

December 16, 2009

Ms. Victoria A. Whitney
State Water Resources Control Board, Division of Water Rights

Hand carried

Re: Your Letter 12/14/2009 KDM:18115

Dear Ms. Whitney,

Thank you for your letter.

It does seem to be the same form letter the Division of Water Rights has been issuing for decades in answer to extension protests. It is surprising that you are now issuing such letters since now your extension protest forms specifically solicit the Protest that I submitted complete with all its elements. The underlying 18115 extension petition forms, and especially paragraph 4 of Reclamation's petition attachment #1 to its Environmental Information form, all clearly demonstrate that every issue I presented is well within the scope of your extension review. Your forms and your letter are contradictory. Either or both would seem arbitrary and capricious. Part of the arbitrary and capricious nature of your letter was in picking some issues and ignoring others, and in misstating the issues you did pick.

Most federal and state agencies include narrative on the right of appeal when there has been an administrative denial such as yours. Although I may be capable of divining that right of administrative appeal on my own, I urge you to state it for me now, promptly, in writing, before any hidden SWRCB or CalEPA Secretary deadlines pass.

Your letter carefully avoids the forms' area of jurisdiction. For parties, successors, and assigns to the Angle Decree, and that of course includes me and the United States of America, and presumably by now the State of California, for all such parties the SWRCB has absolutely no jurisdiction whatsoever to grant or deny surface flow rights (and thus to even consider the petitioned-for extension) in the Stony Creek watershed as long as the Angle Decree is not set aside or modified. To repeat, you do not have jurisdiction.

Didn't you even chat with your legal department?

I wish to appeal every other point in your letter as well as well as your failure to address the issues you excluded from your letter. Does that go to the full Board or the CalEPA Secretary or do you have some other internal appeal process established?

You threw in comments about salmon. With your history and in light of the rest of your letter I am uncertain as to whether or not your offer to consider more evidence on salmon is any more sincere than your extension petition notice and forms are. Even while the GCID berms were in place they would periodically wash out allowing Salmon upstream during springtime.

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There are records of salmon upstream until Black Butte was built, and further upstream until Stony Gorge was built. Once the GCID siphon was in place, Reclamation began finding salmon at the Tehama-Colusa Canal barrier, a barrier you allowed. NMFS issued them a 100% incidental take permit. They exceeded that. NMFS issued another one for the new higher level, again a 100% take. This is very naughty. Despite NMFS powers to issue such take permits, the environmental damage to salmon under NEPA and CEQA does not automatically disappear as long as feasible mitigations exist, and they do exist. I see the ESA and Regs allow me to petition to have critical habitat for various Chinook runs extended to cover Stony Creek and its tributaries. Is it your intention to aid the USA in blocking that as well?

I have been spending much effort working through local histories, California Indian studies, and biological reports digging out further information on Stony Creek salmon. I am finding several pertinent references per month but am far from finished with that effort. Even so, it has become obvious that in the past you have enabled the extinction of salmon on Stony Creek. Your benevolent attitude toward the United States of America in this watershed is part of the problem, and it is part of why salmon have not been allowed to "un-extinct" themselves on Stony Creek and its Big Stony and Grindstone tributaries. I am reminded of the answer by the USA to the Brownells (then owners of 14,000 acres between Stony Gorge & Black Butte) in your Ap 2212 file, wherein USA said there was no material affect on them because the bulk of the Stony Creek Watershed was still available to them as a source for irrigation water if they wished. Then along came USA and built Black Butte with your blessing with a much lower volume of retention than USA assured was available to the Brownells, and you, the SWRCB, followed up with a finding that Stony Creek is fully appropriated, a consummate *Catch-22* result. Salmon are extinct in the watershed because of actions by you and USA and you are hostile to any efforts to bring them back. USA's attitude is a problem, but so is yours.

I urge you to set aside your letter and pursue the issues I presented, all of the issues, including and especially cumulative effects, or else inform me immediately of your internal appeal rights on each and every issue I presented, and there are a lot more issues than the handful you listed in your letter.

Best wishes,

Michael J. Barkley

cc: Bob Colella