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BLE  
EXEC

In reply refer to: L2015-013

March 4, 2015

Barbara Evoy, Deputy Director  
Division of Water Rights  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

**Via Electronic Submission and US Mail**

Re: Order for Additional Information (Order WR 2015-0002-DWR)

Dear Ms. Evoy:

Concurrently with this letter, El Dorado Irrigation District (District) is submitting all information required by the above-named Order for the two pre-1914 water rights held by the District that are subject to the Order. We write separately, however, to provide additional comments on the Order and the potential use of the information it requires.

The District is disappointed that the State Water Resources Control Board (SWRCB) did not – at least to our knowledge – consult with or inform any senior water rights holders prior to issuing the Order. The Order came only days after the issuance of a Dry Year Program Report that specifically identified the need for the SWRCB to improve communications on curtailments and to improve communications regarding complaints. (SWRCB Dry Year Program Report, January 30, 2015, at pp. 8-9.) By issuing the Order without any notice or consultation, the SWRCB missed an important first opportunity to turn its words into action.

The District also believes that the Order's scope exceeds legal bounds in several respects. We agree that obtaining accurate information about all water rights holders' use is critically important, particularly during a drought, and we support the apparent objective of enforcing the water-rights priority system, which "has long been the central principal in California water law." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243.) In this case, however, the Order's ends do not justify its means.

The Order references two complaints received in 2014 – the state and federal project operators' complaint that downstream interests were unlawfully diverting releases of stored water from the project reservoirs, and an environmental group's converse complaint that those projects were unlawfully intercepting and delivering water to which senior water rights holders were entitled.



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The Order cites California Code of Regulations, title 23, section 879, subdivision (c) as the Board's authority for requiring information: "*Upon receipt of a complaint alleging interference with a water right by a riparian or pre-1914 appropriative water right holder, or upon receipt of information that indicates unlawful diversions of stored water by riparians or pre-1914 appropriative water right holders, the Deputy Director may issue an order under this article requiring such water right holders to provide additional information regarding the property patent date, the date of initial appropriation, and diversions made or anticipated during the current drought year.*"

The referenced complaints and regulation furnish sufficient authorization for the SWRCB to require information submittals from water rights holders *downstream of the project reservoirs*, and from the project operators themselves. But the Order is not so limited; instead, it sweeps pre-1914 water rights holders like the District, *upstream of the project reservoirs*, into its dragnet. It is physically impossible for the District to intercept stored releases from project reservoirs, and therefore the District's water rights cannot be a source of interference under the two complaints' allegations.

The Order attempts to address this legal and logical flaw in two ways. First, it "notes that unauthorized diversions anywhere within the Sacramento. . . watershed may reduce instream flows in a manner which would require the Projects to increase reservoir releases to meet Delta water quality standards." (Order at ¶8.) While true, this statement has no relevance to the allegations of the two complaints. Further, it applies only to *unauthorized* diversions, not to the upstream diversion of water under rights, like the District's, that are senior to those of the projects. The validity and priority of senior upstream water rights is not vitiated by the fact that their exercise may burden the projects, by causing them to release more water (or store less water) to meet their legal obligations. (See *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 147 Cal.App.4<sup>th</sup> 937, 967-969.)

Second, Finding 2 of the Order states, "The Deputy Director for the Division has information that indicates there may be unlawful diversions of stored water by riparians or pre-1914 appropriative water rights claimants in the Sacramento and San Joaquin River watershed and Delta." On its face, this broad finding might provide support for the Order's scope, under section 879(c) or some other authority. To learn more, the District recently requested all SWRCB records containing any information referred to in that finding. The SWRCB responded that the only such records were the two complaints referenced in the Order, and some supporting letters. In other words, Finding 2 adds nothing to the Order's legally deficient justification for compelling responses from senior water rights holders upstream of the Delta and the project reservoirs.



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Accordingly, the District concludes that the Order is overbroad and lacks a competent legal foundation to require the District to respond. Further, the District is concerned that the Order could be a faulty first step in a path that leads to more coercive and unauthorized mandates later this year, in contravention of the District's legal rights. Therefore, although the District is responding fully and in good faith to the Order, we reserve all legal rights to challenge it and any subsequent actions based upon it, if need be.

How the SWRCB uses the diversion information and projections it receives will be critically important. The District supports the SWRCB's apparent goal of better defining senior water rights holders' *actual* demands in 2015, rather than "paper" demands based upon maximum entitlements. To that end, we recommend that the SWRCB utilize the reported 2014 actual diversions, rather than projected 2015 diversions, as the measure of such demands this year. With 2015 likely to be comparable to – if not drier than – 2014, actual diversions in 2014 provide a reasonable estimate of 2015 demands. Conversely, water rights holders have every incentive to inflate their projected 2015 diversions to try to protect their potential uses, rather than to reflect their actual needs this year. If the SWRCB relies upon such projections, the result will be unnecessarily early and severe curtailment of junior water rights.

It is also imperative, both from a legal and equitable standpoint, that the SWRCB conduct its curtailment analyses on truly watershed-specific bases. (See SWRCB Dry Year Program Report, *supra*, at pp. 6, 8-9.) Using the entire Sacramento River basin as the analytical area risks the unnecessary curtailment of junior water rights because the water foregone under those rights will not necessarily increase the supplies available to senior rights holders, who may be upstream or on watercourses with no hydrologic connection to the foregone flows.

Even within a single watershed, the SWRCB needs to take hydrologic connectivity into account. Last year, 500 District customers in Outingdale faced draconian cutbacks after the District's permitted right on the Middle Fork Cosumnes River was curtailed for the sake of senior rights holders downstream. For those customers' severe sacrifices benefitted no one, because the Cosumnes River itself was completely dry just a few miles downstream (at Michigan Bar), for the entire summer. Thus, the water supplies that our customers were denied never reached a senior user.



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In summary, the District supports the SWRCB's objectives and does not doubt its good faith, but we are gravely concerned by the legal and logical missteps this Order presents, and we remain concerned about how the SWRCB will use the information it receives. California's drought is causing enough suffering as it is; the SWRCB must ensure that its actions mitigate – not compound – that suffering.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Thomas D. Cumpston', is written over a faint, larger version of the same signature.

Thomas D. Cumpston  
General Counsel

TDC:pj

cc: Jim Abercrombie, General Manager  
Brian Mueller, Director of Engineering  
Brian D. Poulsen, Jr., Senior Deputy General Counsel  
Dan Corcoran, Environmental Manager  
Jim Murphy, Administrative Analyst