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DIV. OF WATER RIGHTS
SACRAMENTO

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12 and R. C. Farms, Inc. (hereinafter Central Delta
13 Parties)

14 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

15 In re the matter of:

16 PETITIONS FOR LONG TERM TRANSFER)
17 INVOLVING A CHANGE IN THE PLACE)
18 AND PURPOSE OF USE OF LICENSES)
19 2685, 6047 AND 11395 (APPLICATIONS)
20 1224, 10572 AND 16186) OF MERCED IRRI-)
21 GATION DISTRICT AND LICENSES 5417)
22 AND 11058 (APPLICATIONS 1233 AND)
23 14127) OF MODESTO AND TURLOCK IR-)
24 RIGATION DISTRICTS)

**CENTRAL DELTA PARTIES
REPLY BRIEF**

25 **Introduction**

26 The Central Delta Parties consist of the Central Delta Water Agency and R. C. Farms, Inc.
27 The Central Delta Water Agency represents the general interest of the approximately 120,000 acres
28 within its boundaries relating to a sufficient in-channel water supply of suitable quality for any
present or future beneficial use or uses of lands within the Agency. California Water Code Appen-
dix § 117-4.2 provides:

“Sec. 4.2. (a) The agency shall have no authority or power to * * * bind, prejudice, impair, restrict, or limit vested water rights within the agency.

(b) The agency may assist landowners, districts, and water right holders within the agency’s boundaries in the protection of vested water rights and may represent the interests of those parties in water right proceedings and related proceedings before the State Water Resources Control Board and the courts of this state and the United States, to carry out the purposes of the agency.”

1 R. C. Farms, Inc. owns, farms and irrigates a parcel of land which is within the Central
2 Delta Water Agency and abuts the San Joaquin River.

3 Both parties are concerned with the direct and cumulative adverse impacts on water quality
4 of the proposed water transfer as the result of the shift of tributary flow from the peak irrigation
5 period to the pulse period and the depletion of carryover storage which will result in degraded
6 conditions in subsequent years.

7 **Legal User Status**

8 The SWRCB Notice of the Petitions dated October 16, 2001, provided:

9 "All protests must clearly describe the objections to approval of the petition and the
10 factual basis for those objections. If the objection is based on injury to a legal user
11 of water or existing water rights, the protest must describe the specific injury that
12 would result from approval of the petition. In addition, the party claiming injury to
13 prior water rights must provide specific information that describes the basis of the
14 existing right, the date the use began, the quantity of water used, and the purpose of
15 use and the place of use of the existing right. If the protest is based on environmen-
16 tal grounds, or other factors listed above, the protest must be accompanied by a
17 statement of facts supporting the basis of the protest. If sufficient information is not
18 submitted, the SWRCB may reject the protest or request that the protestant submit
19 additional information. **The Division will not accept protests that are directed
20 against the underlying water right, rather than the change proposed by the
21 petition.**"

22 The Central Delta Water Agency and R. C. Farms, Inc. on November 20, 2001, filed their
23 protests based on Environmental Issues, Etc., Other Issues, Etc. and Injury to Prior Rights setting
24 forth the factual and legal basis for their protests.

25 On or about May 21, 2002, Petitioners answered the protests and requested a dismissal of
26 the Central Delta Parties' protest without a hearing. The grounds included failure to establish legal
27 user status.

28 On July 26, 2002, Mark Stretars, Chief Petitions and Transfer Unit responded:

"The Division of Water Rights (Division) has reviewed your protests and answers
with respect to the subject petition. Based on our review, resolution of these pro-
tests by negotiation is not likely. Therefore, in accordance with the provisions of
Water Code section 1736, this petition has been referred to the Division's Hearing
Section for further processing. For further information regarding the status of this
petition, please contact Kick Wilcox, Chief of the Bay-Delta Unit, at (916) 341-
5424."

The Protests from the Central Delta Parties met the threshold requirements set forth in the
"Notice" and no deficiency was noted.

1 The protests stated that objection was based on injury to a legal user of water or existing
2 water rights in that the proposed actions would increase the salinity of the water supply used for
3 irrigation within the Central Delta Water Agency including the R. C. Farms, Inc. parcel and that
4 increased soil salinity results. Increased soil salinity increases the need for costly artificial leaching
5 of the soils. The specific information describing the basis of the existing right was that all of the
6 lands within the Central Delta Water agency including the R. C. Farms, Inc. parcel are within the
7 Sacramento-San Joaquin Delta, that all of said lands are riparian to the channels within the Central
8 Delta Water Agency and/or to the underground flow of water of said channels, that the water rights
9 pertaining to said lands are riparian and in some instances are also covered by Pre-1914 and/or
10 Post-1914 appropriative rights.

11 The Protests also provided:

12 "R. C. Farms, Inc. was formed April 17, 1973, and shortly thereafter com-
13 menced diverting water from the San Joaquin River for irrigation of row and field
14 crops. The amount of water used has not been measured but varies with crops and
15 climatic conditions. Such lands of R. C. Farms, Inc. are below sea level and all
16 water which is not evaporated or used for the evapotranspiration needs of the crops
is pumped back into the Delta by way of the Reclamation District canals and pump-
ing plants. Depending upon crops and climatic conditions, diversions take place
throughout the year. The points of diversion for R. C. Farms, Inc. are located in
Sections 28 and 29, T. 2 N., R. 5 E., M.D.B. & M."

17 The low elevation of the lands results in the water use being that which is lost to evapora-
18 tion and evapotranspiration. Determination of the consumptive use of water within the Delta is
19 part of the State's normal reporting for operations of the SWP. Specific quantification of the water
20 used is not necessary to the determination of injury herein. With row and field crops there is
21 evaporation and evapotranspiration of water which results in a concentration of salts in the soil.
22 Water from the channels enters the soil by way of seepage and applied water. The quality of the
23 applied water and water seeping into the land is adversely impacted by the proposed transfer. As is
24 commonly understood and readily acknowledged by Petitioners' expert, Daniel Steiner, reduction
25 of flows from the east side including the proposed 47,000 acre feet transfer will result in higher
26 salt concentrations at Vernalis. (See RT 76 and 77.) The evidence clearly established that there
27 are soil salinity problems which already exist and increasing salt concentrations will make the
28 problems worse.

1 Legal user status does not require an adjudication of a protestor's water rights. Similarly,
2 an adjudication of the water right of the transferring party is not required. The October 16, 2001
3 SWRCB Notice of the Petitions provided:

4 "The Division will not accept protests that are directed against the underlying
5 water right rather than the change proposed by the petitioners."

6 Petitioners' contention that protests as to injury to legal users should be ignored unless the
7 legal users' water rights have been proven in a manner equivalent to an adjudication while the right
8 to be transferred should be treated as most senior and totally unrestricted as to previous beneficial
9 use of the quantities to be transferred is both unsupported in law and total inequitable.

10 R. C. Farms, Inc. is both a protestant and a legal user. Protestant, Central Delta Water
11 Agency, is not itself a user of water but is a protestant setting forth multiple grounds including
12 injury to legal users of water. There is nothing in Water Code section 1736 that requires that a
13 protestant claiming injury to any legal user of water must be the affected legal user. It would
14 appear that the SWRCB itself without any protest could deny a petition based on substantial injury
15 to any legal user of water. Water code section 1703.6 provides that the SWRCB may cancel a
16 protest if the protestant fails upon request of the SWRCB to provide:

17 "Information that is reasonably necessary to determine if the protestant has a
18 valid water right."

19 Although it would appear that the language is addressing a situation where the protestant is
20 the legal user, the requirement is not mandatory.

21 Water Code section 1703.6 is the mechanism to put some "teeth" behind the SWRCB
22 request for reasonably necessary information as provided in Water Code section 1703.5. It does
23 not appear to establish a mandatory requirement that a protest on the basis of injury to any legal
24 user can only be filed by the injured legal user or that proof be given equivalent to that required for
25 adjudication of a water right.

26 Central Delta Water Agency clearly has the authority to assist landowners and water right
27 holders in the protection of vested water rights and may represent their interests in proceeding
28 before the SWRCB. (Water Code Appendix § 117-4.2.)

 The fact that the Central Delta Water Agency cannot bind, prejudice, impair, restrict, or

1 limit vested water rights within the agency should not preclude the agency from filing protests and
2 providing evidence to assist the SWRCB in its Water Code section 1736 determination as to
3 whether or not the change would result in substantial injury to any legal user of water.

4 **Petitioners Have Failed to Put Forth Any Evidence to Refute the Riparian Character of the**
5 **Property of R. C. Farms, Inc. or Rudy M. Mussi.**

6 Although all exhibits were served on Petitioners on March 10, 2003, well in advance of the
7 April 23, 2003 hearing date, Petitioners did not cross-examine Kurt Sharp as to the chain of title
8 for R. C. Farms, Inc. or Rudy Mussi as to the chain of title for his parcel. Additionally, Petitioners
9 were well aware of the location in Sections 28 and 29 T. 2 N., R. 5 E., M.D.B. & M. of the R. C.
10 Farms, Inc. parcel from the time the protest was filed in November of 2001 yet did not produce any
11 evidence of severance of such parcel from the San Joaquin River.

12 Petitioners argue that the uncontroverted testimony of Mr. Sharp and Mr. Mussi as to the
13 riparian character of the subject parcels should be disregarded in that some of the documents in the
14 chain of title submitted for each of the subject parcels are not legible. Petitioners' closing brief
15 attaches Exhibit D for the R. C. Farms, Inc. parcel and Exhibit E as to the Mussi parcel as exam-
16 ples. An examination of even the copy of the document attached to Petitioners' Closing Brief as
17 Exhibit D reveals that it is legible and describes a parcel bounded on the west by the east bank of
18 Black Slough and on the east by the west bank of the San Joaquin River. Its relevance in the chain
19 of title is a matter of completeness in that it was part of a larger parcel containing the R. C. Farms,
20 Inc. parcel. Even the absence of such a document would not diminish the proof of the chain of title
21 for the R. C. Farms, Inc. parcel.

22 An examination of the copy of the document attached to Petitioners' Closing Brief as
23 Exhibit E reflects that it is difficult to read. The copy submitted into evidence as part of CDWA-7
24 is a little easier to read. It is apparent even from said Exhibit E that it is a deed from Tideland
25 Reclamation Co. to J. P. Whitney recorded March 27, 1875. The document listing sheet which is
26 the second page of CDWA-7 shows the deed as predating the original patent from the State and
27 unnecessary for the chain of title. Although requiring a diligent effort the document can be read
28 and is a large parcel extending from the San Joaquin River to Middle River including the Mussi

1 parcel in Section 25, T. 1 N., R. 5 E. A review of the earliest document in CDWA-7 which is the
2 Certificate of Purchase issued by the State of California to George D. Roberts dated June 4, 1869,
3 reflects a similar parcel in excess of 26,683 acres including the Mussi parcel.

4 Petitioners' argument does not provide any basis to discredit the evidence presented by
5 Central Delta Parties as to the riparian status of the R. C. Farms, Inc. and Mussi parcels.

6 If for the sake of argument it is assumed that the elements for establishing riparian water
7 rights set forth in Hudson v. West (1957) 47 Cal.2d 823 for water rights adjudications are to be
8 used to help determine legal user status for water transfer protests, the unrefuted evidence submit-
9 ted by the Central Delta Parties satisfies such elements.

10 The R. C. Farms Inc. parcel is today and always has been contiguous to the San Joaquin
11 River (See CDWA 4 and 6). The Mussi property is and has been contiguous to Middle River
12 either as part of parcel abutting Middle River and/or by way of its connection to the sloughs
13 connecting to Middle River which are with some modifications presently used to deliver water by
14 way of the operations of the Woods Irrigation Co. (See CDWA 5 and 7 including the map attached
15 to the September 29, 1911 agreement between Woods Irrigation Co. and Wilhoit recorded Septem-
16 ber 30, 1911.). Delivery of water to riparian parcels by way of facilities operated by the Woods
17 Irrigation Co. does not diminish the riparian rights.

18 It is common knowledge and the exhibits so indicate that the R. C. Farms, Inc. parcel and
19 Mussi parcel are within the Sacramento-San Joaquin Delta and are within the watershed of the San
20 Joaquin River and its tributaries including the Tuolumne and Merced Rivers. The chains of title,
21 CDWA 6 and 7, show that the subject parcels are respectively part of the smallest tract held under
22 one title in the chain of title leading to the present owner. Although not critical to this argument, it
23 is apparent that Pre-1914 appropriative use of water took place throughout the area.

24 **Petitioners Have Failed to Demonstrate that the Proposed Transfer of 47,000 Acre Ft. Will**
25 **Not Cause Substantial Salinity Injury to R. C. Farms, Inc. and Mussi.**

26 The computer modeling which at best provides a crude basis for comparison of differing
27 courses of action was based on the USBR's Interim Plan of Operation for New Melones (1997
28 NMIOP) which will result in substantial non-compliance with the SWRCB Water Quality Stan-

1 dards at Vernalis. See Exhibit B to CDWA 2 which are copies of pages 244 through 249 of Ap-
2 pendix A to the Final SEIS/EIR.

3 For the April 110 condition study period and the months of June through September, there
4 were violations in 92 of the 284 months. The USBR is required under both State and Federal law
5 to meet the SWRCB Water Quality Standards. In order to properly evaluate the impact of the
6 proposed transfer, the base case for modeling should include a USBR plan of operation which will
7 meet the water quality standards. Then and only then can the potential impacts of the proposed
8 transfer be evaluated. To make matters even worse, it is apparent that the 1997 NMIOP will not be
9 the plan for USBR operations. (See Exhibit C to CDWA-2.) Due to the lack of a reasonably
10 certain plan which will meet the SWRCB water quality standards, the modeling has no significant
11 value in predicting the impacts of the proposed transfer. Even so, the modeling which was pro-
12 vided shows that the proposed transfer will result in additional violations of the Vernalis Salinity
13 Standards. See Final SEIS/EIR at pages 4-19 and 4-20.

14 Increasing salinity of applied and seeping water when soil salinity problems already exist
15 should be viewed as substantial injury to the agricultural users. The injury will result from the
16 shift of tributary flow from the peak irrigation months to the pulse flow period and from the lack of
17 water in potentially all months of subsequent years should dry years occur when there is inadequate
18 carryover storage to meet regulatory requirements.

19 **Petitioners' Analysis Did Not Consider the Possibility of a Series of Dry Years Occurring**
20 **During the Study Period at Times When Carryover Storage Will be Depleted by the Pro-**
21 **posed Transfer.**

22 There is no dispute that the San Joaquin River System has been degraded and the natural
23 flow substantially depleted. New Melones lacks sufficient yield to meet even the regulatory
24 requirements in all years. (RT 80) Carryover storage is critical to meeting regulatory requirements
25 in dry periods, including those required to protect fish. There is no guarantee that future hydrology
26 will occur in the exact sequence as the 1922-1992 study period. It is possible that a series of dry
27 years could occur at the end of a period when carryover storage in New Melones, Don Pedro
28 Reservoir, and Lake McClure has already been depleted. Petitioners' consultant Daniel Steiner

1 confirmed that no analysis of such an event was conducted. (RT 78 and 79)

2 Petitioners argue that the possible additional violations of the SWRCB Water Quality
3 standards are insignificant. Their argument ignores the resulting increase in salinity concentrations
4 which do not constitute a violation of the standards. It is common knowledge that the San Joaquin
5 River is significantly degraded and as the SWRCB found in D-1641 such degradation has been in
6 large part due to the actions of the USBR. The violation of the fish flow requirements in February
7 and March should be a “wake-up call” to the need for a plan to meet the requirements in the San
8 Joaquin River and careful analysis of such plan.

9 **Petitioners Have Failed to Demonstrate That There Will BE No Unreasonable Effect on Fish**
10 **and Wildlife.**

11 The purpose of the 47,000 acre feet transfer is to provide water for the “double step.” The
12 “double step” would provide more water for the fish pulse flow in a year of good flow than the
13 SWRCB found in the 1995 Water Quality Control Plan was reasonably necessary to protect fish.
14 Petitioners’ expert Dr. Hanson in response to cross-examination candidly admitted that in general
15 providing minimum fish protection in dry years “would be probably where I would focus my
16 attention.” The question to be answered is whether or not the proposed transfer will inhibit the
17 provision of minimum fish protection in subsequent years. The USBR has in February and March
18 of 2003 failed to meet the minimum fish protection even without the proposed transfer. Even the
19 inadequate modeling shows that there will be increased salinity and additional violations of the
20 Vernalis Salinity Standard. The evidence herein does not support a finding that the proposed
21 transfer will not unreasonably affect fish.

22 **Approval of the Proposed transfer Will Enable Petitioners to Increase Their Diversion and**
23 **Storage of Natural Flow.**

24 The fact that the permitted limits of diversion and storage will not be exceeded does not
25 mean that Petitioners are not increasing their entitlement to use water. Appropriative water entitle-
26 ment is based on beneficial use of water. The proposed transfer will allow Petitioners to release
27 water and refill under circumstances which would not have occurred absent the transfer. This
28 increases the amount of natural flow diverted by the Petitioners. Absent the transfer, Petitioners

1 would not have beneficially used such water. Since the transferred water is based on Petitioners'
2 rights, it clearly represents an increase in Petitioners' use. Additionally, there is no evidence that
3 Petitioners have ever put this much water to use. Petitioners are meeting all demands in an
4 expanding area and selling water "left and right." It certainly appears that they are using more
5 water.

6 **Conclusion**

7 The proposed 47,000 acre feet transfer should not be approved. Substantial injury will be
8 caused to legal users, use of water for the "double step" is a wasteful and unreasonable use of
9 water, unlawful profiteering on water rights will result, petitioners' use of water will be increased
10 and violations of water quality standards will be increased.

11 If in spite of the above the transfer is to be permitted, then it should be conditioned upon
12 the water being provided from savings in surface water resulting from a reduction of consumptive
13 use by fallowing irrigated land.

14 If after presentation and analysis of a plan to meet regulatory requirements on the San
15 Joaquin River and in the south delta it is shown that there will be no degradation of water quality
16 and no detrimental carryover storage impacts, then the condition could be revisited.

17 Dated: July 18, 2003

Respectfully submitted,

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19
20
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