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STATE WATER RESOURCES  
CONTROL BOARD

2003 JUN 27 AM 11: 26

DM. OF WATER RIGHTS  
SACRAMENTO

**STATE OF CALIFORNIA**

**STATE WATER RESOURCES CONTROL BOARD**

In the matter of:	)	<b>CLOSING BRIEF OF SOUTH DELTA</b>
	)	<b>WATER AGENCY, ET AL., ON</b>
Consideration of a Petition of the San Joaquin	)	<b>PETITIONS FOR LONG-TERM</b>
River Group Authority (Merced Irrigation District	)	<b>TRANSFER BY MERCED IRRIGATION</b>
and Modesto Irrigation District and Turlock	)	<b>DISTRICT, MODESTO IRRIGATION</b>
Irrigation District) for Approval of a Long-Term	)	<b>DISTRICT, AND TURLOCK</b>
Transfer Involving a Change in the Place and	)	<b>IRRIGATION DISTRICT</b>
Purpose of Use of Water	)	

Petitioners have requested a long term transfer of water to supplement the San Joaquin River Agreement ("SJRA") flows where a "double-step" is necessary. Double step refers to those situations where the SJRA provides for an increase in the spring pulse flows when the numerical values assigned to previous and current water year types total a specified amount.

The Petition was filed under Water Code Sections 1735 et. seq., and 1707. The Board may approve the Petition if the license change allowing the transfer:

1. Would not result in substantial injury to any legal user of water; and
2. Would not unreasonably affect fish, wildlife, or other instream beneficial uses.

The Board's Notice states that protests may be based upon any of the following factors:

- Injury to another legal user of water.
- Adverse environmental impact.
- Not in the public interest.
- Contrary to law.

1 Not within the jurisdiction of the SWRCB.

2 SDWA submits that the Petition fails under each of the first four of these factors.

3 **PETITIONERS' ANALYSIS ASSUMES VIOLATION OF**  
4 **EXISTING LICENSE CONDITIONS.**

5 In support of the Petition, Petitioners submitted the testimony of Mr. Daniel Steiner who  
6 performed the modeling in the original EIR/EIS supporting the SJRA, and also for the  
7 supplemental EIR/EIS supporting the subject transfer, entitled *Acquisition of Additional Waters*  
8 *for Meeting Flow Objectives for the San Joaquin River Agreement*. Mr. Steiner states in his  
9 testimony at page 19:

10 For the May supplemental water setting, modeling indicates  
11 that Stanislaus River operations may be affected by the recovery of  
12 New Don Pedro Reservoir storage in one instance . . . out of the  
13 eight years requiring supplemental flow, . . . In this instance, the  
14 reduction in release from the Tuolumne River during April 1995  
(for recovery of May 1984 supplemental water) resulted in an  
increase in release from New Melones for water quality objectives  
at Vernalis.

15 Mr. Steiner goes on to state at page 20 of his testimony:

16 In this instance, the supplemental release in the modeled  
17 year 1971 resulted in a reduction in release from the Merced River  
18 during August 1973. This reduction in Summer-time discretionary  
release from New Exchequer resulted in increased release from  
New Melones . . . for water quality objectives at Vernalis.

19 At pages 169 and 170 of D-1641, the Board limited the Petitioner's licenses as follows:

20 At times when the USBR is release water from New  
21 Melones Reservoir for the purpose of meeting the Vernalis Salinity  
22 Objective, or when standard permit term 93 is in effect, or when  
23 salinity objectives at Vernalis are not being met, licensee shall not  
24 replenish (1) stored water or foregone diversions provided for the  
25 April-May pulse flow or the October target flow at Vernalis, or (2)  
water transferred to the USBR pursuant to the SJRA. The  
Executive Director of the SWRCB has delegated authority to  
insure that this condition is not used by the USBR to increase the  
obligation of licensee.

26 Hence we see that although current license conditions preclude Petitioners from refilling  
27 their reservoirs when there are releases from New Melones for water quality (salinity), the  
28 assumptions in the modeling place no such restrictions on reservoir operations; otherwise refill

1 could never result in increased New Melones releases as described by Mr. Steiner.

2 The only conclusion to this is that the modeling does not indicate what could happen if  
3 the Petition is granted; it assumes reservoir operations contrary to current license restrictions.

4 This point becomes more than mere speculation about modeling. Attached to the  
5 testimony of Kevin Kaufman (SDWA 01) on behalf of Stockton East Water District ("SEWD")  
6 is a February 14, 2003 letter from the SWRCB to the Petitioners. That letter indicates that in this  
7 very year, the Petitioners did indeed store water to refill SJRA releases during times when New  
8 Melones was making releases for water quality at Vernalis. In fact, on cross examination the  
9 operators for Petitioners on the Tuolumne and Merced Rivers confirmed they have "yet to"  
10 implement that license restriction (RT 25:9-26:1) and that when refilling their reservoirs, they  
11 make no investigation to see if New Melones is releasing water for water quality (RT 26:9-23).

12 Petitioners may argue that in one instance the increased New Melones release was later in  
13 the year, not at the time of refill. Such an argument cannot prevail. The USBR decides each year  
14 how it will release its water quality allocation from New Melones. Petitioners should not be able  
15 to rely on the Bureau's manipulation of when the insufficient allocation is released in order to  
16 avoid the obligations set forth in their licenses.

17 **THE MODELING PRESENTED BY PETITIONERS DOES NOT**  
18 **SUPPORT A FINDING OF NO INJURY.**

19 In addition to several pieces of evidence provided by Protestants, Mr. Steiner  
20 acknowledged that although his modeling assumed the Bureau operated New Melones under the  
21 Interim Operations Plan ("IOP") (for example, see RT 92:7-11), the Bureau was in fact not  
22 operating pursuant to the provisions of that Plan. Mr. Steiner describes it as the IOP being  
23 "implemented with exception." (RT 80:25-81:1) and "this year they've stated they may operate  
24 outside the IOP." (RT 86:8-11). Whatever words are used, the fact is that the underlying  
25 assumption in the Petitioners' modeling (the base case of the IOP) is not correct. Mr. Steiner was  
26 forced to admit that changes to the IOP affect water allocations from New Melones and that such  
27 changes have not been determined or analyzed. (RT 97:16-23).

28 Mr. Steiner attempted to soften this gap in analysis by claiming that changes to the IOP

1 would likely have little affect on water allocations. However, that is simply not true. Mr.  
2 Steiner's tells us how the IOP allocates water on page 10 of his testimony (SJRG 1). Although  
3 small changes in storage in New Melones may not at first seem to affect amounts from 1.4 MAF  
4 to 6 MAF, on cross-examination the truth was revealed. Changes in storage that are near the  
5 boundaries of allocation categories can make the difference between CVP contractors (eg.,  
6 SEWD) receiving zero, 59 TAF, or 90 TAF in any particular year due to "stair step" allocations.  
7 (See RT 84:8-25).

8 In addition, the modeling for the SJRA EIR/EIS had a significant difference than that of  
9 the supplement EIR/EIS. In the SJRA EIR/EIS, Mr. Steiner assumed that 15,000 acre-feet of  
10 OID Stanislaus allocation went back (actually remained in storage rather than be delivered) into  
11 the total amount allocated for all users. (See generally RT 51:3-13). In the Supplemental  
12 EIR/EIS, he now assumes that water from OID is subsequently allocated for fishery releases.  
13 (RT 51:11-52:2).

14 Mr. Steiner asserts this flaw in his modeling would have no real affect because the water  
15 would either eventually spill or "go down the river." (RT 53:24-54:4). Such statements are  
16 unsupported. Even a cursory look at the IOP (page 10 of SJRG 1) indicates that yearly  
17 allocations do not equal inflow and storage as we discussed above. Even small changes can  
18 affect water allocations. Mr. Steiner originally assumed 15 TAF from OID would each year go  
19 back into the pot and improve all allocations. We now discover to the contrary that there is 15  
20 TAF less each year in New Melones during the 12 year VAMP.

21 The modeling simply does not tell us what happens when water is provided under the  
22 Petition.

23 **APPROVAL OF THE PETITIONS WOULD LIKELY RESULT**  
24 **IN INJURY TO LEGAL USERS.**

25 The Board will recall that a part of the testimony of Alexander Hildebrand (SDWA 5)  
26 indicated that the Petitioners were currently supplying SJRA flows by switching summer flows to  
27 spring and thus affecting downstream quality and diversions during the summer. Mr. Hildebrand  
28 concluded the proposed transfer would do the same. Petitioners tried to rebut this position with

1 the testimony of Mr. Robert Nees and Mr. Ted Selb. However, their testimony actually  
2 confirmed Mr. Hildebrand's analysis. Fore example, in SJRGA 6, Mr. Selb discussed what  
3 flows might be affected by refill. He stated on the second page of SJRGA 6:

4 Merced has the discretion as to when the additional releases  
5 are made. Under these conditions Merced would release this water  
6 to optimize power production while meeting the flood control  
7 requirements. These releases would likely occur during the peek  
8 power production need of July though September.

9 More telling though are the admissions by these witnesses on cross-examination.

10 MR. NOMEILLINI: Would you agree that there are some  
11 of the flows, some of the water being transferred for the 47,000  
12 acre-feet, that would have been released in July through September  
13 for power production purposes if this proposed transfer doesn't go  
14 through?

15 MR. SELB: Yes. . . .

16 MR. NOMEILLINI: Your testimony is that South Delta's  
17 testimony is partially incorrect?

18 MR. SELB: Yes.

19 (See generally RT 214:5-215:13).

20 We will now review Mr. Hildebrand's and other testimony to see what harm occurs. First  
21 of all, SDWA presented the complete chains of title for three diverters; one on Old River, one on  
22 Grant Line Canal, and one on the San Joaquin River; (See SDWA 2, 3 and 4 respectively).  
23 Those documents confirm the riparian status of the diverters and were not challenged or  
24 contradicted by Petitioners. As an example, Mr. Hildebrand's title documents (SDWA 4) show  
25 that a portion of his property is an island in the San Joaquin River; all sides of it abutting the  
26 water. It cannot seriously be asserted that at least a portion of all lands abutting the South Delta  
27 channels are riparian. SDWA also put on evidence of appropriative rights (see SDWA 5, 8, an  
28 10).

These properties all experience problems associated with water quantity or levels and  
quality. The Thorson property (SDWA 2) regularly experiences low water levels, sometimes  
preventing diversions (see SDWA 21 and 5), due to export pumping.

The Augusta-Bixler property on Grant Line Canal (SDWA 3) experiences water level and

1 high salinity problems (SDWA 21 and 5). The Hildebrand property (SDWA 4) sometimes  
2 experiences low water levels and quality problems. In addition, Mr. Jerry Robinson testified that  
3 his property on Middle River is sometimes affected by low water levels and showed pictures of  
4 Middle River with virtually no water. (SDWA 8).

5 Mr. Hildebrand explained that the shift in summer flows to spring as confirmed by  
6 Petitioners' witnesses will exacerbate these problems. Less water in summer can do a number of  
7 things. It places a greater burden on New Melones to meet the Vernalis standard, thus increasing  
8 the times when New Melones water will be insufficient to meet this standard. It means less  
9 water in the South Delta channels which affects local diverter's ability to divert water. It  
10 decreases circulation and flushing which increases salinity and causes the type of harm  
11 experienced by Mr. Salmon on the Augusta-Bixler Farm (see SDWA 21). Due to D-1641's  
12 authorization to export 100 percent of the spring pulse flow under JPOD, it increases export  
13 pumping rates at times other than spring (see generally SDWA 5). [Although D-1641 allows  
14 export of 100 percent of the San Joaquin River during pulse flows, USF&WS biological opinions  
15 limit the amount of exports resulting in the make-up pumping of this "lost" amount and the  
16 consequent increased rate of exports later in the year. Hence, Petitioners' transfer which  
17 increases spring pulse flows actually results in increased export pumping at other times of the  
18 year under JPOD.]

19 Petitioners' response to this is that New Melones is obligated to meet water quality, and  
20 JPOD requires a Response Plan to protect against the incremental impacts of pumping this water.  
21 This issue is answered by SDWA 5 and 10. It is now clear that DWR and USBR ( the purchaser  
22 of Petitioners' water under this transfer) are incapable of analyzing the effects of the transfer on  
23 South Delta water levels and quality. Last year, there were water level problems upstream of the  
24 barriers in Tom Paine Slough and resulting damage. (See SDWA 10). JPOD modeling did not  
25 and has not predicted this event, thus there is insufficient data to conclude the transfer will not  
26 affect legal users. The only data is Mr. Hildebrand's analysis which indicates the Petition will  
27 result in decreased flows and the harm to water levels and quality that result. This analysis  
28 remains uncontroverted.

1 Thus, not only did Petitioners fail to meet their initial burden as discussed above, but  
2 Protestants have shown that the Petition will harm legal users.

3 **THE PROPOSED TRANSFER IS CONTRARY TO LAW.**

4 Water Code Section 1707(b)(1) requires that the subject license change "will not increase  
5 the amount of water the person is entitled to use."

6 Petitioners' request does exactly this. As Mr. Steiner, Mr. Ward, Mr. Selb, and Mr. Nees  
7 confirm, in order to provide the transfer water, the Petitioners will sometimes make releases from  
8 storage. That released water will later be recovered by refilling the storage. The Petitioners'  
9 refill in order to not lose that amount of water for their use.

10 By definition then, the Petitioners are using the same amount of water as before, and  
11 using additional water for the pulse flow at Vernalis. It is impossible to describe this as anything  
12 but increasing the amount of water Petitioners use. California law limits the amount of water a  
13 license holder is permitted to use to the amount actually put to beneficial use. Thayer v.  
14 California Development Co. 164 Cal. 117 (1912) notwithstanding the maximum amount  
15 specified under the license.

16 It is certainly against public policy to let irrigation districts who have used the same  
17 amount of water for the last 80 or more years to suddenly increase the total amount they use,  
18 especially on an over committed river system.

19 In addition, Water Code Section 1629 (as well as Section 1392) provides:

20 Every licensee, if he accepts a license, does so under the  
21 conditions precedent that no value whatsoever in excess of the  
22 actual amount paid to the State therefore shall at any time be  
23 assigned to or claim for any license granted or issued under the  
24 provisions on this division, or for any rights granted or acquired  
25 under the provisions of this division, in respect to the regulation by  
26 any competent public authority of the services or the price of the  
27 services to be rendered by any licensee or by the holder of any  
28 rights granted or acquired under the provisions of this division or  
in respect to any valuation for purposes of sale to or purchase, whether  
through condemnation proceedings or otherwise, by the State or  
any city, city and county, municipal water district, irrigation  
district, lighting district, or any political subdivision of the State, of  
the rights and property of any licensee, or the possessor of any  
rights granted, issued, or acquired under the provisions of this  
division.

1 The phrases, "or for any rights granted or acquired under the provisions of this division"  
2 and "any rights granted, issued or acquired under the provisions of this division" cannot be  
3 logically limited to only the transfer of the entire license. The "division" referred to is Division 2  
4 of the Water Code which provides for the manner in which permits and licenses are granted.  
5 Under those statutes, there are granted rights for place of use, purpose of use, time of use, and  
6 amount of use; which are clearly "rights granted" under the division. Section 1629 precludes  
7 transfer of any of these rights for profit.

8 **CONDITIONS FOR APPROVAL OF PETITION.**

9 As stated above, it does not appear that the Petitions have abided by the refill limitations  
10 set forth in D-1641. A record of compliance on those existing conditions should be a  
11 prerequisite before consideration be given to the subject Petitions. However, should the Board  
12 approve the Petitions, refill should only be allowed with water that is truly excess to the system.  
13 Discretionary flood and power releases are not surplus to the system as explained by Mr.  
14 Hildebrand (SDWA 5). In addition, Petitioners should be ordered to pass through all inflow  
15 from at least June through September when inflow to the Delta is less than diversion needs.

16 **CONCLUSION**

17 Petitioners have failed to meet their initial burden to show the Petition, if granted, will not  
18 result in harm to other legal users. Protestants' evidence confirms that harm will result and that  
19 currently proposed mitigation/protection (D-1641 Response Plan for JPOD) is not reliable. In  
20 addition, the transfer is contrary to law and against public policy. The Petition should therefore  
21 be denied. SDWA joins in the Briefs submitted by CDWA and SEWD to the extent they are not  
22 inconsistent with this Brief.

23 Dated: June 27, 2003

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26 JOHN HERRICK, ESQ., Attorney for  
27 Protestants South Delta Water Agency, et al.

28 SDWA\Pleadings\MID Brief Long-Term Transfer



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**PROOF OF PERSONAL SERVICE**

STATE OF CALIFORNIA            )  
  ss.  
County of San Joaquin         )

I am a citizen of the United States and a resident of the County of San Joaquin. My business name is Service First and my business address is Post Office Box 2257, Stockton, California, 95202. I am over the age of eighteen years and not a party to the within entitled action.

On Friday, June 27, 2003, I hand delivered **CLOSING BRIEF OF SOUTH DELTA WATER AGENCY, ET AL., ON PETITIONS FOR LONG-TERM TRANSFER BY MERCED IRRIGATION DISTRICT, MODESTO IRRIGATION DISTRICT, AND TURLOCK IRRIGATION DISTRICT** on Ms. Diane Lawson, of the State Water Resources Control Board, Division of Water Rights, 1001 I Street, 14<sup>th</sup> Floor, by hand delivering true copies thereof to the person at the front desk of the SWRCB at approximately 11:45 a.m.

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

EXECUTED on June 27, 2003, at Stockton, California.

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\_\_\_\_\_  
PATRICK BURNETT

1 PROOF OF SERVICE BY MAIL

2 STATE OF CALIFORNIA )  
3 )  
4 County of San Joaquin )  
5 )  
6 )  
7 )  
8 )

9 I am a citizen of the United States and a resident of the County of San Joaquin. My  
10 business address is 4255 Pacific Avenue, Suite 2, Stockton, California 95207. I am over the age  
11 of eighteen years and not a party to the within entitled action. I am readily familiar with the  
12 practice of the Law Office of John Herrick for collection and processing of correspondence for  
13 mailing with the United States Postal Service. In the ordinary course of business of the Law  
14 Office of John Herrick, correspondence is deposited with the United States Postal Service the  
15 same day as it is collected and processed.

16 On June 27, 2003, I served the within **CLOSING BRIEF OF SOUTH DELTA**  
17 **WATER AGENCY, ET AL., ON PETITIONS FOR LONG-TERM TRANSFER BY**  
18 **MERCED IRRIGATION DISTRICT, MODESTO IRRIGATION DISTRICT, AND**  
19 **TURLOCK IRRIGATION DISTRICT** on the interested parties in said action, by placing a  
20 true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, and placed for  
21 collection and mailing on said date to be deposited with the United States Postal Service  
22 following ordinary business practices at Stockton, California, addressed as follows:

23 Tim O'Laughlin, Esq.  
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26 Chico, CA 95928

27 Dante John Nomellini, Esq.  
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2291 W. March Lane, Suite B100  
Stockton, CA 95207

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

EXECUTED on June 27, 2003, at Stockton, California.

  
Dayle Daniels