



## California Sportfishing Protection Alliance

*“An Advocate for Fisheries, Habitat and Water Quality”*

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February 23, 2010

Ms. Katherine Mrowka  
Chief, Inland Streams Unit  
Division of Water Rights  
P.O. Box 2000  
Sacramento, CA 95814  
(via e-mail and first class mail)

Re: Response to KDM: 5627 inquiring whether CSPA can dismiss its protest of time extension petitions of the Bureau of Reclamation for Applications 5625, 5626, 5627, 5628, 9363, 9364, 9365, 9366, 9367, 9368, 13370, 13371, 13372, 14662, 14858A, 14858B, 14859, 15374, 15375, 15376, 15764, 16767, 16768, 17374, 17375, 17376, 18115, 19303, 19304, 21542, 22316, and 27319

Dear Ms. Mrowka:

I received, on behalf of the California Sportfishing Protection Alliance, your letter (KDM:5627) of January 25, 2010, regarding CSPA's protest of the Bureau of Reclamation's thirty-two petitions for extension of time (Applications 5625 et al).

You ask whether the Bureau's January 13, 2010 response to the State Board (hereinafter, "Bureau letter re CSPA's protest") concerning CSPA's protest addressed our concerns. It did not.

You also ask us to advise you of protest issues that remain unresolved. This letter will address those issues. The short answer is that all of the issues we raised in our protest remain unresolved.

### **Protest issues disallowed by the Board in its December 14, 2009 acceptance of CSPA's protest**

The State Board, in accepting CSPA's protest in a letter to CSPA dated December 14, 2009, stated that five issues "related to ongoing project operations ... are not subject to

review in the context of the time extension petitions.”<sup>1</sup> For the record, we disagree with the characterization by the Board that this relates only to ongoing operations.

Among other reasons, CSPA believes that, given the history of the Bureau’s use of its permits, and the Bureau’s unrepentant attitude about its operations, it is almost certain that additional water put to use under the Bureau’s permits will be put to use unlawfully. This has direct bearing on whether additional use of water should be allowed under permits for extension of time.

### **Accounting for water used, description of proposed use, and CEQA**

CSPA respectfully reminds the Board that it is the Bureau, and not CSPA, that has petitioned to extend the time on 32 water rights permits. The Bureau therefore has the minimum obligation to describe how much water it has used under each permit, how much it proposes to use in the future under each permit, and why it is reasonable to think that it can lawfully use more water under each permit.

In its response to CSPA, the Bureau states: “Any request for additional permit-specific diversion information, that is, water diversion and use information provided in Reclamation’s Permittee Reports for CVP water rights, is not practical and is inconsistent with the nature of integrated CVP operation including the very purpose of the consolidated purposes and places-of use approved by the State Water board, with the Division of Water Rights’ and State Water Board’s understanding of CVP operations, and with agreed-upon accounting procedures for CVP operations.” (p. 2)

Water rights petitions, including petitions for extension of time, are not simply normal business. They are subject to evaluation as being in the public interest. In California, that evaluation takes place under the California Environmental Quality Act. In order to comply with CEQA, a proponent of a project has to describe the project. The Bureau’s reply to CSPA (and to the public) in this regard is analogous to showing a financial auditor a room full of shoe boxes or file cabinets and saying it’s all in there somewhere. It is not simply a matter of “inconvenience in reviewing public records.” (Ibid). It is rather a matter of the absence of a basic description of what has been done and what one plans to do, and describing it in a form that can be reasonably understood by affected or interested parties, including the public at large.

While places and purposes of use of the CVP have been consolidated, the sources of water for each permit have not. One pertinent question in considering these petitions for extension of time is whether the Bureau can use the water. Another is whether additional water can be used from each or any source while still meeting operational requirements and protecting public trust resources. In some measure, the Board has explicitly recognized this: in a letter to the Bureau regarding these petitions dated December 23, 2009 (KDM:5625), the State Board asks the Bureau “for a list of the operating protocol

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<sup>1</sup> The five issues are: the POD and adverse effects to fisheries; selenium and impaired water quality; failure of the Bureau to comply with D-1641; violation of the Clean Water Act and other laws; and conflict between Bureau operation and the Draft Strategic Plan Update.

that Reclamation uses for operation of each facility.” (p. 2) In the same letter, the State Board also asks the Bureau to identify the operational constraints that affect each of its 32 permits.

The Bureau needs to describe its project. In the absence of such a description, it is inappropriate and premature to suggest that CSPA’s protest should be dismissed because “Protestant fails to describe how the diversion and use information actually presented in Reclamation’s Progress Reports by Permittee could not support a finding of good cause to grant the extensions of time.” (Bureau letter re CSPA protest, p. 2).

CSPA, on page 5 of its protest, disputes the Bureau’s contention that “the BDCP EIR/EIS could potentially function as the environmental document for this project.” (See Attachment No. 1 to Environmental Information for Reclamation’s Petitions for Extension of Time, p. 2). In response to the Board concerning CSPA’s protest, the Bureau mischaracterizes its original statement concerning this document and mischaracterizes CSPA’s response.

The Bureau states in response to CSPA’s protest:

In its Petitions, Reclamation suggested that the State Water Board refer to the information to be presented in the Bay Delta Conservation Plan Environmental Impact Report/Environmental Impact Statement (BDCP EIR/EIS), and stated that the need for completion of the BDCP EIR/EIS process as part of the environmental documentation could be necessary for approving the petitions. (Bureau letter re CSPA protest, p.2)

The Bureau did not simply suggest that the Board “refer to the information to be presented.” It suggested, in the first instance, that the BDCP EIR/EIS could be used as the CEQA document for the Bureau’s 32 petitions (as quoted above). CSPA did not suggest that any reference to such a document would be confusing; CSPA stated that use of such a document as **the** CEQA document for these petitions would be “inherently incomplete and confusing.” (CSPA protest, p. 5). It would be incomplete because it would not define the project under CEQA as the extension of time for the 32 petitions. It would be confusing because it would assume a second hypothetical project that has no certainty of going forward, thus confounding the no-project alternative.

The Bureau needs to complete CEQA for its petitions. When it does, CSPA will evaluate the project, the alternatives, the environmental baseline and the impacts, and state additional terms of protest dismissal.

### **Diligence**

The Bureau suggests that it has been diligent because it has built and operated the Central Valley Project. However, the principal features of the CVP were completed decades ago. The permits for the CVP that are addressed by the 32 petitions have long been expired, most for about twenty years. On page 3 of the Bureau letter re CSPA protest, the Bureau

says that it “manages some 9 million acre-feet of water” and that it “annually delivers 7 million acre-feet of water.” Even leaving aside the hydropower permits and the possible redundancies in its (non-disclosed) water accounting, the disconnect between actual use and the additional face value of tens of millions of acre-feet of water authorized under the CVP permits is enormous. There is no reasonable expectation that this gap will be bridged or even substantially closed, in another twenty years, or in two hundred.

The lock-up of water in these CVP permits is a classic case of “cold storage.” Indeed, Reclamation admits that it does not know where it will use the water: “Reclamation envisions that prior to 2030, it may be necessary to request the State Water Board for adjustments in order to conform the authorized CVP places of use to match water use demands anticipated to exist at time of build-out, but that would be met with no changes in permitted diversion quantities, permitted diversion rates, or contract totals.” (Ibid). The request for permit extension is effectively a twenty-year line of credit for all the water in the bank.

The Bureau suggests that it may enter into new contracts that it will need to fulfill. The fact is, the Bureau cannot meet existing contracts, a fact that is notoriously and vociferously decried by its most junior contract holders on the west side of the San Joaquin valley. This is not a simple matter of “uncertainty.” It is, rather, a question of speculation with no substantive basis. It not only perpetuates a system where more water is promised than can be delivered, it proposes to expand it. As stated in CSPA’s protest: “Having paper water on file that vastly exceeds the water available is not in the public interest.”

### **Trinity River Permits**

The Bureau contends, on pages 4 and 5 of its Letter to the Board re CSPA’s protest, that the 2000 Trinity River Record of Decision should not be incorporated into the Bureau’s Trinity River permits. The Bureau states that the ROD contains an adaptive management element that may in the future allow greater diversions from the Trinity system to the CVP than are allowed under the current ROD flow schedule.

However, the scale involved does not pass the laugh test. It is similar to suggesting that a Little League concessionaire needs to have a couple of million dollars in coins and small bills on hand to make change for the sodas that will be purchased after a city tournament. At present, the ROD flow schedule gives the operating rules for the Trinity River. The Board can and should incorporate that flow schedule into licenses. Surely the Board can allow, within the language of a license and subject to Board jurisdiction and approval, any changes that might be mutually agreed on in the Trinity River adaptive management program. It is ridiculous to retain millions of acre-feet in paper water in order to allow adaptive management flexibility.

Moreover, any statement of maximum annual use for purposes of licensing the Trinity permits, which the Bureau has failed to provide, would already likely present direct diversion amounts and possibly diversion to storage amounts that are too high. Maximum

diversions in the past took place in the context in which up to 90% of the water in the Trinity watershed was diverted to the CVP. Average annual diversion under the 2000 Trinity Record of Decision is 53% of the water in the watershed. Should the Board license Trinity River permits, it will need to adjust the licenses to reflect the recognition that previous maximum diversion amounts took place under operating rules that severely degraded the Trinity River's public trust resources.

## **Conclusion**

It is not in the public interest that the Bureau of Reclamation be treated by the State Water Resources Control Board with rules and standards that are different from those applied to other water users.

For the reasons stated above and in the protest, CSPA's protest of the Bureau of Reclamation's petition for extension of time of thirty-two permits has not been resolved and should not be dismissed.

CSPA continues to recommend that the permits in questioned be licensed, subject to reductions needed to protect public trust resources and to comply with applicable law. Should the Board decide to allow any or all of the petitions to go forward, it should require, among the next steps, the Bureau to complete a CEQA analysis which describes its project, including a description of past use under each permit, and the impacts of its project.

Respectfully submitted,



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