

*Testimony of
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Jim Borcuk, Chief, San Bernardino County Flood Control District, Federal
Projects Division;
and
Lance Natsuhara, Manager, Orange County Flood Control District, Santa Ana
River Project Section,
on behalf of the
Santa Ana River Mainstem Project Local Sponsors
in the
SWRCB Hearing on Santa Ana River Water Rights Applications¹*

INTRODUCTION

This direct testimony of the San Bernardino County Flood Control District, Riverside County Flood Control and Water Conservation District, and Orange County Flood Control District, collectively the Santa Ana River Mainstem Project Local Sponsors (“Local Sponsors”), is submitted jointly by Vana Olson, Director, San Bernardino County Flood Control District, Jim Borcuk, Chief, San Bernardino County Flood Control District, Federal Projects Division, and Lance Natsuhara, Manager, Orange County Flood Control District, Santa Ana River Project Section. This testimony is the Local Sponsors’ Exhibit 1 (“Exhibit LS-1”). Exhibits LS-1-1 through LS-1-15 are true and correct copies of the documents described in the following testimony.

The San Bernardino County Flood Control District, Riverside County Flood Control and Water Conservation District, and Orange County Flood Control District are responsible for providing flood control services throughout their respective districts. The central flood control feature in the three counties is the federal Santa Ana River Mainstem Project (“SAR Project”). The SAR Project includes Seven Oaks Dam, Prado Dam, and other flood control facilities along the Santa Ana River. The Local Sponsors entered into a Local Cooperation Agreement with the United States Army Corps of Engineers (“USACE”) to implement and share the costs of the SAR Project.

The Local Sponsors present this testimony and exhibits to discuss Seven Oaks Dam, a key element of the SAR Project, the Local Sponsors’ implementation of the SAR Project, the water rights applicant’s proposed use of the Local Sponsors’ Seven Oaks Dam, and the process that has been underway for over a decade to evaluate potential use of Seven Oaks Dam for water conservation as a secondary use that will not interfere with flood control operations.

¹ The other witnesses disclosed on the Local Sponsors’ Notice of Intent to Appear, Nadeem Majaj, Zulema Smith and Thomas Rheiner, may participate on the panel and testify as to matters stated in this written testimony and exhibits.

LOCAL SPONSORS' PARTICIPATION IN THE WATER RIGHTS HEARING

The Local Sponsors protested the San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County ("Muni/Western") Application Nos. 31165 and 31370, Orange County Water District Application No. 31174, and San Bernardino Valley Water Conservation District Application No. 31371 to require the applicants to enter into access agreements with the Local Sponsors if the applicants propose to use, access or affect the SAR Project facilities, including Seven Oaks Dam, or Local Sponsors' lands.

The San Bernardino Valley Water Conservation District withdrew its application on April 13, 2007. The Local Sponsors had worked with the San Bernardino Valley Water Conservation District to confirm that its proposed appropriation would not affect Seven Oaks Dam or Local Sponsors' land, and the District and the Local Sponsors would have reached an agreement that would have allowed the Sponsors to dismiss their protest to the District's application before commencement of the hearing.

The Local Sponsors dismissed their protest to the Orange County Water District application in a January 3, 2007 letter submitted to the State Board on March 16, 2007. (Exhibit LS-1-1.) The Local Sponsors dismissed the protest following the execution of the Operations Agreement between Orange County Water District and the Orange County Flood Control District that ensures that Orange County Water District's water rights application and any new water conservation activities at Prado Dam do not adversely affect the Local Sponsors' property interests and Santa Ana River flood control obligations. (Exhibit LS-1-2.) The protest dismissal requests that the State Board condition any water rights permit or license granted to Orange County Water District on compliance with the Operations Agreement.

The Sponsors will continue to work with Muni/Western in this hearing and through the USACE Water Conservation Feasibility Study process (described in more detail below) in order to negotiate an agreement regarding Muni/Western access to and use of Seven Oaks Dam and related lands. The Sponsors do not oppose the granting of water rights permits and licenses to Muni/Western provided that the State Board adopts appropriate terms and conditions requiring Muni/Western to enter into an access agreement with the Local Sponsors as described below, and Muni/Western enter into all necessary study and funding agreements as required by federal law and regulations.

OVERVIEW OF THE SANTA ANA RIVER MAINSTEM PROJECT AND THE LOCAL SPONSORS' RESPONSIBILITIES

The Santa Ana River Mainstem Project is designed to provide crucial flood protection for Orange, Riverside and San Bernardino Counties to protect the health and safety of nearly four million people. The rapid growth and development of Southern California had decreased effectiveness of the pre-SAR Project flood control system, threatening severe floods along the Santa Ana River that could have covered more than 110,000 acres and have resulted in untold billions of dollars in economic losses. The SAR Project system improvements cover 75 miles from the headwater of Santa Ana River to the mouth of the river at the Pacific Ocean.

Elements of SAR Project

The SAR Project flood control improvements include three principal features:

- Seven Oaks Dam is approximately 550 feet high and 2,980 feet long and has a gross reservoir storage of 145,600 acre-feet. Construction of Seven Oaks Dam took nine years and cost approximately \$465 million.
- Enlargement of Prado Dam to increase reservoir storage capacity from 217,000 acre-feet to 362,000 acre-feet.
- Lower river channel modification for flood control along the 30.5 miles of the Santa Ana River from Prado Dam to the Pacific Ocean.

Project History

The SAR Project was initiated in 1964, in partial response to a resolution of the House Committee on Public Works adopted May 8, 1964. A survey report was completed by the USACE in 1975. The report was submitted to Congress in September 1978.

In September 1980, the USACE completed the Phase I General Design Memorandum (“GDM”) for the Santa Ana Mainstem Project. Construction of the SAR Project was authorized by Section 401(a) of the Water Resources Development Act of 1986. Construction of the SAR Project began in 1989. Construction of Seven Oaks Dam began in 1990 and was completed in 1999.

Local Cooperation Agreement between the Local Sponsors and USACE

On December 14, 1989, the USACE and the Orange, Riverside and San Bernardino Flood Control Districts as Local Sponsors entered into a Local Cooperation Agreement (“LCA”) defining the responsibilities and cost-sharing of each party for each feature of the SAR Project. (Exhibit LS-1-3.) There have been several modifications to the LCA. In 2003, the Second Modification to the LCA was entered between the USACE and Orange County Flood Control District whereby the Prado Dam feature was deleted from the LCA and USACE and Orange County Flood Control District entered into a separate Project Cooperation Agreement to construct Prado Dam as a Separable Element of the SAR Project. (Exhibit LS-1-4.)

The Local Sponsors were required to acquire all lands, easements, rights-of-way and to perform relocations required to make way for construction of the SAR Project. The USACE has constructed the improvements, including Seven Oaks Dam. The LCA provided for the USACE to turn completed project facilities over to Local Sponsors, who are then responsible for the operation and maintenance. (See discussion of Seven Oaks Dam turnover, below.)

Congress authorized the SAR Project for construction in 1986 under new guidelines for cost sharing of water resources projects between Federal and local governments. The Local

Sponsors have paid approximately 30 percent of the total cost of project facilities, with the remaining funding provided by the Federal government.

SEVEN OAKS DAM

Background

Seven Oaks Dam is a single purpose flood control facility that serves as the principal regulating structure located on the upper Santa Ana River. Seven Oaks Dam is a 550-foot-high and 2,980-foot long rockfill dam with a design storage capacity of 147,970 acre-feet at the spillway crest elevation of 2,580 feet, NGVD, of which 32,000 acre-feet is allocated for 100 years of estimated sediment accumulation. Its flood control plan is designed to work in conjunction with the flood control plan of Prado Dam, located 40.3 miles downstream on the Santa Ana River. Seven Oaks Dam will reduce the Reservoir Design Flood inflow of 85,000 cfs to a controlled outflow of 7,000 cfs to provide protection from a 350-year flood. Seven Oaks Dam accounts for approximately \$465 million of the total \$1.7 billion SAR Project total cost. The Dam is designed to resist an earthquake measuring 8.0 on the Richter scale. Construction of Seven Oaks Dam by the USACE was completed in 1999.

Turnover of Seven Oaks Dam to Local Sponsors

Seven Oaks Dam and permanent structures (with the exception of the project administration building and office trailer), the control of rights-of-way used for Seven Oaks Dam construction, and the obligation to operate and maintain the Dam was turned over to the Local Sponsors by the USACE effective October 1, 2002. (See August 27, 2002 letter from Brian Moore, USACE, to Ken Smith, OCFCD, Exhibit LS-1-5 at 1-2.) The “turnover” is conditioned on Local Sponsors’ continued compliance with the Operation, Maintenance, Repair, Replacement, and Rehabilitation Manual (“OMRR&R Manual”) and USACE OMRR&R regulations, the Water Control Manual, and an Emergency Action Plan.

Water Control Manual, OMRR&R Manual and Emergency Action Plan

The Local Sponsors operate Seven Oaks Dam according to the September 2003 USACE Water Control Manual. (Exhibit LS-1-6.) In accordance with the Water Control Manual, the Seven Oaks Dam Reservoir Regulation is performed by the Orange County Flood Control District staff. The USACE has exclusive authority to revise the Water Control Manual.

Maintenance and repair functions are performed by San Bernardino County Flood Control District staff in accordance with the OMRR&R Manual. (Exhibits LS-1-7, LS-1-8.)

The Local Sponsors also operate Seven Oaks Dam in accordance with the USACE Emergency Action Plan.

PROCESS FOR ADDING WATER CONSERVATION TO SEVEN OAKS DAM

Seven Oaks Dam is authorized to be operated as a flood control facility only. The following agreements govern the process for evaluating the use of Seven Oaks Dam for water conservation purposes. Water conservation is not at this time an authorized or approved use of Seven Oaks Dam.²

Water Resources Development Act of 1986

The Water Resources Development Act of 1986, P.L. 99-662, (“1986 WRDA”) authorized the USACE to study the feasibility of adding water conservation to flood control facilities. The USACE conducted a reconnaissance study of water conservation at Seven Oaks Dam and Prado Dam in 1986, and determined that a feasibility study of water conservation at Seven Oaks Dam was required. The 1986 WRDA requires that a local sponsor contribute 50% of the cost of the feasibility study.

1993 Study Agreement and Reimbursement Agreement

At the request of Muni/Western, the San Bernardino County Flood Control District, on behalf of the Local Sponsors, entered into the Agreement with the United States for the Seven Oaks Dam Water Conservation Study on May 23, 1993 (“1993 Study Agreement”), whereby the USACE agreed to prepare a Feasibility Study to investigate the feasibility of providing water conservation at Seven Oaks Dam and for San Bernardino County Flood Control District to pay 50% of the costs of the study. (Exhibit LS-1-9.)

Muni/Western and San Bernardino County Flood Control District entered into a separate agreement, the Agreement between the San Bernardino Flood Control District and San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County Seven Oaks Water Conservation Study, dated November 23, 1993 (“1993 Reimbursement Agreement”), to reimburse San Bernardino County Flood Control District for the Local Sponsor’s 50% share of the study cost. (Exhibit LS-1-10.)

The 1993 Study Agreement provided that the USACE “will not continue the Study if it determines that there is no solution in which there is a Federal interest or which is not in accord with current policies or budget priorities,” unless the designated Local Sponsor is given an exception to continue under the Study Agreement. (1993 Study Agreement, Art. II(f), Exhibit LS-1-9 at 2.) The Local Sponsor “may wish to conclude the Study if it determines that there is no solution in which it has an interest or which is not in accord with its current policies and budget priorities.” (*Id.*, Art. II(g).)

² “Water Conservation” is a term of art under federal law regarding federal water resource projects. In this testimony we refer to “water conservation” as the use of Seven Oaks Dam for the purpose of storage of water and diversion of water for consumptive purposes.

Blanket Drain Reimbursement

During construction of Seven Oaks Dam and before completion of the Water Conservation Feasibility Study, Muni/Western requested and paid for certain improvements to Seven Oaks Dam that would facilitate its use for water conservation, if ultimately deemed feasible and approved. On behalf of Muni/Western, the San Bernardino County Flood Control District requested that the USACE extend the blanket drain of the Dam to a height that would permit future water conservation reservoir elevations. (Exhibit LS-1-11.) Muni/Western reimbursed San Bernardino County Flood Control District for its cost share in accordance with the 1993 reimbursement agreement. (*Id.*) As stated in a USACE letter, “[a]s the water agencies have no standing relative to requesting a design modification for this purpose, San Bernardino County Flood Control District requested the modification on their behalf as a courtesy.” (Letter from Ruth Villalobos, USACE, to Ken Miller, San Bernardino County Flood Control District, dated May 21, 2001 (“Villalobos Letter”), Exhibit LS-1-12 at 2.)

1997 Feasibility Study

A Seven Oaks Dam Water Conservation Feasibility Study and EIS/EIR were completed by the USACE in June 1997 in accordance with the 1993 Study Agreement. (Exhibit LS-1-13.) The Study concludes that water conservation at Seven Oaks Dam is technically and economically feasible. The Study, however, does not approve water conservation. A final Record of Decision on the Feasibility Study was not adopted due to uncertainty regarding the ongoing consultation with the United States Fish and Wildlife Service under the Endangered Species Act and the mitigation measures that may be imposed through the consultation. (Villalobos Letter, Exhibit LS-1-12 at 2.)

Muni/Western Obligations to Obtain USACE Approval to Use Seven Oaks Dam for Water Conservation

A 2001 USACE letter defines the steps that Muni/Western must complete in order to obtain USACE approval to operate Seven Oaks Dam for water conservation:

If it is determined that water conservation [at Seven Oaks Dam] is feasible, the interested agencies [Muni/Western] would be required to complete the following steps prior to Corps approval and agency implementation:

1. All hydrological requirements for flood control and related environmental mitigation purposes for Seven Oaks Dam must be met before water conservation is considered.
2. The interested water agencies, and not the Local Sponsors or the USACE, are fully responsible to assess the potential impacts of their proposed water conservation program, and to pay for all costs – including potential mitigation costs – associated with their proposed program. The water agencies are required to prepare adequate environmental documentation, such as an Environmental

Impact Statement/Environmental Impact Report and Biological Assessment.

3. The water agencies must acquire all permits necessary to implement their proposed water conservation program, and pay all associated costs. The permitting agencies include the U.S. Forest Service, the United States Fish and Wildlife Service, the California Department of Fish and Game, the State Board, the California Regional Water Quality Control Board, and the USACE.
4. The water agencies must complete Endangered Species Act consultation under both state and federal acts.
5. The water agencies must ensure that existing water rights are not impacted by their proposed water conservation program, and must acquire additional rights, if necessary, in accordance with State Board requirements.
6. The water agencies must work with the USACE and Local Sponsors to ensure that flood control operations, including endangered species requirements, are not adversely affected by any water conservation activities.
7. As the Local Sponsors are responsible for Seven Oaks Dam operations and maintenance, the USACE will not consider supporting implementation of water conservation unless requested by the Local Sponsors; the water agencies must enter into an agreement with the Local Sponsors to implement any water conservation program at Seven Oaks Dam.

(Villalobos Letter, Exhibit LS-1-12 at 2-3.)

Proposed Feasibility Study Update and Study Agreement Amendment No. 1

Muni/Western has requested an update to the 1997 Feasibility Report to further investigate water conservation options and impacts and that the USACE and Local Sponsors revise the Seven Oaks Dam Water Control Manual to include water conservation in addition to flood control.

An amendment to the 1993 Study Agreement is required to authorize the USACE to update the 1997 Feasibility Study and to establish the Local Sponsor cost share. The USACE has prepared a draft Amendment No. 1 to the Study Agreement. (Exhibit LS-1-14.) The USACE will not execute the amendment and commence the update to the Feasibility Study until funding of the Local Sponsor's cost share is committed, which requires Muni/Western committing to reimburse San Bernardino County Flood Control District for the Local Sponsor cost share.

Funding Agreement

Muni/Western and the Local Sponsors have negotiated a Funding Agreement whereby Muni/Western will pay 100% of the costs to update the Feasibility Study and indemnify the Local Sponsors for any liability arising out of the agreement. (Exhibit LS-1-15.) The Funding Agreement provides, among other things, that the Local Sponsors are not representing or warranting the suitability of Seven Oaks Dam for water conservation purposes, and that any operational or facility changes at Seven Oaks Dam will require a separate agreement approved by the Local Sponsors. (*Id.*, ¶¶ 6.a., 6.b.) All parties except for Western have executed the Funding Agreement. Western will consider approval of the Funding Agreement on April 18, 2007.

CONDITIONS OF THE LOCAL SPONSORS NON-OPPOSITION TO THE GRANTING OF WATER RIGHTS PERMITS TO MUNI/WESTERN

The Local Sponsors do not object to the granting of water rights permits and licenses to Muni/Western in accordance with Application Nos. 31165 and 31370 and the Final EIR, subject to following terms and conditions:

Requirement that All Necessary Federal, State and Local Approvals be Obtained

The State Board imposes a standard term and condition on all new permits that no construction shall be commenced and no water shall be diverted until all necessary federal, state and local approvals have been obtained. The Local Sponsors request that the record for this proceeding reflect that Muni/Western must obtain approvals from the USACE and the Local Sponsors in accordance with this standard term and condition.

Access Agreement

Before construction of facilities and operation of Seven Oaks Dam for water conservation, Muni/Western must enter into an access agreement with the Local Sponsors that will govern Muni/Western access to Seven Oaks Dam for purposes of exercise of water rights which may be granted by the State Board in accordance with the Applications. The access agreement shall include Muni/Western payment for the separable costs for adding water conservation at Seven Oaks Dam, reimbursement of the Local Sponsors' expenses incurred as a result of granting Muni/Western access and for operating Seven Oaks Dam for water conservation purposes, indemnification of the Local Sponsors for liability and losses associated with Muni/Western's access to the Seven Oaks Dam and associated facilities, insurance, and related provisions.

The following term and condition must be added to all water rights permits granted by the SWRCB to Muni/Western:

Permittee shall not, without prior written agreement of the Santa Ana River Mainstem Project Local Sponsors, have the right of access to, or commence

construction or operate diversion works affecting, Seven Oaks Dam or lands or facilities of the Local Sponsors pursuant to this Permit. Permittee must secure all other necessary federal, state and local approvals before commencing construction of works and before Seven Oaks Dam is operated for water conservation purposes.

Uses of Seven Oaks Dam

Muni/Western must agree that flood control is the primary purpose of Seven Oaks Dam, and that Muni/Western's exercise of water rights permits at Seven Oaks Dam for water conservation, if authorized, shall not interfere with flood control and shall at all times be governed by the then-applicable Water Control Manual.

Limitations to the Sponsors' Non-Opposition

By not opposing the granting of permits or licenses to Muni/Western consistent with the aforementioned conditions, the Local Sponsors are not representing or warranting the suitability of Seven Oaks Dam for water conservation. Furthermore, by not opposing the granting of permits or licenses to Muni/Western consistent with the aforementioned conditions, the Local Sponsors are not approving Muni/Western water conservation or any other uses of Seven Oaks Dam or Local Sponsors' properties.

CONCLUSION

We appreciate the opportunity to present this testimony on behalf of the Local Sponsors to the State Water Resources Control Board in the hearing on the Santa Ana River Water Rights Applications.