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February 22, 1995

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HAND DELIVERY

State Water Resources Control Board
901 P Street
Sacramento, California 95814

Re: Draft Water Quality Control Plan
for the San Francisco Bay/Sacramento-
San Joaquin Delta Estuary, December 1994

Dear Board Members:

Introduction

This letter is written on behalf of the court-appointed representatives of and other irrigators in Area I, the original and largest area of Westlands Water District. We here provide their preliminary comments on the draft Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, December 1994 (the "Draft Plan"). Initially, we wish to commend the Board for its efforts in coordinating and creating a proposed agreement on Bay-Delta standards in conjunction with the federal government, urban and agricultural water users (although not our clients), and environmental interests.

However, there are certain issues of serious concern with the Draft Plan, particularly as it applies to or affects Area I. The Draft Plan states (at p. 1) that "[f]ull implementation of this plan by the SWRCB will occur through the adoption of a water right decision." The Draft Plan further states (at p. 24) "the SWRCB will initiate a water right proceeding following adoption of this water quality control plan . . . . The water right decision, which is anticipated before June 1988, will allocate responsibility for meeting objectives among water right holders in the Bay-Delta Estuary watershed and will establish terms and conditions in appropriate water right permits." Although the Bureau of Reclamation ("Bureau") should not operate the Central Valley Project ("CVP") in accordance with the Draft Plan until its adoption and the adoption of a water right decision, the Bureau is now employing the Draft Plan's restrictions.

In a December 21, 1994 letter from the Bureau's Regional Director to the National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS"), the Bureau stated: "It is our intent to immediately modify, upon your concurrence, coordinated operations of the Central Valley Project and State Water Project to conform to California Urban Water Agency/Agricultural Water Users (CUWA/Ag) proposal as modified by the Principles." On February 15, 1995 the Bureau announced for the upcoming wet year 100% allocations of CVP water for agricultural contractors north of the Delta, Friant division and exchange contractors, but only 75% for San Luis Unit contractors, including Area I. Prior to the adoption of the Draft Plan and an appropriate water right decision we object to any partial implementation of the Draft Plan if and to the extent that such implementation (1) requires the Bureau to take Area I's vested water rights, or (2) gives the Bureau of Reclamation discretion to take such rights.

U.S. v. State Water Resources Control Board, 182 Cal. App. 3d 82, 119 (1986) opines that combining the Board's water quality and water rights functions in a single proceeding is "unwise." It declined to suggest explicitly that the Board must first define or quantify all existing water rights, acknowledging that such an "omnibus assessment" would prove "cumbersome and impractical." Id. at 118-19. On the other hand, the court did not expressly suggest that an omnibus water quality plan should be adopted without examining its direct or indirect adverse effect on specific water rights. As reflected in the notice of public hearing (at p. 2) the Board has previously recognized that water quality regulation should not "preampt" water rights protection: "The 1991 Bay-Delta Plan did not amend the flow and operational objectives for protection of fisheries-related beneficial uses, because the SWRCB intended to address flow and operations in a subsequent water right decision." In our view, as it relates to Area I and other San Luis Unit farmers, the Draft Plan puts the cart before the horse.

Here, the Bureau and other involved federal government agencies are already "implementing" the not-yet-adopted Draft Plan in such a way as to claim it as the basis for the involuntary reallocation of 25% of the water to which our clients are entitled, even in this extremely wet year. It would not be unduly cumbersome or impractical for the Board to make a specific assessment at this time of the impact of the Draft Plan on such rights -- and to protect them against federal abridgement. We would welcome the opportunity to discuss with the Board techniques for insuring that Area I's rights are not effectively modified or amended pending a formal water right decision. One such technique would be for the Board to require the Bureau to

operate the CVP under the Draft Plan in a manner that gives full deference to Area I's existing rights.

Our clients' lands and those of other Area I farmers they represent are served with federal irrigation water pursuant to a 1963 service contract (the "1963 Contract") and various repayment and recordable contracts implementing the 1963 Contract. The 1963 Contract has been enforced in a 1986 federal court judgment (the "1986 Judgment"). Barcellos & Wolfsen, Inc. v. Westlands Water District, 491 F. Supp. 263 (E.D. Cal. 1980) ("Barcellos I"); Barcellos & Wolfsen, Inc. v. Westlands Water District, 899 F.2d 814 (9th Cir. 1990) ("Barcellos II"). In addition to these contractual and judicially decreed rights, our clients' rights to irrigation water from the CVP derive from the federal reclamation statutes and permits issued by the Board. Each source of our clients' rights is discussed more fully below. Copies of the 1963 Contract and the 1986 Judgment were filed by our clients under cover of the letter dated February 16, 1993 of Donnelly, Clark, Chase & Smiland relating to proposed D-1630, all of which are incorporated herein by reference.

1. Clients' Rights

(a) Federal Reclamation Statutes

A landholder who has applied irrigation water to beneficial use on his land has a statutory property right appurtenant thereto which cannot be unilaterally altered or taken away by the government. 43 U.S.C. §§ 372, 383, 485h-4, 485h-1(4); Pub. L. No. 86-488 § 1(a); Ickes v. Fox, 300 U.S. 82, 95 (1937); U.S. v. Alpine Land & Reservoir Co., 697 F.2d 851, 853-57 (9th Cir. 1983); Nevada v. U.S., 463 U.S. 110, 121, 126 (1983).

Reclamation statutes prefer irrigation over other purposes and restrict the government's authority to divert irrigation water for nonirrigation uses. 43 U.S.C. §§ 485h(c), 521; Pub. L. No. 674 § 7; California Water Code §§ 106, 1254; Pub. L. No. 86-488 § 1(a); California v. U.S., 438 U.S. 645, 671 (1978); Fresno v. California, 372 U.S. 631 (1963).

Reclamation statutes require the government to sell project water to beneficial users of the water under contract to reimburse their portion of the government's construction and operation and maintenance costs. 43 U.S.C. §§ 390b(b), 485h(a), 485h(c), 521; 16 U.S.C. § 460l-13; 50 Stat. 844, 850 § 2; Pub. L.

No. 674 § 6; Pub. L. No. 86-488 § 8; Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257, 260 (9th Cir. 1984).

Areas outside the geographic boundaries of a project are generally not a part of the project and persons operating in those areas have no rights to project water thereunder. Hudspeth County Conservation & Recreation District No. 1 v. Robbins, 213 F.2d 425, 431 n. 6 (5th Cir. 1954); Bean v. U.S., 163 F. Supp. 838, 844 (Ct. Cl. 1958). The Unit was constructed and is operated to furnish water to approximately five hundred thousand acres of land referred to as the Federal San Luis Unit "service area." Pub. L. No. 86-488 § 1(a). The Unit authorizing act allows only "occasional" diversions "in times of drought" outside the service area of the Unit. Westlands Water District v. Firebaugh Canal, 10 F.3d 667, 671, 672, 676 (9th Cir. 1993).

Section 3408(k) of the Central Valley Project Improvement Act ("CVPIA") provides that "nothing in [CVPIA] is intended to alter the terms of any final judicial decree confirming or determining water rights." The legislative history confirms that this was specifically intended to protect Area I's 1986 judgment. 138 Cong. Rec. S17659-60 (daily ed. Oct. 8, 1992). Accordingly, Area I farmers enjoy statutory immunity from involuntary reallocation.

Water rights under federal reclamation law are appurtenant to all project lands irrigated with project water and are measured by beneficial use. 43 U.S.C. § 372. The right is a first right to a stated share of the project's available water. Id. at § 485h-1. In carrying out reclamation statutes, the government shall not affect in any way the right of any water user or landowner within the project to such water. Id. at § 383. The 1937 act authorizing the CVP provides that the "entire" CVP is for the purpose, among others, of reclaiming arid lands by irrigation and that reclamation law shall govern its operation. 50 Stat. 844, 850 (Aug. 26, 1937). The 1954 reauthorization statute provides that the "entire" CVP is subject to the priorities under said statutes. Pub. L. No. 674 (Aug. 27, 1954). The Unit was authorized to be operated as "an integral part" of the CVP. Pub. L. No. 86-488 (June 3, 1960) at § 1(a). It creates no "preference" for Unit contractors over other CVP contractors. Westlands v. Firebaugh, 10 F.3d 667 at 671. Congress did not intend that Unit water is for the "exclusive benefit" of Unit contractors. Id. It is reasonable to construe the act "to serve the overall needs of the CVP." Id. If Congress had wanted "preferential treatment" with respect to the Unit it could have said so. Id. at 672.

(b) Permits

Our clients are the owners of rights to beneficial use of the water which are property rights appurtenant to their lands which arose 25 years ago upon original application and beneficial use. 43 U.S.C. §§ 372, 485h-1(4); Ickes v. Fox, 300 U.S. 82, 95 (1937); Nevada v. U.S., 463 U.S. 110, 121, 126 (1983). These rights are reflected in the permits and licenses issued by the Board.

A permit or license granted by a state agency, which is relied upon, creates a vested right which may not be deprived under the due process clause. Halaco Engineering Co. v. South Central Coast Regional Commission, 42 Cal. 3d 52, 72-73 (1986); City of West Hollywood v. Beverly Towers, Inc., 52 Cal. 3d 1184, 1189-94 (1991).

A state agency may also be estopped to alter a permit or license under such conditions. Raley v. California Tahoe Regional Planning Agency, 68 C.A.3d 965, 975 (1977); Security Environmental Systems, Inc. v. South Coast Air Quality Management District, 229 Cal. App. 3d 110, 128 (1991).

Our clients have operated in reliance upon the permit issued by the Board three decades ago. They acquired a vested right, which the Board is estopped to destroy.

(c) 1963 Contract

The 1963 Contract expressly requires that the federal government "shall furnish" to Area I farmers 900,000 acre feet of irrigation water each year. It also expressly recites that such water can be made, and will be "available" each year. Further, it states that "the right to the beneficial use of water . . . pursuant to the terms of this contract . . . shall not be disturbed."

(d) 1986 Judgment

The 1986 Judgment ordered that the government "shall perform" the 1963 Contract. It "requires" the government to perform the 1963 Contract. Barcellos II, 899 F.2d at 826. The 1986 Judgment also enforces certain of the statutory rights described above, including those relating to the sale of the water, and its use within the San Luis Unit.

Section 3408(k) of the CVPIA provides that nothing therein shall "alter the terms of any final judicial decree confirming or determining water rights." The legislative history makes clear that this provision was intended by Congress to protect the 1986 Judgment. 138 Cong. Rec. S17659, S17660 (Oct. 8, 1992).

A federal court judgment is binding upon, and must be honored by, an agency of the state government. Martin v. Martin, 2 Cal. 3d 752, 761-62 (1970); Gene R. Smith Corp. v. Terry's Tractor, Inc., 209 Cal. App. 3d 951, 953-54 (1989).

Furthermore, a state court judgment, rendered December 5, 1963, decreed that the 1963 Contract was "valid," the judgment was "conclusive" against all persons, including the Board, "as to all matters which could have been adjudicated" in that action, and that each such person, including the Board, is "enjoined and restrained" from raising any issue as to which the judgment was conclusive.

(e) Section 8 Of The 1902 Act

Under Section 8 of the Reclamation Act of 1902 and the 1956 reenactment and clarification thereof, water rights shall be appurtenant "to the land irrigated." 43 U.S.C. §§ 372, 485h-4. The 1956 legislation provides that a water user "shall . . . have a first right" to water for use "on the irrigable lands . . . owned" by him. Id. at § 485h-1(4). In short, federal water rights arise out of the use of water for irrigation, not for other purposes.

Section 8 and its 1956 iteration obligate the government to proceed in conformity with state laws relating to the use of irrigation water. No holder of appropriative water rights under California law may change the purpose of use of such water without the permission of the Board. Water Code § 1701. It is within the Board's discretion to grant or refuse an application to change the purpose of use of appropriated water. However, before permission to make such a change is granted the Board shall find that the change will not operate to the injury of any legal user of the water involved. Id. at §§ 1702, 1705. Where the requested change of purpose of use is for preserving or enhancing fish resources, in addition to finding that the change will not unreasonably affect any legal user of water, the Board must determine if the proposed change is in the public interest. Id. at § 1707(b)(2).

Here, as applied to Area I, vested rights under Board issued permits are being abrogated by the Bureau's operation of the CVP. We request that Board ensure the sanctity of such rights until they are amended through the procedure of a Board water right decision.

2. Recent Scholarship

What is at stake here? Perhaps some perspective is in order.

Several well-known western historians have in the last decade mounted a determined critique on irrigators' water rights. A central focus of the attack has been on landowners' rights and correlative government duties under the federal reclamation program. A second target has been the state law doctrine of prior appropriation which underlies that program, as well as this Board's water right program. Norris Hundley, Jr., The Great Thirst: Californians And Water, 1770s-1990s (1992); Donald J. Pisani, To Reclaim A Divided West: Water, Law, And Public Policy 1848-1902 (1992); Donald Worster, Rivers of Empire: Water, Aridity, And The Growth Of The American West (1985). Typical of the views of these historians are Professor Hundley's: "The entire body of water law itself has been -- and remains -- a major culprit because of flawed statutes and other principles out of step with the times." The Great Thirst at 385-86. ". . . [T]he overriding message [is] . . . abandon those attitudes and institutions that were born of an earlier era . . . Id. at 422. "Ultimately what seems clearly warranted is a coordinating agency authorized to take charge." (Emphasis in original.) Id. at 416.

This thesis has also been advanced by several professors of law. Professors Hutchinson and Monahan co-authored an article praising certain recent California water rights decisions for revealing "the fundamental truth that everything is in a process of changing or becoming." Allan C. Hutchinson, Patrick J. Monahan, "Law, Politics, And The Critical Legal Scholars: The Unfolding Drama Of American Legal Thought," 36 Stan. L. Rev. 199, 217 n. 70 (1984). This article was praised by Professor Freyfogle in his analysis of California's recent water law jurisprudence. Eric T. Freyfogle, "Context And Accommodation In Modern Property Law," 41 Stan. L. Rev. 1529, 1545-47 (1989). Professor Freyfogle describes the "critical legal studies" perspective, as follows: "Entitlement issues . . . cannot be resolved neutrally and objectively, based either on formal reason or on the inherent nature of the property item itself, because they raise questions of power, value, and social policy that are

inevitably political in nature." Id. at 1546. He argues that the assertion of political control over the process of defining water rights "has regained for the public much of the power to prescribe water use practices" traditionally governed by the free market and the common law. Id. He praises the new development, as follows: "By discarding all pretense that water use entitlements are clearly and permanently defined, the story casts aside the notion of neutral, rule-driven adjudications." Id. Professor Freyfogle seems comforted that water rights which had once been "secure" are suddenly "precarious." Id. at 1537. And he endorses the tempering of strict priorities by "a sense of equitable sharing." Id. at 1537 n. 43.

Professor Freyfogle's views on water rights have been recently cited approvingly in a book about water rights and related issues. Charles F. Wilkinson, Crossing The Next Meridian: Land, Water, And The Future Of The West (1992) at 290. Professor Wilkinson offers vehement criticism of federal reclamation rights and state appropriation rights. Id. at 21-22, 219-92. The effects of these doctrines have become "unacceptable," he says. Id. at 298. Accordingly, "eliminating" and "abolishing" them is required. Id. at 297, 305. In their stead he posits processes of "planning" by the "community." Id. at 260.

Similar opinions are expressed in another recent law book. Lawrence J. MacDonnell, Sarah F. Bates, eds., Natural Resources Policy And Law: Trends And Directions (1993). The editors write that a new understanding "calls for major changes in existing laws and institutions," including the elimination of reclamation and appropriation rights and their replacement by government planning and management. Id. at 9. One contributor, Professor Getches, assails the same two doctrines and concludes: "Now the time is right and the ideas are ripe for change." Id. at 146. Another contributor, Professor Lazarus, postulates a shift from the old paradigm of private property, contract, and the free market to a new paradigm involving the "deemphasis" of property where "government will dictate the substance of the necessary restrictions." Id. at 202, 213.

Similar themes are even more boldly advanced in a book published last year by four of the above mentioned law professors. Sarah F. Bates, David H. Getches, Lawrence J. MacDonnell, and Charles F. Wilkinson, Searching Out The Headwaters: Change And Rediscovery In Western Water Policy (1993). They mount a strong challenge to the wisdom of the water rights system underlying reclamation and appropriation law. Id. at 128-51. The professors advocate "breaking free" of those doctrines. Id. at 175. They urge "reshaping" traditional western water

policy. Id. at 198, 202. The four would institute a new regime based on "what is 'right' instead of who has rights." Id. at 179.

Professor Gray published a law review article last year which incorporates many of these ideas. Brian E. Gray, "The Modern Era In California Water Law," 45 Hast. L.J. 249 (1994). He writes about "reallocations" of water, including "involuntary" or "government-mandated" reallocations of the type now being undertaken by the Bureau under the Draft Plan. Id. at 249, 253, 261, 262, 263, 272, 306. He describes involuntary reallocations to protect fish and wildlife as "the most dramatic challenges to the existing allocational scheme" and as "emblematic of the central themes of the modern era." Id. at 252, 260-61, 306. Professor Gray touts the importance of the "definition" of a water right in such a way as to allow the government to "alter" it. Id. at 262. The new type of water right he favors is "fragile," i.e., existing at government sufferance, and is "dynamic", i.e., subject to change by government. Id. at 262, 271.

A competing vision about western water policy has been offered by a group of influential market resource economists. Terry L. Anderson, Donald R. Leal, Free Market Environmentalism (1991) at 32-33, 55-56, 99-120; Terry L. Anderson, ed., Water Rights: Scarce Resource Allocation, Bureaucracy, And The Environment (1983); Terry L. Anderson, Water Crisis: Ending The Policy Drought (1983). These economists are also critical of certain aspects of the reclamation program, including water development and marketing by the government, acreage limitations, interest subsidies, and environmental impacts. But they stoutly advocate well-defined and enforced water rights, including those created under federal reclamation law and state appropriation law, as a basis for voluntary reallocation in private water markets. They teach a principle of central importance: Without firm water rights, there can be no water marketing.

The property rights/free market model advocated by these economists is supported by leading legal scholars. Charles J. Meyers, Richard A. Posner, Market Transfers Of Water Rights: Toward An Improved Market In Water Resources (1971); Richard A. Epstein, "The Public Trust Doctrine," 7 Cato J. No. 2 (Fall 1987).

Professor Gray notes that to date government has chosen to exercise any authority to effect involuntary reallocations "sparingly." Id. at 307. As noted in a leading treatise, one scholar has opined that involuntary reallocation is "legally difficult." Robert E. Beck, ed., Waters And Water Rights (1991)

§ 16.03(a) at 331 n. 464. Beck also states that "there is little enthusiasm for the idea" of involuntary reallocation. Id. § 16.04(a) at 370. However, the implementation of the Draft Plan by the Bureau is now resulting in just such an involuntary reallocation of Area I's water.

3. Porter-Cologne Act

In enacting the Porter-Cologne Water Quality Control Act the Legislature found that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." Water Code § 13000. In adopting a water quality control plan the Board must take into account economic considerations. Id. at § 13241(d). The Draft Plan as applied to Area I does not sufficiently consider the economic impacts of the reduced irrigation deliveries that the Bureau is unilaterally imposing under the Draft Plan.

4. Administrative Procedure Act

Board exercises of quasi-legislative power are subject to compliance with the Administrative Procedure Act ("APA"). State Water Resources Control Board v. Office of Administrative Law, 12 Cal. App. 4th 697 (1993). Under the APA, the notice of proposed amendment of a regulation shall include various information relating thereto. Government Code § 11346.5(a)(2), (3), (7), (10). The Board must prepare and make available to the public an initial statement of reasons including a description of the "problem" addressed, the "purpose" of the amendment and the "rationale" about whey it is "necessary," studies relied upon, and "alternatives" that would lessen the impact on small business. Id. at § 11346.7(a). The initial statement must also include the reasons for mandating "specific technologies" and an analysis of whether alternatives would be "more effective" or "as effective and less burdensome." Id. at § 11346.14. The Board "shall assess the potential for adverse economic impact on California business . . ., avoiding the imposition of unnecessary or unreasonable regulations or . . . compliance requirements. Id. at § 11346.53(a)(1). Its acts "shall be based on adequate information concerning the need for, and consequences" thereof. Id. at § 11346.53(a)(1)(A). The Board shall approve any regulation in compliance with the APA. Id. at § 11347.5(a).

We have serious concerns that the procedure currently being followed by the Board for the adoption of the Draft Plan does not comport with these requirements of the APA, as applied to Area I.

5. California Environmental Quality Act

The Draft Environmental Report states (at VIII-62): "Reduced water deliveries in export areas as a result of implementation of the draft plan are expected to cause significant impacts." See also County of Fresno v. Andrus, 8 Envtl. L. Rep. 20179 where the court found that reductions in irrigation deliveries would cause the following significant adverse impacts: ". . . [S]erious and substantial overdrafts to the groundwater supply will result or be intensified in . . . Westlands Water District within Fresno and Kings Counties . . . . [L]and use patterns and cropping patterns will be altered throughout the San Joaquin, Coachella, and Imperial Valleys."

However, the Environmental Report goes on to state (at X-1) "[b]ecause implementation actions will not be fully formulated and established in this plan, the SWRCB cannot mitigate for the potential significant impacts of this plan through regulatory actions incorporated into the plan. Such regulatory actions must wait until the plan is implemented through a water right decision." This acknowledged deficiency in the environmental documentation again points out the wisdom of completing the water right decision before adopting any water quality control plan, at least one which the Bureau and other federal agencies can and will use to take away Area I's water rights.

6. Judicial Review

The above principles of law, as well as those discussed in the February 16, 1993 letter to the Board about D-1630, render highly problematic the Draft Plan, as it will apply to and affect Area I and the water rights of its farmers.

Where an agency is charged with regulating in violation of applicable law, judicial review is nondeferential. Ontario Community Foundation, Inc. v. State Board of Equalization, 35 Cal. 3d 811, 816-17 (1984); Henning v. Division of Occupational Safety & Health, 219 Cal. App. 3d 747, 757-58 (1990); California Assn. of Psychology Providers v. Rank, 51 Cal. 3d 1, 11-12

(1990); Dunn-Edwards Corp. v. Bay Area Air Quality Management District, 9 Cal. App. 4th 644, 655 (1992).

It is the hope of the Area I parties that they can work with the Board and its staff and other interested parties in the coming weeks and months with a view to Board action with respect to the Draft Plan which protects Area I water rights from direct or indirect impairment by the federal government.

Very truly yours,

Christopher G. Foster

CGF:k:mad