

DOWNEY BRAND

621 Capitol Mall, 18th Floor
Sacramento, CA 95814
916.444.1000 Main
downeybrand.com



500 Capitol Mall, Suite 1000, Sacramento, CA 95814
Office: 916-446-7979 Fax: 916-446-8199
somachlaw.com

March 30, 2021

VIA ELECTRONIC MAIL ONLY

Joaquin Esquivel, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
E-Mail: Joaquin.Esquivel@waterboards.ca.gov

Re: Sacramento River Settlement Contractors' Response to NRDC, et al. Request for Immediate Action under Order WR 90-5

Dear Chair Esquivel and Members of the Board:

On behalf of the listed Sacramento River Settlement Contractors ("SRS Contractors"),¹ we write in response to the Natural Resources Defense Council and other environmental interest organizations' (collectively, "NRDC") March 12, 2021 request that the State Water Resources Control Board ("State Board") take "immediate action" to address perceived threats to listed salmon in the Sacramento River watershed from Central Valley Project ("CVP") operations. The SRS Contractors have long supported actions intended to improve habitat conditions for salmon in the Sacramento River, and continue to do so through a variety of efforts, including the Sacramento River Science Partnership. Although the SRS Contractors prefer to focus their energy and resources on proactively developing solutions to meet the needs of salmon and other beneficial uses of water in the Sacramento Valley, we write today to address certain assertions by NRDC in its March 12 letter that are inaccurate and undermine efforts to have a productive dialogue on these issues.

Specifically, NRDC essentially asks the State Board to violate its authority under California law, and misinterprets the nature of the U.S. Bureau of Reclamation's ("Reclamation") obligations under the Sacramento River Settlement Contracts ("SRS Contracts"). The SRS Contractors respectfully request that the State Board ignore NRDC's inaccurate interpretations of other parties' legal obligations, and allow Reclamation and its stakeholders to work through its process and the Sacramento River Temperature Task Group (SRTTG) forum to develop a protective

¹ Anderson-Cottonwood Irrigation District; Beverly F. Andreotti, et al.; Carter Mutual Water Company; City of Redding; Conaway Preservation Group, LLC; David and Alice teVelde Family Trust; Glenn-Colusa Irrigation District; Henry D. Richter, et al.; Howald Farms, Inc.; Knights Landing Investors, LLC; Maxwell Irrigation District; Meridian Farms Water Company; Natomas Central Mutual Water Company; Oji Brothers Farms, Inc.; Oji Family Partnership; Pelger Mutual Water Company; Pelger Road 1700, LLC; Pleasant Grove-Verona Mutual Water Company; Princeton-Codora-Glenn Irrigation District; Provident Irrigation District; Reclamation District 108; Reclamation District No. 1004; River Garden Farms Company; Sutter Mutual Water Company; Tisdale Irrigation and Drainage Company; Windswept Land and Livestock Company.

temperature management plan (TMP) that balances the needs of all beneficial uses served by CVP operations.

A. Reclamation Lacks Discretion to Implement the SRS Contracts in a Manner that would Violate the Terms of those Contracts.

The SRS Contractors support Reclamation’s preparation of a proposed TMP before May and submittal of the initial TMP through the SRTTG. NRDC, however, incorrectly argues that in preparing such a TMP, Reclamation must consider breaching its obligations under the SRS Contracts to improve temperature management operations because the SRS Contractors’ diversions are “within Reclamation’s control under Order 90-5.” Indeed, NRDC’s argument that Reclamation has discretion to operate the CVP to benefit listed salmon in the Sacramento River in a manner that would violate the terms of the SRS Contracts was soundly rejected in federal court.²

In *Natural Resources Defense Council, et al. v. Norton, et al.* (“*NRDC v. Norton*”), a coalition of interest groups led by NRDC alleged that Reclamation had unlawfully failed to reinstate consultation on the “implementation” of the SRS Contracts after temperature management difficulties occurred during the summer and fall of 2014 and 2015. After an exhaustive analysis, the U.S. District Court for the Eastern District of California dismissed NRDC’s claim. It found that, in order “to trigger the requirement for re-consultation under . . . 50 C.F.R. § 402.16 in the context of an executed and otherwise valid contract, [Reclamation] must have retained sufficient discretion in that contract to permit material revisions to it that might benefit the listed species in question. *NRDC v. Norton* (E.D. Cal. 2017) 236 F. Supp. 3d 1198, 1217 (emphasis in original). Analyzing the SRS Contracts in considerable detail, the court found that they did not allow Reclamation to make unilateral revisions to their terms, and rejected NRDC’s argument that Reclamation possessed the requisite discretion “to modify SRS Contract quantities (or deliveries under an existing SRS Contract) upon determining that additional water is needed to protect in-stream beneficial uses.” *Id.* at 1225. Thus, NRDC’s request that the State Board order Reclamation to submit alternative operational scenarios that evaluate what NRDC refers to as “different water supply assumptions” for the SRS Contractors directly conflicts with the court’s ruling in *NRDC v. Norton* because it calls for Reclamation to exercise discretion it does not have. NRDC identifies nothing in state or federal law that would permit the State Board to order Reclamation to breach the terms of the SRS Contracts by unilaterally imposing “different water supply assumptions” than the diversion schedules set forth in the SRS Contracts. Indeed, as explained more fully below, any State Board order directing Reclamation to violate the terms of the SRS Contracts in response to NRDC’s request would violate state law. In doing so, Reclamation might be precluded from operating the CVP in any capacity—including to ensure water temperatures sufficient to protect listed salmon spawning downstream of Keswick Dam.

² NRDC has appealed the court’s ruling and the appeal is currently pending in the Ninth Circuit Court of Appeals. The SRS Contractors will defend the SRS Contracts in the appeal and argue in support of upholding the district court’s ruling on these issues.

B. Reclamation Cannot Exercise the Discretion It Does Possess to Address NRDC's Water Temperature Concerns Unless Reclamation Fully Complies with the SRS Contracts.

NRDC's suggestion that the State Board can order Reclamation to consider violating its contractual obligations to the SRS Contractors because "Reclamation's contractual obligations do not take precedence over meeting minimum water quality standards" ignores the foundational role the SRS Contracts play in Reclamation's water rights to operate the CVP.

The SRS Contractors have a unique history and nature.³ Before Reclamation constructed Shasta Reservoir as part of the CVP, the SRS Contractors (or their predecessors-in-interest) were lawfully diverting water from the Sacramento River. Thus, the SRS Contractors' rights to divert water from the Sacramento River are senior to Reclamation's rights to store water in Shasta Reservoir, and the SRS Contractors do not rely on Reclamation facilities to divert water for beneficial use in the Sacramento Valley. Instead, when Reclamation applied for water rights from the State Board, the SRS Contractors filed protests to protect their senior water rights.

By executing the original SRS Contracts in 1964 (which were renewed in 2005), the United States resolved the Sacramento Valley water users' protests against Reclamation's water right applications for the CVP. In doing so, Reclamation was able to avoid litigation over its rights to operate the CVP, including the potential for a lengthy and expensive adjudication of water rights in the Sacramento Valley. Thus, the SRS Contracts truly represent a "settlement" whereby the senior water right holders dismissed their protests to the United States' water right applications in consideration for a contractual commitment to provide a defined volume of water under a defined schedule, and with an agreed upon reduction for critically dry years.

The State Board's Decision 990 ("D-990") underscores the importance of Reclamation's compliance with the SRS Contracts in operating the CVP for beneficial purposes, including temperature management to benefit salmon. D-990 granted Reclamation's water rights applications for the CVP subject to certain conditions. Specifically, in granting Reclamation water rights on the Sacramento River, the State Board found it "imperative, therefore, that the holders of existing rights and the United States reach agreement concerning these rights and the supplemental water required to provide the holders with a firm and adequate water supply, if a lengthy and extremely costly adjudication of the waters of the Sacramento River and its tributaries is to be avoided." D-990 at 75. As a result, the State Board included Condition 23 to Reclamation's water rights that expressly required Reclamation to execute settlement agreements with the senior water rights holders represented by the undersigned, and subordinated Reclamation's water rights to vested senior rights. D-990 at 80, 85-86. Reclamation complies with these legal mandates imposed by the State Board by performing its obligations under the SRS Contracts.

Accordingly, not only does Reclamation lack any discretion to modify the terms of the SRS Contracts, it must comply with them as a condition of its water rights to operate the Shasta Reservoir, including for temperature management purposes. And the State Board's authority to

³ A detailed description of the history and nature of the SRS Contracts is set forth in the May 11, 2020 letter attached hereto as **Attachment 1**.

require Reclamation to operate the CVP for such purposes pursuant to Order WR 90-5 necessarily depends on Reclamation's prior satisfaction the SRS Contractors' senior water rights by performing the SRS Contracts. *See e.g., Meridian, Ltd. v. San Francisco* (1939) 13 Cal. 2d 424, 450 ("It should be the first concern of . . . the [State Board] in the exercise of its powers . . . to recognize and protect the interests of those who have prior and paramount rights to the use of the waters of the stream."). In other words, the State Board has no authority to order Reclamation to meet water quality objectives under Order WR 90-5 in a way that would require Reclamation to violate its obligations under the SRS Contracts and thereby violate its water rights permits. *See* D-990 at 80, 85-86.

The Court of Appeal's recent decision in *Stanford Vina Ranch Irr. Dist. v. State of California* (2020) 50 Cal. App. 5th 976, did not expand the State Board's authority under state law to ignore water right priorities here. Although the *Stanford Vina* court upheld emergency regulations that curtailed senior water rights on Deer Creek for the protection of fish and wildlife, it did not do so in a way that violated the rule of priority by permitting junior water rights holders to divert and store water at the expense of more senior priority rights holders. Rather, the regulations at issue in *Stanford Vina* curtailed the rights of "all water rights holders in the Deer Creek watershed" to meet minimum flow requirements. *Stanford Vina Ranch, supra*, 50 Cal. App. 5th at 991. Here, in contrast, NRDC effectively asks the State Board to curtail more senior priority water rights holders on the Sacramento River so that a more junior diverter can use its water rights to meet downstream water quality objectives. No court has ever held that the State Board has authority to do so. *See Meridian, Ltd., supra*, 13 Cal. 2d at p. 450.

Finally, it bears emphasis that the SRS Contractors have committed to meet and confer with Reclamation, NMFS, and other appropriate agencies to determine if there is any role they can play in connection with Reclamation's operational decision-making for Shasta Reservoir during challenging water years like this one. *See* National Marine Fisheries Service, *Biological Opinion on Long-term Operation of the Central Valley Project and the State Water Project* at p. 8 (Oct. 21, 2019). In addition to this process that the SRS Contractors are actively engaging in this year, the SRS Contractors remain committed to active involvement in the SRTTG and its consideration of all feasible actions consistent with the SRS Contracts' terms that may promote adequate water temperature management in the upper Sacramento River throughout the temperature management season. The State Board should thus decline the invitation to exceed its authority under state law, and allow the many agencies to work through these processes to develop an effective TMP this year, with the help of constructive stakeholders like the SRS Contractors.

Sincerely,



Andrew M. Hitchings
SOMACH SIMMONS & DUNN
ahitchings@somachlaw.com



Meredith E. Nikkel
DOWNEY BRAND LLP
mnikkel@downeybrand.com

MEN

cc: Dorene D'Adamo (Dorene.Dadamo@waterboards.ca.gov)
Tam Doduc (Tam.Doduc@waterboards.ca.gov)
Sean Maguire (Sean.Maguire@waterboards.ca.gov)
Laurel Firestone (Laurel.Firestone@waterboards.ca.gov)
Eileen Sobeck (Eileen.Sobeck@Waterboards.ca.gov)
Michael Lauffer (Michael.Lauffer@waterboards.ca.gov)
Jared Blumenfeld (SectyBlumenfeld@calepa.ca.gov)
Wade Crowfoot (Wade.Crowfoot@resources.ca.gov)
Karen Ross (KB.R@cdfa.ca.gov)
Ernest Conant (econant@usbr.gov)
Kristin White (knwhite@usbr.gov)
Kevin Tanaka (Kevin.Tanaka@sol.doi.gov)
Thad Bettner (tbettner@gcid.net)
Lewis Bair (lbair@rd108.org)
Roger Cornwell (rcornwell@RiverGardenFarms.com)
Brittany Johnson (bjohnson@somachlaw.com)
Kevin O'Brien (firm)
Sam Bivins (firm)

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ATTACHMENT 1

DOWNEY BRAND

621 Capitol Mall, 18th Floor
Sacramento, CA 95814
916.444.1000 Main
downeybrand.com



500 Capitol Mall, Suite 1000, Sacramento, CA 95814
Office: 916-446-7979 Fax: 916-446-8199
somachlaw.com

May 11, 2020

VIA E-MAIL ONLY:

Bay-Delta@waterboards.ca.gov

Ms. Diane Riddle
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
Diane.riddle@waterboards.ca.gov

Re: Comment Letter – Sacramento River Temperature Management Plan

Dear Ms. Riddle:

In accordance with the State Water Resources Control Board's (State Board) April 27, 2020 notice of availability for public comments on the U.S. Bureau of Reclamation's (Reclamation) draft Sacramento River temperature management plan, and on behalf of the listed Sacramento River Settlement Contractors (SRS Contractors)¹, undersigned counsel submit the following comments and materials for the State Board's consideration as it evaluates Reclamation's temperature management plan (TMP) for the 2020 temperature management season. In sum, the SRS Contractors are extremely troubled by the characterization of Reclamation's obligations under the Sacramento River Settlement Contracts (SRS Contracts) in recent letters to Reclamation regarding the TMP. Moreover, the position taken in these recent letters appear to far exceed the State Board's authority under Water Right Order WR 90-5. The SRS Contractors request that the State Board withhold any objection to Reclamation's TMP and refrain from attempts to impose conditions on Reclamation that violate obligations under the SRS Contracts.

¹ Anderson-Cottonwood Irrigation District; Beverly F. Andreotti, et al.; Carter Mutual Water Company; City of Redding; Conaway Preservation Group, LLC; David and Alice teVelde Family Trust; Glenn-Colusa Irrigation District; Henry D. Richter, et al.; Howald Farms, Inc.; Knights Landing Investors, LLC; Maxwell Irrigation District; Meridian Farms Water Company; Natomas Central Mutual Water Company; Oji Brothers Farms, Inc.; Oji Family Partnership; Pelger Mutual Water Company; Pelger Road 1700, LLC; Pleasant Grove-Verona Mutual Water Company; Princeton-Codora-Glenn Irrigation District; Provident Irrigation District; Reclamation District 108; Reclamation District No. 1004; River Garden Farms Company; Sutter Mutual Water Company; Tisdale Irrigation and Drainage Company; Windswept Land and Livestock Company.

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I. Reclamation Must Comply with the Terms of the SRS Contracts in Order to Operate the Central Valley Project

A. Background

The April 3, 2020 correspondence from Executive Director of the State Board to Kristin White, Reclamation's Area Operations Manager for the Central Valley Project (CVP) (April 3 Letter), indicated that Reclamation must submit alternative operational scenarios with "different water supply delivery assumptions to provide for improved cold water pool maintenance." Reclamation subsequently explained in its April 17, 2020 letter to the Executive Director (April 17 Letter) that the requested scenarios are inconsistent with Reclamation's "limited discretion regarding such contracts with senior water users and wildlife refuges." In response, the April 29, 2020 correspondence from the Executive Director to Reclamation (April 29 Letter) stated that "evaluation of alternative operational scenarios with different water supply delivery assumptions is not inconsistent with Reclamation's contractual obligations to the settlement contractors or their senior claims of right, provided that none of the operational scenarios evaluated involve a reduction in deliveries of natural flows to which senior water right holders may be entitled." This statement reflects a fundamental misunderstanding of and grossly mischaracterizes Reclamation's contractual obligations to the SRS Contractors. It also ignores the critical role of the SRS Contracts in CVP operations.

The SRS Contractors have a unique history and nature.² Prior to the construction of the CVP, the SRS Contractors (or their predecessors-in-interest) were lawfully diverting water from the Sacramento River. In contrast to a CVP water-service contractor, whose contractual entitlements to water delivery derive from the water rights obtained by Reclamation to build the CVP and store, convey, and deliver water with CVP facilities, the SRS Contractors' rights to divert water from the Sacramento River arise out of their own pre-existing vested water rights, established pursuant to state law, and which are independent of Reclamation's construction and operation of CVP facilities. The SRS Contractors divert water at their own diversion facilities located on the Sacramento River and do not rely on Reclamation facilities in order to divert water.

In entering into the original SRS Contracts in 1964 (which were renewed in 2005), the United States resolved the Sacramento Valley water users' protests against Reclamation's water right applications for the CVP, thereby avoiding litigation, including the potential for a lengthy and expensive adjudication of the CVP and other water rights in the Sacramento

² Attached as Attachment 1 is the Declaration of Marc E. Van Camp in Support of Glenn-Colusa Irrigation District, et al.'s Supplemental Memorandum in Support of Motion for Summary Adjudication of Plaintiffs' Second Claim (Jan. 30, 2009), filed in *Nat. Res. Def. Council v. Kempthorne*, E.D. Cal. Case No. 1:05:cv:01207-LJO-EPG (2009 Van Camp Declaration). Therein, Mr. Van Camp testified in detail on the nature and extent of the senior water rights of identified SRS Contracts and explained the history of the execution of the SRS Contracts.

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Valley watershed. Thus, the SRS Contracts truly represent a “settlement” whereby the senior water right holders dismissed their protests to the United States’ water right applications in consideration for Reclamation’s contractual commitment to provide a defined volume of water.

B. State Board Decision 990

In 1961, the State Board issued its Decision 990 (D-990) granting Reclamation’s water rights applications subject to certain conditions. In D-990, the State Board relied on information generated in a cooperative study commonly referred to as the “1956 Cooperative Studies,” which was a mutual effort among Reclamation, the State of California, and Sacramento Valley water users that involved years of water rights research and technical studies to determine the amount of water available under existing water rights.

The 1956 Cooperative Studies and related information demonstrated that the combined water rights of the SRS Contractors authorized the diversion of greater quantities of water than the amounts ultimately provided for by the SRS Contracts. The 1956 Cooperative Studies also showed that Reclamation’s operation of the CVP depended on shifting the timing of diversions and limiting the SRS Contractors’ monthly diversions to maximize storage behind Shasta Dam, which could only be accomplished by entering into settlement agreements with the SRS Contractors. D-990, at pp. 28-32; 39-40.

Based on this information and along with the SRS Contractors’ dismissal of their protests, the State Board approved and conditioned Reclamation’s water right permits for diversion of water from the Sacramento River. In granting Reclamation water rights on the Sacramento River, the State Board expressly subordinated those rights to vested senior rights and required the execution of settlement agreements with those senior water rights holders.³ D-990 and the corresponding state water rights permits issued to Reclamation, require Reclamation to honor the SRS Contractors’ senior water rights. Reclamation complied with these legal mandates by originally entering into the SRS Contracts starting in 1964, and by renewing the SRS Contracts in 2005.

³ The water rights were issued “subject to vested rights” and subject to D-990, including its Condition 23: “The export of stored water under permits issued pursuant to Applications 5626, 9363 and 9364 outside the watershed of Sacramento River Basin or beyond the Sacramento-San Joaquin Delta shall be subject to the reasonable beneficial use of said stored water within said watershed and Delta, both present and prospective, provided, however, that agreements for the use of said stored water are entered into with the United States prior to March 1, 1964, by parties currently diverting water from Sacramento River and/or Sacramento-San Joaquin Delta and prior to March 1, 1971, by parties not currently using water from Sacramento River and/or Sacramento-San Joaquin Delta.” D-990, at pp. 80; 85-86.

C. Key Provisions in the SRS Contracts

Specifically, subject to the conditions in each contract, an SRS Contractor is “authorized to divert from its Source of Supply at the locations shown in Exhibit A, for beneficial use within the area delineated on Exhibit B . . . the Contract Total in Exhibit A . . . in accordance with the monthly operating schedule” submitted by the SRS Contractor.⁴ Before April 1 in each Water Year, and as revisions are needed, a Contractor submits a written schedule, “indicating the Contract Total to be diverted by the Contractor during each month under this Settlement Contract. The United States *shall* furnish water to the Contractor in accordance with the monthly operating schedule or any revisions thereof.”⁵

The Contract Total is defined as the sum of Base Supply and Project Water and is set forth in each Exhibit A.⁶ Base Supply is the quantity of water which may be diverted by SRS Contractors between April and October of each year without payment to the United States.⁷ Project Water is defined as “all Surface Water diverted or scheduled to be diverted each month during the period April through October of each Year by the Contractor from [the Sacramento River] which is in excess of the Base Supply.”⁸ The Contractor agrees to pay for Project Water as uniquely defined under the SRS Contracts and as provided for in Article 8.⁹

The Contract Total may be reduced only in a Critical Year, and then only by 25 percent.¹⁰ The SRS Contracts define a Critical Year as one in which either:

- (1) The forecasted full natural inflow to Shasta Lake for the current Water Year . . . is equal to or less than 3.2 million acre-feet; or
- (2) The total accumulated actual deficiencies below 4 million acre-feet in the immediately prior Water Year . . . together with the forecasted efficiency for the current Water Year, exceed 800,000 acre-feet.¹¹

There are no other provisions that affect the quantity of water in the SRS Contracts, other than the agreement that the Contract Total may be reduced to 75 percent in a Critical Year.¹²

⁴ Glenn-Colusa Irrigation District Contract No. 14-06-200-855A-R-1 (GCID Contract), art. 3(a), included as Attachment 2.

⁵ GCID Contract, art. 3(c) (emphasis added).

⁶ GCID Contract, art. 1(e).

⁷ GCID Contract, art. 1(b).

⁸ GCID Contract, art. 1(n).

⁹ GCID Contract, art. 8(a).

¹⁰ GCID Contract, art. 5(a).

¹¹ GCID Contract, art. 1(f).

¹² See *Nat. Res. Def. Council v. Norton* (E.D. Cal. 2017) 236 F. Supp. 3d 1198, 1224-1226.

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Notably, the SRS Contracts expressly provide that they “shall constitute the full agreement as between the United States and the Contractor as to the quantities of water and the allocation thereof between Base Supply and Project Water which may be diverted by the Contractor from its Source of Supply for beneficial use on the land shown on Exhibit B from April 1 through October 31, which said diversion, use, and allocation shall not be disturbed so long as the Contractor shall fulfill all of its obligations hereunder.”¹³

As is apparent from a review of the contractual terms, any interpretation that Reclamation may reduce releases to satisfy diversions by the SRS Contractors so long as there is no “reduction in deliveries of natural flows to which senior water right holders may be entitled”¹⁴ is deeply flawed and in contravention of Reclamation’s obligations under the SRS Contracts. The contractual rights of the SRS Contractors to divert and use Base Supply and Project Water are not limited by the quantity of natural flow existing in the Sacramento River system in any particular year. Under the terms of the SRS Contracts, the SRS Contractors receive the benefit of water stored in Shasta Reservoir by Reclamation pursuant to its appropriative water right permits. In order for Reclamation to exercise its water rights to store water in Shasta Dam and operate the entire CVP without violating the senior rights held by SRS Contractors, Reclamation must comply with the terms of those contracts.¹⁵ The diversion schedules set forth in the SRS Contracts enable Reclamation to store water in spring months which, in the absence of the SRS Contracts, Reclamation would not be able to store without causing injury to the senior water rights of the SRS Contractors.¹⁶ This stored water is then utilized for various CVP project purposes (including irrigation use by SRS Contractors) over the summer and fall months. Without the agreed upon diversion schedules and releases provided for under the SRS Contracts, the Sacramento River would be subject to the decades-long adjudication that parties have avoided since the idea of the CVP first originated.

Another error implicit in the statement in the April 29 Letter is that diversions under the SRS Contracts could be reduced before allocations to other CVP contractors are reduced.

¹³ GCID Contract, art. 9(a)(1).

¹⁴ See April 29 Letter at p. 2.

¹⁵ Several court decisions in litigation related to the operation of the CVP under the Endangered Species Act recognize the importance of the SRS Contracts in the legal regime controlling the operation of the CVP. See, e.g., *NRDC v. Kempthorne* (E.D. Cal. June 15, 2015, No. 1:05-cv-01207-LJO-GSA, 2015 U.S. Dist. LEXIS 78036, at *35) (“Here, any party that assumes vacatur would be the automatic result in this case ignores the 800-pound gorilla in the room. As this Court has previously explained, non-renewal of the Settlement Contracts could result in potentially catastrophic consequences for California’s entire water delivery system. This is because the Settlement Contractors hold water rights that pre-existed the creation of the CVP. While the exact priority of these rights vis-à-vis the Bureau’s rights to divert water for the CVP has never been conclusively determined, Congress has expressed intent that the Bureau avoid the ‘monstrous lawsuit . . . that would embroil the CVP in litigation for decades,’ should the matter ever be adjudicated.”) (citations omitted).

¹⁶ See Exhibits D-1 to D-28 to the 2009 Van Camp Declaration showing the difference between the quantity and timing of the SRS Contractors’ historical diversions and the contract amounts.

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This is a misinterpretation of the water rights priority of various CVP contractors, and the area-of-origin conditions in Reclamation's water right permits and licenses. In addition, Reclamation interprets its contractual obligations to require that Project Water diversions made available under the SRS Contracts have priority over the delivery of water pursuant to other CVP water service contracts when making allocation or operation decisions.¹⁷

II. Order WR 90-5 Provides Limited Authority for Implementation of an Existing Water Quality Objective

A. The Terms of Order WR 90-5 Do Not Authorize the Division of Water Rights to Place Onerous Demands on Reclamation's Temperature Management Planning

Order WR 90-5 provides that Reclamation "shall operate Keswick Dam, Shasta Dam, and the Spring Creek Power Plant to meet a daily average water temperature of 56°F in the Sacramento River at Red Bluff Diversion Dam during periods when higher temperatures will be detrimental to the fishery." It then provides:

During periods when (a) daily average temperatures higher than 56°F will be detrimental to the fishery, and (b) factors beyond the reasonable control of Permittee prevent Permittee from maintaining 56°F at the Red Bluff Diversion Dam, [Reclamation] *shall*, after consultation with the California Department of Fish and Game, the U. S. Fish and Wildlife Service, the National Marine Fisheries Service, and the U. S. Western Area Power Administration, designate a location upstream of the Red Bluff Diversion Dam where Permittee will meet a daily average water temperature of 56°F.¹⁸

Order WR 90-5 provides examples of factors "considered to be beyond the reasonable control" of Reclamation. When the conditions exist, and Reclamation must move the temperature compliance location upstream, Reclamation must "immediately report any change in the location where it will meet the temperature requirement to the Chief of the Division of Water Rights, and shall file an operation plan showing [Reclamation's] strategy to meet the temperature requirement at the new location."¹⁹ Reclamation must then meet the temperature requirement at the new location "unless within 10 days after submission of the report the Chief of Division of Water Rights objects to the change."²⁰ Order WR 90-5 does not provide authority for the Chief of the Division of Water Rights to do more than object and

¹⁷ See Letter from Donald R. Glaser, Regional Director, Reclamation, to Donald Bransford, President, Glenn-Colusa Irrigation District re: Sacramento River Settlement Contractors' Withdrawal from Reclamation's Long-Term North South Water Transfer Program (Nov. 8, 2011), attached as Attachment 3.

¹⁸ Order WR 90-5, at pp. 54-55 (emphasis added).

¹⁹ Order WR 90-5, at p. 55.

²⁰ *Ibid.*

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certainly does not provide a basis to require the multitude of actions demanded by the April 3 and April 29 Letters.

Rather, in adopting Order WR 90-5, the State Board also recognized the “need for flexibility in the farthest location where [Reclamation] will maintain 56°F.”²¹ Thus, it adopted a permit term with a reporting requirement and a requirement that Reclamation consult with the fishery agencies before moving the compliance location.²² Under this permit term, Reclamation can move the compliance location *first* and without the process that State Board staff is attempting to impose.²³

B. Order WR 90-5 Does Not Alone Allow Imposition of a Different Water Quality Objective

The governing basin plan for the upper Sacramento River is the *Water Quality Control Plan for the Sacramento and San Joaquin River Basins* (5th ed. Rev. May 2018) (Basin Plan). The Basin Plan contains the applicable water quality objective for temperature for the Sacramento River from Shasta Dam to the I Street Bridge. For this reach of the Sacramento River, the Basin Plan provides that “the temperature shall not be elevated above 56°F in the reach from Keswick Dam to Hamilton City nor above 68°F in the reach from Hamilton City to the I Street Bridge during periods when temperature increases will be detrimental to the fishery.”²⁴ Order WR 90-5 enforces the water quality objective in the Basin Plan pursuant to Water Code section 1258.²⁵

The April 3 and April 29 Letters request multiple modeling scenarios that target 53.5°F at different compliance locations in the upper Sacramento River. However, nothing in the Basin Plan or Order WR 90-5 requires a water quality objective lower than a daily average temperature of 56°F from Keswick Dam to Hamilton City. In allowing Reclamation to move the compliance location upstream from Red Bluff Diversion Dam, there is no question that Order WR 90-5 requires compliance with a daily average temperature of 56°F at the upstream compliance location.²⁶ Although Reclamation has committed to a tiered strategy to achieve 53.5°F at Clear Creek in certain years in furtherance of its obligations under the Endangered

²¹ *Id.* at p. 19.

²² *Ibid.*

²³ The process and authority outlined in Order WR 90-5 is distinguishable from the urgency change procedures and authorities under Water Code section 1435. Unlike the drought conditions of 2014 and 2015, Reclamation has not filed a temporary urgency change petition and the State Board is not being asked to make the necessary findings under the urgency change procedures.

²⁴ Basin Plan, § III-8.00.

²⁵ Order WR 90-5, at p. 6.

²⁶ *E.g.*, Order WR 90-5, at p. 19 (“Because of the need for flexibility in the farthest location where the Bureau will maintain 56°F”; *id.* at p. 54; “During periods when (a) daily average temperatures higher than 56°F will be detrimental to the fishery”).

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Species Act, that commitment does not translate into a new water quality objective under state law. To achieve such a result, the State Board would have to proceed with a quasi-legislative administrative process and comply with Water Code section 13241.²⁷ However, Order WR 90-5 alone does not provide that Reclamation may be required to meet 53.5°F at an upstream compliance location without further compliance under the Porter-Cologne Water Quality Control Act.

C. The State Board Can Only Take Enforcement Action Against Reclamation After Appropriate Notice and a Hearing

In addition to Water Code section 1258, the State Board issued Order WR 90-5 under Water Code section 275 and the Public Trust Doctrine.²⁸ The April 3 and April 29 Letters, however, do not purport to be enforcing these provisions. Of course, the existing mechanisms for the State Board to enforce California Constitution Article X, section 2, Water Code section 275, and the Public Trust Doctrine require the State Board to provide notice and an opportunity for a hearing before it could take any official action.²⁹ Only the Board or Administrative Hearing Office (AHO) may conduct such a hearing, and only the Board or the AHO can issue findings or an order.³⁰ Neither the Executive Director nor the Deputy Director of Water Rights have been delegated this authority.³¹ These individuals also have not been delegated the authority to adopt state policy for water quality control or approve water quality control plans of plan amendments.³² In this context, State Board staff are limited to the provisions of Order WR 90-5, and the current approach under the April 3 and April 29 Letters has vastly departed from those terms. For example, the Deputy Director and the Executive

²⁷ “Basin planning, on the other hand, is a quasi-legislative process that is well-suited for water quality standards development.” See State Board WQO 2002-0014, at p. 13. In a basin-planning process where the State Board considers the reasonable protection of beneficial uses and the conditions that can be reasonably achieved, with full participation from parties like the SRS Contractors, the State Board would investigate and study which species are present at which times in the river and how they may be reasonably protected. See generally Declaration of Meredith E. Nikkel in Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction and its exhibits filed in *Pacific Coast Federation of Fishermen’s Associations, et al. v. Ross, et al.*, Case No. 1:20-cv-00431-DAD-EPG (E.D. Cal. filed May 8, 2020) (Nikkel Declaration), included herein as Attachment 4.

²⁸ Order WR 90-5, at pp. 6-7.

²⁹ See Wat. Code, §§ 1410, 1675, 1831; Cal. Code Reg., tit. 23, §§ 820-823, 845(c), 855(b) (regarding SWRCB enforcement powers and exercise thereof); see also Wat. Code, §§ 1410.1, 1675.1, 1834; Cal. Code Reg., tit. 23, § 857(b) (regarding notice procedures for exercise of SWRCB enforcement powers).

³⁰ See Wat. Code, § 1112 (regarding authority of AHO and the Board to preside over hearings); *id.*, § 1114 (regarding authority of AHO and Board to issue findings and adopt orders); see also Cal. Code Reg., tit. 23, § 648 et al. (regarding rules for adjudicative proceedings).

³¹ See State Board Resolution Nos. 2012-0061 and 2012-0029.

³² *Ibid.*

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Director lack the authority to assert an objection to the draft TMP where such an objection is conditioned on Reclamation's refusal to disregard the rights of the SRS Contractors.³³

III. Federal Court Actions Challenging Sacramento River Temperature Management

As the State Board is aware, two federal court actions are currently pending where the plaintiffs in those actions are challenging the validity of the National Marine Fisheries Service's 2019 Biological Opinion for the Long-Term Operations of the CVP and State Water Project (2019 NMFS BiOp).³⁴ These actions include claims and defenses that implicate the efficacy of temperature management conditions under the 2019 NMFS BiOp for the upper Sacramento River, and Reclamation's operations to meet those conditions. Multiple groups, including the SRS Contractors, have intervened in those actions, and the factual and legal issues are hotly contested particularly as to whether any preliminary injunctive relief may be warranted in the cases. In this regard, the SRS Contractors recently filed an opposition to the plaintiffs' requests for injunctive relief in the *PCFFA, et al. v. Ross, et al.* case. The SRS Contractors' filings in that case highlight the SRS Contractors' positions on the temperature management issues and provide relevant evidence as to why Reclamation's TMP and operational approach for 2020 will be protective of the salmonid species in the upper Sacramento River this year.³⁵

IV. Conclusion

The SRS Contractors support Reclamation's TMP as submitted to the State Board on April 30, 2020, and Reclamation's process and approach to implement the Plan for 2020 operations. In addition, the SRS Contractors join in and incorporate herein by reference the comments submitted by Glenn-Colusa Irrigation District (GCID) and the Northern California Water Association (NCWA) on these matters under separate cover. In particular, the SRS Contractors encourage the State Board to support the significant ongoing collaborative

³³ Indeed, basic principles of due process require that a party be entitled to notice and an opportunity to be heard prior to the deprivation of substantial rights. See, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601, 605-606.

³⁴ The SRS Contractors were actively engaged in the administrative process prior to the issuance of the 2019 Biological Opinion by the National Marine Fisheries Service, and their comments submitted on June 12, 2019 during that process are included as Attachment 5.

³⁵ See exhibits attached to the Nikkel Declaration and Sacramento River Intervenors' Opposition to Plaintiffs' Motion for Preliminary Injunction filed in *Pacific Coast Federation of Fishermen's Associations, et al. v. Ross, et al.*, Case No. 1:20-cv-00431-DAD-EPG (E.D. Cal. filed Mar. 31, 2020), and supporting declaration, included as Attachment 6 to this letter.

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efforts as described in these letters to reasonably protect the multi-beneficial uses of water in the Sacramento Valley. We appreciate the State Board's consideration of these comments, and please do not hesitate to contact the undersigned if you have any questions.

Sincerely,



Andrew M. Hitchings
SOMACH SIMMONS & DUNN
ahitchings@somachlaw.com



Meredith E. Nikkel
DOWNEY BRAND LLP
mnikkel@downeybrand.com

Attachments

cc: Eileen Sobeck
Michael Lauffer
Kristin White
Kevin Tanaka
Roger Cornwell
Thad Bettner
Lewis Bair
David Guy

AMH/MEN:cr