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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of the State Water Resources) **MEMORANDUM OF POINTS AND**
Control Board's Order for Additional) **AUTHORITIES IN SUPPORT OF THE SAN**
Information in the Sacramento and San) **JOAQUIN TRIBUTARIES AUTHORITY'S**
Joaquin River Watershed and Delta) **PETITION FOR RECONSIDERATION OF**
(Information Order).) **THE ORDER FOR ADDITIONAL**
) **INFORMATION IN THE SACRAMENTO**
) **AND SAN JOAQUIN RIVER WATERSHED**
) **AND DELTA (INFORMATION ORDER)**

INTRODUCTION

Pursuant to Water Code section 1122 and California Code of Regulations, title 23, section 769, the San Joaquin Tributaries Authority (SJTA) petitions the State Water Resources Control Board (State Water Board) to reconsider the Order for Additional Information in the Sacramento and San Joaquin River Watershed and Delta (Information Order), due to an error in law. California Code of Regulations, title 23, section 879(c) (section 879(c)) has not been satisfied with regard to the members of the SJTA. Specifically, the Information Order is unfounded as it relates to the SJTA members, due to the lack of complaint against SJTA members and lack of information that indicates any SJTA member is unlawfully diverting stored water. For these reasons, the SJTA petitions the State Water Board to revise the Information Order so that it no longer requires the members of the SJTA to provide information to the State Water Board pursuant to section 879(c).

1 STATEMENT OF FACTS

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3 On July 23, 2014, the Department of Water Resources (DWR) and the United States Bureau
4 of Reclamation (Reclamation) (collectively Project Agencies) filed a letter requesting the Deputy
5 Director of the State Water Board use her authority to order central and south Delta diverters to
6 provide information to support their respective claims to water rights. The Project Agencies alleged
7 that central and south Delta diverters were diverting Sacramento River water without a valid basis
8 of right. In response to the Project Agencies letter, on August 23, 2014, the California Sportfishing
9 Alliance (CSPA) filed a complaint with the Deputy Director alleging the Project Agencies were
10 unlawfully exporting water from the San Joaquin, Mokelumne, Consumes, and Calaveras Rivers, as
11 well as Delta agricultural return flows in the Delta. Thus, at the end of 2014, there were allegations
12 against the central and south Delta diverters and the Project Agencies.

13 On February 4, 2015, the Deputy Director issued Information Order. In the Background
14 section, the Information Order refers to the Project Agencies letter and the CSPA complaint. In
15 addition, the Findings section states the Deputy Director “has information that indicates there may
16 be unlawful diversions of stored water by riparians or pre-1914 appropriative water right claimants
17 in the Sacramento and San Joaquin River watershed and Delta.” (Information Order, at 3.) Other
18 than the Project Agencies letter and the CSPA complaint, the Information Order does not reference
19 or otherwise provide any other information that would reflect it received other information
20 regarding unlawful diversions.

21 The Information Order requires all diverters in the Sacramento, San Joaquin, and Delta
22 watersheds claiming to divert pursuant to pre-1914 and riparian rights from April 1 to September 1
23 to provide the State Water Board with additional information. (*Id.*, at 2 [all diverters subject to the
24 Information Order are listed on Attachment A thereto].) The Information Order requires
25 Attachment A diverters to provide information regarding monthly quantity for each diversion, the
26 location of the point of diversion and place of use, identification of the basis of right, and all
27 documents supporting the claimed rights. (*Id.*, at 3.) Failure to comply with the Information
28 Order subjects each Attachment A diverter to enforcement action. (*Id.*)

1 On February 12, 2015, the SJTA sent a letter objecting to the Information Order and
2 requested the State Water Board revise the Information Order to be consistent with the authority
3 provided by section 879(c). State Water Board staff responded on February 20, 2015. In its
4 response, staff declined the request to revise the Information Order, stating that the CSPA complaint
5 amounted to a complaint against all water users above Vernalis.

6 STANDARD OF REVIEW

7 The Information Order cites section 879(c) as the operating section that provides the Deputy
8 Directory with the authority to order information. (Information Order, at 2-3.) Section 879(c) was
9 enacted in 2014 and expands the authority of the State Water Board to request information from
10 diverters claiming riparian and pre-1914 rights. However, this expansion is limited to specific
11 circumstances. Section 879(c) allows the Deputy Director to act if she receives:

12 (1) a complaint alleging interference with a water right by a riparian
13 and pre-1914 appropriative right holder; OR

14 (2) information that indicates riparian or pre-1914 water right holders
15 are unlawfully diverting stored water.

16 If either of the above are triggered, the Deputy Director may issue an order requiring the
17 alleged violating diverters to provide information substantiating the right.

18 **I. Limited to Claims Against Riparian and Pre-1914 Water Rights**

19 Both of the triggering actions in section 879 are specific to diversions pursuant to claims of
20 pre-1914 and riparian rights. This means that the State Water Board may not issue an Informational
21 Order pursuant to section 879 to water right holders that divert pursuant to post-1914 water rights.
22 The State Water Board, as reflected by the Information Order which only includes pre-1914 and
23 riparian water right claimants, seems to understand and agree with this limitation.

24 **II. Complaint Alleging Interference with a Water Right**

25 (A) Complaint Must Include Specific Allegations

26 Pursuant to the State Water Board's February 2005 document titled "Investigating
27 Water Right Complaints" and the California Code of Regulations, title 23, section 820, a complaint
28 requires more than general allegations. A complaint must submit sufficient information to

1 “establish that an illegal diversion, violation of a permit or license term, waste or unreasonable use
2 of water, or injury to public trust resources is occurring or is threatened.” (Investigating Water Right
3 Complaints, at 3.) In addition, a complaint must affirmatively identify the respondent (person
4 subject to the complaint), the location of the respondent’s diversion, and a description of injury.
5 (*Id.*, at 4.)

6 (B) Complaint Must Allege Interference With An Existing Right

7 Section 879 requires that the complaint allege the riparian or pre-1914 diversion
8 interferes with an existing right. (Title 23 of the California Code of Regulations, section 879(c).)
9 This means the complainant must identify the an existing valid water right and include allegations
10 that the riparian and/or pre-1914 diversions are interfering with or otherwise harming the existing
11 right.

12 (C) Information Indicating Unlawful Diversion of Stored Water

13 Section 879 also allows the State Water Board to issue an order for information if it
14 receives information that indicates stored water is being unlawfully diverted. An allegation that
15 does not provide supporting information is not sufficient to trigger action under this section. In
16 addition, information of any unlawful diversion is not sufficient to satisfy this condition; the
17 information must indicate riparian or pre-1914 diversion is unlawfully diverting of previously stored
18 water.

19 (D) Order Against Alleged Violators

20 If either of the above two sections described above are satisfied, section 879 states
21 the Deputy Director “may issue an order . . . requiring such water right holders to provide additional
22 information.” The phrase “such water right holders” refers to the water right holders for which a
23 complaint or information was provided. This section cannot be read to provide the State Water
24 Board with the authority to order water right holders not subject to a complaint or subject to
25 information regarding unlawful diversion of stored water to provide information to the State Water
26 Board. To do so would defeat the purpose of the triggering actions and allow the State Water Board
27 to order any water user to provide information.

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1 DISCUSSION

2 The Information Order is not supported by law. The Information Order far exceeds the
3 authority provided by section 879(c). In addition, the stated purpose of the Information Order will
4 not be furthered by ordering SJTA members to provide information to the State Water Board.

5 **I. Section 879 Does Not Authorize the Issuance of the Information Order**

6 Section 879(c) allows the Deputy Director to order water claimants to provide information in
7 a limited context under specific circumstances. The authority to issue an order for information
8 under section 879(c) arises if the State Water Board receives a complaint or information indicating
9 unauthorized diversions. The State Water Board order received a letter and complaint – neither of
10 which provided allegations or information that SJTA members were diverting water in an unlawful
11 or unauthorized manner.

12 A. Project Agencies Letter

13 The Project Agencies letter makes general allegations that central and southern Delta
14 diverters are diverting water in an unauthorized manner. The Project Agencies request the State
15 Water Board issue an order pursuant to its authority under section 879(c), requiring central and
16 southern Delta diverters provide the State Water Board with additional information supporting the
17 claims to divert water pursuant to pre-1914 and riparian rights.

18 The Project Agencies letter is clear that the allegations are narrowly tailored and
19 directed only toward diversions in the central and southern Delta. In fact, the Project Agencies letter
20 identifies the specific diverters from whom they would like the State Water Board to obtain
21 additional information. Attached to the Project Agencies letter a list of diverters and State
22 Statements of Diversion and Use of specific diverters in the central and south Delta. Consistent with
23 the body of the letter, the diverters identified in the attached materials are limited to diverters in the
24 central and south Delta. The Project Agencies letter does not request the State Water Board issue an
25 order against any diverters outside or upstream of central and south Delta area. Nor does the letter
26 include any allegations or provide information regarding diversions upstream of the Delta.

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1 To the extent the State Water Board reads the general allegations in the Project
2 Agencies letter expansively, as requiring further information from upstream diverters, the State
3 Water Board must find another mechanism through which it acquires this information; section 879
4 does not allow the State Water Board to order such information absent a receipt of a complaint or
5 information indicating unlawful diversion of stored water.

6 B. CSPA Complaint

7 The CSPA complaint makes two specific allegations. Neither of the allegations
8 triggers the authority for the State Water Board to act under section 879.

9 (1) Allegation #1: Unlawful Exports

10 The first allegation is against DWR and USBR for the unauthorized and illegal
11 diversion of water at the Delta pumping facilities. This allegation is specific to DWR and USBR.
12 DWR and USBR divert water pursuant to post-1914 water right permits and licenses. Because
13 DWR and USBR do not divert water pursuant to pre-1914 or riparian rights, section 879 cannot be
14 used to request that DWR or USBR provide the State Water Board with information.

15 (2) Allegation #2: Unlawful Diversion of San Joaquin River Riparian Flow

16 The second allegation is against USBR "and others" for unauthorized and illegal
17 diversion of San Joaquin River riparian flow. (CSPA Complaint, at 5.) For the same reason noted
18 above, section 879 does not apply to the post-1914 appropriative water rights of USBR.

19 There are several reasons CSPA's general allegations against "others" does not allow
20 the State Water Board to issue an Information Order to SJTA members under section 879:

21 (a) CSPA Allegations Do Not Allege Interference With a Water Right

22 In order to trigger section 879(c), a complaint must allege an interference
23 with a water right. This requirement is specific and does not allow the Deputy Director to act based
24 on general complaints of public trust or unreasonable use. Rather section 879 is triggered only
25 when there is an alleged injury to a competing water right. CSPA does not allege it holds a water
26 right. CSPA does not allege riparian or pre-1914 diversions have interfered with its water rights.
27 Nor does CSPA allege that the diversions made by the group of "others" interferes with any
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1 identified water right. For this reason, the CSPA allegations against “others” is not sufficient to
2 trigger the authority in section 879.

3 (b) CSPA Allegations Fail to Identify Defendants

4 A complaint is required to identify the specific diverters against which
5 allegations are lodged. Without such identification, no complaint exists. CSPA does not
6 specifically identify the “others” referred to in its complaint. Without specific identification of
7 parties, no valid “complaint” exists against a group of “others.”

8 (c) “Others” Do Not Include SJTA Members

9 Although CSPA does not identify specific diverters sufficient to qualify as a
10 complaint, CSPA does provide a general geographic description of the group of “others” on the San
11 Joaquin River. The CSPA document clearly refers to diverters upstream of the Merced Confluence
12 on the San Joaquin River. (CSPA Complaint, at 3 [stating that the Exchange Contractors and Friant
13 Water Authority diversions cannot deprive lower San Joaquin River riparians of natural riparian
14 flows from the upper watershed].) Thus, even if the reference to “others” were sufficient to support
15 a complaint, the complaint would not be against any parties diverting water in the lower portion of
16 the San Joaquin River. SJTA members divert water from the Merced, Tuolumne, and Stanislaus
17 Rivers, which are not in the area of the “other” upper San Joaquin River diversions described by the
18 CSPA Complaint.

19
20 (d) CSPA Provides No Information Regarding Unlawful Diversion of Stored
21 Water

22 Not only does the CSPA Complaint fail to amount to a complaint against
23 SJTA members, but CSPA does not trigger section 879(c) by providing information regarding the
24 unlawful diversion of stored water. The CSPA letter alleges the group of “others” is unlawfully
25 diverting riparian flows. By definition, a riparian flow is water that naturally occurs in the system
26 and is not previously stored water. Thus, information regarding the unlawful diversion of natural
27 flows is not sufficient to trigger authority under section 879(c).
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1 The CSPA complaint clearly requests the State Water Board take action against DWR and
2 USBR. In addition, the CSPA makes general allegations against "other" diverters in the upper San
3 Joaquin River area. These allegations have nothing to do with SJTA members. The allegations do
4 not name any SJTA member, nor do the allegations provide information indicating any SJTA
5 member has unlawfully diverted stored water. For these reasons, the CSPA complaint does not
6 authorize the Deputy Director to include the SJTA members in the Information Order.

7 C. Other Information

8 The Information Order does not disclose any other information it has received that
9 would authorize it to exercise authority under section 879(c). Specifically, the Information Order
10 does not refer to any other complaint received by the State Water Board. Nor does the Information
11 Order cite or refer to any other information received by the State Water Board regarding the
12 diversion of stored water. To the extent the State Water Board has received other complaints or
13 information specific to the SJTA, the SJTA requests the State Water Board provide the information
14 to the SJTA and re-issue a separate Information Order based on this information.

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16 **II. The Stated Purpose of the Information Order Will Not Be Furthered by**
17 **Expanding the Order to SJTA Members**

18 The Information Order states it applies to diverters that "have potential to divert water
19 released from Project storage facilities or water needed by other senior rights." (Information Order,
20 at 2.) The SJTA members do not and cannot divert water released from Project storage facilities;
21 the SJTA members' points of diversion are upstream, not below, Project facilities. Further, SJTA
22 members divert water pursuant to valid senior water rights and are not aware of any valid or verified
23 water rights downstream that are more senior to rights held by SJTA members. For these reasons,
24 the stated purpose and application of the Information Order will not be furthered by including SJTA
25 members.

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CONCLUSION

Section 879(c) allows the Deputy Director to order specific water right claimants to submit information if a complaint is filed against the claimant or if the State Water Board receives information that the claimant is unlawfully diverting previously stored water. There is no evidence the State Water Board has received a complaint against any of the SJTA members. In addition, there is no evidence the State Water Board has received information that indicates any SJTA member is unlawfully diverting previously stored water. For this reason, the Information Order's application to SJTA members is overreaching and is not supported by existing law. The SJTA respectfully requests the State Water Board amend the Information Order to remove the SJTA members.

Dated: March 6, 2015 O'LAUGHLIN & PARIS LLP


VALERIE C. KINCAID, Attorneys for Petitioner
SAN JOAQUIN TRIBUTARIES AUTHORITY

PROOF OF SERVICE BY MAIL

(Government Code §11440.20)

I, Linda L. Wood, declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is 2617 K Street, Suite 100, Sacramento, CA 95816. On this date, in the following manner, I served the foregoing document(s) identified as:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE SAN JOAQUIN TRIBUTARIES AUTHORITY'S PETITION FOR RECONSIDERATION OF THE ORDER FOR ADDITIONAL INFORMATION IN THE SACRAMENTO AND SAN JOAQUIN RIVER WATERSHED AND DELTA (INFORMATION ORDER)

▶▶▶ UNITED STATES MAIL [CCP §1013]: I enclosed the documents in a sealed envelope addressed to the following persons and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with our practice for collection processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage thereon fully prepaid at Chico, California addressed as below:

FACSIMILE: Based on prior consent, I caused the documents to be sent to the following persons via telecopier/facsimile machine a true copy thereof to the parties indicated below:

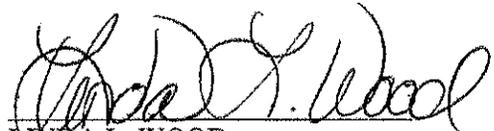
OVERNIGHT DELIVERY [CCP §1013(c)]: I enclosed the documents in a sealed envelope provided by an overnight delivery carrier and addressed it to the persons identified below. I placed said envelope for collection at a regularly utilized drop box of the overnight carrier.

▶▶▶ E-MAIL [CCP §1010.6]: Based on a court order or an agreement of the parties to accept service by e-mail, I caused the documents to be sent to the following persons at the following e-mail address, and did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful:

PERSONAL DELIVERY [CCP §415.10]: I personally delivered the documents to the persons identified below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 6, 2015, at Sacramento, California.


LINDA L. WOOD

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