

Michael J. Barkley
161 N. Sheridan Ave. #1
Manteca, CA 95336
209/823-4817
mjbarkl@inreach.com

January 12, 2010

PETITION FOR RECONSIDERATION

To Charles R. Hoppin, Frances Spivy-Weber, Arthur G. Baggett, Jr., Tam M. Doduc, and Walter G. Pettit, individually and as members of the California State Water Resources Control Board:

PETITION FOR RECONSIDERATION OF STAFF DENIAL OF PROTEST LETTER OF
12/14/2009

I. Preliminaries

A. I am Michael J. Barkley. I make this Petition with a Verification: I intend this to be as testimony, a truthful statement of what I know, believe, have seen, have heard, and have read.

B. On 12/14/2009 Division of Water Rights staff issued a letter denying my right to protest a Petition for Extension of Bureau of Reclamation's Permitted Application 18115 which is for storage at Black Butte Reservoir on Stony Creek in Tehama & Glenn Counties. For convenience of all, a copy of that letter is on my web site at <http://www.mjbarkl.com/swrb1214.pdf>. Thereafter I sent two letters asking that the denial be set aside and that I be allowed my protest and a formal hearing, first to Ms. Whitney (copy at <http://www.mjbarkl.com/whitney.pdf>) and the second to Ms. Rice (<http://www.mjbarkl.com/rice.pdf>). On 01/04/2010 I received a phone call from one of your lawyers, a Mr. Nathan Jacobson, who informed me that the appropriate reconsideration procedure for a staff denial of the right to protest is under Sections 1122 of the Water Code and 768 & 769 of your Regulations.

C. After speaking with you on 01/05/2010 and delivering to you my petition to gain access to the procedures used by staff to screen protests (<http://www.mjbarkl.com/swrc0105.pdf>) I was approached by [Mr. Sawyer ?] who confirmed that appeal procedure. No reasonable, thinking person adequately skilled in the English language could look at the 12/14/2009 letter and at these cited code sections and conclude that the appeal procedure to the letter is in those code sections. The letter does not use the words "decision" or "order" (Water Code Section 1120), there's no mention of "adoption by the board" (Regulation Section 768), it was not served by personal delivery or registered mail (Section 1121), and so on. What's missing is the connective tissue, and that is an "Underground Regulation" under the Government Code and Office of Administrative Law Regulations. So, here I am attempting to meet the imprecisely stated deadline and preparing this appeal by working all night before the day I'm having to deliver it to

you. Under your system, petitioners get decades, protestants get a week. That is not right.

A copy of my protest filed 10/01/2009 is at:

<http://www.mjbarkl.com/index10.htm> Table of Contents (not filed, included for convenience),

<http://www.mjbarkl.com/p1.pdf> Forms,

<http://www.mjbarkl.com/p2.pdf> Supplement,

<http://www.mjbarkl.com/p3.pdf> Exhibits.

D. I have also filed a companion motion in the Angle Case with the United States District Court, Eastern District, case #80-583 (was Equity #30), due to be heard by Judge Karlton at 10:00 a.m. 02/08/2010 which includes the entirety of my protest and seeks to align the Judge, Water Master and Angle Decree in advance of this 18115 case arriving in his courtroom. A copy of the filing showing the court's electronic filing stamp across the top is at:

<http://www.mjbarkl.com/307.pdf> filed 12/21/2009 case Doc #307 Motion to require changes in practices of the Water Master,

<http://www.mjbarkl.com/307-2.pdf> # 1 Memorandum in support of Motion,

<http://www.mjbarkl.com/307-3.pdf> # 2 exhibits in support of motion,

<http://www.mjbarkl.com/307-4.pdf> # 3 proof of service, CM/ECF,

<http://www.mjbarkl.com/307-5.pdf> # 4 proof of service, mail,

<http://www.mjbarkl.com/307-6.pdf> # 5 proposed order.

No matter which way this motion goes, it should simplify this Protest.

II. Elements of Regulation Section 768

(a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

1. Not only was I prevented from having a fair hearing, I was prevented from having ANY hearing. No hearing was allowed. I repeat my request for a formal hearing.

2. The ruling does not conform to the appeal statute and regulations:

As noted above: The letter, if a "ruling", does not use the words "decision" or "order" (Water Code Section 1120), there's no mention of "adoption by the board" (Regulation Section 768), it was not served by personal delivery or registered mail (Section 1121), and so on. Over the months before filing my protest I reviewed a number of files from the Stony Creek watershed, I examined protests that were allowed and protests that were denied (see PROTESTS AND THEIR DISPOSITIONS IN SWRCB AP. 18115 , Exhibit A for instance) , the protest elements in the statutes and published regulations, and the designated forms. I complied precisely with each of those elements. What I cannot comply with is the set of underground regulations by which staff handles protests, see my petition filed with you on 01/05/2010. I repeat my petition

to you to make those underground regulations known to the public and formalize them in compliance with the requirements of the Office of Administrative Law and the statutes they administer

3. Irregularity in the proceedings: again, staff is using a set of underground regulations to handle protests. This is irregular, and has been prohibited by the Administrative Law portions of the Government Code as well as by OAL regulations.

4. Abuse of discretion: it appears, and I have to say appears because the process is unlawfully opaque, that staff did not read my protest, that staff picked out a few phrases here and there and called it a day. Attached as Exhibit B is a list of issues from which they could have selected. Why they chose this tiny handful, and then rejected them is totally unclear. Their choice was arbitrary and capricious.

Further, it appears that their policy of not allowing full environmental or water rights review for extensions is pursuant to another underground regulation, and is an abuse of discretion. It is also an abuse of discretion to refuse to consider the environmental impacts of the proposal under NEPA which, for this applicant, is required.

Federal and state constitutional and statutory interests impaired by this behavior include:

- right to Protest under state water code and regs, and not have that protest misstated, distorted, trivialized, or ignored see OAL's Underground Regulations provisions, Title 1 of the California Administrative Code Sections 250-280, and petition forms on OAL's web site

- right to the hearing if the Protest had been accepted, evasion of and denial of the right to the hearing; it's obvious that both the petitioner and the protestant have equal hearing rights when contrasting Water Code Sections 1340 & 1341 with Section 1342; if either party does not show up, no hearing is necessary and the other "wins"; the hearing requires both; the parties are equivalent in the statute; with both, a hearing is required; without either, a hearing is not needed; the protestant's right to a hearing is as strong as the petitioner's; it is a due process and equal protection issue

- inequitable and unfair treatment, prejudicial in favor of petitioners; if petitioner have a petition rejected, they are allowed to amend repeatedly until Staff's requirements are satisfied; the protestant when rejected is out; state code requires a hearing if petition & protest, protestant is an essential component of the hearing right, a right to a hearing unless petition is withdrawn; again, a due process and equal protection issue

- right to administrative discovery

- right to complain of theft of water from the people of the State of California under Water Code Section 1052 (for instance)

- right to pursue protection of public trust elements and, specifically, to get salmon restored to the watershed

- right to comment on substantial and cumulative environmental effects under both CEQA and NEPA and not have those comments ignored

- damage to adjacent property, we own property adjacent to Black Butte which has already

been damaged once by being prohibited from irrigating and then losing large parts of it to petitioner at a cost held artificially low by their actions to prohibit irrigating

- damage to vested water rights, the riparian right to underflow
- right to recover property taken by Black Butte, once it is torn down
- disregard of our Small Business Interests:
 - We are Agriculture under \$1,000,000 per year
 - We are a fledgling Elderberry plantation

--refusal to demand salmon and steelhead data beyond protestant's reach but not beyond petitioner's or SWRCB's reach, SWRCB by demanding it from petitioner, and petitioner by consulting with NMFS, CDFG, USFWS, et al.; protestant's reach limited to published reports

--failure to provide a finding of fact, a finding of fact is an essential due process protection (decisionmaker should state reasons for his determination and indicate the evidence he relied on) [California Administrative Law, Michael Asimow, Marsha N. Cohen, West, 2002 American Casebook Series, 324 pp., p. 89]

(b) The decision or order is not supported by substantial evidence;

I cannot tell if it is even a decision or order, or if it supported by ANY evidence, or what that evidence might be. I think they made it up.

(c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

That includes evidence not yet produced; I need:

- Black Butte condemnation cases and remaining USACE plans, which I paid to have delivered to U.S. District Court Clerk's Office but the U.S. Archives is refusing to release (7-1/2 boxes)
- Water master files, still not made available, now subject of my motion for hearing 02/08/2010
- review the rest of Division of Water Right files; some 314 files, which takes time regardless of diligence; I've indexed 21 of them so far
- Division of Water Right procedures, for which I filed my CPRA petition with you on 01/05/2010
- resolution of motion on Water Master in District Court, 02/08/2010
- Reclamation & DOJ files; Freedom of Information Act requests outstanding, have to sue
- Various reports listed on the attached Salmon schedule, Exhibit C, but not yet found (Loggins 1997, the other 4 Maslin reports, Puckett 1969, Murphy 1948, etc.), including and especially the references behind them for Clark 1929 and the various Kroeber reports
- remaining unlocated, unidentified anecdotal and data reports on salmon in the watershed before 1904
- regular inspection access to fish barriers on Stony Creek, requested as a mitigation and settlement term
- current and recent run and take counts
- to learn what happened to the 1914 fish ladder, as in, did it get built and where and is it still operative

--to examine salmon/steelhead reports learned about on 01/10/2010, the NMFS Public Draft Central Valley Recovery Plan and Related Documents , for which public comment opened on 10/07/2009, 7 days after filing my protest

--fish ladder report p. 52, 2002 BiOp

--to petition the responsible agencies to extend critical habitat to the entirety of Stony Creek and to Grindstone and Big Stony and its tributaries

--Did the annual EA compliance report (FWS 05/11/1995) ever happen? where is it

Also, I built the Salmon Schedule, Exhibit C, over the past week; most of the information thereon has taken months of digging since filing my protest.

(d) Error in law.

See Exhibit B, the issues list, and comments on underground regulations above. Staff has done a pretty good job of defining for themselves what they think their tasks are, and then not sharing the definitions. This needs to change.

III. Elements of Regulation Section 769.

(a) Any petition for reconsideration of a decision or order shall be submitted in writing and shall contain the following:

(1) Name and address of the petitioner.

As above

(2) The specific board action of which petitioner requests reconsideration.

I do not know if this is a board action or not because it does not say that it is, but in any event, that would be the Division of Water Rights Letter of 12/14/2009 denying my right of protest.

(3) The date on which the order or decision was made by the board.

I do not know if it was an order, or decision, or was made by the board, but the letter is date-stamped 12/14/2009.

(4) The reason the action was inappropriate or improper.

As above, it denied me the right to protest, and did so in an arbitrary and capricious and undiscernible manner.

(5) The specific action which petitioner requests.

- a) Reinstate my protest, require USA to respond to it, and move on to a full formal hearing and environmental review.
- b) Reject Reclamation's BDCP EIR/EIS proposal as shown at p. 2 of Reclamation's "Attachment No. 1 to Environmental Information for Reclamation's Petitions for Extension of Time" as inadequate to address the substantial adverse cumulative effects of its ever-expanding control over the Stony Creek Watershed, including by way of this (Reclamation's) Petition for Extension of Time. [see the notice of petition on-line]
- c) Formalize the underground regulations that govern the handling of protests
- d) Prosecute petitioner's excess diversions, waste, and the development and use of the Lateral 40 Intertie
- e) Appear in District Court and move to set aside the Angle Decree and dismiss the case, or
- f) Revoke all permits and licenses in the watershed except for 20104 and 27382 and any others that are for underflow only
- g) Refund all fees for those collected under f) since 01/13/1930

(6) A statement that copies of the petition and any accompanying materials have been sent to all interested parties.

Before filing this with you, I have mailed by first class mail a copy to Bob Colella of the Bureau of Reclamation.

(b) If reconsideration is requested based in whole or in part on Section 768, subdivision (c), the petition shall include an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the board and the reason it was not presented. A general statement of the nature of the evidence and of the facts to be proved shall also be included.

Verification below. In II.(c) above is the list; the count and take lists from Reclamation or their contractors should show the status of the fish in the lower reaches of Stony Creek in recent years. For many of those items I don't know what they will prove but I do know from indexing Division of Water Rights Files that I find new and interesting information in almost every one of them.

IV. Salmon/Steelhead/Eagles

Please see the issues list, Exhibit B and the Salmon Schedule, Exhibit C. I've been accumulating snippets regarding salmon (and now Steelhead) on Stony Creek from here and there over the past months and I've compiled them in Exhibit C. The 12/14/2009 letter stated: "We will consider any statement of facts you submit on the fish habitat issue within 30 days from the date of this letter." Presumably that includes any studies with a date after the 04/01/1996 Negative Declaration (how can you have a negative declaration for a project that kills listed species?), see list of environmental actions on Exhibit D, ORDERS, DECISIONS, DECREES, AND ENVIRONMENTAL REVIEWS MENTIONED IN SWRCB AP. 18115 . This is in response to that invitation.

Reports since 04/01/1996 include:

Lower Stony Creek Fish, Wildlife and Water Use Management Plan November 13, 1998
(while it is true this plan was produced to settle the CSPA protest, for the most part this version was generated after 04/01/1996 in response to complaints by the Task Force)

NMFS 03/11/2002, NMFS Biological Opinion on Lower Stony,

Corwin, R.R. and D. J. Grant. 2004. Lower Stony Creek Fish Monitoring Report, Glenn County, California, 2001-2004. U.S. Bureau of Reclamation, Northern California Area Office, Mid-Pacific Region.

U.S. Bureau of Reclamation. 2005a. Additional information from Reclamation to proceed with and complete formal consultation on lower Stony Creek water management. Memorandum to Rodney R. McInnis, NMFS. August 5, 2005. Mid-Pacific Region, NCAO, Shasta Lake, California.

U.S. Bureau of Reclamation. 2005b. Results of 2005 monitoring period for the constant head orifice and the North Canal. Memorandum to Rodney R. McInnis, NMFS. October 11, 2005. Mid-pacific Region, NCAO, Shasta Lake, California.

U.S. Bureau of Reclamation. 2006. Results of 2006 monitoring period for the constant head orifice and the North Canal. Memorandum to Rodney R. McInnis, NMFS. October 26, 2006. Mid-pacific Region, NCAO, Shasta Lake, California.

NMFS 01/29/2007 Draft BiOp,

NMFS 06/20/2008 Final BiOp ,

H.T. Harvey & Associates. 2007b. Stony Creek Watershed Assessment, Volume 1. Lower Stony Creek Watershed Analysis

H.T. Harvey & Associates. 2007a. Stony Creek Watershed Assessment, Volume 2. Existing Conditions Report.

GCRCDD (Glenn County Resource Conservation District). 2009. Lower Stony Creek Restoration Plan. January 12, 2009. Also available online at:

NMFS Public Draft Central Valley Recovery Plan and Related Documents , 10/2009

Many of these may be directly accessed from my web page, <http://www.mjbarkl.com/salmon.htm>. I will attempt to add links this week for such others as I can find. Some of these I have not yet examined. If the Board or Staff wishes these reports printed out I can do so and have them on

their desks upon two hours' notice. Otherwise, I ask that the Board and Staff take the equivalent of judicial notice of them. Other reports since 04/01/1996 appear on the Salmon schedule but I have not yet located them to verify that they include or exclude information on Stony Creek.

It appears that where Chinook go, steelhead follow except they go higher up into the watershed. Maps in various NMFS reports such as the 10/2009 draft show critical habitat beyond Black Butte to about Julian Rocks I do not know the significance of this designated habitat above Black Butte.

Reynolds, 1993, asserted that of 6000 miles of spawning streams before Europeans began settling in the Central Valley, only 300 mile (5%) remains. Not all spawning streams are equal, of course, but if the bypass canals were designed and installed around Black Butte and Stony Gorge and the other fish ladders and screens were installed it would add about half again the linear miles of spawning stream to that 300 miles, making 450 miles or so, a substantial increase. Everyone assumes those two dams are impassable but they are not like Friant or Shasta, the low valleys adjacent to the Creek main stems make it feasible. Black Butte required the construction of dikes at various locations around the perimeter because it's in such a shallow valley. The map in the the Ap. 18115 file Category 20 Volume 1, Transcripts and Exhibits, Item 6 - USBR, Exh. 8 Black Butte Dam plan & profile & Sections dated July, 1960, Drawing No., 654-208-4, including dikes, shows dike #1 between Stony and Hambright Creek where the old road used to pass through the hills and drop down to Simpson Bridge.

Not much elevation is needed for either bypass canal.

Reclamation has been participating in developing other bypass canals, see for instance the canal around 12-mile Dam for the Tongue and Yellowstone Irrigation District for warm-water migrating fish, <http://cooperativeconservation.gov/library/DOICCAAnnualReport2007ver11.pdf> or <http://fwp.mt.gov/mtoutdoors/HTML/articles/2008/BypassingtheBarrier.htm> (the Montana Department of Fish and Game magazine "Montana Outdoors"). Reclamation's canal between Rainbow Diverwion Dam and East Park is much longer than that and although not lined it is through terrain similar to that to bypass Stony Gorge and Black Butte. Yes, research into chillers will be necessary but if we can cool hundreds of thousands of tractor-trailer/rail-car "refers" and millions of automobiles, it shouldn't be too difficult to keep these canals under the needed 70-degree Fahrenheit ceiling for Chinook.

One last comment appeared on the 12/14/2009 letter: "The protest also mentions the de-listing of bald eagles. It appears that this is an informational item." Not so. Staff completely misses the issue. The issue is: " Does the equivalence of the "take" provision in the Endangered Species Act and the Bald and Golden Eagle Protection Act of 1940 mean that the Eagles enjoy the same regulatory protection as ESA listed species even if they have been delisted?"

In digging through various web sites I found the following: "The generosity of the Division of Water Rights in allocating the water of the streams and lakes without the least consideration of

the needs of fish life and the overgrazing privileges given in the forests without due consideration of the needs of the wild life of the state are situations difficult to handle." p. 24, Fish and Game Commission, Twenty-Eighth Biennial Report, 1924

Apparently, this has not changed. It's time it did.

VII. VERIFICATION

I am the protestant in this proceeding and I researched, compiled and wrote this Petition. I declare under penalty of perjury that the allegations and factual contentions in this Protest are true and correct, except for those submitted on information and belief and as for those I believe them to be true and correct.

Michael J. Barkley

Dated: January 12, 2009

cc: Bob Colella, Reclamation