SOUTH DELTA WATER AGENCY

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May 27, 2008

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Dear Chairperson Doduc and Board Members:

This letter is in response to Mr. Allen Short's letter to you of May12, 2008. Mr. Short did not provide me a courtesy copy of his letter; I only recently received on from a third party. His letter purports to review the water availability and water rights of portions of the San Joaquin River and southern Delta. Mr. Short, on behalf of the San Joaquin River Group Authority makes numerous allegations which I will attempt to address herein.

The letter begins with the bald assertion that "it is well know that individuals and entities in the South Delta take water they are not entitled to divert." Of course this allegation is certainly not "known," much less "well known,"and has been regularly denied and contradicted by me at numerous forums including SWRCB meetings.

Apparently Mr. Short's allegation is based on the misconception that existing San Joaquin River flows are the sole source of water for diverters in the areas he mentions. Of course, any particular water right, and the availability of water to satisfy (or partially satisfy) the right remains to be determined in a proceeding constituted for such purpose. However, there are general laws of physics and hydraulics which contradict Mr. Short's opinion.

The Delta is influenced by the tidal action of the ocean, and in fact the legal Delta has been defined as that tidal area. This means that in the legal Delta, the tide regularly ebbs and flows. This tidal action in any particular area defines where the influence of the ocean is always present, that is to say, the water level at such a point never decreases because it is maintained by the level of the ocean unless the tide is artificially distorted, such as by export operations.

Although inflow to the Delta from its various tributaries can increase the minimum water levels, those levels will not decrease below the minimum, regardless of inflow. Put another way, even if all tributary flow ceased, there would still be water in those channels which are lower than the ocean level. Because of this, virtually all of the Delta channels have a supply of water regardless of inflow or year type. Attached is a diagram evidencing this physical situation. These were prepared a number of years ago by Dr. Gerry Orlob, SDWA's previous engineer and were submitted as part of a declaration in a legal action.

Given this physical situation, persons or entities which draw water from these channels are never faced with the circumstance of not having any water to divert (absent something like the exports pumps artificially drawing the water level down at a rate which prevents inflow or ocean level to re-establish the minimum level). Hence, a riparian abutting these channels always has water, a permitee or licensee always has water, and a pre-1914 right holder always has water. Assertions to the contrary simply reflect a misunderstanding of physics at best, or are intentional misrepresentations at worst.

As stated earlier, each particular set of facts for any diverter determines if he/she is in this tidal zone. From that determination, opposing parties and a trier of fact would proceed down the appropriate avenues of inquiry to try to resolve how or why the circumstance does or does not apply, or if some intervening events artificially changed the situation.

It is important to note that an allegation such as Mr. Short's can only be resolved through a court adjudication of water rights. Although the SWRCB exercises regulatory power over appropriative rights, the courts retain jurisdiction over riparian rights and the determination of what is available under those rights.

I might further add with regard to the amount of water available in the southern Delta that none of the tributaries to the San Joaquin River make any releases for downstream superior right holders. That is, neither the mainstem, the Merced, the Tuolumne or the Stanislaus make any releases of flow to satisfy superior right holders along the majority of mainstem and in the Delta be they riparian, appropriative or pre-1914. Until a court is presented with the issue, there can be no resolution of what water is available. It's likely that such an adjudication of the basin would result in additional releases from the tributaries for downstream users and for fisheries.

This brings us to the issue of water quality. Both historically and today, the Delta channels hold a large supply of fresh water available for local diversion. The quality of water in Delta channels historically decreased during droughts due to Bay water intrusion, but the historic record reveals no times when the southern Delta had salinities at ocean levels. Only in very rare events did ocean salts intrude into the southern Delta, and then only for brief periods (one month in 1931).[1] There is no dispute that the water quality entering the southern Delta from the San Joaquin River is now greatly diminished due to the CVP's annual importation of hundreds of thousands of tons of salt into the valley. In addition, the export of water before it reaches the Delta and the consumptive use of water on the tributaries has decreased the flow of the River, which means there is less water to dilute constituents such as salt.

The obligation to maintain water quality has been placed squarely on the DWR and USBR by federal statute, state regulation and permit conditions. One need only examine the authorizing statutes for the projects to find "salinity control" as a primary purpose, or to read the San Luis Act which required drainage before delivering water to the San Luis Unit, or to examine the Delta Protection Act to find the obligation of the projects to maintain Delta water quality. These obligations do not include any exemption or "out" even though the projects are now trying to argue they don't always need to meet their permit conditions. The conclusion from all this is that, generally, diverters in the southern Delta would always have water available to divert in the absence of the CVP and SWP and the quality of such water is supposed to be maintained by DWR and USBR.

I would like to briefly address the DWR and USBR argument that "since they maintain water quality at Vernalis any worsening which occurs downstream need not be mitigated" by them. This assertion is incorrect. As stated above, the CVP causes hundreds of thousands of tons of salt to enter the River, sometimes at concentrations ten times the downstream standard. The USBR's current operations only attempt to meet the Vernalis standard with New Melones releases. This means that after loading the River with excessive amounts of salt, the CVP dilutes their imported salt at Vernalis, but only to the point of the standard. The result is that diverters upstream of Vernalis can divert River water, use it, concentrate the salts therein, and discharge water with a concentration in excess of the standard back into the River. However, Mr. Short (along with DWR and USBR) is contending that diverters downstream of Vernalis should not be allowed to divert water, consume water and discharge back to the River the salt contained in the diverted water because they are discharging water with an increase in the concentration of the CVP salt load in excess of the standard.

The projects' argument that they need not meet the downstream standards falls apart for numerous reasons. First, the Vernalis and downstream standards were set to protect agricultural

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[1] See the Delta Atlas at page 53, attached

beneficial uses ***downstream of Vernalis.***[2] Meeting only the Vernalis standard and not the downstream standards does nothing for agricultural diverters in the Delta. Second, it was the USBR which polluted the River from Mendota to Vernalis, using all of the River's assimilative capacity but now denies others the ability to use or access to any assimilative capacity. This means they (or their contractors) are the only ones allowed to be able to use the assimilative capacity of the River while removing any such capacity for others to use. Third, neither the record nor the text of D-1641 supports the position that the assignment of the four southern Delta standards was actually only an assignment of the Vernalis standard. Lastly, the courts have now told us a standard cannot be only partially implemented.[3] Thus the SWRCB could not have legally implemented the three downstream standards only at some times.

Returning to Mr. Short's letter, what is "well known" is that (i) the amount of inflow on the San Joaquin does not reflect what is legally required for superior right holders, (ii) diverters within the tidal zone of the Delta always have water present to divert, and (iii) the quality of the "ever-present" water is supposed to be maintained by the projects. Clearly, the broad allegation of "illegal diverters" in the Delta is unsupported.

Mr. Short asserts Mr. Alex Hildebrand testified that local diversions range from 1400-1800 cfs. Mr. Short provides no reference or citation for this. We don't know if the statement (if actually made) was referring to total diversions or net channel depletions, or averages or peaks. However, in the hearings leading up to D-1641, SDWA submitted its exhibit SDWA22 (attached hereto) which included a cover letter and the amounts estimated to be the channel depletion needs of the area with tidal barriers installed and operated. As you can see, this data indicates that the minimum flows needed to satisfy these depletion needs are for the most part much lower than Mr. Short's assertion. Of course these amounts can change depending on temperature, and other conditions. I assume DWR has more updated information if needed. The point to remember is that focusing on depletions ignores the fact that a water supply is always present in the Delta

Mr. Short references D-1641 implying that the SWRCB has already determined there is insufficient flow for riparians. Although the Decision did go through an analysis of water availability in examining potential impacts to other legal users which might result from a change petition, that analysis does not and cannot substitute for the jurisdictional requirements which protect/determine riparian rights. As stated above, if there is a dispute about whether a riparian right exists and what water is available under that right, it must be resolved in the courts.

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[2] D-1641 found the CVP to be the principle cause of high salinity in the southern Delta at page 83.

[3] See *SWRCB Cases* Appellate Decision at pages 87 - 89.

I note that after the analysis, D-1641 goes on to state:

> Notwithstanding the unavailability of water to satisfy existing water rights in the southern Delta during certain periods, the SWRCB has determined that protection of agriculture in the southern Delta is in the public interest. . . . Consequently, the southern Delta agricultural uses should not be deprived of water of useable quality as a result of this decision. (D-1641 at page 35)

Given these statements, it would not appear that D-1641 can be used to support Mr. Short's allegation.[4]

Mr. Short has not given any citation to his statement that DWR has sampled the drains of Pescadero Reclamation District and found they discharge 4000 EC. Even if this were true it would reflect the concentration of CVP salt and not a local source of salt. No information is given regarding time of year or amount of drainage. Any discharge quality depends on the time of year, the quality of the source water and the conditions existing prior to the application of the water to the land/crops. We do know that farming in the southern Delta is not a source of any significant salt load to the system. Although we constantly hear references to local agriculture contributing salts, no one ever presents evidence for such a conclusion.

Pescadero's lands have known soil types, none of which naturally contain any significant amounts of salts. Any natural salts in the root zone have been long flushed out after more than 100 years of irrigation. All the salts now on these lands (in the soils) derive from the salts the CVP introduced in to the system (or to a much smaller degree came down the tributaries). Under "natural" conditions, any salts which accumulated in the soils were flushed out during high spring flows; a condition which has been dramatically decreased by upstream dam operations and increased uses with no provision for mitigating the effect.

Mr. Short alleges that "illegal" diversions also affect DO in the Stockton Deep Water Ship Channel. Evidence is again lacking. It is likely that any "extra" water resulting from decreases in local diversions would simply make its way to the export pumps as the rest of the San Joaquin flows does. Furthermore, the reductions in River inflow discussed above are far greater than any effect of local diversions. Preliminary indications suggest the DO problem in the DWSC may be mostly resolved as a result of the recent changes at the City of Stockton's wastewater treatment facility. The more immediate problem maybe the violations of the existing

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[4] It is interesting to note that the analysis of water availability contained in D-1641 was never the subject of the hearings leading up to the Decision. The analysis, information and language appeared in the Decision without any public input or discourse.

DO standard (currently assigned to no party) in the remainder of the Delta channels. The null zones induced by the CVP and SWP and their failure to meet the water quality requirements of their permits creates low DO in these other areas where fish kills regularly occur.

I believe Mr. Short makes another error in his reference to New Melones and other releases being "protected" from diversions downstream of Vernalis. First, the VAMP flows approved by the SWRCB as part of D-1641 are specifically "abandoned" at Vernalis.[5] Once abandoned, they are in fact available for diversion by other legal users. You should be advised that this idea of "abandoning" the water was part of the "deal" worked out by your staff, your predecessors, the SJRGA and the export projects and contractors over the objections of the Delta interests. Once abandoned, the water was then to be counted as "lost" exports so that all of it could be re-couped under the nonsensical principle of "no net loss" to exports. That is to say, water was released for fisheries as long as it was available to be exported, or counted as lost to exports. The fisheries are now suffering the effects of that "deal."

With regard to the water released from New Melones to satisfy the Water Quality Objectives for Fish & Wildlife Beneficial Uses (see Table 3, page 184 of D-1641), I find no reference in D-1641, the 1995 WQCP or any other source which states this water is "protected" once it passes Vernalis, the compliance location. In fact, an important part of the problem with Delta outflow, fishery needs and X2 is in large part a result of the export pumps re-routing and diverting all of the San Joaquin River flow; allowing none of it to reach the Bay. To identify local Delta diversions as a contributing cause of these problems is to wholly ignore history. In-Delta agricultural diversions peaked in the 1920's and have actually gone down since then due to urban development (which does not generally get its water from the channels)

References by Mr. Short to Judge Wanger's recent decisions are also inappropriate. The Delta agencies were not party to that proceeding and it is not clear on what data he relied when he set his limitations. We do not know if there was any testimony or declarations dealing with this issue or even if it was mentioned. Clearly, his orders make no relevant restriction on in-Delta diversions other than the export projects and can't be used as support for Mr. Short's misunderstanding of hydraulics.

Mr. Short makes a number of references (without citing any specifics) to D-1641, the *SWRCB Cases*, the *El Dorado* case, the *Phelps* case (the Term 91 case) and SWRCB briefing therein. He references the Delta parties' theories regarding the Delta Protection Act, the Watershed Protection Act, and Area of Origin principles. It is not clear what his point is in referencing these issues and the litigation. None of them addressed the issue of whether the in-

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[5] See D-1641 at page 166.

channel supply for tidal zone diverters is dependant on San Joaquin River inflow and none of them dealt with the ability of riparians to divert during times of low River flow.

Remarkably, Mr. Short also states that these cases somehow resolved the "novel theory of riparian rights (the Delta as a Bathtub)." I have discussed this issue with you before in a previous correspondence. The issue of always having water in Delta channels was not even a small part of any of the referenced ligation (or any other litigation). It would be interesting to ask for some citation from the records or decisions to support his assertion. If one exists it should be referenced for discussion.

Oddly, Mr. Short references D-990 for the proposition that "illegal" diversions have been of concern for some time. When the projects were seeking permits to store and export water, the issue of in-Delta needs was part of the necessary calculation. The concern then was to make sure project operations fully satisfied those in-Delta needs, not that legal and illegal diversion needed to be segregated. The processes assumed in-Delta use was proper and estimated it through consumptive use calculations. All parties assumed that an adjudication of the system would not only be prohibitively time consuming and not worth the effort, but was not necessary. It wasn't and still isn't necessary because any in-Delta user who is within the area of origin is able to get a priority contract with DWR and/or USBR. The reference Mr. Short quotes is the SWRCB encouraging the parties to figure out the amount of water needed.

Even stranger, Mr. Short quotes D-1485 as an "ultimatum" for SDWA DWR and USBR to complete their negotiations for a water supply contract. That decision struggled with how and to what degree the SWRCB would force the projects to live up to their obligations to provide drainage, salinity control, and water quality protection; obligations which have not yet been fully met. The only "threat" contained in the referenced citation is the SWRCB's to USBR that if agreement is not reached (to settle SDWA's claims of decreased quality, flows and levels) the Board would itself address them and restrict the projects as necessary. Unfortunately, we are still waiting for an upstream standard on the San Joaquin River and the SWRCB is not enforcing the existing water quality standards.

For some reason, the results of those negotiations are never mentioned. After SDWA had to file suit to get USBR to negotiate, the parties met for approximately 12 years. After a draft contract was developed (and recommended for execution by the participating representatives), USBR deferred taking action because CVPIA had been recently enacted. Thereafter, the USBR informed SDWA it would no longer negotiate. Whenever someone casts aspersions about SDWA not having entered into a contract it is clear they know not of what they speak.

Mr. Short's letter is a string of unsupported and false accusations and should not be the basis for any serious discussions. We have heard for some time that the SJRGA (and some other

party) is developing information which indicates there are illegal diversions in the southern Delta. Every person or interest has the right to investigate and make such allegations, and if done, the parties should be given the opportunity to respond, defend themselves, and present evidence and testimony in support thereof. Instead we have been subjected to endless allegations with no support, with the clear intent to simply slander Delta interests. This intent is supported by upstream diverters who are loathe to have any downstream responsibilities and export users who seek to escape the need to mitigate the horrendous impacts they have visited upon Delta diverters and the environment. With this as mind set, Mr. Short and others contend that water quality objectives must be changed and users reliant on in-channel water must be challenged and destroyed.

It is also clear from public statements that the parties making these allegations have met with both SWRCB staff and Board members. Since some of the allegations involve issues on which the SWRCB would act as judge (appropriative water rights), I believe it is clearly inappropriate for such discussions to occur. It is certainly not fair to have staff briefing Board members about one side of a case which is presumed to be coming before the Board, and neither is it appropriate for Board members to be gathering information on such an upcoming matter. No one has contacted me about gathering "facts" in support of the in-Delta diverters. We are even at the point where Board members feel obligated to state publically that this issue must be addressed, even before any evidence has been presented! When and if the time comes, it would appear such persons (staff and Board members) must recuse themselves. If they don't we will of course seek their removal from this matter through legal means.

I hope this clears up the numerous misstatements contained in Mr. Short's letter. If you have any questions, I would be more than happy to answer them as best I can. Of course, if your staff is investigating these matters, I know they will be contacting me at the earliest possible time.

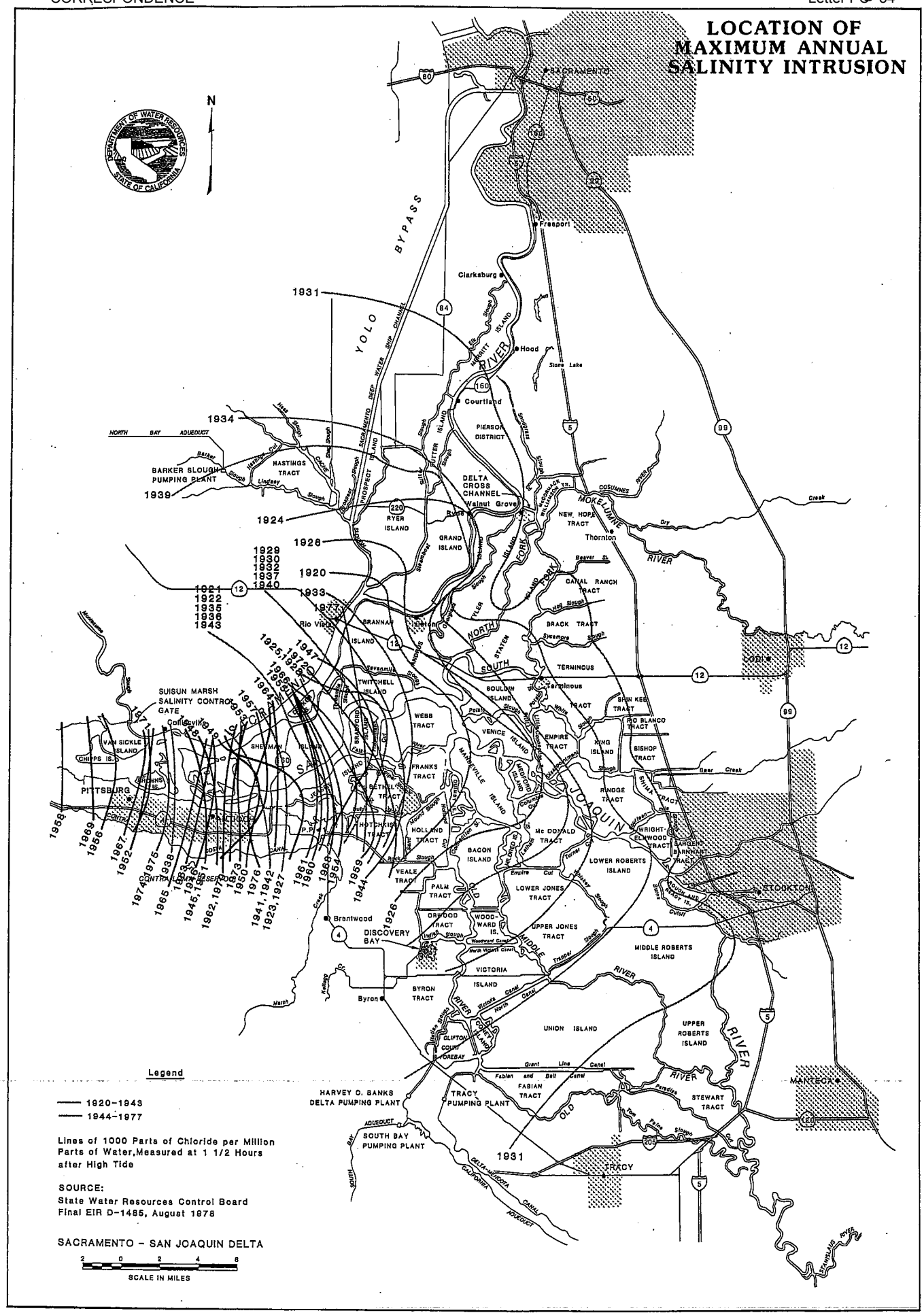
Very truly yours,

JOHN HERRICK

Enclosures
cc: Mr. Les Grober (SWRCB)
Ms. Victoria Whitney (SWRCB)
Mr. Steve Thompson (USFWS)
Mr. Donald Koch (CDF&G)
Mr. Joe Grinfstaff CALFED)

Mr. Lester Snow (DWR)
Mr. Jerry Johns (DWR)
Mr. William Philmore
Mr. Dan Nelson (SLDMWA)
Tom Birmingham, Esq. (SLDMWA)
Mr. Phil Isenberg (DV Task Force)
~~Blue~~ Ribbon Task Force Members
BDCP
Senator Michael Machado
Assemblyperson Lois Wolk
Assemblyperson Jared Huffman
Congressman Dennis Cardoza
Dante Nomellini, Esq.
Mr. Alex Hildebrand
San Joaquin County Farm Bureau
Mr. Alan Short
Tim O'Laughlin, Esq.

Figure 30


LOCATION OF MAXIMUM ANNUAL SALINITY INTRUSION
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DEPARTMENT OF WATER RESOURCES
STATE OF CALIFORNIA
SACRAMENTO
Freeport
Clarksburg
Hood
Courtland
Walnut Grove
Thornton
Rio Vista
Isleton
Terminous
Brentwood
DISCOVERY BAY
Byron
Collinsville
PITTSBURG
STOCKTON
MANTECA
TRACY
YOLO BYPASS
SACRAMENTO DEEP WATER SHIP CHANNEL
SACRAMENTO RIVER
MOKELUMNE RIVER
SOUTH FORK
NORTH FORK
SOUTH FORK
SAN JOAQUIN RIVER
MIDDLE RIVER
OLD RIVER
NORTH BAY AQUEDUCT
BARKER SLOUGH PUMPING PLANT
HASTINGS TRACT
PIERSON DISTRICT
DELTA CROSS CHANNEL
RYER ISLAND
GRAND ISLAND
NEW HOPE TRACT
CANAL RANCH TRACT
BRACK TRACT
TERMINOUS
BOULDIN ISLAND
SHIN KEE TRACT
RIO BLANCO TRACT
BISHOP TRACT
BRANNAN ISLAND
TWITCHELL ISLAND
WEBB TRACT
VENICE ISLAND
EMPIRE TRACT
KING ISLAND
SUISUN MARSH SALINITY CONTROL GATE
VAN SICKLE ISLAND
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SHERMAN ISLAND
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HOLLAND TRACT
Mc DONALD TRACT
WRIGHT-ELMWOOD TRACT
SANDERS-BARNHART TRACT
BACON ISLAND
LOWER ROBERTS ISLAND
VEALE TRACT
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ORWOOD TRACT
WOOD-WARD IS.
UPPER JONES TRACT
MIDDLE ROBERTS ISLAND
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BYRON TRACT
UNION ISLAND
UPPER ROBERTS ISLAND
CLIFTON COURT FOREBAY
FABIAN TRACT
STEWART TRACT
HARVEY O. BANKS DELTA PUMPING PLANT
TRACY PUMPING PLANT
SOUTH BAY PUMPING PLANT
DELTA-MENDOTA CANAL
CALIFORNIA AQUEDUCT
STATE WILDLIFE AREA
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Legend
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1944-1977
Lines of 1000 Parts of Chloride per Million Parts of Water, Measured at 1 1/2 Hours after High Tide
SOURCE:
State Water Resources Control Board
Final EIR D-1485, August 1978
SACRAMENTO - SAN JOAQUIN DELTA
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SCALE IN MILES

ORIGINAL GMC Amend WR

SOUTH DELTA WATER AGENCY

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July 15, 1997

Ms. Stacey Gianoli
State Water Resources Control Board
Bay-Delta Division
P. O. Box 100
Sacramento, CA 95812-0100

Re: South Delta Channel Depletion Requirements
Development of 1995 WOCP EIR

Dear Ms. Gianoli:

Enclosed please find the channel depletion requirements for the South Delta for all months except July as developed by Mr. Jerry Orlob, Engineer for SDWA. As we discussed, the calculation for these amounts is predicated on the South Delta tidal barriers being installed and operated. The channel depletion amounts for the South Delta in the absence of the barriers are unknown but would be higher.

It is my understanding that you have the amounts for the month of July, as they are included in an exhibit to the Draft Contract between SDWA, USBR, and DWR which seeks to settle the 1982 lawsuit. These amounts for other months were produced at the request of USBR during our ongoing negotiations. It is my understanding that USBR and DWR would agree that these numbers are accurate because SDWA's engineer developed them from the calculations set forth in the Draft Contract. However, I do not believe DWR or USBR have confirmed their accuracy.

Very truly yours,

BREWER, PATRIDGE & HERRICK
Attorneys At Law

By _____
JOHN HERRICK

State Water Resources Control Board
Bay-Delta Hearings Application No. 5626
PARTICIPANT: South Delta Water Agency
EXHIBIT: SDWA22
INTRODUCED: 7/14/98
ACCEPTED IN EVIDENCE YES NO
DATE 7/14/98

JH/dd
Enclosure

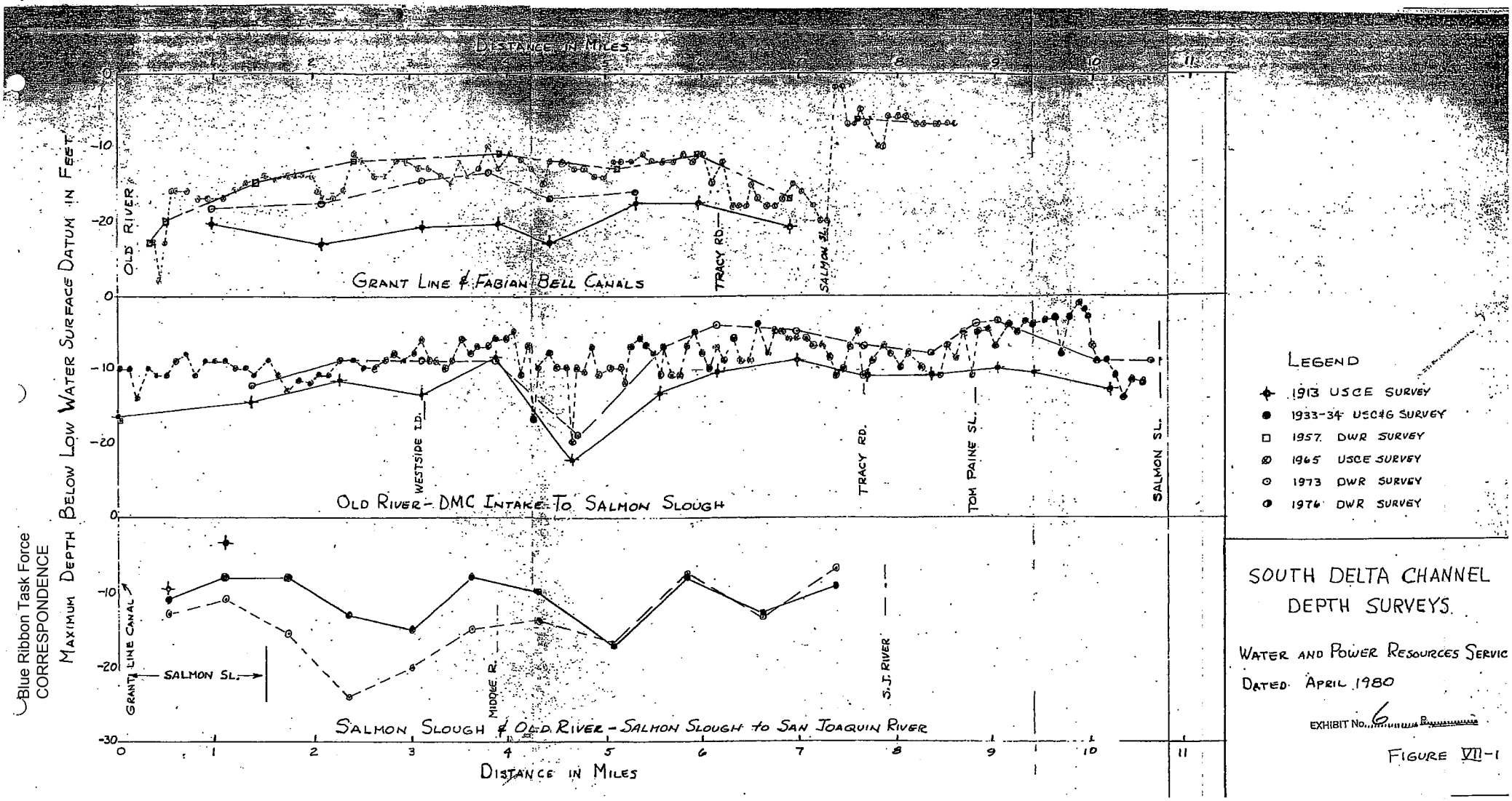
GTO 5/9/96

TABLE 2 MINIMUM REQUIRED FLOWS FOR THE SOUTH DELTA WATER AGENCY

Mean Monthly Flows, cubic feet per second

Month	Inside Barrier	Total SDWA	At Vernalis
Jan	169	234	573
Feb	111	154	483
Mar	151	209	548
Apr	293	406	745
May	368	519	849
Jun	565	785	1124
Jul	765	1051	1400*
Aug	717	995	1334
Sep	518	718	1057
Oct	405	563	902
Nov	303	420	759
Dec	274	380	719

* Vernalis base flow for evaluation of barrier performance includes 339 cfs flushing flow in addition to channel depletion requirements.



SOUTH DELTA CHANNEL DEPTH SURVEYS.

WATER AND POWER RESOURCES SERVIC

DATED APRIL 1980

EXHIBIT No. 6

FIGURE VII-1