



JON D. RUBIN

February 8, 2006

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Jean McCue
State Water Resources Control Board
Division of Water Rights
P. O. Box 2000
Sacramento, CA 95812-2000

Re: Agenda Item 6, State Water Board Meeting, February 15, 2006

Dear Ms. McCue:

On behalf of the San Luis & Delta-Mendota Water Authority and Westlands Water District, I submit this letter. The Authority and Westlands have reviewed the "DWR Comments to Resolve Issues Related to Draft Cease and Desist Order Against DWR and Reclamation", dated February 8, 2006. Those comments include a set of "milestones" that respond to a request made by the State Water Resources Control Board at its February 1, 2006, meeting. Representatives of the Authority and Westlands have worked closely with the California Department of Water Resources to develop those "milestones", and both the Authority and Westlands generally support DWR's comments.

The Authority and Westlands take this opportunity to explain further their concerns with the amended draft CDO, which was issued on or about January 27, 2006. Stated simply, the Authority and Westlands believe the amended draft CDO is inconsistent with the 1995 Water Quality Control Plan, Decision 1641, and Order WR 2000-02.

The 1995 WQCP states clearly that to implement water quality objectives for the Southern Delta, its program of implementation should balance responsibility assigned through water rights proceedings with actions taken pursuant to other authorities. *See* 1995 Plan at p. 28. The findings in D-1641 are consistent with the 1995 WQCP. It summarizes the causes of salinity concentrations downstream of Vernalis as follows:

Water quality in the southern Delta downstream of Vernalis is influenced by San Joaquin River inflow; tidal action; diversions of water by the SWP, CVP, and local water users; agricultural return flows; and channel capacity. (R.T. p. 3668; DWR 37, p. 8.) The salinity objectives for the interior southern Delta can be implemented by providing dilution flows, controlling in-Delta discharges of salts, or by using measures that affect circulation in the Delta.

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D-1641 at pp. 86-87. The responsibility that the State Water Board imposed on Reclamation and DWR to meet the southern Delta was thus conditioned. The State Water Board provided an exception to strict compliance if the "noncompliance is the result of actions beyond the control" of Reclamation and/or DWR. *See, e.g.*, D-1641 at p. 161. That exception reflects a balance, one that does not force Reclamation or DWR to operate to prevent exceedances of the southern Delta water quality objectives caused by others. The amended draft CDO does not reflect that balance.

The failure to achieve that balance causes the amended draft CDO to also run counter to other statements made by the State Water Board in D-1641 and determinations made by the State Water Board in Order WR 2000-02, the order denying reconsideration of D-1641. On page 30 of D-1641, the State Water Board wrote:

Assuming that any water right holders downstream of the parties supplying water under the SJRA have senior riparian water rights, such water right holders could require the SJRA suppliers of water to bypass water from natural flow. They could require this with, or in the absence of, the petitioned changes. Riparian right holders cannot, however, require that water stored in another season be released for their benefit. Water stored in another season is not natural flow of the stream. Riparian rights attach only to the natural flow of a stream. . . . Thus, if water previously stored in another season is flowing in the stream, that water is not available to riparian right holders. It follows that if previously stored water is not available to a riparian right holder, the riparian right holder cannot be injured if the water does not arrive at the riparian right holder's point of diversion due to a change in the use of the stored water. If an upstream diverter increases its use of natural flow or detains the water as a result of a change in its water right so that it does not reach the downstream riparian right holder at the natural time, however, and this change deprives the downstream riparian right holder of adequate water for beneficial uses, the downstream riparian right holder could be injured by the change.

D-1641 at p. 30. The State Water Board reiterated that point in Order WR 2000-02:

The Central and Southern Delta parties argue that riparian right holders in the Delta have a right to stored water from upstream reservoirs during seasons when natural flow is unavailable or inadequate to serve the uses of all riparian right holders taking water from the source. . . . These parties also argue that riparian right holders can take advantage of a "physical solution" by simply taking any water that appears in the stream during dry periods. This water, if it is present, usually is present only because it has been released from storage in an upstream reservoir. This water is not part of the natural flow that is subject to riparian rights.... Accordingly, there is no basis for requiring the parties whose changes were approved to release water from storage during the dry season for these

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parties, without compensation. The petitioned cause for reconsideration is dismissed.

Order WR 2000-02 at pp. 22-23. The Authority and Westlands recognizes that Reclamation may need to provide stored water or otherwise modify Central Valley Project operations if necessary to mitigate salinity degradation caused by its operations. But, to compel Reclamation to go beyond mitigation is the equivalent to providing, at no cost, water to others, who have no legal right to the previously stored water.

For these reasons, and reasons previously provided to the State Water Board, the Authority and Westlands request that the State Water Board (1) withdraw or stay issuance of the amended draft CDO, (2) allow for discussion of the milestones, and (3) adopt the milestones (or ones substantially similar to those) presented by DWR in its comments.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation



Jon D. Rubin
Attorneys for the San Luis & Delta-Mendota Water
Authority and Westlands Water District

cc: Dan Nelson
Thomas Birmingham

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