

## **Consensus Strategy for Avoiding Duplicative Reporting of Water Diversion and Use in the Delta**

**February 1, 2021**

During 2020, the Office of the Delta Watermaster consulted with several members of the Delta water use reporting community (including reclamation districts, large farming organizations, agents, engineers and water lawyers), to discuss the problem of duplicative reporting, as outlined in the attached Problem Statement. A consensus approach to addressing the duplicative reporting problem emerged from these *ad hoc* group discussions. For water use reporting for calendar year 2020:

- Water users in the Delta agree to voluntarily report water diversion and use under the most senior claim before reporting diversion under any available more junior right (usually a license).
- If all water diversions for use within a place of use can be accommodated within the senior claim (usually a riparian or pre-1914 claim), then licensees will report a nominal '1' acre-foot diverted for the junior licensed right covering the same place and purpose of use.
- Water users individually, voluntarily and without waiving any rights, agree to adopt this method for Reports of Licensee due on or before April 1, 2021 and for Supplemental Statements of Diversion and Use due on or before July 1, 2021. Reporting under this method will require coordination between license holders and constituent senior water right claimants.
- Following submission of reports of water diversion and use for calendar year 2020, this consensus approach to avoiding duplicative reporting will be reevaluated based on experience.
- If this method of reporting proves beneficial in addressing the problem of duplicative reporting, the Delta water user community, in association with the Office of the Delta Watermaster and the Division of Water Rights, may seek State Water Resources Control Board action to assure that reporting under this method over multiple years will not be construed as evidence of abandonment or forfeiture of licensed rights.

## **Problem Statement: Duplicate Reporting of Water Diversion and Use in the Delta**

by Lindsay Kammeier, PE

[updated to February 1, 2021]

**Summary:** Many water diversions in the Delta are routinely double counted in annual reports to the State Water Resources Control Board (Water Board). Double counting water diversions makes understanding actual water demand difficult and makes it more difficult for the Water Board to manage the water rights system to protect priority, particularly in periods of shortage.

### **Delta Water Rights**

There are over 1,000 miles of waterways in the Delta, an area of reclaimed “swamp and overflowed” lands. So, it is no surprise that riparian water right claims dominate the area. There are also widespread claims of pre-1914 water rights (not licensed by the Water Board) throughout the Delta. Many of these claimants of riparian and/or pre-1914 rights also divert under “junior” post-1914 licenses that were issued by the Water Board and its predecessor, the State Water Commission. These licenses were issued to both individual landowners and reclamation districts that represent entire reclaimed islands surrounded by levees. Some of the licenses benefit land that already claimed a riparian water right, resulting in some parcels having both an unadjudicated but apparently valid riparian claim and a licensed water right issued directly to their property or to the reclamation district for their island. This is a “belt and suspenders” approach to water rights: the pre-existing riparian claim, which is inherently limited to the riparian parcel as the place of use (POU) allows that land to divert from the contiguous water course as much natural flow as can be beneficially used thereon. Theoretically, where natural flow is always available to meet the riparian’s beneficial uses, there is no need to also have a license, because a valid riparian right is sufficient to meet the demand for that property. However, because most riparian claims have never been adjudicated, seeking a licensed right was thought to add reliability to the water supply.

Because most pre-1914 claims have also never been adjudicated, many diverters claim that parcels patented before December 19, 1914 and continuously irrigated since then have “overlapping” pre-1914 water rights and riparian water rights.<sup>1</sup> Because annual diversion and use under riparian and pre-1914 claims are both reported in the same “Supplemental Statement” form, there is no double counting of this water. The issue of double counting the diversion and use of the same water—often from the same points of diversion (PODs), for the same use, on the same POUs—arises because the same water is reported both in Reports of Licensee and in one or more Supplemental Statements.

### **Water Diversion Reporting**

Water diversions are reported to the Water Board on an annual basis. Reports of Licensee (permit, license, registration, and certificate water rights) are statutorily required to be filed by April 1<sup>st</sup> of the year following water use (i.e., water use for calendar year 2020 is to be reported by April 1, 2021). These Reports of Licensee are completed in the Water Board’s electronic Report Management System (RMS)

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<sup>1</sup> See Overlap Memo.

by the license-holder or legal representative. Supplemental Statements reporting water use under non-licensed water right claims are statutorily required to be filed by July 1 of the year following the water use (i.e., water use for calendar year 2020 is reported by July 1, 2021).<sup>2</sup> These Supplemental Statements are completed, also in the RMS, by the claimant or legal representative. Often, duplication is an innocent result of the different due dates and the lack of coordination between two different reporters. However, even when the same reporting entity both holds a license and claims a riparian and/or pre-1914 water right, the same water may be reported twice, sometimes with an explicit comment in both forms acknowledging that the two reports duplicate, essentially “double counting,” the actual water use.

### **Duplicate Reporting**

Duplicate reporting is when the same water diversions are reported under both a license (due by April 1) and a riparian or pre-1914 claim (due by July 1). Holland Tract provides an example. All parcels on Holland Tract were subdivided in such a way that each parcel retained contiguity to a natural water course since patent; thus, all parcels present an apparently valid, though unadjudicated, riparian claim. The reclamation district for Holland Tract (RD 2025) was granted a license (License 001571) to divert water from the beginning of March through the end of October with a 1922 priority date. RD 2025 reports all water use on Holland Tract during the license period by April 1 of the following year. Individual riparian claimants on Holland Tract report their water diversions during the previous year by July 1. Often, this results in at least a portion of the same water being reported twice: once under the license and again under the Supplemental Statement.

However, even when the same reporting entity both holds a license and claims an unlicensed senior water right, the same water may be reported twice, sometimes with an explicit comment in both forms acknowledging that the two reports duplicate, essentially “double counting,” the actual water use. See Banta Carbona Irrigation District’s (BCID) 2020 Report of Licensee (A001933 and A005248) and 2020 Supplemental Statement (S000495). Similarly, McDonald Island RD 2030’s 2020 Report of Licensee (A002956) includes language acknowledging the duplication but does not include similar language on RD 2030’s Supplemental Statements (S021849 and S021850), or on other Supplemental Statements for McDonald Island.

Holland Tract, BCID and McDonald Island are only three ready examples of duplicate water use reporting that is pervasive throughout the Delta. Below is a list of what appear to be the primary ways water use in the Delta is currently reported. Some of these methods try to avoid double counting while others embrace it.

1. Method No. 1 (**duplicative**)
  - a. Report all water diversions during the prior calendar year in the Report of Licensee due by April 1.
  - b. Report all (the same) water diversions in one or more Supplemental Statements covering the same POU as the license by July 1.

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<sup>2</sup> The Water Board is considering seeking legislation to conform the due dates and reporting periods for all water use. The potential shift would use the water year (October 1 to September 30) as the uniform reporting period and February 1 as the uniform due date.

- c. Do not include a note in either report informing the Water Board that it should not add the licensed amounts and the riparian or pre-1914 claim amounts to obtain total diversions for the POU.
2. Method No. 2 (**duplicative**)
    - a. Report all water diversions during the prior calendar year in the Report of Licensee due by April 1.
    - b. Report all (the same) water diversions in one or more Supplemental Statements covering the same POU as the license by July 1.
    - c. Include a note in one or both reports informing the Water Board that it should not add the license amounts and the statement amounts to obtain total diversions and use for the place of use. [The apparent BCID and McDonald Island approach.]
  3. Method No. 3 (**not duplicative**)
    - a. Report water diversions by April 1 in the Report of Licensee for water diverted at times when the license was available during the prior calendar year.
    - b. Report water diversions outside of the license availability period of the prior calendar year in the Supplemental Statements due by July 1.
    - c. Include a note informing the Water Board of this reporting methodology. [This is the apparent Holland Tract approach, which fails to make clear that, in a shortage when the junior license is curtailed, the same annual demand will be reported under the available riparian claim. Thus, this approach “masks” a portion of the actual senior demand in the system.]
  4. Method No. 4 (**not duplicative**)
    - a. Record nominal ones (‘1’) as the diversions under the Report of Licensee by April 1.
    - b. Report all water diversions during the prior calendar year in the Supplemental Statements due by July 1.
    - c. Include a cross-referencing note in the Report of Licensee (with or without a similar note in the Supplemental Statements) explaining that water use is reported under the most senior water right available to its exhaustion but maintaining nominal reported use under the license to avoid the risk of forfeiture for non-use. [This is the Delta Watermaster’s preferred approach, because it accurately indicates the actual senior demand while maintain a tracking record for the license.]
  5. Method No. 5 (**not duplicative**) (variation on Method 4)
    - a. Switch back and forth between reporting primarily under the license (with nominal use under the riparian and/or pre-1914 claims) and primarily under the riparian and/or pre-1914 claims (with nominal use under the license) to avoid any consecutive five-year period without reported diversions and use for both the licensed right and the riparian and/or pre-1914 claims.
    - b. Include a note informing the Water Board of this reporting methodology.

**There are problems with all five methods listed.**

The first two methods explicitly double count water diversions, inflating apparent water use in the Water Board’s RMS. Method No. 3 reports maximum exercise of the licensed right but does not fully reflect the actual riparian or pre-1914 demand that would appear only in shortage periods when the

license is curtailed and all water will be diverted under the riparian and/or pre-1914 claims. Method No. 4 ensures that all senior water demand (whether riparian or pre-1914) is fully reported and recognized in aggregated RMS data. **This method is viable only if the water user community is comfortable that reporting token amounts of diversion under the license will not result in forfeiture.** Method No. 5 is confusing to both the Water Board and reporters. In some years it will fully record riparian and pre-1914 demand for a specific reporter, and only record junior (licensed) water demand in other years. While it avoids duplication, it shares the same shortcoming as Method No. 3 because, for many years, the actual riparian or pre-1914 demand will not be fully reflected in the Water Board's RMS.

None of the current reporting methods (1) avoids double counting, (2) fully reflects riparian and pre-1914 water demand, and (3) protects licenses from risk of forfeiture.

### **Benefits of Accurate Reporting**

The water user community needs accurate reporting to responsibly manage water use during droughts within California's dual and unreconciled riparian and priority allocation systems. User reports to the Water Board must accurately quantify senior and junior demand to responsibly manage water use during drought, a prerequisite for protecting water rights priority.

### **Proposed Solution to Duplicative Reporting**

As noted above, the Office of the Delta Watermaster prefers Method No. 4 (report all water use under the most senior available claim and report a token 1 acre-foot of diversion under the license to avoid risk of forfeiture). In order to induce non-duplicative reporting, the Water Board may be willing to stipulate or to otherwise assure that reporting token water use under the overlapping license will not be construed as evidence of non-exercise of the license and will not provide a basis for claim of forfeiture of the license. Diverters who voluntarily agree to report under Method No. 4 would not face licensee jeopardy for adopting that method for at least five consecutive years (the minimum forfeiture period for non-exercise). Therefore, many diverter representatives propose adopting Method No.4 (or some close variant) for reports due in 2021 to evaluate impact without agreeing to follow that procedure in successive years, pending further assurance of non-jeopardy to their licenses.

### **Potential Delta Community Impact to Proposed Solution**

Water Board staff (from both the Office of the Delta Watermaster and the Division of Water Rights) will work with the Delta community to ensure that experience with the voluntary adoption of Method No.4 is reflected in any formal guidance or regulation developed to reduce the incidence of duplicative reporting, including possible mechanisms to avoid negatively impact water rights or claims.