



## Westlands Water District

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August 7, 2014

*Via E-mail*

Ms. Barbara L. Evoy, Deputy Director  
Division of Water Rights  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Dear Ms. Evoy:

On July 23, 2014, the California Department of Water Resources and the United States Bureau of Reclamation submitted a letter to the State Water Resources Control Board ("State Water Board"), in which DWR and Reclamation requested that the State Water Board use its authority to order those south and central Delta diverters claiming riparian and pre-1914 water rights to provide the State Water Board with information regarding the diverters' claimed water rights and the scope of their diversions.

Westlands Water District submits this letter to express its support for DWR's and Reclamation's request, as well as to submit that water stored and released by the Central Valley Project ("CVP") and water acquired by Westlands and its farmers through transfer and exchange agreements is likely being unlawfully diverted by many south and/or central Delta diverters asserting riparian or pre-1914 water rights. These assertions appear to be entirely unsupported and at odds with California water law.

### Legal Support

Both the California Supreme Court and the California Water Code state that riparian diverters are restricted to the natural flow of a stream.<sup>1</sup> In both D-1641 and Water Rights Order 89-8, the State Water Board found that southern Delta riparian right holders have no right, in any year, to natural flow from the Sacramento River because the Sacramento's natural flow does not reach those diverters, and therefore they are restricted to the natural flow in the San

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<sup>1</sup> See *Bloss v. Rahilly* (1938) 16 Cal.2d 70, 76; Water Code, §§ 1201-02.

Joaquin River.<sup>2</sup> In addition, neither in-Delta riparian diverters nor appropriators are permitted to divert CVP stored or transfer water conveyed through channels in the Delta. Such water has not been abandoned, as it is being put to beneficial use in meeting various regulatory requirements and delivery to Westlands' farmers and families.<sup>3</sup>

### The Failure of the Current Water Rights Regime and the Need for Immediate Action

Westlands believes that the Delta Watermaster and the current water rights enforcement regime have failed to achieve any meaningful compliance with the legislative mandate to collect information through statements of diversion and use from water users in the Delta.<sup>4</sup> This failure is largely due to the lack of support both for the various rights asserted in those statements as well as to the asserted cost ineffectiveness of measuring water use by many diverters in the south and central Delta. The statements of diversion and use supplied in the letter submitted by DWR and Reclamation under Exhibit 1 represent a sample of what is – at best – questionable assertions, and what – at worst – amounts to a flagrant disregard for the law.<sup>5</sup> These assertions include dates of priority of 1800, when all available evidence demonstrates that the Delta was an unreclaimed swamp in 1800. We find it hard to accept that Westlands' staff were able, after minimal effort, to discover so many examples of these, and other,<sup>6</sup> questionable assertions, which the staff of the State Water Resources Control Board were unable to discover and/or unwilling to investigate.

The current drought has conclusively revealed the significant and systemic failures in the current regime of water rights enforcement in the Delta, and the available data clearly demonstrate these failings. Current and projected flows at Vernalis are less than half of the 1,334 cfs identified in D-1641 as the southern Delta diversion requirement for August. The difference between inflow and diversions strongly suggests that the deficit is being made up through illegal diversions of stored and transfer water by south and possibly central Delta diverters.

The State Water Board has the statutory responsibility to ensure that the impacts and risks of the current drought are being properly allocated under California's water rights regime – a regime in which all are free and willing participants to and beneficiaries of – and that the fees it

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<sup>2</sup> D-1641, pg 31-33; SWRCB Order WR 89-8, pg 22-23.

<sup>3</sup> See *Phelps v. State Water Resources Control Bd.* (2008) 157 Cal.App.4th 89, 111; *El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 962; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 116; Water Code, § 1202.

<sup>4</sup> See Water Code, §§ 5100 – 5107.

<sup>5</sup> See, e.g., Statement of Diversion and Use Numbers S017302, S021005, S017817, S020858, S020857, S021293, S020859, S016582, S018507, S018798, S016653, and S017590.

<sup>6</sup> Other examples of questionable assertions include the nearly-ubiquitous claim that the measurement of diversions of water is “not locally cost effective.” See, e.g., Statement of Diversion and Use Numbers S019076, S017215, S021250, S018081, and S017899.

collects go toward perpetuating the integrity of that regime. The data readily available to the State Water Board strongly indicate that those risks have been improperly shifted from those in-Delta diverters who are unlawfully diverting water that they have no right to divert onto the shoulders of Westlands' farmers and families. Such a reallocation of risk is simply untenable under the California water rights system, which is intended, in part, to create reliability.<sup>7</sup>

#### Effects of the Current Drought and Lack of Water Rights Enforcement

At the Emergency Regulations hearing held by the State Water Board in July 2014, many in-Delta interests commented on the impacts that curtailments would have on the future prosperity of their farms and the financial security of their families. While truly unfortunate, the stark reality is that Westlands' farmers and families are intimately familiar with the impacts of reduced water supplies.

The current drought has only exacerbated the impacts to Westlands' farmers and families suffering under an already-devastating environmental regulatory regime. The combination of the two has resulted in a zero allocation for Westlands for the current contract year. As a result of this stranglehold, Westlands, its farmers, and communities on the westside of the San Joaquin Valley have had to rely extensively on a limited supply of water available for transfer. Much of this transfer water was contracted for as much as \$2000 an acre-foot, an unheard-of and unprecedented price. This year, one truth is clear to all of us: every single drop of water counts.

The very same water which Westlands farmers have gone so far as to pay unprecedented prices is very likely being unlawfully diverted by south and central Delta diverters, all while Westlands' farmers are operating close to failure. In recent weeks, our farmers have had to harvest their crops before they were ready, and as a result will get significantly less value for their harvest. Some have been forced to completely abandon their crops. One of our farmers has had to go so far as tear out 120 acres of almond trees, negating years of labor and significant investments. Those farmers who have had to rely on groundwater have witnessed decreased yields of up to 20%.

Unfortunately, these impacts cannot be isolated to the farms and the men and women who work them every day. The farms inside Westlands employ thousands of men and women who bring their wages home to support their families. These wages go toward purchases that range from groceries to clothes to homes. These purchases in turn provide wages for others in the

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<sup>7</sup> See *In re Waters of Long Valley Creek System* (1979) 25 Cal.3d 339, 358 (finding that "an important interest of the state is the promotion of clarity and certainty in the definition of those rights [to the use of the water in a stream system]; such clarity and certainty foster more beneficial and efficient uses of state waters as called for by the mandate of article X, section 2 [of the California Constitution].").

community. Revenues from these sales support programs that range from the mundane such as sewer and road service, to the crucial such as education and fire and police protection. The situation in our area is so dire that it has prompted letters from law enforcement, relating the increased incidence of crime and gang activity as our unemployed and desperate youth turn to violence, to clergy, relating the increased pressure on social and welfare programs as parents who have always been able to provide are forced to beg for food for their children.

Though unlawful diversions in the Delta are not the sole cause of these impacts, they represent yet another crushing layer of stress on top of the drought and a compounding environmental regulatory regime. Unlawful diversions in the Delta add insult to injury when they are apparently ratified by a water rights enforcement regime that is supposed to ensure a fair and impartial application of our law.

In summary, Westlands pleads that, between the data readily available to the State Water Board and the information set forth in the letter submitted by DWR and Reclamation, the State Water Board has sufficient cause to find that stored and transfer water is being unlawfully diverted by south and likely central Delta diverters. On that basis, we respectfully request that, as the Deputy Director for the Division of Water Rights, you use the authority granted you under the recently adopted Emergency Regulations, Title 23 to the California Code of Regulations, section 879(c), and order south and central Delta diverters claiming riparian and pre-1914 water rights to provide the State Water Board with information that (1) supports the basis of any asserted right or rights, and (2) reflects the quantity of water diverted and expected to be diverted.

Westlands stands ready to assist you and your division in whatever capacity we can to help you meet your statutory responsibility and remedy what amounts to a gross injustice to the farmers and families in Westlands.

Sincerely Yours,

A handwritten signature in cursive script that reads "Thomas W. Birmingham".

Thomas W. Birmingham  
General Manager

cc: Felicia Marcus, Chair, State Water Resources Control Board  
Tom Howard, Executive Director, State Water Resources Control Board