

**PROTEST AND OBJECTION, AND IN THE ALTERNATIVE
PETITION FOR RECONSIDERATION, OF
FRIANT WATER AUTHORITY AND ITS MEMBER AGENCIES,
RELATED TO THE
TEMPORARY URGENCY CHANGE ORDER**

Friant Water Authority ("Friant") and its member agencies hereby renew their protest and object to, and in the alternative, petition for reconsideration of, the Order Approving a Temporary Urgency Change In License and Permit Terms and Conditions Requiring Compliance With Delta Water Quality Objectives In Response To Drought Conditions (With Modifications Dated February 7, 2014, February 28, 2014, March 18, 2014, April 9, 2014, April 11, 2014, and April 18, 2014 (collectively, "Orders")), which have been issued in response to a series of Temporary Urgency Change Petitions jointly filed by the California Department of Water Resources ("DWR") and the United States Bureau of Reclamation ("Reclamation").

I. INCORPORATION OF PRIOR PROTEST AND OBJECTION

Friant hereby incorporates in full its prior protest and objection, filed on March 2, 2014.

II. STATEMENT OF THE CASE

A. Summary of Salient Facts

As you are well aware, California has been experiencing critically dry conditions for many months. As a result, to date, and pursuant to the specific terms of the SWRCB's prior orders, the water pumped from the Delta in 2014 and delivered into San Luis Reservoir has been natural and abandoned flows from storms, rather than water released from storage in reservoirs.

Reclamation holds the senior water rights to pump natural and abandoned flows from the Delta. Applications 9363 and 9364 have priority dates of August 2, 1938, and authorize the United States to divert directly from the Delta up to 10,000 cfs to provide, among other things, a substitute water supply to be delivered through the Delta Mendota Canal. Application 9368 also has a priority date of August 2, 1938, and it authorizes the United States to divert 4000 cfs from Old River at the Tracy Pumping Plant for irrigation and domestic purposes on up to 320,000 acres in the central and western portions of the San Joaquin Valley.

The State Water Project ("SWP") permits for diverting water from the Delta have priority dates of August 24, 1951 (Application 14443), and March 15, 1957 (Application 17512). These are junior to the Central Valley Project's ("CVP") Delta water rights – by more than a decade.

This year, for the first time in the 60+ year history of the Central Valley Project, Reclamation has indicated it will not provide the required amount of substitute water supply to satisfy the demands of the Exchange Contractors, who hold the prior water rights on the San Joaquin River, because: (1) the State Water Resources Control Board ("SWRCB) and/or the National Marine Fisheries Service ("NMFS) has ordered Reclamation not to deliver water stored behind Shasta Dam consistent with its contractual obligations to the Exchange Contractors, but rather to retain it for future unspecified uses by unknown persons, despite the terms of Reclamation's permits and contractual duties; and (2) DWR has insisted that half of the water pumped from the Delta be provided to its junior contractors, even though the senior water rights of the Exchange Contractors have not yet been satisfied. As a result of these decisions, the Exchange Contractors may be required to call on San Joaquin River water to serve their needs, which would deprive the Friant Division water users of all of their CVP water supply.

Because California water law follows the prior appropriation doctrine, the seniority of the water rights associated with the Friant Division has meant that these supplies have historically been the most reliable supplies developed by either the CVP or the SWP. The usurpation of those senior water rights this year has deprived Friant of all of its surface water supply. This will have devastating effects on the 15,000 small family farmers of the Friant Division, since over 70% of the Friant Division service area is dedicated to permanent plantings that will die without a water supply, and many of the Friant Districts have little to no access to groundwater supplies. Unless SWRCB reverses course and honors Friant's senior water rights, California Citrus Mutual estimates that the direct result of the SWRCB's decision will be the loss of 50,000 acres – the vast majority – of California's citrus, the closing of 8-9 packing houses and associated loss of jobs, and about \$3,000,000,000 in damages, and this is only to the citrus industry. Friant also produces numerous other high-value crops, such as walnuts, pistachios, almonds, grapes, plums, cherries, and peaches, and all of these orchards and vineyards are at risk of total loss as a direct result of the SWRCB's failure to enforce the Exchange Contractors' senior water rights. Moreover, since about 12% of all the milk in the nation is produced with Friant water, consumers in California and throughout the nation have already seen a dramatic increase in the price of milk and other dairy products as a direct result of the lack of water being provided to Friant.

B. History of These Proceedings

On January 31, 2014, without giving notice to affected parties or conducting any type of hearing, SWRCB staff issued an Order to amend the Bay-Delta Water Quality Control Plan that was approved and adopted under D-1641. The SWRCB's Order: (1) reduced the amount of Delta outflow that would otherwise be required under D-1641 from 4500 cfs to 3000 cfs; (2) restricted CVP and SWP export pumping in the Delta to 1500 cfs for use for "public health and safety"; and (3) required DWR and Reclamation to keep all water "conserved" by virtue of the order "in storage for use later in the year for purposes of maintaining water supplies, improving water quality, or protecting flows for fisheries." Essentially, the January 31 Order gave 6000 acre-feet per day to the Delta and restricted all of the CVP and SWP water users to 3000 acre-feet per day.

Changes to the D-1641 mandated Delta outflow were needed because the SWRCB had not had the foresight when it set the Delta outflow levels to predict a drought as severe as this one. D-1641 established a range of desired Delta outflow levels, but unfortunately, it did not tie those desired amounts to the underlying hydrologic conditions. Rather, D-1641 set a minimum Delta outflow standard of 4500 cfs for January for "all" year types, including critically dry years such as this one. This flat numeric standard proved unattainably high this year; there was not sufficient natural flow in the system to achieve this target. Moreover, because the United States Fish and Wildlife Service and the National Marine Fisheries Service had released more than 800,000 af of water from storage to create fish habitat in 2013, a dry year, there was insufficient water left in the CVP and SWP reservoirs to provide the outflow range called for under D-1641.

Almost immediately after the SWRCB issued the Order, Friant and other CVP contractors contacted SWRCB staff and began lodging objections to the improper attempt by SWRCB staff to override the Congressionally authorized irrigation purposes of the CVP via an amendment to a water quality control plan. Moreover, it was subsequently acknowledged that the "health and safety" limitation had not been needed, as most major municipal water suppliers have adequate supplies to deliver water to serve their customers during this drought and the "health and safety" limitation was borne out of a misunderstanding of that fact, lack of knowledge of how the CVP and SWP operate, and an incorrect assumption that all communities throughout the

state would be in the same situation as some smaller communities that had no adequate backup water supply – most of which were CVP or SWP contractors.

The February 7, 2014 Order clarified that DWR and Reclamation would be required to comply with D-1641 during storm events, and that their pumping could be increased over 1500 cfs only when there were natural or abandoned flows in the Delta, or there was transfer water being moved.

From February 1 to June 30, D-1641 establishes a Delta outflow range from 7100 to 29,200 cfs. This range is desired to move the location of X2, which is water of a certain specified salinity level that is viewed as providing suitable habitat for the Delta smelt, an endangered species of fish. Although the smelt is a fish, biologists say it is not a good swimmer, and therefore high levels of outflow are required to keep the smelt from becoming entrained in the water export pumps and killed. As noted above, though, D-1641's numeric outflow standards are unfortunately devoid of any link to the actual water available in the system. Again, this year, the standards set in deference to academics proved far too high for the system to provide in the real world. Accordingly, the February 28, 2014 Order continued the adjusted Delta outflow level of 3000 cfs through the end of March.

Moreover, the 2014 real-world data strongly suggests that this standard lacks any valid scientific basis. Not a single juvenile or adult Delta smelt was taken at the CVP or SWP pumping facilities through the end of March. In other words, the best available scientific data from 2014 shows that the fish this standard was adopted to protect were nowhere in the vicinity when this water passed the pumps and flowed out to the ocean. It appears that the hypothesis that Delta smelt are "always" in this part of the Delta in February and March is incorrect and must be adjusted.

The March 18 Order indicates that it was intended to allow the CVP and SWP to take advantage of the storm events that had occurred in order to move more water south of the Delta where it was most needed. The March 18 Order permitted exports of natural and abandoned flows up to the Export Limits contained in Table 3 of D-1641, when precipitation and runoff events occurred that allowed the DCC Gates to be closed and the projects were in compliance with the flow or salinity requirements included in footnote 10 of Table 3 in D-1641. Unfortunately, though, the CVP and SWP actually *lost* water as a result of this action because the National Marine Fisheries Service and the United States Fish and Wildlife Service demanded a "payback" for the

increased pumping during the storm events. According to the CVP contractors' calculations, the volume of water lost through foregone pumping demanded by the fishery agencies exceeded the volume that was captured and moved to San Luis Reservoir during and following the brief storm events in March. What makes this situation particularly disheartening to the water contractors damaged by these demands is that there was no biological justification for them. The best available data show that the number of salmon taken at the pumps was just 1% of the established safe and legal limit, and, as noted above, the number of Delta smelt taken by the pumps through the end of March was zero.¹

The March 18 Order also removed the "health and safety" restriction on CVP and SWP water use, so Friant understands that this is no longer an issue at this time.

On April 8, Reclamation and DWR prepared a Drought Operations Plan. Unfortunately, the Drought Operations Plan was based on a hydrological forecast from March, so it did not include any of the gains from the March storms and was a month out of date even when it was issued. For this reason, the SWRCB's April 9 Order merely extended the Delta outflow modifications of the March 18 Order into April, and noted that a comprehensive update to the Order would be issued in the near future to address other parts of the Drought Operations Plan, once DWR and Reclamation updated it to reflect existing conditions.

The April 11 Order required Reclamation, from April 11 through June, to provide minimum San Joaquin River flows at Vernalis of no less than 700 cfs on a 3-day average until the start of a 31-day pulse flow period occurring during April and May. During the pulse flow period, the Order requires that minimum flows be no less than 3300 cfs for 16 days and 1,500 cfs for the remaining 15 days of the 31 day pulse flow period, or a pulse or pulses with an equivalent flow volume that is approved by the fisheries agencies. From the end of the pulse flow period through the end of May, San Joaquin River flows at Vernalis are required to be no less than 500 cfs. For June, Reclamation is required to operate to achieve the applicable NMFS Biological Opinion

¹ As hinted above, at various times during February and March, as conditions changed, so did which regulation was controlling and limiting Delta pumping. Some of the water that was foregone was lost due to the imposition of D-1641 standards, and some of it was lost due to the Biological Opinions for the Delta smelt and the salmonids and the refusal of the National Marine Fisheries Service and the U.S. Fish and Wildlife Service to either initiate emergency consultation procedures as warranted by the severity of the drought (which is, by definition, an Act of God) or adjust the existing regulatory standards to reflect the best available scientific data that the fish were not being harmed (as that term is defined in the ESA) by the export pumping operations.

flows, dissolved oxygen requirements on the Stanislaus River at Ripon, and D-1641 salinity requirements at Vernalis on the San Joaquin River. This Order required Reclamation to make extensive releases from New Melones to meet standards at Vernalis, but did not allow Reclamation to capture any of the water that would be released from storage and export it for use south-of-Delta.

Finally, the April 18 Order allows for exports of 100% of the 3-day average of San Joaquin River flows at Vernalis or 1500 cfs – whichever is greater. According to the Order, this is intended to allow both Reclamation, which is releasing this water from storage and pumping it through its own pumping facilities, and DWR, which is doing neither, to capture this water for export south-of-Delta.

At no time has the SWRCB conducted any adjudicatory hearing related to any of these proceedings, nor has it made any findings related to the water rights priorities thereby affected.

III. PROTEST

Friant Water Authority and its member districts protest and object to the State Board's Order because: (1) the Order is not within the SWRCB's jurisdiction; (2) the Order is contrary to law; and (3) the Order violates the prior appropriation doctrine and injures the prior rights of the Friant Division contractors by allowing junior water users to take water even though the senior water rights of the Exchange Contractors have not been satisfied. Each ground of this Protest and Objection will be discussed in more detail below.

A. The State Board's Order Is Not Within Its Jurisdiction and Is Contrary to Law

1. The SWRCB's Staff Has No Power to Make These Orders That Effectively Deprive Friant of Its Water Rights

To amend a water quality control plan, the SWRCB must conduct a regulatory proceeding to amend a water quality control plan, as well as an adjudicative proceeding to assign responsibility to the water users for meeting the water quality objectives in the plan. *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 729 & n. 21 (2006), citing *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 119 (1986). To date, the SWRCB has failed to take these steps this year. Rather, all of the orders have been adopted by SWRCB staff, and at no time has any stakeholder been afforded the opportunity for an adjudicative hearing, even though the Orders have the effect of overturning the prior appropriation doctrine and depriving

Friant of its property rights. Protestants are unaware of any statute or other authority allowing SWRCB staff to circumvent these legal requirements.

2. Neither Reclamation Nor the State Board Can Legally Disregard Water Rights Priority, and the Drought Operations Plan and the State Board's Orders on the TUCPs are Void to the Extent They Violate This Fundamental Rule of California Water Law

California's law of prior appropriation generally requires the SWRCB to adhere to water rights priorities. Even when the SWRCB seeks to impose water quality objectives or public trust obligations, the SWRCB cannot disregard or subvert water rights priorities without an evidentiary finding of substantial justification. *El Dorado Irrigation Dist. v. State Water Resources Control Bd.*, 142 Cal. App. 4th 937, 967 (2006).

Section 8 of the Reclamation Act of 1902 requires the United States to comply with state water laws, unless the state law is inconsistent with the clear congressional directives for the CVP. *California v. United States*, 438 U.S. 645, 650, 678 (1978); see also *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1131-32 (9th Cir. 1998) (the relevant question is whether the state water law may be implemented in a way that is consistent with federal reclamation law). There is no clear congressional directive that overcomes the undisputed default rule that Reclamation must operate the CVP, a federal reclamation project, in accordance with California law of water rights priority. *Westlands Water Dist. v. United States*, 153 F. Supp. 2d 1133, 1178 (E.D. Cal. 2001). California's appropriative water rights system is founded upon the principle of "first in time is first in right." *Id.* [citations omitted]. The state-granted water rights establish the Exchange Contractors' senior priority over later water users, and Reclamation must honor this priority and adhere to the seniority of its state-issued water rights. *Westlands*, 153 F. Supp. 2d at 1178.

Despite Reclamation's clear legal obligation to protect the seniority of the Exchange Contractors' water rights, both the TUCP jointly filed by Reclamation and DWR and the subsequent orders issued by the State Water Resources Control Board abrogate this priority. Specifically, the orders purport to approve the Drought Operations Plan. The Drought Operations Plan provides for Reclamation and DWR to split the water exported from the Delta even though this has the effect of allowing DWR to take water under its *junior* water rights

permits before Reclamation's *senior* water rights have been satisfied. Thus, both the petition and the Orders disregard this senior priority and violate California water law.

The Drought Operations Plan proposed by Reclamation and approved by the SWRCB's Order also violates water rights priority in that it purports to allow CVP wildlife refuges to take water under their CVP contracts before any CVP yield has been developed. To construct the CVP and SWP, Reclamation and DWR first had to make deals to protect and satisfy the senior water rights holders who held perfected rights to waters from the streams they sought to impound. For the CVP, this required Reclamation to reach agreements with the senior water rights holders on the Sacramento River (the Sacramento River Settlement Contractors) and on the San Joaquin River (the Exchange Contractors).

Significantly, Reclamation cannot develop *any* CVP yield until it has fulfilled its mandatory obligations to deliver water to the senior water rights holders, including the Exchange Contractors. "Substitute water delivered to the Exchange Contractors is not 'available water' [for the CVP contractors] because such water is a vested priority obligation the Bureau must satisfy without including it in CVP available supply." *Westlands Water District v. United States of America*, 337 F.3d 1092, 1103-04 (9th Cir. 2003) ("*Westlands VII*"), approving the District Court's holding in *Westlands Water Dist. v. United States*, 153 F. Supp. 2d 1133, 1165 (E. D. Cal. 2001) ("*Westlands VI*"). In other words, Reclamation must provide the water owed to the Exchange Contractors (and the other senior water rights holders) as a condition prerequisite for it to be able to develop any CVP yield. The SWRCB extensively discussed and approved this arrangement in D-935 and D-990.

Under the Section 3406(d) of the Central Valley Project Improvement Act, the national wildlife refuges were given permanent CVP contracts. *Id.* Under this section, the wildlife refuges are entitled to priority when CVP yield is allocated. However, when the Exchange Contractors' senior water rights have not been satisfied and there is no CVP yield, the wildlife refuges, like all other CVP contractors, are entitled to nothing.

To the extent the Drought Operations Plan or the SWRCB's Orders suggest that Reclamation has discretion to withhold water from delivery to the Exchange Contractors, they are incorrect. Reclamation has no such discretion. Likewise, to the extent the Drought Operations Plan or the SWRCB's Orders purport to allow Reclamation to deliver water to junior water users (including the wildlife refuges and the SWP) when the

Exchange Contractors' senior water rights have not been satisfied, they violate California's prior appropriation doctrine.

The Order must be modified to provide that (1) the first water pumped from the Delta (including the volume of all natural and abandoned flow) will be supplied to the Exchange Contractors, and (2) no water may be delivered to any SWP or CVP water service contractors, including the wildlife refuges, until the Exchange Contractors' senior water rights have been fully satisfied.

B. Friant Division Contractors Are Legal Users of Water Under Reclamation's Permits, and the Terms of the Order Injure Their Interests

As noted in our prior protest, the Friant Division contractors hold contracts that entitle them to CVP supplies developed on the San Joaquin River after satisfaction of the Exchange Contractors' senior water rights. Article 3(n) of each of the contracts between Reclamation and each Friant Division long-term contractor reflects this arrangement:

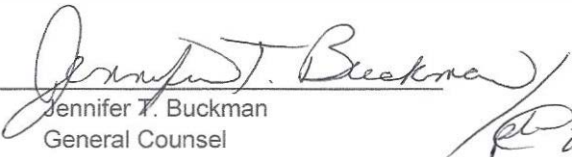
(n) The rights of the Contractor under this Contract are subject to the terms of the contract for exchange waters, dated July 27, 1939, between the United States and the San Joaquin and Kings River Canal and Irrigation Company, Incorporated, et al., (hereinafter referred to as the Exchange Contractors), Contract No. Ilr-1144, as amended. The United States agrees that it will not deliver to the Exchange Contractors thereunder waters of the San Joaquin River unless and until required by the terms of said contract, and the United States further agrees that it will not voluntarily and knowingly determine itself unable to deliver to the Exchange Contractors entitled thereto from water that is available or that may become available to it from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta those quantities required to satisfy the obligations of the United States under said Exchange Contract and under Schedule 2 of the Contract for Purchase of Miller and Lux Water Rights (Contract Ilr-1145, dated July 27, 1939).

Under this provision of the contracts, Reclamation has contractually bound itself not to "voluntarily and knowingly" render itself unable to deliver water to the Exchange Contractors such that the Friant Division

contractors' rights are compromised. To the extent the Drought Operations Plan and the Orders allow delivery of water to junior water rights holders such as the wildlife refuges and the SWP contractors before Reclamation has satisfied the Exchange Contractors' senior water rights, they deprive the Friant Division of the entirety of its CVP water supplies and critically injure the Friant contractors' legally protected contract rights.

DATED: April 28, 2014

FRIANT WATER AUTHORITY

By 
Jennifer T. Buckman
General Counsel

STATEMENT OF SERVICE

Notice of this Protest and Objection, and in the alternative, Petition for Reconsideration, has been served by email upon SWRCB, Reclamation and the Department of Water Resources as follows:

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

Department of Water Resources
c/o James Mizell
P.O. Box 942836
Sacramento, CA 94236-0001
James.Mizell@water.ca.gov

Regional Solicitor's Office
c/o Amy Aufdemberge
2800 Cottage Way, Rm. E-1712
Sacramento, CA 95825
Amy.Aufdemberge@sol.doi.gov

U.S. Bureau of Reclamation
Paul Fujitani
3310 El Camino Ave., Room 300
Sacramento, CA 95821
pfujitani@usbr.gov