

SOUTH DELTA WATER AGENCY

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April 9, 2014

jbowles@watereducation.org

Ms. Jennifer Bowles, Executive Director
Water Education Foundation
717 K Street, Suite 317
Sacramento, California 95814

Re: March 27, 2014, Executive Briefing

Dear Ms. Bowles and Board members:

I am general counsel and manager of the South Delta Water Agency, and have been so since 1994. If you would, please make sure this letter is forwarded to the WEF Board Members as well as the panel participants at the above-referenced Executive Briefing.

Briefly, I heard second-hand that at the above-referenced Executive Briefing, Dr. Jerry Meral made a statement to the effect that the Department of Water Resources was "ready and willing" to enter into a contract with the South Delta Water Agency, but that the SDWA was "not willing or not interested" in such an agreement. Since the truth is so far removed from such a statement to the degree to which it becomes difficult to breathe, I will have to assume Dr. Meral's statement got messed up in the retelling. It is inconceivable that a recent senior staff member of DWR could make such a statement. Again, assuming that he did not say anything so horribly wrong, I will take the opportunity to update the WEF Board Members on the status of the 30+ plus years of attempts by SDWA to get a contract from both DWR and the Bureau of Reclamation.

SDWA was constituted by statute in 1972 for two main purposes, in light of the development of the SWP and ongoing operations of the CVP. Those two purposes were, first, to protect the in-channel water supply and quality for current and future beneficial uses on the lands within the Agency boundaries, and second, to seek a water supply/quality contract with DWR and/or the Bureau. The underlying reasons for these mandates was the acknowledgment that the operations of the projects was and would adversely affect the southern Delta water and those dependent upon them. Incidentally, our area continues to suffer damages each year from the project operations which cause lowered water levels, reverse flows, stagnant areas and poor water quality. After nearly 54 years of project operations, these ongoing impacts and damages remain largely unaddressed.

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When SDWA first approached the Bureau about a contract, the Bureau responded with the usual federal position of "we are the federal government and do not have to deal with you." This instigated legal action which resulted in an appellate court decision which dissuaded the Bureau of its less than friendly attitude and investigations and negotiations began. The investigations resulted in a 1980 Report authored by the Bureau (it at the time being under a different name during the Carter Administration) and SDWA which identified and quantified the impacts referenced above.

Based on this Report, DWR, USBR and SDWA began negotiations, which resulted in a draft contract which included such things as in-channel barriers and additional flows on the San Joaquin river. The participating personnel (from DWR, USBR and SDWA) signed a letter recommending their superiors execute the Contract. In the interim, SDWA undertook an election to authorize an assessment to fund its portion of the actions in the Contract. Sometime in 1995 or 1996, the parties attended one of their regularly scheduled negotiation/technical meetings wherein the Bureau abruptly stated, "We do not have anything else to discuss and we are withdrawing from the process." Again, the typical federal position on nearly all issues. In response to this DWR stated, "Well, since we don't do anything on the San Joaquin River we're out too."

Fortunately, this unexpected refusal to continue did not stop DWR from continuing its yearly efforts at installing, operating and removing the above-referenced barriers, which barriers provide needed mitigation for export pump effects on water levels. The SDWA representatives (Alex Hildebrand and I) returned from the meeting clueless as to what had just happened.

A few years later, Alex and I again tried to restart the discussion/negotiation. The Bureau said "no thanks" and DWR told us "sorry we can't help you."

A few years later, again during the CalFed fiasco, our local State Senator called DWR, SDWA and Central Delta Water Agency into a meeting and the issue of a contract for SDWA was among the topics. Our Senator naively thought that a contract protecting SDWA might allow for other efforts to go forward. The DWR representative attending was Director Lester Snow. Director Snow assured our Senator and us that DWR was of course willing to negotiate and enter into a contract with SDWA, actually acknowledging that it was DWR's obligation to do so under various statutes, including those relating to area of origin.

This resulted in two meetings between myself and various DWR legal, technical and Delta Division personnel. The first meeting included DWR's senior counsel and Chief of the Delta Division. Their position turned out to be the opposite of Director Snow's statements. DWR intoned that it was not possible for it to supply water to the southern Delta via releases from Sacramento River or Sacramento tributary rivers. Thus it could not enter into any agreement for supply. With regard to quality, DWR stated that the operation of the Oroville project and the SWP export pumps had no effect on water quality in the Delta. DWR stressed that it was "willing" to negotiate a contract but it interpreted the conditions as precluding it from doing anything. I made sure I "clarified" their position that they were "willing" but incapable.

Since each of the DWR statements was patently false, I suggested they have one modeler and one Delta Division person meet with me to see if we could agree on certain facts. In a rare moment of confusion, DWR agreed and I had a phone call and email exchange with the two

persons I had requested be involved. With regard to the ability of DWR to provide a supply to southern Delta diverters, we three AGREED that the Delta to a large extent operates like a bathtub with numerous inputs and outflows. If DWR increased Oroville releases but held exports and outflow steady, then that additional inflow could be diverted at virtually any interior Delta place even though the water molecules of the additionally released water may not be the ones diverted. The only caveat to this was that of course, depending on where the additional diversion occurred, there could be localized effects due to changes in channel flow or elevation. However, since the SDWA "supply" was not to increase any diversions but rather to cover existing diversions, even this notion of localized effects was moot.

We regard to the DWR impacts on southern Delta water quality, we found it was more difficult to reach any agreement. The DWR representatives understandably did not want to stray too far from the party line (my assumption, not their statements) and end up admitting to something that could have serious liability problems. Suffice to say that both CVP and SWP export pumps alter flows, lower water levels, cause and exacerbate stagnant zones and cause south valley drainage that yearly adds hundreds of thousands of tons of salt to the San Joaquin River, thus providing the foreign source of the River's horrible pollution problem. These facts are indisputable.

Our small "committee's" finding were forwarded by me in an email/letter to the larger group. In that and subsequent emails I repeatedly asked DWR to provide me with a draft contract covering those areas it thought we could resolve and listing those it thought we could not. The quality/salinity issue was of course a very difficult one and remains so today. However, the supply issue was and remains a very simple one. At first I thought DWR was struggling with how to add a new "SWP Contractor" in that the issue of paying towards the past forty years of capital costs appeared difficult. Recognizing this issue in writing, I also provided DWR with my arguments as to how other obligations of the project to both comply with statutory directives and provide mitigation would decrease any proposed payment for water supply.

As one might expect, DWR ceased any responses, and simply let the matter fade away (in their minds). I never received a draft contract, I never received a discussion about which issues would be agreeable and which would not. I never received any comments about pricing or arguments regarding pricing. DWR simply changed focus.

A few years late again and we were in the midst of the BDCP process. At some public meeting I asked Dr. Meral why DWR would not negotiate a contract with SDWA. He of course stated they would and agreed to meet with me. The meeting was set up at my office in Stockton. Invited were Dr. Meral and a senior staff counsel of DWR, though counsel may now be retired and working as a legal contractor. The day of the meeting I found out that also attending, but not invited were representatives of export contractors. I did not object to their attendance.

At this point I had come up with an extremely clever idea, if I do say so myself. You see, the projects operate the Delta by measuring reservoir releases, river flows and exports. From these data, they calculate outflow because a measuring device would be near useless given the ever changing channel morphology and tidal actions. One cannot accurately measure net outflow, even though we have specific outflow standards. As part of this calculation, DWR uses estimated interior Delta losses including evaporation and evapo-transpiration. This interior Delta

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consumptive use data is of course necessary in order to know all (or as many as possible) variables, which allows for Delta operations to at least be close if not correct.

Given this current and perennial treatment of in-Delta use of course meant that since the projects were ALREADY taking in-Delta diversion into consideration, a supply contract with SDWA would have no effect on project operations. They could give SDWA a contract and nothing would change; not releases, not storage, not exports; nothing! This is of course why I thought my idea was so clever. Clever stupid.

When the uninvited export representatives at the meeting finally understood my proposal, I detected either burning hatred or some high degree of abject fear. We will probably never know which. Dr. Meral agreed we should begin negotiating the contract, and that we should address the issue of the ability to supply the southern Delta with Sacramento River inflow. I asked him if we could use the modeler previously involved in these discussions and he readily agreed.

Thereafter ensued a number of email, mostly on my part, including a draft contract dealing with the supply issue. I even had a provision dealing with drought conditions as I simply was unsure how the projects would operate during a severe drought. [Sadly we now know.] After a long period of inactivity by DWR in responding to my follow up email, punctuated by episodes of excruciating quiet, DWR assigned a new or different attorney to the matter. He became the sole DWR contact. This attorney began with a long letter to me informing me that I was ignorant of Delta operations and that DWR DID NOT take into account in-Delta diversions. He then repeated the same old litany of reasons why DWR could not supply SDWA with water. After this long mangle of reasons why DWR could not enter into an agreement and why I was congenitally misinformed of Delta operations, he ended with a polite statement that "DWR remains willing to negotiate a contract with SDWA."

The strong language "questioning" my knowledge of Delta operations took me aback to say the least. I therefore checked with others, more knowledgeable than I (including CCWD technical personnel, DWR technical personnel, and others all of whom will remain un-named). Although I may have incorrectly referenced the source of the estimated in-Delta consumptive use loss data, I was correct in noting that the project operations did indeed take this into consideration. See for example <http://www.water.ca.gov/swp/operationscontrol/docs/delta/DeltaHydrology.pdf> page two, column 3 "Delta Gross Channel Depletions."

I responded the DWR attorney affirming my position, referencing the support for this and noting that if the projects did not take in-delta depletions into account, then all outflow X2 calculations would be incorrect. The response from the DWR attorney was dated November 2013 and received by me in February 2014. Those dates are not typos. Incidentally, this email/letter exchange occurred over an approximate two-year period as apparently DWR had assigned it a ultra-high, double-secret priority. That last response by DWR included the same old tired, unfounded and incorrect statements of how DWR did not take our diversions into account, how it could not supply us with water, how they were not responsible for southern Delta water quality, and how any agreement could only be done if the Bureau was involved and if the salinity/quality issue was included.

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Any notion that DWR is attempting a good faith negotiation with SDWA on a supply and/or water quality contract is fanciful. In my 20 years of representing SDWA I have personally participated in four attempts to negotiate such contract(s). Only the "original" draft contract negotiated when the Bureau was participating was ever offered. Since that time, DWR has specifically avoided even discussing the relevant issues, much less offering any meaningful draft contract conditions. I of course cannot read the minds of DWR personnel, but it is clear to me it is the policy of DWR to ensure that it never enters into a contract with SDWA as it has at every turn misrepresented the issues, the facts and its efforts. At the same time, DWR continues to repeat the mantra that its "ready, willing and able" to enter into a contract. DWR has informed elected officials, State Water Resources Control Board staff and members that it is willing to negotiate with SDWA while at the same time intentionally frustrating any efforts at doing so. Again, I assume that Dr. Meral's statements were misrepresented to me, but certainly I am obligated to make sure that WEF Board Members and attendees are made aware of what is actually going on.

If there is a contrary view to the above, please make sure it is brought to my attention so that I, as the sole SDWA representative in these efforts at negotiation, can help clarify the situation.

Very truly yours,

A handwritten signature in blue ink that reads "John Herrick". The signature is written in a cursive, slightly slanted style.

JOHN HERRICK

cc: Water Education
Foundation Board Members