(12/15/16) Board Meeting- Item 7
TUCP
Deadline: 12/14/15 by 9:00 am

December 14, 2015
Submitted Via E-Mail to: commentletters@waterboards.ca.gov

OBJECTIONS OF FRIANT WATER AUTHORITY AND ITS MEMBERS TO DRAFT ORDER EXTENDING TEMPORARY URGENCY CHANGE PETITION

Friant Water Authority and its member agencies (collectively, "Friant") joins in and incorporated by reference the concerns raised in the comments submitted by the United States. Friant also joins in and incorporates by reference the preliminary comments (pp. 1-2), and the second and third comments (pp. 2-4) jointly submitted by the San Luis & Delta-Mendota Water Authority, Westlands Water District and the San Joaquin River Exchange Contractors Water Authority.

Friant also submits these additional comments. First, Friant asks this Board to amend its Order on the Temporary Urgency Change Petition to require the United States to adhere to the holdings of this Board's Decision No. 935 and the terms of the water rights permits issued to Reclamation under that Decision. Second, Friant asks the Board to include terms and conditions so that the amount of riparian water rights and use claimed by each of the four Exchange Contractor districts can be ascertained. Finally, Friant asks the Board to reconsider the terms of the proposed Order relating to the application of the Coordinated Operating Agreement in years in which the Central Valley Project has no surplus under the "Study 1" calculations.

I. IN DECISION NO. 935, THIS BOARD DELINEATED THE SCOPE, AMOUNT AND NATURE OF RECLAMATION'S WATER RIGHTS ON THE SAN JOAQUIN RIVER AND SPECIFICALLY EXCLUDED THE SENIOR WATER RIGHTS RESERVED BY THE EXCHANGE CONTRACTORS FROM THE PERMITS ISSUED TO RECLAMATION

Before the authorization of the Central Valley Project, Miller and Lux, Incorporated, was the owner of extensive land holdings on both sides of the San Joaquin River between Gravelly Ford and a point some miles below the mouth of the Merced River, much of it riparian to the San Joaquin River, its sloughs and tributaries. (D-935, p. 80.) Miller and Lux had also initiated and developed appropriative rights to the waters of the San Joaquin River. (D-935, p. 80.) As a result of actions instituted by the Miller and Lux interests, an extensive adjudication was made of the Company's rights to the use of the flows of the San Joaquin River; the Court decisions in these cases are commonly referred to as the "Haines Decrees." (D-935, p. 80.) These decrees entitled Miller and Lux and its affiliated companies to most of the flow of the San Joaquin River at Whitehouse gaging station for use on their lands. (D-935, p. 80.) However, the Miller and Lux entities had never developed any storage facilities to regulate the flows of the San Joaquin River. Hydrologists developing the California Water Plan calculated that additional water supplies could be generated for the use of the eastern San Joaquin Valley by damming the river and creating a reservoir. However, in order for the United States to be able to access these additional water supplies on the San Joaquin River, it was necessary to reach an agreement with the Miller and Lux interests that held the prior water rights.

Via the Purchase Contract executed on July 27, 1939, the successors to the Miller and Lux interests (now known as the Exchange Contractors) sold **all** of their San Joaquin River water rights to the United States, except for the rights to the "reserved water," which they would receive as per Schedule 1 of the Purchase Contract. (Memorandum of San Joaquin River Exchange Contractors Water Authority in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 24, 1994, p. 3., l. 17 – p. 4., l. 5, adopted as the Memorandum of Points and Authorities in Support of Motion for Summary Judgment,

filed January 5, 1995; Exchange Contractors' Request for Judicial Notice in Support of Reply Brief ("RJN 2"), tab 1, p. 2-3; RJN 2, tab 1, p. 3-4.)[1] It is these reserved waters that the Bureau is obliged to supply to the Exchange Contractors in case of a temporary or permanent inability to deliver substitute water. See Article 4, RJN, tab 21. (Reply Brief of San Joaquin River Exchange Contractors Water Authority and Friant Power Authority to Westlands and San Benito County Water Districts' Consolidated Memorandum in Opposition to Federal Defendants'/Intervenors' Motions for Summary Judgment, filed February 24, 2000, p. 11, ll. 2 – 11.5; see also Declaration of Dee Swearingen, Michael Porter, Steve Chedester, David Woolley, and Robert Capehart in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 23, 1994, ¶¶ 4-5, 8-9 [if Reclamation becomes unable to deliver the amount of substitute water specified in the Exchange Contract, the Exchange Contractors are relegated to the amount of their reserved water rights].)

Simultaneously under the Exchange Contract, the Exchange Contractors agreed not to exercise their rights to the "reserved water" as long as they received substitute water from the federal Delta-Mendota Canal ("DMC") or other sources, delivered at Mendota Pool, a pool formed at the confluence of the San Joaquin River, Fresno Slough, and the Delta-Mendota Canal. (Memorandum of San Joaquin River Exchange Contractors Water Authority in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 24, 1994, p. 3., l. 17 – p. 4., l. 5, adopted as the Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed January 5, 1995, emphasis added.)

In its Water Rights Decision No. 935, this Board was asked to determine how much water in the San Joaquin River was available for appropriation by the United States for the use of the Friant Division. To resolve that question, the Water Rights Board specifically adjudicated how much water the United States had acquired under the Purchase and Exchange Contracts and the nature and amount of the water rights reserved by the Exchange Contractors. The Water Rights Board also ruled how much water was subject to appropriation by the United States under the permits, how much water could be stored at Friant Dam, where the water appropriated under the permits could be diverted, and how and where the water appropriated under the permits could be used.

First, the Board examined the nature of "the rights acquired [by the United States] pursuant to the Purchase and Exchange contracts with the former Miller and Lux interests." (D-935, p. 81.) With respect to the Exchange Contract, the Board found as follows:

> A close analysis of the Exchange Contract reveals that essentially all rights are appropriative. Some of these are also riparian. **A maximum flow of 2,316 cfs is in the contract reserved to the contracting companies** for use on "crop lands". These rights are now vested in the Central California Irrigation District. **The United States is obligated to release these scheduled flows at Friant for the use of the District, subject to the right of the United States to use the water to the extent it makes available to the District at Mendota Pool a water supply from the Sacramento River of a specified quantity and quality**.

(D-935, pp. 82-83, emphasis added.)

[1] Due to the limited time permitted by the very abbreviated deadline for submitting comments, Friant was unable to prepare excerpts of these prior court filings to be submitted with these comments. However, Friant believes excerpts of those court filings will be helpful to the Board in its review of this matter and Friant will prepare and submit those at the first available opportunity.

Regarding the Purchase Contract, the Board found that it "includes many well established appropriative rights and also some riparian rights." (D-935, p. 83.) Consistent with its holdings regarding the nature of the rights acquired under the Exchange Contract and the extent to which those could be incorporated into the terms of the water rights permits sought by the United States, the Board found that the riparian rights acquired by the United States are included within the scope of the permit, but the appropriative rights were not because they were pre-1914 water rights outside the scope of the Board's jurisdiction. (D-935, p. 83.)

The Board then found that "a determination of the validity, nature and extent of rights acquired by the United States under the Purchase and Exchange Contracts, as well as other acquired vested rights is not within the province of this Board." (D-935, p. 83.) The Board did not find the need to quantify specifically how much of the rights acquired by the United States were pre-1914 rights that were not subject to the Board's jurisdiction and would not be covered by the scope of the permits. (D-935, p. 83, finding, instead, that, "to the extent the United States in operation of the project utilizes acquired vested rights, the amount so utilized shall be deducted from the aggregate water quantities under the permits.") However, based on its findings about the extent of the senior water rights reserved under the Exchange Contract, the Board did specifically find that "The permits will provide for water in an amount to enable the project to operate substantially as programmed by the United States, with noted exceptions. . . ." (D-935, p. 83.) The noted exceptions were, of course, the water rights reserved under the Exchange Contract, as set forth in Schedule 1 of the Purchase Contract.

The Board then proceeded to determine the quantity of water that would be available to United States under the permits. The Board found that there would be only two conditions under which the United States would release water from Friant Dam "for use in the vicinity of Mendota Pool": (1) the satisfaction of <u>prior vested rights</u> under the Exchange Contract, as amended March 17, 1956, or (2) water released from storage to provide space in Millerton Lake for flood control. (D-935, p. 84, emphasis added.)

Therefore, the Board limited the total quantity of water to be appropriated by direct diversion under the permits to 6,500 cfs – the combined initial capacities of the Madera and Friant-Kern Canals. The Board then <u>denied</u> the applications "insofar as they propose direct diversion at points downstream from Friant Dam." (D-935, pp 84, 108.)

Finally, the Board found that "Any releases of water for the satisfaction of downstream prior rights, including the rights now being litigated in <u>Rank v. Krug</u>, (ante p. 42) and <u>any releases for satisfaction of the Exchange Contract, as amended March 17, 1956</u>, would not be considered a claim against the 6,500 cubic feet per second" and therefore were <u>not</u> included in the water rights permits. (D-935, pp. 84-85, emphasis added.)

II. <u>IN MULTIPLE PRIOR COURT FILINGS, THE EXCHANGE CONTRACTORS HAVE ACKNOWLEDGED BOTH THE LIMITS OF THEIR RESERVED WATER RIGHTS ON THE SAN JOAQUIN RIVER AND THE FACT THAT RECLAMATION'S SAN JOAQUIN RIVER WATER RIGHTS CANNOT BE USED TO SUPPLY THE EXCHANGE CONTRACTORS.</u>

As noted above, Decision No. 935 includes the following key findings by this Board:

1. The extent of the senior water rights reserved under the Exchange Contract is the <u>flow schedule</u> specified in Schedule 1 of the Purchase Contract.

2. The United States has the right to use the San Joaquin River water in accordance with the terms of the water rights permit as long as it is providing the quantity and quality of substitute water specified under the Exchange Contract.

3. The substitute water to be made available to the Exchange Contractors at Mendota Pool is "a water supply from the Sacramento River."

4. When the United States is not able to provide the "water supply from the Sacramento River of a specified quantity and quality," the United States is "obligated to release these scheduled flows [the flow schedule set forth in Schedule 1 of the Purchase Contract] at Friant for the use of" the Exchange Contractors.

In prior court filings, the Exchange Contractors themselves have admitted the limitations of their reserved rights and their inability to claim Friant Division water, as specified in Decision No. 935 and the permits issued to Reclamation. Indeed, as set forth below, the Exchange Contractors have confirmed that their understanding of San Joaquin River water rights is completely consistent with each of the Board's four key findings.

1. The Exchange Contractors have admitted that their reserved water rights are limited to no more than the monthly flow schedule set forth in Schedule 1 of the Purchase Contract, and do not constitute a specified block or volume of water.

As the Exchange Contractors have previously testified, the amount of the reserved water to be delivered under the Exchange Contract is set forth in Schedule 1 of the Purchase Contract. (Declaration of Dee Swearingen, Michael Porter, Steve Chedester, David Woolley, and Robert Capehart in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 23, 1994, ¶¶ 8, 9.) Furthermore, as the Exchange Contractors have admitted, their reserved water rights are monthly flow volumes, not a block or amount of water:

> Because the Exchange Contractors' reserved water rights are based upon the run of the river, the Exchange Contract attempts to follow this scheme to deliver the water. Consequently, rather than an allocation of a block of water which can be used at any time in a calendar year, the Exchange Contract is based upon deliveries of water which, generally, must be used within certain calendar months.

(Memorandum of San Joaquin River Exchange Contractors Water Authority in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 24, 1994, p. 5, ll. 22-26, adopted as the Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed January 5, 1995; *see also* Declaration of Dee Swearingen, Michael Porter, Steve Chedester, David Woolley, and Robert Capehart in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 23, 1994, ¶ 5 [if Reclamation's ability to deliver substitute water is temporarily interrupted in the middle of a water year, the Exchange Contractors may be "relegated to San Joaquin River flow during the hot summer months, [when] historical information available demonstrates that the natural flow on the San Joaquin River between Friant Dam and Mendota Pool would be insufficient during those critical months. . . ."], ¶ 9 [water rights reserved under the Exchange Contract are "water flow cfs or delivery capacity."].)

The Exchange Contractors have also conceded that this schedule is inflexible and may not be changed. "There is an agreement between the United States and [Southern California] Edison entitled the "Mammoth Pool Agreement," the terms of which require that whenever the Bureau must make a call on the San Joaquin River and Millerton storage in order to meet the Exchange Contract obligation, Edison must release all water down the San Joaquin River without changing the timing of those flows." (Memorandum of San Joaquin River Exchange Contractors Water Authority in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 24, 1994, p. 7, l. 25 - p. 8, l. 5, adopted as the Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed January 5, 1995.)

2. The Exchange Contractors have admitted that Reclamation should be storing and delivering San Joaquin River water to the Friant Division contractors as long as Reclamation is performing the exchange by providing the quantity and quality of substitute water specified under the Exchange Contract.

In testifying to the Federal Court regarding the amount of damages that they would suffer if the amount of substitute water supply was reduced, the Exchange Contractors noted that "Millerton Lake, which has a small amount of storage – 520,500 acre-feet – will be drawn down by deliveries to the Madera and Friant-Kern Canal service areas during this same period of time" – in other words, while Reclamation is delivering substitute water supply to the Exchange Contractors, it is performing the exchange and it should be delivering the San Joaquin River water to the Friant Division contractors. The Exchange Contractors informed the Court that, because the Friant Division contractors are entitled to draw this water down as long as Reclamation is delivering the substitute supply, "there will be insufficient storage in Millerton Lake to provide [the full maximum flow specified in Schedule 1 of the Purchase Contract], and the San Joaquin River at that period of time is reduced to a trickle." (Memorandum of San Joaquin River Exchange Contractors Water Authority in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 24, 1994, p. 6, l. 18 - p. 7, l. 19, adopted as the Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed January 5, 1995.)

Similarly, when discussing a period of Reclamation's temporary inability to provide substitute water due to insufficient supplies from the Sacramento-San Joaquin Delta and the Sacramento River and its tributaries, the Exchange Contractors have admitted that the water stored behind Friant Dam "will be regulated and released until the storage is depleted for the benefit of both the Exchange Contractors and the Friant and Madera Canals." (Memorandum of San Joaquin River Exchange Contractors Water Authority in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 24, 1994, p. 3., l. 17 – p. 4., l. 5, adopted as the Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed January 5, 1995.)

3. **The Exchange Contractors have acknowledged that the San Joaquin River is not a source of "substitute water."**

As the Exchange Contractors previously admitted to the Court, "The Exchange Contract sets up a procedure for the exchange of waters of the San Joaquin River for waters of the Sacramento River system." (Memorandum of Exchange Contractors and Friant Power Authority in Reply to Plaintiffs' Consolidated Opposition to Motions for Summary Judgment, filed February 13, 1995, p. 8, ll. 15 – 17; *see also* Points and Authorities in Support of the San Joaquin River Exchange Contractors Water Authority's and Friant Power Authority's Motion for Summary Judgment, filed January 20, 2000, p. 25, ll. 7 – 19, citing the District Court's holding *Westlands III*, 864 F. Supp. at 1546 ["Exchange contractors 'exchanged'

their senior water rights to water in the San Joaquin River for a CVP water supply from the Delta."].) This is inherently logical, since the Exchange Contract entitles the Exchange Contractors to substitute water to replace San Joaquin River water. (Memorandum of San Joaquin River Exchange Contractors Water Authority in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 24, 1994, p. 23, ll. 7 - 9, adopted as the Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed January 5, 1995.) Thus, the Exchange Contractors "agreed not to exercise their rights to San Joaquin River water so long as the United States provides the entities with substitute water from the Delta-Mendota Canal or other sources according to a schedule specified in the Exchange Contract." (Memorandum of Exchange Contractors and Friant Power Authority in Reply to Plaintiffs' Consolidated Opposition to Motions for Summary Judgment, filed February 13, 1995, p. 2, ll. 9 – 13, 15 – 18, citing Plaintiffs' Complaint, ¶ 13; Exchange Contractors' Answer, ¶ 13, Scheduling Conference Order, September 2, 1994, p. 4, ll. 24-26, p. 5, ll. 1- 24.)

Until recently, the Exchange Contractors acknowledged that the "other sources" of substitute water consisted of water from the Sacramento River or its tributaries that had been captured by the United States in Central Valley Project facilities. As the Exchange Contractors admitted in a Federal Court filing made in 2000:

> Substitute water made available to the Exchange Contractors by the United States was not strictly Delta water, but included water from the Sacramento River or its tributaries which had been captured and stored by another facility of the CVP and released into the Delta for the specific purpose of being delivered via the DMC [Delta-Mendota Canal].

(Points and Authorities in Support of the San Joaquin River Exchange Contractors Water Authority's and Friant Power Authority's Motion for Summary Judgment, filed January 20, 2000, p. 14, ll. 9 – 13.5.)

Obviously, then, the Exchange Contractors were fully aware that the San Joaquin River would not be a source of the substitute supply. (Memorandum of San Joaquin River Exchange Contractors Water Authority in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 24, 1994, p. 20, l. 23 - p. 21, l. 2.5, adopted as the Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed January 5, 1995 [noting that the Regional Director of the Bureau of Reclamation confirmed that the United States would continue to satisfy the Exchange Contract substitute supply obligation out of the Sacramento/San Joaquin Delta].) The Exchange Contractors have also admitted that the amendments made to the Friant Division contracts in the early 1960s confirmed that substitute supply would be provided from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta:

> The United States did in fact enter into agreements with all of the Friant Division contractors memorializing Regional Director Dugan's promise. In the early 1960's, amendatory contracts between the United States and Friant Division Contractors were executed. . . . The amendatory contract, on pages 4 and 5, incorporates Regional Director Dugan's promise,
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> > "and the United States agrees that it will not deliver to the Contracting Entities thereunder waters of the San Joaquin River unless and until required by the terms of said contract so to do, and the United States further agrees that it will not voluntarily and knowingly render itself unable to deliver to the parties entitled thereto from water that is available or that may become available to it from the Sacramento River and its tributaries, or the Sacramento-San Joaquin Delta, those quantities required to satisfy

the obligations of the United States under said Exchange Contract and under Schedule 2 of the Contract for Purchase of Miller and Lux Water Rights (Contract IIr-1145, dated July 27, 1939).

(Memorandum of San Joaquin River Exchange Contractors Water Authority in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 24, 1994, p. 21, l. 11 - p. 22, l. 7.5, adopted as the Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed January 5, 1995.)

4. The Exchange Contractors have admitted that when the United States is not able to provide the "water supply from the Sacramento River of a specified quantity and quality," the United States is "obligated to release these scheduled flows [the flow schedule set forth in Schedule 1 of the Purchase Contract] at Friant for the use of the District."

As the Exchange Contractors have previously testified to the Court, this is the effect of the reserved water rights on Reclamation's Friant Division operations in the event of a temporary interruption in the ability to provide a substitute water supply, for any reason:

> Under the terms of the Exchange Contract, if the United States is temporarily unable to provide substitute water to the Exchange Contractors for any reason or for any cause, the following procedure is triggered: during the first seven consecutive days of the temporary interruption, the Exchange Contractors receive the full quantities as specified in the Exchange Contract for the calendar year delivery schedule based upon the Shasta Inflow. For the balance of the period of temporary interruption, the Bureau must release the full natural flow of the San Joaquin River at Friant so as to meet the delivery schedule in the Purchase Contract, as follows:
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> | April | 1,837 cubic feet per second (cfs) |
> | May | 2,144 cfs |
> | June | 2,291 cfs |
> | July | 2,316 cfs |
> | August | 2,099 cfs |
> | September | 1,267 cfs |
> | October | 620 cfs |
>
> If the full natural flow amounts to less than 72% of the Purchase Contract Schedule 1, the Bureau must supplement natural flow with releases of available storage from Millerton Lake down to the level of 464 feet elevation, which is the equivalent of dead storage at Friant Dam.

(Memorandum of San Joaquin River Exchange Contractors Water Authority in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 24, 1994, p. 6, l. 18 - p. 7, l. 19, adopted as the Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed January 5, 1995.) In other words, if Reclamation becomes unable to deliver substitute water, "the amounts of water which would be available to be shared by the Exchange Contractors . . . would be limited to the natural flow of the San Joaquin River" if the San Joaquin River were not producing the full amount of the reserved water right at that time. (Declaration of Dee Swearingen, Michael Porter, Steve Chedester, David Woolley, and Robert Capehart in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed March 23, 1994, ¶ 21.c.) The flow regimen under the water rights reserved by the Exchange Contractors

in the Exchange Contract provides “no flexibility” to change the timing of deliveries of San Joaquin River water. (Declaration of Dee Swearingen, Michael Porter, Steve Chedester, David Woolley, and Robert Capehart in Opposition to Plaintiffs’ Motion for Preliminary Injunction, filed March 23, 1994, ¶ 21.c.)

III. THE EXCHANGE CONTRACTORS ARE ESTOPPED FROM CONTESTING IN THESE PROCEEDINGS THE POSITIONS THAT THEY HAVE AFFIRMED IN PRIOR COURT FILINGS.

Judicial estoppel generally prevents a party from prevailing on an argument in one court and then later advancing a contradictory argument to try to prevail in another court or another phase of the litigation. *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808 (2001), quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8, 120 S. Ct. 2143 (2000). It is an equitable doctrine invoked "not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.'" *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993 (9th Cir. Cal. 2012), quoting *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) and *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (alteration omitted). Judicial estoppel applies to a party's stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion. *Helfand v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997).

Judicial estoppel applies to statements made in both judicial and administrative proceedings. *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993 (9th Cir. 2012); *Rissetto v. Plumbers and Steam-fitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996).

In *New Hampshire*, the Court identified three factors that courts should consider in determining whether the doctrine is applicable in a given case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993-994 (9th Cir. 2012), citing *New Hampshire v. Maine*, 532 U.S. at 750-51.

Here, as set forth above, the Exchange Contractors have previously acknowledged both the limits of their reserved rights on the San Joaquin River, and the fact that the San Joaquin River water diverted and stored by the United States under its permits is not available for diversion or use by the Exchange Contractors. The Exchange Contractors are estopped from taking inconsistent positions before this Board.

IV. RELEASING WATER FROM FRIANT DAM FOR USE BY THE EXCHANGE CONTRACTORS VIOLATES THE HOLDINGS OF DECISION NO. 935 AND THE TERMS OF RECLAMATION'S WATER RIGHTS PERMITS.

A. Water Appropriated and Stored by Reclamation Under Its Friant Division Permits Cannot Be Used to Serve the Exchange Contractors.

As noted above, releases for satisfaction of the rights reserved under the Exchange Contract were not included in the San Joaquin River permits issued to the United States under D-935. Thus, the permits issued to the United States do not allow or authorize it to store water for releases for satisfaction of the rights reserved under the Exchange Contract. As acknowledged by the Exchange Contractors' multiple prior admissions, this is consistent with the nature of the reserved rights, which were for seasonal direct diversion and did not include any storage.

It is an undisputed fact that in 2014 and 2015, the United States delivered to the Exchange Contractors water it had diverted and stored under the water rights permits issued to the United States under D-935. See, e.g., San Luis Canal Company's Statement of Diversion and Use for 2014, submitted July 1, 2015, which admits that "Decision 935" was one of the sources of water delivered to them by the United States in 2014.

These deliveries were improper because the water rights permits issued to the United States under D-935 **do not allow "releases for satisfaction of the Exchange Contract," nor do they allow the United States to store water for such releases.** Under this Board's decision in D-935, this water can only be lawfully stored and used for deliveries to the contractors of the Friant Division.

B. Except for San Joaquin River Restoration Flows, Water Appropriated and Stored by Reclamation Under Its Friant Division Permits Cannot Be Diverted Downstream of Friant Dam.

In Decision No. 935, this Board approved only one point of diversion for the water appropriated and stored by the United States under its permits: Friant Dam. (D-935, pp. 101, 107-108.) The Board explicitly rejected the application of one of the Exchange Contractors to allow a point of diversion downstream of Friant Dam. (D-935, pp. 107-108.)

Many years later, after the San Joaquin River Restoration Settlement Agreement was entered into, the United States' applied for and received an amendment to its permits for the San Joaquin River under Water Code section 1707. This amendment protects releases of San Joaquin River Restoration Flows under Water Code section 1707 and allows their rediversion at specified points downstream of Friant once they have served their fisheries purposes under the Settlement.

It is undisputed that the United States has not made any San Joaquin River Restoration Settlement Flows since February 2014 and the United States' releases from Friant Dam for use by the Exchange Contractors did not start until after February 2014. Therefore, the additional points of rediversion do not apply to the 2014 and 2015 operations at issue in this proceeding since no Restoration Flows were released.

Water released from Friant Dam in 2014 and 2015 by Reclamation for use by the Exchange Contractors included water diverted and stored by Reclamation under its San Joaquin River permits.

See, e.g., San Luis Canal Company's Statement of Diversion and Use for 2014, submitted July 1, 2015, citing "Decision 935" as one of the sources of water delivered to the Exchange Contractors by the United States in 2014. Except for San Joaquin River Restoration Flows, which this water clearly was not, the United States' water rights permits for the San Joaquin River do not authorize diversion of water at any point downstream of Friant Dam.

IV. THE WATER CODE PROTECTS ALL LEGAL USERS OF WATER AND DOES NOT ALLOW INJURY TO A LEGAL USER OF WATER MERELY BECAUSE "MOST" OR "SOME" OTHER LEGAL USERS OF WATER WILL BENEFIT.

Friant respectfully urges the Board to reconsider the findings of the Draft Order related to the Coordinated Operating Agreement. Initially, Friant notes that the Draft Order seems to suggest that the means by which the Central Valley Project and the State Water Project have been allocating water in 2014 and 2015 does not injure any legal user of water because, on the whole, the "projects and their contractors have benefited" from the changes under the TUCP Orders issued by the Board. (Draft Order, p. 32.) Just as CEQA does not allow an agency to skip environmental review because the project may be beneficial on the whole, the Water Code does not allow a project that injures a legal user of water even if it benefits some (or even many) others. The Board cannot grant a temporary urgency change petition unless the Board has found that "the proposed change may be made without injury to any other lawful user of water." (Water Code § 1435(b), emphasis added.) The Friant Division contractors are lawful users of the water the United States diverts and stores under its San Joaquin River permits. By giving water to the State out-of-priority and rendering itself unable to deliver the required amount of substitute supply to the Exchange Contractors, the United States injured its Friant Division contractors. The Water Code does not allow this injury to be ignored or brushed aside simply because the State Water Contractors who received the water benefited from it. Rather, the very purpose of this statute is to prevent injuries to all lawful users of water. This statute protects the Friant Division contractors, and the Draft Order errs by suggesting the statutory standard is satisfied merely because State Water Project contractors benefited from the changes. It is not.

Moreover, the terms of the Coordinated Operating Agreement did not even authorize the United States to give water to the State in 2014 or 2015. By its terms, the Coordinated Operating Agreement is an agreement for the projects to share water in years in which the Central Valley Project has a surplus. The amount of the Central Valley Project surplus is calculated under "Study 1," which deducts, among other things, the amount of substitute supply the United States must deliver to satisfy the Exchange Contractors. When there is no Central Valley Project water remaining after the "Study 1" calculations are made, there is no surplus, and the United States does not owe any water to the State under the terms of the Coordinated Operating Agreement. In both 2014 and 2015, the United States was temporarily unable to meet its substitute supply obligations to the Exchange Contractors. Therefore, there was no surplus remaining after "Study 1" calculations, and no water should have been provided to the State out-of-priority under the Coordinated Operating Agreement.

V. ADDITIONAL CONDITIONS MUST BE INCLUDED IN THE ORDER TO REQUIRE RECLAMATION TO COMPLY WITH THE TERMS AND CONDITIONS OF ITS WATER RIGHTS PERMITS SO THAT THE INTERESTS OF THE FRIANT DIVISION CONTRACTORS ARE NOT FURTHER INJURED BY RECLAMATION'S ILLEGAL USE AND DELIVERY OF WATER.

For the last two years, the contractors of the Friant Division have suffered extreme damage, while the United States has stored and delivered water **in violation of this Board's Decision No. 935 and**

the terms of its permits for the Friant Division. This Board has the power and the duty to enforce the terms of the water permits and decisions it issues. The Friant Division contractors therefore request that this Board amend the Draft Order to include the following terms and conditions to enforce the Board's holdings of D-935:

1. The United States shall immediately cease and desist from using any water appropriated under the permits issued to it under D-935 for any releases for satisfaction of the Exchange Contract.

2. The United States shall not release any water generated under the permits issued to it under D-935 from Friant Dam for use by the Exchange Contractors except as necessary to satisfy prior vested rights as set forth in the flow schedule specified in the Exchange Contract, that is, Schedule 1 of the Purchase Contract. The United States shall not at any time allow any releases made to satisfy the Exchange Contractors' prior vested rights to exceed the maximum flows specified in Schedule 1 of the Purchase Contract, nor shall the United States permit any alteration of the timing or quantity of the specified flow schedule.

3. The United States shall not deliver to the Exchange Contractors any water stored under the permits issued to the United States under D-935, nor shall the United States store any water under the permits issued to it under D-935 for the purposes of delivering it to the Exchange Contractors.

4. To the extent the United States makes available a substitute water supply from the Sacramento River or its tributaries or the Sacramento-San Joaquin Delta of the quantity and quality specified in the Exchange Contract, the United States shall use the water generated under the permits issued to it under D-935 to enable the Friant Division of the Central Valley Project to operate substantially as programmed by the United States and presented to and approved by this Board in D-935.

5. Except for any water released as San Joaquin River Restoration Settlement Flows and protected under Water Code section 1707, which may be re-diverted at the previously approved points of diversion downstream from Friant Dam once it has served its instream purposes, the United States shall comply with the condition of its permits that specifies that "The point of diversion is to be located at "Friant Dam, N. 39^{o} 30' W - 2,200 feet from S ¼ corner of Section 5, T11S, R21E, MDB&M, being within the NW ¼ of SW ¼ of said Section 5."

6. Except for any water released as San Joaquin River Restoration Settlement Flows and protected under Water Code section 1707, which may be re-diverted at the previously approved points of diversion downstream from Friant Dam once it has served its instream purposes, the United States shall not release from Friant Dam any water appropriated under the permits issued to it under D-935 for diversion at points downstream from Friant Dam, nor shall the United States allow or authorize any person or entity to divert water appropriated under the permits issued to the United States under D-935 at any point downstream from Friant Dam.

Moreover, the Statements of Diversion and Use filed by the four districts that make up the Exchange Contractors obfuscate the nature and extent of the reserved water rights they purport to have been exercising in 2014 and 2015. Rather than filing Statements of Diversion and Use that quantify

separately the type and amount of each district's water reserved rights, these four districts filed four copies of one combined Statement that aggregates their water use. This is improper because some of the rights that they claim to be exercising are riparian and, generally speaking, can only be legally used on riparian lands owned by the water right holder. Because the Statements aggregate all four of the districts water use, it is impossible to determine how much riparian water was actually being used on which allegedly riparian lands.

7. The four districts that comprise the Exchange Contractors are directed not to aggregate their water rights and water use for purposes of the Statements of Diversion and Use.

8. By January 15, 2016, Central California Irrigation District is directed to file an amended Statement of Diversion and Use for 2014 setting forth the specific water rights that District claims to own or otherwise have right to use, the nature of each of these rights, and the specific amounts of water used under each of these rights.

9. By January 15, 2016, Firebaugh Canal Water District is directed to file an amended Statement of Diversion and Use for 2014 setting forth the specific water rights that District claims to own or otherwise have right to use, the nature of each of these rights, and the specific amounts of water used under each of these rights.

10. By January 15, 2016, San Luis Canal Company is directed to file an amended Statement of Diversion and Use for 2014 setting forth the specific water rights that District claims to own or otherwise have right to use, the nature of each of these rights, and the specific amounts of water used under each of these rights.

11. By January 15, 2016, Columbia Canal Company is directed to file an amended Statement of Diversion and Use for 2014 setting forth the specific water rights that District claims to own or otherwise have right to use, the nature of each of these rights, and the specific amounts of water used under each of these rights.

V. CONCLUSION

The people of the Friant Division urge this Board to exercise its authority to enforce the terms and conditions of its Decision No. 935 and the permits issued to the United States pursuant to that decision. No area of the State has suffered more in this current drought than the eastern part of the San Joaquin Valley. The inability to get the United States to deliver the water diverted and stored under its San Joaquin River permits to the Friant Division contractors who contracted and paid for that water has drastically depleted local groundwater supplies. The situation within the Friant Division is growing more desperate with each passing month.[2] Our small family farms have suffered unimaginable damage. In the last year, **about 40% of the permanent plantings** – that is, orchards – **in the Terra Bella Irrigation District have been lost**. Equally concerning, over the last two years, **thousands of homes within the Friant Division have lost their water service** as groundwater levels dropped precipitously and their wells failed. The Friant-Kern Canal was not designed for water to sit in it for extended periods of time as has happened over the past two years. As a result, the water in the Canal – which provides drinking water supplies to six cities and dozens of rural communities – has become so stagnant that earlier this fall, the

[2] In our previous filings we have noted some of the impacts suffered by the Friant contractors; in the interest of time, we will not repeat those statements here, but we do note that those statements remain pertinent and valid.

turbidity was measured at 87 NTUs. (Turbidity is also spiking after storm events because the Canal contains stormwater inlets and the areas within the Friant Division watershed suffered much damage under this summer's massive wildfires.) Emergency releases had to be made from Millerton Lake to bring the turbidity down to 5 NTUs so that the 980+ homes in the Lindsay-Strathmore service area that rely on this water for their drinking supply did not lose water service to their homes. If the lawful users of water within the Friant Division are denied access to their water supplies for a third year in a row, the Canal will stagnate further and the water supplies to many more homes will be threatened. In other words, if the Friant Division and its facilities are not operated as they were designed and permitted to operate, they cannot serve the purposes – and communities – they were designed and permitted to serve.

At the same time, the United States continues to financially cripple the Friant Division by charging its contractors millions of dollars in operations and maintenance costs even though they have not received the benefit of any water. In combination with the lack of water deliveries needed for water districts to generate revenue, the charges imposed on Friant Division contractors by the United States for water the United States delivered to the Exchange Contractors has depleted our member districts' reserves and rendered them unable to participate in the water transfer market as other entities have been able to do.

This Board is the only state agency with the power to help the people of the Friant Division – the legal users of the water diverted and stored under the permits issued to the United States – defend themselves against the opportunistic misuse of those water rights. Friant is asking only that you enforce existing terms and conditions on water rights. The two years in which we have been deprived of the benefits of these rights have been crippling to our communities, our farms, and our people. We urge you – we beg you – to help us before any more of the small family farms of the eastern San Joaquin Valley vanish, or any more homes lose their water service.

Respectfully Submitted,

Jennifer T. Buckman
General Counsel
Friant Water Authority