From: William Jennings [mailto:deltakeep@me.com]
Sent: Wednesday, April 27, 2016 2:28 AM
To: Riddle, Diane@Waterboards; Satkowski, Rich@Waterboards; Carr, Chris@Waterboards; Howard, Tom@Waterboards
Cc: Amy L. Aufdemberge Esq.; RMILLIGAN@usbr.gov; Mike Jackson; Chris Shutes; Carolee Krieger; Barbara Vlamis; Tccannon@comcast.net; Jason Flanders; Herrick, John @aol.com; ngmplcs@pacbell.net; Tom Keeling; Barbara Barrigan-Parrilla; Tim Stroshane; Meserve, Osha@semlawyers.com
Subject: CSPA et al. Protest, Objection: San Joaquin River Flow TUCP Order

Dear Tom Howard, Diane Riddle, Rich Satowski and Chris Carr:

Attached is a Protest, Objection, Petition for Reconsideration and Petition for Hearing respectfully submitted by the California Sportfishing Protection Alliance, California Water Impact Network and AquAlliance regarding the 19 April 2016 *Order Approving in Part and Denying in Part a Petition for Temporary Urgency Changes in Permit Terms and Conditions Requiring Compliance with San Joaquin River Flows.*

We would appreciate a receipt of timely submission.

If you have questions, please don't hesitate to contact us. Thank you.

Bill Jennings
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State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
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PROTEST– PETITION
Objection
Petition For Reconsideration
Petition For Hearing

Temporary Urgency Change Petition and Responding Order for New Melones Permits 16597, 16600 and 20245 (Application A014585A, A019304 and 14858B) of the U.S. Bureau of Reclamation

We, Chris Shutes, Water Rights Advocate, California Sportfishing Protection Alliance (CSPA), 1608 Francisco St., Berkeley, CA 94703, blancapaloma@msn.com, (510) 421-2405; Bill Jennings, Executive Director, CSPA, 3536 Rainier Ave, Stockton CA 95204, deltakeep@me.com, (209) 464-5067; Barbara Vlamis, Executive Director, AquAlliance, P.O. Box 4024, Chico, CA 95927, barbarav@aqualliance.net, (530) 895-9420; Carolee Krieger, Executive Director, California Water Impact Network, 808 Romero Canyon Rd., Santa Barbara, CA 93108, caroleekrieger7@gmail.com, (805) 969-0824; and Michael Jackson, counsel to CSPA, CWIN and AquAlliance, P.O. Box 207, 429 W. Main St., Quincy, CA 95971, mjatty@sbcglobal.net (Protestants)

have read carefully a notice relative to a petition for Temporary Urgency Change (TUCP) of the Bureau of Reclamation (Bureau), dated April 1, 2016. The Executive Director issued an Order granting this petition on April 19, 2016 entitled ***Order Approving in Part and Denying in Part a Petition for Temporary Urgency Changes in Permit Terms and Conditions Requiring Compliance with San Joaquin River Flows*** (TUCO or "Order").

The proposed petition for water and Order will:

(1) not be within the State Water Resources Control Board's (SWRCB) jurisdiction
(2) not best serve the public interest
(3) be contrary to law
(4) have an adverse environmental impact

(All of the above)

State facts, which support the foregoing allegations:

We incorporate by reference the 11 April 2016 Protest on the subject TUCP submitted by The Bay Institute, Nation Resource Defense Council, Pacific Coast Federation of Fisherman's Associations. Institute for Fisheries Resources and Defenders of Wildlife into these comments. Consequently, we do not duplicate or reiterate their excellent comments.

Background

The April 4, 2016 Temporary Urgency Change Petition (TUCP) of the Bureau of Reclamation (Bureau) to reduce D-1641 flow requirements at Vernalis in the months of April, May and June, 2016, and the associated April 5, 2016 workshop held by the State Board, repeat the legacy of bad process that became standard operating procedure in the litany of Temporary Urgency Change Petitions and Orders in 2014 and 2015.

On March 29, 2016, the Board sent out through its "lyris" listserve notice that it would hold a workshop on April 5, 2016. The Board posted an agenda link for the workshop on April 1. The Board circulated Bureau's TUCP on the day it was filed, April 4, one day prior to the workshop. On April 5, 2016, the Board held the workshop. On April 14, 2016, the Board issued a Temporary Urgency Change Order (Order). The Order granted the majority of the Bureau's requested changes, most notably the flow reductions, approved a requested water transfer in lieu of some of the no-longer-required flow objectives, required an accounting of water in New Melones for the water year 2016, and required carryover storage in New Melones of a minimum 415,000 acre-feet. On April 18, the fisheries agencies concurred with the Order. On April 18, flows slightly increased on the lower Stanislaus River, and on April 21, at about 4 a.m., they peaked at 3647 cfs at Orange Blossom Bridge.

While, in distinction to 2014 and 2015, the Board did not issue a TUCO prior to holding a workshop, the compressed timeline of the process still did not allow time for careful review of the proposed changes and relevant facts. This was compounded by the failure of the Board to post the presentations from the workshop, a condition that to our knowledge continues to be the case. After a request to the Clerk to the Board, CSPA received copies of these presentations on April 18, and distributed them to several other interested parties.

In addition, the workshop nature of the process did not require careful scrutiny of the representations concerning water available to the Bureau to release to meet its D-1641 Vernalis flow obligations. In particular, the 1988 "Agreement and Stipulation" between the Bureau of Reclamation (Bureau) and Oakdale and South San Joaquin Irrigation Districts (Districts) (Stipulation)[1] was paraphrased both by Board staff and counsel for the Districts, but not presented at the workshop.

The TUCP was made public on April 4, 2016, one day before the workshop on April 5. The TUCP proposes to waive the D-1641 Vernalis flow requirements for April through June. In place of the required D-1641 flows, the Bureau, as part of an agreement with the Districts, propose to substitute the required flows under the Biological Opinion for the Long Term Operation of the State Water Project and Central. In addition, the TUCP proposes that the Districts will make a water transfer of 75,000 acre-feet to Westlands Water District during the April 15-May15 time period, and that this transfer water will augment the BiOp flows and anticipated flows from the Merced and Tuolumne rivers to provide an average pulse flow of 3000-3200 cfs on the San Joaquin River at Vernalis. The Bureau and the Districts propose to let the fisheries agencies shape the pulse flow according to the agencies' perception of greatest benefit. The fisheries agencies, represented by Mr. Wikert from the US Fish and Wildlife

[1] http://www.oiwn.org/app/download/9316354/OID+1972+,1988+Water+Agreements.pdf

Service, presented a plan at the workshop for how the water proposed for release under the TUCP should be shaped. The fisheries agencies, both during the workshop and in April 18 e-mails concurring with the TUCO, offered no alternative proposals for New Melones and lower Stanislaus April-June operations.

At the workshop, State Board staff, on the one hand, and Bureau of Reclamation and counsel for the Districts on the other, presented two major threads of discussion for the Board's consideration. First, Staff and the Districts presented trade-offs between end-of-September storage in New Melones and the volume of April-June instream flow releases to the lower Stanislaus River. Second, the Districts presented the view that the Bureau of Reclamation did not have the water in New Melones to meet the D-1641 required April-June flows at Vernalis. The Board and Board staff apparently completely accepted this second thread of argument presented by the Bureau and counsel for the Districts, and accordingly appear not to have considered alternatives to the flows proposed in the TUCP.

Discussion

CSPA disputes the interpretation that the Bureau does not have water available in New Melones Reservoir. Accordingly, CSPA requests that the Board reconsider the TUCO and order an alternative flow requirement for Vernalis beginning forthwith, as we describe below.

In the description of the April 5 public workshop, provided as a link of the Board meeting agenda for that same date, the Board describes the situation of New Melones storage as follows: "OID and SSJID claim rights to the first 600 TAF of inflow to New Melones Reservoir."

Similarly, the April 5 joint presentation to the Board by OID, SSJID and the Bureau makes the representation that as of April 5 the Bureau had no water stored in New Melones Reservoir that it could draw on to meet all or part of the D-1641 required April-June flows at Vernalis. Specifically, Slide 18 of the presentation presents a water accounting:

> New Melones – Current Conditions
>
> 650,000 A/F in storage (approx.)
> -450,000 A/F of inflow since 10/1/2015 (approx.)
> 200,000 A/F remaining
> -200,000 A/F in Districts' Conservation Account
> 0 A/F remaining for USBR
> - The Districts will be entitled to the first 150,000 A/F of additional inflow after April 5, 2016

As is the case with the statement from the Workshop Notice quoted above, the truth of the claimed accounting turns substantially on the assumption that the Districts are entitled to the "***first***" 600,000 acre-feet of water that enters New Melones Reservoir in any given year. This interpretation would suggest that the Bureau is not entitled to do anything with water in storage in New Melones Reservoir, including meeting its D-1641 instream flow requirements, until the

Districts' annual entitlement, plus its Conservation Account water, is already physically present in New Melones Reservoir.

However, that is not what the 1988 Stipulation states. The Stipulation reads in pertinent part: "[T]he United States will deliver each water year to the Districts for diversion at Goodwin Diversion Dam the following quantity of water: …" (Stipulation, p. 1).

There is absolutely nothing in the agreement that requires the Bureau to have that water ***physically present in storage*** in New Melones at any particular time of year. On the contrary, §3 of the agreement requires: "For the purposes of estimating the amount of water available for the Districts, the Bureau of Reclamation will furnish a forecast in April of the inflow to New Melones Reservoir for the water year." (*Id.*). As is almost universally the case in California water operations, an operator can reasonably apply forecasting tools accepted industry-wide to estimate the amount of future inflow to a reservoir and make use that forecasting to allocate water to various beneficial uses.

In short, the Bureau can make use of forecasting to allocate water available to protect public trust resources in the lower Stanislaus River, the lower San Joaquin River, and the Delta. In fact, it is legally obligated to do so.

First, such operation is consistent with Article X, Section 2 of the California Constitution, which mandates: "…[t]he general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable." Water currently in storage in New Melones should be put to the beneficial use of protecting public trust resources if future inflow will allow the Bureau to meet its obligations to the Districts under the rule of priority. Clearly, this better meets the test of the "fullest extent" requirement under Article X, Section 2 than waiting to release Stanislaus River water past Vernalis when it is too late to benefit fish.

Second, as we quoted during the April 5 workshop, the *Light* decision affirmed: "when the public trust doctrine clashes with the rule of priority, the rule of priority must yield."[2] If water deliveries to the Districts are based on projected inflow, releases to protect public trust resources must be accorded equal operational forecasting. If there is risk that the Bureau will make releases and that subsequent inflow to New Melones is not as great as forecast, surely, under Light, the risk should be shared by the water users, and not placed on public trust resources alone.

In CSPA's oral presentation to the Board at the April 5 workshop, we recommended that the Board consider applying its authority under the waste and unreasonable use doctrine (again, Article X, Section 2), as affirmed by *Light*, to reduce irrigation deliveries to the Districts in order to protect public trust resources and meet at least the April and May D-1641 flows and still retain 415 TAF end-of-September storage in New Melones. In the Order, the Board argues that any such reductions would require a proceeding:

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[2] Light v. State Water Resources Control Bd. (2014), Cal.App.4th, [No. A138440. First Dist., Div. One. June 16, 2014.], citing El Dorado v SWRCB 142 Cal.App.4th at p. 966.

> Before making other water users responsible for meeting the San Joaquin River flow objectives, the State Water Board would need to undertake a separate proceeding to do so, which would be contentious and could be lengthy. In any event, such a proceeding would not be complete in time to address flow needs this spring and would distract from efforts to update the Bay-Delta Plan.

(Order, p. 16). As we noted during the workshop, the Districts lived off Bureau's storage in New Melones during the drought while flow at Vernalis was reduced to a trickle. They chose to draw New Melones down, far more than any other entity made choices about New Melones operations. In 2014, gross farm revenue in Stanislaus County reached a record $4.397 billion. CSPA objects to the fact that the Board is prepared once again to summarily reduce instream flows and other measures to protect public trust resources in a workshop, while it insists on the need to address potential reductions in water deliveries in a formal proceeding.[3] We also object to the eleventh hour presentation of the TUCP by the Bureau, which did not allow time for a proceeding such as that described in the Order as quoted above, or even for an accounting of water available to the Bureau.

In addition, CSPA objects to the use of transfers as a substitute for required instream flow when water to meet that flow is available. It is not in the public interest to allow irrigation districts to achieve substantial monetary gain from flows needed to protect public trust resources. Instream flow requirements are part of the cost of doing business. Compelling the river to fund itself through water sales, particularly when such sales are enabled by reducing flow requirements by 80%, is an unacceptable, fundamental paradigm shift from making developmental uses and users mitigate their impacts on the environment.

The Bureau and the Districts propose that NMFS RPA Action IV.2.1 for Import/Export ratio be maintained at the Dry year requirements of 2:1, but that the larger volume of water, because it is a "transfer," be allowed the ratio of 1:1. This significantly diminishes the benefit of the San Joaquin pulse as even the Vernalis Adaptive Management Program recognized: export of the San Joaquin pulse entrains salmonid outmigrants toward and into the Delta pumps.

The D-1641-required magnitude of the April-May pulse was determined through extensive evidentiary hearings. Until the Board updates the Bay-Delta Water Quality Control Plan, which may in whole or in part supersede the existing requirements for a spring San Joaquin pulse flow, the Board should respect the numbers achieved through due process. There is no basis in substantial evidence that a pulse whose average volume is 3000-3200 cfs will achieve benefits to fisheries and other aquatic resources comparable to the D-1641 requirements. Indeed, the predicted pulse volumes under the TUCP are in aggregate lower than the D-1641 requirements for Critically Dry years.

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[3] As it moves forward with the update of the Bay-Delta Water Quality Control Plan, the Board should file for future consideration the 1988 Stipulation that chronically over-allocates the Stanislaus River. Promising 600,000 acre-feet of water per year to the Districts, with an added 200,000 acre-foot "Conservation Pool," in a watershed whose average annual runoff is 1.1 million acre-feet, is a permanent deprivation of the public trust and an unsustainable business model.

As noted during the workshop, the number of spawning fall-run Chinook in the Stanislaus in the fall of 2015 was high. It was augmented in substantial part by fall attraction pulse flows that the Districts and their consultants opposed (by contrast, the Merced had a very small fall pulse flow, and the Tuolumne had none). The current Stanislaus outmigrants represent most of the 2015 fall-run cohort for the San Joaquin River watershed. The Board should give them every chance to successfully outmigrate from the Stanislaus through the Delta.

In addition, the turbid San Joaquin water provides an important benefit to Delta smelt and other species in the central and western Delta. Water coming down the Sacramento River will soon be nutrient-starved reservoir water. It is important that flows from the San Joaquin provide plankton and other nutrients to species in the Delta.

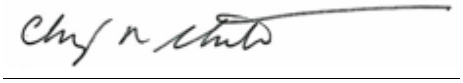
In sum, more water is available to the Bureau for instream flow release than Board Staff and the Districts presented to the Board on April 5. First, as described above, the Bureau can release water now based on forecasted inflow to New Melones. As of April 22, the Districts' two upstream storage reservoirs, Donnells and Beardsley, have only 31,000 acre-feet of unused capacity between them, and the Tri-Dam website described Beardsley as "spilling." They are effectively accounted for as water "due" to the Districts under their water rights. The prediction by the Bureau at the April 5 workshop that April-July inflow to New Melones would likely be close to the 90% exceedance figure appears to be low. Temperatures have been high on many days, and the snowpack in the Stanislaus watershed at the Bloods Creek station has lost half its snow water content since April 1. However, it snowed in the Stanislaus watershed on April 22, and more precipitation is predicted for most of the last week of April. While predicting future runoff is of course uncertain, the 75% exceedance figure seems far more reasonable for this water year. If indeed the April-July inflow to New Melones tracks the 75% exceedance forecast, the Bureau could meet the remainder of the D-1641 required April 15 – May 15 pulse flow and still meet the 415 TAF carryover storage requirement in New Melones that the Executive Director ordered in the TUCO.

Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.)

1. The Bureau must increase the flow in the Stanislaus to meet the D-1641 Dry year pulse flow requirement between the date of receipt of this objection and May 15, so that the flow at Vernalis meets or exceeds 4880 cfs
2. The Bureau must release D-1641 Dry year requirements through June.
3. The Board must order an Import/Export ration of San Joaquin inflow to exports of 2:1, including for transfer water, consistent with NMFS RPA Action IV.2.1 for Dry years.
4. The Board must use its authority to prevent waste and unreasonable use of water to order OID and SSJID to divert no more water in 2016 than they did in 2015, less the amount of water transferred to Westlands Water District. The Bureau and the Districts did not allow time for a formal proceeding on this issue. They should not be rewarded for gaming process in order to avoid an undesirable outcome.

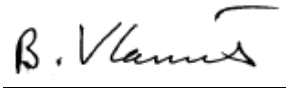
All protests must be signed by the protestant or authorized representative:

Chris Shutes, Water Rights Advocate
California Sportfishing Protection Alliance



Bill Jennings, Executive Director
California Sportfishing Protection Alliance

Barbara Vlamis, Executive Director
AquAlliance



Carolee Krieger, Executive Director
California Water Impact Network

Michael Jackson
Counsel to California Sportfishing Protection Alliance,
AquAlliance, and
California Water Impact Network
/s/ Michael Jackson

Dated: 26 April 2016

All protests must be served on the petitioner. Provide the date served and method of service used:

We have filed this protest, objection, petition for reconsideration and petition for hearing, on 26 April 2016, via e-mail to: Rich.Satowski@waterboards.ca.gov, chris.carr@waterboards.ca.gov, Diane.Riddle@waterboards.ca.gov and Tom.Howard@waterboards.ca.gov.

Also, we have served this protest, objection, petition for reconsideration, and petitions for hearing, on 26 April 2016, via e-mail to rmilligan@usbr.gov and Amy.Aufdemberge@sol.doi.gov.