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ATTORNEYS

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October 15, 2014

VIA ELECTRONIC MAIL

STATE WATER RESOURCES CONTROL BOARD
c/o Jeanine Townsend, Clerk to the Board
Post Office Box 100
Sacramento, California 95812-100
commentletters@waterboards.ca.gov

Re: Dry Year Report - Improvements to Implementation and Enforcement of Water Rights During Drought Conditions

Dear Ms. Townsend:

This letter is written on behalf of Banta-Carbona Irrigation District, Patterson Irrigation District, West Stanislaus Irrigation District and The West Side Irrigation District ("**Districts**") in response to the Notice of Solicitation regarding Improvements to the Implementation and Enforcement of Water Rights During Drought Conditions issued by the State Water Resources Control Board ("**State Water Board**") on September 10, 2014.

The State Water Board has indicated that its primary objective is to improve the confidence in the technical tools and analysis that will be used for making determinations on water availability relative to water rights priority in 2015. State Water Board staff is requesting recommendations on what actions should be taken in the near-term and what actions should be taken in the longer-term related to the following questions, as well as other issues related to this matter. Specifically:

1. **What actions, if any, should the State Water Board take to improve the Board's information and analyses to support determinations on water availability relative to water right priority, including, but not limited to, improvements to supply, demand and watershed specific information and water right priority information?**

As the Districts have stated numerous times, the single most effective action that the State Water Board should take to improve its information is more accurate data regarding water availability and actual water demand. State Water Board staff provided the attached updated San Joaquin River Basin Supply/Demand updated through October 2, 2014. "Calculated Full Natural Flow" is based on a series of CDEC stations. However, the list of CDEC stations is woefully inadequate and fails to account for the full natural flow. For instance on the Stanislaus River, the listed station is New Melones Reservoir, but inflow into New Melones Reservoir is not a measurement of full natural flow of the Stanislaus River. There are upstream reservoirs operated by PG&E and the Tri-Dam Project that store and release water on the various forks of the Stanislaus River upstream of New Melones Reservoir. Inflows into those reservoirs must be included in the "Calculated Full Natural

Flow", adjustments would need to be made for what they are releasing and then what is observed flowing into New Melones Reservoir to calculate natural flow that would be subject to appropriation based on the water right priority system. This same analysis must be done for each of the tributaries and the main-stem San Joaquin River. It is unclear why the State Water Board is using CDEC station TLG - Tuolumne River at LaGrange, when there are additional reservoirs upstream including New Don Pedro and Hetch-Hetchy.

Additionally, as we have repeatedly told the State Water Board and staff you cannot simply rely on a few random CDEC stations to determine "Measured Outflow." "Measured flow" for purposes of determining whether or not there is water subject to appropriation is highly dependent on what part of the river system is being analyzed. For instance, on the Stanislaus River, the State Water Board staff includes CDEC station NML - New Melones Reservoir in "Measured Outflow" so these flows include releases being made to serve all of the water users (Oakdale and South San Joaquin Irrigation Districts, Stockton East Water District and Central San Joaquin Water Conservation District), that take water prior to the water being released into the Stanislaus River at Goodwin Dam. While we agree that this station should be included, it cannot be used exclusively because it does not show the complete picture as there are additional releases from Goodwin Dam that need to be included in the Measured Outflow because that water is actually being released into the river and may be subject to appropriation downstream.

In the San Joaquin River, the majority of water in the river available for appropriation during the irrigation season is not natural flow – it is comprised of groundwater accretions, irrigation runoff, discharged treated wastewater, abandoned stored water, and other sources. Water from these sources is available for diversion by appropriators and cannot be ignored. We submitted information on flows in the San Joaquin River during the irrigation season – a time when natural flow in a drought year would cease in June - on the San Joaquin River tributaries. The raw data we provided shows that much of the San Joaquin River from the Merced River to Vernalis is gaining flow as a result of groundwater accretions, irrigation runoff, discharged treated wastewater, abandoned stored water, and other sources, even in the driest years like 2013. The information we submitted to the State Water Board clearly demonstrate that the San Joaquin River is a gaining river even with full diversions by riparian, pre-1914 and post-1914 water rights holders. In particular, in the reach between the Patterson and Maze gages, there are substantial diversions (in excess of 575 cfs) but because of the inflows from groundwater accretions, irrigation return flows, abandoned stored water and other sources there is sufficient flow to fully support the diversions. In light of this information, we maintain it is absolutely essential to: (1) break down the tributaries on an individual basis, and (2) break down the San Joaquin River into logical reaches in order to determine if there is water that is available for appropriation based on the water right priority system.

We suggest 4 reaches:

- Reach 1: CDEC gage NEW at Newman ending at CDEC gage SCL at Crows Landing Bridge (11 miles);
- Reach 2: CDEC gage SCL ending at the CDEC gage SJP at Patterson (10 miles);
- Reach 3: CDEC gage SJP ending at CDEC gage MRB at Maze Road bridge (23 miles);
- Reach 4: CDEC gage MRB ending at VNS at Airport Way Bridge near Vernalis (4.5 miles).

If flow in each reach is analyzed on a real time basis, the State Water Board will be able to better evaluate water availability and make a determination on what water is available to appropriate based on the water right priority system.

Regarding water availability and real time operations, major diverters in the San Joaquin River system should be consulted on a monthly or more frequent basis to help identify water flow to be expected for the next thirty days. Through such a process, discussions could determine who has priority to those flows and to what extent other junior diverters should be curtailed. In May of 2014 the Executive Director stated in a State Water Board workshop that the San Joaquin River was going to dry up this summer. Diverters asserted that would not happen because the State Water Board was not properly accounting for the real time flows in the San Joaquin River. In the end the Executive Director was wrong about the San Joaquin River drying up, as flows did not drop below 150 cfs at or above Vernalis during the June through August time frame. In putting together these meetings, we believe they should be grouped by Reaches and include the tributary water operators as well various diverters along the San Joaquin River in that particular reach. As highlighted above, flows occur above the rim dams and flows occur below the rim dams, and they are not directly connected. Below the rim dams there are inflows to the river that are separate from the diversion dam releases such as at Goodwin, La Grange and Huffman Crocker. These flows are available for diversion and the flow amounts cannot be determined either by looking at water conditions above the rim dams, nor by the releases at the diversion dams. Thus the need for monthly meetings with water operators and diverters below the diversion dams to look at flows below the diversion dams and to discuss anticipated flow conditions for the following month.

Such should be the operating criteria for the State Water Board now and through the winter on the San Joaquin River. Flows have rebounded from the 150 cfs to 200 cfs at Vernalis during the summer to 400 cfs to 500 cfs at Vernalis since the first of September with no appreciable increase in flows from the tributaries. Why is this? Junior diverters that have been curtailed on the San Joaquin River should be released from the curtailment order. This would allow agriculture to plant winter crops that could minimize financial hardships that would otherwise occur because of curtailment during the summer. Winter crops use less water and diverters have insignificant peak demands during the winter months. Winter crops will be completing any irrigations by May 1st of the following year. This is the type of analysis that could take place by the State Water Board staff if they would meet with diverters below the diversion dams each month. Diverters could provide reliable rules of thumb for anticipated diversion flows that should give State Water Board staff some comfort that the river will not be dried up and that the water rights priority system is being adhered to.

Finally on the issue of water demand, by following what is outlined above the State Water Board would have a realistic picture of actual demand, rather than the 2010 demand that the State Water Board has been using that has been demonstrated to have no relationship to realistic diversions. The State Water Board has been allocated significant amounts of money for additional staff. We suggest that this staff be used to conduct these on the ground real time meetings for the remaining 2014 and 2015 water years. In addition, the Districts, and other major diverters on the San Joaquin River and its tributaries would be more than willing to provide real time diversions data as well as projected diversion data to assist the State Water Board staff with developing real time water availability estimates on the system. Curtailment decisions are having widespread devastating effects on agriculture in the Central Valley. These losses are real and significant and will only

intensify if we have another dry year. Decisions that will have long-term real adverse affects on landowners should be based only upon the more accurate information. Decisions cannot and should not be from a bunch of desktops in Sacramento, they need to be made based on the best available real time information which can only be known when they are actually on the ground talking with the operators and diverters.

2. **What actions should the Board take to better communicate information about limited water availability relative to water right priorities, including the need and basis for curtailments of water diversions?**

The Districts believe that the use of electronic communications and the State Water Boards' website were very effective for communicating information to water users. However, it is essential that the communications be updated regularly and easily found. At times it has been difficult to determine how to find a particular posting; all information should be in one location on the website.

3. **What, if any, changes should be made to enhance the effectiveness of the State Water Board's curtailment process, including measures to protect the public interest, health and safety and public trust resources?**

The primary change to enhance the effect of the curtailment process is using more accurate information as described in Item 1 above. In addition, however, there are two additional important points to be made:

Public Trust

It is essential that the State Water Board, and the public, understand that consideration of the public trust does not necessarily result in water operations that maximize the fish and wildlife uses. Rather, the various interests protected by the public trust must be balanced. It is beyond argument that the State Water Board must consider the public trust in its allocation (and curtailment) decisions; In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the California Supreme Court confirmed that the state has "an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."

However, the Supreme Court also concluded that the state has a dual mandate: to balance the need for municipal water supplies with the ecological need for water to restore and maintain natural water-dependent ecosystems, and that "[a]s a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses." (*Id.* at p. 446). Protection of the public trust requires reaching a balance between the needs of water users and instream protection. This concept is critically important during a drought year. While the dedication of flow to instream purposes may be a reasonable public trust use under certain circumstances, it is not a reasonable public trust use when to do so would eliminate all other public trust benefits in a year of critical drought. Moreover, when considering protections to be afforded to fish and wildlife, the State Water Board has a duty to consider and protect all of the other beneficial uses to be made of the water, including municipal, industrial and agricultural uses. See *State Water Resources Control Board Consolidated Cases* (D 1641) (2006) 136 Cal.App.4th 674.

Curtailments

The State Water Board must return to a fundamental understanding and implementation of water rights. In 2014 the State Water Board imposed curtailments under the guise of protecting senior water rights. However, imposing curtailments based on the *assumption* that senior water right holders are being injured without a determination of injury in fact has no authority under the law. An appropriator has no recourse against acts that cause him no injury. *Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 Cal.App. 213, 221. **A junior appropriator in California has the right to validly exercise his or her water right in accordance with its terms and conditions provided no senior water right holder is materially injured.** A prior appropriator is "clearly entitled to protection against acts which materially diminish the quantity of water to which it is entitled. . ." *Phoenix Water Co. v. Fletcher* (1863) 23 Cal. 481, 487, but unless there is actual injury to the senior water right holders, there is no right to adversely impact the junior water users. *Id.* at 486. The question for the Board to consider before it imposes curtailments is whether the "reasonable use of the water to which the upstream claimant is entitled cause any positive or sensible injury to the prior appropriator below by diminishing the value of his right." *The California Law of Water Rights*, Hutchins, p. 156-157. And that determination is a question of fact:

> The mere inconvenience, or even the matter of extra expense, within limits which are not unreasonable, to which a prior user may be subjected, will not avail to prevent a subsequent appropriator from utilizing his right. There must be a substantial as distinguished from a mere technical or abstract damage to the right of the prior appropriator by the exercise by the subsequent appropriator of this right to entitle the former to relief against any attempt of the latter to utilize his right. . . *Waterford Irr. Dist. v. Turlock, Irr. Dist* (1920) 50 Cal.App. 213, 221.

This requirement was upheld by the California Supreme Court in *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 376.

In a time when water is a valuable resource, the absence of which may result in the loss of long-term livelihood, it is essential that the State Water Board strictly adhere to the law, and not impose curtailments until injury is imminent. The complaint system is designed to provide this kind of information, and should be allowed to serve as the bellwether of such need.

4. **What, if any changes should be made to enhance the effectiveness of the State Water Board's complaint process?**

The Districts believe that the State Water Board's complaint process is effective. However, the State Water Board should use the complaint process to determine the need for curtailments.

5. **Should the State Water Board pursue any additional authorities or policies to more effectively implement and enforce the water rights priority system?**

There is no need for the State Water Board to pursue any additional authorities or policies to more effectively implement and enforce the water rights priority system. The severe drought conditions facing water users has created enough uncertainty, fear and financial stress. For the State Water

Board to attempt to gain additional powers over water and/or water users, or to adopt new and unknown policies would simply impose additional hardship on water users who have already been pushed to the limit.

6. **How can the Board better assist water users in planning for upcoming dry periods?**

Advance notice of actions is essential for planning.

7. **What additional actions, if any, should the Board take to prepare for the next dry year or series of dry years?**

Working with water users to more accurately measure water uses and availability as described in Item 1 above.

Finally, we believe it is important to meet with State Water Board staff to discuss these issues, and would request a meeting to do so when you have had an opportunity to review our comments.

Very truly yours,

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Attorney-at-Law

JMZ:pg

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San Joaquin River Basin Supply/Demand