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Via Electronic Mail

Felicia Marcus, Chair
State Water Resources Control Board
c/o Jeanine Townsend, Clerk to the Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Email: commentletters@waterboards.ca.gov



Re: **9/24/2014 Notice of Public Workshop - Central and Southern Delta Water Availability and Use**

Dear Ms. Townsend:

These comments are submitted on behalf of the Woods Irrigation Company ("WIC") and its various constituent members with respect to the State Water Resources Control Board's ("Board") Notice of Workshop concerning Central and Southern Delta Water Availability and Use, which is scheduled for September 24, 2014, the ("Workshop"). WIC also joins in the comment letters submitted by Dante Nomellini, Sr., on behalf of the Central Delta Water Agency ("CDWA"), John Herrick, submitted on behalf of the South Delta Water Agency ("SDWA"), and Jennifer Spaletta, submitted on behalf of various South Delta landowners. The Workshop raises significant threshold issues which must be addressed in connection with a determination of the ever present availability of water for diversion in the central and south Delta. However, we are mindful that the notice of Workshop seeks focused comments and suggestions as to how the Board should proceed in addressing this very important issue. As such, WIC's comments will be, accordingly, limited in scope.

A. Nature Of Proceeding Or Process

Although the determination of many of the issues raised by the subject matter of the Workshop appear self-evident they, nevertheless, continue to linger and need to be finally resolved. Accordingly, WIC strongly urges the Board to determine underlying and threshold factual issues by way of an evidentiary hearing. Such process should allow for the formal presentation and cross-examination of witnesses. Otherwise, testimony is allowed to be presented on these crucial topics without rigorous cross-examination which serves to further encourage incomplete, selective, and misleading testimony by those interests who

continue to promulgate the baseless position that Delta water rights don't exist, or that there isn't sufficient water in the central and south Delta to allow for in-Delta diversions. Moreover, a formal evidentiary hearing facilitates the proper use of expert testimony and cross-examination which is crucial in determining the subject issues. The factual issues which WIC believes the Board should determine are discussed below.

Obviously, the Board's factual determinations can and likely will be appealed to the Courts. Nevertheless, the Board is the best and most appropriate entity to determine the factual issues and the completeness of the availability and administrative record will prove crucial in future proceedings.

In contrast, the Court, rather than the Board by way of a declaratory relief action, is the most appropriate venue to determine the threshold legal issues in dispute. A discussion of the legal issues which WIC feels the Court must determine, following the Board's determination of the factual issues, is discussed below within the context of the three questions posed by the Notice of Workshop.

B. The First And Second Questions Posed In the Notice

The first question posed in the Notice of Workshop is 1) *Is any of the previously stored water in the Sacramento River watershed reservoirs that DWR and USBR release from storage (including releases for exports from the Delta or salinity control and public trust protection, or stored water that is transferred through the Delta from purchase points north of the Delta to points of delivery south of the Delta) available for appropriation by diverters in the central and southern Delta?*

The second question posed in the Notice of Workshop is 2) *Does the connection of the Delta to the ocean provide additional water to satisfy water right demands in central and southern Delta? If so, is this water subject to, or available for, appropriation or riparian right? Are there other sources of water available for appropriation or riparian right in the central and southern Delta, other than contributions from Sacramento-San Joaquin Watersheds?*

The two questions set forth above are not very useful and seem to presume that Delta diverters are, in fact, intentionally diverting stored water. If the purpose of the Workshop is truly intended to be informative as opposed to an attempt to confirm the Projects' hypothesis, the emphasis should be on how to determine the overall ability of water in the Delta at any given time, including during dry conditions. To answer that question, the Board should simply determine if there is water available for diversion in the south and central Delta under a no-project operation scenario.

While the Delta's connection to the Bay is self-evident, in order to answer the above question, the Board should determine whether there are other sources of water available in the central and south Delta other than water deriving from the Sacramento/San Joaquin watersheds. Such a determination must be made by the Board before it has any basis to suggest that in-Delta diverters are intentionally, solely, or improperly diverting stored water.

After such factual determination is made, legal questions such as are other sources available for appropriation or a use under a riparian right could, and should, be determined by the courts pursuant to a declaratory relief action.

In order to fully embrace the questions we propose above, a plethora of other factual determinations must be made including, but not limited to:

1. How does the volume of water in the Delta Pool change under different hydrologic conditions?
2. What water makes up the Delta Pool (or, alternatively, “the watercourses from which South and Central Delta diverters divert?”)
3. Does the effect of the tide maintain a constant pool of water in the central and southern Delta or does that pool dissipate in the absence of inflow from eastside tributaries?
4. What effect does the diversion of water from the central and southern Delta have on the total amount of water available from those channels?

Under natural conditions did the waters of the various tributaries remain distinct after entering the Delta or did tidal action, sea level, and varying rates of inflow mix those waters? Did that mixed water travel upstream on tides or did only the water originating from each tributary move back upstream on each tide towards the respective tributaries?

5. Does Sacramento River water reach the central and southern Delta channels under natural conditions and how, specifically, is that determination made? Are the central and southern Delta part of the Sacramento River watershed? The Suisun Bay watershed? The San Francisco Bay watershed?

Do transfers affect accretions to and losses from watercourses upstream of the Delta?

6. Of what does the “natural flow” in the central and southern Delta consist? Inflow from Sacramento River, San Joaquin River, Mokelumne River, Calaveras River, Consumnes River? Water already in Delta channels? Suisun Bay? San Francisco Bay? Rivers tributary to Bay waters like the Napa River? Artesian flow? Accretions from groundwater?

7. How does the Board, or anyone, properly determine natural flow in the Delta in light of the numerous inputs, accretions, losses, reuse and discharges which occur upstream?

C. The Third Question Posed In The Notice

The third question posed in the Notice of Workshop is: *Will required diversion information proposed in the attached draft Order, in conjunction with the information submitted pursuant to the Delta TUCP Order, be sufficient to inform a State Water Board determination on the availability of water for diverters in the central and southern Delta?*

The answer to the third questions is clearly, no. This question does not logically relate to or track what should be the underlying, fundamental purpose of the Workshop (to determine the availability for diversion of water in the Delta). Instead, the draft Order focuses on the propriety of in-Delta diversion without an understanding of what water is available to divert in the Delta and why and how it's available. The draft Order also is improper because it focuses only on the Delta, seeks information which cannot reasonably be provided in a short period of time, requests information which has already been, and is continuing to be, provided as part of the existing statutorily required statements of use.

Additionally, the information submitted pursuant to the Delta TUCP Order does nothing to answer the fundamental question of how to determine water availability in the Delta.

Thank you for the opportunity to comment on the notice of Workshop. We look forward to discussing these issues in more detail on September 24th.

Very Truly Yours,

HARRIS, PERISHO & RUIZ



S. DEAN RUIZ, ESQ

SDR/ajf