



O'Laughlin & Paris LLP

Attorneys at Law



SENT VIA E-MAIL

February 3, 2012

Clerk to the Board  
California State Water Resources Control Board  
PO Box 100  
Sacramento, California 95812-0100  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Re: **2/7/2012 BOARD MEETING: Informational Report of Water Right Compliance and Enforcement in the Delta**

Dear Ms. Townsend:

The Modesto Irrigation District (“MID”) has concerns regarding the Delta Watermaster’s “Informational Report on Water Right Compliance and Enforcement in the Delta” (“Report”) provided to the State Water Resources Control Board (“State Board”) for its February 7, 2012 meeting. The Report reveals that, contrary to the direction provided by the State Board, the Delta Watermaster is not properly enforcing water rights in Delta. In addition, the Report is inconsistent with the results of a public records act request.

The Report reveals the Delta Watermaster has made water right enforcement decisions based on a standard significantly less stringent than the law requires. One example of the deficient standards is reflected by the Report’s statement that intent to preserve a riparian right may be evidenced by “statements of persons attesting” to retention. (Report, at 5.) This is not consistent with the law, which requires express evidence of intent at the time of severance. Therefore, self-interested attestations made after the severance do not amount to sufficient evidence upon which a riparian right may be preserved.

The application of this type of lenient and unlawful standard is likely the reason the vast majority of investigated parcels were not prosecuted. The Report also misstates the effect of this lack of prosecution by equating the lack of enforcement with a grant of a water right. (Report, at 4 [stating that “water rights were established for 485 parcels (74% of parcels)].) The Report should be revised to make clear the Delta Watermaster’s decision not to take enforcement action is not a water right adjudication. If the Report is not revised, the State Board should make clear it does not accept the Delta Watermaster’s decision not to take enforcement action as an adjudication of a water right.

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One of the fundamental purposes for the Delta Watermaster's enforcement duties is to increase certainty in the system by defining water rights. The Delta Watermaster's actions have not increased certainty. The Watermaster has exclusively focused on determining whether to take enforcement action, without defining whether existing rights are riparian or pre-1914. This superficial determination makes it unclear when, how, and to what extent water users may divert water and the Delta remains an area of great uncertainty for statewide planning and operations purposes.

Further, MID was surprised by several facts in the Report in light of information it previously received from the Delta Watermaster. On May 23, 2011, MID made a public records act ("PRA") request to the Delta Watermaster in response to his May 17, 2011 presentation to the State Board regarding investigations of illegal water use in the Delta. (See Attachment 1.) Generally, the PRA requested the Delta Watermaster provide a list of all parcels that the State Board or the Delta Watermaster had investigated, the status of investigations, and any evidence provided to support claims to water rights. The Delta Watermaster responded on June 1, 2011, by stating only five (5) parcels had been reviewed and subsequently provided the requested information for the five parcels. (Response attached as Attachment 2.)

The response to MID's PRA dramatically differs from information provided in the Report. The Report states that since 2008, the State Board has investigated over 1,000 properties. (Report, at 9.) However, in June of 2011, the Delta Watermaster reported only five parcels had been investigated. The disparity between the Report and the results of the PRA suggests that either the Delta Watermaster investigated 995 parcels in the last six months or the Delta Watermaster's response to MID's PRA was nonresponsive.

In response to the Report, the State Board should ensure the Delta Watermaster understands the purpose, duty, and standards with which he is required to enforce unlawful Delta diversions.

Very truly yours,  
**O'LAUGHLIN & PARIS LLP**

  
\_\_\_\_\_  
VALERIE C. KINCAID

VCK/tlb  
Attachments



May 23, 2011

Craig Wilson, Delta Watermaster  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Re: Public Records Act Request for Illegal Delta Diversion Enforcement Actions

Dear Mr. Wilson:

At the State Water Resources Control Board (State Water Board) meeting on May 17, 2011, you reported you and your staff had undertaken water rights investigations on numerous properties in the Delta and determined not to take enforcement actions on many of these parcels. Pursuant to California Government Code section 6250 et seq., I request copies of the following records, as defined by California Government Code section 6252(e):

1. A list of APN numbers that includes all parcels of land for which you, your staff, or State Water Board staff has determined no enforcement action is warranted at this time.
2. A list of APN numbers that includes all parcels of land for which you, your staff, or State Water Board staff has determined enforcement action should be taken.
3. Any and all chains of title, deeds, State Water Board records, filings, notices, or other historical evidence reviewed or relied upon in making the above enforcement determinations.
4. Any and all lists, matrices, and maps created by you, your staff, or State Water Board staff in support of the enforcement determinations above.

Craig Wilson  
State Water Resources Control Board  
May 23, 2011  
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Please contact me with an estimate of copying costs and to make arrangements for my receipt of the requested records.

Very truly yours,

**O'LAUGHLIN & PARIS LLP**



A handwritten signature in cursive script, appearing to read 'Valerie C. Kincaid', is written over a horizontal line.

VALERIE C. KINCAID  
Attorneys for Modesto Irrigation District

cc: Tim O'Laughlin  
Jon Rubin  
Stan Powell  
Cliff Schulz  
John O'Hagan  
James Kassel



**Linda S. Adams**  
*Acting Secretary for  
Environmental Protection*

# State Water Resources Control Board

## Office of Delta Watermaster

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Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100  
Fax 916.341.5620 • <http://www.waterboards.ca.gov>



**Edmund G. Brown Jr.**  
*Governor*

**June 1, 2011**

Valerie C. Kincaid  
O'Laughlin & Paris LLP  
2617 K Street, Suite 100  
Sacramento, CA 95816

Dear Ms. Kincaid:

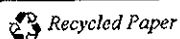
### PUBLIC RECORDS ACT REQUEST: DELTA WATER RIGHTS INVESTIGATIONS

This letter responds to your Public Records Act Request (dated May 23, 2011) which I received on May 25, 2011. You specifically requested the following records:

1. A list of APN numbers that includes all parcels of land for which you, your staff, or State Water Board staff has determined no enforcement action is warranted at this time.
2. A list of APN numbers that includes all parcels of land for which you, your staff, or State Water Board staff has determined enforcement action should be taken.
3. Any and all claims of title, deeds, State Water Board records, filings, notices, or other historical evidence reviewed or relied upon in making the above enforcement determinations.
4. Any and all lists, matrices, and maps created by you, your staff, or State Water Board staff in support of the enforcement determinations above.

My staff and I are currently researching what disclosable documents we may have that are responsive to your request. In your request, you stated that I had reported at the May 17, 2011 State Water Resources Control Board meeting that my staff and I had undertaken water rights investigations on numerous properties in the Delta and had determined not to take enforcement actions on many of these properties. Actually, I had reported that of the few, small numbers of cases I had looked at, in most cases determinations had been made not to pursue enforcement action. In this regard, I have been involved in the review of five Delta water rights investigations.

**California Environmental Protection Agency**



Valerie C. Kincaid  
O'Laughlin & Paris LLP

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June 1, 2011

My staff and I will review the files of these five cases to identify disclosable documents that are responsive to your request. I estimate that this identification will be made within 14 days of the date of this response. The Public Records Act provides for a requestor to pay for the costs of producing documents. Accordingly, included with any documents sent in response to this request you will find an invoice for the costs of producing those documents. I will contact you in advance with an estimate of the costs for reproduction of the requested documents and arrangements for your receipt.

One of your requests relates to pending investigations where enforcement actions may be taken. Please note that the Public Records Act exempts from disclosure records relating to pending investigations.

If you have any questions related to this response, please contact me at (916) 445-5962 or [cwilson@waterboards.ca.gov](mailto:cwilson@waterboards.ca.gov).

Sincerely,



Craig M. Wilson  
Delta Watermaster

cc: John O'Hagan, Division of Water Rights  
James Kassel, Division of Water Rights

**California Environmental Protection Agency**

