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September 10, 2014

Via Electronic and U.S. Mail

Cathy Crothers, Chief Counsel
California Department of Water Resources
P.O. Box 942836, Room 1104-4
Sacramento, CA 94236-0001
Email: crothers@water.ca.gov

Re: Byron-Bethany Irrigation District

Dear Ms. Crothers:

The purpose of this letter is to notify the California Department of Water Resources (DWR) that it is in breach of the May 28, 2003 Agreement Between the Department of Water Resources of the State of California and the Byron-Bethany Irrigation District Regarding the Diversion of Water From the Delta (2003 Agreement).

As DWR is aware, the Byron-Bethany Irrigation District (BBID) diverts water under its pre-1914 appropriative water rights in the south Delta. Originally, BBID's diversion point was located on Italian Slough. In the 1960s, DWR constructed the State Water Project (SWP), including the construction of Clifton Court Forebay and the SWP intake channel, which eviscerated a portion of BBID's facilities and necessitated the relocation of those facilities to the SWP intake channel. Pursuant to a 1964 Agreement, DWR consented to BBID's *permanent and perpetual use* of SWP property and facilities, without cost, to operate and maintain the new point of diversion. Since the 1960s, BBID has diverted water pursuant to its pre-1914 appropriative water rights from this point of diversion. As DWR operates Clifton Court Forebay and the intake channel, BBID has absolutely no control over the source of water present at its diversion point.

The stated purpose of the 2003 Agreement was to reach agreement on BBID's water diversions from the Delta. (2003 Agreement, Recital F.) Through the 2003 Agreement, DWR agreed that BBID could "divert up to 50,000 acre-feet of water annually" at BBID's diversion facilities located on the intake channel of the SWP. (2003 Agreement, ¶ 9.) DWR agreed that BBID had the right to divert water at a rate not to exceed 300 cubic-feet per second and that diversions could occur year-round. (2003 Agreement, ¶ 9.)

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In the 2003 Agreement, DWR also affirmed that it would not take any action to call into question, in any way, BBID's right to divert water. To that end, the 2003 Agreement provides that the:

Agreement shall constitute the full and sole agreement between [DWR] and [BBID] to divert water from the Delta for agricultural, municipal and industrial use. The uses *shall not be disturbed or challenged* by [DWR] and [BBID] shall not claim any right against [DWR] in conflict with the provisions in this Agreement so long as this Agreement remains in full force and effect.

(Emphasis added.)

On July 23, 2014, DWR and the United States Bureau of Reclamation (USBR) sent a letter to the State Water Resources Control Board (SWRCB) regarding in-Delta diversions. The letter, signed on behalf of DWR by its director, Mark Cowin, complained that "south and central Delta diverters" are improperly diverting water previously stored by the projects. In its letter, DWR requested that the SWRCB exercise its enforcement authority to require *all* south and central Delta water users to identify all claimed rights, identify the basis for those claimed rights, and provide the rate and quantity of water being diverted on a monthly basis. In its letter, DWR suggests that these diversions are "unlawful," and posits that there is "uncertainty as to the basis and extent of the riparian and pre-1914 water rights being asserted in the south and central Delta."

In response to DWR's letter, the SWRCB has issued a notice of a public workshop to be held on September 24, 2014, to begin the process of "determin[ing] the facts pertaining to water availability and water diversion and use within the central and southern Delta." The notice explains that the workshop is being held, in part, to address the complaint made by DWR that water users in the south and central Delta are "unlawfully" diverting SWP water. The notice included a Draft Order that, if adopted, will require all pre-1914 appropriative water users to substantiate claimed rights to the SWRCB under threat of enforcement, and require monthly reporting of rates and quantities of water used.


DWR's letter and blanket allegations regarding water users in the south and central Delta implicate BBID's water rights. Through this letter, DWR has "disturbed" and "challenged" BBID's use of water from the Delta. As such, DWR has breached the 2003 Agreement. BBID takes that breach very seriously and believes it is no longer subject to the restrictions contained in the 2003 Agreement.

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Moreover, both DWR and the USBR have complained that users in the south and central Delta are not entitled to water from the Sacramento River, and have rejected the concept of a "Delta Pool" where in-Delta diversions can rely on the pool of fresh water in the Delta to supply needed water. Since the 1960s, as a direct result of DWR's actions in constructing the SWP, and in relocating BBID's diversion to the SWP intake channel, BBID has been taking whatever water DWR brings into the intake channel through Clifton Court Forebay. DWR cannot now complain that BBID's source might include Sacramento River water, as BBID only diverts whatever water DWR transports to BBID's point of diversion.

I suggest we convene a meeting prior the SWRCB's workshop so that we can discuss DWR's breach of the 2003 Agreement and how we are going to resolve these very serious issues. If you have any questions, or need additional information, please do not hesitate to contact me or Rick Gilmore, BBID's General Manager.

Sincerely,



Daniel Kelly

cc: Mark Cowin, Director
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