

STATE WATER RESOURCES
CONTROL BOARD

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DM. OF WATER RIGHTS
SACRAMENTO

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9 **STATE OF CALIFORNIA**

10 **STATE WATER RESOURCES CONTROL BOARD**

<p>11 In the matter of:</p> <p>12 Consideration of a Petition of the San Joaquin</p> <p>13 River Group Authority (Merced Irrigation District</p> <p>14 and Modesto Irrigation District and Turlock</p> <p>15 Irrigation District) for Approval of a Long-Term</p> <p>16 Transfer Involving a Change in the Place and</p> <p>17 Purpose of Use of Water</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>REBUTTAL BRIEF OF SOUTH DELTA</p> <p>WATER AGENCY, ET AL., ON</p> <p>PETITIONS FOR LONG-TERM</p> <p>TRANSFER BY MERCED IRRIGATION</p> <p>DISTRICT, MODESTO IRRIGATION</p> <p>DISTRICT, AND TURLOCK</p> <p>IRRIGATION DISTRICT</p>
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18 **PETITIONERS HAVE NOT PROVIDED THE BOARD WITH RELIABLE**
19 **INFORMATION TO SUPPORT APPROVAL OF THE PETITION.**

20 Petitioners Closing Brief confirms that it has not met its initial burden to show the
21 requested approval would not have "an unreasonable effect on any legal user of water or a
22 substantial injury to any legal user of water."

23 Petitioners admit that the modeling supporting their Petition assumed, among other
24 things, adherence to "the regulatory requirements of the USACOE, FERC, SWRCB, and others
25 . ." (Petitioners Opening Brief 12:4-5). One of the existing SWRCB requirements is the refill
26 limitations set forth in D-1641 which states:

27 At times when the USBR is releasing water from New
28 Melones Reservoir for the purpose of meeting the Vernalis salinity
objective, or when standard permit 93 is in effect, or when salinity
objectives at Vernalis at not being met, licensee shall not replenish
(1) stored water or foregone diversions provided for the April-May
pulse flow or the October target flow at Vernalis, or (2) water

1 transferred to the USBR pursuant to the SJRA. (D-1641 at 169,
2 170.)

3 Petitioners then admit in certain instances their modeling shows that they *will* recover lost
4 storage at times when New Melones releases for water quality are being made (e.g., Petitioners
5 Opening Brief 8:9-14; 10:12-14). Petitioners try to avoid this error by claiming they will defer
6 recovery of lost storage to other times because of a proposed condition to preclude such action; a
7 condition set forth for the first time in their Brief. Petitioners cannot have it *either* way. If they
8 modeled something contrary to existing permit conditions, they have not adequately or accurately
9 examined the effects of the Petition. If they claim they will operate contrary to what is modeled,
10 they again have not examined the effects of the Petition. Either way, *the record does not show*
11 *us when they will recover water and how that might affect other legal users.*

12 **PETITIONERS PROPOSED CONDITION TO APPROVAL OF**
13 **PETITION PROVIDES NO PROTECTION TO LEGAL USERS.**

14 Petitioners cannot claim the refill limitation is not yet effective for the 47,000 acre-feet
15 sought under the Petition, and therefore modeling refill at any time is appropriate. Directly
16 contrary to Petitioners' assertions in its Brief, Petitioners' witnesses *confirmed* that they do not
17 currently implement the existing refill limitation (RT 25:6 - 27:2), and they do indeed sometimes
18 reduce summer flows to provide the spring fishery flows.

19 Petitioners' true colors shine through when they propose their own refill condition. The
20 existing condition precludes refill when:

21 . . . the USBR is releasing water from New Melones
22 Reservoir for the purpose of meeting the Vernalis salinity objective
23 . . . (D-1641 at 169, 170).

24 The proposed condition states, "at times when the USBR is releasing stored water from
25 New Melones Reservoir for the *sole purpose* of meeting the Agricultural Standard at Vernalis . .
26 ." (See Petitioners Opening Brief Exhibit "A").

27 This not so subtle change completely eviscerates the condition, as apparently intended by
28 Petitioners. The parties who admitted to not abiding by the existing refill limitation have
proposed a new one that would in fact place absolutely no limitation on them because of the

1 likelihood that any release from New Melones can have multiple benefits.

2 Petitioners did not inform the Board whether other New Melones releases may or
3 typically do occur when water quality releases are made (although it may be buried in the
4 modeling somewhere). However, under the Petitioners' suggested condition, there would only
5 need to be one cubic foot per second released (or designated as such) from New Melones *for any*
6 *purpose other than salinity control, and the Petitioners could refill their reservoirs irrespective*
7 *of any impact on New Melones or legal users dependent thereon!* Still worse, it is the USBR
8 that would decide *in its absolute discretion* how to label any release from New Melones for any
9 allowed purpose; the same USBR which is buying Petitioners' water under the Petitions.
10 Normally, scenarios such as this are confined to stories such as *Alice in Wonderland*.

11 **PETITIONERS HAVE FAILED TO EXAMINE THE**
12 **EFFECTS OF THEIR PETITION ON OTHER LEGAL USERS.**

13 In addition, Petitions have not met their initial burden with regard to showing any
14 unreasonable effect on or substantial injury to legal users. Even if the Board accepted
15 Petitioners' modeling as useful in analyzing the effects of the Petition, the model results purport
16 to show the Petition will result in an instance of New Melones being unable to meet its obligation
17 for salinity control and a few instances of increased releases from New Melones to meet water
18 quality in any particular year. Petitioners conclude that the small number of instances translates
19 into a reasonable effect, or insufficient injury. This is not the analysis required.¹

20 It is the extent of the effect and not the frequency of the effect that is the proper analysis.
21 Petitioners have made no such analysis. They have not examined the decreases in the amount of
22 water flowing into the Delta resulting from the Petition.² They have not examined the number of

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24 ¹ Petitioners cite the often repeated fiction that effects on New Melones are irrelevant
25 because the Bureau is "obligated" to meet the salinity standard and can use means other than New
26 Melones. Such fanciful musings ignore the reality of Bureau operational plans and guidelines.
27 Why would Petitioners model these effects if the Bureau was going to meet the Vernalis standard
28 with some other water?

29 ² Petitioners Footnote 16 on page 36 of their Closing Brief suggests that by not increasing
30 storage, MID is not affecting New Melones releases in one (modeled) instance. It has yet to be

1 diverters dependent upon the Vernalis salinity standard or the extent to which the Bureau's
2 ability to meet water quality on a long term basis may be affected by the Petition. They have not
3 examined the extent to which crop injury will occur when New Melones cannot meet water
4 quality in any particular instance, or the effect on agriculture resulting from New Melones'
5 decreased ability to meet water quality in later years resulting from the Petition. Without
6 showing the Board the level of effects on legal users dependent on New Melones water quality
7 releases, Plaintiffs cannot be said to have met their burden. Petitioners cannot treat legal users as
8 some amorphous group. The Water Quality Objective for Agricultural Beneficial Uses is meant
9 to protect a specific group of users at and downstream of Vernalis. Petitioners have made
10 absolutely no analysis as to the effects resulting from the Petition on those users.

11 **PETITIONERS WRONGLY ASSERT THAT PROTESTANTS MUST**
12 **ADJUDICATE THEIR WATER RIGHTS.**

13 Petitioners confuse the issue of whether a legal user may be harmed with that of a water
14 right adjudication. Petitioners cite Rancho Santa Margarita v. Vail (1938) 11 Cal. 2d. 501 which
15 is itself a review of an adjudication of water rights case. In such a case, the court must determine
16 the existence and priority of rights amongst the parties, the amount of water used under those
17 rights, when the water is used, etc. This is very different from a hearing on a petition for a long-
18 term transfer where the issue is to determine if other legal users might be unreasonably affected
19 or substantially injured.

20 Under Water Code Section 1707 and 1735, et sec., the inquiry is not to prioritize and
21 determine who has rights to use what water at what time; it is to determine the existence of other
22 legal users and analyze the effects on them resulting from the requested change.

23 Petitioners, who made no analysis of the water right priorities which may attach to the
24 water they store, or the water they seek to use for refill, argue that in fact there are no legal users
25 downstream of them. Even if the Board were to accept this hollow argument, the point is moot.

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28 determined if downstream riparians are entitled to the water MID would be diverting but not
storing.

1 After making this very same arguments during the recent Bay-Delta hearings, the Board
2 concluded:

3 Notwithstanding the unavailability of water to satisfy
4 existing water rights in the southern Delta during certain periods,
5 the SWRCB has determined that protection of agriculture in the
6 southern Delta is in the public interest. Water quality objectives
7 have been set for this purpose, and the USBR is responsible for
8 meeting the Vernalis salinity objective. The months in which the
9 southern Delta water users' needs exceed their rights to water
10 under riparian claims are the same months in which water quality
11 violations tend to occur. Consequently, the southern Delta
12 agricultural uses should not be deprived of water of useable quality
13 as a result of this decision. (D-1641 at page 35.)³

14 If it is in the public interest to protect Delta agriculture under D-1641, such protection
15 remains in a subsequent hearing to further effectuate the San Joaquin River Agreement which
16 was itself adopted or recognized in the Bay-Delta hearings resulting in D-1641.

17 Petitioners complain that they cannot read some of the title documents submitted as
18 evidence of riparian use. Tellingly, Petitioners never once asked for additional or better copies
19 that might have solved their problem. In fact, this "legibility" issue is a red herring. With a
20 minimal of effort, any party can "struggle through" the cursive writing on the old deeds.

21 The real issue is making a showing of riparian rights. With limited space allotted for
22 these briefs, there is not room to cover every piece of evidence. For illustrative purposes, we
23 refer to the fourth page of SDWA 4 (Attachment "A" hereto). This document shows a portion of
24 Alexander Hildebrand's land as an island in the San Joaquin River. After not reviewing the
25 documents, Petitioners may suppose that all parts of this island were somehow severed from the
26 river if they so choose. The island continues to be farmed, and the Board has no evidence to
27 suggest no riparian right exists.

28 This is not simply a convenient point, the statutes governing transfers set forth certain
criteria for protests to petitions (see, for example, sections 1703.1, 1703.2, 1703.6, 1726(f),
1736). These statutes do not require each and every legal user potentially affected by the change

³ In D-1641 the Board made no conclusion as to how much water might be available to appropriative right holders.

1 appear or comment nor do they require Protestants themselves be legal users. What they do
2 require is that the Board conclude from the initial showing of the Petitioners, the response from
3 the Protestants, and/or their own investigation whether or not the change will, among other
4 things, effect legal users of water.

5 This power to address the issue but discretion on how to do it is set forth for example in
6 Water Code Section 1703.6(c) which states:

7 If a protest is based on injury to a legal user of water, the
8 Board *may* cancel the protest if the Protestant fails to submit any of
the following information requested by the Board: . . .

9 (2) Information that is reasonably necessary to determine if
10 the Protestant has a valid water right.

11 (3) Information concerning the Protestant's historical,
12 current, or proposed future diversion and use of water that is
13 reasonably necessary to determine if the proposed change will
result in injury to the Protestant's exercise of its water right. . .
[Emphasis added.]

14 In this case, there is no actual issue as to whether or not there are legal users in the Delta
15 that may be affected by the Petition; D-1641 already resolved the issue. There is no need to
16 determine how much water is being put to use in the Delta. The salinity standard is to protect all
17 agricultural users. The establishment of water quality objectives in four different locations in the
18 South Delta certainly confirms that legal agricultural use is both prevalent and common in the
19 South Delta. The Board has recognized that the hundreds of miles of Delta channels create at
20 least some riparian users, and the Board has the hundreds of permits and licenses for this area in
21 its files.

22 **PROTESTANTS HAVE MET THEIR BURDEN OF SHOWING OF**
23 **UNREASONABLE EFFECTS AND SUBSTANTIAL INJURY**
24 **WILL RESULT FROM THE PETITION.**

25 The SDWA testimony referenced SWRCB licenses and permits issued to Pescadero
26 Reclamation District 2058, Alexander Hildebrand, and Jerry Robinson. It is true that each of the
27 diverters did not specifically set forth the amount of water used under each permit; however, that
28 information is not necessary. The Board accepts the fact that there are permitted users in the
Delta and has decided to protect them pursuant to the language cited in D-1641 above.

1 Petitioners' focus on these issues is misdirection to avoid its failure to analyze the effects of its
2 proposal on a group of diverters the Board has already determined will be protected. Whether
3 the Delta diverts some or all of the inflow from the San Joaquin River changes in quality and
4 amount will affect the diverters.

5 Petitioners next try to insult the witnesses by noting they don't know such things as the
6 San Joaquin River Index for 1999. These attempts only show Petitioners' lack of interest in
7 discovering the true facts. (For example, Petitioners allege Mr. Pellegrini did not know how many
8 people diverted off of Tom Paine Slough. To the contrary, Mr. Pellegrini actually answered the
9 question by clarifying that the diversions off of the slough were by the Reclamation District and
10 not by individuals, but Petitioners failed to follow up with the next logical question. (RT at 138.)
11 The party whose witnesses admitted they don't abide by D-1641 license conditions should
12 temper its criticism of farmers they seek to harm.

13 Petitioners finally allege that there is no showing of injury. To the contrary, Petitioners'
14 own modeling shows a violation of the Vernalis Water Quality Standard (strangely the analysis
15 ignored the other three interior Delta salinity standards) and other instances of increased New
16 Melones releases because of the change. By highlighting the fact that their analysis only showed
17 infrequent occurrences, Petitioners were therefore able to avoid showing the effects of such
18 violations and decreased water quality. Mr. Hildebrand clearly described the results of the
19 Petition. His testimony explained how: (1) decreased summer flows lessen the amount of water
20 available for all diverters; (2) decreased summer flows sometime place a greater burden on New
21 Melones which can cause water quality violations, exacerbate such violations, or deplete the
22 amount of water in New Melones available for water quality at future times; (3) less water can
23 result in insufficient water depth for diverters; (4) worsened quality will decrease crop yield; (5)
24 additional export pumping to recover the "lost exports" associated with the artificially elevated
25 spring flows pursuant to the Petition will lower South Delta water levels; (6) refill operations
26 decrease the amount of water available downstream for uses other than agricultural. (See SDWA
27 5.) It was in fact the Petitioners' burden to make an initial showing whether or not the above
28 effects would cause a substantial injury or unreasonably effect any legal user. They did not.

1 SDWA showed that some of these effects have already occurred during the life of the San
2 Joaquin River Agreement. The fact that any particular harm did not occur in any particular year
3 has no bearing on whether or not the above consequences will necessarily follow from the
4 Petitioners' proposal and whether or not that constitutes an unreasonable effect or substantial
5 injury.

6 Petitioners' allegations that SDWA and CDWA cannot represent the diverters in the
7 Delta is irrelevant and wrong. Obviously, when five diverters offer their time and testimony as
8 part of Protestants' case, there are diverters asking these agencies to help them. There is no
9 doubt that SDWA and CDWA's authorizing statutes allow, if not require, their participation in
10 matters such as this.

11 **APPROVAL OF THE PETITION WILL RESULT IN AN**
12 **INCREASE IN THE TOTAL AMOUNT OF WATER**
13 **PUT TO BENEFICIAL USE BY THE PETITIONERS.**

14 Petitioners make the unsupported argument that their analysis shows the Petition will not
15 result in an increase in the amount of water they are entitled to use. In fact, they prove the
16 opposite. Petitioners admit that if the Petition is granted, it will "increase the average yield of
17 their reservoirs" (Petitioners' Closing Brief page 40:21-22). This means they will use the same
18 amount of water for their existing purposes and use more water for fishery flows at Vernalis.

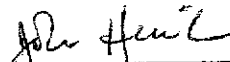
19 As previously set forth in more detail in SDWA's Closing Brief, Petitioners cannot
20 simply increase the amount of water used in their districts because their licenses may allow more
21 storage than is currently put to beneficial use. Licenses and permits are limited by what is
22 actually put to use. Just as Petitioners cannot increase use within their districts, neither can they
23 avoid legal limits by increasing the use some other place. It is clear that the Petitioners would
24 increase the amount of water they put to beneficial use if the Petition is approved.

25 **CONCLUSION**

26 It is undeniable that there are legal users in the Delta dependent on the quantity and
27 quality of water in the San Joaquin River. It is undeniable that the Petitioners will provide the
28 47,000 acre-feet in the Petition by reallocating the timing of downstream flows and without
decreasing their consumptive use. It is undeniable that such allocation will affect the amount and

1 quality of water entering the Delta from the San Joaquin River. It is undeniable that Petitioners'
2 analysis of the effects of the Petition assumed conditions contrary to existing permit conditions
3 and that to address this mistake, they propose to operate in some other, unknown manner. In
4 combination with SDWA's evidence regarding the harm which will result from the Petition, the
5 Board cannot approve the Petition.

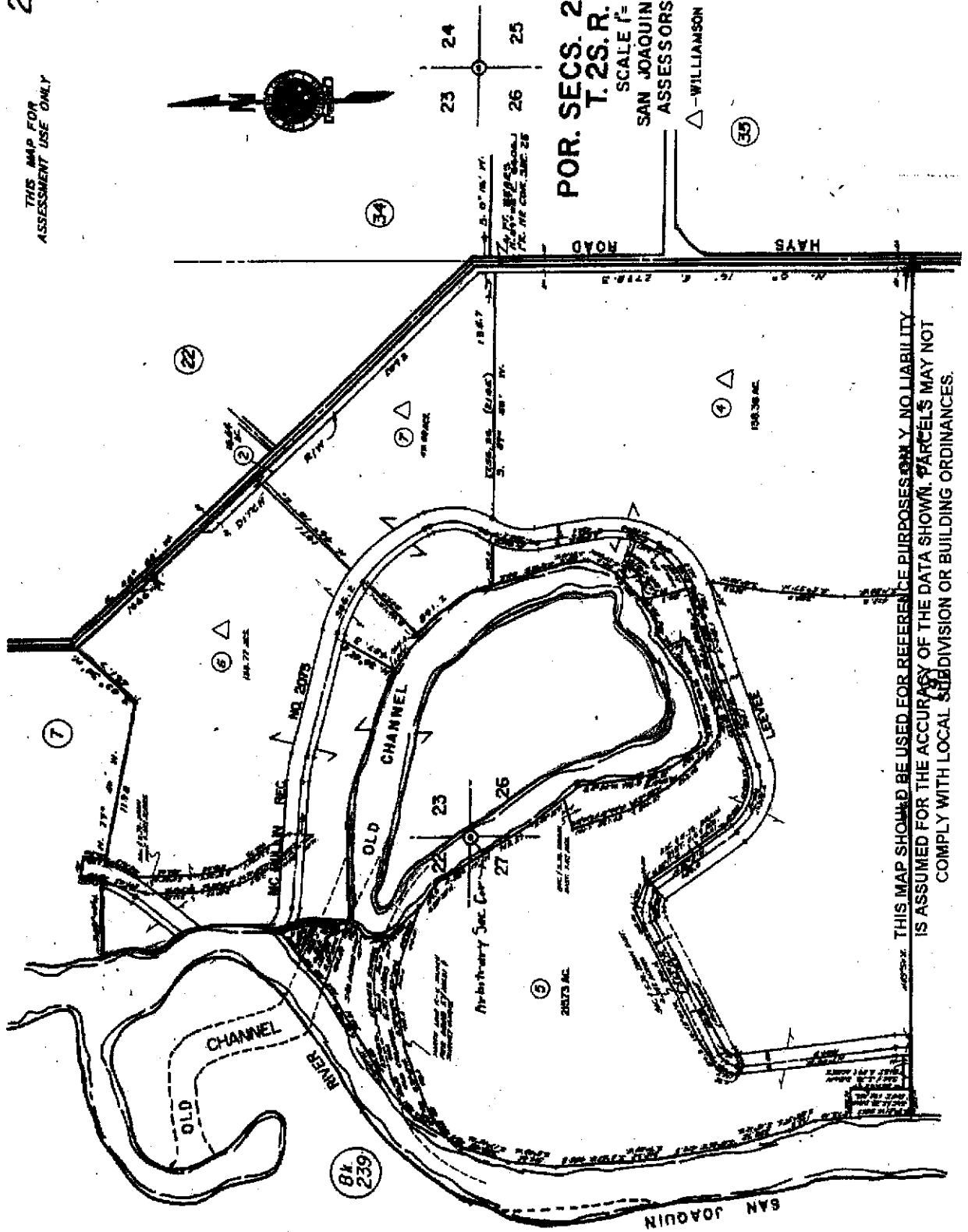
6 Dated: July 18, 2003

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8 JOHN HERRICK, ESQ., Attorney for
9 Protestants South Delta Water Agency, et al.

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27 SDWA\Pleadings\MID Rebuttal Brief Long-Term Transfer
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241-08

THIS MAP FOR ASSESSMENT USE ONLY



Description: San Joaquin, CA Assessor Map 241.8 Page: 1 of 1
Order: TP7800 Comment:

POR. SECS. 22, 23, 2
T. 2S. R. 6E.
SCALE 1" = 600'
SAN JOAQUIN COUNTY
ASSESSORS MAPS
△ - WILLIAMSON ACT PARCEL

THIS MAP SHOULD BE USED FOR REFERENCE PURPOSES ONLY. NO LIABILITY IS ASSUMED FOR THE ACCURACY OF THE DATA SHOWN. PARCELS MAY NOT COMPLY WITH LOCAL SUBDIVISION OR BUILDING ORDINANCES.

ATTACHMENT "A"

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PROOF OF PERSONAL SERVICE

STATE OF CALIFORNIA)
 ss.
County of San Joaquin)

I am a citizen of the United States and a resident of the County of San Joaquin. I am employed by Attorney's Diversified Services and my business address is 845 North California Street, Stockton, California, 95202. I am over the age of eighteen years and not a party to the within entitled action.

On Friday, July 18, 2003, I hand delivered **REBUTTAL BRIEF OF SOUTH DELTA WATER AGENCY, ET AL., ON PETITIONS FOR LONG-TERM TRANSFER BY MERCED IRRIGATION DISTRICT, MODESTO IRRIGATION DISTRICT, AND TURLOCK IRRIGATION DISTRICT** on Ms. Diane Riddle, of the State Water Resources Control Board, Division of Water Rights, 1001 I Street, 14th Floor, by hand delivering true copies thereof to the person at the front desk of the SWRCB at approximately 11:50 a.m.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on July 18, 2003, at Stockton, California.

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1 PROOF OF SERVICE BY MAIL

2 STATE OF CALIFORNIA)
3) ss.
4 County of San Joaquin)

5 I am a citizen of the United States and a resident of the County of San Joaquin. My
6 business address is 4255 Pacific Avenue, Suite 2, Stockton, California 95207. I am over the age
7 of eighteen years and not a party to the within entitled action. I am readily familiar with the
8 practice of the Law Office of John Herrick for collection and processing of correspondence for
9 mailing with the United States Postal Service. In the ordinary course of business of the Law
10 Office of John Herrick, correspondence is deposited with the United States Postal Service the
11 same day as it is collected and processed.

12 On July 18, 2003, I served the within **REBUTTAL BRIEF OF SOUTH DELTA**
13 **WATER AGENCY, ET AL., ON PETITIONS FOR LONG-TERM TRANSFER BY**
14 **MERCED IRRIGATION DISTRICT, MODESTO IRRIGATION DISTRICT, AND**
15 **TURLOCK IRRIGATION DISTRICT** on the interested parties in said action, by placing a
16 true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, and placed for
17 collection and mailing on said date to be deposited with the United States Postal Service
18 following ordinary business practices at Stockton, California, addressed as follows:

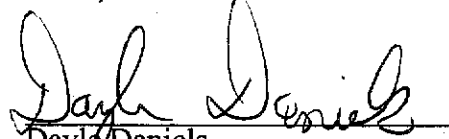
19 Tim O'Laughlin, Esq.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on July 18, 2003, at Stockton, California.


Dayle Daniels