

May 10, 1996

BY FACSIMILE AND REGULAR MAIL

MAY 14 1996

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Thomas Hurlbutt
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Robert Smith
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Santa Clara Water District

Re: Your proposal for implementation of the Bay-Delta Water Quality Control Plan as it pertains to San Joaquin River flows

The three environmental signatories to the delta accord tender this response to your letter of May 3 to members of the Environmental Water Caucus. Others may reply separately to address other points.

We understand the following from your letter, and request your confirmation that we understand you correctly:

- ▶ You "are not proposing a change in the Vernalis flow requirement in the WQCP" and the doubts you profess about the underlying science you will address in the triennial review process.
- ▶ At the same time, we understand that you wish to propose only a partial implementation of that Vernalis flow requirement, ostensibly to shift some of the burden of compliance from the CVP and its contractors to the other San Joaquin water users and the State Water Project.

One interpretation is that you intend to ask the State Board to adopt your settlement proposal, as far as it goes, as part of an implementation program, but that you recognize and

acknowledge that the Board will have to supplement it with additional water rights requirements in order to fully implement the WQCP. We are unclear as to whether you quarrel with the proposition that the State Board must fully implement the WQCP to the extent of its powers and authority. We are also unclear as to whether you recognize that, if necessary to fully implement the Vernalis flow requirement of the WQCP, the State Board must go beyond the interim arrangement in the delta accord which relied upon compliance by the USBR utilizing New Melones storage.

Your agreement with this central proposition, which seems to us beyond serious cavil, would go a long way toward resolving the current dispute. The point is rather obvious: the accord committed the parties to recommend a consensus-based set of water quality standards to the State Board for promulgation. That has been done, and the State Board has now adopted, and EPA has approved, a WQCP. It is these standards that have the force and effect of law and that are incumbent upon the State Board to now implement through the exercise of its water rights and other authorities. In short, the accord's limitation on compliance with the Vernalis flow requirement does not apply to the water rights proceeding to which your proposal is addressed. If you agree with this proposition, we see no insurmountable impediment to a consensus involving all of the parties on partial implementation measures for the San Joaquin. If we disagree on this fundamental legal issue, we see no recourse but to seek resolution before the State Board and the reviewing courts. That would be most unfortunate. The repercussions for the CalFed process are obvious.

If we can agree that the State Board must adopt measures to implement the residual flow requirements on the San Joaquin, then we can turn to a more constructive dialogue on how that should be accomplished. We hope that that is the meaning of your point that "it is important to recognize that the proposed program is not intended to preclude other actions to improve fisheries and habitat in the San Joaquin River watershed, including additional purchases of water on a willing-seller basis and other appropriate action". Indeed, we are very open to discussing environmental water purchases¹ as a strategy for fully satisfying the Vernalis flow requirements, including the important issues regarding who would pay for the purchases of compliance water. We would be very interested in hearing your concept on that matter. It may not be realistic to assume that these costs will be absorbed by the CVP restoration fund or the public fisc. The first may not comport with emerging priorities, the second may not comport with political realities. Of course, in default of a consensus on a full implementation strategy for the San Joaquin, that matter must be determined by the State Board in its water right order.

Your letter offers dismissal of the SJTA litigation as an inducement. While that would be preferable, we regard the litigation as a trivial risk and minor annoyance. It is almost certainly a loser, and absent a preliminary injunction--a very remote possibility--at best, it will be a side show while the water rights proceeding goes on unaffected. History suggests that final resolution will

¹ NHI has concrete suggestions on how this might be done, including where the water may be found.

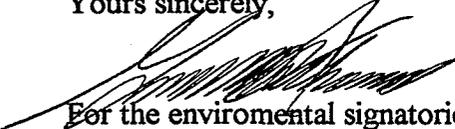
take the better part of a decade, by which time the current WQCP will be superseded anyway. The real pertinence of the litigation to our dialogue is its opportunity costs. If half of what the petitioners are spending on lawyers were spent instead on investigating workable solutions to meeting the SJ environmental water needs, both the environment and your customers would be better off. Indeed, the only losers would be your law firms.

If you affirm our understanding of the substance of your letter, and if we do not have an irreconcilable legal dispute, we would suggest as a next step the convening of a three-way retreat to re-establish productive dialogue and prevent the current game of "chicken" from spinning out of control.

Finally, in the interest of keeping the record straight, we found your interpretations of the delta accord rather disingenuous in that several positions in your letter are contradicted by earlier statements from your agencies in court papers and elsewhere. Should you desire the particulars, we will be happy to present you with the "smoking guns". However, we would prefer to move beyond disputes over the meaning of the accord to something more constructive. Specifically, we wish to explore whether you and we can agree on the proposition that the SWRCB must implement the Vernalis flow standards in its WQCP and whether we can get down to business on the options for full implementation.

The courtesy of a prompt reply would be greatly appreciated.

Yours sincerely,



For the environmental signatories of the delta accord:

Thomas J. Graff and David Yardas for the Environmental Defense Fund
Gary Bobker for the Bay Institute
Gregory A. Thomas for the Natural Heritage Institute

cc: Hon. Diane Feinstein
Hon. Barbara Boxer
Hon. George Miller
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Carol Browner, Administrator, EPA
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