

## COMMENTS ON DELTA VISION STRATEGIC PLAN

Fourth Staff Draft, dated September 12, 2008

By George Basye

I am a retired lawyer who has practiced water and flood control law from 1955 to 2006, to a great extent in the Northern Delta. I have the following comments on the Fourth Staff Draft of the Strategic Plan.

### 1. TERMS

On page 3 of the Plan, Figure 1-1, line 7, I deplore the comment that Californians “like to fight about water”. Despite the famous and flippant remark of Mark Twain, I have never found this to be true and it demeans those who have pursued what they deemed to be legitimate positions. I know of no instance in my experience when any party was enjoying the dispute. I suggest the phrase should simply be “Californians’ regional battles have been long standing.”

Similarly, reference to “warring parties” in line 14 is also demeaning. “Competing interests” would be appropriate and less pejorative. In the same vein, please delete the unhelpful, to say the least, phrase “aging water buffalos.” As one of those to whom this description may be intended to apply, it is deeply resented. I would apply it to no one whom I have had the opportunity either to support or oppose in water disputes. This term should also be replaced in line 23 by the phrase “competing parties.”

On page 18, under Goal 3, reference is made to “tidal marshes” and also to “floodplains”. The term “tidal marsh” is repeated frequently. If it is to be used, it must be defined. Similarly the term “intertidal marsh” should be defined. What is the distinction between the two?

The term “tidal marsh” seems often to be used loosely to describe the Delta islands as they existed when California became a State. The Delta channels were clearly “tidal”, as the tides from the bay extend up the Sacramento River beyond Sacramento, and up the San Joaquin River to Stockton and beyond. The Delta islands however, as distinguished from the channels, were undoubtedly “marsh”, but they were never, since California became a State, “tidal”. Therefore the Delta Islands would be inaccurately and confusingly described as “tidal marsh.”

### 2. HISTORY OF DELTA ISLANDS

The State acquired from the federal government, under the 1850 Arkansas Act of Congress, title to all of the “swamp and overflowed lands” within the State. The Arkansas Act pertained specifically to lands within Arkansas, but Section 4 extends the provisions and benefits to all other States. Its purpose was to transfer title of these lands to the states to enable the state to provide, “the necessary levees and drains to reclaim the swamp and overflowed lands” which the overflow had made “unfit thereby for cultivation.” (Quotes from the Arkansas Act of 1850)

The swamp and overflowed lands (hereafter referred to as S&O lands), under the Arkansas Act, could be sold into private ownership provided that the proceeds were used as necessary for “the purpose of reclaiming said lands by means of the levees and drains” described

in Section 1 of the Act. The term "Reclamation District", in use ever since for the local districts which achieved this "reclaiming" on behalf of the purchasers of S&O lands, is derived from that Act.

It was therefore essential to identify which lands California would acquire under the Arkansas Act. The Secretary of the Interior was required to make an accurate list and plats of the S&O lands. This job was, however, passed down to the State. This required that the California State Surveyor General (since replaced by the State Lands Division) send out surveyors to make that determination and prove up the State's title to the S&O lands. This was done primarily in the 1850's and 60's.

"Tidelands" comprised those parcels which were inundated by the daily tides. S&O lands were those which were not impacted by the daily tides, but which were periodically overflowed by high water stages. Tidelands also were transferred to California, and remain under State control.

The State Lands Division will confirm that all of the islands in the Delta were surveyed as S&O lands and not as Tidelands. The California State Surveyor General had to certify these surveys to the Secretary of the Interior in order for the State to acquire title to these S&O lands. Title to the S&O lands was then transferred to the State. The S&O lands were conveyed by the State into private ownership to those willing to acquire them and to undertake the "reclamation" of these lands so that they could be made "fit for cultivation," as the Arkansas Act provided. The State Lands Division has all of these documents.

Unless we consider that the Surveyor General of California and all of his field assistants were falsifying their reports and that the Secretary of the Interior was wrong to have accepted the certification of the State Surveyor General, we must assume, 148 years later, that the Delta Islands were indeed overflowed by periodic high water, but were not inundated by the daily tides which ebbed and flowed in the adjacent channels. This condition is correctly shown on Figure 1-17 which indicates that the islands in the Delta, pre-1880, had low banks (often with trees) which kept out the tides, but not the periodic high flows.

Engineers will confirm that when water slows down it drops much of its load of sediment. The constraint of the Carquines Strait slowed down the outflow to the Bay and thus created the Delta by the two rivers slowing down and dropping the sediment which they had carried from the Sierras. The rivers still needed to reach the Bay, however, so they formed a complex of channels, leaving a large number of islands where the material was not swept out by the flows in these channels.

These islands formed natural banks when the high waters overflowed them, as the place where the most debris was dropped out by the flows was at the edge of the islands. It is logical, even without the surveys under the Arkansas Act, that the Delta islands would be formed by this process with natural banks which kept out the daily tides, but not the periodic high flows.

Portions of these natural banks still exist. Reclamation Districts, when shoring up the natural banks to attempt to fend off or diminish the periodic overflow, would frequently cut off a sharp corner of an island which was not worth attempting to "reclaim". Many of these natural

island points still exist. They are often called "channel islands" as they were left out in the channels. Some channel islands still extend above the high tides and reflect the status of the natural banks of the island from which they were severed.

This has been a long explanation, but it is necessary to stamp out the impression, apparently widely held, that the Delta Islands were subject to the daily tides and that the landowners, through their Reclamation Districts, built levees to cut off these tides. That is simply untrue unless the Surveyor General of the State and the Secretary of the Interior were falsely attesting to the condition of these islands as S&O lands and not Tidelands.

This conclusion can also be supported by the natural banks which the Sacramento River created for itself below Chico where it left the high banks upstream. The River, over millennia, created its own high banks, leaving the deeper basins on either side, Butte, Colusa, Sutter, Yolo and American Basins, all lower than the natural River banks. The River dropped the greatest amount of sediment when it left its channel and thereby created a natural bank. The Delta channels did the same in creating the Delta islands.

### 3. YOLO BYPASS FLOWS

Volume 2 of the Draft Plan, page 9, paragraph a., suggests greater and more frequent inundation of the Yolo Bypass. However beneficial this may be, the need must be acknowledged that the landowners within the bypass must be compensated for the additional impact which such a modification would impose. The flowage easements from the landowners were obtained and valued based upon the impact of the Bypass as designed, with flows from the Fremont and the Sacramento Weirs as constructed. Any additional impact as a result of a modification in these flows must be compensated, and the right acquired by negotiation or condemnation. This, in the law, would be called an improper "surcharge" on the original easement.

### 4. DELTA LEVEE MAINTENANCE ASSISTANCE

Finally, the Plan is deficient in not describing the Delta Levee Maintenance Program which was authorized by the State Legislature following the tragic Isleton flood in 1972. (See Water Code Section 12980 and following.) Under that program the State, through the Department of Water Resources (DWR) and the State Reclamation Board (since renamed), have contributed a portion of the costs of repairing and improving levees in the Delta to diminish, if not entirely prevent, further levee failures. This program has provided funds to the Reclamation Districts responsible for the maintenance of Delta levees. These funds provide a share of the costs incurred by these districts for repairs or improvements, which are approved by the DWR and the Reclamation Board. The work is performed by the Districts, at greatly less cost than the State could achieve.

DWR will confirm that this important assistance program for Delta levee Maintenance has been a success. It is well worth its costs to the State, in diminishing, though of course not eliminating, levee failures since its adoption in 1973. The Strategic Plan should include, at some point, a description of this levee maintenance assistance program of DWR, so that the public will be aware of the opportunity which it provides, at least for near time Delta protection. The

alternative of simply abandoning the Delta levees pending some overall long-term solution is totally unacceptable.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "George Basye". The signature is written in black ink and is positioned above the printed name.

George Basye,

September 25, 2008