

Continued from previous page.

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February 26, 2010

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Mr. Donald R. Glaser
Regional Director
Bureau of Reclamation
2800 Cottage Way
Sacramento, California 95825-1898

Re: San Joaquin River Restoration Program
Your letter of February 4, 2010 to Reggie N. Hill

Dear Mr. Glaser:

Once again we must take issue with the position which the Bureau of Reclamation has taken with regard to the land owners adjacent to the Eastside Bypass and the Mariposa Bypass. Your position, as the Levee District understands it, is as follows: The easements in which the Eastside Bypass and Mariposa Bypass were constructed provide that they are to allow water:

To flow, without recourse by grantors, their successors or assigns, for compensation for past, present or future damages therefrom, any and all waters which may as a result of any present or future flood control project of the State of California, from time to time inundate the [grantor's property].

Reach 4 B of the River silted up because the Levee District found that it was not cost effective, from a flood control perspective, to keep it clear. As a consequence, any water which would normally go down Reach 4 B of the River must necessarily now go down the Eastside Bypass, (where it may or may not be diverted into the Mariposa Bypass). You seem to believe that, under this set of facts, the interim flows enter the bypasses "as a result of . . . [the] flood control project", and, therefore, are within the scope of the easements.

Your logic is deeply flawed. The Levee District's actions or inactions cannot legally increase the burden on the lands over which the bypass easements are located. If, by an action, it did increase the burden, the landowners would have a valid claim for inverse condemnation – that is to say a taking of an additional property interest from the landowners without paying just

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Mr. Donald R. Glaser, Regional Director, Bureau of Reclamation

Re: San Joaquin River Restoration Program

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compensation. However, the Levee District is not the one sending water which is unnecessary for the flood protection project down the River. That water is being sent down the River by the Bureau of Reclamation as a part of the river restoration project. Its purpose is river restoration and not flood protection. From the perspective of the landowners, this constitutes a taking of a property interest without just compensation and a trespass. They never agreed to have the restored River run through their property -- they only agreed for flood waters to run across their property.

There is very little question but that your interpretation will get both the Levee District and the Bureau of Reclamation sued. The Levee District does not want to be sued and, if it is sued, will probably not be able to bear the cost of an effective defense. Therefore, from the Levee District's position, it does not matter who is right or wrong. If the District gets sued, it will be a catastrophe, whether it wins or not.

However, for the record, the Levee District would like to point out some facts. Reach 4B1 of the River, insofar as the Levee District can tell, never took the 1,500 cubic feet per which it was designed to take. The soil there is extremely sandy. Low flows not only allow silt to accumulate, but, because of the area's soil conditions, the banks of River would slough into the channel, creating further constrictions. This part of the flood protection project was inadequately designed. While, it is certainly true that the Levee District did stop its efforts to keep the channel in Reach 4B1 cleared, (because it was not cost effective to do otherwise,)¹ the Levee District believes that this defect in the design of the flood protection project led inevitably to the present condition of Reach 4 B. It was impossible to maintain this reach of the River in a cost effective manner. The failure of Reach 4 B goes more to problems with the initial design by DWR, with approval by the Army Corp of Engineers and, ultimately to the fact that the Bureau of Reclamation built Friant Dam than to the Levee District's fiscal decision to avert channel clearing activities. Once the dam was built, the volume and, therefore, the velocity of the water going down the River was not sufficient to maintain a channel rid of obstructions such as sediment deposition like Reach 4B1.

Again, the District believes that, without the River Restoration Project, the District would not be sued over the condition of Reach 4 B. With the River Restoration Project, it will be sued. The Levee District cannot afford to be sued -- whether it wins the suit or not. We again urge you to change course.

¹ It should be remembered that the Levee District was not created for the purpose of protecting a river but for the protection of people and property from floods.

Mr. Donald R. Glaser, Regional Director, Bureau of Reclamation

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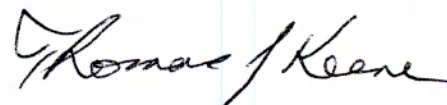
Your letter mentions your negotiations with San Luis Canal Company and Central California Irrigation District in which "Reclamation is working to address similar concerns". The Levee District is a part of the negotiations between Reclamation, CCID and SLCC on an Operations Agreement. Up until now, Reclamation has resisted any suggestion that anything like an indemnification might be a part of the Operations Agreement. The Levee District has, since before the Operations Agreement, negotiated with Reclamation and Financial Assistance Agreement for the purpose of reimbursing the Levee District for the costs it incurs as a result of the river restoration activities. In that negotiation Reclamation has also continued to resist any suggestion of an indemnification or any other mechanism to address the Levee District's concerns. Reclamation's insistence on not addressing this issue is the reason why the Levee District has not entered into either an Operations Agreement or a Financial Assistance Agreement with Reclamation.

Finally, we were disturbed by your statement that you "anticipate that the Levee District will continue to operate the Flood Control Project as it has for more than 40 years, routing any and all waters reaching the San Slough Control Structure into the bypass system to avoid damages in Reach 4B1 of the San Joaquin River." As we understand the Settlement Agreement, paragraph 11(a)(3), Reclamation will be modifying Reach 4B1 "to the extent necessary to ensure conveyance of at least 475 cfs". We understood that, after this modification was completed and on line, the Secretary of the Interior, in consultation with the Restoration Administrator and the concurrence of the National Marine Fisheries Service and the Fish and Wildlife Service, would determine whether to make further modifications to Reach 4B1 so that it could convey 4,500 cfs. If this modification does occur, it will totally eliminate the problem.

The District has advocated through the comment time period on the settlement and the environmental review of the project for the final modification of Reach 4B1 so that it will accommodate 4,500 cfs. We still believe that this should be done both to have a truly restored River and to preserve the flood protection capacity of the bypass system. It would be a shame if this went by the wayside at this point.

Very truly yours,

Linneman, Burgess, Telles,
Van Atta, Vierra, Rathmann,
Whitehurst & Keene



Thomas J. Keene

Mr. Donald R. Glaser, Regional Director, Bureau of Reclamation

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cc: Honorable Diane Feinstein, United States Senate
Honorable Barbara Boxer, United States Senate
Honorable Dennis Cardoza, House of Representatives
Honorable George Radanovich, House of Representatives
Honorable Jim Costa, House of Representatives
John Engbring, U. S. Fish & Wildlife Services
Rhonda Reed, National Marine Fisheries Service
Jeffrey R. Single, California Department of Fish & Game
Paula Landis, California Department of Water Resources
Victoria Whitney, State Water Resources Control Board
Kathy Mrowka State Water Resources Control Board
Monty Schmidt, National Resources Defense Council
Ronald Jacobsma, Friant water Users Authority
Reggie Hill, Lower San Joaquin Levee District
Steve Chedester, San Joaquin River Exchange Contractors