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9 BEFORE THE CALIFORNIA
10 STATE WATER RESOURCES CONTROL BOARD

11 In the Matter of Draft Cease and Desist Order
Nos. 262.31-16 and 262.31-17 Against the
12 Department of Water Resources and the
13 United States Bureau of Reclamation Under
their Water Right Permits and License; and

14 In the Matter of Petitions for Reconsideration
15 of the Approval of a Water Quality Response
16 Plan Submitted by the Department of Water
17 Resources and the United States Bureau of
18 Reclamation for their Use of Joint Points of
Delta

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PETITION
FOR RECONSIDERATION OF ORDER
WR 2006-0006**

19
20 **I. INTRODUCTION**

21 The San Luis & Delta-Mendota Water Authority (Water Authority), acting for and on behalf
22 of its member agencies, and Westlands Water District (Westlands) request that the State Water
23 Resources Control Board (State Water Board) reconsider its February 15, 2006, decision to issue
24 Order 2006-0006: a cease and desist order against the United States Bureau of Reclamation
25 (Reclamation) and California Department of Water Resources (DWR). Order 2006-0006 must be
26 withdrawn and the State Water Board should decide no cease and desist order should issue because
27 Order 2006-0006 (1) results from an irregular proceeding in which the State Water Board abused its
28 discretion, thus preventing those who participated from having a fair hearing, (2) is not supported by

1 substantial evidence, (3) results from a proceeding for which there is relevant evidence that was not
2 presented because, in the exercise of reasonable diligence, it could not have been produced, and (4)
3 results for an error in law.

4 **II. LEGAL STANDARD FOR THE PETITION**

5 Section 1122 of the Water Code authorizes the Water Board to “order a reconsideration of
6 all or part of a decision or order on the [State Water Board’s] own motion or on the filing of a
7 petition of any interested person.” Water Code § 1122. A petition for reconsideration may be filed
8 by:

9 [A]ny person interested in any application, permit or license affected
10 by the decision or order . . . upon any of the following causes:

11 (a) Irregularity in the proceedings, or any ruling, or abuse of
12 discretion, by which the person was prevented from having a fair
hearing;

13 (b) The decision or order is not supported by substantial evidence;

14 (c) There is relevant evidence which, in the exercise of reasonable
15 diligence, could not have been produced;

16 (d) Error in law.

17 Cal. Code Regs. tit. 23, § 768. The petition must be filed no later than thirty days after adoption,
18 Cal. Code Regs. tit. 23, § 768, and “[t]he [State Water B]oard shall order or deny reconsideration on
19 a petition therefor not later than 90 days from the date on which the [State Water B]oard adopts the
20 decision or order.” Water Code § 1122.

21 **III. DISCUSSION**

22 **A. Order 2006-0006 Results From An Irregular Proceeding In Which The State**
23 **Water Board Abused Its Discretion, Thus Preventing Those Who Participated**
24 **From Having A Fair Hearing**

25 On January 31, 2006, the Water Authority and Westlands filed a petition with the State
26 Water Board, which sought to have it take action to correct for due process violations committed
27 against the Water Authority and Westlands. The due process violations result from certain State
28 Water Board staff members (members of the prosecutorial team) seeking a cease and desist order
against Reclamation and DWR, when those same staff members were concurrently advising or had

1 previously advised the State Water Board on other issues. The Water Authority and Westlands
2 requested that the State Water Board disqualify the prosecutorial team (or at least several of its
3 members), strike all evidence offered by the prosecutorial team that was accepted by the State Water
4 Board, and strike all pleadings filed by the prosecutorial team in the above-captioned hearing. The
5 State Water Board denied that petition, providing its explanation in footnote 10 of the Order 2006-
6 0006.

7 There, the State Water Board explained that it denied the petition, in part, because (1) the
8 Water Authority and Westlands are not entitled to due process because they were not “parties to
9 either the CDO or the reconsideration of the WQRP”, (2) the request was untimely, and (3) the case
10 law cited by the Water Authority and Westlands was either not “citable precedent” or
11 distinguishable. The State Water Board should reconsider its decision because none of those
12 reasons support the denial.

13 The Water Authority and Westlands will not repeat every basis for the due process violation.
14 Instead, the Water Authority and Westlands incorporates herein by reference the documents
15 previously filed in this proceeding, including the pleadings file in support their Petition to
16 Disqualify and Strike Evidence, and focuses this section of the memorandum on the bases presented
17 by the State Water Board to support the denial.

18 1. *The Water Authority And Westlands Are Entitled To Due Process*

19 The attempt to distinguish the Water Authority and Westlands as “participants” in and not
20 “parties” to the hearing is a post hoc rationale that the State Water Board is now using in an effort to
21 avoid the due process violations that occurred. At no time before the issuance of Order 2006-0006
22 has the State Water Board or its staff drawn such distinction. *See, e.g.*, September 23, 2005 Revised
23 Notice of Public Hearing. Indeed, at no time before the issuance of Order 2006-0006 had the State
24 Water Board or its staff indicated that the rights of the Water Authority or Westlands were any less
25 than any of the other person or entity involved in the hearing. To the contrary, until the issuance of
26 Order 2006-0006, the State Water Board and its staff have accorded the Water Authority and
27 Westlands the same rights as all other involved persons or entities.

28 Moreover, even if a basis exists to draw a distinction between a party and a participant, such

1 a distinction cannot justify the State Water Board according the Reclamation, DWR, and the
2 prosecutorial team due process, but not the Water Authority and Westlands. The California Court
3 of Appeal recently wrote:

4 When a person obtains a permit to appropriate water for a specific
5 beneficial purpose, and that purpose is to be accomplished by others
6 who put the water to use under the terms of a contract with the permit
7 holder, the persons who use the water are an integral part of the
8 appropriator's right to take that water from its natural course in the
9 first place. Without their beneficial use of the water, the appropriator
10 would have no right to take the water.

11 Opinion, *State Water Resources Control Board Cases*, C044714, JCCP No. 4118, at 213 (emphasis
12 added). Under those principles, the interests of Reclamation, as the holder of the water rights for
13 the Central Valley Project, and the interests of the Water Authority's member agencies, as those
14 who put appropriated Central Valley Project water to beneficial use (i.e., those who use the water),
15 are interdependent. It is beyond reasonable dispute that in this proceeding Reclamation is entitled to
16 the procedural safeguards required by constitutional due process. The water rights held by
17 Reclamation are at issue. Because those rights are dependant upon the beneficial use by the Water
18 Authority's member agencies, the entitlement to due process must therefore extend to the Water
19 Authority and its member agencies.

20 2. *The Petition By The Water Authority And Westlands Was Timely Filed*

21 The Water Authority and Westlands filed their petition without undue delay. On January 24,
22 2006, in their Supplemental Comments on Draft Order, the Water Authority and Westlands first
23 notified the State Water Board of potential due process violations. That filing was made just seven
24 working days after the Superior Court of California issued a tentative ruling in *Morongo Band of*
25 *Mission Indians v. State Water Resources Control Board*, Case No. 04cs00535. The *Morongo Band*
26 *of Mission Indians* applied to the State Water Board the legal principle that causes the due process
27 violation in this proceeding, and which the California Court of Appeal articulated years earlier in
28 *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810. Upon learning that the Court issued a
final order in *Morongo Band of Mission Indians*, the Water Authority and Westlands formally
petitioned the State Water Board. It is incredulous for the State Water Board to now assert that the

1 actions of the Water Authority and Westlands somehow remove the State Water Board's obligation
2 to afford the Water Authority and Westlands their due process rights.

3 At the very least, prior to the issuance of the tentative ruling, the State Water Board took the
4 position that the underlying legal principles articulated in *Quintero* were wrong and that *Quintero*
5 conflicted with established law that administrative decision-makers are accorded a presumption of
6 impartiality absent specific evidence of actual bias. Thus, if the Water Authority or Westlands were
7 to file with a petition with the State Water Board, before the Superior Court issued its ruling, the
8 petition would have faced the same fate as the petition filed by the *Morongo Band of Mission*
9 *Indians*. The "inaction" by the Water Authority and Westlands simply reflects the reality of the
10 circumstances, that the State Water Board would not subject itself to the legal principles established
11 in *Quintero*, and applied in *Morongo Band of Mission Indians*.

12 3. *The Case Law Cited By The Water Authority And Westlands Controls*

13 In Order 2006-0006, the State Water Board, in essence, posits that the petition by the Water
14 Authority and Westlands is without merit because there is no law to support it. The State Water
15 Board explains the cases cited by the Water Authority and Westlands are distinguishable, in the
16 instance of *Quintero*, and none-citable precedent, in the instance of *Morongo Band of Mission*
17 *Indians*. Those explanations present a thin façade for a clearly arbitrary determination.

18 The legal principles that form the basis for the petition are solid and have now been applied
19 to the State Water Board. They cannot be summarily dismissed. The Water Authority and
20 Westlands cite *Quintero* for the following legal principles:

- 21 ○ Due process demands an administrative hearing that: (1) is absent of actual
22 bias, (2) is absent of the probability of actual bias, and (3) maintains the
23 appearance of fairness.
- 24 ○ Bad faith is not needed to demonstrate a due process violation.
- 25 ○ The probability of actual bias exists and an appearance of unfairness results
26 when a member of a prosecutorial team simultaneously acts as an advisor to
27 the decision maker.
- 28 ○ The dual role of prosecutor and advisor is barred, even if the roles are
undertaken at different times, unless there is an adequate separation of the
two roles.

1 Those principles are law. Thus, the citation to *Morongo Band of Mission Indians* need not be
2 viewed as “controlling precedent.” It is a case in which the relevant legal principles were applied to
3 the actions of the State Water Board.

4 Contrary to the protections afforded by law, documents presented by the Water Authority
5 and Westlands show that the probability of actual bias and an appearance of unfairness existed in
6 the above-captioned hearing. *See Declaration of Jon D. Rubin in Support of Petition to Disqualify.*
7 The only substantive responses the State Water Board offers to evidence presented in those
8 documents are: (1) there was not the “same type of close attorney-client relationship . . . that was
9 evident in *Quintero*”, and (2) the role of one member of prosecutorial team, Mr. Sawyers, was
10 outside *Quintero* because he “did not speak on the record during the hearing.” Those responses
11 ignore the law.

12 Regardless of the extent of a dual role, if a member of a prosecutorial team simultaneously
13 acts as an advisor to the decision maker, the probability of actual bias and unfairness exists. That is
14 the “bright-line” established by *Quintero* and acknowledged in *Morongo Band of Mission Indians*.
15 The extent of the relationship is not relevant. If the line is crossed, a due process violation results.
16 The documents attached to the Declaration of Jon D. Rubin in Support of Petition to Disqualify
17 show that in this proceeding the line was crossed.

18 The law also demands that where the dual role of prosecutor and advisor was undertaken at
19 different times, the roles played by the member(s) of the prosecutorial team must be adequately
20 separated to avoid a due process violation. There is nothing to suggest that such a separation exists
21 in this case. Indeed, the positions expressed by the State Water Board appear to concede that no
22 separation existed because, in its opinion, none was needed.

23 In sum, *Quintero v. City of Santa Ana* and *Morongo Band of Mission Indians* make plain
24 that due process demands the Water Authority and its member agencies be afforded a hearing that is
25 absence of “actual bias,” but that also has the “appearance of fairness and the absence of even a
26 probability of outside influence.” They also tell us that has not occurred in this proceeding.

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1 B. Order 2006-0006 Is Not Supported By Substantial Evidence

2 The evidence before the State Water Board does not support the issuance of Order 2006-
3 0006. In this proceeding, to issue a cease and desist order, the State Water Board must have
4 evidence to support a finding of “a violation or threatened violation of . . . [a]ny term or condition
5 of a permit, license, certification, or registration.” Water Code § 1831(d)(2). Order 2006-0006 is
6 based upon a finding by the State Water Board that Reclamation and DWR threaten to violate water
7 right terms and conditions related to water quality objectives intended to protect agricultural
8 beneficial uses in the southern Delta (Southern Delta salinity objectives), which were placed in the
9 water rights they hold by Decision 1641. The finding of threatened violations is thus premised upon
10 an interpretation of Decision 1641. Simply put, the finding of threatened violations is unsupported
11 by evidence and is based on a completely arbitrary interpretation of Decision 1641.

12 It is beyond reasonable dispute that Decision 1641 imposed terms and conditions on the
13 water rights held by Reclamation and DWR that make them responsible for the southern Delta
14 salinity objectives. *See, e.g.*, WR-5a at p. 159-161. That responsibility, however, is not absolute.
15 *Id.* The terms and conditions on the water rights they hold do not make Reclamation and DWR
16 responsible for ensuring at all times or under all circumstances that the southern Delta salinity
17 objectives are achieved. *Id.* The terms and conditions provide that if there is an exceedance,
18 Reclamation and DWR shall prepare a report for the Executive Director, which the Executive
19 Director will evaluate and make a recommendation to the State Water Board as to “whether
20 enforcement action is appropriate or the noncompliance is the result of actions beyond the control of
21 [Reclamation and DWR].” *Id.* Thus, a violation of those terms and conditions cannot be found if
22 the “noncompliance” with the southern Delta salinity objectives “is the result of actions beyond the
23 control of [Reclamation and DWR].”

24 There may be evidence before the State Water Board arguably showing that exceedance of
25 the southern Delta salinity objectives – “noncompliance” – may occur in the coming years.
26 However, there is no evidence before the State Water Board that shows the exceedance will likely
27 be caused by actions of Reclamation or DWR. Indeed, the evidence shows just the opposite. *See,*
28 *e.g.*, DWR 18, 18A, Attachment 1. The evidence shows that actions by Reclamation, DWR, and

1 their contractors have improved water quality such that any future exceedence of a Southern Delta
2 Salinity objective is likely to be caused by actions beyond their control. *See, e.g. id.*; DWR 20,
3 20A, 20B, 20C; SLDMWA-1.

4 C. **There Is Relevant Evidence Which Has Not Been Presented Because, In The**
5 **Exercise Of Reasonable Diligence, It Could Not Have Been Produced**

6 As described above, the findings that support Order 2006-0006 rely upon an interpretation of
7 those sections of D-1641 related to responsibility for southern Delta salinity objectives. Order
8 2006-0006 reflects a view by the State Water Board that Decision 1641 imposes responsibility for
9 achieving the southern Delta salinity objectives completely and absolutely with Reclamation and
10 DWR. That view may be affected by evidence that was not presented during the hearing because, in
11 the exercise of reasonable diligence, it could not have been produced. The evidence is the Court of
12 Appeal opinion in *State Water Resources Control Board Cases*, C044714, JCCP No. 4118. *See*
13 Declaration of Jon D. Rubin filed in support of the Petition for Reconsideration. There, the Court
14 explained:

15 The Board included within the second component of the program of implementation
16 -- "measures requiring a combination of [the Board's] water quality and water rights
17 authorities and actions by other agencies to implement the objectives" -- the
18 agricultural salinity objectives for the southern Delta, including the Vernalis salinity
19 objective.

20 Opinion, *State Water Resources Control Board Cases*, C044714, JCCP No. 4118, at p. 33. The
21 Court's acknowledgment of the dual nature of actions to achieve the southern Delta salinity
22 objectives cannot be ignored by the State Water Board. Amendments of the draft order, which are
23 reflected in the February 10, 2006 Amended Proposed Order, do not cure the defect.¹

24 D. **The State Water Board Committed An Error In Law**

25 As discussed in detail above and in papers previously filed with the State Water Board in
26 this proceeding, the issuance of Order 2006-0006 results from multiple legal errors by the State
27 Water Board. At a minimum, the State Water Board violated the due process rights of the Water
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¹ Indeed, the defects found by the Court of Appeal are with D-1641. Those defects must be addressed, not through a
cease and desist order, but through changes in D-1641 or through modifications of the underlying water quality control
plan and then revisions to relevant water rights.

1 Authority and Westlands, the State Water Board improperly construed D-1641, failed to adhere to
2 Water Code section 1831, and failed to adhere to the decision by the Court of Appeal in *State Water*
3 *Resources Control Board Cases*, C044714, JCCP No. 4118.

4 **IV. CONCLUSION**

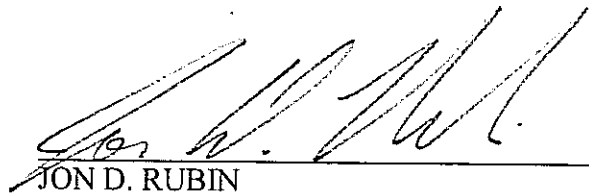
5 For the above stated reasons, the Water Authority and Westlands respectfully request that
6 the Water Board reconsider Order 2006-0006. The State Water Board must withdraw the Order and
7 should decide that there is no basis to issue a cease and desist order against either Reclamation or
8 DWR.

9 Dated: March 17, 2006

Respectfully submitted,

10
11 DIEPENBROCK HARRISON
A Professional Corporation

12
13
14 By



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