SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
813 SIXTH STREET, THIRD FLOOR, SACRAMENTO, CA 95814
T: 916-446-7979 F: 916-446-8199
SOMACHLAW.COM

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HAND DELIVERED

Michael Chrisman
Secretary of Resources
Resources Agency
1416 9th Street, Suite 1311
Sacramento, CA 95814

Re: Delta Vision Committee – Water Rights

Dear Mr. Chrisman:

On July 9, 2008, the Attorney General provided an opinion letter advising the Delta Vision Blue Ribbon Task Force that the public trust doctrine may be used as a principal tool for reallocating water for ecosystem restoration purposes from existing water right holders, without regard to the priority of their various legal entitlements to water. (July 9, 2008 Letter to John J. Kirlin, Executive Director, Delta Vision, from Virginia A. Cahill, Deputy Attorney General, Re: Reallocation of Water under Specified Conditions.) The opinion letter of the Attorney General suggests that the responsibility for protecting public resources may be spread incrementally to all who divert water from the Delta or its tributaries, including upstream water users, and that this can occur without establishing that upstream water uses are, in fact, incompatible with the public trust values sought to be protected.

The Attorney General also advances the argument that article X, section 2 of the California Constitution can be used as an additional tool for reallocating water for ecosystem restoration purposes within the Delta. Article X, section 2 of the California Constitution requires that water be put to beneficial use to the fullest extent capable and that unreasonable use be prevented. This provision ensures that water is used efficiently and without waste. Contrary to the guidance given by the Attorney General, the constitutional requirement of beneficial use does not serve as a legal basis for reprioritizing one type of existing water use over another.

As discussed more fully herein, the Attorney General's reliance on the doctrines of public trust or reasonable use to massively reallocate water within California for the protection of the Delta is misplaced. Proceeding with proposals to reallocate water based upon the Attorney General's advice will destabilize California's system of water rights, and will thrust the State into decades of costly and counterproductive litigation. In turn, the State's economy will needlessly suffer, and the State will have done little, if anything, to further its goal of ecosystem restoration.

1. A Water Rights Is a Property Right

California water law, developed over the past 158 years, is based upon the fundamental premise that one cannot take water from a stream without acquiring some type of water right. This well-developed area of law has, as one of its bedrock principles, a relative system of priorities. This system recognizes a senior right for those that first developed water resources for beneficial uses. Thus, those that have previously put water to beneficial use have the prior right, senior to those that came later, to continue to put water to beneficial use. While a water right is usufructuary in nature, once the right is perfected, i.e., put to beneficial use, the use of water becomes a vested real property right.

That perfected water rights are real property is confirmed by more than 150 years of California law. This recognition appears in numerous cases, in the California Constitution, and has been the position of the State in numerous adjudicative proceedings. In fact, the California Attorney General has argued, at least before the Appellate Courts of this State, that the right to water is classified as real property. (See *Fullerton v. State Water Resources Control Board* (1979) 90 Cal.App.3d 590, 598.) Thus, courts have continually affirmed that an appropriative water right is a real property interest incidental and appurtenant to land.

Any attempt to overturn this body of well-established law through reallocation schemes will, as noted above, result in protracted and costly litigation, including, among other things, numerous inverse condemnation actions for the unconstitutional taking of water rights.

2. Public Trust Doctrine

The California Supreme Court in *National Audubon Society v. Superior Court (Los Angeles Dept. of Water & Power)* (1983) 33 Cal.3d 419, 447 (*National Audubon*), defined the relationship between the public trust doctrine and California's system of water rights. We do not question California's affirmative duty to take public trust resources into account in the planning and allocation of water resources. Nor do we dispute the State's continuing supervisory authority over navigable waters for the protection of public trust values. We furthermore acknowledge that the scope of the public trust doctrine has evolved over time to encompass a broad range of ecological values. We fundamentally disagree, however, with the Attorney General's asserted "practical application of the public trust doctrine," and the Attorney General's assertion that the public trust doctrine authorizes a proportionate reallocation of all water diverted from the Delta or its tributaries for ecosystem restoration purposes.

In *National Audubon*, the California Supreme Court states that "[a]s a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses." (*Id.* at p. 446.) Realizing that California's economy and population centers have developed in reliance upon appropriations of water, the Supreme Court unmistakably contemplated that before water is allocated or, as in this case, reallocated, there must be a careful balancing and weighing

between the costs and the benefits associated with the continued use of water and the protection of public trust values.[1]

The balancing and weighing of specific benefits and costs must be done on a case-by-case basis, and only where an individual's diversion of water can be traced to actual harm to the public trust resources. In *National Audubon*, the Court set forth a number of elements that enter into a public trust decision. In addition to considering the public trust values to be protected, the State was required to balance numerous other factors, including the City of Los Angeles's need for water, its reliance on past board decisions, and the cost in terms of money and the environmental impact of obtaining water elsewhere. (*National Audubon, supra*, 33 Cal.3d at p. 448.) Because the relevant components that must be considered may vary according to the individual circumstances of each situation, it is evident that the type of balancing directed by the Supreme Court cannot be achieved on a macro scale.

None of the cases cited by the Attorney General substantiates a decision to reallocate water over an entire watershed without first examining the unique circumstances associated with each individual diversion, and carefully weighing those against the particular public trust values to be protected. The Attorney General attempts by analogy to rely on *People v. Gold Run Ditch & Mining Co.* (1884) 66 Cal. 138 (*Gold Run*) to support the proposition that all who divert water from the Delta should be responsible for a proportionate share of the water required to protect public trust uses.

The Attorney General takes the California Supreme Court's holding in *Gold Run* entirely out of context, and misapplies it to the question of which water users may bear the burden of avoiding or reducing harm to public trust values. This case involved a public nuisance wherein each and every challenged mining operation, including the defendants', was considered to be wrongful and destructive of the public's right in the navigable rivers of the State. As the California Supreme Court stated:

> [I]n an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined, jointly or severally. It is the nuisance itself, which, if destructive of public or private rights of property, may be enjoined. (*Gold Run, supra*, 66 Cal. at p. 149.)

Two-thirds of California's entire population are dependent upon diversions of water from the Delta. Diversions of water provide essential drinking water for California's cities and towns. California agriculture would be non-existent but for the ability to divert water critical to growing the food upon which this nation and the world depend. Industries throughout California rely on Delta diversions for manufacturing. Diversions of water from the Delta are the lifeblood of this State, not a nuisance to be enjoined. While there may be very unusual situations wherein an individual's

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[1] Of course, even after an appropriate balancing, there would likely be significant issues associated with an unconstitutional taking that would need to be addressed.

diversion of water may be harmful of the public trust, it is beyond reason to conclude as a general proposition that all diversions from the Delta are wrongful, and therefore may be enjoined. Accordingly, the Attorney General's reading of *Gold Run* simply cannot be supported. [2]

While the Attorney General cannot cite a single case on point to support its proposals, there is case law which directly challenges those recommendations. The California Supreme Court recently rejected equitable apportionment of water as a physical solution to the overdraft of the Mojave River Groundwater Basin in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, specifically because it disregarded the priority of certain existing water right holders. Reiterating that water right priorities are fundamental to California's system of water law, the Court concluded that equitable solutions must preserve water right priorities to the fullest extent possible. (*Id.* at p. 1243.)

> The solution's general purpose cannot simply ignore the priority rights of the parties asserting them. In ordering a physical solution, therefore, a court may neither change priorities among the water right holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine. (*Id.* at p. 1250, internal citations omitted.)

Contrary to the Attorney General's opinion, the State is compelled to ascertain whether there exists a solution that will avoid harm to the public trust resources while at the same time not adversely affect prior appropriators' vested property rights in water. Only if there is a direct conflict between prior rights to water and the public trust can the State apply the balancing test established by *National Audubon*. In addition, this balancing test must be assiduously undertaken before water can be reallocated for the benefit of public trust uses.

In *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937 (*El Dorado Irrigation Dist.*), the 3rd District Court of Appeals clearly articulated the fundamental principle of California water law that "priority of right is significant only when the natural or abandoned flows in a watercourse are insufficient to supply all demands being made on the watercourse at a particular time." (*Id.* at p. 962.) According to the Attorney General, it is the over-diversion of water that is causing the harm to public trust resources. California water law dictates that water right priorities be utilized to determine availability of water for competing uses, including use of water for the protection of public trust resources.

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[2] Unable to find any case law justifying its theory that each Delta diverter should contribute proportionately to the ecosystem restoration, the Attorney General resorts to the State Water Resources Control Board's draft Decision 1630 as evidence of the acceptability of its proposal. However, as the Attorney General itself acknowledges, Decision 1630 was withdrawn and never adopted. Decision 1630 therefore is only demonstrative of an approach promoted by the State Water Resources Control Board staff, not the State Water Resources Control Board itself.

"[E]very effort must be made to preserve water right priorities to the extent those priorities do not lead to violation of the public trust doctrine." (*El Dorado Irrigation Dist., supra*, 142 Cal.App.4th at p. 966.) Thus, rather than use the over-diversion of water in a strained attempt to justify the incremental reallocation of water for the benefit of public trust resources, the law requires just the opposite — that water right priorities be used in the first instance to address the over-diversion of water.

3. Unreasonable Use

In its analysis of article X, section 2 of the California Constitution, the Attorney General acknowledges that a determination of whether an existing use of water is reasonable requires a fact specific determination. Nevertheless, the Attorney General conjectures that California's doctrine of reasonable use may be used to prohibit uses of water that are less than optimum or desirable. Competing beneficial uses of water may affect the determination of what is "reasonable" over time. In order for an existing beneficial water user to lose its water rights, however, a finding must be made that the use is unreasonable, not simply that there is a more valued use for that water, in someone else's opinion. The doctrine of reasonable and beneficial use is not a legal basis for reprioritizing between various reasonable uses of water. A use must first be determined as being unreasonable before that use is reallocated to another.

Nor should the doctrine of reasonable and beneficial use be construed to inhibit the vesting of a quantifiable property right in water. The property right to water is defined, in part, by reasonable beneficial use. Like an easement in land, the property holder owns the land subject to the purpose of the easement, but the property owner still holds a vested interest in the subservient estate. Similarly, as long as a water right holder reasonably uses water for a beneficial purpose, the water right holder has a vested property right that cannot be reallocated simply because someone decides that there may be a higher valued use for the water.

After summarizing the case law on the reasonable and beneficial use, the Attorney General's opinion itself concedes that the doctrine has never been utilized in the manner it suggests as a basis for reprioritizing between existing uses of water. In spite of this admission, the Attorney General's opinion is currently being cited as authority for that very proposition, a proposition that is not substantiated by any of the cases cited within the Attorney General's opinion.

4. Conclusion

The purpose of the Attorney General's Opinion was ostensibly to identify tools to further the restoration goals for the Delta. The Attorney General, however, advances theories with little support in the law, and in doing so creates an unnecessary conflict with the lawful users of water. If implemented, the Attorney General's Opinion will undoubtedly result in

costly complex litigation that will undermine the State's ability to achieve its overall objective.

California's system of water rights, based upon prior appropriation, was intended to inject an element of legal certainty into an inherently uncertain physical situation. Undercutting the concept of priority destabilizes California's system of laws. Thus, rather than ignoring California's water right law to achieve the State's restoration goals, the system of water rights should be fully recognized and utilized to facilitate a solution to the Delta.

Very truly yours,

SOMACH SIMMONS & DUNN

By _____
Sandra K. Dunn

SKD:sb

cc: Linda Adams, Secretary for Environmental Protection
Dale Bonner, Secretary for Business, Transportation and Housing
Michael Peevey, President, California Public Utilities Commission
A.G. Kawamura, Secretary for Food and Agriculture
Frances Spivy Weber, State Water Resources Control Board
Lester Snow
Darrell Steinberg
Doris Matsui
David Jones
Donald R. Bransford
Thaddeus Bettner
Keith DeVore
Todd Manley

bcc: Roger Gwinn
Stuart L. Somach
Andrew M. Hitchings
Jennifer T. Buckman
Daniel Kelly