

## John Herrick

Attorney at Law  
4255 Pacific Avenue, Suite 2  
Stockton, CA 95207  
Telephone (209) 956-0150  
Fax (209) 956-0154  
E-mail: Jherrlaw@aol.com

April 27, 2010

**Via email: [dheinrich@waterboards.ca.gov](mailto:dheinrich@waterboards.ca.gov)**

Dana Heinrich, Esq.  
Staff Counsel IV  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Re: May 5, 2010 CDO Hearings Mussi, Dunkel & Pak

Dear Ms. Heinrich:

As you know, I have been out of the country during most of this month; my delay in returning having been affected by the Icelandic volcanic ash cloud. I appreciate any and all considerations given during this time.

Pursuant to earlier telephone calls, and your discussion this morning with Dean Ruiz, Esq., you are aware that the above-referenced parties to the scheduled CDO hearings, in conjunction with the South and Central Delta Water Agencies have filed a *Petition for Writ of Prohibition and Complaint for Declaratory Relief* in the Superior Court of California, County of Sacramento. Generally, this action seeks a judicial determination that the SWRCB has no authority to determine riparian and pre-1914 rights, and a court order barring the above referenced May 5 CDO hearings and other such hearings. A hearing on the temporary relief we seek has been scheduled for next Tuesday, May 4, 2010, at 9:00 a.m. in Department 19.

As we have previously stated, we believe it is more economical and convenient to determine some of the legal issues prior to conducting any CDO hearings. This is especially true regarding the issues involved in the SWRCB's authority to conduct these hearings. Our review of the law as set forth in the pleadings indicates no such authority exists. It is likely that the court will grant some form of temporary relief, including an order precluding the May 5, 2010, hearings, at least until any opposing parties have had the opportunity to submit further briefing. In light of this, we again request that these first CDO hearings be continued until a reasonable time after the court has been able to make a decision subsequent to next Tuesday's hearing.

We suggest that the current CDO hearings be tentatively continued until the June 7 date which was previously set for the second round of CDO hearings. That second round can then be

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rescheduled to a later date, if necessary. This approach gives all parties sufficient time to prepare for all contingencies pending the court's interim and/or final decision.

I also suggest that all the discovery and public record productions be continued to agreed upon dates pending the court's decision, some or all of the requests may become mute.

Third, I again raise my request for recusal regarding Chairman Hoppin and Board member Baggett as hearing officers. If we continue the May 5 hearings until the June 7 date, the hearing officers for the later date can simply act as hearing officers for the continued May 5 hearings. This would partially address the issue I have raised regarding bias.

With regard to that issue, I note in response to your April 23, 2010, letter the following. There is apparently some confusion regarding the Wee Report. Your letter states that neither Chairman Hoppin nor Board Member Baggett are familiar with the Report. This does not appear likely. They may not recall that information they reviewed and discussed was in fact authored by Mr. Wee. His Report (dated May 2008) was part of the material submitted by the SJRGA for the workshops held to develop the Strategic Plan. I do not think there is any disagreement that the Report was heavily relied on by the Board when it concluded in the Strategic Plan that the number of illegal diversions in the Delta "could be quite significant." I understand the Wee Report *was the reason why* the SWRCB staff began investigating San Joaquin County Assessor's maps (as was done by Mr. Wee) as a partial evaluation of local water rights. The conclusion about significant numbers of illegal diversions (repeatedly stated by Board members at numerous public meetings) was reached after the Report was presented the Board and after Mr. O'Laughlin made a presentation before the Board regarding the Report. Since this was done in 2008, your review of calendars for 2009 does not fully address the issue, and the Board Member must be familiar with the Report.

Notwithstanding the current recollection of the members, serious questions still remain regarding communications between the Board and Mr. O'Laughlin's office. The recollections and statements of the board members pertaining to 2009 only partially answers the question. At this time, we do not have any statements about meetings with board members during the earlier times, and I do not believe we have identified the meeting(s) referenced by Mr. Petruzzelli between his office and board members. It appears that additional inquiries and a review of older records is necessary so that we might refresh the recollections of the board members.

With regard to the Almond Growers convention statements, I must have misstated my point regarding what was said at that function. When I stated that the words used might not lead anyone else to the same conclusion, I was trying to be polite in asserting that the words alone were not dispositive. However, when viewed in context with the Strategic Plan, the reasons for focusing on the Delta, the obvious shortcomings of the Wee Report, and Mr. Hoppin's position as "judge," the statements become very serious. Chairman Hoppin certainly would not make

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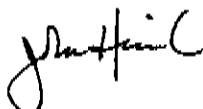
unqualified statements about the existence or prevalence of "illegal diversions" in the Delta unless he believed such were the case, especially knowing that he was about to be the "judge" in cases on that very subject. Whether or not he is familiar with the particular facts surrounding a diverter being attacked, having already concluded there are illegal diversions in the southern Delta means he is biased. As I stated before, no superior court judge would act as trier of fact on an issue on which he has already made up his mind, and the parties would not condone such if he/she attempted to do so.

I will contact you within the next few days to discuss this further and focus/limit the records I believe need to be disclosed.

Notwithstanding this unresolved issue, to repeat, I ask that the May 5 CDO hearings be continued pending the court's resolution of the jurisdictional/authority issues, those hearings be continued until the June 7 date, and that the hearing officers for the May 5 hearings recuse themselves and the June 7 hearing officers preside instead.

Please feel free to contact me if you have any questions.

Very truly yours,



JOHN HERRICK

cc (via e-mail):

Dean Ruiz	dean@hpllp.com
David Rose	Drose@waterboards.ca.gov
DeeAnn M. Gillick	dgillick@neumiller.com
Thomas Shepard	tshephard@neumiller.com
Stanley C. Powell	spowell@kmtg.com
Tim O'Laughlin	towater@olaughlinparis.com
Ken Petruzzelli	kpetruzzelli@olaughlinparis.com
Jon D. Rubin	JRubin@Diepenbrock.com
Bruce Blodgett	director@sjfb.org
Erick Soderlund	esoderlu@water.ca.gov
Valerie Kincaid	vkincaid@diepenbrock.com
Mia Brown	mbrown@neumiller.com