O'Laughlin & Paris LLP

Attorneys at Law

VIA US MAIL AND ELECTRONIC MAIL

March 10, 2008

Ms. Diane Riddle
Staff Environmental Scientist
Hearings and Special Programs Sections
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Re: SJRGA's Comments on March 19, 2008 Workshop to Receive Information on Development of a Strategic Work Plan for the San Francisco/Sacramento-San Joaquin Delta

Dear Ms. Riddle:

The San Joaquin River Group Authority ("SJRGA") has reviewed the notice of the March 19, 2008 workshop to receive information related to the development of the strategic-level work plan for the San Francisco Bay/Sacramento-San Joaquin Delta described in Resolution No. 2007-0079. Of specific interest to the SJRGA are the four items identified on Attachment B as actions that need to be evaluated and further refined through the work plan process. In our view, the first three items listed on Attachment B are items which, while likely complicated and controversial in their specifics, are entirely appropriate from a legal, political and process standpoint. The fourth item, however, is not appropriate. Any effort to rely upon or utilize "the public trust" will be more than merely controversial. It will divert the SWRCB and the parties from efforts which may result in concrete benefits to the Delta now and into the future.

As laid out in the workshop notice, each of the first three items on Attachment B identifies an issue to be evaluated (salinity, pelagic organism decline and San Joaquin River flows needed to protect beneficial uses) and the proposed method of addressing the issue (amend the Southern Delta salinity objectives, amend the Bay-Delta Plan, and amend San Joaquin River flow objectives). In each case, the SWRCB clearly has the legal authority to address the issue and to take the proposed action. Moreover, for the listed items, the SWRCB has a history of hearings, recommendations and decisions which the affected participants have participated in and relied upon. While the information and evidence regarding each of the first three issues will be controversial and complex, these issues and the process to implement them are understood and relatively straightforward. While time consuming, they could provide a concrete foundation for other Delta actions.

Post Office Box 9259
Chico, California 95927-9259
www.olaughlinandparis.com

530.899.9755 tel
530.899.1367 fax

Emailed on March 10, 2008 at 2:08 pm

The same cannot be said for the fourth item. This item provides, in part, that the SWRCB will "consider a proceeding" to "protect public trust resources and balance competing demands for water in and from the Bay-Delta." Unlike the description of the first three items, this description provides no guidance or detail as to what the specific proceeding will be, which "public trust resources" are to be protected, why the SWRCB feels that competing demands need to be balanced or how the SWRCB proposes to perform and enforce such balancing. Given the vague description, and the specific request that representatives of the Delta Vision provide information allowing the SWRCB to conduct its activities in a way that compliments those of Delta Vision, we are concerned that the SWRCB is erroneously contemplating the use of the "public trust doctrine" as a policymaking tool and a mechanism for reallocating waters.

As we explained to the Delta Vision Task Force, the "public trust doctrine" is not a separate tool that can be used to make broad water supply and re-allocation decisions. Rather, the "public trust doctrine" functions as part of an integrated system of water law, preserving continuing sovereign power of the state to protect public trust uses and precluding anyone from acquiring a vested right to harm the public trust.

The "public trust doctrine" provides the State two opportunities to consider and protect, where feasible, public trust resources. The first opportunity is in an initial water planning and allocation decision. (National Audubon Society v Superior Court (1983) 33 Cal.3d 419,446 (cert. denied, 464 U.S. 977)). The second opportunity arises out of the State's continuing duty and obligation to supervise the existing uses of water and, if necessary, to reconsider its past allocations in light of the knowledge concerning current needs of the public trust resources. (Id. at 447). However, the "public trust doctrine" does not provide, in either instance, the opportunity for the State to make sweeping, general allocation or re-allocation decisions. To the contrary, the "public trust doctrine" can only be used to make or reconsider an ***individual*** water right, water use or water allocation decision.

The public trust doctrine acts to prevent any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust. (Id. at 445). Thus, in most cases, an existing use is evaluated to determine whether or not it is consistent with the public trust. (*See, e.g.*, City of Berkeley v. Superior Court (1980) 26 Cal.3d 515, 521 [court decided grant of tideland for construction of marina incompatible with public trust doctrine]). If the use is compatible with the public trust, there is no problem. If the use is not compatible, such use may be curtailed, amended or even eliminated. (National Audubon, *supra,* 33 Cal.3d at 448). However, the SJRGA is not aware of any case or authority that utilizes or authorizes the "public trust doctrine" to be used to make general allocation or re-allocation decisions amongst multiple water users.

Moreover, the "public trust doctrine" does not suppose or grant any heightened value to public trust resources, including navigation, commerce, fisheries, recreational, ecological and environmental interests. (National Audubon, *supra*, 33 Cal.3d at 447, fn. 30). To the contrary, the "public trust doctrine" only requires that such interest be "taken

Emailed on March 10, 2008 at 2:08 pm

into account" in making allocation decisions. Indeed, the California Supreme Court noted that taking such interest into account will not always end up favoring protection of the public trust resources, but that

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

The bottom line is that the State has a duty to consider and protect *all* beneficial uses of water, including municipal, industrial, and agricultural uses. (*See, e.g.*, Water Code §13241). To suggest that it has some additional or higher duty or obligation under the "public trust doctrine" is simply erroneous.

> While the Board had a duty to adopt objectives to protect fish and wildlife uses and a program of implementation for achieving those objectives, in doing so the Board also had a duty to consider and protect all of the other beneficial uses to be made of water in the Bay-Delta, including municipal, industrial, and agricultural uses. It was for the Board in its discretion and judgment to balance all of these competing interests in adopting water quality objectives and formulating a program of implementation to achieve those objectives.

(St. Water Resources Control Bd. Cases (2006) 136 Cal.App.4th 674, 778).

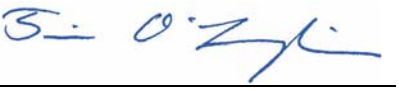
Consequently, so long as the SWRCB considers public trust beneficial uses when formulating water quality objectives and so long as it fully implements such objectives, it fulfills its duties under the public trust doctrine. (Id.) Since water quality control plans are a regulation, an attempt to implement different water quality objectives, whether more or less stringent, would constitute an illegal underground regulation. (Government Code §11340 et seq.; *see also* Excelsior College v. Cal. Bd. of Registered Nursing (2006) 136 Cal.App.4th 1218, 1239.) Therefore, assuming the water quality and flow objectives contained in the current water quality control plan are already fully implemented, the SWRCB would have to amend the current objectives, but doing so would require several years of hearings and work. Only when the SWRCB has the water quality control plan may it then proceed to a water right hearing for a flow-based implementation component. Such a hearing to implement a new Basin plan, based on the history of the D-1641, would be extremely adversarial and take many more years.

We are aware of the SWRCB's continuing and oft-expressed frustration with taking incremental efforts to address problems in and around the Delta. While the desire to take sweeping actions is strong and understandable, the SWRCB's authorities and general water law principles, including those of the "public trust doctrine," simply do not permit it. We therefore strongly recommend that the SWRCB not further pursue item number four on Attachment B. Rather we recommend focusing its efforts on the first three items, and any additional items that are within the clear jurisdiction and authority of

Emailed on March 10, 2008 at 2:08 pm

the SWRCB. In that regard, we recommend that the SWRCB review water diversions and rights in the South and Central Delta. The SJRGA will be submitting a report to the SWRCB and diversions and water rights in the SDWA in May 2008.

Very truly yours,
O'LAUGHLIN & PARIS LLP

By: 

TIM O'LAUGHLIN