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BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING IN THE MATTER OF CALIFORNIA DEPARTMENT OF WATER RESOURCES AND UNITED STATES BUREAU OF RECLAMATION REQUEST FOR A CHANGE IN POINT OF DIVERSION FOR CALIFORNIA WATER FIX	MOTION TO DISMISS PETITION

The Bureau of Reclamation is seeking to add three new points of Direct Diversion to Permits 12721, 12722, and 12723, which total 18,000 cfs. The source for these permits is the Sacramento River and the Delta.

The information in the permits on the Bureau's existing diversion works clearly show that the California WaterFix would create additional diversion capacity in exceedance of the permitted rates of direct diversion authorized under the existing permits. The Bureau failed to provide sufficient information with the Change Petition to show that the Bureau's diversions would stay within the permitted total of 18,000 cfs.

According to the Board's 2009 ruling on reconsideration of the City of Santa Cruz Change Petition,

> "The common feature among the changes that have been found to constitute the creation of a new right, as opposed to a change in an existing right, is that the changes that initiate a new right *increase the amount of water taken from a water source at a given time.* (See Johnson Rancho County Water District v. State Water Rights Board, supra, 235 Cal.App.2d at 879 [approving as "commonsense" the granting of a change in a water right application that did not increase the amount of water appropriated or its source]; State Water Board Decision 940 (1959) ["a direct diversion right can be converted to a storage right only to the extent there is *no change in rate of diversion from the stream* …"]; George A. Gould, Water Rights Transfers and Third-Party Effects, 23 Land and Water Law Review 1 (1988) p. 9 ["To paraphrase Mead, 'the later comers had an equal claim to protection from

> the enlargement of prior uses which reduced the flow available to satisfy their appropriations' … consequently, *a rate of diversion … limits the 'flow' to which each appropriator may claim a priority*…. Some states later added a volume ("quantity") limitation."] referencing E. Mead, Irrigation Institutions 66, 67 (1903).)
>
> (p. 6, emphasis added.)

In Decision 990, which granted the permits 12721, 12722, and 12723 the Board did not carefully examine the rates of direct diversion in the applications, but stated:

> In fixing the rates of direct diversion to be allowed, the Board is inclined to greater liberality than usual because of the magnitude of the Project and the complexities involved in determining at this time the direct diversion as distinguished from rediversions of stored water. However, notwithstanding these considerations, we would require greater particularity in proof of direct diversion requirements were we not assured that no prejudice to others will result from failure of applicant to produce such proof. This assurance is provided by conditions which will be imposed in the permits subjecting exports of water from the Delta to use within the Sacramento River Basin and Delta so that there can be no interference with future development of these areas. (p. 40.)

Ray Sahlberg's written testimony (DOI-4) was proposed to authenticate Reclamation's permits. That testimony stated on p. 4:

> Reclamation holds 22 water rights permits for the CVP (plus nine permits for hydroelectric power). 11 of these permits are the subject of this petition: Permits 11315, 11316, 11967, 11968, 11969, 11971, 11973, 12364, 12721, 12722, and 12723
> (SWRCB-10 through SWRCB-20)[7]

Footnote 7 stated:

> True and correct copies have been provided by the SWRCB as SWRCB-10, SWRCB-11, SWRCB-12, SWRCB-13, SWRCB-14, SWRCB-15, SWRCB-16, SWRCB-17, SWRCB-18, SWRCB-19, and SWRCB-20.

However, when SWRCB-13 and SWRCB-14 were introduced in cross-examination in the Hearing by Patrick Porgans on September 27, 2016, both Maureen Sergent and Ray Sahlberg testified that SWRCB-13 and SWRCB-14 were not permits, but only petitions for temporary transfer. Kevin Long, a member of the Hearing Team, stated that the original permit was at the back of the 145 page pdf document, but both Ms. Sergent and Mr. Sahlberg appeared to be unfamiliar with the document and did not corroborate Mr. Long's statement. (Tr. Sept. 7, 2016, 99:15, reproduced in Attachment A.) Based on this lack of authentication of

the document, the Hearing Chair requested that there not be further cross-examination on the permits, based on not wanting to "spend time doing a document search." (*Id.*)

Because both Mr. Sahlberg and Ms. Sergent failed to recognize the permits, it was not possible for Mr. Porgans to ask detailed questions on the Bureau's compliance with the permit terms in Decision 990. The information submitted with the Change Petition also did not address the Bureau's future compliance permit terms in Decision 990. For this reason, the Board will have wholly insufficient information to determine if the Bureau has been complying the permit terms set in Decision 990 to ensure no prejudice to others, and if the operations with the additional points of diversion will comply in the future with the permit terms in Decision 990 to assure no prejudice to others. These permit terms go beyond the water quality standards set by the Board, most recently in Decision 1641.

In the Change Petition, the Bureau did not disclose the current or proposed maximum total rates of direct diversion under the Bureau's permits. Neither the Change Petition nor the Petitioners' Case in Chief provides clear information on the current and proposed total rates of direct diversion from the Sacramento River and the Delta under these permits. Thus the Board does not have sufficient information to even determine if the permitted rate of diversion will be exceeded with the 9,000 cfs of new diversions. The current and proposed diversion schedules are also required under Cal. Code Regs. Title 23 § 794.

When cross-examined by Mr. Porgans on September 27, 2016, Mr. Sahlberg could not even provide any information on the current capacity or current diversion rate of the Delta Cross Channel. (Tr. Sept 27, 2016: p. 103, lines 2 through 5, reproduced in Attachment A.) The Delta Cross Channel is listed in the Bureau's applications as having a planned capacity of 9,500 cfs, and is included in the Bureau's permits of 18,000 cfs of direct diversion from the Sacramento River. (Exhibit SWRCB-13, p. 168 and p. 32 of D 990.) The applications show that the Delta Cross Channel capacity, together with the 4,600 cfs Delta Mendota Canal, totals 14,100 cfs. (Exhibit SWRCB-13, p. 154.)

The maximum combined rate of diversion and rediversion under these permits from both the Banks Pumping Plant and the Tracy Pumping Plant shall not exceed 4,600 cubic feet per second. (Exhibit, SWRCB-14, p. 140.)

With the new 9,000 cfs conduits, the total capacity of the diversion works will be significantly higher than the 18,000 cfs limit set in the Bureau's permits. (See Attachment A.) Since the Bureau has not provided information to indicate that the total rates of direct diversion will be within the permitted limits, the permit is a new water right and requires a new application.

PORGANS line of questioning at the 27 September 2016 hearing was to discern what applications and permits that the SWB, including its predecessors, approved and denied the Bureau.

SWB Exhibits 13 and 14 were submitted as PETITIONS FOR TEMPORARY CHANGE INVOLVING THE TRANSFER OF WATER. It was discovered that D 990, and all of the files associated with that decision, was not submitted into the record. PORGANS requested that D 990, in its entirety be submitted into the record and is currently awaiting a decision from the CWF Team for that request. The information contained in those files is necessary for participants to be more informed about the issues and findings contained therein, because 11 of the permits that the Bureau list in the Change Petition, were inclusive in D 990.

Attachment: Status of Petitions to Change Place of Use and Points of Diversion and of Rediversion[1]

ATTWATER: WHAT STATE WATER BOARD APPROVED/DENIED IN D990 DUE TO LITIGATION

> Please proceed to dismiss the above-entitled action. Application No. 5626, Permit No. 12721; Application 5628, Permit No. 11967; Application 5636, Permit No. 11887; Application 9363, Permit 12722; Application 9364, Permit No. 12723; Application 9366, Permit No.12725; Application 9367, Permit No. 12726, Application No. 9368, Permit No. 12727; Application 13370, Permit No. 11315; Application No. 13371, Permit 11316; all were "Denied because of lawsuit filed challenging D 990.

Lastly, the purpose of PORGANS line of questioning was impeded by the hearing officer, and the ability to focus on what permits the SWB has approved and or denied was disrupted. It is for this and other obvious reasons that this MOTION TO DISMISS is requested.

Respectfully submitted,

X

Patrick Porgans
Solutionist

Patrick Porgans

[1] William R. Attwater, Chief Counsel, SWRCB letter to Robert H. Connett, Assistant Attorney General **Re: Sacramento River and Delta Water Association, an Unincorporated Association, et al, v. California Water Commission, Sacramento Superior Court No. 126921**, March 25, 1980, pp. 1, 2 and 3.

STATUS OF
PETITIONS TO CHANGE PLACE OF USE
AND TO
ADD POINTS OF DIVERSION AND OF REDIVERSION

APPLICATION NO.	PERMIT NO.	LICENSE NO.	STATE FILING/ RELEASE OF PRIORITY	STATUS
23	---	1986	No	Granted
234	11885		No	Granted
1465	11886		No	Granted
5626	12721		Yes	Denied because lawsuit pending
5628	11967		Yes	No action because lawsuit filed
5636			Yes	Cancelled
5638	11887		Yes	No action because lawsuit filed
7940			Yes	Cancelled
9363	12722		Yes	Denied because lawsuit filed
9364	12723		Yes	Denied because lawsuit filed
9366	12725		Yes	Denied because lawsuit filed
9367	12726		Yes	Denied because lawsuit filed
9368	12727		Yes	Denied because lawsuit filed
13370	11315		Yes	No action because lawsuit filed
13371	11316		Yes	No action because lawsuit filed
15374	11968		No	Granted
15375	11969		No	Granted
16767	11971		No	Granted
17374	11973		No	Granted
17376	12364		No	Granted

Attachment A

Estimated Capacities of Bureau's Diversion Works

(From SWRCB-13, p. 154.)

Sac Valley canals:	
Tehama (Corning) Canal:	500 c.f.s.
Tehama-Colusa Canal:	2,000 c.f.s. (see supplement 8)
Chico Canal:	310 c.f.s.
Total Sac Valley:	2,810 c.f.s.
Delta:	
Delta Cross Channel:	9,500 c.f.s. (see supplement to par. 6)
Delta-Mendota Canal:	4,600 c.f.s.
Total Delta:	14,100 c.f.s.
M&I:	1,000 c.f.s.
Total including M&I:	17,910 c.f.s.

Attachment B

Transcript Excerpts: Cross-examination by Patrick Porgans

- Cross-examination on Permit Terms (Tr. Sept 7, 2016, 99:15)

15 MR. PORGANS: Yes, I believe that's it. I
16 just have to peruse it for a minute and determine where
17 I am in this.
18 Now, under the terms and conditions of -- wait
19 a minute. Hold it there. Excuse me. I have to do
20 some work here.
21 Is this particular exhibit pertinent to the
22 amount of water that the Bureau can export out from
23 either the Sacramento River or the San Joaquin Delta,
24 Sacramento-San Joaquin Delta?
25 WITNESS SERGENT: I'd just like to clarify.
1 the document that's up now is a petition for temporary
2 transfer. It's commonly referred to as a "consolidated
3 place of use." It relates only to exchanges between
4 DWR and Reclamation contractors of previously allocated
5 State Water Project or CVP water. And those
6 contractors are all located downstream of the Delta.
7 It has no impact on the amounts of water that are
8 exported from the Delta.
9 MR. PORGANS: Can we see 14, please.
10 Thank you for explaining that to me.
11 This is another transfer?
12 WITNESS SAHLBERG: Yes.
13 MR. PORGANS: I'm actually looking for Water
14 Right Permit 12722. And it was filed under Application
15 9363. And it says here it's at SW-13 [sic]. But it's
16 apparently not the one.
17
CO-HEARING OFFICER DODUC: Perhaps,
18 Mr. Porgans, if you might ask the question that you
19 want to ask of these witnesses --
20 MR. PORGANS: Okay.
21 CO-HEARING OFFICER DODUC: -- regarding that,
22 while Mr. Baker or Mr. Long's looking for it.
23 MR. PORGANS: My question is are you familiar
24 with water rights permit --
25 MR. LONG: Mr. Porgans, the permit that you're
1 looking for, the original permit, is at the back of

this 145-page pdf.
MR. PORGANS: Yes.
MR. LONG: And then on top of it are amending others over the years, '70s, '80s, '90s. And then at the very, very top is the latest amending order approving the latest TUCP.
CO-HEARING OFFICER DODUC: Thank you, Mr. Long.
I'm going to ask Mr. Porgans to state his specific questions to these witnesses. If we need to pull the document up, we will. But let's see first, Mr. Porgans, what is your question?
MR. PORGANS: My question is are you familiar with the Water Permits 12722?
WITNESS SAHLBERG: Yes.
MR. PORGANS: And do you know what exhibit that would be? Is it a DOI exhibit? Would it be a State Board exhibit?
CO-HEARING OFFICER DODUC: Let me ask you, Mr. Porgans, to get to the substance of your question. I'd rather we not spend time doing a document search. I am more interested in the substance of your question.

- Cross-examination on the Delta Cross Channel (Tr. Sept 7, 2016,103:2)

MR. PORGANS: And what is the capacity of the Delta Cross Channel in terms of the amount of water it can move through there?
WITNESS SAHLBERG: I don't know that.
MR. PORGANS: Does anyone here know that?
(No response)

STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

MOTION TO DISMISS PETITION

to be served **by Electronic Mail** (email), in parts due to server limitations, upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated November 15, 2016, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

I certify that the foregoing is true and correct and that this document was executed on December 13, 2016.

Signature: *Patrick Porgans*

12/13/2016

X Patrick Porgans

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