



By Regular and Electronic Mail

March 26, 2014

Mr. Tom Howard
Executive Director
State Water Resources Control Board
Post Office Box 100
Sacramento, CA 95812-0100
Tom.Howard@WaterBoards.CA.Gov

Re: Order on Temporary Urgency Change Petition

Dear Mr. Howard:

The San Luis & Delta-Mendota Water Authority ("Authority") received a copy of the March 10, 2014, letter sent to the State Water Resources Control Board ("State Water Board") by the cities of Folsom and Roseville and San Juan Water District. In that letter, Folsom, Roseville and San Juan Water District request that the State Water Board order the United States Bureau of Reclamation ("Reclamation") to prepare "a plan for operating Folsom Reservoir to meet the needs of water supplies in the American River region." In support of that request, Folsom, Roseville and San Juan Water District assert a priority to Central Valley Project water. The Authority agrees that a plan for operating Folsom Reservoir is needed, but it does not support the request that the State Water Board order Reclamation to prepare such a plan. Nor does the Authority agree that the bases cited by Folsom, Roseville and San Juan Water District support their assertion that a focus of the plan should be "meet[ing] the needs of water supplies in the American River region."

The Authority knows that you are intimately aware of the unprecedented drought conditions being suffered by California and the challenges faced by every region of the State as a consequence. The Authority is acutely aware of the position in which public water agencies across the state currently find themselves, as they attempt to reduce the harm to the people they serve; people who would benefit from greater certainty of the availability of limited water supplies. For this reason, the Authority supports the notion that Reclamation should prepare an annual operations plan for Folsom Reservoir. However, Reclamation historically has prepared a plan for its operation of the Central Valley Project. And, Reclamation has already prepared and made publically available its 2014 plan.¹ That plan allocates to Folsom, Roseville and San Juan Water District 50 percent of their contract entitlements, that 50 percent allocation occurring even though many other public water

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¹ See www.usbr.gov/mp/cvo/data/Feb90b2_Min_Rels.pdf; http://www.usbr.gov/mp/cvo/data/Feb90b2_Min_Std.pdf; www.usbr.gov/mp/cvo/vungvari/water_allocations_historical.pdf.

agencies with Central Valley Project contracts have received a zero allocation. Accordingly, there is no need for the State Water Board to order Reclamation to prepare such a plan. Not only is the term requested by Folsom, Roseville and San Juan Water District unnecessary, but the bases they cite to support a plan that meets the needs of water supplies in the American River region – a priority – are contrary to law.

In support of their claimed priority to Central Valley Project water, Folsom, Roseville and San Juan Water District cite Water Code sections 11128 and 11460. However, section 11460 only provides protection to potential appropriators who seek a permit to appropriate water through the State's water rights process. The Attorney General has clearly stated that “[t]he establishment of this priority does not create or vest in any individual person a presently definable ‘water right’ in the conventional sense of the term.” Attorney General Opinion No. 53-298, Jan. 5, 1955. The United States Court of Appeals, in *Tehama-Colusa Canal Authority v. U.S. Department of the Interior*, recognized and was in agreement with the opinion of the Attorney General and applied it in the context of a claimed priority to Central Valley Project water. *Tehama-Colusa Canal Authority v. U.S. Dept. of Interior*, 721 F.3d 1086 (9th Cir. 2013), cert. denied, 13-836, 2014 WL 138371 (U.S. Mar. 24, 2014).

There, the Court of Appeals wrote: “[a]rea of origin protection [is] secured by filing an application with the SWRCB and receiving a water rights’ permit with seniority vis-à-vis the state Department of Resources and the Federal Bureau of Reclamation as exporters.” *Tehama-Colusa*, at 1090. It explained further that “the appropriate way to obtain additional service water supplies under the Watershed Protection Act is to file applications to appropriate the additional water[.]” *Id.*, at 1091. The Court of Appeals applied those principles in the context of the Central Valley Project.

In *Tehama-Colusa*, the Court of Appeals made clear that, when faced with a claimed priority to Central Valley Project water by an entity that contracts with the United States for that water, the terms of the contract control. While the Court of Appeals acknowledged that it is “undisputed that the Bureau[of Reclamation’s] appropriation of water for the CVP is subject to the area of origin statutes[.]” it ruled that “those statutes *in no way control how the water is allocated by the Bureau once acquired.*” *Tehama-Colusa*, at 1089 (emphasis added). Rather, the Court ruled that the terms of the contract control. See *Tehama-Colusa*, at 1094. The ruling in *Tehama-Colusa* is consistent with the California Court of Appeal decision in *El Dorado Irrigation District v. State Water Resources Control Board*. *El Dorado Irrigation Dist. v. SWRCB*, 142 Cal.App.4th 937, 976 (2006) (holding any priority that 11460 may grant to an area of origin user “does not extend to water the projects have properly diverted to storage at an earlier date”).

The rulings by the federal and state courts thereby prohibit Folsom, Roseville and San Juan Water District from now asserting they, as contractors for Central Valley Project water, have priority to Central Valley Project water under Water Code section 11128 and 11460. Much like the CVP contractors in *Tehama-Colusa*, Folsom, Roseville and San Juan Water District hold contracts with Reclamation and therefore, as in *Tehama-Colusa*, the terms of those contracts govern the allocation of Central Valley Project water, and not the area of origin protection provided by the Watershed Protection Act.

Folsom, Roseville and San Juan Water District also claim to have priorities to Central Valley Project water based on Term 14 of Water Rights Decision 893. The term that purportedly provides the protections they claim is actually Term 11 of Permits 11315 and 11316, which admittedly is nearly identical to the language of Term 14 in Water Rights Decision 893. Term 11 states:

Deliveries of water under this permit shall be limited to deliveries for beneficial use within Placer, Sacramento and San Joaquin Counties and shall not be made beyond the westerly or southerly boundaries thereof, except on a temporary basis, until the needs of those counties, present or prospective, are fully met *provided, however, that agreements in accordance with Federal Reclamation laws between permittee and parties desiring such service within said counties are executed by July 1, 1968.*

Permits 11315 and 11316 (emphasis added). Term 11, however, does not provide Folsom, Roseville and San Juan Water District with a priority, independent of the terms of the contracts they hold with Reclamation. Term 11 provides a priority to contract for water services, but that priority expired in 1968. The State Water Board in Decision 893 explained:

While not attempting to define the area which may be entitled to preferential consideration under Water Code Section 11460, the Board nevertheless concludes that in view of that code section, the demonstrated needs for additional water in Sacramento, San Joaquin, and Placer Counties, the provisions of Water Code Sections 1253, 1255, and 1257, and consideration of public interest, *the three counties mentioned should be allowed a reasonable period, say ten years, within which to negotiate with the United States for water from the American River, before the supply available from that source is permanently committed to use in a more remote area.*

D-893, at p. 52 (emphasis added).

In *Tehama-Colusa*, the United States Court of Appeals considered a claim nearly identical to that raised here by Folsom, Roseville and San Juan Water District. The relevant term at issue in *Tehama-Colusa*, Term 23, states:

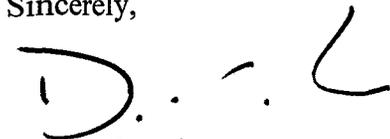
The export of stored water under permits issued pursuant to [a]pplications outside the watershed of Sacramento River Basin or beyond the Sacramento-San Joaquin Delta shall be subject to the reasonable beneficial use of said stored water within said watershed and Delta, both present and prospective, provided, however, that agreements for the use of said stored water are entered into with the United States prior to March 1, 1964, by parties currently diverting water from Sacramento River and/or Sacramento-San Joaquin Delta and prior to March 1, 1971, by parties not currently using water from Sacramento River and/or Sacramento-San Joaquin Delta.

See: *Tehama-Colusa*, at 1090. Regarding Term 23, the United States Court of Appeals held that it merely granted a priority to area of origin users to request a water service contract from Reclamation, and even then for only a certain length of time, and did not require CVP

water to be allocated for the benefit of specific water users within the areas of origin. The United States Court of Appeals decision cites State Water Board Decision 990, which like Decision 893, explains that Term 23 was designed to give preference to “requests for water service contracts” from area of origin users “over requests from users outside the watershed.” D-990, at p. 72-73. As a result, Decision 893 and the precedent set by *Tehama-Colusa* are in opposite of the claim by Folsom, Roseville and San Juan Water District of priority to Central Valley Project water, based on Term 11 of Permits 11315 and 11316, or Term 14 of Decision 893.²

For all of these reasons, the Authority respectfully requests that the State Water Board not include in any order a term that requires Reclamation to prepare an annual operations plan for Folsom, particularly one that provides Folsom, Roseville and San Juan Water District a priority over other Central Valley Project water users on the bases cited in their March 10, 2014 letter.

Sincerely,



Daniel G. Nelson
Executive Director

² However, even were Folsom, Roseville and San Juan Water District to succeed under the bases advanced, under section 11460 they would still need to demonstrate that the water they seek is not being put to a beneficial use either in the area of origin, or “an area immediately adjacent thereto which can conveniently be supplied with water therefrom.” Water Code, § 11460. As the California Court of Appeal stated in *SWRCB Cases*, “all beneficial uses within the area of origin stand on equal footing under section 11460.” *SWRCB Cases*, 136 Cal.App.4th 674, 758 (3rd Dist. 2006). The Court of Appeal expanded that statement to include the area immediately adjacent thereto. See: *SWRCB Cases*, at 759.