

SOLANO COUNTY WATER AGENCY



September 4, 2008

John Kirlin, Executive Director
Delta Vision
1416 9th Street, Suite 1311
Sacramento, CA 95814

Dear Mr. Kirlin:

This letter is in regards to the July 9, 2008 letter to you from the Attorney General's Office regarding "reallocation of water under specified conditions". We offer the following points to clarify and correct some of the statements in the letter for the record.

California Constitution

On Page 3, Section I, the letter states: "The California Constitution, Article X, Section 2 requires the water resources of the state to be put to beneficial use to the fullest extent of which they are capable". The actual text of Article X, Section 2 is in a footnote at the bottom of the page, and does not impose the actual "requirement" stated on Page 3 of the letter. This issue is critical because there are some who wish to use Article X, Section 2 as a justification to reallocate water supplies from current uses to what, in their opinion, are more beneficial uses, and that would be an incorrect reading of Article X, Section 2.

While the first sentence of Article X, Section 2 uses the word "requires", that sentence is merely a declaration of a "salutary policy" goal. The enforceable rule of this constitutional provision starts with the second sentence, which reads: "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." While the first sentence mentions a hierarchy of beneficial uses, that hierarchy cannot be imposed through the language of the constitutional requirement. Footnote 3 on Page 5 of the Attorney General's letter acknowledges "It is apparently still an open question whether unreasonable use under Article X, Section 2 refers only to wasteful use of water, or applies comparatively to prohibit any use which is less than the optimum allocation of water". It is in fact more than an open question. The language of Article X, Section 2 of the California Constitution does not grant the state the authority to restrict or prohibit uses of water which are less than optimum or desirable. Competing beneficial uses of water can change what is "reasonable" over time. But for an existing beneficial water user to lose water rights, a finding must be made that the use is now unreasonable, not simply that there is a more valued use for that water, in someone's opinion.

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Fish and Game Code

Page 14 of the Attorney General's letter discusses Fish and Game Code Section 5937. The first sentence under Section C states: "Related to the public trust doctrine is Fish and Game Code Section 5937, which requires the owner of a dam to release sufficient water to keep fish below the dam in good condition". This is an inaccurate reading of Section 5937.

Fish and Game Code Section 5937 reads in its entirety:

"The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway."

Note that Section 5937 does not use the term "release" which would imply the use of stored water. Instead, it uses the terms "pass through", "pass over", "around" and "through", implying merely the use of natural flow that is entering the impoundment created by the dam at a particular time. A physical solution or a settlement can require the release of stored water, but Section 5937, acting alone, cannot. Nor can the public trust doctrine, for the same reason.

On Page 15 of the report the last sentence of the first full paragraph states "Section 5937 has provided a basis for requiring additional releases of water for fish and other cases as well, including litigation involving releases from Solano Diversion Dam to benefit fish in Putah Creek". The Solano County Water Agency was a party in that litigation, which was settled before going to an appellate court decision. Section 5937 was raised as an argument in the litigation, however the settlement does not concede to any interpretation of Section 5937.

We hope that these comments are constructive in pointing out some fine, but important clarifications in the Attorney General's analysis.

Sincerely,



David B. Okita
General Manager

Cc: Virginia Cahill, Deputy Attorney General

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