

**WATER RIGHT COMPLIANCE
AND
ENFORCEMENT IN THE DELTA**

A Report to the State Water Resources Control Board
and
the Delta Stewardship Council

by

Craig M. Wilson
Delta Watermaster



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BACKGROUND

On July 10, 2008 the State Water Resources Control Board (State Water Board) adopted a Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Strategic Workplan or Workplan). Resolution No. 2008-0056. The purpose of the Strategic Workplan was to prioritize and describe the scope of individual activities that will be completed to protect beneficial uses of water in the Bay-Delta.

One of the nine workplan activities set forth in the Strategic Workplan addresses the following subject: Water Right Compliance, Enforcement, & Other Activities to Ensure Adequate Flows to Meet Water Quality Objectives. (Workplan, pages 6, 14). Included in the activities is the investigation of whether illegal diversions and violations of water right permit and license conditions are occurring in the Bay-Delta watershed and taking action to address those violations. The objective is to fulfill the State Water Board's statutory responsibility (see Water Code sec. 1825) to vigorously enforce water rights by preventing unauthorized diversions of water, violations of terms of water rights permits or licenses, and violations of the prohibition against the waste or unreasonable use of water. Concurrently, compliance inspections will be performed to assess overall existing water rights and compliance with terms and conditions. (Workplan, page 1).

There are approximately 3000 diversions of water in the Delta. About 2700 diversions are made under riparian or pre-1914 claims of water rights. Many of the claims have not been verified and there may be additional diversions taking place where no claim of water right has been identified. Accordingly, the number and magnitude of illegal diversions in the Bay-Delta watershed is unknown. However, the Workplan indicated that it could be quite significant (Workplan, page 83). For example, records revealed that many parcels within the Delta islands are not contiguous to Delta waterways. Yet aerial photographs and other evidence indicate that such parcels have been irrigated and are likely supplied with water diverted from Delta channels. While many of these diversions have retained riparian water rights and/or possess valid pre-1914 appropriative water rights, the basis of right must be investigated to make that determination (Workplan, page 83). Accordingly, the Strategic Workplan indicates that the State Water Board will employ its statutory responsibilities to investigate whether illegal diversions are occurring and take action to address those illegal diversions (Workplan, page 83). While this project will initially focus in the Delta, other areas of the Bay-Delta watershed are also subject to investigations and potential enforcement action.

INITIAL INVESTIGATION AND ENFORCEMENT

To implement the enforcement element of the Strategic Workplan, the State Water Board began a focused investigation of two islands in the southern Delta, Roberts and Union Islands. Using detailed property mapping and title research information for these islands, which included information developed by private parties,¹ properties were identified that were not contiguous to Delta waters and that consequently may lack riparian status. Other information, including DFG records regarding diversion works and aerial photos, was used to identify which of these properties were diverting water. Finally, such properties were checked to see if they had existing water rights on record with the State Water Board.

Those properties on Union and Roberts Islands that were using water, did not have State Water Board issued water rights, and that did not appear to be contiguous to a Delta watercourse were identified. The property owners in question were provided written notice and given an opportunity to identify their existing basis of right, or to cease diversion and use of water. In this regard, the State Water Board was aware that a riparian right may be retained even though land is no longer contiguous to a watercourse and that pre-1914 appropriative water rights may apply to these properties.

The investigation of the basis of water rights for existing diverters on Roberts and Union Islands began in October of 2008. Of the 651 separate parcels of land, 371 owners of parcels received letters. 549 telephone and mail responses were received. In addition, complaints were received regarding six specific parcel owners. Through the initial investigation, water rights were established for 485 parcels (74% of parcels). Eighty-four parcels in the Woods Irrigation Company (Woods) service area and 82 additional parcels were the subject of additional investigation. The status of the 166 parcels is as follows:

- 1) An additional 62 cases were closed based on additional information received, including four of the complaints.
- 2) The 84 cases within the Woods Irrigation Company service area are pending resolution of a lawsuit filed over the State Water Board's adoption of WR 2011-0005.
- 3) 20 parcels on Roberts Island were subject to further review, including diversions from Duck Slough and others where State Water Board hearings have already been conducted. Of this group, 11 cases were issued Cease and Desist Orders and all requested hearings. Three of those cases were dismissed based on new

¹ The law firm of O'Laughlin & Paris, LLP compiled information regarding Delta water rights on Union and Roberts Islands on behalf of the San Joaquin River Authority. The objective of this effort was to show the potential loss of riparian water rights through the original patenting process or by subsequent land subdivisions that resulted in parcels being detached from contiguous water courses. The reports acknowledged that deed transactions were not examined to determine whether or not grantors may have preserved the riparian right in detached parcels by stipulation in conveyances nor did they seek historical evidence regarding riparian rights on severed lands that did not change ownership.

evidence; one case was the subject of a Board Settlement Order; one Board Order was issued and is now in litigation; and six cases are pending (for 4 of which, hearings were conducted).

It should be noted that some of these cases moved to a more formal review because property owners did not present rebuttal evidence when first notified of possible deficiencies in their claims of right. In several cases, once more formal review ensued, the matter was taken more seriously and the requisite evidence was developed.

In reviewing these cases, staff has followed the following evidentiary principles:

- 1) The prosecution has the burden of proof in enforcement matters. The weight of the evidence must support an action.
- 2) There is prosecutorial discretion as to whether enforcement action is warranted even if the evidence substantiating a right is deficient in certain respects.
- 3) Once a prima facie case is established, the burden shifts to the water right claimant to present evidence supporting the water right claim.
- 4) Regarding riparian water right claims, evidence that a grantor retained other parcels when selling a contiguous parcel to another person does not create a presumption that the severed parcel retains riparian status.
- 5) Severed parcels may retain riparian status if it can be shown that there was intent to retain the water right.
- 6) Regarding pre-1914 appropriative water right claims, review of the claims must take into account the difficulties of proof regarding old diversions: however, evidence must be present to support a claim; no leaps of faith should be taken.

To date, most of the cases reviewed involved the review of evidence to support riparian claims for severed parcels. Evidence supporting retention of riparian status can take several forms: language in deeds reflecting such intent, evidence of sloughs that retained contact with severed parcels, and statements of persons attesting to retention of riparian rights. The State Water Board is continuing to look at individual parcels where there is evidence of diversions taking place where there is no Statement of Diversion and Use on file. It remains to be seen whether most of such situations can be resolved as has been the case in investigations conducted to date.

MORE RECENT INVESTIGATION AND ENFORCEMENT

The State Water Board has recently broadened its investigation of individual diverters beyond Union and Roberts islands. Based on a review of U.S. Geological Survey topographical maps, aerial photographs, and county assessor's records, properties in an area of the southern Delta were identified as having been irrigated with no records establishing any claim of right for existing diversions of water. 361 separate parcels of land were evaluated. 300 parcels were found to have a basis of right. The remaining 61 parcels, owned by 40 separate owners, were identified for further review and sent notices on August 15, 2011. The owners were given an opportunity to provide evidence to support any claims of riparian or pre-1914 appropriative rights to support the diversion of water on their properties. Follow-up investigation and review of records provided by the property owners resolved all but 1 case as having valid rights for the diversion of water. One Administrative Civil Liability (ACL) Complaint was issued for failure to file a Statement of Water Diversion and Use and that case has been settled.²

² This settlement was made in accordance with the Delegation of Authority granted by the State Water Board to the Delta Watermaster in 2010. Resolution 2010-0048. Pursuant to the Delegation, the Delta Watermaster has authority to settle enforcement matters up until the time a formal adjudication has been commenced by the noticing of a hearing.

CURRENT AND FUTURE INVESTIGATION AND ENFORCEMENT

Current activities involve a statewide review of water users, including those in the Delta, who have been identified as failing to file required reports, including Supplemental Statements of Water Diversion and Use, Annual Progress Reports of Permittees and Annual Reports of Licensees. The status of these investigations is as follows:

- 1) Failure to file Statements: 21 parties identified in the Delta (394 statewide); 11 of those had been resolved and closed, leaving 10 actual cases
- 2) Failure to file Progress Reports of Permittees: 27 parties were identified in the Delta (341 statewide) for further investigation
- 3) Failure to file Reports of Licensees: 330 parties were identified in the Delta (4,595 statewide) for further investigation

Staff is evaluating these cases to determine appropriate enforcement action.

For future investigations, it is appropriate to ask whether limited enforcement staff should continue to focus on individual diverters in the Delta. There are approximately 3,000 diversions taking place. Alternatively, there are a much smaller number of special districts and water companies who either divert water directly or work with individual diverters within their service area. Special districts include Reclamation Districts, Water Districts, and Irrigation Districts. There are also private Mutual Water Companies serving water in the Delta. The number of such districts is small in relation to the number of individual diverters. It appears that there are about 50 special districts and companies that divert water and/or who are involved in diversions to individuals. The focus of future water right compliance activities may be better served at the Districts/Companies level rather than the individual diverter level. For example, staff recently met with officials of the Pescadero Reclamation District. This district was established in 1921 and has two licenses to divert water from Tom Paine Slough. The district has no Statements claiming riparian or pre-1914 rights, but does furnish water to landowners in their service area who have filed Statements. In this regard, it is legal for a district to deliver water in excess of its licensed amounts to owners under the owners' riparian and pre-1914 rights. By meeting with the district, staff now has a clearer picture of the water right claims in the area. This result was arrived at much more quickly than what would have occurred under the older approach of investigating each individual diverter. Accordingly, future investigations of water right claims in the Delta may be accomplished better by focusing on Districts and Water Companies.

To better achieve this District focus, staff are currently in the process of identifying all Districts/Water Companies in the Delta who divert water under their own claim of water right(s) and/or furnish water to individuals under the latter's claim of right. After such identification, Districts in various parts of the Delta will be notified that State Water Board staff would like to meet to review the water rights situation in their service area. It is hoped that such an approach will have multiple benefits: better compliance, greater certainty and more efficient use of staff resources.

ENFORCEMENT LITIGATION

There have been a few recent court cases dealing with water right enforcement issues in the Delta. Listed below are summaries of the one Appellate case and two matters pending in Superior Courts.

- 1) *Phelps v. State Water Resources Control Board (2007) 157 Cal. App. 4th 89.* This Third District Court of Appeal case involved review of board imposed administrative civil liabilities for unauthorized diversions in the Delta. While the case involved enforcement of board water right permit terms, one of the issues reviewed was whether the diverters had riparian and pre-1914 appropriative water rights apart from water rights granted in permits and licenses. Regarding the riparian right claims, the court rejected three arguments presented in support of riparian right claims and concluded that no language in the deeds which severed the parcels from watercourses showed any intent to retain riparian rights. Regarding pre-1914 rights, the court upheld the lower courts findings that the owners had failed to establish actual appropriations of water for irrigation before 1914.
- 2) *Young et al. and Woods Irrigation Company v. State Water Resources Control Board (2011).* This case involved review of a Board enforcement order which resolved multiple issues regarding riparian and pre-1914 appropriative water right claims in the Delta. While lauding the State Water Board's goal to vigorously enforce water rights law by preventing unauthorized diversions of water, the trial court determined to set aside the Order on the procedural due process grounds that individual landowners within the Woods service area had been illegally excluded from being parties in the administrative water rights proceeding. The court also ruled that the State Water Board loses jurisdiction to conduct an enforcement proceeding for unauthorized diversion if the diverter claims a riparian or pre-1914 right, with no requirement that the diverter show that the claim is valid. This decision has been appealed.
- 3) *Modesto Irrigation District v. Tanaka and State Water Resources Control Board.*³ This case was filed in Sacramento Superior Court in October 2011. The Complaint asserts that Tanaka's are illegally diverting water with no valid claim of rights. It also alleges that the State Water Board has failed to protect the public trust by allowing unlawful Delta water diversions to continue without enforcement response. The case is pending.

³ Modesto Irrigation District is a member of the San Joaquin River Group Authority which had compiled studies in 2008 regarding potential illegal diversions on Union and Roberts Islands. See Page 4.

CONCLUSIONS

Since October 2008, the State Water Board and its staff have investigated and evaluated water rights for over 1,000 properties in the Delta. Activities have centered on looking for unauthorized diversions and parties who have failed to file required reports. Many of the cases were closed based on preliminary investigation. Most of the remaining cases were also resolved based on further review. To date formal enforcement action has been taken in 12 cases involving illegal diversions and failure to file reports. Given the level of effort expended for the relatively small number of cases that resulted in enforcement action, it may be more appropriate to focus some of the future compliance and enforcement activities on special districts in the Delta who divert water under their water rights and/or furnish water to individuals under the latter's rights.