



CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

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May 9, 2008

Hon. Philip Isenberg, Chair; and Members
Delta Vision Blue Ribbon Task Force
650 Capitol Mall
Sacramento, CA 95814

Re: **Comment Letter—Guidance Regarding Appropriately Incorporating the Principles of Reasonable Use and Public Trust in California Water Policy Making.**

Dear Honorable Members of the Task Force:

The California Farm Bureau Federation (“Farm Bureau”) is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California’s largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 91,000 members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California’s resources.

Farm Bureau appreciates the opportunity to provide comments regarding the appropriate incorporation of the principles of reasonable use and public trust into Delta Vision’s Strategic Plan. Farm Bureau recommends that the Strategic Plan incorporate the principles of reasonable use and public trust only to the extent these principles are well established as a matter of law. Because both reasonable use and the public trust doctrine have been the subject of extensive commentary regarding how these principles may be extended to modify water allocation within California, a significant difference has developed between doctrinal interpretations of law and theory. Delta Vision should rely only upon well established principles of beneficial uses and obligations imposed by the public trust doctrine.

1. Public Trust Doctrine’s Application to Water Resources in the State of California

In order to avoid confusion as to differing legal and theoretical interpretations of the scope and reach of the public trust doctrine, Farm Bureau recommends that Delta Vision adhere,

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as a fundamental matter, to the guiding principles plainly laid out by the California Supreme Court in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419. As described by the California Supreme Court, the public trust doctrine requires:

a. The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust. [Footnote omitted.]

b. As a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream. The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values. [Footnote omitted.] California's Constitution (see art. X, § 2), its statutes (see Wat. Code, §§ 100, 104), decisions (see, e.g., *Waterford I. Dist. v. Turlock I. Dist.* (1920) 50 Cal.App. 213, 220), and commentators (e.g., Hutchins, *The Cal. Law of Water Rights*, op. cit. supra, p. 11) all emphasize the need to make efficient use of California's limited water resources: all recognize, at least implicitly, that efficient use requires diverting water from in-stream uses. Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel.

c. *The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.* [Footnote omitted.] Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. [Citations omitted.]. As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [citations omitted], and to preserve, so far as consistent with the public interest, the uses protected by the trust.

(*Id.* at pp. 445-46, emphasis added.) Given this clear direction, the Strategic Plan should adhere to the principles laid out by the Supreme Court and not deviate from this foundational precedent.

2. Public Trust Doctrine and Existing Regulatory Authority

The public trust doctrine is a legal theory which provides authority to, and imposes an obligation upon the State to act as trustee for the people's interest in tidal lands and navigable waterways. (*National Audubon, supra*, at p. 435.) The public trust doctrine is neither a new doctrine, nor is it the only doctrine seeking to protect the values and uses of waterways. Rather, to a large degree, the public trust doctrine has been absorbed by the body of state and federal law and regulatory authority, including the Clean Water Act, the Porter-Cologne Act, the Federal Endangered Species Act, the California Endangered Species Act, the Delta Protection Act, the California Environmental Quality Act, Regional Water Quality Control Board Basin Plans aimed to protect beneficial uses, regulatory authority of the Department of Water Resources, the Department of Fish and Game, the State Water Resources Control Board, the Regional Water Quality Control Boards, area of origin statutes, and recent court decisions concerning the Bay-Delta.

To the extent that the Strategic Plan incorporates the public trust doctrine, it must also acknowledge the wide body of current regulatory authority, existing laws, and policy protecting our environment and trust values and not treat the public trust doctrine as a novel avenue protecting ecological interests. Additionally, the Strategic Plan must carefully avoid reliance upon the public trust doctrine that conflicts with existing law since, to the extent they impact trust values, these laws clearly state the intent of the legislature regarding appropriate stewardship of trust resources.

3. Public Trust Determinations Must Balance Competing Needs

The public trust doctrine "evolves in tandem with the changing public perception" and public needs. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434.) The doctrine must balance the needs of all, including the economy of the state, which includes water diversions and agriculture, with the economy of the environment. In addition, protection of trust values is not unrestrained. In its most lucid description, the Supreme Court stated that the State's public trust responsibility, insofar as it concerns diversions, is to "consider the effect of such diversions upon interests protected by the public trust, and attempt, *so far as feasible*, to avoid or minimize any harm to those interests." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, emphasis added.) Therefore, the Strategic Plan must examine current needs, whether agricultural, environmental or municipal, and balance such needs against feasible protections.

4. Reasonable Use

In considering how to appropriately develop the Strategic Plan, Delta Vision must properly relate the public trust doctrine to the constitutional requirement of reasonable use. Although it can be difficult to apprehend how these principles interact, the California Supreme Court clearly establishes that the public trust is subordinate to reasonable use when it stated that

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“[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use.” (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443.)

The State Board has various authorities to prevent waste and enforce the reasonable use requirement of Article X, Section 2, including its authority under Water Code section 275. “Reasonableness,” however, or any charge of waste is a fact-specific, case-by-case determination. (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140.) The traditional measure of “reasonableness” has been the reasonableness of the “means” employed to serve a particular beneficial use of water (“means-ends test”). In contrast, courts have been very reluctant to enter the realm of “social policy,” applying an “end use standard” that prioritizes different beneficial uses. And, while it is ostensibly within the purview of the state legislature to engage in such relative prioritization of uses, legal experts broadly agree that the effect of doing so would be very detrimental. Most fundamentally, such prioritization would severely undermine the need for reasonable certainty that is the bedrock of California water rights law and, thus, of water management through the state. “Playing favorites” among different beneficial uses would promote endless rounds of litigation as favored water users jockeyed to undermine the existing rights of those less favored. Furthermore, such an approach would have a severe chilling effect on the water markets that currently provide a more equitable and efficient means of redistributing water supplies.

Preserving and ensuring the ability of farmers throughout the state to freely choose among the crops they grow is essential to the health and resilience of the State’s agricultural sector as it competes within a global marketplace. Similarly, to maximize the potential of increased efficiency statewide, the state should provide positive incentives and avoid a punitive or heavy-handed regulatory approach. State policies should afford farmers maximum flexibility to select methods to improve water efficiency. Efforts to improve existing efficiencies should occur within the bounds of feasible technologies, basic requirements for plant growth, practices to ensure long-term soil conservation, cost, and other practical considerations. Policies on agricultural efficiency should also consider the possible adverse impacts on groundwater, downstream users, and instream flows. Furthermore, the State should avoid imposing rigid efficiency standards that ignore local conditions, differences among crop types, agricultural practices, etc.

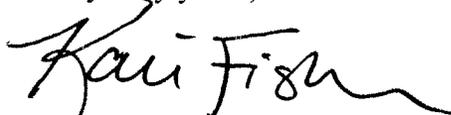
As a final consideration relating to application of both Article X, Section 2 and the public trust, we would remind the Task Force that water rights are a species of the property right. A taking of water for a public purpose, such as the preservation and enhancement of fish and wildlife, or for a regulatory purpose such that there is a substantial loss of the economic use of that property, may constitute a Fifth Amendment taking of private property and may require just compensation. (*Fallini v. Hodel* (D.Nev. 1989) 725 F.supp. 1113; *Tulare Lake Basin Water Storage Dist. v. United States* (2003) 59 Fed.Cl. 246; *Hage v. United States* (2002) 51 Fed.Cl. 570.)

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CONCLUSION

Thank you for the opportunity to provide our comments and concerns. We look forward to further involvement and discussion with Delta Vision on the development of the Strategic Plan.

Very truly yours,

A handwritten signature in black ink that reads "Kari Fisher". The signature is written in a cursive, flowing style with a long horizontal flourish at the end.

KARI E. FISHER
Associate Counsel

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