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VIA EMAIL
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September 15, 2014

State Water Resources Control Board
c/o Ms. Jeanine Townsend
Clerk to the Board
Post Office Box 100
Sacramento, CA 95812-0100

Re: Central and Southern Delta Water Availability and Use Workshop

Board Members:

The following comments are submitted on behalf of The West Side Irrigation District, Banta-Carbona Irrigation District, Patterson Irrigation District and West Stanislaus Irrigation District ("**Districts**") on the Notice of Public Workshop for Central and Southern Delta Water Availability and Use ("**Notice**").

PRELIMINARY QUESTIONS

The Notice states:

The purpose of this workshop is to receive comments and discuss the process the State Water Board should use to address recent allegations and legal theories regarding the sources and quantity of water supplies available for diversion and use within the central and southern Delta.

and

The State Water Board is specifically interested in receiving input on the type of proceeding or process the Board should use (such as public hearing, case-by-case investigation, or regulation) to most effectively resolve the issue of what water is available for diversion and use by water right holders in the central and southern Delta.

The Notice stems from the July 23, 2014 DWR and USBR ("**Water Agencies**") joint letter regarding south and central Delta diversions. While not technically a "complaint", the letter makes assertions such as:

The Water Agencies submit that absent information to the contrary water stored and released by the State Water Project and the Central Valley Project ("Water Projects") and water acquired by the Project Agencies' contractors through transfer and exchange agreements is likely being diverted by south and/or central Delta diverters asserting riparian and pre-1914 water rights.

The three quotations above, taken together, describe a bizarre circumstance wherein the Water Agencies, using unsubstantiated allegations, have somehow convinced the State Water Board to alter its ordinary burden of proof.

INSUFFICIENT BASIS FOR INVESTIGATION

The Water Projects have an obligation to meet water quality requirements established in the Sacramento San Joaquin Delta Water Quality Control Plan, as set forth in D 1641. If the Water Projects are having difficulty meeting the standards set forth in D 1641, it is incumbent upon the Water Agencies to undertake the investigation required to determine if stored water being released to meet these standards is being unlawfully diverted, and by whom. It is clear that they have not done so.

The Water Projects release water from various sources to meet D 1641 requirements; this water can be unlawfully diverted at anywhere in the system from the point of release until the point of compliance. Yet, without any supporting factual information or assertions, the Water Agencies "submit that absent information to the contrary" diverters in the south and central Delta are "likely" diverting stored water. It appears that the Water Agencies believe that rather than requiring them to document a prima facie case establishing that diverters in the south and central Delta are illegally diverting water, it is somehow the responsibility of diverters in the south and central Delta to affirmatively prove that they are not diverting stored water. Further, the Water Agencies are asking that the State Water Board undertake its investigation for them.

In December of 2003, the State Water Board released a document entitled Information Pertaining to Investigating Water Right Complaints in California, which described the process of filing and investigating water right complaints. The State Water Board notes:

The complainant is responsible for submitting sufficient information to show that the condition or situation being complained against in fact exists and that a violation, injury, damage, misuse, adverse impact, secondary effect, or other unanticipated result is occurring or threatened. Detailed studies and reports are not normally necessary to file a complaint, although pertinent backup information can assist Division staff in processing the complaint. As a minimum, the following information should be incorporated into the complaint for the various types of complaints:

- For complaints involving a violation of permit or license terms, the specific term(s) in question should be identified and the current actions or inactions of the permittee or licensee should be included in the description of the complaint. Supplying as much of the information requested on the Division's complaint form as possible is helpful for this type of complaint.
- For complaints involving unauthorized diversions, it is important to describe the location of the respondent's diversion as accurately as possible so that it can be researched in the Division's records.

In the present circumstances, the Water Agencies have not even filed a complaint, let alone established a prima facie case required for the State Water Board to put forth effort to undertake an investigation focused on the south and Delta diverters. As a result, any action taken by the State Water Board should be limited to directing the Water Agencies to undertake additional internal investigation to provide sufficient information to show that the condition or situation being complained against in fact exists and that a violation, injury, damage, misuse, adverse impact, secondary effect, or other unanticipated result is occurring or threatened.

ISSUE FOR DISCUSSION AT THE WORKSHOP

As detailed above, the State Water Board should not pursue a proceeding to resolve the issue of what water is available for diversions and use by water right holders in the central and southern Delta until it has information supporting allegations that these water right holders are diverting water illegally. If such information can be provided by the Water Agencies, then the State Water Board can consider what questions would need to be addressed in any such proceeding.

If the State Water Board is to undertake such a process in the future, the following should be noted:

1. Any proceeding undertaken to determine the validity of water rights or the sufficiency of water available for diversion must be a full evidentiary hearing.
2. Any evidentiary hearing held by the State Water Board should be limited to factual determinations, with all legal issues to be addressed by a court.
3. The first question proposed in the Notice asks:

Is any of the previously stored water in Sacramento River watershed reservoirs that DWR and USBR release from storage (including releases for exports from the Delta or salinity control and public trust protection, or stored water that is transferred through the Delta from purchase points north of the Delta to points of delivery south of the Delta) available for appropriation by diverters in the central and southern Delta?

This is an inappropriate starting point for any investigation into Delta water right issues. The primary question is not whether Delta diverters are diverting stored water; rather, the

question is whether or not Delta diverters are being injured by the Water Projects' use of Delta channels for conveyance pursuant to Water Code section 7075. Our August 6, 2014 letter to Barbara Evoy is hereby incorporated herein by reference, and attached for convenience.

4. The second question proposed in the notice, if reworked and expanded, would be an appropriate second question to explore after the primary issues described in Item 3 above were addressed.

5. The additional information addressed in the third question proposed in the notice may be warranted, but must be obtained in a much narrower and more precise manner. On that third question we incorporate the comments submitted by Jennifer Spaletta of Spaletta Law PC dated September 15, 2014.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeanne Zolezzi". The signature is written in a cursive, flowing style.

JEANNE M. ZOLEZZI
Attorney-at-Law