



May 9, 2008

Mr. Philip Isenberg, Chair
Delta Vision Blue Ribbon Task Force
650 Capitol Mall
Sacramento, CA 95814

RE: Submission By San Joaquin River Group Authority Regarding
Incorporation of Public Trust Principles in California Water Policy
Making

Dear Mr. Isenberg:

The San Joaquin River Group Authority ("SJRG") appreciates the opportunity to provide this submission regarding the incorporation of public trust principles into California water policy making process and looks forward to participating in the upcoming public meetings and other activities that the Task Force will be conducting prior to the development and release of its strategic plan in October 2008.

The SJRG has serious concerns with the Task Force's repeated calls for the use and incorporation of the principles of the public trust doctrine into California water policy-making since the State is already required to take into consideration the needs of public trust resources before making any water planning and allocation decisions. (*See, e.g.,* Water Code §§1243, 1243.5, 13000, 13241, 13050(f); *see also* National Audubon Soc'y v. Superior Court (1983) 33 Cal.3d 419, 446). This additional public trust process suggests to the SJRG that some of the Task Force may be looking for ways to extend the use of the public trust doctrine beyond making water policy decisions, by inserting

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such an analysis into the implementation of such water policy decisions as they relate to competing water right holders. The Task Force should be aware that the public trust doctrine may inform policy regarding water right availability but cannot be used as a mechanism to reallocate previously allocated water among competing water right holders.

A. The Public Trust Doctrine

The public trust doctrine provides that certain natural resources are held in trust by the government for the benefit and use of all. The doctrine has its origins in Roman law, which held that the air, running water, sea and seashore were owned by all persons based upon natural law. (The Institutes of Justinian 2.1.1 (J. Moyle trans. 3d ed. 1896)). The doctrine was adopted from Roman law into the English common law, and from the English common law came to America. (Carstens v. California Coastal Com. (1986) 182 Cal.App.3d 277, 288).

Traditionally, the public trust doctrine only protected the public's right to navigation, commerce and fisheries. (Marks v. Whitney (1971) 6 Cal.3d 251, 259). However, in California, the range of interests protected by the public trust doctrine has been expanded to meet some of the evolving needs of the public, and now has been expanded to protect recreational, ecological and environmental interests in addition to the traditional interests. (Id. at 259; National Audubon, *supra*, 33 Cal.3d 419, 434-435). Interests protected by the public trust doctrine do not include all public uses, but generally only non-consumptive uses associated with a watercourse. (Id. at 440).

The state is obliged to take the public trust into account in making any water planning and allocation decisions, and is bound to protect the public trust resources

“whenever feasible.”¹ (National Audubon, *supra*, 33 Cal.3d. at 446). Further, the state has a continuing duty to supervise the existing uses of water and, if necessary, to reconsider its past allocations in light of the knowledge concerning and current needs of the public trust resources. (Id. at 447). This duty prevents any party from obtaining a vested interest to appropriate water in a manner harmful to resources protected by the public trust doctrine. (Id. at 445).

While the public trust doctrine inures the state with an affirmative duty to consider public trust resources when making water planning and allocation decisions and to protect such resources whenever feasible, it **does not create a priority for public trust resources**. To the contrary, in National Audubon, the California Supreme Court specifically rejected the concept of rigid priorities involving the needs of the environment generally. The court stated

“neither domestic and municipal nor in-stream uses can claim an absolute priority.” (National Audubon, *supra*, 33 Cal.3d at 447, fn. 30).

Rather, the Court in National Audubon indicated that needs of the environmental resources must be “considered” and “taken into account,” and that such resources must be protected “whenever feasible.” (National Audubon, *supra*, 33 Cal.3d at 444-446). The California Supreme Court noted that such balancing will not always end up favoring protection of the environmental resources, but that

¹ This language does not mean “whenever possible.” “Feasible” must be read in terms of what is “consistent with the public interest.” (The State Water Resources Control Board Cases (2006) 136 Cal.App.4th 674, 778).

“as a practical matter, the state may have to approve appropriations despite foreseeable harm to public trust uses.” (*Id.* at 446).²

The California Attorney General has offered the same opinion. In 1980, the Attorney General was asked to review a series of regulations, proposed by the State Water Resources Control Board (“SWRCB”), which would have required the SWRCB to determine the instream needs of all bodies of water generally, without regard to any specific appropriative application, and which would establish a presumption that the determined instream needs were reasonably required to meet the needs of the public interest. The Attorney General indicated that such regulations were not authorized under the Water Code since

“the [SWRCB] would have effectively ordained in the absence of legislative authorization, that the beneficial instream uses shall prevail against the other beneficial uses...” (63 Ops.Atty.Gen. 95, 104 (1980)).

The Attorney General went on to say that

“while beneficial instream uses are to be considered by the [SWRCB], *such uses are not determinative*, and the presumption which would impose upon applicants for appropriation of water for beneficial offstream uses the burden of proof as to the nonexistence of presumed facts is not countenanced by the statutes in question.” (*Id.* at 105)(emphasis added).³

Respected commentators reviewing the above decisions and others have reached the same conclusions. Cynthia Koehler, a senior attorney with the National Heritage Institute, noted that the Court in National Audubon did “not establish an absolute priority

² The Court further noted that “We do not dictate any particular allocation of water... The human and environmental uses of Mono Lake – uses protected by the public trust doctrine – deserve to be taken into account.” (National Audubon, *supra*, 33 Cal.3d at 452).

³ The Attorney General’s decision in 1980 casts equal doubt on the Delta Vision Task Force’s effort to declare a reliable water supply and the Delta ecosystem as co-equals. (DV, Element #1, p. 7-8). The DV’s

for public trust resources...” (Koehler, “*Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*,” 22 *Ecology Law Quarterly* 541, 566 (1995)). Likewise, Arthur L. Littleworth and Eric L. Garner, in their 1995 treatise on water law, acknowledged that “[p]ublic trust uses do not have a priority over other water uses, and all competing uses of water must be balanced.” (Littleworth & Garner, *California Water* (1995) p. 88)(see also Slater, *California Water Law and Policy*, Vol. 2, §13.14, p. 13-47 – 13-49 (2007)).

It is precisely because the public trust doctrine does not establish any priority for public trust resources that it is not a tool for allocating water among competing users. Simply put, the public trust doctrine provides no direction or guidance whatsoever which can be used in the context of water allocation decisions. To the contrary, so long as the public trust resources are taken into consideration, along with all other beneficial uses including municipal, agricultural and domestic⁴, any planning or allocation decision is left to the discretion of the SWRCB. (The State Water Resources Control Board Cases, *supra*, 136 Cal.App.4th at 778-779).

The public trust doctrine is, therefore, properly understood as an obligation or duty on behalf of the state to consider and take into account certain resources when making water planning and allocation decisions. The public trust does not mandate a particular outcome, nor establish any priority, but simply requires the state, as the trustee of the resources held in trust for the public at large, to insure that those resources are

effort to make the Delta ecosystem equal to human consumptive uses is contrary to existing law, which the DV Task Force expressly recognizes. (DV, p. 38).

⁴ In National Audubon, the California Supreme Court noted that in any reconsideration of the allocation of the waters of Mono Lake, there must be a consideration not just of the public trust resources, but also of “the city’s need for water, its reliance on the 1940 board decision, the cost of both in terms of money and environmental impact of obtaining water elsewhere.” (National Audubon, *supra*, 33 Cal.3d at 448).

taken into account when decisions are made. Understanding the true nature of the public trust doctrine is critical, as it demonstrates that the public trust doctrine is not a mechanism that the SWRCB or the courts⁵ can use to reallocate water among competing users in an effort to achieve a desired outcome.

B. The Method of Re-Allocation Depends Upon How the Problem Is Viewed

There are only two methods of reallocating existing water supplies. First, the SWRCB can conduct investigations into existing water rights for evidence of waste and unreasonable use. If a particular use is found to be wasteful, it can be prohibited or limited to the degree that it is no longer wasteful. Second, the SWRCB can determine that no existing user is doing anything wrong, but that there simply is not enough water to meet all of the existing competing needs. In that event, the SWRCB must apply the water rights priority doctrine to adjust those rights and obligations.

1. Individual Waste and Unreasonable Use.

Article X, Section 2 of the California Constitution provides that the waters of the state must be put to reasonable and beneficial use. The requirement that water be put to a reasonable and beneficial use attaches not only to actual use, but also to method of use and method of diversion. (Peabody v. Davis of Vallejo (1935) 2 Cal.2d 351, 367). As such, any use, method of use or method of diversion that is unreasonable or non-beneficial can be prohibited. (Gin S. Chow v. Davis of Santa Barbara (1933) 217 Cal. 673; Antioch v. Williams Irr. Dist. (1922) 188 Cal. 451; Joslin v. Marin Mun. Water Dist.

⁵ For those of our members who hold riparian or pre-1914 appropriative rights, such as the San Joaquin River Exchange Contractors Water Users Authority, it is important to remember that an adjudication or court proceeding is required to subject those rights to review and the SWRCB has no jurisdiction unless it becomes a party to those proceedings or the court refers issues to the SWRCB. To apply the public trust doctrine or reasonable and beneficial use concepts to reduce or quantify riparian or pre-1914 rights is even more unlikely and problematic to achieve the purposes cited in the Task Force's report.

(1967) 67 Cal.2d 132). What constitutes a reasonable and beneficial use of water is a question of fact. (People v. Forni (1976) 54 Cal.App.3d 743, 750).

Article X, Section 2 is a limitation on all water rights and diversions. (Peabody, *supra*, 2 Cal.2d at 367). In most reported cases involving Article X, Section 2, the court examined a particular water use or method of diversion and determined if that particular use justified the amount of water utilized. (Antioch, *supra*, 188 Cal. 451 (sought flows to prevent saltwater intrusion); Peabody, *supra*, 2 Cal. 2d. 351 (flows to flood land and to provide incidental recharge); Forni, *supra*, 54 Cal.App.3d 743 (sought water for frost protection); Imperial Irr. Dist. v. SWRCB (1990) 225 Cal.App.3d 548 (examined irrigation and delivery practices which resulted in dumping of tailwater and drainage into the Salton Sea); Erickson v. Queen Valley Ranch Co. (1971) 22 Cal.App.3d 578, 585 (determined method of diversion which resulted in loss of five-sixths of water during transport); Joslin, *supra*, 67 Cal.2d at 141-145 (use of water to transport gravel not reasonable)).

The prohibition against waste and unreasonable use is a limitation on existing water rights. If the SWRCB has information of the waste of water by a particular water right holder, it can conduct a fact-specific review of the circumstances surrounding the particular use in question. If waste is determined, the SWRCB can eliminate the right entirely or, if appropriate, alter, amend or reduce the right such that it is no longer wasteful.⁶

⁶ The SWRCB has existing procedures which identify the need for substantial evidence to support a finding of waste. (Calif. Code of Regs., tit. 23, § 856). Such procedures also require the SWRCB to notify the water right holder of its finding and provide the holder an opportunity to cure. (*Id.*, § 857(a)). If the waste is not timely cured, the SWRCB can then hold a hearing to revoke or alter the underlying water right. (*Id.*, § 857(c)).

However, the SWRCB cannot use Article X, Section 2 to reallocate water among existing, competing uses for water in an effort to optimize water use. The SJRGA is aware of no reported case in which Article X, Section 2 has been utilized to effect a reallocation of water among competing, reasonable uses of water. Indeed, in several cases that seem to provide the opportunity to make such a ruling, the courts have all declined. In Antioch, for instance, the California Supreme Court ruled that a farmer is entitled to grow whatever crops he chooses, regardless of the overall water cost, provided that the water used was not unreasonable in light of the needs of the crop chosen. (Id. at 467-468). A similar result occurred in Allen v. Cal. Water & Tel. Co. (1946) 29 Cal.2d 446, where the California Supreme Court ruled not only that a water user could choose what crops to grow, but also that he did not have to remove all non-crop vegetation from his land to prevent additional water use. (Id. at 483). Additional authority stands for the proposition that irrigation in winter may be permitted even in an area of limited water availability and that a method of diversion was acceptable even though it could result in loss of fifty percent of the water diverted. (Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. (1935) 3 Cal.2d 489, 572-574).

In each of these cases, the court could have found that a more “reasonable” allocation of water existed. However, in recognition of the general rule that Article X, Section 2 acts as a limitation on a right, and not as a mechanism for reallocating water without the underlying finding that the existing use is wasteful or unreasonable, each court examined the particular use by the particular party under the particular circumstances and determined whether it was reasonable. (*See also* Witherill v. Brehm (1929) 207 Cal. 574, 580 where court held that water user need not use best methods of

irrigation). There is simply no authority for the proposition that water may be reallocated from one reasonable and beneficial use to another which use is comparatively more reasonable pursuant to Article X, Section 2 of the California Constitution.

Article X, Section 2 applies to *individual* water rights and thus cannot be used to make broad policy determinations that a particular type of diversion or use constitutes a waste of water. Thus, Article X, Section 2 can only be used to reduce or eliminate existing individual water rights as previously described. Assuming it is used successfully in this fashion, additional water may be made available for the benefit of other public trust resources.⁷ However, whether or not Article X, Section 2 may be successfully employed in this fashion is dependent not upon general policy statements or recognition of the harm to or need by public trust resources, but rather upon specific facts demonstrating that an individual water right use, method of diversion, or method of use, is wasteful or unreasonable.

2. The Water Right Priority System

One of the first acts of the California Legislature was the adoption of the English common law, which included the doctrine of riparian rights. (Civ. Code § 22.2). Such rights attached to land contiguous to a stream or watercourse and provided each owner of such land the right to divert and use upon the land the entire natural flow of the stream or watercourse. Thus, each riparian was entitled to a proportional share of the water running through or contiguous to their property. (Lux v. Haggin (1886) 69 Cal. 255, 279).

⁷ Water made available by the limitation of an appropriative right through a finding of unreasonable use becomes unappropriated water of the State. (Wat. Code § 1202(c); see also Wat. Code § 1201). This section has been cited on several occasions to demonstrate that water lost through unreasonable use becomes subject to appropriation. (Stevinson Water Dist. v. Roduner (1950) 36 Cal.2d 264, 270; Meridian, Ltd. v. Davis & County of San Francisco (1939) 13 Cal.2d 424, 445-446). Whether or not such water would be approved for appropriation, or left for the benefit of public trust resources, will depend upon the results of future applications to appropriate such water.

However, despite the application of the riparian rights doctrines, early miners in California, who relied upon water to work their claims, were generally trespassers upon public lands and had no valid claims as riparians. In an effort to regulate themselves, the miners developed a system of priority to define their rights as to other miners. (Jennison v. Kirk, 98 U.S. 453, 457-458 (1978)). This priority system was based upon the theory of “first in time, first in right.” After legislative action in 1872 codified the miner’s procedures as a valid method of obtaining appropriative rights (Civ. Code § 1414), the California Supreme Court acknowledged the continued validity of the doctrine of riparian rights. California ended up with a dual system of water rights. (Lower Tule etc. co. v. Angiola etc. Co. (1906) 149 Cal. 496, 499). This dual system was further solidified in 1914 when California adopted the Water Commission Act which declared that all water of the state belonged to the people, subject to appropriation, provided that such appropriation was obtained in accordance with the permit system to be administered by the Water Commission, now the SWRCB. (Wat. Code § 102, 1201-1202). The current Water Code requires the SWRCB to consider the needs of any environmental resources before granting any permit to appropriate water, and provides it with the power to re-examine any previously issued permit in order to protect such resources. (Wat. Code § 1243.5; Wat. Code § 275; United States, *supra*, 182 Cal.App.3d at 149-150; National Audubon, *supra*, 33 Cal.3d at 447).

Pursuant to the terms and conditions of the Water Code, priority of an appropriative right is based upon the time that the application for a permit is filed, even though the permit is not granted until later. (Wat. Code § 1450). In determining water rights among those holding appropriative rights, the priority system is still utilized. Thus

“water rights as between appropriators..., are based upon their relative priority in time. A water user whose right accrues before one neighbor but after another does not have the same right with respect to both when there is insufficient water in the stream to meet all their needs.” (Pleasant Valley Canal Company v. Borrer (1998) 61 Cal.App.4th 742, 770).

Stated another way, the application of the priority system provides that the holder of a senior appropriative right is entitled to use its full allotment before a junior appropriative right holder may use the water to which such holder is entitled. Thus, in times of shortage or drought, a junior appropriator must reduce and/or cease its water use before any senior appropriative right holder must reduce or cease its use. (United States, supra, 182 Cal.App.3d at 131, fn. 25).⁸

Recently, there have been efforts to avoid the strict application of the priority system that are relevant to the DV Task Force’s effort to expand the use of the public trust doctrine into water right reallocations. In both instances, it was asserted that there was not enough water available to meet all of the demands. In both instances, the court re-affirmed the principle that the “water right priority system has long been the central principle in California water law” and the effort to avoid the strict application of the priority system was rejected. (City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224, 1243; *see* El Dorado Irrigation District v. State Water Resources Control Board (2006) 142 Cal.App.4th 937, 961)

In 2000, the California Supreme Court reviewed a trial court decision which disregarded legal water rights in order to apportion on an equitable basis the water rights

⁸ The reduction or elimination of junior rights is not based upon a finding of wrong-doing. The reduction in the rights of the junior water right holders is a function of their lack of rights, and not in the reasonableness or unreasonableness of their use. (*See Moskowitz, “Conflicts Between Water Rights and Water Quality,”* 174 California Env’tl. Law Reporter 216, 218 (1994))

of all water right holders to an overdrafted groundwater basin. The reason for the trial court's decision was its determination that a strict adherence to established water right principles like the priority system would lead to "inequitable water allocation." (Barstow, *supra*, 23 Cal.4th at 1235). The trial court found that since the groundwater basin was in overdraft, all uses were unreasonable, and that Article X, Section 2 required an equitable apportionment. Specifically, the trial court "concluded that the constitutional mandate of reasonable and beneficial use dictates an equitable apportionment of all water rights when a river basin is in overdraft" and found it "unnecessary to adjudicate individual legal water rights." (Id. at 1237-1238). Before the Supreme Court, those supporting the trial court's decision "cite[d] the principle that the State Constitution requires the greatest number of beneficial users that the water supply can support" and specifically argued "for imposition of an equitable physical solution that disregards prior legal water rights." (Id. at 1250).

The Supreme Court disagreed. It found that an overdraft, far from justifying an exception to the use of the priority system, is precisely the situation in which the priority system must be used. The Court stated

"In the case of an overdraft, riparian and overlying use is paramount, and the rights of the appropriator must yield to the rights of the riparian or overlying user." (Id. at 1243).

The Court acknowledged that equitable apportionment has never been used to resolve a water conflict in California before (Id. at 1246, fn. 12), found that there was no case that could be interpreted as precedent for "wholly disregarding the priorities of existing water rights in favor of equitable apportionment in this state," (Id. at 1247-1248) and stated that

the only scenario in which equitable apportionment could apply would be one in which all water right holders had correlative rights. (*Id.* at 1248).

The decision in Barstow is particularly important since many Delta stakeholders claim that public trust values are being harmed because the Delta system is “oversubscribed.” (*See, e.g.*, Nov. 29, 2007 Comment from Bay Institute, p. 1; Oct. 25, 2007 Comment from NRDC and The Bay Institute, p. 1). Claiming that the Delta is “oversubscribed” is the same as claiming that a groundwater basin is “overdrafted;” in each case, the claim is essentially that there is not enough water to meet all of the demands. Assuming that the Delta is, in fact, oversubscribed, the solution is not an equitable re-allocation, an equitable reduction, or some other plan to “share the pain” pursuant to an expanded application of the public trust doctrine or other legal or quasi-legal theory, but rather the strict adherence to and application of the priority system as required by the Barstow decision.

Among certain groups, the desire to equitably apportion water rights in an effort to obtain additional water for the public trust resources of the Delta is undoubtedly strong. Such an effort is thought to avoid any allegation or finding that a particular water user is wasting water in contravention of the California Constitution, to be done without a long, attenuated and controversial water right hearing, to be justified on the basis that any reduction can and should be made up through the use of best management practices and other conservation measures, and to not have the effect of eliminating junior water right holders. These claims may or may not be true. Nonetheless, often quoted claimed benefits do not justify the disregard of the long-standing priority rights system which the

California Supreme Court has stated must be preserved to the extent that they do not lead to an unreasonable use of water. (Id. at 1243).

Nor does citation to the needs of public trust resources justify a deviation from the priority system. This was the claim made by the State of California in the El Dorado case as justification for its disregard of the priority system concerning El Dorado Irrigation District's appropriative rights. (El Dorado, supra, 142 Cal.App.4th at 967). The appellate court disagreed, and stated that the "subversion of a water right priority is justified **only** if enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust." (Id. at 967)(emphasis added). The court went on to affirm even when evaluating affects of water use on public trust resources, the state's obligation was not to decide what was the most fair or equitable, but rather its first concern was whether or not it could preserve and protect existing water right priorities. (Id. at 970-971).⁹

If the Delta is truly oversubscribed, and it is not the diversion of a single party that has caused or triggered the harms to the public trust resources within the Delta, then there simply may not be enough water to accommodate all of the otherwise reasonable and beneficial uses. If the SWRCB knew at the time that it considered certain applications to appropriate water what it knows now regarding the amount of water necessary to protect, preserve and enhance the public trust resources of the Delta, it would have denied such applications even though they were for a reasonable and beneficial purpose. Given this, there is no reason or justification for a system designed to equitably re-allocate water rights among all water right holders. Rather, the SWRCB

⁹ The court noted that "**every effort** must be made to preserve water right priorities to the extent those priorities do not lead to a violation of the public trust doctrine." (Id. at 966)(emphasis added).

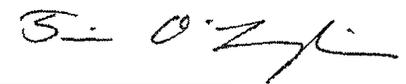
should do now what it should have done earlier, which is curtail and/or eliminate the use of the junior water right holders until such time as the needs of the public trust resources are met.

With all due respect, the public trust doctrine alone is not a mechanism by which the state may re-allocate water rights among competing water right holders in an effort to obtain more water for public trust resources in the Delta. Any regulatory effort to “expand” the use or reach of the public trust doctrine to re-allocate water among existing water right holders will constitute an illegal, end-run around established laws.

The SJRGA agrees with many of the Governor’s findings as set forth in Executive Order S-17-06, and find many of the DV Task Force’s recommendations worthy of further consideration. We look forward to working with the DV Task Force in an effort to develop durable, long-term solutions for the Delta as recommended by the Governor.

Very truly yours,
O’LAUGHLIN & PARIS LLP

By:



TIM O’LAUGHLIN
Attorneys for the San Joaquin River Group
Authority

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