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8 Attorney for SOUTH DELTA
9 WATER AGENCY and
10 LAFAYETTE RANCH

11 **BEFORE THE**
12 **STATE WATER RESOURCES CONTROL BOARD**
13 **STATE OF CALIFORNIA**

14 In the matter of

15 HEARING REGARDING PROPOSED
16 MODIFICATION OF ORDER WR 2006-0006

17 } SOUTH DELTA AND LAFAYETTE
18 } RANCH'S CLOSING BRIEF
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29 **INTRODUCTION**

30 The SOUTH DELTA WATER AGENCY ("SDWA") and LAFAYETTE RANCH submit
31 the following Closing Brief regarding the above-referenced proposed modifications to the Cease
32 and Desist Order, WR 2006-0006 ("CDO"). The hearing in this matter was conducted by the
33 SWRCB to receive testimony and evidence relating to two "Key Issues" associated with potential
34 changes to the CDO. The CDO itself addressed threatened water quality violations, and among
35 other things, ordered DWR and USBR to develop and implement a plan by July 1, 2009 to
36 "obviate" the threatened violations. This plan was required under Part A of the CDO.

37 The two Key Issues asked (i) "What modifications, if any should the State Water Board
38 make to the compliance schedule set forth in Part A of Order WR 2006-0006, and how should
39 any modifications be structured to take into account any potential changes to the southern Delta's
40 salinity objectives or the program of implementation that may occur as a result of the State Water
41 Board's current review of the Bay-Delta Plan?" and (ii) "If the compliance schedule contained in
42 Part A of Order WR 2006-0006 is modified, what interim protective measures, if any, should be

1 imposed?"

2 SDWA asserts that no modifications should be made to the compliance schedule in Part
3 A of the CDO. The evidence presented at the hearing indicates that DWR and USBR took no
4 meaningful actions to meet the deadline, other than plan on one action which was known to be
5 insufficient. In addition, DWR and USBR were fully aware that additional actions were
6 necessary to meet the standards, were informed of those additional actions, yet chose to not seek
7 approval or implementation of those actions.

8 Finally, and more importantly, the CDO was a method of addressing *possible future*
9 *threats to the water quality standards*. The compliance schedule was an effort by the SWRCB
10 to force DWR and USBR to better plan for, and take actions to comply with their existing permit
11 obligations; which included meeting the water quality standards in the southern Delta. The CDO
12 was adopted at a time when the standards were not regularly violated. Now however, things are
13 very much different. The standards are regularly being violated (before, during, and after the
14 hearing) and the compliance schedule deadline has passed. Rationally, there is no need to change
15 an order which addressed *threatened violations*. Rather the only proper course of action for the
16 SWRCB is to *enforce* the DWR and USBR permit terms and conditions. Changing the
17 compliance schedule in the CDO would merely excuse ongoing and future violations. No
18 purpose is served by extending the time by which the projects must remove the threat to
19 violations once violations are occurring. The premise of the hearing is a logical fallacy.

20 BACKGROUND

21 In 2000, the SWRCB adopted the Revised D-1641, a water rights decision which sought
22 to enforce the 1995 Water Quality Control Plan for the San Francisco Bay-Sacramento Bay/San
23 Joaquin Delta Estuary ("1995 Plan"). D-1641 assigned most of the water quality objectives
24 contained in the 1995 Plan to the USBR and DWR as the operators of the Federal Water Project
25 and State Water Project, respectively, and as the permit/license holders of the permits authorizing
26 the projects to store, divert, transport and use water.

27 D-1641 assigned USBR the obligation of meeting the Water Quality Objective for
28 Agricultural Beneficial Uses (with a compliance monitoring location) at Vernalis to USBR, and

1 the Objectives at Brandt Bridge, Old River at Middle River, and Old River at Tracy Blvd. Bridge
2 to USBR and DWR. These Objectives, or "salinity standards," were/are contained in Table 2 of
3 both D-1641 and the 1995 Plan. D-1641 also contained a footnote [5] which applied to each of
4 the latter three standards and which stated:

5 The 0.7 EC objective becomes effective on April 1, 2005. The DWR and
6 USBR shall meet 1.0 EC at these stations year round until April 1, 2005. The 0.7
7 EC objective is replaced by the 1.0 EC objective from April through August after
8 April 1, 2005 if permanent barriers are constructed, or equivalent measures are
9 implemented, in the southern Delta and an operations plan that reasonably
protects southern Delta agriculture is prepared by the DWR and the USBR and
approved by the Executive Director of the SWRCB. The SWRCB will review the
salinity objectives for the southern Delta in the next review of the Bay-Delta
objectives following construction of the barriers.

10 The Third Appellate District held that D-1641 improperly delayed implementation of the
11 three interior southern Delta standards until April of 2005 (even though the 1995 Plan required
12 the Brandt Bridge standard to be immediately implemented, and the two Old River standards be
13 implemented by the end of 1997), and improperly allowed those three standards to revert back
14 (worsen) to the 1.0 EC standard all year (even though the 1995 Plan required 0.7 EC April
15 through August, 1.0 EC and September through March). SDWA commented many times about
16 the impropriety of this footnote, the conditions of which were not discussed of the more than 80
17 days of hearing which led to D1641.

18 The Appellate Court agreed with SDWA's view of this footnote in its decision in the
19 *State Water Board Cases* Third Appellate District, Case No. C044714. In that decision, the
20 Court held that the footnote improperly changed the 1995 Water Quality Control Plan in the
21 water rights hearings held to implement the Plan. Setting standards or objectives is part of the
22 SWRCB's quasi-legislative functions, while implementing the Plan through a water rights
23 hearing is part of the SWRCB's quasi-adjudicatory functions. The Appellate Court noted that the
24 standards could only be changed in another quasi-legislative hearing, and not through the quasi-
25 adjudicatory water rights hearing of D-1641. The Appellate Court therefore nullified the suspect
26 footnote. [See *State Water Board Cases* pages 87-89.] As a consequence and pursuant to D-
27 1641, all four of the salinity standards are now fully in effect and are the responsibility of USBR
28 (all four) and DWR (the three interior standards).

1 Importantly, the Appellate Court also confirmed that the SWRCB cannot delay or
2 partially implement water quality standards contrary to the plan of implementation contained in
3 the 1995 Plan. (See *State Water Board Cases* at pages 87-88) Hence, the SWRCB cannot
4 extend the implementation of the southern Delta salinity standards. Modifying the CDO appears
5 to do just that, by contemplating further delay in requiring the projects to meet the standards.

6 In 2005, DWR and USBR notified the SWRCB that they may not be able to meet the 0.7
7 EC standards as of April 1, 2005, and that installation of the permanent barriers would not occur
8 for a number of years hence. This notification resulted in the hearing which resulted in the CDO.
9 Among other things, the CDO ordered DWR and USBR to:

10 **ORDER**

11 A. The State Water Resources Control Board (State Water Board) ORDERS
12 that, pursuant to Water Code sections 1831 through 1836, the Department of
13 Water Resources (DWR) and the United States Bureau of Reclamation (USBR)
shall take the following corrective actions and satisfy the following time
schedules:

14 1. DWR and USBR shall implement measures to obviate the threat of
15 non-compliance with Condition 5 on page 159, Condition 1 on pages 159 and
16 160, and Condition 1 on pages 160 and 161 of Revised Decision 1641 (D-1641)
regarding the 0.7 mmhos/cm electrical conductivity (EC) objective by July 1,
17 2009. Beginning April 1, 2005, these conditions require DWR and USBR to
meet the 0.7 EC Water Quality Objective for Agricultural Beneficial Uses at the
following locations specified in Table 2 of D-1641 at page 182:

- 18 1) San Joaquin River at Brandt Bridge (Interagency Station
19 No. C-6);
- 20 2) Old River near Middle River (Interagency Station No. C-8);
21 and
- 22 3) Old River at Tracy Road Bridge (Interagency Station No. P-
 12).

23 2. Within 60 days from the date of this order, DWR and USBR shall
24 submit a detailed plan and schedule to the Executive Director for compliance with
the conditions mentioned above, including planned completion dates for actions
25 that will obviate the current threat of non-compliance with the 0.7 EC objective at
stations C-6, C-8, and P-12 by July 1, 2009. If the plan provides for
26 implementation of equivalent measures, DWR and USBR shall submit
information establishing that those measures will provide salinity control at the
27 three compliance stations equivalent to the salinity control that would be achieved
by permanent barriers. The plan and schedule are subject to approval by the
28 Executive Director of the State Water Board, shall be comprehensive, and shall
include significant project milestones. DWR and USBR shall submit any
additional information or revisions to the schedule and plan that the Executive

1 Director requests within the period that the Executive Director specifies. DWR
2 and USBR shall implement the plan and schedule as approved by the Executive
Director.

3 3. Within 60 days from the date of this order, if DWR And USBR
4 decide to implement the permanent barriers project or equivalent measures, DWR
and USBR shall submit a schedule to the Chief of the Division of Water Rights
5 (Division) for developing an operations plan that will reasonably protect southern
Delta agriculture. DWR and USBR shall submit the final plan to the Executive
6 Director for approval no later than January 1, 2009. To ensure that the plan is
adequate prior to the required compliance date, DWR and USBR shall submit a
7 draft of the operations plan by January 1, 2008, to the Division Chief for review
and comment.

8 Although DWR and USBR eventually submitted a plan to “obviate the threatened
9 violations” to the standards, they implemented virtually no measures before July 1, 2009, to
10 ensure that the standards would/will be met. The record from the hearing clearly indicates that
11 the projects relied solely on installation of the permanent barriers, or “gates” as they call them,
12 and ignored, or only belatedly considered and pursued other measures which would or could
13 result in compliance with the standards. The other measures are/were necessary because D-1641
14 and DWR modeling indicated that barriers alone would not result in compliance. SDWA
15 repeatedly identified these other measures and petitioned DWR and USBR to pursue and
16 implement them. To the contrary, DWR and USBR did nothing except hope that the permanent
17 barriers would eventually be permitted and constructed and allowed to operate.

18 STANDARD OF REVIEW

19 The subject hearing was not the result of any Petition by the DWR or USBR, rather by
20 way of a letter dated May 29, 2009, the projects “applied” to the Board for it to make changes to
21 the CDO pursuant to the process authorized in Water Code Section 1832. That statute allows the
22 Board to “modify, revoke, stay in whole or in part” any cease and desist order. Hence, the
23 subject hearing was not conducted to determine if there would be any adverse impact to fisheries
24 or other legal users (as under Water Code Sections 1734 et.seq.). Nor did the hearing notice
25 specify any criteria under which the hearing would be held. The CDO was the subject of fact-
26 finding by the Board pursuant to an evidentiary hearing under its quasi-judicial function.
27 Therefore, any changes to the CDO should only be adopted if there is substantial evidence to
28 support such changes. SDWA submits that the CDO should only be changed/modified if

1 evidence clearly showed that the findings of the CDO itself were somehow incorrect.

2 I.

3 ARGUMENT

4 A. **THERE IS NO BASIS FOR FINDING PART A OF THE CDO SHOULD**
5 **BE CHANGED.**

6 Key Issue 1 of the notice for the subject hearing asked if the SWRCB should modify the
7 compliance requirement in Part A of the CDO, and how potential changes to the standards
8 (which are currently under review) should be taken into consideration in such modifications. As
9 stated before, Part A required DWR and USBR to implement measures to obviate the threatened
10 violations of the three interior southern Delta salinity standards. No such changes or
11 modifications are justified or appropriate because nothing has changed since the CDO was
12 adopted. The findings in the CDO eerily reflect the current situation. The CDO found that DWR
13 and USBR had not taken the appropriate steps to meet their obligations under D-1641 even when
14 they knew they had to do so before April 1, 2005, that barriers alone would not be sufficient, and
15 that other measures were required but not undertaken. Nothing has changed; DWR and USBR
16 have not taken the appropriate steps to meet their obligations by July 1, 2009 (under the CDO);
17 barriers alone are known to not be sufficient; and they failed to undertake other measures made
18 known to them which would result in compliance with the standards.

19 Before addressing each of these reasons, it should be noted that as reviewed in the notice
20 CDO, on February 18, 2005 DWR and USBR submitted a long term petition to change the
21 effective date of the 0.7 EC standard (at the three interior southern Delta locations) from April 1,
22 2005 to December 31, 2008. Between those dates, the SWRCB issued the CDO, the Third
23 Appellate Court issued its Decision in the *State Water Board Cases*, the SWRCB issued and
24 adopted the 2006 Water Quality Control Plan for the Bay-Delta, and the permanent barriers were
25 never approved or permitted. The requested date (in the February 18, 2005 letter) of December
26 31, 2008 passed without DWR or USBR seeking any other relief from their permit conditions as
27 set forth in D-1641, until their letter of May 29, 2009. At that time, they asked the SWRCB to
28 once again bail them out, and the Board inexplicably complied. This persistent failure to act

1 diligently or to adequately plan to meet their obligations is a constant theme in these proceedings.
2 If for no other reason than this, the Board should refuse to modify the CDO and finally, once and
3 for all force the projects to meet the standards or penalized them for not doing so. This
4 “reward/punishment” approach is the only way a regulator can meet its obligations to protect
5 other beneficial uses. The “constant delay/excuse” approach assures harm to those for whom the
6 standards protect.

7 SDWA will first address the second part of Key Issue 1.

8 **B. FUTURE, UNKNOWN, POTENTIAL CHANGES TO THE SALINITY**
9 **STANDARDS CANNOT TAKEN INTO CONSIDERATION.**

10 The second part of Key Issue 1 asks how modifications to the CDO compliance schedule
11 “be structured to take into account any potential changes to the southern Delta salinity objectives
12 or the program of implementation” thereof which may result from the ongoing review of those
13 objectives? Such a consideration is impossible. Changes to the standards, or the implementation
14 thereof will occur after further studies, deliberations, evidence, testimony, and hearings occur in
15 both quasi-legislative and quasi-adjudicatory processes. Such unknowns cannot logically or
16 honestly be “considered” as part of this hearing unless the SWRCB has already made undisclosed
17 conclusions about what is necessary to protect southern Delta agriculture and what water rights
18 should be burdened to insure such protection.

19 Besides being unable to consider an unknown, future occurrence, two points must be
20 made. The first is that the existing standards might be tightened, whereas the question in Key
21 Issue 1 apparently assumes they will be relaxed. If tightened, then any delay in requiring
22 enforcement of the standards would result in more harm now, and thus be unjustified. Second,
23 The existing findings of D-1641 indicate that the CVP is responsible for the salinity problems in
24 the southern Delta (D-1641 at page 63). Hence, the only justifiable position to be taken
25 regarding maintenance of the standards is that the projects’ permits will continue to be burdened
26 with these responsibilities. The SWRCB should acknowledge that this second part of Key Issue
27 is inappropriate.

1 **C. THE EVIDENCE AND TESTIMONY DO NOT SUPPORT ANY**
2 **CHANGES TO THE CDO.**

3 **1. THERE HAS BEEN TOO MUCH DELAY IN IMPLEMENTING THE**
4 **STANDARDS,**

5 The salinity standards were first adopted by the SWRCB in 1978 via D-1485; 31 years
6 ago (see CDO page 8). Although the Board did not assign the responsibility for meeting these
7 standards in D-1485, the adoption was the Board's recognition that they were necessary to
8 protect southern Delta agriculture. The standards were not implemented by the Board until
9 D-1641 was adopted in 2000. At that time, only the Vernalis standards went into effect, the three
10 interior standards were set at 1.0 EC year round. D-1641 incorrectly delayed full
11 implementation, and the CDO in practice further delayed it. Since the standards are necessary to
12 protect southern Delta agriculture, they should be enforced.

13 **2. THE CDO ADDRESSED THE PROJECTS FAILURE TO PLAN**
14 **AHEAD AND MEET THEIR D-1641 OBLIGATIONS.**

15 D-1641 states at page 88: "The construction of permanent barriers alone is not expected
16 to result in attainment of the water quality objectives." Obviously then, DWR and USBR have
17 known since 2000 that reliance on permanent barriers alone would not result in them complying
18 with their permit terms and conditions. The CDO confirmed that barriers were not enough, and
19 that the projects had not acted properly in trying to meet their obligations.

20 First, the CDO notes that DWR and USBR are "fully" responsible for meeting the interior
21 salinity standards (CDO at page 7). The Order even noted that in the absence of the CDO, the
22 projects must meet these standards (CDO at page 18, Footnote 12).

23 Second, the CDO notes that DWR and USBR "did not take adequate measures to ensure
24 future compliance with their permit/license conditions by April 1, 2005" which was their
25 deadline in D-1641 to comply with the standards (CDO at page 20).

26 Third, the CDO concluded that the projects were relying solely on the permanent barriers
27 as the means of meeting the standards (CDO at page 21).

28 Fourth, the CDO noted that the existence of other pending actions did not excuse DWR

1 and USBR from taking adequate steps to comply with their permit/license conditions (CDO at
2 page 22).

3 Fifth, the CDO confirms that SDWA and other parties notified (and in fact put on
4 evidence) that other measures were available and necessary to meet their obligations. Those
5 measures included water purchases/additional river flows, recirculation, modified operations of
6 temporary barriers, control of drainage, etc. (CDO at page 15).

7 Sixth, the CDO encouraged the projects to "consider all potential means" to comply with
8 their permits/licenses and meet the salinity standards (CDO at page 23).

9 Seventh, the CDO confirms that the time frame granted to "obviate" the threatened
10 violations "does not relieve DWR and USBR of the requirement to meet" the interior standards.

11 Eighth and last, the CDO states unequivocally that [C]onsidering that the objectives were
12 first adopted in the water quality control plan in 1978, and there is evidence that salinity is a
13 factor in limiting crop yields for southern Delta agriculture, *the State Water Board will not*
14 *extend the date for removing the threat of non-compliance beyond July 1, 2009.*" (CDO at
15 page 27) (Emphasis added). Ignoring the SWRCB's cautious caveat about there (only) being
16 evidence that salinity is bad for crops (instead of confirming it does cause harm as was shown in
17 the CDO hearing) we see that the CDO expressly states the projects are to be given no third,
18 fourth or fifth chance; they must do what has to be done to meet the standards by July of 2009.

19 This should be the end of the arguments, the issues and the discussions. The projects put
20 all of their eggs in one basket (permanent barriers), did not plan ahead and ended up violating
21 their permits and D-1641. The CDO gave them more time to get their work done (because the
22 standards were not being regularly violated at the time). The result? The projects again did not
23 plan ahead, relied again solely on permanent barriers and violated not just D-1641 and their
24 permits, but now the CDO also. One could not construct a more perfect scenario justifying
25 enforcement of the standards or a worse one to support extending the CDO deadline.

26 This case should turn on a re-reading of the CDO by the SWRCB Board members.
27 Everything covered in the subject hearing is a mere repetition of that which was covered in the
28 CDO hearing; everything. There is virtually no new evidence, no new arguments and certainly

1 even less reason to excuse DWR and USBR from acting appropriately under their permits.

2 **3. THE EVIDENCE SUBMITTED DURING THE HEARING DOES**
3 **NOT SUPPORT MODIFYING THE CDO.**

4 The testimony of Alex Hildebrand on behalf of SDWA answered all of the relevant
5 questions regarding DWR and USBR's failure to diligently act to meet their obligations under D-
6 1641, their permits and the CDO. Mr. Hildebrand confirmed what the CDO stated; that he had
7 personally informed DWR and USBR that there were other measures which could be taken
8 which would improve southern Delta water quality and meet the standards (SDWA 12, at page
9 1). He also confirmed that eventually, after his repeated prodding, DWR and USBR engineers
10 evaluated some of these measures and agreed that if implemented, the measures would establish
11 net flows in the southern Delta channels which would control salt and likely meet the standards;
12 all at little or no water cost to any party. There was also agreement that these measures could be
13 implemented for the 2009 irrigation season (SDWA 12 at page 1-2).

14 Mr. Hildebrand also confirmed that rather than proceed with these measures (which were
15 not evaluated until 2008), the projects instead asserted they were not responsible for the
16 standards, meeting the standards would entail large releases from reservoirs, that other measures
17 were beyond their authority, that the standards should be relaxed, and that compliance with the
18 standards could not be achieved without the permanent barriers (via the South Delta
19 Improvement Project or SDIP) (SDWA 12 at page 2).

20 Mr. Hildebrand explained how SDIP does not establish net flows in all channels and thus
21 would not result in full compliance with the standards. Because of this, he explained how the
22 other measures he had suggested were necessary regardless of SDIP and would establish net
23 flows with temporary barriers (SDWA 12 at page 2-3). It should be noted that SDWA and not
24 DWR submitted SDWA 3, the technical analysis of some of these other measures.

25 We see then from the evidence that just as DWR and USBR did not diligently pursue
26 measures to meet their April 1, 2005 deadline, they did not pursue measures to meet their July 1,
27 2009 deadline.

28

1 4. **DWR AND USBR EVIDENCE DOES NOT SUPPORT MODIFYING**
2 **THE CDO.**

3 USBR's sole witness submitted testimony which sought to excuse the projects from
4 complying with the southern Delta salinity standards. On cross-examination, he admitted his
5 testimony was aimed at amending the projects' permits and not the CDO (DVD Segment 1,
6 beginning at 2:05:06).¹

7 DWR put on a number of witnesses who attempted to show that DWR had little or not
8 control over southern Delta salinity (Tara Smith), that the permanent barriers were the only
9 method by which DWR could meet the standards (Kathy Kelly), and how the temporary barriers
10 affect flow, water level heights, and quality (Mark Holderman). Mr. Holderman also updated the
11 SWRCB on minor changes to temporary barrier operations undertaken in 2007 and 2008 and
12 proposed changes for which permitting approvals were only recently sought.

13 The DWR testimony is important for a number of reasons. First, it echoed that which
14 was given in the CDO hearing itself. As stated above, the CDO noted that DWR and USBR
15 were only pursuing permanent barrier; a position confirmed by Ms. Kelly's testimony (DWR-04
16 at page 1). DWR's evidence of their impacts to southern Delta salinity were found irrelevant in
17 the CDO when the SWRCB found noted that the projects failed to appeal their obligations
18 created in D-1641 (CDO at pages 20-21).

19 Second, in answering cross-examination questions, the DWR witnesses significantly
20 clarified their testimony. Ms. Kelly noted that DWR still sought permanent barriers as the only
21 actions to meet water quality standards even though it was believed those barriers could not
22 accomplish this goal. She also stated that DWR has not considered changing its plan (permanent
23 barriers only) to obviate the threatened violations even though the barriers will not be enough
24 (DVD Segment 1, beginning at 2:28:10).

25
26
27 ¹ The first day of the subject hearings did not include a court reporter, but was recorded
28 digitally on a DVD. References to that portion of the Record will note the DVD, Segment and
time when the referenced language began.

1 Mr. Holderman confirmed that the SDWA suggestions for other measures arose “several
2 years ago” (DVD Segment 1, beginning at 2:40:42 and 2:44:18). He also confirmed that the
3 modeling for some of these measures did not include flows above 1200 cfs on the San Joaquin
4 River (DVD Segment 1, beginning at 2:44:28) which contradicts DWR and USBR assertions that
5 large river flows are necessary to meet the standards, and that such flows would be an
6 unreasonable use of water.

7 Mr. Holderman also confirmed that DWR knew by at least 2006 that permanent barriers
8 would not be installed before the July 1, 2009 deadline of the CDO (DVD Segment 1 beginning
9 at 2:45:10 and :48). Finally, he confirmed that the decision to pursue some of these measures
10 (raising the Middle River barrier by one foot) was not done until in 2009, although it could have
11 been done in 2008, and that if these measures had been studied by DWR earlier, the measures
12 could have been pursued ever earlier (DVD Segment 1, beginning at 2:46:20 and 2:47:05).

13 It should be noted here that an argument was made during the hearing which suggested
14 that these other measures required time and significant environmental and permitting review
15 before they could be implemented. Mr. Hildebrand however testified as to the speed at which
16 USBR had sought and obtained recirculation approvals as well as referencing Mr. Holderman’s
17 testimony that he had sought permission to raise the Middle River barrier height in just the last
18 two months (Transcript, June 30, 2009, at pages 159-161).

19 Ms. Smith showed the SWRCB practical tracking animations. On cross-examination she
20 admitted that she did not show modeling of quality in locations other than the compliance sites
21 (DVD Segment 1, beginning at 2:52:58), did not model different San Joaquin River flows
22 (2:53:55), did not model San Joaquin River salt concentrations and loads (DVD Segment 1,
23 beginning at 2:54:12), did not model export pump effects on ocean salts entering the system
24 (DVD Segment 1, beginning at 2:55:00), and did not model a “pre-project” scenario showing
25 good quality San Joaquin River flows (DVD Segment 1, beginning at 2:57:15).

26 In response to further questions, Ms. Smith confirmed that her modeling was not aimed at
27 showing the best operations scenarios for imposing water quality with temporary or permanent
28 barriers, and that other operational parameters could show improved water quality (DVD

1 Segment 1, beginning at 3:59:35).

2 This cross-examination shows that the projects have not been diligent in seeking to
3 evaluate and implement other measures, even though they are aware these other measures are
4 necessary to meet the southern Delta water quality standards.

5 The only other "evidence" of note was presented by the San Luis Delta-Mendota Water
6 Authority. The Authority put on a witness to show what actions local farmers/districts have done
7 to decrease salt loads into the San Joaquin River. Though interesting, the evidence was not
8 connected to any actions by DWR or USBR and thus does not provide a basis for modifying the
9 CDO. That is to say, actions by third parties to improve river conditions do not take away from
10 the fact that DWR and USBR have not taken steps to meet the salinity standards.

11 **II.**

12 **CONCLUSION**

13 Ignoring for the moment that the CDO should now be mute because of ongoing violations
14 of the southern Delta salinity standards, modification of the CDO would only be appropriate
15 under certain circumstances, none of which exist. If the current water quality standards were not
16 yet fully effective, the Board could give the permittees time to develop a plan by which they could
17 meet the permit obligations. Here, the standards are in place and there is an Appellate Court
18 Opinion which precludes any delay in implementing the standards.

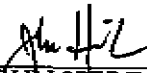
19 The CDO could be modified if there was some significant change of circumstances. Here
20 however, nothing has changed since the CDO. DWR and USBR took no actions to meet the D-
21 1641 deadline of April 1, 2005, and took no real actions to meet the July 1, 2009 deadline. They
22 sought only to install the permanent barriers, a long delayed project which is known to be
23 insufficient. At the hearing, DWR and USBR presented the same evidence they did in the CDO
24 hearing when they argued they should not have to meet the standards. The Board rejected those
25 arguments then, and they do not support changing the CDO now.

26 The CDO could perhaps be modified if the projects had worked diligently to seek to
27 implement other actions or measures, but were frustrated in those efforts. However, the evidence
28 shows that they were aware that other actions were necessary yet did not investigate those actions

1 until after they knew the permanent barriers could not be installed by the deadline set forth in the
2 CDO. During this entire time, the projects knew the barriers were insufficient, yet continually
3 stated that was all they were pursuing. Only after SDWA's continued prompting did they
4 begrudgingly seek some of the other measures; and then not in time to meet the July deadline.

5 There is no basis to extend the time by which the DWR and USBR must "obviate"
6 threatened violations. The standards are in effect and compliance is clearly the responsibility of
7 the projects as stated in the CDO. Since violations are now occurring, there is no logical reason
8 to extend the time by which threatened violations must be avoided; it is too late. DWR and
9 USBR must be finally forced to meet the standards, especially since they have been shown (and
10 their engineers agree) there are other measures which will accomplish the goal. That same
11 evidence shows the Board that it is only a threat of enforcement that results in action, not excuses
12 and delays.

13
14 Dated: August 11, 2009

By: 
JOHN HERRICK, Attorney for SOUTH DELTA
WATER AGENCY and LAFAYETTE RANCH

1 **PROOF OF SERVICE BY E-MAIL**

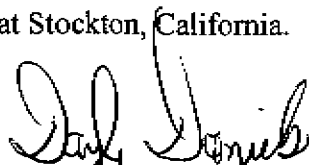
2
3 I declare as follows:

4 I am over eighteen years of age and not a party to the within entitled action. My business
5 address is the Law Office of John Herrick, 4255 Pacific Avenue, Suite 2, Stockton, California,
6 95207. I am employed in San Joaquin County, California. Based on an agreement of the parties
7 to accept service by e-mail or electronic transmission, on August 11, 2009, at approximately 11:00
8 a.m., I caused the SOUTH DELTA AND LAFAYETTE RANCH'S CLOSING BRIEF to be sent
9 to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time
10 after the transmission, any electronic message or other indication that the transmission was
11 unsuccessful.

12 wrhearing@waterboards.ca.gov,	SWRCB
13 cpanelson@bpmnj.com,	Carl P. A. Nelson
14 jrubin@diepenbrock.com,	Jon D. Rubin
15 julia.r.jackson@gmail.com,	Julia R. Jackson
16 agalbraith@herumcrabtree.com,	A. Galbraith
17 Kharrigfeld@herumcrabtree.com,	Karna Harrigfeld
18 awhitfield@minasianlaw.com,	A. Whitfield
19 dforde@minasianlaw.com,	D. Forde
20 pminasian@minasianlaw.com,	Paul R. Minasian
21 rsahlberg@mp.usbr.gov,	USBR
22 dgillick@neumiller.com,	DeeAnne M. Gillick
23 tshephard@neumiller.com,	Tom Shephard
24 kpetruzzelli@olaughlinparis.com,	K. Petruzzelli
25 towater@olaughlinparis.com,	Tim O'Laughlin
26 Ngmplcs@pacbell.net,	Dante J. Nomellini
27 mjatty@sbcglobal.net,	Michael B. Jackson
28 AMY.AUFDEMBERGE@sol.doi.gov,	Amy L. Aufdemberge
	USBR
	Erick D. Soderlund

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

24 EXECUTED on August 11, 2009, at Stockton, California.

25 
26 Dayle Daniels
27
28