



October 15, 2014

VIA E-MAIL AND U.S. MAIL

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Re: Recommendations For Improvements To The Implementation And Enforcement Of Water Rights During Drought Conditions

Members of the Board:

The San Luis & Delta-Mendota Water Authority ("Water Authority") appreciates the opportunity to respond to the September 10, 2014 "Notice of Solicitation Regarding Improvements to the Implementation and Enforcement of Water Rights During Drought Conditions." Through the Notice, the State Water Resources Control Board ("State Water Board") requests interested parties to recommend actions that the State Water Board should take to allow it to more effectively implement and enforce the water rights priority system. Prior to and at the September 24, 2014 workshop on Central and Southern Delta Water Availability Use, the Water Authority recommended that the State Water Board exercise its investigatory powers and request that water users in the Sacramento-San Joaquin Delta ("Delta") provide information they believe support the claimed rights. Unfortunately, substantial amounts of time have passed without action. At this time, the Water Authority renews its request. The information is critical to effectively administer the water rights system in arguably the most important watershed in California.

Many water users in the Delta have claimed water rights for more than 50 years. Those claims, however, have generally been assumed valid; they have not been investigated or verified. The assumption of valid water rights is reflected in a 1956 report

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prepared by the United States Department of the Interior, Bureau of Reclamation (“Reclamation”), California Department of Water Resources (“DWR”), and the Sacramento River and Delta Water Association.¹ In that report, titled “Report on 1956 Cooperative Study Program – Water Use and Water Rights along Sacramento River and in Sacramento-San Joaquin Delta”, Reclamation, DWR and the Sacramento River and Delta Water Association explain:

Estimates of the extent of physically riparian land along the Sacramento River between Redding and Sacramento were based upon extensive work by the Bureau of Reclamation... The foregoing work by the Bureau of Reclamation was spot checked under the 1956 Cooperative Study Program to confirm the validity of the methods used and the accuracy of the computations.

(Report, p. 20.) The Report’s description of the investigation and verification of claimed water rights along the Sacramento River is in stark contrast to the description of claimed water rights in the Delta.

It was assumed that all of the Delta Lowlands are riparian to channels of the Delta... No research of individual title records, such as that described for the Sacramento north of Sacramento, were made for this Delta Lowlands area.

(Report, p. 21.)

Water users in the Delta have submitted information to the State Water Board through Statements of Diversion and Use. Those submittals, however, do not overcome the uncertainty caused by assuming claimed water rights in the Delta are valid. In their Statements, many in-Delta water users claim multiple water rights (e.g., Riparian, Pre-1914 Claim, Overlying & Statutory), identify the same year of first use (e.g., 1800), and do not measure diversions (e.g., asserting “[t]he cost of acquisition, installation, maintenance, ... collection and compilation of data from measuring devices is not locally cost-effective because the value of the local benefits of installing and maintaining meters is not greater than the value of the local cost of implementing that measure”). Submittals of that type create uncertainty. They do not reduce it.

The uncertainty caused by assumptions of water rights and the Statements of Diversion and Use filed by many in-Delta water users warrants the State Water Board exercising its investigatory powers, particularly since this uncertainty exist in arguably the most critical area of California – the Delta. As the State Water Board is well aware, the Delta is the focal point for environmental, water use, and water quality issues and regulation. And, although the State Water Board imposes within the Delta relatively precise water quality objectives intended to

¹ Report on 1956 Cooperative Study Program – Water Use and Water Rights along Sacramento River and in Sacramento-San Joaquin Delta, available at: www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/docs/comments102612/desjardins/1956cooperative_study.pdf.

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protect beneficial uses, and other regulatory agencies impose equally precise requirements on certain water users to protect fish and wildlife, among many other regulations, all of which have significant impacts on those regulated, the State Water Board cannot accurately determine when and to what extent many in-Delta water users divert water under each claimed water rights. And, the State Water Board thus cannot fully assess water right claims (e.g., injury to legal users of the water involved), regardless of whether that claim is by or against an in-Delta water user or within the context of a water right dispute or the water quality control planning process.

The difficulty of administering the water rights system caused by uncertainty of claimed in-Delta water rights was demonstrated in 2014. As you are well aware, earlier this year, State Water Board staff proposed that the State Water Board adopt regulations that would provide for expedited curtailment of all illegal diversion, including those claiming pre-1914 and riparian rights. The State Water Board rejected that proposal and, instead, adopted regulations limited to post-1914 water rights. The basis for the State Water Board decision for limited regulations was the “complexities surrounding the relative priority of individual pre-1914 appropriate water rights and riparian water rights.”²

It is in the light of this apparent, clear need for information to support claimed pre-1914 and riparian water rights that the Water Authority has recommended and continues to recommend the State Water Board utilize its existing powers to investigate claimed in-Delta water rights. (See, e.g., Wat. Code, §§ 183, 1051.) Specifically, the Water Authority now recommends that the State Water Board:

- (1) By **October 31, 2014**, issue letters to in-Delta water users diverting water under claimed water rights, stating that the State Water Board is investigating the bases for these claimed rights and attach a form that each water user must complete within 21 days.³
- (2) By **December 1, 2014**, have State Water Board staff prepared to act on inadequate responses to the request for information, including direct follow-up with individual diverters and, if necessary, issuance of deposition notices or subpoenas requiring the production of the requested information. (See, e.g., Wat. Code, §§ 1080, 1100.)
- (3) By **January 31, 2015**, have State Water Board staff include in the report a summary of the investigation into claimed in-Delta water rights.

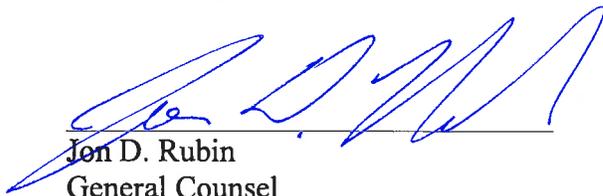
² State Water Board Resolution No. 2014-0031 (“Resolution”) at p. 4, available at: www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/emergency_regulations/attach2_rs2014_0031_with_regs.pdf.

³ See the attachment to the State Water Contractors’ September 15, 2014 comment letter for a suggested form to obtain such information, available at: www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/comments091514/terry_erlewine.pdf.

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In sum, there are sufficient bases for the State Water Board to exercise its existing powers and investigate claimed in-Delta water rights. The Water Authority respectfully requests that the State Water Board act immediately, to increase certainty for all water users within the critical Sacramento-San Joaquin River watershed and Delta and to assure the State Water Board is in a better position in future years of shortage to administer the water right system.

Respectfully,



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