

KARNA E. HARRIGFELD (State Bar No. 162824)  
**HERUM CRABTREE BROWN**  
A Professional Corporation  
2291 West March Lane, Suite B100  
Stockton, California 95207  
(209) 472-7700  
(209) 472-7986 Fax  
kharrigfeld@herumcrabtree.com

STATE WATER RESOURCES  
CONTROL BOARD

2009 JUL 18 PM 11:46

DN. OF WATER RIGHTS  
SACRAMENTO

Attorneys for  
**STOCKTON EAST WATER DISTRICT**

**STATE OF CALIFORNIA**

**STATE WATER RESOURCES CONTROL BOARD**

**In the Matter of:** )  
 )  
**PETITIONS FOR LONG TERM TRANSFER** )  
**INVOLVING A CHANGE IN THE PLACE** )  
**AND PURPOSE OF USE OF LICENSES 2685,** )  
**6047 AND 11395 OF MERCED IRRIGATION** )  
**DISTRICT AND LICENSES 5417 AND 11058** )  
**OF MODESTO AND TURLOCK** )  
**IRRIGATION DISTRICTS** )

**CLOSING REPLY BRIEF**

**I.**  
**INTRODUCTION**

This Closing Reply Brief is filed on behalf of Stockton East Water District (SEWD), a party to the Petitions for Long-Term Transfer involving a change in the place and purpose of use of Licenses 2685, 6047 and 11395 of Merced Irrigation District (Merced) and Licenses 5417 and 11058 of Modesto and Turlock Irrigation Districts (MID/TID) (hereinafter referred to as San Joaquin River Group Authority (SJRGA) "SJRGA Petitions"), in response to the Closing Brief of SJRGA.

SJRGA does NOT argue that SEWD has failed to meet its burden to show that it will be injured by the proposed petition. Rather, SJRGA rests its defense of SEWD's protest on a technical argument that SEWD is not a legal user of water, using a tortured interpretation of this Board's holding in Water Right Order 2000-02, and the subsequent approval of that holding in *State Water Resources Control Board Cases*, Coordinated

Case No. JC 4118, Statement of Decision (May 5, 2003). Under the facts of this case, SEWD is a legal user of water that will be injured by the proposed change. This conclusion is supported by the rationale clearly articulated by both the Board and the Court.

SEWD's requested condition on the Petitioner's permits is a reasonable one which will prevent this injury without hindering the purpose of the requested change. SEWD does not object to the requested change so long as this condition is incorporated. Further, SJRGA has failed to controvert the evidence presented by SEWD that the impacts to it from the proposed change may be more serious than those modeled by SJRGA. SEWD's requested condition should be incorporated into the SJRGA water right permits if the SJRGA Petitions are granted.

## II.

### ARGUMENT

#### **A. Contract Water Right Holders are Legal Users of Water who may Protest Change Petitions brought by Third Parties.**

SJRGA's Closing Brief drives a truck through the narrow exception to the definition of "legal user of water" delineated by the Board in Decision 1641 and Water Right Order No. 2000-02, and by Judge Candee in his decision in the *State Water Resources Control Board Cases*, Coordinated Case No. JC 4118, Statement of Decision (May 5, 2003), p. 43-49. In Decision 1641, the Board was faced with a situation where contractors of the Bureau of Reclamation (Bureau) were protesting petitions for change that were actually requested by and supported by the Bureau. The Board found that *in this situation*, the water service contractors are not injured legal users of water within the meaning of Water Code section 1702. However, the Board clearly articulated that this was a narrow holding:

...this does not mean that a water service contractor cannot maintain a protest against a change in water rights of an application for new water rights based on other legal theories, such as public interest or public trust....**A contractor also can protest a change proposed by another**

**water right holder that would cause injury to the water right holder from whom the contractor buys water.** Water Right Order 2000-02, page 11. (Emphasis Added).

The Board found the articulation of these concepts so important, that it directed that Decision 1641 be amended to include them. Water Right Order 2000-02, page 12. This language was added to the last paragraph on Page 130 of the Revised Decision 1641.

In the Writ of Mandate proceeding that followed Decision 1641, the Sacramento Superior Court heard arguments from the parties about whether the Board's exception to the "legal user" definition was correct. The Court concluded that it was, and did not expand or retract from the Board's decision on this issue in any fashion. (See Conclusions and Order Section of *State Water Resources Control Board Cases*, Coordinated Case No. JC 4118, Statement of Decision (May 5, 2003), pp. 100-102, omitting any discussion of the topic). Rather, the Court's opinion contains a discussion of whether Westlands Water District and Santa Clara Valley, as contractors of the Bureau, could challenge the Bureau's place of use petition. *Id.* at 43-49.

After reviewing the development of the "legal user" concept, the Court concluded that the term "legal user" was not intended to include those persons who use water under contract with a water supplier entity. The Court clarified this holding by explaining that traditional "trust theory" supports the concept that the trustee has general management powers, including the power to compromise claims involving the trustee property as long as the trustee exercises reasonable prudence. *Id.* at 48. Therefore, a beneficiary (in this case Westlands and Santa Clara) cannot challenge the outcome of a proceeding in which the trustee (the Bureau) has petitioned the Board concerning some aspect of the water right held in its name but benefiting contractors. *Id.* at 48. **Notably, however, the Court was careful to explain that its holding was limited to "the facts of these cases,"** *Id.* at 49, and that other situations could exist in which a contractor would be a legal user":

"a beneficiary's position may be enhanced in limited situations **if the harm is caused by a third party.** Under Restatement (Second) section 281, "[I]f the beneficiary is in possession of the subject matter of the trust,

he can maintain such actions [at law] against the third person in possession is entitled to maintain.”...this possibility appears to have been recognized by the Board when it amended D-1641 to provide that **the “legal user” requirement does not preclude water service contractors from protesting changes to existing project water rights or application for new rights or from filing protests based upon injury to the water right holder whom they rely on for deliveries under their water service contracts.** AR/0770/143. *Id.* at 49 (Emphasis Added).

Contrary to SJRGA’s irresponsible presentation of the holding in *State Water Resources Control Board Cases*, the Court in fact did not even independently discuss whether SEWD was a “legal user” of water. Rather, at page 91, the Court explains that the San Joaquin entities (including SEWD) did not have standing to protest the Bureau’s requested permit conditions to meet flow objectives. *Id.* at 91. Again, SJRGA ignores the fact that in that case, SEWD was protesting the Bureau voluntary commitment to certain conditions on its New Melones water right permits, with whom it had a contractual relationship. It was not, as it is here, protesting a petition **brought by a third party** that is not supported (and was in fact **protested by) the Bureau.**

**B. The SJRGA Advocates an Impractical Exception to the Legal User Definition.**

Beyond the fact that SJRGA’s argument represents a tortured interpretation of Decision 1641 and Judge Candee’s Statement of Decision, it also advocates an impractical rule. To the extent that SJRGA is asking this Board to expand the holding from Decision 1641 (that Bureau contractors were not legal users of water who could protest the Bureau’s petition for change) to the facts of this case (where a third party action threatens to injure the contractor and the Bureau has not agreed to the change), the Board should not exercise its jurisdiction to do so.

The Board and the Court’s rationale in making the holdings they did under the facts of Decision 1641 (while still subject to legal criticism by many) are at least supported by a practical consideration. A rule that allows a contractor and the Bureau to bicker over a proposed change under the guise of the no-injury rule in Board proceedings puts the Board in the awkward position of contract law arbitrator, rather than its intended

role of water policy decision-maker. This is not the case here. Rather, practical considerations weigh strongly in favor of allowing contractors to essentially stand in the shoes of the Bureau in protesting *change petitions brought by third parties* that may inhibit their contractual water rights. The contractor is in the best position to advocate these interests, and has the most at stake in doing so since it is the beneficiary of the water. Further, the contractor's protest in such cases does not present any messy contract issues for the board since the contractor is merely standing in the shoes of the Bureau. Finally, if the Board were to hold otherwise, contractors and the Bureau would be forced to start entering into agency agreements in which the Bureau would appoint the contractor as its agent for the purposes of such Board proceedings. Such a practice would force the Board to add another layer of bureaucracy to its proceedings and create yet another layer of conditions that would be the subject of dispute in a hearing such as this.

**C. SJRGA's Brief Fails to Recognize the Injury to SEWD Developed at the Long Term VAMP Hearings.**

In all of its efforts to argue that SEWD is not a "legal user", SJRGA fails to address the real issue in front of the Board – the potential injury to SEWD due to the requested change and the way to alleviate it. SJRGA's brief rests solely on the conclusions of its own modelers to argue that the impacts to New Melones will be minimal. While admitting that there is some potential for injury, SJRGA still fails to address the two serious issues raised by SEWD at the hearing that show that this injury may be far more severe in the following two cases:

*(1) If VAMP causes New Melones storage to decrease by a small increment, but that reduction results in a re-classification of the water year type under the IOP.* As SEWD described on page 5 of its Closing Brief, and in the testimony of Kevin Kaufman (SEWD001), allocations under the IOP are based upon February end of month storage plus March through September forecast of inflow. For certain water year types, a mere 1,000 acre-foot reduction in carry-over storage would result in an amplified reduction in deliveries to contractors of up to 31,000

acre-feet. This impact is best understood from a summary of the CVP Contractor allocations in Table 2 from page 2 of the IOP (SEWD 006). As illustrated below, if VAMP causes New Melones storage to be reduced from 2,500,000 to 2,499,000 acre-feet, deliveries to contractors under the IOP are reduced from 90,000 to 59,000 af.

**Summary of IOP Table 2**

(1,000 acre-feet measured at Goodwin)

<u>New Melones Storage Plus Inflow</u>		<u>CVP Contractors</u>	
<i>From</i>	<i>To</i>	<i>From</i>	<i>To</i>
1,400	2,000	0	0
2,000	<b>2,500</b>	0	<b>59</b>
<b>2,500</b>	3,000	<b>90</b>	90

*(2) If the Bureau does not operate New Melones to the IOP.* SEWD described at the hearing and detailed at pages 5-7 of its Closing Brief that these impacts were not modeled by SJRGA, but that its own witness, Mr. Steiner, admitted that variation from the IOP would impact New Melones and the water quality at Vernalis.

SJRGA's failure to contest this evidence is significant in that this potential for more serious injury to SEWD is uncontroverted. This injury must be addressed by the Board when it crafts the conditions under which it will grant SJRGA's petition for change. SEWD proposed condition squarely addresses these potential adverse impacts.

**D. The Condition Requested by SEWD is Reasonable and Justified.**

The condition requested by SEWD is logical and it supports the Board's own reasoning in Decision 1641. Conversely, the condition put forth by SJRGA takes a step backward and advocates a protection of SJRGA's senior water rights which was already rejected by the Board in Water Right Order 2000-02.

SJRGAs Closing Brief proposes a condition that would only limit its refill abilities when the Bureau releases water from storage, rather than when it is bypassing inflow. (SJRGAs Brief at p. 37). *Blazingly, SJRGA admits that this condition backpedals from that agreed to by it and the Bureau as a condition of the Bureaus protest withdrawal!* *Id.* at p. 37, lines 15-19. For good reason, the Board has already rejected such an approach in Water Right Order 2000-02:

A refill constraint that applies only when the USBR is making releases of stored water from New Melones would be similar to the provisions in SWRCB Standard Permit Term 93, which requires upstream water right holders to cease diversions when the USBR has to release stored water to supplement uncontrolled river flows to meet the Vernalis objectives. **Merced and Turlock irrigation districts seek reconsideration because they mistakenly believe that the condition would constitute a reversal of their senior water right priorities by requiring them to contribute to the existing permit responsibilities of USBR. This is not the purpose of the condition; its function is to avoid shifting the water cost of the flow releases under the SJRA to the USBRs New Melones Project, where the SWRCB has found that the USBR did not agree to provide additional dilution flows to make up for refill operations. WR Order No. 2000-02 at page 17. (Emphasis Added).**

SEWDs proposed condition is practical and limited to adding two simple, logistical concepts to the condition that was already imposed by the Board in Decision 1641 to address (1) coordination, and (2) Vernalis standards other than salinity.

As the testimony at the hearing bore out – absent year-round coordination and simple communication between reservoir operators any refill condition is meaningless. We trust that the Board is not in the business of imposing meaningless conditions and will take SEWDs suggestions to add some practical implementation provisions to the proposed condition seriously. It is not as if the operators on the tributaries are not familiar with coordination of releases on the various tributaries, including the Stanislaus River. That is precisely what is done by the three tributary operators during the April/May VAMP pulse period and for months leading up to pulse period and after the

period. It is not burdensome to require that this coordination be extended to additional periods of the year impacted by the proposed change.

SEWD's second request to correct what appears to be a clerical error in the Revised Decision 1641 is similarly harmless. Water Right Order No. 2000-02 clearly contemplated that the refill condition was being imposed to protect the Bureau's junior water rights from impairment due to an increased need to meet Vernalis objectives, including flow, caused by VAMP. Water Right Order No. 2000-02 at pages 16-17. Yet, the final condition mentioned only the Vernalis salinity objective. It is a simple exercise to modify the condition to reflect the true intent of the Board in Water Right Order No. 2000-02. Anything less subjects the Bureau, and subsequently SEWD, to further injury in violation of Water Code section 1707 and 1736 if SJRGA refill to compensate for VAMP releases causes the need for New Melones releases to meet the flow objectives at Vernalis.

III.

CONCLUSION

For the foregoing reasons, we respectfully request that State Board make the modifications proposed herein to the refill to protect SEWD from increased releases for water quality and flow caused by the refilling of Merced and MID/TID respective reservoirs.

Dated: 7/18/03

Respectfully Submitted,

  
\_\_\_\_\_  
KARNA E. HARRIGFELD  
Attorney for Stockton East Water District



**PROOF OF SERVICE**

I, Rosie Lopez, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 2291 West March Lane, Suite B100, Stockton, California 95207, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On July 18, 2003, at my place of business a copy of **CLOSING REPLY BRIEF** was placed for deposit following ordinary course of business as follows:

**BY U.S. MAIL** - with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.

The envelopes were addressed as follows:

John Herrick  
South Delta Water Agency  
4255 Pacific Avenue, Suite 2  
Stockton, California 95207  
Fax: (209) 956-0154

Dante John Nomellini  
Central Delta Water Agency  
235 East Weber Avenue  
Stockton, California 95201  
Fax: (209) 465-3956

Tim O'Laughlin  
San Joaquin River Group Authority  
2571 California Park Dr., #210  
Chico, California 95928  
Fax: (530) 899-1367

Barbara Leidigh  
State Water Resources Control Board  
Executive Office  
Post Office Box 100  
Sacramento, California 95812-0100  
Fax: (916) 341-5621

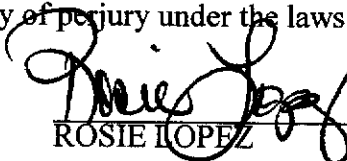
**BY FEDERAL EXPRESS/OVERNIGHT MAIL** in a sealed envelope, with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013©, 2015.5.]

**BY PERSONAL SERVICE/HAND DELIVERY.**

**BY FACSIMILE** at approximately \_\_\_\_\_m. by use of facsimile machine telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2008 and 2003(3).]

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 18, 2003

  
\_\_\_\_\_  
ROSIE LOPEZ