

PROTEST AND OBJECTION, AND IN THE ALTERNATIVE
PETITION FOR RECONSIDERATION, OF
FRIANT WATER AUTHORITY AND ITS MEMBER AGENCIES,
RELATED TO THE
TEMPORARY URGENCY CHANGE ORDER

Friant Water Authority (“Friant”) and its member agencies hereby protest and object to, and in the alternative, petition for reconsideration of, the Order Approving A Temporary Urgency Change In License and Permit Terms and Conditions Requiring Compliance With Delta Water Quality Objectives In Response To Drought Conditions (With Modifications Dated February 7, 2014 and February 28, 2014) (collectively “Order”), which was issued in response to a Temporary Urgency Change Petition jointly filed by the California Department of Water Resources (“DWR”) and the United States Bureau of Reclamation (“Reclamation”).

I. BACKGROUND FACTS

A. The Friant Division Water Supplies

Friant Dam is the oldest Central Valley Project (“CVP”) facility and the water rights permits associated with its operation are the most senior permits issued to Reclamation. Because California follows the law of prior appropriation, the seniority of the water rights associated with the Friant Division has meant that these supplies have historically been the most reliable supplies developed by either the CVP or the State Water Project (“SWP”).

Friant Water Authority’s members hold permanent contracts with Reclamation that entitle them to deliveries from the Friant Division of the CVP. These CVP supplies are developed by storing the water of the San Joaquin River behind Friant Dam and diverting it into the Friant-Kern and Madera Canals.

As the State Water Resources Control Board (“State Board”) extensively discussed in D-935, the development of the CVP supplies for the Friant Division is contingent upon the satisfaction of prior water rights on the San Joaquin River. For the CVP to be able to use the San Joaquin River water, it had to purchase, exchange, acquire or condemn the prior water rights holders’ senior rights. The vast majority of these senior rights are now held by the four entities that make up the San Joaquin River Exchange Contractors Water Authority. Under the terms of the Exchange Contract these entities hold with Reclamation, Reclamation agrees to provide them with a substitute supply of water pumped from the Delta and delivered at Mendota Pool, and in exchange, the Exchange Contractors agree not to exercise their prior water rights on the San Joaquin River, thereby permitting the diversion of that water by Reclamation and its use by the Friant Division contractors.

Since Reclamation began operating Friant Dam in 1944, there has *never* been a year when Reclamation was unable to obtain enough Delta water to satisfy these demands.

The fulfilment of the senior water rights on the San Joaquin River allows Reclamation to develop the water of the San Joaquin into supplies that can be used to satisfy its contracts with the Friant Division. *See Westlands Water District v. United States of America*, 337 F.3d 1092, 1103-04 (9th Cir. 2003)(“*Westlands VII*”) (“substitute water delivered to the Exchange Contractors is not ‘available water’

[for the CVP contractors] because such water is a vested priority obligation the Bureau must satisfy without including it in CVP available supply"), approving the District Court's holding in *Westlands Water Dist. v. United States*, 153 F. Supp. 2d 1133, 1165 (E.D. Cal. 2001) ("*Westlands VI*").

The Friant Division is unique among federal reclamation projects in that its contractors are divided into two classes to reflect the variable hydrology of the San Joaquin River: Class 1, whose contractors have little to no access to groundwater supplies, and Class 2, whose contractors have the capability to access groundwater supplies. The amount of water allocated under Class 1 is less, but Class 1 yield was calculated as the amount that could be obtained during the 1927-33 drought, making it highly reliable. In reliance on these highly reliable supplies, the Friant Division service area has developed into over 15,000 small family farms, with an average size of about 200 acres, and about half of which are dedicated to permanent plantings.

This year, for the first time, it appears that Reclamation may not be able to divert sufficient water at the Delta to provide the required amount of substitute water supply to satisfy the demands of the prior water rights holders. As a result, the Exchange Contractors may be required to call on San Joaquin River water to serve their needs, which would deprive the Friant Division water users of all of their CVP water supply.

B. History of the Current Order

On January 27, 2014, Reclamation and DWR filed Temporary Urgency Change Petitions with the State Board. The petitions request adjustment of certain standards imposed in the Bay-Delta Water Quality Control Plan and adopted by this Board in D-1641, including the X2 water quality objective which sets salinity standards in the Delta for the benefit of aquatic species including the Delta smelt, which is listed as endangered under the federal Endangered Species Act. Under D-1641, the X2 standard requires an outflow of 7100 cfs starting February 1. Adjustment of this standard to reflect California's dry hydrological conditions this year was necessary because attempts by the projects to meet the standard would have effectively drained all available water supplies.

On January 31, 2014, the Executive Director issued an Order approving the temporary change petition. According to the Notice issued by the SWRCB on February 28, 2014, that Order:

- Allows a reduced level of Delta outflow so that DWR and Reclamation can conserve water in upstream reservoirs;
- Requires that water saved as a result of this action remain in storage to release later in the season for health and safety and ecosystem protection;
- Requires DWR and Reclamation to report flows, storage, and water deliveries;
- Provides flexibility to DWR and Reclamation to operate the Delta Cross Channel gates to conserve water and to minimize salinity intrusion from San Francisco Bay; and
- Allows limited water exports from the Delta for public health and safety needs.

C. Protest

Friant Water Authority and its member districts object to the State Board's Order because: (1) the Order is not within the SWRCB's jurisdiction, (2) the Order is contrary to law, (3) the Order does

not best serve the public interest, and (4) the Order's reassignment of Central Valley Project water from agricultural uses to "health and safety" injures the prior rights of the Friant Division contractors. Each ground will be discussed in detail below.

II. The State Board's Order Is Not Within Its Jurisdiction and Is Contrary to Law.

A. The State Board Cannot Legally Change the Purposes of the CVP Through a Change to a Water Quality Control Plan.

The SWRCB's power and authority to impose state water quality standards on the federal reclamation project is not unlimited. Section 8 of the Reclamation Act of 1902 requires the United States to comply with state water laws, including water quality laws, unless the state law is inconsistent with the clear congressional directives for the CVP. *California v. United States*, 438 U.S. 645, 650, 678 (1978). In other words, to the extent that the state's water quality regulations conflict with the clear congressional directives for the CVP, they are preempted by the federal law. *Id.*; *see also Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1131-32 (9th Cir. Cal. 1998) (the relevant question is whether the state water law may be implemented in a way that is consistent with federal reclamation law).

If the "public health and safety" is interpreted to limit CVP water supplies to certain types of municipal and industrial uses, this is fundamentally inconsistent with the reclamation laws under which the CVP was authorized. Under Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), 53 Stat. 1194, no contract relating to municipal water supplies shall be made unless, in the judgment of the Secretary of the Interior, "it will not impair the efficiency of the project for irrigation purposes." *City of Fresno v. California, et al.*, 372 U.S. 627, 630 (1963). In fact, *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), the Supreme Court specifically considered the history of the Friant Division and the CVP, and concluded "that Congress realistically elected to treat it as a reclamation project." *Id.* at 739.

Despite the language in the federal reclamation laws authorizing the CVP, the Order proposes to limit water exports from the Delta to "public health and safety needs" – without defining that term – and mandates that "water saved as a result of this action remain in storage to release later in the season for health and safety and ecosystem protection."

If this "health and safety" standard is interpreted to prohibit the CVP from exporting water for its federally authorized purposes, as confirmed in its water rights permits, the Order is beyond the SWRCB's jurisdiction and contrary to law. The SWRCB does not have the power to change the purposes for which Congress authorized the CVP. Thus, in the context of an Order adjusting a water quality plan to reflect real-world hydrological conditions, the SWRCB cannot direct the CVP to be operated exclusively for municipal and industrial purposes rather than the purposes that were authorized and directed under federal reclamation law. In other words, the SWRCB cannot adopt a water quality objective that requires Reclamation to consent to change the federally authorized purposes of the CVP.

B. The Order Does Not Properly Adhere to the Seniority of Water Rights in Allocating the Responsibility for Meeting Water Quality Objectives.

As noted above, the water quality standards at issue in this proceeding derive from D-1641, which was extensively litigated and ultimately resulted in an appellate decision. In *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 729 & n. 21 (2006), the Court of Appeals confirmed

that the Board must conduct a regulatory proceeding to amend a water quality control plan as well as an adjudicative proceeding to assign responsibility to the water users for meeting the water quality objectives in the plan. *Id.*, citing *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 119 (1986). In seeking to ensure compliance with water quality objectives, California's law of prior appropriation generally requires the SWRCB to adhere to water rights priorities; priorities cannot be disregarded or subverted without an evidentiary finding of substantial justification. *El Dorado Irrigation Dist. v. State Water Resources Control Bd.*, 142 Cal. App. 4th 937, 967 (2006).

The Order does not respect water rights priority as the Board has been directed to do by the Courts when assigning responsibility for meeting water quality objectives. The Order purports to limit CVP pumping effective immediately, but it does not indicate that the water users junior to Reclamation have been shut off. Because the Order makes no attempt to consider or honor water rights priority, it is invalid.

III. The Order Does Not Best Serve the Public Interest.

The determination of what level and type of appropriation is in the public interest requires balancing multiple factors. *See, e.g., National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 447 (1983); *Environmental Defense Fund v. E. Bay Mun. Util. Dist.*, 26 Cal. 3d 183, 198 (1980) (Water Code includes hearing requirements and judicial review procedures "to assure that board action under these sections properly balances the rights of the appropriator with the needs of the public"). The Order fails to even take the public interest into consideration, much less make the required balancing.

As noted above, if the "health and safety" standard precludes substitute water from being delivered to the Exchange Contractors, the practical effect is to cut off the Friant contractors' CVP water supply entirely. Depriving the Friant Division of its entire CVP water supply would result in catastrophic loss. As noted above, Reclamation's permits to divert water at the Delta to serve the Exchange Contractors have the most senior priority dates of any of the permits issued for CVP or SWP exports. The economy and fabric of the Friant Division has developed in reliance on its highly reliable water supplies. More than half of Friant's service area is in permanent plantings, and the percentage is even higher in the Class 1 districts. If the Order's "public health and safety" limitation is interpreted to prohibit the CVP exports from being delivered to satisfy the Exchange Contractors' irrigation uses, the effect of that is to reduce Friant Division CVP supplies to **zero**. Without definition of the term, and without performing the balancing that is required (following notice and a hearing, and due consideration and weighing of the evidence), the Order threatens the social and economic fabric of the entire Friant Division. These public interest factors must be taken into consideration and weighed against other competing factors, including the need to maintain water quality in the Delta.

The Order does not contain any evidence that it has even taken any of these public interest factors into consideration, and it certainly makes no attempt to balance them. The Order grants a reduction in the amount of X2 flow that was imposed for aquatic species and authorizes export pumping up to 1500 cfs – but it inexplicably imposes a "public health and safety" limitation on the use to which the pumped water is put. The X2 water quality standard seeks to protect fish. While there may be a biological basis for restricting the amount or timing of export pumping, there is no biological basis whatsoever for imposing a use limitation on the pumping that is allowed: simply put, it makes no difference to the fish how the pumped water is used. Either 1500 cfs is an appropriate level of export

pumping that is sufficiently protective of the fish, or it is not. If this level of export pumping is biologically appropriate, the use to which the water is put is irrelevant.

The Order's attempt to impose this "public health and safety" use limitation as part of a modification to a water quality standard to protect aquatic species has no rational basis. The balance of the public interest must weigh the purported benefits of this arbitrary water use restriction against the very real and certain harms that will result from it. The Order fails to do so, and, accordingly, it is fatally defective.

IV. Friant Division Contractors Are Legal Users of Water Under Reclamation's Permits, and the Terms of the Order Injure Their Interests.

As noted above, the Friant Division contractors hold contracts that entitle them to CVP supplies developed on the San Joaquin River after satisfaction of the senior water rights. Article 3(n) of each of the contracts between Reclamation and each Friant Division long-term contractor reflects this arrangement:

(n) The rights of the Contractor under this Contract are subject to the terms of the contract for exchange waters, dated July 27, 1939, between the United States and the San Joaquin and Kings River Canal and Irrigation Company, Incorporated, et al., (hereinafter referred to as the Exchange Contractors), Contract No. Ilr-1144, as amended. The United States agrees that it will not deliver to the Exchange Contractors thereunder waters of the San Joaquin River unless and until required by the terms of said contract, and the United States further agrees that it will not voluntarily and knowingly determine itself unable to deliver to the Exchange Contractors entitled thereto from water that is available or that may become available to it from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta those quantities required to satisfy the obligations of the United States under said Exchange Contract and under Schedule 2 of the Contract for Purchase of Miller and Lux Water Rights (Contract Ilr-1145, dated July 27, 1939).

Under this provision of the contracts, Reclamation has contractually bound itself not to "voluntarily and knowingly" render itself unable to deliver water to the Exchange Contractors such that the Friant Division contractors' rights are compromised. To the extent the Order's "health and safety" limitation interferes with Reclamation's delivery of water to the Exchange Contractors, it injures the Friant contractors' legally protected contract rights.

VI. INCORPORATION BY REFERENCE

Friant joins in and incorporates by reference the arguments raised in the petition for reconsideration filed by San Luis & Delta-Mendota Water Authority and its member agencies as well as the arguments made in the protest, objections, and in the alternative, petition for reconsideration, filed by the San Joaquin River Exchange Contractors Water Authority and its member agencies.

VII. STATEMENT OF SERVICE

Notice of this Protest and Objection, and in the alternative, Petition for Reconsideration, has been served by email upon SWRCB, Reclamation and the Department of Water Resources as follows:

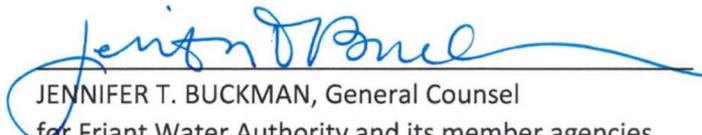
State Water Resources Control Board
c/o Michael Buckman
P.O. Box 2000
Sacramento, CA 95812-2000
Michael.Buckman@waterboards.ca.gov

Department of Water Resources
c/o James Mizell
P.O. Box 942836
Sacramento, CA 94236-0001
James.Mizell@water.ca.gov

Regional Solicitor's Office
c/o Amy Aufdemberge
2800 Cottage Way, Rm. E-1712
Sacramento, CA 95825
Amy.Aufdemberge@sol.doi.gov

U.S. Bureau of Reclamation
Paul Fujitani
3310 El Camino Ave., Room 300
Sacramento, CA 95821
pfujitani@usbr.gov

Dated: March 2, 2014


JENNIFER T. BUCKMAN, General Counsel
for Friant Water Authority and its member agencies