 2000
Sacramento, CA 95812-2000
Michael.Buckman@waterboards.ca.gov

Re: Comments by Grassland Water District on the Board's Revised TUCP Orders for the State Water Project and Central Valley Project

Dear Mr. Buckman and members of the Board,

Grassland Water District (GWD) submits these comments in response to the Board's request that commenters provide any additional clarifications to the Board on the above-referenced temporary urgency change orders (TUCP Orders) by today's comment deadline.

1. GWD's February 17th Comment Letter

On February 17th, GWD submitted a comment letter on the Board's initial TUCP Order. The letter emphasized the ecological significance and necessity of annual water deliveries from the CVP to managed wetlands (refuges). It described Reclamation's legal obligation to deliver no less than 75% of "Level 2" refuge water supplies. It also quoted from the Board's prior decisions, which acknowledge that Reclamation's refuge water deliveries are ecologically critical and legally necessary, and that CVP deliveries to refuges constitute CVP "base supply." GWD requested that exports from the Delta be allowed as needed by Reclamation to meet the 75%

minimum Level 2 refuge water supply obligation. GWD also requested that the ecological need of refuges in receiving this water be weighed with upstream ecological needs. As GWD has not yet received its minimum 75% allocation of Level 2 refuge water from the CVP, these requests remain active.

2. GWD's March 3rd Protest

On March 3rd, GWD submitted a protest, based on its understanding that there was inter-agency debate regarding the scope of permissible uses of water exported from the Delta under the TUCP Orders. The protest argued that precluding the use of exported water for refuge deliveries would unreasonably affect wildlife, threaten the survival of listed species, undermine the assumptions in the biological opinions that cover Delta pumping, and conflict with prior Board orders and the Central Valley Project Improvement Act (CVPIA). GWD also asked for a public hearing on the matter. The protest stated that GWD did not seek "a Board determination on each and every point raised" in the protest, but that the TUCP Orders should not be interpreted as prohibiting the diversion and delivery of water from the Delta to refuges. Because the Board's March 18th TUCP Order clarified that exported water can be used by Reclamation for lawful CVP uses beyond health and safety, GWD believes that the points raised in its protest are now moot, at least as they apply to that specific issue.

3. Friant Water Authority's April 28th Protest and Petition for Reconsideration

On April 28th, the Friant Water Authority (FWA) filed a protest and petition for reconsideration of the TUCP Orders, arguing that Level 2 refuge water supplies are "junior water rights," and that Article 3(n) of FWA's CVP contracts gives FWA members "legally protected contract rights" that override Reclamation's legal obligations to refuges. GWD strongly disagrees with FWA's assertions; however, GWD does not believe these issues are relevant to the Board's TUCP Orders, and GWD requests that the Board refrain from attempting to interpret the relative legal priorities of federal contractors to CVP water allocations.

In any case, Level 2 refuge water supplies are not junior water rights. When Congress enacted the CVPIA it dedicated a "firm" quantity of CVP water to refuges. Congress did not specify any particular source or any particular portion of CVP water that must be used to meet this obligation. Congress simply instructed Reclamation to provide firm refuge water supplies "either directly or through contractual agreements with other appropriate parties."[1] It declared that Reclamation "shall be obligated to provide such water whether or not [ ] long-term contractual agreements [with refuges] are in effect."

[1] *Id.* § 3406(d).

The Refuge Contracts do not refer to CVP "yield," "available water," or any other priority-based or geographic-based limit on the CVP water that must be used to meet Level 2 refuge water needs. The only basis allowed by the CVPIA and the contracts for failing to deliver the mandated supplies is the authority of Reclamation to reduce refuge deliveries "up to twenty-five (25) percent" in a critically dry year when reductions are also imposed on agricultural deliveries.[2] This 25 percent cap on reductions of Level 2 refuge water supplies demonstrates that Congress intended Refuge Contractors to be treated on par with the Exchange Contractors and Settlement Contractors. The Refuge Contracts contain a shortage provision similar to the Exchange and Settlement Contracts, and Reclamation's longstanding practice has been to issue refuge allocations in parity with the Exchange and Settlement Contractor allocations. Accordingly, the Board has previously characterized refuge water supplies as CVP "base supply."

FWA's protest letter references the "*Westlands VII"* case, which merely invoked the general rule that a "court cannot, under the guise of construction, add words to a contract, which would impermissibly re-write that contract."[3] The water service contracts at issue in *Westlands VII* required apportionment of the "available water supply" among "those entitled under then existing contracts to receive water from the San Luis Unit."[4] "Available water supply" was defined in the contracts, and the court found that the apportionment provision was not intended to include the Exchange Contractors.[5] The Refuge Contracts contain no apportionment provision and do not use the phrase "available water supply." FWA mischaracterizes the *Westlands VII* decision and its applicability to the Refuge Contracts. However, the same rule of contract law that applied in *Westlands VII* also applies here: it is impermissible to read language into a contract that is not there.

FWA also refers to "extensive" treatment of these issues in the SWRCB's Decision D-935 (1959) and Decision D-990 (1960). Neither of these decisions contains a relevant discussion that supports FWA's assertions. Regardless, "a state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme."[6] Congress's express directive in the CVPIA to provide a "firm" refuge water supply from the CVP is not undermined by historical SWRCB decisions.

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[2] GWD Contract, Article 9(a), *available at:* http://www.usbr.gov/mp/cvpia/3406d/env_docs/index.html; CVPIA § 3406(d)(4).
[3] *Westlands Water Dist. v. United States*, 337 F.3d 1092, 1103 (9th Cir. 2003) ("*Westlands VII*") (quoting *Westland Water Dist. v. United States*, 153 F. Supp. 2d 1133, 1162 (E.D. Cal. 2001) ("*Westlands VI*").
[4] *Id.*
[5] *Id.*
[6] *United States v. State of Cal., State Water Res. Control Bd.*, 694 F.2d 1171, 1177 (9th Cir. 1982).

Finally, Article 3(n) of FWA's contracts does not give FWA a priority over refuges. In Article 3(n), Reclamation agreed not to deliver San Joaquin River water to the Exchange Contractors unless required to do so by the Exchange Contract, and not to declare itself "unable" to deliver supplies from the Delta, if water is in fact "available" from the Delta to satisfy the Exchange Contract. Article 4(b) of the Exchange Contract provides that deliveries to the Exchange Contractors will be made from the San Joaquin River if Reclamation is "temporarily unable for any reason or for any cause to deliver to the Contracting Entities substitute water from the Delta-Mendota Canal or other sources." Compliance with the mandatory provisions of the CVPIA is one such reason.

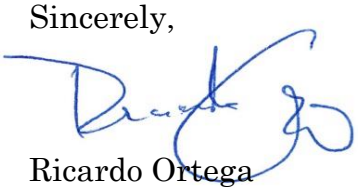
FWA does not go so far as to suggest that Reclamation must divert water from the Delta to satisfy the Exchange Contract regardless of any state or federal environmental obligations or other operational considerations of the CVP. Instead, it arbitrarily selects one such obligation, the refuge water supply obligation, without regard to the other obligations that Reclamation must meet when operating the CVP. Even more discouraging is FWA's implied suggestion that increasing south-of-delta refuge water supplies from the current 40 percent Level 2 allocation to the mandated 75 percent allocation would make a crucial difference for the survival of FWA members' crops. GWD is by far the largest south-of-delta Refuge Contractor, and it requires only 43,750 acre-feet of water to close the gap between a 40 and 75 percent allocation. This represents only 5 percent of FWA's Class I water supplies. Again, GWD does not believe that resolution of these issues is necessary or relevant in the context of the Board's TUCP Orders, but it strongly disagrees with FWA's characterization of Reclamation's legal obligations to refuges.

4. Conservation Groups and GWD's May 1st Letter of Support

On May 1st, Audubon California, California Waterfowl Association, Defenders of Wildlife, and GWD sent an e-mail to the Board, questioning the Board's decision to relax flow standards at Vernalis. This was because a decrease in flows at Vernalis can be correlated with less water available for export to south-of-delta refuges, and also because the Stanislaus River contractors, who would benefit from the relaxation, currently have a higher water allocation than GWD. GWD continues to believe that these issues warrant reconsideration by the Board.

Thank you for your continued consideration of these important matters.

Sincerely,



Ricardo Ortega
General Manager

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