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BEFORE THE STATE WATER RESOURCES CONTROL BOARD
PETITION FOR RECONSIDERATION

In the matter of:)
Order WR 2009-0033)
Approval of Change of Place of Use Petition)
_____)

Pursuant to California Water Code § 1120 et seq. and Title 23, California Code of Regulations § 768 et seq., the California Water Impact Network (C-WIN) and the California Sportfishing Protection Alliance hereby jointly petition the State Water Resource Control Board (hereinafter “the Board”) to reconsider Order WR 2009-0033 signed on May 19, 2009 in which

1 the Board granted a Change of Place of Use petition to the California Department of Water
2 Resources (DWR) and the U.S. Bureau of Reclamation (Bureau).

3 **STANDARD OF REVIEW**

4 In accordance with California Water Code § 1120 et seq., and title 23 of the California
5 Code of Regulations § 768 et seq. any interested party may petition the SWRCB for
6 reconsideration of a decision or order based on:

- 7 a. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the
8 person was prevented from having a fair hearing;
- 9 b. The decision or order is not supported by substantial evidence;
- 10 c. There is relevant evidence, which in exercise of reasonable diligence, could not
11 have been produced; and
- 12 d. Error in law.

13 C-WIN and CSPA contend that the SWRCB order granting the DWR and Bureau's
14 change of place of use petition constitutes an error in law and is not supported by substantial
15 evidence. C-WIN and CSPA further allege that relevant evidence has become available since the
16 April 27, 2009 hearing which should be considered by the Board.

17 **STATEMENT OF FACTS**

18 On March 20, 2009 DWR and the Bureau filed a petition for change pursuant to Water
19 Code section 1700 et seq. to change the place of use of certain water rights of the State Water
20 Project (SWP) and the Central Valley Project (CVP) for a period of two years. Petitioners
21 requested the change in conjunction with the Governor's February 27, 2009 Drought
22 Proclamation, asserting that the proposed change of place of use would allow DWR and the
23 Bureau to alleviate water supply shortages during the drought. A Notice of Exemption (NOE)
24 was filed by DWR on April 27th, alleging that the change is exempt from CEQA review.

25 **ERROR IN LAW**

26 As stated above, a petition for reconsideration may be made if there is an error in the law.
27 On April 27, 2009, a NOE was filed by DWR, citing the Governor's Drought Proclamation as

1 the legal authority for the exemption. The Board concurred with this determination, and did not
2 require any formal CEQA review prior to approval of the petition. In this petition for
3 reconsideration, C-WIN alleges that the Board made an error in the law when it found that DWR
4 was not required to comply with the CEQA process in filing their request for a change of place
5 of use.

6 CEQA section 21080(b)(4) exempts CEQA review when “[s]pecific actions necessary to
7 prevent or mitigate an emergency.” The related CEQA Guidelines section 15269(c) provides:
8 “Specific actions necessary to prevent or mitigate an emergency” are emergency projects and are
9 therefore “exempt from the requirements of CEQA.” Under CEQA, an “emergency” is defined
10 as: “a sudden, unexpected occurrence, involving a clear and imminent danger, demanding
11 immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential
12 public services. ‘Emergency’ includes such occurrences as fire, flood, earthquake, or other soil
13 or geologic movements, as well as such occurrences as riot, accident, or sabotage.” (Pub.
14 Resources Code, § 21060.3; 14 Cal. Code Regs., § 15360.)

15 Evidence presented in the hearing by C-WIN and CSPA showed that the current
16 hydrological conditions in California were far from “sudden” or “unexpected.” Tim Stroshane of
17 C-WIN presented copious evidence indicating that drought was not only expected in California,
18 it was common. Witnesses for DWR and the Bureau testified that it took low rainfall over a three
19 year period to compounded and create the current hydrologic situation. Further, in the February
20 27, 2009 Proclamation, the Governor himself admitted that the drought conditions were not
21 sudden, but rather had “become worse” over a period of three years. *See* Governor
22 Schwarzenegger’s Drought Proclamation, February 27, 2009. By all accounts, this was not a
23 sudden or unexpected situation. At the time of hearing, the water conditions in California did not
24 present a clear and imminent danger which demanded immediate action without environmental
25 review. The mere presentation of evidence by DWR and the Bureau that the 2009 water year is a
26 “low water” year does not sufficiently rise to the level of “emergency” contemplated by Pub.

1 Resources Code, § 21060.3. A three year gradual change does not, and should not qualify as a
2 “sudden” or “unexpected” emergency requiring an exemption from CEQA.

3 **RELEVANT EVIDENCE EXISTS THAT WAS NOT AVAILABLE AT HEARING**

4 As stated above, a petition for reconsideration may also be made if there is relevant
5 evidence which, in the exercise of reasonable diligence, could not have been produced in the
6 hearing. In the change petition, DWR and the Bureau loosely define approximately three
7 categories of water transfers that would be possible if the petition was approved. One of the three
8 categories of exchanges were exchanges that would allow CVP contractors within the Friant
9 Division of the CVP to transfer water to CVP contractors within the San Luis, Delta Mendota,
10 San Felipe, or Mendota Pool divisions – all serving the Westlands Water agency. In testimony
11 before the Board, evidence was presented that Westland’s Water Agency would only be
12 receiving approximately 10% of its annual water allotment, which Petitioners and other parties
13 argued would cause extensive damage to permanent crops planted in the Westlands service area.
14 The Board relied on this testimony to find that this emergency situation required a consolidation
15 of the place of use for the two projects for a period of two years.

16 However, on or about May 13, 2009, the Director of DWR drafted a letter to Senator
17 Diane Feinstein which included a breakdown of the water supplies within the San Joaquin Valley
18 for 2009. *See Exhibit 1, attached.* In that chart Mr. Snow indicates that Westland’s water district
19 will be receiving 86% of its water allotments in 2009, not the 10% that was alleged at the
20 hearing. By the director’s own calculations, Westlands will receive 76% more water than was
21 claimed in the hearing. As the date of the chart indicates, the information was not compiled until
22 May 13, 2009, and therefore was not available to protestants prior to the hearing. Yet, these
23 figures, and whether the 86% allocation of water eliminates the “damage to, life, health,
24 property, or essential public services” as required under Public Resources Code § 21060.3, are
25 crucial to a proper determination of whether or not the drought qualifies as an emergency. This
26 new information should be considered by the Board prior to rendering a final decision.
27

1 Board anticipated the term “historic average deliveries” to include averages from all types of
2 water years. Therefore, the Board’s conclusion that proposed transfers will not create a
3 substantial risk or harm because they stay within “historic average” deliveries does little to
4 protect the Bay/Delta from excessive transfers for the 2009-2010 water years.

5 The actual amount of water reaching the San Joaquin and Bay/Delta is far greater than
6 what was alleged at the hearing. Again, as an example, Westlands will receive 86% of the
7 average according to DWR Director Snow. This evidence directly contradicts the Board’s
8 finding, “in light of these facts and the low allocation to CVP contractors this year,” that the
9 “approval of the petition will not cause a significant impact to water quality as a result of
10 increased agricultural drainage.” Order WR 2009-0033, Section 4.2. The order is therefore
11 unsupported by the evidence. The same error negates the Board’s finding that “any increase in
12 agricultural drainage will not cause injury to any legal user of water, and any impacts to fish,
13 wildlife, or other instream beneficial uses would not be unreasonable, particularly when taking
14 into consideration the need for the petition to address the significant economic and other impacts
15 of the drought.” Order WR 2009-0033, Section 4.2. The order itself indicates that: “As of April,
16 the estimated water allocation to SWP contractors was 30 percent of their contract supply, and
17 the estimated allocation to CVP contractors south of the Delta was 10 percent for agricultural
18 users and 60 percent for municipal and industrial users.” Order WR 2009-0033, Section 2.1. As
19 Director Snow’s letter to Senator Feinstein makes clear, allocations to CVP users south of the
20 Delta changed immediately after this hearing and changed the facts relied upon by the Board in
21 issuing this order. Moreover, this one example is not the only way that the increased allocations
22 change the facts relied upon by the Board in issuing this order.

23 **REQUEST FOR RELIEF**

24 C-WIN and CSPA respectfully request that the Board reconsider the determination that
25 the Petition for Change is exempt from CEQA review, and further request that the Board reopen
26 the consolidation of place of use hearing to reconsider the appropriateness of the consolidation of
27

1 the state and federal projects place of use in light of new evidence of water availability within the
2 projects original place of use.

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4 Respectfully submitted this 17th day of June, 2009

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8 _____
9 Michael B. Jackson
10 Attorney for CSPA

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14 _____
15 Julia R. Jackson
16 Attorney for C-WIN

DEPARTMENT OF WATER RESOURCES

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791



May 15, 2009

Honorable Dianne Feinstein
United States Senator
331 Hart Senate Office Building
Washington DC 20510-5054

Dear Senator Feinstein:

This letter is a follow up to our meeting of April 6, 2009 with representatives of Westlands Water District as well as a response to your April 16, 2009 letter. I appreciate your continued engagement and leadership on water issues in California and in particular your support for our current efforts to provide near-term relief to those affected by water shortages due to drought and regulatory reductions in supply. As you noted, the state is working diligently to see that all viable options are reviewed and that creative approaches to getting water to those who need it are developed, evaluated and implemented as appropriate.

The state and local agencies have taken a number of actions in response to drought conditions including but certainly not limited to: the creation of a drought water bank and facilitation of other dry year transfers, expedited and prioritized financial assistance through the Department of Water Resources' (DWR) Integrated Regional Water Management program, expanded groundwater monitoring and data collection, financial assistance for urban water user efficiency and planning for a 20 percent reduction in urban per capita water use by 2020, and upgrades to the California Irrigation Management Information System to provide information to farms that maximizes irrigation efficiency.

As you aware, conditions have improved since our meeting but continue to be dry. The State Water Project allocation now currently stands at 30 percent and will likely be increased this month. Precipitation for 2009 is nearing average levels, however, after two dry years, major reservoir levels still remain low and a parched watershed will impact runoff levels which determine water supply.

Despite recent improvements in conditions, the system continues to become less reliable with each passing day. Climate change, at-risk species, seismic risk and multiple ecosystem stressors mean that certainty in water supplies continues trending downward. Additionally, heavy reliance on groundwater pumping this summer is likely to significantly draw down aquifer levels which will increase the vulnerability in future dry years of areas dependent on those supplies. Until we address the underlying issues plaguing California's water supply system we will see dry conditions continuing to have disproportionate impacts such as we are experiencing in the current year. Consecutive dry years only exacerbate already unstable economic and environmental conditions.

Exhibit 1

Honorable Dianne Feinstein
May 15, 2009
Page 2

I have included responses to the specific issues raised in your April 16, 2009 letter:

Joint Point and Consolidated Place of Use Authorities

The Central Valley Project and the State Water Project historically have shared Sacramento-San Joaquin Delta export pumping facilities to assist with project deliveries and to aid each project during times of facility outages, referred to as Joint Point of Diversion (JPOD). Though some question our authority to use JPOD, DWR is confident that we currently have the authority to utilize this tool this summer if necessary.

In our meeting we discussed the application for Consolidated Place of Use. Both the DWR and the U.S. Bureau of Reclamation (Bureau) have submitted a petition to combine their places of use south of the Delta for a two year period to help facilitate water exchanges between their respective contractors in response to the drought. A hearing of the State Water Resources Control Board (SWRCB) was held in late April and a decision from the SWRCB is expected at their May 19, 2009 meeting.

Increased Pumping in Late Summer

In the fall of 2008, DWR requested an extension from the U.S. Army Corp of Engineers (Corps) of the ability to pump water 500 cubic feet per second (cfs) above the 6680 cfs limit during the summer of 2009. This request is currently being processed by the Corps. On May 4, 2009 I sent a letter to the California Department of Fish and Game (DFG) asking for their assistance in expediting the extension of permits. The Bureau sent a similar letter to the National Marine Fisheries Service and to the U.S. Fish and Wildlife Service. If the permit extension is approved, this increased diversion over a period of three months could yield up to 90,000 acre-feet (AF) in additional supply.

Status of Dry Year Transfers and the Drought Water Bank

The bulk of water usually made available for water transfers in California comes from the Sacramento Valley, and largely from rice farmers with senior water rights. Due to exceptionally high rice commodity prices many farmers have chosen to farm rice this year rather than sell their water. Furthermore, restrictions in place on Delta pumping for May and June impact our ability to move some transfer water across the Delta. However, to date, DWR has received commitments for approximately 80,000 AF of water from willing sellers in the Sacramento Valley to Drought Water Bank participants in areas south and west of the Delta. In addition, DWR and other parties entered into an agreement with the Yuba County Water Agency (YCWA) in 2007 that allows long term water transfers. This year, pursuant to this agreement, YCWA will provide 150,000 AF to users south and west of the Delta. Also, other private water transfers are taking place, some of which require state facilitation. The total so far from all these sources amounts to approximately 400,000 AF. A table is attached detailing pending transfers. Final amounts are subject to evaluation and validation (**2009 Water Transfers**).

Wildlife Refuge Water Supply Transfers

Since our April 6 meeting, the Bureau has increased the Central Valley Project south of Delta agricultural water service contract allocation to 10 percent. Based on recent rains there is a strong chance that this could be further increased. While still historically low, water transfers will help supplement supplies this year, as will groundwater pumping. Attached is a table detailing the water supply outlook for each region of the San Joaquin Valley (***San Joaquin Valley 2009 Water Supplies***). This data was compiled by DWR with information gathered from each individual agency.

Regarding your request about the potential for refuge-to-agricultural water transfers, I consulted with DFG Director Don Koch. According to Mr. Koch, in the case of this year, a 100 percent allocation for "Level 2" supplies for refuges that you reference in your letter actually represents only a portion of total dedicated refuge supplies. In fact, state, federal and private refuges currently have 75 percent of what is considered an average supply. Furthermore, these allocation amounts are contractually obligated and are especially critical for refuges and the species they support in dry years. Given the current San Joaquin Valley supply availabilities detailed in the aforementioned table, the transfer of refuge water is not warranted or advisable. However, I believe that all of the San Joaquin Valley water users should collaborate on water management strategies in case 2010 continues the dry trend.

Flexibility in U.S. Fish and Wildlife Service's Delta Smelt Biological Opinion

Finding flexibility in a biological opinion (BO) is a challenge for the agencies charged with its implementation. On May 7, 2009 I sent a letter to the U.S. Fish and Wildlife Service requesting that they initiate reconsultation on the Delta smelt BO. A copy of this letter is attached (***Letter to Ren Lohofener dated May 7, 2009***). My goal is that reinitiation will allow the opportunity for state and federal agencies to refine some of the BO's Reasonable and Prudent Alternatives in a way that better protects Delta smelt while acknowledging any impacts to salmon and reducing the impacts to water supplies where possible.

Honorable Dianne Feinstein
May 15, 2009
Page 4

While I join you in your concern for the impacts of water shortages this year and feel strongly about the need to prepare for the likelihood of a dry 2010, I believe many have lost sight of the plain fact that we are in a hydrologic drought, and as such water supplies are simply limited for all users. This cycle of water boom and bust in California is not new, but it has intensified as court decisions and regulatory protections govern the operation of the state and federal pumps. Climate change poses an additional threat. This is why it is critical that we move forward with the long-term fix. Restoring the Delta ecosystem, improving Delta conveyance, adding storage, and aggressively improving water use efficiency are all necessary pieces of a comprehensive strategy that will help protect our environment and our economy from the highs and lows of California's ever-changing hydrograph.

Your support in our planning for the long-term is essential.

Sincerely,



Lester A. Snow
Director

Attachments

Exhibit 7

2009 Water Transfers

DROUGHT WATER BANK		
<u>EXISTING POOLS (Through Delta)</u>		<u>AMOUNT (Acre Feet)</u>
Pool 1 - Feather River Idling		12,598
Pool 2 - Advance Groundwater		2,993
Pool 3 - Sacramento River Idling		7,637
Pool 4 - Groundwater Substitution		35,581
Pool 5 - Groundwater Substitution		22,466
TOTAL ESTIMATED WATER BANK		81,275
OTHER POTENTIAL THROUGH DELTA TRANSFERS		
<u>SELLER</u>	<u>BUYER</u>	<u>SELLER AMOUNT (Acre Feet)</u>
Agencies Upstream of Delta	Agencies Downstream of Delta	250,500
NORTH OF DELTA to NORTH of DELTA TRANSFERS		
<u>SELLER</u>	<u>BUYER</u>	<u>SELLER AMOUNT (Acre Feet)</u>
CVP Sacramento Valley Contractors	Tehama-Colusa Canal Authority	80,640
POTENTIAL TRANSFER AMOUNT*		412,415

*amounts projected and subject to change

Exhibit 7

**San Joaquin Valley 2009 Water Supplies
As of 5-13-09**

Working Draft

	San Luis Delta Mendota*	Westland's Water District	Friant Water Users Authority	Kern County Water Agency	Modesto Irrigation District	San Joaquin River Exchange Contractors	SJV Refuges
Carryover Water	96	236	50	120	0	0	0
Surface Water	125 (CVP only)	125	870 (Friant Supplies Only)	568	170	840	250 Level 2
Groundwater	147	200	0	1,200	30	0	unknown
Additional 2009 Groundwater	0	260+ (last year 460TAF total, expect to exceed last year in 2009)	0	1,000	0	0	0
Transfers/ Exchanges	80	172	0	10	unknown	0	30 Level 4
Total	448	993 (86%)	920 (74%)	2,898 (85%)	200 (89%)	840 (100%)	280 (75%)
Average Annual Use	unknown	1,154	1,250	3,400	255 (175 ag, 80 urban from website)	840	371
Fallowing							
Maximum Irrigated Acres	315,000	569,000	920,000	995,000	58,650	240,000	136,000 (total SJV refuge acres)
Normal Fallowing (assumes 10% unless otherwise specified)	39,000	78,000	92,000	100,000	5,900	24,000	NA
2009 Fallowing	65,000 (21%)	225,000 (40%)	0 (Reduced double cropping)	220,000 (22%)	unknown	unknown	NA

* Ag Service Contractors only, excluding Westland's Water District

**The information contained in this table was obtained from multiple sources and is subject to change.
This information should be used only as an estimate.**

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PROOF OF SERVICE

I am a citizen of the United States of America and a resident of the County of Plumas, California. I am over the age of 18 years and am not a party to the within entitled action. My business address is 429 W. Main Street, P. O. Box 207, Quincy, California, 95971.

I hereby certify that on June 17, 2009 I served electronically one copy of the **California Water Impact Network's** and the **California Sportfishing Protection Alliance's Joint Petition for Reconsideration of Order WR 2009-0033** on the persons listed below:

Division of Water Rights
State Water Resources Control Board
Attn: Jane Farwell
P. O. Box 2000
Sacramento, CA 95812-2000
wrhearing@waterboards.ca.gov

U. S. Bureau of Reclamation
c/o Amy L. Aufdemberge
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Sacramento, CA 95825
AMY.AUFDEMBERGE@sol.doi.gov

CA Department of Water Resources
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San Luis & Delta-Mendota Water Authority
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Westlands Water District
c/o James Snow
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Public Trust Alliance
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CA Salmon and Steelhead Assoc.
c/o Bob Baiocchi
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Defenders of Wildlife
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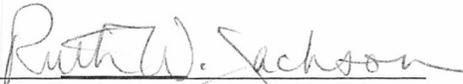
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South Delta Water Agency
Central Delta Water Agency
Lafayette Ranch
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Santa Clara Valley Water District
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jmaher@valleywater.org

I certify under penalty of perjury that the foregoing is true and correct. Executed on
June 17, 2009 in Quincy, California.


Ruth W. Jackson