

## CENTRAL DELTA WATER AGENCY

235 East Weber Avenue • P.O. Box 1461 • Stockton, CA 95201  
Phone (209) 465-5883 • Fax (209) 465-3956

### DIRECTORS

*George Biagi, Jr.*  
*Rudy Mussi*  
*Edward Zuckerman*

### COUNSEL

*Dante John Nomellini*  
*Dante John Nomellini, Jr.*

September 15, 2014



Via Email [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Re: Central and Southern Delta Water Availability and Use

Dear Ms. Townsend:

The Central Delta Water Agency ("CDWA") submits the following comments:

### Process:

There are two alternative courses of action which we recommend.

The first is for the SWRCB to conduct an evidentiary hearing wherein certain fundamental facts and relevant legal issues can be determined. Thereafter, the involved parties will likely appeal the findings and determinations of the hearing to the relevant court and the issues and facts can be finally resolved.

The second course of action, and the one preferred by CDWA is for the SWRCB and the involved parties to outline the issues to be determined and jointly petition the superior court for declaratory relief to resolve these same factual and legal issues. This course of action should be less expensive and less time consuming and allows for these very important, if not controlling issues and facts to be finally resolved.

**Issues:**

The Notice of Workshop sets forth as the issue “what water is available for diversion and use by water right holders in the central and southern Delta.” The questions presented extend to whether or not the “water is subject to, or available for appropriation or riparian rights.”

The proper issue is “what water is available for diversion by the Water Projects and their contractors.”

Delta diverters claim entitlements to water which extend not only to the traditional water rights including riparian, pre-1914 appropriative, post-1914 appropriative, overlying rights to groundwater together with the rights to recapture and to statutory rights as against the SWP and CVP. Any objective consideration of the subject matter must address the issues in the context of the specific water in the Delta pool and the status of such water (i.e. naturally occurring water and natural flow, including accretions from groundwater, groundwater and precipitation; abandoned flow; recycled/recaptured water; salvaged or saved water; water for salinity control; water for an adequate supply for Delta diverters, water for protection of the public trust; water for a physical solution, etc.). The DWR and USBR have complained “that absent information to the contrary, water stored and released by the State Water Project and the Central Valley Project (“Water Projects”) and water acquired by the Project Agencies’ contractors through transfer and exchange agreements is likely being diverted by south and/or central Delta diverters asserting riparian and pre-1914 water rights.”

The Delta pool is comprised of commingled water. The Water Projects and their contractors seek to have the SWRCB impose burdens of proof on the senior water right holders in the Delta while escaping their proper legal burden as the parties who have commingled water with that to which Delta diverters are entitled.

Water Code Section 7075. Reclamation of Water provides:

“Water which has been appropriated may be turned into the channel of another stream, mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another shall not be diminished. (Stats. 1943, c. 368, p. 1669, § 7075.)”

In Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, the California Supreme Court made it clear that in cases of the commingling of water where it is difficult to determine with exactness

the quantity of water which parties are entitled to divert:

“The burden of proof rests with the party causing the mixture. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.”

Among the issues to be addressed should be the threshold question as to whether and to what extent the Water Projects and their export water contractors have any water in the Delta Pool to which they are entitled which is being diverted by Delta diverters? The next question should be can such water to which the Water Projects and their export contractors are entitled be reclaimed without diminution of the entitlement of Delta users? The bottoms of Delta waterways are below the tide level and absent project operations always have water. The issue in the Delta has not been a matter of quantity but rather has been quality. Because the water diverted by the water projects is commingled with Delta water, the maintenance of adequate quality in the south and central Delta for their purposes and obligations is controlling.

Water stored or diverted in violation of the terms and conditions of permits and licenses or statutory requirements is not water to which the projects or their contractors are entitled.

Transferred water has no greater entitlement than the water right to the water which is being transferred.

Water in storage is already commingled water and as it travels to the Delta Pool it is diverted and rediverted and what amounts of stored water are returned to the rivers and actually reach the Delta Pool is an issue where the burden of proof is clearly on the party causing the commingling.

Typical upstream storage captures the natural flow in the winter and spring and at other times which would otherwise flush the Delta and Bay thereby extending the period of adequate water quality in the Delta pool. The SWP and CVP seek to take advantage of such diversion to storage without the obligation to provide a physical solution or compensating release of water for salinity control. Such a physical solution is not only required by reason of basic equity and water rights law, but is part of the statutory entitlements of Delta diverters versus the water projects. The statutory entitlements not only include salinity control but require that there be no exports from the Delta unless the Delta is first provided an adequate supply.

An overriding practical issue which should also be addressed is what if anything is to be gained by curtailing Delta diversions. The Delta if not farmed would consume more water.

The Delta is the exact situation where it is difficult to determine with exactness the quantity of water which parties are entitled to divert and the burden as required by the California Supreme Court in the "Butte Canal & Ditch Co." case must be applied to the Water Projects and their contractors.

Use for farming in the Delta saves consumption and the real issue is what quantity of the commingled water in the Delta is properly available for diversion by the Water Projects and their contractors. The questions presented in the notice have the issues reversed.

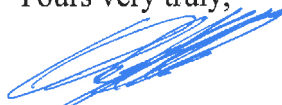
Additional Information From Delta Diverters

The consumptive use modeling by the Water Projects and the information already being provided by Delta diverters is more than sufficient for any reasonable operating purposes. The excess water in the Delta is recycled to the Delta pool and there is no loss except due to evaporation and evapotranspiration which is being determined by crop planting data and actual measurements of local evaporative losses.

The proposed use of the emergency regulation and five day response is abusive and serves no real purpose. There is no way to achieve substantial compliance with a five day return requirement and no real purpose for the information requested. We urge that the factual and legal issues as to the availability of water for export from the Delta by the Water Projects and their contractors be determined prior to any new requests for information.

Thank you for the opportunity to comment.

Yours very truly,



DANTE JOHN NOMEILLINI  
Secretary and Co-counsel

DJN:ka