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BEFORE THE
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Public Hearing,

Consideration of (1) Alternatives to
Implement Water Quality Objectives for the
San Francisco Bay/Sacramento-San Joaquin
Delta Estuary, (2) a Petition to Change Points
of Diversion of the Central Valley Project and
the State Water Project in the Southern Delta,
and (3) a Petition to Change Places of Uses
and Purposes of Use of the Central Valley
Project [Bay-Delta Water Rights Hearing]

**REPLY BRIEF OF WESTLANDS WATER
DISTRICT FOR PHASES TWO THROUGH
SEVEN**

I.
INTRODUCTION

In the State Water Resources Control Board's ("Water Board") May 6, 1998, Revised Notice of Public Hearing, the Water Board provided any party with the right to submit a brief at the close of each phase. Pursuant to this authority, parties have submitted closing briefs for each of the phases that have been completed. Several of the briefs filed with the Water Board made arguments to which Westlands Water District ("Westlands" or "District") requested an opportunity to reply. By an order dated June 21, 1999, the Water Board granted Westlands' request. Accordingly, Westlands submits this reply brief.

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II.
ARGUMENT

A. Many of the parties to this hearing mischaracterize the county-of-origin and watershed statutes.

The closing briefs filed by several of the parties grossly overstate the applicability of the county-of-origin and watershed protection statutes. For example, Central Delta Water Agency ("CDWA") in support of its position that the Interim Operation Plan for New Melones Reservoir is contrary to law, unconditionally asserts:

The 'Interim Operation Plan' violates Water Code section 11460 in that project water which is otherwise needed to meet water quality needs in the 'areas of origin' is being used to meet fish flow requirements at Vernalis . . .

(CDWA, Phase 2A Closing Brief at 6:7 to 6:9.) CDWA's argument ignores the fact that using Stanislaus River water to meet fish flow requirements at Vernalis would be a beneficial use of water within the "area of origin" to the same extent as using Stanislaus River water to meet water quality standards at Vernalis would be a beneficial use of water within the "area of origin." (See Water Code, § 1243.)

Similarly, the Phase 2A closing brief filed by the City of Stockton states that solely

[b]ecause of its location within the watershed of the San Joaquin River, within the watershed of the Calaveras River, and within an area immediately adjacent to the watershed of the Stanislaus River, Stockton is entitled to the protection of Water Code sections 11460 *et seq.*, which protect beneficial uses in watersheds of origin from the operation of the Central Valley Protect and State Water Project.

(City of Stockton, Phase 2A Closing Brief at 2:17 to 2:21.)

The Phase 7 closing brief filed by the Tehama-Colusa Canal Authority ("TC Authority") also exaggerates the rights of its member agencies under principles of "area of origin." Based on an interpretation of the watershed protection statutes for which it cites no authority, the TC Authority opposes the United States Bureau of Reclamation's ("Reclamation") petition to consolidate and conform the place of use of all its CVP water right permits "unless the Board imposes adequate conditions that will assure Reclamation meets its entire area-of-origin

1 obligation, including the obligation to deliver water supplies to its CVP contractors in the Basin.”
2 (TC Authority, Phase 7 Closing Brief at 3-4.) The fallacy of the TC Authority’s argument is that
3 the watershed protection statutes do not impose on Reclamation an affirmative obligation or duty
4 to supply water to users in the areas of origin.¹ Rather, the watershed protection statutes create an
5 inchoate right, which protects water users in the areas of origin from operation of the CVP. (25
6 Ops.Atty.Gen. 8 (1955).)

7 Watershed protection statutes are found in various divisions of the Water Code.
8 (See generally Water Code, §§ 1215 *et seq.*; 11460 *et seq.*) The watershed protection statutes
9 that apply to operation of the CVP provide:

10 In the construction and operation by the department of any project
11 under the provisions of this part a watershed or area wherein water
12 originates, or any area immediately adjacent thereto which can
13 conveniently be supplied with water therefrom, shall not be
14 deprived by the department directly or indirectly of the prior right
15 to all of the water reasonably required to adequately supply the
16 beneficial needs of the watershed, area, or any of the inhabitants or
17 property owners therein.

18 (Water Code, § 11460.)

19 In the construction and operation by the department of any project
20 under the provisions of this part, no exchange of the water of any
21 watershed or area for the water of any other watershed or area may
22 be made by the department unless the water requirements of the
23 watershed or area in which the exchange is made are first and at all
24 times met and satisfied to the extent that the requirements would
25 have been met were the exchange not made, and no right to the use
26 of water shall be gained or lost by reason of any such exchange.

27 (Water Code, § 11463.) These provisions of the Water Code are made applicable to
28 Reclamation’s operation of the federal CVP by Water Code section 11128, which states:

The limitations prescribed in Section 11460 *and* 11463 shall also
apply to any agency of the State or Federal Government which shall

¹ WR Decision 990 does contain language from which it can be inferred that the Water Board interpreted the watershed protection statutes as imposing an obligation on Reclamation to supply water to users through contract. (WR Decision 990 at 73.) If this were indeed the Water Board’s interpretation, it was based on the mistaken view that Water Code section 11128 made “sections 11460 to 11463” applicable to Reclamation. (*Id.* at 71 (emphasis added).) However, as explained, *infra*, section 11128 does make Water Code section 11462 applicable to Reclamation. Rather, section 11128 makes the “limitations prescribed by sections 11460 *and* 11463” applicable to Reclamation’s operation of the federal CVP. (Water Code, § 11128 (emphasis added).)

1 undertake the construction or operation of the project, or any unit
2 thereof, including, besides those specifically described, additional
3 units which are consistent with and which may be construed,
maintained, and operated as a part of the project and in furtherance
of the single object contemplated by this part.

4 (Emphasis added.)

5 Neither section 11460 nor section 11463 imposes an obligation on Reclamation to
6 contract with water users in the watershed or area of origin. The language of section 11462 does
7 impose such an obligation on the California Department of Water Resources ("DWR"). Section
8 11462 provides:

9 The provisions of this article shall not be so construed as to create
10 any new property rights other than against the department as
11 provided in this part or to require the department to furnish to any
person without adequate compensation therefor any water made
available by the construction of any works by the department.

12 However, section 11462 does not apply to Reclamation's operation of the federal
13 CVP; only sections 11460 and 11463 apply. (See Water Code, § 11128.) Water Code section
14 1217 also imposes an obligation on entities that export water from a "protected area" to sell water
15 "for adequate compensation" to water users in the "protected area." (Water Code, § 1217.)
16 However, like section 11462, section 1217 does not apply to Reclamation's operation of the
17 federal CVP. (Water Code, § 1215.)

18 Sections 1217 and 11462 indicate that when the Legislature intended to create a
19 right for water users in a watershed or area of origin to purchase water from an export project, the
20 Legislature was able to craft language to express that intent in unambiguous terms. Had the
21 Legislature intended that section 11462 apply to Reclamation's operation of the federal CVP, it
22 could have expressed that intent in section 11128, but it did not. The Legislature's exclusion of
23 Reclamation's operation of the federal CVP from the scope of these statutes' application
24 establishes that the Legislature did not intend to impose an affirmative obligation or duty on
25 Reclamation to supply water to users in the watershed or area of origin. (See *David A. v. Superior*
26 *Court* (1994) 20 Cal.App. 4th 281 (the express inclusion of one class of actions implies the
27 exclusion of others).)²

28 ² The rules governing statutory construction are well-established; the objective is to ascertain and

1 Even if section 11462 of the Water Code were applicable to Reclamation's
2 operation of the federal CVP, its application would not lead inexorably to the conclusion that
3 Reclamation is obligated to contract with water users in the TC Authority service area for
4 additional water. Section 11462 states that the watershed protection statutes "shall not be so
5 construed as . . . to require the department to furnish to any person *without adequate*
6 *compensation* therefor any water made available by construction of any works by the
7 department." (Water Code, § 11462 (emphasis added).)

8 The witnesses who appeared on behalf of the TC Authority testified that water
9 users served by members of the TC Authority could not afford to pay the full cost of the water
10 they already receive. (Reporter's Transcript, ("R.T."), at 12902-911, 12939, TC Authority
11 Exhibit 6 at 4:9 to 4:11, Exhibit 8 at 4:11 to 4:13, Exhibit 9 at 4:11 to 4:13.) Indeed, the TC
12 Authority submitted a repayment capacity study which concluded that TC Authority members
13 lacked capacity to pay adequate compensation for CVP water. (TC Authority Exhibit 19.)
14 Witnesses appearing on behalf of the TC Authority did testify they expected that an additional
15 water supply would improve their repayment capacity, but on cross-examination they conceded
16 they had no information on which to base this expectation. (R.T. 12939-942.) Section 11462
17 could not be interpreted as imposing an obligation on Reclamation to supply without adequate
18 compensation more water to TC Authority members.

19 In support of its argument that the area-of-origin statutes provide preference to
20 CVP contractors in the Sacramento Valley over contractors in the export areas, the TC Authority
21 also cites Water Right Decision 1635. (TC Authority, Phase 7 Closing Brief at 18.) However,
22 that Decision does not support the TC Authority's argument. The proceedings that resulted in
23 Decision 1635 resulted from a petition by El Dorado County Water Agency and El Dorado
24 Irrigation District for a partial assignment of a state filed application. (WR Decision 1635 at 2.)
25 It was not a case in which El Dorado, a CVP contractor, attempted to exercise an area-of-origin
26 right through its contract with Reclamation.

27 effectuate legislative intent. (*City of Huntington Beach v. Board of Administration* (1993) 4 Cal.App.4th
28 462, 468 (citation omitted).) In ascertaining and effectuating legislative intent, it is inappropriate to insert
into a statute that which has been omitted. (Code of Civ. Proc., § 1859.)

1 In Decision 1635, the Water Board stated:

2 The Board recognizes that granting water rights to El Dorado, an
3 in-basin water user, will reduce the Bureau's ability to export water.
4 *However, this is what was intended by the Legislature when it*
5 *passed the watershed protection statutes. (Water Code Sec. 11460*
6 *et. seq.) Any significant water supply impacts to the Bureau's*
7 *export customers are overridden by the Board's legal requirements*
8 *to reallocate water supplies to the watershed of origin for CVP*
9 *projects pursuant to the watershed protection statutes.*

10 (WR Decision 1635 at 116 (emphasis added).) If the TC Authority or its members want to obtain
11 a priority for their use of water over CVP export contractors, the TC Authority or its members can
12 follow the procedure used by El Dorado. They can file an application to appropriate water or
13 seek an assignment of a state filed application. Then, any water right that results from the
14 application would have priority over permits held by Reclamation. (WR 95-6 at ¶ 3-3.2 (to obtain
15 benefit of watershed protection statutes, water users in protected areas could file a water right
16 application and receive a permit with seniority over rights of DWR and Reclamation to export
17 water).) In such circumstances, neither Reclamation's operation of the CVP nor allowing the use
18 of CVP water in a consolidated place of use would deprive the TC Authority or its members of
19 their prior right to water. Moreover, Reclamation's operation of the CVP would be consistent
20 with all of the historical statements quoted by the TC Authority, that operation of the CVP would
21 not deprive the area of origin with water needed in that area.

22 **B. PHASE 2 and 2(A) – The Water Board received evidence and legal argument from**
23 **parties addressing the manner in which responsibility for achieving the flow-**
24 **dependant objectives for the San Joaquin River should be assessed.**

- 25 1. Central Delta Water Agency and South Delta Water Agency will not be injured if
26 the flow dependent objectives are achieved by implementation of the San Joaquin
27 River Agreement.

28 In their Phase 2(A) closing briefs, CDWA and South Delta Water Agency
("SDWA") (collectively "Agencies") continued to argue that the San Joaquin River Agreement
("SJRA" or "Agreement") cannot be implemented because if the terms of the Agreement were
satisfied, the rights held by water users within their service areas will be adversely impacted.
(CDWA, Phase 2A Closing Brief at 3:23 to 3:28; SDWA, Phase 2A Closing Brief at 11:26 to
12:3.) However, neither the evidence nor the law supports their claim.

1 The SJRA provides that all water for instream use will be purchased from
2 members of the SJRGA or other willing sellers. (SJRGA Exhibit 2 at ¶¶ 5.0, 8.0.) Settling
3 parties will be obligated to the terms set in the Agreement and non-settling parties will be
4 protected from bearing any flow responsibilities that would have been assigned to the settling
5 parties absent the settlement. (SJRGA Exhibit 2 at ¶¶ 5.0, 6.0; DWR Exhibit 39 at 2; R.T.: 8690-
6 692.) Reclamation and DWR will “assume responsibility, for the term of this Agreement, for the
7 San Joaquin River Portion of the 1995 WQCP objectives. . . .” (SJRGA Exhibit 2 at ¶ 10.1.1.
8 *See also id.* at ¶ 10.1.2; Interior Exhibit 103; DWR Exhibit 39 at 2; R.T.: 8690-692, 9988.) This
9 obligation exists even if the Agreement is terminated. (SJRGA Exhibit 2 at ¶ 10.1.2; R.T.: 8692.)
10 Non-settling parties in the San Joaquin River watershed will not be assessed any of the
11 responsibility for implementation of the SJRA. (SJRGA Exhibit 2 at ¶¶ 5.0, 6.0; R.T.: 8690-692,
12 9988-989, 9992-995.)

13 Further, no instream beneficial uses of water will suffer specific injury from
14 adoption of the SJRA. The additional water needed for satisfaction of the pulse flow as required
15 by the 1995 WQCP will result from reductions in surface water diversion and by foregoing or
16 releasing water from storage. (SJRGA Exhibits 104 at 1; 107 at 3; 108 at ¶¶ 2-7; 109 at ¶ 9.2;
17 113.) These measures result in “real” water being made available to satisfy the terms of the
18 Agreement. (*Id.*)

19 CDWA and SDWA also persist in alleging that their members will suffer if the
20 SJRA is implemented because the foregone or released storage used to satisfy the flow objectives
21 will deprive them of water at a later time. (*See* CDWA, Phase 2A Closing Brief at 3:23 to 3:28;
22 SDWA Exhibit 27 at 6; R.T.: 283-85, 353-355, 430-31, 8228-229.) The Water Board, however,
23 has already determined that a change in the timing of releases from upstream reservoirs cannot
24 form the basis of injury. By WR Order 97-05, the Water Board held: “A downstream water right
25 holder cannot require that the owner of an upstream reservoir release water appropriated during
26 another season.” (WR Order 97-05 at ¶ 5.2.5 (*citing Lindblom v. Round Valley Water Co.* (1918)
27 178 Cal. 450).) The Water Board explained:
28

1 Riparian rights attach only to the natural flow of the stream.
2 Riparian rights do not attach to water that someone has stored from
3 an earlier season and released or that someone has brought in from
4 another watershed.

5 (WR Order 97-05 at ¶ 5.2.6 (citing *Lux v. Haggin* (1884) 69 Cal. 255; *Bloss v. Rahilly* (1940) 16
6 Cal.2d 70).) The evidence presented during Phases 2 and 2(A) is clear: Implementation of the
7 SJRA will not unreasonably affect or substantially injure any legal user of water or instream
8 beneficial uses.

9 **C. PHASE 5 – Noticed to address the manner in which the dissolved oxygen and**
10 **southern Delta salinity objectives should be achieved.**

- 11 1. The allegation raised by the County of Trinity and the San Joaquin River
12 Exchange Contractors Water Authority that Westlands' use of water is not
13 reasonable or beneficial is unsubstantiated and contrary to testimony presented
14 during this hearing.

15 In the Phase 5 closing brief filed by the San Joaquin River Exchange Contractors
16 and the Phase 5 and Phase 7 closing briefs filed by the County of Trinity, the allegation is made
17 that the use of water in the San Luis Unit of the CVP, which includes Westlands, without the
18 completion of the San Luis Drain constitutes waste and unreasonable use. (Exchange
19 Contractors, Phase 5 Closing Brief at 37, 40, 43; Trinity County, Phase 5 Closing Brief at 2, 8-13;
20 Phase 7 Closing Brief at 6-8.) Although Westlands agrees that completion of the Drain is vitally
21 important to agricultural on the west side of the San Joaquin Valley, neither the law nor the facts
22 support the allegations of waste and unreasonable use made by the Exchange Contractors and
23 Trinity County. In addition, there is no evidence to support the claim made by the Exchange
24 Contractors that the application of surface water for irrigation of lands in Westlands exacerbates
25 salinity problems in the San Joaquin River.³

26 ³ The Exchange Contractors' Phase 5 closing brief contains allegations concerning the San Luis Unit
27 generally and Westlands specifically. (Exchange Contractors, Phase 5 Closing Brief at 3, 8, 9, 37, 38.)
28 The San Luis Unit is comprised of Westlands, Panoche Water District, and San Luis Water District. In
addition, Broadview Water District receives CVP water from facilities of the San Luis Unit. Panoche, San
Luis, and Broadview all participate in the Grasslands Drainers' By-pass Project, which was the subject of
substantial evidence introduced during Phase 5. (See, e.g., R.T.: 4317-318, 4475, 5814-815; 5844-846,
6077.) As participants in this project, these entities are involved in the same efforts as the Exchange
Contractors to reduce the selenium load entering the San Joaquin River. In light of these joint efforts and
in light of the settlement agreement executed on December 7, 1998, among the Exchange Contractors,
Broadview, Panoche, and Westlands, which provides that each party covenants not to take a position in
any administrative proceeding that is adverse to other parties on issues related to agricultural drainage,

1 Ample evidence presented during this hearing demonstrates that the lands within
2 Westlands service area do not discharge drainage water, tailwater or tile water, outside of its
3 boundary. (R.T.: 7232-233, 7245, 7302-305.) Westlands' tailwater is controlled through on-farm
4 reuse programs, (R.T.: 7528), and all tile water generated by farmers in Westlands is contained
5 within the District's boundaries. (R.T.: 7232-233, 7245.)

6 Although no drainage system exists, farmers in Westlands are able to continue to
7 farm the lands by carefully managing their use of water. The farmers maintain water levels below
8 the crop root zone by applying, on average, less water for irrigation than is required by the crops
9 that are planted. (R.T.: 7306.) As a result, water applied for irrigation in Westlands moves in a
10 general downward direction. (R.T.: 7302.) And while water may flow in the "shallow lenses
11 between Westlands and the Firebaugh Canal Water District," any lateral movement of
12 groundwater from Westlands does not reach the San Joaquin River. (*Compare Exchange*
13 *Contractor Exhibit 5(a) at 26:13 to 26:16 with R.T.: 7299.*)

14 Even Steven Deverel, Ph.D., the expert witness called by the Exchange
15 Contractors, agreed that water applied in Westlands does not reach the San Joaquin River.
16 During cross-examination by counsel for CDWA, Dr. Deverel testified as follows:

17 MR. NOMELELLINI: Can these flows that we talked about that go
18 across the boundary of Westlands into the Firebaugh Canal Water
District find their way to the San Joaquin River?

19 DR. DEVEREL: No.

20 MR. NOMELELLINI: What happens to those flows, and why is it
21 that they do not get to the river?

22 DR. DEVEREL: Well, the primary reason is that the hydraulics
23 gradients are such that flow shifts tend to flow downward once you
get past or somewhere in Firebaugh Canal Water District. So,
somewhat of a complicated hydraulic or hydrologic situation.

24 At the boundary of Firebaugh and Westlands and into Firebaugh
25 you have upward flow at some depth to the surface to drainage
laterals. But there is a point in Firebaugh and beyond Firebaugh

26 (Westlands Exhibit 99 at 11), the only reasonable conclusion is that by their allegations, the Exchange
27 Contractors are attempting to create a false sense of simple frankness. If the Exchange Contractors'
28 purpose was to convince the Water Board that drainage is a regional problem and that there is a great need
for the San Luis Drain, positions with which Westlands agrees, these points could have made by saying
something other than "the fault is everyone's but our own."

1 where, as you move closer to the river, water starts flowing
2 downward and to the east. Flows in a manner that goes underneath
3 the river. There is not accretion; at least the data I have seen does
4 not indicate that there is accretion of groundwater to river in that
5 area.

6 MR. NOMELLINI: Could you show us on Westlands 97 where
7 that area is.

8 DR. DEVEREL: One would look at this area here that we just
9 talked about. This is the four-mile boundary of Firebaugh with
10 Westlands.

11 As you can see, water can flow across that boundary. But, in
12 general, it does not flow to the river here. Because of pumping that
13 takes place on the east side of the river, groundwater flows
14 downward and towards the pumping trough that tends to exist over
15 here.

16 MR. NOMELLINI: So there is a gradient that would take the water
17 to the low point of that pumping trough or hole, and that is below
18 the flow line to the river?

19 DR. DEVEREL: That's right.

20 (R.T.: 7734:7-7735:16.)

21 Many of Dr. Deverel's opinions, on which the Exchange Contractors base their
22 arguments, concern the impact of applying irrigation water on upslope lands and increased
23 pressure resulting therefrom on the downslope water table. (Exchange Contractors Exhibit 5(A)
24 at 26-27.) These opinions were based on a study conducted by Dr. Deverel in Broadview Water
25 District. (Exchange Contractors Exhibit 5(A) at 27-29; Exchange Contractors Exhibit 4(G); R.T.
26 7665-666.) On cross-examination, Dr. Deverel explained that the field in which he conducted his
27 study was three miles from Westlands, (R.T.: 7986:10), and it would take approximately 200
28 years for water from Westlands to migrate downslope to that field. (R.T.: 7987:1.)

29 Moreover, Dr. Deverel's testimony directly contradicts the Exchange Contractors'
30 contention that the downslope migration of water from the Westlands service area "is a
31 significant source of highly saline and selenium enriched water which appears in the drains of the
32 Firebaugh Canal Water District and the Camp 13 area." (Exchange Contractors, Phase 5 Closing
33 Brief at 37-38.) During cross-examination, Dr. Deverel acknowledged that the application of
34 water for irrigation in Westlands does not significantly affect the quality or quantity of

1 groundwater in the Firebaugh Canal Water District or the Camp 13 service area. (R.T.: 8029.)

2 The following exchange occurred during the cross-examination:

3 MR. BIRMINGHAM: . . . Now, when we talk about upslope areas,
4 and you mentioned this very briefly yesterday, Dr. Deverel, but
5 when we talk about upslope areas we're talking about areas that are
6 upgradient from which there is a water table that applies pressure,
7 or through water can move downgradient; is that correct?

8 DR. DEVEREL: That's basically true.

9 MR. BIRMINGHAM: And so if I point to an area, Camp 13 on
10 Westlands' 97 -- maybe it would be easier if I used Exchange
11 Contractors' Exhibit 4G.1. Now, Camp 13 is basically at the
12 bottom of the groundwater gradient; is that right, Dr. Deverel?

13 DR. DEVEREL: In terms of drained areas, yes, it is. There are
14 other areas that are further downgradient past Camp 13, but
15 generally there are no drainage systems there. The water table
16 drops off as you go east.

17 MR. BIRMINGHAM: And upgradient of Camp 13 is the
18 Firebaugh Canal Water District?

19 DR. DEVEREL: That's right.

20 MR. BIRMINGHAM: And so the application of irrigation water in
21 Firebaugh Canal Water District creates pressure which adds to the
22 need for drainage in Camp 13 of Central California Irrigation
23 District?

24 DR. DEVEREL: That's true.

25 MR. BIRMINGHAM: And upslope of Firebaugh Canal Water
26 District there are areas of Panoche Water District, Broadview Water
27 District and Westlands Water District?

28 DR. DEVEREL: That's right.

MR. BIRMINGHAM: And the application of irrigation water in
Panoche Water District, Broadview Water District and Westlands
Water District can create pressure giving rise to the need for
additional drainage in Firebaugh Canal Water District?

DR. DEVEREL: That's true.

MR. BIRMINGHAM: And upslope of Broadview Water District
there are areas of Westlands Water District?

DR. DEVEREL: Yes, that's true.

MR. BIRMINGHAM: And, now, to be more specific, the areas
within Westlands Water District that are upslope of Broadview

1 Water District, are those areas that are east of the groundwater
2 divide?

3 DR. DEVEREL: That is true.

4 MR. BIRMINGHAM: And you testified earlier that the
5 groundwater divide on the cross-section marked P6 F1 on Exchange
6 Contractors' Exhibit 4G.1 is a little bit to the east of the area marked
7 F1; is that correct?

8 DR. DEVEREL: That was true when the groundwater divide was
9 mapped in 1984, yes.

10 MR. BIRMINGHAM: So it would be those areas that are to the
11 east or northeast of F1 that are upslope of - let me restate the
12 question.

13 It would be those areas in Westlands that are to the east or
14 northeast of the point F1 that are upslope of Broadview Water
15 District?

16 DR. DEVEREL: In general, that's true. I'm not sure about the
17 position of the groundwater divide today, but that's the approximate
18 location of the groundwater divide. It could be shifted to the west a
19 little bit.

20 MR. BIRMINGHAM: And it would have shifted to the west a little
21 bit as a result of the application of additional irrigation water?

22 DR. DEVEREL: That's right. The water levels have continued to
23 rise and that would shift the groundwater divide to the west, in
24 general.

25 MR. BIRMINGHAM: And it's the pressure that is created by the
26 buildup of the water table which in part gives rise to the need for
27 drainage within Camp 13, Firebaugh Canal Water District,
28 Broadview Water District and Westlands Water District?

DR. DEVEREL: That's right.

(R.T.: 8022-024.) The cross-examination continued:

MR. BIRMINGHAM: Now, in response to a question by Mr.
Minasian you stated that the influence of the upslope water
pressure, using your words, 'decays exponentially as we move
away from the source.' Do you recall stating that to Mr. Minasian?

DR. DEVEREL: That is true.

MR. BIRMINGHAM: Can you, please, tell us what you meant by
'decays exponentially as we move away from the source'?

DR. DEVEREL: In general, it's a hydraulic principle of
groundwater that the affects of pressure are most clearly seen, if
you will, at those locations that are closest to the area of a change in
pressure. In other words, if you pump a well, for example, there's a

1 drawdown that occurs that's exponential to the location of the
2 drawdown. So very close to the well you'd see a very strong affect,
3 but as you move away from the well exponentially proportional to
4 distance the pressure decreases, or the pressure affect decreases.

5 MR. BIRMINGHAM: So I take it from your answer that the affect
6 which is depicted for the non-irrigated period on Exhibit 5R is a
7 result of activities or influences on nearby adjacent fields?

8 DR. DEVEREL: That would be true that most of the affect [sic]
9 that we see here is probably the result of adjacent areas. I'm
10 unprepared to say exactly how far that influence extends, but I
11 would say, you know, adjacent fields probably.

12 MR. BIRMINGHAM: But you'd agree with me that the influence
13 that is depicted for the specific field identified, or which the
14 experiments was conducted is not a result of water pressure within
15 Westlands Water District?

16 DR. DEVEREL: Not directly, probably, no, given that this is
17 downslope of Broadview Water District.

18 (R.T.: 8028-029.)

19 The evidence clearly demonstrates that claims asserted by the Exchange
20 Contractors concerning the impact within the Firebaugh Canal Water District and the Camp 13
21 area resulting from the application of irrigation water in Westlands are greatly exaggerated.
22 There is *no* evidence that the application of irrigation water in Westlands has had any impact,
23 either direct or indirect, on the San Joaquin River. There is *no* evidence that application of
24 irrigation water in Westlands has significantly increased the need for drainage in Firebaugh Canal
25 Water District or Camp 13.

26 The fallacy in the argument presented by the Exchange Contractors and Trinity
27 County that water use in Westlands is wasteful and unreasonable is further demonstrated by the
28 extraordinary benefit that Westlands provides both to the region and the nation. For example,
29 Westlands is one of the most productive regions in the nation, harvesting over 50 different crops,
30 (Westlands Exhibit 10 at 2), producing millions of dollars worth of crops annually and generating
31 jobs, taxes and strong economic activity. (Westlands Exhibit 10 at 2.)

32 Indeed, data collected by Westlands during its long-term monitoring program
33 firmly establishes that the application of surface water in Westlands is reasonable and beneficial.
34 (R.T.: 7247-315; Westlands Exhibits 31-88, 96, 97.) The data evidences the District's highly

1 efficient distribution system, and the exceptional ability of the District's farmers to produce crops
2 with a minimum of water loss and without discharging tile or tailwater. (R.T.: 7313; Westlands
3 Exhibits 31-88, 96, 97.) Westlands' use of water is reasonable and beneficial.⁴

- 4 2. The proposal by the Exchange Contractors and the City of Stockton that fallowing
5 of lands on the west-side of the San Joaquin Valley is a solution to the drainage
6 problem is unsupported by the evidence presented during this hearing.

7 The Exchange Contractors and the City of Stockton suggest that land retirement is
8 a solution to the alleged drainage problem which contributes to the low dissolved oxygen and
9 high salinity in the San Joaquin River. However, the evidence presented during this hearing
10 demonstrates that taking land within the Westlands service area out of production is not a
11 solution.

12 As discussed above, Westlands no longer discharges drain water outside of its
13 boundary. Accordingly, the only "drainage problem" that results from the application of
14 imported water to lands within Westlands is the accumulation of salt in the crop root zone, (R.T.:
15 7241-244); a consequence of which is a reduction in crop yield. (R.T.: 7305-306.) The fallowing
16 of land, however, will have the same effect. (*Id.*) It will adversely affect the productivity of the
17 farms in Westlands. (*Id.*)

18 Land retirement not only fails to solve Westlands' "drainage problem," but such
19 action will cause severe economic impacts. The lost revenue resulting from the fallowing of just
20 400 acres of land in Westlands is approximately \$600,000. (Westlands Exhibit 7 at 3; Westlands
21 Exhibit 14 at 4.) In addition, for that same 400 acres of land removed from production, five

22 ⁴ To date, Westlands has supported the San Joaquin River Agreement as a reasonable compromise
23 concerning responsibility for meeting the San Joaquin River portion of the 1995 Water Quality Control
24 Plan for the San Francisco Bay and Sacramento-San Joaquin River Delta Estuary System. By letter dated
25 July 24, 1998, Westlands, as an agency that supported the SJRA, notified the Water Board that it would
26 not submit evidence adverse to members of the San Joaquin River Group Authority. Westlands reserved
27 the right to submit adverse evidence concerning the responsibility of these agencies for meeting the water
28 quality standards in Phase 8 if the Water Board rejected the SJRA. On this basis, Westlands did not
submit in Phase 5 of these proceedings evidence adverse to the Exchange Contractors. Westlands still
supports the SJRA. However, if based on the arguments of the Exchange Contractors the Water Board
concludes that it would be appropriate to limit in any way Reclamation's ability to deliver water to
Westlands or restricts the lands on which CVP water can be used, Westlands requests that the Water Board
withhold judgment on these issues, reject the SJRA, and include in Phase 8 issues concerning the
responsibility of San Joaquin River Group Authority members for meeting the water quality standards in
the 1995 WQCP.

1 people will likely become unemployed. (Westlands Exhibit 7 at 3; Westlands Exhibit 14 at 4.)

2 **D. PHASE 7 – Granting Reclamation’s petition to consolidate the permitted purposes of**
3 **use would injure legal users of the water involved.**

4 As part of Phase 7, the Water Board is considering Reclamation’s petition to
5 change the permitted purposes of use specified in its water right permits. If this change petition
6 were approved, each of the permits held by Reclamation would include fish and wildlife
7 enhancement as a permitted use. Westlands opposes this change because it would result in
8 reduced water supplies for farmers within its service area. Stated succinctly, if the change were
9 approved, water historically used for irrigation would be used for fish and wildlife enhancement.

10 Interior asserts that Westlands’ objection is without merit because “[n]either
11 Westlands Water District nor any other CVP water service contractor is entitled to a fixed supply
12 of CVP water during every year.” This argument is both wrong and irrelevant. Westlands’
13 objection to the proposed change is not based on its contractual rights. Rather, Westlands’
14 objection is based on the right, created under state water law, of water users within its boundaries
15 to use the water that Interior proposes to use for a new and different purpose.⁵

16 It is beyond reasonable dispute that changing the purposes of use in the permits
17 held by Reclamation to include fish and wildlife enhancement as a permitted use would reduce
18 the water supply of CVP contractors. Prior to the 1992 enactment of the Central Valley Project
19 Improvement Act, Public Law 102-575, CVP contractors south of the Delta were allocated 100
20 percent of their contractual entitlement in every year except 1977. (Westlands Exhibit 14 at 5.)
21 After Reclamation began operating the CVP to implement the fish and wildlife provisions of
22 CVPIA, contractors’ supplies have been reduced even in wet years. For instance, in 1993, a wet
23 year, contractors received only a 50 percent allocation, (*Id.* at 7), because water that historically
24 would have been provided to contractors for irrigation was used for fish and wildlife
25 enhancement. The testimony of Thomas Boardman and Stephen Ottemoeller presented the
26 results of modeling analysis that shows permitting the appropriation of water at CVP facilities for

27 _____
28 ⁵ Water Code section 35409 gives Westlands standing to take action on behalf of its landowners and water users to protect rights that may be of common benefit to lands in the district.

1 fish and wildlife enhancement will result a reduction in contractors' water supplies in virtually
2 every year. (Westlands Exhibit 14, San Luis & Delta Mendota Water Authority Exhibit 7.)
3 Interior did not present any evidence to rebut this conclusion.

4 Instead, Interior argues that under Westlands' contract, the United States may
5 reduce Westlands' allocation of CVP water in the event of a water shortage. (Interior, Phase 7
6 Closing Brief at 9-10.) Reclamation's argument implies resolution of Westlands' objection in
7 this proceeding depends on the language of Westlands' water service contract. However,
8 Westlands is not complaining that Reclamation has breached its contractual obligations. Indeed,
9 the Water Board lacks jurisdiction to resolve contractual disputes between Reclamation and a
10 contractor. (WR 95-6 at ¶ 3.3.1.) Resolution of Westlands' objection must be based on the
11 requirement of California water law, that before the Water Board approves a change in a
12 permitted purpose of use, the party seeking the change must establish and the Water Board must
13 find "that the change will not operate to the injury of any legal user of the water involved."
14 (Water Code, § 1702.)⁶

15 In its Phase 7 closing brief, the Department of Fish and Game ("Fish and Game")
16 asserts that Westlands and other CVP contractors lack standing under Water Code section 1702
17 because they are not "legal users of water." (Fish and Game, Phase 7 Closing Brief at 13:8 to
18 14:28.) This assertion is based on a letter dated September 11, 1998, which Fish and Game
19 characterizes as a determination by the Water Board that Westlands is not a "legal user of water."
20 Fish and Game's characterization of the September 11, 1998 letter is wrong: it is not a
21 determination of the Water Board. However, regardless of the letter's character, Fish and Game's
22 observation that "*title* to the water rights conferred by the permits . . . is held by [Reclamation,]
23 not by reclamation project beneficiaries," (Fish and Game, Phase 7 Closing Brief at 14 (emphasis
24 added), does not lead to the conclusion that Westlands is not a legal user of water.

25 ⁶ In support of the petition to consolidated the permitted purposes of use, Interior argues that
26 consolidation is required to implement the fish and wildlife enhancement provision of CVPIA. (Interior's
27 Phase 7 Closing Brief at 11.) Assuming that this assertion is factually correct, it does not obviate
28 Reclamation's obligation establish and the Water Board's duty to determine that the change will not injure
legal users of the water involved. (See CVPIA § 3411(a).) For the reasons explained in Westlands' Phase
7 closing brief, CVPIA did not preempt the requirements of section 1702. (See Westlands, Phase 7
Closing Brief at 16-17)

1 The fundamental principal of California water law is that a water right, regardless
2 of its origin, is a usufruct. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419,
3 441 (quoting *Eddy v. Simpson* (1853) 3 Cal. 249, 252).) "Hence, the cases do not speak of the
4 ownership of water, but only of the right to use it."⁷ (*Id.* (citing *Rancho Santa Margarita v. Vail*
5 (1938) 11 Cal. 501, 554-55).) Therefore, contrary to Fish and Game's suggestion, the question of
6 who is the "legal user of the water" involved in a change petition is not resolved by asking who
7 has title to water right permits or to the project works by which the water is appropriated. The
8 "legal user" of the water involved in a change petition must be identified by asking who, under
9 California water law, has the right to put the appropriated water to beneficial use. In this case, it
10 is the contractors who have that right.

11 Water supplied by Reclamation to Westlands and other south-of-Delta contractors
12 is appropriated pursuant to permits issued as a result of Water Right Decisions 893, 990 and
13 1020. Each of these decisions provides that the right to the use of the water involved is
14 appurtenant to the lands on which the water has been used for irrigation. (See WR Decision 893;
15 WR Decision 990; WR Decision 1020.) WR Decision 893 provides:

16 The right to divert and store water and apply said water to
17 beneficial use as provided in the permits issued pursuant to
18 Applications 13370 and 13371 is granted to the United State as
19 *Trustee for the benefit of the public agencies of the State together*
with the landowners and water users within such public agencies as
shall be supplied with the water appropriated under the permits.

20 Subject to compliance by the public agencies concerned with any
21 and all present and future valid contractual obligations with the
22 United States, *such public agencies, on behalf of their landowners*
and water users, shall, consistent with other terms of the permits,
23 *have the permanent right to the use of all water appropriated and*
beneficially used under permits issued pursuant to Applications
13370 and 13371 which right, except where water is distributed to
24 *the general public by a private agency in charge of the public use,*
shall be appurtenant to the land to which said water shall be
applied. . . .

25 (WR Decision 893 at ¶¶ 15, 16 (emphasis added).) WR Decision 990 similarly provides:

26 *The right to the beneficial use of water for irrigation purposes,*

27 ⁷ Indeed, "[a]ll water within the State is the property of the people of the State, but the right to the use of
28 water may be acquired by appropriation in the manner provided by law." (*National Audubon Society v.*
Superior Court (1983) 33 Cal.3d 419, 441 (quoting Water Code, § 102).)

1 except where water is distributed to the general public by a private
2 agency in charge of a public use, *shall be appurtenant to the land*
3 *on which said water shall be applied*, subject to continued
4 beneficial use and the right to change the point of diversion, place
5 of use and purpose of use as provided in Chapter 10 of Part 2 of
6 Division 2 of the Water Code of the State of California and further
7 subject to the right to dispose of a temporary surplus.

8 The right to the beneficial use of water for irrigation purposes shall,
9 consistent with other terms of the permit, continue in perpetuity.

10 (WR Decision 990 at ¶ 29 (emphasis added).) The Water Board included an almost identical
11 statement in Decision 1020,⁸ which provides:

12 *The right to the beneficial use of water for irrigation purposes,*
13 *except where water is distributed to the general public by a private*
14 *agency in charge of a public use, shall be appurtenant to the land*
15 *on which said water shall be applied*, subject to continued
16 beneficial use and the right to change the point of diversion, place
17 of use and the purpose of use as provided in Chapter 10 of Part 2 of
18 Division 2 of the Water Code of the State of California and further
19 subject to the right to dispose of a temporary surplus.

20 The right to the beneficial use of water for irrigation purposes shall,
21 consistent with other terms of the permit, continue in perpetuity.

22 (WR Decision 1020 at ¶ 13 (emphasis added).)

23 Fish and Game makes the remarkable argument “that the fact the water is
24 appurtenant to the lands *is nothing more than a limitation on the [USBR's] water rights*, and does
25 not confer a water right upon CVP contractors or upon the land themselves.” (Fish and Game,
26 Phase 7 Closing Brief at 14:23 to 14:25 (emphasis added).) The first part of the argument is
27 remarkable because it concedes Westlands’ point. The “fact that the water is appurtenant to the
28 lands” is indeed a limitation on Reclamation’s water rights: it is a limitation imposed by the
29 Water Board, under California law. (See *Ivanhoe Irr. Dist. v. All Parties and Persons* (1957) 47
30 Cal.2d 597, 625-26 rev’d on other grounds 357 U.S. 275, 290.) The effect of the limitation is that
31 notwithstanding Reclamation’s title to the permits, the right to the use of the water is a right of
32 entities other than Reclamation, and Reclamation cannot, to the detriment of those water users,

33 ⁸ Decision 1020 resulted from Application 15764, an application that was originally filed by Westlands
34 and assigned to Reclamation. The assignment was made after Reclamation guaranteed to Westlands that
35 [a] permanent water supply for [W]estlands will, of course, be assured and made available pursuant to a
36 long term contract, renewable in accordance with the current provisions of Reclamation Law.” (Westlands
37 Exhibit 8, letter from Reclamation to Jack W. Rodner, Manager of Westlands dated September 29, 1960.)

1 decide to use water appropriated under the permits it holds for another purpose. The second part
2 of this argument is remarkable because it ignores the language of Decisions 893, 990, and 1020,
3 and the fundamental principle of California water law, discussed above, that regardless of it
4 origin, a water right is a usufruct. Decisions 893, 990, and 1020 each state in varying forms that
5 the "right to the use of the water" shall be appurtenant to the land. (WR Decision 893 at ¶ 16;
6 WR Decision 990 at ¶ 29; WR Decision 1020 at ¶ 13.)

7 In support of its argument that Westlands is not a legal user of water, Fish and
8 Game also argues that Westlands' entitlement to the use of CVP water arises from a contract and
9 that that the Water Board is not the appropriate forum to resolve "CVP contracting issues." (Fish
10 and Game, Phase 7 Closing Brief at 14:8.) Like Interior's argument, this argument might be
11 persuasive if Westlands' objection to change the petition were based on language in its contract,
12 but it is not. Westlands' objection is based on California water law and the above-quoted
13 decisions of the Water Board. Moreover, as evidenced by the language of Decision 893, the
14 Water Board contemplated that the "permanent right" of public agencies such as Westlands "to
15 the use of all water appropriated" would arise under contracts with the United States. (WR
16 Decision 893 at ¶ 16.)

17 In Water Rights Decision 95-6, this Board explained who was protected under
18 Section 1702:

19 [a] legal user of water who could be injured would include any
20 party who has an existing legally protectible right to use the water,
21 where the proposed action would adversely affect the legal user's
22 ability to use the water.

22 (WR 95-6, ¶ 3.3.1.) The language of Water Right Decisions 893, 990 and 1020 and the basic
23 principle of California water law that a water right is the right to put water to beneficial use,
24 establish that Westlands has an "existing legally protectible right to use the water," which allows

25 ///

26 ///

27 ///

28 ///


1 it to claim protection under section 1702. It is difficult to comprehend how Fish and Game could
2 argue that Westlands is not a legal user of water.⁹

3
4 **III.**
CONCLUSION

5 The Water Board's consideration of the foregoing is appreciated.

6 Dated: July 12, 1999

7 Respectfully submitted,
8
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10
11 By 
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22 566793.1

23 ⁹ Westlands Phase 7 Closing Brief contains a discussion of state and federal case law that supports
24 Westlands' argument it is the contractors, not Reclamation, who are the "legal users" of the water
25 appropriated under permits held by Reclamation. (Westlands, Phase 7 Closing Brief at 13-15.) The issue
26 of who is entitled to the use of water appropriated by Reclamation was most squarely addressed by the
27 United States Supreme Court in *Ickes v. Fox* (1937) 300 U.S. 82, where the Court stated:

28 Although the government diverted, stored and distributed the water, the
contention of the petitioner that thereby ownership of the water or water
rights became vested in the United States is well founded. Appropriation
was made not for the use of the government, but, under the Reclamation
Act, for the use of the landowners; and by the terms of the law and of the
contract already referred to, the water rights became the property of the
landowners, wholly distinct from the property right of the government in
the irrigation works.

(*Id.* at 94-95.)

1 **PROOF OF SERVICE**

2 I, Marlene Gerrard, declare:

3 I am a resident of the State of California and over the age of eighteen years, and
4 not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento,
CA 95814-4417. On July 12, 1999, I served the within documents:

5 **REPLY BRIEF OF WESTLANDS WATER DISTRICT FOR PHASES TWO
6 THROUGH SEVEN**

- 7 by transmitting via facsimile from (916) 321-4555 the above listed document(s)
8 without error to the fax number(s) set forth below on this date before 5:00 p.m. A
9 copy of the transmittal/confirmation sheet is attached.
- 10 by placing the document(s) listed above in a sealed envelope with postage thereon
11 fully prepaid, in the United States mail at Sacramento, California addressed as set
12 forth below.
- 13 by causing personal delivery by _____ of the document(s) listed above
14 to the person(s) at the address(es) set forth below.
- 15 by placing the document(s) listed above in a sealed _____ envelope
16 and affixing a pre-paid air bill, and causing the envelope to be delivered to a
17 _____ agent for delivery
- 18 by personally delivering the document(s) listed above to the person(s) at the
19 address(es) set forth below.

20 **SEE ATTACHED LIST**

21 I am readily familiar with the firm's practice of collection and processing
22 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
23 Service on that same day with postage thereon fully prepaid in the ordinary course of business. I
24 am aware that on motion of the party served, service is presumed invalid if postal cancellation
25 date or postage meter date is more than one day after date of deposit for mailing in affidavit.

26 I declare under penalty of perjury under the laws of the State of California that the
27 above is true and correct.

28 Executed on July 12, 1999, at Sacramento, California.



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