

From: David Rose
To: Unit , Wr_Hearing
CC: dean@hpllp.com; dgillick@neumiller.com; jherrlaw@aol.com; jrubin@diep...
Date: 9/13/2010 2:44 PM
Subject: Re: "Mark and Valla Dunkel CDO Hearing"; "Rudy Mussi et al. CDO Hearing"; and "Yong Pak and Sun Young CDO Hearing"
Attachments: Prosecution Team Response to Request for Official Notice.PDF

Dear Chair Hoppin and Board Member Baggett:

The Division of Water Rights Prosecution Team for the Dunkel CDO matter would like to ensure that the attached letter be included in record for the Dunkel CDO matter as a response to the Request for Official Notice submitted by the Dunkels dated September 10, 2010.

David Rose, Staff Counsel
Office of the Chief Counsel
State Water Resources Control Board
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Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board



Arnold Schwarzenegger
Governor

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September 2, 2010

Chair Hoppin and Board Member Baggett
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Dear Chair Hoppin and Board Member Baggett:

REQUESTS FOR OFFICIAL NOTICE BY SAN JOAQUIN COUNTY AND SAN JOAQUIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT AND BY MUSSI, PAK AND YOUNG, AND CENTRAL AND SOUTH DELTA WATER AGENCIES

The Division of Water Rights Prosecution Team received copies of a request for official notice of certain documents from counsel for San Joaquin County and San Joaquin County Flood Control and Water Conservation District, dated August 30, 2010, in regards to the Mussi, Pak and Young, and Dunkel CDO hearings. The Prosecution Team also received copies of a request from Mussi, Pak and Young and the Central and South Delta Water Agencies for official notice of certain other documents and for cross-incorporation of the evidence and records presented in the Woods Irrigation Company CDO hearing, the Mussi CDO hearing, the Pak and Young CDO hearing and the Dunkel CDO hearing. The Prosecution Team opposes portions of these requests for the reasons discussed below.

In regards to the San Joaquin County and San Joaquin County Flood Control and Water Conservation District's request for official notice dated August 30, 2010, both Exhibit "A" and Exhibit "B" to that request are inappropriate documents for official notice. As mentioned in the August 30 request, the Board may take official notice of "such facts as may be judicially noticed by the courts of this state." (Cal. Code Regs., tit. 23, § 648.2.) The request goes on to cite Evidence Code section 452 for the types of facts which a court may take judicial notice of. Specifically, the request attempt to fit Exhibits "A" and "B" under the category of Evidence Code section 452, subdivision (c) – "Official acts of the legislative, executive, and judicial department of the United States and of any state of the United States."

The San Joaquin County and San Joaquin County Flood Control and Water Conservation District's request for official notice does not, however, provide any explanation as to how these documents, which do not bear any of the indicia of being either "official" or "acts", fit under the umbrella of Evidence Code section 452, subdivision (c). Contrary to San Joaquin County and San Joaquin County Flood Control and Water Conservation District's contention, these documents are not appropriate for official notice, and should have been presented at the hearing if the parties wished to rely upon them as evidence.

If the Board chooses to take official notice of these documents notwithstanding the deficiencies identified herein, the Prosecution Team recommends the Board follow its position taken with

regards to these same documents in the Woods Irrigation Company CDO hearing, where the Board held

the State Water Board will take official notice that these documents were posted on the Board's website, without accepting them for the truth of the matter asserted.

(Hearing Officer's Ruling, July 19, 2010, Woods Irrigation Company CDO Hearing, p. 6.)

In regards to the Mussi, Pak and Young and Central and South Delta Water Agencies' request for cross-incorporation and official notice of the evidence and records presented in the Woods Irrigation Company CDO hearing, the Mussi CDO hearing, the Pak and Young CDO hearing and the Dunkel CDO hearing, the Prosecution Team likewise opposes this request.

The parties to the Woods Irrigation Company Hearing made a similar request in that proceeding, the resolution of which was that the parties would present a stipulation as to what evidence could be integrated from one hearing to another. (Woods Irrigation Company CDO Hearing Reporter's Transcript, pp. 901-906.) To date the Prosecution Team has not seen any draft stipulation to that effect, and would therefore echo Board Member Pettit's problem with "the legal concern we would have about just merging records without any forethought." (*Id.*)

Without any concrete proposal to integrate only certain portions of the records, the Prosecution Team remains opposed to this request. Not all of the proceedings were noticed together, nor were they all heard together. The issues and evidence in the proceedings were not identical and should not be further muddied by mixing together the separate records. Contrary to Mussi, Pak and Young and Central and South Delta Water Agencies' contention, the Prosecution Team has not agreed to the request being made here. Other than a previous limited proposal to use specific testimony from one proceeding in another (see Mussi, Pak and Young and Central and South Delta Water Agencies' request for Official Notice, p. 3), the Prosecution Team has never expressed agreement with a broad-brush use of evidence or testimony from one hearing in another.

Considering the lengths that the Board and all parties went to to make clear records for the proceedings, including presenting the same evidence and testimony anew in each separate proceeding as applicable, there is no good reason to integrate testimony and evidence that the parties did not feel was necessary to bring up in a particular hearing. I'm sure the Board would agree that the parties were very thorough in presenting evidence for each proceeding so that each record was clear.

For these reasons, the San Joaquin County and San Joaquin County Flood Control and Water Conservation District's request for official notice and the Mussi, Pak and Young and Central and

September 2, 2010

South Delta Water Agencies' request for cross-incorporation of the records of the various proceedings should be denied.

Sincerely,



David Rose
Staff Counsel
Division of Water Rights Prosecution Team

PROOF OF SERVICE

I, Wanda Warriner, 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, September 2, 2010 I served the within documents:

LETTER REGARDING REQUESTS FOR OFFICIAL NOTICE BY SAN JOAQUIN COUNTY AND SAN JOAQUIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT AND BY MUSSI, PAK AND YOUNG, AND CENTRAL AND SOUTH DELTA WATER AGENCIES

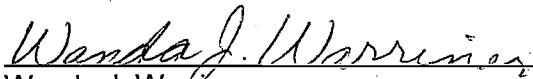
X	BY COMPUTER EMAIL: I caused a true and correct copy of the document to be transmitted by a computer machine compliant with rule 2003 of the California Rules of Court to the offices of the email addresses shown on the service list.
	BY HAND DELIVERY: I caused a true and correct copy of the document(s) 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.
	BY FIRST CLASS MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

By placing a true copy in a computer and emailing said documents addressed to:

Division Of Water Rights Prosecution Team c/o David Rose State Water Resources Control Board 1001 I Street Sacramento, CA 95814 DRose@waterboards.ca.gov	Modesto Irrigation District c/o Tim O'Laughlin Ken Petruzzelli O'Laughlin & Paris LLP 117 Meyers Street, Ste. 110 P.O. Box 9259 Chico, CA 95927-9259 towater@olaughlinparis.com kpetruzzelli@olaughlinparis.com	San Luis & Delta-Mendota Water Authority c/o Jon D. Rubin/Valerie C. Kincaid Diepenbrock Harrison 400 Capitol Mall, Ste. 1800, Sacramento, California 95814 jrubin@diepenbrock.com vkincaid@diepenbrock.com
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<p>State Water Contractors c/o Stanley C. Powell Kronick, Moskowitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 spowell@kmtg.com</p>	<p>Yong Pak and Sun Young c/o John Herrick, Esq. 4255 Pacific Avenue, Ste. 2 Stockton, CA 95207 jherlaw@aol.com</p> <p>Harris, Perisho & Ruiz c/o Dean Ruiz, Esq. 3439 Brookside Road, Ste. 210 Stockton, CA 95219 dean@hpllp.com</p>	<p>Rudy Mussi, Toni Mussi and Lory C. Mussi Investment, LP c/o John Herrick, Esq. 4255 Pacific Avenue, Ste. 2 Stockton, CA 95207 jherlaw@aol.com</p> <p>Harris, Perisho & Ruiz c/o Dean Ruiz, Esq. 3439 Brookside Road, Ste. 210 Stockton, CA 95219 dean@hpllp.com</p>
<p>San Joaquin County and the San Joaquin County Flood Control & Water Conservation District c/o DeeAnne M. Gillick Neumiller & Beardslee P.O. Box 20 Stockton, CA 95201-3020 dgillick@neumiller.com tshepard@neumiller.com</p>	<p>Central Delta Water Agency c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Ste. 210 Stockton, CA 95219 dean@hpllp.com</p>	<p>South Delta Water Agency c/o John Herrick, Esq. 4255 Pacific Avenue, Ste. 2 Stockton, CA 95207 jherlaw@aol.com</p> <p>c/o Dean Ruiz, Esq: Harris, Perisho & Ruiz 3439 Brookside Road, Ste. 210 Stockton, CA 95219 dean@hpllp.com</p>
<p>Mark And Valla Dunkel c/o John Herrick, Esq. 4255 Pacific Avenue, Ste. 2 Stockton, CA 95207 jherlaw@aol.com</p>	<p>Harris, Perisho & Ruiz c/o Dean Ruiz, Esq. 3439 Brookside Road, Ste. 210 Stockton, CA 95219 dean@hpllp.com</p>	<p>State Water Resources Control Board Division of Water Rights Attention: Ernest Mona P.O. Box 2000, Sacramento, CA 95812-2000 1001 I Street, 2nd Floor, Sacramento, CA 95814 wrhearing@waterboards.ca.gov</p>

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 September 2, 2010 at Sacramento, California.


Wanda J. Warriner
Legal Secretary