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Agency Secretary

State Water Resources Control Board



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February 8, 2006

SENT VIA EMAIL AND HAND DELIVERY

Chair Tam Doduc
c/o Ms. Selica Potter
Acting Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100

Dear Chair Doduc:

COMMENT LETTER—FEBRUARY 15, 2006 BOARD MEETING ITEM NUMBER 6 (DELTA SALINITY DRAFT ORDER ADOPTING CEASE AND DESIST ORDER AND GRANTING PETITIONS FOR RECONSIDERATION)

The Division of Water Rights Enforcement Team (Enforcement Team) supports the State Water Resources Control Board's (State Water Board or Board) adoption of the draft order, revised January 27, 2006, issuing a joint cease and desist order (CDO) to the Department of Water Resources (Department) and United States Bureau of Reclamation (Bureau). The draft order is supported by substantial evidence and provides a reasonable method of ensuring the Department's and the Bureau's compliance with their existing water right requirements. Moreover, adoption of the order would serve to demonstrate the Board's independence as an impartial adjudicator of water rights and would help to assure water right holders that the Board will be evenhanded as between the Department, the Bureau, and other water right holders.

The San Luis & Delta-Mendota Water Authority, Westlands Water District, and the State Water Contractors petition to disqualify the majority of the Enforcement Team and the evidence proffered by it. The Enforcement Team opposes this petition for the same reasons enumerated in footnote 9 of the revised draft order. It merits noting again, however, that this request is not timely. These entities have known from the outset that the Board's water right attorneys and staff advise the Board on any number of matters, and they certainly knew at the beginning of this proceeding that members of the prosecution team have advised the Board on other matters. They waived any objection when they failed to timely make it at the beginning of this proceeding.

Moreover, the agencies' reliance on the recent trial court decision in *Morongo Band of Mission Indians v. State Water Resources Control Board* (Sacramento County Sup. Ct. No. 04CS00535) and on the appellate court decision in *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810,

is misplaced. The *Morongo* trial court proceeding is still pending and could be the subject of a motion for reconsideration, new trial or appeal. In fact, it is disingenuous to ask the Board to follow a trial court ruling in another case when the California appellate courts have held that trial courts do not make binding precedents. (*Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 596 [163 Cal.Rptr. 182].) The existence of a nonprecedential trial court decision in another case does not excuse these entities from their failure to file a timely motion.

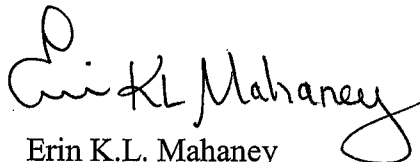
Additionally, as the revised draft order acknowledges, *Quintero* is factually and procedurally distinguishable from the case at hand. The Enforcement Team further notes that *Quintero* was decided in 2003—two years before this proceeding. For a hearing participant who is not a party to an enforcement proceeding to wait until now to claim some vague injury to its due process rights based on *Quintero*, after six full days of hearing and after receiving a decision not to its liking, rings hollow.

Finally, the Enforcement Team suggests two factual revisions to the revised draft order:

- Page 16, footnote 9: To avoid any potential evidentiary dispute, delete the second sentence of the fifth reason for rejecting the request for disqualification so that reason reads: "Fifth, the *Quintero* case is based on evidence and is distinguishable ~~Not is there any evidence that Ms. Mahaney was advising the members of the Board in another proceeding during the pendency of this proceeding.~~"
- Page 17, second full paragraph: In this paragraph, which summarizes the draft CDOs, the revised order replaces the word "violation" with the word "exceedance." The Enforcement Team has no objection to the use of the term "exceedance" as it is generally used in the revised draft order, but the draft CDOs actually used the term "violation" and it would be more accurate to continue to use that term when describing the contents of the draft CDOs.

The Enforcement Team respectfully requests the State Water Board to adopt the proposed order without further delay.

Sincerely,



Erin K.L. Mahaney
Staff Counsel
Division of Water Rights Enforcement Team

cc: See next page

cc: Delta Salinity Draft CDO and
WQRP Hearing Service List

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PROOF OF SERVICE

I, Dolores White, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, 22nd Floor, Sacramento, California 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, I served the within documents:

**COMMENT LETTER—FEBRUARY 15, 2006 BOARD MEETING ITEM NUMBER 6
(DELTA SALINITY DRAFT ORDER ADOPTING CEASE AND DESIST ORDER AND
GRANTING PETITIONS FOR RECONSIDERATION)**

	BY FACSIMILE: I caused a true and correct copy of the document to be transmitted by a facsimile machine compliant with rule 2003 of the California Rules of Court to the offices of the addresses at the telephone numbers shown on the service list.
X	BY ELECTRONIC MAIL: I caused a true and correct copy of the document(s) to be transmitted by electronic mail compliant with section 1010.6 of the California Code of Civil Procedure to the person(s) as shown.
	BY HAND DELIVERY: I caused a true and correct copy of the document(s) to be hand-delivered to the person(s) as shown.
	BY OVERNIGHT MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of overnight mail packages. Under that practice, packages would be deposited with an overnight mail carrier that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
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Service List

By placing a true copy thereof in separate, sealed envelopes addressed to:

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I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on February 8, 2006, at Sacramento, California.

Dolores White

Dolores White
Sr. Legal Typist