



July 23, 2014

Via E-mail

Ms. Barbara L. Evoy, Deputy Director
Division of Water Rights
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
bevoy@waterboards.ca.gov

Dear Ms. Evoy:

The California Department of Water Resources and United States Bureau of Reclamation ("Project Agencies") submit this letter to request the State Water Resources Control Board ("State Water Board") through the Deputy Director use the authority granted to her under the recently adopted Emergency Regulations, Title 23 to the California Code of Regulations, section 879(c), and order south and central Delta diverters claiming riparian and pre-1914 water rights to provide the State Water Board with information that (1) supports the basis of any asserted right or rights, and (2) reflects the quantity of water diverted and expected to be diverted. The Project Agencies acknowledge that, notwithstanding the general information contained herein and the information already in the State Water Board's possession, consideration of our objections to diversions of water beyond a valid water right would be further informed by information obtained from south and central Delta diverters regarding their asserted rights and actual water use. The Water Agencies submit 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.

Diversions by riparian and pre-1914 water rights holder in the south and central Delta contribute to additional loss of stored water due to depletions and further complicate water

management in this extremely dry year. Where water quality standards are controlling Water Project operations, any diversion of stored water by these diverters results in additional releases of stored water or reductions in Project deliveries, and requires a trade-off in the protection of beneficial uses.

It has long been recognized that there is uncertainty as to the basis for and extent of the riparian and pre-1914 water rights being asserted in the south and central Delta. This uncertainty was recognized in the final report of the Governor's Commission to Review California Water Rights Law, which identified riparian rights statewide as one of the three sources of uncertainty in California water law because riparian water rights are unrecorded and generally unquantifiable based on existing information. (*Governor's Commission to Review California Water Rights Law, Final Report* (1978), pg. 17.) In 2009, the legislature responded to the need for better information regarding riparian and pre-1914 water rights by adding Water Code section 5100 *et seq.*, requiring statements of diversion from each person who diverts water. Unfortunately, irrespective of these efforts by the legislature and State Water Board, the information obtained from many water users does not enable the State Water Board and the Delta Watermaster¹ to effectively administer the water rights system.²

When acted upon, the additional information required pursuant to the authority granted under the emergency regulations is critical to informing the State Water Board about the nature and extent of the water rights, use, water classification and priority. Based upon the information provided below indicating potential unlawful diversions of stored water by users claiming riparian or pre-1914 appropriative water rights, the State Water Board may request the south and central Delta water diverters to identify each right claimed, the basis for each right, and the rate and quantity of water being diverted pursuant to each right on a monthly basis.

I. Legal Background

California water law states that riparian and appropriative water rights are limited to the natural flow of a river or stream. *Bloss v. Rahilly* (1938) 16 Cal.2d 70, 76; California Water Code sections 1201-2. Additionally, the State Water Board has found that southern Delta riparian right holders have no right, in any year, to natural flow from the Sacramento River. D-1641, pg. 31-33; SWRCB Order WR 89-8, pg. 22-23. These rights of south Delta riparian water users only extend to their correlative share of natural flow in the San Joaquin River. *Id.* Therefore, the

¹ Water Code section 85230 *et seq.* provides for the appointment of a Delta Watermaster tasked with monitoring and enforcement.

² Attached are 20 selected Statement of Diversions. Each contains the same claims to water use, the same year of first use and the same source and a claim that direct measurement using a device is not locally cost effective. The information provided is characteristic of the quality of many statements of diversion.

southern Delta riparian and appropriative rights holders have no right to natural or abandoned flows from the Sacramento River.

Nor are in-Delta riparian and appropriators permitted to divert the Projects stored or purchased water conveyed through channels in the Delta. *Phelps v. State Water Resources Control Board* (2008) 157 Cal.App.4th 89, 111; See also *El Dorado Irrigation Dist. V. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 962. Southern Delta appropriators, absent purchasing other water, are only entitled to excess natural flow and abandoned water. *United States v. SWRCB* (1986) 182 Cal.App.3d, 82, 116 [citing *Meridian, Ltd v. San Francisco* (1939) 13 Cal.2d 424, 455; *Phoenix Water Co. v. Fletcher* (1863)23 Cal. 481, 487]; Water Code § 1202.³ The Project Agencies and their contractors have not abandoned their stored or water transfer water, as they are putting it to beneficial use in meeting regulatory requirements and for delivery to the water contractors.

Some south and central Delta water users appeared to also be seeking to expand California Water Law by asserting rights to water from the "Delta Pool."⁴ The "Delta Pool" concept is that by virtue of the geography in the Delta water from many sources, including the Sacramento River, San Joaquin River, and the Pacific Ocean, mix and becomes a new source of appropriable water. The State Water Board explicitly rejected the idea that water users in the south and central Delta have rights to divert under a "Delta Pool" concept. (See Order WR 2011-0005, pg. 37; Order 2004-0004, pg. 15.)

II. Previous Source Water Analysis

The State Water Board, in recognition that water users in the south Delta only have a right to water from the San Joaquin River, made findings on the availability of San Joaquin River water in the southern Delta. Specifically, in D-1641, the Board concluded:

1. On average, insufficient water is available to supply the southern Delta in Below Normal, Dry and Critical Dry years in August, September and October.
2. On average, sufficient water is available in September only in Wet Years.
3. Insufficient water is available in July during 16 percent of years, in August during 56 percent of years, in September during 78 percent of years, and in October during 70 percent of years. (D-1641, pg. 33).

³ Pre-1914 appropriators in the south and central Delta could potentially divert this foreign water, but only if the foreign water is in excess of the Water Projects' needs. *Stevinson WaterDistrict v. Roduner* (1950) 36 Cal.2d 264; SWRCB Order WR 89-8; California Water Code section 1203.

⁴ During the recent State Water Board proceedings, south Delta diverters claimed a right to divert ocean water. See Order WR 2011-0005, pg. 37; June 30, 2014, letter submitted by South Delta Water Agency to the State Water Board. However, in California, a riparian or appropriative right cannot be established or defined by availability and diversion of ocean water. More importantly, none of the Statements of Diversions filed in the South and Central Delta state ocean water as a source.

The State Water Board summarized those conclusions by stating: riparian [and pre-1914 appropriative] rights to the water of the San Joaquin River are inadequate to meet the agricultural demands in the southern Delta in some months of many years. D-1641, pg. 33. We believe that similar conditions exist in some or all areas of the central Delta.

III. Current Source Water Information Available

To date in July, actual flow in the San Joaquin River flow at Vernalis has only averaged about 250 cfs. Calculated natural flow in San Joaquin River tributaries is an estimated average of 887 cfs to date in July. The southern Delta diversion requirement identified for July in D-1641 (Page 32) is 1,400 cfs and for August is 1,334 cfs. Current and projected flows at Vernalis, as well as natural inflow on upstream San Joaquin River tributaries, are both considerably less than half of the southern Delta diversion requirement. This shortage in water supply from natural flow on the lower San Joaquin River indicates that water is being diverted from other sources, presumably the Projects' stored water or water contracted through transfer and/or exchange agreements, neither of which is available to southern Delta diverters.

Additional irrigation demands by some members of Central Delta Water Agency also rely substantially on San Joaquin River flows. These diversions exacerbate the supply shortage already existing in southern Delta channels and likely result in further diversion from stored water.

Under Water Year 2014 hydrologic conditions in particular, when water users in the south and central Delta divert water in excess of that available under their asserted water rights, they divert stored water and/or water purchased through transfer or exchange agreements. Without additional information that the State Water Board has the authority under the emergency regulations to require, the Project Agencies and their water contractors are presumably injured by diversions in the Delta. Therefore the Project Agencies respectfully request that the State Water Board exercise its statutory authority and obtain information from these Delta water users to support their assumed right to water or require curtailment as unauthorized diversions.

Thank you in advance for your consideration.

Sincerely,



Mark Cowin
Director
California Department of Water Resources



David G. Murillo
Regional Director
Bureau of Reclamation

Attachments

**cc: Felicia Marcus, Chair, State Water Resources Control Board
Tom Howard, Executive Director, State Water Resources Control Board**